

NO. 79356-5

SUPREME COURT OF THE STATE OF WASHINGTON

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by the assignment  
justice.

STATE OF WASHINGTON,  
Respondent,  
v.  
RICHARD WARREN,  
Appellant.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**2. THE PROSECUTOR'S MISSTATEMENT OF THE LAW WAS CURED WHEN THE COURT SUSTAINED AN OBJECTION AND CORRECTED THE MISSTATEMENT.**

Warren contends that a misstatement by the prosecutor in closing argument of his first trial was so prejudicial that his conviction for molesting SS must be reversed. This claim has no merit. The misstatement, a mischaracterization of the law, was immediately corrected by the trial judge. There is no likelihood that the jury was misled into believing they could convict based on proof less than beyond a reasonable doubt.

When a defendant alleges that the prosecutor's argument prejudiced his right to a fair trial, he first bears the burden of establishing the impropriety of the argument. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). An improper comment by a prosecutor does not require reversal unless the reviewing court finds there is a substantial likelihood the comment affected the verdict. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Where the error is constitutional in nature,<sup>6</sup> if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury

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<sup>6</sup> It is only when the alleged misconduct is found to directly violate a constitutional right that it is subject to the stricter harmless error standard. State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001).

could have reached the same result in the absence of the error, the verdict must stand. State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995).

Here, during rebuttal closing, in an attempt to counter some of the assumptions the defense asked the jury to make, and in a rhetorical play on words the prosecutor said, "[r]easonable doubt does not mean give the defendant the benefit of the doubt." 23RP

42. The prosecutor added:

I talked to you about the fact that you must find the defendant guilty beyond a reasonable doubt. That is the standard to be applied in the defendant's case, the same as any other case. But reasonable doubt does not mean beyond all doubt. It doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.

23RP 46-47.<sup>7</sup>

Warren objected and the court immediately sustained the objection and corrected the prosecutor in front of the jury.

There has been an objection to the statements made by the State as to the definition of reasonable doubt. The definition of reasonable doubt is provided in your jury instructions.....I want you to read that instruction very carefully, particularly the last paragraph of the instruction.

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<sup>7</sup> This statement was inartful and incorrect. What the prosecutor likely meant to express was that the jury need not uncritically accept the defendant's version of events. The expression "give him the benefit of the doubt," is often used colloquially to indicate a flippant, careless, or unconcerned decision making process. It was likely this colloquial understanding of the expression that the prosecutor was warning against.

And the second sentence of that reads, "It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or lack of evidence."

Now, my statement on that is, after you have done that, after you have reviewed all of the evidence or lack of evidence, and you continue to have a reasonable doubt then you must find the defendant not guilty. And if in still having a reasonable doubt that is a benefit to the defendant then in a sense you are giving the benefit of the doubt to the defendant so I don't want you to misconstrue the language that somehow there is no benefit here. Indeed there is, because the benefit of the doubt is if you still have a doubt after having heard all of the evidence and lack of evidence, if you still have a doubt, then the benefit of that doubt goes to the defendant, and the defendant is not guilty.

So we are playing with words here in a sense. The instruction is here in the package. I commend it to you for your reading. Ultimately you will determine whether at the conclusion of your deliberations you have a reasonable doubt or not.

23RP 47-48. Apparently satisfied with the court's action, Warren did not seek any additional instruction or a mistrial. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1994) (failure to request a mistrial or further instruction strongly suggests trial counsel felt the remedy was sufficient).

In determining the likelihood that an improper comment affected the verdict, a reviewing court should consider whether a limiting instruction or mistrial was requested, the effect of the

instructions given, the overall strength of the State's case, the nature of the improper comment, and whether the remark was of an isolated nature. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993) rev. denied, 123 Wn.2d 1030 (1994).

The prosecutor did mischaracterize the concept of reasonable doubt. The question is whether the court's curative instruction obviated any potential prejudice, as the Court of Appeals held, or whether the jury was led to believe they could convict on a lower standard of proof. Here, there is no likelihood the jury was misled. The jury was hung on four of the five counts. The court's curative and accurate instructions, along with the other instructions of the court, sufficiently corrected the misstatement by the prosecutor.

The beyond a reasonable doubt standard is a requirement of due process. Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Taken as a whole, instructions must correctly convey the concept of reasonable doubt to the jury. Id. In reviewing instructions, the proper inquiry is not whether the instructions "could have" been applied in an unconstitutional manner, but "whether there is a reasonable likelihood that the jury **did** so apply it." Id. at 6 (emphasis in original).

There is no question--and Warren does not contest--that the jury was repeatedly and properly instructed on the beyond a reasonable doubt standard. See Appendix B (copy of written instruction provided to the jury, CP 91, WPIC 4.01A).

The court read aloud the instruction prior to closing argument and repeated part of it again during the State's rebuttal. 22RP 74; 23RP 47-48. The jury had a copy of the instruction during deliberations, and the judge encouraged them to read it again. 23RP 47-48, 107.

This is not a situation where a bell once rung cannot be unrung. The prosecutor's statement did not interject extraneous matters into the proceeding. It was simply a mischaracterization of the standard of proof and it was an isolated incident. The court had already read the proper standard (22RP 74), it had provided the proper standard in writing (CP 91; 23RP 107), and, immediately upon hearing the misstatement, the court corrected it, making it clear to the jury that the statement of the prosecutor was incorrect. The court urged the jury to "read that instruction very carefully." 23RP 47-48. The court then read the pertinent part of the instruction to them yet again, "It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully

considering all the evidence or lack of evidence." 23RP 47. The instructions also directed that "[i]t is your duty to accept the law from the court" and that the jury, must "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP 88.

While it is true that a curative instruction does not always obviate prejudice, there is nothing about the court's oral instruction and written instructions that suggest the jurors were misled as to the burden of proof. A reviewing court will presume that jurors follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Warren asserts that the court could have been more "forceful," and cites to one statement of the court that "we are playing with words here in a sense." But this statement does not diminish the court's rebuke of the prosecutor. In simply acknowledges that although some might believe the matter was purely semantic, it was not, and that correction was needed. The court never deviated from the directive that the law of the case was the law provided for by the court and in the jury instructions.

**3. EVIDENCE THAT WARREN SHOWED SS HIS PENIS PUMP WAS ADMISSIBLE.**

Warren contends the trial court abused its discretion in admitting evidence that he showed SS his penis pump because there was conflicting evidence on the point. This claim is without merit. Warren's argument went to the weight of the evidence, not its admissibility.

The admission of evidence lies within the sound discretion of the trial court. State v. Rivers, 129 Wn.2d 697, 709, 921 P.2d 495 (1996). A decision to allow certain evidence will not be reversed absent a showing of abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Minimal logical relevance is all that is required. State v. Luvane, 127 Wn.2d 690, 903 P.2d 960 (1995). Relevant evidence will be excluded only if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Pretrial, Warren sought to suppress evidence that he possessed pornographic videos and a penis pump. 11RP 69-70.

The court agreed to suppress the actual items, but denied Warren's relevance/prejudice objection to the admission of testimony that he had shown the items to SS. 2RP 67, 11RP 75. The court found that this was "highly relevant" grooming type behavior and rebutted Warren's claim that his touching of SS's genital region was for parental/medical reasons only. 11RP 69, 75-77.

At trial, defense counsel was able to get nine-year-old SS to respond affirmatively to a leading question that Warren had not shown her the penis pump. 22RP 21. It is this testimony on which Warren's argument is premised. However, Detective Rylands testified that when interviewed, SS said that "[h]e showed me a penis pump. I know how it works. He did not show me how it works." 19RP 140. Counsel tried to get the detective to say that SS had not said that Warren showed her his penis pump, but the detective disagreed. The detective agreed only that SS said Warren did not show her how it worked.<sup>8</sup> 20RP 17.

The defense argument here ignores the detective's testimony that suggests that Warren showed SS the penis pump. While Warren was free to argue that other evidence supported a

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<sup>8</sup> In opening, defense counsel told the jury there would be evidence Warren showed SS his penis pump. 17RP 17.

different conclusion, this argument goes to the weight of the evidence, not its admissibility. State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). The evidence that Warren showed SS his penis pump was relevant and admissible to show he was grooming her, consistent with showing her a pornographic video cover and exposing himself to her. The evidence was also admissible to rebut Warren's claim that he touched SS for medical purposes only. In any event, any error was harmless. The defendant must show that "within reasonable probabilities," but for the error, the outcome of the trial would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). SS made spontaneous disclosures of abuse. Her disclosures and testimony were consistent, her knowledge of sexual practices was not age-appropriate and strongly supported her allegations of abuse, as did the physical examination showing injuries consistent with abuse.

#### **4. THE CUMULATIVE ERROR DOCTRINE.**

While Warren has abandoned many of the issues he lost at the Court of Appeals (Appendix A), he still alleges that the cumulative effect of numerous trial errors deprived him of his right to a fair trial. It is axiomatic, however, that to seek reversal

pursuant to the “accumulated error” doctrine, a defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. As argued above, Warren has failed to prove either multiple errors or prejudice.

**E. ARGUMENT PERTAINING TO TRIAL NUMBER 2.**

**1. THE COURT PROPERLY ADMITTED EVIDENCE THAT WARREN WAS ACCUSED OF AND CHARGED WITH SEXUALLY ASSAULTING SS.**

Warren contends that the trial court erred in admitting evidence that, prior to NS’s disclosure, SS had alleged Warren abused her, that he had been “prosecuted,” and that NS made her disclosure in the context of preparing for Warren’s “trial.” This claim is without merit because its factual predicate is inaccurate and because the evidence was admissible under ER 404(b).

**a. The Facts.**

Pretrial, the State moved to admit facts of Warren’s molestation of SS as common scheme or plan evidence under ER 404(b). 29RP 18-60. Although the court denied the State’s motion, it agreed that limited facts were relevant and admissible to show the jury the context in which NS made her disclosure. Those facts included the following: that SS had made an allegation; that an investigation ensued; that NS was contacted and denied being

abused; that charges were filed and that a "hearing" was pending (the term "trial" was excluded) when NS was brought to the prosecutor's office and made her disclosure. 29RP 60. The jury also heard that after SS's disclosure Lisa Warren hid the girls at Warren's request, and that upon being apprehended and brought to the prosecutor's office to discuss an upcoming "hearing," NS, afraid she was going to have to put her hand on a Bible and swear to tell the truth, disclosed that Warren had sexually abused her. In any event, the jury never heard that Warren was tried, and never heard that he was convicted of, molesting SS.

At trial, and in closing, the defense attacked NS's credibility in two ways. First, the defense argued that NS made up the allegations because she thought SS wasn't going to cooperate with the prosecution of her case and she wanted Warren convicted to get him out of the house. Second, the defense argued that NS's disclosures were unreliable because of the way her disclosures were made; through so-called repressed and reclaimed memories.

**b. The Trial Court Properly Admitted The Evidence.**

Warren argues that evidence admitted under the res gestae exception must be limited to evidence immediately surrounding the

actual criminal act. This is incorrect. Evidence may be part of the res gestae of the crime if it relates to the defendant's efforts to evade the crime and the subsequent investigation. In any event, the evidence was relevant, material, more probative than prejudicial and was thus admissible regardless of whether it is called "res gestae evidence" or not.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The list of purposes supporting admissibility of ER 404(b) evidence is non-exhaustive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Evidence of misconduct is admissible if (1) the evidence is relevant and necessary to a material issue and (2) the probative value of the evidence outweighs its potential for prejudice. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id. The decision to admit prior bad act evidence lies within the sound discretion of the trial court. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion

exists only when the reviewing court concludes that no reasonable person would take the position adopted by the trial court. Powell, 126 Wn.2d at 258.

This Court has defined "res gestae" as the admission of acts necessary to complete the picture of the event. Powell, at 259-63.

The circumstances of a child's disclosure are of paramount importance in virtually every child sex abuse case. Without putting NS's disclosure in context, a jury would be denied invaluable evidence. The fact that SS made a prior disclosure, that Warren was charged, that NS was contacted as a result of SS's disclosure, that NS initially denied being abused, that Warren attempted to secret the girls away, and that NS made her disclosure while discussing a hearing after being found; these were all critical facts for the jury to weigh in determining NS's credibility and thus whether the abuse actually occurred. In fact, NS's disclosure directly referenced SS's allegations. NS expressed fear of having to swear on the Bible and tell the truth if she were asked whether Warren had done the same thing to her that he did to SS. 34RP 9-11, 54-55. Thus, NS's disclosure makes sense only if the jury is supplied with the context.

Moreover, the defense case was predicated on attacking NS's disclosures, her motive for disclosing and her "repressed memory."

The trial court did not abuse its discretion in admitting the evidence so that NS's disclosure could be evaluated in the context it was made.

In addition, the evidence was also admissible as common scheme or plan evidence under State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). The admission of evidence will be upheld on appeal if admissible for any proper purpose, even if the basis relied upon by the trial court was improper. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989). Although the trial court rejected this argument, the court did so based on a misinterpretation of this Court's ruling in DeVincentis. Instead of relying upon the marked similarities between the abuse of SS and NS--similarities the trial court acknowledged existed--the court erroneously looked for similar but unique or uncommon aspects of abuse. 29RP 33-34, 46-47, 60. This Court has held that uniqueness is not a required part of the analysis. DeVincentis, 150 Wn.2d at 13. The Court of Appeals did not reach this issue because it agreed the evidence was admissible as res gestae evidence. Warren, 134 Wn. App. at 63.n 9. In the event this Court reaches the issue, the State relies on DeVincentis and the analysis contained in the Brief of Respondent. Br. of Resp. at 49-54.

**c. Any Error Was Harmless.**

Even if error is found in the admission of the evidence, reversal is not required if the error is harmless. Smith, 106 Wn.2d 772, 780. Warren must show that “within reasonable probabilities,” but for the error, the outcome of the trial would have been different. Id.

NS's disclosures were supported by other evidence. NS said that Warren used a ball-gag sexual device on her—Warren possessed one. NS said that Warren used lubricants on her—Warren possessed lubricants. NS said that Warren showed her pornographic videos—Warren possessed some. And NS had hymen notches that were possibly the result of penetration.

In addition, Warren's own testimony helped convict him. He testified that 12-year-old NS flirted with him, wanted to be naked in the shower with him and wanted to “get laid.” He also made sure that SS and NS were hidden so he could not be prosecuted. With these facts, Warren cannot show that there is a reasonable probability the verdict would have been different absent the alleged error.

**2. WARREN OPENED THE DOOR TO ADMISSION OF HIS PRIOR CHILD MOLESTATION CONVICTION.**

Warren contends the trial court erred in finding that he opened the door to the admission of his prior conviction for child molestation. This claim has no merit.

The long-standing rule in this state is that a criminal defendant who places his character in issue by testifying as to his own past good behavior may be cross-examined as to specific acts of misconduct unrelated to the crime charged. State v. Brush, 32 Wn. App. 445, 448, 648 P.2d 897 (1982), rev. denied, 98 Wn.2d 1017 (1983); State v. Renneberg, 83 Wn.2d 735, 738, 522 P.2d 835 (1974). The rationale behind this policy was set forth over a half century ago.

The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); Brush, 32 Wn. App. at 450.

The threshold question here is whether Judge Hayden abused his discretion in finding that the door had been opened. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). In other words, Warren can only prevail if this Court determines that no reasonable

person would have taken the position adopted by the trial court.

Demery, 114 Wn.2d at 758.

Prior to trial, the court ruled that Warren's molestation conviction of SS was not admissible. 29RP 58. At trial, Warren portrayed himself as an excellent caretaker of his stepdaughters. 37RP 77-83. Of particular significance was his claim that NS had developed a rare skin disease and that he helped rub medicine on other parts of her body, but that "there is areas I wouldn't do because of, you know, being like she is a girl." 37RP 82. The court then ruled that Warren had opened the door to the fact that he had previously been convicted of child molestation by suggesting he would never touch a girl's genitalia, and thus, providing an explanation as to why the allegations against him were untrue. 37RP 112-125. As Judge Hayden put it, there was only one way to interpret Warren's statement--he is not the type of person who would touch a girl in an inappropriate manner. 37RP 116.<sup>9</sup> Thus, the door was open to the admission of evidence proving that Warren's statement was not true,

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<sup>9</sup> The trial court should be given great deference because he was in the best position to judge the import, intent and impact of the defendant's testimony.

that he would touch a girl in such a manner and had been convicted of doing just that.<sup>10</sup> A reasonable judge could so find.

**3. EVIDENCE SUPPORTED THE STATE'S USE OF WARREN'S RAP SONG.**

Warren contends that the prosecutor violated his due process rights by arguing different theories at each trial regarding his rap song. This claim is based on a misreading of the record. The prosecutor's interpretation of the song changed only after the defendant testified at his second trial and told everyone for the first time who he was referring to in his song.

A prosecutor may commit a constitutional violation by introducing testimony in two separate trials to obtain two separate convictions on inconsistent theories or facts. State v. Roberts, 142 Wn.2d 471, 498, 14 P.3d 713 (2001). This rule is premised upon the due process notion that the court will not condone the "deliberate deception of the court and jurors by the presentation of known false evidence." Id. (citing Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)), also, Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). "[I]t is well established that when no new significant evidence comes to light a

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<sup>10</sup> The court asked Warren if he wanted the jury to know SS was the victim, but the defense declined. 37RP 125.

prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."

Thompson v. Calderon, 120 F.3d 1045, 1058 (Cal. 1997), rev. on other grounds, 523 U.S. 538 (1998).

Prior to the first trial, the State sought permission to admit portions of a rap song written by Warren. Appendix C; 11RP 90; 12RP 6-7, 15. One passage of the song reads:

Ms. Exhibition in the Federal Way in the bathroom, rubbin' yo kittle real slow. Okay. And, yo, no lie, you looked sexy and sweet standin naked up in that mirror on top of that toilet seat. What? Who me peek? Neva had to. She keeps the door open. If momma only knew what you do, round yo neck she be chokin'. Neva spoken, not a word bout things that ya did. Keepin' her fooled smooth, fakin' like you are still a kid, dig. Neva figured on how her hominess influenced you. Who seein' all them men she bring home, makin' love past 2:00. Didn't think that moanin' and that gruntin' make ya curious, leavin' yo hormones in a frenzy, wantin' some climactic sludge love. . .

12RP 7.

Lisa Warren testified at the first trial that she believed "Ms. Exhibition" referred to SS.<sup>11</sup> 12RP 7; 20RP 76, 85. Consistent with Lisa's testimony--the only testimony interpreting the song--the prosecutor argued in closing that Warren was referring to SS. 23RP 26.

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<sup>11</sup> Lisa also believed that "Stretch," "Mouseola" and "Queen Freakiness" referred to NS and "Demon Seed, the Judas Breed" referred to SS. 20RP 78, 84-85.

At the second trial, the prosecutor sought permission to admit portions of the rap song, but stated that the particular passage discussed above should not be admitted because the prosecutor believed it pertained to SS. 29RP 61-63. The prosecutor then decided not to admit any of the song in the State's case-in-chief. 32RP 10.

After Warren testified on direct, the court ruled that Warren opened the door to cross-examination about the song by claiming that he was a good caretaker and that he used complementary terms with NS simply to bolster her low self-esteem. 37RP 108-09, 124.

During cross, Warren then admitted that the derogatory terms in the song to referred to NS, not SS, and he admitted that the entire passage in question was about NS. He admitted it was based on an incident that actually happened, and that he was referring to NS rubbing her genitalia. He minimized the lyrics, claiming that he didn't really find NS "sexy and sweet," that it was just a rhyme. 37RP 142-49. He claimed that NS pretended to be helpless, manipulated her mother, flirted with him, wanted to be naked with him and "get laid," and that this is what the passage referred to. 37RP 142-149.

Subsequently, and consistent with Warren's own testimony, the prosecutor argued that Warren was referring to NS when he wrote that particular passage. 38RP 33-35.

It is true that the prosecutor in the first trial argued that the passage referred to SS, and in the second trial, the prosecutor argued that the passage referred to NS. However, the prosecutor based her arguments on the only evidence that was available at the time. But for Warren's testimony--information the prosecutor did not have during the first trial--the prosecutor's belief about the "rap" passage would not have changed. Thus, Warren's argument that the prosecutor knowingly presented conflicting theories, i.e., deliberately relied upon false evidence, has no merit.

**4. WARREN HAS FAILED TO ESTABLISH THAT PROSECUTORIAL MISCONDUCT JUSTIFIES REVERSAL OF HIS CONVICTION.**

Warren contends prosecutor misconduct rendered his trial unfair. He cites three discrete instances of alleged misconduct, none of which were objected to at trial.

Where improper argument is alleged, the defense bears the burden of establishing (1) the impropriety of the argument and (2) its prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A conviction will be reversed only where the defendant

# APPENDIX A

For the benefit of the Court, the State has compiled a list of issues raised before the Court of Appeals but since abandoned.

**A. Issue Related to his First Trial.**

1. Warren claimed that Detective Rylands expressed an improper opinion when she testified that Lisa Warren seemed more protective of him than NS and SS. Ruled properly admitted under ER 701. Warren, 134 Wn. App. at 58-59.

**B. Issues Related to his Second Trial.**

1. Warren claimed he was prevented from putting on a defense by the exclusion of evidence that he had a heart attack during the charging period; that he could not physically commit rape. Ruled trial court had not prohibit such evidence, but had stated that door would be open to evidence that he was capable of molesting SS and Warren decided not to introduce the evidence. Warren, 134 Wn. App. at 65-66.

2. Warren claimed that he was prevented from putting on a defense by exclusion of evidence that SS said that she should not have said anything about the abuse and NS told her to be quiet. Ruled trial court had not prohibit such evidence, but had stated that door would be open to evidence supporting SS's credibility and Warren decided not to introduce the evidence. Warren, 134 Wn. App. at 65-66.

3. Warren claimed that the trial court erred in admitting evidence that the detectives were surprised by NS's disclosure. Ruled the context of NS's disclosure relevant to rebut Warren's theory that NS's disclosure was a product of suggestion. Warren, 134 Wn. App. at 68.

# APPENDIX B

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it was been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

CP 91 (WPIC 4.01A)



# APPENDIX C

do.

Q. Yes, please.

3 A "Ya thought I was long and forgotten. Visioned my  
4 body had rottened. Picture time passin' by just  
5 like us slaves pickin' cotton. I steadily hold my  
6 tears, cop ya a smile, wipe my face. Tell all my  
7 enemies, contemplate, make no mistake, seal they  
8 fate prematurely. Because I am number one, danga.  
9 Brewin, they'll howl when it's dun dun dun. Who  
10 think I'm playin'? Who think foolin'? Who feel I'm  
11 havin' fun? This system ain't stoppin', Jack. In  
12 fact, they better run, yeah. Fo' a duly reparation  
13 neva two end on your ungodly livin' people, floatin  
14 in boats of sin. Crossin' that oceans of  
15 destruction, callin' it, basin' it on lies. Watered  
16 down pervert justice, playin' tricks on my wife. Is  
17 she all right? Light up the chambers, Honorable  
18 Judge Deceit. Detect no opportunity fo' redemption  
19 when you are fightin just to be free. Why me? I  
20 wonder what happened to liberty. No constitution  
21 right provisions fo' they, immorality. How do you  
22 plea? Not guilty, Judge. And I swear been framed.  
23 The only crime they got up on me is I dared to speak  
24 change, uhh, at a shattered family unit with filth,  
25 from its head to them feet. Peep. Put some order

forth too clean it up, and they hollered police. O  
 Maybe I went wrong. Bein' what I know they neva had  
 to my suga' that husband --" I'm not sure what that  
 4. says. "And abort them kids, real dad. Look at me  
 5. now. Ya left me when I found God, my only escape  
 6. from this conspiracy everywhere I look, and I turn.  
 7. Swear, yo demons keep chasin me. God catch me if I  
 8. fall. When I climb, Lord, I'm losen my gravity to  
 9. reach within yo body and mind. Yeah, so I move  
 10. spiritually, and believe me I'm comin'. Don't  
 11. believe a word they say. Yo, I truly adore you.  
 12. Now sit and think with me. Can't see. Covered in  
 13. flame. Am I the holy vein entrusted rivulet for  
 14. your heart, and gave my name without shame. I gave  
 15. it up for Hopscotch. Must I regret? They always  
 16. said blood sweeta than love. Slaughter State  
 17. advocates. Look at me now. Crushin' out evil.  
 18. Heli's Heavenly innocence. Demon seed, the Judas  
 19. breed was schemin' me get sent to the pen. Mutant  
 20. sent me up and thought it was fun, but the ransom  
 21. for your wickedness, caged you, hell everyone.  
 22. Yeah, you forgiven. I halla. Hear me, beatin' my  
 23. chest. Yo, peep, when it is ova and I am out there,  
 24. lovely, stackin' my chips. ~~Tell stretch Mouseola~~

25. ~~Queen's weakness, don't lay a paw up on holy word~~

with a false witness on her lips. Trip, confess what

really happened. Spill it out. I told ya no

Ms. Exhibition in the Federal Way in the bathroom,

rubbin' yo kittle real slow. Okey. And you no

lie, you looked sexy and sweet standin' naked up in

that mirror on top of that toilet seat. What? Who

me peek? Neva had to. She keeps the door open. If

momma only knew what you do, round yo neck she be

chokin'. Neva spoken, not a word bout things that

ya did. Keepin' her fooled smooth, fakin' like you

are still a kid, dig. Neva figured on how her

horniness influenced you. Who seein' all them men

she bring home, makin' love past 2:00. Didn't think

that moanin' and that gruntin' make ya curious,

leavin' yo hormones in a frenzy, wantin' some

climactic sludge love. That's enough. I forgive

you, girl. I know yo arms got bent. And this

message for your momma, hope she gettin' the hint.

Look at me now. I am bustin' my chains. I'm

breakin' free. Thought I told you, nobody could

hold me. Look at me now. Cut me up so you can help

me bleed. But I stay stompin' out the D.A.s and

fleas. Look at me now. Ahh-hha. 'Cause I am truly

bless. Can't stop my faith. Ahh-hha. I'll never

quit. See, I'm a real one, neva could play like I

was a none. Hop's and heat fo two men with one  
lovin' to work from. It's a cold play, yet I  
continue to keep it crackin' in the back of your  
mind. Question if it really happened. Girl, you is  
cold, makin' young old is fair, one is cute -- old  
one is cute. Don't believe you look alike, but for  
him, give me the boot. That's fruit. It could neva  
be done so easily, no struggle, no scream, or was it  
just given up freely? Why stress this little issue,  
girl? From the answer don't cry. Should have known  
when I told ya it wasn't me. Must have been him,  
that other guy, no lie. But ya askin'. Now I'm  
written you some truth. Got them out there huntin'  
for lost novelties, oldies for the kinky like, you  
know. That's drama. Pulp Fiction, Ving gettin'  
plucked from the back. Remba how we used to freak  
it with the pink thingie like that. Let's ask them  
cats who found it up under your matters in fact.  
Drug it off into yo Shortie's room, playin' cat bat  
an' scratch. They got mad when I took it 'cause,  
you know, I stopped they play. Put your toy up in  
the spot. 'Bout the rest, no need to say. Hey ask  
yourself about your photos that you shredded up and  
trashed. And ya rollin' with the DA, with the gall  
to be mad. You know it is sad how you do me when I

gave my love. Girl, just when look like something  
special you swept it under the rug. Look at you  
now, huh. Wanna see me cuffed and deranged. You'll  
neva have me pay fo' something that I haven't put in  
my thang. Is your insane, like that evil tramp who  
is feedin' you false hope. She constantly cluckin'  
that trail, 'cause I got her on the rope, like Ali  
floats. Uh cheah. Still love ya. Hop's miss Hali  
an' say these words off in her ear. Tell her only  
God puts fear before one, an' I'll see you next  
year. Lyrics written by Richard H. Warren."

Q If I could ask you a few follow up questions. He  
refers to someone by the name of Hopscotch. Who is  
that?

A That's me.

Q And references somebody by the name of Stretch. You  
indicated that was Naomi?

A Yes.

Q And what about the term Mouseola, Queen Freakiness?

A That would be talking about Naomi, because she is  
quiet and sneaky. That's how he said she was.

That's something he said about her.

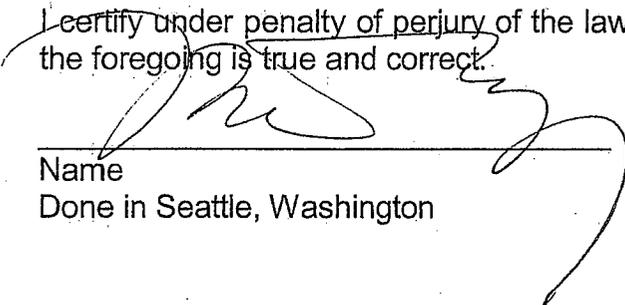
Q He uses the term Heli's heavenly innocence. Who is  
Heli?

A Heli is my nine month old now, baby.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine L. Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. WARREN, Cause No. 79356-5-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

10-12-2007  
Date