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STATE OF WASHINGTON

NO. \_\_\_\_\_

Court of Appeals No. 54032-7-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD H. WARREN,

Petitioner.

PETITION FOR REVIEW

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COURT OF APPEALS  
STATE OF WASHINGTON  
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A. IDENTITY OF PETITIONER

Richard H. Warren, defendant and appellant below, requests this Court grant review of the Court of Appeals decision in Part B.

B. COURT OF APPEALS DECISION

Richard H. Warren seeks review of the Court of Appeals decision affirming his convictions and sentence for one count of child molestation in the first degree and three counts of rape of a child in the second degree. State v. Richard H. Warren, 134 Wn.App. 44, 128 P.3d 1081 (2006). He also seeks review from the court order denying his motion for reconsideration of a portion of the decision.

A copy of the Court of Appeals opinion dated July 10, 2006, is attached as Appendix A, and a copy of the Order Denying Motion for Reconsideration dated September 6, 2006, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The rights to privacy and to freedom of association include the right to marry, and the government may not interfere absent a compelling reason and only after providing due process. U.S. Const. amends. 1, 14; Wash. Const. art. 1 § 3. Did the court

order prohibiting Warren from having any contact with his wife for life violate his right to free association and to marry? (Argument 1).

2. The Sentencing Reform Act authorizes the sentencing court to prohibit a defendant from having contact with a crime victim or witness. Did the court exceed its statutory authority by ordering Warren to have no contact with his wife for life when she was not a victim or witness to the crimes in question? (Argument 1).

3. A defendant's constitutional right to a jury trial is violated if a witness testifies, directly or indirectly, on the credibility of another witness or offers an opinion as to the defendant's guilt. U.S. Const. amend. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. Two government employees indirectly vouched for SS's credibility by testifying that she promised to tell the truth in her interviews and said she had told the truth in all of them; one witness added that SS understood the difference between the truth and a lie. Is this a manifest constitutional error that Warren may raise for the first time on appeal? Can the State prove the error was harmless beyond a reasonable doubt when the State's case rested completely upon SS's testimony and her hearsay statements? (Argument 2(a)).

4. The prosecutor argued three times in closing that the reasonable doubt standard did not mean the jury should give the

defendant the benefit of the doubt. The court first overruled Warren's objection, and when the court finally sustained the objection, it ended the curative instruction by stating, "we are playing with words here in a sense." Was Warren's constitutional right to be convicted only upon facts found by a jury beyond a reasonable doubt violated by the prosecutor's misstatement of the beyond a reasonable doubt standard? U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. (Argument 2(b)).

5. The court admitted evidence that Warren owned a "penis pump" even though it was not related to the crime. Did this irrelevant, inflammatory evidence demonstrate Warren's bad character and violate his constitutional right to a fair trial? U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. (Argument 2(c)).

6. Was Warren's constitutional right to due process violated by the combination of the above errors in his trial on child molestation where the jury's determination of the credibility of S.S. and Warren was critical to its verdict? U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. (Argument 2(d)).

7. A criminal defendant's constitutional right to a fair trial may be violated when the trial court improperly admits inflammatory

evidence of other misconduct. U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. In Warren's trial on charges that he had sexual intercourse with his stepdaughter N.S., the court admitted evidence that (1) her younger sister S.S. alleged Warren sexually abused her, (2) Warren was prosecuted as a result of that allegation, and (3) Warren had a conviction for child molestation. Where the molestation of S.S. was unrelated to the charges involving N.S., was Warren's constitutional right to a fair trial violated by the admission of the irrelevant and highly prejudicial information? (Argument 3(a)).

8. The Court of Appeals held evidence of S.S.'s allegation of sexual abuse by Warren and his prosecution for that charge was admissible under the res gestae rule to show the context in which N.S. reported the offense. The res gestae doctrine permits evidence of other misconduct to show the context of the crime. Does the doctrine permit the introduction of evidence of a defendant's other misconduct to show the context in which the crime was later reported? (Argument 3(a)).

9. Warren testified he did not touch N.S. inappropriately in response to her description of child rape. Was Warren's testimony that he provided child care for his step-daughter but did not put

lotion on her chest character evidence that “opened the door” to his prior child molestation conviction? (Argument 3(a)).

10. Warren wrote a rap song after he was charged. In Warren’s first trial the State alleged the rap contained derogatory references to S.S., and in the second trial the State argued the same lyrics referred to N.S. Was Warren’s right to due process violated by the State’s inconsistent use of the evidence when the State was aware the rap lyrics described S.S.? U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. (Argument 3(b)).

11. The prosecuting attorney’s misconduct may violate a defendant’s constitutional right to a fair trial. U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. In closing argument the prosecutor (1) argued facts about delayed disclosure of sexual abuse that were not in the record, (2) disparaged Warren’s defense counsel for performing his constitutionally-mandated function, and (3) vouched for NS’s credibility by using a “badge of truth” theme to describe her testimony. Was the misconduct so flagrant and ill-intentioned that no limiting instruction would have cured the resulting prejudice? (Argument 3(c))

12. Was Warren’s constitutional right to due process violated by the combination of the above errors in his trial on three

counts of rape of a child where the jury's determination of N.S. and Warren's credibility was critical to its verdict? U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. (Argument 3(d)).

D. STATEMENT OF THE CASE

Richard Warren was conviction by a jury of child molestation in the first degree for sexual contact with his step-daughter S.S. CP 28. The jury was unable to reach a verdict as to allegations concerning her older sister N.S., but Warren was convicted of three counts of rape of a child in the second degree at a later trial. CP 42-44; 2/21/03 RP 9-10. The facts of the case are lengthy, and Warren therefore refers this Court to the Statement of the Case found at pages 10-22 of the Appellant's Opening Brief.

The Court of Appeals affirmed Warren's convictions as well as a portion of his sentence forbidding him from having any contact with his wife. State v. Warren, 134 Wn.App. 44, 138 P.3d 1081 (2006). He now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE SENTENCING CONDITION PROHIBITING WARREN FROM ANY CONTACT WITH HIS WIFE VIOLATES HIS CONSTITUTIONAL RIGHT TO MARRIAGE

The federal constitution protects the right of citizens to associate with other. U.S. Const. amend. 1. The due process guarantees of the Fourteenth Amendment protect individual liberty against government interference with fundamental rights and liberty interests. U.S. Const. amend. 14; Washington v. Glucksberg, 532 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). Accord Wash. Const. art. 1 § 3. Marriage is a fundamental constitutional right. Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct.1817, 18 L.Ed.2d 1010 (1967). See Andersen v. King County, \_\_\_ Wn.2d \_\_\_, 138 P.3d 963 (2006) (fundamental right to marry not applicable to same sex couples).

An individual's constitutional rights may be limited as authorized by the Sentencing Reform Act (SRA) when he has committed a crime. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Any infringement on constitutional rights, however, must be necessary to accomplish the goals of punishment and

protection of the public and must be “imposed sensitively.” Id. at 350; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

The SRA permits the sentencing court to impose “crime-related prohibitions.”<sup>1</sup> RCW 9.94A.505(8) (conditions of sentence). RCW 9.94A.700(5)(b) also permits special conditions of community placement prohibiting contact with “the victim of a crime or a specified class of individuals.” Warren was being sentenced for improper sexual contact with his two step-daughters; his wife was not a victim or witness to the offenses. Prohibiting Warren from contacting his wife was thus not authorized by the SRA.

The Court of Appeals conclusion that the order prohibiting contact was directly related to the circumstances of the crimes and is thus authorized by the SRA is incorrect. State v. Warren, 134 Wn.App. 44, 71, 138 P.3d 1081 (2006). The no contact order unconstitutionally interferes with Warren’s marriage and his fundamental constitutional rights. This Court should accept review of this constitutional issue, which is of interest to sentencing courts throughout the state. RAP 13.4(b)(3), (4).

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<sup>1</sup> A “crime-related prohibition” is an order directly relating to the crime for which the defendant is being sentenced. RCW 9.94A.030(12); Riles, 135 Wn.2d at 349-50.

2. THIS COURT SHOULD ACCEPT REVIEW OF WARREN'S  
CONVICTION FOR CHILD MOLESTATION IN THE FIRST  
DEGREE

The Court of Appeals rejected Warren's arguments that his conviction for molestation of a child in the first degree should be reversed on the following grounds: (1) two government witnesses vouched for the credibility of alleged victim, (2) the prosecutor committed misconduct by misstating the burden of proof in closing argument, (3) the court admitted prejudicial, irrelevant evidence, and (4) the cumulative effect of the errors violated Warren's constitutional right to a fair trial. Warren, 134 Wn.App. at 52-61.

a. The Court of Appeals decision conflicts with *State v. Kirkman*, a Division Two case holding witness testimony vouching for a child victim's credibility is manifest constitutional error that may be raised for the first time on appeal. In Warren's case, a police detective and a "child interview specialist" from the prosecutor's office both testified they assured themselves S.S. knew the difference between the truth and a lie and that S.S. assured them she was telling the truth when she made three separate statements describing sexual abuse. 2/11/03 RP 7, 12-13, 19-20, 32-33; 2/12/03 RP 105-06, 128-29, 135. Warren's attorney did not object to the testimony.

Division Two of the Court of Appeals held somewhat similar testimony constituted improper vouching for a child witness's credibility and it is a manifest constitutional error that may be raised for the first time on appeal. State v. Kirkman, 126 Wn.App. 97, 106-07, 107 P.3d 133, rev. granted, 155 Wn.2d 1014 (2005).<sup>2</sup> In this case, Division One disagreed with Kirkman and found the evidence did not constitute a manifest constitutional error Warren could raise. Warren, 134 Wn.App. at 55, 56-58. The opinion is thus in conflict with Kirkman, and this Court should accept review. RAP 13.4(b)(2).

In addition, the evidence infringed upon the jury's role as fact-finder and determiner of witness credibility. See State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). The Court of Appeals held that neither of the State's witnesses said they tested S.S.'s ability to tell the truth or opined they believed she was telling the truth. Warren, 134 Wn.App. at 57-58. Both witnesses, however, testified they determined S.S. was capable of telling the truth and secured her promise to do so. 2/11/03 RP 7, 12-13, 19-20, 32-33, 59-60; 2/12/03 RP 105-06, 134, 142. In addition, the

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<sup>2</sup> This Court heard argument in Kirkman, Supreme Court Number 76833-1, and State v. Candia, Supreme Court Number 77596-6, on February 7, 2006.

detective testified about S.S.'s interview with the prosecuting attorney, which ended with S.S.'s statement, "I told everybody the truth." 2/12/03 RP 135. The State carefully elicited these witnesses' professional credentials and training. 2/11/03 RP 3-9, 11, 15-16, 62; 2/12/03 RP 100, 104.

The witness's testimony indirectly vouched for S.S.'s credibility. As S.S. was the key witness for the State, the testimony invaded the province of the jury and violated Warren's constitutional right to a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1 §§ 3, 22. This Court should accept review to address this constitutional issue. RAP 13.4(b)(3).

b. This Court should accept review because the prosecutor committed misconduct by misstating the burden of proof and this Court should clarify the standard of appellate review when prosecutorial misconduct prejudicially impacts a constitutional right.

A criminal defendant has a constitutional right to be convicted only upon proof beyond a reasonable doubt of every element of the crime. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. An integral piece of proof beyond a reasonable doubt is that the accused receive the benefit of the

doubt. Victor v. Nebraska, 511 U.S. 1, 8, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850). When a prosecutor commits misconduct, a defendant may be denied his constitutional right to a fair trial and due process of law. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Here, the deputy prosecuting attorney told the jury the reasonable doubt standard did not mean the jury should give the Warren the benefit of the doubt. 2/20/03 RP 98-99. First, the prosecutor said, "And for them [defense] to ask you to infer everything to the benefit of the defendant is not reasonable." Id. at 98. After Warren objected and the court ruled off the record, the prosecutor continued, "Reasonable doubt does not mean that you give the defendant the benefit of the doubt, and that is clear when you read the definition." Id. at 99. Later, the prosecutor returned to this theme, arguing, "But reasonable doubt does not mean beyond all doubt. And it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt." Id. at 103-04.

Warren again objected, and the trial court gave a curative instruction referring the jury to the instructions and stating the

benefit of any doubt would go to the defendant. Id. at 104-05. The court concluded with the dismissive statement, "So we are playing with words here in a sense." Id.

The Court of Appeals held the prosecutor's explanation of the burden of proof beyond a reasonable doubt was incorrect but found the trial court's curative instruction obviated any prejudice to Warren. Warren, 134 Wn.App. at 60-61. A curative instruction, however, does not always prejudice caused by prosecutorial misconduct. State v. Stith, 71 Wn.App. 14, 22-23, 856 P.2d 415 (1993) (prosecutorial misconduct that strikes at heart of defendant's right to fair trial not cured despite "strongly worded curative instructions"). Here, the prosecutor made the improper comment three times, and the court's curative instruction was not forceful. The Court of Appeals conclusion that the misconduct did not require reversal was incorrect.

The Court of Appeals also held that the constitutional harmless error standard did not apply even though the misconduct violated Warren's constitutional right to a jury determination of every element of the crime beyond a reasonable doubt. Warren, 134 Wn.App. at n. 7. The appropriate standard of review when prosecutorial misconduct impacts the defendant's constitutional

rights is the constitutional harmless error standard. State v. Moreno, 132 Wn.App. 663, 672, 132 P.3d 1137 (2006) (prosecutor commented in closing argument on defendant's decision to represent himself); State v. Fleming, 83 Wn.App. 209, 215-16, 921 P.2d 1076 (1996) (prosecutor's closing argument shifted burden of proof to defendant), rev. denied, 131 Wn.2d 1018 (1997); State v. Fiallo-Lopez, 78 Wn.App. 717, 728-29, 899 P.2d 1294 (1995) (same). Contra State v. French, 101 Wn.App. 380, 385-86, 4 P.3d 857 (2000) (prosecutorial misconduct that tended to shift burden of proof did not directly violate defendant's constitutional right to remain silent; using "flagrant and ill-intentioned" standard because defendants did not pose timely objections to misconduct), rev. denied, 142 Wn.2d 1022 (2001).

Warren has not found any support in Washington Supreme Court cases for the Court of Appeals' theory that prosecutorial misconduct may only indirectly violate a defendant's constitutional rights and in that case it is not subject to the constitutional harmless error standard.<sup>3</sup> This Court should accept review because the

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<sup>3</sup> This Court applied the constitutional harmless error standard when the prosecutor violated the defendant's constitutional rights by eliciting testimony of pre-arrest silence, finding the error was compounded by the repeated references to the silence in closing argument. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). This Court found a prosecutor's comments on defendant's post-

prosecutor's misconduct violated Warren's right to a fair trial and to clarify that the constitutional harmless error test must be applied when the prosecutor commits misconduct that impacts a defendant's constitutional right. RAP 13.4(b)(3), (4).

c. This Court should accept review because the admission of prejudicial and irrelevant evidence violated Warren's constitutional right to a fair trial. The improper introduction of inflammatory evidence may violate a criminal defendant's constitutional right to due process. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).. The trial court admitted evidence that Warren owned a "penis pump." The Court of Appeals held that evidence was relevant because S.S. told the detective about the "penis pump" after she explained that Warren told her about sexual intercourse. Warren, 134 Wn.App. at 58-59. S.S., however, never told the detectives or testified that Warren showed her the "penis pump" or how it worked; rather she said she saw it in Warren's briefcase in

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arrest silence violated due process but did not decide if the remarks constituted harmless or prejudicial error in light of reversal due to prosecutor's inflammatory closing argument in State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988).

the master bedroom. 2/12/03 RP 112-13, 140; 2/13/03 RP 16-17;  
2/19/03 RP 21-22, 29-30, 32.

The trial court's determination that the "penis pump" evidence was relevant to show Warren's state of mind is incorrect. The Court of Appeals concluded the "penis pump" was relevant without stating what it was relevant to show. The evidence of the "penis pump" permitted the jury to speculate about Warren's bad character. The United States Supreme Court has strongly suggested that the improper admission of character evidence may deny a criminal defendant a fair trial. Sims v. Stinson, 101 F.Supp.2d 187, 196 (S.D.N.Y. 2000), citing Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948); Dowling v. United States, 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). This Court should accept review to determine if the admission of irrelevant and prejudicial evidence violated Warren's constitutional right to a fair trial. RAP 13.4(b)(3).

d. This Court should accept review because the cumulative effect of the above errors denied Warren a fair trial. The due process clauses of the federal and state constitutions provide that a

criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1, § 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). In Coe, for example, this Court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89. This Court should accept review to determine if cumulatively the above errors violated Warren's constitutional right to due process. RAP 13.4(b)(3).

3. THIS COURT SHOULD ACCEPT REVIEW OF WARREN'S  
CONVICTIONS FOR RAPE OF A CHILD IN THE SECOND  
DEGREE

The Court of Appeals challenged his three convictions for rape of a child in the second degree, arguing (1) that admission of evidence that Warren sexually assaulted N.S.'s sister S.S. violated Warren's right to a fair trial, (2) the trial court's evidentiary rulings prevented Warren from presenting his defense, (3) the admission of irrelevant evidence was prejudicial, (4) the prosecutor committed misconduct in closing argument, and (5) the cumulative effect of all

errors violated Warren's right to a fair trial. The Court of Appeals affirmed the convictions. Warren, 134 Wn.App. at 61-69.

a. This Court should accept review because the admission of the molestation of S.S. was not admissible as part of the *res gestae* of the crimes against N.S. and Warren did not open the door to the offense through his testimony. The court admitted evidence (1) that N.S.'s sister S.S. alleged Warren sexually abused her, (2) that he was prosecuted as a result of the allegation, and (3) Warren had a prior conviction for child molestation. 11/12/03 RP 3-6, 109-12; 11/17/03 RP 3-7, 149. As mentioned above, the improper admission of inflammatory evidence, especially evidence of other misconduct, may violate a defendant's constitutional right to due process. Argument 2(c). The improper use of misconduct evidence is contrary to "firmly established principles of Anglo-American jurisprudence." McKinney v. Rees, 993 F.2d 1378, 1380 (9<sup>th</sup> Cir.), cert. denied, 510 U.S. 1020 (1993). When evidence of a defendant's prior misconduct is improperly admitted and there is no proper inference the jury can draw from the evidence, it renders the trial unfair, violating the defendant's constitutional right to due process of law. Sims, 101 F.Supp.2d at 194-95.

i. Res Gestae. Washington's evidence rules forbid the use of prior misconduct evidence to prove the defendant's character. ER 404(b); State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Such evidence is admissible only when relevant to prove an ingredient of the charged offense. Id. The "res gestae" exception to ER 404(b) permits other misconduct evidence only where it is "a 'link in the chain' of an unbroken sequence of events surrounding the charged offense . . . 'in order that a complete picture be depicted for the jury.'" State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998), habeas granted on other grounds, Brown v. Lambert, 451 F.3d 946 (9<sup>th</sup> Cir. 2006), quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). This Court has affirmed the use of other misconduct evidence when it demonstrated the immediate context in which a crime occurred. State v. Elmore, 139 Wn.2d 250, 285-87, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000); Brown, 132 Wn.2d at 572-76. The Court of Appeals, however, upheld the admission of another incident of sexual abuse because it placed N.S.'s disclosure of sexual abuse in context, not the crime itself. Warren, 134 Wn.App. at 62-63.

In rejecting Warren's claims, the Court of Appeals relied upon an expansive definition of res gestae evidence found in State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591 (1981). When this Court affirmed the Court of Appeals decision, however, it did not utilize the same definition of res gestae evidence. This Court's opinion in Tharp does not provide support for the Court of Appeals' conclusion that the res gestae exception permits the admission of uncharged offenses relevant to the reporting of a crime and not the crime itself. Tharp, 96 Wn.2d. at 594.

ii. Opening the Door. Evidence of Warren's conviction for child molestation was also admitted because the trial court found Warren had "opened the door" to the evidence by claiming his own good character when he testified. 11/12/03 RP 115-16. The Court of Appeals agreed. Warren, 134 Wn.App. at 64-65. In fact, Warren did not assert his good character, but simply testified about his care-giving responsibilities for his step-daughters while Mrs. Warren was working and said he would apply lotion to N.S.'s back but not her front. 11/17/03 RP 82-83.

The "open door" doctrine applies when a party introduces inadmissible evidence, which Warren did not do. State v.

Avendano-Lopez, 79 Wn.App. 706, 714, 904 P.2d 324 (1995), rev. denied, 129 Wn.2d 1007 (1996), citing Karl B. Tegland, 5 Wash. Prac. Evidence 41 (3<sup>rd</sup> ed. 1989). The rule is designed to “preserve fairness.” Id. By stating he applied lotion to N.S.’s back, Warren did not logically open the door to his conviction for molesting S.S. See Avendano-Lopez, 79 Wn.App. at 714-15 (defendant did not “open door” to questions about prior heroin sales by testifying he had recently been released from jail).

Comparing Warren’s testimony to other cases also reveals Warren’s testimony did not put his character in issue. State v. Renneberg, 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974) (defendant testified as to prior work experience, college attendance and participation in Miss Yakima pageant, glee club, pep club, drill team and science club to show good character); Avendano-Lopez, 79 Wn.App. at 715-16 (testimony that not working the co-defendant to sell drugs was not character evidence that opened door to prior drug sales by defendant); State v. Pogue, 104 Wn.App. 981, 986-87, 17 P.3d 1272 (2001) (defendant did not make sweeping assertions about his good character by implying police planted evidence ). Here, N.S. said Warren took showers with her and she did not like the way he touched her, although both were clothed.

Warren then testified he did not touch N.S.'s private areas. He was not putting his character in issue but responding to the State's allegations.

iii. Conclusion. The jury learned Warren was prosecuted for sexual abuse of N.S.'s younger sister and that Warren was convicted of child molestation. Any reasonable juror would conclude either (1) Warren was convicted of sexually molesting S.S., or (2) Warren was convicted of sexually molesting a third child before he was accused of molesting his step-daughters. The evidence concerning prior sexual abuse prejudiced Warren's right to a fair trial. Review is appropriate to determine if Warren's constitutional right to a fair trial was violated. U.S. Const. amend. 14; Wash. Const. art. 1 §§ 3, 22. RAP 13.4(b)(3).

This Court should also address the Court of Appeals use of the res gestae exception to include other crimes connected to the reporting of a crime because the Court of Appeals decision is not supported by authority from this Court and lower courts need guidance in this area. RAP 13.4(b)(1), (4). In addition, this Court review whether testimony designed to counter the victim's description of the offense opened the door to other misconduct evidence. RAP 13.4(b)(4).

b. This Court should accept review because the State's inconsistent use of the rap lyrics at the two trial violated due process. At both trials, the State was permitted to introduce rap lyrics penned by Warren after he was charged with the offenses, but the prosecutor argued the same lyric described different girls in the different trials. 2/20/03 RP 26-27; 11/18/03 RP 33-36. In the first trial, the prosecutor admitted the rap lyric to demonstrate Warren's lustful disposition and argued in closing the song described S.S. 2/13/03 RP 73-76, 80-87; 2/20/03 RP 26-27, 93-94. The prosecutor explained, "This is a man who clearly writes about finding an eight year old girl sexy and sweet as she is standing in a bathroom in Federal Way." 2/20/03 RP 26. In the N.S. trial, the State utilized the rap song, this time to counter Mr. Warren's testimony that he tried to boost N.S.'s self-esteem. 11/17/03 RP 108, 111-12, 124, 136-49. In closing argument, the prosecutor argued the Mr. Warren's lyrics description of a girl in the bathroom described N.S. 11/18/03 RP 33-34. This argument was inconsistent with what the prosecutor argued in the earlier trial and what the State actually believed was true.

The prosecutor's use of inconsistent theories to convict co-defendant may violate due process. See State v. Roberts, 142

Wn.2d 471, 498, 14 P.3d 713 (2000) (criticizing State's practice of taking inconsistent positions about the truthfulness and reliability of a codefendant's statement in defendant's and codefendant's cases); Smith v. Goose, 205 F.3d 1045, 1051, 2000 (8<sup>th</sup> Cir. 2000), cert. denied, 531 U.S. 985 (2000) (due process prevents State from arguing two fundamentally inconsistent theories of codefendant's guilt at their separate trials); Thompson v. Calderon, 120 F.3d 1045, 1058 (9<sup>th</sup> Cir. 1997) (en banc), rev'd on other grounds, 523 U.S. 538 (1998) (due process prevents prosecutor from arguing contradictory theories about which co-defendant was guilty of the murder at the co-defendants' two separate trials). Similarly, this Court should not condone the State's inconsistent use of facts to convict one defendant of separate crimes at separate trials.

The Court of Appeals held the admission of the rap lyrics to impeach Warren's testimony at the second trial was not improper because Mrs. Warren did not testify in that trial that the girl described in the rap lyrics was S.S. as she had in the first trial. Warren, 134 Wn.App. at 67. While this may be true, it does not address the prosecutor's attribution of the same derogatory

comment to different girls in the different trials.<sup>4</sup> This Court should accept review of the Court of Appeals opinion because the reconsider its opinion and hold the admission of rap lyrics violated Mr. Warren's right to a fair trial in the case involving N.S. RAP 13.4(b)(3).

c. This Court should accept review because prosecutorial misconduct denied Warren a fair trial. Warren pointed out three instances of prosecutorial misconduct in closing argument – vouching for N.S.'s credibility, arguing facts not in evidence, and disparaging defense counsel. Appellant's Opening Brief at 41-48. The Court of Appeals held the prosecutor did not vouch for N.S.'s credibility and the other two instances of misconduct did not prejudice Warren. Warren, 134 Wn.App. at 68-69. Because Warren did not object to the misconduct, the Court of Appeals determined the misconduct was not so flagrant and ill-intentioned that it could not have been cured by a limiting instruction.<sup>5</sup> Id.

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<sup>4</sup> Warren asked the Court of Appeals to reconsider this portion of its opinion, but the Court did not address his argument. Motion for Reconsideration filed July 31, 2006; Order Denying Motion for Reconsideration filed September 6, 2006.

<sup>5</sup> The trial court repeatedly ruled that the attorneys could not voice an objection to closing argument on the basis the other party was arguing facts not in evidence. 2/20/03 RP 7-8, 95-95; 11/18/03 RP 44; 12/12/03 RP 15. Warren's failure to object on that basis should be excused in this circumstance.

A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amends. 6, 14; Wash. Const., art. 1, §§ 3, 21, 22. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor commits misconduct, a defendant may be denied his right to a fair trial and due process of law. Charlton, 90 Wn.2d at 664-65.

The prosecuting attorney told the jury in closing argument that delayed disclosure of sexual abuse is not uncommon and that children carefully decide to whom they reveal sexual abuse. 11/18/03 RP 9. These "facts" and theories were in evidence. This Court found a similar argument concerning incest victims to be prejudicial misconduct in State v. Case, 49 Wn.2d 66, 69, 298 P.2d 500 (1956). Attorneys may not mislead the jury by misstating the evidence or arguing facts not in the record. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.2d 432 (2003); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); RPC 3.4(e).

Second, the deputy prosecuting attorney began her rebuttal closing argument by stating she made notes of the "number of

mischaracterizations” in defense counsel’s argument “as an example of what people go through in a criminal justice system when they deal with defense attorneys.” 11/18/03 RP 62. Later she complained that defense counsel’s argument was “a classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” *Id.* at 63. And the prosecutor culminated this argument by suggesting that the defense kept changing its position as the trial progressed. *Id.* at 65-66. When the State argues in a manner that disparages defense counsel, it is misconduct because it impacts the defendant’s constitutional right to counsel. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984); Bruno v. Rushen, 721 F.2d 1193 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 920 (1984).

Third, the deputy prosecutor devoted a substantial portion of her closing argument to demonstrating that N.S.’s testimony had the “badge of truth.”

... there are certain details and certain facts that a child may tell you that I may refer to, and what I’m going to refer to here as a badge of truth. The reality is they hit you in the gut. You listened to the testimony, you hear these details and they are things that just have the ring of truth. . . .

11/18/03 RP 12. (Emphasis added). The prosecutor then went over the portions of N.S.'s testimony that "rang out clearly with the truth." Id. at 13-15. The prosecutor's references to the "ring of truth" and "badge of truth" improperly vouched for N.S.'s credibility.

As in many cases involving sexual abuse of a child, the case came down to whether the jury believed N.S. or Warren. The prosecutor's improper argument filled in gaps by adding a social science explanation for N.S.'s delay in reporting that was not supported by the evidence, disparaging defense counsel for doing his job, and the claiming N.S.'s testimony had the "ring of truth." In Case, this court held that the cumulative effect of the deputy prosecutor's improper arguments constituted the flagrant misconduct that requires reversal because no instruction or series of instructions could have cured the prejudicial error. Case, 49 Wn.2d at 73-74. Similarly, here, the instances of misconduct were many and hit hard. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

d. This Court should accept review because the cumulative effect of the above errors denied Warren a fair trial. As argued above, combined effect of several error may deny the defendant a fair trial. Coe, 101 Wn.2d at 789; Alexander, 64 Wn.App., at 158.

The Court of Appeals rejected Warren's cumulative error argument because "there were no errors in either trial" even though the Court of Appeals held the prosecutor committed misconduct in this trial. Warren, 134 Wn.App. at 69. The trial court erred by admitting evidence of Warren's molestation of S.S. and the rap lyrics. This Court should accept review because cumulative error denied Warren a fair trial. RAP 13.4(b)(3).

F. CONCLUSION

Richard Warren requests this Court accept review of the Court of Appeals decision affirming his convictions for child molestation and rape of a child and the order forbidding him from contact with his wife.

Respectfully submitted this 6<sup>th</sup> day of October, 2006.

*Elaine L. Winters*

Elaine L. Winters – WSBA # 7780

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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

*EL*  
Name

OCT - 6 2006  
Date

Done in Seattle, Washington

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2006 OCT - 6 PM 4: 50

**APPENDIX A**

**COURT OF APPEALS DECISION TERMINATING REVIEW**

**July 10, 2006**

LEXSEE 134 WN.APP. 44

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

No. 54032-7-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

*134 Wn. App. 44; 138 P.3d 1081; 2006 Wash. App. LEXIS 1438*

July 10, 2006, Filed

**PRIOR HISTORY:** [\*\*1] Superior Court County: King. Superior Court Cause No: 02-1-05060-0 SEA. Date filed in Superior Court: March 30, 2004. Superior Court Judge Signing: Hon. Michael Hayden.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the decision of the Superior Court of King County (Washington), which convicted him, in two trials, of one count of child molestation in the first degree of his 8-year-old stepdaughter and three counts of rape of his 14-year-old stepdaughter.

**OVERVIEW:** Defendant appealed his molestation and rape convictions, but the court affirmed. Because the child interview specialist and the police detective did not explicitly say they believed the younger victim, any error in admitting their testimony was not manifest constitutional error that could be raised for the first time on appeal. Additionally, the trial court's evidentiary rulings were not an abuse of discretion; there was not a substantial likelihood the outcome of the two trials was affected by improper arguments of the prosecutor, and defendant was not denied his constitutional right to a fair trial. The trial court's decision to prohibit contact with his wife, the victim's mother, as a condition of his sentence, was not an unconstitutional restriction. The detective was permitted to testify under *Wash. R. Evid. 701* based on her observations of the wife. Testimony about the wife's reaction of being more protective of defendant than concerned about the younger victim's allegations offered an alternative explanation about the timing of the disclosures and why the younger victim did not tell her mother about the abuse.

**OUTCOME:** The judgment was affirmed.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses  
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of the Evidence  
Evidence > Testimony > Experts > General Overview  
Evidence > Testimony > Lay Witnesses > Opinion Testimony > General Overview*

[HN1] No witness may state an opinion about a victim's credibility because such testimony invades the province of the jury to weigh the evidence and decide the credibility of the witness.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview  
Evidence > Testimony > Experts > General Overview  
Evidence > Testimony > Lay Witnesses > Opinion Testimony > General Overview*

[HN2] When a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview  
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object*

[HN3] Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to "manifest constitutional error" reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, it may permit defense counsel to deliberately let error be created in the record, reasoning

134 Wn. App. 44, \*; 138 P.3d 1081;  
2006 Wash. App. LEXIS 1438, \*\*

that while the harm at trial may not be too serious, the error may be very useful on appeal.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview*  
*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Exceptions to Failure to Object*

*Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object*  
*Criminal Law & Procedure > Appeals > Standards of Review > General Overview*

[HN4] If a defendant does not object at trial, the defendant cannot challenge the testimony for the first time on appeal, *Wash. R. App. P. 2.5(a)*. The exception under Rule 2.5(a) for manifest error affecting a constitutional right is a narrow one. Requiring defendants to meet a high threshold to raise issues for the first time on appeal ensures that parties give the trial court an opportunity to obviate error and prevent prejudice to the defendant. The exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms. Under Rule 2.5(a)(3), a defendant must also show how an alleged constitutional error actually affected his rights at trial. It is this showing of actual prejudice that makes the error "manifest." A "manifest" error is unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed. An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.

*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence*

[HN5] The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.

*Evidence > Testimony > Lay Witnesses > Opinion Testimony > Rational Basis*

[HN6] *Wash. R. Evid. 701* allows a witness to express an opinion that is rationally based on the perception of the witness.

*Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of the Evidence*  
*Criminal Law & Procedure > Trials > Bench Trials*

[HN7] It is the function of the trier of fact to weigh the persuasiveness of evidence.

*Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview*

*Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Burdens of Proof*

[HN8] To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of showing the prosecutor's comments were improper and there is a substantial likelihood that the comments affected the jury's decision.

*Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview*

*Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Prosecutorial Misconduct*

[HN9] If alleged prosecutorial misconduct directly violates a constitutional right, it is subject to the stricter standard of constitutional harmless error. Arguments affecting constitutional rights can be cured with a proper instruction to the jury.

*Evidence > Relevance > Confusion, Prejudice & Waste of Time*

*Evidence > Relevance > Prior Acts, Crimes & Wrongs*

*Evidence > Relevance > Relevant Evidence*

[HN10] Under the *res gestae* exception to *Wash. R. Evid. 404(b)*, evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in time and place to the charged crime. The *res gestae* exception includes admission of prior bad acts when necessary to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. Like other Rule 404(b) evidence, such evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. Evidence is relevant when 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, *Wash. R. Evid. 401*. A fact bearing on the credibility or probative value of other evidence is relevant. The trial court must conduct the required balancing of probative value versus prejudicial effect before admitting evidence of other bad acts.

*Criminal Law & Procedure > Appeals > General Overview*

[HN11] A cross appeal is only required if a respondent seeks "affirmative relief" to modify the decision below, *Wash. R. App. P. 2.4(a)*.

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence***

***Evidence > Relevance > Character Evidence***

[HN12] While *Wash. R. Evid. 404(a)* prohibits evidence of a person's character to prove "conformity," the rule provides an exception when the accused offers evidence of his character, Rule 404(a)(1). 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. The determination that a party has opened the door is reviewed for abuse of discretion. The trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to the evidence.

***Criminal Law & Procedure > Trials > Closing Arguments > General Overview***

***Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview***

***Evidence > Testimony > Credibility > General Overview***

[HN13] It is improper for a prosecutor to vouch for the credibility of a witness. However, an argument does not constitute vouching unless it is clear that the prosecutor is not arguing an inference from the evidence but instead is expressing a personal opinion as to the witness's credibility. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the evidence.

***Criminal Law & Procedure > Trials > Closing Arguments > General Overview***

***Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object***

[HN14] Appellate courts review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that an admonition could not have neutralized.

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial***

***Criminal Law & Procedure > Appeals > Reversible Errors > Cumulative Errors***

[HN15] The cumulative error doctrine applies when several trial errors occur which, standing alone, may not be sufficient to justify reversal but, when combined, deny a defendant a fair trial.

***Civil Rights Law > General Overview***

***Constitutional Law > Substantive Due Process > Privacy > General Overview***

[HN16] Marriage is one of the basic civil rights of man, fundamental to man's very existence and survival.

***Criminal Law & Procedure > Sentencing > Appeals > General Overview***

***Criminal Law & Procedure > Sentencing > Imposition > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview***

[HN17] Appellate courts review sentencing conditions, including crime-related prohibitions, for abuse of discretion. Under *Wash. Rev. Code § 9.94A.505 (8)*, the court may impose and enforce crime-related prohibitions as part of a sentence. A crime-related prohibition means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, *Wash. Rev. Code § 9.94A.030(12)*. The existence of a relationship between the crime and the condition will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. Witnesses to a crime are directly connected to the circumstances of the crime. Crime-related prohibitions which limit fundamental rights are permissible provided the restrictions are reasonably necessary and narrowly drawn. A reviewing court looks to whether the order prohibits a real and substantial amount of protected conduct in contrast to the statute's legitimate sweep. A convicted defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and public order.

**COUNSEL:** *Elaine L. Winter* (of *Washington Appellate Project*), for appellant.

*Norm Maleng*, Prosecuting Attorney, and *Dennis J. McCurdy*, Deputy, for respondent.

**JUDGES:** Written by: Judge. Schindler. Concurred by: Judge Coleman, Judge Agid.

**OPINION BY:** Schindler

**OPINION:**

[\*49] SCHINDLER, A.C.J. - In the first trial, a jury convicted Richard Warren on one count of child molestation in the first degree of his eight-year-old stepdaughter, S.S. In a second trial, a jury convicted Warren on three counts of rape of his fourteen-year-old stepdaughter, N.S. Warren challenges his conviction in the first trial claiming the child interview specialist and police detective violated his constitutional rights by improperly vouching for S.S.'s credibility; the trial court abused its discretion in admitting evidence; prosecutorial misconduct denied him a fair trial; and cumulative error. Warren challenges his conviction in the second trial based on evidentiary rulings, prosecutorial misconduct, and cumulative error. Warren also contends [\*\*2] the condition of his sentence prohibiting contact with Lisa Warren, the mother of S.S., N.S., and his child is not crime-related and violates his constitutional rights.

Because the child interview specialist and the police detective did not explicitly say they believed S.S., any error in admitting their testimony is not manifest constitutional error that can be raised for the first time on appeal. We also conclude the trial court's evidentiary rulings were not an abuse of discretion; there is not a substantial likelihood the outcome of the two trials was affected by improper arguments of the prosecutor; and Warren was not denied his constitutional right to a fair trial. In addition, the trial court's decision to prohibit contact with Lisa Warren as a condition of his sentence is crime-related and is not an unconstitutional restriction. We affirm Warren's conviction for child molestation of S.S. and three counts of second-degree rape of N.S.

*FACTS*

Richard Warren and Lisa Warren married in 2001 and lived together with Lisa's two daughters from a prior marriage S.S. and N.S. In March 2002, the family was living in Bellevue and Lisa was approximately seven months pregnant [\*\*3] with [\*50] Warren's child. n1 On March 24, Lisa and Warren had an argument which became physical. Warren was charged with a domestic violence offense. He pleaded guilty and was sentenced to serve time in the King County Jail.

n1 Lisa gave birth to a daughter, H.S., on May 2, 2002.

On the morning of June 11, 2002, nine-year-old S.S. told her teacher she was upset because her stepfather was coming home from jail. When S.S. met with the school counselor, she said Warren did "disgusting things" to her. When asked what she meant, S.S. said Warren made her wear short skirts without underwear, touched her between her legs, showed her pornographic video covers, and talked to her about sex. The counselor reported the disclosures to the police and Child Protective Services (CPS).

Two Bellevue police detectives came to S.S.'s elementary school to talk to her. S.S. again described how Warren touched her inappropriately on several different occasions and exposed her to sexual material. After the interview, the detectives met [\*\*4] with S.S.'s 14-year-old sister, N.S., at her school. N.S. denied Warren had any inappropriate sexual contact with her. CPS placed S.S. and N.S. in protective custody.

When S.S. was later interviewed by Nicole Farrell, a forensic child interview specialist for the prosecutor's office, S.S. repeated the disclosures she made to the school counselor and the detectives. The State charged Warren with one count of rape in the first degree and one count of child molestation in the first degree of S.S.

Lisa Warren did not initially cooperate with the police. After Warren was arrested, S.S. and N.S. returned home to live with their mother. In August 2003, Lisa and her daughters did not appear for the scheduled trial date. The police located Lisa and the girls in Tacoma at Lisa's sister's house. Lisa was arrested on a material witness warrant and S.S. and N.S. were again placed in protective custody.

[\*51] The next day, S.S. and N.S. went to the prosecutor's office to prepare for the trial. S.S. was upset and wanted to see her mother. S.S. did not want to talk about the trial, but told the detectives and the prosecutor that everything she told the counselor was true. When Detective Ryland and the [\*\*5] prosecutor met separately with N.S., she told them she only wanted to talk about what happened to S.S. N.S. said she was concerned about having to swear on the Bible when she testified because she did not want to lie. N.S. did not want the prosecutor to ask her at trial if Warren did anything to her. N.S. then disclosed that she had been sexually abused by Warren.

N.S. said Warren engaged in vaginal, anal, and oral intercourse with her on numerous occasions. Warren told her he was "teaching" her and he made her watch pornographic videos to show her how to perform sexual acts properly. Sometimes when Warren had intercourse with her, he covered her eyes with a bandana and sometimes he put a pink ball in her mouth. N.S. also said Warren told her that if she complied, he would not do the same

things with S.S. N.S. was afraid to tell her mother, but told the detectives she "didn't want to lie anymore." After talking to N.S., the police detectives visited Lisa in jail and told her about N.S.'s disclosures. After learning about the disclosures, Lisa cooperated with the police and the prosecutor.

The court allowed the State to amend the information to add three additional counts of second-degree [\*\*6] rape of N.S. The charges against Warren for one count of rape and child molestation of S.S. and for three counts of second-degree rape of N.S. were tried together.

The defense theory was that S.S. and N.S. were not truthful or credible. Warren argued that S.S. alleged sexual abuse because she did not want Warren to return home after the domestic violence incident with her mother. Because S.S. suffered frequent vaginal irritations, Warren claimed he only touched her genital area for benign medical reasons. Warren argued N.S. was not credible because when she was initially asked by the detectives, N.S. unequivocally [\*52] denied Warren sexually abused her and only "remembered" the abuse later. Warren claimed N.S. had a motive to fabricate because she thought lying might result in her mother being released from jail and prevent Warren from returning home. Warren did not testify in the first trial. Following a six-day trial, the jury found Warren guilty on one count of child molestation of S.S. The jury was unable to reach a verdict on the charge of rape of S.S. or on the three counts of second-degree rape of N.S.

A second trial on the three counts of second-degree rape of N.S. began in November [\*\*7] 2003. n2 Warren testified in the second trial. Elizabeth Loftus, a research psychologist and expert on memory also testified on Warren's behalf. After a five-day trial, the jury found Warren guilty on all three counts of second-degree rape of N.S. The court imposed a 280-month standard range sentence. n3 As a condition of Warren's sentence, the court ordered no contact with Lisa Warren for life. Warren appeals.

n2 The State dismissed the rape charge pertaining to S.S.

n3 Warren had prior convictions for murder and promotion of prostitution. Warren's standard range sentence for child molestation in the first degree was 149-198 months; his standard range sentence on each count of rape of a child in the second-degree was 210-280 months. The court sentenced Warren to 198 months for child molestation in the first degree and 280 months on each

count of rape in the second-degree to be served concurrently.

## ANALYSIS

### S.S. TRIAL

#### Opinion Testimony

For the first time on appeal, Warren [\*\*8] contends that the testimony of child interview specialist Nicole Farrell and Bellevue police detective Jennifer Rylands improperly vouched for S.S.'s credibility and violated his constitutional rights. Even though Warren did not object at trial, he argues admission of the testimony was a "manifest error affecting a constitutional right." [HN1] No witness may state an opinion about a victim's credibility because such testimony [\*53] "invades the province of the jury to weigh the evidence and decide the credibility of [the witness]." *State v. Jones*, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (citing *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992)); *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989).

Child interview specialist Nicole Farrell testified that she interviewed S.S. on June 13, 2002. Before testifying about S.S.'s disclosures, Farrell described the interview process. Farrell told the jury she conducts a "forensic" or "neutral" interview as distinguished from an interview for therapeutic purposes. Farrell also testified that the protocol requires discussing the importance of telling the truth with the child. When interviewing [\*\*9] a very young child, Farrell said she often conducts a "competency assessment" that includes an in-depth discussion of truthfulness. Farrell testified she did not do a competency assessment when she interviewed S.S. because of her age and developmental stage. But Farrell told S.S. that as they talked, it is "important to only talk about the truth" and asked S.S. if she could "promise to only talk about the truth today." Farrell testified that S.S. nodded her head affirmatively. Farrell then testified about the information S.S. disclosed during the interview.

Both the State and the defense asked Farrell questions to clarify if her role in the interview was to determine whether a child is telling the truth. The prosecutor asked Farrell if she forms "an opinion about whether or not you believe the child or believe that something really happened" when interviewing a child. In response, Farrell said that type of assessment was "outside the scope" of her role. During cross examination, the defense suggested that it was not Farrell's role to determine what actually happened, but "only to see what the child said happened." While Farrell said that one of her objectives was to "set up a context [\*\*10] in which the child has

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demonstrated a knowledge of the difference between telling the truth and fabricating, and to get an agreement from the child that they will in fact tell the truth," she agreed that it was not her role to determine whether the child was being truthful.

[\*54] Detective Rylands also testified about her interview of S.S. at her school following the disclosures to the school counselor. Detective Rylands said that after introducing herself to S.S., she explained the "rules" of the interview. She told S.S. to let her know if she didn't understand a question and "always tell the truth." Detective Rylands said she then asked S.S. to describe the meaning of the truth and a lie, and asked her which one was better. S.S. told Detective Rylands the truth is "[w]hen someone is telling what really happened and it happened to them" and "[a] lie is when it really didn't happen." S.S. also responded that "truth is better, even when it hurts someone." Rylands then testified about S.S.'s disclosures.

Warren relies on *State v. Kirkman*, 126 Wn. App. 97, 107 P.3d 133, review granted, 155 Wn.2d 1014, 124 P.3d 304 (2005), to argue admission of Farrell's [\*11] and Detective Ryland's testimony was manifest constitutional error. In *Kirkman*, Division Two held that a police detective's testimony about evaluating a child's competency to tell the truth was "'manifest' 'constitutional error that will be reviewed for the first time on appeal'" and reversed the defendant's conviction for first-degree rape of an eight-year-old child. *Kirkman*, 126 Wn. App. at 107. The police detective in *Kirkman* testified that he gave a "competency" test during an interview with the alleged child victim to determine if she could distinguish between the truth and a lie. *Id.* at 101. When asked if the child understood the importance of telling the truth and distinguishing between the truth and a lie, the detective testified the child could and that she promised to tell the truth. The court held that although the detective did not express an opinion on the victim's credibility, "he told the jury that he tested [the victim's] competency and her truthfulness. In essence, he told the jury that [the victim] told the truth when she related the incriminating events to him." *Id.* at 105. The court concluded the detective's [\*12] testimony invaded the role of the jury to decide [\*55] credibility and violated Kirkman's right to a trial by jury. n4 Because the only evidence supporting the defendant's conviction was the child's testimony and her prior statements, the court concluded the error in admitting the testimony was a "manifest" constitutional error that could be raised for the first time on appeal and the erroneous admission of the evidence was not harmless. *Id.* at 107. n5 The dissent in *Kirkman* argued the majority improperly considered the issue for the first time on appeal and the detective did not express an opinion on

the victim's credibility or a belief in the truth of her account. *Id.* at 112, (Quinn-Brintnall, J., dissenting).

n4 *Kirkman* also involved the testimony of a physician who examined the victim and testified that she gave a "clear and consistent history of sexual touching with appropriate affect." *Kirkman*, 126 Wn. App. at 102. This case does not involve similar testimony, and we address *Kirkman*'s analysis only as it relates to the police detective's testimony.

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n5 Division Two followed *Kirkman*'s analysis in an unpublished decision, *State v. Candia*, noted at 158 Wn. App. 1053 (2005), involving similar police officer testimony. The Supreme Court consolidated *Kirkman* and *Candia* in granting review of both cases. 155 Wn.2d 1014 (2005).

We disagree with the analysis in *Kirkman* and follow this court's recent decision in *State v. King*, 131 Wn. App. 789, 130 P.3d 376 (2006). In *King*, we followed previous decisions holding that [HN2] when a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error. *King*, 131 Wn. App. at 800. In *King*, two witnesses testified that they tested the victim's competency to determine his ability to tell the truth and that the victim agreed to tell the truth in his interview. Relying on *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989), and *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993), we held this testimony did not infringe on the jury's [\*14] role to determine credibility because the witnesses did not explicitly state they believed the victim. *King*, 131 Wn. App. at 800.

In *Madison*, an expert witness testified without objection, that a young child's conduct was "'typical of a sex abuse victim.'" *Madison*, 53 Wn. App. at 760. The court rejected the argument that the testimony amounted to a [\*56] statement of belief in the victim's story and, consequently, an opinion on the defendant's guilt. *Id.* After acknowledging that certain statements would have been properly excluded if challenged at trial, the court indicated its general reluctance to recognize the admission of testimony without objection as manifest constitutional error.

[HN3] Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial,

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gives rise to 'manifest constitutional error' reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate [\*\*15] consequences. Even worse, and we explicitly are not referring to counsel in this case, it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

*Madison*, 53 Wn. App. at 762-63

In *Jones*, the child told the CPS caseworker that Jones sexually abused her. Jones did not object to the testimony that the child told the caseworker, "[b]elieve me, believe me, I am telling you that this happened," or the caseworker's reply, "I believe you." *Jones*, 71 Wn. App. at 804. The court held that in context, the caseworker's testimony was an effort to reassure the child and was not a statement that the caseworker believed the child. Citing *Madison*, we also held that because there was no objection and the caseworker did not expressly state that she believed the child, Jones could not raise the issue for the first time on appeal. *Jones*, 71 Wn. App. at 812.

[HN4] If a defendant does not object at trial, the defendant cannot challenge the testimony for the first time on appeal. *RAP 2.5(a)* [\*\*16]. The exception under *RAP 2.5(a)* for manifest error affecting a constitutional right is a narrow one. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Requiring defendants to meet a high threshold to raise issues for the [\*57] first time on appeal ensures that parties give the trial court an opportunity to obviate error and prevent prejudice to the defendant. *City of Seattle v. Heatley*, 70 Wn. App. 573, 584-85, 854 P.2d 658 (1993). The exception "is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms." *State v. Trout*, 125 Wn. App. 313, 317, 103 P.3d 1278, review denied, 155 Wn.2d 1004, 122 P.3d 185 (2005).

Under *RAP 2.5(a)(3)*, a defendant must also show how an alleged constitutional error actually affected his rights at trial. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). It is this showing of actual prejudice that makes the error "'manifest.'" *McFarland*, 127

*Wn.2d* at 333. [\*\*17] A "manifest" error is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). "An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error." *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Here as in *King*, we conclude the testimony of Farrell and Detective Rylands was not manifest constitutional error that impermissibly invades the province of the fact finder and because Warren did not object below, he may not challenge the testimony for the first time on appeal. We also conclude that the testimony of Farrell and Detective Rylands was not the same as the detective's testimony in *Kirkman*. Unlike the detective in *Kirkman* who told the jury that he tested the victim's "competency" and her "ability to tell the truth," 126 Wn. App. at 104, neither Farrell nor Detective Rylands testified that they evaluated S.S.'s "competency;" that they made a determination of S.S.'s ability to tell the truth; or that they believed S.S. was telling the truth. Farrell explicitly told the jury that she did not [\*\*18] test S.S.'s competency or assess her truthfulness and it was outside the scope of her role to do so. And Detective [\*58] Rylands did not explain any purpose for her questions about the difference between the truth and a lie beyond stating that it was a part of the "rules" for the interview. But even if the testimony in this case were indistinguishable from that in *Kirkman*, as in *King*, we conclude the admission of the testimony without objection is not manifest constitutional error that Warren can challenge for the first time on appeal.

#### *Evidentiary Rulings*

Warren challenges (1) the admission of Detective Rylands' testimony that Lisa appeared to be more protective of him than concerned about S.S.'s allegations, and (2) the admission of the evidence that Warren owned a "penis pump."

[HN5] The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Id.*

Detective Rylands testified that she spoke [\*\*19] to Lisa Warren on the telephone after S.S. disclosed Warren sexually abused her. Detective Rylands told Lisa her daughters were in protective custody and asked Lisa to come to the police station. Lisa agreed, but then did not show up. The next day, Detective Rylands went to Lisa's residence to arrest Warren. When asked to describe

Lisa's demeanor, Detective Rylands said Lisa seemed "not so concerned" about her daughters and "more protective" of her husband. The trial court overruled Warren's objections based on "speculation" and "hearsay." The court ruled that Detective Ryland's testimony was admissible opinion testimony under *ER 701* because it was "rationally based on the perception of the witness." We agree.

Detective Rylands could properly testify under *ER 701* based on her observations of Lisa Warren. [HN6] *ER 701* allows a witness to express an opinion that is "rationally [\*59] based on the perception of the witness." In addition, the evidence was relevant to rebut the defense theory that S.S. fabricated the allegations against Warren because she did not want him to return home. Testimony about Lisa's reaction offered an [\*\*20] alternative explanation about the timing of the disclosures and why S.S. did not tell her mother about the abuse.

Warren also claims the trial court abused its discretion in admitting evidence that he owned a "penis pump" because the evidence was irrelevant and prejudicial. Detective Rylands testified that S.S. talked about a "penis pump" when describing how Warren showed her pornographic video covers and explained sexual intercourse. S.S. told the detectives what a penis pump looked like and about its use.

S.S. did not testify about the penis pump during direct examination. On cross examination S.S. said she saw the penis pump in Warren's briefcase, but Warren did not show it to her or show her how it worked. Warren contends that because S.S. did not testify that Warren showed the device to her or talk to her about it, the evidence was not relevant and should have been excluded. Detective Rylands' testimony about what S.S. described was relevant. S.S.'s contradictory testimony on cross examination goes to the weight of the evidence, not its admissibility. See *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) [HN7] (it is the function of the trier of fact [\*\*21] to weigh the persuasiveness of evidence). The trial court's decision to allow Detective Rylands to testify about what S.S. told her about the penis pump was not an abuse of discretion.

#### *Prosecutorial Misconduct*

During the State's closing argument, the prosecutor stated several times that reasonable doubt does not mean "give the defendant the benefit of the doubt." After sustaining objections to the prosecutor's statements, the court gave the following lengthy curative instruction:

There has been an objection to the statements made by the State as to the defini-

tion of reasonable doubt. The definition of [\*60] reasonable doubt is provided in your jury instructions. I don't have the number in front of me, but I think it is the third instruction. I want you to read that instruction very carefully, particularly the last paragraph of the instruction. And the second sentence of that reads, '[i]t 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.' 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 [\*\*22] to have a reasonable doubt then you must find the defendant not guilty. And if in still having 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.[n6]

The State concedes the prosecutor's description of reasonable doubt was incorrect, but contends there was no prejudice given the court's detailed curative instruction.

n6 The court gave a virtually identical cautionary instruction again at the end of the State's rebuttal argument.

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[HN8] To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of showing the prosecutor's comments were improper and there is a substantial likelihood that the comments affected the jury's decision. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Warren asserts that the court's curative instruction was ineffective because the court's "dismissive" com-

ment about "playing with words here" suggested the language in the reasonable doubt instruction was unimportant. In context, we disagree. In the curative instruction, the court properly described the standard of proof. The court informed the jury that contrary to the prosecutor's [\*61] statements, the standard of proof in a criminal case does impart the benefit of doubt to the defendant. The court then read the definition of reasonable doubt in the jury instruction again and reiterated its importance to the jury. We conclude the trial court's curative instructions to the jury obviated any potential prejudice caused by the prosecutor's improper argument. Because of the instructions, there is no substantial likelihood that the prosecutor's remarks affected the jury's decision. n7

n7 We reject Warren's argument that the prosecutor's misconduct must be reviewed under the constitutional harmless error standard. See *State v. Traweek*, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986) [HN9] (if alleged misconduct directly violates a constitutional right, "it is subject to the stricter standard of constitutional harmless error"). Arguments affecting constitutional rights can be cured with a proper instruction to the jury. See *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (argument suggesting that defense failed to meet their burden to present evidence touched on constitutional right but reviewed under nonconstitutional harmless error standard); *State v. Klok*, 99 Wn. App. 81, 84, 992 P.2d 1039 (2000) (comment on defendant's demeanor at trial touched upon constitutional right but reviewed under nonconstitutional harmless error standard).

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#### N.S. TRIAL

##### ER 404(b) Evidence

The jury did not convict Warren in the first trial on the charges against him for three counts of rape of N.S. Before the second trial, the court ruled the State could introduce limited evidence about the circumstances concerning N.S.'s disclosures. The court limited the State to the evidence that S.S. alleged Warren sexually abused her; N.S. was aware of S.S.'s disclosures; charges were filed against Warren; and in the course of the investigation into S.S.'s case, N.S. told the detectives that she had been sexually abused. The court ruled that the fact that Warren was convicted of molesting S.S. was not admissible and the jury would be instructed that the case in-

volving S.S. had [\*62] been resolved and the jury should not otherwise consider it. n8

n8 The court rejected the State's argument that all of the facts pertaining to Warren's conviction were admissible as a "common scheme or plan" under ER 404(b). *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003).

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The defense's theory in the second trial was that N.S. was not credible and she fabricated the allegations. The defense also claimed that N.S. alleged Warren abused her hoping that her cooperation with the State would keep her family together.

The testimony in the first trial established N.S. did not disclose that Warren sexually abused her when the detectives first asked her after S.S.'s disclosures. N.S. only disclosed sexual abuse when talking to the detectives in preparation for the trial concerning S.S.'s allegations of sexual abuse. In the second trial, the defense planned to call an expert witness to testify about memory to support the theory that N.S. was not credible and her explanation that she did not remember the abuse when the police first asked her was implausible.

Warren argues the evidence that S.S. alleged sexual abuse and that charges were filed was inadmissible under ER 404(b). Warren contends the court's decision to admit the evidence under the "res gestae" exception was erroneous. Warren concedes the charges involving S.S. were a part of the sequence of events which led N.S. to report sexual abuse, but argues the evidence was not related [\*\*26] to the rape charges.

[HN10] Under the res gestae exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in time and place to the charged crime. Contrary to Warren's argument, the res gestae exception includes admission of prior bad acts when necessary to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *Tharp*, 27 Wn. App. at 204, 616 P.2d 693 (1980) (quoting Charles T. McCormick, McCORMICK'S HANDBOOK ON [\*63] THE LAW OF EVIDENCE § 190, at 448 (2d ed. 1972)); see also *State v. Fish*, 99 Wn. App. 86, 94 992 P.2d 505 (1999).

Like other ER 404(b) evidence, such evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). Evidence is relevant when 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*. A fact bearing on the credibility or probative value of other evidence is relevant. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). [\*\*27] The trial court must conduct the required balancing of probative value versus prejudicial effect before admitting evidence of other bad acts. *State v. Trickler*, 106 Wn. App. 727, 732, 25 P.3d 445 (2001).

In both trials, Warren vigorously challenged N.S.'s credibility. The facts about N.S.'s initial denial and her disclosures of sexual abuse after her mother was arrested, was central to the defense case in the second trial. The court concluded that the probative value of the evidence "exceed[ed] its prejudicial impact" and took into consideration the fact that the charges were tried together in the first trial and the jury did not convict Warren on any charges involving N.S. Given the defense theory at trial and the necessity of providing the jury with evidence about the timing and context for N.S.'s disclosures, we conclude the trial court did not abuse its discretion in ruling that limited evidence concerning the circumstances of N.S.'s disclosures was admissible under the res gestae exception to *ER 404(b)*. n9

n9 Relying on *DeVincentis*, 150 Wn.2d 11, the State contends the evidence was also admissible under the "common scheme or plan" exception to *ER 404(b)*, even though the trial court declined to admit the evidence on this basis. Because we agree with the trial court that the evidence was admissible under the res gestae exception, it is not necessary for us to address the State's argument. We note, however, that it was not necessary for the State to file a cross appeal in order to argue an alternative ground to affirm the trial court's 404(b) ruling. [HN11] A cross appeal is only required if a respondent seeks "affirmative relief" to modify the decision below. *RAP 2.4(a)*.

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[\*64] *Admission of Conviction for Molesting S.S.*

After Warren testified, the court revisited its decision excluding Warren's conviction for child molestation of S.S. The court ruled that Warren's testimony opened the door to admission of his conviction. n10 Warren argues that because he merely denied inappropriately touching N.S. and did not make an assertion as to his own good character, the trial court's ruling was an abuse of discretion.

n10 The court only allowed the fact of Warren's conviction, not the identity of the victim or the date of conviction.

During his testimony in the second trial, Warren described his role as a caretaker for S.S. and N.S. Warren explained that he and Lisa had major differences in their approach to childrearing and suggested that because he had grown up in a two-parent family, he was much stricter and had higher expectations of the girls. Warren also described a time when N.S. developed a skin condition that required applying lotion to her body and how he helped N.S. [\*\*29]

Now, there is areas I wouldn't do because of, you know, being like she is a girl. But arms and back, those were areas that she couldn't reach that that was all right between me and my wife for her to have those-for me to help her there.

The court concluded that Warren's testimony did more than deny that he had sexual contact with N.S. when he put on lotion. Rather, Warren said he wasn't the type of person who would touch the sexual parts of a girl. Consequently, the court ruled that Warren could be impeached with the fact that he had been convicted of child molestation.

[HN12] While *ER 404(a)* prohibits evidence of a person's character to prove "conformity," the rule provides an exception when the accused offers evidence of his character. *State v. Avendano-Lopez*, 79 Wn. App. 706, 715, 904 P.2d 324 (1995); *ER 404(a)(1)*. "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 [\*65] to the crime charged." *State v. Brush*, 32 Wn. App. 445, 448, 648 P.2d 897 (1982). [\*\*30]

The determination that a party has opened the door is reviewed for abuse of discretion. *State v. Bennett*, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985). The trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to the evidence.

The trial court's decision that Warren's testimony was an affirmative assertion of a character trait that allowed the State to impeach Warren with his prior conviction was not an abuse of discretion. As the trial court concluded, the only reasonable interpretation of Warren's

testimony was that he was not the type of person who would touch N.S. sexually.

#### *Exclusion of Evidence*

Warren claims the trial court abused its discretion in excluding evidence in support of his defense. Specifically, the court excluded evidence that Warren suffered a heart attack in October 2001 and S.S.'s statement that she regretted telling anyone about the sexual abuse.

During opening statements, the defense told the jury that Warren suffered a heart attack in October 2001 and spent several months recovering. Outside the presence of the jury, the State objected to the introduction of evidence about [\*\*31] Warren's heart attack. The State argued that if Warren introduced testimony about his heart attack, the molestation conviction should be admitted. The court ruled that if the defense was going to argue that because of the heart attack, Warren was not physically capable of sexual acts "during a period of time during which he has already been convicted of other acts that would open the door." The defense did not challenge the court's ruling and did not seek to introduce evidence about Warren's heart attack during trial.

In opening statement, Warren's attorney also told the jury that after Lisa was arrested, S.S. and N.S. went to the [\*66] prosecutor's office to discuss a hearing in S.S.'s case. Warren's attorney said that before S.S. talked to the prosecutor or the detectives, N.S. heard S.S. say she "shouldn't have said anything." According to the defense theory, this remark influenced N.S. to tell the detectives she had been abused because she thought S.S. might not continue cooperating with the State and her family would not be reunited.

After the opening statements, Warren's attorney said the defense only wanted to present S.S.'s statement to argue that N.S. believed that S.S. might [\*\*32] stop cooperating with the prosecutor. The court ruled that the inference that S.S. made up the charges was inescapable and if the defense wanted to present testimony about S.S.'s statement, the State was entitled to present evidence pertaining to S.S.'s credibility and the fact that Warren was convicted of molesting her. Warren did not introduce evidence about S.S.'s statement during the trial.

The trial court's evidentiary rulings were not an abuse of discretion and because of the strategic decision of the defense to not present evidence about Warren's heart attack or S.S.'s remark, any claimed error was not preserved. *See State v. Mezquia*, 129 Wn. App. 118, 131-132, 118 P.3d 378.

#### *Admission of Rap Lyrics and Officers' Reaction to N.S.'s Disclosures*

Although rap lyrics written by Warren after his arrest were admitted in the first trial, the State did not seek to admit them in the second trial. But after Warren's direct examination, the court ruled that because Warren portrayed himself as someone who was a good caretaker of N.S. and as someone who tried to boost her self-esteem, the State could impeach [\*\*33] Warren with the derogatory terms he used in the rap lyrics. The State then asked Warren on cross examination about his references in the lyrics to N.S. as "stretch" and "mouseola-queen freakiness." Over defense objection, the prosecutor also asked Warren about [\*67] other parts of the lyrics including a line which described watching "Miss Exhibition in the Federal Way bathroom, rubbing your kitty real slow" looking "sexy and sweet" and also a line describing N.S. as "wanting some climactic sludge-love." n11

n11 The trial court overruled the objection.

Warren argues that the rap lyrics were inadmissible because they were irrelevant. He claims the lyrics were not probative of his feelings towards N.S. during the time period of the alleged crimes because they were written after his arrest. But the jury could certainly draw an inference that the lyrics reflect the way Warren felt about N.S. when they lived together and Warren was free to argue otherwise.

Warren also claims that the State misused the lyrics [\*\*34] in the second trial by suggesting that "Miss Exhibition" was N.S. whereas in the first trial, the State argued that reference described inappropriate contact with S.S. While Lisa testified in the first trial that the "Miss Exhibition" referred to S.S., Lisa did not testify in the second trial, and the reference was not definitive. The court did not abuse its discretion in allowing the State to use the rap lyrics to impeach Warren's testimony.

Warren also argues the court abused its discretion in admitting the testimony of the detectives who said they were surprised when N.S. told them that Warren sexually abused her. Detective Rylands and Detective Faith testified that when they talked to N.S. in preparation for a hearing in S.S.'s case, they did not ask N.S. if Warren abused her and were surprised when she reported sexual abuse. Warren claims the detectives' state of mind was not relevant and was inadmissible. One of Warren's theories at trial was that N.S.'s allegations were the product of suggestion and the details came from talking to her mother and from interviews with the detectives. The context of the disclosures and the fact that N.S.'s disclosures were not in response to [\*\*35] questioning was relevant to rebut Warren's theory and the trial court did not abuse its discretion in admitting the testimony.

[\*68] *Prosecutorial Misconduct*

Warren contends that the prosecutor engaged in misconduct in three instances in closing argument. First, while discussing N.S.'s testimony, the prosecutor said certain details recounted by N.S. were a "badge of truth" and had "the ring of truth." The prosecutor then argued that N.S.'s testimony was credible based on the specific details she recounted. Warren claims the prosecutor improperly vouched for N.S.'s credibility.

[HN13] It is improper for a prosecutor to vouch for the credibility of a witness. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). However, an argument does not constitute vouching unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion as to the witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the [\*\*36] evidence. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Here, the prosecutor argued that N.S.'s testimony was credible based on specific details she testified to at trial. Because the prosecutor's argument was based on the evidence presented at trial, it was not misconduct.

The State concedes that the two other arguments Warren challenges were improper. First, in rebuttal the prosecutor talked about defense counsel's mischaracterization of the evidence:

In this case, as defense counsel argued-I made notes about that number of mischaracterizations as an example of what people have to go through in a criminal justice system when they deal with defense attorneys.

Second, in discussing N.S.'s disclosure, the prosecutor made general assertions about how abused children "carefully assess who they will disclose to and how they will do it" and about the "phenomenon of delayed disclosure" being not [\*69] "uncommon." Warren did not object to either of these arguments.

We agree these arguments were improper and accept the State's concession. The prosecutor's derogatory comment about defense attorneys was inappropriate and there was no evidence at trial [\*\*37] about child sexual abuse victims in general or about how and why they disclose abuse. Nevertheless, Warren cannot establish "a substantial likelihood the instances of misconduct af-

fect the jury's verdict." *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

[HN14] We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned that it causes an enduring and resulting prejudice" that an admonition could not have neutralized. *Russell*, 125 Wn.2d at 86.

The derogatory remark about defense attorneys in rebuttal was an isolated comment. And the general statements about disclosure of sexual abuse are largely a matter of common knowledge and were not particularly relevant. We conclude Warren cannot establish prejudice that could not have been addressed by a curative instruction and there is no substantial likelihood [\*\*38] the improper arguments affected the verdict.

*Cumulative Error*

Warren contends cumulative error denied him a fair trial. [HN15] The cumulative error doctrine applies when several trial errors occur which standing alone, may not be sufficient to justify reversal, but when combined, deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because there were no errors in either trial, the cumulative error doctrine is inapplicable.

[\*70] *No-Contact Condition*

Warren challenges the condition of his judgment and sentence that prohibits him from having contact with Lisa Warren. Warren claims the condition is not related to the circumstances of the crimes because Lisa Warren was not a witness to the crimes or a victim. He also argues that imposition of a condition prohibiting contact with Lisa violates his right to association under the United States and the Washington Constitutions and interferes with his fundamental right to marriage. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) [HN16] (marriage is "one of the 'basic civil rights of man,' fundamental to our very existence and survival. [\*\*39] ").

[HN17] We review sentencing conditions, including crime-related prohibitions, for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Under *RCW 9.94A.505 (8)*, the court may "impose and enforce crime-related prohibitions" as part of a sentence. A crime-related prohibition means "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been

134 Wn. App. 44, \*, 138 P.3d 1081;  
2006 Wash. App. LEXIS 1438, \*\*

convicted." *RCW 9.94A.030(13)*. The existence of a relationship between the crime and the condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON § 4.5 (1985)); *Riley*, 121 Wn.2d at 28. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Witnesses to a crime are "directly connected to the circumstances of the crime." *State v. Ancira*, 107 Wn. App. 650, 650, 27 P.3d 1246 (2001). [\*\*40]

Crime-related prohibitions which limit fundamental rights are permissible provided the restrictions are reasonably necessary and narrowly drawn. *Riley*, 121 Wn.2d at 38 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 [\*71] (9th Cir. Cal. 1975)); *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974). A reviewing court looks to whether the order prohibits "a real and substantial amount of protected conduct in contrast to the statute's legitimate sweep." *State v. Riles*, 135 Wn.2d 326, 346-347, 957 P.2d 655 (1998). A convicted defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and public order. *Id.* at 347 (quoting *Riley*, 121 Wn.2d at 37-38).

Here, the trial court concluded the condition that Warren has no contact with Lisa Warren was warranted

because even though Lisa Warren was not a direct victim, she was a witness who testified against Warren. The court also noted:

Despite the fact that she's sympathetic toward Mr. Warren at the very outset of this case it became real [\*\*41] clear to the Court by the time everything was said and done, that she totally changed her attitude toward Mr. Warren and was absolutely convinced that she had brought someone into her family that had totally destroyed it.

We conclude the order prohibiting contact with Lisa Warren was directly related to the circumstances of the crime and was not an unconstitutional restriction on Warren's constitutional rights. n12

n12 Warren is not prohibited from having contact with his child, H.S., but is prohibited from having contact with Lisa, N.S. and S.S.

We affirm Warren's convictions for one count of child molestation in the first degree of S.S. and three counts of second-degree rape of N.S. and the judgment and sentence.

Coleman and Agid, JJ., concur.

**APPENDIX B**

**ORDER DENYING MOTON FOR RECONSIDERATION**

**September 6, 2006**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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

No. 54032-7-1

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Washington Appellate Project

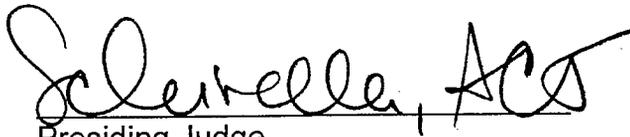
ORDER DENYING MOTION FOR  
RECONSIDERATION

Appellant filed a motion for reconsideration of the portion of the opinion filed July 10, 2006 upholding the no contact order with his wife. A majority of the panel has determined this motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration upholding the no contact order with appellant's wife is denied.

DATED this 6<sup>th</sup> day of September 2006.

FOR THE PANEL:

  
Presiding Judge

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DIVISION ONE