

54032-7

54032-7

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NO. 54032-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD WARREN,

Appellant.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED--TRIAL NUMBER TWO**

1. A detective and child interview specialist testified about questions they asked a child victim and the answers she gave regarding telling the truth. The defendant claims this was improper opinion testimony. Should the defendant be barred from raising this issue for the first time on appeal and should this court reject the notion that by simply reiterating questions and answers expresses an opinion?

2. Should this court reject the defendant's claim that his conviction should be reversed because of a single improper comment by the prosecutor that was corrected by the trial court?

3. Should this court reject the defendant's claim that the court improperly admitted evidence he showed his child victim a penis pump when this claim is based upon testimony the child was not shown the item but other evidence indicates the child was shown the item?

4. Did the trial court properly admit evidence that Lisa Warren was protective of her husband, the defendant, and less concerned about allegations of sexual abuse against her children when the timing and motive of the children's disclosures was a key issue in the case?

5. Has the defendant shown multiple errors that together had such substantial prejudice, that he can avail himself of the cumulative error doctrine?

**B. ISSUES PRESENTED—TRIAL NUMBER FOUR**

1. Did the trial court correctly admit SS's allegations of sexual assault against the defendant as the allegations ultimately led to the allegations by NS and the circumstances of NS's disclosure was a key issue in the case?

2. Did the trial court correctly rule that the defendant opened the door to admission of his prior child molestation conviction when he testified he would have touched his stepdaughter in an inappropriate place because she was a girl?

3. Should this court reject the defendant's claim he was prevented from presenting a defense because the trial court did not exclude evidence (1) the defendant had a heart attack or that (2) SS said she should not have said anything, but rather, the court ruled that if the defendant admitted the evidence, he would be opening the door to the fact he had been convicted of molesting SS?

4. Did the trial court correctly admit the defendant's RAP song that discussed the allegations against him?

5. Did the trial court correctly admit evidence the detectives were surprised at NS's disclosures where the circumstances of her disclosures and the fact the detectives were not asking questions about abuse was a key issue in the case?

6. Should this court reject the defendant's claim that his conviction should be reversed because of two minor improper comments by the prosecutor in closing when he failed to object below and failed to prove prejudice?

7. Has the defendant shown multiple errors that cumulatively have such substantial prejudice that he can avail himself of the cumulative error doctrine?

8. Did the trial court properly include a condition of sentence that bars the defendant from contacting Lisa Warren as this condition protects SS, NS and Lisa?

**C. CROSS-APPEAL ASSIGNMENT OF ERROR**

1. The trial court erred in denying the State's request to admit the facts of the defendant's molestation of SS under ER 404(b), in his subsequent trial for molesting NS.

**D. ISSUE FOR CROSS-ASSIGNMENT OF ERROR**

1. Under ER 404(b), and State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), a prior bad act is admissible against a defendant if there exists a similar plan or scheme to commit a similar act. This common scheme or plan exception does not require uniqueness. Did the trial court err in its 404(b) analysis by looking for uniqueness, as opposed to commonality, between the sexual assaults of SS and NS?

**E. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The defendant was charged with First-Degree Child Rape and First-Degree Child Molestation for crimes committed against his stepdaughter, SS (counts I and II). CP 15-18. He was also charged with three counts of Second-Degree Child Rape for crimes committed against another stepdaughter, NS (counts III, IV, and V). CP 15-18. He was convicted of First-Degree Child Molestation and the three counts of Second-Degree Child Rape. CP 28, 42-44. The State dismissed the First-Degree Child Rape charge. 28RP 15, 27.<sup>1</sup> With prior convictions for murder and promoting prostitution, the defendant received a standard range sentence of 280 months. CP 65-74.

**2. SUBSTANTIVE FACTS OF TRIAL NUMBER TWO.**

On the morning of June 11, 2002, nine-year-old SS walked into class and announced that her stepfather, the defendant, was coming home

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<sup>1</sup> The convictions did not arise from a single trial. A mistrial was declared in the first trial when a witness inadvertently disclosed that the defendant had been in prison. 16RP 74-85. The defendant's second trial resulted in him being convicted of First-Degree Child Molestation against SS. The jury was hung as to the other counts. The third trial resulted in a mistrial when the prosecutor misunderstood a pretrial ruling and referred to the prior trial as a "trial," instead of a "hearing." 31RP 6-19. In the fourth trial, he was convicted of the three counts of Second-Degree Child Rape involving NS.

from jail.<sup>2</sup> 19RP 5, 34. Her teacher asked if she wanted to talk to a counselor and SS said that she did. 19RP 5.

The counselor had SS draw a picture as a way of making her feel comfortable. 19RP 6. When the counselor asked about the drawing, SS “blurted out” that the defendant did disgusting things to her. 19RP 8-9. She said the defendant showed her a video cover of men and women having sex in ways that make babies and ways that don’t. 19RP 9. She said the defendant explained to her that he had milky stuff and that if she put it in her mouth, she wouldn’t get pregnant. 19RP 9. SS said the defendant made her wear short skirts and that he would walk around with nothing on below the waist, squat down and then look to see if she was watching him. 19RP 9.

SS also confided that one time when she was cleaning herself in the bathroom (SS had a yeast infection), she noticed that she was growing hair and commented about it. 19RP 9. The defendant then took her into the bedroom, made her lay on the bed, and touched her between the legs.

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<sup>2</sup> The verbatim report of proceeding is cited as follows: 1RP-8/22/02, 2RP-8/26/02, 3RP-8/27/02, 4RP-8/28/02, 5RP-9/4/02, 6RP-9/6/02, 7RP-9/9/02, 8RP-9/10/02, 9RP-9/27/02, 10RP-10/9/02, 11RP-11/18/02, 12RP-11/19/02, 13RP-11/21/02, 14RP-12/2/02, 15RP-12/3/02, 16RP-12/4/02, 17RP-2/11/03, 18RP-2/11/03, 19RP-2/12/03, 20RP-2/13/03, 21RP-2/18/03, 22RP-2/19/03, 23RP-2/20/03, 24RP-2/21/03, 25RP-2/21/03, 26RP-4/4/03, 27RP-4/9/03, 28RP-11/3/03, 29RP-11/4/03, 30RP-11/5/03, 31RP-11/6/03, 32RP-11/10/03, 33RP-11/12/03 (opening), 34RP-11/12/03, 35RP-11/13/03, 36RP-11/14/03, 37RP-11/17/03, 38RP-11/18/03, 39RP-3/19/04.

19RP 9. The defendant told SS he would only touch her when her mother wasn't available. 19RP 10.

The counselor did not interview SS. Rather, the narrative by SS was the result of the one question about the drawing.<sup>3</sup> 19RP 11.

Detectives Jennifer Rylands and Elizabeth Faith responded to the school and conducted a cursory interview of SS. SS told the detectives about two incidents when the defendant touched her in an "icky place." 19RP 107.

The first incident happened as she was cleaning herself in the bathroom. The defendant came in and touched her "gina" and "it really hurt." 19RP 18. The second incident was the incident SS told her counselor about, the incident when she noticed she was growing pubic hair.

SS said that the defendant made her lie on the bed, that he unzipped her pajamas, pulled down her underwear, put his hand on her "gina" and held it apart. 19RP 109. The defendant told SS she was getting more advanced. 19RP 109. He then took off her underwear and began touching her again. 19RP 109. The defendant made her promise

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<sup>3</sup> The drawing was of SS's pregnant mother being assaulted by the defendant. 19RP 10.

not to tell anyone and said that he would only do it when her mother was not available. 19RP 110.

She also talked about a penis pump, how a man puts his thing inside and it makes it plump. 19RP 113. SS added that the defendant told her a "snatch" is what hillbilly white people call a vagina. 19RP 111-12.

After the initial interview, SS was taken into protective custody. 19RP 114. The detectives then went to NS's school and interviewed her. NS is SS's 14-years-old sister. NS denied that the defendant had done anything to her. 21RP 13. NS was also taken into protective custody. 19RP 117.

The detectives then called Lisa Warren, the girls' mother. They told Lisa about the children and asked her to meet them at the Bellevue Police Department. 19RP 118. Lisa agreed, but never showed up. 19RP 118.

The next day, detectives went out to Lisa's house. 19RP 119. Lisa was present with the defendant, who was arrested. The detectives noted that Lisa did not seem concerned about her daughters and seemed more protective of the defendant. 19RP 121.

When a later attempt was made to serve Lisa with a subpoena at her work, she became angry, refused service, stormed out, and drove away. 19RP 127-28. It was soon discovered that she had moved out of

her home, stopped going to work, and pulled the children out of school. 19RP 126-27. A material witness warrant was issued for her arrest. 19RP 124.

On September 4<sup>th</sup>, 2002, Lisa and the children were located at her sister's home in Tacoma. 19RP 124. Lisa was arrested and the children were taken into protective custody. 19RP 124.

The next day, NS and SS were brought to the prosecutor's office to talk about the pending trial. 19RP 128. SS was upset, crying, and wanted to see her mother. 19RP 130. SS again went over some of the details of the abuse and said that everything she had told the counselor was true. 19RP 135-146.

The prosecutor and detective also talked with NS about the process of the pending trial. 20RP 29. NS became concerned about having to answer a particular question while swearing on the Bible to tell the truth. 20RP 30. NS did not want to be asked if the defendant had done the same things to her that he had to SS. 20RP 31. She then made certain disclosures and drew a picture of a tube of lubricant used by the defendant.<sup>4</sup> 20RP 32-33.

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<sup>4</sup> The Child Hearsay Statute, RCW 9A.44.120, applies to children under age ten. Thus, the disclosures by NS were not admitted except for impeachment purposes, rehabilitation purposes, or because the door had been opened to the statements.

NS testified that she had been scared to tell her mother earlier and that she was speaking out now because she just “didn’t want to lie anymore.” 21RP 16. She also testified that the defendant told her not to tell and said he would not “teach” SS the way he taught her. 21RP 37.

NS said the abuse started when the family lived in Federal Way and that it consisted of vaginal, anal, and oral sex. 21RP 20-22. Sometimes, NS said, the defendant would use a condom, sometimes he would put a lubricant on his penis, and sometimes he would make her wear a blindfold.<sup>5</sup> 21RP 20-24, 29.

NS testified that the defendant tried to teach her how to properly perform certain sex acts. He would show her pornographic movies and tell her to perform accordingly. 21RP 22, 26. NS remembered one occasion when the defendant ejaculated in her mouth, but she could not swallow. The defendant then showed her a video of a couple having oral sex and told her to imitate what they were doing. 21RP 32-33.

When NS finally did disclose, she did so slowly, in part, she said, because she had tried to block things out of her mind. She admitted that she sometimes remembered other things the defendant had done to her and

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<sup>5</sup> A lubricant, a bandana used as a blindfold, and a sexual devise were recovered from the defendant’s possessions. 19RP 163, 20RP 36, 21RP 35.

that on some occasions this had occurred after speaking with her mother.  
21RP 59-60.

After the interview on September 5<sup>th</sup>, the detectives visited Lisa in jail and told her about NS's disclosures. 19RP 184. Lisa began crying and her cooperation changed. 19RP 184.

Lisa testified that the defendant continued to communicate with her after his arrest. 20RP 74. In one of the letters she received from him, the defendant enclosed a RAP song he had written that referred to being in their Federal Way bathroom with "Ms. Exhibition," and "rubbing yo' kitty real slow." 20RP 75-76, 80-84, Exh. 11. Lisa testified that, "Ms. Exhibition" referred to SS and "kitty" was another word for vagina. 20RP 76. The defendant also wrote that SS "look[ed] sexy and sweet standin' naked up in that mirror on top of that toilet seat." 20RP 75.

The defendant also talked about "Stretch," "Mouseola" and "Queen Freakiness," terms he used to refer to NS. 20RP 78, 80-84. The song even included derogatory references to the judge, prosecutor, victim advocate, and to Lisa. 20RP 78, 80-84.

When SS was asked why she disclosed the abuse to the school counselor, she testified matter-of-factly that the defendant had been touching her in ways she didn't like and she didn't want it to start up again when he came home from jail. 21RP 87. At trial, she talked about the two

incidents she had previously disclosed. 21RP 93-104. She said that during the first incident, the defendant made her put on a short red skirt without any underwear before he touched her. 12RP 93-56. She said the defendant showed her a video cover of people having sex and that he then drew her a picture of a penis and explained how when a penis goes into a woman's mouth, the milky stuff doesn't make a baby. 21RP 100-104.

SS was never able to say definitively whether the defendant had inserted a finger into her. During her interview with Child Interview Specialist Nicole Farrell, SS said that she felt something hurt down there, but did not know what the defendant had done. 18RP 21. When asked if it was "outside or inside," SS responded, "I have absolutely no idea. . . I was too afraid to look." 18RP 25-26. When asked what made it hurt, SS responded that "maybe him pushing into the part where you pee." 18RP 31. She then demonstrated what the defendant was doing by repeatedly tapping her index finger on the table. 18RP 32.

Six days after her disclosure, an examination revealed that SS had a decrease in tissue to the upper hymen and a u-shaped notch, consistent with penetrating trauma and "concerning for probable sexual abuse." 19RP 48-50. After NS's disclosure, she also underwent an examination. Nurse Practitioner Joanne Mettler testified that NS was post puberty and that she could not say whether there was evidence of abuse. 19RP 57-59.

The defense called Clinic Coordinator Barbara Haner of Providence Sexual Assault Center in an attempt to combat the physical evidence of abuse regarding SS. 22RP 42-56. While Ms. Haner felt there were more things that could have been done in examining SS, she agreed that the photos she reviewed appeared to show a healed injury more consistent with sexual abuse than a normal variation. 22RP 64. Ms. Haner would not take issue with Ms. Mettler's opinion that there was conclusive proof of penetration. 22RP 58. Rather, because Ms. Haner did not conduct the examination, but only reviewed photographs, she limited her opinion to stating that the evidence was more consistent with, as opposed to conclusive for, sexual abuse. 22RP 58, 64.

The defendant did not testify at this trial.

### **3. SUBSTANTIVE FACTS OF TRIAL NUMBER FOUR.**

This trial involved only the crimes committed against NS. The defendant had already been convicted of one count of child molestation for acts committed against SS, the second count having had been dismissed for double jeopardy reasons. See 28RP 15. While the jury was informed about allegations involving SS, and the actions that arose as a result of those allegations, the jury did not hear the detail of the allegations.

The jury was informed that Detectives Faith and Rylands contacted SS at her school on June 11, 2002, because she had disclosed that the defendant had sexually assaulted her. 34RP 3. As a result of this allegation, NS was also contacted. While she denied that she had been abused, she did say that she was afraid to go home. 34RP 4-5. She later testified that when she was asked about being abused, she "panicked" and did not want to acknowledge what had happened to her. 34RP 40.

After the disclosure by SS, both girls were taken into protective custody. 34RP 4-5. Lisa Warren was informed that the children had been taken into protective custody and was asked to come down to the police station. 37RP 5. Despite agreeing to do so, Lisa never showed up. 37RP 5. The next day, the detectives located the defendant and Lisa at their residence and placed the defendant under arrest. 37RP 6. The defendant was then charged with sexually assaulting SS. 34RP 6.

On September 4<sup>th</sup>, 2002, Lisa Warren was taken into custody on a material witness warrant and the two girls were again taken into protective custody. 34RP 5. The next day the girls were brought to the prosecutor's office for the purpose of talking about a pending "hearing" against the defendant. 34RP 6-7. NS became upset and said that she did not want to swear on the Bible and then have someone ask if the defendant had done

anything to her. 34RP 9-10. She then disclosed that the defendant had been sexually abusing her for quite some time. 34RP 11.

Four days later, NS was subjected to a defense interview. 34RP 11-12. She again disclosed that the defendant had been sexually assaulting her. 34RP 12.

NS testified that the defendant first came into her family's life when she was 12-years-old. 34RP 36. When she would get home from school, the defendant would be there, but that her mother would be at work. 34RP 37-38. She then described how the sexual abuse began. She recalled the defendant taking her to the bathroom, having her face the mirror, pulling up her shirt, telling her to look at herself and saying that she was beautiful. 34RP 42-44. She described how the defendant would wash her hair in the shower by getting in with her—suits on—but that she did not like the way he touched her. 34RP 43.

While she could not remember the first time the defendant actually had sexual intercourse with her, she told the jury that the defendant would tell SS to go watch TV and then tell her they needed to do some work. 34RP 45-46. He would then take her into the bedroom, have her lay naked on the edge of the bed with her legs hanging down, and then have sexual intercourse with her. 34RP 46. Although NS would make up excuses in an attempt to avoid the abuse, the defendant never stopped. 34RP 47-48.

Vaginal intercourse led to both oral and anal sex. 46RP 49-50.

When performing anal sex, the defendant would have NS get on her hands and knees, and while raping her he would tell her whether she was doing it right or not. 34RP 51. She described how he would have her watch pornographic videos to teach her how to do things right. 34RP 51-53. She described how sometimes he used a lubricant and sometimes he would put a bandana over her eyes. 34RP 60-63. A bandana and lubricant were recovered from the defendant's possessions. 34RP 63-64. He also put a pink ball with a wire attached in her mouth during sex. 34RP 71, 85. The defendant later admitted that he possessed such a device. 37RP 96.

NS admitted that her initial disclosures did not contain some of the details or manners of sexual abuse she disclosed in later interviews. 34RP 80-94. She said that she tried to push everything to the back of her mind and that things would come back to her in bits and pieces, sometimes when she dreamed and sometimes after talking with her mother. 34RP 93-97. NS was quite clear that it was only specific details that she did not remember; she always had a memory of the abuse.<sup>6</sup> 34RP 96.

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<sup>6</sup> The defendant called Doctor Elizabeth Loftus to describe what she termed, "repressed and reclaimed memory," a situation—dissimilar to here—in which years of brutalization can be banished completely out of awareness and then "recovered" later. 36RP 21. On cross, she admitted that she wrote a book in which she called this theory the "queen of defenses." 36RP 42. She also admitted that persons who suffer traumatic events can be motivated to push things aside in their minds. 36RP 44-48.

Lisa Warren testified that the defendant moved in with her in January of 2001, and that they were married in June of 2001. 34RP 104-05. She said that just before the couple moved to Bellevue in March of 2001, she discovered the defendant owned some pornographic movies. 36RP 109.

Lisa admitted that even after the defendant was arrested and charged with sexually assaulting SS, she was not cooperative with the police and that she remained in contact with the defendant. 34RP 110-13. She said the defendant suggested taking the girls out of school and moving out of state until after the hearing. 34RP 113. She confessed that it wasn't until she learned of the allegations by NS that she began to cooperate with the police. 34RP 116-17.

Nurse practitioner Joanne Mettler testified that in her initial report listing NS's examination results as normal she had made a mistake. 35RP 33. After viewing the photographs for the first time and discussing the results with Doctor Naomi Sugar, her opinion changed. 35RP 33, 47. She now considered the notches visible in the photos as a "possible" result of penetration.<sup>7</sup> 35RP 34.

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<sup>7</sup> Doctor Sugar confirmed that the photographs showed notches to the hymen. She testified that this could be indicative of penetration but because she did not conduct the evaluation and thus could not be sure of the victim's position when the photos were taken, she could not make this determination. 35RP 83, 88, 103-05.

The defendant testified that he moved in with Lisa in October of 2000, and that he watched the girls while Lisa worked. 37RP 73, 75. He professed that his relationship with Lisa was great except for Lisa's deficiencies regarding child rearing. 37RP 77.

In discussing NS, the defendant claims that she was very insecure and that he would tell her she was pretty to boost her self-esteem. 37RP 84. He admitted to washing her hair in the shower as NS described, but claims he did not climb in the shower with her. 37RP 88. He also admitted to possessing condoms, lubricants and the pink ball sexual device described by NS. 37RP 93, 96. He insinuated that NS knew about the condoms and lubricants because they were kept in his bathroom. 37RP 92-93. As for the pink ball, he said that he experimented with it once but then threw it under his bed. The next time he saw it, he claimed the cats had drug it into the girls' room. 37RP 96-98.

The defendant also claimed to have little memory of the domestic violence incident that led to being jailed prior to the disclosure by SS. He recalled Lisa and him disagreeing over NS doing her chores, that the argument got physical, and that Lisa hit him. 37RP 102-04. He professed, however, that he "stepped to the plate" and pled guilty. 37RP 105.

On cross-examination, the defendant denied referring to NS as "mouse," "queen freakiness" or "demon seed." 37RP 136. When

confronted with the RAP song he wrote, the defendant said the song referenced a number of people and that he was just telling what he was going through. 37RP 139-40. He also admitted that one passage referred to NS's "behaviors" and included the terms "mouseola," "queen freakiness," and "stretch." 37RP 137-38.

In this same passage, the defendant said that when he wrote, "Miss Exhibition, in the Fed Way bathroom rubbing your kitty real slow," he was referring to her "female genitalia." 37RP 143. Although he followed this line up with the phrase that "she looked sexy and sweet," he claimed that although the event really did happen, he was "beyond" finding her sexy. 37RP 144-45. The words, he claimed, were used because they rhymed. 37RP 44-45.

In discussing his lyrics wherein he talks about NS hearing Lisa and him having sex, "moaning and groaning," the defendant testified that NS wanted to "get laid," or, as he put it in his song, "having your hormones in a frenzy, wanting some climactic sludge-love." 37RP 147-48. The defendant went on to testify that NS would flirt with him and that she wanted to be naked in the shower with him. 37RP 148.

**F. ARGUMENT PERTAINING TO THE DEFENDANT'S  
CONVICTION FOR MOLESTING EIGHT-YEAR-OLD S.S.**

**1. THE DEFENDANT INCORRECTLY ASSERTS  
THAT TWO WITNESSES VOUCHERED FOR THE  
CREDIBILITY OF S.S.**

The defendant contends that Child Interview Specialist Nicole Farrell and Detective Jennifer Rylands improperly expressed their opinion vouching for the credibility of SS. This claim is without merit. The defendant is barred from raising the issue for the first time on appeal. In any event, neither witness, either expressly or impliedly, rendered an opinion vouching for SS's credibility.

**a. The Testimony Of Nicole Farrell.**

Child Interview Specialist Nicole Farrell interviewed SS on June 13, 2002. 18RP 3, 9-10. Nicole testified that protocol dictates that a discussion be held with a child interviewee regarding the importance of telling the truth, but that the depth of the discussion is age dependent. 18RP 7, 13. The jury was told that because SS was older than four (she was eight), a competency assessment and in-depth discussion about what it meant to tell the truth was not conducted. 18RP 13-14.

Nicole described SS as appearing bright and articulate, with an age appropriate demeanor. 18RP 14. She said the interview began with her entering the room in which SS was seated and in the process of coloring a picture. 18RP 18. Nicole asked SS what she was working on and SS

replied that she was angry, that she wanted to go home, but could not because the defendant touches her in "icky ways." 18RP 18-19. Nicole then told SS that while they were talking it was important to tell the truth and asked if she promised to do so. 18RP 19. SS nodded her head affirmatively. 18RP 19. Nicole then instructed SS to let her know if she did not understand a question and to not guess at answers. 18RP 19. This was the full extent of the preliminary discussion between Nicole and SS.

At trial, on at least four separate occasions Nicole told the jury that it is not her role to assess, determine or render an opinion as to whether the person she interviews was telling the truth. 18RP 37, 56, 58, 59-60.

Q: [I]t is not your job to determine whether or not what you are told is true?

A: That's correct.

18RP 37.

Q: After you asked a child to give you a description about what may have happened to them, do you follow up on that and try to form an opinion about whether or not you believe the child or believe that something really happened?

A: As I mentioned earlier, it is outside the scope of my role to give a formal, professional recommendation about, this is true, that is not true. That is completely above and beyond what this role calls for.

18RP 56-57.

Q: [Y]ou said it is not inside your role to form an opinion as to what is and is not true?

A: Correct.

18RP 58.

Q: . . .your job, as you described it more fully, is only to see what the child said happened?

A: Here is my child. My job was not to be [a] renegade child questioner, throwing out, this child is telling the truth, this one is lying, and formulating opinions that I then present that might impact filing decisions so forth and so on. It is my job to get a better sense of what, if anything, happened per the child's report in response to appropriate and well researched questioning. . .It is incumbent upon me to set up a context in which the child has 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. That is my connection to the truthful aspect of what a child is reporting.

18RP 59-60.<sup>8</sup>

b. The Testimony Of Detective Jennifer Rylands.

Detective Rylands first interviewed SS on June 11<sup>th</sup>, 2002, in the counselor's office at her school. 19RP 102. Detective Rylands testified that she told SS that she should tell the truth, and then asked her what the truth means. SS responded that the truth is "when someone is telling what really happened and it happened to them." 19RP 106. Asked to define a lie, SS responded, "A lie is when it really didn't happen." 19RP 106.

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<sup>8</sup> The defendant elicited this last answer. To the extent the defendant claims this answer constitutes error, his argument must not be considered. The doctrine of "invited error" prohibits a party from setting up an error at trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984).

Asked which was better, SS responded, “[t]he truth is better, even when it hurts someone.” 19RP 106. SS then promised to tell the truth. 19RP 106. Detective Rylands did not state whether she believed SS actually understood the difference between the truth and a lie or whether she believed the information SS provided was true.

Detective Rylands also testified about an interview that occurred in the prosecutor’s office on September 5<sup>th</sup>, 2002. She testified that the prosecutor asked SS the following question: “Do you know the difference between the truth and a lie, what’s real and not real?” 19RP 134. SS responded that “Fairies aren’t really real, unless you are talking about a game.” 19RP 134. Later the prosecutor told SS that there was one rule and that was to tell the truth. 19RP 142. Again, Detective Rylands did not state whether she believed SS understood the difference between the truth and a lie or whether she was telling the truth.

c. The Defendant Is Barred From Raising This Issue For The First Time On Appeal.

The defendant has failed to preserve this issue for appeal by failing to object below. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). In an attempt to avoid this prohibition, the defendant claims this is constitutional issue. It is not.

As a general rule, an issue may not be raised for the first time on appeal. RAP 2.5(a); Guloy, at 421. A limited exception exists where the issue being raised involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Lynn, 67 Wn. App. 339, 343, 835 P.2d 251 (1992). This “manifest error” exception “is a narrow one, affording review only of certain constitutional questions.” Id. at 343. The test in determining whether an unobjected to error will be reviewed on appeal is as follows:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Id. at 345. At a minimum, the error must be “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” Id. at 345.

The defendant cannot meet this burden. First, there is no manifest error, no error that is “unmistakable, evident or indisputable.” Even viewed in the light most favorable to the defendant, it would take a strained interpretation to hold that Detective Rylands and Nicole Farrell

were expressing their personal opinion that SS was telling the truth. They certainly did not expressly provide such an opinion and merely reiterating the questions and answers of their interview does not impliedly suggest they thought SS was telling the truth. In fact, it is difficult to fathom that a discussion regarding the truth, conducted prior to the interviewee providing a statement, can suggest that the interviewer has given a personal opinion that the content of the statement they have not yet heard, is truthful.

Second, the defendant can make no plausible showing that the asserted error had practical and identifiable consequences in the trial of his case. Where the limitations of testimony are clear to the jury, prejudicial error is difficult to prove. State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993); State v. Ferguson, 100 Wn.2d 131, 667 P.2d 68 (1983). It was made quite clear to the jury that neither Detective Rylands nor Nicole Farrell had any personal knowledge as to whether SS was telling the truth or not. With this clear limitation, the defendant cannot show that the testimony impacted the trial.

d. The Rule Does Not Apply To The Given Testimony  
And Neither Witness Rendered An Opinion.

A trial court has wide discretion in determining the admissibility of evidence. State v. Rivers, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996).

A trial court's decision to admit evidence will not be reversed unless the appellant can establish that the trial court abused its discretion. Id. at 710.

A court abuses its discretion only if no reasonable person would have adopted the position espoused by the trial court. State v. Demery, 114 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable minds could take differing views, the court has not abused its discretion. Id. at 758.

“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ER 704; City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994).

While a witness may not testify to his opinion as to the guilt of a defendant, “under modern rules of evidence, an opinion is not improper merely because it involves ultimate factual issues.” Id. at 578. After all, “[i]t is the very fact that such opinions imply that the defendant is guilty, which makes the evidence relevant and material.” Id. at 579. The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony and this court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. Id. at 579.

No matter what the parameters of this rule are, in order to fall within the purview of the rule, the contested evidence must be “opinion

testimony.” Demery, at 760. “Testimony” refers to evidence that is given at trial while the witness is under oath. Id. at 759, citing, Black’s Law Dictionary, 1485 (7th Ed. 1999). “Opinion testimony” is defined as “[t]estimony based on one’s belief or idea rather than on direct knowledge of facts at issue.” Id. at 760.

Here, the defendant’s argument fails. The contested evidence was not the type of evidence considered testimony and the witnesses did not render an opinion, either express or implied. All the witnesses did was reiterate what was said to SS, the questions that were asked, and her responses. In this regard, the evidence is functionally equivalent to a taped statement of an interview, a situation our supreme court had concluded does “not fall within the definition of opinion testimony for purposes of the evidentiary prohibition.” Id. at 760. In other words, had the interviews with SS been recorded, the tape would have provided the same evidence as the witnesses’ testimony and would not be subject to this analysis.

Additionally, neither witness was ever asked, nor did they express, an opinion on the veracity of SS. While the witnesses asked SS to tell the truth and obtained her agreement to do so, this does not mean (1) that SS told the truth or (2) that the witnesses believed SS told the truth. The agreement to tell the truth is no different than a judge swearing in a

witness, an act that does not imply that the judge believes the witness is being truthful.

In support of his argument, the defendant relies upon State v. Kirkman, 126 Wn. App. 97, 107 P.3d 133 (Div. 2, 2005). To the extent that Kirkman implies that a witness, by merely reiterating the questions posed to a witness about the concept of truthfulness, and reiterating the witness's answers, is expressing an improper opinion, the case is wrongly decided.<sup>9</sup> In any event, the facts of this case are distinguishable from the facts of Kirkman.

In Kirkman, child hearsay evidence was admitted through the interviewing detective. At trial, the detective testified in detail about a competency examination he gave the victim related to her ability to tell the truth. Id. at 136. The detective was then specifically asked whether the victim was able to distinguish between the truth and a lie and whether the victim understood the importance of tell the truth. The detective responded in the affirmative. Id. at 136. Division II found that the

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<sup>9</sup> A petition for review is pending. In addition, in accepting review absent an objection and determining whether the error was manifest, the Kirkman court mistakenly considered the perceived impact of the evidence, instead of determining whether the error was "unmistakable, evident or indisputable." Kirkman, 107 P.3d at 137. Thus, the court was undertaking a harmless error analysis instead of the second factor of the manifest error test. See Kirkman, 138-41 (Quinn-Brintnall dissenting, finding no manifest error).

detective had “tested” the victim’s competency and truthfulness and “[i]n essence, he told the jury that A.D. [the victim] told the truth.” Id. at 137.

Here, the detective was never asked, nor expressed an opinion on, whether the victim understood the difference between a truth and a lie, or was speaking the truth in relating the facts of abuse. In addition, even had this occurred, as the dissent in Kirkman noted, while the detective’s belief that the victim understood the difference between the truth and a lie may have been irrelevant, it was not an opinion as to whether the victim was telling the truth in regards to the facts of the charged crime.<sup>10</sup> Id. at 140-41.

e. Any Error Was Harmless.

As this Court stated, “[t]he assertion that a witness’s testimony ‘invades the province of the trier of fact’ is of little assistance in assessing the effect of an alleged evidentiary error.” Heatley, 70 Wn. App. at 583, fn. 5. Jurors remain free to draw their own conclusions. Id. at 583, fn. 5. The effect of erroneously admitted evidence must be judged in the specific context in which it is offered. Id.

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<sup>10</sup> In Kirkman, the court also found improper the testimony of a doctor who was asked his “general assessment of the case,” and said that the victim displayed appropriate affect when describing the abuse—sad when one would expect her to be sad, etc. Id. at 135-36. Whatever the propriety of this testimony is, there is no comparable testimony in the case at bar. Witnesses here described the victim’s demeanor but did not draw conclusions for it. State v. Carlson, 80 Wn. App. 116, 130 n. 44, 906 P.2d 999 (1995).

If this Court were to even consider this issue on appeal absent an objection, it necessarily follows that the court has found the error was a manifest error affecting a constitutional right under RAP 2.5(a)(3). Thus, a constitutional harmless error standard would apply. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, at 425. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986).

It was quite clear that Detective Rylands and Nicole Farrell had no personal knowledge of any facts about the case, the defendant, the victim or any other evidence when they interviewed SS. As such, the defendant cannot ascribe any undue prejudice to their testimony. The substance of the SS's disclosures remains unchanged. The physical evidence remains the same. The examination finding of a genital variant "concerning for probable sexual abuse" remains the same. 19RP 50. Under these facts, there can be little debate but that any error did not affect the verdict.

**2. THE DEFENDANT HAS FAILED TO PROVE THAT THE PROSECUTOR'S ONE COMMENT DURING CLOSING ARGUMENT WAS SUCH FLAGRANT MISCONDUCT THAT HIS CONVICTION SHOULD BE REVERSED.**

The defendant contends that one comment by the prosecutor in closing argument, corrected by the trial court, was so flagrant and prejudicial that it tainted the entire trial to such a degree that his conviction should be reversed. This claim has no merit. The comment, while inappropriate, was not so prejudicial (and certainly the defendant's trial counsel did not feel it was), that his conviction should be reversed.

In an attempted play on words, the prosecutor twice tried to characterize the reasonable doubt instruction in a persuasive manner. In the first instance, the prosecutor stated, "Reasonable doubt does not mean give the defendant the benefit of the doubt." 23RP 42. No objection followed. In the second instance, the prosecutor stated:

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

23RP 46-47.

The defendant objected, but did not seek a mistrial. 23RP 47.

The trial court then gave a lengthy cautionary instruction:

There has been an objection to the statements made by the State as to the definition of reasonable doubt. The definition of reasonable doubt is provided in your jury instructions....I want you to read that instruction very carefully, particularly the last paragraph of the instruction. And the second sentence of that reads, "It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or lack of evidence."

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

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

23RP 47-48.

The State concedes that the prosecutor's remarks here were misconduct.<sup>11</sup>

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<sup>11</sup> In an unpublished opinion, this Court previously ruled that this argument by the same prosecutor was improper. The State will not argue otherwise. Please note that the prosecutor has been informed that this argument should not be made again. This Court's decision occurred after the trials in this case.

Once improper argument is found, the defendant bears the heavy burden of proving prejudice, prejudice that is so enduring that it could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 24 (1994). A conviction will be reversed only where the defendant can prove that there is a substantial likelihood that the misconduct affected the verdict. Id. at 86. Even when indirectly touching upon a constitutional right, prejudice is tested by whether the argument was so flagrant and ill-intentioned as to create incurable prejudice. State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001). It is only when the alleged misconduct is found to directly violate a constitutional right that it is subject to the stricter constitutional harmless error standard. Id. at 386. That is not the case here.<sup>12</sup>

In determining the likelihood that an improper comment affected the verdict, a reviewing court will consider whether a limiting instruction or mistrial was requested, the effect of the instructions given, the overall strength of the prosecutor's case, the nature of the improper comment, and

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<sup>12</sup> In French, the prosecutor's comment that "the defense has given you absolutely no reason to conclude the defendant didn't do this," found to only touch upon the right to remain silent and thus non-constitutional harmless error standard applied. French, at 386, also State v. Klok, 99 Wn. App. 81, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000) (reference to defendant laughing during trial touch on constitutional right to be present but non-constitutional harmless error standard applied).

whether the remark was of an isolated nature. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

Under either standard, the defendant's conviction must stand. Immediately after the prosecutor's comment, the court gave a lengthy, detailed and accurate accounting of the burden of proof. The court also directed the jurors to read the instruction that was provided to them. Thus, the jurors had the reasonable doubt instruction read to them, they had the court explain the instruction, they were given a copy of the instruction, and they were directed to read the instruction again. Reviewing courts will presume that juries follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Apparently, even trial counsel felt this was sufficient. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1994) (failure to request a mistrial or further instruction strongly suggests trial counsel felt the remedy was sufficient); French, 101 Wn. App. at 387. There is simply nothing so prejudicial about the prosecutor's comments, nor so deficient about the court's curative instruction, that reversal of the conviction is required.

**3. THE DEFENDANT SHOWING S.S. HIS PENIS PUMP WAS RELEVANT.**

The defendant contends that the admission of evidence that he possessed a penis pump was irrelevant and prejudicial. This claim is

without merit. The defendant's argument is based upon citation to the record wherein SS responded to leading questions that he did not show her his penis pump. However, in making this argument, the defendant ignores other evidence indicating he did just that.

Prior to trial the defendant sought to suppress pornographic movies and a penis pump that were turned over to the police by his wife shortly after his arrest. He also sought to suppress any mention of the items, including the references SS had previously made about these items. 11RP 69-70.

The court agreed to suppress the actual items.<sup>13</sup> 2RP 67. The court, however, denied the defendant's relevance/prejudice objection to the admission of testimony that the defendant had possessed and shown the items to SS. 11RP 75. While referencing the defendant's grooming behavior of his stepdaughters (11RP 69), the deciding factor for the court was the defendant's claim that his contact with SS' s genital region was benign contact for parental/medical reasons. 11RP 75-77. The court held that "clearly his conduct of a sexual nature toward an eight year old before is highly relevant," when the defendant now claims that his touching was not of a sexual nature. 11RP 75.

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<sup>13</sup> The court believed detectives were required to obtain the defendant's consent despite the fact that he had been removed from the scene and his wife voluntarily turned over the items. 2RP 67.

At trial, the defendant was able to get SS to respond affirmatively to a leading question that he had not shown her his penis pump. 22RP 21. It is this testimony that the defendant's argument is premised.

However, Detective Rylands had already testified that during her interview of SS, she disclosed that "[h]e showed me a penis pump. I know how it works. He did not show me how it works." 19RP 140. Despite efforts by the defendant to get the detective to testify that SS had not said that the defendant showed her his penis pump, Detective Rylands would not agree. The detective would only agree that SS said the defendant did not show her how it worked. 20RP 17.

The admission of evidence lies within the sound discretion of the trial court. Rivers, 129 Wn.2d at 709. A decision to allow certain evidence will not be reversed absent a showing of abuse of discretion, a standard met only when this court concludes that no reasonable person would have taken the position adopted by the trial court. Demery, 114 Wn.2d at 758. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. Id. at 758. The admission of evidence will be upheld if it is admissible for any proper purpose. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Minimal logical relevance is all that is required. State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995).

Relevant evidence will be excluded only if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The burden is on the defendant to prove the evidence should have been excluded as there is a presumption of admissibility under Rule 403. Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994). By necessity, the trial court's ruling must be based in part upon the judge's own subjective assessment of the evidence. 5B Karl B. Tegland Washington Practice: Evidence Section 183.18 p. 68 (4<sup>th</sup> ed. 1999).

The defendant's argument here is not well taken. He ignores the evidence indicating he showed SS his penis pump. In fact, he conceded as much at trial. At one point, the defendant told the court that in her disclosure, SS indicated "the times when she says Richard showed her these things, the penis pump and the videos." 11RP 71.

While the defendant was free to argue at trial that other evidence supported a different conclusion, this argument goes to the weight of the

evidence, not its admissibility. State v. Vaughn, 101 Wash.2d 604, 610, 682 P.2d 878 (1984). The evidence that the defendant showed SS his penis pump was relevant and admissible to show he was grooming her, consistent with showing her a pornographic video cover and exposing himself to her. The evidence was also admissible to rebut the defense that the defendant's touching of SS was for medical purposes.

In any event, any error was harmless. Even if error is found, reversal is not required if the error is harmless. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The defendant must show that "within reasonable probabilities," but for the error, the outcome of the trial would have been different. Id. at 780. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. Thamert, at 151.

SS made an absolutely spontaneous disclosure to being sexually abused. Her future disclosures and testimony were consistent. She showed knowledge of sexual practices not consistent with her age and experience and her claim that the defendant showed her a penis pump and pornographic video case were supported by evidence showing the defendant possessed these items. The defendant cannot show that there is a reasonable probability the outcome of trial would have been different but for the claimed errors.

**4. DETECTIVE RYLANDS PROPERLY TESTIFIED THAT LISA WARREN WAS PROTECTIVE OF THE DEFENDANT AND SEEMED LESS CONCERNED ABOUT HER CHILDREN.**

The defendant contends that when Detective Rylands testified that Lisa Warren was more protective of the defendant than her children, this was improper opinion testimony. This claim must be rejected. First, the defendant failed to preserve the issue on appeal as his objection was limited to “speculation” and “based on hearsay.” Second, the testimony was a proper lay opinion based upon the detective’s observations of Lisa Warren’s demeanor and actions. Third, any error was harmless because Lisa Warren testified to the very things that were expressed by the detective.

During the examination of Detective Rylands, the following questioning occurred regarding Lisa Warren’s initial cooperation, or lack thereof, with the investigation into the sexual abuse allegations made by SS.

Q: When you met with Lisa Warren on June 12<sup>th</sup>, and had the chance to apprise her of the allegations and the statements that her daughter, SS, made, how would you describe her mood or demeanor towards you, or in general?

A: She seemed very protective of her husband –

Mr. Hamaji: Your Honor, I’m going to object. This calls for speculation. I think it is based on hearsay.

The Court: Overruled.

The Witness: She also seemed to be not so concerned about her daughters, more protective – she was more protective over her husband and not concerned about what the accusations were.

Mr. Hamaji: I would like to have a continuing objection.

The Court: You may. The basis of the ruling is ER 701. This witness is expressing opinions, but she is expressing opinions about demeanor and mood of a person with which she had direct contact. It is therefore a lay opinion under 701, and permitted.

19RP 121-22.

a. **The Defendant Is Barred From Raising This Issue For The First Time On Appeal.**

A defendant may not raise a claim of error on appeal without first having raised an objection at trial. RAP 2.5(a); Guloy, 104 Wn.2d at 421. Objections below must be both timely and specific. State v. Loehner, 42 Wn. App. 408, 410, 711 P.2d 377 (1985), rev. denied, 105 Wn.2d 1011 (1986). An objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection in order to give them an opportunity to correct the alleged error. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Here, the objection consisted of “speculation” and “based on hearsay.” The defendant never mentioned ER 701 or made a claim that the testimony constituted impermissible opinion evidence. While the

court ruled the testimony was admissible under ER 701, that was not the basis for the defendant's objection and the issue has not been preserved.

b. Permissible Lay Opinion.

A lay witness is allowed to render an opinion when the opinion is “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’ testimony or a determination of a fact in issue.” ER 701; Halstien, 122 Wn.2d 109; Ferguson, 100 Wn.2d 131. In Ferguson and Halstien, the supreme court stated that lay opinion testimony is admissible, especially when the opinion is expressed in terms that make it clear that the testimony is a lay opinion based upon perceptions—such as was done in the case at bar.

In Ferguson, a prosecution for indecent liberties against his daughter, Ferguson’s wife was properly allowed to testify that she “noticed something. . .that looked like semen” on a towel. The court upheld the admission of the testimony, stating:

[The wife] did not testify that the stains were in fact semen stains. She testified that they appeared to be semen stains based upon her prior experience. This testimony is clearly within the scope of ER 701, which allows opinion evidence by a lay witness.

Ferguson, 100 Wn.2d at 141.

Likewise, in Halstien, a prosecution for burglary with sexual motivations, the court held proper a police officer's testimony that a substance on a picture frame "might have been" semen.

The trial court has wide latitude about admitting such evidence. As noted by the trial court, the issue is not one of admissibility, but goes to the weight given the evidence.

Halstien, 112 Wn.2d at 128.

Here, not only was the question clearly intended to elicit an opinion based upon the detective's observations and the actions of Lisa Warren, but the judge specifically told the jury the testimony was such an opinion. Further, Lisa Warren's loyalties and demeanor were relevant for several reasons. First, the timing and circumstances of SS's disclosure and the fact she did not initially disclose the abuse to her mother were important issues at trial. Second, Lisa's lack of cooperation was at least in part at the urging, if not the instruction, of the defendant. Just as an attempt to flee demonstrates guilty knowledge, so would an attempt to get a state's witness not to cooperate. Under these facts, the defendant cannot show that no reasonable person would have admitted the evidence.

c. Any Error Was Harmless.

Even if error is found in the admission of the evidence, reversal is not required if the error is harmless. Smith, 106 Wn.2d at 780. The defendant must show that within reasonable probabilities, but for the error,

the outcome of the trial would have been different. Smith, at 780; Thamert, 45 Wn. App. at 151. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. Id. at 151.

This last point is an important point in analyzing any error here. Lisa Warren testified and validated the detective's opinion. She admitted to not cooperating with the detectives, that she was standing by the defendant, and that the defendant instructed her to take the kids out of state until the trial was over. In short, the jury heard all the evidence supporting the detective's opinion and that the opinion was correct.

**5. THE DEFENDANT IS UNABLE TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL PURSUANT TO THE "CUMULATIVE ERROR" DOCTRINE.**

The defendant alleges that the cumulative effect of numerous trial errors deprived him of his right to a fair trial. An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Here, as explained above, the defendant has failed to satisfy this burden.

**G. ARGUMENT PERTAINING TO THE DEFENDANT'S  
CONVICTIONS FOR RAPING 12-YEAR-OLD N.S.**

**1. THE TRIAL COURT PROPERLY ADMITTED  
TESTIMONY THAT S.S. HAD ACCUSED THE  
DEFENDANT OF SEXUAL ASSAULT AND THAT  
CHARGES HAD BEEN FILED.**

The defendant contends that the trial court erred in admitting evidence that prior to NS's disclosure that she had been sexually assaulted by the defendant, SS had made an allegation of sexual abuse, that the defendant had been "prosecuted," and that NS made her disclosure in the context of preparing for the defendant's "trial." This claim is without merit. First, the factual premise is inaccurate. The jury never heard that the defendant was prosecuted, went to trial, or even that the case was set to go to trial. Rather, the jury only heard that charges had been filed and NS made her disclosure while discussing a pending hearing. Second, as the trial court noted, there was no way in which to try the case involving NS without putting her disclosure in context, the reasons she was first contacted, her initial denial of abuse, and her subsequent disclosure. Whether the evidence is termed *res gestae* or simply evidence putting the case in context, the trial court's decision was correct. Additionally, but for the trial court's misapplication of State v. DeVincentis, 150 Wn.2d 11 (see cross-assignment of error), even more evidence regarding the defendant's molestation of SS would have been admissible.

a. Prior Bad Act Evidence.

Prior to the trial involving NS, the State sought permission to admit the facts of the defendant's molestation of SS as a common scheme or plan under ER 404(b). 29RP 18-60. The trial court rejected the State's motion. 29RP 60. At the same time, the court agreed that the circumstances in which SS made her allegation, the continuing investigation, the filing of charges, and the preparation of the hearing at which NS made her disclosure, were all facts necessary to show the jury the context in which NS made her disclosure.<sup>14</sup> 29RP 60.

In summary, the facts were that SS made a disclosure that the defendant had sexually abused her. After talking with SS, detectives contacted NS and asked if she had been abused. She denied that she had. Charges were filed against the defendant for acts alleged to have been committed against SS. Lisa Warren then secreted the two girls away, at the defendant's request, until she was apprehended on a material witness warrant.

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<sup>14</sup> The defendant claims the jury heard that he was "prosecuted" for sexually abusing SS and that the disclosure by NS was made while preparing "for trial." Def. br. At 25-26. The jury never heard anything about the defendant's trial or that he was facing trial. In fact, this was the basis for an earlier mistrial when the prosecutor used the term "trial," instead of "hearing" as ordered by the court. 29RP 56-58 (court ruling), 31RP 6-11, 19 (referring to trial), 34RP 6-10 (referring to hearing). Further, a prosecution refers to a case proceeding through its final determination. Blacks Law Dictionary, 1221 (6<sup>th</sup> Ed. 1991). The jury here was never informed what happened to the prior case after charges were filed.

Both NS and SS were then brought to the prosecutor's office to discuss an upcoming hearing on the allegations made by SS. At that time, afraid that she was going to have to put her hand on a Bible and swear to tell the truth, NS disclosed that the defendant had also sexually abused her.

One of the defense theories at trial was that NS was making the allegations up because she thought SS wasn't going to cooperate with the prosecution and she wanted the defendant convicted to get him out of the house.

b. The Trial Court Did Not Abuse Its Discretion In Admitting The Inseparably Intertwined Circumstances Surrounding The Disclosures Of N.S. And S.S.

ER 404(b) provides that,

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

The list of purposes for admissibility under ER 404(b) is non-exhaustive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The rule contemplates that evidence of other misconduct will be admitted if (1) the evidence sought to be admitted is relevant and necessary to a material issue and (2) the probative value of the evidence outweighs its potential for prejudice. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id. at 259. An admission of evidence will be upheld on appeal if it's admissible for any proper purpose, even if the basis relied upon by the trial court was improper. Mutchler, 53 Wn. App. at 901.

The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion exists only when the reviewing court concludes that no reasonable person would take the position adopted by the trial court. Powell, at 258. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. Demery, 144 Wn.2d at 758. The Supreme Court has defined "res gestae" as the admission of acts necessary to complete the picture of the event. Powell, at 259-63.

Here, the fact that SS made a prior disclosure, that the defendant was charged based upon this disclosure, that NS was contacted and denied any abuse occurred, and that NS made her disclosure while discussing a hearing, were important facts for the jury to weigh in determining NS's credibility. The evidence showed why NS was contacted at school by sexual assault unit detectives, why she was asked about possibly being sexually abused by the

defendant, why she was initially taken into protective custody, why she was later taken into protective custody and brought to the prosecutor's office, and why she would have been afraid of being asked at a hearing whether she had been sexually abused like SS. Additionally, the context of the disclosures was necessary to show that NS initially denied being abused, that she changed her story, and why. The facts are also relevant to show that Lisa Warren sought to keep the girls away from the police and that the defendant encouraged, if not orchestrated, Lisa's secreting the girls away.

The allegations by SS set in motion, and directly resulted in, the disclosures by NS and were a part of the evidence for the jury to consider in answering the question of the validity of the allegations. The defendant simply cannot show that no reasonable judge would have ruled as the trial court.

c. Any Error Was Harmless.

Even if error is found in the admission of the evidence, reversal is not required if the error is harmless. Smith, 106 Wn.2d at 780. The defendant must show that "within reasonable probabilities," but for the

error, the outcome of the trial would have been different.<sup>15</sup> Id. at 780. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. Thamert, at 151.

NS disclosed sexual abuse by defendant what was supported by other evidence. NS said that the defendant used a sexual devise with a pink ball and string attached—the defendant possessed one. NS said the defendant used lubricants—the defendant possessed some. NS said the defendant showed her pornographic movies—the defendant possessed some that even his wife did not initially know about. And NS had hymen notches possibly the result of penetration.<sup>16</sup>

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<sup>15</sup> The defendant cites Sims v. Stinson, 101 F.Supp.2d 187 (S.D.N.Y. 2000), and argues this pure evidentiary issue is one of constitutional magnitude. It is not. In Stinton, by way of a habeas petition, the defendant made a failed attempt to get his state law evidentiary issue before a federal court by claiming his right to a fair trial was violated. Errors of state law are not subject to federal review. Morales v. Goord, 2005 WL 1383166 (S.D.N.Y. 2005). In order to demonstrate that a state ruling had violated federal law, a defendant has the “heavy burden” of showing that the alleged error was “so extremely unfair that its admission [of evidence] violates fundamental conceptions of justice,” and the evidence “must have been sufficiently material to provide a basis for conviction.” Id. The defendant does not even attempt to argue this standard and this Court should not consider the allegation. In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (This Court need not consider arguments that are not developed in the briefs).

<sup>16</sup> The defendant’s claim that there was no physical evidence is incorrect. Joanne Mettler testified that the notches to NS’s hymen were possibly the result of penetration. 35RP 34. While Doctor Sugar could not confirm this result, this was because she observed only the photographs and thus could not be sure at what position the notches actually were. 35RP 83, 88, 103-05.

The defendant also hurt himself by claiming that his young stepdaughter flirted with him, wanted to “get laid,” and wanted to be naked in the shower with him. He also hurt himself with the disclosures by his wife that he was behind her secreting the girls out of the area so he could not be prosecuted. With these facts, the defendant cannot show that there is a reasonable probability the verdict would have been different absent the alleged error.

d. The Defendant’s Molestation Of S.S. Was Admissible As A Common Scheme Or Plan.

The existence of a similar scheme or plan by a defendant as to a prior similar act may be admissible under ER 404(b) as probative of whether the current crime occurred. DeVincentis, 150 Wn.2d at 17. To admit common scheme or plan evidence, the prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” Lough, 125 Wn.2d 847.

In regards to step number three, where the trial court erred here, our supreme court has held that, “the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” DeVincentis, at 13. If, the court said, the trial court

finds the existence of a prior similar plan, this past behavior is probative as to the issue of whether the crime occurred. Id. at 17-18.

In confirming that there need only be marked similarities between the prior acts and current crime sufficient to demonstrate a common scheme or plan, the court rejected the argument that the similarities between the prior acts and the current acts must be unique or uncommon. Id. at 13. As the court has stated, while the purpose of ER 404(b) is to prohibit admission of evidence designed to prove bad character, “it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case.” Lough, at 859. Thus, if the prior bad acts are similar enough to be naturally explained as individual manifestations of an identifiable plan, the acts are admissible. DeVincentis, at 18.

The facts of DeVincentis illustrate the similarities the court is looking for to show a common plan, despite the substantial dissimilarities of that can exist.

In the summer of 1998, DeVincentis offered 12-year-old KS money to mow his lawn. KS was simply a friend of DeVincentis’ neighbor’s daughter. In September, DeVincentis asked if KS would also clean his house. While KS cleaned, DeVincentis would walk around in a g-string or bikini underwear. In October, DeVincentis asked KS to give him a massage, but warned her not to tell anyone. Two weeks later,

DeVincentis again asked for a massage and this time had KS massage his penis, after which, he massaged her breast and touched inside her vagina. KS then disclosed the abuse to her mother.

To help prove that the abuse of KS occurred, the State sought to admit DeVincentis' prior molestation of 10-year-old VC; abuse that occurred 15 years prior to the acts committed against KS. DeVincentis met VC through his daughter, as the two were best friends. VC would spend three or four evenings a week at DeVincentis' residence, many times with DeVincentis present wearing only a g-string or bikini underwear. The sight of DeVincentis in underwear became normal for VC.

One time, after his daughter's birthday party, DeVincentis showed VC photos of naked people and asked if she had ever seen a penis before. On another occasion, he had VC sit on a rowing machine with him. VC could feel DeVincentis' erect penis on her back and he touched her private areas. On other occasions, DeVincentis demanded that VC try on transparent mesh-like clothing, he offered her \$10 to pose nude, and he would leave magazines with pictures of nude people throughout the house where VC could find them. VC also recalled DeVincentis asking for a back massage and having VC put his penis in her mouth.

Without question, there were substantial differences between the meeting, grooming and sexual assault perpetrated upon VC and the meeting, grooming, and sexual assault perpetrated upon KS. The way DeVincentis met and got the victims into his home was substantially different, one was paid to clean his house, the other was best friends with his daughter. DeVincentis showed VC photos of naked people and left pornographic magazines out for VC to find, neither of which occurred with KS. VC was asked to pose nude and ordered to wear sexual provocative clothing, neither of which occurred with KS. The sexual acts themselves were profoundly different with VC having to perform oral sex upon DeVincentis, while KS was asked to manually masturbate DeVincentis.

Despite these dissimilarities, the supreme court upheld the trial court's determination that the prior acts committed against VC demonstrated a plan to get to know young people through a safe channel, create a familiarity in his own home, bring the children into "an apparently safe but actually unsafe and isolated environment," so that he could pursue his compulsion to have sexual contact with pubescent girls. DeVincentis, at 22. In short, despite the many factual differences, there were enough similarities to demonstrate DeVincentis had an overarching plan to gain access to and molest young girls. This is exactly the type of situation that

exists here, but the case at bar has far more similarities and less dissimilarities than exists in DeVincendis.

In the case at bar, there are a number of similarities wherein a reasonable person could find that the defendant used a common plan to sexually abuse the two sisters. Obviously, with the two victims being sisters living in the same house, everything about how the defendant met the victims and became an intricate part of their lives is identical. The defendant also started slowly with each victim, having NS look at herself in the mirror and walking around with no underwear on so SS could see him. Of particular note, with both girls, the defendant commented on, and started his abuse, as they showed signs of development. With SS, it was her growing pubic hair, him checking her and commenting on her development. With NS, it was the defendant having NS pull up her shirt in front of a mirror and telling her how beautiful she was.

The defendant also used pornography with both girls and professed to be teaching them. He told both girls about different ways to have sex. He also warned both girls not to tell anyone.

The error here was not because the court did not find similarities. To the contrary, the court noted the substantial similarities. 29RP 33-34, 46-47, 60. The error occurred because the court misapplied DeVincendis. The court was looking for similar but unique aspects of each crime—facts

that separated it from other similar crimes. But this is the very thing DeVincentis tells us is not the test for finding a common scheme or plan. It is the evidence of a plan, not whether other criminals committing the same crime also use the same type of plan. Under the facts here, with two sisters living in the same home, being groomed in a similar manner, and being molested by the same person during the same time period, there can be no question but that had the ER 404(b) test been properly applied, the evidence of the molestation of SS would have been admissible in the trial of NS.

**2. THE TRIAL COURT PROPERLY RULED THE DEFENDANT OPENED THE DOOR TO THE ADMISSION OF HIS PRIOR CHILD MOLESTATION CONVICTION.**

The defendant contends that the trial court erred in ruling that he opened the door to the admission of his prior conviction for child molestation. This claim has no merit. The defendant testified that he would not touch NS in certain areas of her body because she was a girl. As Judge Hayden put it, there was only one way to interpret the defendant's statement, he is not the type of person who would touch a girl in an inappropriate manner. 37RP 116. This, the court properly ruled, opened the door to the fact that the defendant's statement was not true, that he had been convicted of child molestation in the past.

Prior to trial the court ruled that the defendant's prior child molestation conviction was not admissible. 29RP 58. During trial, the defendant portrayed himself as a good caretaker of his stepdaughters. 37RP 77-83. He testified that he would help NS with applying medications. Specifically, the defendant said that NS developed a skin disease, that he helped her rub medicine on her body, but that "there is areas I wouldn't do because of, you know, being like she is a girl." 37RP 82.

Based upon this testimony, the court ruled that the defendant had opened the door to admission of his prior child molestation conviction.<sup>17</sup>

37RP 112-125. The court found that there was only one way to interpret the defendant's statement, he is not the type of person who would touch a girl in an inappropriate manner. 37RP 116. Because the fact of his prior conviction demonstrated that the defendant's statement was untrue, the court ruled the defendant had opened the door to the admission of his prior child molestation conviction. 37RP 116.

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

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<sup>17</sup> While the prior conviction was for the defendant's molestation of SS, the court did not allow admission of who the victim was or when the conviction occurred. 37RP 125.

crime charged. State v. Brush, 32 Wn. App. 445, 448, 648 P.2d 897 (1982), rev. denied, 98 Wn.2d 1017 (1983); State v. Renneberg, 83 Wn.2d 735, 738, 522 P.2d 835 (1974). The rationale behind this policy was set forth over a half century ago.

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

Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

This long-standing rule is still the law today. Brush, at 450. The law is quite clear that if the defendant opens the door, the prosecutor was free to drive through it. The threshold question is simply whether Judge Hayden abused his discretion in finding that the door had been opened. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). In other words, the defendant can only prevail if this Court determines that no reasonable person would have taken the position adopted by the trial court. Demery, at 758.

If the defendant had limited his testimony to a mere denial that he had touched NS inappropriately, the door to his prior conviction would not have been opened. But the defendant did not do this. Instead, the defendant denied that he touched NS inappropriately and gave his reason for it, the fact that NS was a girl. There can be only one interpretation of this statement;

the defendant would not touch any young girl in an inappropriate manner. This statement was untrue, as evidenced by his prior conviction, and the defendant cannot show that no reasonable person would have so ruled.

In any event, the defendant cannot show that but for this alleged error, there is a reasonable likelihood the verdict would have been different. See (1)(c).

**3. THE DEFENDANT WAS NOT PREVENTED FROM PUTTING ON A DEFENSE.**

The defendant contends that he was denied his right to put on a defense by the court's exclusion of evidence (1) he had a heart attack and (2) that SS said she should not have said anything about the abuse. This claim is without merit. First, the court did not exclude this evidence. Second, had the court done so, it would merely have been a proper exercise of judicial discretion.

In opening, the defendant said that in October of 2001, he suffered a heart attack, spent time convalescing, and that this caused marital problems. 33RP 17. Outside the presence of the jury, the State argued that the defendant was either attempting to garner sympathy or suggesting he was physically incapable of committing the offense. 34RP 20. While the court interpreted the comments as an improper attempt to garner sympathy, the court cautioned defense counsel that if he was suggesting that somehow his

client was unable to have committed the alleged acts due to his medical condition, acts that occurred during the same time period that he was convicted of molesting SS, that this would open the door to admission of his conviction for molesting SS. 34RP 21-24. Counsel responded, "I certainly understand why it would." 34RP 22.

The defendant also said in opening that as NS and SS were being brought to the prosecutor's office after their mother had been arrested, SS "said she shouldn't have ever said anything." 33RP 20. Outside the presence of the jury, the court advised counsel that his delving into SS's statement was concerning. 34RP 15-16. The court cautioned counsel that if he started questioning the veracity of SS and her disclosures, "then likely it will be my ruling the jury gets to hear that he is already convicted of those." 34RP 16.

The defendant argued that the evidence was admissible under the theory that NS made her disclosures because she might have thought SS was not going to cooperate with the prosecution and she needed to do something to "save the family." 34RP 16, 18. The court found that this was only one interpretation of the evidence, the other being that SS was lying. 34RP 31. Thus, the court said, the defendant would be opening the door to his conviction. 34RP 31. After hearing further argument the court stated, "I am going to stand by my ruling. Comments that [SS] has made about her

willingness to cooperate will not be allowed into this case unless the whole picture of [SS] comes in, including the conviction.” 34RP 32.

On appeal, the defendant claims the court excluded evidence he had a heart attack and that SS said she should not have said anything about the abuse. This is incorrect. The defendant was absolutely free to admit the evidence. There were ramifications of doing so, opening the door to his molestation of SS, but he was not prevented from doing so. The decision was thus entirely tactical and there is no court decision under RAP 2.2 or RAP 2.3 for the defendant to appeal.

In any event, had the court actually excluded the evidence, it would simply have been a proper exercise of judicial discretion. State v. Howard, \_\_\_ P.3d \_\_\_, 2005 WL 1367356 (Wn. App. Div. 1 June 6, 2005). While the Sixth Amendment right to compulsory process has been interpreted to include the right to present a defense, this right is in no way absolute. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Roberts, 80 Wn. App. 342, 50, 908 P.2d 892 (1996). A right to present a defense consists of the right to present evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), rev. denied, 120 Wn.2d 1022 (1993). The defendant “bears the burden of establishing the relevance and admissibility of the proposed testimony.” Roberts, at 351. Even where Confrontation Clause rights are implicated, a trial judge still retains wide

latitude and may exclude prejudicial evidence or evidence that may confuse the issues. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence—court properly excluded defense witness for a willful discovery violation).

Here, even had the trial court excluded the evidence, the issue would simply be one of the proper exercise of the court's discretion under the rules of evidence. The record clearly shows that the defendant was not prevented from presenting a defense. The claim that he could not have had sex with NS for a few weeks due to a heart attack, during a charging period of over two years is marginally relevant at best. Further, the argument that he could have molested SS, as this took little exertion, but could not have engaged in sex acts against NS because it involved "strenuous sexual activity," is incredulous. Def. br. at 34. Certainly, had the court actually excluded the evidence, the trial court's decision would have been a reasonable exercise of discretion, a decision that would have avoided opening up the trial to the collateral issue of the defendant's health, what sex acts he could or could not perform, and the sex acts perpetrated against SS.

The same is true for the one comment by SS, a comment that the defendant tried to admit under a theory that was speculative at best and would have again opened the door to the sexual assault upon SS and everything NS knew about the allegations and upcoming trial.

Finally, any error here was harmless. Considering the collateral nature of the evidence, the fact that the defendant was not prevented from arguing his theory of the case, and the marginal relevance of the evidence, the defendant cannot show that but for the evidence not being admitted, there is a reasonable probability the outcome of trial would have been different.

**4. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S RAP SONG AND EVIDENCE THAT THE DETECTIVES WERE SURPRISED AT N.S.'S DISCLOSURE.**

The defendant contends that his own RAP song, chronicling the events in question, should have been excluded because it was too prejudicial. This claim, paramount to a claim that a confession should not be admitted because it is prejudicial, is without merit. The defendant also claims that the detectives' testimony that they were surprised by NS's disclosure was too prejudicial. Considering that a key issue at trial was the manner in which this disclosure arose, the fact that the detectives were not asking questions about sexual abuse and were thus surprised by the disclosure is highly relevant.

a. The Defendant's RAP Song.

At the defendant's last trial, the State decided not to admit the defendant's RAP song in its case-in-chief. 32RP 10. However, after the defendant testified that he always tried to bolster NS's self-esteem and was a good caretaker, the State sought to admit the song to impeach the defendant's testimony with the many derogatory terms he used in the song to refer to NS. 37RP 108. The court agreed. 37RP 124.

On cross, the defendant admitted that many of the derogatory terms in the song referred to NS.<sup>18</sup> 37RP 137. He admitted his lyrics described NS's behavior and that the song chronicled what he was going through. 37RP 137-40.

The RAP song was clearly relevant as it was the defendant's own words and thoughts describing the many aspects of the case. His argument that the song was irrelevant because it was written after his arrest has no merit. The defendant used multiple derogatory terms in describing NS and a reasonable inference is that (1) this is the way he referred to NS at other times and (2) this is the way he felt about NS—both inferences in contrast to how he testified.

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<sup>18</sup> This is consistent with the State's position at trial, the court's understanding of the song, and Lisa Warren's testimony that she believed the song referred to both NS and SS. 20RP 75-76, 78, 29RP 61-63.

Also without merit is the defendant's argument that the prosecutor's use of the song in closing was misleading. Specifically, the defendant claims that portions of the song referred to SS when they really pertained to NS. First, this has nothing to do with the admissibility of the evidence. If the defendant felt the prosecutor was misstating the evidence, he could have objected or argued to the contrary in his closing. Second, the record clearly shows that when the defendant was asked about the portions of the RAP song in question, he was referring to NS. 37RP 137-49. The defendant simply cannot show any undue prejudice, and certainly cannot show that no reasonable judge would have found that the probative value of the evidence was not substantially outweighed by any unfair prejudice.

b. The Disclosure By N.S. Was Not The Result Of Leading Questions.

When NS and SS were brought to the prosecutor's office on September 5<sup>th</sup>, it was for the purpose of discussing an upcoming hearing involving the allegations by SS. NS had previously denied having been sexually abused. The detectives testified that during the meeting, they were not investigating any allegations involving NS, were not asking any questions about whether anything happened between the defendant and NS, and were thus surprised when NS disclosed she too had been sexually abused. 34RP 7, 13-14.

The defendant's claim that this was irrelevant ignores the issues of the case and every child abuse case. In virtually every child abuse case, the issue of how a disclosure was made and what prompted the disclosure is a major issue. Part of the defense in this case was that suggestive questioning prompted NS's disclosures. Therefore, lack of questioning by the detectives, evidenced by their surprise, was relevant to show that the disclosure was not the result of some recalled memory, coercion, or suggestive inquiry. Further, there is certainly no unfair prejudice that can be shown or an abuse of discretion in allowing the evidence.

**5. THE DEFENDANT'S PROSECUTORIAL MISCONDUCT CLAIM FAILS BECAUSE HE HAS FAILED (1) TO DEMONSTRATE THAT THE CHALLENGED COMMENTS WERE IMPROPER, (2) FAILED TO PRESERVE THE ISSUE FOR APPEAL, AND (3) FAILED TO DEMONSTRATE THAT THE CHALLENGED COMMENTS AFFECTED THE VERDICT.**

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A conviction will be reversed only where the defendant can prove that there is a substantial likelihood that the misconduct affected the verdict. Russell, 125 Wn.2d at 86. The failure to object to an improper remark constitutes a waiver of such error unless the remark is deemed to

be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, at 93.

a. The Defendant Has Failed To Prove The Challenged Comments Were Improper.

The defendant claims that the following passage in closing constitutes a clear and unmistakable example of the prosecutor personally vouching for the credibility of the victim:

The next thing I want to talk to you about is, in addition to examining how this person disclosed, it is important that we carefully listen to what they say and the manner in which they relate it.

And the reason that we do that is 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 listen to the testimony, you hear these details and they are things that just have the ring of truth.

38RP 12. The prosecutor followed this passage by discussing the facts that supported NS's disclosure. 38RP 13-15.

A prosecutor is free to comment on the credibility of a witness and argue all reasonable inferences about credibility based on the evidence.

State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), rev. denied, 129 Wn.2d 1012 (1996). Error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). For example, the supreme court found no misconduct by the prosecutor's use of the phrase, "I think the evidence shows," where the record showed that "[a]ll of the statements objected to in this connection contained material which was supported by the evidence." Hoffman, at 94.

Here, the prosecutor was doing nothing more than using a rhetorical concept in discussing the facts and evidence, which demonstrated that the victim was credible. This is not misconduct.

b. The Defendant Cannot Raise The Issue Of Misconduct For The First Time On Appeal.

A claim of prosecutorial misconduct may not be raised for the first time on appeal unless a proper objection, request for a curative instruction, or a motion for a mistrial was made at trial, or the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). Here, there were two comments by the prosecutor that were inappropriate.

First, in rebuttal, the prosecutor discussed what she felt were mischaracterizations of the evidence made by defense counsel, a perfectly appropriate argument to make. In doing so, the prosecutor did step over the line with the following passage:

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

38RP 62. No objection followed.

Second, in discussing the disclosure by NS, the prosecutor made some inappropriately sweeping general statements about children disclosing:

What we know in these cases is children carefully assess who they will disclose to and when they will do it. They are constantly assessing people and determining whether they think those people are worthy of their trust, worthy of telling them.

And, as we discussed in jury selection, what we know is the phenomenon of delayed disclosure is not uncommon, that many people go through life not telling or denying sexual abuse, and confiding to people. Because that's really what it is when you have that experience. The child is choosing to trust you and confide in you what happened to them.

38RP 9. No objection followed.

Because there was no objection made, the defendant must show that the misconduct was so flagrant that no curative instruction could have obviated the resulting prejudice. Neidigh, at 77. But one of the reasons

for placing the burden on the defense to object is “that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor’s remarks.” Klok, 99 Wn. App. at 85. RAP 2.5 creates a relatively small category of error that a trial judge must watch for and guard against even when the parties fail to object and an argument of a prosecutor, this Court has said, “does not readily fall into this category . . . Trial judges have a variety of options available to deal with prosecutorial misconduct in argument.” Id. at 84.

Here, had an objection been raised, the trial court could have admonished the prosecutor about the remark about defense attorneys and could have stopped her sweeping comments about disclosures. Both remedies would have been sufficient. Lough, 125 Wn.2d at 864 (jurors are presumed to follow instructions).

c. The Defendant Cannot Show That The Verdict Was Based On Anything But An Evaluation Of The Evidence.

A conviction will be reversed upon a claim of misconduct only if there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, at 86. Whatever minor prejudice the defendant can ascribe to the alleged misconduct, he cannot show that it overcame his own damning testimony that his 14-year-old stepdaughter, who observed him assault her mother, flirted with him, wanted to be naked in the shower with him, and

wanted to “get laid.” He cannot overcome the fact that he told the jury he would not touch a girl in an inappropriate manner only to be impeached with the fact that he had been convicted of doing just that. And he cannot show that the verdict was based on anything other than the jury’s evaluation of the credibility of NS and the evidence.

**6. THE DEFENDANT IS UNABLE TO SUSTAIN HIS BURDEN IN SEEKING A REVERSAL PURSUANT TO THE “CUMULATIVE ERROR” DOCTRINE.**

The defendant alleges that the cumulative effect of numerous trial errors deprived him of his right to a fair trial. An accumulation of non-reversible errors may deny a defendant a fair trial. Coe, 101 Wn.2d at 789. It is axiomatic however, that to seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Here, as explained above, the defendant has failed to satisfy this burden.

**H. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING THE DEFENDANT FROM CONTACTING LISA WARREN**

The defendant challenges the condition of his sentence prohibiting him from having contact with Lisa Warren. He argues that the condition violates his right of association and is not a crime-related prohibition. This claim has no merit. The condition is reasonably related to the

defendant's conviction as Lisa is the mother of the defendant's two sexual assault victims, the assaults occurred in her house, and she was used by the defendant in an attempt to avoid conviction. Further, the condition was a proper limitation upon the defendant's freedom of association because it was reasonably necessary to protect NS and SS, as well as Lisa.

The defendant's no-contact condition of sentence was imposed pursuant to RCW 9.94A.505(8) and RCW 9.94A.700(5)(e), which provide the court with the authority to impose "crime-related prohibitions." A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(12).

This court reviews the imposition of crime-related prohibitions for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). The defendant argues that imposition of the no-contact condition was an abuse of discretion because it violates his right to association under the First Amendment. Marriage is "one of the basic civil rights of man, fundamental to our very existence and survival." Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). But crime-related prohibitions, which limit fundamental rights are permissible, provided they are imposed sensitively and the restrictions are reasonably necessary to accomplish the essential needs of the state and public order. Riley, at 38.

Riley, for example, was convicted of computer trespass and was prohibited from communicating with others through computer bulletin boards. The court held this was a reasonable crime related means of discouraging his communication with other hackers. Riley, at 38. The condition here is even more narrow, specific, and related to an essential state interest—the protection of NS, SS and Lisa, herself.

The defendant was convicted of sexually assaulting NS and SS. He is a convicted murderer and has assaulted Lisa Warren in front of her two girls. He used Lisa in a failed attempt to circumvent the criminal justice system and avoid conviction for his acts. The no-contact condition with the children is appropriate and justified. The inclusion of Lisa is a reasonable crime-related means of discouraging and hindering the defendant's contact with his young victims. For example, were the defendant to call Lisa's residence, one of the children could answer the phone.

A second reason for the inclusion of Lisa in the no-contact condition is that it protects her and is a reasonable crime-related condition. Lisa was a witness in the case and testified against the defendant. As such, she deserves protection just as much as her children.

Still, the defendant claims that because Lisa was not a "victim" or "witness," a no-contact condition with her cannot be crime-related. There is no support for this claim. While Lisa was not an eyewitness, she certainly

was a witness and there is nothing in the statutory provisions that create the limitation argued by the defendant. To the contrary, while a crime-related prohibition must relate to the crime (certainly the paramour of a man who sexually assaults her two children relates to the crime), the prohibition need not even be causally related to the crime. State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (2000); see e.g. State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (defendant convicted of child rape of six-year-old appropriately prohibited from contacting all children).

Finally, the defendant contends that the no-contact condition involving Lisa impermissibly prohibits him from contacting his child, HW. It does not. The order does not limit in any legal way his ability to have contact with his child. Any practical limitation upon his ability to have contact with his child is the result of being imprisoned and his criminal acts. Were the defendant not in prison, for example, there is nothing about the defendant's sentence that prohibits him from living with his child.<sup>19</sup>

In sum, the defendant cannot show that the trial court abused its discretion in prohibiting him from having contact with Lisa Warren.

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<sup>19</sup> Considering the defendant sexually assaulted his own stepdaughters, the court could have prohibited the defendant from having contact with all minor children. Riley, at 349; Letourneau, at 438; Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (prevention of harm to children is a compelling state interest).

I. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 7 day of July, 2005.

Respectfully submitted,

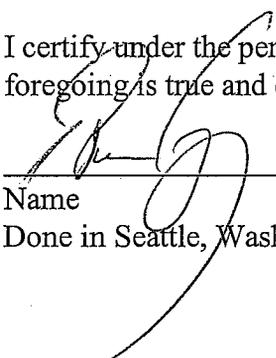
NORM MALENG  
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Elaine Winters, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of Brief of Respondent in STATE V. RICHARD WARREN, Cause No. 54032-7-I in the Court of Appeals of the State of Washington, Division I.

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

  
Name  
Done in Seattle, Washington

07-07-05  
Date

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