

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	No. 79356-5
	)	
v.	)	En Banc
	)	
Richard HEADEN Warren,	)	
	)	
Petitioner.	)	Filed November 20, 2008
_____	)	

Chambers, J. — Richard Warren was convicted of one count of first degree child molestation of his eight-year-old stepdaughter, S.S., and, in a separate trial, three counts of second degree child rape of his fourteen-year-old stepdaughter, N.S. In the first trial, Warren was convicted only of offenses relating to S.S., and in the second trial, he was convicted only of offenses relating to N.S.<sup>1</sup> The Court of Appeals affirmed his convictions in a consolidated appeal. We accepted review primarily to consider two issues: whether the prosecutor committed misconduct during closing arguments and whether the State may lawfully prohibit contact between Warren and his wife.

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<sup>1</sup> This case has involved four trials. Warren’s first trial ended in a mistrial. In the second trial, he was convicted of molesting S.S., but the jury was unable to reach a verdict on the charges relating to N.S. The third trial again resulted in a mistrial. At a fourth trial, Warren was convicted of raping of N.S. For purposes of this opinion, we disregard the two mistrials and refer to the first trial at which there was a conviction as the first trial, and the second at which there was a conviction as the second trial.

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We affirm.

The facts surrounding Warren's offenses are ably described by the Court of Appeals.<sup>2</sup> We find it largely unnecessary to review the facts again.

#### PROSECUTORIAL MISCONDUCT

Warren argues that the prosecutor committed misconduct by repeatedly misstating the burden of proof during closing argument in the first trial. The trial judge overruled Warren's first objection, but after the third time the prosecutor used substantially the same language and Warren made substantially the same objection, the trial judge gave a lengthy curative instruction. During this curative instruction, the trial judge also stated that essentially counsel were "playing with words." Report of Proceedings (RP) (Feb. 20, 2003) at 105. Warren argues that the judge's comment undercuts the seriousness of the misconduct and the effectiveness of the curative instruction. The State properly concedes the prosecutor's language was improper but contends that any error was cured by the trial judge's thorough curative instruction and, in the alternative, that the error was harmless.

The prosecutor's argument was clearly improper and we set forth the pertinent portion of the verbatim report of proceedings for clarity and future guidance. During her rebuttal closing, this exchange occurred:

Ms. Snow [prosecutor]: We also are not clear about the size of the defendant's penis. We have no idea. And for them to ask you to infer everything to the benefit of the defendant is

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<sup>2</sup> *State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006).

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not reasonable.

MR. CARNEY [defense counsel]: Objection, your Honor. Misstates the burden of proof and presumption of innocence.

THE COURT: Counsel, the objection is overruled. Do you want to talk about it? Come here.

(At this time an off-the-record discussion was held.)

THE COURT: Let's move on, Counsel.

MS. SNOW: Reasonable doubt does not mean give the defendant the benefit of the doubt, and that is clear when you read the definition.

Defense counsel calls [S.S.]'s description of what happened a rambling eight-year-old's description. And the bottom line for you is, it has been uncontroverted.

RP (Feb. 20, 2003) at 98-99. The prosecutor continued with an appropriate argument that the jury should not confuse a child's memory with credibility and discussed child testimony concerning penis pumps, pornographic video covers, bathing, and sexual touching. Then the following transpired:

Ms. Snow: Finally, in this case I want to point out that this entire trial has been a search for the truth. And it is not a search for doubt. 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 and it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.

MR. CARNEY: Again, your Honor --

THE COURT: Counsel, just a second. 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 don't have the number in front of me, but I think it is the third instruction. I want you to read that instruction very carefully, particularly the last paragraph of the instruction. 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 of the evidence or lack of evidence."

Now, my statement on that is, after you have done that, after you have reviewed all of the evidence or lack of evidence, and you continue 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. You may complete your argument, Counsel.

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The prosecutor concluded her closing argument briefly without suggesting, again, that the defendant did not enjoy the benefit of any reasonable doubt. Warren did not seek any additional instructions or a mistrial.

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, *cert. denied*, 128 S. Ct. 2964 (2007); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).<sup>3</sup> In this case, the prosecutor's argument was improper because it undermined the presumption of innocence. As we have said recently:

The presumption of innocence is the bedrock upon which the criminal justice system stands . . . . The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

*State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Due

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<sup>3</sup> This has long been our approach to analyzing prosecutorial misconduct. *See, e.g., Yates*, 161 Wn.2d at 774; *Russell*, 125 Wn.2d at 85. Warren urges us to apply instead a constitutional harmless error analysis because the misconduct in this case touches on constitutional rights. Perhaps if a prosecutor violated an accused's right of silence by improperly blurting out the accused had exercised his constitutional right, the constitutional harmless error standard would be appropriate. But Warren's jury was properly instructed on the presumption of innocence. Before us is trial counsel's argument over the application of the instructions and the trial judge's prompt intervention with a curative instruction. We decline to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right.

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process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

But this prosecutor did more than merely suggest otherwise. She sought to undermine the State's burden of proof beyond a reasonable doubt. Telling the jury, "it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt," was simply improper. RP (Feb. 20, 2003) at 104. As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice. *See State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The jury knows that the prosecutor is an officer of the State. It is, therefore, particularly grievous that this officer would so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.<sup>4</sup>

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Here, the prosecutor made the same or similar incorrect statement three times and Warren made prompt objections. The prosecutor's conduct was certainly flagrant. This court's pronouncement of many years ago bears repeating in this instance:

“It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and *such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for.* Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.”

*State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (quoting *State v. Montgomery*, 56 Wash. 443, 447-48, 105 P. 1035 (1909)).

In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Yates*, 161 Wn.2d at 774. Had the trial judge not intervened to give an appropriate and effective curative instruction,

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<sup>4</sup> We take judicial notice that, indeed, the same prosecutor made similar arguments before. In *State v Wells*, noted at 118 Wn. App. 1061, 2003 WL 22286178, the very same prosecutor made the very same “benefit of the doubt” argument; however, the defendant neither objected nor sought a curative instruction. The Court of Appeals held the remark was “entirely inappropriate,” but the defendant waived the misconduct because the remark was not so flagrant and ill-intentioned that it could not have been obviated by a curative instruction. *Id.*

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we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction. *See State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) (some improper prosecutorial remarks may touch upon constitutional rights but are still curable by a proper instruction); *State v. Stenson*, 132 Wn.2d 668, 730, 940 P.2d 1239 (1997). Warren has not shown that he was prejudiced by the prosecutor's improper argument in the first trial.<sup>5</sup>

Warren also argues that the prosecutor's conduct was improper in his

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<sup>5</sup> We respectfully disagree with our dissenting colleagues that *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) applies to this case. In *Sullivan*, the written reasonable doubt instruction given to the jury was flatly incorrect. The Supreme Court unanimously concluded that this was a structural error that deprived the defendant of a fair trial. *Id.* at 278. Warren does not challenge the written instructions given to the jury. The real instructional issue is whether the trial judge's unfortunate statement that "we are playing with words here in a sense" so undermined the correct instruction as to constitute reversible error. Like most errors, even constitutional ones, it is subject to some sort of harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (misstatement of elements subject to harmless error analysis). *Accord Bartlett v. Battaglia*, 453 F.3d 796, 801 (7th Cir. 2006) (declining to extend *Sullivan's* structural error analysis to prosecutorial argument misstating the burden of proof).

We are also not persuaded that anything that falls from a judge's lips during a trial is an instruction to the jury. Warren does not ask that we evaluate the judge's comment that counsel was playing with words as an instruction. Instead he argues—appropriately—that it is relevant to whether the prosecution's misstatement of the law was prejudicial to his case.

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second trial in which he was convicted of offenses against N.S. The State concedes the closing argument was improper insofar as it referred to facts not in evidence. In explaining why N.S. did not report her stepfather's abuse, which had continued for several years, the prosecutor argued that children assess very carefully who they will disclose sexual abuse to and that long delays are common because people frequently repress sexual abuse. No evidence supporting that argument had been offered to the jury. Warren did not object but argues an objection would have been futile because the court had previously made clear it would not hear objections based on mischaracterizing the evidence.<sup>6</sup> But the jury is presumed to follow the instruction that counsel's arguments are not evidence. *Stenson*, 132 Wn.2d at 729-30; *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Given the weight of the properly admitted evidence against Warren, he has failed to show that he was prejudiced by the prosecutor's comments. *See Russell*, 125 Wn.2d at 85.

Warren also argues, and the State properly concedes, it was improper for the prosecutor to tell the jury there were a "number of mischaracterizations" in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense

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<sup>6</sup> The judge had responded to an earlier objection as follows: "Members of the jury, as I have instructed you, and I have obviously instructed both counsel, what counsel say is not evidence. So the objection is overruled because it is up to the jury to decide what the evidence is. If counsel misstates the evidence I'm sure you will correct it in the jury room. An objection to mischaracterizing the evidence during closing argument is not a well founded objection." RP (Nov. 18, 2003) at 44; *see also* RP (Feb. 20, 2003) at 7-8, 94-95.

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attorneys.” RP (Nov. 18, 2003) at 62-63. The prosecutor also described defense counsel’s argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” *Id.* While the prosecutor’s comments were improper because they commented on defense counsel’s role, Warren did not object at the time to these comments, and they are not so flagrant and ill-intentioned that no instruction could have cured them. *See Stenson*, 132 Wn.2d at 719; *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002) (misconduct to directly contrast prosecutor’s role with defense attorney’s role). As in *Yates*, Warren has failed to show prejudice. *See Yates*, 161 Wn.2d at 776 (even if prosecutor’s argument improperly commented on defense counsel’s role, there was no substantial likelihood the comment affected the jury’s decision).

Next, Warren argues that the prosecutor’s “badge of truth” theme during closing argument amounted to misconduct. The prosecutor argued the details in N.S.’s testimony gave it a “badge of truth” and the “ring of truth.” RP (Nov. 18, 2003) at 12. The prosecutor then went over specific parts of N.S.’s testimony that “rang out clearly with truth in it.” *Id.* at 13. Warren did not object. It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

But defense counsel clearly attacked N.S.’s credibility during opening

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statements and cross examination. The prosecutor responded by arguing that the level of detail in N.S.'s testimony raises a reasonable inference that she was telling the truth. For example, N.S. testified that Warren would withdraw before ejaculating during intercourse and that she had difficulty swallowing Warren's ejaculate during oral sex and sometimes would spit it into a sink. The prosecutor argued that these statements had a "ring of truth" and the detail was not the kind one would expect a 14-year-old to know absent abuse. These arguments were not improper. First, there was no explicit statement of personal opinion. *Id.* (prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion). Second, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility. *Stenson*, 132 Wn.2d at 727. Therefore, this argument was not improper.

Finally, Warren argues the prosecutor's closing argument in the second trial was misconduct because the State's interpretation of certain lyrics in the rap song Warren wrote while in jail on these charges was different from the interpretation argued in the first trial. We reject this claim because even if the prosecutor's interpretation was different at the first and second trials, the song was admitted only to impeach Warren's characterization of himself as a caring stepparent. This does not amount to the prosecutor arguing inconsistent theories of liability. *See State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000).

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While we find that the prosecutor made several improper arguments, Warren has not established prejudice.

#### NO CONTACT CONDITION OF SENTENCING

As a condition of his sentence, Warren was prohibited from having contact with his wife, Lisa Warren, for life. He argues that this prohibition is unauthorized by statute and violates his constitutional marriage rights.

We will briefly review the salient facts.

Warren moved in with his then-girlfriend Lisa<sup>7</sup> and her two daughters, N.S. and S.S., around January 2001, and the couple married several months later. By the following spring, Lisa was pregnant with Warren's child. During an argument in March 2002, Warren assaulted Lisa. He pleaded guilty to domestic violence and went to jail.

It was in June 2002 that allegations of child molestation first surfaced. Eight-year-old S.S. told a school counselor she was upset that her stepfather was being released from jail because he did disgusting things to her. After S.S. described two recent incidents in great detail, Warren was charged with first degree rape of a child and first degree child molestation. At first Lisa stood by Warren but when her other daughter, N.S., disclosed that she had been abused as well, Lisa began to cooperate with the State, ultimately testifying against Warren. As a condition of his sentence, the court prohibited Warren from contacting S.S., N.S., and their mother Lisa. He was not

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<sup>7</sup> To avoid confusion, Lisa Warren is referred to by her first name. No disrespect is intended.

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prohibited from contacting his own biological child.

The trial court imposed the no-contact order because Lisa's children were the victims of the crimes and because she testified against Warren at his first trial. The court cited Warren's controlling behavior in general, including the fact that Lisa took the children out of school and avoided subpoenas at Warren's urging.

The Sentencing Reform Act of 1981 (Act), RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions."

Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). "Crime-related prohibitions" are orders directly related to "the circumstances of the crime." RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Id.* at 36-37.

More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *See State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Id.* Additionally, conditions that interfere with fundamental rights must be sensitively imposed. *Riley*, 121

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Wn.2d at 37 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975)).

Whether a condition of sentence prohibiting contact with a spouse who is not the direct victim of the crime is reasonably crime related or violates the fundamental right to marriage are questions of first impression in Washington.<sup>8</sup> However, the Court of Appeals considered similar issues in *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001). The order at issue in that case prohibited all contact between the defendant and his children, although he was convicted only of domestic violence against his wife. *Id.* at 654. The court held that the order prohibiting contact with the children violated Ancira's fundamental right to parent his children because cutting off

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<sup>8</sup> Published case law from other jurisdictions is scant and not directly on point. Florida upheld a condition of probation prohibiting contact with any member of the child victim's family, although this de facto prohibited the defendant from contacting his own daughter, who lived with the victim's family. *Russ v. State*, 519 So. 2d 715 (Fla. Dist. Ct. App. 1988). A Mississippi trial court prohibited the defendant from contacting the families of the victim or the witnesses, but the appellate court did not consider the validity of this condition of probation. *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037 (Miss. Ct. App. 2001). Arizona upheld a condition of probation that the defendant not contact his wife who was also his co-defendant in a theft case. *State v. Nickerson*, 164 Ariz. 121, 791 P.2d 647 (1990). Oregon upheld a condition of probation that the defendant, convicted of obtaining money under false pretenses, could not marry without a court order because he was a bad influence on his fiancée. *State v. Allen*, 12 Or. App. 455, 506 P.2d 528, 529 (1973). On the other hand, Oregon revised a condition prohibiting contact with persons convicted of a crime to allow contact with the defendant's husband, despite his criminal record. *State v. Martin*, 282 Or. 583, 589-90, 580 P.2d 536 (1978). In *Stephenson v. Taylor*, the district court noted a habeas petitioner had not cited any authority for a right to marry a 17-year-old girl when he was forbidden, as a sex offender, from contacting any person under 18. *Stephenson v. Taylor*, No. 0:06-816-RBH, 2000 WL 1068247 (S.D.S. C. Mar. 30, 2007) (unpublished).

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all contact was not reasonably necessary to protect them from the harm of witnessing domestic violence. *Id.*

Warren first argues that the no-contact order was not reasonably crime related because Lisa was not the victim of the crimes. While this is admittedly a close question, we conclude that the trial court did not abuse its discretion. Warren is correct that Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime. *See Riles*, 135 Wn.2d at 349 (no-contact order with minors was not related to crime of rape of adult woman); *Ancira*, 107 Wn. App. at 656 (no contact order with children not necessary when defendant convicted of domestic violence against wife). But unlike the protected parties in the cases cited above, protecting Lisa is directly related to the crimes in this case. She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and Lisa testified against Warren resulting in his conviction of the crime. Warren's criminal history includes convictions for murder and for beating Lisa. There is nothing in the record to suggest that Lisa objects to the no-contact order.<sup>9</sup> Thus, we conclude that protecting Lisa was reasonably related to the crime.

Warren also argues the no-contact order violates his fundamental

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<sup>9</sup> Although the court considered an e-mail from Lisa at sentencing, the contents of the e-mail are not in the record; aside from her cooperation with the State, there is no evidence as to her wishes regarding the no-contact order.

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constitutional right to marriage and to parent his children. The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny. *See Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Although Warren's ability to engage in marital activity is necessarily limited by his imprisonment and the no-contact orders with N.S. and S.S., there remain certain aspects of marriage which may not be denied absent a compelling state interest. *See Turner v. Safley*, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (married inmate still entitled to benefits of marriage such as emotional support, spiritual commitment, eligibility for government benefits, and inheritance and property rights).

We conclude the order prohibiting contact does not violate Warren's fundamental right to marry because it is reasonably necessary to achieve a compelling state interest, namely, the protection of Lisa and her daughters. We are mindful that crime-related prohibitions affecting fundamental rights must be narrowly drawn. *Riley*, 121 Wn.2d at 38 (citing *Consuelo-Gonzalez*, 521 F.2d at 265). There must be no reasonable alternative way to achieve the State's interest. *See Ancira*, 100 Wn. App. at 655.

In *Ancira*, the court struck down the no-contact order because the children could be protected through indirect contact by phone or mail, or

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supervised visitation outside the presence of their mother (who was the victim of the domestic violence at issue). *Id.* Thus, it was not reasonably necessary to cut off all contact with the children. *Id.* Here, by contrast, preventing all contact appears reasonably necessary to protect Lisa. Under these unique facts, we agree with the Court of Appeals that the order prohibiting contact with Lisa was directly related to the circumstances of the crime and was not an unconstitutional restriction on Warren's constitutional rights.

We also agree with the Court of Appeals that the remaining alleged errors do not warrant reversal. We first note that Warren's argument that witnesses' descriptions of their interviews with S.S. and N.S. constituted improper vouching was recently settled by this court in *State v. Kirkman*, 159 Wn.2d 918, 934-37, 155 P.3d 125 (2007) (description of interview protocol of asking child to tell the truth and eliciting promise to do so is not improper vouching). We agree with the Court of Appeals that the evidence of Warren's charges and conviction for child molestation from the first trial was within the trial court's discretion to admit in the second trial under ER 404(b) and ER 609. *See State v. Elmore*, 139 Wn.2d 250, 285-87, 985 P.2d 289 (1999) (discussing res gestae exception to ER 404(b)); *State v. Renneberg*, 83 Wn.2d 735, 738, 522 P.2d 835 (1974) (discussing open door doctrine). Evidence of a sexual device found by S.S. was also within the trial court's discretion to admit. *See State v. DeVincendis*, 150 Wn.2d 11, 22, 74 P.3d 119 (2003) (discussing evidence of grooming behaviors in child sexual abuse

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case). Since we find no improperly admitted evidence, Warren's claim of cumulative error fails.

#### CONCLUSION

While we find the prosecutor's comments were improper, Warren has not established prejudice. We find the no-contact order did not infringe on Warren's constitutionally protected marriage rights. None of Warren's other arguments merit reversal. We affirm.

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AUTHOR:

Justice Tom Chambers

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WE CONCUR:

Justice Susan Owens

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Justice Mary E. Fairhurst

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Justice James M. Johnson

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Bobbe J. Bridge, Justice Pro Tem.

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