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COURT OF APPEALS  
DIVISION II

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NO. 39648-3-II  
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
BY   
DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

SEAN P. STOLL,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable Amber L. Finlay, Judge  
Cause No. 08-1-00438-4

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BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340-0510  
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence of Stoll's prior sex offense that did not satisfy the requirements of RCW 10.58.090(6).
02. The trial court erred in admitting evidence of Stoll's prior sex offense under RCW 10.58.090, which violates the state and federal separation of powers doctrines.
03. The trial court erred in admitting evidence of Stoll's prior sex offense under RCW 10.58.090, which violates federal and state constitutional prohibitions of ex post facto laws.
04. The trial court erred in permitting Stoll to be represented by counsel who provided ineffective assistance by failing to properly object to the admission of evidence of Stoll's prior sex offense under RCW 10.58.090.
05. The trial court erred in giving its purported limiting instructions that permitted the jury to consider the evidence of Stoll's prior sex offense for any purpose the jury deemed relevant, which failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes.
06. The trial court erred in giving its purported limiting instructions that permitted the jury to consider the evidence of Stoll's prior sex offense for any purpose the jury deemed relevant, which constituted a directed verdict.

07. The trial court erred in giving its purported limiting instructions that permitted the jury to consider the evidence of Stoll's prior sex offense for any purpose the jury deemed relevant, which amounted to a comment on the evidence.
08. The trial court erred in permitting Stoll to be represented by counsel who provided ineffective assistance by failing to properly object to the court's purported limiting instructions.
09. The trial court erred in admitting testimony by Detective Stratton that constituted impermissible vouching for S.R.J.'s credibility.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether evidence that Stoll committed a prior sex offense was improperly admitted under RCW 10.58.090? [Assignments of Error Nos. 1-3].
02. Whether the trial court erred in permitting Stoll to be represented by counsel who provided ineffective assistance by failing to properly object to the admission of evidence of Stoll's prior sex offense under RCW 10.58.090? [Assignment of Error No. 4].

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03. Whether the court's purported limiting instructions that permitted the jury to consider evidence of Stoll's prior sex offense for any purpose the jury deemed relevant failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes and constituted a directed verdict and comment on the evidence. [Assignments of Error Nos. 5-7].
04. Whether Stoll was prejudiced as a result of his counsel's failure to properly object to the court's purported limiting instructions? [Assignment of Error No. 8].
05. Whether the trial court abused its discretion in admitting testimony by Detective Stratton that constituted impermissible vouching for S.R.J.'s credibility? [Assignment of Error No. 9].

C. STATEMENT OF THE CASE

01. Procedural Facts

Sean P. Stoll (Stoll) was charged by second amended information filed in Mason County Superior Court on April 9, 2009, with two counts of rape of a child in the first degree, contrary to RCW 9A.44.073. [CP 57-58].

Following a pre-trial hearing, the court ruled that S.R.J., the alleged victim, was competent and available to testify and that her out-of-court statements would be admissible under RCW 9A.44.120. [RP 187-197, 225]. After a mistrial [RP 303; CP 59-77], a second trial to a jury commenced on June 3, the Honorable Amber L. Finlay presiding. The

jury returned verdicts of guilty as charged, Stoll was sentenced within his standard range and timely notice of this appeal followed. [CP 5-21, 33-34].

02. Substantive Facts

According to S.R.J., DOB 03/10/99, Stoll inappropriately touched her on several occasions for about a week. [RP 454, 464-65, 469, 477].<sup>1</sup> Her testimony concerning the extent of the touching is quoted at length.

Q. When you said he touched you with his finger, what did his finger do?

A. I can't remember.

Q. You said it touched that private part of your body, right? The part where you made the "x"?

A. I think so.

....

Q. Okay. Did his - - what part of his body touched the front part of your body that you marked with an "x"?

A. His hand.

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<sup>1</sup> S.R.J. marked an "x" on two body diagrams (Exhibits 5 and 6) to show where Stoll had touched her, in addition to similarly marking another diagram (Exhibit 7) to indicate the part of Stoll's body that she referred to as his "sack." Exhibits 5 and 6 show marks on the vaginal and anal parts of the respective diagrams and Exhibit 7 is marked in the penile area of the diagram. This was done because S.R.J. did not know the names of the body parts she had marked. [RP 461-62, 481].

Q. Did his hand stay on the outside of that area, or go inside, or something else?

A. Outside.

Q. Okay. And when his hand touched you on your back side, did your - - did his hand do - - stay outside, go inside, or do something else?

A. Stayed outside.

[RP 465].

Q. Did his finger go anywhere?

A. No.

Q. When you said he touched you with another part of his body that you called his sack, what did his sack do?

A. I can't remember.

[RP 466].

Q. When he would touch you, would it last a long time, a short time, or something else?

A. I can't remember

[RP 467].

Q. Did he touch - - did he touch you with a part of his body when you were laying on your stomach?

A. Yes.

Q. What part of his body did he touch you with?

A. His seck (sic).

Q. And where did his seck (sic) go?

A. I can't remember.

[RP 468].

S.R.J. did not remember if she was in the second grade during the relevant period but did remember that Stoll had told her not to tell anybody about what he had done. [RP 459, 463 472].

In August 2008, according to her dad and grandmother, S.R.J. first alleged that Stoll had put his finger in her rear. [RP 394-95, 408-09]. On the same day, she told her de facto stepmother, who was not technically married to S.R.J.'s dad, that Stoll had put his hand down her pants in the back. [434, 436, 438, 444]. A subsequent physical examination of S.R.J. proved normal, though she maintained that Stoll had touched her front and rear private parts. [RP 605, 610].

The following September 17, S.R.J. was interviewed by Detective Shelly Stratton, who conducts forensic interviews of children for Mason County. [RP 544, 551]. During the interview, which was played to the jury [RP 572], S.R.J. said that about two years ago, starting on April 24, Stoll, who was staying at her house and sleeping on the floor a couple of feet from her bed, would wake her early in the morning and have her go to

his bed on the floor, where, on more than one occasion, he would vaginally penetrate her and make her promise not to tell. [State's Exhibit 9 at 6-11, 14]. At one point, she said it was a daily routine for about a week. [State's Exhibit 9 at 7].

Prior to the admission of evidence of Stoll's prior sex offense under RCW 10.58.090,<sup>2</sup> the court read the following instruction to the jury:

In a criminal case in which the defendant is accused of a sex offense, evidence of the commission - - of defendant's commission of another sex offense is admissible and may be considered for its bearing on any matter to which it's relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct or offense that is not charged in the information.

[RP 628-29].

Over objection, the court then admitted certified copies of Stoll's statement of plea of guilty and order of disposition concerning his 1998

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<sup>2</sup> A copy of the statute is attached as Appendix A.

offense for communicating with a minor for immoral purposes. [RP 364-370, 630; Exhibits 2 and 10].

Stoll rested without presenting evidence. [RP 641].

D. ARGUMENT

01. EVIDENCE THAT STOLL COMMITTED A PRIOR SEX OFFENSE WAS IMPROPERLY ADMITTED UNDER RCW 10.58.090.

01.1 Evidence of Stoll's Prior Sex Offense Did Not Satisfy the Requirements of RCW 10.58.090(6)

In determining whether evidence of a defendant's prior sex offense should be excluded pursuant to ER 403, RCW 10.58.090(6) directs the trial court to consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;

- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and other facts and circumstances; and
- (h) Other facts and circumstances.

The basic facts regarding Stoll's prior sex offense are these: In May 1998, then 17-year-old Stoll had sexual intercourse with his 12-year-old girlfriend, for which he pleaded guilty to the reduced charge of communication with a minor for immoral purposes, a gross misdemeanor. [State's Exhibits 2 and 10].

Despite any claim to the contrary, there was little if any similarity between the current charges and the prior offense nor a closeness in time between the events, the former occurring 8 to 9 years earlier during a consensual act between two juveniles in a boyfriend-girlfriend relationship with an age difference somewhere between 4 and 5 years, all of which do not parallel the facts and events complained of in the instant charges, which involve an alleged victim of almost half the age of the girlfriend in the prior offense, an age difference of approximately 20 years between Stoll and S.R.J., and a manipulative act ending with a threat of the consequences of disclosing what had occurred. There was no frequency connected to the prior offense, which, it was claimed, occurred once or

twice. [RP 368]. Plus there have been intervening circumstances during the 8 to 9 years between the offenses: “Stoll has fathered a child in a completely adult and age appropriate relationship. He has a 10 year old daughter of his own.” [RP 369]. And any claim of the necessity of the evidence of the prior offense is more than suspect, given that S.R.J. testified along with the five people to whom she had related her version of the events, one of which was filmed and played to the jury.

Although the prior offense was a crime, the probative value of its admission was outweighed by the danger of unfair prejudice under ER 403. The only logical relevancy of the evidence was to show Stoll’s propensity to commit similar acts. Given that the State during closing argument told the jury on two occasions that it could use the evidence of the prior offense for anything it deemed relevant [RP 659, 694], it cannot be declared that the resulting verdicts were the result of a fair trial. See Garceau v. Woodford, 275 F.3d 769, 777-78 (9<sup>th</sup> Cir. 2001), reversed on other grounds at 538 U.S. 202 (2003).

The evidence should not have been allowed under RCW 10.58.090(6). And the error was not harmless. The prejudice resulting from the introduction of the evidence denied Stoll his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984);

State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980). The error was of major significance and was exacerbated by the purported limiting instructions the court gave the jury [RP 628-29; CP 41], which instead of restricting the jury's consideration of the evidence, were tantamount to a directed verdict and comment on the evidence (see subsequent argument on purported limiting instructions, infra at 29).

Whether viewed as an evidentiary error (outcome materially affected) or as a constitutional error (untainted evidence is so overwhelming that it necessarily leads to a finding of guilt), the admission of the evidence here was not harmless. There is a reasonable doubt that the jury would have reached the same verdicts in the absence of the evidence at issue, and the evidence also materially affected the outcome of the trial. Stoll is entitled to a new trial.

01.2 RCW 10.58.090 Violates the Separation of Powers Doctrine

Underlying the basic concept of the separation of powers doctrine is this: Each of the three branches of government—the legislative, executive and judiciary—exercises only the power it is given. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). In this state, the three branches stem from Const. Arts. II, III and IV, while our federal system was derived from U.S. Const Arts. I, II and

III. And while the Washington Constitution does not specifically set forth a clearly defined separation of powers provision, our Supreme Court has recognized that “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991)). This doctrine is critical “in ... preventing the exercise of autocratic power.” Washington State Bar Ass’n v. State, 125 Wn.2d 901, 906-07, 890 P.2d 1047 (1995).

The Washington Supreme Court is vested with the sole authority to govern court procedures under Const. Art 4, § 1. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Concomitantly, under RCW 2.04.190, the same court has the authority

to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and the district courts of the state.

State court rules produce procedural rights, whereas the development of substantive rights is generally within the sole province of the Legislature. State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002).

When a court rule and a statute conflict, the nature of the right at issue determines which one controls. State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Smith, at 501-02. This standard reflects the division of power between the two branches issuing the conflicting regulations. Smith , at 501....

State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995).

According to the notes accompanying RCW 10.58.090, the act is deemed substantive, with the inescapable result that any retroactive application of any substantive change would violate the ex post facto provisions of the federal and state constitutions (see following argument on ex post facto, infra at 14).

If it is assumed, on the other hand, that RCW 10.58.090 is a procedural statute, then the Legislature was without authority to enact it under the separation of powers doctrine, with the result that the statute is void, State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996), and its prejudicial impact on Stoll's case requires reversal of his convictions.

01.3 Effect of State v. Gresham, 153 Wn. App. 659, 2009 WL 4931789, Regarding Separation of Powers

Stoll recognizes that Division I of this court has recently held that RCW 10.58.090 does not violate the separation of

powers doctrine, reasoning that “(s)ince the statute permits, but does not mandate, the admission of the evidence of past sex offenses, it does not circumscribe a core function of the courts.” ¶ 18 WL 4931789.

There are reasons to be cautious about this opinion, for it unswervingly undercuts our Supreme Court’s authority by permitting trial courts the discretion to admit propensity evidence under RCW 10.58.090 even where such evidence heretofore has been excluded unless admissible for a limited and defined purpose under ER 404(b), as directed by our Supreme Court. By ignoring this conflict, which directly interferes with our Supreme Court’s inherent power to promulgate rules, Division I has fallen short of advancing a convincing argument that RCW 10.58.090 does not violate the separation of powers doctrine. This court should not follow this decision and instead reverse Stoll’s convictions.

01.4 The Application of RCW 10.58.090 in this Case Violated Federal and State Constitutional Prohibitions of Ex Post Facto Laws

01.4.1 Procedural Review

Stoll was charged with two offenses that occurred on or about the period between April 24, 2006 and March 31, 2007. [CP 57-58]. RCW 10.58.090 took effect on June 12, 2008. Laws 2008, ch. 90, § 2. Hence the statute took effect after the alleged

offenses but before the trial, which commenced on February 27, 2009 and then again on June 3 following a mistrial.

#### 01.4.2 State and Federal Prohibitions Regarding Ex Post Facto Laws

The ex post facto clauses of the federal and state constitutions, Article I, § 10 and Article I, § 23, respectively, prohibit the enactment of any law that imposes punishment for an act that was not punishable when committed, or which increases the length of punishment following the commission of the offense. Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed 2d 30 (1990); State v. Ward, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

#### 01.4.3 Federal Prohibition

“A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it (citations omitted).” In re Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991).

As previously set forth supra at 13, the notes accompanying RCW 10.58.090 indicate that the act is substantive, which makes sense since it appears to open the door to the unlimited use, including proof of guilt, of

evidence of other sexual misconduct in the prosecution for any sexual offense listed in RCW 10.58.090(4)(a), (b) and (c).

What is worse, as happened in this case, is that RCW 10.58.090 encompasses prior acts and crimes that occurred prior to June 12, 2008, the effective date of the statute. This was crucial here and proved a major disadvantage to Stoll, given that the prosecutor had free rein during her closing and rebuttal arguments to argue that the jury could consider Stoll's prior sex offense for any matter it deemed relevant in the case (see following argument on purported limiting instruction, infra at 29). [RP 659, 694]. The application of RCW 10.58.090 in this case violated the ex post facto clause of the United States Constitution. In re Powell, 117 Wn.2d at 185.

#### 01.4.4 State Prohibition

As demonstrated above, RCW 10.58.090 alters the rules of evidence for the prosecution of persons charged with sex offenses by allowing evidence of other sexual misconduct as proof of guilt, thereby qualifying as a category of ex post facto laws under the framework adopted from the 1798 case of Calder v. Bull, 3 U.S. 386, 390-91, 1 L. Ed. 648 (1708): "Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offence, in order to

convict the offender.” Cf. Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (1999) (“(O)rdinary” rules of evidence do not implicate ex post facto concerns “because they do not concern whether the admissible evidence is sufficient to overcome the presumption of innocence.”). The substantive rules encompassed in the Calder category—prohibiting the retroactive application of laws that alter the legal rules of evidence— as contrasted to the procedural rules addressed in Carmell, is at play here.

In order to enable this court to determine whether greater protection under our state constitution is warranted in this case, our Supreme Court has set forth six nonexclusive criteria in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).<sup>3</sup>

i. Textual language

Our state constitution declares that “(n)o ... ex post facto law ... shall ever be passed.” Const. Art. I, § 23. The use of the adverb “ever” connotes an intent to prevent ex post facto laws.

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<sup>3</sup> The Gunwall factors are: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

ii. Textual differences

Although the language of Article I, § 10 of the United States Constitution and the above parallel provision of our state constitution is similar, the use of the word “ever” in the latter demonstrates that the language of the former falls short of the rights intended to be protected by our state constitution. See State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001).

iii-iv. Constitutional history and preexisting state law

While there is little if any legislative history addressing ex post facto laws, in 1884 our Supreme Court opined that ex post facto laws prohibited by the federal constitution included statutes changing rules of evidence by which less or different testimony was made sufficient to convict(,)” Fox Territory, 2 Wash. Terr. 297, 300, 5 P. 603 (1884), a case that predated the adoption of our state constitution. Importantly, after our constitution was ratified, our Supreme Court, in State v. Lybrger, 2 Wash. 552, 560-61, 27 P. 449 (1881), explained that the Calder factor, supra at 16-17, prohibits changes in “the rules of evidence to make convictions more easy(,)” reflecting the political climate of the day, which included traditional limitations on bills or attainder and ex post facto laws. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 67-68 (2001/2002).

v. Structural differences

As noted by our Supreme Court in State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994), “(t)he fifth Gunwall factor ... will always point toward pursuing an independent state constitutional analysis because the Federal Constitution is a grant of power from the States, while the State Constitution represents a limitation of the State’s power.”

vi. Matters of particular state interest or local concern

The conduct of criminal trials in state courts is a matter of particular state or local concern and does not require adherence to a national standard. State v. Smith, 150 Wn.2d at 152. This court is thus free to give full effect to the intent of the framer’s of the Washington Constitution.

vii. Summary

This discussion and application of the Gunwall factors warrants independent state constitutional analysis. Under this analysis, given that RCW 10.58.090 makes convictions for sexual offenses far more obtainable by altering the rules of evidence, Stoll requests this court to find that the statute violates Article I, § 23 of the

Washington constitution when applied to acts occurring prior to its enactment.

01.5 Effect of State v. Gresham, 153 Wn. App. 659, 2009 WL 4931789, Regarding Ex Post Facto Laws

Division I of this court, in Gresham, supra, held that RCW 10.58.090 did not violate state or federal ex post facto laws, concluding that the statute is essentially procedural because it “does not alter the quantum of evidence necessary to convict(,)” ¶ 28 WL 4931789, thus ignoring, as previously illustrated, the Legislature’s assertion to the contrary. For the reasons argued herein, the state and federal clauses here at issue are not coextensive, as proclaimed by Division I, ¶ 20 WL 4931789, with the result that this court should not follow Gresham and instead reverse Stoll’s convictions.

02. STOLL WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO PROPERLY OBJECT TO THE ADMISSION OF EVIDENCE OF STOLL’S PRIOR SEX OFFENSE UNDER RCW 10.58.090.<sup>4</sup>

A criminal defendant claiming ineffective

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<sup>4</sup> While it is submitted that this issue is properly preserved for appeal based on counsel’s arguments below and RAP 2.5(a)(3), this portion of the brief is presented in the event this court disagrees.

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court find that trial counsel waived the errors claimed and argued in the preceding section of this brief by failing to properly object for the same reasons to the admission of the evidence of Stoll's prior sex offense, or by somehow inviting the error then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly object, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to properly object, the jury was free to use the evidence of Stoll's prior sex offense for any purpose it deemed relevant, including Stoll's propensity to commit the crimes charged.

Counsel's performance was deficient for the reasons argued herein, which was highly prejudicial to Stoll, with the result that he was deprived

of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

03. THE COURT'S PURPORTED LIMITING INSTRUCTIONS THAT PERMITTED THE JURY TO CONSIDER EVIDENCE OF STOLL'S PRIOR SEX OFFENSE FOR ANY PURPOSE THE JURY DEEMED RELEVANT FAILED TO ELIMINATE THE POSSIBILITY THAT THE JURY WOULD CONSIDER THE EVIDENCE FOR IMPROPER PROPENSITY PURPOSES AND CONSTITUTED A DIRECTED VERDICT AND COMMENT ON THE EVIDENCE.

03.1 Instructions

Prior to the admission of evidence of Stoll's prior sex offense under RCW 10.58.090, the court, over objection as to relevancy and prejudice [RP 557-560, 564, 628], read the following instruction to the jury:

In a criminal case in which the defendant is accused of a sex offense, evidence of the commission - - of defendant's commission of another sex offense is admissible and may be considered for its bearing on any matter to which it's relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the

defendant is not on trial for any act, conduct or offense that is not charged in the information.

[RP 628-29].

Over renewed objection [RP 642], included in the court's written instructions to the jury was the following:

Evidence that the defendant has been convicted of a prior offense is not sufficient to prove the defendant guilty of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. The defendant is not on trial for any prior act, conduct, or offense not charged in the information.

[Court's Instruction 5; CP 41].

### 03.2 Overview Applicable Law

#### 03.2.1 Comment on the Evidence

Article IV, § 16 of the Washington Constitution explicitly prohibits judicial comments on the evidence.<sup>5</sup> A judge is prohibited from "conveying to the jury his or her personal attitudes toward the merits of the case." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of this constitutional prohibition will arise not only where the judge's opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

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<sup>5</sup> Article IV, § 16 reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Impermissible judicial comments on the evidence are presumed to be prejudicial, and reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726.

#### 03.2.2 Directed Verdict

The most important element of the right to a jury trial is the right to have the jury, not the judge, reach findings on guilt. Sullivan v. Louisiana, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). A judge may not direct a verdict of guilt in a criminal case no matter how overwhelming or conclusive the evidence is. Id.; United Brotherhood v. United States, 330 U.S. 395, 408, 91 L. Ed. 973, 67 S. Ct. 775 (1947).

#### 03.2.3 Impact of RCW 10.58.090

As recently noted by this court, the operation of RCW 10.58.090, “on the threshold issue of admissibility of other acts evidence has no impact upon the post-admission requirement that our Supreme Court has placed upon the trial court to give a limiting instruction if such evidence is admitted.” State v. Russell, \_\_\_ Wn. App.

\_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 436463 at 13 (citing State v. Foxhoven, 161 Wn. 2d 168, 175, 163 P.3d 786 (2007)).

#### 03.4 Argument

There are many things wrong with the above purported limiting instructions, which the prosecutor conflated during her closing and rebuttal arguments:

The Judge has also told you that you can consider the fact that the defendant has previously been convicted of a sex offense for any - - any matter you see relevant in this case.

[RP 659].

Defendant's prior sex offense can be considered by you for anything that you deem it to be relevant on.

[RP 694].

The instructions had nothing to do with limitation and everything to do with permitting the jury to use the evidence of Stoll's prior sex offense with no discernible limitation. While cautioned that the evidence "was not sufficient to prove the defendant guilty," the instructions allowed if not encouraged the jury to consider the prior offense as a component of such evidence, as reinforced and driven by the prosecutor's above-quoted statements.

Rather than limit the jury's use of the evidence of the prior misconduct ("any matter you see relevant"), the instructions focused instead on the conduct and assumed that because Stoll had acted similarly before, he committed the current charges. "Once a thief always a thief." See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, reviewed denied, 106 Wn.2d 1003 (1986). The jury was free to use the evidence for an improper propensity purpose: to prove Stoll's propensity to commit the crimes charged, see State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997), with the undeniable result that the evidence regarding the prior offense was unmistakably more prejudicial than probative. See State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

More egregious still is that the instructions were equivalent to a directed verdict, in addition to violating the Washington Constitution's prohibition on judicial comments on the evidence.

Aside from permitting the jury to use the evidence of Stoll's prior sex offense for anything—as in everything—it deemed relevant, there is the distinctive recognition that the phrase "evidence of the ... defendant's commission of another (emphasis added) sex offense" clearly implies "in addition to the commission of the current offenses," which is the key factual determination the jury needed to make, not the court, which is strictly prohibited from instructing the jury that "matters of fact have been

established as a matter of law.” State v. Becker, 132 Wn.2d at 64. As such, the instructions amounted to an unconstitutional comment on the evidence and were equivalent to a directed verdict, Becker, 132 Wn.2d at 65 (finding comment “tantamount to a directed verdict”).

This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, “[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff’d in part, rev’d in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibly asserted that the court’s improper comment did not influence the jury. The State cannot sustain its burden of rebutting the presumption that the court’s comment was prejudicial, with the result that this court should reverse Stoll’s convictions.

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04. STOLL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE COURT'S PURPORTED LIMITING INSTRUCTIONS.<sup>6</sup>

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to properly object for the same reasons to the court's two limiting instructions or by somehow inviting the error,<sup>7</sup> then both elements of ineffective assistance of counsel have been established.<sup>8</sup>

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly object, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

The prejudice here is self-evident: but for counsel's failure to properly object, the jury was free to use the evidence of Stoll's prior sex offense for any purpose it deemed relevant, including Stoll's propensity to commit the crimes charged, all of which was exacerbated by the fact that

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<sup>6</sup> While it is submitted that this issue was properly preserved for appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

<sup>7</sup> While counsel appears to have proposed an instruction during the second trial [RP 556-57] along the lines of the instruction he proposed in the first trial [CP 86-87], the document never made it into the court record.

<sup>8</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

the instructions constituted a directed verdict and comment on the evidence.

Counsel's performance was deficient for the reasons argued herein, which was highly prejudicial to Stoll, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

05. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY BY DETECTIVE STRATTON THAT CONSTITUTED IMPERMISSIBLE VOUCHING FOR FOR S.R.J.'s CREDIBILITY.

Over objection [RP 521-22], the trial court admitted the following statements made by Detective Stratton to S.R.J. during her interview with her that was played to the jury:

And you didn't do anything wrong....

[State's Exhibit 9 at page 9].

O.k. Well I'm sorry that this has happened. And you've been very brave....

[State's Exhibit 9 at page 11].

Anything else that you can tell me about that. O.k. You've been very brave. O.k.?

[State's Exhibit 9 at page 13].

Defense counsel argued that the statements were not probative of anything, created sympathy and invaded the province of the jury. [RP 521-22]. In overruling the objection, the court held that the “arguments go to weight, not admissibility.” [RP 522].

In admitting evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; See State v. Robtoy, 93 Wn.2d 30, 42, 653 P.2d 284 (1982). Evidentiary rulings will not be disturbed on appeal absent an abuse of discretion. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

No witness may offer opinion testimony regarding the veracity of a witness because it unfairly prejudices the defendant by invading the jury province. State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). A law enforcement officer’s opinion testimony may be especially prejudicial because it can have “a special aura of reliability.” State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

As the evidence served to bolster 's S.R.J.'s testimony and, in the process, prejudiced Stoll, there can be little doubt that it materially affected the outcome of the trial. The error was of major significance and not harmless. There was no manifest need for this testimony, and Stoll was prejudiced because it invaded the jury's role as a fact finder. Constitutional error is harmless error only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d at 426. On the other hand, the erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Regardless of the analytic prism employed, under either standard, admitting the testimony here at issue was not harmless. There is reasonable doubt the jury would have reached the same verdict without this evidence. The remedy is to reverse.

E. CONCLUSION

Based on the above, Stoll respectfully requests this court to reverse his convictions.

DATED this 5<sup>th</sup> day of March 2010.

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STATE OF WASHINGTON

BY   
DEPUTY

Respectfully submitted,

Thomas E. Doyle  
THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Monty Cobb	Sean P. Stoll #312460
Deputy Pros Atty	A.H.C.C.
P.O. Box 639	P.O. Box 2049
Shelton, WA 98584-0639	Airway Heights, WA 99001

DATED this 5<sup>th</sup> day of March 2010.

Thomas E. Doyle  
Thomas E. Doyle  
Attorney for Appellant  
WSBA No. 10634

APPENDIX "A"

West's RCWA 10.58.090

West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.58. Evidence (Refs & Annos)

→**10.58.090. Sex offenses--Admissibility**

- (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
- (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
- (4) For purposes of this section, "sex offense" means:
  - (a) Any offense defined as a sex offense by RCW 9.94A.030;
  - (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and
  - (c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).
- (5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."
- (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
  - (a) The similarity of the prior acts to the acts charged;
  - (b) The closeness in time of the prior acts to the acts charged;

- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

CREDIT(S)

[2008 c 90 § 2, eff. June 12, 2008.]

#### HISTORICAL AND STATUTORY NOTES

**Purpose--Exception to evidence rule--2008 c 90:** "In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantiative law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict." [2008 c 90 § 1.]

**Application--2008 c 90 § 2:** "Section 2 of this act applies to any case that is tried on or after its adoption." [2008 c 90 § 3.]

**Reviser's note:** Section 2, chapter 90, Laws of 2008 was approved by the legislature on March 20, 2008, with an effective date of June 12, 2008.