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## A. ASSIGNMENTS OF ERROR

1. 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).
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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.
9. 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

1. Did the trial court err and improperly admit evidence under RCW 10.58.090 that Stoll committed a prior sex offense when it methodically addressed each element of that statute and cited caselaw to support its reasoning?
2. Did error occur when the trial court allowed Stoll to be represented by counsel who did not object to the admission of Stoll's prior sex offense conviction when: (a) the balancing tests of RCW 10.58.090 were properly completed; and (b) that statute is constitutional under both state and federal law?
3. By providing the jury with a limiting instruction regarding its potential use of Stoll's prior sex crime conviction immediately before the jury heard testimony about it and again in the set of jury instructions at the close of the case which reminded the jurors that regardless of that conviction the State was still obligated to prove each element of the crime charged, did the trial court err?
4. In admitting statements by a detective who conducted an interview with the child victim, S.R.J., did the trial court abuse its discretion when the statements did not: (a) bolster S.R.J.'s testimony; (b) have a fundamental impact on the jury's verdict; and (c) if error occurred it was harmless?

## C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Stoll's recitation of the procedural history and facts and adds the following:

In determining whether Stoll's prior conviction for communication with a minor for immoral purposes should be admitted into evidence, the trial court conducted the requisite analysis as mandated under RCW 10.58.090-Sex offenses-admissibility. RP Vol.12: 375-380. The trial court began its analysis by ruling that the State gave Stoll proper notice as required under subsection (2) of that statute. RP Vol.12, 376: 1-2. Stoll's 1998 conviction for communication with a minor for immoral purposes was proven by a preponderance of the evidence under subsections 4(a)<sup>1</sup> and/or (c)<sup>2</sup>, which satisfied subsection (6)(f) of the statute. RP Vol.12, 376: 2-5.

Citing to "Benally,"<sup>3</sup> the trial court addressed subsection (6)(b)-The closeness in time of the prior acts to the acts charged. RP Vol.12, 376: 6-12. As the court reasoned:

Closeness in time; if you review the case law, the federal case law, which we'll use as guidance here because this is a relatively new Statute modeled after the federal one, the

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<sup>1</sup> RCW 10.58.090(4)(a)-Any offense defined as a sex offense by RCW 9.94A.030.

<sup>2</sup> RCW 10.58.090(4)(c)-Any violation under 9.68A.090-communication with a minor for immoral purposes.

<sup>3</sup> United States v. Benally, 500 F.3d 1085, 74 Fed. R. Evid. Serv. 361 (C.A. 10 2007).

Court will find that the time there was 1998 for that conviction, and the alleged acts here occurred in 2007. That under the case law, that is close enough in time, as indicated by the case--RP Vol.12, 376: 6-12.

Moving to subsection (6)(c)-Frequency of the prior acts, the trial court, based on the State's offer of proof, found that Stoll had "sexual intercourse" on "at least more than one time" for his 1998 conviction. RP Vol.12, 376: 14-18.

Addressing subsection (6)(d)-The presence or lack of intervening circumstances, the trial court did not accept Stoll's argument that his having a child between 1998 and the time this offense occurred constituted an intervening circumstance. RP Vol.12, 376: 21-25; 377: 1-2. Regarding this subsection, the court also reasoned:

There's no indication of any treatment that the Court's been provided [with], or any other unusual circumstance such as Mr. Stoll was heavily intoxicated or under the influence or use of drugs at that time versus not now to the extent that it would impact his ability to understand clearly what he was doing. RP Vol.12, 377: 11-16.

Moving to subsection (6)(a)-The similarity of the prior acts charged, the trial court distinguished the facts of Stoll's 1998 conviction with those of his case at trial. RP Vol.12, 377: 17-25. Specifically, the court noted that in Stoll's 1998 case, the victim was 12 and Stoll was 17 or 18. RP Vol.12, 377: 17-21. In this case, the court found that while Stoll was in his 20s, the victim was 6 or 7. RP Vol.12, 377: 17-21.

The court also distinguished the nature of the relationships in both cases in examining subsection (6)(a): Whereas Stoll was “in a dating relationship” with the 12 year old in the 1998 case, he (Stoll) was “more of becoming part of the [victim’s] family” and was “residing in the home” in this one. RP Vol.12, 377: 22-25. Ultimately, the trial court found that while the two relationships were “not exactly similar,” Stoll employed “manipulation in both instances in order to gain access” to the juvenile females. RP Vol.12, 378: 1-11. In making that finding, the trial court compared the facts of both cases:

...[Y]ou have a dating relationship, you have the other one where he’s in the home, [s]pecifically the one where he was at home, he was sleeping near her and then threatened her, told her not to say anything. But how he gained access was basically by sleeping near her. And the other one was entered in a dating relationship and essentially not telling her parents the truth about how old he was in order to date her. RP Vol.12, 378: 3-10.

While the court noted the age differences between the victims in each case, it also reasoned that both females were “very young,” not peer age, and were “inappropriate people” for Stoll to “have a relationship with.” RP Vol.12, 378: 12-19. In that sense, the court found Stoll’s 1998 conviction and the facts of this case to be similar. RP Vol.12, 378: 19.

In analyzing subsection (6)(e)-The necessity of the evidence beyond the testimonies already offered at trial, the trial court ruled that:

The necessity in this case is that there is no other evidence beyond what the young girl has said. There's no scientific or forensic testimony that would also come in in establishing how this occurred. So the necessity of this evidence beyond the testimony that's already offered at trial, the Court would find would be great.  
RP Vol.12, 378: 21-24; 379: 1-2.

The final substantive prong of RCW 10.58.090, subsection (6)(g)<sup>4</sup> involving prejudice, the court balanced its reasoning on two main factors: (1) the jury would be provided with a limiting instruction, and (2) testimony regarding Stoll's 1998 conviction would be "minimized," in that involved simply "a guilty plea and a conviction." RP Vol.12, 379: 3-17. Because the court did not find "any other facts or circumstances" pertaining to this issue under subsection (6)(h), the testimony was allowed, as the court found that it would be:

[P]robative, demonstrates a propensity for an attraction to children, which is relevant to whether or not the actual crime occurred, because this is the issue in the [present] case; did this actually happen. RP Vol.12, 380: 8-13.

Prior to the testimony on Stoll's 1998 conviction, the court read the following limiting instruction to the jury:

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

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<sup>4</sup> 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.

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 Vol.15 628: 23-25; 629: 1-12.

Prior to closing argument, the jury was also instructed that:

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.  
RP Vol.15 649: 17-20, Instruction No. 5.

The primary testimony that the State elicited on direct examination regarding Stoll's 1998 conviction is that it was from juvenile court regarding one count of "Communication with a Minor for Immoral Purposes." RP Vol.15 629: 12-15.

### 3. Summary of Argument

The trial court did not err and improperly admit evidence under RCW 10.58.090 that Stoll committed a prior sex offense because: (a) the court properly and methodically addressed each element of the statute and cited caselaw to support its reasoning; and (b) RCW 10.58.090 is

constitutional. Although the State's Gunwall<sup>5</sup> analysis shows that independent state constitutional analysis is not warranted because RCW 10.58.090 contains adequate safeguards that protect defendants charged with sex crimes, all of Stoll's constitutional arguments are addressed out of an abundance of caution.

Stoll's separation of powers argument fails under the rationale of Gresham<sup>6</sup>, because the statute is permissive and not mandatory. Put another way, the trial court's admission of evidence involving Stoll's prior sex offenses did not "circumscribe a core function of the courts," and RCW 10.58.090 does not violate either state or federal constitutional authority.

The ex post facto argument advanced by Stoll likewise fails under the reasoning in Scherner<sup>7</sup>, because all RCW 10.58.090 does is to simply create a category of potentially admissible evidence. RCW 10.58.090 has neither altered the definition of the crime that Stoll was charged with nor increased the punishment for criminal acts.

Error also did not occur when the trial court allowed Stoll to be represented by counsel who did not object to the admission of Stoll's prior sex offense conviction because the balancing tests of RCW 10.58.090

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<sup>5</sup> State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986).

<sup>6</sup> State v. Gresham, 153 Wash.App. 659, 223 P.3d 1194 (2009).

<sup>7</sup> State v. Scherner, 153 Wash.App. 621, 225 P.3d 248 (2009).

were properly completed, and that statute is constitutional under both state and federal law.

Because the trial court provided the jury with a limiting instruction regarding its potential use of Stoll's prior sex crime conviction (a) immediately before the jury heard testimony about it, and (b) again in the set of instructions at the close of testimony, error did not occur because both instructions reminded the jurors that regardless of Stoll's conviction, the State was still obligated to prove each element of the crime charged.

Both the limiting and closing instructions were proper, because neither eliminated or reduced an element of the crime charged that the State had to prove beyond a reasonable doubt. Likewise, the limiting instruction did not constitute a directed verdict because it did not change the State's burden of proof. Admission of Stoll's prior sex crime conviction was not propensity evidence and did not reduce the quantum of evidence necessary for conviction, because RCW 10.58.090 relates to the admissibility of evidence and not its sufficiency.

The trial court also did not abuse its discretion when it admitted statements by a detective who conducted an interview with the child victim S.R.J., because the statements did not: (a) bolster S.R.J.'s testimony; (b) have a material impact on the verdict; and (c) if error

occurred it was harmless because the evidence of Stoll's guilt was overwhelming.

As Delaney Johnson testified, S.R.J., then 7 or 8, disclosed that Stoll, who was then in his 20s, had "put his finger in her rear end and told her that it'd help her do the splits 'cause she was in cheerleading." RP Vol.12, 394: 22-25; 395: 1-2. The admission of the detective's statements that S.R.J. was "very brave" and that she (the detective) was "sorry that this has happened" were at most innocuous. RP Vol.14, 521: 18-25; 522: 1-22; see State's Exhibits 8 & 9.

The State respectfully requests the Court to affirm Stoll's judgment and sentence as being complete and correct.

#### E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR AND IMPROPERLY ADMIT EVIDENCE UNDER RCW 10.58.090 THAT STOLL COMMITTED A PRIOR SEX OFFENSE BECAUSE:
  - (a) THE COURT PROPERLY AND METHODICALLY ADDRESSED EACH ELEMENT OF THE STATUTE AND CITED CASELAW TO SUPPORT ITS REASONING; AND
  - (b) RCW 10.58.090 IS CONSTITUTIONAL.
    - (i) The Trial Court's Analysis of Stoll's Prior Sex Offense Conviction Satisfied RCW 10.58.090.

The trial court thoughtfully and methodically parsed RCW 10.58.090 and correctly concluded that because its elements were

satisfied, evidence of Stoll's prior sex crime conviction should be admitted.

While noting the age differences between Stoll and his juvenile victims, the court succinctly reasoned that prong (6)(a)<sup>8</sup> of the statute was satisfied because Stoll used manipulation in both instances to gain access to juvenile females. RP Vol.12, 378: 1-11. Subsection (6)(b)<sup>9</sup> was likewise met under Benally, because there, evidence of the defendant's prior sex crimes that occurred some forty years earlier was deemed admissible. Benally, 500 F.3d at 1088, 1091-1092. In Stoll's case, just nine years separated his 1998 conviction and date of his current offense in 2007. RP Vol.12, 376: 6-12.

Subsection (6)(c)<sup>10</sup> was also satisfied, because the trial court accepted the State's offer of proof that Stoll had "sexual intercourse" on "at least more than one time" for his 1998 conviction. RP Vol.12, 376: 14-18. In addressing prong (6)(d)<sup>11</sup>, the trial court rejected Stoll's argument that his having had a child between 1998 and 2007 constituted an intervening circumstance, and intimated, as did the court in Benally, that treatment, intoxication and/or drug usage, given certain facts, might. RP Vol.12, 377: 11-16; see: Benally, 500 F.3d at 1093.

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<sup>8</sup> RCW 10.58.090(6)(a)-The similarity of the prior acts charged.

<sup>9</sup> RCW 10.58.090(6)(b)-The closeness in time of the prior acts to the acts charged.

<sup>10</sup> RCW 10.58.090(6)(c)-Frequency of the prior acts.

The trial court also concluded that subsection (6)(e)<sup>12</sup> was met primarily because, “there is no other evidence beyond what the young girl has said,” and that “no scientific or forensic testimony” that would establish “how this occurred” would be presented. RP Vol.12, 378: 21-24; 379: 1-2. Subsection (6)(f)<sup>13</sup> was established at the outset, because Stoll’s prior act was indeed a conviction from 1998, and subsection (6)(h)<sup>14</sup> did not apply. CP 69; RP Vol.12, 380: 8-9.

In analyzing subsection (6)(g)<sup>15</sup>, the trial court found that Stoll would not be prejudiced by the admission of evidence regarding his 1998 sex crime conviction for two reasons: (1) the jury would be provided with a limiting instruction, and (2) any testimony regarding the 1998 conviction would be reduced to just Stoll’s guilty plea and conviction. RP Vol.12, 379: 3-17. This rationale comports with Division One’s reasoning in Schnerer, where that Court recently concluded in a child molestation case:

As long as the protections of ER 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.

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<sup>11</sup> RCW 10.58.090(6)(d)-The presence or lack of intervening circumstances.

<sup>12</sup> RCW 10.58.090(6)(e)-The necessity of evidence beyond the testimonies already offered at trial.

<sup>13</sup> RCW 10.58.090(6)(f)-Whether the prior act was a criminal conviction.

<sup>14</sup> RCW 10.58.090(6)(h)-Other facts and circumstances.

<sup>15</sup> RCW 10.58.090(6)(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.

Schnerer, 153 Wash.App. at 654-655.

Based on a thorough evaluation and careful balancing of all the sections in RCW 10.58.090, the trial court correctly found that evidence of Stoll's conviction would be "probative," and also demonstrate "a propensity for an attraction to children," which would ultimately be "relevant to whether the actual crime occurred." RP Vol.12, 380: 8-13. The trial court in Stoll's case reached its decision to admit evidence of Stoll's 1998 conviction after a careful analysis of RCW 10.58.090 that encompassed recent as well as relevant state and federal case law, statutes, and evidence rules. Error did not occur.

(ii) RCW 10.58.090 Is Constitutional and Does Not Violate the Separation of Powers Doctrine.

Constitutional challenges to legislation are questions of law that are reviewed de novo. Gresham, 153 Wash.App at 663. Statutes are presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. Gresham, 153 Wash.App. at 664.

The doctrine of separation of powers is implicit in our constitution, derived from the distribution of power into three coequal branches of government. Schnerer, 153 Wash.App. at 643. However, the three

branches are not hermetically sealed and some overlap must exist. City of Fircrest v. Jensen, 158 Wash.2d 384, 393, 143 P.3d 776 (2006). The inquiry that must be made is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. Fircrest, 158 Wash.2d at 393.

The authority to enact evidence rules is shared by the Supreme Court and the legislature. Fircrest, 158 Wash. at 394. The Supreme Court is vested with judicial power from article IV of our constitution and from the legislature under RCW 2.04.190. The court's authority to govern court procedure flows from these dual sources of authority. The legislature's authority to enact rules of evidence has long been recognized by the Supreme Court. State v. Pavelich, 153 Wash. 379, 381, 279 P. 1102 (1929). The adoption of the rules of evidence is a legislatively delegated power of the judiciary. Pavelich, 153 Wash. at 381. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. Fircrest, 158 Wash.2d at 394.

When rules and statutes cannot be harmonized, the nature of the right at issue determines which one controls. Gresham, 153 Wash.App. at 667. Whenever there is an irreconcilable conflict between a court rule and

a statute concerning a matter related to the court's inherent power, the court rule will prevail. Gresham, 153 Wash.App. at 667.

The Court in Gresham has succinctly addressed Stoll's separation of powers argument by holding that RCW 10.58.090, while permissive in allowing 404(b) evidence, also preserves the trial court's authority to exclude evidence of past sex offenses under ER 403. Gresham, 153 Wash.App. at 669. As the Court in Gresham correctly reasoned:

RCW 10.58.090(1) states, "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<sup>16</sup> notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403. Gresham, 153 Wash.App. at 669-670.

Advancing this rationale a step further, the Gresham Court reasoned that with this language, the legislature recognized the trial court's ultimate authority to determine what evidence will be considered by the finder of fact in each case. Gresham, 153 Wash.App. at 670. Because the statute is permissive and not mandatory, the trial court's admission of evidence involving prior sex offenses does not "circumscribe a core function of the courts."

The reasoning in Gresham is also quite similar to the 10<sup>th</sup> Circuit's opinion in Benally, which examined Federal Evidence Rules (FER) 413

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<sup>16</sup> Emphasis in the original.

and 414 in addressing propensity evidence in the context of sexual assault and child molestation. The difference in Benally is that while “congressional intent” instead of the Washington State Legislature or Washington Supreme Court was involved, the underlying goal remains unchanged: an intent regarding the admission of evidence tending to show a defendant’s propensity to commit sexual assault or child molestation. Benally, 500 F.3d at 1090.

Stoll’s argument that Gresham “unswervingly undercuts our Supreme Court’s authority by permitting trial courts the discretion to admit propensity evidence” is in error, because any defendant, under the protections of RCW 10.58.090, will have: (a) the trial court judge serving as gatekeeper in applying the multipart test to determine whether the evidence will be admitted; and (b) an ER 403 balancing test to protect him/her from unfair prejudice. AB: 14. RCW 10.58.090 does not violate the separation of powers doctrine, just as FER 413 and 414 do not offend federal law, rendering Stoll’s argument regarding separation of powers meritless.

(iii) As Applied in Stoll’s Case RCW 10.58.090 Did Not Violate Either State or Federal Constitutional Prohibitions of Ex Post Facto Laws.

The United States Constitution declares that “[n]o state shall...pass any...ex post facto law.” U.S. Const. art. I, § 10; see: Scherner, 153 Wash.App. at 635. The Washington Constitution includes a virtually identical prohibition: “No...ex post facto law...shall ever be passed.” Wash. Const. art. I, § 23. Both the United State Supreme Court and the Washington Supreme Court have repeatedly endorsed the analytical framework articulated in Calder v. Bull for analyzing ex post facto violations. Scherner, 153 Wash.App. at 635. The framework in Calder identifies four categories of ex post facto laws:

1<sup>st</sup>. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was, when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

4<sup>th</sup>. 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 offense, in order to convict the offender. Calder, 3 U.S. (3 Dall.) 386, 390, 1. L.Ed. 648 (1798).

The crux of Stoll’s ex post facto argument is that the trial court’s admission of his 1998 sex crime conviction under RCW 10.58.090 prejudiced him because: (1) that statute encompassed prior acts and crimes

that occurred prior to June 12, 2008; and (2) the State had “free rein” to argue Stoll’s conviction for whatever purpose it chose. AB: 16. Stoll’s argument fails, however, under the rationale of either Scherner or Gresham, because all RCW 10.58.090 does is to “simply create a category of potentially admissible evidence.” Scherner, 153 Wash.App. at 642-643. RCW 10.58.090, as the Scherner Court reasoned, did not alter the definition of the crime that Stoll was charged with, nor increase the punishment for criminal acts. Scherner, 153 Wash.App. at 642.

Both Scherner and Gresham cite to the U.S. Supreme Court decision, Carmel v. Texas, as an example where a rule did change the quantum of evidence and the defendant was unfairly prejudiced by its admission. In Carmel, ex post facto was problematic because an amendment applied retroactively to Texas criminal procedure reduced the amount of proof necessary to support a number of the defendant’s sex crime convictions. Carmel v. Texas, 529 U.S. 513, 516, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Before September 1, 1993, the Texas Criminal Code specified that a victim’s testimony by itself about a sexual offense could not support a conviction unless corroborated by other evidence or the victim informed another person of the crime within six months after it occurred. Carmel, 529 U.S. at 516. If a victim was under 14 at the time of the crime,

however, the victim's testimony alone could support a conviction. The 1993 amendment allowed the victim's testimony by itself to support a conviction if the victim was under 18.

By applying this 1993 amendment retroactively to that defendant's case, the Texas courts reduced the quantum of evidence necessary to convict the defendant and in doing so, violated ex post facto.

The main distinction between Carmel and Stoll's case is that RCW 10.58.090 did not reduce the quantum of evidence necessary for a jury to convict, because it "simply create[ed] a category of potentially admissible<sup>17</sup> evidence." Scherner, 153 Wash.App. at 642-643. Put another way, while the amended criminal code in Carmel fundamentally changed the amount of evidence that Texas needed to convict the defendant, i.e., a victim's testimony by itself could now be used to convict even if he/she was over 14 but under 18, RCW 10.58.090 is instead permissive, not mandatory.

For any evidence of Stoll's prior sex crime to be presented to the jury under RCW 10.58.090, it had to first pass through the multi-pronged tested enunciated in the statute, and then clear an ER 403 balancing test. Only then did the trial court have to decide whether evidence of Stoll's prior sex crime conviction should be admitted. ER 609- Impeachment by

Evidence of Conviction of Crime, although an evidence rule, is comparable to RCW 10.58.090, because it contains a balancing test that can allow a trial court to admit evidence of a witness' prior conviction, here of dishonesty instead of a sex offense.<sup>18</sup> Applying the rationale of the U.S. Supreme Court in Carmel, RCW 10.58.090 does not violate ex post facto, and error did not occur.

(iv) Gunwall Analysis: Independent State Constitutional Analysis Is Not Warranted Because RCW 10.58.090 Contains Adequate Safeguards That Protect Defendants Charged With Sex Crimes.

Six nonexclusive neutral criteria are relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution:

1. The textual language of the Washington State Constitution;

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<sup>17</sup> Emphasis added.

<sup>18</sup> ER 609 Impeachment by Evidence of Conviction of Crime. (a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions;
3. State constitutional and common law history;
4. Preexisting state law;
5. Differences in structure between the federal and state constitutions;
6. Matters of particular state interest or local concern.<sup>19</sup>

#### Analysis

1. The textual language of the Washington State Constitution: Stoll is correct in that the Washington State Constitution declares, “No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” WA Const. Art. I, § 23. It is also agreed that the use of the adverb “ever” was included in Art. I, § 23 with the intent to prevent ex post facto laws.
  
2. Significant differences in the texts of parallel provisions of the federal and state constitutions: Article I, Section 9 of the U.S. Constitution does not include the adverb “ever,” but instead reads: “No Bill of Attainder or ex post facto Law shall be passed.” See: Scherner, 153 Wash.App. at 635. This is not dissimilar to the

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<sup>19</sup> State v. Gunwall, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986).

meaning expressed in the Washington State Constitution, as both constitutions place a prohibition on the passage of ex post facto laws.

3. State constitutional and common law history: In 1908, the Washington State Supreme Court in State v. Gilluly reversed a defendant's forgery conviction because of a violation of ex post facto. State v. Gilluly, 50 Wash.1, 3, 96 P. 512 (1908). Specifically, the Court reversed because that defendant was sentenced under a statute that was approved by the Governor on March 13, 1907, and took effect on June 11, 1907; the defendant was found to have committed his crime on April 11, 1907. The Court's reasoning was succinct:

We think it cannot be questioned that the sentence should have been imposed under the law which was in force and effect at the time the crime was committed. Gilluly, 50 Wash. at 3.

Washington Courts have closely scrutinized ex post fact concerns since at least the early 1900s.

4. Preexisting state law: Stoll is correct that in the early Washington cases, Fox v. Territory<sup>20</sup> and Lybarger v. State,<sup>21</sup> the Supreme

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<sup>20</sup> Fox v. Territory, 2 Wash. Terr. 297, 300-301, 5 P. 603 (1884).

Court followed Article I, Section 9 of the U.S. Constitution, in that ex post facto laws shall not be passed. In Lybarger, the Court concluded that the Washington law which changed the mode of procedure from an indictment to an information did not constitute an ex post facto law under the federal constitution. Lybarger, 2 Wash. at 555. Specifically, the Court held that:

The law complained of makes no new offense. It give no new definition to the crime he is charged with. It does not increase the punishment for the commission of the crime. It does not change the rules of evidence to make conviction more easy. None of his rights are interfered with. Lybarger, 2 Wash. at 560.

5. Differences in structure between the federal and state constitutions:

The Washington State constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789. City of Pasco v. Mace, 98 Wash.2d 87, 99, 653 P.2d 618 (1982). The state constitution limits<sup>22</sup> powers of state government, while the federal constitution grants power to the federal government. State v. Iniguez, 167 Wash.2d 273, 289, 217 P.3d 768 (2009). While the structural differences in federal and state constitutions mean the federal analysis is not binding upon our state

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<sup>21</sup> Lybarger v. State, 2 Wash. 552, 556, 27 P. 449 (1891).

<sup>22</sup> Emphasis in the original.

constitutional analysis, it can still guide us because both recognize similar constitutional principles. State v. Lakotiy, 151 Wash.App. 699, 712-713, 214 P.3d 181 (2009).

6. Matters of particular state interest or local concern: The legislature's purpose for adopting RCW 10.58.090 as an exception to Evidence Rule 404(b) is to ensure that juries receive the necessary evidence to reach a just and fair verdict. Gresham, 153 Wash.App. at 665; see: S.B. 6933, at 412-414, 60<sup>th</sup> Leg. Reg. Sess. (Wash. 2008).

7. Conclusion of Gunwall Analysis: Independent state constitutional analysis is not warranted because RCW 10.58.090 contains adequate safeguards that protect defendants charged with sex crimes. The State addresses Stoll's constitutional arguments out of an abundance of caution.

2. ERROR DID NOT OCCUR WHEN THE TRIAL COURT ALLOWED STOLL TO BE REPRESENTED BY COUNSEL WHO DID NOT OBJECT TO THE ADMISSION OF STOLL'S PRIOR SEX OFFENSE CONVICTION BECAUSE:
- (a) THE BALANCING TESTS OF RCW 10.58.090 WERE PROPERLY COMPLETED; AND
  - (b) THAT STATUTE IS CONSTITUTIONAL UNDER BOTH STATE AND FEDERAL LAW.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. State v. Walker, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see: Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Stoll's attorney argued vigorously that under RCW 10.58.090 evidence of his client's prior sex crime conviction should not be presented before the jury because it could not pass the multi-pronged balancing test:

But the fact is that in this case, this evidence is not necessary...its probative value is limited, and its prejudice is great...and I think in this case that's dispositive. RP Vol.12, 364: 16-20.

Counsel for Stoll provided effective assistance even though it was not ultimately successful, because he posited a persuasive argument confined to valid law, here RCW 10.58.090.

3. BECAUSE THE TRIAL COURT PROVIDED THE JURY WITH A LIMITING INSTRUCTION REGARDING ITS POTENTIAL USE OF STOLL'S PRIOR SEX CRIME CONVICTION
  - (a) IMMEDIATELY BEFORE THE JURY HEARD TESTIMONY ABOUT IT; AND
  - (b) AGAIN IN THE SET OF JURY INSTRUCTIONS AT THE CLOSE OF TESTIMONY,ERROR DID NOT OCCUR BECAUSE BOTH INSTRUCTIONS REMINDED THE JURORS THAT REGARDLESS OF STOLL'S CONVICTION THE STATE WAS STILL OBLIGATED TO PROVE EACH ELEMENT OF THE CRIME CHARGED.

Jury instructions challenged on appeal are reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The effect of a particular phrase in an instruction is examined by considering the instructions as a whole and reading challenged portions in the context of all the instructions given. Pirtle, 127 Wn.2d at 656. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 908-909, 976 P.2d 624 (1999). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The jury is

presumed to follow the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982).

Article IV, § 16 of the Washington State Constitution prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. State v. Becker, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997). In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law. State v. Primrose, 32 Wash.App. 1, 3, 645 P.2d 714 (1982).

In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004). Issues of conflicting witness testimony, witness credibility and the persuasiveness of the evidence must be left to the trier of fact. Thomas, 150 Wash.2d at 874-875.

(i) Both the Limiting and Closing Instructions Were Proper

The limiting instruction that the trial court provided to the jury immediately prior to testimony regarding Stoll's prior sex crime conviction is this:

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 Vol.15, 628: 23-25; 629: 1-12.

This cautionary instruction was reiterated in Instruction No. 5 at the close of testimony:

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. CP: 70.

Contrary to Stoll's argument that these instructions had "nothing to do with limitation," neither instruction eliminated an element of the crime charged that the State had to prove beyond a reasonable doubt. AB: 26. Stoll's argument regarding the phrase in the limiting instruction, "evidence of the commission--of defendant's commission of another<sup>23</sup> sex offense" is purely a play on linguistics and semantics: Logically, since Stoll was charged with two counts of rape of a child and the jury was about to hear

that Stoll had committed a prior sex offense, no unfair prejudice could occur by the jury hearing “another sex offense” in the limiting instruction. AB: 27. In other words, a reasonably prudent juror would know from the trial court’s use of the word “another” in conjunction with what they (the jurors) knew he was already charged with, their conclusion would be that had a prior sex crime conviction, which they heard about from Detective Pittman’s immediately afterwards. RP 629: 13-25; 630: 1-15.

As was outlined in section 1 of the State’s argument above,<sup>24</sup> the trial court correctly parsed RCW 10.58.090, completed the requisite balancing tests and admitted evidence of Stoll’s prior sex crime conviction. To further safeguard Stoll’s presumption of innocence, the trial court provided two instructions delineating what the jury could and could not do with Stoll’s prior conviction. The State’s argument regarding Stoll’s prior conviction was simply that; argument. Through Instruction No. 1, the jury was specifically told that:

The attorney’s remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court. CP: 70.

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<sup>23</sup> Emphasis added.

<sup>24</sup> See: Pages 11-14.

The limiting instruction specifically states that Stoll's prior sex offense "may<sup>25</sup> be considered," which allowed the jury the jury to either use or ignore it as they chose within the limited confines of its admissibility. RP Vol.15, 629: 2-3. Stoll's argument that "the jury was to use the evidence for an improper propensity purpose" was addressed by the second half of the limiting instruction, which clearly stated that mere admission of Stoll's prior conviction did not lessen the State's burden of proof. AB: 27. This is similar to the limiting instruction that the trial court gave in Scherner:

In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information. Scherner, 153 Wash.App. at 639.

Citing to Benally, the Scherner Court noted that while this instruction appears to have been adopted from that case, it is not the only type of instruction that may be given in such cases. Scherner, 153 Wash.App. at

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<sup>25</sup> Emphasis added.

640, Fn. 38. The trial court did not err in providing this limiting instruction the jury.

(ii) The Court's Limiting Instruction Did Not Constitute a Directed Verdict.

The limiting instruction that the trial court used in Stoll's case is not materially different than the one in either Benally or Scherner, and does not constitute a directed verdict. See: AB 27. As the Scherner court reasoned, RCW 10.58.090 did not change the State's burden of proof for convicting that defendant of child molestation. Scherner, 153 Wash.App. at 640.

In Stoll's case, regardless of the admission of evidence under RCW 10.58.090, the State still had to prove the following to convict him of rape of a child in the first degree:

To convict the defendant of the crime of rape of a child in the first degree charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between April 24, 2006, and March 31, 2007, the defendant had sexual intercourse with S.R.J., separate and distinct from those acts alleged in Count II;
- (2) That S.R.J. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That S.R.J. was at least twenty-four months younger than the defendant; and

(4) That the acts occurred in the State of Washington. CP 70: Instruction 12.<sup>26</sup>

Applying the rationale of Schnerer, just as the passage of RCW 10.58.090 did not change the elements for child molestation, they likewise did not for rape of a child, which Stoll was charged with and ultimately convicted of here. Schnerer, 153 Wash.App. at 640.

(iii) Admission of Stoll's Prior Sex Crime Conviction Was Not Propensity Evidence and Did Not Reduce the Quantum of Evidence Necessary to Convict.

Employing the rationale of Schroeder v. Tilton,<sup>27</sup> the Schnerer Court also dispensed with that appellant's argument that sex offense evidence is propensity evidence that reduces the quantum of evidence that the State must produce in order to convict. As the Tilton court reasoned, the key aspect of a California statute in sex crime cases is that it related to the admissibility of evidence, and not sufficiency.<sup>28</sup> Schnerer reached the same conclusion regarding RCW 10.58.090 and ER 404(b), as the Evidence Rule permits admission of evidence for "other purposes" than to show propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

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<sup>26</sup> The State cites to only Instruction No. 12 for illustrative purposes, noting that Stoll was charged with two separate counts of this offense.

<sup>27</sup> Schroeder v. Tilton, 493 F.3d 1083 (9<sup>th</sup> Cir. 2007).

<sup>28</sup> Emphasis added.

order to show action in conformity therewith. It may, however, be admissible for **other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**<sup>29</sup> Schnerer, 153 Wash.App. at 640-641.

The limiting instruction and closing jury instruction specifically informed the jury of how evidence of Stoll's prior conviction could and could not be used in his present case, and error did not occur.

(iv) If Any Error Occurred in Stoll's Case Regarding the Limiting Instruction and/or Jury Instruction it was Harmless Error.

Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). 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, 104 Wash.2d at 425. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wash.2d at 425-426.

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<sup>29</sup> Emphal. in the original.

The record in Stoll's case demonstrates that the trial court took care in the crafting of both the limiting and closing instructions, and read both to the jury at important phases of the trial where they would: (a) have the greatest impact on the jury; (b) allow the State to present its case; and (c) protect Stoll's right to a fair trial. If error occurred then it was harmless, for the instructions were fair to both the State and defense, and allowed both to argue their respective cases.

Addressing Issue No. 4 that Stoll raises in his brief here,<sup>30</sup> his attorney did not provide ineffective assistance because the trial court properly followed RCW 10.58.090, and crafted jury instructions that were based those from Benally; a leading federal case. Objection by defense counsel on this issue after the trial court rigorously adhered to procedure and relevant caselaw would have been meritless.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED STATEMENTS BY A DETECTIVE WHO CONDUCTED AN INTERVIEW WITH THE CHILD VICTIM S.R.J. BECAUSE THE STATEMENTS DID NOT:
  - (a) BOLSTER S.R.J.'S TESTIMONY;
  - (b) HAVE A MATERIAL IMPACT ON THE VERDICT; AND
  - (c) IF ERROR OCCURRED IT WAS HARMLESS.

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<sup>30</sup> AB: 29-30.

A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. State v. Foxhoven, 161 Wash.2d 168, 174, 163 P.3d 786 (2007). Alternatively, the Court considers whether any reasonable judge would rule as the trial judge did. State v. Nelson, 108 Wash.2d 491, 504-505, 740 P.2d 835 (1987).

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wash.2d 457, 303 P.2d 290 (1956).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable... MacKay v. MacKay, 55 Wash.2d 344, 347-348, 347 P. 2d 1062 (1959).

That the trial court allowed evidence that the detective told the child victim, S.R.J., “you’ve been very brave” and “...I’m sorry that this has happened” cannot be considered to have been manifestly unreasonable, especially because the final sentences of Instruction No. 1 cautioned them that:

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper

verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict. CP 70.

S.R.J. testified at length in court, and the jury had ample opportunity to assess both her demeanor and testimony. RP Vol.13, 453-482. If the Court finds that error did occur then it should be deemed harmless error, because the evidence of Stoll's guilt of committing rape of a child in the first degree against S.R.J. was overwhelming: When S.R.J. was 7 or 8 years old, Stoll, who was in his 20s, improperly touched her on at least two occasions. As Delaney Johnson testified on direct, S.R.J. disclosed that:

She [S.R.J] was laying in bed one night and that Sean [Stoll] had told her to lay down with him on the floor, and that he put his finger in her rear end and told her that it'd help her do the splits 'cause she was in cheerleading. RP Vol.12, 394: 22-25; 395: 1-2.

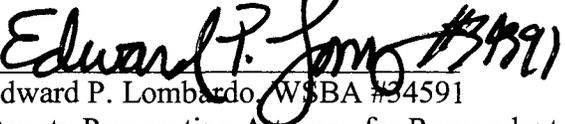
The trial court did not err by admitting the innocuous statements of the detective in this case, and Stoll received a fair trial.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 6<sup>TH</sup> day of MAY, 2010

Respectfully submitted by:

  
Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Burleson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON,	)	
	)	No. 39648-3-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
SEAN P. STOLL,	)	
	)	
Appellant,	)	
_____	)	

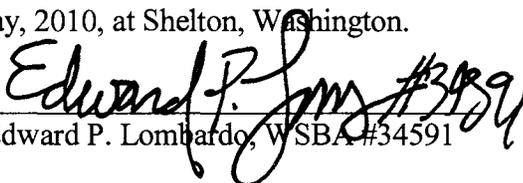
I, EDWARD P. LOMBARDO, declare and state as follows:

On THURSDAY, MAY 6, 2010, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Edward Doyle  
Attorney at Law  
P.O. Box 510  
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 6<sup>th</sup> day of May, 2010, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591