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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. Appellant received ineffective assistance of counsel.
2. The State introduced evidence that violated the confrontation clauses of Washington Constitution article IV, section 22 and the Sixth Amendment.
3. The evidence was insufficient to prove the essential elements of third degree rape of a child, RCW 9A.44.079.
4. The trial court induced the defense to stipulate to damaging evidence on erroneous grounds.
5. The court erroneously admitted prior bad acts evidence under RCW 10.58.090.
6. The court allowed the prosecutor to call a witness for the sole purpose of impeachment, and to coach the witness with an inadmissible recording before he took the stand.
7. Appellant was denied a record of sufficient completeness.
8. Appellant was denied a public trial as required by the Amendment and art. 1, § 22.
9. The prosecutor committed reversible misconduct in closing argument.
10. Cumulative errors denied Appellant a fair trial under the Fifth Amendment and Const. art 1, § 22.

B. Issues Pertaining to Assignments of Error

1. Appellant received ineffective assistance of counsel.
2. Defense counsel failed to request a mistrial when the State elicited testimony from an anonymous caller in flagrant violation of the court's order in limine.
3. Testimony that an anonymous caller accused Appellant by name of having sex with the alleged victim violated *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and the Sixth Amendment when the caller did not testify and was not made available for cross examination..
4. The State failed to prove that Appellant was at least forty-eight months older than the alleged victim, an essential element of third degree rape of a child, RCW 9A.44.079.
5. Defense counsel failed to protest when he was induced to stipulate to admitting the prior offense for a strictly limited purpose and the court instructed the jury it could use the stipulation for any relevant purpose.
6. The trial court erroneously admitted prior bad acts evidence under RCW 10.58.090.
  - (a) RCW 10.58.090 is unconstitutional on its face.
  - (b) The court misinterpreted RCW 10.58.090.
7. Counsel failed to object to inadmissible hearsay from the alleged victim who read from a transcript of her out-of-court statement when it did not refresh her memory.
8. Counsel failed to challenge multiple instances of inadmissible evidence from the police witness.

Issues Pertaining to Assignments of Error, continued ...

9. Counsel failed to challenge the State's calling a witness for the sole purpose of impeachment.
10. At the suggestin of the court, the State coached this witness with an inadmissible recording before he took the stand.
11. Counsel failed to request a limiting instruction regarding this impeachment evidence.
12. Counsel did not object to inadmissible police witness testimony.
13. Appellant was denied an appellate record of sufficient completeness by the trial court's failure to make a record of the substance of a crucial sidebar.
14. Failure to make a public record of the substance of the sidebar violated the rights of Appellant and the public to a public trial.
15. The prosecutor argued directly and indirectly, that, in order to acquit, the jury must find that the State's witnesses were lying.
16. Cumulative errors denied Appellant a fair trial.

### III. STATEMENT OF THE CASE

Appellant, Roland K. Douglas, was charged with one count of third degree rape of a child for allegedly having sexual intercourse with A.J.S., when she was aged fourteen and Douglas was at least 48-months older. CP 55. He was convicted after a jury trial. CP 33.

The witnesses against Douglas who appeared at trial were A.J.S., her mother Carol Kessel, and Brandon Pippins, a friend to whom the State claimed Douglas confessed, and investigating Detective Harry Heldreth. VII RP 95,89, 120, and 130, respectively.<sup>1</sup> Witnesses who did not appear included an anonymous phone caller to Ms. Kessel, and both A.J.S. and Pippins by way of out-of-court statements to Heldreth. VII RP 90, 105, 123-24, and 134, respectively.

The trial court ordered in limine that Ms. Kessel not testify to the specifics of the alleged anonymous call. VII RP 73. But the court invited the prosecutor to play a recording of Mr. Pippins's untranscribed pretrial police interview to Pippins before he testified. VII RP 84.

The court admitted a stipulation by Douglas to a prior conviction for communicating with a minor for immoral purposes. VII RP 151-52. Defense counsel objected to admitting this under RCW 10.58.090. VI RP

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<sup>1</sup> The transcribed proceedings are in eight continuously paginated volumes, designated I–VIII. Most references are to Volume VI, the relevant pretrial hearings, and to Volume VII, the jury trial.

82-83. But the defense agreed to stipulate under the State's motion to apply the doctrine of *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d. 574 (1997). VII RP 66. The court accepted the stipulation with the proviso that a limiting instruction would be given to the jury. VI RP 38, 81.

When the stipulation was read to the jury, the court instructed them to give it the same weight as if someone were sitting in the witness chair.

VII RP 151. The court instructed the jury:

I'll also in this matter however, give you a cautionary instruction before I provide that stipulation. In a criminal case in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense 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 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.

The parties have stipulated to the following evidence. The person before the Court and who has been identified in the charging document as defendant Roland K. Douglas, was convicted on October 15, 2007 of the crime of communication with a minor for immoral purposes, a sex offense, in *State of Washington v. Roland K. Douglas*, Mason County Superior Court Cause No. 07-1-00400-9. And that is the conclusion of the stipulation.

VII RP 151-52. The court also included in the instructions packet an instruction that evidence of another sex offense “may be considered for its bearing on any matter to which it is relevant. Instr. No. 6, CP 43.<sup>2</sup>

Upon conviction, Douglas received a high-end standard range sentence. CP 7, 9, 10, 33. He appeals. CP 6.

IV. **ARGUMENT**

1. DEFENSE COUNSEL RENDERED  
CONSTITUTIONALLY INEFFECTIVE  
ASSISTANCE.

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This Court must decide (1) whether counsel’s conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. To prevail, Appellant must show (1) that his lawyer’s representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137

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<sup>2</sup> Additional trial facts are cited as they arise in the discussion of the issues.

Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland*, 466 U.S. at 693-94. Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

Counsel waives any objection to the erroneous admission of damaging evidence unless he makes a timely objection. *State v. DeSantiago*, 149 Wn.2d 402, 413, 68 P.3d 1065 (2003); *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). A claim of deficiency resting on counsel’s failure to object will succeed if appellant can satisfy this court that an objection likely would have been sustained. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). In egregious circumstances, where testimony central to the State’s case is erroneously admitted, the failure to object constitutes incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). If no legitimate reason can be discerned to explain counsel’s conduct, however, deficient performance is established. *State v. Nichols*, 161 Wn.2d 1, 8,

162 P.3d 1122 (2007); *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, 262 (2010).

No legitimate strategy can be conceived here to explain counsel's failure to object to the slew of violations of the evidence rules that allowed the State repeatedly to put highly damaging, unreliable and manifestly inadmissible evidence before the jury.

Prejudice is established if there is "a reasonable probability" that, had counsel done his job, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 335. Objection to the admission of evidence is waived unless timely made. *DeSantiago*, 149 Wn.2d at 413; *Coria*, 146 Wn.2d at 641. Thus, failure to preserve an issue for review with a timely objection is deficient performance that is per se prejudicial if it is likely the objection would have been sustained. *Id.*; *Saunders*, 91 Wn. App. at 578.

Reversal is required. Please see issues 2, 3, 4, 5, 7, 8, 9 10, 11, and 12 for discussion of specific failures of effective representation.

2. DEFENSE COUNSEL FAILED TO OBJECT  
WHEN ALLEGED OUT-OF-COURT  
STATEMENTS BY AN ANONYMOUS CALLER  
VIOLATED THE COURT'S ORDER IN LIMINE.

The court granted a defense motion in limine excluding any testimony from A.J.S.'s mother, Carol Kessel, as to any specifics of an anonymous phone call she claimed to have received informing her that A.J.S. was involved with a registered sex offender. VII RP 73. The court recognized the enormous potential prejudice of this unmitigated hearsay. VII RP 74. Before the jury, however, Kessel testified that an anonymous caller told her A.J.S. was having sex with "someone besides her boyfriend." Instead of diverting the witness, the prosecutor asked:

Q: And who was the person that she was supposedly having sexual relations with?

A: Roland."

VII RP 90. Possibly stunned speechless, defense counsel simply ignored this flagrant violation of the court's order.

Defense counsel is not required to object to evidence at the time of its admission if the court has made a final ruling on the motion and did not request further objections at trial. *State v. Kelly*, 102 Wn.2d 188, 192, 685 P.2d 564 (1984); *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984) (overruled on related but distinguishable grounds by *State v.*

*Brown*, 111 Wn.2d 124, 137, 761 P.2d 588, 596 (1988)). Regardless, effective counsel would have moved immediately for a mistrial.

The prejudice resulting from this flagrant prosecutorial misconduct is indisputable. Reversal is unavoidable.

3. THE ANONYMOUS HEARSAY VIOLATED  
THE CONFRONTATION CLAUSES OF ART. 1,  
§ 22 AND THE SIXTH AMENDMENT.

The state and federal constitutions both prohibit the government from convicting people with testimony from witnesses the accused cannot confront. Wash. Const. art. I, § 22; U.S. Const. amend VI; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). This court reviews alleged violations of the Confrontation Clause de novo. *State v. Larry*, 108 Wn. App. 894, 901-02, 34 P.3d 241(2001); *United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir., 1993).

The Confrontation Clause excludes testimonial statements from criminal trials unless the defendant has an opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). “Testimonial” simply means the declarant would reasonably expect his statements to be used to prosecute someone. *Crawford*, 541 U.S. at 52. The Confrontation Clause permits an absent witness’s testimonial statements to be introduced at trial only if the witness has been subject to the rigors of cross-examination. *Crawford*,

541 U.S. at 53-54. The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

This error was not harmless by any standard. It is difficult to conceive of a statement more testimonial than one accusing a named person of a particular offense against a named victim. This is another instance of defense counsel's ineffective assistance. Moreover, out of regard for judicial economy, the trial court arguably should have declared a mistrial sua sponte. Reversal is required.

4. THE STATE FAILED TO PROVE A FORTY-EIGHT-MONTHS AGE DIFFERENCE BETWEEN ALLEGED PERPETRATOR AND ALLEGED VICTIM.

Every person accused of crime is presumed innocent unless the State proves every essential element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

Evidence is sufficient to support a conviction only if a rational fact finder could find the essential elements beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380,

208 P.3d 1107 (2009). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Id.* Direct and circumstantial evidence are deemed equally reliable and this Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Nevertheless, assuming the jury believed the State's evidence, that evidence must support a reasonable, logical inference of the fact at issue. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Douglas was charged with third degree rape of a child. The essential elements are that (1) the defendant had sexual intercourse with another who (2) was at least fourteen years old but less than sixteen years old and not married to the perpetrator, and (3) the accused was at least forty-eight months older than the alleged victim. RCW 9A.44.079. The State neglected to present any direct evidence of Douglas's age. The only age-related testimony was that Douglas had told A.J.S. he was 21 years old and she believed him. VII RP 97. This is insufficient on its face.

First, this witness appears in the transcript to be barely conscious. She understood virtually no question asked of her and remembered

practically nothing about anything. VII RP 95-118. Standing alone, her testimony as to what she may have been told a year before cannot support a criminal conviction beyond a reasonable doubt. Second, even if we accept as true that Douglas did tell A.J.S. he was 21, this does not support a logical inference that this really was his age. The prosecutor repeatedly told the jury in argument that Douglas was 21. VII RP 169, 177. And defense counsel (bizarrely, and ineffectively) conceded in argument that he was. VII RP 169. But, absent a contrary showing, this Court presumes the jury followed the judge's instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984); *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). The court instructed the jury that counsels' arguments are not evidence. Instr. No. 1, CP 37 ("the only evidence is the testimony of witnesses and the exhibits); Instr. 1, CP 38 (attorneys' remarks not evidence.) The jury was also told that the contents of the Information are not evidence; Instr. No. 1, 37. On their face, the testimony and exhibits here are insufficient to establish the age-difference element beyond a reasonable doubt.

The State is not relieved of the obligation to prove a fact merely because it appears obvious. For example, the State made sure to prove the crime occurred in Washington, with personal knowledge testimony from Heldreth. VII RP 146. Also, A.J.S. had personal knowledge that she and

Douglas were not married. VII RP 96. But A.J.S. did not have personal knowledge of Douglas's age — only what she thought his age was. But the alleged victim's belief as to the defendant's age is not an element of RCW 9A.44. 079. This is not enough to support a reasonable inference she was correct. Lying about one's age arguably is equally common in such situations as telling the truth.

Insufficient evidence requires dismissal with prejudice as a matter of law. *Stanton*, 68 Wn. App. at 867. Retrial is prohibited unequivocally, and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, the Court should reverse the conviction and dismiss the prosecution.

**5. COUNSEL FAILED TO PROTEST WHEN HE WAS INDUCED TO STIPULATE TO A PRIOR OFFENSE FOR A STRICTLY LIMITED PURPOSE AND THE COURT INSTRUCTED THE JURY IT COULD USE THE STIPULATION FOR ANY RELEVANT PURPOSE.**

The State asked the defense to stipulate to Douglas's prior gross misdemeanor conviction for communicating with a minor for immoral purposes. The State referred to this as an "Old Chief" stipulation. Defense counsel agreed. VII RP 66. This was ineffective assistance of counsel, because this was not an "Old Chief" situation.

A trial court's rulings on the admission of evidence are reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245

(1995). Discretion necessarily is abused if a decision was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

“Old Chief” refers to *Old Chief v. U.S.*,<sup>3</sup> which permits defendants to stipulate to the existence of a prior conviction to keep the State from discussing the details where the prior conviction is an element of the current charge that the State must prove beyond a reasonable doubt. *Old Chief v. U.S.*, 519 U.S. at 174; *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008). The possibility of prejudice is outweighed by the State’s need to introduce the evidence, and the court is supposed to give a limiting instruction to protect the defendant’s interests. *Spencer v. State of Tex.*, 385 U.S. 554, 561, 87 S. Ct. 648, 652 (1967).

The court stated it was accepting the stipulation pursuant to “*Old Chief*.” CP 51. But *Old Chief* has no application in this case. Douglas was charged with third degree rape of a child, RCW 9A.44.079, which does not include a prior offense as an element. RCW 9A.44.079(1). Accordingly, Douglas’s prior offense should not have come to the attention of the jury. ER 404(b). Moreover, an “Old Chief” stipulation entitled the defense to an instruction limiting the jury’s consideration of

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<sup>3</sup> 519 U.S. 172, 117 S. Ct. 644. 136 L. Ed. 2d. 574 (1997).

the stipulation strictly for the question of whether a prerequisite prior conviction had been proved to satisfy the elements of the current charge.

The court agreed to do this, but then modified the “limiting” instruction to tell the jury they could consider the prior offense “for its bearing on any matter to which it is relevant.” This was intended to reflect RCW 10.58.090. VII RP 82; Instr. No. 6, CP 43. Defense counsel assented to this “bait and switch” arrangement, even though Douglas challenged the admission of the prior under RCW 10.58.090. VI RP 37-38; VII RP 82. This was ineffective assistance.

This Court uses a manifest abuse of discretion standard in reviewing a trial court’s balancing of the probative value of prior crime evidence against the danger of unfair prejudice. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). It is error to admit evidence of which the probative value is negligible and the unfair prejudice is significant. *Johnson*, 90 Wn. App. at 63. Only where no other means of proof is available should the court admit prejudicial evidence. *Id.*, citing ER 403 cmt. A trial court decision based on a clear error of law is an abuse of discretion on its face. Discretion necessarily is abused if a decision was reached by applying the wrong legal standard.” *Rohrich*, 149 Wn.2d at 654.

Douglas’s prior conviction was entirely irrelevant for any legitimate purpose. Therefore, its overwhelming potential for prejudice is dispositive. Moreover, the court did not engage in any balancing whatsoever. RP 66; CP 51. Had it done so, the court would have noticed that the State’s supposed compelling reason for introducing the prior was nonexistent. The court missed the whole point of *Old Chief*.

Here, as in *Johnson*, it is reasonably probable that these errors materially affected the outcome, and reversal is required. *Johnson*, 90 Wn. App. at 74.

6. THE COURT ERRONEOUSLY ADMITTED  
PRIOR OFFENSE EVIDENCE UNDER RCW  
10.58.090.

Generally, this Court reviews a trial court’s decision of whether evidence is admissible for abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 463-64, 979 P.2d 850 (1999). But a court “necessarily abuses its discretion by denying a criminal defendant’s constitutional rights.” *State v. Iniguez*, 167 Wn.2d 273, 280-281, 217 P.3d 768 (2009), quoting *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). A claim of denial of a constitutional right is therefore reviewed de novo. *Id.*

(a) ***RCW 10.58.090 is Unconstitutional on its Face.***

This Court reviews constitutional challenges de novo. *See, e.g., State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005).

RCW 10.58.090 is facially invalid under the separation of powers clause of Const. art 4, § 1. The separation of powers doctrine is triggered when the activity of one branch of government invades the prerogatives of another. *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002). This Court should resolve rulemaking preeminence from the perspective of institutional competence. Chandler at 265.<sup>4</sup>

Our Supreme Court has inherent and exclusive power to prescribe rules of procedure and practice, stemming directly from Const. art. 4, § 1. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). The constitutional separation of powers vests in the Supreme Court the power to dictate its own court rules, “even if they contradict rules established by legislature.” *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.* 102 Wn.2d 457, 461, 687 P.2d 202 (1984).

In asserting legislative power to directly contravene ER 404(b) in RCW 10.58.090, the Legislature cited a couple of decisions predating Washington’s adoption of the Uniform Rules of Evidence: *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to

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<sup>4</sup> Chandler, Blythe, BALANCING INTERESTS UNDER WASHINGTON’S STATUTE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS SEX-OFFENSE EVIDENCE, 84 Wash. L. Rev. 259, 260, note 8 (2009) (Chandler), *citing* Cavallaro, Rosanna, FEDERAL RULES OF EVIDENCE 413-415 AND THE STRUGGLE FOR RULEMAKING PREEMINENCE, 98 J. Crim. L. & Criminology 31, 31 (Fall, 2007).

enact laws that create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) (rules of evidence are sustentative law).<sup>5</sup>

First, this contradicts the Legislature's own doctrine regarding the effect of rules upon statutes: "When and as the rules of courts herein authorized shall be promulgated[,] all laws in conflict therewith shall be and become of no further force or effect." RCW 2.04.200.<sup>6</sup> RCW 10.58.090 conflicts with ER 404(b). By its plain language, that is the sole reason it exists. Then-Chief Justice Gerry Alexander urged the Judiciary Committee Chair to reconsider its enactment and leave the matter to the courts. Chandler, at 275-76.

Second, *Sears* and *Pavelich* predate our Supreme Court's adoption of the Uniform Rules of Evidence by half a century. See, Adoption of Rules of Evidence, 91 Wn.2d 1117 (1978). By their own plain language, the Rules of Evidence govern court procedures, and thus supersede *Sears* and *Pavlevich*.<sup>7</sup> The rules declare that they govern all proceedings in the courts of the State of Washington, with a few non-germane exceptions. ER 101; ER 1101(a). ER 101 states: "These rules govern proceedings in the courts of the state of Washington to the extent an with the exceptions

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<sup>5</sup> See Chandler, at 275.

<sup>6</sup> *Id.*

<sup>7</sup> Like statutes, court rules are interpreted as if they were enacted by the legislature. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). Accordingly, they have equivalent authoritative weight. Therefore, court rules, like statutes, trump case law in the hierarchy of binding authority.

stated in Rule 1101. Rule 1101 provides: “Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington.” ER 1101(a). Section (c) states proceedings where the rules do not apply — not including criminal trials. ER 1101(c).

The judicial task force guiding the adoption process determined that the judiciary, not the legislature, should create rules of evidence, pursuant to Const. art 4, § 1. Chandler, at 266-67.<sup>8</sup>

When a statute and court rule appear to conflict, the Court should, if possible, harmonize and give effect to all the provisions of both. *State v. W.W.*, 76 Wn. App. 754, 757, 887 P.2d 914 (1995). If the conflict is irreconcilable, the nature of the right at issue determines which controls. *W.W.*, 76 Wn. App. at 758, citing *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). When a court rule and a statute conflict with regard to a procedural right, it is well established that the court rule prevails. *In re Personal Restraint of Becker*, 96 Wn. App. 902, 982 P.2d 639 (1996). Only if the right is substantive does the statute prevail. *Smith*, 84 Wn.2d at 501-02. This reflects the separation of powers between the legislature and the judiciary. *Id.*, at 501. “Ordinary principles of construction give effect to the clear language of a court rule: ‘A court rule must be

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<sup>8</sup> Citing task force member Karl B. Tegland, THE PROPOSED RULES OF EVIDENCE: AN OPPORTUNITY FOR CODIFICATION, Wash. State Bar News, Jan., 1979 at 28.

construed so that no word, clause or sentence is superfluous, void or insignificant.’ When the language of a rule is clear, a court cannot construe it contrary to its plain statement.” *W.W.*, 76 Wn. App. at 757.

Where a statute addresses substantive rights, the statute supersedes any contrary court rule. *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997). If RCW 10.58.090 is procedural, however, it usurps the inherent power of the judiciary to establish the rules of courtroom procedure, including the admissibility of evidence. Specifically, Const. art. 4 confers the power to adjudicate cases exclusively upon the judiciary. *Id.*

A similar situation was presented in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 200 (1984) (decided after the adoption of the Uniform Rules and interpreting the then recently enacted child hearsay statute.) The admission of the alleged child victim’s statements in *Ryan* (a) did not comply with the statute’s requirements, and (b) violated the confrontation clauses of Const. art. 1, § 22 and the Sixth Amendment. Our Supreme Court accordingly reversed the convictions. *Ryan*, 103 Wn.2d at 167.

*Ryan* asserts that our Supreme Court is the final arbiter of evidentiary rules in cases arising from evidence rules created by the legislature. *Ryan*, 103 Wn.2d at 178. Although the courts should try to harmonize conflicting statutes and court rules, ultimately, “Where a rule of

court is inconsistent with a procedural statute, the court's rulemaking power is supreme." *Ryan*, at 178. The legislature could not pass a procedural rule in direct conflict with ER 802. *Ryan*, at 178. Likewise, here, to the extent RCW 10.58 conflicts with ER 404(b), it is invalid.

Two decisions addressing the facial invalidity of RCW 10.58.090 are presently before the Supreme Court. *State v. Scherner*, 153 Wn. App. 621 (2009), 84150-1; and *State v. Gresham*, 153 Wn. App. 659 (2009), 84148-9.

**(b) *The court Misinterpreted RCW 10.58.090.***

The court conflated RCW 10.58.090 with the *Old Chief* stipulation rule. This resulted in defense counsel's stipulating to a sex offense conviction the admission of which Douglas objected to under RCW 10.58.090, based on spurious assurances from the court that the jury would receive an instruction limiting their consideration of this evidence in some undefined way. VI RP 44. Douglas would not have stipulated to the admission of the prior offense but for the court's error.

The admission of a prior conviction for communicating with a minor for immoral purposes was highly prejudicial. Reversal is required.

7. COUNSEL FAILED TO OBJECT WHEN  
A.J.S. READ FROM AN OUT-OF-COURT  
STATEMENT INSTEAD OF USING IT TO  
REFRESH HER MEMORY.

The prosecutor engaged in a strenuous but futile struggle with A.J.S. to extract from her a statement that Douglas put his penis in her vagina. Finally, the prosecutor asked the witness to review page 6 of exhibit 4, the transcript of her interview with Heldreth, at lines 26 and 27 and to say whether that refreshed her memory as to what she told Heldreth about what body parts went where.

Q: What part of his body went into your body?

A: I really don't know how to answer that.

Q: Is the question confusing?

A: Yeah.

Q: Okay. What does sexual intercourse mean to you? ...

A: I really don't know how to explain.

Q: Try your best to explain to us.

A: I really can't.

Q: Do you remember telling Detective — well, let me approach.

I'm going to ask you to review page 6 of Exhibit No. 4. And look at about line 26 and 27. And tell me if that refreshes your memory as to what you

told Detective Heldreth about what body part of his touched what body part of yours?

A: Yeah.

Q: Okay. What part of his touched what body part of yours?

**What does line 27 say, Alexis?**

A: His penis was inserted into my vagina.

VII RP at 105.

This was a flagrant violation of the Evidence rule regarding refreshing a witness's memory from a writing.

Interpretation of the rules of evidence is a question of law that the Court reviews de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). In examining a trial witness, counsel may hand her a writing to inspect for the purpose of refreshing her memory, so that, when she testifies, she does so on the basis of her own recollection, not the writing. *State v. Coffey*, 8 Wn.2d 504, 508, 112 P.2d 989 (1941) (citing cases) (cited in *State v. Huelett*, 92 Wn.2d 967, 972, 603 P.2d 1258 (1979), Wright, J. dissenting. *See also, U.S. v. Morlang*, 531 F.2d 183, 191 (1975), citing McCormick, EVIDENCE, 2nd Ed. § 9.

Here, the prosecutor did precisely what the government may not do — substitute the witness's prior statement for her actual testimony. *See, Morlang*, 531 F.2d at 191. There “would be error where under the

pretext of refreshing a witness'[s] recollection the prior testimony was introduced as evidence.' *Id.*, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, 60 S. Ct. 811, 849, 84 L. Ed. 1129 (1940). That is what happened here, without objection from defense counsel.

This exchange was highly prejudicial, because the prosecutor could not establish the crucial element of sexual intercourse without resorting to this egregious rules violation.

Reversal is required.

**8. COUNSEL FAILED TO CHALLENGE THE  
ADMISSIBILITY OF THE POLICE WITNESS'S  
EVIDENCE REGARDING OUT-OF-COURT  
STATEMENTS BY A.J.S. OR THE  
RELIABILITY OF THOSE STATEMENTS.**

Detective Heldreth claimed to have conducted a "forensic" interview of A.J.S., in the course of which, A.J.S. allegedly told Heldreth "what happened between her and Roland." VII RP 132, 134.

First, defense counsel did not challenge Heldreth's testimony as to what A.J.S. told him as inadmissible hearsay. A.J.S. was not under oath during the interview. She was not a party in the case. No exception exists to admit this evidence under the rules. Failure to recognize this was deficient performance. As discussed below, the prosecutor wasted no time in squashing defense counsel's attempt to introduce Heldreth's hearsay testimony. VII RP 144.

Second, defense counsel did not challenge Heldreth's forensic interview credentials. Heldreth said he had "interviewed multiple children." VII RP 130. This means nothing. He also said he had "attended various child interview courses," which could mean anything. VII RP 130. Heldreth subjected the terrified A.J.S. to non-stop interrogation for several hours, which sounds like questionable forensics. VII RP 134. And her statements to Heldreth constituted the only evidence for the crucial element that sexual intercourse took place.

Accordingly, minimally effective counsel would have held Heldreth's feet to the fire regarding his competence to conduct such interrogations. Truly effective counsel would have called a defense expert to challenge Heldreth's forensic technique and the reliability of the resulting "evidence."

Again, the prejudice is manifest, because it was solely through A.J.S.'s out-of-court statements to Heldreth that the State introduced evidence a crime occurred. The error requires reversal.

9. WITHOUT OBJECTION, THE STATE  
CALLED A KNOWN ADVERSE WITNESS,  
SOLELY FOR PURPOSE OF IMPEACHMENT.

The State may not call a witness whose testimony is known to be adverse for the purpose of impeaching him or her. *State v. Lavaris*, 106 Wash. 2d 340, 721 P.2d 515 (1986). And impeaching testimony may not

be admitted for the purpose of “supplying what the witness was expected to, but did not, say.” *State v. Thorne*, 43 Wn.2d 47, 52, 260 P.2d 331 (1953).

Like the spurious use of a writing to refresh memory discussed above (please see pp. 24-25), this practice permits the government to present testimony to the jury in the name of impeachment that otherwise would not be admissible. *Morlang*, 531 F.2d at 189. Impeachment by prior inconsistent statement is not permitted where it is “employed as a mere subterfuge to get before the jury evidence not otherwise admissible.” *Morlang*, 531 F.2d at 190. Moreover, if the extrinsic evidence used for impeachment constitutes hearsay, it is inadmissible. *State v. Huynh*, 107 Wn. App. 68, 76, 26 P.3d 290 (2001).

When a witness fails to come up to expectations, counsel is understandably tempted to get the desired testimony before the jury by way of the witness’s prior statements. However practical this is, however, it is forbidden by the principle that “men should not be allowed to be convicted on the basis of unsworn testimony.” *Morlang*, 531 F.2d at 190. A witness’s prior unsworn statements “are mere hearsay and are, as such, generally inadmissible as affirmative proof.” *Morlang*, 531 F.2d at 190. This testimony is inadmissible for all purposes. “The introduction of such testimony, even where limited to impeachment, necessarily increases the

possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to the jury, it is often difficult for them to distinguish between impeachment and substantive evidence.” *Id.* *Morlang*, 531 F.2d at 190. Here, besides failing to object, defense counsel also neglected to request an instruction limiting consideration of the hearsay to impeachment purposes.

The government in *Morlang* knew its witness was not going to testify consistently with his prior statement. The prosecutor nevertheless put on the witness to get his prior unsworn and otherwise inadmissible statement before the jury. *Morlang*, 531 F.2d at 190. That is exactly what happened here.

#### 10. THE STATE UNLAWFULLY COACHED WITNESS PIPPINS.

The State requested permission to play Pippins his prior recorded – but not transcribed – statement after he testified inconsistently with it. VII RP 82. As discussed above, ER 612 would permit a writing — but not a tape recording — to be used to refresh the witness’s memory, but only after the witness has testified and it was established that his memory needed to be refreshed. *Morlang*, 531 F.2d at 191.

But the court invited the prosecutor to go ahead and play the recording to Pippins before he testified. VII RP 84. The prosecutor did

so.<sup>9</sup> But this did not work, and Pippins remained recalcitrant on the stand. The prosecutor then, without producing the untranscribed prior statement, commenced browbeating Pippins with alleged citations to it. RP 124. Pippins never did recite the words the prosecutor wanted to hear. The evidence came in out of the mouth of the prosecutor. RP 123-24.

It is not clear what evidence rule the State thought it was asserting here. It was not to refresh Pippins's memory, because proper foundation for this requires that the witness's recollection must be exhausted before being refreshed. *Morlang*, 531 F.2d at 191. And a recording is not a writing, as required by ER 612.

In this instance, defense counsel did object to the out-of-court statement. VII RP 82-83. Counsel also objected that he was handicapped in his ability to impeach Pippins without a transcription of the tape recording. VII RP 85. The prosecutor then graciously proposed that defense counsel be present while Pippins listened to the tape during the rehearsal. VII RP 85. Defense counsel accepted this and did not object to the arrangement. VII RP 84. This was deficient performance that resulted in extreme prejudice to Douglas.

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<sup>9</sup> When a defendant does this, it is called witness tampering: A person is guilty of tampering with a witness if he or she attempts to induce a ... person he or she has reason to believe is about to be called as a witness in any official proceeding ... to: Testify falsely or, without right or privilege to do so, to withhold any testimony[.] RCW 9A.72.120(1)(a).

11. THE STATE'S IMPEACHMENT OF PIPPINS  
THROUGH HELDRETH VIOLATED MULTIPLE  
RULES OF EVIDENCE.

The prosecutor told Det. Heldreth that Pippins said he told Heldreth that Douglas just said he was being charged with having sex with A.J.S.

Q: Is that what he told you?

A: Absolutely not. No, that's —

Q: What did he tell you?

A: He told me that he was told by Roland Douglas that he sex — that Roland had sex with Alexis.

VII RP 136. This is not how you impeach your own witness.

Either side may impeach any witness. ER 607. But impeachment is limited to reputation evidence under ER 608(a), and specific instances of conduct as provided by ER 608(b), and by evidence of conviction of crime under ER 609, none of which apply here.

“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility, other than conviction of a crime, as provided in rule 609, may not be proved by extrinsic evidence.” ER 608(b). Specific instances of conduct may, at the discretion of the court, be inquired into *on cross examination* but only insofar as they concern the character for truthfulness of either the witness or another witness whose character for truthfulness this witness has testified about.

ER 608(b) (emphasis added). The evidence impeaching Brandon Pippins was extrinsic evidence of a specific instance of conduct, i.e. his prior inconsistent statement to Heldreth.

As discussed above regarding A.J.S.'s out-of-court statements, exposing a prospective witness to a recording of the desired testimony to "refresh memory" before he testifies improperly influences and taints the testimony, which is not a result of the witness's experiences or memory, but rather the recording counsel has just played for him. *Saldivar v. Momah*, 145 Wn. App. 365, 405-06, 186 P.3d 1117 (2008).

Moreover, the prior out-of-court statement is hearsay for which the evidence rules contain no exception.

Defense counsel did not object to these violations, allowing highly damaging testimony to prejudice Douglas.

12. COUNSEL FAILED TO REQUEST A JURY INSTRUCTION LIMITING CONSIDERATION OF PIPPINS'S PRIOR INCONSISTENT STATEMENT TO IMPEACHMENT.

At minimum, Douglas was entitled to have his jury instructed not to consider Pippins's out-of-court statements for their truth, but solely for purposes of impeachment.

Where prior inconsistent statements are admitted as impeachment evidence, an instruction cautioning the jury to limit its consideration of the

statement to its intended purpose is necessary and proper. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). But where no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Legitimate trial tactics or strategy cannot be the basis for an ineffective assistance of counsel claim. *Aho*, 137 Wn.2d at 745. And admission of improper impeachment evidence is harmless if it did not affect the trial outcome. *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988). But reversible prejudice is shown if there is a reasonable probability that the result of the trial would be different but for counsel's errors. *Thomas*, 109 Wn.2d at 226. That is the case here.

The error was far from harmless. Given the devastating nature of the alleged out-of-court statement that Douglas confessed, it was both deficient and prejudicial for counsel not to request a limiting instruction. Moreover, no legitimate strategy could excuse this lapse by the defense. Without corroboration from Pippins, the State's only evidence that sexual intercourse occurred was the inadmissible and patently iffy testimony from A.J.S. It was ineffective representation not to request an instruction admonishing the jury to limit consideration of a prior inconsistent taped

statement to impeachment purposes if this could result in a conviction based on the prior statement as substantive evidence.

Had the jurors been properly instructed (assuming they understood how to follow the limiting instruction), it is likely they would have declined to convict a man on the testimony of an anonymous caller and a witness as pathetically unpersuasive as A.J.S.

The error calls for reversal.

13. THE TRIAL COURT'S FAILURE TO MAKE A RECORD OF THE SUBSTANCE OF A CRUCIAL SIDEBAR DENIED APPELLANT A RECORD OF SUFFICIENT COMPLETENESS.

Defendants in Washington have a constitutional right to a record of sufficient completeness to allow new appellate counsel to discover potentially reversible errors. Second, defendants and the public (including appellate counsel arriving late on the scene) have a constitutional right to have all relevant proceedings conducted in public. That means, the substance of a bench conference held off the record must be put into the record at the earliest opportunity.

Under federal law, failure to transcribe a sidebar does per se requires reversal if the appellant can demonstrate that the missing portion of the transcript prejudices his appeal. *United States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir.1990). Federal courts do not assume prejudice solely

because the incomplete record deprives new appellant counsel of the opportunity to discover potential errors. *United States v. Antoine*, 906 F.2d 1379, 1381 (9th Cir.1990); *United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir.1989).

In Washington, by contrast, a criminal defendant's right to a "record of sufficient completeness" to allow appellate review of potential errors is guaranteed by Const. art. 1, § 22. *State v. Classen*, 143 Wn. App. 45, 54, 176 P.3d 582, quoting *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963), *review denied* 164 Wn.2d 1016 (2008). A sufficiently complete record does not necessarily require a verbatim transcript of every word. *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). But failure to transcribe all the proceedings is reversible error if the defendant can demonstrate prejudice. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985).

Generally, if the trial record is incomplete, appellate counsel must try to get affidavits from the court and trial counsel of what occurred in the missing portion. *Miller*, 40 Wn. App. at 488. "The usual remedy for a defective record is to supplement the record with appropriate affidavits" and have the judge who heard the case resolve any discrepancies, as provided in RAP 9.4.3. *Id.* But if this is not satisfactory, a new trial is required. *Tilton*, 149 Wn.2d at 783.

Here, supplementing the record with affidavits would prejudice Douglas by inordinately delaying the filing of his opening brief. No hearing dates are missing, so appellate counsel could not discover the gap in the record until long after the appellate record appeared to be perfected. Moreover, the untranscribed sidebar did not occur until almost the end of the trial, so the briefing period was well advanced before the constitutional violation came to light.

14. FAILURE TO MAKE A PUBLIC RECORD  
OF THE SUBSTANCE OF THE SIDEBAR  
VIOLATED THE RIGHTS OF APPELLANT  
AND THE PUBLIC TO A PUBLIC TRIAL.

Failing to make a record of the substance of the sidebar also violated Douglas's right to a public trial. The question of whether a trial court committed constitutional error is reviewed de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a public trial. *State v. Russell*, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007). Additionally, article I, § 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716

(1982). Article I, §10's guarantee of public access to proceedings and article I, § 22's public trial right are complementary. Together, they assure the fairness of our judicial system. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 235 (1995).

The Court reviews de novo whether a trial court procedure violates the right to a public trial. *Brightman*, 155 Wn.2d at 514. Prejudice is presumed if the court proceedings violate this right. *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001). A defendant's failure to object at the time of a courtroom closure does not waive this right. *Brightman*, 155 Wn.2d at 514-15. The remedy is to reverse and remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

Moreover, "the constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts." *Brightman*, 155 Wn.2d at 514. Among other concerns, closure prevents the press and the public — here including appellate counsel — from viewing crucial proceedings. *See, Brightman*, 155 Wn.2d at 515.

A public trial violation is not limited to the presentation of evidence. A spate of recent Washington cases has addressed the issue in

the context of jury voir dire.<sup>10</sup> This Court has held that violation of a defendant's right to a public trial is structural error that is per se reversible. *State v. Sadler*, 147 Wn. App. 97, 118, 193 P.3d 1108 (2008).

The prosecutor elicited pages of testimony from Heldreth regarding what he said to A.J.S. and Pippins and they to him. VII RP 136; VII RP 144-147. When defense counsel opened his cross examination with a question about what Heldreth asked A.J.S., the prosecutor immediately jumped up and objected to it as hearsay. VII RP 148. After a sidebar, the court sustained the State's objection. VII RP 148.

The substance of this sidebar most certainly would be helpful to Douglas on appeal. Either his lawyer argued that the State opened the door to this testimony in its own examination of Heldreth or counsel did not. If he did, this is a strong issue on appeal. Under the rule of completeness, if the State introduces a statement into evidence, the defense may to introduce any other part "which ought in fairness to be considered contemporaneously with it." ER 106; *Larry*, 108 Wn. App. at 910.

Also, counsel may or may not have argued that these hearsay statements had already been admitted into evidence, rendering the

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<sup>10</sup> See, e.g., *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 723 (2010).

credibility of the declarant subject to attack by any evidence “that would be admissible for those purposes if declarant had testified as a witness.” ER 806. This would also be a plausible appeal argument. Since Pippins’s out-of-court interview with Heldreth was hearsay introduced by the State, the rules would permit Douglas to attack his statements as if they had been made from the witness stand.

If counsel failed to raise these arguments, it was both deficient and prejudicial representation, because it was essential for Douglas to mitigate the devastating impact of the inadmissible hearsay that Pippins told Heldreth that Douglas told Pippins he committed the offense.<sup>11</sup>

This was reversible error.

15. IT WAS FLAGRANT AND  
CONSTITUTIONAL MISCONDUCT TO TELL  
THE JURY TO CONVICT UNLESS IT FOUND  
THE STATE’S WITNESSES WERE LYING.

An appellant alleging prosecutorial misconduct bears the burden of showing both improper conduct and prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. *Id.* Where, as here, defense counsel did not object to the challenged arguments below, appellant must demonstrate that the

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<sup>11</sup> Pippins, not Douglas, was the declarant here. Therefore, ER 801(d)(2), which allows statements of a party, does not apply.

misconduct was so “flagrant and ill-intentioned” that it caused prejudice that a curative instruction could not have remedied.” *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005), quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The challenged remarks are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). That is what happened here.

Moreover, prosecutorial misconduct may deprive a defendant of a fair trial as guaranteed under the state and federal constitutions. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). In that case, it sufficient for appellant to establish the impropriety and prejudice, defined as a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because the alleged misconduct affects a constitutional right, the issue may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The Court considers the challenged remarks in the context of the entire argument, the issues, the evidence, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578.

The prosecutor's remarks here are reversible as a constitutional violation as well as misconduct "so flagrant and ill intentioned" that no curative instructions could have obviated the prejudice the misconduct engendered, because they called to the attention of the jurors matters they should not consider, and it is likely that the jurors were influenced. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963), quoting *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939).

Argument is flagrant and ill intentioned where established case law is to the contrary. *State v. Fleming*, 83 Wn. App. 209, 213,-14, 921 P.2d 1076 (1996). That is what happened here. It is flagrant misconduct to argue that in order to acquit, the jury must find that the State's witnesses are lying. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), *superseded on other grounds by* RCW 9.94A.360(6); *State v. Castaneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). This is a false choice that misleads the jury about its constitutional duty, because testimony "can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." *Wright*, 76 Wn. App. at 826. Rather, the jury must acquit if it finds the State has not met its burden to prove its case beyond a reasonable doubt.

Here, the prosecutor exhorted the jury that either A.J.S. and Brandon Pippins were lying to Heldreth or they were telling the truth. VII RP 175. That is, the jury must convict unless they believed those witnesses were lying. In addition, the prosecutor established the same false dilemma indirectly by repeatedly eliciting testimony from Detective Heldreth characterizing Douglas's refusal to confess as calling his friends liars. V RP 25-26; VI RP 46, 144. Here, as in *Wright*, the prosecutor's comment that the jurors had to decide who was lying and who was telling the truth and had to find that the State's witnesses were lying in order to acquit, constituted flagrant misconduct. *Wright*, 76 Wn.2d at 826.

This necessarily misled the jury and is reversible misconduct.

#### 16. ACCUMULATIVE ERRORS DENIED DOUGLAS A FAIR TRIAL.

The cumulative error doctrine applies where no single error warrants reversal, but the weight of several errors denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). That is the case here. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is possible for defense counsel's actions to render the process so unreliable that no specific showing of prejudice is

required – prejudice is presumed. *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). That is the case here. A presumption of prejudice arises because the adversarial process broke down. *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Douglas’s trial was conducted with apparent disregard for the Evidence Rules. The cumulative effect of the errors denied Douglas a fair trial. Consider:

The defense was duped into stipulating to a prior sex offense, which is the most damaging possible evidence. The court failed to follow through with a promised limiting instruction because it misinterpreted RCW 10.58.090, a statute that is unconstitutional on its face. The jury had to take the prosecutor’s word for it that a 48-month age difference existed between the alleged perpetrator and victim. The court invited the prosecutor to coach a key witness. Time and again, the jury heard highly damaging evidence that was plainly inadmissible under the rules. The prosecutor extracted crucial evidence from both A.J.S. and Brandon Pippins only by flagrantly violating the evidence rules to get their prior hearsay statements before the jury.

“Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal

defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) and cases cited therein.

Here, the prosecutor violated the clear direction of this Court to refrain from creating a false dilemma for the jury during closing argument. The prosecutor exploited the deficiencies in defense counsel’s performance to introduce evidence the prosecutor clearly knew was inadmissible as demonstrated by the swift and effective objection to the defense following suit. This is contrary to the prosecutor’s role as an officer of the court.

Mr. Douglas deserves a new trial.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Douglas’s conviction, vacate the judgment and sentence, and dismiss the prosecution.

Respectfully submitted this 2<sup>nd</sup> day of August, 2010.



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STATE OF WASHINGTON

BY Jordan McCabe  
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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of the foregoing Appellant's Brief to:

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