

COURT OF APPEALS

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40530-0-II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

ROLAND K. DOUGLAS
Appellant

40530-0-II

On Appeal from the Superior Court of MASON COUNTY

Cause No. 09-1-00177-4

The Honorable Toni A. Sheldon

APPELLANT'S REPLY

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II. RECAP OF THE CASE

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.

On appeal, he challenges the admissibility of much of the evidence against him, and the remaining evidence is insufficient to sustain the conviction. Douglas's contends his trial counsel was ineffective for:

(a) failing to keep inadmissible and damaging testimony out of the trial and

(b) failing to preserve for appeal numerous viable challenges to the court's erroneous evidentiary rulings.

III. ARGUMENTS IN REPLY

1. **Douglas received ineffective assistance of counsel.**

The State disputes that counsel was ineffective for not objecting to a series of trial errors because no errors occurred. Brief of Respondent (BR) 4. This is wrong. And the State repeatedly asserts that Douglas cannot appeal any of the prejudicial errors because his counsel did not object. This establishes Douglas's contention that, to be effective, counsel must object to inadmissible evidence. If inadmissible evidence cannot be

kept out of court, effective counsel will at least preserve the issue for appeal.

It is deficient performance not to preserve a potentially reversible error for review. *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (to effectively preserve error for review, “an objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection.”) Counsel waives any objection to the erroneous admission of damaging evidence absent 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).

Failing to argue applicable law is deficient performance per se and is reversible when the failure to object allows the jury to hear highly prejudicial evidence. *State v. Kylo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009). This is particularly so in egregious circumstances where testimony central to the State’s case is erroneously admitted. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). This is what happened here.

Confidence in a conviction is undermined if there is a reasonable probability an error affected the verdict. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And this

Court will grant relief upon a showing that an objection likely would have been sustained. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As discussed in the individual assignments of error, counsel failed to invoke multiple rules of evidence resulting in the erroneous admission in numerous instances of highly damaging evidence. Generally, this Court does not review issues raised for the first time on appeal, but will do so in the context of an ineffective assistance claim. *See, e.g., State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000). Accordingly, the Court should at minimum vacate judgment and sentence and remand for a new trial. Moreover, since the admissible evidence was insufficient to prove the essential elements of the offense, the Court should reverse and dismiss. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. Eliciting an anonymous caller's specific accusation of Douglas in flagrant violation of the court's order in limine requires reversal.

The State flatly denies that the prosecutor violated the court's order in limine. BR 4. But the record speaks for itself. The court ordered the State not to elicit any testimony from Ms. Kessel or any other witness regarding the specifics of an anonymous call telling Kessel her daughter, A.J.S., was involved with a sex offender. VII RP 73. The prosecutor

nevertheless asked Kessel outright to name the person the anonymous caller had accused. She responded that it was Douglas. VII RP 90.

The State calls this a general question. BR 5. It was not; it is about as specific as it gets. It was a direct question that could not fail to elicit the precise information the court had ordered the State not to mention. This was intentional misconduct that could not have been more prejudicial. It introduced non-confrontable out-of-court testimonial statements accusing Douglas by name.

Counsel should have requested a mistrial, but the failure to object did not waive the issue, and this Court should reverse. *State v. Smith*, 189 Wn. 422, 428-429, 65 P.2d 1075 (1937). The State asks the Court to deny review of this manifest due process violation on the technical ground that Douglas's counsel did not object when the violation occurred. But a *Crawford* violation can be raised for the first time on appeal.¹ RAP 2.5(a)(3). Moreover, a party need not assert a contemporaneous objection to the erroneous admission of evidence if the court has made a final ruling and did not request further objections at trial. *State v. Kelly*, 102 Wn.2d 188, 192, 685 P.2d 564 (1984). And the Court may review the error in the context of Douglas's ineffective assistance claim. *Soonalole*, 99 Wn. App. at 215. And finally, no objection could have cured the prejudicial impact

¹ Please see Issue 3.

of this violation. The reason for pretrial evidentiary rulings is the recognition that the bell cannot be unrung once the jury is exposed to prejudicial evidence.

Reversal is the appropriate remedy under *Smith* for the flagrant violation of the in limine order as well as under *Crawford* for the manifest confrontation violation. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

3. The anonymous accusation that Douglas had sex with A.J.S. violated the Sixth Amendment confrontation right.

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); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *Davis*, 154 Wn.2d at 304.

The State contends that the anonymous caller's statement accusing Douglas of rape of a child was not testimonial. BR 7. This argument verges on the frivolous. "Testimonial" simply means that a declarant

would reasonably expect his statements to be used prosecutorially.

Crawford, 541 U.S. at 52.

This error cannot be deemed harmless by any standard. No statement can be more testimonial than one accusing a named person of a particular offense against a named victim. Reversal is required.

4. The court admitted evidence of a prior offense under a misinterpretation of *Old Chief*² and erroneously instructed the jury it could consider the prior for all relevant purposes.

The court admitted a stipulation by the defense that Douglas had a prior conviction for communicating with a minor for immoral purposes.

VII RP 151-52. Defense counsel objected that this evidence was inadmissible under RCW 10.58.090. VI RP 82-83. But the stipulation came under a spurious application of the doctrine of *Old Chief*. VII RP 66. This was not an “Old Chief” situation, because a prior conviction is not an element of the current charge. RCW 9A.44.079(1); *Old Chief*, 519 U.S. at 174.

The court accepted the stipulation with the proviso that a limiting instruction would be given to the jury. VI RP 38, 81. Instead, the jury was permitted to use the stipulation “for its bearing on any matter to which it is relevant.” Instr. No. 6, CP 43; VII RP 151-52. The ‘all relevant

² *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997).

purposes' instruction appears to reflect the court's understanding of RCW 10.58.090. VII RP 82; Instr. No. 6, CP 43. But only where no other means of proof is available should the court admit prejudicial evidence of which the probative value is negligible and the unfair prejudice is significant. ER 403 cmt.; *State v. Johnson*, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

The prior conviction was probative of nothing but propensity, its potential for prejudice was huge, and the State's supposed reason for introducing the prior under *Old Chief* was spurious. It is reasonably probable that these errors materially affected the outcome. Therefore, reversal is required. *Johnson*, 90 Wn. App. at 74.

The State minimizes the seriousness of inducing a defendant to stipulate to an otherwise inadmissible prior conviction (a) under the false premise that it was to his benefit to do so and (b) under the false assurance that the jury would be instructed that it's evidentiary purpose was strictly limited. BR 14. The Court should reverse.

5. The trial court erroneously admitted prior bad acts evidence under RCW 10.58.090.

The prior offense was not admissible for any legitimate purpose. ER 404(b). The court erroneously admitted it as propensity evidence, citing RCW 10.58.090.

(a) RCW 10.58.090 is unconstitutional on its face. The constitutionality of RCW 10.58.090 is currently awaiting review by our Supreme Court. Douglas rests on his opening brief in contending that RCW 10.58.090 violates the separation of powers and also that ER 404(b) should prevail to the extent the statute conflicts with the rule. RCW 2.04.200 (“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.”). *See also, In re Personal Restraint of Becker*, 96 Wn. App. 902, 982 P.2d 639 (1996). Here, ER 404(b) is in direct conflict with RCW 10.58.090. ER 404(b) prevails and strictly excludes evidence of prior similar offenses to prove propensity.

(b) The trial court misinterpreted RCW 10.58.090.

Even if RCW 10.58.090 were constitutional, the trial court erred by conflating RCW 10.58.090 with the *Old Chief* stipulation rule. This nullified the defense objection to the prior conviction evidence under RCW 10.58.090. The objection just sort of vaporized and faded away. VI RP 44.

Prejudice is irrefutable. Reversal is required.

6. Counsel failed to object to inadmissible hearsay when A.J.S. read from a transcript of her police interview.

The State's claim that A.J.S.'s reading from her prior statement comported with the rules of evidence is without merit. BR 15-16.

A witness may look at her own notes to refresh her recollection provided that the witness's memory needs refreshing and she is not being coached. "Not being coached" means that she "is using the notes to aid, and not to supplant, [her] own memory." *State v. Williams*, 137 Wn. App. 736, 750, 154 P.3d 322 (2007).

A.J.S.'s memory did not need refreshing. She did not claim lack of memory about relevant facts. Rather, she repeatedly declined to recite the particular fact the prosecutor needed from inadmissible, unsworn, out-of-court statements to the police. VII RP at 105. A.J.S. was coached by the *Williams* definition. The prosecutor basically forced her to read the inadmissible statement. That is, it was used to supplant, not to refresh, her memory.

Substituting a witness's prior statement for her actual testimony is precisely what the government may not do. *U.S. v. Morlang*, 531 F.2d 183, 191 (1975), citing McCormick, EVIDENCE, 2nd Ed. § 9. The Court should reverse and dismiss with prejudice because the State could not

have established the essential element of sexual intercourse without this violation.

7. The State improperly impeached Brandon Pippin.

The State contends the impeachment of Pippin was proper. BR 17. It was not. Impeaching testimony is not admissible for the purpose of supplying testimony the prosecutor failed to elicit from the witness. *State v. Thorne*, 43 Wn.2d 47, 52, 260 P.2d 331 (1953). Moreover, evidence used for impeachment must be independently admissible. *Morlang*, 531 F.2d at 189. This includes an otherwise inadmissible prior inconsistent statement. *Morlang*, 531 F.2d at 190. Here, the extrinsic impeachment evidence was not independently admissible because it was hearsay. *See, State v. Huynh*, 107 Wn. App. 68, 76, 26 P.3d 290 (2001).

Admission of improper impeachment evidence is not harmless if it affected the verdict. *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988). Reversible prejudice is shown if there is a reasonable probability that the result of the trial would be different but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). This error was far from harmless. It introduced otherwise inadmissible evidence that the defendant confessed. The State asserts that instructing the jury in general terms that it was the sole judge of credibility is a satisfactory substitute for

a specific instruction limiting the purposes for which an item of evidence may be considered. The State offers no authority for this. BR 20-21.

8. Pippins Was Coached.

Without objection, the State was allowed to rehearse Brandon Pippins by playing him a tape of his prior statement before he testified. VII RP 84-85. The State sees nothing wrong with this. BR 18. But it denied Douglas a fair trial.

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).

In defense of this practice, the State cites ER 613(a). BR 18-19. But this rule applies to witnesses, not potential future witnesses, and it contemplates procedures in open court, not in a back room.

Moreover, Pippins’s prior out-of-court statement is hearsay for which the evidence rules contain no exception. Failure to object to this or request a limiting instruction was deficient performance that resulted in extreme prejudice.

Finally, the State disputes that the prosecutor put Pippins on the stand for the purpose of impeachment. BR 18. But the prosecutor clearly anticipated that Pippins would not testify according to Heldreth's report of his earlier statements, as evidenced by the decision to play Pippins a CD of his prior statement immediately before he testified.

9. Failure to make a record of a crucial sidebar denied Douglas a sufficient appellate record and violated the public trial doctrine.

(a) Conducting legal argument in an unreported proceeding constructively denied the right to effective counsel.

The Sixth Amendment right to counsel is fundamental and is safeguarded by the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 799 (1963). It is not sufficient merely to appoint counsel. Counsel may not be procedurally hobbled in the performance of the representation. *U.S. v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). A violation constitutes constructive denial of the effective assistance of counsel.

The failure to put legal argument in the record prevents appellate counsel from reviewing court's analysis and ruling on the issue for possible error. *See State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963). The substance of this sidebar would have been helpful on appeal.

It likely would contain an open door argument or it would show deficient performance. Therefore, the appropriate remedy is to remand for a new trial. *State ex rel. Henderson v. Woods*, 72 Wn. App. 544, 550, 865 P.2d 33 (1994); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The state constitution provides: “The superior courts shall be courts of record....” Const. art. 4, § 11. This is also a statutory mandate: “The superior courts are courts of record... .” RCW 2.08.030. A “court of record” by definition is one that is “required to keep a record of its proceedings.” Black’s Law Dictionary 353 (6th rev. ed. 1990). The superior court clerk is charged with the statutory duty to ensure that the proceedings get recorded. RCW 2.32.050, .050(2).

Accordingly, Superior Court Rule CR 80 requires the court to make a record of all spoken proceedings. The rule does not distinguish between fact testimony and other oral proceedings in the matter of recording. CR 80³; *Henderson*, 72 Wn. App. at 550.

(b) Private Sidebars Implicate the Public Trial Right. The State claims that the requirements for a complete record and a public trial are

³ In any civil or criminal proceedings, electronic or mechanical recording devices approved by the Administrator for the Courts may be used to record oral testimony and other oral proceedings in lieu of or supplementary to causing shorthand notes thereof to be taken. CR 80 (emphasis added.)

not implicated by holding relevant legal argument off the record in an unreported sidebar. BR 22-23. This is wrong.

Const. art. 1, § 22 and art. 1, § 10⁴ require public access to open criminal proceedings to assure the fairness of our judicial system. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 235 (1995). The State offers no authority for the proposition that the constitution requires only factual testimony to be public while permitting legal arguments that potentially affect the verdict or the conduct of the trial to be conducted in private.

(c) It is the State's Duty to Record Criminal Proceedings. The State argues that appellate counsel should be responsible for repairing defects in the record. BR 21. This is not practical.

Appellate counsel cannot discover defects and omissions in the verbatim report of proceedings until work on the brief begins (frequently under the shadow of the filing deadline) during the 45-day window following the 60-day filing period for the transcript. The superior court may be in a remote county, and appellate counsel often is unfamiliar with local court personnel and practice. To expect appellate counsel to coordinate a meeting between the prosecutor, trial counsel, judge and reporter in order to reconstruct the record is unfair both to appellants and appointed appellate counsel. Moreover, the exercise would be purely

⁴ "Justice in all cases shall be administered openly." Art.1, § 10.

speculative. Counsel can only evaluate potential errors after seeing the transcript. It makes much more sense to assign this responsibility to the trial court, as our statutes and judicial decisions have recognized.

The burden is on the appellant to perfect the appellate record. But it is the duty of the trial court and the State to create a record of sufficient completeness for appellate counsel to identify errors and for this Court to review them. *State v. Larson*, 62 Wn.2d at 66-67.

It is the obligation of the State, not the defendant, to make sure the proceedings are recorded in such a way as to preserve issues for review. *State v. Clinkenbeard*, 130 Wn. App. 552, 571, 123 P.3d 872 (2005). The United States Supreme Court holds unequivocally that it is the independent obligation of the court, not the defendant, to ensure the public nature of criminal proceedings. *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 724-25, ___ L. Ed. 2d ___ (2010). Washington law is in accord. *State v. Strode*, 167 Wn.2d 222, 229-30, 217 P.3d 310 (2009).

10. The prosecutor committed flagrant and deliberate misconduct by arguing, both directly and indirectly, that, in order to acquit, the jury must find that the State's witnesses were lying.

The State denies misconduct during closing argument. BR 27.

The record speaks for itself.

The prosecutor confronted the jurors with a false dilemma, both directly and indirectly by suggesting that they must convict unless A.J.S.

and Brandon Pippins were lying and by repeatedly characterizing Douglas's refusal to confess as calling his friends liars. V RP 25-26; VI RP 46, 144; VII RP 175.

This necessarily misled the jury and is reversible misconduct. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

11. Cumulative errors denied Appellant a fair trial.

This is a case in which it is appropriate for the Court to consider the cumulative effect of the numerous errors in the conduct of this trial, some of which arguably do not justify reversal standing alone. *See, 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); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Douglas's trial was characterized by so many violations of the Evidence Rules that the cumulative effect denied him a fair trial.

The erroneous stipulation of a prior sex offense caused extreme prejudice which no limiting instruction could have cured. Even if RCW 10.58.090 is not unconstitutional on its face, the trial court misinterpreted it. The manner in which the State repeatedly introduced highly damaging evidence was plainly a violation of the rules. And the prosecutor once again fell into the error of creating a false dilemma during closing argument.

IV. CONCLUSION

For the foregoing reasons, Mr. Douglas asks the Court to reverse his conviction, vacate the judgment and sentence, and dismiss the prosecution.

Respectfully submitted this 9th day of November, 2010.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she deposited this day in the U.S. mail, first class postage prepaid, a true and correct copy of this Reply Brief to:

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