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STATE OF WASHINGTON

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Court of Appeals No. 38233-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ARTHUR RUSSELL,
Respondent.

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STATE OF WASHINGTON
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ANSWER TO STATE'S PETITION FOR REVIEW

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I. Introduction

The State of Washington has petitioned this court to review the Court of Appeals decision in *State v. Russell*, ___ Wn.App. ___, 225 P.3d 478 (2010). Mr. Russell prevailed in his appeal to the Washington State Court of Appeals, Division II.

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State argues that the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, is in conflict with a decision of another division of the Court of Appeals, presents a significant question of law under the Constitution of the State of Washington because it is contrary to the rule that only claims of manifest constitutional error should be considered for the first time on appeal, and presents an issue of substantial public interest that should be determined by this court “because

[the decision of the Court of Appeals] deviates from the preservation rule that was established to conserve judicial resources and prevent ‘sandbagging’ by parties at trial.” State’s Petition, p. 1-2. The State’s arguments fail.

For purposes of this Response, Respondent Russell adopts and incorporates the facts as set forth in the decision of the Court of Appeals.

II. Response

The State’s arguments as to why this court should accept review of this case all fail because the State’s arguments are based on a misunderstanding of Washington law.

At the core of each of the State’s arguments as to why this court should accept review of this case is the incorrect premise that, where the trial court in a sex crime case admits evidence of prior acts of sexual misconduct under ER 404(b) to show the defendant’s “lustful disposition” towards the alleged victim, the duty to ensure that the jury is given a limiting instruction rests with the defendant and not with the trial court. The State’s arguments fail to take into account the nature of the charges and the nature of the 404(b) evidence in this case as well as this court’s recent decision in *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) and over 50 years of precedent.

The State is correct in arguing that, in general, failure of trial counsel to request a limiting instruction be given to the jury when

evidence of prior bad acts is admitted under 404(b) precludes the defendant from being able to raise any issues on appeal regarding failure of trial counsel to request the limiting instruction. *See, e.g., State v. Yarbrough*, 151 Wn.App. 66, 90, 210 P.3d 1029 (2009) (failure to request limiting instruction regarding gang-related evidence in trial of purportedly gang-motivated shooting presumed to be legitimate trial strategy and, therefore, could not be the basis of an ineffective assistance of counsel claim on appeal); *State v. Stein*, 140 Wn.App. 43, 165 P.3d 16 (2007) (failure to request limiting instruction regarding evidence of defendant's previous acquittal of murder charges where evidence of prior murder charges was admitted in new murder trial waived argument on appeal that trial court erred in failing to give such an instruction); *State v. Newbern*, 95 Wn.App. 277, 975 P.2d 1041, *review denied* 138 Wn.2d 1018, 989 P.2d 1142 (1999) (failure to request jury be given a limiting instruction where evidence of witness' prior inconsistent statement implicating defendant in attempted murder was admitted as impeach that witness at trial waived defendant's ability to assign error on appeal to trial court's failure to give limiting instruction); *State v. Donald*, 68 Wn.App. 543, 844 P.2d 447, *review denied* 121 Wn.2d 1024, 854 P.2d 1084 (1993) (In trial for attempt to obtain a controlled substance from a hospital emergency room, trial counsel's failure to requesting limiting instruction regarding

evidence of defendant's prior visits to the emergency room where defendant used a false names and obtained narcotics admitted as evidence of intent, knowledge, motive, or plan, waived ability of defendant to assign error to lack of instruction on appeal). *However, the State ignores the line of Washington cases which have created an exception to this general rule for cases involving evidence of prior acts of sexual misconduct admitted under ER 404(b) in prosecutions for sex crimes.*

In *State v. Goebel*, 36 Wn.2d 367, 378-379, 218 P.2d 300 (1950), a case decided before the rules of evidence were adopted, this court addressed the issue of the trial court's duty to give the jury limiting instructions where the trial court finds that evidence of prior sexual misconduct is admissible in a trial for different sexual misconduct:

It is our view that this matter of the admission of evidence of independent and unrelated crimes, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment, should be surrounded with definite safeguards. When it becomes apparent that certain evidence tends to prove an independent and unrelated offense, the trial judge, in the absence of the jury, should ascertain upon what basis of relevancy the state relies. **If the evidence offered is shown to be relevant to any material issue before the jury, it may be admitted, and, if it is, an explanation should be made at the time to the jury of the purpose for which it is admitted.** (The reason for its admission will generally be found within the five generally recognized exceptions to the rule of exclusion, but we are not prepared to say that they are exclusive.) The court, in arriving at its

decision as to the admissibility of the evidence, is of course not limited to the reasons given by the state; but the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and **it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.**

Goebel, 36 Wn.2d at 378-379, 218 P.2d 300 (emphasis added). Thus, under *Goebel*, where a trial court admits evidence of prior sexual misconduct in a trial where a defendant stands accused of further sexual misconduct, it is the duty of the trial court, not the defendant, to ensure that the jury is given a limiting instruction. *See also State v. Whalon*, 1 Wn.App. 785, 794, 464 P.2d 730, *review denied* 78 Wn.2d 992 (1970).

In *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982), this court recognized that the risk of prejudice to a defendant from the admission of prior sexual misconduct is at it highest in cases where a defendant is charged with committing a sex crime. *Saltarelli*, 98 Wn.2d at 363, 655 P.2d 697. Because of this extremely high risk of prejudice, this court reaffirmed *Goebel* and held that where such evidence of prior sex related crimes, wrongs, or acts is admitted under ER 404(b), “*an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose or purposes.*” *Saltarelli*, 98 Wn.2d at 361-362, 655 P.2d 697, *citing Goebel*, 36 Wn.2d at 378-379, 218 P.2d

300. See also *State v. Murphy*, 44 Wn.App. 290, 295, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986) (noting that *Saltarelli* requires the trial court to give a cautionary instruction when 404(b) evidence is admitted).

In *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), this court again noted that it is the trial court's duty to explain the purpose of the admission of evidence of prior sexual misconduct to the jury and to give a cautionary instruction that the jury should consider the evidence for no other purpose. *Lough*, 125 Wn.2d at 860 n. 18, 889 P.2d 487, citing *State v. Brown*, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989) (“*We have said that if evidence is admitted under ER 404(b), the trial court should explain to the jury the purpose for which the evidence is admitted, and should give a cautionary instruction that the evidence is to be considered for no other purpose.*”)

Most recently, in *State v. Foxhoven*, 61 Wn.2d 168, 163 P.3d 786 (2007), this court again affirmed that where 404(b) evidence is admitted, a limiting instruction “must be given to the jury.” *Foxhoven*, 161 Wn.2d at 175, 163 P.3d 786.

These cases make it the duty of the trial court, not the defendant, to ensure the jury receives a limiting instruction when the trial court admits evidence of prior sexual misconduct under ER 404(b) in a case where the

defendant is charged with a sex crime. The State's arguments that a trial court has no duty to ensure the jury is given a limiting instruction in cases such as Mr. Russell's ignore decades of established law. In cases such as Mr. Russell's, a defendant certainly may request a limiting instruction, and if one is requested the trial court must give it, but it is ultimately the duty of the trial court to ensure that the jury receives a limiting instruction regarding evidence of prior sexual misconduct where a such evidence is admitted pursuant to ER 404(b) and the defendant is charged with a sex crime. Washington law is clear that it is an abuse of discretion for the trial court to fail to give a limiting instruction under such circumstances as are present in this case.

The decision of the Court of Appeals in this case is not contrary to any prior Washington appellate or Supreme Court decisions. The Court of Appeals decision is in accord with *Foxhoven*, *Lough*, *Murphy*, *Saltarelli*, *Whalon*, and *Goebel* in holding that it was the duty of the trial court, not Mr. Russel, to ensure the jury received the requisite limiting instruction. The Court of Appeals properly determined that the failure of the trial court to so instruct the jury was an abuse of discretion that deprived Mr. Russell of a fair trial.

III. CONCLUSION

The decision of the Court of Appeals in this case is not in conflict

with any appellate or Supreme Court cases. Further, the decision comports perfectly with over 50 years of established Washington law. This court should deny the State's Petition and affirm the decision of the Court of Appeals.

DATED this 11th day of April, 2010

Respectfully submitted,



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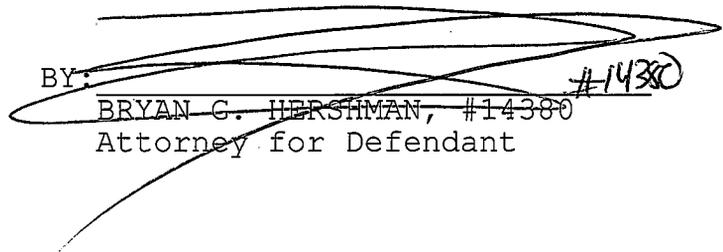
Court of Appeals No. 38233-4-IIII
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
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) Petitioner)
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) vs.)
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) Arthur Russell,)
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) Respondent.)
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that copies of Respondent's
Answer to State's Petition for Review, have been sent by certified
mail to the Kitsap County Prosecuting Attorney's, at 614 Division
St., MS 35, Port Orchard, WA., 98366.

DATED this 12th day of April, 2010.

BY:  #14380
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