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COURT OF APPEALS
DIVISION II

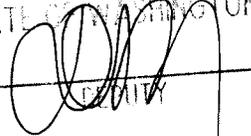
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STATE OF WASHINGTON

No. 40232-7-II

COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

BY 
CITY

STATE OF WASHINGTON,

Respondent,

v.

RODNEY THAYER,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Cause No. 09-1-00314-9

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of Thayer's prior sex offense that did not satisfy the requirements of RCW 10.58.090(6).
2. The trial court erred in admitting evidence of Thayer's prior sex offense under RCW 10.58.090, which violates the state and federal separation of powers doctrines.
3. The trial court erred in permitting Thayer to be represented by counsel who provided ineffective assistance by failing to properly object to the admission of evidence of Thayer's prior sex offense under RCW 10.58.090.
4. The trial court erred in giving its purported limiting instruction that permitted the jury to consider the evidence of Thayer's prior sex offense for any purpose the jury deemed relevant, which failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes.
5. The trial court erred in giving its purported limiting instruction that permitted the jury to consider the evidence of Thayer's prior sex offense for any purpose the jury deemed relevant, which constituted a directed verdict.
6. The trial court erred in giving its purported limiting instruction that permitted the jury to consider the evidence of Thayer's prior sex offense for any purpose the jury deemed relevant, which amounted to a comment on the evidence.
7. The trial court erred in permitting Thayer to be represented by counsel who provided ineffective assistance by failing to properly object to the court's purported limiting instruction.
8. The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence that Thayer was guilty of child molestation in the third degree.
9. The trial court erred in not reducing Thayer's period of community custody.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err and improperly admit evidence under RCW 10.58.090 that Thayer committed a prior sex offense when it methodically addressed each element of that statute?
2. Did error occur when the trial court allowed Thayer to be represented by counsel who did object to the admission of

Thayer's prior sex offense conviction when: (a) the balancing tests of RCW 10.58.090 were properly completed; and (b) that statute is constitutional under both state and federal law?

3. By Providing the jury with a limiting instruction regarding its potential use of Thayer's prior sex conviction immediately after admission of such evidence and again in the set of jury instructions at the close of the case which reminded the jurors that regardless of that conviction the State was still obligated to prove each element of the crime charged, did the trial court err?
4. Did the trial court err in not taking Thayer's case from the jury for lack of sufficient evidence when the State elicited ample direct and circumstantial evidence that Thayer committed the crime?
5. Should Thayer's sentence be remanded to the trial court to reduce the period of community custody when the judgment and sentence specifies that the maximum term of confinement is sixty months/

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Thayer's recitation of the procedural history except for the following distinctions and additional facts:

In determining whether Thayer's prior conviction for communication with a minor for immoral purposes should be admitted into evidence, the trial court conducted the requisite analysis as mandated under RCW 10.58.090-Sex offense-admissibility. RP Vol. IV: 25-31. The

trial court addressed subsection (6) and started with (6)(a)-The similarity of the prior acts to the acts charged. RP Vol. IV 25. The court reasoned:

They're similar in a couple regards: number one, they are both sex offenses; number two, they are both said to have the same victim, or alleged victim. RP Vol. IV: 26.

Moving on to subsection (6)(b)-The closeness in time of the prior acts to the acts charged, the trial court found that prior incident occurred late in 2008 and the charge currently is alleged to have occurred August 8, 2009 and stated:

So, essentially, eight-a little less than eight months, or right around the eight-month figure, that the court finds is close in time. It's not a conviction that occurred fourteen years ago, for example, or five years ago, or even three years ago. It is within months of the prior conduct. RP Vol. IV 26.

Moving to the third factor (6)(c)-The frequency of the prior acts, the court found that there is just one prior act and now this new charge that is before the court stating:

So, the frequency is not a factor that is in favor of putting this before the jury.

Addressing the fourth factor (6)(d)-The presence or lack of intervening circumstances, the court did not find any intervening factors. RP Vol. IV 27.

Moving to subsection (6)(e)-The necessity of the evidence beyond the testimonies already offered at trial, the court stated:

The state has indicated that the probative value of this would be to show –is their hope to show-that actual sexual contact had occurred on one prior occasion to be able to use in terms of what was occurring with regard to the two individuals in the bed at the time that law enforcement came in to the bedroom. And based upon the fact that there was a hung jury previously, that is a logical step to take. And, so, the court would find that it would be helpful and assist the state in presenting their case; that it does have probative value. RP Vol. IV 27.

Addressing subsection (6)(f)-Whether the prior act was a criminal conviction; the court found that the prior act was a criminal conviction based on a guilty plea. RP Vol. IV 28.

Moving to subsection (6)(g)-involving prejudice, the court looked at whether the probative value is substantially outweighed by any of the factors set out in this subsection. RP Vol. IV 28. The court looked at these factors and found that needless presentation of cumulative evidence, considerations of undue delay, misleading the jury, and confusion of the issues were not present. RP Vol. IV 28-29. Next, the court addressed the issue of unfair prejudice and stated:

The court will find that with Communication with a Minor for Immoral Purposes, rather than an identically-similar offense, that the danger of unfair prejudice is less than it would be for an exactly similar offense. RP Vol. IV 29.

Regarding the last factor, subsection (6)(h)-Other facts and circumstances, the court did not find any particular additional facts or circumstances to consider. RP Vol. IV 30.

Phillip Grout testified that he saw Thayer in bed with H.E.C. on the morning of August 8, 2009 and called 911. RP Vol. IV 76.

E. ARGUMENT

e.1 EVIDNCE THAT THAYER COMMITTED A PRIOR SEX OFFENSE WAS PROPERLY ADMITTED UNDER RCW 10.58.090

The trial court thoughtfully and methodically parsed RCW 10.58.090 and correctly concluded that because its elements were satisfied, evidence of Thayer's prior sex crime conviction should be admitted. In evaluating whether evidence of a defendant's prior sex offense should be excluded pursuant to ER 403, RCW 10.58.090(6) directs the trial court to consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste
of time, or needless presentation of cumulative evidence; and
(h) Other facts and circumstances.

The court found that the present crime and the prior act were similar in a couple of regards. First, both are sex offenses. Secondly, they both had the same victim. RP Vol. IV 26. The court was correct in its analysis on this subsection of the statute because both the prior crime and the present crime involved the same victim. Subsection (6)(b) was likewise met under *U.S. v. Benally*, 500 F.3d 1085, 74 Fed R. Evid Serv. 361 (C.A. 10 2007). In *Benally*, because there, evidence of the defendant's prior sex crimes that occurred some forty years earlier was deemed admissible. *Benally*, 500 F.3d at 1088, 1091-1092. In Thayer's case, just approximately 8 months separated his 2008 conviction and date of his current offense in 2009. RP Vol. IV 26. The court found that in regard to (6)(c), that there was just one prior act and that frequency was not a factor that was in favor of putting the evidence before the jury. RP Vol. IV 26.

In addressing prong (6)(d), the court found no intervening factors. The Court in *Benally*, stated that treatment, intoxication or drug use, given certain facts might be considered an intervening circumstance. *Id* at 1093. In the present case, there are no such intervening factors. The court stated

that with regard to prong (6)(e) that evidence of the prior offense would be probative to what had occurred in the present case. RP Vol. IV 27. In the present case there was no scientific testimony or forensic testimony and therefore the admission of the prior conviction has probative value.

The trial court spent a lot of time discussing prong (6)(g) and found that Thayer would not be prejudiced by the admission of evidence regarding his prior conviction. The court found that there is probative value with respect to the prior conviction, and primarily because it is a sexual offense against the same alleged victim. RP Vol. IV 28. The court went on to find that admission of the evidence would not result in needless presentation of cumulative evidence, considerations of undue delay, or misleading the jury. RP Vol. IV 28. The court examined the issue of the danger of unfair prejudice and reasoned that admission of evidence of the prior sex offense, communication with a minor for immoral purposes, rather than an identically-similar offense, that the danger of unfair prejudice is less than it would be for an exactly similar offense. RP Vol. IV 29. Finally, the court did not find any other facts or circumstances contemplated by subsection (6)(h).

Based on a thorough evaluation and careful balancing of all the sections in RCW 10.58.090, the trial court reached its decision to admit evidence of Thayer's 2008. Error did not occur.

e. 2 RCW 10.58.090 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Constitutional challenges to legislation are questions of law that are reviewed de novo. *State v. Gresham*, 153 Wash.App at 659,663, 223 P.3d 1194 (2009). Statutes are presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *Id.* at 664.

The doctrine of separation of powers is implicit in our constitution, derived from the distribution of power into three coequal branches of government. *Id.* at 643. However, the three branches are not hermetically sealed and some overlap must exist. *City of Fircrest v. Jensen*, 158 Wash.2d 384, 393, 143 P.3d 776 (2006). The inquiry that must be made is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *City of Fircrest v. Jensen*, 158 Wash.2d at 393 143 P.3d 776 (2006).

The authority to enact evidence rules is shared by the Supreme Court and the legislature. *Id.* at 394. The Supreme Court is vested with judicial power from article IV of our constitution and from the legislature

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

When rules and statutes cannot be harmonized, the nature of the right at issue determines which one controls. *State v. Gresham*, 153 Wash.App. at 667 223 P.3d. 1194 (2009). Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail. *Id.* at 667.

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

RCW 10.58.090(1) states, "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex

offenses is admissible notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403. *Gresham*, 153 Wash.App. at 669-670.

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

The reasoning in *Gresham* is also quite similar to the 10th Circuit's opinion in *Benally*, which examined Federal Evidence Rules (FER) 413 and 414 in addressing propensity evidence in the context of sexual assault and child molestation. The difference in *Benally* is that while "congressional intent" instead of the Washington State Legislature or Washington Supreme Court was involved, the underlying goal remains unchanged: an intent regarding the admission of evidence tending to show a defendant's propensity to commit sexual assault or child molestation. *Benally*, 500 F.3d at 1090.

Thayer's argument that *Gresham* "unswervingly undercuts our Supreme Court's authority by permitting trial courts the discretion to

admit propensity evidence” is in error, because any defendant, under the protections of RCW 10.58.090, will have: (a) the trial court judge serving as gatekeeper in applying the multipart test to determine whether the evidence will be admitted; and (b) an ER 403 balancing test to protect him/her from unfair prejudice. RCW 10.58.090 does not violate the separation of powers doctrine, just as FER 413 and 414 do not offend federal law.

e.3 ERROR DID NOT OCCUR WHEN THE TRIAL COURT ALLOWED THAYER TO BE REPRESENTED BY COUNSEL WHO DID OBJECT TO THE ADMISSION OF THAYER’S PRIOR SEX OFFENSE

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

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel’s

unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful assistance of counsel. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Thayer's attorney argued vigorously that under RCW 10.58.090 evidence of his client's prior sex crime conviction should not be presented before the jury because it could not pass the multi-pronged balancing test and was highly prejudicial to the defendant. RP Vol. IV 21.

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

e.4 BECAUSE THE TRIAL COURT PROVIDED THE JURY WITH A LIMITING INSTRUCTION REGARDING ITS POTENTIAL USE OF THAYER'S PRIOR SEX CRIME CONVICTION IMMEDIATELY AFTER THE ADMISSION OF THE EVIDENCE AND AGAIN IN THE SET OF JURY INSTRUCTIONS AT THE CLOSE OF TESTIMONY, ERROR DID NOT OCCUR BECAUSE BOTH INSTRUCTIONS REMINDED JURORS THAT REGARDLESS OF THAYER'S CONVICTION THE STATE WAS STILL OBLIGATED TO PROVE EACH ELEMENT OF THE CRIME CHARGED.

Jury instructions challenged on appeal are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The effect of a particular phrase in an instruction is examined by considering the instructions as a whole and reading challenged portions in the context of all the instructions given. *Pirtle*, 127 Wn.2d at 656. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908-909, 976 P.2d 624 (1999). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The jury is presumed to follow the instructions of the court. *State v. Grisby*, 97 Wash.2d 493, 499, 647 P.2d 6 (1982).

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

In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses,

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

The limiting instruction that the trial court provided to the jury immediately following admission of Thayer's prior sex crime conviction is this:

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's relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct or offense that is not charged in the information. RP Vol.V 105-106

This cautionary instruction was reiterated in Instruction No. 6 at the close of testimony. CP 41

Contrary to Thayer's argument that these instructions had "nothing to do with limitation," neither instruction eliminated an element of the crime charged that the State had to prove beyond a reasonable doubt.

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

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court. CP: 49.

The limiting instruction specifically states that Thayer's prior sex offense "may be considered," which allowed the jury to either use or ignore it as they chose within the limited confines of its admissibility. Stoll's argument that "the jury was to use the evidence for an improper propensity purpose" was addressed by the second half of the limiting instruction, which clearly stated that mere admission of Thayer's prior

conviction did not lessen the State's burden of proof. This is similar to the limiting instruction that the trial court gave in *Scherner*:

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

Citing to *Benally*, the *Scherner* Court noted that while this instruction appears to have been adopted from that case, it is not the only type of instruction that may be given in such cases. *Scherner*, 153 Wash.App. at 640, Fn. 38. The trial court did not err in providing this limiting instruction the jury.

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

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

To convict the defendant of the crime of child molestation in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8th day of August, 2009, the defendant had sexual contact with H.E.C;
- (2) That H.E.C. was at least fourteen years old, but less than sixteen years old, at the time of the sexual contact, and was not married to the defendant;
- (3) That the defendant was at least forty-eight months older than H.E.C.; and
- (4) That the acts occurred in Mason County in the State of Washington. CP 49

Applying the rationale of *Scherner*, just as the passage of RCW 10.58.090 did not change the elements for child molestation, which Thayer was charged with and ultimately convicted of here. *Scherner*, 153 Wash.App. at 640.

Employing the rationale of *Schroeder v. Tilton*, 493 F.3d 1083 (9th Cir. (2007)) the *Scherner* Court also dispensed with that appellant's argument that sex offense evidence is propensity evidence that reduces the quantum of evidence that the State must produce in order to convict. As the *Tilton* court reasoned, the key aspect of a California statute in sex crime cases is that it related to the admissibility of evidence, and not sufficiency.

Scherner reached the same conclusion regarding RCW 10.58.090 and ER 404(b), as the Evidence Rule permits admission of evidence for “other purposes” than to show propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Scherner*, 153 Wash.App. at 640-641.

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

Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.

State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). A

constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Guloy*, 104 Wash.2d at 425.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Guloy*, 104 Wash.2d at 425-426.

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

e.5 THAYER WAS NOT PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO THE COURT'S LIMITING INSTRUCTION

Addressing this issue that Thayer raises in his brief here, his attorney did not provide ineffective assistance because the trial court properly followed RCW 10.58.090, and crafted jury instructions that were based those from *Benally*; a leading federal case. Objection by defense counsel on this issue after the trial court rigorously adhered to procedure and relevant case law would have been merit less.

e.6 THE TRIAL COURT DID NOT ERR BY NOT TAKING THAYER'S CASE AWAY FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE THE STATE PROVED ITS CASE BEYOND A REASONABLE DOUBT.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

In the present case there was ample evidence elicited at trial for the state to prove the charge beyond a reasonable doubt. Loretta Record testified that H.E.C. was 15 at the time of trial. RP Vol.V 62. H.E.C.

testified that Thayer was 21. RP Vol.V 93. Officer Patton testified that he went into the bedroom of H.E.C. and immediately saw Thayer in bed with H.E.C. Patton saw H.E.C. was on her back in bed and Thayer was flipping off of her onto his back. Thayer was in his boxers and Patton could see bare skin on the side of H.E.C. H.E.C. continued to cover up with the bed sheets. RP Vol. V 82. H.E.C. also testified regarding a letter she wrote to the defendant, admitted as exhibit 1 at trial, about how she told Thayer that all she had to do was to go into court and say that no physical contact had occurred. RP Vol. V 95-96. Thayer wants to discredit the weight given to circumstantial evidence. The direct and circumstantial evidence elicited at trial was sufficient to prove beyond a reasonable doubt that Thayer committed child molestation in the third degree.

e.7 THAYER'S SENTENCE DOES NOT NEED TO BE REMANDED TO THE TRIAL COURT TO REDUCE THE PERIOD OF HIS COMMUNITY CUSTODY

The maximum punishment for every offense is set by the legislature. The total punishment, including imprisonment and community custody, may not exceed the statutory maximum. Where a defendant is

sentenced to the statutory maximum, and also sentenced to community custody, the judgment and sentence should set forth the statutory maximum and clarify that the term of community custody cannot exceed that maximum. *State v. Sloan*, 121 Wash.App. 220, 87 P.3d 1214 (2004).

In *Sloan*, the defendant was sentenced on three counts of rape of child in the third degree and one count of child molestation in the third degree. The trial court sentenced her to the statutory maximum of 60 months' confinement for each count, to be served concurrently. In addition, the court imposed 36-48 months' community custody. *Id.* at 222. The defendant objected to the community custody provision of her sentence, arguing that upon her release from prison, she will have served the statutory maximum. The court disagreed. The court noted that the defendant was sentenced to the statutory maximum, but she may earn early release credits and transfer to community custody before serving the entire term. In that event, the defendant will remain in community custody for up to the statutory range of 36-48 months, but no longer than the 60-month maximum term. In no event will she serve more than the statutory maximum *Sloan*, 121 Wash.App. at 223.

The court in *Sloan*, goes on to say that to avoid confusion, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. In

the present case, like *Sloan*, Thayer was sentenced to sixty months, the statutory maximum sentence and was also sentenced to 36-48 months of community custody. The judgment and sentence in the present case states “the combined terms of confinement and community custody shall not exceed the statutory maximum of 60 months.” This language was in bold and underlined. CP 59 p.5.

F. CONCLUSION

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

Dated this 30 day of September 2010.

Respectfully submitted by:



Timothy W. Whitehead, WSBA #37621
Deputy Prosecuting Attorney for Respondent
Mason County, WA

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 40232-7-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 RODNEY THAYER,)
)
 Appellant,)
 _____)

FILED
COURT OF APPEALS
DIVISION II
10 OCT - 1 PM 2:30
STATE OF WASHINGTON
BY 

I, MARGIE OLINGER, declare and state as follows:

On THURSDAY, SEPTEMBER 30, 2010, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF
RESPONDENT, to:

Thomas Doyle
P.O. Box 510
Hansville, WA 98340-0510

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 30TH day of September, 2010, at Shelton, Washington.


MARGIE OLINGER