80547-4

NO. 34334-7-II

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

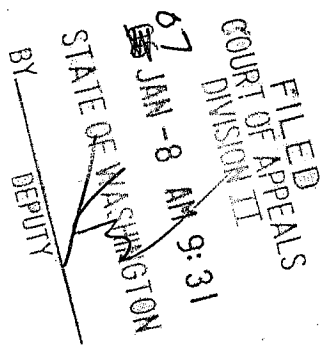
STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ROSWELL,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01048-5

BRIEF OF RESPONDENT

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Thomas Weaver P.O. Box 1056 Bremerton, WA 98337	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 5, 2007, Port Orchard, WA **Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether there was sufficient evidence regarding the communication with a minor counts when, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt?

2. Whether Roswell is precluded from challenging the sufficiency of the evidence regarding his prior conviction when he stipulated that he had a previous conviction, and whether, even if he had not been precluded from raising this claim, the evidence of his prior conviction was sufficient?

3. Whether the trial court erred in denying Roswell's request to bifurcate the trial and hold a jury trial on some elements and a bench trial on another element, when there was no authority that in any way supported Roswell's request, and Washington court's have previously rejected such claims?

4. The State concedes that the trial court erred in failing to enter written findings of fact and conclusions of law regarding the exceptional sentence, but the appropriate remedy is a remand for entry of those findings, not a vacation of the exceptional sentence.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jonathan Roswell was charged by amended information filed in Kitsap County Superior Court with child molestation in the second degree (with a victim named DMW), child molestation in the third degree (with a victim named CMP), and three counts of felony communication with a minor for immoral purposes (with victims named DMW, CMP, and LB). CP 12. After a jury trial, Roswell was convicted of the child molestation in the second degree and the communication court involving DMW, as well as the communication count involving CMP. He was acquitted of the child molestation in the third degree count involving CMP and the communication count involving LB. CP 106. This appeal followed.

B. FACTS

Prior to trial, Roswell made a motion in limine asking the court to exclude any evidence of his prior conviction for a sex offense as alleged in the felony communication with a minor counts. RP 12/5 at 14. Defense counsel stated that Roswell had "convictions for child molestation in the third degree and a rape 3 as a juvenile from 2002." RP 12/5 at 14. Defense counsel then proposed that Roswell sign a stipulation that he had a "prior conviction for child molestation in the third degree, a class C felony." RP 12/5 at 15. Defense counsel further proposed that "Mr. Roswell will stipulate

that he has a prior felony sex offense that qualifies under this statute, and he is going to waive his right to a jury trial on that, on that issue." RP 12/5 at 19. Roswell then proposed that there be a later bench trial on this element. RP 12/5 at 19. The State argued that Roswell was not entitled to stipulate to an element and keep the jury from hearing about an element of the offense. RP 12/5 at 26. The State acknowledged that Roswell was entitled to an "Old Chief" type stipulation that would inform the jury that he had a prior convictions for a sex offense (without stating the exact nature of the prior offense or giving any other details). RP 12/5 at 29.

The trial court ruled that it was not going to order a bifurcated trial on each element, but that the evidence presented to the jury would be limited to the fact that Roswell had a prior sex offense. RP 12/5 at 30. Roswell then signed a stipulation entitled, "Stipulation of Defendant to Allegation of Prior Conviction of Sex Crimes and Partial Waiver of Jury Trial" which stated that he stipulated as follows,

1. That he is the named Defendant in cause number 03-1-01047-1 in Kitsap County Superior Court which resulted in him being convicted of Child Molestation in the Third Degree, a Class C Felony under the laws of the State of Washington.
2. That Defendant acknowledges that he had been advised that he has the right to have a jury decide beyond a reasonable doubt whether he was convicted of a sex offense under RCW 9A.68, 9A.44 or 9A.64. Defendant waives his right to a jury trial as to this question and

> consents to a determination by the court on the issue of prior conviction.

CP 21. Defense counsel stated that Roswell had signed the stipulation. RP 12/5 at 31.

The court later addressed Roswell's written motions in limine which included motions to exclude reference or testimony that Roswell was previously convicted of a sex offense and to exclude evidence regarding his status as a sex offender, prior sex offender, prior convicted felon, and probationary status. RP 12/5 at 45, CP 11. Roswell argued that that court already had the stipulation, so he was moving to exclude any other reference to his prior offense or its consequences. RP 12/5 at 45-46. The trial court agreed and ruled that the witnesses would not be allowed to "testify that he's a registered sex offender, has a prior sex conviction." RP 12/5 at 46.

The following day, as the court prepared to read the charges and the Information to the jury, defense counsel proposed a modification of the language of the Information, stating,

> You ruled yesterday that the jury would be instructed pursuant to Mr. Roswell's stipulation that he was convicted of a prior felony sexual offense.

RP 12/6 at 5. The court agreed and changed the language in the Information stating that Roswell had previously been convicted of communicating with a minor and inserted in its place that Roswell had been previously convicted of

a felony sexual offense. RP 12/6 at 5.

Defense counsel later renewed his objection to exclude evidence of a prior sexual offense as alleged in the felony communication with a minor counts. RP 12/6 at 8. Defense counsel stated,

> As a reminder, we – Mr. Roswell has filed a stipulation to the prior sexual offense. He has filed a waiver of jury as to that element of the crime, which would enable the court to find beyond a reasonable doubt, based on his stipulation, that he committed that element of the crime.

RP 12/6 at 8-9. The court stated that Roswell had made his record and again denied the motion for a bifurcated trial. RP 12/6 at 9.

At trial, the State first called DMW. RP 12/7 at 15. DMW testified that she was 14 and that her birth date was July 23, 1991. RP 12/7 at 16. She stated that Roswell had been friends with sister, and that DMW had been friends with Roswell back when she was five or six years old. RP 12/7 at 17. DMW also stated that there had then been a period when she had not seen Roswell for some time, but that she had been around Roswell again from May to June of 2005. RP 12/7 at 18. Around this time, DMW saw Roswell though a mutual friend, Kyle Masters, when Masters brought Roswell to a park where DMW and her friends hung out. RP 12/7 at 16. This park was near DMW's home and had a jungle gym, swings sets, a slide, and a big rock that DMW and her friends would climb on. RP 12/7 at 19-20. DMW went to

the park frequently with her various friends and "hung out," and stated that there were not usually adults at the park, but rather, "it was just us kids." RP 12/7 at 21.

When Kyle Masters first brought Roswell to the park, DMW was there with her best friend, CMP, who lived up the road. RP 12/7 at 20-21. When DMW saw Roswell she greeted him with a hug. RP 12/7 at 20. Roswell then began to come to the park several times a week, usually by himself. RP 12/7 at 22. Eventually DMW and Roswell exchanged phone numbers, although DMW gave Roswell her cell phone number and not her home number, as she thought her sister would get mad if he called. RP 12/7 at 23. DMW stated that at some point things started to get uncomfortable in her relationship with Roswell, and that he touched her. RP 12/7 at 24. Roswell touched her on her stomach, breasts, and butt, and this touching was different than a hug. RP 12/7 at 24. DMW described that Roswell would touch her on her "boobs," and "down below," which she described as below her waist but above her crotch. RP 12/7 at 25. She stated that this occurred more than one time, and that she told him to stop, but he did not do so. RP 12/7 at 26. DMW also stated that she and Roswell kissed. RP 12/7 at 27.

DMW also described an incident in the woods at the park, and said that she and Roswell were hanging out and drinking orange schnapps. RP 12/7 at 43. Roswell then began to touch her below her waist, down to her

crotch, and she felt uncomfortable so she screamed and ran away. RP 12/7 at 43-44.

DMW and Roswell also talked about sex, and DMW stated these conversations started about three weeks after their first meeting, and about a week after he began touching her. RP 12/7 at 28. DMW described how Roswell wrote down on a little piece of paper in a "little black book" that when she turned 18 they were going to have sex. RP 12/7 at 29. Roswell also told her this out loud, and DMW told him, "no." RP 12/7 at 29. DMW did admit, however, that she had signed the book. RP 12/7 at 29. She also stated that CMP was around, and that she also signed the book at the same time. RP 12/7 at 29-30.

Eventually DMW's sister found out about the contact and called the police. RP 12/7 at 30-21. DMW spoke to the police and an interviewer at the sexual assault center and told them that Roswell had twice asked her to have sex with him. RP 12/7 at 30-32. She also told the interviewer that Roswell had asked CMP to have sex, but they both said "no." RP 12/7 at 36. DMW stated that this statement was "the truth" and that she was around when Roswell asked CMP to have sex. RP 12/7 at 36. DMW also saw Roswell touching another female friend of hers (whom she would go to the park with), and this touching included holding her hand and touching her breasts. RP 12/7 at 21, 39. DMW also heard Roswell asking this friend to have sex with

him and reiterated that she heard Roswell asking CMP to have sex with him. RP 12/7 at 40.

CMP also testified, and her date of birth is November 21, 1989. RP 12/7 at 69. CMP hung out at the park a couple of times a week, and did not typically see adults at the park. RP 12/7 at 69. CMP first saw Roswell around the beginning of the summer, and started to see him at the park. RP 12/7 at 72. Later on, Roswell began to make CMP uncomfortable, and began to talk about sex. RP 12/7 at 73, 74. Roswell would ask CMP if she ever had sex and "things like that." RP 12/7 at 75. CMP stated that there were quite a few times that Roswell asked her and DMW if they had had sex. RP 12/7 at 76. Roswell also asked CMP to have sex with him and asked DMW the same question. RP 12/7 at 76-77. CMP stated that Roswell asked her to have sex with him on more than one occasion, and asked DMW to have sex with him "quite a few" times. RP 12/7 at 76-77. CMP also stated that Roswell had told her that he was in Port Orchard because he was hanging out with his friends, drinking, and "looking to have sex." RP 12/7 at 93.

CMP also described that Roswell had touched her in a way that made her feel uncomfortable, but the touching consisted of only a "quick smack, you know, a tap," to her bottom, and a touch to her face. RP 12/7 at 80-81.

At the conclusion of the evidence, the jury was instructed, pursuant to the previously mentioned stipulation, that, "[t]he defendant has previously been convicted of a felony sexual offense," and Roswell did not object to this instruction. RP 12/8 at 16-17, CP 89. Rather, Roswell proposed a limiting instruction, which the court also gave, which stated that, "The fact that the defendant has been convicted of a prior felony sex offense is admitted to satisfy an element of the crimes of communication with a minor for immoral purposes, and cannot be used for any other purpose." CP 56-57, 90, RP 12/8 at 18, 22. The State had no objection to Roswell's limiting instruction. RP 12/8 at 22.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE REGARDING THE COMMUNICATION WITH A MINOR COUNTS BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

Roswell argues that the evidence was insufficient to convict him of the two counts of communication with a minor for immoral purposes. App.'s Br. at 9. This claim is without merit because the evidence was sufficient.

Under RCW 9.68A.090, any person "who communicates with a minor for immoral purposes" is guilty of a crime. *State v. McNallie*, 120 Wn.2d 925,

933, 846 P.2d 1358 (1993), *citing* RCW 9.68A.090. The Washington Supreme Court has recently stated that, "As this court has made clear, RCW 9.68A.090 is designed to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006), *citing McNallie*, 120 Wn.2d at 933. In addition, the court has stated that RCW 9.68A.090 requires the State to prove that the defendant communicated with a minor for "immoral purposes," and that the statute also imposes a more general prohibition on communication with minors for the "predatory purpose of promoting their exposure to and involvement in sexual misconduct." *State v. Jackman*, 156 Wn.2d 736, 748-49, 132 P.3d 136 (2006). Thus, the court stated, "it incorporates within its scope a relatively broad range of sexual conduct involving a minor." *Jackman*, 156 Wn.2d at 748-49. The *Jackman* court also cited to *McNallie*, where the court stated that, "An invitation or inducement to engage in behavior constituting indecent liberties with it without consideration, for example, would also satisfy the statute." *See Jackman*, 156 Wn.2d at 748-49, *citing McNallie*, 120 Wn.2d at 934.

When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Hosier*, 157 Wn.2d at 8, *citing State v.*

Myles, 127 Wn.2d 807, 816, 903 P.2d 979 (1995); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Hosier*, 157 Wn.2d at 8, *citing Myles*, 127 Wn.2d at 816; *Joy*, 121 Wn.2d at 339.

Preliminarily, Roswell ultimately concedes that there was substantial evidence that he invited DMW and CMP to have sex with him. App.'s Br. at 11. Roswell, however, argues that there was not substantial evidence of the "alternative means that he invited sex with them using the little black book." App.'s Br. at 11. Roswell's claim that the present case is an "alternative means" case is misplaced.

Alternative means statutes identify a single crime and provide more than one means of committing that crime. *In re Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); *State v. Arndt*, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). For example, under RCW 9A.44.040(1)(a) and (b), rape in the first degree may be committed by the alternative means of either (1) using or threatening to use a deadly weapon, or (2) kidnapping the victim. *State v. Whitney*, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987). The statute found in the present case, however, does not present alternative means for its

commission, thus Roswell's argument and characterization of the present case as an "alternative means" case is misplaced.

If, however, this court were to liberally construe Roswell's argument as a claim that the present case was a "multiple act" case, his claim must still fail. A multiple acts case is one where the State alleges several acts, any one of which could constitute the crime charged. *State v. Beasley*, 126 Wn. App. 670, 682, 109 P.3d 849 (2005), *citing State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). A multiple acts case requires that the jury be unanimous on which act or incident constituted the crime. *Beasley*, 126 Wn. App. at 682, *citing Kitchen*, 110 Wn.2d at 411. Even if this court were to engage in a "multiple act" case analysis, however, the evidence was still sufficient to support the jury's verdict, because the evidence regarding the use of the "black book" was sufficient when viewed in its proper context in relation to the other evidence.

Roswell argues that the States argued in the alternative that he could be convicted of communicating with a minor either for inviting the victims to have sex with him or for having them sign the black book, citing to page 99 of the report of the proceedings. App.'s Br. at 9. The State's argument, however, was in response to Roswell's half-time motion, and the State never specifically characterized the black book as an "alternative." Rather, the State pointed that the evidence regarding communication with a minor was

sufficient because CMP testified that Roswell asked her to have sex with him and had her sign the book. RP 12/7 at 99. The State's actual argument can be read simply as an accumulation of the relevant evidence, and the State did not ever argue in this passage that the black book incident was independent from the overall course of conduct that constituted communication with a minor. Nor has Roswell pointed to any citation from the record where the State made such an argument to the jury. Even if the State had made such an argument, however, the evidence would still have been sufficient, as the evidence regarding the black book, when placed in its proper context and viewed in conjunction with all of the other evidence, was sufficient to support the conviction in this case.

Rather than viewing the use of the black book in its proper context, Roswell's argument regarding the black book focuses on the literal words used and fails to view the use of the book in relation to the other evidence. Washington courts, however, have addressed similar situations before and have looked beyond the literal wording in the communication. For instance, in *Hosier*, the defendant was convicted of two counts of communication with a minor for immoral purposes. *Hosier*, 157 Wn.2d at 7. One of the counts (count "two") was based on the defendant having placed a pair of hot pink, young girl's underpants in a chain link fence of a children's playground at a day care center. *Hosier*, 157 Wn.2d at 4. Written on the front of the

underpants was a message fantasizing about sexual contact with a 7-year-old girl. *Hosier*, 157 Wn.2d at 4. The actual wording of the communication was as follows:

> I love baby sitting this little girl 7 yr old and already as nasty as most big girls ever get she does everything but fuck and real soon I'll be getting it all she is ready and willing just got to open up the gold mine to heaven ... daddy.

State v. Hosier, 124 Wn. App. 696, 701, 103 P.3d 217 (2004). The actual wording, therefore, did not contain a literal invitation to engage in sexual contact.

Seven to eight children playing in the area found the underpants in the fence, and reported it to a teacher. *Hosier*, 157 Wn.2d at 5. The children who found the underpants were between the ages of 3 and 5 and could not read because of their ages. *Hosier*, 157 Wn.2d at 5.

On appeal, the defendant argued that there was insufficient evidence to support his conviction because the minors who received the communication could not read the message. *Hosier*, 157 Wn.2d at 12. The State argued that the message on the underpants was clearly a communication made for "personal gratification" of the sender and the minors were exposed to that communication. *Hosier*, 157 Wn.2d at 12. The court held that the statute did not require that the children be able to read or understand the

written message, and that the defendant's message to the children consisted both of words "and also a symbolic message." *Hosier*, 157 Wn.2d at 13-14. In addition, the court held that the defendant's conduct illustrated his "overall intent: to convince a young girl to take off her underpants to engage in sexual misconduct." *Hosier*, 157 Wn.2d at 13. The court thus held that, viewing the evidence in a light most favorable to the State, the defendant's written and symbolic message was transmitted and received by the children and was sufficient to support the conviction. *Hosier*, 157 Wn.2d at 14.

The analysis and holding in *Hosier* is informative, because the actual written message was not an explicit invitation for the actual victims to engage in sexual acts. Rather, the written message spoke of fantasizing about someone other that the actual victims. Nevertheless, the court found the evidence to be sufficient by looking behind the actual words and looking at the "overall intent" and "symbolic message" that were behind the actual words used in the message.

Roswell, however, argues that his explicit comments in relation to the "little black book" were insufficient to support a conviction because he only asked the victims to have sex with him when they turned 18. App.'s Br. at 11-12. To support his argument, Roswell cites to several cases where the courts have held that a defendant cannot be convicted where he or she only asks the minor to engage in something that would be legal to do. App.'s Br.

at 11-12, *citing State v. Danforth*, 56 Wn. App. 133, 782 P.2d 1091 (1989), *State v. Wissing*, 66 Wn. App. 745, 833 P.2d 424 (1992), *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992). These cases, however, are distinguishable.

Viewing the evidence in the present case in a light most favorable to the State, the jury could infer that while Roswell's actual wording associated with the black book was a request that the vicitms promise to have sex with him when they turned 18, this request had other implications other than its literal meaning. For instance, while the request was that they have sex with him later, the jury could infer that the communication was designed to induce the victims to engage in other sexual misconduct, such as fondling and the like, immediately. If the message associated with the underpants in *Hosier* carried such a message, there is no reason that the use of the black book, especially in light of the other evidence in this case, could not be viewed by the jury as an attempt to induce the victims to engage in illegal sexual misconduct in the near term. This fact distinguishes the present case from the cases cited by Roswell. The reasonable inference that Roswell's use of the black book was an attempt to induce the victims to engage in illegal sexual misconduct was also supported by the other evidence that Roswell had specifically asked the girls to have sex with him, and had stated that he was in Port Orchard looking to have sex. RP 12/7 at 30-32, 36, 76-77, 93. In

addition, DMW stated that Roswell started to use the black book only after he had molested her. RP 12/7 at 28 . Based on all the evidence, and viewing the evidence in a light most favorable to the State, the jury could reasonably infer that asking children to sign a pledge that they would have sex with him when they turned 18 was a communication for immoral purposes relating to sexual misconduct.

As in *Hosier*, this court should look beyond the literal wording of the communication and look at Roswell's "overall intent." A reasonable jury, given all the evidence in the case, could reasonably infer that the use of the "little black book" was a communication with a minor for immoral purposes, namely, promoting their exposure to and involvement in sexual misconduct. While the explicit words may have stated that Roswell was only looking to have sex once the girls turned 18, his actions demonstrated that he was clearly seeking to have sexual contact of some sort with the minors immediately, and the use of the black book, despite its literal wording, was a communication designed to further that goal.

For all of these reasons, even if this court were to undertake a "multiple acts" case analysis, the evidence of each act, including the use of the black book, was sufficient to support the conviction when the evidence, and all reasonable inferences drawn from the evidence, are viewed in a light most favorable to the State.

B. ROSWELL IS PRECLUDED FROM CHALLENGING THE SUFFICIENCY OF THE EVIDENCE REGARDING HIS PRIOR CONVICTION BECAUSE HE STIPULATED THAT HE HAD A PREVIOUS CONVICTION. IN ADDITION, EVEN IF HE HAD NOT BEEN PRECLUDED FROM RAISING THIS CLAIM, THE EVIDENCE OF HIS PRIOR CONVICTION WAS SUFFICIENT.

Roswell next claims that the State presented insufficient evidence that Roswell had a prior conviction for a felony sex offense. This claim is without merit because Roswell waived any objection to the sufficiency of the evidence regarding this element when he stipulated that he had a prior conviction.

First, the defendant's stipulation in the present case was sufficient to establish that Roswell had a prior conviction for a sex offense. The instructions informed the jury that Roswell had previously been convicted of a felony sexual offense. CP 89. This instruction, when read in conjunction with the "to convict" instructions (which required a finding of a previous conviction before the date of the current offenses) was sufficient. Viewing the evidence in a light most favorable to the state, and drawing all reasonable inferences in the State's favor, the stipulation was sufficient to allow the jury to conclude that a "previous conviction" meant a conviction prior to the only operative date that the jury was ever instructed on (the date of the current offenses). The jury could reasonably infer, therefore, that the wording of the

stipulation ("previously been convicted") followed the language in the to convict instructions that required a conviction prior to May 15, 2005.

Roswell's reading of the stipulation instruction relies on a hyper-technical reading of the instruction that would only begin to even raise a question if the instruction is read in isolation from all of the other instructions. Jury instructions, however, are to be read as a whole, and each one is read in the context of all others given. *State v. DeRyke*, 110 Wn. App. 815, 819-20, 41 P.3d 1225 (2002), *citing State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). For these reasons, Roswell's argument must fail.

Although the evidence in the present case was sufficient, this court need not even reach this holding because Roswell waived any right to contest the sufficiency of the evidence in this regard and because he invited any potential error in this regard, and Washington courts have previously held that a stipulation such as the one in the present case serves as such a waiver.

In *State v. Wolf*, 134 Wn. App. 196, 139 P.3d 414 (2006), for instance, the defendant was convicted of unlawful possession of a firearm. Prior to testimony, the defendant stipulated that he had previously been convicted of a serious offense, and agreed that the stipulation would be included as a jury instruction. *Wolf*, 134 Wn. App. at 198. At trial, however,

the stipulation was never read to the jury. *Wolf*, 134 Wn. App. at 198. On appeal, the defendant argued that the jury lacked sufficient evidence to find him guilty of the firearm charge because the State failed to offer the stipulation into evidence. *Wolf*, 134 Wn. App. at 198. While the defendant characterized his claim as a sufficiency of the evidence question, the court disagreed and held that this was not the dispositive issue. *Wolf*, 134 Wn. App. at 199. Rather, the court held that the dispositive issue was, "whether he waived the requirement that the State prove the element he now contests by stipulating to that element. *Wolf*, 134 Wn. App. at 198. The court went on to note that the premise of the waiver theory is that, upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. *Wolf*, 134 Wn. App. at 199, *citing Vander Linden v. Hodges*, 193 F.3d 268, 279 (4th Cir.1999). In addition, the court held that,

> It is well settled in cases that have considered the issue that a defendant, by entering into a stipulation, waives his right to assert the government's duty to present evidence to the jury on the stipulated element.

Wolf, 134 Wn. App. at 199, *citing United States v. Meade*, 175 F.3d 215, 223 (1st Cir.1999); *United States v. Melina*, 101 F.3d 567, 572 (8th Cir.1996); *United States v. Mason*, 85 F.3d 471, 472 (10th Cir.1996); *United States v. Keck*, 773 F.2d 759, 769-70 (7th Cir.1985); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir.1976) (per curiam).

Ultimately the court in *Wolf* held that the defendant had waived the right to put the State to its burden of proof on the element of having previously been convicted of a serious offense due to his stipulation. The court also held that, pursuant to *Old Chief v. U.S.*, the defendant was entitled to stipulate to the existence of the prior conviction rather than allowing the jury to hear the specifics about that conviction, but that once he so stipulated, the defendant had "no legal or equitable basis to contest the government's failure to read the stipulation to the jury. He received the benefit of the bargain-prejudicial information about his prior conviction never entered into the jury's deliberations." *Wolf*, 134 Wn. App. at 203, *citing United States v. Hardin*, 139 F.3d 813, 817 (11th Cir 1998). The court also pointed out that, having resolved the "dispositive issue," it did not need to reach the State's invited error claim. *Wolf*, 134 Wn. App. at 203.

As in *Wolf*, Roswell has waived any sufficiency challenge to the existence of his prior conviction as he stipulated to that element. Roswell received the benefit of his bargain, as the specifics regarding his prior convictions were not presented to the jury. He cannot now complain that the jury did not hear all of the specifics regarding his prior conviction. In addition, Roswell clearly invited any error in this regard.

The invited error doctrine prohibits a party from creating an error at trial and then complaining of it on appeal, and the doctrine applies even when

the error is of constitutional magnitude. *State v. McLoyd*, 87 Wn. App. 66, 69, 939 P.2d 1255 (1997) *citing In re Griffith*, 102 Wn.2d 100, 102, 683 P.2d 194 (1984); *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990).

In the present case, Roswell stipulated that he had been previously convicted of a felony sexual offense. CP 21, 89. Furthermore, Roswell sought, and was granted an order in limine preventing any discussion of his prior conviction, including any evidence regarding his status as a sex offender, a prior sex offender, a prior convicted felon, or his probationary status. RP 12/5 at 45, CP 11. Roswell argued that that court already had the stipulation, so he was moving to exclude any other reference to his prior offense or its consequences. RP 12/5 at 45-46. The trial court agreed and ruled that the witnesses would not be allowed to "testify that he's a registered sex offender, has a prior sex conviction." RP 12/5 at 46.

In addition, defense counsel also stated below that,

> As a reminder, we – Mr. Roswell has filed a stipulation to the prior sexual offense. He has filed a waiver of jury as to that element of the crime, which would enable the court to find beyond a reasonable doubt, based on his stipulation, that he committed that element of the crime.

RP 12/6 at 8-9. The record, therefore, establishes that Roswell stipulated that he had a prior sex offense and waived any requirement that the State present evidence in this regard. His motions in limine, in fact, precluded any

presentation of evidence in this regard. In addition, the State had the actual judgment and sentence and was prepared to present it, and it was marked as an exhibit and was listed on the exhibit list, but was never offered or presented to the jury due to the stipulation and the motions in limine. State's Supplemental Designation of Clerk's Papers (which include the exhibit list and the actual exhibit – the Judgment and Sentence in question). As in *Wolf*, Roswell received the benefit of his bargain, and the dispositive issue is not the sufficiency of the evidence question, but rather, the dispositive issue was, "whether he waived the requirement that the State prove he now contests by stipulating to that element. Wolf, 134 Wn. App. at 198. In any event the evidence was sufficient, as the jury was instructed that Roswell had a previous conviction. For all of these reasons, Roswell's argument must fail.

C. THE TRIAL COURT DID NOT ERR IN DENYING ROSWELL'S REQUEST TO BIFURCATE THE TRIAL AND HOLD A JURY TRIAL ON SOME ELEMENTS AND A BENCH TRIAL ON ANOTHER ELEMENT, BECAUSE THERE WAS NO AUTHORITY THAT IN ANY WAY SUPPORTED ROSWELL'S REQUEST, AND WASHINGTON COURT'S HAVE PREVIOUSLY REJECTED SUCH CLAIMS.

Roswell next claims that the trial court erred in denying his request to bifurcate the trial and delete the element of his prior conviction from the jury trial. This claim is without merit because there is no support for Roswell's

claim under the law, and Washington Courts have previously rejected similar claims.

In the court below, Roswell asked the court to essentially allow him to have a jury trial on some elements, and a bench trial on the element that he had a prior conviction for a sex offense. Roswell, however, cited no authority, either in the court below or on appeal, that authorizes a bifurcated trial on each element of an offense. In addition, at least one Washington court has previously rejected such a claim.

In *State v. Gladden*, 116 Wn.App. 561, 66 P.3d 1095 (2003) the defendant challenged his felony conviction of communication with a minor for immoral purposes, arguing that the court abused its discretion by admitting evidence of his prior conviction when he was willing to stipulate to that element to avoid having this evidence introduced to the jury. *Gladden*, 116 Wn. App. at 563. At trial, the defendant had brought a motion in limine and offered to stipulate to delete the statutory element of the offense requiring proof of a prior conviction so that the jury would not hear any evidence related to that element. *Gladden*, 116 Wn. App. at 563. The trial court, however, denied this motion and concluded that the jury was entitled to make a determination on each element of the crime charged. On appeal, the court noted that as the defendant was charged with felony communication with a minor, the State was required to show that the defendant had a prior

conviction for a felony sex offense. *Gladden*, 116 Wn. App. at 563, 565, *citing* RCW 9.68A.090. The defendant, however, had offered to "stipulate to delete that statutory element," citing *Old Chief v. United State*s, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) as support for this position. *Gladden*, 116 Wn. App. at 565. The court of appeals, however, held that *Old Chief* was distinguishable. *Gladden*, 116 Wn. App. at 565. The court noted that *Old Chief* involved a situation where the trial court had spurned an offer to stipulate to the existence of a prior conviction, and admitted the full record of the prior judgment. *Gladden*, 116 Wn. App. at 565. The court in *Gladden*, however, noted that the defendant's offer was not to stipulate to the existence of the prior offense, but was to "delete any reference to a statutory element that required proof of a prior conviction for a felony sex offense." *Gladden*, 116 Wn. App. at 566. The court thus held that *Old Chief* was distinguishable, and that the trial court did not abuse its discretion in denying the defendant's motion to "delete" the element at issue. *Gladden*, 116 Wn. App. at 565-56.

Roswell, however attempts to argue that a bifurcated trial, such as the one suggested below, is allowed. App.'s Br. at 17-19. To support this claim, Roswell cited: *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002); RCW 9.94A.535; and the bifurcated trial authorized in death penalty cases for the special sentencing proceedings under 10.95.050(2). These authorities, however, do not apply to the present case. First, *Oster* discussed bifurcated

"instructions," not bifurcated "trials," and merely held that the to convict instruction need not contain language regarding a prior conviction element so long as the prior conviction element was covered in a special verdict. *Oster*, 147 Wn.2d at 148. In addition, the bifurcated trials authorized in RCW 9.94A.535 and 10.95.050 are not applicable to the present case, and Roswell cites no statutory authority that would allow defendants to seek to a bifurcated trial on each element of an offense. As there is not authority in prior decisions or in the RCW's requiring a bifurcated trial in the present case, the trial court did not abuse its discretion in denying Roswell's "novel" claim.

Roswell further argues that a bifurcated trial should have been granted because there was a danger that the jury might have used the evidence regarding the prior conviction element improperly in its decision regarding the other elements. App.'s Br. at 20. If, however, the law were to allow a defendant to seek a bifurcated trial on each element if there were any such danger, this court need not look far to see the absurd results that would follow. For instance, a defendant charged with vehicular assault court argue that the jury should not hear any evidence regarding injuries that might have resulted from an automobile collision until after the jury had already reached a decision regarding whether the defendant had been driving in reckless manner (as such evidence of injury would potentially be prejudicial and cause

unnecessary sympathy). Similarly, a defendant charged with burglary in the first degree or rape in the first degree could seek to bifurcate that portion of the trial regarding the use of a weapon (or an assault or serious injury), and request that a bifurcated trial on the underlying burglary or rape take place first. Countless other crimes would fit this scenario as well, and each would include a monumental waste of resources and would require witnesses to be recalled repeatedly, and would unnecessarily turn trials into a collection of individual trials on each element. The primary flaw in Roswell's argument, however, continues to be that there is no authority under the law for bifurcated trials on each element of an offense. The above examples only demonstrate that there is no such authority in the law for good reason. Roswell's argument that the trial court erred by not requiring a bifurcated trial below, therefore, must fail.

D. THE STATE CONCEDES THAT THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE EXCEPTIONAL SENTENCE, BUT THE APPROPRIATE REMEDY IS A REMAND FOR ENTRY OF THOSE FINDINGS, NOT A VACATION OF THE EXCEPTIONAL SENTENCE.

Roswell next claims that the trial court erred by imposing and exceptional term community custody. App.'s Br. at 21. The State concedes

that the trial court erred in failing to enter written findings of fact and conclusions of law as required. Nevertheless, the trial's court reasons for imposing a trial court was a recognized basis under the law, and the appropriate remedy is to remand for entry of written findings of fact and conclusions of law.

RCW 9.94A.535 states that "whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." As the statute uses the term "shall," the State concedes that the trial court erred in not entering written findings of fact and conclusion of law.

The remedy for a trial court's failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings. *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999), *citing State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); *Templeton v. Hurtado*, 92 Wn. App. 847, 965 P.2d 1131 (1998). Thus, the appropriate remedy in the present case is remand for entry of findings.

Roswell, however, argues that the trial court stated that it was not going to impose an exceptional sentence on the basis of his offender score of a "13." App.'s Br. at 21-22. Roswell, however, fails to accurately reflect the entirety of the trial court's comments and fails to mention the statements the

trial court made with respect to the term of community custody, which the trial court described as "exceptional."

In what is know as the multiple offense policy, RCW 9.94A.535(2)(c) states that a court may impose and exceptional sentence when a "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

At sentencing the State sought an exceptional sentence based on the fact that Roswell was convicted of multiple current offenses that resulted in an offender score that was higher than a "9," thus some of his current offenses would go unpunished. RP 1/20 at 4. The State did not argue that any other basis for an exceptional sentence, and the trial court specifically inquired if the basis for the State's request was due to "the aggravating factor of multiple current offenses?" RP 1/20 at 7. The State replied, "That's correct." RP 1/20 at 7. The State specifically asked the court to impose 120 months on count 1, and to run the convictions on the other counts consecutively. RP 1/20 at 5. The State also advised the court that it could impose and exceptional term of community custody up to 60 months, as had been recommended in the PSI. RP 1/20 at 5.

Defense counsel also specifically conceded at sentencing that the trial court had the discretion to impose an exceptional sentence based on the

multiple offense policy, and, when asked, conceded that Roswell's offender score was a "13." RP 1/20 at 10.

In imposing its sentence, the trial court stated,

> And I was asking what the offender score was. 13. And I understand that multiplies faster. It's not just single points but it's – multipliers – three points per offense.
>
> And it – it – it's—it's hard to decide whether the aggravating factor is sufficient in your case to warrant the exceptional sentence. I'm toying – not toying with. That's the wrong word. I'm struggling with that. I'm not going to do it. Perhaps I should, but I'm not.
>
> I'm going to impose the top end of the range, 116 months confinement on count 1.
>
> 60 months on counts 3 and 4.
>
> I'm not going to run them consecutive. I'm going to run them concurrently to each other.
>
> I am, however, going to impose 60 months community custody, exceptional probationary period, because I believe you should be – if I could, I would give you probation for life.

RP 1/20 at 15-16.

The record thus shows that: (1) the only aggravating factor that the State argued at sentencing was the fact that Roswell's offender score exceeded a score of "9" due to his multiple current offenses; (2) defense counsel conceded that the court could impose an exceptional based on the multiple offense policy; (3) the trial court stated specifically that it was struggling with whether "the" aggravating factor warranted an exceptional sentence; and, (4) the trial court characterized the 60 months of community

custody as an "exceptional probationary period." The record, therefore, shows that the only factor argued was the offender score issue, and the court was aware of this, as it mentioned "the" aggravating factor. Although the trial court failed to enter written findings of fact and conclusions of law, the record shows that the trial court intended to impose an exceptional term of community custody based on the only aggravating factor discussed at sentencing, which even defense counsel admitted would justify an exceptional sentence. Based on all of these factors, remand for entry of findings and conclusion is appropriate, and Roswell's arguments to the contrary must fail.

IV. CONCLUSION

For the foregoing reasons, Roswell's conviction and sentence should be affirmed, with a remand for entry of findings of fact and conclusions of law regarding the exceptional sentence.

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Respectfully submitted,

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