

NO. 40232-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODNEY L. THAYER,

Appellant,

FILED
COURT OF APPEALS
10 JUL 26 AM 10:10
STATE OF WASHINGTON
BY [Signature]

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Toni A. Sheldon, Judge
Cause No. 09-1-00314-9

BRIEF OF APPELLANT

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P. M. 7-23-2010

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A. ASSIGNMENTS OF ERROR

01. 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).
02. 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.
03. 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.
04. 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.
05. 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.
06. 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.

07. 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.
08. 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.
09. The trial court erred in not reducing Thayer's period of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether evidence that Thayer committed a prior sex offense was improperly admitted under RCW 10.58.090? [Assignments of Error Nos. 1-2].
02. Whether 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? [Assignment of Error No. 3].
03. Whether the court's purported limiting instruction that permitted the jury to consider evidence of Thayer's prior sex offense for any purpose the jury deemed relevant failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes and constituted a directed verdict and comment on the evidence? [Assignments of Error Nos. 4-6].

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04. Whether Thayer was prejudiced as a result of his counsel's failure to properly object to the court's purported limiting instruction? [Assignment of Error No. 7].
05. Whether there is sufficient evidence to uphold Thayer's criminal conviction for child molestation in the third degree? [Assignment of Error No. 8].
06. Whether, as a matter of law, Thayer's period of community custody must be reduced consistent with RCW 9.94A.701(8)? [Assignment of Error No. 9].

C. STATEMENT OF THE CASE

01. Procedural Facts

Rodney L. Thayer (Thayer) was charged by information filed in Mason County Superior Court on August 11, 2009, with child molestation in the third degree, count I, and violation of sexual assault protection order, count II, contrary to RCWs 9A.44.089 and 26.50.110. [CP 88-89]. Thayer pleaded guilty to count II on October 1. [CP 76-79; RP 5-6].

Following a mistrial [CP 75; RP 11], a second trial to a jury commenced on November 3, the Honorable Toni A. Sheldon presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 107]. The jury returned a verdict of guilty as charged in count I, Thayer was sentenced within his standard range and timely notice of this appeal followed. [CP 4-20, 33].

02. Substantive Facts

On August 8, 2009, Officer Daniel Patton was dispatched to a residence in Mason County, Washington, for a suspected violation of a protection order. [RP 79].

Upon his arrival, he was informed that Thayer (dob 03/09/88) was in the upstairs bedroom with H.E.C. (dob 03/28/94). [RP 70, 80; State's Exhibit 2]. When the bedroom door was opened by H.E.C.'s stepfather, Patton observed Thayer and H.E.C. in bed:

I saw one subject who was in mid-flight, basically – what I mean in flight, he was as if someone was lying face down in the bed, but then they're flipping back onto their back. And I saw the subject about mid-flip, and from the location of that subject, that subject would have been, you know, partially or fully on the other subject in the bed.

[RP 81].

As Thayer exited the bed in his boxer shorts [RP 81], Patton observed one side of H.E.C.'s body: "I could just see all bare skin on the side. I wasn't able to see her chest or below her waist, just the side of her torso from - -" [RP 82].

In admitting evidence of Thayer's prior sex offense under RCW 10.58.090,¹ the court, over objection [RP 52-53], informed the jury that

¹ A copy of the statute is attached as Appendix A.

“the parties have agreed that you would hear this by stipulation or agreement.” [RP 105].

The person before the court, and who has been identified in the charging document as defendant Rodney L. Thayer, was convicted on May 11, 2009 of the crime of Communication with a Minor for Immoral Purposes, a sex offense, in State of Washington v. Rodney L. Thayer, Mason County Superior Court Cause No. 08-1-00591-7. The victim in that case was (H.E.C.), date of birth 03/28/1994.

[RP 105].

The court also read the following limiting instruction to the jury:

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 105-06].

Thayer rested without presenting evidence. [RP 106].

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D. ARGUMENT

01. EVIDENCE THAT THAYER COMMITTED A PRIOR SEX OFFENSE WAS IMPROPERLY ADMITTED UNDER RCW 10.58.090.

01.1 Evidence of Thayer's Prior Sex Offense Did Not Satisfy the Requirements of RCW 10.58.090(6)

In determining 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 issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

other facts and circumstances; and

(h) Other facts and circumstances.

The basic facts presented to the jury regarding Thayer's prior sex offense are these: He was convicted on May 11, 2009, of the crime of communication with a minor (H.E.C.) for immoral purposes. [RP 105].

Despite any claim to the contrary, there was little if any evidence presented relating to the similarity between the current charge and the prior offense, other than the fact that H.E.C. was named as the victim in each instance. There was no frequency connected to the prior offense, and any claim of the necessity of the evidence of the prior offense is more than suspect, given that Officer Patton provided eyewitness testimony.

Although the prior offense was a crime, the probative value of its admission was outweighed by the danger of unfair prejudice under ER 403. Given that the only logical relevancy of the evidence was to show Thayer's propensity to commit sexual offenses, it cannot be declared that the resulting verdict was the result of a fair trial. See Garceau v. Woodford, 275 F.3d 769, 777-78 (9th Cir. 2001), reversed on other grounds at 538 U.S. 202 (2003).

The evidence should not have been allowed under RCW 10.58.090(6). And the error was not harmless. The prejudice resulting from the introduction of the evidence denied Thayer his right to a fair and

impartial jury trial and outweighed the probative value, if any, of the evidence. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980). The error was of major significance and was exacerbated by the purported limiting instruction the court gave the jury [RP 105-06; Court's Instruction 6; CP 41], which instead of restricting the jury's consideration of the evidence, was tantamount to a directed verdict and comment on the evidence (see subsequent argument on purported limiting instruction, infra at 13).

Whether viewed as an evidentiary error (outcome materially affected) or as a constitutional error (untainted evidence is so overwhelming that it necessarily leads to a finding of guilt), the admission of the evidence here was not harmless. There is a reasonable doubt that the jury would have reached the same verdicts in the absence of the evidence at issue, and the evidence also materially affected the outcome of the trial. Thayer is entitled to a new trial.

01.2 RCW 10.58.090 Violates the Separation of Powers Doctrine

Underlying the basic concept of the separation of powers doctrine is this: Each of the three branches of government—the legislative, executive and judiciary—exercises only the power it is given. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265

(2002). In this state, the three branches stem from Const. Arts. II, III and IV, while our federal system was derived from U.S. Const Arts. I, II and III. And while the Washington Constitution does not specifically set forth a clearly defined separation of powers provision, our Supreme Court has recognized that “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991)). This doctrine is critical “in ... preventing the exercise of autocratic power.” Washington State Bar Ass’n v. State, 125 Wn.2d 901, 906-07, 890 P.2d 1047 (1995).

The Washington Supreme Court is vested with the sole authority to govern court procedures under Const. Art 4, § 1. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Concomitantly, under RCW 2.04.190, the same court has the authority

to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and the district courts of the state.

State court rules produce procedural rights, whereas the development of substantive rights is generally within the sole province of

the Legislature. State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002).

When a court rule and a statute conflict, the nature of the right at issue determines which one controls. State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Smith, at 501-02. This standard reflects the division of power between the two branches issuing the conflicting regulations. Smith, at 501....

State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995).

If it is assumed, that RCW 10.58.090 is a procedural statute, then the Legislature was without authority to enact it under the separation of powers doctrine, with the result that the statute is void, State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996), and its prejudicial impact on Thayer's case requires reversal of his conviction.

01.3 Effect of State v. Gresham, 153 Wn. App. 659, 2009 WL 4931789, Regarding Separation of Powers

Thayer recognizes that Division I of this court has recently held that RCW 10.58.090 does not violate the separation of powers doctrine, reasoning that “(s)ince the statute permits, but does not mandate, the admission of the evidence of past sex offenses, it does not circumscribe a core function of the courts.” ¶ 18 WL 4931789.

There are reasons to be cautious about this opinion, for it unswervingly undercuts our Supreme Court's authority by permitting trial courts the discretion to admit propensity evidence under RCW 10.58.090 even where such evidence heretofore has been excluded unless admissible for a limited and defined purpose under ER 404(b), as directed by our Supreme Court. By ignoring this conflict, which directly interferes with our Supreme Court's inherent power to promulgate rules, Division I has fallen short of advancing a convincing argument that RCW 10.58.090 does not violate the separation of powers doctrine. This court should not follow this decision and instead reverse Thayer's conviction.

02. THAYER WAS PREJUDICED AS A
RESULT OF HIS COUNSEL'S FAILURE
TO PROPERLY OBJECT TO THE ADMISSION
OF EVIDENCE OF THAYER'S PRIOR
SEX OFFENSE UNDER RCW
10.58.090.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a

² While it is submitted that this issue is properly preserved for appeal based on counsel's arguments below [RP 20-23, 85-86, 103] and RAP 2.5(a)(3), this portion of the brief is presented in the event this court disagrees.

reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court find that trial counsel waived the errors claimed and argued in the preceding section of this brief by failing to properly object for the same reasons to the admission of the evidence of Thayer's

prior sex offense, or by somehow inviting the error, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly object, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to properly object, the jury was free to use the evidence of Thayer's prior sex offense for any purpose it deemed relevant, including Thayer's propensity to commit the crime charged.

Counsel's performance was deficient for the reasons argued herein, which was highly prejudicial to Thayer, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

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03. THE COURT'S PURPORTED LIMITING INSTRUCTION THAT PERMITTED THE JURY TO CONSIDER EVIDENCE OF THAYER'S PRIOR SEX OFFENSE FOR ANY PURPOSE THE JURY DEEMED RELEVANT FAILED TO ELIMINATE THE POSSIBILITY THAT THE JURY WOULD CONSIDER THE EVIDENCE FOR IMPROPER PROPENSITY PURPOSES AND CONSTITUTED A DIRECTED VERDICT AND COMMENT ON THE EVIDENCE.

03.1 Instructions

As previously set forth, immediately following the admission of Thayer's prior sex offense under RCW 10.58.090, the court, over continuing objection to the admissibility of the evidence [RP 103], read the following instruction to the jury:

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 105-06].

This same instruction was later included in the court's written instructions to the jury. [Court's Instruction 6; CP 41].

03.2 Overview Applicable Law

03.2.1 Comment on the Evidence

Article IV, § 16 of the Washington Constitution explicitly prohibits judicial comments on the evidence.³ A judge is prohibited from “conveying to the jury his or her personal attitudes toward the merits of the case.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of this constitutional prohibition will arise not only where the judge's opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Impermissible judicial comments on the evidence are presumed to be prejudicial, and reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726.

³ Article IV, § 16 reads “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

03.2.2 Directed Verdict

The most important element of the right to a jury trial is the right to have the jury, not the judge, reach findings on guilt. Sullivan v. Louisiana, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). A judge may not direct a verdict of guilt in a criminal case no matter how overwhelming or conclusive the evidence is. Id.; United Brotherhood v. United States, 330 U.S. 395, 408, 91 L. Ed. 973, 67 S. Ct. 775 (1947).

03.2.3 Impact of RCW 10.58.090

As recently noted by this court, the operation of RCW 10.58.090, “on the threshold issue of admissibility of other acts evidence has no impact upon the post-admission requirement that our Supreme Court has placed upon the trial court to give a limiting instruction if such evidence is admitted.” State v. Russell, 154 Wn. App. 775, 786, 225 P.3d 478 (2010) (citing State v. Foxhoven, 161 Wn. 2d 168, 175, 163 P.3d 786 (2007)).

03.4 Argument

There are many things wrong with the above purported limiting instruction, which had nothing to do with limitation and everything to do with permitting the jury to use the evidence of Thayer’s prior sex offense with no discernible limitation. While cautioned that the evidence “was not sufficient to prove the defendant guilty,” the instruction

allowed, if not encouraged, the jury to consider the prior offense as a component of such evidence.

Rather than limit the jury's use of the evidence of the prior misconduct ("any matter to which it's relevant"), the instruction focused instead on the conduct and assumed that because Thayer had acted similarly before, he committed the current charge. "Once a thief always a thief." See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, reviewed denied, 106 Wn.2d 1003 (1986). The jury was free to use the evidence for an improper propensity purpose: to prove Thayer's propensity to commit the crime charged, see State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997), with the undeniable result that the evidence regarding the prior offense was unmistakably more prejudicial than probative. See State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

More egregious still is that the instruction was equivalent to a directed verdict, in addition to violating the Washington Constitution's prohibition on judicial comments on the evidence.

Aside from permitting the jury to use the evidence of Thayer's prior sex offense for anything—as in everything—it deemed relevant, there is the distinctive recognition that the phrase "evidence of the ... defendant's commission of another (emphasis added) sex offense" clearly implies "in

addition to the commission of the current offense,” which is the key factual determination the jury needed to make, not the court, which is strictly prohibited from instructing the jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d at 64. As such, the instruction amounted to an unconstitutional comment on the evidence and was equivalent to a directed verdict, Becker, 132 Wn.2d at 65 (finding comment “tantamount to a directed verdict”).

This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, “(t)he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff’d in part, rev’d in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibility asserted that the court’s improper comment did not influence the jury. The State cannot sustain its burden of rebutting

the presumption that the court's comment was prejudicial, with the result that this court should reverse Thayer's conviction.

04. THAYER WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE COURT'S PURPORTED LIMITING INSTRUCTION.⁴

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to properly object for the same reasons to the court's purported limiting instruction or by somehow inviting the error, then both elements of ineffective assistance of counsel have been established.⁵

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly object, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

The prejudice here is self-evident: but for counsel's failure to properly object, the jury was free to use the evidence of Thayer's prior sex offense for any purpose it deemed relevant, including Thayer's propensity to commit the crime charged, all of which was exacerbated by the fact that

⁴ While it is submitted that this issue was properly preserved for appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

⁵ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

the instruction constituted a directed verdict and comment on the evidence.

Counsel's performance was deficient for the reasons argued herein, which was highly prejudicial to Thayer, with the result that he was deprived of his constitutional right to effective assistance of counsel and is entitled to reversal of his conviction.

05. THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT THAYER WAS GUILTY OF CHILD MOLESTATION IN THE THIRD DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Thayer was charged and convicted of child molestation in the third degree. The jury was instructed as follows:

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 as at least forty-eight months older than (H.E.C.)....

[CP 44; Court's Instruction No. 9].

The jury was also instructed on the definition of sexual contact as follows:

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purposes of gratifying the sexual desires of either party. [Emphasis Added].

[CP 43; Court's Instruction No. 8].

Sexual gratification clarifies the meaning of the essential and material element of sexual contact. State v. T.E.H., 91 Wn. App. 908,

915, 960 P.2d 441 (1998). The issue here is whether the State sustained its burden of establishing beyond a reasonable doubt that there was any touching for the purpose of gratifying sexual desires.

Since H.E.C. denied any impermissible touching [RP 92-93, 100-101], the State's evidence centered on the testimony of Officer Patton, who, as previously set forth, asserted only that he saw Thayer flipping like he was twisting in the air. He never said that he saw Thayer on top of H.E.C.; he could only speculate that was the situation, with the result that the State failed to establish the element of touching for the purpose of gratifying sexual desires, requiring this court to reverse and dismiss Thayer's conviction for this crime.

06. THAYER'S SENTENCE MUST BE
REMANDED TO THE TRIAL
COURT TO REDUCE THE PERIOD
OF HIS COMMUNITY CUSTODY
CONSISTENT WITH RCW 9.94A.701(8).

Thayer's presumptive sentence range for count I was 51 to 60 months [CP 7], for which he was sentenced to 60 months and ordered to serve a community custody range of 36 to 48 months. [CP 9]. The judgment and sentence further indicated that the "combined term(s) of confinement and community custody shall not exceed the statutory maximum of 60 months." [CP 9].

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and “that a defendant cannot agree to punishment in excess of that which the Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.”

Recently, our Legislature adopted an amendment to RCW 9.94A.701(8) to provide that

(t)he term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody

exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.⁶

Given that this amendment applies to all cases, as here, in which the community custody term has not yet been completed, this case must be remanded to the trial court to reduce Thayer's period of community custody accordingly.⁷

E. CONCLUSION

Based on the above, Thayer respectfully requests this court to reverse his conviction and/or remand for resentencing.

DATED this 23rd day of July 2010.

Respectfully submitted,

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⁶ Law of 2009, ch. 375, § 5.

⁷ See note following RCW 9.94A.502: Application - - c 375: "This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009." [2009 c 375 § 20].

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Monty Cobb
Deputy Pros Atty
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Rodney L. Thayer #898427
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DATED this 23rd day of July 2010.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
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STATE OF WASHINGTON
BY 

APPENDIX "A"

West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.58. Evidence (Refs & Annos)

***10.58.090. Sex offenses--Admissibility**

(1) 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.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall 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.

CREDIT(S)

[2008 c 90 § 2, eff. June 12, 2008.]

HISTORICAL AND STATUTORY NOTES

Purpose--Exception to evidence rule--2008 c 90: "In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantiative law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict." [2008 c 90 § 1.]

Application--2008 c 90 § 2: "Section 2 of this act applies to any case that is tried on or after its adoption." [2008 c 90 § 3.]

Reviser's note: Section 2, chapter 90, Laws of 2008 was approved by the legislature on March 20, 2008, with an effective date of June 12, 2008.