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CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. 34334-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON

vs.

JONATHON D. ROSWELL

PETITION FOR REVIEW

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ORIGINAL

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A. Identity of Petitioner

Jonathon Daniel Roswell asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

The Court of Appeals affirmed Mr. Roswell's convictions in an unpublished decision filed July 31, 2007. A copy of the decision is in the Appendix and pages A-1 through A-19.

C. Issues Presented for Review

Did the trial court err by not permitting Mr. Roswell to bifurcate his trial and waive his right to have a jury determine the existence of a prior sex offense, the existence of which increased the maximum penalty for his offenses?

D. Statement of the Case

Jonathon D. Roswell went to trial on an amended information. CP, 12. He was convicted of three of the five charges. CP, 106. He was convicted of two counts of felony Communication with a Minor for Immoral Purposes and one count of Child Molestation in the Second

Degree. The jury concluded based upon disputed facts that he engaged in illegal sexual conversations with two teenage girls and had sexual contact with one of them. The jury acquitted Mr. Roswell of two additional counts.

Mr. Roswell has previously been convicted of a felony sex offense. CP, 123. The offense of Communication with a Minor for Immoral Purposes is a felony if the defendant has a prior felony sex offense. RCW 9.68A.090(2). The parties disagreed how this issue should be addressed. The proposal from the defense was that Mr. Roswell stipulate to the existence of the prior felony sex offense, and that he waive his right to a jury on that issue. RP (Dec. 5, 2005), 19. In support of that proposal, Mr. Roswell submitted a Stipulation of Defendant to Allegation of Prior Conviction of Sex Crimes and Partial Waiver of Jury Trial. CP, 21. The stipulation reads, "That [Mr. Roswell] 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." CP, 21. The reason for this proposal was stated bluntly by defense counsel, "I don't want the jury to hearing that Mr. Roswell has a prior sex offense." RP (Dec. 5, 2005), 20. The State took the position that the defense cannot stipulate to an element of the crime and thereby "eviscerate" the State's case. RP (Dec. 5,

2005), 26. Mr. Roswell questioned whether the existence of a prior offense is an element or an aggravating factor, but regardless, argued that the defendant may waive his right to have a jury decide an issue if the issue does not go to the res gestae of the offense. RP (Dec. 5, 2005), 29-30. The court overruled the defense objection, but ruled the State would only be allowed to show that it was a prior sex offense and would not be allowed to show that it was a prior child molestation charge. RP (Dec. 5, 2005), 30. Mr. Roswell asked for a “continuing objection to that evidence.” RP (Dec. 5, 2005), 31. The court noted the continuing objection.

At the time of jury instructions, the court instructed the jury, “The defendant has previously been convicted of a felony sexual offense.” CP, 122. The “to convict” instructions for the offense of Communication with a Minor for Immoral Purposes each required the jury to decide whether the State had proved beyond a reasonable doubt that “prior to the 15th day of May, 2005, the defendant was convicted of a felony sex offense.” CP, 126-27.

The State brought a motion in limine to introduce the facts underlying the child molestation. RP (Dec. 5, 2005), 31-33. The court weighed the facts of the prior conviction under ER 403 and 404(b) and concluded that the underlying facts were not admissible. CP, 23.

Each of the convictions charged two aggravating circumstances: rapid recidivism and multiple current offenses. CP, 12. The jury was unable to reach a unanimous decision on whether Mr. Roswell committed the current offense shortly after being released from incarceration. CP, 108.

Mr. Roswell brought a pre-trial motion to dismiss the aggravating factor of multiple current offenses. CP, 26. The court denied the motion. RP, 6. The court found RCW 9.94A.535(2)(c) constitutional, even in light of State v. Hughes, infra. RP, 7.

At sentencing the State requested an exceptional sentence of 240 months, RP (Jan. 20, 2006), 5. The proposed exceptional sentence was based upon the fact that the defendant committed “multiple current offenses” which resulted in an offender score of greater than “9.” RP (Jan.20, 2006), 4. According to the prosecutor, failure to give an exceptional sentence would “result in the current offenses basically going unpunished, or the free crime doctrine.” RP (Jan.20, 2006), 4. The defense objected to the proposed exceptional sentence. RP (Jan.20, 2006), 8.

The court determined Mr. Roswell’s offender score is “13.” CP, 135. This is based upon two prior sex offenses, two current sex offenses, and being on community placement at the time of the offense. CP, 135.

His standard sentencing range was 87 to 116 months and his standard community custody range was 36 to 48 months. CP, 136. Turning to the issue of whether to impose an exceptional sentence, the court said, "[I]t'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." RP (Jan.20, 2006), 15. The judge imposed a sentence at the top of the standard range sentence.

But then, as if in an afterthought, the judge says, "I am, however, going to impose the 60 months community custody, exceptional probationary period, because I believe you should be – if I could, I would give you probation for life. It is concerning for the reasons I've set forth, that you don't appear to acknowledge the seriousness of the charges against you and the harm that you caused the victims. And I hope you are amenable to treatment. But if you're not, I want somebody to supervise you for as long as the law will allow." RP (Jan.20, 2006), 16. The court imposed a sentence of 116 months with 60 months of community custody as an exceptional sentence. CP, 136. No written findings of fact and conclusions of law were entered in support of the exceptional sentence.

E. Argument Why Review Should Be Granted

The offense of Communication with a Minor for Immoral Purposes, a gross misdemeanor, has a maximum penalty of one year in jail. If, however, the defendant has been previously convicted of a felony sex offense, then the offense is a Class C felony with a maximum penalty of five years in prison. The issue is whether, in order to increase the maximum penalty for the offense, the State is required to prove to a jury that the defendant has been previously convicted of a felony sex offense when the defendant stipulates to the existence of that fact and waives his right to a jury determination of that fact. Essentially, the defense was asking for a bifurcated trial with the second part of the trial limited to the issue of whether Mr. Roswell has a felony sex offense.

This issue was anticipated by the Supreme Court's Apprendi jurisprudence. Apprendi v. New Jersey, 430 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Under Apprendi, any fact that increases the maximum penalty for the offense, other than a prior conviction, must be proved to a jury. The Apprendi exception stems from the Supreme Court's determination that the existence of a prior conviction is different than other factual determinations. Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Apprendi also applies when the State seeks to impose a sentence beyond the standard

sentencing range. Blakely v. Washington, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004).

The maximum sentence for Mr. Roswell's conviction was increased as a result of a prior conviction. It was not constitutionally required for the jury to find that he had a prior sex offense. Additionally, the case law anticipates a waiver of jury trial on any issue that increases the maximum penalty for the offense. In Blakely, the majority said:

If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Blakely at 310. This Court quoted this paragraph directly in State v. Hughes, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005). As the Court explained in Hughes, a defendant may waive the right to a jury or stipulate to facts supporting an increase in the maximum penalty. Consistent with Hughes, the legislature authorized the waiver of a jury determination of aggravating factors in the Blakely-fix legislation. RCW 9.94A.537. Mr. Roswell attempted to do what the Blakely and Hughes court anticipated by asking the court to decide without a jury whether the maximum penalty for his offense is one year or five years.

The Court of Appeals rejected this analysis because Blakely and Hughes only pertain to “sentence enhancements” and not to “elements” of the offense. See Opinion at 17 (footnote 15). But footnote 15 ignores the fundamental holdings of Apprendi and its progeny that it is legally insignificant whether the state court labels a fact an “element” or a “sentence enhancement.” What is significant is whether the fact in question increases the maximum penalty for the offense. Compare McMillan v. Pennsylvania, 477 U.S. 79, 93, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

It is interesting to juxtapose Washington statutes where a fact is labeled either an “element” or a “sentencing enhancement.” While the defendant cannot force the State to prove a “sentencing enhancement” conviction to a jury, the State can force the defendant to put an “element” conviction before the jury. RCW 69.50.408 doubles the penalties for a second drug conviction, but this issue is decided by a judge without a jury. See In re Cruz, 157 Wn.2d 83, 134 P.3d 1166 (2006). Similarly, a second offense for failure to register becomes a Level II offense (as opposed to an unranked offense), but no one would suggest that the jury should decide whether there is a prior offense for failure to register. RCW 9.94A.515.

Mr. Roswell had a significant interest in preventing the jury from knowing that he had previously been convicted of a felony sex offense.

Under ER 403 and 404, the existence of unrelated prior facts is not admissible to prove conformity on a particular occasion. After an offer of proof from the State, the trial court concluded that the facts of the underlying prior sex offense were not relevant and precluded the State from introducing those facts at trial. But the trial court then allowed the State to tell the jury that Mr. Roswell had been convicted of a prior sex offense, despite the fact that he stipulated to its existence and waived his right to have a jury decide this fact. Evidence of a prior conviction is more prejudicial than relevant under ER 403 when the defendant stipulates to its existence. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

The prosecutor in Mr. Roswell's trial complained that the defense was trying to "eviscerate" its case. This was the same complaint raised by the government and rejected by the Supreme Court in Old Chief. The Court said that the normal rule that a prosecutor is entitled to present its case in the manner in which it chooses is based upon "good sense." "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." Old Chief at 189. But this principle has no application when the fact to be proved is the "defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged

against him.” Old Chief at 191. Further, the danger of the jury using the evidence improperly as propensity evidence weighs in favor of requiring the State to accept the stipulation. Old Chief at 181.

Ironically, despite the State’s insistence that there not be a bifurcated trial of the material facts of Mr. Roswell’s case, the trial court held a bifurcated trial. Pursuant to RCW 9.94A.535(2), the trial court held a bifurcated trial to determine whether to impose an exceptional sentence because Mr. Roswell committed “multiple current offenses” which resulted in an offender score of greater than “9.” The legislature provided that an exceptional sentence may be imposed without a finding from the jury in four contexts, three of which relate the existence of prior criminal history.¹

The Court of Appeals has recognized that when the issue is the existence of a prior conviction, bifurcation of the jury instructions may be appropriate. State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002). In Oster, the defendant claimed error because the “to convict” instruction omitted an element of the offense. Specifically, the instruction did not require the jury to find that the defendant had been twice previously convicted of

¹ The trial court declined to impose an exceptional prison sentence, but did impose an exceptional term of community custody. The Court of Appeals reversed the exceptional sentence for reasons not relevant to this petition for review.

violating a no contact order. Instead, the court used a special verdict form to determine whether the element had been proved. The Court approved of this procedure, saying:

[W]e recognize a special exception when the element of a crime is prior criminal history and where, as here, only after determining that all of the other elements of the crime have been proved, the jury is asked by special verdict form to decide, beyond a reasonable doubt, whether or not the accused has committed prior crimes. Instructional bifurcation with respect to criminal history has an important benefit to the accused: it constrains the prejudicial effect of prior convictions upon the jury while clearly maintaining the State's burden to prove each element beyond a reasonable doubt. The purpose of requiring all of the elements to be contained in the "to convict" instruction is to protect the due process rights of criminal defendants. However, in the context of proving prior criminal history, the criminal defendant is afforded greater constitutional protection by adopting a bifurcated instruction which guards against unfair prejudices and guarantees that the State meets its burden. See State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) ("Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes.")

Oster at 148. Given the recognition by Washington courts that courts should take pains to safeguard the rights of defendants and reduce the risk of prejudice inherent in admitting criminal history, the logical extension of Oster's bifurcated jury instructions is to bifurcate the trial on this issue after procuring appropriate stipulations and jury waivers.

The number of issues raised in the aftermath of the Blakely decision is almost too numerable to count. This Court is still addressing issues prompted by that decision. Mr. Roswell's trial raises yet another important issue of constitutional magnitude that merits further review. RAP 13.4(b)(3).

In addition, this is an issue of substantial public interest. RAP 13.4(b)(4). Communication with a Minor for Immoral Purposes is just one of many charges where defendants may want to waive their right to have a jury determination of prior criminal history. In addition to Communication with a Minor for Immoral Purposes, there are at least fourteen additional statutes that increase a gross misdemeanor to a felony upon proof of one or more prior convictions. See RCW 9A.46.110(5)(b) (stalking); RCW 9A.46.020(2)(b) (harassment); RCW 9.61.230 (telephone harassment); RCW 9.61.260 (cyberstalking); RCW 26.50.110(5) (violation of no contact order with two priors); RCW 46.61.502(6) (DUI with four priors); RCW 9.16.035(3) (counterfeiting with two priors); RCW 9A.88.010 (indecent exposure); RCW 9.68.060 (distribution of erotic material with two priors); RCW 19.25.030(2)(a) (use of recordings of live performance without consent); RCW 10.66.090 (willful violation of PADT order); RCW 77.15.410 (unlawful hunting of big game); RCW 77.15.450 (spotlighting big game); RCW 90.56.300 (unlawful operation of

onshore or offshore facility). While some of these statutes are rarely charged as felonies, several of them are regularly charged as felonies, including violation of a no contact order and harassment. In addition, it is likely the recent amendments to the DUI statute will result in many felony DUI prosecutions where this issue will be important. This is an issue of substantial public interest.

F. Conclusion

Review should be granted. Mr. Roswell's convictions should be reversed and remanded for a bifurcated trial where he is permitted to stipulate to the existence of his prior felony sex offense and waive his right to have the jury determine the existence of the felony sex offense.

Dated this 22nd day of August, 2007.



Thomas E. Weaver
WSBA #22488
Attorney for Appellant

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

STATE OF WASHINGTON,)	Case No.: 05-1-01048-5
)	Court of Appeals No.: 34334-7-II
Plaintiff,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
JOHNATHON D. ROSWELL,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

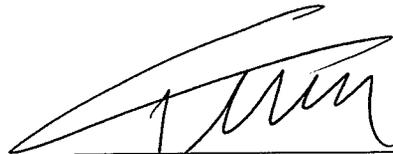
On August 22, 2007, I sent an original and copy, postage prepaid, of the PETITION FOR REVIEW, and the OBJECTION TO STATE'S REQUESTS FOR COSTS OF APPEAL to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On August 22, 2007, I sent a copy, postage prepaid, of the PETITION FOR REVIEW, and the OBJECTION TO STATE'S REQUESTS FOR COSTS OF APPEAL to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366.

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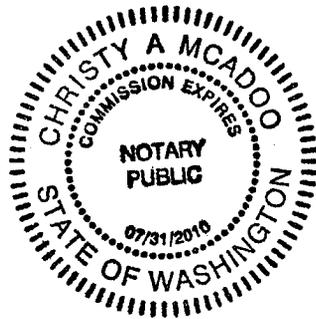
1 On August 22, 2007 I sent a copy, postage prepaid, of the PETITION FOR REVIEW and
2 the OBJECTION TO STATE'S REQUESTS FOR COSTS OF APPEAL to Mr. Johnathon
3 Roswell, LEGAL MAIL, DOC #863601, Stafford Creek Corrections Center, 191 Constantine
4 Way, Aberdeen, WA 98520.

5 Dated this 22nd day of August, 2007.

6
7 

8 Thomas E. Weaver
9 WSBA #22488
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 22nd day of August, 2007.





Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 7/31/2010

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JOHNATHON DANIEL ROSWELL,
Appellant.

NO. 34334-7-II

UNPUBLISHED OPINION

Van Deren, A.C.J. -- Johnathon D. Roswell appeals his conviction for two counts of communicating with a minor for immoral purposes. He claims that the State failed to provide sufficient evidence (1) to support his two convictions for communication with a minor for immoral purposes because this was an alternative means case and the State failed to prove one of the alternative means of committing the crimes, and (2) to prove that he was convicted of a felony sex offense before May 15, 2005. Additionally, he claims that the trial court erred by denying his motion for a partial jury waiver and a bifurcated trial on the issue of his previous felony sex conviction. Finally, he contends that the trial court erred by imposing an exceptional community custody term. We affirm Roswell's convictions, but we remand for correction of his sentence so that it does not exceed the 10-year maximum sentence for class B felonies.

FACTS

In 2005, the State charged Roswell with committing felony sex offenses against minor victims -- DMW, born July 23, 1991, CMP, born November 21, 1989, and LLB, born November 30, 1989.¹ Specifically, the State charged Roswell with second degree child molestation of DMW (count I), third degree child molestation of CMP (count II), and three counts of felony communication with a minor for immoral purposes involving DMW, CMP, and LLB² (counts III, IV, and V). The State included special allegations of aggravating circumstances for each count; specifically, that Roswell committed multiple current offenses that could potentially go unpunished and committed the current offense shortly after being released from incarceration.

Roswell moved to exclude all evidence of his previous conviction for a sex offense,³ but the parties could not agree about how the trial court should handle the prior conviction if the evidence were to be excluded. Roswell questioned whether the prior offense is an element of the charged crimes or an aggravating factor, but proposed that he stipulate to a prior conviction for a felony sexual offense either to satisfy RCW 9.68A.090(2)⁴ or to provide sufficient proof of an aggravating factor. He further suggested that he be allowed to waive his right to a jury

¹ Under RCW 7.69A.030(4), we will not disclose the name of a crime victim or witness to a crime who is younger than 18 years old without their permission; thus, we identify the victims' by their initials.

² In count V, the State charged Roswell with felony communication with a minor, sixteen-year old LLB, for immoral purposes, but the jury acquitted him on Count V. Roswell does not address LLB on appeal.

³ Roswell's criminal history includes a 2001 juvenile felony for third degree rape and a 2003 adult felony for third degree child molestation.

⁴ RCW 9.68A.090(2) provides in relevant part: "A person who communicates with a minor for immoral purposes is guilty of a class C felony . . . if the person has previously been convicted . . . of a felony sexual offense."

determination of that particular issue.

His stipulation provided:

1. That [Roswell] 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 [S]tate of Washington.
2. That Defendant acknowledges that he has been advised that he has the right to have a jury decide beyond a reasonable doubt whether he was convicted of a felony sex offense under RCW 9A.68, 9A.44 or 9A.64. Defendant waives his right to a jury as to this question and consents to a determination by the court on the issue of a prior conviction.

Clerk's Papers (CP) at 21.

Roswell's counsel told the trial court, "I don't want the jury to hear that Mr. Roswell has a prior sex offense." Report of Proceedings (RP) (Dec. 5, 2005) at 20. Roswell hoped that the trial court, alone, would decide whether he had committed a prior felony sex offense beyond a reasonable doubt and that the jury would return a verdict solely on the remaining elements of the crimes.

The State argued that a defendant is not entitled to stipulate to an element of the crime, because it would "eviscerate the [S]tate's case." RP (Dec. 5, 2005) at 26. But the State acknowledged that Roswell was entitled to an *Old Chief*⁵ stipulation that would inform the jury that he had a prior felony sex offense without providing further details.

Before trial, the court denied Roswell's request to bifurcate the trial on the gross misdemeanor elements of the crime from the issue of his prior felony sex offense, but ruled that the State could only elicit that Roswell had a prior felony sex conviction. It also granted Roswell a continuing objection on the issue. The trial court granted Roswell's motion to exclude

⁵ *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

reference to, or testimony about, his previous felony sex offense as well as any evidence of his status as a sex offender, convicted felon, and probationer, and agreed to bifurcate the jury's consideration of the aggravating factor of rapid recidivism from the main charges so that only if the jury found Roswell guilty, would it decide whether the offenses occurred shortly after Roswell was released from incarceration. Roswell moved to dismiss the special allegation on multiple current offenses alleged under RCW 9.94A.535(2)(c), arguing that the special allegation was unconstitutional because it provided for a judicial, not a jury, determination of the special allegation. The trial court denied Roswell's motion.⁶

A. Victim 1 - DMW

DMW testified that she met and became friends with Roswell when she was five or six years old. Several years later, she became reacquainted with him when one of her friends brought Roswell to a park where she and her friends socialize. Thereafter, Roswell began frequenting the park several times a week.

When DMW was thirteen years old she began to view Roswell "in a boyfriend-girlfriend kind of way," but, although she was comfortable kissing Roswell, she became uncomfortable when he began touching her. He touched her stomach, breasts, butt, and "down below," which she described as below her waist, but above her crotch, on more than one occasion and when she asked him stop, he refused. RP (Dec. 7, 2005) at 25. One time, she and Roswell were hanging

⁶ RCW 9.94A.535 provides in relevant part:

(2) Aggravating Circumstances -- Considered and Imposed by the Court --

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

.....

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

out and drinking liquor in the woods about 200 feet behind the swings when he began to touch her crotch, at which point she screamed and ran away.

DMW also testified that Roswell began to talk about sex with her about a week after he began touching her. He had a little black book in which he wrote that DMW would have sex with him when she turned 18. He then had DMW sign her name in the book next to the statement. Although she acknowledged signing the book, DMW testified that she told Roswell "no" when he read the statement to her aloud and she did not believe he was serious. RP (Dec. 7, 2005) at 29.

Eventually, DMW's sister learned about Roswell's conduct and called the police. Kitsap County Special Assault Unit member, Sasha Mangahas, interviewed DMW about her interactions with Roswell. DMW told both Mangahas and the police that Roswell asked her to have sex with him at least twice. DMW's friend, CMP, also heard Roswell ask DMW to have sex with him.

B. Victim 2 - CMP

After interviewing DMW, Mangahas interviewed CMP, who was 15 years old, to discuss her interaction with Roswell. During the interview, CMP revealed that she hung out at the park with DMW and other friends. There, Roswell talked about sex with CMP and asked her on several occasions to have sex with him. DMW heard Roswell ask CMP for sex. Roswell also told CMP to sign his little black book, which she did, so that he would leave her alone. She stated that she wrote her name in the book, but she did not know its purpose.

CMP also revealed that Roswell made her uncomfortable when he smacked her on the buttocks and touched her face. Roswell told her that he had come back to Port Orchard because he was turning 21 and wanted to hang out with his friends, drink, and have sex. Both minors testified that they told Roswell how old they were and that they knew he was at least 18 years old

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at the time of the crimes.

At the conclusion of the evidence, the trial court instructed the jury that “[t]he defendant has previously been convicted of a felony sexual offense.” CP at 89. It also gave Roswell’s proposed limiting instruction that informed the jury “[t]he fact that the defendant has been convicted of a prior felony sex offense is admitted to satisfy an element of the crimes of communications with a minor for immoral purposes, and cannot be used for any other purpose.” CP at 90. Both of the “to convict” jury instructions for communication with a minor for immoral purposes required the jury to decide whether the State proved beyond a reasonable doubt that “prior to the 15th day of May, 2005, the defendant was convicted of a felony sexual offense.” CP at 93-94.

The jury found Roswell guilty of second degree child molestation involving DMV, count I, and communication with a minor for immoral purposes involving DMV and CMP, counts III and IV, but was unable to reach a unanimous decision on the rapid recidivism aggravating factor.

At sentencing, the State requested an exceptional sentence of 240 months, based on multiple current offenses resulting in an offender score above nine, because failure to give an exceptional sentence “would result in the current offenses basically going unpunished, or the free crime doctrine.” RP (Jan. 20, 2006) at 4. The trial court calculated Roswell’s offender score as 13 and sentenced Roswell to 116 months on count I and 60 months on each counts III and IV. The trial court also imposed an exceptional term of 60 months of community custody, but did not enter written findings of fact and conclusions of law to support the exceptional community custody sentence.

Roswell appeals only his conviction and sentence on counts III and IV, communication with a minor (DMV and CMP) for immoral

purposes.

ANALYSIS

I. Sufficiency of the Evidence

Roswell first contends that the evidence is insufficient to support his two convictions of communicating with a minor for immoral purposes.

Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Partin*, 88 Wn.2d 899, 907, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d* 95 Wn.2d 385, 622 P.2d 1240 (1980). We do not review credibility determinations and we defer to the trier of fact on issues of conflicting testimony and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d at 874-75.

A. Communicating with a Minor for Immoral Purposes

Roswell asserts that the State argued in the alternative that the jury could convict him based on his requests for sex or his request that DMW and CMP sign his little black book, promising to have sex with him when they turned 18. Roswell argues that the evidence was insufficient to support a conviction based on his use of the little black book because asking each girl to write in the book that they would have sex with him upon turning 18, a consensual sex act between adults, was lawful and, thus, would not satisfy the statutory requirement that he

communicated for immoral purposes.

Specifically, Roswell claims that his case is an alternative means case in which a single offense may be committed in more than one way, but he confuses the issue. Alternative means statutes identify a single crime and provide more than one means of committing the crime.⁷ *State v. Arndt*, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976). Factors that aid the court in determining whether a statute is an alternative means statute include: “[1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.” *Arndt*, 87 Wn.2d at 379 (quoting *State v. Kosanke*, 23 Wn.2d 211, 213, 160 P.2d 541 (1945)).

Here, the State charged Roswell with communicating with a minor for immoral purposes under RCW 9.68A.090(1), which states: “Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.” RCW 9.68A.090 does not provide alternative means of committing the crime of communicating with a minor for immoral purposes.

Roswell confuses multiple acts with alternative means. He claims that the State impermissibly did not elect between the alleged acts that constituted the crime and relied instead on a *Petrich*⁸ instruction that required the jury be unanimous as to which act had been proved.

⁷ See, e.g., RCW 9A.44.040(1)(a) and (b), rape in the first degree, which “may be committed by the alternative means of (1) using or threatening to use a deadly weapon, or (2) kidnapping the victim.” Br. of Resp’t at 15.

⁸ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled in part by*, *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The trial court instructed the jury as follows:

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Br. of Appellant at 10.

“The *Petrich* rule applies only to multiple acts cases (those cases where several acts are alleged, any one of which could constitute the crime charged).” *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). “Criminal defendants in Washington have a right to a unanimous jury verdict.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). As the *Petrich* court noted, “[w]hen the evidence indicates that several distinct criminal acts have been committed, but [the] defendant is charged with only one count of criminal conduct, jury unanimity must be protected.” *Petrich*, 101 Wn.2d at 572.

The *Petrich* court provided two methods to protect jury unanimity: (1) “[t]he State may, in its discretion, elect the act upon which it will rely for conviction” or (2) the jury must be “instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *Petrich*, 101 Wn.2d at 572. If the State fails to elect and the trial court fails to instruct, and if “a rational trier of fact could have found each incident proved beyond a reasonable doubt,” the error is harmless. *Petrich*, 101 Wn.2d at 573.

The State charged Petrich with one count of indecent liberties and one count of second

There are allegations that the defendant committed acts of Communicating [w]ith a Minor for Immoral Purposes on multiple occasions. To convict the defendant of Communicating [w]ith a Minor for Immoral Purposes, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP at 79.

degree statutory rape, both based on numerous instances of sexual contact. *Petrich*, 101 Wn.2d at 568. At the end of the State's case, Petrich moved to compel the State to elect the instance of sexual contact on which the State relied for conviction and the trial court denied the motion. *Petrich*, 101 Wn.2d at 569. The trial court also did not instruct the jury that, in order to find Petrich guilty, it must unanimously agree on at least one instance of conduct. *Petrich*, 101 Wn.2d at 571. Roswell's case, however, differs.

Here the State's evidence showed that Roswell touched and propositioned DMV and CMP for sex on more than one occasion.⁹ The trial court specifically instructed the jury that it "must unanimously agree as to which act or acts have been proved beyond a reasonable doubt."¹⁰ CP at 79. Thus, contrary to Roswell's assertions, on appeal we need not examine whether a rational trier of fact could have found every act beyond a reasonable doubt, a requirement that arises only if the trial court fails to give the *Petrich* unanimity instruction.

Finally, even though Roswell concedes in his appellant's brief that he requested sex from DMW and CMP, he claims that the evidence is insufficient to support his convictions for communicating with a minor for immoral purposes because both DMW and CMP gave

⁹ Both girls also testified that they signed their names in a little black book in which Roswell had written that they would have sex with him when they turned 18.

¹⁰ Roswell contends that the State argued to the jury that the use of the little black book was one of the multiple acts by Roswell that violated the statute. But, there is no evidence that the State made this argument and we have no way of knowing whether the State elected the means on which the jury could rely because the appellate record does not contain a transcript of the opening statement or closing argument. Roswell points only to the State's argument about the book to the trial court in response to his motion to dismiss at the conclusion of the State's case. He fails to provide us with a record showing the State's opening statement or closing argument to the jury, or any other State argument relating to the little black book. We also note that the State did not rely on the little black book in charging Roswell with communication with a minor for immoral purposes. Additionally, the *Petrich* instruction does not identify for the jury the specific acts to which it could agree beyond a reasonable doubt.

ambiguous testimony. He alleges that DMW's testimony was ambiguous because she failed to offer a direct quotation and gave conflicting testimony about Roswell's request for sex. He also alleges that CMP's testimony was ambiguous because the only direct quotation CMP offered was, "Have you ever had sex?" RP (Dec. 7, 2005) at 75.

But DMW testified that Roswell began to talk about sex about a week after he began touching her; she told both the police and an interviewer at the sexual assault center that Roswell asked her to have sex at least twice; and CMP heard Roswell ask DMW for sex. Additionally, CMP testified that Roswell talked about sex with her and asked her to have sex with him on several occasions. Although both victims provided some inconsistent testimony, the jury is the sole judge of credibility and weight and it concluded that sufficient evidence supported Roswell's convictions for two counts of communicating with a minor for immoral purposes despite inconsistencies in the witnesses' testimony. We defer to the trier of fact in judging the witnesses' credibility, the weight of the evidence and to conclude that the evidence was sufficient to support the convictions. *Thomas*, 150 Wn.2d at 875.

B. Conviction Prior To May 15, 2005

Roswell next contends that the evidence was insufficient to support a finding that he was convicted of a felony sex offense prior to May 15, 2005. The State argues that Roswell waived his right to challenge this issue and that sufficient evidence supported the conviction. Because we agree that Roswell waived his right to contest this element, we do not reach his sufficiency claim.

If the name or nature of a prior offense that serves as an element of the current offense raises the risk of a tainted verdict and, when the purpose of the evidence is solely to prove the element of prior conviction, a defendant may stipulate to the previous conviction. *Old Chief*, 519

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U.S. at 174.

Trial courts have discretion in formulating jury instructions. *Roberts v. Goerig*, 68 Wn.2d 442, 455, 413 P.2d 626 (1966). Jury instructions are sufficient if they permit counsel to satisfactorily argue their theory of the case to the jury. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

But under the law of the case doctrine, elements added to the “to convict” jury instructions without objection must be proved beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). On appeal, a defendant may appeal the sufficiency of the evidence supporting the added elements. *Hickman*, 135 Wn.2d at 102.

When determining whether there is sufficient evidence to prove the added element, the reviewing court inquires “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” If the reviewing court finds insufficient evidence to prove the added element, reversal is required. Retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. (“The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.”)

Hickman, 135 Wn.2d at 103 (internal citations and italics omitted).

But, under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was or was not intentional. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

Roswell claims that the evidence was insufficient to support his conviction because the State failed to offer any evidence that his previous conviction occurred before May 15, 2005. Here, the State submitted the “to convict” jury

instruction stating in part, “[t]hat prior to the 15th day of May, 2005, the defendant was convicted of a felony sexual offense.” CP at 93. Roswell does not argue that the State failed to prove that he had a previous felony conviction for a sex offense but, rather, that the State never addressed the timing of the conviction, which became an element of the crime under the law of the case doctrine. He contends that the evidence is insufficient to prove that he previously was convicted before May 15, 2005, and that we must reverse both of his convictions for communicating with a minor for immoral purposes with prejudice.

Roswell relies on *Hickman*, arguing that it is dispositive in his favor. In *Hickman*, the trial court instructed the jury that the crime must have occurred in Snohomish County, although venue was not an element of the offense. 135 Wn.2d at 105. On review, the Supreme Court determined that the State failed to prove venue and dismissed the charges because the evidence of venue was insufficient. *Hickman*, 135 Wn.2d at 106. But *Hickman* is distinguishable in that it did not involve a stipulation to an undisputed fact of a prior sex offense that is an element of the crime charged.

The State argues that Roswell waived his right to contest the sufficiency of the evidence of the prior felony sexual offense. The State contends that *State v. Wolf*, 134 Wn. App. 196, 139 P.3d 414 (2006) and *State v. Stevens*, 137 Wn. App. 460, 153 P.3d 903 (2007) are dispositive. We agree.

The jury convicted Wolf of unlawful possession of a firearm. Before trial, he stipulated that he had previously been convicted of a serious offense and agreed that the stipulation would be included as a jury instruction, but neither of the parties read the stipulation to the jury or entered it as evidence. *Wolf*, 134 Wn. App. at 198. On appeal, Division One of this court rejected Wolf’s claim that the evidence was

insufficient to support his conviction because he had waived the requirement that the State prove that he had been convicted of a prior serious offense by stipulating to that element.

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. “A stipulation is ‘an express waiver . . . conceding for the purposes of the trial the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it.’”

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. We hold that [defendant] waived the right to put the State to its burden of proof on the element of having previously been convicted of a serious offense by his written stipulation.

Wolf, 134 Wn. App. at 199 (internal citations omitted).

Roswell attempts to distinguish *Wolf* because it involved a different offense and because *Wolf* agreed that the trial court would include the stipulation as a jury instruction. These distinctions are not determinative. Here, Roswell did not object to the jury instruction based on his stipulation¹¹ and he drafted a corresponding limiting instruction¹² that the trial court gave. Both *Wolf* and Roswell stipulated to an element of the charged crimes, thereby waiving the right to insist that the State prove that element.

Stevens, provides further support for this conclusion. 137 Wn. App. at 460. *Stevens* entered an *Old Chief* stipulation that he had been convicted of a serious offense in Oregon, an element of unlawful possession of a firearm. *Stevens*, 137 Wn. App. at 463. After the jury found him guilty on all counts, *Stevens*, 137 Wn. App. at 464-65, he appealed, arguing that the evidence

¹¹ Jury instruction no. 17: “The defendant has previously been convicted of a felony sexual offense. CP at 89.”

¹² Jury instruction no. 18: “The fact that the defendant has been convicted of a prior felony sex offense is admitted to satisfy an element of the crimes of communications with a minor for immoral purposes, and cannot be used for any other purpose.” CP at 90.

was insufficient to support his conviction because the record did not establish the element or fact of the previous conviction. *Stevens*, 137 Wn. App. at 466. The State responded that Stevens had invited any error because it was obligated to agree to the *Old Chief* stipulation, effectively barring it from presenting evidence of Stevens's Oregon conviction. *Stevens*, 137 Wn. App. at 466. Division Three of this court, relying on *Wolf*, applied the waiver doctrine and held that when "a defendant enters into a stipulation, he waives the right to require the government to prove . . . the stipulated element." *Stevens*, 137 Wn. App. at 466.

Here, Roswell stipulated that he had a previous third degree child molestation conviction, a class C felony sex offense, and waived his right to have a jury decide whether the State proved that element. Tactically, this prevented the jury from hearing the details of his previous felony sex offense, including the date he was convicted. He received the benefit of his stipulation because the jury did not learn anything other than the fact of a previous conviction. *See Wolf*, 134 Wn. App. at 203. Under these circumstances, we hold that Roswell waived his right to challenge the sufficiency of the evidence supporting the existence of a previous felony sex offense.¹³

II: Denial Of Bifurcation And Jury Waiver

Roswell next claims that the trial court erred when it denied his motion to bifurcate the gross misdemeanor elements of the crime from the issue of his prior sex offense and for a partial jury waiver. Essentially, Roswell asked for two separate trials: one where the trial court determined whether he committed a previous felony sex offense and one where a jury determined

¹³ Additionally, Roswell invited the error when he asked the trial court to exclude all evidence and testimony relating to his previous sex offense. The invited error doctrine prevents Roswell from complaining that the State did not meet its burden of proving that the previous felony sex offense occurred "prior to the 15th day of May, 2005." CP at 93. We note, however, that even if we considered the sufficiency argument, the stipulation referenced cause number 03-1-01047-1, which indicates he was charged in 2003, two years before the trial in this case.

whether his conduct satisfied the remaining elements of the charge of communicating with a minor for immoral purposes. He argues on appeal that we should extend *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002), which dealt with bifurcated jury instructions, to allow bifurcated trials on separate elements of a crime. We decline this invitation.

In Washington, there is no right to waive a jury trial without the trial court's consent. *State v. Newsome*, 10 Wn. App. 505, 506-07, 518 P.2d 741 (1974) (stating that this court reviews a trial court's denial of a request for jury waiver for abuse of discretion). "[W]here the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form." *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005). But while "such bifurcation is constitutionally *permissible*, it is not constitutionally *required*." *Mills*, 154 Wn.2d at 10 n.6.

In *Oster*, our Supreme Court considered a bifurcated jury instruction. 147 Wn.2d at 145. The trial court first asked the jury to determine whether Oster violated a no-contact order. *Oster*, 147 Wn.2d at 147. After the jury determined that there was a violation, the trial court provided the jury with a special verdict form asking the jury to decide whether Oster had a prior criminal history raising the offense to a class C felony. *Oster*, 147 Wn.2d at 145. On appeal, the Court first referred to the long settled principle stated in *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 854 (1953), that "a jury has a right to regard the 'to convict' instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction." *Oster*, 147 Wn.2d at 147. Nevertheless, the Court upheld the trial court's decision to bifurcate the jury instructions, recognizing that a separate instruction relating to the prior criminal conviction better protects

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the defendant's constitutional due process rights because the bifurcated instruction "guards against unfair prejudices and guarantees that the State meets its burden." *Oster*, 141 Wn.2d at 147-48. Roswell does not explain how *Oster* provides authority for a "bifurcated trial."¹⁴ Br. of Appellant at 18.

Roswell also relies on RCW 9.94A.535, RCW 10.95.050, *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *State v. Hughes*, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005), *overruled on other grounds*, *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466, 2006 U.S. LEXIS *5164 (2006), to support his alleged right to a partial jury waiver and a bifurcated trial. This authority is not relevant.¹⁵

Accordingly, we hold that the trial court did not abuse its discretion in denying Roswell's request to waive the jury's consideration of one of the elements of the charged crime. *See Newsome*, 10 Wn. App. at 506-07.

III. Exceptional Community Custody Term

Finally, Roswell contends that the trial court erred by imposing an exceptional term of 60 months of community custody. He argues that the trial court's failure to provide a "substantial

¹⁴ Division Three of this court denied a similar request in *State v. Gladden*, 116 Wn. App. 561, 66 P.3d 1095 (2003). Gladden was charged with communicating with a minor for immoral purposes. He offered to stipulate to a deletion of any reference to the statutorily-required element of a previous felony sex offense. Division Three upheld the trial court's decision allowing the State to introduce evidence of the prior conviction rather than accept the offered stipulation. *Gladden*, 116 Wn. App. at 566.

¹⁵ RCW 9.94A.535 allows a trial court to impose exceptional sentences. RCW 10.95.050 allows a defendant to waive a jury for the sentencing portion of a capital punishment case. Roswell claims that *Blakely* and *Hughes* anticipated partial jury waiver. But *Blakely* only discusses waiving a jury's consideration of sentencing enhancements, not waiving a jury's consideration of an element of the charged offense, 542 U.S. at 310, and *Hughes* merely supports the *Blakely* holding that, except for the fact of a prior conviction, a jury must decide every fact that increases the penalty for a crime beyond the statutory maximum. *Hughes*, 154 Wn.2d at 135.

and compelling reason” to justify the exceptional sentence and failure to enter written findings of fact and conclusions of law require that we vacate his exceptional community custody term. Br. of Appellant at 22. The State concedes that the trial judge did not enter written findings of fact and conclusions of law, but it argues that the appropriate remedy is to remand for entry of written findings.

Neither party challenges the exceptional community custody term on the basis that it causes Roswell’s sentence to exceed the statutory maximum for a class B felony, nor did the trial court indicate that it intended to impose an exceptional sentence beyond the statutory maximum. We find this to be the determinative factor. “[W]hen a statute authorizes community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the statutory maximum.” *State v.*

Hudnall, 116 Wn. App. 190, 197, 64 P.3d 687 (2003); RCW 9.94A.505;¹⁶ RCW 9.94A.710.¹⁷

Second degree child molestation is a class B felony. RCW 9A.44.086(2).¹⁸ The maximum allowable sentence for a class B felony is 10 years. RCW 9A.20.021.¹⁹ Here, the trial court

¹⁶ RCW 9.94A.505(5) provides: “Except as provided under [the restitution statutes], a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.”

¹⁷ RCW 9.94A.710(3) provides in relevant part: “[a]t any time prior to the completion of a sex offender’s term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW.”

¹⁸ RCW 9A.44.086(2) provides: “Child molestation in the second degree is a class B felony.”

¹⁹ RCW 9A.20.021 provides in relevant part: “Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following: . . . (b) For a

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sentenced Roswell to 116 months in prison, which equals 9 years and 8 months. Because the total sentence imposed exceeds the 10-year maximum sentence for a class B felony, we remand for correction of the sentence so that it does not exceed the 10-year maximum allowable term.

We affirm Roswell's convictions and remand for correction of the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, A.C.J.

We concur:

Bridgewater, J.

Quinn-Brintnall, J.

class B felony, by confinement in a state correctional institution for a term of ten years.”