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STATE OF WASHINGTON

NO. 80547-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ROSWELL,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 34334-7-II
Kitsap County Superior Court No. 05-1-01048-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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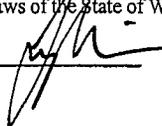
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DATED May 28, 2008, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying Roswell's request for a bifurcated trial on one of the statutory elements of the charged offense when there is no authority authorizing or requiring bifurcated trials in such an instance?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jonathan Roswell was charged by amended information filed in Kitsap County Superior Court with child molestation in the second degree, child molestation in the third degree, and three counts of felony communication with a minor for immoral purposes (based on the fact that Roswell had a prior sex offense conviction). CP 12. After a jury trial, Roswell was convicted of the child molestation and communication counts involving DMW, as well as the communication count involving CMP.¹ The Court of Appeals affirmed in an unpublished decision. *State v. Roswell*, 2007 WL 2183113 (Wn.App. Div. 2, July 31, 2007)(Attached as Appendix A). This Court then granted Roswell's Petition for Review.

B. FACTS

Prior to trial, Roswell made a motion in limine asking the court to exclude any evidence of his prior conviction for a sex offense as alleged in

¹ Roswell was acquitted of the child molestation in the third degree count involving CMP and

the felony communication with a minor counts. RP 12/5 at 14. Roswell proposed to stipulate that he had a prior sex offense conviction and waive his right to a jury trial on that issue, but proposed that there would be a later bench trial on this element. RP 12/5 at 19.

The State argued that Roswell was not entitled to stipulate to an element and keep the jury from hearing about an element of the offense. RP 12/5 at 26. The State acknowledged, however, that Roswell was entitled to an “Old Chief” type stipulation that would inform the jury that he had a prior conviction for a sex offense (without stating the exact nature of the prior offense or giving any other details). RP 12/5 at 29. The trial court ruled that it was not going to order a bifurcated trial on each element, but that the evidence presented to the jury would be limited to the fact that Roswell had a prior sex offense conviction. RP 12/5 at 30.²

The evidence at trial showed that in 2005 Roswell began to come to a park where DMW and her friends hung out. RP 12/7 at 16-18. Eventually DMW and Roswell exchanged phone numbers. RP 12/7 at 23. DMW stated that at some point things started to get uncomfortable in her relationship with Roswell, and that he touched her in various locations including on her

the communication count involving LB. CP 106.

² The trial court granted Roswell’s motion to exclude any testimony or further reference to his conviction or the fact that he was required to register as a sex offender, and modified the language of the Information before reading it to the jury. RP 12/5 at 45-46, RP 12/6 at 5.

stomach, breasts, butt and “crotch.” RP 12/7 at 24-25, 43-44. DMW also stated that Roswell kissed her. RP 12/7 at 27. Roswell also talked to DMW about sex. RP 12/7 at 28. DMW described how Roswell wrote down on a little piece of paper in a “little black book” that when she turned 18 they were going to have sex. RP 12/7 at 29. Roswell also told her this out loud, and DMW told him, “no.” RP 12/7 at 29.

CMP also encountered Roswell at the park. RP 12/7 at 72. Later, Roswell began to make CMP uncomfortable, and began to talk about sex. RP 12/7 at 73, 74. CMP stated that Roswell asked her to have sex with him on more than one occasion, and asked DMW to have sex with him “quite a few” times. RP 12/7 at 76-77. CMP also stated that Roswell had told her that he was in Port Orchard because he was hanging out with his friends, drinking, and “looking to have sex.” RP 12/7 at 93.

At the conclusion of the evidence, the jury was instructed pursuant to Roswell’s stipulation that, “[t]he defendant has previously been convicted of a felony sexual offense.” RP 12/8 at 16-17, CP 89. The trial court also gave the jury a limiting instruction (as proposed by Roswell³) that restricted the jury’s use of the prior conviction. CP 56-57, 90, RP 12/8 at 18, 22.

³ The State had no objection to Roswell’s limiting instruction. RP 12/8 at 22

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ROSWELL'S REQUEST FOR A BIFURCATED TRIAL ON ONE OF THE STATUTORY ELEMENTS OF THE CHARGED OFFENSE BECAUSE THERE IS NO AUTHORITY AUTHORIZING OR REQUIRING BIFURCATED TRIALS IN SUCH AN INSTANCE.

Roswell essentially asks this court to find that the trial court erred by failing to hold a bifurcated trial on different statutory elements of an offense. This court has never before held that a trial court is authorized, much less obligated, to destroy the integrity of a charged offense by splitting elements of an offense into separate trials, and this Court should decline Roswell's invitation to do so now.

Roswell specifically argues that the trial court erred by not permitting Roswell to have a jury trial on some of the elements of the charged offense and a bench trial on the element regarding his prior conviction of a sex offense. Petition for Review at 1. This claim is without merit because Roswell has failed to show that the trial court abused its discretion in denying the bifurcation motion and admitting the evidence of the prior conviction when there is no authority under Washington law permitting or requiring bifurcation of statutory elements.

A trial court's evidentiary rulings are reviewed for an abuse of

discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

1. *The existence of a prior conviction is an element of the offense of felony communication with a minor.*

Roswell never argues that the existence of his prior conviction was not an element of the crime of felony communication with a minor. Such an argument would find no support in Washington law, as the statutes and caselaw make it clear that the existence of a prior conviction in “status offenses”⁴ is an element of the offense and that the state must prove this

⁴ By “status offense,” the State is referring to those offenses where specific conduct becomes a felony if a defendant has certain, relevant, prior convictions. For instance, the crimes of felony communication with a minor, felony violation of a no contact order, and felony harassment are such “status offenses” and the statutes for these offenses are essentially structurally identical. For instance, the communication with a minor statute (RCW 9.68A.090) states that:

- (1) 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.
- (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.

element beyond a reasonable doubt.⁵ In addition, the Court of Appeals has specifically held that a prior conviction is a “statutory element” of the crime of felony communication of a minor. *State v. Gladden*, 116 Wn. App. 561, 565-66, 66 P.3d 1095 (2003). Numerous courts in other states have also concluded that prior convictions in similar “status offenses” are actual elements of the crime.⁶ Thus, this Court should find that the existence of a prior conviction is an element of the charged offense of felony communication with a minor.

The statutes for violation of a no contact order (RCW 26.50.110), harassment (RCW 9A.46.020), and DUI (RCW 46.61.502) are set up in the same manner.

⁵ See, e.g., RCW 9.68A.090; *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002)(the existence of two prior convictions was an element of the crime of felony violation of a no contact order); *State v. Mills*, 154 Wash.2d 1, 9 109 P.3d 415 (2005) (holding that it was “unquestionably true” that “threatening to kill” was an element of the crime of felony harassment where the existence of a threat to kill elevates the crime from a misdemeanor to a felony); *State v. Brown*, 29 Wn. App. 1, 5 (1981) (A prior felony conviction is an element of Escape 1, and a prior conviction “is a fact which it is necessary for the state to allege and prove to obtain a conviction”); *State v. Lopez*, 107 Wn. App. 270, 276 (2001) (The existence of a prior conviction is an essential element of the offense of UPF, one the State must prove beyond a reasonable doubt); *State v. Reed*, 84 Wn. App. 379, 384 (1997)(Holding State must allege and prove previous conviction, citing *State v. Swindell*, 93 Wn.2d 192, 196-97, 607 P.2d 852 (1980); *State v. Tully*, 198 Wash. 605, 608, 89 P.2d 517 (1939)).

⁶ See, e.g., *State v. Lugar*, 734 So.2d 14 (La. Ct. App. 1999)(prior DWI conviction must be alleged, read to the jury, and proved at trial, and bifurcated trial is not allowed as there is no procedure in place for such a trial under Louisiana criminal procedure); *State v. Ireson*, 594 N.E.2d 165, 168, (Ohio Ct. App. 1991)(prior conviction is an element of felony domestic violence and noting that under Ohio law, “Where the prior conviction elevates the degree of the subsequent offense, it is an essential element of the subsequent offense and may not be bifurcated from the remainder of the elements of the subsequent offense”); *State v. Murray*, 169 P.3d 955, 961 (Haw. 2007)(prior conviction is an element of felony abuse charge); *State ex rel. Romley v. Galati*, 985 P.2d 494, 497 (Ariz. 1999)(prior is an element of aggravated DUI); *State v. Newnom*, 95 P.3d 950, 951 (Ariz. Ct. App. 2004)(existence of two prior convictions for domestic violence is an element of the offense of aggravated domestic violence and defendant was not entitled to stipulate and prevent the jury from hearing evidence on this element).

2. *The United States Supreme Court and the Washington Supreme Court have long held that neither due process nor a defendant's right to a fair trial is offended by the introduction of evidence of a prior conviction when the language of the charged offense requires the existence of the prior conviction.*

In *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967), the United States Supreme Court addressed so-called recidivist or habitual criminal statutes that required a state to prove the existence of a prior conviction. In the three consolidated cases before the court the jury was informed of the prior conviction through an allegation in the indictment and proof of the prior conviction at trial, and the jury was also given a limiting instruction. *Spencer*, 385 U.S. at 556, 87 S. Ct. at 649-50. The defendants argued that this use of the prior convictions violated the due process clause of the Fourteenth Amendment. *Spencer*, 385 U.S. at 559, 87 S. Ct. at 651.

The Supreme Court rejected the defendants' due process claims and stated that the possibility of prejudice was outweighed by the validity of the State's purpose in introducing the evidence and that the defendants' interests were protected by limiting instructions. *Spencer*, 385 U.S. at 561, 87 S. Ct. at 652. The Court went on to state that,

To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several

codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

Spencer, 385 U.S. at 562, 87 S. Ct. at 653 (citations omitted). The Court concluded by holding that,

It is fair to say that neither the *Jackson* case nor any other due process decision of this Court even remotely supports the proposition that the States are not free to enact habitual-offender statutes of the type Texas has chosen and to admit evidence during trial tending to prove allegations required under the statutory scheme.

Spencer, 385 U.S. at 565-66, 87 S. Ct. at 654-55.

Similarly, over fifty years ago, this Court rejected a defendant's claim that the inclusion of statutory element of a prior conviction placed his character in evidence and deprived him of a fair trial. *Pettus v. Cranor*, 41 Wn.2d 567, 568, 250 P.2d 542 (1953)(unlawful possession of a firearm); *See also, State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939). In *Pettus*, this Court held that because the charge followed the language of the statute, and because the existence of the prior conviction was a fact "which was necessary for the

state to allege and prove to obtain a conviction for its violation,” there was no error. *Pettus*, 41 Wn.2d at 568-69.

In the present case the trial court was asked to bifurcate the statutory elements of the crime of felony communication of a minor into separate trials despite the fact that Roswell could point to no authority either permitting or requiring bifurcation of a statutory element. Given the holdings of *Spencer* and *Pettus*, Roswell has failed to show that the trial court abused its discretion or that the trial court’s denial of the request for a bifurcated trial was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”

3. *Roswell’s claim that Blakely and Hughes provide support for his bifurcation motion is without merit because those cases do not state that bifurcation of statutory elements is either allowed or required.*

Rather than arguing that the his prior conviction is not an element under Washington law, Roswell argues that the term “element” is no longer useful and that his prior conviction was merely a fact “that increases the maximum penalty for the offense.” Petition for Review at 7. Roswell argues that pursuant to *Apprendi*,⁷ *Blakely*,⁸ and *Hughes*,⁹ it is legally insignificant whether something is an “element” or a “sentence enhancement” and that he

⁷ *Apprendi v. New Jersey*, 430 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁸ *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

was entitled to waive his right to a jury and stipulate to facts supporting an increase in the maximum penalty. Petition for Review at 6-8.

Roswell's argument can be broken down into the following syllogism:

1. Elements and sentence enhancements are functionally equivalent pursuant to *Apprendi*, *Blakely* and *Hughes*.
2. *Blakely* and *Hughes* state that a defendant may consent to judicial fact-finding as to sentence enhancements
3. Therefore, since there is no distinction between elements and sentence enhancements, a defendant may consent to judicial fact-finding on any element he chooses.

This argument fails for several reasons. First, although *Blakely* and *Hughes* held that elements and enhancements are equivalent in the sense that a defendant has a Sixth Amendment right to jury findings on both, neither case states that elements and enhancements are equivalent for all purposes. Furthermore, the Court's specific language regarding a defendant's right to waive a jury finding is limited to fact-finding as to "sentence enhancements." For instance, the specific language in *Blakely*, cited by Roswell, is that,

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.

Petition for Review at 7, citing *Blakely*, 542 U.S. at 310, 124 S. Ct. at

⁹ *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

2541(emphasis added). In *Hughes*, the court merely quoted this same language from *Blakely*. See, *Hughes*, 154 Wn.2d at 133-34, quoting *Blakely*, 542.U.S. at 310, 124 S. Ct. at 2541. In short, there is no language in either *Blakely* or *Hughes* that states that a defendant may consent to judicial fact-finding on a statutory element (as opposed to a sentence enhancement).

The Court of Appeals, therefore, correctly rejected Roswell's citations to *Blakely* and *Hughes*, stating,

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.

Roswell, App. A. at page 17, n15.

The second problem with Roswell's argument is that it fails to recognize the real differences between elements and sentence enhancements and the very real differences that result when an element, as opposed to an enhancement, is removed. If an *enhancement* is removed or taken away from the jury's consideration the integrity of the charged crime survives and all of the statutory elements of the charged crime would still be presented to the jury. If, however, one or several statutory *elements* are removed or taken away from the jury's consideration, the result is that the integrity of the

charged crime would be destroyed and the jury would be presented with a fragmented collection of elements that together constitute something less than the statutory elements of the charged crime. *See, e.g., United States v. Gilliam*, 994 F.2d 97, 102 (2nd Cir 1993) (“There is a significant difference, however, between a rule formulated to limit the admissibility of potentially prejudicial evidence and a rule that eliminates an element of a crime legislated by Congress”).

Despite the dramatic ramifications of his request, Roswell fails to cite any Washington statutes or caselaw that authorize or require a court to allow a defendant to stipulate away an element of the charged offense.

Furthermore, numerous State and Federal courts have rejected similar claims that a defendant should be allowed to stipulate away elements of an offense in order to prevent the jury from ever hearing about a particular statutory element. For instance, in *State v. Rigby*, 826 So.2d 694 (2002), the Supreme Court of Mississippi rejected a defendant’s argument that a bifurcated trial was required due to the fact that the charged offense of felony DUI included an element that the defendant had prior convictions. The court began by stating that it had repeatedly held that the prior convictions were necessary elements of the charge of felony DUI. *Rigby* 826 So.2d at 700. The *Rigby* court held that bifurcation was not appropriate, citing numerous federal cases that had rejected requests for bifurcated trials for the following reasons:

First, if the jury did not return a guilty verdict on the possession portion of the crime, the government would be precluded from proving an essential element of the charged offense. Second, a bifurcated proceeding would withhold from the jury all knowledge of the prior felony element of the crime. Third, the bifurcation order would require omitting an element of the charged offense from the jury instructions.

Rigby, 826 So.2d at 701-02, citing *United States v. Barker*, 1 F.3d 957, 959 (9th Cir.1993), amended, 20 F.3d 365, 365-66 (9th Cir.1994)(The bifurcation order removes an element of the crime charged from the jury's consideration, prevents the government from having its case decided by the jury, and changes the very nature of the charged crime).¹⁰ The court, therefore, concluded that a bifurcated trial was not appropriate, but that if a defendant offered to stipulate to the existence of the prior convictions, the court should accept the stipulations and submit them to the jury with a proper limiting instruction. *Rigby*, 826 So.2d at 702-03.

¹⁰ Numerous other federal circuits follow the *Barker* rule. See *United States v. Jacobs*, 44 F.3d 1219, 1223 (3d Cir.), cert. denied, 115 S. Ct. 1835 (1995); *United States v. Birdsong*, 982 F.2d 481, 482 (11th Cir.), cert. denied, 508 U.S. 980 (1993); *United States v. Collamore*, 868 F.2d 24, 27 (1st Cir.1989); *United States v. Aleman*, 609 F.2d 298, 310 (7th Cir.1979), cert. denied, 445 U.S. 946 (1980); *United States v. Brinklow*, 560 F.2d 1003, 1006 (10th Cir.1977), cert. denied, 434 U.S. 1047 (1978).

The *Rigby* court also cited numerous other federal cases for these same propositions. See *Rigby*, 826 So.2d at 701-02, citing: *United States v. Koskela*, 86 F.3d 122 (8th Cir.1996); *United States v. Nguyen*, 88 F.3d 812 (9th Cir.1996); *United States v. Dean*, 76 F.3d 329 (10th Cir.1996); *United States v. Jacobs*, 44 F.3d 1219 (3d Cir.1995); *United States v. Milton*, 52 F.3d 78 (4th Cir.1995); *United States v. Tavares*, 21 F.3d 1, 3 (1st Cir.1994); *United States v. Campbell*, 774 F.2d 354, 356 (9th Cir.1985) (the government is "entitled to prove the elements of the charged offenses by introduction of probative evidence"); *United States v. Combs*, 762 F.2d 1343, 1346 (9th Cir.1985) ("When a person is prosecuted under a statute, the requirements of the statute should be explained to the jury so that they may determine whether or not the defendant's conduct fits within the statute.").

Similarly, in *Barker*, the Ninth Circuit held that a bifurcated trial was improper and rejected the defendant's claim that he would be prejudiced by the introduction of evidence regarding the prior convictions. *Barker* 20, F.3d at 365. The Ninth Circuit specifically rejected the prejudice claim, stating,

Barker misunderstands the fundamental nature of "prejudicial evidence." Evidence is prejudicial only when it has an additional adverse effect on a defendant beyond tending to prove the fact or issue that justifies its admission. A prior conviction is not prejudicial when it is an element of the charged crime. Proof of the felony conviction is essential to the proof of the offense-be it proof through stipulation or contested evidence. The underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not.

Barker, 20 F.3d at 366 n.3.

Similarly, in *Gilliam*, the Second Circuit rejected a defendant's claim that a bifurcated trial would prevent potential prejudice without causing harm. *Gilliam*, 994 F.2d at 100. The court held that where the prior conviction "is essential to proving the crime, it is by definition not prejudicial," and rejected the claim that bifurcation was harmless, stating,

But there is harm done by his proposal, harm to the judicial process and the role of the jury in determining the guilt or innocence of the accused as charged. Gilliam's proposal violates the very foundation of the jury system. It removes from the jury's consideration an element of the crime, leaving the jury in a position only to make findings of fact on a particular element without knowing the true import of those findings.

Gilliam, 994 F.2d at 100-01. The court went on to note that the nature and

function of a jury is:

to be informed of the nature of the crime, as well as to find the defendant guilty of the offense at issue beyond a reasonable doubt. Without full knowledge of the nature of the crime, the jury cannot speak for the people or exert their authority. If an element of the crime is conceded and stripped away from the jury's consideration, the jurors become no more than factfinders. The jury must know why it is convicting or acquitting the defendant, because that is simply how our judicial system is designed to work.

Gilliam, 994 F.2d at 101. In addition, the court noted that it “perceived no authority for counsel or the court to modify a criminal statute enacted by Congress by eliminating through stipulation one of the elements of the crime.” *Gilliam*, 994 F.2d at 102, citing *United States v. Williams*, 612 F.2d 735, 740 (3d Cir.1979), cert. denied, 445 U.S. 934, 100 S. Ct. 1328, 63 L. Ed. 2d 770 (1980). Finally, the court noted that,

Whatever the basis of the reasoning, be it Congressional mandate or the duty of the jury to make a totally informed judgment, there is virtual judicial unanimity in the belief that the jury must be informed of all the elements of the crime charged.

Gilliam, 994 F.2d at 102.

As in *Gilliam*, Roswell’s request in the present case would have removed a statutory element from the jury's consideration, leaving the jury in a position only to make findings of fact on a portion of the statutory elements without knowing the true import of those findings. In addition, Roswell ignores the fact that his prior conviction did not merely increase the penalty

for his crime, but rather, was an essential element of the felony crime itself. This distinction, though essentially ignored by Roswell, should not be ignored by this Court.¹¹

Armed with no authority that either authorized or required bifurcation of elements of the crime as drafted by the legislature, the trial court did not abuse its discretion in refusing Roswell's request for a bifurcated trial in order to stipulate away a statutory element of the charged offense.¹²

4. ***Roswell fails to explain why the "logical extension" of this Court's authorization of bifurcated instructions would result in a requirement of bifurcated trials, especially when this court specifically stated that bifurcated instructions, while permissible, are not required.***

Finally, the Defendant argues that because this court has previously allowed bifurcated instructions, the "logical extension" of this holding is to require bifurcated trials. Petition for Review at 10-11, *citing Oster*, 147 Wn.2d at 148.

In *Oster*, however, this Court began by reaffirmed the holdings in prior cases that the "to-convict" instruction should be a complete statement of

¹¹ See *State v. Ireson*, 594 N.E.2d 165, 168, (Ohio Ct. App. 1991) (stating that, "Where the prior conviction elevates the degree of the subsequent offense, it is an essential element of the subsequent offense and may not be bifurcated from the remainder of the elements of the subsequent offense").

¹² In addition, as the Court of Appeals noted, the trial was free to reject Roswell's request for a bench trial regarding his prior conviction because, under Washington law, there is no right to waive a jury trial without the court's consent. See, *Roswell*, App. A. page 16, *citing State v. Newsome*, 10 Wn. App. 505, 506-07, 518 P.2d 741 (1974).

the law and must contain all of the elements of the crime and that “an instruction purporting to list all of the elements of a crime must in fact do so.” *Oster*, 147 Wn.2d at 146-47, citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The *Oster* court, however, carved out a narrow exception and allowed for an element of a crime involving a prior conviction to be listed in a special verdict form as long as the “the jury instructions taken as a whole clearly set forth all of the elements of the crime charged.” *Oster*, 147 Wn.2d at 146-47.

As in *Oster*, the *Mills* court stated that it was acceptable to bifurcate the instructions and to put the element regarding the prior conviction into a special verdict form. *Mills*, 154 Wn.2d at 10. The court, however, specifically noted:

We emphasize, however, that while such bifurcation is constitutionally *permissible*, it is not constitutionally *required*. There would have been no constitutional violation had the trial court provided one “to-convict” instruction including the “threatening to kill” element.

Mills, 154 Wn.2d at 10, n 6 (emphasis in original).

In the present case the Court of Appeals noted that because *Oster* allowed, but did not require, bifurcated instructions, Roswell failed to explain how *Oster* provided any authority for a bifurcated trial. *Roswell*, App. A, page 17. Given the clear language in *Mills* stating that even bifurcated

instructions are not required, the absence of an explanation, as pointed out by the Court of Appeals, remains unaddressed.¹³

5. ***The “logical extension” of Roswell’s argument would lead to absurd results.***

This Court need not look far to see the absurd results that would stem from Roswell’s claim that there is no longer a distinction between elements and sentence enhancements and that a defendant can choose to stipulate away statutory elements of a charged offense. For instance, in a typical vehicular homicide case, the state has to prove the following elements:

- (1) That the defendant drove a motor vehicle on the relevant date;
- (2) That the defendant's driving proximately caused injury to another person;
- (3) That at the time of causing the injury, the defendant was driving the motor vehicle while under the influence of intoxicating liquor or drugs;
- (4) That the injured person died within three years as a proximate result of the injuries; and
- (5) That the defendant's act occurred in the State of Washington.

See RCW46.61.520; WPIC 90.02. Under Roswell’s argument, a defendant could argue that the trial should be bifurcated into multiple trials. First, the

¹³ Again, Roswell fails to recognize the significance associated with a jury hearing evidence and receiving instructions regarding all of the statutory elements of the charged offense. For even in *Oster* and *Mills*, the jury was still allowed to hear evidence on all of the elements and all of the elements were present in the jury instructions. Although the jury had to look past the to convict instruction, the jury did not have to look far, as the prior conviction element was found in a special verdict form. A bifurcated trial, on the other hand, would prevent the jury from hearing about certain statutory elements at all and would eliminate those elements from the jury instructions.

jury should have to decide whether the defendant was driving. As evidence of alcohol, a crash, and an injury would be prejudicial, these elements should be excluded from the first trial. In the next phase the jury should decide whether the defendant was under the influence, but as evidence of subsequent injuries (particularly a death) would be prejudicial, these facts should again be excluded. In the next phase, the jury could hear about whether the defendant proximately caused injury, but evidence of the subsequent death should be excluded as prejudicial. Finally, in the fourth trial the jury could be informed that the victim later died of his or her injuries.¹⁴ The number of statutes that would lead to similar absurd results, of course, is staggering.¹⁵

When the legislature chooses to create a criminal statute and outline the elements for a specific offense, the State should be allowed (and required) to present evidence to the jury on every statutory element at trial. As the Second Circuit noted, whether it is because of Congressional mandate or the duty of the jury to make a totally informed judgment, “there is virtual judicial unanimity in the belief that the jury must be informed of all the elements of

¹⁴ A Defendant might also argue that since the jury had previously found that he had been driving under the influence, the jury would potentially be prejudiced against him and could not be trusted to fairly consider the issue of whether injuries and death resulted. Perhaps the only remedy is to use different juries for each element so as to completely insulate each from the potential of prejudice.

¹⁵ For instance, any statute that includes an element requiring a certain degree of bodily harm or the use of a firearm or other weapon, to name but a few, would be subject to multiple trials under Roswell’s logic.

the crime charged." *Gilliam*, 994 F.2d at 102. Similarly, as outlined above, the law in Washington has long been that a defendant is not deprived of a fair trial by the introduction of evidence regarding a prior conviction when the language of the relevant statute requires proof of that prior conviction in order to obtain a conviction for the charged offense. *Pettus*, 41 Wn.2d at 568, *Tully*, 198 Wash. 605.

Roswell, however, now invites this court, for the first time, to destroy the integrity of the charged offense by holding that a defendant is entitled to bifurcated trials on individual statutory elements. This court should decline the invitation.

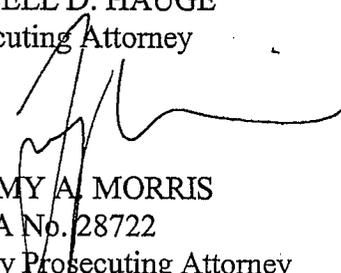
IV. CONCLUSION

For the foregoing reasons, Roswell's conviction and sentence should be affirmed.

DATED May 28, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

*Filed as attachment
to E-mail*

Appendix A

State v. Roswell, 2007 WL 2183113 (Wn.App. Div. 2, July 31, 2007).

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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

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."

aggravating factor. He further suggested that he be allowed to waive his right to a jury 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

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

a continuing objection on the issue. The trial court granted Roswell's motion to exclude 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

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.

asked him stop, he refused. RP (Dec. 7, 2005) at 25. One time, she and Roswell were hanging 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 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 DMV 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

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.

on a *Petrich*⁸ instruction that required the jury be unanimous as to which act had been proved. 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

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:

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.

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

NO. 34334-7-II

element of prior conviction, a defendant may stipulate to the previous conviction. *Old Chief*, 519 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.

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.

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 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

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.

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 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 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

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.

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 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

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

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 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.
Van Deren, A.C.J.

We concur:

Bridgewater, J.
Bridgewater, J.

Quinn-Brintnall, J.
Quinn-Brintnall, J.

*Filed as attachment
to E-mail*

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