IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY L. THAYER, Appellant.	No. 40232-7-II UNPUBLISHED OPINION

Hunt, J. – Rodney L. Thayer appeals his jury trial conviction for third degree child molestation and his community custody term. He argues that (1) the trial court erred in admitting evidence of a prior sex offense conviction under RCW 10.58.090(6) because RCW 10.58.090 violates the separation of powers doctrine; and (2) the evidence was insufficient to prove third degree child molestation.[1] We stayed this appeal pending our Supreme Court's decisions in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), and *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011).[2] We hold that, although the evidence was sufficient to support the third degree

[1] Thayer also argues that (1) the trial court's limiting instruction about the use of his prior conviction was inadequate and constituted a comment on the evidence and a directed verdict, and (2) his community custody term was improper under RCW 9.94A.701(9) (formerly RCW 9.94A.701(8)(2009)). *See* Laws of Washington 2010, ch. 224, §5. Because we reverse on other grounds, we do not address these issues.

[2] Because we do not reach the community custody issue, we do not further address *Franklin*.

child molestation conviction, admission of the prior sex offense evidence under RCW 10.58.090 was improper and prejudicial. Accordingly, we reverse and remand for further proceedings.

FACTS

I. Crimes

In January 2009, a court issued a sexual assault protection order prohibiting then 21-year-old Rodney L. Thayer from contacting then 14-year-old HEC.[3] In May 2009, Thayer pleaded guilty to communication with a minor, HEC, for immoral purposes.

Three months later, on the evening of August 7, 2009, HEC's mother and stepfather were at work; some of HEC's friends and Thayer came to the house to drink alcohol and to listen to music with then 15-year-old HEC. Her grandmother, who had remained at the house, observed HEC and Thayer kissing. When HEC's mother returned home from work around 9:30 pm, she saw Thayer and HEC outside talking, with no "displays of affection." V Report of Proceedings (RP) at 72. HEC's grandmother later observed HEC and Thayer come inside and "scoot[] upstairs real fast." V RP at 66. When HEC's stepfather returned,around 10:30 pm, HEC's grandmother told him she thought Thayer was in the house. HEC's stepfather went upstairs, but he did not see anyone in HEC's bedroom; he found HEC talking to her mother.

The next morning, HEC's stepfather unlocked and opened HEC's bedroom door (which was not usually locked) to put HEC's kitten back in her room; he saw Thayer on his back next to HEC in her bed. Aware of the protection order, HEC's stepfather quietly shut the door and called 911. Shelton Police Officer Daniel Patton responded. When HEC's stepfather opened

[3] We use juvenile HEC's initials to protect her privacy.

HEC's door, Patton observed Thayer and HEC in her bed. They appeared startled: Thayer, who appeared to have been on top of HEC, "flipp[ed] back[ward]" off her; both pulled the covers over their heads. V RP at 81. Patton ordered Thayer out of the bed. Wearing only boxer shorts, Thayer pulled the covers back, exposing, according to Patton, what appeared to be one bare side of HEC's torso. After allowing Thayer to dress, Patton arrested him for violating the protection order. HEC remained in the bed with the covers pulled up to her neck until after Patton and her stepfather left.

II. Procedure

The State charged Thayer with third degree child molestation and violation of a sexual assault protection order. Thayer pleaded guilty to the protection order violation. The jury was unable to reach a verdict in the first trial on the third degree child molestation charge. The State elected to retry Thayer.

Before the second trial, the State moved under RCW 10.58.090 to admit evidence of Thayer's May 11, 2009 guilty plea communicating-with-a-minor conviction—a prior conviction that the State had not presented during the first trial. Thayer objected, arguing that the prior sex offense was (1) not necessary, as demonstrated by the State's failure to present this evidence at the first trial; and (2) highly prejudicial propensity evidence. In a detailed oral ruling, the trial court considered each of the eight RCW 10.58.090(6) balancing factors and ruled that the prior sex offense was admissible under RCW 10.58.090. The trial court did not address whether the prior offense was also admissible under ER 404(b); nor did it give a corresponding limiting instruction about how the jury could use this evidence.

In addition to the testimony described above, the State called HEC as a witness. She testified that (1) although she had known Thayer for "[a] year or two," they had never been boyfriend and girlfriend; (2) although Thayer had slept in her bed the night of August 7, he had not touched her anywhere between her neck and her knees or in an "intimate[]" manner; (3) she had been wearing a bra, a tank top, underwear, and "basketball shorts" when she was in bed with Thayer that night; and (4) she did not recall what Thayer had been wearing. V RP at 92, 94, 101. HEC identified and acknowledged the contents of a letter she had written to Thayer when he was in jail. In this letter she had suggested that, if subpoenaed, she could testify that there had been no physical contact when they were in bed together and that he had just needed a place to stay. She also testified that in her letter she had acknowledged she had "feelings" for Thayer, although he did not return these feelings.[4] V RP at 95.

Reiterating his objection to admission of his prior sex offense conviction, Thayer conditionally agreed to the wording of the following description of that offense:

> The person before the Court and who has been identified in the charging document as Defendant Rodney L. Thayer, was convicted on May 11, 2009 of the crime of Communication with a Minor For Immoral Purposes, a sex offense, in *State of Washington v. Rodney L. Thayer*, Mason County Superior Court Case No. 08-1-00591-7. The victim in that case was [HEC].

Clerk's Papers (CP) at 49. In connection with reading this stipulation to the jury, the trial court gave a limiting instruction, revised at defense counsel's request. This limiting instruction, which

[4] The trial court admitted the letter, but it is not included in the record on appeal. The record does show, however, that the State noted in closing argument that HEC's letter described "how she feels when [Thayer] touches her; how she wants to have his baby; [and] how she feels when she's with him." V RP at 119.

the trial court repeated in its final written jury instructions, provided:

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

CP at 41 (Jury Instruction 6) (emphasis added).

Thayer presented no evidence. The jury found him guilty of third degree child molestation. He appeals.

ANALYSIS

I. RCW 10.58.090

In his opening brief, Thayer argues that the trial court's admission of his prior sex offense was improper because RCW 10.58.090 violates the separation of powers doctrine.[5] Recently, our Supreme Court agreed and resolved this issue in *Gresham*, holding that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine. 173 Wn.2d at 432-33. It also held that the nonconstitutional harmless error standard applies and, that to determine whether admission of evidence under RCW 10.58.090 was harmless, we must address whether, "'within

[5] Thayer also argues that the trial court erred when it admitted the prior sex offense evidence because it did not satisfy RCW 10.58.090(6)'s requirements. Because we hold that RCW 10.58.090 is unconstitutional and, therefore, inapplicable, we do not reach this issue. In the alternative, Thayer argues that, if we hold that defense counsel failed to preserve errors related to admission of the prior sex offense conviction, then defense counsel rendered ineffective assistance. Because we do not hold that counsel failed to preserve this issue for appeal, we need not address Thayer's ineffective assistance of counsel argument.

reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham*, 173 Wn.2d at 433 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Applying this test, we hold that admission of Thayer's prior sex offense conviction under RCW 10.58.090 was not harmless.

To convict Thayer of third degree child molestation, the jury had to find that (1) he had "sexual contact" with HEC, (2) HEC was at least 14 years old but less than 16 years old, (3) he was not married to HEC, and (4) he was at least 48 months older than HEC. RCW 9A.44.089(1). The only disputed element was whether Thayer had "sexual contact" with HEC. The jury instructions defined "sexual contact" as follows: "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." CP at 43 (Instruction 8). At trial, the State presented no direct evidence of sexual contact between HEC and Thayer.

Instead, the State offered the following circumstantial evidence: HEC's grandmother had observed Thayer and HEC kissing the previous evening. At trial, HEC denied any intimate physical contact during the night in question, although her letter to Thayer indicated that, because she cared for him, she was fabricating a story for trial to protect him. Her stepfather did not observe Thayer touching HEC when he (her stepfather) first opened the bedroom door. And Patton testified only that when he opened the bedroom door, he saw Thayer "flipping"[6] off of HEC and observed that the side of HEC's torso was bare and that Thayer was wearing only undershorts. Although, as we discuss below, this circumstantial evidence may be sufficient to

[6] V RP at 81.

support a conviction, it was not the only evidence before the jury; and, unlike in a sufficiency of the evidence context, we do not look at the evidence in the light most favorable to the State[7] when engaging in a harmless error analysis.

Here, the element of sexual contact between HEC and Thayer was contested; in the absence of any direct evidence of sexual contact, the jury had to render its verdict based largely on witness credibility determinations. Furthermore, not only was Thayer's prior sex offense highly prejudicial in general,[8] it was more prejudicial here because it had involved the same victim and the trial court gave no instruction limiting the jury's use of this evidence to any proper purpose under ER 404(b).

In light of the following circumstances, we cannot say that there is no reasonable probability that the trial's outcome would have been materially different had the jury not been aware of Thayer's improperly admitted previous sex offense conviction: (1) This case rested primarily on witness credibility determinations; (2) the previous trial in which the prior sex offense evidence had *not* been admitted, and therefore, in which the jury had *not* considered Thayer's prior sex conviction, had resulted in the jury's being unable to reach a unanimous verdict; (3) the limiting RCW 10.58.090(6)-based instruction improperly allowed the jury to consider Thayer's prior sex offense evidence for "*any* matter to which it is relevant," improperly including propensity to commit similar sex offenses, CP at 41 (Instruction 6) (emphasis added); and (4)

[7] *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[8] *See State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (the potential prejudice of a prior sex offense is "at its highest" in sex cases).

even if the prior sex offense evidence was admissible under ER 404(b), the trial court gave no proper ER 404(b) limiting instruction because it had admitted the prior conviction under RCW 10.58.090(6), which, at that time, had not yet been held unconstitutional. Accordingly, we hold that admission of Thayer's prior sex offense evidence was not harmless, and we reverse Thayer's conviction.

II. Sufficient Evidence

Thayer next argues that the evidence was insufficient to support the jury's third degree child molestation verdict because it did not establish that "there was any touching for the purpose of gratifying sexual desires."[9] Br. of Appellant at 22. We disagree.

When evaluating the sufficiency of the evidence, we view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). We consider circumstantial evidence to be equally reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The jury instructions required the State to prove that Thayer had had "sexual contact" with HEC. CP at 44. The instructions also provided, "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of

[9] Thayer does not challenge the sufficiency of any other element of the offense. Despite our reversal on other grounds, we address this sufficiency issue to resolve whether the State can retry Thayer on remand.

either party or a third party." CP at 43. The State's evidence showed that (1) HEC's grandmother saw HEC and Thayer kissing the night before Patton found them in bed together, (2) Patton observed Thayer in the process of rolling off all or part of HEC's apparently partially nude body, (3) Thayer apparently had spent the entire night in HEC's bed, and (4) Thayer was wearing only his boxer shorts. Taking this circumstantial evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that, when Patton opened HEC's bedroom door, Thayer was lying in an intimate way on top of HEC (his sudden "flipping"[10] off HEC undercutting any claim of innocent intent) and that Thayer's contact with HEC was for purposes of sexual gratification. Accordingly, this argument fails.

We reverse Thayer's third degree child molestation conviction and remand for further proceedings.

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.

Hunt, J.

We concur:

Worswick, C.J.

Armstrong, J.

[10] V RP at 81.