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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

TERRENCE HOPWOOD

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REPLY BRIEF OF APPELLANT

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A. Partial Restatement of Assignments of Error

Assignments of Error

1. The evidence is insufficient to sustain a conviction for commercial sexual abuse of a minor when the State failed to present any evidence of the age of the alleged minor. [Assignment of Error 28]
2. Mr. Hopwood was twice placed in jeopardy for the offense of unlawful possession of a firearm when the Court, after jeopardy attached, allowed the State to refile that offense after first dismissing it. [Assignment of Error 5]
3. The trial court erred when, after finding the hearsay text messages and statements of GSW were not admissible as co-conspirator statements, were still admissible as statements against interest. [Supplemental Assignment of Error]

Issues Pertaining to Assignments of Error

1. Should the offense of commercial sexual abuse of a minor be dismissed when the only substantive evidence of the minor's age was that she was booked into Remann Hall? [Assignment of Error 28]
2. Should the offense of unlawful possession of a firearm be dismissed as violating his double jeopardy rights when, after

jeopardy attached, the trial court dismissed the offense?

[Assignment of Error 5]

3. Did the trial court err when, after finding the hearsay text messages and statements of GSW were not admissible as co-conspirator statements, they were still admissible as statements against interest even though the declarant was not unavailable and most of the statements were innocuous and not against penal interest?

[Supplemental Assignment of Error]

B. Argument in Reply

This case presents interesting and complex issues of hearsay and confrontation involving text messages between a non-testifying declarant and an undercover police officer. The trial court ruled the text messages were admissible, albeit for reasons that both the State and the defense disagreed with. The defense, on appeal, complains the text messages should not have been admitted as statements against interest. On the other hand, the State cross-appeals the trial court's ruling that the statements were not admissible as co-conspirator statements. While these issues are certainly interesting, this Court should decline to reach them because both convictions should be reversed and dismissed for far simpler reasons.

Preliminarily, a note about the procedural posture of this appeal is in order. Undersigned counsel was appointed originally to represent Mr. Hopwood. After the record was ordered and the transcripts received, Mr. Hopwood retained private counsel, Phil Mahoney, who filed a motion to substitute as counsel of record. The motion was granted and undersigned counsel ceased working on the case. Mr. Mahoney filed the Brief of Appellant on behalf of Mr. Hopwood raising 31 assignments of error and the State filed the Brief of Respondent. Shortly after that, Mr. Mahoney passed away. Undersigned counsel was then reappointed and ordered to file the reply brief. Undersigned counsel has reviewed in detail the Briefs of Appellant and Respondent. In the opinion of undersigned counsel, there are three issues that deserve more detailed analysis than were afforded in the Brief of Appellant.

This appeal is further complicated by the assignments of error related to the hearsay of GSW and the detective. In the Brief of Appellant, Mr. Mahoney assigned error to whether the text messages were properly authenticated or violated the Confrontation Clause. In his argument on the confrontation issue, Mr. Mahoney argued the statements against interest exception did not apply because GSW was not unavailable and the statements were not against her interest, citing *State v. Roberts*, 142 Wn.2d 471, 492, 14 P.3d 713 (2000). Brief of Appellant, 19. He did not,

however, specifically assign error to the hearsay nature of the text messages, a fact that the State points out twice in its Brief. Brief of Respondent, 12 and 18. The State raises the hearsay issues in its cross-appeal. Mr. Hopwood believes the hearsay issue is properly raised in the Brief of Appellant in Assignments of Error 7, 8, 9, 12, 15, 16, 18, 23, and 25, but to the extent the Brief of Appellant does not specifically assign error to the hearsay statements, a supplemental assignment of error has been added. A motion to supplement the assignments of error is submitted contemporaneously with this Reply Brief.

1. The evidence is insufficient to sustain a conviction for commercial sexual abuse of a minor when the State failed to present any evidence of the age of the alleged minor.

In order to convict defendant of commercial sexual abuse of a minor, the State was required to prove beyond a reasonable doubt that GSW was under the age of 18 at the time of the offense. There was not sufficient evidence presented at trial of GSW's age to satisfy this element and the charge must be dismissed. In the Brief of Appellant, Mr. Mahoney properly raised this issue, but buried it at the end of the brief without citation to a single case, despite the fact that there is a Washington case almost directly on point.

In *State v. Duran-Davila*, 77 Wn.App. 701, 892 P.2d 1125 (1995), the defendant was charged with involving a minor in a drug transaction. Like Mr. Hopwood's case, the State was required to prove the non-testifying co-defendant was under 18 at the time of the offense. The State relied on two pieces of evidence. First, the State relied on the juvenile court records, including the booking sheet, which the trial court took judicial notice of. Second, the arresting detective testified he attended the witness' juvenile court remand hearing where the juvenile court retained jurisdiction. The Court of Appeals spent most of its analysis determining whether it was proper to take judicial notice of the witness' age from the juvenile records. The Court held her age was hearsay and that judicial notice was improper. The Court then took up the issue of whether the detective's testimony that he attended the juvenile remand hearing was sufficient. The Court disposed of this issue quickly saying, "The only remaining evidence as to Woody's age was Hamilton's testimony about seeing Woody at a remand hearing. This evidence, alone, was insufficient to prove beyond a reasonable doubt that Woody was under 18 years old at the time of the offense." *Duran-Davila* at 706.

Turning to the evidence in Mr. Hopwood's case, the following facts were presented of GSW's age. First, Detective Larson is a member of the Washington State Patrol's Missing and Exploited Children's Task

Force, whose primary mission is the recovery of exploited juveniles. RP, 342. This statement is a general statement about his position and experience and says nothing about GSW or her age. Additionally, Detective Larson testified the Task Force also investigates adults who are being exploited as well. RP, 342.

Second, Detective Larson was looking for a runaway out of Oregon. In the course of his investigation, he was able to confirm that GSW was the runaway he was looking for. RP, 389. But the fact that GSW was a runaway says nothing about her age. She could have been a runaway from an adult group home, or a vulnerable adult facility, or an Oregon jail, or any number of other places. It is also possible she could have been classified as a runaway while a minor and subsequently turned 18. The fact that she was confirmed as the runaway he was looking for does not prove she was under 18 years of age.

Third, the State introduced a driver's license photo of GSW into evidence as Exhibit 1. But Exhibit 1 was a redacted copy of her driver's license and contained only her photo. All other information on the driver's license was redacted, including her date of birth. RP, 411-12. Exhibit 1 was used by Detective Larson to identify GSW as the runaway he was seeking. But the photo does nothing to prove her age.

Fourth, Detective Faivre testified she filled out a booking sheet when GSW was booked into Remann Hall. She wrote out her name and date of birth (December 25, 1998). RP, 676-77. She did not testify about where she got that date of birth. More importantly, there was a timely hearsay objection to the testimony. RP, 676. The prosecutor argued he was not admitting the evidence for the truth of the matter, saying, “The question was what date of birth she wrote on the form. It's not hearsay. It's just what she put on the form.” RP, 677. The trial court overruled the objection on this basis. Therefore, the booking sheet is not substantive evidence of GSW's date of birth.

Fifth, Detective Larson testified he booked GSW into Remann Hall, which is Pierce County's juvenile detention facility. This is the argument most strenuously argued by the State. Brief of Respondent, 54. The State inquired of Detective Larson why he booked GSW in Remann Hall rather than the Pierce County Jail. The following colloquy took place:

Q: If you choose not to release her and you choose to book her, do you have an option as to where to book her?

A. No. We have one location here in Pierce County.

Q. And where is that?

A. That's at Remann Hall.

Q. Why don't you book her into the Pierce County Jail?

A. Because that is for adults only.

Q. Can you book an adult into Remann Hall and then have them transferred to the jail?

A. Book an adult into Remann Hall?

Q. Yep.

A. I don't know. I've never tried to do that because it's a juvenile facility.

Q. Can you book a juvenile into the Pierce County Jail before they get transferred to Remann Hall?

A. Again, I myself have never did that, so I can't say.

Q. Where was this girl booked?

A. She was booked into Remann Hall.

Q. What is the maximum age you can be to be booked into Remann Hall?

A. 17.

RP, 490-91. Therefore, Detective Larson did not know whether it was possible to book a juvenile in the Pierce County Jail or an adult in Remann Hall. He could only testify as to his experience. The evidence that she was booked into Remann Hall instead of the Pierce County jail is insufficient factually to prove GSW was under 18 years old.

Even if we assume that Detective Larson's understanding of Remann Hall booking procedures is correct, the fact that she was booked into Remann Hall is insufficient as a matter of law to establish beyond a reasonable doubt that GSW was under 18. The detective in *Duran-Davila* had far more information, both quantitatively and qualitatively, that the witness was a juvenile. In *Duran-Davila* the detective attended (presumably because he testified) a juvenile remand hearing of the witness in juvenile court where the State sought to remand her to adult court. The juvenile court retained jurisdiction and she was prosecuted in juvenile court, where she pleaded guilty. The detective, therefore, undoubtedly heard evidence of her age in relation to the *Kent* factors<sup>1</sup> for the purpose of determining whether the juvenile court should retain jurisdiction. This is significantly more information than simply booking a witness into a juvenile detention facility, yet the trial court in *Duran-Davila* still concluded the evidence was insufficient as a matter of law to conclude the witness was under 18 years old.

The conclusion in *Duran-Davila* is consistent with *State v. K.N.*, 124 Wn.App. 875, 103 P.3d 844 (2004). In *K.N.*, the defendant was convicted in juvenile court of minor in possession of alcohol. Although there was no evidence of her age presented at trial, the juvenile court

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<sup>1</sup> *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

convicted reasoning that the defendant's age was proven by the fact of juvenile jurisdiction. The Court of Appeals reversed holding that due process requires more. The fact that a person is prosecuted in juvenile court does not establish beyond a reasonable doubt that the person is in fact under 18.

The fact that GSW was booked into Remann Hall does nothing to establish her age. It is common knowledge juveniles lie about their age for a variety of reasons, a fact that the legislature has recognized. See RCW 66.44.310 (making it illegal for a minor to misrepresent his age for the purpose of purchasing alcohol); Compare RCW 9.35.020(9) (exempting from the identity theft statute possession of another's identification for the sole purpose of misrepresenting age). In *K.N.*, the Court opined that some adults may want to misrepresent their age in order to take advantage of the juvenile system, rather than be tried as an adult. In *State v. Mora*, 138 Wn.2d 43, 977 P.2d 564 (1999) a 17-year old defendant was erroneously booked into the adult jail and charged as an adult. Defense counsel objected at the arraignment, prompting the State to amend the charges to an automatic decline offense. In *State v. Anderson*, 83 Wn.App. 515, 922 P.2d 163 (1996) the 17-year old defendant lied about her age and said she was 18, causing her to be charged (and presumably booked) as an adult.

In this case, the jury heard a scintilla of tangential and unreliable evidence of GSW's age. The evidence was insufficient as a matter of fact and as a matter of law to establish her age and the charge of commercial sexual abuse of a minor must be reversed and dismissed. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. Mr. Hopwood was twice placed in jeopardy for the offense of unlawful possession of a firearm when the Court, after jeopardy attached, allowed the State to refile that offense after first dismissing it.

Mr. Hopwood was originally charged in Count II with unlawful possession of a firearm in the first degree (UPF1). That was the charge at the time the jury was sworn on July 16, 2017. CP, 151. Mr. Hopwood had 15 felonies on his record: 14 nonviolent convictions and one robbery charge for which he had been found not guilty by reason of insanity (NGI). The State was relying on the robbery conviction, which was his only violent offense, as the predicate offense for the UPF1.

An issue arose about the constitutional validity of the robbery offense and Mr. Hopwood filed a motion to dismiss. CP, 55. In the motion, Mr. Hopwood argued the documents supporting the NGI plea did

not comply with *State v. Brazel*, 28 Wn.App. 303, 623 P.2d 696 (1981). CP, 56.

The prosecutor first expressed frustration at having to prove the predicate offense. RP, 303. He then said, "So it's my inclination to amend to UPOF II, prove the possession by the 14 other convictions that he has. . . It's 11:10. I have a couple witnesses this morning that I wanted to get to. We haven't even done openings. It would be my request that the Court move forward this morning with an understanding that at 1:30 I'll prepare and present an amended that changes Count II Unlawful Possession of a Firearm Second Degree and listing two of his drug offenses probably is what I'll do." RP, 303-04.

The Court then ruled, "I think I've actually heard enough. Based on what I have here, it's clear the prior charge doesn't meet the four factors set forth in *Brazil* [sic]. And so to the extent that what's been given to me is a motion to dismiss, I'm going to grant that. However, I will grant the State's request to amend as it sees fit, if that's what it chooses to do." RP, 305.

At 2:07 that afternoon, approximately three hours after the offense was dismissed, the State filed the Second Amended Information, charging unlawful possession of a firearm in the second degree (UPF2). CP, 53, 153.

Once jeopardy has attached to a criminal offense, it may not be resurrected at a later time. The prohibition against double jeopardy applies when (1) jeopardy previously attached, (2) jeopardy was terminated, and (3) the defendant is again prosecuted for the same offense. *State v. George*, 160 Wn.2d 727, 741, 158 P.3d 1169 (2007). Jeopardy attaches when a jury is sworn or the first witness called, whichever comes first. *George* at 742; *Martinez v. Illinois*, 134 S.Ct. 2070, 2074, 188 L.Ed.2d 1112 (2014) (“There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn.”) In *George*, the defendant was charged in District Court with violation of a no contact order and the charge was dismissed “with prejudice.” The charge was later refiled in Superior Court. The Supreme Court ruled that because jeopardy never attached in District Court, there was no double jeopardy violation. In Mr. Hopwood’s case, the jury was sworn on July 16, 2017, so jeopardy attached.

The State argues although jeopardy attached, it never terminated, characterizing the record as an amendment of the charges to a lesser degree offense pursuant to CrR 2.1. The State misreads the record. At the time of the trial court’s ruling, the defense had a pending motion to dismiss. The Court unequivocally dismissed the case (“[T]o the extent

that what's been given to me is a motion to dismiss, I'm going to grant that...”) RP, 305. At that point, jeopardy terminated.

The Supreme Court has defined an acquittal for double jeopardy purposes as an acquittal as “a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 2183, 57 L.Ed.2d 43 (1978). In *Sanabria*, the trial court erroneously dismissed the case at the conclusion of the State’s case based upon a misreading of the statute. The Supreme Court held that retrial was prohibited.

In *State v. Goldsmith*, 147 Wn.App. 317, 195 P.3d 98 (2008), the defendant was convicted of three counts of child molestation. After the trial, the trial court concluded the evidence did not match the charging document and vacated the judgment. The State then filed an amended information. The Court of Appeals held that the vacation of judgment terminated jeopardy and that a retrial on the amended information was not permitted.

In this case, the defense filed a motion to dismiss arguing the State could not prove the validity of the predicate offense, an essential element of the charge of UPF1. The trial court agreed, saying, “It’s clear the prior charge doesn't meet the four factors set forth in *Brazil* [sic].” The Court then dismissed the charge. This resolution, correct or not, of some of the

factual elements of the offense charged was the legal equivalent of an acquittal and jeopardy terminated at that point.

Finally, the State appears to concede that, for double jeopardy purposes, UPF1 and UPF2 are the “same offense.” See Brief of Respondent, 46. This concession is proper. UPF1 and UPF2 are probably lesser included offenses and are certainly lesser degree offenses. The only difference between UPF1 and UPF2 is the seriousness of the predicate felony. The two offenses are the same offense. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). The second amended information charging a lesser degree offense three hours later after the trial court dismissed the greater charge subjected Mr. Hopwood to double jeopardy in violation of the Fifth Amendment and the charge must be dismissed.

3. The trial court erred when, after finding the hearsay text messages and statements of GSW were not admissible as co-conspirator statements, were still admissible as statements against interest.

At trial, a significant dispute arose over the admissibility of text messages between GSW and an undercover police officer posing as a “John.” The State’s primary theory for excluding the statements was that they qualify as co-conspirator statements pursuant to ER 801(d)(2)(v).

The trial court excluded the statements on that basis. RP, 289-90. Instead, the trial court admitted them statements against interest pursuant ER 801(d)(2)(v). RP, 290-91. The State argues the trial court erroneously interpreted the co-conspirator exception but correctly interpreted the statement against interest exception. Predictably, the defense agrees with the trial court on the co-conspirator exception and disagrees with the trial court on the statement against interest exception.

The State takes issue with the trial court's conclusion that the text messages were not admissible as co-conspirator statements. Statements made by a co-conspirator in the course of and in furtherance of a conspiracy are not hearsay. ER 801(d)(2)(v); *State v. St. Pierre*, 111 Wn.2d 105, 759 P.2d 383 (1988). But the court must first conclude that a conspiracy took place and that the defendant was part of it. *State v. Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). The State must show this independently of the statements it seeks to admit. *St. Pierre* at 118. The decision to admit co-conspirator statements is judged on an abuse of discretion standard. *State v. Sanchez-Guillen*, 135 Wn.App. 636, 642, 145 P.3d 406 (2006).

The trial court did not abuse its discretion in this case. Essentially, the trial court concluded GSW was not part of the conspiracy because she was the victim of the offense. *United States v. Daniels*, 653 F.3d 399 (6th

Cir. 2011). Similar to Mr. Hopwood, the defendant in *Daniels* was accused of child trafficking for prostitution. One of the offenses, child exploitation enterprise, required proof that he act in concert with three other people. The Court held that as “the victim, HH cannot be deemed a co-conspirator. When a crime inherently requires ‘two to tango,’ but the statute is not intended to punish the victim of the crime—as is the case in prostitution or the manufacture of pornography—federal courts regularly apply a common-law exception to conspiratorial or accomplice liability.” *Daniels* at 413. See also, *State v. Gray*, 189 Wn.2d 334, 344, 402 P.3d 254 (2017) (quoting verbatim the same paragraph approvingly).

Washington also has a conspiracy statute that specifically excludes victims from being c-conspirators. RCW 9A.08.020(5)(a). Under the authority of *Daniels* and RCW 9A.08.020(5)(a), the trial court was correct to conclude that GSW’s text messages to the undercover officer were not admissible as co-conspirator statements. GSW was unquestionably the alleged victim of the offense of commercial sexual abuse of a minor. RCW 9.68A.100. The text messages were not made by a co-conspirator because victims of crime cannot be conspirators.

The next issue is whether the trial court erred by admitting the text messages under ER 804(b)(3), statements against interest. In order to be admissible under this rule, the State was required to show three things: (1)

the declarant was unavailable; (2) the statements were so far contrary to the declarant's civil or criminal liability that a reasonable declarant would not have made the statement unless it was true; and (3) the statement is accompanied by corroborating circumstances which clearly indicate the trustworthiness of the statement.

In Mr. Mahoney's Brief of Appellant, he argued the State had not proved GSW was not available and, therefore, the statements were admitted in violation of Mr. Hopwood's right to confrontation. After her arrest, GSW was allowed to return home to Oregon. RP, 279. Although the State claimed it had attempted to subpoena her for trial, the State was very vague in its efforts and made no effort to get a material witness warrant. RP, 280-81, 292, 296.

The second issue whether the statements were clearly against her penal interest. All of the statements made, both by text message and orally to the undercover officer, were made prior to her arrest. As soon as she was arrested, she invoked her right to remain silent. RP, 293. Defense counsel argued that many of the statements were not against her penal interest. RP, 293-94. For instance, the statement, "I'm almost there," is not so far contrary to the declarant's civil or criminal liability that a reasonable declarant would not have made the statement unless it was true. RP, 294.

At trial, Detective Larson testified to his text message exchange with GSW. RP, 440-54. Most of the messages are innocuous and involve trying to set up a meeting time and place. Once in the hotel room, the detective told GSW he wanted oral sex, vaginal sex, and anal sex in exchange for a \$200 “donation.” RP, 459.

Whether a statement qualifies as a statement against interest is judged on a sentence by sentence basis. The Washington Supreme Court has narrowly construed the word “statement” to mean “a single declaration or remark,” as opposed to an extended declaration or narrative. *State v. Roberts*, 142 Wn.2d 471, 492, 14 P.3d 713 (2000), quoting *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The trial court in this case took a holistic approach to the text messages, admitting all of them without engaging in any individual analysis. This was a clear abuse of discretion.

In sum, the text messages and conversation between GSW and Detective Larson should not have been admitted. GSW did not testify, was not unavailable, and mostly made innocuous statements. The trial court erred by admitting them.

C. Conclusion

This Court should dismiss Count I for insufficient evidence and Count II for violation of double jeopardy. In the alternative, this Court should reverse and remand for a new trial.

DATED this 25<sup>th</sup> day of July, 2018.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

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