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Court of Appeals  
Division III  
State of Washington  
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No. 34416-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

EUGENE LESTER STANDFILL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR BENTON COUNTY

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. The notation ruling regarding the term of community custody as applied to Count IV fails to comply with RCW 9.94A.701 and requires remand. .... 1

    2. The possession of the masturbation photograph and the sexual exploitation count were the same criminal conduct and counsel was ineffective for failing to so move. .... 3

B. CONCLUSION ..... 5

TABLE OF AUTHORITIES

WASHINGTON CASES

*In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023  
(2009)..... 1

*State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012)..... 2

*State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160  
(1987)..... 3

*State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993)..... 3

*State v. Porter*, 133 Wn.2d 177, 942 P.2d 974 (1997) ..... 4

STATUTES

RCW 9.94A.589 ..... 3

RCW 9.94A.701 .....i, 1, 2

RCW 9A.20.021 ..... 2

A. ARGUMENT

In addition to the arguments in reply submitted here, Mr. Standfill asks this Court to accept the State's concessions of error.

1. **The notation ruling regarding the term of community custody as applied to Count IV fails to comply with RCW 9.94A.701 and requires remand.**

The State concedes that remand is required for Counts II and III as the terms of community custody exceed the statutory maximum for those offenses. Brief of Respondent at 8. The State is incorrect that the notation in the Judgment and Sentence remedies the fact the sentence for Count IV exceeds the statutory maximum. This count must be remanded as well to correct the error.

The State argues, without any citation to authority, that the court's notation on the Judgment and Sentence indicating the total term of confinement and community custody actually served could not exceed the statutory maximum corrected any error. CP 344; Brief of Respondent at 8. This type of notation was sufficient under *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009). The decision in *Brooks* held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying

that the total term of confinement and community custody actually served may not exceed the statutory maximum. 166 Wn.2d at 674–75.

However, that changed after the passage of RCW 9.94A.701(9)<sup>1</sup> in 2009. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Following enactment of this statute, the *Brooks* notation procedure no longer complied with the statutory requirements. *Id.* Because Mr. Standfill was sentenced after RCW 9.94A.701(9) became effective, the *trial court*, not the Department of Corrections was required to reduce his term of community custody to avoid a sentence in excess of the statutory maximum. The court erred in not doing so. Remand to the trial court is required to either amend the community custody term or resentence Mr. Standfill consistent with RCW 9.94A.701(9). *Id.* at 473.

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<sup>1</sup> RCW 9.94A.701(9) states:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

**2. The possession of the masturbation photograph and the sexual exploitation count were the same criminal conduct and counsel was ineffective for failing to so move.**

The State takes far too myopic a view in arguing the possession of child pornography and sexual exploitation counts do not constitute the same criminal conduct.

Two crimes manifest the “same criminal conduct” where they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). As part of this analysis, courts also look to whether one crime furthered another. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *see also State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

Here, according to the State’s closing argument, the sexual exploitation count furthered the child pornography count. RP 388-389.

Then we have the picture crime. I need to go through this to make sure you understand. There are crimes that caused and invited the minor to do the picture. [K.J.S.] stand over there. Click. [K.J.S.] do this. Click. That’s your crime. Then we have the crime to possess the photos. Not only is it a crime to invite the child to cause the child to be photographed but it’s a separate crime to possess these pictures and that is why there were two separate crimes. Sexual exploitation of a minor.

RP 388.

Instead of focusing on Mr. Standfill's intent as we must, the State focuses on the elements as listed in the statute. But, Mr. Standfill's objective intent in engaging in these two offenses was the same; to obtain sexually explicit images of K.J.S. to possess. The sexual exploitation count furthered Mr. Standfill's possession of the sexually explicit photos, the masturbation photo being the one charged here. Thus, Mr. Standfill's intent was the same in committing both offenses.

The two offenses happened at the same time as well. The "same time" element does not require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997). Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86.

While the sexually exploitation count is charged over several days, the child pornography count overlaps this time period. Thus, Mr. Standfill's act of taking the picture, constituting the sexual exploitation count, then possessing the photo occurred at the same time and place.

Counsel for Mr. Standfill rendered constitutionally deficient representation in failing to move the court to find the sexual

exploitation and child pornography counts to be the same criminal conduct. Mr. Standfill is entitled to remand for resentencing.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and this reply brief, Mr. Standfill asks this Court to reverse his conviction for count IV and/or remand for resentencing.

DATED this 6<sup>th</sup> day of March 2018.

Respectfully submitted,

*s/Thomas M. Kummerow*

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	)	
APPELLANT.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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# WASHINGTON APPELLATE PROJECT

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