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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

THOMAS ALVIN SWARERS,

Appellant

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

NO. 17-1-00783-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The defendant's trial attorney did not fall below reasonable professional standards and did not prejudice the defendant at the sentencing hearing.
- B. The two offenses, one attempted rape against a 6-year-old and one against an 11-year-old, are not in the same course of criminal conduct.
- C. The \$200 filing fee should be stricken.

II. STATEMENT OF FACTS

On July 7, 2017, the Missing and Exploited Children Task Force, MECTF, a unit with the Washington State Patrol, posted the following ad on Craigslist: "Mommy likes to watch-young family fun-420 friendly (meaning marijuana friendly)-woman 4 men KPR" (meaning Kennewick, Pasco, Richland.) RP at 375, 433, 436.

The body of the ad stated: "Still looking for that special man. Young family fun. Experience with taboo is best. Replies with phone numbers get answers from me more quickly. Change the subject line to your name and favorite color so I know you are not a bot. 2 DA 1 son. LG for daddy here." RP at 433-34. "DA" standing for daughters and "LG" meaning little girl. RP at 434. Detective Carlos Rodriguez initially played the role of the mother, followed by Detective Kristl Pohl. RP at 433, 464.

The defendant responded at 6:24 A.M., saying, “What does mommy like to watch daddy do? Is you[r] family invoked [*sic*] in this? If so, I may be interested. Get back to me before I give out a number. Tom.” RP at 437, 440. The subject line said, “Tom Blue”, following the directions in the ad for the responder to state his first name and favorite color. RP at 435.

The “mother” was clear that she had three children of varying sexual experience. “My girls are 11 and 6. Oldest is not totally active but still likes to play and is very ready and mature. Younger is not very active at all. My boy is 13. Son is very active. I’m single and looking for someone that is open and free to new ideas.” RP at 438-39.

The defendant responded, “I’m open to anything that will make you comfortable. Is boy active with men or with women? Oral sex is a good starter for the girls and can work into more as we get to [know] each other.” RP at 441.

The “mother” responded, “He started with me, but he likes both. Oral sex is a great way to start. Youngest has done a little bit of that and touching. Anna is my older girl, and she has played with toys and is ready for more.” RP at 441-42.

The defendant sent a picture of himself to the “mother” and said, “I’m an older man, hope that doesn’t change anything.” RP at 468-70. The

“mother” responded, “Doesn’t change it at all you look very nice. I was hoping to find someone so you might be a perfect fit for my family.” RP at 471.

The texting continued and the “mother” stated, “I grew up this way with my dad teaching me and showing me about sex and how it should be and I really want that for my kids to but no man in my life to fill that role.” RP at 473. The dialogue continued with the defendant stating, “What all would like to be done babe? Is everyone willing to participate?” RP at 474-75.

The “mother” responded with, “Yes they all like it as long as its [*sic*] fun. I had a friend a few years ago that used to teach them but he moved back east. They really enjoyed everything that they did.” RP at 475.

Defendant: “What all have they done with a man?” *Id.* The dialogue continued. Defendant: “What momma like to do sexually? I don’t expect to walk in and start having sex, but I would like to meet you guys.” RP at 476.

The “mother” stated “I like boys 10-13 age range. I really like to watch my son. He’s more into boys though.” RP at 476-77.

Defendant: “So I’m more for the girls than mom?” RP at 477.

“Mother”: “Yes this is for my kids. Not you and me sorry hun.” *Id.*

Defendant: “That’s OK, as long as your [*sic*] good with it.” *Id.*

“Mother”: “Yes of course. I can teach them some but its [*sic*] good for them to have a man to show them what feels good and how to do things.” RP at 478.

Defendant: “Yes, that’s true. I can show them what a man likes and teach them also.” *Id.*

The texts continued with this dialogue:

“Mother”: “I just like to be able to prepare my kids for what may or may not happen. Especially the girls you know?” RP at 479.

Defendant: “I understand, that’s why I said ‘play it by ear.’ They may not even like me.” *Id.*

“Mother”: “Oh I think they will. I already showed them your picture and they thought you looked very nice. The friend I had before was an older gentleman, they called him pappa and they liked him a lot. He was very gentle with them.” *Id.*

Defendant: “And will be too, babe.” RP at 480.

“Mother”: “So what would you like to do the most once you’re sure they like you? Just the girls you think or boy maybe too?” *Id.*

Defendant: “Just the girls first, oral, and see how much they know—see how much they do know about sex.” *Id.*

“Mother: “That sounds nice. They both do good with oral. The oldest has done more with oral and partial penetration and is better at giving they both have played with toys too.” RP at 482.

Defendant: “That’s good, we just need to get to know one another and get comfortable with each other. I have a rabbit vibrator.” *Id.*

“Mother”: “Oh nice they would like that.” *Id.*

The defendant asked for the meeting to happen now. “I’m open now.” RP at 483.

The “mother” stated she had some rules: no anal sex, condoms are mandatory, and lubrication is required. RP at 484. The defendant said, “It’s ok, I have all that.” *Id.*

The “mother” texted some additional requirements about the defendant taking a selfie at a gas station. *Id.* The defendant responded, “I fully understand and agree to that.” RP at 485.

“Mother”: “Thanks for being so understanding hun I can’t wait for my girls to meet you.” *Id.*

Defendant: “Thnxs [*sic*]. As long as you are the consenting adult, I don’t have a problem with this. OK?” *Id.*

“Mother”: “Yes of course. I will be there to watch and make sure the girls are ok and having a good time and are comfortable with you.” RP at 486.

Further in the text messages:

“Mother”: “My girls are very excited about this.” *Id.*

Defendant: “Good.” *Id.*

Defendant: “They might also like the fact that I’m shaved below!”

RP at 487.

“Mother”: “Oh yes perfect I meant to ask you that the girls really don’t like hair in their mouths lol.” *Id.*

Defendant: “Well, there you go! No hair! You said the other one has had partial penetration, have they been fingered as [*sic*] had their pussy’s eaten?” *Id.*

“Mother”: “Yes they both have been fingered and licked.” *Id.*

Defendant: “OK, that’s good!” *Id.*

“Mother”: “The oldest has had a penis partially pushed in but it was hurting so he stopped and they did other stuff.” *Id.*

Defendant: “That’s the same thing that we’ll do, don’t want to hurt anyone.” RP at 487-88.

“Mother”: “That was a year ago and shes [*sic*] bigger now and been playing with a dildo so she might be ready now.” RP at 488.

Defendant: “We’ll see. You will watch me with your girls, I want to watch you with your son.” *Id.*

“Mother”: “That sounds good.” *Id.*

The text messages continued and the defendant and “mother” planned for him to come by her apartment.

“Mother”: “I hope you’re ready to come over and have some fun this afternoon. Cause I hope you don’t just expect to chit chat now, they’re way too excited for that.” RP at 489.

Defendant: “Just say when and where.” *Id.*

The defendant wanted the “mother” to state in writing that she consented. She did so. RP at 492. The defendant replied, “Thanks, I’m showered, shaved and ready. Just say when babe.” *Id.*

The “mother” then directed him to a nearby 7-11, asked him to buy the girls slurpees, and to take a picture of himself and send it to her. *Id.* The defendant then went to the supposed apartment of the “mother” and was arrested. RP at 495. In his possession when he was at the “mother’s” apartment were two nipple clamps, two bottles of lubrication, three condoms, a blister pack of three Viagra pills with one missing, and a remote-controlled sex toy. RP at 512-17.

The defendant declined to testify but did tell the police that he actually wanted to meet the mother, not her children. RP 554-56.

The defendant was charged with two counts of Attempted Rape of a Child in the First Degree for the 6-year-old girl and the 11-year-old girl and found guilty of both. CP 1-2, 72-73. Both the defense and prosecution

calculated his minimum standard range as 90-120 months. CP 74, 79. He was sentenced to a minimum of 108 months and a maximum sentence of life. CP 83.

III. ISSUES

- A. Was the defendant deprived of effective assistance of his attorney at sentencing?
 - 1. What is the standard on review?
 - a. For ineffective assistance claims?
 - b. Regarding “same criminal conduct” issues?
 - 2. Was there any prejudice to the defendant where his attorney agreed that the crimes were not in the same criminal conduct?
 - a. Was the defendant’s intent for the two crimes the same if his planned sexual encounters for the 6-year-old and 11-year-old differed and the two crimes were not dependent on each other?
 - b. Are the victims of the crimes the same?
 - i) Is the defendant’s citation of authority helpful?
 - ii) Considering the definition of “victim” in RCW 9.94A.030 (54), are there actual,

participating in the sexualization of 6 and 11-year-old girls?

- iii) If RCW 9.94A.030 (54) is interpreted to mean that minor girls who are sexually assaulted with their mother's permission are not victims, would that be an absurd result?

3. Did the trial attorney fall below reasonable professional standards?

B. Should the \$200 filing fee be stricken?

IV. ARGUMENT

A. **The defense attorney provided effective assistance.**

1. **Standard on review.**

a. **Standard on review for ineffective assistance claims on sentencing.**

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. Johnson*, 180 Wn. App. 92, 105, 320 P.3d 197 (2014). Prejudice requires a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

b. **Standard on review regarding whether multiple offenses are within the same course of criminal conduct.**

Current offenses which are found to encompass the same criminal conduct shall only be counted as one crime for sentencing purposes under RCW 9.94A.589. “Same criminal conduct” means two crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589 (1)(a). The legislature intended the phrase “same criminal conduct” to be construed narrowly and the burden is on the defendant to establish the crimes are the same criminal conduct. *Johnson*, 180 Wn. App. at 104.

The standard in determining the “same criminal intent” prong is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. This can be measured in part by whether one crime furthered the other. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). “Intent” is not defined as the particular mens rea element of the specific crime, but the offender’s objective criminal purpose in committing the crime. *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013). When an offender has time to pause, reflect, and either cease his criminal activity or proceed and makes the decision to proceed, he or she has formed a new intent to commit a further crime. *State v. Latham*, 3 Wn. App. 2d 468, 479-80, 416 P.3d 725 (2018).

- 2. There was no prejudice to the defendant because the defense attorney correctly concluded the defendant's two crimes were not in the same course of criminal conduct.**
 - a. The defendant's intent differed for the 6-year-old and 11-year-old and one crime did not further the other.**

The defendant intended to have penile-vaginal intercourse with the 11-year old. See the exchange on RP at 487. The "mother" said the 11-year-old had a penis partially inserted in her, but the man stopped when it hurt the "girl." The defendant responded, "That's the same thing that we'll do don't want to hurt anyone." RP at 487-88.

With the 6-year-old, the defendant was going to engage in oral sex. "Oral sex is a good starter for the girls and can work into more as we get to [know] each other." RP at 441. The defendant's intent for the two girls was objectively different.

The defendant's anticipated sexual abuse of the 11-year-old had nothing to do with his anticipated abuse of the 6-year-old and vice versa. The defendant did not ask for a "threesome" with the girls. He did not say that he would have sex with the 11-year-old as an ice breaker or prelude to sex with the 6-year-old. One offense did not further the other. Under *Vike*, the defendant's intent was not the same for the 6-year-old and the 11-year-old. *Vike*, 125 Wn.2d. Under *Latham*, the defendant would have time to

reflect between abusing the 6-year-old and 11-year-old. *Latham*, 3. Wn. App. 2d.

Since the defendant's planned conduct with each girl differed and since the crimes were independent, the defendant's intent for each count was different. This is especially true because RCW 9.94A.589 (1)(a) is to be narrowly construed. *State v. Johnson*, 180 Wn. App. 92, 104, 320 P.3d 197 (2014).

With all due respect to the defendant, he is conflating the "same time" prong with the "same intent" prong. Suppose the crimes happened on separate days, with, say, the defendant agreeing with the "mother" to have full intercourse only with her 11-year-old on a Friday. If that "date" is cancelled because the defendant became ill and the next day the defendant said he wanted only the 6-year-old, it should be clear that his intent has differed. The defendant may have planned to have oral sex and intercourse with the 11-year-old and oral sex with the 6-year-old on the same visit, but his intent with respect to each girl was not the same.

b. The victims are also not the same.

i) The defendant's citation is not helpful.

The defendant's citation to *State v. Stockmyer*, 136 Wn. App. 212, 148 P.3d 1077 (2006) is not too helpful. That case held that the victim in an Unlawful Possession of a Firearm case is the public at large. There is

no individual “victim” of such cases, as that term is defined in RCW 9.94A.030 (54): “‘Victim’ means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” In an Unlawful Possession of a Firearm case, no one is emotionally, psychologically, physically or financially injured.

- ii) **There are actual, living victims for both counts and they differ. Specifically, the victims for Count I are every 6-year-old girl and their care providers, while the victims for Count II are every 11-year old girl and their care providers.**

This definition of “victim” helps the defendant because it would indicate that there must be an actual, living, person who suffered emotional, physical or financial injury. Are there are victims of both crimes that would meet the definition of “victim” in RCW 9.94A.030 (54)? As stated below, the answer is yes, the victims in Count I includes every 6-year-old girl and her parents or caregivers, and the victims of Count II includes every 11-year-old girl and her parents or caregivers.

The two statutes, RCW 9.94A.589 (1)(a) on “same criminal conduct” and RCW 9.94A.030 (54) on the definition of “victim”, should be construed with the idea that the legislature intended to limit the

application of RCW 9.94A.589 (1)(a). *State v. Johnson*, 180 Wn. App. 92, 104, 320 P.3d 197 (2014).

With this in mind, *State v. Luther*, 157 Wn.2d 63, 134 P.3d 205 (2006) is helpful. In *Luther*, the court dealt with a charge of Attempted Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. The defendant argued that because the prosecution did not prove the individuals depicted in various images were in fact minors, his convictions for Attempted Possession was overbroad. *Id.* at 70-71. Specifically, the crime of attempted possession of such materials is overbroad, the defendant argued, because no actual child has been harmed. *Id.* at 72. The Court rejected this argument and stated:

Contrary to Luther's argument, harm to children results even where the attempt offense is concerned. Individuals seeking to obtain actual child pornography, as opposed to individuals seeking virtual pornography or seeking images of adults who appear young enough to be children, are part of the child pornography market with its sexual exploitation and abuse of children. The United States Supreme Court has reasoned that the government has a legitimate interest in drying up the child pornography market and has said that '[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product. In contrast, the Court has rejected the objective of eliminating the pornography market where the argument was advanced to justify a prohibition on virtual images. Individuals who attempt to obtain actual child pornography are part of the child pornography market whether they are successful in obtaining child pornography or not.

Id. at 74 n.8. (internal citations omitted).

Likewise, in this case, the defendant was part of a subculture seeking sex with underage girls. Whether he was successful or not, he was part of a class of individuals who respond to ads with coded language for sex with minors, who view oral sex as a “great way to start” for a 6-year-old, and who view an 11-year-old as a candidate for partial penetration. RP at 398, 441, 487. In short, he and people like him participate in a culture of sexualizing 6 and 11-year-old girls, making every such girl and her parents a notch more susceptible to unwanted verbal or physical assaults.

Therefore, there are actual, living victims of both crimes. The victims in Count I are every 6-year-old girl and her parents or caregivers. The victims in Count II are every 11-year-old girl and her parents or caregivers. There may not have been an actual girl involved in this case, but the parents of such girls, and the girls themselves, have suffered emotional or psychological damage by having girls that age subjected to the behavior of the defendant.

It should go without saying that these are two separate groups. There are significant differences in the social and psychological development of a 6-year-old compared with an 11-year-old. To quote a website, www.fundamentallychildren.com, a 6-year-old is

starting to become more familiar with the rules around them and know when the rules apply and when they don't. . . Their friendship circles are starting to evolve and are becoming more defined. Peers will help them develop a sense of belonging and of their own identity. Being liked and accepted by friends is very important to them.

Developmental Milestones: 6 Year Olds, FUNDAMENTALLY CHILDREN,

<https://www.fundamentallychildren.com/child-development-advice-including-special-needs/child-development-by-age/6-year-olds/> (last visited Jan. 4, 2019).

By age 11,

Thought patterns are adjusting to adulthood and the brain is allowing them to start thinking about intangible ideas such as love, faith and the meaning of life. A positive outlook on adulthood can help to make this transition an exciting one and less of a scary one. . . . Secondary school may pose fears and anxiety within your child and they may require additional support or a confidence boost to help with their concerns. Playing lots of sport or having active interests can help to burn off energy and help with the stresses.

Developmental Milestones: 11 + Year Olds, FUNDAMENTALLY

CHILDREN, <https://www.fundamentallychildren.com/child-development-advice-including-special-needs/child-development-by-age/11-year-olds/> (last visited Jan. 4, 2019).

Courts have recognized the difference between an almost six-year-old and another child who is just under a statutory age requirement in a sex offense. In *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987), the defendant argued the trial court erred in imposing an exceptional sentence

in an indecent liberties case due to the victim's vulnerability. The victim was five-and-a-half-years old and the argument was that under the prong of the indecent liberties statute, the victim would have to be under 14-years-old. Therefore, the legislature must have already considered the victim's youth in determining the presumptive sentencing range.

The *Fisher* court rejected this argument. The Court held that a five-and-a-half-year-old victim would be particularly vulnerable. *Id.* at 423. "To prohibit consideration of the age of the victim in a particular case in sentencing would be to assume that all victims of this offense were equally vulnerable regardless of their age, an unrealistic proposition." *Id.*

In sum, there are two classes of distinct victims: all 6-year-old girls, their parents and caregivers and all 11-year-old girls, their parents and caregivers.

- iii) **In the alternative, the context of RCW 9.94A.589 (1)(a) requires a broader definition of "victim" than in RCW 9.94A.030 (54) and should include the defendant's intent to have sex with two fictitious girls. Otherwise, an absurd outcome would result.**

RCW 9.94A.030's preamble states, "Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter." Reading the definition of "victim" in RCW 9.94A.030 (54) in

isolation would result in an absurd consequence, which should be avoided.

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

It would be an absurd result because a strict reading of RCW 9.94A.030 (54) would mean that there would be no victim in this case, even if the mother and the girls were actual individuals. Let us assume this was not a setup and there actually was a mother who was eager for her 6-year-old and 11-year-old girls to learn about sex from a father figure. RP at 473. The girls were eager to participate, enjoyed sex with a previous man, and were excited about sex with the defendant. RP at 475, 486.

Assume that there were a number of meetups between the girls and the defendant. The police receive a tip about this, intervene with a search warrant, and catch the defendant in the act of having sex with one of the girls.

If the girls say they appreciated the attention and education from the defendant and the mother says that she approved of the sex, there is no victim under RCW 9.94A.030 (54). The girls did not suffer any known emotional or psychological harm. Neither did their mother. That result would be absurd. Surely the legislature intended for a 6 and 11-year-old to be viewed as victims even if their mother encouraged a man to have sex with them and even if they did not object.

Again, the *Luther* case is helpful:

If a person attempts to obtain actual child pornography but the crime is not completed because the individual does not in fact receive the images sought or receives images that turn out to be images that are not of actual minors, the individual can nevertheless be convicted of the attempt crime because factual impossibility is not a defense. Our recent decision in *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) is instructive. There the defendant used his computer to send e-mail messages to someone who he thought was a 13-year-old girl named “Amber,” urging her to meet with him to have sex. “Amber” was actually an adult male police officer who set up a “sting” operation. The defendant was charged with and convicted of attempted second degree rape of a child. He challenged his conviction, arguing that he could never have taken a substantial step toward completion of the offense because “Amber” was in reality not a minor but instead was a police officer. We disagreed because factual impossibility is not a defense to an attempt crime and therefore the fact that “Amber” was not in fact a 13-year-old girl was irrelevant. Of critical importance to Luther’s case, we emphasized in *Townsend* that “[t]he attempt statute focuses on the actor’s criminal intent, rather than the impossibility of convicting the defendant of the completed crime”. The same is true of the offense of attempted possession of depictions of minors engaged in sexually explicit conduct—the critical focus is on the defendant’s criminal intent and not on the fact that no minors were actually subjected to sexual exploitation or abuse. Generally, it makes no difference in the case of attempt offenses that the harm that the underlying criminal offense statute addresses does not occur.

Luther, 157 Wn.2d at 73-74.

A defendant could argue in many attempted crimes that there is no victim as defined in RCW 9.94A.030 (54) because the intended victim may not have been harmed physically or emotionally. However, if the

focus is on the defendant, he certainly had the intent to harm two different girls.

State v. Townsend, 147 Wn.2d 666, 671, 57 P.3d 255 (2002), *State v. Sivins*, 138 Wn. App. 52, 56-58, 155 P.3d 982 (2007), and *State v. Wilson*, 158 Wn. App. 305, 308-11, 242 P.3d 19 (2010) all dealt with a similar child sex sting operation and all held that although there was no actual “girl”, the defendants’ intent and the crimes were real. It would be a strained result to conclude that the victims of these offenses are as vague as a victim of a crime of Unlawful Possession of a Firearm.

The context of the term “victim” in RCW 9.94A.030 (54) fits well with who should be allowed to address the court at sentencing, RCW 9.94A.500, or those who are entitled to restitution, RCW 9.94A.750 (3), (5) or (6). But, in the context of RCW 9.94A.589 (1) and same criminal conduct, the definition of “victim” in RCW 9.94A.030 (54) does not fit. If the Court does not accept the State’s argument in section (A) (2) (b), that the definition of “victim” covers every 6-year-old girl and her parents in Count I and every 11-year-old girl and her parents in Count II, the Court should recognize that this reading of RCW 9.94A.030 (54) results in an absurd result. The defendant intended to sexually assault two different minor girls and he should be viewed as having two separate victims, although that is not consistent with the definition of “victim.”

3. Even accepting the defendant's argument, it is at least arguable that his trial attorney did not fall below reasonable professional standards.

Leave aside the issue of whether the defense attorney could have successfully argued that Counts I and II are the same criminal conduct.

Would a reasonable, professional attorney have spotted the issue?

Consider the following:

First, the deputy prosecutor also determined that the range was 90-120 months, based on an offender score of 3. CP 79. A prosecutor has a quasi-judicial role. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice" RPC 3.8 cmt.1. The defense attorney should check the work of the prosecution but could also rely on the prosecutor not to deliberately produce a false standard range.

Second, there are no reported cases on exactly this issue.

Townsend, Sivins, and Wilson all dealt a single count of attempted child rape. Kudos to the defendant for raising the issue on appeal. But, it is an open question if a diligent, professional attorney would have also raised the issue. It seems at least reasonable that a diligent defense attorney would easily conclude that since the defendant intended to violate two different girls, there are two different offenses.

B. The defendant is correct that the \$200 filing fee should be stricken.

The trial court is not at fault. When the defendant was sentenced, the filing fee was mandatory. Legislation changed that, and the legislation applies to cases on appeal.

V. CONCLUSION

The defense attorney was not ineffective. An argument that the two crimes were the same criminal conduct would have failed because the defendant's planned actions for the 11-year-old was different than his plans for the 6-year-old and because the two crimes were not in furtherance of each other. The argument would also fail because the victims are not the same. The definition of "victim" in RCW 9.94A.030 (54) would include every 6-year-old girl and her parents for Count I and every 11-year old girl and her parents in Count II.

It is good that no girl was harmed directly, but that does not relieve the emotional or psychological damage that occurs by having children viewed as sexual objects. The defendant's participation in these ads and his seeking to have sex with minor children makes each 6-year-old and each 11-year-old and their parents a little less secure. Otherwise, the result is absurd: there would be no "victim" under RCW 9.94A.030 (54) if there was a mother seeking an older man to have sex with her children, because

the mother would have encouraged it and the girls may not be able to articulate the emotional and psychological damage to them.

While the attempted offenses would have occurred at the same time, the other prongs, same victim and same intent, are different. This argument would not have been successful if the defense attorney had made it.

The defendant's sentence should be affirmed with the exception of the \$200 filing fee.

RESPECTFULLY SUBMITTED on January 7, 2019.

ANDY MILLER
Prosecutor



Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

**Christopher Gibson
Nielsen, Broman & Koch, PLLC
1908 E Madison Street
Seattle, WA 98122**

E-mail service by agreement
was made to the following
parties:
sloanej@nwattorney.net

Signed at Kennewick, Washington on January 7, 2019.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

January 07, 2019 - 9:46 AM

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