

71799-5

71799-5

NO. 71799-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC HOPPER,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JACOB R. BROWN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that an instruction could not have cured the prejudice. The prosecutor argued that, in order to find Hopper's affirmative defense proven, the jury had to believe that it was "more likely than not, 51%, . . . what happened." Hopper did not object to the prosecutor's description of the preponderance of the evidence standard or request a curative instruction. Where appellate courts routinely describe the preponderance standard as fifty-one percent of the evidence, was the prosecutor's argument proper? If not, could an instruction have cured any prejudice?

2. A defense attorney's decision of when or whether to object is a matter of trial tactics, and only in egregious circumstances will a failure to object constitute deficient performance. Defense counsel below refrained from objecting to the prosecutor's statement that the preponderance standard required proof that Hopper's defense was "more likely than not, 51%, . . . what happened." Even if an objection would likely have

been sustained, this legitimate tactical decision did not prejudice Hopper. Did Hopper receive effective representation?

3. RCW 9.94A.703 authorizes a sentencing court to impose crime-related prohibitions while a defendant is supervised on community custody. The sentencing court ordered Hopper to abide by a nighttime curfew. Because Hopper's criminal activity occurred only during the day, the State concedes error and asks that this matter be remanded solely to strike this condition from the Judgment and Sentence.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Eric Hopper with one count of Commercial Sexual Abuse of a Minor, contrary to RCW 9.68A.100.¹ CP 1. The State alleged that Hopper had paid money in exchange for having sexual intercourse with K.H., a 16-year-old girl, on December 15, 2012. CP 1.

¹ Under this section, "[a] person is guilty of commercial sexual abuse of a minor if: (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her; (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee." *Id.* at (1).

Jury trial was held before the Honorable Judge Timothy A. Bradshaw. 1RP; 2RP.² Hopper conceded that he had paid money to have sexual intercourse with a minor, but raised an affirmative defense: that he had made a reasonable bona fide attempt to ascertain the victim's true age, by requiring the production of her identification. CP 25 (Instruction 9) (attached at App. A); 2RP 242, 273, 310; RCW 9.68A.110(3). The jury convicted Hopper as charged. CP 10; 2RP 317.

Hopper received a standard range sentence of 26 months of incarceration, followed by 36 months of community custody.³ CP 35-37; 2RP 332. The court also imposed the condition that he abide by a curfew between 10:00 p.m. and 5:00 a.m. CP 37, 42.

This appeal timely followed. CP 46.

2. SUBSTANTIVE FACTS.

In October of 2012, 16-year-old K.H. was evicted from the house that she shared with her father's ex-girlfriend, and became homeless. 1RP 141-44. She began drinking alcohol, using

² The State refers to the report of proceedings in this case as follows: 1RP – Jan. 21, 2014; Jan. 22, 2014; Jan. 27, 2014; Jan. 28, 2014. 2RP – Jan. 28, 2014 (continued); Jan. 29, 2014; Feb. 21, 2014; Mar. 14, 2014.

³ The parties also noted that, as a result of the instant conviction, Hopper will serve 43 months of incarceration in Minnesota, because of a prior conviction for a sex offense there. 2RP 326.

methamphetamine, and stealing to support herself. 1RP 144, 151. She wandered between parties at night, looking for a place to stay. 1RP 145.

K.H. and another teenaged girl were befriended by a man named Allix Park. 1RP 146-47. Park arranged for the girls to have sex with strangers for money. 1RP 148-49. He posted advertisements on a website called Backpage. 1RP 59-60, 75-76, 152-53. The advertisements showed pictures of K.H.'s body and stated that she was 19 years old. 1RP 155; 2RP 233.

On December 14, 2012, Eric Hopper—a career software engineer—searched Backpage with the intent of purchasing sex. 2RP 225-26, 239-40. He saw K.H.'s advertisement and became interested in having sex with her. 2RP 240. He contacted the phone number on the advertisement and exchanged several text messages with Park, believing him to be K.H. 1RP 76-86. Hopper agreed to pay \$250 to have sex with K.H. 1RP 84; 2RP 228.

The next day, December 15, Park and another man named Demario Jones drove K.H. to the ferry terminal in Bremerton. 1RP 160-61; 2RP 216-17. Hopper became very excited when he learned that K.H. was coming, and sent Park a text message, reading, "Yea!" 2RP 249. K.H. got off the ferry in Seattle and took

the bus to Hopper's home in the Ballard neighborhood.

1RP 161-62.

Hopper answered the door for K.H. and did not seem surprised by her appearance. 1RP 163. They exchanged hellos, and she asked to use the restroom. 1RP 163. Although Park had instructed K.H. to request \$300 for one hour, Hopper reiterated that he would pay \$250. 1RP 167. Then, they had sexual intercourse in Hopper's bed. 1RP 168. He did not wear a condom. 1RP 168.

After he had sexual intercourse with K.H., Hopper began a conversation with her. 1RP 167-69. He told her that he was in an "open relationship" with his girlfriend, and showed K.H. a picture of his daughter. 1RP 164. He also asked K.H. about her hobbies and how old she was. 1RP 165. K.H. told him she was 19 years old, because Park instructed her to lie about her age and because she knew it "wasn't good" to be 16. 1RP 165. When K.H. told Hopper that she was 19, he appeared unconcerned. 1RP 166. He did not ask to see her identification. 1RP 166. She didn't have any identification, regardless. 1RP 166.

Soon after K.H. left, Hopper received a text message that read, "Did you give me \$250?" 2RP 235. The message made him believe that K.H. was being prostituted by a pimp, and purportedly

he became concerned for her safety. 2RP 235. Nevertheless, he sent additional text messages on December 26, attempting to arrange a second paid sexual encounter with her. 1RP 90-92; 2RP 250-51. He was unable to arrange a second encounter. 2RP 236.

Acting on a tip from another victim, police in Kitsap County arrested Park and interviewed K.H. 1RP 65-69, 101, 127-33, 174-76. Initially, K.H. minimized Park's involvement, because she wanted to protect him and was worried about being perceived as a snitch. 1RP 138, 172-76, 193. In particular, she was uncomfortable because the interview was being recorded. 1RP 69, 175. When she realized that the police already knew "basically everything," however, she agreed to tell the truth in exchange for turning off the recording. 1RP 175. She then told police the truth about Park. 2RP 205. She also admitted that Hopper paid to have sexual contact with her, and identified him from a photographic montage. 1RP 96-100, 105-06, 176-77.

Additional facts and procedural history are set forth below, as appropriate.

C. ARGUMENT

- 1. THE PROSECUTOR PROPERLY EXPLAINED THE BURDEN OF PROOF DURING CLOSING ARGUMENT; IF THE PROSECUTOR MISSTATED THE BURDEN OF PROOF, HOPPER WAIVED ANY CLAIM OF ERROR BY FAILING TO OBJECT.**

Hopper asserts that the prosecutor committed misconduct when he described a preponderance of the evidence as fifty-one percent. But Hopper failed to preserve this argument, because his attorney did not object to the prosecutor's statement or request a curative instruction. Because courts routinely describe a preponderance of the evidence as fifty-one percent, and because a curative instruction would have obviated any prejudice, Hopper cannot demonstrate that the prosecutor's argument was flagrant, ill-intentioned, and incurably prejudicial. Hopper's conviction should be affirmed.

a. Additional Facts.

At trial, Hopper admitted to having sexual intercourse with K.H. in exchange for money. 2RP 242, 310. However, he raised the affirmative defense that he had made a reasonable bona fide attempt to ascertain her true age, by requiring the production of her identification. CP 25 (Instruction 9) (App. A); 2RP 273, 297;

RCW 9.68A.110(3). Specifically, he testified that K.H.'s advertisement claimed that she was 19. 2RP 233. When he first met her at his house, however, he noticed that she seemed "inexperienced." 2RP 232. He clarified that she didn't look young, but rather acted young. 2RP 232. Because of this, he asked to see her identification. 2RP 232. She reached into her purse and pulled out something that resembled a "Washington State ID." 2RP 232. He saw a birthdate in April of 1991, which made him believe that she was 21 years old. 2RP 233. He intentionally avoided looking at other details on the identification, because he respected her privacy. 2RP 233.

The prosecutor verified, on cross-examination, Hopper's testimony that he expected K.H. to be 19, but that she showed him an identification purporting to be 21. 2RP 252-53. On re-direct examination, Hopper testified for the first time that he had asked K.H. about this discrepancy, and she told him that "some guys like younger girls." 2RP 253.

The jury was instructed that Hopper must prove his affirmative defense by a preponderance of the evidence. CP 25 (Instruction 9) (App. A); 2RP 273; RCW 9.68A.110(3). The instructions provided that the "[p]reponderance of the evidence

means that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true.” CP 25 (Instruction 9) (App. A); 2RP 273. The jury was also instructed to disregard any argument by an attorney that was contrary to its instructions. CP 15 (Instruction 1); 2RP 268-69.

In closing argument, the prosecutor said:

Now what the legislature also said is that we don't want to punish those people who are legitimately or affirmatively tricked into this. So it says it's a defense if at the time of the offense, the Defendant made a reasonable bona fide effort to determine the true age by requiring some kind of document, and did not rely solely on the oral representations of the girl or her apparent age.

Now the interesting thing about this is that the legislature has decided that this is his burden. Okay? It's my burden to prove the crime beyond a reasonable doubt. But once he raises this argument, it's his burden. And he has to prove to you that it's more likely than not, 51%, that you believe that that's what happened.

2RP 282. Hopper did not object to the prosecutor's argument or request a curative instruction. 2RP 282.

Hopper's attorney then made argument addressing the preponderance of the evidence standard:

The narrow question is . . . [h]ave we proven, by a preponderance—by a preponderance of the evidence, which is more likely than not—okay, so you have even scales—any amount of evidence that changes the scales, that side wins. Have we presented, by a

preponderance of the evidence, that an ID was shown?

2RP 297. He added that a preponderance of the evidence was “a very low standard,” 2RP 298, and that “even a feather’s weight . . . tips the scales.” 2RP 300.

b. Standard Of Review.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of establishing that the conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). “If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the prejudice.” *Id.* at 760-61. This requires a defendant to show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. *Id.* at 761. The reviewing court’s focus is on whether the resulting prejudice could have been cured. *Id.* at 762.

The Washington Supreme Court has recognized that “the absence of an objection by defense counsel ‘*strongly suggests* to a court that the argument or event in question did not appear critically

prejudicial to an appellant in the context of the trial.” *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis original) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

On review, the prosecutor’s remarks are viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

It is misconduct for a prosecutor to misstate the law or to argue in a manner that reduces the State’s burden of proof. *State v. Warren*, 165 Wn.2d 17, 23-27, 195 P.3d 940 (2008). However, reversal is required only if the misconduct had a substantial likelihood of affecting the verdict. *Id.* at 28-29.

**c. The Prosecutor’s Argument Was Proper
And Any Prejudice Could Have Been Cured
By A Timely Objection And Instruction.**

Hopper asserts that the prosecutor misstated the burden of proof applicable to his affirmative defense, making it “easier” for the jury to convict him. Br. of Appellant, at 6. However, Hopper did not object to the prosecutor’s characterization of the preponderance

standard as “51%,” and must therefore establish that this statement was so flagrant and ill-intentioned that it resulted in incurable prejudice. *Emery*, 174 Wn.2d 760-61. Hopper’s claim fails because the prosecutor’s comment was not improper. Even if it was, any prejudice could easily have been cured by a simple instruction.

The preponderance of the evidence standard requires proof that the matter in question is “more probably true than not true.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). While Washington courts have not expressly addressed whether “51%” properly expresses the standard, other states’ and federal appellate courts routinely employ this formulation.⁴ See, e.g., *In re OCA, Inc.*, 551 F.3d 359, 372 n.41 (5th Cir. 2008) (a preponderance of the evidence is “[e]vidence by ‘fifty-one percent’ or to the extent of ‘more likely than not’” (citations omitted)); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 136 (3d Cir. 1982) (referring to “a preponderance or 51% of the evidence”); *Ethyl Corp. v. Env’tl. Prot. Agency*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (observing that “the standard of ordinary civil litigation, a preponderance of the

⁴ Hopper correctly notes that Washington courts recognize, in some contexts, an intermediate standard of proof known as a “clear preponderance” of the evidence. Br. of Appellant, at 5-6 (citing civil decisions). However, the jury was not instructed on this intermediate standard, so there is no danger that the jury applied it. Further, Hopper has provided no authority equating or even comparing “51%” with the clear preponderance standard.

evidence, demands only 51% certainty”); *Swearingen v. State*, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010) (affirming denial of motion for post-conviction DNA testing because “appellant cannot show by a preponderance of the evidence, or that there is a 51% chance, that he would not have been convicted”); *Bryant v. State*, 374 Md. 585, 614, 824 A.2d 60 (2003) (finding no error in the term “51 percent” to describe a preponderance of the evidence).

Here, the prosecutor’s statement was proper because “[t]he use of ‘51 percent’ [is] *merely illustrative of the slight tilt to one side of the scale* that is required to find that that side outweighs the other in a preponderance of the evidence analysis.” *Bryant*, 374 Md. at 614 (emphasis added). The prosecutor correctly stated that the standard means “more likely than not,” and illustrated this by adding, “51%.” 2RP 282. This argument was proper.

Even if the prosecutor mischaracterized the burden of proof, Hopper has not shown that the comment was so flagrant and ill-intentioned that no curative instruction could have neutralized the resultant prejudice. *Emery*, 174 Wn.2d 760-61. Arguments that misstate the burden of proof are curable by instruction. In *Warren*, for example, the prosecutor “grievous[ly]” misstated the burden of proof by arguing that “reasonable doubt does not mean . . . that you

give the defendant the benefit of the doubt.” 165 Wn.2d at 25, 27. This categorical misstatement of the burden of proof struck at the very “bedrock principle of the presumption of innocence, the foundation of our criminal justice system.” *Id.* at 27. And yet, because the defense timely objected and the trial court issued an instruction, the Washington Supreme Court held that any prejudice was cured. *Id.* at 28. If such a fundamental, qualitative mischaracterization of the burden of proof can be cured by a timely objection and instruction, then the prosecutor’s sterile, quantitative formulation for the burden of proof in this case—if erroneous—could have been cured by a simple instruction from the trial court.

Hopper relies on *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), for the proposition that a prosecutor’s argument that misstates the burden of proof may require reversal. But *Fleming* is inapposite. First, the *Fleming* court found that the prosecutor’s argument in that case—that the jury could only acquit the defendant if it found that the victim was lying or mistaken—was flagrant and ill-intentioned, because published decisions had previously condemned such arguments. *Id.* at 214 (citations omitted). Second, the prosecutor in *Fleming* also made improper comments that infringed directly upon the defendant’s right against

self-incrimination. *Id.* at 214-15. The comments were therefore subject to the constitutional harmless error test. *Id.* at 216. The *Fleming* court reversed because the State could not show that the improper comments were harmless beyond a reasonable doubt. *Id.*

Cases decided since *Fleming* establish that the correct test, when a prosecutor's comment misstates the burden of proof but does not otherwise infringe directly upon a constitutional right, is simply whether prejudice could have been cured by an instruction. *Emery*, 174 Wn.2d at 757-65 (declining to adopt constitutional harmless error test for prosecutor's improper comments, and holding that timely objection and instruction could have cured prejudice); *Warren*, 165 Wn.2d at 26-28 (prosecutor's misstatement of the burden of proof and presumption of innocence did not result in incurable prejudice). Because an objection and instruction could have cured any prejudice in this case, Hopper's claim fails.

Finally, Hopper cannot establish that the prosecutor's comment was prejudicial, because, as will be discussed in greater detail below, Hopper's defense was highly incredible. Hopper failed to prove by a preponderance of the evidence—no matter how quantified—that he made a reasonable bona fide attempt to ascertain K.H.'s true age, by requiring the production of her

identification. He therefore has not shown that any resulting prejudice had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. Hopper's conviction should be affirmed.

2. HOPPER'S ATTORNEY PROVIDED EFFECTIVE REPRESENTATION.

Hopper asserts that, if he failed to preserve his claim of prosecutorial misconduct by failing to object below, this Court should find that his attorney provided ineffective assistance by failing to object. But Hopper has not shown that an objection would likely have been sustained. Hopper's attorney also had legitimate tactical reasons to refrain from objecting, and this decision did not prejudice Hopper. Accordingly, Hopper's claim should be rejected.

a. Standard Of Review.

A challenge to effective assistance of counsel is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both: (1) that trial counsel's performance fell below a minimum objective standard of reasonableness (the performance prong); and (2) that the defendant was prejudiced by counsel's deficient performance

(the prejudice prong). *State v. West*, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, “scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing *Strickland*, 466 U.S. at 689). Courts will presume that a failure to object “can be characterized as *legitimate* trial strategy or tactics,” and the defendant bears the burden of rebutting this presumption. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (citations and internal quotation marks omitted) (emphasis original). This is because “[t]he decision of when or whether to object is a classic example of trial tactics,” and “[o]nly in egregious circumstances . . . will the failure to object constitute incompetence of counsel justifying reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The defendant must also show that the proposed objection would likely have been sustained. *Davis*, 152 Wn.2d at 714.

Regarding the prejudice prong, a defendant must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been

different.” *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). Trial counsel does not guarantee a successful verdict, and competency is not measured by the result. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

b. An Objection Would Not Likely Have Been Sustained And Counsel’s Legitimate Tactical Decision Did Not Prejudice Hopper.

As explained above, the prosecutor’s argument did not misstate the burden of proof. Hopper therefore cannot show that an objection would likely have been sustained. Even if an objection could have been sustained, however, Hopper’s attorney had legitimate strategic reasons to refrain from objecting. As the Ninth Circuit has observed, “many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality.” *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991); see also *Seehan v. State of Iowa*, 72 F.3d 607, 610 (8th Cir. 1995) (failure to object part of reasonable strategy to avoid alienating jury); *State v. Barr*, 127 N.M. 504, 512, 984 P.2d 185,

193 (1999) (reasonable to refrain from objecting in order to avoid appearance of “quibbling” before jury).

Here, Hopper’s attorney reasonably refrained from objecting and requesting a curative instruction, in order to avoid the appearance of quibbling over a hyper-technicality. It would have appeared desperate to challenge the State’s characterization of the standard of proof—to urge the jury to find the affirmative defense proven by some fractional percentage between 50% and 51%, rather than 51%.⁵ This is especially the case when counsel had the reasonable alternative of simply arguing to the jury that “any amount of evidence that changes the scales,” even a “feather’s weight,” was sufficient. 2RP 297, 300. Because Hopper cannot overcome the presumption that his attorney’s strategy was reasonable, his claim fails.

Even if Hopper’s trial attorney was deficient for failing to object, Hopper cannot demonstrate prejudice. The jury was properly instructed on the meaning of a preponderance of the evidence, and to disregard any argument that was inconsistent with its instructions. CP15 (Instruction 1), CP 25 (Instruction 9) (App. A);

⁵ This effectively would have amounted to an admission by defense counsel that the strength of Hopper’s defense was below “51%.” A defense attorney could reasonably refrain from making such a tacit admission.

2RP 268-69, 273. The jury is presumed to follow the court's instructions, absent evidence to the contrary. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). The prosecutor also said that a preponderance of the evidence was "more likely than not," 2RP 282, and Hopper's attorney explained that this meant "any amount of evidence that changes the scales." 2RP 297. The State did not contest defense counsel's explanation. The prosecutor's comment, in light of the record as a whole, was not prejudicial.

Hopper also cannot demonstrate prejudice because he has not shown that, had his attorney objected and requested a curative instruction, there is a reasonable likelihood that the jury would have found his affirmative defense proven. As the trial court observed at sentencing, Hopper's testimony that he requested identification from K.H. simply was not credible. 2RP 332. K.H. was adamant that Hopper did not ask her about her age until after they had sexual intercourse, and that he never asked to see any identification, which she did not anyway possess. 1RP 166-67, 169, 200; 2RP 202-03.

Further, K.H. was never treated as a suspect or criminal defendant, was not promised anything by the State in exchange for

testifying, and had no motive whatsoever to lie about whether Hopper asked for her identification. 1RP 101-02. While there was evidence that K.H. once was arrested for giving a false name to the police, and initially lied to investigators about Park's involvement in prostituting her, the jury would have understood—as the prosecutor argued—that she had specific motives to lie about those matters: to protect herself and to protect Park. 1RP 131-32, 138, 145, 172-75, 193; 2RP 286-87.

No such motive attached to K.H.'s account of whether Hopper asked to see her identification. 2RP 284. She testified that Hopper was nice to her, polite, and did not harm her in any way. 2RP 205-06. It made no sense that K.H. would admit to stealing, using drugs, and engaging in juvenile prostitution, yet would lie about whether Hopper asked to see her identification. 2RP 286. Ultimately, the jury appreciated the difficulty of K.H.'s candid testimony, and found her to be a credible witness.

In contrast, Hopper's strange and inconsistent testimony—for example, that he was concerned for K.H.'s safety and suspected that she was being sold by a pimp, but still attempted to purchase sex from her again—was highly suspect. 1RP 90-92; 2RP 237-39, 250-51. So, too, was the timing of Hopper's testimony. He testified

on both direct- and cross-examination that he thought K.H. was supposed to be 19, but that she showed him identification for a 21-year-old. 2RP 232-33, 252-53. It was only on re-direct examination that he testified, for the first time, that he had asked K.H. about the discrepancy, and she responded that “some guys like younger girls.” 2RP 253. The jury could have questioned whether a detail so central to Hopper’s defense, if true, would have been relegated to what amounted, at best, to an afterthought.

Finally, it is entirely likely that an objection and curative instruction would have hurt Hopper’s case—not helped it. An objection and curative instruction could have backfired by alienating the jury, making Hopper appear desperate and quibbling. Because Hopper cannot show prejudice from his attorney’s decision not to object, his conviction should be affirmed.

3. REMAND FOR ENTRY OF AN AMENDED JUDGMENT AND SENTENCE.

RCW 9.94A.703(3)(f) authorizes a sentencing court to impose “crime-related prohibitions” while a defendant is supervised by the Department of Corrections (DOC), on community custody.⁶

⁶ RCW 9.94A.703(1)(b) also requires that an offender comply with all DOC-ordered conditions, imposed under RCW 9.94A.704. That section lists specific conditions for sex offenses, but does not include a curfew.

The sentence imposed by the trial court included the condition that Hopper “[a]bide by a curfew of 10pm-5am unless directed otherwise [by DOC].” CP 42 (Judgment and Sentence). Because all of Hopper’s criminal activity occurred during daylight hours, the State concedes that the curfew is not crime-related. The State asks that this matter be remanded solely to strike this condition from the Judgment and Sentence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hopper’s conviction for Commercial Sexual Abuse of a Minor and to remand this matter solely to strike the curfew condition from Hopper’s Judgment and Sentence.

DATED this 25th day of November, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

No. 9

It is not a defense to the crime of Commercial Sexual Abuse of a Minor that the defendant did not know the alleged victim's age.

It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge of commercial sexual abuse of a minor.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Eric Matthew Hopper, Cause No. 71799-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of November, 2014.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington