

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 41184-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Steven Hooper,

Appellant.

Lewis County Superior Court Cause No. 10-1-00110-1

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Hooper's Sixth Amendment right to confront his accuser.
2. The trial court erred by excluding evidence that M.M. had misrepresented her age on numerous occasions.
3. The trial court erred by excluding evidence that M.M. had a fake ID which listed her age as older than she was.
4. The trial court erred by excluding evidence that M.M. misrepresented her age on her MySpace page.
5. The trial court erred by excluding M.M.'s statement to the police that Mr. Hooper was the fourth person she had gotten in trouble by misrepresenting her age.
6. Mr. Hooper was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Defense counsel was ineffective for failing to object when Bonnie Griffith testified that Terrance Larr knew M.M.'s correct age.
8. Defense counsel was ineffective for failing to object when Bonnie Griffith testified that Jessie Thomas knew M.M.'s correct age.
9. Defense counsel was ineffective for failing to seek an order excluding evidence that Mr. Hooper left his small child home unattended when he went to meet M.M. at the park.
10. The trial court erred by admitting M.M.'s recorded statement as substantive evidence.
11. The evidence was insufficient to prove that Mr. Hooper's current offenses should be scored separately.
12. The trial court erred by finding that counts 1 and 3 did not comprise the same criminal conduct.
13. The trial court erred by adopting Finding of Fact No. 2.3 of the Findings of Fact and Conclusions of Law Regarding Offender Score and Same Criminal Conduct.

14. The trial court erred by adopting Finding of Fact No. 2.4 of the Findings of Fact and Conclusions of Law Regarding Offender Score and Same Criminal Conduct.
15. The trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence (relating to same criminal conduct finding).
16. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence (relating to offender score calculation).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the constitutional right to confront witnesses. Here, the trial court restricted Mr. Hooper's opportunity to cross-examine M.M. regarding matters affecting her credibility and bias. Did the restriction on cross-examination violate Mr. Hooper's Sixth and Fourteenth Amendment right to confront his accuser?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel unreasonably failed to object to inadmissible and prejudicial evidence. Was Mr. Hooper denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. A past recorded recollection is admissible as substantive evidence if the witness has insufficient memory to testify truthfully and accurately. In this case, the trial court admitted M.M.'s recorded statement even though she had sufficient memory to testify truthfully and accurately, and even though the recorded statement included contradictory accounts, some of which were acknowledged to be false. Did the trial court err by admitting M.M.'s recorded statement as substantive evidence?
4. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred

at the same time and place and if they were committed for the same overall criminal purpose. Here, the prosecutor failed to prove that Mr. Hooper's Communication with a Minor charge was not the same criminal conduct as the Child Molestation charge. Did the trial judge violate RCW 9.94A.525 by scoring counts 1 and 3 separately in calculating Mr. Hooper's offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Steven Hooper met M.M. in 2008. At that time, she misrepresented her age, claiming that she was older than she actually was.¹ RP (7/14/10) 72, 74; RP (7/15/10) 62-63. He believed her, because she looked mature, and because she spent a lot of time with Bonnie Griffith, whom he knew to be 15. RP (7/14/10) 125; RP (7/15/10) 63, 74. She also lied about her age to others (outside Mr. Hooper's presence), possessed a fake ID card that misrepresented her age, and listed her age as older than it was on her MySpace page. RP (7/14/10) 18-24.

After they met, Mr. Hooper did not see M.M. for some time. They struck up a friendship when she moved in with friends of his. RP (7/14/10) 101, 137. They spent time together when he visited the house where she lived. RP (7/14/10) 80, 101. M.M. liked Mr. Hooper romantically. RP (7/15/10) 82.

In February of 2010, M.M. and two friends were hanging out in a park, late at night. RP (7/14/10) 85. She and Mr. Hooper exchanged texts, and she invited him to come and join them. RP (7/14/10) 86-88.

¹ Mr. Hooper and his friend Terrance Larr heard her say that she was 15 (although Larr believed the conversation took place in 2007). RP (7/15/10) 57, 60. M.M. testified that she told him she was 13 (although she also denied lying about her age). RP (7/14/10) 75. In fact, she was only 11 or 12. RP (7/14/10) 72.

One of his texts indicated that he wanted to see her “[b]ecause I want to f*ck.” RP (7/15/10) 34, 35, 83. At some point after Mr. Hooper arrived at the park, M.M. joined him alone in his van, which was parked next to her friends’ vehicle. RP 7/14/10) 88-90.

A patrol officer approached the two vehicles. He spoke to Mr. Hooper, who initially denied that anyone else was in the van. The officer then spoke to M.M. RP (7/14/10) 65-68. After some conversation, Mr. Hooper was arrested on suspicion that he had molested M.M. RP (7/14/10) 64-70. M.M. told the officer that Mr. Hooper had done no more than give her a back rub. RP (7/14/10) 90, 93, 111. During a later interview she said that he had touched her breast. RP (7/15/10) 20-23.

The state charged Mr. Hooper with two counts of Child Molestation in the Second Degree, and one count of Communication with a Minor for Immoral Purposes. CP 1-3. He entered an *Alford* plea to the communication charge prior to trial. RP (7/13/10) 3-11.

Mr. Hooper denied any sexual contact. He also asserted an affirmative defense, based on M.M.’s initial lie about her age. At trial, he testified that M.M. had told him she was 15 when they met in 2008.² RP (7/15/10) 67-72. During cross-examination, the prosecutor asked Mr.

² At that time, she was actually 11 or 12 years old. RP (7/14/10) 72.

Hooper if he had left his small child home alone when he went to meet M.M. after texting with her in February of 2010. Defense counsel did not object, and Mr. Hooper answered that he had done so. RP (7/15/10) 84.

The prosecution sought to exclude testimony that M.M. had lied to others about her age, possessed a fake ID, and misrepresented her age on her MySpace page. The court excluded the evidence. RP (7/14/10) 18-24. Mr. Hooper also sought to admit evidence that M.M. told the police that she had gotten four other men in trouble by lying about her age; again, the court excluded the evidence. RP (7/14/10) 23-24.

At trial, M.M. testified that when she met Mr. Hooper in 2008, she told him she was 13. She also claimed that she had never lied to him about her age. RP (7/14/10) 75, 97, 99-100. She asserted that Mr. Hooper had touched her thigh and above her breast at her house, on one occasion. Regarding the February incident in his van, she testified that he rubbed her back, and they did not kiss or engage in any other sexual behavior. RP (7/14/10) 81-82, 90-93, 96, 103.

The state sought to admit her recorded statement as substantive evidence, to establish the element of sexual contact required for conviction in count 1. RP (7/14/10) 142-154; RP (7/15/10) 3-13. Outside the presence of the jury, M.M. testified that it was hard to remember the events of that evening (because she was tired and because thinking about

the events made her cry). RP (7/14/10) 114. She also testified that her recollection was better at the time she made the statement; however, she did not testify that she was unable to accurately remember the events of the evening. The prosecutor did not attempt to refresh her recollection by having her review the recorded statement. RP (7/14/10) 114-115. M.M. testified that she told the truth during the recorded interview; however, she also admitted lying, and the transcript of the interview included contradictory accounts of what had happened. RP (7/14/10) 115; RP (7/15/10) 3-10, 19-22. The court admitted the statement as a recorded recollection, and the interviewing officer testified about it for the jury. RP (7/15/10) 12-29.

Mr. Hooper gave the prosecutor notice that he planned to call two witnesses who had heard M.M. tell Mr. Hooper that she was 15. Defendant's List of Witnesses, Supp. CP; RP (7/14/10) 18-19. To blunt that information, the prosecutor asked Bonnie Griffith if those two witnesses knew M.M.'s true age. Defense counsel did not object, and Griffith testified that both witnesses were aware of M.M.'s true age.³ RP (7/14/10) 134-135.

³ Only one of the two witnesses called by Mr. Hooper testified about M.M.'s lie concerning her age. RP (7/15/10) 57, 60.

The jury convicted Mr. Hooper of both charges of Child Molestation in the Second Degree. At sentencing, the state argued that the convictions for counts 1 and 3 (the texting and alleged sexual contact that took place in February of 2010) were not the same criminal conduct, and should score separately. Defense counsel argued that they were the same criminal conduct. The court ruled that they were not the same criminal conduct, determined that Mr. Hooper had an offender score of seven, and sentenced Mr. Hooper. RP (9/8/10) 181-190; CP 5-18. He timely appealed. CP 19-33.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. HOOPER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER BY RESTRICTING HIS CROSS-EXAMINATION OF M.M.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *U.S. v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

- B. The Sixth and Fourteenth Amendment guarantee an accused person the right to confront her or his accuser, particularly on matters affecting credibility.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Our Supreme Court has stated that the purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002), citations omitted.

Where credibility is at issue, the defense must be given wide latitude to explore matters affecting credibility. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to

disrupt the fairness of the trial.” *Darden*, at 621. Furthermore, an accused person “has a constitutional right to impeach a prosecution witness with bias evidence.” *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002).

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden*, at 621; *see also* ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wash.2d 1, 16, 659 P.2d 514 (1983); *State v. Reed*, 101 Wash.App. 704, 709, 6 P.3d 43 (2000); *State v. Barnes*, 54 Wash.App. 536, 538, 774 P.2d 547 (1989).

C. The trial judge violated Mr. Hooper’s right to confront M.M. by restricting cross-examination about her credibility and bias.

ER 608 permits cross-examination of a witness regarding specific instances of misconduct, if probative of the witness’s untruthfulness. ER 608(b). A witness’s prior lies are relevant to her credibility, and are generally admissible under ER 608. *See, e.g., State v. Gregory*, 158 Wash.2d 759, 799, 147 P.3d 1201 (2006) (witness’s lie about recent drug use “was relevant to her veracity on the stand and it was relevant to this case”); *State v. McSorley*, 128 Wash.App. 598, 614, 116 P.3d 431 (2005)

(witness's pranks—feigning the need for assistance from passing motorists— “were highly probative of his credibility at trial, both because they showed a willingness to mislead strangers, albeit through nonverbal conduct, and because they ‘constitute[d] the only available impeachment’”) (quoting *State v. Clark*, 143 Wash.2d 731, 24 P.3d 1006, *U.S. cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001)); *State v. McDaniel*, 83 Wash.App. 179, 187, 920 P.2d 1218 (1996) (both “[t]he fact of the lie and the motivation for the lie are highly relevant”).

Mr. Hooper's affirmative defense required him to show that M.M. had misrepresented her age to him. *See* Instruction No. 12, Court's Instructions to the Jury, Supp. CP. On direct examination, she denied having done so,⁴ contradicting his testimony and that of his friend Terence Larr. RP (7/14/10) 75; RP (7/15/10) 57, 60, 63, 74. Her credibility was therefore critical to the outcome of trial, and Mr. Hooper should have been given wide latitude to explore any matter affecting her credibility. *York*, at 36.

Significant impeachment material was available. M.M.'s (apparently) frequent lies about her age, her possession of a fake identification that misrepresented her age, and her untruthful MySpace

⁴On cross-examination, she admitted telling Mr. Hooper that she was 13 in 2008, when, in fact, she was only 12 years old. RP (7/14/10) 99.

information were all relevant to her credibility on the witness stand, and should have been admitted under ER 608(b). *Gregory, supra; McSorley, supra.* The trial court's refusal to allow any cross-examination on these subjects severely hampered Mr. Hooper's ability to cast doubt on M.M.'s testimony, especially in the absence of other impeachment evidence. *McSorely, at 614.*

In addition, available evidence suggested that M.M. was biased. Specifically, she told police that that Mr. Hooper was the fourth person she had gotten in trouble by misrepresenting her age. RP (7/14/10) 19. This implies that she had some undisclosed personal reason for misrepresenting her age, despite the serious consequences to others.

The restrictions on cross-examination violated Mr. Hooper's Sixth and Fourteenth Amendment right to confrontation. *Id.* Accordingly, his convictions must be reversed and the case remanded for a new trial, with instructions to allow cross-examination into M.M.'s lies, her possession of a fake identification, and her untruthful MySpace page. *Id.*

II. MR. HOOPER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

D. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

E. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, which is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

F. Defense counsel provided ineffective assistance by failing to object to inadmissible and prejudicial testimony.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998). In this case, defense counsel unreasonably failed to object to inadmissible testimony, and thereby prejudiced Mr. Hooper.

1. Defense counsel should have objected to testimony that Larr and Thomas knew M.M.'s true age.

Defense counsel failed to object when Bonnie Griffith testified that Mr. Hooper's witnesses, Terrance Larr and Jessie Thomas, both knew M.M.'s true age. RP (7/14/10) 134-135. The prosecutor did not establish a proper foundation for the testimony: Griffith provided no basis for her testimony about the extent of either witness's knowledge. RP (7/14/10) 134-135.

There was no legitimate reason for counsel's failure to object, because it undermined his affirmative defense. Because Larr and Thomas were closely aligned with Mr. Hooper—all three described themselves as brothers—Griffith's testimony strongly implied that Mr. Hooper should

also have known M.M.'s true age. RP (7/15/10) 49, 57-58, 91.

Furthermore, Larr testified that M.M. claimed to be 15 (in December of 2007). Griffith's testimony therefore suggested that Larr should have known M.M. was lying at the time she misrepresented her age to Mr. Hooper. Presumably Larr would have told Mr. Hooper M.M.'s true age, to keep him from getting in trouble. RP (7/15/10) 57.

There is a reasonable probability that the outcome of trial would have differed had counsel objected. Mr. Hooper had to overcome significant hurdles to establish his affirmative defense. Griffith's testimony suggested that he could not have reasonably believed that M.M. was over 14, because his companions—his brothers—both knew that she was significantly younger. Accordingly, Mr. Hooper's conviction must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

2. Defense counsel should have objected to evidence that Mr. Hooper left his young child at home when he went to meet M.M. at the park.

Defense counsel unreasonably failed to seek an order excluding evidence that Mr. Hooper left his young child at home when he went to meet M.M. at the park, and unreasonably failed to object when the subject was raised on cross-examination. RP (7/15/10) 84-85. There was no legitimate strategic reason for this evidence to be presented to the jury.

The evidence was irrelevant under ER 401, and thus should have been excluded under ER 402 and ER 403. Instead, the evidence was introduced, without any instructions to the jury on how to make use of it. RP (7/15/10) 84-85.

It is likely that this evidence of Mr. Hooper's serious lack of judgment prejudiced jurors against him. Furthermore, his affirmative defense required jurors to assess the reasonableness of his belief that M.M. was over 14 in 2010. By failing to object to evidence of his unreasonable behavior (with regard to his own child), defense counsel diminished any chance that jurors would favorably assess the reasonableness of his belief that M.M. was over 14.

Thus defense counsel's failure to object prejudiced Mr. Hooper. It painted him in a bad light, and encouraged the jury to reject his affirmative defense. Without the improper evidence, a reasonable juror might have voted to acquit. Accordingly, Mr. Hooper was denied the effective assistance of counsel. *Saunders, supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE TRIAL JUDGE SHOULD NOT HAVE ADMITTED M.M.'S RECORDED STATEMENT AS SUBSTANTIVE EVIDENCE.

A. Standard of Review

The interpretation of an evidence rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wash.2d 11, 74 P.3d 119 (2003). Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

- B. A recorded recollection is not admissible as substantive evidence unless the witness has insufficient recollection of the matter to provide truthful and accurate testimony and the recorded recollection correctly reflects the witness's prior knowledge.

ER 803(a)(5) permits the introduction of a recorded recollection, defined as “[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.” ER 803(a)(5).

Admission of a recorded recollection under ER 803(a)(5) requires proof that “(1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness’s memory; and (4) the record reflects the witness’s prior knowledge accurately.” *State v. White*, 152 Wash.App. 173, 184, 215 P.3d 251 (2009).

In this case, the trial judge should not have admitted M.M.’s statement as substantive evidence. First, the prosecution did not establish that M.M. had “insufficient recollection of the matter to provide truthful and accurate trial testimony.” *Id.* Instead, M.M.’s testimony was only

that it was hard to remember (because she was tired and because thinking about the events made her cry). RP (7/14/10)) 114. The prosecutor did not attempt to refresh her recollection by having her review the recorded statement. RP (7/14/10) 114-115.

Second, the prosecution did not establish that M.M.'s statement accurately reflected her prior knowledge. *Id.* Instead, although M.M. claimed to have told the truth during the interview, she also admitted lying, and the transcript included contradictory accounts of what had happened. RP (7/14/10) 115; RP (7/15/10) 3-9.

Under these circumstances, the recorded statement should have been available for impeachment, but not as substantive evidence. *See, e.g., State v. Floreck*, 111 Wash.App. 135, 140, 43 P.3d 1264 (2002). Because the recorded statement provided the only evidence of sexual touching for the incident charged in count 1, the error was prejudicial. Accordingly, Mr. Hooper's convictions⁵ must be reversed and the case remanded for a new trial. *Id.; Asaeli*, at 579.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT MR. HOOPER'S CURRENT OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT.

A. Standard of Review

⁵ Although the evidence only pertained to Count 1, it is likely that the jury used it as additional proof of the allegations in Count 2. Therefore, both convictions must be reversed.

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

B. Counts 1 and 3 should have scored as the same criminal conduct, yielding an offender score of four.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more 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 burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court ““should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other...”” *State v. Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)).

RCW 9.94A.589(1)(a) requires analysis of whether the offender’s criminal intent, objectively viewed, changed from one crime to the next. *Haddock*, at 113; see also *State v. Anderson*, 72 Wash.App. 453, 464, 864 P.2d 1001 (1994). Sometimes this necessitates determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

Two appellate cases illustrate the analysis. In *State v. Miller*, 92 Wash.App. 693, 964 P.2d 1196 (1998), the Court of Appeals held that the charges of Attempted Theft of a Firearm and Assault in the Third Degree constituted the same criminal conduct under the facts of that case. In *Miller*, the defendant assaulted an officer while struggling to get his gun.

The court held that the “assault on [the officer,] when viewed objectively, was ‘intimately related’ to the attempted theft. Miller could not deprive [the officer] of his holstered weapon without assaulting him.” *Miller*, at 708. Similarly, in *State v. Taylor*, 90 Wash.App. 312, 950 P.2d 526 (1998), the court held that the two crimes at issue—Assault in the Second Degree and Kidnapping—constituted the same criminal conduct under the facts of that case:

The evidence established that [the defendant’s] objective intent in committing the kidnapping was to abduct [the victim] by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade [the victim], by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when [the defendant] entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that [the defendant] engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime... Thus, this record supports only a finding that the offenses were part of the same criminal conduct and [the defendant] is entitled to have the two offenses counted as one crime.

Taylor, at 321-322.

Here, Mr. Hooper pled guilty to count 3, Communication with a Minor for Immoral Purposes. CP 5. At trial, the evidence established that he texted M.M., and that his texts included the message that he wanted to

see her “[b]ecause I want to f*ck.” RP (7/15/10) 34, 35, 83. Shortly after sending the text, he spent time with her in his van, where he was alleged to have molested her as charged in count 1. The two crimes occurred at the same time (although they were not simultaneous) and they involved the same victim. Although the communication originated elsewhere, it was received by M.M. at the park. Furthermore, under the state’s theory of the case, Mr. Hooper’s overall criminal purpose did not change from one crime to the next; instead, according to the prosecutor, the communication furthered the molestation and proved his intent.

Because of this, the crimes—committed in an uninterrupted sequence of events—comprised the same criminal conduct, and should not have scored against each other in Mr. Hooper’s criminal history. RCW 9.94A.589(1)(a); *Garza-Villarreal*.

The trial court misapplied the law. Mr. Hooper should have been sentenced with an offender score of four. Accordingly, his sentence must be vacated and the case remanded to the trial court for correction of the offender score and resentencing. *Haddock, supra*.

CONCLUSION

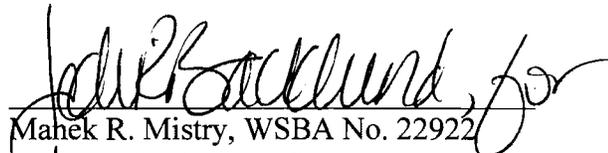
For the foregoing reasons, Mr. Hooper's conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for correction of the offender score and a new sentencing hearing.

Respectfully submitted on January 26, 2011.

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STATE OF WASHINGTON

BY 
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Steven Hooper, DOC #342036
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and to:

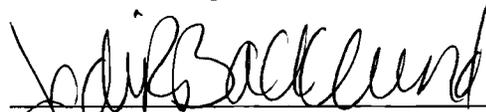
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And that I hand delivered the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 26, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 26, 2011.



Jodi R. Backlund, WSBA No. 22917
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