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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 Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE ALLOWED MR. HOOPER TO CROSS-EXAMINE M.M. ABOUT SPECIFIC INSTANCES OF MISCONDUCT AFFECTING HER CREDIBILITY.

The state and federal constitutions protect an accused person's right to conduct meaningful cross-examination of adverse witnesses. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22; *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).

Where credibility is at issue, an accused person must be given wide latitude to impeach. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The threshold for relevance is low, and impeachment evidence that is highly probative can never be excluded. *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).

An accused person may cross-examine a witness regarding specific instances of misconduct, if probative of the witness's untruthfulness. ER 608(b). Prior lies are relevant to credibility, and are generally admissible. ER 608(b); *see also, e.g., State v. Gregory*, 158 Wash.2d 759, 799, 147 P.3d 1201 (2006); *State v. McSorley*, 128 Wash.App. 598, 614, 116 P.3d

431 (2005); *State v. McDaniel*, 83 Wash.App. 179, 187, 920 P.2d 1218 (1996).

M.M. initially denied misrepresenting her age, and later admitted only that she had lied and said she was 13 in 2008.¹ RP (7/14/10) 75, 99. This contradicted the testimony of Mr. Hooper and Mr. Larr, both of whom heard her say she was 15. RP (7/15/10) 57, 60, 63, 74-75. Accordingly, her credibility was critical, and Mr. Hooper should have been granted wide latitude on cross-examination. *York*, at 36. The trial court should have allowed him to explore her frequent misrepresentations about her age, including her possession of a fake ID and the false age published on her MySpace page. ER 608(b). *Gregory*, *supra*; *McSorley*, *supra*. The court should also have allowed Mr. Hooper to explore her statement that she had caused trouble for three other men by misrepresenting her age. RP (7/14/10) 19.

The limitation on cross-examination violated Mr. Hooper's confrontation right. Respondent's argument—that the evidence was irrelevant—fails to address the cases finding such testimony highly relevant. Brief of Respondent, p. 10; *see Gregory*, at 799; *McSorley*, at 614; *McDaniel*, at 187.

¹ At the time, she was 12 and not 13.

Likewise unpersuasive is Respondent's bare contention that the evidence was inadmissible under ER 403. Brief of Respondent, p. 10. Nothing about the evidence was unduly prejudicial, confusing, or misleading; any problems could have been addressed with a limiting instruction. Contrary to Respondent's assertion, Mr. Hooper was not required to demonstrate a good faith basis for his questions, in the absence of an objection on that ground or a request by the court.² Brief of Respondent, p. 11. See Tegland, *Evidence Law and Practice*, 5A Wash. Prac. §608.5.

Finally, RCW 9A.44.020(2) did not bar cross-examination about M.M.'s statement (to police) that she had caused trouble for three other men by lying about her age. The statement did not necessarily imply that she'd had sexual relations with the other three men—for example, she may have caused trouble for them by staying out late or by traveling out of state without her parents' consent. Even if the statement implied that she'd had prior sexual relationships with older men, cross-examination need not have delved into the relationship history; instead, Mr. Hooper's proposed examination related only to the statement itself.

² Furthermore, the state implicitly conceded a good faith basis for the inquiry when it brought a motion *in limine* to exclude the evidence on other grounds. RP (7/14/10) 18-24.

RCW 9A.44.020 does not act as a bar prohibiting all cross-examination if it might touch on a matter related to the complainant's sexual history. *See, e.g., State v. Horton*, 116 Wash.App. 909, 920, 68 P.3d 1145 (2003). Cross-examination would have impeached M.M.'s credibility, either by showing that she frequently lied about her age, or that she lied to the police by giving the statement at issue.³

The trial court violated Mr. Hooper's Sixth and Fourteenth Amendment right to confrontation by restricting cross-examination. *McSorley*, at 614. The convictions must be reversed and the case remanded for a new trial. *Id.*

II. DEFENSE COUNSEL SHOULD HAVE SOUGHT TO EXCLUDE EVIDENCE THAT WAS INADMISSIBLE AND PREJUDICIAL.

A. Counsel should have objected to prosecution evidence presented without proper foundation.

On direct examination, Bonnie Griffith testified that Mr. Larr and Mr. Thomas knew M.M.'s true age, and thus, presumably communicated their knowledge to Mr. Hooper. RP (7/14/10) 134-135. This evidence was prejudicial because it undermined Mr. Hooper's affirmative defense

³ Respondent's contention that Mr. Hooper had ample impeachment material available is incorrect. Brief of Respondent, pp. 11-12. The examples cited by Respondent were inherently counterproductive: they required Mr. Hooper to highlight M.M.'s statements accusing him of molestation.

(that he reasonably relied on her misrepresentations). It was inadmissible (without additional foundation) because Ms. Griffith failed to outline facts establishing her personal knowledge. *See* ER 602.

Despite this, defense counsel did not object.

Griffith and Larr's relationship did not prove that Larr knew M.M.'s true age, absent some indication that her true age was communicated to him. Respondent's contention that "[t]here was a proper foundation laid" is therefore without merit. Brief of Respondent, p. 13.

Likewise without merit is Respondent's assertion that counsel's failure to object stemmed from the existence of a proper foundation for the evidence. Brief of Respondent, p. 13. Respondent also suggests that counsel's decision was based on strategy.⁴ But there is no indication that counsel was somehow pursuing a strategy that involved undermining the affirmative defense. An unsupported claim that counsel's mistake was based on strategy cannot overcome the error. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996).

Similarly, testimony that "Mr. Thomas knew M.E.M. pretty well and knew how old M.E.M. was" did not, by itself, demonstrate Griffith's

⁴ Respondent erroneously states that "Mr. Larr testified that M.E.M. told Hooper in Mr. Larr's presence that she was only 15 years old." Brief of Respondent, p. 13, citing "2RP 63." In fact, the reference is to Mr. Hooper's testimony. Furthermore, M.M.'s statement was made in 2007 or 2008, suggesting that she was close to 18 at the time of Mr. Hooper's arrest. RP (7/15/10) 63, 74-75.

personal knowledge of the facts asserted, and thus did not provide a proper foundation. Brief of Respondent, pp. 13-14. Respondent's assertions that "the foundation was laid" and that an objection would have had "no basis" are therefore incorrect. Brief of Respondent, p. 14.

B. Counsel should have sought to exclude evidence of Mr. Hooper's bad character.

Defense counsel should have objected to testimony that Mr. Hooper left his infant son alone when he met with M.M. at the park. RP (7/15/10) 84. Respondent's contention that the evidence was "relevant under ER 402 and not precluded under ER 403" is unconvincing, in the absence of any explanation, citation to the record, or citation to relevant authority. Brief of Respondent, p. 14. According to Respondent, "[t]he question showed Hooper would rather go to the park and be with M.E.M. than sit at home while his son slept." Brief of Respondent, p. 14. But Hooper's preferences were not at issue. There was no dispute that he did actually go to the park.

Contrary to Respondent's assertion, the prosecution is *not* allowed free rein "to paint Hooper in an unfavorable light." Brief of Respondent, p. 15. Respondent cites no authority suggesting that evidence of an accused person's bad character is generally admissible. Brief of Respondent, pp. 14-15. Furthermore, even if the evidence had

legitimately been offered for a limited purpose, counsel should have requested an instruction prohibiting the jury from considering the evidence as evidence of Mr. Hooper's general bad character.

This highly prejudicial evidence undoubtedly impacted the jury's view of Mr. Hooper, and tarnished jurors' assessment of 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. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998). 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.

M.M.'s prior recorded statement should not have been admitted as substantive evidence, because the prosecution failed to lay an adequate foundation. There were two problems with the evidence.

First, although M.M. had difficulty remembering what had happened, the prosecutor did not attempt to refresh her recollection with the recorded statement before offering it as substantive evidence. RP (7/14/10) 114-115. Respondent does not address this deficiency. Brief of Respondent, pp. 17-18. Accordingly, the prosecutor did not establish that M.M. had "an insufficient recollection of the matter to provide truthful

and accurate trial testimony...” *State v. White*, 152 Wash.App. 173, 184, 215 P.3d 251 (2009). By skipping this step and submitting the recording as substantive evidence, the prosecutor evaded the general preference for live testimony. See Tegland, *Evidence Law and Practice*, 5C Wash. Prac. §803.26. The fact that M.M.’s trial testimony (denying sexual contact) differed (in part) from her recorded statement did not justify admission of the recorded statement. *State v. Floreck*, 111 Wash.App. 135, 43 P.3d 1264 (2002).

Second, the recorded interview included M.M.’s acknowledged falsehoods, and thus did not accurately reflect her prior knowledge. RP (7/14/10) 115; RP (7/15/10) 3-9. By admitting that she lied in her prior statement, M.M. defeated the prosecutor’s attempt to lay the foundation.

Accordingly, the recording was not admissible as substantive evidence. *White*, at 184. Mr. Hooper’s convictions must be reversed and the case remanded for a new trial. *Id.*

IV. THE TWO CRIMES WERE THE SAME CRIMINAL CONDUCT, AND SHOULD NOT HAVE SCORED AGAINST EACH OTHER AT SENTENCING.

The prosecution bears the burden of establishing that multiple current offenses score separately. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996); *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199 (1993).

Respondent does not dispute that the two offenses involved the same victim and the same overall criminal purpose. Brief of Respondent, pp. 20-23. The absence of argument on these points may be treated as a concession. See *In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

M.M. received Mr. Hooper's text shortly before she saw him. RP (7/14/10) 86-88. Respondent argues that the two crimes were "not part of a simultaneous act." Brief of Respondent, p. 22. But simultaneity is not required. See, e.g., *State v. Palmer*, 95 Wash.App. 187, 191, 975 P.2d 1038 (1999); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997). Respondent does not suggest that the text and the molestation were anything other than "an uninterrupted sequence" of events. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); see also *Porter*, at 183.

Similarly, the two crimes occurred at the same place. The communication was complete only when M.M. received the text at the park, the same location as the alleged molestation. Respondent suggests that the two crimes occurred at different locations, arguing (apparently) that the communication occurred at Mr. Hooper's home. Brief of Respondent, pp. 20-23. While it is true that Mr. Hooper sent the text from his home, he did not "communicate" until M.M. received the text at the

park—had she not received the text, he would have been guilty only of the attempted crime.

The two crimes should have scored together, and Mr. Hooper should have been sentenced with an offender score of four. Accordingly, his sentence must be vacated and the case remanded for correction of the offender score and a new sentencing hearing. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

CONCLUSION

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 a new sentencing hearing.

Respectfully submitted on April 26, 2011.

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CERTIFICATE OF MAILING

DATE: _____
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I certify that I mailed a copy of Appellant's Reply Brief to:

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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 April 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 April 26, 2011.



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