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STATE OF WASHINGTON  
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No. 41184-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**STEVEN HOOPER,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

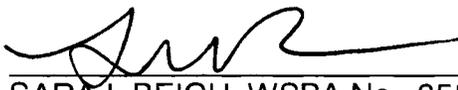
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**Respondent's Brief**

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## I. ISSUES

- A. Was Hooper denied his constitutional right, under U.S. Const. amend VI, U.S. Const. amend. XIV and Const. art. I § 22, to confront and cross-examine adverse witnesses?
- B. Did Hooper receive ineffective assistance from his trial counsel?
- C. Were M.E.M.'s prior recorded statements improperly admitted at trial?
- D. Did the trial court error in concluding that Count One and Count Three were not the same criminal conduct?

## II. STATEMENT OF THE CASE

The State filed an information, on February 26, 2010, charging Steven Richard Hooper with Counts One and Two, Child Molestation in the Second Degree, and Count Three, Communication with a Minor for Immoral Purposes. CP 1-3. The State alleged that Counts One and Three occurred on or about and between February 25, 2010 and February 26, 2010. CP 1-3. The State alleged Count Two occurred on or about and between January 1, 2010 and February 24, 2010. CP 2. The victim in all three counts is M.E.M., whose date of birth is April 8, 1996. CP 1-3. Hooper's date of birth is June 26, 1986. CP 4.

Hooper pleaded guilty to Count Three on July 13, 2010 by way of an Alford<sup>1</sup> plea. 1RP 3-13<sup>2</sup>. A jury trial was held July 14, 2010 through July 15, 2010 on the remaining two counts of Child Molestation in the Second Degree. 1RP 1, 14-16; 2RP 1. On the first day of trial the court heard the State's motions in limine. 1RP 16; CP Limine 1-5<sup>3</sup>. The trial court granted all 11 of the State's motions. 1RP 17-25; CP Limine 1-5. The trial court ruled there was to be no mention of any alleged instances where M.E.M. previously misstated her age to anyone other than Hooper, unless Hooper was present when the statement was made. 1RP 18-23. The trial court also ruled there was to be no mention of M.E.M. possessing a fake identification. 1RP 18-23. Trial court prohibited any mention of M.E.M.'s prior sexual activity with anyone other than Hooper or any mention of getting other men in trouble. 1RP 23-24.

M.E.M. testified her date of birth was April 8, 1996, she was 14 and just completed the eighth grade. 1RP 72. M.E.M. met

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<sup>1</sup> The verbatim proceedings refers to the plea as an Alfred plea, this is an error and should be noted as an Alford plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

<sup>2</sup> There are two volumes of verbatim report of proceedings. Volume one contains the proceedings on July 13<sup>th</sup> and 14<sup>th</sup>, 2010 – this volume will be referred to as 1RP. The second volume contains the proceedings from July 15, 2010, August 17, 2010, September 8<sup>th</sup> and 13<sup>th</sup>, 2010 – this volume will be referred to as 2RP.

<sup>3</sup> The State will be filing a supplemental designation of Clerk's papers to include the State's motions in limine. The motions will be referred to as CP Limine and the page number of the motion.

Hooper, who goes by Richie, in 2008. 1RP 74. M.E.M. stated she had talked to Hooper about her age at the library when she was 13 about four or five months after moving to Centralia. 1RP 74-75.

M.E.M. said she never misrepresented her age to Hooper. 1RP 75.

M.E.M. did not know Hooper's age. 1RP 76. Hooper and M.E.M. exchanged phone numbers prior to December 2009 and began exchanging phone calls and text messages. 1RP 76. Hooper and M.E.M. began to develop feelings for each other. 1RP 76-77.

M.E.M. testified that Hooper rubbed her inner thigh while they were lying on the bed in M.E.M. and Bonnie Griffith's room. 1RP 80-82.

The touching on the bed happened after M.E.M. and Hooper began dating and before February 25, 2010. 1RP 86. M.E.M. also said Hooper touched her chest for three to four minutes. 1RP 91-93.

M.E.M. said she went to Riverside Park with Ms. Griffith and another friend, Joseph Skeen, on February 25, 2010. 1RP 84-85.

M.E.M. considered Hooper her boyfriend and they had been going out for about a month at that time. 1RP 85-86. Once at the park M.E.M. and Ms. Griffith used Mr. Skeen's phone to text Hooper to see if he wanted to come to the park and hang out with them. 1RP 86. According to M.E.M., Hooper texted her back that he couldn't hang out because Hooper was putting his son to sleep. 1RP 87.

Hooper came to park later to hang out with M.E.M. 1RP 87.

Hooper was driving a van. 1RP 88. Hooper came up to the Blazer M.E.M. and her friends were in and knocked on the window and asked if he could hang out with them. 1RP 88. Hooper, M.E.M., Ms. Griffith and Mr. Skeen were all hanging out at the park in the Blazer together for two to three hours. 1RP 88-89. Hooper got out of the Blazer and went to his van. 1RP 89. M.E.M. got out of the Blazer and went to Hooper's van to see if he was okay. 1RP 89-90. M.E.M. asked Hooper to give her a back rub. 1RP 90. While in the van, Hooper touched the top half of M.E.M.'s breast over the top of her clothes. 1RP 90. M.E.M. testified she could not remember what happened after the back rub. 1RP 94. M.E.M. said the next thing she remembered was the police showing up. 1RP 94.

M.E.M. stated she spoke to the police and at first she lied to the police about what she was doing in the van to avoid getting herself and Hooper into trouble. 1RP 94-95. M.E.M. also told the police that Hooper was her uncle because she tried to do everything she could not get Hooper into trouble. 1RP 95. M.E.M. told police that nothing had happened between herself and Hooper in the back of the van. 1RP 111. M.E.M. eventually told Officer Humphrey the truth, that M.E.M. and Hooper were in a relationship

and the touching that had occurred. 11RP 98-99. M.E.M. said it was difficult for her to remember time lines and dates. 1RP 113-114. M.E.M. also stated she was having a difficult time remembering things because she was tired and she has "tried to put it away and not think about it, because when I think about it what happened it like makes me cry." 1RP 114. M.E.M. was shown identification four, which is the transcript of the taped statement M.E.M. gave to Officer Humphrey. 1RP 114-115. M.E.M. identified the transcript as the statement she gave Officer Humphrey and stated she eventually told Officer Humphrey the truth about what had happened between M.E.M. and Hooper in the back of the van. 1RP 114-115. M.E.M. also testified she and Hooper had never been married or in any type of domestic partnership. 1RP 96-97.

Centralia Police Officer David Sims was on patrol on February 25, 2010 when he spotted two vehicles at Riverside Park around midnight. 1RP 65. Riverside Park closes at 10 p.m. 1RP 64. Officer Sims went up to inspect the vehicles by shining his spotlight into them. 1RP 65. Officer Sims shined his spotlight first on Hooper's van. 1RP 65. Officer Sims could see movement in the van and it appeared there were multiple people in the van. 1RP 66.

Hooper exited the van quickly, closed the door and contacted Officer Sims. 1RP 66. Hooper told Officer Sims he didn't know the park closed at 10 p.m. and he was just looking for a place to sleep. 1RP 67. Hooper also denied that there was anyone else in the van. 1RP 67. Officer Sims told Hooper he knew there were other people in the van and Hooper became very nervous, almost shaking. 1RP 67. Eventually Hooper opened the van door and told M.E.M. to step out. 1RP 68. Officer Sims testified M.E.M. looked very young, approximately 13 or 14 years old. 1RP 68. Hooper said M.E.M. was his niece. 1RP 69; 2RP 31. Officer Sims said the back of the van had a makeshift bed, covered with a sheet. 1RP 71.

Centralia Police Officer Mary Humphrey spoke with M.E.M. in the early morning hours of February 26, 2010. 2RP 18-19. M.E.M. was erratically emotional, crying then laughing then being quiet. 2RP 19. M.E.M. was not forthcoming with Officer Humphrey and changed her version of events numerous times. 2RP 20. Officer Humphrey took a taped statement from M.E.M.. 2RP 20-21. The trial court ruled that Officer Humphrey could be questioned and cross-examined regarding the contents of M.E.M.'s taped statement because it was admissible under ER 803(a)(5). 2RP 13-

14. M.E.M. denied anything happened, then admitted that Hooper had touched her breasts. 2RP 22.

Hooper testified he met M.E.M. in December 2007. 2RP 62. According to Hooper and his good friend, Terrance Larr, M.E.M. told them she was 15. 2RP 63. Mr. Larr and Ms. Griffith had a dating relationship. 1RP 134. Ms. Griffith believed Mr. Larr knew how old M.E.M. was. 1RP 134. Hooper, Mr. Larr and Jesse Thomas were like brothers. 2RP 49, 91. Ms. Griffith stated Mr. Thomas knew M.E.M.'s age. 1RP 135. Mr. Thomas testified he only knew M.E.M. for approximately three years. 2RP 47. Mr. Thomas later admitted he lived on the same property as M.E.M. and her father in Colorado when M.E.M. was a baby. 2RP 47-48.

Hooper denied he and M.E.M. had a dating relationship. 2RP 82. Hooper stated he never had any type of sexual contact with M.E.M. in her bedroom. 2RP 67. Hooper admitted he sent text messages to M.E.M. arranging to meet up at the park. 2RP 35. Hooper admitted he sent M.E.M. a text message that said "Because I want to fuck" but also denied doing so during cross-examination. 2RP 35, 70, 83-84. Hooper denied having any sexual contact with M.E.M. in his van. 2RP 72. Hooper testified

that on February 25, 2010 he believed M.E.M. was 17 going on 18.  
2RP 72.

The jury convicted Hooper on both counts of Child Molestation in the Second Degree. 2RP 149. After a sentencing hearing, Hooper was sentenced to 78 months in prison. CP 8.

### **ARGUMENT**

#### **A. HOOPER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE M.E.M.**

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. There is no absolute right to cross-examine an adverse witness. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

When attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608(b). A witness may, in the discretion of the trial court, be impeached

using specific instances of conduct on cross-examination if the trial court finds the conduct is probative of the truthfulness of the witness. ER 608(b). "The cross-examiner must have a good faith basis for the inquiry, and the court, in its discretion, may require that the basis be revealed in the absence of the jury before the cross-examination is allowed." 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, §608.10 at 329 (2010-2011). Questions asked on cross-examination must be in good faith and with proper foundation. *State v. Briscoe*, 78 Wn.2d 338, 341, 474 P.2d 267 (1970).

There are also statutory limitations on cross-examination and the introduction of evidence. Specifically, the rape shield statute does not allow for evidence of a victim's past sexual behavior to be admitted in regards to the victim's credibility. RCW 9A.44.020(2). "The purpose of the statute... is to encourage rape victims to prosecute and eliminate prejudicial evidence which often has little, if any relevance on the issues for which it is usually offered, namely, credibility or consent." *State v. Cosden*, 18 Wn. App. 213, 218, 568 P.2d 802(1977), *review denied*, 89 Wn.2d 1016 (1978), *cert. denied*, 439 U.S. 823 (1978).

The State sought and was granted the limitation that specific alleged conduct of M.E.M. was prohibited from Hooper's cross-examination of M.E.M.. 1RP 18-24; CP Limine 1-5. Specifically, there was to be no questions or testimony regarding M.E.M.'s allegedly previously lying about her age, a fake identification she allegedly possessed or that M.E.M. allegedly got other men in trouble because of her age. 1RP 18-24. Hooper claims that it was critical to his defense that he be able to attack M.E.M.'s credibility by asking her about lying about her age, possession of a fake identification and previously getting other men in trouble. Brief of Appellant 11-12. Hooper argues that this impeachment evidence was necessary to cast doubt on M.E.M.'s testimony, especially without other impeachment evidence. Brief of Appellant 12.

The trial court did not error in limiting Hooper's cross-examination of M.E.M. in regards to the alleged lies about her age, fake identification and getting other men in trouble. None of the evidence was relevant and even if it was relevant it would not be allowed due to confusion, prejudice or misleading the jury. ER 402; ER 403. While the State is not conceding that the evidence was admissible under ER 402 or ER 403, if the evidence was admissible under those rules, it still would not be admissible at trial

for other reasons. First, there was no foundation laid as to the basis for alleging that any of the evidence was true. There must be a good faith basis for asking the question and there is no showing that Hooper even attempted to lay any type of foundation for the baseless allegations he wanted to question M.E.M. about. 1RP 18-24. The evidence, and therefore any cross-examination questions regarding it, is inadmissible.

Next, under RCW 9A.44.020(2) any evidence relating to M.E.M.'s past sexual history is inadmissible. The allegation that M.E.M. had previously gotten four other men in trouble obviously implies that she had sexual relations with four other men, who got in trouble due to M.E.M.'s young age. Therefore, any mention of the M.E.M. getting any other men in trouble due to her age is inappropriate and barred under the rape shield statute. See, RCW 9A.44.020.

Finally, there was other impeachment evidence available to Hooper. M.E.M. admitted to making false statements to police officers in regards to the molestation that had occurred in the back of the van. 1RP 94-95. Officer Humphrey also testified that M.E.M. was not truthful when Officer Humphrey initially started asking M.E.M. about what had happened in the back of the van. 2RP 20.

There was ample other evidence to impeach M.E.M. with in regards to her propensity for truthfulness and thereby her credibility.

Hooper was not denied his constitutional rights to confront and cross-examine his accuser. Hooper's convictions should be affirmed.

**B. HOOPER RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.**

To prevail on an ineffective assistance of counsel claim Hooper must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921,

68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

There was a proper foundation laid to establish how Ms. Griffith would know whether Mr. Larr and Mr. Thomas knew M.E.M.’s true age. Ms. Griffith had known Mr. Larr for a number of years and dated him for approximately two years. 1RP 133. Ms. Griffith testified that she and Mr. Larr were dating while M.E.M. was living with Ms. Griffith. 1RP 134. When asked if Mr. Larr knew how old M.E.M. was Ms. Griffith replied, “[t]hat I know of, yeah.” 1RP 134. Trial counsel’s failure to object to the question was not improper. Trial counsel may have had a number of reasons for not objecting, including that the proper foundation was laid, he may have not wanted to emphasize this statement, also trial counsel knew he was having Mr. Larr testify and this was a matter he could take up with Mr. Larr on direct examination if trial counsel chose. Mr. Larr testified that M.E.M. told Hooper in Mr. Larr’s presence that she was only 15 years old. 2RP 63.

Similarly, Ms. Griffith testified that she knew Mr. Thomas for most of her life. 1RP 134. Ms. Griffith stated Mr. Thomas knew

M.E.M. pretty well and knew how old M.E.M. was. 1RP 135. The foundation for this knowledge was laid and it was a permissible question by the State. Since the foundation was laid, trial counsel's objection would not have been sustained. Failure to make an objection that has no basis is not deficient performance on trial counsel's part. Further, Mr. Thomas later testified on behalf of Hooper.

The deputy prosecutor asked Hooper if he left his child at home to see M.E.M. 2RP 84. M.E.M. previously testified Hooper texted her that he could not come to the park because he was putting his son to bed. 1RP 87. Further, Hooper explained in his testimony the reason he could not meet M.E.M. at the park to talk with her was, "I was putting my son down for bed..." 2RP 69. The evidence was relevant under ER 402 and not precluded under ER 403. The question was not unfairly prejudicial to Hooper. The question showed Hooper would rather go to the park and be with M.E.M. then sit at home while his son slept. Failure to object to the question by Hooper's trial counsel was not deficient because the objection would not have been sustained. Hooper opened the door. Hooper argues that the failure to object prejudiced Hooper because it encouraged the jury to reject Hooper's affirmative

defense and painted him in a bad light. Brief of Appellant 17. The State is permitted to paint Hooper in an unfavorable light and encourage the jury not to believe his affirmative defense, just as Hooper and his trial counsel may attempt to show Hooper in a favorable light and present evidence to prove his affirmative defense. That is what the trial is for.

Hooper has not met the requisite burden of showing his trial counsel's performance was deficient. When looking at trial counsel's performance throughout the trial, it is clear trial counsel was competent and effectively advocated for Hooper. Further, even if for the sake of argument, Hooper did show his trial counsel was deficient, Hooper has not shown that he is prejudiced by any deficiency in his trial counsel.

**C. THE TRIAL COURT DID NOT ERROR WHEN IT RULED M.E.M.'S PRIOR RECORDED STATEMENT WAS ADMISSIBLE UNDER ER 803(a)(5).**

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v.*

*Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

A recorded recollection is not considered hearsay under ER 803(a)(5) if certain conditions are met.

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness. . .

(5) *Recorded Recollection.* 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. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a)(5). The recorded recollection is admissible if it meets the following requirements:

(1) the record must pertain to a matter about which the witness once had knowledge; (2) the witness must now have an insufficient recollection about the matter to enable him to testify fully and accurately; (3) the record must have been made or adopted by the witness when the matter was fresh in the witness's memory; and (4) the record must reflect the witness's prior knowledge accurately.

*State v. Mathes*, 47 Wn. App. 863, 867, 737 P.2d 700 (1987).

M.E.M. had difficulty testifying during trial. During her direct and cross examination she answered numerous questions with the answer that she did not know or could not remember. See, 1RP 72-115. During redirect the deputy prosecutor showed M.E.M. exhibit four, the transcript of the recorded statement she gave Officer Humphrey during the early morning hours of February 26, 2010. 1RP 114. M.E.M. agreed she gave the statement when the events were fresh in her mind. 1RP 115. M.E.M. also agreed she eventually told Officer Humphrey the truth in the statement. 1RP 115. M.E.M. had been forthcoming in earlier testimony that she had not been truthful when answering some of the officer's questions but that she eventually did tell the truth. 1RP 94-95, 98-99. M.E.M. testified she could not remember because she was tired and she had pushed all the memories away because it had upset her to think about it. 1RP 114. Later, M.E.M. testified that she did not have a memory of what had happened in the back of

the van. 2RP 10. M.E.M. also agreed that she had made a recorded statement to Officer Humphrey and identification four, the transcript of that statement, was an accurate transcript of the statement. 2RP 10.

The State adequately proved M.E.M. did not have a sufficient recollection at the trial of the events. M.E.M. testified that she remembered the back rub, but did not remember anything else until the police showed up. 1RP 94. M.E.M. also testified she could no longer recall the events. 1RP 114-115; 2RP 10. Given this testimony it was clear M.E.M. no longer remembered the events in a manner that would allow her to fully and accurately testify. M.E.M. also told the trial court that the transcript was an accurate transcript of the recorded statement she had given Officer Humphrey. 2RP 10. M.E.M.'s inconsistent statements to Officer Humphrey does not negate that the transcript accurately reflects M.E.M.'s knowledge. M.E.M. had admitted to giving contradictory statements and not being truthful to the police when initially questioned. Trial counsel was able and did ask to have portions of the transcript read into the record where M.E.M. made statements to Officer Humphrey that nothing had happened. 2RP 23-27.

Hooper cites to *State v. Floreck* for the premise that M.E.M.'s recorded statement could only be used for impeachment but not for substantive evidence. Brief of Appellant 20, *citing State v. White*, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). The circumstances regarding the admission of the recorded recollection in *White* are factually distinct from Hooper's case. In *White* the co-participant, Ms. Mazza, testified about the burglaries in great detail, but contradictory to the recorded statement she gave police. *State v. White*, 111 Wn. App. at 138-139. The court held Ms. Mazza testified fully about the underlying events of the burglary and only stated she could not remember the statement she gave police, therefore her memory of the event was sufficient and the recorded recollection could only be used to impeach her, not for substantive evidence. *Id.* 139-140. This is not the case in Hooper's trial. M.E.M. testified she could not remember certain events; this is the insufficient memory necessary to admit a previously recorded recollection. M.E.M.'s prior recorded statement was admissible under ER 803(a)(5). The trial court made the correct ruling and Hooper's convictions should be affirmed.

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**D. COUNT ONE, CHILD MOLESTATION IN THE SECOND DEGREE AND COUNT THREE, COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES IS NOT SAME CRIMINAL CONDUCT, THEREFORE THE TRIAL COURT'S SENTENCE WAS APPROPRIATE.**

When an appellate court reviews the trial court determination whether two offenses count as same criminal conduct it will reverse the trial court's decision only for "a clear abuse of discretion or misapplication of the law." *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citation omitted). Offenses considered same criminal conduct will not be used in a defendant's offender score against each other and will be counted as one crime for sentencing purposes. RCW 9.94A.589(1). Same criminal conduct as used in RCW 9.94A.589(1) "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If one of the elements outlined in RCW 9.94A.589(1) is missing, the offenses are not considered same criminal conduct. *State v. Haddock*, 141 Wn.2d at 110 (citation omitted). While the court will analyze whether one crime furthered the next, the court must look at the specific facts of the case. *State v. Longuskie*, 59 Wn. App. 838, 847, 807 P.2d 1004 (1990).

In this case, the act of communication with a minor for immoral purposes happened through electronic means, via text

message. 2RP 35. Hooper sent M.E.M. a text message that said, "I want to fuck." 2RP 35, 83-84. Hooper was at home when he sent M.E.M. the text message and she was at Riverside Park. 1RP 86-87; 2RP 69-70, 83-84. Later that night Hooper went to the park and hung out with M.E.M. and a couple friends. 1RP 88-89; 2RP 70-71. After sitting and talking for a while in Mr. Skeen's vehicle, Hooper got out and went back to his van. 1RP 89; 2RP 70. M.E.M. got out of Mr. Skeen's vehicle to go and check on Hooper. 1RP 89-90. Hooper molested M.E.M. in the back of the van. 1RP 90.

The molestation, in count one, happened at a different location after the communication with M.E.M. for immoral purposes. The difference in time and place and means of communication are important in this case. Unlike the facts in the two cases Hooper uses in his brief<sup>4</sup> to illustrate same criminal conduct, the molestation was not contemporaneous with the communication with the minor for immoral purposes. See, Brief of Appellant 22-23. In *State v. Miller*, the defendant assaulted an officer while struggling for the officer's gun and was charged and convicted of assault in the third degree and attempted theft of a firearm. *State v. Miller*, 92 Wn. App. 693, 964 P.2d 1196 (1998). The court in *Miller* concluded the

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<sup>4</sup> Hooper cites *State v. Miller*, 92 Wn. App. 693, 964 1196 (1998) and *State v. Taylor*, 90 Wn. App. 312, 950 P.2d 526 (1998).

assault and attempted theft were same criminal conduct as Miller could not steal the officer's gun without assaulting the officer. *State v. Miller*, 92 Wn. App. at 708. Similarly, in *State v. Taylor*, the court found that assault in the second degree and kidnapping in the second degree were same criminal conduct due to the specific facts of that case. *State v. Taylor*, 90 Wn. App. 312, 950 P.2d 526 (1998). In *Taylor*, the defendant's intent in kidnapping the victim was to do so by using or threatening use of a gun and the second degree assault was intended to persuade the victim to submit to the kidnapping. *State v. Taylor*, 90 Wn. App. at 321. Additionally, in *Longuskie*, the court explained a kidnapping and child molestation were same criminal conduct because the crimes were committed at the same place and time. *State v. Longuskie*, 59 Wn. App. at 847. Further, it was the underlying child molestation in the third degree charge that elevated the kidnapping charge to first degree and therefore the two crimes were same criminal conduct. *Id.*

In contrast, Hooper's case, count one and count three were not part of a simultaneous act or an event where one crime was necessarily dependent on the commission of the other crime. This is not a case where Hooper tells M.E.M. he wants to have sex with her and then takes her into the back of his van and molests her.

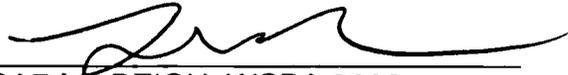
The communication with M.E.M. for immoral purposes was via text message, removed from the act of molestation in the van. The trial court correctly ruled the two counts were not similar criminal conduct and thus established Hooper's offender score at seven. Hooper's sentence should be affirmed.

**CONCLUSION**

For the foregoing reasons, this court should affirm Hooper's convictions in counts one and two for child molestation in the second degree. Hooper's sentence should be affirmed because the trial court correctly ruled that counts one and three were not same criminal conduct.

RESPECTFULLY submitted this 11<sup>th</sup> day of April, 2011.

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by: 

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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) NO. 41184-9-II  
Respondent, )  
vs. ) DECLARATION OF  
MAILING  
STEVEN HOOPER, )  
Appellant. )  
\_\_\_\_\_ )

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY: [Signature]  
11 APR 15 2011  
CLERK OF COURT

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy  
Prosecuting Attorney, declares under penalty of perjury under the  
laws of the State of Washington that the following is true and  
correct: On April 12, 2011, the appellant was served with  
a copy of the **Respondent's Brief** by depositing same in the  
United States Mail, postage pre-paid, to the attorney for Appellant  
at the name and address indicated below:

Jodi R. Backlund  
Manek R. Mistry  
Backlund & Mistry  
PO Box 6490  
Olympia, WA 98507

DATED this 12<sup>th</sup> day of April, 2011, at Chehalis, Washington.

[Signature]

Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing