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SEP 29 2014

King County Prosecutor  
Appellate Unit

NO. 71799-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ERIC HOPPER,

Appellant.

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

The Honorable Timothy A. Bradshaw, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Closing argument that overstated the burden of proof pertaining to appellant's affirmative defense was prosecutorial misconduct that denied appellant a fair trial.

2. Hopper's right to effective assistance of counsel was violated when his attorney failed to object or request a curative instruction after the prosecutor overstated the burden of proof pertaining to his affirmative defense.

3. The court exceeded its statutory sentencing authority by requiring a curfew unrelated to the circumstances of the crime as a condition of community custody.

Issues Pertaining to Assignments of Error

1. In closing argument, the prosecutor told the jury the burden of proof by a preponderance of the evidence requires "51% that you believe that's what happened." Because any amount over 50% is a preponderance, did the prosecutor overstate the burden of proof and violate appellant's right to a fair trial? Alternatively, was counsel ineffective in failing to request a curative instruction?

2. Other than the conditions listed in RCW 9.94A.701, community custody conditions must be "crime related." The events of this case took place in mid-afternoon. Yet the court imposed a condition

requiring appellant to be at home between 10 p.m. and 5 a.m. Should the curfew condition be stricken because it is not crime-related?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Eric Hopper with one count of commercial sexual abuse of a minor. CP 1. The jury found him guilty, and the court imposed a standard range sentence. CP 10, 37. Notice of appeal was timely filed. CP 46.

2. Substantive Facts

Hopper admitted he sought out and utilized the services of a prostitute via advertisement on the website backpage.com. RP 226-27, 234. However, he testified that upon meeting the young woman, he noticed she seemed inexperienced. RP 232. Therefore, when they approached his apartment after walking back from the bus stop, he asked to see her identification. RP 232. She produced what appeared to be a Washington State identification card. RP 232. Out of respect for her privacy, he tried not to look at the photograph or the name. RP 233. He focused on the date of birth, which he noted was in April of 1991, which would have made her 21 years old in 2013 when their encounter took place. RP 233. He also testified he believed she must be an adult because he believed backpage.com required

those posting adult advertisements to be over 18 and he assumed they would have checked her identification. RP 254.

The young woman, K.H., testified her encounter with Hopper was arranged by Allixzander Park. RP 160. At Park's instruction, she testified, she told Hopper she was 19. RP 165. In reality, she was 16 years old at the time. RP 141, 159. She testified Hopper never asked for any identification and she did not have any to show him if he had asked. RP 166. A series of text messages between Hopper and Park (posing as K.H.) to set up the encounter contained no discussion of age or identification. RP 81-92.

C. ARGUMENT

1. HOPPER WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR OVERSTATED THE BURDEN OF PROOF REGARDING HOPPER'S AFFIRMATIVE DEFENSE.

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Comments that attempt to shift the burden of proof to the defense or diminish the State's burden of proof beyond a reasonable doubt are particularly problematic. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt). Here, the prosecutor improperly argued Hopper's burden of proof

for his affirmative defense was “51%.” Like arguments that shift the burden of proof, the argument made in this case misstates the law. Hopper’s conviction must be reversed because the improper argument likely caused the jury to hold Hopper to a higher standard of proof than the law requires.

a. The Prosecutor Overstated the Burden of Proof by a Preponderance of the Evidence.

The presumption of innocence, the bedrock of our criminal justice system, means that, generally speaking, an accused person has no burden to present evidence or proof at trial. State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). An exception is that a defendant seeking to raise certain affirmative defenses must prove the circumstances amounting to the affirmative defense by a preponderance of the evidence. State v. Riker, 123 Wn.2d 351, 366, 869 P.2d 43 (1994).

It is an affirmative defense to the charge of commercial sexual abuse of a minor that a person “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.” RCW 9.68A.110(3). The law requires proof of this defense by a preponderance of the evidence. Id.

The burden of proof by a preponderance of the evidence means that, based on all the evidence, the proposition is “more probably true than not true.” 11 Washington Practice, Pattern Jury Instructions – Criminal, WPIC 19.04 (3d ed.). The legal definition of preponderance does not mandate how much more likely; any amount will suffice. As defense counsel argued in his closing, “even a feather’s weight . . . tips the scales.” RP 300.

The prosecutor added to Hopper’s burden by declaring the preponderance of the evidence standard equivalent to “51%.” RP 282. This argument suggested there must be a significant or substantial amount of evidence to tip the scale, amounting to a full one percent.

The difference between a preponderance and 51 percent is significant because a clear preponderance is not the same as a mere preponderance. Our legal system provides for step-wise increases in the burden of proof. A preponderance of the evidence is the “lowest legal standard of proof.” Nguyen v. State, 144 Wn.2d 516, 524, 29 P.3d 689 (2001); Mansour v. King County, 131 Wn. App. 255, 266, 128 P.3d 1241 (2006). By contrast, the 51 percent standard cited by the prosecutor is more akin to the intermediate civil standard of “clear preponderance” imposed in, for example, medical disciplinary proceedings. Nguyen, 144 Wn.2d at 525.

“A clear preponderance is more than a mere preponderance of the evidence.” In re Disciplinary Proceeding Against Simmerly, 174 Wn.2d

963, 981, 285 P.3d 838 (2012). The difference between these two standards has been described as “vast.” Rowe v. Whatcom Cnty. Ry. & Light Co., 44 Wash. 658, 663, 87 P. 921, 923 (1906). Merely adding the word “clear” to a jury instruction describing the burden of proof by a preponderance of the evidence has been held to mislead the jury and require reversal of a jury verdict. Puget Sound Iron Co. v. Lawrence, 3 Wash. Terr. 226, 231-32, 14 P. 869, 870 (1887). By declaring that the burden of proof by a preponderance of the evidence was equivalent to “51%,” the prosecutor misstated the law and committed misconduct that directly impacted the jury’s consideration of Hopper’s affirmative defense.

b. Argument Equating Hopper’s Burden of Proof to “51%” Was Likely to Affect the Jury’s Verdict by Making It Easier to Render a Guilty Verdict.

Prosecutorial misconduct violates the defendant’s right to a fair trial and requires reversal of the conviction when the prosecutor’s argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor’s mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158

(2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

Although jurors are instructed to disregard any argument not supported by the court’s instructions,<sup>1</sup> a misstatement of the law pertaining to the burden of proof cannot be easily dismissed. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State’s burden of proof, was “flagrant and ill intentioned,” and required a new trial). The pattern jury instructions encourage jurors to consider the lawyers’ remarks when applying the law. See CP 15 (“The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law.”). Moreover, jurors would likely credit the prosecutor’s interpretation of the burden of proof by a preponderance because to a layperson, 51% sounds correct and provides a simple (albeit mistaken) way for jurors to decide.

This case was close enough that the subtle influence of this overstatement of the burden likely made a difference in the jury’s deliberations. Hopper testified he became concerned about the young woman’s apparent inexperience and requested identification. RP 232.

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<sup>1</sup> See CP 15 (“You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions.”).

When he saw identification showing an age of 21, which conflicted with her prior assertion that she was 19, he questioned her about the discrepancy. RP 253. Her answer, that many men prefer younger women, appeared reasonable. RP 253. Thus, the jury was left to weigh Hopper's testimony against K.H.'s claims that this conversation never happened and she would not have had any such identification to show him. K.H.'s many admitted falsehoods over the course of the incident and the subsequent investigation gave the jury reason to doubt her testimony. RP 181-82, 195-96, 198. Under a correct application of the preponderance of the evidence standard, if there was any reason, however slight, to credit Hopper's testimony over K.H.'s, the jury would have to vote not guilty. But the prosecutor's argument deprived Hopper of the benefit of the correct burden of proof.

“The function of a standard of proof . . . is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (quoting In re Winship, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring)). The prosecutor's argument distorted that standard, required greater confidence, and unfairly increased Hopper's burden. The misstatement deprived Hopper of a fair chance to establish his defense and requires reversal of his conviction.

c. Alternatively, Counsel Was Ineffective in Failing to Object or Request a Curative Instruction When the Prosecutor Overstated the Burden of Proof for the Affirmative Defense.

Alternatively, if this Court concludes this issue was not preserved, Hopper's right to effective assistance of counsel was violated when counsel failed to object to the argument discussed above or request a curative instruction. The federal and state constitutions guarantee accused persons the right to effective representation at trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The two-part test set forth in Strickland is used to determine ineffective assistance of counsel. Thomas, 109 Wn.2d at 225-26. Under the first prong, the court must determine if counsel's performance was deficient. Id. Representation is deficient when, taking into account all the circumstances, it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, the court must reverse if it finds 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 (citing Strickland, 466 U.S. at 694).

If this Court finds the error discussed above could have been cured by instruction to the jury, counsel was ineffective in failing to request such an instruction to correct the prosecutor’s misstatement of the burden of proof. Additionally, counsel was ineffective in failing to preserve the error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel’s performance, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney’s error undermines confidence in the outcome. Id. That confidence is undermined here. Whether Hopper in fact requested and was shown identification could only be decided by weighing his credibility against K.H.’s. With reasons to doubt both of their credibility, a subtle shift in the amount of confidence required was likely to make the difference and tip the scale. If the Court declines to

consider this prosecutorial misconduct issue, it should reverse for violation of Hopper's right to effective assistance of counsel.

2. THE COURT ERRED IN IMPOSING A COMMUNITY CUSTODY CONDITION REQUIRING HOPPER TO ABIDE BY A CURFEW UNRELATED TO THE CIRCUMSTANCES OF THE OFFENSE.

The court's authority to impose sentence in a criminal case is strictly limited to that authorized by the Legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id. Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. at 325-26. An invalid sentencing condition may be challenged at any time, including for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable. A curfew is not expressly listed. RCW 9.94A.703. However, a court may impose other "crime-related prohibitions." RCW 9.94A.703.

"A 'crime-related prohibition' is an order prohibiting conduct that *directly relates to the circumstances of the crime.*" State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (quoting State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006)). The condition need not be causally

related to the crime, but it must be directly related to the crime. Zimmer, 146 Wn. App. at 413. A court's finding that a condition is crime-related is reviewed for substantial evidence in the record. Id. Once that is established, imposition of conditions is reviewed for an abuse of discretion. Id.

Here, the evidence in the record does not establish that a 10 p.m. to 5 a.m. curfew bears any relation to the circumstances of the offense. Therefore, the court exceeded its authority in imposing the curfew, and the community custody condition pertaining to the curfew should be stricken.

Zimmer illustrates a community custody condition that is not directly related to the circumstances of the crime. Zimmer was convicted of possessing methamphetamine. Id. at 410-11. As a condition of community custody, the sentencing court prohibited her from possessing a cellular telephone or other handheld electronic storage device. Id. at 412. The court recognized these devices are often used to further acquisition and possession of illegal drugs. Id. at 414. But the record revealed no indication that any such device was used in Zimmer's case. Id. at 413-14. No evidence showed any phone or device was used by her or even found in her possession. Id. And the lower court made no specific finding to that effect. Id. Therefore, the court held the cell phone ban was not crime-related, and the court abused its discretion in imposing it. Id. at 414. The fact that cell phones are often used in this type of offense was insufficient.

Similarly, here the only connection between the curfew and the offense at issue would be a general assertion that prostitution-related activities often occur at night. But the facts of this case unfolded in broad daylight, with the encounter between Hopper and K.H. occurring between approximately three and four in the afternoon. RP 88-89. Arrangements were made by phone, not by going out at night. RP 82-92. A night-time curfew bears no direct relationship to the circumstances of this case, and imposition of the curfew was an abuse of discretion.

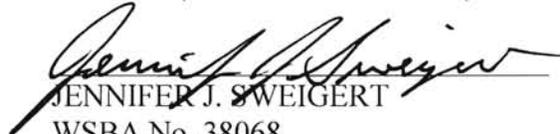
D. CONCLUSION

For the foregoing reasons, Hopper asks this Court to reverse his conviction or, in the alternative, vacate the unauthorized condition of community custody.

DATED this 29<sup>th</sup> day of September, 2014.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71799-5-1
	)	
ERIC HOPPER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC HOPPER 304073  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2014.

x Patrick Mayovsky

2014 SEP 29 PM 4:12  
COURT OF APPEALS  
STATE OF WASHINGTON