IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DERRICK LANG HUNTER, Appellant.	No. 38828-6-II ORDER AMENDING UNPUBLISHED OPINION AND OTHERWISE DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's August 6, 2010 opinion. Upon consideration, the Court denies the motion.

We amend the unpublished opinion filed August 6, 2010, in this case as follows:

On page 6 of our opinion, third full paragraph, fifth line, we delete the words "at length" so that the second full sentence now reads: "At Hunter's sentencing hearing, both parties argued their respective positions, including the statutory comparisons."

It is so **ORDERED**.

DATED this _____ day of _____, 2010.

Hunt, P.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. Derrick Lang Hunter, Appellant.	No. 38828-6-II UNPUBLISHED OPINION

Hunt, J. — Derrick Lang Hunter appeals his exceptional sentence and bench trial convictions for one count of failure to register as a sex offender and four counts of communication with a minor for immoral purposes. He argues that the trial court erred in imposing the exceptional sentence because it failed to classify his prior Oregon felony convictions properly by comparing their elements to Washington felony offenses. In his Statement of Additional Grounds (SAG),[1] Hunter asserts that (1) the evidence is insufficient to prove that his communications with three of the four victims (counts III, IV, VI) were for purposes of a sexual nature; (2) the evidence is insufficient to prove that he communicated with a minor for immoral purposes (count V) because the fourth victim did not identify him; (3) he received inadequate

[1] RAP 10.10.

notice of his obligation to register as a sex offender; (4) the trial court erred by allowing the State to amend the charging information one day before trial; (5) the search warrant affidavit was deficient and failed to establish probable cause; and (6) defense counsel rendered ineffective assistance by failing to make a hearsay objection. We affirm.

FACTS[2]

I. Crimes

In both 1990 and 1997, the State of Oregon convicted Derek Lang Hunter of first degree sex abuse. In both 1992 and 2005,[3] the State of Oregon notified Hunter about his obligation to register as a sex offender and that if he moved from Oregon, he should contact the appropriate state agency about that state's registration requirements. By 2008, Hunter relocated from Oregon to Washington, but he failed to register with the State of Washington as required.

In May 2006, DML,[4] a 15-year-old female, was at the Tacoma Mall with a friend. Thirty-seven-year-old Hunter approached her and asked if she had done any modeling. When DML responded, "No," Report of Proceedings (RP) at 276, Hunter told her that models made

[2] The trial court entered two sets of findings of fact and conclusions of law, one for Hunter's bench trial verdict and one for Hunter's exceptional sentence. We derive these facts from the trial court's unchallenged findings of fact following Hunter's bench trial.

Hunter challenges two of the trial court's findings of fact concerning his exceptional sentence, and one of the trial court's conclusions of law regarding his exceptional sentence. He does not challenge the other findings, which we accept as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820 (1969)).

[3] Although not part of the trial court's findings of fact, Hunter concedes in his SAG that he received such notice in 2005.

[4] Under RAP 3.4, we use the juveniles' initials throughout this opinion to protect their right to confidentiality.

thousands of dollars and could earn $500 as starting pay. He asked her to twirl around for him; asked what size pants, shirt, bra, and underwear she wore; and asked whether she was a virgin. Hunter told her that he had a studio at his house where he photographs models, and he offered to take her there. He asked for her phone number, and she gave him her mother's cell phone number. DML wanted to speak to her mother before accepting any modeling opportunity. But Hunter told her not to tell anyone about the opportunity and that, because of the money involved, it was a secret job.

In late September, early October, SP, a 16-year-old female, was meeting with friends outside a Lakewood K-Mart store when Hunter approached her. Using a false name, Hunter mentioned that he was compiling and advertising a catalogue and that he wanted SP to pose for the catalogue at his studio. She refused to take the business card he offered. Hunter then asked SP sexually suggestive questions[5] and asked her to twirl and then to bend over. She refused and walked away.

After school one day in November, Hunter approached MO, a 15-year-old female, inside the library near her Clover Park High School. Using a false name, he claimed to be involved in the modeling industry, showed her photographs of woman modeling lingerie, asked whether she was a virgin, and told her that "to lose [her] virginity would make [her] hips right." RP at 378. When MO explained that she did not want to get pregnant, Hunter then used his fingers to demonstrate that if the man inserted his penis just slightly then she would not get pregnant.

[5] These questions included the following: "[H]ave you ever kissed a girl?" "What is your bra size?" "Would you pose in undergarments?" "Have you posed in a catalogue before?" CP at 148, Finding of Fact IV.

Hunter and MO agreed to meet the following day to discuss further the modeling business. Hunter cancelled this meeting.

After school one day in January 2007, Hunter approached AS, a 15-year-old female, inside the same library where he had approached MO. He asked if she had ever modeled or wanted to model, offered to show her photographs from a modeling website, and said that he had modeling photographs in his car if she wanted to see them. AS refused. When Hunter asked for her phone number, she gave him a false one. Hunter told her that she could make $500 for a modeling interview and as much as $5,000 for a photo shoot. AS again declined the offer. Hunter then told her she had "nice hips and nice thighs," RP at 316, and asked if she would stand up so he could look at her figure. AS declined to stand up.

After at least one of Hunter's victims approached officials, Clover Park High School teachers warned their classes about "a man going around asking girls to do modeling for him." RP at 286-87. Shortly after, police asked the victims for statements. Looking at a police photo montage, DML, MO, and AS each identified Hunter as the person who had approached them. SP chose no one from the montage.

II. Procedure

The State charged Hunter with one count of failure to register as a sex offender (RCW 9A.44.130), four counts of communication with a minor for immoral purposes (RCW 9.68A.090), and other charges not relevant to this appeal.[6]

[6] The State filed its original information on January 31, 2007. On February 27, 2007, the State obtained a warrant to search Hunter's residence. The State filed its "Amended Information" on September 4, 2007. CP at 3.

DML, SP, MO and AS each testified at Hunter's July 2008 bench trial. All except SP, who was "not sure," positively identified him in court. RP at 425. Hunter did not object to a police detective's testimony about results from an internet-based data search that ultimately led to Hunter. Hunter did not testify. The trial court found Hunter guilty of failure to register as a sex offender and of all four counts of communication with a minor for immoral purposes.

Sentencing memoranda from the State and Hunter discussed the comparability of Hunter's five prior Oregon felony convictions with Washington felonies, which prior convictions Hunter did not contest. The State argued that the elements of Hunter's Oregon felonies corresponded to the elements of comparable Washington felonies. Hunter argued that the felonies were not comparable. The trial court agreed with the State's comparability analysis and used Hunter's Oregon felonies to calculate his offender score.

The State also argued that the trial court should impose an exceptional sentence under RCW 9.94A.535(2)(c) because Hunter's offender score was so high that some of his current offenses would go unpunished.[7] The State asked for an exceptional sentence of 252 months.[8] Hunter asked for a standard range sentence of 60 months, with the sentences for all counts to run concurrently. The trial court imposed an exceptional sentence totaling 120 months of

[7] The State argued that Hunter had 13 offender points from prior offenses and 12 points from current offenses, yielding an offender score of 25. Offender points above 9 do not result in a higher standard sentencing range. *See* RCW 9.94A.510.

[8] According to the State, each of Hunter's four counts of communication with a minor for immoral purposes carried a standard range of 60 months confinement. The State asked for 60 months on each conviction (the standard range), plus 12 months for Hunter's failure to register, each running consecutively to the others, resulting in a total of 252 months.

confinement.[9] Hunter appeals his convictions and his exceptional sentence.

[9] The trial court imposed the following sentences for the following counts: Count II, 12 months; Count III, 60 months; Count IV, 60 months; Count V, 60 months; and Count VI, 60 months. The trial court ran the sentences for II, III, IV, and V; it ran the sentence on VI consecutively.

ANALYSIS

I. Classification of Out-of-State Offenses

Hunter argues generally that the trial court failed to classify his out-of-state offenses properly under RCW 9.94A.525(3), for purposes of calculating his offender score for sentencing. Br. of Appellant at 9. Hunter generally alludes to the superior court's failure to "compar[e] . . . elements of potentially comparable Washington crimes," Br. of Appellant at 9, but he fails to specify how the trial court erred. This argument fails.

When a defendant has prior convictions for out-of-state criminal offenses, the trial court must classify them by comparing them to offenses under Washington law. RCW 9.94A.525(3); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). To conduct such comparability analysis, the trial court compares the elements of the out-of-state offense with the elements of the Washington criminal statutes in effect when the defendant committed the out-of-state offense. *Morley*, 134 Wn.2d at 605-606. *See also In re the Pers. Restraint of Crawford*, 150 Wn. App. 787, 209 P.3d 507 (2009).

Both Hunter's and the State's sentencing memoranda compared in detail Hunter's Oregon convictions under Oregon Revised Statutes (ORS) 163.425 and ORS 163.305(6) with Washington felonies under former RCW 9A.44.100(1) (1986) and former RCW 9A.44.100(2) (1986), element-by-element. At Hunter's sentencing hearing, both parties argued their respective positions at length, including the statutory comparisons. The crux of Hunter's argument at sentencing was that the Oregon statute did not have a *mens rea* that was comparable to Washington's former indecent liberties statute, former RCW 9A.44.100 (1986), or the then

current child molestation statutes, RCW 9A.44.083 and RCW 9A.44.086. The State pointed out that the Oregon statutes and case law required the element of intent and, therefore, the offenses were comparable.

It is clear from the record that the trial court read the parties' detailed sentencing memoranda and was familiar with the issues presented. After hearing argument, the trial court indicated that it agreed with the State's memorandum and argument outlining the basis for an exceptional sentence and its recitation of the law as it related to the case.[10] Thus, contrary to Hunter's assertion, the record shows that the trial court conducted the required comparability analysis.

II. SAG

A. Sufficiency of Evidence

In his SAG, Hunter challenges the evidence as insufficient to support his convictions for his communications-with-a-minor convictions. More specifically, he asserts that the State failed to produce sufficient evidence to prove that he communicated with his minor victims for immoral purposes of a sexual nature in Counts III, IV and VI. For Count V, he argues that the evidence is insufficient to show that he was the perpetrator. Hunter's challenges to the evidence fail.

[10] Hunter argues that the trial court erred in its comparability analysis. But he fails to specify how, and he fails to provide meaningful "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record," as RAP 10.3(a)(6) requires. Thus, we do not further consider this argument. *See also Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.") (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992), *review denied*, 135 Wn.2d 1015, 966 P.2d 1278 (1998).

A person commits the crime of communication with a minor for immoral purposes when he or she communicated with a minor "for immoral purposes of a sexual nature." *State v. McNallie*, 120 Wn.2d 925, 930, 846 P.2d 1358 (1993); RCW 9.68A.090(1). The test for determining the sufficiency of the evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). We draw all reasonable inferences from the evidence in favor of the State and interpret it most strongly against the defendant. *Gentry*, 125 Wn.2d at 597. There is sufficient evidence to support the element that Hunter communicated with his minor victims "for immoral purposes of a sexual nature." *McNallie*, 120 Wn.2d at 930.

Evidence adduced at trial showed that while at the mall, Hunter asked DML if she had ever modeled, whether she had ever had sex, and what size bra and underwear she wore. He then asked her to "twirl in a circle," RP at 277. Taken in the light most favorable to the State, this evidence is sufficient to show that Hunter communicated with DML for purposes of a sexual nature, Count IV.

Similarly, the evidence showed that Hunter approached MO at the library, showed her photographs of women modeling lingerie, then asked her whether she was a virgin. He then told her that "to lose [her] virginity would make [her] hips right." RP at 378. When MO explained that she did not want to get pregnant, Hunter used his fingers to demonstrate that if the man inserted his penis just slightly, then she would not get pregnant. The evidence also showed that Hunter approached AS at the library, asked her if she was interested in modeling, told her she had

"nice hips and nice thighs," RP at 316, and asked if she would stand up so he could look at her figure. Taken in the light most favorable to the State, the evidence is sufficient to show that Hunter communicated with both MO and AS for purposes of a sexual nature, Counts III and VI, respectively.

And although SP failed to identify Hunter, either by photo montage or in court, as the man who had approached her, SAG at 3, the circumstantial evidence, taken in the light most favorable to the State, is sufficient to show that it was Hunter who approached SP. Specifically, SP testified that (1) a male of "African-American mix," RP at 412, approached her, inviting her to model for a catalog he was putting together; (2) he attempted to offer her a business card, which she refused, then asked her bra size and whether she had ever had sex, kissed a girl, or posed in a catalog; (3) he then asked her if she could bend over so he could look at her figure; and he asked for her phone number. All of this evidence—the targeted female teen, the modeling agent pretense, the promise of money, the offer to photograph, the questions about sexual history, the request to bend over, and the request for a phone number—is consistent with the ruse Hunter used with the other victims. Under ER 404, "Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity."

Moreover, circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). And it is not necessary that circumstantial evidence exclude "every reasonable hypothesis consistent with the accused's innocence [but only] that the

trier of fact is convinced beyond a reasonable doubt that the defendant is guilty." *State v. Isom*, 18 Wn. App. 62, 66, 567 P.2d 246 (1977) (citing *Gosby*, 85 Wn.2d 758). Taken in the light most favorable to the State, this evidence is sufficient to show that it was Hunter who approached SP. *See State v. Valencia*, 148 Wn. App. 302, 315-16, 198 P.3d 1065 (2009) (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)), *review granted*, 166 Wn.2d 1010 (2009).

B. Failure to Register as a Sex Offender

Hunter next challenges the "knowing" element of his conviction for failure to register as a sex offender. He argues that the State of Oregon's 2005 notice to contact "the appropriate agency" in Washington upon relocating there, SAG at 6 (quoting Aug. 15, 2005 notice), was [in]adequate[11] because (1) it failed to direct him "who the appropriate agency is and . . . where and how to contact the appropriate agency," SAG at 7; and (2) he would have to "go on a treasure hunt to find the appropriate agency to contact." SAG at 7. This challenge also fails.

RCW 9A.44.130(11)(a) makes it a crime for a convicted sex offender to "*knowingly* fail[] to [register]." (Emphasis added). "Lack of notice of the duty to register constitutes a defense to the crime of knowingly failing to register as a sex offender." *State v. Clark*, 75 Wn. App. 827, 832, 880 P.2d 562 (1994). First, the record shows that Hunter had notice of his duty to register—he acknowledges the State of Oregon's 2005 notice. And the trial court found that he also had received similar notification in 1992.[12] Second, Hunter had multiple avenues for

[11] Hunter actually says such notice was "adequate," SAG at 6, but we presume this was in error and he intended to say *inadequate*.

[12] We treat this unchallenged finding as a verity on appeal. *Hill*, 123 Wn.2d at 644 (citing *Riley*, 76 Wn.2d at 33).

obtaining the information he needed to register in his new community. He cannot nullify his duty to register simply by choosing to avoid these avenues. We hold that Hunter has failed to demonstrate that he received inadequate notice of his duty to register; thus, he has not established a defense to this charged crime.

C. Amending Information

Hunter also asserts that the trial court prejudiced his case by allowing the State "to amend the information one day before trial," which "surprised" defense counsel and made his case "more complex." SAG at 1. It is unclear to which amendment Hunter refers. The record shows that the State filed its last "Amended Information" in September 2007. CP at 3. But Hunter's bench trial began more than ten months later in July 2008. We find nothing in the record to support Hunter's assertion that the trial court allowed an amendment the day before trial.

Assuming that Hunter is referring to this September 2007 amended information, filed over ten months before his trial, he fails to show the prejudice that he alleges. On the contrary, this amended information contains each offense of which he was ultimately convicted. Moreover, nothing in the record suggests that any amendment of the information necessitated a continuance to allow for further preparation or that the trial court denied such a request.

D. Search Warrant Affidavit

Hunter next asserts that (1) the trial court "improperly relied on information not contained in the [search warrant] affidavit of probable cause to conclude probable cause and a valid nexus existed to support the [search] warrant," SAG at 4; (2) the affidavit failed to explain "how discovering the photo studio or photo's [sic] in the residence and vehicle would link [Hunter] to

the crime," SAG at 4; and (3) the trial court "improperly relied on a child pornography profile to find a nexus in the search warrant." SAG at 4. These challenges also fail.

We do not address the first challenge because Hunter fails to identify the "information" on which the issuing court relied that the affidavit of probable cause lacked. RAP 10.10(c) provides: "[T]he appellate court will not consider a[n] . . . appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors."

As for Hunter's second challenge, we review an issuing court's issuance of a search warrant for abuse of discretion:

> Issuance of a warrant is a matter of judicial discretion and is, therefore, reviewed under the abuse of discretion standard . . . . [Appellate courts] accord great deference to the issuing magistrate's determination of probable cause and resolve any doubts in favor of the validity of the warrant.

State v. Olson, 73 Wn. App. 348, 354, 869 P.2d 110 (1994) (citing *State v. Kalakosky*, 121 Wn.2d 525,531, 852 P.2d 1064 (1993); *State v. Remboldt*, 64 Wn. App. 505, 509, 827 P.2d 282 (1992)). Hunter fails to show that the issuing court abused its discretion in issuing the search warrant. On the contrary, the search warrant affidavit explains how discovering a photo studio or photographs in Hunter's residence and vehicle would link Hunter to the charged crimes: Hunter's crimes involved "present[ing] himself as a modeling agent" to numerous victims, CP at 63, and "show[ing] [victims] explicit photos of either naked girls or girls dressed in sexually provocative lingerie." CP at 64. Moreover, the affidavit stated that one victim claimed the photographs Hunter displayed "did not look professional but rather home based photos," CP at 64, and that Hunter had told another victim that his studio "was out of his home." CP at 64. Probable cause

supports the search warrant; thus, Hunter's argument that the issuing court abused its discretion in issuing it fails.

With respect to Hunter's third challenge, that the trial court improperly relied on a child pornography profile to find a nexus in the search warrant, the affidavit does not mention child pornography as Hunter alleges. The record thus does not support Hunter's allegation of trial court error in this regard.

E. Effective Assistance of Counsel

Hunter next argues that his defense counsel denied him effective assistance by failing to make hearsay and "best evidence," SAG at 5, objections when a police detective testified for the State about results he obtained from an internet-based data search, which ultimately led to Hunter, without "providing the physical item itself," namely, the computer printouts. SAG at 5. Even assuming, without deciding, that the detective's testimony constituted impermissible hearsay and was not "the best evidence," this argument fails.

To prove ineffective assistance of counsel, Hunter must show that (1) counsel's performance was deficient, and (2) that this deficient performance prejudiced the outcome of his case. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To satisfy the prejudice prong, Hunter must show there is a reasonable probability that, except for defense counsel's error, the result of the proceeding would have differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). But "[c]ounsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions"; and we presume that a failure to object constituted a legitimate

strategy or tactic. *State v. Johnston*, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007) (citing *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989)). Hunter fails to meet his burden of "demonstrat[ing] an absence of legitimate strategy or tactics in failing to object." *Johnston*, 143 Wn. App at 21. Thus, Hunter fails to satisfy the deficiency prong of the test.

Moreover, although Hunter vaguely asserts that the detective's testimony "violated [the best evidence rule] denying [Hunter] a fair trial," SAG at 5, he fails to explain adequately how defense counsel's failure to object prejudiced the outcome of his case. On the contrary, as we have just explained in the earlier section outlining the sufficient evidence to support each of the communications with a minor convictions, nothing in the record or in Hunter's argument persuades us that the outcome of the case would have differed but for this alleged failure by counsel.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.