# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON , | ) | No. 67564-8-1 |
| Respondent, | ) | |
| | ) | DIVISION ONE |
| v. | ) | |
| | ) | UNPUBLISHED OPINION |
| STEVEN RICHARD HOOPER, | ) | |
| | ) | |
| Appellant. | | FILED: February 6, 2012 |
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Appelwick, J. — Hooper appeals his conviction and sentence for two counts of child molestation in the second degree and one count of communication with a minor for immoral purposes. He argues he was denied his constitutional rights to confront and cross-examine the victim, M.M. on matters affecting her credibility and bias. He argues he received ineffective assistance of counsel, based on the failure to object to certain testimony. He also argues the trial court erred by admitting M.M.'s prior recorded statement. Finally, Hooper argues the trial court miscalculated his offender score by concluding the first child molestation charge was not the same criminal conduct as the communication with a minor charge. Finding no error, we affirm.

## FACTS

Steven Hooper and M.M. met in 2008, when she was 11 or 12 years old. At trial, Hooper testified M.M. lied about her age when they first met; he believed she was 15 at that time, in part because she spent a lot of time with another girl, B.G., who Hooper knew to be 15. M.M. testified she never lied to Hooper about

her age. M.M. and Hooper eventually exchanged phone numbers, began spending time together, and struck up a romantic relationship. Hooper would visit M.M. at the house where she was living with B.G. and others.

Late at night on February 25, 2010, M.M., B.G., and another friend were hanging out in a park. M.M. texted Hooper and invited him to join them. They exchanged text messages, and Hooper initially said he could not come, because he was putting his son to sleep. One of his texts indicated he wanted to see her because "I want to fuck." Hooper later drove to the park in his van to join M.M. and her friends. Hooper parked next to the vehicle that M.M. and her friends were in, and joined them for a little while. Eventually, Hooper left their vehicle and went back to his van. M.M. then followed Hooper into his van. She asked Hooper to give her a backrub. He gave her a backrub and also touched the top half of M.M.'s breasts over her clothes. At that point, patrol officer David Sims noticed the two vehicles and approached them. Hooper exited the van quickly, closed the door and contacted the officer. Hooper denied that anyone else was in the van, but Officer Sims told him he had already seen a second person. M.M. then exited the van and spoke with Officer Sims.

Another responding officer, Officer Mary Humphrey, spoke with M.M. in the early morning hours of February 26, 2010, both at the scene and at the police department. Officer Humphrey recorded the conversation, and the police department made a transcript of the audio recording. M.M. was emotional, crying at times and laughing shortly thereafter. M.M. initially denied that

anything happened in the van. But, she eventually admitted that Hooper had given her a backrub and touched the top half of her breast. At trial, M.M repeated this testimony. She also testified that at an earlier date, while lying on her bed in B.G.'s room, Hooper had rubbed her inner thigh. The touching on the bed happened after M.M. believed she and Hooper had begun dating, but before the subsequent touching in the van.

The State charged Hooper with two counts of child molestation in the second degree and one count of communication with a minor for immoral purposes. The State alleged counts one and three occurred on or about and between February 25 and February 26, 2010. Hooper's date of birth is June 26, 1986. M.M.'s date of birth is April 8, 1996. Hooper pleaded guilty to the communication with a minor count by way of an Alford plea. A jury trial was held on July 14 and July 15, 2010. Jury instruction 12 addressed Hooper's affirmative defense, providing in relevant part:

> It is . . . a defense to the charge of child molestation in the second degree that at the time of the acts the defendant reasonably believed that [M.M.] was at least fourteen years of age, or was less than thirty-six months younger tha[n] the defendant, based upon declarations as to age by [M.M.].
>
> The defendant has the burden of proving this defense by a preponderance of the evidence.

The jury found Hooper guilty on the two counts of child molestation.

## ANALYSIS

### I. Right to Confront and Cross-examine Adverse Witnesses

Hooper contends the trial court abused its discretion and violated his right to confront M.M. when it granted the State's motions in limine limiting the scope of his cross-examination of M.M. Hooper alleged M.M. had previously lied about her age to other people, that she had a fake identification, that she misrepresented her age on her MySpace page, and that she had gotten three other men in trouble because of her age. The trial court ruled questions or testimony on these allegations would be excluded. Hooper's affirmative defense required him to show M.M. misrepresented her age to him. He argues this impeachment evidence should have been admissible and was necessary to cast doubt on M.M.'s credibility, particularly in light of the absence of other impeachment evidence.

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Const. art. 1, § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). The right to cross-examine an adverse witness is not absolute, however. Darden, 145 Wn.2d at 620. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. Id. at 620-21. Such determinations are limited by general considerations of relevance. Id. at 651; see ER 401, 403. A defendant's right to introduce relevant evidence must also be balanced against the State's interest in

precluding evidence so prejudicial as to disrupt the fairness of the trial. Darden, 145 Wn.2d at 621. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Even where the evidence is of minimal relevance, it may be excluded if the State's interest in applying the rape shield law is compelling in nature. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). Washington's rape shield statute provides that evidence of a victim's past sexual behavior may not be admitted on the issue of the victim's credibility. RCW 9A.44.020(2). Additionally, when attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608. At the discretion of the trial court, a witness may be impeached on cross-examination with specific instances of conduct, if that conduct is probative of the truthfulness of the witness. ER 608(b).

In granting the State's motion in limine, the trial court stated that Hooper could only question M.M. regarding what representations she made specifically to him, not to prior men or to other people in the community. It concluded, in essence, that this line of questioning was not relevant, since it did not help establish what M.M. had represented to Hooper regarding her age. But, the prior conduct of M.M., while not relevant to Hooper's reasonable belief about M.M.'s age, was relevant to attacking her credibility and at least somewhat probative of her truthfulness. ER 608. Nevertheless, the trial court was within its discretion when it restricted cross-examination. Even where evidence is

minimally relevant, it must be balanced against the possibility for prejudice, and may be excluded under the rape shield statute as well. Here, the allegation that M.M. had gotten other men into trouble constituted evidence relating to her past sexual history. Hooper suggests M.M. may have caused this trouble simply by "staying out late or by traveling out of state without her parents' consent." But, the clear implication of this allegation is that the other men had gotten into trouble based on her young age and based on some improper sexual contact. The trial court did not abuse its discretion by deeming such testimony inadmissible, in light of the rape shield statute.

Turning next to the allegations that M.M. misrepresented her age to other people and possessed a fake I.D., while it is true that such allegations would be probative of her credibility and truthfulness, the trial court concluded they would amount to testimony about prior bad acts. Under ER 402 and 403, a trial court may exclude even probative evidence if its probative value is outweighed by the danger of unfair prejudice. Here, the trial court was within its broad discretion in excluding this line of questioning. The potential prejudice inherent in these allegations would have outweighed the probative value in attacking M.M.'s credibility. As the State points out, this is particularly true where there was other impeachment evidence available to Hooper. For example, M.M. admitted to initially making false statements to police officers in regards to the molestation in the back of the van. Hooper had other options to impeach M.M.'s credibility that had stronger foundation and were less prejudicial. We hold Hooper's

constitutional rights to confront and cross-examine his accuser were not violated.

II. Ineffective Assistance of Counsel

Hooper argues he received ineffective assistance of counsel, based on to two instances where his trial counsel failed to raise objections to certain testimony. He points first to testimony from M.M.'s friend, B.G., relating to two of Hooper's best friends and witnesses, Terrance Larr and Jessie Thomas. B.G. testified that both Larr and Thomas knew M.M.'s true age. Hooper contends that because Larr and Thomas were such close friends of his, the implication of B.G.'s testimony was that Hooper should also have known M.M.'s true age.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). And, under the prejudice prong, a defendant must show a reasonable probability that, but for counsel's error, the result would have been different. Id. at 334-35.

Hooper argues the prosecutor did not establish a proper foundation for

B.G.'s testimony, since B.G. did not provide a basis for knowing about Larr and Thomas's awareness of M.M.'s age. He contends the failure to object prejudiced and undermined his affirmative defense. A party seeking to admit evidence bears the burden of establishing a foundation for that evidence. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Contrary to Hooper's argument, however, B.G. did establish proper foundation for how she would know about Larr and Thomas's awareness of M.M.'s true age. B.G. and Larr dated for approximately two years, and B.G. testified that during that time Larr and M.M. hung out. She also testified to knowing Thomas for most of her life. She stated that both witnesses knew M.M. pretty well and knew how old she was. Where an objection would not have been sustained, it was not deficient performance for Hooper's trial counsel not to object. Hooper also alleges prejudice and asserts there is a reasonable probability than an objection would have led to a different outcome at trial, but fails to support this assertion with argument or citation to the record. And, both Larr and Thomas subsequently took the stand. Hooper's attorney had the opportunity to question both of them, mitigating any potential impact that B.G.'s testimony may have had on the jurors.

Hooper next argues his counsel was ineffective for failing to object to evidence that he left his young child at home when he went to meet M.M. at the park. This evidence was raised on two occasions: first during Hooper's direct examination and again on cross-examination. During direct examination, Hooper's attorney appeared to deliberately elicit this testimony:

> A [M.M.] wanted me to go over to the park over there because she was having some problem -- some household problems.
>
> Q Did you have -- were you able to go over there as requested? Did you have something that prevented you from doing that?
>
> A For one I was putting my son down for bed and for two I didn't really have enough gas, but she said it was kind of an emergency to go over there.

Hooper contends this evidence of leaving his son was irrelevant under ER 401, and that his counsel should have sought an order excluding it. He contends there was no legitimate strategic reason for this evidence to be presented to the jury. But, looking at Hooper's testimony in context, it is clear that his counsel did have a legitimate strategic reason for this inquiry. Hooper argues this evidence reflects negatively on him, showing a lack of judgment on his part that he alleges prejudiced the jurors against him. But, it is just as possible to read his testimony in a more positive light. He did not immediately go to join M.M. at the park, but did so only after taking care of his child. According to his own testimony, he also went to the park at least in part out of a desire to help M.M. with an emergency. Here, Hooper has not met his burden of demonstrating there was no legitimate strategic or tactical reason for the challenged conduct. Thus, he has not demonstrated his counsel was deficient.

Hooper raises two additional arguments, in his pro se statement of additional grounds, to support his assertion of ineffective assistance of counsel. He argues first that his attorney failed to elicit testimony from him about the timing of the earlier molestation. But, this argument, even if true, does not

establish that there was any resulting prejudice. Even if Hooper had been allowed, on the record, to narrow down the dates of the earlier crime, he does not demonstrate how such testimony would have helped him prove his innocence.

Second, Hooper contends his attorney failed to raise the fact that when Hooper left his son on February 25, 2010 to join M.M. at the park, he did not leave him unattended but left him with his grandmother. He suggests that since this was ambiguous, he looked worse in the jurors' eyes. But, to evaluate whether this constituted ineffective assistance would require us to inquire into evidence not contained in the record. We may not consider additional evidence not presented at trial. RAP 9.1.

Hooper fails to prove ineffective assistance of counsel.

III. Prior Recorded Statements

Hooper argues the trial court erred by admitting M.M.'s recorded statement under ER 803(a)(5). ER 803(a)(5) provides an exception to the hearsay rule for the admission of recorded recollections under certain conditions.

> Admission is proper when the following factors are met: (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 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 Wn. App. 173, 183, 215 P.3d 251 (2009), review denied, 168

Wn.2d 1015, 227 P.3d 852 (2010). The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. Id.

Hooper contends the prosecution failed to establish both the second and the fourth factors. We disagree. M.M. had difficulty testifying during trial. She frequently answered questions in both direct and cross-examination with the answer that she did not know or could not remember. She also testified she could not remember some details of the night at the park because she had tried to put it out of her mind; thinking about it made her cry. She could not recall what had happened in the back of the van that night. When the prosecutor showed M.M. the transcript of the statement she had given to Officer Humphrey, she agreed she had given the statement when events were fresh in her mind. She conceded she was not initially forthcoming or truthful in answering some of Officer Humphrey's questions. But, she testified that she eventually told Officer Humphrey the truth. And M.M. stated the transcript of her taped statement was accurate. Given M.M.'s testimony, it was apparent that she did not have an adequate recollection to be able to testify fully and accurately. And, while M.M. gave contradictory statements and was not initially truthful, she admitted as much in her testimony at trial and this does not negate the fact that the transcript accurately reflects her prior knowledge.

The totality of the circumstances support the trial court's ruling that M.M. had an insufficient recollection to provide truthful and accurate testimony, and that the recorded transcript reflected her prior knowledge accurately. The trial

court did not abuse its discretion in admitting M.M.'s prior recorded statement.

IV. Sentencing

Hooper argues the trial court miscalculated his offender score. He contends his offense of communication with a minor for immoral purposes was the same criminal conduct as his first count of child molestation in the second degree, from that same date. His offender score was calculated as a seven, but he argues it should have been a four, if counts one and three were treated as same criminal conduct. We review a trial court's determination on what constitutes same criminal conduct for abuse of discretion or misapplication of the law. State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999).

Under RCW 9.94A.589(1)(a), multiple current offenses encompassing the same criminal conduct are counted as one crime in determining the defendant's offender score. For multiple crimes to be the same criminal conduct, they must be (1) committed at the same time and place; (2) involve the same victim; and (3) involve the same objective criminal intent. Id.; Tili, 139 Wn.2d at 123.

Hooper pleaded guilty, via an Alford plea, to the third count of communication with a minor for immoral purposes. That count stemmed from a text message Hooper sent to M.M. on the night of February 25, 2010, before he went to join her at the park. The message said, "I want to fuck." When Hooper sent the message, he was at his home. M.M. was texting with Hooper from a vehicle at the park. The conviction for the first count of child molestation in the second degree arose from Hooper's actions later in the night, after he drove to

the park, spent some time with M.M. and her friends in their vehicle, returned to his van, and eventually was joined by M.M.

It is undisputed that both of these offenses involved the same victim. Hooper argues the two crimes also satisfy the other criteria of RCW 9.94A.589(1)(a). He asserts they were committed at the same time and place, and that they involved the same criminal intent. In support of his argument that the offenses occurred at the same time and place, he relies on two cases: State v. Miller, 92 Wn. App. 693, 964 P.2d 1196 (1998) and State v. Taylor, 90 Wn. App. 312, 950 P.2d 526 (1998).

In Miller, the defendant assaulted an officer while struggling to take the officer's gun. 92 Wn. App. at 708. He was charged and convicted of both assault in the third degree and attempted theft of a firearm. Id. at 706. The two offenses occurred at the exact same location and the exact same point in time. Id. The Court of Appeals held the offenses encompassed the same criminal conduct. Id. at 708-09. In Taylor, the defendant was convicted of two offenses—kidnapping and assault—that the Court of Appeals held were same criminal conduct. The court noted both crimes happened at the same time and place and involved the same victim, and focused exclusively on the issue of whether the offenses shared the same intent. Taylor, 90 Wn. App. at 321. Hooper's reliance on these two cases is misplaced and the facts of his case are plainly distinguishable. While the two crimes in Miller and the two crimes in Taylor occurred simultaneously, several hours transpired between when Hooper

sent the text message to M.M. and when he subsequently molested her in his van. He also committed the crime of communication with a minor for immoral purposes from his home, where he sent the text message to M.M. The molestation occurred at Riverside Park.

Hooper acknowledges the two crimes did not occur simultaneously, but states they occurred at the same general time for purposes of this analysis. He also contends that while the text message he sent to M.M. originated at a different location, she received it at the park, such that the crime of communication with a minor for immoral purposes occurred at the same time and place as the molestation in his van. We reject these arguments. Hooper's offenses fail to satisfy the same time and place component. We need not reach his argument on same objective criminal intent. Accordingly, his two offenses did not constitute the same criminal conduct. We hold the trial court did not abuse its discretion in calculating Hooper's offender score.

We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

Becker, J.