Supreme Court No. 95869-6
COA No. 75652-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN SCOTT GEHR,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Ryan Scott Gehr requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Gehr, No. 75652-4-I, filed April 16, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. To prove the crime of child molestation, the State was required to prove beyond a reasonable doubt that Gehr touched the sexual or other intimate parts of a person for the purpose of gratifying his sexual desires. Did the Court of Appeals err in holding the State proved this essential element, where the evidence showed any touching was unintentional on Gehr's part?

2. A trial court must grant a new trial if the defendant produces newly discovered evidence that is material to the verdict. Here, after the trial, Gehr produced a new statement from the complaining witness explaining that the touching was her idea, that it was unintentional and undesired on Gehr's part, and that when she touched him, he told her to stop immediately. Given that this newly discovered evidence was material to the question whether Gehr touched her for the purpose of

his sexual gratification, did the Court of Appeals err in affirming the trial court's decision to deny the motion for a new trial?

C. STATEMENT OF THE CASE

Ryan Gehr lived in Blaine with his fiancée Courtney Blomeen and their five-year-old daughter S.G. RP 325. Gehr was a good father but a little strict. RP 327. S.G. "ha[s] a problem fibbing" and Blomeen and Gehr "were always trying to get her to tell the truth." RP 28.

Blomeen worked the night shift. RP 326. Gehr took care of S.G. while Blomeen was at work. RP 327. He was usually the one responsible for helping S.G. to take a shower. RP 357. The bathroom had only a small standup shower and no bathtub. RP 331.

One day, Blomeen was about to take a shower when S.G. asked if she could take a shower with her. RP 336. Blomeen asked S.G. why she would ask that. S.G. said "me and daddy take showers together." RP 336. She said she took a shower with Gehr and put soap on his "pee-pee" and washed it for him. RP 337.

Blomeen confronted Gehr. RP 338. He acted confused and angry. RP 339. He denied it. RP 359.

Blomeen took a video of S.G. on her cell phone. RP 339-40. On the video, in response to Blomeen's questions, S.G. said Gehr

"putted soap on his thingy" and then she washed it. RP 344. She said Gehr did not tell her to do it. RP 344.

Blomeen never saw Gehr shower with S.G. She was never in the bathroom when they supposedly showered together. RP 350-51.

The prosecutor arranged for an interview of S.G., which was recorded. RP 363-64, 374. In the interview, S.G. said "I washed my dad's pee-pee." RP 398. She said she "use[d] some soap and then I rub it on my dad's pee-pee." RP 402. She said it was her idea. RP 405, 421. She said, "My heart said it was a good idea." RP 406.

S.G. also said her mother was in the bathroom putting on makeup at the time and saw S.G. taking a shower with Gehr. RP 432.

Gehr was interviewed by the police. He said he did not take a shower with S.G. He said "he just put soap in her hand and he has her wash her privates." RP 461.

Gehr was charged with one count of first degree child molestation. The State alleged the crime occurred sometime between June 1, 2015, and March 10, 2016. CP 1.

At trial, S.G. testified "I washed my dad's private" with shampoo. RP 444. She said her mother told her to say the truth which

means that she touched her dad's privates. RP 453. She said her mother was in the bathroom with them at the time. RP 454.

Gehr testified he never directed S.G. to wash his penis. RP 484. He was shocked when Blomeen accused him of it. RP 478.

The jury was instructed they must find beyond a reasonable doubt that Gehr had "sexual contact" with S.G. CP 96. They were further instructed that "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP 97.

During deliberations, the jury submitted a written inquiry asking the judge to define or clarify the phrase "for the purpose of gratifying sexual desires" CP 103. The court did not clarify the phrase but instead directed the jury to "refer to the Court's instructions on the law." CP 102.

The jury found Gehr guilty as charged. CP 104.

After the verdict, Blomeen contacted defense counsel and said she had new information that she felt compelled to disclose. CP 109. She said she had asked S.G. again what happened. S.G. repeated her earlier claim "that she was in the shower and she washed her dad's pee pee." CP 154. She also reiterated that it was her idea. This time, she

clarified that Gehr told her to stop "right away." CP 154. He did not want her to do it. She said "she did it and he told her to stop." CP 155.

Defense counsel filed a motion for a new trial pursuant to CrR 7.5. He argued S.G.'s statement to Blomeen in which she insisted Gehr did not want her to wash his penis and immediately told her to stop was new material evidence warranting a new trial. CP 105-08.

The trial court denied the motion, finding it was unlikely the new information would change the outcome of the trial. CP 149-51. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals erred in holding the State proved beyond a reasonable doubt that Gehr had "sexual contact" with S.G. because the evidence showed that any touching was unintentional on Gehr's part.

S.G. said repeatedly that Gehr did not tell her to wash his penis and that it was her idea to do so. RP 344, 405-06, 421, 444-45. Thus, the evidence shows Gehr did not intend for the touching to occur. It was not done for the purpose of gratifying his sexual desires. This is an essential element the State was required to prove beyond a reasonable doubt. The State's failure to prove the element requires reversal of the conviction and dismissal of the charge.

To prove child molestation, the State was required to prove beyond a reasonable doubt that Gehr had "sexual contact" with S.G. RCW 9A.44.083; CP 96 (to-convict instruction). "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP 97; RCW 9A.44.010(2).

Constitutional due process required the State to prove this element beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. The question on review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found this element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The offense of child molestation requires a showing that the touching was done for the purpose of sexual gratification because without that showing the touching may be inadvertent. State v. T.E.H., 91 Wn. App. 908, 916, 960 P.2d 441 (1998). In determining whether

the sexual contact element is satisfied, the Court looks at the totality of the facts and circumstances presented. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

Here, the facts and circumstances demonstrate that any touching was not done for the purpose of gratifying Gehr's sexual desires. The only evidence presented to prove sexual contact were S.G.'s statements. Yet S.G. said repeatedly and consistently that it was *her* idea to wash her father's penis. RP 344, 405-06, 421, 444-45. He did not tell her to do it. RP 344.

Therefore, the touching was not *purposeful* on Gehr's part. It was not done for the purpose of gratifying his sexual desires.

Moreover, there were reasons to doubt the accuracy of S.G.'s statements. S.G. "ha[s] a problem fibbing" and her parents "were always trying to get her to tell the truth." RP 28. She said Blomeen was in the bathroom putting on makeup when S.G. and Gehr took a shower together. RP 432, 454. But Blomeen directly contradicted that statement. RP 350-51. Also, the shower is very small with not enough room for two people to fit comfortably. RP 331. Gehr denied they ever took a shower together although he acknowledged he would help S.G. wash herself. RP 461, 480.

Contrary to the Court of Appeals' opinion, the State did not present sufficient evidence to prove beyond a reasonable doubt that Gehr had "sexual contact" with S.G. Therefore, the conviction must be reversed and the charge dismissed.

2. The Court of Appeals erred in upholding the trial court's decision to deny the motion for new trial because the newly discovered evidence seriously undermined the State's theory that Gehr purposely touched S.G. in order to gratify his sexual desires.

Contrary to the Court of Appeals' opinion, the trial court should have granted Gehr's motion for a new trial on the basis of newly discovered evidence. S.G. made statements to her mother after the verdict consisting of new information relevant to the element of sexual contact. The new statements established that Gehr did not want his daughter to touch his penis and immediately told her to stop when she did so. CP 154-55. This evidence seriously undermined the State's theory that the purpose of the touching was to satisfy Gehr's sexual desires. Fairness demands that Gehr be given a new trial so that the jury can hear this new information.

A trial court may grant a new trial on the basis of "[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at

the trial." CrR 7.5(a)(3). A new trial should be granted if the new evidence demonstrates "that a substantial right of the defendant was materially affected." Id.

A trial court's decision to deny a new trial is reviewed for abuse of discretion. State v. Larson, 160 Wn. App. 577, 586, 249 P.3d 669 (2011). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Id. That standard is satisfied if the court's decision rests on facts unsupported by the record or was reached by applying the wrong legal standard. Id.

The reviewing court gives less discretion to an order denying a new trial than to one granting a new trial. State v. Hawkins, 181 Wn.2d 170, 179, 332 P.3d 408 (2014).

A trial court should grant a new trial on the basis of newly discovered evidence if the defendant establishes the new evidence (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Mullen, 171 Wn.2d 881, 905-06, 259 P.3d 158 (2011).

In deciding whether the new evidence will probably change the outcome of the trial, the court considers the credibility, significance, and cogency of the proffered evidence. Larson, 160 Wn. App. at 587.

At trial and in her out-of-court statements, S.G. said repeatedly and consistently that it was her idea to wash her father's penis. RP 344, 405-06, 421, 444-45. After the verdict, she told her mother more details about what occurred. She said that when she started to wash Gehr's penis, he told her to stop "right away." CP 154. It seemed like he did not want her to do it. CP 155. "[S]he did it and he told her to stop." CP 155.

These statements are consistent with S.G.'s earlier testimony that the touching was her idea. But they are not merely cumulative of the earlier testimony. They provide additional information that the jury should have been allowed to hear. They are material because they seriously undermine the State's theory that Gehr wanted S.G. to touch him for the purpose of gratifying his sexual desires.

Moreover, the court had no reason to question the credibility of the new statements. If S.G.'s out-of-court statements prior to trial, and her testimony at trial, were credible, then her statements made to her mother after trial were just as credible. There is no suggestion that S.G.

fabricated the later statements. S.G. is only six years old. RP 325. It is likely she did not tell anyone earlier that Gehr had told her to stop immediately when she touched him because she did not realize it was relevant.

Contrary to the trial court's understanding, S.G.'s later statements are not inconsistent with her earlier statements. See CP 149-51. S.G. consistently maintained that the touching was her idea. RP 344, 405-06, 421, 444-45. Unlike recantation testimony, therefore, the new statements are not "inherently questionable." See State v. Macon, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996) ("Recantation testimony is inherently questionable.").

The new information is material and would probably change the outcome of the trail. The only evidence presented of "sexual contact" were S.G.'s statements. Yet the jury did not hear all of the relevant information about what actually happened. S.G.'s later statements clarify that Gehr did not initiate the touching, did not want it to happen, and tried to stop it immediately. CP 154-55. The new information seriously undermines the State's theory that the touching was done for the purpose of gratifying his sexual desires.

Moreover, the jury's inquiry during deliberations demonstrates the materiality of the new information. The jury asked the judge to clarify the meaning of the phrase "for the purpose of gratifying sexual desires" CP 103. This suggests the jury had doubts about whether the touching *was* for the purpose of gratifying sexual desires. It is reasonable to conclude that, if the jury had heard the new information, it would have reached a different verdict.

The new evidence is material. It affects Gehr's substantial right to proof beyond a reasonable doubt. Therefore, a new trial should have been granted. CrR 7.5(a)(3). The Court of Appeals erred in upholding the trial court's decision to deny the motion for a new trial.

E. CONCLUSION

For the reasons provided, this Court should grant review and order a new trial.

Respectfully submitted this 14th day of May, 2018.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RYAN S. GEHR, Appellant.	DIVISION ONE No. 75652-4-I UNPUBLISHED OPINION FILED: April 16, 2018

DWYER, J. – A jury found Ryan Gehr guilty of child molestation in the first degree. He appeals, contending that the evidence was insufficient to establish sexual contact and that newly discovered evidence warrants a new trial. We conclude that sufficient evidence supports the conviction and that the trial court did not abuse its discretion in denying a new trial. We accept the State's concession that the trial court lacked authority to impose a mental health evaluation as a condition of community custody. Accordingly, we affirm Gehr's conviction, but remand the matter to the trial court solely for the purpose of striking the unauthorized sentencing condition.

I

In March 2016, Courtney Blomeen lived in Blaine, Washington, with her fiancé Gehr and the couple's five-year-old daughter S.G.

On the morning of March 10, Blomeen returned from her nightshift job and prepared to take a shower. As Blomeen was about to enter the shower, S.G. asked, "can I take a shower with you?" Blomeen thought the question was "weird" because S.G. had never asked to do this before.

Blomeen decided to investigate further. At first, S.G. was reluctant to talk. After Blomeen assured S.G. that she was not mad and asked S.G. to just tell the truth, S.G. said that "daddy and her took a shower . . . and that he put soap on his pee-pee and had her wash his pee-pee for him."

Blomeen became extremely upset and ran outside to confront Gehr, who was about to drive to a store. Blomeen "started yelling in the neighborhood for everyone to hear that he was a child molester." Gehr attempted to calm Blomeen down.

Blomeen went back inside the house to ask S.G. some more questions. Blomeen used her cellphone to make a video recording of the conversation.

In the video, S.G. twice demonstrated the contact by rubbing her hand back and forth on Blomeen's hand. S.G. said she had done it "[j]ust for awhile." When asked if Gehr told her to do it, S.G. said, "Well, he didn't really" and that he had first put soap on his "thingy" and then she began rubbing it. S.G. indicated that Gehr had told her to go ahead.

S.G. promised she was telling the truth and said that Gehr had told her, "Don't talk about pee-pee, okay." S.G. looked down and responded "yeah" when

Blomeen asked if she thought she was in trouble and that Gehr was going to yell at her.

Gail Tierney, a child forensic interviewer, video recorded an interview with S.G. on March 21, 2016. S.G. said that her father "got in trouble" and was "in timeout for a long time." S.G. missed her father and felt "very, very sad" when the police officers came to her house. S.G. told Tierney that she "washed my dad's pee-pee, right, but I say that by accident." S.G. said her father told her not to tell anyone and then told her to apologize to him because "I forgot not to say I washed my dad's pee-pee, but I did by accident."

S.G. explained she had taken some soap and rubbed "it on my dad's pee-pee." She then washed "my butt first, then I washed dad's butt." When Tierney asked what she meant by "butt," S.G. pointed to the front area between her legs. S.G. described her dad's "butt" as "a red log because it was long . . . shaped like an oval . . . [and felt] like a beetle or something that's long." S.G. said she reached up to get soap from a bottle on the ledge in the shower, put the soap on her hand "and then I rub it together and then I washed my butt first and then dad's pee-pee." S.G. demonstrated by rubbing her hand up and down on her other hand.

S.G. said it was her idea to wash her dad's "pee-pee," but she was embarrassed and "a little scared first and then I did it after." S.G. knew how to do it because "[m]y heart said it was a good idea." S.G. said that when Gehr usually helped her to shower, he would touch "[t]his part and this part," pointing to her

crotch and then to her buttocks. When Gehr washed her in this way, it felt "[k]ind of ticklish."

At Tierney's request, S.G. drew a picture of her dad's "pee-pee." S.G. said that Gehr was rubbing his "pee-pee" in the picture and that his "pee-pee" was pink. At one point, S.G. said that her mother was in the bathroom putting on makeup while she was showering with her dad. S.G. said that it was her idea to wash Gehr's "pee-pee" and that Gehr told her she would get in trouble if she told anyone. S.G. confirmed that she had "accidentally told" her mother.

The State charged Ryan Gehr with one count of child molestation in the first degree. At trial, the court admitted Blomeen's cellphone video and the video of S.G.'s interview with Tierney. S.G. also testified.

S.G. testified that she "washed my dad's private" with shampoo. S.G. recalled the shower had occurred sometime after her fifth birthday party. S.G. told her mother about it "[b]ecause I wanted to." During cross-examination, S.G. insisted her mother was not in the bathroom when she was showering, although she remembered telling Tierney that she was.

Blaine Police Officer Jonathan Landis interviewed Gehr shortly after the reported incident. Gehr denied ever taking a shower with S.G. He said that he would put soap in S.G.'s hand and that S.G. would then wash herself.

At trial, Gehr denied that he had ever taken a shower with S.G. or molested her. Gehr also denied that S.G. had ever seen him naked, but

acknowledged that S.G. had described his anatomy "pretty specifically for a five year old."

The jury found Gehr guilty as charged.

Before sentencing, Gehr moved for a new trial under CrR 7.5. In a supporting declaration, Courtney Blomeen stated that after the trial, she again asked S.G. to tell her what happened. In response to a series of questions, S.G. said that she "washed her dad's pee-pee," that it was her idea, that Gehr had told her to stop "right away," and that it did not seem to S.G. that Gehr had wanted her to touch him. Blomeen stated that S.G. repeated the account on the following day. Gehr argued that the new information was material to the issue of whether any contact was incidental or sexual in nature.

The trial court denied the motion for a new trial, concluding that the new information would not likely change the outcome. The court sentenced Gehr to a standard-range indeterminate term of 52 months to life. The court also ordered Gehr to complete a mental health evaluation as a condition of community custody and follow all treatment recommendations.

II

Gehr contends that the evidence was insufficient to support his conviction for child molestation in the first degree. He argues that S.G.'s testimony established only inadvertent touching and that the State therefore failed to prove that he had sexual contact for the purpose of sexual gratification. We disagree.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 3. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When reviewing a challenge to the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201; see also Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We defer to the jury on questions of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person is guilty of child molestation in the first degree when the person has "sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Sexual gratification is not an element of child molestation in the first degree, but rather a definitional term that clarifies the meaning of "sexual contact" to exclude "inadvertent touching or contact from being a crime." State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). Whether the evidence is sufficient to establish sexual contact necessarily

depends on the specific facts and circumstances of each case. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Circumstantial evidence and direct evidence can be equally reliable. State v. Rodriquez, 187 Wn. App. 922, 930, 352 P.3d 200 (2015).

S.G. repeatedly and consistently demonstrated how she rubbed Gehr's penis up and down while they were naked in the shower together. She described Gehr's penis as a "red log" that was long and oval-shaped and that felt "like a beetle or something that's long." S.G. also drew a picture of Gehr rubbing his "pee-pee." When S.G. first told her mother about the contact, she indicated that Gehr told her to go ahead after his penis had soap on it. S.G. repeatedly said that Gehr told her not to tell anyone immediately after getting out of the shower.

Gehr contends that S.G.'s assertions that the touching was her idea and that "I did it by accident" establish that any contact was inadvertent and fleeting. But after telling Tierney that she washed her dad's "pee-pee . . . by accident," S.G. explained that even though she was embarrassed and did not want to do it, "I did it anyways." Moreover, any minor inconsistencies in S.G.'s testimony involve credibility determinations that this court cannot review on appeal. See Camarillo, 115 Wn.2d at 71.

The evidence of S.G.'s deliberate actions in rubbing Gehr's penis and her apparent regret for having "accidentally" told her mother, coupled with Gehr's direction to go ahead, S.G.'s physical description and drawing of Gehr's penis, Gehr's admonition not to tell anyone, and Gehr's denial that S.G. ever saw him

naked or showered with him, was sufficient to support a reasonable inference that the contact was not inadvertent and was for the purpose of sexual gratification. Cf. Harstad, 153 Wn. App. at 23 (defendant's moving his hand back and forth and heavy breathing supported inference of sexual purpose sufficient to satisfy sexual contact element of first degree child molestation). The evidence was sufficient to establish sexual contact and support Gehr's conviction for child molestation in the first degree.[1]

III

Gehr contends that the trial court erred in denying his motion for a new trial. He argues that S.G.'s post-trial disclosure that Gehr told her to stop washing his penis "right away" seriously undermined any inference that the touching was for the purpose of sexual gratification.

To obtain a new trial based upon newly discovered evidence, the defendant must demonstrate that the evidence "(1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Macon, 128 Wn.2d 784, 803-04, 911 P.2d 1004 (1996); see also CrR 7.5(a)(3); 7.8(b)(2). The absence of any one of these factors warrants denial of a new trial. Macon, 128 Wn.2d at 804.

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[1] Gehr's reliance on S.G.'s statement that he told her to stop "right away" is misplaced. That statement was part of Blomeen's postverdict declaration and not admitted at trial. It is therefore irrelevant to our determination that the evidence was sufficient to support Gehr's conviction.

We will not disturb the trial court's denial of a motion for a new trial absent a manifest abuse of discretion. State v. Franks, 74 Wn.2d 413, 418, 445 P.2d 200 (1968).

Gehr claims the new evidence was consistent with S.G.'s earlier statements that the touching was her idea and accidental. But evidence that Gehr told S.G. to stop "right away" was clearly inconsistent with S.G.'s initial disclosure indicating that Gehr told her to "go ahead" before she began washing his penis and with evidence suggesting that Gehr became sexually aroused during the contact. More importantly, however, Gehr fails to demonstrate that the new evidence would have had any effect on the outcome of the trial.

The jury in this case considered not only both of S.G.'s video recorded interviews, but also her trial testimony. In her interview with Tierney, S.G. acknowledged that she missed her father and expressed some regret for having told her mother about the shower after Gehr told her not to tell anyone. Gehr also testified at trial.

Consequently, the jury had a full opportunity to assess S.G.'s accounts of the touching and any inconsistencies in light of Gehr's repeated denial that he showered with S.G. or that S.G. had ever seen him naked. Although S.G.'s brief posttrial statement was inconsistent with some of her testimony, it was also inconsistent with Gehr's defense. Given the extent and nature of the evidence at trial, there is no reasonable likelihood that the trier of fact would have assessed the relative credibility of the witnesses differently had it considered the new

information. The trial court did not abuse its discretion in denying the motion for a new trial.

IV

The State concedes that the trial court lacked authority to impose a mental health evaluation as a condition of community custody. RCW 9.94A.703(3)(c) authorizes the trial court to require an offender's participation in "crime-related treatment or counseling services" as a condition of community custody. See RCW 9.94A.030(10) ("crime-related prohibition" is one that "directly relates to the circumstances of the crime for which the offender has been convicted"). But nothing in the record suggests that Gehr had mental health issues that contributed to the crime. See State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003) (striking alcohol counseling and mental health treatment conditions). We accept the State's concession that the mental health evaluation condition must be stricken.

Gehr's conviction is affirmed. We remand solely with instructions to strike the mental health evaluation condition.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75652-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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