SUPREME COURT NO. 98784-0

NO. 81379-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HUYCK,

Petitioner.

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

The Honorable Jack Nevin, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Robert Huyck, appellant below, asks this Court to review the decision of the Court of Appeals referenced below.

B. COURT OF APPEALS DECISION

Robert Huyck seeks review of the Court of Appeals decision in State v. Robert Huyck, No. 81379-0-I, 2020 WL 3270317 (Slip Op. filed June 15, 2020). A copy of the slip opinion is attached as an appendix.

C. REASONS WHY REVIEW SHOULD BE GRANTED

Review is warrant under RAP 13.4(b)(1), (2) & (4) because the decision in State v. Huyck, supra, conflicts with prior published decisions by this Court and the Court of Appeals, and because it involves an issue of substantial public interest.

D. ISSUES PRESENTED

1. Huyck was accused of raping and molesting his daughter, J.H., when she was much younger. He denied the allegations, claiming J.H. made them up in an attempt to move out of the house. J.H.'s mother testified on behalf of Huyck, suggesting J.H.'s accusations were false and based on a television episode of "Criminal Minds." J.H. testified at trial over two days and broke down in tears at the conclusion of the first day when asked to describe the alleged abuse. Was Huyck deprived of a fair trial when the prosecutor eliciting from J.H. that her mother never hugged

her after her emotional breakdown at trial the day before, thereby improperly appealing to the passions and prejudices of the jurors?

2. Does the prohibition on sentencing courts considering how much "good time credit" could be earn against a sentence apply whether the sentence imposed is an exceptional sentence or a standard range sentence?

E. STATEMENT OF THE CASE

At the time of trial, Huyck had been married to Deanne Huyck (Deanne) for 34 years. 5RP 73; 8RP 6. They had six children: Ryan (34), Sara (32), Joshua (28), Caleb (21), Ben (19) and J.H. (17). 5RP 74, 166; 7RP 42; 8RP 7-10. J.H. was born June 28, 2001. 5RP 73, 166. According to Deanne, "Caleb is on the autism spectrum and things that are upsetting and that are difficult for him in a way that's magnified." 5RP 106.

On January 5, 2016, J.H. attempted suicide by ingesting Tylenol. 5RP 102-04; 6RP 39, 44; 8RP 56. [1] When Huyck found her dressed in dark clothes laying on the floor in apparent stomach pain. When Huyck asked what she was doing, J.H. admitted she ingested Tylenol but could or would not say how many pills she had taken. 8RP 56. Huyck and Deanne,

[1] There are eleven individually paginated volumes of verbatim report of proceedings referenced as follows: **1RP** – October 22, 2018; **2RP** – October 23, 2018; **3RP** – October 24, 2018; **4RP** – October 25, 2018; **5RP** – October 29, 2018; **6RP** – October 30, 2018; **7RP** – October 31, 2018; **8RP** – November 1, 2018; **9RP** - November 5, 2018; **10RP** November 7, 2018; and **11RP** – December 14, 2018.

discussed what to do, and eventually took her to the hospital because they were unsure whether she had ingested a lethal dose or not. 5RP 102-04; 6RP 52; 8RP 57-59. Huyck took J.H. to the emergency room while Deanne stayed with Ben and Caleb, who both still lived at home. 6RP 52; 8RP 59.

At the emergency room it was learned J.H. had taken twice the lethal dose of Tylenol. 8RP 98. It was also discovered she had been cutting her arms and thighs. 8RP 60-61. J.H. was treated for the Tylenol overdose and cuts and then transported by ambulance to Mary Bridge Children's Hospital. 8RP 61-62.

Huyck recalled being asked by staff at Mary Bridge if he could provide a reason for J.H.'s suicide attempt. Huyck offered she was depressed about the anniversary of her maternal grandmother's death and about being bullied at school. 8RP 62. Huyck also recalled leaving J.H.'s room at both the emergency room and Mary Bridge at the request of the treatment providers so they could ask J.H. about any abuse issues. 8RP 63. Several days later, J.H. was transferred to a children's psychiatric hospital in Seattle, where she remained for about two weeks before coming home. 8RP 63-65.

According to J.H., she attempted suicide on January 5, 2016 because she was depressed and feeling alone at home and school, and there seemed to be no path out of her depression. 6RP 39. J.H. denied the alleged sexual

abuse by her father was the basis for the attempt, offering that it was a "background factor," but not the catalyst, which instead was her perceived lack of family support exacerbated by the anniversary of her grandmother's passing, with whom she had been very close, and whose death she blamed on her mother. 6RP 40-43. The recent loss of an aunt and Caleb's drug-induced psychosis episode also played factors in her depression. 6RP 41. J.H. noted the same depression had prompted her to start cutting herself in 2015. 6RP 47.

J.H. initially denied being asked about any prior abuse by hospital staff. 6RP 54. Later she said she could not remember. 6RP 55. Eventually she testified she recalled being asked in Huyck's absence if she had ever been sexually abused and that she had denied it. 6RP 56-57.

J.H. admitted that when she started cutting herself, she had been trying to come up with a way to move out of the family home, and that was still on her mind when she attempted suicide. 6RP 57-58. Her hope had been to move in with her brother Joshua and his wife. 6RP 58. She said her father seemed "mostly okay about it." 6RP 58.

After J.H. was discharged from the hospital she started treatment with Dr. Naomi Huddlestone, a clinical child psychologist. 6RP 59, 136. They met for the first time on January 27, 2016. 6RP 139. They then met weekly from February through April 2016. 6RP 150. Huddlestone recalled

J.H.'s main concerns during the initial few months were about being bullied in school since kindergarten and her brother Caleb's "explosive" episodes. 6RP 146. She also claimed she "felt picked on and blamed for everything," that her parents treated her like an accidental "afterthought," and her mother loved her brothers more than her. 6RP 146-47. Based on these feelings, Huddlestone diagnosed J.H. with a "major depressive disorder." 6RP 151.

The April 6, 2016 session between Huddlestone and J.H. was the first time J.H. raised the prospect that she had been sexually abused by her father but refused to divulge details. 6RP 151-52. Huddlestone, a mandatory reporter, did not report the allegation because of the lack of detail. 6RP 154. The subject was not mentioned at their April 13, 2016 session, but did come up again at the April 20, 2016 session. 6RP 159.

According to Huddlestone, at the April 20th session J.H. claimed her father had sexually abused her from the age of 4 until a few year ago. She could not provide a specific time that it stopped. 6RP 159. J.H. explained it started with her father sitting her on his lap as he watched pornography on a computer, and eventually progressed to him touching her inappropriately. 6RP 160-61. J.H. claimed her father told her not to tell anyone or he would stop playing with her. 6RP 161. J.H. said the last time it happened was when she was in elementary school, and that she had told her father she did not want him to do it anymore. 6RP 161. J.H. told

Huddlestone that after the sexual abuse stopped her father became verbally abusive. 6RP 162. Huddlestone reported J.H.'s claims to "CPS." 6RP 162

J.H.'s mother, Deanne, testified at Huyck's trial as a prosecution witness. 5RP 72-165. She testified that after she and J.H. watched an episode of "Criminal Minds," J.H. accused Huyck of having sexually molested her in the past, but Deanne did not believe her given J.H.'s inability to describe the alleged misconduct with any detail. 5RP 114-17, 123-24, 152-57.

The next prosecution witness was J.H. 5RP 165. She first testified about her general background and the layout of the family home. 5RP 165-83. The prosecutor then began questioning J.H. about her sex abuse allegations. 5RP 184-88. When those questions sought specifics about the alleged abuse, J.H. refused, stating, "I don't want to describe it." 5RP 190. The prosecutor asked if it would help "to take a break," J.H. replied, "I don't know." The prosecutor's subsequent request to recess for the day because J.H. was "in tears" was granted. 5RP 190; 6RP 3.

J.H. retook the witness stand as the first witness the next day. 6RP 4. Over defense relevance objection, the prosecutor was allowed to inquire of J.H. who the two women were that in the front of the gallery when she testified the day before on the basis it was relevant to "her demeanor and

bias." 6RP 4. J.H. explained they were her mother's best friend and an aunt, both who she considered friends with her mother more than her. Id.

The following exchange then occurred between the prosecutor and J.H.:

> [PROSECUTOR:] Likewise, after court yesterday, at any time either yesterday here at the courthouse or at home, did your mom ever give you a hug yesterday?
>
> [J.H.:] No.
>
> [PROSECUTOR:] Did that include before court and after court.
>
> [J.H.:] Yes.

6RP 4-5. The prosecutor then elicited details from J.H. about alleged sexual abuse. 6RP 5-33.

Huyck testified. 8RP 6-156. He acknowledged J.H. received less attention from him as a result of Ben and Caleb's behavioral problems growing up. 8RP 20-22. He denied, however, ever touching J.H. inappropriately or ever watching pornography with her, or that he ever looked at pornography on the family's computers, noting he had rigged their modem to prevent access to such materials. 8RP 43, 53-54, 94, 110, 112, 122-23, 134. He also denied ever warning J.H. against telling anyone about his alleged abuse. 8RP 59.

In closing argument, Huyck's counsel argued J.H.'s suicide attempt was a plea for more attention, and that when her parents did not respond as she expected, she resorted to false sexual abuse allegations against her father. 9RP 90. The jury convicted Huyck as charged. CP 98-101.

On appeal, Huyck argued prosecutorial misconduct during its examination of J.H. warranted a new trial and that the sentencing court improperly took into consideration how much "good time" credits he could earn against his sentence in setting the length of his standard range sentence. Huyck also argued certain community custody conditions should be struck along with the $200 criminal filing fee imposed. Brief of Appellant (BOA) at 1-28; Reply Brief of Appellant (RBA) at 1-9.

The Court of Appeals accepted the prosecution's concession of error regarding the filing fee and some of the challenged community custody conditions. Appendix at 7-11. The Court rejected, however, Huyck's prosecutorial misconduct claim, and the improper-consideration-of-good-time-credit claim. Appendix at 4-6.

F. ARGUMENTS

1. PROSECUTORIAL MISCONDUCT DEPRIVED HUYCK OF A FAIR TRIAL.

The Court of Appeals rejected Huyck's claim on appeal that the prosecutor's questioning of J.H. about the absence-of-a-hug constituted

prosecutorial misconduct warranting a new trial. It concluded that whether J.H. got a hug from her mother or not "was relevant in that it gave context to her demeanor while testifying." Appendix at 5. The Court of Appeals is wrong.

Whether J.H.'s mother comforted her following her emotional breakdown on the stand the day before was irrelevant because it failed "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; BOA at 14.

The Court of Appeals states the absence-of-a-hug evidence was relevant to J.H.'s demeanor on the witness stand but fails to explain how. Appendix at 5. Whether J.H. received a hug from her mother before or after her first day of testimony has no bearing on demeanor during either day of testimony. That her mother's friends were present to observe her initial testimony may be relevant to her demeanor the first day, but what occurred outside the courtroom either before or after does not. The only purpose for eliciting the absence-of-a-hug evidence was to garner sympathy for J.H. and paint her mother as uncaring, thereby garnering sympathy for J.H.

The right to a fair trial is a fundamental liberty guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers.

Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), cert. denied, 136 S. Ct. 357 (2015). Reversal is warranted when the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Prejudice is established when it is shown there is a substantial likelihood the prosecutor's misconduct affected the verdict. Id. at 760.

If a defendant fails to object to the misconduct at trial, reversal is still warranted if the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Id. at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making a prejudice determination, this Court should "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." Id. at 762.

It is improper for a prosecutor "'to inflame the passions or prejudices of the jury.'" Glasmann, 175 Wn.2d at 704 (quoting Am. Bar Ass'n, Standards for Criminal Justice, std. 3-5.8(c) (2d ed. 1980)). For example, during closing argument a prosecutor may not deliberately appeal to the

jury's passions and prejudice and encourage a verdict not based on properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Argument that "exhorts the jury to send a message to society about the general problem of child sexual abuse" qualifies as such an improper emotional appeal. State v. Bautista–Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (emphasis omitted).

Here, the prosecutor used J.H.'s emotional breakdown at the end of her first day of testimony to garner sympathy and passion from the jury for J.H. by eliciting on her second day of testimony that her mother never comforted her after her emotional breakdown the day before. 6RP 4-5. This inquiry did not provide evidence relevant to whether Huyck sexually abused J.H. Instead, the inquiry served only to prejudice the jury against Huyck by demonizing his wife Deanne, who supported his defense by stating she did not believe J.H.'s allegation of sexual abuse, as an uncaring mother more inclined to provide a defense for her husband than emotional support for her child. This could serve only to inflame the passions of jurors in favor of J.H. by making them more likely to give her the benefit of the doubt with regard to the allegations. This cut directly against the reasonable doubt standard applicable to criminal prosecutions, thereby effectively lowering the prosecution's burden of proof to convict.

There was no physical evidence supporting J.H.'s claims against her father. There were no eyewitnesses. There was no evidence supporting the notion that Huyck was sexually attracted to children, much less to his own children. Therefore, jurors had to decide whether to convict based solely on who they believed: J.H., who made repeated uncorroborated claims Huyck exposed her to pornography and touched her inappropriately, or Huyck, who admitted not giving J.H. as much attention as she deserved growing up but steadfastly denied sexually abusing her. By demonizing the one prosecution witness that did not believe J.H.'s allegations against Huyck, J.H.'s mother Deanne, the prosecutor improperly inflamed the passion and prejudiced of the jurors in favor of J.H. and the prosecution and against Huyck and his defense.

To the extent defense counsel's relevance objection made just prior to the offending inquiry by the prosecutor failed to adequately alert the trial court to the improper nature of the prosecution tactic, the prosecutor's misconduct was nonetheless so blatant and ill-intentioned that it warrants reversal even under the heightened standard of review because no instruction could have cured the resulting prejudice. Although who the women were in the front row during J.H.'s initial testimony may have had some relevance to J.H.'s demeanor as a witness, whether her mother hugged her following her emotional breakdown *after* she had concluded her first

day of testimony had no relevance whatsoever to her credibility and served only to encourage jurors to be sympathetic to J.H. based on nonevents that had nothing to do with whether the allegations against Huyck were true or false. In other words, the prosecutor's improper inquiry had no legitimate purpose at trial and served only to blatantly inflame the passions and prejudiced of juror against Huyck. Instructing jurors to ignore the evidence would have been futile in light of how emotionally charged it was.

The Court of Appeals decision to the contrary conflicts with this Court's decision in Glassman, Emery and Belgarde. Review is therefore warranted under RAP 13.4(b)(1).

2. THE TRIAL COURT'S CONSIDERATION OF POTENTIAL "GOOD TIME" CREDITS WHEN IMPOSING SENTENCE WARRANT RESENTENCING.

Huyck was sentenced on December 14, 2018. 11RP 3-22. The prosecution recommended a high-end standard range sentence of 318 months (26.5 years) to life. 11RP 6-7. The defense requested a low-end standard range sentence of 240 months (20 years) to life, noting "[t]here's very little good time given in these cases." 11RP 10.

Following the recommendations from the defense and prosecution, the following exchange occurred:

> THE COURT: Tell me, if you would, to refresh my recollection, how, if at all, the nature of this offense impacts upon the DOC good time calculation, if , in fact –

> [DEFENSE COUNSEL]: I think it is 10 percent.
> THE COURT: Is it different than that which would be otherwise afforded?
> [DEFENSE COUNSEL]: I think it's 10 percent.
> [PROSECUTOR]: My recollection is 15 percent.
> [DEFENSE COUNSEL]: Or 15.
> [PROSECUTOR]: But I'm not entirely sure about that.
> [DEFENSE COUNSEL]: I know they change it periodically. I know it's not more than 15.
> THE COURT: That's why I asked, actually.

11RP 10-11.

Thereafter, following Huyck's brief allocution (11RP 13-14), the court imposed a 260-month to life sentence for the rape conviction, and concurrent 198-month sentences for each of the molestation convictions. CP 130-46; 11RP 14-15.

Both the Court of Appeals and this Court have repeatedly cautioned lower courts not to rely on the possibility of good time credits when imposing sentence. This is true under both the Sentencing Reform Act (SRA) and Juvenile Justice Act (JJA). See, e.g., State v. Sledge, 133 Wn.2d 828, 845, 947 P. 2d 1199 (1997); State v. Fisher, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987); In re Crow, 187 Wn. App. 414, 425, 349 P.3d 902 (2015); State v. Buckner, 74 Wn. App. 889, 899, 876 P.2d 910 (1994), reversed on other grounds, 125 Wn.2d 915, 919 (1995); State v. Bourgeois, 72 Wn. App. 650, 659-661, 866 P.2d 43 (1994).

The reasoning behind these cases is simple, it is "inappropriate" to determine the length of a sentence by relying on an "entirely speculative prediction of the likely behavior of an offender while in confinement." Fisher, 108 Wn.2d at 430 n.6. Stated another way, "There is no guaranty credits will ever be earned, either because the prisoner fails to qualify or because the Legislature alters the rules." Buckner, 74 Wn. App. at 899.

According to the SRA, good time credits play no role until the offender begins serving his sentence. Specifically, RCW 9.94A.728 provides no person committed to the custody of the DOC may leave confinement before his sentence expires, except in a few specifically delineated circumstances, one of which is "An offender may earn early release time as authorized by RCW 9.94A.729." RCW 9.94A.728(2). That statute provides:

> The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.

RCW 9.94A.729(1)(a).

Regardless of the type of sentence imposed, earning early release credits are not guaranteed. The offender may ultimately not qualify for any credits at all, or the Legislature may choose to modify or extinguish the program altogether. Moreover, the SRA specifically delegates to the Department of Corrections (DOC) the power to award early release credits and may do so only after the offender has been sentenced and actually earned the credits. RCW 9.94A.729(1)(a). See In re Personal Restraint of Atwood, 136 Wn. App. 23, 26, 146 P.3d 1232 (2006) ("Correctional authorities, both county and state, have original authority over good time awards."); In re Personal Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005) (statutory language grants exclusive authority to determine prisoner's earned early release time to the correctional agency having jurisdiction over the offender; trial court's handwritten notation restricting good time rendered judgment and sentence facially invalid). If the DOC cannot assume credits will ultimately be earned, courts should not either.

Here, the sentencing court imposed a 260-month term of incarceration for Huyck's rape conviction, just less than 10% more than the 240-month recommendation by defense counsel, which is about how much "good time" credits both the prosecutor and defense counsel guesstimated Huyck would be eligible to earn. It cannot reasonably be disputed that the trial court considered the amount of earned early release time Huyck was

eligible to earn in deciding how long of a sentence to impose. This is the only reasonable inference that can be drawn from the court's inquiry about "good time" credits; why would the court ask about "good time" credits if it was not using it to determine the length of Huyck's sentence? This is prohibited under RCW 9.94A.729(1)(a), Fisher, and the other cases rejecting consideration at sentencing of potential earned early release credits.

The trial court unlawfully invaded the DOC's exclusive province by considering possible good time credits when determining an appropriate sentence. Therefore, the Court of Appeals should have at least remanded for resentencing. Instead, it rejected Huyck's claim on the basis that because a standard range sentence was imposed, he could not challenge it. Appendix at 5-9 (citing RCW 9.94A.585(1)).

The Court of Appeals acknowledged there is an exception to RCW 9.94A.585(1), and that is "'when the sentencing court violated fundamental procedural tenets or constitutional requirements.'" Appendix at 6 (quoting State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005)). It concluded, however, that because Huyck's sentencing court considered the information and arguments required under RCW 9.94A.500(1), Huyck was barred from challenging his standard range sentence. Appendix at 6.

With regard to Huyck's reliance on Sledge, Fisher, Crow, Buckner, and Bourgeois,, the Court of Appeals held it was misplaced and does not support Huyck's "novel theory that he can challenge the duration of his standard range sentence" because they involved exceptional sentences, not standard range sentences. Appendix at 6 n.2. While it is true these cases involved exceptional sentences, nothing about their holdings specifically limits the prohibition on considering good time credits at sentencing to such sentences.

In light of DOC's exclusive authority to grant or deny good time credits, the Court of Appeals holding here that the prohibition on considering potential good time credits at sentencing only applies if an exceptional sentence is imposed is not supported, and therefore arguably conflicts with the cases relied on by Huyck. Review is therefore warranted under RAP 13.4(b)(1) & (2).

And because whether it is appropriate or not for sentencing courts to take into consideration the potential to earn good time credits when imposing a standard range sentence involves an issue of substantial public importance because it could allow sentencing court to usurp some of DOC exclusively authority in this regard, review is also warranted under RAP 13.4(b)(4).

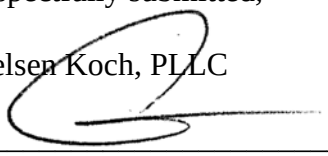
G. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 15th day of July, 2020.

Respectfully submitted,

Nielsen Koch, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT WARREN HUYCK, Appellant.	DIVISION ONE No. 81379-0-I UNPUBLISHED OPINION

DWYER, J. — Robert Huyck was convicted of one count of rape of a child in the first degree and three counts of child molestation in the first degree. On appeal, he contends that the prosecutor engaged in misconduct during his trial. He also claims that the sentencing court erred both by considering Huyck's eligibility for early release in determining the length of his standard range sentences and by imposing noncrime-related prohibitions as conditions of his community custody. We affirm the convictions, the sentences of confinement, and the condition of community custody that Huyck not access or use the Internet or Internet connected devices. However, we remand this matter to the superior court to strike the other challenged community custody conditions, and to strike an improperly imposed fee.

Citations and pin cites are based on the Westlaw online version of the cited material.

I

Huyck began sexually abusing his daughter, J.H., when she was in kindergarten. The first incident that J.H. could confidently anchor in time took place when she was in first grade. She recalled her father taking her into the bathroom of their family home, where he removed her clothing, and began touching her sexually with his hands and mouth. Huyck's head was between J.H.'s legs when she gathered the courage to ask him to stop. He complied with her request.

The methods of abuse took many forms. One common method was for Huyck to watch pornography on the family's computer with J.H. on his lap. J.H. estimated that Huyck had her watch pornography with him "between 10 or 20" times. Initially Huyck just had J.H. sit on his lap to watch the pornography with him. However, after many such viewings, Huyck began putting his hands down J.H.'s pants and touching her vagina while they watched the pornography.

At age 15, J.H. attempted suicide. Huyck found J.H. on the floor of her room and took her to a local hospital for treatment. A week later, J.H. was transferred to Seattle Children's Hospital's psychiatric ward. After J.H. was discharged from the hospital, she began seeing a clinical psychologist, Naomi Huddlestone. After several sessions, J.H. revealed the details of her abuse to Dr. Huddlestone. As a mandatory reporter of suspected child abuse, Dr. Huddlestone reported J.H.'s revelations to Child Protective Services.

The State subsequently charged Huyck with one count of rape of a child in the first degree and three counts of child molestation in the first degree.

J.H. testified at trial. As she was testifying to one of the incidents of abuse that she had endured, J.H. became emotional and found it difficult to continue. The prosecutor suggested that testimony end for the day. The trial court excused the jury for the evening.

The next morning, the State resumed its direct examination of J.H. J.H.'s mother had testified the day before and had expressed doubts as to the truthfulness of J.H's claims. The prosecutor asked J.H. if "after court yesterday, at any time either yesterday here at the courthouse or at home, did your mom ever give you a hug yesterday." Huyck's counsel did not object. "No," J.H. replied.

The jury found Huyck guilty of all charged offenses. At sentencing, both the State and Huyck proffered sentencing recommendations to the court. Huyck's attorney stated that his client's recommended sentence, "is a significant amount of time. 240 months is a very significant amount of time. Twenty years. He's 57 now. He's looking at 77. There's very little good time given in these cases." This prompted the court to ask the defense attorney and the prosecutor:

> THE COURT: Tell me, if you would, to refresh my recollection, how, if at all—both will be asked the same question—how, if at all, the nature of this offense impacts upon the DOC good time calculation, if, in fact—
>
> [DEFENSE COUNSEL]: I think it's 10 percent.
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> THE COURT: Is it different than that which would be otherwise afforded?
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> [DEFENSE COUNSEL]: I think it's 10 percent.
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> [PROSECUTING ATTORNEY]: My recollection is 15 percent.

> [DEFENSE COUNSEL]: Or 15.
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> [PROSECUTING ATTORNEY]: But I'm not entirely sure about that.
>
> [DEFENSE COUNSEL]: I know they change it periodically. I know it's no more than 15.
>
> THE COURT: That's why I asked, actually.
>
> [DEFENSE COUNSEL]: And that is—so it's not a significant time in terms of what we're used to: One-third off, in some cases almost 50 percent off. So he's looking at significant time.

Following this exchange, Huyck's counsel continued discussing his sentencing recommendation.

After having heard both parties' recommendations and Huyck's allocution, the court imposed concurrent, standard range sentences of confinement of 260 months to life for rape of a child and 198 months to life for each count of child molestation. It also imposed numerous lifetime community custody conditions. Finally, the court ordered Huyck to pay a $500 crime victim assessment, a $100 DNA (deoxyribonucleic acid) database fee, and a $200 criminal filing fee. Huyck appealed to Division Two, which transferred the matter to us for resolution.

II

Huyck first contends that prosecutorial misconduct deprived him of a fair trial. This is so, he asserts, because "the prosecutor used J.H.'s emotional breakdown at the end of her first day of testimony to garner sympathy and passion from the jury for J.H. by eliciting on her second day of testimony that her mother never comforted her after her emotional breakdown the day before." This contention fails. Nothing about the prosecutor's questioning was improper.

It is not misconduct for a prosecutor to elicit admissible testimony or present admissible evidence. See, e.g., State v. Manthie, 39 Wn. App. 815, 820-21, 696 P.3d 33 (1985); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240 (1978). Prosecutors are authorized to adduce evidence concerning the demeanor of a witness and, in closing argument, urge the jury to consider that witness's testimony credible. See State v. Bautista-Caldera, 56 Wn. App. 186, 194, 783 P.2d 116 (1989); see, e.g., United States v. Thomas, 86 F.3d 647, 654 (7th Cir. 1996) ("In such situations, the evidence of threats is necessary to account for the specific behavior of a witness that, if unexplained, could damage a party's case."). Indeed, the jury was instructed to consider J.H.'s "manner . . . while testifying" in assessing the credibility of her testimony. Evidence establishing that J.H. did not receive any emotional support from her mother following her first day of testimony—which ended because she was in tears and unable to continue—was relevant in that it gave context to her demeanor while testifying. There was no impropriety.

III

Huyck next contends that the sentencing court erred by "considering how much earned early release [Huyck] might be eligible for it setting the minimum term of incarceration." The State asserts that, because Huyck received standard range sentences, he may not appeal the duration of those sentences. The State is correct.

"A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." RCW 9.94A.585(1). The

only recognized exceptions to this statutory prohibition arise when "the sentencing court violated fundamental procedural tenets or a constitutional requirement." State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). To fall within this exception, a defendant must show that "the sentencing court had a duty to follow some specific procedure required by the [Sentencing Reform Act], and that the court failed to do so." Mail, 121 Wn.2d at 712. Washington's Sentencing Reform Act of 1981 is codified in chapter 9.94A of the RCW. That chapter requires a sentencing court to consider various sources of information, such as a victim impact statement, and "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.500(1). The sentencing court herein followed that directive.

Huyck's sentences fell within the applicable statutory standard ranges. Huyck does not assert any constitutional violation, and his contention that the sentencing court improperly considered Huyck's opportunity to earn good time credits does not establish that the court failed to follow the procedures outlined in the Sentencing Reform Act. RCW 9.94A.500(1).[1] Huyck's appellate challenge to the length of his sentence is barred.[2] RCW 9.94A.585(1); Mail, 121 Wn.2d at 712.

[1] We further note that it was Huyck who first called the sentencing court's attention to the issue of his limited potential for amassing good time credits.

[2] To support his novel theory that he can appeal the duration of his standard range sentence to protest the court's consideration of potential good time credits, Huyck directs us to

IV

Huyck next contends that the sentencing court erred in imposing a number of community custody conditions. This is so, he avers, because many of the activities these prohibitions limit are not related to his crimes and are in excess of the sentencing court's statutory authority. In response, the State argues that these prohibitions were not challenged in the sentencing court and therefore cannot be challenged for the first time on appeal. Alternatively, the State avers that the prohibitions barring Huyck from accessing the Internet and social media use are supported by the record, but concedes that the remaining prohibitions should be deleted or modified. We reject the State's argument that we may not review the prohibitions, but we agree with the State that the restrictions on Internet access are sufficiently crime-related. However, we agree with Huyck that the other challenged provisions must be stricken.

A

The State first argues that Huyck failed to preserve his challenges to the community custody conditions because he failed to object to their imposition before the sentencing court. The State is wrong. Our Supreme Court has held that "unpreserved sentencing error may be raised for the first time on appeal because sentencing can implicate fundamental principles of due process if the

several cases that he believes support his argument. Specifically, he cites to State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997), State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987), In re Crow, 187 Wn. App. 414, 349 P.3d 902 (2015), State v. Buckner, 74 Wn. App. 889, 876 P.2d 910 (1994), rev'd on other grounds, 125 Wn.2d 915, 890 P.2d 460 (1995), and State v. Bourgeois, 72 Wn. App. 650, 866 P.2d 43 (1994). However, all of these cases address the imposition of exceptional sentences. The law pertaining to exceptional sentences is quite different than that applicable to standard range sentences. The cited cases do not establish either trial court error or that Huyck has an appealable claim.

sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Jones, 182 Wn.2d 1, 6, 338 P.3d 278 (2014) (citing State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999), superseded by statute on other grounds, Laws of 2008, ch. 231, § 4, as recognized in State v. Cobos, 182 Wn.2d 12, 338 P.3d 283 (2014)). We therefore address Huyck's sentencing contentions.

B

Huyck challenges the following community custody conditions:

> 11. Do not use or consume . . . alcohol and/or drugs to include Marijuana.
> . . . .
>
> Offenses Involving Minors -
> . . . .
> 19 Stay out of areas where children's activities regularly occur or are occurring. . . .
>
> Offenses Involving Alcohol/Controlled Substances -
> 20 Do not purchase or possess alcohol.
> 21 Do not enter drug areas as defined by court or CCO.
> 22 Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
> 23 Obtain alcohol [and] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. . . .
>
> Offenses Involving Computers, Phones or Social Media -
> 24 No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court.
> 25 No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). . . . Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind.

> Offenses Involving Mental Health Issues -
> 26 Obtain both a Mental Health Evaluation and an Anger Management Evaluation, and follow through with all recommendations of the providers, including taking medication as prescribed. . . .

Huyck requests that we remand this matter to the sentencing court with directions to strike all of the above listed provisions, save for paragraph 11, in which Huyck requests only that the word "use" be stricken. In response, the State contends that the provisions barring Huyck from accessing the Internet, in paragraphs 24 and 25, were properly imposed but concedes that the remaining provisions should be struck as requested. We agree that the provisions the State concedes were improperly imposed must be stricken. We also agree that the provisions barring Huyck from accessing the Internet and Internet connected devices were sufficiently crime-related, but conclude that the prohibition against accessing social media platforms is not crime-related and must be stricken.

We review the imposition of community custody conditions for an abuse of discretion. State v. Lee, 12 Wn. App. 2d 378, 401, 460 P.3d 701 (2020) (citing State v. Hai Minh Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018)). A sentencing court abuses its discretion when it imposes a condition that is either unconstitutional or manifestly unreasonable. Lee, 12 Wn. App. 2d at 401.

"A court is authorized to impose discretionary community custody conditions as part of a sentence." Lee, 12 Wn. App. 2d at 401 (citing RCW 9.94A.703(3)). "As part of that authority, a court may order offenders to '[p]articipate in crime-related treatment or counseling services[,] . . . [p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably

related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[,] . . . [and] [c]omply with any crime-related prohibitions.'" Lee, 12 Wn. App. 2d at 401 (alterations in original) (quoting RCW 9.94A.703(3)(c), (d), (f)). Crime-related prohibitions must relate "to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Thus, there must be some evidence in the record connecting the community custody condition to the crime." Lee, 12 Wn. App. 2d at 401-02 (citing State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015)).

Herein, Huyck was barred from accessing the Internet "without prior approval of the supervising CCO, Treatment Provider, and the Court," from using "a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches)," and from accessing "any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind." The State contends that these community custody provisions are crime-related because there was evidence establishing that Huyck viewed pornography with J.H. on a family computer during several of the occasions when he touched her inappropriately. We agree that this evidence is sufficient to establish that the prohibitions against accessing the Internet or using devices connected to the Internet are crime-related. At trial, it was noted that a search of Huyck's computer did not reveal any pornography stored therein, thus making it more probable that he accessed digital pornographic material from an external source, most likely the Internet. However, this does not establish that Huyck in any way utilized social media to perpetrate his offenses. The record

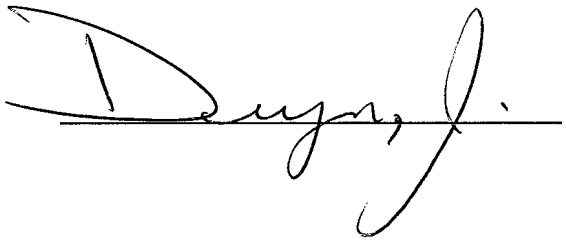
does not set forth any evidence that use of such platforms enabled Huyck to engage in his criminal behavior, and, thus, the condition explicitly barring access to social media must be stricken along with those other conditions that the State has conceded were improperly imposed.

V

Finally, Huyck contends that the sentencing court's imposition of a $200 criminal filing fee was erroneous because Huyck is indigent. The State concedes that Huyck is correct. We agree and direct the superior court on remand to strike Huyck's obligation to pay this fee. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

In summation, we affirm Huyck's convictions and his sentences of confinement. However, we remand the matter to the superior court to strike the criminal filing fee and the challenged community custody conditions excepting those prohibiting Huyck from accessing the Internet and Internet connected devices.

Affirmed in part, and reversed in part.



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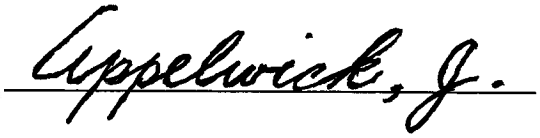

NIELSEN KOCH P.L.L.C.

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