Supreme Court No. 94305-2
COA No. 73904-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON EUGENE TURNER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Clifton Eugene Turner requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Turner, No. 73904-2-I, filed February 27, 2017. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Expert testimony is necessary where the question to be decided involves scientific, technical, or other specialized knowledge. Washington courts recognize that post-traumatic stress disorder (PTSD) is a mental disorder beyond the ordinary understanding of laypersons. Here, the State presented evidence that the complaining witness suffered symptoms of PTSD but did not present expert testimony to explain how the crime could have led to those symptoms. Should this Court grant review and hold the trial court abused its discretion in admitting evidence of PTSD in the absence of the necessary expert testimony to explain these symptoms to the jury?

2. Should this Court grant review in order to correct the miscalculated offender score?

C. STATEMENT OF THE CASE

Clifton Turner was convicted of two counts of second degree child molestation based on allegations involving his girlfriend's daughter, M.L. 6/23/15RP 64; CP 27.

At trial, M.L. said that during her sophomore year in high school, she started skipping school, doing drugs, and drinking alcohol. 6/23/15RP 113.

Defense counsel objected, arguing the State could not present evidence that M.L. suffered from symptoms of PTSD unless the State presented expert testimony to tie M.L.'s symptoms to the allegations of abuse. 6/23/15RP 114-15. After all, M.L. did not start experiencing those symptoms until at least a year and a half after the alleged abuse had stopped. 6/23/15RP 115. Counsel argued a layperson could not testify that M.L.'s troubling behavior, especially when it occurred so long after the fact, was connected to sexual abuse. 6/23/15RP 114.

The court ruled M.L. could testify about her feelings and behavior, as long as the prosecutor did not ask questions that would lead to a medical conclusion. 6/23/15RP 117.

Thus, M.L. testified that, at the beginning of her sophomore year, she began engaging in troubling behavior. She quit playing

softball. 6/23/15RP 118. She started using marijuana and drinking alcohol every day. Before that, she had used marijuana only occasionally and did not drink. 6/23/15RP 119, 175. She became depressed and suicidal and was admitted to the hospital a couple of times for suicidal ideation. 6/23/15RP 119-20. She started burning and cutting herself. 6/23/15RP 120.

M.L.'s Aunt Denise testified that after M.L. disclosed sexual abuse, she started skipping school, drinking alcohol, and smoking marijuana. 6/24/15RP 304-05. She used to have a lot of friends but no longer does. 6/24/15RP 304. She started cutting her arms, pulling her hair out, and saying she wanted to kill herself. 6/24/15RP 304.

No expert testimony was presented to explain why or how these symptoms could have been caused by sexual abuse.

At sentencing, the court imposed a sentence based upon an offender score of five. CP 29.

Turner appealed, arguing the trial court abused its discretion in admitting evidence of PTSD without expert testimony.[1]

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[1] Turner also challenged some conditions of community custody. The Court of Appeals vacated two conditions of community custody. That aspect of the Court of Appeals' opinion is not at issue in this petition.

Turner filed a *pro se* statement of additional grounds for review challenging the trial court's calculation of the offender score. The Court of Appeals ordered the State to respond to Turner's statement of additional grounds for review.

The Court of Appeals issued an opinion affirming the trial court's decision to admit evidence of PTSD. Slip Op. at 3. The court also held the trial court properly determined the offender score but remanded to the trial court with instructions that the court correct the judgment and sentence to correctly reflect the criminal history used to calculate that score. Slip Op. at 11.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted because the trial court abused its discretion in admitting evidence of M.L.'s symptoms of PTSD in the absence of the necessary expert testimony to explain the nexus between the alleged symptoms and the allegations of sexual abuse.

Expert testimony was necessary to explain M.L.'s purported symptoms of PTSD and establish any nexus between them and the underlying allegations of abuse. The trial court abused its discretion in refusing to require the State to present expert testimony regarding M.L.'s supposed mental disorder.

M.L. and her Aunt Denise testified M.L. started exhibiting troubling behaviors long after the alleged incidents of sexual abuse had stopped. M.L. started skipping school, doing drugs, and drinking alcohol in her sophomore year of high school. 6/23/15RP 113. She lost friends. 6/24/15RP 304. She became depressed and suicidal. 6/23/15RP 119-20; 6/24/15RP 304. She started burning and cutting herself. 6/23/15RP 120. These behaviors were uncharacteristic of her. 6/23/15RP 119, 175.

The State presented this evidence of M.L.'s downward spiral as proof of the underlying allegations of sexual abuse. 6/23/15RP 115-16. Yet the State did not present any expert testimony to explain how or why a person could start experiencing such symptoms of PTSD so long after the alleged traumatic event had ended. PTSD is a mental disorder that is beyond the understanding of an ordinary layperson.

A lay witness may not express an opinion as to matters that are beyond the realm of common experience and that require the special skill and knowledge of an expert witness. Randolph v. Collectramatic, Inc., 590 F.2d 844, 846-47 (10th Cir. 1979). "[W]here the Topic requires special experience, only the testimony of a person of that special experience will be received." Id. (citation omitted).

Thus, if a party wishes to present evidence regarding matters outside the realm of common experience, it must do so through the testimony of an expert. Under ER 702, expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Expert testimony is admissible under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons. State v. Green, 182 Wn. App. 133, 146, 328 P.3d 988, review denied, 337 P.3d 325 (2014).

Washington courts recognize that mental disorders—specifically PTSD—are beyond the understanding of ordinary lay persons. Id. at 146-47 (citing State v. Janes, 121 Wn.2d 220, 236, 850 P.2d 495 (1993); State v. Ciskie, 110 Wn.2d 263, 273-74, 751 P.2d 1165 (1988); State v. Allery, 101 Wn.2d 591, 597, 682 P.2d 312 (1984); State v. Bottrell, 103 Wn. App. 706, 717, 14 P.3d 164 (2000)).

Washington case law also acknowledges that PTSD is a mental disorder recognized within the scientific and psychiatric communities. Bottrell, 103 Wn. App. at 717. According to the American Psychiatric Association, the essential feature of PTSD is

> "the development of characteristic symptoms following exposure to an extreme traumatic stressor involving

> direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate."

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 424 (4th ed.1994) (quoted in Bottrell, 103 Wn. App. at 717).

Because PTSD is a recognized mental disorder that is beyond the understanding of ordinary laypersons, when the State presents evidence of PTSD to prove the elements of a crime, the State must also present expert testimony to explain the disorder to the jury and elucidate how it is related to the crime. ER 702; Green, 182 Wn. App. at 146; Bottrell, 103 Wn. App. at 717; Randolph, 590 F.2d at 846-47.

Here, the State presented extensive testimony of M.L.'s purported symptoms of PTSD as evidence to prove that the alleged abuse actually occurred. But the trial court did not require the State to present expert testimony to explain any nexus between M.L.'s purported symptoms and the alleged offenses. As ordinary lay people, the jurors were not capable of understanding how or why a person might experience symptoms of PTSD long after the underlying trauma

had ended. The trial court's ruling refusing to require the State to provide an expert to explain this mental disorder to the jury and how it related to the crime is contrary to the above authorities. The court therefore abused its discretion.

This Court should grant review and reverse the Court of Appeals' opinion affirming the trial court's ruling. RAP 13.4(b)(1), (2), (4).

2. This Court should grant review because the offender score is miscalculated.

In his statement of additional grounds for review, Turner argued his offender score was miscalculated. Turner argued the court did not find he had two prior convictions that count in the offender score and it is not reflected on the judgment and sentence. He argued his offender score was only four.

The judgment and sentence states the offender score is five. CP 29. The base score for the two current offenses is three. Slip Op. at 11. Therefore, the State was required to prove that Turner had prior felony convictions that resulted in an offender score of five. Yet the judgment and sentence states the criminal history includes only one prior felony conviction—for VUCSA from 1996. CP 29.

At sentencing the State provided a judgment and sentence from 1993 for a felony VUCSA conviction. CP 4. The State also provided a judgment and sentence from 1996 for a felony VUCSA conviction. CP 11.

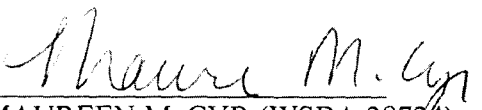
Yet the trial court did not find expressly find the State had met its burden to prove the prior conviction from 1993. See CP 29; 8/21/15RP 23-24.

This Court should grant review and remand for resentencing based upon an offender score of four.

E. CONCLUSION

For the reasons stated, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 24th day of March, 2017.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 73904-2-I
Respondent,	)	DIVISION ONE
v.	)	
CLIFTON EUGENE TURNER,	)	UNPUBLISHED
Appellant.	)	FILED: February 27, 2017

COX, J. – Clifton Turner appeals his judgment and sentence based on convictions of two counts of second degree child molestation and one count of fourth degree assault. The trial court did not abuse its discretion in admitting evidence of the victim's emotional and psychological trauma following the offenses without supporting expert testimony. Two of the several sentencing conditions are improper: substance abuse counselling and submitting to Breathalyzer tests. The criminal history in the judgment and sentence fails to list two prior convictions used to compute the correct offender score of five. Appellate costs shall not be awarded to the State. We affirm in part, vacate in part, and remand with instructions.

The victim in this case is M. Turner met M.'s mother, L., when they were both patients in drug treatment. Two and a half years later, Turner and L. moved in together. M. would visit often.

TRAUMA EVIDENCE

Turner argues the trial court abused its discretion in admitting evidence of M.'s behavior following the offenses without supporting expert testimony linking her behavior to Post-Traumatic Stress Disorder (PTSD). We disagree.

We review for abuse of discretion a trial court's decision to admit evidence.[1] A trial court abuses its discretion when its ruling is manifestly unreasonable or it bases its decision on "untenable grounds or reasons."[2]

The parties have couched their argument in the context of ER 702, which governs the admission of expert opinion testimony. ER 702 allows the admission of expert testimony where it will help the trier of fact understand evidence or facts at issue. But no expert opinion was presented in this case.

Rather the parties contest the admission of M.'s alleged opinion testimony. ER 701 governs our analysis of this testimony.

That rule provides for the admission of lay opinion testimony when it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge."

There is no question that M.'s testimony was based on her own perception. She testified to her own behavior of self-harm and substance usage. Similarly, there is no question that such testimony was helpful to understanding

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[1] State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

[2] Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 277, 372 P.3d 97 (2016).

her relevant experience of sexual abuse, a central determination of fact in this case.

Thus, the parties' dispute focuses on whether M.'s testimony was based on specialized knowledge.

In State v. Black, the supreme court explained that a lay witness may testify to her own experience of trauma without supportive expert testimony.[3] In that case, the court reversed Michael Black's conviction because the trial court had abused its discretion in admitting expert testimony about rape trauma syndrome.[4] The relevant expert, a counselor who had counseled the alleged victim for several months, testified that there was "a specific profile for rape victims and [the victim] fits in."[5]

On review, the supreme court found this testimony to be scientifically unreliable because "there is no 'typical' response to rape."[6] The counselor's profiling technique was "not the type of scientific test that reliably determines whether a rape has occurred, as the characteristic symptoms may follow any psychologically traumatic [experience]."[7]

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[3] 109 Wn.2d 336, 349, 745 P.2d 12 (1987).

[4] Id. at 350.

[5] Id. at 339 (emphasis omitted).

[6] Id. at 343.

[7] Id. at 348.

The supreme court further concluded such testimony was not helpful to the trier of fact because it was overly prejudicial.[8] Specifically, the expert had testified that the alleged victim fit the profile of rape victims, improperly suggesting the guilt of the defendant.[9]

But the court clarified that it did:

> not imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape prosecution. The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence. We simply hold that the State may not introduce expert testimony which purports to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome.[10]

Here, the trial court admitted M.'s testimony concerning certain changes in her behavior. It concluded that M. could "testify to her own behavior and her own feelings." But it instructed the State not to ask questions that would require a medical conclusion. Nothing in the record suggests the State violated this instruction. The jury was fully capable of deciding whether the changes to M.'s behavior arose in response to the past trauma of this molestation without expert testimony. There was no abuse of discretion in admitting M.'s testimony.

Turner points to numerous cases that upheld the admission of expert testimony connecting a person's response to previous trauma when the response

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[8] Id. at 349.

[9] Id.

[10] Id.

might have seemed counterintuitive to the layperson.[11] These cases fail to establish that expert testimony is necessary rather than merely admissible under such circumstances. Additionally, the testimony in this case did not present any counterintuitive inference.

Here, the trial judge instructed the jurors that they could consider inferences from circumstantial evidence based on their "common sense and experience." Based on this instruction and the principle elucidated in Black, the jury could properly consider M.'s relevant testimony against the backdrop of their own experience.

SENTENCING CONDITIONS

Turner argues the trial court improperly imposed substance abuse treatment as a condition of community custody. We agree.

The trial court's sentencing authority depends on statute.[12] Generally, we review for abuse of discretion the imposition of sentencing requirements.[13] But we review de novo that imposition when the trial court's statutory sentencing authority is challenged.[14]

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[11] State v. Ciskie, 110 Wn.2d 263, 274, 751 P.2d 1165 (1988); State v. Allery, 101 Wn.2d 591, 597, 682 P.2d 312 (1984); State v. Green, 182 Wn. App. 133, 139, 328 P.3d 988 (2014); State v. Bottrell, 103 Wn. App. 706, 717, 14 P.3d 164 (2000).

[12] In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

[13] State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

[14] Id.

The Sentencing Reform Act authorizes the trial court to impose certain prohibitions or affirmative conditions of community custody so long as they are "crime-related."[15] A prohibition is "crime-related" when it "directly relates to the circumstances of the crime for which the offender has been convicted."[16] It "may [also] include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense."[17]

When the trial court sentences the offender to community custody, RCW 9.94A.703(3)(c) authorizes it to require that the offender "[p]articipate in crime-related treatment or counseling services.[18] RCW 9.94A.703(3)(d) also authorizes the trial court to require that the offender "[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."[19]

But these two provisions present an ambiguity. A statute is ambiguous "if it can be reasonably interpreted in more than one way."[20] In this statute, it is unclear whether the rehabilitative programs that the trial court may impose must

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[15] RCW 9.94A.505(9).

[16] RCW 9.94A.030(10).

[17] RCW 9.94A.505(9).

[18] RCW 9.94A.703(3)(c).

[19] RCW 9.94A.703(3)(d).

[20] State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002).

be "crime-related" or "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Thus, the trial court could impose such programs even if not "crime-related," despite other clear text in the statute.

Division Two of this court addressed these provisions in State v. Jones.[21] The court examined the identical statutory precursors to what are now RCW 9.94A.703(3)(c) and (d).[22] It cited the rule requiring that statutes be construed to avoid rendering any provision superfluous.[23] It explained that subsection (c), allowing the court to order such services so long as they are crime-related, would be rendered superfluous if subsection (d) were construed to allow courts to order substance counselling or treatment without showing that the need for such services was "crime-related."[24] Thus, the court concluded that a trial court could impose treatment programs under subsection (d) "only if the evidence shows that [substance use] contributed to the offense."[25] We agree with that reasoning.

Here, the trial court imposed a condition requiring that Turner participate in "substance abuse treatment as directed by the supervising Community Corrections Officer." But no evidence in the record shows that either alcohol or drugs contributed to these offenses.

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[21] 118 Wn. App. 199, 76 P.3d 258 (2003).

[22] Id. at 207-08.

[23] Id. at 208.

[24] Id.

[25] Id.

On this record, the trial court lacked authority to impose community custody condition 15, requiring that Turner participate in substance abuse counselling. We vacate this condition and direct that it be stricken on remand.

The State argues that even if RCW 9.94A.703(c) is superfluous, to harmonize this superfluity as Jones did, would render superfluous the language in RCW 9.94A.703(d) concerning "the offender's risk of reoffending, or the safety of the community." This argument is not convincing.

Subsection (c) requires the trial court to make a specific conclusion before it orders that a defendant participate in counselling or treatment services. This requirement avoids coercing offenders to undergo rehabilitation unrelated to their crimes. Subsection (d), by contrast, allows the court to order other rehabilitative programs "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

Because substance abuse treatment is at issue, subsection (c) controls and dictates that such services must be crime-related. This case does not meet the requirements of the statute and a fair reading of subsection (d) does not require a different result.

Turner also argues that the court erred in imposing monitoring conditions, requiring him to participate in urinalysis, polygraph, and Breathalyzer tests. We agree in part.

A sentencing court may require that an offender submit to tests to monitor compliance with the other valid conditions of community custody.[26] Specifically,

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[26] State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998).

the supreme court has recognized the investigative utility of polygraph tests in monitoring general compliance with sentencing conditions.[27]

Here, the trial court imposed three monitoring conditions. Of these, the court acted within its discretion in requiring that Turner submit to polygraph testing. But the court erred in imposing the Breathalyzer requirement because any alcohol-related condition it was imposed to monitor was not crime-related.

But the trial court acted within its discretion in imposing the urinalysis requirement. RCW 9.94A.703 divides the available conditions on community custody into three categories. Some are mandatory, which the court must impose.[28] Some are discretionary, such as those discussed above.[29] The rest are waivable and imposed, unless the trial court affirmatively waives them.[30] This last category includes the requirement that a defendant "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions."[31]

Here, the trial court did not waive the above condition. It was thus imposed. The condition that Turner submit to urinalysis testing was proper to monitor whether he was consuming controlled substances.

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[27] Id.

[28] RCW 9.94A.703(1).

[29] RCW 9.94A.703(3).

[30] RCW 9.94A.703(2).

[31] RCW 9.94A.703(2)(c).

Thus, we hold that the trial court was without authority to impose community custody condition 15 and the Breathalyzer component of condition 16. It did not abuse its discretion in imposing the other challenged conditions.

STATEMENT OF ADDITIONAL GROUNDS

Turner argues that the trial court miscalculated his offender score for sentencing purposes in his Statement of Additional Grounds pursuant to RAP 10.10. We hold that the trial court properly determined his offender score as five, but remand with directions that the trial court correct the judgment and sentence to correctly reflect the criminal history used to calculate that score.

RCW 9.94A.525(17) provides the framework for calculating an offender score when the current crime is a sex crime. All current sex crimes count as three. Turner concedes the base score is a three.

The RCW 9.94A.525(17) framework then directs the sentencing court's consideration to RCW 9.94A.525(7)-(9). The court selects one of those subsections based on whether the current offense was nonviolent, violent, or seriously violent. The two felony convictions in this case were child molestation in the second degree. The statute defining that offense does not characterize it as violent.[32] Thus, RCW 9.94A.525(7) provides the appropriate arithmetic for calculating the score here. Under that provision, we add one point for each prior adult felony conviction.

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[32] RCW 9A.44.086.

Here, counsel for Turner properly conceded below that the offender score for his current offenses totaled three. At the sentencing hearing, the trial court had before it certified copies of two prior judgment and sentences for controlled substance felonies. The first of these was entered on October 5, 1993. The second was entered on February 9, 1996. Both serve as qualifying felonies that would add one point each to Turner's current offender score, provided neither "washed."

> Pursuant RCW 9.94A.525(2)(b), Class B prior felony convictions
>
> shall not be included in the offender score, if since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ***ten consecutive years in the community without committing any crime that subsequently results in a conviction***.[33]

The issue is whether the two prior felony convictions washed due to Turner spending ten consecutive years in the community being crime free. The certified copy of a 2004 controlled substances conviction proved that he did not meet this test. Thus, the two prior convictions, and only those convictions, were properly considered for inclusion in the offender score: five.

The judgment and sentence does not correctly reflect both prior convictions on which basis the offender score of five was calculated. Accordingly, we vacate this judgment and sentence to that extent only and direct the trial court on remand to modify the document accordingly to include the correct prior convictions.

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[33] (Emphasis added.)

COSTS

Turner argues that this court should decline to award the State appellate costs should he not prevail. We agree.

RCW 10.73.160(1) gives appellate courts discretion to decline to impose appellate costs on appeal.[34] Under State v. Sinclair, there is a presumption that indigency continues unless the record shows otherwise.[35]

Here, the trial court found at sentencing that Turner is indigent. Nothing in this record overcomes this presumption.

The State counters that the record fails to indicate whether Turner will be unable to pay in the future. This argument is insufficient to overcome the presumption stated in Sinclair. The State also requests that we impose costs because Turner did not litigate this matter for the public's benefit. This argument also fails to overcome the presumption stated in Sinclair. An award to the State for appellate costs is inappropriate under these circumstances.

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[34] State v. Nolan, 141 Wn.2d 620, 629, 8 P.3d 300 (2000).

[35] 192 Wn. App. 380, 392-93, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

We affirm Turner's conviction, vacate the substance abuse counselling and Breathalyzer conditions, and remand for correction of the judgment and sentence to reflect the correct criminal history and conditions. We deny any award of costs to the State.

COX, J.

WE CONCUR:

Mann, J.

Leach, J.

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. 73904-2-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:

☒ respondent Seth Fine
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Date: March 24, 2017