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Division II
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NO. 53087-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HUYCK,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 17-1-00855-1

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

- A. Has appellant presented constitutional error or mere unobjected-to evidentiary error?
- B. Has appellant demonstrated that one isolated, unobjected-to question and answer constituted manifest constitutional error?
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- D. Did appellant invite the trial court to consider good time in the fixing of appellant's sentence?
- E. Has appellant demonstrated that the trial court considered good time in the fixing of appellant's sentence?
- F. Has appellant impermissibly challenged a standard range sentence?
- G. Were the internet and computer service access provisions imposed in this case valid crime-related prohibitions?
- H. Should this court order the deletion of the criminal filing fee in this case because of appellant's demonstrated indigency?
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II. STATEMENT OF THE CASE

On January 5, 2016 J.H. was hospitalized for a suicide attempt. 10/29/18 VRP 102, 104. In February, 2016, J.H. began seeing Dr. Naomi Huddleston, a psychologist. 10/29/18 VRP 110-11.

On April, 21, 2016, J.H. was taken into protective custody by CPS.
10/29/18 VRP 112-13.

J.H.'s mother, Deanne Huyck, testified that about three weeks prior to J.H. being taken into protective custody by CPS (late March, early April 2016), J.H. disclosed that she had been molested by her dad (Robert Huyck, hereinafter "defendant"). 10/29/18 VRP 113. This disclosure took place while J.H. and her mother were watching a television show called "Criminal Minds." *Id.* J.H.'s mother did not report this to any criminal justice agencies. 10/29/18 VRP 115-16. J.H.'s mother did not tell Dr. Huddleston about this disclosure. 10/29/18 VRP 116. J.H.'s mother testified that she didn't report J.H.'s disclosure for the following reasons:

Because of the questions that I asked and the answers that I received. I didn't believe that it was an accurate memory because the questions that were answered, the way they were answered was more of, this is what happened -- it wasn't this is what happened, it was, well, this could have happened to me.

10/29/18 VRP 117. J.H.'s mother sought to explain further. *Id.* Defense counsel affirmatively sought that further explanation. 10/29/18 VRP 117.¹

The reason why was what does it mean, what are you saying, what are the timeframes when it happened. The answers to the questions were so broad and so wide ranging. And it wasn't in the way you hear someone talk about a memory, it wasn't a memory so much as a trying to fit, well, maybe you'll believe this. You don't -- maybe you'll believe, maybe,

¹ "Your honor, I'm going to ask that she can answer the question." *Id.*

and kept trying to change the parameters of what was being said.

Id. J.H.'s mother testified that she did not believe J.H.'s disclosure was serious enough that her treating psychologist should know about it. 10/29/18 VRP 118. J.H.'s mother testified that, to her knowledge this was the first disclosure that J.H. made concerning sexual abuse. 10/29/18 VRP 119.

On cross-examination, defense counsel explored with J.H.'s mother that she "had questions in [her] mind as to whether [J.H.] was telling the truth." 10/29/18 VRP 123. J.H.'s mother acknowledged that "she called [J.H.] into question" and that they "had words." *Id.*

J.H. was born on June 28, 2001. 10/29/18 VRP 166. J.H. testified that the first incident she could specifically mark was "about 1st grade." 10/29/18 VRP 184. It happened in her parents' bathroom. 10/29/18 VRP 184-85. J.H. testified to facts amounting to sexual assault. 10/29/18 VRP 188-90. J.H. was asked to describe what defendant's mouth did when it was in contact with J.H.'s vagina. 10/29/19 VRP 190. J.H. responded: "I don't want to describe it." *Id.* When asked "Would it help you to take a break?", J.H. responded "I don't know." *Id.* J.H.'s first day of testimony ended abruptly as she was being examined about that assault. 10/29/18 VRP 190.

The next day, the prosecutor noted for the record that the proceedings left off the day before with J.H. "in tears." 10/30/18 VRP 3. The prosecutor further noted that "[i]t was a very difficult afternoon". *Id.*

The prosecutor's expressed intention when recommencing the examination of J.H. was the exploration of J.H.'s demeanor and bias. 10/30/18 VRP 4. The entire exchange was relatively brief:

Q Let's do a couple of questions to make sure the microphone is picking up your voice. First question is do you remember where we left off yesterday?

A Yes.

Q And when we broke for the afternoon, there were two people here in the courtroom who are here today in the front row. Can you tell me by relationship to your family who they are?

A Sally Casey is my mom's best friend and my Aunt Donna.

Q Are they friends of yours or just friends of your mom's?

MR. WINSKILL: Your Honor, I'm going to object, I don't think it is relevant.

MR. SCHACHT: Goes to her demeanor and bias.

THE COURT: I will allow the question. I'll take this opportunity to ask if you can raise your voice a bit.

THE WITNESS: Sorry.

THE COURT: Thank you very much.

Q (By Mr. Schacht) I don't know if you remember the question I put to you. would you consider them friends of yours or friends of your mom's?

A More friends of my mom's.

Q 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?

A No.

Q Did that include before court and after court?

A Yes.

10/30/18 VRP 4-5.

The jury in this case was instructed that “the manner of the witness while testifying” was a relevant consideration in evaluating the credibility of each witness. Jury Instruction No. 1 (CP 77).

In closing argument, defense counsel highlighted the fact that J.H.’s own mother does not believe her:

She is watching Criminal Minds, a television show, with her daughter approximately three weeks prior to [J.H.] disclosing that she was touched by her dad to Dr. Huddleston. They’re watching this show and she said to mom, dad did that to me. So there is a discussion. And she obviously wants to know what she is talking about. They discuss this. And if you recall her testimony, Deanne, she indicated that she's asking her questions, but her responses sounded more like a story than a history of what had happened.

11/5/18 VRP 80.

Following the presentation of further evidence, defendant was subsequently found guilty of one count of rape of a child in the first degree and three counts of child molestation in the second degree. CP 128-146.

Facts relevant to defendant's sentencing claims are addressed in the body of the argument below.

III. ARGUMENT

A. Petitioner's prosecutorial misconduct claim is not well taken.

1. Defendant presents a claim of unpreserved evidentiary error—not constitutional error.

The prosecutor had a legitimate purpose in seeking to demonstrate to the jury that J.H.'s "manner . . . while testifying" (explicitly made relevant by the jury instructions²) was not merely the product of the stress of testifying in court, but the stress of testifying in court without any family support. This brief questioning was logically relevant. It helped explain J.H.'s tearful demeanor while testifying and was relevant for that reason.³

Defendant argues that the absence-of-hug evidence was unfairly prejudicial,⁴ and amounted to prosecutorial misconduct. This is a claim of evidentiary error—specifically an ER 403 prejudice / probativity claim—which has been recast as a claim of constitutional error.

Evidentiary error under ER 404 is not constitutional error. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951, 955 (1986) (citing *State v.*

² Jury Instruction 1 (CP 77-78).

³ *United States v. Qamar*, 671 F.2d 732, 736 (2d Cir. 1982) and *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir.1996) discuss how death threats were relevant to explain the witness' trial demeanor. These cases also address the concomitant ER 403 prejudice / probativity issues. Of course, in these cases the claim of error was preserved.

⁴ Appellant's Brief at 14-16.

Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)); *State v. Everybodytalksabout*, 145 Wn.2d 456, 468–69, 39 P.3d 294 (2002)).⁵ It necessarily follows that ER 403 error, which involves the same prejudice—probativity balancing, is also not constitutional error. *See State v. Jackson*, 102 Wn.2d at 693-94 (which explicitly makes the obvious point that the necessary ER 404(b) prejudice / probativity balancing test is the ER 403 test). Because defendant failed to object to the evidence at trial

he is barred from raising any objection here. *State v. Chase*, 59 Wn.App. 501, 508, 799 P.2d 272 (1990) (defendant waived any error in admitting his use of the alias because he made no objection at trial; error, if any, would have been due to a violation of ER 403 and 404(b); such error is not of constitutional magnitude and cannot be raised for the first time on appeal per RAP 2.5(a)).

State v. Elmore, 139 Wn.2d 250, 283, 985 P.2d 289, 310 (1999).

Defendant presented no timely prejudice / probativity objection to the absence-of-hug evidence. He cannot raise this claim for the first time on appeal by simply recasting it as a constitutional claim. ER 103; RAP 2.5(a).

⁵ A four justice plurality held the same in *State v. Powell*, 166 Wn.2d 73, 206 Pl3d 321 (2009). Three concurring justices concluded that the claim of evidentiary error had been preserved with a timely objection, and resolved the issue as a matter of harmless evidentiary error. *State v. Powell*, 166 Wn.2d at 85-88.

2. Alternatively, defendant has failed to demonstrate manifest constitutional error.

“The admission of evidence on an uncontested matter is not prejudicial error.” *Brown v. Quick Mix Co.*, 75 Wn.2d 833, 839, 454 P.2d 205 (1969) (citing *Matthews v. City of Spokane*, 50 Wn. 107, 96 P. 827 (1908)).

The State elicited the absence-of-hug evidence to demonstrate the absence of maternal support in this case. That absence of maternal support had already been elicited by defendant’s lawyer from J.H.’s mother, Deanne,⁶ when he led Deanne to explain that she “had questions in [her] mind as to whether [J.H.] was telling the truth” and that those questions were why Deanne did not “contact any agencies” to report J.H.’s disclosure of sexual assault. The absence-of-hug evidence harmonized well with defendant’s even-her-own-mother-doesn’t-believe-her argument. *See* 11/5/18 VRP 80 (quoted *supra*). The reason that skilled defense counsel did not object to the absence-of-hug evidence is that it corresponded with defense counsel’s theory of the case.

“The admission of evidence on an uncontested matter is not prejudicial error.” *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321, 328 (2009) (citing *Brown v. Quick Mix Co.*, 75 Wn.2d 833, 839, 454 P.2d 205

⁶ 10/29/18 VRP 123.

(1969) (citing *Matthews v. City of Spokane*, 50 Wn. 107, 96 P. 827 (1908)). Defense counsel had good reasons for not objecting to the absence-of-hug evidence. In addition to the relevant explanatory inference addressed above, the evidence presented some additional⁷ reason for sympathy, but it also reinforced the argument that J.H.'s own mother did not believe her. See *State v. Israel*, 113 Wn. App. 243, 272–73, 54 P.3d 1218 (2002) which cited *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) as authority for the refusal to presume that an impermissible inference was meant or taken in the absence of an objection by the defense.

To reverse based on unobjected-to prosecutorial misconduct, the reviewing court needs to find inflammatory behavior or “severe” misconduct sufficient to demonstrate “flagrant and ill-intentioned” misconduct. *In re Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142, 1150 (2018). Nothing like that presents itself in this case.

Alternatively, defendant presents this Court with no ER 403 prejudice-probativity analysis. Defendant has not even demonstrated evidentiary error. If evidentiary error is undemonstrated, manifest constitutional error is surely undemonstrated.

⁷ The jury had already heard that J.H.'s mother did not believe her and did not report J.H.'s disclosure to law enforcement or J.H.'s psychologist. 10/29/18 VRP 115-16, 123.

A prosecutor is authorized to explain and analyze the demeanor of a witness. *State v. Bautista-Caldera*, 56 Wn. App. 186, 194, 783 P.2d 116 (1989); *State v. Israel*, 113 Wn. App. 243, 272, 54 P.3d 1218, 1236 (2002). This case presents an evidentiary foundation necessary for such explanation and analysis.

3. Alternatively, if manifest constitutional error is presented by this case it is harmless beyond a reasonable doubt.

Before J.H. testified, the jury already knew that J.H.'s mother did not believe her and that her mother did not report J.H.'s disclosure of sexual assault to anyone. 10/29/18 VRP 115-16, 123. The absence of maternal support for J.H. was a reality of defendant's trial. The absence-of-hug evidence was merely another facet of that reality.

As noted above, the absence-of-hug evidence (a) helped explain J.H.'s demeanor (a relevant purpose), and (b) further amplified defendant's argument that J.H.'s own mother didn't believe her. See 11/5/18 VRP 80. There is also a sympathy component to this evidence but it is relatively minor in comparison. The absence-of-hug evidence was harmless beyond a reasonable doubt.

4. Alternatively, defendant has not established that a curative instruction could not have remedied the alleged prosecutorial misconduct.

Defendant frames his absence-of-hug evidence claim as prosecutorial misconduct. "If counsel does not object at trial, the claim [of prosecutorial misconduct] is waived unless conduct is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" *In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 143, 385 P.3d 135 (2016). Petitioner's only argument is a conclusory statement that "[i]nstructing jurors to ignore the evidence would have been futile in light of how emotionally charged it was." Appellant's Brief at 16.

In this case J.H. testified about repeated rape by her own father. J.H.'s own mother previously testified that she did not believe her. J.H. became upset and cried. The jury saw and heard all of these things without objection. The prosecutor was legitimately entitled to explain why J.H. cried and was unwilling to answer a question. Any potential prejudice could have been remedied with a curative instruction or a limiting instruction.

B. Defense counsel invited the trial court to consider good time credit at defendant's sentencing. The record does not establish that good time credit played any role in the determination of defendant's standard range sentence. The duration of a standard range sentence is not appealable.

Defendant complains that the trial court erred by considering potential good time credits when imposing sentence. Appellant's Brief at 16. The trial court asked about good time, but only after an invitation by defendant's lawyer:

We're asking the Court to impose the 240 months in custody. This is -- because of the sentencing ranges and guidelines in these matters, Your Honor, you know how significant always the punishments are. It's a life sentence. It's -- the minimal sentence is significant. He will not become eligible to be considered by the parole board until the minimum sentence is served. He may or may not be paroled at that time. It's up to the parole board. It 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.**

(emphasis added) 12/14/18 VRP at 10. Defendant then quotes the trial court's response which immediately followed that invitation:

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 --

MR. WINSKILL: I think it's 10 percent.

THE COURT: Is it different than that which would be otherwise afforded?

MR. WINSKILL: I think it's 10 percent.

MR. SCHACHT: My recollection is 15 percent.

MR. WINSKILL: Or 15.

MR. SCHACHT: But I'm not entirely sure about that.

MR. WINSKILL: I know they change it periodically. I know it's no more than 15.

THE COURT: That's why I asked, actually.

Appellant's Brief at 16-17; 12/14/18 VRP 10-11. Defense counsel sought to further exploit that invited exchange:

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.

12/14/18 VRP 11.

“Good time” arguments can favor either the aggravation or mitigation of a prospective sanction. In this case, the record only supports the argument that the availability of good time was presented as a reason for the mitigation of defendant's sentence. 12/14/18 VRP at 10-11. There is no suggestion of adverse prejudice in this case. Error without prejudice is not reversible.⁸ *State v. Barry*, 183 Wn.2d 297, 318, 352 P.3d 161 (2015) (citing *State v. White*, 72 Wn.2d 524, 531, 433 P.2d 682 (1967)).

Alternatively, the record of defendant's sentencing clearly expresses that the consideration of good time was requested by defense counsel.

⁸ Appellant makes no claim of constitutional error. See Appellant's Brief at 20 (“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.”). *Id.*

12/14/18 VRP 10-11. If consideration of the relative paucity of good time available to defendant was error, it was invited error.

In this case the trial court imposed a sentence within its statutory authority—a sentence within the standard range. CP 128-146. Defendant does not challenge the duration of his standard range sentence as beyond the trial court’s statutory authority. Appellant’s Brief at 16-20. Defendant’s failure to demonstrate that the trial court exceeded its statutory authority means that the doctrine of invited error applies in this case. *In re West*, 154 Wn.2d 204, 214, 110 P.3d 1122, 1127 (2005).

“[T]he invited error doctrine prohibits a party from appealing on the basis of an error that he or she ‘set up’ at trial.” *State v. Schierman*, 192 Wn.2d 577, 618, 438 P.3d 1063 (2018). In this case, defense counsel asked the sentencing judge to consider the relative paucity of good time available to defendant when fixing sentence. Now, on appeal, defendant claims that the trial court erred by doing just what defense counsel asked.

Alternatively, it is not clear that the trial court did anything more than try to understand the nature of defense counsel’s good time assertion. The record does not demonstrate that the availability or unavailability of good time was a factor which weighed in the trial court’s sentencing decision. Merely discussing good time does not demonstrate error. *See State v. Wakefield*, 130 Wn.2d 464, 478, 925 P.2d 183, 190 (1996).

Alternatively, defendant received a standard range sentence and the duration of a standard range sentence is not appealable. *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993).⁹ All of the cases cited by defendant are exceptional sentence or juvenile manifest injustice cases.¹⁰

C. Defendant has failed to preserve his sentencing conditions challenge for appellate review.

Defense counsel in this case is presumed competent.¹¹ Defendant presented no objection to the conditions of his sentence to the sentencing court. Defendant has asserted no constitutional sentencing error on appeal. If a competent defense lawyer is not required to argue nonconstitutional sentencing provisions before the sentencing court, then the appellate court *de facto* and *de jure* assumes that role. Judicial economy should preclude such a situation. This defendant should not be permitted to challenge the conditions of his sentence for the first time on appeal. RAP 2.5(a).

⁹ See also, *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005), which reaffirms the principle that the duration of a standard range sentence (unlike the fixing of restitution in a case where a standard range sentence is imposed) is entitled to the presumption that there can be no abuse of discretion as a matter of law.

¹⁰ *State v. Buckner*, 74 Wn. App. 889, 892, 876 P.2d 910 (1994), *reversed on other grounds*, 125 Wn.2d 915 (1995). *State v. Sledge*, 133 Wn.2d 828, 830, 947 P.2d 1199 (1997); *State v. Fisher*, 108 Wn.2d 419, 421, 739 P.2d 683 (1987); *In re Crow*, 187 Wn. App. 414, 418, 349 P.3d 902, 905 (2015); *State v. Bourgeois*, 72 Wn. App. 650, 651, 866 P.2d 43, 44 (1994).

¹¹ There is a strong presumption counsel was competent. *State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

D. Should this court elect to consider the issue, the internet access provisions imposed as a condition of defendant's sentence were valid crime-related prohibitions.

The following computer-related community custody conditions were imposed as a condition of defendant's sentence:

No internet access or use without prior approval of the CCO [Community Corrections Officer], Treatment Provider, and the Court.

CP 146.

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). The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant to monitor compliance with this condition. Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind.

Id. Defendant interposed no timely objection to those conditions. CP 8-22.

Defendant appeals the imposition of these conditions because “there is no evidence in the record that Huyck used the internet, email, or any social media sites to perpetrate his offenses.” Appellant’s Brief at 23.

This provision should be interpreted as barring the use of “computer[s], phone[s], or computer-related device[s]” that have access to the Internet or on-line computer services. The language of the provision, taken as a whole, applies only to “connected” devices.¹² There would be no

¹² Defendant argues that defendant was barred from accessing computers. Appellant’s Brief at 24. Microprocessors (computers) are everywhere now.

need for “random searches of any computer, phone, or computer related device” if the use of such devices were totally barred. The banning of “dumb” telephones is obviously not intended.

“Whether a sentence condition is related to the circumstances of a crime is an inherently factual question.” *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137, *review denied*, 193 Wn.2d 1029, 445 P.3d 561 (2019).

Determining whether a relationship exists between the crime and the condition “will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.” *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989). Thus, we review sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

State v. Casimiro, 8 Wn. App. at 249 (n.2). This Court should not consider defendant’s claim that the record does not support the computer and internet related prohibitions, raised for the first time on appeal, because its consideration requires more than consideration of a question of law. RAP 2.5(a); *State v. Casimiro*, 8 Wn. App. 2d at 249-50.

Alternatively, the record adequately supports the computer and internet prohibitions imposed by the sentencing court. After J.H. testified about rape committed upon her by defendant,¹³ J.H. testified that the rape

¹³ 10/30/18 VRP 5-8. The viewing of the “porn” was “[b]efore” the rape. 10/30/18 VRP 9-10.

was not “the first time that something happened with [her] father.” 10/30/18

VRP 8. J.H. then testified:

It was in early morning, my mom wasn't up yet, and I had woken up and went into the dining room and my dad was at the computer. And he was watching porn and he had me come sit on his lap.

Id. J.H. described the pornography she viewed with her father, and noted that the viewing of the pornography happened “maybe between 10 or 20” times before it escalated to defendant touching J.H. 10/30/18 VRP 12. The pornography was viewed on defendant’s computer. 10/30/18 VRP 9, 10, 11, 12.

J.H. also testified how, in a later incident, defendant rubbed his hand on J.H.’s vagina, under her underwear. 10/30/18 VRP 13. This happened while J.H. was seated on defendant’s lap in a chair facing the computer. 10/30/18 VRP 14. Defendant had J.H. watch a video before he put his hand under J.H.’s underwear.¹⁴ 10/30/18 VRP 13.

There was thus sufficient evidence that defendant used pornography displayed on his computer to facilitate the commission of rape. Defendant argues that the search of defendant’s “family computer failed to reveal the presence of any pornographic materials.” Appellant’s Brief at 23. That argument, raised for the first time on appeal, ought not avail defendant

¹⁴ The content of the video was not described. *Id.* The context would appear to suggest that it was pornographic. *Id.*

much. If defendant's computer held no pornography, then the pornography he viewed with J.H. had to be imported into that computer from some other source. The Internet is the most convenient facility and the most probable source (especially in this context, where defendant is raising his claim for the first time on appeal). Barring the defendant from being able to use such a facility is a crime related prohibition.

State v. Riley, 121 Wn.2d 22, 36–38, 846 P.2d 1365 (1993) provides ample authority for the sentencing authority's barring defendant from using devices which are connected to the Internet. If "prohibiting Riley from possessing a computer for the length of his sentence is a reasonable punishment for a self-proclaimed computer hacker,"¹⁵ then prohibiting defendant from accessing the Internet for the length of his sentence is a reasonable punishment for a rapist who used the Internet to facilitate rape.

Defendant mischaracterizes the sentencing issue in this case with the elements of a crime at issue in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733-34, 198 L. Ed. 2d 273 (2017). Appellant's Brief at 23. *Packingham* addresses constitutional limitations upon the power to criminalize conduct—not the power to impose conditions upon a criminal sentence. See *United States v. Perrin*, 926 F.3d 1044, 1048 (8th Cir. 2019).

¹⁵ *State v. Riley*, 121 Wn.2d at 37.

The sentencing power is broad enough to encompass the restrictions imposed in this case. *State v. Riley*, 121 Wn.2d at 36-38.

E. Should this court elect to consider the issue, the State concedes that the criminal filing fee should not have been ordered and should be deleted because defendant is indigent.

The State acknowledges that defendant's argument on this particular issue is correct. The State asks this court to impose the directory remedy of directing the trial court to delete the imposition of the criminal filing fee from the judgment and sentence.

F. Should this court elect to consider the issue, the State concedes certain conditions pertaining to alcohol should be deleted or modified.

After reviewing the alleged victim's testimony and the pre-sentence report, the State cannot develop an argument that alcohol or drugs contributed to appellant's crimes. *See State v. Munoz-Rivera* 190 Wn. App. 870, 893-94, 361 P.3d 182 (2015). The State asks this court to impose the directory remedy of directing the trial court to strike the following provisions of Appendix H to the judgment and sentence (CP 146):

paragraph 20,¹⁶ paragraph 21,¹⁷ paragraph 22,¹⁸ and paragraph 23¹⁹ (requiring alcohol evaluation and treatment).

The State also agrees that the word “use” should be deleted from paragraph 11, so that the paragraph should read: “Do not ~~use or~~ consume alcohol and/or drugs to include Marijuana.” This provision is authorized by RCW 9.94A.700(4)(c), (5)(d). The State asks this court to impose the directory remedy of directing the trial court to modify the judgment and sentence as requested.

G. Should this court elect to consider the issue, the State concedes sentencing error regarding the “stay out of areas where children’s activities regularly occur or are occurring.”

The State concedes that paragraph 19 (CP 146) should not have been imposed and should be deleted because the record contains no indication that a rape of J.H. occurred at a location or locations where children’s activities regularly occur or are occurring, or that any such locations were used to facilitate any of defendant’s rapes of J.H. The State asks this court

¹⁶ “Do not purchase or possess alcohol.” CP 146.

¹⁷ “Do not enter drug areas as defined by court or CCO.” CP 146.

¹⁸ “Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos or any location which requires you to be over 21 years of age.” CP 146.

¹⁹ “Obtain alcohol [and] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.” CP 146.

to impose the directory remedy of directing the trial court to delete paragraph 19 of Appendix H from the judgment and sentence.

H. Should this court elect to consider the issue, the State concedes sentencing error regarding sentencing conditions relating to mental health issues.

The record does not disclose that mental health issues or anger management issues are in any way related to defendant's crime. Accordingly, the State agrees that paragraph 26²⁰ should be deleted from the judgment and sentence. The State asks this court to impose the directory remedy of directing the trial court to delete paragraph 26 of Appendix H from the judgment and sentence.

IV. CONCLUSION

Without objection, the prosecutor asked a victim of rape a question intended to help explain her courtroom demeanor the previous day. That relevant question and its answer may have imparted feelings of sympathy to some jurors, but it also highlighted the opinion evidence (already elicited by defense counsel) that the victim was not believed by her own mother. Any issue posed by this question was resolved when defense counsel made the tactically reasonable decision not to object.

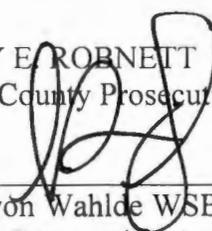
²⁰ "Obtain both a Mental Health Evaluation and an Anger Management Evaluation, and follow through with all recommendations of the providers, including taking medication as prescribed. Should mental health treatment be currently in progress, remain in treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming." CP 146.

Defendant asked the trial court to consider good time credit at sentencing and now argues that the trial court considered good time credit at sentencing. For several different reasons, that claim is meritless.

Defendant's arguments relating to crime-related prohibitions are raised for the first time on appeal and should be barred by RAP 2.5(c). Should this court elect to resolve them, the State has responded.

RESPECTFULLY SUBMITTED this 23rd day of October, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


Mark von Wahle WSB# 18373
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

10.23.19 Pheren Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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