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NO. 53087-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HUYCK,

Appellant.

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

The Honorable Jack Nevin, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THIS COURT SHOULD REJECT THE STATE’S ATTEMPT TO RECAST HUYCK’S CONSTITUTION-BASED PROSECUTORIAL MISCONDUCT CLAIM INTO A MERE WAIVED EVIDENTIARY ISSUE.....	1
2. IT WAS IRRELEVANT WHETHER J.H. WAS COMFORTED BY HER MOTHER FOLLOWING HER FIRST DAY OF TESTIMONY, BUT STILL UNFAIRLY PREJUDICIAL TO HUYCK.	2
3. A CURATIVE INSTRUCTION WOULD NOT HAVE CURED THE TAINT ON HUYCK’S TRIAL RESULTING FROM THE PROSECUTOR’S MISCONDUCT.	6
4. HUYCK’S COUNSEL DID NOT INVITE THE SENTENCING COURT TO CONSIDER “GOOD TIME” CREDITS WHEN IMPOSING SENTENCE.	7
5. THE STATE’S CONCESSION THAT SEVERAL COMMUNITY CUSTODY CONDITIONS WERE IMPROPERLY IMPOSED SHOULD BE ACCEPTED AND THE STATE’S CLAIM HUYCK’S FAILURE TO OBJECT TO THE CONDITIONS AT SENTENCING PRECLUDES RELIEF SHOULD BE REJECTED.	8
6. THE STATE’S CONCESSION THAT THE CRIMINAL FILING FEE SHOULD BE STRICKEN FROM HUYCK’S JUDGMENT AND SENTENCE SHOULD BE ACCEPTED.	9
B. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Crow</u> 187 Wn. App. 414, 349 P.3d 902 (2015)	7
<u>In re Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	1
<u>In re Pers. Restraint of Call</u> 144 Wn.2d 315, 28 P.3d 709 (2001).....	8
<u>State v. Bourgeois</u> 72 Wn. App. 650, 866 P.2d 43 (1994)	7
<u>State v. Buckner</u> 74 Wn. App. 889, 876 P.2d 910 (1994) <u>reversed on other grounds</u> , 125 Wn.2d 915 (1995)	7
<u>State v. Casteneda–Perez</u> 61 Wn. App. 354, 810 P.2d 74 (1991).....	1
<u>State v. Coombes</u> 191 Wn. App. 241, 361 P.3d 270 (2015).....	8
<u>State v. Fisher</u> 108 Wn.2d 419, 739 P.2d 683 (1987).....	7
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	3
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	1
<u>State v. Sledge</u> 133 Wn.2d 828, 947 P. 2d 1199 (1997).....	7
<u>State v. Smiley</u> 195 Wn. App. 185, 379 P.3d 149 (2016).....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<u>People v. Fielding</u> 158 N.Y. 542, 53 N.E. 497 (1899).....	2
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
AM BAR ASS'N, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)	1
RAP 2.5.....	8
U.S. Const. Amend. VI.....	1
U.S. Const. Amend. XIV	1
Wash. Const. article I, § 22.....	1

A. ARGUMENTS IN REPLY

1. THIS COURT SHOULD REJECT THE STATE'S ATTEMPT TO RECAST HUYCK'S CONSTITUTION-BASED PROSECUTORIAL MISCONDUCT CLAIM INTO A MERE WAIVED EVIDENTIARY ISSUE.

On appeal, Huyck argues the prosecutor deprived him of his constitutional right to a fair trial by improperly pandering to the passions and prejudices of jurors at the beginning of J.H.'s second day of testimony. Brief of Appellant (BOA) at 11-16. In response, the State claims Huyck's challenge involves not a constitutional claim, but instead a mere unpreserved relevance claim. Brief of Respondent (BOR) at 6-7. This Court should reject the State's claim.

The constitutional right to a fair trial is a fundamental liberty interest secured by the Sixth and Fourteenth Amendments and Wash. Const. article I, section 22. In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). In this context, a prosecutor must seek a conviction based only on "probative evidence and sound reason," and should not be sought through efforts to "inflame the passions and prejudice of the jury." Id. at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991) and AM BAR ASS'N, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)); see also State v. Monday, 171 Wn.2d 667, 676 n.2, 257 P.3d 551 (2011) (noting that for over 100 years it has been

improper for a prosecutor to procure a conviction by resorting to “the aid of passion, sympathy or resentment[,]” quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

Here, the prosecution did just that by pandering to the jurors’ passions and prejudices by eliciting the irrelevant but disturbing fact that J.H.’s mother did not comfort her following her emotional breakdown on the witness stand the day before. 6RP 4-5. This constitutes a violation of Huyck’s constitutional right to a fair trial and therefore involves an issue of constitutional magnitude that may be raised on appeal.

2. IT WAS IRRELEVANT WHETHER J.H. WAS COMFORTED BY HER MOTHER FOLLOWING HER FIRST DAY OF TESTIMONY, BUT STILL UNFAIRLY PREJUDICIAL TO HUYCK.

As argued in Huyck’s opening brief, 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 State attempts to argued to the contrary is unpersuasive.

The State candidly admits it elicited the “absence-of-hug” evidence “to demonstrate the absence of maternal support.” BOR at 8. The State also admits there is “a sympathy component to this evidence[,]” but claims

it is only minor compared to its relevance. BOR at 10. The State is wrong on both counts.

The State claims the “absence-of-hug” evidence was relevant because the defense elicited from J.H.’s mother, Deanne, that she did not believe J.H. because her allegations were too similar to those depicted in an episode of “Criminal Minds” they had just watched. 5RP 113-17, 123, 152-57; BOR at 8. Notably, in making this argument the State ignores the fact that it was the prosecution, not the defense, that introduced Deanne’s lack of belief in J.H.’s allegations.¹ 5RP 116-18.

The State also ignores the context in which Deanne’s testimony was presented, which was regarding how the allegations initially came to light, which is relevant to whether or not they are true. The circumstances surrounding an accuser’s reporting of sex abuse allegations are almost always relevant, especially when the reporting is delayed and becomes an issue at trial, as it was here. See e.g., State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)(evidence of prior child abuse by defendant accused of molesting stepdaughter relevant and admissible to explain why

¹ The State does acknowledge in its statement of the case that this testimony was elicited during the prosecutor’s examination of Deanne on direct, but cites only to the defense cross in the argument section of its brief. BOR at 2-3, 8 n.6.

stepdaughter waited six years to report once delayed reporting raised as an issue by defense).

Here, J.H.'s claim was that Huyck had sexually abused her years before when she was in grade school. 5RP 184. Therefore, the facts surrounding her initial disclosure were relevant to her credibility and therefore properly admitted.

But whether her mother comforted her following her emotional breakdown at trial had no bearing on J.H.'s credibility, or Deanne's. Nor did it make it more or less likely Huyck committed the charge offenses. Instead, the "absence-of-hug" evidence served only "to demonstrate the absence of maternal support" at the trial, as the State admits. BOR at 8. Whether Deanne supported her daughter at trial had nothing to do with whether the sex abuse allegations against Huyck were true or not.

Instead it was an egregious and ill-intentioned tactic by the prosecution to garner sympathy for J.H. from the jurors. The State's claim that this evidence was actually helpful to the defense is patently absurd. See BOR at 8 (claiming the "absence-of-hug evidence harmonized well with defendant's even-her-mother-doesn't-believe-her argument."). That Deanne did not believe J.H.'s allegations against Huyck when they were made was relevant to J.H.s credibility. But the lack of a mother-daughter hug after J.H.'s breakdown on the stand was not relevant to any fact or

issue of consequence at trial. Rather, it served only to inflame the passions of jurors in favor of J.H. given her uncaring mother, the only witness besides Huyck himself who supported Huyck's defense and made it more likely they would give J.H. the benefit of the doubt with regard to the allegations as a result. This cut directly against the reasonable doubt standard applicable to criminal prosecutions, thereby effectively lowering the prosecution's burden of proof to convict.

As noted in the opening brief, 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. or Huyck. By demonizing the one prosecution witness that did not believe J.H.'s allegations, 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.

3. A CURATIVE INSTRUCTION WOULD NOT HAVE CURED THE TAINT ON HUYCK'S TRIAL RESULTING FROM THE PROSECUTOR'S MISCONDUCT.

Once it was revealed J.H.'s mother failed to provide her with emotional support following her emotional breakdown concluding the first day of her testimony, the resulting prejudice could not be "unrung" through a curative instruction from the trial court. State v. Smiley, 195 Wn. App. 185, 196, 379 P.3d 149 (2016).

Deanne's disbelief in J.H.'s allegations did not open the door for the no-hug evidence, nor did it "fit" with the defense theory of the case. Instead it revealed the irrelevant fact that despite being J.H.'s mother, Deanne was not providing emotional support to her daughter following a difficult day on the witness stand. Such lack of in-the-moment maternal support was a fact that could not be ignored once revealed, even if jurors had been told to do so because it evokes an emotional reaction that cannot reasonably be disregarded once revealed. It is unlike an instruction to ignore simple fact evidence, which can be compartmentalized and then purposefully disregarded. Evidence that a mother failed to provide emotional support for a daughter, however, evokes an emotional response likely to negatively and pervasively taint a juror's perception of the

mother. An instruction to disregard such emotionally charged evidence would not cure the introduction of such evidence.

4. HUYCK'S COUNSEL DID NOT INVITE THE SENTENCING COURT TO CONSIDER "GOOD TIME" CREDITS WHEN IMPOSING SENTENCE.

Despite the State's contrary claim, Huyck's counsel did not invite the trial court to consider "good time credits when imposing sentence." BOR at 12. Defense counsel did note Huyck was 57-years-old and facing a potential life sentence regardless of what minimum term the court set, and also noted that Huyck's crimes of conviction are eligible for less "good time" credits than other types of offenses. 11RP 10.

But regardless of defense counsel's comments, it has been well-settled since long before Huyck's sentencing that it is error for a sentencing court to rely on the possibility of good time credits to determine what sentence to impose. 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 record here shows the sentencing judge specifically considered that "good time" credits had the potential to result in Huyck's release from

confinement prior to serving a 20-year sentence and therefore lengthened Huyck's minimum term of incarceration to avoid that possibility. This was error warranting remand for resentencing.

5. THE STATE'S CONCESSION THAT SEVERAL COMMUNITY CUSTODY CONDITIONS WERE IMPROPERLY IMPOSED SHOULD BE ACCEPTED AND THE STATE'S CLAIM HUYCK'S FAILURE TO OBJECT TO THE CONDITIONS AT SENTENCING PRECLUDES RELIEF SHOULD BE REJECTED.

On appeal, Huyck challenges several of the community custody conditions imposed. Brief of Appellant (BOA) at 20-26. In response, the State concedes several of the challenged conditions were wrongly imposed. Brief of Respondent (BOR) at 20-22. The State's concessions are well taken and should be accepted by this Court for the reasons set forth in Huyck's opening brief.

This Court should, however, reject the State's claim Huyck is not entitled to relief because he failed to object to the conditions at sentencing. BOR at 12 (citing only RAP 2.5(a)). It is well settled that "courts must correct an erroneous sentence upon discovery." State v. Coombes, 191 Wn. App. 241, 249, 361 P.3d 270, 274 (2015)(citing In re Pers. Restraint of Call, 144 Wn.2d 315, 331-32, 28 P.3d 709 (2001)). Because, as the State concedes, several of the community custody conditions were imposed in error, this Court must order them corrected now. Id.

6. THE STATE'S CONCESSION THAT THE CRIMINAL FILING FEE SHOULD BE STRICKEN FROM HUYCK'S JUDGMENT AND SENTENCE SHOULD BE ACCEPTED.

The State concedes, correctly, that the \$200 criminal filing fee should be stricken from Huyck's judgment and sentence. BOR at 20. For the reasons set forth in Huyck's opening brief (BOA at 27-28), the State's concession should be accepted.

B. CONCLUSION

For the reason set forth here and in Huyck's opening brief, this Court should reverse and remand for a new, fair trial as required by the State and Federal constitutions. In the alternative, this Court should remand for resentencing and to strike several conditions of community custody and the criminal filing fee.

DATED this 18th day of November 2019.

Respectfully submitted,

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