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

STATE OF WASHINGTON, RESPONDENT

V.

CHRISTOPHER DECICIO, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay, Judge

No. 19-1-00197-23

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Decicio presents three different arguments that each claim that the prosecutor committed misconduct when challenging his credibility during closing arguments. The State contends that the prosecutor's arguments were proper and that in any event, because Decicio failed to object to the argument in the trial court, his appeal should be denied because he has failed to show that the prosecutor's arguments were flagrant and ill intentioned comments that caused prejudice that could not be obviated with a curative jury instruction.
 - a) Decicio contends that the prosecutor improperly expressed a personal opinion about Anderson's credibility. The State counters that the prosecutor did not express a personal opinion but instead properly marshalled the evidence and appropriately argued inferences from the evidence to address the contested issue of credibility.
 - b) Decicio identifies a fragment of the prosecutor's closing argument and contends that the prosecutor committed misconduct by expressing a personal opinion about Decicio's guilt. The State counters that the prosecutor's comment cannot reasonably be interpreted as a comment on Decicio's guilt but was instead an appropriate argument that addressed Decicio's credibility.
 - c) Decicio contends that the Prosecutor committed misconduct by implying that the jury must find that Decicio lied or was mistaken in order to acquit him. The State counters that the prosecutor did not mention guilt or acquittal but instead merely and appropriately argued the credibility inferences to be drawn from the evidence where Decicio's testimony conflicted with the victim's testimony.

2. Decicio contends that certain conditions of community supervision imposed by the court are not crime-related and are therefore unlawful. The State counters that each one of the conditions imposed are statutorily required or are statutorily within the discretion of the sentencing court to impose.

B. FACTS AND STATEMENT OF THE CASE

This case proceeded to a jury trial on the charge of assault in the second degree. CP 10-11.¹ Evidence presented at trial showed that on the date alleged Decicio unlawfully struck the victim, Lucas Anderson, in the face with brass knuckles and again with a loaded pistol, causing injury to Anderson's face. RP 36-38.

Anderson testified that, as he passed Decicio's home when he was driving down the road on the way to his own home, he had to come to a stop because Decicio's dogs were in the roadway. RP 35. When Anderson came to a stop, Decicio approached him and accused him of driving inappropriately in a Shelby Mustang. *Id.* Anderson denied owning a Shelby Mustang. RP 36. Decicio responded by striking Anderson in the face with brass knuckles, causing injury to Anderson's face. *Id.* Decicio then pulled a pistol from his shirt, cocked it and in

¹ A second count, alleging unlawful imprisonment, was dismissed prior to trial on the State's motion. RP 27-28.

doing so chambered a round, and then struck Anderson in the face with the pistol. RP 37-38. Anderson then put his car in drive and began driving away, but as he did so Decicio hung onto the window and struck Anderson two more times with pistol. RP 39. When Anderson got home, he called 911 and reported the incident. RP 39. A responding officer arrived within 15 minutes. RP 43, 48.

Sheriff's Deputy Corporal Clark was apparently the first officer to arrive. RP 48. After speaking with Anderson, Corporal Clark attempted to locate Decicio. RP 50. He went to Decicio's house and noted that Decicio's pickup truck was not at the house. RP 51. But as Corporal Clark was parked in front of Decicio's house, he saw Decicio drive into the driveway in his pickup truck. RP 51. When Corporal Clark saw Decicio look at him, he summoned Decicio to stop, but Decicio continued on to his house. RP 51-52, 54. Decicio ignored Corporal Clark, opened the garage door, pulled the truck into the garage, and closed the door. RP 54.

Because Decicio was suspected to be an armed subject and refused to come out of the house, SWAT was called to respond to the scene. RP 55. Decicio continued to ignore commands to come out of the house. Id.

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Eventually, officers deployed CS gas in an attempt to flush Decicio from the house. RP 57, 60. Decicio's initial response was to come out of the house and yell something, but he then went back in the house. *Id.* Decicio remained barricaded in his house for three to four hours. RP 77. While Decicio was barricaded in his house, a trained hostage negotiator, Detective Drogmund, contacted him by telephone and tried to persuade him to surrender peaceably, but Decicio refused. RP 73-76. Eventually, officers entered the house and placed Decicio under arrest. RP 59.

After he was arrested and Mirandized, Decicio told Detective Drogmund that he had been home all day. RP 76. Officers searched the house but were unable to find either the gun or the brass knuckles. RP 61. Decicio testified and admitted that he had had a confrontation with Anderson, but he denied having brass knuckles or a firearm and denied assaulting Anderson. RP 87-88, 103.

Despite having told Detective Drogmund that he had been home all day, Decicio testified that he left his house to go the casino to buy cigarettes. RP 89-90, 104-05. Decicio testified that the casino was 20 to 22 miles from his house and agreed that it would take him about 15 minutes to drive to the casino. RP 105. Decicio asserted that when he

returned from the casino and drove into his garage he did not know that an officer was trying to stop him. RP 91-92, 107. Decicio testified that he took some pills and did not know that Detective Drogmund and SWAT officers were trying to get him to surrender. RP 92-94.

After receiving the evidence, the jury returned a guilty verdict for the lesser charge of assault in the third degree. RP 183. The instant appeal followed.

C. ARGUMENT

1. Decicio presents three different arguments that each claim that the prosecutor committed misconduct when challenging his credibility during closing arguments. The State contends that the prosecutor's arguments were proper and that in any event, because Decicio failed to object to the argument in the trial court, his appeal should be denied because he has failed to show that the prosecutor's arguments were flagrant and ill intentioned comments that caused prejudice that could not be obviated with a curative jury instruction.

Decicio makes three separate claims of prosecutorial misconduct. To prevail on any one of his three claims of prosecutorial misconduct, Decicio must show that, in the context of the *entire* record and the circumstances at trial, the prosecutor's conduct was both improper *and* prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43

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(2011). Thus, even if Decicio were to successfully show that the prosecutor's conduct was improper on some occasion, he must then show that there is a *substantial* likelihood that the improper conduct affected the verdict. *Id.* at 442-43. The State contends that Decicio has not made either showing in the instant case.

On appeal, a prosecutor's comments at closing are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The prosecutor's comments are reviewed in light of the entire record because:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

In re Pers. Restraint of Lui, 188 Wn.2d 525, 561, 397 P.3d 90 (2017)

(internal quotations and alterations omitted). The State contends that no error occurred in the instant case because, rather than to be clear and

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unmistakable that the prosecutor was arguing his personal opinions, it is instead clear and unmistakable that the prosecutor was properly arguing reasonable inferences from the evidence.

Additionally, Decicio did not object at trial based on any of the three claims of prosecutorial misconduct that he now advances for the first time on appeal. Therefore, because Decicio did not object at trial, in addition to showing a *substantial* likelihood that misconduct affected the jury verdict, he must also show that the alleged misconduct was so flagrant and ill intentioned that any resulting prejudice could not have been cured a by jury instruction. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

“[T]he absence of an objection by defense counsel ‘strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.’” *Id.* at 53 n.2 (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal.” *State v. Reed*, 168

Wn. App. 553, 577-78, 278 P.3d 203 (2012) (alteration in original).
(internal quotation marks omitted) (quoting *State v. Russell*, 125 Wn.2d
24, 93, 882 P.2d 747 (1994)). In summary, even if the prosecutor's
statements were improper in this case (which they were not), to prevail on
appeal Decicio bears the burden of showing that a curative instruction
would have been futile. *Glasmann*, 175 Wn.2d at 704. Decicio fails to
meet this burden.

Each of Decicio's three claims of prosecutorial misconduct are
addressed separately, below:

- a) Decicio contends that the prosecutor improperly expressed
a personal opinion about Anderson's credibility. The State
counters that the prosecutor did not express a personal
opinion but instead properly marshalled the evidence and
appropriately argued inferences from the evidence to
address the contested issue of credibility.

Decicio bases this claim of prosecutorial misconduct on his factual
assertion that the prosecutor expressed his personal belief and thereby
vouched for Anderson's credibility. Brief of App. (BOA) at 5. Decicio
bases this assertion on the following, partial quote from the prosecutor's
closing argument:

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There's only one person it could have come from, ladies and gentlemen, and that's the defendant. That's the only person he had contact with, the only person. And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury. So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't.

BOA at 5 (citing RP 158).²

Decicio cites *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985), to support his legal contention, but *Sargent* is distinguishable from the instant case. In *Sargent*, the prosecutor repeatedly vouched for the credibility of a witness by bluntly stating "I believe [the witness]." *Id.* at 343. But in the instant case the prosecutor did not vouch for Anderson's veracity; instead, the prosecutor appropriately drew proper inferences about credibility based upon facts in the record and did so without stating his personal belief. RP 155-59. During closing arguments, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" from the facts in evidence. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (alteration in original) (quoting *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)).

² The correct citation is RP 159.

There is a difference between a prosecutor's personal opinion as an independent fact as compared to an opinion based upon or deduced from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Here, the prosecutor referred to facts in the record to show that Anderson's testimony was credible. RP 159. The testimony at trial showed that although Decicio denied hitting Anderson, Decicio had contact with Anderson, that no one else was present, and that Anderson had injuries that corroborated his testimony that Decicio hit him in the face with brass knuckles and with a pistol. RP 36-38, 52. Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence but is instead expressing a personal opinion. *McKenzie* at 54. Here, the prosecutor was arguing inferences from the evidence.

Courts have cautioned against the use of "we know" statements by a prosecutor during closing arguments because it sometimes blurs the line between what is improper vouching as compared to what is an appropriate marshalling of the evidence. *State v. Robinson*, 189 Wn. App. 877, 894-95, 359 P.3d 874 (2015). However, a prosecutor is afforded wide latitude to draw reasonable inferences from the evidence during closing argument,

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and reviewing courts should consider the prosecutor's "we believe" statement in light of the issues in the case, the evidence presented, and the entire argument provided by the prosecutor. *Id.* at 893. Here, as discussed in *Robinson* at 893-94, the prosecutor's use of the phrase "we know" did not imply special knowledge, express a personal opinion, or attempt to appeal to the jury's passions. Where, as here, the prosecutor uses the "we know" phrase when marshalling the evidence to draw reasonable inferences from it, no error occurs. *Id.* at 894-95.

Additionally, to prevail on his claim of prosecutorial misconduct, Decicio must show that the prosecutor's conduct was both improper and prejudicial. *Id.* at 892. Decicio has made neither showing. Still more, Decicio did not object at trial. Because Decicio did not object at trial, even if he had made the required showings, to prevail on appeal he must also show that no curative instruction would have cured any prejudicial effect of the claimed misconduct and must also show that use of the alleged misconduct "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgenson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Decicio has not shown that a curative instruction was futile and has not

shown a substantial likelihood that the prosecutor's "we know" phrase affected the jury's verdict.

- b) Decicio identifies a fragment of the prosecutor's closing argument and contends that the prosecutor committed misconduct by expressing a personal opinion about Decicio's guilt. The State counters that the prosecutor's comment cannot reasonably be interpreted as a comment on Decicio's guilt but was instead an appropriate argument that addressed Decicio's credibility.

Here, Decicio argues that "[t]he prosecutor also committed misconduct by expressing his personal belief about Decicio's guilt." BOA at 7. To support this argument, Decicio cites to the same fragmented portion of closing argument that he cited in relation to his first claim of prosecutorial misconduct.³ *Id.* Decicio did not object at trial. The quoted language is as follows:

And he got this injury. And he got this injury in the spots where he said the defendant had struck him and shoved the gun into his face. That's where he got this injury.

So, we know, we know that Mr. Anderson is telling the truth and the defendant isn't.

RP 159. This quotation does not support Decicio's contention that the prosecutor was expressing a personal opinion about guilt.

Courts distinguish between a prosecutor's opinion as an independent fact and an opinion deduced from the testimony in the case. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). "[T]here is no prejudicial error unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Calvin*, 176 Wn. App. 1, 19, 316 P.3d 496 (2013) (internal quotation marks omitted) (quoting *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (plurality opinion)). Here, the prosecutor said nothing at all to suggest his personal opinion about Decicio's guilt; instead, he was making reasonable inferences from the evidence about Decicio's credibility as a witness.

Anderson and Decicio both testified that there was a confrontation between them. RP 34-38, 87-88. One witness, Anderson, testified that Decicio had brass knuckles and a gun and that Decicio hit him in the face with the brass knuckles and then hit him in the face with the gun. RP 34-38. Decicio provided directly contrary testimony, asserting that he did not hit Decicio and that he did not have any brass knuckles and did not have a gun. RP 87-88. Obviously, the jury had to make a credibility determination and decide which witness to believe. Prosecutors do not

³ Although Decicio cites to RP 158, the quoted language in Decicio's brief is actually at

commit misconduct by marshalling the evidence to argue reasonable inferences about the credibility of witnesses who testify at trial, including the defendant. *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996); *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 167, 410 P.3d 1142 (2018).

The prosecutor summarized the evidence in the case and argued the inferences that could reasonably be drawn from it, including the credibility of witnesses. RP 148-63. “To determine whether the prosecutor is expressing a personal opinion of the defendant’s guilt, independent of the evidence, a reviewing court views the challenged comments in context...” and “[prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (emphasis added), *review denied*, 100 Wn.2d 1003 (1983)).

The State contends that in view of the prosecutor’s entire argument that it is not clear and unmistakable that the prosecutor was expressing a

RP 159.

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personal opinion about Decicio's guilt. To the contrary, it is clear and unmistakable that the prosecutor did not express a personal opinion about Decicio's guilt and that, instead, he was properly arguing reasonable inferences from the evidence admitted trial. RP 148-63.

- c) Decicio contends that the Prosecutor committed misconduct by implying that the jury must find that Decicio lied or was mistaken in order to acquit him. The State counters that the prosecutor did not mention guilt or acquittal but instead merely and appropriately argued the credibility inferences to be drawn from the evidence where Decicio's testimony conflicted with the victim's testimony.

Here, Decicio contends that during closing argument the prosecutor "improperly implied that the jury had to find that all of the state's witnesses lied or were mistaken in order to acquit Decicio." BOA at 12. Decicio bases his contention on his assembly of two selective, broken-up, partial quotations from the prosecutor's closing argument. BOA at 11-12.

Anderson testified that Decicio hit him in the face with brass knuckles and with a gun. RP 36-38, 52. But Decicio denied hitting Anderson, denied having brass knuckles, and denied having a gun. RP 88, 95. At RP 159, in relation to the prosecutor's argument that Anderson's

facial injuries corroborated his testimony, the prosecutor commented “we know Mr. Anderson is telling the truth and the defendant isn’t.”

The prosecutor then went over portions of the testimony of other witnesses and pointed out, item by item, how there were contradictions between their testimonies and Decicio’s testimony. RP 159-62. Thus, it was in this context that the prosecutor then argued as follows:

Now, to believe the story of the defendant, here's what you have to do. First of all, you have to take your common sense and just heave it out the door. That's your first step. But then you have to believe that there is this conspiracy, a conspiracy between Corporal Clark, Mr. Anderson, Detective Drogmund to get the defendant, because according to the defendant's testimony, what he said happened, he's basically saying that Detective Drogmund -- well, he couldn't remember Detective Drogmund. He remembered talking - he thought it was a male officer, but it was Detective Drogmund. He couldn't remember what he said to her, but then he had a completely different story than Mr. Anderson and he had a completely different story than Corporal Clark.

So, to believe the defendant you have to believe that this was a big conspiracy against him to basically frame him maybe, for whatever reason. But, ladies and gentlemen, there is absolutely no reason whatsoever to do that. Why would you want to frame a person?

RP 162. Decicio did not object.

“Where a prosecutor shows that other evidence contradicts a defendant’s testimony, the prosecutor may argue that the defendant is

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lying.” *State v McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006) (citations omitted). At no point did the prosecutor argue to the jury that it must believe the defense’s theory or that it must disbelieve the State’s witnesses before it could acquit. Instead, the prosecutor summarized the evidence presented at trial and argued reasonable inferences from it. “It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Decicio cites *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), to support his assertion that prosecutor’s argument in this case was misconduct. However, *Fleming* is clearly distinguished from the instant case. In *Fleming*, the prosecutor argued that in order to *acquit* the defendant, the jury would have to find the State’s witnesses were either lying or mistaken. *Id.* at 213. In *Fleming* the prosecutor misstated the role of the jury, misstated the nature of reasonable doubt, infringed on the defendant’s right to remain silent, and improperly shifted the burden of proof. *Id.* 213, 216. In the instant case, however, the prosecutor made no such arguments, did not misstate the jury’s role, did not misstate the nature

of reasonable doubt, did not comment on the defendant's right to remain silent, and did not misstate the burden of proof.

The instant case is more similar to the case of *State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995). "Where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." *Id.* at 825. "The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility." *State v. Rodriguez-Perez*, 1 Wn. App.2d 448, 458, 406 P.3d 658 (2017).

Additionally, because Decicio did not object to the prosecutor's comment, he must show that the misconduct, if any, was "so flagrant and ill intentioned" that no curative instruction could have eliminated any resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The prosecutor's fleeting use of the word "conspiracy" was neither flagrant nor ill intentioned, and an objection followed by curative jury instruction would have easily obviated any possible prejudice. *Emery* at 763-64. To prevail on appeal, Decicio bears the burden of showing that

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there is a substantial likelihood that the allegedly improper argument affected the jury's verdict. *Id.* at 760-61; *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). Decicio has not meet his burden to make this showing and also has not shown that a curative instruction would not have obviated any possible prejudice (if any), and for this reason, also, his claim of error should be denied.

2. Decicio contends that certain conditions of community supervision imposed by the court are not crime-related and are therefore unlawful. The State counters that each one of the conditions imposed are statutorily required or are statutorily within the discretion of the sentencing court to impose.

Decicio contends that certain community custody conditions ordered by the trial court are unlawful. The conditions that Decicio challenges are as follows:⁴

- 1) "The defendant shall report to and be available for contact with the assigned Community Custody Correction Officer as directed[.]"

⁴ Although the community custody conditions set forth in the facts section of Decicio's brief relate to legal financial obligations, counsel for Decicio has communicated to the respondent that the challenged community custody conditions are actually those that are located at page 1 of 4 of the "Conditions of Community Custody" (CP 91).

- 2) “The defendant shall reside at a location and under living arrangements that been approved in advance by the CCO, and shall not change such arrangements/location without prior approval[.]”
- 3) “The defendant shall consent to allow home visits by the DOC/CCO to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the defendant lives and/or has exclusive or joint control or access.”
- 4) “The defendant shall remain within, or outside of, geographic boundaries specified by the CCO[.]”
- 5) “The defendant shall work at a Department of Corrections-approved education, employment and/or community service program[.]”
- 6) “The defendant shall not own, use, possess, transport, or receive firearms or ammunition[.]”

CP 91.

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RCW 9.94A.703(2) states that when ordering a term of community custody the sentencing court “shall order” certain specified conditions “[u]nless waived by the court” in its discretion. Because they were not waived by the court, conditions 1, 2, and 5, above, are each statutorily mandated by RCW 9.94A.703(2) at subsections (a), (e), and (b), respectively.

RCW 9.94A.703(3) sets forth certain discretionary conditions that the court is authorized, but not required, to impose. Subsection (f) allows the court to impose “crime-related prohibitions.” Irrespective of whether the condition is crime-related, subsection (a), however, authorizes the court to require the defendant to “[r]emain within, or outside of, a specified geographical boundary[.]” Thus, the sentencing court was statutorily authorized to impose condition 4 above.

Decicio was in this case convicted of the felony crime of assault in the third degree. CP 76. RCW 9.41.040 prohibits firearm possession by convicted felons. Thus, the sentencing court was authorized by RCW 9.94A.703(3)(f) to impose condition 6.

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Condition 3, above, is condition that is imposed as means to monitor compliance with the terms of supervision. Therefore, the court was authorized to impose it. RCW 9.94A.030(10).

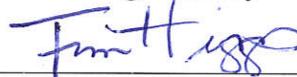
Because each of the challenged conditions was statutorily required or authorized, the trial court did not err or abuse its discretion by imposing them. Accordingly, each condition should be affirmed on appeal.

D. CONCLUSION

For the reasons argued above, the State asks that this court deny Decicio's appeal and to sustain the judgment and sentence in this case.

DATED: August 21, 2020.

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