Supreme Court No. 96588-9
(COA No. 34716-8-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL TILTON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Nathaniel Tilton, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Nathaniel Tilton seeks review of the Court of Appeals decision dated October 23, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court deprive Mr. Tilton of his Fourteenth Amendment right to have all of the essential elements of residential burglary proved against him when the prosecution failed to prove that he had no permission to reside in the house he shared with his father?

2. Was the Sixth Amendment right to counsel denied when the trial court failed to inquire into whether the breakdown in communication between Mr. Tilton and his attorney had become so severe that they constituted a constructive denial of counsel?

3. Did the prosecutor's misconduct in closing argument by referring to facts not in evidence to argue that Mr. Tilton committed his crimes while high on methamphetamines and by omitting essential elements of the crime of burglary deprive Mr. Tilton of his Sixth and Fourteenth Amendment and Article 1, Section, 22 right to a fair trial?

4. Was the sentence imposed by the superior court clearly excessive where no facts distinguished Mr. Tilton's crime from others in the same statutory category, especially in light of Mr. Tilton's struggles with his mental health?

D. STATEMENT OF THE CASE

Nathaniel Tilton has a history of mental illness. [1] The Department of Corrections housed him in the mental health unit. 8/11/15 RP 163.[2] They released him to live with his father Michael. 7/13/16 RP 170. Nathaniel was going to live with his father until he was able to get back on his feet. *Id.* No end date was set for when Nathaniel would move out. 7/14/16 RP 252. Other than his father's bedroom, Nathaniel had free reign of the house. *Id.* Almost everything he owned was stored at his father's house. *Id.* at 236, 250.

When Nathaniel arrived at his father's house, they sat outside and talked. 7/13/16 RP 170. The two men then had dinner together. *Id.* at 171. After dinner, Michael gave Nathaniel $50 to buy some new clothes. *Id.* Nathaniel walked to Walmart; his father was asleep when he returned. *Id.* The next day the two men agreed to go fishing after breakfast. *Id.* at 171-

[1] Nathaniel and Michael Tilton share the same last name. To avoid confusion, they are referred to by their first name. No disrespect is intended.

[2] The transcripts are not in chronological order. In this brief, the transcripts are referred to by the date of the first proceeding recorded in that volume. E.,g. 8/11/15 RP.

72. They left together for their fishing hole, stopping at Walmart to get Nathaniel a fishing license. *Id.*

While fishing, Nathaniel's line broke. 7/13/16 RP 179. His mood changed when he returned from fixing it. *Id.* at 180. The men started to argue, with Nathaniel blaming his father for many of his problems and for not helping him when he was a child. *Id.* at 181. They continued to fight on their trip home, with Michael almost stopping the truck to insist that Nathaniel get out. *Id.* at 183.

Michael parked the truck and started to remove his dog and belongings. 7/13/16 RP 183. Nathaniel then hit his father. *Id.* at184-85. Michael then went into the house, locking the door behind him. *Id.* at 186. Michael Never told Nathaniel that he could no longer live with him. *Id.* at 244-45, 249.

Nathaniel then started kicking at the doors of the house, damaging two of them and gaining entry. 7/13/16 RP 187. Inside the house, he insisted Michael give him the keys to the truck. *Id.* at 189. The police arrived shortly afterwards and arrested Nathaniel. *Id.* at 190. As the police were investigating the house, they discovered a lightbulb modified to smoke methamphetamine. 7/14/16 RP 349. The residue in the lightbulb tested positive for methamphetamines. *Id.* at 714.

The government charged Nathaniel with residential burglary, assault in the fourth degree, malicious mischief in the second degree, and possession of a controlled substance. CP 46-48. The prosecutor also alleged an aggravating factor for rapid recidivism and for committing the burglary with a person present. CP 46-48.

The court held Nathaniel on bail. He had a hard time in jail and difficulty communicating with his attorneys. His first attorney described him as disoriented and agitated. 8/11/15 RP 3. She recognized his severe mental health issues and asked to have his competency examined. *Id.* Nathaniel's attorney did not ultimately challenge his competency after receiving a report. *Id.* at 18, 23.

Nathaniel's condition did not improve over time. 8/11/15 RP 38-39. Nathaniel frequently did not appear for court. *Id.* at 3, 40, 46, 57. When he was in court, Nathaniel had trouble controlling his behavior and language. *Id.* at 30, 32, 38. Nathaniel's lawyer continued to question his competency, but rather than ask for a second exam, she asked to be relieved in the hope that a new attorney would be able to communicate better with Nathaniel than she had. *Id.* at 51.

The situation did not get better. Nathaniel did not communicate well with his new lawyer. 8/11/15 RP 58, 64, 80, 88, 93. Nathaniel frequently refused to come to court. *Id.* at 63, 78, 86. Even a month before

trial, Nathaniel's second attorney told the court he had not had any effective communication with his client. *Id.* at 100. Nathaniel informed the court on several occasions that he had fired his attorney. 7/5/16 RP 3, 7/14/16 RP 291, 8/11/15 RP 113. Nathaniel's second lawyer also acknowledged their inability to communicate. 7/5/16 RP 6.

Nathaniel tried to control his behavior when trial started but had great difficulty. 7/14/16 RP 386, 288, 385. Nathaniel advised the court he was trying to behave when the court warned him about his behavior. 7/13/16 RP 26; 7/14/16 RP 225, 358. By the end of testimony, Nathaniel voluntarily absented himself from the remainder of the proceedings, including the verdict. 7/15/16 RP 426. He instead chose to the lie on his bed under his covers. *Id.* at 438, 537, 559.

In his pre-trial motions, Nathaniel asked the court to preclude any evidence he was using drugs when the crimes occurred. CP 49. The court granted this motion. 7/13/16 RP 34. In his closing, however, the prosecutor twice attempted to argue Nathaniel had acted the way he had because he was under the influence of methamphetamines. 7/15/16 RP 470, 479. The court sustained Nathaniel's objections and instructed the jury to disregard the argument. *Id.* at 470, 479.

The prosecutor also argued that when a person entered a store with the intent to commit a crime, they could be found guilty of burglary.

7/15/16 RP 474. The prosecutor equated this with Nathaniel's case, arguing that Nathaniel's right to remain in the house he shared with his father was revoked when he hit his father. *Id.* at 475. Nathaniel did not object to this mischaracterization of the law.

The jury found Nathaniel guilty of residential burglary, assault in the fourth degree, and malicious mischief in the second degree. 7/15/16 RP 547-48. The jury was unable to reach a verdict on the possession of controlled substance charge. *Id.* at RP 546. The jury also found evidence of the aggravating factors. *Id.* at 547-48, 587.

At sentencing, the court and the prosecutor recognized Nathaniel's mental illness. Nathaniel had been housed with the mentally ill when he was in prison. 8/11/16 RP 163. The prosecutor suggested to the court it include an order directing the Department of Corrections to provide Nathaniel with services while incarcerated, although this was not included in the order. *Id.* at 163. Nathaniel's father recognized the need for drug treatment for his son. *Id.* at 158. The prosecutor also recognized Nathaniel was eligible for the Drug Offender Sentencing Alternative, but asked the court nor to consider it. *Id.* at 164. In his statement to the court at sentencing,

The prosecutor asked the court to impose the maximum allowable sentence for the residential burglary conviction, which is ten years.

8/11/16 RP 135. The court followed the recommendation, sentencing Nathaniel to ten years. *Id.* at 165, CP 185. The court made no other findings regarding how Nathaniel's conduct was distinguishable from other crimes in the same statutory category. *See* CP 128.

E. ARGUMENT

1. Because Mr. Tilton resided with his father and his residential status was not revoked when they fought, there was insufficient evidence of residential burglary.

The Court of Appeals held that the government presented sufficient evidence that Nathaniel's residential status in his father's house was revoked, despite clear evidence that Nathaniel was never told he could not live with his father. Slip Op. at 4. Instead, the court found that Nathaniel's father impliedly revoked Nathaniel's residential status when he locked him out of the house. *Id.* Because the Court of Appeals decision is in conflict with other decisions and confuses the holdings established by this Court, Nathaniel asks this Court to take review. RAP 13.4(b).

This decision is in conflict with *State v. Wilson*, which holds when facts demonstrate that the accused was residing in the building, there is insufficient evidence of burglary. 136 Wn. App. 596, 604, 150 P.3d 144 (2007). The Court of Appeals distinguishes the two cases because Mr. Wilson had signed a lease, which was not only factor in that case. *Id.* There, the court ordered Mr. Wilson to stay away from his girlfriend, but

did not include her residence. *Id.* at 600. After getting into a fight, she locked him out, just like here. *Id.* He kicked in the door, threatened to kill her, and then assaulted her with splinters from the broken door. *Id.* at 601.

In reversing Mr. Wilson's conviction for burglary in the first degree, the Court of Appeals held there was insufficient evidence of unlawfully entry or remaining. *Id.* at 611-12. The *Wilson* court analyzed the question of whether there can be implied permission to revoke, rejecting the government's argument Mr. Wilson's girlfriend revoked his permission to remain on the premises by calling 911. *Id.* at 612. Like here, locking Mr. Wilson out was insufficient to establish unlawful entry in a shared residence. *Id.* at 611-12. Just like Mr. Wilson, Nathaniel lived with his father. Locking the door in the middle of a fight is insufficient to show he could no longer live with his father.

Not every crime that takes place in a house is a burglary. The Court of Appeals relies on *State v. Collins* to justify its holding. Slip Op. at 5 (citing *Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988)). *Collins* involves a stranger who entered the victim's home to use her telephone, ultimately dragging the victims into a bedroom, where he raped them. *Id.* The defendant in *Collins* had no relationship to the house or with the women he raped. *Id.* Unlike here and in *Wilson*, Mr. Collins scope to enter the home was limited to using the phone. *Id.* By exceeding that scope, he

committed the burglary. *Id.* Nathaniel had no such limitation, with free reign of this house, except for his father's bedroom.

Dismissal of the burglary charge is necessary where the government fails to establish the accused entered or remained unlawfully within the building. *State v. Thomson*, 71 Wn. App. 634, 640-41, 861 P.2d 492 (1993). Nathaniel's father had not excluded Nathaniel their home when the assault took place. The government failed to prove the essential element of entering or remaining unlawfully. *Wilson*, at 611-12. Without proof of this essential element, there is insufficient proof of residential burglary. *Id.* Nathaniel asks this Court to take review of this question.

2. The breakdown in communication between Mr. Tilton and his attorney constructively deprived Mr. Tilton of his right to counsel.

The Court of Appeals held that the record of communication difficulties between Nathaniel and his attorney did not compel the trial court to inquire into whether there was a breakdown in communication. Slip Op. at 7. But the record established Nathaniel and his lawyer had a complete breakdown in communication, resulting in a constructive deprivation of counsel. This Court accept review of this significant question of constitutional law. RAP 13.4(b).

The Court of Appeals acknowledged that the trial court must appoint new counsel when there is a conflict of interest, an irreconcilable

conflict, or a complete breakdown in communication between the attorney and the defendant. Slip Op. at 7 (citing *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)). The court also found that where the breakdown in communication is attributable to the defendant and could not reasonably be expected to be resolved by appointing a new lawyer, a court does not abuse its discretion when it does not appoint new counsel. *Id.* at 8 (citing *State v. Thompson*, 169 Wn. App. 436, 463, 290 P.3d 996 (2012)).

This Court should accept review of when the inability to communicate with counsel amounts to a constructive deprivation of counsel. The constructive denial of counsel doctrine applies to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court fails to substitute counsel. *See United States v. Nguyen*, 262 F.3d 998, 1003–04 (9th Cir.2001); *United States v. Adelzo–Gonzalez*, 268 F.3d 772, 778–79 (9th Cir.2001). "Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense." *Nguyen*, 262 F.3d at 1003 (citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir.2000)). When the court denies a request for new court-appointed counsel, a reviewing court will examine (1) the timeliness of the substitution motion and the extent of resulting inconvenience or delay; (2) the adequacy of the inquiry into the defendant's complaint; and

(3) whether the conflict between the defendant and his attorney was so great that it prevented an adequate defense. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010). This inquiry is designed to determine whether the attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants. *See Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir.2005).

Even though the Court of Appeals found that the conflict with his lawyer was entirely of Nathaniel's doing, the inquiry should not stop there. Slip Op. at 9. Nathaniel displayed profound symptoms of mental illness before and during his trial. On frequent occasions, his lawyer told they court he could not communicate with Nathaniel. 8/11/16 RP 58, 64, 80, 86, 93, 98, 7/5/16 RP 4. When Nathaniel was able to appear for court, he told the judge of the same problems. 7/5/16 RP 3. Nathaniel and his lawyer were not communicating. Nathaniel's lawyer made this clear when he exclaimed, "I'm not able to communicate with the client." *Id.* at 6. Nathaniel echoed this sentiment declaring, "I have no voice." 7/5/16 RP 7.

Under these circumstances, the court owed Nathaniel a duty to inquire into whether there was a constructive denial of counsel. The conflict articulated by both Nathaniel and his attorney demonstrated a complete breakdown in communication. Without further inquiry, this conflict constituted a constructive denial of counsel. *Rivera-Corona*, 618

F.3d at 979. The court abused its discretion by failing to make an inquiry into why Nathaniel believed he had fired his attorney, especially in light of their failure to communicate with each other. *United States v. Brown*, 785 F.3d 1337, 1352 (9th Cir. 2015). This is a significant constitutional question and Nathaniel asks this Court to accept review. RAP 13.4(b).

3. The prosecutor's misconduct in closing arguments deprived Mr. Tilton of his right to a fair trial.

The Court of Appeals held that the trial court properly dealt with the misconduct that occurred in the prosecutor's closing argument. Slip Op. at 9. Because the misconduct deprived Nathaniel of his right to a fair trial, he asks this Court to accept review. RAP 13.4(b).

a. Appealing to the emotions of the jury by asserting Mr. Tilton was using methamphetamines when he assaulted his father.

The Court found no error when the prosecution asserted that Nathaniel was using methamphetamines when he assaulted his father, the Court of Appeals found no error. Slip Op. at 11. But this Court has made clear that a prosecutor has no right to call to the jury's attention matters jurors may not consider. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing *State v. Case*, 49 Wn.2d 66, 74-75, 298 P.2d 500 (1956)). These rules prohibit prosecutors from making make prejudicial statements unsupported by the record. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

The prosecutor violated these rules when he argued Nathaniel was under the influence of methamphetamines in his closing argument. 7/15/16 RP 470, 479. Although there was no evidence Nathaniel had been using methamphetamines, the prosecutor argued Nathaniel had "so must methamphetamine in him that did didn't know what he was doing. 7/15/16 RP 470. After the court sustained Nathaniel's objection, the prosecution returned to this subject, arguing Nathaniel had used all the methamphetamines he had with him. 7/15/16 RP 479. The court again sustained Nathaniel's objection and instructed the jury to disregard the prosecutor's argument. 7/15/16 RP 479.

These comments were especially concerning because of Nathaniel's frequent outbursts and absences from court. By equating drug use with Nathaniel's episodes, it is possible the jury could have thought he was high during the trial. The jury was not aware of Nathaniel's custody status and could not have known he did not have access to controlled substances. By arguing the drugs made Nathaniel angry, the prosecutor made impermissible comments that deprived Nathaniel of his right to a fair trial.

A prosecutor may not attempt to argue facts based on inadmissible evidence. *State v. Alexander*, 64 Wn. App. 147, 155-56, 822 P.2d 150 (1992). Where the content of an argument is inadmissible, the repeated

attempts to argue it requires reversal. *Id.* When the Court of Appeals reversed the conviction in *State v. Jones*, it focused on prejudicial statements made by the prosecutor in closing arguments, among other misconduct. 144 Wn. App. at 314. The court found that the arguments the prosecutor made in his closing about evidence not presented at trial constituted misconduct. *Id.*

This Court has also held it is misconduct for a prosecutor to present altered versions of the facts. *See State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015); *In Re Glasmann*, 175 Wn.2d 696, 706-07, 286 P.3d 673 (2012). Here, the calculated attempt to argue facts not supported by the evidence, in defiance of the court's ruling, had no place in Nathaniel's trial. *Glasmann*, 175 Wn.2d at 705 (citing *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)). This Court should accept review to make clear that arguments not based on the evidence heard at trial are impermissible and require reversal. *Alexander*, 64 Wn. App. at 155-56.

b. Reducing the government's burden by misstating the essential elements of burglary.

The Court of Appeals also held that the prosecutor's misstatement of law did not render the trial unfair. Slip Op. at 11. Nathaniel asks this Court to accept review of whether the prosecutor's decision to describe

burglary as not requiring unlawful entry to be misconduct requiring reversal.

Statements made by prosecutors in their closing arguments must be confined to the law as instructed by the court. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

In his closing argument, the prosecutor misstated the elements of residential burglary. The prosecutor argued that burglary can committed by "walking into Walmart." 7/15/16 RP 473.

This is an incorrect statement of law. Burglary requires that the defendant enter or remain unlawfully within the building with the intent to commit the crime. RCW 9A.52.025.

The prosecutor then addressed Nathaniel's right to enter his father's house. 7/15/16 RP 474. The prosecutor argued by punching his father, Nathaniel no longer had the privilege to enter the house. 7/15/16 RP 474. But this was also an erroneous argument, suggesting that the jury only had to find Nathaniel intended to commit a crime inside the house in order to find him guilty of burglary.

In *State v. Allen*, this Court held that repeated misstatements of the law constitute misconduct. 182 Wn.2d at 375. Mr. Allen objected to the

misconduct, so the court did not need to address whether the conduct was flagrant and ill-intentioned. *Id.* The Supreme Court recognized, however, that the question of prejudice does not rest on whether there was sufficient evidence to support the verdict, but whether there was a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 375-76.

Nathaniel did not object. Where defense counsel fails to object to misconduct at trial, this Court must find the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glasmann*, 175 Wn.2d at 678. Here, the prosecutor's misstatement of law was flagrant and ill-intentioned. It reduced his burden of proof and made the jury more likely to convict Nathaniel. *Allen*, 182 Wn.2d at 382.

The failure of Nathaniel's lawyer to object should not end this Court's analysis of whether a prosecutor may so misconstrue residential burglary. Instead, this Court should accept review to address whether the prosecutor's argument that the jury could find unlawful entering or remaining by finding Nathaniel intended to commit a crime inside the house constituted flagrant and ill-intentioned misconduct. RAP 13.4(b).

4. Sentencing Mr. Tilton to the high end of the standard range was clearly excessive.

The Court of Appeals held that Nathaniel's sentence was not clearly excessive. Slip Op. at 12. The court's primary focus was on

whether there was authority for the sentence, an issue Nathaniel never challenged. Instead, Nathaniel challenged whether the court provided sufficient justification for its sentence and, even if authorized, whether it was clearly excessive. Nathaniel's crimes were the result of his untreated mental health. Sending him back to the institution for the maximum sentence authorized is not only unfair, but clearly excessive. How the criminal justice system treats those suffering from mental illness is an issue of substantial public interest. RAP 13.4(b). This Court should take review of Nathaniel's clearly excessive sentence.

Nathaniel did not intend to commit a new crime when he was released him from prison. He hoped to solve his homelessness, get back on his feet, and return to Bellingham, where he still had family. 7/13/16 RP 170, 7/14/16 RP 252. Moving in with his father was the first step in this process. 7/13/16 RP 209. It was immediately clear that Nathaniel did not have the tools to achieve his goals. Less than a day after moving in with his father, he got into the fight that returned him to prison. *Id.* at 184.

The court gave no reason for why it was imposing the maximum sentence possible on Nathaniel, other than to state it would follow the prosecutor's recommendation. CP 128. The court's written findings also lack any reason for why an exceptional sentence was imposed. CP 128.

The lines below this pre-printed statement that the "imposition of an exception sentence is appropriate in this case" are left blank. CP 128.

The imposition of an exceptional sentence is appropriate in this case.

CP 128.

Nathaniel recent released from prison fact does not distinguish this case from others in the same statutory category. Nathaniel did not leave prison intent on committing new crimes. 7/13/16 RP 170. His goal while living with his father was to create a plan for his life. *Id.* at 209.

It is clear that Nathaniel's mental illness got in his way. No one disputed Nathaniel suffered from mental illness. The Department of Corrections released Nathaniel from the mental health unit at Monroe Correctional Facility. 8/1/15 RP 163. When the court sentenced Nathaniel, the court considered how it could require the Department of Corrections to provide Nathaniel with mental health services. 8/1/15 RP 163. Nathaniel's mental illness was pervasive throughout the trial.

Prison exacerbates psychiatric disabilities. Michael J. Sage et al., *Butler County SAMI Court: A Unique Approach to Treating Felons with Co-Occurring Disorders*, 32 Cap. U. L. Rev. 951, 953 (2004). Individuals with major mental illnesses face a substantial likelihood of incurring

serious harm in prison. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 147, 229 (2013). Mentally ill prisoners are more likely to be the victim of physical assaults. Paula M. Ditton, *Bureau of Justice Statistics, U.S. Dep't of Justice, Mental Health and Treatment of Inmates and Probationers* 9 (1999)[3]. Victimization by staff is also more common. *See* Cynthia L. Blitz et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 Int'l J.L. & Psychiatry 385, 389-90 (2008). Mentally ill prisoners are also at a heightened risk of sexual victimization. Johnston, at 222 (citing Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and Without Mental Disorders*, 58 Psychiatric Servs. 1087, 1088 (2007)). They are also more likely to be confined in stark conditions, including solitary confinement. Maureen L. O'Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, at iv (2010).[4]

Nathaniel will be exposed to these dangers. Neither the community nor Nathaniel will benefit from the exceptional sentence the court imposed. The community is no safer by incarcerating Nathaniel for the maximum term. Nathaniel's mental illness will not improve while he is incarcerated. Harvard Law Review Association, *Booker, the Federal*

[3] Available at http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtip.pdf.
[4] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf.

Sentencing Guidelines, and Violent Mentally Ill Offenders, 121 Harv. L. Rev. 1133, 1144 (2008). This sentence only delays when Nathaniel and the community must deal with his mental illness.

While the rapid recidivism aggravator authorizes an exceptional sentence, the court must still find the facts of the crime distinguish it from other crimes in the same statutory category. This crime is not distinguishable from other residential burglaries. This Court should accept review of whether the sentencing court abused its discretion in imposing an exceptional sentence of 120 months. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). This issue is of substantial public interest and warrants review. RAP 13.4(b).

F. CONCLUSION

Petitioner Nathaniel Tilton respectfully requests this Court grant review of the issues raised pursuant to RAP 13.4 (b).

DATED this 16th day of November 2018.

Respectfully submitted,

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APPENDIX

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FILED
OCTOBER 23, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NATHANIEL EVAN TILTON, Appellant.	)	No. 34716-8-III UNPUBLISHED OPINION

KORSMO, J. — Nathaniel Tilton appeals from convictions for residential burglary, second degree malicious mischief, and fourth degree assault, primarily arguing that the evidence did not establish he was no longer allowed in his father's home. Since the evidence permitted the jury to draw that conclusion, we affirm.

FACTS

Mr. Tilton was released from prison with nowhere to stay. His father, Michael Tilton, allowed his 32-year-old son to stay at his residence temporarily while he got on his feet. The events that led to the criminal charges occurred within 36 hours of Mr. Tilton's release from incarceration.

Mr. Tilton was released from the mental health unit of the Monroe Correctional Complex on July 13, 2015. Some of his personal effects had been stored at his father's home during his incarceration. Mr. Tilton was allowed to temporarily stay in his father's house, where he had full run of the building, other than his father's bedroom, for an indefinite period of time while he got back on his feet and found his own place to live.

On the morning of July 14, the father and son went fishing. Nathaniel Tilton stopped fishing after ten or fifteen minutes due to a broken line and returned to his father's car. About an hour later, Michael Tilton returned to the vehicle only to see his son 60 yards away, behaving strangely. The son started yelling at the father and the two then got in the car to return home.

When the car was parked at the house, Nathaniel slugged Michael in the ear with his fist, sending the older man reeling through rose bushes and on to the ground. As Michael struggled to his feet, Nathaniel slugged him again in the other ear. The father once more fell to the ground. A neighbor saw the attack and called 911.

Michael Tilton was able to get to his house, unlock the door, and then relock it upon entering. Although he did not expressly state the fact to his son, the father believed that locking his son out of the house informed the younger man that he was no longer allowed in the dwelling. Nathaniel Tilton did not have a key to the building.

Nathaniel smashed a door to the garage and left it hanging by its upper hinge; the lower hinge had been separated from the door frame. He then kicked in the backdoor to

the house, cracking the door jamb and breaking the door latch strike plate. Entering the house, Nathaniel demanded his father's car keys, while the older man asked that he not be hit any more. The police arrived and took Nathaniel into custody. Michael Tilton was bleeding profusely from one ear. In the yard, police discovered a propane torch and a scorched light bulb in the yard. Methamphetamine remains were found inside the bulb.

Prosecutors filed charges of residential burglary, fourth degree assault, second degree malicious mischief, and possession of a controlled substance. After a contentious twelve-month period of time that included ten trial continuances, a mental health evaluation, and repeated conflicts with multiple assigned attorneys, Mr. Tilton's case eventually proceeded to jury trial.

The jury failed to reach a verdict on the drug possession charge, but convicted Mr. Tilton on the three remaining counts. The jury also entered findings that the offenses constituted domestic violence and that the victim was present at the time of the residential burglary. After supplemental instruction and deliberation, the jury found by special verdicts that the two felony offenses were committed rapidly after release from incarceration.

The court imposed an exceptional sentence of 120 months on the residential burglary count. The written findings of fact reference the jury's finding of rapid recidivism and the victim's presence during the burglary. Mr. Tilton appealed to this court, where a panel heard oral argument on the appeal.

ANALYSIS

The brief filed by counsel raises five[1] separate issues, while Mr. Tilton filed a statement of additional grounds (SAG) that raises a sixth issue. We address the first five issues in the order presented by counsel before turning to Mr. Tilton's issue.

Sufficiency of the Evidence

Mr. Tilton first argues that the evidence does not support the residential burglary count because his revocation of permission to use his father's house was not made manifest to him. We conclude that the jury was permitted to find that his permission was revoked when the older man locked him out of the house.

Familiar standards govern review of this claim. We review sufficiency challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence."

[1] The appellate brief also seeks a waiver of costs due to indigency. In the event that the prosecutor files a cost bill our commissioner will consider the issue in accordance with RAP 14.2.

State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

At issue in this challenge is the element of residential burglary that the accused "enters or remains unlawfully in a dwelling." RCW 9A.52.025. An entry is unlawful if the person was "not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(2). The State bears the burden of proving the entry is unlawful, but may do so by circumstantial evidence. *State v. McDaniels*, 39 Wn. App. 236, 239-240, 692 P.2d 894 (1984).

Mr. Tilton argues that his entry was not unlawful because his father had not orally communicated that his permission to stay in the house had been revoked. However, permission to remain on property impliedly can be revoked or limited. *State v. Collins*, 110 Wn.2d 253, 261-262, 751 P.2d 837 (1988). Whether a limitation exists depends on the facts of the case. *Id.* at 261.

Here, the evidence permitted the jury to determine that Nathaniel Tilton's temporary permission[2] to reside in his father's house had been revoked. Nathaniel had no key to the house, a fact that Michael knew when he locked the younger man out of the building. Nathaniel did not seek his father's permission to enter the building upon

[2] Nathaniel Tilton was a guest in his father's house. That undisputed fact takes this case outside of the fact pattern of *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007). The defendant in *Wilson* had signed a lease that allowed him to live in the premises at issue there; he was not a permissive guest on the premises.

finding himself locked out, but kicked in two doors to force entry. His sole stated purpose for entering in this manner was to demand the keys to his father's car. These were not the actions of a man who believed he was still permitted in the house. More critically for this analysis, the father's actions in locking out his guest, knowing that the young man could not enter without his new permission because he had no key, is a clear expression that Nathaniel's guest status has been revoked.

Nathaniel's argument that his father was merely protecting himself by locking his son out was a proper claim to put in front of the jury, which was free to believe or reject the contention. Nonetheless, the evidence also permitted the jury to find, as it did, that the younger Tilton was no longer welcome in the residence. He had never been granted permission to enter the building for the purpose of assaulting his father and stealing property, nor could permission have been implied by the original granting of a place to temporarily stay. The evidence permitted the jury to find that locking his son out demonstrated the father's removal of permission to enter. It also permitted them to conclude that his actions in breaking into the house exceeded the scope of his original permission to reside there temporarily. Under either theory, the evidence supported the jury verdict. *Collins*, 110 Wn.2d at 260-261.

The evidence was sufficient to support the jury's verdict on the residential burglary charge.

Conflict with Counsel

Mr. Tilton next argues that the trial court should have inquired into whether he and his attorney were in conflict in light of evidence that they had difficulties communicating. The record of communication difficulties here did not compel the trial court to inquire into whether there was a breakdown of the attorney-client relationship, particularly in the absence of a request to do so. Instead, the record[3] strongly suggests that Mr. Tilton refused to cooperate except when he chose to do so.

If a criminal defendant is dissatisfied with appointed counsel, the defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *State v. Stenson,* 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). This court reviews a denial of a request for new counsel for abuse of discretion. *Id.* at 733. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

However, even a breakdown in communication is insufficient to warrant substitution of counsel when a defendant "simply refuses to cooperate with his attorneys." *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). In *State v.*

[3] The evidence in question is well known to the parties and need not be detailed here. The first counsel appointed for Mr. Tilton was allowed to withdraw and the next had difficulties obtaining his client's cooperation. Mr. Tilton also frequently acted out during courtroom proceedings, both before and during trial.

Thompson, the defendant filed a motion to dismiss counsel due to a conflict of interest and a breakdown in communication; the trial court denied his motion. On appeal, this court held that because "the conflict and communication breakdown were attributable entirely to Thompson and could not be reasonably expected to resolve with substitution of counsel, the court did not abuse its discretion by denying Thompson's motions." *State v. Thompson*, 169 Wn. App. 436, 463, 290 P.3d 996 (2012). The *Thompson* court elaborated:

> The collapse of the attorney-client relationship may so degrade the quality of the defense as to deny the accused effective representation. But that was clearly not so here. Despite Thompson's unrelenting insolence, verbal abuse, and refusal to cooperate, [defense counsel] remained a capable and determined advocate. He filed motions to suppress evidence. He vigorously opposed the State's efforts to present evidence of Thompson's past sex crimes. He used cross-examination and closing argument to highlight gaps in the State's evidence. [Defense counsel] even managed to "accommodate Mr. Thompson's view that he was a victim of a conspiracy" in the rape case. Tavel, the attorney appointed as liaison counsel, performed Thompson's direct examinations and attempted to minimize the damage resulting from his testimony while still allowing Thompson to express his view of the cases. And during closing arguments, [defense counsel] attempted to explain Thompson's obviously untruthful testimony in a way the jury might understand. Thompson was effectively represented in spite of the breakdown in the relationship.

Id. at 463-464 (footnotes omitted).

This case is even one step removed from those cases because Mr. Tilton never sought another new attorney and trial counsel never advised the judge that there was in fact a breakdown in communications. Instead, the record reflects that there were some

communication difficulties, largely of Mr. Tilton's own making, and that he would cooperate with the court or with his counsel only when he desired to do so.

In light of the entire record, which shows both occasional communication and cooperation, along with the opposite, the trial court simply was not put on notice that an actual breakdown had occurred. The trial judge is not a monitor of appointed counsel with an obligation to regularly check in to see how well the defense is progressing. The judge has an obligation to inquire upon request or when an obvious breakdown occurs in the court's presence, neither of which occurred here.

Any difficulties displayed in the record were of the defendant's own making and did not, in light of the entire record, establish an actual breakdown of communications. Appellant has not established that error occurred.

Prosecutor's Closing Argument

Mr. Tilton next argues that the prosecutor engaged in misconduct during closing argument. The errors that occurred were properly dealt with by the trial court.

Well settled standards also govern review of this issue. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-719. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed

in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

The trial court granted a defense motion in limine, largely agreed to by the prosecutor, to exclude evidence of "past" drug use by the defendant and any opinion testimony by Michael Tilton concerning whether his son was under the influence. The ruling expressly exempted "demeanor" testimony and the evidence found in the front yard.

In closing, the prosecutor twice mentioned possible methamphetamine use during the incident. In the first instance, the prosecutor stated that the defendant knew what he was doing when he kicked the door in and asked "was there any evidence" that the defendant "had so much methamphetamine in him that he didn't know what he was doing?" In the second instance, the prosecutor explained to jurors that a search of Mr.

Tilton revealed no methamphetamine "because he had already used it all." In each instance, the court sustained defense objections, and on the second occasion the court advised the jury to disregard the statement.

The basis for the trial court's rulings is unclear—we do not know if the court believed the statements violated the ruling in limine concerning past usage or were improper inferences from the evidence. However, assuming actual error, the two comments were not prejudicial and were properly addressed by the trial court. In the context of the first statement—that defendant knew what he was doing—the negation of methamphetamine use does not appear to be prejudicial to the defendant at all. In the second instance, the court struck the remark and the defense did not seek any additional remedy. Neither remark was so prejudicial that we can say that they deprived Mr. Tilton of a fair trial.

The remaining claim involves a remark, not challenged in the trial court, likening the facts of the burglary case to entering a store with the intent to steal merchandise. The prosecutor concedes that it was error not to mention the unlawful entry element. In light of the instruction that jurors are not to treat attorney remarks as evidence and the correct statement of the law in the instructions and in the remainder of the closing arguments by both parties, there is no likelihood this one mistake rendered this trial unfair. A timely objection could easily have cured the misstatement.

Mr. Tilton has not established that the prosecutor's remarks prejudiced his right to a fair trial.

Exceptional Sentence

The trial court imposed an exceptional sentence on the residential burglary count by sentencing Mr. Tilton to the statutory maximum sentence of 120 months in prison. The standard range had been 63 to 84 months. Mr. Tilton argues that the sentence is clearly excessive. We disagree.

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id.* A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1). However, an exceptional sentence above the standard range must be based on a recognized statutory factor. RCW 9.94A.535(2), (3).

Either party may appeal an exceptional sentence. RCW 9.94A.585(2). The statutory scheme for review of an exceptional sentence has long been in place. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4).

Thus, appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Differing standards of deference or nondeference apply to those three issues. *Id.*

At issue here is whether the sentence is "clearly excessive." This determination is reviewed for abuse of discretion. *Id.* Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

The jury found two aggravating factors present on the burglary count—the victim was present and the crime was committed shortly after Mr. Tilton had been released from custody. The court's written findings reflect that the jury made these determinations, and also reflect that the actual period of time was not more than 36 hours. Although Mr. Tilton argues that the court needed to explain its reasoning more fully, he cites no statutory or case law requiring such or even that findings need detail the reasons for sentence length. The trial court did not need to do more than it did.

The two aggravating factors certainly were tenable bases for imposing the exceptional term that exceeded the standard range by a mere 36 months. Mr. Tilton also argues that *he* would be better served by a shorter sentence term. However, his personal preferences or needs do not determine the appropriate length for a sentence, let alone establish that a sentence is excessive.

Instead, the trial court could properly focus on the fact that the defendant, on the day following his release from prison, continued to demonstrate an inability to conform to the requirements of the law and had already lost the support of the parent who was willing to assist him. The judge could determine that a maximum sentence was required in order to protect both the needs of society and of Mr. Tilton himself. Mr. Tilton demonstrated that he was not able to care for himself and needed a structured environment. Although there was no need to demonstrate that a sentence is not excessive, the record would support such a conclusion.

However, the question presented is whether appellant has demonstrated that the sentence is clearly excessive. Mr. Tilton's arguments do not establish that the court imposed an untenable sentence. It is not *clearly* excessive.

Financial Obligations

The trial court imposed only the assessments that were mandatory financial obligations at the time of sentencing and waived discretionary costs. Since sentencing in this case, two of the formerly mandatory costs—the criminal filing fee and the DNA collection fee if assessed previously—have become discretionary costs. The new statutes are applicable to cases on appeal. *State v. Ramirez*, ___ Wn.2d ___, ¶¶ 30-36, 426 P.3d 714 (2018).

In light of these changes and the trial court's expressed desire to waive discretionary costs, we remand for the trial court to strike those two discretionary costs. Accordingly, we need not consider Mr. Tilton's other challenge to those assessments.

Statement of Additional Grounds

In his SAG, Mr. Tilton argues that his time for trial rights guaranteed by CrR 3.3 were violated when he was not accorded his trial within 60 days. In particular, he claims that trial was sometimes continued because he was under restraint in a chair in a "rubber room."

However, the right to a trial within 60 days of arraignment is subject to many exceptions, all of which serve to either reset the 60 day calculation or exclude time from that period. *See* CrR 3.3(d)(2), (e). While we need not discuss the matter exhaustively, there are several reasons this CrR 3.3 challenge fails. First, our record shows no written objection, let alone a motion to reset the trial within the perceived time for trial period. Thus, the challenge was waived. CrR 3.3(d)(3), (4). Second, Mr. Tilton also has not explained why any of the trial continuances were improper. Thus, even if there had been proper objections, these periods of time were properly excluded from the time for trial calculation. CrR 3.3(f)(2).

The SAG does not demonstrate any violation of CrR 3.3.

The convictions and exceptional sentence are affirmed. The matter is remanded to strike the two discretionary financial obligations.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, A.C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 34716-8-III
	)	
NATHANIEL TILTON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF NOVEMBER, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF NOVEMBER, 2018.

X_____

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