IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT WARREN HUYCK, Appellant.	DIVISION ONE No. 81379-0-I UNPUBLISHED OPINION

DWYER, J. — Robert Huyck was convicted of one count of rape of a child in the first degree and three counts of child molestation in the first degree. On appeal, he contends that the prosecutor engaged in misconduct during his trial. He also claims that the sentencing court erred both by considering Huyck's eligibility for early release in determining the length of his standard range sentences and by imposing noncrime-related prohibitions as conditions of his community custody. We affirm the convictions, the sentences of confinement, and the condition of community custody that Huyck not access or use the Internet or Internet connected devices. However, we remand this matter to the superior court to strike the other challenged community custody conditions, and to strike an improperly imposed fee.

Citations and pin cites are based on the Westlaw online version of the cited material.

I

Huyck began sexually abusing his daughter, J.H., when she was in kindergarten. The first incident that J.H. could confidently anchor in time took place when she was in first grade. She recalled her father taking her into the bathroom of their family home, where he removed her clothing, and began touching her sexually with his hands and mouth. Huyck's head was between J.H.'s legs when she gathered the courage to ask him to stop. He complied with her request.

The methods of abuse took many forms. One common method was for Huyck to watch pornography on the family's computer with J.H. on his lap. J.H. estimated that Huyck had her watch pornography with him "between 10 or 20" times. Initially Huyck just had J.H. sit on his lap to watch the pornography with him. However, after many such viewings, Huyck began putting his hands down J.H.'s pants and touching her vagina while they watched the pornography.

At age 15, J.H. attempted suicide. Huyck found J.H. on the floor of her room and took her to a local hospital for treatment. A week later, J.H. was transferred to Seattle Children's Hospital's psychiatric ward. After J.H. was discharged from the hospital, she began seeing a clinical psychologist, Naomi Huddlestone. After several sessions, J.H. revealed the details of her abuse to Dr. Huddlestone. As a mandatory reporter of suspected child abuse, Dr. Huddlestone reported J.H.'s revelations to Child Protective Services.

The State subsequently charged Huyck with one count of rape of a child in the first degree and three counts of child molestation in the first degree.

J.H. testified at trial. As she was testifying to one of the incidents of abuse that she had endured, J.H. became emotional and found it difficult to continue. The prosecutor suggested that testimony end for the day. The trial court excused the jury for the evening.

The next morning, the State resumed its direct examination of J.H. J.H.'s mother had testified the day before and had expressed doubts as to the truthfulness of J.H's claims. The prosecutor asked J.H. if "after court yesterday, at any time either yesterday here at the courthouse or at home, did your mom ever give you a hug yesterday." Huyck's counsel did not object. "No," J.H. replied.

The jury found Huyck guilty of all charged offenses. At sentencing, both the State and Huyck proffered sentencing recommendations to the court. Huyck's attorney stated that his client's recommended sentence, "is a significant amount of time. 240 months is a very significant amount of time. Twenty years. He's 57 now. He's looking at 77. There's very little good time given in these cases." This prompted the court to ask the defense attorney and the prosecutor:

> THE COURT: Tell me, if you would, to refresh my recollection, how, if at all—both will be asked the same question—how, if at all, the nature of this offense impacts upon the DOC good time calculation, if, in fact—
>
> [DEFENSE COUNSEL]: I think it's 10 percent.
>
> THE COURT: Is it different than that which would be otherwise afforded?
>
> [DEFENSE COUNSEL]: I think it's 10 percent.
>
> [PROSECUTING ATTORNEY]: My recollection is 15 percent.

> [DEFENSE COUNSEL]: Or 15.
>
> [PROSECUTING ATTORNEY]: But I'm not entirely sure about that.
>
> [DEFENSE COUNSEL]: I know they change it periodically. I know it's no more than 15.
>
> THE COURT: That's why I asked, actually.
>
> [DEFENSE COUNSEL]: And that is—so it's not a significant time in terms of what we're used to: One-third off, in some cases almost 50 percent off. So he's looking at significant time.

Following this exchange, Huyck's counsel continued discussing his sentencing recommendation.

After having heard both parties' recommendations and Huyck's allocution, the court imposed concurrent, standard range sentences of confinement of 260 months to life for rape of a child and 198 months to life for each count of child molestation. It also imposed numerous lifetime community custody conditions. Finally, the court ordered Huyck to pay a $500 crime victim assessment, a $100 DNA (deoxyribonucleic acid) database fee, and a $200 criminal filing fee. Huyck appealed to Division Two, which transferred the matter to us for resolution.

II

Huyck first contends that prosecutorial misconduct deprived him of a fair trial. This is so, he asserts, because "the prosecutor used J.H.'s emotional breakdown at the end of her first day of testimony to garner sympathy and passion from the jury for J.H. by eliciting on her second day of testimony that her mother never comforted her after her emotional breakdown the day before." This contention fails. Nothing about the prosecutor's questioning was improper.

It is not misconduct for a prosecutor to elicit admissible testimony or present admissible evidence. See, e.g., State v. Manthie, 39 Wn. App. 815, 820-21, 696 P.3d 33 (1985); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240 (1978). Prosecutors are authorized to adduce evidence concerning the demeanor of a witness and, in closing argument, urge the jury to consider that witness's testimony credible. See State v. Bautista-Caldera, 56 Wn. App. 186, 194, 783 P.2d 116 (1989); see, e.g., United States v. Thomas, 86 F.3d 647, 654 (7th Cir. 1996) ("In such situations, the evidence of threats is necessary to account for the specific behavior of a witness that, if unexplained, could damage a party's case."). Indeed, the jury was instructed to consider J.H.'s "manner . . . while testifying" in assessing the credibility of her testimony. Evidence establishing that J.H. did not receive any emotional support from her mother following her first day of testimony—which ended because she was in tears and unable to continue—was relevant in that it gave context to her demeanor while testifying. There was no impropriety.

III

Huyck next contends that the sentencing court erred by "considering how much earned early release [Huyck] might be eligible for it setting the minimum term of incarceration." The State asserts that, because Huyck received standard range sentences, he may not appeal the duration of those sentences. The State is correct.

"A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." RCW 9.94A.585(1). The

only recognized exceptions to this statutory prohibition arise when "the sentencing court violated fundamental procedural tenets or a constitutional requirement." State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). To fall within this exception, a defendant must show that "the sentencing court had a duty to follow some specific procedure required by the [Sentencing Reform Act], and that the court failed to do so." Mail, 121 Wn.2d at 712. Washington's Sentencing Reform Act of 1981 is codified in chapter 9.94A of the RCW. That chapter requires a sentencing court to consider various sources of information, such as a victim impact statement, and "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.500(1). The sentencing court herein followed that directive.

Huyck's sentences fell within the applicable statutory standard ranges. Huyck does not assert any constitutional violation, and his contention that the sentencing court improperly considered Huyck's opportunity to earn good time credits does not establish that the court failed to follow the procedures outlined in the Sentencing Reform Act. RCW 9.94A.500(1).[1] Huyck's appellate challenge to the length of his sentence is barred.[2] RCW 9.94A.585(1); Mail, 121 Wn.2d at 712.

[1] We further note that it was Huyck who first called the sentencing court's attention to the issue of his limited potential for amassing good time credits.

[2] To support his novel theory that he can appeal the duration of his standard range sentence to protest the court's consideration of potential good time credits, Huyck directs us to

IV

Huyck next contends that the sentencing court erred in imposing a number of community custody conditions. This is so, he avers, because many of the activities these prohibitions limit are not related to his crimes and are in excess of the sentencing court's statutory authority. In response, the State argues that these prohibitions were not challenged in the sentencing court and therefore cannot be challenged for the first time on appeal. Alternatively, the State avers that the prohibitions barring Huyck from accessing the Internet and social media use are supported by the record, but concedes that the remaining prohibitions should be deleted or modified. We reject the State's argument that we may not review the prohibitions, but we agree with the State that the restrictions on Internet access are sufficiently crime-related. However, we agree with Huyck that the other challenged provisions must be stricken.

A

The State first argues that Huyck failed to preserve his challenges to the community custody conditions because he failed to object to their imposition before the sentencing court. The State is wrong. Our Supreme Court has held that "unpreserved sentencing error may be raised for the first time on appeal because sentencing can implicate fundamental principles of due process if the

several cases that he believes support his argument. Specifically, he cites to State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997), State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987), In re Crow, 187 Wn. App. 414, 349 P.3d 902 (2015), State v. Buckner, 74 Wn. App. 889, 876 P.2d 910 (1994), rev'd on other grounds, 125 Wn.2d 915, 890 P.2d 460 (1995), and State v. Bourgeois, 72 Wn. App. 650, 866 P.2d 43 (1994). However, all of these cases address the imposition of exceptional sentences. The law pertaining to exceptional sentences is quite different than that applicable to standard range sentences. The cited cases do not establish either trial court error or that Huyck has an appealable claim.

sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Jones, 182 Wn.2d 1, 6, 338 P.3d 278 (2014) (citing State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999), superseded by statute on other grounds, Laws of 2008, ch. 231, § 4, as recognized in State v. Cobos, 182 Wn.2d 12, 338 P.3d 283 (2014)). We therefore address Huyck's sentencing contentions.

B

Huyck challenges the following community custody conditions:

> 11. Do not use or consume . . . alcohol and/or drugs to include Marijuana.
> . . . .
>
> Offenses Involving Minors -
> . . . .
> 19 Stay out of areas where children's activities regularly occur or are occurring. . . .
>
> Offenses Involving Alcohol/Controlled Substances -
> 20 Do not purchase or possess alcohol.
> 21 Do not enter drug areas as defined by court or CCO.
> 22 Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
> 23 Obtain alcohol [and] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. . . .
>
> Offenses Involving Computers, Phones or Social Media -
> 24 No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court.
> 25 No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). . . . Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind.

> Offenses Involving Mental Health Issues -
> 26 Obtain both a Mental Health Evaluation and an Anger Management Evaluation, and follow through with all recommendations of the providers, including taking medication as prescribed. . . .

Huyck requests that we remand this matter to the sentencing court with directions to strike all of the above listed provisions, save for paragraph 11, in which Huyck requests only that the word "use" be stricken. In response, the State contends that the provisions barring Huyck from accessing the Internet, in paragraphs 24 and 25, were properly imposed but concedes that the remaining provisions should be struck as requested. We agree that the provisions the State concedes were improperly imposed must be stricken. We also agree that the provisions barring Huyck from accessing the Internet and Internet connected devices were sufficiently crime-related, but conclude that the prohibition against accessing social media platforms is not crime-related and must be stricken.

We review the imposition of community custody conditions for an abuse of discretion. State v. Lee, 12 Wn. App. 2d 378, 401, 460 P.3d 701 (2020) (citing State v. Hai Minh Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018)). A sentencing court abuses its discretion when it imposes a condition that is either unconstitutional or manifestly unreasonable. Lee, 12 Wn. App. 2d at 401.

"A court is authorized to impose discretionary community custody conditions as part of a sentence." Lee, 12 Wn. App. 2d at 401 (citing RCW 9.94A.703(3)). "As part of that authority, a court may order offenders to '[p]articipate in crime-related treatment or counseling services[,] . . . [p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably

related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[,] . . . [and] [c]omply with any crime-related prohibitions.'" Lee, 12 Wn. App. 2d at 401 (alterations in original) (quoting RCW 9.94A.703(3)(c), (d), (f)). Crime-related prohibitions must relate "to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Thus, there must be some evidence in the record connecting the community custody condition to the crime." Lee, 12 Wn. App. 2d at 401-02 (citing State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015)).

Herein, Huyck was barred from accessing the Internet "without prior approval of the supervising CCO, Treatment Provider, and the Court," from using "a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches)," and from accessing "any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind." The State contends that these community custody provisions are crime-related because there was evidence establishing that Huyck viewed pornography with J.H. on a family computer during several of the occasions when he touched her inappropriately. We agree that this evidence is sufficient to establish that the prohibitions against accessing the Internet or using devices connected to the Internet are crime-related. At trial, it was noted that a search of Huyck's computer did not reveal any pornography stored therein, thus making it more probable that he accessed digital pornographic material from an external source, most likely the Internet. However, this does not establish that Huyck in any way utilized social media to perpetrate his offenses. The record

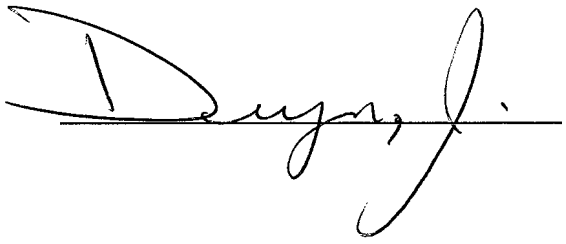
does not set forth any evidence that use of such platforms enabled Huyck to engage in his criminal behavior, and, thus, the condition explicitly barring access to social media must be stricken along with those other conditions that the State has conceded were improperly imposed.

V

Finally, Huyck contends that the sentencing court's imposition of a $200 criminal filing fee was erroneous because Huyck is indigent. The State concedes that Huyck is correct. We agree and direct the superior court on remand to strike Huyck's obligation to pay this fee. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

In summation, we affirm Huyck's convictions and his sentences of confinement. However, we remand the matter to the superior court to strike the criminal filing fee and the challenged community custody conditions excepting those prohibiting Huyck from accessing the Internet and Internet connected devices.

Affirmed in part, and reversed in part.



WE CONCUR: