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# NO. 55968-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CAREY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

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BRIEF OF APPELLANT

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1. INTRODUCTION

Appellant John Carey was convicted of charges relating to sexual misconduct against his brother’s teenage daughter I.C. But, at his trial, the court denied Carey his right to present a complete defense and failed to observe the rules of evidence when it excluded Carey’s immediate reaction—denial—to news that his niece was alleging sexual misconduct. The trial court also commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that the testimony of a sex crime complainant need not be corroborated. This Court should reverse Carey’s convictions.

This case also presents additional errors related to sentencing. The community custody condition prohibiting “unauthorized use of electronic (web) media or devices”[[1]](#footnote-1) is unconstitutionally vague and overbroad, impermissibly burdening Carey’s due process and First Amendment rights. The trial court also erred in imposing the community custody supervision fee on Carey, who is indigent, despite the court’s stated intent to waive all discretionary fees. Relatedly, defense counsel was ineffective in failing to object to/alert the trial court that it was inadvertently imposing the discretionary fee despite the court’s stated intent to waive. Finally, remand is required for the trial court to correct scrivener’s errors in the judgment and sentence as to offense dates.

1. assignments of error
2. The trial court denied Carey his right to present a complete defense and failed to observe the rules of evidence when it excluded Carey’s immediate reaction—denial—to news that his niece was alleging sexual misconduct.
3. The trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that the testimony of a sex crime complainant need not be corroborated.

3. The community custody condition prohibiting “unauthorized use of electronic (web) media or devices” is unconstitutionally vague and overbroad, in violation of Carey’s constitutional rights.

1. The trial court erred when it imposed a community custody supervision fee on an indigent defendant and despite the court’s stated intent to waive all discretionary fees.
2. Relatedly, defense counsel was ineffective in failing to object to/alert the court to the discretionary fee despite the trial court’s stated intent to waive all discretionary fees.
3. Scrivener’s errors in the judgment and sentence as to offense date must be corrected.

Related Issues for this Court

1. A trial court violates the right of an accused person to present a defense when it excludes relevant evidence that is necessary to the presentation of a complete defense. A violation of the right to present a defense may also violate evidentiary rules. But where a violation of the right to present a defense occurs, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. The trial court excluded Carey’s unfiltered reaction to his niece’s allegations, violating his right to present a defense as well as the rules of evidence. Where exclusion of the evidence was not harmless under either the constitutional or evidentiary error harmlessness standards, should this Court reverse his convictions?
2. A trial court comments on the evidence, in violation of the state constitution, when it instructs the jury in a manner that highlights specific parts of the prosecution’s case or emphasizes specific evidence. Such an error is presumed prejudicial. Here, the trial court instructed the jury, over defense objection, that the testimony of a sex crime complainant need not be corroborated, unfairly emphasizing the complainant’s testimony as warranting special consideration. In other words, the trial court commented on the evidence. The State cannot demonstrate that the error was harmless. Should this Court reverse Carey’s convictions for this reason, as well?
3. A community custody condition must not be vague—failing to warn an individual what is proscribed and/or allowing for arbitrary enforcement—and it must not be overbroad, burdening important constitutional rights more than necessary for safety. The trial court entered a condition prohibiting “unauthorized use of electronic (web) media or devices,” in violation of both precepts. Should this Court order that the vague and overbroad community custody condition be stricken?
4. Community supervision fees are a discretionary legal financial obligation (LFO) that should be waived for an indigent defendant. The judgment and sentence nonetheless imposed the fee in a section set apart from other LFOs. Where Carey is indigent, and where the trial court intended to waive all discretionary legal financial obligations, should this fee be stricken from the judgment and sentence?
5. Relatedly, was defense counsel ineffective in failing to ensure the written judgment and sentence conveyed the court’s intent to waive the fee?
6. Finally, should this Court remand for correction of the scrivener’s errors in the judgment and sentence?
7. statement of the case[[2]](#footnote-2)
8. **Introduction to facts**

Carey is a member of large extended family living in Clark County. RP 394, 564-65.Carey’s family (which included his children and his partner’s children) had a close relationship with his brother Kevin’s family, gathering at weekly dinners. RP 398-99, 564-65, 614. Kevin’s children, including complainant I.C., also spent the night at Carey’s house playing video games and hanging out with Carey’s and his partner’s children. RP 399-400, 566, 614.

But, in late 2018, then-16-year-old I.C. accused Carey of inappropriate touching, occurring when she was between 13 and 15 years old. Carey was charged with seven related offenses,[[3]](#footnote-3) and the case went to trial in March of 2021.

1. **Trial testimony**

I.C., 18 years old at the time of trial, lived with her family in Battle Ground. RP 187. Carey is her paternal uncle. RP 190-91.

I.C.’s immediate family frequently spent time with Carey’s family, which included Carey’s children, his partner, and her children. RP 194-96. Carey and his family were frequent guests at Sunday dinners, and I.C. spent time at Carey’s home in Vancouver. RP 196-98, 208.

I.C. testified that when she was about 13 years old, Carey would slap her butt, and “it became a thing.” RP 203. The activity was treated as a joke or game, and others joined in, but I.C. didn’t like it. RP 203-04, 285-86; see also RP 402-03. I.C. said Carey also grabbed her butt sometimes. RP 205.

I.C. estimated she was still 13 when Carey started touching her breasts over her clothes. It continued when she was 14 and 15. RP 207-12. Carey also grabbed her front genital area over her clothes. RP 213-15.

Carey also touched I.C. under her clothes. On one occasion, while driving together in Carey’s Suburban, Carey pulled down I.C.’s pants and put a finger in her vagina. RP 218-20. I.C. testified that on one occasion when she was spending the night at Carey’s house, she got up to use the bathroom in the middle of the night. As she was leaving the bathroom, Carey pushed her back into the bathroom, pulled down her pants, turned her body so she was facing away from him, and digitally penetrated her vagina. RP 222-26. I.C. was initially confused about what was happening and asked Carey what he was doing; she did not recall his response. RP 224. I.C. also testified about incidents (also occurring in that bathroom) during which Carey masturbated while penetrating her vagina with his fingers. RP 226-27. In addition, on one occasion when I.C. was 14 or 15, Carey placed her hand on his penis while they were in Carey’s car. RP 229-33. Carey also sent I.C. photos of his genitals on messaging applications Kik and Snapchat. She did not keep the photos. RP 228-29.

I.C. stopped going to Carey’s house for sleepovers. RP 234, 314; see also RP 590-91 (I.C.’s mother’s testimony). A few months later, in late 2018, I.C. made a disclosure on a written questionnaire at a routine medical appointment. RP 234; see also RP 345-46 (mental health counselor Heidi Kirkpatrick’s testimony). Asked about the questionnaire, I.C. told her physician that her uncle had done sexual things to her. RP 239. The physician set up an appointment with an affiliated mental health counselor. RP 239-41. At that appointment, I.C. told her father, Kevin, that Carey had touched her. RP 241. I.C. and Kevin then told I.C.’s mother. RP 242-43. I.C. gave additional details at an interview with a forensic interviewer; she was later examined by a nurse. RP 246-47, 305.

Upon cross-examination, I.C. acknowledged that details of her disclosures changed over time. For example, she gave details of a bathroom incident to the forensic interviewer. But she disavowed this disclosure at trial. RP 319-21. I.C.’s estimates regarding the number of incidents in the bathroom and car varied between various interviews and trial. RP 306-07, 323-24. I.C. also acknowledged that, although other people were around at times when Carey touched her, no one ever saw. See, e.g., RP 207-08 (Carey’s partner’s daughter was around when Carey grabbed her breast, but did not see misconduct); RP 231-32, 309-11 (Carey would cease inappropriate comments/conduct when someone walked by).

Following I.C.’s disclosure, she no longer saw extended family on her father’s side. RP 249.

I.C.’s father Kevin testified. Carey is Kevin older brother. RP 393. Carey and his family moved to Clark County in 2012 and rented a home owned by Kevin and his wife. RP 395. Kevin testified that in 2018, I.C. became sullen and lost weight. RP 408-10.

After I.C.’s disclosure, Kevin sent Carey a text message alerting Carey to the disclosure and cancelling holiday dinner plans. RP 450-51, 467.

The State introduced this text exchange via screenshots captured from Kevin’s phone. Exs. 1, 2; see also RP 534, 536 (Kevin texted screenshots to detective). According to Kevin, Carey did not deny the texted allegations but, rather, responded by asking Kevin what he was going to do so Carey could “get stuff in order.” RP 452. Kevin texted back that the allegations were made to a mandatory reporter, so the matter was out of Kevin’s hands. RP 453. Carey responded by asking “when” and also texted “I’m sorry.” RP 453. Kevin texted back that he was not sure when a case had been opened but guessed “12/21.” RP 453. According to Kevin, Carey responded, “Okay. Thank you. Sorry. And apologize to her too.” RP 454. Carey’s last text was, “It’s up to you on charges though, to press or not.” RP 454. I.C.’s mother was present while Kevin was texting back and forth with Carey. RP 602-03.

Carey and his partner Chantel Cannady testified the text thread purportedly memorialized in Exhibits 1 and 2 had been altered. RP 664-65; cf. RP 463 (Kevin’s testimony acknowledging that individual texts may be deleted from text threads). Carey’s statements denying culpability had been deleted.[[4]](#footnote-4) RP 665, 733-37, 844-49. But Carey no longer had the phone he used to send the texts because it had been dropped and broken. RP 737, 743, 837.

Carey sought to introduce Cannady’s testimony that, shortly after receiving Kevin’s initial text, Carey entered the room where Cannady was located. He was shaking and appeared shocked. RP 650. Carey stated, “Are you F-ing kidding me[?]” RP 650.

Defense counsel argued this statement qualified as an excited utterance,[[5]](#footnote-5) an exception to the evidence rule prohibiting the introduction of hearsay. RP 652.

But the trial court excluded the statement on the ground that it was a denial of culpability by an accused person and, although Carey made the statement after a startling event, it was not the type of startling event contemplated by the evidence rules. RP 654-55. The court stated

So the general rule is that it’s an exception to the hearsay rule in the—it has to be—the statement has to be made after a particularly exciting or shocking event, and the person still has to be under . . . the effect of the event. And there’s all sorts of events that have been identified in case law, automobile accidents, assaults, that sort of thing.

So here the event is a receipt of a text message with an accusation of a sexual assault. And, you know, certainly that . . . could provoke an emotional response. I think there’s no real question about that. But, you know, is it the sort of startling event that the rule was structured to reflect? And, you know, I think that’s kind of difficult here.

. . . . I’m having problems in a couple different areas. There’s—interestingly enough [evidence rule commentator Karl B. Tegland] talks about credibility, and that’s not recognized in case law as being a factor. But, you know, he’s candid enough to say it’s a factor the courts take into account.

You know, I think certainly, you know, when there’s a third party, you know, unaligned, you know, who is the recipient of a declaration, you know, I think that certainly that plays into it.

*And there’s a concern. I think [the prosecutor] pointed out that essentially it’s an opportunity for—you know, for the declarant to get away from cross-examination by getting the statement in as a hearsay exception. So, you know, in this case I just don’t find that . . . the event is of the startling nature . . . that the case law I think requires*.

You know, I’m not going to say that the defendant did not . . . have an emotional response. I think somebody accused of a crime like this would have an emotional response. But my concern is that it’s just not of the nature that the rule contemplates. So I sustain the objection.

RP 654-55 (emphasis added).

Carey testified and denied all allegations. But, as stated, the trial court prohibited both Carey and Cannady from testifying about Carey’s initial statement after learning of his niece’s allegations.

Carey denied touching his niece in a sexual manner. RP 849, 875. Carey only drove I.C. alone one occasion, and he was driving his Chevrolet Cavalier, not the Suburban I.C. mentioned in her testimony. RP 832-35. Butt-slapping was a game initiated by I.C.’s siblings and cousins. Carey did smack I.C.’s butt. But he also smacked, for example, Cannady’s butt. RP 841-42.

Several individuals also testified on Carey’s behalf. Carey’s son Christian, I.C.’s cousin, testified that I.C. was rarely alone when she visited for sleepovers, and the teenagers, including Christian and I.C., stayed up later than the adults. RP 615-17; see also RP 783 (teens often hung out together in Christian’s room until 1:00 or 2:00 a.m.). Cannady testified Carey rarely drove alone with I.C. Except for one specific occasion that Cannady could recall, family members were always present. RP 634-35, 643-44, 671, 675. Cannady’s daughter Isabell, formerly I.C.’s close friend, testified that during sleepovers at Carey’s residence I.C. slept in Isabell’s room, and Isabell tended to stay up later than I.C. RP 782, 798, 800.

1. **Non-corroboration jury instruction**

The State proposed a “non-corroboration” jury instruction relating to I.C.’s testimony. Carey objected. RP 881-91, 996. Overruling the objection, the trial court instructed the jury that “to convict a person of the [charged] crimes of child molestation in the second degree, child molestation in the third degree, or rape of a child in the third degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.” CP 48 (instruction 21).

1. **Verdicts and sentence, including community custody conditions.**

The jury acquitted Carey of the single charge of second degree child molestation. CP 56. But it found Carey guilty of the remaining six charges, three counts of third degree child molestation and three counts of third degree child rape. CP 57-62. The jury also found by special verdict that Carey used a position of trust or confidence to facilitate the crimes. CP 64-69.

The court found the jury’s special verdict was a substantial and compelling reason to impose an exceptional sentence upward, as was Carey’s high offender score based solely on the current offenses. CP 117-18 (citing RCW 9.94A.535(3)(n) and RCW 9.94A.535(2)(c)); see CP 122 (no prior offenses). The court sentenced Carey to a total exceptional sentence upward of 120 months (consecutive 60-month terms), plus a consecutive term of 36 months of community custody (standard range incarceration reduced to impose community custody). CP 125.[[6]](#footnote-6)

Carey had lost his leg to amputation before trial. RP 1002. The trial court found him indigent and waived all non-mandatory legal financial obligations. RP 1011.

Indeed, in the “Legal Financial Obligations” section of the judgment and sentence, the court imposed only the mandatory $500 Victim Penalty Assessment and $100 DNA collection fee; it waived all other discretionary financial obligations. CP 127. However, buried among community custody conditions on a different page is the requirement that Carey “pay supervision fees as determined by [Department of Corrections (DOC)].” CP 126 (condition 7).

In Appendix F of the judgment and sentence, “Additional Conditions of Sentence,” the court also ordered: “No unauthorized use of electronic (web) media or devices.” CP 138; CP 126 (directing to “Appendix F” for community custody conditions).

Carey timely appeals. CP 139.

1. argument
2. **By improperly excluding Carey’s surprised response to his niece’s allegations, the trial court denied his right to present a defense.**

The trial court improperly excluded important evidence of Carey’s immediate, unfiltered reaction to I.C.’s allegations, irrevocably damaging his case. The trial court violated Carey’s right to present a defense. It also violated the rules of evidence when it excluded Carey’s exculpatory exclamations on the ground that, despite meeting the letter of the evidentiary rules, they were somehow not the right type of excited utterance. It appears the trial court concluded an out-of-court statement by a defendant favorable to the defense simply should not be admitted.

This was not fair. The error was prejudicial and requires reversal—under either a constitutional or evidentiary standard.

* 1. Rights of accused to present a defense and standards of review

An accused person has a constitutional right to present testimony in their defense. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Orn, 197 Wn.2d 343, 347, 482 P.3d 913 (2021); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); accord Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (“Few rights are more fundamental than that of an accused to present witnesses in his own defense.”).

This right extends to presenting a meaningful defense. State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). The constitutional right to present a complete defense circumscribes even the government’s ability to draft rules that limit evidence. State v. Cayetano-Jaimes, 190 Wn. App. 286, 297, 359 P.3d 919 (2015). An accused person has the right to present relevant evidence. Id. at 297-98.

This Court reviews de novo whether the trial court’s evidentiary rulings abridged a defendant’s Sixth Amendment rights. Orn, 197 Wn.2d at 350. The more the exclusion of defense evidence prejudiced the defendant, the more likely a reviewing court is to find a constitutional violation. Jones, 168 Wn.2d at 720-21.

This Court reviews the exclusion of evidence under the evidentiary rules for abuse of discretion. Orn, 197 Wn.2d at 351. A trial court’s misapplication of the law is an abuse of discretion, so a court necessarily abuses its discretion by denying an accused person their constitutional rights. Id.

* 1. The trial court violated Carey’s right to present a defense by excluding his unfiltered reaction to the allegations.

The trial court violated Carey’s right to present a defense—and the rules of evidence—by excluding his unfiltered reaction to his niece’s allegations.

Upon learning of I.C.’s allegations through Kevin’s texts, a stunned Carey reportedly stated, “Are you F-ing kidding me[?]” RP 650. Defense counsel argued that if the statement could be considered an assertion—a denial of the allegations—the statement qualified as an excited utterance, an exception to the evidence rule prohibiting the introduction of hearsay. RP 652. But the court excluded the statement on the ground that it was a denial of culpability by an accused person. Relatedly, although Carey made the statement after a startling event, it was—somehow—not the type of startling event contemplated by the evidence rule. RP 654-55. As indicated, the trial court violated Carey’s right to present a defense and the rules of evidence by excluding his unfiltered reaction to his niece’s surprising allegations.

“Evidence . . . a defendant seeks to introduce ‘must be of at least minimal relevance.’” Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)); Cayetano-Jaimes, 190 Wn. App. at 297-98. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

A defendant has no constitutional right to present irrelevant evidence, but only minimal logical relevancy is required for admissibility. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986), aff’d, 108 Wn.2d 515 (1987). If relevant to the defense, the right to present a defense places the burden on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 622. But for evidence of high probative value, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and [article 1, section 22].” Jones, 168 Wn.2d at 720 (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Turning from constitutional rights to the rules of evidence, hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. ER 801(c). Hearsay evidence is inadmissible unless it falls within one of the hearsay exceptions. ER 802.

The excited utterance exception to the hearsay rule, ER 803(a)(2), provides that the hearsay prohibition does not exclude “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

The exception is based on the idea that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 John H. Wigmore, Evidence § 1747, at 195 (1976)). “Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance.” Chapin, 118 Wn.2d at 686. First, a starling event occurs. Second, while under the stress of the event a statement is made. Third, the statement must relate to the startling event or condition. Id. Where the declarant is an accused person, the startling event may be the accusation rather than the charged crime. See, e.g., People v. Vanderpauye, \_\_\_ P.3d \_\_\_, 2021 WL 4096977, at \*6 (Colo. App. Sept. 9, 2021) (accusation by rape complainant sufficiently startling to support admissibility of defendant’s statement as excited utterance); United States v. Moolick, 53 M.J. 174, 177 (C.A.A.F. 2000) (rape allegation, not underlying charged conduct, was the startling event provoking defendant’s statement, which was erroneously excluded).

The crucial question is whether the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. State v. Briscoeray, 95 Wn. App. 167, 173, 974 P.2d 912 (1999). The key consideration is spontaneity. State v. Woods, 143 Wn.2d 561, 598, 23 P.3d 1046 (2001). In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. Briscoeray, 95 Wn. App. at 173-74.

Meanwhile, a trial court decides preliminary questions of fact, including the admissibility of evidence, under ER 104(a). State v. Karpenski, 94 Wn. App. 80, 102, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). The proper inquiry is “whether the evidence is sufficient to support a finding of the needed fact.” Karpenski, 94 Wn. App. at 102. Under the sufficiency test, the trial court “must take the information in the light most favorable to the proponent, accepting that . . . which favors the proponent.” Condon Bros., Inc. v. Simpson Timber Co., 92 Wn. App. 275, 286, 966 P.2d 355 (1998). In contrast, “[i]t is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.” State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967); see also State v. Cox, 17 Wn. App. 2d 178, 188, 484 P.3d 529 (2021) (trial court should admit probative evidence, even where court may have question as to credibility, and allow it to be tested by cross-examination).

There is no “self-serving hearsay” rule that bars admission of statements favorable to the defense that would otherwise satisfy a hearsay rule exception. State v. Pavlik, 165 Wn. App. 645, 650, 268 P.3d 986 (2011). Washington adopted the Rules of Evidence in 1979, and one of those rules provides that a statement is *not* hearsay if it is offered against a party and is the party’s own statement. Pavlik, 165 Wn. App. at 651-52 (citing ER 801(d)(2)). Pre-rule cases admitted such admissions by party-opponents as hearsay *exceptions* rather than of excluding them from the hearsay definition altogether. Under this approach, admissions of a party were hearsay but admissible against the party if relevant. Pavlik, 165 Wn. App. at 653. Several cases referenced self-serving hearsay as undesirable, but the cases failed to recognize the phrase as a reference to pre-rule authority. Id. Indeed, “[t]he rules of evidence contain no self-serving hearsay bar that excludes an otherwise admissible statement.” Id.; see also State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967) (“self-serving” is shorthand way of saying statement is hearsay and does not fit recognized exception to hearsay rule).

Courts, however, must address admissibility under the recognized exceptions to the hearsay rule. Pavlik, 165 Wn. App. at 653-54. ER 803(a)(2) is one such exception, and there is no exception to the exception for statements by an accused person. See, e.g., Hinck v. State, 260 So. 3d 325, 331 (Fla. Dist. Ct. App. 2018) (where a defendant’s statement otherwise qualifies by evidence as an excited utterance, fact that statements are exculpatory “is not, in and of itself, a sufficient evidentiary basis for their exclusion”). “A flat rule of exclusion of declarations of a party on the grounds that they may be described as ‘self-serving’ even though otherwise free from objection under the hearsay rule and its exceptions, detracts from the fund of relevant information which should be available to the jury.” United States v. Dellinger, 472 F.2d 340, 381 (7th Cir. 1972).

Here, regardless of whether Carey’s out-of-court statement was beneficial to his case, Carey met each requirement for admissibility under the excited utterance hearsay exception. According to the offer of proof, Carey received a startling text message while smoking outside. Carey, who was described as “shaking” and “shocked” at the time, immediately entered the outbuilding where he and Chantel Cannady slept, threw the phone on the bed, and exclaimed “Are you F-ing kidding me[?]” CP 650-51. His was an immediate—and emotional—response to a startling event, indicating he had no opportunity to reflect on the event and fabricate a story about it. Briscoeray, 95 Wn. App. at 173-74.

The trial court even acknowledged the event was of a sort that might provoke an excited utterance. Yet the trial court appeared to exclude the statement on the principle that such a statement should not be insulated from cross-examination. There is no such rule, despite a debunked yet apparently pervasive judicial skepticism regarding “self-serving” hearsay. The trial court misapplied the rules of evidence in excluding Carey’s statement, which, even though it was exculpatory, qualified under the evidence rules and case law as an excited utterance.

Putting aside the matter of evidentiary error—which did occur—the trial court’s exclusion of the statement denied Carey his right to present a complete defense. Although Cannady testified that Carey appeared to be in shock and was shaking, RP 650-51,these physical reactions were just as likely to result from a truthful allegation than a false one. Although Carey testifiedand denied culpability, RP 849, 875, the court’s ruling prevented him from presenting evidence of his immediate reaction to the allegations, which was likely to have enhanced his credibility in the eyes of jurors. Carey’s immediate reaction of denial was a crucial component of the defense, and no countervailing consideration warranted its exclusion. Jones, 168 Wn.2d at 720; Hudlow, 99 Wn.2d at 16. Thus, exclusion of this relevant evidence both violated the rules of evidence and denied Carey the right to present a defense.

* 1. The error was prejudicial under either a constitutional or a non-constitutional prejudice standard.

Assuming constitutional error occurred, this Court must determine whether the trial court’s error was harmless beyond a reasonable doubt. Orn, 197 Wn.2d at 359. For this Court to so find, the State must demonstrate beyond a reasonable doubt that the jury would have reached the same verdict without the trial court’s error. Id. Under the nonconstitutional harmless error standard, an error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); see State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (improper exclusion of evidence required reversal under nonconstitutional harmless error standard).

Either standard requires reversal. Exclusion of Carey’s unfiltered, exculpatory statement was prejudicial. The evidence was not cumulative of other evidence and was necessary to present a full picture of the defense. As discussed in the preceding section, although Cannady testified that Carey appeared to be in shock and was shaking, these physical reactions were just as likely to result from a *truthful* allegation. Thus, the presentation of the evidence may well have left the jury with the impression Carey was shaking because he had been found out. Carey’s unfiltered denial would have put this to rights.

In addition, as also discussed in the preceding section, Carey testified, and denied culpability. RP 849, 875. But the court’s ruling prevented him from presenting evidence of his immediate reaction to the allegations, which was likely to have enhanced his credibility in the eyes of jurors.

In Vanderpauye, 2021 WL 4096977, for example, the Colorado appellate court held that exclusion of an analogous statement was not harmless. There, the court held that a trial court erred in excluding a defendant’s statement made immediately following an accusation by a rape complainant. Id.at \*6. The defendant stated that he thought he had received consent. Id. The court held the statement qualified as an excited utterance under Colorado’s evidence identical evidence rule, id., and determined that the error was not harmless under a nonconstitutional harmless error standard:

Because the victim’s lack of consent is an element of the charge for which Vanderpauye was convicted, whether the victim consented to sexual intercourse, the extent and substance of that consent, and whether the victim was, in fact, asleep during the incident were all critical factual determinations for the jury. Vanderpauye’s statement was directly relevant to these factual determinations.

Id. at \*7 (internal citation omitted). Further, the appellate court rejected the prosecution’s claim that the “jury would not have credited [Vanderpauye’s] self-serving hearsay statement.” Id. at \*8. The court stated, “Maybe so. But the determination of the credibility of witnesses is solely within the province of the jury. We cannot say what weight the jury would have given the evidence.” Id. (internal quotations omitted). The court concluded, “there is a reasonable probability that Vanderpauye’s statement could have affected the jury’s verdict. Id.

The improper exclusion of Carey’s spontaneous reaction denying I.C.’s allegations undermined the defense and prejudiced Carey. Reversal is warranted under both constitutional or nonconstitutional harmlessness standards.

1. **The trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that the testimony of the complainant need not be corroborated**.

This Court should also reverse Carey’s convictions based on a second constitutional violation. Overruling a defense objection, the trial court instructed the jury that “to convict a person of the [charged] crimes of child molestation in the second degree, child molestation in the third degree, or rape of a child in the third degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.” CP 48 (instruction 21). This instruction constituted an unconstitutional comment on the evidence, and reversal is required.

Article 4, section 16 of the Washington Constitution specifies, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision prohibits judges from making any statement that amounts to a “comment on the evidence.” State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Further, the constitution prohibits a judge from giving instructions that single out specific parts of the prosecution’s case or emphasize specific evidence. State v. Lewis, 6 Wn. App. 38, 41-42, 492 P.2d 1062 (1972). The provision also prohibits judicial officers from conveying their personal attitudes towards the merits of the case or instructing a jury that matters of fact have been established as a matter of law. State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

This Court applies apply a two-step analysis to determine if a judicial comment requires reversal of a conviction. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). First, this Court examines the facts and circumstances of the case to determine whether a court’s conduct or remark rises to a comment on the evidence. State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). “It is sufficient if a judge’s personal feelings about a case are merely implied.” Id. If the court made an improper comment on the evidence, this Court presumes the comment is prejudicial, “and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” Levy, 156 Wn.2d at 723.

The Washington Supreme Court addressed the non-corroboration instruction in State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949). The State charged Clayton with “an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years.” Id. at 572. At trial, the trial court instructed the jury as follows:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Id. Clayton argued on appeal that the instruction was an impermissible comment on the evidence. Id. at 572-73. The court gave a cursory examination of the instruction, agreed with Clayton’s concession that it was a correct recitation of the law, and upheld the instruction. Id.

The Washington Supreme Court has not addressed the instruction again since Clayton in 1949. Notably, however, the Washington Pattern Criminal Jury Instructions (WPIC) do not include a corroboration instruction. State v. Zimmerman, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), review granted, cause remanded, 157 Wn.2d 1012 (2006). The Washington Supreme Court Committee on Jury Instructions has explicitly recommended *against* such instruction, finding corroboration to be a matter of sufficiency of the evidence “best left to the argument of counsel.” Id. (quoting 11 Wash. Practice: Wash. Pattern Jury Instructions: Criminal 45.02 cmt. (4th ed. 2016)).

The Court of Appeals has, subsequent to Clayton, likewise expressed misgivings about the constitutionality of an instruction telling jurors the testimony of one witness is “enough” to convict. In Zimmerman, for instance, this Court noted it shared the WPIC Committee’s misgivings about the instruction, but it felt “bound by Clayton to hold that the giving of such an instruction is not reversible error.” Zimmerman, 130 Wn. App. at 182-83. Similarly, in Division One, Judge Becker concurred in a separate opinion to express her concern in State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015). She declared, “If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction.” Id.

Carey recognizes that, at present, this issue is controlled by Clayton and Zimmerman. However, the Washington Supreme Court recently granted review of State v. Svaleson, noted at 3 Wn. App. 2d 1065, 2018 WL 2437289, review granted, 195 Wn.2d 1008 (2020). The Supreme Court granted review solely on the issue of the non-corroboration instruction. State v. Svaleson, 195 Wn.2d 1008, 458 P.3d 790 (Table) (Mar. 6, 2020). However, the Supreme Court then terminated review without deciding this issue after Mr. Svaleson’s death. See State v. Garza, noted at 16 Wn. App. 2d 1028, 2021 WL 351991, \*7 (discussing events following grant of review in Svaleson), review denied, 197 Wn.2d 1014 (2021).[[7]](#footnote-7)

Carey therefore raises the issue to preserve his own ability to petition for review on the issue.

The next question is prejudice. When a judge comments on the evidence in a jury instruction, this Court will presume prejudice. Jackman, 156 Wn.2d at 743. The prosecution bears the burden of showing there was no prejudice. Levy, 156 Wn.2d at 725. The prosecution cannot do so here.

I.C.’s in-court and out-of-court statements, many of which were inconsistent, constituted the only evidence supporting the charges. No other physical evidence or eyewitnesses corroborated her allegations. E.g., RP 207-08, 231-32, 309-11 (I.C.’s testimony that although there were people around, they didn’t see anything); RP 615-17, 634-35, 643-44, 671-72, 783-84, 798, 800(household members’ testimony they did not see inappropriate contact and establishing limited opportunities for such contact). The jury clearly had doubts about some of I.C.’s allegations, acquitting Carey on Count 1. Under the circumstances, the State cannot demonstrate with certainty that the court’s instruction to the jury, that I.C.’s testimony needed no corroboration, was harmless. CP 106. Should the non-corroboration instruction ultimately be held to be invalid, Carey’s convictions must be reversed.

1. **The community custody condition prohibiting “unauthorized use of electronic (web) media or devices” is unconstitutionally vague and overbroad, in violation of Carey’s due process and First Amendment rights.**

Not only must Carey’s convictions be reversed, the judgment and sentence also contains community custody conditions that must be removed. The sixth bulleted community custody condition listed on Appendix F to the judgment and sentence states “[n]o unauthorized use of electronic (web) media or devices.” CP 138; see CP 126 (directing reader to “Appendix F” for additional community custody conditions).

This provision is gravely flawed. First, the condition is vague. The prohibited “electronic . . . devices” might include any wi-fi enabled electronic device. “Electronic (web) media” could be interpreted to include any piece of journalism appearing online. *Who* must provide authorization for such use is not clear from the language of the condition nor is it otherwise apparent from the judgment and sentence. The condition is also unconstitutionally overbroad in that it impermissibly burdens Carey’s First Amendment rights. This Court should remand for the trial court to strike the condition.

1. Applicable law and standards of review

A sentencing court “may impose and enforce crime-related prohibitions” under the Sentencing Reform Act of 1981. RCW 9.94A.030(10); RCW 9.94A.505(9); RCW 9.94A.703(3)(f); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” RCW 9.94A.030(10). The condition need not causally relate to the crime, but it must directly relate to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Put another way, the prohibited conduct need not be identical to the crime of conviction, but there must be “some basis for the connection.” State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018). Crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

This Court examines whether a trial court has abused its discretion in imposing a disputed community custody condition. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A trial court abuses its discretion when it imposes unconstitutional community custody conditions. State v. Johnson, 197 Wn.2d 740, 744, 487 P.3d 893 (2021).

This Court reviews constitutional questions de novo. State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). Imposing an unconstitutional condition is “manifestly unreasonable.” State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). “This [C]ourt does not presume that community custody conditions are constitutional.” Id.

Finally, “[c]onditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement.” Padilla, 190 Wn.2d at 677.

1. The condition is unconstitutionally vague.

The challenged condition is vague because it does not sufficiently define prohibited conduct and invites arbitrary enforcement.

Under the due process principles of the Fourteenth Amendment and article I, section 3 of the Washington Constitution, “[a] legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” Padilla, 190 Wn.2d at 677; see Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975) (explaining importance of fair notice).

A condition is unconstitutionally vague if enforcement depends on a completely subjective standard. Padilla, 190 Wn.2d at 680. “Subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (internal quotation marks omitted) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990)).

When governmental prohibitions affect First Amendment rights, “a stricter standard of definiteness applies.” Padilla, 190 Wn.2d at 681 (citing State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)). “Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (internal quotations omitted).

Here the challenged condition is vague in the first sense. For example, it is not clear *which* sort of device is prohibited, *what* would constitute “unauthorized use,” or *who* must provide authorization for such use.[[8]](#footnote-8)

Further, this condition is vague in the second sense in part because it would allow a state official to sanction Carey for an extremely broad array of behavior based on the official’s personal preferences. The “electronic . . . devices” Carey might be prohibited from using could include any electronic device, from phones to household appliances like wi-fi enabled washing machines. “[E]lectronic (web) media” [[9]](#footnote-9) could be interpreted to included include any piece of journalism or photograph that is not physically printed, presenting obvious First Amendment concerns.

In Bahl, the Supreme Court deemed even a far more limited and specific condition deficient. A condition prohibiting access to or possession of pornographic materials “as directed by the supervising Community Corrections Officer” did not protect against arbitrary enforcement. Bahl, 164 Wn.2d at 754, 758. The fact that the condition allowed the CCO to direct what fell within the condition “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id. at 758.

The deficiencies are even more glaring in this case. The condition’s language leaves confusion as to its meaning and invites arbitrary enforcement. It must be stricken. See Irwin, 191 Wn. App. at 655 (striking condition where, even if CCO offered additional definition to defendant regarding prohibited activities, condition still violated vagueness doctrine based on “potential for arbitrary enforcement”).

1. The condition is unconstitutionally overbroad.

The condition is also unconstitutionally overbroad in that it impermissibly burdens free speech.

Overbreadth “goes to the question of whether State action is couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well,” including activity protected under the First Amendment. In re Pers. Restraint of Sickels, 14 Wn. App. 2d 51, 73, 469 P.3d 322 (2020). Overbreadth and vagueness are related concepts, with vagueness exacerbating the effects of an overbroad prohibition. Padilla, 190 Wn.2d at 679 (citing Grayned, 408 U.S. at 109)); see also Blondheim, 84 Wn.2d at 878 (discussing related doctrines of vagueness, encompassing procedural due process/notice concerns, and overbreadth, encompassing substantive due process/First Amendment concerns) (citing Grayned, 408 U.S. at 108, 114).

Restrictions on Internet access have First Amendment implications. See Packingham v. North Carolina, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017) (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)).

Nonetheless, sentencing courts may restrict a convicted defendant’s access to the Internet. But those restrictions must be narrowly tailored to the concerns posed by the specific individual. Johnson, 197 Wn.2d at 745; see also State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (“[l]imitations upon fundamental rights are permissible, provided they are imposed sensitively”).[[10]](#footnote-10)

In Johnson, the defendant was convicted of attempted second degree rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes. The charges arose from an undercover sting operation, in which a law enforcement officer posed as a 13-year-old via a Craigslist ad. At sentencing, the trial court imposed community custody conditions including that Johnson shall “‘not use or access the World Wide Web unless specifically authorized by [his community custody officer] through approved filters.’” Id. at 744 (alteration in original). Johnson appealed, and the Washington Supreme Court affirmed while making it clear that the condition survived scrutiny based on its appropriate tailoring.

Johnson’s analysis of a constitutional free speech claim focused on the fact that a filter would be used to balance Mr. Johnson’s constitutional freedoms with the government’s interest in community safety. The Supreme Court wrote:

Johnson committed his crimes using the Internet. A proper filter restricting his ability to use the Internet to solicit children or commercial sexual activity will reduce the chance he will recidivate and will also protect the public. While a blanket ban might well reduce his ability to improve himself, a properly chosen filter should not. We encourage Johnson’s future community custody officer to have a meaningful conversation with Johnson about appropriate Internet use and to choose filters that will accommodate Johnson's legitimate needs.

Id. at 745-46.

In State v. Geyer, \_\_ Wn. App. 2d \_\_\_, 496 P.3d 322 (2021), applying the rule in Johnson, Division Three of this Court disapproved of conditions requiring advance permission from a community corrections officer and sexual deviancy treatment provider before the convicted defendant could purchase, possess, or use a computer or “any electronic device, including a cell phone, capable of connecting to the internet.” Geyer, 496 P.3d at 327.

Acknowledging that Geyer used the Internet to commit a crime, the appellate court nonetheless found the conditions unacceptable under Johnson, stating that “unlike in Johnson, the State’s supervision of Mr. Geyer’s Internet use is not tempered. . . . Instead, Mr. Geyer’s every action on a computer or the Internet must be preapproved. This is unnecessarily broad.” Geyer, 496 P.3d at 327.

The prohibition in this case was not sensitively imposed or appropriately tailored, and it interferes with constitutionally protected activity. Here, evidence at trial indicated only that Carey used messaging applications to send photos to I.C., with whom he primarily had *in-person* contact. RP 228-29. The alleged use of the Internet and electronic devices was merely incidental to the familial relationship. It was certainly far less pervasive than in Johnson or Geyer, which involved Internet “sting” operations in which a defendant, perusing the Internet, contacted a fictitious child, using the Internet. E.g., Geyer, 496 P.3d at 324-25. Yet the prohibition in Carey’s case is far broader than the conditions analyzed in Johnson and Geyer. Based on the phrase “electronic (web) media,” for example, the condition could prohibit Carey from reading the news online. It is hard to imagine a problematic prohibition where First Amendment freedoms are concerned.

In summary, the challenged condition is irredeemably vague and overbroad. This Court should remand for the condition to be stricken. Although Carey does not believe any related condition is necessary, an appropriately tailored condition might prohibit use of messaging applications to communicate with minors.

1. **The community custody supervision fee is a discretionary legal financial obligation and should have been waived based on indigency. Further, defense counsel was ineffective for failing to raise the matter in the trial court.**

As indicated, the trial court imposed community custody as part of the sentence in this case. CP 125-26. The judgment and sentence states that Carey must “[p]ay supervision fees as determined by DOC.” CP 126 (condition 7). But appellate courts recognize that the community custody supervision fee is a discretionary legal financial obligation, and Carey is indigent. And the trial court wished to waive all discretionary legal financial obligations. RP 1011. This Court should remand for the trial court to strike the supervision fee. Further, defense counsel was ineffective for failing to specifically raise the matter in the court below.

As stated above, “[c]onditions of community custody may be challenged for the first time on appeal.” Padilla, 190 Wn.2d at 677.

Trial courts have an obligation to conduct an individualized inquiry into a defendant’s current and future ability to pay discretionary legal financial obligations before imposing them at sentencing. State v. Ramirez, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). Further, RCW 10.01.160(1) authorizes a court to impose costs on a convicted defendant. But this general authority is discretionary; the statute states the court “may require the defendant to pay costs.” RCW 10.01.160(1). “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” RCW 10.01.160(3). This statute defines an “indigent” person as one (a) who receives certain forms of public assistance, including disability benefits, (b) who is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125 percent or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

“The legislature . . . and our Supreme Court have made it clear that discretionary LFOs should be waived for an indigent defendant.” State v. Reyes-Rojas, noted at 15 Wn. App. 2d 1023, 2020 WL 6708241, at \*3 (2020) (unpublished decision).

Carey is likely indigent under RCW 10.101.010(3)(c) because he receives disability benefits. RP 1002. The trial court stated it would waive all non-mandatory fines. RP 1011.

Despite Carey’s indigence, and the court’s apparent willingness to waive all discretionary legal financial obligations, preprinted language on the judgment and sentence—located separately from other listed legal financial obligations—requires Carey to pay “supervision fees” as determined by DOC. CP 126.

The judgment and sentence does not cite legal authority for this requirement, but RCW 9.94A.703(2)(d), the statute discussing allowable community custody conditions, appears to authorize it.

Nonetheless, the statutory language and recent case law establish that these fees are discretionary. Subsection (2) of the statute is “Waivable conditions” and provides that, “Unless waived by the court, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by [DOC].” RCW 9.94A.703(2)(d).

Citing this statutory language, this Court has noted the fee is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018) (quoting RCW 9.94A.703(2)(d)), review denied, 193 Wn.2d 1007 (2019); accord State v. Spaulding, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). Division One has also recognized that such fees are discretionary and has ordered the fee stricken in circumstances similar to those in the present case. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020). The Supreme Court recently cited Dillon with approval in State v. Bowman, \_\_\_ Wn.2d \_\_\_, 498 P.3d 478, 490 (2021) and ordered that such fees be stricken under similar circumstances.

Here, the trial court ordered that all discretionary fees be waived and inadvertently failed to waive the only other discretionary fee, found in a separate section of the judgment and sentence, far from other legal financial obligations. See Dillon, 12 Wn. App. 2d at 152 (“it appears that the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of its location in the judgment and sentence”). As did the courts in Dillon and Bowman, this Court should remand for the trial court to strike the supervision fee from the judgment and sentence.

In the alternative, defense counsel was ineffective for failing to specifically seek waiver of the community custody supervision fee based on Carey’s indigency.

Both the federal and the state constitution guarantee every accused person the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court reviews de novo an ineffective assistance claim. Id. at 689. Further, this Court will consider a claim of ineffective assistance of counsel for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To prevail a claim of ineffective assistance, an appellant must show both deficient performance and a reasonable probability of resulting prejudice. Id.

Carey can demonstrate both deficient performance and prejudice. As for the first criterion, deficient performance: By the April 2021 sentencing, decisional law clearly established that the fee was discretionary. For example, Division One’s Court’s decision in Dillon had been issued more than a year earlier. And this Court had decided Spaulding five months prior to sentencing. Counsel was deficient for failing to bring the matter to the court’s attention. See Kyllo, 166 Wn.2d at 868 (counsel has duty to be aware of existing case law).

As for the second, prejudice: Counsel’s failure to alert the trial court that the supervision fee was discretionary and waivable was prejudicial to Carey. Had counsel made the argument, the trial court was likely to waive the fee based on indigency. The trial court waived every other discretionary legal financial obligation. Thus, had counsel objected and pointed out the stray discretionary legal financial obligation, it is likely the court would have stricken it from the judgment and sentence.

For either or both reasons, this Court should remand for the trial court to strike the community custody supervision fee.

1. **Finally, this Court should remand for correction of the scrivener’s errors as to the offense date.**

The judgment and sentence also incorrectly lists the ending date for each of the offenses (Counts “02” through “07”) as “12/12/2018.” CP 120. As indicated in the relevant charging document, that date should read September 30, 2018. CP 21-23. This Court should remand for correction of the errors.

A “scrivener’s error” is synonymous with a “clerical” mistake. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2003). “A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence.” State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000) (citing Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). The remedy for such an error is remand for correction of the error. Mayer, 128 Wn. App. at 701-02.

Here, the judgment and sentence indicates that the ending dates for Counts 2 through 7 are December 12, 2018. CP 120. However, according to the charging document and pertinent jury instructions, the end date should be September 30, 2018 for each of the counts. CP 21-23, 39, 42-46. This Court should remand for correction of the errors.

1. conclusion

The trial court denied Carey his right to present a complete defense and violated the rules of evidence when it excluded Carey’s immediate reaction to the complainant’s allegations of sexual misconduct. The trial court also commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that the testimony of a sex crime complainant need not be corroborated. For these reasons, this Court should reverse Carey’s convictions.

Several sentencing-related errors also occurred. The community custody condition ordering that Carey not engage in “unauthorized use of electronic (web) media or devices” is unconstitutionally vague and overbroad, impermissibly burdening Carey’s First Amendment rights. The trial court also erred in imposing the community custody supervision fee on Carey, who is indigent, despite the court’s stated intent to waive all discretionary fees. Finally, scrivener’s errors in the judgment and sentence as to offense dates need to be corrected.

**I certify that this document was prepared using word processing software and contains 10,144 words excluding the parts exempted by RAP 18.17(c).**

DATED this 10th day of January, 2022.

Respectfully submitted,

Text, letter

Description automatically generated NIELSEN KOCH & GRANNIS, PLLC

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1. CP 138. [↑](#footnote-ref-1)
2. This brief refers to the four consecutively paginated volumes of the verbatim reports as “RP” and the March 15, 2021 verbatim report, primarily consisting of jury selection, as “Supp. RP.” [↑](#footnote-ref-2)
3. The State charged Carey with a single count of second degree child molestation (Count 1), three counts of third degree child molestation (Counts 2, 6 and 7), and three counts of third degree child rape (Counts 3, 4, 5). CP 21-23. [↑](#footnote-ref-3)
4. Carey’s statements deleted by Kevin included “WTF [are you] talking about, and “[H]ow do you think I could do something like this.” RP 845. Carey also sent a message urging Kevin to get I.C. help because he suspected someone else may have harmed her. RP 847. [↑](#footnote-ref-4)
5. Under ER 803(a)(2), “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is not excluded by the rule generally prohibiting hearsay. [↑](#footnote-ref-5)
6. The court imposed 60-month terms on Counts 2, 3, 5, 6, and 7. It imposed zero months of incarceration on Count 4 but imposed 36 months of community custody. CP 124-25. The court also announced the total sentence was 120 months plus 36 months of community custody. CP 125; RP 1009. The judgment and sentence also states that “Counts 03, 04, 02 are consecutive.” CP 125. Presumably, this meant that Counts 2 and 4 ran consecutively to Count 3, which ran concurrently to the other counts. [↑](#footnote-ref-6)
7. In Garza, an unpublished decision, this Court rejected a similar argument, stating, “[w]e are still bound by Clayton to hold that this noncorroboration instruction is constitutional.” Garza, 2021 WL 351991 at \*7. [↑](#footnote-ref-7)
8. In two recent unpublished decisions, this Court accepted concessions by the State—specifically, the Clark County prosecutor’s office—that similar, yet arguably *less* broad, conditions were unconstitutionally vague. See State v. Belser, noted at 8 Wn. App. 2d 1047, 2019 WL 1779616 (“no unauthorized use of electronic media”), review denied, 193 Wn.2d 1034 (2019); State v. Cocom-Vazquez, noted at 5 Wn. App. 2d 1040, 2018 WL 5013925 (2018) (“[n]o unauthorized use of electronic media”). [↑](#footnote-ref-8)
9. According to Wikipedia, “Electronic media” are

   media that use electronics or electromechanical means for the audience to access the content. This is in contrast to static media (mainly print media), which today are most often created digitally, but do not require electronics to be accessed by the end user in the printed form. The primary electronic media sources familiar to the general public are video recordings, audio recordings, multimedia presentations, slide presentations, CD-ROM and online content.

   https://en.wikipedia.org/wiki/Electronic\_media (accessed Jan. 10, 2022). [↑](#footnote-ref-9)
10. Federal courts, for example, examine three factors in determining whether an Internet- or computer-related condition is sufficiently tailored: The restriction’s length; its coverage; and the defendant’s underlying conduct. United States v. Holena, 906 F.3d 288, 292 (3d Cir. 2018) (citing United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010)). [↑](#footnote-ref-10)