IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63980-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
SCOTT BRIAN WHITE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 16, 2011
	)	

Lau, J. — Scott White pleaded guilty to one count of second degree murder, with a deadly weapon enhancement. He challenges the sentencing court's refusal to impose an exceptional sentence below the standard range and imposition of a high end standard range sentence. White argues that the court ignored mitigation evidence, misconstrued the evidence presented, and substituted its judgment for that of the medical experts. Because the record shows no materially false information relied on by the court and because the court properly exercised its discretion, we affirm the judgment and sentence.

FACTS

Scott White began attending Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings at the predominantly gay Alano Club on Capitol Hill sometime in the

summer or fall of 2006. White met Kevin Helvie and Michael Unash while attending AA/NA meetings and eventually moved in with Helvie. In October 2006, White met Michael Webb at the Alano Club. According to the defense's "Confidential Pretrial Negotiations" memo to the State, Helvie and Unash reported that Webb was known to abuse prescription pain-killers. White and a friend, Brent Zimmerman, watched movies at Webb's home two to three nights a week.

In November 2006, Webb broke his arm and needed help at home. White moved in to help Webb and received free room and board and a $50 weekly stipend. According to defense expert Dr. Mark Cunningham, White reported that he also received prescription pain-killers as part of the arrangement, which he and Webb abused daily. White told Dr. Cunningham that Webb provided him with other medications including Seroquel, Ambien, Lunesta and, later, Xanax, which White eventually took four to five times daily. White also began drinking a six-pack three to four times a week and smoking marijuana daily. Eventually, he began using heroin, taking "the $50.00 weekly he received from Mike Webb . . . to buy and shoot heroin."

According to White, Webb pressured him for a sexual relationship. White also reported to Dr. Cunningham that Webb pressured him, saying, "I do this and this and this for you, you could at least be a lover in return." White and Webb shared a bed, but White slept on top of the covers with a separate blanket. In the weeks prior to the murder, White

> reported that almost nightly from February to the charged offense, Mike Webb would "scoot" over next to [White] in bed . . . and feel [White's] body "up and down" and attempt to unfasten [White's] pants. [White] reported that he variously pretended to be asleep, pushed Mike Webb's hands away, told him to

stop, or moved to the couch.

White began to fear that Webb would rape him because "[h]e is a lot bigger than I am and he expected something I was not willing to give him."

Around April 14, the night of Webb's death, White was "high as a kite." White claimed that Webb was also intoxicated and pushing him for sex. White went out for a cigarette and maintained that he brought an axe back in "as a security blanket to keep from getting raped." White placed the axe under the bed on his side. After both men returned to the bed, Webb eventually tried to unfasten White's pants. White got up again, saying he was going to smoke. He then grabbed the axe and "started swinging like a madman." Subsequent examination revealed Webb suffered at least five blows to his face. White then put a bag over Webb's head because of the large amount of blood and bound his feet and hands with duct tape so he could move Webb's body. He hid the body in the crawl space under the house and covered it with a tarp. White then cleaned the bedroom and got rid of the bloody sheets.

After Webb's death, White continued to live in the house. White sent text messages from Webb's phone to his friends telling them Webb had left town. He pawned some of Webb's electronic equipment, used his Department of Social and Health Services (DSHS) debit card, and attempted to use his credit cards. On April 20, Webb's friend, Jane Bengston, went to the house looking for Webb. A panicked man ran out of the house, telling her he was there to visit White and Webb was not home. A few minutes later she received a text message from Webb's phone chastising her for coming to his house uninvited.

On June 28, 2007, workers

discovered Webb's body in the crawl space under his home. Police officers arrested White on July 18. The State initially charged White with first degree murder with a deadly weapon enhancement. The State amended the charge to second degree murder after each party's retained psychologist evaluated White's mental state at the time of the crime. Both experts concluded that White likely did not have the mental capacity to premeditate the murder due to the combined effects of alcohol, drugs, and his mental illness. White pleaded guilty to second degree murder, with a deadly weapon enhancement.

At sentencing, White requested an exceptional sentence below the standard range based on three mitigating factors under RCW 9.94A.535(1):

> (a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
>
> . . . .
>
> (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.
>
> . . . .
>
> (h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.[1]

To support this request, the defense submitted a lengthy presentence report and a 116-page mitigation packet[2] detailing White's medical, social, and mental history. Both parties agree that White suffers from schizoaffective disorder.

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[1] This provision is not at issue on appeal.

[2] The mitigation packet included the defense's "confidential pretrial negotiations" memo to the King County prosecutors, a comprehensive chronology of White's mental health and substance abuse treatment history, a clinical and forensic psychology report by Dr. Mark Cunningham with curriculum vitae, and Webb's various court records.

Dr. Cunningham's report described White's history of mental illness and substance abuse. White first reported to mental health professionals that he heard voices in 1998. In 2003, during treatment, White complained of "disturbed sleep and suicidal ideation." White described a "'spiritual' experience of being watched by his grandfather while he slept." On other occasions, White described "waking up in the middle of the night to find his grandfather, standing over him, naked, watching him sleep." White's adoptive parents suspected that he may have been molested by a family acquaintance that they called "grandfather Don."

In May 2003, White sought treatment at Pathways Treatment Program in Yakima. He reported using alcohol and marijuana and complained of paranoia about people hearing what he says and thinks through ceiling vents. White stated that "nobody liked him and [people] were calling him 'gay.'" He expressed guilt about "letting God down." White was diagnosed with schizoaffective disorder. In November 2003, White reported to a doctor that the "wind follows him and keeps him company."

On January 2, 2004, White reported to Harborview Medical Center doctors that he feared a woman was following him and experienced paranoia about his biological father. He said he heard voices calling him "bitch." On January 14, White returned to Harborview after cutting himself. On January 21, White reported to Dr. Heidi Walsh that he felt he was being watched, stalked, and poisoned. He avoided mirrors and thought some music had special messages for him. Dr. Walsh eventually diagnosed White with "probable schizophrenia." White was voluntarily hospitalized in March because of suicide risks. After discharge, he was homeless because his then girl friend had kicked him out. His doctors at

Harborview diagnosed him with schizoaffective disorder and anxiety.

Throughout the end of 2004, medical reports of White's treatment described auditory hallucinations, and in April 2004, he was diagnosed with schizoaffective disorder, depressed type. In November 2005, he returned to Harborview after cutting himself and was again diagnosed with schizoaffective disorder. Beginning in January 2006, White fluctuated between periods of marijuana and heroin use and sobriety. White told Dr. Cunningham that he was sober from May 2006 until he began abusing prescription drugs with Webb in October 2006. But he also described a two-week period in August when he was using alcohol.

The total standard range for White's offense was 147 to 244 months of confinement. The State recommended the low end of the standard range of 147 months. White requested an exceptional sentence downwards of 123 months. The court rejected this request and imposed a sentence of 244 months. The court explained its decision:

> [T]his Court is struck by the defendant's behavior following the murder: The secreting of Mr. Webb's body in the crawl space of his own home; the creation of a post-murder to-do list to cover his tracks; the pawning of Mr. Webb's property; the use of Mr. Webb's DSHS card and the attempted use of his credit cards; and, lastly, and perhaps in my mind the most sinister of all, the defendant's masquerading as Mr. Webb for several weeks wherein he texts friends of Mr. Webb in an effort to convince them that Mr. Webb was just fine and that nothing was wrong.
>
> This act of the defendant strikes me as exceptionally cunning, callous and calculated. By assuaging the concerns of Mr. Webb's friends, he turned them into unwitting pawns in his effort to avoid detection and justice. . . .
>
> . . . . In my mind, Mr. White is not some poor, unfortunate victim of circumstances in this scenario. I think and I believe the evidence supports that he's a master manipulator who will do whatever it takes to attain his own ends.

Verbatim Report of Proceedings (July 10, 2009) (VRP) at 41-42. White appeals his judgment and sentence.

ANALYSIS

White contends the court violated due process of law when it refused to grant an exceptional sentence below the standard range and imposed a high end standard range sentence premised on misinformation.

A standard range sentence is generally not appealable. But a criminal defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act of 1981, ch. 9.94A RCW] or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). "[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

"A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." Garcia-Martinez, 88 Wn. App. at 330.

> A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for

> example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion.

Garcia-Martinez, 88 Wn. App. 330. And a sentencing court may not consider "material facts of constitutional magnitude that are not true." State v. Herzog, 112 Wn.2d 419, 431, 771 P.2d 739 (1989).

We presume, however, that a judge considers evidence only for its proper purpose. State v. Bell, 59 Wn.2d 338, 360, 368 P.2d 177 (1962); State v. Maesse, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981). Sentencing courts have wide discretion over the "sources and types" of information they consider in determining the length of a sentence within the standard range. Herzog, 112 Wn.2d at 424. To balance this discretion, the SRA allows a defendant to dispute facts presented at sentencing. RCW 9.94A.530(2). If the defendant disputes a fact, the court must either hold an evidentiary hearing or disregard that fact. Herzog, 112 Wn.2d at 424. The court may rely on facts that are not disputed, however, unless the error "invades a fundamental right of the accused." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (jury instructions).

In State v. Cole, 117 Wn. App. 870, 880, 73 P.3d 411 (2003), the defendant unsuccessfully requested a sentence below the standard range and then challenged the court's refusal to impose an exceptional sentence on appeal. We held that the defendant could not appeal from a standard range sentence where the trial court considered the defendant's request for the application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the

request. Cole, 117 Wn. App. at 881. Similarly, in Garcia-Martinez, which involved an equal protection challenge to a standard range sentence, we held that

> a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.

Garcia-Martinez, 88 Wn. App. at 330.

White relies principally on Herzog. At sentencing, the trial court had concluded that a West German rape conviction committed by Herzog did not satisfy the requirements of the United States Constitution. The court did not include that conviction in calculating Herzog's offender score. But it did consider the facts of the rape in imposing sentence. Our Supreme Court affirmed the sentence after stating the rule in Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948) and State v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). "[I]f a sentencing judge relies upon material facts of constitutional magnitude that are not true, the defendant's sentence has been enhanced in violation of due process." Herzog, 112 Wn.2d at 431.

Herzog is premised on two Supreme Court cases—Townsend, 334 U.S. 736 and Tucker, 404 U.S. 443. In Townsend, the sentencing court treated three prior felony charges as convictions where they had actually been either dismissed or resulted in acquittals. Townsend, 334 U.S. at 739-40. The Supreme Court reversed the sentence, holding, "[I]t is the careless or designed pronouncement of sentence on a foundation so

extensively and materially false . . . that renders the proceedings lacking in due process." Townsend, 334 U.S. at 741.

In Tucker, the sentencing court gave "explicit attention" to Tucker's three prior felony convictions and imposed the statutory maximum. Tucker, 404 U.S. at 444. Two of Tucker's prior convictions were later determined to be constitutionally invalid. The Supreme Court reversed the sentence, holding it was "founded at least in part upon misinformation of constitutional magnitude." Tucker, 404 U.S. at 447.

Relying on Herzog,[3] White contends that the court violated due process, even absent materially false information, when it misconstrued accurate information at sentencing. This reading of Herzog is questionable. But we need not address the interpretation of Herzog here. Our review of the record shows that the court neither relied on materially false information nor misconstrued accurate information in exercising its sentencing discretion.

"Victim Initiator" Mitigation

White contends the court erred when it "discounted [the] mitigating factor [that] "the victim was an initiator" under RCW 9.94A.535(1)(a). He claims the court relied on constitutionally material false information because it reached the following three conclusions: (1) There was no credible evidence that Webb was abusing nonprescription drugs, (2) There was no credible evidence that Webb supplied White with drugs, and (3) The evidence presented cast doubt on White's claim that he was

[3] The parties do not dispute that under Herzog, Tucker, and Townsend, a sentence that is based on materially false information of a constitutional magnitude violates due process.

ambivalent and anxious about his sexual orientation. Our review of the record shows the court accurately cited evidence presented on which it relied to support its conclusions. Contrary to White's claim, the court did not rely on misinformation.

And as the trier of fact, at sentencing, it is the court's responsibility to determine witness credibility and weigh the evidence presented. Here, the record indicates the court reviewed and carefully considered the voluminous mitigation packet White submitted and the State's sentencing materials.[4] The trial court may rely on all facts admitted, proved or acknowledged, to determine a sentence. RCW 9.94A.530(2); State v. Grayson, 154 Wn.2d 333, 338-39, 111 P.3d 1183 (2005). Acknowledged facts include all facts presented or considered by the sentencing court that are not objected to by the parties. Grayson, 154 Wn.2d at 339.

White asserts ample evidence supports Webb's abuse of prescription drugs. He cites the statements about Webb's reputation made by two of White's friends, a statement by an acquaintance that Webb was addicted to a prescription pain-killer, and prescription medication found at White's home after his death. As the record shows, the court noted Webb may have been using prescribed drugs, but no credible evidence supported prescription drug abuse.[5] The court also found White's posthomicide claims not credible based on extensive materials submitted by both the State and White. For example, the court concluded that White was a "manipulator" because he, while living

[4] Notably, White does not argue that the sentencing materials submitted to the court contained any material misinformation.

[5] Statements by Webb's friends, family, and colleagues submitted to the court strongly disputed White's assertion that Webb was a predatory drug abuser.

in Webb's home, posed as Webb after the murder to delay discovery of Webb's death and to steal Webb's money and property. This posthomicide charade influenced the court's determination that White was not credible.

In addition, the court questioned both attorneys about whether corroborative evidence existed to support White's claim that Webb was using heroin or supplying drugs to White. The prosecutor confirmed that Webb's autopsy report revealed no heroin use and no needle marks. The toxicology report showed prescription medication but no heroin present in Webb's system at death. Other than asserting Webb's body was too decomposed and independent witnesses could not testify about matters that occurred in private, defense never disputed these facts. The court noted the experts merely repeated White's claims. We conclude that no evidence supports White's claim that the court relied on material misinformation.

We turn next to White's claim based on the court's second conclusion. The court stated, "I certainly don't find any credible evidence that [Webb] was supplying drugs to the defendant." VRP at 37. White argues that ample evidence demonstrates he had no income but he used drugs, so Webb must have supplied them. The record indicates the court relied on the monthly disability check White or Webb received,[6] White's free room and board, the allowance Webb paid to White, and White's admission that he was willing to perform sex acts in exchange for money to buy drugs. White had been using illegal drugs, including heroin, for years before he met Webb. He also reported he used heroin before Webb did and used his weekly allowance to

[6] The record is unclear who received the check.

buy heroin. There is no evidence that the court relied on misinformation in making its determination.

On White's third argument, the court rejected as not credible White's claim he was sexually abused by Webb and that he was ambivalent and anxious about his sexual orientation. The record shows White admitted having sexual relations with men both before and after he killed Webb. The court cited this activity as being inconsistent with the claim that White was conflicted over his sexuality. The court noted the claimed sex abuse was based solely on White's own assertions after the murder. Defense counsel did not dispute this assertion was uncorroborated. And Dr. Strachan's observations that White claims that he brought the axe into the bedroom so that Webb would take White seriously further undermined his claim that he feared Webb. White also denied that Webb had ever threatened him. We conclude that nothing in this record supports White's claim that the court relied on material misinformation. The court properly exercised its traditional fact-finding responsibility in determining witness credibility and the weight of the evidence.

Diminished Capacity Mitigation[7]

White contends the court relied on misinformation when it rejected his failed diminished capacity defense because it misunderstood Dr. Strachan's report and incorrectly determined White's actions were related solely to drug and alcohol use.[8]

[7] This mitigating factor is commonly known as "failed mental defense."

[8] White also asserts the court rejected this mitigating factor based on its rejection of White's claim of conflict about his sexual orientation. The record shows that the court made no mention of that conclusion in its discussion of the failed mental

We disagree.

White requested an exceptional sentence below the standard range, premised on RCW 9.94A.535(1)(e)—the impaired mental capacity mitigating factor. The statute provides in part:

> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative . . . reasons for exceptional sentences.
>
> . . . .
>
> (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1)(e).

Two Supreme Court cases have defined this statutory mitigating factor as applied to a person whose mental state was impaired by a combination of substance abuse and other factors. In State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991), the defendant committed two robberies while armed with what appeared to be a gun. At sentencing, two experts testified that he suffered from depression, compulsive personality disorder, and alcoholism and that the combination of those problems had impaired his ability to perceive and understand. Although neither expert said that these problems would have impaired the defendant's capacity in the absence of alcohol and drugs, the trial court found that "the separate and combined effects of each mental disorder" had significantly affected the defendant's capacity to conform his conduct to the law and, based on this finding, imposed a sentence below the standard range.

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defense factor.

Allert, 117 Wn.2d at 161-66. Concluding the trial court erred, the Supreme Court held the record did not show that "absent alcohol abuse the defendant would have been impaired in appreciating the wrongfulness of his conduct," and the "voluntary use of alcohol is an improper factor to consider in deciding whether to impose an exceptionally low sentence."[9] Allert, 117 Wn.2d at 167 (construing predecessor statute, RCW 9.94A.390(1)(e)).

In State v. Fowler, 145 Wn.2d 400, 38 P.3d 335 (2002), Fowler was convicted of first degree robbery and requested an exceptional sentence below the standard range on the grounds that he "'had not slept in more than 48 hours and was experiencing symptoms of extreme sleep deprivation.'" Fowler, 145 Wn.2d at 410 (quoting sentencing court). The court rejected that argument "[b]ecause there [was] evidence that Fowler's sleep deprivation was associated with his voluntary consumption of alcohol and drugs, it cannot serve as a basis for an exceptional sentence." Fowler, 145 Wn.2d at 411 (construing predecessor statute, RCW 9.94A.390(1)(e)).

The court here reached a similar conclusion:

> The defendant next asserts that his capacity to appreciate the wrongfulness of his conduct was significantly impaired as provided for in RCW 9.94A.535(1)(e).
>
> A great deal of information has been provided to this Court regarding the defendant's mental health issues. However, I find the final analysis is fairly straightforward. It is certainly undisputed that the defendant has suffered from schizoaffective disorder for at least a decade. However, that diagnosis by itself does not establish anything regarding the defendant's state of mind at the time of the murder. The defendant's diagnosis does not predispose him toward violent behavior or cause him to misjudge perceived threats.
>
> Rather, the evidence indicates that the defendant's voluntary ingestion of

[9] And drug use may not be considered as a nonstatutory mitigating factor. State v. Gaines, 122 Wn.2d 502, 510, 859 P.2d 36 (1993).

> alcohol and drugs impaired his judgment and perhaps his assessment of the circumstances. The drugs and alcohol did not render him delusional. Rather, it stifled his inhibitions and enabled him to take the brutal actions he took on the night of April 14, 2007. And under RCW 9.94A.535(1)(e), voluntary use of drugs or alcohol is excluded as a basis for mitigation under the statute.

VRP at 37.

Under Allert and Fowler, White must establish diminished capacity that was unrelated to his voluntary use of drugs and alcohol. The court determined that White failed to meet this burden—a conclusion supported by the record. White told Dr. Cunningham that he was "high as a kite" when he murdered Webb. Dr. Cunningham concluded the combination of substance abuse and schizoaffective disorder led to the crime:

> Unfortunately, a co-morbid substance dependence/abuse disorder is likely to further psychologically destabilize persons like Scott [sic] who suffer from a schizophrenia spectrum disorders [sic], aggravating their psychotic symptoms, increasing their interpersonal misperceptions, potentiating their emotional volatility, and disinhibiting their aggression. This synergistic interaction between the various substances Scott was ingesting proximate to the offense, as well as between these substances and Scott's Schizoaffective Disorder, played a major role in this tragic outcome.

(Emphasis added.)

Likewise, the State's expert, Dr. Strachan, did not conclude that White's diminished capacity was unrelated to his voluntary consumption of alcohol.[10] Discussing the issue of whether "Mr. White misjudged the threat that Mr. Webb posed," Dr. Strachan concluded, "Mr. White, despite his history of psychotic symptoms, would not have made such a terrible misjudgment without voluntary consumption of drugs and

[10] Strachan made this determination in the context of determining whether White was "insane."

alcohol." Dr. Strachan elaborated on this conclusion noting, "Mr. White's typical response to his psychotic symptoms was isolation rather than anger." Dr. Strachan elaborated that two factors explained the "gap between Mr. White's history and his actions on the night of the alleged murder . . . . The first is that the living situation with Mr. Webb was particularly unpleasant. The second is that he was using drugs and alcohol." Dr. Strachan also described the relation between the two factors and their affect on White's reasoning:

> The more unpleasant the situation was for Mr. White, the more drugs and alcohol he used. The more drugs and alcohol he used, the more his judgment would have been impaired separate from his typical psychosis. Impaired judgment, in turn, is the most parsimonious explanation as to why Mr. White could have so profoundly misjudged the situation and therefore the wrongfulness of his actions
> . . . .

Like in Allert and Fowler, the evidence here amply showed that some combination of White's mental condition and the voluntary ingestion of drugs or alcohol made the crime possible. The court concluded, "The drugs and alcohol did not render him delusional. Rather, it stifled his inhibitions and enabled him to take the brutal actions he took on the night of April 14, 2007". VRP at 39. We conclude the court neither relied on material misinformation nor misconstrued correct information when it determined that White did not establish this mitigating factor.

Standard Range Sentence

White does not assert the court applied an erroneous legal standard, ignored statutory procedures, categorically refused to exercise its discretion, or relied on impermissible basis like race, sex, or religion. Rather, White argues that the court's imposition of a high end sentence

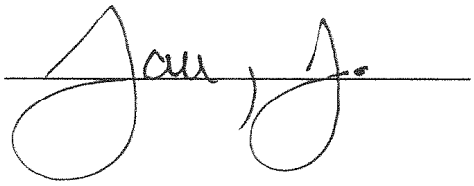
violated due process of law because it mistakenly concluded that White was a "master manipulator" despite the opinions of two psychologists who concluded White did not premeditate the killing. White misreads the record. The record unambiguously shows that the court's "master manipulator" conclusion was based entirely on White's actions during and after the murder.

> The facts of this murder are undisputedly horrific and gruesome. The defendant himself recounts directing multiple axe blows to Mr. Webb's head as hard as he could. In 13 years as a superior court judge, I must say that this is one of the two most brutal murders that have been before me. The horror of it all is thankfully almost unimaginable to most people. But to the people affected, it's a waking nightmare whose images will not fade away.
>
> As if that weren't enough, this Court is struck by the defendant's behavior following the murder: The secreting of Mr. Webb's body in the crawl space of his own home; the creation of a post-murder to-do list to cover his tracks; the pawning of Mr. Webb's property; the use of Mr. Webb's DSHS card and the attempted use of his credit cards; and, lastly, and perhaps in my mind the most sinister of all, the defendant's masquerading as Mr. Webb for several weeks wherein he texts friends of Mr. Webb in an effort to convince them that Mr. Webb was just fine and that nothing was wrong.
>
> This act of the defendant strikes me as exceptionally cunning, callous and calculated. By assuaging the concerns of Mr. Webb's friends, he turned them into unwitting pawns in his effort to avoid detection and justice. . . .
>
> . . . . In my mind, Mr. White is not some poor, unfortunate victim of circumstances in this scenario. I think and I believe the evidence supports that he's a master manipulator who will do whatever it takes to attain his own ends.
>
> And given the horrific nature of this crime and the reprehensible conduct of the defendant following its commission, I find that the top end of the range is amply justified . . .

VRP at 40-42 (emphasis added). The court's colloquy leaves no doubt its conclusion was based on the horrific nature of the murder and White's actions afterwards.

Even if the court disregarded the experts' opinions, White cites no controlling authority finding constitutional error when the court considers but rejects expert opinion. And expert opinions are not binding on a trial court. State v. Toomey, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984) (trier of fact not bound by expert opinion). The same is true of a sentencing court. State v. Hays, 55 Wn. App. 13, 17, 776 P.2d 718 (1989). At trial "[t]he trier of fact . . . determine[s] what weight, if any, it will give to their testimony." State v. Ellis, 136 Wn.2d 498, 523, 963 P.2d 843, (1998); see also State v. Pirtle, 127 Wn.2d 628, 647-48, 904 P.2d 245 (1995) (finding evidence of impaired mental processes due to drug abuse did not negate premeditation evidence where expert testimony equivocal and State effectively cross-examined experts). White fails to demonstrate error in the court's imposition of a high end standard range sentence.

For the reasons discussed above, we affirm White's judgment and sentence.



WE CONCUR: