NO. 47624-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN BAGLEY,

Appellant.

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

The Honorable Garold E. Johnson, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The court failed to bring appellant to trial within the speedy trial period established in CrR 3.3.

2. Erroneous admission of prejudicial character evidence denied appellant a fair trial.

3. The court's refusal to allow appellant to impeach his accuser with a prior inconsistent statement violated his right to confrontation.

4. The court exceeded its authority in imposing a community custody condition prohibiting the use of social media.

Issues pertaining to assignments of error

1. Where the court failed to ensure that appellant was brought to trial within the time specified in CrR 3.3, must appellant's convictions be reversed and the charges against him dismissed?

2. Over defense objection, the court admitted surveillance video from a store a short distance from where the alleged attempted rape occurred. Where appellant's conduct in the video is unrelated to the charged offenses but portrays him as strange and potentially dangerous, did admission of this prejudicial character evidence deny appellant a fair trial?

3. Did the trial court's refusal to allow appellant to impeach the State's key witness with a prior inconsistent statement as to a material fact violate appellant's constitution right of confrontation?

4. Where there was no nexus between appellant's offense and social media, did the court exceed its authority in imposing a community custody condition prohibiting the use of social media?

B. STATEMENT OF THE CASE

1. Procedural History

On July 12, 2013, the Pierce County Prosecuting Attorney charged appellant Sean Bagley with attempted second degree rape and indecent liberties. CP 1-2; RCW 9A.44.050(1)(a); RCW 9A.28.020; RCW 9A.44.100(1)(a). After a mistrial and numerous continuances, the case proceeded to jury trial before the Honorable Garold E. Johnson, and the jury returned guilty verdicts. CP 168-69. The court dismissed the indecent liberties conviction and imposed a low-end standard range sentence of 83.25 months to life on the attempted rape conviction. CP 308-13. Bagley filed this timely appeal. CP 333.

2. Substantive Facts

Sean Bagley was charged based on an incident in Puyallup on July 9, 2013. Most of the facts surrounding that event are undisputed. It is

undisputed that Sean Bagley left his apartment that evening and went for a walk. 11RP[1] 489. He was wearing jeans and a red baseball cap, but no shirt. 11RP 489. Bagley has a large tattoo in the shape of a sun on his abdomen. Exhibit 44[2] at 5.

Bagley proceeded up a steep hill toward a nearby shopping center. When he reached the parking lot of the Sportsman's Warehouse, he encountered Kevin Bye and Dustin Luft, who were standing outside talking. 9RP 204-05; 10RP 319. Bagley was sweating profusely, and Bye asked him if he was okay. 9RP 205. Bagley said he was going to buy milk, and he asked if they had any money. He also asked Luft if he had a credit card. 9RP 206; 10RP 320. When they told him no, Bagley walked off toward the Walmart at the other side of the parking lot. 9RP 208; 10RP 320; Exhibit 44 at 7-8. Both Bye and Luft noticed Bagley's tattoo. 9RP 206; 10RP 321.

Bagley went inside Walmart. A surveillance video shows Bagley, still wearing no shirt, attempting to hand a lighter to various customers. 8RP 155; Exhibit 1; Exhibit 44 at 5, 9-10, 20. He walked in and out of the store, and then he walked through the parking lot in front of the store.

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[1] The Verbatim Report of Proceedings is contained in 13 volumes, designated as follows: 1RP—6/27/14; 2RP—10/17/14; 3RP—12/19/14; 4RP—1/9/15; 5RP—1/21/15; 6RP—2/27/15; 7RP—3/12, 19, 23, 24/15; 8RP—3/25/15; 9RP—3/26/15; 10RP—3/30/15; 11RP—3/31/15; 12RP—4/1/15; 13RP—5/22/15.

[2] Bagley's testimony from the first trial was admitted as Exhibit 44 and read to the jury in this trial. 11RP 536-37.

8RP 152, 156; Exhibit 44 at 11. Bagley's sun-shaped tattoo on his abdomen is visible in the video. 8RP 153; Exhibit 44 at 5.

After leaving Walmart Bagley went to Bradley Lake Park, where he walked past Christopher Yager and his girlfriend. Exhibit 44 at 12. Yager noticed Bagley because he had no shirt on, he had a big tattoo shaped like a sun on his stomach, and he gave off a weird vibe. 9RP 258-59.

BP also walked to Walmart that evening. 10RP 355. She went inside, made a purchase, and then started walking home. 10RP 357-58. As she was walking across the street from Bradley Lake Park, not far from Walmart, she saw Bagley. 10RP 360-61. Although they had never met before, Bagley said to BP, "What are you doing out this late little girl? You realize you could get raped?" 10RP 361, 372; Exhibit 44 at 13[3]. What happened next was disputed.

Bagley testified that after he spoke to BP, they both continued walking, and he went home. Exhibit 44 at 13-14. BP said, on the other hand, that Bagley pushed her against a fence and touched her vaginal area over her clothes. 10RP 364-65, 367. She kneed him in the genitals and ran away. 10RP 366, 404. Bagley said he spoke to BP from across the street, and he denied ever touching her. Exhibit 44 at 13, 22.

[3] Bagley testified that he said, "Hey girl, it's dark out here. You could get raped." Exhibit 44 at 13.

The remaining facts are also undisputed. BP ran back to Walmart, asked a cashier to use the phone, and called 911. 8RP 160; 10RP 368-69. She reported what happened, and police responded to Walmart. 10RP 369, 372. BP repeated her description to the police. 10RP 373, 448-49. BP said she had not seen the man's face, but she was able to describe what he was wearing and a tattoo in the shape of a sun encircling his navel, which was visible because he was not wearing a shirt. 10RP 362, 381.

The cashier heard the description BP gave police, and she remembered seeing someone at Walmart who matched that description. 8RP 163-64. With that information, the investigating officers obtained the Walmart surveillance video of Bagley. 8RP 150-51; 10RP 454. BP identified Bagley in the surveillance footage as the man who had attacked her. 10RP 384. Images from the video were released to the media in an attempt to identify a suspect. 9RP 289; 10RP 464. Calls to a tip line provided Bagley's name, and a photo montage was created using Bagley's picture. 9RP 271, 277. Bye, Luft, and Yager identified Bagley from the photo montage, although BP did not. 9RP 213-14, 261-62; 10RP 324, 469. Bagley was arrested the next day. 8RP 183-84; 9RP 283.

C. ARGUMENT

1. TRIAL DID NOT COMMENCE WITHIN THE TIME ESTABLISHED BY CRR 3.3, AND THE CHARGES AGAINST BAGLEY MUST BE DISMISSED.

Bagley was arraigned on July 12, 2013, and has remained incarcerated since that date. This case was originally tried in February 2014 before the Honorable Vicki Hogan, but the jury was unable to reach a verdict, and a mistrial was declared. Bagley's attorney withdrew and a new attorney was appointed to represent him in the retrial. Supp. CP (Order Continuing Trial, filed 2/28/14). The case was assigned to The Honorable John R. Hickman, and Judge Hickman granted a continuance to July 7, 2014, to allow new defense counsel to prepare for trial. Id.

On June 27, 2014, the court granted a motion for continuance, finding good cause based on the unavailability of necessary witnesses, the prosecutor's vacation, and the court's involvement in another trial. A new trial date of August 18, 2014, was set. CP 25; 1RP 4, 8. Bagley objected to the continuance. 1RP 6. The trial date was struck due to competency proceedings, however, and a new trial date of October 20, 2014, was set. 2RP 3.

A continuance hearing was held on October 17, 2014. At that hearing, the State argued that the case could not be tried before the end of the year due to everyone's schedules and asked the court to set a trial date

in January 2015. 2RP 3. Bagley again objected to any continuance. 2RP 4. The court noted that it was assigned to Criminal Division One in December and was therefore not available to handle the trial that month. 2RP 5. January 12 was the first date the court had available the next year, and it set the trial for that date. 2RP 5-7. It entered an order of continuance finding good cause, noting that the prosecutor was currently in trial until the end of October, defense counsel would be out for the first part of November through November 13, the prosecutor would be on vacation the last week of November, and the court would be in CD courts and unavailable for trials in December. CP 26. The court noted that the new trial date of January 12, 2015 accommodates all of this and the attorneys' trial schedules. Id.

The trial was continued again in January because the prosecutor was in another trial, with Bagley again objecting. 4RP 5-9; CP 28. The court stated that it would most likely be in trial on the scheduled date, but if both attorneys were available it would send the case to CDPJ for reassignment to an available judge. 4RP 11. On January 21, 2015, both attorneys were in other trials, however, and the case was again continued over Bagley's objection, to March 2, 2015. 5RP 3-5; 29. On February 27, 2015, the State moved for continuance because defense counsel was in a trial expected to go through March 3 and one of the detective witnesses

would be in training. 6RP 3-4. Bagley objected, and defense counsel stated she planned to file a motion to dismiss for speedy trial violations. 6RP 6. The court entered an order continuing the trial until March 11, 2015. CP 30.

On March 2, 2015, defense counsel filed a motion to dismiss for violation of Bagley's speedy trial rights. CP 31-40. Counsel argued that the length of the continuance granted on October 17, 2014, was not supported by good cause. A continuance through the end of November was justified due to the attorneys' participation in other trials and vacations, but the only reason for not setting the case in December was the court's unavailability. Yet the court made no inquiry into the availability of other courtrooms or judges before setting trial for mid-January. Because the court failed to articulate and document an adequate basis for a continuance beyond the end of November, the charges against Bagley should be dismissed. CP 31-40.

The case was transferred to Judge Johnson for trial, and he heard the motion to dismiss. 7RP 3. The judge noted that there was no indication in the record that Judge Hickman looked to see if other courts were available while he was in Criminal Divisions. 7RP 5, 7. He concluded, however, that because there was good cause for ordering a

continuance on October 17, it was within the court's discretion to set the trial date. He denied the motion to dismiss. 7RP 13.

A defendant who is held in jail must be brought to trial within 60 days of arraignment, unless a period of time is excluded from the time for trial. CrR 3.3(b)(1), (c)(1). When a period of time is excluded from the speedy trial period, the speedy trial period extends to at least "30 days after the end of that excluded period." CrR 3.3(b)(5). A delay pursuant to a properly granted continuance is excluded from the time for trial period. CrR 3.3(e)(3).

A motion for continuance is properly granted only if it is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). While the court's decision to grant a continuance under CrR 3.3(f)(2) is generally reviewed for an abuse of discretion, a violation of the time for trial rule is reviewed de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Once the 60-day time for trial period expires without a lawful basis for further continuances, CrR 3.3 requires dismissal and the trial court loses authority to try the case. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009); CrR 3.3(h). "The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials

take precedence over civil trials." Saunders, 153 Wn. App. at 220 (citing CrR 3.3(a)(1)-(2)).

There was good cause for a continuance on October 17, 2014, to accommodate the attorneys' trial schedules and vacations, which left them unavailable through the end of November. Extension of the time for trial into January 2015 to accommodate the trial court's unavailability was unreasonable, however. "Even though trial preparation and scheduling conflicts may be valid reasons for continuances beyond the time for trial period, court congestion is not." State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

In Flinn, the defendant was granted three continuances to allow time for preparation, notifying the State at the time of the third that he planned to present a diminished capacity defense. Flinn, 154 Wn.2d at 196. When the State learned that certain discovery items relating to the defense it had requested did not exist, it requested a further continuance to review materials on which the defense expert relied, to interview the defense expert, and to have a state expert evaluate Flinn. Id. at 196-97. The State estimated it needed at least two weeks to complete its preparations for trial. The court found good cause for a continuance. In considering the appropriate length, the court noted that it wanted to keep the delay as short as possible but realistically give the State sufficient time

that no further continuances would be needed. It set the trial date five weeks out, noting that it was working around a judicial conference as well. Id. at 197-98.

In reviewing the trial court's decision, the Supreme Court held that five weeks was a reasonable period for the continuance under the facts of that case. While recognizing that court congestion is not a valid reason for a continuance, the Court noted that the judicial conference was not the primary reason for the continuance in that case. Rather, the continuance was granted because the State needed time to prepare for the diminished capacity defense. It was not an abuse of discretion for the court to plan around the judicial conference, considering the time needed for preparation. Id. at 200-01. The Supreme Court noted that "[t]here is a point at which the length of the continuance would be unreasonable, but five weeks under these circumstances was not." Flinn, 154 Wn.2d at 201.

Under the circumstances in this case, however, the length of the continuance was unreasonable. The October 2014 continuance was not granted to allow the attorneys time for trial preparation. That was already done. The continuance was necessary solely because the attorneys were not available through the end of November. But once those schedule conflicts were passed, there was no other legitimate basis for the continuance.

The trial court's assignment to Criminal Divisions, making it unavailable for trial, was not a valid basis for a continuance beyond the time for trial period, without further showing that no other courtrooms or judges were available. See Kenyon, 167 Wn.2d at 137. "When the primary reason for the continuance is court congestion, the court must record the details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." Flinn, 154 Wn.2d at 200.

In Kenyon, the trial court continued a trial for "unavoidable or unforeseen circumstances" because he was presiding over another criminal trial and the second judge of the two-judge county was on vacation. Id. at 134; CrR 3.3(e)(8). But the court made no record "regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tempores to hear criminal cases in the unoccupied courtrooms." Kenyon, 167 Wn.2d at 138. The failure to do so violated Kenyon's right to a speedy trial, and the charges against him were dismissed. Id. at 139.

Here, as in Kenyon, the only justification for the continuance for the entire month of December and into January was the trial judge's unavailability due to a scheduled rotation in Criminal Divisions. Yet the

court made no attempt to determine on the record whether other courtrooms or judges would be available during that time. The failure to do so violated Bagley's right to a speedy trial. The lack of sufficient basis for continuing the trial date past the end of November requires dismissal of the charges.

2. ERRONEOUS ADMISSION OF THE SURVEILLANCE VIDEO ALLOWED THE JURY TO CONVICT BAGLEY ON CHARACTER EVIDENCE AND DENIED HIM A FAIR TRIAL.

Prior to trial the defense moved to exclude the surveillance video showing Bagley at Walmart prior to the alleged incident. 7RP 77; CP 41-52. Counsel argued that the video was not relevant or necessary to the State's case. Although the video showed a person matching the description BP provided, and Bagley testified he was the person in the video, there was no reason to show him wandering around Walmart, extending his hand to offer his lighter to various people. 7RP 78-79. The danger of unfair prejudice was high, because it showed Bagley acting strangely in a context unrelated to the charged offense. Counsel argued that the video constituted impermissible character evidence which should be excluded pursuant to ER 403 and 404. 7RP 79-80.

When the State responded that the video was needed to establish identity based on the description BP gave, counsel argued that at most the

court should permit a still shot taken from the video. That would establish the time and location and allow the State to prove identity. In the alternative, the court could admit just the portion of the video showing Bagley outside, which would meet the State's purposes but eliminate depiction of Bagley's odd behavior inside the store. 7RP 85-86.

The court found that the video was relevant to the credibility of BP's identification. Since the description of a man with no shirt on was so unusual, the video helped establish the credibility of her description. The court allowed the State to use the full video, granting the defense a continuing objection. 7RP 86-87, 90.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court has noted the reasoning underlying this rule:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to

> weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)), review denied, 124 Wn.2d 1022 (1994).

To be admissible under ER 404(b), evidence of other conduct must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The court below ruled that the surveillance video from Walmart was relevant to support BP's credibility, because it showed that Bagley was indeed at Walmart with no shirt on. But BP did not testify that she saw Bagley at Walmart, and it was undisputed that Bagley was out walking that night, including at Walmart, with no shirt. Every witness who saw Bagley that night testified to that fact, including Bagley.

The court also admitted the video to prove Bagley's identity as the perpetrator of the alleged sexual assault which occurred a short distance away. It is true that the video showed that Bagley fit the description BP gave of the person she said attacked her, and his presence at that location

at that time was relevant to identify him as the man she encountered in the street. But, as defense counsel argued, that purpose would have been served by admitting only a still from the video with the date and time stamp, or even the portion of the video showing Bagley outside.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Salterelli, 98 Wn.2d at 361-62. Evidence is unfairly prejudicial if it is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). That is the case here. The video in its entirety, admitted by the court, shows Bagley inside the store trying to hand his lighter to various customers. This strange behavior had no bearing on the charged offenses. BP never alleged that that Bagley offered her his lighter. While not serving to make any fact of consequence more or less likely, this footage does make Bagley appear strange and potentially dangerous, leading to the unfair inference that he is the type of person who would commit the alleged offenses.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence

constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." Id.

This case came down to whether the jury believed BP's allegations that Bagley forced her against a fence and touched her vaginal area or Bagley's testimony that he did not. No one else saw their encounter. Improper evidence of Bagley's prior conduct could have been enough to tip the scales for the jury on this crucial determination. The court's error in admitting the video was not of minor significance, and there is a reasonable probability it affected the outcome of the trial. Bagley's conviction must therefore be dismissed.

3. THE COURT'S REFUSAL TO ALLOW BAGLEY TO IMPEACH THE STATE'S WITNESS WITH A PRIOR INCONSISTENT STATEMENT VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER.

At trial, the State played a recording of BP's 911 call for the jury. The prosecutor then asked BP, "You told the 911 operator that this male tried to rape you. What made you think that?" 10RP 370. BP responded, "Because of what he said.... The words that he said towards me." Id.

On cross examination, BP testified that she had been interviewed by a news station the next day. 10RP 390. The State objected that what she told the news reporter was hearsay and should be excluded. 10RP 392. Defense counsel explained that she wanted to ask BP whether she

had told the reporter that she did not know what the man's intentions were. 10RP 392. When the court noted that the statement was a prior inconsistent statement, the prosecutor argued that it was not inconsistent with BP's testimony because she could only speculate as to his intentions. 10RP 392-93. Defense counsel agreed with the court, arguing Bagley had a right to confront his accuser with a statement she had made, and it was important for the jury to hear it. 10RP 393. Counsel pointed out that BP had testified on direct that she believed the man intended to rape her because of what he said, and counsel just wanted to flesh that out on cross exam. 10RP 394.

The court then noted that BP's statement to the news reporter did not meet the qualifications for admission under the rule for prior statements of witnesses. 10RP 394. Defense counsel agreed but repeated her argument that Bagley has the right to confront his accuser. 10RP 394-95. The court ruled that the statement was inadmissible and sustained the State's objection. 10RP 395.

The Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995).

Confrontation is a fundamental "bedrock" protection in a criminal case. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). See Davis v. Alaska, 415 U.S. at 315. The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. Davis, 415 U.S. at 316; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. Davis, 415 U.S. 316; Darden, 145 Wn.2d at 620. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to confront must be zealously guarded." Darden, 145 Wn.2d at 620 (citations omitted). Because cross examination is so integral to the adversarial process, "a criminal defendant is given extra latitude in cross examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). As the Supreme Court has explained, "[c]ross examination is the principle means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 316.

A witness's prior inconsistent statement may be admissible for impeachment to allow the trier of fact to compare the witness's prior

statement with his or her testimony, in order to ascertain the witness's credibility. ER 613(b)[4]; State v. Spencer, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). "These inconsistencies are important, not because one version of the events is more believable than the other, but because they raise serious questions about [the declarant's] credibility and perceptions." State v. Newbern, 95 Wn. App. 277, 295, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). Unlike prior statements admitted as substantive evidence, statements admitted under ER 613 serve only to impeach the witness. Thus, the prior statement need not have been given under oath in a prior proceeding. See ER 801(d)(1)[5].

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[4] ER 613 provides as follows:

> ER 613. PRIOR STATEMENTS OF WITNESSES
> (a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[5] ER 801(d)(1) provides as follows:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if--
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper

The court below correctly found that BP's prior statement to the news reporter, that she did not know her attacker's intentions, was inconsistent with her trial testimony. Counsel argued that it was important to confront BP with this inconsistency so the jury could assess her credibility. Because counsel was seeking to impeach the State's key witness, rather than to admit the prior statement as substantive evidence, the prior statement did not need to meet the requirements of ER 801(d)(1), and the court erred in excluding it. In doing so, the court violated Bagley's right to confront his accuser.

A violation of the Confrontation Clause is subject to harmless error analysis and requires reversal unless the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 126 S. Ct. 2266 (2006). Because the court's erroneous ruling kept from the jury information regarding the credibility of the key prosecution witness, the error cannot be considered harmless.

In order to convict Bagley, the jury needed to find he intended to rape BP. CP 181. This element necessarily depended on circumstantial evidence. BP's testimony as to her perceptions based on Bagley's statement was a crucial piece of evidence as to this element. The fact that

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influence or motive, or (iii) one of identification of a person made after perceiving the person;

she had previously said she had a different perception calls into question her reliability on this issue and weakens the State's argument that the circumstances demonstrated an intent to rape. The court's failure to allow Bagley to confront his accuser on this material issue was not harmless beyond a reasonable doubt, and Bagley's conviction should be reversed.

4. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A COMMUNITY CUSTODY CONDITION PROHIBITING THE USE OF SOCIAL MEDIA.

As a condition of community custody the court ordered that Bagley be "prohibited from joining or perusing any public social websites (Facebook, My Space, etc.)." CP 332. This condition was proposed in the Presentence Investigation Report, and Bagley objected that there was no nexus between the condition and the offensive behavior. CP 331; 13RP 726.

A court's sentencing authority is derived solely from statute. Any condition imposed in excess of statutory authority is void. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). As part of a criminal sentence, the court may impose "crime related prohibitions and affirmative conditions." RCW 9.94A.505(9). A crime related prohibition must "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Thus, the court may not prohibit the use of public social websites if the crime lacks a nexus to

such websites. State v. Johnson, 180 Wn. App. 318, 330, 327 P.3d 704 (2014) (court exceeded authority in prohibiting access to computers, internet, and public social websites where there was no nexus between condition and offense); State v. O'Cain, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008) (condition prohibiting Internet use stricken where there was no evidence Internet use contributed to defendant's crime of second degree rape).

As in Johnson and O'Cain, there is no nexus between Bagley's conviction and the prohibition of social media use. The only evidence regarding social media was that witnesses had seen footage from the surveillance video that news stations had posted on Facebook and called police to report their encounters with Bagley. 9RP 211; 10RP 322. But there was no evidence Bagley used social media in committing the crime or that social media contributed to the crime in any way. The trial court exceeded its authority in imposing the community custody condition, and it must be stricken.

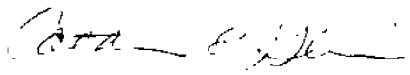
D. CONCLUSION

Because the October 2014 continuance violated the time for trial rule, the charges against Bagley must be dismissed. In addition, the improper admission of prejudicial character evidence and the denial of Bagley's right to confront his accuser require that Bagley's convictions be

reversed and the case remanded for a new trial. Finally, the community custody condition prohibiting the use of social media must be stricken.

DATED January 8, 2016.

Respectfully submitted,



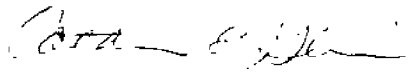
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers and Exhibits in *State v. Sean Bagley*, Cause No. 47624-0-II as follows:

Sean Bagley DOC# 862248
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 8, 2016

GLINSKI LAW FIRM PLLC

January 08, 2016 - 11:25 AM

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Case Name:

Court of Appeals Case Number: 47624-0

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Statement of Arrangements

Motion: ____

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Statement of Additional Authorities

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Objection to Cost Bill

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Letter

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