SUPREME COURT NO. 94217-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN BAGLEY,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 47624-0-II
Pierce County No. 13-1-02793-5

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, SEAN BAGLEY, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Bagley seeks review of the January 31, 2017, unpublished decision of Division Two of the Court of Appeals affirming his conviction.

C. ISSUES PRESENTED FOR REVIEW

1. Where the court failed to ensure that Bagley was brought to trial within the time specified in CrR 3.3, must his conviction be reversed and the charge 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 Bagley's conduct in the video is unrelated to the charged offense but portrays him as strange and potentially dangerous, did admission of this prejudicial character evidence deny him a fair trial?

D. STATEMENT OF THE CASE

Sean Bagley was charged with attempted second degree rape 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.

Bagley was convicted and sentenced to 83.25 months to life incarceration. CP 308-13. The Court of Appeals affirmed his conviction but remanded to strike an erroneous community custody condition.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' HOLDING THAT BAGLEY'S RIGHTS UNDER CRR 3.3 WERE NOT VIOLATED CONFLICTS WITH DECISIONS OF THIS COURT AND PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

Bagley was arraigned on July 12, 2013, and remained incarcerated while awaiting trial. This case was originally tried in February 2014, 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. CP 340. 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).

This Court recognized in Flinn that, even when there is good cause for a continuance, "[t]here is a point at which the length of the continuance would be unreasonable...." Flinn, 154 Wn.2d at 201. Under the circumstances of this case, 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 the time for trial rules. The Court of Appeals' holding to the contrary conflicts with this Court's decisions in Flinn and Kenyon, and the proper application of the time for trial rule presents an issue of substantial public importance. This Court should grant review. RAP 13.4(b)(1), (4).

2. THE CIRCUMSTANCES UNDER WHICH ER 404(B) REQUIRES EXCLUSION OF EVIDENCE IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE WHICH THIS COURT SHOULD REVIEW.

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). 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 trial court 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. 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. The Court of Appeals upheld the trial court's decision to admit the video, stating that it did not constitute character evidence and the trial court had tenable grounds for concluding that the video was proof of Bagley's identity and corroborated BP's description of her attacker. Opinion at 10.

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. And, while 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, 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.

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. The proper application of ER 404(b), which would have resulted in exclusion of the unfairly prejudicial video, presents an issue of substantial public importance which this Court should review. RAP 13.4(b)(4).

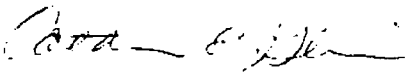
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Bagley's conviction.

DATED this 2nd day of March, 2017.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



CATHERINE E. GLINSKI
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Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Sean Bagley,* Court of Appeals Cause No. 47624-0-II, as follows:

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Walla Walla, WA 99362

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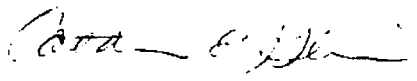

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Done in Manchester, WA
March 2, 2017

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Filed
Washington State
Court of Appeals
Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SEAN T. LEVERETTE BAGLEY, Appellant.	No. 47624-0-II UNPUBLISHED OPINION

MELNICK, J. — Sean T. Leverette Bagley appeals his conviction and sentence for attempted rape in the second degree. We conclude that the trial court did not violate time for trial rules or err by admitting a surveillance video. In addition, we need not consider if Bagley's right to confrontation was violated. We reverse the trial court for imposing a community custody condition, and we decline to review appellate costs. We affirm, but remand for the court to strike the community custody condition prohibiting the use of social media.

FACTS

On July 9, 2013, B.P. went to Walmart and made a purchase. She left the store to walk home. It was getting dark. Approximately five minutes into her walk home, Bagley, a stranger, approached her. He said, "What are you doing out this late, little girl. You realize you could get raped." 4 Report of Proceedings (RP) at 361, 372. B.P. put her head down and tried to walk past him.

Bagley pushed B.P. up against the fence. He put one of his hands against her shoulder and his other hand against her vagina over her pants. B.P. kneed Bagley in his genitals, and after he released his grip on her, she ran back in the direction of Walmart.

B.P. ran into Walmart and asked to borrow a phone to call the police. B.P. was crying and in a lot of distress. B.P. told the 911 operator that a man had tried to rape her. She could not describe his face, but she remembered that he was shirtless, had a sun tattoo around his belly button, and he wore a red baseball hat. The next day, Detective Kenneth Lewis showed B.P. a Walmart surveillance video showing Bagley walking around the store shirtless. She identified Bagley as the person who she encountered and accurately described him.

I. PROCEDURE

The State charged Bagley with attempted rape in the second degree and indecent liberties.[1] Bagley's first trial ended in a mistrial because of a hung jury.

Subsequently, Bagley went to Western State Hospital for a competency evaluation. The trial court entered an order finding him competent and set a new trial date of October 20, 2014.

On October 17, the trial court heard the State's motion for a continuance of the trial. The trial court granted the motion over Bagley's objection. The trial court reasoned a continuance was proper because the "[State] is currently in trial until 10/28 or 10/29. Defense counsel [is] out first part of Nov. until 11/13. [The State] is out last week of Nov. (previously scheduled vacation)[.] This Dept. is in the [Criminal Division] courts [and] unavailable for trial in December. New trial date accommodates all of this [and] also atty's trial schedule." Clerk's Papers (CP) at 26. On December 19, the trial court entered a scheduling order with a status conference hearing on January 9, 2015 and a trial date of January 12.

[1] RCW 9A.44.050(1)(a); RCW 9A.44.100(1)(a).

On January 9, the State moved for another continuance. The trial court granted the motion over Bagley's objection and continued the trial to January 21.

On January 21, the trial court entered an order continuing the trial until March 2 because Bagley's lawyer was in trial, the State was in trial, and the assigned courtroom was in trial. On February 27, the trial court entered an order that continued trial until March 11 because Bagley's lawyer was in trial and a material witness for the State was set to attend a training from March 2 through March 13.

On March 2, Bagley filed a motion to dismiss, arguing that the trial court violated his time for trial right by continuing the trial to January 12.[2] The State argued that good cause existed for the continuance because the prosecutor was in a different trial, and a court may consider the court's congestion after good cause is established. Bagley argued that initially there was good cause for the continuance, but the length of the continuance was improper. The trial court denied the motion.

II. TRIAL PROCEEDINGS

Bagley moved in limine to prohibit the State from offering any character evidence, and to exclude the Walmart surveillance video under ER 401, 403, 404(b). The State objected to the motion to exclude the video and argued that it was relevant to prove Bagley's identity, it was admitted in the first trial, and it was probative for proving that Bagley appeared as B.P. described him and that he was in Walmart. The trial court granted the motion to exclude character evidence in general.

[2] Bagley argued his "speedy trial" rights were violated but all of his arguments implicate CrR 3.3. CP at 31.

As to the video, Bagley argued that it was irrelevant and prejudicial and it constituted impermissible character evidence.[3] In the video, Bagley was wandering around Walmart shirtless, and he extended his hand to people walking past him. The trial court denied the motion. It ruled that the video was relevant because it corroborated B.P.'s identification of Bagley and how he appeared on the day of the incident. The trial court also ruled that the video had high probative value and that it was not unduly prejudicial to Bagley.

Bagley attempted to elicit testimony from B.P. about an interview she gave to a news station on the day following the attack. She told the reporter that "she did not know what [Bagley's] intentions were." 4 RP at 392. The State objected and argued that her statement to the reporter was hearsay. The State further argued that it was not a prior inconsistent statement because it is not inconsistent with her in-court testimony. Bagley responded that the statement went to her state of mind and that he had the right to confront his accuser. The trial court sustained the State's objection.

The jury found Bagley guilty of attempted rape in the second degree and of indecent liberties.

III. SENTENCING

On May 22, the trial court sentenced Bagley to 83.25 months to life of confinement. The trial court dismissed the indecent liberties conviction to avoid a double jeopardy violation. The trial court prohibited Bagley "from joining or perusing any public social websites." CP at 322. Bagley objected to this condition.

[3] Bagley did not specify what character trait the video portrays. Bagley seemed to argue that his actions were out of the ordinary and strange.

At sentencing, Bagley told the trial court that his most recent employment was in 2010 as a painter and he did not have any assets. The trial court found him indigent and entered an order of indigency. Bagley appeals.

ANALYSIS

I. TIME FOR TRIAL

Bagley argues that the trial court violated his time for trial right when it continued his case into January because it only had good cause for the continuance until the end of November. We disagree.

We review an alleged violation of the time for trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). Under CrR 3.3(b)(1)(i), a defendant held in custody pending trial must be tried within 60 days of arraignment. The trial court may grant an extension of time for trial when unavoidable or unforeseen circumstances exist. CrR 3.3(e)(8). The trial court may also grant a continuance on the written agreement of the parties, or on the motion of the court or a party when required in the administration of justice. CrR 3.3(f). The trial court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). A continuance is properly granted where the defendant will not be substantially prejudiced in the presentation of the defense. CrR 3.3(f)(1), (2). Violation of the time for trial rule will result in dismissal with prejudice. CrR 3.3(h).

Specific periods are excluded in the time for trial calculation, CrR 3.3(b)(5), including competency proceedings and continuances. CrR 3.3(e)(1), (3). "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5).

Both parties cite to *State v. Flinn*, 154 Wn.2d 193, 110 P.3d 748 (2005), as authority on this issue.[4] In *Flinn*, the State requested a continuance of the trial date to prepare for Flinn's diminished capacity defense. 154 Wn.2d at 196-97. The trial court granted the continuance and discussed with the State how much time it would need to prepare. *Flinn*, 154 Wn.2d at 197-98. The trial court set the new trial date over five weeks. In so doing, it also worked to avoid a judicial conference. *Flinn*, 154 Wn.2d at 198. In *Flinn*, the court reasoned that no time for trial violation occurred because "[t]he trial court granted the continuance after finding good cause . . . not because of the judicial conference[;] . . . the judicial conference was not the reason for the continuance." 154 Wn.2d at 200-01. The *Flinn* court held that "Having found good cause, the trial court could consider availability of judges and courtrooms in deciding when to schedule." 154 Wn.2d at 201.

Here, the trial court reasoned a continuance was proper because the State was in trial, defense counsel was in trial, and the State had previously scheduled vacation. These reasons constituted good cause for a continuance. After the trial court found good cause for the continuance, it considered court congestion and scheduling issues in setting the new trial date. The trial court acted in accord with *Flinn*, 154 Wn.2d at 201. Therefore, the trial court did not err by granting the continuance and setting the new trial date.

[4] We note that Bagley never objected to the trial date as mandated by CrR 3.3(d)(3); however, because neither party on appeal raised his failure to object, we do not decide the case on that basis. *State v. Farnsworth*, 133 Wn. App. 1, 12-13, 130 P.3d 389 (2006); *see also State v. Harris*, 130 Wn.2d 35, 44-45, 921 P.2d 1052 (1996) (if a defendant does not timely object, his speedy trial rights under the court rules are deemed waived)).

II. SURVEILLANCE VIDEO

Bagley argues that the trial court abused its discretion by admitting the surveillance video because it allowed the jury to convict him on character evidence and denied him a fair trial. We disagree.

A. STANDARD OF REVIEW

The trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). Accordingly, when a party objects to the admission of evidence on relevance and undue prejudice, we review a trial court's decision for a manifest abuse of discretion. *Barry*, 184 Wn. App. at 801-02. A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Barry*, 184 Wn. App. at 802.

We review a "trial court's decision to admit or deny evidence of a defendant's past crimes or bad acts under ER 404(b) for an abuse of discretion." *State v. Fuller*, 169 Wn. App. 797, 828, 282 P.3d 126 (2012). "A trial court abuses its discretion by not following the requirements of ER 404(b) in admitting evidence of a defendant's prior convictions or past acts." *Fuller*, 169 Wn. App. at 828. When a trial court admits evidence under ER 404(b), it must "'(1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence.'" *Fuller*, 169 Wn. App. at 828-29 (quoting *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)).

B. THE TRIAL COURT DID NOT ERR BY ADMITTING THE SURVEILLANCE VIDEO

Bagley argues that the video was unfairly prejudicial because his strange behavior depicted in the video "had no bearing on the charged offenses." Br. of Appellant at 16. Before the trial court, Bagley moved for the exclusion of the surveillance video because it was not relevant and was it was overly prejudicial, and because it showed Bagley walking in and out of the store shirtless and extending his hand out to people it was impermissible character evidence.

First, we address whether the video was relevant. We then address whether it should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice.

"'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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence may be unfairly prejudicial when it excites an emotional rather than a rational response by the jury or when it promotes erroneous inferences and a decision on an improper basis. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). The trial court has broad discretion in weighing the probative value versus the unfair prejudice of evidence. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997).

The video was relevant. B.P. identified Bagley to the police using the video. It placed Bagley near the scene of the crime within thirty minutes of the attack.

The video had strong probative value. The trial court reasoned that because it went to the credibility of B.P.'s description of her attacker and her description of how he looked, it was relevant. The trial court balanced the probative value of this evidence against its prejudicial effect and determined that the evidence was admissible.

We conclude that the trial court did not abuse its discretion in admitting the surveillance video into evidence based on its relevancy and probative value.

Second, we address whether the video should have been excluded because it constituted impermissible character evidence.

ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "Character evidence may be used circumstantially to show that a person acted consistently with that character. Th[e] use of character evidence to show conformity is generally rejected." *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

"[C]ertain types of evidence (i.e., '[e]vidence of other crimes, wrongs, or acts') are not admissible for a particular purpose (i.e., 'to prove the character of a person in order to show action in conformity therewith')." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (quoting ER 404(b)). However, the same evidence may "be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *Gresham*, 173 Wn.2d at 420. "The burden of demonstrating a proper purpose is on the proponent of the evidence." *Gresham*, 173 Wn.2d at 420.

The video did not constitute character evidence. In the trial court and on appeal Bagley never specifies what character trait of Bagley's is portrayed in the video. The trial court ruled that the video did not constitute character evidence. The trial court focused on the fact that the video had a high probative value and was not unduly prejudicial. The State argued that the video was not character evidence because the content of the video showed Bagley walking around the store shirtless. The State acknowledged that the behavior was unusual, but did not use the video to prove any character trait that Bagley acted in conformity with on that night.

We conclude that the trial court did not abuse its discretion by admitting the surveillance video because it had tenable grounds for concluding that the video was proof of Bagley's identity and corroborated B.P.'s description of her attacker. Nor did the trial court abuse its discretion by finding the video's probative value outweighed any prejudicial effect.

III. CROSS-EXAMINATION OF B.P.

Bagley argues the trial court violated his right under the confrontation clause by prohibiting him from using the victim's prior inconsistent statement for impeachment. However, at trial Bagley tried to admit the statement for substantive purposes, and not impeachment. Therefore, we do not consider this issue.

"A party cannot change theories of admissibility on appeal." *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011). "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *see also* RAP 2.5(a). Since the specific objection made at trial is not the basis Bagley argues before us, he has lost his opportunity for review.

At trial, Bagley asked B.P. about a statement she made in an interview the day following the attack. When the State objected, Bagley said he wanted to use the statement to prove B.P.'s state of mind. He did not argue that the statement was admissible for impeachment purposes. Because Bagley asserts a different theory of admissibility on appeal than he did before the trial court, we do not consider the issue.

IV. COMMUNITY CUSTODY CONDITION PROHIBITING SOCIAL MEDIA USE

Bagley argues that the trial court erred by imposing the community custody condition prohibiting him from using social media because there was no nexus between the conviction and the condition. We agree and remand for the trial court to strike the condition and enter a modified judgment and sentence.

A. STANDARD OF REVIEW

The legislature has authorized trial courts to impose crime-related prohibitions. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). "A 'crime-related prohibition' is an order prohibiting conduct that *directly relates to the circumstances of the crime.*" *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (emphasis added). We review whether a community custody prohibition is crime-related for abuse of discretion. *Autrey*, 136 Wn. App. at 466.

B. THE TRIAL COURT ERRED BY IMPOSING THE CONDITION

A defendant convicted of attempted rape in the second degree must be sentenced under RCW 9.94A.507. RCW 9.94A.507(5) provides that a defendant sentenced under the section also be sentenced to "community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence."

Conditions imposing prohibitions must be crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.030(10). "[A] sentencing court may not prohibit a defendant from using the Internet if his or her crime lacks a nexus to Internet use." *State v. Johnson*, 180 Wn. App. 318, 330, 327 P.3d 704 (2014); *State v. O'Cain*, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008). Because there is no evidence that Bagley used social media to commit his crime, there is no nexus between Bagley's crime and the prohibition of social media use.

Therefore, because the prohibition in this case is not crime-related, we remand for the trial court to strike the community custody condition prohibiting the use of social media.

V. APPELLATE COSTS

Bagley argues that we should exercise our discretion and decline to impose appellate costs because Bagley is indigent. Under *State v. Grant*, ___ Wn. App. ___, 385 P.3d 184, 187 (2016), a defendant is not required to address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Bagley objects to that cost bill.

We affirm, but remand for the court to strike the community custody condition prohibiting the use of social media.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, J.

Maxa, A.C.J.