NO. 47624-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SEAN BAGLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson

No. 13-1-02793-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court violated defendant's speedy trial rights when it considered its schedule to choose the next available date as allowed by the Washington State Supreme Court in ***Flinn***?

2. Whether the trial court abused its discretion in admitting the Wal-Mart surveillance video when the significant probative value of the video was not substantially outweighed by its minimal, if any, prejudicial effect.

3. Whether trial court violated defendant's right to confrontation when it limited the cross-examination of the victim to admissible evidence and even if there was a violation, it was harmless?

4. Whether this Court should remand with orders to strike condition 22 in appendix H from defendant's judgment and sentence when it does not relate to the crime for which defendant was convicted?

B. STATEMENT OF THE CASE.

1. Procedure

On July 12, 2013, the Pierce County Prosecutor's Office charged SEAN BAGLEY, hereinafter "defendant", with one count of attempted rape in the second degree and one count of indecent liberties. CP 1-2.

After a hung jury, the court declared a mistrial and the case was continued multiple times for competency and scheduling issues. CP 25-30, 340, On March 2, 2015, defendant filed a motion to dismiss based on speedy trial violations which the court denied. CP 31-40; RP[1] 12-14. The case proceeded to trial before the Honorable Garold Johnson after which the jury convicted defendant as charged. CP 168-169; 11RP 691. During sentencing, the court dismissed the indecent liberties count for double jeopardy purposes. 12RP 713-14. Defendant was sentenced to 83.25 months to life on the attempted rape in the second degree conviction. 12RP 723; CP 306-325. Defendant filed a timely notice of appeal. CP 333.

2. Facts

On the evening of July 9, 2013, B.P. walked to her local Wal-Mart in Puyallup, Washington to get food for dinner. 10RP 354-55. She bought her food and shortly after she had begun her walk home, a man started walking towards her from the other direction on the same sidewalk. 10RP 358-60. B.P. observed the man was white, had no shirt on and had a tattoo of a sun or star around his bellybutton. 10RP 362-63. When they were about five feet apart, he said to her "What are you doing out this late,

[1] In the interest of simplicity, the State will refer to the Verbatim Report of Proceedings the same as defendant, which is 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.

little girl. You realize you could get raped." 10RP 361-63. B.P. put her head down and as she tried to walk past the man, he pushed her up against a wood fence. 10RP 364. He used one hand to hold her shoulders while his other hand touched her vagina over her yoga pants. 10RP 364-65, 367. B.P. kneed him in the genitals, felt him release the hold on her and she started running back towards the Wal-Mart. 10RP 365-66.

B.P. tried to get the attention of some security guards in Bradley Lake Park nearby by waving her arms, but they did not notice her so she continued to run. 10RP 368. She ran inside the Wal-Mart crying and in shock, and asked the first cashier she found if she could use their phone to call 911. 8RP 160; 10RP 368-69. She told the cashier that a man had pushed her up against the wall and tried to rape her. 8RP 162. B.P. used the cashier's cell phone to call 911 as she did not have one with her. 10RP 356, 369. She told the operator a man wearing a red baseball hat had tried to rape her and said she had seen him earlier that night when she was walking into the Wal-Mart. 10RP 370-72.

The cashier waited with B.P. while she called 911 until Puyallup Police Detective Kevin Lewis arrived. 8RP 160-63; 10RP 373, 439. B.P. told him what had happened and described the man, including his tattoo. 10RP 448-50. The cashier said that she believed she had just seen the man with the tattoo walking around outside the store when she came in to work. 8RP 163-64; 10RP 454. Detective Lewis checked the store surveillance videos with the help of store security and copied the videos

showing the man with the tattoo and red hat. 8RP 151-54; 10RP 454-59. He took B.P. back to the scene where the incident occurred and she described to him what had happened. 10RP 450-52. She also gave a video recorded statement and afterwards, her boyfriend picked her up and took her home. 10RP 453.

The next morning, several screen shots and video clips of the surveillance video were released to patrol units and the media to assist in identifying the suspect. 10RP 464-65. A man named Christopher Yager called police and said he and his girlfriend had seen the man the night before while walking their dog around Bradley Lake near the Wal-Mart. 9RP 258. They said he was walking around with his shirt off giving off a weird vibe and they recognized him in the photo from his bellybutton tattoo. 9RP 258.

Two employees from the Sportsman's warehouse also called police after recognizing the individual from an encounter in the parking lot the night before. 9RP 211-212. The Sportsman's warehouse is across the parking lot from the Wal-Mart. 9RP 202; 10RP 318. Kevin Bye and Dustin Luft told police that they were having a cigarette after the store had closed around 9:30 the night before when the individual approached them. 9RP 204-05; 10RP 319. They said the man in the video had walked up to them sweating profusely and asked for a cigarette, money and a credit card. 9RP 205-08; 10RP 319-20. When they declined, he tensed up and they were concerned there might be a physical altercation. 9RP 207-08.

They asked the man if he was ok and he said he had just walked up the hill to get milk for his girl before walking towards the Wal-Mart. 9RP 206-08.

A neighbor of SEAN BAGLEY, hereinafter the defendant, recognized him as the individual in the video and photographs and called the police. 10RP 413-16, 465-66. Police made a photo montage of faces of six similar looking individuals, including the defendant, and showed it to several witnesses. 10RP 468-69. Christopher Yager, Kevin Bye and Dustin Luft all identified defendant in the montage as the individual they had seen the night before. 9RP 213, 233-34, 261, 277, 326; 10RP 472-73. The Wal-Mart cashier and B.P. were unable to unable to identity anyone in the montage. 8RP 165, 380-83; 9RP 274; 10RP 470. The next day however, B.P. did identify the defendant in the video surveillance footage as the man who had attacked her. 10RP 383, 470.

Police went to the defendant's address which was within a mile and walking distance of the Wal-Mart. 9RP 279; 10RP 475. Defendant's fiancée answered and officers learned defendant was in a back bedroom, but refused to come out and was laying under the comforter on their bed. 8RP 178-83. Eventually, officers were able to arrest the defendant and take him to the police station. 8RP 183-84; 9RP 280-84. He appeared to be wearing the same pair of jeans as in the surveillance video. 11RP 551. In defendant's bedroom, officers also retrieved a red hat that appeared to be the same one he was wearing in the surveillance video. 9RP 285-87.

At the station, defendant's tattoos were photographed and Detective Lewis confirmed they matched the tattoos on the individual in the surveillance video. 10RP 476-70. During the trial, the cashier, Kevin Bye, Christopher Yager and Dustin Luft all identified the tattoo in the picture of defendant as the one they had seen the day of the incident. 8RP 165-66; 9RP 217, 265; 10RP 328. Kevin Bye, Christopher Yager and Dustin Luft all also identified the defendant in court as the individual they had seen that day. 9RP 215, 263; 10RP 327.

B.P. testified during the trial that she did not get a look at the face of the person who attacked her as it happened so fast and she was focused on the tattoo on his stomach. 10RP 380-81, 83. During the trial B.P. also identified the tattoo on defendant's stomach as the same tattoo that she saw when she was attacked on July 9, 2013. 10RP 385-86. She testified defendant was the same height and build as the man who attacked her. 10RP 386.

B.P.'s 911 tape was played for the jury during the trial. 10RP 370. The surveillance video was also played for the jury. 8RP 154-156; Exhibit 1. It contained three clips totaling 36 seconds of video. Exhibit 1. Two of the clips showed a man walking from the shopping area of the store to the exit doors from two different angles. Exhibit 1. He has a red hat on, no shirt and a tattoo around his belly button and offers his lighter to a group of women at one point on his walk out. Exhibit 1. The third clip showed the same man walking along the side walk just outside the Wal-

Mart store without interacting with anyone. Exhibit 1. Several freeze frames from the video were also shown to the jury. 10RP 460-65.

Defendant's fiancée Tasha Bouvia, testified during the trial that he lived with her on July 9, 2013, at an apartment in Puyallup that was 10-15 minutes walking distance from the Wal-Mart. 11RP 486-91. She said that on July 9, 2013, he left their home around 8:30 or 9 pm on foot wearing a red baseball hat, jeans, shoes and no shirt. 11RP 488-89. She identified the red hat taken by the police from the defendant's bedroom as the hat he was wearing that night. 11RP 489-90. He returned home a couple hours later after dark without saying anything. 11RP 491.

Ms. Bouvia testified that the next day her neighbors showed her the surveillance video on the news and she recognized the individual as the defendant, specifically based on his tattoo. 11RP 491-93. Shortly thereafter, the police arrived at her home while the defendant was in her bedroom underneath the comforter on the bed. 11RP 494-95. She testified that defendant said they had the wrong person and he did not know why they were there. 11RP 496. Ms. Bouvia called defendant's mother because his behavior was concerning her and he is schizophrenic. 11RP 494-96. Officers were eventually able to arrest him. 11RP 496.

Defendant chose not to testify during the trial, but a transcript of his testimony from the previous trial was read to the jury. Exhibit 44; 11RP 537, 584. In it, he admitted walking from his home to the Wal-Mart

on July 9, 2013, and that he was the individual on the surveillance video. Exhibit 1 at 5-8. He said he saw B.P. on his walk home and told her "Hey, girl, it's dark out here. You could get raped" before walking home. Exhibit 1 at 13. He denied ever touching her or getting close to her. Exhibit 1 at 13. A stipulation was also read to the jury detailing that the defendant had a prior conviction for possession of stolen property in the first degree from 2006 and a prior conviction for possession of a stolen vehicle from 2010. 11RP 550.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S SPEEDY TRIAL RIGHTS BY CONSIDERING ITS SCHEDULE TO CHOOSE THE NEXT AVAILABLE TRIAL DATE AS ALLOWED IN ***FLINN***.

A defendant who is detained in jail must be brought to trial within 60 days of the commencement date specified in CrR 3.3(c). CrR 3.3(b)(1)(i). Certain time periods may be excluded from the computation of time awaiting trial, including continuances granted by the trial court. CrR 3.3(e)(3). CrR 3.3(f)(2) provides a basis by which the court may validly continue the start of trial, stating:

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance....

It is well established that a trial court does not abuse its discretion by granting a State's continuance motion based on a prosecutor's scheduling conflict from a different trial assignment. *See, e.g.*, ***State v. Flinn***, 154 Wn.2d 193, 200, 110 P.3d 748 (2005) ("Scheduling conflicts may be considered in granting continuances."); ***State v. Krause***, 82 Wn. App. 688, 698, 919 P.2d 123 (1996) ("Conflicts in the prosecuting attorney's schedule may be considered 'unavoidable' circumstance justifying an extension of the speedy trial date under CrR. 3.3").

Alleged violations of CrR 3.3 are reviewed de novo. ***State v. Kenyon***, 167 Wn.2d, 130, 135, 216 P.3d 1024 (2009). The decision to grant or deny a continuance rests within the sound discretion of the trial court and will not be disturbed unless the appellant clearly shows the trial court's decision was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. ***State v. Flinn***, 154 Wn.2d 193, 199, 110 P.3d 748 (2005).

On October 17, 2014, defendant's trial date was continued from October 20, 2014, to January 12, 2015, based on the prosecutor's unavailability for trial as she was in another trial until the end of October. CP 26; 2RP 3-5. In choosing a date to reschedule the trial date, the trial court discussed the trial attorneys' vacations during the month of November, the court's assignment to CD[2]-1 and the holidays in December,

[2] CD-1 refers to "criminal division" 1 and is a month long rotation. 2RP 5.

and the prosecutor's scheduled trials at the beginning of January. CP 26; 2RP 3-7. As a result, it chose to schedule the trial date on January 12, 2015, as it was the first date available that accommodated the trial court and attorneys' schedules. CP 26; 2RP 3-7.

Defendant does not dispute that the continuance itself was granted for good cause. Brief of Appellant at 10. Rather, he argues that the length of the continuance was unreasonable and violated his speedy trial rights as the court did not schedule his trial date until January because of court congestion. Brief of Appellant at 11. Defendant contends that because ***State v. Flinn***, *supra,* and ***State v. Kenyon***, *supra*, have held that court congestion is not a valid basis for a good cause continuance, the trial date in January violated his speedy trial rights.

But defendant's argument misconstrues the holdings in ***Flinn*** and ***Kenyon***. Those cases held that court congestion itself is not a valid basis for a good cause continuance. ***Flinn***, 154 Wn. At 200; ***Kenyon***[3], 167 Wn.2d at 137. However, once good cause to continue the case has been established, the court may take into consideration its calendar, including court congestion, in determining when to schedule the next trial date. ***Flinn***, 154 Wn. 2d at 201 ("Because the continuance was granted for good cause, we will not second-guess the trial judge's discretion in placing the

[3] The ***Kenyon*** court did however discuss that under the newer version of CrR 3.3, there may be good cause for a continuation based on court congestion if the court carefully makes a record about the unavailability of judges and courtrooms and the availability of judges pro tempore. ***Kenyon***, 167 Wn.2d at 137.

trial on the court's calendar"). Specifically, the ***Flinn*** court held that "[w]hen scheduling a hearing after finding good cause for a continuance, the trial judge can consider known competing conflicts on the calendar." *Id.*

That is exactly what occurred in the present case. The trial court found good cause to continue the trial date based on the prosecutor's unavailability and then scheduled the trial date on the next available date when all parties, including the court, were available. Defendant's argument misconstrues the holding in ***Flinn*** and ignores the Washington State Supreme Court's specific statement that the court's calendar may be considered when scheduling a trial date after good cause for a continuance has been found. Because there was good cause for the continuance in the present case, and the court is allowed to take into consideration its own schedule in setting the next trial date, defendant's speedy trial rights were not violated.

In addition, the length of the continuance was reasonable given the numerous scheduling conflicts all parties involved had. The record reveals the trial court was especially concerned with trying this case as soon as possible. The court discussed its "crowded calendar" and noted how the month assignment in CD-1 "wreaks havoc for everyone" in terms of scheduling cases. 2RP 5. It also noted that this case was the oldest case on the court's docket and said "so it's very much on the radar screen not only of my court, but all of the judges who are in criminal trial dockets are

(*sic*) looking at each other's cases." 2RP 5. The court continued, talking to the defendant and the defendant's mother who was present in the gallery:

> So it's on my radar screen, sir. You don't have to respond, but I want you to know I do care, and I am concerned about the time wait. But this is the first available trial date I have next year, and I'm going to go ahead and do it over your objection. But I wanted you to know that this Court is with you.
>
> ...
>
> At least you can hear from the judge as the reasons why and my concerns about making sure this gets done. But believe me, there's not a day in this courtroom where we're not trying to try a case or look for someone to do it because I don't like to be not trying cases. It's just – there's a lot of different components that go into making sure that everything can come together on the day. I just – we just can't clone people right now to do all of our trials.

2RP 7-8. The court reiterated the scheduling issues and discussed its concern and effort to get defendant's case tried as soon as was realistically possible. The length of the continuance was reasonable given the scheduling conflicts and fact that the next available date for all parties was the date the trial was set. Defendant's speedy trial rights were not violated as the continuance was based on good cause and the court is allowed to consider its schedule in re-setting the date.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE WAL-MART SURVEILLANCE VIDEO AS ITS SIGNIFICANT PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ITS MINIMAL, IF ANY, PREJUDICIAL EFFECT.

In general, evidence of a defendant's prior crimes, wrongs or acts are inadmissible to demonstrate the person's character or general propensities. However, such evidence may be admissible for other purposes such as proof of "motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident." ER 404(b).

To admit evidence of other wrongs under ER 404(b), the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. ***State v. Boot***, 89 Wn. App. 780, 788, 950 P.2d 964 (1998) (*citing* ***State v. Saltarelli***, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). A danger of unfair prejudice exists when evidence is likely

to stimulate an emotional response rather than a rational decision. ***State v. Barry***, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

The admission or refusal of evidence lies largely within the sound discretion of the trial court and its decision will not be reversed on appeal absent an abuse of discretion. ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). An abuse of discretion occurs when there is a clear showing the trial court's decision was manifestly unreasonable, or based on untenable grounds, or for untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

During motions in limine in the present case, defendant moved to exclude the surveillance video from Wal-Mart arguing that it constituted impermissible character evidence and was more prejudicial than probative as it showed defendant wandering around acting strangely. 7RP 78-80. The State argued the video was relevant to prove identity and the timing of the attack and that defendant's behavior was not unduly prejudicial, especially in light of the fact that other courts have allowed evidence of uncharged prior crimes to prove identity. 7RP 80-84. Defense counsel responded by suggesting the court use freeze frame shots of the defendant outside to show the lighting conditions which she admitted were relevant, but continued to assert that the video was unfairly prejudicial. 7RP 85-86. The trial court ruled that the surveillance video was admissible as it was relevant to prove the identity of the attacker and evaluate the credibility of

B.P.'s statement to police of the incident. 7RP 86-87. The court found that the video was not unduly prejudicial and the probative value was "fairly high" given its relevance. 7RP 86-87.

On appeal, defendant contends the trial court abused its discretion in admitting the surveillance video as its probative value was substantially outweighed by the prejudicial effect as the video made the defendant appear strange and potentially dangerous. Brief of Appellant at 16. But defendant's argument fails as the probative value of the video was significant and any prejudicial effect was minimal at best. The video was particularly relevant to prove defendant was the attacker. It showed defendant within walking distance of the crime scene approximately 20 minutes before the incident occurred. It also corroborated the victim's description of her attacker to police making it relevant in terms of evaluating the credibility of the witness whose testimony was crucial to the State's case. In addition, the third clip on the video displayed the lighting conditions outside just before the incident took place also making a visual of the defendant in such conditions relevant.

Defendant contends that the video makes him appear strange and dangerous thereby improperly influencing the jury about impermissible character inferences. But any prejudicial impact was minimal if any even exists. The video does not show the defendant displaying any bad behavior or wandering around looking mentally unstable. It shows him walking through a Wal-Mart and on a sidewalk and offering his lighter to

a group of individuals a single time. There is no sound so the offering of the lighter could have easily been in response to something from the group and the fact that he does not have a shirt on can be explained by the weather being hot. The total length of all three clips combined is only 36 seconds long. There is simply nothing in the video which makes him appear strange or dangerous such that one could argue it was unfairly prejudicial, especially not so prejudicial as to outweigh its significant relevance. Given the lack of prejudicial impact, the trial court's decision to admit the video cannot be considered an abuse of discretion.

Furthermore, any sort of belief the jury got about the defendant being odd from the video played into defense counsel's closing argument strategy. Defense counsel essentially argued that it was defendant's odd behavior that made the victim believe something had happened to her when no actual touching had occurred and that his odd behavior was essentially the only reason he was on trial. 11RP 663-72. Defense counsel even began her closing argument by saying:

> This guy looks just plain weird. Anybody want to think about encountering him on a street? No. [B.P.] didn't want to particularly.
>
> Chris Yager, who had no conversation with him, and I forgot how he described him, but made him uncomfortable, something like that; described by everybody who encountered [the defendant] that night, other than friends and family who know him, as a weirdo. Made me uncomfortable, words like that. Oh, sure.

> Is that why we're here? Yeah, that's part of it. That's part of it.
>
> Saying those words to that young woman, Hey, little girl, what are you doing out here this late? You could get raped. Is that why we're here? Yes. Yes, that's why we're here.
>
> Are those words enough? The state wants you to believe their convoluted, complex argument let's pull this along. Let's put stuff on top of it. Pretend that they have bricks, and what we have is a field of straw; that's saying something like that this guy, who is acting weird that night is enough to prove that he intended to rape her. Well, the facts belie that, obviously.

11RP 663. The defense attorney routinely referenced throughout her closing argument how the witnesses described the defendant as a weirdo and how he made them feel uncomfortable. 11RP 663-64, 668, 673. She concluded her argument by saying "wandering around weird may be something that we don't want in our neighborhoods, but it's not a crime. And it's only through our justice system that people don't get convicted based upon being weird or strange." 11RP 673. Any prejudice about the defendant being odd or strange from the video played into the defense strategy that that was the only reason B.P. believed something had happened and that defendant was on trial for these accusations.

Even if the trial court could have accomplished the same purpose by only admitting still photographs from the video, the decision to admit the entire video was harmless. Any error in the admission of evidence under 404(b) is harmless if, within reasonable probabilities the outcome of

the trial would have been the same even if the evidence had not been admitted. ***State v. Fuller***, 169 Wn. App. 797, 831, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013).

Not only was there minimal prejudicial impact if any from the video itself, the belief that defendant was acting strangely that night came primarily from the testimony of other witnesses. Kevin Bye and Dustin Luft described in detail their strange interaction with defendant in the parking lot and said that his behavior stood out to them and made them feel uncomfortable. 9RP 205-08; 10RP 318-21. Christopher Yager described his encounter with the defendant in the park and said he had a "weird vibe about him." 9RP 258-59. Defendant's own girlfriend described how the next day he seemed upset and panicky and she called his mom because he is schizophrenic and she did not know how to deal with the situation. 11RP 495. Thus, the jury's knowledge of defendant's strange behavior came in large part from the testimony of witnesses and would have existed even if the video had not been shown to them. The trial court did not abuse its discretion in admitting the video and even if it arguably did, defendant is unable to show the result of his trial would have been different had the video not been admitted.

3. DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE TRIAL COURT LIMITING THE CROSS-EXAMINATION OF THE VICTIM TO ADMISSIBLE EVIDENCE, BUT EVEN IF IT WAS, ANY VIOLATION WAS HARMLESS.

The Sixth Amendment to the United States Constitution and the Washington Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses. ***State v. O'Connor***, 155 Wn.2d 335, 348, 119 P.3d 806 (2005); U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. Although the right to confrontation should be zealously guarded, that right is not without limitation. ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). It is well established that a trial court that limits cross-examination through evidentiary rulings as the examination unfolds does not violate a defendant's Sixth Amendment rights unless its restrictions on examination "effectively ... emasculate the right of cross-examination itself." ***Smith v. Illinois***, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). Generally speaking, the confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. ***Delaware v. Fensterer***, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

A confrontation clause challenge to the admission of evidence is reviewed de novo. ***State v. Mason***, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). However, "proper assertion of the right of confrontation is

dependent upon proper compliance with state-mandated trial procedures and evidentiary procedural rules – such as a rule requiring timely and specific objection." ***State v. O'Cain,*** 169 Wn. App. 228, 239, 279 P.3d 926 (2012). Thus, "a defendant has the obligation to assert the right to confrontation at or before trial, in compliance with the applicable trial court procedural rules...." *Id.* at 240. The proponent of excluded evidence may only assign error on the specific ground advanced for admissibility below. *See* ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); ER 103(a)(1).

During the direct examination of B.P. in the present case, she testified that she told the 911 operator that the man had tried to rape her because of what he said to her upon their encounter[4]. During the cross-examination of B.P., defense counsel attempted to ask B.P. whether she had told a news reporter the following day that she did not know what the man's intentions were. 10RP 390-392. The State objected on hearsay grounds and a hearing was held outside the presence of the jury. 10RP 391-95.

[4] B.P. testified the man said "What are you doing out this late, little girl. You realize you could get raped." 10RP 370-71.

On appeal, defendant argues that defense counsel was attempting to introduce the statement under ER 613[5] and the trial court's refusal to admit the statement violated defendant's right to confrontation. Brief of Appellant at 17-22. But a review of the record reflects defense counsel was attempting to admit the statement for substantive purposes, not for purposes of impeachment as allowed under ER 613. *See* ***State v. Garland***, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012) (under ER 613, a prior inconsistent statement of a witness is admissible for impeachment purposes to show that the trial testimony is unreliable, not to prove the facts contained in the prior statement are substantively true).

Although no specific evidence rules were mentioned, defense counsel stated she was offering the prior inconsistent statement because "[B.P.]'s state of mind, especially after she's had a chance to gather her thoughts and reflect until the next day when she's sitting with the reporter,

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[5] ER 613 entitled "Prior Statements of Witnesses" reads:
(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 party-opponent as defined in Rule 801(d)(2).

I think that's relevant...." 10RP 393. The court then read ER 801(d)(1)[6] and defense counsel agreed with the court that no foundation had been laid for admission under that rule saying:

> That's correct, Your Honor. I talk about the rule of completeness, but I don't think that would help me either, to be honest with you. That would be a recording or a statement of a party offering pieces of it and you want to put in the rest of it. I don't have that either.... I'm simply hanging my hat on the right to confront his accusers.

10RP 394. In response, the court said "Well, you have to confront accusers with admissible evidence. I do find it's not admissible" and sustained the objection. 10RP 395. Defense counsel never discussed or implied in any way that she was offering the statement to impeach the victim. 10RP 391-95. Nor did she ever discuss a limiting instruction concerning the statement suggesting its use was only for impeachment purposes. 10RP 391-95. Instead, her comments reflect that she was attempting to admit the statement for substantive purposes and searching for a rule which would allow her to do that. 10RP 391-95.

A party cannot change theories of admissibility on appeal. ***State v. Mak***, 105 Wn.2d 692, 718-719, 718 P.2d 407 (1986), *overruled on other*

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[6] ER 801(d)(1) reads:
(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 (1) 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 is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person".

grounds by, ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994). While the statement to the news reporter would likely have been admissible under ER 613 for impeachment purposes, defense counsel did not seek its admission under that theory[7]. Instead, the trial court properly excluded the statement as it was hearsay and not admissible under ER 801(d)(1). There is no constitutional right to admit irrelevant or otherwise inadmissible evidence. ***State v. Classen***, 143 Wn. App. 45, 60-61, 176 P.3d 582, *review denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008). B.P. was present in court and underwent cross examination in accordance with the evidence rules. The trial court's limitation of B.P.'s cross examination to admissible evidence was not a violation of defendant's right to confrontation.

Defense counsel's general request to admit the statement based on the defendant's right to confront his accusers does not satisfy the specificity needed to form the basis for an erroneous ruling and subsequent confrontation clause violation. As stated above, "proper assertion of the right of confrontation is dependent upon proper compliance with state-mandated trial procedures and evidentiary procedural rules – such as a rule requiring timely and specific objection." ***State v. O'Cain,*** 169 Wn. App. 228, 239, 279 P.3d 926 (2012). B.P.'s statement to the newsreporter did not qualify as a statement that was not hearsay under ER 801(d)(1) and was thus excludable as hearsay evidence.

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[7] Defendant does not assign error on appeal or argue that his defense counsel was ineffective for failing to do this.

Defense counsel did not argue that it met an exception to the hearsay rule or offer the statement for any other purpose besides a general argument that the defendant had the right to confront his accusers. Such a broad general claim of a confrontation violation is not sufficient enough for the trial court to determine the theory of admissibility the defense is offering the evidence under. It does not make the trial court's decision a confrontation clause violation just because defense counsel claims it is without offering the evidence for an admissible purpose. There was no confrontation clause violation by the trial court's limitation of B.P.'s cross examination to admissible evidence.

However, even if this Court were to review the issue and find a confrontation clause violation in that defendant should have been allowed to impeach B.P. with the news reporter statement, any violation was harmless. A violation of defendant's rights under the confrontation clause does not require reversal if the error is harmless. ***State v. Moses***, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006). A confrontation clause violation is considered harmless if "the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt." ***State v. Koslowski***, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). "If there is no 'reasonable probability that the outcome of the trial would have been different had the error not occurred,'

the error is harmless." ***State v. Mason***, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (*quoting* ***State v. Powell***, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

In the present case, the statement by B.P. to the news reporter would have only been admissible under ER 613 for purposes of impeaching B.P.'s trial testimony. The effect of that singular arguable inconsistent statement would have had little to no effect on the jury's determination. For one, B.P. was a very credible witness. She had no motive to make up the story and had never seen the defendant before that incident. The cashier and police officer testified to B.P.'s distraught behavior immediately after the incident. She called 911 as soon as she could and the jury was able to hear that call. She also did not deny the fact that she could not remember her attacker's face and could only identify the defendant in court through his tattoo.

In addition, it was not as if B.P.'s testimony went completely unchallenged. There were minor differences in her testimony that were brought out either by the defense attorney or through inconsistent statements of other witnesses. As such, the jury already was evaluating her testimony with the knowledge of some minor differences existing in it. Having one more statement that was slightly inconsistent which the jury would have only been allowed to consider for the purpose that it was inconsistent would not have affected or altered their determination of her credibility.

Finally, in addition to B.P.'s testimony, other evidence was indicative of defendant's guilt. Numerous witnesses testified to him being in the area close in time to the incident. He was seen on the surveillance video at the nearby Wal-Mart. The hat the attacker was wearing was found in his room and ultimately, defendant himself admitted he walked past B.P. on the sidewalk in his previous testimony which was read to the jury. His testimony that he claimed to have only warned B.P. on the sidewalk that she could get raped is an odd thing to say out of nowhere to a stranger. However, his behavior after the police came to speak with him most significantly suggests remorse or concern that he had in fact done something wrong. He hid under the covers, refused to come out and was extremely agitated yelling at his fiancée throughout the encounter that the police had the wrong person and he did not know why they were there.

Given all of this, even if B.P.'s statement to the news reporter should have been admitted for impeachment purposes, it would have had little to no impact on the jury's determination and certainly cannot be said to be a situation where there is a reasonable probability that the outcome of the trial would have been different had the statement come in. Any error in the exclusion of the statement was harmless and does not require reversal.

4. CONDITION 22 OF APPENDIX H DOES NOT RELATE TO THE CRIME FOR WHICH THE DEFENDANT WAS CONVICTED AND THIS COURT SHOULD REMAND WITH ORDERS TO STRIKE THE CONDITION FROM DEFENDANT'S JUDGMENT AND SENTENCE.

When a defendant is sentenced under RCW 9.94A.507, the sentencing court must sentence the defendant to community custody. RCW 9.94A.507(5). As part of the term of community custody, there are certain conditions the court must order the defendant to comply with and certain conditions the court has discretion to impose upon the defendant. RCW 9.94A.703(1)-(3). Under RCW 9.94A.703(3)(f), the court has the authority to order the defendant to "[c]omply with any crime related prohibitions." "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). When a trial court imposes an unauthorized condition on community custody, we remedy the error by remanding the issue with instructions to strike the unauthorized condition. ***State v. O'Cain***, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

In the present case, over the defendant's objection, the trial court ordered defendant to comply with Condition 20 of Appendix H in his judgment and sentence which states "You also are prohibited from joining or perusing any public social websites (Facebook, MySpace, etc.)." CP 322, 330-32. On appeal, defendant argues that because there is no

evidence that the defendant joined or used public social websites in the commission of his crime, such a prohibition is improper as it is not a "crime-related prohibition." He cites to ***State v. O'Cain***, 144 Wn. App. 772, 184 P.3d 1262 (2008) and ***State v. Johnson***, 180 Wn. App. 318, 327 P.3d 704 (2014) in support of his argument and a review of those cases reveals that the defendant appears to be correct. In this case, there was no evidence adduced at trial that defendant joined or used public social websites in any way in the perpetration of his crimes. As such, a community custody condition prohibiting defendant from joining or perusing any public social websites does not fit within what the trial court is authorized to impose as "crime-related prohibitions" under RCW 9.94A.703(3)(f)[8].

This Court should remand and order the trial court to enter an order modifying the judgment and sentence which strikes Condition 22 from Appendix H of defendant's judgment and sentence.

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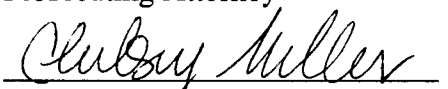
[8] The court should note however that this does not mean to suggest that such a prohibition against joining or using public social websites will always be improper in defendant's case. Under RCW 9.94A.704(2)(a), the department has the authority to "establish and modify additional conditions of community custody based upon the risk to community safety." Therefore, such a prohibition against joining or using social media websites could be deemed appropriate at a later time by the department of corrections under other circumstances.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions, but remand to the trial court with instructions to strike Condition 22 of Appendix H in defendant's judgment and sentence which prohibits him from joining or using public social websites.

DATED: May 11, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
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WSB # 42892

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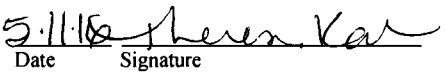

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