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Division III
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No. 37260-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT M. WAGGY,

Appellant.

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

The Honorable Judge Raymond F. Clary

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Robert Waggy was convicted of third-degree assault based on an incident on October 19, 2018, that culminated in his spraying pepper spray at his neighbor, Christian Bewick. Mr. Bewick and his family had lived next-door to the Waggy family since approximately 2004. A number of incidents had occurred over the years that had soured the relationship between the two families, and a long-standing dispute existed over whether Mr. Bewick had poured concrete stairs and a walkway over the property line into Mr. Waggy's yard. Mr. Waggy claimed that on the day of the incident, words and actions on the part of Mr. Bewick and his family necessitated that he defend himself and his family, thus spraying the pepper spray.

At trial, over defense objection, the trial court allowed the State to cross-examine Mr. Waggy about convictions for harassment in 2004, 2008, and 2016. These convictions did not involve the Bewicks. The State was also allowed to cross-examine Mr. Waggy about prior standoffs with law enforcement, and his designation in their CAD records system as "anti-government" and "anti-police." The prosecutor then argued in closing that Mr. Waggy's claim of self-defense was not plausible in this case when he had a history of repeated harassing behavior.

Mr. Waggy's conviction for third-degree assault must be reversed and remanded for a new trial, since the admission of such highly prejudicial, irrelevant, and impermissible evidence materially affected the outcome of his first trial.

If Mr. Waggy's case is not reversed and remanded for a new trial, four community custody conditions must be stricken from the judgment and sentence as unlawful. The trial court erred in ordering Mr. Waggy to pay DOC supervision fees after finding him indigent. Prohibiting Mr. Waggy from possessing or consuming alcohol or non-prescribed drugs including marijuana was unlawful when those conditions were not crime-related. The trial court improperly delegated authority to DOC when it allowed it to determine appropriate treatment and other conditions.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in allowing testimony of Mr. Waggy's harassment convictions and other misconduct under the "open door doctrine," and erred entering Findings of Fact No. 18, 19, 23, and 24, and Conclusions of Law 3, 4, 5, 7, and 9.
2. The trial court abused its discretion in admitting testimony of Mr. Waggy's harassment convictions and other misconduct under ER 404(b), and erred in entering Conclusions of Law 6, 8, and 10.
3. The error in allowing the testimony of Mr. Waggy's prior harassment convictions and misconduct materially affected the outcome of the trial.

4. The trial court erred by imposing four unauthorized community custody conditions.
 - a. The trial court erred by requiring Mr. Waggy to pay supervision fees as determined by DOC.
 - b. The trial court erred by requiring Mr. Waggy not to possess or consume alcohol, or possess or consume controlled substances, including marijuana, without a prescription as conditions of community custody.
 - c. The trial court erred in requiring Mr. Waggy to participate in the following crime-related treatment or counseling services: “per CCO,” and other conditions: “per CCO.”

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court abused its discretion in allowing testimony of Mr. Waggy’s harassment convictions and other misconduct under the “open door doctrine,” and erred entering Findings of Fact No. 18, 19, 23, and 24, and Conclusions of Law 3, 4, 5, 7, and 9.

Issue 2: Whether the trial court abused its discretion in admitting testimony of Mr. Waggy’s harassment convictions and other misconduct under ER 404(b), and erred in entering Conclusions of Law 6, 8, and 10.

Issue 3: Whether the error in allowing the testimony of Mr. Waggy’s prior harassment convictions and misconduct materially affected the outcome of the trial.

Issue 4: Whether the trial court erred by imposing four unauthorized community custody conditions.

- a. Whether the trial court erred by requiring Mr. Waggy to pay supervision fees as determined by DOC.
- b. Whether the trial court erred by requiring Mr. Waggy not to possess or consume alcohol, or possess or consume controlled substances, including marijuana, without a prescription as conditions of community custody.
- c. Whether the trial court erred in requiring Mr. Waggy to participate in the following crime-related treatment or

counseling services: “per CCO,” and other conditions: “per CCO.”

D. STATEMENT OF THE CASE

In August of 2004, Robert Waggy and his wife moved to 1517 West 7th in Spokane, an older house which had been subdivided into apartments. (RP 374, 378). They intended to restore the house into a single-family residence. (RP 378). Directly east of the Waggys was a similar house where Christian Bewick lived with his wife and two sons. (RP 345, 375). The Bewicks were also converting that house from apartments to a single-family home. (RP 213, 214).

Mr. Bewick came over within days of the Waggys moving in and demanded they immediately remove a tree near the property line because the roots were invading his sewer line. (RP 345, 375). Short on money with the recent home purchase, the Waggys borrowed money from Mr. Waggy’s mother to remove the tree. (RP 345). About the same time, Mr. Bewick asked to rent the Waggy’s garage, having rented it from the prior owner for two years. (RP 378, 347). He was angry when the Waggys declined since the garage was full of their belongings from the remodel of the main house. (RP 378, 347).

Over the next few years, the Waggys and Bewicks interacted infrequently. (RP 377-78). Ms. Waggy’s grandchildren let out her pet

chicken one day and it dug up Ms. Bewick's flowers, angering Ms. Bewick. (RP 350).

In the spring of 2013, Mr. Bewick began reopening an old door to his basement on the side of his house that adjoined the Waggy property. (RP 215, 218, 379).¹ Mr. Bewick dug a hole large enough to accommodate stairs down to the basement door and poured the concrete stairs. (RP 216, 217). A City of Spokane code enforcement inspector arrived during the construction, inspecting the project, presumably called by Mr. Waggy. (RP 218, 219). Mr. Waggy came over and told Mr. Bewick that the stairs were being built over the property line onto the Waggy property. (RP 221). Mr. Bewick disagreed and nothing further came of it at that time. (RP 223).

Several years later, Mr. Bewick added a sidewalk along the same side of the house. (RP 225-27). Mr. Waggy again told Mr. Bewick that he was building over the property line, but still neither the Bewicks nor the Waggys took any legal action regarding the boundary dispute. (RP 227-228). Conflict, however, arose again between the two families in August of 2017 following a camping trip taken by the Waggys. (RP 382). Driving home, Mr. Waggy received an urgent call from his father telling him to

¹ The testimony is inconsistent as to whether the opening to the basement was in fact an old entrance or a coal-bin chute. (RP 215, 379). Mr. Waggy and Mr. Bewick's testimony also differed on the date; Mr. Bewick testified the work was done in 2006 and Mr. Waggy testified it was approximately 2013. (RP 217, 379). These facts are provided as background information.

come home right away. (RP 382). Mr. Waggy hurried home and attempted to park their RV on the public street in front of the Bewick's house. (RP 351, 382). Ms. Bewick came out and angrily told him not to park in front of her house. (RP 351, 383).

In December of 2017, Mr. Waggy was shoveling snow from the walkway between their house and the street. (RP 353). Ms. Bewick emerged from her house and yelled at Mr. Waggy not to throw snow on her property. (RP 388). Afterward, Mr. Bewick came over and apologized for his wife's behavior. (RP 232,389-90). The property line was again brought up in the ensuing discussion. (RP 233, 390).

On December 17, 2017, Mr. Waggy wrote a letter to the Bewicks advising them that the walkway and stairs to the Bewick's basement had been built on his property. (State's Ex. P-14). He asked that the sections on his property be removed by January 1, 2018, or he would begin charging a fee of \$5,000 per day for trespassing, per the No Trespassing sign posted on his porch. (State's Ex. P-14).

Another letter followed on April 8, 2018. (State's Ex. P-15, RP 233-34). Mr. Waggy observed that neither the stairs or sidewalk had been removed, and the Bewicks now owed him \$500,000 in usage fees per the Spokane Municipal Code. (State's Ex. 15, RP 234, 391). The letters were ignored. (RP 235).

Shortly thereafter, Mr. Waggy hung a piece of string along the property line with a No Trespassing sign, which Mr. Bewick removed. (Defense Exhibit 105, RP 235, 236). Then, Mr. Waggy observed Mr. Bewick photographing the Waggy house and No Trespassing sign. (RP 393). He went to the Bewick home and spoke with Mr. Bewick. (RP 393). Another argument ensued over the property line. (RP 394). Mr. Bewick followed Mr. Waggy back to his yard, threatening to hurt Mr. Waggy if he did not get off the Bewick property. (RP 394). After this, the Bewicks filed a legal claim to the property where the stairs and sidewalk were located. (RP 236-37, 394).

A few months later, on October 19, 2018, Mr. Waggy was vacuuming his living room when he observed an unfamiliar man walking around the house on the disputed sidewalk toward the Bewick's basement door. (RP 396). He walked outside and asked him not to trespass on his property. (RP 396). Mr. Bewick came out and Mr. Waggy made the same request, to which Mr. Bewick responded, "I don't want to deal with this right now. I've got to go to a gig," flipping off Mr. Waggy and swearing at him. (RP 396-97).

Mr. Bewick continued to use the basement stairs, yelling and cussing at Mr. Waggy on his next trip up the stairs. (RP 397). Mr. Bewick followed Mr. Waggy onto his lawn, threatening to "kick his a--," and "I'll

f---ing kill you.” (RP 398). Mr. Waggy opened his front door and yelled at his wife to get his weapons. (RP 398). He grabbed a can of pepper spray from behind his front door and ran back to Mr. Bewick, who ran into his house while yelling at Mr. Waggy he was getting weapons. (RP 399).

Three people came out of the house with Mr. Bewick to confront Mr. Waggy on the front lawn. (RP 399-400). Mr. Bewick’s son yelled at Mr. Waggy that he was going to, “...f---ing beat your a--, you f---ing f---got.” (RP 400). The unfamiliar man carried what appeared to be a metal rod. (RP 400). Mr. Bewick whispered something to his wife, and she began recording with her cell phone. (RP 401). Mr. Waggy called 911 while Mr. Bewick again ran back into his house, then emerged behind Mr. Waggy from his basement door. (RP 401). He charged up the basement steps wielding a box and Mr. Waggy found himself stuck between two groups of people. (RP 402). Mr. Bewick reached the top of the stairs and threw the box at Mr. Waggy, hitting him in the face as Mr. Waggy began spraying pepper spray. (RP 403).

Law enforcement arrived shortly thereafter, viewed the video taken by Ms. Bewick and treated Mr. Bewick for the effects of pepper spray. (RP 332-34). Mr. Waggy was charged with Second Degree Assault (CP 11).

The State moved to amend the Information on the morning of trial to charge Third Degree Assault, committed as follows:

That the defendant, Robert M. Waggy, in the State of Washington, on or about October 19, 2018, did, with criminal negligence, cause bodily harm to Christian Bewick, by means of a weapon or other instrument or thing likely to produce bodily harm.

(CP 61, RP 6). The defense did not object. (RP 6). The defense had previously notified the court Mr. Waggy intended to raise a self-defense claim. (CP 24, 138, RP 10).

The defense moved in limine to exclude Mr. Waggy's prior convictions for Third Degree Rape (2000), Second Degree Child Molestation (2000), Harassment (2004), and Harassment (2008), and Harassment (2016). (CP 55-56, 139, RP 25-26).² The court excluded the convictions for Third Degree Rape and Second-Degree Child Molestation, reserving ruling on the three Harassment convictions. (RP 29).

The State called Jason Strand, Staci Bewick, Christian Bewick, and Officer Benjamin Fuson to testify in its case-in-chief. (RP 124, 148, 211, 325). Mr. Strand testified that he was a friend and bandmate of Mr. Bewick's and had been present at the Bewick home on October 19, 2018. (RP 125-126). He had been transferring band equipment from the basement to his van when Mr. Waggy approached and asked him not to use the

² With the exception of the convictions in 2000 for Third Degree Rape and Second Degree Child Molestation, the Judgment and Sentences for Mr. Waggy's prior convictions are not found in the record. They are referred to in this briefing as specifically as possible by the names used in the trial court proceedings.

sidewalk. (RP 129). The two argued, and then Mr. Waggy said, “honey, get my weapon.” (RP 129-30). Mr. Strand went into the house and told Mr. Bewick about what was occurring outside. (RP 130).

Mr. Strand continued to load his van, and was arranging gear inside when he heard a commotion behind him. (RP 131-32). He turned around to see t-shirts and CDs strewn around the yard and Mr. Bewick holding his face. (RP 132).

Ms. Bewick testified to the purchase of the home and the renovation of the basement stairs and sidewalk. (RP 149-156). She testified regarding the snow shoveling incident in December of 2017 and the letters received from Mr. Waggy, and the string barrier placed on the property line, largely consistently with the recitation of facts above. (RP 157-171).³ She testified to being present during the incident on October 18, 2018, and recording a portion of it with her cell phone. (RP 171-73). She stated that her husband had not threatened Mr. Waggy, that he did not throw the box at him, and she observed the effects of the pepper spray. (RP 175-77).

Mr. Bewick testified to the renovation of his home and the installation of the basement stairs and walkway. (RP 211 – 218). He testified

³ Ms. Bewick testified she was calm during the incident rather than yelling at Mr. Waggy as he testified. (RP 160).

about the snow incident, the property line dispute, and the subsequent lawsuit in accordance with the above recitation. (RP 221-238).

Mr. Bewick stated that on October 19, 2018, he exchanged words with Mr. Waggy, flipped him off, shouted profanities at him, but did not threaten him either verbally or with a weapon. (RP 242). After telling his wife to record the events with her cell phone, he went back outside with a box and was pepper sprayed by Mr. Waggy. (RP 244-45). He testified that the pepper spray “burns like crazy,” for the rest of that day and into the following day. (RP 248). Mr. Bewick stated the land dispute had been settled, and the Bewicks would be purchasing the area of land in dispute from Mr. Waggy. (RP 268).

The State’s final witness, Spokane Police Department Officer Fuson, testified to responding to the incident on October 19, 2018. (RP 332). Prior to describing his observations, he outlined his training and experience, which included training with non-lethal weapons like pepper spray. (RP 327). He had been sprayed with pepper spray during his tactical training, and discussed the effects it had on him, as well as the evidence he would look for when there was an allegation it had been sprayed. (RP 327-331). When he responded to the scene that day, he observed that Mr. Bewick’s physical appearance was consistent with having been sprayed with pepper spray. (RP 333). Officer Fuson also testified that he had a chance to observe

Mr. Waggy that day, and he did not appear to have any noticeable physical limitations. (RP 335-36). The State rested following Officer Fuson's testimony. (RP 340).

The defense called Jason Byrnes, Walter Dale, Crystal Waggy, and Mr. Waggy. (RP 201, 304, 344, 374). Mr. Byrnes testified he had helped Mr. Waggy with some work on his roof around October 5, 2018. (RP 202, 203). Mr. Waggy had been very conscious of the property line and asked him not to place a ladder over the line. (RP 204). Mr. Byrnes observed Mr. Bewick knocking on the window and yelling at Mr. Waggy, then watching them work through the window. (RP 204-05).

Walter Dale testified that he was a land surveyor who was hired by Mr. Bewick to survey the property in the fall of 2018. (RP 309). He did the field work for the survey in September of 2018 and then provided the results to Mr. Bewick and his attorney. (RP 309).

Crystal Waggy testified to the history between her family and the Bewicks, including the tree removal incident, the garage rental, the chicken incident, the RV parking incident, and the dispute over snow removal. (RP 344-348, 350-351, 353-354). She stated that members of the Bewick family constantly tried to instigate confrontations with her husband, and had videocameras that recorded the Waggy property. (RP 358, 361-362). This behavior escalated after the lawsuit was filed. (RP 364).

On the day of the charged incident, Ms. Waggy was preparing lunch for her grandchildren when she observed her husband get up from his chair and go outside. (RP 365). She heard him say, “could you please get off my property,” before she looked out the window and saw Mr. Waggy standing in their front yard. (RP 365-366). She saw Mr. and Ms. Bewick, their son, and their male friend having a heated conversation with her husband. (RP 366). Mr. Waggy then came back in the house yelling something, grabbing his pepper spray and running back out. (RP 366).

Ms. Waggy took her grandchildren into the bedroom, then Mr. Waggy came back in yelling he was calling the police. (RP 366). The side of his face was bright red. (RP 366). She looked out in the yard and saw a big box with cassette tapes and a bunch of shirts strewn about. (RP 366). She had not seen the actual incident occur. (RP 367).

Mr. Waggy then testified in his own defense. (RP 374-449). He began with testimony about his family moving into the home and who resided in the nearby homes, including the Bewicks. (RP 374-377). He also discussed the tree removal and rental request from the Bewicks, and later the observation of Mr. Bewick constructing the staircase and walkway. (RP 377-381). He testified about the parking problems. (RP 381-382). While testifying about the dispute with parking his RV in front of the house in August of 2017, Mr. Waggy stated:

...I belong to a group called the Point Man International Ministries. It's a veterans outreach group. Mainly deals with post-traumatic stress with veterans. And I've been with them for 17 years now. We have a summer, I think it's the third weekend in August, and it used to be at Vantage, and now we've been doing it at a little lake up by Newport. I can't remember the name of it. But we had come back from that weekend with the veterans. There's usually about 30 or 40 of us that get together and try to counsel each other and do things...

(RP 382). Later, he went on to briefly describe his military service.

[Defense counsel]: And you mentioned you had served in the military.

[Mr. Waggy]: Yes.

[Defense counsel]: Did you suffer any physical injury while in the military?

[Mr. Waggy]: I was in three helicopter crashes. I was a crewman on —

[Defense counsel]: Take a second.

[Mr. Waggy]: I was a crewman on Stage 53.

...

[Defense counsel]: Before we broke for the afternoon, I was beginning to ask you if you had any physical ailments from your service in the military.

[Mr. Waggy]: Yes.

[Defense counsel]: And could you please describe those ailments for me?

[Mr. Waggy]: I had 23 injuries. The most severe was a head injury, traumatic brain injury. I injured my neck and back. I crushed six vertebrae, like L-3, L-4 down into the lower spine, spinal stenosis, a torn annular disc, a neck injury. I broke my right hand and arm. I have nerve damage that runs down mostly the left side of my body down through my back and leg. Then some minor injuries and the PTSD. And I'm rated a hundred percent service-connected permanent and totally disabled.

[Defense counsel]: And I know you kind of got a little emotional before the break, so I'm not trying to hit a nerve, but can you go through with me some of the symptoms of PTSD?

[Mr. Waggy]: I have extreme hypervigilance, hyperprotectiveness, especially with myself and my family. I have severe anxiety and severe clinical depression that I take medication for.

[Defense counsel]: Do you suffer from seizures of any kind?

[Mr. Waggy]: Yes. That's from the brain injury and the PTSD.

(RP 383, 386-387).

Mr. Waggy went on to testify about the snow shoveling incident, and Mr. Bewick's apology, then the letters he had sent them. (RP 387-392). He testified to being threatened by Mr. Bewick. (RP 393-394). He stated the Bewicks had filed a property claim, resulting in the Bewicks paying the Waggy's \$1,500 for the property they had built on. (RP 394-395).

Mr. Waggy testified that on the day of the incident, Mr. Bewick had threatened to "kick his a--," and "f---ing kill" him. (RP 398). He stated that there were four people in the yard against him, and the Bewick's son had threatened to "beat his a--." (RP 400). He felt threatened that day, testifying as follows:

[Defense counsel]: So is it fair to say you felt threatened?

[Mr. Waggy]: Yes.

[Defense counsel]: That you were afraid?

[Mr. Waggy]: Yes.

[Defense counsel]: Is this based on the incidents that day?

[Mr. Waggy]: Yes, and the prior incidents of his threats. He has threatened me. His son has threatened me. And you know, I think from the time they filed the lawsuit until this incident, I think we had called probably two dozen times to get police reports, but I'm not a hundred percent sure. I know I called. My daughter had called about the videotaping.

(RP 404).

Following Mr. Waggy's direct examination, the court excused the jury. (RP 405). The State moved to admit Mr. Waggy's prior harassment convictions from 2004, 2008, and 2016, and also information contained in the CAD report designating Mr. Waggy as "anti-government" and "anti-law enforcement," as well as evidence of prior standoffs Mr. Waggy had with police. (RP 406-407). The State argued:

To be frank, your Honor, I don't think there are too many doors that haven't been opened by Mr. Waggy's testimony in one way or another. I think even beyond the 404(b) arguments the state was making with respect to intent, knowledge, those types of things have been opened even further with the fact that now Mr. Waggy has alleged that he has serious physical limitations, emotional, mental limitations through the tacit acknowledgment and affirmative representation as to his health and those issues. So I think we're firmly in a place where all of the prior harassment convictions strike straight to the heart of this matter. And I think additionally we also get to a place where the things such as the CAD report under 404(b) that talk about the standoffs with law enforcement and antigovernment, law enforcement, all those things are in.

I think there's also been a door open with respect to through some of the testimony that's come from Mr. Waggy about the lawsuits he's had pending, and also the – I mean, it's all kind of jumbled together through the testimony. But I think through 404(a)(1) and 404(b) we get to a lot of this because Mr. Waggy has put his character for peacefulness at issue. And I think as such, the State's entitled to bring in his history of harassment behavior. And as I said, your Honor, this kind of all dovetails together because with the harassment we have the issues that are tied together with the VA and that harassment charge.

Again, there was significant testimony about his relationship with the VA and as a veteran and with respect to, you know, all the different aspects of his interaction with law enforcement after the

fact in this matter, the T3 warning that was put out due to the altercations they've had with him, or at least the threats of lethal force made against law enforcement. I think it's all going to come in at this point.

(RP 406-408).

The defense again objected to admission of the evidence. (CP 55-57, RP 22-23, 25-26, 411-412, 414-415, 430). In an oral ruling, the trial court found the evidence admissible. (RP 415-418, 429-430). The trial court then entered written Findings of Fact and Conclusions of Law on the evidentiary ruling. (CP 138-144).

The court found:

(18) the defendant made material representations that his physical and mental limitations (PTSD) were significant factors in his decision to engage and use pepper spray on October 19, 2018;

(19) the purpose of his material representations, as well as the presentation of testimony, was to show that the defendant's state of mind and intent at the time he sprayed Chris Bewick with pepper spray on October 19, 2018;

...

(23) The defendant's testimony put his physical health at issue in the years leading up to and at the time of the alleged events on October 19, 2018;

(24) The defendant's testimony put his mental health (PTSD diagnosis) at issue in the years leading up to and at the time of the alleged events on October 19, 2018;

(CP 141-142).

The court concluded:

(3) The defendant's material representations on direct examination "opened the door" to the 2004, 2008, and 2016 Harassment and his prior misconduct;

(4) The defendant's prior misconduct can be used by the State to rebut the defendant's material representations about his physical and mental health from 2004-2018;

(5) The defendant's prior misconduct can be used by the State to rebut the defendant's material representations about his lack of aggressive conduct towards the Bewick family from 2004-2018;

(6) The defendant's misconduct can be used by the State to rebut the defendant's material representations about his knowledge and intent at the time of the alleged events on October 19, 2018;

(7) The 2004, 2008 and 2016 Harassment and the underlying events are admissible pursuant to the "open door" doctrine and ER 404(b);

(8) The CAD report is admissible pursuant to ER 404(b); and

(9) The trial court finds that the prior misconduct of the defendant to be relevant as a result of the defendant's direct examination. ER 401; and

(10) The trial court finds that all of the misconduct evidence proffered by the State to rebut the material assertions made by the defendant is highly probative given the nature of the defendant's testimony on direct examination which far outweighs the prejudicial effect of such evidence. ER 403.

(citations omitted)(CP 143, RP 415-418).

During cross-examination, the State questioned Mr. Waggy regarding his \$5,000 per day usage fee levied upon the Bewicks, then questioned him about the similarities to his demands of the VA leading to his 2016 harassment conviction. (RP 434-436).

[The State]: You're requesting your \$5,000 per us per day fee?

[Mr. Waggy]: Yep.

...

[The State]: So is requesting fines usually the first step that you take?

[Mr. Waggy]: I don't know. That's what the sign says.

[The State]: So you typically, though, do you go request fine until you move on to other portions of your No Trespass sign?

[Mr. Waggy]: I, like in the first letter, I just asked him to remove what he had damaged.

[The State]: *Because fines, fees and force is kind of your thing, isn't it?*

[Mr. Waggy]: I would say no, but however you interpret it.

[The State]: Okay, so you've got the Bewicks up to 500,000 bucks, right?

[Mr. Waggy]: Yeah.

[The State]: Now, is that a similar demand to the one you made to the VA?

[Mr. Waggy]: They're completely separate issues, so I don't see how it's relevant to this, but...

[The State]: Okay. Did you demand a sum of money from the VA, as well?

[Mr. Waggy]: Yes, just the money they actually owed me that they actually admitted they owed me.

[The State]: Didn't you request millions of dollars?

[Mr. Waggy]: Yes.

[The State]: Okay, let's chat about this. How much exactly did you request?

[Mr. Waggy]: I think what you're referring to is the 9.2 million or something like that.

[The State]: That, too, was related to some property?

[Mr. Waggy]: No.

[The State]: Okay. Something you felt you were owed, though?

[Mr. Waggy]: Something I am owed and they actually have admitted that they owed it.

[The State]: Let's talk about your interaction with the VA. Okay. You've had an issue with the VA in the past, correct?

[Mr. Waggy]: Yeah, I do.

[The State]: And you were accused of harassment against the VA?

[Mr. Waggy]: Yep, several times.

[The State]: Subsequently convicted?

[Mr. Waggy]: Yep.

[The State]: As recent as 2016?

[Mr. Waggy]: Yeah. That's on appeal in the Ninth Circuit right now.

[The State]: Because you demanded that the VA pay you \$9.25 million or get off your property?

[Mr. Waggy]: No. I was charged with telephone harassment because I was told to contact the director and I used foul language at the secretary.

[The State]: So you didn't demand that the VA pay you \$9.5 million or quote "get off your property?"

[Mr. Waggy]: That was from what they had brought – that's what the prosecutor brought into the case. That wasn't the actual charge.

[The State]: Okay. But we're not talking about your residence, right? That's different property.

[Mr. Waggy]: No.

[The State]: So you didn't threaten to come to the center to seize property and to quote, "use force to defend himself?"

[Mr. Waggy]: Yeah, I did. But like, again, I don't understand the relevance, because it's not – I don't know. I guess you would have to – we would have to bring in all the people at the VA, my veteran's rep, all the receipts. And I think it's – I think we're straying very far from this.

[The State]: *Fines and force is kind of your thing, isn't it, Mr. Waggy?*

[Mr. Waggy]: If that's what you believe.

(RP 434-436).

The State then went on to question Mr. Waggy about his prior interactions with law enforcement:

[The State]: And you've had issues with law enforcement, haven't you?

[Mr. Waggy]: Yes, I have. Don't trust them.

[The State]: Okay. And I'm holding a CAD report from October 19 of 2018. And on the call out, are you aware that the officers flagged you as ex-military, anti-government, anti-law enforcement, and noted that 'we had many standoffs with him in the past?'

[Mr. Waggy]: I don't know that there were many standoffs, because the only issues I've had were really were these, those harassment things that you talked about.

[The State]: Are you aware that that's why they sent more than usual officers to your house on this particular day?

[Mr. Waggy]: Yep.

[The State]: And at the end of your interaction with law enforcement on October 19, there was an issue, wasn't there?

[Mr. Waggy]: Yes.

[The State]: And you got into an altercation with law enforcement, didn't you?

[Mr. Waggy]: Yes, I did...

(RP 437-438).

Mr. Waggy further admitted to disliking law enforcement, and not trusting them. (RP 443). The State asked him if he knew he only got the designations in the CAD report if he had previously made "lethal threats against law enforcement." (RP 443). He admitted to having a felony harassment conviction from 2005 and another conviction for harassment from 2008. (RP 444). When the State pointed out he was the one with harassment history, not the Bewicks, Mr. Waggy said people were different from entities like the VA. (RP 444). The State then commented:

It looks like from what we've seen, Mr. Waggy, you're going on the same course with the Bewicks that you did with the VA. First you make the demand for money. Then you make the demand for property and reparations, and then it becomes I'm going to use force to defend myself.

(RP 445).

Mr. Waggy denied that he had a history of requesting fines, asking for repairs, and then demanding to use self-defense to regain his property or what was owed to him. (RP 445). He stated that during the incident, he feared mainly for his wife and grandchildren because he did not know what Mr. Bewick was going to do when he said he was going to kill him and go get weapons. (RP 446).

During rebuttal closing argument, the State argued:

The evidence you have in that time and everything that he testified leading up to it talking about his interactions with the Bewicks, everything that had happened, you're entitled to look at it all. You're entitled to look back on his own testimony where he admitted that even since he moved into this residence in that 2004-2018 period, he's been convicted of harassment three times. You get to look back and look at that 2016 conviction where he does something strikingly similar to what he does here: We make a demand for payment or else we're going to go defend ourselves.

You get to look at the fact or look at his background with law enforcement; that he had many standoffs with them. All of that goes to the weight of his testimony that you alone are the sole judges as to the credibility... This is someone who was actively going to engage, wanted to be on the offensive and this was the next step or escalation in his usual mode of operation.

(RP 529-30, 532).

The jury convicted Mr. Waggy of Third-Degree Assault. (CP 90, RP 539). The court sentenced him to 12 months confinement followed by 12 months of community custody. (CP 238, 240, RP 576). The court waived the court costs pursuant to a finding of indigency. (CP 241, RP 580). As a condition of community custody, the court ordered Mr. Waggy to pay DOC supervision fees. (CP 240). It also ordered conditions as follows: not possess or consume alcohol, not possess or consume controlled substances including marijuana without a valid prescription, "participate in the following crime-related treatment or counseling services: per CCO," "other conditions: per CCO." (CP 241).

This appeal timely follows. (CP 249).

E. ARGUMENT

Issue 1: Whether the trial court abused its discretion in allowing testimony of Mr. Waggy’s harassment convictions and other misconduct under the “open door doctrine,” and erred entering Findings of Fact No. 18, 19, 23, and 24, and Conclusions of Law 3, 4, 5, 7, and 9.

Mr. Waggy’s testimony did not link his mental and physical conditions to his decisions regarding the actions taken toward the Bewicks either over the years from 2004-2018, or on October 19, 2018. Findings of Fact No. 18, 19, 23, and 24 were thus unsupported by facts in the record.

Mr. Waggy’s testimony about his status as a veteran and his physical and mental limitations did not make his prior harassment convictions and misconduct relevant. Allowing the State to inquire about such evidence was an abuse of discretion and Conclusions of Law 3, 4, 7, and 9 were made for untenable reasons.

A trial court’s decision to allow rebuttal testimony is reviewed for abuse of discretion. State v. Lang, No. 36397-0-III, ___ Wn. App.2d ___, ___ __ ___, slip op. at 5, 458 P.3d 791, (Wash. Ct. App. Feb. 20, 2020)(citing State v. Horn, 3 Wn. App.2d 302, 310, 415 P.3d 1225 (2018)). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Horn, 3 Wn. App.2d at 312 (citing State v. Dye, 178 Wash.2d 541, 548, 309 P.3d 1192 (2013)). A

decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard. Id.

- A. The trial court erred in entering Finding of Fact No. 18 when Mr. Waggy's testimony about his medical conditions did not link those conditions to his decision to use pepper spray on October 19, 2018, and was thus unsupported by facts in the record.
- B. The trial court erred in entering Finding of Fact No. 19 when the purpose of Mr. Waggy's testimony about his physical and mental health limitations was not show his state of mind or intent at the time he sprayed Mr. Bewick on October 19, 2018.
- C. The trial court erred in entering Finding of Fact No. 23 when Mr. Waggy's testimony did not relate his physical health to his decision to use pepper spray on October 19, 2018, and was thus unsupported by facts in the record.
- D. The trial court erred in entering Finding of Fact No. 24 when Mr. Waggy's testimony did not relate his mental health to his decisions in his dealing with the Bewicks in the years leading up to and at the time of the events on October 19, 2018, and thus was unsupported by facts in the record.

The trial court abused its discretion in entering Findings of Fact No. 18, 19, 23, and 24 when those findings were unsupported by facts in the record. The trial court made inferences that did not follow from Mr. Waggy's testimony.

Mr. Waggy testified that he was involved in a veteran's outreach group and had suffered physical and mental injuries as the result of his

military service. (RP 382-383, 386-387). The information was provided largely as background information. Mr. Waggy never stated that his status as a veteran, or his physical and mental injuries were the reason he decided to use pepper spray on October 19, 2018. Rather, he testified that he had felt threatened and afraid based on the Bewicks' conduct that day and prior threats. (RP 404). Findings of Fact 18 and 23 were thus unsupported by the testimony.

Mr. Waggy also did not relate his mental health or his physical limitations to his decisions in dealing with the Bewicks over the years or on October 19, 2018. The court made inferences that were unsupported by the testimony in entering Findings of Fact 23 and 24.

- E. The trial court abused its discretion in entering Conclusion of Law No. 3 when Mr. Waggy's testimony on direct examination did not make the prior harassment convictions and other misconduct relevant, thus "opening the door."
- F. The trial court abused its discretion in entering Conclusion of Law No. 4 when Mr. Waggy did not claim his physical and mental health from 2004-2018 were factors that impacted his decision to act on October 19, 2018.
- G. The trial court erred in entering Conclusion of Law No. 5 when evidence of prior conduct unrelated to the Bewicks is not relevant to rebut Mr. Waggy's assertions of his lack of aggressive conduct to the Bewicks from 2004-2018.
- H. The trial court abused its discretion in entering Conclusion of Law No. 7 when the fact of Mr. Waggy's prior harassment convictions and the underlying events were not admissible under the "open door" doctrine because his testimony did not make them relevant.

- I. The trial court erred in entering Conclusion of Law No. 9 when Mr. Waggy's prior misconduct did not become relevant as a result of his direct examination.

The Court abused its discretion when it allowed the State to use Mr. Waggy's prior misconduct against him when his testimony about his mental and physical limitations did not make his prior misconduct relevant. Mr. Waggy did not claim that he took the actions he did on October 19, 2018, because of his limitations, but rather because he feared for his family and himself due to the Bewicks' conduct. The testimony was further improper under ER 404(b), addressed below in Issue 2. The trial court abused its discretion in allowing the evidence and in entering Conclusions of Law 3, 4, 5, 7, and 9.

The open-door doctrine is simply a theory of expanded relevance. State v. Rushworth, No. 36077-6-III, ____ Wn. App.2d ____, ____ ____, slip op. at 8, 458 P.3d 1192, (Wash. Ct. App. Feb. 20, 2020). A court may admit evidence that would otherwise be excluded for reasons of policy or undue prejudice when that evidence is raised by the party who benefitted from exclusion. Id. A party can waive protection from a forbidden topic by bringing up the subject. Id. When that happens, the opposing party is entitled to respond. Id.

However, the fact that an ordinarily excluded topic becomes relevant does not result in automatic admission. Rushworth, No. 367077-6-

III, ___ Wn. App.2d at ___, slip op. at 8, 458 P.3d 1197. Evidence is still subject to constitutional requirements, applicable statutes, and the rules of evidence. Id.

"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. The trial court abused its discretion in allowing the State to inquire into Mr. Waggy's prior harassment convictions and other misconduct when Mr. Waggy's testimony did not make either relevant.

Mr. Waggy made his status as a veteran and his physical and mental limitations relevant by providing facts about both during his testimony. (RP 383-383, 386-387). However, rather than appropriately impeaching Mr. Waggy with information challenging his status or limitations, for example medical evidence that would test the degree of his impairment, the State requested the court grant permission to inquire into the unrelated matters of his prior convictions and misconduct. Mr. Waggy's status as a veteran and the fact of his impairments did not become more or less likely by virtue of his prior convictions, despite the State's roundabout argument.

During Officer Fuson's testimony, the State asked whether Officer Fuson observed Mr. Waggy and whether he appeared to suffer any physical impairments. (RP 335-336). This inquiry, although prior to Mr. Waggy's

testimony, was the type of testimony that would be relevant based on Mr. Waggy's recitation of his medical issues.

The State could have properly impeached Mr. Waggy by questioning him regarding the things he was able to do despite his medical conditions. Testimony during the trial had Mr. Waggy shoveling snow, vacuuming, working on his roof, and driving an RV. (RP 202, 203, 351, 353, 396). His ability to do all those things was evidence as to the severity, or lack of severity, of his medical conditions. Instead, the court allowed the State to raise irrelevant and highly prejudicial evidence that was otherwise barred by ER 404(b).

In Lang, the defendant testified in his trial for first-degree robbery and first-degree assault. No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 3, 458 P.3d 791. He denied he was involved in the conduct that led to the charges, despite a prior confession. Id. His defense attorney did not inquire into his mental health and the defendant did not volunteer any of that information. Id. However, during cross-examination, the defendant conceded his prior confession and alleged he had been poisoned. Id. The prosecutor then asked the defendant about his mental health history and tried to get him to concede that he was malingering, or producing false or exaggerated physical or psychological symptoms. No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 3-4, 458 P.3d 791.

The trial court allowed the State to call a psychologist who had evaluated the defendant during the competency process. Lang, No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 4, 458 P.3d 791. The psychologist testified that the defendant was “malingering” his mental health symptoms. Id. He then opined that the defendant’s behavior on the witness stand was consistent with “malingering.” Lang, No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 5, 458 P.3d 791. Since the defendant put his credibility at issue by testifying, the prosecutor could employ appropriate rules of impeachment. Lang, No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 7, 458 P.3d 791. However, explicit statements about a witness’s believability are prohibited since they invade the province of the jury to assess witness credibility. Id. The psychologist’s testimony concluding the defendant was “malingering” on the witness stand was impermissible. Lang, No. 36397-0-III, ___ Wn. App.2d at ___, slip op. at 9, 458 P.3d 791.

Mr. Waggy, similar to the defendant in Lang, put his mental and physical health at issue by his testimony on direct examination. The State was thus allowed to appropriately inquire into his mental and physical health. An appropriate inquiry was not an inquiry into his criminal convictions and prior misconduct; it was an inquiry into the veracity of his physical and mental limitations. Questions regarding those limitations were relevant; questions regarding his prior misconduct were not.

In allowing the State to inquire into Mr. Waggy's prior misconduct, the court misapplied the legal standard of relevant evidence. The trial court's decision to admit the evidence was thus based on untenable grounds, and was an abuse of discretion.

Issue 2: Whether the trial court abused its discretion in admitting testimony of Mr. Waggy's harassment convictions and other misconduct under ER 404(b), and erred in entering Conclusions of Law 6, 8, and 10.

- A. The trial court erred in entering Conclusion of Law No. 6 when evidence of prior unrelated misconduct is not properly admissible to show Mr. Waggy's knowledge and intent at the time of the events on October 19, 2018.
- B. The trial court erred in entering Conclusion of Law No. 8 when the designations in the CAD report are not properly admissible pursuant to ER 404(b).
- C. The trial court erred in entering Conclusion of Law No. 10 when the evidence is not relevant and is highly prejudicial.

The trial court abused its discretion in allowing evidence of Mr. Waggy's prior harassment convictions and other misconduct. The court misapplied the law when it relied on cases that were not applicable to Mr. Waggy's facts. The evidence was not admissible to show motive, intent, knowledge, or absence of self-defense.

Evidence that a defendant has committed other crimes or alleged bad acts is admissible only if relevant for purposes other than to prove the defendant's propensity to commit the crime charged and only if its probative value is not substantially outweighed by its prejudicial

impact. ER 404(b); ER 403; see State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Specifically, to admit evidence of other crimes or bad acts 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 of the evidence against its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); State v. Burkins, 94 Wn. App. 677, 687, 973 P.2d 15 (1999).

The trial court must identify the purpose of the evidence and conduct the balancing on the record. State v. Jackson, 102 Wn.2d 689, 693-694, 689 P.2d 76 (1984). ER 404(b) identifies proper purposes as including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The court will resolve doubtful cases in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

The trial court identified “intent” as one of the purposes for admission of both Mr. Waggy’s prior convictions and the other designations delineated in the CAD report identifying him as “anti-government, anti-law enforcement...” (CP 143).

When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act ‘goes to intent’ is not a ‘magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].’

Wade, 98 Wn. App. at 334 (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 696 (1982)).

Mr. Waggy was charged with third degree assault and claimed self-defense. His claim of self-defense meant he conceded having the requisite intent to commit the crime, and rather claimed that his commission of the crime was justified. Intent was never an issue in Mr. Waggy’s case.

Further, while the State posited a roundabout theory to the trial court as to the purpose for introducing the evidence of Mr. Waggy’s prior bad acts, the cross-examination of Mr. Waggy and the State’s closing argument clearly show that theory was a bluff that allowed the prosecutor to argue propensity. During cross-examination, the prosecutor repeatedly asked Mr. Waggy if fines and force was “kind of your thing.” (RP 434-436). The prosecutor then commented,

It looks like from what we’ve seen, Mr. Waggy, you’re going on the same course with the Bewicks that you did with the VA. First you make the demand for money. Then you make the demand for property and reparations, and then it becomes I’m going to use force to defend myself.

(RP 445). Then during closing argument, the prosecutor argued that

You're entitled to look back on his own testimony where he admitted that even since he moved into this residence in that 2004-2005 period, he's been convicted of harassment three times. You get to look back and look at that 2016 conviction where he does something strikingly similar to what he does here: We make a demand for payment or else we're going to go defend ourselves.

You get to look at the fact or look at his background with law enforcement; that he had many standoffs with them. All of that goes to the weight of his testimony that you alone are the sole judges as to the credibility...This is someone who was actively going to engage, wanted to be on the offensive and this was the next step or escalation in his usual mode of operation.

(RP 529-30, 532).

The State did not use Mr. Waggy's prior misconduct to argue intent, which was not at issue. It used it to argue that Mr. Waggy exhibited the same behavior before, and that he was the type of person who wanted to engage in confrontations as evidenced by his prior standoffs with law enforcement. This is clearly a propensity argument.

In State v. Richards, No. 76858-1-I, 2019 WL 1772360 at *1, (Wa. Ct. App. April 22, 2019)⁴, the defendant claimed he had fired his rifle in the air in self-defense to scare the alleged victim. The State sought to admit evidence of a prior incident in which the defendant had shot a firearm into

⁴ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

the air to scare his neighbor's dog. Richards, 2019 WL 1772360 at *2.⁵ The State argued that this evidence was to show a common scheme or plan, the defendant's state of mind and his motive, and the absence of self-defense. Richards, 2019 WL 1772360 at *3.⁶ The trial court admitted the evidence to show the defendant's intent and motive and an absence of self-defense, concluding his prior actions had the requisite similarity because, "[t]he Defendant is alleged to have been angry and discharged a firearm to scare someone in both cases." Id.⁷

The appellate court ruled the trial court had abused its discretion in admitting evidence of the prior incident. Richards, 2019 WL 1772360 at *3.⁸ The prior incident did not have sufficient similarities, nor were the facts uniquely similar enough to outweigh the potential prejudice to the defendant. Richards, 2019 WL 1772360 at *4.⁹ Further, since the defendant's motive for shooting the rifle in the alleged victim's presence and the motive for shooting the rifle in the prior incident were different, such evidence was not admissible to show motive. Id.¹⁰

⁵ See footnote 4.

⁶ See footnote 4.

⁷ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

⁸ See footnote 7.

⁹ See footnote 7.

¹⁰ See footnote 7.

The court also found the trial court had abused its discretion in allowing the evidence to rebut a claim of self-defense when the prior incident did not involve a claim of self-defense. Richards, 2019 WL 1772360 at *5.¹¹

The reasoning employed in Richards is similarly applicable to the evidence of prior convictions and misconduct in Mr. Waggy's case. The record is sparse regarding the facts of Mr. Waggy's prior convictions. However, none of the prior harassment convictions involve the Bewicks, and there is no showing of factual similarity that would overcome the prejudice to Mr. Waggy in admission of the facts of those prior convictions. Mr. Waggy is not alleged to have used force in the prior incidents, and in fact the charges are entirely different than in this case. His motivation for using force in this case and yelling at someone on the telephone with the VA are not the same, nor did the court make a finding that it was admitting the prior conduct to show motive. None of Mr. Waggy's prior misconduct appears to involve a claim of self-defense, so the reasoning employed in Richards also applies here.

The trial court in Mr. Waggy's case relied upon State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995), and State v. Gakin, 24 Wn. App.

¹¹ See footnote 7.

681, 603 P.2d 380 (1979), to support its ruling admitting Mr. Waggy's prior misconduct. Neither are applicable. The trial court misapplied the law and abused its discretion in admitting the prior convictions and misconduct.

The defendant in Medrano was charged with residential burglary and raised a diminished capacity defense, which he claimed prevented him from forming the necessary intent to commit the crime. 80 Wn. App. at 110. The State called a doctor to testify that the defendant was not suffering from diminished capacity. Id. During his testimony, the doctor referred to the defendant's prior convictions for second-degree burglary and second-degree theft. Id. The defendant also referred to the convictions in his own testimony. 80 Wn. App. At 112. The court found that evidence of the prior crimes was relevant given the diminished capacity defense the defendant had raised, and any prejudice was created by the defendant himself in mentioning the convictions during his testimony. Id. at 113.

Mr. Waggy, unlike the defendant in Medrano, did not raise a diminished capacity defense or any defense that called his intent into question. He admitted by asserting self-defense that he intended to assault Mr. Bewick with the pepper spray, but argued it was justified because of his fear. Intent was never an issue in Mr. Waggy's case, and

the trial court misapplied the law by using the Medrano case to support its ruling.

In Gakin, the defendant was also charged with burglary. 24 Wn. App. at 681. The alleged burglar had drilled two holes near the handle of a safe to gain entry. Id. at 682. During his direct examination, the defendant claimed he did not know how to drill a hole in a safe to gain entrance. Id. at 683. Unfortunately, in a prior burglary, the defendant had signed a written confession in which he described how he successfully drilled into the safe at the burglarized business. Id. at 684. The prosecutor was appropriately allowed to use the defendant's prior confession to challenge the defendant's asserted lack of knowledge. 24 Wn. App. at 687.

The facts of Gakin are similarly inapplicable to the facts of Mr. Waggy's case. Mr. Waggy did not assert in his direct examination that he lacked knowledge as the result of any of his limitations. He admitted to pepper-spraying Mr. Bewick, and claimed it was justified. The trial court misapplied the Gakin case to the facts of Mr. Waggy's case.

The trial court abused its discretion when it allowed the State to inquire into Mr. Waggy's prior harassment convictions and other misconduct referred to in the CAD report. The evidence was not

admissible to show intent, knowledge, motive, or lack of self-defense under ER 404(b).

Issue 3: Whether the error in allowing the testimony of Mr. Waggy's prior harassment convictions and misconduct materially affected the outcome of the trial.

A reviewing court will not reverse due to error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). “[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id. at 871 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961(1981)).

The trial court's error in admitting the inadmissible testimony of Mr. Waggy's prior misdeeds materially affected the outcome of the trial. The State impermissibly used the evidence, both in Mr. Waggy's cross-examination and in closing argument. The prosecutor's argument invited the jury to convict Mr. Waggy based on propensity, and no jury instruction was given as to use of the highly prejudicial evidence. Since Mr. Waggy had been the harasser before, assaulted police officers, and did not believe in government or law enforcement; the jury would have seen his claim of self-defense as less reasonable. The jury should have focused on the facts of the interactions between the Bewicks and the Waggys. However, the evidence of the other misconduct would have

been so prejudicial that it is likely the outcome of the trial would have been different had the jury not heard about it. Mr. Waggy's conviction should be reversed and the case remanded for a new trial.

Issue 4: Whether the trial court erred by imposing four unauthorized community custody conditions.

The trial court erred in imposing the following conditions of community custody: (1) requiring Mr. Waggy to pay supervision fees as determined by DOC; (2) requiring Mr. Waggy to not possess or consume alcohol, and to not possess or consume controlled substances including marijuana without a valid prescription; and (3) participate in the following crime-related treatment or counseling services: "per CCO," and other conditions: "per CCO." (CP 240-241, RP 550, 577). Should the court choose not to reverse Mr. Waggy's conviction and remand the case for a new trial, these conditions should be stricken from his judgment and sentence.

Mr. Waggy challenges these community custody conditions for the first time on appeal. Sentencing errors may be raised for the first time on appeal. See State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008) (stating that "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.") (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

This Court has found it has discretion to decline to review certain objections to community custody conditions raised for the first time on appeal. State v. Peters,

10 Wn. App. 2d 574, 580-83, 591, 455 P.3d 141 (2019); State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137, review denied, 193 Wn.2d 1029 (2019). In Peters, the Court stated, “for an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as Blazina¹² explains, is ‘illegal or erroneous’ as a matter of law, and (2) it must be ripe.” Peters, 10 Wn. App. 2d at 583. The Court further stated “[w]e are not required to consider an argument that a sentencing condition is not crime-related when the offender had the opportunity to raise the contention in the trial court, creating a record, and failed to do so.” Id. at 591.

However, subsequent to Peters, a panel of this Court considered challenges to community custody for the first time on appeal, including considered challenges to four community custody conditions as not crime-related. State v. Alvarez, No. 35567-5-III, 2019 WL 5566355, *8-11 (Wash. Ct. App. Jan. 23, 2020).¹³ Prior to considering these challenges, the Court stated “[d]efendants may generally challenge community custody conditions that are contrary to statutory authority for the first time on appeal.” Id. at *8¹⁴ (citing Bahl, 164 Wn.2d at 745).

Mr. Waggy asks this Court to exercise its discretion and consider his challenges to community custody conditions below, for the first time on appeal.

¹² State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

¹³ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

¹⁴ See footnote 14.

See Bahl, 164 Wn.2d at 744-45; see also Alvarez, 2019 WL 5566355, at *8-11.¹⁵

As set forth below, the record contains the facts necessary to consider the challenges.

Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. See, e.g., State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

a. Whether the trial court erred by requiring Mr. Waggy to pay supervision fees as determined by DOC.

¹⁵ See footnote 14.

The trial court erred in imposing a condition of community custody requiring Mr. Waggy to pay supervision fees as determined by DOC, because this fee is a discretionary legal financial obligation (LFO), and the trial court found Mr. Waggy indigent. This condition should be stricken from the judgment and sentence.

The trial court erred in imposing a condition of community custody requiring Mr. Waggy to pay supervision fees as determined by DOC. (CP 240). The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. See State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) (holding that costs of community custody are discretionary LFOs); see also State v. Lilly, No. 78709-8-I, 2019 WL 6134572, *1 (Wash. Ct. App. Nov. 18, 2019) (recognizing and applying the holding from Lundstrom);¹⁶ RCW 9.94A.703(2)(d) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to “[p]ay supervision fees as determined by the department[.]”).

Discretionary LFOs cannot be imposed on a defendant who is indigent at the time of sentencing. See RCW 10.01.160(3); see also RCW 10.101.010(3)(a)-(c) (defining indigent). Mr. Waggy was indigent at sentencing. (RP 580-81).

¹⁶ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

Therefore, the condition of community custody requiring Mr. Waggy to pay supervision fees as determined by DOC should be stricken. See State v. Taylor, Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184, *4 (Wash. Ct. App. June 25, 2019) (holding that because the defendant was found indigent at sentencing, the community custody supervision fee must be stricken under RCW 10.01.160(3)); see also State v. Reamer, Nos. 78447-1-I, 78506-1-I, 2019 WL 3416868, *5 (Wash. Ct. App. July 29, 2019) (directing the trial court to strike this condition on remand); State v. Redmann, No. 36689-9-III, 2020 WL 242490, *1-2 (Wash. Ct. App. Jan. 16, 2020) (considering the issue of whether the trial court erred in imposing community custody supervision fees for the first time on appeal, and remanding the case for the trial court to conduct an inquiry into the defendant's financial status); but see State v. Abarca, No. 51673-0-II, 2019 WL 5709517, *10-11 (Wash. Ct. App. Nov. 5, 2019) (concluding that a community custody supervision assessment is discretionary, but it is not a cost requiring an inquiry into the defendant's ability to pay; nonetheless encouraging the trial court to reconsider the imposition of this assessment on remand).¹⁷

b. Whether the trial court erred by requiring Mr. Waggy not to possess or consume alcohol, or possess or consume controlled substances, including marijuana, without a prescription as conditions of community custody.

¹⁷ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

The trial court erred in imposing conditions of community custody requiring Mr. Waggy not to possess or consume alcohol, or controlled substances, including marijuana, without a prescription, because there is no evidence that alcohol or drugs contributed to the offense, or that these requirements are crime-related. These conditions should be stricken from the judgment and sentence.

A trial court's sentencing authority is limited to that granted by statute. Leach, 161 Wn.2d at 184. The trial court may order an offender to do the following, as part of a term of community custody:

- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

.....

- or (f) [c]omply with any crime-related prohibitions.

RCW 9.94A.703(3)(c), (d), (f). The Court of Appeals "has struck crime-related community custody conditions when there is 'no evidence' in the record that the circumstances of the crime related to the community custody condition." State v. Irwin, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

In State v. Jones, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). The court further found that "alcohol counseling

‘reasonably relates’ to the offender’s risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” Id. at 208.

Here, the trial court imposed community custody conditions requiring Mr. Waggy to refrain from possessing or consuming alcohol or controlled substances, including marijuana. (CP 241). However, there is no evidence in the record that alcohol or drug use contributed to the crime for which Mr. Waggy was convicted, nor that these prohibitions were crime-related.

The trial court erred by requiring Mr. Waggy refrain from possessing or consuming alcohol or marijuana, the conditions were not crime-related. See Jones, 118 Wn. App. at 207-08; *see also* RCW 9.94A.703(3)(c); State v. Warnock, 174 Wn. App. 608, 611-14, 299 P.3d 1173 (2013) (the trial court erred in ordering evaluation and treatment for substance abuse, where there was no evidence that anything other than alcohol contributed to the offense).

Therefore, the condition of community custody requiring Mr. Waggy not to possess or consume alcohol or other non-prescribed controlled substances, including marijuana, should be stricken. See O’Cain, 144 Wn. App. at 775 (setting forth this remedy).

c. Whether the trial court erred in requiring Mr. Waggy to participate in the following crime-related treatment or counseling services: “per CCO,” and other conditions: “per CCO.”

The trial court may impose a sentence only if it is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Sentencing courts do have the power to delegate some aspects of community placement to probation. State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).¹⁸ However, sentencing courts may not delegate excessively. Id. at 642; RCW 9.94A.704. A sentencing court “may not wholly ‘abdicate [] its judicial responsibility’ for setting the conditions of release.” Sansone, 127 Wn. App. at 643 (quoting United States v. Loy, 237 F.3d 251, 266 (3rd Cir. 2001) (quoting United States v. Mohammad, 53 F.3d 1526, 1538 (7th Cir. 1995))).

In State v. Williams, the defendant argued that it was an improper delegation of judicial authority to allow the probation department to establish the specific conditions of his probation. State v. Williams, 97 Wn. App. 257, 264, 983 P.2d 687 (1999). The Court agreed that the precise delineation of the terms of probation is a core judicial function. Id. at 264-

¹⁸ While it is the function of the judiciary to determine guilt and impose sentences, “the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in nature and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.” Sansone, 127 Wn. App. at 642 (quoting State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937)).

65. “The task cannot be delegated to a probation officer, treatment provider, or other agency.” Williams, 97 Wn. App. at 264.¹⁹

Here, the trial court allowed DOC to determine additional community conditions, without limitation. (CP 241). This is an excessive delegation of the sentencing court’s authority to DOC. See Sansone, 127 Wn. App. at 642. Mr. Waggy was not put on notice as to what would result in him violating his community custody and being incarcerated. See Sansone, 127 Wn. App. at 644.

Accordingly, this court should remand this case with an order that the trial court strike the community custody conditions permitting, “[o]ther conditions: as determined by D.O.C.” and requiring, “participate in the following crime-related treatment or counseling services: per CCO.” (CP 241); see O’Cain, 144 Wn. App. at 775 (setting forth this remedy).

F. CONCLUSION

The trial court abused its discretion when it allowed the State to inquire into Mr. Waggy’s harassment convictions from 2004, 2008, and

¹⁹ Although the Court agreed that delineating terms of probation is a core judicial function, it ultimately concluded that no reversible error occurred where the sentencing court advised probationer of the right to a hearing, the conditions of probation were clear and understandable, and the court ratified the terms recommended by the probation officer or treatment agency and adopted them as its own. *Williams*, 97 Wn. App. at 265. *See also State v. Wilkerson*, 107 Wn. App. 748, 756, 31 P.3d 1194 (2001).

2016, his prior standoffs with law enforcement, and his designations in the CAD report as “anti-law enforcement” and “anti-government.” Mr. Waggy’s factual testimony about his status as a veteran and his physical and psychological injuries did not make this evidence relevant when he did not link those facts to his actions toward his neighbors either over the years or on October 19, 2018. The evidence was further prohibited under ER 404(b) when the State used it for propensity in both its cross-examination and closing arguments. The trial court misapplied the law when it found the evidence was admissible to show lack of self-defense, intent, or state of mind.

Allowing the jury to hear such highly prejudicial evidence that Mr. Waggy had been of harassment three prior times, and that he had many stand-offs with law enforcement, as well as designations of “anti-government” and “anti-law enforcement” materially affected the outcome of the trial. The outcome likely would have been different had the jury not heard that evidence. The case should be reversed and remanded for a new trial.

Should the court decline to reverse and remand for new trial, the trial court further erred when it entered four unauthorized community custody conditions: (1) requiring Mr. Waggy to pay supervision fees as determined by DOC; (2) requiring Mr. Waggy to not possess or consume alcohol, and

to not possess or consume controlled substances including marijuana without a valid prescription; and (3) participate in the following crime-related treatment or counseling services: “per CCO,” and other conditions: “per CCO.” (CP 240-241, RP 550, 577). The court found Mr. Waggy indigent at sentencing and should have waived supervision fees. That condition should be stricken from the judgment and sentence.

No evidence existed in the record showing that alcohol or non-prescribed drugs were involved in the offense. Those conditions are not crime-related and should be stricken from the judgment and sentence.

The court erred in allowing the CCO to determine appropriate treatment or counseling services, and ordering a blanket, “other conditions: per CCO.” The trial court improperly delegated these decisions to the CCO, and such conditions should be stricken from the judgment and sentence.

Respectfully submitted this 15th day of June, 2020.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 37260-0-III
vs.)
ROBERT M. WAGGY) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Brooke D. Hagara, counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 15, 2020, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's Opening Brief to:

Robert M. Waggy
1517 W. 7th Ave.
Spokane, WA 99204

Having obtained prior permission from the Respondent, I also served the same at on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 15th day of June 2020.

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