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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT M. WAGGY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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 in entering Findings of Fact Nos. 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 trial.
4. The trial court erred by imposing four unauthorized community custody conditions.
5. The trial court erred by requiring Mr. Waggy to pay supervision fees as determined by the Department of Corrections.
6. 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.
7. The trial court erred in requiring Mr. Waggy to participate in the following crime-related treatment or counselling services: "per CCO," and other conditions "per CCO."

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when permitting the State to introduce evidence of Mr. Waggy's prior bad acts, after ruling that Mr. Waggy's testimony during direct examination opened the door to that otherwise irrelevant evidence?
2. Did the trial court err by requiring Mr. Waggy to pay a discretionary legal financial obligation when his sole source of income derives from federal assistance?

3. Did Mr. Waggy preserve a crime-related challenge to community custody conditions requiring him not to use, possess or consume alcohol or controlled substances? If so, are those conditions independently authorized by statute?
4. Did the trial court excessively delegate its authority to the Department of Corrections when requiring Mr. Waggy to participate in mental health treatment and counselling services per the direction of his community custody officer?

III. STATEMENT OF THE CASE

Robert Waggy appeals from his conviction for third degree assault. CP 235. The assault occurred when Mr. Waggy pepper-sprayed his neighbor, Chris Bewick, on October 19, 2018, amidst a contentious property dispute. CP 2, 3; Ex. P-12.

Chris and Stacy Bewick purchased a residence in Spokane, Washington, in 2001. RP 149-51. Mr. Waggy moved in to the residence next door a few years later. RP 153-55. Around the year 2005, Mr. Bewick installed a rear stairwell to reach the basement of his home. RP 155. In 2012, the Bewicks installed a sidewalk very near the side of their residence to reach the stairwell, in between or possibly abutting both the Bewick and Waggy properties. RP 155, 226-27. In December 2017, Mr. Waggy sent a demand letter of payment to the Bewicks for the improvements. RP 156-62.

Mr. Waggy had placed a “no trespassing” sign near the disputed property. RP 162, 432. The sign warned potential trespassers that the property owner would use force to remove them, that the property owner

would fine trespassers up to \$10,000 or imprison them for not more than 10,000 years. RP 162, 433. The sign charged trespassers a \$5,000 fee per use per day and included law enforcement in the category of trespassers. RP 162, 433-34. Mr. Waggy billed the Bewicks \$500,000 for their repeated “trespasses” on the disputed property in the year of 2018, prior to the assault on October 19, 2018. RP 162, 166, 433-34.

On October 19, 2018, Jason Strand was visiting Mr. Bewick to pick up band equipment for a band “gig” the two were to perform later that evening. RP 124-27. The band commonly stored its equipment in the Bewick residence basement, and the band members regularly used the stairwell and disputed sidewalk to transport the equipment to the street. RP 128-29, 240-41.

Mr. Strand carried some equipment out of the basement, using the stairwell and sidewalk between the two properties, to the street in front of the residence. RP 129-30. After the third or fourth trip, Mr. Waggy, who had come outside of his residence and was seated on his porch, ordered Mr. Strand not to use the sidewalk. RP 129. Mr. Strand went inside to tell Mr. Bewick. RP 130. Mr. Waggy used his phone to call law enforcement, and hollered, “Honey, get my weapon.” RP 129-30. Mr. Strand thought it strange that Mr. Waggy appeared to be calm and collected. RP 131.

Mr. Bewick went into the basement to retrieve more band equipment. RP 175, 244. Mr. Bewick emerged from the basement and began walking down the sidewalk, both hands full carrying a box of equipment. RP 175, 244. He did not orally threaten or approach Mr. Waggy. RP 175-77, 242-43. Mr. Waggy suddenly strode several steps towards Mr. Bewick and sprayed pepper-spray in his face. RP 175-77, 244. Mr. Bewick reacted by throwing the box at Mr. Waggy and running into his home to douse his face in an effort to remove the spray. RP 176, 191, 245.

The Bewicks video-recorded the assault with a cellular phone. *See* RP 173; Ex. P-12. Ms. Bewick and her son, Josh, stood on the sidewalk between the two properties, in front of their residence, while Mr. Waggy stood on his lawn, roughly fifteen or twenty feet away in the center of his lawn, as he was on the telephone call with police. Ex. P-12 at 00:02-00:40. The Bewick family spoke quietly, but did not communicate audible threats to Mr. Waggy. Ex. P-12 at 00:04-00:40. Mr. Waggy noticed Mr. Bewick walking down the sidewalk between the two properties. Ex. P-12 at 00:42. The video shows Mr. Waggy shaking the bottle of pepper spray, taking at least six full steps to approach the sidewalk, and then deploying the pepper-spray at Mr. Bewick, without any audible or visible provocation. Ex. P-12 at 00:42-00:48.

The State originally charged Mr. Waggy with second degree assault, and later amended the charge to third degree assault. CP 11, 61. Prior to trial, the State moved the court in limine to permit it to introduce rebuttal evidence of Mr. Waggy's prior harassment convictions pursuant to ER 404(b), in the event that Mr. Waggy's testimony opened the door to rebuttal evidence. CP 268-72. Mr. Waggy moved the court in limine to exclude such evidence. CP 54-59. The parties discussed at length the intersection of prior bad acts with Mr. Waggy's asserted self-defense claim. RP 13-26, 60-67, 82-91. The State advised the court that it was not seeking to elicit prior bad act evidence in its case-in-chief, but rather intended to use it only in rebuttal, and only then if Mr. Waggy first opened the door to making the evidence relevant. RP 21-22, 60-61. The court reserved ruling on the motion until after Mr. Waggy testified. RP 26, 69-70.

Mr. Waggy's testimony and ER 404(b) ruling.

Mr. Waggy testified on his behalf. RP 373. Mr. Waggy characterized the Bewicks as angry neighbors, who had been harassing his family since roughly 2006. RP 378-79. Mr. Waggy testified that he had served in the military, and suffered from post-traumatic stress disorder, as well as a number of physical ailments. RP 386-87. Mr. Waggy described himself as hypervigilant and hyper-protective as a result of his injuries. RP 387.

Mr. Waggy described the contentious property dispute, as well as a parking dispute. RP 378-82. Mr. Waggy described a snow-shoveling incident wherein he claimed that Ms. Bewick angrily confronted him. RP 388. Mr. Waggy described her as generally confrontational, while characterizing himself as respectful. RP 389. Mr. Waggy also described a conversation he had with Mr. Bewick, where he stated that he had been “pestered” “over the last 10 years” by the Bewick family, but that he had always been sorry and willing to resolve the on-going issue. RP 390. Mr. Waggy espoused that he was the target of Ms. Bewick’s constant complaints and anger. RP 390. Mr. Waggy stated that after 10 years he “had enough” of Ms. Bewick. RP 391.

Mr. Waggy also accused Mr. Bewick of getting confrontational “and all that stuff” after he sent the Bewicks the \$500,000 demand letter about the disputed property. RP 391-93. Mr. Waggy described Mr. Bewick confronting him at his door, upset over the letter. RP 393-94. Mr. Waggy characterized Mr. Bewick as angry, while minimizing his own response, claiming that he calmly went back inside after stating the law supported his demand letter. RP 394. The relationship became “more strained” after that incident. RP 394.

Regarding the charged assault, Mr. Waggy explained that he politely asked Mr. Strand to stop using the sidewalk. RP 396. Mr. Waggy

testified that Mr. Bewick came outside, and became angry and confrontational. RP 397. He claimed Mr. Bewick threatened to assault him. RP 397-98. When Mr. Bewick said he would continue using the sidewalk, Mr. Waggy told him that he would “keep [him] off my property.” RP 398. Mr. Waggy testified that Mr. Bewick threatened to kill him, before walking away. RP 398.

Mr. Waggy yelled at his wife to get his weapons, and then grabbed a bottle of pepper spray and walked outside. RP 399. Mr. Waggy testified that Mr. Bewick said he was going to get his own weapon, and the entire Bewick family came outside and began to video record the incident. RP 399-400. Mr. Waggy claims the Bewicks made threats. RP 400. Mr. Waggy described the moment of the assault:

When he saw that I saw him, he ducked back inside. I didn't know what he was doing. So I walked over, because it was kind of obscured by our bushes, so I started walking over there and the next thing I know he's charging up the step with a box. He's got it like this. And I stopped. I hear the yelling behind me, I think it was [Mr. Bewick's son], saying, he was saying, you know, “you better not or I'll beat your ass,” or something. And Chris is charging at me and I realized I was stuck between two groups of people. And I didn't know where Mr. Strand was. So I held up the pepper spray, and as I started to pepper spray Chris, the box slams into my face.

RP 402.

The State asked the court to excuse the jury to resolve the reserved motion in limine regarding the ER 404(b) evidence. RP 406. The State

argued that Mr. Waggy had opened the door to prior bad act evidence, by testifying as to the decade-long course of harassment from the Bewicks, his peaceful character in response, and his own physical and mental limitations from his injuries. RP 406-10, 412-14. The State intended to introduce evidence: (1) that Mr. Waggy had two prior convictions for harassment from 2004 and 2008, (2) that Mr. Waggy had a prior conviction for harassment from 2016, wherein he demanded a 9.2-million-dollar fee from the Veteran's Administration, claimed property that the Veteran's Administration owned, and then told the Veteran's Administration that if they did not acquiesce to his demands, he would travel to the property he claimed and use force to defend the property, and (3) a police report generated on the night of the assault that warned Mr. Waggy was an aggressive, confrontational individual who had threatened to kill law enforcement during past encounters. CP 139-43.

The State asserted the ER 404(b) evidence would be used to rebut Mr. Waggy's testimony concerning his peaceable nature, and that he had been the victim of years of harassment. RP 407. The State also argued that it had the burden to disprove self-defense and could introduce rebuttal evidence to demonstrate Mr. Waggy's state of mind and absence of self-defense. RP 414. The State also argued that the 2016 harassment incident, in particular, constituted *res gestae* or showed a common scheme because

of the similar demands of payment, claims of property, and assertions of using force to defend the property. RP 412-14.

The court orally ruled the evidence admissible:

Here is my ruling: 404(b) provides that “evidence of other crimes, wrongs, or acts” –I’m focusing on acts – “are not admissible to prove the character of a person in order to show action, conformity therewith. It may,” i.e, the acts, “however, be admissible for other purposes, such as proof of motive, intent, or absence of mistake.” And that’s not an all inclusive. Those are really just examples.

And in Tegland’s handbook on 404(b) on page 199 in Section 404:22, under the heading Opening the Door to Clarification or Explanation, “As mentioned immediately above, the courts have occasionally held that material assertions by the defense, e.g. claiming to have acted in self-defense, may open the door to rebuttal with evidence of misconduct that would otherwise be barred by 404(b).”

And here I’m finding that several aspects fall into the “other purposes” category. One certainly is opening the door. Another is intent or mode or reasonable apprehension of fear, because the instruction itself in pertinent part reads “the person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person” - - and now emphasize – “*taking into consideration all the facts and circumstances known to the person,*” here Mr. Waggy, “*at the time of and prior to the incident.*”

And he took the stand and opened the door to his state of mind, what was he thinking at the time when he pepper sprayed his neighbor by favorably referring to post-traumatic stress disorder, a brain injury, coupled with perceptions of fear or threat. I think that these other events, these other acts clarify or explain the state of mind that Mr. Waggy had and that he repeatedly exhibits.

Also, with respect to intent, Section 404:21 in Tegland’s Handbook under the heading Prior Misconduct Admissible to Show Intent Generally is the caption, it says

“Evidence of other misconduct may be admissible to include intent assuming intent is actually at issue, and then only when the evidence in some tangible way links the defendant to the crime with which the defendant is charged.”

Here, we’re not so much focused on the crime of the assault, but we’re focused on what was in Mr. Waggy’s mind when he took it upon himself to run around the hedge, as exhibited in the video, and spray his neighbor with pepper spray.

And so, again, under the rubric of intent, I think that the evidence is being admitted, again, to show state of mind and what his intent was with one of fear or threat or was his intent one of inflicting some kind of harm on his neighbor. And the jury will decide that. But for those reason, and much of the argument that was provided by Mr. Whaley, *I think that the way that Mr. Waggy chose to testify in his case-in-chief brought about my ruling. Had he done no more than taken the stand and testified about the, for example, it’s not by way of exclusions, had he taken the stand and simply testified to how he felt right there at that right and why he ran around the hedge and sprayed Mr. Bewick in the face with the pepper spray, it might be a different circumstance. But there was a great deal of favorable testimony where Mr. Waggy tried to characterize his state of mind, his perception that necessitates this other purposes evidence that the State is proffering.* For those reasons, I’m going to allow it.

RP 415-18 (emphasis added). The court also directed the State to prepare a written order. RP 418. The order summarized and incorporated the oral ruling, as well as the procedural history of the motions in limine:

6. The defendant had a prior felony harassment conviction stemming from events on March 19, 2004 (generally referred to by the parties as “2004 Harassment”);
7. The defendant had a prior misdemeanor harassment conviction stemming from events on February 5, 2008 (generally referred to by the parties as “2008 Harassment”);

8. The defendant had a prior misdemeanor conviction out of the Eastern District of Washington stemming from events that occurred in April 2016 (generally referred to by the parties as “2016 Harassment”);

...

11. The State advised the trial court that it did not intend to present any evidence as to the 2004 Harassment, 2008 Harassment, or 2016 Harassment in its Case-in-Chief, but that such evidence may become relevant and admissible if the defendant “opened the door” to the issues of knowledge, intent, or to rebut material assertions of fact made by the defendant during direct examination;

...

13. Neither the 2004, 2008, or 2016 Harassment convictions, or the underlying events of those convictions, were mentioned or presented in the State's Case-in Chief;

...

15. The defendant testified, after having the opportunity to seek advice from defense counsel, on November 6, 2019;

16. The defendant’s testimony on November 6, 2019, addressed the following:

- a. His status as a veteran;
- b. His training and experience as a Marine;
- c. His past and current relationship with other veterans and veteran associations;
- d. His status as a “completely disabled” veteran, including extensive recitation of his physical disabilities and Post-Traumatic Stress Disorder (PTSD) diagnosis;
- e. His general experience with aggressive behavior exhibited by the Bewick family since he moved next door in 2004;
- f. His subjective feelings that he was being “harassed” by the Bewick family after he moved next door in 2004;
- g. Specific instances where he observed Chris Bewick and Staci Bewick be aggressive towards him after he moved next door in 2004;

h. His belief that the Bewick family was being aggressive in an attempt to intimidate in the years prior to the October 19, 2018[,] incident;

i. His non-aggressive response(s) to the “aggressive” and “harassing” conduct of the Bewick family after he moved next door in 2004;

j. His belief that he had done nothing to warrant or encourage the “aggressive” or “harassing” conduct from the Bewick family after he moved next door in 2004;

k. His assertion that Chris Bewick had threatened his life and physical safety immediately before using pepper spray on October 19, 2018;

l. His non-aggressive response and demeanor on October 19, 2018;

m. His assertion that he needed to use force (i.e. pepper spray) to defend himself on October 19, 2018 as a result of the past “aggressive” interactions with the Bewick family in the years leading up to and on the day of this incident; and

n. His assertion that he needed to use force (i.e. pepper spray) in order to defend himself as a result of his own physical and mental disabilities.

17. The culmination of the defendant’s material representations was that the Bewick family had been aggressively harassing the defendant for years leading up to October 19, 2018[,] as result of a boundary dispute and the defendant was not ever aggressive;

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

19. The purpose of the defendant’s 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;

...

21. The State requested permission to present such evidence pursuant to the “open door doctrine” and ER 404(b) in order to directly address the defendant's knowledge and intent the

time of the assault, and material assertions made by the defendant as to his claimed physical disabilities, mental health issues, and his claimed “non-aggressive” response to “aggressive” behavior displayed by the Bewick family members in the years leading up to the October 19, 2018[,] incident and on the day of;

22. Additionally, the State sought permission to confront the defendant with excerpts from the computer aided dispatch (CAD) report from the October 19, 2018[,] event, which showed his prior mini-stand-off’s with law enforcement, to rebut the defendant’s implied and affirmative representations of non-aggressive behavior and claims of physical disability;

23. The defendant’s testimony put his physical health at issue in the years leading up to and at the time of 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;

25. The defendant’s testimony put at issue the nature and scope of his interactions with the Bewick family in the years leading up to and at the time of the events on October 19, 2018;

26. The defendant’s testimony put at issue who was the first aggressor in the events on October 19, 2018; and

27. The defendant’s testimony put at issue his state of mind in the years leading up to and at the time of the alleged events on October 19, 2018.

...

1. The defendant made a knowing, voluntary, and intelligent decision to testify at trial with the opportunity to seek advice from counsel;

2. The culmination of the defendant’s direct examination asked the jury to put themselves in his shoes for purposes of evaluating his self-defense claim. *State v. Walden*, 131 Wash.2d 469, 474, 932 P.2d 1237 (1997);

3. The defendant's material representations on direct examination "opened the door" to the 2004, 2008, and 2016 Harassment and his prior misconduct. *See State v. Young*, 158 Wash. App. 707, 720, 243 P.3d 707 (Div. III, 2010);
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. *Young*, 158 Wash. App. at 720; *State v. Gakin*, 24 Wash. App. 681, 685-86, 603 P.2d 380 (Div. II, 1979);
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 to 2018. *Young*, 158 Wash. App. at 720; *Gakin*, 24 Wash. App. at 685-86;
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. *State v. Medrano*, 80 Wash. App. 108, 113, 906 P.2d 982 (Div. III, 1995);
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.

CP 138-43 (some omissions for brevity).

During cross-examination, the State questioned Mr. Waggy about his "no trespassing" sign and the \$500,000 fee he had "charged" the

Bewicks. RP 434. The State then asked if “fines, fees and force” was Mr. Waggy’s scheme. RP 434. The State referenced the 2016 harassment, wherein Mr. Waggy had charged a 9.2-million-dollar fee to the federal government, and told the federal government to vacate the property at the Veteran’s Administration Center. RP 435-36. Mr. Waggy agreed that he had said if the government did not pay his demand, he would have travelled to the Center to “seize property” and “use force to *defend* himself.” RP 436 (emphasis added).

The State also cross-examined Mr. Waggy concerning the CAD report generated on October 19, 2018, and whether Mr. Waggy had made lethal threats against law enforcement during prior standoffs, rebutting Mr. Waggy’s explicit and implied claims of a peaceable character. RP 436-37, 443. The State also cross-examined Mr. Waggy with his two other prior harassment convictions, pursuant to his assertion that he had been the non-aggressive victim of harassment since first encountering the Bewicks. RP 444. The State connected the 2016 harassment with the assault: “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 or reparations, and then it becomes I’m going to use force to defend myself.” RP 445.

The jury found Mr. Waggy guilty of assault. CP 235. The trial court imposed a sentence of 12-months confinement, the high end of the standard range. CP 237-38. When imposing the sentence, the court indicated that the video recording “speaks volumes,” about the seriousness of the assault, as it demonstrated Mr. Waggy attacking Mr. Bewick essentially after a buildup of resentment for not complying with his “self-help” \$500,000 payment demand over the property dispute. RP 574. The court also imposed 12 months of community custody, and several conditions of community custody, including that Mr. Waggy pay supervision fees, not possess or consume alcohol or controlled substances, receive crime-related mental health treatment, and participate in treatment or counselling services “per CCO.” RP 577; CP 240-41. Mr. Waggy timely appeals.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN RULING THAT MR. WAGGY’S TESTIMONY OPENED THE DOOR TO OTHERWISE IRRELEVANT PRIOR BAD ACT EVIDENCE, AND THAT THE EVIDENCE SATISFIED ER 404(b).

Mr. Waggy contends that the trial court’s evidentiary ruling admitting his prior bad acts was an abuse of discretion. Specifically, the court ruled that Mr. Waggy’s testimony during his direct examination opened the door to prior bad acts, and that introduction of the now relevant bad acts satisfied ER 404(b). Because Mr. Waggy claimed self-defense and

testified that he had been a non-aggressive victim of the Bewicks alleged harassment for 14 years, the trial court did not abuse its discretion in permitting the State to introduce evidence of Mr. Waggy's prior bad acts. If this Court disagrees, this evidentiary error is harmless as the State introduced irrefutable recorded evidence showing Mr. Waggy marching towards Mr. Bewick and assaulting him with pepper spray absent provocation.

1. Standard of review.

The decision to admit ER 404(b) evidence is reviewed for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). A trial court's evidentiary ruling will be upheld absent an abuse of discretion, "which may be found only when no reasonable person would have decided the same way." *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014) (quoting *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)).

2. *Interplay between ER 404(b) and the open door doctrine.*

Evidence Rule 404(b) provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” This list is not exhaustive or exclusive. *State v. Turner*, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981). In determining whether evidence is admissible under ER 404(b), a trial court must undertake the following analysis on the record: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be admitted; (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); *Slocum*, 183 Wn. App. at 448. ER 404(b) evidence may not be admitted to show propensity to commit crimes. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The open door doctrine is a rule of expanded relevance. *State v. Rushworth*, 12 Wn. App. 2d 466, 473, 458 P.3d 1192 (2020). “The open door doctrine recognizes that a party can waive protection from a forbidden topic by broaching the subject. Should this happen, the opposing party is

entitled to respond.” *Id.* This occurs when a party opens up a subject of inquiry on direct or cross-examination, because the broaching party necessarily assumes the risk that the rules of evidence will permit the opposing party to pursue further inquiry on the subject. *Id.* (citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

This Court has noted that the open door doctrine primarily applies in the context of Title IV of the rules of evidence. *Id.* at 474. This is because Title IV “protects against the introduction of certain types of relevant evidence for reasons of policy or prejudice.” *Id.* This Court pointed to ER 404(b) as an example of an evidentiary rule this doctrine acts in conjunction with. *Id.* at 474 n.4 (citing *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610 (1990) (defendant may open the door to impeachment with ER 404(b) evidence by testifying to their own past good behavior)). Thus, the proper inquiry is not whether the open door doctrine *and* ER 404(b) each *independently* permitted the State to introduce evidence of Mr. Waggy’s prior bad acts, as he submits in his brief. Instead, the inquiry should focus on whether the trial court abused its discretion ruling the prior bad act evidence admissible pursuant to ER 404(b), premised on its ruling that Mr. Waggy’s testimony during direct examination expanded the scope of relevant evidence in the context of the third prong of the ER 404(b) test.

3. *ER 404(b) test first prong: find the misconduct occurred.*

First the trial court must find by a preponderance of the evidence that the misconduct occurred. *Thang*, 145 Wn.2d at 642. This element of the test was not meaningfully disputed below, as Mr. Waggy acknowledged the prior bad acts. *See* RP 20-26, 57-70, 87-92, 406-31; CP 141-43.

4. *ER 404(b) test second prong: identify the purpose for the evidence.*

The trial court identified several reasonable purposes for the evidence: to rebut the defendant's own testimony of his mental and physical health; to rebut the defendant's testimony about his own non-aggressive behavior over the past two decades; and to rebut the defendant's characterization of his motive, knowledge and intent at the time he attacked Mr. Bewick with the pepper spray. CP 143. The record also supports additional purposes identified in the court's oral ruling: common plan or scheme, and the reasonableness of Mr. Waggy's apprehension of harm pursuant to his self-defense claim. RP 415-18.

Regarding self-defense specifically, the trial court reasoned that Mr. Waggy's state of mind was at issue: "what he was thinking at the time when he pepper sprayed his neighbor by favorably referring to post-traumatic stress disorder, a brain injury, coupled with perceptions of fear or threat. I think that these other events, these other acts clarify or explain the state of mind that Mr. Waggy had and repeatedly exhibits." RP 416-17. The

court believed that, in order to properly evaluate Mr. Waggy's claimed defense, the jury would need to know "what's in the mind of that person that's asserting self-defense at this time, and if you get to look at a movie rather than a snapshot, isn't that better?" RP 425.

ER 404(b) was not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). Accordingly, evidence may be admitted under ER 404(b) to establish intent, *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995), ER 404(b); and motive, *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011). Evidence may also be admitted under ER 404(b) to rebut a defendant's testimony regarding their own past good behavior or denial of prior acts of misconduct. *Swan*, 114 Wn.2d at 653. The common plan or scheme exception includes permitting the introduction of evidence that an individual has devised a plan and uses it repeatedly to "perpetuate separate but very similar crimes." *Lough*, 125 Wn.2d at 855

Additionally, evidence may be admitted under ER 404(b) to prove an essential element of the crime. *See Foxhoven*, 161 Wn.2d at 175. When

a defendant asserts self-defense, the State must disprove self-defense beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). Self-defense “incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Washington courts have long recognized the proposition that the State may be permitted to introduce otherwise irrelevant or prejudicial evidence to impeach a defendant’s claimed defense:

The exception to which we refer would allow evidence of unrelated criminal conduct both as impeachment evidence and as substantive evidence, despite the danger of undue prejudice, when the defendant has interposed a defense to the crime charged and the offered evidence is relevant and necessary to refute the defense. *See* 1 C. Torcia, *Wharton’s Criminal Evidence* s 258 at 619 (13th ed. 1972). The reason for this exception is that it would be basically unfair to allow a defendant to raise a defense and not allow the State an opportunity to impeach it, solely because the impeachment shows prejudicial details concerning defendant’s participation in another crime. Under these circumstances, the evidence becomes highly probative and should be deemed to substantially outweigh the danger of unfair prejudice. *See* ER 403. The search for the truth, the ultimate objective of a criminal trial, would be defeated by a contrary result.

State v. Gakin, 24 Wn. App. 681, 685-86, 603 P.2d 380 (1979).

The trial court's ruling is reflected in the above statements of law. Mr. Waggy testified he felt it was necessary to engage Mr. Bewick in order to pepper spray him, to defend the disputed property and to defend himself. Mr. Waggy asserted self-defense. Thus, the evidence spoke directly to Mr. Waggy's state of mind and intent. The trial court recognized that Mr. Waggy's "frame of mind" was one of engagement; Mr. Waggy testified that he was hypervigilant, hyper-protective, and trained to *engage* threats. RP 387, 447, 449, 573. The trial court reasonably determined the prior bad acts held probative value in determining Mr. Waggy's state of mind as to the threat he perceived the day of the assault. Mr. Waggy argues that his intent was not at issue because he conceded the assault, but Mr. Waggy himself testified that he threatened to "defend" his property from Mr. Bewick, if he kept using it, on the day of the incident. RP 398. Mr. Waggy's intent was at issue, because the jury needed to determine both his objective and subjective perception the moment he assaulted Mr. Bewick. His intent was not that of a reasonable person defending himself from imminent harm.

Significantly, Mr. Waggy also characterized himself as a peaceable victim who had endured over a decade of harassment from the Bewicks. The Washington Supreme Court has held that a defendant may open the door to rebuttal evidence by "testifying to his or her own past good behavior

and denying prior acts of misconduct.” *Swan*, 114 Wn.2d at 653 (citing *State v. Ciskie*, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988)). Rebuttal was a valid purpose for the evidence. The State only introduced the evidence during cross-examination of Mr. Waggy, in rebuttal to Mr. Waggy’s assertions of his own past good behavior. The trial court properly exercised its discretion in permitting the State to rebut Mr. Waggy’s testimony with evidence of his prior bad acts. The prior convictions and the CAD report rebutted Mr. Waggy’s characterization of himself as a peaceful, patient person.

The evidence also satisfied the common scheme or plan purpose. Mr. Waggy demanded millions of dollars from the Veteran’s Administration (VA), asserted ownership of VA property, and announced that he would travel to the disputed property to defend it by force; this prior act bore striking resemblance to the history of the property dispute between Mr. Waggy and the Bewicks. RP 63. That prior act tended to show that Mr. Waggy had devised a plan and used it repeatedly to perpetuate a separate but similar crime. *Lough*, 125 Wn.2d at 855. It also permitted the jury to see the claimed self-defense from Mr. Waggy’s perspective, which made the prior act highly probative on the issue of self-defense.

Mr. Waggy cites *State v. Lang*, 12 Wn. App. 2d 481, 487-89, 458 P.3d 791 (2020), for the proposition that the State may not call an expert rebuttal witness to testify that the defendant was “malingering.” That case

is inapplicable. First, the core problem in *Lang* was that the expert witness testimony in that case implicated Title VI of the rules of evidence and the constitution. *Id.* at 487-88. This Court determined that witness credibility was a core jury function, and the State committed improper vouching when it called a witness to explicitly opine on the defendant's credibility as a witness. *Id.* at 488. By contrast, the evidentiary ruling in this case did not implicate the constitution, and prior bad act evidence is subject to Title IV of the rules of the evidence. *See State v. Powell*, 166 Wn.2d 73, 206 P.3d 321 (2009) (erroneous admission of ER 404(b) evidence is not of constitutional magnitude); *Rushworth*, 12 Wn. App. 2d at 474 (open door doctrine typically applies to Title IV of the rules of evidence).¹ Any application of *Lang* is inapposite. Whether the State could have chosen to introduce other rebuttal evidence, such as additional witnesses who may or may not have seen Mr. Waggy performing yardwork, does not speak to whether the trial court abused its discretion in determining the State's proffered prior bad act evidence satisfied ER 404(b).

The purposes identified by the trial court in its written and oral rulings are supported by law. Mr. Waggy described the Bewicks as a threat,

¹ This Court specifically pointed to ER 404 as an evidentiary rule that the open door doctrine complements. *Rushworth*, 12 Wn. App. 2d at 474 (citing *Swan*, 114 Wn.2d at 653).

and felt it was necessary to engage that threat, based in part on his perception of their years-long harassment. The rules of evidence permit the State to rebut Mr. Waggy's characterizations and demonstrate a common scheme. The evidence was not used for propensity purposes.² The trial court did not abuse its discretion.

5. *ER 404(b) test third prong: determine whether the evidence is relevant.*

Relevancy turns on the facts of the prior acts themselves. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to determination of the action more or less probable than it would be without the evidence. ER 401.

Here, the trial court ruled that Mr. Waggy made evidence of his prior bad acts relevant through his direct examination. CP 143. This is the application of the open door doctrine. *See Rushworth*, 12 Wn. App. 2d at 473. Normally, Mr. Waggy's prior bad acts would not be relevant to his charged assault, and the State did not seek to introduce evidence of the prior

² As further example, the State did not present the challenged evidence in its case-in-chief, referenced the evidence only in rebuttal after the close of evidence, and agreed that Mr. Waggy's child rape conviction served no legitimate ER 404(b) purpose and did not elicit such information. CP 139-43; *see* RP 508-14 (State's closing argument), RP 529-32 (State's rebuttal argument). The State did not make any implicit or explicit argument that the jury should convict because Mr. Waggy was a criminal type.

acts in its case-in-chief. But, as the trial court reasonably recognized, Mr. Waggy claimed self-defense and testified concerning his training and experience as a member of the armed forces; his physical limitations and diagnosis of post-traumatic stress disorder; his general experience with aggressive behavior exhibited by the Bewicks since 2004; his subjective feeling he had been harassed by the Bewicks since 2004; his specific instances where he observed the Bewicks to be aggressive with him since 2004; his belief that the Bewicks were attempting to intimidate him since 2004; his non-aggressive response to the 14-years of harassment; his non-aggressive demeanor both since 2004 and on the day of the assault; his assertion that he believed he needed to defend himself from the Bewicks on account of the past aggression he had received from the Bewicks; and his apprehension of harm based on his past interactions, and his physical and mental limitations. CP 140-41.

The court's reasoning is supported by Mr. Waggy's testimony. RP 378, 382-83, 386-87, 387-91, 393-95, 398-99, 404. In fact, the court plainly stated that "the way Mr. Waggy chose to testify in his case-in-chief brought about my ruling." RP 417. The court reasoned Mr. Waggy could have simply testified about the day in question to avoid opening the door to prior bad acts, but "there was a great deal of testimony where Mr. Waggy tried to characterize his state of mind, his perception that necessitates this

other purposes evidence that the State is proffering.” RP 418. The trial court was in the best position to observe Mr. Waggy’s demeanor and nonverbal indicators during his testimony.

At a minimum, it was reasonable for the trial court to rule that Mr. Waggy’s prior bad acts were relevant to rebut his contentions that he had a peaceful nature, that he was the reasonable entity in the dispute between neighboring families, that he reasonably believed the Bewicks would harm him based on their historically aggressive behavior, and that his infirmities rendered him susceptible to attack. The evidence also permitted the jury to see the assault from Mr. Waggy’s perspective, knowing all he knows, to help the jury evaluate the reasonableness of his self-defense claim. The past misconduct was also relevant to demonstrate Mr. Waggy’s pattern of asserting financial claims to property that did not belong to him, demanding payment from the owner of the property, and espousing his intent to defend “his” property by self-defense. The evidence held probative value in determining Mr. Waggy’s motive and intent in approaching the Bewicks, armed with pepper spray, after charging them a \$500,000 “fee” over property along the boundary between the two properties. The scheme was remarkably similar to Mr. Waggy’s scheme to charge the federal government several million dollars in fees and assert that he would travel to the VA hospital to defend property he had claimed. In

light of Mr. Waggy's testimony, the trial court did not abuse its discretion in determining that Mr. Waggy opened the door to otherwise irrelevant evidence through testimony about his hostile neighbors, his non-aggressive nature, and his assertion that he was reasonably afraid of harm.

6. *ER 404(b) test fourth prong: weigh the probative value of the evidence against prejudicial effect.*

The court also ruled that the prior bad act evidence was highly probative, and "far" outweighed any prejudicial effect. CP 143. From the context of the court's oral ruling, the court astutely recognized that the only contested issue was the reasonableness of Mr. Waggy's self-defense claim. The court stated, "we're not so much focused on the crime of assault, but we're focused on what was in Mr. Waggy's mind when he took it upon himself to run around the hedge, as exhibited in the video, and spray his neighbor with pepper spray." RP 417. The court cited Tegland's Handbook on Courtroom Evidence for the proposition that material assertions by a defendant in support of a claim of self-defense may open the door to rebuttal evidence. RP 416. The court linked that proposition directly to the self-defense jury instruction: "the person using [self-defense] may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person" and now emphasize *'taking into consideration all the facts and circumstances known to the*

person' here Mr. Waggy, '*at the time of and prior to the incident.*'" RP 416 (emphasis added).

The trial court surmised that the rebuttal evidence helped place the jury in the position of the defendant in order to assess the reasonableness of the self-defense claim, and was, therefore, highly probative. This is buttressed by the fact that Mr. Waggy testified to his own prior good behavior and peaceable nature during direct examination. Given that the central issue in this case was self-defense, the court did not abuse its discretion in determining the highly probative nature of the evidence far outweighed prejudice.

7. *Any alleged error is harmless.*

Evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). An evidentiary error requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). An error is harmless if the evidence is of minor significance compared to the overall evidence. *Id.*

The central issue in this case was whether Mr. Waggy's use of force was reasonable self-defense. To that point, the jury agreed the State disproved that Mr. Waggy's use of force was reasonable. The State

provided evidence, through testimony and the video recording, that Mr. Waggy chased down and pepper-sprayed Mr. Bewick over a long-standing property dispute. Next, Mr. Waggy testified that the Bewicks were threatening him, as they had for several years, that he was a peaceful, nonaggressive neighbor, and that he only pepper-sprayed Mr. Bewick out of a reasonable belief of imminent harm. The evidence Mr. Waggy challenges on appeal was elicited briefly at the conclusion of Mr. Waggy's testimony, and only used to rebut the claims Mr. Waggy made. In that sense, the prior bad act evidence used to impeach Mr. Waggy held lesser importance than the State's evidence presented in its case-in-chief.

The most critical piece of evidence was the video recording of the assault. The recording unambiguously shows Mr. Waggy approaching Mr. Bewick, striding around a hedge, and pepper-spraying him. Ex. P-12. The recording completely dismantles Mr. Waggy's claim of self-defense. The trial court reasoned so when imposing a high-end standard range sentence:

Number one, I'm to ensure the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. Here Mr. Waggy, we have a boundary dispute between two neighbors that escalated because, as you have said, it's your frame of mind that you engage. And it's evident from your history and your remarks that you've not been dispossessed of that as a result of what's happened here. And your criminal history shows that you've had instances of harassment

before and instances where you feel that you somehow have a right to resort to self-help to obtain retribution against those who you think are violating your rights or doing something that's wrong, when the only recourse that any of us have are legal channels.

And so, for example, with the boundary dispute and you putting up your strings and so forth, that's never really going to work until you get a pronouncement from the court what the boundary is. Even though you have a survey, that survey doesn't disprove what might otherwise be adverse possession or an easement by prescription or other reasons the Bewicks would have lawfully been where they were.

But that video speaks volumes. I mean, it cannot be denied. You attacked him with that pepper spray, and you went after him in a way that is foretold by the kinds of letters that you were writing to the VA, foretold by the kinds of self-help asserted imposition of fines and thousands and thousands of dollars against the Bewicks. So this is a really serious offense, even though it's no more than a third-degree assault with the use of pepper spray, because of the totality of the circumstances and because you can't restrain yourself. So I think that first factor weighs towards a longer sentence.

RP 573-74 (emphasis added).³

Although Mr. Waggy's case was tried to a jury and not to the bench, the trial court's accurate description of the video record convincingly demonstrates that any alleged error in the admission of the prior bad act evidence would not have changed the result of trial. The video recording

³ Although the court espoused this reasoning after the jury returned a verdict, gives further insight into the trial court's reasoning in support of its discretionary ER 404(b) ruling.

demonstrates unequivocally that Mr. Waggy's self-defense was devoid of merit. Ex. P-12.

As the recording begins, Mr. Waggy announces he is on the phone with police. Ex. P-12 at 00:02-00:04. The Bewick family stands on the sidewalk between the two properties for the next half-minute. Ex. P-12 at 00:04-00:40. The recording shows Mr. Waggy standing on the sidewalk in front of his own home, located in the middle of his yard and roughly fifteen to twenty feet from the sidewalk abutting the Bewick home. Ex. P-12 at 00:04-00:40. Although the Bewick family can be heard speaking quietly, no one is yelling at or approaching Mr. Bewick. Ex. P-12 at 00:04-00:40. At this time, Mr. Waggy senses or hears Mr. Bewick walking down the sidewalk. Ex. P-12 at 00:42. Mr. Waggy, still on the phone with law enforcement, can be seen shaking the bottle of pepper spray, walking at least eight feet perpendicular to Mr. Bewick's vector of approach, turning ninety degrees towards Mr. Bewick, and pepper-spraying him, without any audible or visible provocation. Ex. P-12 at 00:42-00:48.⁴ Only after the unprovoked use of pepper spray does Mr. Bewick throw the box (presumably in defense to avoid further assault), or does Mr. Bewick's son yell at Mr. Waggy.

⁴ The video corroborates Mr. Waggy's testimony that *he* approached Mr. Bewick to "engage a threat," in accordance with his military training. RP 447.

Ex. P-12 at 00:47-00:50. Mr. Waggy turns and calmly picks the Bewicks belongings out of his hedge bush, contradicting his claim that he felt threatened. Ex. P-12 at 00:50-1:00.

The trial court's characterization of Mr. Waggy's actions depicted in the recording is highly accurate. Mr. Waggy was standing in the middle of his yard, turned around, strode several feet over to Mr. Bewick as he walked between the homes and mercilessly pepper sprayed him. No reasonable trier of fact could have concluded that Mr. Waggy was acting in self-defense. In light of the State's evidence, any error in admitting evidence of Mr. Waggy's prior bad acts was harmless.

B. COMMUNITY CUSTODY CONDITIONS

Mr. Waggy challenges community custody conditions directing him to pay costs of supervision, refrain from possessing or consuming alcohol, refrain from possession or consuming controlled substances, and comply with crime-related treatment as ordered by his community custody officer. With one exception, these claims fail.

1. The State concedes Mr. Waggy's challenge regarding costs of supervision.

Mr. Waggy challenges the imposition of supervision fees. The trial court found Mr. Waggy indigent under the basis of RCW 10.101.010(3)(a) and intended to impose only mandatory financial obligations. RP 577, 580-81. Mr. Waggy's sole income derives from public assistance; assistance that

he no longer qualifies for as a result of this conviction. RP 580. Therefore, the State agrees this discretionary cost should be stricken. *See* RCW 10.01.160(3); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116, *review denied*, 193 Wn.2d 1007 (2019).

2. *The challenges related to controlled substances and alcohol are not preserved.*

Mr. Waggy did not preserve any challenge to his community custody conditions. RAP 2.5; *see State v. Peters*, 10 Wn. App. 2d 574, 581-83, 455 P.3d 141 (2019). Some challenges to sentencing conditions must be asserted at the trial court to be eligible for review. *Id.* at 581 (citing *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019)). “*Blazina* made clear that the exception for illegal or erroneous sentences does not apply when the challenged sentence term, had it been objected to in the trial court, was one that depends on a case-by-case analysis.” *Id.* at 582 (citing *State v. Blazina*, 182 Wn.2d 872, 834, 344 P.3d 680 (2015)). “To summarize, 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 *Blazina* explains, is ‘illegal or erroneous’ as a matter of law, and (2) it must be ripe.” *Id.* at 583.

Among discretionary conditions that the court is authorized to impose are orders that an offender “[c]omply with any crime-related

prohibitions.” RCW 9.94A.703(3)(f). “Crime-related prohibitions” are orders “prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). They can include prohibitions that address some factor of the crime that might cause the convicted person to reoffend. *State v. Nguyen*, 191 Wn.2d 671, 684-85, 425 P.3d 847 (2018). The State need not establish that the conduct being prohibited directly caused the crime of conviction or will necessarily prevent the convict from reoffending. *Id.* at 685. Review is for abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Regarding these principles, review of whether a condition is crime-related generally requires a case-by-case analysis.

Mr. Waggy argues that the community conditions forbidding him from possessing or consuming alcohol or controlled substances are not-crime related. Br. at 44. Defense counsel did not object to the conditions, so his challenge is not preserved. RP 577. The State asks this Court to decline to review this unpreserved argument.

3. *The validity of these conditions is not based on crime-relatedness.*

Although Mr. Waggy argues the conditions at issue are not crime-related, they are nonetheless valid because they are authorized by statute. The trial court *shall* order an offender to refrain from possessing or consuming controlled substances, unless it chooses to waive this condition.

RCW 9.94A.703(2)(c). The court also may order an offender to refrain from possessing or consuming alcohol, regardless of whether the prohibition is crime-related, at its discretion. RCW 9.94A.703(3)(e). Here, the trial court ordered Mr. Waggy not to possess or consume alcohol or controlled substances. CP 240-41.

The court did not order Mr. Waggy to undergo a chemical dependency evaluation or treatment, or alcohol counselling, which distinguishes this case from *Warnock and Jones*. See *State v. Warnock*, 174 Wn. App. 608, 610-14, 299 P.3d 1173 (2013) (RCW 9.94A.607 requires a chemical dependency finding before imposing chemical dependency treatment, in addition to evidence that the defendant's chemical dependency relates to the crime); *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (alcohol counselling condition unauthorized when not crime-related). There is no error.

4. *The trial court did not excessively delegate its authority to the Department of Corrections.*

Mr. Waggy relies on *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), and *State v. Williams*, 97 Wn. App. 257, 983 P.2d 687 (1999), for his claim that the trial court erred by delegating its sentencing authority to the Department of Corrections when ordering him

to participate in treatment or counselling services “per CCO,” and comply with other conditions “per CCO.” This claim also fails.

First, the trial court ordered a mental health evaluation and follow-up treatment pursuant to the State’s recommendation. CP 241; RP 550 573, 575, 577. The law requires the court to impose as a condition of community custody that Mr. Waggy “comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). Under that provision, the Department has authority to decide what “rehabilitative programs” and “affirmative conduct” should be required during the term of community custody. RCW 9.94A.704(4). The trial court described the parameters of treatment: mental health. The Department administers the specifics.

Mr. Waggy also argues that the community corrections officer has the unfettered ability to define what is, in fact, prohibited conduct. RCW 9.94A.704(4) defines the parameters of the Department’s supervision during community custody, so the community correction officer’s discretion is not unfettered. Further, the Department determines the conditions of community custody “based upon the risk to community safety,” not their relation to the crime. RCW 9.94A.704(2). The statutory scheme creates a system notice and review of any conditions imposed by the Department. RCW 9.94A.704(7)-(8); RCW 9.94A.737.

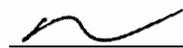
Second, Mr. Waggy's authorities are distinguishable. *Williams* dealt with a misdemeanor offender in a court of limited jurisdiction, which is a jurisdiction that the Sentencing Reform Act does not control. 97 Wn. App. at 263-64. *Sansone* involved an overly vague condition prohibiting the defendant from possessing pornography; delegating the responsibility of defining pornography was problematic. 127 Wn. App. at 638-42. *Sansone*'s holding was limited to that circumstance. *Id.* at 643. By contrast, in this case the court ordered mental health treatment, but only delegated the specifics of that treatment to the Department, per statute. These conditions are valid and authorized by statute.

V. CONCLUSION

Mr. Waggy's claims do not succeed. The trial court did not abuse its discretion when permitting the State to introduce ER 404(b) evidence. Other than the conceded discretionary cost, Mr. Waggy's challenges to his community custody conditions fail. The State respectfully requests this Court affirm.

Dated this 29 day of September, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WAGGY,

Appellant.

NO. 37260-0-III

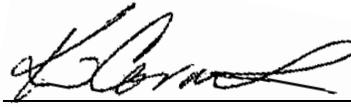
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 29, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Brooke Hagara
brooke@hagaralaw.com

9/29/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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