No. 45587-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BRUCE McKAY-ERSKINE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State's argument that Mr. McKay-Erskine's alleged prior statements expressing a sexual interest in children were admissible to prove motive and intent rests on an erroneous interpretation and application of ER 404(b)

a. The evidence was not admissible to prove intent because intent was not a material issue in the case

The State maintains that Mr. McKay-Erskine's alleged prior statements expressing a sexual interest in children, which he supposedly made years before the current allegations, which had no connection to the current crimes, and which were highly inflammatory, were nonetheless admissible. The State contends the statements were admissible to prove intent, that is, that the touchings were done for the purpose of gratifying his sexual desire.[1] SRB at 18-19. But intent was not a material issue in the case justifying the admission of prior bad act evidence because an intent to gratify sexual desire followed naturally from the testimony regarding the nature of the alleged conduct.

As stated in the opening brief, other act evidence is admissible only if it is logically relevant to a material issue through a theory other

[1] To prove the child molestations charges, the State was required to prove beyond a reasonable doubt the "touching of the sexual or intimate parts of a person done for the purpose of gratifying sexual desire of either party." CP 74-76; RCW 9A.44.083(1); RCW 9A.44.010(2).

than propensity. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). The fact which the evidence is offered to prove must be of consequence to the determination of the action and the probative value of the evidence must outweigh its potential for prejudice. Id. Thus, for example, the evidence is not admissible to prove intent, if intent is of no consequence to the outcome of the action. Id. at 363. Generally, intent is not a material issue justifying the admission of prior bad act evidence if "the acts, if committed, indisputably show an evil intent and the defendant does not specifically raise the issue of intent." Id. at 366 (internal quotation marks and citation omitted).

Although the crime of child molestation requires proof that the touching was done for the purpose of gratifying sexual desire, that does not mean intent is always a material issue justifying the admission of prior bad act evidence. Generally, intent is at issue only if the proof of intent is ambiguous, such as if the defendant admits touching the sexual or intimate parts of a child but claims the touching was because of mistake or accident. See State v. Bowen, 48 Wn. App. 187, 193-95, 738 P.2d 316 (1987), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995); State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

In addition to Ramirez, discussed in the opening brief, Bowen is a case on point. Bowen was a physician convicted of indecent liberties. Bowen, 48 Wn. App. at 188. The alleged victim, one of his patients, testified that when he came to her home to check on one of her children, he put his hand down her shirt and under her bra, then touched her breast and put his hand down her pants. Id. at 189. At trial the State introduced the testimony of two of Bowen's former patients, who testified he had committed similar acts against them. Id. The Court of Appeals reversed, holding the evidence was inadmissible, highly prejudicial propensity evidence. Id. at 195-96.

The Bowen Court rejected the State's argument that intent was a material issue justifying the admission of the prior bad act evidence. Id. at 193-95. The Court explained,

> [a]lthough the issue of a defendant's intent is almost always formally in dispute, in this case, proof of Dr. Bowen's intent follows from the testimony that he reached inside Mrs. Gettemy's clothes and touched her private parts. Because intent was not a material issue, the prior acts were not admissible to prove intent.

Id. at 194-95. Moreover, the evidence was not admissible to demonstrate that the touching was not an accident or mistake because the defense was general denial. Id. at 193-94. In the absence of an assertion of a defense of accident or mistake, the State may not

introduce such evidence to show the touching was not done by accident or mistake. Id.

As in Bowen and Ramirez, intent was not a material issue in this case because proof of intent followed from the testimony regarding the alleged acts, and Mr. McKay-Erskine did not assert a defense of accident or mistake. The child molestation charges were based on the child's testimony that Mr. McKay-Erskine forced her to put her hands on his penis, and that he rubbed his penis on her vaginal area. 10/15/13RP 706. There should be no question that such alleged acts, if performed, were for the purpose of gratifying sexual desire. Moreover, Mr. McKay-Erskine asserted a defense of general denial and did not argue that the touchings were accidental or by mistake. Thus, intent was not a material issue justifying the admission of prior bad act evidence. Bowen, 48 Wn. App. at 193-95; Ramirez, 46 Wn. App. at 227.

The State contends intent was at issue because Mr. McKay-Erskine was not an unrelated male with no caretaking function as to A.B. SRB at 19. But the case law does not stand for this proposition. It is true that the case law holds that "[p]roof that an unrelated adult with no caretaking function has touched the intimate parts of a child

supports the inference the touching was for the purpose of sexual gratification." State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991); see also Ramirez, 46 Wn. App. at 226 ("Where an adult, unrelated male, with no caretaking function, is proven to have touched the 'sexual or intimate parts' of a little girl, RCW 9A.44.100, the jury may infer from that proof that the touching was for the purpose of sexual gratification."). Such an inference is permissible if the touching was not through clothing, and if the intimate parts touched were in the "primary erogenous areas" of the body. Powell, 62 Wn. App. at 917. Also, the touching must be more than "fleeting or inadvertent." State v. Price, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005).

But simply because the jury may infer an improper intent when an unrelated adult with no caretaking function touches the sexual or intimate parts of a child, that does not mean the jury may *not* infer intent where the defendant *is* a related adult who has caretaking responsibilities regarding the child. Whether intent is a material issue depends on the facts of the case. As stated, the allegations in this case, if true, indisputably show an improper intent. Moreover, Mr. McKay-Erskine did not specifically raise the issue of intent. Therefore, intent was not a material issue jurying the admission of prior bad act

evidence. Saltarelli, 98 Wn.2d at 366; Bowen, 48 Wn. App. at 193-95; Ramirez, 46 Wn. App. at 227.

b. The evidence was not admissible to prove motive because the only relevance of the evidence to the issue of motive was under a theory of propensity

The State argues the prior bad act evidence was relevant and admissible to prove motive because a motive for the alleged crimes was not self-evident. SRB at 20. But the only relevance of the evidence to motive was to show that because Mr. McKay-Erskine allegedly expressed an interest in having sexual contact with a child in the past, he must have had a similar motive in the present. That is a propensity theory and ER 404(b) does not permit the admission of evidence to make such a showing.

As argued in the opening brief, prior bad acts are ordinarily not admissible to show motive unless the State can show that the prior act was a "motive or inducement" for the current crime. Saltarelli, 98 Wn.2d at 365. In Bowen, for instance, the Court held the prior acts were not admissible to show motive because they could not be said "to have motivated or induced Dr. Bowen to commit indecent liberties on a different woman, at a later time." Bowen, 48 Wn. App. at 191.

Similarly, here, any statement Mr. McKay-Erskine might have made in the past cannot be said to have motivated him to commit the current alleged crimes. Instead, the evidence demonstrates little more than a general propensity to commit sexual offenses against children. It was therefore inadmissible to prove motive. Id.

c. The State's argument that the admissibility of the evidence turned on the apparent similarity of the prior statements to the current allegations rests on an erroneous interpretation of ER 404(b)

Relying heavily on State v. Quigg, 72 Wn. App. 828, 866 P.2d 655 (1994), the State argues the prior bad acts were relevant and admissible due to the similarity of the statements to the alleged facts of the current crimes. SRB at 21-23. But admissibility under ER 404(b) to show motive and intent does not turn on the similarity of the prior acts to the facts of the current offenses.

Generally, the similarity of a prior event to a current event does not bear on the relevance of the first event to the defendant's motive or intent in the latter. Saltarelli, 98 Wn.2d at 363. In other words, simply because the defendant had a motive or intent to commit a *similar* act in the past does not make it more likely he had the motive or intent to commit the current crime, except by applying a theory of propensity.

At the State's urging, the trial court in this case concluded the prior statements were admissible because they were relevant due to their similarity to the current allegations. 9/26/13RP 23-25. But "the question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant—they are." State v. Slocum, __ Wn. App. __, 333 P.3d 541, 550 (2014). Instead,

> ER 404(b) reflects the long-standing policy of Anglo–American law to exclude most character evidence because "it is said to weigh too much with the jury and to so overpersuade them. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Id. (quoting Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948)). The question to be answered in applying ER 404(b) is not whether the prior acts are relevant, but whether they are relevant *for a purpose other than showing propensity*. Id. Here, because the prior acts were relevant only to show propensity, they were inadmissible under ER 404(b). Id.

State v. Quigg does not apply here because the admissibility of the evidence in that case was not analyzed under ER 404(b). In Quigg, a prosecution for child sexual abuse, the trial court admitted a handwritten story written by the defendant several years earlier which

described in detail some of the same acts allegedly performed on the girl in the present case. Quigg, 72 Wn. App. at 833. On appeal, Quigg challenged the admissibility of the document as hearsay, not authenticated, and irrelevant. Id. at 837. Quigg did not raise a challenge under ER 404(b) and the Court of Appeals did not analyze the issue under ER 404(b). Instead, the Court concluded the evidence was admissible because it was relevant due to the similarity of the acts described in the story to the current allegations. Id. at 838-39.

But again, whether the prior acts are relevant or similar to the current crimes is not the question under ER 404(b). Instead, the question is whether the prior acts are relevant for a purpose other than showing propensity. Slocum, 333 P.3d at 550. Here, Mr. McKay-Erskine's prior statements were relevant only to show that because he allegedly expressed a sexual interest in children in the past, he must have had a similar interest in the present. Therefore, the statements were relevant only to show propensity and were inadmissible. Id.

d. The alleged prior statements are verbal "acts" whose admissibility must be analyzed under ER 404(b)

The State argues the statements were not inadmissible propensity evidence under ER 404(b) because they were not prior

"crimes, wrongs, or acts." SRB at 25. Instead, according to the State, they were simply statements of intent or motive and were therefore not governed by ER 404(b). SRB at 25. This argument is contrary to the State's argument in the trial court, where the State maintained the admissibility of the statements turned on ER 404(b). 9/26/13RP 23. In any event, the State's argument on appeal is incorrect because the statements do qualify as other "crimes, wrongs, or acts" under ER 404(b).

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The "acts" inadmissible under ER 404(b) are "*any acts* used to show the character of a person to prove the person acted in conformity with it on a particular occasion." State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002) (emphasis added).

ER 404(b) applies to prior verbal "acts" and not just to prior conduct or behavior. In State v. Venegas, for example, the trial court admitted two prior statements made by the defendant to show a motive and pattern for her alleged repeated assaults on her step-grandson. State v. Venegas, 155 Wn. App. 507, 515, 228 P.3d 813 (2010), review

denied, 170 Wn.2d 1003, 245 P.3d 226 (2010). The Court of Appeals analyzed the admissibility of the evidence under ER 404(b) because the evidence was offered to show the defendant's character in order to prove she acted in conformity with that character at the time of the crimes. Id. at 526.

Likewise, in State v. Coe, the Washington Supreme Court analyzed the admissibility of the defendant's prior sexually explicit writings under ER 404(b) because they were offered to show Coe's lustful disposition. State v. Coe, 101 Wn.2d 772, 779-80, 684 P.2d 668 (1984).

Here, Mr. McKay-Erskine's alleged prior statements fall under ER 404(b) because they were verbal "acts" offered to show he was a person with particular sexual proclivities who acted in conformity with that character on the present occasions. The statements had no connection to the current case. They were made several years earlier. They did not refer to A.B. or to any child in particular. They were not statements of an intention to commit a particular act but were instead statements expressing a general interest in certain sexual activities. The statements were relevant only to show a propensity to commit the current crimes and were inadmissible under ER 404(b).

Everybodytalksabout, 145 Wn.2d at 466; Slocum, 333 P.3d at 550. For the reasons provided in the opening brief, the erroneous admission of this highly inflammatory and prejudicial evidence was not harmless.

2. Mr. McKay-Erskine was entitled to cross-examine Ms. Erskine-McKay with evidence that she had expressed an intention for revenge against him and his new girlfriend

The State contends Mr. McKay-Erskine was not entitled to cross-examine his estranged wife and the mother of the complaining witness with evidence that she had threatened his new girlfriend by saying, "once I am done with the defendant, I am going to come after you." 10/14/13RP 44-46. SRB at 31-33. To the contrary, as argued in the opening brief, Ms. Erskine-McKay was a key prosecution witness and Mr. McKay-Erskine had a broad constitutional right to cross-examine her with evidence of her bias and prejudice against him.

The State argues the statement was not relevant because it was "inherently ambiguous." SRB at 31. It is true that the statement "I am going to come after you" is ambiguous in terms of what action is contemplated. But it is not ambiguous in terms of being a threat. It clearly demonstrates Ms. Erskine-McKay's intention to "come after" Ms. Edwards. It also clearly shows Ms. Erskine-McKay's view that she has already "come after" Mr. McKay-Erskine. Mr. McKay-Erskine

was entitled to cross-examine her about the statement to elucidate her motives and actions taken against him.

The State argues the statement was ambiguous because it was not clear that the statement was made around the time the charges were filed. SRB at 32. But counsel's offer of proof showed that the statement *was* made around the time the charges were filed. When the trial court asked when the statements were made, counsel said "2012. It was after the – Mr. McKay-Erskine had left the house. That would have been in fall of 2012. They must have had some contact over the course of the last year." 10/14/13RP 46.

The State also argues the statement was not relevant because Ms. Erskine-McKay was not the victim, she did not raise the allegations, and Ms. Edwards was not the defendant. SRB at 32-33. But the trial court had already determined that whether Ms. Erskine-McKay had a motive to accuse Mr. McKay-Erskine was relevant. Prior to trial, the State had moved to exclude evidence of prior domestic violence between Mr. McKay-Erskine and his wife, arguing the evidence was not relevant because the child had not disclosed the sexual abuse to Ms. Erskine-McKay. 9/26/13RP 18-19. Defense counsel objected, arguing Ms. Erskine-McKay was very angry at her

husband, believing he had abused her and cheated on her, and therefore had a motive to accuse him. 9/26/13RP 20-21. The trial court agreed, finding the evidence of domestic violence, and that Ms. Erskine-McKay was a jilted lover, was relevant and admissible. 9/26/13RP 22. For these same reasons, the evidence that Ms. Erskine-McKay had "come after" Mr. McKay-Erskine and was going to "come after" his new girlfriend was relevant and admissible to show her motive to accuse him.

Moreover, Ms. Erskine-McKay was a key player in raising the allegations against Mr. McKay-Erskine. She was the one who called the police after hearing about the child's allegations. 10/09/13RP 341. She gave a police statement and is the one who took A.B. to have a forensic interview and physical examination. 10/09/13RP 342.

Because the statement was relevant to show Ms. Erskine-McKay's bias and because Mr. McKay-Erskine had a broad constitutional right to cross-examine the witnesses against him, the court erred in excluding the evidence.

3. The condition of community custody precluding Mr. McKay-Erskine from having contact with "physically or mentally vulnerable individuals" was not crime-related

The State argues the condition of community custody prohibiting Mr. McKay-Erskine from having "any contact with physically or mentally vulnerable individuals," see CP 125, is crime-related because the crime involved a physically and mentally vulnerable individual, i.e., a child. SRB at 40-42.

This Court should reject this argument because the trial court imposed ample conditions restricting Mr. McKay-Erskine's contact with children in general and A.B. in particular. See CP 125. Although the controlling statute gives courts authority to order offenders not to have contact with "a specified class of individuals," RCW 9.94A.703(3)(b), the "specified class of individuals" must have some relationship to the crime. State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Here, there is no evidence that the crime involved a "physically or mentally vulnerable individual" aside from the fact that the crime involved a child. The conditions prohibiting contact with children adequately address the circumstances of the crime and protect the

public. This Court should strike the condition prohibiting contact with "physically or mentally vulnerable individuals."

4. The trial court acted without statutory authority in requiring Mr. McKay-Erskine to undergo a substance abuse evaluation and comply with recommended treatment as a condition of community custody

The State contends the condition of community custody requiring Mr. McKay-Erskine to undergo a substance abuse evaluation and comply with recommended treatment is crime-related because, several years before the charged offenses, he allegedly made statements expressing a sexual interest in children during a time when he had "ongoing drug issues." SRB at 45. The State also contends the condition is crime-related because according to the presentence report, Mr. McKay-Erskine had a history of alcohol, marijuana, methamphetamine, and psilocybin mushroom use. SRB at 45.

Contrary to the State's argument, this evidence is insufficient. As argued in the opening brief, a condition of community custody requiring the offender to participate in alcohol or drug treatment must be "crime-related." RCW 9.94A.703(3)(c); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). A "crime-related condition" is one that "directly relates to the circumstances of the crime for which

the offender has been convicted." RCW 9.94A.030(10). To justify such a condition, the evidence must show and the court must find that alcohol or drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208. Alcohol or drug treatment "'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol [or drugs] contributed to the offense." Id. at 208.

The philosophy underlying the "crime-related" provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

Here, the evidence is insufficient to show that alcohol or drugs contributed to the crimes. There is no evidence that Mr. McKay-Erskine was using alcohol or drugs at the time of the alleged incidents, or that his alcohol or drug use somehow contributed to the offenses. Simply because Mr. McKay-Erskine used alcohol or drugs at times in the past does not render the condition requiring him to undergo a substance abuse evaluation "crime-related." The court may not require

an offender to participate in drug or alcohol counseling simply because the court believes it will be good for him or help to rehabilitate him. Id.

Because the condition requiring Mr. McKay-Erskine to undergo a substance abuse evaluation and comply with recommended treatment is not crime-related, it must be stricken. Jones, 118 Wn. App. at 203, 208.

5. The court acted without statutory authority in imposing a condition of community custody requiring Mr. McKay-Erskins to undergo a mental health evaluation and comply with all treatment recommendations

The State contends the condition requiring Mr. McKay-Erskine to undergo a mental health evaluation and comply with recommended treatment is crime-related because the presentence report indicates he has a history of mental health concerns. SRB at 46. But again, simply because Mr. McKay-Erskine reported a history of some mental health issues does not make this condition crime-related or statutorily authorized. Because there is no evidence that Mr. McKay-Erskine is a "mentally ill person" as defined by statute, or that his mental health condition likely influenced the offense, the condition must be stricken.

A trial court may order an offender to participate in treatment or counseling services as a condition of community custody only if the

condition is "crime-related." State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008); Jones, 118 Wn. App. at 208-09; RCW 9.94A.703(3). The court is not authorized to impose mental health treatment or counseling unless the court finds that (1) "reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025," and (2) "this condition is likely to have influenced the offense." RCW 9.94B.080; Brooks, 142 Wn. App. at 850-51; Jones, 118 Wn. App. at 208-11.

Thus, the evidence must show that the offender is a "mentally ill person" as defined in RCW 71.24.025. RCW 9.94B.080. The statute defines "mentally ill persons" as "persons and conditions defined in subsections (1), (4), (27), and (28)" of RCW 71.24.025. RCW 71.24.025(18).

Under subsection (1) of the statute, "'[a]cutely mentally ill' means a condition which is limited to a short-term severe crisis episode of: (a) A mental disorder as defined in RCW 71.05.020,"[2] or "(b) Being gravely disabled as defined in RCW 71.05.020,"[3] or "(c) Presenting a

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[2] RCW 71.05.020(26) defines "mental disorder" as "any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions."

[3] RCW 71.05.020 defines "gravely disabled" as
a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting

likelihood of serious harm as defined in RCW 71.05.020."[4] RCW 71.24.025(1).

Subsection (4) of the statute defines "chronically mentally ill adult" as

> an adult who has a mental disorder and meets at least one of the following criteria:
>
> (a) Has undergone two or more episodes of hospital care for a mental disorder within the preceding two years; or
>
> (b) Has experienced a continuous psychiatric hospitalization or residential treatment exceeding six months' duration within the preceding year; or
>
> (c) Has been unable to engage in any substantial gainful activity by reason of any mental disorder which

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> from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

RCW 71.05.020(17).

[4] RCW 71.050.020 defines "likelihood of serious harm" as

> (a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or
>
> (b) The person has threatened the physical safety of another and has a history of one or more violent acts.

RCW 71.05.020(25).

> has lasted for a continuous period of not less than twelve months. "Substantial gainful activity" shall be defined by the department by rule consistent with Public Law 92-603, as amended."

RCW 71.24.025(4).

Subsection (27) of the statute defines "seriously disturbed person" as a person who:

> (a) Is gravely disabled or presents a likelihood of serious harm to himself or herself or others, or to the property of others, as a result of a mental disorder as defined in chapter 71.05 RCW;
> (b) Has been on conditional release status, or under a less restrictive alternative order, at some time during the preceding two years from an evaluation and treatment facility or a state mental health hospital;
> (c) Has a mental disorder which causes major impairment in several areas of daily living;
> (d) Exhibits suicidal preoccupation or attempts; or
> (e) Is a child diagnosed by a mental health professional, as defined in chapter 71.34 RCW, as experiencing a mental disorder which is clearly interfering with the child's functioning in family or school or with peers or is clearly interfering with the child's personality development and learning.

RCW 71.24.025(27).

Finally, subsection (28) of the statute does not apply because it defines "severely emotionally disturbed child." RCW 71.24.025(28).

Here, the evidence is insufficient to show that Mr. McKay-Erskine is a "mentally ill person" as defined by statute. There is no evidence that he is "acutely mentally ill," that is, that he is experiencing

a "short-term severe crisis episode" of a "mental disorder," of "being gravely disabled," or of "presenting a likelihood of serious harm." RCW 71.24.025(1). There is no evidence that he is "chronically mentally ill." RCW 71.24.025(4). And there is no evidence that he is a "seriously disturbed person." RCW 71.24.025(27).

Simply because Mr. McKay-Erskine reported a history of Asperger syndrome, anxiety attacks, and depression does not make him "mentally ill" as defined by the controlling statute.

Moreover, there is no evidence that Mr. McKay-Erskine had a mental illness that contributed to the offense. By contrast, in Jones, the evidence showed Jones had bipolar disorder and was not taking his medication at the time of the offenses, and the combination "obviously resulted" in the crimes. Jones, 118 Wn. App. at 209. This evidence was sufficient to show the condition requiring him to participate in mental health treatment was "crime-related." Id.

Because there was no evidence to show that Mr. McKay-Erskine had a "mental illness," as defined by statute, which likely influenced the offense, the court acted without statutory authority in imposing the condition requiring him to undergo a mental health

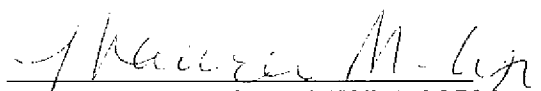
evaluation and comply with recommended treatment. RCW 9.94B.080; Brooks, 142 Wn. App. at 850-51; Jones, 118 Wn. App. at 208-11.

The remedy is to strike the condition. Brooks, 142 Wn. App. at 851-52; State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).

C. CONCLUSION

For the reasons given above and in the opening brief, the trial court erred in admitting highly inflammatory and prejudicial prior bad act evidence, and in restricting Mr. McKay-Erskine's constitutional right to cross-examine the witnesses against him. Because cumulative error deprived him of a fair trial, the convictions must be reversed. In addition, three conditions of community custody were not statutorily authorized and must be stricken.

Respectfully submitted this 17th day of November, 2014.



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

STATE OF WASHINGTON, Respondent, v. ROBERT MCKAY-ERSKINE, Appellant.	)))))))))	NO. 45587-1-II

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