Filed
Washington State
Court of Appeals
Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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	No. 47624-0-II UNPUBLISHED OPINION

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

FACTS

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

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

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

I. PROCEDURE

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

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

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

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

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

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

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

II. TRIAL PROCEEDINGS

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

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

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

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

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

III. SENTENCING

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

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

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

ANALYSIS

I. TIME FOR TRIAL

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

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

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

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

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

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

II. SURVEILLANCE VIDEO

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

A. STANDARD OF REVIEW

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

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

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

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

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

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence may be unfairly prejudicial when it excites an emotional rather than a rational response by the jury or when it promotes erroneous inferences and a decision on an improper basis. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). The trial court has broad discretion in weighing the probative value versus the unfair prejudice of evidence. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997).

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

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

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

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

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

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

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

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

III. CROSS-EXAMINATION OF B.P.

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

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

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

IV. COMMUNITY CUSTODY CONDITION PROHIBITING SOCIAL MEDIA USE

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

A. STANDARD OF REVIEW

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

B. THE TRIAL COURT ERRED BY IMPOSING THE CONDITION

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

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

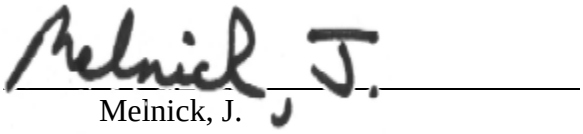
Therefore, because the prohibition in this case is not crime-related, we remand for the trial court to strike the community custody condition prohibiting the use of social media.

V. APPELLATE COSTS

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

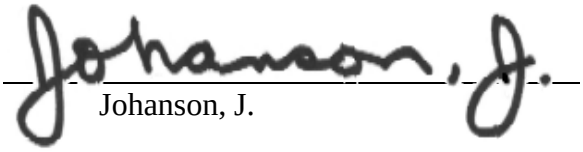
We affirm, but remand for the court to strike the community custody condition prohibiting the use of social media.

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



Melnick, J.

We concur:



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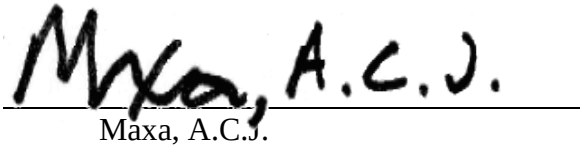

Maxa, A.C.J.