IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KRISTINA RANAE GRIER, Appellant.	No. 36350-0-II PUBLISHED IN PART OPINION

Hunt, J. — On remand from our Supreme Court, Kristina Ranae Grier appeals her second-degree murder conviction and her community custody sentencing conditions requiring her to undergo mental health and drug abuse treatments. She argues that we should reverse her conviction because (1) the trial court failed to conduct a competency hearing despite having reason to doubt her competency; (2) the State committed prosecutorial misconduct by eliciting testimony that violated a pretrial order to exclude evidence of Grier's drug use and drug paraphernalia found her in house; (3) the trial court erred by admitting irrelevant, prejudicial, or inadmissible ER 404(b) evidence; (4) Grier's trial counsel was ineffective for failing to object to this inadmissible evidence and, in the alternative, for failing to request limiting instructions related to this evidence; and (5) cumulative error warrants the reversal of her conviction. In her Statement of Additional Grounds (SAG),[1] Grier asserts that the State clandestinely prohibited her

son Nathan from testifying about the victim's drug use and drug dealing. She also argues that we should strike the mental health and substance abuse treatment conditions of her sentence because the trial court failed to make statutorily required findings supporting these conditions.

We affirm Grier's conviction, vacate the mental health and substance abuse treatment conditions of her community custody, and remand to the trial court to strike these two conditions from her sentence or to conduct appropriate hearings and then to enter the relevant statutorily required findings to support such treatment conditions.

FACTS

We incorporate here the facts in our 2009 opinion, in which we held that defense counsel's withdrawing his request for lesser-included-offense instructions constituted ineffective assistance and reversed Grier's conviction for murdering Gregory Owen during an evening confrontation; accordingly, we did not address Grier's remaining claims. *State v. Grier*, 150 Wn. App. 619, 632-33, 208 P.3d 1221 (2009). The Washington Supreme Court reversed our decision and remanded to us for "adjudication of Grier's remaining claims." *State v. Grier*, 171 Wn.2d 17, 45, 246 P.3d 1260 (2011). We now address those claims and supplement our 2009 opinion's facts with the following facts:

[1] RAP 10.10.

I. Pretrial Proceedings

A. Competency Evaluation

At a June 26, 2006 pretrial hearing, the State asked the superior court[2] to continue the trial and to "send [Grier] out to Western State [Hospital] for a . . . 15-day evaluation." Verbatim Report of Proceeding (VRP) (June 26, 2006) at 3. The State explained:

> The State has reason to believe there's possible insanity.[3] [Grier] wrote a couple of letters to the court right after she was incarcerated. Those are in the court file. The primary thrust of those letters was that she [Grier] wanted her guns returned.

VRP (June 26, 2006) at 3. Grier's counsel agreed:

> [The State] informed me and discussed with me this possibility. And I have had discussions with [Grier] in trying to prepare for her defense and must admit that *those discussions . . . don't usually . . . lead to a conclusion where I'm satisfied that she is assisting me in the preparation of her defense.*
>
> [The State] is requesting that [Grier] be evaluated at Western State Hospital. That *seems to be a prudent idea,* because whether she [Grier] comes back as having a mental deficiency or coming back completely competent, both of those *would be beneficial as far as I'm concerned in my representation of her to know whether what we're doing is appropriate or not.*

VRP (June 26, 2006) at 4 (emphasis added).

The superior court responded, "What I'm hearing is both sides agree that a competency evaluation is prudent. Is that correct?" VRP (June 26, 2006) at 5. The State answered, "The State believes it's prudent at this point, your Honor. I see a built-in appeal issue if we don't do

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[2] We use the term "superior court" to differentiate between the two courts that issued and addressed the June 26, 2006 competency evaluation order and the third court, which vacated the competency evaluation order.

[3] Although the State said "insanity," it appears that the State meant "incompetency."

it." VRP (June 26, 2006) at 5. Defense counsel did not respond. Granting the State's request, on June 26, 2006, the superior court issued an "Order for Examination by Western State Hospital" contained preprinted language that stated, "[T]here may be reason to doubt the defendant's [Grier's] fitness to proceed," and ordered the examination report to include "opinion[s]" about Grier's "competency," "sanity," and "mental state."[4] Clerk's Papers (CP) at 188, 190. The superior court and the State both signed the order; defense counsel and Grier signed the order, under the heading "Approved as to Form." CP at 191. The superior court scheduled the next hearing for July 13, 2006.

On July 18, a different superior court judge held a hearing, during which defense counsel advised that he "had requested to be taken off this case." VRP (July 18, 2006) at 2. The State informed the superior court that Grier had not yet received an examination at Western State Hospital. One week later, on July 25, Grier's first counsel withdrew and Grier obtained different counsel.

That same day, July 25, Grier's new counsel presented to a third superior court judge an order vacating the first superior court judge's June 26, 2006 that Grier undergo an examination at Western State Hospital. Without written or oral explanation on the record before us, the third judge vacated the June 26, 2006 order. Grier's former counsel signed the order, and the State

[4] This June 26, 2006 order defined (1) "competency" as "an opinion as to [Grier's] capacity to understand the proceedings and to assist in [Grier's] own defense"; (2) "sanity" as "an opinion as to the extent [that], at the time of the offense [and] as a result of mental disease or defect, [Grier] was unable to either perceive the nature and quality of the acts with which [Grier] is charged, or to know right from wrong with reference to those acts"; and (3) "mental state" as "the capacity of [Grier] to have the particular mental state of mind [namely, intent] which is an element of [second degree murder]." CP at 190.

signed it, "[A]s To Form"; Grier's signature is not on it. The record before us contains no objection by Grier to the trial court's vacating the competency examination.

Neither before nor when trial began did Grier ask for a competency hearing, raise any issues concerning her fitness for trial, or object to the lack of a competency evaluation or other examination at Western State Hospital. The record before us includes no facts suggesting any need for a competency hearing at that time.

B. Pre-trial Evidentiary Rulings

During a pre-trial hearing, Grier informed the trial court that "there was mention made by [her son, Nathan Grier, and his girlfriend, Cynthia Michaels, in their statements] about . . . some threats and/or waving around of a gun by Ms. Grier to Nathan." 1 RP at 94. Grier argued that the trial court should exclude "any reference to any previous alleged threats . . . , to include any waving around of any guns," because such evidence was irrelevant and inadmissible "conformity" evidence under ER 404(b). 1 RP at 94. The State responded that Grier's waving the gun and threatening Nathan was "part of the chain of events that occurred that evening." 1 RP at 96. The trial court orally denied Grier's motion to exclude, stating, "[*Y*]*ou* [Grier] *can raise an objection at the time if you don't have an exception such as res gestae or anything else as relates to that evening only*." 1 RP at 96 (emphasis added). The trial court then issued an order in limine denying Grier's request to "preclude mention of threats and/or threatening behavior such as waving of guns by [Grier] on the day in question." CP at 29.

Grier also moved in limine to exclude statements about the derogatory names that she had called Nathan and Michaels the night of the murder. Grier's counsel told the trial court:

> [T]he statements by Nathan and [Michaels] and perhaps [Michelle Starr, murder victim Gregory Owen's girlfriend], though I'm not sure about her [Starr], indicate that there was some name-calling going on there that evening. And specifically, I'm concerned about any allegations of Ms. Grier calling her son [Nathan] or anyone else any names. They were, to say the least, unflattering, offensive.

1 RP at 97. The State again argued that the trial court should admit Grier's name-calling because it was "part of the chain of events that occurred that evening." 1 RP at 97.

The trial court orally denied Grier's motion, stating, "I will deny this motion with regard to any statements made by the witnesses with regard to *name-calling* as that *would be a part of what happened that evening.*" 1 RP at 98 (emphasis added). The trial court later entered a written order denying Grier's motion in limine "to preclude mention of name-calling by [Grier] to Nathan [ ] or Mich[a]els." CP at 30. The trial court did, however, grant Grier's motions in limine to exclude mention of Grier's "past or present drug use" and "any drugs or drug paraphernalia found in [Grier's] house." CP at 29.

II. Jury Trial

In addition to the testimony described in our 2009 opinion, gunshot trace analyst Patricia Eddings testified about finding (1) "quite a bit of plant material"[5] on a "red sweatshirt"[6] that police had taken from Grier's hospital room and (2) "large pieces of plant material" and "an additional amount of loose plant material which was burned" in a "debris packet" that the Washington State Patrol crime lab had collected. 6 RP at 766-67. Grier objected, requested a sidebar, and argued, "[I]t's obvious" that the "plant matter" to which Eddings referred in her

[5] 6 RP at 758.

[6] 6 RP at 757.

testimony was "marijuana," which an order in limine prevented the State from mentioning. 6 RP at 768. The trial court sustained Grier's objection. Grier did not request a curative instruction to disregard the plant material testimony; nor did she request a new trial.

Michaels testified that (1) at some point during the night Owen was shot,[7] Nathan had initiated a conversation with Grier, telling her that she "couldn't kill somebody,"[8] to which Grier had responded, "[Y]es, she could," and "that she could shoot [Nathan] if she wanted to"[9]; (2) when Grier "wav[ed] [her guns] at Nathan in the kitchen" and "almost us[ed] it like a pointer, kind of,"[10] Nathan had said, "Go ahead and do it"[11]; and (3) Grier had then "put the gun away." 3 RP at 445.

Nathan testified that Grier had said he "was not a good son."[12] Starr testified that Grier had called Nathan "a little punk, a bitch, . . . a loser, . . . a wimp and not a man." 2 RP at 228. Starr also testified that (1) Grier had called Michaels "an Asian whore" and had said that "she [Grier] couldn't stand [Michaels]"[13]; (2) Owen, Starr, and their daughter had gone to Grier's

[7] Michaels could not remember whether Nathan had made this comment before Owen, Starr, and their daughter arrived at Grier's house.

[8] 3 RP at 480.

[9] 3 RP at 444.

[10] 3 RP at 445.

[11] 3 RP at 444.

[12] 2 RP at 141.

[13] 2 RP at 226.

house for dinner sometime during the week before Owen's death; (3) during this visit, Grier had displayed to Owen and Starr a handgun in the waistband of her pants; and (4) Owen had jokingly asked Grier if she thought her gun was "big and bad." 2 RP at 214. Grier objected to this testimony, contending, "It's irrelevant what's going on a week before." 2 RP at 214. The trial court overruled Grier's objection.

Grier appealed her conviction and sentence. We reversed her conviction on ineffective assistance grounds because her trial counsel had withdrawn his request for a lesser included instruction.[14] The Supreme Court reversed our decision and remanded to us to address her remaining arguments.[15]

Analysis

I. "Res Gestae" Evidence

Grier raises numerous evidentiary challenges on appeal, only some of which she has properly preserved.[16] Consequently, we address only her preserved challenges to the following

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[14] *State v. Grier*, 150 Wn. App. 619, 645-46, 208 P.3d 1221 (2009).

[15] *State v. Grier*, 171 Wn.2d 17, 45, 246 P.3d 1260 (2011).

[16] Grier cannot raise an issue for the first time on appeal unless she demonstrates that it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *see also State v Grimes*, 165 Wn. App. 172, 185-88, 267 P.3d 454 (2011); *State v. Bertrand*, 165 Wn. App. 393, 400-01, 267 P.3d 511 (2011), *petition for review filed*, No. 86903-1 (Wash. Jan. 11, 2012). Generally evidentiary errors are not of constitutional magnitude. *State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990). Grier has not shown that the following non-preserved evidentiary errors fall within this exception to RAP 2.5(a) and, therefore, we do not further address them: (1) her withholding money from Nathan's Social Security benefits checks; (2) Nathan's "g[etting] kicked out" of her house because she "didn't want" Nathan at her house, Nathan's living in foster care "for a couple of months," and Nathan's returning to live at her house for three days before Owen was killed, 2 RP at 124, 140, 150; (3) Grier's shooting her gun at unidentified people who drove into her driveway in the middle of the night and "rev[ved] their engines" on occasions before the shooting,

evidence: (1) that on the night of the murder, she waved a gun around, told Nathan that she

2 RP at 136; (4) Grier's telling Starr, on the night of the murder, about Grier's thoughts that "people were in her attic" and that Grier's boyfriend had sent somebody to rape her (Grier); and (5) Grier's unemployment status the night of the murder. 2 RP at 219.

could kill him,[17] and called Nathan and Michaels insulting names; and (2) that the week before Owen was murdered, she had brandished a gun during a dinner party at which Owen was present. The trial court admitted evidence of events the night of the murder under the "res gestae" exception to ER 404(b). We agree with the trial court that this evidence was admissible, but we uphold its admission on alternative grounds, departing from characterizing "res gestae" evidence as an "exception" to ER 404(b). 1 RP at 96. In our view, Grier's name-calling, threatening gestures, and statements the night of the murder were not "[e]vidence of other crimes, wrongs, or acts" under ER 404(b). Rather, we hold that this "res gestae" evidence was relevant and admissible under ER 401 and 402 as part of the events leading up to and culminating in the murder.

The trial court did not make a pretrial ruling on the admissibility of Grier's brandishing a gun during the previous week's dinner party; nor did the trial court explain why it overruled Grier's relevancy objection to the testimony about the dinner party. Assuming, without deciding, that this evidence was too attenuated to be considered "res gestae," we hold that any error in its admission was harmless.

[17] During a pre-trial hearing, Grier informed the trial court that "there was mention made by [Nathan and Michaels in their statements] about . . . some threats and/or waving around of a gun by Ms. Grier to Nathan." 1 RP at 94. Grier asked the trial court to exclude "any reference to any previous alleged threats . . . and that's to include any waving around of any guns"; Grier contended that such evidence was irrelevant and inadmissible "conformity" evidence under ER 404(b). 1 RP at 94. The State responded that Grier's waving a gun around and threatening Nathan was "part of the chain of events that occurred that evening." 1 RP at 96. Although the trial court denied Grier's motion to suppress, it also told her, "[Y]ou can raise an objection at the time if you don't have an exception such as res gestae or anything else as relates to that evening only." 1 RP at 96.

A. Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Lormor*, 172 Wn.2d 85, 94, 257 P.3d 624 (2011). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *Lormor*, 172 Wn.2d at 94. We leave credibility determinations to the trier of fact; such determinations are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We review questions of law de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Furthermore, we can affirm the trial court's rulings on any grounds the record and the law support. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). We find no abuse of discretion in the trial court's admission of evidence here.

B. Grier's Name Calling and Threatening Behavior the Night of the Murder

We accept the trial court's characterization of Grier's calling Nathan and Michaels derogatory names and making gun threats to Nathan the night of the murder as "res gestae" evidence. But we depart from characterizing this "res gestae" evidence as an exception to ER 404(b), despite our state courts' recognition of "a res gestae or 'same transaction' exception"[18] to ER 404(b) if the evidence is admitted "to complete the crime story by establishing the immediate time and place of its occurrence." *Hughes*, 118 Wn. App. at 725, *review denied*, 151 Wn.2d 1039 (2004).

In our view, and as other courts and legal scholars have noted, this judicially created "res

[18] *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997) (quoting *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation marks omitted)).

gestae" exception bears little or no resemblance to the specific exceptions that ER 404(b) enumerates,[19] inviting contemplation of the ejusdem generis rule of statutory construction[20]:

> [W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

Black's Law Dictionary 556 (8th Ed. 2004); *see also State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). ER 404(b) provides a non-exhaustive list of examples of "other purposes" for which trial courts may admit "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith," namely, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Except for identity, these enumerated exceptions concern the defendant's state of mind or thought process. In contrast, "res gestae" evidence pertains to the factual context of the crime, not to the defendant's mindset. In our view, "res gestae" evidence is so unlike the expressly listed ER

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[19] Other courts and commentators also note that characterizing the res gestae rule as an exception to ER 404(b) is indefinite, is prone to abuse, and "tends merely to obscure" ER 404(b) analysis. *United States v. Krezdorn*, 639 F.2d 1327, 1332 (5th Cir. 1981); *see also United States v. Bowie*, 232 F.3d 923, 928-29 (D.C. Cir. 2000); 1A Wigmore on Evidence § 218, at 1888 (Tillers rev.1983); E. Cleary, McCormick on Evidence § 288 (3d Lawyer's ed. 1984); 2 J. Weinstein, Evidence para. 404[10] at 404-79 (1989). We further note that many states have discontinued using the term "res gestae" in the context of admitting evidence of other crimes, wrongs, or acts. *See* e.g., *State v. Gunby*, 282 Kan. 39, 63, 144 P.3d 647 (2006); *State v. Rose*, 206 N.J. 141, 146, 19 A.3d 985 (2011); *People v. Dennis*, 181 Ill.2d 87, 97-98, 692 N.E.2d 325 (1998); *State v. Fetelee*, 117 Hawai'i 53, 81, 175 P.3d 709, (2008).

[20] The principles of statutory construction are equally applicable to rule construction. *State v. Kray*, 31 Wn. App. 388, 390, 641 P.2d 1210 (1982), *overruled on other grounds*, 100 Wn.2d 1020, 670 P.2d 662 (1983).

404(b) exceptions that considering "res gestae" evidence to be an ER 404(b) exception contravenes the ejusdem generis doctrine.

In our view, "res gestae" evidence more appropriately falls within ER 401's definition of "relevant" evidence, which is generally admissible under ER 402.[21] *Compare State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) ("'res gestae'" evidence "'complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place'") (*quoting State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)), *with* ER 401 (evidence is relevant if it has "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.") For these reasons, we agree with the trial court that Grier's threatening behavior on the night of the murder was admissible as "res gestae" evidence, (1) not only because it arguably might have fallen under an ER 404(b) exception, but (2) also because it was evidence of the continuing events leading to the murder, relevant under ER 401, and, thus, not "prior misconduct" of the type generally inadmissible under ER 404(b).

The following evidence was relevant under ER 401 because it "complete[d] the story of the crime on trial by proving its immediate context of happenings near in time and place"[22] and it "'depicted'" a "'complete picture . . . for the jury.'" *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004) (quoting *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)). Michaels

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[21] ER 402 provides: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

[22] *Lane*, 125 Wn.2d at 831) (internal quotation marks omitted) (quoting *Tharp*, 27 Wn. App. at 204).

testified that (1) at some point that night, Nathan initiated a conversation with Grier, telling her that she "couldn't kill somebody"[23]; (2) Grier responded, "[Y]es, she could," saying "that she could shoot [Nathan] if she wanted to"[24]; (3) Grier "wav[ed] [her guns] at Nathan in the kitchen" and "almost us[ed] it like a pointer, kind of"[25]; and (4) when Nathan said, "Go ahead and do it,"[26] Grier then "put the gun away." 3 RP at 445. This testimony made several consequential facts "more probable"[27] because it (1) showed that Grier had possession of at least one gun at some point that evening, which pertained to the charge that Grier was armed with a firearm when she killed Owen; (2) helped establish why Nathan, Starr, and Owen had tried to take Grier's guns away from her; (3) bore on the factual question of who had possession of guns that evening; and (4) contradicted Grier's self-defense argument that she had acted "in resistance to a felony" and in "defense of Nathan." 8 RP at 971.

Years ago Division One of our court applied a similar analysis to analogous facts in *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987), Thompson argued that his aggressive and threatening conduct before shooting several people in a tavern parking lot was inadmissible prior misconduct under ER 404(b). *Thompson*, 47 Wn. App. at 4, 10. Witnesses described Thompson's walking out of the tavern, yelling and brandishing a gun shortly before the shooting,

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[23] 3 RP at 480.

[24] 3 RP at 480, 444.

[25] 3 RP at 444-45.

[26] 3 RP at 444.

[27] ER 401.

acting belligerently, pointing a gun at the witnesses' truck, and making a menacing comment as they drove by the tavern within an hour before the shooting. *Thompson*, 47 Wn. App. at 4. Division One held that this testimony was (1) "*relevant under the res gestae exception*, because this conduct took place in between the time Thompson [acted aggressively and threateningly] and the time of the shootings"; and (2) admissible because it provided a more complete factual context of the crime.[28] *Thompson*, 47 Wn. App. at 12 (emphasis added).

Similarly, testimony about Grier's brandishing a gun and acting belligerently before the shooting was admissible because it was relevant and it showed a continuing course of action by Grier. Grier's statements and behavior that evening help "set the stage" for her shooting of Owen later that night. *State v. Schaffer*, 63 Wn. App. 761, 770, 822 P.2d 292 (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993). Michaels' testimony showed that Grier had possession of at least one gun at some point in the evening, which was relevant to the State's charge that Grier had been armed with a firearm when she killed Owen. Michaels' testimony "explained parts of the whole story which otherwise would have remained unexplained." *State v. Mutchler*, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989).

Moreover, this testimony's potential prejudice did not "substantially outweigh[]" its probative value under ER 403. On the contrary, the testimony helped to complete the picture of the events of February 21, 2006, and served as a counter-argument to Grier's self-defense

[28] The *Thompson* court used two labels to describe this evidence in the same sentence: "relevant" and "res gestae." *Thompson*, 47 Wn. App. at 12. In our view, and as the *Thompson* opinion's analysis implicitly shows, these terms describe the same evidence characteristic: Evidence that completes the story of the crime ("res gestae" evidence) is also evidence that pertains to the existence of facts that are of consequence to the crime ("relevant" evidence). ER 401.

contention that she shot Owen to protect Nathan.[29] Thus, ER 403 did not bar the admission of Michaels' testimony about Grier's threatening and aggressive behavior.[30]

Similarly, we find no abuse of discretion in the trial court's admission of Grier's name-calling the night of the murder, which, like her threats and gun waving, was relevant res gestae evidence, admissible under ER 402 to "'complete the story of the crime on trial by proving its

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[29] During closing argument, for example, Grier argued:

> [The State] also ha[s] to prove in instruction [ ] 15—and this is very important. They have to prove to you that this was not defense of self, not defense of Nathan.
> [. . .]
> [Y]ou have to put yourself in the position that [Grier] was in, the instruction tells you, knowing what she knew, knowing the history of [ ] Owen, in other words what might he do, that sort of thing. It's a man against a woman, a guy who is a pretty good-sized guy, 29 years old. [Owen] assaulted two women that night, his girlfriend [Michaels] and [Grier] earlier. He is drunk. Same blood alcohol as [Grier]. He fired a gun, believed to be armed, assaulted Nathan, put a gun in Nathan's mouth.
> [. . .]
> And what reasonable person is going to stand by and watch their son have this happen? You can say what you want about her mothering skills that night, but you tell me any mother, any reasonable mother, that's going to stand by and let some guy do this to their son and not act upon it. To suggest that somebody should not, a 17-year-old boy who is disabled? Ridiculous. There is no reasonable parent that is going to watch their child be assaulted like this more than once and not do something about it.

8 RP at 971-73; *see also* 1 RP at 100 (Grier's trial counsel: "Just to clarify, we've done an omnibus order, and I don't think it's unclear that the defense here is defense of self and others.")

[30] We further note, in the alternative, even if Grier's gun threats arguably constituted "[e]vidence of other crimes, wrongs, or acts," inadmissible to prove character and action in conformity therewith, this evidence was admissible under the ER 404(b) "intent" and "absence of mistake" exceptions (1) to show that Grier acted "[w]ith intent to cause the death of another person," an element of the second degree murder under RCW 9A.32.050, which element she denied; and (2) to rebut Grier's characterization that she had merely been "wrestling" with Owen when a "shot [wa]s fired" from a gun that nobody saw, which characterization implied that the gunshot was accidental, maybe even self-inflicted, and that Grier did not act "[w]ith intent to cause the death of another person." ER 404(b); 8 RP at 967; RCW 9A.32.050.

immediate context of happenings near in time and place.'"[31] *Lane*, 125 Wn.2d at 831 (quoting *Tharp*, 27 Wn. App. at 204).[32] Furthermore, any unfair prejudicial effect of this testimony was low in light of the other evidence in this second degree murder trial, especially Grier's claim of self-defense. We hold, therefore, that ER 403 did not require exclusion of this name-calling evidence because the danger of its unfair prejudice did not outweigh its probative value.[33]

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[31] Even if admission of this evidence were error, such error was harmless.

[32] The trial court in *Lane* (1) admitted evidence of other crimes or acts under the "res gestae" exception to ER 404(b) because the incidents had taken place during a 48-hour time span before or after the charged crime and, thus, were "basically relevant"; and (2) determined that the evidence related to the defendants' "participation or degree of participation" in the charged crimes. *Lane*, 125 Wn.2d at 834 (internal quotation marks omitted). Our Supreme Court held that, in so ruling, the trial court did not abuse its discretion. *Id* at 835. The Court held as follows:

> Once the trial court has found res gestae evidence relevant for a purpose other than showing propensity and not unduly prejudicial, that evidence is admissible under the res gestae exception to ER 404(b).
> [. . .]
> We find a sufficient basis on which to affirm the trial judge's determination under an abuse of discretion standard. The [*Lane*] trial court was aware of this court's decision in [ ]*Tharp*. *It found the evidence relevant because of its proximity in time and place to the crimes charged and because it showed the degree of participation of the various Defendants.*

Lane, 125 Wn.2d at 834-835 (emphasis added) (internal citations omitted).

Two years later, the Supreme Court cited *Lane* with approval in *Brown*, 132 Wn.2d at 576 n.107, for the principle that "evidence of events occurring within a two- or three-day period of the charged crime [is] admissible under res gestae exception to ER 404(b)."

[33] Even assuming, without deciding, that the trial court erred in introducing evidence of Grier's name-calling, because admission of this evidence was not prejudicial, error, if any, would have been harmless: This evidence was of minor significance in reference to the overwhelming evidence as a whole. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). A rational juror would not believe that Grier was more likely to have killed Owen merely because she had called Nathan and Michaels derogatory names earlier that evening. Thus, in light of the ample testimony supporting the jury's verdict, any error in the trial court's admission of evidence of Grier's name-calling was harmless.

Accordingly, we hold that the trial court did not abuse its discretion when it admitted Michaels' testimony about Grier's gun-waving, threats, and name-calling the night of the murder under the res gestae exception to ER 404(b).

C. Grier's Gun-Brandishing the Week before the Murder

Grier also argues that the trial court erred in overruling her relevancy objection to Starr's testimony that Grier thought her guns were "'big and bad'"[34] while brandishing a gun in her waistband a week before the murder. Br. of Appellant at 39.[35] We disagree and conclude that, even if admission of this evidence was error, such error was harmless.

Even if the trial court erred in admitting this evidence, its admission was harmless because we cannot say that "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Tharp*, 96 Wn.2d at 599. The jury heard ample evidence linking Grier to possessing and owning guns on the night of the murder and evidence of Grier's aggressive behavior that night. Therefore, in light of evidence presented at trial, this error, if any[36], would not have affected the outcome of the trial "within reasonable probabilities."

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[34] Br. of Appellant at 39 (quoting 2 RP at 214).

[35] Grier argues (1) that the testimony indicating that "[she] in essence said her guns were 'big and bad'" was "irrelevant because [her] braggadocio, occurring in the context of a friendly dinner party with Owen, did not tend to make it any more likely that she shot Owen a week later"; and (2) that her "[c]ounsel was deficient in failing to timely object to Starr's testimony that Grier displayed her guns the week before" because "[c]ounsel simply objected too late." Br. of Appellant at 39 (quoting 2 RP at 214). Grier specifically asserts that her counsel was ineffective for not objecting because the evidence was "irrelevant" and "unfairly prejudicial under ER 403 and ER 404(b)." Br. of Appellant at 39. We separately address and reject Grier's ineffective assistance of counsel claims related to this issue.

[36] Defense counsel objected to this evidence on the grounds of relevancy. Therefore, in reviewing the trial court's exercise of its discretion in admitting this evidence, we need determine only

Tharp, 96 Wn.2d at 599.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

iI. No Need for Competency Hearing

Grier also argues that we should reverse her conviction because "the trial court found reason to doubt [her] competency but failed to hold a hearing before proceeding to trial." Suppl. Br. of Appellant at 4. Not only did Grier fail to request a competency hearing below, but also she was the party who requested and obtained vacation of the June 26, 2006 competency examination order. And Grier does not assign error on appeal to the July 25, 2006 order granting her motion to vacate the original June 26, 2006 competency examination order. Instead, Grier appears to contend that the trial court, should have conducted a competency hearing sua sponte, regardless of third judge's vacation of the June 26, 2006 competency examination order.[37] Because a defendant's competency is central to the defendant's constitutional rights to a fair trial, however,

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whether this evidence satisfied the relevancy standard under ER 401.

[37] No facts in the record before us on appeal suggest that the trial court should have ordered a competency hearing for Grier sua sponte; nor does Grier offer any authority to support such a proposition. Even if Grier had requested a competency hearing below, it is well settled that (1) a trial court need not hold a competency hearing merely because a party requests one; (2) a factual basis must first provide a "reason to doubt" the defendant's competency; and (3) when considering whether to hold a competency hearing, the trial court should give "considerable weight . . . to the attorney's opinion regarding his client's competency and ability to assist the defense." *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). Here, the third judge did just that: She gave considerable weight to Grier's counsel's opinion about Grier's competency and granted [Grier's counsel's] request to vacate the June 26, 2006 competency exam order.

we address this argument for the first time on appeal, despite Grier's failure to comply with RAP 2.5(a)(3).

We first reject Grier's argument, advanced primarily at oral argument, that *State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009), requires reversal. In *Heddrick*, our Supreme Court held that "the statutory competency procedures" of chapter 10.77 RCW[38] "may be waived" when defense counsel withdraws a competency challenge. *Heddrick*, 166 Wn.2d at 908. In so holding, the Supreme Court carefully distinguished between "the substance of competency, which cannot be waived, and the procedures used in its determination, which may be waived in certain circumstances." *Heddrick*, 166 Wn.2d at 905. The Supreme Court rejected Heddrick's complaint on appeal that the trial court should have proceeded with a competency hearing, despite his withdrawal of his competency challenge, which, the court declared "amount[ed] to invited error." *Heddrick*, 166 Wn.2d at 909.

Like Heddrick, Grier waived her right to statutory competency procedures and invited any error in the trial court's failure to conduct a competency hearing because it was Grier who caused the cancellation of the existing evaluation order. *See Heddrick*, 166 Wn.2d at 909. Rather than requiring the reversal that Grier seeks, *Heddrick* supports our holding that the trial court here did not err by failing to conduct a competency hearing sua sponte.[39]

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[38]More specifically, RCW 10.77.060(1) governs the competency hearing that Grier argues the trial court should have conducted sua sponte.

[39] Because we hold that the trial court's "failure" to conduct a competency hearing was not erroneous, we do not address the parties' arguments about remanding for a retrospective competency hearing. *See* Br. of Resp't at 16; Reply Br. of Appellant at 2.

IIi. No Reversible Prosecutorial Misconduct

Grier next argues that the State committed reversible prosecutorial misconduct when it elicited testimony about "plant material"[40] on a piece of Grier's clothing because (1) this testimony violated the trial court's order in limine to exclude all references related to Grier's alleged drug use and the drug paraphernalia found in her house; and (2) there is a substantial likelihood that the "plant matter"[41] testimony affected the jury's verdict. Even assuming, without deciding, that mentioning "plant material" violated the trial court's order in limine preventing the mention of drugs, Grier shows no substantial prejudice flowing from these references and, therefore, does not establish cause for reversal.

"'In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Coleman*, 152 Wn. App. 552, 570, 216 P.3d 479 (2009) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). "'Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict.'" *Coleman*, 152 Wn. App. at 570 (internal quotation marks omitted) (quoting *In re Detention of Sease*, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009)). "Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment "was so flagrant or ill-intentioned that an instruction could not have cured the prejudice." *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010).

[40] Br. of Appellant at 17 (quoting 6 RP at 761).

[41] Br. of Appellant at 18 (quoting 6 RP at 769).

Grier objected after the third reference, but she did not request a curative instruction. Thus, technically, she should have to meet this higher burden of showing that the alleged prosecutorial misconduct "was so flagrant or ill-intentioned that an instruction could not have cured the prejudice." *Corbett*, 158 Wn. App. at 594. But even assuming, without deciding, that Grier properly objected, the "plant material" references did not likely affect the jury's verdict. *See Coleman*, 152 Wn. App. at 570. Although, "[a]s a general proposition, evidence of drug usage can be prejudicial," here the State's eliciting of drug references in violation of the order in limine was "so minute in the overall picture so as to create only a hint of prejudice." *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10 (1991).[42] The disguised "plant material" references consumed only a few minutes of six days of testimony.

Moreover, Dr. Adam Fox, an emergency room physician at St. Joseph's Hospital in Tacoma, testified that he had treated Grier in the emergency room in the early morning hours of February 22, 2006, and that her urinalysis screening did not show any narcotics in her system. As Grier emphasized in closing argument, this urinalysis screening showed that she had no "pot" in her system, in contrast to the victim. 8 RP at 948-49. In light of this lack of prejudice, we hold that there was no prosecutorial misconduct warranting reversal of Grier's conviction.

IV. Effective Assistance of Counsel

Grier next argues that her trial counsel was ineffective for three reasons: (1) He failed to object at the earliest opportunity to expert witness Eddings' "plant material" references and failed to request curative instructions for those references; (2) he failed to object to testimony that was

[42] Overruled on other grounds in *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

allegedly irrelevant, prejudicial, or inadmissible under ER 404; and (3) he failed to request limiting instructions for eight specific facts.[43] These arguments fail.

A. Standard of Review

We review de novo a claim of ineffective assistance of counsel. *State v. Castro*, 141 Wn. App. 485, 492, 170 P.3d 78 (2007). The defendant bears the burden of showing that (1) trial counsel's performance was deficient and (2) trial counsel's deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Trial counsel's performance is deficient if it "falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because of the "deference afforded to decisions of defense counsel in the course of representation," there exists a "'strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)); *see also State v. Breitung*, 173 Wn.2d 393, 400-01, 267 P.3d 1012 (2011) (explaining that the *Strickland* standard is "highly deferential").

Legitimate trial strategy or tactics do not count as deficient performance; but "a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The burden is on the defendant to show deficient performance and, absent evidence in the record of a failure to consult, we presume that counsel consulted with the defendant about trial strategy and tactics. *Breitung*,

[43] We previously addressed Grier's SAG ineffective assistance argument that trial counsel failed to request jury instructions on lesser included offenses. *See Grier*, 150 Wn. App. at 646.

173 Wn.2d at 401.

Furthermore, "[c]ounsel's decisions regarding whether and when to object [to a prosecutor's remarks] fall firmly within the category of strategic or tactical decisions." *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Johnston*, 143 Wn. App. at 19 (quoting *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)).

Even if the defendant shows deficient performance, she then must establish prejudice by showing that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). Grier fails to meet this two-pronged test here.

B. Failure To Object

To establish that counsel's failure to object to evidence constituted ineffective assistance, Grier must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel actually had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). As our Supreme Court has explained:

> An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. Collateral matters, which may appear in retrospect to have been errors in judgment or in trial strategy, cannot be said to

> constitute incompetence. The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial[?]

State v. Lei, 59 Wn.2d 1, 6, 365 P.2d 609 (1961) (internal citations omitted).

Grier's counsel did object to the "plant material" references, but only after the witness's third reference. 6 VRP at 767. These "plant material" references, however, were not "testimony central to the State's case."[44] We cannot say that waiting until the third reference to object was not legitimate trial strategy. Thus, we hold that Grier's trial counsel's failure to object to the first two "plant material" references was not deficient performance.

Nor has Grier shown deficient performance in her trial counsel's failure to object to the following testimony: (1) Grier's withholding of money from Nathan's Social Security checks, (2) Nathan's living situation, (3) Grier's brandishing of a gun during a dinner party the week before Owen was killed, (4) Grier's shooting a gun in her driveway to scare off threatening motorists, (5) Grier's apparent delusions, and (6) Grier's unemployment status. First, Grier does not "overcome the presumption that the decision not to object was the result of a deliberate tactical choice"[45] because she does not show that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *Reichenbach*, 153 Wn.2d at 130). We discern at least one "conceivable legitimate tactic" that explains Grier's trial counsel's multiple failures to object: Her trial counsel may have declined to object because he "may not have wanted to risk emphasizing the testimony with an objection." *In re Pers. Restraint of Davis*, 152 Wn.2d 647,

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[44] *Johnston*, 143 Wn. App. at 19 (internal quotation marks omitted) (quoting *Madison*, 53 Wn. App. at 763).

[45] *Sexsmith*, 138 Wn. App. at 509.

714, 101 P.3d 1 (2004) (failure to object to inadmissible evidence did not constitute ineffective of counsel). As we have previously noted, this evidence to which counsel did not object was relatively insignificant in the context of the other evidence presented at trial. Because Grier's trial counsel had a plausible reason for his multiple failures to object, we reject Grier's assertion that her trial counsel was ineffective for "fail[ing] to object to every item of evidence to which an objection might successfully be interposed." *Lei*, 59 Wn.2d at 6.

C. Failures To Request Limiting Instructions

Grier also contends that her trial counsel was ineffective for failing to request limiting jury instructions for the following evidence: (1) Grier's threatening of Nathan and brandishing a gun the night Owen was murdered, (2) Grier's name-calling of Nathan and Michaels the same night, (3) Grier's withholding of money from Nathan's Social Security checks, (4) Nathan's living situation, (5) Grier's brandishing a gun during a dinner party the week before the murder, (6) Grier's shooting a gun in her driveway to scare off threatening motorists on previous occasions, (7) Grier's apparent delusions, and (8) Grier's unemployment status. Again, Grier fails to establish that "there is no conceivable legitimate tactic explaining counsel's performance."[46] Grier's trial counsel may have elected not to request a limiting jury instruction "as a trial tactic so as not to reemphasize" this allegedly damaging evidence. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (failure to request limiting jury instructions was not ineffective assistance of counsel). Grier having failed to show deficient performance, we do not address the second, prejudice prong of the test. We hold that Grier has not shown that her trial counsel provided

[46] *Grier*, 171 Wn.2d at 33 (quoting *Reichenbach*, 153 Wn.2d at 130).

ineffective assistance.

V. Statement of Additional Grounds

In her SAG, Grier asserts that the State told Nathan he "was not al[l]owed to speak in the courtroom about [Owen's] being a drug dealer or anything else about [Owen's] drug use and other topics," yet Nathan testified that Owen was a drug dealer. SAG at 1. The record does not support the first part of Grier's assertion. On the contrary, the record shows that the trial court prohibited the State from bringing out Grier's drug use. There was no similar ruling concerning the admissibility of Owen's prior drug use or Owen's potential status as a drug dealer.

VI. Cumulative Error

Grier next contends that even though she did not preserve some errors for appeal, and other errors are not reversible, we should still reverse her conviction under the cumulative error doctrine. This argument also fails.

At the outset, we reiterate that we do not consider the alleged errors that Grier failed to preserve for appeal. With respect to the preserved errors, "'[c]umulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.'" *State v. Bluehorse*, 159 Wn. App. 410, 436, 248 P.3d 537 (2011) (quoting *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006)). Of Grier's alleged errors, we hold that the following were not errors: (1) the trial court's failure to conduct a competency hearing, (2) the trial court's admission of evidence that Grier waved a gun at Nathan and told him that she could kill him (Nathan) on the night Owen was killed, (3) trial counsel's performance, and (4) the State's alleged instruction to Nathan regarding the admissibility of Owen's prior drug use or Owen's potential status as a drug dealer. And the other errors, if any, were harmless: Admission of

Grier's name-calling of Nathan and Michaels and Grier's brandishing of a gun at a dinner party during the previous week. These potential harmless errors are few in number and limited in prejudicial effect, if any. Accordingly, we find no cumulative error warranting reversal.

VII. Sentencing Conditions

Grier asks us to order the trial court to strike the mental health and substance abuse treatment conditions of her sentence because the trial court failed to make statutorily required findings to support those conditions. The State concedes that the sentencing court failed to make these required findings. "'[I]llegal or erroneous sentences may be challenged for the first time on appeal.'" *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial court commits reversible error when it exceeds its sentencing authority. *State v. C.D.C.*, 145 Wn. App. 621, 625, 186 P.3d 1166 (2008).

Under former RCW 9.94A.505(9) (2002),[47] a sentencing court could order a defendant to participate in mental health treatment if the court found (1) "that reasonable grounds exist to believe that the offender is a mentally ill person" and (2) that "this condition is likely to have influenced the offense" if the sentencing court entered a finding that the defendant's mental illness contributed to his crimes. *State v. Jones*, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). Here, the sentencing court did not make this required finding. Because it did not comply with former RCW 9.94A.505(9) (2002), it lacked authority to impose mental health treatment as a condition of Grier's sentence. Accordingly, we vacate this mental health treatment condition and remand to

[47] "[T]he law in effect at the time a criminal offense is committed controls the sentence." *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). Grier committed her offense on February 21, 2006.

the trial court (1) to strike this condition from Grier's sentence; or (2) to conduct a hearing to determine whether this case satisfies the criteria for a mental health treatment condition and, if so, to enter the required finding under former RCW 9.94A.505(9) (2002).

A trial court may also order a defendant to "participate in rehabilitative programs" under RCW 9.94A.607(1) if the trial court finds "that the offender has a chemical dependency that has contributed to his or her offense."[48] Again, the trial court did not enter the required finding; and because it did not comply with RCW 9.94A.607(1), it lacked authority to require Grier to participate in rehabilitative programs treatment as a condition of her sentence. Accordingly, we vacate this substance abuse treatment condition and remand to the trial court (1) to strike this condition from Grier's sentence; or (2) to conduct a hearing to determine whether this case satisfies the criteria for a mental health treatment condition and, if so, to enter the required

[48] In *State v. Powell*, the sentencing court imposed a substance abuse treatment sentencing condition, but the court "did not make an explicit finding" that the defendant suffered from a chemical dependency that contributed to his offense. 139 Wn. App. 808, 819, 162 P.3d 1180 (2007), *rev'd on other grounds*, 166 Wn.2d 73, 206 P.3d 321 (2009). Despite this, we affirmed the imposition of the substance abuse treatment condition because (1) the trial evidence established that the defendant ingested methamphetamine before committing the offense and (2) both the State and defense counsel requested the imposition of a substance abuse treatment sentencing condition. *Powell*, 139 Wn. App. at 819-20.

Here, on the night Owen was killed, Grier's blood alcohol level tested at .16. But, unlike *Powell*, there was no request during sentencing for a substance abuse treatment sentencing condition.

finding under RCW 9.94A.607(1).

We affirm Grier's conviction, vacate the mental health and substance abuse treatment community custody conditions of her sentence, and remand to the trial court to strike these conditions from her sentence or to conduct appropriate hearings and then to enter the relevant statutorily required findings to support such treatment conditions.

Hunt, J.

We concur:

Johanson, A.C.J.

Van Deren, J.