

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,)	1 CA-CR 10-0783
)	
Appellee,)	DEPARTMENT C
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication - Rule
TIMOTHY KEITH BLAND,)	111, Rules of the Arizona
)	Supreme Court)
Appellant.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-144890-001DT

The Honorable Michael W. Kemp, Judge

AFFIRMED AS CORRECTED

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By Kent E. Cattani, Chief Counsel	
Criminal Appeals/Capital Litigation Section	
and Myles Braccio, Assistant Attorney General	
Attorneys for Appellee	

James J. Haas, Maricopa County Public Defender	Phoenix
By Eleanor S. Terpstra, Deputy Public Defender	
Attorneys for Appellant	

N O R R I S, Judge

¶1 Timothy Keith Bland timely appeals his convictions and sentences for two counts of first degree murder and one count of misconduct involving a weapon (collectively, "the offenses").

On appeal he argues "other act" evidence introduced by the State -- witness C.T.'s testimony he had seen Bland with a revolver two days before the offenses -- was inadmissible under Arizona Rule of Evidence ("Rule") 404(b). The State argues, as it did in the superior court, the evidence "was relevant evidence of [Bland's] crimes" and was not character evidence as contemplated by Rule 404(b) -- an argument the court accepted when it denied Bland's pretrial motion in limine.¹ For the reasons discussed below, we agree with the State and the superior court.

¶2 Rule 404(b) prohibits the admission of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith."

¶3 In denying Bland's motion in limine, the superior court did not abuse its discretion in finding the evidence was relevant, see Rule 401 ("'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."), and admissible to show Bland possessed a revolver two days before the offenses. See *State v. Tucker*, 215 Ariz. 298, 313, ¶ 46,

¹Bland's counsel initially raised this issue in a motion in limine two days before trial, arguing it would "portray [Bland] as someone who carries a gun -- a dangerous man" and implicate Rule 404(b). Specifically, the superior court ruled C.T.'s testimony was "very relevant and probative" and did not "rise[] to a 404(b) type analysis."

160 P.3d 177, 192 (2007) (appellate court reviews superior court's ruling on admissibility of evidence for abuse of discretion). Before admitting the evidence, the superior court also determined its "probative value outweigh[ed] any prejudicial impact" under Rule 403.

¶4 In arguing the admissibility of C.T.'s testimony, the State specifically stated C.T. would testify "he was in a car with [Bland] a couple days before and saw him with a revolver. . . . That's all the State's evidence is going to be."² Testimony Bland had a revolver, on its own, does not raise inferences about his "character" or "action in conformity therewith." *Cf. State v. Zamora*, 140 Ariz. 338, 340, 681 P.2d 921, 923 (App. 1984) (evidence of possession of pistol of "minimal probative value on the possessor's aggressive character"). Because the State initially told the court the evidence it intended to introduce was focused on C.T.'s testimony Bland had possessed a revolver, the State's proposed use of this evidence did not

²The State argued C.T. seeing Bland with a revolver was significant because, first, it "put[] what [the State believed was] the murder weapon in [Bland's] hand" and, at the very least, was "relevant to show or put a revolver in [his] possession . . . within a very short period before this murder." This evidence bolstered the State's theory Bland's use of a revolver, which does not eject shell casings, explained why police did not find shell casings at the murder scene. Although their testimony was not entirely consistent, two other witnesses testified they had seen Bland with a gun consistent with a revolver the night of the offenses. It was up to the jury to resolve any inconsistencies in their testimony. *State v. Rivera*, 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005).

implicate Rule 404(b). See *People v. VanderVliet*, 444 Mich. 52, 64, 508 N.W.2d 114, 121 (1993) ("If the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated."); David P. Leonard, *The New Wigmore: A Treatise on Evidence*, ch. 11, § 11.7.1 at 2 (2011) ("The uncharged misconduct rule arguably does not come into play . . . when the prosecution merely wishes to present evidence that defendant possessed the weapon or other item used in committing the charged crime Often, the court should agree and limit the presentation of evidence so as to reveal only Defendant's possession of the tool and thus the opportunity to commit the crime."). Thus, the superior court did not abuse its discretion in denying Bland's motion in limine.³

¶15 We acknowledge Bland's argument that C.T.'s testimony at trial went beyond seeing him with a gun. Indeed, as Bland argued in his opening brief, during its direct examination of C.T. the State elicited testimony that edged closer to suggesting Bland had "'acted' in conformity with his violent character." See *State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997) (citation omitted) (despite relevance, evidence

³Bland also argues the superior court improperly "implicitly [held] that the prior possession of a gun was intrinsic to the charged crimes." We reject this argument because the State did not rely on this theory and the record does not reflect the superior court did so either.

may go beyond what is necessary and create substantial risk jury will consider it for an improper purpose if discussed "in the context" of defendant's bad character). But, as we explain, we do not agree with Bland that C.T.'s trial testimony triggered application of Rule 404(b).

¶6 At trial, C.T. testified that two days before the offenses, he was riding in the car with Bland and the two were having a "disagreement" and "exchanging words." He testified he saw a handgun tucked under Bland's right thigh with the handle "hanging out" and, as they continued driving, Bland "took it from under his leg and placed it on top of his lap." The State questioned C.T. about the type of gun Bland had, but also elicited the following testimony without objection:

[State]: At that point were you not really on comfortable speaking terms with [Bland]?

[C.T.]: Well, I was pretty uncomfortable with the situation. I remained silent pretty much. We came to a stoplight and I remember jumping out of the vehicle.

.

[State]: And did he say anything to you when he put [the gun] on top of his leg or just it was displayed that way?

[C.T.]: The way it was done, he really didn't have to say anything.

After the State established the gun was a revolver, it resumed questioning C.T. about jumping out of the car and asked, "[h]ow

did you feel when you first saw that gun come from under [Bland's] thigh?" Before C.T. could answer, Bland's counsel objected and, consistent with its rationale in ruling on the motion in limine, the court properly sustained the objection. Bland's counsel then moved for a mistrial and the court, because it had sustained the objection, denied the motion and cautioned the State, "[l]et's stay away from this."⁴

¶7 Although the testimony above, in context, perhaps began to hint at Bland's character, as soon as his counsel raised an objection, the court properly prevented the State from going any further or using the testimony for an impermissible purpose. The State also deemphasized that portion of the testimony in its closing. Although it erroneously stated C.T. "just fe[lt] a little scared," the State then argued, "[C.T.] wanted to come in and tell you that he saw a gun, a revolver, fairly recently in time to the time this happened. But the

⁴The State suggests we should not consider C.T.'s trial testimony which went beyond the testimony the parties discussed when arguing Bland's motion in limine, see *supra* ¶ 4, because on appeal Bland only challenges the court's ruling on his motion in limine and not the court's denial of his request for a mistrial. When "a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Anthony*, 218 Ariz. 439, 446, ¶ 38, 189 P.3d 366, 373 (2008) (quoting *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985)). Although Bland did not specifically challenge the mistrial ruling, he does argue, as he did in his motion in limine, C.T.'s testimony about the gun was, as a whole, improper. We decline to find waiver under these circumstances.

situation that happen[ed] with [C.T.] in the car, that wouldn't be an aggravated assault." We cannot say this brief dialogue involving only a handful of questions and one statement in closing over the course of an approximately 22 day trial raised character evidence implicating Rule 404(b). Although it would have been better if the State would have confined its questioning to what it told the superior court it would cover during its argument on the motion in limine, under these circumstances the superior court did not abuse its discretion in denying Bland's motion for a mistrial after instructing the State to "stay away from this" testimony.

¶18 Bland also argues that because the jury knew he was charged with misconduct involving a weapon it would have viewed his prior possession of a gun as a criminal act and C.T.'s testimony about seeing the revolver was therefore "highly prejudicial." But, the State argued in closing the jury could only find Bland guilty of misconduct involving a weapon if it also found he had committed the murders and, therefore, possessed the gun on the date of the offenses. Furthermore, the parties stipulated the misconduct involving a weapon charge only related to the use of a gun on the date of the offenses. The Arizona Supreme Court has instructed us, "absent some evidence to the contrary," to presume the jurors followed their instructions. *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d

237, 248 (1994); see *State v. Kuhs*, 223 Ariz. 376, 387, ¶ 55, 224 P.3d 192, 203 (2010) (citations omitted). Further, Bland did not request a limiting instruction and the court's "failure to *sua sponte* give a limiting instruction [was] not fundamental error." See *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996) (citations omitted).

¶9 Finally, Bland's counsel points out the court awarded Bland 777 days presentence incarceration credit toward his first sentence, a "natural life" term, yet "presentence incarceration credit cannot be applied to [Bland's] benefit when he will never be released from prison." See *State v. Palmer*, 219 Ariz. 451, 453, ¶ 7, 199 P.3d 706, 708 (App. 2008). Because the court sentenced Bland to first serve two consecutive natural life sentences, we correct the sentencing minute entry to apply the 777 days presentence incarceration credit to his third sentence (4.5 years on "Count 4," misconduct involving weapons). See *State v. Boozer*, 221 Ariz. 601, 602, 212 P.3d 939, 940 (App. 2009) (citations omitted) (appellate court modifying sentence to correct presentence incarceration credit).

¶10 For the foregoing reasons, we affirm Bland's convictions and sentences as corrected.

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Judge

_____/s/_____
JOHN C. GEMMILL, Judge