IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAIL LEE. DRAPER, aka, MICHAEL Lee DRAPER, Appellant.	No. 39361-1-II UNPUBLISHED OPINION

Van Deren, J. — Michael Lee Draper appeals his conviction for second degree unlawful possession of a firearm and possession of a stolen firearm, arguing that (1) the trial court abused its discretion in admitting testimony that he had an outstanding felony warrant at the time of arrest and in refusing a limiting instruction related to that fact, (2) his counsel was ineffective, and (3) cumulative error deprived him of a fair trial. Holding that no prejudicial error occurred, we affirm.

FACTS

On September 18, 2008, Lewis County Deputy Sheriff Duncan Adkisson spotted a gold Windstar van at the intersection of Highway 508 and Thicket Road in Lewis County. Centralia

police were searching for a van that matched that description because Draper, who was wanted on a felony warrant,[1] had been identified as traveling in such a vehicle. Adkisson approached the van and identified himself. When Adkisson looked into the van, Draper immediately ran into the woods. Adkisson directed him to stop and then pursued him. During the pursuit, Draper dropped a small pistol, which was later identified as stolen. Adkisson eventually caught, handcuffed, and arrested Draper and recovered the pistol.

The State charged Draper with one count of second degree unlawful possession of a firearm and one count of possession of a stolen firearm. At trial, Adkisson testified that he approached Draper because he was wanted on an outstanding felony warrant. A jury convicted Draper of both counts.

Draper appeals, arguing the trial court abused its discretion when it admitted statements by the arresting officer explaining why he first approached Draper. He then raises several claims related to that argument.

ANALYSIS

I. Standard of Review

A trial court has wide discretion in admitting evidence and balancing the value of evidence and its prejudicial effect; we review evidentiary rulings for an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997); *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies

[1] Draper was convicted in a separate trial for bail jumping, the charge for which the Centralia police were pursuing him.

on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); *see Brown*, 132 Wn.2d at 572.

II. The Trial Court Did Not Abuse Its Discretion in Admitting Adkisson's Testimony

A. The Evidence Was Admissible Under the Res Gestae Exception

Draper first contends that Adkisson's statements about Draper's outstanding felony warrant were both irrelevant and unfairly prejudicial.[2] The State responds that the evidence was only briefly mentioned and that it did not unfairly prejudice Draper when viewed in the context of the whole trial.

We first address whether the trial court properly admitted Adkisson's statements that he approached Draper because Draper had an outstanding felony warrant under ER 404(b).[3] "ER 404(b) provides that evidence of other crimes or acts is not admissible to show that a person

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[2] Draper contends for the first time on appeal that Adkisson's statement that he was traveling "incognito" was both irrelevant and unfairly prejudicial. Report of Proceedings (RP) (Feb. 23, 2009) at 33; Br. of Appellant at 5. But Draper did not object to Adkisson's statement that Draper first identified himself as "Chris Chastaine" or that he was traveling "incognito" in his pretrial motion in limine or during trial. RP (Feb. 23, 2009) at 34, 33. Arguments not raised before the trial court are waived. RAP 2.5(a); *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). Further, had Draper properly preserved this error on appeal, the statements were evidence of guilty knowledge, similar to flight to avoid detection or apprehension and were, thus, admissible as an exception to ER 404(b). *See State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999).

[3] ER 404(b) provides:

> **Other Crimes, Wrongs, or Acts**. 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.

acted in conformity with his character, but is admissible for other purposes." *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). In addition to the enumerated ER 404(b) exceptions, Washington has recognized a "res gestae or same transaction exception." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *Mutchler*, 53 Wn. App. at 901. This exception allows admission of uncharged acts that are "inseparable psychologically" from the charged acts, permitting the introduction of the uncharged acts when "evidence about the charged crime will naturally pique the jury's curiosity about the aspect of the transaction the uncharged misconduct relates to, and forcing the witness to avoid that aspect of the case will leave the jurors dangling and suspicious." 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 6:30, at 6-111 (Rev. Ed. Supp. 2005) (citations omitted).

Before admitting evidence of an uncharged crime under any of the ER 404(b) exceptions, the trial court must (1) find that a preponderance of the evidence shows the uncharged acts occurred; (2) state for what purpose the evidence is being admitted; (3) find the evidence is relevant for that purpose; and (4) balance the probative value of the evidence against any unfair effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *Lillard*, 122 Wn. App. at 431. When the defendant is convicted of the charge in a separate trial, the first part of the test is not reviewed. *State v. Burkins*, 94 Wn. App. 677, 687, 973 P.2d 15 (1999).

At a pretrial suppression hearing, the trial court ruled that Adkisson's statement was admissible under the res gestae exception to explain why Adkisson initially approached Draper. Draper does not contest that there was a felony warrant for his arrest, and this purpose is not related to a propensity to commit crimes nor is it unduly prejudicial. *See Lane*, 125 Wn.2d at

834.

Here, the existence of Draper's outstanding warrant, coupled with knowledge that Draper was traveling in the van Adkisson spotted, provide the "'immediate context of happenings near in time and place'" to Adkisson's approach to Draper in the van. *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (quoting Edward W. Cleary, McCormick's Handbook of the Law of Evidence § 190, at 448 (2d ed. 1972)), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). We hold that the trial court did not abuse its discretion in admitting Adkisson's statements under the *res gestae* exception.

B. Failure To Give a Limiting Instruction Is Harmless Error

Draper next contends that the trial court also abused its discretion when it refused his request for a limiting instruction on the jury's use of the information relating to the felony warrant. The State responds that the evidence was only offered to prove why Adkisson approached Draper and that no limiting instruction is required.

Whenever ER 404(b) evidence is offered by the State, a limiting instruction is required. ER 105; *Foxhoven*, 161 Wn.2d at 175. Here, the trial court denied Draper's request for a limiting instruction. In doing so, the trial court abused its discretion. But the State also argues that any abuse of discretion in admitting Adkisson's statements was harmless. We agree.

Even if evidence is wrongly admitted, "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Tharp*, 96 Wn.2d at 599; *see State v. White*, 43 Wn. App. 580, 587-88, 718 P.2d 841

(1986). Here, Adkisson's testimony did not include any details relating to the felony warrant. The parties had stipulated that Draper had previously been convicted of a felony, an element of the unlawful possession charge. The jury could plausibly have associated this stipulated conviction with the outstanding warrant. And even if they did not do so, the charges in this case informed them that Draper was a convicted felon, so associating him with a second offense is unlikely to have a determinative effect on the outcome of this case. Draper's possession of the gun was the only trial issue and it was not seriously disputed by the defense. *See Tharp*, 96 Wn.2d at 600. We hold that the trial court's refusal of a limiting instruction regarding Adkisson's statements was harmless in this case.

III. Draper's Counsel Was Effective

Draper also contends that if his counsel waived a request for a limiting instruction, that he was ineffectively represented. Br. of Appellant at 32. Here, Draper's counsel explicitly requested a limiting instruction, RP (Feb. 23, 2009) at 36, thus, this claim fails.

IV. Draper Received a Fair Trial

Finally, Draper contends that cumulative error deprived him of his constitutional right to a fair trial. Br. of Appellant at 38. The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors affects the trial outcome. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). Although we hold the trial court abused its discretion in not giving a limiting instruction about Adkisson's reference to an outstanding felony warrant, it was harmless in the context of these charges and we do not hold that the trial court abused its

discretion in its other evidentiary rulings; thus, Draper's cumulative error claim also fails.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, P.J.