IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. PATRICK J.E. DOCKERY, Appellant.	No. 40256-4-II UNPUBLISHED OPINION

Armstrong, J. — Patrick Dockery appeals his conviction for third degree assault. He argues that the prosecutor's cross-examination and comments during closing argument violated his constitutional right to pre-arrest silence. He also argues that the trial court erred in failing to issue a limiting instruction when it admitted evidence of prior bad acts. Finding no reversible error, we affirm.

FACTS

On May 18, 2009, Larry Morrison encountered a male skateboarding in the street near a high school. After yelling at the skateboarder to get off the road, Morrison stopped and waited for the skateboarder. The skateboarder approached Morrison, threatening to hurt him.

Patrick Dockery arrived at the scene from across the street holding a skateboard. Morrison testified that Dockery "came roaring right up in my face" and that he responded by pushing Dockery away with his cane. Report of Proceedings (RP) at 26-27. He testified that Dockery then hit him with the skateboard and "picked up my crutch and started pounding on me with that." RP at 27, 38-39.

Dockery testified that he saw his skateboarder friend and Morrison yelling at each other.

Before involving himself in the altercation, he went to the high school to pick up his keys. Dockery spoke with a teacher's assistant, who testified that Dockery became argumentative and angry when she told him she did not have the keys.

According to Dockery, when he eventually approached the two men, Morrison stepped toward him, hitting him in the chest with the cane. He testified that Morrison tried to hit him again and in response, he picked up his skateboard and "kind of threw it" at Morrison. RP at 143. Dockery maintained that he felt threatened by Morrison and that he acted in self-defense. After the incident, Dockery left the scene before the police arrived.

As a result of the altercation, Morrison suffered abrasions to both forearms, a welt about four inches in length on his back, a large bruise on his thigh, bruising around his ribs, bruising on his arms, and two broken ribs.

The State charged Dockery with second degree assault. At trial, without objection, the State elicited testimony by the teacher's assistant that when Dockery went to get his keys, he was "mad," "angry," and that "his body language was very aggressive." RP at 48-49. She further testified that "he . . . went out the front door and kicked the front door open with a bang." RP at 50.

The prosecutor several times referred to Dockery's leaving the scene of the incident before the police arrived. During cross-examination of Dockery, the prosecution elicited testimony about his departure from the scene:

> Q: You didn't wait around for the police, did you?
> A: No, I—I just got a ride home.
> Q: You were informed that the police were coming and you left?
> A: I—I don't remember—I don't remember anybody saying anything about police coming or not. I didn't hear it.

> Q: Okay. So that didn't happen?
> A: All—all I just—I couldn't—I was just—I just left after it happened. I just wanted to go home.
> Q: In fact, nobody informed you that the police were coming and you didn't remain around?
> A: No, I just went home.

RP at 148.

During closing argument, the prosecution argued that other witnesses "were told that the police were coming and they waited for the police to arrive." RP at 158. The prosecutor also reminded the jury that Dockery had testified that no one was informed that the police were coming and that most of the witnesses "just walked off." RP at 158.

The jury found Dockery guilty of the lesser-included offense of third degree assault.

ANALYSIS

I. Prosecutor's Cross-examination and Closing

Dockery argues that the prosecutor's comments during cross-examination and closing argument on his failure to remain at the scene until police arrived violated his constitutional right to pre-arrest silence. U.S. Const. amend. V; Wash. Const. art. I, § 8. He also claims the comments amount to prejudicial misconduct. The State responds that evidence of Dockery's failure to remain at the scene was admissible evidence of flight, citing *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

Dockery's defense counsel did not object to the cross-examination testimony now complained of, or the prosecutor's remarks at closing. Generally, a defendant cannot raise an issue for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.2d 756 (2009). For the exception

to apply, the defendant must demonstrate that (1) the error is truly of constitutional magnitude and (2) the error is manifest. *O'Hara*, 167 Wn.2d at 98. An error is "manifest" when the defendant makes a plausible showing that it had a practical and identifiable consequence in the trial of the case. *O'Hara*, 167 Wn.2d at 99. Here, even if we consider the prosecutor's remarks to be comments on Dockery's pre-arrest silence, implicating a constitutional right, Dockery has failed to establish that the error was manifest.

At trial, the responding police officer and a doctor testified to Morrison's substantial injuries. The officer testified that when he arrived at the scene, Morrison's cane and watch were broken. He also observed abrasions on both of Morrison's forearms and a four-inch welt on his back. The doctor testified that Morrison sustained a large bruise on his thigh, bruising around his ribs, bruising on his arms, and two broken ribs. Dockery's assertion that he was acting in self-defense and "kind of threw" the skateboard at Morrison is inconsistent with the nature and extent of Morrison's injuries. RP at 143. Further, Dockery's claim that he felt threatened and scared by a disabled 65-year-old man with a bad back and a "shot up leg" is unpersuasive. RP at 23.

Moreover, the prosecutor did not expressly argue that Dockery's leaving the scene suggested that he was guilty. Rather, he pointed to the inconsistency between Dockery's testimony and the other witnesses about whether they knew the police were coming. Given this relatively benign comment and the overwhelming evidence that Dockery assaulted the victim without provocation, we cannot find that the prosecutor's cross-examination and closing remarks had a practical and identifiable consequence in the trial of the case. *O'Hara*, 167 Wn.2d at 99. Thus, Dockery cannot establish a manifest constitutional error that would allow us to consider the

merit of his argument for the first time on appeal.[1] RAP 2.5(a)(3); *O'Hara*, 167 Wn.2d at 97-98.

II. Limiting Instruction For The ER 404(b) Evidence

Dockery next argues that the trial court erred in failing to give a limiting instruction explaining the purpose of the teacher's assistant's testimony, which he concedes was admissible under ER 404(b). The trial court's failure to issue such a limiting instruction allegedly allowed the jury to consider his prior bad act as propensity evidence. Additionally, he argues that defense counsel's failure to request a limiting instruction constitutes ineffective assistance of counsel.

Trial courts are not required to sua sponte give a limiting instruction regarding ER 404(b) evidence admitted against a defendant. *State v. Russell*, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011). ER 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.) Under the plain language of ER 105, "the trial court has a duty to issue a limiting instruction only *upon request* for such an instruction." *Russell*, 171 Wn.2d at 123. Our Supreme Court has held that "a request for a limiting instruction is a prerequisite to a successful claim of error on appeal." *Russell*, 171 Wn.2d at 123 (citing *State v. Noyes*, 69 Wn.2d 441, 447, 418 P.2d 471 (1966)); *see also State v. Athan*, 160 Wn.2d 354, 383, 158 P.3d 27 (2007) (the

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[1] Dockery also argues that the comments constituted prosecutorial misconduct. But to establish misconduct, Dockery must show both improper conduct and a resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (a defendant claiming prosecutorial misconduct must show both improper conduct and a resulting prejudice). Because Dockery has failed to show that the prosecutor's remarks caused any prejudice, his claim of prosecutorial misconduct accordingly fails.

omission of a limiting instruction is not reversible error where the defendant fails to request the instruction during trial).

Defense counsel did not request a limiting instruction. Because the trial court was not required to give a limiting instruction for the ER 404(b) evidence sua sponte, Dockery's argument fails. *Russell*, 171 Wn.2d at 124.

Additionally, we reject Dockery's claim that he was denied effective representation. We review de novo a claim that counsel ineffectively represented the defendant. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on such a claim, a defendant must demonstrate that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). We presume that counsel was effective, a presumption the defendant can overcome only by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that if counsel had made the objections or arguments now urged, they likely would have succeeded. *See McFarland*, 127 Wn.2d at 337 n.4.

Here, Dockery concedes that the evidence was properly admitted under the res gestae or "same transaction" exception to ER 404(b). Br. of Appellant at 13; *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.2d 969 (2004) (evidence of other crimes or bad acts is admissible to provide the immediate context for events close in both time and place to the charged crime). A decision not to obtain a limiting instruction can be a legitimate trial tactic because such an instruction may

simply underscore the damaging evidence. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). Trial counsel may have chosen not to risk further highlighting Dockery's aggressive state. And even if the court issued a limiting instruction on the ER 404(b) evidence,[2] it is likely that the jury would have convicted Dockery on the overwhelming evidence against him. Dockery cannot prevail on either *Strickland* prong and, accordingly, his argument fails.

Affirmed.

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.

Armstrong, J.

We concur:

Penoyar, C.J.

Johanson, J.

[2] Dockery does not suggest what "limits" such an instruction would place on the jury in considering the evidence. Generally, evidence of the full story of a crime, including the events immediately leading up to the crime, is admissible to prove the defendant's guilt. *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997).