

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070375-CA
v.)	
)	F I L E D
Robert Brian Pedockie,)	(November 14, 2008)
)	
Defendant and Appellant.)	2008 UT App 417

Second District, Ogden Department, 011900689
The Honorable Ernest W. Jones

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Thorne, Billings, and Davis.

BILLINGS, Judge:

Defendant Robert Brian Pedockie was convicted of aggravated kidnapping. The trial court imposed an indeterminate prison term of ten-years-to-life and ordered that the sentence run consecutively to the sentence Defendant was then serving. The trial court also ordered that Defendant be given credit for time served, although Defendant had not requested it. Defendant appealed his conviction, and the case was remanded for a new trial.

Prior to the new trial, Defendant filed a motion in limine requesting "an order forbidding the prosecutor from mentioning that Defendant has been in prison, has been on parole, has had any participation in the Soldiers of Aryan Culture (SAC), had any prior history of domestic violence, or has solicited another person to allegedly threaten the alleged victim." The trial court denied the motion, ruling that the matters at issue in the motion were relevant to explaining the relationship between Defendant and the victim and "extremely relevant in trying to figure out what she did, what he did, and why they reacted the way they did during the course of the kidnapping or the alleged kidnapping." The trial court did, however, determine that the prosecutor need not elicit the name of the gang to which

Defendant belonged. Defendant was again convicted of aggravated kidnapping, sentenced to ten-years-to-life, and was not given credit for time served.

Defendant appeals the trial court's denial of the motion in limine, arguing that the evidence in question was highly prejudicial and inflammatory. Defendant also appeals the trial court's denial of credit for time served.

I. Motion in Limine

We review the trial court's decision to admit evidence of Defendant's prior bad acts for an abuse of discretion. See State v. Allen, 2005 UT 11, ¶ 15, 108 P.3d 730. "We review the record to determine whether the admission of other bad acts evidence was scrupulously examined by the trial judge in the proper exercise of that discretion." State v. Nelson-Waggoner, 2000 UT 59, ¶ 16, 6 P.3d 1120 (internal quotation marks omitted).

Evidence of prior bad acts is subject to rule 404(b) of the Utah Rules of Evidence:

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,

Utah R. Evid. 404(b).

This list is "not exhaustive," Daines v. Vincent, 2008 UT 51, ¶ 43, 190 P.3d 1269, and evidence may be admitted "so long as the evidence is offered for a legitimate purpose other than to show the defendant's propensity to commit the crime charged," id. (internal quotation marks omitted). Our supreme court allows evidence to be introduced under rule 404(b) if "(1) the evidence is offered for a proper, noncharacter purpose, such as one of those listed in rule 404(b); (2) the evidence meets the requirements of rule 402; and (3) the evidence meets the requirements of rule 403." Allen, 2005 UT 11, ¶ 16.

A. Proper, Noncharacter Purpose

First, the State argues that the evidence was admissible for a proper, noncharacter purpose because it went to the victim's and Defendant's intents and showed how the victim met Defendant, why the victim was genuinely afraid of Defendant, why she was

afraid to escape, why she did not call the police when she had the opportunity, and why a mutual friend told her not to call the police, stating it would "become[] a whole gang situation." All of this information tends to show that the victim was truly being held against her will, a key element of aggravated kidnapping.

In denying Defendant's motion in limine, the trial court stated:

You know, normally evidence about him being in prison or on parole or belonging to SAC would not be relevant, but in this case it just seems it is because it explains how they met, why she was afraid of him, and I just--I don't know how you try the case because of the relationship and the setting in which they met and leave that out. It just--the jury is not going to have a correct picture of the relationship and what went on here. So I'm going to deny the motion in limine.

It just seems to me it's being offered to explain how they were together, how they met, how they knew each other, what the relationship was, then it becomes extremely relevant in trying to figure out what she did, what he did, and why they reacted the way they did during the course of the kidnapping or the alleged kidnapping here. It also explains why she was afraid of . . . [D]efendant, why she was afraid to call the police. And again, it does seem to be relevant in this particular case.

These statements by the trial court indicate that it "scrupulously" examined the evidence and determined that the evidence was not being admitted for character purposes. Moreover, the trial court ruled that the prosecutor did not need to elicit testimony of "what [specific] gang [Defendant] belongs to," which shows that the trial court attempted to separate the necessary evidence from the prejudicial, unnecessary evidence.

B. Rules 402 and 403

Next, we consider whether the evidence meets the requirements of rules 402 and 403 of the Utah Rules of Evidence. Rule 402 simply considers whether the information is relevant, about which there is little debate here. See Utah R. Evid. 402. The evidence in question also conforms to rule 403, which states that "[a]lthough relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. R. 403. Here, we agree with the trial court that the importance of the evidence for purposes of explaining the circumstances around the crime and the victim's and Defendant's intent is not substantially outweighed by any unfair prejudice.¹

II. Credit for Time Served

Where a sentence has been vacated and remanded for a new trial, the trial court may not impose a new sentence that is harsher than the first unless the reason is readily clear. See Utah Code Ann. § 76-3-405 (2003) ("Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied."). This is to ensure that defendants are not penalized for appealing a conviction. See State v. Sorenson, 639 P.2d 179, 180 (Utah 1981).

Here, the State initially asserts that because credit for time served was granted orally but not included in the written statement, Defendant cannot say that the second sentence is harsher than the first. Under the circumstances of this case, the effect of credit for time served is determined by the Board of Pardons and Parole (the Board of Pardons). "[I]t is . . . the Board of Pardons, and not the trial court, which has authority to grant defendant credit for the time he served prior to conviction." State v. Alvillar, 748 P.2d 207, 209 (Utah Ct. App. 1988). Our supreme court has stated: "Under the indeterminate sentencing scheme adopted by this [s]tate, the trial judge has no discretion in fixing the term of imprisonment. . . . The trial judge's recommendation to the [B]oard [of Pardons] is simply the judge's personal non-binding expression It does not increase to any degree the effect or magnitude of a sentence." State v. Bakalov, 1999 UT 45, ¶ 75, 979 P.2d 799. Accordingly, the trial court's decision to not grant credit for time served does not necessarily lengthen the time Defendant will serve. This decision is left with the Board of Pardons.

We conclude that the evidence of Defendant's prior bad acts was admissible under rule 404(b) of the Utah Rules of Evidence. We also conclude that the trial court's decision to not grant

¹We do not reach the issue of whether the admission of the evidence was harmful because we conclude it was proper.

credit for time served does not amount to a harsher sentence than originally imposed, because the ultimate length of Defendant's sentence is left to the Board of Pardons. We affirm.

Judith M. Billings, Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

James Z. Davis, Judge