IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONALD M. GRAY, a.k.a. SCOTT WILLIAM SANBEG, Appellant.	)))))))))))	DIVISION ONE No. 65198-6-I UNPUBLISHED OPINION FILED: October 10, 2011

Dwyer, C.J. — Scott Sanbeg[1] appeals from the judgment entered on a jury's verdict finding him guilty of assault in the third degree. Contrary to Sanbeg's contentions, the trial court properly interpreted ER 404(b) when considering the admission of prior bad acts evidence and properly exercised its discretion by excluding evidence of alleged prior misconduct by an arresting officer. Accordingly, we affirm Sanbeg's conviction.

I

On September 6, 2008, at approximately 1:30 a.m., Sanbeg was seated in a chair outside of a closed coffee shop in Kirkland, apparently unconscious. Kirkland Police Officers Duncan McKay and Glenn Shackatano approached

[1] Sanbeg is also known as "Donald Gray," an alias that was memorialized in his law enforcement records and consequently used in the original charging documents herein. Throughout this opinion, as during trial, the appellant is referred to by his legal name, Scott Sanbeg.

Sanbeg, and Officer McKay tapped Sanbeg on the knee with a flashlight, asking Sanbeg if he was okay. Although Sanbeg was initially unresponsive, he eventually awoke and kicked forward, striking Officer McKay in the knee. After Officer McKay identified himself as a police officer and advised Sanbeg not to kick him again, Sanbeg braced himself on the arms of the chair, scooted backward, smiled or smirked, and kicked Officer McKay again, this time in the groin.

The officers then attempted to place Sanbeg under arrest. Sanbeg resisted, pulling away from the officers and taking swings at them while uttering profanities. During the scuffle, Sanbeg struck Officer McKay in the upper lip, and Officer McKay struck Sanbeg in the forehead three times. Because Sanbeg refused to comply with the officers' repeated orders to lie down and stop resisting, Officer Shackatano used his taser on Sanbeg. Sanbeg was later charged with assault in the third degree based upon this incident.

Before trial, the State disclosed to Sanbeg's counsel that Kirkland Detective Joseph Indahl had commented to the prosecutor that Officer McKay was "assaulted a lot or ends up tasing people a lot." Report of Proceedings (RP) (March 2, 2010) at 56. Sanbeg sought to introduce this statement as evidence of Officer McKay's prior conduct in order to prove that Officer McKay frequently used excessive force, establishing a common scheme or plan or modus operandi. In a pretrial hearing, the trial court excluded the evidence of Officer

McKay's alleged prior behavior, ruling:

> [M]y real problem is that in order for me to analyze this kind of evidence of modus operandi or common scheme or plan, I need to have very specific facts about the prior incidents. . . . I deny the motion to introduce this evidence. I would simply need more facts to be able to make a decision, but simply the, just the bare fact, that somebody has been assaulted a number of times and has tased people is not sufficient.

RP (March 2, 2010) at 65-67.

The jury convicted Sanbeg of assault in the third degree.

Sanbeg appeals.

II

Sanbeg first contends that the trial court erred as a matter of law in its interpretation of ER 404(b) and, in so doing, created an unprecedented limitation on the admission of evidence offered pursuant to that rule. We disagree.

A trial court's interpretation of an evidentiary rule is a question of law subject to de novo review. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

Pursuant to ER 404(b),

> [e]vidence 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.

Thus, evidence of prior misconduct is admissible only if relevant for some purpose other than suggesting a propensity to act in a manner consistent with such misconduct. ER 404(b); State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321

(2009). Accordingly, evidence of prior misconduct is admissible in order to show a common scheme or plan—in other words, to show that an individual "committed markedly similar acts of misconduct against similar victims under similar circumstances." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Similarly, evidence of prior misconduct proffered in order to demonstrate a modus operandi is admissible if it "bears such a high degree of similarity as to mark it as the handiwork of the accused." State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007) (internal quotation marks omitted) (quoting State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)).

Sanbeg contends that the trial court improperly interpreted ER 404(b) to limit the admission of prior bad acts evidence to circumstances in which identity of the individual or the commission of the act is disputed. The trial court, however, did not create any such limitation. Rather, the court merely referenced, by way of example, the types of cases in which prior bad acts evidence is usually admitted.[2] Thus, the trial court did not err by creating an

[2] In excluding the evidence, the trial court explained:

> [M]y real problem is that in order for me to analyze this kind of evidence of modus operandi or common scheme or plan, I need to have very specific facts about the prior incidents. For example, under modus operandi. The proponent must be able to prove or point to something distinctive or unusual, signature[']s often the word associated with modus operandi. And in that particular instance modus operandi is used to show a system or course of conduct that connects a person to a particular act. *Typically*, in other words, it's used to show identity. *Not exclusively*, but often to show that a person actually committed a particular crime in that way. Common scheme or plan is a broader exception to 404(b). It was *most often* employed prior to the enactment of rules on sex crimes. It was used in cases involving sex crimes with children and also under the Lough case. . . . Also having to do with proving that a person did a particular kind of crime, and they were guilty of that crime when there was a dispute as to whether or not they actually

improper limitation on the use of prior bad acts evidence proffered pursuant to ER 404(b).

Notwithstanding Sanbeg's mischaracterization of the trial court's ruling, each of the court's statements of the law pertaining to ER 404(b) was accurate.[3] The trial court did not err in its interpretation of ER 404(b).

III

Sanbeg next contends that, even if the trial court correctly interpreted ER 404(b), it abused its discretion by excluding evidence of arresting Officer McKay's alleged prior behavior. We disagree.

Where a trial court correctly interprets an evidentiary rule, its decision to admit or exclude evidence is reviewed for abuse of discretion. DeVincentis, 150 Wn.2d at 17 (citing Lough, 125 Wn.2d at 856). A trial court abuses its discretion when its evidentiary ruling is "'manifestly unreasonable or based upon untenable grounds or reasons.'" State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

In assessing the admissibility of proposed ER 404(b) evidence, a trial

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> committed it. Lough involved a fireman who drugged women, and sexually assaulted them, for example, and Lough disputed those actually occurred at all. So these exceptions really are *usually* used to prove identity, and that somebody actually did something.

RP (March 2, 2010) at 65-66 (emphasis added).

[3] In addition to his contention that the trial court improperly limited the use of ER 404(b) evidence, Sanbeg suggests that the court improperly construed and distinguished the Lough case. Because the trial court did not limit the use of ER 404(b) evidence to cases in which identity or the commission of an act is disputed, as Sanbeg contends, it did not interpret Lough to support such a proposition. Moreover, Sanbeg misunderstands the Lough case when he states that neither identity nor the commission of the act was disputed in that case, as Lough directly disputed the occurrence of the charged attempted rape by asserting that the sexual contact at issue was consensual. Lough, 125 Wn.2d at 849.

court must (1) find by a preponderance of the evidence that the misconduct actually occurred; (2) identify a non-propensity purpose for introducing the evidence; (3) determine that the evidence is materially relevant to that purpose; and (4) find that the probative value of the evidence outweighs its prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002) (citing State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995)). Significantly, evidence proffered pursuant to ER 404(b) should be excluded in doubtful cases. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

Here, the trial court properly conducted this four-part analysis when considering the admissibility of Sanbeg's proffered ER 404(b) evidence and found that the evidence clearly failed to satisfy at least two requirements. First, Sanbeg failed to offer sufficient evidence from which the trial court could conclude that the alleged prior acts more likely than not occurred. State v. Carleton, 82 Wn. App. 680, 683-84, 919 P.2d 128 (1996) (explaining the trial court's role in deciding "whether the evidence is sufficient to allow a jury to conclude there was a common scheme or plan" (citing Lough, 125 Wn.2d at 852)). Because Sanbeg offered no additional facts beyond the claim that "this is what happens to Officer McKay all the time, that he gets kicked in the balls, and then tases people," RP (March 2, 2010) at 64, the trial court was not given sufficient evidence from which to assess whether the alleged acts actually

occurred.

Although Sanbeg's proffer of evidence undoubtedly failed at this initial step, the trial court nevertheless proceeded to the second and third steps of the requisite ER 404(b) analysis. The trial court identified the proposed purposes of the evidence before attempting to evaluate the relevance of the evidence relative to those purposes. Because the trial court did not have any facts before it regarding the alleged prior assaults and tasing incidents, it was unable to assess the similarity of the prior incidents to the case at hand and, therefore, was equally unable to discern the relevance of the evidence.

Admission of evidence for the purpose of showing a common scheme or plan requires *substantial* similarity between the prior and charged acts. DeVincentis, 150 Wn.2d at 21. Evidence offered to show a common scheme or plan is commonly used in cases where commission of an act is disputed because the relevance of the evidence is manifest—evidence of "substantially similar features between a prior act and the disputed act" suggests that the acts can be "naturally explained as individual manifestations of a general plan" and that the contested act in fact occurred. DeVincentis, 150 Wn.2d at 20-21. Evidence offered to show modus operandi requires an even greater measure of similarity between the alleged prior misconduct and the current act. See Foxhoven, 161 Wn.2d at 176. Evidence proffered for that purpose must bear "such a high degree of similarity as to mark it as the handiwork of the accused."

Foxhoven, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting Coe, 101 Wn.2d at 777). Evidence admitted to show modus operandi is primarily used to corroborate the identity of the accused because the relevance of such evidence is its tendency to increase the probability that the accused committed the act in question. See Coe, 101 Wn.2d at 777-78.

Thus, in order to assess the similarity of the alleged prior acts and the incident in question in order to confirm the relevance of the evidence for either proposed purpose, the trial court needed specific evidence about the alleged prior assaults culminating in the use of a taser. Sanbeg failed to offer any evidence from which the trial court could undertake the deeply fact-dependent inquiry into whether there was sufficient similarity between the alleged prior misconduct and the current act in order to justify admission of the proffered evidence.[4]

The trial court conducted the requisite four-part inquiry in determining the admissibility of ER 404(b) evidence of Officer McKay's alleged prior behavior of being assaulted and deploying his taser. Because Sanbeg offered insufficient evidence from which the trial court could conclude that the alleged acts actually occurred or from which it could determine the relevance of those acts, the trial court properly excluded the evidence. Exceptions to ER 404(b), such as modus operandi and common scheme or plan, "are not magic passwords whose mere

[4] As these previous steps were dispositive, the trial court did not reach the fourth and final step of the inquiry, which requires the court to balance the probative value of the proffered evidence against the risk of unfair prejudice.

incantation will open wide the courtroom doors to whatever evidence may be offered in their names," but instead are exceptions "carefully carved out of the general rule to serve a limited judicial and prosecutorial purpose." United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974). By offering nothing more than a bare claim that Officer McKay was often assaulted and employed his taser, Sanbeg failed to supply the trial court with sufficient evidence to justify the

admissibility of the proffered evidence. Accordingly, the trial court properly exercised its discretion by excluding that evidence.

Affirmed.

Dwyer, C. J.

We concur:

Ellington, J.

Becker, J.