IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL J. PELKEY, Appellant.	No. 67415-3-I DIVISION ONE UNPUBLISHED OPINION FILED: January 14, 2013

Leach, C.J. — Michael Pelkey appeals his conviction for domestic violence felony violation of a court order. He argues that the court denied him a fair trial by refusing to give a limiting instruction when it admitted into evidence a copy of a no-contact order. Pelkey also claims that the trial court erroneously calculated his offender score and improperly imposed community custody. The claimed instructional error was harmless because overwhelming evidence supported his conviction and the requested instruction would not have materially affected the outcome of trial. We reject Pelkey's other claims and affirm.

Background

On November 24, 2010, Auburn Police Officer John Clemmons received a tip that Michael Pelkey was at an apartment with Destiny West in violation of a domestic violence protection order. After confirming the no-contact order, Clemmons responded to the apartment. While standing outside its door, he heard a male and a female voice inside. He knocked on the door, and West answered it. Clemmons described her

demeanor as "calm, but appeared slightly nervous." After she consented to a search of the apartment, Clemmons found Pelkey hiding in a back bedroom.

The State charged Pelkey with domestic violence felony violation of a court order. As an element of this crime, the State must prove that the defendant has two prior convictions for violating an order. The trial court admitted a copy of the no-contact order into evidence. To avoid the admission of copies of Pelkey's prior convictions, defense counsel stipulated that Pelkey had two such convictions.

At Pelkey's request, the court gave a limiting instruction that the jury should not consider the stipulation about Pelkey's prior convictions for "any other purpose than determining whether the defendant had at least two prior convictions for violating a no contact order." Pelkey also requested an instruction telling the jury, "Evidence has been introduced in this case on the subject of a no contact order. You must not consider this evidence for any other purpose than determining whether the no contact order was valid." The State objected, arguing that the instruction implied that the State had to prove the validity of the no-contact order, which was not an element of the crime. Rather than rewording the instruction to allay the State's concerns, the court declined to give the requested instruction.

A jury found Pelkey guilty as charged, and the court imposed a standard range sentence, including community custody. Pelkey appeals.

Standard of Review

We review the trial court's refusal to give a particular jury instruction for an abuse of discretion.[1] A trial court abuses its discretion when the decision is manifestly

unreasonable or is based upon untenable grounds or untenable reasons.[2] Whether a rule of evidence applies to a particular factual scenario is a question of law that we review de novo.[3]

Analysis

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." According to our Supreme Court, "[t]his prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime."[4]

> [But] ER 404(b) is not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case," but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.[5]

To that extent, ER 404(b) evidence may be admitted for another purpose, including, but not limited to, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[6] When the trial court admits ER 404(b) evidence, it must state its reasoning on the record.[7] Further, the defendant is entitled to a limiting

---

[1] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

[2] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[3] State v. Chambers, 134 Wn. App. 853, 858, 142 P.3d 668 (2006).

[4] State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)).

[5] Foxhoven, 161 Wn.2d at 175 (quoting State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

[6] ER 404(b).

[7] State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984).

instruction upon request.[8]

Pelkey objected to potentially damaging character evidence contained in the first paragraph of the domestic violence no-contact order. The provision at issue read, "[T]he court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW." In the court's colloquy on the admission of the State's exhibits and the requested limiting instructions, neither the parties nor the court explicitly discussed exhibit 1 as ER 404(b) evidence, but the court clearly addressed Pelkey's concern that the no-contact order's language could indicate to the jury that Pelkey was guilty because he had previously violated the order. The State maintained that this language could not be redacted from the exhibit. Pelkey argued that telling the jury that he had been "charged with, arrested for, or convicted of" domestic violence in the past, without providing a limiting instruction, allowed the jury to conclude that he was guilty because he had a propensity to commit crimes. He requested a limiting instruction, which the court declined to give after the State objected that the proposed instruction was an incorrect statement of the law because it implied that the order's validity was an element of the crime.

Our Supreme Court has said, in the context of ER 404(b) limiting instructions, that once a criminal defendant requests an instruction, the court has a duty to instruct the jury correctly, even if the defense fails to offer a correct instruction.[9] As the court

[8] ER 105; Foxhoven, 161 Wn.2d at 175.
[9] State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012).

held in State v. Goebel, "[T]he court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes."[10]

The evidence was clearly admissible to prove an essential element of the charged offense—that Pelkey was restrained by a no-contact order. We agree, however, that the unredacted language of the order is evidence of Pelkey's other crimes. Thus, Pelkey was entitled to a limiting instruction, and the court erred by failing to give one.

Nonetheless, failure to give an ER 404(b) limiting instruction may be harmless.[11] An evidentiary error that is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence or failure to give a limiting instruction, requires reversal only if there is a reasonable probability that the error materially affected the trial's outcome.[12] No such probability exists in this case. Even if the court had given a limiting instruction to prohibit the jury from considering the evidence of Pelkey's prior court order violations to show his propensity to commit crimes, the overwhelming evidence of Pelkey's guilt leads us to conclude that the outcome of his trial would not have been materially affected.

Officer Clemmons, a 14-year police veteran, acted on a reliable tip that Pelkey was in an apartment with West in violation of the no-contact order against him. He

[10] 36 Wn.2d 367, 379, 218 P.2d 300 (1950).
[11] State v. Mason, 160 Wn.2d 910, 935, 162 P.3d 396 (2007).
[12] State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997).

heard a man and a woman speaking inside the apartment, so he attempted to make contact with the occupants. West opened the door and spoke to Clemmons. That conversation gave him reason to believe that Pelkey was still in the area. After West gave Clemmons permission to search the premises, Clemmons found Pelkey hiding in a back bedroom to escape police detection.

At trial, Pelkey acknowledged that he knew about the no-contact order and argued only that the State failed to prove that he knowingly violated that order. Specifically, he claimed that because Clemmons did not see Pelkey or West enter the apartment together, they might have entered separately and stayed in separate rooms, technically satisfying the order's 500-foot distance requirement. The jury, as the ultimate arbiter of witness credibility,[13] rejected this interpretation of the officer's undisputed evidence. Given Clemmons's testimony, the jury had more than sufficient evidence to decide that Pelkey knowingly violated the order. Thus, even though Pelkey was entitled to a limiting instruction regarding the no-contact order's admissibility, the court's failure to give that instruction did not materially affect the outcome of the trial.

For the first time on appeal, Pelkey also challenges his offender score calculation, arguing that because it had been more than five years since his last felony conviction, his criminal history washed out.[14] RCW 9.94A.525(2), the "wash out" statute, requires that the offender spend a certain amount of time "in the community

[13] State v. Raleigh, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010).

[14] He did not object to his offender score on this ground at sentencing. But, despite his failure to preserve this issue for appeal, he is still entitled to relief if he can show he was subject to an unlawful sentence. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

without committing any crime that subsequently results in a conviction"[15] before the conviction is no longer included as a prior offense for scoring purposes. Pelkey's two prior misdemeanor convictions for violating the no-contact order preclude his prior felony convictions from washing out.

Pelkey also contends that the court lacked authority to impose community custody for a violation of a court order. Because violation of a domestic violence court order is a crime against persons[16] and the court has authority to impose up to one year of community custody for such violations,[17] Pelkey's claim fails.

Conclusion

Although Pelkey was entitled to a limiting instruction, because overwhelming evidence supports his conviction, we find the error was harmless. The sentence imposed by the trial court was proper. Therefore, we affirm.

Leach, C.J.

WE CONCUR:

Becker, J.

Grosse, J.

[15] For Class B felonies, this is 10 years; for Class C felonies, it is 5.
[16] RCW 9.94A.411(2)(a).
[17] RCW 9.94A.701(3)(a).