IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28797-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
LARRY GLENN GATEWOOD,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Larry Gatewood was convicted of escape from community custody. He contends that the trial court improperly denied his request for a limiting instruction and there was insufficient evidence to support the conviction. We disagree with both arguments and affirm.

FACTS

Community Corrections Officer (CCO) Jack Durkin was assigned to supervise Larry Gatewood in early 2007. Between February 1, 2007 and August 5, 2008, the two men met several times, always as scheduled. At each meeting the CCO gave Mr.

Gatewood a business card with the next scheduled appointment. During the August 5, 2008 meeting, the next meeting was scheduled for September 11, 2008. Mr. Gatewood did not appear. The CCO attempted, without success, to locate him. An arrest warrant soon issued. On September 17, Gatewood called Durkin and acknowledged that he was wanted but declined to tell the officer where he was. He said he would turn himself in on September 22. He did not. On October 9, the two men again spoke by telephone. Mr. Gatewood said it was "not in his nature to turn himself in." The two had no further contact.

Mr. Gatewood was eventually arrested and charged with escape from community custody. At trial, Durkin testified that he was a community corrections officer who "supervise[d] individuals who have been to superior court and sentenced to a term of community custody." He also testified that a "community custody inmate" (CCI) "is an individual who was sentenced in superior court, and part of their sentence is prison and supervision to follow." CCO Durkin also stated that he and Mr. Gatewood had "telephonic meetings prior to Mr. Gatewood's release." No mention was made of Mr. Gatewood's underlying conviction, nor was any other criminal act mentioned. There was no objection to Durkin's testimony.

At the instructions phase of trial, Mr. Gatewood proposed a limiting instruction

regarding his status as a CCI. The trial court found that CCO Durkin's testimony had been "clean," and no instruction was necessary. Mr. Gatewood took exception, arguing that in light of CCO Durkin's testimony, the mere fact of community custody was itself a "specter" of the prior criminal conviction, and without an instruction the jury might impermissibly speculate about the conviction or sentence.

The jury convicted as charged. This appeal followed.

ANALYSIS

Mr. Gatewood argues that the trial court erred in refusing to issue a jury instruction limiting the purposes for which the jury could consider his status as a CCI. He believes that Durkin's testimony was within the scope of ER 404(b), therefore entitling him to a limiting instruction. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). He also argues that the evidence was insufficient to support the conviction. We address each argument in turn.

Limiting Instruction

Preliminarily, the State argues that Mr. Gatewood failed to preserve this issue by not objecting during Durkin's testimony. It is axiomatic that in order to preserve a matter for appellate review, a timely objection must be made in the trial court. *See, e.g.*, *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986);

RAP 2.5(a). If the issue before this court were the admissibility of Durkin's testimony or the lack of a contemporaneous limiting instruction, then Mr. Gatewood would be precluded from raising the issue because he did not object at trial. *Id*. Whether waiver of an ER 404(b) objection also waives a written jury instruction on the topic is an interesting question. It is conceivable that a defense attorney would prefer not to highlight testimony and thus eschew a contemporaneous limiting instruction while still desiring a later written instruction. However, since the right to a limiting instruction is based upon the admission of ER 404(b) testimony, it is arguable that the failure to object also waives a final limiting instruction because there has been no determination that ER 404(b) testimony was even admitted at trial. However, in the absence of authority extending the waiver by nonobjection doctrine to a timely requested jury instruction, we will consider the claim.

Whether to give a particular jury instruction is a matter within the discretion of the trial court. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). A trial court is only required to instruct the jury where substantial evidence supports a particular theory. *Id.* Refusal to give a particular instruction is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is based upon untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). However the question

of whether a rule of evidence applies to a particular factual scenario is a question of law that this court reviews *de novo*. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002 (1994).

ER 404(b) states:

> 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.

The purpose of ER 404(b) is to prohibit the admission of evidence that suggests that the defendant is a "criminal type" and thus likely guilty of committing the crime with which he is charged. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). When ER 404(b) evidence is admitted, the trial court is required to state its reasoning on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). Further, the defendant is entitled to a limiting instruction upon request. ER 105; *Foxhoven*, 161 Wn.2d at 175.

Here, Mr. Gatewood argues that Durkin's testimony that he was a CCI was prior misconduct evidence under ER 404(b), and that the trial court erred in denying his request for a limiting instruction. However, the record shows that Durkin's testimony stated only that Mr. Gatewood was in community custody as the result of a superior court

order, and that he and Mr. Gatewood had been in contact prior to the latter's release. No details were disclosed regarding the underlying offense or any other criminal acts. Accordingly, the testimony does not constitute propensity evidence under ER 404(b) because it does not mention any particular actions or conduct that would tend to show Mr. Gatewood was a "criminal type." It added nothing to what the jury already knew from the charge itself. Because the unchallenged testimony was not propensity evidence, the trial court was within its discretion to deny the request for a limiting instruction.

Even if the trial court had erred in failing to give the requested limiting instruction, the error was harmless because it was a nonconstitutional error that did not affect the outcome of the trial. *Jackson*, 102 Wn.2d at 695. "Where an error is not of constitutional magnitude, it requires reversal only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). Here, had the alleged error not occurred, a limiting instruction would have been given to the jury. The evidence before the jury would not have differed; there is therefore no reasonable probability that a material change in outcome would have occurred. The alleged error was harmless.

We conclude that the trial court did not err in refusing the limiting instruction because Durkin's testimony was not propensity evidence. Further, any error was

harmless because there is no reasonable probability that the outcome of the trial would have changed if the requested instruction had been given.

Sufficiency of the Evidence

Mr. Gatewood contends that even when viewed in the light most favorable to the State, the evidence is insufficient to prove that he was in the custody of the Department of Corrections at the time he allegedly escaped from community custody.

A sufficiency of the evidence challenge admits the truth of the State's evidence; all reasonable inferences therefrom are drawn most strongly in favor of the State. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). The test to determine the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find each element of the charged offense proven beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

Here the jury was instructed:

> To convict the defendant of the crime of Escape from Community Custody, each of the following elements must be proved beyond a reasonable doubt:
> (1) That on or about the 11th Day of September, 2008, the defendant was an inmate in community custody;
> (2) That on or about that date, the defendant did willfully discontinue making himself available to the department of corrections by failing to maintain contact as directed with his community corrections officer; and

> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers at 23.

The record demonstrates that as of February 1, 2007, Mr. Gatewood was required to report to Durkin for his court-ordered community supervision and understood his duty to report. He lived up to that obligation for 18 months. On August 5, 2008, the two men met in person and scheduled their next meeting for September 11, 2008. Mr. Gatewood failed to appear or otherwise make contact. The record thus indicates that on September 11, 2008, Mr. Gatewood was still in community custody and failed to report as ordered. The subsequent telephone conversations confirmed Mr. Gatewood's understanding of his failure to comply. When construing the evidence and inferences therefrom most strongly against Mr. Gatewood, sufficient evidence permits a rational trier of fact to conclude beyond a reasonable doubt that Mr. Gatewood was an inmate on community custody and failed to report as required. The evidence established each element of the offense.

The trial court did not err in declining the requested jury instruction. Sufficient evidence supports the conviction.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.