IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29688-1-III**
Respondent,	)	
v.	)	**Division Three**
CHRISTOPHER DALE BROCKMILLER,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J. • Christopher D. Brockmiller appeals his convictions for attempting to elude a pursuing police vehicle, possessing a stolen vehicle, and driving while license suspended (DWLS). He contends the trial court erred in allowing prior bad acts evidence under ER 404(b). Alternatively, Mr. Brockmiller argues the court should have offered a limiting instruction regarding the prior bad acts.[1] In his statement of additional grounds for review (SAG), Mr. Brockmiller contends the court's instructions erroneously required unanimity, he was denied his right to a public trial because the court conducted a jury instruction conference in chambers, and the court erred in denying a defense continuance motion. We affirm.

[1] Mr. Brockmiller also appealed his sentence based on a clerical mistake. The error has been corrected and the issue is now moot.

FACTS

In December 2009, while pursuing a speeding vehicle, Washington State Patrol Trooper Nickolaus Lull identified the driver as a male with a rounder face, wearing a black beanie and a black jacket. Trooper Lull clocked the speed at approximately 100 miles per hour. The vehicle stopped when it went off the road into a field. Two men exited the vehicle and fled. The trooper chased the two men, first capturing one man that fell, later identified as Mr. Brockmiller. Trooper Lull reported he was wearing a "[b]lack jacket, the beanie and blue jeans." Report of Proceedings (RP) (Jan. 19, 2011) at 100. He identified Mr. Brockmiller as the vehicle driver. The vehicle had two different license plates, and neither plate was registered to the vehicle. The vehicle was reported as stolen. The other individual apprehended was Adam Clements. He stated that he was in the vehicle with Mr. Brockmiller on the date in question, but the driver was a man named Jorge. The State charged Mr. Brockmiller with attempting to elude a pursuing police vehicle, possession of a stolen motor vehicle, and first degree DWLS.

The State sought to admit evidence, under ER 404(b) of a June 2, 2009 incident in which Mr. Brockmiller was charged with attempting to elude a pursuing police vehicle, reckless endangerment, and first degree DWLS. The State argued Trooper Bruce Maier would offer the following testimony regarding the incident:

> This was south of Tonasket on SR 97, same as this

> incident, speeding, 71 in a 60. There's, you know, a chase that goes on. Subjects fled from the vehicle, and again, Mr. Brockmiller's outside the vehicle, he stopped, he says, you know, "[h]ey, I wasn't, I wasn't driving.[] Gives several inconsistent statements by which they deduced that he must've been driving. And when they do the investigation on the car that was being driven, the car had rear Washington license plate 5-0-9-R-Y-B, but had expired in January 2010, it returned to a white 1987 Honda Prelude. The running vehicle was a white Acura Integra. . . . The front plate on the car was - - he had a different license number, Washington 0-1-6-L-O-I, it returned to an '86 Honda Accord . . . . The license was cancelled and the vehicle report destroyed. The VIN returned to the Acura Integra.

RP (Jan. 20, 2011) at 149-50. The June 2 incident charges were dismissed. The State, however, argued this evidence "would be *modus operandi* evidence under 404(b), or at least evidence of absence of mistake here, that he could be mistakenly in a vehicle with two different plates, knowledge, plan, [and] scheme. It goes to things other than to prove conformity on another occasion." RP (Jan. 20, 2011) at 149. Mr. Brockmiller objected.

The trial court allowed the evidence, finding, "the basic thinking is that the prior bad conduct is so similar or similar enough to the present case that it shows that the - - it identifies [Mr. Brockmiller]." RP (Jan. 20, 2011) at 163. The court went on to find the evidence of a prior incident was highly probative of Mr. Brockmiller's guilt in the present case and that the probative value of the prior incident outweighs the prejudicial effect. Mr. Brockmiller unsuccessfully requested a continuance.

Mr. Brockmiller unsuccessfully proposed the following limiting instruction regarding ER 404(b) evidence:

> The court has admitted testimony regarding a prior alleged incident in which [Mr. Brockmiller] was identified. This testimony was admitted solely for the purpose of establishing a common technique. You may not use the evidence to determine that [Mr. Brockmiller], because of earlier accusations, was more likely to commit the crime(s) in question, or that [Mr. Brockmiller] has any tendency to commit such crimes.

Clerk's Papers (CP) at 20. The court reviewed the proposed instruction and stated it was "not a correct statement of the law, and it's not helpful in the Court's view." RP (Jan. 20, 2011) at 247. The court noted it would be "difficult or impossible to draft an instruction that would make the situation any better or any clearer or be of assistance to the defense or to the jury." *Id.* at 246. Mr. Brockmiller did not offer a revised instruction.

The court partly instructed the jury, "You must fill in the blank provided in the verdict form the words 'not guilty' or the word 'guilty' according to the decision you reach. . . . Because this is a criminal case, each of you must agree for you to return a verdict on any count." CP at 39. The court noted for the record that the judge and attorneys met and the judge, "tweaked the instructions a little bit. I think the only thing that you might call substantial is that I added a definition of willful because willful is -- it seems like it's a technical term." RP (Jan. 20, 2011) at 228.

During rebuttal closing argument, the State, apparently in response to Mr.

Brockmiller's argument that Jorge drove the car, argued:

> What are the odds in a person's whole lifetime that they would twice be the passenger in a vehicle that is eluding from police in the area of Tonasket, speeds over 100 mph, and twice ditch in, into, you know, a dirt-strewn remote area and flee for hundreds of yards and attempt to put distance between yourself and, and the vehicle and get away? What are the odds of that happening in one's lifetime to the same person, and that both of those vehicles would have switched plates, let alone happening within six months.

RP (Jan. 20, 2011) at 290. The jury found Mr. Brockmiller guilty as charged. He appealed.

ANALYSIS

A. ER 404(b) Evidence

The issue is whether the trial court erred by abusing its discretion in admitting the ER 404(b) evidence. Mr. Brockmiller does not challenge the trial court's rule interpretation. Rather, he contends the evidence was more prejudicial than probative. Alternatively, he argues the court should have provided a limiting instruction.

We review the admission of evidence under ER 404(b) for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under 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." (Emphasis added.)

"Before admitting ER 404(b) evidence, a trial court 'must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Foxhoven*, 161 Wn.2d at 175. Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Such evidence is relevant when the existence of the charged crime is at issue. *Id*. 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." *Foxhoven*, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)).

Here, Mr. Brockmiller argued he was not the driver of the eluding vehicle. By a preponderance of the evidence, the trial court found Mr. Brockmiller was the driver of the June 2009 eluding vehicle. The June 2009 vehicle had two separate license plates

just like the vehicle used in the December 2009 incident. And, in both incidents the occupants fled the scene on foot after a high speed chase. Based on these facts, the common scheme between the two incidents helps establish the identity of the driver.

Here, the trial court acknowledged that the prior conduct was strongly prejudicial for the same reasons that it tended to be strongly probative. This is often the case for modus operandi evidence, or signature type crime evidence. Just like a graffiti case in which prior "tags" of the defendant are introduced, that information is highly probative but also highly prejudicial and in some ways show a propensity to "tag again." *See Foxhoven*, 161 Wn.2d at 178-79 (differences go to the weight that the jury should attach to the evidence of the prior acts, not admissibility).

The probative value was substantial given the extensive factual similarities. Mr. Brockmiller argues the State exacerbated the prejudicial effect of the prior conduct by mentioning the prior incident in closing argument. But this mention was limited to a single brief rebuttal paragraph in response to Mr. Brockmiller's argument that he was not the driver. The striking similarity between the two events carries the signature hallmarks of the defendant and allow (1) an inference of identity, (2) an inference of knowledge the vehicle was stolen. These inferences are expressly permissible by ER 404(b). Accordingly, the trial court had tenable grounds to allow the ER 404(b) evidence.

Mr. Brockmiller alternatively argues the court should have given a limiting

instruction. If ER 404(b) evidence is admitted, "a limiting instruction must be given to the jury." *Foxhoven*, 161 Wn.2d at 175. Trial courts, however, 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). Our Supreme Court has held that "a request for a limiting instruction is a prerequisite to a successful claim of error on appeal." *Id.* at 123 (citing *State v. Noyes*, 69 Wn.2d 441, 447, 418 P.2d 471 (1966)).

The proposed instruction stated the jury could consider the ER 404(b) evidence, "for the purpose of establishing a common technique. You may not use the evidence to determine that [Mr. Brockmiller], because of earlier accusations, was more likely to commit the crime(s) in question, or that [Mr. Brockmiller] has any tendency to commit such crimes." CP at 20. ER 404(b) states, "[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." (Emphasis added.) The court reviewed the proposed instruction and stated it was "not a correct statement of the law, and it's not helpful in the Court's view." RP (Jan. 20, 2011) at 247. The court further noted that it would be "difficult or impossible to draft an instruction that would make the situation any better or any clearer or be of assistance to the defense or to the jury." *Id.* at 246. Mr. Brockmiller did not request the court to submit a limiting instruction and failed to offer an alternative or formally take exception to the failure to give the proposed limiting instruction. He does

not argue the proposed limiting instruction correctly states the law or that it is not confusing.

In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). A trial court's ruling on the propriety of a limiting instruction is reviewed for abuse of discretion. *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). A court certainly has tenable grounds to deny an offered instruction if it is confusing or a misstatement of the law; Mr. Brockmiller does not suggest otherwise. Mr. Brockmiller did not offer a clear statement of law, risking jury confusion. Under *Russell,* the trial court was not required at that point to sua sponte offer one of its own.

B. Statement of Additional Grounds for Review

First, regarding unanimity, Mr. Brockmiller contends for the first time on appeal that the jury was not required to be unanimous on deciding not guilty. We review de novo claimed errors of law in jury instructions. *State v. Pirtle*, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). In so doing, this court considers "the context of the instructions as a whole," rather than viewing each instruction as an isolated mandate. *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). As stated earlier, in order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." *Dana*, 73 Wn.2d 533 at 537. This court recently held that failure to object to this type of jury instruction prevents the issue from being considered for the

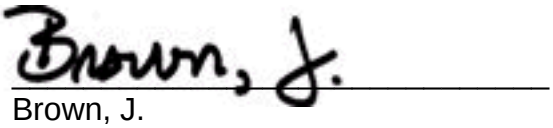
first time on appeal because it does not involve constitutional error. *State v. Nunez,* 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011); RAP 2.5(a). Under *Nunez*, we conclude Mr. Brockmiller cannot now raise this challenge.

Second, Mr. Brockmiller contends he was denied his right to a public trial during a critical stage of the proceedings when the court conducted a jury instruction conference in chambers without his presentence. A defendant's constitutional right to a public trial requires the court to be open during "adversary proceedings" including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). But "[a] defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler,* 147 Wn. App. at 114. Here, counsel and the court met off the record to "tweak" the instructions. RP (Jan. 20, 2011) at 228. The court and counsel then went on the record in open court (with Mr. Brockmiller present) to address any objections or exceptions to the instructions. No one objected to the procedure. Instruction conferences discuss purely legal matters and generally do not involve resolving disputed facts. *Sadler*, 147 Wn. App. at 114. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (in-chambers conferences between court and counsel on legal matters are not critical stages except when the issues involve disputed facts). Given this record, no public trial right violation occurred.

Third, Mr. Brockmiller contends the court discretionarily erred in denying his continuance motion made after the court allowed the ER 404(b) evidence. The decision to grant or deny a continuance motion rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). After the court found the ER 404(b) evidence more probative than prejudicial, Mr. Brockmiller unsuccessfully requested a continuance. The continuance was made on the second day of trial. It was noted that the defense would have the opportunity during trial to explain or mitigate the ER 404(b) evidence. Mr. Brockmiller was aware that he had been charged with a similar offense six months earlier. Given all, the trial court had tenable grounds to not delay trial. Therefore, the trial court did not abuse its discretion in denying Mr. Brockmiller's motion for a continuance.

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.



Brown, J.

WE CONCUR:

_____ Korsmo, A.C.J.

_____ Siddoway, J.