

FILED

JUL 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

29688-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER D. BROCKMILLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

APPELLANT'S BRIEF

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Attorney for Appellant

Jill S. Reuter
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting prior bad acts evidence of other wrongful acts.
2. The trial court erred in refusing to give a limiting instruction regarding the ER 404(b) evidence.
3. The trial court erred in ordering Mr. Brockmiller to serve his sentence for a gross misdemeanor in the custody of the Department of Corrections.

B. ISSUES

1. The defendant was tried on charges of attempting to elude, possession of a stolen motor vehicle, and driving with a suspended license. The State offered evidence of a prior incident in which the defendant had been charged with attempting to elude a pursuing police vehicle, reckless endangerment, and driving while license suspended, although those charges were dismissed. Did the trial court err in admitting this evidence under ER 404(b) to prove identity?
2. The defendant requested a limiting instruction regarding ER 404(b) evidence. The trial court declined to give this or

any limiting instruction. Did the trial court err in refusing to give a limiting instruction regarding ER 404(b) evidence?

3. The trial court ordered the defendant to serve his entire sentence, for two felonies and one gross misdemeanor, in the custody of the Department of Corrections. Did the trial court err in requiring the defendant to serve the gross misdemeanor sentence in the custody of the Department of Corrections?

C. STATEMENT OF THE CASE

The State charged Christopher D. Brockmiller with one count of attempting to elude a pursuing police vehicle, one count of possession of a stolen motor vehicle, and one count of driving while license suspended or revoked in the first degree, alleged to have occurred on December 14, 2009. (CP 78-80).

Washington State Patrol Trooper Nickolaus Lull told the court he was on patrol on the date in question, and activated his emergency lights to pursue a vehicle he saw speeding. (RP 73-77). Trooper Lull testified he passed the vehicle, and was able to identify the driver and a passenger. (RP 77-78). He said that the driver “was a male with a rounder face, he

had a black beanie, a watch cap on with a black jacket[.]” (RP 77). The vehicle did not pull over, and a chase ensued, with Trooper Lull traveling at approximately 100 miles per hour. (RP 80-83). Trooper Lull testified that the vehicle eventually came to a stop when it went off the road into a field, and “I saw two male subjects exit the vehicle out a front passenger’s door[.]” (RP 84, 92).

According to Trooper Lull, he chased these two men in his police vehicle, as they continued on foot. (RP 98). After the second man fell down and put his hands up, Trooper Lull apprehended him. (RP 98-99). Trooper Lull testified that he did not know it at the time, but this man was Mr. Brockmiller. (RP 99-100). He identified Mr. Brockmiller as the driver of the vehicle, stating that “[h]e looked the same as the driver.” (RP 100). Trooper Lull said that Mr. Brockmiller was wearing a “[b]lack jacket, the beanie and blue jeans.” (RP 100).

Trooper Lull testified that the vehicle had two different license plates, and neither plate was registered to the vehicle. (RP 104-105). “[T]here was one plate that came back to a Pontiac and another one came back to a Buick, an older, like ’85 Buick[.]” (RP 104). Trooper Lull also testified that the vehicle was reported as stolen. (RP 104-105).

Adam Clements said he was in the vehicle with Mr. Brockmiller on the date in question, and the vehicle was involved in a police chase.

(RP 55-56). He testified an individual named Jorge was the driver of the vehicle, and that Mr. Brockmiller was not driving. (RP 57, 69-70).

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 driving while license suspended or revoked in the first degree. (RP 148-172). These charges were dismissed. (RP 153, 159-162). The State proffered that Washington State Patrol 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 149-151).

The State 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, scheme. It goes to things other than to prove conformity on another occasion” (RP 149). Mr. Brockmiller objected to the admission of this evidence, arguing it only shows propensity to commit the current crimes. (RP 153-154, 170-171).

The trial court ruled this evidence admissible on the issue of identity: “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 162-166, 241-242). In ruling the evidence admissible, the court stated:

Now, the State couldn't prove [Mr. Brockmiller] was the driver in the old case beyond a reasonable doubt, and so they gave up. Today if they introduce it, they only have to prove he was the driver by a preponderance of the evidence in the previous event. So you have - - This evidence of a prior incident is highly probative of [Mr. Brockmiller's] guilt in the present case. . . . I guess maybe it's not your typical signature crime, but look at all the exact similarities.

...

So the question comes down to weighing probative value against prejudicial effect. Prejudicial effect is strong because it is - - this is additional evidence of guilt that the jury might find persuasive. For the same reason, its probative value is very strong. I'm balancing this situation. The Court feels that the probative value of the prior incident outweighs the prejudicial effect

(RP 165-166).

Trooper Maier testified regarding the ER 404(b) evidence. (RP 194-203). He testified that on June 2, 2009, he was involved with a vehicle, with switched plates, that was eluding police:

The vehicle, I don't remember the exact speed, it was like 10, 12 miles over the speed limit I U-turned to stop the vehicle, activated my emergency lights, and the vehicle took off at a high speed continuing south on the highway. A long pursuit ensued where the subjects went off, off the main highway and ended up going on dirt roads, and it was probably about a 20-minute chase slash pursuit, dangerous high speeds, up to 100 mph at times.

(RP 194-195). He said that once it stopped, he saw three occupants running from the vehicle, and one of these occupants was Mr. Brockmiller. (RP 196). He testified that the vehicle "was a very similar situation to this it turns out. They had two plates that did not match that vehicle, two Washington plates that came back to different vehicles[.]" (RP 196). Trooper Maier further testified that Mr. Brockmiller denied driving the vehicle on that occasion, but went on to describe facts that led him to believe that Mr. Brockmiller had been driving the vehicle. (RP 202-203). He acknowledged that the vehicle in the prior incident had not been reported stolen. (RP 198).

Mr. Brockmiller proposed the following limiting instruction regarding the 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.

(CP 20; RP 243-246).

The trial court refused to give this instruction, or any limiting instruction regarding the ER 404(b) evidence. (CP 21-39; RP 246-247, 250-267).

In its rebuttal closing argument, the State argued the following regarding the ER 404(b) evidence:

As to dragging in something from the previous summer, as if that is a long span of time, it's not, what are the odds? 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 of . . . [.]

(RP 290).

The jury found Mr. Brockmiller guilty as charged. (CP 16; RP 303-304). The trial court sentenced him to 29 months' confinement for attempting to elude a pursuing police vehicle, and 57 months'

confinement for possession of a stolen motor vehicle, to be served concurrently.

(CP 4, 10; RP 331). The trial court also sentenced Mr. Brockmiller to one year's confinement for driving while license suspended or revoked in the first degree, to be served consecutive to the felony sentences. (CP 4, 10; RP 331). The judgment and sentence states that the number of months of total confinement ordered is 69 months, and that the term of total confinement will be in the custody of the Department of Corrections (DOC). (CP 10). The trial court also gave Mr. Brockmiller credit for time served before sentencing. (CP 10; RP 331-332).

Mr. Brockmiller appealed. (CP 1).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER ACTS UNDER ER 404(b).

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct:

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.

ER 404(b).

The trial court's interpretation of ER 404(b) is reviewed *de novo*. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009) (citing *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). If the trial court correctly interprets the rule, its decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* (citing *Foxhoven*, 161 Wn.2d at 174). "A trial court abuses its discretion where it fails to abide by the rule's requirements." *Id.* (citing *Foxhoven*, 161 Wn.2d at 174). In addition, "[d]iscretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

In order to admit evidence under ER 404(b), the trial court must follow four steps: "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charge[d], and (4) weigh the probative value against the prejudicial effect." *Id.* (citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). "In doubtful cases, the evidence should be excluded." *Id.* (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

Here, the ER 404(b) evidence should have been excluded by the trial court because the prejudicial effect of the evidence outweighed its probative value. The ER 404(b) evidence involved similar facts to those charged here: a high-speed chase by the police, with the occupants running from a vehicle which, like the vehicle here, had two plates that did not match the vehicle. (RP 194-196). Trooper Maier identified Mr. Brockmiller as the driver of the vehicle in both the prior and present incidents. (RP 202-203). The incident took place approximately six months prior to the incident charged here. (RP 194).

Whether Mr. Brockmiller was the driver of the vehicle in the present case was an issue on which evidence was conflicting. (RP 57, 69-70, 100). The jury could readily rely on the similarities between the two incidents to conclude that Mr. Brockmiller was likely the driver in the present instance because the prior incident demonstrate his propensity to engage in similar conduct. (RP 57, 69-70, 100). Under these circumstances, the evidence was more prejudicial than probative.

The error was exacerbated by the State's rebuttal closing argument, where the prosecutor asked, "[w]hat 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[?]" (RP 290); *see also Thang*, 145 Wn.2d at 645 (finding the potential prejudice of evidence admitted under ER 404(b) outweighed its probative value, based in part upon the mention of the evidence in the State's closing argument). The State was essentially arguing that, because Mr. Brockmiller had eluded police in the prior alleged incident, he had the propensity to do so here, which is prohibited by ER 404(b).

"Evidentiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such errors are not harmless when, "within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred." *Id.* (citing *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982)); *see also State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (stating this harmless error standard).

The error in admitting the ER 404(b) evidence was not harmless. Given the conflicting evidence as to whether Mr. Brockmiller was the driver of the vehicle, he would not have been convicted absent the ER 404(b) evidence. Accordingly, Mr. Brockmiller's convictions should be reversed and the case remanded for a new trial.

2. THE TRIAL COURT ERRED IN REFUSING TO GIVE A LIMITING INSTRUCTION REGARDING THE ER 404(b) EVIDENCE.

If prior bad acts evidence is admitted under ER 404(b), the trial court must give a limiting instruction to the jury. *In re Detention of Coe*, 160 Wn. App. 809, 819, 250 P.3d 1056 (2011) (citing *Foxhoven*, 161 Wn.2d at 175). Although the trial court is not required to give a limiting instruction *sua sponte*, the trial court must give one if requested by a party. *State v. Russell*, 171 Wn.2d 118, 122-24, 249 P.3d 604 (2011).

Mr. Brockmiller proposed a limiting instruction regarding the ER 404(b) evidence, but the trial court refused to give the requested instruction, or any limiting instruction addressing this evidence. (CP 20; RP 243-247, 250-267). Given the conflicting evidence as to whether Mr. Brockmiller was the driver of the vehicle, and absent any instruction limiting the purpose of this evidence, the jury could have reasoned that, because Mr. Brockmiller was the driver in the prior incident, he was the driver here. It is likely that the jury used the ER 404(b) evidence to determine that Mr. Brockmiller had the propensity to commit the crimes charged here. Accordingly, Mr. Brockmiller's convictions should be reversed and the case remanded for a new trial.

3. THE TRIAL COURT ERRED IN ORDERING THAT MR. BROCKMILLER SERVE HIS GROSS MISDEMEANOR SENTENCE IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS, RATHER THAN IN THE COUNTY JAIL.

The court sentenced Mr. Brockmiller to one year's confinement for driving while license suspended or revoked in the first degree, to be served consecutive to the sentences for attempting to elude a pursuing police vehicle and possession of a stolen motor vehicle. (CP 4, 10; RP 331). The judgment and sentence states that the term of total confinement, including the consecutive one year sentence for driving while license suspended or revoked in the first degree, will be in the custody of DOC. (CP 4, 10). Although Mr. Brockmiller did not object to this provision, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Attempting to elude a pursuing police vehicle and possession of a stolen motor vehicle are felonies. RCW 46.61.024(1); RCW 9A.56.068(2). Driving while license suspended or revoked in the first degree is a gross misdemeanor. RCW 46.20.342(1)(a). “Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force

at the time of conviction and sentence, shall be punished by *imprisonment in the county jail* for a maximum term fixed by the court of not more than one year[.]” RCW 9.92.020 (2009) (emphasis added). “[W]here the law provides a place of imprisonment, the court cannot direct a different place, and if it does so the sentence is void.” *State v. Linnemeyer*, 54 Wn. App. 767, 770, 776 P.2d 151 (1989) (alteration in original) (internal quotation marks omitted) (*quoting State v. Christopher*, 20 Wn. App. 755, 763, 583 P.2d 638 (1978)).

Under the Sentencing Reform Act of 1981, “[a] sentence that includes a term or terms of confinement totaling more than one year shall be served in a facility or institution operated, or utilized under contract, by the state[.]” RCW 9.94A.190(1). This provision “encompasses only felony terms and not gross misdemeanor terms combined with felony terms.” *State v. Besio*, 80 Wn. App. 426, 432, 907 P.2d 1220 (1995). Therefore, a trial court errs when it orders a defendant to serve an entire sentence for felonies and a gross misdemeanor in the state correctional system. *See id.* at 429, 432 (holding that the trial court erred in ordering the defendant to serve his entire sentence for three felonies and one gross misdemeanor in the custody of DOC). A gross misdemeanor sentence must be served in the custody of the county. *Id.* at 432.

The trial court erred when it ordered that Mr. Brockmiller's consecutive one year sentence for driving while license suspended or revoked in the first degree be in the custody of DOC. *See Besio*, 80 Wn. App. at 429, 432. The sentence must be served in the county jail. *See RCW 9.92.020* (2009); *see also Linnemeyer*, 54 Wn. App. at 770 (*quoting Christopher*, 20 Wn. App. at 763). Therefore, the case should be remanded for resentencing, to specify that Mr. Brockmiller's sentence for driving while license suspended or revoked in the first degree must be served in the county jail. *See Besio*, 80 Wn. App. at 432 (setting forth this remedy for the trial court's error). Also on remand, the trial court should assign Mr. Brockmiller's credit for time served before sentencing to either his felony convictions or his gross misdemeanor conviction. *See Besio*, 80 Wn. App. at 432 n.1.

E. CONCLUSION

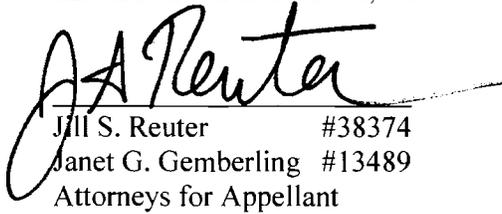
The trial court erred in admitting prior bad acts evidence under ER 404(b), and the error was compounded by the court's refusal to give a limiting instruction regarding the ER 404(b) evidence. This court should reverse the convictions and order a new trial.

This court should remand the case for resentencing, to specify that Mr. Brockmiller's sentence for driving while license suspended or revoked

in the first degree must be served in the county jail, rather than in the custody of DOC. This court should also order the trial court to specify whether Mr. Brockmiller's credit for time served before sentencing applies to his felony convictions or his gross misdemeanor conviction.

Dated this 28th day of July, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
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)	
vs.)	CERTIFICATE
)	OF MAILING
CHRISTOPHER BROCKMILLER,)	
)	
Appellant.)	

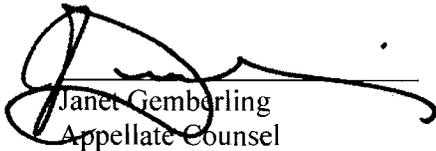
I certify under penalty of perjury under the laws of the State of Washington that on July 28, 2011, I served a copy of Appellant's Brief in this matter by email, receipt confirmed, pursuant to the parties' agreement to:

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I certify under penalty of perjury under the laws of the State of Washington that on July 28, 2011, I mailed a copy of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 28, 2011.


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