

FILED

SEP 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29688-1

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

V.

CHRISTOPHER D. BROCKMILLER

APPELLANT.

RESPONDENT'S BRIEF

KARL F. SLOAN
PROSECUTING ATTORNEY
OKANOGAN COUNTY

By:

CLAYTON A. HILL
WSBA # 34103
Deputy Prosecuting Attorney
P.O. BOX 1130
OKANOGAN, WASHINGTON

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ISSUES

1. Whether it was proper to admit evidence of a prior attempt to elude police in a car with switched plates to show identity of the driver and knowledge/absence of mistake in a case that involved eluding police in a car with switched plates just six months later....
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STATEMENT OF THE CASE

The State charged Christopher D. Brockmiller with one count of Attempt to Elude A 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).

The State's first witness, Janett Jackson, testified that her silver 2005 Chevy Malibu was stolen from an "AutoZone" parking lot in Yakima around July 1, 2009, where she had left it with a For Sale sign in it. (RP 46-49). She had recently relocated so at the time it was stolen it had Tennessee license plates on it. (RP 46-49). It did not have a radar detector in it when it was stolen. (RP 51). A spare key had been left hidden in the vehicle when it was left for sale. (RP 52).

The State's second witness, Adam Clements, testified that he was hitchhiking on December 14, 2009, when his friend Mr. Brockmiller picked him up. (RP 55). He identified Mr. Brockmiller in the courtroom.

(RP 55). Mr. Clements testified that a man who “looked Mexican” named “Jorge” was driving. (RP 57). Mr. Clements said he sat in the back seat, while Mr. Brockmiller was in the front passenger seat. He said that Mr. Brockmiller was wearing a heavy coat and hooded sweatshirt, and he himself was wearing the same but with a ball cap. (RP 58-59). He could give no other description for Jorge other than that he was “kind of stocky” (RP 57).

At the conclusion of the police chase, Mr. Clements testified he bailed out of the vehicle and ran. Initially he stated the only other person he saw bail out of the car was Mr. Brockmiller, then he said he didn't see Mr. Brockmiller until after both were apprehended. (RP 64-65). He didn't see Jorge anywhere (RP 65). On cross-examination, Mr. Clements explained his statement to the Trooper in which he identified that Mr. Brockmiller had picked him up, because Mr. Brockmiller was the only one who knew him and he was sure the driver wouldn't have stopped without Mr. Brockmiller requesting that he do so. (RP 70).

The State's third witness was Trooper Nickolaus Lull. Trooper Lull testified that December 14, 2009 was a clear, sunny and cold day and he was on routine patrol. (RP 74). He had started to pull over at a wide spot on SR 97 facing northbound about 10 miles from Tonasket, Washington when he saw a southbound mid-size sedan at a high rate of speed, and measured the vehicle at 83 mph with his radar gun. (RP 75-76). He activated his emergency lights, and as the vehicle passed him

got a look at the driver. "I saw it was a male with a rounder face, he had a black beanie, a watch cap on with a black jacket." (RP 77). He saw only two occupants, both of whom were in the front. (RP 78).

Trooper Lull observed the vehicle ignore his emergency lights and speed away off SR 97 onto Hubbard Road for two miles in excess of 90 mph, then back onto SR 97 north for about five miles. The vehicle went back north, in a circle, past the initial point of observation, reaching speeds of approximately 100 mph, and turned onto South Pine Creek road, where it traveled into a field of snow and ice. (RP 83-84). There, he saw two males exit the vehicle out of the front passenger door, the second one out wearing a black stocking cap and black jacket. (RP 84). Trooper Lull indicated that he could rule out a third occupant of the vehicle having hidden from him at the scene (RP 174-5).

After apprehending the two fleeing occupants of the vehicle, Trooper Lull conducted further investigation on the 2005 Chevy Malibu. He learned that one plate on it came back registered to a Pontiac and a second license plate came back to an older Buick. (RP 104). The vehicle identification number was then ran through dispatch and used to identify the vehicle as stolen. (RP 104-5). Trooper Lull checked Mr. Brockmiller's license and determined he was Suspended in the First Degree. The State and the defense entered a stipulation to this fact. (RP 106-7).

The defense cross-examination of Trooper Lull focused on establishing that Trooper Lull would have had a little over half a second to make his identification of the driver given the closing speed of the Malibu and the Trooper's patrol vehicle. (RP 176-81).

The State next called Trooper Bruce Maier, who searched Mr. Clements at the scene, searched the scene, and impounded the Chevy Malibu. (RP 188-89). He inventoried the vehicle and noted a large industrial fan with ducting behind the driver's side seat, and nothing to indicate that a person named Jorge had been in the vehicle. (RP 191). There was a scanner and radar detector in the vehicle. (RP 191).

Trooper Maier testified that the front and rear license plates on the Chevy Malibu were different and neither one returned to that vehicle, and the VIN number identified the vehicle as having been stolen. (RP 192).

It was at this juncture in the trial that the State sought to admit ER 404(b) evidence of a June 2, 2009 case in which Mr. Brockmiller was charged with Attempt to Elude, Reckless Endangerment, and Driving While License Suspended or Revoked in the First Degree. The State argued that because the prior incident included a vehicle with two different plates, neither of which were registered to the vehicle this 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).

The State proffered that Trooper Maier would offer the following testimony:

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, "Hey, 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 [...], it returned to a white 1987 Honda Prelude. The running vehicle was a white Acura Integra. The plate returned sold to an Edward Arbuckle of Spokane and Omak. Brockmiller denied knowing Arbuckle. The front plate on the car [...] returned to an '86 Honda Accord registered to a Herbert Leavitt of Okanogan. The license was cancelled and the vehicle reported destroyed. The VIN returned to the Acura Integra.

(RP 149-151).

The State argued for admission of the ER 404(b) evidence, stating, "So this is twice now within six months that Mr. Brockmiller has been fleeing in a vehicle that had in it—or had on it two separate plates, neither of which returned to the vehicle he was in. That's consistent with the testimony we've heard in this case. " (RP 150). The State was specific that it wanted the evidence to show common plan and knowledge,

This is to show knowledge of possessing a stolen motor vehicle, that this was not the first time the Defendant was in the vehicle that had switched plates, not just one switched plate, but two switched plates...The likelihood and odds of that occurring seemed to be so remote as to give rise to an inference that—a reasonable inference the Defendant had knowledge.

(RP 152-53).

The defense objected to the proffered testimony, stating that the similarities were not enough to establish modus operandi or common scheme or plan, and that it was propensity evidence. (RP 153-54).

The trial court went through the factual similarities, (1) same roadway, (2) a several mile chase in excess of 100 mph, (3) the chase ending with occupants fleeing hundreds of feet from the vehicle before apprehension, (4) switched plates and (5) the vehicle not registered to Mr. Brockmiller, (6) just six months prior, (7) charges were filed against Mr. Brockmiller, (8) he claimed someone else was driving, (9) that driver disappeared. (RP 154:21-159:9). The trial court summarized these extensive similarities again. (RP 164).

The trial court was aware that the State's burden on the ER 404(b) evidence was to show by a preponderance that it occurred. (RP163:21; 165:14). The Court clearly considered that Trooper Maier's testimony and the fact the matter was charged and proceeded to a 3.5 hearing cleared that hurdle.

The trial court then balanced the probative value against the prejudicial value. The trial court reasoned as follows, "the odds of this happening to one individual in one lifetime have got be a billion to one. This is an extremely unique set of circumstances...It's almost impossible that that could happen to one person in one lifetime by chance without this being the same person who was the driver in both instances." (RP 165).

The trial court observed that identity is at issue in the case as well as the issue of “knowledge of the stolen nature of the vehicle.” (RP 163). The trial court examined the current edition of Tegland’s *Handbook on Evidence*, and expressly noted the recent cases of *Russell* and *Thang* and that to admit for purposes of identity the prior conduct must relate to a modus operandi or signature-type of evidence. (RP 163). The trial court concluded that the prior conduct at issue here is so similar to the present case to identify the defendant. (RP 163).

The trial explicitly engaged the balancing test. The trial court found that the evidence was highly probative of the Defendant’s guilt in the present case, not only on the felony Elude, but on the issue of knowing possession of stolen property in that the two license plates do not match. (RP 165-166). The trial court explicitly weighed this probative value against the admittedly prejudicial value, and concluded that the evidence should be admitted. (166:8-18).

Trooper Maier was allowed to testify and did testify that he investigated a similar case in June of 2009, just six months before this incident, in which an Attempt to Elude occurred just eight miles north of this location on SR 97. (RP 195). The chase involved high speeds, going off the main highway and onto dirt roads, and ended with three occupants running up an embankment from the vehicle. (RP 195). One occupant was caught in the foot pursuit and that was Defendant Brockmiller. (RP 196).

Trooper Maier testified the vehicle in the June 2009 Elude had two plates on it that both came back to different vehicles, and neither matched the vehicle it was on. (RP 196, 197). Trooper Maier testified that in the June 2009 incident, Mr. Brockmiller denied being the driver, and blamed another person. (RP 197, 198). Trooper Maier testified that the positioning of the driver seat, certain articles of clothing found in the vehicle and video surveillance from a gas station showing Mr. Brockmiller getting in the driver's seat earlier in the day, were all reasons to believe he was the driver in that June 2009 incident. (RP 202-3). Trooper Maier informed the jury that the June 2009 case, the case was dismissed without prejudice due to not having enough proof that Mr. Brockmiller was driving. (RP 199, 200).

Trooper Maier testified that is not common, but he occasionally does see switched plates on a vehicle in his 12 years as a Trooper and his experience is that this is done to hide the identity of the vehicle, because it is stolen or being used to commit other crimes. (RP 200).

The State rested.

The defense called Karilyn Cline as its first witness. She lived with Mr. Brockmiller's fiancé, Tabbatha Norton, in December of 2009. She testified that she saw him leave the house on December 14, 2009 in a four door sedan driven by Jorge. (RP 210-12).

On cross-examination, Ms. Cline testified that Tabbatha Norton was her close friend, and she had lived with Mr. Brockmiller and

Tabbatha for the past year. She testified that there are multiple vehicles on the property that belong to Mr. Brockmiller. (RP 215). She stated that the nature of the relationship between Jorge and Mr. Brockmiller was never discussed. She testified that Jorge was “average-sized”, “about six-something,” with “some facial hair.” She struggled to describe any details about Jorge, for example the type of the facial hair or what he was wearing when she saw him. (RP 217-218).

The defense next called Tabbatha Norton, the Defendant’s fiancé. The direct exam was to establish that the vehicles on the property were both hers and Mr. Brockmiller’s. (RP 221).

The State cross-examined Ms. Norton. She admitted having a conversation with Trooper Lull on January 1, 2010. She was asked if she told Trooper Lull that she had never met Jorge before. On the stand she emphatically denied making that statement to Trooper Lull—twice. (RP 222).

The defense rested its case.

The State recalled Trooper Lull. He testified that on January 1, 2010 he went to speak to Ms. Norton because he had learned that she had talked to Adam Clements and Mr. Brockmiller. Trooper Lull wanted to know if she had been coached in what she should say. He asked her if she knew who was driving the car, and she said, “A Mexican guy named Jose or Jorge,” and stated she hadn’t met him before and was clear about that. (RP 225).

The parties then rested, the jury was excused for lunch. The Court then considered jury instructions with the attorneys. The Court asked, "Is the defense objecting to any of the instructions or the failure of the Court to give any instructions?" The defense, answered, "No, Your Honor." (RP228:23-229:2).

Later, after a missing witness instruction regarding Jorge was discussed, the defense did not specifically request a limiting instruction on the ER 404(b) instruction but instead wondered aloud, "I'm wondering in light of that [the distinction that in the June case there was testimony the car was not stolen, but in the December case the car was stolen] if we do need a limiting instruction on the use to which the jury can use for that—." (RP 246). The Court asked the defense what "limit" it was suggesting, and the defense stated "That its' not to be considered propensity evidence; only for evidence as to identity, and that's, you know, that's a very thin line right there." (RP 246). The Court gave the defense an opportunity to draft a proposed limiting instruction and submit it by the end of the lunch break, which the defense did. 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 247).

The defense's proposed limiting instruction on the ER 404(b) evidence read:

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 243-46).

The jury was instructed, and closing arguments began.

In closing, the State argued that Trooper Lull's identification of Mr. Brockmiller was solid, and that none of the investigation at the scene where the two occupants fled was consistent with the existence of a third occupant, Jorge. (RP 268-271). The State worked on establishing the element of "knowing" possession of stolen property in its closing argument. The State emphasized that testimony that there was a radar detector, a scanner, and switched plates, and an attempt to elude police were all circumstantial evidence of an attempt to conceal detection, which is behavior consistent with someone who knows the vehicle he or she is driving is stolen. (RP 274-75). The State then sat down, not having made any argument in its closing about the testimony of the June 2009 incident.

The defense began its closing. Naturally, the defense emphasized that three witnesses said a Mexican named Jorge was driving [Mr. Clements, Ms. Norton, Ms. Cline], and that the window of time for identification was short. (277-281).

The defense argued the State could not prove Mr. Brockmiller knew the car was stolen, nor had the State proven the car was actually stolen. The defense boldly suggested that Janett Jackson had sold her

2005 Chevy Malibu under the table and committed insurance fraud by reporting it stolen. (RP 281-282). The defense pointed out that the ignition lock had not been ripped out, the steering column wasn't damaged, nor a window broken out, etc. The defense argued that people scrounge other plates to put on cars because they are poor and can't afford the fees, and not necessarily to conceal crimes or stolen property. (RP 283-84).

The defense argued and explained the facts of the June 2009 incident thoroughly. The defense pointed out that the earlier case was dismissed for lack of evidence that Mr. Brockmiller was driving. (RP 283). The defense pointed out that the earlier vehicle had not been reported stolen. (RP 283). Finally, the defense emphasized that there were innocent explanations for having switched plates, for example, being poor and scrounging plates to avoid licensing fees. (RP 283-84).

The State then rose for rebuttal closing argument. The State's discussion of the June 2009 incident consists of no more than a paragraph of its closing argument, and was focused on asking the jury to infer knowledge, plan, and identity, and absence of mistake or accident, and not propensity:

"What are the odds in a person's whole life-time that they would twice 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...[ellipses in the original]. These are again part of circumstantial evidence, which the jury instructions says can be treated equally to direct evidence. You are entitled to consider it and give it as much weight as you think it has credit, nothing more, and that's all we ask."

(RP 290).

This language in the closing argument is nearly the same verbiage as used by the trial court in its reasoning and inferences from the ER 404(b) balancing of probative versus prejudicial effect on the issue of identity and knowledge. (See RP 165, "the odds of this happening to one individual in one lifetime have got to be a billion to one.")

The jury found Mr. Brockmiller guilty as charged. (CP 16; RP 303-304). The trial court sentenced him to 29 months' confinement for Attempt to Elude, 57 months for Possession of Stolen Motor Vehicle, to be served concurrently. (CP 4, 10; RP 331). The trial court originally sentenced Mr. Brockmiller to one year for DWLS 1, to be served consecutive in the custody of the Department of Corrections. (CP 10). However, the trial court subsequently entered an Amended Judgment and Sentence which corrected the error and indicated that the one year sentence for DWLS 1 would be served in the custody of the Okanogan County Jail. (See Amended Judgment and Sentence). The trial court also gave Mr. Brockmiller credit for time served before sentencing. (CP 10; RP 331-332).

This appeal followed. (CP 1).

ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF A PRIOR ELUDE IN A VEHICLE WITH SWITCHED PLATES TO SHOW IDENTITY AND KNOWLEDGE/ABSENCE OF MISTAKE IN A PROSECUTION FOR ELUDING AND POSSESSION OF STOLEN MOTOR VEHICLE.

A trial court's balancing of the probative value of evidence against its potential for prejudice is reviewed for abuse of discretion. *State v. Kennealy*, 151 Wash.App. 86, 890, 214 P.3d 200 (2009). A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wash.2d 168, 174, 163 P.3d 786 (2007)(citing *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003); *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002)).

By its explicit terms, ER 404(b) expressly permits evidence to be admitted of other crimes to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) evidence 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. *Foxhoven*, at 175 (citing *State v. Lough*, 125 Wash.2d 847, 859, 889 P.2d 487 (1995)).

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.” State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)(citing State v. Lough, 124 Wn.2d 847, 853, 889 P.2d 487 (1995)).

First, here the trial court considered that the evidence could be shown by a preponderance in that the case was charged, that Trooper Maier was the investigating officer on the earlier charge, that he was going to testify in this case, and that most of the things he would testify to were not contested (In the June 2009 incident Mr. Brockmiller was apprehended immediately after being in a vehicle that eluded and had switched plates, but disputed being the driver). (RP163:21 and 165:14, where the trial court notes the preponderance standard).

Second, the trial court identified the purposes for which the State sought introduction of the evidence. The State explained to the Court it would be sought for modus operandi identity evidence (RP 149) but also to show common plan knowledge (RP 152-53).

Third, the trial court identified the purposes for which the evidence would be relevant and admissible. It would be relevant and admissible for purposes of *identity* of the driver on the charges of Driving While License Suspended in the First Degree and Attempt to Elude, but also for showing *knowledge* that the vehicle was stolen for the Possession of Stolen Motor Vehicle charge. (RP 163).

Fourth, the trial court weighed the probative value against the prejudicial effect. The trial court carefully, point by point, elicited and considered each element of similarity between the two incidences. (RP 154-159, 164). The Court found that the odds would have to be a “billion to one” for the driver to have been different in the two incidences. (RP 165). The court stated, “I guess it’s not your typical signature crime, but look at all the exact similarities. Speeds over 100 mph; the same situation with the stop; the chase in the same area; blaming another person who can’t be identified.” (RP 165).

Similarly, the trial court also concluded that the information was highly probative as to the element of knowledge that the vehicle being driven was stolen property, given the unlikelihood of this all happening twice in a vehicle with switched and unmatched plates. (RP 166). The court allowed that the evidence would be prejudicial due to the striking similarities, but that the probative value outweighed the effect and that the evidence should be allowed. (166:11-19).

The question for this court is whether the Appellant’s have shown that the trial court abused its discretion in its balancing of the probative value versus prejudicial effect. The Appellant’s argue that the evidence was more prejudicial because the evidence was conflicting on whether Mr. Brockmiller was the driver in the present case, and the mention of Mr. Brockmiller’s involvement in a similar case would lead the jury to infer his propensity to engage in similar conduct. (Appellant’s Brief, 10).

This seems to the State to be a surmised and a conclusion without any reasoning. The Appellant does not address the weight and probative value before concluding that the prejudicial effect was not only greater, but so much greater that the trial court abused its discretion.

To the contrary, here the trial court fairly acknowledged that the prior conduct admitted here 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, *State v. Foxhoven*, 161 Wash.2d 168, 178-79, 163 P.3d 786 (2007)(differences in font, style, medium, and canvas used for the graffiti go to the weight that the jury should attach to the evidence of the prior acts; they do not render the evidence inadmissible).

Here, the probative value was enormous given the extensive factual similarities. The Appellant fails to consider any of the strength and weight of this probative value before it concludes that the prejudicial effect outweighs it. To reiterate, these were the similarities: (1) same roadway, (2) a several mile chase in excess of 100 mph, (3) the chase ending with occupants fleeing hundreds of feet from the vehicle before apprehension, (4) switched plates and (5) the vehicle not registered to Mr. Brockmiller, (6) just six months prior, (7) charges were filed against

Mr. Brockmiller, (8) he claimed someone else was driving, (9) that the supposed driver disappeared. (RP 154:21-159:9; RP 164).

The Appellant argues that the State “exacerbated” the prejudicial effect of the prior conduct by mentioning the prior incident in closing argument. (Appellant’s Brief, 10-11). But, again this is a conclusion without much reasoning. The Appellant miscasts the State’s closing argument as an argument that “because Mr. Brockmiller had eluded police in the prior alleged incident, he had the propensity to do so here.” *Id.* As the State has previously noted, it did not mention the prior conduct in its initial closing argument, and only briefly in its rebuttal closing argument. When it was mentioned, the State did nothing more than illustrate the same reasoning the trial court had used in weighing the probative value of the prior incident.

The trial court had observed the billion to one odds of such strikingly similar events happening in such proximity of time and place to the same individual, and the State asked the jury to consider the same odds. (cf. RP 165, RP 290). At no point did the State use reasoning like, “he did it before, he’ll do it again,” or argue that the past incident means the defendant has the kind of personal *character* from which you can expect bad acts.

The striking similarity between the two events is so parallel as to carry 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). The Appellant has not shown that the trial court abused its discretion in weighing the probative value against the prejudicial effect.

2. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE DEFENSE'S PROPOSED LIMITING INSTRUCTION REGARDING THE ER 404(b) EVIDENCE.

The Court asked, "Is the defense objecting to any of the instructions or the failure of the Court to give any instructions?" The defense, answered, "No, Your Honor." (RP228:23-229:2).

Later, after a missing witness instruction regarding the absent alleged real driver, Jorge, was discussed, the defense did not specifically request a limiting instruction on the ER 404(b) instruction but instead wondered aloud, "I'm wondering in light of that [the distinction that in the June case there was testimony the car was not stolen, but in the December case the car was stolen] if we do need a limiting instruction on the use to which the jury can use for that—." (RP 246).

The Court asked the defense what "limit" it was suggesting, and the defense stated "That its' not to be considered propensity evidence; only for evidence as to identity, and that's, you know, that's a very thin line right there." (RP 246). The Court gave the defense an opportunity to draft a proposed limiting instruction and submit it by the end of the lunch break, which the defense did. 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 247).

The defense’s proposed limiting instruction on the ER 404(b) evidence read:

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 243-46).

Now, on appeal, the Defendant argues it was reversible error for the trial court to decline to give this instruction, citing *State v. Russell*, 171 Wn.2d 118, 122-24, 249 P.3d 604 (2011). In *Russell*, the Supreme Court stated that a trial court is not required to give a limiting instruction for ER 404(b) evidence on its own, i.e., *sua sponte*, but under ER 105 must give one if requested.

ER 105 states that when evidence is admissible for one purpose but not admissible for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Here, the evidence was presented and argued in its proper scope, and the trial court concluded that the proposed instruction was erroneous and would confuse the jury. It cannot be the case that the trial court should be required to proceed with an instruction that is erroneous and would confuse the jury.

3. THE ISSUE OF SERVING THE GROSS MISDEMEANOR SENTENCE IN THE COUNTY JAIL IS MOOT BECAUSE AN AMENDED JUDGEMENT AND SENTENCE WAS ENTERED MAKING THAT CHANGE.

The State admits it erred in initially presenting a felony Judgment and Sentence that had the defendant serving the one year sentence on the DWLS 1 in Department of Corrections Custody. No one objected at the time, but the error was discovered later. An Amended Felony Judgment and Sentence was prepared, and it is now noted that the Defendant shall serve time on the DWLS 1 in county jail. This issue is moot. See CP 81.

CONCLUSION

The Court should affirm that the trial court properly applied ER 404(b) when it went through the analysis on the record to find by preponderance of the evidence that the June 2009 misconduct occurred, identified that the evidence was admissible for the purpose of showing identity and knowledge, determined that the evidence was relevant to prove elements of the crimes charged, and weighed the probative value versus prejudicial effect of the evidence. The Court should affirm that there is no support in the record for the appellant's position that the trial court abused its discretion in its balancing of the probative value and prejudicial effect. The Court should affirm that nothing in the State's closing argument went beyond drawing proper inference from the evidence on the issue of identity and knowledge.

Finally, the Court should not reverse for failure to give the requested limiting instruction. The defendant was fully and fairly allowed to argue his theory of the case without interruption. The defendant has not shown any prejudicial effect from the admission of the evidence that was not already considered in the weighing of the prejudicial effect against the probative value. It is permissible explicitly under ER 404(b) to admit prior bad acts for the purposes admitted here.

There is no need to revisit the sentencing issue on the DWLS 1, because that issue is moot due to an Amended Judgment and Sentence.

Dated this 23rd day of September, 2011

Respectfully Submitted by:



CLAYTON A. HILL WSBA #34103
Deputy Prosecuting Attorney
Okanogan County, Washington.

ATTACHMENT A

Filed

MAY 12 2011

Okanogan County Clerk

Superior Court of Washington

County of Okanogan

State of Washington, Plaintiff,

vs.

CHRISTOPHER DALE BROCKMILLER, Defendant.

SID: 18942279
DOB:08/21/1980

Second

No. 09-1-00353-8

Amended Felony Judgment and Sentence (PROPOSED) (FJS)

Prison

Jail One Year or Less

Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4:15.2, 5.3, 5.6 and 5.8

*CLG
Judge
5/12/11*

Send cc to jail for processing

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon guilty plea jury-verdict bench trial:

Count	Crime	RCW	Date of Crime
1	ATTEMPTING TO ELUDE PURSUING POLICE VEHICLE -- FOR CRIMES COMMITTED ON OR AFTER JULY 27, 2003	RCW 46.61.024 (Laws of 2003, ch. 101, '1)	14th day of December, 2009
2	POSSESSION OF A STOLEN MOTOR VEHICLE	RCW 9A.56.068	14th day of December, 2009
3	DRIVING WHILE LICENSE SUPSENDED OR REVOKED IN THE FIRST DEGREE	RCW 46.20.342 (1)(a)	14 th day of December, 2009

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____ RCW 9.94A.____.

The offense was predatory as to Count _____ RCW 9.94A.836.

The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adul t, Juv.	Type of Crime
1	Vehicle Prowling 2	12 th day of February, 1997	Okanogan County, WA	5th day of August, 1996	J	
2	Taking a Motor Vehicle Without Permission 2	31 st day of December, 1997	Okanogan County, WA	7th day of December, 1997	J	
3	Conspiracy to Manufacture Methamphetamine	5 th day of April, 2001	Okanogan County, WA	19th day of August, 2000	A	
4	Possession of a Controlled Substance Cocaine	5 th day of April, 2001	Okanogan County, WA	20th day of December, 2000	A	
5	Delivery of a Controlled Substance Cocaine	5 th day of April, 2001	Okanogan County, WA	1st day of December,	A	

				2000		
6	Attempted Assault in the Second Degree	18 th day of February, 2004	Okanogan County, WA	3 rd day of July, 2003	A	
7	Unlawful Possession of a Firearm	18 th day of February, 2004	Okanogan County, WA	3 rd day of July, 2003	A	
8	Driving While License Suspended I	18 th day of February, 2004	Okanogan County, WA	3 rd day of July, 2003	A	
9	Attempting to Elude a Pursuing Police Vehicle	24 th day of January, 2008	Okanogan County, WA	21 st day of January, 2007	A	
10	Attempting to Elude a Pursuing Police Vehicle	24 th day of January, 2008	Okanogan County, WA	4 th day of April, 2007	A	
11	Attempting to Elude a Pursuing Police Vehicle	24 th day of January, 2008	Okanogan County, WA	7 th day of May, 2007	A	
12	Possession of Stolen Property in the Second Degree	11 th day of July, 2007	Benton County, WA	25 th day of May, 2007	A	
13	Driving While Under the Influence	17 th day of July, 2002	Okanogan County, WA	29 th day of June, 2002	A	
14	Reckless Driving	1 st day of April, 2003	Okanogan County, WA	31 st day of December, 2002	A	
15	Driving While License Suspended I	19 th day of December, 2006	Okanogan County, WA	9 th day of May, 2006	A	
16	Driving While License Suspended I	24 th day of December, 2009	Okanogan County, WA	17 th day of October, 2009	A	

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):

The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 Sentencing Data:

Felony Judgment and Sentence (FJS)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1.	13.5	I	22-29 months		22-29 months	5 years
2.	14	II	43-57 months		43-57 months	10 years

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

within below the standard range for Count(s) _____

above the standard range for Count(s) _____

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

III. Judgment

3.1 The defendant is **Guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The defendant is found **Not Guilty** of Counts _____

The court **Dismisses** Counts _____

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE

\$ _____ Restitution to: _____

RTN/RJN

\$ _____ Restitution to: _____

\$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV \$ 500.00 Victim assessment RCW 7.68.035

\$ _____ Domestic Violence assessment RCW 10.99.080

CRC \$ 220.50 Court

costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 200.00 FRC

Witness costs \$ _____ WFR

Sheriff service fees \$ 20.50 SFR/SFS/SFW/WRF

Jury demand fee \$ _____ JFR

Extradition costs \$ _____ EXT

Other \$ _____

PUB \$ _____ Fees for court appointed attorney RCW 9.94A.760

WFR \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ _____ Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD \$ _____ Drug enforcement fund of _____ RCW 9.94A.760
NTF/SAD/SDI

CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690

\$ 100.00 Felony DNA collection fee [] not imposed due to hardship RCW 43.43.7541

RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ 40.00 Other costs for: Booking Fees

\$ 860.50 Total RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[] is scheduled for _____

[] Restitution Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJN

[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____.
RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____. (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754:

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 No Contact: The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 Other: _____

4.5 Confinement Over One Year. The court sentences the defendant to total confinement as follows:

- (a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

29 months on Count I Eluding a Police Vehicle - Concurrent

57 months on Count II Possession of a Stolen Motor Vehicle

365 days on Count III DWLS I in County Jail - Consecutive; see Misdemeanor Judgment & Sentence filed separately.

The confinement time on Count(s) III contain(s) a mandatory minimum term of 180 days.

The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation UCSEA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: ~~57 days~~ ^{12 MONTHS} with State DOC; 12 Months in County Jail.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Count III.

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

- (b) **Confinement.** RCW 9.94A.712 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: _____

4.6 Community Placement or Community Custody. The court orders community placement or community custody as follows:

Community Placement. Count _____ for _____ months;
Count _____ for _____ months; Count _____ for _____ months.

Community Custody for count(s) _____, sentenced under RCW 9.94A.712, for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

Community Custody:

Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced

under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) The defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) The conditions of community placement or community custody include chemical dependency treatment		
c) The defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (8) for sex offenses, submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.720. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

The defendant shall have no contact with: _____

The defendant shall remain within outside of a specified geographical boundary, to wit: _____

The defendant shall not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

The defendant shall participate in the following crime-related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions: _____

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

4.7 Work Ethic Camp. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp. The court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 Off - Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Restitution Hearing.

I waive any right to be present at any restitution hearing (sign initials): _____

5.5 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).

5.6 Firearms. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

Cross off or delete if not applicable:

5.7 Sex and Kidnapping Offender Registration. RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or

release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved

of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

- 5.8 [X] Count 1 & 2 is a felony in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 Other: _____

Done in Open Court and in the presence of the defendant this date: _____

April 18, 2011

Clayton A. Hill #22201
 Deputy Prosecuting Attorney
 WSBA No. 34103
 Print Name:
 CLAYTON A. HILL

James Keech
 Attorney for Defendant
 WSBA No. 29972
 Print Name:
 JAMES KEECH

Jack Burchard
 Judge/Print Name: Jack Burchard
 FOR
Christopher Dale Brockmiller
 Defendant
 Print Name:
 CHRISTOPHER DALE
 BROCKMILLER

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

SID No. WAI8942279

Date of Birth 08/21/1980

FBI No. 50366HB2

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:		Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic
<input type="checkbox"/> Native American	<input type="checkbox"/> Other: _____	<input checked="" type="checkbox"/> Non-Hispanic	<input checked="" type="checkbox"/> Male
			<input type="checkbox"/> Female

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____ Dated: _____

The defendant's signature:

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
--	------------	-------------	---

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 / 237 Fourth Avenue North
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Criminal Division

Jennifer Richardson, Chief Criminal Deputy
Garrett Page, Criminal Deputy
Emma Paulsen, Juvenile Court Deputy
Felicia Chandler, District Court Deputy
Joe Caldwell, District Court Deputy,

Civil Division

Stephen Bozarth, Civil Deputy
Dave Jorgensen, Child Support Deputy

Victim-Witness Assistance Program
Pat Behrmann, Program Coordinator
Lona Fritts, Program Assistant

Office Administrator
Pat Behrmann

FILED

SEP 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF MAILING

September 26, 2011

COA# 29688-1

NAME OF CASE: CHRISTOPHER BROCKMILLER

I hereby certify under penalty and perjury of the laws of the State of Washington that on **SEPTEMBER 26, 2011**, I mailed the original and 1 copy of the **RESPONDENT'S BRIEF AND CERTIFICATE OF MAILING** to the following counsel of record and/or other interested parties by depositing in the mails of the United States of America an addressed envelope with prepaid postage to the following:

The Court of Appeals, Div. III
Attn: Renee Townsley
500 N. Cedar Street
Spokane, WA 99201

Christopher D. Brockmiller
#824196
1313 N, 13th Ave.
Walla Walla, WA 99362

GEMBERLING & DOORIS, P.S.
Janet G. Gemberling
PO Box 9166
Spokane, WA 99209

Ronda Watts

Ronda Watts, Legal Secretary
Okanogan County, Washington