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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Deputy Clerk - Waters, Renee

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, v. BRYAN C. KOHBERGER, Defendant.	Ada County Case No. CR01-24-31665 **ORDER MEMORIALIZING ORAL RULINGS ON MOTIONS IN LIMINE**

I. INTRODUCTION

Before the Court are several motions *in limine* filed by both Defendant and the State. Oral argument on motions was held on April 9, 2025. On several motions, the Court rendered oral rulings from the bench. This Order serves to memorialize those oral rulings, together with the findings the Court made during the hearing.

II. STANDARDS

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. "All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the court of this state." I.R.E. 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. 403. "The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion." *State v. Shutz*, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006).

On discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

III. ANALYSIS

A. Defendant's MIL #1 re: Inflammatory Evidence

Defendant moves under IRE 403 to prevent the State from introducing testimony and evidence that is "exceptionally inflammatory," arguing it is irrelevant and/or unfairly prejudicial. The Court finds this motion is premature. As with any potentially prejudicial evidence, the Court must first consider whether it is relevant and material as to an issue of fact under IRE 401 before assessing whether its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Winn*, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992). At this point, Defendant has not identified what specific evidence he wants kept out or otherwise defined "exceptionally inflammatory." Issuing an order as requested by Defendant would lack any substance; it would simply require the State to abide by evidentiary rules and prosecutorial responsibilities when presenting its case. The Court finds this unnecessary and, therefore, DENIES the motion. However, this was a particularly horrific murder and there will be exceptionally graphic depictions of the victims and crime scene. Prior to seeking the admission of this evidence, the State is required to provide copies to Defendant. If Defendant believes the evidence is cumulative, unnecessary or otherwise prejudicial, he can seek to take the matter up outside the presence of the jury.

B. Defendant's MIL #3 re: Use of the Term Murder

Defendant seeks to prohibit the use of the words "murder," "murderer," "murdered," "murder weapon," and similar forms of the word "murder" as applied to Defendant. Again, Defendant seeks an order requiring the State to abide by the evidentiary rules, particularly the prohibition against argument outside of closing. This is unnecessary. The State acknowledges it would be improper to refer to Defendant as the murderer other than stating what the allegations are and has no plans to do so or otherwise elicit similar testimony from its witnesses. Thus, the motion is DENIED as unnecessary.

C. Defendant's MIL #4 re: Use of Terms Psychopath or Sociopath

Defendant moves to exclude any reference to the terms "psychopath" or "sociopath" at trial, arguing it is unfairly prejudicial under IRE 403 and improper opinion testimony under IRE 702. The State does not intend to use these terms at trial. Indeed, the terms are irrelevant given the lack of evidence Defendant has been diagnosed with a personality disorder or similar mental

illness. Their use would also be highly prejudicial. Thus, the State is not to use these terms, or their equivalents, at the guilt phase of trial. If, however, the State believes the door has been opened to allow the use of such terms, it shall raise the matter in advance outside the presence of the jury. The motion is GRANTED.

D. State's MIL re: Improper Death Penalty Comments

The State moves under IRE 401 and 403 to preclude defense counsel from making what it calls "improper" comments about the death penalty; specifically, that the State is "attempting to kill" Defendant, which defendant counsel has stated in past hearings. Defendant stipulates to using phrases that comport with "existing language in statute and jury instruction." Again, the Court is unwilling to enter an order requiring defense counsel to act professionally and comply with existing rules. As defense counsel recognizes, any such statements would be argumentative and improper. The Court trusts defense counsel will comport themselves accordingly. The motion is DENIED as unnecessary.

E. Defendant's MIL #8 re: Unnoticed 404(b) Evidence

Defendant moves *in limine* to exclude any IRE 404(b) evidence that has not already been noticed by the State which, at this point, is only Defendant's pre-homicide traffic stop. By way of example of allegedly unnoticed 404(b) evidence, Defendant notes that the State intends to present evidence of Defendant's graduate paper regarding how to conduct a crime scene investigation and his Amazon purchase records, both of which Defendant contends are subject to IRE 404(b).

As an initial matter, Defendant appears to misapprehend the scope of IRE 404(b). The rule provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." IRE 404(b)(1). Defendant takes the position that "other acts" encompasses any other acts of any nature other than the crime at issue. The rule is not so broad. Its purpose is to govern the use of character evidence. It forbids the use of evidence "to show a defendant's criminal propensity." *State v. Johnson,* 148 Idaho 664, 667, 227 P.3d 918, 921 (2010) (citing *State v. Sheldon,* 145 Idaho 225, 227, 178 P.3d 28, 30 (2008)). "[I]f the evidence does not bear upon the defendant's character, it is not subject to I.R.E. 404(b)." *State v. Whitaker*, 152 Idaho 945, 949, 277 P.3d 392, 396 (Ct. App. 2012) (citing *State v. Norton,* 151 Idaho 176, 190, 254

P.3d 77, 91 (Ct.App.2011)).[1] Defendant's Amazon purchases and his graduate paper discussing proper crime scene investigation techniques do not, standing alone, bear on his character or suggest he has a propensity to commit crimes, including those charged.[2]

Further, the Court is unwilling at this point to preclude the State from filing a 404(b) notice in the future if it determines its evidence is encompassed by the rule. There are still four months until trial begins, well within the "reasonably in advance of trial" time frame required by the rule. The State acknowledges its notice obligations under the rule and intends to comply with the rule with regard to any proposed IRE 404(b) evidence. The timeliness of such future notice will be analyzed if and when such notice is given and objections can be advanced at that time. The motion is therefore DENIED.

F. Defendant's MIL #10 re: Improper Expert Testimony – Mittelman
Defendant's MIL #11 re: Exclude IGG Evidence
State's MIL re: Investigative Genetic Genealogy

Both parties move to exclude evidence of law enforcement's Investigative Genetic Genealogy (IGG) testing in this case, but for entirely different reasons. Given the parties' agreement to not present any IGG evidence, those reasons need not be discussed given the bottom-line agreement and the Court GRANTS the motions. The State has indicated it will present evidence through Detective Brent Payne that Defendant's name was revealed to law enforcement through a "tip." To avoid issues at trial, the Court advises the parties to arrive at a mutually agreeable narrative about how the tip came about.[3] The parties are also directed to jointly craft a jury instruction advising the jurors to not concern themselves with the source or nature of the tip.

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[1] In essence, the rule's reach is prior crimes, wrongful conduct or other prior acts of a nature from which a jury could conclude the person has a bad character and is therefore predisposed to commit crimes that that charged. This conduct is commonly described by Idaho courts as "prior bad acts." *Whitaker*, 152 Idaho at 949, 277 P.3d at 396. While the rule is not limited to "bad" acts, it does not implicate acts that do not bear on a defendant's poor character, even if that act is also evidence of the defendant's motive, intent, identity, etc. *Id.*

[2] Even if this evidence could qualify as character evidence—which it does not—Defendant has notice of the State's intent to rely on it.

[3] If agreement cannot be reached, the parties are to submit to the Court their proposed narratives prior to trial and the Court will decide how it will be presented.

G. Defendant's MIL #13 re: Conditions as Aggravator

Defendant moves to prevent the State from using Defendant's diagnosis of Autism Spectrum Disorder ("ASD") and the characteristics of his ASD as an aggravating factor at the penalty phase of trial. The State responds that it has no plans to use such evidence as an aggravating factor in light of *Zant v. Stephens*, 462 U.S. 862 (1983), but it will argue against and rebut Defendant's diagnosis to the extent he relies upon it as a mitigating factor.[4]

Despite the State's concession, the Court is concerned with the breadth of Defendant's motion. He is not only seeking to preclude the State from referencing his ASD diagnosis as an aggravator, but any symptom of his ASD. Given the broad nature of ASD symptoms, the Court foresees an issue potentially arising at trial whereby the State makes reference to an action taken by Defendant that Defendant contends is a symptom of his ASD. That evidence is not currently before the Court. Thus, at this point, the Court will preclude the State from arguing or presenting evidence of Defendant's ASD diagnosis as an aggravator, but it is not in a position to rule on whether any particular evidence must be excluded on grounds that it evidences a symptom of Defendant's ASD. The motion is, therefore, GRANTED, in part only.

H. State's MIL re: Alternative Perpetrator Evidence

The State seeks an order prohibiting Defendant from offering "alternate perpetrator" evidence without first making a showing that such evidence is relevant and admissible under IRE 401 and IRE 403. These rules govern the standard of admissibility for alternate perpetrator evidence. *State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009) ("Mere inferences that another person *could* have committed the crime will most likely not be relevant, and if relevant will still be subject to the limitation provisions of I.R.E. 403."). Defendant acknowledges his burden under *Meister*, but argues the State's motion is premature. According to Defendant, this case is "full of alternate perpetrators" and he intends to produce offers of proof as to alternate perpetrators.

While Defendant is correct that such offers of proof can be made at trial, this case is not well-suited to waiting until the time of trial to do so, particularly if Defendant intends to submit multiple offers of proof. Laying foundation for the admission of the evidence will likely take a

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[4]To the extent Defendant introduces evidence of his ASD as a mitigating factor, the State is allowed to confront that evidence so that the jury can afford it appropriate weight. I.C. § 19-2515(6). It cannot, however, attach an aggravator label to it.

significant amount of time. After all, Defendant cannot merely show another person could have committed the crime; rather, there must be "evidence (direct or circumstantial) linking the third person to the actual perpetration of the crime." 2 Clifford S. Fishman and Anne Toomey McKenna, *Jones on Evidence* § 13:38.50 (7th ed.) (Dec. 2024 update). To avoid undue delay at trial, Defendant must present the offer(s) of proof no later than May 14, 2025 so the matter can be addressed at the pretrial conference.[5] The Court will RESERVE ruling on the motion.

I. Defendant's MIL #14 re: Statistical Analysis

Defendant moves *in limine* to exclude any misleading comments about the meaning of a "likelihood ratio" for DNA purposes. Specifically, Defendant seeks to avoid attempts to define likelihood ratio through a comparison to the world population.[6] The State agrees that this type of comparison is inappropriate. The Court GRANTS Defendant's motion insofar as it applies to the question asked by the prosecutor at the grand jury proceedings, which both sides agree was not proper. However, the Court will not dictate how the question is to be asked at trial. If Defendant believes there is a similar misrepresentation as to the likelihood ratio at trial, he can object at that time.

J. Defendant's MIL #5 re: Inconclusive Data

Defendant moves to limit expert testimony about the Idaho State Police Forensic Lab's statistical analysis of a swab taken from the fingernail clippings of Madison Mogen ("Item Q13.1"). The testing revealed a likelihood ratio ("LR") in the "inconclusive" range as to whether Defendant was a potential contributor to the DNA mixture. During her grand jury testimony, the lab analyst, Jade Miller, testified that "inconclusive" meant she was "unable to say one way or another whether or not [Defendant] is included in the mixture." Defendant argues this is misleading language in that it allows for an inference that Defendant *might* be included, which he asserts is inaccurate. The State indicates it will not offer the results of Q13.1 as inculpatory evidence, which Defendant agrees renders his motion moot. However, if the State changes

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[5] The scope of the preclusive effect of this ruling includes suggesting that specific individuals looked at and cleared by law enforcement are alternate perpetrators without first complying with a showing required by this Order.

[6]Defendant's motion is directed toward the prosecutor's questioning of a lab analyst at the grand jury proceedings. There, the analyst testified that her DNA testing showed the profile developed from the knife sheath was 5.37 octillion times more likely to be seen if Defendant was the source than if an unrelated individual randomly selected from the general population is the source. In an attempt to clarify this result, the prosecutor asked whether this meant that "if there were 1.37 octillion people that it would be that Bryan Kohberger is one out of that many octillion." The lab analyst explained why this comparison is not a proper way to view a likelihood ratio.

course with regard to the evidence, it must first raise the matter with the Court outside the presence of the jury so the anticipated testimony regarding the meaning of "inconclusive" can be discussed. At this time, however, the motion is DENIED as moot.

K. Defendant's MIL #9 re: Excluding Amazon Click Activity Evidence at Trial

Defendant moves to exclude any evidence of Defendant's Amazon purchase history or "click activity" on grounds that it is "out of context, incomplete and unfairly prejudicial." This evidence will be presented by the State through Shane Cox and Michael Douglass, who will testify simply to what the documentary evidence state, all of which was provided to Defendant in discovery.[7]

The evidence is highly relevant. A Ka-Bar knife sheath was found lying next to the body of one of the deceased victims, all of whom were stabbed to death. Defendant's DNA was found on the knife sheath. Records from an Amazon account registered to Defendant's name and email show that a purchase of a Ka-Bar knife and sheath was made from the account approximately eight months prior to the homicides. Click activity on the same account shows the customer also viewed pages associated with Ka-Bar style knives at that time and, in the week following the purchase, viewed pages associated with the shipping progress of the knife and sheath. The product was shipped to "Bryan Kohberger" at his family address in Pennsylvania. After the homicides, activity from the same account showed the user navigated pages related to the deletion of account activity and, a week later, viewed pages associated with a Ka-Bar knife and sheath. This evidence establishes a significant connection between Defendant and a Ka-bar knife and sheath.

In addition, there is no basis under IRE 403 to exclude the evidence, particularly given how probative it is. Defendant argues it is misleading and prejudicial because it paints and incomplete picture of the account activity. To this end, Defendant provides the declaration of his expert, David Howell, the founder of a firm specializing in, *inter alia*, digital forensics and digital marketplace analytics. According to Mr. Howell, far more information must be reviewed in order to attribute specific activity to a specific person or otherwise render an opinion about

[7] Within this motion, Defendant also seeks to exclude testimony by Shane Cox and Michael Douglass on grounds that their expert disclosures were insufficient. That will be addressed in a separate order regarding Defendant's motion to exclude vague and undisclosed expert testimony.

user behavior with forensic certainty, including Amazon advertising logs, recommended algorithms, cross-device history, retargeting behavior, account personalization and device IDs.

Defendant is free to challenge this evidence through cross-examination and establish through Mr. Howell why more information is needed to reach the conclusion that Defendant made the purchases or "clicks." However, it is not a basis for exclusion. There is nothing inherently unfairly prejudicial or misleading about the evidence itself. It will be up to the jury to consider all the evidence and decide whether Defendant was the "clicker." [8] Thus, the motion is DENIED.

L. State's MIL re: AT&T Timing Advance Records

The State moves *in limine* to prohibit the defense from making any reference to the absence of AT&T Timing Advance Records ("TA Records") related to Defendant's cell phone. The State contends it never received such records from AT&T in response to its subpoenas and, therefore, any statements by Defendant that the records could have or should have been provided to Defendant should not be allowed as it mischaracterizes the evidence, will mislead the jury, waste time and cause undue delay. In support, the State provides Certificates of Authenticity AT&T for each of the two warrants, stating that it "did not provide Timing Advance Records for phone number 509-592-8458" because such records were, at that time, "only available if requested within seven (7) days of the specified time frame."[9] Defendant, relying largely on the affidavit of its expert, Sy Ray, is adamant that the State did receive the documents—which he argues are exculpatory—and is hiding them. Defendant points out he has a constitutional right to challenge evidence against him and, therefore, must be allowed to explore the State's misrepresentation as to the availability of the records.

The Sixth and Fourteenth Amendments guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted). This includes the right to confront and effectively cross-

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[8] Defendant relies, in part, on IRE 106 to exclude the Amazon click evidence. However, that rule "is not an exclusionary rule." 21A Federal Practice & Procedure (Evid.) (*Wright & Miller*) § 5078 (2d ed.) (June 2024 update) (discussing FRE 106). "Rule 106 does not give the opponent the power to prevent the proponent from introducing an incomplete statement; it only gives him the power to require that the statement be completed or to complete it himself." *Id.*

[9] The homicides occurred on November 13, 2022. Defendant first became a person of interest on December 19, 2022. The two AT&T Warrants were issued on December 23, 2022. Thus, TA Records for Defendant that could have been of any relevance had long been discarded by AT&T and no longer exist.

examine witnesses. *Davis v. Alaska,* 415 U.S. 308 (1974). However, these rights are not absolute. *State v. Araiza*, 124 Idaho 82, 91, 856 P.2d 872, 881 (1993). "The trial court may reasonably limit cross-examination that is harassing, confusing, repetitive, or only marginally relevant." *Id.* (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)). "The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (quoting *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985)). Additionally, a defendant "has no right to present irrelevant evidence and even if evidence is relevant, it may be excluded in certain cases." *State v. Self*, 139 Idaho 718, 722, 85 P.3d 1117, 1121 (Ct. App. 2003).

Applying these principles here, Defendant will be allowed to voir dire Special Agent Ballance outside the presence of the jury to ask whether he received Defendant's TA records covering the early morning hours of November 13, 2022 and the months prior, when Defendant was believed to have been in the area of 1122 King Road. However, if Agent Ballance denies having received the TA records, Defendant may not explore the matter further, either in voir dire or before the jury, given the absolute lack of any factual basis supporting his position that the State is hiding them.[10] Thus, the State's motion is GRANTED, except as qualified regarding the very brief voir dire outside the presence of the jury.

K. State's MIL re: Self-Authentication of Records in Reliance on IRE 803(6), 803(8), 902(4), (11) and/or IRE 803(24)

The State moves *in limine* to permit the admission of approximately 60 exhibits pursuant to IRE 803(6), (8) and/or (24). The State represents that it will obtain and submit certifications for the foregoing exhibits to render them "self-authenticating" under IRE 902(4) and/or (11). However, as the State acknowledges, IRE 902(11) contains a notice requirement that has not been satisfied. To this end, the Court will require that, after proper notice is given under IRE 902(11), the parties are to meet and confer regarding self-authentication and any objections Defendant may have to specific exhibits prior to raising the issue with the Court. The Court's ruling on the motion is RESERVED.

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[10] Mr. Ray's affidavit, which forms the basis of the Defendant's challenge, is replete with speculation and unfounded and, thus, highly improper accusations against the State. Further, not once in his affidavit does he address AT&T's seven-day retention period, which fully explains why the State was unable to obtain relevant TA Records for Defendant.

L. State's MIL re: Admissibility of Demonstrative Evidence

The State seeks permission to use a not-to-scale 3D model of the 1122 King Road residence as a demonstrative exhibit at trial, contingent on the State laying sufficient foundation to establish the basic accuracy of the model and a demonstration that it will be helpful to explaining the testimony of the presenting witness(es). The State contends the model will aid certain witnesses in describing their testimony. Defendant objects, arguing the State's drawing of the model and other related information[11] was only recently disclosed in discovery in a file Defendant describes as "massive." Defendant claims the data and model cannot reasonably be evaluated by its expert in time.[12] Defendant disputes that the model is relevant and, even if it was, claims it should be excluded under IRE 403 due to the danger it might not be accurate.

The trial court has discretion in allowing the admission of demonstrative evidence. *State v. Weigle*, 165 Idaho 482, 487, 447 P.3d 930, 935 (2019) (citing IRE 611). Here, the Court finds the demonstrative exhibit is relevant, assuming foundation can be laid, because it will "supplement[] the testimony of witnesses or assists the jury in obtaining a better understanding of facts in issue." *Masters v. Dewey*, 109 Idaho 576, 579, 709 P.2d 149, 152 (Ct. App. 1985) (citing 29 AM.JUR.2d, *Evidence* § 771 (1976)). The homicides occurred in two bedrooms within a three-story home with a complicated layout. The suspect's ability to enter the home, carrying out the stabbings and exit the home consistent with D.M.'s observations will be a central point of the trial, particularly given that Defendant is challenging whether it could be accomplished by one person within the time frame alleged. The model will aid the testimony of lay witnesses and experts alike in explaining the locations of victims, witnesses and other items of evidence as well as understanding the suspect's potential or likely path of travel.

Moreover, though it is not to scale, "accuracy is not the standard governing relevant of illustrative evidence; rather, the illustrative evidence must only be relevant to the witness's testimony." *State v. Stevens*, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008), *abrogated on other grounds by State v. Garcia*, 166 Idaho 661, 462 P.3d 1125 (2020). So long as the exhibit is not

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[11] The other information was the identity and credentials of the person building the model and the data underlying the model.

[12] Defendant submits the declaration of its expert, Matthew Noedel, wherein he discusses the that it will take at least three days to assess the 3D scans recently disclosed by the State, and he will thereafter have to set aside at least two days to travel from Seattle to view the model to assess its accuracy. He states he is unavailable until at least April 7, 2025. Decl. Noedel, ¶¶ 10-12. However, Defendant has ample time prior to trial to accomplish these tasks.

deceptive, it does not have to be shown to be precisely accurate or consistent with the testimony of other witnesses. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993) (diagram properly admitted where not to scale and admittedly inconsistent with another witness's testimony).[13] While Defendant's expert, Mr. Noedel, contends there is a risk the State's model *could be* misleading if it mispresents the location of a wall or door or an actual line of sight, those are simply concerns at this point. The State intends to lay foundation to establish that the 3D model fairly depicts the residence and, if it fails to do so, the model will not be allowed. Further, Defendant is free to cross-examine the testifying witness and to put on his own evidence, including experts. He may also use his own demonstrative exhibits if proper foundation is laid. However, the State is not going to be held to a standard of precise accuracy in this regard; it will only need to demonstrate accuracy to the point of avoiding deception.

In addition, there is no basis under IRE 403 to exclude the model. Defendant contends that allowing the model is prejudicial because it is built from data that was untimely disclosed and which its expert has little time to analyze for accuracy.[14] While this might be a more compelling issue if the State was seeking to introduce the model as substantive evidence or seeking to have the model accompany the jury during deliberations, it is not. It is simply going to be used as an educational device meant to aid in the presentation of evidence and will not go back with the jury during deliberations. *See, Baugh ex rel. Baugh v. Cuprum A.B. de D.V.*, 730 F.3d 701, 706-708 (7th Cir. 2013) (discussing the difference between a demonstrative exhibit and substantive evidence).

Moreover, as discussed, Mr. Noedel's concerns about his time-constraints are based on his impression that he will have to analyze the underlying data to ensure the model's proper scale, dimension and completeness. Decl. Noedel,¶¶ 10-12. Again, accuracy is not the standard; Mr. Noedel need only assure himself the model is not deceptive, and there is sufficient time to do this given the August trial date.[15] To this end, the State is to make the model available to

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[13] *See also, State v. Ehrlick*, 158 Idaho 900, 354 P.3d 462 (2015) (forensic artist's model of crime victim's head properly admitted despite discrepancies in size; discrepancies were small and jury was aware of them); *State v. Hall,* 163 Idaho 744, 419 P.3d 1042 (2018) (images illustrating expert's opinion about how victim was tied after death admissible even if they did not "exactly depict the event.")

[14] Defendant also argues it is prejudicial to the extent it is not accurate, but the Court rejects that argument for the same reason it rejects Defendant's relevancy argument.

[15]Assuming the State can lay sufficient foundation for the model, the Court will entertain a request to provide a limiting instruction to the jury that the model is not intended to be accurate and is not to be considered evidence.

Defendant as soon as it is completed, and no later than the pretrial conference. The motion is GRANTED.

M. State's MIL re: Alibi

The State moves to preclude Defendant from offering any evidence in support of an alibi, other than from Defendant himself. The basis for the State's motion is Defendant's failure to comply with the notice requirements governing alibi evidence. Pursuant to I.C. § 19-519(1) and ICR 12.1, if requested by the State during discovery, a defendant intending to offer an alibi must file a notice listing "the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi." The Court has the discretion to exclude testimony of any undisclosed witness offered as to a defendant's absence from at the scene of the offense. I.C. § 19-519(4).

An alibi is a "defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." Black's Law Dictionary (12th ed. 2024). Hence, in setting forth the notice requirements for an alibi defense, I.C. § 19-519 and ICR 12.1 require a defendant to proffer evidence establishing where the defendant's was "at the time of the alleged offense[.]" "Evidence only counts as alibi evidence if it proves that the defendant could not have been present at the scene of the offense at the time that it was committed." 1 Lane, Fred J.D., Lane Goldstein Trial Technique § 4:45 (3d ed.) (Nov. 2024 update) (collecting cases). If any alibi fails to account for a defendant's whereabouts for at least some period of time during which the crime was reasonably committed, it is not an alibi. *Skakel v. Comm'r of Correction*, 188 A.3d 1, 41 (Conn. 2018) (citing, *Williams* v. *State*, 185 So.3d 1270, 1271 (Fla. App. 2016) ("a partial alibi is no alibi at all")); *U.S. v. White*, 443 F.3d 582, 69 Fed. R. Evid. Serv. 1005, 12 A.L.R. Fed. 2d 825 (7th Cir. 2006) (the defendant was not entitled to an alibi instruction when his witnesses did not account for his whereabouts at the time of the offense).

At this point, Defendant has only provided notice that he was out driving in the "early morning hours" of November 13, 2022 throughout the area south of Pullman, Washington and west of Moscow, Idaho. He intends to present testimony by his expert, Sy Ray, to "partially corroborate" his alibi using CSLI data from Defendant's cell phone. However, the alleged

offense occurred between approximately 4:07 a.m. and 4:20 a.m. At most, Mr. Ray can opine as to where Defendant's cell phone was up until 2:54 a.m., when it was apparently turned off, and approximately 4:48 a.m., when it began reporting to a network. Defendant has provided no evidence as to his location at the time of the crime. In other words, he has provided no alibi evidence as contemplated by the rules.[16]

That said, the Court will not categorically preclude Defendant at this point from offering alibi evidence at trial. *State v. Juarez*, 169 Idaho 274, 277, 494 P.3d 822, 825 (Ct. App. 2021) (whether to exclude late disclosed alibi evidence requires weighing prejudice to the State against the defendant's right to a fair trial and considering whether less severe remedies are sufficient). *Id.* There are still four months until trial begins. If Defendant does unearth alibi evidence, it is his obligation to immediately make the State and the Court aware of it. At that point, the Court can apply the *Juarez* standard. Excluding it at this time is premature and, therefore, the motion is DENIED, subject to being re-raised if Defendant does disclose alibi evidence. However, at this point, Defendant has not provided an alibi, partial or otherwise.

N. State's 404(b) Notice: Prior Traffic Stop

The State moves under IRE 404(b) for the admission of Defendant's August 21, 2022 traffic stop in Moscow, Idaho during which he was stopped for speeding and issued a citation for failing to wear a seat belt. Specifically, the State seeks to admit the officer's OBV footage of the traffic stop as well as the citation, arguing it is relevant to proving Defendant's identity, vehicle, ownership and control, address and phone number.[17]

Defendant objects, pointing to Idaho Supreme Court case law stating that "[e]vidence of prior misconduct is relevant on the issue of identity when the evidence demonstrates sufficiently similar, as well as distinctive, characteristics or patterns between the prior misconduct and the

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[16] This does not preclude Defendant from presenting Mr. Ray's testimony at trial to rebut any contention by the State that Defendant's vehicle was seen on surveillance camera driving to Moscow around the same time Mr. Ray contends he was south of Pullman. However, Defendant may not refer to it as an alibi or partial alibi prior to closing. At that time, Defendant is instructed to address the issue outside the presence of the jury for guidance on what language related to alibi of any sort may be used.

[17] The judge previously presiding over this case analyzed the admissibility of the OBV footage under IRE 404(b) in the context of the grand jury proceeding and found it admissible. Specifically, the judge found it relevant to identity and was not otherwise barred by IRE 403. *See*, Sealed Order Denying Motion to Dismiss Indictment on Grounds of Biased Grand Jury, Inadmissible Evidence, Lack of Sufficient Evidence, and Prosecutorial Misconduct, pp. 43-44 (Dec. 15, 2023).

charged crime." *State v. Porter*, 130 Idaho 772, 783, 948 P.2d 127, 138 (1997)). Confusingly, Defendant argues his prior traffic stop bears no resemblance to the charged crimes and, therefore, cannot be relevant to identity. He also argues it is unfairly prejudicial and may confuse the issues.

Evidence of other crimes, wrongs or acts may not be admitted pursuant to IRE 404(b) when its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. *State v. Salinas*, 164 Idaho 42, 43–44, 423 P.3d 463, 464–65 (2018) (cites omitted). Such evidence may, however, be admissible for other purposes, including to prove identity. IRE 404(b)(2). To determine the admissibility of evidence under Rule 404(b), the Court must find the evidence is sufficiently established as fact[18] and relevant as a matter of law to a material and disputed issue other than the character or criminal propensity. *Id.* It must then conduct a Rule 403 analysis. *Id.*

The Court finds the evidence is relevant to establish Defendant's identity and link him to the charged crimes. Indeed, the citation and OBV footage up to the point that Defendant provides his phone number[19] serve to identify Defendant by name, physical appearance, phone number and address. The evidence also establishes Defendant as the registered owner and driver of a vehicle, the make and model of which was thought to be used by the killer. Further, the evidence places Defendant in Moscow at night on one of the dates of interest alleged by the State to be relevant to planning the charged crime. All of these factors played a role in the investigation of the crime.[20]

While Defendant cites to case law discussing identity under IRE 404(b) as requiring strong similarities between the bad act and the charged crime, this is in the context of

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[18]There is no dispute that the evidence is sufficiently established as fact; thus, the Court need not make a specific articulation on the matter. *Cooke v. State,* 149 Idaho 233, 240, 233 P.3d 164, 171 (Ct. App. 2010).

[19] Just prior to Defendant providing his phone number, he asked the officer why he needed it. This is after Defendant provides his phone number, he and the officer discuss ancillary matters that in no way bear on Defendant's identity. Thus, this portion of the OBV shall be redacted.

[20]Case law supports the use of identity evidence in this regard. In the recent case of *State v. Gordon*, Idaho Court of Appeals held that a prior interaction between the defendant and law enforcement during which the officers identified the defendant with his driver's license and verified his address was relevant to affirmatively establish his identity for the subsequently charged crime. 2025 WL 66399, *6 (Jan. 10, 2025). Likewise, in *State v. Alger*, the Court of Appeals held that evidence that witnesses spotted defendant in a car known to have been used while fleeing from scene of robbery was relevant and admissible as being probative of defendant's identity as one of the robbers. 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

establishing identity through a "signature quality" or *modus operandi*. *Porter*, 130 Idaho at 783, 948 P.2d at 138 (discussing how evidence of a *modus operandi* can prove the identity of the defendant as the perpetrator of the crime charge).[21] The State, however, is not seeking to introduce the prior traffic stop to establish a *modus operandi*. Therefore, Defendant's case law and argument is not well placed.

Upon weighing the IRE 403 factors, the only portion of the OBV footage the Court finds troubling is when Defendant inquires why the officer needs his phone number. This inquiry could be perceived by jurors to be insolent. Given its lack of relevance and potential for prejudice, the inquiry shall be redacted.

Other than this redaction, there is no basis for further exclusion. Defendant's claims of unfair prejudice and jury confusion lack merit. First, he argues there is no nexus between the traffic stop and the charged crimes; thus, the jury may consider it as propensity evidence or otherwise be confused. However, as discussed, a nexus is not required for the purpose advanced by the State. Moreover, unfair prejudice arises only when the evidence "has an undue tendency to suggest a decision on an improper basis and appeals to the jurors' sympathies, arouses their sense of horror, provokes their instinct to punish, or otherwise causes a jury to base its decision on something other than the established propositions in the case." *State v. Russo*, 157 Idaho 299, 309, 336 P.3d 232, 242 (2014). A traffic stop—particularly one as minor as this—is not the type of evidence that will compel a jury to conclude Defendant is guilty of murder because he violated traffic laws. Further, the Court will provide a limiting instruction.

Defendant also contends it is unfairly prejudicial because the OBV footage provides a "clear shot" of Defendant's vehicle, which may lead the jury to believe it is the suspect vehicle captured on surveillance videos at and near the crime scene on November 13, 2022. However, this is precisely what makes the evidence probative. It links Defendant to the crime scene. While this may be damaging to his defense, it is not unfairly prejudicial when balanced against its strong relevance.[22] Thus, the motion is GRANTED, with the noted redactions.

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[21] Noting the demanding standard required to establish identity through *modus operandi* evidence, *Wright & Miller* advises that judges to distinguish between the *modus operandi* exception for proving identity under IRE 404(b) and other methods of proving identity so "they don't impose the strict standards of proof of [the *modus operandi* exception] on other methods of proving identity." 22B Fed. Prac. & Proc. Evid. (*Wright & Miller*) § 5254 (2d ed.) (July 2024 update).

[22] Defendant also noted at the hearing that the traffic stop occurred on the same day that Agent Ballance determined through CSLI analysis that Defendant's cell phone was using resources consistent with being in the area of 1122

IT IS SO ORDERED.

DATED this 17th day of April, 2025.

Steven Hippler
District Judge

King Road. Defendant did not, however, articulate how this correspondence was unfairly prejudicial, nor does the Court find it to be so.

CERTIFICATE OF SERVICE

I hereby certify that on 4/18/2025, I served a true and correct copy of the
ORDER MEMORIALIZING ORAL RULINGS ON MOTIONS IN LIMINE

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