

NO. 46015-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

HEATHER ROARK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence that third parties, with only a speculative link to appellant, threatened and assaulted a witness.

2. Counsel was ineffective in failing to request a limiting instruction that the jury could consider the third party threats and assault only for the purpose of assessing the witness' credibility.

3. The court erred in imposing consecutive school zone enhancements.

Issues Pertaining to Assignments of Error

1. Before admitting evidence of witness intimidation, the court must apply the correct analysis under ER 404(b). The court admitted evidence a witness was threatened by appellant's former boyfriend and assaulted by an unknown person. Did the court err in admitting this evidence without first finding by a preponderance of the evidence that Roark was involved or balancing on the record the probative value against the danger of unfair prejudice?

2. Evidence that a third party other than the defendant attempted to intimidate a witness may be relevant to witness credibility; but is not admissible as substantive evidence or evidence of the defendant's consciousness of guilt. Because there was no evidence appellant was involved in attempts to intimidate the witness, was counsel

ineffective in failing to ask for an instruction limiting the jury's consideration of this evidence?

3. RCW 9.94A.533 mandates that school zone sentencing enhancements be run consecutively to "all other sentencing provisions." The statute does not expressly provide that this includes other school zone enhancements. Did the court exceed its statutory authority in ordering the separate school zone enhancements added to each of the four controlled substance charges run consecutively to each other?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County prosecutor charged appellant Heather Roark with three counts of delivering methamphetamine, one count of possession of methamphetamine with intent to deliver, and three counts of bail jumping. CP 20-26. The State also alleged each of the narcotics violations occurred within 1,000 feet of school grounds or a school bus stop. CP 20-24. The jury found Roark guilty and answered "yes" to the special verdicts regarding the school zone enhancements. CP 73-79.

At Roark's request, the court imposed a Drug Offender Sentencing Alternative (DOSA). CP 147. The court imposed a total of 186 months on the narcotics charges, with half to be served in prison and the other half in treatment. CP 147, 149, 158-59. The 186 months included 90 months, the

mid-point of the standard range for the controlled substance offenses, as well as 96 months for four consecutive 24-month school zone enhancements. CP 146-47. A 60-month sentence for the bail jump charges was to run concurrently. CP 147. Notice of appeal was timely filed. CP 157.

2. Substantive Facts

A paid informant, Robert White, testified he bought methamphetamine from Roark three times while working with law enforcement. 1RP<sup>1</sup> 274-75. On three dates in late May 2011, White was searched by police, was followed to the home, approached the home, and returned with methamphetamine. 1RP 207-14, 226-36. Based largely on these purchases, police obtained a search warrant. 1RP 241.

When they entered the home, police found Roark coming out of the bathroom. 1RP 179. In the bathroom they found a plastic baggie of methamphetamine dissolving in the toilet and another baggie of methamphetamine in the garbage next to the toilet. 1RP 258-61. They also found a hidden room off one of the bedrooms in the house with another baggie of methamphetamine in it. 1RP 458-59. In the bedroom, police also found numerous baggies, one of them containing methamphetamine, a digital scale, and other drug paraphernalia. 1RP 264-69, 474. The arresting officer claimed Roark admitted to him she and Adam Carter had been

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<sup>1</sup> There are five volumes of verbatim report of proceedings referenced as follows: 1RP – Dec. 16 -19, 23, 2013; 2RP – Feb. 27, Mar. 10, 2014.

dealing out of the home for a couple of months. 1RP 251-52. A Kitsap County analyst created a map showing the home was within a 1,000-foot radius from an elementary school. 1RP 153-54. A forensic scientist testified the substance in the baggies taken from the home was methamphetamine. 1RP 428-42.

White also testified he was concerned for his safety because Roark and her former boyfriend Ryan Higgins had threatened him the previous year during the pendency of this case. 1RP 381-82. Also, he had recently heard from an acquaintance that there was a bounty on his head. 1RP 382. Then, the night before his testimony, he was punched by an unknown assailant. 1RP 382-83. He also testified he was concerned because a person who he knew, but who had previously not been involved in this case, suddenly appeared in court the day of his testimony. 1RP 384-85. On cross-examination, White admitted he did not know who had punched him, and the threats came from Higgins' account, with no sign that Roark was involved. 1RP 386, 390-91. He simply assumed she was responsible. 1RP 390-91.

The State also presented jail calls in which Roark appeared to ask a man called Irwin to rally support because her "rat" would be testifying the next day. Ex. 78A. The court noted the new spectator who appeared in court the day of White's testimony was sitting with Irwin. 1RP 373-74. The court found this link was sufficient to admit jail phone calls from Roark in

which she emphasized the date that her “rat” was going to testify as well as White’s testimony that Roark and Higgins had threatened him and an unknown person had punched him. 1RP 374-75.

Defense counsel argued the link to Roark was too speculative to admit the jail calls or White’s testimony about the threats and assault. 1RP 369-71, 510-12. White admitted he had also engaged in controlled buys with Higgins, so Higgins had his own reasons to bear animosity toward White. 1RP 386-87. The court ruled the threats and assault were admissible because the fact that Roark and Higgins used to date was sufficient to link her to the threats and assault. 1RP 375-76. The court admitted the assertion that there was a bounty on White’s head solely for purposes of White’s state of mind and offered to give a limiting instruction if requested. 1RP 376.

After actually hearing the jail calls, defense counsel again argued any link to Roark was far too speculative. 1RP 510-11. The prosecutor responded he was not even attempting to link Roark to the assault on White, but merely wanted to argue her use of the term “rat” showed consciousness of guilt. 1RP 519. Unfortunately, at that time, White had already testified about the assault and the threats and the bounty on his head, with no limiting instruction. 1RP 381-85.

During rebuttal closing argument, the prosecutor argued the jail calls were not meant to suggest Roark tried to arrange the assault on White, but

were instead meant to indicate her consciousness of guilt and a desire to make White nervous while he testified. 1RP 673-74.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE THAT WHITE WAS THREATENED BY ROARK'S FORMER BOYFRIEND AND ASSAULTED BY AN UNKNOWN PERSON.

The trial court erred in admitting the threats and assault on White, and his accusation that Roark was in some way responsible, without first analyzing admissibility under ER 404(b). If evidence shows a defendant caused a witness' reluctance to testify, that evidence may properly be used as substantive evidence of consciousness of guilt. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). However, because such evidence constitutes evidence of other wrongs, the court must first conduct the necessary analysis to determine whether the evidence should be excluded under ER 404(b). State v. McGhee, 57 Wn. App. 457, 459-60, 788 P.2d 603 (1990). Under that analysis, the evidence should have been excluded because the State failed to present a preponderance of the evidence showing Roark was responsible and the danger of unfair prejudice far outweighed any minimal probative value.

On appeal, a trial court's decision whether to admit evidence of other misconduct is generally reviewed for an abuse of discretion. State v. Fisher,

165 Wn.2d 727, 745, 202 P.3d 937 (2009). But a trial court necessarily abuses its discretion when it fails to abide by the requirements of ER 404(b).

Id. That is what occurred here.

a. The Court Failed to Properly Determine Admissibility Under ER 404(b).

Under ER 404, evidence of other wrongs is presumptively inadmissible to prove character or show action in conformity with those other acts. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). It may be admissible for other purposes such as to show motive, intent, or a common scheme or plan. ER 404(b). Before admitting evidence of other wrong acts, the court must engage in a four-step process. Fisher, 165 Wn.2d at 745. First, the court must find by a preponderance of the evidence that the conduct occurred. Id. Second, the court must identify a proper purpose for which the evidence may be admissible. Id. Third, the court must determine the relevance of the evidence to an element of the crime. Id. Finally, the court must engage in a balancing analysis under ER 403 to determine whether any probative value is significant enough to outweigh the danger of unfair prejudice to the defendant. Id. “In doubtful cases, the evidence should be excluded.” State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

The trial court did not find that a preponderance of the evidence showed Roark was behind the threats and assault on White. 1RP 369-78. After reading only a police report about the jail calls and before reviewing any potentially admissible evidence, the court found, for purposes of increasing her bail, it could infer Roark was threatening White. 1RP 329. The court did not review the proposed evidence and find that a preponderance of the evidence showed Roark was responsible for the threats. Nor did the court determine whether the fact of the threats and assault had any probative value that might outweigh the danger that the jury would blame Roark for the conduct of Higgins and the unknown assailant. Id.

Because the trial court failed to follow the dictates of ER 404(b) before admitting this evidence, it necessarily abused its discretion in admitting the evidence. Fisher, 165 Wn.2d at 745. But even if this Court should perform its own analysis based on the record, the conclusion is the same: the evidence of the assault and threats fails to meet the requirements for admissibility under ER 404(b).

b. The Record Fails to Establish that Roark Was Involved with the Threats or the Assault.

ER 404(b) requires proof by a preponderance of the evidence that the misconduct occurred. Fisher, 165 Wn.2d at 745. Here, the State failed to present evidence that could link Roark to the misconduct committed against

White by Higgins and an unknown assailant. Initially, the State appeared to rely on Roark's jail calls to link her to the threats and assault. 1RP 319-22. But after White's testimony about the threats and assault had already been presented to the jury, the State backtracked and announced it wanted to admit the jail calls only to show Roark's consciousness of guilty in using the term "rat." 1RP 519. The State specifically disclaimed any intent to use the jail calls to suggest she was responsible for the assault. 1RP 519. In closing argument, the State denied any intent to link Roark to the threats and assault against White. 1RP 673. The jail calls do not suggest any involvement by Roark in the misconduct by Higgins and the unknown assailant. Ex. 78A.

Similarly, a review of White's testimony reveals no admissible evidence linking Roark to the threats or the assault. White testified 1) he received an emailed threat that came from Higgins' account; 2) he heard from an unnamed person that Higgins had placed a bounty on his head; 3) that same night, an unknown person punched him in the head. 1RP 381-92. He attributed the emailed threats to Roark, but on cross-examination admitted that the email came from Higgins and he had no information that Roark was involved. 1RP 390-91. White admitted he simply assumed she was involved because of this case. 1RP 390-91.

White's accusation that Roark was responsible was not based on any personal knowledge, and is inadmissible under ER 602. The assertion that

someone told him Higgins placed a bounty on his head was inadmissible hearsay if admitted for the truth of the matter that Higgins had done so. ER 801, 802. The only remaining link to Roark is that the emailed threat came from her former boyfriend's email. White's assumption that Roark was involved, based solely on the facts that this case was ongoing and that Roark used to date Higgins are pure speculation that does not amount to a preponderance of the evidence.

c. The Danger of Unfair Prejudice from Unfounded Accusations of Witness Intimidation and Physical Violence Far Outweighs Any Minimal Probative Value.

“There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.” State v. Smith, 103 Wash. 267, 268, 174 P. 9 (1918). Substantial probative value is needed to outweigh the prejudice of such evidence. State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003).

The threats and assault should have been excluded under a balancing analysis because attempting to intimidate a witness is powerful evidence of consciousness of guilt. See State v. Saenz, 156 Wn. App. 866, 874, 234 P.3d 336 (2010) rev'd on other grounds, 175 Wn.2d 167, 283 P.3d 1094 (2012) (noting “extreme probative value” of fact that defendant threatened and

assaulted witness). ER 403 as well as the final step of the four-part analysis under ER 404(b) require weighing the probative value of the proposed evidence against the danger of unfair prejudice. Fisher, 165 Wn.2d at 745; ER 403. When the evidence involves uncharged misconduct attributed to the defendant, courts should err on the side of exclusion. Thang, 145 Wn.2d at 642. The danger was great that Roark would be prejudiced unfairly when the jury heard White's unfounded accusation that Roark was behind the threats and assault he suffered.

Without any evidence linking Roark to the threats and assault, they were relevant only to White's credibility as a witness. Bourgeois, 133 Wn.2d at 400; 1RP 375-76. But the minimal additional support this might provide for White's credibility is far outweighed by the prejudice of unfairly linking Roark to attempts to intimidate a witness. If the court had instructed the jury it could only consider the threats and assault for their effect on White's state of mind or evaluating his credibility as a witness, that may have affected the balancing analysis. But the court did not limit the jury's consideration of this evidence in any way. So this Court is left to balance the prejudice of the jury hearing a baseless accusation of witness intimidation against some minimal bolstering of witness credibility. The unfair prejudice of this accusation requires reversal of Roark's convictions.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION.

The evidence showed Ryan Higgins threatened White and an unknown person assaulted him. 1RP 386. White had no personal knowledge of any involvement by Roark beyond his involvement in this case and Roark's defunct relationship with Higgins. 1RP 390-91. When someone other than the defendant attempts to intimidate a witness, the attempts are relevant only to the witness' credibility, and may not be used as substantive evidence of guilt. Bourgeois, 133 Wn.2d at 400. Without a limiting instruction, the jury was free to take White's accusation as substantive evidence that Roark was trying to prevent his testimony and had ordered others to commit violence against him. Counsel was ineffective in failing to prevent this unfair prejudice by requesting a limiting instruction.

Roark was entitled to constitutionally effective counsel. U.S. Const. amend. VI; Const. art. I, § 22. Even when error is not preserved, reversal is required when counsel's objectively deficient performance undermines confidence in the outcome of the proceedings. State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (review of instructional error "is not precluded where invited error is the result of ineffectiveness of counsel").

An error constitutes deficient performance when it falls below an objective standard of reasonableness, considering all the circumstances. Woods, 138 Wn. App. at 197. Counsel is ineffective when counsel's conduct could not have been a legitimate strategic or tactical choice. Id. That is the case here.

Generally, when evidence is admissible for a limited purpose only, it is appropriate to instruct the jury regarding the limits on its use of the evidence. ER 105. However, the court is not required to give an instruction when none is requested. State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). In this case, no such instruction was given, presumably because none was requested. There was no possible strategic reason for permitting the jury to take the threats and assault as substantive evidence of consciousness of guilt when they were not tied in any way to Roark's conduct. This could only feed the jury's prejudice against an accused drug dealer.

This is not a case where counsel was merely trying to avoid further emphasizing damaging evidence. Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER

404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). White's testimony directly accused Roark of misconduct that, if believed, would be powerful evidence of guilt. There was no disadvantage to limiting the jury's consideration of the evidence.

The court would likely have given an instruction if one had been requested because, "a trial court must give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction. State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928, 938 (2010) (citing ER 105; State v. Gallagher, 112 Wn. App. 601 611, 51 P.3d 100 (2002)). Once given, the jury would be presumed to have followed the instruction to limit the consideration of the threats and assault. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

Prejudice created by evidence of prior bad acts is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). But without that instruction, it is reasonably probable the threats and assault, and White's assumption that Roark was responsible, weighed into the jury's determination of guilt. Roark's convictions should also be reversed because her attorney was ineffective in failing to request an instruction to ensure that the jury did not consider White's baseless accusation as substantive evidence of guilt.

3. THE COURT ERRED IN APPLYING FOUR CONSECUTIVE SCHOOL ZONE SENTENCING ENHANCEMENTS.

A trial court's sentencing authority is limited to that expressly provided by statute. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). "If the statutory provisions are not followed, the action of the court is void." State v. Theroff, 33 Wn.App. 741, 744, 657 P.2d 800 (1983).

RCW 9.94A.533 provides that school zone enhancements must run consecutive to "all other sentencing provisions." Unlike the firearm and deadly weapon sentencing enhancements, the statute does not expressly provide that the "other sentencing provisions" include other school zone enhancements. RCW 9.94A.533. The fact that the legislature included this express language in the firearm and deadly weapon enhancement provisions shows that it knows how to ensure that several of the same enhancement run consecutively to each other. Indeed, in the sexual motivation sentencing enhancement, amended the same year as the school zone enhancement, the legislature included the express language "including other sexual motivation enhancements." Laws of 2006, ch. 123. When the legislature has language making its intent clear, and declines to use that language, the absence of intent is presumed. State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003) (discussing absence of comparability clause). Even without a presumption to the contrary, absent express language, the rule of lenity

should apply, and the court should have run the school zone enhancements concurrently to each other. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281(2005).

The State will likely argue the Legislature intended the current statute to overrule Jacobs, which held that two different enhancements, (only one of which was a school zone enhancement) applied to the same underlying offense, should run concurrently under the rule of lenity. 154 Wn.2d at 598-99. But even an intent to overrule Jacobs does not dictate the outcome in this case. This is not a case of different enhancements applied to one underlying crime. This is a case of several underlying offenses, each with its own school zone enhancement. CP 20-24, 76-79.

Since the sentences for the underlying offenses run concurrently, it is not illogical to assume the legislature intended that the enhancements also run concurrently. Indeed, this Court has noted that the school zone enhancement simply extends the standard range. In re Post Sentence Review of Gutierrez, 146 Wn. App. 151, 154-55, 188 P.3d 546 (2008) (discussing RCW 9.94A.533(6)). The court explained, “ then enhanced range is considered a standard range term.” Gutierrez, 146 Wn. App. at 155. Since the standard range sentences run concurrently, then the extended standard range sentences under the school zone enhancement should do likewise. This interpretation is also consistent with the statutory language, which states

that the enhancement must run consecutively to all “other” sentencing provisions, while remaining silent as to multiple applications of the same sentencing provision, as in this case. RCW 9.94A.533(6).

Other aspects of the sentencing scheme also show it is not illogical to treat firearm and deadly weapon sentence enhancements differently from other sentence enhancements. For example, the firearm sentencing enhancement is singled out for particular treatment under the statute defining earned early release. RCW 9.94A.729.

Courts do not supply omitted language not included in sentencing statutes. State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). That is what would have to occur for the separate school zone enhancements to be run consecutively in this case. Because the court erred in ordering consecutive school zone enhancements without express statutory authority, the sentence should be vacated. Roark asks this Court to remand with instructions to correct the sentence to reflect that the school zone enhancements must run concurrently to each other.

D. CONCLUSION

For the foregoing reasons, Roark asks this Court to reverse her convictions or, in the alternative, to remand for imposition of concurrent, rather than consecutive, school zone sentencing enhancements.

DATED this 19<sup>th</sup> day of September, 2014.

Respectfully submitted,

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Attorney for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 46015-7-II
	)	
HEATHER ROARK,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19<sup>TH</sup> DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HEATHER ROARK  
DOC NO. 326791  
WASHINGTON CORRECTIONS CENTER FOR WOMEN  
9601 BUJACICH ROAD NW  
GIG HARBOR, WA 98322

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2014.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**September 19, 2014 - 2:09 PM**

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