

NO. 46015-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

HEATHER ROARK,

Appellant.

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

The Honorable Jeanette Dalton, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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A. ARGUMENT IN REPLY

THE ACCUSATION THAT ROARK WAS BEHIND THE THREATS AGAINST WHITE WAS PURELY SPECULATIVE AND UNFAIRLY PREJUDICIAL.

The prosecutor did not expressly argue Roark was behind the threats and assault against White. He did not have to. White did that for him. 1RP 382.

Whether by design or not, the prejudice from White's accusation tainted the evidence of the threats and assault and far outweighed any legitimate probative value. The court's discussion of prejudice occurred after the jury had already heard this evidence and did not pertain to White's accusation, but instead to the admission of the jail calls for a different purpose. Moreover, with the State's admission that the jail calls would not be used to link Roark to these incidents, the remaining evidence of her involvement fails to meet the preponderance standard. The evidence of the threats and assault and White's accusation of Roark should have been excluded under ER 404(b).

- a. White's Accusation that Roark Was Behind the Threats and Assault Caused Prejudice that Far Outweighed the Minimal Probative Value of Bolstering White's Credibility.

White's opinion that Roark was behind the threats and assault was pure speculation. The State agreed it would not use the jail calls to suggest Roark was behind the threats. 1RP 519. Therefore, the only remaining

circumstance linking the threats to Roark was the fact that she used to date the person whose email account was used to send them. Nothing linked her to the assault on White. Despite this extremely tenuous link, the jury was allowed to hear not only the fact of the threats and the assault, but White's accusation that Roark was the instigator. White's accusation rendered the evidence of the threat and assault far more prejudicial than probative because of the likelihood the jury would blame Roark and infer guilt based on the forbidden inference of criminal propensity. See State v. Knight, 54 Wn. App. 143, 153-54, 772 P.2d 1042 (1989).

In Knight, the jury was permitted to hear about threats to a confidential informant that resulted in police assisting the informant and his family to move out of town. Id. at 153. On appeal, the court upheld the trial court's exercise of discretion in admitting the testimony for two main reasons. Id. at 153-54. First, the defendant had opened the door to this line of questioning by questions about the police helping the informant move. Second, the threats came from unnamed and unidentified parties. Id. at 154. The detective admitted he did not know who had made the threats. Id. The court reasoned, "The prejudicial effects of the testimony were minimized by the witness' avoidance of an allegation that Mr. Knight himself made the threats." Id.

Neither of these mitigating factors is present in this case. Roark did not open the door to White's testimony about the threats and assault. And White did not avoid alleging Roark's involvement. On the contrary, he directly implicated her despite having no personal knowledge of her involvement. 1RP 382. White's baseless accusation was far more prejudicial than probative, and while the threats and assault might have been permissible without his accusation, his accusation renders them unfairly prejudicial as well.

b. The Court Did Not Weigh the Prejudice to Roark from White's Accusation Before (or After) Admitting the Evidence.

Before admitting White's testimony accusing Roark of the threats and assault, the court failed to engage in the analysis required by ER 404(b). The State has cited to no instance before White's testimony where the court considered the prejudice to Roark from his accusation before White testified. The discussions of prejudice that occurred after White's testimony did not pertain to the prejudice caused by his testimony implicating Roark in the threats and assault.

The court's discussion cited by the State on pages 13-15 of its brief does not mention the potential for prejudice to Roark. The State claims the court considered the prejudice when it "revisited the issue" before admitting the jail calls. Brief of Respondent at 16. But the court was not revisiting the

issue of White's accusation or the threat or the assault. It was deciding admissibility of the jail calls, which the State expressly requested be admitted only to show that Roark's use of the term "rat" showed consciousness of guilt. 1RP 519-21, 528-29.

The prejudice analysis pertaining to her use of the term "rat" in the jail calls is an entirely different question for two main reasons. First, Roark did not dispute her identity as the speaker in the calls. Thus, the unfair prejudice from admitting them is limited at best. Second, her use of the term "rat," unlike White's accusation, does not suggest Roark's involvement in violent crime. 1RP 519-21, 528-30. The court's analysis of the prejudice involved in this separate issue, even though related, does not suffice under ER 404(b).

The State next argues the court balanced the prejudice against the probative value when it discussed having excluded Higgins' name from White's discussion of prior controlled buys because of the prejudice to Roark. Brief of Respondent at 19. This discussion does not support the State's argument that the court weighed the prejudice of permitting White's accusation that Roark was behind the threats. On the contrary, the court suggests it excluded Higgins' name because of the prejudice to Roark of mentioning her former boyfriend's involvement in prior controlled buys with White. 1RP 378. Again, this suggests the court weighed the prejudice

regarding Higgins' involvement in prior controlled buys with White, an entirely separate question. It does not suggest the court carefully weighed the prejudice of White's baseless accusations.

The State admitted it was not using the jail calls to link Roark to the threats and assault. 1RP 519. Thus, the only remaining link was the mere fact that Higgins was her former boyfriend. On this tenuous link, the court permitted the jury to hear not only that the threats and assault occurred, but also White's admittedly speculative accusation that Roark was behind them. The potential for unfair prejudice is great when the State suggests the defendant is responsible for threats against a witness. See Knight, 54 Wn. App. at 154. The court failed to expressly balance the prejudice of this testimony against the minimal probative value. The evidence of the threats and assault, and particularly White's testimony implicating Roark in those violent incidents, should have been excluded under ER 404(b).

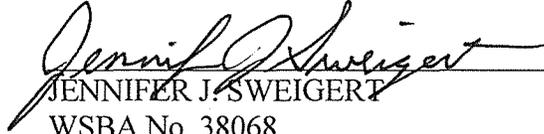
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Roark requests this Court reverse her convictions or, in the alternative, remand for imposition of concurrent, rather than consecutive, school zone sentencing enhancements.

DATED this 20th day of February, 2015.

Respectfully submitted,

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)	
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vs.)	COA NO. 46015-7-II
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HEATHER ROARK,)	
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Appellant.)	

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 20TH DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE REPLY 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 20TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 20, 2015 - 3:23 PM

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