IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM JEFFERS, Appellant.	)	No. 64137-9-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 19, 2010

Becker, J. — William Jeffers challenges his convictions for felony hit and run and bail jumping. He contends the trial court should have given limiting instructions with respect to testimony he claims was otherwise too prejudicial. Because Jeffers did not request the limiting instructions below, he may not assign error on appeal to the trial court's failure to give them. And his argument that counsel was ineffective for failing to request the limiting instructions fails because there is not a reasonable probability that giving the instructions would have changed the outcome of the trial.

Jeffers was out drinking at the R Bar near Renton, Washington, the night of December 19, 2006. When the bar closed, he left at approximately the same time as some new acquaintances, Sheila Dodson and her boyfriend Chris Dahl.

Jeffers and Dahl got in a fight, apparently over remarks Jeffers made to or about Dodson. After the fight, Dodson and Dahl walked away toward a bowling alley. While they were standing outside the bowling alley, Dodson and Dahl heard the screeching of tires. Dahl testified that he looked up to see Jeffers driving toward them with speed, and he dodged away. Dodson testified that she turned around, saw the car, and put out her hand, thinking she might stop it.

According to Dahl, Jeffers jerked his car and straightened it out, but his left front wheel went up on the curb and his left front bumper struck Dodson in the side. Witnesses testified that they heard a loud thud and saw her thrown through the air. Two witnesses saw Jeffers stop his car briefly before driving away. Dodson was transported to the hospital and released later that morning. An officer responding to the scene testified that he spoke with Jeffers on the bartender's cell phone shortly afterward, and Jeffers said he would come back. But he did not.

The State charged Jeffers with second degree assault. The information was later amended to include felony hit and run. A count of bail jumping was added when Jeffers failed to appear in court for a case setting hearing in February 2007. After a three day trial, he was acquitted of assault but convicted on the other two counts.

Jeffers moved in limine to exclude Dodson's testimony that after the fight, he threatened to go and get a gun from his car. The evidence was offered as relevant to the assault count, tending to prove that Jeffers' act of driving the car

up on the curb was not accidental but was done with the intent to hit

Dahl. Jeffers argued the evidence was more prejudicial than probative. The trial court said that the ruling on the motion would be deferred until the evidence was actually presented, at which time Jeffers could renew his objection. Jeffers did not renew his objection when the testimony was elicited at trial and did not request a limiting instruction.

Jeffers now argues that the court erred by not giving a limiting instruction when admitting the testimony that he talked about getting a gun. When evidence is admitted for a limited purpose and the party against whom it is admitted requests a limiting instruction, the court is obliged to give it. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). Conversely, a party who fails to ask for a limiting instruction generally "waives any argument on appeal that the trial court should have given the instruction." State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008); see also State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007) ("The failure of a court to give a limiting instruction is not error when no instruction was requested.").

Jeffers cites State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007), where the Supreme Court stated that "a limiting instruction must be given to the jury" if the court decides to admit evidence under ER 404(b). Division Two of the Court of Appeals interpreted Foxhoven as imposing a duty on the trial court to give a limiting instruction when admitting evidence in the context of ER 404(b) even when the defendant does not request such an instruction. State v.

Russell, 154 Wn. App. 775, 784-85, 225 P.3d 478 (2010).

Russell's interpretation of Foxhoven is questionable and was not adopted by Division Three in State v. Williams, No. 27924-3-III, 2010 WL 2390081, at *7 (Wash. Ct. App. June 15, 2010) (citing Foxhoven as requiring the trial court to give a limiting instruction "if requested" and holding that the failure to request is a waiver). In previous cases involving ER 404(b), the failure to request the limiting instruction below has consistently been regarded as a waiver on appeal. See, e.g., State v. DeVincentis, 150 Wn.2d 11, 23 n.3, 74 P.3d 119 (2003) (trial court should instruct jury of the limited purpose of 404(b) evidence, but the request must be made by the complaining party); State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975) (no error for failure to give limiting instruction when admitting evidence of uncharged offenses when no request for instruction was made); State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966) (trial court should give limiting instruction when admitting evidence of other bad acts, but court has no duty to do so on its own motion and failure to do so is not error where no request is made), cert. denied, 386 U.S. 968 (1967); State v. Myers, 82 Wn. App. 435, 439, 918 P.2d 183 (1996) (if the complaining party fails to request a limiting instruction at trial, there is no error), aff'd, 133 Wn.2d 26, 941 P.2d 1102 (1997); State v. Mahmood, 45 Wn. App. 200, 213, 724 P.2d 1021 ("Where ER 404(b) evidence is admitted, a cautionary instruction has been recommended by the Supreme Court," but there is no error in failing to give instruction where no request is made.), review denied, 107 Wn.2d 1002 (1986).

Even if Foxhoven could be understood as intending to overrule previous cases and to make an exception to the general rule of waiver where evidence is considered under ER 404(b), the exception would not apply to the testimony about the gun threat in this case because Jeffers did not mention ER 404(b) in connection with his objection to the testimony. ER 404(b) makes evidence of other "acts" inadmissible "to prove the character of a person in order to show action in conformity therewith." Jeffers objected that the mention of the gun was more prejudicial than probative, not that it improperly tended to prove he was acting in accordance with a propensity to use guns. We conclude Jeffers waived any argument on appeal that the trial court should have given the instruction.

Jeffers also contends that the trial court erred by failing to give a limiting instruction concerning evidence offered in connection with the charge of bail jumping—even though, again, he did not request such an instruction below. The charge was based on Jeffers' failure to appear in court on February 20, 2007. A warrant for his arrest was issued. On March 28, 2008, he once again failed to appear for a scheduled hearing. Because Jeffers did not quash the warrant after the first hearing, he lost the $5,000 he had posted as bail. He posted another bond to stay out of jail when he was arrested on the warrant.

At trial, the State at first presented evidence that Jeffers missed the first hearing despite having signed a document acknowledging his obligation to do so. Jeffers, in response, testified that he was confused and thought the hearing was the next month. He also made some inconsistent statements suggesting,

inaccurately, that he had always been out on the same bond. The court allowed the State to impeach Jeffers by forcing him to admit that he had failed to show up for the second hearing as well and had to post a higher bond the second time. Jeffers now contends the court erred by not giving a limiting instruction that the jury could consider this testimony only for impeachment purposes. But Jeffers did not request a limiting instruction, and we therefore conclude he has waived any argument on appeal that the trial court should have given a limiting instruction.

In the alternative, Jeffers argues counsel was ineffective for failing to request the limiting instructions. To show ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of his trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Legitimate trial tactics or strategy cannot be the basis for an ineffective assistance of counsel claim. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's errors result in prejudice when there is a reasonable probability the outcome of the trial would have differed absent the errors. Thomas, 109 Wn.2d at 226.

A failure to request a limiting instruction can be a tactical decision not to emphasize damaging evidence. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). The State's argument that the defense

made that tactical decision here is not entirely persuasive. Defense counsel cross-examined Dodson about the fact that she did not mention the gun threat in the more contemporaneous statement she gave to a detective and used this in closing argument to undermine her testimony. Defense counsel responded to the impeachment evidence during closing by emphasizing that the March hearing was not part of the charge. Thus, it is not clear that counsel was intent on avoiding emphasis on the evidence.

We do conclude, however, that the claim of ineffective assistance fails on the prejudice prong. Evidence about gun possession undoubtedly can be prejudicial, but here the State was entitled to elicit the challenged testimony from Dodson in order to prove the element of intent in the charge of assault. The State's presentation of the testimony was confined to that context and so was its closing argument:

> The other definition of assault, with intent to inflict bodily injury. Yes, the intent was not to hurt Sheila, and I will talk about that in a minute. But the intent was to cause bodily injury in this case, to Chris. He meant to hit Chris. What did he say when he apologized to Chris at that party? "You're lucky I didn't have my gun with me that day." What did Sheila tell you happened right before the Defendant got in his car? He said he was going to go get his gun.
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> So the big question is intent. How do we know the Defendant acted intentionally? Well, we know what he said to Chris right before he got in the car. We also know that he talked to Sheila afterwards. And what did you tell Sheila? "I didn't mean to hit you." He was trying to hit Chris. And what did he tell Chris? He also said, "You know, I didn't mean to hit Sheila, I meant to hit you." And he also told him, "You were lucky I didn't have a gun that day."[1]

And finally, the jury acquitted Jeffers on the assault charge. Jeffers suggests that his acquittal on the assault charge might have been based on evidence that he was too intoxicated to form the requisite intent, but the acquittal nevertheless undermines the theory that the jury used prejudice based on gun possession to decide Jeffers' guilt or innocence. The acquittal, combined with the limited scope given to the gun testimony in presentation and argument, makes it unlikely that the jury's decision to convict Jeffers on the hit and run charge would have been different if they had received a limiting instruction.

As to the impeachment evidence, Jeffers argues that without a limiting instruction, the jury could have construed his second failure to appear as a propensity for failing to appear for required court dates and improperly convicted him of bail jumping based on this view of his character. However, he does not show how a limiting instruction could have improved his situation. Jeffers' defense to bail jumping was that he did not knowingly fail to appear on February 20, 2007, because he believed it was on a different date. His defense depended on getting the jury to believe that he was confused about the date of the hearing. If the court had given an instruction that evidence of Jeffers' failure to appear at another hearing the following month was introduced to impeach his testimony, it would have emphasized the inaccuracy of Jeffers' testimony, reinforcing the State's attack on his credibility. We therefore conclude there is not a reasonable

[1] Report of Proceedings (June 18, 2009) at 113-14.

probability that giving the limiting instruction would have changed the outcome of the trial with respect to the charge of bail jumping. We reject the claim of ineffective assistance of counsel.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, C. J.

Cox, J.