

NO. 63306-⁶1-1

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

STATE OF WASHINGTON,

Respondent,

v.

REX CRUSE,

Appellant.

REC'D
MAR 12 2010
King County Prosecutor
Appellate Unit

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

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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APPELLANT'S BRIEF

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A. ARGUMENT IN REPLY

1. A FAILURE TO ACT IS NOT INVITED ERROR.

The invited error doctrine requires “an affirmative, knowing, and voluntary act.” State v. Lucero, 140 Wn. App. 782, 786, 167 P.3d 1188 (2007) (citing In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001)). This Court has recognized that the doctrine “applies when a party requests an instruction and then argues on appeal that the instruction should not have been given.” State v. Medina, 112 Wn. App. 40, 47 n.11, 48 P.3d 1005 (citing State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)), review denied, 147 Wn.2d 1025 (2002).

Cruse did not propose an instruction and then argue it was erroneously given. He did not, for example, propose an instruction affirmatively telling jurors they need not base the crimes on separate and distinct acts. Nor did he ask the Court to delete from a proper instruction the requirement that jurors base the crimes on separate and distinct acts. *Those* affirmative acts would be invited error.

The State attempts to expand the doctrine, arguing that because the “to convict” instructions proposed by the defense did not contain the “separate and distinct” language, the absence of that language in the court’s “to convict” instructions was invited. Brief of

Respondent, at 19.

But Cruse has not assigned error to the “to convict” instructions or claimed they somehow misstate the law. His claim is broader than that, since the “separate and distinct” language could have been placed in any jury instruction. See State v. Berg, 147 Wn. App. 923, 934-937, 198 P.3d 529 (2009) (examining all of the instructions to determine whether “separate and distinct” requirement made manifestly apparent); State v. Borsheim, 140 Wn. App. 357, 364-367, 165 P.3d 417 (2007) (same).

In Cruse’s case, the court could have placed the necessary language in another existing instruction, created a new instruction addressing only that requirement, or provided special verdict forms making clear the constitutional requirement had been met. See Brief of Appellant, at 14-15, 24 (noting that none of the court’s instructions, *including* the “to convict” instructions, contained the required language).

In short, Cruse does not take issue with the instructions that *were* given. Rather, he takes issue with the court’s failure to supplement those instructions as required by Berg and Borsheim. That defense counsel did not recognize the court’s omission was not an affirmative act setting up error for appeal. It was simply a failure

to object.

The State warns that if this Court does not preclude Cruse's double jeopardy claims, in future cases it will create "a strong disincentive to propose jury instructions with the 'separate and distinct' language" because the error is constitutional and can be raised for the first time on appeal. Brief of Respondent, at 19. Under the State's cynical view, defense attorneys will purposefully omit the necessary language to create an appellate issue.

There is no evidence to support the State's claim that defense attorneys, who are officers of the court, will intentionally mislead the trial judges of this state. And there is certainly no evidence that is what occurred here. In fact, it appears the only individual at Cruse's trial aware of the necessary instructional language prior to the jury verdicts was the deputy prosecuting attorney. See 7RP 4 (after Judge Shaffer indicates her discovery of Berg and Borsheim, prosecutor responds "I'm familiar with the Borsheim case."). Yet, the trial deputy failed to request the necessary language.

If prosecutors are truly concerned about defense attorneys intentionally creating error on this issue, they can foil this sinister scheme by simply requesting the necessary instructional language themselves. But the error in Cruse's case was not part of such a

scheme and it was not invited.

2. CRUSE'S CONVICTIONS VIOLATE DOUBLE JEOPARDY PROHIBITIONS.

The State asks this Court to reconsider its decisions in Berg and Borsheim, claiming they “overstate the likelihood of a double jeopardy violation and understate the impact of the other jury instructions.” Brief of Respondent, at 29. But those decisions are sound. Recognizing that instructions must make it manifestly apparent the State is not seeking multiple convictions for the same offense, both opinions reject the same arguments the State makes here, *i.e.*, that instructions directed at other concerns adequately guide jurors away from a double jeopardy violation. *See* Brief of Respondent, at 29-31.

There are no important distinguishing factors between the instructions used at Cruse's trial and the instructions in Borsheim and Berg. Where the State charges multiple counts within the same charging period, the trial court is required to instruct the jury that each conviction must be based upon a separate and distinct act. Otherwise, jurors may use the same act for multiple convictions, violating double jeopardy. Borsheim, 140 Wn. App. at 366; Berg, 147 Wn. App. at 931. That is the error here.

The State argues that under State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006) and State v. Jones, 71 Wn. App. 798, 824-826, 863 P.2d 85 (1993), at best Cruse is entitled to have two of his four convictions vacated because nothing prevented jurors from using the same act of intercourse to find Cruse guilty on one count of rape and one count of molestation. Brief of Respondent, at 32-33. This appears to be correct.

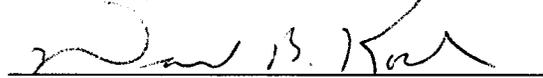
B. CONCLUSION

For the reasons discussed in the opening brief and above, this Court should dismiss one of Cruse's convictions for child rape and one of his convictions for child molestation.

DATED this 12th day of March, 2010.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 63306-1-I
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REX CRUSE,)	
)	
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 12TH DAY OF MARCH, 2010, 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] REX CRUSE
DOC NO. 326258
WASHINGTON CORRECTIONS CENTER
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SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MARCH, 2010.

x Patrick Mayovsky

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