

NO. 34232-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PHYRA NORNG,

Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
06 JUN -5 PM 2:03  
BY 

FILED  
COURT OF APPEALS

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
The Honorable Linda CJ Lee, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel.
2. The trial court abused its discretion by denying appellant's motion for a new trial.
3. Appellant was denied due process by the court's failure to require a unanimity instruction when two alternate means of committing a crime were charged but evidence was insufficient to establish both means.
4. Appellant assigns error to the trial courts findings of fact regarding a motion for a new trial number 3 that Mr. Norng is fluent in English.
5. Appellant assigns error to the trial courts findings of fact regarding a motion for a new trial number 5.
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18. Appellant assigns error to the trial courts findings of fact regarding a motion for a new trial number 21.
19. Appellant assigns error to the trial courts conclusions of law regarding a motion for a new trial number 3.
20. There was insufficient evidence of damage to property to convict appellant of malicious mischief.

Issues Presented on Appeal

1. Was appellant was denied effective assistance of counsel?.
2. Did the trial court abuse its discretion by denying appellant's motion for a new trial?
3. Was appellant denied due process by the court's failure to require a unanimity instruction when two alternate means of committing a crime were charged but evidence was insufficient to establish both mean?
4. Did the state fail to provide sufficient evidence of damage to property to sustain a conviction for malicious mischief?

B. STATEMENT OF THE CASE

## 1. PROCEDURAL FACTS

Phyra Norng was charged by amended information with one count of assault in the second degree in violation of RCW 9A.36.02(1)(a), a domestic violence crime as defined in RCW 10.99.020, two counts of witness intimidation in violation of RCW 9A.72.110(1)(d) and one count of malicious mischief in the third degree in violation of RCW 9A.48.090(1)(a) and 9A.48.090(2)(a). CP 10-12.1. Mr. Norng was convicted as charged following a jury trial the Honorable Linda Lee presiding. CP 16, 17, 18, 19. Mr. Norng filed a motion for a new trial alleging ineffective assistance of counsel. After a hearing, the court issued findings and conclusions denying Mr. Norng's motion. CP 48-52. This timely appeal follows. CP 53-65.

### Motion for a New Trial

After the trial concluded, Norng filed a bar complaint against his attorney and the Department of Assigned Counsel appointed a new attorney Scott Messinger to represent him in his motion for a new trial. RP 331-34. Norng filed a motion for a new trial under CrR 7.5(a)(8) alleging ineffective assistance of counsel. Trial counsel

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<sup>1</sup> CP refers to the clerk's papers designated from Pierce County Superior Court case # 05-1-00181-1.

Travis Currie testified that he did not return many of Norng's calls because he knew that he would see Norng for a court appearance. RP 367. Currie testified that Norng had many court appearances and that he met with Norng to discuss his case before or after these court hearings on the fifth floor of the Pierce County Court house, a loud and noisy place often filled with other attorneys and their clients. RP 372-74. Currie never visited Norng in private even though he could have visited Norng more privately at the Pierce County Jail. RP 372-73. Currie also admitted that he did not always have an interpreter present during his brief interactions with Norng and Norng did not have an interpreter in court on four occasions. RP 377. Currie testified that even though he never met Norng anywhere other than in the crowded fifth floor of the court house before a hearing, he actually discussed Norng's case for 30 minutes to an hour on several occasions even though the total time Currie acknowledged to meeting with Norng was limited to several hours. RP 362, 377. Norng was in custody at all times. RP 385.

Norng testified that Currie never visited him in jail and he was only able to speak with Currie for several minutes at a time before or after a hearing. RP 386. Norng does not speak or understand English

fluently and often did not understand everything Currie said and Currie never answered Norng's questions. RP 388-90. In response to Norng's not understanding Currie, Currie just spoke louder. RP 389. Currie did ask Norng to write down his concerns, but Currie did not discuss the translated letter with Norng or ever acknowledge its contents. RP 390. Currie never discussed the benefits or risks of testifying and did not keep Norng apprised of what was happening during trial. RP 393-94.

## 2. SUBSTANTIVE FACTS

Phyra Norng is a Cambodian man who briefly lived with a Cambodian woman named Sopheap Sok. RP 69-70.<sup>2</sup> Sakoeun Soth, referred to as "Sally" also lived with Sok and Norng. Id. On the night of January 9, 2005, Norng, Sok, Sally and Sok's sister Sophorn went to a dance food club named the Acapulco in Tacoma WA. RP Id. According to Sok, Norng drank a lot of Hennessy and became angry that she was talking to other men in the club. RP 71-74. Sok was afraid of Norng's loud voice but indicated that Norng did not call her any names. Id.

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<sup>2</sup> RP refers to the verbatim report of the trial proceedings.

According to Sok early in the morning of January 10, 2006 Norng hit Sok on the eye and arm many times. RP 75-76. Sok testified that Norng hit her with an open hand and grabbed her head and banged it against a wall and grabbed her neck. RP 76-77. Sok sustained bruises and a bump on her head that hurt for several days and had to speak softly for a few days as well. RP 79, 80. According to Sok, Norng threatened her and told her he would beat her up if she called the police. RP 81. According to Sok, Norng also threatened to beat up Sally if she called the police. RP 79.

Norng stayed home on January 10, 2005 doing laundry in a room several doors away from his apartment and left for work early in the morning of Monday January 11, 2005. He also went to the 7-11 to get Sok Tylenol as she complained of a headache. He drove Sok's car to the 7-11. RP 197-98. According to Sok, Norng disabled her car before he left for work. RP 83. After Norng left, Sok called her sister Sophorn who came over within ½ hour. RP 84.

Sophorn testified that she went to her sister's house after receiving her call and found her sister crying and bruised. RP 107. Several other friends of Sophorn came over to work on Sok's car and

eventually were able to start the car by retrieving a wire from Norng's car. RP 120-21.

Norng testified that he went out on January 9, 2005 with Sok, her sister and Sally but did not drink any alcohol because he is allergic to alcohol. 185-87. Norng bought food for everyone and they spent the evening at the club. RP 185-87. According to Norng, Sok drank a lot of alcohol and was unable to walk or stand and had to be assisted. RP 187-192. Sok fell down in the hallway to their apartment, she hit her head and cut her nose. Norng tried to hold her to prevent a fall and may have grabbed her roughly around the neck for this purpose. Sok fell again and hit her head against a concrete wall and slipped yet again near the bed. RP 190-192.

Sok was crying during this entire time and asked Norng for help which he gave, but Sok called for Sally to help too. RP 193. Norng put Sok in bed and told her to sit still while he went to get some ice. But Sok refused and remained upset. RP 194-95. Norng went to sleep because he had to leave for work Monday at 1:00 AM and needed to sleep. 196-97. Norng testified that Sok eventually went to sleep next to him. RP 196.

Norng testified that there are three telephones in his apartment: one in the kitchen, one in the living room and one in Sally's bedroom. RP 200. Sok testified that there was only one phone in the apartment. RP 81. Sally did not testify.

C. ARGUMENT

1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO PERMIT APPELLANT TO PARTICIPATE IN HIS DEFENSE.

The trial court abused its discretion in denying Mr. Norng's motion for a new trial based on claims of ineffective assistance by his first trial counsel. The Court of Appeals reviews for abuse of discretion the trial court's denial of Norng's motion pursuant to CrR 7.5(a)(8). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Both the state and federal constitutions guarantee the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Strickland established a two-part test for ineffective assistance

of counsel. First, the defendant must show deficient performance. Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65. The reviewing court's scrutiny of counsel's performance is highly deferential and indulges in a strong presumption of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Second, the defendant must show prejudice - "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Hendrickson, 129 Wn.2d at 78 (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). To meet the second prong, defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

In the instant case Norng's trial counsel's performance was deficient. First, trial counsel failed to meet with Mr. Norng in private to

discuss his case or the theory of the case. The only meetings that ever occurred between Mr. Norng and his trial attorney took place in a crowded room on the fifth floor of a court house while waiting to appear for a court date. Norng makes clear from his testimony that he was not apprised of the defense theory of the case, was not consulted, and was thus unable to assist in his own defense. Second, trial counsel was deficient for failing to advise Norng of the risks and disadvantages of testifying in his own defense. A criminal defendant has a constitutional right to testify in his or her own behalf but it is counsel's job to protect the defendant's due process rights. State v. Thomas, 128 Wn.2d 553, 556-57, 910 P.2d 475 (1996). Third, counsel was also deficient for failing to demand a unanimity instruction regarding alternate means of committing the two counts of witness intimidation. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Counsel's performance and this deficiency prejudiced Mr. Norng.

In State v. Visitacion, 55 Wn. App. 166; 776 P.2d 986 (1989) the Court of Appeals held that counsel's rejection of two witnesses based upon their police statements, without making any effort to contact or interview them, fell below the prevailing professional norms.

Visitacion, 55 Wn. App. at 174. In State v. Maurice, 79 Wn. App. 544, 903 P.2d 514 (1995), this court held that counsel's performance was deficient in failing to investigate Maurice's claim that a mechanical failure caused him to lose control of his vehicle and to call a mechanic or accident reconstructionist as an expert witness on his behalf. Maurice, 79 Wn. App. at 552.

These cases are analogous to the instant case. The issue of concern in this case is not limited to an issue such as failure to investigate witnesses but rather is much larger, i.e. a failure to allow Mr. Norng to assist in his own defense. As in Visitacion, counsel for Norng basically rejected any notion that Mr., Norng should have a voice in assisting with his own defense. Like Maurice, counsel made his decisions unilaterally without considering Norng's wishes or potential contributions.

In Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) the Court held that "[a] tactical decision to pursue one defense does not excuse failure to present another defense that would 'bolster rather than detract from [the primary defense].'" Foster, 9 F.3d at 726 (quoting Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990)) (alteration in original). Foster is very similar to the instant case because both

represent counsel's failure to allow the accused to participate in his defense. In the instant case as in Foster, counsel should have allowed Norng to bolster the general denial defense. Trial counsel's failure to consult with and involve Norng in assisting with his defense prejudiced Norng and within a reasonable probability the result of the trial would have been different if Norng had been permitted to participate in his own defense. Thomas, 128 Wn.2d at 556-57.

In State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), the Court addressed the issue of ineffective assistance of counsel for failure to request an intoxication jury instruction to refute the defendant's ability to form the element of intent. Kruger, 116 Wn. App. at 694. The Court held that Kruger was entitled to the instruction because there was substantial evidence of intoxication that could have impaired the defendant's ability to formulate intent. Moreover Kruger was prejudiced by the omission because the defense theory of the case focused on the defendant's intent and there was a reasonable probability that the outcome of the trial would have differed with the instruction. Kruger, 116 Wn. App. at 694-95.

In the instant case, there was substantial evidence to support one means of committing the crime of witness intimidation but not of

the other: attempting to prevent truthful reporting. If counsel had requested the unanimity instruction, there is not only a reasonable probability that the outcome could have differed but also Norng's due process rights would have been protected. Reversal and remand for a new trial is required. Trial counsel was ineffective and the trial court abused its discretion by denying Norng's motion for a new trial on these grounds. Kruger, 116 Wn. App. at 694-95.

2. APPELLANT WAS DENIED HIS WASHINGTON CONSTITUTIONAL RIGHT TO JURY UNANIMITY WHEN HE WAS CHARGED WITH COMMITTING A CRIME BY ALTERNATE MEANS, THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH COMMISSION BY BOTH MEANS, AND HIS ATTORNEY DID NOT REQUEST A UNANIMITY INSTRUCTION.

Criminal defendants in Washington have a right to an expressly unanimous jury verdict. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); Const. art. 1, § 21. The crime of witness intimidation RCW 9A.72.110(1)(d) provides in relevant part:

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

(a) Influence the testimony of that person;

(b) Induce that person to elude legal process summoning him or her to testify;

(c) Induce that person to absent himself or herself from such proceedings;  
or

**(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.**

.....

(Emphasis added) RCW 9A.72.110. Norng was charged under subsection (1)(d).

The appellate courts have determined that RCW 9A.72.110(1) is an alternative means statute. State v. Boiko, 131 Wn. App. 595, 598, 128 P.3d 143 (2006), reconsideration denied 2006 Wn. App. LEXIS 533, citing, State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). Specifically, the Courts have determined that subsections (1)(a) through (1)(d) constitute alternate means of committing the crime of witness intimidation.

When a person is charged with committing this crime and the to-convic<sup>t</sup> instruction describes alternate means for the commission of the crime, the court must provide a unanimity instruction unless there is sufficient evidence of commission of the crime by each alternative

means listed. Boiko, 131 Wn. App. at 598, citing, Ortega-Martinez, 124 Wn.2d at 707 (even though there was sufficient evidence of two alternate means in Ortega-Martinez, the Supreme Court nevertheless “strongly urge[d] counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable.” Ortega-Martinez, 124 Wn.2d at 717, FN 2; quoting, State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987).

Although the Washington Appellate Courts have not addressed this issue with respect to subsection RCW 9A.72.110(1)(d), the rationale of Boiko and Chino is on point. In essence the jury was permitted to find that Norng committed witness intimidation by either (1) preventing the reporting of a crime or (2) by preventing the witness from providing a truthful account of a crime without requiring unanimity as to each means. The failure to provide a unanimity instruction on these alternate means denied Norng his right to jury unanimity and ultimately his right to due process. This is precisely the same right protected under Boiko and Chino.

In the instant case, Norng was charged under subsection (1)(d). Subsection (1)(d) is comprised of two alternate means: (1) induce a person not to report a crime and (2) induce a person not to

be truthful in their reporting. In the instant case, there was insufficient evidence of inducing the witnesses not to provide truthful reporting.

The evidence of witness intimidation presented during trial in the instant case was limited to the testimony of the complainant who testified that Norng said “You not going to help her. I beat you up too if call the police. Nobody call the police.” RP 79. According to the complainant, Norng also said, “Do not call the police. If you do, I’m going to beat you up some more.” RP 81. The evidence presented does not support the alternate means of threatening the person not to be truthful in their reporting. Therefore, Norng was entitled to the unanimity instruction. The failure to provide a jury unanimity instruction requires reversal of his convictions for witness intimidation. Ortega-Martinez, 124 Wn.2d at 707-08.

3. THE STATE FAILED TO PROVE  
DAMAGE TO PROPERTY IN THE  
CHARGE OF MALICIOUS MISCHIEF, A  
MISDEMEANOR

Norng was charged with malicious mischief in the third degree by causing “physical damage to the property of another.” CP 10-12. A challenge to the sufficiency of the evidence is reviewed in the light most favorable to the State. The reviewing Court determines whether

any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). The essential elements of the crime of malicious mischief in the third degree are: (1) knowingly and maliciously; (2) causing physical damage to the property of another. RCW 9A.48.090(1)(a).

Neither the charging document nor the to-convict instruction indicates what property Norng allegedly damaged. Both simply state the elements of the crime. CP 10-12; Supp CP Jury Instruction 21 (9-1-2005). Moreover, there was no evidence of damage to any property. The only evidence regarding property, related to Sok's car which Norng was accused of tampering with by removing a wire. He did not however destroy the wire or in any way cause damage to the car. If anything he disabled the car which was an inconvenience.

In State v. Hernandez, 120 Wn. App. 389, 85 P.3d 398, (2004), the Court of Appeals reversed a conviction for malicious mischief where a defendant spit inside a police car. Hernandez was charged under subsection (b) which requires proof of:

a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or

property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

9A.48.080(1)(b). The Court held that the act of spitting did not rise to the level of causing damage or interrupting service. Hernandez, Wn. App. 120 at 391-92.

In the instant case like Hernandez, the act of removing a wire from a car to temporarily disable the car does not rise to the level of causing physical damage to property. Even assuming that all property has value, the fact that a wire is removed and retained without destruction does not either implicitly or explicitly constitute damage. Hernandez, 120 Wn. App at 392. "Division Two adopted a dictionary definition of tampering: interfering in a harmful way. *Id.* (quoting WEBSTER'S II NEW COLLEGE DICTIONARY 1126 (1999))." Hernandez, 120 Wn. App .at 392, citing, State v. Gardner, 104 Wn. App. 541. 16 P.3d 699 (2001).(defendant pushed a button on a police radio causing an interfering clicking sound which interfered with police radio communication.).

Using a dictionary definition to define "damage" indicates that causing an inconvenience does not amount to "loss or harm resulting

from injury to person, property, or reputation". MERRIAM- WEBSTER ON-LINE DICTIONARY. There was no loss or harm to Sok's car by the removal of the wire. Sok was merely inconvenienced. This is supported by the fact that the people who came to assist with Sok's car simply replaced the wire and restored the car's function.

When reviewing the evidence in the light most favorable to the state, the evidence was insufficient to establish the essential element of causing damage to the property of another. For this reason, this charge should be reversed and dismissed with prejudice. Hernandez, 120 Wn. App. at 392.

#### D. CONCLUSION

Phyra Norng was denied his right to due process by receiving ineffective assistance of counsel and by a lack of jury unanimity as to alternate means of committing the crime of witness intimidation. The state also failed to prove all of the essential elements of malicious mischief. For these reasons, the crime of malicious mischief should be reversed and dismissed with prejudice and Norng should be granted a new trial on the other matters.

DATED this 14 day of June 2006.

Respectfully submitted,

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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm 946, Tacoma, WA 98402 and Phyra Norng DOC # 889564 Washington Corrections Center P. O. Box 900 Shelton, WA 98584 a true copy of the document to which this certificate is affixed, on June 11, 2006  
Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

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