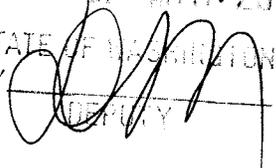


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

NO. 39449-9-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

LUIE ZUNIGA,

Appellant,

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard D. Hicks, Judge  
Cause No. 09-1-00433-5

---

AMENDED BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340-0510  
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in instructing the jury in court's instruction 10 on an uncharged alternative means of committing the crime of residential burglary.
02. The trial court erred in permitting Zuniga to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 10 on the ground that the instruction included an uncharged alternative means of committing the crime of residential burglary.
03. The trial court erred in allowing the State during closing argument to deny Zuniga a fair trial by shifting the burden of proof to Zuniga.
04. The trial court erred in not taking count II, violation of post conviction no-contact order, from the jury for lack of sufficiency of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether it was reversible error to instruct the jury on an uncharged alternative means of committing the crime of residential burglary? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Zuniga to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 10 on the ground that the instruction included an uncharged alternative means of committing the crime of residential burglary? [Assignment of Error No. 2].

03. Whether the trial court erred in allowing the State during closing argument to deny Zuniga a fair trial by shifting the burden of proof to Zuniga. [Assignment of Error No. 3].
04. Whether there was sufficient evidence to support Zuniga's conviction for violation of post conviction no-contact order where the State failed to prove Zuniga was the same person named in the protection order? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Luie Zuniga (Zuniga) was charged by second amended information filed in Thurston County Superior Court on May 5, 2009, with residential burglary (domestic violence), count I, and violation of post conviction no-contact order (domestic violence), a gross misdemeanor, count II, contrary to RCWs 9A.52.025(1), 10.99.020, 26.50.110(1) and 10.99.050. [CP 10].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced on May 11, the Honorable Richard D. Hicks presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 176].<sup>1</sup>

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<sup>1</sup> All references to the Report of Proceedings are to the transcripts entitled Jury Trial – Volumes I-II.

The jury returned verdicts of guilty as charged [CP 50-53], Zuniga was sentenced within his standard range and timely notice of this appeal followed. [CP 50-53, 74-82].

02. Substantive Facts

On March 3, 2009, a post conviction no-contact order was entered prohibiting Zuniga, in part, from “(e)ntering or knowingly coming within or knowingly remaining within 1000 (distance) of the protected person(s)’s” residence, school or workplace. [CP 92]. The protected person was Sandra Hodge, Zuniga’s wife who had filed for divorce. [RP 21-22, 24].

Without objection, the trial court granted the State’s motion to admit the aforementioned post conviction no-contact order. [RP 24]. Other than the exhibit itself, the State did not present any testimony or evidence to identify Zuniga as the same Zuniga listed in the protection order. The signature was never authenticated, nor did the victim, Hodge, who was the subject of the post conviction no-contact order testify to the fact that Zuniga was the same Zuniga who signed the no-contact order.

On March 4, Zuniga allegedly broke into Hodge’s residence by removing a door inside the garage from its hinges that leads into the kitchen. [RP 32-33]. A neighbor noticed Zuniga standing near the garage about 7:00 that morning. [RP 131-32]. He was also seen in the area of the

house that afternoon wearing his backpack. [RP 70-72, 91]. That evening, at approximately 8:30, he was found sleeping in Hodge's car, which was under a car cover and parked on the side of the house within a foot of the garage. [RP 45-46, 53]. His backpack was found inside the car and contained property belonging to Hodge that had been taken from the residence. [RP 39, 47-52, 83-86, 97, 115, 126].

Zuniga rested without presenting evidence. [RP 170].

D. ARGUMENT

01. IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF RESIDENTIAL BURGLARY.

An accused must be informed of the criminal charge to be met at trial and cannot be tried for an offense that has not been charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). When a statute provides that a crime may be committed by alternative means, an information may charge one or all of the alternatives. However, when an information charges only one of the alternative means of committing a crime, it is error to instruct the jury that they may consider other alternative means by which the crime may have been committed,

regardless of the strength of the evidence admitted at trial. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

Zuniga stood trial on a second amended information that charged him, in part, with residential burglary/domestic violence in the following manner:

In that the defendant, LUIE ZUNIGA, in the State of Washington, on or about March 5, 2009, with intent to commit a crime against Sandra L. Hodge, a family or household member, pursuant to RCW 10.99.020, did enter or remain unlawfully in a dwelling.<sup>2</sup>

[CP 10].

The trial court instructed the jury that to convict Zuniga of residential burglary it must find, in part, that he “entered or remained unlawfully in a dwelling” ... “with intent to commit a crime against a person or property therein...” [Emphasis added]. [Court’s instruction 10; CP 41]. No exceptions were taken to this instruction. [RP 176].

Generally, an issue cannot be raised for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). “An error is manifest when it has practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

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<sup>2</sup> This was orally amended prior to trial to March 4, 2009. [RP 4-5].

“The ‘to convict’ instruction carries with it a special weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant’s guilt or innocence.” State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Zuniga’s constitutional right to due process is also potentially implicated by the alleged erroneous jury instruction and, assuming there was error in the jury instruction, it could have had “practical and identifiable consequences at the trial.” Id. at 240. An erroneous instruction, which may have affected a criminal defendant’s right to a fair trial, may be considered for the first time on appeal. State v. Fesser, 23 Wn. App. 422, 423-24, 595 P.2d 955 (1979). Zuniga did not propose the improper instruction, he merely failed to object, and “failing to except to an instruction does not constitute invited error.” State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Here, the error at issue is of constitutional magnitude and may be challenged for the first time on appeal. See, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

It was reversible error to try Zuniga under the uncharged statutory alternative means of residential burglary by acting with the intent to commit a crime “against ... property therein [CP 41],” especially where the prosecutor emphasized the uncharged alternative means during closing argument.

But we know he was there because all the items that were - - were messed with or taken from the residence. And in addition to him being in violation of that no-contact order, he's taking things that don't belong to him, and that was a crime.

[RP 197].

[T]he state believes that it has proven beyond a reasonable doubt the crime of residential burglary, that the defendant unlawfully entered Mrs. Hodge's dwelling with the intent to commit a crime. And there's a couple of crimes here because he went in in violation of the no-contact order. That automatically he's committing a crime. He knew he was committing a crime. He knew about the order. And then he takes stuff that doesn't belong to him....

[RP 203-04].

And while such error may be deemed harmless if other instructions clearly and specifically define the charged crime, State v. Chino, 117 Wn. App. at 540, here court's instruction 6, the definitional instruction for residential burglary, also set forth the uncharged alternative means at issue:

A person commits the crime of residential burglary when he or she enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein.

[Court's instruction 6; CP 37].

The jury was instructed on an uncharged alternative means of committing residential burglary and the State argued both means

throughout its closing argument. As a result, the jury could have convicted Zuniga under the uncharged means. Since there is no special verdict or other evidence to show the means the jury used to convict Zuniga, the error is prejudicial, with the result that reversal and remand for a new trial on the crime of residential burglary as charged is necessary here.

02. ZUNIGA WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT'S INSTRUCTION 10 ON THE GROUND THAT THE INSTRUCTION INCLUDED AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF RESIDENTIAL BURGLARY.<sup>3</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d

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<sup>3</sup> While it has been argued in preceding section of this brief that an instruction that includes an uncharged alternative means of committing a crime constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d at 870, the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. at 188.

Assuming, arguendo, this court finds that trial counsel waived the issue relating to the court's instruction 10 as previously argued herein by affirmatively assenting to the instruction or by not objecting to the court's instruction 10, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have assented to the instruction or failed to object to the instruction. For the reasons set forth in the preceding section of this

brief, had counsel so objected, the trial court would not have given court's instruction 10.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: for the reasons set forth in the preceding section of this brief, but for counsel's failure to properly object to the instruction here at issue or by assenting to the instruction, the trial court would not have given the instruction and the jury would have been precluded from convicting Zuniga based on an instruction that included an uncharged alternative means of committing residential burglary.

03. THE PROSECUTOR'S CLOSING ARGUMENT, WHICH SHIFTED THE BURDEN OF PROOF TO ZUNIGA, CONSTITUTES PROSECUTORIAL MISCONDUCT THAT DENIED ZUNIGA A FAIR TRIAL.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v.

Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). In such a case, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 509-10, 755 P.2d 174 (1988).

During the State's closing argument, the prosecutor told the jury:

So if you believe Sandra Hodge, then I have proven this case beyond a reasonable doubt. If you believe Kaarina Gilchrist, I have proven this case beyond a reasonable doubt.

RP 211].

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is flagrant misconduct to shift the burden of proof to the defendant, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). If the jury believed the State's two witnesses, it did not have to find Zuniga guilty. This is a false dichotomy. An alternative would have been

that it, the jury, had only to entertain a reasonable doubt as to the State's case. In this regard, to the extent that implicit in the prosecutor's closing argument is a false choice, i.e., that the jury could find Zuniga not guilty only if it did not believe the State's two witnesses, it was flagrant misconduct. State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007). The jury was within its right to conclude that although it believed the two witnesses at issue, it was also not satisfied beyond a reasonable doubt that Zuniga was guilty of either charge offense.

As argued by the State, it based its case on the testimony of the two named witnesses, and in the process created the above false choice, with the result that Zuniga's convictions must be reversed.

04. THERE WAS INSUFFICIENT EVIDENCE  
TO UPHOLD ZUNIGA'S CRIMINAL  
CONVICTION FOR VIOLATION OF  
POST CONVICTION NO-CONTACT ORDER  
WHERE THE STATE FAILED TO PROVE  
ZUNIGA WAS THE SAME PERSON NAMED IN  
THE PROTECTION ORDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

In order to convict Zuniga, the jury had to find that on March 4, 2009, Zuniga knew of the existence of the above-mentioned order and knowingly violated it “by coming within or remaining within a specified distance of a location.” [CP 45]. Due process demands that the State prove every element of a charged offense, for that is its burden. See State v. Davis, 141 Wn.2d 798, 899, 10 P.3d 977 (2000).

During the State’s case, it did not prove that Zuniga was the named restrained party. Identity of a name alone in a document is insufficient proof of the identity of the person to warrant the court in submitting the document to the jury. See State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981). “[T]he State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.’” State v. Huber, 129

Wn. App. 499, 502, 119 P.3d 388 (2005) (quoting State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)).

Here, the State offered no evidence to identify Zuniga beyond the no-contact order itself. It did not call any witnesses or present any evidence to sufficiently prove that Zuniga was the person named in the no-contact order. It did not offer a handwriting analysis of the signature on the no-contact order. The State failed to identify Zuniga as the subject of the no-contact order, with the result that the evidence was insufficient to convict him of the violation of the post conviction no-contact order.

E. CONCLUSION

Based on the above, Zuniga respectfully requests this court to reverse and dismiss his convictions for residential burglary and violation of a post conviction no-contact order.

DATED this 23<sup>rd</sup> day of December 2009.

Thomas E. Doyle  
THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne	Luie Zuniga
Deputy Pros Atty	316 Trailblazer SE – Apt 2
2000 Lakeridge Drive S.W.	Lacy, WA 98503
Olympia, WA 98502	

DATED this 24<sup>th</sup> day of December 2009.

Thomas E. Doyle  
Thomas E. Doyle  
Attorney for Appellant  
WSBA No. 10634

09 DEC 28 AM 11:29  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DENISE V. [Signature]  
COURT OF APPEALS  
DIVISION II