

NO. 41585-2-II

COURT OF APPEALS, DIVISION II



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STATE OF WASHINGTON,

Respondent,

vs.

RICHARD D. BUNCH,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Anne Hirsch, Judge  
Cause No. 08-1-01759-5

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in instructing the jury in court's instruction 17 on an uncharged alternative means of committing the crime of robbery in the first degree.
02. The trial court erred in permitting Bunch to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 17 on the ground that the instruction included an uncharged alternative means of committing the crime of robbery in the first degree.
03. The trial court erred in ordering that Bunch not have contact with minor children.
04. The trial court erred in imposing jury costs of \$6,319.50.
05. The trial court erred in permitting Bunch to be represented by counsel who provided ineffective assistance by failing to object to the imposition of jury costs of \$6,319.50 following Bunch's convictions.

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 robbery in the first degree? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Bunch to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 17 on the ground that the instruction included an uncharged alternative means of committing the crime of robbery in the first degree?

[Assignment of Error No. 2].

03. Whether the trial court erred in ordering that Bunch not have contact with minor children where the victim of his offense was not a minor? [Assignment of Error No. 3].
04. Whether the trial court exceeded its statutory authority by imposing jury costs in the amount of \$6,319.50? [Assignment of Error No. 4].
05. Whether the trial court erred in permitting Bunch to be represented by counsel who provided ineffective assistance by failing to object to the imposition of jury costs of \$6,319.50 following Bunch's convictions? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Richard D. Bunch (Bunch) was charged by first amended information filed in Thurston County Superior Court on September 15, 2010, with rape in the first degree, count I, robbery in the first degree with sexual motivation, count II, and kidnapping in the first degree with sexual motivation, count III, contrary to RCWs 9A.44.040, 9A.56.200(1) and 9A.40.020. Each count further alleged that Bunch's conduct during the commission of the offense manifested deliberate cruelty to the victim and that his conduct after the commission of the offense manifested extreme lack of remorse, contrary to RCW 9.94A.533(e). [CP 142-43].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on September 24, the Honorable Anne Hirsch presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 704-05].<sup>1</sup>

The jury returned verdicts of guilty as charged. [CP 229-239]. At sentencing, the parties stipulated to the prosecutor's statement of criminal history, and the court merged counts I (rape) and III (kidnapping) before sentencing Bunch to an exceptional sentence of 720 months. [CP 259, 268-281]. Timely notice of this appeal followed. [CP 282].

02. Substantive Facts

On April 2, 2008, at approximately 5:30 in the early evening, Lacey police officers were dispatched to St. Martin's University on a report of "suspicious circumstances" involving screaming coming from a nearby wooded area. [RP 242-44, 247-48, 274-75, 596]. The person reporting the incident had ridden her bicycle into the area after hearing a scream and observed a male and female having sexual intercourse, though she couldn't tell if it was consensual. [RP 62, 64-65].

Near 6:30 that evening, C.E.M.'s father received a telephone call in Hawaii from a person identifying himself as "Marcus." [RP 80, 615].

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<sup>1</sup> All references to the Report of Proceedings are to the transcripts entitled JURY TRIAL, Volumes I-IV.

“Well, I’m the guy that just raped your daughter,” and I said - - well, it was April 2<sup>nd</sup>, so I think I said, “What are you talking about? Who is this?” And he said, “I can’t tell you who it is, but she’s okay. I’m the guy who put it in her. I just pushed her down, and I left her there in the dirt.”

[RP 81].

After hanging up the phone, C.E.M.’s father called his daughter’s cell phone and the person previously identified as Marcus answered.

“This confirmed my thought that this person actually did have her phone, and I hung up, because there was nothing more to be gained by that.” [RP 82]. It was “(d)efinitely the same voice, definitely.” [RP 84].

Deanna Gomes, C.E.M.’s roommate, also received a call from C.E.M.’s phone that evening from a person saying he had raped C.E.M., that “he came in her face twice, that he was - - or that she was tender, and it was good.” [RP 234]. Similarly, Craig Mosely, a close friend of C.E.M.’s, received a call from C.E.M.’s phone from a person claiming he had sex with C.E.M. and “that his cum was on her” and that he had her iPod. [RP 387-88].

Through the use of cell phone triangulation, it was determined that cell phones belonging to C.E.M. and to Bunch transmitted and received calls near the same time and location on the evening of the incident. [RP 499-502, 506-08, 612-15, 667, 682-83].

C.E.M. related how she had been assaulted and raped by Bunch in the wooded area, explaining that he had applied a Taser gun to her eye and down her face. [RP 109, 116-17, 199]. “It just kept like I guess running against my neck like za za za za.” [RP 191]. He repeatedly punched her in the head and told her if she didn’t be quiet he would kill her. [RP 118]. When he was done, he took her iPod and cell phone that were in he pants and told her if she told anyone he’d kill her. [RP 130, 141]. The iPod and a stun gun were later located in a tractor assigned to Bunch by his employer. [RP 665, 688, 670].

Bunch could not be excluded as the contributor of DNA detected on a sweatshirt worn by C.E.M. during the incident based on a comparison with a DNA sample taken from Bunch. [RP 353, 382, 563-571].

While in custody in Nevada later the same year on October 4, Bunch made a telephone call [RP 516-19] to a friend in which he admitted that while he was in Washington he had met a young woman from Hawaii, that they had sex on a trail, that he had used his stun gun on her a couple of times because she was tearing his “shirt and shit,” and that he took her cell phone and iPod. [RP 516-18; CP 115; State’s Exhibit 73].

Bunch rested without presenting evidence. [RP 69].

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D. ARGUMENT

01. IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF ROBBERY IN THE FIRST DEGREE.

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 it 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).

Under RCW 9A.56.190, a “person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will....” [emphasis added]. Thus robbery can be committed by two alternative means: (1) taking property “from the person of another” or (2) taking property “in his presence.” State v. Roche, 75

Wn. App. 500, 511, 878 P.2d 497 (1994); State v. Nam, 136 Wn. App. 689, 705, 150 P.3d 617 (2007).

Bunch stood trial on a first amended information that charged him with only one of the alternative means of committing robbery in the first degree:

In that the defendant, RICHARD DUANE BUNCH, in the State of Washington, on or about April 2, 2008, did unlawfully take personal property from C.E.M., against her will, by use or threatened use of immediate force, violence, or fear of injury to her person, with the intent to commit theft of the property, and such force or fear having been used to obtain or retain such property or to prevent or overcome resistance to the taking, and in the commission of or immediate flight therefrom the accused inflicted bodily injury on C.E.M.... (emphasis added).

[CP 142-43].

The trial court, however, instructed the jury that to convict Bunch of the crime it must find that he unlawfully took personal property from the person or in the presence of (C.E.M.) [emphasis added]. [Court's Instruction 17; CP 220]. No exceptions were taken to this instruction.

[RP 704-05]. Thus the jury presumably considered both alternative means as potential bases for this component of the offense.

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). “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). Bunch’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). Bunch 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 Bunch under the uncharged alternative means of robbery in the first degree. 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, court's instruction 13, the definitional instruction for robbery, also set forth the uncharged alternative means at issue:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another....

[Court's instruction 13; CP 216].

“An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless (citation omitted). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error (citation omitted).” State v. Jain, 151 Wn. App. 117, 121-22, 210 P.3d 1061 (2009), reviewed denied, 167 Wn.2d 1017 (2010). Here, the jury convicted Bunch of robbery in the first degree stemming from evidence that demonstrated that he took C.E.M.'s iPod and cell phone in her presence. C.E.M. testified that she had removed her pants and set them aside prior to the rape. [RP 141, 197]. After the incident, which lasted approximately 10 minutes, C.E.M. related how it took “about a minute for (Bunch) to grab my pants and walk away....” [RP 205]. In fact, she didn't realize until later that her iPod and

cell phone “were in my pants(,)” thinking “that they were still on the ground...” [RP 141]. Likewise, during closing argument, the prosecutor argued that the property was taken in C.E.M.’s presence: “She’s raped, and when the defendant is done, he takes her pants and her iPod, and he walks off...” [RP 751].

Under these facts, it cannot be said that any reasonable jury would have reached the same result sans the instructional error, with the result that reversal and remand for a new trial on the crime of robbery in the first degree is required.

02. BUNCH WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT’S INSTRUCTION 17 ON THE GROUND THAT THE INSTRUCTION INCLUDED AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF ROBBERY IN THE FIRST DEGREE.<sup>2</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

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<sup>2</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.

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 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 17 as previously argued herein by affirmatively assenting to the instruction or by not objecting to the court's instruction 17, 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 17.

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 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 Bunch based on an instruction that included an uncharged alternative means of committing robbery in the first degree.

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03. THE TRIAL COURT ERRED IN ORDERING THAT BUNCH NOT HAVE CONTACT WITH MINOR CHILDREN.

At sentencing, over objection [RP 11/17/10 41-42],

as a condition of community custody, the court ordered that Bunch:

14. .... not have contact with any children under the age of 18 without the presence of an adult who is knowledgeable of this conviction and who has been approved by the defendant's supervising community corrections officer.
15. .... not loiter or frequent places where children congregate; including, but not limited to, shopping malls, schools, playgrounds and video arcades.

[CP 279-280].

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The conditions of community custody may include “crime-related prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW

community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The conditions of community custody may include “crime-related prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW 9.94B.050(5)(e). A “crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(10).

Because Bunch was convicted of raping a woman who was seven days short of her twenty-first birthday [CP 245-46], conditions 14 and 15 set forth above are not crime related and should be stricken. See State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998) (community placement condition prohibiting convicted sex offender’s contact with minors was not justified where the victim was not a minor).

04. THE TRIAL COURT ERRED IN  
IN IMPOSING JURY COSTS OF  
\$6,319.50.

At sentencing the court ordered that Bunch pay “jury costs” in the amount of \$6,319.50. [RP 11/17/10 44; CP 271].

While there is a question as to whether this issue properly before this court in this appeal as a matter of right, see State v. Smits, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009), Appellant respectfully asks this

court to exercise its discretion and consider the merits of this argument under RAP 1.2(c), as it recently did in addressing a similar issue in State v. Hathaway, \_\_\_ Wn. App. \_\_\_, 251 P.3d 253 (2011).

RCW 10.01.160(1) permits the trial court to impose costs following a defendant's conviction. "They cannot include expenses inherent in providing a constitutionally guaranteed jury trial...." Id. And while a court is authorized to impose a jury demand fee of up to \$125 for a six-person jury or \$250 for a 12-person jury, RCW 36.18.016(3)(b), the trial court erred here when it imposed jury costs of \$6,319.50, which is far in excess of its statutory authority. Accordingly, the case should be remanded to the trial court to impose fees in accordance with the jury's size.

05. BUNCH WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE IMPOSITION OF JURY COSTS OF \$6,319.50 FOLLOWING HIS CONVICTIONS.

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the imposition of jury costs of \$6,319.50, then both elements of ineffective assistance of counsel have been established.<sup>3</sup>

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<sup>3</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the objection for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected, the trial court would not have imposed the jury costs of \$6,319.50 following Bunch's convictions.

E. CONCLUSION

Based on the above, Bunch respectfully requests this court to reverse and dismiss his conviction for robbery in the first degree and to remand for resentencing consistent with the arguments presented herein.

DATED this 10<sup>th</sup> day of June 2011.

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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:

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DATED this 10<sup>th</sup> day of June 2011.

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