FILED
Court of Appeals
Division II
State of Washington
12/6/2019 8:00 AM

NO. 53100-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND CRUZ,

Appellant.

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

The Honorable Christopher Lanese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. As to count three, the trial court erred in instructing the jury on an alternative of possessing stolen property in the second degree not otherwise charged in the information or amended information.

2. The trial court erred in entering a judgment for an uncharged alternative of second degree possession of stolen property.

3. The state violated Mr. Cruz's right to due process by seeking to convict him on conduct that was not charged in the information or amended information.

4. To the extent defense counsel was required to preserve Mr. Cruz's rights, counsel provided ineffective assistance of counsel by failing to object to the trial court instructing the jury only on an uncharged offense on count three and by allowing Mr. Cruz to be sentenced for an uncharged offense.

5. The trial court erred in approving a discretionary cost, witness fees, without a discussion on the record about the discretionary cost and indigent Mr. Cruz's ability to pay the cost.

6. The judgment and sentence improperly authorizes interest to accrue on Mr. Cruz's unpaid, non-restitution, legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The amended information charged Mr. Cruz on count three with possessing stolen property in the second degree by knowingly possessing a stolen motor vehicle and withholding it from the true owner. Yet, in instructing the jury as to the elements of count three, the court instructed the jury only on an alternative means of committing the offense, that of knowingly possessing stolen property valued at over $750. As the court instructed the jury only on an uncharged alternative of unlawful possession of stolen property in the second degree, did the court err in entering a guilty finding and imposing sentencing on the uncharged alternative offense?

2. Defense counsel failed to object to the jury being instructed on, and Mr. Cruz being found guilty of, an uncharged crime of unlawfully possessing stolen property valued at more than $750. Did defense counsel's failure, resulting in Mr. Cruz's conviction and sentence for an uncharged crime, deprive Cruz of constitutionally guaranteed effective assistance of counsel?

3. Prior to imposing discretionary costs on an indigent defendant in a criminal case, the court must determine whether the defendant has the ability to pay the costs. Did the trial court err by imposing a witness fee

cost against Mr. Cruz without having engaged indigent Cruz in a discussion about his ability to pay the cost?

4. By statute, interest does not accrue on unpaid legal financial obligations other than restitution. Yet, Mr. Cruz's judgment and sentence authorizes the accrual of interest on Cruz's non-restitution legal financial obligations. Must Mr. Cruz's case be remanded to strike the improper interest accrual provision?

C. STATEMENT OF THE CASE

By its information, the state charged Raymond Cruz with three crimes:

> count 1 - burglary in the second degree[1]
>
> count 2 - possession of a stolen motor vehicle[2]
>
> count 3 - possession of stolen property in the second degree, a motor vehicle[3]

Supplemental Designation of Clerk's Papers (Supp. DCP), Information.

Before trial, at the state's request, the court arraigned Mr. Cruz on an amended information. RP1[4] 11-12; CP 1-2. The amended

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[1] RCW 9A.52.030(1)
[2] RCW 9A.56.068(1), RCW 9A.56.140
[3] RCW 9A.56.160(1)(d), RCW 9A.56.140(1)
[4] There are four volumes of trial and sentencing verbatim report of proceedings. They are references hearing as "RP" followed by the specific

information changed count two to theft of a motor vehicle but left counts one and three as charged in the original Information. CP 1-2. Specifically, as to count three on both the original and amended information, the charging language provided:

> COUNT 3 – POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, RCW 9A.56.160(1)(d); 9A.56.140(1) – CLASS C FELONY
>
> In that the defendant, RAYMOND RUBEN CRUZ, in the State of Washington, on or about August 21, 2018, did knowingly receive, retain, possess, conceal, or dispose of a stolen motor vehicle, knowing that this property had been stolen, and did withhold or appropriate this property to the use of a person other than the true owner or person entitled thereto.

CP 1.

At trial, the jury heard testimony about a large rural property in Rainier, Washington, with various buildings on it to include two homes, a large two-story garage, and a cargo container. RP1 27, 30, 34, 126. The property owners, Mike (hereafter "Derion") and Lisa Derion, lived in one home. RP2 222. Derion rented the other home to his daughter Kara Schoenherr and her boyfriend, Matthew Brake. RP1 125-27, 160; RP2 222-23. The property is in Thurston County. RP1 24-27, 125-26.

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volume number. There are two other volumes of verbatim that are not cited in Appellant's Brief. The dates of the hearings in those volumes are 12/6/18 and 1/22/19.

On an August 2018 afternoon, a man came onto the property and asked both Brake and Derion, separately, if "Reed" was there. RP1 164; RP2 226-29. Both Brake and Derion told the man "no," and the man left. RP1 164-65; RP2 226, 229. Both Brake and Derion felt the man was casing the property. RP2 229-30. Derion called the police and reported his suspicions to Thurston County Deputy Kendall Reed. RP2 271, 309. Derion and his family took action that day to secure the property by locking doors on various buildings and locking the gate to the property. RP1 131, 166-67; RP2 206, 230.

Around 8 a.m. the next morning, Schoenherr was getting ready to go to work. RP1 134, 168. She noticed Derion's Chevy Blazer drive past her bedroom window. RP1 134. She looked out her window and saw two men she did not know loading items into the Blazer. RP1 135. The Blazer was backed into Derion's garage. RP1 137. She woke up Brake, called her mother, and called 911. RP1 139, 144.

Brake went outside and yelled at the two men. RP1 141, 173. Brake recognized Mr. Cruz as the person who had been on the property the day before looking for Reed. RP1 174.

Mr. Cruz and the other man jumped into the Blazer and drove off. RP1 177. Brake pointed Derion in the direction of the Blazer's travel. RP

177; RP2 235. Derion followed the Blazer in his other car. RP1 177; RP2 233.

Thurston County deputies joined in the pursuit and search for the Blazer. RP1 93-97; RP2 289-93. They found the Blazer parked in bushes near a large metal building. RP1 43-44; RP2 243, 296. Deputy Chris Schoenberg saw Cruz running toward the metal building from the proximate location of the Blazer. RP1 100, 108.

The police stopped a man riding away from the metal building on a bike. The police identified that person as Nathanael Barnett. RP1 103-04, 118.

The police knew of the metal building and knew, too, that the building had a surveillance system that recorded both the activities inside and outside the building. RP1 43-44, 99-100; RP2 278, 291, 297-98. The deputies knocked on the building, but no one answered. RP1 105; RP2 298. The police obtained a warrant to search the building. RP1 106; RP2 299.

The police found Mr. Cruz in the metal building when they served the search warrant. RP2 300. Deputy Paul Gyls took photos of Cruz and sent the images electronically to the deputies at the Derion property. RP1 57, 189. Brake identified Cruz as the person looking for Reed the day

before and as one of the two people taking property from Derion's garage that morning. RP1 189-90; RP2 269-70. Derion also recognized Mr. Cruz as the person asking about Reed the previous day. RP2 272.

The police located a large amount of property, including power equipment, in the metal building, including property identified as that taken from the Derion garage and surrounding property. RP2 270, 274-77, 301, 329.

Thurston County Detective Michael King reviewed some of the surveillance video from the metal building. RP3 380-84, 390. Video showed the Blazer pulling up at the metal building. RP2 394. It showed Mr. Cruz inside the metal building. RP2 397-98. Videos showed Cruz and Barnett carrying items taken from the Derion property into the metal building in the hours before the 911 call from the Derion property. RP2 245-46, 268-70, 391; RP3 443, 445.

At trial, the state asked Derion how much he paid for some items taken from the property but ultimately recovered and returned to Derion. Derion provided information on several of the items taken but recovered. RP2 246. Derion paid $875 for the welder and $1,000 for the pressure washer. RP2 246-47. The state did not ask Derion about the

value of the Blazer. RP2 246-47. Although Derion used the Blazer, the title remained in the previous owner's name. RP2 244.

The parties worked together to prepare the jury instructions. RP3 410, 412-13. Mr. Cruz did not propose any instructions and did not object to the state's proposed instructions. RP2 335; RP3 410-11.

As to count three, possessing stolen property in the second degree, contrary to the charging language used in the information and the amended information specifically alleging a stolen motor vehicle, the court instructed the jury as follows:

Instruction 19

> A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses stolen property that exceeds $750 in value.
>
> Possessing stolen property means knowingly to receive, retain, possess, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

Supp. DCP, Court's Instructions. And,

Instruction 22

> To convict the defendant of the crime of possessing stolen property in the second degree, as charged in Count 3, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 21, 2018, the defendant or an accomplice knowingly received, retained, possessed, concealed or disposed of stolen property;
(2) that the defendant or an accomplice acted with knowledge that the property had been stolen;
(3) That the defendant or an accomplice withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto:
(4) That the stolen property exceeded $750; and
(5) That any of these acts occurred in the State of Washington.

Supp. DCP, Court's Instructions. No one objected to the use of these instructions. RP2 335; RP3 410-11.

During closing argument, consistent with the jury instructions, the state told the jury the crime charged in count three was possession of stolen property in the second degree for property valued at over $750. RP3 447.

The state used a PowerPoint presentation displaying the same information, i.e., property valued over $750. Supp. DCP, state's PowerPoint.

The jury found Cruz guilty of the three charges in the amended information. CP 3-5; RP3 473.

Cruz requested the court impose a Drug Offender Sentencing Alternative (DOSA) sentence, but the court declined to impose it. RP4 499; CP 9.

Consistent with the possession of a stolen property other than a motor vehicle instructions – but contrary to the crime actually charged in the information and amended information as to count three - the state attached a score sheet for possession of stolen property in the second degree other than a firearm, or motor vehicle, to its statement of Mr. Cruz's criminal history. CP 17, 21. Mr. Cruz did not agree with the criminal history in order to preserve any challenges for appeal. RP4 484-85. Mr. Cruz scored eleven points on the second degree burglary, and seven points on both the theft of a motor vehicle and on the incorrectly instructed possession of stolen property, other than a motor vehicle. CP 19-21.

The court sentencing Mr. Cruz to 65 months for the burglary, 27 months for the theft of a motor vehicle, and 16 months for possessing stolen property. RP4 497-500; CP 9.

The judgment and sentence for count three, contrary to the jury instructions and the verdict, notes the jury found Mr. Cruz guilty of possessing stolen property in the second degree (motor vehicle) but cites

to RCW 9A.56.160(1)(d) (stolen property other than a firearm or motor vehicle). CP 6.

The court imposed the mandatory $500 victim assessment. CP 11. The court did not discuss any other legal financial obligations. RP4 484-500. The court said nothing about a witness cost bill, but it entered one the same day, assigning a $63.60 witness fee to Mr. Cruz. Supp. DCP, Cost Bill – Criminal. The court did not set a restitution amount. CP 12.

The judgment and sentence includes boilerplate language that interest accrues from the date of judgment. CP 12. The court ordered that the interest on non-restitution LFOs bear interest from the date of entry of the judgment and sentence at the rate applicable to civil judgments. CP 12.

Mr. Cruz appealed all portions of his judgment and sentence. CP 24-35.[5]

[5] Co-defendant Nathan Barnett died in jail prior to the resolution of his case. CP1; RP1 59; RP3 404.

D. ARGUMENT

Issue 1: The trial court erred in instructing the jury only on an uncharged alternative of committing possessing stolen property in the second degree not otherwise charged in the Information or Amended Information.

The state's information and amended information charged Mr. Cruz in count three with possession of stolen property in the second degree, specifically alleging he knowingly received, retained, concealed, or disposed of a stolen motor vehicle. CP 1-2; CP Supp. DCP, Information. However, the jury instructions informed the jury only that they could convict Mr. Cruz of the uncharged alternative of possession stolen property exceeding $750 in value, an alternative not otherwise charged in the information. Supp. DCP, Court's Instructions, Instruction 22. Mr. Cruz's conviction on count three must be reversed.

Accused persons have the constitutional right to know the charges against them. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. "Pursuant to this right, '[t]he accused ... has a constitutional right to be apprised of the nature and cause of the accusation against him. ... This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.'" *State v. Gehrke*, 193 Wn.2d 1, 6, 434 P.3d 522 (2019) (lead opinion).

The state gives notice of charges by information, which "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). An information is constitutionally sufficient only if all essential elements of a crime are included in the document. *State v. Porter*, 186 Wn.2d 85, 89, 375 P.3d 664 (2016). " 'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (*quoting State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). "The purpose of this essential elements rule is to sufficiently apprise the defendant of the charges against them so that he or she may prepare a defense." *State v. Kosewicz*, 174 Wn.2d 683, 691, 278 P.3d 184 (2012).

When the Information charges only one of the alternatives, however, it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (holding that trial court committed prejudicial error when it instructed the jury on uncharged alternative means of committing forgery).

"It is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged." *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). "An 'alternative means crime' is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.' " *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (alteration in original) (*quoting State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)); *State v. Lindsey*, 177 Wn. App. 233, 240, 311 P.3d 61 (2013).

Mr. Cruz did not challenge the court instructing the jury only on an uncharged alternative. In general, this court does not address claims of error raised for the first time on appeal. RAP 2.5(a). However, RAP 2.5(a)(3) provides an exception to this general rule where an appellant can show a manifest error affecting a constitutional right. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To show manifest error, Mr. Cruz must demonstrate actual and identifiable prejudice to his constitutional rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Mr. Cruz does that by showing he was convicted and sentenced for an uncharged alternative of committing possessing stolen property. The error of offering an uncharged means as a basis for conviction is prejudicial if the jury might have convicted the defendant under the uncharged alternative.

Doogan, 82 Wn. App. at 189. The jury convicted Mr. Cruz only of the uncharged alternative. CP 5; Supp. DCP, Court's Instructions, Instruction 22.

"[I]t is error to instruct the jury on uncharged offenses or uncharged alternative theories." *State v. Morales*, 174 Wn. App. 370, 382, 298 P.3d 791 (2013). When a defendant is tried on an uncharged alternative theory, the remedy is a new trial on that offense. *Id*. at 384.

Issue 2: To the extent defense counsel was required to take exception to the trial court's jury instructions, defense counsel was ineffective for failing to do so.

Defense counsel denied Mr. Cruz the constitutional right to effective assistance of counsel by failing to object to the jury being instructed using the incorrect instructions on possession of stolen property in the second degree. To the extent defense counsel was required to take exception to the trial court's jury instructions, defense counsel was ineffective for failing to do so.

During the jury instruction conference, defense counsel largely remained silent. RP2 335; RP3 410-11. Defense counsel did not propose any instructions. Defense counsel did not take exception to any of his proposed instructions that the trial court declined to give. RP2 335; RP3 410-11.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test: (1) [D]efense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned

decision-making [.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

There was no tactical reason for defense counsel for failing to object to the state presenting the court with instructions for an alternative crime Mr. Cruz was not charged with committing. Trial counsel's omission was deficient performance because the omission leaves Mr. Cruz convicted of, and serving a sentence on, an uncharged crime. *State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011).

Issue 3: Mr. Cruz should not be obliged to pay any discretionary legal financial obligations because he is indigent.

The sentencing court must conduct an individualized inquiry into the defendant's present and future ability to pay costs before imposing discretionary costs. *State v. Ramirez*, 191 Wn.2d 732, 743, 426 P.3d 714 (2018) (clarifying a heightened standard for *Blazina* inquiries based on financial statements contained in motions for indigency). *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This specific, detailed inquiry did not occur at Mr. Cruz's sentencing hearing. RP4 490-502.

The court did not engage in any inquiry on the record before entering an order requiring Mr. Cruz to pay $63.60 for witness costs, a discretionary fee. RP4 490-502. Supp. DCP, Cost Bill – Criminal. *State v.*

Lundy, 176 Wn. App. 96, 107, 308 P.3d 755 (2013) (witness costs are discretionary). The prosecutor signed the cost bill. CP Supp. DCP, Cost Bill. The cost bill may well have been signed ex parte as the record does not reflect its entry at the sentencing hearing. RP4 490-502.

Without a hearing on the witness cost bill, the court did not afford Mr. Cruz or his attorney an opportunity to object to the discretionary cost.

Between what was in the court file, and what the court learned at sentencing, Mr. Cruz was unmistakably indigent. Mr. Cruz's booking indigency screening form notes Mr. Cruz received food stamps. Supp. DCP, Indigency Screening Form. In the Motion for Order of Indigency for this appeal, Cruz notes he has a court-ordered child support obligation. Supp. DCP, Motion for Order of Indigency. Mr. Cruz has two daughters. RP4 496. The court found Mr. Cruz indigent for purposes of appeal. CP 22-23. Mr. Cruz's trial counsel was court-appointed. CP 22-23. The court expressed its doubts about Mr. Cruz's ability to maintain sobriety. RP4 499. A lack of sobriety likely impact a person's ability to maintain a job and a steady income.

RCW 9.94A.760 provides: "The court may not order an offender to pay costs as described in RCW 10.01.160 if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a)

through (c).” Mr. Cruz told the court in his original indigency screening form that he received food stamps. Supp. DCP, Indigency Screening Form. "Indigent" means a person who, at any stage of a court proceeding, is: (a) Receiving one of the following types of public assistance: … food stamps or food stamp benefits transferred electronically.” RCW 10.101.010(3)(a).

The court signed an order of indigency for purposes of appeal. RP 502; CP 22-23. In the judgment and sentence, the court appropriately obliged Mr. Cruz to pay the mandatory $500 crime victim assessment, already a steep fee for an indigent person serving a lengthy prison sentence. CP 11.

Issue 4: The trial court must modify Mr. Cruz’s judgment and sentence to eliminate interest accrual on non-restitution legal financial obligations.

In 2018, the legislature amended former RCW 10.82.090 to prohibit interest accrual on non-restitution LFOs as of June 7, 2018. LAWS OF 2018 ch. 269, § 1. *Ramirez*, 191 Wn.2d at 747.

The court sentenced Mr. Cruz on January 19, 2019, well after the amended law went into effect. RP4 484-501; CP 6-16. At sentencing, the court failed to strike the following outdated paragraph from Mr. Cruz’s judgment and sentence:

> The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.73.160.

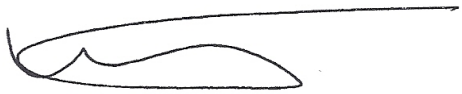
CP 31.

Because the court failed to strike the boilerplate interest language from the judgment and sentence, Mr. Cruz is subject to improper interest accrual on his LFOs. Remand to strike any accrued and accruing interest is required. *Ramirez*, 191 Wn.2d at 746-47.

E. CONCLUSION

On remand, this court should reverse Mr. Cruz's conviction for possession of stolen property in the second degree as charged in count three of the amended information. The trial court should also strike from the judgment and sentence the discretionary $63.60 witness fee and the provision allowing interest accrual on non-restitution costs.

Respectfully submitted December 5, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Raymond Cruz

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Raymond Cruz, DOC#869205, Cedar Creek Center, PO Box 37, Littlerock, WA 98556.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 5, 2019, in Winthrop, Washington.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Raymond Cruz, Appellant

LAW OFFICE OF LISA E TABBUT

December 05, 2019 - 9:55 PM

Transmittal Information

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