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REQUEST FOR PROPOSALS
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APPENDIX F

CAMARATA OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 11111-2-II
Respondent,	)	
	)	DIVISION TWO
v.	)	
	)	
LAWRENCE CAMARATA,	)	PUBLISHED OPINION
	)	
Appellant.	)	
_____	)	Filed: _____

FULLER, C.J. -- Laurence Camarata appeals from his conviction of five counts of first degree rape and one count of residential burglary. He raises issues related to certain evidentiary rulings, ineffective assistance of counsel, insufficiency of the evidence, and unconsitutionality of RCW 9A.44.040. In his pro se brief, Camarata challenges the validity of his seizure, use of evidence obtained as a result of that seizure, and the imposition of an exceptional sentence. We affirm.

I. FACTS

E.D., a 75-year-old widow, lived alone in Port Orchard, Washington. On April 10, 2003, E.D. went to bed around 10:00 p.m. She awoke at 3:15 a.m. when her cat jumped off another bed and ran out of the room. She then saw a man standing by the spare bed.

E.D. was raped five times that night. In between each rape, the man rummaged through other rooms in the house. After the man left, E.D. stayed in bed for a couple of minutes until the house was quiet. She then put on a house coat and went to a neighbor's home. She arrived at the Barnett's house around 5:15 a.m. They called 911 dispatch. Janet Barnett noticed that E.D. was barefoot, wearing a long robe, and was not wearing her glasses or false teeth. E.D. was trembling, frightened and "distraught." E.D. told her "I've been raped."

Barnett asked E.D. if someone had hurt her, and she said that she had been raped five times. She was trembling and stammering while telling this. E.D. identified her attacker as "a tall, skinny man" who walked with a cane and had a scar over his left eye. The paramedics and Barnett took E.D. to the hospital. Barnett noticed blood on the back of E.D.'s robe and on the sheets of the gurney at the hospital.

David Franklin, a Port Orchard patrolman, responded to a call at 5:17 a.m. to look for a rape suspect. At 5:23, he noticed a tall man walking with a cane at the corner of D Street and National Avenue. Franklin ordered the man to stop. The man had a scar over his left eye. Franklin noticed that the man was "polite" and "acting a little nervous".

Franklin asked Camarata where he was going and he stated that he was coming from his sister's house and going to his mother's house. Camarata was holding a flowered print cloth, which resembled a pillowcase or blanket and appeared to have blood smears on it. Franklin then placed Camarata in the patrol car, called to report he had a subject who fit the description, and requested another officer.

Deputy Sherriff John Ayers arrived and conducted a search. He felt many objects in Camarata's pockets and discovered a large quantity of women's jewelry, a cigarette case and a ring case. Ayers told Camarata he was being detained because he matched the description of an assault suspect. Ayers read Camarata his rights. Ayers handcuffed him and put him in his car. Ayers also retrieved a flannel sheet and a telephone cord from Officer Franklin's car. Camarata repeated that he had been at his sister's and that he was on his way to his mother's house. He said that the jewelry was his and that he was carrying it because he did trust his sister.

Investigation revealed that the front door of E.D.'s house had been forced open. The bedroom was in "complete disarray." Drawers had been pulled out; items were scattered about. A telephone cord in the hall had been cut.

Any finger prints which were obtained were mostly smudges and had no usable value. Apparently, the presence of liquids can delete or smudge finger prints and hinder efforts to obtain good prints. Detective George Gable testified that there was to much of an oily substance at the scene to obtain finger prints.

The cloth taken from Camarata matched the sheet on E.D.'s bed. E.D. also identified the jewelry, cigarette case, handkerchiefs and other items.

Hairs were collected from E.D.'s bedroom. One of the hairs from the mattress matched the characteristics of a hair sample taken from Camarata.

At a CrR 3.5 hearing, Camarata's statements to the officer were not suppressed. Camarata was found guilty of five counts of first degree rape and one count of residential burglary. Camarata appeals.

ANALYSIS

Camarata first contends that trial counsel's failure to move under CrR 3.6 to suppress evidence found on him constitutes ineffective assistance of counsel. He asserts that counsel was deficient in not bringing the motion and that he was prejudiced because there was a reasonable probably that such a motion would have been successful.

An error of constitutional magnitude may be raised for the first time on appeal under RAP 2.5 (a). *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65 (1994), *aff'd*, 127 Wn.2d 460 (1995). Although the admission of evidence obtained in violation of the federal or state constitution is an error of constitutional magnitude, failure to move to suppress that evidence constitutes a waiver of the right to have it excluded. *Id.* at 789.

A defendant claiming ineffective assistance of counsel must demonstrate that defense counsel's representation was deficient, in that it fell below an objective standard of reasonableness based upon consideration of all the circumstances, and that defense counsel's deficient representation prejudiced the defendant. The defendant is prejudiced if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's representation is presumed to be effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 482 (1995).

Camarata's argument fails on the first prong of the test. Failure to move for suppression of evidence is not *per se* deficient representation. *Id.* at 337. In *McFarland*, the court noted that counsel may have legitimate strategic or tactical reasons for not seeking a suppression hearing and refused to presume

deficient representation absent contrary evidence in the record. *McFarland*, 127 Wn.2d at 336. The defendant still bears the burden of showing from the record a sufficient basis to rebut the "'strong presumption'" of effective representation. *Id.* at 337 (citing *Thomas*, 109 Wn.2d at 226).

Even if Camarata could show that failure to bring a suppression motion constitutes deficient representation, he must also establish from the record that he was prejudiced by this failure, i.e., that the motion probable would have been granted had it been brought. In *McFarland*, the court noted that the appellant claiming counsel's deficient failure to bring a suppression motion must show from the record that the motion would likely have been granted if it had been made, but that when no motion was made, the record will not indicate whether the court would have granted the motion. *Id.* at 334. Therefore, unless the appellant can indicate in the record what the court would have done, he can not establish prejudice. Furthermore, any evidence or facts not in the record pertaining to the issue will not be considered and must be raised through a personal restraint petition. *Id.* at 335. The trial court denied Camarata's CrR 3.5 motion. Camarata fails to show that a CrR 3.6 motion would have been granted, and his argument fails.

Camrata next contends that the court erred by allowing Barnett to testify as to what E.D. told her. He asserts that the statement was not admissible as an excited utterance because it was a detailed narrative of the events. A trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Jones*, 71 Wn. App. 798, 824, 862 P.2d 85 (1993).

An excited utterance is "a statement relating to a startling event or condition made while the defendant was under the stress of excitement caused by the event or condition" and is an exception to the hearsay rule. ER 803(2). A victim's statement, made while under the stress of the startling event and under circumstances eliminating the likelihood of deliberation is admissable as an excited utterance. *See State v. Guizzotti*, 60 Wn. App. 289, 295, 803 P.2d 808 (1991).

Camarata relies upon *State v. Dixon*, 37 Wn.2d 867, 684 P.2d 725 (1984), which is distinguishable. In that case, the court held that it was harmless error to admit the victim's four-page written statement to police, which was made over a two-hour period but while she was still upset. *Id.* at 870, 875. The court determined that the statement was not an excited utterance because it fully covered details of the incident

and indicated that the victim was able to reason, reflect, and recall details. The victim, therefore, could have fabricated some of the details if motivated to do so. *Id.* at 874. The court also noted that the statement, because of its length and completeness, was impossible to distinguish from statements routinely given by crime victims. *Id.*

Here, Barnett testified that E.D. came to her door around 5:15 a.m. and told her, "I've been raped." Barnett then asked if she was hurt, and E.D. described her injuries. E.D.'s personal statement regarding her attack, minutes after it occurred, exhibits the requisite spontaniety. This statement cannot be compared with a victim's four-page written statement such as that in *Dixon*.

Camarata next contends that RCW 9A.44.040 is unconstitutionally vague because it fails to define "serious physical injury" (RCW 9A.44.040(1)(c)), one of the alternate means of committing first degree rape.[1] If a statute does not involve First Amendment rights, a vagueness challenge must be evaluated as applied to the particular facts of the case. *State v Coria*, 120 Wn. 2d 156, 163, 839 P.2d 890 (1992). An appellant challenging a statute on vagueness grounds must prove, beyond a reasonable doubt, that the statute does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prescribed, or that the statute does not provide ascertainable standards of guilt to guard against arbitrary enforcement. *Id.*

The first requirement is not met and a statute is constitutional if it "'forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.'" *See id.* at 163, quoting *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The second requirement protects against arbitrary enforcement, and a statute fails if it forbids conduct in inherently subjective terms or invites an extreme amount of police discretion. *Id.* at 164.

[1]The jury was instructed that "[b]odily injury or physical injury means physical pain, illness, or an impairment of physical condition." Clerk's Papers at 20. Defense counsel excepted to the instruction, arguing that the instruction misstates the law and that under *Welker*, the phrase speaks for itself and an instruction defining it should not be given.

The phrase "serious physical injury" is not so vague that persons of common understanding could only guess at its meaning and differ as to it's application. *See e.g.*, Black's Law Dictionary at 856 (9th ed. 2009) (providing common sense definitions of "injury" and related terms). In *State v. Welker*, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110 (1984), the court addressed the definition of "serious physical injury" in the context of a jury instruction issue and stated

> The legislature has not defined the term 'serious physical injury,' nor is there case law definition. In our view it is neither necessary nor desirable to attempt to do so in a jury instruction. The term speaks for itself, is adaptable to the type of injury in issue and permits argument both pro and con. The jury is usually told it may rely upon common sense and the 'common experience of mankind.' *Judges and lawyers are no better able to explain such ordinary terms than the jurors themselves.*

Camarata fails to show that the phrase "serious physical injury" as found in RCW 9.44.040(1)(c) is so vague that persons of ordinary intelligence must guess at its meaning and differ as to its application. He does not address the second requirement, which addresses arbitrary enforcement. Camarata's argument fails.

Lastly, Camarata contends that there was insufficient evidence to find him guilty of first degree rape by inflicting "serious physical injury". He asserts that if the evidence fails to support a conviction on an alternative ground upon which the charge is based, the verdict must be set aside unless there is sufficient evidence to support the remaining ground.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d at 221-222. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted against the defendant. *State v. Anderson*, 72 Wn.App. 453, 458, 864 P.2d 1001 (1993).

The jury was instructed that to convict Camarata of first degree rape in counts I through V, each of the elements of the crime must be proven beyond a reasonable doubt:

> (1) That on or about the 11th day of April, 2003, the defendant engaged in sexual intercourse with [E.D.]; separate and distinct from those acts alleged in [the remaining four rape counts];

(2) That the sexual intercourse was by forcible compulsion;
(3) That the defendant inflicted serious physical injury or feloniously entered into the building where [E.D.] was situated; and
(4) That the acts occurred in Kitsap County, Washington.

Clerk's Papers, at 30.

The jury was also instructed that a person feloniously enters "if that person enters into a building with the intent to commit a crime against a person or property therein and the person entering is not then licensed, invited, or otherwise privileged to enter that building." *Id.*

The jury found Camarata guilty of all five counts of first degree rape and guilty of residential burglary as charged in count VI. The jury did not receive a special verdict from requiring it to specify under which of the alternative means of committing first degree rape it found him guilty.

Jury unanimity regarding the underlying means of committing a crime is not required where there is sufficient evidence to support each of the alternative means presented to the jury. *State v. Ortuga-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). A conviction will not be affirmed if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by anyone of the means presented to the jury. *Id.* at 708.

Camarata does not argue that there was insufficient evidence to sustain a conviction under the felonious entry alternative. E.D. and Barnett testified regarding E.D.'s injuries. E.D. also testified that she still suffered pain from her injuries. Our review of the record discloses that the jury could have found Camarata guilty under either alternative, and an unanimous verdict regarding each of the alternative means is therefore not required.

In his pro se brief, Camarata contends that he was unlawfully seized and that evidence obtained as a result of his unlawful seizure should have been excluded. Camarata did not move to suppress evidence at trial; the issue is deemed waved. (See discussion above). Furthermore, the suppression court entered findings of fact and conclusions of law following the CR 3.5 hearing regarding the contact, investigatory stop and ultimate arrest of Camarata, and these are not challenged on appeal.

Also in his pro se brief, Camarata contends that the court abused its discretion by imposing an exceptional sentence and that the court failed to articulate its reasons for the exceptional sentence.[2] He also asserts that a consecutive sentence was improper because the offenses were part of the same criminal conduct.

A reviewing court will reverse an exceptional sentence only if (1) the sentencing court's reasons for the sentence are not supported by the record, (2) the court's reasons do not justify the sentence; or (3) the length of the sentence is clearly excessive. *State v. Russell*, 69 Wn. App. 237, 250, 848 P.2d 743 (1993). The court's first task is to determine whether the sentencing court's reasons for imposing the sentence is supported by the record. *State v. Ross*, 71 Wn. App. 556, 561-62, 861 P.2d 473 (1993). *See also State v. Estrella*, 115 Wn.2d 350, 355, 798 P.2d 289 (1990). The court's findings will be upheld unless they are clearly erroneous. *Id*. at 562. Next, the court must independently determine whether, as a matter of law, the sentencing courts reasons justify imposition of an exceptional sentence. *Id*. Finally, the court decides whether the sentencing court abused its discretion by imposing a sentence that is clearly excessive. *Id.* at 562.

The trial court stated its reasons for imposing an exceptional sentence in its oral ruling and entered findings of fact and conclusions of law regarding the exceptional sentence. Our review of the record reveals that the court's findings are supported by the record and are not clearly erroneous.

The trial court concluded that an exceptional sentence was justified due to Camarata's extreme cruelty towards the victim and the vulnerability of the victim. The defendant's conduct manifesting deliberate cruelty to the victim and the victim's vulnerability are both listed as aggravating factors justifying an exceptional sentence. RCW 9.94A.535(3)(a), (b). The trial court did not abuse its discretion by imposing the exceptional sentence.

[2]The trial court imposed an exceptional sentence of 748.5 months. Camarata's standard sentence range was 432-566 months.

For the first time on appeal, Camarata argues that the five rape counts were part of the same criminal conduct. At the sentencing hearing, defense counsel conceded that the jury found the five rapes were separate and distinct acts, and that the sentences must run consecutively. Camarata does not claim this is an error of constitutional magnitude, and the issue is not reviewable under RAP 2.5(a). *See State v. Phillips*, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (issue raised for the first time on appeal will not be heard unless it is one of constitutional magnitude. Moreover, the doctrine of invited error precludes a party from setting up error at trial and then complaining of it on appeal. *See State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991) (by his remarks at restitution hearing, defendant agreed to pay child support as restitution and invited any error embodied in court's order). This issue is waived.

Affirmed.

Fuller, C.J.

We concur:

Goff, J.

Carpenter, J.