

67038-7

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No. 67038-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATISHA DAVIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE

Matisha Davis was convicted of first degree robbery based upon evidence that another woman, Irene Aguilar, displayed a screwdriver and a knife to intimidate Shane Pantano and Vincent Doolittle, and the women took their money and PlayStation 3 console. In her recitation of the facts, the prosecutor states that Ms. Davis and Ms. Aguilar entered Mr. Doolittle's mother's apartment, citing the testimony of Mr. Doolittle and Ms. Pantano. Brief of Respondent (BOR) at 1. Mr. Doolittle and Mr. Pantano, however, did not identify Ms. Davis as one of the women who entered the apartment either in a show-up shortly after the offense or in court. RP 32-72.

Additionally, the prosecutor refers to the knife as a "Bowie knife." BOR at 1, 4. The knife in question belonged to Mr. Doolittle, who described it as "like a Bowie knife, like a hunting knife," with a compass on it. RP 59. The knife was never recovered. RP 157, 188-89.

B. ARGUMENT IN REPLY

MS. DAVIS'S CONVICTION MUST BE REVERSED
BECAUSE THE JURY WAS INSTRUCTED ON AN
ALTERNATIVE MEANS OF FIRST DEGREE ROBBERY
THAT WAS NOT CHARGED IN THE INFORMATION
AND NO OTHER JURY INSTRUCTIONS CURED THE
ERROR

Matisha Davis was charged with first degree robbery with a deadly weapon, but the court instructed the jury she could be convicted if she or an accomplice was armed with a deadly weapon or displayed what appeared to be a deadly weapon. CP 69-79, 92. No instruction ensured the jury unanimously agreed that Ms. Davis was guilty based upon the means charged in the information, and her due process right to be informed of the charges against her was thus violated. State v. Irizzary, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Laramie, 141 Wn.App. 332, 342-43, 169 P.3d 859 (2007). The State correctly concedes it was error for the trial court to instruct the jury on the uncharged alternative means of committing first degree robbery. BOR at 5-6; State v. Severns, 13 Wn.2d 542, 548, 125 P.3d 659 (1942). This Court should reject the State's argument that Ms. Davis may not raise this constitutional issue for the first time on appeal, find the error is prejudicial, and reverse Ms. Davis's conviction.

1. Ms. Davis may challenge the unconstitutional jury instructions. While appellate courts normally do not address issues that were not raised in the trial court, RAP 2.5(a)(3) creates an exception for manifest constitutional issues because these errors often result in serious injury to the accused and may adversely affect public perception of the integrity and fairness of the judicial process. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). In assessing a constitutional error asserted for the first time on appeal, the appellate court must (1) determine if the error is constitutional, and (2) “examine the effect the error had on the defendant’s trial according to the harmless error standard set forth in Chapman v. California.” Id. at 688 (citing Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967)). Put another way, the error must have “practical and identifiable consequences in the case.” State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Ms. Davis has the constitutional right to be informed of the charges against her, and the State concedes she raises a constitutional issue. U.S. Const. amends. VI, XIV; Const. art. I, § 22; BOR at 6-7. This Court has held that the accused may challenge jury instructions that permit the jury to convict her of a

crime not charged in the information for the first time on appeal. State v. Chino, 117 Wn.App. 531, 538, 72 P.3d 256 (2003); State v. Nicholas, 55 Wn.App. 261, 273, 776 P.2d 1385, rev. denied, 113 Wn.2d 1030 (1989); accord Laramie, 141 Wn.App. at 342. The State nonetheless argues the error is not “manifest” in this case. BOR at 7-11.

In addressing constitutional challenges to jury instructions, the appellate court looks at whether the instructions may have permitted the defendant to be convicted in a manner that violates the constitution. State v. Mutch, 171 Wn.2d 646, 661-63, 254 P.3d 803 (2011) (addressing jury instructions that “potentially” exposed defendant to double jeopardy violation for first time on appeal); Schaler, 169 Wn.2d at 287 (error was manifest because “the instructions given at trial allowed the jury to convict Schaler based on his utterance of protected speech.”); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983) (addressing jury instructions that incorrectly shifted burden of proof to defendant raised for first time in petition for review to Supreme Court). For example, jury instructions that permit the jury to convict the defendant without finding every element of the crime is proven beyond a reasonable doubt create a constitutional error that may

be raised for the first time on appeal, whereas instructions that do not further define one or more of those elements do not. State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) (refusing to address jury instructions that did not define “deliberate cruelty” or “particular vulnerability” when issue not raised in trial court); Scott, 110 Wn.2d at 689 (failure to define “knowledge” not issue of constitutional magnitude).

The State bases its claim that Ms. Davis may not raise this constitutional issue in this appeal on Division Two’s opinion State v. Grimes, ___ Wn.App. ___, 2011 WL 6018399 (No. 40392-7-II, 12/2/11). The Grimes Court held that a challenge to the unanimity instruction for an enhancement based upon Bashaw cannot be raised for the first time on appeal because it is not a constitutional issue. Grimes, 2011 WL 6018399 at *3-6 (interpreting State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)). “We agree that, because the Bashaw decision is not founded in our state constitution or in the United States Constitution, an error in giving the special verdict in Grimes’s case is not based on a constitutional right.” Id. at *6. Thus, given the State’s concession that Ms. Davis raises a constitutional issue, this case provides no support for the State’s position.

Moreover, other panels of this Court have reached the opposite conclusion, and the issue of whether the incorrect unanimity instruction for special verdict forms may be challenged for the first time on appeal is currently before the Washington Supreme Court. State v. Ryan and Guzman Nunez, No. 85789-0;¹ see State v. Cham, ___ Wn.App. ___, 2011 WL 6148731 at *5 (No. 65071-8-I, 12/12/11) (acknowledging split in divisions and holding issue may be raised for first time on appeal); State v. Reyes-Brooks, ___ Wn.App. ___, 2011 WL 6016155 at *3 (No. 64012-7-I, 12/5/11) (accord).

The prosecutor also suggests the error in this case is not manifest because the evidence and argument of counsel did not focus on the uncharged alternative means. BOR at 8-10. This argument ignores several facts. Prior to grabbing a knife, Ms. Aguilar was carrying a flathead screwdriver, which could appear to be a deadly weapon. RP 37, 61, 148. The police found the screwdriver in Ms. Aguilar's pants after she was arrested, and it was introduced as evidence. RP 105-06, 164. Mr. Pantano also testified he was afraid the women might have a gun because Ms.

¹ Oral argument was held on January 12, 2012.

Davis was standing with her hands behind her back as if she had one. RP 42-43.

In contrast with the screwdriver, the police did not find the knife either in the car where the PlayStation 3 was found or on Ms. Aguilar's person with the screwdriver and \$210 cash. RP 105-07, 155. The knife was never recovered and was thus not introduced as evidence. RP 157, 188-89.

The State's argument also ignores the deputy prosecuting attorney's statement in closing argument that it had proven both alternative means. RP 224 ("So either armed with one or display one, and in this case we have both."). Given the facts and argument, one or more of the jurors could have convicted Ms. Davis on the uncharged alternative of display what appears to be a deadly weapon, and this Court cannot be convinced the jury returned a unanimous verdict finding her guilty of the charged count.

As the State concedes, a defendant may not be convicted of a crime not charged in the information because such a conviction violates the defendant's right to be informed of the charges against her. Irizzary, 111 Wn.2d at 592; State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); BOR at 6. The instructions here clearly

permitted the jury to convict Ms. Davis of first degree robbery based upon a means for which she was not charged – display of what appeared to be a deadly weapon. Thus, as in Mutch, Ms. Davis’s constitutional right to be informed of the charges against her was “potentially” violated. Mutch, 171 Wn.2d at 663. And, as in Schaler, the instructions “allowed the jury” to convict Ms. Davis of a crime not charged in the information. Schaler, 169 Wn.2d at 287. Ms. Davis has thus presented a constitutional issue of practical consequence in her trial that this Court should address. RAP 2.5(a)(3).

2. Ms. Davis’s conviction must be reversed because the error was not harmless. Constitutional error is presumed prejudicial, and this Court must reverse unless it is convinced beyond a reasonable doubt that the error is harmless. Chapman, 386 U.S. at 24; Laramie, 141 Wn.App. at 342-43. The harmless error test is designed to block the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22.

An erroneous jury instruction is not harmless “when the evidence and the instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” Schaler, 169

Wn.2d at 288. Where the jury was instructed on an uncharged alternative crime, the Laramie Court quickly concluded the error was not harmless “because, under the instructions given, the jury could have convicted Mr. Laramie of second degree assault based on either the charged or uncharged alternative means.” Laramie, 141 Wn.App. at 343. Similarly, where other instructions did not correct the error by “clearly and specifically” defining the charged crime, the error is not harmless. State v. Bray, 52 Wn.App. 30, 35-36, 756 P.2d 1332 (1988).

No instruction clarified to the jury that it could only convict Ms. Davis based upon the charged and not the uncharged alternative means of committing first degree robbery. Attempting to divert attention from the unconstitutional jury instructions, the State argues the error is harmless because the evidence at trial and argument of counsel focused on the charged means. BOR at 13-14. As mentioned, above, there was evidence to support the uncharged alternative and the prosecutor argued the jury it could convict under both alternatives. The State therefore can not demonstrate beyond a reasonable doubt that the error is harmless.

Given the instructions given in this case, the State cannot demonstrate beyond a reasonable doubt that the jury unanimously

convicted Ms. Davis of the charged alternative of committing first degree robbery. This Court must reverse Ms. Davis's conviction and remand for a new trial. Schaler, 169 Wn.2d at 288-90; Severns, 13 Wn.2d at 552.

C. CONCLUSION

Matisha Davis's right to due process was violated when the court instructed the jury it could convict Ms. Davis based upon an uncharged alternative means. Her first degree robbery conviction must be reversed and remanded for a new trial

DATED this 12th day of January 2012.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67038-7-I
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MATISHA DAVIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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