

67038-7

67038-7

NO. 67038-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MATISHA M. DAVIS,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

1. When the defendant did not object to a jury instruction setting out the elements of the offense which included the charged alternative means of committing the offense may the defendant argue instructional error for the first time on appeal on the basis that the instruction also included an uncharged alternative means of committing the offense?

2. If the defendant may challenge the instruction for the first time on appeal, was any error harmless?

## **II. STATEMENT OF THE CASE**

On July 13, 2010 around 8:00 p.m. Shane Pantano and Vincent Doolittle were sitting in the living room of the apartment Mr. Pantano shared with his mother. The two young men were watching television when, without warning the defendant, Matisha Davis, and Irene Aguilar walked into the apartment. Mr. Pantano and Mr. Doolittle did not know either woman. 1 RP 33-36, 58, 60.

Ms. Aguilar was armed with a screwdriver. She walked over to the table between the sofas the two young men were sitting on and grabbed Mr. Doolittle's Bowie knife. Ms. Aguilar held the knife to Mr. Doolittle's throat. Meanwhile the defendant stood over Mr.

Pantano, preventing him from getting up when he tried to do so. 1  
RP 36-38, 42, 59, 61.

Ms. Aguilar asked who else was in the apartment. One of the young men told her that Mr. Pantano's mother was there. Ms. Aguilar walked Mr. Doolittle over to the mother's bedroom door, looked in, and then shut the door. Ms. Aguilar then came back into the living room and demanded money and drugs. The women took money that Mr. Pantano was saving for a car. Ms. Aguilar did not believe the two young men when they said they did not have any drugs. Ms. Aguilar made both young men lie down on the ground. The women then grabbed the PlayStation game unit that was sitting on a table. When Mr. Pantano's mother came out of the bedroom the two women fled out the front door. 1 RP 41-44, 61-65.

Mr. Pantano grabbed the phone and followed them. He saw the women getting into a car and took note of the license plate. He called 911 and reported the robbery. 1 RP 45, 47, 65.

Police were dispatched to the scene at 9:02 p.m. Officer Crocker saw the defendant's vehicle at 9:05 p.m. a short distance from the victim's apartment. Ms. Aguilar was in the front passenger seat. The defendant was seated in the rear passenger seat along

with a PlayStation game console which Mr. Pantano later identified as his game console. 1 RP 46, 81-85, 96, 102.

Police brought Mr. Pantano and Mr. Doolittle to where the defendant and Ms. Aguilar were stopped. The two young men were able to identify Ms. Aguilar as one of the robbers. They were not able to identify the defendant as the second robber. While the defendant matched the physical description of the second robber her clothing was different and she did not have a lip piercing that the second robber had. Ms. Aguilar was arrested, but the defendant was released. Ms. Aguilar then told police that the defendant had been with her when she committed the robbery. 1 RP 51-54, 66-67.

Officer Crocker later drove the most direct route between the apartment and the place where he first saw the defendant's vehicle. The drive took three minutes and thirty four seconds. 1 RP 108.

The defendant was charged with one count of Robbery first degree. The information read:

That the defendant, on or about the 13<sup>th</sup> day of July, 2010, with intent to commit theft did unlawfully take personal property of another, to wit: PS3 console, cash, and other property, from the person or in the presence of Vincent Doolittle and Shane Pantano, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to

Vincent Doolittle and Shane Pantano, and in the commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon...

1 CP 92. (emphasis added).

At trial Mr. Pantano and Mr. Doolittle testified to the robbery. They denied either using or selling drugs, and they denied knowing either the defendant or Ms. Aguilar. 1 RP 33-56, 58-68.

Ms. Aguilar also testified. She identified the defendant as the one who suggested that they rob Mr. Pantano and Mr. Doolittle because she had just bought marijuana from them and they were young. Ms. Aguilar admitted that she picked up the Bowie knife from the table when they walked in the apartment. She said the defendant grabbed the money and gave it to her, and then grabbed the PlayStation before they left. 1 RP 144, 146-47, 150-56.

Police who went to the victim's apartment after the robbery to interview the victims did not see any evidence of drug use or sales. 1 RP 126-27, 135, 137.

The Court instructed the jury on the elements of first degree robbery. 1 CP 69. The Court included the following language:

(5)(a) That in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or

(b) That in the commission of these acts the defendant, or an accomplice, displayed what appeared to be a firearm or other deadly weapon;...

1 CP 69.

The defense stated it had no objection to this instruction. 2

RP 20. The jury found the defendant guilty of the charge. 1 CP 15, 57.

### **III. ARGUMENT**

#### **A. THE CHALLENGE TO THE ELEMENTS INSTRUCTION HAS NOT BEEN PRESERVED FOR REVIEW.**

A person commits a first degree robbery when in the commission of a robbery or immediate flight therefrom she (i) is armed with a deadly weapon; or (ii) displays what appears to be a deadly weapon. RCW 9A.56.200(1)(a)(i),(ii). These are alternative means of committing the offense. State v. Emery, 161 Wn. App. 172, 199, 253 P.3d 413, review granted, 163 Wn. App. 1014, 262 P.3d 63 (2011). When a defendant is charged with only one alternative means of committing an offense it is error for the court to instruct the jury on other alternative means. State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

Here the defendant was only charged with the first alternative means of committing the offense, i.e. that she or an

accomplice was armed with a deadly weapon. The court instructed on both alternatives. It was error for the court to do so.

However, the defendant did not object to the elements instruction. Generally the court will not consider an issue raised for the first time on appeal. RAP 2.5(a), State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The rule is designed to promote judicial economy by affording the trial court the opportunity to correct an alleged error and thereby avoid a possible appeal and new trial. State v. Scott, 110 Wn.2d 682, 865, 747 P.2d 492 (1988).

The court may consider an issue raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3), Kirkman, 159 Wn.2d at 926. The defendant bears the burden to show the error is constitutional and that it was manifest. Id. An error is manifest if it is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). To establish the error is manifest, the defendant must make a plausible showing that the error had a practical and identifiable consequence in the trial of her case. Id.

A defendant has a constitutional right to be informed of the charges against her. Washington Constitution Art. 1, §22.

Because the jury was instructed on an alternative means of committing the offense not charged in the information, the defendant raises an issue of constitutional dimension.

However, the error is not manifest. The two alternative means of committing first degree robbery are distinct. The first alternative means requires actual possession of a deadly weapon. State v. Holmes, 106 Wn. App. 775, 24 P.3d 1118 (2001). Under the second alternative the defendant does not need to be in possession of a deadly weapon. State v. Hauck, 33 Wn. App. 75, 77, 651 P.2d 1092 (1982), review denied, 99 Wn.2d 1001 (1983). Rather evidence is sufficient to support this alternative means of committing the offense if the defendant's words and conduct lead the victim to believe that the defendant is armed with a deadly weapon. State v. Webb, 162 Wn. App. 195, 204-05, 252 P.2d 424 (2011), In re Bratz, 101 Wn. App. 662, 675, 5 P.3d 759 (2000). A hand in a pocket which is held so as to create a bulge giving the impression the defendant has a gun is sufficient to satisfy that prong. State v. Henderson, 34 Wn. App. 865, 664 P.2d 1291 (1983). Patting a pocket and verbally indicating that one has a gun inside is also sufficient. State v. Kennard, 101 Wn. Ap. 533, 540, 6 P.3d 38, review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000).

Sticking a finger in another's back may also satisfy that prong. State v. Barker, 103 Wn. App. 893, 897, 14 P.3d 863 (2000), review denied, 143 Wn.2d 1021, 25 P.3d 1019 (2001).

Error in a jury instruction is not manifest where the evidence creates no doubt about the existence of evidence supporting the charge. State v. Grimes, \_\_\_\_ Wn. App. \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_ (WL 6018399 2011). In Grimes the jury was instructed that it must be unanimous in order to render a "no" verdict on a special verdict form. The Supreme Court had held that was an erroneous statement of the law in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). The Court in Grimes held the error was not manifest however. As applied to the facts of that case there was no "doubt on the existence of the evidence supporting the imposition of the sentence enhancement on the record at trial..." Grimes at 8.

The facts of this case are similar to those in Grimes. The evidence clearly established that Ms. Aguilar, acting as an accomplice to the defendant armed herself with a deadly weapon when she picked up Mr. Doolittle's large hunting knife upon entering the apartment. Both Mr. Pantano and Mr. Doolittle testified Ms. Aguilar picked up the knife and held it to Mr. Doolittle's throat while demanding money. While Ms. Aguilar denied holding the

knife to Mr. Doolittle's throat, she did admit to holding the knife and that the victims looked scared. Thus the only evidence was that she was armed with a deadly weapon. There was no evidence that Ms. Aguilar was not armed with a deadly weapon, or only acted as if she was armed with a deadly weapon. Thus, the evidence supports the conclusion that the jury unanimously concluded that the defendant was guilty under the charged alternative means of committing the robbery.

The instructional error in this case is not manifest for another reason as well. The arguments of counsel also support the conclusion that the error had no impact on the outcome of the case.

The defendant did not defend on the basis of whether or not Ms. Aguilar was armed with a deadly weapon or only displayed what appeared to be a deadly weapon. The prosecutor only briefly touched on the difference between the two alternatives in closing, stating both were met. 2 RP 224. Defense counsel did not address the alternatives in his closing argument.

Rather the basis for the defense was identity; was the defendant the second robber? The victims were able to give a description of the second robber that matched the defendant's description, but were not able to identify her at the scene. They

were not asked to identify the defendant at trial. From that counsel argued that the defendant was not the second female robber. Instead he suggested that the actual robber was dropped off and the defendant got in the car before it was stopped. 2 RP 233-237. The only direct evidence that the defendant was involved in the robbery came from Ms. Aguilar. Counsel argued that Ms. Aguilar was not a credible witness 2 RP 241-248. The defense conceded that if the jury believed Ms. Aguilar when she identified the defendant as the second robber, they had a duty to return a guilty verdict under the instructions. 2 RP 248.

All of the evidence supported the charged alternative. The parties did not dispute the evidence supporting the charged alternative. This record supports the conclusion that the defendant was convicted of the alternative charged in the information. Because the erroneous inclusion of a second uncharged alternative did not obviously affect the verdict in this case it is not a manifest error which the Court should review for the first time on appeal.

The defendant argues that she may raise this issue because of the nature of the instructional error alleged. BOA at 6-7. However, recent opinions have demonstrated RAP 2.5(a)(3) applies to alleged errors in jury instructions. State v. O'Hara, 167

Wn.2d 91, 100, 217 P.3d 756 (2009). The Court in O'Hara noted some instructional errors have been held to constitute manifest constitutional error, while others have not. Id. There the Court considered a challenge to a self-defense instruction that had not been objected to at trial. The Court acknowledged that it had previously stated that "a jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." Id. at 101, quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Considering the cases relied on by LeFaber and the underlying logic for that blanket rule, the Court rejected its earlier statement and held that the per se rule was not justified. Id. The Court directed courts to again consider whether unpreserved claims of error in self defense instructions met the requirements of RAP 2.5(a)(3). Id.

The defendant asks this Court to bypass the manifest constitutional error analysis and consider the issue for the first time on appeal. She relies on State v. Chino, 117 Wn. App. 531, 72 P.3d 256 (2003), and State v. Nicholas, 55 Wn. App. 261, 776 P.2d 1385, review denied, 113 Wn.2d 1030 (1989). In each case the defendant challenged an instruction that included an uncharged alternative means of committing the crime for the first time on

appeal, despite the lack of objection at trial. However, neither case is persuasive authority for the proposition that the defendant need not show an alleged error is manifest in order to raise it for the first time on appeal.

In Nicholas the Court acknowledged the duty to object. The Court did not analyze whether the error was either constitutional or manifest. Rather the Court assumed the error was constitutional, and found it harmless, without considering whether the error was manifest. Nicholas, 55 Wn App. at 273-274. It performed no analysis under CrR 2.5(a)(3).

In Chino the Court justified considering the issue for the first time on appeal by relying on a line of cases that held failure to instruct the jury on the essential elements of the crime was a “manifest error affecting a constitutional right.” Chino, 117 Wn. App. at 538. The analysis in Chino is flawed because a jury instruction that includes an uncharged alternative still instructs the jury on all of the essential elements of the crime as long as it includes an instruction on the charged alternative. Just as the Court rejected a blanket rule for self-defense instructions because the cases used to create the rule did not support it, this Court should reject the analysis in Chino as a justification for a blanket

rule for “to convict” instructions which contain uncharged alternatives.

Because the defendant did not object to the “to convict” instruction, and inclusion of the uncharged alternative was not manifest under the facts of this case, the Court should decline to review the defendant’s challenge.

**B. IF THE COURT ACCEPTS REVIEW OF THE ISSUE RAISED FOR THE FIRST TIME ON APPEAL, THE INSTRUCTION CONSTITUTED HARMLESS ERROR.**

If the Court finds the defendant has raised a manifest constitutional error then the court must address the merits of the claim. Lynn, 64 Wn. App. at 345. Even then the error may be harmless. Id. An erroneous instruction is harmless if it appears beyond a reasonable doubt from the record that the error complained of did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). If it is ambiguous whether the jury could have convicted the defendant on an improper ground based on a review of the evidence and the instructions, then the error is not harmless. Id. at 341-43.

Here, the evidence and arguments of counsel demonstrate that the jury convicted based on the charged alternative. There was no evidence Ms. Aguilar only “displayed what appeared to be” a

knife or other deadly weapon. The evidence conclusively established that she was “armed with a deadly weapon.” Both victims testified she picked up the large knife and held it to Mr. Doolittle’s throat throughout the robbery. Ms. Aguilar confirmed she held the knife during the robbery.

Neither party raised an issue regarding the manner in which the robbery was conducted. There was no question whether or not she actually had an item that could constitute a deadly weapon. Nor was there any question whether her words and actions constituted a display of what appeared to be a deadly weapon. The entire defense rested on whether or not the defendant was the second robber as Ms. Aguilar testified. Defense counsel began closing argument by stating that there was no doubt a robbery occurred. 2 RP 232. He concluded by stating that if the jury firmly believed Ms. Aguilar when she pointed out the defendant as the second robber, then the instructions required the jury to return a guilty verdict. 2 RP 248. Under the facts of this case, the instructions, and arguments of counsel, there is no question the jury would have convicted the defendant on any other basis than the elements of the charge filed against her. Any error was therefore harmless.

**IV. CONCLUSION**

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on December 13, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*  
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent

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Appellant.

No. 67038-7-1  
  
AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14<sup>th</sup> day of December, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 14<sup>th</sup> day of December, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit