IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. REX B. CRUSE, Appellant.	)	No. 63306-6-I DIVISION ONE UNPUBLISHED OPINION FILED: August 9, 2010

Appelwick, J. — Cruse appeals his convictions for two counts of child rape in the first degree and two counts of child molestation in the first degree. He argues he was exposed to double jeopardy, because the jury instructions did not specifically state that a separate and distinct act had to form the basis for each count. Cruse's proposed instructions omitted the language he now asserts was necessary. The error was invited. While his counsel was deficient for failing to propose the separate and distinct act instruction, Cruse cannot demonstrate prejudice. We affirm.

FACTS

Sarah and Brian Gumke married in 2001, had their daughter K.G. in 2002, and a son in 2003. In 2005, the family needed a place to live, and Sarah's friend

Joanna Cruse arranged for the family to live at the house of Joanna's father, defendant Rex Cruse. Brian moved out shortly thereafter. Before K.G. turned four, Sarah was in her room watching a "racy scene" on TV when K.G. walked in and said, "'That's like the private show that is in [Rex's] room.'" When Sara inquired further, K.G. explained, "'Just the private show where [Rex] put the lotion on his bottom and went like this,'" and then made a hand gesture of male masturbation. Sarah confronted Cruse, who apologized and said K.G. had likely walked in on him while he was masturbating.

In September 2007,[1] Sarah left her children at the house with Cruse and went to rent a movie. When she returned, Sarah overheard K.G. in the bathroom telling Cruse, "'I told my daddy that you played with me.'" Sarah heard Cruse respond, "'You're not supposed to tell your daddy that. That's private. That's secret.'"

Sarah took K.G. and her son and left. Sarah took K.G. to her pediatrician the next day, and K.G. told the doctor that Cruse had rubbed her private parts. After the doctor's visit, K.G. told Sarah that Cruse "'was mean. He put his fingers in . . . my privates.'" K.G. also later told her mother and father that she had watched pornographic shows with Cruse and that she had seen him pee "white stuff."

On October 16, 2007, during a digitally recorded interview with a child interview specialist, K.G. reported that Cruse had licked "my privates" and chest, that he had "put his penis in my privates," and that he had made her rub and put

[1] By this time, Cruse, Sarah, and her two children had moved into a new home.

her mouth on his penis. K.G. testified similarly at trial. Cruse denied ever having touched or molested K.G.

The jury convicted Cruse of two counts of first degree rape of a child, and two counts of first degree child molestation, with a charging period from August 1, 2005 through October 2, 2007. Neither Cruse's proposed instructions nor the instructions given stated that each count had to be based upon a separate and distinct act.

The court imposed an indeterminate sentence with a standard range minimum term of 318 months for the rape convictions, a standard range minimum term of 198 months for the molestation convictions, and a maximum term of life. Cruse appeals.

DISCUSSION

I. Invited Error

Cruse contends the jury instructions exposed him to double jeopardy by allowing the jury to convict him for multiple counts on a single underlying event, thereby exposing him to multiple punishments for a single offense. This issue may be raised for the first time on appeal, as it is an alleged manifest error affecting a constitutional right. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008). However, the invited error doctrine bars a party from raising an alleged error, even when that error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720–21, 58 P.3d 273 (2002).

A party may not request an instruction and later complain on appeal that the requested instruction was given. Patu, 147 Wn.2d at 721; State v. Studd,

137 Wn.2d 533, 546, 973 P.2d 1049 (1999). In other words, an invited error is present when the trial court's instructions contain the same error as the defendant's proposed instructions. State v. Bradley, 96 Wn. App. 678, 681–82, 980 P.2d 235 (1999), aff'd, 141 Wn.2d 731, 10 P.3d 358 (2000).

The infirmity Cruse complained of in the court's instructions to the jury was present in his proposed instructions—neither set of instructions contained a "separate and distinct act" instruction as required by State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007). In Borsheim, we stated that "in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury 'that they are to find separate and distinct acts for each count.'" Id. (internal quotation marks omitted) (quoting State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996)). The other instructions material to a double jeopardy analysis do not satisfy the "separate and distinct act" requirement. See id. (examining the "separate crime" instruction, the "unanimity" instruction, and the "to convict" instruction to resolve Borsheim's double jeopardy claim).

Cruse presented instructions that do not materially differ from the instructions given. Cruse's proposed separate crime instruction was identical to the court's instruction 6, which read: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

Cruses's proposed Petrich instruction read:

> The State alleges that the defendant committed acts of

> Rape of a Child in the First Degree on multiple occasions. To convict the defendant on Count 1 of Rape of a Child in the First Degree, one particular act of Rape must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). He proposed the same instruction for the second count of child rape, as well as two instructions with the same wording for the two counts of child molestation. The court gave two Petrich instructions, one for the two counts of child rape, and one for the two counts of child molestation. Instruction 12, for child rape, read:

> The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt for that count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree.

Instruction 17, the Petrich instruction for child molestation, contained identical language, save the identification of the different crime.

Finally, Cruse proposed four "to convict" instructions. The two for child rape are identical, except for the identification of the count. Cruse's "to convict" instruction for child rape read:

> To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during a period of time intervening between August 1, 2005 through October 2, 2007, the defendant being at least 24 months older than K.G., had sexual intercourse with K.G;
>
> (2) That KG was less than twelve years old at the time of the

sexual intercourse and was not married to the defendant;

(3) That KG was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

The two "to convict" instructions for child molestation are identical, except for the identification of the count. Cruse's "to convict" instructions for child molestation read:

To convict the defendant of the crime of Child Molestation in the First Degree, as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2005 through October 2, 2007, the defendant being at least 36 months older than K.G., had sexual contact for the purpose of sexual gratification, with K.G., [who] was not married to the defendant;

(2) That KG was less than twelve years old at the time of the sexual contact;

(3) That KG was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

The court also gave four "to convict" instructions, two for the two counts of child rape, and two for the two counts of molestation. The "to convict" instruction for count I of child rape stated:

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2005, and October 2, 2007, the defendant had sexual intercourse with K.G.; and

(2) that K.G. was less than twelve years old at the time of the sexual intercourse and was not married to the

defendant; and

(3) that K.G. was at least twenty-four months younger than the defendant; and

(4) that this act occurred in the State of Washington.

The "to convict" instruction for count II was identical, save the identification of the pertinent count. The "to convict" instruction for count III of child molestation stated:

To convict the defendant of the crime of child molestation in the first degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2005, and October 2, 2007, the defendant had sexual contact with K.G.; and

(2) That K.G. was less than twelve years old at the time of the sexual contact and was not married to the defendant; and

(3) That K.G. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

The "to convict" instruction for count IV was identical, save the identification of the pertinent count.

To be invited, the error must be the result of an affirmative, knowing, and voluntary act. In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). Cruse gave a full set of instructions to the court. This was an affirmative representation to the court that his instructions were a proper statement of the law. The instructions did not materially differ from the instructions the court actually gave. The invited error doctrine bars Cruse from raising his double jeopardy argument on appeal.

II. Ineffective Assistance of Counsel

Cruse claims his counsel's performance was deficient for failing to propose the "separate and distinct" instruction, given our statement in Borsheim that such an instruction was necessary. 140 Wn. App. at 367. We may address the alleged instructional error through such a claim. See, e.g., Bradley, 96 Wn. App. at 681–82 (where the instructional error was invited, the court addressed the instructional error argument through defendant's ineffective assistance claim).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Here, then, Cruse must show that it was objectively unreasonable for his counsel not to propose an instruction that specifically stated that each charge must be based on a separate and distinct act, and that there is a reasonable probability such an instruction would have

altered the outcome. If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Cruse relies on State v. Kyllo, 166 Wn.2d 856, 865–69, 215 P.3d 177 (2009), for the proposition that counsel's performance fell below the objective standard of reasonableness when he had reason to know the instructions were incorrect. In Kyllo, the court concluded counsel's performance was deficient for failing to discover relevant case law indicating that an "act on appearances" instruction using "great bodily harm" instead of "injury" was improper, despite the fact that "great bodily harm" appeared in the 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.04 (3d ed. 2008) (WPIC), instruction. Id. at 866–68. Similar to counsel's failure in Kyllo to keep apprised of case law calling into question the validity of the pertinent self defense WPIC, counsel here did not propose the instruction the court in Borsheim clearly indicated was appropriate for a case like this one:

> [I]n sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury "that they are to find separate and distinct acts for each count."

140 Wn. App. at 367 (internal quotation marks omitted) (quoting Hayes, 81 Wn. App. at 431). We hold counsel's performance was deficient, for failing to research or apply relevant law.

Although counsel's performance was deficient, Cruse cannot demonstrate prejudice. As the State aptly points out, the evidence supporting each of the

four counts was the same, Cruse's defense to all counts was general denial, and the ultimate issue was K.G.'s credibility. The jury concluded K.G. was credible, and the evidence showed a pattern of sexual abuse over a substantial amount of time. K.G.'s testimony amply covered more than two acts of rape and two acts of molestation. Given the strong evidence of multiple acts of both rape and molestation, Cruse cannot demonstrate a reasonable probability that the jury would have convicted him on only one count of molestation and one count of rape. His claim of ineffective assistance of counsel therefore fails.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, A.C.J.

Schindler, J.