IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES RIMMER, Appellant.	No. 40508-3-II UNPUBLISHED OPINION

Hunt, J. — James Rimmer appeals his jury convictions and sentence for second degree assault, domestic violence; felony harassment, domestic violence; and interfering with the reporting of domestic violence. He argues that (1) the trial court improperly included uncharged alternative means of committing the crime in its "to convict" instruction for interfering with reporting;[1] (2) the trial court incorrectly calculated his offender score, counting his current assault and harassment convictions separately when they constituted the "same criminal conduct";[2] and (3) trial counsel provided ineffective assistance because he did not object to these two errors. The State concedes that the assault and harassment convictions should have counted as one crime for

[1] Conceding this error, the State argues that it was harmless.

[2] "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

offender score purposes.[3] After reviewing the record, we accept the State's concession of this error: Because the assault and harassment convictions constituted the same criminal conduct, the trial court should have sentenced Rimmer based on an offender score of zero rather than one. We affirm Rimmer's convictions, but we vacate his sentence and remand for resentencing consistent with this opinion.[4]

FACTS

Angry with his girlfriend, Janette Macinata, about dinner, James Rimmer punched her repeatedly in the face, choked her, called her names, and yelled that he wanted to kill her. When she tried to call 911, he threw her to the floor, kicking and hitting her. Ultimately, she got free and fled to a neighbor's house. The neighbor called the police. Macinata suffered multiple bruises, cuts to the inside of her mouth, welts and lumps, damaged teeth, a broken nose, and two black eyes that swelled almost shut.

The State charged Rimmer with second degree assault, domestic violence; felony harassment, domestic violence; interfering with the reporting of domestic violence; third degree malicious mischief; and violation of a no contact order. In its "to convict" instruction for

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[3] *See* RCW 9.94A.589(1)(a):

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That *if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime*.

(emphasis added).

[4] Although Rimmer has already served his time for these convictions, he could be convicted of a future crime, for which calculation of a new offender score would be necesary. Remanding now to correct Rimmer's current offender score and sentence will provide a proper basis for such potential future calculation. *See* RCW 9.94A.525(5)(a)(i).

interfering with reporting, the trial court included alternative means of committing the crime. Rimmer did not object. The jury found him guilty of the first three counts, but acquitted him of the two other crimes. Based on an offender score of 1, the trial court sentenced him to concurrent standard-range sentences totaling 12 months in jail. Rimmer appeals.

ANALYSIS

Rimmer argues that (1) the trial court improperly included in its "to convict" instruction two uncharged alternative means of committing the crime of interfering with reporting and (2) his trial counsel rendered ineffective assistance in failing to object to this instruction. These arguments fail.

It is fundamental that an accused must be informed of the criminal charge to be met at trial and cannot be tried for a crime not charged. *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). If the information alleges only one statutory means of committing a crime, it is error for the trial court to instruct on uncharged alternatives, regardless of the strength of the evidence. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The State concedes that the trial court erred in instructing on alternative means of committing interference with reporting, but the State argues that the error was harmless. We agree.

The State charged Rimmer in Count III with interfering with the reporting of domestic violence, alleging one means of committing domestic violence, namely, assault. The State charged that he

> committed the crime of *Assault* in the Second Degree/Domestic Violence against Janette Sue Macinata, a family or household member, pursuant to RCW 10.99.020, as charged in Count I and prevented or attempted to prevent the victim of that crime from calling 911 emergency communication system.

Clerk's Papers (CP) at 20 (emphasis added). The trial court, however, instructed the jury on three alternative means of committing domestic violence, namely assault, harassment, or malicious mischief:

> A person commits the crime of interfering with the reporting of domestic violence if the person commits a crime of domestic violence and prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.
>
> *Assault, harassment, and malicious mischief in the third degree* are crimes of domestic violence when committed by one family or household member against another.

CP at 73 (emphasis added). Rimmer's trial counsel neither objected to this instruction nor proposed a narrower instruction. Thus, the jury presumably considered all three crimes as potential bases for the domestic violence component of Count III, interfering with the reporting of domestic violence.

Although Rimmer did not object below, he may raise this alleged error for the first time on appeal because it is of potentially manifest constitutional magnitude. *See State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). An instruction that includes uncharged alternatives may be harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *See State v. Jain*, 151 Wn. App. 117, 121-22, 210 P.3d 1061 (2009), *review denied*, 167 Wn.2d 1017 (2010). Here, the jury found Rimmer guilty of the substantive crime of second degree assault, Count I, stemming from the same incident; therefore, the State proved and the jury also unanimously agreed that the State proved one of the three charged alternatives for committing the interference count, namely the assault alternative. Thus, there is no doubt that the jury would have reached the same result if they had been instructed only

on that alternative. Therefore, Rimmer has failed to show that the alleged error was manifest. Accordingly, his argument fails.

Rimmer's related claim—that his trial attorney was ineffective in failing to object to the above noted instruction—also fails for lack of prejudice. *See State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (a criminal defendant claiming ineffective counsel must prove (1) that the attorney's performance fell below an objective standard of reasonableness considering all of the circumstances, and (2) that the attorney's deficient performance prejudiced him). Therefore, Rimmer has failed to carry his burden to show that his trial counsel rendered ineffective assistance.

We affirm Rimmer's convictions, vacate his sentence, and remand for recalculation of his offender score and resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Johanson, J.