IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD DUANE BUNCH, Appellant.	No. 41585-2-II PART PUBLISHED OPINION

Armstrong, J. – Richard Duane Bunch appeals his first degree robbery conviction, arguing that the trial court erred in instructing the jury on an uncharged alternative means of committing that offense. He also challenges the court's imposition of community custody conditions restricting his contact with minors and its imposition of $6,319.15 in jury costs. Bunch raises an additional issue in a pro se statement of additional grounds (SAG). We affirm Bunch's conviction but remand for the trial court to strike the community custody conditions at issue and to correct the jury costs imposed.

Imposition of Jury Costs

We address Bunch's challenge to the jury costs imposed without first referring to the facts underlying his conviction. Bunch did not challenge these costs below, but unlawful sentences can be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The State contends, however, that court costs are not a final judgment and are not appealable as a matter of right. *See State v. Smits*, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009) (order to pay legal financial obligations as part of judgment and sentence is conditional). In *Smits,*

Division One of this court held that challenges to two sets of legal financial obligations were not ripe for review because the State had not yet sought payment and the defendant was not yet aggrieved. *Smits*, 152 Wn. App. at 525. This was the only issue in *Smits*, and the court held that its commissioner had properly dismissed the appeals. *Smits*, 152 Wn. App. at 525.

By contrast, we addressed the merits of a jury fee where the appeal raised additional issues, even though the State had not yet sought to enforce the defendant's legal financial obligations. *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011). We reasoned that review of the jury fee would facilitate justice and likely conserve future judicial resources. *Hathaway*, 161 Wn. App. at 652.

RCW 10.01.160(1) permits the trial court to impose costs on a convicted defendant. *Hathaway*, 161 Wn. App. at 652. Although such costs cannot include "expenses inherent in providing a constitutionally guaranteed jury trial," a court may impose a jury demand fee of up to $125 for a 6-person jury or $250 for a 12-person jury. RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016(3)(b). Because the jury demand fee of $1,604.53 in *Hathaway* exceeded the statutory maximum fee permissible, we remanded to the trial court to impose fees based on the jury's size consistent with its statutory authority. *Hathaway*, 161 Wn. App. at 653.

We reach the same result here. The jury costs of more than $6,000 clearly exceeded the maximum fee permissible for Bunch's 12-person jury. On remand, the trial court must correct the jury costs imposed.[1]

A majority of the panel having determined that only the foregoing portion of this opinion will

[1] Given this result, we need not reach Bunch's alternative argument that his attorney represented him ineffectively by failing to object to the jury costs imposed.

be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

FACTS

C.E.M., a 20-year-old student at St. Martin's University, was walking on some campus trails at dusk when she encountered Bunch. She had been listening to her iPod but took off her headphones to chat with him. She walked away, but he caught up with her and applied a stun gun to force her to the ground. When she struggled, he hit her and threatened to kill her if she did not stop screaming. Bunch ordered C.E.M. to take off her pants and raped her. Afterward, he took C.E.M.'s pants and said he would leave them up on the trail. Her cell phone was in her pants and her iPod was in the front pouch of her sweatshirt, which she did not remove. C.E.M. did not see Bunch take her phone or iPod but could not find them after he left.

A campus employee was riding her bike nearby at the time of the rape when she heard a woman scream. She rode into the trails until she saw a couple having intercourse. Because she did not know whether the act was consensual, she left and called 911.

That evening, C.E.M.'s father received a phone call at his home in Hawaii from someone who identified himself as "Marcus" and said he had just raped C.E.M. I Report of Proceedings (RP) at 78, 80-81. After hanging up, C.E.M.'s father called her cell phone and "Marcus" answered. I RP at 82.

C.E.M.'s roommate also received a call from C.E.M.'s cell phone that night and the caller said he had raped C.E.M. earlier that day. Another close friend received a call from C.E.M.'s cell phone that night; the caller described having sex with C.E.M. and said he had her iPod.

After his arrest in Auburn on a separate matter, the State identified Bunch as a suspect in the case involving C.E.M. and charged him with first degree rape, first degree robbery with sexual motivation, and first degree kidnapping with sexual motivation. Each count further alleged that Bunch's conduct during the commission of the offense manifested deliberate cruelty to the victim and that his conduct after the commission of the offense manifested an extreme lack of remorse.

After C.E.M. and other witnesses testified to the facts cited above, Detective Jeremy Knight testified that C.E.M.'s iPod and a stun gun were found among Bunch's belongings in a truck his employer had assigned to him. The detective also testified that records documented the calls made from C.E.M.'s cell phone shortly after the rape to her father and friends. Bunch could not be excluded as the contributor of DNA (deoxyribonucleic acid) found on C.E.M.'s sweatshirt.

While in custody in Nevada after C.E.M.'s rape, Bunch called a friend and admitted that when he was in Washington, he met a young woman from Hawaii with whom he had sex on a trail. He said he used his stun gun on her and took her cell phone and iPod.

Bunch rested without presenting evidence and did not raise any exceptions to the proposed instructions. The jury found him guilty as charged. At sentencing, the trial court merged the rape and kidnapping convictions before imposing an exceptional sentence of 720 months. Bunch objected to the community custody conditions limiting his contact with minors but did not object when the trial court imposed jury costs of $6,319.15.

ANALYSIS

I. Instruction on Uncharged Alternative Means

Bunch contends that reversible error occurred when the trial court's "to convict"

instruction on first degree robbery included an uncharged alternative means of committing that offense.

An accused person has a constitutional right to be informed of the charges he is to meet at trial and cannot be tried for a crime not charged. *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009). When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. *State v. Chino*, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). Where the information alleges solely one alternative means of committing a crime, however, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. *Chino*, 117 Wn. App. at 540.

In charging Bunch with first degree robbery, the amended information alleged in part that he "did unlawfully take personal property from C.E.M." Clerk's Papers (CP) at 142. Jury instruction 17, the "to convict" instruction on first degree robbery, listed the first element the jury had to find as follows: "That on or about April 2, 2008, the defendant unlawfully took personal property from the person or in the presence of [C.E.M.]." CP at 220. Bunch asserts that the charging document did not allege that he took property in the presence of C.E.M. and that his robbery conviction must be dismissed because instruction 17 included an uncharged alternative.

Bunch did not object to this instruction at trial, but the State concedes that this issue implicates a manifest error of constitutional magnitude and can be raised for the first time on appeal. RAP 2.5(a)(3). We reject this concession in part.

To determine whether an error is truly of constitutional dimension, we look to the asserted

claim and assess whether, if correct, it implicates a constitutional interest. *State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011) (citing *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). After determining that the alleged error is of constitutional magnitude, we must determine whether the error was manifest, i.e., whether it had practical and identifiable consequences at trial. *Grimes*, 165 Wn. App. at 186-87 (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

Instructing the jury on an uncharged alternative means violates a defendant's constitutional right to notice of the crime charged, so the claimed error is clearly one of constitutional magnitude. *Jain*, 151 Wn. App. at 121; *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). We disagree with the State that the alleged error was manifest, however, because we find that it had no identifiable consequences at Bunch's trial.

Washington's robbery statute sets forth two ways to commit a taking of another's personal property: taking property from a victim's person or taking property in the victim's presence. *State v. O'Donnell*, 142 Wn. App. 314, 323, 174 P.3d 1205 (2007) (citing RCW 9A.56.190); *State v. Chamroeum Nam*, 136 Wn. App. 698, 705, 150 P.3d 617 (2007). The distinction between these methods matters only when one is omitted from the charging document or jury instructions. *See O'Donnell*, 142 Wn. App. at 323-24; *Chamroeum Nam*, 136 Wn. App. at 705-06. Where either method of committing robbery is omitted, the State assumes the burden of proving the elements as charged or instructed. *O'Donnell*, 142 Wn. App. at 324; *Chamroeum Nam*, 136 Wn. App. at 706; *but see State v. Klimes*, 117 Wn. App. 758, 769 n.4, 73 P.3d 416 (2003) (distinction between taking property from person of another or in his presence

"immaterial" in light of conduct legislature sought to deter with robbery statutes); *disapproved on other grounds, State v. Allen*, 127 Wn. App. 125 (2005).

We see no omission here. By alleging that Bunch took personal property from C.E.M., the amended information did not specify one particular method of committing robbery. *See Chino*, 117 Wn. App. at 539 (charging document may charge none of alternatives). Rather, the language charging Bunch with taking property from C.E.M. encompassed both methods of committing robbery. *See State v. Noltie*, 116 Wn.2d 831, 842, 809 P.2d 190 (1991) (information not deficient for failing to specify which means of sexual intercourse State intended to prove in statutory rape trial). Moreover, even if the information did allege that Bunch took property from C.E.M.'s person, as he argues here, it necessarily alleged that he took property in her presence as well. *See State v. Grant*, 77 Wn.2d 47, 50, 459 P.2d 639 (1969) (while personal property may be taken from the victim's presence without being taken from his person, it cannot be taken from his person without being taken in his presence). Because the charging document did not allege solely one statutory alternative means of committing robbery, instruction 17 did not include an uncharged alternative and Bunch's claim of manifest constitutional error fails.

Anticipating this result, Bunch argues in the alternative that his attorney was ineffective in failing to object to instruction 17. For the reasons we cite above, defense counsel was not deficient in this respect. *See State v. McDonald*, 138 Wn.2d 680, 697-98, 981 P.2d 443 (1999) (appellant claiming ineffective assistance of counsel must show that counsel's representation was deficient and that the deficiency was prejudicial). Nor can Bunch show the required prejudice. *See McDonald*, 138 Wn.2d at 698 (prejudice is shown by reasonable probability that, but for

counsel's deficiencies, result of proceeding would have differed). We are convinced that the jury would have convicted Bunch of robbery even if the "to convict" instruction had referred only to the "taking from the person" method of committing the offense. C.E.M. testified that her iPod was in her sweatshirt pocket, that she did not remove her sweatshirt during the rape, and that her iPod was missing afterward. C.E.M.'s iPod was later found with Bunch's belongings. During closing argument, the State argued that when Bunch took her iPod, he committed robbery. There is no reasonable probability that the outcome of the trial would have differed had instruction 17 referred only to taking property from C.E.M.'s person, and this ineffective assistance claim fails.

II. Community Custody Condition Limiting Contact with Minors

Bunch argues that the trial court erred in entering the following community custody conditions as crime-related prohibitions:

> 14. Do not have contact with any children under the age of 18 without the presence of an adult who is knowledgeable of this conviction and who has been approved by the defendant's supervising community corrections officer.
> 15. Do not loiter or frequent places where children congregate; including, but not limited to, shopping malls, schools, playgrounds and video arcades.

CP at 279-80.

As a condition of the sentence, the trial court may impose crime-related prohibitions and prohibit conduct that relates directly to the circumstances of the crime for which the offender has been convicted. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), *abrogated on other grounds*, *State v. Mutch*, 171 Wn.2d 646 (2011). We review sentencing conditions for abuse of discretion, and such conditions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Bunch challenged the community custody conditions limiting his contact with minors below, as he does on appeal, as not reasonably crime related because C.E.M. was not a minor at the time of his offenses. As support, he cites a case where the Supreme Court struck a condition prohibiting contact with minors because the victim was 19 years old. *State v. Riles*, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 238 P.3d 1059 (2010). The court reasoned as follows:

> Although the Court of Appeals gratuitously observed the victim was "in her late teen-age years, not so far removed from minority that there is no possibility that her youthful appearance was not a factor in [the defendant's] choice of her as his victim," we find nothing in the record to support that observation.

Riles, 135 Wn.2d at 349. Therefore, the community custody condition failed because there was nothing in the record to support its relationship to the offense.

Here, the State responded to Bunch's challenge by explaining that he had gone to a college campus, which was open to the public, including minors, and into a trail system where all were welcome. The trial court agreed that while Bunch had no idea how old C.E.M. was, he chose to go to a college campus where there were people under, as well as over, the age of 18; consequently, the restrictions on his contact with minors were crime related.

We disagree. There is nothing in the record to show that Bunch intended to harm children when he attacked C.E.M., and the conditions at issue thus do not relate directly to the circumstances of his offenses. On remand, the trial court shall strike the community custody conditions restricting Bunch's contact with minors from his judgment and sentence.

III. SAG Issue

In his SAG, Bunch states that his attorney failed to provide a complete discovery package,

including photographs and phone records, because he did not want Bunch to raise a pretrial challenge to this evidence. The record does not support his claim, and Bunch does not explain why this evidence was subject to challenge. We decline to consider this claim further.

We affirm the defendant's first degree robbery conviction, but we remand for the trial court to strike the community custody conditions restricting Bunch's contact with minors and to correct the jury costs imposed in his judgment and sentence.

Armstrong, J.

We concur:

Van Deren, J.

Worswick, A.C.J.