



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 52916-5-II

Respondent,

v. ORDER GRANTING MOTION TO JOHN MICHAEL SANCHEZ, PUBLISH AND PUBLISHING
OPINION

Appellant.

opinion. After consideration, the court grants the motion. It is
having determined that this opinion will not be printed in the Washington Appellate Reports but
will be filed for publish record in accordance with
is further

ORDERED that the opinion will be published.

PANEL: Jj. Worswick, Melnick, Sutton.

FOR THE COURT:

Melnick, J. Filed Washington State Court of Appeals Division Two

September 9, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

STATE OF WASHINGTON, No. 52916-5-II

Respondent,

v.

JOHN MICHAEL SANCHEZ, UNPUBLISHED OPINION

Appellant.

MELNICK, J. John Sanchez appeals his conviction for tampering with a witness. He argues that the trial court erred by denying a motion for a new trial after instructing the jury on an uncharged alternative way of tampering with a witness. He argues he was prejudiced. The State concedes the error but contends it was harmless. We agree with Sanchez and reverse.

FACTS

In June 2018, Sanchez, an inmate at the Thurston County Jail, had two unresolved cases. Jail staff believed that Sanchez would attempt to contact Nickels in violation of a no-contact order, s s address.

s address. friend

1 Report of Proceedings (RP) at 104. The

envelope contained a letter and some drawings. Hovda recognized the handwriting on the letter

Filed Washington State Court of Appeals Division Two

July 21, 2020 1 RP at 156. Hovda

knew from listening to approximately 100 hours o named Noah and Taj.

I need to be

released now. You need to help in that by not cooperating or returning calls and not [unreadable].



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

1 RP at 155. 1 Nickels identified the author as Sanchez based on the handwriting, the drawings, the content of the letter, and the way the a 2 RP at 222.

The State charged Sanchez with one count of witness tampering. The information alleged is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to testify falsely or, without right or privilege to

CP at 1.

committing witness tampering to inducing a witness to only alternative charged by the State. 2 RP at 242; CP at 89.

1 I will still have to plea a something, but at least

it And I need to be released now. and again, I can 1 RP at 155. When the S not ten to life- end of the second one. 2 RP at 270. The court drafted its own jury instructions for the parties to review. The court asked for

objections and exceptions. After the parties reviewed the instructions given by the court, Sanchez neither objected nor excepted.

To convict the defendant of the crime of tampering with a witness as charged, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about June 15, 2018, the defendant attempted to induce Rachel Nickels to testify falsely, or without right or privilege to do so, withhold any testimony or absent herself from any official [proceeding]; and (2) That Rachel Nickels was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings; and. (3) That any of these acts occurred in the State of Washington. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 121 (Instr. 10).

Another jury instruction stated:



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

A person commits the crime of tampering with a witness when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding to testify falsely or, without right or privilege to do so, to withhold any testimony or to absent himself or herself from any official proceedings.

CP at 118 (Instr. 7).

At trial, Sanchez primarily argued that he did not write the letter. As a result, witness testimony and closing arguments from both parties focused on that issue, rather than whether the language of the letter amounted to tampering. However, both Sanchez and the State discussed the elements of witness tampering and both mentioned absenting oneself from the proceedings in closing argument. After going through each element of the to convict instruction, the State argued It also argued 2 RP at 298-300.

The jury found Sanchez guilty.

Relying on CrR 7.5(a), Sanchez moved for a new trial based on the jury instruction containing an uncharged alternative of committing witness tampering. The State conceded the error but argued that it was harmless. The court agreed with the State and denied the motion. Sanchez appeals.

ANALYSIS

in granting motions for new trial. The exercise of that discretion will not be disturbed on appeal State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). When grant the motion is reviewed de novo. State v. Mohamed, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016).

Sanchez argues that he was denied due process because the jury instructions included an



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

uncharged alternative of committing witness tampering. The State concedes error but argues it was harmless. Sanchez argues that because the jury could have convicted him on uncharged the error was not harmless.

The State is constitutionally required to inform an accused of the criminal charges he or she will face at trial, and the State cannot try an accused for an uncharged crime. U.S. CONST. amend. VI; CONST. art. I, § 22 (amend. 10); State v. Lindsey, 177 Wn. App. 233, 246-47, 311 P.3d 61 (2013). Instructing the jury on uncharged alternatives is a manifest error affecting a constitutional right that this court will address for the first time on appeal. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5.

e[s] . . . by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives Chino, 117 Wn. App. at 539 (quoting State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996)). But, when the information charges only one of the alternatives, it is error to instruct the jury that it may consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial. State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. Bray, 52 Wn. App. at 34. Bray, 52 Wn. App. at 34. Therefore, an instruction containing an uncharged alternative is error. Bray, 52 Wn. App. at 34.



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. Bray, 52 Wn. App at 34-35.

An instructional error stemming from uncharged alternatives may be harmless when additional instructions potentially cured the error by clearly and specifically defining the charged crime. State v. Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942). An error may also be harmless where no evidence was presented on alternative means. State v. Spiers, 119 Wn. App. 85, 89-90, 79 P.3d 30 (2003). during closing argument. Severns, 13 Wn.2d at 548-49. The error cannot be harmless when the jury possibly convicted the accused on the basis of the uncharged alternative. Chino, 117 Wn.

App. at 540-41.

RCW 9A.72.120(1) provides that:

A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . . to: (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or (b) Absent himself or herself from such proceedings; or (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

Both instruction 7, the definition of tampering with a witness, and instruction 10, the to-convict instruction, listed the uncharged alternative of inducing the witness to absent himself or the court erred by instructing the jury on an alternative not alleged in the information. The instructional error is presumed prejudicial unless it affirmatively appears the error was harmless. Bray, 52 Wn. App at 34-35.

First, it should be noted that the State argued in closing that the let



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

2 RP at 270. In contrast,

evidence; therefore, the jury c letter in this manner, the State injected a fact to support a finding that Sanchez induced the witness

to absent herself from the trial.

There are cases where jury instructions containing an uncharged alternative constituted

harmless error. In those cases, the error was harmless because the jury could not have considered

or convicted under the uncharged alternative. That circumstance is not present here. First, no other instruction cured the error by specifically defining the charged crime or

Severns, 13 Wn.2d at 549. Also,

the evidence supported both the charged and the uncharged alternative. Spiers, 119 Wn. App. at

not showing up when called, or it could mean withholding testimony by attending trial but refusing

to testify. Finally, both the State and Sanchez exacerbated the error by referring to the uncharged

alternative during their respective closing arguments. Severns, 13 Wn.2d at 549. The State told

need help in that b 2 RP at 298-300. It is

so the error was not harmless.

Nevertheless, the State argues that it affirmatively showed that any error was harmless

convicted Sanchez of the uncharged means without also convicting him of the charged means.

However, absenting oneself from trial is not the same as withholding testimony. A juror

to not

attend trial at all, i.e. absent herself. A juror also could have viewed the language of the letter as

a request that she withhold testimony even if she appeared at trial.

The court instructed the jury that it could convict Sanchez if it found that he attempted to



State Of Washington, Respondent V. John Michael Sanchez, Appellant

2020 | Cited 0 times | Court of Appeals of Washington | September 9, 2020

induce Nickels to absent herself. The State accentuated the error by arguing that Sanchez

2 RP at 299. Because Sanchez could have been convicted under the alternative not charged in the information, the State has failed

to show the error was harmless. The trial court erred in denying the motion for a new trial.

We reverse.

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 in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Sutton, A.C.J.

