SUPREME COURT NO. 97150-1
C.O.A. No. 50299-2-II
Cowlitz Co. Cause No. 16-1-00217-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH CHANCE BROOKS,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter. The Respondent respectfully requests this Court deny review of the January 15, 2019, Court of Appeals' opinion in *State of Washington vs. Kenneth Brooks*, Court of Appeals No. 50299-2-II.

III. ISSUE PRESENTED FOR REVIEW

Does the Court of Appeals' decision that the trial court did not abuse its discretion in permitting an amendment to the date range in the information when the date was not a material element of the charge conflict with another decision of the Court of Appeals under RAP 13.4(b)(2) or raise a significant question of constitutional law under RAP 13.4(b)(3)?

IV. STATEMENT OF THE CASE

C.H. was born on November 4, 1998. RP1 at 47.[1] In 2014, C.H. was 15-years-old until her birthday in November, when she turned 16. RP1

[1] The verbatim report of proceedings provided by Brooks contained two volumes. The first volume includes the first day of trial, February 22, 2017. The second volume includes the second day of trial, February 23, 2017. The first volume will be referred to as "RP1," and the second volume will be referred to as "RP2."

at 48. In 2014, C.H. lived with her mother and her sister in an apartment on 42nd Avenue in Longview. RP1 at 49-50. C.H.'s brother was six years older than her. RP1 at 50. Although C.H.'s brother did not live with her, he would come over to the apartment frequently. RP1 at 50.

C.H.'s brother's best friend was Kenneth Brooks. RP1 at 51. Brooks was eight years older than C.H. RP1 at 52. In 2014, when C.H. was 15, Brooks was 23. RP1 at 52. C.H. had known Brooks since she was 9. RP1 at 51. C.H. considered Brooks to be like a brother to her. RP1 at 53.

In January of 2014, Brooks was living in California, but came to visit both C.H.'s family and his own. RP1 at 53. Sometimes Brooks would stay at C.H.'s apartment. RP1 at 53. During this time, Brooks and C.H. would watch Netflix alone together in the living room. RP1 at 54. While watching Netflix with C.H., Brooks would cuddle with her. RP1 at 55.

One evening, Brooks and C.H. watched Netflix while lying on the couch together. RP1 at 55. Both were laying on their sides, with C.H. laying in front of Brooks. RP1 at 55. While they were laying together, Brooks reached into C.H.'s shirt and touched her breast. RP1 at 56. After touching C.H., Brooks began to rub her breast. RP1 at 56. C.H. became frightened and stiffened up. RP1 at 56. Brooks continued to rub C.H.'s breast for about five minutes. RP1 at 56. C.H. did not reciprocate. RP1 at 56. Eventually, Brooks stopped. RP1 at 57.

C.H. was upset. RP1 at 57. Brooks told C.H. it would never happen again, and that he did not want her to tell her mother. RP1 at 57. Two days later, C.H. told her mother what had happened. RP1 at 57. However, C.H.'s mother did not contact the police. RP1 at 57. Brooks returned to California. RP1 at 57.

In the summer of 2014, Brooks returned to visit with his girlfriend from California, and they stayed with C.H.'s family. RP1 at 58. Brooks and his girlfriend slept in C.H.'s room on her bed, and C.H. slept on the couch in the living room. RP1 at 59. Eventually, Brooks' girlfriend left, and Brooks continued to stay at C.H.'s apartment. RP1 at 60. After Brooks' girlfriend left, he began sleeping on the living room couch, and C.H. returned to sleeping in her bed. RP1 at 60.

On the evening of August 16, 2014, C.H, her sister, and Brooks were at home, downstairs. RP1 at 61. C.H.'s mother was upstairs. RP1 at 61. C.H., her sister, and Brooks played Monopoly while drinking beer and vodka. RP1 at 62. After Monopoly, they played another "drinking game" with cards. RP1 at 62. They played games and drank for four to six hours. RP 1 at 63. They continued drinking until after midnight, into the morning of August 17, 2014. RP1 at 63. C.H., who was 5'1½" and weighed around 80 pounds, was intoxicated. RP1 at 64. C.H. remembered sitting in the kitchen, then "everything went black." RP1 at 65.

C.H. woke up gasping and naked in the shower. RP1 at 65. C.H. was in a fetal position in the bathtub with water running on her from the showerhead above. RP1 at 65-66. C.H. was cold and shaking. RP1 at 66. Brooks turned the water off and carried C.H. from the bathtub. RP1 at 66. Brooks placed C.H. on her bed. RP1 at 67. The bedding to C.H.'s bed had been removed, and a sleeping bag was placed on it. RP1 at 67. Brooks told C.H. she had "puked up all over" her bed and herself. RP1 at 67. Brooks took C.H.'s boxer shorts and a tie-dye shirt from her pajama drawer and dressed her in them. RP1 at 67. C.H. had worn these boxers since the second grade. RP1 at 68.

C.H. could not move and was going black. RP1 at 68. Brooks told C.H. he had "fingered" her and that she was "wet" and "moaning loudly." RP1 at 68-69. Brooks removed C.H.'s boxers and shirt. RP1 at 69. Brooks licked C.H.'s vagina. RP1 at 69. Brooks obtained a condom, then inserted his penis into C.H.'s vagina and had sex with her. RP1 at 69. Brooks ejaculated into C.H. RP1 at 70. C.H. fell asleep. RP1 at 70.

C.H. woke and noticed her clothes were gone. RP1 at 70. Brooks told C.H. she had a "tight pussy." RP1 at 70. C.H. fell back to sleep. RP1 at 70. When she woke again Brooks was gone. RP1 at 71. C.H. was still intoxicated and vomited until 2:00 that afternoon. RP1 at 71-72. C.H. told her sister what had happened. RP1 at 72. The police were notified. RP1 at

72. The police came, and C.H. provided them with the boxers, tie-dye shirt, and sleeping bag. RP1 at 72.

C.H.'s brother confronted Brooks on August 17, 2014. RP1 at 102-03. Brooks told C.H.'s brother he had touched C.H. outside of her pants. RP1 at 103. C.H.'s brother then "beat him up." RP1 at 103. On August 17, 2014, Brooks called C.H.'s mother and left a voicemail stating he would tell her what happened, and he would apologize. RP1 at 114-15. Brooks returned to California. RP2 at 74.

The right hem in the crotch region of the boxers was tested at the Washington State Crime Laboratory and found to contain both semen and human amylase—which is usually associated with saliva. RP 2 at 33. In the location where these human fluids were found was a mixture of DNA matching Brooks and C.H. RP2 at 39. Brooks was charged with rape of a child in the third degree for raping C.H. on or about August 17, 2014, and child molestation in the third degree for molesting C.H. at a time on or about or between January 1, 2014 and January 31, 2014. CP at 1. On February 22, 2017, the case proceeded to trial. RP1 at 4.

At trial, after the State rested, Brooks testified. RP2 at 51. Brooks testified that on occasions in 2014, when he would visit from San Francisco, he would stay at C.H.'s apartment on 42nd Avenue. RP2 at 54. Brooks said that he could not say whether he was in Washington in January of 2014, but

knew he was in Washington in May of 2014. RP2 at 54. Brooks testified that while he and C.H. were at her apartment on 42nd Avenue watching a movie, he touched C.H.'s breasts inappropriately with his hand. RP2 at 54, 56. Brooks said this was the first and only time that he touched C.H. inappropriately. RP2 at 57. Brooks believed he touched C.H. in May because he claimed this was when he had sent a text message apologizing to C.H. RP2 at 56-57.

Brooks also testified that he drank with C.H. and her sister on the night of August 16, 2014, after playing board games. RP2 at 58-59. Brooks testified that C.H. was intoxicated. RP2 at 59. Brooks said that C.H. was kind of passing out, so he took her upstairs to her room so she could go to bed. RP2 at 60. Brooks said C.H. became ill in her bed, and because he "didn't want her sleeping in puke," he took her to the bathroom. RP2 at 60. Brooks testified that he carried C.H. to the bathroom, and then removed her clothes and put her in the shower. RP2 at 61. Brooks testified that he removed the bedding from C.H.'s bed, laid a sleeping bag on it, then got C.H. a tie-dye shirt and traditional women's underwear out of her drawer. RP2 at 63-64. Brooks testified that he helped C.H. out of the shower and helped her get dressed. RP2 at 63-64. Brooks said he then took C.H. to her room and laid her down. RP2 at 64. Brooks denied having sex with C.H. RP2 at 68.

Although the boxers were obviously too small for him to wear, Brooks claimed they were his. RP2 at 65, 81-82. Brooks claimed he had gained 60 pounds since August of 2014, and that even at the time the boxers had been tight on him, causing him to have to pull them down to avoid cutting off his circulation. RP2 at 65-66.

After Brooks testified, the defense rested. RP2 at 83. Prior to instructing the jury, the State moved to amend the information, expanding the date range on the child molestation in the third degree charge. RP2 at 84-85. Brooks objected, but provided no basis for his objection. RP2 at 88. The court granted the motion to amend the information. RP2 at 88. The amended information provided a date range of on or about or between January 1, 2014 and May 31, 2014. CP at 8; RP2 at 85.

In closing argument, Brooks' attorney agreed that the State had proved beyond a reasonable doubt that Brooks was guilty of child molestation in the third degree. RP2 at 123-24. Brooks' attorney argued that Brooks had admitted to this crime and apologized for it. RP2 at 123-24. Brooks' attorney contrasted his admission to molesting C.H. with his denial of sexual intercourse to support his argument that the State had not proved the rape beyond a reasonable doubt. RP2 at 132. The jury found Brooks guilty of both rape of a child in the third degree and child molestation in the third degree. RP2 at 144-45.

Brooks appealed arguing that the amendment to the date range caused him to suffer prejudice because it frustrated his "alibi" defense. *See* Opening Br. of Appellant at 9, 11. The Court of Appeals affirmed Brooks' conviction, finding that the trial court did not abuse its discretion in allowing the amendment to the date range.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Brooks' petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Brooks argues that the Court of Appeals decision is in conflict with another decision of the Court of Appeals and involves a significant question of law under the Constitution of the State of Washington or of the United States under RAP 13.4(b)(2)(3). He does not claim any grounds under RAP 13.4(1) or (4).

Brooks acknowledges that CrR 2.1(d) states: "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Pet. for Review at 6 n.2. Despite CrR 2.1(d)'s allowance for an amendment at any time prior to the verdict, and Brooks' failure to provide any claim of prejudice when the State moved to amend, Brooks maintains that the trial court abused its discretion in permitting the amendment because he claims his substantial rights were prejudiced. In his appeal, Brooks argued he suffered prejudice because he claimed the trial court frustrated his alibi defense. However, an alibi requires a defendant to deny he committed the crime. *See State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994) ("An alibi defense denies that the defendant committed the crime."). Brooks did not assert an alibi, because he agreed he had committed the crime. Brooks no longer claims the basis of his prejudice was a frustrated alibi defense and fails to explain in the absence of a frustrated alibi how he suffered any prejudice. Accordingly, his petition does not meet any of the criteria required for review under RAP 13.4(b).

A. BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE AMENDED INFORMATION, THE COURT OF APPEALS' DECISION DOES NOT PRESENT A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The trial court did not abuse its discretion when, after Brooks testified he had molested C.H. in May rather than January, it permitted the information to be amended to include a date range of on or about or between January and May of 2014. "[A]n amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991) (motion to amend permitted after the defendant had testified). Brooks did not specify any prejudice at trial, on appeal claimed he suffered prejudice because the amendment frustrated an "alibi" defense, and now speculates that the potential for the amendment, which he had notice of under CrR 2.1(d) before he decided to testify, may have affected his decision to testify. Because the date range was not material to whether or not Brooks committed the crime, he fails to show the amendment caused him to suffer any prejudice.

"Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance,

and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *State v. DeBolt*, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991); *see also* CrR 2.1(d) ("The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."). "The defendant has the burden of showing prejudice." *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011). If a "defendant [is] misled or surprised by the amendment of the information," he or she is "entitled to move for a continuance to secure time to prepare [his or] her defense." *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). The fact that a defendant chooses not to request a continuance "is persuasive of a lack of surprise and prejudice." *Id.*

In cases alleging child molestation, when the State moves to amend the information to enlarge the date range in which a molestation charge occurs in order to conform to testimony and the defendant fails to claim alibi or demonstrate how he or she is prejudiced, a trial court does not abuse its discretion in permitting the date range enlargement. *State v. Goss*, 189 Wn. App. 571, 574-77, 358 P.3d 436 (2015). With regard to crimes of sexual abuse of children, the precise date is not a material part of a criminal charge because "[c]hildren often cannot remember the exact date of an event, and in the cases of sexual abuse, they may repress memory of that

date." *DeBolt*, 61 Wn. App. at 62. If no alibi is claimed, a change to an information is immaterial when the elements remain the same before and after amendment, and only the date has changed. *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45 (1985).

In *Goss*, the State charged Goss with, among other charges, second degree child molestation, alleging that the molestation occurred between September 25, 2011 and September 24, 2012. *Id.* at 574. "Before the State rested, it moved to amend the charging period in [the molestation count] to conform to testimony regarding the time frame within which the incident occurred." *Id.* at 575. The amendment enlarged the charging period by one year. *Id.* at 576. Goss made an unspecified objection, did not make a specific showing of prejudice, and did not request a continuance. *See id.* at 575. Because Goss did not claim an alibi defense, did not otherwise show how any of his rights were prejudiced, and did not request a continuance, the trial court did not abuse its discretion in permitting the amendment. *See id.* at 576.

Here, at trial Brooks did not raise an alibi defense, did not otherwise show how any of his rights were prejudiced, and did not request a continuance. The Court of Appeals correctly held that the trial court did not abuse its discretion in permitting the amendment. On appeal, Brooks originally alleged that he was prejudiced by the amendment because it

frustrated his alibi defense.[2] *See* Br. of Appellant at 9, 11. Brooks did so, to distinguish his case from Goss. *See* Opening Br. of Appellant at 9. Despite claiming his alibi defense was frustrated in his original appellate brief, Brooks conceded in his reply brief that his defense was not an alibi defense. Reply Br. Of Appellant at 7; *see generally* Mtn. for Reconsideration at 1-10. Now he speculates that he might have decided not to testify had he known the amendment would be granted. Speculation on a potential trial strategy that might have been undertaken does not demonstrate Brooks' substantial rights were prejudiced.

Brooks also fails to otherwise meet his burden of demonstrating prejudice. Brooks contends he "could have argued in closing that yes, he inappropriately touched the victim, but . . . the jury cannot convict him of the crime charged because no crime occurred in January." *Id.* at 6. "Had he known that he was being charged with an incident occurring anywhere between January and May, he might have chosen not to admit it." *Id.* at 7. However, that is simply not a defense to child molestation because the precise date of molestation is not a material element of the crime. *DeBolt*, 61 Wn. App. at 61-62. Brooks fails to show that the date is a material

[2] "Here, Brooks **did** assert an alibi, testifying that he did not believe he was in Washington in January 2014, but that he was here in May[;]" and "[m]ost significantly, Brooks **did** present an alibi and testified that the incident did not occur during the original charging period." Opening Br. of Appellant at 9, 11 (bold in original).

element or has any relevance to an actual recognized defense under Washington law.[3] He does not, for example, show that the statute of limitations had lapsed or claim a true alibi defense—that he did not molest C.H. because he was elsewhere when the crime was committed. Rather, Brooks admitted to molesting the victim as she described but just at a different time than she described—this is not a defense. It does nothing to rebut a material element of the crime charged.

It stands to reason that CrR 2.1(d) allows amendment up to the point of the verdict when there is no substantial prejudice to the defendant to avoid confusion as to a nonmaterial issue. Here, Brooks did not deny molesting C.H., but freely admitted it. Brooks and the C.H. both described the same event, where he molested her by rubbing her breast.[4] The change to the date range on the information did not affect the statute of limitations. Because the date was not material to whether or not Brooks had committed the crime, the amendment was appropriate.

The notion that Brooks does not demonstrate prejudice is bolstered by the fact that his trial attorney did not claim any prejudice nor request a

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[3] Moreover, Brooks concedes the date is not a material element of the charge. *See* Pet. for Review at 9.

[4] The impossibility of committing a single crime on two separate occasions may be simpler to illustrate if the crime at issue was murder. If a defendant were to testify that he murdered the victim at a date different than listed in the information, the date would not be material to the question of whether or not he committed the murder.

continuance. Had the amendment truly prejudiced Brooks' defense strategy, he had the ability "to move for a continuance to secure time to prepare [his or] her defense." *Brown*, 74 Wn.2d at 801. Not only is Brooks' failure to request a continuance "persuasive of a lack of surprise and prejudice," *see id.*, but it makes sense considering the record as a whole. Brooks' testimony at trial was geared toward a strategy of admitting the molestation allegation to gain credibility with the jury in order to fight the rape allegation. *See* RP2 at 54-57. It is reasonable to infer that Brooks' trial counsel did not ask for a continuance because amending the information did not affect Brooks' actual trial strategy—to argue that he was telling the truth that the rape did not occur because he was similarly truthful in admitting that he was guilty of molestation. Consequently, Brooks' failure to articulate prejudice at trial and decision to not ask for a continuance both further demonstrate the lack of prejudice that was obvious to the trial court. Thus, the trial court's decision to allow the State to amend the information did not impact Brooks' strategy, and Brooks' speculative arguments to the contrary do not meet his burden of showing specific prejudice.

B. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISION IN STATE V. DEWEY.

Finally, Brooks argues that *Dewey* provides persuasive authority for his argument that the amendment of the information violated his

constitutional rights. Mtn. for Reconsideration at 8-10. However, *Dewey* is distinguishable, and Brooks' reliance on it is misguided. *Dewey* stands for the principle that after the State and defense rest, if the State amends the information to provide an alternative means of committing a crime, the amendment is per se prejudicial under *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987), and a defendant may have his or her conviction reversed without showing prejudice. Here, the amended date range did not create an alternative means of committing the crime.

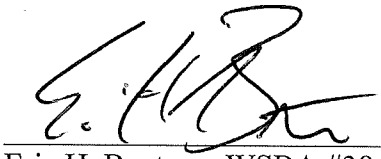
In *Dewey*, Dewey was charged with, among other things, violation of a protection order premised on contacting a protected person. *Dewey*, No. 35515-2-III at *1, *3. Dewey had gone onto property that was protected by a protection order while his estranged wife was not there. *Id.* at *1-2. When Dewey testified, he "acknowledged he sometimes used the [property] as a residence and admitted the property is subject to the protection order." *Id.* at *2. After Dewey rested, "he moved to dismiss the violation of protection order charge," contending that he did not commit the actus reus of the crime because "the . . . information alleged he violated the protection order by contacting Ms. Dewey, and there was no evidence that he contacted her." *Id.* "The State then moved to amend the information to allege that [Dewey] violated the protection order by being at the [property]." *Id.*

The Court of Appeals reversed Dewey's protection order violation conviction, citing precedent in which "this court has reversed late amendments to an alternative means of committing the charged crime." *Id.* The Court of Appeals' decision was limited to the context of amending an information to assert an alternative means of committing a crime. *Id.* at *3. Here, unlike *Dewey*, the State amended the information to modify the dates in the information, which is not a material element of child molestation—the Court of Appeals has already ruled that the date "is usually not a material element of the crime," and therefore the per se rule prejudice rule from *Pelkey* is inapplicable. *See DeBolt*, 61 Wn. App. at 61-62 ("explaining that *Pelkey* is not applicable to all amendments to informations and did not apply to a change in the date range of the information because it was not a material part of the criminal charge"). *Dewey* is also distinguishable in that Dewey actively disputed a material element of the crime—he disputed that he committed the actus reus of contacting the person protected by a protection order. *See Dewey*, 2019 WL 276046 at *2. Differently, here, Brooks openly admitted to molesting the victim, did not dispute any material element, and even apologized for his actions. RP2 at 54, 56, 57. Although Brooks testified that he thought he molested the victim in May rather than January this technicality is simply not a recognized defense under Washington law, and *Dewey* does not provide authority to the contrary.

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 30th day of May, 2019.



Eric H. Bentson, WSBA #38471
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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 30th, 2019.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

May 30, 2019 - 12:20 PM

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