

63273-6

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No. 63273-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TEODULO RODRIGUEZ,

Appellant.

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller

BRIEF OF APPELLANT

MINDY M. ATER
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WASHINGTON APPELLATE PROJECT
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A. SUMMARY OF ARGUMENT

An amendment to the Information's date of the charged offense after the State rests is permissible only if it does not cause substantial prejudice to the defendant. In this case, the trial court erred when it allowed the State to amend the date range for the felony stalking charge after both the State and defense rested, because it prejudiced Teodulo Rodriguez's ability to cross-examine witnesses and present a defense tailored to the relevant charging period, and allowed the jury to convict him of acts that occurred outside the original charging period. Therefore, this Court should reverse Mr. Rodriguez's conviction for felony stalking and remand his case for a new trial.

B. ASSIGNMENT OF ERROR

The trial court erred by permitting the State to amend the Information, causing substantial prejudice to Mr. Rodriguez.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under Article I, sections 3 and 22 of the Washington Constitution¹ and the Fifth, Sixth and Fourteenth Amendments² of

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the federal constitution, a criminal defendant has the right to be apprised with reasonable certainty of the nature of the accusations against him or her. An amendment to the Information regarding the date of the charged offense is not permissible if it causes substantial prejudice to the defense. Where the trial court permitted the State to amend the Information after the State and the defense had presented their cases in chief, to include dates not included in the original Information, thereby allowing the jury to convict Mr. Rodriguez for acts outside the original charging period, and depriving the defense of the opportunity to cross-examine witnesses regarding the amended charging period dates, did the amendment prejudice Mr. Rodriguez's substantial rights?

D. STATEMENT OF THE CASE

1. Trial Testimony. On December 14, 2007, the court entered an order prohibiting him from contacting his ex-girlfriend, Maria del Rosario Beltran. 3/12/09RP 293-94; Ex. 3, 20.

Ms. Beltran's son, A.B., testified that Mr. Rodriguez called his and Ms. Beltran's house on May 29, 2008, and asked to speak

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with Ms. Beltran. 3/16/09RP 361. A.B. testified that Mr. Rodriguez told him that he would find Ms. Beltran at work. 3/16/09RP 361-62. A.B. added that Mr. Rodriguez had called twice a day for a couple of days before May 29, 2008. RP 358. A.B. stated that during at least one call, Mr. Rodriguez told him that he would come inside the house to get Ms. Beltran if she did not come meet him at the park near their house. 3/16/09RP 358.

An employee at Ms. Beltran's place of employment testified that in May and June of 2008, he saw Mr. Rodriguez three times. 3/12/09RP 196-97, 212, 215, 218-20. The first time, Mr. Rodriguez asked the employee when Ms. Beltran would be done with work for the day. 3/12/09RP 196-97. The next day, he saw Mr. Rodriguez inside the building making hand signals toward Ms. Beltran to "come here." 3/12/09RP 212. The employee testified that Mr. Rodriguez left when asked. 3/12/09RP 215. The third time, he saw Mr. Rodriguez pull into the parking lot, get out of his car, and then leave. 3/12/09RP 218-20.

Ms. Beltran testified that on June 2, 2008, when she was leaving her house to go to work, Mr. Rodriguez approached her and attempted to force her into his car by pulling and shoving her. 3/16/09RP 313-14.

2. Superior Court Proceedings. On June 5, 2008, the State charged Mr. Rodriguez with felony stalking “during a period of time intervening between May 29, 2008 through June 2, 2008,” and domestic violence felony violation of a court order based on the alleged assault of June 2, 2008. CP 1-2 (Information). On March 11, 2009, one day before trial, the State amended the Information to include two bases for elevating the stalking to a felony: Mr. Rodriguez’s previous conviction for a crime of harassment against Ms. Beltran, and that the stalking violated a court order protecting Ms. Beltran. CP 20-21 (Amended Information).

At trial, after the State and the defense rested, the State moved to amend the Information once again, to expand the dates of the alleged stalking to “a period of time intervening between May 27, 2008 through June 2, 2008,” in order to encompass the additional phone calls described by A.B. 3/16/09RP 389-93; SuppCP Sub 113. The defense objected to the amendment, explaining,

I’m unable to call these witnesses and specify more clearly the date frames that they were talking about. My entire cross-examination defense was based on the dates that have been previously charged in the Amended Information.

3/16/09RP 389. Defense counsel added,

I'm prejudiced because my cross-examination would have been slightly different had I known that that was the time frame.

3/16/09RP 392. The court granted the motion, reasoning,

[T]he Court finds that the defense was aware that calls had been made, and the Court doesn't believe that – at least there hasn't been a showing made that the defense would have been different had the defense been aware prior to this time that there were some allegations of a few calls before then. The witness did testify to that. Counsel had an opportunity to cross-examine him.

3/16/09RP 391.

After trial, the jury convicted Mr. Rodriguez as charged. CP

51-52. The trial court sentenced Mr. Rodriguez to 17 months in

prison. CP 55-63. Mr. Rodriguez appeals. CP 64-72.

E. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE STATE TO AMEND THE INFORMATION AFTER THE STATE AND DEFENSE RESTED

1. The State may only amend the Information if the defendant's rights are not substantially prejudiced. Defendants have the constitutional right under Article I, sections 3 and 22 of the

Washington Constitution³ and the Fifth, Sixth and Fourteenth Amendments⁴ of the federal constitution to be appraised with reasonable certainty of the nature of the accusations against him or her. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). “Thus, an accused must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged.” Id. (citing Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992)).

Pursuant to CrR 2.1(d), a trial court may amend the Information “at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” In State v. Pelkey, 109 Wn.2d 848, 491, 745 P.2d 854 (1987), the Washington Supreme Court held that an Information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense. See also State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993). Any other

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amendment is deemed to be a violation of the defendant's Article I, section 22 right to demand the nature and cause of the accusation against him or her. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing Vangerpen, 125 Wn.2d at 789; Pelkey, 109 Wn.2d at 491)).⁵

2. It was error to permit the late amendment in this case because it prejudiced Mr. Rodriguez's ability to cross-examine witnesses and present a defense tailored to the relevant charging period, and allowed the jury to convict him based on acts not included within the original charging period. An amendment to the date of the charged offense in the Information after the State rests is permissible only if it is a matter of form rather than substance, and, therefore, does not cause substantial prejudice to the defendant. State v. Downing, 122 Wn. App. 185, 194, 93 P.3d 900 (2004) (citing State v. DeBolt, 61 Wn.App. 58, 61, 808 P.2d 794 (1991)).

Courts recognize prejudice where the amendment compromised an alibi defense. Id. Similarly, an amendment made at the end of the State's case prejudices the defendant if it prevents

⁵ A trial court's decision to allow amendment is reviewed for abuse of discretion. State v. Guttierrez, 92 Wn.App. 343, 346, 961 P.2d 974 (1998) (citing State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

him or her from presenting an effective defense. State v. Spangler, 38 Kan.App.2d 817, 828, 173 P.3d 656 (2007). In Spangler, after the State rested, the trial court allowed an amendment expanding the charging period to include several additional uncharged incidents of methamphetamine manufacturing. Id. The Kansas Court of Appeals determined that the amendment prejudiced the defendant's substantial rights because it forced the defendant to change her defense mid-trial, which had previously focused on the State's inability to prove the acts during the original charging period. Id. The defendant's ability to present a defense was compromised because she had already cross-examined all of the State's witnesses, and was stuck with the prior strategy. Id.

Courts in other jurisdictions have also found that an amendment to the date of the charged offense prejudices the defense where the amended date range encompasses additional acts not contained within the original charging period. People v. Dominguez, 166 Cal.App.4th 858, 866-70, 83 Cal.Rptr.3d 284 (2008) (amendment after close of evidence expanding charging period to include additional incident of theft violated due process, and was not harmless error because jury could have convicted defendant for the uncharged theft); People v. Kellin, 209

Cal.App.2d 574, 25 Cal.Rptr. 925 (1962) (amendment expanding charging period to include additional thefts not alleged in preliminary hearings prejudiced defendant because it allowed jury to convict for uncharged acts); State v. Grothman, 13 N.J. 90, 97-98, 98 A.2d 291 (N.J. 1953) (amendment expanding charging period to include offenses not considered by grand jury prejudiced the defendant by allowing jury to convict based on uncharged acts).

In contrast, where the amendment to the charging period does not affect the defense, courts permit the amendment. In DeBolt, after the State rested its case, it moved to amend the Information from "March 1, 1988 through March 30, 1988," to "December 26, 1987 to April 13, 1988." DeBolt, 122 Wn.App. at 61. It was undisputed that the incident occurred on March 2, 1988. Id. The trial court allowed the amendment and granted the defense a 2-day continuance. Id. The Court of Appeals held that the amendment of the date was a matter of form rather than substance, and that the defendant was not prejudiced because the date of the incident was included within the original and amended charging periods. Id. at 61-63 (citing State v. Allyn, 40 Wn.App. 27, 35, 696 P.2d 45, rev. denied, 103 Wn.2d 1039 (1985) (holding that amendment of date did not prejudice defendant because testimony

during the evidentiary hearing prior to the amendment clearly showed that the date in question was the date in the amended Information)).

Similarly, in Downing, the Court found that the defendant was not prejudiced by the amendment of the date mid-trial because “everyone knew the date in question, and Downing does not allege on appeal that he was prejudiced by the amendment.” Downing, 122 Wn.App. at 194.

In this case, the amendment of the date of the stalking charge, after both the State and defense rested their cases, substantially prejudiced Mr. Rodriguez because it deprived him of the opportunity to cross-examine the witnesses regarding the new dates in the amended Information. 3/16/09RP 389-92. Moreover, Mr. Rodriguez was not given a continuance, as in DeBolt, to modify his defense to address the allegations on the new dates. Mr. Rodriguez’s defense on the stalking charge was highly focused on the witnesses’ inability to identify specific dates of the alleged acts and to place them within the original charging period. 3/17/09RP 434-36, 447. Because his defense counsel was not given more time to develop a different theory or argument, the closing argument made little sense in the context of the amended charging

period. Therefore, the late amendment of the date on the Information compromised Mr. Rodriguez's defense in much the same way it would compromise an alibi defense.

Further, the amendment in this case is not one of form rather than substance, as those in DeBolt, Allyn, and Downing, because the amendment here added two days worth of additional acts (phone calls described in A.B.'s testimony) that the jury could consider to be part of the stalking charge. In contrast, the amendments in DeBolt, Allyn, and Downing were a matter of form because there was no question about the date of the alleged acts in those cases. DeBolt, 122 Wn.App. at 61; Allyn, 40 Wn.App. at 35; Downing, 122 Wn.App. at 194. Because the amended charging period in this case encompassed additional acts, which were not included within the original charging period, the amendment allowed the jury to convict Mr. Rodriguez for uncharged acts.

3. This Court should reverse and remand for a new trial. Because Mr. Rodriguez's right to present a defense, and his right to be informed with reasonable certainty of the accusations against him, were compromised by the late amendment, the amendment caused him substantial prejudice. Therefore, it was error for the trial court to permit the amendment to the Information.

This Court should reverse Mr. Rodriguez's conviction for felony stalking and remand his case for a new trial.

F. CONCLUSION

For the above reasons, Mr. Rodriguez respectfully requests that this Court reverse his conviction for felony stalking.

DATED this 6th day of October 2009.

Respectfully submitted,

Mindy M. Ater (28724) for
MINDY M. ATER (WSBA 40755)
Washington Appellate Project (91052)
Attorney for Appellant

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)	NO. 63273-6-I
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2009.

X _____ 

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A. SUMMARY OF ARGUMENT

An amendment to the Information's date of the charged offense after the State rests is permissible only if it does not cause substantial prejudice to the defendant. In this case, the trial court erred when it allowed the State to amend the date range for the felony stalking charge after both the State and defense rested, because it prejudiced Teodulo Rodriguez's ability to cross-examine witnesses and present a defense tailored to the relevant charging period, and allowed the jury to convict him of acts that occurred outside the original charging period. Therefore, this Court should reverse Mr. Rodriguez's conviction for felony stalking and remand his case for a new trial.

B. ASSIGNMENT OF ERROR

The trial court erred by permitting the State to amend the Information, causing substantial prejudice to Mr. Rodriguez.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under Article I, sections 3 and 22 of the Washington Constitution¹ and the Fifth, Sixth and Fourteenth Amendments² of

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D. STATEMENT OF THE CASE

1. Trial Testimony. On December 14, 2007, the court entered an order prohibiting him from contacting his ex-girlfriend, Maria del Rosario Beltran. 3/12/09RP 293-94; Ex. 3, 20.

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amendment is deemed to be a violation of the defendant's Article I, section 22 right to demand the nature and cause of the accusation against him or her. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing Vangerpen, 125 Wn.2d at 789; Pelkey, 109 Wn.2d at 491)).⁵

2. It was error to permit the late amendment in this case because it prejudiced Mr. Rodriguez's ability to cross-examine witnesses and present a defense tailored to the relevant charging period, and allowed the jury to convict him based on acts not included within the original charging period. An amendment to the date of the charged offense in the Information after the State rests is permissible only if it is a matter of form rather than substance, and, therefore, does not cause substantial prejudice to the defendant. State v. Downing, 122 Wn. App. 185, 194, 93 P.3d 900 (2004) (citing State v. DeBolt, 61 Wn.App. 58, 61, 808 P.2d 794 (1991)).

Courts recognize prejudice where the amendment compromised an alibi defense. Id. Similarly, an amendment made at the end of the State's case prejudices the defendant if it prevents

⁵ A trial court's decision to allow amendment is reviewed for abuse of discretion. State v. Gutierrez, 92 Wn.App. 343, 346, 961 P.2d 974 (1998) (citing State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

him or her from presenting an effective defense. State v. Spangler, 38 Kan.App.2d 817, 828, 173 P.3d 656 (2007). In Spangler, after the State rested, the trial court allowed an amendment expanding the charging period to include several additional uncharged incidents of methamphetamine manufacturing. Id. The Kansas Court of Appeals determined that the amendment prejudiced the defendant's substantial rights because it forced the defendant to change her defense mid-trial, which had previously focused on the State's inability to prove the acts during the original charging period. Id. The defendant's ability to present a defense was compromised because she had already cross-examined all of the State's witnesses, and was stuck with the prior strategy. Id.

Courts in other jurisdictions have also found that an amendment to the date of the charged offense prejudices the defense where the amended date range encompasses additional acts not contained within the original charging period. People v. Dominguez, 166 Cal.App.4th 858, 866-70, 83 Cal.Rptr.3d 284 (2008) (amendment after close of evidence expanding charging period to include additional incident of theft violated due process, and was not harmless error because jury could have convicted defendant for the uncharged theft); People v. Kellin, 209

Cal.App.2d 574, 25 Cal.Rptr. 925 (1962) (amendment expanding charging period to include additional thefts not alleged in preliminary hearings prejudiced defendant because it allowed jury to convict for uncharged acts); State v. Grothman, 13 N.J. 90, 97-98, 98 A.2d 291 (N.J. 1953) (amendment expanding charging period to include offenses not considered by grand jury prejudiced the defendant by allowing jury to convict based on uncharged acts).

In contrast, where the amendment to the charging period does not affect the defense, courts permit the amendment. In DeBolt, after the State rested its case, it moved to amend the Information from "March 1, 1988 through March 30, 1988," to "December 26, 1987 to April 13, 1988." DeBolt, 122 Wn.App. at 61. It was undisputed that the incident occurred on March 2, 1988. Id. The trial court allowed the amendment and granted the defense a 2-day continuance. Id. The Court of Appeals held that the amendment of the date was a matter of form rather than substance, and that the defendant was not prejudiced because the date of the incident was included within the original and amended charging periods. Id. at 61-63 (citing State v. Allyn, 40 Wn.App. 27, 35, 696 P.2d 45, rev. denied, 103 Wn.2d 1039 (1985) (holding that amendment of date did not prejudice defendant because testimony

during the evidentiary hearing prior to the amendment clearly showed that the date in question was the date in the amended Information)).

Similarly, in Downing, the Court found that the defendant was not prejudiced by the amendment of the date mid-trial because “everyone knew the date in question, and Downing does not allege on appeal that he was prejudiced by the amendment.” Downing, 122 Wn.App. at 194.

In this case, the amendment of the date of the stalking charge, after both the State and defense rested their cases, substantially prejudiced Mr. Rodriguez because it deprived him of the opportunity to cross-examine the witnesses regarding the new dates in the amended Information. 3/16/09RP 389-92. Moreover, Mr. Rodriguez was not given a continuance, as in DeBolt, to modify his defense to address the allegations on the new dates. Mr. Rodriguez’s defense on the stalking charge was highly focused on the witnesses’ inability to identify specific dates of the alleged acts and to place them within the original charging period. 3/17/09RP 434-36, 447. Because his defense counsel was not given more time to develop a different theory or argument, the closing argument made little sense in the context of the amended charging

period. Therefore, the late amendment of the date on the Information compromised Mr. Rodriguez's defense in much the same way it would compromise an alibi defense.

Further, the amendment in this case is not one of form rather than substance, as those in DeBolt, Allyn, and Downing, because the amendment here added two days worth of additional acts (phone calls described in A.B.'s testimony) that the jury could consider to be part of the stalking charge. In contrast, the amendments in DeBolt, Allyn, and Downing were a matter of form because there was no question about the date of the alleged acts in those cases. DeBolt, 122 Wn.App. at 61; Allyn, 40 Wn.App. at 35; Downing, 122 Wn.App. at 194. Because the amended charging period in this case encompassed additional acts, which were not included within the original charging period, the amendment allowed the jury to convict Mr. Rodriguez for uncharged acts.

3. This Court should reverse and remand for a new trial. Because Mr. Rodriguez's right to present a defense, and his right to be informed with reasonable certainty of the accusations against him, were compromised by the late amendment, the amendment caused him substantial prejudice. Therefore, it was error for the trial court to permit the amendment to the Information.

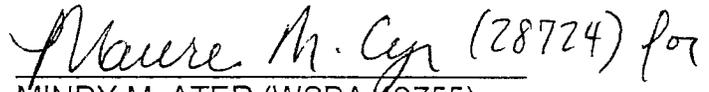
This Court should reverse Mr. Rodriguez's conviction for felony stalking and remand his case for a new trial.

F. CONCLUSION

For the above reasons, Mr. Rodriguez respectfully requests that this Court reverse his conviction for felony stalking.

DATED this 6th day of October 2009.

Respectfully submitted,


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