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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37277-1-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

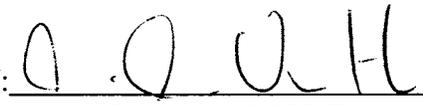
CORRINA LYNCH,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

Before Honorable F. Mark McCauley, Judge

RESPONDENT'S BRIEF

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 
MEGAN M. VALENTINE
Deputy Prosecuting Attorney

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951
WSBA #35570

TABLE

Table of Contents

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

RESPONDENT’S COUNTER STATEMENT OF THE CASE 3

ARGUMENT 8

 1. MANDATORY JOINDER DOES NOT APPLY BECAUSE
 THE STATE HAS NOT SOUGHT MORE THAN ONE
 CONVICTION OF LYNCH FOR THE SAME CRIMINAL
 CONDUCT 8

 2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
 BY ALLOWING THE STATE TO RE-OPEN ITS CASE AND
 FILE AND AMENDED INFORMATION 13

 a. The Information contained the essential elements and the
 trial court did not abuse its discretion by allowing the
 amended information because the defendant suffered no
 prejudice. 14

 b. Even if the information did lack an essential element,
 the trial court did not abuse its discretion when it
 allowed the State to re-open its case and file an
 amended information because the defendant waived
 her right when she chose not to move for dismissal 18

 3. LYNCH’S ATTORNEY’S PERFORMANCE DID NOT
 FALL BELOW THE OBJECTIVE STANDARD OF
 REASONABLENESS AND WAS NOT INEFFECTIVE ... 25

CONCLUSION 28

TABLE OF AUTHORITIES

Table of Cases

<u>Strickland v. Washington</u> , 466, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	25, 27
<u>State v. Quismundo</u> , 192 P.3d 342 (Sept. 11, 2008)	19-20, 23-24
<u>State v. Ward</u> , 148 Wash.2d 803, 811, 64 P.3d 640 (2003)	14
<u>State v. Borrero</u> , 147 Wash.2d 353, 58 P.3d 245 (2002)	16
<u>State v. Taylor</u> , 140 Wash.2d 229, 996 P.3d 571 (2000)	16
<u>State v. Pelkey</u> , 109 Wash.2d 484, 745 P.2d 854 (1989)	17, 24
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.3d 1239 (1997), cert. Denied 523 U.S. 1008 (1998)	25
<u>In the Matter of the Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998)	25
<u>State v. Dallas</u> , 126 Wash.2d 324, 892 P.2d 1082 (1995)	8-9
<u>State v. Leach</u> , 113 Wash.2d 679, 782 P.2d 552 (1989)	14, 16
<u>State v. Vangerpen</u> , 125 Wash.2d 782, 888 P.2d 1177 (1995) 13, 17-19, 24	
<u>State v. Kjorsvik</u> , 117 Wash.2d 93, 105-06, 812 P.2d 86 (1991) . . .	13, 15
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	25

STATUTES

U.S.C.A. Const. amend. VI 13

RCW 46.61.522 10, 14-15

RCW 46.61.502 10

RCW 9A.01.110 15

COURT RULES

CrR 4.3.1 8

CrR 2.1 11, 17

OTHER

Clerk's Papers 1-2 9-10

Clerk's Papers 52 10

A. INTRODUCTION

Mandatory joinder does not apply and therefore dismissal with prejudice is not the remedy. Mandatory joinder does not apply because the State has not and is not seeking more than one conviction of the defendant for the same criminal conduct. The State's information alleged vehicular assault and that is the crime of which the defendant was convicted.

Even if the information did not allege vehicular assault, the State never sought a conviction for more than one crime for this criminal conduct because the original information was defective. The information was defective because it lacked an essential element. Without the essential element, the information was facially ambiguous and charged neither vehicular assault nor driving under the influence.

If the information was defective, the defendant made a knowing, intelligent and voluntary waiver when she chose not to move for dismissal. Because there was a valid waiver, the trial court did not abuse its discretion by allowing the State to re-open its case and file and amended information including the missing term "substantial". If the trial court did abuse its discretion or the defendant did not make a valid waiver, the remedy is dismissal without prejudice to the state to re-file charges of

vehicular assault.

Lastly, Lynch's attorney, Mr. Parker's representation was not ineffective as his pointing out the error in the information and decision not to make a motion to dismiss while denying any waiver of rights created an issue for appeal thus providing his client the best opportunity to have her case dismissed given the strength of the State's evidence

B. ASSIGNMENTS OF ERROR

1. Does mandatory joinder apply where the original information for vehicular assault did not include the term substantial and an amended information was filed during the trial?
2. Did the trial court abuse its discretion by allowing the state to re-open its case and amend the information during trial?
3. Did Lynch's attorney's performance fall below the objective standard of reasonableness?

C. RESPONDENT'S COUNTER STATEMENT OF THE CASE

1. Factual Background

Hoquiam Police were called to a motor vehicle accident in the parking lot at 419 Queen in Hoquiam, Grays Harbor County. Upon arrival, Officer Mitchell observed a black Chevrolet Monte Carlo had struck a parked red Ford Ranger pickup truck in the parking lot. Mr. Ines Ontiveros was pinned between the two vehicles by his leg.¹ Investigation revealed Ontiveros and two acquaintances, Pedro Preciado and Roberto Ontiveros, had just come back from the store and parked their vehicles in west end of the parking lot. Ines Ontiveros and Pedro Preciado were in the van and Roberto Ontiveros was driving a red pickup truck. As Pedro Preciado was walking across the parking lot, he heard the black Monte Carlo rev its engine and yelled to Ines Ontiveros and Roberto Ontiveros. Pedro Preciado ran and Ines Ontiveros was unable to get out of the way of the Monte Carlo.² The driver of the vehicle was Corrina Lynch [Lynch], whose front brakes on her Monte Carlo locked approximately 50 feet prior to Ines Ontiveros,. The vehicle slid across the parking lot pinning Ines

¹ RP 20.

² RP 86-89.

Ontiveros between the Monte Carlo and the red pickup truck by his leg.

Lynch was in the parking lot reaching into the black Monte Carlo when police arrived and was positively identified as the driver of the vehicle.³ Officer Mitchell contacted Lynch who had a strong odor of intoxicants coming from her breath, her eyes were watery and bloodshot, and her speech was extremely slurred and repetitive. Officer Salstrom had the defendant attempt to perform voluntary field sobriety tests, but he was concerned for her safety because, as she was trying, she almost fell down.⁴

Officer Mitchell searched the black Monte Carlo incident to the defendant's arrest and located a black and silver water jug in the front of the vehicle containing a substance that appeared to be beer.⁵ The defendant was placed under arrest. Her blood was drawn and it came back with a result of .31.⁶

Corrina Lynch attempted to perform voluntary field sobriety tests at the Hoquiam Police Station after the blood draw. She was unable to

³ RP 23.

⁴ RP 67-68.

⁵ RP 27.

⁶ RP. 183.

complete the walk and turn and one-leg stand and the HGN revealed both vertical and horizontal nystagmus.⁷

Corrina Lynch told officers she had been driving the vehicle. She said she had left the 101 Bar and Grill a short time earlier and she had come into the parking lot and struck Ines Ontiveros, but she did not know how.⁸ Mechanical inspection of the vehicle revealed that the rear brakes were not functioning, but the front brakes were.⁹

Ines Ontiveros was transported to Grays Harbor Hospital. Multiple fractures were visible in his leg. The bone was sticking out of the skin and stabilization was attempted at Grays Harbor Hospital and Ines Ontiveros¹⁰ was then transferred to Harborview Hospital where he stayed for 17 days. At the trial Ontiveros testified he underwent numerous surgeries including a skin graft and was still awaiting healing of the soft tissue before he would be able to have surgery to replace a portion of bone in his leg and

⁷ RP 42-45.

⁸ RP 46-47.

⁹ RP 148-50.

¹⁰ RP 74.

attempt to repair his tendon so that he may put weight on his leg.¹¹

According to Dr. Hansen of the Grays Harbor Hospital, Ines Ontiveros may be able to walk again someday with bracing.¹²

2. Procedural Background

An information was filed charging Lynch with Vehicular Assault as follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of VEHICULAR ASSAULT, committed as follows:

That the said defendant, Corrina A. Lynch, in Grays Harbor County, Washington, on or about May 25, 2007, being the operator of a motor vehicle, did operate said vehicle while under the influence of or affected by intoxicating liquor and did cause bodily harm to Ines L. Ontiveros;

CONTRARY TO RCW 46.61.522 and against the peace and dignity of the State of Washington.

A jury trial was held on October 23 - 24, 2007. During the jury trial, immediately after the State rested its case, Lynch's counsel filed a brief entitled "Defendant's Memorandum of Law in Support of Exception

¹¹ RP 102-106.

¹² RP 77.

to Jury Instruction”. The memorandum argued that the information did not charge Vehicular Assault and at most charged the defendant with DUI.(Driving Under the Influence).

The Trial Court determined the information lacked an essential element and provided Lynch with the opportunity to move to dismiss the case without prejudice. Lynch’s counsel told they court they did not want to make any new motions (other than the motion to proceed on the Information the trial court had found to be defective). The trial court granted the State’s motion to re-open its case and granted a motion by the State to amend the information. The amended information read as follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Amended Information do accuse the defendant of the crime of VEHICULAR ASSAULT, committed as follows:

That the said defendant, Corrina A. Lynch, in Grays Harbor County, Washington, on or about May 25, 2007, being the operator of a motor vehicle, did operate said vehicle while under the influence of or affected by intoxicating liquor and did cause substantial bodily harm to Ines L. Ontiveros;

CONTRARY TO RCW 46.61.522 and against the peace and dignity of the State of Washington.

The jury found Lynch guilty of Vehicular Assault and found the special

allegation that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime of vehicular assault.¹³

C. ARGUMENT

1. MANDATORY JOINDER DOES NOT APPLY BECAUSE THE STATE HAS NOT SOUGHT MORE THAN ONE CONVICTION OF LYNCH FOR THE SAME CRIMINAL CONDUCT.

Mandatory joinder prohibits the State from pursuing a second conviction of the defendant for an offense which was either intentionally or unintentionally not charged in a previous prosecution arising out of a single criminal incident or episode.¹⁴ Lynch was never charged with more than one offense and the State is not and has not at any time pursued more than one conviction for this criminal incident so mandatory joinder does not apply.

The Court in *Dallas* outlined four procedural contexts in which problems with informations might cause the State to seek an amendment:

(1) failure to state any crime at all because an essential

¹³ RP p. 223.

¹⁴ CrR 4.3.1(b).

element is omitted, (2) naming a higher crime but omitting an essential element so that only the lesser included is sufficiently charged, (3) charging the wrong crime to conform to the evidence, and (4) charging the wrong alternative means of committing a crime, given the evidence.¹⁵

The present case falls under either scenario (1) or (2), not (3) or (4).

Because mandatory joinder only applies to scenarios (3) and (4), it does not apply in this case.¹⁶

Count One of the Information, the single and only count of the Information, charged Corrina Lynch with Vehicular Assault. The State did not amend the information prior to trial and the language of the Information was not challenged or changed prior to trial. The Information read as follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of VEHICULAR ASSAULT, committed as follows:

That the said defendant, Corrina A. Lynch, in Grays Harbor County, Washington, on or about May 25, 2007, being the operator of a motor vehicle, did operate said vehicle while under the influence of or affected by intoxicating liquor and did cause bodily

¹⁵ *State v. Dallas*, 126 Wash.2d 324, 328 n.1, 892 P.2d 1082 (1995).

¹⁶ *Dallas*, 126 Wash.2d at 328 n.1.

harm to Ines L. Ontiveros;

CONTRARY TO RCW 46.61.522 and against the peace and dignity of the State of Washington.¹⁷

During the jury trial, immediately after the State rested its case, Lynch's counsel filed a brief entitled "Defendant's Memorandum of Law in Support of Exception to Jury Instruction". The memorandum argued that the information did not charge Vehicular Assault and at most charged the defendant with DUI.(Driving Under the Influence).¹⁸

The Trial Court determined the information lacked an essential element and provided Lynch with the opportunity to move to dismiss the case without prejudice.¹⁹ Lynch's counsel told they court they did not want to make any new motions (other than the motion to proceed on the Information the trial court had found to be defective).²⁰ The trial court granted the State's motion to re-open its case and granted a motion by the State to amend the information.²¹ The amended information read as

¹⁷ CP 52.

¹⁸ RP 187-89.

¹⁹ RP 195-96.

²⁰ RP 199-200.

²¹ RP 200.

follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Amended Information do accuse the defendant of the crime of VEHICULAR ASSAULT, committed as follows:

That the said defendant, Corrina A. Lynch, in Grays Harbor County, Washington, on or about May 25, 2007, being the operator of a motor vehicle, did operate said vehicle while under the influence of or affected by intoxicating liquor and did cause substantial bodily harm to Ines L. Ontiveros;

CONTRARY TO RCW 46.61.522 and against the peace and dignity of the State of Washington.²²

If the original information contained all the essential elements, the amendment was unnecessary but caused no prejudice because it was to the same crime originally charged.²³ Mandatory joinder applies to two or more offenses, not a single offense.²⁴

If the original information did not charge a crime because it was missing an essential element, it charged no crime at all.²⁵ If the

²² CP 1-2.

²³ CrR 2.1(d).

²⁴ CrR 4.3.1.

²⁵ *State v. Sutherland*, 104 Wash.App. 122, 130, 15 P.3d 1051 (2001), *State v. Vangerpen*, 125 Wash.2d 782, 795, 888 P.2d 1177 (1995).

information was missing an essential element and charged no crime, mandatory joinder does not apply because the defendant was not charged with a crime until the amended information was filed.²⁶

Despite the original information containing all the elements of driving under the influence, a lesser included of vehicular assault, the information was ambiguous and therefore defective.²⁷ The original information was ambiguous on its face because it stated the charge was VEHICULAR ASSAULT and cited the vehicular assault statute and included bodily injury in the charging language. The information was “internally inconsistent and contradictory on its face”²⁸ and therefore the State could not proceed. Because the State could not proceed on a defective information, the defendant could not be convicted until the amended information was filed and mandatory joinder does not apply.

²⁶ *Dallas*, 126 Wash.2d at 328 n.1.

²⁷ *Vangerpen*, 125 Wash.2d at 792.

²⁸ *Vangerpen*, 125 Wash.2d at 792.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO RE-OPEN ITS CASE AND FILE AND AMENDED INFORMATION.

“In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation.”²⁹ “This ‘essential elements rule’ has long been settled law in Washington and is based on the federal and state constitutions and on court rule.”³⁰ If the defendant challenges the information once the State’s opportunity to amend the information is lost, a liberal interpretation is applied in favor of the validity of the Information.³¹ If the challenge comes at a time when the State may amend the information, the information is strictly construed.³² The purpose behind these different levels of review is to discourage a defendant from remaining silent in the face of a constitutionally defective charging document where a timely challenge would merely result in the State amending the charging document to cure the defect.³³

²⁹ U.S. Const. amend. VI.

³⁰ *Vangerpen*, 125 Wash.2d at 787.

³¹ *State v. Kjorsvik*, 117 Wash.2d 93, 105-06, 812 P.2d 86 (1991).

³² *Kjorsvik*, 117 Wash.2d 93.

³³ *Kjorsvik*, 117 Wash.2d at 103.

- a. **The Information contained the essential elements and the trial court did not abuse its discretion by allowing the amended information because the defendant suffered no prejudice.**

The original information was not defective because it did not lack an essential element. An information must state the crime with sufficient specificity as to fully advise the defendant of the charge or charges he or she must prepare to defend against. It is not necessary the charging language mirror the language of the statute but it must contain all the essential elements.³⁴ An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.³⁵

RCW 46.61.522 reads as follows:

A person is guilty of vehicular assault if he or she operates or drives any vehicle: . . . (b)While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another.³⁶

There are three alternative ways of committing the crime of vehicular assault. All three include the phrase “and causes substantial bodily harm

³⁴ *State v. Leach*, 113 Wash.2d 679, 687, 782 P.2d 552 (1989).

³⁵ *State v. Ward*, 148 Wash.2d 803, 811, 64 P.3d 640 (2003).

³⁶ RCW 46.61.522.

to another”.³⁷

To determine if there is a missing essential element, the court must look to the face of the charging document itself.³⁸ The only difference between the original information and the amended information in this case is the word “substantial”. This does not constitute a missing essential element because inclusion of the words “bodily harm” in the original information gave Lynch notice of the alleged missing element.

Bodily harm is defined by RCW 9A.04.110 as follows: “‘Bodily injury,’ ‘physical injury,’ or ‘bodily harm’ means physical pain or injury, illness, or an impairment of physical condition”³⁹ Substantial bodily harm is defined in the same statute as follows:

‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part⁴⁰

A person cannot receive a substantial bodily harm without receiving bodily

³⁷ RCW 46.61.522.

³⁸ *Kjorsvik*, 117 Wash.2d at 107.

³⁹ RCW 9A.04.110(4)(a).

⁴⁰ RCW 9A.04.110(4)(b).

harm. All substantial bodily harm is also bodily harm.

“The charging document need not state the statutory elements of the offense in the precise language employed in the statute, but may ‘use words conveying the same meaning and import as the statutory language.’

“⁴¹ In *Borrero* the defendant was charged with attempted first degree murder. The information charged the statutory language of first degree murder but alleged he “did attempt to cause the death” of the victim.⁴²

The Court held that the phrase “attempt” adequately apprised the defendant they were alleged to have taken a “substantial step toward the commission of first degree murder”.⁴³ The Court found the word “attempt” was sufficient using the strict scrutiny standard. The challenge to the information in *Borrero* was challenged immediately after the State rested its case. Similarly, the State in this case did not include the word “substantial” but this omission did not negate the notice to the defendant that she was charged with vehicular assault and the elements of that

⁴¹ *State v. Borrero*, 147 Wash.2d 353, 361, 58 P.3d 245 (2002) citing *State v. Taylor*, 140 Wash.2d 229, 235-36, 996 P.3d 571 (2000) citing *Leach*, 113 Wash.2d at 689.

⁴² *Borrero*, 147 Wash.2d at 363.

⁴³ *Id.*

offense.

The State in *Vangerpen* inadvertently did not include the word “premeditated” in charging the defendant with attempted first degree murder. Premeditated is an essential statutory element because without the word “premeditated” the information includes only the mental element for second degree murder.⁴⁴ In the present case, however, removing the word “substantial” does not create charging language of a lesser offense.

Because the original information did not lack an essential element, the issue is whether or not the trial court abused its discretion in allowing the State to re-open its case and file its amended information. Because the State’s amendment in no way altered the charges against Lynch and merely corrected a clerical error, the defendant was not prejudiced. Therefore it was not an abuse of discretion to allow the State to re-open its case and file an amended information.⁴⁵

⁴⁴ *Vangerpen*, 125 Wash.2d at 791.

⁴⁵ *State v. Pekley*, 109 Wash.2d 484, 745 P.3d 854 (1987), CrR 2.1(d).

- b. **Even if the information did lack an essential element, the trial court did not abuse its discretion when it allowed the State to re-open its case and file an amended information because the defendant waived her right when she chose not to move for dismissal.**

If, however, the information was defective because failure to include the word “substantial” constitutes a missing essential element of the offense, the lack of this essential element rendered the information ambiguous.⁴⁶ If the Information lacked an essential element, it does not follow that the information charged Driving Under the Influence. As held in *Vangerpen*, the original information lacked an essential element and it was facially ambiguous.

In *Vangerpen* the information failed to allege the defendant’s acted with premeditation and therefore inadvertently charged the defendant with attempted murder in the second degree instead of attempted murder in the first degree. Despite the charging language including all and only the elements of attempted second degree murder, the information was facially ambiguous.⁴⁷ Like *Vangerpen*, the original information filed in this case was ambiguous on its face because it stated the charge was VEHICULAR

⁴⁶ *Vangerpen*, 125 Wash.2d at 787.

⁴⁷ *Id* at 792.

ASSAULT and cited the vehicular assault statute and included bodily injury in the charging language. The information was, therefore, “internally inconsistent and contradictory on its face” and therefore ambiguous⁴⁸ An ambiguous information does not provide the defendant sufficient notice of the charges. The court cannot proceed on an ambiguous information but if the defect is discovered at a point when substantial rights of the defendant may be prejudiced, the defendant is the only one who may waive these rights and proceed.

The Washington State Supreme Court recently decided *Quismundo* who was convicted of felony violation of a no-contact order.⁴⁹ The information was charged the crime in two alternatives, (1) and assault in violation of a no-contact order or (2) violation of a no-contact order after two or more subsequent convictions for violation of a no-contact order.⁵⁰ On the first day of trial, prior to the jury being empanelled, the State amended the information removing the first alternative, assault in violation of a no contact order. In the amended information the State inadvertently

⁴⁸ *Vangerpen*, 125 Wash.2d at 792.

⁴⁹ *State v. Quismundo*, 192 P.3d 342 (September 11, 2008).

⁵⁰ *Quismundo*, 192 P.3d at 342.

deleted the phrase concerning the violation of the orders. Once the State rested its case Quismundo moved for dismissal with prejudice due to the defect in the information. The trial court denied the motion to dismiss and allowed the State to re-open its case and amend the information.⁵¹ The court explained that if there had been a showing of prejudice, surprise or hindrance to the defense it might have granted the motion to dismiss.⁵²

Unlike *Quismundo* the trial court below did not base its decision on an erroneous view that there must be prejudice. To the contrary, the trial judge invited the defendant to move to dismiss the case. The Trial in the present case lasted two days. The Information filed was not amended prior to trial. No motion was brought challenging the original information prior to trial and the court was never asked to order a Bill of Particulars.

During opening arguments the Defense counsel told the jury,

We don't really dispute the injury, and we're not really going to challenge the drinking, but there's more to it than that. Ms. Valentine says she started drinking that day. She started drinking that day. She had a couple of drinks. Later her car hit Mr. Ontiveros,. But there's more to it than that. That's not a crime. She just – she didn't allege anything besides driving under the influence. She didn't allege vehicular assault. She has to prove to you that the drunken

⁵¹ *Quismundo*, 192 P.3d at 343.

⁵² *Quismundo*, 192 P.3d at 344.

driving – not only that the driving was drunken but also that the drinking and driving was the cause of the injury. You’ll receive an instruction later about the proximate cause, it’s a legal thing but it will be explained to you.⁵³

This was the first and only time the argument was mentioned until immediately after the State rested. At the close of the opening statement of the defendant the defense attorney said “[b]ut the State can’t prove beyond a reasonable doubt that a car with two brakes instead of four was not responsible in some way, shape or form for this accident. So you have to find her not guilty of vehicular assault.”⁵⁴ On the second day of trial, immediately after the State rested its case, a brief recess was given to allow the defendant to check on possible witnesses. Once the court was at recess the defendant filed a motion asking the Court instruct the jury only on the crime of driving under the influence arguing that the information charged only that crime and not Vehicular Assault.⁵⁵

Although Lynch requested an erroneous remedy, to proceed to verdict on an erroneous information⁵⁶, after an hour long recess the trial

⁵³ RP 17.

⁵⁴ RP 19.

⁵⁵ RP 187.

⁵⁶ RP 187.

court correctly directed the defendant to the constitutional remedy, that it would grant a motion to dismiss without prejudice.⁵⁷ Lynch was then given the further opportunity to consult with counsel and the court took a recess for that purpose. After the recess Lynch declined to move for dismissal without prejudice.⁵⁸ Although, Mr. Parker, Lynch's attorney, told the court they were not waiving any rights⁵⁹, the actions taken contradicted this statement. Lynch was provided full advisement of her right to have the case dismissed without prejudice to the State re-filing the charge of vehicular assault. The Court engaged in lengthy colloquy to explain Lynch could have the case dismissed without prejudice.⁶⁰ The Court told Lynch "[t]hat didn't adequately inform the person of the charge, and there's a constitutional right to know and be informed properly of the nature of the charge."⁶¹ "[A]fter the State's rested and if there is an essential element left out, there's a presumed prejudice."⁶²

⁵⁷ RP 194-97.

⁵⁸ RP 199-200.

⁵⁹ RP 200.

⁶⁰ RP 194-99.

⁶¹ RP 194.

⁶² RP 195.

[T]he options I'm going to give, I guess, to the defense is that I would entertain a motion to dismiss without prejudice to the State to refile because that's clearly the remedy, not dismissal with prejudice of the charge of vehicular assault⁶³

Mr. Parker, Lynch's attorney told the court he was confused about the alternatives and the trial court explained,

the alternatives would be I would grant the motion to re-open and allow them to file the appropriate information as an alternative. Because I think that's the appropriate way to do it. And then if they file the appropriate amended information, upon re-opening, then it would go to the jury as is. I suppose I could – a motion to declare a mistrial would be basically the same thing, but . . . I guess where I'm coming from, there's a – I guess a presumed prejudice because of the lack of that element in the information. So it's up to the defense. ⁶⁴

Lynch's attorney asked for additional clarification and the trial court told the defense he would be inclined to allow the state to re-open its case and amend the information but if the defendant wanted the case dismissed without prejudice the court would have to grant it.⁶⁵ After all that discussion, Mr. Parker told the court they were not moving for dismissal.

In *Quismundo* the defendant moved for dismissal and the State

⁶³ RP 196.

⁶⁴ RP 196.

⁶⁵ RP 199.

argued against the motion asking the court to allow the State to re-open its case and amend the information. In the present case the defendant did not move for dismissal and the State did not argue against dismissal. Instead the defendant asked the court to proceed on the defective information as a driving under the influence offense. Unlike *Quismundo* or *Pekley*, Lynch did not ask the court for dismissal and that decision amounted to a waiver.⁶⁶ Lynch was fully informed of her rights and represented by counsel and declined dismissal of the charges. Her waiver was knowing, intelligent and voluntary and therefore the court did not abuse its discretion when it allowed the State to re-open its case and amend the information.⁶⁷ If it was an abuse of discretion, the appropriate remedy is dismissal without prejudice to the State's ability to re-file charges of Vehicular Assault.⁶⁸

⁶⁶ *Quismundo*, 192 P.3d 342, 344 n. 4.

⁶⁷ *State v. Quismundo*, 192 P.3d at 343 n.4; *Pelkey*, 109 Wash.2d at 487; *Vangerpen*, 125 Wash.2d at 795.

⁶⁸ *Vangerpen*, 125 Wash.2d at 793.

3. LYNCH'S ATTORNEY'S PERFORMANCE DID NOT FALL BELOW THE OBJECTIVE STANDARD OF REASONABLENESS AND THEREFORE WAS NOT INEFFECTIVE

To support a finding of ineffective assistance of counsel, Lynch must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced Lynch.⁶⁹ Counsel's performance is deficient if it falls below an objective standard of reasonableness.⁷⁰ The defendant is prejudiced only if, but for the deficient performance, the outcome of the trial would have been different.⁷¹ On review, the court gives great deference to counsel's performance and begin with a strong presumption that counsel was effective.⁷²

Appellant argues that counsel, Mr. Parker, was ineffective because he did not move for dismissal without prejudice. Defense counsel's performance was not deficient for failure to move to dismiss because the

⁶⁹ *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

⁷⁰ *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. Denied 523 U.S. 1008 (1998).

⁷¹ *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

⁷² *Strickland v. Washington*, 466, U.S. 668, 689-90, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

error was easily corrected and if the case were dismissed the State would not be prohibited from filing a new information alleging Vehicular Assault. Given the strength of the State's evidence, Lynch would very likely be convicted, as she was in the present case, of vehicular assault.

As evidenced by this appeal, Mr. Parker's may well have believed the best avenue for defending his client was to hope the State's reopening of its case to amend the information would allow the conviction to be overturned by the Court of Appeals. When Mr. Parker indicated that he would not be moving for dismissal, but was not waiving any rights, he created an issue for this appeal. The defendant did not testify and there was no evidence to contradict that Lynch was intoxicated, driving the vehicle and that the vehicle she was driving caused the injury to Ines Onteveros which was a fracture and therefore substantial. Without evidence to raise reasonable doubt as to the elements of the crime, Mr. Parker's trial tactic decision to challenge the information once the State had rested its case did not fall below the standard of reasonableness and, in fact, may have been the strongest method of defense against the charge of Vehicular Assault.

The record before this Court does not overcome the strong

presumption counsel was effective.⁷³ If Appellant fails to establish that counsel's performance was deficient, the claim of ineffective assistance of counsel fails.⁷⁴

Assuming arguendo that counsel's performance did fall below the objective standard of reasonableness, the Appellant still must establish that Defense counsel's failure to move for dismissal after the State rested its case prejudiced Lynch. The standard for prejudice is whether or not, but for the deficient performance, the outcome of the trial would have been different.⁷⁵ Appellant argues Mr. Parker's decision not to make the motion has prejudiced Lynch because the State was allowed to amend the information and Lynch was convicted.

While the trial at issue would have been different, the ultimate resolution would not, there was no disputed evidence and had Mr. Parker moved for dismissal, the State would have filed the amended information as a new information and the same evidence would have been presented at a subsequent trial and Lynch would have been convicted of vehicular

⁷³ *Id.*

⁷⁴ *Id.*, at 700.

⁷⁵ *Id.*

assault. Appellant's claim of ineffective assistance of counsel should be denied.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests the court affirm the verdict in this case and remand this matter for further proceedings.

DATED this 5th day of November, 2008.

Respectfully Submitted,

By: M. M. Valentine
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CORRINA A. LYNCH

Appellant.

No.: 37277-1-II

DECLARATION OF MAILING

DECLARATION

I, [Signature] hereby declare as follows:

On the 5th day of November, 2008, I mailed a copy of the RESPONDENT'S

BRIEF to:

PETER B. TILLER
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

Corrina A. Lynch
DOC# 314586 Unit 2-B-09-C
Pine Lodge Correction Center for Women (PLCCW)
P.O. Box 300
Medical Lake, WA 99022

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 5th day of November, 2008, at Montesano, Washington.

[Signature]