

No. 40186-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANK A. WALLMULLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay, Trial Court Judge
Cause No. 08-1-00305-1

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information, (CP 200), sets for the charging period as “between the 1st day of February, 2007 and the 15th day of March, 2007” yet the to-convict Instruction, Instruction No. 26 (CP 90), sets forth the charging period as “on or about the period between the 15th day of December, 2006, and the 15th day of March, 2007.”
2. The trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information, (CP 200), alleges the crime as that of attempt by charging “did do an act which was a substantial step towards the commission of that crime; contrary to RCW 9A.28.020.....” yet the to-convict Instruction, Instruction No. 26 (CP 90), sets forth the elements for the complete crime not that of attempt.
3. The trial court erred in failing to instruct the jury that it had to find a “separate and distinct act” for Counts III, IV, and V in violation of double jeopardy principle where the jury was given identical to-convict instructions for these counts.
4. The trial court erred in failing to instruct the jury that it had to find a “separate and distinct act” for Counts VI and VIII in violation of double jeopardy principle where the jury was given identical to-convict instructions for these counts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Wallmuller prejudiced when the State moved to amend Count XII before it rested?
2. Were double jeopardy principles violated when the charging documents, evidence presented, jury instructions and closing arguments all made it clear that each count required proof of a separate act.

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Wallmuller's recitation of the procedural history and facts except for the following distinctions and additional facts:

Prior to resting, the State moved orally, to amend Count XII. The State moved to amend the charge from an attempt to that of a completed charge. Additionally, the State moved to amend the date range of that charge to the 15th day of December 2006 to the 15th day of March 2007. RP 1282. The State stated it was doing so to conform to the evidence provided by Ms. Scott. RP 1282. Counsel did not object to amending the charge to a completed crime, but did object to amending the date range. RP 1283-1284. The court found that there was evidence presented that would satisfy the amendment. RP 1284. The court went on to say, "It was clear that this was not evidence that was just newly given to the defense; that they were aware or what the date stamp would have been at the time. So, the court does not see prejudice there." RP 1284.

T.K.O. testified that she was in a car with Wallmuller and he stopped by Southside School on Arcadia St. RP 1035. She testified that Wallmuller zip tied her hands and asked her to touch his penis with her mouth. RP 1038. T.K.O. testified that Wallmuller, some time later

moved her to the back seat of the car and he put his finger in her vagina. RP 1036. Further, T.K.O testified that Wallmuller drove behind the Shelton Athletic Center and parked. Wallmuller told her to perform oral sex on him and she did. RP 1042.

E. ARGUMENT

1. Wallmuller was not prejudiced when the State, prior to resting, orally amended Count XII.

Although the trial court must strictly construe an information challenged before or during trial, unless there is substantial prejudice to the defendant, the State may amend the information to correct the defect at any time before the State rests its case. *State v. Phillips*, 98 Wash.App. 936, 991 P.2d 1195 (2000). The State cannot amend a charge after it has rested its case in chief unless the amended charge is a lesser-included offense or a lesser degree of the same offense. *State v. Pelkey*, 109 Wash.2d 484, 491, 745 P.2d 854 (1987).

In the present case the State moved to amend count XII before it rested. The state moved to amend this count to that of the completed crime, as opposed to the attempted crime, and to change the date range. Counsel did not object to the amendment relating to the completed crime, but did object to the date range amendment. RP 1283-1284. The court

heard argument and found that the defense was aware of the dates and no prejudice resulted. RP 1284. Unlike *Pelkey*, the State moved to amend during its case in chief, prior to resting.

2. Wallmuller was not exposed to double jeopardy.

The double jeopardy clauses of the United States and Washington Constitutions protect a defendant from multiple convictions for the same crime. *State v. Tvedt*, 153 Wash.2d 705, 710, 107 P.3d 728 (2005). Jury instructions are reviewed de novo in the context of the instructions as a whole. *State v. Jackman*, 156 Wash.2d 736, 132 P.3d 136 (2006). Jury Instructions “must make the relevant legal standard manifestly apparent to the average juror. *State v. Borsheim*, 140 Wash.App. 357, 366, 165 P.3d 417 (2007).

a. Counts III, IV, and V.

Wallmuller claims that it was a violation of double jeopardy principles when the court failed to instruct the jury that it had to find a “separate and distinct act” for rape of a child in the first degree in counts III, IV, and V.

The charging documents, evidence presented, jury instructions and closing arguments all made it clear that each count required proof of a separate act. In the present case the court did give a separate crime instruction No. 5 (CP 68) and a unanimity instruction No. 10 (CP 73). T.K.O testified to specific instances of abuse committed by Wallmuller.

This is not a case where a victim alleges a series of unspecific events. The allegations are specific and distinguishable from one another. T.K.O. testified about three distinct incidents and the State charged accordingly.

The State makes this clear during closing arguments. The State argues, based on the evidence presented, that counts III, IV, V all pertained to the acts Wallmuller committed against T.K.O. on the day he took her up on Arcadia Rd. and South Side School. RP 1559. The State goes on to clarify that Count III refers to the incident where Wallmuller zip tied her hands and made her perform oral sex on him. RP 1559-1560. The State makes it clear that Count IV refers to the incident where Wallmuller places T.K.O. in the back of his car and puts his finger in her vagina. RP 1560. The State identifies Count V as being the act of oral sex that happened by the Shelton Athletic Center. RP 1560. There were no other acts testified to, by T.K.O., to confuse the counts. Counts I and II are defined by specific days.

Again the combination of the charging document, evidence presented at trial, jury instructions, and closing arguments make it clear that a “separate and distinct act” was needed for Count III, IV, V.

b. Counts VI and VIII.

Wallmuller claims the same double jeopardy violations with regard to Counts VI and VIII, as noted above. The charging documents, evidence

presented, jury instructions and closing arguments all made it clear that each count required proof of a separate act. There were three videos depicting images of T.K.O. comprising Exhibit No. 34. Detective Vertefeuille testified that these videos were taken off of Wallmullers phone and copied on to a disk that was later admitted as Exhibit No. 34. RP 1005. T.K.O. identified herself in the videos comprising Exhibit No. 34. RP 1055-1058. With respect to T.K.O., the only videos containing images of her are on Exhibit No. 34 and are described as video number 8, 9, and 10. There are no other images of T.K.O. admitted into evidence.

Wallmuller does not take issue with Count VII. Video 8 represents the charge in count VII. That leaves the other two videos of T.K.O on Exhibit No. 34. These other two videos are 9 and 10. These videos correspond to Counts VI and VIII. The State made that clear during the presentation of its case in chief when examining Detective Vertefeuille RP 959-1012, examining T.K.O. RP 1055-1058, and during closing arguments. The State, during closing arguments went through each video with great care. The State argues Instruction No. 21 (Count VI) pertains to video number 9, which depicts T.K.O. performing oral sex on Wallmuller. RP 1561. The State goes on to say that Instruction No. 23 (Count VIII) pertains to video number 10, which depicts the photograph of T.K.O.'s exposed genitalia. RP 1561. There simply are no other images of T.K.O. There

are three images/videos and three counts of sexual exploration of a minor relating to T.K.O. This is not a case where there were a large number of images and only a few charges, and therefore, no way in determining which image the jury is applying to each count. In fact the opposite is true, there are three videos and three counts related to those videos.

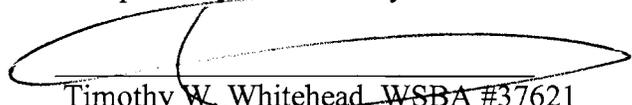
The court gave the separate crime instruction. The charging document had three counts of sexual exploitation of a minor naming T.K.O. as the victim (Counts VI, VII, VIII). The evidence presented confirmed that three of the videos (8,9,10) were of T.K.O. and there were no others. Finally, the State clarified all of this in its closing argument. It is clear based on the aforementioned charging document, instructions, evidence, and arguments that each count required proof of a separate and distinct act for Counts VI and VII.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 10 day of November, 2010

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "Timothy W. Whitehead", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

Timothy W. Whitehead, WSBA #37621
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

10/27/12 PM 1:24
STATE OF WASHINGTON
BY ca
DEPUTY

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 40186-0-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 FRANK A. WALLMULLER,)
)
 Appellant,)
 _____)

I, MARGIE OLINGER, declare and state as follows:

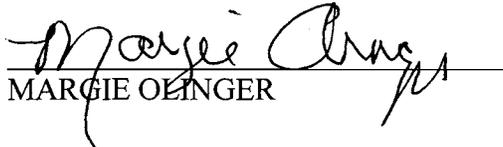
On WEDNESDAY, NOVEMBER 10, 2010, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF
RESPONDENT, to:

Patricia A. Pethick
P.O. Box 7269
Tacoma, WA 98417

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 10TH day of November 2010, at Shelton, Washington.


MARGIE OLINGER