

FILED
Court of Appeals
Division II
State of Washington
11/13/2017 3:43 PM
No. 50299-2-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Kenneth Chance Brooks,

Appellant.

Brief of Appellant

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1. Introduction

A criminal charge may only be amended if the amendment does not prejudice substantial rights of the defendant. Brooks was originally charged with child molestation occurring sometime in January 2014. The entire trial proceeded under that information. The State presented evidence that the incident occurred in January. Brooks presented a defense designed to create reasonable doubt that any January incident ever occurred. He went so far as to testify that the incident actually occurred in May.

After Brooks rested his defense and the State declined the opportunity for rebuttal—that is, after the close of all evidence in the case—the trial court allowed the State to amend the information to expand the charging period from January through May. This change, after Brooks’ defense was complete, deprived Brooks of the opportunity to know the charges against him, to craft a defense to meet those charges, and to intelligently exercise his right to decide whether to testify or remain silent. The amendment allowed the State to circumvent Brooks’ defense after he had already made it. Because the amendment prejudiced substantial rights, the trial court had no authority to allow it. This Court should reverse.

2. Assignments of Error

Assignments of Error

1. The trial court abused its discretion in allowing the State to amend the information after the State had rested and Defendant Brooks had testified.

Issues Pertaining to Assignments of Error

1. A criminal charge may be amended only if substantial rights of the defendant are not prejudiced. Amendment after the State rests is particularly suspect. Here, the trial court allowed the State to amend the information to change the date range of the charge after the close of testimony, when the Defendant had already chosen to testify based on the original date. Did the trial court abuse its discretion in allowing the amendment? (assignment of error #1)

3. Statement of the Case

Kenneth Brooks was charged with rape of a child in the third degree and child molestation in the third degree. CP 1. The original information charged that the alleged rape occurred “on or about 8/17/2014” and that the alleged molestation occurred “on or about or between 01/01/2014 and 01/31/2014.” CP 1.

At trial, the alleged victim, C.H., testified that Brooks, a family friend more than three years older than her, came to visit the family in January 2014. 1 RP 53. According to C.H., while the two of them were alone cuddling on the couch watching Netflix one afternoon that January, Brooks reached under her shirt and rubbed her breast. 1 RP 54, 56. C.H. testified that

Brooks eventually returned to his home in California and she did not see him again until June or July. 1 RP 57-58, 82.¹

After presenting testimony on the other charge, the State rested. Before the start of the Defense's case, the court discussed the proposed jury instructions with the parties. 2 RP 50. Based on the original information, the expected instructions, and the State's completed presentation of its evidence, Brooks decided to testify on his own behalf. *See* 2 RP 49-50.

Brooks testified that he had reviewed his own cell phone records and determined that the incident occurred in May, not January. 2 RP 55-56. Brooks admitted that he inappropriately touched C.H.'s breast at her home in May. 2 RP 56. He testified that he did not touch her in January. 2 RP 57. The incident in May 2014 was the only time. *Id.* He was sure that it was May because he had text messages that showed C.H. told her mother about the incident in May and he texted C.H. asking why she

¹ C.H. also testified that the night of August 16-17, Brooks had intercourse with her while she was too drunk to consent or resist. 1 RP 68-70. Brooks denied having any sexual contact with her that night, testifying that all he did was help clean her up after she vomited all over her bed. 2 RP 60-64. The State presented supporting testimony from other witnesses and DNA evidence from the clothes C.H. was allegedly wearing that night. The jury ultimately believed C.H., finding Brooks guilty of rape of a child in the third degree. CP 27. This conviction is not at issue in this direct appeal.

told. 2 RP 56. C.H. had testified that she told her mother just two days after it happened. 1 RP 57, 85.

After Brooks testified, the Defense rested. 2 RP 83. After declining the opportunity to present rebuttal testimony, the State moved to amend the information to expand the date range for the child molestation charge from the month of January to any time between January 1 and May 31. 2 RP 84-85. Brooks objected. 2 RP 88. The trial court felt it was obligated to allow the amendment. *Id.*

The jury instructions were also amended with the new date range. 2 RP 90, CP 24. The jury found Brooks guilty of child molestation in the third degree. CP 28, 2 RP 144-47.

At sentencing, the trial court found that Brooks had an offender score of four for each of the current crimes (one point total for all prior juvenile offenses, and three points for the other current crime). CP 42. The court imposed concurrent sentences of 36 months for rape of a child and 24 months for child molestation. 2 RP 164, CP 43. Brooks was ordered to enter and complete a sex offender treatment program and to have no contact with minors other than his own biological children. CP 50.

4. Argument

4.1 The trial court abused its discretion in allowing the amendment of the information after the defense rested because the amendment caused great prejudice to Brooks.

Under the rules of criminal procedure, a trial court has discretion to allow amendment of the information so long as the amendment does not prejudice the rights of the defendant. CrR 2.1(d).² This rule is tempered by article I, section 22 of the Washington State Constitution, which requires that the accused be adequately informed of the charge to be met at trial. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

A trial court's ruling on a proposed amendment to an information is reviewed for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). The Defendant must show that his substantial rights were prejudiced by the amendment. *Id.*

4.1.1 The late amendment to the information prejudiced Brooks' rights to know the charges against him, to craft a defense to meet those charges, and to decide whether to testify or remain silent.

A long line of cases has consistently held that allowing an amendment to the information after the State rests its case is

² "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."

per se prejudicial error unless the amendment is to a lesser degree of the same charge or a lesser included offense. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992); *Pelkey*, 109 Wn.2d 484.

“It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *Markle*, 118 Wn.2d at 432. An amendment that changes, mid-trial, what the State must prove in order to convict “necessarily prejudices this substantial constitutional right.” *Pelkey*, 109 Wn.2d at 491.

A defendant’s entire defense is necessarily based on the charge alleged in the original information at the start of trial. “All of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information.” *Pelkey*, 109 Wn.2d at 490; *Vangerpen*, 125 Wn.2d at 789. “An amendment midway through trial, after opening statements and witness testimony, prejudices the defendant’s ability to fairly defend himself or herself, placing the defendant at a severe disadvantage.” *Schaffer*, 120 Wn.2d at 623 (Johnson, J., dissenting). Because the risk of prejudice from an

amendment after the State has rested is so great, the *Pelkey* court adopted a **per se** rule, which has not been overturned.

Here, the State requested its amendment not midway through trial or after the State rested, but after the close of **all testimony** in the case. Brooks had no opportunity to adjust his defense strategy in light of the amendment, because his defense was already finished. He had already chosen to exercise his right to testify. In his testimony, he admitted to inappropriately touching C.H., but testified that he did not do so during the original charging period of January 1 to 31, 2014. When the trial court allowed the State's amendment after Brooks had already rested, Brooks was left with no opportunity to defend himself against the amended charge.

A criminal defendant has the right to remain silent at trial. Wash. Const. art. I, § 9. The defendant also has the right to testify in his own defense. Wash. Const. art. I, § 22. In deciding which of these rights to exercise at trial, a defendant must weigh all that has been presented to the jury at the trial, as well as "the precise nature of the charge alleged in the information." *Pelkey*, 109 Wn.2d at 490. It is the charge in the information that will determine what the jury is instructed that it must find beyond a reasonable doubt in order to convict.

Here, under the original information, the jury would have been instructed that in order to convict Brooks of child

molestation in the third degree, the jury would have to find beyond a reasonable doubt that Brooks had sexual contact with C.H. “on or about or between January 1, 2014, and January 31, 2014.” *See* CP 1, 24. Under this situation, Brooks apparently was comfortable testifying that he touched C.H. in May, because that would raise reasonable doubt as to whether he had sexual contact with C.H. in January. Had Brooks known before he testified that the State would amend the charging period, he might have decided not to testify. The late amendment of the information greatly prejudiced Brooks’ substantial right to choose to testify or remain silent.

4.1.2 The cases relied upon by the trial court to justify the amendment are distinguishable on their facts and do not justify such a late amendment in the face of substantial prejudice to Brooks’ rights.

The trial court’s reliance on *State v. Goss*, 189 Wn. App. 571, 576–77, 358 P.3d 436 (2015), as authority to justify the amendment is misplaced. In *Goss*, the defendant was originally charged with committing the crime between “September 25, 2011 and September 24, 2012.” *Goss*, 189 Wn. App. at 574. Just before the State rested, it moved to amend the charging period to conform to the alleged victim’s testimony, expanding the time by one year, to “September 25, 2010 to September 25, 2012.” *Id.* at 575. On appeal, Division I held that the trial court did not

abuse its discretion in allowing the amendment because “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.” *Id.* at 576. The court found that the defendant had not claimed an alibi and failed to show any other prejudice. *Id.* at 576-77.

This case is very different from *Goss*. 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. 2 RP 54-56. Additionally, Brooks **did** suffer substantial prejudice. Where *Goss* had a full opportunity to adjust his defense and decision to testify based on the amended information, Brooks had no such opportunity. Here, the information was amended to conform to **Brooks’ testimony**, after Brooks had no more chance to adjust his strategy or his decision of whether to testify.

The essential question in whether to allow an amendment of the information during trial is whether the Defendant’s substantial rights will be prejudiced. In *Goss*, there was no prejudice because *Goss* had not presented an alibi and had not otherwise shown prejudice.³ Here, there is substantial prejudice. Brooks was deprived of any opportunity to defend against the

³ The court’s opinion does not go into further detail on this point, stating only, “he has failed to show any prejudice from the amendment.” *Goss*, 189 Wn. App. at 576-77.

amended charging period. Given the circumstances and timing of the amendment, it was not a matter of mere form, but of substance. The general rule that the court applied in *Goss* simply does not apply here.

The State also relied on *State v. DeBolt*, 61 Wn. App. 58, 808 P.2d 794 (1991), and *State v. Allyn*, 40 Wn. App. 27, 696 P.2d 45 (1985). Both of these cases are also distinguishable.

In *DeBolt*, the victim testified that the incident occurred on the night the Grammy awards were on television. *DeBolt*, 61 Wn. App. at 59-60. The original charging period was March 1 through March 30, 1988. *Id.* at 60. After the defendant testified, but before the defense rested, the State moved to amend the charging period to December 26, 1987 to April 13, 1988. *Id.* The court granted the amendment and gave the defense a 2-day continuance to react to the change. *Id.* The defendant denied the incidents occurred and did not present an alibi to any particular dates. *Id.*

On appeal, this Court held that there was no prejudice because there was testimony that “the Grammy awards took place on March 2, 1988, a date which was included in both the original and amended charges.” *DeBolt*, 61 Wn. App. at 62. The court could not conceive of any way the change in dates could have prejudiced the defendant’s rights when all of the testimony—including testimony presented by the defense after

the continuance—pointed to a date that was within the original charging period. *Id.*

The facts here are very different. Most significantly, Brooks **did** present an alibi and testified that the incident did not occur during the original charging period. The amendment was not requested until Brooks had already rested his case. Brooks did not receive a continuance or an opportunity to present additional testimony to meet the amended information. Unlike *DeBolt*, Brooks has suffered substantial prejudice as a result of the late amendment.

In *Allyn*, the defendant was arrested and charged with possession of marijuana based on a January 7, 1983, search of his home. *Allyn*, 40 Wn. App. at 28. The original information charged that the defendant possessed marijuana on December 28, 1982. *Id.* at 35. A pre-trial suppression hearing was held, discussing at length the January 7 search. *Id.* Sometime after the hearing, the trial court allowed the State to amend the information to charge possession on January 7. *Id.* On appeal, this Court held that there was no prejudice because the defendant already knew before trial—because of the suppression hearing—that the incident was alleged to have occurred on January 7. *Id.*

Again, the facts here are very different. The amendment in *Allyn* appears to have been simply correcting a mistake. In

Allyn, the parties all knew from the beginning that the case was focused on January 7. The amendment corrected the information to reflect what everyone already knew. Here, the State's testimony all pointed to an incident in January 2014. The amendment here was not correcting a mistake, it was attempting to circumvent Brooks' defense after he had already made it. The amendment in *Allyn* appears to have happened before trial. *See Allyn*, 40 Wn. App. at 35. As observed in *Pelkey* and its progeny, the analysis of prejudice to the defendant shifts significantly the later in the proceedings the amendment is made. Here, the amendment was not requested until **after the close of all evidence**, when there was no longer any opportunity for Brooks to adjust his defense strategy.

The amendment here was not merely one of form. Rather, it was an attempt to get around Brooks' defense after he had already made it. Brooks' defense was based on the charge that the incident occurred in January. His strategy was to create reasonable doubt as to whether there was any incident in January. It was not reasonable for the trial court to allow the State to circumvent that defense by expanding the charging period after the defense had rested. The timing of the amendment deprived Brooks of the right to know and meet the charges against him. It deprived him of the ability to intelligently exercise his right to choose whether to testify or

remain silent. Because the amendment prejudiced substantial rights of the defendant, the trial court did not have discretion to allow the amendment under CrR 2.1(d). This Court should reverse the conviction.

4.2 Without the child molestation conviction, Brooks' sentence for the rape of a child conviction was based on an incorrect offender score.

Brooks' offender score for the rape of a child conviction was calculated on the basis of 3 points for the "current crime" of child molestation, resulting in a score of 4. If this Court reverses the child molestation conviction, Brooks' offender score for rape of a child should have been only a 1. *See* RCW 9.94A.525(17); RCW 9.94A.589(1)(a). The standard range sentence would have been 15-20 months. *See* RCW 9.94A.510. Brooks' sentence of 36 months is outside that standard range and must be reversed. This Court should remand for resentencing based on the correct offender score.

5. Conclusion

The trial court abused its discretion in allowing the State to amend the information after the close of all evidence to enlarge the charging period in a manner that circumvented Brooks' defense. This Court should reverse the conviction of child molestation in the third degree and dismiss the charges.

This Court should also remand for resentencing on the rape of a child conviction, based on a corrected offender score of 1.

Respectfully submitted this 13th day of November, 2017.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 13, 2017, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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I certify, under penalty of perjury under the laws of the State of Washington, that on November 13, 2017, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Kenneth Brooks, by depositing a copy in the U.S. mail, postage paid, to the following address:

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November 13, 2017 - 3:43 PM

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