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No. 50794-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DOTSON,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Michael Dotson was charged by information with violating a court order which was not in effect on the date of the alleged violation. Based on this information, Mr. Dotson proceeded to trial on the advice of his counsel. Moments before resting its case, the State learned of the error and moved to amend the information to charge Mr. Dotson with violating a different court order. Counsel objected and clearly stated he would have advised Mr. Dotson differently had he been aware the State would move to amend the information. Counsel further argued that had Mr. Dotson still chosen to pursue trial, he would have prepared and presented Mr. Dotson's case in a different manner.

Nevertheless, the court allowed the amendment despite prejudice to Mr. Dotson's substantial rights at trial. Because the State failed to provide notice of the charge, and because Mr. Dotson's substantial rights were prejudiced by the State's eleventh-hour amendment to the information, this Court must reverse.

B. ASSIGNMENTS OF ERROR

1. Mr. Dotson was deprived of his right to notice of the charges against him in violation of the Sixth Amendment and article I, § 22.

2. Mr. Dotson was denied his Sixth Amendment right to effective assistance of counsel.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutional right to notice of the charges brought against him by the State. Here, the State charged Mr. Dotson with violating a court order which was not in effect at the time of the alleged offense. Just moments before resting its case, the State learned of its error and moved to amend the information to allege violation of a different court order. Was Mr. Dotson deprived the right to notice of the charges against him?

2. CrR 2.1(d) permits amendment of the information only when a defendant's substantial rights are not prejudiced by the amendment. When a jury has been empaneled and the State moves to amend late in its case, impermissible prejudice to a defendant's rights is more likely. Here, after learning it had charged Mr. Dotson with violating an invalid no-contact order, the State moved to amend the information to include a different no-contact order just moments before

resting its case. Where the record is clear counsel would have advised Mr. Dotson differently and prepared for trial differently in light of the amendment, were Mr. Dotson's substantial rights to notice, effective counsel, and to prepare a defense prejudiced by the late amendment?

3. The Sixth Amendment right to the effective assistance of counsel is denied where counsel's performance is deficient and prejudices the outcome of trial. Counsel's performance is deficient where he fails to object for no tactical reason. Here, counsel failed to object to admission of Mr. Dotson's prior domestic violence convictions and failed to stipulate to the fact of his prior convictions. As a result, Mr. Dotson was prejudiced by evidence he had twice been convicted of violating a domestic violence court order against the same victim in this case. Was Mr. Dotson's counsel ineffective for failing to object to the prior domestic violence convictions and failing to stipulate to those convictions without tactical reason, and was Mr. Dotson prejudiced by these failures?

D. STATEMENT OF THE CASE

Aberdeen Police Officer Steve Timmons saw Michael Dotson walking with Leona Martin-Starr and a third party. RP 92. Believing Mr. Dotson had a court order prohibiting contact with Ms. Martin-Starr,

Officer Timmons contacted Sergeant Ross Lampky to verify whether a valid no-contact order was in effect. RP 94-95. Sergeant Lampky confirmed the existence of a valid no-contact order between Mr. Dotson and Ms. Martin-Starr, but the officers did not know what specific no-contact order was in place. RP 112. Later that day, Officer Timmons saw Mr. Dotson again, this time without Ms. Martin-Starr. RP 96. Officer Timmons arrested Mr. Dotson for violating a no-contact order. Id.

The State charged Mr. Dotson with one count of violation of a court order. CP 60-62. In the information, the State accused Mr. Dotson of violating a pretrial no contact order issued by Grays Harbor Superior Court under cause number 15-1-381-2. CP 60-62; Ex. 9. The State further alleged Mr. Dotson committed the violation against a family or household member. CP 60-62.

At trial, Ms. Martin-Starr did not testify. Instead, the State offered two prior judgment and sentences and their corresponding no-contact orders to establish Mr. Dotson and Ms. Martin-Starr were family or household members. Ex. 4, 6, 8, 9. Counsel did not object to the prior convictions and did not offer to stipulate to the fact of the prior convictions. Sergeant Lampky testified he confirmed the existence of a no-contact order between Mr. Dotson and Ms. Martin-Starr, but he did not know what specific order or under which cause number the records

department had verified. RP 112. He did not know if there were multiple orders in place. Id.

Just prior to resting its case, the State moved to amend the information to allege Mr. Dotson had violated the post-conviction no-contact order issued under cause number 13-1-75-2 rather than the pretrial order from cause number 15-1-381-2 as initially charged. RP 124-25. The State asserted it was the “consensus of our office that as a matter of law” the subsequent conviction in cause number 15-1-381-2 “would basically nullify the [pretrial] order” charged in the information. Id.

Defense counsel objected to the late amendment. Counsel made clear he would have “proceeded in a different way” had the correct no-contact order been listed in the information. RP 125. Counsel informed the court, “the information is the one that [defense] had been preparing for this entire time.” Counsel argued that had he known the State would proceed under the 13-1-75-2 no-contact order, “it would have been a different issue entirely from the get-go.” RP 126, 127. Counsel further averred, “I know that I would have looked at the case in a different way and advised my client accordingly.” RP 128. More specifically, counsel “would have certainly had different things to say to [Mr. Dotson] and [he] would have certainly prepared differently based on that no-contact order

versus” the order originally alleged in the information. *Id.* Counsel further moved to dismiss based on prosecutorial mismanagement. RP 127.

Nevertheless, the court allowed the amendment, stating, “I don’t see how you could have gotten or attacked this certified copy of the domestic violence no-contact order.” RP 133. The State introduced in evidence the judgment and sentence and post-conviction no-contact order for cause number 13-1-75-2. RP 136-37. Mr. Dotson was convicted of violating a court order. CP 1-12.

E. ARGUMENT

1. The State’s eleventh-hour amendment to the information deprived Mr. Dotson of his constitutional right to notice of the charge, prejudicing his right to effective assistance of counsel and to prepare a defense.

a. The charging document must provide notice of all elements of the offense.

The accused has a constitutional right to notice of the crimes alleged against him. Const. art. I, § 22¹; U.S. Const. amend. VI². Notice of the nature of the charges and cause of the allegations is provided through the information. CrR 2.1. The State must include all essential

¹ Article I, section 22 provides in pertinent part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof . . .”

² The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .”

elements of the allegation in the information. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012) (citing State v. Kjorsvik, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991)). A defendant’s right to notice is violated when he or she is put on trial for an uncharged act. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

The charging document must contain (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted the crime. City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). The description of the alleged conduct is essential to providing the accused with adequate notice and the opportunity to prepare a defense. State v. Tandeki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005).

b. The charging document may only be amended if substantial rights of the defendant have not been prejudiced.

CrR 2.1(d) controls the amendment of a charging document. It provides: “The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d). “CrR 2.1[(d)] necessarily operates within the confines of article 1, section 22.” State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). While amendments to the information

are liberally allowed between arrest and trial, the constitutionality of amending the information once trial has already begun presents a different question. Id. at 490. This is because the stages of trial, including pretrial motions, jury selection, opening statements, and the questioning and cross-examination of the State’s witnesses, are based on the “precise nature of the charge alleged in the information.” Id. “Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.” Id. Impermissible prejudice to a defendant’s substantial rights is more likely when a jury is involved and the amendment occurs late in the State’s case. State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993).

c. Mr. Dotson’s substantial rights were prejudiced by the State’s late amendment to the information.

Here, Mr. Dotson’s substantial rights were prejudiced by the State’s late amendment. The State moved to amend the information shortly before it rested its case. The information as originally charged accused Mr. Dotson of violating a pre-trial no-contact order issued in Grays Harbor Superior Court cause number 15-1-381-2. Because Mr. Dotson was later convicted of the underlying charge from that 2015 case, it was “the consensus of [the State] that as a matter of law, that

would basically nullify the order” which Mr. Dotson had been charged with violating in the instant case. RP 124-25. Upon discovering it had charged Mr. Dotson with violating an order which was not in effect on the date of the incident, the State moved to amend the information, just moments before resting its case, to charge him with violating a post-conviction no-contact order issued in cause number 13-1-75-2.

This late amendment prejudiced Mr. Dotson’s right to notice of the charge against him, his right to effective counsel, and his right to prepare a defense. The 2015 no-contact order originally identified in the information was no longer in effect because it was a pretrial order which was not extended or replaced after Mr. Dotson was convicted.³ Nowhere on the subsequent judgment and sentence did the court restrict contact between Mr. Dotson and Ms. Martin-Starr or indicate the pretrial order was to remain in effect. Ex. 4. Notably, the checkbox next to the no-contact sentencing condition is unchecked. Ex. 4. Thus, counsel advised Mr. Dotson, and prepared for and proceeded to trial,

³ See *State v. Shultz*, 146 Wn.2d 540, 547, 48 P.3d 301 (2002) (holding a pretrial no-contact order may remain in effect after conviction if the trial court determines at sentencing that contact with the victim is to be restricted and affirmatively indicates on the judgment and sentence the pretrial order is to remain in effect).

with the understanding the State had charged Mr. Dotson with violating a no-contact order not in effect at the time of the alleged violation.

The record is clear counsel would have proceeded differently and advised Mr. Dotson differently had the State not amended the information without notice. RP 128, 130. While counsel acknowledged Mr. Dotson might still have chosen to pursue trial, counsel was clear he “would have certainly had different things to say to [Mr. Dotson]” and he “would have certainly prepared differently.” RP 128. It is possible, if not likely, counsel only advised Mr. Dotson to pursue trial *because* the State charged him under the wrong no-contact order, and would have otherwise discouraged Mr. Dotson from trial otherwise. By allowing the State to correct this “error in their ways” just minutes before it rested its case, the court deprived Mr. Dotson of his right to notice, right to effective counsel, and right to prepare a defense. RP 126. This Court should reverse.

2. Mr. Dotson’s counsel was constitutionally ineffective for failing to object to entry of his domestic violence convictions and failing to stipulate to the fact of the convictions.

a. Counsel who, without legitimate tactical purpose, fails to object to entry of a defendant’s prior domestic violence convictions and fails to stipulate to the fact of those convictions is ineffective and the defendant is prejudiced by counsel’s deficient performance.

An accused in a criminal case has a Sixth Amendment right to “effective assistance by the lawyer acting on the defendant’s behalf.” State v. Adams, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S. Const. amend. VI. To establish an ineffective assistance of counsel claim, Mr. Dotson must show that his attorney’s performance was deficient and that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is deficient if there is no legitimate, tactical reason for failing to object to introduction of a defendant’s prior convictions. State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996). Evidence of prior convictions is generally inadmissible to prove character of the defendant or to establish propensity. ER 404(b). Prior convictions may unduly prejudice a defendant because “the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations” “when the purpose of the evidence is solely to prove the element of

prior conviction.” Old Chief v. United States, 519 U.S. 172, 174, 117 S. Ct. 644, 647, 136 L. Ed. 2d 574 (1997). Thus, where a defendant offers to stipulate to the fact of a prior conviction, it is error to admit a prior judgment instead. State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

b. Mr. Dotson’s counsel was ineffective for failing to object to introduction of his prior domestic violence convictions and for failing to offer to stipulate to the convictions, and Mr. Dotson was prejudiced by these failures.

Here, counsel failed to object to introduction of Mr. Dotson’s prior convictions for domestic violence violation of a court order. Counsel also failed to offer to stipulate to the existence of these two convictions. To prove its case, the State only needed to show Mr. Dotson had twice violated conditions of a court order. The State was not required to show Mr. Dotson’s prior offenses were domestic violence offenses, nor was it required to show these offenses were committed against the same victim as in this case.

Counsel had no legitimate, tactical reason for failing to object to introduction of the judgments and failing to offer to stipulate to the convictions. The record fails to show why counsel’s failures were tactical in any way. Had counsel stipulated to Mr. Dotson’s prior

convictions, the jury would not have learned of the unduly prejudicial evidence of two prior domestic violence convictions involving the same victim.

Mr. Dotson was prejudiced by his counsel's deficient performance because counsel's failures permitted the jury to consider highly prejudicial evidence which was not any more probative than a stipulation to the same convictions would have been. That these convictions were both domestic violence offenses against the exact same victim created not just the risk, but the likelihood, the jury convicted Mr. Dotson by "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." Old Chief, 519 U.S. at 180. Therefore, Mr. Dotson was prejudiced by his counsel's deficient performance and reversal is required.

F. CONCLUSION

The State's last-minute amendment to the information prejudiced Mr. Dotson's right to notice, right to effective assistance of counsel, and right to prepare a defense. Moreover, Mr. Dotson was denied the effective assistance of counsel because his attorney failed to object to his prior convictions and failed to stipulate to the convictions

to prevent undue prejudice against Mr. Dotson. For these reasons,
reversal is required.

DATED this 1st day of June 2018.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma – WSBA #51420

Washington Appellate Project

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 50794-3-II
)	
MICHAEL DOTSON,)	
)	
APPELLANT.)	

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