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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

REPLY BRIEF OF APPELLANT

TIFFINIE B. MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. 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.

Mr. Dotson's substantial rights were prejudiced by the State's late amendment. As discussed in the opening brief, the State moved to amend the information shortly before it rested its case and after all its witnesses had been questioned and cross-examined. 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.

Contrary to the State's argument, *State v. Murbach*, 68 Wn. App. 509, 643 P.2d 551 (1993), does not control here. *See* Br. of Respondent at 11. In *Murbach*, the State moved to amend the information before the trial began. *Id.* at 510. *State v. Gosser*, 33 Wn. App. 428, 656 P.2d 514 (1982) presents much the same scenario. The State moved to amend on the first day of trial before jury selection. *Gosser*, 33 Wn. App. at 434-35.

This case was in a significantly different procedural posture than *Murbach* and *Gosser*. "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." *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). 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).

Here, a jury had been empaneled, the parties had made opening statements, the State had presented all its witnesses, and defense had prepared for trial and cross-examined those witnesses under the assumption the State was proceeding on the Information as charged.

Counsel advised Mr. Dotson, and prepared for and proceeded to trial, 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.

Unlike in *Murbach* and *Gosser*, Mr. Dotson did not have the opportunity to reassess his trial strategy and present his case differently to a jury based on the new charge because the trial had already proceeded too far.

Similarly, the State's reliance on *State v. Mahmood*, 45 Wn. App. 200, 724 P.2d 1021 (1986), and *State v. Goss*, 185 Wn. App. 571, 358 P.3d 436 (2015), is misplaced.

Goss involved only a minor amendment to the date of the offense. In *Goss*, a child alleged a single instance of sexual assault that happened when she was in a certain grade, but she did not testify to the specific date of occurrence. 189 Wn. App. at 575. In an abundance of caution, the State amended the Information to include a larger date range. *Id.* There was no change to the underlying legal or factual predicates required to prove the crime. The Court reasoned that because the State did not allege any new offenses or add additional counts, *Goss* could not show prejudice. *Id.* at 576.

Here, the State argues its amendment is akin to, if not less impactful than, the amendment in *Goss* because it merely changes which “piece of paper” Mr. Dotson was alleged to have violated. Br. of Respondent at 13. This Court should reject this argument.

The State’s last-minute amendment did not simply enlarge the window of time during which the offense occurred. Rather, the amendment here was a matter of “substance,” not “form,” and changed the allegation from behavior which could *not* constitute a crime to behavior which could. *Goss*, 189 Wn. App. at 576. The date of an incident is not considered an essential element in a child molestation case like *Goss*. See *State v. Hayes*, 81 Wn. App. 425, 433, 914 P.2d 788 (1996) (“time is not an element of the crime charged”). But, the existence and validity of a no-contact order is a critical element of violation of a no contact order. In agreeing it could not prove the charged crime, the State should not be allowed to simply charge a different crime mid-trial.

Finally, in *Mahmood*, the State’s midtrial amendment came well before the State intended to rest its case. The State indicated evidence to prove the new amended would come from a witness yet to be called. 45 Wn. App. at 205. Thus, defense counsel still had an opportunity to

cross examine the State's upcoming witness and prepare a defense to the amendment. *Id.* Defense counsel indicated at an earlier court date he was aware the State might amend the charges, rendering it unlikely defense was surprised by the later amendment. *Id.* Moreover, the trial court offered Mahmood the opportunity to raise prejudice later, but he did not renew his objection. *Id.*

Here, Mr. Dotson was surprised by the State's late amendment. He had already cross-examined all of the State's witnesses pursuant to his initial trial strategy based on the Information as charged. That is, defense counsel's questions were designed to support and further Mr. Dotson's theory of the case. The State's late amendment did not add a charge for which the State would be calling new witnesses. Unlike in *Mahmood*, Mr. Dotson did not have the ability to cross-examine a new witness or prepare a defense to the new charge because of the case's procedural posture.

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. The reason the State amended the charge after presenting its case is because it acknowledged it could not prove a violation of the law. This prejudiced Mr. Dotson, and 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 12th day of December 2018.

Respectfully submitted,

/s Tiffinie B. Ma
Tiffinie B. Ma (51420)
Attorney for Appellant
Washington Appellate Project (91052)
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

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