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NO. 50794-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL DOTSON,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 
RANDY J. TRICK
DEPUTY PROSECUTING ATTORNEY
WSBA #45190

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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I. INTRODUCTION

“If a defendant is prejudiced by an amendment, then he or she should be able to demonstrate this fact.” *State v. Schaffer*, 120 Wn.2d 616 (1993). Mr. Dotson cannot simply assert he was prejudiced by the State correcting an error in its Information in the middle of trial—he must show that actual prejudice.

The State charged Mr. Dotson with felony violation of a no-contact order and specified in the charging document an order that the Aberdeen police records department believed was in effect, but was not actually valid on the date of the violation. It so happened that a different no-contact order issued in a different cause was valid and in effect protecting and restraining the same individuals with identical terms of restraint. Both of these orders had been provided to defense counsel as discovery five days after Mr. Dotson’s arrest

When the trial prosecutor realized the error during the course of the trial, he moved to amend the Information prior to resting. The Defense attorney objected. When the defense attorney told the Court he was prejudiced by the State’s late motion to amend, the Court inquired as to how. Trial counsel was unable to articulate any actual prejudice and the Court permitted the amendment.

Now on appeal, the Appellant again simply claims prejudice without showing actual prejudice. If the trial strategy was to hope the State did not notice its mistake, it is not prejudicial when the State catches on and the strategy fails. Without a showing of prejudice, the trial court's decision was proper and the conviction should be affirmed.

II. RESPONSE TO ASSIGNMENT OF ERROR

1. Was the trial court within its discretion to allow the State to amend the Information during trial alleging a violation of a different no-contact order that had identical restraint provisions when both orders were known to the Defendant and the Defendant could not demonstrate the prejudice in the amendment?

2. Was defense counsel ineffective when he made a conscious decision to hold the State to its burden of proving every element of a crime and not to stipulate to two prior convictions and the decision likely did not affect the outcome of the trial?

III. RESPONDENT'S COUNTERSTATEMENT OF THE CASE

1. EVIDENCE AT TRIAL

On May 26, 2017, Aberdeen Police Officer Steve Timmons was eating at Billy's Restaurant at about 1 p.m. prior to his shift starting for the day. RP 91. While sitting at a window booth, he saw Michael Dotson walking with Leona Martin-Starr¹ and a third party. RP 92-93. He recognized them on sight. RP 93. Believing Mr. Dotson had a court order

¹ Ms. Martin-Starr is referred to as Ms. Martin throughout the record and this brief.

prohibiting contact with Ms. Martin. Officer Timmons contacted Sergeant Ross Lampky, on duty at the time, to report what he saw and to verify whether a valid no-contact order was in effect. RP 94-95.

Sergeant Lampky contacted the Aberdeen Police records department and verified the existence of a valid no-contact order between Mr. Dotson and Ms. Martin. RP 105. In the field, Sergeant Lampky did not know the cause number of the no-contact order confirmed by the police records department. RP 111-12.

Later that day Officer Timmons saw Mr. Dotson again and arrested him based on the earlier violation of the order he observed. RP 96.

In preparing his report and submitting the case to the prosecuting attorney, Officer Timmons learned that two no-contact orders were in place. RP 136. He sent copies of both orders to the prosecuting attorney with his report. *Id.* Certified copies of both orders were admitted at trial. CP 63; Ex. 3, 8.

Before resting, the State admitted without objection two certified copies of judgement and sentences from two prior court order convictions. RP 137, CP 63.

2. PROCEDURAL HISTORY

The State charged Mr. Dotson with one count of violation of a court order. CP 60-62. The information cited a no contact order issued by the Grays Harbor Superior Court in cause number 15-1-381-2 on Sept. 5, 2015. CP 60-62; Ex. 9. Prior to resting its case, the State moved to amend the information to allege Mr. Dotson violated a no-contact order issued under an older case from the same court in cause number 13-1-75-2 on June 3, 2013. RP 124-25. The trial prosecutor determined the pretrial order in 15-1-381-2 was probably, as a matter of law, not in effect at the time the crime and chose to address that prior to resting. RP 124-125. Defense counsel objected to the late amendment, a discussion was had, and the Court permitted the amendment. RP 125-133. During argument over the amendment, the State pointed out it had provided both no-contact orders to defense counsel as part of discovery on June 1. RP 129. Counsel acknowledged receipt of both orders. RP 130.

Mr. Dotson was convicted as charged. CP 34.

IV. ARGUMENT

1. The Defendant received adequate notice of the crime charged, the essential elements, and specific criminal conduct in the original information, and was therefore not prejudiced when the Sate moved to cure a defect by an amended Information

All essential elements of a crime, statutory or otherwise, must be included in a charging document so as to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). This requirement stems from constitutional law and court rule. The Washington State constitution provides in part, that “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him.” Const. art. 1, § 22. The United States Constitution provides in part, that “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation.” U.S. Const. amend. 6. The Court Rules provide that “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1).

The purpose of the charging document is to provide notice to a defendant of the charges against him, the elements of the offense, and other pertinent information so as to provide a defendant a fair chance to mount a defense. *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993);

State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000). “The rule ensures that the defendant would be apprised ‘with reasonable certainty’ of the nature of the crime charged.” *Taylor*, 140 Wn.2d at 236 (internal citations omitted).

In enforcing the notice requirements of charging documents, the Washington State Supreme Court has avoided “technical rules,” choosing instead to “tailor[] our jurisprudence toward the precise evil that article 1, section 22 was designed to prevent—charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice.” *Schaffer*, 120 Wn.2d at 620.

A defect in the Information is not necessarily fatal to a criminal case and may be cured by the State. Although a trial court must strictly construe an Information challenged before or during trial, and the State may amend the Information to correct the defect at any time before the State rests its case, unless there is substantial prejudice to a defendant. *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995); CrR 2.1(d). The Court Rules also permit the State to amend the Information prior to the close of its case in chief. “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.” CrR 2.1(d) .

A defendant cannot claim error from the amendment of an Information unless he can show he was prejudiced thereby. *State v. Gassman*, 160 Wn. App. 600, 248 P.3d 155 (2011). Whether a defendant has shown prejudice from a trial court decision granting a State's motion to amend the charges is a matter for the trial court to make in its sound discretion, and reviewed for abuse of that discretion. *Id.*; *State v. James*, 108 Wn.2d 483, 739 P.2d 699 (1987). “It is for the trial court to judge each case on its facts, and reversal is required only upon a showing of abuse of discretion.” *Schaffer*, 120 Wn.2d at 621–22 (*citing James*, 108 Wn.2d at 490).

The Appellant claims that the original Information deprived him of notice. Brief of Appellant, 12. However, the notice requirement is not as stringent as counsel suggests. Certainly more detail than a mere reference to the statute, *a la City of Auburn v. Brooke* (119 Wn.2d 623, 836 P.2d 212 (1992) (charging document merely referencing statute does not provide notice without identifying criminal conduct alleged)). As it pertains to no-contact order violations, the Court of Appeals has determined that a reference to the order alleged to have been violated is important, but not indispensable. “A charging document alleging a violation of a domestic violence order must identify the order the defendant is alleged to have

violated, *or at least include sufficient facts* to apprise the defendant of his or her actions giving rise to the charge(s).” *City of Seattle v. Termain*, 124 Wn. App. 798, 799–800, 103 P.3d 209, 210 (2004) (emphasis added); *see City of Bothell v. Kaiser*, 152 Wn. App. 466, 469, 217 P.3d 339, 340–41 (2009). In *Termain*, the City of Seattle cited the defendant without reference to the order violated. The court determined that “appellant is left to guess at the crime he is alleged to have committed.” *Termain*, 124 Wn. App. at 801. The appellate court continued, finding that in the *Termain* case identifying the order was important because “the culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order.” *Id.*, at 804.

The *Termain* decision makes sense since orders from criminal courts, family law matters, civil protection orders, and anti-harassment orders can contain varying prohibitions and levels of protection. A restraining order in a dissolution case may order the parties to keep the peace, for example, while a Domestic Violence Protection Order sought at the same time under a separate cause may prohibit any contact whatsoever. One criminal court may impose 100-foot off-limit zones around a protected person’s residence, while another may impose 1,000-foot zones of protection. Hence, specifying the specific order alleged to

have been violated, and how, can be an important matter of notice when charging violations of court orders.

In this case, however, the mistake in identifying one order rather than the other is not akin to the error in *Termain*. In this case, the restraint provisions contained in the orders from 2013 and 2015 are identical and are the default restrictions imposed in an order issued as part of a criminal case. Trial Exhibits 3, 8. The only difference in the orders, literally, the expiration date and the cause numbers. The Defendant had notice of the criminal conduct alleged by the State, and whether the Mr. Dotson looked to the order entered in 15-1-381-2 or in 13-1-75-2, he would see that his conduct was prohibited. Further, copies of both orders were provided to the Defense through the discovery process, as defense counsel told the Court. RP 129–130.

Considering the charging documents through the lens of *Termain* becomes a fact-specific exercise and demonstrates that, in this unique instance, the cause number of the order alleged to have been violated is not an essential element, nor is it a fact of such importance that the error deprived the Defendant of notice.

2. The Defendant cannot demonstrate prejudice from the State's Amended Information as the amendment did not deprive him of time to prepare a defense, change the charges he faced, or misled or surprised him

When the State moved to amend the Information, defense counsel objected and claimed prejudice. RP 125. Counsel said, “We *might possibly* have proceeded in a different way.” RP 125 (emphasis added). During discussion over the objection, the trial court tried to get counsel to describe the prejudice. “How would you have been able to confront it differently if you knew a month ago that – if you know right now?” asked Judge McCauley. RP 127. Counsel replied that he might have “attacked” the validity of the order differently (RP 130), to which Judge McCauley said, “I don’t see how you could have ... attacked this certified copy of the domestic violence no [contact] order.” RP 133. Ultimately, the Court found no reason to deny the amended Information. *Id.*

To oppose an amended Information, the Defendant must be prejudiced and the prejudice shown must be real and “actually bear on the trial itself.” *State v. Murbach*, 68 Wn. App. 509, 512, 843 P.2d 551, 553 (1993). The usual type of prejudice is that which “may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.” *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986).

Prejudice is not just simply making the trial more difficult. An amendment that would “deprive defendant of a defense she otherwise would have had was not the type of prejudice which would justify denying permission to the state to amend the information.” *Murbach*, 68 Wn. App. at 512. In *Murbach*, the Defendant was charged with Burglary Second degree for entering a garage attached to a house. *Id.*, at 510. An amendment to the statute took effect the day the crime occurred excluding dwellings from Second Degree Burglary and creating the crime of Residential Burglary. *Id.* On the day of trial, the state amended the Information to charge Residential Burglary, increasing the possible sentence and depriving the Defendant of the argument that the garage was a dwelling and she thus did not commit Burglary Second Degree. *Id.*, at 511. The Amendment was upheld.

In the case at hand, if Mr. Dotson’s defense strategy, aware of the State’s mistake, had been to argue in closing or a half-time motion to dismiss, that the order issued in 15-1-381-2 was an invalid pretrial order, *Murbach* makes clear no prejudice is done.

Several other examples show that actual prejudice to deny the State an opportunity to amend the Information before resting cannot just be alleged, but must be real and provable. Adding an additional count of a

sex offense based on trial testimony has been upheld, with the Court of Appeals finding “no specific evidence ... to support a claim of prejudice.” *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010, 790 P.2d 167 (1990). A mid-trial amendment that added a new theory of criminal liability was upheld because there was no showing that defendant was “misled or surprised.” *State v. Mahmood*, 45 Wn. App. 200, 724 P.2d 1021 (1986), *review denied*, 107 Wn.2d 1002 (1986). An amendment on first day of trial did not create prejudice because the “reduced charge involved the same evidence and presented no problems for the preparation of [the defendant’s] defense.” *State v. Brown*, 55 Wn. App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wn.2d 1014, 791 P.2d 897 (1990). And in *State v. Gosser* the State amended the Information regarding a second degree assault cause changing the alternative method of committing the crime from an actual assault to acting with intent to commit an escape. *State v. Gosser*, 33 Wn. App. 428, 656 P.2d 514 (1982). The *Gosser* Court found that “Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial.” *Id.*

Finally, in *State v. Goss*, the State tendered an Amended Information during trial based on testimony that some sex offenses occurred outside the originally alleged time period. *State v. Goss*, 189 Wn. App. 571, 358 P.3d 436 (2015), *aff'd*, 186 Wn.2d 372, 378 P.3d 154 (2016). The Court of Appeals upheld the amendment, seeing that it did not charge any new offenses or add additional child molestation counts. As the 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. As Goss had not claimed an alibi, “he has failed to show any prejudice from the amendment. The trial court did not abuse its discretion in permitting the amendment.” *Id.*, at 577. Comparing the case at hand to *Goss*, the amendment in *Goss* would have presented more difficulty for the defendant than the amendment made in Mr. Dotson’s case—Mr. Goss would have a larger timeline of events to dispute or to investigate. In Mr. Dotson’s case, the facts that created the criminal act did not change—he was with Mr. Martin at specific point in time in a specific place. Whether that conduct violated one piece of paper or another containing identical prohibitions has no bearing on any presentation of a defense.

These examples all support a blunt statement made by the Washington State Supreme Court—“If a defendant is prejudiced by an amendment, then he or she should be able to demonstrate this fact.” *Schaffer*, 120 Wn.2d at 622–23. “To prove an abuse of that discretion, the defendant must demonstrate he was prejudiced. . . . Since no specific evidence was offered to support a claim of prejudice, it must fail.” *Wilson*, 56 Wn. App. at 65. Such is the case here.

3. Counsel made a tactical, considered decision to hold the State to proving each element of the offense. While the tactical value may not be readily apparent in the record, the decision is presumed in favor of effective representation and the Defendant has failed to show otherwise

Claims of ineffective assistance present mixed questions of law and fact reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001). The Court should examine the entire record to decide whether the appellant received effective representation and a fair trial. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008).

Constitutionally ineffective assistance of counsel is established only when a defendant shows that counsel's performance, when considered in light of all the circumstances, fell below an objectively reasonable standard of performance, and there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been

different. *Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017). The burden is on the defendant to demonstrate deficient representation and prejudice. *In re Det. of Hatfield*, 191 Wn. App. 378, 362 P.3d 997 (2015). Failing to satisfy either part of this analysis ends the inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996). “Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). “[T]he presumption of adequate representation is not overcome if there is any ‘conceivable legitimate tactic’ that can explain counsel’s performance.” *Hatfield*, 191 Wn. App. at 402 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

The United States Supreme Court held in *Old Chief* that a trial court must accept a defendant’s offer to stipulate to the existence of a prior conviction when evidence of the prior conviction is unduly prejudicial. *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L. Ed. 2d 674 (1997). In Felony Violation of a No-Contact Order cases, defendants often stipulate to two prior convictions to avoid any prejudice from

introducing the details of those convictions. *State v. Case*, 187 Wn.2d 85, 384 P.3d 1140 (2016). Whether to stipulate to certain facts of facts may represent a tactical decision by counsel. *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995).

While most case law challenges counsel's decisions to stipulate to facts and relieve the State from part of its burden, at least one published case concerns a challenge not to stipulate. In *State v. Streepy*, the appellant contended he received ineffective assistance of counsel because his counsel failed to request an *Old Chief* stipulation. *State v. Streepy*, 199 Wn. App. 487, 400 P.3d 339 (2017), *review denied*, 189 Wn.2d 1025, 406 P.3d 283 (2017). In *Streepy*, a possession of a firearm case, the *Old Chief* stipulation would have also covered prior convictions. According to the record there, the defense attorney told the court "I don't think that it would serve any purpose from our perspective so I'm not going to be requesting that." *Id.*, at 502. The decision there was apparently to "put the State to its proof, having a reasonable belief that the prosecution might fail to properly prove the prior conviction. The fact that this tactic did not, in the end, succeed does not make it any less tactical. Streepy did not receive ineffective assistance of counsel." *Id.*, at 504.

In the case at hand, the decision not to offer an *Old Chief* stipulation was not a mere oversight by counsel. Rather, the decision not to agree to any stipulations was made prior to the trial, as that issue is raised in the Defendant's Trial brief. CP 28-29. The brief, filed the day before the trial, states that "The State will have to prove each and every element of the crime beyond a reasonable doubt ... One of those elements revolves are [sic] prior convictions. The State does have to prove that Mr. Dotson has been convicted of two prior no contact order violations." CP 29. Trial counsel certainly considered the prejudicial effect of not stipulating to the prior convictions and specifically wrote "any details involved in those cases are prejudicial to the defendant and should not be discussed or even mentioned." *Id.* So, counsel determined that the facts of the prior cases would be unfairly prejudicial and he would argue to keep them from coming before the jury, but the convictions themselves would remain an element the State needed to prove.

During the trial, counsel also made a point of arguing that the State should be limited only to the number of prior convictions necessary to prove the case. RP 13–17. While the State had four certified judgement and sentences at its disposal on the day of trial, counsel argued that admitting all four would be unfairly prejudicial. RP 15. The court agreed

and the State was limited to offering two as evidence. RP 17. During this discussion, the fact that no stipulation had been offered came up, showing it the possibility was not just being ignored (counsel could have offered to stipulate then, but chose not to). RP 16.

The fact that counsel drew a tactical line between what evidence of prior convictions to oppose and what not to oppose—four convictions versus two; the fact of the conviction versus the underlying facts of the convictions—demonstrates that the defense counsel thought through and considered how and what evidence to oppose. The decision not to enter a stipulation surely was part of this decision process. The decision not to stipulate may have been made by the Defendant himself, which is possible given earlier friction over whether he would stipulate to the admissibility of prior statements. RP of July 13, 3. The record does not reflect whether the decision not to stipulate came from the attorney or the Defendant.

The decision to oppose the introduction of all four convictions has obvious tactical merit. The tactical merit of not entering a stipulation may be harder to discern from the record. There is certainly merit in requiring the State prove every element of a charged offense. While the tactical merit may be less apparent than in a case involving violent prior offenses, the record demonstrates the absence of a stipulation was a contemplated

decision that defense counsel must have thought had tactical value. Given this, this court should respect the trial counsel's decision and not find the decision fell below an objectively reasonable standard of performance.

Regarding the second prong of the *Strickland* test, it cannot be said there is a reasonable probability that, had it not been for counsel's decision not to oppose the introduction of the two certified judgement and sentences, the result of the proceeding would have been different. Mr. Dotson's trial was factually simple. The jury simply had to decide whether an Aberdeen police officer was credible when he said he recognized Mr. Dotson walking down the street with Ms. Martin. The prior judgements had no bearing on Officer Timmons's credibility in that respect. The evidence showing the Defendant violated a no-contact order was clear, reliable, and undisputed; whether counsel had stipulated to the convictions or not surely did not affect the jury's belief that Mr. Dotson was with Ms. Martin.

V. CONCLUSION

Mr. Dotson knew of two identical and separate no-contact orders restraining him from having contact with Ms. Martin, having been served with both. After he was charged with Felony Violation of a No-Contact Order, his counsel received both orders within a week of the offense and

nearly two months before trial. The State respectfully requests this Court find that the trial court did not abuse its discretion when it allowed the State to amend the Information and when the Defendant could not demonstrate any prejudice caused by the amendment.

The State also respectfully requests this Court find that the considered decision by trial counsel not to stipulate to an element of the offense does not constitute ineffective assistance of counsel, or if the tactical merit of the decision cannot discerned, that the outcome of the trial would most likely not have been different had counsel so stipulated. In short, the State respectfully requests this Court affirm the conviction.

DATED this _18th_ day of October, 2018.

Respectfully Submitted,

By: 
Randy J. Trick
Deputy Prosecuting Attorney
WSBA # 45190

RJT/rjt

GRAYS HARBOR PROSECUTING ATTORNEY

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