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Court of Appeals
Division III
State of Washington

No. 34360-0-III

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

STATE OF WASHINGTON

Respondent

v.

MICHAEL L. GEHRKE,

Appellant

Initial Brief of Appellant

Appeal from Spokane County Superior Court No. 15-1-04223-9

The Honorable Michael P. Price

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INTRODUCTION

On September 4, 2015, Michael Gehrke was approached on bicycle by someone he knew only as “Chaos,” but whose real name was Christopher Pineyro. Mr. Gehrke had prior confrontations with that individual, whom he recognized on sight. Mr. Gehrke also knew that “Chaos” typically carried weapons which could prove deadly in a confrontation. Mr. Gehrke also saw that someone was different about Mr. Pineyro this time. The two exchanged words, Mr. Gehrke approached the bicycle Mr. Pineyro was riding, and kicked it, causing the latter to fall to the ground. When Mr. Pineyro stood up, he was wielding a hammer – Mr. Gehrke responded by backing away from him, and opening a pocket knife once Mr. Pineyro began swinging at him. After retreating approximately 17 feet, Mr. Pineyro again swung, and Mr. Gehrke countered with two jabs, fatally wounding Mr. Pineyro. Mr. Gehrke was subsequently charged with felony murder with second degree assault as the predicate offense.

Immediately prior to trial, the State notified the defense that it “may” amend the information at the close of its case in chief, but before resting. The colloquy was noted on the record, as was the State’s initial decision not to move for an immediate amendment.

After the State’s case in chief was presented, but prior to resting, the state requested an amended alternative charge of first degree manslaughter.

The trial court granted the amendment over defense objection, finding no prejudice to Mr. Gehrke.

At the instructions phase, the trial court provided a “first aggressor” instruction to the jury, though it did not inform the jury that a first aggressor could regain the right to self-defense if he or she retreated from the conflict. Ultimately, Mr. Gehrke was convicted of the amended charge and weapon enhancement. He sentenced within the standard range, and timely appeals.

ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in permitting the State to amend the information immediately before closing pursuant to CrR 2.1 because it prejudiced Mr. Gehrke’s rights under the Washington State Constitution, Article I, section 22.

ASSIGNMENT OF ERROR 2: The trial court erred in providing a first aggressor instruction.

ASSIGNMENT OF ERROR 3: The trial court erred in failing to instruct the jury regarding withdrawal considering the first aggressor instruction given to the jury.

ISSUES

- 1. Whether the trial court abused its discretion by permitting the State to amend the information after the close of its case, but prior to resting, where the State expresses no intention of providing any further information?**
- 2. Whether the trial court erred in providing a first aggressor instruction to the jury without also**

providing an instruction regarding the ability of a first aggressor to regain his right to act in self-defense upon retreat?

MATERIAL FACTS

Michael Gehrke had just arrived at a friend's house in a vehicle driven by his significant other when a man he knew only as "Chaos" rode his bicycle towards him from a nearby alleyway. Verbatim Report of Proceedings (VRP) at 670. The man was Christopher Pineyro. VRP at 671. The two had a history of conflict, and Mr. Gehrke had been previously threatened by Mr. Pineyro with a club. VRP at 672, 676, Mr. Gehrke noticed that Mr. Pineyro seemed abnormally different than in past encounters, as though under the influence of a controlled substance. Mr. Pineyro stated that he "had something" for Mr. Gehrke. VRP at 674.

At those words, Mr. Gehrke approached Mr. Pineyro, who was still coming towards Mr. Gehrke on his bicycle. Suddenly, Mr. Pineyro stopped his bicycle, and more words were exchanged. VRP at 673-74. Mr. Pineyro then began taking off his backpacks, and reached behind himself. VRP at 680, Mr. Gehrke reacted, kicking the bicycle. VRP at 680=81. The bicycle and Mr. Pineyro fell to the ground together. VRP at 682.

When Mr. Pineyro stood, he was wielding a hammer. VRP at 684. Mr. Gehrke drew a pocket knife of his own. VRP at 685. He did not open

it until Mr. Pineyro swung at him, and began advancing. VRP at 685-86. Ultimately, Mr. Gehrke retreated approximately 17 feet during this encounter. VRP at 513-14, 688-89. At the end of those 17 feet, Mr. Pineyro took yet another swing, and Mr. Gehrke stepped in and jabbed twice, fatally wounding Mr. Pineyro in the neck. VRP at 690.

When police arrived, Mr. Gehrke was cooperative, and admitted striking Mr. Pineyro with the knife, though in self-defense. VRP at 333-337. Mr. Gehrke waived his *Miranda*¹ rights, and spoke with detectives. VRP at 483. At the end of the police investigation, Mr. Gehrke was released. VRP at 486.

Ultimately, Mr. Gehrke was charged with felony murder, premised upon second degree assault. Clerk's Papers (CP) at 1. On the day of trial the State determined it "may" move to amend the information to include manslaughter, and notified Mr. Gehrke's counsel of that fact two hours prior to trial. VRP at 122-23. There was a brief colloquy on the record, and during that colloquy, the prosecution stated "I didn't think that it would be prejudicial, and it's a lesser offense. They were not in favor of that [amendment], there, I'm not going to submit that, but I did put them on

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966).

notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative." VRP at 122.

It was not until after the close of the State's case-in-chief, but prior to resting, that the State moved to amend the information to include the alternative crime of manslaughter. VRP at 543. The State based its motion on CrR 2.1(d). During the motion, the State declared that, although it had not yet formally rested, "[t]he State does intend on resting irregardless [sic] of the Court's decision in this case." VRP at 543.

In objecting, defense counsel stated:

defense would likely have looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke's actions were not reckless but an appropriate use of force in self-defense. That's not an issue under the felony murder. All that matters was the fact that we have a justifiable homicide, but for the issue of recklessness that issue could have been something that we may need additional preparation or maybe even potentially additional witnesses. So I do think there is a substantial prejudice to the defense's ability to present the case by allowing this amendment after the trial is already commenced and after the State's case is nearly completed.

VRP at 544-45. Nevertheless, the trial court ruled that the amendment was permissible under the court rule because the defense strategy would not substantially change, and that the defense's decision to not retain an expert would not be impacted by the ruling. VRP at 548.

Prior to closing, the court and the parties engaged in a jury instructions conference. VRP at 726. The primary instruction issues centered around the State's proffered first-aggressor instruction, to which the defense objected. Ultimately, the court determined that the first-aggressor instruction was appropriate under the facts of the case and the appropriate law. VRP at 730-735.

In turn, the defense offered an instruction for purposes of balancing the first-offender instruction. VRP at 742-44; CP at 88. That instruction, though not based upon a formal Washington Pattern Jury Instructions - Criminal (WPIC), cited case-law regarding a first-aggressor's ability to withdraw or retreat, and thereby regain the ability to act in self-defense. *Id.* The court expressed concern that the instruction was not a WPIC instruction, and also determined that the evidence adduced at trial did not "fit" the instruction. VRP at 744.

The jury found Mr. Gehrke guilty of first degree manslaughter, and by special verdict, that he had used a deadly weapon. CP at 189, 191. Mr. Gehrke was sentenced to a mid-point sentence within the standard range, and was given the mandatory enhancement, for a total of 124 months. CP at 232-244. He timely appealed. CP at 246-260.

ARGUMENT

1. The trial court abused its discretion by permitting the State to amend the information after the close of its case, but prior to resting, where the State expresses no intention of providing any further information.

CrR 2.1(d), states that “the court may permit any information or bill of particulars to be amended at any time before the verdict or finding if substantial rights of the defendant are not prejudiced.”

This rule, however, necessarily operates within the ambit of Article I, section 22 of the Washington Constitution which itself provides that “the accused shall have the right [...] to demand the nature and cause of the accusation against him.” Indeed, our Supreme Court has stated on many occasions that the fundamental exercise of this right means that an accused must be given notice of those charges which he or she is to defend at trial, and cannot be placed in jeopardy for an uncharged offense. *State v. Markle*, 118 Wn.2d 424, 432, 823 P.2d 1101 (1992); *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

Two exceptions to this constitutional rule exist: (1) where a defendant is convicted of a lesser included offense of the one charged pursuant to RCW 10.61.006; and (2) where defendant is convicted of an offense of which the crime is an inferior degree to that which has been

charged under RCW 10.61.003. *Pelkey*, 109 Wn.2d at 488 (citing *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)).

In *Pelkey*, our Supreme Court adopted a bright line rule stating that a defendant was *per se* prejudiced if the state moved to amend *after* it has rested its case-in-chief. *Id.* at 491. In that case, the defense moved to dismiss the charge against the defendant after the State's case-in-chief, alleging insufficient evidence. *Id.* at 486-87. In response, the State moved to amend the charge to an offense which was neither a lesser-included, nor an inferior degree. *Id.* The amendment was permitted, and the trial court denied the defense motion to dismiss due to the late amendment. *Id.* The jury found the defendant guilty of the amended charge, though the trial court granted the defense motion to dismiss on the grounds that the offended statute was unconstitutional. *Id.*

The case was certified to our Supreme Court, which, in adopting the above-referenced rule, also addressed the State's argument that such an amendment was permissible under former CrR 2.1(e), which operated the same as our current CrR 2.1(d). *Id.* at 490-91. In addressing the State's argument, the Court provided valuable context as to the prejudicial nature of the mid-trial amendment:

During the investigatory period between the arrest of a criminal defendant and the trial, the State frequently

discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.

The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial 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. 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. at 490. In affirming the trial court's dismissal, albeit on different grounds, the Supreme Court also noted that the amended charge was a related offense, thereby implicating the mandatory joinder rule and subject to a motion to dismiss pursuant to CrR 4.3.1. *Id.* at 491. In the interest of judicial economy, the Supreme Court simply stated that the State was to be precluded from refiling the amended charge. *Id.*

The Supreme Court's revisited its ruling in *Pelkey* in *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993). In that case, the sole issue before the court was the constitutional validity of an amendment to a charging document *during* the State's case, as the Appellant sought to extend the *Pelkey* rule to apply to mid-trial amendments. *Id.* at 619-20. The *Schaffer* court declined to extend the *Pelkey* rule to mid-trial amendments prior to the state resting, noting that former CrR 2.1(e) (now CrR 2.1(d),

appropriately covered such situations, and had been cited with approval by the *Pelkey* court. *Id.* at 621. Nevertheless, the court did state, albeit in *dicta*, that when a jury is involved, and the amendment occurs late in the State's case, impermissible prejudice would be more likely. *Id.* at 616, 621-23.

Here, the logic of *Pelkey* and its progeny provides applicable guidance to demonstrate that the trial court erred in permitting the State to amend its charges against Mr. Gehrke pursuant to CrR 2.1(d), and in so doing, abused its discretion.

The record shows that on the day of trial the State determined it "may" move to amend the information to include manslaughter, and notified Mr. Gehrke's counsel of that fact two hours prior to trial. VRP at 122-23. There was a brief colloquy on the record noting this fact, and during that colloquy, the prosecution stated "I didn't think that it would be prejudicial, and it's a lesser offense. They were not in favor of that [amendment], there, I'm not going to submit that, but I did put them on notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative." VRP at 122.

It was not until after several days of trial, encompassing nine witnesses, that the State moved to amend the information to include the alternative crime of manslaughter. VRP at 543. The State based its motion on CrR 2.1(d). Critically, the State noted that, although it had not yet

formally rested, “[t]he State does intend on resting irregardless [sic] of the Court’s decision in this case.” VRP at 543.

In objecting, defense counsel noted that if reasonable notice had been provided,

defense would likely have looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke’s actions were not reckless but an appropriate use of force in self-defense. That’s not an issue under the felony murder. All that matters was the fact that we have a justifiable homicide, but for the issue of recklessness that issue could have been something that we may need additional preparation or maybe even potentially additional witnesses. So I do think there is a substantial prejudice to the defense’s ability to present the case by allowing this amendment after the trial is already commenced and after the State’s case is nearly completed.

VRP at 544-45. In permitting the amendment, the trial court appeared to rely upon the fact that the State provided notice that it “may” move to amend the information after presenting its case, thereby eliminating the element of surprise from the defense perspective. CRP at 547. The court went on to find that the amendment did not substantially prejudice Mr. Gehrke, and appeared to state that the amendment conformed to the evidence. VRP at 548. The court went on to discuss its experience, and then noted that the defense likely would not have had a “radical” difference in strategy, and that the possibility that the defense may have hired a defense expert was not

changed by the amendment because it was a strategic decision. VRP at 549. For reasons discussed below, the court's decision was in error.

This court reviews a trial court's decision to permit amendment under the abuse of discretion standard. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, or based upon untenable grounds or reasons. *Id.* at 127. A court's decision is based upon untenable grounds or reasons if it is based upon an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* Moreover, a trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices under the facts of the case when the applicable legal standard is applied. *Id.*

Here, the governing rule is, as the trial court correctly noted, CrR 2.1(d). In that analysis, the trial court was to determine whether Mr. Gehrke suffered substantial prejudice by the amendment. It is plain that, under *Pelkey*, had the State formally rested its case prior to the request for amendment, there would have been *per se* prejudice to Mr. Gehrke meriting a reversal since manslaughter is neither a lesser-included offense of felony-murder, nor is it an inferior degree thereof. *E.g., State v. Gamble*, 154 Wn.2d 457, 468, 114 P.3d 646 (2005). As such, the gravamen of the question before this Court is whether the formality of resting has any substantive meaning where the State makes plain that it did not intend to

call any further witnesses, and that it would rest its case whatever the trial court's decision as to the amendment request. VRP at 543. If so, this Court must determine whether Mr. Gehrke was sufficiently prejudiced as to merit reversal.

In order to demonstrate felony murder, the State was required to prove: (1) Mr. Gehrke attempted to commit, or did commit, the felony of assault in the second degree; (2) in the course and furtherance of that assault, did cause the death of Mr. Pineyro; (3) Mr. Pineyro was not acting in concert with Mr. Gehrke to commit the crime; and (4) the acts took place in the State of Washington. RCW 9A.32.050

Unlike the felony murder rule, the crime of Manslaughter in the First Degree requires that the State demonstrate (1) That Mr. Gehrke engaged in reckless conduct; (2) that Mr. Pineyro died as a result of that conduct; and (3) that the act took place in the State of Washington. RCW 9A.32.060. The primary difference then, is the *mens rea* element of recklessness.

Under our criminal code, “a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010

Contrary to the trial court's assertion, it was prejudicial to Mr. Gehrke that he was unable to call an expert witness to discuss what a reasonable person would do in Mr. Gehrke's situation. Moreover, counsel was deprived of the ability to focus cross-examination on that issue with the State's witnesses. Also, although the trial court stated that the amendment made little difference to the defense decision not to call an expert, had the defense known of the additional information to be proven, that may have persuaded the defense to hire an expert. VRP at 544-45.

It is also noteworthy that, contrary to the trial court's statement, the defense strategy could well have been different to the crime of Manslaughter, since Mr. Gehrke elected the affirmative defense of self-defense to the charge of Felony Murder – a defense to which the jury apparently agreed to some extent. Accordingly, Mr. Gehrke's inability to defend the recklessness element by simply presenting evidence of the reasonableness of his actions in that circumstance was a prejudicial violation of this constitutional rights, and an abuse of the trial court's discretion under CrR 2.1(d). This result is consistent with not only the Supreme Court's logic in *Pelkey*, but the policy of preferring substance over form – a technicality upon which the State relied in this matter when it chose to amend prior to “resting” despite stating it would take no further action during its case-in-chief.

Thus, in this case, it was of little practical importance whether the State rested prior to its amendment request given its stated intent to do nothing further. Under the logic of *Pelkey*, Mr. Gehrke was plainly prejudiced, that prejudice was overlooked by the trial court in its ruling, and was therefore not a reasonable decision. This Court should determine find the trial court abused its discretion, and dismiss the conviction with prejudice, as that was the only charge on which Mr. was found guilty.

2. The trial court erred in providing the jury with a first-aggressor instruction without providing an additional, offered instructed regarding the ability to regain the right to self-defense after a withdrawal.

In general, the right of self-defense may be lost where the individual claiming self-defense either acts aggressively or provokes the altercation, unless he or she in good faith first withdraws from the combat in such a way as to let other person know that he or she is withdrawing or intends to withdraw from further aggression. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). However, first aggressor instructions should be used sparingly because other self-defense instructions generally permit the State to argue its theory of the case. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 625 (1999); *State v. Douglas*, 128 Wn. App. 555, 116 P.3d 1012 (2005). Such an instruction is warranted however, where:

- (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts

as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.”

State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). This Court reviews a trial court's instructions to a jury on a *de novo* basis, evaluating it within the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, the trial court determined that sufficient evidence existed to warrant the first aggressor instruction. VRP at 730-35. However, the trial court declined to instruct the jury as to the defense's proffered instruction regarding withdrawal, expressing concern that it was not a formal WPIC instruction. VRP at 743; CP at 88. The court went on to state that it did not consider that the defense had presented a fact pattern that warranted such an instruction. VRP at 744.

However, the court erred in two respects. First, the trial court erred because there was, at a minimum, a genuine question of fact as to whether Mr. Gehrke was the first aggressor – the court apparently agreed given its instruction.

Second, there was likewise a genuine issue of fact as to whether Mr. Gehrke attempted to withdraw from conflict given that there was ample evidence in the record from Detective Cestnik, and Mr. Gehrke stating that Mr. Gehrke had retreated from the point where Mr. Pineyro's bicycle was

struck, and that the distance was somewhere around 17 feet. VRP at 513-514, 688, 709. Certainly, even if there was contrary information in the record, a question of fact nevertheless remained as to whether Mr. Gehrke had attempted to retreat from the victim, and in so doing, regained the right to self-defense under *Wilson* and *Craig*. By failing to instruct the jury concerning Mr. Gehrke's legal ability to regain the right to self-defense after being a first aggressor, the trial court committed reversible error because in effect the first-aggressor instruction – No. 30 - became an improper statement of the law. Because of the trial court's error, this Court should reverse and remand for a new trial.

CONCLUSION

For reasons discussed above, Mr. Gehrke was deprived of his constitutional rights when the trial court permitted the information to be amended after the State had finished its case-in-chief. That error merits a vacation of Mr. Gehrke's conviction with prejudice, owing to the mandatory joinder rule. Further, the trial court's failure to properly instruct the jury likewise mandates a vacation of Mr. Gehrke's conviction.

Respectfully submitted this 25th day of January, 2017 by:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this INITIAL BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

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