

FILED
Court of Appeals
Division III
State of Washington
4/17/2018 11:52 AM

NO. 35515-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW THOMAS DEWEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks

APPELLANT'S OPENING BRIEF

JENNIFER D. STUTZER
Attorney for Appellant
P.O. Box 28896
Seattle, Washington 98118
(206) 883-0417

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

 1. COUNT 4 MUST BE REVERSED FOR INADEQUATE NOTICE AND IMPROPER AMENDMENT. 5

 a. Late amendment. 5

 b. Per se prejudice. 5

 c. Demonstrable prejudice. 9

 2. THE STATE DID NOT PROVE ALL THE ELEMENTS OF SECOND DEGREE BURGLARY, IN VIOLATION OF MR. DEWEY’S CONSTITUTIONAL RIGHT TO DUE PROCESS. 9

 a. Due process requires the State to prove every element of the crime beyond a reasonable doubt. 10

 b. The State did not prove all the elements of second degree burglary. 11

 c. Count 1 must be dismissed. 13

E. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Detention of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012) 13

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009) 11, 13

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)11

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)..... 13

State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989).....12

State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995)13

State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992)5

State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987)6-9

State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993)8-9

Federal Decisions

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000) 11

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970) 11, 13

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed. 2d 560 (1979) 11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the state, after it had rested, to amend the original information to change the manner in which Mr. Dewey was alleged to have violated the protection order.

2. The state did not prove the elements of second degree burglary beyond a reasonable doubt, in violation of constitutional due process rights.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in allowing the state, after it had rested, to amend the information to change the manner in which Mr. Dewey was alleged to have violated the protection order? (Assignment of Error 1).

2. Constitutional due process requires the state to prove all elements of a crime beyond a reasonable doubt. To prove the crime of second degree burglary, the state must prove the defendant entered or remained unlawfully in a building with the intent to commit a crime therein. Did the state prove the elements of second degree burglary where it did not prove beyond a reasonable doubt that Mr. Dewey entered the building with the intent to commit a crime? (Assignment of Error 2).

C. STATEMENT OF THE CASE

Andrew Thomas Dewey was charged in Kittitas County Superior Court by information with one count of residential burglary (domestic violence), RCW 9A.52.025(1) and 10.99.020, one count of violation of a protection order (domestic violence), RCW 26.50.110(1) and 10.99.020, one count of obstructing a law enforcement officer, RCW 9A.76.020, and one count of possession of a stolen vehicle, RCW 9A.56.068. CP 6-7. Mr. Dewey had a jury trial on August 1-2, 2017. RP 1.

On day one of trial, the state presented an amended information. CP 83-85; RP 8. This first amended information charged Mr. Dewey with one count of second degree burglary (domestic violence), RCW 9A.52.030 and 10.99.020, one count of second degree theft (domestic violence), RCW 9A.56.040(1)(a) and 10.99.020, one count of second degree possession of stolen property, RCW 9A.56.160(1)(a) and 10.99.020, one count of violation of a protection order (domestic violence), RCW 26.50.110(1) and 10.99.020, one count of obstructing a law enforcement officer, RCW 9A.76.020, and one count of possession of a stolen vehicle, RCW 9A.56.068. CP 83-85.

The jury heard testimony from Mrs. Dewey. RP 43-65, 77-80. Mr. and Mrs. Dewey were in the process of divorcing and a protection order had been issued after Mrs. Dewey petitioned for the order. RP 45. The jury heard testimony from Officers James Woody and Dan Kivi. RP 93-109, 111-35. These deputies had arrested Mr. Dewey after finding him at the Twin Lakes property. RP 100, 130.

After the state rested, the defense made a half time motion requesting the court to dismiss the charges of second degree theft and possession of stolen property. RP 190-91. The court denied the defense motion. RP 202. The trial continued, the defense called witnesses, including Mr. Dewey, and then the defense rested. RP 293. At the close of evidence, the defense moved to dismiss count 4, violation of a protection order (domestic violence). RP 311-12. In response, the state sought to amend the information; the court allowed the amendment. CP 90-92 (Second Amended Information (8/2/17)); RP 311-13.

The second amended information charged Mr. Dewey with the same counts as the first amended information. CP 90-92. However, the second amended information changed the way it alleged Mr. Dewey committed the crime of violating a protection

order from alleging he contacted Mrs. Dewey to alleging he was at a property that the protection order prohibited him from going to. CP 84; 90-92.

After hearing the testimony, the jury found Mr. Dewey guilty of: second degree burglary (domestic violence), violating a protection order (domestic violence), and obstructing a law enforcement officer, as listed in the second amended information. RP 373-74; CP 90-92; 150-59. The jury found Mr. Dewey not guilty of: second degree theft, second degree possession of stolen property, possession of a stolen vehicle. RP 373-74.

The parties agreed that Mr. Dewey's offender score was 3, with a standard range of 9-12 months. RP 384. Mr. Dewey requested an exceptional upward departure from the standard range so he could serve his term in prison. *Id.* The court imposed the exceptional upward sentence Mr. Dewey requested. CP 162-63; CP 166-67; RP 386. Mr. Dewey appeals. CP 178.

D. ARGUMENT

1. COUNT 4 MUST BE REVERSED FOR
INADEQUATE NOTICE AND IMPROPER
AMENDMENT.

a. Late amendment. The State rested its case. RP 190.

The defense rested its case. RP 293. At the close of evidence, the defense made a motion to dismiss Count 4 (violation of a protection order – domestic violence) and the state responded that it would need to amend the information and argued that it could amend the information anytime before the verdict if the defendant was not prejudiced. RP 311-12. The defense argued that Mr. Dewey was prejudiced because of the timing of the state's motion, nevertheless, the court allowed the state to amend the information. CP 90-92 (Second Amended Information (8/2/17)), RP 311-16.

b. Per se prejudice. The Washington Constitution includes a guarantee that the state will adequately inform Mr. Dewey of the charges he is to meet at trial. Wash. Const. art 1, § 22 (amend. 10).

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.

State v. Markle, 118 Wn.2d 424, 431-32, 823 P.2d 1101 (1992).

CrR 2.1 is the applicable court rule. Under CrR 2.1(d), the state is precluded from amending an information, at any time during trial or after the prosecution rests its case, if doing so would prejudice “substantial rights” of the accused.

Further, the Washington Constitution imposes a rule of categorical or *per se* prejudice, applicable where the state seeks to amend the information after resting its case-in-chief. Wash. Const. art 1, § 22 (amend. 10); *State v. Pelkey*, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987). Technical, non-material amendments are not governed by this rule.

Here, the State presented its second amended information too late. Not only had the state rested its case, but the defendant had also put on its case, and rested, before making its final motion for dismissal. RP 311.

In *Pelkey*, the Washington State Supreme Court addressed late amendments, articulated a bright-line constitutional rule of prejudice: A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. (Emphasis added.) *Pelkey*, 109 Wn.2d at 491. Thus, the state’s

amendment was improper and clearly prejudiced Mr. Dewey's defense.

This case does not involve fixing a technical defect in the information. Rather, here the state was seeking a last minute fix by changing the manner in which it alleged Mr. Dewey violated the protection order. The state had originally charged the crime of violating a protection order by alleging Mr. Dewey had contact with Mrs. Dewey, the protected person. CP 6-7. It had kept this language in its first amended information, which was presented on day one of trial. CP 83-85. But in its second (and final) amended information, presented after both parties had rested, the state alleged Mr. Dewey violated the protection order not by contact with Mrs. Dewey, but by being at a property the order prohibited him from. CP 90-92.

Mr. Dewey was entitled to know in what way he was being charged with violating the protection order, so that it would be possible for him to mount a defense. Thus, the question of what actions were involved in committing the crime of violating a protection order was material to Mr. Dewey's defense. Like *Pelkey*, here the shift in substance of the state's charging document, in the factual context of this case, caused *per se* prejudice. The

amendment should have been denied under the constitutional standard of proper notice before trial commences.

Schaffer is instructive, it involved review of a juvenile bench trial, where the original information alleged that the respondent had damaged “tires” on certain property. *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993). Mid-trial, however, other eyewitnesses stated that the defendant also knocked over a mailbox at that property. The state was allowed to amend the information after direct examination of the witnesses providing this new information; following the amendment, the trial continued, including cross-examination by the defense. *Schaffer*, 120 Wn.2d at 617-18. The Court in *Schaffer*, in affirming the amendment, contrasted *Pelkey*, where the state, after resting, had moved to amend the charge from bribery to “trading in special influence,” with different charged facts, justifying application of *Pelkey’s* per se rule. *Schaffer*, 120 Wn.2d at 620-22. The present case has no opportunity such as in *Schaffer* to address the new subject matter, since the defense had rested, and was just a way to survive the defense’s motion to dismiss for failure to make a prima facie case on count 4.

Under *Schaffer*, when in a jury trial, and where the amendment at issue comes later in trial, impermissible prejudice is

more likely to exist. *Schaffer*, 120 Wn.2d at 621 (citing article 1, section 22 and CrR 2.1). If prejudice is found, denial of the amendment is appropriate because constitutional due process has been violated.

Further, under CrR 2.1, Mr. Dewey suffered demonstrable prejudice to his substantial rights.

c. Demonstrable prejudice. If *Pelkey's* categorical rule does not apply to the change to the subject matter after the state rested, Mr. Dewey suffered demonstrable prejudice to substantial rights of his under CrR 2.1. CrR 2.1; *Pelkey, supra, State v. Schaffer*, 120 Wn.2d at 622-23. As Washington decisions have made clear, the presence of such prejudice at any time of trial makes amending the information constitutional error.

The notice requirement exists as a means to allow the defendant to “mount an adequate defense” in response to the charges laid. *Schaffer*, 120 Wn.2d at 620. Which is why CrR 2.1(a)(1) requires that the “information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” Mr. Dewey argues that the shifting ground under his feet cannot be constitutional notice. Wash. Const. art. 1, §22; CrR 2.1; U.S. Const. amends. 6, 14.

Here, the unusually late change to the information demonstrates unfair prejudice to Mr. Dewey's substantial rights. U.S. Const. amend. 14. In making his motion to dismiss count 4 at the close of evidence, Mr. Dewey attempted to point out how under the information as charged, no evidence was admitted at trial to show that Mr. Dewey made contact with the protected party. RP 311-16. In response to the defense motion, the state amended and changed the subject matter of the crime to Mr. Dewey being at a prohibited residence. RP 311-16. The state's actions here clearly violate Mr. Dewey's constitutional due process rights. Mr. Dewey has a substantial right to be apprised of the factual allegations he was to meet at trial so that he could mount a defense and allowing the amendment at this stage resulted in unacceptable prejudice to Mr. Dewey.

2. THE STATE DID NOT PROVE ALL THE ELEMENTS OF SECOND DEGREE BURGLARY, IN VIOLATION OF MR. DEWEY'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

a. Due process requires the state to prove every element of the crime beyond a reasonable doubt. In all criminal prosecutions, due process requires that the state prove every fact necessary to

constitute the charged crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction should be reversed where no rational trier of fact, viewing the evidence in a light most favorable to the state, could find all elements of the charged crime proven beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 580, 210 P.3d 1007 (2009).

b. The State did not prove all the elements of second degree burglary. In its final amended information, the state charged Mr. Dewey with second degree burglary. CP 90-92. To prove the offense, the state was required to prove beyond a reasonable doubt that Mr. Dewey entered the building on Twin

Lakes road and remained unlawfully, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1); CP 90-92. To support a second degree burglary conviction, the state had to prove that Mr. Dewey had the intent to commit a crime against a person or property therein. RCW 9A.52.030.

The state's theory was that Mr. Dewey entered the recreation property on Twin Lakes road and took items from the storage building, and loaded those items into the truck that he was driving. CP 90-92; RP 335-349. Items were located in the truck that belonged to Mr. Dewey, to Mrs. Dewey, and items that belonged to the community. RP 57. Mr. Dewey was charged with second degree theft and with second degree possession of stolen property, but he was found not guilty of those charges by the jury. CP 150-59; RP 373-74.

Here, the state failed to present sufficient evidence that Mr. Dewey had the intent to commit a crime against a person or property at the building on Twin Lakes road. The court may not infer intent to commit a crime from evidence that is "patently equivocal." *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations -

attempted burglary or malicious mischief). Here, there is insufficient evidence to support the state's contention that Mr. Dewey entered the recreation property in order to commit a crime. The jury found Mr. Dewey not guilty of the charged crimes of theft and possession of stolen property, which supports that he did not have the intent to commit a crime against either person or property.

The evidence is insufficient to support the conviction for second degree burglary. This Court should vacate the conviction and remand with directions to dismiss the charge with prejudice. *Engel*, 166 Wn.2d at 581; *In re Detention of Heidari*, 174 Wn.2d 288, 292-96, 274 P.3d 366 (2012); *In re Winship*, 397 U.S. at 364.

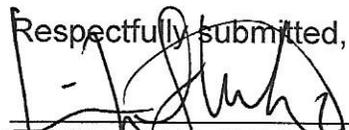
c. Count 1 must be dismissed. If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Because the state did not prove all of the elements of second degree burglary, count 1 must be reversed and dismissed.

E. CONCLUSION

The state did not prove all of the elements of second degree burglary, requiring reversal of the conviction and dismissal of the charge. In addition, the conviction for violation of a protection order must be reversed for inadequate notice and improper amendment.

DATED this 13th day of April, 2018.

Respectfully submitted,



JENNIFER D. STUTZER (38894)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35512-2-III
)	
ANDREW THOMAS DEWEY,)	
)	
APPELLANT.)	

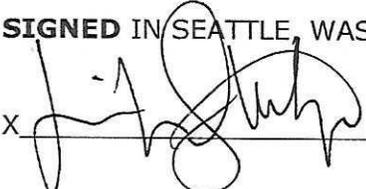
DECLARATION OF DOCUMENT FILING AND SERVICE

I, JENNIFER STUTZER, STATE THAT ON THE 13TH DAY OF APRIL, 2018, I CAUSED THE **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GREGORY ZEMPEL	()	U.S. MAIL
KITTITAS CO PROS ATTORNEY	()	HAND DELIVERY
205 W 5 TH Ave Ste 213	(X)	E-FILED AND
ELLENSBURG, WA 98926-2887		E-DELIVERED TO
		OPPOSING COUNSEL
		VIA COURT'S PORTAL

[X] ANDREW THOMAS DEWEY	()	U.S. MAIL
He is no longer listed in DOC custody and did not provide a forwarding address.	()	HAND DELIVERY
I am holding a copy of the brief for him and looking for a current address.		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF APRIL, 2018.

X  _____

STUTZER LAW PLLC

April 17, 2018 - 11:52 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35515-2
Appellate Court Case Title: State of Washington v. Andrew Thomas Dewey
Superior Court Case Number: 17-1-00153-7

The following documents have been uploaded:

- 355152_Briefs_20180417114928D3697721_2647.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Dewey.355152.aob.041318.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- jodi.hammond@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us

Comments:

re-filed brief as one document (instead of 2)

Sender Name: Jennifer Stutzer - Email: jennifer@stutzerlaw.com
Address:
PO BOX 28896
SEATTLE, WA, 98118-8896
Phone: 206-883-0417

Note: The Filing Id is 20180417114928D3697721