

56924-4

56924-4

80195-9
NO. 56924-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD S. QUISMUNDO,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 JUN 28 AM 11:12

BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

THOMAS M. CURTIS
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 6

A. INTRODUCTION..... 6

B. THIS COURT SHOULD NOT CONSIDER WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION TO RE-OPEN AND FILE A SECOND AMENDED INFORMATION SINCE DEFENDANT WITHDREW HIS MOTION FOR A MISTRIAL AND AFFIRMATIVELY ELECTED TO PROCEED WITH THE TRIAL..... 7

C. THE COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO REOPEN ITS CASE AND AMEND THE INFORMATION..... 8

D. THE AMENDED INFORMATION THAT WAS ENTERED BEFORE THE JURY WAS SELECTED WAS NOT CONSTITUTIONALLY DEFICIENT. 11

IV. CONCLUSION..... 12

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>City of Seattle v. Termain</u> , 124 Wn. App. 798, 103 P.3d 209 (2004)	7
<u>Harvey v. University of Washington</u> , 118 Wn. App. 315, 76 P.3d 276 (2003), <u>review denied</u> , 151 Wn.2d 1025 (2004)	8
<u>Locke v. City of Seattle</u> , _____ Wn. App. _____, _____ P.3d _____, 2006 WL 1669603, (2006)	9
<u>State v. Brinkley</u> , 66 Wn. App. 844, 837 P.2d 20 (1992)	9
<u>State v. Clowes</u> , 104 Wn. App. 935, 18 P.3d 596 (2001)	7
<u>State v. Grant</u> , 104 Wn. App. 715, 17 P.3d 674 (2001)	12
<u>State v. Irizarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988)	7
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	9, 12
<u>State v. Pelkey</u> , 109 Wn. 484, 854 (1987)	10, 11
<u>State v. Perkins</u> , 108 Wn.2d 212, 737 P.2d 250 (1987)	8
<u>State v. Phillips</u> , 98 Wn. App. 936, 991 P.2d 1195 (1991)	12
<u>State v. Schaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993)	10
<u>State v. Valladares</u> , 99 Wn.2d 663, 694 P.2d 508 (1983)	8
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	7

WASHINGTON STATUTES

RCW 10.99	2, 3
RCW 10.99.020	3
RCW 26.09	2, 3
RCW 26.10	2, 3
RCW 26.26	2, 3
RCW 26.50	2, 3
RCW 26.50.110	3
RCW 26.52,020	2, 3
RCW 74.34	2, 3

OTHER AUTHORITIES

2 W. LaFave & J. Israel, <u>Criminal Procedure</u> §19.2 at 442 and n. 2 (1984).	9
--	---

I. ISSUES

1. At the close of the State's case, defendant moved for dismissal arguing the information failed to allege one of the elements of the crime. The judge granted the state's motion to re-open to amend the complaint. Defendant made an intelligent, voluntary decision to proceed with the trial and withdrew his motion for a mistrial. Did defendant's refusal of the offered mistrial waive consideration of whether the court abused its discretion in letting the State re-open its case-in-chief?

2. Did the court abuse its discretion by allowing the State to re-open its case-in-chief to amend the information where defendant clearly had knowledge of the exact nature of the charge, and any perceived prejudice could have been cured by granting a mistrial?

3. Where the first amended information included all necessary elements of the crime of violating a protective order, was there any possibility of prejudice to defendant by the court permitting a second amendment of the information to include the element defendant claimed was missing?

II. STATEMENT OF THE CASE

On November 9, 2000, defendant was sentenced for violation of a domestic violence no contact order. The sentence

included an order that defendant have no contact with the victim, Kelly Quismundo, for five years. CP 61.

On February 18, 2004, defendant was sentenced, inter alia, for violation of a domestic violence court order. The sentence included an order that defendant not have contact with Kelly Quismundo. Exhibit 2-A.

On the night of May 30-31, 2005, defendant went to Kelly Quismundo's apartment. 8/22 RP 31, 74. Ultimately, the police were called, and defendant was arrested. CP 60.

Defendant was charged with felony violation of a domestic violence court order. The information read:

DOMESTIC VIOLENCE COURT ORDER VIOLATION, committed as follows: That the defendant, on or about the 31st day of May, 2005, with knowledge that he/she was the subject of a protection order, restraining order, or no contact order pursuant to RCW 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020, as per Snohomish County Judgment and Sentence #04-1-00021-6 ordered by Judge Bowden on February 18, 2004, protecting Kelly Quismundo, and Snohomish County Judgment and Sentence #00-1-01330-7 ordered on November 9, 2000 protecting Kelly Quismundo, and said order being valid and in effect, did violate the order by assaulting another person, to-wit: Kelly Quismundo, and the conduct that constituted the violation was reckless and created a substantial risk of death or serious physical injury to another person, to-wit: Kelly Quismundo, and the victim was a family or household

member, as defined in RCW 10.99.020; proscribed by RCW 26.50.110, a felony.

CP 62 (Information I).

On the day of trial, the State, with the agreement of defendant, moved to amend the information. 8/22 RP 2. The amended information read:

DOMESTIC VIOLENCE COURT ORDER VIOLATION, committed as follows: That the defendant, on or about the 31st day of May, 2005, with knowledge that he/she was the subject of a protection order, restraining order, or no contact order pursuant to RCW 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020, as per Snohomish County Judgment and Sentence #04-1-00021-6 ordered by Judge Bowden on February 18, 2004, protecting Kelly Quismundo, and Snohomish County Judgment and Sentence #00-1-01330-7 ordered on November 9, 2000 protecting Kelly Quismundo, and said order being valid and in effect, **did violate the order by assaulting another person, to-wit: Kelly Quismundo, and the conduct that constituted the violation was reckless and created a substantial risk of death or serious physical injury to another person, to-wit: Kelly Quismundo and the defendant had at least two prior convictions for violating the provisions of a no contact order issued under RCW 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 or by a valid foreign protection order as defined in RCW 26.52.020**, and the victim was a family or household member, as defined in RCW 10.99.020; proscribed by RCW 26.50.110, a felony.

CP 53 (deleted language in bold, new language underlined)
(Information II).

Defendant then informed the court that he had considered asking for a continuance to obtain two witnesses and some documents for use in his defense, but had decided to forego the witnesses and documents in order to immediately proceed with the trial. 8/22 RP 9-11.

After the State rested, defendant's counsel objected to the amended information saying, "I have reviewed the amended information several times. I don't believe the amended information alleges that [defendant] ever violated the order, or had contact with [the victim] . . . So at this point I'd move to dismiss the charge." 8/22 RP 83-84.

The State suggested there were three options: (1) the court could allow the State to re-open for the sole purpose of again amending the information, (2) the court could grant a mistrial without prejudice, or (3) defendant could withdraw his objection. 8/22 RP 87-88.

The court granted the State's motion to re-open and file a second amended information. Defendant asked for a continuance of several weeks to discuss the second amended information with counsel. The State indicated that this was in effect a motion for a mistrial. 8/22 RP 94-95.

The court then directly discussed with defendant how the motion for a mistrial seemed inconsistent with his earlier comments indicating he wanted to get the trial over with. Defendant indicated he understood, but was concerned that moving for a mistrial might waive an appeal of the court's ruling. 8/22 RP 97. The court then recessed for the day. 8/22 RP 100.

The next day, defendant told the court he wished to proceed with the trial, but did not want to waive any appellate issue. Defendant said that to the extent he had made a motion for a mistrial, that motion was withdrawn. 8/23 RP 102-03.

The State filed a second amended information. The wording was the same as the amended information, except the words "did violate the orders" were added. CP 48 (Information III).

The court noted defendant's objection to the filing of Information III. The court then found defendant was making a knowing, voluntary decision "to proceed [with the trial] rather than ask for a continuance[.]" Defendant did not indicate that Information was III in any way deficient. 8/23P 103-04.

Defendant was convicted of the charge. CP 19.

III. ARGUMENT

A. INTRODUCTION.

A trial court may permit the State to amend the criminal information during its case-in-chief if the substantial rights of the accused are not prejudiced thereby. Here, after the State rested, the court granted the State's motion to re-open and file Information III. Defendant objected, and the court indicated it was willing to grant a mistrial. Defendant then withdrew his motion for a mistrial and asked that the trial proceed. Since the trial court offered defendant the remedy he now seeks, and defendant knowingly and voluntarily waived that remedy, he also waived consideration of whether the court abused its discretion by granting the State's motions.

In any event, there was no abuse of discretion. The court knew that Information I contained all the elements of the charged offense, so defendant knew what he had to defend against. Further, the court knew that any perceived prejudice could have been cured by granting a mistrial without prejudice to the State. Giving defendant the choice of immediately proceeding with the trial or accepting a mistrial, then abiding by defendant's choice, was not an abuse of discretion.

Last, when Information II -- the information that was before the court when the motion for a mistrial was made -- is liberally construed, it is clear that all necessary elements of the crime of violating a domestic violence court order were alleged.

B. THIS COURT SHOULD NOT CONSIDER WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION TO RE-OPEN AND FILE A SECOND AMENDED INFORMATION SINCE DEFENDANT WITHDREW HIS MOTION FOR A MISTRIAL AND AFFIRMATIVELY ELECTED TO PROCEED WITH THE TRIAL.

After the State rested, defendant moved to dismiss the charge, arguing that an element was missing. A defendant has a constitutional right to be fully informed of the criminal charge he or she is to meet at trial. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The remedy for an information that lacks an element is to grant a mistrial, dismiss the charge without prejudice, and allow the State to file an amended information. See City of Seattle v. Termain, 124 Wn. App. 798, 803, 103 P.3d 209 (2004) (remedy for deficient charging document is reversal and dismissal without prejudice); State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001) (same); State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995) (same). That is the remedy defendant now requests. Brief of Defendant 7.

Here, the court offered defendant the appropriate remedy for the perceived error, and defendant affirmatively rejected it. A defendant may waive constitutional rights so long as the waiver is intelligent, voluntary, and with an understanding of the consequences. See State v. Perkins, 108 Wn.2d 212, 215, 737 P.2d 250 (1987) (defendant may waive right to appeal); See also Harvey v. University of Washington, 118 Wn. App. 315, 318, 76 P.3d 276 (2003), review denied, 151 Wn.2d 1025 (2004) (waiver is the voluntary relinquishment of a known right and is enforceable); State v. Valladares, 99 Wn.2d 663, 671-72, 694 P.2d 508 (1983) (by withdrawing a pretrial motion to suppress evidence, the defendant abandoned his fourth amendment objections to the evidence).

This Court should limit its review to whether defendant's waiver of a mistrial was made intelligently, voluntarily, and with an understanding of the consequences. Clearly, it was. This Court should affirm the trial court.

C. THE COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO REOPEN ITS CASE AND AMEND THE INFORMATION.

Should this Court determine that defendant did not waive consideration of this issue, it should still affirm the trial court.

A trial court's actions in regard to reopening of a case will be upheld except upon a showing of manifest abuse of discretion and prejudice resulting to the complaining party..

State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

Defendant has not showed an abuse of discretion.

"A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds." Locke v. City of Seattle, ____ Wn. App. ____, ____ P.3d ____, 2006 WL 1669603, (2006). Here, the trial court determined that defendant would suffer no prejudice from allowing the State to re-open its case and file Information III. Further, while not commented on by the court, it is clear defendant realized Information II was deficient before the State initially rested but chose to reserve his objection.¹ Discouraging withholding objections is not an abuse of discretion.

The court's other alternative was to grant a mistrial and allow the State to file an amended information before the second trial. The court gave defendant the choice of remedies. That action was not manifestly unreasonable or based on untenable grounds.

¹ This practice has been characterized as "sandbagging" . . . a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading." State v. Kjorsvik, 117 Wn.2d 93, 103, 812 P.2d 86 (1991), citing 2 W. LaFave & J. Israel, Criminal Procedure §19.2 at 442 and n. 2 (1984).

Defendant relies on State v. Pelkey, 109 Wn. 484, 745, 854 (1987) to support his position that allowing the State to reopen its case was an abuse of discretion. That reliance is misplaced.

In Pelkey, the State rested without proving one of the elements of the charged crime, bribery. After defendant moved to dismiss for lack of evidence, the court permitted the State to amend the charge to a different crime, trading in special influence. 109 Wn.2d at 486. The Supreme Court held such amendment was error because the defendant was not on notice of “the precise nature of the charge[.]” 109 Wn.2d at 490. The State did not ask to re-open its case-in-chief to file the amended information, so the Supreme Court did not reach the issue here.

Pelkey established a bright line rule that amendments to the charging document after the State rests its case-in-chief may only be to a lesser included offense or to a lower degree of the original charge. 109 Wn.2d at 491; State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993). However, allowing the State to re-open its case resulted in the amendment of the information taking place during the State’s case-in-chief.

Amendment during the State’s case is governed by Schaffer. There, the Supreme Court held that amendment of the charging

document during the State's case-in-chief was not barred by Pelkey. Rather, if the trial court found no prejudice to the defendant's substantial rights, it could permit amendment of the charging document. The standard on appeal was abuse of discretion. Schaffer, 120 Wn.2d at 621-22.

Defendant does not allege prejudice to a substantial right resulting from the amendment of the information. There was no abuse of discretion in permitting the amendment.

Since the court's exercise of discretion in allowing the State to re-open its case-in-chief was in deciding whether to allow filing the second amended information or to grant a mistrial and allow the State to file the second amended information at some later date, granting defendant's wishes and proceeding with the trial was not an abuse of discretion.

D. THE AMENDED INFORMATION THAT WAS ENTERED BEFORE THE JURY WAS SELECTED WAS NOT CONSTITUTIONALLY DEFICIENT.

Defendant claims that Information II failed to allege the element of contact with a protected person. Brief of Defendant 3. When a defendant challenges the sufficiency of the charging document after the State has rested, the document is sufficient if the facts appear in any form, or by fair construction, can they be

found in the charging document. State v. Grant, 104 Wn. App. 715, 720-21, 17 P.3d 674 (2001), citing State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (1991), and Kjorsvik, 117 Wn.2d at 104-05.

Defendant claims there is no allegation that he had contact with the victim. The title of the charge, domestic violence court order violation, by fair implication alleges contact with the victim. Under the liberal construction standard, all elements can be found in the charging document.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 27, 2006.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By:



THOMAS M. CURTIS, WSBA # 24549
Deputy Prosecuting Attorney
Attorney for Respondent