

NO. 63273-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TEODULO RODRIGUEZ,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY PERMITTING THE STATE TO AMEND THE INFORMATION TO EXPAND THE CHARGING PERIOD OF THE STALKING?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

The appellant was charged via amended information in Count I with Felony Stalking occurring between May 29, 2008 and June 2, 2008. CP 6-7 and 21-22. On March 10, 2009, a jury trial commenced in this matter. RP 2. Following A.B's testimony on March 16, 2009, the State rested, the defense rested, and then the State moved to amend the information to expand the charging time period. RP 374, 379, 389. Finding no prejudice to the appellant, the trial court granted the State's motion to amend to charge the appellant with Felony Stalking occurring between May 27, 2008 and June 2, 2008. RP 391. On March 17, 2009, the jury convicted the appellant as charged. CP 51-54. The appellant timely filed this appeal and challenges the jury's verdict. CP 64-72.

2. SUBSTANTIVE FACTS

On December 14, 2007, the appellant was sentenced for the crime of Unlawful Imprisonment under Cause No. 07-1-10661-4 KNT. Ex. 20. At that time, a No Contact Order was issued pursuant to

RCW 10.99 prohibiting the appellant from coming within 500 feet of his ex-girlfriend Maria del Rosario Beltran's home, workplace, school, and person until December 14, 2012. Ex. 3.

On May 29, 2008, the appellant called Ms. Beltran's home phone number. RP 355. Ms. Beltran's son, A.B., answered the phone and the appellant asked for Ms. Beltran. RP 355, 361. A.B. told the appellant that his mother was not home. RP 361. The appellant told A.B. that he wanted to talk to Ms. Beltran and if he couldn't get to Ms. Beltran around her home, he would get to her at her work. RP 361-362.

In the couple of days leading up to May 29, 2008, the appellant called Ms. Beltran's home phone number on multiple occasions. RP 356-358. When A.B. answered the phone, the appellant made similar statements about wanting to speak with Ms. Beltran and what he would do if that didn't happen. RP 356-358.

During this time period, Ms. Beltran was employed at Plush Pippin Pies. RP 278. Between May 27, 2008 and May 29, 2009, her co-worker, Aaron Beltran (no relation to Ms. Beltran or her son, A.B., referenced above), saw the appellant and his car on multiple occasions at Ms. Beltran's workplace. RP 196-197. The first time, Mr. Beltran saw the appellant outside of Plush Pippin Pies talking to

Ms. Beltran. RP 196-198. The second time, occurring one to two days later, Mr. Beltran the appellant inside of Plush Pippin Pies making hand gestures at Ms. Beltran. RP 208-213. The appellant was told to leave, but an hour later Mr. Beltran saw the appellant's car still outside of Plush Pippin Pies. RP 215.

On May 30, 2008, Ms. Beltran saw the appellant banging on the windows of the break room at Plush Pippin Pies. RP 305-307. She told management, who called the police. RP 225, 307-308. Between May 30 and June 1, Mr. Beltran saw the appellant again once, and his car on three separate occasions outside of Plush Pippin Pies. RP 220-221.

On June 2, 2008, as Ms. Beltran was leaving her home to go to work, the appellant approached her in violation of the no contact order and attempted to shove her inside of his car. RP 313-314.

## **ARGUMENT**

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING THE STATE TO AMEND THE INFORMATION TO EXPAND THE CHARGING PERIOD OF THE STALKING.

Article 1, section 22 of the Washington Constitution affords a criminal defendant the right to be informed of the charges against him and protects against "charging documents which prejudice the defendant's ability to mount an adequate defense by failing to

provide sufficient notice." State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993). Consistent with this constitutional provision, the Court may permit the amendment of an information at any time before the verdict or finding if substantial rights of the defendant are not prejudiced. CrR 2.1(d); Schaffer, 120 Wn.2d at 622. The trial court has considerable discretion, based on the facts of each case, in deciding a motion to amend, and "reversal is required only upon a showing of abuse of discretion." Id. at 621-22. Here, there was no abuse of discretion.

The propriety of an amendment generally depends on its timing. Amendments that occur after the State rests its case are not allowed unless the amendment is to a lesser included offense or a lesser degree of the same charge. Schaffer, 120 Wn.2d at 621; State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). With respect to amendments made before the State rests, this per se rule articulated in Pelkey does not apply. Schaffer, 120 Wn.2d at 621. Instead, the trial court may allow amendments during the State's case so long as the amendment does not prejudice the substantial rights of the defendant. Id. at 621-23; State v. Hakimi, 124 Wn. App. 15, 28, 98 P.3d 809 (2004). The burden is on the defendant to show specific

prejudice to a substantial right. State v. James, 108 Wn.2d 483, 486, 739 P.2d 699 (1987).

Pelkey governs amendments made after the State rests; however, it deals with amendments of a "criminal charge." Pelkey, 109 Wn.2d at 491. Crime dates are not part of the "criminal charge," and thus our analysis falls outside of Pelkey.

Specifically, because the date is not generally a material element of the crime "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." State v. DeBolt, 61 Wn. App. 58, 808 P2d. 794 (1991). In DeBolt, the defendant was charged with the crime of Indecent Liberties against his nine-year-old step-daughter. The Court noted "the precise date the abuse occurred was not a critical aspect of the original information, which alleged the act was committed during a period of time. Children often cannot remember the exact date of an even, and in cases of sexual abuse, they may repress memory of that date." Id. at 62.

In DeBolt, after the State had rested its case and the defendant testified, the State moved to amend the charging period from March 1, 1988 through March 30, 1988 to December 26, 1987

to April 13, 1988, and the Court permitted the amendment. The Court noted that there was no prejudice in allowing an amendment of the information that expanded the charging period because "the nature of the case was not changed and there was no alibi defense as to any specific date." Id. at 60. Further, the court found that although the amended information expanded the dates during which the crime was alleged to have been committed, "it is difficult to conceive how this change in the charging period deprived the defendant of necessary notice of the nature and cause of the accusation against him." Id. at 62.

Analogous to DeBolt, there was no prejudice here in permitting an amendment which expanded the charging period by two days because the nature of the appellant's stalking case was not changed, nor was there an alibi defense as to any specific date. The amendment here simply modified the charging period of the same stalking offense. The charged crime remained the same after the amendment.

Appellant's reliance on the Kansas case State v. Spangler, 38 Kan.App.2d 817, 173 P.3d 656 (2007), is misplaced. In Spangler, the initial complaint failed to set forth a sufficient overt act in furtherance of the conspiracy, and thus without the amendment, the State would

have been unable to prove the crime charged. And, not only was the State permitted to amend to allege acts sufficient to prove the charge, but also to change the name of the party who committed the acts. Id. at 827.

Unlike in Spangler, the appellant cannot demonstrate any actual prejudice resulting from the amendment. Here, there were plenty of instances of conduct showing that the appellant repeated harassed or followed Ms. Beltran, and thus supporting the conviction for stalking, absent the additional phone calls made by the appellant on May 27 and 28, 2008. The State did not make a motion to amend to add any additional counts of Stalking, or in any way change the nature of the crime charged. Defense was given ample opportunity to cross-examine A.B. regarding the phone calls made on May 27 and 28, 2008 prior to the original charging period. Appellant was not raising an alibi defense and the nature of his defense of general denial did not change based on these additional calls.

Accordingly, the trial court did not abuse its discretion in granting the State's motion to amend to expand the charging period for the crime of stalking.

**CONCLUSION**

For all of the foregoing reasons, the appellant's conviction should be affirmed.

DATED this 29th day of January 2010.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney



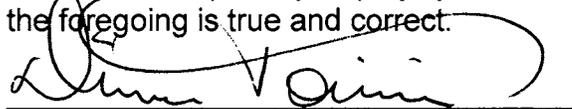
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mindy Ater, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent and Certificate of Mailing, in STATE V. TEODULO RODRIGUEZ, Cause No. 63273-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Divina Tomasini  
DV Paralegal  
Done in Kent, Washington

2-1-10

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