

NO. 73204-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMAR PEELER,

Appellant.

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FILED  
Apr 22, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Theresa B. Doyle, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE IS NOT PERMITTED TO AMEND ITS INFORMATION ONCE ITS CASE-IN-CHIEF HAS CONCLUDED

The rule the Washington Supreme Court adopted in State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987), is clear: “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.” This is so because “[a]ll of the pre-trial 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.” Id. at 490. Allowing the State to elevate charges after its case-in-chief has concluded “necessarily prejudices” a defendant’s article I, section 22 right to be informed of the charge he must meet at trial. Id. at 491.

The State contends this clear rule does not apply because it had not rested its case-in-chief when it sought to amend the information. Br. of Resp’t at 15-16. This contention ignores the facts of this case.

After it presented the testimony of Sametra Green, its final witness, the State represented that it would be resting the following morning. 8RP 94. The next day, the State moved to admit exhibits the defense had used to impeach Green. 9RP 8-14. The trial court wanted additional time to consider the admissibility of this evidence before ruling, and therefore

indicated that the State would not yet rest before the jury. 9RP 13. But, as the trial court and the parties acknowledged, the State's case had concluded, the State's evidence in its case-in-chief had been presented, and the State was allowed to leave its case open for the sole purpose of the State's evidentiary motion. 9RP 14. Indeed, defense counsel sought clarification that "this would be the only issue the State needs to address in its case in chief," and the trial court indicated, "That's correct. That's correct." 9RP 14. Then the defense immediately began its case. 9RP 15.

The State had presented its entire case-in-chief at the time it sought an amendment. The only reason it was not required to formally rest was because the trial court wished to further consider its evidentiary arguments. At this point in the proceedings, as the defense case began, it was error under Pelkey to permit an amendment that elevated the State's charge from a gross misdemeanor to a class C felony. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); Pelkey, 109 Wn.2d at 491. This error requires reversal. Id.

The State attempts to overcome the Pelkey rule by relying on State v. Goss, 189 Wn. App. 571, 358 P.3d 436 (2015). But the amendment at issue in Goss "merely enlarged the time frame within which the crime was

committed,” which “is not usually a material element of a crime . . . .”<sup>1</sup> Id. at 576. Goss did not involve an elevating amendment after the completion of the State’s evidence that converted a misdemeanor charge into a felony. Goss does not support the State’s position.

This court should not permit the State to amend charging documents to elevate crimes from misdemeanors to felonies after the State has concluded its case-in-chief. Peeler asks this court to reverse.

2. THE DEFENSE IS NOT RESPONSIBLE FOR CORRECTING THE PROSECUTION’S ERRORS

It is not a difficult or burdensome task for prosecutors to properly charge a crime in Washington. All they need do is correctly list the elements of the offense and give a date range. State v. Kjorsvik, 117 Wn.2d 93, 102 n.13, 812 P.2d 86 (1991) (“Imposing the responsibility to include all essential elements of a crime on the prosecution should not prove unduly burdensome since the ‘to convict’ instructions found in the Washington Pattern Jury Instructions . . . delineate the elements of the most common crimes.”). Had the State merely consulted the pattern jury instructions in this case, it could easily have charged Peeler with the actual crime of promoting prostitution in the second degree, rather than an attempt. See 11 WASH.

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<sup>1</sup> Here, defense counsel did not object to the State’s motion to narrow the charging period, changing a date from March 7, 2013 to March 26, 2013. 9RP 4, 7; cf. Goss, 189 Wn. App. at 576.

PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 48.05 & 48.06, at 889-90 (3d ed. 2008). The State failed to do so and instead charged Peeler with knowingly attempting to advance and profit from prostitution, an inchoate crime.<sup>2</sup> CP 7-8.

The State does not acknowledge that it bears the responsibility to correctly charge crimes and instead would erroneously shift this responsibility to the defense. Br. of Resp't at 11-12, 14 (asserting Peeler was "sandbagging" by not raising the defect in the State's charging document until it is too late for the State to lawfully amend its charges). In State v. Hobbs, 71 Wn. App. 419, 424, 859 P.2d 73 (1993), the State similarly accused the defense of "'lying in the weeds' on a 'technicality'" where the defense did not notify the State that it could not "prove King County venue beyond a reasonable doubt, even though it had submitted a proposed instruction saying it intended to do so." Defense counsel used the State's venue error to her client's advantage, making a strategic decision not to elicit evidence on the venue issue, and instead raised the issue on appeal. Id. This court disagreed with the State's accusation of sandbagging, holding, "This

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<sup>2</sup> The State argues that it was clear from the information that it was not charging an inchoate crime because RCW 9A.28.020 did not appear in the information. Br. of Resp't at 18 n.3. But it is the actual language the State uses to cast its charges that counts, not the statutory citations it gives. Vangerpen, 125 Wn.2d at 788 (holding that citing the proper statute and naming offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all essential elements).

was a valid defense strategy under these circumstances. Defense counsel is an advocate for her client, not a ‘law clerk’ for the prosecutor.” Id. The same is true here. It was a valid tactic not to bring up the defective information until it was too late for the State to amend it and then argue the State had failed to support its charges with evidence. 9RP 7 (defense counsel asserting this was “picking up where the defense is hoping to go”).

What the State and the cases it cites refer to as the “quintessence of defense sandbagging” is in reality the constitutional and ethical representation of criminal defendants in action. See Br. of Resp’t at 14; State v. Phillips, 98 Wn. App. 936, 940-43, 991 P.2d 1195 (2000). Defense counsel is under no obligation to correct the State’s errors when, as here, correcting those errors would harm his or her client’s current or future claims. Criminal defense attorneys owe an ethical and constitutional duty of loyalty to their clients, not to ensuring the State properly charges their clients with crimes.

In Phillips, the case on which the State relies, Division Two quoted Justice Brachtenbach, who was “‘disturbed . . . by the possibility that a defendant may be well aware at the outset of the proceedings that the charging document fails to state a crime, and yet maintain silence until appeal.’” 98 Wn. App. at 942 (quoting State v. Leach, 113 Wn.2d 679, 700, 782 P.2d 552 (1989) (Brachtenbach, J., concurring)). In Peeler’s view, it is

more disturbing that, with all the State's power and resources, the courts would require defense counsel to do the State's job for it. It is not nor should it be defense counsel's role to ensure prosecutors competently represent the State by correctly charging persons with crimes. Here, the State acted incompetently when it charged Peeler with attempted promoting prostitution in the second degree and then failed to realize its mistake until it was too late to correct it. This court should accordingly reverse.

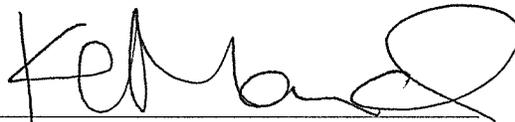
B. CONCLUSION

For the reasons stated here and in his opening brief, Peeler asks this court to reverse his conviction for promoting prostitution.

DATED this 21<sup>st</sup> day of April, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF APRIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMAR PEELER  
3006 COLLEGE STREET  
SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF APRIL, 2016.

x Patrick Mayovsky