Supreme Court No. 97150-1
Court of Appeals No. 50299-2-II

Supreme Court
of the State of Washington

State of Washington,

Respondent,

v.

Kenneth Chance Brooks,

Petitioner.

Petition for Review

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1. Identity of Petitioner

Kenneth Brooks, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

State v. Brooks, No. 50299-2-II (Jan. 15, 2019) (unpublished). A copy of the decision is included in the Appendix at pages 1-11.

3. Issue Presented for Review

1. A criminal charge may be amended only if substantial rights of the defendant are not prejudiced. Here, the trial court allowed an amendment after the Defendant had already completed his defense. Did the trial court abuse its discretion in allowing the amendment?

4. Statement of the Case

A criminal charge may only be amended if the amendment does not prejudice substantial rights of the defendant. Brooks was charged with third degree child molestation alleged to have occurred in January 2014. Brooks prepared for trial on the basis of this charging period. At trial, the victim testified that the molestation occurred in January 2014. Brooks elected to testify and admitted that he had inappropriately touched the victim, but in May, not January.

After the defense rested, the State moved to amend the charging period from January to any time between January 1 and May 31. The trial court granted the amendment.

On appeal, Brooks argued that the trial court abused its discretion in granting the amendment after his defense was completed, because allowing the amendment prejudiced his rights to know the charges against him, to prepare and present a defense to those charges, and to decide whether to testify or to remain silent. By the time the State requested its amendment, Brooks had already exercised these rights based on the original charge. It was too late for him to change his strategy or his testimony in response to the amendment.

The Court of Appeals affirmed the trial court's decision. Brooks requests this Court accept review, correct the legal standard for a late amendment of the information, and reverse the child molestation conviction.

4.1 The State charged and presented evidence of an incident occurring in January 2014.

Kenneth Brooks was charged with rape of a child in the third degree and child molestation in the third degree. CP 1. The original information charged that the alleged rape occurred "on or about 8/17/2014" and that the alleged molestation occurred "on or about or between 01/01/2014 and 01/31/2014." CP 1.

At trial, the alleged victim, C.H., testified that Brooks, a family friend more than three years older than her, came to visit the family in January 2014. 1 RP 53. According to C.H., while the two of them were alone cuddling on the couch watching Netflix one afternoon that January, Brooks reached under her shirt and rubbed her breast. 1 RP 54, 56. C.H. testified that Brooks eventually returned to his home in California and she did not see him again until June or July. 1 RP 57-58, 82.[1]

4.2 Brooks elected to testify in his own defense, describing an incident in May, not January.

After presenting testimony on the other charge, the State rested. Before the start of the Defense's case, the court discussed the proposed jury instructions with the parties. 2 RP 50. Based on the original information, the expected instructions, and the State's completed presentation of its evidence, Brooks decided to testify on his own behalf. *See* 2 RP 49-50.

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[1] C.H. also testified that the night of August 16-17, Brooks had intercourse with her while she was too drunk to consent or resist. 1 RP 68-70. Brooks denied having any sexual contact with her that night, testifying that all he did was help clean her up after she vomited all over her bed. 2 RP 60-64. The State presented supporting testimony from other witnesses and DNA evidence from the clothes C.H. was allegedly wearing that night. The jury ultimately believed C.H., finding Brooks guilty of rape of a child in the third degree. CP 27. This conviction is not at issue in this direct appeal.

Brooks testified that he had reviewed his own cell phone records and determined that the incident occurred in May, not January. 2 RP 55-56. Brooks admitted that he inappropriately touched C.H.'s breast at her home in May. 2 RP 56. He testified that he did not touch her in January. 2 RP 57. The incident in May 2014 was the only time. *Id.* He was sure that it was May because he had text messages that showed C.H. told her mother about the incident in May and he texted C.H. asking why she told. 2 RP 56. C.H. had testified that she told her mother just two days after it happened. 1 RP 57, 85.

4.3 After Brooks rested his defense, the trial court allowed the State to amend the information to expand the charging period from January to any time from January to May.

After Brooks testified, the Defense rested. 2 RP 83. After declining the opportunity to present rebuttal testimony, the State moved to amend the information to expand the date range for the child molestation charge from the month of January to any time between January 1 and May 31. 2 RP 84-85. Brooks objected. 2 RP 88. The trial court felt it was obligated to allow the amendment. *Id.*

The jury instructions were also amended with the new date range. 2 RP 90, CP 24. The jury found Brooks guilty of child molestation in the third degree. CP 28, 2 RP 144-47.

4.4 The Court of Appeals affirmed the trial court decision.

On appeal, Brooks argued that the trial court abused its discretion in granting the amendment after his defense was completed. Br. of App. 5-12. Allowing the late amendment prejudiced his rights to know the charges against him, to prepare and present a defense to those charges, and to decide whether to testify or to remain silent. Br. of App. 6-8 (citing *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992); *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)); Reply Br. of App. 3-5. By the time the State requested its amendment, Brooks had already exercised these rights based on the original charge. It was too late for him to change his strategy or his testimony in response to the amendment.

The Court of Appeals held that, "under the unique facts of this case," the trial court did not abuse its discretion. *Brooks*, slip op. at 6. The court held that the *per se* rule against late amendments set forth in *Pelkey* only applies to amendments that would change a material element of the charge. Slip op. at 7-8. The court reasoned that because a change in date is not a material element of the charge, Brooks' right to know the charge and prepare a defense was not prejudiced. Slip op. at 8-10. The court affirmed the trial court decision.

5. Argument

A petition for review should be accepted when the case involves a significant question of constitutional law, RAP 13.4 (b)(3), or when there is a conflict between decisions of the Court of Appeals, RAP 13.4(b)(2).

5.1 The case involves a significant question of constitutional law.

Under the rules of criminal procedure, a trial court has discretion to allow amendment of the information **so long as the amendment does not prejudice the rights of the defendant.** CrR 2.1(d).[2] The "substantial rights" the rule refers to are a defendant's constitutional rights related to notice of the charges and to preparing and presenting a defense to the charges at trial. *See State v. Pelkey*, 109 Wn.2d 484, 489-91, 745 P.2d 854 (1987).

A defendant has a number of such constitutional rights that would be prejudiced by a late amendment of the information. As noted in *Pelkey*, a defendant has the right to be adequately informed of the charges prior to trial. Wash. Const. art. I, § 22; *Pelkey*, 109 Wn.2d at 487. A defendant has the right to a meaningful opportunity to prepare and present a complete defense. Wash. Const. art. I, § 22; *State v. Wittenbarger*, 124

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[2] "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."

Wn.2d 467, 474-75, 880 P.2d 517 (1994). A defendant has the right to make the tactical decision of whether to remain silent at trial or testify on their own behalf. Wash. Const. art. I, §§ 9, 22; *State v. Mendes*, 180 Wn.2d 188, 194-95, 322 P.3d 791 (2014).

A late amendment to the information implicates all of these rights. This is the reason for the *per se* rule announced in *Pelkey*:

> 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. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e). The trial court committed reversible error in permitting this mid-trial amendment.

Pelkey, 109 Wn.2d at 491.

Similar logic applies to the other constitutional rights. Where, as here, the amendment occurs after the defense has rested, it is too late for the defendant to change their trial strategy. The trial is over. Their defense was prepared and presented based on the original information. Their decision as to whether to testify was made and carried out based on the original information. There is no longer any opportunity to request a continuance to adjust trial strategy. At this point, the

trial is essentially over. If an amendment to the information is allowed at this stage, it entirely defeats the defendant's exercise of these constitutional rights.

This Court has recognized that this prejudice to a defendant's substantial rights necessarily arises from late amendments to the information. "All 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." *Pelkey*, 109 Wn.2d at 490. "An amendment midway through trial, after opening statements and witness testimony, prejudices the defendant's ability to fairly defend himself or herself, placing the defendant at a severe disadvantage." *State v. Schaffer*, 120 Wn.2d 616, 623, 845 P.2d 281 (1993) (Johnson, J., dissenting).

An amendment to the information after the defendant has presented their defense (and either testified or not) necessarily prejudices the defendant's rights to a meaningful opportunity to prepare and present a complete defense and to make the tactical decision of whether to testify. This case is a perfect illustration.

Here, the late amendment prejudiced Brooks' substantial, constitutional rights. The amendment directly undermined the defense that Brooks had prepared and presented. Everything Brooks did in preparing and presenting his defense was based on the original charge of an incident occurring in January.

Brooks cross-examined the victim about the date of the incident because he knew it did not occur in January. He decided to testify and admit to inappropriately touching the victim because he knew it did not occur in January.

The State's original proposed jury instructions required the jury to find that the incident occurred in January. *See* 2 RP 88-89 (changing the instructions to reflect the amended charging period). Absent an amendment, Brooks could have argued in closing that, yes, he inappropriately touched the victim, but he did not do it in January. Brooks could have argued that the jury cannot convict him of the crime charged because no crime occurred in January.

But the late amendment permitted the State to pull a bait-and-switch. After Brooks had already presented his full defense—after he was locked in to the defense theory that he wasn't guilty of a crime in January—the charges changed to include the very dates to which Brooks had been induced to testify.

The amendment destroyed the case that Brooks had built. It changed the rules of the game after Brooks had already made all of his moves.

The date of the incident may not have technically been a material element of the crime, but it was absolutely material to the defense that Brooks had presented prior to the amendment.

The amendment went to the heart of Brooks' defense and stopped it with the stroke of a pen.

Brooks' substantial rights were prejudiced. Due to the late amendment, Brooks was unable to intelligently prepare and present a defense. The amendment directly undermined the defense he had already made. Due to the late amendment, Brooks was unable to intelligently decide whether to testify or remain silent. Had he known that he was being charged with an incident occurring anywhere between January and May, he might have chosen not to admit to it. Brooks' supposed "substantial rights" were rendered meaningless by the amendment.

The trial court abused its discretion in allowing the amendment when "substantial rights of the defendant" would be prejudiced. The error is of constitutional magnitude. Ordinary harmless error analysis does not apply. The error was not harmless beyond a reasonable doubt. This Court should accept review, reverse the trial court decision, and vacate the conviction.

5.2 There is a conflict between decisions of the Court of Appeals.

The decision by Division II of the Court of Appeals in this case conflicts with a recent decision by Division III of the Court

of Appeals in *State v. Dewey*, 2019 WL 276046, No. 35515-2-III (Jan. 22, 2019).[3]

In *Dewey*, the defendant had been initially charged with violation of a protection order by contacting the protected person. *Dewey*, at *1. The protection order prohibited the defendant from contacting the protected person or from going onto either of two residential properties. *Dewey*, at *1. The defendant testified that he had been on one of the properties and admitted that it was subject to the protection order. *Dewey*, at *2. There was no evidence that the defendant contacted the protected person. *Dewey*, at *2.

After resting his case, the defendant moved to dismiss the violation of protection order charge. *Dewey*, at *2. The trial court instead allowed the state to amend the information to allege that the defendant violated the protection order by going onto the property. *Dewey*, at *2.

Division III reversed the amendment, finding it "a violation of the defendant's article I, section 22 right to demand the nature and cause of the accusation against him or her." *Dewey*, at *2. "Once the State has rested its case, amendment of

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[3] *Dewey*, like *Brooks*, is an unpublished opinion. Although RAP 13.4(b)(2) specifically calls out published opinions, this conflict demonstrates that the constitutional question in this case has not been sufficiently settled and that an authoritative decision from this Court is desirable.

the charging document is unconstitutional unless it is an amendment to a lesser included offense or a lesser degree of the same charge." *Dewey*, at *2.

Just as in this case, the state's amendment in *Dewey* went to the heart of Dewey's defense. Dewey defended by demonstrating that he had no contact with the protected person; he only went to the property (an occurrence that was not charged). The amendment entirely undermined this defense by changing the charge to match the defendant's testimony. Surely if Dewey had known that the charge was going to be amended, he would have defended the case differently.

The outcome here should be the same as in *Dewey*. Amendments to the information after the defendant has rested their case necessarily prejudice the defendant's substantial, constitutional rights to know the charges, prepare and present a defense, and determine whether to testify. This Court should accept review, resolve the conflict, reverse the trial court decision, and vacate the conviction.

6. Conclusion

This case involves a significant question of constitutional law, on which there is a conflict between divisions of the Court of Appeals. An amendment to the information after the defense rests necessarily prejudices the defendant's substantial,

constitutional rights and is therefore impermissible under CrR 2.1(d). The trial court abused its discretion when it granted the late amendment. This Court should accept review, reverse, and vacate the conviction.

Respectfully submitted this 2nd day of May, 2019.

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7. Appendix

State v. Brooks, No. 50299-2-II (Jan. 15, 2019)

State v. Dewey, 2019 WL 276046, No. 35515-2-III (Jan. 22, 2019)

Filed
Washington State
Court of Appeals
Division Two

January 15, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH CHANCE BROOKS, Appellant.	No. 50299-2-II UNPUBLISHED OPINION

SUTTON, J. — Kenneth Chance Brooks appeals his conviction for third degree child molestation. He contends that the trial court abused its discretion when it granted the State's motion to amend the molestation charge after the defense rested, prejudicing his right to be adequately informed of the charges against him, to adequately prepare a defense, and to choose whether or not to testify. The State claims that Brooks did not preserve the issue for appeal. We hold that his objection was sufficient to preserve the issue for appeal and we address the issue on the merits. Because Brooks fails to show actual prejudice from the amendment, we hold that, under the unique facts of this case, the trial court did not abuse its discretion in granting the State's motion to amend the information. We affirm Brooks's conviction.

FACTS

On February 22, 2016, the State charged Brooks with third degree rape of a child[1] and third degree child molestation. The initial information alleged that the third degree rape of a child,

[1] Although Brooks was also convicted of third degree rape of a child, he does not challenge that conviction.

C.H.,[2] occurred "on or about [August 17, 2014]," and the third degree child molestation occurred "on or about or between [January 1, 2014] and [January 31, 2014]." Clerks Papers (CP) at 1.

On the first day of trial, C.H. testified about the incidents. She was 15 years old when they occurred. She stated that Brooks was a family friend, he was eight years older than her, and he came to visit her family in January of 2014. C.H. testified that, while they were cuddling on the couch, Brooks reached under her shirt and rubbed her breast. She testified that in the early hours of August 17, 2014, he had intercourse with her while she was too drunk to consent or resist. Defense counsel specifically cross-examined C.H. on the timeline of the rape and the molestation charges. She again testified that Brooks molested her in January of 2014.

On the second day of trial, Brooks testified and admitted that he had touched C.H. inappropriately in May of 2014. He testified that he did not touch C.H. inappropriately during January of 2014 and stated, "May was the first and only time," based on a text message he had sent to her apologizing. Verbatim Report of Proceedings (VRP) (Feb. 23, 2017) at 57. Brooks testified that he was unaware if he was in the state of Washington at all in January of 2014.

After both parties rested, the State moved to amend the information. The State sought to amend the date range for the third degree child molestation charge from "on or about or between [January 1, 2014], and [January 31, 2014]," to "on or about or between [January 1, 2014], and [May 31, 2014]," because "[t]he Defendant testified that the incident occurred in May, or he believed it to be in May." VRP (Feb. 23, 2017) at 85.

[2] The child victim is referred to by her initials to protect her privacy. *See* Gen. Order 2011-1 of Division II, In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases (Wash. Ct. App.).

Brooks objected twice to the information being amended with the altered dates, but did not state a specific basis for his objections or request a trial continuance. The trial court ruled that the amendment was proper "[g]iven the state of the case law and when the claim of the date came up," granted the motion to amend the charging period for the third degree child molestation charge, and adjusted the date range in the jury instructions accordingly. VRP (Feb. 23, 2017) at 88.

During closing argument, defense counsel agreed that the State had proven the molestation charge beyond a reasonable doubt, but argued that Brooks admitted to the crime and apologized to C.H. Defense counsel then contrasted Brooks's admission that he molested C.H. with his denial that he had sexual intercourse with C.H. to argue that the State had not proven the rape charge beyond a reasonable doubt.

A jury found Brooks guilty of both third degree child molestation and third degree rape of a child. The sentencing court calculated his offender score for the crime of child molestation as four, counting one point for two prior felony convictions and three points for the third degree child molestation crime. Brooks appeals.

ANALYSIS

Brooks argues that the trial court abused its discretion when it granted the State's motion to amend the molestation charge after the defense rested because it caused him great prejudice. He asks this court to reverse the molestation conviction and remand for resentencing with a corrected offender score. The State argues that (1) Brooks failed to preserve the issue, (2) the issue is not a manifest constitutional error, (3) Brooks was not prejudiced, and (4) the trial court did not abuse its discretion in allowing the amendment. We hold that Brooks properly preserved the issue

for appeal and that, under the unique facts of this case, the trial court did not abuse its discretion in allowing the amendment of the molestation charge.

I. LEGAL PRINCIPLES

We review a trial court's ruling to grant the State's motion to amend charges for an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). "A trial court abuses its discretion if its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Lamb*, 175 Wn.2d at 127 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). "A court's decision 'is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" *Lamb*, 175 Wn.2d at 127 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). "'A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.'" *Lamb*, 175 Wn.2d at 127 (quoting *Littlefield*, 133 Wn.2d at 47).

Absent the presentation of an alibi defense or a showing of other substantial prejudice to the defendant, an "amendment of the date [on the charging document] is a matter of form rather than substance, and should be allowed." *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991). "The defendant has the burden of showing prejudice." *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011). Failure to request a continuance after an information has been amended has been found to be "persuasive of a lack of surprise and prejudice." *Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968).

II. PRESERVATION OF ISSUE FOR APPEAL

As an initial matter, the State argues that Brooks failed to properly preserve this issue for appeal because he objected below without stating a specific basis and now claims that the

amendment precluded him from adequately asserting a defense. The State also argues that Brooks does not raise a manifest error affecting a constitutional right under RAP 2.5(a)(3)[3] and thus, he waived this issue on appeal. In his reply brief, Brooks first argues that his general objection below was sufficient to preserve the issue. Brooks also argues, alternatively, that the error is a manifest error affecting a constitutional right. We hold that Brooks sufficiently objected below and thus, he properly preserved the issue for review.

Our Supreme Court has held that "to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it." *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). Here, Brooks objected twice to the State's motion to amend, but did not cite a specific basis. Regardless, by making the objection, defense counsel brought the potential error to the trial court's attention and provided the court with the opportunity to resolve it. Thus, we hold that Brooks preserved the issue for appeal and we consider the issue on the merits.

III. AMENDMENT OF INFORMATION

Brooks argues that the trial court abused its discretion when it permitted the State to amend the information for the molestation charge after the defense rested its case and the State declined to present any rebuttal testimony. He claims that the late amendment of the information prejudiced his right to (1) know the charges against him, (2) have an opportunity to assert an alibi defense,

[3] RAP 2.5 (a)(3) provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court . . . [a] manifest error affecting a constitutional right."

and (3) decide whether to testify or to remain silent. Brooks contends that the late amendment is per se prejudicial and reversible error under *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987).

The State argues that (1) the date amendment is not a material element of the charge for a sex crime, (2) Brooks does not have a due process right to an opportunity to assert an alibi defense, (3) Brooks did not assert a true alibi defense here, (4) Brooks was able to present a defense, and (5) amending the date is a matter of form rather than substance. The State also argues that, because he admitted to the molestation of C.H. in May, the jury would have convicted him based on the "on or about" language in the original charge and thus, he fails to show prejudice. Br. of Resp. at 18. We agree with the State and hold that, under the unique facts of this case, the trial court did not abuse its discretion in allowing the State to amend the molestation charge.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, the State must allege in the charging document all essential elements of a crime to inform a defendant of the charges against him and to allow for preparation of his defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Mason*, 170 Wn. App. 375, 378, 285 P.3d 154 (2012). "A charging document is constitutionally sufficient if the information states each essential element of the crime . . . even if it is vague as to some other matter significant to the defense." *Mason*, 170 Wn. App. at 378-79. Brooks does not claim that the charging document was constitutionally deficient here.

An information may "be amended at any time before verdict or finding if [the] substantial rights of the defendant are not prejudiced." CrR 2.1(d). In general, 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 change or a lesser included offense. *Pelkey*, 109 Wn.2d at 491. In *Pelkey*, our Supreme

Court "adopted a per se rule limiting the ability to amend an information once the State has rested its case 'unless the amendment is to a lesser degree of the same charge or a lesser included offense.'" *State v. Schaffer,* 120 Wn.2d 616, 620, 845 P.2d 281 (1993) (quoting *Pelkey*, 109 Wn.2d at 491). "Any greater amendment 'necessarily prejudices' the defendant's rights under the state constitution." *Schaffer*, 120 Wn.2d at 620 (quoting *Pelkey*, 109 Wn.2d at 491).

But this per se prejudice rule does not apply to an amendment of a date if the date is not a material element of the criminal charge. *See DeBolt,* 61 Wn. App. at 61-62. In cases where the per se prejudice rule in *Pelkey* does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d). *State v. Ziegler*, 138 Wn. App. 804, 809, 158 P.3d 647(2007).

A. AMENDMENT OF CHARGE – PER SE PREJUDICE RULE

Brooks argues that the date amendment of the charge after the defense had rested its case is per se prejudicial and reversible error under *Pelkey,* and that he is not required to show prejudice. The State argues that the *Pelkey* rule of per se prejudice does not apply here and Brooks fails to show prejudice by the amendment. We agree with the State.

Pelkey is distinguishable. There, the trial court permitted the State to amend the charging documents to include a charge that was not a lesser included offense of the original charge. *Pelkey*, 109 Wn.2d at 489-90. Additionally, the amended charge included a material element that was not included in the original charge. *Pelkey*, 109 Wn.2d at 490. On appeal, the court held that the amendment was per se prejudicial. *Pelkey*, 109 Wn.2d at 491.

Here, unlike in *Pelkey*, the date amendment was not a material element of the original charge and all material elements were included in the original molestation charge. Thus, we hold

that the per se prejudice rule in *Pelkey* does not apply and Brooks is required to show prejudice under CrR 2.1(d).

B. PROPER NOTICE

Brooks argues that the late amendment prejudiced him because it did not provide him adequate notice of the charges at trial or allow him to prepare a defense. The State argues that Brooks's defense was not affected by the change in dates for the molestation charge and all material elements were alleged in the original charge; thus, he received proper notice of the charge. We agree with the State.

Brooks argues that when the amendment occurs in a jury trial after the parties have rested their cases, the defendant is prohibited from adequately exercising his right to defend himself, characterizing his defense as an alibi defense. Brooks claims that the initial charging document had a different date, "on or about or between [January 1, 2014], and [January 31, 2014]," compared to the amended date, "on or about or between [January 1, 2014], and [May 31, 2014]." Br. of App. at 7-8; CP at 1, 8.

Here, the amendment changed only a date range in the third degree child molestation charge. The original information for the third degree molestation charge stated,

> The defendant, in the County of Cowlitz, State of Washington, ***on or about or between 01/01/2014 and 01/31/2014***, being at least forty-eight months older than Jane Doe, D.O.B. 11/4/1998, did engage in sexual contact with Jane Doe, a person who was at least fourteen years of age but less than sixteen years of age, and not married to the defendant, contrary to RCW 9A.44.089 and against the peace and dignity of the State of Washington.

CP at 1 (emphasis added).

The amended information for the third degree molestation charge stated,

> The defendant, in the County of Cowlitz, State of Washington, ***on or about or between 01/01/2014 and 05/31/2014***, being at least forty-eight months older than Jane Doe, D.O.B. 11/4/1998, did engage in sexual contact with Jane Doe, a person who was at least fourteen years of age but less than sixteen years of age, and not married to the defendant, contrary to RCW 9A.44.089 and against the peace and dignity of the State of Washington.

CP at 8 (emphasis added). The amended charging documents did not charge a different or greater crime, nor did it change or add an essential element of the crime.

Brooks also cites *Schaffer* to argue that an amendment midway through trial prevents a defendant from being informed of the charges against him and, as such, the amendment is prejudicial. But *Schaffe*r is distinguishable from this case because here the only change was to the date range of the molestation charge. Further, *Schaffer* explains that impermissible prejudice is "less likely 'where the amendment merely specif[ies] a different manner of committing the crime originally charged.'" *Schaffer*, 120 Wn.2d at 621 (alteration in original, internal citation omitted) (quoting *Pelkey*, 109 Wn.2d at 490-91). Here, the amendment alleged a different date period for the crime than originally charged, and the amendment did not charge a different or greater crime, nor did it change or add a material or essential element to the initial charge.

Amendment of the charging period is usually not a material element of a crime and thus, an "'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. Goss*, 189 Wn. App. 571, 576, 358 P.3d 436 (2015) (quoting *DeBolt*, 61 Wn. App. at 62). In *Goss*, the amendment did not charge any new offenses or add any additional counts but merely enlarged the

time frame within which the crime was committed to conform to the victim's testimony. *Goss*, 189 Wn.2d at 576.

Like in *Goss*, the amendment here to alter the dates was not a material element of the crime charged. *Goss*, 189 Wn. App. at 576-77. Similarly, as in *DeBolt*, the precise date of the child molestation was not a critical element of the original information. *DeBolt*, 61 Wn. App. at 61-62.

Because the amended charge did not alter a material element of the molestation charge, we hold that Brooks had proper notice of the charge and an adequate ability to prepare a defense.

C. PREJUDICE

Brooks next claims that the amended information prejudiced him by impacting his ability to determine whether to testify. The State does not directly address this issue but argues that the "on or about" language in the original charge would have permitted the jury to find him guilty based on his admission that he molested C.H. in May and thus, he fails to show prejudice. We hold that Brooks fails to show prejudice.

"The defendant has the burden of showing prejudice." *Statler*, 160 Wn. App. at 640. Failure to request a continuance after an information has been amended has been found to be "persuasive of a lack of surprise and prejudice." *Brown*, 74 Wn.2d at 801.

Here, although Brook claims that the amendment prevented him from deciding whether to testify, as discussed above, he was able to prepare an adequate defense and address the difference in dates of the molestation charge when he cross-examined C.H. about the incident. Further, he was not convicted of a different crime than the one charged, and he admitted touching C.H. in May of 2014. Nor does Brooks adequately explain how the date amendment prevented him from

determining whether he should testify. He also failed to request a trial continuance after the court granted the State's motion to amend.

CONCLUSION

Because Brooks fails to demonstrate actual prejudice from the amendment, we hold that, under the unique facts of this case, the trial court did not abuse its discretion in granting the State's motion to amend the information. Accordingly, we affirm Brooks's conviction for third degree child molestation.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Lee, J.

LEE, J.

2019 WL 276046
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 3.

STATE of Washington, Respondent,
v.
Andrew Thomas DEWEY, Appellant.

No. 35515-2-III
|
Filed January 22, 2019

Appeal from Kittitas Superior Court, 17-1-00153-7, Honorable Scott R. Sparks, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Lawrence-Berrey, C.J.

***1** A jury found Andrew Dewey guilty of second degree burglary, violation of a protection order, and obstructing a law enforcement officer. Mr. Dewey appeals his convictions for second degree burglary and violation of a protection order. We affirm the first but reverse the second.

FACTS

The State initially charged Mr. Dewey with residential burglary, violation of a protection order, obstructing law enforcement, and possession of a stolen vehicle. The information alleged that Mr. Dewey violated the protection order by contacting his wife, Cyndee Dewey, the protected person.

On the first day of trial, the State filed an amended information charging Mr. Dewey with second degree burglary, second degree theft, second degree possession of stolen property, violation of a protection order, obstructing law enforcement, and possession of a stolen vehicle. The amended information continued to allege that Mr. Dewey violated the protection order by contacting his wife, Cyndee Dewey, the protected person.

The State called Ms. Dewey as its first witness. She testified she and Mr. Dewey had been married for 18 years but were in the process of divorcing. During the divorce, she requested a protection order, and she and Mr. Dewey were present at the hearing. At the hearing, both she and Mr. Dewey discussed their residential property and another property located at 1560 Twin Lakes Road.

Ms. Dewey testified that the Twin Lakes property had an outbuilding with a bathroom inside. She explained there were items of personal property inside the building that belonged to both her and Mr. Dewey. She testified she thought Mr. Dewey sometimes used the outbuilding as a residence. At the hearing for a protection order, Mr. Dewey expressed a desire to obtain some of his personal property at the Twin Lakes property. The judge told Mr. Dewey that he could contact the sheriff's department so a deputy could do a standby to assist him in recovering his personal property.

Ms. Dewey testified that the court issued a protection order that prevented Mr. Dewey from contacting her or going onto either of their properties. Mr. Dewey signed the order. Deputy Dan Kivi later personally served the order on Mr. Dewey.

Ms. Dewey testified that she later received a call from Deputy Kivi about a blue truck loaded with items at the Twin Lakes property. She learned Mr. Dewey was using the truck, and the truck was impounded. She went to the sheriff's office and identified items that were in the blue truck. Ms. Dewey testified she put the items into three categories: (1) items that belonged to Mr. Dewey, (2) items that were community property, and, (3) items that belonged to her. Some of the items that belonged to Ms. Dewey included her son's football, components of her cotton candy machine, which she used as a side business, and pictures of her children from a previous relationship. All of these items had been stored inside the Twin Lakes outbuilding.

Deputy Kivi also testified. Deputy Kivi testified he was doing a security check in the area of the Twin Lakes property and saw a blue pickup truck that was backed up to the door of the outbuilding. Deputy Kivi thought this was suspicious because he knew, from previously serving the protection order, that Mr. Dewey was not supposed to be there. Deputy Kivi testified there were a lot of items stacked in the truck's bed and cab. Deputy Kivi called for backup. He also called Ms. Dewey to confirm that nobody was supposed to be there and nobody had permission to remove belongings. Other deputies arrived and found a way into the building. Nobody was inside. The deputies searched the surrounding area and eventually found Mr. Dewey laying in the brush. They arrested Mr. Dewey and advised him of his constitutional rights. Mr. Dewey stated that the Twin Lakes property was not included in the protection order and that he lived there.

***2** Mr. Dewey then presented his defense. Mr. Dewey testified he was taking all of the items that were in the blue truck back to where he currently was living. He also testified he took the items belonging to Ms. Dewey to exchange them later during a civil standby. On cross-examination, Mr. Dewey acknowledged he sometimes used the Twin Lakes property as a residence and admitted the property is subject to the protection order.

After Mr. Dewey rested, he moved to dismiss the violation of protection order charge. Mr. Dewey argued that the amended information alleged he violated the protection order by contacting Ms. Dewey, and there was no evidence that he contacted her. The State then moved to amend the information to allege that Mr. Dewey violated the protection order by being at the Twin Lakes property. The trial court granted the State's motion to amend.

The jury returned a verdict finding Mr. Dewey guilty of second degree burglary, violation of the protection order, and obstructing law enforcement. The jury found Mr. Dewey not guilty of second degree theft, second degree possession of stolen property, and possession of a stolen vehicle.

Mr. Dewey appeals.

ANALYSIS

A. LATE AMENDMENT TO THE INFORMATION

Mr. Dewey argues the trial court erred when it allowed the State to amend the information after all the evidence was presented.

Article I, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him." Simply put, "a defendant has the right to be informed of the charges against him and to be tried only for offenses charged." *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A "midtrial amendment of an information is 'reversible error per se even without a defense showing of prejudice.' " *Id.* (quoting *State v. Markle*, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992)); *accord State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). Although CrR 2.1(d) allows amendment "any time before verdict or finding if substantial rights of the defendant are not prejudiced," this works within the confines of article I, section 22. *Pelkey*, 109 Wn.2d at 490. "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." *Id.* at 491. "*Anything else* is a violation of the defendant's article I, section 22 right to demand the nature and cause of the accusation against him or her." *Id.* (emphasis added).

The State argues that a technical amendment, including amending to an alternative means of committing a crime, is allowed and is only reversible if the defendant can show prejudice. *See* Resp't's Br. at 13-15. The three authorities cited by the State to support its argument are distinguishable or otherwise not controlling. *State v. Gosser*, 33 Wn. App. 428, 434-35, 656 P.2d 514 (1982) (amendment occurred before State rested); *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45 (1985) (overruled sub silentio by *Pelkey*); *State v. Schaffer*, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993) (amendment occurred before State rested its case).

Pelkey is clear. Once the State has rested its case, amendment of the charging document is unconstitutional unless it is an amendment to a lesser included offense or a lesser degree of the same charge. *Pelkey*, 109 Wn.2d at 491. In two cases, this court has reversed late amendments to an alternative means of committing the charged crime.

***3** In *State v. Griffith*, 129 Wn. App. 482, 486, 120 P.3d 610 (2005), the defendant was originally charged with knowingly dealing in child pornography. After the defendant rested his case, the State moved the court to amend the information to include an alternative means of committing the offense—possession with intent to deal in child pornography. *Id.* at 490. The court allowed it. *Id.* On appeal, this court reversed the conviction for dealing in child pornography, adhering to *Pelkey*'s bright line rule. *Id.* at 491. After an analysis, this court concluded that possession under RCW 9.68A.050(2) is not a lesser included offense of RCW 9.68A.050(1) because one can commit the dissemination crime (subsection 1) without committing the possession crime (subsection 2). *Id.* Thus, the amendment was not to a lesser included offense or a lesser degree of the same crime.

In *State v. Laramie*, 141 Wn. App. 332, 341, 169 P.3d 859 (2007), the defendant was charged with assault with a deadly weapon in violation of RCW 9A.36.021(1)(a). However, when the court instructed the jury on assault, the court gave an instruction that included an alternative means of committing second degree assault—recklessly inflicting substantial bodily harm. *Id.* The defendant did not object, but the State brought the discrepancy to the court's attention. *Id.* Instead of reinstructing the jury, the court allowed the State to amend the information. *Id.* at 342. On appeal, this court once again adhered to *Pelkey*'s bright line rule and recognized *Griffith*'s holding that an amendment to an alternative means is not a lesser included offense. *Id.* at 343-44. [1]

1 Courts have also reversed amendments for more minor, technical reasons. *See, e.g.*, *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995) (finding an amendment to the information after both sides had rested to include the statutory word "premeditation" was reversible error); *State v. Hull*, 83 Wn. App. 786, 802, 924 P.2d 375 (1996) (finding an amendment to the information after the State had rested its case to include the word "required" was per se reversible error because the omission of the word "required" in the first information resulted in no viable charge at all).

Here, the second amended information stated an alternative means of committing violation of a protection order. The original information charged Mr. Dewey with violation of a protection order by contacting the protected person, Cyndee Dewey. Contacting a protected person violates RCW 26.50.110(1)(a)(i). After both sides rested, the State amended the charge to violation of a protection order that excluded Mr. Dewey from a residence. Going onto residential property contrary to a protection order violates RCW 26.50.110(1)(a)(ii).

We conclude the trial court erred by allowing the State to amend the information to assert an alternative means of committing violation of a protection order. The amendment was prohibited by *Pelkey*, and Mr. Dewey is not required to show that the amendment prejudiced him.

B. SUFFICIENCY OF THE EVIDENCE

Mr. Dewey argues that a rational jury could not have found him guilty of second degree burglary because the State presented insufficient evidence.

A challenge to the sufficiency of the evidence admits the truth of all of the State's evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). "Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." *Id.* "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against" Mr. Dewey. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

***4** To prove second degree burglary, the State was required to prove beyond a reasonable doubt that Mr. Dewey entered the Twin Lakes outbuilding or remained unlawfully, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). Burglary does not require an intent to commit a specific crime; rather, the intent is simply the intent to commit *any* crime against a person or property. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

Here, the State proved that Mr. Dewey entered the Twin Lakes outbuilding and took items that belonged only to Ms. Dewey. Viewing the facts most favorably to the State, a reasonable trier of fact could find that Mr. Dewey entered the outbuilding with the intent to commit theft, i.e., deprive Ms. Dewey of property that belonged to her.

Mr. Dewey notes that the jury found him not guilty of the crimes of second degree theft and second degree possession of stolen property. The not guilty verdicts on these offenses and the guilty verdict on second degree

burglary are inconsistent. But the inconsistency of a jury's verdict does not support the dismissal of a conviction otherwise supported by substantial evidence. *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988).

Affirmed in part and reversed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Korsmo, J.

Fearing, J.

All Citations

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