SUPREME COURT NO. 98232-5

NO. 79034-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BOUNPHET MANIVANH,

Appellant.

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

The Honorable Julia L. Garratt, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Bounphet Manivanh, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Manivanh seeks review of the Court of Appeals decision in State v. Bounphet Manivanh, (Slip Op. filed February 3, 2020). A copy is attached as an appendix.

C. REASONS WHY REVIEW SHOULD BE ACCEPTED

Review is warrant under RAP 13.4(b)(1) because the decision in State v. Bounphet Manivanh, (Slip Op. filed February 3, 2020) conflicts with this Court's decisions in Gehrke[1] and Pelkey,[2] which make clear that allowing midtrial amendment to a charge that result in unfair prejudice to the defense constitutes an abuse of discretion.

D. ISSUE PRESENTED FOR REVIEW

The State originally charged Manivanh with Driving Under the Influence (DUI) under the "while under the influence of or affected by intoxicating liquor or any drug" ("affected by") prong, but not the so-called "per se" prong, which allows for conviction if a driver's blood-alcohol concentration (BAC) is 0.08 or higher within two hours of driving. RCW

[1] State v. Gehrke, 193 Wn.2d 1, 434 P.3d 522 (2019)

[2] State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987)

46.61.502(1)(a) & (c). Midtrial and over defense objection, however, the court allowed the prosecution to add the "per se" prong to the charge. Was this an abuse of discretion under Pelkey and Gehrke when the amendment to the per se prong prejudiced Manivanh's defense because his attorney had already conceded to jurors in opening statement that Manivanh's blood-alcohol concentration was above the legal limit set by the per se prong, but argued the prosecution could not prove him guilty *as charged* because the evidence would fail to show his driving was adversely impacted by drugs or alcohol use, as required for conviction under the "affected by" prong?

E. STATEMENT OF THE CASE

The King County Prosecutor charged Manivanh with felony DUI, failure to have a required ignition interlock device (IID) and driving while license suspended in the first degree (DWLS1). CP 1-2; RCW 46.61.502(1) & (6); RCW 46.61.5055; RCW 46.20.740(2); RCW 46.20.342(1)(a). The prosecution alleged that at about 1:00 a.m. on September 10, 2017, Manivanh was stopped "for an equipment violation" and was subsequently arrested for driving while his license was suspended, driving without the IID required due to prior DUI prosecutions, and for alleged alcohol impairment while driving. CP 3-4.

A jury trial was held before the Honorable Julia L. Garratt, Judge. RP 4.[3] Early on the court also granted the prosecution's motion to amend the information from charging DWLS1 to driving while license suspended in the third degree (DWLS3), without objection. The other charges remained the same. CP 13-14; RP 8-9.

The prosecutor's opening statement emphasized the test result on Manivanh's blood, which indicated a BAC 2.25 times the legal limit of 0.08, i.e., 0.18. RP 583-87. Defense counsel's opening statement conceded Manivanh's BAC was above the legal limit but emphasized the lack of evidence showing Manivanh was intoxicated to the point of it adversely affecting his ability to drive. RP 587-89.

Thereafter, jurors heard testimony from Justin Knoy (the state toxicologist who tested Manivanh's blood, RP 590-658, 745-47), Renton Police Officer Michael Thompson (the officer that stopped Manivanh shortly after 1 a.m. for a defective headlight, RP 659-700), Kelly Harris (a records custodian for the Department of Licensing used to introduce records showing Manivanh license was suspended and that he was required have an IID to drive, RP 751-61), Renton Police Officer Jeana Christiansen (the officer who arrested Manivanh for DUI and obtained the warrant to have

[3] There are twelve consecutively paginated volumes of verbatim report of proceedings for the dates of August 7, 8, 13-16, 22, 23, 29, 30, 2018, September 4, 2018 and October 10, 2018, referenced herein as "RP."

his blood drawn, RP 807-55, 869-906), and Adam Watson (the medical technician that drew Manivanh's blood. RP 862-68).

On the ninth day of a ten-day trial, the prosecution moved to recall Knoy to ask about the rate at which alcohol is eliminated from the body once a person stops drinking. The prosecution argued this was necessary because it also wanted to amend the information to charge Manivanh under the "per se prong" of the DUI statute based on a BAC of 0.08 or higher within two hours of driving. RP 718; see RCW 46.61.502(1).[4]

The prosecutor admitted the failure to include the "per se" prong in the original and amended information had been a mistake. RP 718. The prosecutor also acknowledge Manivanh's blood was drawn more than two-hours after driving, which was why he claimed he needed Knoy to retake

[4] This subsection of the statute provides:

> A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
> **(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506**; or
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Emphasis added.

the stand and explain the rate at which alcohol is eliminated from the body. RP 718-19. The defense objected.

As to recalling Knoy to testify about the "burn-off rate" of alcohol, the defense argued an "expert witness" was required to testify on that subject and noted one of the defense motions in limine requested the prosecution reveal any "expert witnesses" in advance and the prosecution had responded that no such witnesses would be called. RP 720; see RP 216 (In response to a defense motion to disclose experts, prosecutor responds that he will call no "expert" witness). Defense counsel also noted the prosecution's failure to provide advance notice of an expert constitutes a discovery violation. Id.

As to amending the DUI charge, defense counsel noted the prosecution failed to amend the DUI charge when it amended the DWLS charge from first degree to third degree nine days earlier and had committed pretrial not to call any expert witnesses. RP 720-21. Counsel noted that based on these facts the defense "approached the case in a particular way, which is different from the way [it] likely would have approached the case had the [Prosecution] identified upfront they anticipated presenting expert testimony." RP 721. Counsel argued the prosecution's failure to recognize and provide pretrial notice of its intention to amend the DUI charge and call

an expert witness, if allowed, would prejudice Manivanh's defense in light of what had transpired at trial so far. RP 721-26.

In response, the prosecution reasoned that the defense was aware of Manivanh's blood test results before trial and that it would be evidence admitted at trial. RP 726. In urging the court to overrule the objection, the prosecutor stated:

> And so – and we still have proceeded with trial. Defense and the [Prosecution] have made strategic choices throughout trial. So without the information changing, and with the court rules giving the [Prosecution] the ability to amend the information up until the time it rests, I don't see how the defendant is prejudiced by the addition of the second prong [sic] . . . of the DUI statute.
>
> It wasn't --- the result is .18, and so it's well over .08. And so I think the . . . assumption that the [Prosecution] may try to proceed under the per se prong is obvious. And it should have been caught earlier by me, but I'm catching it now, and I think the [Prosecution] should still have the ability to amend the information now.

RP 727-28.

The trial court refused defense counsel's request to respond to the prosecutor's argument before it ruled:

> The Court has great latitude in allowing amendments of the information up to the [Prosecution] resting. I am going to allow the [Prosecution] to amend the information to add the per se prong, which I'm . . . assuming will be done sometime today.

RP 729. The trial court failed to address Manivanh's he would be prejudice by the amendment in light of his trial strategy thus far.

After the court granted the prosecution's request to amend the DUI charge, it allowed defense counsel to make a further record. RP 732. Counsel repeated his frustration with having moved in limine for the disclosure of expert witnesses by the prosecution and being assured none would be called, only to have that assurance revoked mid-trial. RP 732-33. Counsel further explained how allowing the prosecution to proceed under the per se prong of the DUI statute prejudiced Manivanh:

> And, as I said, I think the prejudice to the defense, not in terms of being able to cross-examine the witness effectively about this . . . newly disclosed testimony, but in terms of being able to effectively voir dire a jury panel and conduct an effective opening statement understanding the general ground rules for the evidence that will and won't be admitted during trial
>
> So that's where the prejudice to the defense is.

RP 734.

The prosecution amended the DUI charge and the jury subsequently convicted Manivanh on all three charges. CP 72-73; RP 771.

On appeal, Manivanh argued his DUI conviction should be reversed because the trial court abused its discretion by allowing the prosecution to add the per se prong to the DUI charge. Brief of Appellant at 11-18; Reply Brief of Appellant 1-5. The Court of Appeals rejected this claim. Appendix at 6-9. The Court relied on CrR 2.1(d), which allows for amending a criminal charge any time before a verdict as long as it does not prejudice

the defendant, and this Court's decision in Pelkey, which noted with approval the practice of allowing "[m]idtrial amendment of a criminal information" that "merely specified a different manner of committing the crime originally charged." Appendix at 7 (quoting Pelkey, 109 Wn.2d at 490). And although the Court noted the prosecution's decision to add the "per se" prong midtrial "was not ideal," it concluded Manivanh failed to show how the amendment prejudiced his defense. Appendix at 7. The Court specifically rejected Manivanh's assertion that he was prejudiced by the amendment because he had already conceded to the jury in opening statement that his BAC was above the legal limit, which was not a concession of guilt at the time, but became so once the prosecution was allowed to add the per se prong to the DUI charge. Appendix at 7-9.

F. ARGUMENT

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS DECISION FAILS TO ADHERE TO THIS COURT'S HOLDING IN PELKEY THAT MIDTRIAL AMENDMENTS MUST NOT UNFAIRLY PREJUDICE THE DEFENSE.

Manivanh's counsel relied on the limited nature of the original DUI charge at the beginning of trial in pursuing a defense, as reflected in how he conducted jury selection and opening statements. RP 721. That reliance had unfair and disastrous consequences later after the prosecutor was allowed to amend the DUI charge. Because the midtrial amendment all but

guaranteed Manivanh's conviction on the DUI in light of his counsel's prior trial strategy, it was unfairly prejudicial to his defense and therefore the Court of Appeals should have reversed his DUI conviction.

> It is a central right, provided in our constitution, that "[i]n criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him." Wash. Const. art. I, § 22. Pursuant to this right, "[t]he accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. ... This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894). The "accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged." State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982). Thus, "defendants have a right to be fully informed of the nature of accusations against them so that they may prepare an adequate defense. This right is satisfied when defendants are apprised with reasonable certainty of the accusations against them." State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989) (citations omitted).

State v. Gehrke, 193 Wn.2d 1, 6-7, 434 P.3d 522 (2019) (footnote omitted); accord State v. Pelkey, 109 Wn.2d 484, 487, 490-91, 745 P.2d 854 (1987).

CrR 2.1(d) provides that "[t]he 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." Emphasis added. A trial court's ruling on a proposed amendment to an information is reviewed for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). "A trial court abuses its discretion if its decision 'is manifestly

unreasonable or based upon untenable grounds or reasons.'" State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012), quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"[T]he limits to the trial court's discretion are clear from the text of the rule - the trial court cannot permit amendment of the information if substantial rights of the defendant would be prejudiced." CrR 2.1(d); Lamb, 175 Wn.2d at 130-31. The defendant has the burden of showing prejudice to his substantial rights. Schaffer, 120 Wn.2d at 621-22.

"Prejudice" under CrR 2.1(d) involves surprise or inability to prepare a defense. See State v. James, 108 Wn.2d 483, 489, 739 P.2d 699 (1987). Prejudice is more likely "when a jury is involved and the amendment occurs late in the State's case." Gehrke, 193 Wn.2d at 20 (C.J. Fairhurst, concurrence) (quoting Schaffer, 120 Wn.2d at 621); accord, State v. Brisebois, 39 Wn. App. 156, 163, 692 P.2d 842 (1984), review denied, 103 Wn.2d 1023 (1985). As this court noted in Pelkey:

> The constitutionality of amending an information after trial has already begun presents a different question. 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. Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.

109 Wn.2d at 490.

Here, Manivanh was unfairly prejudiced by the mid-trial amendment to the DUI charge. As originally charged, the defense was "general denial" and the only potential defense witnesses were the defense investigator if needed for impeachment and Manivanh if he chose to testify. CP 31; RP 191, 203-04. In pursuit of this defense, counsel sought pretrial assurance the prosecution would not call any "experts" to testify at trial, and the prosecutor agreed. CP 41; RP 215-16, 226. Counsel also moved pretrial to exclude any "references to impairment other than [from] alcohol" use, to which the prosecutor agreed. CP 43-44; RP 230-31.

Defense counsel made clear that had the prosecutor charged Manivanh under the "per se" prong of the DUI statute and provided notice of its plan to call expert witnesses, the defense strategy would have been different during jury selection and opening statements. RP 720-21. The defense may also have obtained an expert to attack the reliability of the process used to determine Manivanh's BAC more than two hours after being stopped. And in opening statement the defense likely would have focused less on the lack of evidence showing Manivanh's driving was impaired and more on the evidence and circumstances calling into question the accuracy of the blood test. RP 589. But as originally charged, defense counsel simply conceded the existence of "[a] blood test result of a [sic] .18" during opening statements. RP 588.

The defense also tailored its jury selection strategy to fit with the specific charges. This is reflected in how counsel questioned the venire, which included asking whether potential jurors could acquit despite evidence of some alcohol consumption when there was no evidence that Manivanh's driving was adversely influenced as a result. RP 516-18. Juror 10, with whom defense counsel engaged in this discussion expressed strong adverse feelings about those who overindulge in alcohol, and those who fail to take responsibility for such behavior. RP 515-16. Juror 10 was one of only two potential jurors struck by the defense with peremptory challenges. RP 552. The defense also struck Juror 2, a minister who claimed the ability to tell if a person was being untruthful through "body language" and inconsistent responses to questions. RP 507, 552.

The defense conceded in opening statement that Manivanh's BAC was 2.25 times higher than 0.08, the legal limit set by the "pro se" prong of the DUI statute. RP 588. This concession was appropriate and strategically sound given the nature of the DUI charge at that point because the controversy would not turn on Manivanh's BAC, but instead on whether his driving was impaired, such as driving over the center line, parking askew in a parking stall or failing to properly negotiate a turn, for which there was no such evidence presented.

Once the prosecution was allowed to amend the charge to include the "pro se" prong, however, the defense concession to a BAC 2.25 times the legal limit all but guaranteed conviction. Manivanh relied upon and adapted his defense strategy to the DUI charge as originally filed and as maintained following a day-of-trial amendment to the DWSL charge. Based on that reliance defense counsel made a concession in opening that it would not have otherwise made. Because that concession all but guaranteed conviction on the DUI charge after the charge was amended, Manivanh has met his burden to show he was unfairly prejudiced by the amendment. This Court should therefore grant review and reverse his DUI conviction and resulting sentence.

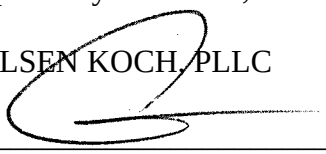
G. CONCLUSION

For the reasons stated herein, this Court should accept review.

DATED this 4th day of March, 2020

Respectfully submitted,

NIELSEN KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BOUNPHET MANIVANH, Appellant.	)	No. 79034-0-I DIVISION ONE UNPUBLISHED OPINION FILED: February 3, 2020

MANN, A.C.J. — Bounphet Manivanh appeals his conviction for driving under the influence (DUI), contending that the trial court abused its discretion when it allowed the State to amend the information midtrial, changing the charge from a violation of RCW 46.61.502(1)(c) (driving while affected by alcohol), to a violation of RCW 46.61.502(1)(a) (having a blood alcohol content (BAC) above 0.08 within two hours of driving). We affirm Manivanh's conviction but remand to the trial court to exercise its discretion under RCW 46.61.5054(1)(b) to suspend the $250 toxicology lab fee in all or part based on Manivanh's financial situation.

I.

On September 10, 2017, at 1 a.m., Renton Police Officer Michael Thompson stopped Manivanh for a broken headlight. Manivanh and his wife were driving home

from their niece's birthday party. When Thompson asked Manivanh for his license and registration, he noticed that Manivanh's eyes were bloodshot, watery, and droopy. Thompson asked Manivanh if he had been drinking and Manivanh remained silent. Manivanh handed his wallet to his wife and she retrieved Manivanh's license.

Thompson called for backup, suspecting that Manivanh was impaired. Officer Jeanne Christiansen arrived and assumed control of the investigation. Upon approaching Manivanh's vehicle, Christiansen smelled alcohol and the intensity of the smell increased when Manivanh spoke. Manivanh admitted drinking two beers at his niece's birthday party. Christiansen asked if Manivanh would perform a field sobriety test. Manivanh refused to answer the question. Christiansen placed Manivanh under arrest.

Manivanh did not exit the vehicle and Christiansen escorted him out by opening the car door and grabbing his hands. When Christiansen read Manivanh the Miranda warnings, Manivanh claimed he needed an interpreter. When Christiansen asked Manivanh what language he spoke, he said he did not know.

Christiansen transported Manivanh to the police station for a breath test, but Manivanh refused and stated he needed a Khmu interpreter. Christiansen obtained a search warrant for a blood draw. Christiansen transported Manivanh to the hospital and the blood sample was taken at 3:37 a.m. The Washington State Patrol Crime Laboratory determined that Manivanh had a BAC of 0.18.

At the time of the incident, Manivanh was required to have an ignition interlock installed on his vehicle and his license was suspended. The State charged Manivanh with one count felony driving under the influence, one count of violating an ignition

interlock requirement, and one count of first degree driving with a suspended license. At the beginning of trial, the State amended the information and reduced the license charge from first to third degree. The State alleged in its original information and first amended information that Manivanh "drove a vehicle within this state while under the combined influence of or affected by intoxicating liquor and any drug and while under the influence of or affected by intoxicating liquor or any drug; having at least three prior offenses within ten years of the arrest." The language was based on RCW 46.61.502(1)(c), commonly known as the "affected by" prong of DUI.

The defense moved pretrial for an order in limine requiring the State to disclose potential expert witnesses. The State responded that none of its witnesses were providing expert testimony, rather they would be "testifying to things they've observed and things they have personal knowledge of."

Manivanh was tried by jury beginning August 22, 2018. The prosecutor's opening statement emphasized that "Manivanh's blood alcohol content at the end of the night was 0.18, which is over twice the legal limit." Defense counsel's opening statement acknowledged that Manivanh's BAC was 0.18, but asked the jury to think about "what is the evidence of intoxication in this case." The defense explained that the jury would hear officer testimony about Manivanh's bloodshot and watery eyes, the odor of alcohol, and an admission to consuming two beers, but that the jury would not hear that he had "trouble standing up, trouble walking, trouble driving, trouble talking, the kind of things that indicate a person's actually intoxicated." The defense explained that Manivanh did not cooperate because there was a language barrier. Further, during closing argument, the defense criticized a video that the State introduced from inside

the police car, arguing that the video contradicted the officers' testimonies that Manivanh slurred his words because Manivanh spoke clearly while being transported to the police station.

Justin Knoy, the state toxicologist who tested Manivanh's blood testified about the testing procedures. Officer Thompson then testified about the stop and his observations. Kelly Harris, a records custodian for the Department of Licensing, testified and introduced records showing Manivanh's license was suspended and that he was required to have an ignition interlock device. Officer Christian, the arresting officer and officer that obtained the warrant for Manivanh's blood draw, testified that the results of the test were a BAC of 0.18.

After Knoy and Thompson testified, the State moved to amend the information to allege that Manivanh's BAC exceeded the legal limit. The State also requested leave to recall Knoy to testify about the burn-off rate of alcohol in humans because the State needed the testimony to prove that Manivanh's BAC exceeded 0.08, within two hours of driving. The defense opposed the amendment, contending that it prejudiced Manivanh because the defense conceded BAC during opening, with the understanding that the State was only proceeding under the "affected by" alternative. Further, the defense opposed recalling Knoy to testify to the burn-off rate in humans because it was expert testimony and the State failed to disclose during motions in limine that Knoy would be offering expert testimony.

The trial court granted the State's request to amend the information. The defense moved to dismiss under CrR 8.3(b) for government mismanagement or, in the alternative, to prevent Knoy from testifying further because any expert testimony

violated the motions in limine. In clarifying its ruling, the court asked the State to explain its offer of proof. The State responded that it expected Knoy to testify that, after two and a half hours, a "person would be in the elimination phase, because alcohol peaks in its absorption after 1 1/2 hours." The State indicated it would not use any hypothetical situations to analogize to Manivanh's BAC when eliciting testimony. The court concluded that as long as the State did not elicit testimony from Knoy connecting Knoy's knowledge about the burn-off rate to Manivanh's BAC and consumption timeframe, then the testimony would not violate the motions in limine.[1] The court denied Manivanh's motion to dismiss.

The second amended information alleged that Manivanh

> drove a vehicle within this state and while driving had an amount of alcohol in his/her body sufficient to cause a measurement of his/her blood to register 0.08 percent or more by weight of alcohol within two hours after driving, as shown by analysis of the person's blood and while under the influence of or affected by intoxicating liquor or any drug.

This language was based on RCW 46.61.502(1)(c), commonly known as the "per se" prong of DUI. The second amended information did not allege the "affected by" alternative.

The defense rested after the close of the State's case. The court instructed the jury that it must find Manivanh guilty of DUI if the State proved beyond a reasonable doubt that "the defendant at the time of driving a motor vehicle (a) was under the influence of or affected by intoxicating liquor; or (b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown

[1] During argument, the State indicated that Knoy's testimony was expert testimony, but that he was qualified to testify to the average burn-off rate of alcohol in humans.

by an accurate and reliable test of the defendant's blood." The jury found Manivanh guilty on all counts.

II.

Manivanh first argues that the trial court abused its discretion by allowing the midtrial amendment. He contends that this is so because the defense strategy was to concede the BAC level exceeded the legal limit, but he was not guilty because there was a lack of evidence that he was "under the influence of or affected by" drugs or alcohol. We disagree.

CrR 2.1(d) provides that:

> The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

CrR 2.1(d) is intended to "permit[ ] liberal amendment" of the charging document. State v. Goss, 189 Wn. App. 571, 576, 358 P.3d 436 (2015). The application of CrR 2.1(d) is constrained by article I, section 22 of the Washington State Constitution, which provides that "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." "Under this constitutional provision, an accused person must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged." State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). This constitutional provision is designed to ensure that a criminal defendant has notice of the change to be met at trial. State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993).

It is a per se constitutional violation for the State to amend the information after it has rested its case, unless the amendment is to a lesser degree of the same charge or

a lesser included offense. Pelkey, 109 Wn.2d at 491. Our Washington Supreme Court has recognized that amending an information midtrial may violate article I, section 22.

> The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial 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. Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.

Pelkey, 109 Wn.2d at 490. "Midtrial amendment of a criminal information has been allowed where the amendment merely specified a different manner of committing the crime originally charged." Pelkey, 109 Wn.2d at 490 (citing State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982)).

Deciding whether an amendment should be granted is left to the sound discretion of the trial court, and the court's decision is reviewed only for abuse of discretion. State v. Rapozo, 114 Wn. App. 321, 323, 58 P.3d 290 (2002). The defendant bears the burden of demonstrating that they were prejudiced by the amendment during trial. State v. Brisebois, 39 Wn. App. 156, 162-63, 692 P.2d 842 (1984).

While the State's late decision to amend the information to charge the "per se" prong of DUI statute instead of the "affected by" prong was not ideal, Manivanh fails to meet his burden of demonstrating prejudice.

At the outset, the amendment did not add a new offense, but rather an alternative means of committing the same crime originally charged—DUI. RCW 46.61.502 provides four alternatives for proving DUI. Relevant here,

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.64.506; or
>
> ***
>
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

The State's first amended information alleged that Manivanh was in violation of RCW 46.61.502(1)(c). The midtrial amendment changed charge from a violation of RCW 46.61.502(1)(c) to RCW 46.61.502(1)(a)—"a different manner of the crime originally charged." Pelkey, 109 Wn.2d at 490-91. The likelihood that the jury would be confused by a variance in the original information was low since both charges were for DUI.

Manivanh's argument relies heavily on his characterization of opening statements where his counsel confirmed that Manivanh's blood alcohol level was 0.18. We disagree that prejudiced Manivanh. The prosecutor's preceding argument had already informed the jury that Manivanh's blood alcohol level was 0.18. Knoy then testified about the chain of custody, receiving the intact sample and testing the sample. Officer Christiansen testified to receiving the test and viewing that the result was 0.18. The defense's reference to the test results in opening statements was not a concession that the State proved its case, rather it was an acknowledgement of admissible evidence that the jury would hear during the trial. Further, the defense had notice that Knoy was a State witness.[2] The evidence admitted demonstrated Manivanh was in

[2] Manivanh raises the issue that the State failed to identify during pretrial motions that Knoy would provide expert testimony under ER 702. We agree the State should have identified Knoy as an expert witness under ER 702. This failure, however, did not prejudice Manivanh because the State

violation of RCW 46.61.502(1)(a) beyond a reasonable doubt because his blood alcohol level was 0.18—over twice the allowable limit.

While Manivanh indicates that he "may have obtained an expert to attack the reliability of the process used to determine Manivanh's blood alcohol" this is speculation. Manivanh does not explain how an expert could have challenged the results of the BAC analysis. Without evidence, or even an offer of proof, that the BAC analysis was somehow inaccurate, the admitted evidence was more than enough for the jury to find Manivanh guilty beyond a reasonable doubt. Manivanh fails to demonstrate that he was prejudiced by the late amendment or that the trial court abused its discretion.

III.

Manivanh next contends the trial court did not intend to impose the $250 toxicology lab fee because trial court stated it would waive discretionary fees and the toxicology lab fee is discretionary. The State responds that Manivanh failed to raise this objection below and we should therefore decline review. RAP 2.5(a), however, gives this court discretion to address the imposition of legal financial obligations (LFOs) on appeal despite a lack of objection below. State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

RCW 46.61.5054 appears on its face to assess a mandatory LFO. The statute provides that a $250 fee "shall be assessed to a person who is either convicted, sentenced to a lesser charge, or given deferred prosecution, as a result of violating

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indicated it would call Knoy and, after moving to amend the information, offered the defense the opportunity to re-interview Knoy.

RCW 46.61.502." RCW 46.61.5054(1)(a). However, "[u]pon a verified petition by the person assessed the fee, the court may suspend the payment of all or part of the fee if it finds that the person does not have the ability to pay." RCW 46.61.5054(1)(b).

It is undisputed here that post sentencing the trial court found Manivanh indigent under the applicable statutory criteria. We remand to the trial court to exercise its discretion under RCW 46.61.5054(1)(b) to suspend the $250 toxicology lab fee in all or part based on Manivanh's financial situation.

We otherwise affirm.

Mann, ACJ

WE CONCUR:

Leach, J.

Applewick, CJ

NIELSEN KOCH P.L.L.C.

March 04, 2020 - 12:37 PM

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