

NO. 64418-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RISE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES

1. A trial court may permit the State to amend the charging information anytime before the State rests if the defendant is not prejudiced. Here, the information was amended before trial and the defendant anticipated this amendment for weeks. Did the trial court abuse its discretion in amending the information?

2. A defendant must have had deficient representation that prejudiced him at trial or sentencing before he claims that he had ineffective assistance of counsel. Here, the trial counsel did not argue that the defendant's criminal convictions were the same criminal conduct at sentencing because each conviction occurred at different times. Did the defendant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Robert Rise was charged by amended information with two counts of Second Degree Rape of a Child, one count of Third Degree Rape of a Child, and one count of Second Degree Child Molestation. CP 19-21. A jury convicted Rise as charged. CP 71-74. The trial court imposed a standard range

sentence. 2RP¹ 260-61; CP 111-20. Rise appeals his conviction and sentence. CP 121-31.

2. SUBSTANTIVE FACTS

From ages twelve to fourteen, J.P. lived with Robert Rise in Kenmore, Washington. 5RP 15-17, 31, 41-43. Rise was the father of J.P.'s friend, and Rise welcomed J.P. into his house after J.P. became estranged from his family. 5RP 15-17, 41-43. Soon, J.P. was staying at Rise's house regularly and Rise became "like a dad" to J.P. 5RP 17, 25.

J.P. would regularly shower in Rise's bathroom. 5RP 29-31. Soon, Rise began to shower with J.P. 5RP 33-35. During the showers, Rise began to "wash" J.P., which involved touching J.P.'s penis. 5RP 35-37. This touching of J.P.'s penis continued regularly. 5RP 36-37. One day, while J.P. was still twelve years old, J.P. was sitting in the shower when Rise kneeled down and put J.P.'s penis in Rise's mouth. 5RP 37-39. For the next two years, nearly every time J.P. showered, Rise would enter the shower to perform oral sex on J.P. 5RP 40-42. This oral sex continued

¹ The Verbatim Report of Proceedings will be referred to as listed in the appellant's brief: 1RP (03/19/09, 08/26/09, and 09/01/09); 2RP (09/03/09 and 10/30/09); 3RP (08/25/09); 4RP (08/27/09); 5RP (08/31/09); 6RP (09/02/09); 7RP (09/08/09).

weekly until J.P. moved back in with his mother at age fourteen.

5RP 39-42.

During the period that J.P. lived with Rise, J.P. slept in Rise's bed. 5RP 41-43. Rise never touched J.P. in bed. 5RP 43.

However, one time when J.P. was twelve or thirteen, Rise performed oral sex on J.P. in the bed. 5RP 43-44. Three years later, J.P. reported this history of abuse to his family. 5RP 82-85.

Rise was charged with two counts of Second Degree Child Rape for having sexual intercourse with J.P. between September 2003 to 2005, when J.P. was twelve and thirteen years old. CP 1-2. Rise was charged with a count of Third Degree Child Rape for having sexual intercourse with J.P. between September 2005 and June 2006, when J.P. was fourteen years old. CP 2. Three weeks before trial, at an omnibus hearing, Rise was notified that the State would add a count of Second Degree Child Molestation. Supp. CP ___ (Sub 46). On the first day of trial, over Rise's objection, the trial court permitted the State to amend the information to add Second Degree Child Molestation (Count Four) for having sexual contact with J.P. between September 2003 to 2005, when J.P. was twelve and thirteen years old. CP 20.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ALLOWED THE AMENDED INFORMATION.

Rise argues that the trial court improperly allowed the State to amend the information at the start of the trial. Because the court properly exercised its discretion in allowing the amendment, Rise's claim fails.

"The court may permit any information or bill of particulars to be amended at any time before verdict . . . if substantial rights of the defendant are not prejudiced." CR 2.1(d). A trial court is permitted the liberal discretion to amend an information but is limited by the state Constitution to make sure that the defendant is adequately informed of the charge he is to meet at trial. WASH. CONST. Art. I § 7; State v. Hockaday, 144 Wn. App. 918, 925-26, 184 P.3d 1273 (2008); State v. Hull, 83 Wn. App. 786, 799-801, 924 P.2d 375 (1996). Accordingly, a trial court cannot amend the information to add a new charge after the State's case-in-chief, unless the amended charge is a lesser included offense. State v. Griffith, 129 Wn. App. 482, 490-91, 120 P.3d 610 (2005). If the State adds a new charge before the State rests, however, the defendant must show prejudice from this amendment. State v. Fischer, 40 Wn. App. 506, 510-11, 699 P.2d 249 (1985).

The burden is on the defendant to establish prejudice. State v. Guttierrez, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

Prejudice, whenever it is alleged, must be specially demonstrated and cannot be based upon speculation. United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); State v. Christensen, 75 Wn.2d 678, 453 P.2d 644 (1969); State v. Rolax, 3 Wn. App. 653, 479 P.2d 158 (1970). Impermissible prejudice is more likely after the jury is involved in the case and if the amendment comes late in trial. State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993). Whether a defendant has shown prejudice is left to the trial court's sound discretion. State v. Rapozo, 114 Wn. App. 321, 323-24, 58 P.3d 290 (2002).

Here, the trial court allowed the amendment of the information pretrial, before the jury was selected. 3RP 32-46. The amendment was "the first order of business" after discussing counsel scheduling issues. 3RP 32. Rise knew that this child molestation count was going to be added since at least the omnibus hearing, nearly three weeks before trial. Supp. CP ___ (Sub 46, Omnibus Order); 3RP 32-33. Because Rise had notice of this pretrial amendment, the trial court properly exercised its discretion in allowing the amendment. See CR 2.1(d).

Rise maintains that he was prejudiced by this amendment and relies exclusively on State v. Ziegler as an example of how a defendant can be prejudiced by a late amendment. 138 Wn. App. 804, 158 P.3d 647 (2007). But Ziegler involves amendments to the information during the middle of trial, after all of the victims had testified. Id. at 806. This Court reasoned that adding new rape charges after the victims' testimony did not allow for Ziegler to defend against these new offenses. Id. at 809-10.

Unlike Ziegler, Rise had weeks to prepare for his child molestation charge, since he was expecting the amendment. 3RP 32, 42; Supp. CP __ (Sub 46). Had Rise been surprised by the amendment he was entitled to move for a continuance to have the time necessary to prepare his defense. State v. Brown, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). Notably, Rise did not request a continuance. See State v. Murbach, 68 Wn. App. 509, 512, 843 P.2d 551 (1993) (absence of request for continuance indicated amendment to information was not prejudicial).

Rise's decision to proceed to trial invalidates his claim that his "trial strategy and plea negotiations with the State would likely have been different had he known there would be the additional child molestation charge." Appellant's Brief at 8. Before the

amendment, the State clarified that the acts forming the child molestation charge "were the precursors to the [later] actual acts of intercourse" that formed the basis of the child rape charges. 5RP 44-45. Rise knew the nature of the charges and which acts constituted what crimes. CP 19-21; 5RP 32, 42. At the omnibus hearing, Rise indicated he did not intend to plead to any of the trial charges, and at the start of trial he "vehemently denied all of the allegations made by [the victim]." CP 31; Supp. CP ___ (Sub 46).

The trial court had every reason to believe that Rise was adequately informed of his charges at trial, including the child molestation charge. As such, the pretrial amendment was proper and the trial court did not abuse its discretion.

2. RISE'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT.

Rise claims that his trial counsel was ineffective because he did not argue at sentencing that his convictions were the same criminal conduct. Because these offenses were distinct acts committed at different times, the convictions were not the same criminal conduct, and Rise's claim fails.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that trial counsel's representation was

deficient; and (2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

There is a strong presumption of adequate assistance of counsel. State v. Sardinia, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." McFarland, 127 Wn.2d at 335. There can only be prejudice if the outcome would have been different due to the deficient performance. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Since Rise cannot show that the trial court would have found the convictions to be the same criminal conduct, he cannot establish ineffective assistance of counsel.

a. The Convictions Were Not The Same Criminal Conduct.

Under the Sentencing Reform Act multiple current offenses generally count separately in determining a defendant's offender

score. RCW 9.94A.589(1)(a). However, if the sentencing court finds that two or more offenses encompass the "same criminal conduct" those offenses count as a single offense for offender score purposes. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The absence of any one of these prongs – intent, time or place, or victim – prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts narrowly construe the statute to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

In this case, the record establishes that the jury found each conviction to have occurred on a separate occasion, invalidating any claim of "same criminal conduct." The trial court specifically instructed the jury in each to-convict instruction that the molestation and rape offense needed to be "an act separate and distinct" from each other. CP 60-61, 63, 67 (Jury Instructions 10, 11, 13, 17).

Moreover, the prosecutor clarified that each conviction must be based on a separate incident. See State v. Bland, 71 Wn. App.

345, 352, 860 P.2d 1046 (1993) (a prosecutor may elect in closing which facts the State is relying on to support the charged counts).

In closing argument the trial prosecutor directed the jury that:

Your jury instructions tell you that of those countless times that you heard about, that you have to unanimously agree that the defendant had sexual conduct [child molestation] or sexual intercourse [child rape] with [J.P.] on separate occasions. And that these sexual acts or sexual intercourse that he had with [J.P.], each one has to be considered separately.

7RP 81.

The prosecutor directed the jury to the evidence of earlier touching that separately formed the basis for the child molestation charge. She further clarified:

[F]or count four, child molestation, [J.P.] talked to you about the first time that the defendant washed his penis in the shower. And [J.P.] told you when he testified actually that he was twelve years old at the time. [J.P.] told you that the defendant continued to wash him in the shower for quite some time before any of that behavior escalated into oral sex in the shower. So what you need to do in order to find the defendant guilty of the crime of child molestation in the second degree is you all need to pick one act, and you all must agree that the one act occurred in order to find the defendant guilty, and you just have to pick one.

7RP 82.

The prosecutor then addressed the incidents of child rape. She stated that the "State alleges that the defendant committed acts

of rape [] of a child on multiple occasions." 7RP 82. The prosecutor then gave examples of three separate occasions of child rape:

[F]or count one, which is rape of a child in the second degree, [J.P.] talked to you about the first time that the defendant performed oral sex on him in the shower, and [J.P.] told you that he was twelve years old, about, at that time. So you can choose that, that one act when [J.P.] told you about the first time that the defendant performed oral sex on him.

7RP 83.

The prosecutor explained that that the testimony established that Rise raped J.P. nearly every weekend in the shower when J.P. was twelve but that the jury must be unanimous as to each separate count. Id. The prosecutor continued:

Count two is the same charge, rape of a child in the second degree. So you can pick one of the other times in the shower, or [J.P.] talked to you about one time, there was one time that this happened in the bed. You can choose that one for count two. That one is separate, separate and distinct from the acts in the shower, as long as you all agree that the defendant also performed oral sex on [J.P.] in the bed that one time, you can find the defendant guilty of the crime of rape of a child in the second degree in count two.

7RP 82-83.

The prosecutor again explained the importance of jury unanimity as to a specific incident. 7RP 83. She then concluded that:

Count three deals with when [J.P.] was a little bit older so, for count three, we're talking about when [J.P.] was fourteen years old, and [J.P.] talked to you about how these acts continued when he was fourteen. So if you find that the defendant performed oral sex on [J.P.] in the shower when he was fourteen years old on one occasion, and you guys all agree, all twelve of you agree that this happened in the shower when [J.P.] was fourteen years old, then you can find the defendant guilty of the crime of rape of a child in the third degree.

7RP 84.

The prosecutor focused on three separate acts of oral sex in her closing argument – one when J.P. was twelve in the shower, another when J.P. was twelve or thirteen and in bed, and finally when J.P. was fourteen in the shower. 5RP 82-84. Each occasion of child rape followed the separate earlier touching in the shower that the jury relied upon to convict Rise of child molestation. While the prosecutor only suggested to the jury the acts from which to convict Rise, the prosecutor was clear that whatever act was used by the jury to convict must each be based on a separate occasion.

The court's instructions and the prosecutor's closing argument, consistent with the evidence, established that the jury convicted Rise based on four separate incidents. Because each conviction was committed at a different time, the convictions cannot be the same criminal conduct.

b. A Special Verdict Form Was Not Necessary.

Rise argues that without a special verdict indicating that the convictions were separate incidents this Court must assume the jury relied on the same incident to convict Rise for each count. Rise argues that State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996), supports this claim because, like in Dolen, the counts "occurred during the same charging period." Appellant's Brief at 12. But in Dolen the record did not support the belief that the jury relied on separate incidents for each count. Dolen, 83 Wn. App. at 361-62. Because the record here shows that the jury found that each conviction was based on a separate incident, Dolen is inapposite.

In Dolen, the defendant was convicted of one count of child rape and one count of child molestation based on six separate allegations of abuse, where each of the six incidents included *both* touching and digital penetration. Id. at 363. This Court held that in each incident it was Dolen's inappropriate rubbing and touching of the victim led to the penetration of the victim's vagina. Id. at 365. The verdict did not specify which incident formed the basis of each conviction, and the evidence did not indicate clearly whether the jury's conviction was based on a single incident or separate incidents. Id. This Court held that (1) if the convictions were based

on the same incident, they encompassed the same objective criminal intent of sexual gratification and therefore the same criminal conduct, and (2) because the verdict did not specify whether the crimes occurred in the same or separate incidents, the record did not support the finding that the crimes were not part of the same criminal conduct. Id.

In Dolen, each alleged incident formed the basis for both charges (child molestation and child rape) at the same time, because each incident involved touching accompanied by sexual penetration. Thus, without the record establishing the contrary, the court was left speculating that the jury may have believed only one of six incidents occurred, but yet still convicted Dolen of both charges based on that one incident.

However, the record here establishes that the child molestation occurred before any allegation of child rape. Further, each subsequent incident of child rape was committed in the same way – oral sex. Because the record provides no alternative basis by which Rise penetrated J.P. in a given incident, each child rape conviction was committed at a different time. Because there was no evidence of touching with penetration, the child molestation conviction was a separate time than the later child rapes. Moreover,

had there been an evidentiary basis to combine the counts, the court and prosecutor resolved the issue by instructing the jury to rely on separate incidents for each count. See supra § C.2.a.

The record shows that the jury relied on separate incidents to convict Rise for each count. Because each conviction occurred at a different time, the convictions cannot amount to the same criminal conduct. As such, Rise's claim that his counsel was ineffective for not raising this issue is without merit.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rise's conviction and sentence.

DATED this 11th day of August, 2010.

Respectfully submitted,

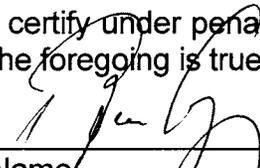
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101, containing a copy of the Brief of Respondent, in STATE V. ROBERT M. RISE, Cause No. 64418-1, in the Court of Appeals, Division I, for the State of Washington.

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



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Done in Seattle, Washington

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