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No. 65528-1-I

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

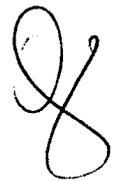
STATE OF WASHINGTON,

Respondent,

v.

CLIFTON DODD,

Appellant.



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

The Honorable Douglass North

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. THE SURPRISE AMENDMENT ON THE DAY OF TRIAL TO CHARGE A NEW CRIME OF WHICH DODD DID NOT HAVE NOTICE VIOLATED DODD'S ARTICLE I, SECTION 22 RIGHT TO FAIR NOTICE 1

 a. The State fails to distinguish or does not address controlling case law which requires reversal..... 2

 b. The failure to grant a continuance requires reversal 4

 2. THE TRIAL COURT ERRONEOUSLY INCLUDED A GEORGIA CONVICTION THAT WAS COMPARABLE TO A MISDEMEANOR IN DODD'S OFFENDER SCORE 7

 a. Dodd specifically objected to the inclusion of the Georgia Family Violence Battery conviction in his offender score..... 8

 b. Under *Mendoza* and *Bergstrom*, Dodd's objection precludes any finding of waiver..... 9

 c. The Georgia Family Violence Battery conviction was comparable to the Washington misdemeanor of assault in the fourth degree 12

 d. No factual analysis is possible because the facts were not proven or stipulated 15

B. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005)	11
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971) .	6
<u>State v. Bergstrom</u> , 162 Wn.2d 87, 169 P.3d 816 (2007).....	9-11
<u>State v. Carr</u> , 97 Wn.2d 436, 645 P.2d 1098 (1982)	2
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	7, 15
<u>State v. Irizarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988)	1
<u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)	11
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009)	7, 9
<u>State v. Purdom</u> , 106 Wn.2d 745, 725 P.2d 622 (1986).....	3, 4, 6
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	9, 10
<u>State v. Shaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993).....	2
<u>State v. Tobin</u> , 161 Wn.2d 517, 166 P.3d 1167 (2007)	6

Washington Court of Appeals Decisions

<u>State v. Collins</u> , 144 Wn. App. 547, 182 P.3d 1016 (2008).....	9, 10
<u>State v. Gosser</u> , 33 Wn. App. 428, 656 P.2d 514 (1982)	2
<u>State v. Ziegler</u> , 138 Wn. App. 804, 158 P.3d 647 (2007).....	3, 4

Washington Constitutional Provisions

Const. art. I, § 3.....	1
Const. art. I, § 22.....	1

United States Supreme Court Decisions

<u>Gray v. Netherland</u> , 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996)	1
---	---

United States Constitutional Provisions

U.S. Const. amend. VI	1
U.S. Const. amend. XIV	1

Statutes

Georgia Code Ann. § 16-5-23.1 12, 14
RCW 9A.36.031 13

Other Authorities

Carroll v. State, 667 S.E.2d 708 (Ga. App. 2008) 14
RAP 10.3(c)..... 1

A. ARGUMENT IN REPLY¹

1. THE SURPRISE AMENDMENT ON THE DAY OF TRIAL TO CHARGE A NEW CRIME OF WHICH DODD DID NOT HAVE NOTICE VIOLATED DODD'S ARTICLE I, SECTION 22 RIGHT TO FAIR NOTICE.

The right to fair notice of criminal charges is protected by the state and federal constitutions. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22;² Gray v. Netherland, 518 U.S. 152, 167-68, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). On the day of trial, the State amended the information against appellant Clifton Dodd to add two new charges, assault in the second degree and felony harassment. CP 16-19. The State never provided notice of its intent to charge Dodd with felony harassment. RP 6-7, 13-14. The trial court nevertheless authorized the amendment and denied Dodd's request for a continuance to prepare to meet the surprise charge. RP 18, 22, 87, 90-91. The amendment violated Dodd's constitutional right to fair notice.

¹ According to RAP 10.3(c), a reply brief should "be limited to a response to the issues in the brief to which the reply brief is directed." Believing his arguments regarding evidentiary errors during the trial to be well-presented in the Brief of Appellant, this reply brief is confined to the State's claims regarding the surprise amendment of the charges and the sentencing error.

² Article I, section 22 provides in pertinent part: "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, to have a copy thereof, ..."

In its response brief the State fails to address controlling case law. The State also mischaracterizes the record with regard to Dodd's continuance request. The State fails to rebut the presumption that Dodd's right to fair notice was violated. Dodd's conviction for felony harassment should be reversed and dismissed.

a. The State fails to distinguish or does not address controlling case law which requires reversal. The propriety of a prosecutor's amendment of a criminal information during the trial depends on the nature of the amendment. The pertinent standard is set forth at length in Dodd's opening brief. See Br. App. at 14-16. Generally, the State will be permitted to amend a criminal information during trial only when "the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated." State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982); accord State v. Shaffer, 120 Wn.2d 616, 620-21, 845 P.2d 281 (1993). But "[a]n amendment during trial stating a new count charging a different crime violates [article I, section 22]." State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982). In this latter instance, a defendant is entitled to a continuance to prepare

to meet the new charge “as a matter of law.” State v. Purdom, 106 Wn.2d 745, 747, 725 P.2d 622 (1986).

The State does not dispute that Dodd was never informed he would be charged with felony harassment. But the State does not address the principles set forth above or, indeed, appear to appreciate that the analysis differs depending on the nature of the amendment. The State’s sole claim is that Dodd did not show prejudice from the amendment.

In State v. Ziegler, 138 Wn. App. 804, 158 P.3d 647 (2007), the Court rejected a similar claim:

[T]he State amended the information to charge Ziegler with two additional serious felonies. This was not merely the amendment from one crime to a similar charge. Nor was this an amendment that changed the means of a crime already charged. Adding two child rape charges during trial affected Ziegler’s ability to prepare his defense. His trial strategy and plea negotiations with the State would likely have been different had he known there would be two additional child rape charges. The addition of two child rape charges was a violation of Zeigler’s right to know of and defend against the State’s charges.

138 Wn. App. at 810-11 (emphasis added).

The State asserts that there was no prejudice to Dodd because his denial defense “remained the same regardless of the amendment.” Br. Resp. at 14. This simplistic assessment fails to

account for the new elements that the State must prove to support a charge of felony harassment, as opposed to the crimes of assault and rape, and the different kinds of evidence that would be admissible at a prosecution for such a charge. See RP 86 (defense counsel tells the presiding judge, "I know I had never looked at the discovery with the view towards defending that charge. I certainly never talked about that with Mr. Dodd.").

The State also utterly fails to address the impact that an additional count, which would elevate his offender score and thus the maximum possible punishment that could be imposed upon conviction, would have had upon Dodd's plea negotiations. Compare Ziegler, 138 Wn. App. at 810-11. In short, the surprise amendment on the day of trial to charge an entirely new offense was prejudicial. Dodd is entitled to reversal of his convictions.

b. The failure to grant a continuance requires reversal. The State acknowledges that under Purdum, when the State amends a charge on the day of trial, as a matter of law a defendant is entitled to a continuance to prepare. Br. Resp. at 16 (citing Purdum, 106 Wn.2d at 748). But the State claims that the court's refusal to grant a continuance was not an abuse of discretion. Br. Resp. at 16-18. The State is wrong.

Dodd's counsel opined that Dodd should not be forced by the fact of the State's untimely and unexpected amendment to seek a continuance. RP 23-24. Counsel's position was driven by the fact that, in the past, Dodd had strenuously opposed any continuance. RP 3-4, RP 74 (counsel states, "before when we discussed with the new charge and everything and then asking for a continuance, I thought Mr. Dodd would be opposed to a continuance"), RP 86 (counsel tells presiding judge, "the court said . . . your remedy . . . would be a continuance. I thought that Mr. Dodd would be opposed to that so I didn't . . . accept that offer"). Thus the State's suggestion that "the requested delay was not due to Dodd's lawyer's need to prepare" assumes too much.³ Defense counsel was simply following what she believed were her client's wishes.

In fact, Dodd was so distressed by the addition of "charges I've never even heard of or thought about or had any time to prepare or look at" that he believed a continuance was necessary. RP 42, RP 74. The State derisively refers to Dodd's "complaints" about the new charge and his desire for additional time to prepare.

³ The State acknowledges as much when it admits, in a footnote, that Dodd's counsel offered these explanations for why she did not immediately request a continuance. Br. Resp. at 17 n. 3.

Br. Resp. at 17. The State has apparently forgotten that this was Dodd's trial. Dodd's liberty was at stake, and the constitution protected Dodd's right to notice of the charges. Because the State elected to charge Dodd with a new crime of which he did not have notice, Dodd was entitled to a continuance. Purdom, 106 Wn.2d at 748.

A trial court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “[A]pplication of an incorrect legal analysis or other error of law can constitute abuse of discretion.” State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). As a “matter of law” Dodd was entitled to a continuance to meet the surprise new charge. Purdom, 106 Wn.2d at 748. The trial court's inexplicable refusal to grant Dodd the continuance to which he was legally entitled was an abuse of discretion. This Court should reverse Dodd's conviction.

2. THE TRIAL COURT ERRONEOUSLY INCLUDED
A GEORGIA CONVICTION THAT WAS
COMPARABLE TO A MISDEMEANOR IN
DODD'S OFFENDER SCORE.

Appellate courts recognize that it is in the interests of public policy to permit challenges to erroneous offender scores, even when such challenges were not made below. “[T]he purpose is to preserve the integrity of sentencing laws; allowing review ‘tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.’” State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (quoting State v. Ford, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). It is the State’s burden and obligation to prove criminal history and to assure that the record before the sentencing court supports the criminal history determination. Id. “This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing ‘some minimal indicium of reliability beyond mere allegation.’” Id. (emphasis in original, citation deleted).

a. Dodd specifically objected to the inclusion of the Georgia Family Violence Battery conviction in his offender score. The State repeatedly and falsely contends that Dodd “conceded” that his prior Georgia convictions should be included in his offender score. Br. Resp. 1, 4-5, 33. Although Dodd’s lawyer agreed with the State’s determination of Dodd’s criminal history (a fact Dodd does not dispute on appeal), Dodd, however, specifically objected, stating, “I don’t agree with my attorney when she’s, you know, adding up my criminal history.” RP 1005. With respect to the Georgia Family Violence Battery conviction, he said,

And the other one is the, uhm, family violence. They’re not right with this one sir, because if they would have actually brought up the definition, family violence starts off as a misdemeanor and, depending on what you do, can aggravate it up to a felony. I don’t remember, because it was so long ago when the judge sentenced me, that she said it was a felony or not. But, also I think that one also should be classified as a Class C felony and shouldn’t be counted also.

RP 1006.

The State does not admit to the fact of Dodd’s objection until page 36 of its brief. The State then refuses to acknowledge that Dodd’s objection placed the State on notice of its obligation to establish that Dodd’s out-of-state convictions were properly

included in his offender score.⁴ Instead the State contends the error is waived. The State's arguments are specious.

b. Under *Mendoza* and *Bergstrom*, Dodd's objection precludes any finding of waiver. Curiously, although the decisions of the Washington Supreme Court in *Mendoza* and *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007), are on point, the State cites to neither of those decisions. Instead the State cites to *State v. Collins*, 144 Wn. App. 547, 182 P.3d 1016 (2008) and *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). Br. Resp. at 34-35.

Collins differs from this case in several material respects. First, Collins entered into a plea agreement with the State in which he agreed in writing to a specific sentence recommendation and that his criminal history and the offender scoring forms submitted by the prosecutor were accurate. Id. at 550-51. After Collins pleaded guilty, he notified the State that he intended to contest the inclusion of two prior California convictions in his offender score, contending that the court bore an independent obligation to calculate the

⁴ The State alleges that because Dodd's objection was to whether the crime should wash out, Dodd may not challenge comparability on direct appeal. Br. Resp. at 36. This assertion is not well-taken. See *Mendoza*, 165 Wn.2d at 929-30 (holding that defendants could challenge criminal history calculation even where no objection was raised below).

offender score correctly. Id. at 552. The court found that Collins had breached the plea agreement, and Collins obtained discretionary review of that issue. Incidental to its affirmance of the trial court's finding, this Court noted that Collins' affirmative acknowledgment of his criminal history in the plea statement relieved the State of its normal burden of proof. Id. at 556.

In Ross, the defendants' attorneys affirmatively acknowledged that prior offenses should be included in the criminal history. Ross, 152 Wn.2d at 230-31. The defendants did not object when their lawyers conceded comparability. Id. at 225-27.

In contrast to Collins, this case involved a trial. Dodd did not enter into any agreement with the State. While it is true that Dodd's lawyer concurred with the prosecutor's determination regarding criminal history, unlike Ross, Dodd never endorsed this position but instead specifically and expressly voiced his disagreement with his lawyer's calculation of his criminal history. RP 1005-06.

This case, therefore, is like Bergstrom. In Bergstrom, as here, defense counsel affirmatively acknowledged her agreement with the State's calculation of the offender score and criminal history, but Bergstrom raised a pro se objection at a hearing to determine his suitability for electronic home monitoring, which

succeeded his actual sentencing hearing. 162 Wn.2d at 90-91, 94-95. The Court did not find the error waived, despite counsel's acknowledgment. Instead the Court held:

Following Bergstrom's pro se argument, the sentencing court erred when it failed to hold an evidentiary hearing and instead sentenced Bergstrom without determining if his prior convictions were same criminal conduct. Once the defense "disputes material facts, the sentencing court either must not consider the facts, or it must grant an evidentiary hearing on the matter."

Id. (citing In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005)).

The Court next considered whether the State should be held to the existing record, as in State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002). Given the unique factual circumstances, the Court found it would be inequitable to disallow the State an opportunity to prove criminal history. Id. at 98.

The Court's holding was extremely narrow:

Given these unique circumstances--where defense counsel agreed with the offender score and the standard range and the only objection was a pro se argument at a hearing to determine the eligibility for EHM after repeated continuances--it is inequitable to deny the State on remand an opportunity to prove the existence of Bergstrom's prior convictions. We agree with the Court of Appeals decision to permit both parties to introduce additional evidence on remand given these unique facts of this case.

Id.

Here, Dodd made an objection at the sentencing hearing. RP 1005-06. The prosecutor and defense counsel had explored the prior convictions and the Georgia records at length before defense counsel erroneously conceded comparability. RP 997, 999. The State submitted extensive documentation of Dodd's Georgia prior convictions. Upon being alerted to Dodd's objection, which preceded the imposition of sentence, if the prosecutor had sought a continuance to further perfect the record, it surely would have been granted. This Court should hold the State to the existing record.

c. The Georgia Family Violence Battery conviction was comparable to the Washington misdemeanor of assault in the fourth degree. Relying erroneously on trial counsel's concession that Georgia Code Ann. § 16-5-23.1 was comparable to assault in the third degree, the State does not bother to address Dodd's extensive argument on appeal that the statute was actually comparable to assault in the fourth degree. See Br. Resp. at 36-38; Br. App. at 32-36.

These arguments bear repeating here, albeit in abridged form. Georgia Code Ann. § 16-5-23.1 provides: "A person commits the offense of battery when he or she intentionally causes

substantial physical harm or visible bodily harm to another.”

Georgia Code. Ann. § 16-5-23.1(a). The same statute defines “visible bodily harm” as “bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.” Georgia Code Ann. § 16-5-23.1(b).

RCW 9A.36.031 provides that a person is guilty of assault in the third degree if “[w]ith criminal negligence, [he or she] causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(f).

RCW 9A.36.041 provides, “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1). Assault in the fourth degree is a misdemeanor. RCW 9A.36.041(2).

The trial prosecutor conceded that that “the Washington [assault in the third degree] statute requires slightly more than the corresponding Georgia law.” CP 109. Under Washington law, anything that is not an assault in the first, second, or third degree,

or custodial assault, is an assault in the fourth degree. RCW 9A.36.041(1). Thus Georgia Code Ann. § 16-5-23.1 is comparable to assault in the fourth degree.

This conclusion is compelled in light of the definitions of the kinds of injury that are contemplated under the statute. Georgia Code Ann. § 16-5-23.1 provides that an assault that results in “substantial bodily harm” or “visible bodily harm” is a battery. “Visible bodily harm” encompasses all “bodily harm capable of being perceived by a person other than the victim.” Georgia Code Ann. §16-5-23.1(b). The Georgia Legislature has not defined “substantial bodily harm,” however under Georgia law “substantial bodily harm” must be distinguished from “the ‘seriously disfiguring’ injury required for aggravated battery.” Carroll v. State, 667 S.E.2d 708, 722-23 (Ga. App. 2008).

As noted in the Brief of Appellant, Family Violence Battery is a subset of the offense which involves batteries between members of the same household. Georgia Code Ann. § 16-5-23.1(f). The crime is a misdemeanor for a first conviction and a felony for all subsequent convictions. Id.

The State does not address these arguments. The State does not provide authority for its contention that the Georgia statute

is “broader than Washington’s assault in the third degree [sic].”
See Br. Resp. at 37. The State, in any event, is wrong. Georgia’s misdemeanor battery statute is comparable to assault in the fourth degree. Dodd is entitled to be resentenced without the Georgia prior offense in his offender score.

d. No factual analysis is possible because the facts were not proven or stipulated. Because the Georgia offense is comparable to assault in the fourth degree, a factual analysis is unnecessary. Ford, 155 Wn.2d at 479. However, even assuming that an examination of the underlying facts is authorized, these facts are unproven. As the State agrees, Dodd entered a straight guilty plea to the crime charged. Br. Resp. at 38. The Georgia prosecutor, who was not under oath, made a statement regarding the alleged facts supporting the charge. CP 148. Dodd did not affirmatively agree with the prosecutor’s factual recitation. Instead, when asked by the prosecutor if the recitation was true Dodd equivocated. He stated, “To an extent, yes sir.” CP 154. No further proof of the underlying facts was adduced – either in the Georgia proceeding or in Dodd’s Washington sentencing hearing. Because the underlying facts were not proven, no further factual

comparability is possible. The Georgia conviction should have been excluded from the offender score.

B. CONCLUSION

For the foregoing reasons, and for the reasons stated in Dodd's opening brief, Dodd's convictions should be reversed. This Court should further hold that the trial court erred in including Dodd's prior Georgia conviction for Family Violence Battery in his offender score.

DATED this 20th day of April, 2011.

Respectfully submitted:

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

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	NO. 65528-1-I
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CLIFTON DODD,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 26th DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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