

NO. 73204-8-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

JAMAR PEELER,

Appellant.

---

---

FILED  
Jan 27, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Theresa B. Doyle, Judge

---

---

BRIEF OF APPELLANT

---

---

KEVIN A. MARCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
THE TRIAL COURT ERRED IN PERMITTING THE STATE, AFTER THE CLOSE OF ITS EVIDENCE, TO AMEND THE INFORMATION TO CHARGE A FELONY RATHER THAN A MISDEMEANOR.....	4
D. <u>CONCLUSION</u> .....	11

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Auburn v. Brooke</u> 119 Wn.2d 623, 836 P.2d 212 (1992).....	7
<u>State v. Brown</u> 74 Wn.2d 799, 477 P.2d 82 (1968).....	6
<u>State v. Carr</u> 97 Wn.2d 436, 645 P.2d 1098 (1982).....	5
<u>State v. Foster</u> 91 Wn.2d 466, 589 P.2d 789 (1979).....	5
<u>State v. Gosser</u> 33 Wn. App. 425, 656 P.2d 514 (1982).....	6
<u>State v. Markle</u> 118 Wn.2d 424, 823 P.2d 1101 (1992).....	6
<u>State v. McCarty</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	8
<u>State v. Pelkey</u> 109 Wn.2d 484, 745 P.2d 854 (1987).....	5, 9, 10
<u>State v. Rhinehart</u> 92 Wn.2d 923, 602 P.2d 1188 (1979).....	5
<u>State v. Schaffer</u> 120 Wn.2d 616, 845 P.2d 281 (1993).....	6
<u>State v. Vangerpen</u> 125 Wn.2d 782, 888 P.2d 1177 (1995).....	6, 7, 9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 2.1.....	6, 10
RCW 9A.28.020 .....	7
RCW 9A.88.080 .....	2, 7, 8
RCW 10.61.003 .....	5
RCW 10.61.006 .....	5
CONST. art. I, § 22 .....	4, 6

A. ASSIGNMENT OF ERROR

After the State's case-in-chief had concluded, the trial court erred when it permitted the State to amend its information to charge a felony rather than the gross misdemeanor it initially charged.

Issue Pertaining to Assignment of Error

The State charged Jamar Patrick Peeler with attempted promoting prostitution in the second degree, a gross misdemeanor. After the close of the State's case, the trial court allowed the State to amend the information to charge the completed crime, felony promoting prostitution in the second degree. In light of Washington's bright-line rule that, after its case-in-chief, the State may only amend the information to charge a lesser included or lesser degree offense, did the trial court err in permitting the State to amend its information to charge a greater offense?

B. STATEMENT OF THE CASE

The State initially charged Peeler with second degree assault against Sametra Green. CP 1. Prior to trial, the State amended the information to include the following:

Count 2 Promoting Prostitution in The Second Degree

That the defendant Jamar Patrick Peeler in King County, Washington, between March 7, 2013 and November 18, 2013, did knowingly attempt to advance and profit from the prostitution of S.N.G. (another person);

Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.

CP 7-8 (emphasis added). Both the assault and attempted promoting prostitution charges included special domestic violence allegations. CP 7-8

Evidence at trial revealed that, on November 18, 2013, police responded to reports of an assault against Green. 4RP<sup>1</sup> 88-89. The right side of Green's face was swollen and Green had a fractured rib. 4RP 90-95, 144; 5RP 26-27, 86, 113-14; 7RP 106-07. Green said Peeler hit her. 4RP 118; 7RP 105-07. Police arrested Peeler. 5RP 34.

In August 2014, Green discussed being involved in prostitution with law enforcement and agreed to assist in a promoting prostitution investigation.<sup>2</sup> 7RP 123-25. Green testified Peeler took out ads on backpage.com to advertise Green as a prostitute. 7RP 38, 128-30. Green also stated she started sex work on Aurora Avenue with a friend, and told Peeler about the sex she had and the money she made. 7RP 54-57.

---

<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP—January 5, 2015; 2RP—January 6, 2015; 3RP—January 12, 2015; 4RP—January 13, 2015; 5RP—January 14, 2015; 6RP—January 15, 2015; 7RP—January 20, 2015; 8RP—January 21, 2015; 9RP—January 22, 2015; 10RP—January 23, 2015; 11RP—January 23, 2015 (containing the verdict); 12RP—March 6, 2015. Currently, after page 70 of the ninth volume, all pages are numbered 70. Peeler is in the process of correcting this error and resubmitting a transcript with the correct pagination. This portion of the transcript is not cited herein.

<sup>2</sup> Green appears to have mentioned her involvement in sex work to her assigned victim advocate in November 2013, but law enforcement did not begin investigating prostitution issues until August 2014. 4RP 119; 7RP 120, 122; 9RP 17-18, 21-22, 26.

According to Green, Peeler thereafter would accompany Green for protection while she prostituted on Aurora. 7RP 64-65.

Green identified for police the phones she and Peeler used with respect to her sex work. 7RP 125. Officers were able to locate several advertisements on backpage.com that listed these phone numbers. 5RP 147-48; 6RP 11-21. In addition, the addresses contained on backpage.com invoices matched addresses on Peeler's driver's license and on the driver's license of Peeler's son's mother. 6RP 16-17, 21.

After the State had concluded its case-in-chief, it sought to amend the information to remove the words "attempt to" from the attempted second degree promoting prostitution charge.<sup>3</sup> CP 79; 9RP 4-5. Defense counsel objected to the amendment:

we are now post-omnibus, the State should have known at the time it moved to amend that . . . the Information should have not included the term: Attempt. That is a gross misdemeanor . . . it is attempted promoting prostitution, it is a gross misdemeanor. At this point, the State is moving to remove that from the charge, elevating the charge to a Class C Felony.

9RP 5. Defense counsel asserted this prejudiced Peeler because up until that point, he operated with the understanding that the State had charged him

---

<sup>3</sup> At this point, the State had not formally rested before the jury because it was attempting to admit Green's prior consistent statements in response to the defense's impeachment of Green's testimony. 8RP 88-91; 9RP 8-14. To promote judicial efficiency, the trial court directed the defense to begin its case, noting, "I am not going to allow the State to reopen and present additional evidence on any other point. It's just this particular offer of proof." 9RP 14.

with a gross misdemeanor, not a felony. 9RP 5-6. Defense counsel also indicated it had planned on attacking the State's lack of evidence regarding attempt: "The statute itself does not include an attempt element . . . . This is an element the State . . . was taking on when they charged it originally . . . ." 9RP 7. Noting the defense objections, the trial court allowed the State to amend the information. 9RP 6-7.

The jury found Peeler guilty of second degree assault and second degree promoting prostitution. CP 122-23; 11RP 2-5. However, the jury concluded Peeler and Green were not members of the same family or household and therefore answered no to the domestic violence allegation for each count in the special verdict. CP 124-25; 11RP 3.

The trial court sentenced Peeler to standard range, concurrent sentences of 12 months for second degree assault and eight months for second degree promoting prostitution. CP 129; 12RP 14. This timely appeal follows. CP 136.

C. ARGUMENT

THE TRIAL COURT ERRED IN PERMITTING THE STATE, AFTER THE CLOSE OF ITS EVIDENCE, TO AMEND THE INFORMATION TO CHARGE A FELONY RATHER THAN A MISDEMEANOR

"Under [article I, section 22 of the Washington Constitution], 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) (citing State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979)). “This rule is subject to two narrowly defined statutory exceptions: ‘(1) where a defendant is convicted of a lesser included offense of the one charged in the information pursuant to RCW 10.61.006; and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged, pursuant to RCW 10.61.003.’”<sup>4</sup> Id. at 488 (quoting State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)).

The State is free to amend charges during the pretrial investigatory period. Id. at 490. “The constitutionality of amending an information after trial has already begun presents a different question” because “[a]ll of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information.” Id.

Even so, amendments to the information are allowed during trial “where the amendment merely specified a different manner of committing

---

<sup>4</sup> RCW 10.61.003 provides, “Upon an . . . information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the . . . information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.” RCW 10.61.006 provides, “In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the . . . information.”

the crime originally charged” or “charged a lower degree of the original crime charged,” if there is no prejudice to the defendant. Id. at 490-91 (citing State v. Brown, 74 Wn.2d 799, 477 P.2d 82 1968); State v. Gosser, 33 Wn. App. 425, 656 P.2d 514 (1982)); CrR 2.1(d). However,

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 I, section 22 right to demand the nature and cause of the accusation against him or her.

Id. at 491. “Such a violation necessarily prejudices this substantial constitutional right, within the meaning of [former] CrR 2.1(e).”<sup>5</sup> Id. It is bright-line reversible error for the trial court to permit an amendment to charge a crime that is neither a lesser included offense nor a lesser degree of the same charge after the State has presented its case-in-chief. Id.; accord State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Schaffer, 120 Wn.2d 616, 622, 845 P.2d 281 (1993); State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

---

<sup>5</sup> Former CrR 2.1(e) was amended in 1986, “revers[ing] present sections (d) and (e) to maintain a more logical order in the rule.” CrR 2.1, 1986 cmt. CrR 2.1(d) states, “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.”

The State charged Peeler with attempted promoting prostitution in the second degree. The first amended information,<sup>6</sup> filed November 18, 2014, read,

Count 2 Promoting Prostitution in The Second Degree

That the defendant Jamar Patrick Peeler in King County, Washington, between March 7, 2013 and November 18, 2013, did knowingly attempt to advance and profit from the prostitution of S.N.G. (another person);

Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.

CP 7-8 (emphasis added). Second degree promoting prostitution is a class C felony. RCW 9A.88.080(2). Attempted second degree promoting prostitution is a gross misdemeanor. RCW 9A.28.020(3)(d) (“An attempt to commit a crime is a . . . [g]ross misdemeanor when the crime attempted is a class C felony.”). The information plainly charged Peeler with a gross misdemeanor—attempted promoting prostitution in the second degree.

Although the information listed count 2 as promoting prostitution in the second degree, “[m]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime.” Vangerpen, 125 Wn.2d at 788 (citing City of Auburn v. Brooke, 119 Wn.2d 623, 635, 836 P.2d 212 (1992)). In addition, “[e]very material element of

---

<sup>6</sup> The initial information, filed November 25, 2013, charged Peeler solely with assault in the second degree. CP 1.

the charge, along with all essential supporting facts, must be put forth with clarity.” State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Here, the named charge, “Promoting Prostitution in The Second Degree,” did not apprise Peeler of the essential elements of the crime—profiting from prostitution or advancing prostitution. RCW 9A.88.080(1)(a)–(b). And the information did not charge that Peeler knowingly profited from or advanced prostitution; the information alleged only that Peeler “knowingly attempt[ed] to” do so. CP 7. Based on the clear language of the information, the State charged Peeler with and proceeded to trial on the gross misdemeanor of attempted second degree promoting prostitution.

After it had presented all its evidence at the close of its case-in-chief, the State sought to amend the information, filing a second amended information on January 22, 2015 that eliminated the words “attempt to” from the attempted second degree promoting prostitution charge. CP 79; 9RP 4-6. Defense counsel objected, arguing the State was now “elevating the charge to a Class C Felony” from a gross misdemeanor. 9RP 5-6. The trial court permitted the amendment, stating, “I don’t think that is a valid reason to object to an amendment, the fact it changes it from a gross misdemeanor to a felony, if indeed that is correct.” 9RP 6.

The trial court was mistaken in light of Washington’s bright-line rule that “an information may not be amended after the State has rested its case in

chief unless the amendment is to a lesser degree of the same crime or a lesser included offense.” Vangerpen, 125 Wn.2d at 789. Indeed, “[a]ny other amendment is deemed to be a violation of the defendant’s article I, § 22 (amend. 10) right to demand the nature and cause of the accusation against him or her.” Id. Because the State’s case-in-chief was concluded and all the State’s evidence had been presented, it was error to allow the amendment of the information to elevate the charge from a gross misdemeanor to a class C felony. Such an elevating amendment is per se prejudicial and constitutes reversible error. Id.; Pelkey, 109 Wn.2d at 491.

In response, the State might attempt to split hairs by arguing that it had technically not rested its case when it sought to amend the second degree promoting prostitution charge. This argument would elevate form over substance. The only reason the State had not formally rested was because it sought to admit the complaining witness’s out-of-court statements to police as prior consistent statements. 9RP 8-13. Perplexed by the State’s arguments (which were ultimately rejected, 9RP 44-45), the trial court stated, “I think this is going to take some time. What I am going to do is we will go on to defense case. State won’t rest right now before the jury.” 9RP 13. However, the trial court made clear,

I am not going to allow the State to reopen and present additional evidence on any other point. It’s just this particular offer of proof. If the Court does grant State’s

motion, then I will allow them to present this evidence. And rather than having [the prosecutor] rest and a motion to reopen, this is the way I am going to proceed for purposes of judicial efficiency.

9RP 14 (emphasis added). Thus, for all intents and purposes—other than the discrete and unrelated evidentiary issue the State raised—the State’s case-in-chief was closed when it sought to amend the information to exclude the attempt language and elevate the charge from a gross misdemeanor to a felony. This court therefore must apply the bright-line rule against midtrial amendments elevating a charge and reverse.

In any event, Peeler was prejudiced—prohibiting an amendment under CrR 2.1(d)—by learning at the end of the State’s case that he faced two felony charges instead of one felony and one gross misdemeanor. As the Pelkey court noted with respect to prejudice, “[a]ll of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information.” 109 Wn.2d at 490. Indeed, Peeler prepared his entire defense strategy under the impression that he faced only one felony charge. To learn after the State’s case that he must meet two felony charges prejudiced Peeler.

The erroneous and prejudicial midtrial amendment to the information, which allowed the State to elevate one of its charges from a

misdemeanor to a felony, requires reversal of Peeler's second degree promoting prostitution conviction and retrial on this charge.

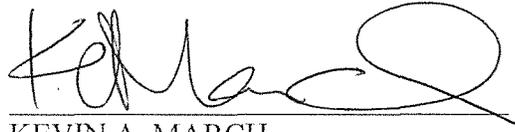
D. CONCLUSION

The trial court erroneously permitted the State to amend its information to include an elevated charge after the close of the State's evidence. This error requires reversal and a new trial.

DATED this 27<sup>th</sup> day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'K. March', written over a horizontal line.

KEVIN A. MARCH  
WSBA No. 45397  
Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73204-8-1
	)	
JAMAR PEELER,	)	
	)	
Appellant.	)	

---

DECLARATION OF SERVICE

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

THAT ON THE 27<sup>TH</sup> DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

SIGNED IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF JANUARY, 2016.

x Patrick Mayovsky