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DIVISION II

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NO. 34280-4-II

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

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| STATE OF WASHINGTON, Respondent, v. JEFFREY SCOTT ZIEGLER, Appellant. |
| FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE DIANE M. WOOLARD CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01088-6 |
| BRIEF OF RESPONDENT |

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office
Franklin Center
1013 Franklin Street
PO Box 5000
Vancouver, WA 98666-5000
Telephone (360) 397-2261

pm 8/19/06

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I. **STATEMENT OF THE FACTS**

The original Information filed in this matter charged the defendant with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. These counts dealt with two children ages approximately ten and eleven at the time of trial. The time period being claimed for the incidences of repeated sexual abuse was between December 1, 2004 and May 1, 2005.

Jury trial began on September 19, 2005. During the State's case-in-chief, the prosecution moved to modify the Information filed in this matter. Based on the information provided by one of the victims, the prosecution was moving to dismiss the Rape of Child in the First Degree and substitute Child Molestation in the First Degree. As explained by the Deputy Prosecutor at the time of the motion, this is because of her testimony, which had just been taken in front of the jury, and indications that there was a lack of penetration (RP 162). Because of the nature of the testimony, the State further was moving to charge two separate occasions of this Molestation of a Child in the First Degree. This would be based on

the testimony that the jury had previously heard and it would be contained within the time period that was originally charged.

Concerning the other child, the testimony was developing that the child was talking about at least a minimum of three Rape of Child in the First Degree where the State had only charged one. Again, this was during the same period of time when the State had charged multiple actions by the defendant but had not specified specifically which actions it was going on.

The State maintained that it was appropriate to do this because the defense had had an opportunity to interview the children; there was no surprise here because the children had previously talked about multiple acts of penetration. The claim was that this was at the interview and also in the police reports (RP 163) and further, that it was the understanding of the State that the defense to be offered in this was the total denial of any type of activity with the children so therefore it would not prejudice the nature of the defense.

At the time that the prosecution made its motion, one of the children had testified but the other one had not. It was anticipated that the other child would be discussing oral sex, digital penetration by a vibrator, other penetration by a penis and other types of

sexual improprieties (RP 164). However, because of the nature and age of the children, even at that point it was unclear as to just exactly what that child would be testifying to. The defense objected to the amendment of the Information. The trial court asked the defense specifically if it wanted a continuance and the defense said that it did not (RP 166).

THE COURT: Okay. And so you were not opposing the continuance, you were opposing the amendment. Is that correct?

MR. BARRAR: A continuance to interview the --

THE COURT: But --

MR. BARRAR: -- child now?

THE COURT: Well, no, you had -- you added -- you opposed a continuance instead of an amendment, and I think maybe -- which is what I heard. So I don't think you're having anything to do with a continuance in this matter; correct?

MR. BARRAR: No, I'm sorry, did I say continuance?

THE COURT: Yeah.

MR. BARRAR: Okay, well, I -- I meant amendment, thank you.

THE COURT: Okay. I just wanted to be clear about that.

(RP 166, L.4 -166, L.21)

The trial court allowed the amendment of the Information to split the multiple acts that had been alleged in the original Information during a specific time period into specific acts during that particular time period. Jury instructions were prepared. No exceptions were taken by the defense to the jury instructions given. (RP 347)

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant in this appellant's brief deals with the court allowing the amendment of the Information during the case-in-chief and prior to the State having rested. The timing of the motion was after the mother and one of the children had testified and prior to the second child testifying. The State called a total of six witnesses.

The defendant testified in the case denying any type of sexual impropriety with the children. (RP 336-338)

The trial court may permit the State to amend an Information at any time before verdict, providing the defendant's substantial rights are not prejudice. CrR 2.1(d); State v. Pelkey, 109 Wn.2d 484, 490-491, 745 P.2d 854 (1987); State v. James, 108 Wn.2d 483, 739 P.2d 699 (1987). "The defendant has the burden of

showing prejudice.” State v. Guttierrez, 92 Wn.App 343, 346, 961 P.2d 974 (1998). The appellate court reviews the decision to grant a motion to amend an Information for abuse of discretion. State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995).

If a defendant does not request a continuance, it suggests there is no prejudice. State v. Murbach, 68 Wn.App 509, 512, 843 P.2d 551 (1993) (absence of request for a continuance indicated amendment to Information was not prejudicial); State v. Wilson, 56 Wn.App 63, 65, 782 P.2d 224 (1989) (failure to request continuances waived objection to Amended Information), review denied, 114 Wn.2d 1010, 790 P.2d 167; State v. Brown, 55 Wn.App 738, 743, 780 P.2d 880 (1989) (“the fact that the defendant does not request a continuance is persuasive of lack of surprise and prejudice.”), review denied, 114 Wn.2d 1014, 791 P.2d 897 (1990).

The State requested the amendment to the Information near the beginning of its case. The defense did not request a continuance. The underlying facts of the charges were contained in the police reports which had previously been supplied to the defense and the defense had had an opportunity to interview the

victims. The State submits that the defendant has failed to establish any prejudice from the amendment of the Information.

The defense has also couched this in terms of a violation of Article I, §22 of the Washington State Constitution and the provision “the accused shall have the right . . . to demand the nature and cause of the accusation against him”. The Supreme Court has previously held that the accused must be informed of the criminal charge that he or she is to meet at trial and cannot be tried for an offense that is not charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). This rule is clarified in State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993) with the following discussion:

In enforcing the State constitution’s notice provision, this court has avoided technical rules. Instead, we have tailored our jurisprudence toward the precise evil that Article 1, §22 was designed to prevent – charging documents which prejudice the defendant’s ability to mount an adequate defense by failing to provide sufficient notice. State v. Leach, 113 Wn.2d 679, 695-696, 782 P.2d 552 (1989). For example, in Pelkey, this court adopted a per se rule limiting the ability to amend an information once the state has rested its case “unless the amendment is to a lesser degree of the same charge or a lesser included offense.” 109 Wn.2d at 491. Any greater amendment “necessarily prejudices” the defendant’s rights under the State constitution. Pelkey, at 491. . . .

Schaffer’s attempt to read into Pelkey a per se rule prohibiting amendments during the state’s case is misplaced. Pelkey did not paint with so broad a

brush. Instead, it addressed only the constitutionality of an amendment adopted *after* the state has rested its case.

Schaffer, 120 Wn.2d at 620-621.

As for amendments during the State's case-in-chief, Pelkey has cited the court rule allowing such amendments, CrR 2.1(e), (now re-codified as CrR 2.1(d)) with approval. Pelkey, at 490-491. It is for the trial court to judge each case on its facts and reversal is required only upon a showing of abusive discretion. State v. James, 108 Wn.2d 483, 490, 739 P.2d 699 (1987).

The State submits that similar types of amendments of the information have been allowed by the appellate courts. For example, in State v. Wilson, 56 Wn.App 63, 782 P.2d 224 (1989), review denied, 114 Wn.2d 1010 (1990), the trial court granted the State's motion to amend the information to include a third count of Indecent Liberties on the day of the trial. The Court of Appeals upheld Wilson's conviction finding that there was no specific evidence to support a claim of prejudice. Another example of mid-trial amendment was in State v. Mahmood, 45 Wn.App 200, 724 P.2d 1021, review denied, 107 Wn.2d 1002 (1986), which added a new theory of criminal liability. The State, in making the motion to amend its case during its case-in-chief, indicated that a later

witness would offer testimony supporting a new theory. The Court of Appeals upheld the amendment because there was no showing that Mahmood was misled or surprised by the amendment nor did it effect the presentation of his defense. Mahmood, 45 Wn.App at 205. In State v. Gossert, 33 Wn.App 428, 435, 656 P.2d 514 (1982) it was noted that "where the principle element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow an amendment on the day of trial."

The State submits that the defendant, to prove an abuse of discretion, must demonstrate how he was prejudice. State v. Collins, 45 Wn.App 541, 551, 726 P.2d 491 (1986), review denied, 107 Wn.2d 1028 (1987). The defendant testified in our case and categorically denied any type of sexual improprieties with either of the children. The defense had had an opportunity to interview both children pretrial, had ready access to the police reports from the beginning of the case, and the amendment sought by the State was within the timeframe that was originally charged. The amendments consisted of reduction of one count from rape to molestation and expanding of the rape counts as it relates to one of the young ladies because of her recollections of specific instances

and events. All of this was within the same time period as originally charged. The defense sought no setovers or continuances nor were they able to claim surprise by the actions of the State. Further, the defendant testified and no exceptions were taken to the jury instructions that were offered in this case. As set forth in State v. Wilson, supra, the defendant could have requested a continuance, but he did not. His failure to do so was a waiver of his claim to error. Wilson, at 65; State v. Laureano, 101 Wn.2d 745, 762, 682 P.2d 889 (1984); State v. Murbach, 68 Wn.App 509, 511, 843 P.2d 551 (1993). The fact that a defendant does not request a continuance is persuasive evidence of lack of surprise and prejudice to his defense. State v. Brown, 55 Wn.App 738, 743, 780 P.2d 880 (1989).

III. CONCLUSION

The State submits that the trial court properly allowed the amendment during the early part of the State's case-in-chief.

There has been no showing by the defense that the trial court abused its discretion nor that the defense was prejudice by the allowing of this amendment.

DATED this 9 day of August, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA #7869
Deputy Prosecuting Attorney

