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NO. 35976-6-II
Cowlitz Co. Cause NO. 06-1-01375-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ADAM J. HOCKADAY,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JASON LAURINE/WSBA #36871
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ISSUE

WHETHER THE APPELLANT INVITED ERROR WHEN, AFTER THE STATE HAD RESTED ITS CASE IN CHIEF AND BEFORE STARTING HIS OWN CASE, HE AGREED TO ALLOW THE STATE TO AMEND THE CHARGING INFORMATION?

II. STATEMENT OF CASE

A. Procedural History

On October 23, 2006, the Honorable James Stonier found probable cause existed to arrest Hockaday for assault in the third degree, obstructing law enforcement, and resisting arrest. RP 3, 19-21. On October 25, 2006, Hockaday was charged with one count of assault in the third degree, for assaulting Longview Police Officer Ferris, and one count of resisting arrest, for intentionally attempting to prevent Officer Ferris, a peace officer, from lawfully arresting him. CP 1-2. Hockaday was arraigned on October 26, 2006, and entered not guilty pleas on both charged counts. RP 5, 7-11.

Trial was held on February 9, 2007, and the Honorable James E. Warne presided. The State presented testimony from Officer Jason Ferris, Officer Jeremy Johnson, and Officer Alan Buchholz, while Hockaday presented testimony from one witness, David Andrews. After the testimony by the State's witnesses, and before Hockaday presented his witness, the State made a motion to amend the charging information for

the resisting arrest charge. 2RP 92. The amendment did not charge a new crime, but merely removed any reference to Officer Ferris as the specific peace officer Hockaday resisted. 2RP 92, 20-21. This amendment had been discussed between the State and Hockaday. 2RP 92, 16-21. Defense counsel acknowledged that a discussion had occurred and also agreed to the late amendment of the charging information. 2RP 92, 24. The court then granted the amendment. 2RP 92, 25. Hockaday then put on his case.

Following testimony, a jury found Hockaday guilty of both the assault in the third degree and the resisting arrest charges. CP 51, 52; 2RP 137-38. On February 13, 2007, the court sentenced Hockaday to 25 days confinement for the assault charge and to 25 days confinement on the resisting arrest charge. CP 60-61; 2RP 142. The sentences ran concurrent. CP 60-61; 2RP 142. Hockaday appealed.

B. Substantive History

On October 22, 2006, Officer Jason Ferris, along with Officer Buchholz, Officer Johnson and Officer Hardy, went to 2914 Louisiana. The officers were looking for three individuals, Jason Austin, Randi Beck, and Tony Cavossos, who were suspected of being involved in a prior assault and malicious mischief. 2RP 28-30. The appellant, Hockaday, was not one of these individuals.

Officer Ferris knocked on the door at 2914 Louisiana, Longview, Washington. Two individuals answered and came outside, Jason Austin and Hockaday. Jason Austin was arrested. Rather than allowing Officer Ferris to perform his duties, an intoxicated Hockaday was inquisitive to the point of obstructing Officer Ferris. 2RP 30-31. During Hockaday's questioning, Officer Ferris could hear individuals talking within the residence, and he asked Hockaday if anyone else was within the house. 2RP 34-35. Hockaday informed Officer Ferris that no other people were within the house. 2RP 35, 2-3. Hockaday then went inside the house. Officer Ferris could still hear people talking within the house and began to knock on the door. This lasted for several minutes. 2RP 35. Because no one answered, Officer Ferris obtained permission to enter the house from a resident of 2914 Louisiana, via radio. 2RP 36-37.

Officer Ferris attempted to enter through the front door but Hockaday prevented this, stating that he was not going to let Officer Ferris enter the residence. 2RP 37-43. Hockaday tried to close the door. Officer Ferris attempted to block the door from being closed and Hockaday shoved him in the chest, knocking Officer Ferris backwards. 2RP 65. Officer Ferris and Officer Johnson then attempted to arrest Hockaday, but he resisted. Officer Johnson then informed Hockaday that he was under arrest. 2RP 66-67. During the scuffle, the Officers and Hockaday fell into

the house. Sitting on a couch was another male, and in another room was a female. 2RP 44. Officer Buchholz then assisted with the arrest. Before he was finally subdued, Hockaday threw more punches at Officer Buchholz and Officer Johnson. 2RP 44. Hockaday was then taken into custody.

III. ARGUMENT

EVEN THOUGH THE TRIAL COURT ERRORED BY ALLOWING THE STATE TO AMEND ITS CHARGING INFORMATION AFTER HAVING RESTED ITS CASE IN CHIEF, THE ERROR WAS INVITED AND AGREED TO BY HOCKADAY AND HE IS THEREFORE PROHIBITED FROM CHALLENGING ON APPEAL.

Article 1, Section 22 of the Washington State Constitution states: “In criminal prosecutions the accused shall have the right to demand the nature of the cause of the accusation against him.” *State v. Markle*, 118 Wash. 2d 424, 432, 823 P.2d 1101 (1992). It is a fundamental right that an accused be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged. *Id. citing State v. Irizzary*, 111 Wash. 2d 591, 592, 763 P.2d 432 (1988).

If there is a defect in the charging document, the State may amend the information to correct that defect at any time before the State rests its case. *State v. Phillips*, 98 Wash. App. 936, 941, 991 P.2d 1195 (2000) *citing State v. Vangerpen*, 125 Wash. 2d 782, 789, 888 P.2d 1177 (1995) However, the State may not amend an information to charge a different

crime after it has rested “unless the amendment is to a lesser degree of the same crime or a lesser included offense.” *Vangerpen*, 125 Wash. 2d at 789. But, mid-trial amendment is allowed where the amendment merely specifies a different manner of committing the crime originally charged. *State v. Pelkey*, 109 Wash. 2d 484, 490, 745 P.2d 854 (1987) citing *State v. Grosser*, 33 Wash. App. 428, 656 P.2d 514 (1982).

1. Hockaday invited the error and is prohibited from complaining on appeal.

Hockaday’s challenge to the late amendment of the charging information, which he agreed to, is prohibited by the invited error doctrine. Under the invited error doctrine, defense counsel cannot set up an error at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wash. 2d 129, 147, 904 P.2d 1132 (1995) citing *State v. Pam*, 101 Wash. 2d 507, 511 680 P.2d 762 (1984), *overruled on other grounds* in *State v. Olson*, 126 Wash. 2d 315, 893 P.2d 629 (1995); *see also State v. Henderson*, 114 Wash. 2d 867, 870, 792 P.2d 514 (1990). This prohibition will apply to even constitutional issues. *State v. Boyer*, 91 Wash. 2d 342, 345, 588 P.2d 1151 (1979).

The invited error doctrine is a strict rule to be applied in every situation where the defendant’s actions at least in some part have

contributed to or caused the error. *State v. Summers*, 107 Wash. App. 373, 381-82, 28 P.3d 780 (2001); *In re Dependency of K.R.*, 128 Wash. 2d at 147 (error will be determined waived if the party claiming error materially contributed to the error); see *State v. Korum*, 157 Wash. 2d 614, 649, 141 P.3d 13 (2006) (defense counsel's stipulation to the admissibility of all terms and conditions of a plea agreement was invited error). For an error to be invited, it must be the result of an affirmative, knowing, and voluntary act. *In re Call*, 144 Wash. 2d 315, 328, 28 P.3d 709 (2001).

In *Korum*, after having stipulated to the admissibility of the terms and conditions of his plea agreement, the defendant later objected at trial when that agreement was entered into evidence and then again complained on appeal that error had occurred. The Court ruled that the defendant invited the error, reasoning that his stipulation to the admissibility was an error he created and that the invited error doctrine prohibited him from complaining about the admission of the evidence. 157 Wash. 2d at 649.

In the current case, Hockaday agreed to the late amendment of the information. 2RP 92-93. Hockaday cannot set up an error and then complain about it on appeal. *Korum*, 157 Wash. 2d at 649; *Henderson*, 114 Wash. 2d at 870. During discussions with the trial court prior to Hockaday putting on his witnesses, the State made the motion to amend the information. 2RP 92-93. While making this motion, the State both

informed the court that it was making such an amendment after having rested, and that in an earlier conversation with defense counsel the defendant had agreed to allow that amendment. 2RP 92. Defense counsel acknowledged these comments and did not make any objection to the amendment; in fact defense counsel agreed to allow the state to amend, stating “that’s true” when the state informed the court of the earlier discussions held with defense counsel. 2RP 92. Such an acknowledgment is a knowing and affirmative act, which invited the error now complained of on appeal. To allow Hockaday the opportunity to challenge the late amendment of the charging information on appeal rather than challenge at trial when the State requested the opportunity to amend is the type of action the invited error doctrine was intended to prevent. Hockaday cannot agree to an apparently prohibited amendment of the charging information and then cry foul on appeal.

2. The Trial court’s error was harmless

In order for a constitutional error to be harmless, the Court must be convinced beyond a reasonable doubt that the evidence not tainted by the error was so overwhelming that a jury would do nothing but find the defendant guilty. *State v. Guloy*, 104 Wash. 2d 412, 425, 705 P.2d 1182 (1985) *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321

(1986). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Id.*

Here, the State amended the charging information after having rested to specify a different way of committing the same crime. The State may not amend an information to charge a different crime after it has rested “unless the amendment is to a lesser degree of the same crime or a lesser included offense.” *Vangerpen*, 125 Wash. 2d at 789. If a defendant challenges the sufficiency of an information after verdict, the Court shall construe the document liberally, by asking whether: 1) the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was prejudiced by the inartful language which caused a lack of notice?” *State v. Phillips*, 98 Wash. App. 936, 940, 991 P.2d 1195 (2000) *citing State v. Kjorsvik*, 117 Wash. 2d 93, 105-106, 812 P.2d 86 (1991).

In *Grosser*, where the State moved to amend charges from a knowing assault of another with intent to commit a felony of first degree escape, under RCW 9A.36.020(d), to a knowing assault of another with a weapon or other instrument or thing likely to produce bodily harm, under RCW 9A.36.020(c), the Court held that the state had to prove an assault in each instance therefore the amendment did not prejudice the defendant. 33 Wash. App. at 435. The Court reasoned that where the principal 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 amendment. *Id.*

In *Vangerpen*, in a trial for attempted first-degree murder where after having rested its case in chief and after the defense had moved to dismiss based on insufficiency of the information, the State moved to amend the charging information to include the element of premeditation. 125 Wash. 2d at 784-85. The Court held that the State could not amend charging document after it had rested its case in chief if the amended charge was not lesser degree of same charge or a lesser included offense, reasoning that an essential element had been omitted. *Id.* at 789.

In the current case, on October 25, 2006, Hockaday was charged with one count of assault in the third degree, for assaulting Officer Ferris, and one count of resisting arrest, for resisting Officer Ferris while he was performing a legal arrest. CP 1-2. Hockaday had been notified from the outset of the proceedings against him that he had been charged with resisting arrest. RP 3, 19-21; RP 4, 16-18. At trial, after having rested, the State moved to amend the charge of resisting arrest. However, the State did not amend the information to charge a different crime; it merely amended the charge of resisting arrest to only reference “peace officer” and not to specifically reference Officer Ferris. 2RP 92. Whether the information referenced only a generic peace officer or a specific officer

does not change the fact that Hockaday had been notified from the outset that he was charged with resisting arrest. At the time of amendment, Hockaday was still aware of the essential elements of resisting arrest. Moreover, the State was still required to prove those elements: that Hockaday intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. CP 48; RCW 9A.76.040(1).

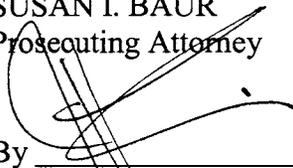
While Hockaday does specify a constitutional error, he does not specify any prejudice he may have suffered. The change to the charging information did not prejudice Hockaday at trial. Again, the State was still required to prove the same elements: that Hockaday intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. CP 48; RCW 9A.76.040(1). The jury was informed of these elements, 2RP 138, 1-2, and, after having heard the evidence presented, returned with a verdict of guilty.

IV. CONCLUSION

For the above reasons, the State requests that the Court affirms Hockaday's conviction for resisting arrest.

Respectfully submitted this 13th day of December, 2007

SUSAN I. BAUR
Prosecuting Attorney

By 

JASON LAURINE/WSBA #36871
Deputy Prosecuting Attorney
Representing Respondent

