

NO. 44884-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW STEARMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Edmund Murphy (Venure Motion)
The Honorable Judge Katherine M. Stolz (Trial Judge)

No. 12-1-01292-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court that presided over the defendant's pretrial motion for change of venue abuse its discretion when it denied the motion?
2. At the same time of the venue motion, did the court abuse its discretion when it allowed the State to amend the information to include conspiracy?
3. Was it harmless error for the trial court to fail to hear defendant's renewed venue motion at the close of the State's case when defendant failed to provide the court the necessary remedy for alleged improper venue?

B. STATEMENT OF THE CASE.

1. Procedure

The defendant, Andrew Stearman, and his brother, Alix Harris, were both arraigned on April 13, 2012. The defendant was charged in Pierce County cause No. 12-1-01292-1 with one count each of trafficking in stolen property and possession of a stolen firearm. CP 1-2. His brother, Harris, was also charged with those two charges and unlawful possession of a firearm in the first degree. CP 206-07.

Prior to the Omnibus Hearing of September, 2012, on July 6, 2012, both defendants filed motions for a change of venue. CP 9-26, 208-10. The hearing was held before the Honorable Judge Edmund Murphy on July 10, 2012. 7/10/12 RP 3-4. Defendant Stearman incorporated Harris' briefing and attachments of the declaration of probable cause and supplemental police report to his briefing. CP 9-26, *Appendices A & B*.

After argument from all parties, Judge Murphy denied the defendants' motion to change venue to King County. 7/10/12 RP 13-16. At the hearing, the judge allowed the State to file an amended information as to both defendants, adding one count of conspiracy to traffic in stolen property. CP 30-31; 7/10/12 RP 19. There was no objection to the amendment. 7/10/12 RP 18-19. After a number of trial continuances, the case was called for trial by the Honorable Judge Katherine Stoltz on March 28, 2013. 1 RP 5. The court conducted a CrR 3.5 hearing, heard motions in limine, and accepted the filing of the *Second Amended Information*. CP 58-60. On April 1, 2013, the court granted what amounted to an agreed motion to sever the two defendants. The State intended to offer the custodial statements of both defendants, however, there was no transcript of either lengthy statement, only a video/audio CD of each defendants' interview. There was no meaningful way to redact

each of the CD's to comply with *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620 (1968). Furthermore, Defendant Harris elected to proceed by bench trial. The court and parties decided the motions would be held, then Harris' trial, followed by defendant's. 1 RP 75-80. A *Third Amended Information* was filed to correct the dates alleged in the respective charges just prior to beginning trial. CP 114-16.

Stearman's jury trial consisted of the testimony of one detective, the playing of Stearman's lengthy interview with law enforcement, Ex. 2, CP 203, and three other exhibits. CP 201-05. One of the exhibits included a stipulation regarding the December 17, 2012, burglary of numerous firearms from the Pierce County business "Sportco." The stipulation further included the names of the burglars. CP 205. Therefore, the trial was able to be significantly shortened because the parties did not dispute the burglary occurred or at what date or time, nor was it disputed who committed the burglary. By the time Stearman's trial began, he was charged with four charges. The original two, plus the conspiracy added in July, and unlawful possession of a firearm in the second degree. CP 114-16.

At the conclusion of the State's case, Stearman asked the court to dismiss the conspiracy and trafficking charges for lack of evidence. The court granted Stearman's request as to the conspiracy charge, but denied

his request to dismiss the trafficking charge. 1 RP 138, 153. The defendant did not put on a case and rested on April 3, 2013. 1 RP 174. The following Monday, April 5th, the jury returned verdicts of guilty to possession of a stolen firearm and unlawful possession of firearm in the second degree. CP 139-40. The jury found Stearman not guilty of trafficking in stolen property. 1 RP 137. The defendant was sentenced on April 12, 2013, to a total of 14 months. CP 170-81. Stearman filed a *Notice of Appeal to the Court of Appeals* on May 10, 2013. This timely appeal followed.

2. Facts

On December 17, 2012, the Sportco business in Pierce County, Washington was burglarized after store hours. Numerous handguns were stolen. The victim business advised law enforcement that 41 guns were missing and presumed stolen. CP 205, Ex.3. The business supplied law enforcement with the necessary description and serial numbers of the missing firearms.

Three men were ultimately arrested and convicted of the burglary. CP 205, Ex. 3. One of the three included Soeun Sun, also known as "Maap" or "Mop." Sun is acquainted with defendant Stearman and his brother. CP 205, Ex. 3. Both Stearman and his brother live in King County. 1 RP 112. It is undisputed that neither brother participated in the

burglary. The State alleged and argued that a conspiracy existed between a number of defendants, including defendants not mentioned in this briefing, to commit the burglary, transport the guns to several locations, including Stearman's home in King County, and that the guns would be sold or otherwise distributed from these locations for profit. 1 RP 7-10, 48-50. Stearman was arrested and interviewed on April 11, 2012. He cooperated with detectives and provided a lengthy statement. Based upon Stearman's statement and other evidence, the State argued that there was communication between Sun and Stearman immediately after the early morning burglary. The State asserted that the communication included a text photo of numerous guns layed out on a bed. CP 204, Ex.1, 1 RP 7-10, 48-50, 2RP 185. Circumstantial evidence indicated that Stearman acknowledged the weapons were in route and was willing to allow his home to be used to sell the guns, or at least hide them until a later time. 2 RP 185-86.

The State relied upon the uniqueness of the burglary, i.e. over 40 guns from a sporting goods store, and circumstantial evidence that demonstrated that Stearman had knowledge of the conspiracy and his anticipated role. In support of its argument, the State pointed out numerous statements Stearman made in his interview with law enforcement, coupled with the photograph of the guns, and the peculiar hour the guns were being transported, to demonstrate that Stearman had

knowledge of the conspiracy and agreed to at least facilitate trafficking in the stolen firearms. 1 RP 7-10, 48-50, 194-96.

The parties also stipulated that Stearman had previously been convicted of felony, and therefore was not eligible to possess or own a firearm. CP 168-69, Ex. 4.

C. ARGUMENT.

1. THE COURT THAT PRESIDED OVER DEFENDANT'S PRETRIAL MOTION FOR CHANGE OF VENUE DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION.

On July 10, 2012 the Honorable Edmund Murphy heard defendants Stearman and Harris's motion for change of venue. Judge Murphy properly denied defendants' motion to change venue pursuant to CrR 5.1 (a)(2).

Brothers and codefendants, Stearman and Harris, jointly requested the court change the venue of their respective trials to King County. Defendant Stearman filed his brief through counsel on July 8, 2012. He incorporated by reference the briefing filed by counsel for his co-defendant Harris. Harris's counsel attached to his *Motion for Change of Venue*, the *Declaration for Determination of Probable Cause* which is identical in the two cases, ("*Appendix A*"), and a four page "*Case Supplemental Information police report*" in 2011004509 of Fife Police

Department. ("Appendix B.") CP 9-26. At the time of the motion the defendant was charged with trafficking in stolen property and possession of a stolen firearm. CP 1-2. The motion was based upon CrR 5.1, which reads:

(a) Where Commenced. All actions shall be commenced:

- (1) In the county where the offense was committed;
- (2) In any county wherein an element of the offense was committed or occurred.

(b) Two or More Counties. When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.

(c) Right to Change. When a case is filed pursuant to section (b) of this rule, the defendant shall have the right to change venue to any other county in which the offense may have been committed. Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.

Stearman stipulated the guns that were the subject of the defendant's charges came from the December 17, 2011, Pierce County burglary of Sportco. CP 205, Ex. 3. However, defendant emphasized that all of his pertinent acts occurred in King County exclusively. Counsel for both defendants argued that even if all facts alleged in the *Declaration of Probable Cause* were true, the stated facts showed that neither defendant committed any acts in Pierce County. 7/10/12 RP 4-7, 9-26. Furthermore, the defendants argued there was no evidence to indicate that they knew of the burglary prior to it occurring, and both defendants gave statements

saying they only learned of the burglary some time after the guns arrived at their house. 4/11/12 RP 11, 16, 27 (As to Stearman).

As noted earlier, in their motion the defendants attached a supplemental police report, CP 9-206, *See "Appendix B."* of defendants' briefing. The report states that cell tower information indicated that one of the burglar's cell phone "pinged" off a cell tower near the defendant's King County address. Defendant argued this only demonstrated that the burglar had been in King County in the area of the defendants' home. There was no further information listed indicating a date or time of the alleged "pinging."

The parties stipulated that Souren Sun (hereinafter "Sun") was one of the Sportco burglars. CP 205, Ex. 3. The attached police report stated there were "text messages on Sun's phone in the weeks after the burglary from Alex Andy [Harris & Stearman]...mentioning weapons." CP 9-26, *Appendix B*, p. 2 of 4. A different codefendant, Witten, told officers he purchased a gun from [Harris and Stearman] "a couple of weeks after the burglary." *Id.* p. 1 of 4. The report also stated officers spoke to another individual, Bunta, one of the burglars. CP 9-26, *Id.*, p. 2 of 4. The officers obtained his cell phone provider information and was able to determine it "pinged" on December 28th at approximately 1:30 a.m. in the GPS location of the defendants' home in King County. *Id.*, p. 2 of 4.

Defendant Harris said that "Mop" [Sun] came to his home he believes "around December 17th in the afternoon..." and showed him "what he estimated to be approximately 30 handguns." *Id.*, p. 3 of 4. Harris also said, according to the attached report, that Sun and the others did not tell [him] where they got the guns, but he knew they were stolen. *Id.* Harris also said that Sun "might have been around December 27th...and gave him several guns a couple of weeks after the burglary." *Id.*

As for defendant Stearman, the report states that "the people who took "the stuff" brought a duffle bag of guns to his house, but he didn't know at the time what they had done." *Id.* He identified Sun as the person with the duffle bag. However, according to the attached report, Stearman, "said he wasn't sure of the date that Sun came to his house...but said it was before Christmas andthe duffle bag contain[ed]approximately 10 guns." According to the report, Stearman admitted trying to get one of the guns as payment for an outstanding debt. CP 9-26, "Appendix B," pp. 3-4. Stearman admitted he sent Sun several text messages regarding the guns the day Sun was arrested. CP 9-26, "Appendix B," p. 4 of 4. The report states "that information is consistent with text messages on Sun's phone from "Alex Andy."

The essence of defendant's oral argument and briefing was that the information provided by the State does not place either defendant in Pierce

County and that no element of the offenses charged was alleged to have been committed in Pierce County. CP 9-26, *Stearman's Motion for Change of Venue via Defendant Harris' Amended Motion for Change of Venue*, p. 2-4. Further, that the submitted documents do not implicate either defendant prior to the burglary or acts in Pierce County. 7/10/12 RP 4.

The State responded to the defendant's arguments. The State indicated that at the time of charging he was "waiting for further telephone records, including cell tower information as well as who communicated with whom based on the telephone numbers and data...." 7/10/12 RP 7-8. He stated that since that time, the State discovered that shortly after the burglary the various codefendants [the burglars] contacted the defendants [Harris & Stearman] by telephone, in King County...in the very early morning hours, after midnight by phone from Pierce County. After or during the call, one or more of the burglars headed to King County shortly thereafter...to the codefendants' residence...where these handguns are allegedly either sold or traded to [Stearman & Harris] for cash or something else, I'm not sure." 7/10/12 RP 8. He continued, based upon ongoing discovery the State now sought to amend the defendants' charges and include one count of conspiracy to traffic in stolen property. 7/10/12 RP 7-8.

As for the issue of venue, the State argued that CrR 5.1(a)(2) applied. It states that an action may be maintained in any county wherein an element of the offense was committed or occurred. 7/10/12 RP 9. The State explained that the contact with the defendant immediately following the burglary occurred in Pierce County and was indicative of an agreement, however informal, to fence the guns in question. 7/10/12 RP 8-10. The defendant disagreed.

The court ruled:

What the Court is guided by in making this decision is Criminal Rule 5.1. 5.1(a) talks about all actions shall be commenced in the county where the offense was committed or in any county wherein an element of the offense was committed or occurred.... [Neither section (b) or (c)] necessarily give the defendant the option if there was *a portion of a crime committed in one county and a portion of a crime committed in another county* to chose which county he or she wishes to be prosecuted in.

....

What the State has charged in Count I of the Original Information is Trafficking in Stolen Property in the First Degree. In that count, the defendants are charged as acting as accomplices. There are two ways to commit trafficking in stolen property. One is to initiate, organize, plan, finance, direct, manage or supervise the theft of property for sale to others. The other is to knowingly traffic in stolen property. Both have been charged.

The theft of the firearms clearly occurred in Pierce County. The fact they were stolen firearms was generated because of actions that occurred in Pierce County. Both defendants were charged ... with possession of stolen firearms. The firearms were

allegedly stolen because of actions that occurred in Pierce County. Mr. Harris is charged by himself in Count III with Unlawful Possession of Firearm in the First Degree, which clearly that occurred in King County.

The Court is going to deny the motion to change venue based upon the Original Information, and also based upon the State's indication that it is seeking to file an Amended Information to add Conspiracy to Commit Trafficking in Stolen Property based upon additional evidence that has come to light that would indicate there were phone calls that were made from Pierce County from the ones that are suspected or alleged to have been involved in the actual burglary to these defendants in King County.

7/10/12 RP 13-15. The court clearly based its ruling on two separate bases. First, the trafficking charge was based upon the guns undisputedly stolen exclusively in Pierce County. There obviously could not be a trafficking charge absent the necessary stolen merchandise. This act constituted an act in Pierce County sufficient to justify Pierce County as proper venue.

In addition, based upon the information provided the court in anticipation of filing an additional charge of conspiracy, the court anticipated that further evidence would be admitted at trial indicating phone contact between the burglars and the defendant. The inference from this phone contact was the burglars were notifying the defendant they were in route with the guns as agreed. This was a second and distinct basis upon which the court relied in denying the defendant's motion to

change venue.

Based upon the information available to the court at this motion, the court did not abuse its discretion in denying the defendant's motion for change of venue.

A decision denying a change of venue is reviewed for an abuse of discretion. *State v. Rockl*, 130 Wn. App. 293, 297, 122 P.3d 759 (2005). The trial court's decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. *Id.* A new trial is necessitated only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997)(citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); see also *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) ("Something more than a possibility of prejudice must be shown to warrant a new trial.")). Dismissal is an extraordinary remedy and its appropriateness is fact specific, to be determined on a case by case basis. See *State v. Ramos*, 83 Wn. App. 622, 637, 922 P.2d 193 (1996), *State v. Coleman*, 54 Wn. App. 742, 749, 775 P.2d 986 (1989). In the present case, the court properly maintained venue in Pierce County pursuant to CrR 5.1(a)(2).

2. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE STATE TO AMEND CHARGES TO INCLUDE CONSPIRACY.

CrR 2.1(d) governs the amending of criminal charges. It reads:

Indictment and the Information.

(d) Amendment. 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.

A court's ruling allowing the State to amend charges is reviewed for an abuse of discretion. *State v. Johnston*, 100 Wn. App. 126, 133, 996 P.2d 629, *review denied*, 141 Wn.2d 1030 (2000). Generally, amending charges is liberally allowed. *State v. Johnson*, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992). The State is required to give formal notice by information to the defendant of the criminal charges to satisfy the Sixth Amendment and our state constitution, article, I, section 22. *State v. Finch*, 137 Wn.2d 792, 806, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). The defendant bears the burden of demonstrating the court abused its discretion in allowing the amended information. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995).

The timing of the State's decision to amend charges is often the issue when addressing the trial court's approval of an amendment. For example, allowing the State to amend the charge to a greater offense after

trial has commenced can amount to an abuse of discretion. *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995). Wholly changing the nature of the charge after the State had rested its case was also deemed prejudicial. *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992). In Mr. Stearman's case, however, the amendment was months in advance of the March 28, 2013 trial. 1 RP 5. Furthermore, the defendant did not object to the amendment or otherwise offer any argument that he was prejudiced as a result of the proposed change to the information. Defendant cannot support his claim that the court's acceptance of the *Amended Information* filed July 10, 2012, was an abuse of discretion. This argument fails.

3. THE TRIAL COURT SHOULD HAVE ENTERTAINED DEFENDANT'S RENEWED MOTION BUT THE FAILURE TO REVISIT THE MOTION WAS HARMLESS IN VIEW OF DEFENDANT'S FAILURE TO PROVIDE THE TRIAL COURT THE NECESSARY REMEDY FOR ALLEGED IMPROPER VENUE.

It is undisputed that Stearman raised the issue of venue again at the close of the State's case. 1 RP 147-48. The trial court clearly believed the issue was preserved for appeal, and did not warrant another hearing. 1 RP 148.

As previously noted, the judge that heard the motion in July, 2012, based his ruling on two separate factors. One of the factors was the then-original information charging the defendant with trafficking in stolen property, property that had been undisputedly stolen in Pierce County. That factor had not changed between the time the motion was heard and the conclusion of the State's case. Therefore, in applying the prior judge's analysis, there is no reasonable expectation, if that analysis were reapplied, the result would be any different.

Regardless, even if the court were to have found venue misplaced, defendant waived his objection to venue by failing to request the issue be submitted to the jury as required by *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994).

State v. Dent involved two defendants charged with conspiracy to commit murder. Dent was in the King County Jail as a result of a former girlfriend's allegation of assault. Dent began a conspiracy with another inmate in the King County Jail and his then-girlfriend to kill the former girlfriend. Over the course of time there were conversations, letters, and eventually a meeting. In total, these acts covered three counties, including Snohomish. Dent unsuccessfully raised a motion to change venue in pretrial motions. Dent did not revisit the issue until after the case was submitted to the jury. *Dent* established several things, first, venue is not

an element that the State must prove beyond a reasonable doubt. *Dent* at 478. The court ultimately held that venue was proper in Snohomish County, where the conspiring girlfriend lived and received phone calls and letters regarding the conspiracy. Before arriving at that holding, *Dent* also addressed when and how the issue of venue is waived or inadequately preserved.

In *Dent's* case, the Supreme Court noted that neither he, nor his codefendant, raised the issue of venue when discussing jury instructions with the court. When the court ruled on instructions, neither defendant took exception to the court's instructions. More importantly, though his co-defendant had purposed a jury instruction which included a requirement the State prove venue, neither defendant took exception to the court's failure to give the instruction.

The case proceeded to instructing the jury and closing arguments. While the court was instructing the jury, *Dent's* co-defendant interrupted the court and "reserved [an] objection to the "to convict" instructions. *Dent* at 478. *Dent's* counsel did not comment. Later, after arguments and the jury retired to the jury room, his co-defendant specified the objection was to venue. *Dent* joined in the exception. *Id.*

Dent announced the remedy that could have been afforded *Dent* and his codefendant had they preserved the proper jury instruction. If, at

the close of the evidence, there is a genuine issue of fact about venue, it becomes a matter for resolution by the trier of fact. If it is a jury case, it will be a jury question. The instruction should require proof by a preponderance of the evidence, not beyond a reasonable doubt. *Dent* at 480. In *Dent* as here, Stearman needed to request a jury instruction submitting the issue of venue to the jury.

In the present case, Stearman's counsel filed a motion to change venue and argued it months prior to trial. CP 9-26, 7/10/12 RP. He revisited the issue at the close of the State's case. 1 RP 148. As stated earlier, the State does not dispute the trial court declined to hear argument at the close of the State's case. However, review of Stearman's proposed jury instructions indicate that he did not propose any instruction or otherwise request the issue of venue be submitted to the jury. CP 117-25. Without a proposed instruction, the court could not have afforded Stearman the proper remedy, i.e., to submit the issue of venue to the jury. The State submits that failure to do so deprived the court the opportunity to at least consider his proposed remedy. As in *Dent*, Stearman's failure to submit the instruction constitutes a waiver of the issue.

Venue properly remained in Pierce County in this case and served the interests of judicial economy. The judicial economy is served by not charging counts in different jurisdictions. Trying multiple counts together

that arise from the same or similar acts is in the best interest of judicial economy. Additional court rules demonstrate the preference for judicial economy and maintaining related charges together in a single prosecution whenever possible if the defendant(s) are not substantially prejudiced. CrR 4.3(a) directs the court as to where different counts (or different defendants) should be prosecuted. It provides:

Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

.....

Joinder furthers the policy of judicial economy. Joinder of possession of stolen property with charges of indecent liberties, unlawful imprisonment, and burglary was not manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Vermillion*, 66 Wn. App. 332, 832 P.2d 95, *review denied*, 120 Wn.2d 1030, 847 P.2d 481 (1993); *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).

Reviewing the general nature of the allegations and the facts supporting them, it is clear that one jury trial was preferable for all the charges in defendant's case. The charges are all based on a series of acts and conduct arising from the Sportco burglary. Conducting bifurcated trials, i.e. separate counts in different counties, would be duplicitous as to the facts elicited, inconvenient for witnesses, and consume two court rooms for trial.

D. CONCLUSION.

The court that heard defendant's pretrial motion for a change of venue did not abuse its discretion in finding that CrR 5.1(a)(2) properly placed venue in Pierce County for defendant's charges.

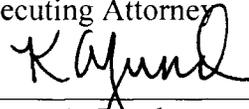
The same court did not abuse its discretion in allowing the information to be amended the same day as the motion and months prior to trial pursuant to CrR 2.1(d).

The trial court abused its discretion in failing to readdress the venue issue at the close of the State's case. However, the error was harmless as the defendant failed to provide the court with the proper remedy for improper venue, and therefore waived the issue as provided in *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994).

Therefore, the State respectfully requests this Court affirm the defendant's convictions for possession of a stolen firearm and unlawful possession of a firearm in the second degree.

DATED: July 9, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.9.14 Therese Kai-
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