

FILED
March 3, 2016
Court of Appeals
Division III
State of Washington
No. 33142-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

EVAN WAYNE SULLIVAN,

Appellant

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

NO. 14-1-00240-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

A. Substantive Facts

1. Someone intentionally injured six-month-old A.K.G.

A six-month-old is not able to stand or run. RP at 306. A child that age should have far fewer bruises than, say, a two-year-old because of the lack of mobility. RP at 306. Yet on May 5, 2013, A.K.G. (DOB: 10/25/2012) had a skull fracture (RP at 183), three distinct bruises on the left side of her head (RP at 147), and a bruise along her chin which showed some petechial (breaking of small blood vessels) bruising. RP at 148. She had a “goose egg” on the right side of her head. RP at 181. An expert described the bruises on her chin as “fingerprint bruising”—bruising when a child is forcibly grabbed and the fingers leave round bruises. RP at 307. In addition, A.K.G. had a fracture of her right tibia. RP at 313.

Two experts testified about the nature of A.K.G.’s injuries. Dr. Michelle Messer, a pediatric hospitalist-physician at Sacred Heart where A.K.G. was treated. RP at 296, 300. She concluded that because of the number of injuries, the bruises in different planes, the age of A.K.G., and the potential history of prior bruises, she could not conclude the injuries were accidental. RP at 322. Likewise, Dr. Brent Crabtree, who is an emergency room physician at Kadlec in Richland, Washington, and who

initially treated A.K.G., concluded that “almost invariably” a child A.K.G.’s age could not have caused the injuries by her own maneuvers or activities. RP at 176, 179, 187.

2. The evidence against the defendant: before and after pictures.

This was a rare case where the jury had pictures of the six-month-old victim before her visit with the defendant (her father) and after. A.K.G. started crawling on May 5, 2013. RP at 66, 68, 70. Her mother and great-grandparents videotaped this milestone. Ex. 1; RP at 81. The State encourages the Court to review that video. Ex. 1. The Gingrichs described A.K.G. as “without injuries, not fussy,” “without bruises or injuries,” and “asleep” on that morning. RP at 72, 117-18. A.K.G. was with her mother and great-grandparents until they took her to the defendant’s residence around 3:00 p.m. RP at 72, 116-17.

After the visit ended around 7:00 p.m., the Gingrichs almost immediately noted that A.K.G. had bruises around her forehead and ear with a big contusion on the back of her head that was oozing. RP at 74-75. A.K.G. was shaking and crying and they took her to the hospital. RP at 74-75. Photos taken by police officers were admitted and published with the jury. Exs. 2-9.

The video taken of A.K.G. crawling before her visit with the defendant and the photos of her injuries after the visit with the defendant were important parts of the State's argument. Ex. 1; RP at 388.

B. Procedural Facts Relevant to Appeal

1. Facts relevant to Information:

The defendant was charged by Second Amended Information¹ with Assault of a Child in the Second Degree. CP 9-10; App. A. The defendant knew which prong of Assault in the Second Degree the State alleged he violated because that prong, RCW 9A.36.021(1)(a), is listed in the Information and because the defendant made repeated references to that prong in his Opening Statement. CP 9-10.

From the defense attorney's opening statement:

[A]ssault two is a very serious charge. Along with that charge are important elements that Mr. Sullivan . . . intended to assault [A.K.G.]. In addition to that, that he has intentionally assaulted her and thereby recklessly caused very serious injuries

RP at 52-53.

So, all we really know is what the injuries were, and so from that the State is gonna ask you to take a leap that this must have been, number one, an intentional injury, an intentional assault, and done recklessly.

RP at 57.

¹ Hereinafter referred to as "Information."

[W]here the State has to prove beyond any reasonable doubt that not only Evan caused this, that he intended to cause this and did so recklessly

RP at 58.

The defendant never sought a bill of particulars or claimed any confusion about which prong of the Assault in the Second Degree statute the State alleged the defendant violated. Instead, he moved to dismiss the case after the State rested, stating that the “recklessness” element of Assault in the Second Degree, RCW 9A.36.021(1)(a), was not included in the Information. RP at 335.

2. Facts relevant to playing Detective-Defendant recording:

A tape recording of a telephonic interview between the defendant and Detective Athena Clark was admitted and played for the jury. Ex. 17; RP at 256-67. The defendant had no objections to the admission of the recording. RP at 256. The defendant stated he had a tactical reason not to object to the playing of the tape recording. RP at 293.

However, after the recording was played, the defendant stated that he wanted the court to instruct the jury that a pause by the defendant after Detective Clark asked him to come to the police station for an interview should not be used against him. RP at 276. Still later, the defendant made a motion to dismiss because “it’s prosecutorial misconduct.” RP at 290.

The controversy concerns the following portion of Exhibit 21, at
page 7 of 8:

Det.: Ya? Would you be willing to come in to the
Richland Police Department and give the formal
statement when you get into town?
Susp: Uh I can—um ya let me um—God I can't think um
I really need to call her um.
Det.: Oh ya that's fine you know that's a good idea so
maybe once you get off the phone with me you can
give her a call but I'd like to get you in sooner than
later so we can get a statement from and then uh
you know, continue to talk to everybody we can to
get you know . . . some resolution to this.
Susp: Ya um—um ya how late are you going to be there?
Det.: I will be here as late as it takes for you to come in.
Susp: OK
Det.: So.
Susp: Fuck ok um ya I'll give you a call when I'm in
town.
Det.: Sounds good.
Susp: OK. Alright.
. . . .
Det.: Alright and if I don't hear from you what in like an
hour and halfish, that sound good?
Susp: Uh ya.
Det.: Then I'll give you a call?
Susp: Ok
Det.: Ok. Thank you for your time.
Susp: No problem.
Det. Bye-Bye.

The defendant did meet with Detective Clark following this
telephone call at the Richland Police Department for an interview. RP at
260-66.

II. ARGUMENT

- A. **State's Response to Defendant's Argument No. 1:** "The Information was constitutionally defective in that the State failed to allege all essential elements of the crime charged." Br. Appellant at 20.

Summary of argument: The defendant sandbagged the State by waiting to object to the Information until the State had rested and was unable to amend the Information. RP at 335. This Court should liberally construe the Information. All the elements of the crime of Assault of a Child in the Second Degree were alleged, even if the Information is strictly construed. The defendant argues that the elements of the specific prong of Assault in the Second Degree must be alleged. There is no such requirement in Assault of a Child in the Second Degree. Even if there were, the Information adequately advises the defendant of that prong. The proof is that the defense attorney repeatedly referred to the elements of that prong in his Opening Statement. RP at 52-53, 57-58. The defendant should be considered to have waived this argument by not asking for a bill of particulars.

1. **Standard of Review on Appeal**

- a. **The more liberal construction rule should apply when considering the challenge to the sufficiency of the Information in this case because the defendant engaged in "sandbagging" by waiting to raise the objection until the State rested.**

Courts adopt a liberal construction rule when considering challenges to the Information if the defendant is “sandbagging,” defined by Professor LaFave as a situation where a defendant might keep quiet about the defects in the Information only to challenge them after the State has rested and can no longer amend it. *State v. Kjorsvik*, 117 Wn.2d 93, 105-08, 812 P.2d 86 (1991).

That is exactly what happened here. The defendant raised an issue regarding the Information only after the State rested. RP at 335. As stated in *State v. Killiona-Garramone*, 166 Wn. App. 16, 267 P.3d 426 (2011), generally, after the State has rested its case, it cannot amend an Information unless the amendment is to a lesser degree of the same crime or a lesser included offense, with the exception of resolving scrivener’s errors. Therefore, the Court of Appeals would apply a liberal standard in determining the sufficiency of an Information and construe the Information in favor of its validity, where the defendant did not object to the sufficiency of the Information until after the State had rested its case.

The defendant argues that since he objected to the Information before the verdict, the stricter standard would apply, citing *State v. Borrero*, 147 Wn.2d 353, 58 P.3d 245 (2002) (citing *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992)). However, in *Borrero*, the Information was challenged only on appeal, not during any portion of the trial. 147

Wn.2d at 358. In *Johnson*, the Information was challenged *pre-trial*. 119 Wn.2d at 145.

Cases actually considering this fact pattern hold that a defendant cannot wait until after the State rests to challenge the sufficiency of the Information. In *State v. Vangerpen*, 125 Wn.2d 782, 785, 888 P.2d 1177 (1995), the defendant waited until the State had rested to allege that the Information was deficient. The Court held that the State may not amend a charging document after it rests its case-in-chief unless the amended charge is a lesser degree of the same charge or a lesser included offense. *Vangerpen*, 125 Wn.2d at 787. Therefore, the more liberal standard was adopted. Likewise, *Kiliona-Garramone* held that generally, after the State has rested its case, it cannot amend an information unless the amendment is to a lesser degree, a lesser included crime, or to correct a scrivener's error. 166 Wn. App. at 21, n.4.

To quote *Kiliona-Garramone*:

When a defendant challenges the sufficiency of a charging document, our standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.3d 1235 (1997). If a defendant challenges the sufficiency of the information "at or before trial," we construe the information strictly. Under this strict construction standard, if a defendant challenges the sufficiency of the information *before* the State rests and the information omits an essential element of the crime, the court must dismiss the case "without prejudice to the State's ability to re-file the charges." If, however, a defendant moves to dismiss an

allegedly insufficient charging document after a point when the State can no longer amend the Information, such as when the State has rested its case, we construe the information liberally in favor of validity.

166 Wn. App. at 23. (citations omitted)

Other cases are in accord. *State v. Phillips*, 98 Wn. App. 936, 991 P.2d 1195 (2000), held that the more liberal standard would be used where the defendant had waited until both sides had rested before challenging the Information. The Court reasoned that once the State had rested, it may not amend the Information unless it was to a lesser degree or a lesser included crime. 98 Wn. App. at 941.

Please review the Statement of Facts for a list of the times in Opening Statement that the defendant referred to the State's burden to prove that he intentionally assaulted A.K.G. and thereby "recklessly" caused substantial bodily harm. The defendant had spotted a possible issue and wanted to exploit it by waiting until the State had rested its case before speaking of it. This Court should use the more liberal standard on review.

Under that standard, the Court must determine whether 1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, 2) whether the defendant can show that he was nonetheless actually prejudiced by the unartful or vague language

that he alleges caused a lack of notice. *Kiliona-Garramone*, 166 Wn. App. at 25.

Nevertheless, even under the stricter standard, the Information contained all the essential elements. Under that test, if all the essential elements of a crime are included in the Information so as to apprise the accused of the charges against him or her and to allow the accused to prepare a defense, it is constitutionally adequate. *State v. Taylor*, 140 Wn.2d 229, 996 P.2d 571 (2000).

2. The Information was sufficient under either standard.

a. The Information alleges all of the elements of Assault of a Child in the Second Degree under a strict construction of the Information.

i. The specific prong of Assault in the Second Degree is not an element of Assault of a Child in the Second Degree.

The defendant is arguing that the Information alleging Assault of a Child in the Second Degree should include an allegation of which prong of Assault in the Second Degree the defendant is accused and include each element of that specific prong. The State respectfully suggests that the defendant is misreading the elements required under RCW 9A.36.130, Assault of a Child in the Second Degree.

The defendant was charged under RCW 9A.36.130(1)(a), which provides:

Assault of a child in the second degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

See App. A.

Thus, the elements for Assault of a Child in the Second Degree under RCW 9A.36.130(1)(a) are:

1. The defendant is a person eighteen years of age or older;
2. The child is under the age of thirteen; and
3. The defendant commits the crime of Assault in the Second Degree as defined in RCW 9A.36.021.

The State alleged all of these elements. The State went further and alleged the specific subsection of RCW 9A.36.021 as the method by which the defendant committed the Assault in the Second Degree. CP 9-10. The State was not required to do so. RCW 9A.36.130(1)(a) does not require the State to allege the manner in which the defendant committed Assault in the Second Degree. All essential elements are in the Information; the defendant is arguing for a non-essential element, the

specific prong of Assault in the Second Degree which elevates the crime to Assault of a Child in the Second Degree. CP 9-10.

- ii. ***Even if the Assault of a Child in the Second Degree statute were read to require the specific prong of Assault in the Second Degree, the Information includes the prong of “intentional assault recklessly causing substantial bodily harm.”***

The Information specifically alleges that the defendant committed Assault of a Child in the Second Degree by violating RCW 9A.36.021(1)(a), the prong by which a defendant commits Assault in the Second Degree by “intentionally assault[ing] another and thereby recklessly inflicts substantial bodily harm.” If that was not sufficient, the Information further alleges that the defendant did assault the child by “inflict[ing] trauma to [her] head and/or leg resulting in a skull fracture and/or tibia fracture” CP 9-10.

Further, it is clear from a reading of both RCW 9A.36.021 (Assault in the Second Degree) and RCW 9A.36.130(1) (Assault of a Child in the Second Degree) that the only manner in which the State alleged the defendant committed Assault in the Second Degree was under subsection (1)(a), that the defendant intentionally assaulted the child and thereby recklessly caused substantial bodily harm. App. A, B. The Information alleges that the defendant assaulted the child by inflicting trauma which

thereby inflicted substantial bodily harm. CP 9-10. A review of the Assault in the Second Degree statute shows that by both citing RCW 9A.36.130(1)(a) and by using the phrases “assault,” “inflict trauma,” and “inflict substantial bodily harm,” the only possible prong alleged was (1)(a).

To review the Assault in the Second Degree statute, RCW 9A.36.021(1):

Subsection (b) “injury to an unborn quick child” is ruled out by the Information, both because subsection (1)(a) was specifically alleged and because the victim was living. CP 9-10.

Subsection (c) “assault with a deadly weapon” is ruled out by the Information, both because subsection (1)(a) was specifically alleged and because there is a specific reference to an assault causing substantial bodily harm. CP 9-10.

Subsection (d) “use of poison” is ruled out by the Information. The Information alleges a physical assault, not the use of poison. CP 9-10.

Subsection (e) “intent to commit felony” is not alleged in the Information. The Information specifically references “substantial bodily harm” and cites that subsection. CP 9-10.

Subsection (f) “bodily harm which . . . causes such pain or agony as to be the equivalent of . . . torture” is ruled out by the Information and

by a reading of RCW 9A.36.130(1). The State specifically alleged a violation of RCW 9A.36.130(1)(a). CP 9-10. Subsection RCW 9A.36.130(1)(b) refers to torture as possible element. Even if the defendant ignored the reference to RCW 9A.36.021(1)(a) in the Information, the defendant would have known that he was not charged with torturing the child because the State did not charge him with torture under the Assault of a Child in the Second Degree statute. Further, this subsection does not have an element of “substantial bodily harm.”

Subsection (g), “strangulation or suffocation,” is ruled out by the Information. The Information does not allege such an assault; it does allege “substantial bodily harm” and specifically alleges subsection (a). CP 9-10.

Only subsection (1)(a) has a requirement of “substantial bodily harm.” Most of the other subsections do not have a “hands-on, physical assault” as a requirement. And, only subsection (1)(a) was alleged as the method by which the defendant committed Assault in the Second Degree.

State v. Johnson, 180 Wn.2d 295, is helpful. The defendant was charged with Unlawful Imprisonment. *Id.* at 299. He argued that the Information should have included the definition of “restrain.” *Id.* at 299-300. The Court held it was not necessary to include definitions. *Id.* at 307-08.

An Information need not use the exact words of the statute so long as the words used adequately convey the same meaning. *State v. Ralph*, 85 Wn. App. 82, 930 P.2d 1235 (1997). The State emphasizes that the elements of Assault of a Child in the Second Degree were alleged. The defendant is suggesting that non-elements, specifically, the prong of Assault in the Second Degree used to elevate the crime, must also be alleged. Even accepting the defendant's argument, the Information does that by citing the specific prong and using the language of that prong. CP 9-10. If the primary purpose of the essential elements rule is to adequately identify the crime charged and to give the defendant notice of the nature of the crime he must be prepared to defend, then the defendant had the elements of Assault of a Child in the Second Degree **and** Assault in the Second Degree. *State v. Lindsey*, 177 Wn. App. 233, 245, 311 P.3d 61 (2013).

iii. The defendant's failure to ask for a bill of particulars specifying which prong of Assault in the Second Degree the State alleged should be a waiver of the challenge.

The defendant could have asked for a bill of particulars to ascertain by what method the State alleged that he committed an Assault in the Second Degree. Having failed to do so, the defendant should not be allowed to now claim some confusion. A challenge to the sufficiency of

the Information may be waived by the failure to request a bill of particulars. *State v. Nonog*, 169 Wn.2d 220, 237 P.2d 250 (2010).

B. State’s Response to Defendant’s Argument No. 2: “The Court erred in allowing a telephone recording of Mr. Sullivan and a Detective into evidence in violation of the Fifth Amendment.” Br. Appellant at ii.

1. The defendant has misstated several things. First, it is important to realize the objections the defendant did or did not make.

a. This alleged error of admitting the tape recording is not preserved for the record. The defendant not only did not object to the admission of the recording, but stated he had a tactical reason for playing it.

To be fair, the defendant rephrased this argument, stating, “The trial court erred in denying the motion to dismiss made after Mr. Sullivan made a late objection to exhibit number 17 as violating Mr. Sullivan’s Fifth Amendment Right to remain silent.” Br. Appellant at 29. However, neither statement—the one above nor the one on page 29—is correct. The defendant did not object to the admission of the telephone recording, late or otherwise. RP at 256. In fact, he stated that there were tactical reasons he wanted the tape played. RP at 293.

Since he did not object at trial to the admission of the tape recording, the defendant should not now be allowed to argue error.

b. A motion in limine was not violated.

The defendant moved pre-trial that “Police officers’ opinion that Mr. Sullivan was hesitant to be interviewed by them.” CP 11. The defendant suggests that the motion in limine was violated. It was not; no one offered an opinion on whether the defendant was hesitant to be interviewed.

Note that discussion was on page seven of an eight-page transcript; the defendant had been interviewed. Ex. 21. The defendant was not hesitant to come to the police station. He was on the road and it was not certain when he could make arrangements to get to the police station.

c. The State did not “play a different recording than had been discussed during pretrial motions.”

The defendant was interviewed at the Richland Police Department and that interview was recorded. The State elected not to admit that recording. However, the defendant had the recording of his telephone call with Detective Clark and knew it could be submitted as evidence. Ex. 17; RP at 292.

2. The only error preserved for appeal is the trial court’s denial of the defendant’s request to dismiss the case for prosecutorial misconduct for playing the tape recording.

The defendant has not briefed this issue of prosecutorial misconduct on appeal and it should be considered abandoned. How can

the defendant later blame the prosecutors when the tape recording was played? The defendant agreed to the admission of a tape recording and later stated there were tactical reasons for the admission. RP at 256, 293.

But, to address this issue: Failure to object to an improper remark constitutes waiver of the error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). Also, a trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that a defendant will be tried fairly. *Id.* at 85. In this case, the evidence of the defendant's guilt is overwhelming. No one other than the defendant had the opportunity to cause the injuries observed on May 5, 2013. The prosecutors played the tape recording after it had been admitted without objection.

The trial court correctly denied the defendant's motion for a dismissal.

III. CONCLUSION

The Information correctly alleges the elements of the crime of Assault of a Child in the Second Degree. While it must be alleged that the defendant committed an Assault in the Second Degree, it is not required to list the specific prong of Assault in the Second Degree and the elements

for that prong in an Information charging Assault of a Child in the Second Degree. Nevertheless, the Information did charge that the defendant assaulted the victim causing substantial bodily harm and cited the subsection of the Assault in the Second Degree statute. The defendant was fully aware of the charges and the applicable prong of Assault in the Second Degree and referred to that prong at least four times in his Opening Statement. Whether the Information is construed liberally or strictly—and it should be liberally construed because the defendant attempted to sandbag the State—it provides the elements of the crime.

The defendant's other argument concerning the tape recording is without merit. The defendant had no objection to the admission or playing of the recording. He stated there was a tactical reason for not objecting to the admission. A reading of the transcript shows that the defendant cooperated with the police; he was on the road when the police called, gave a long interview, and may not have been able to get to the police station on the night in question. The defendant's claim of prosecutorial misconduct was not argued on appeal for good reason.

The defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of March, 2016.

ANDY MILLER

Prosecutor

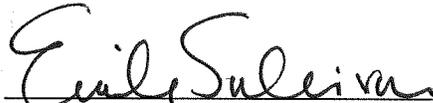
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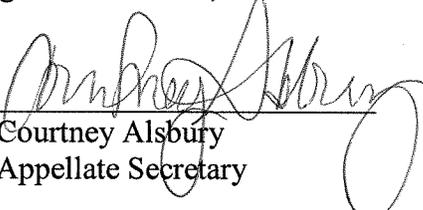
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Roger Peven
Law Office of Roger Peven
1403 W. Broadway
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E-mail service by agreement
was made to the following
parties: rjpeven@gmail.com

Signed at Kennewick, Washington on March 3, 2016.



Courtney Alsbury
Appellate Secretary

RCW 9A.36.130

Assault of a child in the second degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the second degree is a class B felony.

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.