

IN THE COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

APPELLATE NO. 23569-6-III

FERRY COUNTY NO. 04-1-00025-4

STATE OF WASHINGTON,

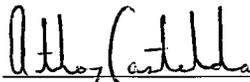
Respondent,

v.

ANDRE PAUL BECKLIN,

Appellant.

BRIEF OF APPELLANT



Roger A. Castelda, WSBA#5571
Anthony Castelda, WSBA#28937
Attorneys for Appellant
P.O. Box 1307
Tonasket, WA 98855

TABLE OF CONTENTS

Table of Contents	i
Table of Cases and Statutes	
Identity of Appellant	1
Issues Presented	1
Statement of the Case	1
Legal Argument	6
Conclusion	21

TABLE OF CASES AND STATUTES

<i>Spokane v. Dale</i> , 112 Wash. 533, 123 P. 921 (1920).	17
<i>State v. Baun</i> , 123 Wash. 340, 212 P. 553 (1923)	17
<i>State v. Dale</i> , 110 Wash. 181, 188 P. 473 (1920)	17
<i>State v. Hull</i> , 83 Wn.App. 786, 924 P.2d 375, rev. den. 131 Wn.2d 1016, 936 P.2d 416 (1996)	14
<i>State v. Jones</i> , 3 Wash. 175, 28 P. 254 (1891)	18
<i>State v. Jones</i> , 26 Wn.App. 1, 612 P.2d 404 rev. den. 94 Wn.2d 1013, _____ P.2d _____ (1980)	12
<i>State v. Kenney</i> , 23 Wn.App. 220, 595 P.2d 522 (1979)	13
<i>State v. Kubreka</i> , 35 Wn.App. 909, 671 P.2d 260 (1983)	7
<i>State .v Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992)	14

<i>State v. Matlock</i> , 27 Wn.App. 152, 616 P.2d 684 (1980)	. . . . .	7
<i>State v. Pelky</i> , 109 Wn.2d 484, 745 P.2d 854 (1987).	. . . . .	9,10,11
<i>State v. Purdom</i> , 106 Wn.2d 745, 725 P.2d 622 (1986)	. . . . .	9,10,11,12
<i>State v. Ransom</i> , 56 Wn.App. 712, 784 P.2d 469 (div. 2 1990)	. . . . .	20
<i>State v. Renfro</i> , 28 Wn.App. 248, 622 P.2d 1295 rev. granted aff. 96 Wn.2d 902, 639 P.2d 737, cert. den. 103 S.Ct. 94, 459 U.S. 842, 74 L.Ed.2d 86 (1981)	. . . . .	20
<i>State v. Saldano</i> , 36 Wn.App. 344, 675 P.2d 1231, rev. den. (1984)	. . . . .	6
<i>State v. Schaffer</i> , 120 Wn.2d 616, 845 P.2d 281 recon. den. (1993)	. . . . .	8,14
<i>State v. Walters</i> , 7 Wash. 246, 34 P. 938 (1893)	. . . . .	17
<i>State v. Wheeler</i> , 93 Wash. 538, 161 P. 373 (1916)	. . . . .	17,19,20
Wash. State Const., art. I, sec. 22, amend. 10	. . . . .	14
Criminal Rule 1.1	. . . . .	6
Criminal Rule 1.2	. . . . .	7
Criminal Rule 2.1	. . . . .	7
Criminal Rule 6.15	. . . . .	16

I. IDENTITY OF APPELLANT

The Appellant in this matter is ANDRE PAUL BECKLIN. He resides at 27 Bacon Creek Drive, Republic, Washington 99166. This Appeal is being filed on his behalf by his counsel of record the Law Office of Castelda & Castelda, Inc., P.S.

II. ISSUES PRESENTED FOR REVIEW.

1. Were the Amendments of the Information Unfairly Prejudicial to the Defendant?

2. Were the Court's answers to the questions raised by the Jury during deliberations a harmful error?

III. STATEMENT OF THE CASE

This Appeal arises out of a Jury Trial conducted in Ferry County Superior Court on November 2 and 3, 2004 before the Honorable Judge Rebecca Baker. See Report of Proceedings (hereinafter referred to as RP), vol. 1, pg. 50. The Defendant was initially charged by Information filed April 6, 2004 in Ferry County Superior Court with One (1) Count of Stalking for alleged actions which occurred on or about March 26, 2004. See Clerk's Papers (hereinafter referred to as CP), pgs. 1-2. This was signed by Michael Sandonna, Deputy Prosecuting Attorney. See Id.

The State filed an Omnibus Application in the matter on May 28, 2004. It made no mention of any intent to Amend the Original Information from the one (1) original count of Stalking. CP, pgs. 11-14. Nor did the Court's Omnibus Order make any mention of any intent on that of the State to Amend from the Original Count. See CP, pgs. 21-25.

October 20, 2004 the State filed a Motion and Affidavit to Amend Information along with a Note for Motion to Amend. It was set to be heard on November 2, 2004 the first day of trial. See CP, pgs. 32-33 and pg. 34. The Motion and Affidavit along with the Note for Motion failed to contain any Proposed Amended Information. In fact there was no provision to the Defendant as to what the Amended Information would be. Just a general Motion to Amend. See Id.

The original Information remained in effect and was never Amended by Order of the Court. As such the Defendant and counsel operated off this Original Information in preparation for trial. See RP, vol. 1, pgs. 3-6. The Original Information charged one count of Stalking for one instance on March 26, 2004. That is all. See Id. On the date of trial, rather the very morning trial is to begin, the State moved over objection of the Defendant, to create a Second Amended Information which was never

before seen by the Defendant or Defense, including new language of “several times” and a entirely new date of March 13, 2004. See RP, vol. 1, pgs. 3-6 and CP pgs. 59-60. This was the Second Amended Information. Id. Defendant and Defense counsel had agreed previously to allow an Amendment to include language which would clarify the charge. That was acceptable to the Defendant and Defense. RP, vol. 1, pgs. 1-3. This first Amended Information still adhered to the same date as the original Information, and the same single count. See CP, pgs. 3-4. There was nothing new to it. It had in fact been discussed between counsel for the State and the Defendant. RP, vol. 1, pgs. 3-6.

The Amended Information contained no change from the original charge, date of offense or number of counts. It was essentially the same, containing only some clarification as to RCW 10.99.020. See CP, pgs. 1-2 and 3-4. It was not until the day of trial this Second Amended Information even surfaced with the new date of March 13, 2004, and the language of “several times” as it related to March 26, 2004. See CP, pgs. 3-4. Defendant and Defense objected to this Second Amended Information as prejudicial, surprise, lack of notice and not in compliance with the Superior Court Criminal Rules (hereinafter referred to as CrR) as it relates

to Amendments. See RP, vol. 1, pgs. 3-6 and vol. 1, pgs. 9.

The Court granted the Motion to Amend and allowed the State to file the Second Amended information over objection of the Defendant and Defense Counsel. RP, vol. 1, pgs. 11. However, the State then moved for a third time during the course of trial to amend the Information yet once again. In fact this was the Third Amended Information. RP, vol. 3, pgs 242-245. See also CP, 121-122.

This Third Amended Information was done by the State during the course of finalizing the Jury Instructions. The State moved to Amend the Information a third time, what was deemed by Defense to be a Fourth effort to Amend the Information to conform to its version of the events. RP, vol. 3, pgs. 242-243. This Fourth amendment of the Information by the State changed the Information to state "on or about the 13th day of March, 2004, up to and including on or about the 26 day of March, 2004". RP, vol. 3, pgs. 243, lines 3-4. This was again very different from the Third Amendment which the Court had signed not forty-eight (48) hours previously on November 22, 2004. RP, vol. 1, pgs. 11 and CP, pgs 3-4. So there were in effect four (4) separate and distinct Amendments of the Information. The fourth and final Amendment being undertaken by

the State at what appeared to be the direction and request of the Court from the bench. See RP, vol. 2, pgs. 236.

During the course of deliberations the Jury came back to the Court with two (2) separate questions. The first question was raised on November 3, 2004 at 1830 hours. The Jury queried to the Court, "Is third party included in Stalking? Pursuant to our instructions of changes (sic) brought against the Defendant, can you stalk a party through a third person?" RP, vol. 3, pgs 340. The Court answered the question "Yes" over the objection of Defense counsel. RP, vol. 3, pgs. 340-342. It was the position of Defense counsel this was essentially handing the verdict to the State. RP, vol. 3 pgs. 341, lines 19. The Court refused to refer the jury back to a specific instruction such as the instructions dealing specifically with conviction, numbers 16 through 21. See RP vol. 3, pgs. 281 through 286 and CP, pgs. 91 to 117.

This occurred once again during deliberations of the jury. On November 3, 2004 at 2000 hours the jury queried "Is there a stalking distance between the stalker and victim?" RP, vol. 3, pgs. 343. The Court over objection from Defense counsel responded to the question as follows; "No. Refer to Instruction Number 6 for the elements of the crime that

need to be proven.” RP, vol. 3, pgs. 344. Defense counsel objected to any response outside of referring the jury to a specific instruction or series of instructions. RP, vol. 3, pgs. 343-344.

It is the position of the Defendant the Amendments as allowed and the Court’s responses to the Jury’s Questions were harmful and prejudicial errors warranting the overturning the conviction and remanding for further proceedings.

IV. LEGAL ARGUMENT

A. The Amendments to the Information by the State were prejudicial to the Defendant.

The Superior Court Criminal Rules (CrR) govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede such statutes and rules which may be in conflict with them. CrR 1.1. In reviewing the court rules, the Court must approach a rule as though it had been drafted by the legislature, and give the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it. *State v. Saldano*, 36 Wn.App. 344, 675 P.2d 1231, rev. den. (1984). Furthermore, construction of the rules is governed by ordinary principals and ideals of statutory construction. *State*

v. *Kuberka*, 35 Wn.App. 909, 671 P.2d 260 (1983), see also *State v. Matlock*, 27 Wn.App. 152, 616 P.2d 684 (1980).

In fact the rules themselves provide a broad and sweeping statement as to their purpose and construction.

“These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.” CrR 1.2.

CrR 2.1(d) specifically addresses Amendment to any Information undertaken in a criminal proceeding. It 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.” CrR 2.1(d). The crucial phrase being “ ... if substantial rights of the defendant are not prejudiced.” In the case at bar the number of amendments combined with their timing worked a substantial prejudice upon the rights of the Defendant.

The later the amendment comes in time the more likely such amendment is to be considered prejudicial to the defendant. When a jury is involved in a case, and the amendment occurs late in the State’s case, as the Third Amended Information did in the case at bar, impermissible

prejudice could be more likely. *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281, reconsideration den. (1993). Here there were three amendments of the Information within forty-eight (48) hours. See CP, pgs. 3-4, 59-60, and 121-122. All of which sufficiently modified the original charge as to be highly prejudicial to the Defendant.

The Amended Information charging stalking was stipulated to by the Defense. See CP, pgs. 3-4. See also RP, vol. 1, pgs. 1-3. But this Amended Information Charging Stalking merely added one (1) new line to the Information. Nothing more. Even the Court admitted such. RP, vol. 1, pgs. 2, line 11. From there however, the Information would Amended a second time in mere minutes.

The new amendment, what was deemed the Amended Information-Second (CP, pgs. 59-60), would add an entirely new date for an offense and expand the time of exposure of criminal culpability to the Defendant. See CP, pgs. 5-60. See also RP, vol. 1, pgs. 2, and 3-6. The charge was now Amended via this Amended Information Second to include March 13, 2004 and "several times on March 26, 2004." What had always been a case wherein the Defendant was facing one (1) charge for one (1) day, minutes before trial became two (2) separate dates with several different

undefined occurrences. See CP, pgs. 59-60 and RP, vol. 1, pgs. 3-6.

But the Amendments did not stop there. During the course of trial, just prior to the State resting, a Third Amended Information was allowed by the Court over objection from the Defense. See RP, vol. 3, pgs. 242-244. This Amendment modify the Information yet once again and changed the offense period from March 13, 2004 up to and including March 26, 2004. See Id. and CP, pgs. 121-122. This Third Amended Information came just prior to the close of the State's case in chief and at the bequest of the Court it would seem. It was rather the Court directing the State to amend yet again in order to conform to the Jury Instructions the Court thought were appropriate. Specifically the Court's version of Instruction Number 6. See RP, vol. 2, pgs. 236. The Court even took a recess to allow the State to undertake the necessary steps to get a Motion to Amend and new Third Amended Information drafted. All right during the very course of trial. See RP, vol. 3, pgs. 242-243.

This procedure has not been well taken by the Court's upon previous review and similar undertakings by the Court have been found to be in error. Specifically, in the case of *State v. Pelky* following the holding and reasoning of *State v. Purdom*. There it was deemed to be an error and

an abuse of the trial Court's discretion to refuse a continuance when an amendment was sought on the day of trial. See *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986) cited in *State v. Pelky*, 109 Wn.2d 484, 745 P.2d 854 (1987). Both of which held the lateness of the Amendment and failure to continue the trial was an abuse of the trial Court's Discretion. It was held in both cases a continuance should have been granted.

In the case at bar not only were two amendments undertaken on the very morning of trial minutes before trial began, there was also a fourth amendment during trial just prior to the close of the State's case in chief. See CP, pgs. 3-4, 59-60, and 121-122. Also see RP, vol. 1, pgs1-4 (where interestingly there was the First Amendment by Stipulation of counsel making the second Information on this case) followed in minutes by the Court's allowance of a third Information over objection. Then there was the fourth amendment or Information as stated *infra* just prior to the close of the State's case in chief. So there were four (4) separate instances where an Information was issued in the case at bar. The last two during the course of trial and over objection of Defense. No continuance was allowed and the Amendments went forward over strenuous objections of

the Defense.

Both of these cases, *Pelky and Purdom*, deal with this mid-trial amendment as occurred in the case at bar. They both carefully and eloquently point out amendments at such times greatly alter the case and ability of the defendant to prepare. Likewise it leads to a high degree of confusion among the members of the jury and the ability to differentiate between guilt and innocence. A mid-trial amendment which increases the criminal culpability of the defendant is highly prejudicial. See *Pelky* infra at 490.

An Amendment which alters the criminal culpability of the Defendant, as was done in the case at bar, is an unconstitutional violation of the Defendant's article I, section 22, amendment 10 right to demand the nature of the charge and/or accusation against him. See *Pelky* infra at 491. Also see Wash. State Const., art. I, sec. 22, amend. 10.

Such is exactly what occurred to the Defendant in the case at bar. Each Amendment after the first stipulated amended, substantially altered the nature of the charges and accusations leveled against the Defendant. They increased the dates, number of alleged violations, and finally went so far as to create an entire period of criminal exposure. All of which was

substantially different from the Original Information filed on April 6, 2004. See CP, pgs. 1-2, 3-4, 59-60, and 121-122. Four (4) separate and distinct Information or charging documents were filed and allowed by the Court in the case at bar. The last three (3) occurring on the day of trial and during the course of trial. All of which appreciably modify the criminal exposure and culpability of the Defendant so as to make it impossible for the Defendant to understand the nature of the charges and accusations leveled against him.

The key is allowing the defendant in any specific case time to adequately prepare a defense to the crime with which he is charged. Amendments on the very day of trial and or during the very course of trial violate this heavily protected right of the accused and depending on the facts of each case may be considered prejudicial. See *State v. Jones*, 26 Wn.App. 1, 6, 612 P.2d 404, rev. den. 94 Wn.2d 1013, _____ P.2d _____, (1980), cited in *Purdum*, *infra*.

That is exactly what occurred in the case at bar. Defense counsel was aware of an amendment proposed to change one line and add RCW 10.99.020. That was acceptable to Defense counsel as it had been requested October 22, 2004. See CP, pgs. 32-34. But as it turned out this

proposed amendment was actually not the one moved for by the State on the very morning of trial. The State proposed an entirely new Second Amended Information, never before seen by Defense counsel and never before discussed with Defense counsel. See RP, vol. 1, pgs. 1-6 and CP, 3-4 and 59-60. It created major confusion for the defense as now with this Third Information the Defendant was exposed to culpability on a new date (March 13, 2004) and several additional occurrences on March 26, 2004. As argued by Defense counsel this was not a situation wherein one could easily tell what was potential for criminal culpability. RP, vol. 1, pgs. 3-6.

What is even more concerning is the appearance of the Court directing the State to Amend to create the Fourth Information, what was deemed the Third Amended Information. CP, pgs. 121-122. As stated *infra*, it appears the Court directed the State to undertake to create the Third Amended Information. See RP, vol. 2, pgs. 236. The Court is to refrain from sua sponte amendments. Any such action by the Court is a nullity. See *State v. Kenney*, 23 Wn.App. 220, 595 P.2d 522 (1979).

It would appear the Fourth Information, what was deemed by the Court to be the Third Amended Information, was done at the bequest of the Court. Even then this Third Amended Information substantially altered

the crime charged and criminal culpability of the Defendant so as to warrant a meaningful defense all but impossible. Such is an impermissible prejudice. See *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992) and Wash. State Const., art. I, sec. 22.

The defendant in any criminal proceeding is entitled by right to be adequately informed of the charges they are to meet at time of trial. So they may know and prepare to defend against those charges. Any amendment to an Information is balanced against this right of the defendant. No amendment is allowed nor should be granted when it violates the defendant's right to be adequately informed of the charges he is to meet at time of trial. See *State v. Hull*, 83 Wn.App. 786, 924 P.2d 375, rev. den. 131 Wn.2d 1016, 936 P.2d 416 (1996). Such is what occurred to the Defendant in the case a bar. The number of Amendments combined with the substantial alterations to the charge were so prejudicial to the Defendant as to deprive of him his Constitutionally guaranteed right to be properly informed. See also *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281, reconsideration den. (1993).

B. The responses the Court provided to the Jury Questions were an abuse of Court discretion and prejudicial to the Defendant.

During the course of the deliberations the Jury made two (2) separate queries to the Court. The first coming November 3, 2004 at 1830 hours. The question stated:

“Is third party included in stalking? Pursuant to our instructions of changes (sic) brought against the Defendant, can you stalk a party through a third person?” RP, vol. 3, pgs. 340, lines 7-9. CP, pgs. 123.

The second question came on November 3, 2004 at 2000 hours and stated:

“Is there a stalking distance between the stalker and the victim?” RP, vol. 3, pgs. 343, lines 5-6. CP, pgs. 124.

To the first inquiry the Court responded “Yes” over the objection of counsel for the Defense. Counsel for the State of course desired an affirmative response to the question. See RP, vol. 3, pgs. 340-341.

To the second inquiry the Court responded; “No. Refer to Instruction Number 6 for the elements of the crime that need to be proven.” RP, vol. 3, pgs. 344. Once more this was over objection from the Defense which requested a simple refer to instruction number 6. Again, counsel for the State desired a “No” answer. RP, vol. 3, pgs. 343.

CrR 6.15 contains specific instructions to the Court as it relates to the responding of questions from a deliberating jury. It states in part:

“ ... Written questions from the jury, the court’s responses and any objections thereto shall be made part of the record. The Court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury’s request to rehear or replay evidence, but should do so in a way that is *least likely* to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instructions upon any point of law shall given in writing. (2) After deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.”
CrR 6.15 (f)(1)(2) emphasis added.

In the case at bar the two (2) responses given by the Court to the jury questions were prejudicial to the Defendant and did constitute an impermissible comment on the evidence. The Court is specifically forbidden from commenting on the evidence or appearing to comment on the evidence. CrR 6.15 (f)(1). See also Instruction Number 1 as read to the jury. RP, vol. 3, pgs. 275-278 and CP, pgs. 91-94. The sole purpose of our criminal justice system is to have a fair and impartial jury of your peers decide your guilt or innocence. This rests solely with the jury. The responses provided by the Court essentially directed the verdict of the jury.

The duty of guilt or innocence rests solely with the jury. Neither Court or Counsel for either side is to interfere with this. It is a prejudicial error for the Court to give an instruction containing an assumption that a crime has been committed. *State v. Baun*, 123 Wash. 340, 212 P. 553 (1923). This is very foundation of our system of laws. The responses provided by the Court in the case at bar did in fact assume guilt. Rather than referring the jury to a specific instruction both responses assumed facts not in evidence. Something strictly forbidden. *Spokane v. Dale*, 112 Wash. 533, 123 P. 921 (1920), *State v. Dale*, 110 Wash. 181, 188 P. 473 (1920).

The Court is to never give an instruction or response to a jury which gives the jury the impression there is direct evidence of a certain nature in the court's opinion, when they may not be such evidence. *State v. Wheeler*, 93 Wash. 538, 161 P. 373 (1916). Furthermore, it is well established all remarks and observations by a court in charging the jury as to facts before them will be cause for reversal. *State v. Walters*, 7 Wash. 246, 34 P. 938 (1893).

The jury is never to be given an instruction, which would also necessarily imply a response to a query as well, which is not applicable to

the facts of the case as presented. *State v. Jones*, 3 Wash. 175, 28 P. 254 (1891). This occurred in the case at bar. As to the first question; it queried as to whether or not a third party was included in stalking. Rather than refer to the jury to specific instruction the Court responded “Yes”. See RP, vol. 3, pgs. 340-341. The appropriate response of the Court would have been to refer to the “To Convict” Instruction for the charge. Specifically Instruction Number 6. It contains the specific elements which must be proven to convict the Defendant of the crime of stalking. See RP, vol. 3, pgs. 281-282. Also see CP, pgs. 91-117.

Instruction Number 6 outlines exactly what is to be determined to convict the Defendant of the crime of Stalking. It makes no mention of Third Parties or action of Third Parties. See *Id.* Nor was a third party charged. More importantly in all of the four (4) different Information documents in the case at bar not one mentions liability for the actions of a third party nor is the Defendant charged in the alternative via complicity liability. All four (4) separate Information documents state the Defendant, ANDRE PAUL BECKLIN. See CP, pgs. 1-2,3-4,59-60, and 121-122. Not one mentions a third party or complicity liability for the actions of a third party.

The responses given by the Court assumed facts not in evidence and were therefore an impermissible prejudice. The first question raised an issue as to liability for actions of a third party. See CP, pgs, 123, and RP, vol. 3, pgs. 340-342. Not once was the Defendant charged as a complicity. Nor was he charged with aiding and abetting. The appropriate response would have been to simply refer the Jury back to a specific instruction. Preferably Instruction Number 6, the to convict instruction. RP, vol. 3, pgs. 281-282. It bears noting no agency instruction was even proposed by the State. Nor was an instruction on complicity liability.

The same argument applies to the second Question proffered by the Jury. The overriding issue is to ensure the court is not improperly instructing the jury or commenting on evidence so as to ensure the verdict is in fact impartial. Our entire system of justice operates off the theory that justice is blind. Here the comments of the court removed the veil if you will and directed the Jury on facts and evidence which were not before it to consider.

It is this overriding concern the Court addressed in *State v. Wheeler*. The evidence and determination of guilt or innocence is to be the province of the jury and jury alone. The court is not to direct this as such

is an encroachment on the province of the jury; See *Wheeler*, infra.

A judge is considered to have commented on the evidence when they have conveyed their personal opinion regarding truth or falsity of any evidence introduced at trial. *State v. Renfro*, 28 Wn.App. 248, 622 P.2d 1295, rev. granted aff. 96 Wn.2d 902, 639 P.2d 737, cert. Den. 103 S.Ct. 94, 459 U.S. 842, 74 L.Ed.2d 86 (1981).

It seems evident the Judge was interjecting her own personal opinion as to the facts and evidence in the responses to the Questions raised by the Jury. As to both questions the Judge indicated; “ ... I think the simple answer to this is yes.” and “ ... I am going to say both.” See RP, vol. 3, pgs. 341, lines 12-13 and RP, vol. 3, pgs. 344, lines 6-7.

The issue of accomplice liability has in fact come up just recently before the Court. In fact in the case of *State v. Ransom*, it was found to be a reversible error for the court to provide an instruction on accomplice liability to a jury question, after deliberations had begun, where the prosecution had not pursued the theory and defense counsel had been afforded no opportunity to argue such a theory. See *State v. Ransom*, 56 Wn.App. 712, 785 P.2d 469 (div. 2 1990).

This case is analogous to the case at bar. Here the jury had started

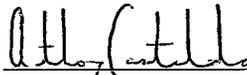
deliberations and came back with two separate questions. Neither of which was pursued as a theory by the State. Both of which were responded to by the Judge in an affirmative nature so as to instruct the jury they could convict upon such theories. See RP, vol. 3, pgs. 340-344.

V. CONCLUSION.

Based upon the foregoing, the Appellant should prevail. The Amendments to the Information by the State were unfairly prejudicial to the Defendant. The Judge's responses to the questions of the Jury were unfairly prejudicial to the Defendant. As such the Defendant's conviction should be overturned and the case remanded for further proceedings commensurate therewith.

DATED this 1 day of April, 2005.

Castelda & Castelda, Inc., P.S.



Roger A. Castelda, WSBA#5571
Anthony Castelda, WSBA#28937
Attorneys for Appellant