

NO. 23569-6-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ANDRE PAUL BECKLIN,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Andre Becklin claims he suffered unfair prejudice when the stalking incident date of March 13th was added to the charging information. However, all three divisions of this Court have held that adding an incident date to an information is a matter of form, rather than substance, and is not prejudicial unless there is an alibi issue. Becklin did not assert an alibi defense.

Becklin also alleges that the trial court improperly commented on the evidence by answering “yes” to a jury question about whether a party can stalk someone through a third person, and by answering “no” to the question of whether there is a stalking distance between the stalker and the victim. However, the additional instructions did no more than accurately state the law pertaining to the issues.

II. APPELLANT’S ASSIGNMENTS OF ERROR

1. The amendments to the charging information during trial prejudiced the Defendant’s substantial rights.

2. The trial court’s answers to the jury’s questions during deliberation were improper comments on the evidence and were harmful error.

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III. ISSUES PRESENTED

1. The Defendant's counsel had advance notice of the March 13th stalking incident that was added to the charging information during trial. Did the addition of this date to the information prejudice the Defendant's substantial rights?

2. The trial court answered two jury questions during deliberation by stating that a person can commit the crime of stalking by doing so through a third person and there is no specific distance between the stalker and the victim. The trial court also referred the jury to a specific instruction for the elements of the crime that needed to be proven. Did the trial court's answers to the jury's questions constitute improper comments on the evidence rather than the law?

IV. STATEMENT OF THE CASE

A. AMENDMENTS TO THE INFORMATION.

Mary McGee Ash ("McGee") and Defendant/Appellant Becklin had a child together. On December 29, 2003, McGee received a protection order from district court restraining Becklin from coming within 100 feet of her or her home and preventing third-party contact. 2 RP¹ 165-167; State's trial exhibit P-15, Order for Protection. On March 13, 2004, she filed a statement with the sheriff's office reporting that two

¹ "RP" refers to the trial transcript, i.e., the report of proceedings.

people whom she recognized drove Andre Becklin's car slowly by her home several times. State's pre-trial exhibit P-2, March 13, 2004, Ferry County Sheriff's Office Statement; 2 RP 181. On March 26, 2004, she filed another statement with the sheriff's office to report that when she left court after a custody proceeding in which she and Becklin were involved, Becklin followed her in his car as she drove home. 2 RP 169-170 & 181.

1. First Amendment To The Information.

On April 6, 2004, the State charged Becklin by information in Ferry County Superior Court with stalking McGee. CP² 1-2, Information Charging Stalking. The information stated that Becklin, "on or about March 26, 2004 . . . repeatedly harassed or repeatedly followed another person and placed the Petitioner in fear . . ." Id. The information did not cite a statute. The trial court allowed the State to amend the information the same day to include citation to RCW 9A.46.110, the stalking statute. CP 3-4, Amended Information Charging Stalking.

About a month later, the State moved for an order finding probable cause to issue summons. 1 RP 7-8. In the affidavit the State declared that on March 13, 2004, the victim saw Becklin's car driving down the street outside her home very slowly three times. Id.; State's pre-trial exhibit P-2.

² "CP" refers to the clerk's papers on appeal.

Becklin's defense counsel did not receive the State's affidavit personally. 1 RP 9. However, during the course of pretrial discovery, defense counsel received the victim's March 13th statement to the sheriff. Id. (Mr. Castelda: "Well, yes, Your Honor. If you look at the exhibit, I don't know which one we're referring to, but it's the statement of March 13, 2004. I also received statements for March 19, 2004, March 22, 2004, March 25, 2004."). Additionally, defense counsel had access to the State's affidavit when he became Becklin's counsel because the affidavit was in the court file. 1 RP 8.

2. District Court Proceeding For A Separate VNCO Charge.

In October 2004, the State filed an amended complaint in district court charging Becklin with violating the victim's no-contact order and stalking her. 2 RP 179. A few days later, a district court jury found Becklin guilty of violating the victim's protection order. 2 RP 179. The incident date charged was February 20, 2004. 2 RP 180.

3. Second And Third Amendments To The Information.

The superior court proceeding for the criminal stalking charges began on November 2, 2004, less than two weeks after the district court verdict. In pretrial hearings the superior court granted the State's motion to amend the information a second time by adding March 13th as another

date when the stalking occurred. 1 RP 1. Prior to this amendment, the information read, “[O]n or about March 26, 2004, in Ferry County, Washington . . . [Becklin] repeatedly harassed or repeatedly followed” CP 3. After the amendment, the information read, “[O]n or about the 13th day of March, 2004 and several times on or about the 26th day of March, 2004, in the County of Ferry, State of Washington . . . [Becklin] . . . did . . . repeatedly harass or repeatedly follow” CP 59-60, Second Amended Information Charging Stalking.

The trial court allowed the amendment over defense counsel’s objections. 1 RP 10. The court found that the amendment was not prejudicial because defense counsel had received notice of the March 13th incident when he received pretrial discovery papers. Additionally, the State’s probable cause affidavit was in the court file prior to when defense counsel was appointed to represent Becklin. Id. The court also noted that the State had the burden of proving a course of conduct, and that the addition of another date merely increased the amount of facts the State had to prove. Id.

The next day, after the trial had begun but before the State rested, the State moved to amend the information again. 3 RP 242. The new information changed the phrase, “several times on or about the 26th day of March” to the phrase, “up to and including on or about the 26th day of

March” CP 121, Third Amended Information Charging Stalking. Becklin’s defense counsel again objected. 3 RP 242-43. The trial court noted that the court rule gives it discretion to allow amendments as late as at the time of the verdict. Id. Finding that the State had not yet rested and the defense had not yet offered any evidence or opened its case, the court granted the motion to amend. 3 RP 244.

B. ANSWERS TO JURY QUESTIONS.

After the jury began deliberating, it returned two questions. One was, “Is there a stalking distance between the stalker and the victim?” CP 124, Inquiry from the Jury and The Court’s Response. Becklin did not want the trial court to answer yes or no, but to answer simply, “Refer to Instruction No. 6.” 3 RP 344. The trial court overruled the objection and answered, “No; refer to Instruction No. 6 for the elements of the crime that need to be proven.” Id.

The other question from the jury was, “Is third party included in stalking? Pursuant to our instructions of charges brought against the defendant? Can you stalk a party thru a third person?” CP 123, Inquiry from the Jury and The Court’s Response. Becklin wanted the court to answer “no.” 3 RP 240-41. The trial court answered, “yes,” ruling simply that a party can stalk someone else through a third person. Id.

The jury returned a verdict of guilty and the court sentenced Becklin to 12 months confinement in jail. Judgment and Sentence at 5.

V. STANDARD OF REVIEW

A. **AMENDMENTS TO THE INFORMATION.**

The Court reviews the trial court's decision to allow an amendment of charges for abuse of discretion. State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). Becklin has the burden of showing prejudice. State v. Hakimi, 124 Wn. App. 15, ___, 98 P.3d 809, 814-15 (2004).

B. **ANSWERS TO JURY QUESTIONS.**

The Court reviews alleged instructional errors under a de novo standard of review. See State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed.2d 331 (1993). In assessing whether the trial court presented the jury with an erroneous instruction, the Court evaluates the allegedly erroneous instruction "in the context of the instructions as a whole." Benn, 120 Wn.2d at 654-55.

VI. ARGUMENT

A. **THE TRIAL COURT'S ADDITION OF A DATE TO THE INFORMATION WAS A MATTER OF FORM, NOT SUBSTANCE, AND WAS NOT PREJUDICIAL.**

Becklin claims he suffered unfair prejudice when the trial court added the date of March 13th to the information and again when the court changed the wording slightly from "several times on . . . March 26th" to

“up to and including . . . March 26th.” However, all three divisions of this Court have held that adding an incident date to an information is a matter of form rather than substance and is not prejudicial unless there is an alibi issue. Becklin does not claim an alibi.

The court rules allow amendment to charges even after trial has begun, as long as the amendment does not prejudice the defendant’s substantial rights. See CrR 2.1(d) (“The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.”).

Also, this Court has held that changing a date in an information does not prejudice substantial rights. In State v. Allyn, 40 Wn. App. 27, 35, 696 P.2d 45 (1985), this Court held that “the elements of the crime charged remained the same before and after the amendment. Only the date was changed which has been held not to be material where, as here, no alibi is claimed.” See also State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (Division II, 2004); State v. DeBolt, 61 Wn. App. 58, 62-63, 808 P.2d 794, (Division I, 1991).

As in Allyn, here the elements of the crime charged remained the same before and after the amendment. The stalking statute states in part:

(1) A person commits the crime of stalking if . . . :

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person

RCW 9A.46.110. The original, unamended information in Becklin's case stated that Becklin repeatedly harassed or repeatedly followed the victim. CP 1 & 3. Hence, this satisfied the requirement for repetition of the behavior. Adding another date and adding the phrase "up to and including" March 26th did not alter this repetition.

Furthermore, there was no surprise. Becklin already had notice from pretrial discovery that the behavior occurred on March 13th as well as on other multiple dates leading up to March 26th. 1 RP 9 ("I also received statements for March 19, 2004, March 22, 2004, March 25, 2004.").

Becklin has failed to show that the second and third amendments to the information prejudiced his substantial rights. The Court should reject his claim.

B. THE JUDGE'S ANSWERS TO THE JURY'S QUESTIONS COMMENTED ON THE LAW, NOT ON THE EVIDENCE.

Becklin alleges that the trial court erred by answering "yes" to a question posed by the jury during deliberations as to whether a party can stalk someone through a third person. CP 123; 3 RP 340-41. Becklin also alleges that the trial court erred by answering "no" to another question posed by the jury as to whether there is a stalking distance between the

stalker and the victim. CP 124; 3 RP 343-44. He claims the answers were improper comments on the evidence. However, because the jury instructions did no more than accurately state the law pertaining to the issues, they do not constitute impermissible comments on the evidence by the trial judge.

The trial court has discretion whether to give further instructions to a jury after it has begun deliberations. CrR 6.15(f)(1); State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). The number and wording of instructions is discretionary with the trial judge. State v. McReynolds, 104 Wn. App. 560, 580-81, 17 P.3d 608 (2000). The necessity for and specificity of clarifying instructions are matters vested in the discretion of the trial court. Safeway, Inc. v. Martin, 76 Wn. App. 329, 335, 885 P.2d 842 (1994).

Nevertheless, trial court judges are forbidden from commenting upon the evidence presented at trial. State v. Woods, 143 Wn.2d 561, 590-91, 23 P.3d 1046 (2001). The Washington State Constitution, article IV, section 16, provides, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” An impermissible comment is one that conveys to the jury a judge’s personal attitudes toward the merits of the case. Woods, 143 Wn.2d at 591. “A jury instruction that does no more than accurately state the law pertaining

to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.” Id.

Jury instructions satisfy the demands of a fair trial if, when read as a whole, they correctly tell the jury of the applicable law, are not misleading, and permit the defendant to present his theory of the case. State v. Eaker, 113 Wn. App. 111, 117, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003). A comment on the evidence does not take place unless the judge conveyed his or her personal opinion regarding the truth or falsity of any evidence introduced at trial to the jury. Woods, 143 Wn.2d at 591. “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

“The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury.” Id. “[T]he ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and . . . such opinion, if known to the juror, has a great influence upon the final determination of the issues.” Id., (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)).

Becklin claims the trial court commented on the evidence when it stated that stalking could be committed through a third party. Becklin claims defense counsel had been afforded no opportunity to argue such a theory. Appellate Brief of Becklin at 20. However, Becklin did argue this theory. In closing argument, defense counsel stated repeatedly that there was no evidence to show that Becklin had directed his friends to drive Becklin's car past the victim's house. 3 RP 314-15 & 320 ("They say it's got to be Andy directing these other people, but they offer not one shred of evidence to indicate to you that he's directing these people . . .").

More importantly, the trial court's additional instructions were a correct statement of law. Cf. State v. Parmelee, 108 Wn. App. 702, 32 P.3d 1029 (2001) (dismissing double jeopardy challenge to stalking conviction based on efforts by defendant, a prison inmate, to make ex-wife's life "living hell" by distributing flyers to other inmates that encouraged them to write dirty letters to her).

In this case, there was never any dispute that members of Becklin's household repeatedly drove past the victim's house in Becklin's car. The dispute concerned only whether Becklin himself had directed it. The wording in the instructions does not indicate how the court felt about the extent of Becklin's involvement in his car being driven on those occasions. The instructions merely informed the jury of the appropriate

rule of law applicable to the facts in this case. Consequently, there was no error. See, e.g., State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (holding that judge's answers to questions merely informed jury of appropriate rule of law and did not indicate how court felt about testimony).

The court's additional instructions concerning the jury's question of whether there is a legal stalking distance are also a correct statement of the law. See RCW 9A.46.110 ("Follows' means deliberately maintaining visual or physical proximity to a specific person over a period of time."). The court's simple answer of "no" to the question did not reveal how the court felt about the facts in this case.

Becklin has failed to show that the trial court's answers to the jury's questions were an improper comment on the evidence. The Court should reject his claim.

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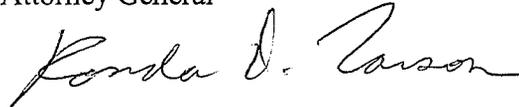
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VII. CONCLUSION

Becklin failed to show that the State's addition of another incident date to the charging information was anything more than a matter of form rather than substance. And he also failed to show that the trial court's answers to the jury's questions were more than a mere statement of law. The Court should deny his appeal and affirm the superior court's judgment.

RESPECTFULLY SUBMITTED this 20th day of September, 2005.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of September, 2005, I served a copy of the foregoing document on all parties or their counsel of record as follows:

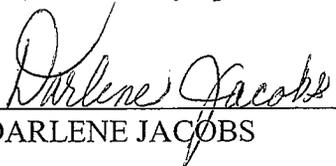
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