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**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Kenneth Chance Brooks,

Appellant.

Reply Brief of Appellant

Kevin Hochhalter
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

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1. Introduction

The trial court's decision allowing the State to amend the information at the conclusion of trial, after the close of all testimony, worked a bait-and-switch on Brooks. Induced by the original information, which alleged Brooks committed child molestation in January 2014, Brooks chose to testify and presented a defense that he was out of state in January and did not commit the alleged acts in January. He went so far as to testify that he could not have done it in January, because it only happened once, in May. Then, after his defense was complete, the State switched the charges and obtained a conviction by expanding the charging period by four months to include May.

Brooks' defense had been designed to create reasonable doubt that he committed the crime charged, in January. The late amendment, after Brooks' defense was already complete, deprived Brooks of the opportunity to know the charges against him, to craft a defense to meet those charges, and to intelligently exercise his right to decide whether to testify or remain silent. The amendment allowed the State to circumvent Brooks' defense after he had already made it. Because the amendment prejudiced substantial rights, the trial court had no authority to allow it. This Court should reverse.

2. Reply Argument

2.1 The trial court abused its discretion in allowing the amendment of the information after the defense rested because the amendment caused great prejudice to Brooks.

In his opening brief, Brooks argued that the trial court abused its discretion in allowing the State to amend the information to expand the charging period for the child molestation charge after the close of all evidence at trial because the late amendment caused prejudiced Brooks' substantial rights. Br. of App. at 5. The trial court may not allow an amendment if substantial rights of the defendant are prejudiced. Br. of App. at 5 (citing CrR 2.1(d) and *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)).

Brooks first argued that the late amendment to the information prejudiced his substantial, constitutional rights to know the charges against him, to craft a defense to meet those charges, and to decide whether to testify or remain silent. Br. of App. at 5-8. Next, Brooks showed that the cases relied upon by the trial court are distinguishable on their facts and do not justify such a late amendment in the face of prejudice to Brooks' substantial rights. Br. of App. at 8-13. Brooks argued that this Court should reverse the child molestation conviction and remand for resentencing on the rape conviction with a corrected offender score. Br. of App. at 13.

2.1.1 The late amendment to the information prejudiced Brooks' rights to know the charges against him, to craft a defense to meet those charges, and to decide whether to testify or remain silent.

Brooks' opening brief emphasized that Washington follows a per se rule that amendment of the information after the State rests its case is per se prejudicial error unless the amendment is to a lesser degree of the same charge or a lesser included offense. Br. of App. at 5-7 (citing, *e.g.*, *Pelkey*, 109 Wn.2d 484).

Amendment of the information after the defense has rested violates the defendant's right to be informed of the charges. Br. of App. at 6. It violates the defendant's right to craft a defense to meet the charges. Br. of App. at 6-7. It defeats the defendant's constitutional choice of whether to testify or remain silent. Br. of App. at 7. The State's late amendment expanded the charging period after Brooks' defense was already complete and after he had already testified. Br. of App. at 7-8. Had Brooks known that the State wanted to expand the charging period, he likely would have changed his defense strategy and his decision to testify.

The amendment allowed the State to pull a bait-and-switch: The original information induced Brooks to admit to inappropriately touching C.H. at a time four months outside the charging period, only to have the charging period expanded after

it was too late for Brooks to change his defense strategy. The State's argument that this is not prejudicial is absurd.

2.1.2 The trial court's decision approving the late amendment was manifest error affecting Brooks' constitutional rights.

Three separate, substantial, constitutional rights of Brooks were violated by the State's bait-and-switch: First, the right to be adequately informed of the charges against him. Wash. Const. art. I, § 22. Brooks was informed of the original charge, but then it changed, retroactively, after it was too late for Brooks to do anything with the new information. Second, the right to present a defense to meet the charges. U.S. Const. amends. VI, XIV; *see State v. Lizarraga*, 191 Wn. App. 530, 552, 364 P.3d 810 (2015) ("This right is a fundamental element of due process of law"). The late amendment directly undermined the defense that Brooks had crafted and presented in response to the original information. Third, the right to choose whether to remain silent at trial, Wash. Const. art. I, § 9, or to testify in his own defense, Wash. Const. art. I, § 22. Brooks chose to testify on the basis of the original information, only to have the charging period changed after it was too late to change his decision of whether to remain silent.

The trial court's abuse of discretion in granting the amendment even when these substantial rights were prejudiced

was manifest error affecting Brooks' constitutional rights. Applying the analysis suggested in *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), 1) a cursory review reveals the three constitutional issues described above and in Brooks' opening brief; 2) the error is manifest, not obscure, and had practical consequences at trial, depriving Brooks of his ability to craft and present a defense to the charge upon which the jury convicted him and of his ability to intelligently exercise his right to testify or to remain silent; 3) the error was an abuse of discretion because it is manifestly unreasonable for the trial court to allow an amendment that prejudices substantial rights of the defendant; 4) the State has not shown that the error was harmless beyond a reasonable doubt.¹

2.1.3 Brooks appropriately objected to the amendment.

Even if this Court finds that the amendment was not manifest constitutional error, Brooks did object to the amendment when it was raised at trial. His objection was

¹ Errors affecting constitutional rights are subject to a higher standard of harmless error analysis, requiring the State to prove beyond a reasonable doubt that the violation of the defendant's rights had no effect on the verdict. *State v. Slerf*, 189 Wn. App. 821, 825, 358 P.3d 1234 (2015). The State has not shown, or even attempted to argue, that a change of Brooks' defense strategy in response to the expanded charging period could not have changed the outcome. The State cannot meet this burden, therefore the error was not harmless.

appropriate under the circumstances and sufficient to preserve the issue for appeal.

On the morning of the second day of trial, Brooks testified that he did not believe he was in Washington in January 2014 but was sure that he was in Cowlitz County in May 2014. 2 RP 54-55. He testified that he touched C.H. inappropriately in May 2014. 2 RP 56-57. He did not touch her in January. 2 RP 57.

At the conclusion of Brooks' testimony, the defense rested. 2 RP 83. Just before the lunch recess, the State mentioned that it would be researching some issue over the break and bring it to the court's attention afterward. 2 RP 84. Immediately upon returning from the break, the State moved to amend the information. 2 RP 84. The State cited CrR 2.1(d), which provides that the information can be amended at any time before the verdict as long as there is no prejudice to substantial rights of the defendant. 2 RP 85. The State then argued, incorrectly, that there would only be prejudice if the amendment changed an essential element of the crime charged. 2 RP 87.

The trial court asked if Brooks had any objection to the amendment. 2 RP 88. Not having had any advance notice of the motion to amend and not having the opportunity to research the issue, Brooks responded the only way he could: "Yeah, we would object to the Information being amended." 2 RP 88. The trial court responded, "All right. Given the state of the case law and

when the claim of the date came up, I think I am required to permit that amendment and I'll do so." 2 RP 88. The court then moved on to jury instructions. 2 RP 88.

Brooks had no opportunity to develop a substantive response to the motion. The State fully framed the inquiry for the trial court. The amendment could be allowed as long as there was no prejudice to substantial rights of the defendant. Prejudice was the issue. The State claimed there was no prejudice. Brooks' objection had only one, obvious meaning: the amendment would prejudice his substantial rights and therefore should have been denied. That is the argument Brooks is making in this appeal. The issue was appropriately framed for the trial court's decision. The record is sufficient for this Court to review the issue, even if the Court finds that it was not manifest constitutional error.

2.1.4 The State's focus on "alibi" is a straw man.

The State expends much energy on the concept of "alibi." This is a straw man. Alibi is not the issue. The prejudice that Brooks claims is not the ability to put on an alibi defense. The prejudice, as shown in Parts 2.1.1 and 2.1.2, above, and in Br. of App. at 5-8, is that the lateness of the amendment, coming after the close of all testimony, prejudiced Brooks' substantial rights to know the charges against him, to prepare and present a

defense to meet those charges, and to decide whether to testify or remain silent. The late amendment undermined all of Brooks' strategic choices after it was too late for Brooks to adjust his defense in response to the amendment. The prejudice here does not depend on whether Brooks had a right to make an alibi defense or whether he presented a "real" alibi defense. The prejudice comes from the fact that the original information induced Brooks to make certain choices in the exercise of his constitutional rights, which the trial court then allowed the State to turn to Brooks' disadvantage by allowing the amendment.

Effective exercise of the right to present a defense requires deliberate planning and affirmative conduct on the part of the defendant. *Lizarraga*, 191 Wn. App. at 552. As Brooks argued in his opening brief, a defendant's entire defense is necessarily based on the charge alleged in the original information at the start of trial. "All of the pre-trial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information." *Pelkey*, 109 Wn.2d at 490; *State v. Vangerpen*, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995). "An amendment midway through trial, after opening statements and witness testimony, prejudices the defendant's ability to fairly defend himself or herself, placing the defendant at a

severe disadvantage.” *State v. Schaffer*, 120 Wn.2d 616, 623, 845 P.2d 281 (1993) (Johnson, J., dissenting).

Similarly, in deciding whether to testify at trial or to remain silent, a defendant must weigh all that has been presented to the jury at the trial, as well as “the precise nature of the charge alleged in the information.” *Pelkey*, 109 Wn.2d at 490. At the time Brooks had to choose which right to exercise, the charge alleged in the information was limited to the month of January. When the trial court allowed the amendment, changing the charge in the information, Brooks had already testified and could no longer weigh the precise nature of the charge before making his decision.

It makes no difference whether a defendant has a due process right to a charging period that would allow an alibi defense. There would have been no prejudice if the original information charged a period from January to May. But it didn’t! The charging period itself is not the source of prejudice, but the lateness of the amendment, coming after Brooks had rested his case and no longer had any opportunity to react to the change. All of Brooks’ strategic decisions in preparing his defense and deciding whether to testify were based on the original information’s charging period of January. If the original information had charged January to May, Brooks’ strategic decisions would likely have been different.

It also makes no difference whether Brooks' defense was a "true" alibi defense. The issue of "alibi" comes from *State v. Goss*, 189 Wn. App. 571, 358 P.3d 436 (2015), and *State v. DeBolt*, 61 Wn. App. 58, 808 P.2d 794 (1991), in which the court stated, "amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *Goss*, 189 Wn. App. at 576 (emphasis added); *DeBolt*, 61 Wn. App. at 62. Neither court went into any detail as to what they meant by "an alibi defense." The point appears to be that where the defense is based on showing that the defendant did not commit the crime at the time charged, an amendment to the charging period would cause "substantial prejudice to the defendant." In the end, "substantial prejudice to the defendant" is the heart of the analysis. An alibi defense is not required. If there is substantial prejudice, the amendment should not be allowed.

Here, unlike *Goss* and *DeBolt*, the amendment was not merely one of form. Rather, it was an attempt to get around Brooks' defense after he had already made it. Brooks' defense was based on the charge that the incident occurred in January. His strategy was to create reasonable doubt as to whether there was any incident in January. Brooks testified (albeit equivocally) that he was not even in Washington in January. He testified (unequivocally) that he touched C.H. only once, in May. It was

patently unreasonable for the trial court to allow the State to circumvent that defense by expanding the charging period after the defense had rested. Because the amendment prejudiced substantial rights of the defendant, the trial court did not have discretion to allow the amendment under CrR 2.1(d). This Court should reverse the conviction.

2.1.5 “On or about” language in the information does not render the error harmless.

Contrary to the State’s arguments, “on or about” language in the information and jury instructions does not give the jury carte blanche to convict a defendant for actions that are far outside of the stated date range. Here, the difference between the original charging period and the amended period is a full four months. The State argues that the amendment was not prejudicial because even without the amendment, the jury could have convicted Brooks for an act four months outside the charging period. This is actually a harmless error argument,² and therefore must be proven by the State beyond a reasonable doubt.

² The gist of the State’s argument is that the violation of Brooks’ constitutional rights was harmless because he would have been convicted anyway. *See* Br. of Resp. at 20 (“Had the date range remained as originally charged, the ‘on or about’ language would still have permitted the jury to find Brooks guilty”).

The State has not provided any authority to support a conviction for acts four months outside of the charging period. *State v. Oberg*, 187 Wash. 429, 432, 60 P.2d 66 (1936), allowed conviction for an incident two months outside the charging period. *State v. Osborn*, 39 Wash. 548, 81 P. 1096 (1905), allowed conviction for an incident two weeks prior to the charging date. *State v. Pitts*, 62 Wn.2d 294, 299-300, 382 P.2d 508 (1963), allowed conviction for an incident one day before or after the charging date.

But in *State v. Hayes*, 81 Wn. App. 425, 914 P.2d 788 (1996), this Court specifically declined to consider evidence of incidents two years before the charging period, instead finding sufficient evidence of incidents within the charging period to support the four counts of rape of a child. *Id.* at 434-35. In declining to consider evidence so far outside of the charging period, the court stated, “we have found no case that permits [it].” *Id.* at 435.

Hayes demonstrates that there is some point at which an incident is no longer “on or about” by any reasonable interpretation of that phrase. No reasonable juror would conclude that May is “on or about” January. There is no reason for Brooks to have understood that “on or about” January would extend all the way to May. *Cf., State v. Statler*, 160 Wn. App. 622, 640-41, 248 P.3d 165 (2011) (holding that “on or about”

language put the defendant on notice of the possibility of a two day change and affirming a pre-trial amendment of the information with a one month continuance of the trial to allow the defendant time to prepare a new defense).

The State has not cited any case that permits a conviction for an act four months outside of the charging period. The State has failed to prove beyond a reasonable doubt that Brooks would have been convicted without the erroneous amendment. The error is not harmless under the applicable constitutional harmless error analysis.

The trial court had discretion to allow an amendment of the information only if there was no prejudice to substantial rights of the defendant. The late amendment of the information to change the charging period to undermine Brooks' defense after he had already made it greatly prejudiced Brooks' substantial, constitutional rights to know the charges against him, to prepare and present a defense to those charges, and to decide whether to testify or remain silent. Where there was such prejudice, it was manifestly unreasonable for the trial court to allow the amendment. The trial court abused (and exceeded) its discretion. This Court should reverse the conviction of child molestation.

2.2 Without the child molestation conviction, Brooks' sentence for the rape of a child conviction was based on an incorrect offender score.

Brooks' opening brief argued that if this Court reverses the child molestation conviction, Brooks' offender score for rape of a child should have been only a 1, requiring reversal and remand for resentencing based on the correct offender score. The State does not contest Brooks' logic. *See* Br. of Resp. at 20, n. 10. This Court should remand for resentencing on the rape of a child conviction.

3. Conclusion

The trial court abused its discretion in allowing the State to amend the information after the close of all evidence to enlarge the charging period in a manner that circumvented Brooks' defense and prejudiced his constitutional rights. This Court should reverse the conviction of child molestation in the third degree and dismiss the charges. This Court should also remand for resentencing on the rape of a child conviction, based on a corrected offender score of 1.

Respectfully submitted this 26th day of April, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

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I certify, under penalty of perjury under the laws of the State of Washington, that on April 26, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

Ryan Paul Jurvakainen
Cowlitz County Prosecuting Attorney's Office
312 SW 1st Ave Rm 105
Kelso, WA 98626-1799
appeals@co.cowlitz.wa.us
jurvakainen.ryan@co.cowlitz.wa.us

DATED this 26th day of April, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

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Address:

4570 AVERY LN SE STE C-217

LACEY, WA, 98503-5608

Phone: 360-763-8008

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