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Supreme Court No. 97150-1

**Supreme Court
of the State of Washington**

State of Washington,

Respondent,

v.

Kenneth Chance Brooks,

Petitioner.

Supplemental Brief of Petitioner

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1. Introduction

A criminal charge may only be amended if doing so does not prejudice substantial rights of the defendant. Here, the trial court permitted an amendment after both the State and Brooks had rested. The amendment prejudiced Brooks' rights.

Brooks was charged with third degree child molestation alleged to have occurred in January 2014. At trial, Brooks admitted to committing the act, but in May, not January. After both sides had rested, the trial court permitted the State to amend the Information to change the charging period from January to any time between January 1 and May 31.

Brooks' exercise of his constitutional rights to prepare and present a defense and to decide whether to testify or remain silent were based on the January date. The late amendment directly undermined the choices Brooks had made and the defense that he had already presented. By the time of the amendment, it was too late for Brooks to change his strategy or his decision to testify.

This Court should hold that Brooks' substantial rights were prejudiced by the late amendment and should reverse the child molestation conviction, dismiss the charge, and remand for resentencing on the rape charge with a corrected offender score. *See Br. of App. at 13.*

2. Issue Presented for Review

1. A criminal charge may be amended only if substantial rights of the defendant are not prejudiced. Here, the trial court allowed an amendment after the Defendant had already completed his defense. Did the trial court abuse its discretion in allowing the amendment?

3. Statement of the Case

3.1 The State charged and presented evidence of an incident occurring in January 2014.

Kenneth Brooks was charged with rape of a child in the third degree and child molestation in the third degree. CP 1. The original information charged that the alleged rape occurred “on or about 8/17/2014” and that the alleged molestation occurred “on or about or between 01/01/2014 and 01/31/2014.” CP 1.

At trial, the alleged victim, C.H., testified that Brooks, a family friend more than three years older than her, came to visit the family in January 2014. 1 RP 53. According to C.H., while the two of them were alone cuddling on the couch watching Netflix one afternoon that January, Brooks reached under her shirt and rubbed her breast. 1 RP 54, 56. C.H. testified that Brooks eventually returned to his home in California and she did not see him again until June or July. 1 RP 57-58, 82.¹

¹ C.H. also testified that the night of August 16-17, Brooks had intercourse with her while she was too drunk to consent or resist. 1 RP 68-70. Brooks denied having any sexual contact with her that

3.2 Brooks elected to testify in his own defense, describing an incident in May, not January.

After presenting testimony on the other charge, the State rested. Before the start of the Defense's case, the court discussed the proposed jury instructions with the parties. 2 RP 50. The State's proposed "to-convict" instruction for the child molestation charge would have required the jury to find beyond reasonable doubt that Brooks committed the act in January 2014. *See* 2 RP 88-90; CP 24.² Based on the original information, the original proposed instructions, and the State's completed presentation of its evidence, Brooks decided to testify on his own behalf. *See* 2 RP 49-50.

night, testifying that all he did was help clean her up after she vomited all over her bed. 2 RP 60-64. The State presented supporting testimony from other witnesses and DNA evidence from the clothes C.H. was allegedly wearing that night. The jury ultimately believed C.H., finding Brooks guilty of rape of a child in the third degree. CP 27. This conviction is not at issue in this direct appeal.

² The proposed jury instructions are not in the record, but the content of the proposed "to-convict" instruction can be deduced from the final instructions and the discussion on the record of changes that were made from the original proposed instructions. The amended instruction required the jury to find "That on or about or between January 1, 2014, and May 31, 2014, defendant had sexual contact with [C.H]." CP 24. In discussing the amendments, the State noted, "I have prepared and provided copies to Defense Counsel of a corrected – of a to convict instruction that would have the different date range." 2 RP 88. Brooks objected to the change in the date range in the instruction. 2 RP 90.

Brooks testified that he had reviewed his own cell phone records and determined that the incident occurred in May, not January. 2 RP 55-56. Brooks admitted that he inappropriately touched C.H.'s breast at her home in May. 2 RP 56. He testified that he did not touch her in January. 2 RP 57. The incident in May 2014 was the only time. *Id.* He was sure that it was May because he had text messages that showed C.H. told her mother about the incident in May and he texted C.H. asking why she told. 2 RP 56. C.H. had testified that she told her mother just two days after it happened. 1 RP 57, 85.

3.3 After Brooks rested his defense, the trial court allowed the State to amend the information to expand the charging period from January to any time from January to May.

After Brooks testified, the Defense rested. 2 RP 83. After declining the opportunity to present rebuttal testimony, the State moved to amend the information to expand the date range for the child molestation charge from the month of January to any time between January 1 and May 31. 2 RP 84-85. Brooks objected. 2 RP 88. The trial court felt it was obligated to allow the amendment. *Id.*

The jury instructions were also amended with the new date range. 2 RP 88-90, CP 24. The jury found Brooks guilty of child molestation in the third degree. CP 28, 2 RP 144-47.

3.4 The Court of Appeals affirmed the trial court decision.

On appeal, Brooks argued that the trial court abused its discretion in granting the amendment after his defense was completed. Br. of App. 5-12. Allowing the late amendment prejudiced his rights to know the charges against him, to prepare and present a defense to those charges, and to decide whether to testify or to remain silent. Br. of App. 6-8 (citing *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992); *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)); Reply Br. of App. 3-5. By the time the State requested its amendment, Brooks had already exercised these rights based on the original charge. It was too late for him to change his strategy in response to the amendment or to decide not to testify.

The Court of Appeals held that, “under the unique facts of this case,” the trial court did not abuse its discretion. *Brooks*, slip op. at 6. The court held that the *per se* rule against late amendments set forth in *Pelkey* only applies to amendments that would change a material element of the charge. Slip op. at 7-8. The court reasoned that because a change in date is not a material element of the charge, Brooks’ right to know the charge and prepare a defense was not prejudiced. Slip op. at 8-10. The court affirmed the trial court decision.

4. Argument

4.1 The late amendment was improper because it prejudiced Brooks' substantial rights.

Under the rules of criminal procedure, a trial court has discretion to allow amendment of the information **so long as the amendment does not prejudice the rights of the defendant.**

CrR 2.1(d).³ The “substantial rights” that cannot be prejudiced are a defendant’s constitutional rights guaranteeing a fair trial. *See State v. Pelkey*, 109 Wn.2d 484, 489-91, 745 P.2d 854 (1987). Brooks identified the particular rights at issue here as the right to be adequately informed of the charges; the right to prepare and present a defense; and the right to decide whether to testify at trial or to remain silent. *E.g.*, Br. of App. at 6-7; Pet. for Rev. at 6-7 (citing, *e.g.*, Wash. Const. art. I, §§ 9, 22). A late amendment to the information implicates all of these rights.

4.1.1 Prejudice under CrR 2.1 is shown when the defendant suffers harm to their ability to defend themselves.

The Court of Appeals erred when it held there was no prejudice in this case. The Court of Appeals appears to have misunderstood the legal analysis that was required. The Court

³ “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.**” (emphasis added)

of Appeals accepted the State's argument that there was no prejudice because the jury could have convicted Brooks based on the original information. But CrR 2.1 and the Constitution do not allow amendment "if the outcome would not likely change." Late amendments are permissible **only if** "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Whether a defendant's substantial rights are prejudiced has nothing to do with the outcome of the trial. The analysis is not about whether Brooks could have been convicted anyway. It is about Brooks' fundamental, constitutional rights. It is about the fairness of the trial process.

The standard is illustrated in *State v. James*, 108 Wn.2d 483, 739 P.2d 699 (1987). The James court explained that under the rule, "the defendant has the burden of showing specific prejudice to a substantial right." *Id.* at 486 (emphasis added). This is what other courts have meant by the defendant's burden to show "prejudice under CrR 2.1(d)." *See, e.g., State v. Hakimi*, 124 Wn. App. 15, 26-28, 98 P.3d 809 (2004) (analyzing whether a late amendment "jeopardize[d] Hakimi's ability to defend himself," not whether the outcome would be different).

After explaining that the analysis focuses on the defendant's substantial rights, the *James* court analyzed whether the amendment impacted the defendant's right to plead guilty. *James*, 108 Wn.2d at 486. The *James* court found no

prejudice to that right and did not find other prejudice such as “surprise or an inability to prepare a defense.” *Id.* at 489. The *James* court did not consider whether the outcome would have been different absent the amendment.

Hakimi further illustrates the difference in the prejudice analysis under CrR 2.1. The *Hakimi* court dealt with two, different standards of “prejudice”: one standard for a claim of ineffective assistance of counsel and another standard for prejudice to substantial rights under CrR 2.1. The standard of prejudice that must be shown to support a claim of ineffective assistance of counsel is a “showing that there is a probability that but for counsel’s errors, **the result would have been different.**” *Hakimi*, 124 Wn. App. at 22 (emphasis added). But when it came time to analyze whether a late amendment had prejudiced the defendant’s substantial rights, the *Hakimi* court did not consider whether the outcome would have been different. Rather, the court focused on a different standard: whether the amendment “jeopardize[d] Hakimi’s ability to defend himself.” *Id.* at 28.

4.1.2 Brooks' rights were prejudiced because the amendment directly undermined the strategic choices he had already carried out based on the original information.

With the proper standard in mind, the *per se* prejudice rule of *Pelkey* comes into focus, particularly as it should apply to a case like this one. An amendment to the information after the defendant has already completely presented their defense (and either testified or not) necessarily prejudices the defendant's rights to a meaningful opportunity to prepare and present a complete defense and to make the tactical decision of whether to testify or remain silent.

Here, the late amendment directly undermined the defense that Brooks had prepared and presented. Everything Brooks did in preparing and presenting his defense was based on the original charge of an incident occurring in January. Brooks cross-examined the victim about the date of the incident because he knew it did not occur in January. He decided to testify and admit to inappropriately touching the victim because he knew it did not occur in January.

When the trial court allowed the amendment, after Brooks had rested his case, it was too late for Brooks to adjust his defense strategy. He could not undo his testimony and choose a different approach. He could not call new witnesses to replace

or support his testimony. He could not change the way he cross-examined witnesses or his strategic choices in objecting or not objecting to particular pieces of evidence. The only thing he could do was adjust his closing argument.

This is why Brooks did not request a continuance. It would have been futile. There was nothing to continue. There were no adjustments that could be made because the whole defense had already been presented. It could not be changed. Brooks' decision not to request a continuance is not a sign that there was no prejudice; on the contrary, it is a sign that the prejudice was so great that it could not be remedied by a continuance.

This is why Brooks' closing argument admitted that the State had proven the child molestation charge. 2 RP 123-24. What else could he do now that the date range had been expanded to include the dates to which he had testified? The record does not indicate that this was the original plan. Indeed, if it had been the original plan, there would have been no reason for Brooks to clarify that the incident happened in May, not January. The fact that Brooks was so careful to demonstrate the inaccuracy of the charged date range demonstrates that this was an essential element of his defense—one which he was forced to abandon after the improper, late amendment of the information and the jury instructions.

4.1.3 Brooks' admission of the incident in May was a valid defense to create reasonable doubt that any incident occurred in January, as charged.

The Court of Appeals erred in accepting the State's argument that the date of the alleged crime is not an essential element of the crime. In this case, the State made the date range an essential element and accepted the burden of proving the date to the jury beyond a reasonable doubt.

Constitutional due process requires the State to prove every element of the crime beyond a reasonable doubt. *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). However, the law of the case doctrine provides that jury instructions not objected to become the law of the case. *Id.* Thus, "If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable jury of that element regardless of the fact that the additional element is not otherwise an element of the crime." *Id.*

The State's original proposed jury instructions would have required the jury to find beyond a reasonable doubt that Brooks had sexual contact with the victim on or around or between January 1, 2014 and January 31, 2014. *See* 2 RP 88-90; CP 1, 24. There were no objections to the proposed instructions prior

to the amendment to the information. 2 RP 50. The original date range would have become an essential element of the crime in this case because it was a part of the instructions to the jury.

It is a valid defense to attempt to raise reasonable doubt as to any element of a crime. Absent the amendment, it appears that Brooks would have argued to the jury that there was reasonable doubt as to the date of the incident. The instructions required proof beyond a reasonable doubt that the incident occurred in January. Brooks would have argued that there was reasonable doubt. If just one juror believed Brooks that the incident occurred in May, not January, Brooks would not have been found guilty.

The late amendment to the information and the jury instructions directly targeted this defense and silenced it before the closing argument could be made.

Due to the late amendment, Brooks was unable to intelligently prepare and present a defense; the amendment directly undermined the defense he had already made. Due to the late amendment, Brooks was unable to intelligently decide whether to testify or remain silent; had he known that he was being charged with an incident occurring anywhere between January and May, he might have chosen not to admit to it. Brooks' choices in how to exercise his substantial, constitutional rights were rendered meaningless by the late amendment.

Brooks' substantial rights were prejudiced. The trial court abused its discretion in granting the late amendment. This Court should reverse the conviction and dismiss the charge.

5. Conclusion

An amendment to the information after the defense rests necessarily prejudices the defendant's substantial, constitutional rights and is therefore impermissible under CrR 2.1(d). Here, the late amendment directly undermined Brooks' trial strategy, prejudicing his rights to know the charges, to prepare and present a defense, and to decide whether to testify or remain silent. The trial court abused its discretion when it granted the late amendment.

This Court should hold that Brooks' substantial rights were prejudiced by the late amendment and should reverse the child molestation conviction, dismiss the charge, and remand for resentencing on the rape charge with a corrected offender score.

Respectfully submitted this 7th day of October, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 7, 2019, 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.

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