

No. 29564-8-III

Sweeney, J. (dissenting) — We rarely conclude that counsel ineffectively represented an indigent defendant in a criminal case. There are many different ways to try a case and counsel's decision to try the case one way rather than another does not render the decision wrong and the representation ineffective. But the circumstances here lead me to conclude that counsel's failure to move for a bill of particulars amounts to ineffective assistance. If granted, the order would have required the State to spell out which of Waymond Turner's two assaultive acts the State intended to rely on. I conclude the failure amounts to ineffective assistance of counsel based on the way counsel elected to try this case.

Here was his objection:

Your Honor, the Assault 3 has been and always has been about whether or not my client head butted [sic] this Corporal Lamens. . . . When, in fact, the only thing that was ever represented in all of our discussions throughout the entire case was whether or not my client head butted [sic] him at the car.

Report of Proceedings (Oct. 8, 2010) at 27.

Now, for me, it does not make any difference whether the lawyer just assumed that the State would rely on the head-butt to support the assault charge or whether the State affirmatively represented (misrepresented) that it would rely on the head-butt. It was

apparently an important part of the defense to that charge and a request for a bill of particulars would have cleared up any confusion and permitted the lawyer to structure his defense accordingly. *State v. Peerson*, 62 Wn. App. 755, 768, 816 P.2d 43 (1991) (“[T]he purpose of the bill of particulars is to give the defendant sufficient notice of the charge so that he can competently defend against it.”). The purpose of a bill of particulars is to “amplify or clarify the particular matters essential to the defense.” *State v. Holt*, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985). The right to a bill of particulars is grounded in our constitution. *State v. Duffey*, 97 Wn. App. 33, 43, 981 P.2d 1 (1999). The test is whether the State’s information provides enough facts to defend against the charge and avoid surprise. *State v. Allen*, 116 Wn. App. 454, 460, 66 P.3d 653 (2003). The failure to move to require a bill of particulars also waives any right to complain about the inadequacy of the facts in the information later on. *State v. Hayes*, 81 Wn. App. 425, 440, 914 P.2d 788 (1996); *Holt*, 104 Wn.2d at 320.

The information here charged:

On or about the 16th day of June, 2010, in the County of Grant, State of Washington, the above-named Defendant, did assault a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; contrary to the Revised Code of Washington 9A.36.031(1)(g).

Clerk’s Papers at 2. Again, counsel proceeded on the assumption that the State would

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rely on the head-butt to show the assault. Whether or not the State would so rely is not spelled out in the information. A bill of particulars would have solved that problem and permitted counsel to adequately prepare a defense or encourage Mr. Turner to plead guilty to the charge.

I would reverse the conviction for third degree assault and remand for retrial on that charge.

Sweeney, J.