IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 61763-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
KENNETH LAMONTE WHEATON,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: November 23, 2009
	)	
	)	

Cox, J. — Kenneth Wheaton appeals his conviction for rape and felony harassment. Because Wheaton does not claim that any biased juror actually sat on the jury, he has failed to show any prejudice in denying his challenges for cause. Because he does not claim or establish that he suffered any prejudice from the joinder of the counts, the trial court did not abuse its discretion in denying his motion to sever. And because the information was not defective and the amendment did not prejudice him, Wheaton fails to demonstrate any error in the trial court's rulings. We affirm.

Sandra Hughes and Kenneth Wheaton dated for about seven years. Over the course of the relationship, Wheaton sometimes lived with Hughes and her two children. In March 2007, Hughes asked Wheaton to move out. Hughes continued to be friendly with Wheaton and allowed him to spend time with her children, but she indicated that their relationship was over.

In late March and April, Wheaton began coming to Hughes's house uninvited and late at night, asking to talk about their relationship and asking Hughes if she was seeing someone else. Late in the evening of April 26, Wheaton came to the house and Hughes allowed him into the living room. While they were sitting on the couch, Wheaton again accused Hughes of seeing someone else. Then Wheaton told Hughes he would hurt her like she had hurt him. He pushed her back on the couch, climbed on top of her, bit her face and raped her. Hughes later told her sister and a co-worker about the attack. Her sister noticed a mark on Hughes's face.

On May 10, Hughes came home from work to find Wheaton at her house with her daughter. Wheaton asked to speak with her and asked her for her cell phone. When Hughes refused to give him the phone, Wheaton took it from her bag and told her to go upstairs. Because she was concerned about her daughter, Hughes went to the bedroom with Wheaton. He eventually forced her into the master bathroom and locked the door. Wheaton forced Hughes onto the floor and raped her while he called numbers on her cell phone, saying that everyone would know what he was doing to her. Wheaton accused Hughes of having a sexual relationship with Dr. Joseph Conrad, a co-worker. After completing the rape, Wheaton told Hughes, "I know what I'm going to do. I'm going to kill him, that's what I'm going to do."

After Wheaton left, Hughes called Dr. Conrad and told him about the rape and Wheaton's threat. Dr. Conrad told Hughes to call the police. Dr. Conrad

then called Wheaton and asked him why he had raped Hughes. Wheaton replied, "She deserved everything she got."

The State charged Wheaton with two counts of second degree rape and one count of felony harassment. The jury found Wheaton guilty as charged and the trial court imposed a standard range sentence.

Wheaton appeals.

FAIR AND IMPARTIAL JURY

Wheaton claims that the trial court violated his right to a fair and impartial jury by refusing to grant his challenges for cause as to jurors 15, 23, and 37. We disagree.

The Federal and Washington State Constitutions guarantee criminal defendants the right to a fair and impartial jury.[1] Even if a juror should have been excused for cause, where a defendant exercises a peremptory challenge to remove the juror and no biased juror sat on the panel, the right to a fair and impartial jury is not violated.[2]

Wheaton's reliance on City of Cheney v. Grunewald[3] is misplaced. In Grunewald, after the trial court denied the defendant's for-cause challenge, the juror in question was seated on the panel because the defendant had already exhausted his peremptory challenges.[4] Here, Wheaton exercised his

[1] U.S. Const. amend. VI; Wash. Const. art. I § 22; State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001) (because Washington law does not recognize that the Washington State Constitution provides more protection than the Sixth Amendment, federal authority defines the scope of the right to a fair and impartial jury).

[2] Fire, 145 Wn.2d at 159, 162.

[3] 55 Wn. App. 807, 780 P.2d 1332 (1989).

[4] 55 Wn. App. at 809.

peremptory challenges to remove jurors 15, 23, and 37.[5] He does not claim that any of the sitting jurors should have been removed for cause. Because Wheaton does not claim that any sitting juror was biased, any error in the trial court's denial of his for-cause challenges was cured.[6]

MOTION TO SEVER

Wheaton next contends that the trial court abused its discretion by denying his motion to sever the charged offenses. We disagree.

Criminal Rule 4.3(a) allows the State to join offenses in one charging document if the offenses:

> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Criminal Rule 4.4(b) allows the trial court to sever joined offenses if doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance has the burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy.[7] Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.[8]

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[5] Fire, 145 Wn.2d at 162 ("the forced use of a peremptory challenge is merely an exercise of the challenge and not the deprivation or loss of a challenge.").

[6] Fire, 145 Wn.2d at 165.

[7] State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

[8] State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

We review a trial court's ruling on a motion to sever for an abuse of discretion.[9] We consider such factors as "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately," and we weigh strongly the concern for judicial economy.[10] Jurors are presumed to follow the trial court's limiting instructions.[11]

Wheaton presents only one argument to demonstrate error. He claims that because the trial court did not conduct a careful balancing on the record of the probative value of evidence of each separate offense against the prejudicial effect of the admission of such evidence at separate trials, such as that required by ER 404(b), the counts should have been severed for trial. Wheaton provides no authority for this claim. The case upon which he relies for the analysis required under ER 404(b), State v. DeVincentis,[12] did not include a motion for severance. And Wheaton does not identify any evidence that would not have been cross-admissible for the separate counts if the trial court had conducted an extensive analysis on the record. Moreover, even if the evidence of the separate counts would not have been cross-admissible in separate trials, "this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial."[13]

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[9] Bythrow, 114 Wn.2d at 717.
[10] State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).
[11] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).
[12] 150 Wn.2d 11, 74 P.3d 119 (2003).
[13] State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (citing Bythrow,

Wheaton does not address any of the other factors and does not describe any prejudice outweighing the concern for judicial economy. The State's evidence was of similar strength and character on each count, consisting of the testimony of Hughes, supported by evidence of her injuries and Wheaton's statements and actions after the incidents. Wheaton asserted the same defense of general denial for each count. The evidence relating to each count was not difficult to compartmentalize, the offenses were connected by victim, time and place, and the evidence overlapped. And the trial court properly instructed the jury to consider each count separately. Wheaton makes no argument that the jury was unable to follow these instructions.

We conclude that the trial court did not abuse its discretion in declining to sever the counts.

AMENDMENT OF THE INFORMATION

Finally, Wheaton contends that the trial court abused its discretion by allowing the State to amend the information as to the charge of felony harassment rather than granting the defense motion to dismiss for failure to allege all the necessary elements of the crime. We disagree.

A charging document must allege sufficient facts to support every element of the crime charged.[14] Although the remedy for an insufficient charging document is reversal and dismissal without prejudice,[15] "a charging document which states the statutory elements of a crime, but is vague as to some other

114 Wn.2d at 720).

[14] State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989).

[15] State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

significant matter, may be corrected under a bill of particulars."[16]

We review a trial court's decision on a motion to amend an information for abuse of discretion.[17] A trial court may allow amendment of the information any time before the verdict as long as there is no prejudice to the defendant.[18]

Under RCW 9A.46.020, a person is guilty of felony harassment if, without lawful authority, he knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person, and by words or conduct places the person threatened in reasonable fear that the threat will be carried out, and the threat was to kill the person threatened or another person.[19]

The State charged Wheaton as follows:

> That the defendant KENNETH LAMONTE WHEATON in King County, Washington, on or about May 10, 2007, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to John Conrad, by threatening to kill John Conrad, and the words or conduct did place Sandra Hughes in reasonable fear that the threat would be carried out.[20]

Relying on State v. Kiehl,[21] Wheaton argues that the information failed to include an essential element by omitting an allegation that the person threatened was the person who was placed in fear. But Kiehl addressed the question of whether a jury instruction misstated the elements needed to convict Mr. Kiehl of felony harassment as charged in the information filed against him.[22]

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[16] Leach, 113 Wn.2d at 687.

[17] State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995).

[18] CrR 2.1(d) ("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.").

[19] State v. Kiehl, 128 Wn. App. 88, 92, 113 P.3d 528 (2005).

[20] Clerk's Papers at 34.

[21] 128 Wn. App. 88.

Here, Wheaton does not assign error to the jury instructions. And the information charging Wheaton tracks the language of the statute by inserting the name "John Conrad" in the place of "any other person" and "another person" and inserting the name "Sandra Hughes" in place of "the person threatened." Contrary to Wheaton's claim, the information here includes all the essential elements of the crime of felony harassment. As our supreme court has recognized, "The statute also contemplates that a person may be threatened by harm to another."[23] Because the information included all the essential elements of the charge, the trial court properly denied Wheaton's motion to dismiss.

Regarding the amendment, the State moved to amend the complaint with a "technical addition" in response to Wheaton's motion to dismiss. The trial court allowed the State to amend the information as follows:

> That the defendant KENNETH LAMONTE WHEATON in King County, Washington, on or about May 10, 2007, knowingly and without lawful authority, did threaten Sandra Hughes by threatening to cause bodily injury immediately or in the future to John Conrad, by threatening to kill John Conrad, and the words or conduct did place Sandra Hughes in reasonable fear that the threat would be carried out.[24]

Wheaton does not contend that he was prejudiced by the amendment. Indeed, the record demonstrates that when the State charged Wheaton with felony harassment on the first day of trial, he acknowledged that the State intended to prove that Sandra Hughes was the person threatened. The trial

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[22] Id. at 91.
[23] State v. J.M., 144 Wn.2d 472, 488, 28 P.3d 720 (2001).
[24] Clerk's Papers at 74.

court did not abuse its discretion by allowing the amendment.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Dwyer, A.C.J.