ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-1184

September 26, 2007

CRAIG WILLIAMS
APPELLANT

AN APPEAL FROM UNION COUNTY CIRCUIT COURT
[CR2005-459-4]

V.

HON. CAROL ANTHONY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On June 30, 2006, a Union County jury found Craig Williams guilty of possession of a controlled substance (cocaine) with intent to deliver, possession of a controlled substance (marijuana) with intent to deliver, simultaneous possession of drugs and firearms, and possession of a firearm by certain persons. The jury also found that appellant possessed a controlled substance with intent to deliver within one thousand feet of a school. For these crimes, appellant was sentenced to a 182-year term in the Arkansas Department of Correction. He challenges the sufficiency of the evidence to support that he possessed a firearm and that he possessed cocaine within one thousand feet of a school. In addition, he alleges that the trial court erred (1) by denying his motion to suppress on Fourth Amendment grounds; (2) by denying his motion for continuance prior to the suppression hearing; (3) by overruling a hearsay objection; (4) by failing to ensure that he was adequately represented by counsel; and (5) by refusing to quash an amended information filed by the State. We affirm, holding (1) that the State presented substantial evidence that appellant possessed a firearm and that he

committed drug crimes within one thousand feet of a school; (2) that the trial court did not err in denying the motion to suppress despite appellant's argument that the traffic stop was pretextual; (3) that appellant failed to show prejudice when the court denied his motion for continuance; (4) that the trial court did not erroneously admit hearsay evidence; (5) that the trial court did not err by refusing to allow appellant time to seek new counsel; and (6) that appellant was not prejudiced when the State filed an amended information adding a sentencing enhancement for committing a drug offense within one thousand feet of a school the day before his trial.

*Factual and Procedural History*

On August 9, 2005, the State filed a criminal information alleging that appellant committed four offenses: possession of a controlled substance (cocaine) with intent to deliver, possession of a controlled substance (marijuana) with intent to deliver, simultaneous possession of drugs and firearms, and possession of a firearm by certain persons. The day before trial, the State amended the information to allege a sentencing enhancement for committing a drug offense within one thousand feet of Barton Junior High School. Appellant filed a motion to quash the amended information, arguing that the enhancement changed the nature or degree of the crime charged and was added to the information without permission from the court. In his written motion, he sought exclusion of any evidence going toward the enhancement or, alternatively, a continuance to adequately prepare. The court denied the motion before trial.

A suppression hearing was held on June 26, 2006, and the trial was held on June 30, 2006. At the beginning of the suppression hearing, appellant's counsel requested a continuance. He received a call the previous Wednesday or Thursday informing him that the suppression hearing would be on June 26 at 9:00 a.m. However, he was advised the following Friday afternoon that the attorney in the companion case had a medical problem

and that the case would be continued. Counsel then received a telephone call from the prosecutor the day of the hearing at 8:35 a.m., stating that the motion to suppress was going forward despite the information he received the previous Friday afternoon. He admitted that he had not prepared to the degree that he would have normally prepared had he stayed on schedule; however, he asked that the suppression hearing be rescheduled at a time that would give him at least twenty-four hours' notice. The trial court indicated that the suppression hearing had been continued several times because of an unavailable witness, and the court offered to allow the State to present its case that day and have appellant present his case the following morning or evening. At the conclusion of the State's case during the suppression hearing, appellant presented his case. However, at the conclusion of the hearing, he renewed his motion to continue the matter, stating that he understood that this case would not be heard and that he had planned his week accordingly. The court again denied his motion.

The evidence at the suppression hearing and at trial shows that on July 1, 2005, a confidential informant for the El Dorado Police Department informed Lieutenant Matt Means that appellant was coming into town with a large quantity of drugs. Testimony regarding the informant's statement was admitted over appellant's hearsay objection; the State argued and the court agreed that the information was introduced for the limited purpose of explaining how police involvement began in the case. Lieutenant Means passed this information to Officer Randy Conley, who set up surveillance near appellant's residence. Lieutenant Means testified at trial that appellant's residence was 625 feet from Barton Junior High School, measured from the fence along the edge of appellant's residence to the rear of a parking lot area near the rear of the school.

Officer Conley was later informed that appellant was driving north on College Street. Appellant appeared fidgety, was tapping his brakes, and was looking around and in his mirrors. According to Officer Conley, appellant turned on his passenger side blinker, indicating that

he intended to turn north. Instead, appellant turned south without flashing his driver side blinker. Conley radioed Officer Aaron Morris, who spotted appellant's vehicle, pulled behind the vehicle, and activated his blue lights. According to Officer Morris's testimony, the vehicle came to a stop at an intersection. Then, both the driver and passenger doors opened and appellant fled the vehicle while holding a plastic grocery bag. Officers chased and caught him in a parking lot. After appellant was placed in handcuffs, Officer Morris noticed a gun between appellant's legs. The gun did not belong to Officer Morris or any other police officer. Officers recovered the bag, which contained 249.6 grams of crack cocaine. Appellant's vehicle was later taken to the police station, where police found 46.1 grams of marijuana under the passenger seat.

While watching appellant's home, Officer Conley observed two women moving items into the trunk of an automobile. One of them later drove away in the automobile. Officer Conley followed the automobile and initiated a traffic stop after the driver ran a stop sign. Various items were found in the car, including 123 grams of marijuana, approximately $2000 cash, and a safe. The safe contained approximately $39,000 in cash, a large quantity of cocaine, and a life insurance policy for appellant. In a statement to police, appellant admitted that the contents of the safe belonged to him.

However, during the suppression hearing, appellant testified that he made a complete stop at a stop sign, continued through the intersection, and made a left turn past a church. He stated that he signaled for and made a left turn. Minutes later, he noticed a police car speeding off the church parking lot and a police officer standing in the middle of the street with a gun pointed at him. He testified that he stayed in the truck for about two or three minutes and that he did not "stop and jump and run." Appellant also presented the testimony of Frederick Colvin, a passenger in appellant's vehicle at time of the incident, and Carolyn Burgie, who was working at a restaurant that was located at the intersection. Both testified

about the stop similar to appellant. At the conclusion of the suppression hearing, the court denied appellant's motion to suppress, specifically noting that the police did not have probable cause to search appellant's vehicle when they initially stopped him, but that "once [appellant] ran he kind of set himself up."

During the trial, appellant complained about his trial counsel. After the lunch recess and toward the conclusion of the State's case, the following colloquy occurred:

THE COURT: Mr. McDonald you indicated to me, note that it's one o'clock right as we were about to get started, you notified me that there is a problem.

MR. MCDONALD: Yes, Your Honor, Mr. Williams has indicated to me that I'm no longer needed as his attorney, that he wanted to fire me. Is that right?

APPELLANT: Yes, he left out some information that really hurt me at this point.

THE COURT: Mr. Williams, let me just caution you first of all we are in the middle of this trial and it's going to proceed. Are you telling me that you wish to represent yourself?

APPELLANT: No, I don't wish to represent myself.

THE COURT: Those are your choices. I'm not stopping in the middle of a trial or declaring a mistrial. We are close to having the State rest.

APPELLANT: I've got some important information that he left out and it's going to hurt me if I don't get it out now.

THE COURT: I don't want to ask and I don't think I need to know what you're talking about. He has successfully suppressed your video tape confession. Do you understand that, it's not going to get played?

APPELLANT: Yes, ma'am.

THE COURT: Do you understand that with a delay it will?

APPELLANT: I'm just trying to get a fair trial, Your Honor. Like I said he left out some things that was ordered to me by a Judge back in January that I haven't received. I feel like I'm entitled to them.

THE COURT: A higher Judge?

APPELLANT: He went to a civil rights trial or something about me that I didn't even know about it.

THE COURT: I don't know what that has to do with this case.

APPELLANT: It was about my property.

MS. HARP [PROSECUTOR]: A forfeiture?

THE COURT: Are you talking about the forfeiture case? Let me just caution you, Mr. McDonald has been retained to represent you. If you no longer wish his services or those of Ms. Price you certainly can fire them but we're not stopping this trial. We started this morning, we are almost through the evidence and you can't do this and expect the trial not to go forward. If you wish to represent yourself you have an absolute right to but you are held to the same standards as a lawyer as if you had a law degree and license which means you have to understand all the rules of evidence, the rules of procedure and how to proceed which is going to include the jury instructions and closing arguments.

APPELLANT: I'm just trying to get a fair trial.

THE COURT: Those are your choices.

APPELLANT: That's all I'm trying to do.

THE COURT: I've given you your choices.

APPELLANT: I can't represent myself.

THE COURT: Then you better keep Mr. McDonald. We've been at this since nine o'clock.

APPELLANT: Yes, ma'am. I was also gave [sic] last notice about things that would help me in my case.

THE COURT: Mr. Williams, that is an issue and I don't encourage you to raise them out loud, discuss them with Mr. McDonald. I'll give you a couple of minutes to discuss this with him and then you will let me know your decision.

After a brief recess, appellant informed the court that he was keeping his attorney.

At the close of the State's case, appellant moved for directed verdict. Regarding the sentencing enhancement, appellant argued that the State failed to meet its burden of proof and that it failed to establish the boundaries of the school or of his homestead. He also argued that

the State did not establish that he possessed the firearm that was located near him during his arrest. The court denied the motions, and appellant rested without presenting a case.

After deliberations, the jury found appellant guilty of all four counts. It also found that he had committed possession offenses within one thousand feet of Barton Junior High School. Appellant was later sentenced to a total of 182 years in the Arkansas Department of Correction and $250,020 in fines.[1]

*Sufficiency Challenges*

While appellant's sufficiency challenges are the last of his six points on appeal, we consider challenges to the sufficiency of the evidence before considering other allegations of error. *See, e.g.*, *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). Appellant argues that the trial court should have granted his motions for directed verdict on the sentencing enhancement and on both charges involving possession of the firearm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Id.* When a defendant makes a challenge to sufficiency of the evidence on appeal, the appellate court views the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict will be considered, and the conviction will be affirmed if there is substantial evidence to support it. *Id.* Circumstantial evidence may constitute sufficient evidence to support a conviction, but it must exclude every other reasonable hypothesis other than the guilt of the accused. *Whitt v. State*, 365 Ark. 580, ___ S.W.3d ____ (2006). The question of whether the circumstantial evidence excludes every other reasonable

[1]The judgment and commitment order states that appellant was fined a total of $250,020. However, it also notes that he received a $250,000 fine for the cocaine possession, $10,000 for the marijuana possession, and $10,000 for the possession of the firearm.

hypothesis consistent with innocence is for the jury to decide. *Id.* With these standards in mind, we reject both sufficiency challenges.

Appellant's argument regarding his possession of a firearm affects two charges, simultaneous possession of drugs and firearms, Ark. Code Ann. § 5-74-106(a)(1) (Repl. 2005), and possession of firearms by certain persons, Ark. Code Ann. § 5-73-103(a)(1) (Repl. 2005). He contends that the State failed to prove that he possessed the firearm that was found near his person at the time of his arrest. To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004). However, neither exclusive nor actual possession is necessary to sustain a charge of possessing contraband; constructive possession is sufficient. *Id.* Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). Such control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

Here, police found the firearm between appellant's legs after they apprehended him. Officer Morris testified that the firearm did not belong to any of the officers, and common sense dictates that one usually does not find a firearm in the middle of a parking lot unattended. While police suspected appellant to be in possession of a large quantity of drugs, his flight from the automobile prompted his arrest. The action of an accused fleeing from the scene of a crime is a circumstance that may be considered with other evidence in determining guilt. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991). Given the proximity of the gun to appellant's person coupled with appellant's flight, the State presented substantial evidence that appellant possessed the firearm found near his person at the time of his arrest.

As for the sentencing enhancement, Ark. Code Ann. § 5-64-411(a)(2) (Repl. 2005)

provides up to an additional ten-year term of imprisonment if a person possessed a controlled substance with intent to deliver within one thousand feet of a public school. Here, Lieutenant Means testified that appellant resided 625 feet from Barton Junior High. In his home was a safe that contained a large quantity of cocaine, and appellant admitted that he possessed the cocaine in the safe. This is substantial evidence that appellant possessed a controlled substance with intent to deliver within one thousand feet of a public school.

*Motion to Suppress*

Appellant argues that the trial court erred in failing to grant his motion to suppress. He argues that the traffic stop was pretextual, that it constituted a full arrest without probable cause, and that the police lacked probable cause that a drug crime had been committed.

In reviewing the denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances, reviews findings of historical facts for clear error, and determines whether those facts give rise to reasonable suspicion or probable cause that a crime has been committed, while giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We do not reverse the trial court's decision unless that decision was clearly erroneous. *Lawson v. State*, 89 Ark. App. 77, 200 S.W.3d 459 (2004).

A pretextual arrest may not serve as the basis for validating an otherwise invalid search. In *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (*Sullivan I*), a Conway police officer approached the appellee after he had pulled into a gas station for speeding. During the stop, the appellee was unable to find his registration and proof of insurance. While looking for the documents, the appellee opened his car door, and the officer noticed a rusted roofing hatchet corroding into the carpet of the appellee's vehicle. The officer arrested the appellee for speeding, no registration or proof of insurance, carrying a weapon, and improper tint. A subsequent inventory search of the vehicle yielded items that formed the basis for several drug

charges. The lower court granted the appellee's motion to suppress. After issuing two opinions on the matter, *see State v. Sullivan*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) (Supplemental Opinion on Denial of Rehearing) (*Sullivan II*); *Sullivan I*, *supra*, and being reversed by the United States Supreme Court, *see Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam), the Arkansas Supreme Court declared that *under the Arkansas Constitution*, "pretextual arrests—arrests that would not have occurred *but* for an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule." *State v. Sullivan*, 348 Ark. 647, 655-56, 74 S.W.3d 215, 221 (2002) (*Sullivan III*).

However, *Sullivan III* does not apply to a valid traffic stop made by an officer who suspected other criminal activity. In *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003), an undercover police officer witnessed the appellee drive up to and enter a suspected drug house, emerge five minutes later, and leave. The officer followed the appellee and asked another police officer to stop the appellee after observing that the appellee's right brake light was not working. During the stop, the first officer gave the appellee a warning for having a broken brake light. He then asked the appellee for consent to search his vehicle and person. The appellee consented, and a search of his pocket yielded two small baggies of methamphetamine. The trial court suppressed the contents of the search, but the supreme court reversed, distinguishing the case from *Sullivan III*, and holding that a search should not be invalidated because an otherwise valid traffic stop was made by a police officer who suspected other criminal activity.

This case is similar to *Lawson*, *supra*, which also involved the El Dorado Police Department. There, the appellant's disgruntled girlfriend called the police department and was referred to then-Sergeant Matt Means. The girlfriend told Sergeant Means that she wanted the appellant in jail and asked how long he would be in jail if police caught him with drugs. There was conflicting testimony about whether the girlfriend would plant drugs in the

appellant's car or whether appellant would have the drugs in the car after a trip to Little Rock. In any event, police followed the appellant's car and initiated a traffic stop after observing the car cross the center line. Other officers came to the scene and requested consent to search the vehicle. Appellant agreed, and officers found a large quantity of crack cocaine under the passenger seat. The appellant moved to suppress the contents of the search, but the motion was denied. On appeal, the appellant argued that the motion to suppress should have been granted under *Sullivan III*; however, we affirmed, stating that the officers' conduct was valid under *Harmon*.[2]

In the present case, police received a tip that appellant had a large quantity of drugs. Police followed appellant and later initiated a traffic stop after observing a violation of the law. Though appellant denied committing the traffic violation, our standard of review requires us to defer to the trial judge, who accepted Officer Conley's testimony that appellant did commit a traffic offense. *See Lawson*, *supra*. At the time police stopped the vehicle, they may not have had probable cause to search appellant's vehicle. However, as the trial court found, a search of appellant's vehicle and person became proper once appellant fled his vehicle.

Appellant argues that he presented evidence that one of the police officers had his gun drawn when the police stopped him and that the use of the gun constituted a constructive, if not an actual, arrest, citing *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982) (finding the argument that the appellant consented to leave the room meritless considering the fact that officers held a gun to the appellant and asked him to come out of the room). Even if we accept appellant's version of the facts, his attempt to flee gave police probable cause to seize his person and search his automobile and the bag that he was carrying at the time of arrest.

---

[2]This court also noted:

> [W]e do not intend to endorse pretextual police traffic stops. We merely are unable to hold that the pretextual conduct in this case required the trial court to grant appellant's suppression motion in view of the applicable federal and state authorities.

*Lawson*, 89 Ark. App. at 84, 200 S.W.3d at 464.

We hold that, though police suspected other criminal activity when they stopped appellant's vehicle, the police had probable cause to search appellant's person and vehicle when appellant attempted to flee the scene. Accordingly, we affirm the denial of appellant's motion to suppress.

*Motion for Continuance*

Next, appellant argues that the trial court erred in denying his motion for continuance. We review the grant or denial of a motion for continuance under an abuse-of-discretion standard. *See*, *e.g.*, *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). An appellant must also show prejudice that amounts to a denial of justice. *E.g.*, *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

We affirm the denial of the motion for continuance. The trial court offered to allow the State to present its case, then allow appellant to present his case the following morning or evening. The State presented its case, and appellant proceeded with his case. He did not renew his objection to the denial of the continuance until after the court ruled against him. Had appellant accepted the trial court's offer, he would have heard the State's case, then had the twenty-four hours *that he requested* to prepare and present his case. In addition, appellant has failed to present an argument showing how the denial of the continuance was prejudicial to the point that it amounted to a denial of justice. We do not reverse absent a showing of prejudice. *See id.* Accordingly, we affirm the denial of appellant's motion for continuance.

*Hearsay Testimony*

Next, appellant argues that the trial court erroneously allowed police officers to testify about the statement of the confidential informant. He contends that the State offered the evidence for the truth of the matter of delivery of the drugs and that the testimony should have been excluded as inadmissible hearsay.

Hearsay is defined as a statement, other than one made by the declarant while testifying

at trial, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). Subject to a litany of exceptions, hearsay testimony is generally inadmissible. Ark. R. Evid. 802. We do not reverse a ruling on a hearsay objection absent an abuse of discretion. *E.g.*, *Hawkins v. State*, 348 Ark. 384, 72 S.W.3d 493 (2002).

Here, the testimony regarding the informant's statement was admissible, as it was not hearsay. The court found that the testimony did not go to the truth of the matter asserted, but to how the El Dorado Police Department became involved in the case. An out-of-court statement is not hearsay if it is offered to show the basis of an officer's actions. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997); *McKenzie v. State*, 69 Ark. App. 186, 12 S.W.3d 250 (2000).[3] We hold that the trial court did not err in allowing the informant's statement and affirm on this point.

*Request for Change of Counsel*

Next, appellant argues that the trial court erred in failing to ensure that he was appropriately represented by counsel. He contends that the trial court abused its discretion when it failed to look into the circumstances of his disagreements with his trial counsel. He also alleges that the trial court erroneously presented him with choice of remaining with ineffective counsel or proceeding pro se.

Once competent counsel has been obtained, the delay involved in changing counsel must be balanced against the public's interest in prompt dispensation of justice. *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990). A request for a change in counsel was effectively a request for a continuance, as a change of attorneys so close to trial—or in the present case, during trial—would require the granting of one. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d

[3]In his reply brief, appellant also argues that this court should consider the prejudicial effect of such testimony. However, this was the first time appellant made the argument, and this court does not address arguments made for the first time in a reply brief. *See*, *e.g.*, *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006).

310 (1995). The right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient and effective administration of justice. *Id.* If change of counsel would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to the defendant. *Id.* We review the denial of a request for new counsel under the abuse-of-discretion standard. *Id.*

We affirm on this point. Appellant simply alleged that his trial counsel failed to present evidence in his favor. He neither alleged that his trial counsel was ineffective nor identified the favorable information on his behalf. Appellant made no request for a change in counsel until almost at the conclusion of the State's case, and he had no other counsel identified. Further, after the discussion with the court, appellant never raised the issue of his trial counsel again. We hold that the trial court did not err in how it addressed appellant's objection to trial counsel.

*Motion to Quash Second Amended Information*

Finally, appellant argues that the trial court erred in not quashing the State's amended allegation, which added a sentencing enhancement for committing a drug crime within one thousand feet of a school. He argues that the State made this amendment without leave of the court and that he had no time to prepare for the amendment.

The Arkansas Code allows prosecutors, with leave of the court, to made amendments to a criminal information. Ark. Code Ann. § 16-85-407(a) (Repl. 2005). However, the State cannot amend an information to change the nature of the crime or the degree of the crime charged. Ark. Code Ann. § 16-85-407(b). The State is entitled to amend an information anytime prior to the case being submitted to the jury so long as the amendment does not

change the nature or degree of the offense charged or create unfair surprise. *Deasis v. State*, 360 Ark. 286, 200 S.W.3d 911 (2005).

In *Baumgardner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1984), the supreme court held that an amendment to include habitual-offender status does not change the nature or degree of a crime. It noted that such an amendment simply authorized a more severe punishment, not by creating an additional offense or an independent crime, but by affording evidence to increase the final punishment in the event the defendant is convicted. *Id.* The supreme court inquired as to whether appellant was prejudiced by the amendment and held that, because counsel was not surprised by the amendment, no prejudice resulted. *Id.*; *see also Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999) (stating that the mere fact that an amendment authorizes a more severe penalty does not change the nature or degree of the crime charged).

We hold that the State could amend the information to add the sentencing enhancement for commission of a drug crime within one thousand feet of a school. Like habitual-offender status, such an amendment merely operates to increase penalties in the event the accused is found guilty of the crime. The nature and degree of the charges against appellant remained the same. Other than the enhancement itself, appellant was not required to defend against any additional elements of proof. In addition, appellant does not present any argument showing why he was prejudiced; he simply alleges it. We do not presume prejudice. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

We hold that the State validly amended the criminal information and that appellant has failed to show how he was prejudiced by the amendment. Accordingly, we affirm on this point.

Affirmed.

BIRD, J., agrees.

HART, J., concurs.