IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLIFTON DODD AKA DOUGLAS DODD, Appellant.	)))))))))	No. 65528-1-I DIVISION ONE UNPUBLISHED OPINION FILED: December 12, 2011

Schindler, J. — Clifton Dodd appeals his convictions for rape in the second degree, felony violation of a court order, felony harassment, and assault. Dodd argues the trial court erred by allowing the State to amend the information at the beginning of the trial without granting a continuance. Dodd also challenges the trial court's evidentiary rulings and determination of his offender score. We affirm, but remand to correct a scrivener's error in the judgment and sentence.

FACTS

On the evening of February 19, 2009, Madolyne Lawson heard a woman screaming for help outside her apartment. The woman, Nancy Davis, was hysterical and hyperventilating. Davis asked Lawson to call the police. Davis told Lawson, "[H]e tried to kill me." Lawson told the 911 operator that Davis reported that the man next

door raped and tried to hurt her. Davis told the emergency medical technicians that her ex-boyfriend had raped, choked, punched, and burned her with cigarettes. Medical personnel at Harborview Hospital performed a sexual assault examination of Davis. The report notes bruises and abrasions on her body and around her neck.

Davis told the police that she had been attacked by Douglas Dodd, the man she had been dating on and off since 2006. Davis said that Dodd began calling her in mid-February, and that she went to his apartment on February 17 and stayed for a day and a half. Davis said that when she told Dodd on February 19 that she wanted to end their relationship, Dodd responded, "Bitch, this will be the last time I see you, and I'll take you out." Davis said that Dodd then grabbed her by the hair and dragged her into the bedroom, where he raped her, saying, "Bitch, this is the last I'll get of you," and strangled Davis until she passed out. When Davis regained consciousness, she said that Dodd was gone, and she ran to a neighbor to call 911. Police verified that Dodd was also known as Clifton, and that a two-year protection order prohibiting Dodd from contacting Davis had been issued in January 2009.

Detective Kevin Grossman interviewed Dodd the next day. Dodd admitted having contact with Davis but denied assaulting her. Dodd also denied having a sexual relationship with Davis. However, Dodd later admitted that he had had sex with Davis but said that he could not recall when. A DNA[1] sample was obtained from Dodd. The DNA sample matched the DNA from the sexual assault examination of Davis.

On July 24, 2009, the State charged Dodd with one count of first-degree rape and one count of felony violation of a court order. The trial began on March 8, 2010.

[1] (Deoxyribonucleic acid.)

At the beginning of trial, the State moved to amend the information to add a charge of second-degree assault and felony harassment. Defense counsel objected to adding the felony harassment charge. Counsel stated the defense had not done anything to prepare for a felony harassment charge. In response, the prosecutor argued that the facts supporting the charge were included in the original discovery, that Davis was the only witness who would testify about the charge, and the defense had already interviewed Davis extensively. Nonetheless, the prosecutor offered to arrange for an additional defense interview with Davis before calling her to testify.

When the court asked whether the defense needed more time to respond to the felony harassment charge, defense counsel argued that Dodd should not be required to waive his speedy trial right. "[I]n the absence of there being any demonstrable prejudice to the Defense," and because the new charge was based on the same set of facts giving rise to the original charges, the court granted the State's motion to amend. Thereafter, the court offered to consider a continuance but defense counsel did not request one.

Following a brief recess, the State called Detective Grossman to testify in the CrR 3.5 hearing. During the State's examination of Detective Grossman, Dodd interrupted and asked the court for time to speak with defense counsel about the new charges "to allow me and my attorney to be better prepared." The trial court agreed to give Dodd an opportunity to confer with counsel after Detective Grossman testified.

After Dodd and his attorney conferred, defense counsel informed the court that Dodd wanted a 10-day continuance but that counsel's vacation schedule would require

a three-week continuance. Given the length of the requested continuance, the motion was heard by the criminal presiding judge.

At the hearing before the criminal presiding judge, defense counsel stated that she "honestly was caught off-guard [by] the amendment, which was adding Felony Harassment," and "had never looked at the discovery with the view towards defending that charge." Defense counsel also explained that the additional charge "caught Mr. Dodd off-guard," and that Dodd "started feeling insecure about the whole situation, probably especially seeing that I too was caught off-guard." Defense counsel stated that Dodd "wanted a ten-day continuance," explained her vacation schedule, and stated that "probably we would have wanted more time to flush out that whole medical expert issue." After the prosecutor clarified that the medical expert issue was limited to a rebuttal matter related to the original charges, the presiding judge denied the motion to continue. However, the court said that the defense could ask the trial court to take a recess for an afternoon to allow Dodd to confer with counsel.

Dodd then addressed the judge, stating:

> I feel that my attorney right now is unprepared. . . .
> . . . [A]nd the reason being is me and her went over what are the issues that they're charging me with. And I understand based on the definition I shouldn't be charged with that. . . .
> All I'm asking the Court is to allow me time to sit down with [defense counsel]. I haven't had a chance to see anything, Your Honor. And pretty much all I'm asking for within a couple of days, that's not enough time for me to go over that.

The criminal presiding judge reiterated that the motion for a three-week continuance was denied but the trial judge had discretion to authorize a half-day continuance.

When the parties returned to the trial court, the prosecutor indicated that after

conferring with defense counsel, the parties agreed to recommend taking a recess either the afternoon of Wednesday, March 10 or Thursday, March 11 to allow defense counsel additional time to confer with Dodd. The trial court agreed. The record reveals that at 10:17 a.m. on Thursday, March 11, the trial court recessed for the day.

During the pretrial hearing, the State also moved to exclude extrinsic evidence of specific instances of conduct for the purpose of attacking Davis's credibility under ER 608. In particular, the State referred to the defense interview with Officer Brian Hunt. Officer Hunt told the defense he did not take any action in response to a prior incident where Davis reported that Dodd allegedly attacked her with a baseball bat because Davis did not have any injuries. The court ruled that the defense could cross-examine Davis about the incident but would not be allowed to impeach her credibility with Officer Hunt's testimony. Defense counsel conceded that ER 608 prohibited impeaching Davis with extrinsic evidence.

During the trial, defense counsel sought to introduce Officer Hunt's testimony about the baseball bat incident under ER 404(b) to show that Davis had a pattern of making false or exaggerated allegations against Dodd. Defense counsel argued that the evidence showed Davis's motive to lie in light of her claim during the 911 call that the police always think Dodd is not guilty. The trial court ruled the proposed evidence did not relate to motive, but "this is rather propensity evidence," and denied the motion to admit the evidence under ER 404(b).

During cross-examination of Davis, defense counsel asked, "Didn't you once . . . tell Officer Hunt that [Dodd] had hit you with a baseball bat and he didn't believe you?"

Davis responded that Dodd had threatened her with a baseball bat but did not hit her, that she did not say that he had hit her, and that she did not recall telling Officer Hunt that Dodd had hit her with a baseball bat.

Pretrial, the State also raised its intent to offer evidence that Dodd signed cards to Davis as the "candy man" to show that Dodd manipulated Davis by supplying her with drugs and controlling her money. Defense counsel argued that the evidence was not relevant because Dodd was not charged with a drug offense and it amounted to improper character evidence under ER 404(b). The trial court ruled that the evidence was relevant to show Davis's fear and explain Davis's decision to go to Dodd's apartment.[2]

The jury found Dodd guilty of felony violation of a court order, second-degree assault, felony harassment, and the lesser included offense of second-degree rape. The jury returned special verdicts finding an ongoing pattern of abuse charged as aggravating factors. The trial court imposed a standard range sentence. Dodd appeals.

ANALYSIS

Felony Harassment

Dodd contends the trial court violated his constitutional right to notice of the charges against him by granting the motion to amend the information to add the felony

[2] The court gave the jury a limiting instruction on the ER 404(b) evidence:

> Evidence has been introduced in this case on the subject of prior incidents between the defendant and Nancy Davis. You should consider such evidence only insofar as it may assist you in considering the defendant's and Ms. Davis' state of mind on February 19, 2009 and in considering your answers to Special Verdict Forms A-2 or A-4 and B-2, C-2 and D-2.
>
> You must not consider this evidence for any other purpose.

harassment charge on the first day of trial.

We review the decision to grant a motion to amend for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). Under article I, section 22 of the Washington Constitution, a defendant " 'must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.' " Schaffer, 120 Wn.2d at 619-20 (quoting State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988)). Rather than enforcing this constitutional guarantee based on technical rules, the focus is on "the relationship between article 1, section 22 and prejudice." Schaffer, 120 Wn.2d at 620. The trial court may permit the State to amend the information at any time before the verdict if the defendant's "substantial rights" are not prejudiced. CrR 2.1(d). But in State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987), our supreme court held that amending the information to charge a new crime after the State rests violates the defendant's rights under article I, section 22. Pelkey, 109 Wn.2d at 487. The defendant has the burden of showing prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). "If a defendant is prejudiced by an amendment, then he or she should be able to demonstrate this fact." Shaffer, 120 Wn.2d at 623.

Relying on State v. Carr, 97 Wn.2d 436, 645 P.2d 1098 (1982) and State v. Ziegler, 138 Wn. App. 804, 158 P.3d 647 (2007), Dodd argues that the trial court's decision to grant the motion to amend to add the charge of felony harassment was prejudicial. Carr and Ziegler are distinguishable.

In Carr, the court addressed amending the information to change the allegation

of violation of a statute regulating intrastate transportation to violation of a different statute for interstate transportation. But Carr was decided under a different rule, JCrR 4.10. JCrR 4.10, unlike CrR 2.1(d), provides: "The court may permit a complaint to be amended at any time before judgment if no additional or different offense is charged, and if substantial rights of the defendant are not thereby prejudiced." Carr, 97 Wn.2d at 439.[3]

In Ziegler, the State charged Ziegler with one count of child rape and one count of child molestation for two children. Ziegler, 138 Wn. App. at 806. After the two children testified, the trial court allowed the State to amend the information to reduce the rape charge to molestation as to one child, and to add two rape charges as to the second child. Ziegler, 138 Wn. App. at 807. We affirmed amending the charge from rape to molestation because Ziegler failed to demonstrate prejudice. The defense had interviewed witnesses, had access to police reports, the amendment did not involve additional discovery, and the defense did not request a continuance. Ziegler, 138 Wn. App. at 810. However, we held that allowing the State to add two rape charges during the trial "affected Ziegler's ability to prepare his defense," and violated his right to know of and defend against the charges because "[h]is trial strategy and plea negotiations with the State would likely have been different had he known there would be two additional child rape charges." Ziegler, 138 Wn. App. at 811.

Here, the "Certification for Determination of Probable Cause" filed with the original information sets forth the alleged threatening statements Dodd made during the rape on February 19 that formed the basis for the felony harassment charge. The

[3] (Internal quotation marks omitted) (emphasis added).

State's motion to amend was made at the beginning of trial before jury selection. The addition of the felony harassment charge did not involve any new discovery or any additional witnesses and the State agreed to arrange an additional interview with Davis before she testified.[4]

Although defense counsel claimed she "had never looked at the discovery with the view towards defending" a charge of felony harassment, and "certainly never talked about that with Mr. Dodd," defense counsel did not claim that she was not aware of the statements or was not prepared to address them as evidence in the trial of the rape charge. Defense counsel also did not claim that the new charge of felony harassment had any impact on trial strategy or the defense theory of the case. Under the circumstances, because Dodd failed to articulate any reason to believe that defense counsel was not adequately prepared to meet the additional charge or to demonstrate prejudice, the trial court did not abuse its discretion by allowing the amendment. See, e.g., State v. Wilson, 56 Wn. App. 63, 65, 782 P.2d 224 (1989) (trial court did not abuse discretion by allowing State to amend information to include third count of indecent liberties on day of trial where "no specific evidence" supported claim of prejudice and additional act was related in scope to the previous counts).

Continuance

Dodd also claims that as a matter of law, the trial court should have granted his request for a continuance. Relying on State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986), Dodd argues the trial court violated his constitutional rights by denying his

[4] And, as the State points out, the evidence would have been admissible in the trial on the rape charge even if the State had not charged felony harassment.

request for a continuance to prepare to meet the new charge.

CrR 3.3(f) allows a court to grant a motion for a continuance if it "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). We review a trial court's decision for an abuse of discretion. State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. Nguyen, 131 Wn. App. at 819.

In Purdom, the State charged Purdom with conspiracy to deliver a controlled substance. On the first day of trial, the State moved to amend the information to replace the conspiracy charge with a charge of being an accomplice to the delivery of a controlled substance. Purdom, 106 Wn.2d at 746. Defense counsel expressed surprise and requested a continuance, stating that "he did not know whether the prejudice would be great because he had not had time to study the matter. Counsel further explained that he had prepared to answer the original charge and should be given an opportunity to consider how to meet the new charge." Purdom, 106 Wn.2d at 749. On appeal, the supreme court held that the trial court violated Purdom's rights as a matter of law "by amending the charge on the day of trial without granting a continuance when one was requested." Purdom, 106 Wn.2d at 748. "The defendant must be given the opportunity when it is requested to prepare to meet the actual charge made against him when it is made for the first time on the day trial is to begin." Purdom, 106 Wn.2d at 749.

Here, unlike in Purdom, Dodd's request for a continuance was not based on

defense counsel's need for more time to prepare to meet the additional charge of felony harassment. Defense counsel did not request additional time to consider the new charge. Defense counsel did not assert that more time was needed to conduct research, review additional discovery, interview additional witnesses, or consider alternative defense theories. Although defense counsel mentioned the medical expert issue as a basis for a continuance before the criminal presiding judge, the record shows that evidence was completely unrelated to the new charge of felony harassment.

Instead, Dodd insisted on a 10-day continuance to confer with counsel, review the discovery, and satisfy himself that his attorney was prepared for trial. Dodd offered absolutely no explanation as to why he needed more than the half-day recess during trial to address his concerns. Dodd's lack of confidence in defense counsel and demand for a lengthy continuance is not the equivalent of the attorney's request in Purdom for time to prepare to meet the new charge made against his client on the first day of trial. Under these circumstances, Dodd fails to establish any abuse of discretion and Purdom does not require reversal.

Evidentiary Rulings

Dodd claims the trial court improperly admitted evidence in violation of ER 404(b) that Dodd sent cards signed the "candy man" to Davis and supplied her with drugs. Under 404(b), evidence of other crimes, wrongs, or acts is generally inadmissible to prove character or show action in conformity therewith. ER 404(b); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). But such evidence is admissible for other purposes, including showing the dynamics of a relationship in

order to assist the jury in evaluating the credibility and conduct of the alleged victim of a domestic violence offense. Grant, 83 Wn. App. at 106-08 (history of domestic violence was relevant to victim's credibility and to explain why victim continued to associate with defendant despite protection order). To admit such evidence, the trial court must identify the purpose, determine whether the evidence is relevant and necessary to prove an essential ingredient of the charged crime, and determine that its probative value outweighs its prejudicial effect. Grant, 83 Wn. App. at 105. We review the trial court's decision on admissibility for abuse of discretion. Grant, 83 Wn. App. at 105.

At the pretrial hearing, the State argued that the evidence should be admitted to explain why Davis stayed with Dodd at his apartment despite the existence of the protection order. Defense counsel argued that the evidence was unnecessary, distracting, and merely showed Dodd's bad character. The trial court ruled that the evidence was admissible because an understanding of the dynamics of the relationship was "fundamental" to the jury's understanding of Davis's decision to stay with Dodd. Dodd fails to establish abuse of discretion. See Grant, 83 Wn. App. at 109 (history of domestic violence admissible under ER 404(b) "at the very least for the purpose offered by the State of explaining Ms. Grant's inconsistent statements and conduct").

Dodd also contends the trial court violated his right to present a defense by excluding the testimony of Officer Hunt regarding the baseball bat incident. Dodd claims for the first time on appeal that the trial court erred in not admitting Officer Hunt's testimony under ER 613. We do not address an evidentiary argument made for

the first time on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).[5]

Offender Score

Next, Dodd argues the trial court erred by including a Georgia conviction in Dodd's offender score. At sentencing, the State identified the inclusion of a 2004 Georgia conviction of "family violence battery" in the offender score. The State presented a transcript of the plea colloquy from the Georgia court and asserted that the conviction was comparable to third-degree assault in Washington.

Defense counsel conceded the Georgia conviction was comparable to third-degree assault in Washington. But Dodd stated that he did not agree with defense counsel. Dodd claimed that he could not remember whether the Georgia conviction was a felony but argued that it should not count, apparently based on the claim that it should wash out. In sentencing Dodd, the court used the offender score presented by the State.

The State has the burden to show, by a preponderance of the evidence, that the record supports the existence and classification of out-of-state convictions. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An affirmative acknowledgement by defense counsel that a prior out-of-state conviction is properly included in the offender score satisfies the requirements of the Sentencing Reform Act and requires no

[5] Even if the exclusion of Officer Hunt's testimony impinged on Dodd's right to present a defense, any error was harmless. Guloy, 104 Wn.2d at 425. In addition to suggesting on cross-examination that Officer Hunt did not believe Davis's prior allegation, Dodd attacked Davis's credibility with other evidence. For example, Dodd presented testimony from Officer Steven Pomper that neither Davis nor her cat appeared to have injuries consistent with her report of abuse in January 2008. Dodd also pointed out that Davis stated in the 911 call that the police did not believe her previous allegation that Dodd threatened her with a gun because the police found no gun. Further, the State presented overwhelming evidence of Dodd's guilt. Dodd's neighbor heard a commotion next door and later found Davis in the hall screaming for help and obviously injured. Medical personnel described significant injuries and the forensic analysis established that Dodd had sex with Davis.

further proof. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

In State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007), defense counsel agreed to the State's calculation of the offender score and criminal history. But the defendant objected, arguing that some of his crimes were the same criminal conduct. Bergstrom, 162 Wn.2d at 90-91. The sentencing court addressed Bergstrom's argument and rejected it. The supreme court held that although the sentencing court was entitled to rely on defense counsel's agreement to the offender score and criminal history, because the court considered and ruled on Bergstrom's pro se argument, the court erred in failing to hold an evidentiary hearing and require the State to produce evidence in support of the offender score. Bergstrom, 162 Wn.2d at 97.

Here, defense counsel specifically acknowledged the 2004 Georgia conviction was comparable. Dodd stated that he disagreed with counsel and claimed that the Georgia conviction either was not a felony or had washed out. The sentencing court relied on defense counsel and did not either consider or rule on Dodd's pro se argument. Accordingly, the court did not err in failing to hold an evidentiary hearing. Bergstrom, 162 Wn.2d at 97. Based on this record, we conclude Dodd waived his right to challenge the comparability of his 2004 Georgia conviction for the first time on appeal.

Correction of Judgment and Sentence

The State requests remand to the trial court to correct a scrivener's error in the judgment and sentence. The jury convicted Dodd of second-degree rape but the judgment and sentence lists the original charge of first-degree rape. Although the

seriousness level and sentencing range properly reflect the conviction of rape in the second degree, we remand to correct the scrivener's error in the identification of the crime.[6]

Affirmed but remand to correct scrivener's error.

WE CONCUR:

[6] In his "Statement of Additional Grounds for Review," Dodd claims that the prosecutor's actions "were deliberate indifference, to put Mr. Dodd in prison for a crime the jury didn't convict Mr. Dodd on." Dodd also claims that the Department of Corrections has not given him the proper earned early release time. Because these claims are not supported by evidence in the record, we cannot review them. See RAP 10.10(c).