

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66778-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
SHELLISE BARTON MONTGOMERY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 17, 2012
_____	)	

Becker, J. — Shellise Montgomery appeals her convictions of theft, identity theft, and forgery, claiming that the prosecutor’s comment on her prearrest silence deprived her of a fair trial. She also claims that the forgery charge must be reversed because the State filed the charge after the expiration of the statute of limitations. We agree that the forgery charge was time barred and vacate the conviction. Because the prosecutor’s argument does not constitute reversible error and the remaining issues Montgomery raises in a statement of additional grounds do not warrant further review, we otherwise affirm.

FACTS

On September 18, 2006, Joseph Miles contacted police to report the theft

of his tax refund issued by the Internal Revenue Service (IRS). Miles explained that before he left the country for business on March 23, 2006, he had hired Shellise Montgomery to prepare his federal tax return and hold any refund until he returned. When Miles returned on September 9, 2006, he discovered that the IRS authorized a refund for \$5,258. Miles reported to police that he believed Montgomery obtained his refund without his knowledge or authorization.

Seattle Police Detective A.J. Thompson obtained a search warrant and learned that a cashier's check in Miles's name had been deposited into an account for a business called Cash on the Spot, belonging to Montgomery. Detective Thompson went to Cash on the Spot on October 23, 2006, to speak with Montgomery. After some conversation, Detective Thompson arrested Montgomery.

On August 16, 2007, the State filed an information charging Montgomery with first degree theft of money and first degree identity theft based on the use of Miles's name on or about May 8, 2006. The case proceeded through an omnibus hearing on March 7, 2008, and was on standby for trial when the State moved to dismiss the case without prejudice on April 7, 2008. At a hearing, the prosecutor reported that Miles was out of the country and that she had not been able to confirm when he would return. Montgomery's privately retained counsel argued that the dismissal should be with prejudice because the defense was prepared to go to trial, the State had indicated in the omnibus order that all State witnesses were ready, and the case had been on standby for one week. The

trial court dismissed the case without prejudice.

On December 17, 2009, the State filed an information under a new case number charging Montgomery with one count of first degree theft, one count of first degree identity theft, and one count of forgery, all occurring on or about May 8, 2006. Montgomery appeared for arraignment on December 28, 2009.

Defense counsel appearing for the limited purpose of the arraignment objected to the date of arraignment as potentially in violation of the statute of limitations and noted a potential double jeopardy argument.

On January 13, 2010, the court heard a defense motion to dismiss under CrR 8.3(b) for prosecutorial mismanagement. Appointed counsel argued that the State failed to exercise due diligence in the preparation of its case under the previous case number by failing to do any work on the case or determine the availability of witnesses and then obtaining a dismissal without prejudice 30 days before the expiration of the statutory time for trial. According to defense counsel, Montgomery was prejudiced when the State later filed the new information because she had to obtain new counsel and then choose between waiving her speedy trial rights and going to trial with unprepared counsel. After reviewing the docket of the 2007 case, the trial court denied the motion.

On February 2, 2010, the parties appeared for a hearing on Montgomery's motion to discharge appointed counsel. Montgomery claimed that her attorney had only spoken with her one time and that she did not feel that her attorney was protecting her best interests. The trial court denied the motion to

discharge counsel. However, at a hearing on July 2, 2010, the trial court granted counsel's motion to withdraw based on a material conflict of interest. In July 2010, an attorney from a different public defense firm appeared in the case to represent Montgomery.

On November 16, 2010, the parties appeared for trial. Defense counsel advised the court that Montgomery wished to substitute counsel and deferred to Montgomery to explain her reasons. Montgomery explained that she did not trust appointed counsel and did not believe that counsel had a strategy for the case. Montgomery complained that counsel had not subpoenaed witnesses or documents and had not talked to her about the facts of the case. Counsel stated that her communication with Montgomery was completely broken. The trial court inquired whether "this will happen with any attorney," and then asked the State to describe how it intended to prove its case. The prosecutor reported that she intended to call Miles and various records custodians and that three of the State's witnesses were flying in from out of state. The prosecutor briefly described that she intended to prove that Montgomery fraudulently prepared Miles's tax return, deposited his refund into her own account, and spent the money. Defense counsel requested a one week continuance to allow new counsel, who was present at the hearing and ready to appear, additional time to prepare for trial. The trial court denied the request for a continuance and denied the motion to substitute counsel.

At trial, Miles testified that he had made a small investment in a

barbershop for a friend, Joseph Irving. Miles met Montgomery, Irving's fiancée, at Irving's barbershop and hired her to prepare his tax return. Miles testified that he gave Montgomery his receipts and bank statements. He also testified that he gave her his contact information in case she needed to reach him while he was overseas. While overseas, he assumed that his taxes had been filed without incident because he did not hear from Montgomery. When Miles returned home, he discovered several pieces of mail and phone messages regarding taxes from the Department of Revenue and the IRS. Miles called the police when he learned that the IRS authorized a refund. He eventually discovered that Montgomery had filed a tax return in his name listing as dependents two children he did not know.

Montgomery testified that she agreed to prepare Miles's tax return, despite her concerns about the accuracy of his business expenses, because Irving encouraged her and suggested that Miles would hire her for additional bookkeeping work. Montgomery claimed that she prepared Miles's taxes, including the information regarding the two dependent children, based on the information Miles provided. Montgomery testified that she did not know that Miles was out of the country when she filed his return. She testified that she gave the cashier's check in the amount of the IRS refund and a copy of the return to Irving, at his request, with the understanding that Irving would give it to Miles because they were business partners. According to Montgomery, Irving took the check and then returned later the same afternoon with the check

endorsed with Miles's name. Montgomery testified that she believed Irving had obtained Miles's signature and that she cashed the check and gave Irving the money to give to Miles. Montgomery denied signing Miles's name to the check and testified that she would not have deposited the check into her Cash on the Spot business account if she did not have authorization because she knew everything would be immediately traced back to her.

Montgomery also testified that Miles met with her in September and demanded that she return all his tax information. Because Miles was yelling at her and because she was afraid for her own safety and that of her child, who was with her, she gave Miles the entire file without keeping any copies for her records. Montgomery ended her relationship with Irving a short time later. Montgomery testified that she did not know that there was any problem with Miles's return until October when the police came to her office.

In closing argument, defense counsel argued that Irving deceived Montgomery and suggested that Miles had been involved or responsible. Counsel highlighted the connection between Miles and Irving, referring to Miles's admission that he had communicated more with Irving than Montgomery about the preparation of his taxes. Counsel pointed out inconsistencies in Miles's testimony about his contacts with Montgomery about the taxes. Counsel described Miles as evasive and dishonest and asked the jury to consider what reason Montgomery would have to alter Miles's tax return when it could be so easily traced back to her.

In rebuttal, the prosecutor discussed the credibility and motivations of the witnesses, arguing that Montgomery could have committed the crimes because she needed the money. She suggested that regardless of Irving's participation, Montgomery knew that Miles did not sign the check because she knew he was out of the country. The prosecutor asked the jury to consider what motivation Miles would have for calling the police, testifying at trial, and hiring another tax expert to assist him in refiling his taxes if he were somehow involved. The prosecutor finished her argument, stating:

And remember, the defendant, there's no evidence she contacted the police. No evidence that she contacted the IRS when she learned there was a problem. It was Mr. Miles who did both of those things. Mr. Miles who has paid a significant price for what has happened to him. And it's time for the defendant to pay hers and own up to what she did. And that is why I ask that you find her guilty as charged of all three counts. Thank you.

The jury found Montgomery guilty of all three charges. Following the verdict, Montgomery filed a motion for a new trial, arguing that the prosecutor committed misconduct by commenting on Montgomery's prearrest silence in her rebuttal argument. The trial court denied the motion, finding that the statement was improper, but there was not a substantial likelihood that it affected the jury's decision.

Montgomery appeals.

## DISCUSSION

Montgomery first contends that the prosecutor improperly commented on her prearrest silence. The State may not make closing arguments "relating to a

defendant's silence to infer guilt from such silence." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). An improper comment on silence occurs "when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In contrast, a mere reference to silence is not reversible error absent a showing of prejudice. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). And the State may use the defendant's prearrest silence to impeach the credibility of his or her testimony at trial. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); State v. Hamilton, 47 Wn. App. 15, 20-21, 733 P.2d 580 (1987).

Montgomery claims the prosecutor's remark implied that if Montgomery were actually a victim, she would have had nothing to hide and would have reported the problem. She argues that the prosecutor referred to her silence only to demonstrate guilt. We disagree. The prosecutor focused her rebuttal on the credibility of the witnesses, particularly Miles and Montgomery, and responded to defense counsel's argument that Miles had been dishonest in his testimony. The prosecutor argued that Miles was more credible than Montgomery because his actions, including his report of the matter to the authorities, were consistent with that of a victim. The prosecutor briefly referred to the lack of evidence that Montgomery made any report to authorities to demonstrate that Montgomery's claim that she was an unwitting victim of the dishonesty of Irving and/or Miles was less credible. The prosecutor did not



invite the jury to infer that Montgomery was guilty of the charged crimes from her failure to call the police or the IRS.

Under these circumstances, the prosecutor's argument was, if improper, not prejudicial. Montgomery claims that the prosecutor's argument impermissibly undermined her credibility. But the remark was brief and made in the context of a discussion of Miles's credibility. In denying Montgomery's motion for a new trial, the trial court determined there was no reasonable probability that the comment affected the jury's verdict. The trial court was in the best position to weigh the prejudice of the prosecutor's remarks here. Lewis, 130 Wn.2d at 707 (where no improper comment on silence occurred, trial court did not abuse discretion in denying motion for mistrial given lack of prejudice). The trial court did not err in denying Montgomery's motion for a new trial.

Montgomery next challenges her forgery conviction, claiming that the charge was barred by the applicable three-year statute of limitations. RCW 9A.04.080(1)(h). The parties agree that the timely filing of the original information in 2007 tolled the statute of limitations as to the theft and identity theft charges, such that those two charges were properly refiled in 2009. RCW 9A.04.080(4);<sup>1</sup> State v. Warren, 127 Wn. App. 893, 896, 112 P.3d 1284 (2005). Montgomery argues that the forgery charge must be reversed and dismissed

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<sup>1</sup> RCW 9A.04.080(4) provides:

If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

with prejudice.

In the civil context, the statute of limitations provides repose and limits remedies, but a criminal statute of limitations is “an absolute bar to prosecution,” limiting “the power of the sovereign to act against the accused.” State v. Eppens, 30 Wn. App. 119, 124, 633 P.2d 92 (1981); State v. Glover, 25 Wn. App. 58, 62, 604 P.2d 1015 (1979) (amended information could not relate back to untimely original information) (internal quotation marks omitted). However, Washington courts have applied the civil rule, CR 15(a), to evaluate amendments to timely filed charges in criminal cases. Eppens, 30 Wn. App. at 123; State v. Smith, 16 Wn. App. 425, 431-32, 558 P.2d 265 (1976). CR 15(c) allows relation back when the claim in the amended pleading “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” An amendment will not be permitted in a criminal case if it operates to “broaden or substantially amend the original charges.” In re Pers. Restraint of Thompson, 141 Wn.2d 712, 729, 10 P.3d 380 (2000); Warren, 127 Wn. App. at 896. Notice to the defendant of the activities for which he will be called to account “is the touchstone in deciding whether a superceding indictment substantially changes the original charges.” United States v. Gengo, 808 F.2d 1, 3 (2nd Cir. 1986) (cited with approval in Thompson, 141 Wn.2d at 729).

In Gengo, the government amended a conspiracy charge after the statute of limitations had expired to correct the time frame of the charge and to state a

different object of the conspiracy. Gengo, 808 F.2d at 3. Because “the initial indictment gave Gengo full notice of the time frame during which he was alleged to have conspired” and the amended charge “rested on the same factual allegations as the first and required no preparation of new evidence or defenses on Gengo’s part,” he was eventually tried and convicted with the same conspiracy charged in the first indictment such that the prosecution was not time barred. Gengo, 808 F.2d at 4.

In Warren, we considered whether an amendment adding a charge of negligent driving impermissibly broadened the original charge of driving under the influence. Warren, 127 Wn. App. at 896. Because the less serious offense was charged in the alternative, did not rely on different evidence, “did not place Warren in jeopardy of multiple convictions,” and “did not create a potential for a greater stigma or penalty,” we determined the amendment did not impermissibly broaden the original charge. Warren, 127 Wn. App. at 898.

In contrast, where the government attempts to add separate counts, rely on different evidence, or expose the defendant to a greater penalty, courts have held amendments to impermissibly broaden the original charge. In United States v. Zvi, 168 F.3d 49, 53 (2nd Cir. 1999), the government charged the defendants with conspiracy and wire fraud, alleging they staged a robbery to defraud their insurer. After the statute of limitations expired, the government filed superseding indictments adding 16 counts of money laundering. On appeal, the court determined that the statute of limitations was not tolled for the

additional charges because the “superseding indictments required the defendants to defend against additional charges that alleged violations of a different statute, contained different elements, relied on different evidence, and exposed the defendants to a potentially much greater sentence.” Zvi, 168 F.3d at 55. The fact that the government had previously informed the defendants that it intended to prosecute them for money laundering did not provide sufficient notice of the charges to the defendant where the original indictment failed to mention “the pre-robbery sale of gold or of the funds transfers that were allegedly used to launder the proceeds from the pre-robbery sale of gold.” Zvi, 168 F.3d at 55.

In Eppens, 30 Wn. App. at 122, the State amended the information after the statute of limitations had run “to include additional counts of the identical crime alleged to have occurred within the time frame described in a timely filed information.” The original information alleged one count of grand larceny for collecting disability checks over the course of eight months, while the amended information charged four separate counts of grand larceny over the same period. On appeal, the court vacated three counts of grand larceny as time barred because the amendment broadened the original charge by exposing the defendant to “a potentially longer minimum prison term and substantially increased stigma.” Eppens, 30 Wn. App. at 125. The Eppens court rejected an argument that the defendant had not been prejudiced because he received concurrent sentences. The court stated, “In addition to the effect multiple

convictions might have on time actually spent in prison, we also consider the heavy stigma which attends *each* conviction.” Eppens, 30 Wn. App. at 125 (emphasis added).

Here, relying solely on Warren, the State contends that the addition of the forgery charge did not impermissibly broaden the original charge because the facts alleged in the original theft charge supported the forgery charge, the forgery constituted the same criminal conduct as the theft such that it did not increase Montgomery’s offender score or punishment, and the increased stigma of an additional conviction “is not persuasive.” The State fails to address the fact that the additional forgery charge alleges a violation of an additional statute, involves different elements, relies on different evidence, and exposes Montgomery to the *potential* for additional punishment as well as the increased stigma of an additional felony conviction.

The original information refers to the theft of “U.S. currency” in excess of \$1,500.00 and the use of the name Joseph Miles to obtain a total value in excess of \$1,500.00. The 2009 information additionally alleges that Montgomery “did falsely make, complete and alter a written instrument, to wit: a cashier’s check, and knowing the same to be forged did possess, utter, offer, dispose of and put off as true to Bank of America such written instrument of the following tenor and effect: Bank One cashier’s check number 80137729 to Joseph Miles in the amount of \$5,258.00.” The original information did not mention that the State intended to prove that Montgomery forged Miles’s signature on the

identified cashier's check. The forgery count was not charged in the alternative and therefore exposed Montgomery to the potential for increased punishment and the stigma of a third felony conviction, regardless of the trial court's ultimate sentencing rulings. Because the 2009 information impermissibly broadened the original charges, the relation back doctrine does not apply and the forgery conviction must be vacated. Eppens, 30 Wn. App. at 125, 130.

In her statement of additional grounds for review, Montgomery argues that she was denied a fair trial when the trial court denied her motion to substitute counsel on the first day of trial. She argues that the prosecutors' misstatements of certain facts during pretrial motions contributed to the error and that the exclusion of certain evidence, in addition to the fact she was denied her counsel of choice, prevented her from putting on a defense.

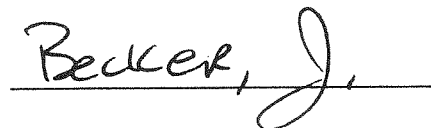
As to the motion to substitute counsel, the record indicates that the trial court likely viewed Montgomery's request to substitute counsel and to continue the trial date as nothing more than an attempt to delay the trial. Whether or not dissatisfaction with court-appointed counsel is justified and warrants appointment of new counsel is a matter of trial court discretion. State v. Stenson, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997). Montgomery indicates that the trial court misapprehended her arrangements with proposed substitute counsel as well as her reasons for the requested continuance. The record does not provide any basis to question the trial court's determination.

Montgomery contends that different prosecutors at different hearings lied

to the trial court or made misstatements about the reasons for dismissing the original charge, about whether and when Montgomery hired private counsel, about whether a particular prosecutor was aware of the circumstances of the conflict between Montgomery and her former attorney, and about the resources available to the State in the preparation of its case. But Montgomery fails to demonstrate that the inconsistencies she identifies in the record amount to dishonesty or affected the outcome of the trial.

Regarding excluded evidence, Montgomery refers to Miles's criminal history and to documents indicating that Irving granted Miles power of attorney and that Irving and Miles had entered a joint venture agreement. Montgomery suggests that the trial court's denial of her motion for new counsel deprived her of the opportunity to put on a defense because her new counsel would have properly used the identified evidence to challenge Miles's credibility. But Montgomery fails to explain the relevance or demonstrate the admissibility of the documents or the fact that Miles had a prior drug conviction. Therefore, these claims do not merit further review.

The forgery charge is hereby vacated, and the remaining convictions are affirmed.

A handwritten signature in cursive script, reading "Becker, J.", is written over a horizontal line.

WE CONCUR:

Jan, J.

Grosse, J