IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JONATHAN MICHAEL CARTER, Appellant.	No. 38366-7-II UNPUBLISHED OPINION

Van Deren, J. — Jonathan Michael Carter appeals his conviction on two counts of first degree child molestation, arguing that: (1) his waiver of his right to a jury trial was not voluntary, knowing, and intelligent; (2) the trial court improperly allowed the State to amend the information after he testified; and (3) the trial court violated his due process rights by imposing a community custody condition possibly barring him from residing within 880 feet of a public or private school without resolving a relevant factual issue. We affirm.

FACTS

On January 4, 2008, the State charged Jonathan Michael Carter with three counts of first

degree child molestation[1] against "Bernadette."[2] On June 19, 2008, following a trial court colloquy, Carter filed a written waiver of his right to a jury trial.

During trial, Carter testified that he babysat Bernadette in "May or June" of 1994, before Bernadette was four years old. Report of Proceedings (RP) at 130. After Carter rested his case, the State successfully moved to amend the information, specifically, to change the time period during which the charged offense occurred from "between October 2, 1994 and May 1, 1996" to "between January 1, 1994 to May 1, 1996." Clerk's Papers (CP) at 11-12, 22-23. Carter objected to the amendment but did not ask for a continuance of the trial proceedings.

The trial court found Carter guilty of two counts[3] of first degree child molestation. It sentenced Carter to 125 months' confinement and 24 months' community custody.

Carter appeals.

ANALYSIS

I. Jury Trial Waiver

Carter admits that his written waiver indicates that he "was . . . aware that he did have the

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[1] RCW 9A.44.083(1) provides:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

[2] We use a fictitious name to protect a juvenile's right to confidentiality. Bernadette was born on October 2, 1990. On October 2, 1994, the beginning of the time period in the first amended information, she was exactly four years old. On January 1, 1994, the beginning of the time period in the second amended information, she was one day short of being three years and three months old.

[3] At closing, the State conceded that there was no evidence to find Carter guilty of a third count. The trial court agreed that there was no evidence supporting a third count and, accordingly, found Carter not guilty on this count.

right to trial by jury." Br. of Appellant at 14. But he argues that, because the colloquy was "short[,]" his waiver was not knowing, intelligent, and voluntary and, thus, his right to a jury trial was violated. Br. of Appellant at 14. Specifically, he argues that the colloquy was deficient because it did not reveal whether: (1) the court adequately informed him of the nature of the jury waiver, (2) he consulted with his attorney regarding the right, and (3) he understood that complete jury unanimity is necessary for a guilty verdict.

A. Standard of Review

Because the right to a jury trial is "an important constitutional right," we review the waiver of that right de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). We indulge "every reasonable presumption . . . against the waiver of such a right, absent an adequate record to the contrary." *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The State bears the burden to establish a valid waiver. *Wicke*, 91 Wn.2d at 645.

B. Waiver Was Effective

A defendant's waiver of his right to a jury trial must be "voluntary, knowing, and intelligent." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Under CrR 6.1(a), "[c]ases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court." A written waiver is not determinative but is "strong evidence" that the waiver is valid. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). "[A]ll that is required is a personal expression of waiver from the defendant." *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). This personal expression can be either a written waiver or a colloquy. *See Wicke*, 91 Wn.2d at 645-46. We do not require either a

"colloquy or on-the-record advice as to the consequences of a waiver" to hold a waiver valid. *Stegall*, 124 Wn.2d at 725.

Here, the trial court conducted a colloquy and Carter filed a written waiver. The trial court's colloquy[4] with Carter ascertained that Carter waived his right to a jury trial freely and voluntarily after consulting with his attorney:

> THE COURT: . . . . [Y]ou have executed a waiver of jury trial. Do you understand what that means that you waive your right to be tried by a jury, it would be just tried by the bench, the Court, by me.
> [CARTER]: Yes.
> THE COURT: And that you're doing so freely and voluntarily.
> [CARTER]: Yes, Your Honor.
> THE COURT: And after consulting with your attorney.
> [CARTER]: Yes, Your Honor.
> COURT: Okay.

RP at 170-71. Both the written waiver and the colloquy indicate Carter's personal expression of waiver and that he made the waiver knowingly, intelligently, and voluntarily and also indicate the trial court's consent to his waiver. Furthermore, contrary to Carter's claim, the trial court did ascertain that Carter had consulted with his attorney about waiving his right to a jury trial. Accordingly, we hold that the trial court did not violate his right to a jury trial.

II. Amended Information

Carter also argues that his Washington constitutional right[5] to "'demand the nature and cause of the accusation against him'" was violated when the trial court, after the defense rested its

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[4] The State erroneously states that "the defendant has not included the hearing on June 19, 2008, where [he] entered the written [w]aiver[; h]e simply did not order up that transcript." Br. of Resp't at 1-2. But the transcript is before us.

[5] Wash. Const. art. I, § 22 states: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him."

case, granted the State's motion to amend the information to change the date of the charged offense. Br. of Appellant at 15 (quoting Wash. Const. art. I, § 22). We disagree.

A. Standard of Review

We review a trial court's ruling on a motion to amend an information for abuse of discretion. *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). Abuse of discretion occurs when the ruling is manifestly unreasonable or the court exercised its discretion on untenable grounds or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

B. No Abuse of Discretion

Under CrR 2.1(d), a trial court "may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." The defendant bears the burden to show prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). Prejudice may occur when the amendment "leav[es the defendant] without adequate time to prepare a defense to a new charge." *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986) (*quoting State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980)). When the defendant does not request a continuance when confronted with the State's request to amend, we consider this "persuasive of lack of surprise and prejudice." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

Carter relies heavily on *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987) for the proposition that "'[a] criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.'" Br. of Appellant at 17 (emphasis omitted) (quoting 109 Wn.2d at 491). He argues that the change in time period does not make the charge either one of "a lesser degree" or "a lesser included offense." Br. of Appellant at 21.

But the *Pelkey* rule "is not applicable to all amendments to informations." *State v. DeBolt*, 61 Wn. App. 58, 61, 808 P.2d 794 (1991). An amendment during trial is permissible when the "amendment merely specifie[s] a different manner of committing the crime originally charged." *Pelkey*, 109 Wn.2d at 490. These permissible amendments include a change to the charging date because the "date . . . was not a material part of the 'criminal charge.'" *DeBolt*, 61 Wn. App. at 62. "Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *Gosser*, 33 Wn. App. at 435. Because the charging date is generally not a "material" element of the crime,[6] amendment of the date is "a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *DeBolt*, 61 Wn. App. at 61-62.

Here, the crime charged remained the same after the State's amendment. Carter neither requested a continuance in order to prepare a defense to the new time period, nor raised an alibi

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[6] Although first degree child molestation requires the State to show inter alia that the victim was under 12 years old and the perpetrator was at least 36 months older than the victim, such age restrictions do not make the charging date a "material" element of the crime for purposes of an amended information analysis. *See* RCW 9A.44.083(1). For instance, we have held that a midtrial amendment to the period during which the alleged second and third degree child rape occurred was proper because "the act of amending the dates [to conform to the proof at trial] did not change the substance of the offense or the degrees of the offenses." *State v. Ford*, 151 Wn. App. 530, 541, 213 P.3d 54 (2009), *review granted*, 168 Wn.2d 1005 (2010). Also, Division III of our court held that an amendment of an information charging first degree rape of a child to include an additional seven month period in which the alleged crime occurred was "a matter of form rather than substance" because the amendment did not: (1) charge a different or higher degree offense, (2) increase the number of counts, or (3) charge an alternative means of committing the offense. *State v. Havens*, 70 Wn. App. 251, 255, 852 P.2d 1120 (1993). Division I indicated that changes to charging periods may be unsurprising and necessary occurrences in sex crimes against children because "[c]hildren often cannot remember the exact date of an event, and in cases of sexual abuse, they may repress memory of that date." *DeBolt*, 61 Wn. App. at 61-62.

defense. The amendment to the time period was in response to and is consistent with Carter's own testimony about when he babysat Bernadette. Because the amendment conformed to the evidence at trial creating no surprise or substantial prejudice, we hold that the trial court did not abuse its discretion when it allowed the amendment.

Carter argues that the amendment of the time period from "between October 2, 1994 to May 1, 1996," to "between January 1, 1994 to May 1, 1996," prejudiced him in his preparation of the case. CP at 11-12, 22-23. Specifically, he states that "[h]ad the defense known that this was the allegation," he would have used an expert witness to test the "capacity of a three-year old to accurately remember" her experiences "some fourteen years later." Br. of Appellant at 18. Relying on the previous dates in the information, Carter apparently did not find it necessary to conduct the same test of her memory when she was 9 months older, because he did not raise this issue during his case before the amendment. Moreover, Carter's own testimony indicates that his only contact with Bernadette occurred in "May or June of . . . 1994," before she was four years old. RP at 130. Thus, an amended time period encompassing the time of contact to which he admits does not create substantial prejudice, and Carter's argument fails.

III. Community Custody Condition

Carter argues that his due process rights were violated when the trial court "imposed" the following community custody condition appearing in appendix A to the felony judgment and sentence: "If the offense was committed on or after July 24, 2005, you may not reside within

eight hundred eighty (880) feet of the facilities and grounds of a public or private school." Br. of Appellant at 22 (quoting CP at 93). Specifically, he argues that the court did not resolve whether the offense was committed "'on or after July 24, 2005,'" and, therefore, he is "left with the question" whether there is such a restriction on his residence. Br. of Appellant at 22-23.

Carter simply misreads the record. As Carter admits, paragraph 2.1 of the judgment and sentence states that the "Date of Crime" is "1/1/1994 to 5/1/1996." CP at 78 (emphasis omitted). The language to which Carter refers, states that the condition applies only "*[i]f* the offense was committed on or after July 24, 2005," CP at 93 (emphasis added). Furthermore, the judgment and sentence has a box checked indicating that, "[t]he defendant shall remain . . . within [and] outside of a specified geographical boundary, to wit: as determined by the Department of Corrections," but leaves unchecked the item immediately beneath it that states: "[t]he defendant shall not reside within 880 feet of the facilities or grounds of a public or private school." CP at 84 (emphasis omitted). Furthermore, Carter could not have committed first degree child molestation against Bernadette "on or after July 24, 2005," because, at that time, Bernadette would have been 14 years and 9 months or older, thus placing her outside the purview of the relevant statute. CP at 93; *see* RCW 9A.44.083(1). Thus, a plain reading of the judgment and sentence and its appendix A indicates that the community custody condition that Carter

complains about does not apply to him. Accordingly, we hold that Carter's due process rights were not violated.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, P.J.