IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEEANNA WHITE, Appellant.	No. 41544-5-II UNPUBLISHED OPINION

Armstrong, J. — Leeanna White appeals her conviction of assault in violation of a protection order. White argues that the trial court violated her constitutional rights to confront the witnesses against her by allowing two witnesses to testify by telephone. She also argues that her counsel ineffectively represented her by allowing the testimony and the information was constitutionally deficient. We affirm.

FACTS

A. Background

The State charged White with violating a no-contact order during the course of committing an assault, not amounting to first or second degree assault, a class C felony. RCW 26.50.110(4). White does not contest that a valid no-contact order prohibited her from contacting her grandmother, Edna Lingle.[1] She also admits that in violation of the order, she went to Lingle's apartment in Forks, Washington on August 17, 2010.

At trial, Lingle's next door neighbor, Jacquelyn Howard, testified by telephone that she was sitting on the front porch of her apartment when she heard arguing inside Lingle's apartment.

[1] Lingle has an advanced form of Huntington's disease, which causes uncontrolled movements.

Lingle, White, and Lingle's son, Larry Bolton, came out of the house. The three continued to argue on Lingle's front porch, and at some point Howard asked them to take the argument down the road. Despite Howard's request, the three continued to argue. The argument turned physical when Bolton pushed White away from Lingle, and White punched Lingle in the jaw. When Lingle fell, Howard called the police.

Before trial, Lingle told the prosecutor that White had not assaulted her and that she was not going to testify against White. Not surprisingly, White's attorney called Lingle as a witness, who then testified by telephone. Lingle testified, however, that White had assaulted her, explaining that while the two were arguing, White pulled her hair and flung her head to the kitchen floor. When asked where White assaulted her, Lingle responded, "In the kitchen," but later said, "We took the fight outside." Report of Proceedings (RP) at 45-46.

White testified that when she arrived at Lingle's house on August 17, 2010, she went into the kitchen and found Lingle standing on the kitchen counter, trying to reach cigarettes on top of the cabinet. When she tried to help Lingle off the counter, White lost her grip and Lingle slipped on the floor. Bolton arrived at that point, and in a drunken outburst, yelled for White to leave. After a short argument, White tried to leave but Bolton followed her out the door. Lingle approached and struck White on the jaw.

B. Procedural History

The State filed a motion for determination of probable cause. Attached to the motion was Officer Rowley's probable cause statement in which he stated that Lingle had told him White struck her in the head and back. Officer Rowley also reported that Howard heard an argument in

the apartment and saw White strike Lingle outside.

The information reads as follows:

> On or about the 17th day of August, 2010, in the County of Clallam, State of Washington, the above-named Defendant [Leanna Rae White], with knowledge that District Court II of Clallam County, had previously issued a protection order, restraining order, or no contact order pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in *City of Forks v. Leanne R. White*, Cause No. CR 23416, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding him or her from . . . knowingly remaining within, a specified distance of a location, and furthermore did intentionally assault another in a manner that does not amount to assault in the first or second degree to another, to-wit: Edna Lingle, contrary to the contrary [*sic*] to Revised Code of Washington RCW 26.50.110, a Class C felony.

Clerk's Papers (CP) at 22-23.

When the case came on for trial, White's counsel asked for and received a one day continuance to arrange for Lingle's transportation from Forks to Port Angeles. The next day, counsel suggested that Lingle testify by telephone because of her difficulties in traveling from Forks to Port Angeles. The State then asked the court to allow Howard, the neighbor, to testify by telephone because she had "childcare issues." RP at 2. The trial court asked whether both parties agreed to take testimony from the witnesses by telephone. Both parties said they did and, based on this stipulation, the trial court allowed both Lingle and Howard to testify by telephone. At the conclusion of the evidence, the trial court found White guilty.

ANALYSIS

I. Confrontation Clause

White argues that her confrontation rights were violated when the trial court allowed Howard, the principal State witness, to testify by telephone. White also contends that her right to

confrontation was violated when Lingle, a defense witness, became a prosecution witness and was still allowed to testify by telephone. The State counters that White waived the errors because she did not object to the testimony and, in fact, she asked that Lingle be permitted to testify by telephone and agreed to Howard testifying by telephone.[2] White asserts that she did not waive the challenge because she did not personally express her agreement to waive the right. We agree with the State.

A defendant can waive a fundamental constitutional right if she "'intentional[ly] relinquish[es] or abandon[s] [] a known right or privilege.'" *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). Stated in slightly different terms, a defendant's waiver is valid if done knowingly, voluntarily, and intelligently. *Thomas*, 128 Wn.2d at 558. The right to confront witnesses falls into the category of rights that trial counsel can waive as a matter of trial strategy without the defendant's personal expression of waiver. *Wilson v. Gray*, 345 F.2d 282, 287-88 (9th Cir. 1965) (holding that the right to confrontation was waived by trial counsel's stipulation to the matter being heard based on the transcript of the preliminary hearing); *see also Thomas*, 128 Wn.2d at 559-60 (stating this right is similar to the right to testify, right not to testify, and right to self-representation in that it can be waived by counsel).

White's counsel stipulated that Howard could testify by telephone. White was present when her attorney waived the right to confront Howard face-to-face. *See Wilson*, 345 F.2d at

[2] The State does not concede that the telephone testimony violated White's right to confront the witnesses, arguing that the telephone testimony was the "live testimony" required by the constitution. Br. of Resp't at 13-14.

287 (stating "in the presence of appellee and without any objection on his part, his counsel stipulated" to a waiver for the right to cross-examination and confrontation). And, in regards to Lingle's testimony, White's trial counsel actually requested that Lingle be allowed to testify by telephone and did so in White's presence.

White relies on *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979), to support her claim that the record must show a personal expression of waiver by defendant. *Wicke* is distinguishable because its analysis dealt with the right to a jury trial. *Wicke*, 91 Wn.2d at 644. Later cases have not extended this personal waiver requirement to confrontation rights. *See Thomas*, 128 Wn.2d at 559-60.

Accordingly, we hold that the defense counsel's stipulation to Howard's telephonic testimony and proposal of Lingle's telephonic testimony effectively waived White's right to face-to-face confrontation.

II. Ineffective Assistance

White argues that her trial counsel ineffectively represented her by agreeing that Howard could testify by telephone. She contends that if counsel had not so agreed, the trial court would have dismissed the case. She reasons that Howard, an indispensable State witness, was not present when the case was called for trial; the trial court would not have granted the State a continuance; and, the trial court would have dismissed the charge. White also faults counsel for failing to move for a mistrial when Lingle's testimony turned accusatorial rather than supportive of the defense.

Both the federal and state constitutions guarantee a defendant effective representation by

counsel. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To show that counsel provided ineffective representation, a defendant must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the trial outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689.

A. Stipulation to Howard's Testimony

The defendant has the burden of showing that her counsel had no legitimate strategic reason for counsel's trial decisions. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Defense counsel may be deficient where there is no reasonable basis for failing to submit a motion. *See State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001) (explaining that the court could find no reasonable basis not to bring a motion to suppress the defendant's statement to law enforcement).

A trial court may grant a continuance where a material witness is unavailable if: (1) there is a valid reason for the unavailability; (2) the witness will be available within a reasonable time frame; and (3) the defendant incurs no substantial prejudice from the continuance. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). But the court should not grant the State a

continuance for failure to secure a material witness's attendance at trial if the State has not followed the standards of due diligence. *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960). The issuance of a subpoena is evidence of due diligence. *Smith*, 56 Wn.2d at 370.

First, White has not shown that counsel's decision not to move for dismissal was anything other than strategic. Apparently neither side had its key witness available at the beginning of the first scheduled day of trial. Counsel could have reasonably decided that a compromise with the State that allowed the defense to present Lingle's testimony by telephone was better than fighting the State's motion for a continuance with the hope of having the case dismissed.

Moreover, it is not clear that the trial court would have denied the State a continuance. The State issued a subpoena to Howard, which demonstrates due diligence. Nothing in the record explains why Howard did not appear as subpoenaed. The trial court could have ruled that the State was not responsible for Howard's failure to attend and granted a short continuance until Howard could drive from Forks to Port Angeles. (The State points out that it could have taken Officer Rowley's testimony while waiting for Howard to arrive.) The record does not reflect any reason why a short recess to wait for Howard's arrival would have prejudiced White.

We conclude that White has not shown that counsel was ineffective for failing to move for dismissal.

B. Lingle's Reversal of Course--Mistrial

White cites no authority to support her argument that a witness called by the defense can convert into a witness against the defendant for purposes of raising a confrontation clause challenge. White also fails to cite authority for the proposition that when Lingle's testimony

turned accusatorial, White's counsel could have successfully moved for a mistrial.

White's counsel made a reasonable strategic decision to call Lingle based on Lingle's statement to the prosecutor that no assault occurred. The defense stated on the record that based on that information, "I definitely want her [Lingle] to appear and give testimony." RP at 2. It was certainly reasonable for counsel to anticipate a better result for White if Lingle had testified as expected. Thus, it was reasonable for White's counsel to call Lingle as a witness. And White cites no case that supports her argument that under these circumstances, White was entitled to a mistrial.

Accordingly, we hold that White has not shown her counsel was ineffective for failing to move for a mistrial.

III. Charging Documents

Finally, White argues, for the first time on appeal, that the information was fatally deficient. Specifically, White asserts she could not properly prepare a defense because the information did not specify the manner in which she committed the assault.

Both the United States Constitution and Washington State Constitution require the State to give the defendant notice of the crime it intends to prove. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ."); Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . ."). Thus, a charging document must contain "[*a*]*ll* essential elements of a crime." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) (emphasis added). Pursuant to the essential elements rule the State must include in the

charging document both the elements of the crime charged and the "*facts supporting every element of the offense*." *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

When a defendant challenges the charging document for the first time on appeal, we liberally construe the charging document in favor of finding notice. *Kjorsvik*, 117 Wn.2d at 105. Thus, we ask (1) whether the necessary facts appear in any form in the charging document; and, if so, (2) whether the defendant can show that she was nonetheless actually prejudiced by the charging document's unartful language. *Kjorsvik*, 117 Wn.2d at 105-06. We address the first prong of the test solely from the language on the face of the charging document. *Kjorsvik*, 117 Wn.2d at 106. We read the charging document "as a whole, according to common sense and including facts that are implied . . ." *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010). The second prong allows us to consider whether the defendant received actual notice. *Kjorsvik*, 117 Wn.2d at 106. In looking for actual notice, we can consider the certificate of probable cause. *Kjorsvik*, 117 Wn.2d at 111; *see also State v. Phillips*, 98 Wn. App. 936, 943-44, 991 P.2d 1195 (2000) (challenge to information fails because affidavit of probable cause set forth all necessary allegations).

Because White does not argue that the information lacked a necessary element, we turn to whether she can show the information's unartful language prejudiced her. *See Kjorsvik*, 117 Wn.2d 105-06. Here, the unartful language is the general language alleging assault when the testimony supports two possible assaults: (1) Lingle testified that the hair pulling in the kitchen was the assault; but, (2) Howard testified to an assault that occurred outside when White struck Lingle on the jaw. The State must allege the manner of committing a crime. *State v. Bray*, 52

Wn. App. 30, 34, 756 P.2d 1332 (1988). For example, in alternative means cases, it is error to try the defendant on the uncharged means because of the failure to provide notice to the defendant. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Thus, the State's general allegation of an assault, without stating factually what incident underlay the assault, is arguably unartful language.

The State's motion for determination of probable cause included Lingle's claim that she was "in a physical confrontation with WHITE as she and her son LARRY BOLTEN attempted to remove her from the residence," and "WHITE had struck her closed fist [sic] in the head and in the back." CP at 28-29. The motion also reports Howard's explanation that she heard an argument inside the apartment and she "observed WHITE striking LINGLE until the parties separated." CP at 29. Thus, the information, together with the probable cause affidavits, notified White of the outside assault but not an assault inside the apartment.

But White has not shown that the unartful language prejudiced her. The trial court explained in its oral ruling that it had to find only that an assault occurred at any time during the violation of the no-contact order. And the trial court convicted White of the outside assault (i.e., Howard's testimony), of which she had notice. The trial court explained that Howard testified to an assault outside the apartment, and she was close to the assault when it occurred. The trial court then stated, "Ms. Lingle testified there was an assault, although not as clearly [as Howard], but did testify that the assault started inside and 'we took it took [sic] outside,' which is consistent with Ms. Howard's observations." RP at 54. The trial court concluded that there was sufficient evidence that an assault occurred. Similarly, the findings of fact follow this same

reasoning: (1) Howard heard arguing inside; (2) Howard saw White hit Lingle outside; (3) Lingle testified to an assault inside, but also testified "we took it outside"; and (4) the "we took it outside" testimony was consistent with Howard's observations. CP at 20. We are satisfied that the trial court found White guilty of the outside assault and that the charging documents gave her notice that she must defend against the outside assault. We hold that the information provided sufficient notice.

Affirmed.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Worswick, A.C.J.