No. 28972-9-III

Korsmo, A.C.J. (dissenting) — This court should focus on the sufficiency of the evidence to support the jury's verdict rather than render an advisory opinion about a theory that the jury did not consider. The instructional theory is the normal focus for an appellate court's sufficiency review of a jury verdict; it also is how we address comparable errors in civil cases. This approach also is consistent with the cases addressing the closely analogous situation of improper amendments to the charging document during trial. For these reasons I dissent from the majority's approach to this case.

Moreover, there was sufficient evidence adduced to support either theory of custodial interference. This case must be retried because the jury was instructed on the elements of the wrong offense. Accordingly, I would reverse and remand this case for a new trial with correct instructions.[1]

Erroneous Elements Instruction

The majority correctly identifies the problem with the elements instruction in this case. The State charged Ms. Kirwin with violating RCW 9A.40.060(1)(c), which defines custodial interference in terms of a relative depriving a guardian of physical custody by

[1] I thus do not address whether the defendant's waiver of counsel was valid.

taking the children out of state. Clerk's Papers (CP) at 1-2. However, the elements instruction informed the jury that it was to decide if the mother deprived her ex-husband of his visitation time with the children under the parenting plan by taking them out of state, which constitutes a violation of RCW 9A.40.060(2)(c). CP at 36 (Instruction 6).

The state and federal constitutions require that an accused be informed of the charges he or she must face at trial. Const. art. I, § 22;[2] Sixth Amendment.[3] Because of the centrality of this notice to the ability to defend, it is error to instruct the jury on uncharged offenses or uncharged alternative theories. *E.g.*, *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The error can be harmless if other instructions define the crime in a manner that leaves only the charged alternative before the jury. *Severns*, 13 Wn.2d at 549; *Chino*, 117 Wn. App. at 540.

That is not the circumstance here. The crime of first degree custodial interference was defined for the jury consistent with the elements instruction. CP at 35 (Instruction 5). Thus, Ms. Kirwin was tried on a theory of the case that she was not informed about by the charging document. Since the definitional instruction supported the new theory,

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[2] "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof."

[3] "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

the error was not harmless. *Severns*, 13 Wn.2d 542; *Chino*, 117 Wn. App. 531. She is entitled to a new trial.

Focus of Sufficiency Review

This typical resolution would normally be the end of the discussion. However, instead of seeking a new trial, Ms. Kirwin wants the charges dismissed due to alleged insufficiency of the evidence to support the theory stated in the charging document. She provides no authority in support of her argument, which is a question of first impression. Her theory is not consistent with the reason appellate courts conduct sufficiency review, nor is it consistent with the treatment of this error in untimely amendment cases or in civil cases.

Purpose of Review. The United States Supreme Court first applied the proof beyond a reasonable doubt standard in criminal cases to the states in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). One of the ensuing questions was the standard to be applied to adjudge state compliance with *Winship*, an issue addressed in *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). There the court determined that federal courts would look to see if the state verdict was supported by evidence sufficient to prove each element of the crime beyond a reasonable doubt. *Id.* at 324.

Unsurprising, the Washington Supreme Court then adopted the same standard for reviewing the sufficiency of the evidence to support a jury verdict in *State v. Green*, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). The courts of this state have uniformly applied that standard ever since to review verdicts reached by juries and judges.

Neither the Washington Supreme Court nor the United States Supreme Court has weighed in on the problem of a variance between the charging document and the jury instructions in a criminal case. The latter court once dealt with the situation where the defendants had argued on appeal that their conviction under section 2 of an Arkansas statute was invalid because the evidence was insufficient; the Arkansas Supreme Court upheld the convictions because the evidence supported a conviction under section 1 of the statute. *Cole v. Arkansas*, 333 U.S. 196, 197-201, 92 L. Ed. 644, 68 S. Ct. 514 (1948). The United States Supreme Court promptly reversed and remanded, finding that because the defendants had been charged and convicted under section 2 of the statute, they had a due process right to have their challenges to a section 2 conviction heard. *Id*. at 201-202. The court ruled:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id. at 202.

One could argue from this quote that the United States Supreme Court would believe that the current issue should be analyzed from the standpoint of what the jury decided rather than what the charging document said. However, *Cole* is easily distinguished for the same reason that the cases cited by the majority are distinguishable—all of the cases involved fact patterns where the defendant was charged and the jury instructed on the same crime. In none of those cases was there a variance between the charged crime and the one in the instructions given the jury. Thus, there is no governing authority on this issue.

We should begin our review by recalling our function here. In the case of verdicts, as discussed above, an appellate court applies the *Green* standard to see if there was a factual basis for the trier-of-fact returning the verdict it did. That should be our focus here. Ms. Kirwin presents no reason justifying abandonment of our traditional focus on the jury's verdict, let alone changing that focus to the charging document.

Analogous Cases. There also is persuasive authority suggesting that review of the verdict, not the charge, is the appropriate focus. Like the majority, I find analogous support from the cases involving amendments to the charging document during trial. However, it is the remedy aspect of those cases that points to the correct resolution of this case.

It is axiomatic that trial courts should not allow amendments to charging documents that state a new crime[4] after the State has rested its case because they limit the defendant's ability to defend against the charge due to lack of notice of what is at issue.[5] *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). When a trial court permits such an amendment after the State has rested, and the jury then returns a verdict on the amended charge, the remedy is a new trial on the amended charge since the defendant would then have sufficient notice to mount a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787-791, 888 P.2d 1177 (1995); *State v. Markle*, 118 Wn.2d 424, 439-441, 823 P.2d 1101 (1992).[6]

"Jury instructions and charging documents serve different functions." *Vangerpen*,

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[4] Amendments that merely change the method of committing the offense or add additional counts are permitted at trial. *E.g.*, *State v. Schaffer*, 120 Wn.2d 616, 621-622, 845 P.2d 281 (1993); *State v. Pelkey*, 109 Wn.2d 484, 490-491, 745 P.2d 854 (1987); *State v. Debolt*, 61 Wn. App. 58, 61, 808 P.2d 794 (1991); *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010 (1990); *State v. Mahmood*, 45 Wn. App. 200, 205-206, 724 P.2d 1021, *review denied*, 107 Wn.2d 1002 (1986).

[5] "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. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her." *Pelkey*, 109 Wn.2d at 491.

[6] *Accord State v. Quismundo*, 164 Wn.2d 499, 503-504, 192 P.3d 342 (2008); *State v. Cochrane*, 160 Wn. App. 18, 26, 253 P.3d 95 (2011); *State v. Hull*, 83 Wn. App. 786, 799-802, 924 P.2d 375 (1996), *review denied*, 131 Wn.2d 1016 (1997).

125 Wn.2d at 788. The charging document is not a concern for the jury. Its primary purpose is to alert the defendant to the charge and underlying conduct at issue. *Pelkey*, 109 Wn.2d at 491. From the jury's perspective, the case is contained in the elements instruction and any accompanying definitional instructions. Thus, when a court instructs the jury on an incorrect theory of the case, it is the functional equivalent of amending the charging document to a new crime and then instructing the jury on that new offense. In each instance, the defendant is facing a jury's verdict on a crime other than the one she had been notified she was facing. In each instance, the error requires a new trial. *Markle*, 118 Wn.2d at 441 (erroneous amendment to new charge); *Severns*, 13 Wn.2d at 552 (erroneous instruction on additional uncharged alternatives).

Consistent with these cases, our sufficiency review in this case should be focused on the jury's verdict rather than the unconsidered, but charged, theory of liability. That is the same approach taken in civil cases. When a jury is erroneously instructed on the elements of a civil claim, review focuses on whether the evidence supports the jury instruction. *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 590, 262 P.2d 765 (1953); *Tonkovich v. Dep't of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948).[7]

[7] As stated in *Noland*, "[n]o assignments of error being directed to any of the instructions, they became the law of the case on this appeal, and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge." 43 Wn.2d at 590.

This is recognized as an application of the law of the case doctrine. *Noland*, 43 Wn.2d at 590. That doctrine has also long applied in criminal cases. *E.g.*, *State v. Willis*, 153 Wn.2d 366, 374-375, 103 P.3d 1213 (2005); *State v. McGilvery*, 20 Wash. 240, 251, 55 P. 115 (1898). Thus, when the prosecution alleges an extraneous element in a charging document and then undertakes to prove that additional element by including it in the jury instructions, the sufficiency review includes the additional element. *State v. Hickman*, 135 Wn.2d 97, 102-103, 954 P.2d 900 (1998).

The focus of review in all of these circumstances is on the elements actually considered by the jury instead of what should have been considered. In the current case, this court likewise should focus on the elements considered by the jury rather than what ought to have been submitted to the jury. These cases are the most analogous to our current fact pattern because the error here was that Ms. Kirwin was not given prior notice of the theory of liability ultimately submitted to the jury. Nothing cited by the majority is nearly as close a fit legally or factually.[8] The difference between civil and criminal

[8] I believe the majority's erroneous focus, based on a misreading of the *Vangerpen* line of cases, is best captured by this sentence from the majority's opinion: "Because a defendant is entitled to have the sufficiency of the evidence to convict her tested against the original information." Majority at 16. The problem with the wrongful amendment cases is that the defendant does not receive timely notice of the crime she is facing. *Pelkey*, 109 Wn.2d at 491. If it were a question of measuring the evidence by the charging document, instead of the instructions given the jury, then the remedy could not be a new trial. *See Markle*, 118 Wn.2d at 441.

charging is the constitutionally mandated notice required in a criminal case. *Pelkey*, 109 Wn.2d at 491. The majority does not explain why the constitutional notice requirement in a criminal case justifies a different focus of review than the well-settled civil standard. There is no connection between notice and evidentiary sufficiency. Here, as in every other case where improper notice was given, the appropriate remedy is a new trial rather than dismissal of charges. *Vangerpen*, 125 Wn.2d at 791.[9]

Application

Little need be said about the sufficiency of the evidence presented at trial. Like the majority, I agree there was ample evidence to support the verdict returned by the jury on the uncharged (but instructed upon) theory of custodial interference by interruption of visitation rights. With respect to the charged (but unconsidered) theory of interference with the father's custody, the failure to serve the defendant with the order changing custody to her former husband should not be dispositive. Ms. Kirwin fled the weekend

[9] The majority concludes its opinion with an amusing hypothetical, largely tracking *Quismundo* except for the evidentiary insufficiency challenge, in which a string of errors by the prosecutor and trial judge deprive the defendant of his right to raise a sufficiency of the evidence challenge. There are two simple answers to the hypothetical. First, government mistakes that deprive a defendant of a fair trial are remediable by CrR 8.3(b) and the hypothetical defendant would obtain his dismissal without a new trial. Second, this case is not that hypothetical because if the trial court had granted a motion to amend the theory of kidnapping in this case, it would not have been "wrongful" since amendments to the means of committing a crime are proper even at trial. *See* note 5, *infra*, at 6.

that the notice of the hearing to change custody was served at her mother's house.[10] When told by her mother that she had 20 days to respond to the June 12 hearing, Ms. Kirwin stated, "No, I don't" and ripped the papers in half. Report of Proceedings (Feb. 23, 2010-Trial) at 69. She then took off with the children in the middle of the night. *Id.* Her willful ignorance of the court's order should not immunize her from violating it. If this theory of the case had been submitted, the jury could have considered her flight as a basis for inferring her knowledge of the change in custody. Accordingly, the evidence was sufficient to support even the hypothetical alternative charge the jury did not consider.

Ms. Kirwin should be given a new trial due to the instructional error. She is not

[10] While the record could certainly be stronger, the majority merely speculates that the papers served on Ms. Kirwin were for yet another futile contempt hearing. In fact, Plaintiff's Exhibit 1, the order changing custody to the father, was entered at the hearing on June 12 that Ms. Kirwin had been summoned to attend. Unless the trial court entered the change of custody order without proper service and calendaring, the documents served in late May were for the custody hearing, which is the only matter this record identifies as occurring June 12.

entitled to dismissal because the evidence did support the jury's actual verdict. I respectfully dissent.

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Korsmo, A.C.J.