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State v. Blankenship Appellant's Brief Dckt. 40354

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Appellant, vs. GARY DEAN BLANKENSHIP, Defendant-Respondent.	)	No. 40354 Bonner Co. Case No. CR-2012-1121

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature of the Case

The state appeals from the district court's order denying the state's motion to amend and granting Gary Dean Blankenship's motion to dismiss the Amended Information that charged him with rape.

Statement of Facts and Course of Proceedings

Blankenship sexually abused his stepdaughter, B.C., for a number of years, beginning when B.C. was approximately seven years old. (P.H. Tr., p.8, Ls.8-11; p.28, Ls.7-8; p.29, Ls.2-14; p.40, L.24 – p.41, L.3; p.61, Ls.17-21.) The abuse culminated in the rape of B.C. in the spring of 1997, when B.C. was 16 years old. (P.H. Tr., p.12, L.7 – p.13, L.18; p.17, L.24 – p.22, L.15; p.29, Ls.15-22.) B.C. disclosed the abuse to law enforcement for the first time many years later, in 2012. (R., p.15; P.H. Tr., p.10, L.19 – p.11, L.24.)

On March 15, 2012, the state filed a Criminal Complaint charging Blankenship with two counts of lewd conduct with a minor under 16 years of age, with Count I being alleged to have occurred "on or about 1988 through 1996" and Count II being alleged to have occurred "on or about 1990." (R., pp.7-8.) Upon recognizing that the crimes charged were barred by the applicable statute of limitations, the state filed an Amended Criminal Complaint, on May 30, 2012, alleging a single count of rape, in violation of Idaho Code § 18-1601. (R., pp.44-45.) Specifically, the amended complaint alleged:

> The Defendant, **Gary Dean Blankenship**, on or about Spring 1997, in the County of Bonner, State of Idaho, did penetrate the vaginal opening of [B.C.], a female person, with his penis and

> where [B.C.] was under the age of Eighteen (18) years, to-wit; of the age of Fifteen (15) or Sixteen (16) years old, and where Defendant at the time of the commission of the act was approximately Thirty-four (34) years of age.

(R., p.44 (emphasis original).) Following a preliminary hearing, the magistrate found probable cause to believe the crime had been committed and bound Blankenship over on the charge. (R., pp.46-56; see also P.H. Tr., p.73, L.22 – p.75, L.2.)

The state thereafter filed its Information and, subsequently, an Amended Information, charging Blankenship with rape. (R., pp.59-62.) Both the Information and the Amended Information used the same charging language that was contained in the Amended Criminal Complaint. (Compare R., p.44 with pp.59-61.) On July 11, 2012, Blankenship filed a Motion to Dismiss and a memorandum in support thereof, asserting as the basis for dismissal that "prosecution of the alleged crime is barred by the Statute of Limitations." (R., pp.75-80.) Specifically, Blankenship argued that because the Amended Information alleged a rape on the theory that B.C. was "under the age of Eighteen (18) years," the five-year limitation period for bringing a statutory rape charge applied and prevented the prosecution of Blankenship for the charged crime.[1] (R., pp.77-80; 8/9/12 Tr., p.3, L.5 – p.4, L.23.) The state opposed Blankenship's Motion to Dismiss and also filed its own motion to amend the

[1] Idaho Code § 19-402(1) establishes a five-year limitation period for the prosecution of "any felony other than murder, voluntary manslaughter, rape pursuant to section 18-6101 2., 3., 4., 5. or 7., or section 18-6108, Idaho Code ...." A prosecution for statutory rape pursuant to I.C. § 18-6101(1) is not excepted from the five-year limitation period.

Information, for a second time, "to more specifically allege facts constituting the alleged crime for which the Defendant has been charged." (R., p.103.) Specifically, the state sought to amend the charging document to allege facts constituting forcible rape, a charge that the state asserted was both supported by the evidence at the preliminary hearing and not barred by the statute of limitations.[2] (8/9/12 Tr., p.9, L.11 – p.13, L.4.)

After a hearing, the district court denied the state's motion to amend the Information and granted Blankenship's motion to dismiss. (R., pp.105-13.) Regarding the state's motion to amend, the district court concluded that allowing the proposed amendment to allege forcible rape would prejudice Blankenship's substantial rights because he was not put on notice, before the preliminary hearing, that he would have to defend against a forcible rape charge and was therefore denied the right of cross examination. (R., pp.109-10.) The court also concluded that the evidence presented by the state at the preliminary hearing was not sufficient to support a charge of forcible rape. (R., pp.110-11.) Regarding Blankenship's motion to dismiss, the court concluded that the prosecution of Blankenship for the rape of B.C. in the Spring of 1997, on the charged theory that B.C. was "under the age of Eighteen (18) years," was barred by the five-year limitation period applicable to statutory rape. (R., pp.111-12.) The court thus dismissed the case without prejudice, stating in conclusion that, "if the prosecution concludes there are sufficient facts to charge Mr. Blankenship

[2] Pursuant to I.C. § 19-401, "[t]here is no limitation of time within which a prosecution for" forcible rape, I.C. § 18-6101(3) and/or (4), "must be commenced."

with Forcible Rape, it can pursue this new charge in accordance with the requirements of constitutional due process." (R., p.113.) The state timely appealed. (R., pp.121-23.)

ISSUE

Did the district court apply an incorrect legal standard and, therefore, abuse its discretion by dismissing the Information rather than allowing an amendment?

ARGUMENT

The District Court Applied An Incorrect Legal Standard And, Therefore, Abused Its Discretion By Dismissing The Information Rather Than Permitting The State's Proposed Amendment

A. Introduction

The district court denied amendment of the Information from "statutory" rape to forcible rape[3] on two bases: First, it concluded that allowing the amendment would deny Blankenship the right of cross examination. Second, it concluded the evidence presented at the preliminary hearing was insufficient to support a finding of probable cause for forcible rape. (R., pp.109-11.) The district court erred in respect to both rulings. As to the first basis, it is well settled that the right of confrontation does not apply to pretrial probable cause determinations at preliminary hearings or grand juries, and therefore Blankenship had no right to cross examination that could have been denied. As to the second, the district court again applied an incorrect legal standard instead of the two-prong test of whether the amendment charged a different or additional offense and whether the proposed amendment would prejudice the defendant's ability to defend himself at trial.

B. Standard Of Review

The decision whether to allow the state to amend an Information is a matter within the discretion of the trial court. State v. LaMere, 103 Idaho 839,

[3] The state does not challenge on appeal that the statutory rape charge was barred by the statute of limitation. It does not appear from the record that Blankenship has contended that a forcible rape charge would be barred by the applicable statute of limitation.

655 P.2d 46 (1982); State v. Tribe, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994). In evaluating whether the trial court abused its discretion, this Court considers (1) whether the trial court perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with any applicable legal standards; and (3) whether the trial court exercised reason in reaching its decision. State v. Miller, 133 Idaho 454, 456, 988 P.2d 680, 682 (1999) (citation omitted).

C. The District Court Erred As A Matter Of Law When It Concluded That The Amendment Would Deprive Blankenship Of The Right To Cross Examine The State's Witnesses At The Preliminary Hearing Because Confrontation Is A Trial Right Inapplicable At The Probable Cause Stage Of Criminal Proceedings

"The court may permit a complaint, an information or indictment to be amended at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." I.C.R. 7(e). "The rule's reference to prejudice to substantial rights means prejudice to the defendant's *ability to defend against the charge*." State v. Herrera, 152 Idaho 24, 31, 266 P.3d 499, 506 (Ct. App. 2011) (emphasis added). Thus, the relevant inquiry is whether the amendment would prejudice the defendant at trial. Id. ("Herrera has shown no *trial prejudice*" (emphasis added)).

The court found that Blankenship suffered prejudice to his "substantial right to due process" because he was not provided notice that the state intended to proceed under a forcible rape theory and therefore "did not cross-examine the State's witnesses on these issues." (R., p.110.) The district court erred because

the right to confrontation did not apply to Blankenship's preliminary hearing, and cross examination at a preliminary hearing is not prerequisite to a fair trial.

"[T]he right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (emphasis original) (citations omitted) (holding that "the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial"). This interpretation extends beyond pretrial discovery to preliminary hearings. See Graves v. State, 307 S.W.3d 483, 489 (Tex. App. 2010) (in holding that the right to confront does not attach until trial, noted that "[m]any other jurisdictions have held that the federal Confrontation Clause does not apply to preliminary hearings"); Oakes v. Commonwealth, 320 S.W.3d 50, 55 (Kentucky 2010) (holding as a matter of first impression that the Sixth Amendment does not apply to pre-trial hearings, a holding consistent with "every other state ruling on this issue reject[ing] claims that the Confrontation Clause applies to pre-trial hearings); State v. Timmerman, 218 P.3d 590, 594 (Utah 2009) ("[W]e hold that the federal Confrontation Clause does not apply to preliminary hearings. In so doing, we note that a substantial number of jurisdictions have reached the same conclusion."). Indeed, if the right to cross examination at a preliminary hearing were required by due process for the fairness of a trial, the state would be prohibited from proceedings by grand jury. Idaho Const., Art. I, § 8 (state may proceed in criminal case by Information or Indictment).

The district court erred when it held that cross examination at the preliminary hearing was required for Blankenship to obtain a fair trial. Because the only prejudice identified by the trial court was not prejudicial as a matter of law, the district court erred when it denied the requested amendment.

D. The District Court's Alternative Holding That The Amendment Is Not Supported By The Evidence Of The Preliminary Hearing Is Also Erroneous

The district court alternatively held that the amendment should be denied because "the State did not elicit sufficient evidence to support a charge of forcible rape." (R., pp.110-11.) This analysis is wrong because the district court did not apply the proper legal standard for ruling on a motion to amend. Alternatively, the district court erred in concluding the evidence did not support probable cause to believe that Blankenship raped the victim.

As set forth above, the proper test for allowing an amendment is two-fold: whether the proposed amendment charges an "additional or different offense" and whether the proposed amendment prejudices the "substantial rights of the defendant." I.C.R. 7(e). The district court did not apply this test when it concluded the state had failed to establish probable cause. (R., pp.110-11.) Application of the correct legal standard shows that the district court erred.

First, it is well established in Idaho that an amendment from one type of rape to another does not charge an additional or different offense. State v. LaMere, 103 Idaho 839, 842 n.4, 655 P.2d 46, 49 n.4 (1982) (amending Information from forcible rape to statutory rape did not allege a different crime); State v. Banks, 113 Idaho 54, 56-57, 740 P.2d 1039, 1041-42 (Ct. App. 1987)

(amending Information from forcible rape to statutory rape did not charge different crime because there was only one rape). The sufficiency of the evidence presented at the preliminary hearing is irrelevant to this inquiry.

The sufficiency of the evidence at the preliminary hearing is also irrelevant to the second prong of the test, whether Blankenship would be prejudiced at trial. "The rule's reference to prejudice to substantial rights means prejudice to the defendant's *ability to defend against the charge*." State v. Herrera, 152 Idaho 24, 31, 266 P.3d 499, 506 (Ct. App. 2011) (emphasis added). The district court made no analysis of how review of the evidence at the preliminary hearing would affect Blankenship's ability to defend himself at trial, and indeed, there is nothing in the record to suggest that a new preliminary hearing would in any way facilitate Blankenship's trial preparation.

The district court in this instance did not apply the well-established two-prong test for amendment when it reviewed the sufficiency of the evidence at the preliminary hearing. It therefore abused its discretion.

Even if the sufficiency of the evidence at the preliminary hearing were relevant to the motion to amend the district court erred. The purpose of the preliminary hearing is quite limited. State v. Williams, 103 Idaho 635, 644-45, 651 P.2d 569, 578-79 (Ct. App. 1982), overruled on other grounds State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984). The finding of probable cause must be based upon substantial evidence on every material element of the offense charged, and this test may be satisfied through circumstantial evidence and reasonable inferences to be drawn therefrom. State v. Reyes, 139

Idaho 502, 504, 80 P.3d 1103, 1105 (Ct. App. 2003); State v. Munhall, 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct. App. 1990). The state is not required to produce all of its evidence at a preliminary examination. Carey v. State, 91 Idaho 706, 709, 429 P.2d 836, 839 (1967). Rather, the state need only show that a crime was committed and that there is probable cause to believe the accused committed it. State v. Gibson, 106 Idaho 54, 57, 675 P.2d 33, 36 (1983) ("it is sufficient to state that the evidence produced by the State at the preliminary hearing established that a crime had been committed and a reasonable person would believe that Gibson had probably or likely participated in the commission of the offense charged"). Reviewing courts will not substitute their judgment for that of the magistrate as to the weight of the evidence and a probable cause finding will not be disturbed if any reasonable view of the evidence, including permissible inferences, support findings that the offense occurred and the accused committed it. Id. (citing State v. Holcomb, 128 Idaho 296, 299, 912 P.2d 664, 667 (Ct. App. 1995)).

The state moved to amend to forcible rape under the theory that the victim's resistance was overcome by force or violence or that she was prevented from resistance due to threat. I.C. § 18-6101 (3) or (4) (1994). The victim testified at the preliminary hearing that Blankenship, her stepfather, "raped [her]." (P.H. Tr., p.12, L.20.) She was "[a]pproximately 16," and a sophomore in high school. (P.H. Tr., p.13, Ls.3-6; p.18, Ls.4-6.) He went to her bedroom, undressed, and told her he "wanted to take [her] virginity." (P.H. Tr., p.18, Ls.15-23.) He stated he "knew that [she] wanted it." (P.H. Tr., p.198, L.24 – p.19, L.5.)

He then either took off her clothes or "made [her] take off [her] clothes." (P.H. Tr., p.19, Ls.5-9.) He then put his penis in her vagina "very forcefully." (P.H. Tr., p.20, Ls.1-5.) She did not fight him because she knew that would be "useless" because of prior physical and sexual abuse over the course of several years. (P.H. Tr., p.21, Ls.11-24; p.26, L.5-24; p.28, Ls.7-10; p.29, Ls.10-14; p.40, L.22 – p.41, L.8; p.47, Ls.19-22; p.49, Ls.11-24; p.50, L.22 – p.51, L.6; p.61, L.3 – p.62, L.13.) Given the history of abuse by which the victim learned it was useless to physically resist, the youth and inexperience of the victim, and the testimony that Blankenship penetrated her "very forcefully," the district court erred by concluding that the state had not met the relatively low threshold of establishing probable cause.

Because the amendment would not, as a matter of law, have charged an "additional or different offense" and would not have prejudiced the "substantial rights of the defendant" to a fair trial, the district court erred by denying the amendment.

CONCLUSION

The state respectfully requests that this Court reverse the district court's order denying the state's motion to amend and granting Blankenship's motion to

dismiss, and that the case be remanded for further proceedings on the Second Amended Information.

DATED this 26th day of March 2013.

KENNETH JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of March 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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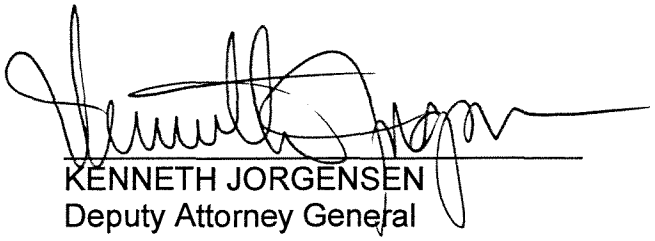

KENNETH JORGENSEN
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KKJ/pm