

COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA0124
El Paso County District Court Nos. 00CR3561 & 00CR3897
Honorable Thomas L. Kennedy, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Randy A. Davis,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II

Opinion by: JUDGE LOEB

Rothenberg, J., concurs

Dailey, J., concurs in part and dissents in part

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: December 1, 2005

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Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

Defendant, Randy A. Davis, appeals the judgment of conviction entered on jury verdicts finding him guilty of attempt to commit sexual assault and bribing a witness or victim of a crime. We affirm in part, reverse in part, and remand for further proceedings.

The victim was defendant's former girlfriend, and they had held themselves out as husband and wife until April 2000. Defendant and the victim remained friends, and after they separated, the victim occasionally slept on the couch in defendant's trailer. On September 8, 2000, defendant, the victim, and a roommate of defendant were all drinking in defendant's trailer. Shortly after midnight, defendant went into his bedroom, the roommate went into another bedroom, and the victim went to sleep on the couch. As she was falling asleep, defendant, who was naked, came down the hall, picked the victim up, carried her to his bedroom, and dropped her on the bed.

Defendant straddled the victim, put a pillow over her face, and started to rip off her dress, breaking one of the shoulder straps. He choked her with his hands and threatened to kill her. She

momentarily lost consciousness. The victim was so terrified that she lost control of her bowel functions. Defendant then attempted to insert his flaccid penis into the victim's mouth. The victim was screaming, and so defendant put the pillow over her head again, but she banged on the walls with her hands.

When the roommate heard the victim's screams, he walked into defendant's bedroom and told defendant to get off the victim. The victim then ran to a phone and called 911, and defendant fled.

Defendant was convicted of attempt to commit sexual assault, violating a restraining order, bribing a witness or victim of a crime, and assault in the third degree. He appeals only his convictions for attempted sexual assault and bribery.

I.

Defendant contends the trial court erred by instructing the jury on attempt to commit sexual assault by causing the submission of the victim by actual application of physical force or by threat of imminent death, when those offenses were never charged in the information. Specifically, defendant contends that Instruction 19, the elemental instruction on sexual assault, constituted a constructive amendment of the information, thus

depriving him of his due process right to notice of the charge against him. We agree in part and, accordingly, reverse the conviction and remand for a new trial.

At trial, the jury was instructed on the elements of sexual assault in Instruction 19 as follows:

The elements of the crime of sexual assault are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual penetration on a person and
5. caused submission of that person,
6. through the actual application of physical force
or
5. caused submission of that person,
6. by threat of imminent death to be inflicted upon anyone, and
7. the person submitting believed the defendant had the present ability to execute the threat.

Because defendant did not object to this instruction at trial or otherwise claim that it constituted a constructive amendment of the information, we apply the plain error standard of review. People v. Miller, 113 P.3d 743, 745 (Colo. 2005); People v. Foster, 971 P.2d 1082, 1087 (Colo. App. 1998). Under this standard, the error must so undermine the fundamental fairness of the trial itself as to cast

serious doubt on the reliability of the judgment of conviction.

People v. Miller, *supra*, 113 P.3d at 750.

An accused person is entitled to be tried on the specific charge contained in the information. Casadas v. People, 134 Colo. 244, 248, 304 P.2d 626, 628 (1956).

However, not every variance from the actual charge is fatal.

Section 16-10-202, C.R.S. 2005, provides:

When on the trial of any indictment, information, felony complaint, or complaint for any offense there appears to be any variance between the statements in the indictment, complaint, or information and the evidence offered in proof thereof . . . such variance is not grounds for the acquittal of the defendant, unless the court before which such trial be had finds such variance is material to the merits of the case or may be prejudicial to the defendant. No indictment, information, felony complaint, or complaint shall be deemed insufficient nor shall the trial, judgment, or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits.

The law recognizes two types of variances between the charge contained in the charging document and the charge of which a defendant is convicted. People v. Rodriguez, 914 P.2d 230, 257 (Colo. 1996). One type is a simple variance, which occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the charging instrument.

With respect to a simple variance, convictions generally are sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the charging document. United States v. Miller, 471 U.S. 130, 136, 105 S.Ct. 1811, 1815, 85 L.Ed.2d 99 (1985); People v. Rodriguez, *supra*.

The second type of variance is a constructive amendment, which changes an essential element of the charged offense and thereby alters the substance of the charging instrument. People v. Rodriguez, *supra*. The constitution prohibits those amendments that effectively subject a defendant to the risk of conviction for an offense that was not originally charged in the charging instrument. People v. Rodriguez, *supra*; People v. Petschow, 119 P.3d 495, 504 (Colo. App. 2004); People v. Weinreich, 98 P.3d 920 (Colo. App. 2004), *aff'd*, 119 P.3d 1073 (Colo. 2005); *see* United States v. Apodaca, 843 F.2d 421, 428 (10th Cir. 1988) (“An indictment is constructively amended if the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment.”) .

Further, technical defects in an information do not require reversal unless the substantial rights of the defendant are prejudiced. The defendant is only entitled to reversal if he was prejudiced, surprised, or hampered in his defense. See § 16-10-202; People v. Rodriguez, supra, 914 P.2d at 259; People v. Daniels, 973 P.2d 641, 646 (Colo. App. 1998)(reversal not required where defendant was put on adequate notice of prosecution's motion to amend information and could properly defend himself at trial).

A.

Defendant first argues that the trial court improperly instructed the jury on attempt to commit sexual assault by causing submission of the victim by actual application of physical force. Specifically, defendant contends that the prosecution never charged him with such an offense, because the applicable paragraph in the information erroneously contained the name of a person other than defendant, and thus, instructing the jury on this offense amounted to an improper constructive amendment. We disagree.

The information provided as follows:

COUNT TWO: CRIMINAL ATTEMPT TO COMMIT
SEXUAL ASSAULT

On or about September 8, 2000, RANDY ALAN DAVIS did unlawfully and feloniously attempt to commit the crime of Sexual Assault, and did engage in conduct constituting a substantial step toward the commission of said crime, as defined by C.R.S. 18-3-402(1)(a); RANDY ALAN DAVIS did unlawfully, feloniously, and knowingly attempt to inflict sexual penetration on [the victim] by means of sufficient consequence reasonably calculated to cause submission against [the victim's] will and MIGUEL A. CASILLAS attempted to cause submission of [the victim] through the actual application of physical force and physical violence; In violation of Colorado Revised Statutes, 18-3-402(1)(a) and (4)(a), and 18-2-101, as amended Criminal Attempt to Commit Sexual Assault (F-4).

(Emphasis added.)

The first part of count two in the information tracks § 18-3-402(1)(a), C.R.S. 2005, which provides that a person who knowingly inflicts sexual penetration on a victim commits sexual assault if the person “causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim’s will.” This offense is a class 4 felony, and the attempt thereof is a class 5 felony. The second part of count two in the information tracks § 18-3-402(4)(a), C.R.S. 2005, which provides that sexual assault is a class 3 felony (and the attempt thereof is a class 4 felony) if the person “causes submission of the victim

through the actual application of physical force or physical violence.”

At the preliminary hearing, the prosecution presented evidence on count two, including testimony by the victim that defendant used physical force and violence.

At a subsequent pretrial hearing, the prosecutor noted the mistake in the information, which substituted another man's name for defendant's in the sentence charging the use of physical force and violence, and asked the court to amend the information by interlineation with defendant's name in place of the incorrect name. There was no objection by defendant to the proposed amendment. However, the record does not reflect an amendment by interlineation by the court or a formally filed amendment by the prosecution.

We conclude there was no constructive amendment of the information because there is no possibility that defendant was convicted of an offense other than that charged. Here, there was no dispute as to the identity of the perpetrator. The record shows that defendant was on notice that he was being charged with attempted sexual assault under § 18-3-402(4)(a). His name was on the

information, and the insertion of an obviously incorrect name in the portion of count two concerning the use of physical force was, in our view, simply a mistake. Furthermore, defendant was specifically on notice and aware that he was being charged under § 18-3-402(4)(a) because of the prosecutor's request to amend the charge prior to trial. See People v. Daniels, supra, 973 P.2d at 646 ("Regardless of whether the motion to amend the information was filed or was lost, defendant was aware of it. Thus, he was put on adequate notice and could properly defend himself during the . . . trial."); People v. Thomas, 832 P.2d 990 (Colo. App. 1991).

Defendant did not object to this proposed amendment and was in no way prejudiced by the incorrect name in the information. See People v. Rodriguez, supra, 914 P.2d at 259 (the defendant is entitled to reversal only if he was prejudiced, surprised, or hampered in his defense); People v. Thomas, supra, 832 P.2d at 992 (the prosecution's failure actually to file an amended information, where the defendant was on notice of the proposed amendment, did not result in a lack of jurisdiction, nor was it an error so grave as to require vacation of the conviction).

We thus conclude the variance between the information and the instruction did not amount to a constructive amendment and that there was no error, let alone plain error, in the court's instruction on the charge under § 18-3-402(4)(a).

B.

Defendant also contends the trial court constructively amended the information by instructing the jury on the uncharged crime of sexual assault by causing submission of the victim by the threat of imminent death. We agree.

The second part of Instruction 19 tracks the language of § 18-3-402(4)(b), C.R.S. 2005, which provides that sexual assault is a class 3 felony (and the attempt thereof is a class 4 felony) if the actor "causes submission of the victim by threat of imminent death . . . to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats." This language was not included in the information, nor did the information make any reference to § 18-3-402(4)(b).

Here, § 18-3-402(4)(a) and (b) set forth two alternative and distinct methods of committing sexual assault, as a class three felony. In the information, defendant was only charged with the

method provided for in § 18-3-402(4)(a), namely, causing submission of the victim by the application of physical force. However, because the instructions allowed the jury to convict defendant under the method provided for in § 18-3-402(4)(b), we conclude this amounted to a constructive amendment of the information, requiring reversal of the conviction. See People v. Petschow, supra; People v. Weinreich, supra.

We reject the People's argument that defendant was not prejudiced because he was on notice that he would have to defend against a charge of attempted sexual assault under § 18-3-402(4)(a), which is the same class of felony as § 18-3-402(4)(b). Here, the information did not place defendant on notice that he would have to defend against the charge under § 18-3-402(4)(b) actually submitted to the jury. See People v. Weinreich, supra, 119 P.3d at 1079; People v. Petschow, supra; cf. People v. Madden, 111 P.3d 452 (Colo. 2005).

Because defendant was not on notice of the charge under § 18-3-402(4)(b), and because we cannot exclude the reasonable possibility that defendant was convicted on the uncharged offense of attempted sexual assault under that statutory section, we

conclude that the constructive amendment here constituted plain error requiring reversal of the conviction.

Accordingly, because the instruction constituted a constructive amendment to the information and thus cast serious doubt on the reliability of the conviction, we reverse defendant's conviction for attempted sexual assault and remand for a new trial on that charge.

Because they are unlikely to arise on retrial, or are unlikely to arise in the same context, we need not address defendant's remaining contentions concerning his conviction for attempted sexual assault. See People v. Weinreich, supra, 98 P.3d at 924.

II.

Defendant contends that the evidence is insufficient to support his conviction for bribery of a witness or victim. We disagree.

Defendant was charged under § 18-8-703(1)(a), C.R.S. 2005. The elements of bribing a witness or victim are that the defendant (1) offered, conferred, or agreed to confer any benefit upon a victim or witness or a person he believes is to be called as a witness (2)

with the intent to influence the victim or witness to testify falsely or unlawfully withhold any testimony.

The evil sought to be proscribed by the statute is the inducing of a witness to testify falsely or to unlawfully withhold testimony in exchange for the promise of a benefit. The statute protects against conduct that would threaten the veracity and cooperation of witnesses by prohibiting any attempt to bribe another to withhold testimony or otherwise subvert the administration of justice. See People v. Moyer, 670 P.2d 785, 791 (Colo. 1983)(citing the Model Penal Code with respect to tampering with a witness).

Where the sufficiency of the evidence is challenged on appeal, we must determine whether the evidence, taken as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime charged beyond a reasonable doubt. Kogan v. People, 756 P.2d 945, 950 (Colo. 1988); People v. Candelaria, 107 P.3d 1080, 1087 (Colo. App. 2004)(cert. granted Mar. 7, 2005). The prosecution must be given the benefit of every reasonable inference which might be fairly drawn from the evidence, and the

determination of the credibility of the witnesses is solely within the province of the fact finder. Kogan v. People, supra.

Here, the record shows that, at defendant's request, a friend of his contacted the victim in late September 2000 and asked her to write a notarized letter to defendant's attorney requesting that the charges against him be dropped. At the time, defendant was subject to a temporary restraining order that he not have contact with the victim. In exchange for his request that the victim drop the charges, defendant promised to leave her alone and not contest making the restraining order permanent at a hearing that was scheduled later that week.

Defendant contends this evidence was insufficient to prove that he offered to confer a benefit on the victim with the intent to influence her to testify falsely or to unlawfully withhold her testimony. We disagree.

Under the plain language of the statute, defendant's offer to leave the victim alone and not to challenge the permanent restraining order suffices to satisfy the element of offering to confer a benefit on the victim. See People v. Cunefare, 102 P.3d 302, 305 (Colo. 2004)(to give effect to the intent of the legislature, the court

should look to the plain language of the statute itself). The continuing existence of a permanent restraining order to protect the victim from defendant could be a significant benefit to her and satisfied that element of the statute.

Further, the term “unlawfully withhold” includes an attempt to influence the victim to withhold testimony at a future time.

People v. Cunefare, supra, 102 P.3d at 306 (interpreting identical language in the tampering statute); People v. Proctor, 194 Colo. 172, 174, 570 P.2d 540, 541 (1977). “[I]t is not necessary that the defendant succeed in his attempt or actually induce the witness to do anything.” People v. Moyer, supra, 670 P.2d at 791. In our view, defendant’s request that the victim drop the assault charges in exchange for his agreement not to contest the restraining order includes an attempt to have the victim withhold her testimony, which necessarily would not be required if the charges were dropped.

Accordingly, the evidence was sufficient to sustain defendant’s conviction for bribing a victim or witness.

III.

Finally, defendant contends the trial court erred by failing to give a complicity instruction on the bribery charge because he could only have committed that crime as a complicitor. Again, we disagree.

Because this argument is raised for the first time on appeal, our review is limited to whether the absence of a complicity instruction constitutes plain error. See People v. Miller, supra.

To be convicted of bribery as a complicitor, the defendant must have had the culpable mental state required for bribery and must have intended that his own conduct promote or facilitate the commission of bribery by the principal. People v. Candelaria, supra, 107 P.3d at 1090. Here, however, defendant was charged as the principal who made the bribery offer, albeit through his friend, not to contest the permanent restraining order if the charges against him were dropped. Thus, there was no need to give a complicity instruction.

Moreover, even if a complicity instruction had been given, it would only have given the jury an easier alternative method to

convict defendant of bribery, and thus, any such failure to instruct the jury inured to his benefit and did not constitute plain error.

The judgment of conviction of attempted sexual assault is reversed, and the case is remanded for a new trial on that charge. In all other respects, the judgment is affirmed.

JUDGE ROTHENBERG concurs.

JUDGE DAILEY concurs in part and dissents in part.

JUDGE DAILEY concurring in part and dissenting in part.

I join all but parts II and III of the majority's opinion.

With respect to part II, I do not believe that an attempt to influence a witness to have the charges dropped necessarily also includes an attempt to have that witness withhold testimony. The decision to drop charges is for the prosecution, not the witness, to make. If the prosecution decided not to drop charges, the witness would still be expected to testify. Inasmuch as the evidence did not go so far as to indicate an attempt to influence the witness to be wholly uncooperative with the prosecution, I find insufficient evidence of bribery under the terms of the statute.

Nor am I persuaded otherwise by People v. Cunefare, 102 P.3d 302 (Colo. 2004), and People v. Proctor, 194 Colo. 172, 570 P.2d 540 (1977). In my view, both cases are factually distinguishable in significant respects from the present case and ought not control the outcome here.

In light of this conclusion, I would see no need for a part III.

For these reasons, I respectfully dissent from parts II and III of the majority's opinion.