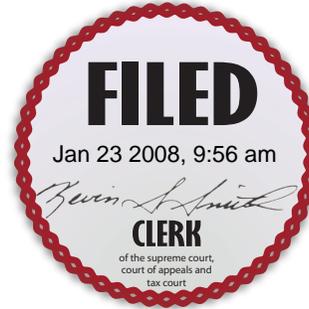


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

RUTH JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

NURA SHELBURNE,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0705-CR-287
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G17-0612-FD-251224

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Nura Shelburne (“Shelburne”) brings this interlocutory appeal from the trial court’s grant of the State’s motion to amend the charging information. We reverse.

Issue¹

Shelburne raises the issue of whether the trial court erred in permitting the State to belatedly amend the charging information.

Facts and Procedural History

On December 30, 2006, police arrested Shelburne at her home in Indianapolis for allegedly stabbing her husband, Michael Shelburne (“Michael”), in the chest and head. The affidavit for probable cause indicated that the responding officer observed that Michael had a large laceration on the right side of his face as well as many other lacerations to his head, face, right arm, and chest.

On January 2, 2007, the State charged Shelburne with Criminal Recklessness, as a Class D felony,² Domestic Battery, as a Class A misdemeanor,³ and Battery, as a Class A

¹ The State also alleges that Shelburne waived the issue of untimely amendment of the charging information because she failed to object to the State’s motions to amend for a month after the State filed the motions. In support of its argument, the State cites Absher v. State, 866 N.E.2d 350 (Ind. Ct. App. 2007). Absher involved circumstances where the defendant never objected to the State’s motion to amend, and Absher raised the issue on appeal of his conviction. Id. at 354. In contrast, the circumstances before this Court are that Shelburne did object to the amendments and pursued this interlocutory appeal from the order permitting one of the amendments. Therefore, Shelburne did not waive the issue for appeal.

² Ind. Code § 35-42-2-2.

³ Ind. Code § 35-42-2-1.3.

misdemeanor.⁴ The next day at the initial hearing, the trial court set the omnibus date as February 7, 2007.

On January 25, 2007, the State filed two motions to amend the information to add charges of Battery, as a Class C felony, Invasion of Privacy, as a Class A misdemeanor,⁵ and Invasion of Privacy, as a Class D felony. On February 1, 2007, the State filed a motion for a continuance in order to gain access to the medical records of the victim. The trial court granted the motion and reset the date of the trial. On February 26, 2007, Shelburne filed an objection to the amended information. The trial court set a hearing on the motions regarding the amendment of the charging information for the beginning of March. At the conclusion of the hearing, the trial court held that it would not permit the amendments, because the State's motions to amend were untimely pursuant to Indiana Code Section 35-34-1-5.

The State subsequently filed a motion to reconsider the ruling as to the charge of Battery, as a Class C felony, contending that the proposed amendment was one of form and not substance. After the hearing on the motion on April 16, 2007, the trial court reversed its ruling and concluded that, although the State's motion was untimely, the proposed amendment was permissible because it was a change in form that is permitted by statute. In making its decision, the trial court noted: "[The Defendant] still ha[s] to defend against an alleged battery. The severity of the battery is [a]t issue but it's still a battery nonetheless." Trial Transcript at 68.

⁴ Ind. Code § 35-42-2-1.

⁵ Ind. Code § 35-46-1-15.1.

This interlocutory appeal ensued.

Discussion and Decision

On appeal, Shelburne contends that the trial court erred in permitting the State to amend the charging information after the omnibus date by adding the charge of Battery, as a Class C felony. Indiana Code Section 35-34-1-5 (2004)⁶ governs amendments to charging information, which provides in relevant part:

(a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:

* * *

(9) any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

- (1) thirty (30) days if the defendant is charged with a felony; or
 - (2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
- before the omnibus date....

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

⁶ The General Assembly amended Indiana Code Section 35-34-1-5, which took effect on May 8, 2007. *See* P.L. 178-2007, §1 (Senate Enrolled Act No. 45). In subsection (b), the amendment replaces the basis for amending a charging information from the distinction between matters of form and substance to whether the amendment prejudices the substantial rights of the defendant. Presumably, this amendment was in response to the inconsistency noted by our Supreme Court in *Fajardo v. State*, 859 N.E.2d 1201, 1205 (Ind. 2007). Here, the alleged crimes occurred prior to the amendment of the statute. Thus, our review is based on the prior version of the statute.

Recently, our Supreme Court clarified the analysis for determining whether an amendment to a charging information was permissible under this statute in Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). In reviewing the language of the statute, our Supreme Court concluded:

This statutory language thus conditions the permissibility for amending a charging information upon whether the amendment falls into one of three classifications: (1) amendments correcting an *immaterial defect*, which may be made at any time, and in the case of an unenumerated immaterial defect, only if it does not prejudice the defendant's substantial rights; (2) amendments to *matters of form*, for which the statute is inconsistent, subsection (b) permitting them only prior to a prescribed period before the omnibus date, and subsection (c) permitting them at any time but requiring that they do not prejudice the substantial rights of the defendant; and (3) amendments to *matters of substance*, which are permitted only if made more than thirty days before the omnibus date for felonies, and more than fifteen days in advance for misdemeanors.

Id. at 1204-1205 (emphasis in original). Providing guidance in applying the restrictions of the statute, the court held in part:

[T]he first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

Id. at 1207. Thus, we must first determine whether the amendment is addressed to a matter of substance or form or immaterial defect. Clearly, we are not dealing with an immaterial defect, because the State did not revise its initial charge but rather added a separate charge. We are therefore left to determine whether the added charge was an amendment to a matter

of substance or form.

The State initially charged Shelburne with Battery, as a Class A misdemeanor, pursuant to Indiana Code Section 35-42-2-1. This statute provides in relevant part:

(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if:

(A) it results in bodily injury to any other person;

.....

(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;

I.C. 35-42-2-1. Relying on the same statute, the State's amended information adds a charge of Battery, as a Class C felony. The initial charge read as follows:

Nura Shelburne, on or about December 30, 2006, did knowingly touch MICHAEL SHELBURNE in a rude, insolent, or angry manner, that is: STABBING AT AND AGAINST MICHAEL SHELBURNE, which resulted in bodily injury, that is: LACERATIONS, to MICHAEL SHELBURNE;

Appendix at 19. The added charge for Battery, as a Class C felony, read similarly except as to the resulting injuries to the victim: “[S]aid touching resulted in serious bodily injury to Michael Shelburne, specifically: loss of consciousness and/or extreme pain” Appendix at 29.

Applying the rule announced in Fajardo for distinguishing between amendments to matters of form and those of substance, we conclude that the addition of the count for Battery, as a Class C felony, constituted an amendment to matters of substance. Essential to making a valid charge for a Class C felony version of Battery as opposed to a Class A misdemeanor is the magnitude of resulting injury suffered by the victim. For the Class A

misdemeanor version, any injury to a victim satisfies the resulting injury element of the crime. As for the Class C felony version, the resulting injury to the victim must be serious bodily injury. Indiana Code Section 35-41-1-25 defines serious bodily injury as “bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.” Moreover, in adding the additional charge, the State did not simply relabel the initial alleged injuries as serious bodily injuries. Instead, it added the alleged fact that the victim lost consciousness as a result of the battery.

Because the challenged amendment of the additional count of Battery, as a Class C felony, is a modification in matters of substance, it was permissible only up to thirty days before the omnibus date. I.C. § 35-34-1-5(b). Here, the State filed its motion to amend over two weeks after this deadline. The defendant’s objection to the amendment should have been sustained and the amendment denied. Therefore, we reverse and remand.

Reversed and remanded.

NAJAM, J., concurs.

CRONE, J., dissents with separate opinion.

**IN THE
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vs.)	No. 49A04-0705-CR-287
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CRONE, Judge, dissenting

I respectfully dissent from the majority’s conclusion that the class C felony battery charge is an amendment of substance. As did the trial court, I believe that it is an amendment of form. The class C felony battery is *the same battery* as the class A misdemeanor battery; as such, Shelburne’s “defense under the original information would be equally available after the amendment.” Fajardo v. State, 859 N.E.2d 1201, 1207 (Ind. 2007).⁷ Moreover, “*the accused’s* evidence would apply equally to the information in either form.” Id. (emphasis

⁷ Shelburne argues that she “may have been able to mount a viable claim of self-defense to a class A misdemeanor battery charge but the State’s amendment alleging a greater degree of injury negates [her] claim that she used an amount of force proportionate to the situation.” Appellant’s Br. at 9. In Fajardo, the court stated only that a defense under the original information must be “equally *available*” after the amendment for the amendment to be considered one of form. 859 N.E.2d at 1207 (emphasis added). The court did not say that a defense to the amended charge must be equally *successful*. Nothing will prevent Shelburne from raising

added).⁸ To be sure, *the State's* evidence regarding the victim's alleged injuries does not apply equally to the information in either form, but that is simply a reflection of the discovery process and does not convert the amendment into a matter of substance.⁹ In sum, I would affirm the trial court's grant of the State's motion to amend the charging information.

a self-defense claim to the class C felony battery charge at trial, although, as she acknowledges, the likelihood of its success may be comparatively slim.

⁸ Shelburne argues that

the amended charge adds an additional element: loss of consciousness and/or extreme pain. Extreme pain and to some extent, loss of consciousness, *can be* nebulous concepts requiring the defense to obtain medical experts to defend against the State's claims. The original charges alleged only that the alleged victim received lacerations which are precise and readily definable.

Appellant's Br. at 9 (emphasis added). In addressing a constitutional vagueness challenge to Indiana Code Section 35-41-1-25, this Court held that "the term 'extreme pain' is not one which persons of average intelligence cannot understand." *Vaillancourt v. State*, 695 N.E.2d 606, 610 (Ind. Ct. App. 1998), trans. denied. Thus, the concept of "extreme pain" is not as nebulous as Shelburne would have us believe. In any event, there is no indication that expert medical testimony will be required to defend against the class C felony battery charge under the facts alleged in this case.

⁹ It is worth noting that the State, not Shelburne, would have to bear the additional burden of proving the "serious bodily injury" element of class C felony battery beyond a reasonable doubt.