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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellant,	)	Filed October 28, 1987
vs.	)	
LISA A. DAGGETT,	)	7-407 86-1678
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Sioux County (No. 5054), James L. McDonald, Judge.

The State appeals from the district court's ruling granting the defendant's motion in arrest of judgment. **AFFIRMED.**

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Mark J. Schouten, County Attorney, for plaintiff-appellant.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ. Snell, J., takes no part.

PER CURIAM 267

On January 28, 1986, Lisa Daggett was charged by trial information with second-degree false use of a financial instrument. Following the close of the State's evidence at trial, Daggett moved for a judgment of acquittal. In support of her motion she argued that false use of a "financial instrument," as that term is defined in section 715.1(3) under which she was charged, is by definition a first-degree offense. See Iowa Code § 715.6 (1985). The district court overruled the motion and allowed the State to amend the information so as to charge Daggett with the first-degree offense. The jury returned a verdict of guilty and Daggett responded with motions for new trial and in arrest of judgment. After denying the new trial motion, the district court granted Daggett's motion in arrest of judgment, concluding the late amendment prejudiced Daggett in several respects and should not have been allowed. The State brings this appeal. See Iowa Code § 814.5(1)(c) (1985); Iowa R. App. P. 23(4)(c). Our review is limited to the correction of legal errors. Iowa R. App. P. 4.

The State maintains the district court's allowance of the amendment during trial was appropriate and, consequently, that its granting of the motion in arrest of judgment was not. Our rules of criminal procedure provide for amendment of trial informations during trial unless "substantial rights of the defendant are prejudiced by the amendment, or . . . a wholly new and different offense is charged." Iowa R. Crim. P. 4(8)(a); see also Iowa R. Crim. P. 5(5). The following portions of the record, taken from the district court's ruling on Daggett's motion in arrest of judgment, demonstrate that the court was motivated by both the concerns listed in rule 4(8)(a):

> The court feels that it errored [sic] in granting the State's motion to amend the trial information for the following main reasons. I won't elaborate, but I do feel that the Defendant was entitled to know the nature of the charge against her and the penalty that she was facing at the time the trial commenced.

> The jury selection was altered—or, would have been altered had the charge been a felony at the outset. There would have been two additional strikes that the Defendant would be entitled to. Now, whether this is a substantial variance, the Court does feel that this did prejudice the Defendant to a degree and that the other elements that I'm discussing here would so prejudice the Defendant's rights under the circumstances that the judgment just can't stand. I also feel that a Defendant faced with a felony charge would probably act differently at the bargaining table when bargaining for a plea of guilty if such bargaining took place, and I'm sure it did.

The amendment changed the charge against Daggett from an aggravated misdemeanor into a class D felony. See Iowa Code § 715.6 (1985). An amendment affecting this change has been held to be prejudicial to a criminal defendant's right to fair trial and, for that reason, reversible error. Turner v. State, 376 So.2d 429, 430 (Fla. App. 1979). In addition, had this case been tried as a felony prosecution ab initio, Daggett would have been entitled to two additional peremptory challenges during pretrial voir dire. See Iowa R. Crim. P. 17(9). In cases which touch analogously upon this issue, error effectively resulting in the loss to a criminal defendant of one peremptory challenge has been held presumptively prejudicial. State v. Kuster, 353 N.W.2d 428, 433 (Iowa 1984); State v. Beckwith, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951). The case at bar, with the erroneous denial of two peremptory challenges, certainly cannot be said to present us with a situation any less prejudicial to the criminal defendant herein. We also share the district court's concern with the fact that Daggett was inadequately informed during the period of plea bargaining. The maximum penalty for the amended charge is greater than twice that accompanying the original charge. See Iowa Code §§ 902.8(4), 903.1(2) (1985). We need not engage in baseless speculation as to the effect this change would have on Daggett's pretrial decision-making, for our cases establish the importance of accurate information at that stage. See State v. Boone, 298 N.W.2d 335, 338 (Iowa 1980).

Moreover, we are unpersuaded by the State's claim that the amendment did not charge Daggett with "a wholly new and different offense." Our supreme court dealt with a similar claim involving the charges of first- and second-degree murder in State v. Sharpe, 304 N.W.2d 220 (Iowa), cert. denied, 454 U.S. 834, 70 L. Ed. 2d 113, 102 S. Ct. 134 (1981). There the core offense was murder which, as is the case with false use of a financial instrument, has but one statutory definition. See Iowa Code §§ 707.1 (1977), 715.6 (1985). The decree of murder actually charged depends upon the precise circumstances surrounding the commission of the offense. See Iowa Code § 707.2, 707.3 (1985). Similarly, whether an accused may be charged with first- or second-degree false use of a financial instrument is controlled by the precise method by which the core crime is perpetrated. See Iowa Code § 715.6 (1985). Also, as was the case with respect to first- and second-degree murder in Sharpe, 304 N.W.2d at 223, the charges of first- and second-degree false use of a financial instrument are associated respectively with significantly disparate potential punishments. See Iowa Code §§ 902.8(4), 903.1(2) (1985). These inherent differences in both crime and punishment were sufficient to persuade the Sharpe court that enhancing the degree of offense charged was equivalent to charging the defendant with a "wholly new and different offense." Sharpe, 304 N.W.2d at 223. We think the same is true with respect to the charges of first- and second-degree false use of a financial instrument.

Finding the district court's ruling on Daggett's motion in arrest of judgment to be fully justified, we affirm.

AFFIRMED.