



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. MARK ALLEN FREENEY
CR-08-0363-PR, 1 CA-CR 07-0448**

PARTIES AND COUNSEL:

Petitioner: Mark Allen FreeneY is represented by Eric W. Kessler, Mesa.

Respondent: The State of Arizona is represented by Melissa A. Parham, Assistant Attorney General.

FACTS:

FreeneY and the victim lived together in a mobile home complex. A neighbor in the same complex saw FreeneY and the victim fighting one evening. FreeneY was beating the victim with a metal pipe and threatening her with a box cutter. The neighbor called 911 and reported the fight. Officer Yoder arrived at the scene and talked to the victim. She reported that FreeneY was her live-in boyfriend, they had argued, and he had hit her repeatedly with a metal pipe. The victim was transported to the hospital for treatment. The doctor in the emergency room reported that her most serious injury was a four inch laceration on the back of her scalp that required a dozen stitches. She also had swelling over her eye and in her left wrist.

FreeneY left the scene before police arrived but was arrested two days later. FreeneY did not admit to hitting the victim but told the police that he was not worried about the case going to trial because the victim would not testify against him. FreeneY was charged by indictment with aggravated assault by using a deadly/dangerous instrument (metal pipe) and intentionally placing the victim in reasonable apprehension of imminent physical injury under A.R.S. §13-1203(A)(2). The State also charged the crime as a dangerous felony.

Immediately before jury selection on the day of trial, the State moved to amend the indictment under Ariz.R.Crim.P. 13.5(b) to change the element of the offense of aggravated assault from placing a person in reasonable apprehension of imminent physical injury under subsection (2) to “intentionally, knowingly or recklessly causing any physical injury to another person” under subsection (1). Defense counsel objected to the motion based on its late timing. Counsel informed the court that he first became aware of the State’s intention when he and the prosecutor were talking that morning. Defense counsel objected based on the late notice but informed the court, “as far as the State moving to amend to include injuries, I can avow to the Court that the reports that I’ve received in this case do reference injuries. I was aware there were injuries or at least allegations of injuries.” The court granted the motion to amend stating:

The issue is really notice under the 6th Amendment. And I think that under the circumstances of this case, there really isn’t a notice issue here. The defendant is not prejudiced by the amendment. So I will allow the State to amend the indictment.

At trial, the victim recanted her statements against Freaney and claimed that another man injured her. The State presented the testimony of the police and the neighbor, the eyewitness to the crime. Freaney was convicted by a jury of aggravated assault and sentenced to 11.25 years in prison.

On appeal, Freaney argued that the trial court violated his Sixth Amendment right to notice in allowing the State to amend the indictment before jury selection on the first day of trial. The court of appeals found that the prejudice-per-se rule of *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003), did not apply to the amendment in this case. In Freaney's case, the amendment to the indictment did not occur mid-trial, but occurred before jury selection. Thus, Freaney was required to show actual prejudice from the amendment. The court of appeals concluded that Freaney could not establish prejudice because no evidence had yet been presented in the case, defense counsel did not seek a continuance or otherwise indicate that the amendment affected his trial strategy, the defense had notice of the allegations of physical injuries which formed the basis of the amended charge, and Freaney's defense was not impacted. Based on this record, the court of appeals found that Freaney's Sixth Amendment rights were not violated and he had not shown that his defense was prejudiced in any way.

Judge Hall concurred in the result, but disagreed with the analysis of the majority. Judge Hall would have found that the amendment did not change the nature of the offense and overrule *Sanders* on this issue. Even assuming that the amendment did change the nature of the offense, however, Judge Hall would have rejected the *Sanders* prejudice-per-se analysis, apply a harmless error analysis, and affirm the conviction.

ISSUE:

Petitioner contended on direct appeal that the trial court violated the Sixth Amendment's notice requirement when it permitted the State to amend the indictment on the first day of trial, thus changing the elements of the offense.

Definitions:

Rule 13.5(b) governs the amendment of an indictment:

The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

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