IN THE COURT OF COMMON PLEAS FOR GREENE COUNTY, OHIO

State of Ohio	*	Case No. 2008CR0176
	*	
Plaintiff	*	
	*	
v.	*	Motion to Dismiss
	*	
Tara L. Whitacre	*	
	*	
Defendant	*	

TARA L. WHITACRE, by and through her undersigned Counsel, moves the Court to dismiss this case, with prejudice. As grounds for this dismissal she files the attached memorandum.

Respectfully submitted,

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MEMORANDUM

In late November, 2007, Chad Day brutally beat Tara Whitacre, continuing an ongoing pattern of abuse. As she had done before, she filed criminal charges against him. She did this with some reluctance, since she had filed such charges in the past, had protection orders issued against him and attempted to remove him from the lives of herself and her children all to no avail. He continually violated protection orders, beat her into recanting and received only minimal jail sentences.

However, this time her friends assured her that things would be different. If she would trust them and file charges, they would work to make sure that he was not released and could not harm her again. Despite their best efforts, Mr. Day was released from jail within a matter of days. Despite the fact that he was a repeat violent offender the court set his bond at such a low amount that he was able to get family and friends to purchase a bond from a bondsman.

Once he was released, he began to violate the protection order and make visits to the residence that he shared with Tara Whitacre. She felt that she was powerless to stop this. After all, she had tried many times and each time the system failed to protect her.

Throughout December and into the early months of 2008, Mr. Day continued his mental and physical abuse of Tara Whitacre and her children. Fearing for her safety and that of her children, she gave into his demands and recanted once again.

In March, 2008, her fears were realized. All charges against Mr. Day were dropped and she was charged with perjury. She continued her efforts to distance herself from Mr. Day. She refused to let him return to their residence. She began to seek out her old friends and ask them for help.

Then, on March 31, 2008, Mr. Day broke down the door to her house and brutally beat and raped her for a period of three hours before she convinced him to leave. Apparently, this was too much for the system to ignore. Mr. Day was charged with attempted murder and other crimes. Eventually, he entered a plea and has been sentenced to 12 years without the possibility of early release.

Despite the clear evidence that Mr. Day forced Tara Whitacre into recanting her grand jury testimony, the Greene County Prosecutor's office has continued to seek to punish the victim in this case by maintaining the prosecution of perjury charges. This is despite the fact that they know, as evidenced by their concession in the final pre-trial held August 8, 2008, that they cannot prove a charge of perjury. Instead of perjury, the prosecutor says, they now wish to seek a conviction for falsification under R.C. 2921.13, which they feel is a lesser included offense for the charges of perjury.

As demonstrated below, under the facts of this case falsification is not a lesser included offense of perjury. The State would not be entitled to a jury instruction on falsification and they cannot prove perjury. Since no conviction can be obtained for perjury, this case must be dismissed.

CAN THE STATE OBTAIN A PERJURY CONVICTION?

The State simply cannot obtain a conviction on a charge of perjury in this case. The perjury statute itself precludes a conviction under these facts.

It is undisputed that only two people were present in November, 2007, when Mr. Day beat Tara Whitacre. Her testimony before the grand jury involved only this particular incident. The only two people who have first hand knowledge of the incident described in her grand jury testimony are Tara Whitacre and Chad Day.

Mr. Day is not on the State's witness list. There is no witness on the list who has first hand knowledge of the facts of the incident who can testify that Tara Whitacre's grand jury testimony is false. Yet the State must prove that the testimony is false in order to obtain a perjury conviction. Obviously, they would be unable to do so.

Even if Mr. Day was on the State's witness list, they would be unable to obtain a conviction. The perjury statute, R.C. 2921.11(E), expressly prohibits a conviction based upon the testimony of only one other person. Since only one other person has first hand knowledge of the events that were the subject of the grand jury testimony, a perjury conviction is impossible in this case and an indictment should not have even been sought.

Since there is no possibility that the State can obtain a perjury conviction based upon the testimony of the witnesses they have disclosed, dismissal of this case is required.

CAN THE STATE BROADEN THE INDICTMENT TO INCLUDE A CHARGE OF FALSIFICATION?

At the final pre-trial held August 8, 2008, the State indicated that its case was predicated upon an undisclosed document and that they believed that this document would support a charge of falsification.

Setting aside the fact that the State would have the same difficulty in obtaining a falsification conviction as they would in obtaining a perjury conviction (i.e. that no one on their witness list can testify that the facts attested to in the statement are false), they would not be entitled to an instruction on falsification as a lesser included offense for perjury.

If the instructions and the proof at trial broaden the indictment, the variance constitutes a

constructive amendment and violates the Fifth Amendment to the United States Constitution[1].

> The Fifth Amendment requires that a defendant be tried only on charges handed down by a grand jury. See Stirone v. United States, 361 U.S. 212, 217, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). Thus, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." Id. at 215-16. A variance that broadens the indictment constitutes a constructive amendment and is reversible per se. Hunter, 916 F.2d at 599; Apodaca, 843 F.2d at 428. A variance rises to the level of a constructive amendment "'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.'" Hunter v. State of New Mexico, 916 F.2d 595, 599 (10th Cir. 1990) (quoting United States v. Apodaca, 843 F.2d 421, 428 (10th Cir.), cert. denied, 488 U.S. 932, 102 L. Ed. 2d 342, 109 S. Ct. 325 (1988)). When an amendment occurs, the jury "convicts the defendant upon a factual basis that effectively modifies an essential element of the offense charged." United States v. Chandler, 858 F.2d 254, 257 (5th Cir. 1988)[2].

If the State proceeds to trial on this case, in order to obtain a conviction for falsification they would have to ask for, and receive, a jury instruction for falsification as a lesser included offense. They would not be able to do so. Most cases dealing with jury instructions for lesser included offenses arise in the context of the defendant having requested the instruction. In those cases, Ohio courts have held that there are two factors to consider when determining whether a jury instruction on a lesser included offense is warranted. The first is whether one crime is, statutorily, a lesser included offense of the other. In other words, are all of the elements of the lesser crime present in the greater crime so that, if the greater crime is proven, the lesser crime must also have been proven. It has been held that falsification under R.C. 2921.13 is, statutorily, a lesser included offense of the crime of perjury under R.C. 2921.11[3]. If the analysis ended there, the State would be entitled to a jury instruction for the crime of falsification. But the analysis does not end there.

The Court must also look at the evidence that would be presented in the case. On a charge of perjury, the State would be required to prove that the events that were the subject of Tara Whitacre's grand jury testimony did not happen as she testified. This would require the testimony of someone who

1 *United States v. Crockett*, 435 F.3d 1305 (10th Cir. 1991)
2 *United States v. Wright*, 932 F.2d 868, 874 (10th Cir. 1991)
3 *State of Oho v. Bell*, 97 Ohio App. 3D 576, 647 N.E.2d 193, 1994 Ohio App. LEXIS 4126 (11th District 1994); *State of Ohio v. Peterman*, 1992 Ohio App. LEXIS 4048 (4th District, 1992).

could say, in effect, "I was present at that day and time and Chad Day did not beat Tara Whitacre."

This is in stark contrast to what would be required in order to obtain a conviction for falsification. In order to obtain a conviction for falsification the State would have to present evidence from someone present who could say, in effect, "I was present at that day and time and Chad Day did beat Tara Whitacre." This is not a lesser included offense, it is an allegation of a completely separate crime, committed (if it was) several months after the crime charged in the indictment.

As with the charge of perjury, Mr. Day is not on the State's witness list and no one else has first hand knowledge of the events of that day. Tara Whitacre is not required to testify and the State cannot rely upon the fact that they might elicit damaging testimony from her in aid of their case.

An analysis of the two reported cases in which falsification was found to be a lesser included offense of perjury[4] reveals that in both instances it was the same statement that was at issue. The same statement was either perjury or falsification. In this case, the State, knowing that it cannot obtain a perjury conviction, now wants to change the entire basis for the case. In essence, it is saying "We don't believe she committed the crime of perjury by testifying in front of the grand jury, but several months later she committed the crime of falsification by giving a false statement to the prosecutors." This does not entitle the State to a charge on a lesser included offense. At most, it entitled them to dismiss the perjury charge and refile a charge of falsification.

Permitting the State to change the entire basis of its case at the final pre-trial also has due process implications. Due process requires that the defendant in a criminal case be given notice of the charges against them and an opportunity to defend against those charges. In this case, the indictment charges Tara Whitacre with the crime of perjury.

Upon finally obtaining Counsel, Tara Whitacre requested a bill of particulars in order to determine what statements she had made that the State was alleging were false. The State replied to the bill of particulars on July 14, 2008. In the bill of particulars, the State said only that it was the

4 See footnote 1.

testimony before the grand jury that supported the charges and referred to the discovery that had been provided. That discovery contained only a transcript of Tara Whitacre's testimony before the grand jury. It did not contain the statement that the State now believes would support a charge of falsification.

It would be a gross violation of Tara Whitacre's due process rights if the State is permitted to "swap out" the facts that support their indictment. No grand jury ever considered whether the statement made to the prosecutor's office was false. The indictment was predicated upon a grand jury's belief that statements that were made, under oath, to the grand jury were false.

Crim. R. 7, first adopted in 1973, affected the rule with respect to the amendment of indictments. Crim. R. 7(D) states: HN17"The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

> Despite the language of Crim. R. 7(D) permitting amendment, an indictment must still meet constitutional requirements, and its failure to do so may violate a defendant's constitutional rights. In order to be constitutionally sufficient, an indictment must, first, contain "'the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" State v. Childs (2000), 88 Ohio St.3d 558, 565, 2000 Ohio 425, 728 N.E.2d 379, quoting Hamling v. United States (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590.
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> In the instant case, the indictment did not meet constitutional requirements, as it did not include all the essential elements of the offense charged against the defendant. Thus, the defendant was not properly informed of the charge so that he could put forth his defense.[5]

Permitting the State to proceed to trial upon a theory of falsification as a lesser included offense would violate Tara Whitacre's due process rights. The only proper course of action, should the State

5 *State v. Colon*, 118 Ohio St. 3d 26; 2008 Ohio 1624; 885 N.E.2d 917; 2008 Ohio LEXIS 874 (2008)

wish to continue to prosecute the true victim of Mr. Day's crimes, would be for them to dismiss the indictment for perjury and refile charges of falsification.

PROSECUTORIAL MISCONDUCT

In a case that already has one allegation of prosecutorial misconduct (an apparent ex-parte communication between the prosecutor and the judge to deny the defendant her Sixth Amendment right to counsel of her choice), two other charges of misconduct can now be added. First, the State failed to disclose a document that is now being made the underpinning of their case. Second, the prosecutor has admitted that he does not believe that Ms. Whitacre committed perjury (the crime with which she is charged), yet is proceeding to trial of the case.

The State failed to provide a copy of a statement made by Tara Whitacre, contradictory to her grand jury testimony. They did this despite a lengthy request for discovery that was served on them by her prior counsel, Ken Sheets.

A dismissal or nolle with prejudice pursuant to CrimR 48(A) may only be entered where there is a deprivation of a defendant's constitutional or statutory rights[6]. In this case, Tara Whitacre's constitutional right to due process (notice of the charges against her) would be violated if the State is permitted to use this new statement to prosecute her on a charge of falsification. Dismissal with prejudice is warranted under the circumstances of this case.

More seriously, the prosecutor admitted at the final pre-trial that he believes that Ms. Whitacre's testimony before the grand jury was true and that she did not commit the crime of perjury. Were this a civil case, the prosecutor would be guilty of committing a violation of Ohio Civ. R. 11, which prohibits the filing of a case, or pleadings, for which there is no reasonable basis under the law or facts.

Ohio Crim. R. 57(B) renders Civ. R. 11 applicable to criminal cases[7]. The prosecutor is proceeding to trial of a case after having admitted before Counsel and the judge that he believes the

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6 *State v. Dixon*, 14 Ohio App. 3d 396, 471 N.E.2d 864, 14 Ohio B. 513, 1984 Ohio App. LEXIS 11919 (1984)

7 *State v. Schlee, 1*17 Ohio St. 3d ; 2008 Ohio 545; 882 N.E.2d 431; 2008 Ohio LEXIS 388153; *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25, 24 O.O.3d 64, 434 N.E.2d 723

defendant to be innocent of the charges against her. The appropriate sanction is dismissal of this case, with prejudice.

THE DEFENDANT'S DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF OF THE PROCEEDINGS

A criminal defendant has a "due process right to be present at a proceeding 'whenever his presence has a relation, reasonable substantial, to the fulness of his opportunity to defend against the charge...[8]'" Ohio Crim. R. 43 provides that "The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules."

In this case, there have been two pre-trial conferences. Tara Whitacre has been denied permission to attend both. At the final pre-trial on August 8, 2008, Counsel asked that the fact that she had been denied admittance to the pre-trial to be placed into the record. Denying her the right to attend the pre-trial and to assist her Counsel in maintaining her defense is a prejudicial violation of her due process rights under the United States Constitution and the Constitution of the State of Ohio. Since this defect can not now be cured, the only remedy is to dismiss this indictment.

CONCLUSION

This case must be dismissed. Tara Whitacre is the true victim of crimes committed by Chad Day. The Greene County Prosecutor is aiding and abetting Mr. Day in continuing his abuse of Ms. Whitacre even after he has finally been incarcerated for a substantial period of time. The prosecutor is so zealous in its efforts to continue to victimize Ms. Whitacre that they now wish to change the entire basis of their original charge and force her to defend a new charge of falsification. This would violate Tara Whitacre's due process rights, in addition to continuing to further victimize her.

The Court should dismiss this case with prejudice based upon the prosecutor's misconduct in not providing essential evidence to the Defendant until the final pre-trial (barely a week before the

8 *United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 78 L. Ed. 674, 54 S. Ct. 330 (1934)).

trial). If the Court does not feel that dismissal with prejudice is warranted, it should dismiss the perjury indictment and require the State to refile falsification charges, should they still desire to do so.

No other course of action will protect Tara Whitacre's due process rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing was served upon the Greene County Prosecutor by fax to number 937-562-5647 and by mail to their office at 61 Greene Street, 2nd Floor, Xenia, Ohio 45385, this 11th day of August, 2008.

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Kermit F. Lowery