Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-304

APRIL TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
Jeannette Carr	}	
	}	DOCKET NO. 1261-10-03 Wrcr
		Trial Judge: Harold E. Eaton, Jr.
		Paul F. Hudson

In the above-entitled cause, the Clerk will enter:

Defendant appeals her convictions for simple assault and disorderly conduct, arguing that the district court erred: (1) by allowing the State to add a new charge to its information less than one week before the scheduled jury draw; and (2) by erroneously instructing the jury on reasonable doubt. We affirm.

On October 2, 2003, the State filed an information charging defendant with simple assault based on a scuffle that occurred between a Town of Hartford employee and her on June 17, 2003. Defendant was arraigned on the charge in October 2003. On May 27, 2004, one week before the scheduled jury draw, the State sought to amend its information by adding a charge of disorderly conduct. Defendant opposed the amendment. On June 2, 2004, the trial court granted the State's motion, stating that because there was a factual basis for the new charge within the original affidavit, defendant was not unfairly prejudiced by the amendment. Defendant was arraigned on the new charge the next day, and the jury trial was held over three days beginning on June 22, 2004. Following the trial, the jury convicted defendant on both counts. On the simple assault conviction, defendant received a suspended two-to-four-month sentence and was fined $341. On the disorderly conduct conviction, defendant was fined $300.

Defendant first argues that the trial court erred by allowing the State to add a new charge to its information only one week before the scheduled jury draw. She states that because she is deaf, a sign language interpreter had to be present during her meetings with her assigned counsel, and the deposition of three of the State's witnesses had to be taken so that she could review the written testimony to prepare for trial. She argues that, given these unique circumstances, she did not receive constitutionally adequate notice to prepare a defense for the second charge. She acknowledges that she informed the trial court in her opposition to the State's motion that a continuance would not cure the prejudice resulting from the new charge, but nonetheless contends on appeal that the court erred by failing to offer her a continuance once it decided to grant the State's motion.

These arguments are unavailing. Defendant is correct that the salient question is whether she had fair notice to prepare an adequate defense against the added charge. See State v. Jewett, 148 Vt. 324, 331 (1986) (citing Reporter's Notes to V.R.Cr.P. 7 for proposition that Rule 7 "contemplates that prosecutor may amend an information or indictment at any time prior to trial without leave of court provided defendant receives fair notice of charge"); Reporter's Notes, V.R.Cr.P. 7 ("[T]here is no reason to deny the prosecutor the right to file what amounts to a supplemental information, so long as the fundamental right of the defendant to notice of the charge is not violated."); see also State v. Bleau, 132

Vt. 101, 104 (1974) ("The allowance of the amendment [to an information] must not prejudice the accused's ability to prepare an adequate defense."). Here, the trial took place approximately four weeks after the State's motion to amend and three weeks after the court granted the motion. In opposing the State's motion, defendant stated that her deafness would make it difficult to arrange new depositions and meetings with her attorney to counter the additional charge, but she did not indicate specifically how she would be prejudiced with respect to the new charge. Nor does she do so on appeal. Rather, she states that the trial court should have sua sponte offered her a continuance rather than grant the State's motion.

We disagree. Defendant informed the court that a continuance would not cure the prejudice resulting from the State's motion because the attorney "of her choice," who had been assigned by the court, was planning to move out of state shortly after the scheduled hearing. If defendant believed that she could not prepare an adequate defense against the new charge in the three weeks before trial, she should have explained why additional time was necessary and sought a continuance. Cf. State v. Holden, 136 Vt. 158, 160 (1978) (where amended information charged additional offense from one originally charged, trial court erred by not granting defendant's request for continuance to prepare defense to new charge and to consider whether to seek private counsel). Under these circumstances, the trial court did not err by not offering her a continuance.

Next, defendant argues that the court erred by giving the jury the following instruction on reasonable doubt:

> A reasonable doubt is a real doubt based on reason and common sense which comes from a fair and rational consideration of the evidence or lack of evidence in this case. It is not a vague, speculative or imaginary doubt. No Defendant may be convicted on suspicion or conjecture.

Defendant objected that the term "real doubt" suggested to the jury that the doubt must be serious or unquestionable. On appeal, defendant argues that serious is the same as substantial or grave, exactly the objectionable terminology that resulted in a reversal in Cage v. Louisiana, 498 U.S. 39 (1990) overruled on other grounds by Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991). Defendant exaggerates the similarity of the instructions in Cage and the instant case; indeed, the two instructions are not even comparable. In Cage, the trial court instructed the jurors that their doubt about the defendant's guilt "must be such doubt as would give rise to a grave uncertainty," and that the doubt must be "an actual substantial doubt" amounting to a "moral certainty." Id. at 40. The Supreme Court reversed the conviction because the instruction "equated a reasonable doubt with 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required was a 'moral certainty' that the defendant was guilty." Id. at 41.

Here, the better practice would be to avoid using the word "real," but, read as a whole, the instruction plainly informed jurors that real was the opposite of speculative or imaginary, and that they could not convict defendant based on mere suspicion or conjecture. We find no reversible error, if any error at all. Cf. State v. Francis, 151 Vt. 296, 302 (1989) (finding no reversible error but concluding that trial courts should avoid comparing beyond-a-reasonable-doubt standard to decisions of personal importance and telling jurors that they should be able to assign specific reason to their doubt).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned