

CHAPTER IV – THE VIOLATION NOTICE, INFORMATION, SUMMONS AND WARRANT

Judge D. Kimberly Whittle

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CHAPTER IV

THE VIOLATION NOTICE, INFORMATION, SUMMONS AND WARRANT

4.1 SCOPE OF CHAPTER

This chapter discusses the difference between violation notices and informations, summarizes the Supreme Court Rules related to informations, and outlines the procedures for using a summons or an arrest warrant to compel a defendant's attendance in court.

VIOLATION NOTICES

Rule 37.33; Form 37.A

4.2 CONTENTS OF VIOLATION NOTICE

Rule 37.33. Violation Notice – Contents.

A violation notice is typically the first method by which an accused is notified that he or she will be prosecuted for a municipal ordinance violation. Rule 37.33(a) specifies the requirements of a violation notice. It must be in writing and it shall: “(1) State the name and address of the court; (2) State the name of the prosecuting county or municipality; (3) State the name of the accused or, if not known, designate the accused by any name or description by which the accused can be identified with reasonable certainty; (4) State the date and place of the ordinance violation as definitely as can be done; (5) State the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it; (6) State the facts contained therein are true; (7) Be signed and on a form bearing notice that false statements made therein are punishable by law; (8) Cite the chapter and section of the ordinance alleged to have been violated and the chapter and section that fixes the penalty or punishment; and (9) State other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation.”

Additionally, Rule 37.33(b) states that when the violation is one which the judge has designated within the authority of a violation bureau, then the violation notice must state: “(1) The specified fine and cost for the violation; and (2) That a person must respond to the violation notice by: (A) Paying the specified fine and court costs; or (B) Pleading not guilty and appearing at trial.”

The requirements of a violation notice were expanded when the Supreme Court of Missouri amended Rule 37.33, effective July 1, 2004. Although the “date and place” requirement was broadened in subsection (4) from the previous “time and place” requirement, the Supreme Court rule became more specific with the fact-stating subsection (5). The previous rule simply stated the notice shall “state facts constituting the claimed violation.” The rule now declares a notice shall state “facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it.” In addition, the Supreme Court added subsections (6), (7), and (8) to section(a).

4.3 FORM OF VIOLATION NOTICE

When the Supreme Court of Missouri amended [Rule 37.33](#), it also added section (c), which requires the violation notice be substantially in the form of the Uniform Citation set out in Form 37.A. It should be noted that Form 37.A is a five-part document initially utilized by officers when issuing traffic violations. The front side of each part is identical, with the backside having variations depending on its purpose. Each part is used as follows: (1) abstract court record, (2) information; (3) arrest record; (4) violator's copy; and (5) officer's record. (See form 37.A following this chapter.)

INFORMATIONS

Rules 37.34 through 37.41, Rule 37.51, and Rule 37.60; Forms 37.A and 37.E Section 479.090 RSMo (2004)

4.4 FORM AND CONTENT

Rule 37.35. Information – Form of – Contents.

Rule 37.34 requires all ordinance violations to be prosecuted by information. An information may be based on the prosecutor's information and belief that the ordinance violation was committed. However, the rule further states that the information *shall* be supported by a violation notice as prescribed by Rule 37.33. Section 479 of the Revised Statutes of Missouri governs Municipal Courts and Traffic Courts, and specifically § 479.090, RSMo (2004) references informations by stating ordinance violations "shall be instituted by information and *may* be based upon a complaint."¹ To the extent that § 479.090 is inconsistent with any section of Rule 37, the Rule controls. See [Rule 37.02](#).

Form 37.A (part two entitled Uniform Citation – Information), as well as Form 37.E, are the forms that may be used by a prosecutor instituting a charge or charges against the defendant. The forms contain blank spaces to insert the requirements set out in Rule 37.35. First, the information must "be in writing, signed by the prosecutor and filed in the court having jurisdiction of the ordinance violation." Further, the information shall: (1) state the name of the defendant or, if not known, designate the defendant by any name or description by which the defendant can be identified with reasonable certainty; (2) state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged, *including facts necessary for any enhanced punishment*;² (3) state the date and place of the ordinance violation charged as definitely as can be done; and (4) cite the chapter and section of the ordinance alleged to have been violated and the chapter and section providing the penalty or punishment. The 2004 amendment of Rule 37.35 deleted the requirement that the information state the name of the prosecuting county or municipality, as well as the requirement that the information be in substantially the same form as set forth in Form 37.A.

Missouri courts have addressed various questions regarding the adequacy of informations. The most widely addressed concern is that of Rule 37.35(b)(2) which requires that the information state plainly, concisely and definitely the essential facts constituting the ordinance violation charged. A wide sampling of decisions regarding the sufficiency of informations follows.

¹ "Complaint" was the word used for a "violation notice" prior to the 2000 amendment of Rule 37.33.

² This italicized clause was added in the Rule's 2004 amendment.

A. Leading Cases on Sufficiency of Information

The leading and most often-cited case regarding the sufficiency of an information is *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). In this case the defendant was charged with unlawful use of a weapon. Although the word “knowingly” was an element of the charge, it was omitted from the information. The defendant first raised the issue of the omission of the essential fact of “knowingly” in his appeal brief. The court held that when the issue of an essential element missing from the charge is raised for the first time only after the verdict, the “information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced.” *Parkhurst*, 845 S.W.2d at 35 (footnote omitted). The court further stated that “[i]n either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient unless the defendant demonstrates actual prejudice.” *Id.*

A more recent Supreme Court of Missouri case addressing the sufficiency of an information is *State v. Baker*, 103 S.W.3d 711 (Mo. banc 2003). In this case the defendant was charged with creation of a controlled substance. The amended information charged that defendant knowingly possessed “methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid . . .,” listing the precursor substances in the disjunctive form.³ *Id.* at 721. The state conceded that it should not have charged possession of each chemical disjunctively in a single count, as possession of anyone of the listed chemicals, by itself, is a separate and distinct offense. *Id.* It appears this defendant also failed to raise the validity of the information issue until his appeal. The court stated that “[f]ailure to challenge the validity of an information or indictment before a verdict is entered severely limits the scope of available appellate review.” *Id.* at 721-722. Then the court went on to recite its rule from *Parkhurst*, as noted above, and found the defendant was not prejudiced by the language in the information.

The Missouri Court of Appeals, Southern District, recently noted that any “analysis of the sufficiency of an information must begin with a discussion of *State v. Parkhurst*.” *State v. McCullum*, 63 S.W.3d 242, 248-250 (Mo.App. S.D. 2001). Noting that *Parkhurst* “dealt only with a question of an untimely challenge to the information,” the court stated that “the standard of review for timely-challenged objections to the information remains to be decided.” *Id.* at 249 (footnote omitted). In making its analysis, the court stated “[a] sufficient charging instrument serves three constitutional purposes: (1) inform the accused of the charges against him or her so that he or she may prepare an adequate defense, (2) prevent retrial on the same charges in case of an acquittal, and (3) inform the court of the facts alleged to determine if those facts as alleged are sufficient, as a matter of law, to withstand motions (such as to dismiss) or support a conviction if one is to be had. . . . Omitting an essential element from a charging instrument hinders these aforementioned purposes, but the extent and prejudicial effect of the hindrance must be judicially determined.” *Id.* (citation omitted). Since the defendant in *McCullum* suffered no prejudice at all, the information charging him was not fatally defective. *Id.* at 250.

The Supreme Court of Missouri Rule 37.41 sets forth its own “prejudicial” standard for ordinance violation informations, outlined below at 4.11 Nonprejudicial Defects of an

³ The original information listed many of the same substances, just not in the disjunctive form.

Information. As in *Parkhurst, Baker, and McCullum*, Rule 37.41 provides that an information shall not be invalid because of any defect that does not prejudice the substantial rights of the defendant.

Typically, most cases concerning the issue of sufficiency of the information are cases where the issue is not addressed until the appeal. As a practical matter, defendants who raise the issue prior to or during trial simply prompt the prosecutor to request an amendment. When allowing the prosecutor to amend, a municipal judge should grant defendant additional time to properly prepare for his or her trial if the amendment would consequently affect the defendant's defense. This issue is more fully outlined below in Section 4.9 Amendment of Information.

B. Sufficiency of Information v. Jurisdiction

In reviewing cases regarding the sufficiency of an information, numerous cases state that a conviction based on an offense not properly charged in the charging instrument is a nullity, as the trial court acquires no jurisdiction over the non-charged offense. The Supreme Court of Missouri has noted a “confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter.” *Parkhurst*, 845 S.W.2d 31, 34 (Mo. banc 1992). Subject matter jurisdiction of the court and the sufficiency of an information are two distinct concepts. The blending of those concepts serves only to confuse the issue to be determined. *Id.* at 34-35. “[A] defendant may for the first time on appeal raise either the issue of the trial court’s jurisdiction to try the class of case of which defendant was convicted or a separate claim that the indictment or information was insufficient to charge the crime of which defendant was convicted.” *Id.* at 35.

In *State v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007), a speeding case tried in circuit court, defendant claimed that the trial court lacked jurisdiction, and its actions were a nullity, because the information was insufficient. The court of appeals reiterated the *Parkhurst* rule that jurisdiction and a charging document’s sufficiency are two distinct concepts. *Id.* at 369. “Circuit courts obviously have subject matter to try crimes . . .” *Id.* at 370 (citing *Parkhurst*, 845 S.W.2d at 35). It is equally obvious that a municipal court has subject matter jurisdiction to hear and determine municipal ordinance violation cases. While *Parkhurst* was a felony case, the distinction between sufficiency of the information and subject matter jurisdiction applies in ordinance violation cases as well.

In *State v. Hicks*, 221 S.W.3d 497 (Mo.App. W.D. 2007), the defendant argued that the court lacked jurisdiction as the state failed to file an information formally charging him with two counts of assault of a law enforcement officer in the third degree, misdemeanors. The original complaint against defendant charged two counts of second-degree assault of a law enforcement officer, class C felonies. The court opined that the line of cases relied upon by defendant, in holding there was a lack of subject matter jurisdiction, totally ignore the Supreme Court of Missouri holding in *Parkhurst*. *Id.* at 501-502. The court went on to outline the *Parkhurst* rule regarding subject matter jurisdiction, but stated the defendant could argue the information was insufficient. *Id.* at 502.

C. Plain, Concise, and Definite Statement of the Essential Facts

1. Insufficient Informations

In *Griffin v. State*, 185 S.W.3d 763 (Mo.App. E.D. 2006), the defendant pled guilty to first degree assault of a law enforcement officer. Defendant moved for post-conviction relief, claiming that the information filed by the state was defective because it did not contain all the essential elements as set forth by statute for first degree assault of a law enforcement officer. *Id.* at 766. The information stated that the acts of defendant caused “physical injury” to the officer rather than “serious physical injury” pursuant to the statute for first degree assault of a law enforcement officer. As the appellate court found the information was not substantially consistent with the approved form set forth in the Supreme Court Rules, it proceeded to a two-part analysis to determine the sufficiency of the information: “(1) whether the information contains all essential elements of the offense as set out in the statute creating the offense, and (2) whether it clearly apprises the accused of the facts constituting the offense.” *Id.* The court concluded that the information did not meet the test, in that defendant could have reasonably believed a jury may have acquitted him of the higher standard of “serious physical injury” rather than the standard in the information. *Id.* at 767.

In *City of Montgomery v. Christian*, 144 S.W.3d 338, (Mo.App. E.D. 2004), the defendant was charged with four ordinance violations: (1) resisting arrest; (2) driving while revoked; (3) hazardous driving, and (4) careless and imprudent driving. The appellate court noted in its opinion that the City failed to file a brief.⁴ The appellate court found that the first two charges failed to allege essential facts of the underlying charge. It held that “resisting arrest by flight” was insufficient because the defendant could have violated the ordinance in a variety of ways, none of which are clear from the information. *Id.* at 341-342. The court found that the information on the driving while revoked charge was equally insufficient, as the information omitted the essential element of the defendant’s culpable mental state. *Id.* at 342. As for the hazardous driving and careless and imprudent driving charges, the court found that those informations did contain sufficient essential facts to apprise the defendant of the charges against him. However, the court held on those two charges, since the informations failed to name the municipality prosecuting the violation and the chapter and section providing the penalty or punishment, that those informations were also deficient.⁵ At no point in its opinion does the court discuss whether the defendant suffered any prejudice as a result of the insufficiencies in the informations.

The Court of Appeals, Western District, had occasion to consider the sufficiency of an amended information in *State v. Frances*, 51 S.W.3d 18 (Mo.App. W.D. 2001). The defendant had originally been charged with three counts of assault, as well as three counts of armed criminal action, involving three separate victims. When the state filed an amended information charging the defendant as a prior offender, it made typographical errors in two of the three armed criminal action counts. The amended information referred to the same victim in each armed criminal

⁴ “When one party fails to file a brief, this court is left with the dilemma of deciding the case (and possibly establishing precedent for future cases) without the benefit of that party’s authority and point of view. Appellate courts should not be asked or expected to assume such a role.” *Christian*, 144 S.W.2d at 340.

⁵ The other two counts also failed to name the municipality prosecuting the violation and the chapter and section providing the penalty or punishment. It should be noted that since the amendment to Rule 37.35, effective July 1, 2004, naming the municipality prosecuting the violation is no longer a requirement of an information.

action count. The defendant was found guilty on all six counts and on appeal raised the issue of double jeopardy. The court noted that *Parkhurst* is “not directly apposite because *Parkhurst* does not relate to double jeopardy concerns.” *Id.* at 23. Although *Parkhurst* expresses “a philosophical position that an otherwise valid charge should not be considered invalid merely because of a minor technical omission”, it was unacceptable to simply ignore the appearance that the defendant’s double jeopardy rights have been violated. *Id.* at 23-24. The court vacated the convictions on two of the three armed criminal action counts.

Defendant’s conviction for “‘assault’ on January 30, 1989, in violation of Ordinance 15-46” was reversed in *City of El Dorado Springs v. Edmiston*, 821 S.W.2d 913 (Mo.App. S.D. 1992). The court held “[n]o facts constituting the assault were alleged”, and that the “bare conclusional allegation violated Rule 37.35(b)(2,)” which requires the information to state “plainly, concisely, and definitely the essential facts constituting the ordinance violation charged.” *Id.* at 914.

In a similar case, where the information simply charged defendant with “STEALING/SHOPLIFTING AT WALMART,” the court found the information to be “so patently devoid of any allegation of facts as to require little or no discussion.” *City of Excelsior Springs v. Redford*, 795 S.W.2d 123, 124 (Mo.App. W.D. 1990). “The statement concerning the violation is at most a bare legal conclusion.” *Id.* The court held that since the information in the case did not state the essential facts constituting the offense charged, the conviction could not stand.

In *City of Berkeley v. Stringfellow*, 783 S.W.2d 501 (Mo.App. E.D. 1990), the information alleged that the defendant did “unlawfully resist a lawful arrest.” On appeal, the defendant alleged the information was in violation of Rule 37.35, requiring the information to “state plainly, concisely, and definitely the essential facts constituting the ordinance violation charged . . .” *Id.* at 503. The court of appeals noted that “[a]lthough an information charging an ordinance violation is not subject to the same degree of strictness and particularity applicable to testing the sufficiency of indictments and informations in criminal cases, it must nevertheless set forth facts which if found true would constitute the offense prohibited by the ordinance.” *Id.* The court set forth the test for sufficiency of an information as (1) whether it states the essential elements of the offense so as to adequately apprise the defendant of the charge against her and (2) whether final disposition of the charge will bar further prosecution for the same offense. *Id.* The court held that the information charging defendant with resisting lawful arrest did not comply with Rule 37.35 nor did it comply with the test for sufficiency. “It does not set forth an ordinance violated as required by the rule; it does not allege any essential facts constituting a violation of an ordinance; it does not allege any elements of the crime intended to be charged.” *Id.*

In *City of Perryville v. LaRose*, 701 S.W.2d 202 (Mo.App. E.D. 1985), the information charged the defendant with the ordinance violation of “improper passing in violation of ordinance § 19-74.” The prosecutor subsequently amended the information, changing the ordinance number to § 19-76. Section 19-76 listed two ways in which a driver could pass improperly. The appellate court noted that Rule 37 requires a plain, concise and definite statement of essential facts, and that the purpose of the information is to inform the defendant of the charge against him so that he may prepare an adequate defense and plead former jeopardy if he is acquitted. *Id.* at 204. The court held that the information failed the stated tests in that it did not allege the offense prohibited. The ordinance with which appellant was charged may be violated a number of ways.

“Merely alleging that appellant made an improper passing maneuver . . . in violation of § 19-76 does not inform appellant of the charge against him so that he may prepare a defense.” *Id.*

In *City of Joplin v. Graham*, 679 S.W.2d 897 (Mo.App. S.D. 1984), the defendant was convicted of assaulting a police officer in violation of a city ordinance. Although an element of the violation was that the officer had to be in the discharge of official duty, this element was not stated in the information. “[W]hile an information charging an ordinance violation is not tested by the same degree of strictness and particularity as is one charging a criminal offense, . . . it must allege specific facts amounting to a violation in order to be sufficient.” *Id.* at 899 (citations omitted). The court held that the information in this case failed to allege any facts constituting the offense and was, therefore, defective. *Id.*

2. Sufficient Informations

In *State of Missouri v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007), defendant was convicted of speeding in circuit court. The court of appeals held that the information was sufficient as it plainly alleged defendant was driving 108 mph in a 70 mph zone. The court noted that “a charging document first challenged on appeal is deemed insufficient only if it is so defective that it (1) by no reasonable construction charges the offense of which the defendant was convicted, or (2) prejudices the defendant’s substantial rights to prepare a defense and plead former jeopardy in case of acquittal. . . . In either event, the defendant also must prove actual prejudice. . . . Defendant has not even argued nor has he met his burden on either of the two prongs.” *Id.* at 370 (citations omitted).

The Court of Appeals, Southern District, recently held that an information charging defendant with second degree assault was sufficiently specific even though allegations that the injury was inflicted by means of a dangerous instrument was omitted. *State v. Carlock*, 242 S.W.3d 461 (Mo.App. S.D. 2007). The court noted that the information correctly identified the offense with which defendant was charged, the proper grade of the offense, the date of the offense, the name of the alleged victim, the proper mental state for the offense, the injury inflicted and the act that inflicted the injury. *Id.* at 464-465. “The only thing omitted was an allegation that injury was inflicted ‘by means of a dangerous instrument.’” *Id.* at 465. As the court determined that the issue was presented for the first time on appeal, the *Parkhurst* test was applicable. Pursuant to *Parkhurst*, the defendant was required to demonstrate actual prejudice. On appeal, defendant failed to explain how his defense would have changed if the “dangerous instrument” language had been included in the information. *Id.*

In *State of Missouri v. Chavez*, 165 S.W.3d 545 (Mo.App. E.D. 2005), the defendant was convicted of violating an order of protection and harassment. The defendant asserted that the information was insufficient, and that the trial court lacked jurisdiction due to the insufficient information. The court of appeals stated that as the issue is raised for the first time on appeal, the scope of its review is severely limited. *Id.* at 548. “Further, whether a trial court has jurisdiction does not depend upon the sufficiency of an information.” *Id.* The information referenced the charging and punishment statute, the date and place of the offense, and stated the defendant violated the order of protection by “abusing, threatening to abuse or molesting or stalking or disturbing the peace of [the victim] or entering upon the premises of her dwelling.” *Id.* After reciting the law as dictated by *Parkhurst* and *Baker*, the court held that the defendant did not demonstrate actual prejudice as a result of the language of the information.

In *City of Chesterfield v. Deshelter Homes*, 938 S.W.2d 671 (Mo.App. E.D. 1997), the court of appeals reversed the trial court's dismissal of the case and remanded. Defendant had filed a motion to dismiss based partly on an allegation of insufficiency of the information. After outlining the requirements of Rule 37.35, and noting that this type of information is not held to the same rule of strictness as charges presented in criminal cases, the court held that all the procedural requirements of Rule 37.35 had been met. As the city's information was in writing, signed by the prosecutor, filed in Municipal Court of Chesterfield, named the defendant, stated the dates the violation took place, noted the ordinance number, and stated specific facts as to how the ordinance was violated, the court found that the city's information satisfied the requirements of Rule 37.35. *Id.* at 672-674.

In a case where defendant was convicted pursuant to a city's nuisance ordinance, the court of appeal held that failure to include an element of the charge in the information is not necessarily grounds for reversal. *City of Hurdland v. Morrow*, 861 S.W.2d 585 (Mo.App. W.D. 1993). Defendant claimed the city failed to allege in the information that defendant was given notice as required by the ordinance. In its ruling, the court relied upon Rule 37.03: "Rule 37 shall be construed to secure the just, speedy and inexpensive determination of . . . all ordinance violations." *Id.* at 587. Additionally, the court relied upon Rule 37.41: "No information shall be invalid . . . because of any defect therein that does not prejudice the substantial rights of the defendant."⁶ *Id.* Defendant did not show how he was prejudiced by the incomplete information, did not object at trial to the city's evidence of notice, nor did he ever request a bill of particulars before trial.

In *City of Peculiar v. Dorflinger*, 723 S.W.2d 424 (Mo.App. W.D. 1986), defendant was convicted of violating a zoning ordinance by constructing a utility shed on a lot not authorized for that use. Defendant claimed that the information was defective as it did not inform defendant of the charge with particularity of the facts. The court of appeals found the information to be a sufficiently plain, concise and definite statement of facts which charged that "defendant did then and there unlawfully construct a utility shed on Lot 13, Lea Land, in violation of the zoning ordinance of the City of Peculiar, Ordinance Number 120379 of said city." *Id.* at 426. The court ruled that the "information in the present case does allege facts and, indeed, probably all the facts which could be set out pertinent to the charge made." *Id.*

D. Lack of Prosecutor's Signature on the Information

Although Rule 37.35(a) clearly states an information shall be signed by the prosecutor, the majority of cases hold that the lack of signature is a mere formal defect. If applying Rule 37.41, it would seem that the lack the prosecutor's signature would be a defect not prejudicing the substantial rights of the defendant. In most cases where the prosecutor's failure to sign the information voids the conviction, the courts base their rulings on the trial court's lack of jurisdiction. However, the Supreme Court of Missouri has made it abundantly clear in *Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992), that insufficiency of the information and lack of jurisdiction are separate and distinct concepts. *See* Section 4.4B Sufficiency of Information v. Jurisdiction.

⁶ The current 2008 version of Rules 37.03 and 37.41 are substantially the same as when this case was decided in 1993.

In *Walster v. State*, 439 S.W.2d 1 (Mo. 1969), it was held that when a defendant who had been charged with a felony had entered a guilty plea to an amended information, the fact that the information was not subscribed and sworn to by the prosecuting attorney was a mere formal defect. “This court has held repeatedly that deficiencies in an information, such as the failure of the state’s attorney to sign and verify the information . . . may be waived, and that the information will be treated as valid if the accused does not attack it by a motion to quash; that such mere formal defects are waived by proceeding to trial without objection.” *Id.* at 3.

In *State v. Knight*, 764 S.W.2d 656 (Mo.App. E.D. 1988), the court of appeals, relying on *Walster*, held “that lack of a signature by a prosecutor on an information is a minor defect not affecting substantial rights where the defendant has alleged no prejudice therefrom.” *Id.* at 658. After determining that the lack of the prosecutor’s signature was a minor defect only, the court then relied on Rule 37.41 for its holding. Rule 37.41 states that an information shall not be invalid because of any defect that does not prejudice the substantial rights of the defendant. *See also, State v. Cobb*, 898 S.W.2d 124, 127 (Mo.App. E.D. 1995) (deficiencies in an information, such as the failure of the state’s attorney to sign and verify the information may be waived by proceeding to trial without objection; an information will be treated as valid if the accused does not attack it by a motion to quash).

E. Lack of Reference to the Charge or Punishment by Chapter and Section

Rule 37.35(b)(4) requires the information to cite the chapter and section of the ordinance alleged to have been violated, as well as the chapter and section providing the penalty and punishment. As with the prosecutor’s signature, many courts have found the lack of reference to the particular ordinance or statute a mere technical defect and, unless the defendant is prejudiced, should not invalidate a conviction.

In fact, the Supreme Court of Missouri has held that mentioning a statute number in an information is treated as “surplusage.” *State v. Madison*, 997 S.W.2d 16, 19 (Mo. banc 1999). In this case of child endangerment charges, the information erroneously referenced the less stringent mental state of “criminal negligence”, a class A misdemeanor, rather than the mental state required for the Class D felony of “knowingly acts.” All other references in the information were correct: title of the offense; the statute creating the offense; the classification of the offense; and the jury instructions stating the law as to the offenses, including the requisite mental state “knowingly acts.” The court stated that “a careful reading of the information might have served to put Madison on notice of the crime with which he was charged since the statutory reference and the classification were accurate.” *Id.* “However, mentioning a statute number in an information is not conclusive as to the offense charged and is ‘treated as surplusage’.” *Id.* Here, the court found that since the defendant claimed he did not do the act, his mental state was irrelevant and did not prejudice his defense. *Id.* at 20.

In *State v. Angle*, 146 S.W.3d 4 (Mo.App. W.D. 2004), defendant was charged with possession of a chemical with intent to manufacture methamphetamine. The information referenced the incorrect statute, § 195.235 rather than § 195.233. The appellate court held that “[c]iting an incorrect statute or omitting a statutory reference does not necessarily render an information fatally deficient.” *Id.* at 10. The court stated that the test for sufficiency is whether the information contains all essential elements of the offense and clearly apprises the defendant of the facts constituting the offense. *Id.* “Here, the factual allegations and evidence were clearly

sufficient to convict Angle under Section 195.233 despite the State's failure to cite that statute." *Id.* The court concluded that defendant was unable to show any prejudice caused by the omission of the correct statute.

Other cases include *State v. Knight*, 764 S.W.2d 656, 658 (Mo.App. E.D. 1988) (DWI case where information failed to state penalty provision; court held that absent any showing of prejudice, the omission of statutory section numbers is not error where the information notified the defendant of the offense charged); *but cf. City of Montgomery v. Christian*, 144 S.W.3d 338 (Mo.App. E.D. 2004) (court found that lack of chapter and section providing the penalty or punishment voided defendant's convictions; this case is more fully discussed above on page 6.)

F. Lack of Date and Place - Venue

Rule 37.35(b)(3) requires that the information state the date and place of the ordinance violation charged as definitely as can be done. When Rule 37.35 was amended, effective July 1, 2004, subsection (b)(5) was deleted, requiring the information to state the name of the prosecuting county or municipality.

In a case in which a jury convicted defendant of driving under the influence and driving while revoked, the defendant raised the question of venue for the first time at his sentencing hearing. *State v. Mack*, 903 S.W.2d 632 (Mo.App. W.D. 1995). The appellate court stated two reasons for denying defendant's venue argument. First, venue must be proved but it can be inferred from all the evidence, and this case produced facts sufficient for such an inference. Second, venue is "a personal prerogative which is waived by proceeding to trial without objection." *Id.* at 627. The Court of Appeals, Eastern District, appears to take a stricter view of the Rule 37.35(b)(3) requirement as opined in *City of Cool Valley v. LeBeau*, 824 S.W.2d 512 (Mo.App. E.D. 1992). LeBeau was convicted for violations of municipal ordinances involving the city's property maintenance code. As the information failed to allege that the offenses were committed within the city or that the building was located within the city, the Eastern District court reversed the conviction based on the premise that the trial court "lacked jurisdiction."⁷ *Id.* at 513.

4.5 PRETRIAL MOTIONS, DEFENSES AND OBJECTIONS TO PLEADINGS

Rule 37.51. Pleadings and Motions Before Trial – Defenses and Objections – Hearing on Motion

Rule 37.51 outlines the timing of defenses and objections to the pleadings. Any defense or objection capable of determination without trial may be raised before trial by motion. However, defenses and objections based on defects in the institution of the prosecution or in the information *must* be made by motion *before* trial unless it's an objection based on the information failing to show jurisdiction in the court or the information failing to charge an ordinance violation. The failure to present any such defense or objection constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Further, "[I]ack of jurisdiction or the failure of the information to charge an ordinance violation shall be noticed by the court at any time during the pendency of the proceeding." Rule 37.41(b)(5).

⁷ The court did not do any type of "prejudice" analysis.

4.6 JOINDER

Rule 37.36. Information – Joinder of Violations

Rule 37.37. Information – Joinder of Defendants

Rule 37.36 allows violations of similar character that are connected or constitute parts of a common scheme to be charged in the same information in separate counts. Rule 37.37 allows two or more defendants to be charged in the same information if they are alleged to have participated in the same act(s) or transaction(s) constituting an ordinance violation(s). Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

Joinder addresses the basic question of what violations and what defendants can be charged in a single proceeding as a matter of law. In a criminal case, liberal joinder is favored in order to achieve judicial economy. *State v. Woodson*, 140 S.W.3d 621, 626 (Mo.App. S.D. 2004); *State v. Kelley*, 901 S.W.2d 193, 202 (Mo.App. W.D. 1995); *State v. Davis*, 860 S.W.2d 369, 372 (Mo.App. E.D. 1993).

4.7 SEVERANCE

Rule 37.60. Severance

The rule regarding severance was recently amended⁸ requiring a *written motion* for severance by the defendant when seeking a separate trial due to multiple defendants or by a party when seeking a separate trial of multiple violations.

In two distinct paragraphs, this rule addresses severance of multiple defendants and severance of multiple violations. The first paragraph of the rule concerns an information where more than one defendant has been charged. Under a multiple defendant case, all defendants shall be tried together unless the court orders a defendant to be tried separately. A defendant may only receive a separate trial if he or she files a written motion requesting a separate trial and the court finds a probability of prejudice exists.

The second paragraph sets forth the requirements for allowing separate trials on different violations which were all filed in one information. A violation shall be tried separately only if: (1) a written motion is filed requesting a separate trial; (2) a party makes a showing of substantial prejudice if the violation is not tried separately; and (3) the court finds a bias or discrimination against the party that requires a separate trial of the violation.

All three appellate districts recognize that joinder and severance are separate and distinct issues. Severance assumes that joinder is proper and leaves to the discretion of the trial court to determine whether prejudice may result if the defendant or charges are tried together. *See State v. Simmons*, 158 S.W.3d 901, 908-909 (Mo.App. S.D. 2005); *State v. Reeder*, 182 S.W.3d 569, 576 (Mo.App. E.D. 2005); *State v. McQuary*, 173 S.W.3d 663, 670 (Mo.App. W.D. 2005).

4.8 INCORRECT NAME OF DEFENDANT

Rule 37.38. Information – Incorrect Name of Defendant

⁸ Rule 37.60 was amended Dec. 23, 2003, effective July 1, 2004.

This rule allows a defendant charged under an incorrect name to furnish the correct name and to have the correct name substituted in the information. If the defendant fails to furnish the correct name, that failure will not invalidate the proceedings against him or her.

4.9 AMENDMENT OF INFORMATION

Rule 37.39. Information – Amendment – Delay

This rule allows a prosecutor to amend an information at any time before a judge’s finding (guilty or not guilty), provided that (1) no additional or different ordinance violation is charged and (2) defendant’s substantial rights are not prejudiced by the amendment. No delay of a trial after such amendment is allowed unless the judge finds that the defendant requires additional time to defend against the amended charge.

A. Amendment that Charges a New or Different Violation

Typically, it is obvious when an amendment changes the charge to a new or different violation. When the amendment to the information charges a different violation, it for all purposes becomes a new information. *State v. Simpson*, 846 S.W.2d 724, 727 (Mo. banc 1993); *State v. Mattic*, 84 S.W.3d 161, 166 (Mo.App. W.D. 2002). It has been held that this rule prohibiting amending to a new charge would not apply if the subsequent charge is a lesser-included offense of the initial charge. *Messa v. State*, 914 S.W.2d 53, 54 (Mo.App. W.D. 1996) (applying Rule 23.08, which is substantially similar to Rule 37.39). An offense is a lesser-included offense if it is impossible to commit the greater without necessarily committing the lesser. *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002). The prohibition of amending to a new or different charge “does not apply if the subsequent charge is a lesser included offense of the initial charge because, in the contemplation of law, they are the same.” *Messa*, 914 S.W.2d at 54.

In *State v. Messa*, 914 S.W.2d 53 (Mo.App. W.D. 1996), the prosecutor amended the information on the morning of trial from felony sodomy, in that the defendant had deviate sexual intercourse, to felony sodomy, in that defendant attempted to have deviate sexual intercourse. The court held that the prosecutor’s amendment of the information was not prejudicial to defendant, in that the “attempt” charge was a lesser included offense of the completed offense charged. *Id.* at 55. As such, the same evidence and defense available to defendant prior to the amendment were equally available to defendant after the amendment. *Id.* at 54-55.

B. Test for Prejudice Due to Amendment

All three appellate district courts have announced the test for prejudice within the meaning of the rule allowing a prosecutor to amend an information. When an amendment is allowed by the prosecution, the test for prejudice is whether a defendant’s evidence would be equally applicable and his defense equally available. *State v. Hoover*, 220 S.W.2d 395, 399 (Mo.App. E.D. 2007); *State v. Fitzpatrick*, 193 S.W.3d 280, 284 (Mo.App. W.D. 2006); *State v. Love*, 88 S.W.3d 511, 517 (Mo.App. S.D. 2002). Stated another way, the test for prejudice is whether the planned defense to the original charge would still be available after the amendment. *Love*, 88 S.W.3d at 517.

4.10 UNAVAILABILITY OF ORIGINAL INFORMATION

Rule 37.40. Information – Unavailability of Original

When the original information is unavailable for any reason, a copy, certified by the clerk or by the prosecutor, may be substituted. For example, a certified copy may be used to replace a lost, burned, or misplaced original.

4.11 NONPREJUDICIAL DEFECTS OF AN INFORMATION

Rule 37.41. Information – Nonprejudicial Defects

Rule 37.41 makes it clear that an information is not invalid simply because it contains a defect. An information shall only be invalid if the defect prejudices the substantial rights of the defendant. Some of the cases discussed above in Section 4.4.C.2 Sufficient Informations are examples of informations with nonprejudicial defects. *See, State v. Richter*, 241 S.W.3d 368 (Mo.App. S.D. 2007); *State v. Chavez*, 165 S.W.3d 545 (Mo.App. E.D. 2005); *City of Hurdland v. Morrow*, 861 S.W.2d 585 (Mo.App. W.D. 1993).

APPEARANCE OF THE DEFENDANT

4.12 Voluntary Appearance of the Defendant

If a defendant is present in court on the charge, no other proceedings are necessary to obtain jurisdiction of the person. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992) (citing *State v. Conway*, 351 Mo. 126, 171 S.W.2d 677, 683 (Mo. 1943)).

4.13 Compelling the Appearance of the Defendant

A. Appearance By Summons

Rules 37.42 through 37.44; Form 37.L

Rule 37.42 describes what a summons must contain, and Form 37.L is a sample summons setting forth those requirements. The summons shall: (a) be in writing and in the name of the prosecuting county or municipality; (b) state the name of the person summoned and the address, if known; (c) describe the ordinance violation charged; (d) be signed by a judge or by a clerk of the court when directed by a judge; and (e) command the person to appear before the court at a stated time and place in response thereto.

When an information charging the commission of an ordinance violation is filed, Rule 37.43 requires a summons to be issued upon the defendant. Upon this Rule's amendment, effective July 1, 2004, violation notices (tickets given by officers to defendants) are no longer equivalent to a summons. The violation notice given to a defendant by an officer at the time of the violation is simply a notice (1) of the violation and (2) of the first date and time the case will appear on the court's docket. The 2004 amendment added subsection (d) to the Rule, requiring the summons to be signed by the judge or the court clerk. Typically, if the defendant fails to voluntarily appear on the first docket date, the court clerk will issue a summons for the defendant to appear on the next court date.

Rule 37.44 allows the summons to be served by the clerk to defendant's last known address, by first class mail, or by an officer in the manner provided by Rule 54.13 (personal service within the state) or Rule 54.14 (personal service outside the state). If the clerk serves the summons by mail, then the clerk certifies on the "Certificate of Mailing" (Form 37.L) the date on which the summons and copy of the information were mailed to the defendant.

B. Appearance By Warrant For Arrest

**Rules 37.43 through Rule 37.46; Form 37.M
Section 479.100 RSMo (2004)**

Rule 37.44 states that "[i]f the defendant fails to appear in response to a summons and upon a finding of probable cause that an ordinance violations has been committed, the court may issue an arrest warrant."

Under certain circumstances, Rule 37.43 allows for the issuance of an arrest warrant without a summons having been issued. There are three conditions that are required before an arrest warrant may be issued prior to a summons being issued: (1) an information charging an ordinance violation is filed; (2) the court finds sufficient facts stated to show probable cause that an ordinance violation has been committed; and (3) reasonable grounds for the court to believe that the defendant will not appear upon the summons *or* a showing has been made to the court that the accused poses a danger to a crime victim, the community, or any other person.

Rule 37.45(b) specifies the required contents of an arrest warrant, and Form 37.M is the recommended form containing all the requirements for a warrant. The rule states that the warrant shall: (1) contain the name of the person to be arrested or, if not known, any name or description by which the defendant can be identified with reasonable certainty; (2) describe the ordinance violation charged in the information; (3) state the date when issued and the jurisdiction where issued; (4) command that the defendant named or described therein be arrested and brought forthwith before the court designated in the warrant; (5) specify the conditions of release; and (6) be signed by a judge or by a clerk of the court when directed by the judge for a specific warrant.

It is important to note that the clerk of the court may sign the arrest warrant only in the circumstance stated in Rule 37.45(b)(6), *i.e.*, when directed by the judge for a specific warrant. It is recommended that the judge review and sign each of the court's arrest warrants in lieu of the court clerk using a "judge's signature stamp."

Rule 37.46 allows all warrants ordered for ordinance violations to be directed to any peace officer in the state. The officer executes the warrant by arresting the defendant. The officer need not possess the warrant at the time of the arrest, but shall inform the defendant of the ordinance violation charged and the fact that a warrant has been issued. Upon request, the officer shall show the warrant to the defendant as soon as possible. The court, by its written order, may withdraw any warrant previously issued if the warrant has not been executed.

Section 479.100 RSMo (2004) allows the issuance and executions of arrest warrants by a municipal or associate circuit judge hearing violations of municipal ordinances to be directed to the city marshal, chief of police, or any other police officer of the municipality, or to the sheriff of the county. Under this statute, the warrant may only be executed within that particular county

unless it is endorsed in a manner provided for warrants in criminal cases, and, when so endorsed, shall be served in other counties.