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Court of Appeals
Division III
State of Washington

No. 30032-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KIMBERLY LYNN GRIJALVA,

Defendant/Appellant.

Appellant's Reply Brief

Jill S. Reuter, WSBA No. 38374
Of Counsel
David N. Gasch, WSBA No. 18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorneys for Appellant

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Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

A. ARGUMENT

Issue No. 1. The amended information charging second degree theft was constitutionally defective because it failed to charge a crime, and must therefore be dismissed.

The State argues that the amended information charging second degree theft was not defective, because it gave Ms. Grijalva sufficient notice of the charge against her. (Resp't Br. at 3-4). However, the problem with the amended information is not that Ms. Grijalva received inadequate notice of the charge. Instead, the problem with the amended information is that it failed to charge a crime. *See In re Richard*, 75 Wn.2d 208, 211, 449 P.2d 809 (1969). The State charged Ms. Grijalva with theft of property, and alleged that this property was "telephone services." (CP 10). "Telephone services" are not property. The State failed to properly charge second degree theft, by incorrectly alleging that "telephone services" are property.

Respondent also points to the fact that Ms. Grijalva did not request a bill of particulars. (Resp't Br. at 5). However, even if Ms. Grijalva had requested a bill of particulars, it would not have changed the fact that the amended information failed to charge a crime.

Issue No. 2. The trial court erred in finding Ms. Grijalva guilty as charged, where the evidence was insufficient.

First, the evidence was insufficient to find Ms. Grijalva guilty of second degree theft. The State argues that the actions of Ms. Grijalva meet the definition of theft. (Resp't Br. at 18-29). However, the State does not directly address Ms. Grijalva's argument, as set forth in her opening brief. (Appellant's Br. at 19-21).

Ms. Grijalva's argument is that the State did not prove that Ms. Grijalva wrongfully obtained or exerted unauthorized control over "telephone services" belonging to the Yakima County Department of Corrections. *See* RCW 9A.56.020(1)(a), RCW 9A.56.040(1)(a). Due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because the State alleged theft of property in the form of "telephone services" from the Yakima County Department of Corrections, theft of "telephone services" is what it was required to prove. (CP 10).

However, the only property belonging to the Yakima County Department of Corrections arguably taken by Ms. Grijalva, as an accomplice, was commission money the County would have received from

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

inmate calls that should not have gone through the inmate attorney phone system. This is property in the form of money, not property in the form of “telephone services” as alleged by the State. (CP 10).

The State does not refute Ms. Grijalva’s argument. Instead, the State admits that the only property taken from the Yakima County here was money. (Resp’t Br. at 8). Therefore, there was insufficient evidence of second degree theft of “telephone services” from Yakima County Department of Corrections, as charged here.


Second, the evidence was insufficient to find Ms. Grijalva guilty of third degree introducing contraband. The State appears to argue that the legal analysis of this issue is affected by whether Ms. Grijalva thought that giving her cell phone to the jail inmate was wrong. (Resp’t Br. at 31-34). However, the issue is whether, on the date in question, October 23, 2010, a cell phone met the statutory definition of contraband. *See* RCW 9A.76.010(1). Because there was no rule expressly prohibiting obtaining or possessing a cell phone on this date, a cell phone was not contraband. (RP 44-46, 51-52, 89, 97-98, 105, 318; Def.’s Exs. 2, 21). Ms. Grijalva did not act unlawfully on the date in question. Therefore, there is insufficient evidence of third degree introducing contraband, as charged here.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

B. CONCLUSION

For the reasons stated herein, and in appellant's opening brief, the convictions should be reversed and dismissed with prejudice, or in the alternative, the second degree theft count should be dismissed because the amended information was constitutionally defective. The sentencing condition imposing the cost of incarceration should also be stricken.

Respectfully submitted on October 28, 2013,



s/Jill S. Reuter, WSBA No. 38374
Of Counsel
Attorney for Appellant

s/David N. Gasch, WSBA No. 18270
Attorney for Appellant

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on October 28, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Reply Brief:

Kimberly Lynn Grijalva
3167 Wildwood Drive
Longview, WA 98632

E-mail: trefrylaw@wegowireless.com
David Brian Trefry
Special Deputy Prosecuting Attorney
P. O. Box 4846
Spokane WA 99220-0846

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com