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APR 30 2010

King County Prosecutor  
Appellate Unit

NO. 64618-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

FRANCISCA OTHIENO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard F. McDermott, Judge

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it permitted the State to amend the information on the first day of trial.

Issue Pertaining to Assignment of Error

The trial court may permit amendment of an information so long as there is no prejudice to the defendant. Appellant was charged with theft for wrongfully obtaining money. Her defense was that she obtained the money under good faith claim of title. The first day of trial, the State moved to amend the information with an allegation that appellant had obtained the money “by color and aid of deception,” for which a good faith claim of title defense does not apply. The trial court granted the motion, mistakenly believing it would have no impact on appellant’s defense. Did the trial court err in allowing the amendment?

B. STATEMENT OF THE CASE

1. State’s Motion To Amend The Information

On February 5, 2009, the King County Prosecutor’s Office charged Francisca Othieno with one count of Theft in the First Degree. The information alleges:

That the defendant FRANCISCA S. OTHIENO in King County, Washington, during a period of time intervening between September 25, 2007 through September 28, 2007, with intent to deprive another of property, to-wit: money, did wrongfully obtain such property belonging to Neema Seeds LLC; that the thefts were a series of transactions which were part of a criminal episode or common scheme or plan in which the sum value of the property taken in the said transaction did exceed \$1,500;

CP 1.

An omnibus hearing was held on May 8, 2009. The deputy prosecutor assigned to the case gave no indication she intended to file an amended information. Supp. CP \_\_\_\_ (sub no. 17, Order on Omnibus Hearing). In a defense trial brief, defense counsel alleged that "the funds were appropriated openly and validly under a claim of title made in good faith." 1RP 4.

Trial started on October 26, 2009. 1RP<sup>1</sup> 3. The prosecutor immediately moved to amend the information, adding a new means of committing the crime: theft by deception. 1RP 3. Defense counsel objected, noting that she had prepared for trial based on the original information. 1RP 3. Counsel indicated that the planned

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – October 26, 2009; 2RP – October 27, 2009; 3RP – October 28, 2009; 4RP – October 29, 2009; 5RP – November 12, 2009.

defense – a good faith claim of title – might not apply in light of the new charging language. 1RP 4.

The deputy prosecutor assured the defense and the court that the defense was available for theft by deception. 1RP 4. The court indicated, “I want to make sure we don’t take away any defense from the defendant at this late stage; and that’s what concerns me.” 1RP 5. The prosecutor noted that under the criminal rules, she could amend the information any time prior to the case going to the jury so long as there was no prejudice to the defendant. 1RP 4-5. She argued that since the defense was still available after the amendment, there was no prejudice to Othieno. 1RP 5.

Defense counsel responded that she had found case law indicating the good faith claim of title defense is inapplicable, as a matter of law, where the charge is theft by deception. 1RP 7. The court responded, “but that doesn’t mean you can’t plead it and try and prove it.” 1RP 7. The judge believed the good faith defense applied under either theory the prosecutor was attempting to pursue, but said he would take a closer look before ruling on the State’s motion. 1RP 8.

The next morning, the court granted the motion to amend the information, finding that the defense could still raise a good faith claim of title defense. 2RP 4. The amended information provides:

That the defendant FRANCISCA S. OTHIENO in King County, Washington, during a period of time intervening between September 25, 2007 through September 28, 2007, with intent to deprive another of property, to-wit: U.S. Currency, having a value in excess of \$1,500, did obtain control over such property belonging to Neema Seeds, L.L.C., by color and aid of deception, and, did exert unauthorized control over such property;

CP 9.

## 2. Trial Evidence

In the spring of 2006, several members of the local Kenyan community organized a group called Neema Seeds, LLC. The group's purpose was to pool financial resources and invest the assets. 3RP 47-51. Each member was required to pay a \$50 registration fee plus \$150.00 each month. 3RP 51.

The group elected three officers. Peter Rito Kimuhu was elected Chairman. 3RP 43, 52. Ezibon Njuguna was elected Treasurer. 3RP 52, 78. And Francisca Othieno was elected Secretary. 3RP 52; 4RP 18. In July 2006, Neema Seeds opened a

business savings account with Boeing Employees Credit Union (BECU). Each of the elected officers was listed as an authorized signer on the account, meaning that BECU would allow any of the three to make withdrawals from the account. 2RP 19-22; 3RP 35; exhibit 1. Othieno also had a personal savings account at BECU. 3RP 25; 4RP 20.

Neema Seeds established certain rules for its members. There were monthly meetings, to which members were expected to bring their regular contributions. 3RP 53. All members had to agree on monetary withdrawals from the Neema account. 3RP 57. And only the treasurer (Mr. Njuguna) could make deposits and withdrawals on the account. 3RP 58-59, 83. Those wishing to leave the group had to provide notice in writing. 3RP 53, 57, 84. The departing member would then receive a check in the amount of his or her contributions, less the \$50.00 registration fee. 3RP 87-89.

Francisca and her husband, who also was a member of Neema Seeds, stopped attending the monthly meetings and, in late 2006, submitted a letter giving notice they were leaving the group. 3RP 55, 62-64, 91. On January 16, 2007, Neema sent the Othieno's a refund check for \$900.00. 3RP 91-92; exhibit 31. Njuguna called BECU and asked that Francisca Othieno be

removed as an authorized signer on Neema's account. 4RP 84. But Njuguna did not make that request in writing, which BECU requires. 2RP 18; 4RP 85.

On September 28, 2007, Njuguna checked Neema's account on line and noticed several unauthorized withdrawals. 3RP 104, 108-110. On September 25, BECU had issued a check payable to Dish Network for \$80.00, a check payable to Best Buy for \$200.00, a check payable to T Mobile for \$250.00, and a check payable to U.S. Bank for \$72.00. Francisca Othieno was listed as the purchaser of each check. 3RP 13-14, 16-18; exhibits 21-24. On September 27, BECU had issued a check payable to Francisca Othieno for \$20,000.00. 3RP 19; exhibit 25. Finally, on September 28, BECU had issued a check to Macy's for \$1,000.00. Again, Othieno was listed as the purchaser. 3RP 20; exhibit 26.

Othieno testified at trial. 4RP 12. She explained that she used her personal account with BECU to pay her bills. And because she did not have a checking account, she had BECU issue checks to her creditors. 4RP 20-21. In September 2007, she went to BECU and the teller informed her she had \$20,000.00 available. 4RP 22-23, 37. Othieno thought this was a miracle. She told the teller that if the money truly was available, she should

put it in her personal account, which the teller did. 4RP 23-24, 41-42. As to the other checks drawn on the Neema account and paid to Othieno's creditors, Othieno did not have a clear memory of the circumstances of those withdrawals. It was her practice to hand the teller a list of her creditors and her account number, and the teller would print the checks for her. 4RP 33-38, 44-45.

Othieno testified that Mr. Njuguna and others from Neema Seeds confronted her about the money missing from the Neema account. 4RP 25. Othieno told them she did not have their money and believed the money in her account was her own, but she was willing to go to the bank with them to resolve the matter. They never went, however. Two police officers arrived at her house and asked about the money. She said she did not have it. 4RP 25-26. Later, Othieno also offered to go to BECU with Peter Kimuhu, but he refused. 4RP 27. By the time of trial, Othieno still believed the \$20,000.00 was her money. 4RP 27.

The State called Federal Way Police Detective Annette Scholl in rebuttal. 4RP 48-49. Detective Scholl testified that when she questioned Othieno about the missing funds, Othieno denied taking Neema's money and said she had used her ATM card to withdraw her own money from her personal account. 4RP 54-55.

When shown documents from BECU concerning the funds, she said the bank was wrong and that if her name had not been left on the Neema account, she would not have been able to withdraw money from that account. 4RP 58. Scholl conceded she had never obtained a video of the transactions in question, which had since been destroyed. Nor had she identified the teller who assisted Othieno with the transactions. 4RP 62-65.

The State also recalled Ezibon Njuguna. 4RP 82. He denied that Othieno suggested they go to BECU to resolve the matter. 4RP 86. According to Njuguna, when asked about the missing money, Othieno admitted she had been to BECU around the dates of the withdrawals, but denied taking it and said she had been there simply to withdraw her own funds from her personal account using her ATM card. 4RP 86.

### 3. Instructions and Closing Arguments

When arguing for permission to amend the information to add theft by deception, the deputy prosecutor had assured the defense and the court that the good faith claim of title defense was still available under that theory. 1RP 4. By the end of trial, however, the prosecutor had changed her mind. She argued jurors could not consider the defense because it was inapplicable, as a

matter of law, to theft by deception. 4RP 70. Moreover, the prosecutor argued the evidence did not support an instruction since the testimony did not show a good faith belief Othieno was entitled to the money. 4RP 71, 73.

The court overruled the State's objection and indicated it would instruct the jury on the defense. 4RP 73-74. Citing its original objection to the amended information, defense counsel objected to that portion of the proposed "to convict" instruction that included the theft by deception means of committing the charged offense because it precluded the good faith defense. 4RP 74, 78-79. Counsel also objected to all other instructions that discussed the concept of theft by deception. 4RP 75. The objections were overruled. 4RP 75, 80.

Jurors were instructed they could convict Othieno if she "wrongfully obtained or exerted unauthorized control over property of another or the value thereof" or if she "by color or aid of deception, obtained control over property of another or the value thereof[.]" CP 20. Other instructions defined "color or aid of deception." CP 24-25. Jurors also were instructed on the good faith defense:

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even though the claim be untenable.

The State has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 28.

In closing argument, the prosecutor argued both theories of liability. Regarding its original charged theory (unauthorized control), the prosecutor argued that Othieno took money from Neema that she knew did not belong to her and that she was not authorized to use. 4RP 94-97. Regarding its amended theory (theft by deception), the prosecutor argued that Othieno took advantage of the fact BECU mistakenly accessed Neema's business account, asking the teller to transfer money to her personal account knowing it did not belong to her. 4RP 97-99.

The defense pointed to the absence of two critical pieces of evidence – the surveillance tape and the teller who assisted Othieno at BECU. 4RP 106. Counsel argued that Othieno truly

believed the money was a miracle and a gift that belonged to her.  
4RP 108-109.

Jurors convicted Othieno, the court imposed a 30-day standard range sentence, and Othieno timely filed her Notice of Appeal. CP 31, 36, 40-48.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO AMEND THE INFORMATION THE FIRST DAY OF TRIAL.

“The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d); but see State v. Pelkey, 109 Wn.2d 484, 487-491, 745 P.2d 854 (1987) (prejudice presumed when prosecution amends after it has rested). The decision to permit an amendment is reviewed for abuse of discretion. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

Prejudice is less likely where the State merely specifies a different means of committing the charged crime. State v. Shaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993). But even “[w]here the principal element in the new charge is inherent in the previous charge[,]” it is an abuse of discretion to allow the amendment if the

defendant can show prejudice. Gosser, 33 Wn. App. at 435. “An amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.” State Purdom, 106 Wn.2d 745, 749, 725 P.2d 622 (1986) (quoting State v. Jones, 26 Wn. App. 1, 6, 612 P.2d 404, review denied, 94 Wn.2d 1013 (1980)).

The State’s amendment on the first day of Othieno’s trial denied her the defense her attorney had prepared and left no time to prepare a new defense. From February to October 2009, the only allegation Othieno faced was that she had committed theft by wrongfully obtaining Neema Seeds’ money. See CP 1-4, 9. Defense counsel prepared to meet this charge with a defense that “the funds were appropriated openly and validly under a claim of title made in good faith.” 1RP 4.

RCW 9A.56.020(2)(a) provides that “[i]n any prosecution for theft, it shall be a sufficient defense that . . . [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” A good faith belief negates the intent to steal. State v. Hicks, 102 Wn.2d 182, 184, 683 P.2d 186 (1984).

By amending the information on the first day of trial to add a claim that Othieno had committed theft by deception, the trial deputy removed the prepared good faith defense. It is well established that a good faith claim of title is inapplicable to theft by deception. “A jury cannot convict on a charge of theft by deception without first rejecting any claim of good faith by the defendant. We therefore reiterate the conclusion we reached in Stanton: The good faith claim of title is inapplicable as a matter of law where the charge is theft by deception.” State v. Casey, 81 Wn. App. 524, 527, 915 P.2d 587 (citing State v. Stanton, 68 Wn. App. 855, 845 P.2d 1365(1993), review denied, 126 Wn.2d 1016 (1995)), review denied, 130 Wn.2d 1009 (1996).

Defense counsel properly objected to the State’s amendment, noting its probable impact on her prepared defense. 1RP 3-4. She did not ask for a continuance once the State’s motion was granted. See 2RP 4. Typically, this undermines any prejudice claim. State v. Alvarado, 73 Wn. App. 874, 877, 871 P.2d 663 (1994); State v. Schaffer, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), aff’d, 120 Wn.2d 616, 845 P.2d 281 (1993). But there is good reason defense counsel did not ask for a continuance. She

was led to believe the good faith defense applied to theft by deception.

The prosecutor expressly indicated the defense was still available for that means of committing theft. 1RP 4. Even when defense counsel noted contrary case law, the court responded, “but that doesn’t mean you can’t plead it and try and prove it.” 1RP 7. But any such attempt was futile for the reason discussed in Casey. As a matter of law, the defense simply does not apply. The trial court was trying to be careful and indicated, “I want to make sure we don’t take away any defense from the defendant at this late stage; and that’s what concerns me.” 1RP 5. But the court ended up doing just that based on its failure to recognize the defense could not apply to theft by deception no matter how hard counsel might try to plead and prove it.

Even by the end of trial, after the prosecutor had reversed course and argued the good faith defense could not apply to theft by deception, the court did not fully understand this to be true. The court was under the mistaken belief that jurors could convict Othieno under both theories without finding deception on her part. Therefore, the court believed, the good faith defense still applied to each means. 4RP 72 (“It seems to me that there is evidence here

before the jury that they could take a look at either of your allegations and certainly could decide that she wrongfully obtained or exercised control over the property of another without being deceptive and still be guilty.”).

This is incorrect. To find Othieno guilty of theft under the deception means, jurors had to find that she obtained control over the property “by color or aid of deception.” CP 20. Therefore, the good faith defense could not apply and the amendment had denied Othieno her prepared trial defense. Neither the amendment nor the instructions pertaining to that amendment should have been permitted.

D. CONCLUSION

For nine months, Othieno faced a charge for which good faith claim of title was a defense. On the first day of trial, the State was permitted to amend the information to add a new theory to which the defense does not apply. Because the amendment prejudiced Othieno's ability to defend against the charged theft, her conviction must be reversed.

DATED this 30<sup>th</sup> day of April, 2010.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64618-4-I
	)	
FRANCISCA OTHIENO,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANCISCA OTHIENO  
P.O. BOX 6072  
FEDERAL WAY, WA 98063

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL, 2010.

x *Patrick Mayovsky*

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