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NO. 64618-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCA OTHIENO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD F. McDERMOTT

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the trial court err by permitting the State to amend the information on the first day of trial where the new charge was inherent in the previous charge and no prejudice is demonstrated?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant was charged via information with one count of Theft in the First Degree on February 9, 2009. CP 1. On October 26, 2009, the first day of trial, the State moved to amend the information to charge an alternative prong of the same crime, specifically theft by deception and exerting unauthorized control over property. CP 9. Finding no prejudice to the appellant, the court granted the State's motion to amend. 2RP 4; 4RP 80. On October 30, 2009, the jury convicted the appellant as charged. CP 31. The appellant timely filed this appeal. CP 40-48.

2. SUBSTANTIVE FACTS

Othieno was a member of an investing group called Neema Seeds LLC and, because she became a board member, was added

to the group's bank account on July 24, 2006. 2RP 22. The group created rules to govern how the deposits and withdrawals were to be made with regard to the group's members, along with regulations for entry and departure by members. 3RP 53, 57-59, 87-89. Othieno left the group in late 2006 and was given her refund check. 3RP 55, 91-92. Despite efforts to the contrary, Othieno was inadvertently not removed as an authorized signer on Neema Seeds' bank account. 4RP 84.

In September and October 2007, numerous unauthorized withdrawals were made from Neema Seeds' account, with Othieno as purchaser as well as one \$20,000 withdrawal which had been made in the form of a check to Othieno. 3RP 13-14, 16-20, 104. Other Neema Seeds board members discovered the withdrawals by Othieno and confronted her about it. 4RP 25. At trial, Othieno testified that she believed the money had appeared in her personal bank account because of a miracle and the money was rightfully hers. 4RP 23, 27.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY PERMITTING THE FILING OF AN AMENDED INFORMATION ON THE FIRST DAY OF TRIAL WHERE THE NEW CHARGE WAS INHERENT IN THE PREVIOUS CHARGE AND NO PREJUDICE IS DEMONSTRATED.

Article 1, section 22 of the Washington Constitution affords a criminal defendant the right to be informed of the charges against him and protects against, "charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice." State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993). Consistent with this constitutional provision, the Court may permit the amendment of an information at any time before the verdict or finding if substantial rights of the defendant are not prejudiced. CrR 2.1(d); Schaffer, 120 Wn.2d at 622. The trial court has considerable discretion, based on the facts of each case, in ruling on a motion to amend, and "reversal is required only upon a showing of abuse of discretion." Id. at 621-22.

A trial court abuses its discretion only if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if it falls

outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 136 (1997); State v. Olivera-Avila, 89 Wn. App. 313, 949 P.2d 824 (1997). Here, the trial court did not abuse its discretion.

The decision to permit an amendment is reviewed under an abuse of discretion standard. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Othieno correctly notes prejudice is less likely where the State merely specifies a different means of committing the charged crime. Schaffer, 120 Wn.2d at 621. It is not an abuse of discretion to allow an amendment on the day of trial where the new charge is inherent in the previous charge and no other prejudice is demonstrated. Gosser, 33 Wn. App. at 435. Othieno fails to show any prejudice by the amendment.

According to State v. Casey, that funds were appropriated openly and avowedly under a claim of title made in good faith is not a defense to theft by deception. 81 Wn. App. 524, 915 P.2d 587 (1996). In this case, the only error possible is the fact that the court allowed argument and an instruction it should not have. That Othieno

was possibly erroneously able to argue good faith belief as a defense only benefitted her.

Othieno made no motion for continuance, nor did she need to, because she was allowed to argue the prepared defense. 1RP 7. Specifically, the jury does not know that a good faith belief is not a defense to theft by deception as a matter of law. Othieno argued the lack of the intent element throughout her closing argument and was given the benefit of the good faith belief instruction. 4RP 107-09.

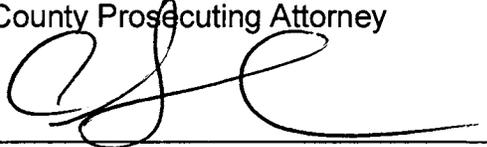
D. CONCLUSION

Accordingly, the appellant has shown no prejudice and the court did not abuse its discretion by allowing the amendment to include an alternate means of committing Theft in the First Degree. Thus, this court should affirm the trial court.

DATED this 7th day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, attorney for the Appellant, of the Washington Appellate Project, at the following address: 1908 E. Madison St. Seattle, WA 98122 containing a copy of Brief of Respondent to be sent to Court of Appeals, in State v. Francisca Othieno, Cause No. 64618-4-I, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct

Janice Schwarz

Janice Schwarz
Done in Kent, Washington

6/8/10
Date