

68567-8

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No. 68567-8

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

STATE OF WASHINGTON,

Respondent,

v.

DOLORES E. PIMIENTA-DE SINNER,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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A. ASSIGNMENT OF ERROR

The information omitted the essential dollar-value element of the charged crime of first degree theft.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The “essential elements” rule requires that the charging document contain all essential elements of the crime. An essential element of the crime of first degree theft as charged in this case is that the accused committed theft of property in excess of one thousand five hundred dollars in value. Did the information violate the essential elements rule where it omitted this essential element?

C. STATEMENT OF THE CASE

The State charged Delores Pimienta-De Sinner with one count of first degree theft (count 9).¹ CP 22. The State alleged the offense occurred on December 31, 2007. CP 22. Specifically, the information alleged:

¹ The State also charged Ms. Pimienta-De Sinner with three other counts of first degree theft arising from three other transactions (counts 3, 6 and 13); three counts of first degree identity theft (counts 10, 14 and 15); and two counts of tampering with a witness (counts 11 and 12). CP 20-25. Prior to trial, the court dismissed counts 6 and 13 with prejudice. CP 26. The jury was unable to agree on a verdict as to counts 3, 11, and 15. CP 62-63. The jury found Ms. Pimienta-De Sinner guilty as to counts 9, 10 and 12. CP 62-63. The jury was not instructed on count 14 and was not asked to reach a verdict on that count. See CP 35-61.

That the defendant DOLORES E. PIMIENTA-DE SINNER AKA EVANGELINA PIMIENTA in King County, Washington, on or about December 31, 2007, with intent to deprive another of property, to-wit: U.S. currency via the Castro/Guido loan for \$290,000, did obtain control over such property belonging to IndyMac Bank F.S.B., by color and aid of deception, that the value of such property did exceed \$5,000;

Contrary to RCW 9A.56.030(1)(a) and 9A.56.020(1)(b), and against the peace and dignity of the State of Washington.

CP 22.

The jury found Ms. Pimienta-De Sinner guilty of count 9 as charged. CP 62-63.

D. ARGUMENT

The information was constitutionally deficient because it omitted an essential element of the crime

1. The charging document must set forth every essential element of the crime.

It is a fundamental principle of criminal procedure, embodied in the state² and federal³ constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations

² Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

³ The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In

before the State may prosecute and convict her of a crime. The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth every essential element of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This “essential elements rule” has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008); State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995).

All essential elements of the crime—both statutory and non-statutory—must be included in the charging document so as to apprise the accused of the charges and allow her to prepare a defense, and so that she may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every element of the charge, along with all essential supporting facts, must be set forth with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the

addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

challenge is raised for the first time on appeal. But for post-verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Nonetheless, an information cannot be upheld, regardless of when the challenge is raised, if it does not contain all the essential elements, as “the most liberal possible reading cannot cure it.” State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge.

Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790.

2. The “essential elements” rule was violated because the information omitted the essential dollar-value element of first degree theft.

The State alleged that the crime of first degree theft charged in count 9 occurred “on or about December 31, 2007.” CP 22. The first degree theft statute in effect at that time set forth the following elements: “A person is guilty of theft in the first degree if he or she commits theft of: (a) Property or services which exceed(s) *one thousand five hundred dollars in value* other than a firearm as defined

in RCW 9.41.010” Former RCW 9A.56.030(1)(a) (2005) (emphasis added).⁴ The term “theft” as charged means: “By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(b).

Here, the information omitted the essential statutory element that the property stolen “exceed[ed] one thousand five hundred dollars in value.” Former RCW 9A.56.030(1)(a) (2005); CP 22. The information alleged only the following elements: (1) with intent to deprive another of property; (2) Ms. Pimienta-De Sinner obtained control over such property; (3) by color and aid of deception. CP 22. Nowhere on the face of the document does the information contain the essential statutory element that the value of the property exceeded “one thousand five hundred dollars in value.”⁵ Former RCW

⁴ In 2009, the Legislature amended the statute to increase the dollar-value element of the crime. See Laws 2009, ch. 431, § 7. The statute now provides: “A person is guilty of theft in the first degree if he or she commits theft of: (a) Property or services which exceed(s) *five thousand dollars in value* other than a firearm as defined in RCW 9.41.010.” RCW 9A.56.030(1)(a) (emphasis added).

⁵ The information does allege that the value of the property “did exceed \$5,000.” CP 22. But that was not an essential element of the crime as charged and therefore cannot cure the constitutional deficiency in the charging document. See former RCW 9A.56.030(1)(a) (2005).

9A.56.030(1)(a) (2005). Therefore, the information is constitutionally deficient. Kjorsvik, 117 Wn.2d at 101-02.

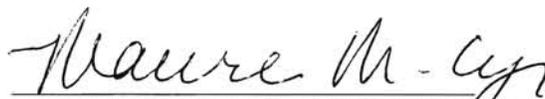
3. The conviction must be reversed and the charge dismissed without prejudice to the State's ability to re-file the charge.

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

E. CONCLUSION

Because the information omitted the essential dollar-value element of the crime of first degree theft, the conviction for count 9 must be reversed and the charge dismissed without prejudice.

Respectfully submitted this 14th day of January, 2013.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68567-8-I
v.)	
)	
DOLORES PIMIENTA-DESINNER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> DOLORES PIMIENTA-DESINNER 19261 218 TH AVE SE MAPLE VALLEY, WA 98038	(X) () ()	U.S. MAIL HAND DELIVERY _____

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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JANUARY, 2013.

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