

64618-4

REC'D

64618-4

JUL 13 2010

King County prosecutor
Appellate Unit

NO. 64618-4-I

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

2010 JUN 13 PM 3:53

Handwritten signature

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCA OTHIENO,

Appellant.

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

The Honorable Richard F. McDermott, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
<u>A.</u> <u>ARGUMENT IN REPLY</u>	1
<u>OTHIENO WAS PREJUDICED BY THE AMENDED</u> <u>CHARGE.</u>	1
<u>B.</u> <u>CONCLUSION</u>	2

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Casey

81 Wn. App. 524, 915 P.2d 587

review denied 130 Wn.2d 1009 (1996) 1

A. ARGUMENT IN REPLY

OTHIENO WAS PREJUDICED BY THE AMENDED CHARGE.

The State argues that Othieno suffered no prejudice from the amended information because “she was allowed to argue the prepared [good faith] defense” and “the jury does not know that a good faith belief is not a defense to theft by deception as a matter of law.” Brief of Respondent, at 5.

But jurors would have quickly recognized the good faith defense did not apply to theft by deception as soon as they considered the elements of that charge. They were specifically told:

Deception occurs when an actor knowingly creates or confirms another’s false impression that the actor knows to be false or fails to correct another’s impression that the actor previously has created or confirmed or prevents another from acquiring information material to the disposition of the property involved.

CP 25. Jurors would have realized precisely what this Court realized in State v. Casey, 81 Wn. App. 524, 527, 915 P.2d 587, review denied 130 Wn.2d 1009 (1996), that deception is inherently inconsistent with a good faith defense.

The bottom line is this: amendment of the information permitted the prosecution to avoid the defense prepared on Othieno's behalf. That the trial court mistakenly believed otherwise is irrelevant. Jurors would have rejected Othieno's good faith defense as a matter of law, prejudicing her ability to defend against the theft charge.

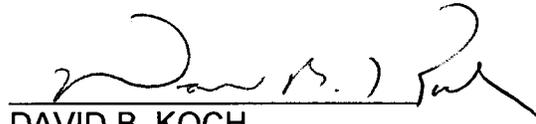
B. CONCLUSION

Because the late amendment to the information prejudiced Othieno's ability to defend against the charged theft, her conviction must be reversed.

DATED this 13th day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64618-4-1
)	
FRANCISCA OTHIENO,)	
)	
Appellant.)	

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 13TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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 13TH DAY OF JULY, 2010.

x *Patrick Mayovsky*