

COURT OF APPEALS NO. 69758-7-I

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

REC'D
MAY 31 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON

V.

R.T.,

Juvenile Appellant.

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

The Honorable Palmer Robinson, Judge

OPENING BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The information was constitutionally infirm as it failed to make definite and certain the offense charged.

Issue Pertaining to Assignment of Error

Did the court err in denying the defense motion to dismiss at the close of the state's case on grounds of an insufficient charging document, where the state charged appellant with stealing property belonging to Julianna Sharifah, but the undisputed evidence at trial showed the property belonged to Jason Hendrix, and the defense asserted it had been misled by the erroneous ownership allegation in the presentation of its defense?

B. STATEMENT OF THE CASE

On August 24, 2012, the King County prosecutor charged juvenile appellant J.T. with third degree theft of property belonging to *Julianna Sharifah*:

That the respondent, [R.T.], in King County, Washington on or about July 28, 2012, with intent to deprive another of property, to wit: sunglasses and an iPhone, did wrongfully obtain such property belonging to Julianna Sharifah[.]

CP 1.

The accompanying probable cause statement indicates that on that date, police responded to a reported theft. Julianna

Sharifah told police “that a neighborhood child stole an Iphone [sic] and a pair of sunglasses from her home.” CP 2. Her fiancé Jason Hendrix told police “[h]e saw their Iphone [sic] and a pair of sunglasses on the kitchen counter.” CP 2. “He then saw [R.T.] put the phone in his pocket and pick up the sunglasses” and walk out the door. CP 2. Hendrix tried to follow R.T., but he was gone. CP 2.

At R.T.’s adjudicatory hearing on December 18, 2012, Sharifah and Hendrix essentially testified to the facts as recited in the probable cause statement. However, the testimony established that the iPhone and sunglasses actually belonged to Hendrix, not Sharifah.

Sharifah testified that on July 28, 2012, she and her fiance Jason Hendrix were packing to move out of their Auburn home, as they were being evicted. RP 6-7, 42. Also present that day were Hendrix’s nephew, Sharifah’s mother (Karen Gold), Sharifah’s two teenaged sons, and their friend, R.T. RP 7-8, 14, 20, 39.

Gold testified that in addition to helping her daughter pack, she was there to purchase an iPhone and pair of Ray-Ban sunglasses belonging to Hendrix. RP 22, 29. She did not end up purchasing them, however, as they disappeared. RP 22, 27.

Gold testified she was in the kitchen and the iPhone and sunglasses were about two feet from her on the counter. RP 23-24, 29. According to Gold, she turned away for 30 seconds to one minute and when she turned back, the items were gone. RP 22, 29. She saw movement three to four feet away but did not see who took the phone and glasses. RP 23-24.

Gold testified Hendrix – who was in the living room – came back into the kitchen and asked, “Where’s the phone; where’s the Ray-Bans?” RP 24, 30-31, 36. Gold responded she had just seen them, but now they were gone. RP 24. Gold testified Hendrix called for the older boys to start looking for R.T., as “[h]e must have grabbed them.” RP 25. Gold testified Hendrix and the boys ran out the back sliding glass door. RP 26.

Hendrix testified that on the day they were packing, he hoped to sell Gold his iPhone and Ray-Ban sunglasses for some cash to put down on an RV for them to move into.¹ RP 41-42. Hendrix testified he often buys and sells items, such as cellular phones, on Craigslist for extra money. RP 41. According to Hendrix, Gold was planning a trip to Malaysia and the items would be worth a lot of money there. RP 42. Hendrix claimed Gold

¹ Sharifah confirmed the iPhone and sunglasses belonged to Hendrix. RP 15-16.

agreed to buy the phone for \$500.00 and the sunglasses for \$200.00.² RP 42.

Hendrix alleged that when he turned around to retrieve the phone and glasses, he saw R.T. grab them off the dining room table and run out the back door. RP 42. Hendrix followed but could not find R.T. RP 43. He also drove around the block but didn't see him. RP 43.

Sharifah did not see what happened. RP 15. Sharifah testified that she was in the living room, while her mother and Hendrix were in the kitchen. The boys, including R.T., were mostly sitting outside on the back porch but helping here and there. RP 9. Sharifah testified that while she was still in the living room, she looked out the window and saw R.T. outside running toward the fence and main road. RP 9. Sharifah testified she and Hendrix drove around looking for R.T. but couldn't find him. RP 10. Sharifah called the police. RP 11.

² Hendrix testified the sunglasses still had a price tag of \$220.00 on them, although he received them as a gift several months prior. RP 44, 59-61. Hendrix testified he bought the phone from a cousin whose last name he did not know "by heart" for \$250.00. RP 55-56.

At the close of the state's case, the defense moved to dismiss on grounds the state failed to prove the crime charged in the information:

Your Honor, the State charged the property belonged to Julianna Sharifah. They put it in the Information – they're actually not required to put into the Information who the property belongs to, but when they do, it binds them to proving that information. In this case I think it's been clearly established the parties are not married. Julianna Sharifah and Jason Hendrix are not married. She stated the property belonged to Jason Hendrix. He stated the property belonged to him and Ms. Gold also stated the property belonged to him. The State didn't charge that offense. The State charged that it belonged to somebody else. So we're asking the court to dismiss and the fact that there was no evidence presented that the property belonged to Julianna Sharifah.

RP 68-69.

Defense counsel explained she would have handled the case differently had ownership not been specifically charged:

Had the State not put that information in there, had they said it belonged to another, we would have done one of two things. We would have crafted our case in a different way or potentially we would have sought a bill of particulars to find out who they were alleging it belonged to. Because they put it in there, we assume that that's what they were intending on proving and they didn't prove that, so we're asking the court to dismiss.

RP 69.

In response, the state asked the court to deny the motion on grounds Sharifah and Hendrix lived together, had children together and are “essentially one in the same[.]” RP 70. When the prosecutor attempted to add that “they combine their assets,” defense counsel promptly objected: “That is not information that’s been presented before the court[.]” RP 70. The court agreed. RP 70.

Alternatively, the state asked the court “to not force the State into this box where we have to prove that Julianna Sharifah and Jason Hendrix didn’t share a phone or anything like that.” RP 70. But as defense counsel countered, “[t]he State, not the court put themselves in that box, and so I would ask the court to hold the State to what they said they were going to prove and dismiss.” RP 70. The court reserved ruling. RP 71.

Following closing argument, the court asked whether defense counsel could cite to any authority providing that the state’s charging mistake was “fatal.” Defense counsel cited State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995). Lee was charged with second degree theft. The information alleged that he wrongfully obtained property belonging to “Lucila Dominguez and/or the American Red Cross.” Lee, 128 Wn.2d at 154. The to-convict

merely required jurors to find Lee wrongfully obtained “property of another.” Id.

On appeal, Lee argued the trial court erred in failing to instruct the jury it must unanimously agree on the victim of the theft. The Court of Appeals agreed but found the error harmless. Lee, 128 Wn.2d at 156. Lee renewed his argument before the Supreme Court. Id. The court disagreed that a unanimity instruction was required. Lee, 128 Wn.2d at 158. More pertinent to this appeal, however, is the following language in the opinion, recited by defense counsel in her argument for dismissal:

While we share the court of appeals’ concern that Lee be informed as to the victim’s identity, here the victims were named in the information but not in the “to convict” instruction. Thus, unlike the instruction in Stephens^[3] which created alternative crimes, only one count of theft committed by alternate means was charged in these instructions.

Lee, 128 Wn.2d at 158; RP 81.

As defense counsel argued, Lee supported her position that the state’s charging error required reversal for lack of notice:

My case theory was they were going to prove it was Julianna Sharifah and I was going to establish that it wasn’t and that was the prejudice. That was the

³ State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) (defendant’s right to a unanimous verdict was violated where defendant was charged with assaulting Richard Heieck *and* Norman Jahnke, but jury was instructed it must find the defendant assaulted Richard Heieck *or* Norman Jahnke).

problem. That's where the State made I think a fatal error in this case in not simply amending to include the other potential victim. And they can't do that anymore, but I think this case, while there is a lot of different language in it, I think this case makes it clear that the Supreme Court said at least they were both named. You know, the defense was on notice. I wasn't on notice.

RP 82.

The court denied the motion to dismiss, reasoning the crux of the case would have been the same:

None of that changed, I mean, it seems to me and it's not like there were different people or different witnesses or that if it had belonged to somebody, one or the other, it wouldn't have been a theft because there might have been permission or it wouldn't have been wrongful.

RP 83.

The court's written findings echo this reasoning:

In finding the Respondent guilty, the Court denied the Respondent's oral motion to dismiss. The Respondent asked the Court to dismiss the State's case because the Information stated that the sunglasses and iPhone belonged to JS, and JH, JS, and KG each testified that the iPhone and sunglasses belonged to JH.

The Respondent's motion was denied because he could not show he was prejudiced by the State's error or point to a single legal authority that stated that such an error was prejudicial (e.g., JH and JS live together, are engaged to be married, and have children together, the Respondent's attorney and investigator interviewed both JH and JS before trial, and the to-convict instruction contained in the State's

trial brief stated "That the Respondent intended to deprive the other person of the property[.]"

Because the State is required to prove only that the property belonged to someone other than the accused, the State's error was not prejudicial. See, e.g., State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (citing State v. Leierer, 242 La. 961, 964, 140 So.2d 375 (1962)); see also State v. Leicht, 124 N.J. Super. 127, 132, 305 A.2d 78 (1973); 52A C.J.S. Larceny § 99 at 572 (1968); 50 Am.J.2d Larceny § 27 at 37 (1995)).

CP 9. Tochinskiy timely filed a notice of appeal. CP 6.

C. ARGUMENT

THE INFORMATION WAS DEFECTIVE BECAUSE IT FAILED TO NOTIFY R.T. OF THE NATURE OF THE CRIME CHARGED.

R.T.'s theft conviction must be reversed because the charging document alleged he stole property belonging to Sharifah, but the state's evidence showed he actually stole property belonging to Hendrix. Contrary to the trial court's ruling, this deficiency in notice is fatal and R.T. was clearly prejudiced by it.

The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ..." U.S. Const. amend. 6. The Washington Constitution similarly provides that "[i]n criminal prosecutions the accused shall have the right ... to demand the

nature and cause of the accusation against him." Washington Const. art. 1, § 22 (amend. 10).

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime, statutory and non-statutory. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the well-established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

Although the courts have liberalized the standard of review for charging documents which are first challenged on appeal, no decision has questioned the constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document. Vangerpen, 125 Wn.2d at 788 (citing inter alia State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)). In this case, the sufficiency of the information was challenged prior to verdict and therefore the liberalized standard of review announced in Kjorsvik does not apply.⁴ Vangerpen, 125 Wn.2d at 785-86, 788

⁴ State v. Kjorsvik held that when the sufficiency of the information is challenged for the first time on appeal, it is more liberally construed in favor of validity than if raised before verdict. Under the more liberalized standard, the court undertakes

(liberalized standard inapplicable where defendant challenged sufficiency of information after both sides rested but before verdict); accord, State v. Tang, 77 Wn. App. 644, 647, 893 P.2d 646 (1995) (liberalized standard inapplicable where defendant moved to dismiss at the close of the state's case).

Where, as here, the adequacy of the information is challenged at the close of the state's case, the court is required to strictly construe the information pursuant to Vangerpen. Tang, 77 Wn. App. at 647. Under the strict construction test, the language in the information must clearly suggest the requisite elements of the charged crime. Tang, 77 Wn. App. at 647 (citing State v. Johnson, 119 Wn.2d 143, 829 P.2d 1078 (1992)). The proper remedy for a conviction based on a defective information is dismissal without prejudice to state's refiling the information. State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992).

a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and; if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). The first prong of the test looks to the fact of the charging document itself and there must be some language in the document giving at least some indication of the missing element. Vangerpen, 125 Wn.2d at 788, n.10. If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

As defense counsel argued below, the Lee decision supports the position that a charging document that includes ownership of the property allegedly stolen for a theft charge is defective when it alleges the wrong owner. Lee, 128 Wn.2d at 159-60 (citing with approval inter alia, Von Tonglin v. State, 200 Ark. 1142, 1146, 143 S. W. 2d 185 (1940)). In holding otherwise, the trial court reasoned:

Because the State is required to prove only that the property belonged to someone other than the accused, the State's error was not prejudicial. See, e.g., State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (citing State v. Leierer, 242 La. 961, 964, 140 So.2d 375 (1962); see also State v. Leicht, 124 N.J. Super. 127, 132, 305 A.2d 78 (1973); 52A C.J.S. Larceny § 99 at 572 (1968); 50 Am.J.2d Larceny § 27 at 37 (1995)).

CP 9.

In ruling this way, it appears the court relied on the following passage of the Lee opinion:

Other authorities agree that in cases of theft and larceny proof of ownership of the stolen property in the specific person alleged is not essential. The State is required to prove only that it belonged to someone other than the accused. State v. Leierer, 242 La. 961, 964, 140 So.2d 375 (1962); see also State v. Leicht, 124 N.J. Super. 127, 132, 305 A.2d 78 (1973); 52A C.J.S. Larceny § 99 at 572 (1968); 50 Am.J.2d Larceny § 27 at 37 (1995)).

State v. Lee, 128 Wn.2d at 159.

Significantly, however, the Lee Court was discussing why it was unnecessary for the court to include the names of the persons who allegedly owned the property in the *to-convict instruction*, not the charging document. Lee, 128 Wn.2d at 158. Lee was charged with theft of property “belonging to Lucila Dominguez and/or the American Red Cross.” Lee, 128 Wn.2d at 154 (emphasis added). Specifically, the prosecutor alleged that Lee:

Did wrongfully obtain or exert unauthorized control and/or did, by color or aid of deception obtain control over property, of a value in excess [of] \$250.00, belonging to Lucila Dominguez and/or the American Red Cross, with intent to deprive the same of such property.

Lee, 128 Wn.2d at 154 (citation to record omitted).

The court instructed the jury that in order to convict Lee of theft, it had to find that he:

“wrongfully obtained or exerted unauthorized control over the property of another, and/or by color or aid of deception did obtain control over the property of another,” that the property exceeded \$250 in value, and the Lee intended to deprive “the other person” of the property.”

Lee, at 154 (citation to record omitted).

Lee first argued the court erred in failing to instruct the jury it had to unanimously agree on the victim of the theft. Lee, at 156. Lee argued to the Court of Appeals the state accused him of

committing two offenses against two separate victims in one count of the information but erroneously failed to give a unanimity instruction. The Court of Appeals agreed, but found the error harmless. Lee, at 156.

On review, the Supreme Court rejected the lower court's conclusion that a unanimity instruction was required, reasoning that "this is an alternative means of commission case and an expression of jury unanimity is not required if the evidence supports each alternate means charged." Lee, at 157. While the Court of Appeals had recognized the case was "an alternative means case because the information charges a single count of theft alleging two alternative modes of commission," it added that this was also an alternative crimes case "because there were two potential victims and Mr. Lee had a right to know who his victim was." State v. Lee, 77 Wn. App. 119, 889 P.2d 944 (1995), reversed, 128 Wn.2d 151, 904 P.2d 1143 (1995).

In rejecting the Court of Appeals' holding regarding unanimity, the Supreme Court stated:

While we share the court of appeals' concern that Lee be informed as to the victim's identity, here the victims were named in the information but not in the "to convict" instructions. Thus, unlike the

instruction in Stephens⁵ which created alternate crimes, only one count of theft committed by alternative means was charged in these instructions.

Lee, 128 Wn.2d at 158. The court further held there was no error in failing to include the names of the victims in the to convict instruction, because it included all statutory elements of the offense and because “[t]he State is required to prove only that it belonged to someone other than the accused.” Lee, at 158-59. This was the context in which the court stated: “Other authorities agree that in cases of theft and larceny proof of ownership of the stolen property alleged is not essential.” Lee, at 159.

While that is the case regarding the state’s proof at trial and the to-convict instruction, the Lee Court went on to hold such is not the case as far as the information is concerned:

The name of the victim, however, is not superfluous in a theft case, as the Court of Appeals correctly observed. Though not a necessary element of a theft instruction, allegations of ownership must be sufficiently stated in an information to establish that the property was not that of the accused, to protect the accused against a second prosecution for the same crime, and to avoid misleading or embarrassing the accused in the preparation of his or her defense. 50 Am.J.2d § 139 at 131 (citing Clark v. State, 293 So.2d 768, 769 (Fla.Dist.Ct.App.1974)); see also Von

⁵ State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) (defendant’s right to a unanimous verdict was violated where defendant was charged with assaulting Richard Heieck *and* Norman Jahnke, but jury was instructed it must find the defendant assaulted Richard Heieck *or* Norman Jahnke).

Tonglin v. State, 200 Ark. 1142, 1146, 143 S.W.2d 185 (1940) and 52A C.J.S. § 99 at 572. “The names of the owners of stolen property constitute no part of the offense and are stated in the information primarily as a matter of description for the purpose of identification and to show ownership in a person or persons other than the accused.” 50 Am.J.2d § 139 at 131.

In some jurisdictions, an information that fails to allege ownership in the person from whom it is charged the property was taken may be amended, and the accused may be brought to trial on the amended information. 50 Am.J.2d § 139 at 131; State v. Jensen, 83 Utah 452, 455, 30 P.2d 203 (1934). In other jurisdictions, an information may omit any allegation of ownership, provided the accused may request a bill of particulars. 50 Am.J.2d § 139 at 131 (citing State v. Shroyer, 49 N.M. 196, 204, 160 P.2d 444 (1945)).

Lee, 128 Wn.2d at 159-160.

Based on these authorities, the court concluded:

Here Lee does not contend that he lacked information regarding the State's theory or the identity of the victims. The information referred to the Red Cross and Lucila Dominguez as the victims of Lee's alleged theft, and gave Lee ample opportunity to prepare his defense.

Lee, 128 Wn.2d at 160.

As Lee clearly states, allegations of ownership must be sufficiently stated in an information to avoid misleading the accused in the preparation of his defense. And as defense counsel averred to the court, she was in fact misled by the state's erroneous

ownership allegation in the preparation of R.T.'s defense. Under the Supreme Court's decision in Lee, the state's error in charging the property belonged to Sharifah instead of Hendrix was "fatal."

Indeed, one of the cases cited approvingly by Lee, the Supreme Court of Arkansas held this precise charging error required dismissal. Von Tonglin v. State, 200 Ark. 1142, 143 S.W.2d 185 (1940). Von Tonglin was convicted, following trial, under an indictment that charged that he had stolen "one cow, the property of Joe Randolph." Von Tonglin, 143 S.W.2d at 185. The undisputed testimony, however, was to the effect that the cow was not the property of Joe Randolph, but was owned by Mrs. F.S. Randolph, his mother. Id.

The court held this variance to be "fatal" requiring reversal of the conviction:

Here, ownership was alleged in one who did not own the stolen property, and no facts or circumstances were alleged making definite and certain that appellant was charged with stealing a cow the property of Mrs. Randolph. It cannot, therefore, be said that it did not tend to the prejudice of appellant to be convicted of stealing a cow alleged to be the property of one person whereas it was the property of another without allegations making definite the fact that he was charged with stealing the property of that other person.

We, therefore, hold, as it has been many times held by this court, that ownership is a material allegation in prosecutions for larceny, and that the allegation in this respect, which the testimony does not sustain, is a fatal variance unless the crime is otherwise so identified and described in the indictment or information as to make definite and certain the offense charged, so that the accused may prepare for trial and be able to plead former acquittal or conviction if he be again charged with the commission of the same offense.

Von Tonglin, 143 S.W.2d at 187.

Similarly, the state's material allegation the property belonged to Sharifah, which the testimony did not sustain, was a fatal variance. Under Lee, the trial court erred in denying the motion to dismiss.

In response, the state may cite to this Court's opinion in State v. Greathouse, wherein this Court held the information was constitutionally sufficient despite the *omission* of the name of the owner of the allegedly embezzled fuel. State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002). However, the omission of ownership is not the same as an erroneous allegation of ownership. In the first instance, the defendant can ask for a bill of particulars if there is confusion as to ownership. Greathouse, 113 Wn. App. at 906. But an affirmation that the property is owned by a definite and certain individual obviates the need to request a bill of particulars

and therefore affirmatively misleads the defense as to precise offense charged. Accordingly, the fatal variance at issue here is not the same as an omission and the state's potential attempt to liken this case to Greathouse should be rejected.

D. CONCLUSION

This Court should reverse and dismiss the conviction without prejudice to the state refiling the information. Simon, 120 Wn.2d at 199.

Dated this 30th day of May, 2013

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69758-7-1
)	
R.T.,)	
)	
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 31ST DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] R.T.
18315 261ST CT PL E.
AUBURN, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2013.

X *Patrick Mayovsky*