

NO. 69758-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RUVIM TOCHINSKIY,

Appellant.

2013 AUG -5 PM 2:09

COURT OF APPEALS OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

LINDSEY M. GRIEVE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. SUBSTANTIVE FACTS	1
2. PROCEDURAL FACTS	3
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT DID NOT ERR IN DENYING TOCHINSKIY'S MOTION TO DISMISS WHERE THE INFORMATION CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED.....	6
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Greathouse, 113 Wn. App. 889,
56 P.3d 569 (2002)..... 11

State v. Holt, 52 Wn.2d 195,
324 P.2d 793 (1958)..... 10, 11

State v. Hopper, 118 Wn.2d 151,
822 P.2d 775 (1992)..... 8

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 8, 9, 13

State v. Leach, 113 Wn.2d 679,
782 P.2d 552 (1989)..... 9

State v. Lee, 128 Wn.2d 151,
904 P.2d 1143 (1995)..... 9, 10

State v. Vangerpen, 125 Wn.2d 782,
888 P.2d 1177 (1995)..... 8

Constitutional Provisions

Federal:

U.S. Const. amend. 6..... 8

Washington State:

Const. art. 1, § 22 (amend. 10) 8

Statutes

Washington State:

RCW 9A.56.020 3
RCW 9A.56.050 3, 7

Rules and Regulations

Washington State:

CrR 2.1 8

Other Authorities

LaFave, Wayne R. & Israel, Jerold H.,
Criminal Procedure § 19.2 (1984) 13
WPIC 70.11 7

A. ISSUE PRESENTED

1. A charging document must set forth all essential elements of the crime charged so that a defendant may adequately prepare a defense. Here, the information accusing Tochinskiy of theft in the third degree contained all essential elements of the crime charged; however, the information listed the property as belonging to Julianna Sharifah where the testimony at trial showed that the property belonged to her fiancé. The trial court denied Tochinskiy's motion to dismiss based on his claim that the charging document was defective. Has Tochinskiy failed to show that the court erred?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

Julianna Sharifah and Jason Hendrix were engaged to be married. RP¹ 7, 10. They lived together in Auburn, Washington with their two children in common and Sharifah's two children. RP 13-14. Sharifah and Hendrix knew the defendant, Ruvim Tochinskiy. RP 7, 39. Tochinskiy lived in their neighborhood, was a friend of their son, and frequented their home. RP 7, 39.

¹ There is one volume of verbatim report of proceedings; it contains the hearings held on December 18, 2012 and January 2, 2013.

On July 28, 2012, the family was being evicted from their home and was planning to move into an RV. RP 7, 15. Tochinskiy was at their home with their children while Sharifah and Hendrix prepared for the move. RP 7-8, 39. A pair of sunglasses and an iPhone were on the kitchen counter. RP 9, 24, 42. Karen Gold, Sharifah's mother, was planning to purchase both items from Hendrix and was assisting with the move. RP 42.

After agreeing to sell the items for \$700, Hendrix saw Tochinskiy grab the sunglasses and the iPhone off the kitchen table and run out the back door. RP 42. Gold was looking away when the items were taken. RP 24. When she looked back the items were missing, and Tochinskiy was running away. RP 24, 36. At the time, Sharifah was in the living room packing; through the window she saw Tochinskiy run away from the house toward the main road. RP 9. Sharifah and Hendrix drove around the neighborhood looking for Tochinskiy. RP 10. After failing to locate him, they called the police to report the theft. RP 10, 43.

2. PROCEDURAL FACTS.

Ruvim Tochinskiy was charged by information in Juvenile Court with one count of theft in the third degree. CP 1. The information alleged that the theft was committed as follows:

That the respondent, Ruvim R. Tochinskiy, 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;

Contrary to RCW 9A.56.050 and 9A.56.020(1)(a), and against the peace and dignity of the State of Washington.

CP 1. The probable cause statement accompanying the information states that Sharifah told the police that Tochinskiy stole an iPhone and sunglasses "from her home" and that her fiancé, Hendrix, witnessed the crime. CP 2. Summarizing Hendrix's statement to the police, the probable cause statement indicates that Hendrix saw "their iPhone and a pair of sunglasses" on the kitchen counter before Tochinskiy fled with them. CP 2.

Tochinskiy was tried in a bench trial presided over by the Honorable Palmer Robinson. CP 7. Before trial, Tochinskiy's counsel and a defense investigator interviewed all three of the

State's witnesses without the prosecutor's presence.² CP 4; RP 13, 28, 46. In the State's Trial Memorandum, the State made a motion requesting that defense provide "a summary of any statements made by State's witnesses that are inconsistent or in addition to statements made in discovery." CP 25. The court did not address this motion and there is no record that any additional discovery from the defense interviews was provided to the State. RP 3-5. Tochinskiy did not request a bill of particulars.

At trial, the testimony established that the sunglasses and iPhone at issue belonged to Hendrix, not his fiancée, Sharifah, as stated in the information.³ CP 1; RP 15-16, 22, 55. After the State rested, Tochinskiy made an oral motion to dismiss. RP 68.

² The State's witnesses were Julianna Sharifah, Jason Hendrix, and Karen Gold. RP 6, 19, 37.

³ The issue of ownership of the sunglasses and iPhone was first addressed on cross-examination by Tochinskiy:

Defense Counsel:	And the phone, your husband had purchased it – or, excuse me, your boyfriend had purchased it?
Sharifah:	Correct.
Defense Counsel:	Fiance? And your boyfriend, Jason Hendrix, he was going to sell it; is that right?
Sharifah:	Uh-huh.
Defense Counsel:	Okay. And the sunglasses, as far as you know, they were also his; is that right?
Sharifah:	Correct.

RP 15-16.

Tochinskiy argued that the State had not proved every element of the crime as charged in the information because the stolen property belonged to Hendrix. CP 21; RP 68. After hearing argument, the court reserved ruling on the motion. RP 71. During closing argument, the defense theory focused on witness inconsistencies, suggesting that one of the couple's children could have stolen the items. RP 74-76.

The court found Tochinskiy guilty of theft in the third degree and denied Tochinskiy's motion to dismiss. RP 78, 79. In its ruling, the court acknowledged that the testimony showed that the stolen property belonged to Hendrix where the information alleged that it belonged to his fiancée. RP 78. Despite Tochinskiy's claim that he would have crafted his case "in a different way" or sought a bill of particulars, the court rejected his claim and found there "isn't any conceivable prejudice." RP 69, 79.

The court further noted that the elements of the crime are the same and that testimony showing Hendrix owned the stolen items did not alter the defense theory of the case. RP 79, 84. The court concluded by stating that there was no danger of lack of unanimity or of Tochinskiy being prosecuted a second time for the

same crime. RP 87. Finally, the court found that Tochinskiy had not been prejudiced nor misled by the information. RP 87.

The court entered oral and written findings of fact and conclusions of law. CP 7-10; RP 78. At a later sentencing hearing, the defendant was ordered to complete two days of work crew. CP 13. The sentence was later converted to two days of confinement after the defendant was not accepted into work crew. CP 11.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN DENYING TOCHINSKIY'S MOTION TO DISMISS WHERE THE INFORMATION CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

Tochinskiy contends that the charging document for theft in the third degree "failed to inform [him] of the nature of the crime charged" where it stated the property belonged to Julianna Sharifah and testimony at trial revealed that the property actually belonged to her fiancé, Jason Hendrix. This argument should be rejected. The charging document contained all essential elements of the crime charged. Despite listing Sharifah, rather than her fiancé Hendrix as the owner of the property, the information sufficiently

notified Tochinskiy of the crime charged so that he could adequately prepare a defense. Moreover, the information was sufficiently specific that it did not mislead or embarrass Tochinskiy in the preparation of his defense nor did it expose him to a second prosecution for the same crime.

The statute defining theft in the third degree, states in relevant part:

- (1) A person is guilty of theft in the third degree if he or she commits theft of property or services which
 - (a) Does not exceed seven hundred fifty dollars in value,

RCW 9A.56.050(1).

As stated in the State's Trial Brief, to convict the defendant of the crime of theft in the third degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 28, 2012, the Respondent wrongfully obtained or exerted unauthorized control over property of another,
- (2) That the Respondent intended to deprive the other person of property, and
- (3) That this act occurred in the State of Washington, City of Auburn, County of King[.]

CP 29; WPIC 70.11.

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to

an accused of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Both the federal and state constitutions require that notice be provided to the person charged. “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...” U.S. Const. amend. 6. “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him...” Wash. Const. art. 1, § 22 (amend. 10). Criminal Rule 2.1(a)(1) provides in part: “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

Charging documents that “fail to set forth the essential elements of a crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he is charged are constitutionally defective, and require dismissal.” State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). However, technical defects in the charging document, such as an error in the statutory citation, the date of the crime, or the specification of a different manner of committing the charged crime, do not generally require reversal. State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

In an information or complaint for a statutory offense, it is sufficient to charge in the language of the statute if the statute sufficiently defines the crime to apprise an accused person with reasonable certainty of the nature of the accusation. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). However, it is not necessary to use the exact words of the statute, if other words are used that equivalently or more extensively signify the words in the statute. Id. The primary goal of the “essential elements” rule is to provide notice to the accused of the nature of the crime that he must be prepared to defend against. Kjorsvik, 117 Wn.2d at 101.

In theft cases, proof of ownership of stolen property in the specific person alleged is not an essential element of the crime. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). The State is required to prove only that the items alleged to be stolen belonged to someone other than the accused. Id. The name of an owner of stolen property constitutes no part of the offense and is “stated in the information primarily as a matter of description for the purpose of identification and to show ownership in a person... other than the accused.” Id. When an allegation of ownership is included, it “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 crime, and to avoid misleading or embarrassing the accused in the preparation of his defense.”⁴ Id.

In State v. Holt, the information charged the defendant with theft by embezzlement for converting “property of the United States.” 52 Wn.2d 195, 196, 324 P.2d 793 (1958). At trial, the evidence established that the property at issue belonged either to the United States or to some eligible donee that had returned the property. Id. The court held that there was sufficient evidence to convict even though the State was unable to prove whom the embezzled property belonged to. Id. To support its holding, the court reasoned that “[t]he phrase ‘property of the United States,’ as it appears in the information, is surplusage and immaterial. Delete it and the information remains sufficient [for the crime charged][.]” Id. at 198.

While noting that Holt addressed the sufficiency of the evidence, not the sufficiency of the charging document, the court in

⁴ Tochinskiy’s claim, that Lee supports the position that a charging document that includes ownership of the allegedly stolen property is defective where it alleges the wrong owner, is mistaken. While alleging the wrong victim in a charging document for a theft crime could make the information defective in some circumstances, the court in Lee did *not* make a blanket assertion that listing the wrong victim would render an information defective.

State v. Greathouse noted that Holt supports the proposition that an information for theft is sufficient so long as it clearly charges that the defendant, on or about a specific date, with intent to deprive the owner thereof, exercised unauthorized control over specifically described property of another. 113 Wn. App. 889, 903, 56 P.3d 569 (2002).

Here, all the essential elements of the crime charged can be found in the information. The information states that: 1) Tochinskiy is charged with theft in the third degree; 2) the crime is alleged to have occurred on or about July 28, 2012; 3) the property is described as sunglasses and an iPhone belonging to a person other than the accused, Julianna Sharifah. CP 1.

Tochinskiy claims that the information was defective because it failed to inform him of the nature of the crime charged. This claim is incorrect. Although the charging document listed Sharifah, not her fiancé, Hendrix, as the owner of the sunglasses and iPhone, the charging document was sufficiently specific in detail to establish that the stolen property belonged to someone other than Tochinskiy. Moreover, the detailed nature of the information, which included the date and specific items taken, did not place Tochinskiy in danger of a second prosecution for the

same crime. The probable cause statement attached to the information provided further details about the specific crime charged in the information.

Additionally, given the facts and circumstances of this case, the information did not mislead or embarrass Tochinskiy in the preparation of his defense. Tochinskiy mounted a defense relying on the inconsistencies in the witnesses' testimony and raising the possibility that one of Sharifah and Hendrix's children could have stolen the items. RP 74-76. The information's allegation that Sharifah, rather than Hendrix, owned the stolen property did not affect Tochinskiy's defense theory. Tochinskiy interviewed all of the trial witnesses before trial. CP 4; RP 13, 28, 46.

Additionally, Tochinskiy indicated through leading questions on cross-examination of the first witness that he was aware that Hendrix, not Sharifah, was the owner of the stolen items.

RP 15-16; see Footnote 3, supra. Finally, it is hard to conceive of a possible defense that Tochinskiy might have wished to form based on the misstated ownership of the property as belonging to Sharifah rather than Hendrix, where the items were taken from the home they shared in the presence of both people.

Trial counsel's claim that the defense would have been different is disingenuous. The record demonstrates that trial counsel knew, likely through pre-trial interviews of the State's witnesses, that Hendrix owned the stolen items. RP 15-16; see Footnote 3, supra. Rather than bringing the error to the court's attention when she became aware of it, trial counsel waited to object until after the State rested its case. RP 68. Trial counsel thereby engaged in what Professor LaFave described as "sandbagging," a "defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading." Kjorsvik, 117 Wn.2d at 103 (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 19.2 at 442 & n. 36 (1984)). The record demonstrates that Tochinskiy was aware of the error before trial began; as a result, his trial counsel's claim that she would have conducted trial differently fails.

Because the information included all essential elements of the crime charged and enabled Tochinskiy to prepare his defense without being misled, embarrassed, or exposed to a second

prosecution for the same crime, this court should reject his claim that the trial court erred in denying his motion to dismiss.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Tochinskiy's conviction and sentence.

DATED this 5 day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
LINDSEY M. GRIEVE, WSBA #42951
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RUVIM TOCHINSKIY, Cause No. 69758-7 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 5 day of August, 2013

A handwritten signature in black ink, appearing to be "Dana M. Nelson", written over a horizontal line.

Name
Done in Seattle, Washington