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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DOLORES E. PIMIENTA-DE SINNER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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**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. Where the sufficiency of a charging document is challenged for the first time after a verdict, the information is liberally construed in favor of validity. Here, the charging document accusing Pimienta-De Sinner of theft in the first degree contained all essential elements of the crime charged; however, the information misstated the required dollar-value as a higher amount than that required under the statute in effect when the crime was committed. Construing the information liberally in favor of validity, has Pimienta-De Sinner failed to show that the use of a higher dollar-value in the information constituted the omission of an essential element?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Dolores Pimienta-De Sinner was charged by Amended Information with four counts of theft in the first degree, three counts of identity theft in the first degree, and two counts of tampering with a witness. CP 19-25. Prior to the trial, two counts

of theft in the first degree were dismissed with prejudice (counts six and thirteen). CP 26.

A jury trial found Pimienta-De Sinner guilty of three counts: theft in the first degree (count nine), identity theft in the first degree (count ten), and tampering with a witness (count twelve). CP 62-63. The jury was unable to agree on a verdict for three counts (counts three, eleven, and fifteen). CP 62-63. The jury was not instructed on count fourteen and was not asked to reach a verdict on that count. CP 35-63. The trial court granted Pimienta-De Sinner a First Time Offender Waiver and sentenced her to ninety days on each count, to be served concurrently. CP 70. Thirty days of Pimienta-De Sinner's ninety-day sentence were converted to thirty days in King County Supervised Community Option (Enhanced CCAP). CP 70.

## 2. SUBSTANTIVE FACTS.

Pimienta-De Sinner worked as a licensed loan originator for Casa Linda Mortgage Company. 5RP<sup>1</sup> 135. As part of her employment, Pimienta-De Sinner referred clients for home loans

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<sup>1</sup> There are 9 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Jan. 4, 2012); 2RP (Jan. 5, 2012); 3RP (Jan. 9, 2012); 4RP (Jan. 10, 2012); 5RP (Jan. 11, 2012); 6RP (Jan. 17, 2012); 7RP (Jan. 23, 2012); 8RP (Jan. 24, 2012); and 9RP (Mar. 2, 2012).

and received money when her clients received a loan. 3RP 106; 5RP 56.

Hugo Castro-Nunez and Yareli Guido-Estrada are domestic partners who have three children together. 2RP 24-26. Neither Castro-Nunez nor Guido-Estrada is a United States citizen, nor do they have visas that allow them to work in the United States. 2RP 25, 85. In 2007, Castro-Nunez and Guido-Estrada met with Pimienta-De Sinner to discuss obtaining a home loan. 2RP 26. Pimienta-De Sinner provided Castro-Nunez with a social security number belonging to another person to use on his loan application. 2RP 35-37; 3RP 120-21. Pimienta-De Sinner also provided Castro-Nunez with falsified employment and income information to use on his loan application. 2RP 38. Using the information provided by Pimienta-De Sinner, Castro-Nunez and Guido-Estrada were able to obtain a home loan for approximately \$290,000 and purchase a home.<sup>2</sup> 2RP 61, 80. For referring the loan, Pimienta-De Sinner received a check for approximately \$3,700. 3RP 106.

In 2010, after criminal charges were filed against Pimienta-De Sinner, she went to Castro-Nunez and Guido-Estrada's home and spoke to Guido-Estrada. 2RP 81. Pimienta-De Sinner told

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<sup>2</sup> Castro-Nunez and Guido-Estrada were unable to afford the monthly mortgage payments of \$2,500 and eventually lost the home. 3RP 24-25.

Guido-Estrada that if anyone came to their home asking questions about the social security number, they were to say that Pimienta-De Sinner was not the person who gave Castro-Nunez the social security number for the home loan application. 3RP 27.

**C. ARGUMENT**

1. THE CHARGING DOCUMENT WAS SUFFICIENT WHERE IT SET FORTH EVERY ESSENTIAL ELEMENT OF THE CRIME CHARGED, BUT MISSTATED THE DOLLAR-VALUE REQUIRED AS A HIGHER AMOUNT.

Pimienta-De Sinner contends that the charging document for theft in the first degree "omitted an essential element" where it alleged that the value of the property exceeded \$5,000, not \$1,500, the minimum dollar-value required for theft in the first degree at the time of the commission of the crime. This argument should be rejected. The charging document did not "omit" an essential element, but rather misstated the amount required as a higher amount. Despite the higher dollar-value listed, the information sufficiently notified Pimienta-De Sinner of the crime charged so that she could adequately prepare a defense.

Pimienta-De Sinner was charged in count nine of the Amended Information with committing theft in the first degree as follows:

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 statute defining theft in the first degree, for crimes committed before September 1, 2009, states in relevant part:

(1) 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...

Former RCW 9A.56.030(1)(a); see Laws 2009, ch. 431, § 7. The theft in the first degree statute was amended for crimes committed on or after September 1, 2009, to require theft of "property or services which exceed(s) five thousand dollars in value..." RCW 9A.56.030(1)(a).

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 her. 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. VI. "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, ..." Wash. Const. art. I, § 22 (amend. 10). Criminal Rule 2.1(b) 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.

When a charging document is challenged for the first time on appeal, it will be liberally construed in favor of validity. Kjorsvik, 117 Wn.2d at 102. The reviewing court should examine the document to determine if there is any fair construction by which the elements are all contained in the document. Id. at 105. In order to establish an information's insufficiency after the verdict, a defendant must establish: 1) the necessary elements of the offense are not in the information in any form, and 2) how the defendant was prejudiced by the faulty information. Id. at 105-06. Employing the two-prong Kjorsvik test, "the primary question is whether the necessary facts appear in any form, or by fair construction can be

found, in the charging document however inartfully it may be worded.” State v. Nonog, 145 Wn. App. 802, 806, 187 P.3d 335 (2008). If so, the information will be held sufficient unless the defendant suffered actual prejudice as a result of the inartful charging language. Id. (citing Kjorsvik, 117 Wn.2d at 105-06).

Using the more liberal construction applied when the charging document is first challenged on appeal, “if the information contains allegations expressing the crime that was meant to be charged, it is sufficient even though it does not contain the statutory language.” Hopper, 118 Wn.2d at 156. A reviewing court should be “guided by common sense and practicality” in determining the sufficiency of the language. Id. Even missing elements may be implied if the language supports such a result. Id.

Here, in applying the Kjorsvik test to the challenged information, the necessary facts can be found for the crime charged. The information states that: 1) Pimienta-De Sinner is charged with theft in the first degree; 2) the property is described as “U.S. currency via the Castro/Guido loan for \$290,000... belonging to IndyMac Bank F.S.B.,” and 3) the value of the property did exceed \$5,000. CP 22. Thus, the dollar-value of \$5,000 required under the amended theft in the first degree statute is listed rather

than the dollar-value of \$1,500, the minimum amount required under the theft in the first degree statute in effect when the crime was committed.

Pimienta-De Sinner claims that an essential element was missing because a dollar-value was "omitted" from the information. This claim is incorrect. Although the dollar-value in the charging document comports with the amended statute, not the statute in effect at the time of the commission of the crime, a dollar-value *is* included. Moreover, the dollar-value listed in the information is a *sufficient amount* for the crime of theft in the first degree for crimes committed both before and after the statute was amended.

Moreover, Pimienta-De Sinner does not allege any prejudice due to the language in the charging document and the record does not support such a claim. The charging document for count nine specifically lists the charged property as U.S. currency obtained via the Castro/Guido loan for \$290,000. This information is specific to one particular loan and unique from the loans alleged in the other counts. CP 19-25. Pimienta-De Sinner never sought a bill of particulars to seek further details for the crimes charged against her in count nine or any other count, demonstrating that she had sufficient information about the crimes charged to prepare a

defense. Finally, it is hard to conceive of a possible defense that Pimienta-De Sinner may have wished to form based on the misstated value of the property as in excess of \$5,000 rather than \$1,500, when the property was further described in the information as "*U.S. currency ... for \$290,000.*" CP 22 (emphasis added).

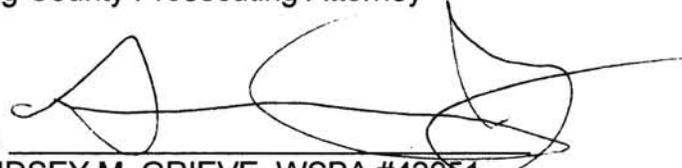
**D. CONCLUSION**

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

DATED this 25 day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

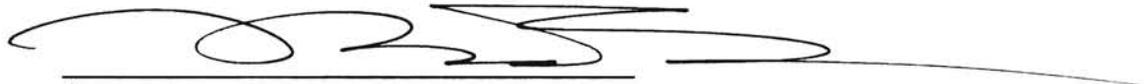
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DOLORES E. PIMIENTA-DE SINNER, Cause No. 68567-8 -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 25 day of March, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Name  
Done in Seattle, Washington