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STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

Supreme Court No. 20190319
Stutsman County District Court No. 47-2018-CR-00850

State of North Dakota
Plaintiff/Appellee,

vs.

Kevin Kenneth Michel
Defendant/Appellant

Appeal from the Verdict of Guilty dated August 27, 2019 and the Criminal Judgment entered on September 23, 2019 by the Honorable Troy LeFevre, District Court Judge, Stutsman County, South East Judicial District

APPELLANT'S REPLY BRIEF

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I. THE COMPLAINT ONLY CHARGED THEFT OF PROPERTY OWNED BY NORTHWEST TIRE AND AUTO AND, CONSEQUENTIALLY, THE STATE INCORRECTLY ASSERTS THAT THE VALUE OF J & L TIRES SHOULD BE CONSIDERED AND AGGREGATED.

a. The State Has the Burden of Drafting Criminal Complaints and Information with Precision, and Correcting Errors and Omissions in the Charging Documents is Not the Burden of the Defendant.

[¶1] A complaint **must** state, among other things, "[t]he person against whom, or against whose property, the offense was committed, if known; and [i]f the offense is against the property of any person, a general description of such property. N.D.C.C. § 29-05-01(5,6)(emphasis added). An information **must** "be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged." N.D.R.Crim.Pro.7(c)(1)(emphasis added). The language of a complaint/information is insufficient unless it sets forth the facts of the offense in such a way as will fairly apprise a person of average intelligence of the nature and cause of the accusation against him (e.g. *State v. Hart*, 152 N.W. 672, 673 (N.D. 1915)); so particularly that it "will protect the accused against a subsequent prosecution for the same offense" (*State v. Tjaden*, 69 N.W.2d 272, 276 (N.D. 1955)); and "so clearly that the Court may determine whether the facts stated support a conviction" (*Wahpeton v. Desjarlais*, 458 N.W.2d 330, 332-3 (N.D. 1990)). *See also, e.g. City of Grand Forks v. Mata*, 517 N.W.2d 626, 628-9 (N.D. 1994).

[¶2] Not all errors cause the complaint/information to be insufficient or otherwise preclude the prosecution from arguing for conviction on particular facts. *See, State v. Romanick*, 2017 ND 42 ¶14, 890 N.W.2d 803 (an erroneous date is an administrative error only unless it is an essential element of the offense); *State v. Ennen*, 496 N.W.2d 46, 49 n.3 (N.D. 1993)(A defendant is apprised of the charges even when the wrong statutory

subsection is cited in the information); *State v. Meier*, 447 N.W.2d 506, 510 (N.D. 1989) (A defendant may be apprised of the state's intent to invoke a statute not specifically cited when the language of the information is substantially similar to the statutory language). Notwithstanding, an error or omission in a fact material to an essential element cannot simply be overlooked. *State v. Gwyther*, 1999 ND 15 ¶¶13-16, 589 N.W.2d 575 (affirmed dismissal of a count of conspiracy due to failure of the information to assert an overt act) *State v. O'Neal*, 124 N.W. 68, 69-71 (N.D. 1909) (hold that when the information contained an incorrect legal description for the alleged public nuisance, it was erroneous for the court allow consideration of the facts involving a location other than what was specified as the location was a material fact, and stating "[i]f it is necessary to described the place at all in the information, and the same is described specifically therein, the proof must conform thereto, substantially.") (*accord* *State v. Kelly*, 132 N.W. 223, 224 (N.D. 1911)). A defective information cannot be remedied through proper jury instruction or other means short of amendment. *See* *United States v. Denmon*, 483 F.2d 1093, 1095 (8th Cir. 1973). Evidence presented at trial outside of the parameters of the complaint should be disregarded. *See* *State v. O'Neal*, 124 N.W. 68, 69-71 (N.D. 1909).

[¶3] "Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, ***may*** be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense." N.D.C.C. § 12.1-23-05(7) (emphasis added).

[¶4] In the immediate case, the Criminal Complaint dated December 20, 2018 reads verbatim "[i]n particular, the Defendant received one or more tires from Andrew Hecklesmiller and Thomas Melland, valued at more than $1,000 but less than $10,000,

from a storage unit belonging to NW Tire & Auto Service." *Appx. 14.* The Criminal Information dated March 13, 2019 exactly mirrors this charging language. *Appx. 15.* Even if not the desired intent of the State, the language of which describes those mandatory inclusions of identity of property and person is definitive as to the scope of charges.

b. The Failure to List J & L Tires Within the Allegations of the Complaint and Information was Not Inherently Cured by Supporting Documents.

[¶5] The listing of witnesses has a very specific purpose, which is to allow the defendant a full opportunity to prepare its defense as to particular witnesses. *State v. Kent*, 67 N.W. 1052, 1057. (N.D. 1896). ("The object is to apprise the accused beforehand of the names of the witnesses against him, to the end that he may investigate their characters and antecedents and be the better prepared to meet and overcome or weaken their testimony by counter testimony gathered in advance of the trial"). To the knowledge of the Appellant, there is no case that suggests that a defendant is required to try to extrapolate from the listed witnesses an understanding of the charges against them which would be inconsistent with the express language of an unambiguous charging document.

[¶6] Furthermore, the supporting affidavit is not considered part of the complaint, and does not itself charge an offense. *State v. Stevens*, 19 N.D. 249, 123 N.W. 888 (N.D. 1909). As with the list of witnesses, to the knowledge of the Appellant there is no case that tasks ta defendant with evaluating and scrutinizing a report or affidavit for the possibility of additional violations of the law within the language of the affidavit, and then presuming that they are in fact charged with those violations.

[¶7] The State has a remedy in the case of its error in the charging documents; it may, unless an additional or different offense is charged or a substantial right of the defendant

is prejudiced, motion to amend the information at any time before the verdict or finding. N.D.R.Evid.7(e). No such motion was ever made. The State, through its inaction was in acceptance of the scope of the charges as alleged.

c. *The Issue of Deficiency in the Pleadings Was Properly Raised by the Appellant During Trial.*

[¶8] The express language of the charging documents confines the parameters of the essential facts to be adjudicated, and extrinsic evidence must be disregarded as delineated above.

[¶9] The consensus of the testimony is that the value of those tires which were stolen from NW Tire and Auto Service and found in Michel's possession had a value of approximately $702.00, *Tr. Trans. 15, 61*, and the State acknowledges the same in its brief. *Appellee's Br. ¶ 33*.[1] Incidentally, the valuation of $702 for the NW Tire and Auto Service tires was adopted for restitution, *Appx. 43*. Michel, however, was charged with theft graded as a C Felony, which requires as an essential element that the property stolen is at least $1,000. Consequentially, acquittal was appropriate upon the State resting its case and Michel's timely motion.

[¶10] This same argument was raised to the District Court upon the State resting. *Tr. Trans. 116,* and the Appellant's Brief, ¶51.

[¶11] The District Court denied Michel's motion, stating that the defense had been put on sufficient notice via citation to the statute under which Michel was being charged, that Michel could have sought a bill of particulars if Michel wanted additional clarity as to

[1] While there was some insinuation that maybe some of the other stolen tires ended up with Michel, the State presented no evidence in support thereof, nor was there any testimony presented as to the value of any additional tires.

charges[2], and that reference to the testimony of Mr. Nelson of J & L Tires was sufficient to put Michel on notice as to the allegations of the State. *Tr. Trans. 121*. These conclusions were, however, were inconsistent with the established case law which does not impute an affirmative duty on the defendant to remedy possible errors by the prosecution.

[¶12] In addition to the inconsistency with established law, this ruling has the de facto outcome of shifting the burden of drafting charging documents to the defendant who must both act as augur to the intent of the prosecution and act to their own detriment by bringing attention to the prosecution facts and crimes with which they may be criminally charged. Such a shift is dubiously consistent with current criminal jurisprudence.

II. THE JURY WAS PRESENTED WITH INSUFFICIENT COMPETENT EVIDENCE FOR A FINDING OF GUILT.

[¶13] The State points to many possible inferences which are not facially inconsistent with the evidence presented, however, the fact that these inferences are not inconsistent with the State's theory of the case is not the standard by which the District Court should review a Rule 29 motion for insubstantial evidence. The vaporous nature of the evidence requires standing on cognitive a house of cards to reach a finding of guilt, which the Appellant's Brief details. On that basis, denial of Michel's Rule 29 motion was improper.

[2] The immediate case is clearly distinguishable from cases that have required the Defendant to request a bill of particulars or waive the objection to the inadequacy of the information as these cases hinge on the Defendant failing to address proactively facial ambiguities in the charging document. *E.g.* *U.S. v. Barbato*, 471 F.2d 918, 922-23 (1st Cir. 1973) (objection that the indictment was "prejudicially duplicitous, multiplicitous, and vague" was waived when the defense did not request a bill of particulars); *State v. Lavin*, 204 N.W.2d 844, 847 (Ia. 1973) (the defendant's argument that indictment language and evidence failed to inform the defendant of the particulars of the offense is waived when a bill of particulars was not sought). There is no facial ambiguity in the charging document in the immediate case.

III. THE APPELLEE'S ASSERTION THAT THE VICTIMS HAVE NOT BEEN MADE WHOLE EXPANDS THE LIMITS OF RESTITUTION TO INCLUDE EXPANSIVE SPECULATION AND PUNITIVE CONSEQUENCES FOR DELAY IN RETURN OF THE PROPERTY.

[¶14] As delineated in the Appellant's brief, attributing any loss of value in the tires on account of division of the sets requires reliance on the presumption that the Defendant caused the division. Nothing in the record suggests or supports that fact, and reaching that conclusion depends on pure speculation. While the District Court certainly has significant discretion as to proper restitution, the statutory language precludes restitution orders which exceed those damages immediately caused by the defendant. *State v. Pippin*, 496 N.W.2d 50, 52 (N.D. 1993). Absent a finding that Michel caused the division of the tires, or at least of offer by the State of some evidence in support of the proposition other than the State's own speculation, the connection between supposed diminution in value and Michel is too tenuous to be in conformity with statutory standards.

[¶15] The Appellee further asserts that since the tires may still remain in evidence for another case that the victims are entitled to restitution in the full amount of their value. *Appellee's Br.* ¶¶*67-68.* While it is undeterminable from the record in the immediate case whether the Hecklesmiller and Melland cases have been fully resolved, the victims are entitled to return of the property upon resolution those cases. The purpose of restitution is to make the aggrieved party whole, but it does not logically follow that a delay in the reunification of the person and their property should automatically result in full restitution as if the property had been permanently lost. While delay may be detrimental for perishable items with a short life, rubber tires have an impressive lifespan and, san an act of god, won't decay or lose additional value on account of amount of additional time that may

result from the two pending cases. For that reason, treating the property as if lost is not logically consistent with the reality of the property.

IV. CONCLUSION

[¶16] For the reasons outlined in the Appellant's Brief and in accordance with the argument presented in this Reply Brief, the Appellant respectfully requests that this Court reversed the conviction and remanded for entry of judgment of acquittal. In the case that this Court finds that the evidence presented is sufficient to sustain a judgment, the Defendant/Appellant asserts and respectfully requests that this Court reverse and remand for a new trial on account of the infringement on the substantial rights of the Defendant/Appellant to be ensured of a jury which is fully apprised of and understand the law which should apply to his case, and the doubt cast on the verdict due to the existence uncorrected jury confusion on the record. In the case that this Court declines reversal on either of the above grounds, the Defendant/Appellant requests that this Court remand for an amendment of the judgment which removes an order for restitution.

Dated March 5, 2020.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify pursuant to rule 5(f) of the North Dakota Rules of Civil Procedure that my office served the foregoing Response Brief by e-mailing true and correct copies of the same on March 5, 2020 to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Response Brief complies with the page limitations imposed by Rule 32 of the North Dakota Rules of Appellate Procedure in that it does not exceed 12 pages.

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