FILED
MAY 26 1981
CLERK SUPREME COURT

IN THE IOWA COURT OF APPEALS

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
)
JAMES NILE MATHIASEN,)
Defendant-Appellant.)

Filed May 26, 1981

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Appeal from Warren District Court. Van Wifvat, Judge.

Defendant appeals his conviction of second degree theft in violation of sections 714.1(1) and 714.2(2), The Code. AFFIRMED.

Louis M. Fusco, of Wilson, Goodhue & Fowler, Indianola, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, acting C. J., Snell, Carter and Johnson, JJ

Considered en banc.

PER CURIAM

Defendant, James Mathiasen, appeals his conviction of second degree theft in violation of sections 714.1(1) and 714.2(2), The Code 1979. We affirm. Our review is on error assigned. Iowa R. App. P. 4.

Mathiasen alleges the trial court erred in allowing an amendment of the information and in denying his request for a continuance following amendment.

Prior to jury empanelment on the morning of the trial, a hearing was held in the judge's chambers. The prosecuting attorney asked that the information be amended. At that time the information stated,". . . take possession or control of one certain 1967 blue and white Ford pickup with a 1979 Iowa license number FL 4315 owned by Charles Lukenbill. . . " The requested amendment read,". . . take possession or control of one certain 1974 white Chevrolet pickup with a 1979 Iowa license number FL 4315 owned by Charles Lukenbill. . . " (emphasis added)

Defendant resisted the amendment and moved for a continuance. He asserted his planned defense that the originally described pickup had not, in fact, been stolen would be thwarted by the amendment. Defendant moved for directed verdict at the close of the state's case and at the close of all evidence asserting denial of a fair trial because of the granted amendment and refusal of a continuance. Defendant moved for a new trial after the guilty verdict on the same grounds.

I. Amendment of Information.

An information may be amended by order of the court before or during trial to correct errors or omissions in form or substance. Iowa R. Crim. P. 4(8)(a); Iowa R. Crim P. 5(5). The only limitations are that no substantial rights of the defendant are prejudiced and that no wholly new and different offense is charged by the amendment. We find the amendment does not result in a wholly new or different offense. The crime as originally charged was theft of a motor vehicle. The amended information does not change or add to that charge.

Similarly, we find no prejudice of defendant's substantial rights. Defendant asserts on appeal the written notice procedures required to amend prior to trial set forth in Iowa R. Crim. P. 4(8)(b) were not applied. He did not raise this ground, however, at the hearing or in his subsequent motions. Furthermore, defendant acknowledged in his resistance that the prosecuting attorney informed him two days

previously about the intended amendment request. Defendant's waiver aside, we find substantial compliance with the rule as defendant was apprised of the amendment and was given the opportunity to resist.

II. Continuance.

Iowa R. Crim. P. 4(8)(d) states:

> When an application for amendment is sustained, no continuance or delay in trial shall be granted because of such amendment unless it appears that defendant should have additional time to prepare because of such amendment.

It is well established that the trial court, in determining whether to grant a request for continuance, is vested with broad discretion. State v. Berenger, 161 N.W.2d 798, 802 (Iowa 1968). Defendant asserts the amendment negated his planned defense and claims surprise regarding the amended description of the vehicle. It was inevitable that the proper description of the pickup would be admitted into evidence by the state's witnesses. At such time during trial, the state would have requested to amend the information to conform to the proof. The viability of defendant's defense would have been short-lived. In addition, the depositions taken by defendant prior to hearing revealed the decription as amended. Defendant's allegation of surprise is, therefore, without merit. We find no abuse of discretion in trial court's denial of a continuance.

Finding no error, we affirm the conviction.

AFFIRMED.