IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
DALE EUGENE HARRIS,	)	8-467 87-1205
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 126806), James Havercamp, Judge.

The defendant appeals his conviction and sentence, following a jury trial, for first-degree theft based on misappropriation of funds. **AFFIRMED.**

Raymond Rosenberg, of the Rosenberg Law Firm, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Gary L. Sissell, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

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The defendant, Dale Eugene Harris, appeals his conviction and sentence, following a jury trial, for first-degree theft based on misappropriation of funds. Defendant raises two issues on appeal: First, that the trial court erred by submitting jury instructions which included a company not listed as a victim in the trial information; Second, that the trial court impermissibly penalized him for refusing to admit guilt by ordering the maximum period of imprisonment. Our review is for the correction of errors at law. We affirm.

Dale Harris was charged with first-degree theft for misappropriation of business funds for his personal use based on numerous incidents extending over more than a year. The victim of all but one of these incidents was Tire Marketing USA. Harris was the president and general manager of said company. The victim of the one other incident was Dunlop Tire and Rubber Company. Dunlop was not specifically listed as a victim in the trial information. Harris objected when the trial court submitted instructions to the jury permitting the jury to convict Harris if they found that he had misappropriated property belonging to "Tire Marketing USA and/or Dunlop Tire." The jury found Harris guilty. The trial court sentenced him to ten years confinement which is the maximum permitted by law.

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I. Trial Information

Defendant contends because the victim, Dunlop Tire, was not named in the trial information there was error in instructing the jury that if they found the misappropriated property belonged to "Tire Marketing USA and/or Dunlop Tire" they would find the defendant guilty of theft. The principal object of an indictment or information is "to apprise defendant of the crime charged." State v. Lass, 228 N.W.2d 758, 765 (Iowa 1975). The term "indictment" embraces the trial information, and all provisions of law applying to prosecutions or indictments apply also to informations. Iowa R. Crim. P. 5(5). The purpose of stating the name of the injured party in an indictment is to identify the particular offense. State v. Moe, 195 Iowa 270, 271, 191 N.W. 858, 859 (1923). If the particular offense is otherwise sufficiently identified, the allegation is not essential, and even an error therein is not material. Id.

We note neither Tire Marketing or Dunlop Tire are specifically named in the trial information. However, Tire Marketing is specifically mentioned in the summary of witnesses and in the police reports which were attached. "That the substance of this matter is that the Defendant, Dale Harris, was employed as President and General Manager of Tire Marketing and did use funds of Tire Marketing

purely for his personal benefit." In this way Tire Marketing has been sufficiently identified so as to give notice to the defendant of the crime charged.

The misappropriation with respect to Dunlop Tire centered around the defendant's use of the Dunlop Tire advertising budget for his wife's dance studio. The funds were originally set aside for Tire Marketing. In the final analysis, $300 of the Dunlop Tire money went for the dance studio ads. The State asserts this incident was described and alleged in the minutes of testimony which was submitted with the trial information. However, the name Dunlop Tire was not used.

The instruction which was given to the jury made it possible for the jury to convict the defendant of theft if they found he had misappropriated property belonging to "Tire Marketing USA and/or Dunlop Tire." The State correctly notes that pursuant to Iowa Code section 714.3 the inclusion of a charge of theft from Dunlop Tire does not require a separate count on the trial information where the thefts are attributable to a single scheme, plan or conspiracy. See Iowa Code § 714.3 (1985). There was evidence of stolen property in the amount of $8,050.74 from Tire Marketing. First degree theft requires a finding of theft of property exceeding five thousand dollars in value. Iowa Code § 714.2 (1985). The value of stolen property in this case exceeds five thousand dollars. Both

the Tire Marketing and Dunlop Tire charges are to be included on one count. We find any error in submitting the name Dunlop Tire as part of a jury instruction to be harmless as the value of the Dunlop property is an insignificant amount and a first degree conviction is supported on the remaining misappropriated Tire Marketing property.

II. Sentencing

Defendant contends the trial court impermissibly penalized him for refusing to admit guilt by ordering the maximum period of imprisonment. When the sentence imposed is within the statutory maximum, we will not interfere unless the record discloses an abuse of discretion by the sentencing court. State v. Williams, 315 N.W.2d 45,59-60 (Iowa 1982); State v. Inger, 292 N.W.2d 119, 126 (Iowa 1980); State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). The court has stated:

> The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979) (quoting State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967)).

The defendant infers from the trial court language that the sentence was increased for defendant's failure to plead

guilty. The relevant language from the sentencing proceeding is as follows:

> THE COURT: I think the tenor of the presentence investigation . . . was intended to convince the court that Mr. Harris was not contrite nor remorseful and perhaps had not learned anything from this experience . . . . What I am concerned about today is the acts themselves, Mr. Harris's attitude about these acts, and what would be the appropriate retribution, if any, that society should exact at this time . . . . I don't believe that you have at this moment a rehabilitative mind . . . you don't recognize the fault that occurred . . . .

We find the language to point to the defendant's character and chances of reform. The trial court seems to be addressing the defendant's disregard for the severity and magnitude of the crime committed. We fail to find error in the trial court's sentencing.

AFFIRMED.