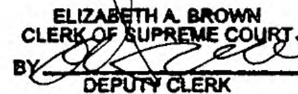
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LILYTH LYNN LITTLEWHITEMAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 83676-COA



AUG 17 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Lilyth Lynn Littlewhiteman appeals from a judgment of conviction, entered pursuant to a jury verdict, of felony embezzlement and burglary. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

Littlewhiteman argues the district court abused its discretion by allowing the State to amend the information the morning jury trial commenced. Specifically, Littlewhiteman argues the amendment prejudiced her substantial rights because she did not receive sufficient advanced notice of the State's addition to its theory of prosecution and was thus unable to adequately prepare a defense. In response, the State argues Littlewhiteman was not prejudiced by the amendment because the amendment had no substantive effect on its theories of prosecution and Littlewhiteman had adequate notice of the amendment.

NRS 173.095(1) allows a district court to permit the amendment of an information "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The district court's decision to allow the

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State to amend the information is reviewed for an abuse of discretion. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

"The Sixth Amendment and Article 1, Section 8 of the Nevada Constitution both guarantee a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense." *Jennings v. State*, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000). To ensure these rights are secured, "[t]he State is required to give adequate notice to the accused of the various theories of prosecution," and a criminal defendant's substantial rights are prejudiced under NRS 173.095 if they are deprived of such notice. *State v. Eighth Judicial Dist. Court (Taylor)*, 116 Nev. 374, 377-78, 997 P.2d 126, 129 (2000). "We may look to the entire record to determine whether the accused had notice of what later transpired at trial." *Collura v. State*, 97 Nev. 451, 453, 634 P.2d 455, 456 (1981).

On January 15, 2020, a preliminary hearing was conducted that indicated Littlewhiteman, an employee of the Nugget Casino, had cashed in two $500 Nugget Casino chips at the Rainbow Casino on March 10, 2019. Shortly thereafter, the State filed an information charging Littlewhiteman with one count of embezzlement and one count of burglary. Documents disclosed in discovery shortly thereafter—including a suspicious activity report filed by D. Solis, an employee of the Peppermill Casino, and a voluntary statement Solis provided to the Nevada Gaming Control Board (NGCB)—indicated Littlewhiteman had also cashed in one $500 Nugget Casino chip at the Peppermill Casino on March 12, 2019.

On May 11, 2021, six days before trial, the State filed a notice of witnesses, which included Solis. The following day, the State sent defense counsel an email that briefly described its witnesses, stating Solis

"wasn't needed for the bind over but was another cashier that the Defendant cashed a chip with" who "worked at the Peppermill." The email also referenced the discovery page numbers associated with the aforementioned discovery as well as surveillance footage. On May 17, 2021, the morning of trial, the district court permitted the State to amend the information. The amendment did not add any additional counts; rather, the amendment added references to the Peppermill incident within each of the existing counts.[1]

Assuming without deciding that the amendment did not charge an "additional or different offense,"[2] it nonetheless substantively expanded the State's theory of prosecution by describing a separate incident wherein Littlewhiteman cashed in a casino chip at a different location on a different date. Moreover, the Peppermill incident was not referenced in the original criminal complaint, the amended criminal complaint, or the original information, and no evidence about it was offered at the preliminary hearing.[3]

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[1]This amendment occurred approximately sixteen months after the information was first filed. The prosecutor stated he had delayed in seeking the amendment because he had forgotten that a prior report mentioned the Peppermill incident and that he only reviewed the information and noticed the omission a couple days before trial was to start.

[2]Littlewhiteman does not argue that the amendment charged her with an "additional or different offense" under NRS 173.095. Therefore, we limit our inquiry to the issue presented: whether the amendment prejudiced Littlewhiteman's substantial rights.

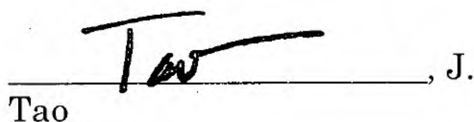
[3]The original information stated that the crimes occurred "on or about the month of February and/or March and/or 10th day of March, 2019"; however, the State conceded below that the factual references contained within each count referred to the events at the Rainbow Casino.

Although the State noticed Solis as a trial witness and disclosed the suspicious activity report and voluntary statement during discovery, there is no indication Littlewhiteman was aware of how the State intended to use this information, if at all, or why the State intended to call Solis. *See Koza v. State*, 104 Nev. 262, 264, 756 P.2d 1184, 1185-86 (1988) (stating due process is served if a criminal defendant had "actual knowledge of the prosecution's intent to proceed on [its] theories"). Moreover, the email stated Solis was not needed for the bind over at the preliminary hearing, suggesting the Peppermill incident was not a basis for the charges.

For these reasons, Littlewhiteman did not have adequate notice that the State intended to prosecute her for the Peppermill incident, and the amendment prejudiced her substantial rights.[4] Accordingly, we conclude the district court abused its discretion by permitting the State to amend the information the morning of trial, and we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_______________, C.J.
Gibbons



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[4]We note that the evidence before this court regarding whether Littlewhiteman unlawfully possessed the chips was far from overwhelming.

cc: Hon. Mason E. Simons, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk