

NOTICE
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2013 IL App (4th) 110672-U

NO. 4-11-0672

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 13, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
LUTHER R. KIMES,)	No. 10CF622
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court held the trial court did not err by permitting the State to amend the information.

¶ 2 In April 2010, the State charged defendant, Luther R. Kimes, by information with three counts unlawful use of a credit card, value not exceeding \$300, a Class 4 felony (720 ILCS 250/8 (West 2010)) (counts I, II, and IV); and one count unlawful use of a credit card, value exceeding \$300, a Class 3 felony (720 ILCS 250/8 (West 2010)) (count III). In April 2011, on the first day of trial, the State (1) amended, without objection, counts I, II and III, (2) dismissed count IV, and (3) added count V, unlawful use of a debit card, value not exceeding \$300, a Class 4 felony (720 ILCS 250/8 (West 2010)). On the second day of trial, the State dismissed count I, and moved to amend, with objection, count III to include the language "and games." The trial court permitted the State to amend count III. A jury found defendant guilty of counts II, III, and

V. In May 2011, the court sentenced defendant to an extended-term sentence of 10 years' imprisonment on count III, and three years' imprisonment on counts II and V, all sentences to run concurrently.

¶ 3 On appeal, defendant argues the trial court erred when it allowed the State to amend count III. Specifically, defendant asserts the amendment changed an essential element of the offense. The State responds the amendment corrected a formal defect in the information. We agree with the State and affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2010, the State charged defendant by information with three counts unlawful use of a credit card, value not exceeding \$300, a Class 4 felony (720 ILCS 250/8 (West 2010)) (counts I, II, and IV); and one count unlawful use of a credit card, value exceeding \$300, a Class 3 felony (720 ILCS 250/8 (West 2010)) (count III). The information for count III alleged defendant committed the offense of unlawful use of credit card, "[i]n that defendant, or one for whose conduct he is legally responsible, with the intent to defraud the issuer, First State Bank, obtained goods, namely a gaming system, having a total value exceeding \$300.00 by representing without the consent of the cardholder *** that he was the holder of a MasterCard debit card." The information in counts I and II also alleged the debit card was a "MasterCard" debit card.

¶ 6 On April 12, 2011, the first day of trial, the State (1) amended, without objection, counts I, II and III to change the type of debit card from "MasterCard" to "Visa;" (2) dismissed count IV, and (3) added count V, unlawful use of debit card, value not exceeding \$300, a Class 4 felony (720 ILCS 250/8 (West 2010)). On the second day of trial, the State dismissed count I. The State moved to amend count III to add the language "and games" so that it read "obtained

goods, namely a gaming system and games," because the gaming system was shown to have a retail value of \$299. Defendant objected. The trial court allowed the amendment.

¶ 7 Evidence presented at trial showed the following: On the evening of January 14, 2010, defendant entered a Wal-Mart in Champaign, Illinois. Defendant's wife worked at the Smart Style Salon inside the Wal-Mart. While defendant's wife and some customers left the salon to smoke outside, defendant and another person entered the salon's back room and removed a debit card from a customer's purse. Defendant then used the debit card at a gas station in Champaign to purchase \$21.75 worth of cigarettes. Around 11 p.m. that evening, defendant and his accomplice returned to the Wal-Mart and used the debit card to purchase a Sony Playstation 3 video-game system and two video games, for a total charge of \$412.08. On February 14, 2010, a stylist at the salon left her purse in the back room while she worked. The stylist observed defendant walk into the back room and then leave. The next day she discovered her debit card and tax return were missing from her purse. On February 15, 2010, defendant used the stylist's debit card at the same gas station to purchase \$59.90 worth of gasoline and alcohol.

¶ 8 The jury found defendant guilty of counts II, III, and V. In May 2011, defendant filed a motion for a new trial, arguing the trial court erred in amending counts II, III, and V during the trial. The court denied the motion.

¶ 9 In late May 2011, the trial court held a sentencing hearing. Evidence introduced at sentencing showed defendant previously committed approximately six felonies since 1997, including robbery, a Class 2 felony, in 2008. The court sentenced defendant to an extended-term sentence of 10 years' imprisonment on count III (see 730 ILCS 5/5-4.5-40(a) (West 2010)), and 3 years' imprisonment on counts II and V, all sentences to run concurrently.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues the trial court erred when it allowed the State to amend count III. Defendant asserts the amendment to add "and games" to the information changed an essential element of the offense. The State responds the amendment corrected a formal defect in the information. We agree with the State and affirm.

¶ 13 Section 111-3(a) of the Code of Criminal Procedure of 1963 (Code) mandates a charge include, as relevant to this case, the name of the offense, the statutory provision alleged to have been violated, and "the nature and elements of the offense charged." 725 ILCS 5/111-3(a) (1), (a)(2), (a)(3) (West 2010). Section 111-5 of the Code provides an information may be amended at any time to correct a formal defect. 725 ILCS 5/111-5 (West 2010); compare *People v. Kincaid*, 87 Ill. 2d 107, 124-25, 429 N.E.2d 508, 515-16 (1981) (discussing procedure where State amends "essential elements of the crime"). "A formal defect is one which does not alter the nature and elements of the offense charged." *People v. Patterson*, 267 Ill. App. 3d 933, 938, 642 N.E.2d 866, 869 (1994); *People v. Martin*, 266 Ill. App. 3d 369, 373, 640 N.E.2d 638, 641 (1994) (a "technical" amendment is one that "does not involve a material change in the allegations contained in the original charging instrument"). "[A] defendant's lack of surprise by the amendment strengthens the finding that the amendment is merely technical." *Martin*, 266 Ill. App. 3d at 373, 640 N.E.2d at 641-42; see also *People v. Cooper*, 97 Ill. App. 3d 222, 225, 422 N.E.2d 885, 887 (1981) ("no hint of surprise or prejudice" to the defendant where name of murder victim in indictment was amended). A trial court's decision to allow an amendment to an information is reviewed for an abuse of discretion. *People v. Alston*, 302 Ill. App. 3d 207, 211,

706 N.E.2d 113, 116 (1999).

¶ 14 In this case, the State moved to amend count III to include the language "and games." Defendant asserts (1) he "was charged with obtaining a gaming system, with a proven value of less than \$300, by the unlawful use of a credit card" and (2) "the State expanded the specific items alleged to have been obtained, in order to achieve a higher classification for the offense" and in so doing "it changed essential elements of the offense of unlawful use of a credit card." Defendant's arguments are unpersuasive.

¶ 15 Section 8 of the Illinois Credit Card and Debit Card Act criminalizes conduct where defendant "obtains or attempts to obtain money, goods, property, services or anything else of value." 720 ILCS 250/8 (West 2010). Before amendment, the information stated defendant "obtained goods, namely a gaming system, having a total value exceeding \$300.00." After amendment, the information stated defendant "obtained goods, namely a gaming system and games, having a total value exceeding \$300.00." At all times the information stated defendant "obtained goods" with a total value exceeding \$300. The amendment did not change this allegation, it merely provided further detail as to the goods obtained by defendant. The amendment did not change the nature and elements of the charged offense and was technical.

¶ 16 Further, there is no hint defendant was surprised or prejudiced by the amendment. As stated above, at all times defendant was aware the State alleged he obtained goods with a value exceeding \$300. Additionally, defendant was aware the goods alleged to have been obtained in count III included the video games as he stipulated to the State's exhibits showing (1) a Wal-Mart receipt in the amount of \$412.08 indicating purchase of a Sony Playstation 3 video-game system and two video games, and (2) the victim's bank statement indicating a debit card

purchase in the amount of \$412.08 from Wal-Mart. We also note, as the State also points out, the \$299 retail price of the video-game system ignores mandatory sales tax.

¶ 17

III. CONCLUSION

¶ 18 For the foregoing reasons, we affirm the trial court's judgment. We award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 19 Affirmed.