

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2006-0163, State of New Hampshire v. Melissa MacKinnon, the court on April 30, 2007, issued the following order:**

Having considered the briefs filed by the parties and the record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal. The defendant, Melissa MacKinnon, claims on appeal that the trial court erred in permitting: (1) the State to amend the indictment; and (2) a keeper of the records to testify about certain bank records. We affirm. We address each claimed error in turn.

Part I, Article 15 of the State Constitution protects a defendant from being convicted of a crime not charged in an indictment. State v. Glanville, 145 N.H. 631, 633 (2000). Thus, a trial judge cannot freely amend indictments brought on the oath of a grand jury. *Id.*

An impermissible amendment would be one that effects a change in the offense charged, or adds an offense. Because an element of the offense charged is automatically considered part of the substance of an indictment, instructing the jury on an element not charged by the grand jury substantively changes the offense and therefore is grounds for automatic reversal.

*Id.* (quotation omitted). A trial judge may, however, amend the form of an indictment as such amendments do not jeopardize the right to be tried only on charges that have been passed on by a grand jury. *Id.*

The amendment at issue was one of form, not substance. The amendment did not change the elements of the charged offense. RSA 637:3, I (1996) provides that a “person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.” The identity of the owner of the property is not an element of this offense. See State v. Fennelly, 123 N.H. 378, 388 (1983).

Additionally, because an allegation that is not part of the element of the offense, but has the effect of specifying and circumscribing the scope of the allegations, may also be part of the indictment’s substance, we must determine whether the amendment prejudiced the defendant’s ability to understand the charges against her or to prepare her defense. State v. Erikson, 129 N.H. 515, 519 (1987).

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The defendant cannot show prejudice. She conceded that she took money that she was not authorized to take and disputed only that she took the money with a purpose to deprive. In her counsel's opening statement, he informed the jury that the defendant "did make out checks to herself that she shouldn't have. She took money that she was not authorized to take from her brother-in-law Bill's business." Amending the indictment to correct the name of her brother-in-law's business did not prejudice her ability to understand the charge or to prepare her defense that she did not act with the requisite criminal intent. Under these circumstances, therefore, we conclude that the amendment was not substantive and that the court did not err by allowing it. See State v. Weeks, 137 N.H. 687, 691 (1993).

The defendant next argues that the trial court erred in permitting a keeper of bank records to testify as to the meaning of certain codes on the back of cashed checks, because the testimony was not disclosed during pretrial discovery, in violation of Superior Court Rule 98.

Decisions relating to pretrial discovery matters are generally within the sound discretion of the trial court. State v. Emery, 152 N.H. 783, 789 (2005). Absent an unsustainable exercise of discretion, we will not reverse the trial court's decisions with respect to alleged discovery violations or the admission of evidence. *Id.*

Based upon our review of the record submitted on appeal, we conclude that the trial court's exercise of discretion was sustainable. There is support in the record for the trial court's determination that the witness was a lay witness and that the State complied with its pretrial discovery obligations with respect to her testimony. There is also support in the record for the court's determination that the ability to explain the codes on the back of the checks was part of the witness's responsibilities. We therefore find no error in the trial court's decision to permit the witness to testify about the meaning of the codes.

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

**Eileen Fox,  
Clerk**

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