

and denied appellant the opportunity to rebut any such announcement from the State.

In *Barfield v. State*, 586 S.W.2d 538 (Tex. Cr.App.1979) the Court said:

"Once the defendant files his motion to dismiss for failure to adhere to the provisions of the Act, the State must declare its readiness for trial then and at the times required by the Act. This declaration is a prima facie showing of conformity to the Act (footnote deleted), but can be rebutted by evidence submitted by the defendant demonstrating that the state was not ready for trial during the Act's time limits." *Barfield*, supra at p. 542.

In this case, appellant had asserted his rights under the Speedy Trial Act by written pre-trial motion and had directed the court's attention to the motion and secured a ruling on the motion.

Since the State did not announce that it was ready during the appropriate time period, the majority relies in part on *Lee v. State*, 641 S.W.2d 533 (Tex.Cr.App.1982), and *Apple v. State*, 647 S.W.2d 290 (Tex.Cr.App.1983), for reversing the case and dismissing the indictment.

On first blush, both *Lee*, supra, and *Apple*, supra, would seem to be directly on point, but a closer examination reveals that in each of those cases, the trial judge conducted a hearing at which the State had the opportunity to retroactively announce ready but did not do so. In the case at bar, the State was not given the opportunity by the trial judge and thus it seems patently unfair and unjust to apply the *Lee* and *Apple* holding to this fact situation. I would allow the State an opportunity to show compliance with the Speedy Trial Act by abating this cause to the trial court for a hearing on appellant's Speedy Trial Act motion.

Although abating an appeal for hearing in the trial court is not frequently done, there is precedent for same in extreme cases. In *Hullum v. State*, 415 S.W.2d 192 (Tex.Cr.App.1966), we abated the appeal and directed that the trial court hold a hearing on defendant's federal claim of denial of due process. In *Kincaid v. State*, 500 S.W.2d 487 (Tex.Cr.App.1973), we abated

the appeal and ordered the trial court to hold a hearing on defendant's claim of ineffective assistance of counsel, a hearing which the trial court had refused to hold prior to the time that defendant perfected his appeal. In *Gonzalez v. State*, 635 S.W.2d 180 (Tex.App.—San Antonio 1982), the San Antonio Court of Appeals ordered the trial court to hold a hearing on defendant's motion for new trial, a hearing which the trial judge had erroneously refused to hold prior to the time that defendant perfected his appeal.

Considering the circumstances of this case, I would abate this appeal and remand the case to the trial court to conduct a hearing on appellant's Speedy Trial Act motion. Accordingly, I dissent to the majority's action in reversing and dismissing this cause.

W.C. DAVIS and CAMPBELL, JJ., join.



Jack Gordon FRANKLIN, Appellant,

v.

The STATE of Texas, Appellee.

No. 68332.

Court of Criminal Appeals of Texas,
En Banc.

Oct. 26, 1983.

Rehearing Denied Dec. 7, 1983.

Defendant was convicted in the 176th Judicial District Court, Harris County, Ernest Coker, Special Judge, of theft by receiving, and he appealed. The Court of Criminal Appeals, W.C. Davis, J., held that where indictment charged that defendant appropriated stolen property owned by a named individual with intent to deprive the named individual of the property and know-

ing that the property was stolen and obtained from the named individual by another, State was required to prove that defendant knew the property was obtained from the named owner.

Judgment reversed; acquittal ordered.

1. Indictment and Information ⇌171

If a variance exists between allegations and proof, it may render evidence insufficient to sustain a conviction.

2. Indictment and Information ⇌119, 167

Unnecessary words or allegations in an indictment may be rejected as surplusage if they are not descriptive of that which is legally essential to the validity of the indictment; however, where the unnecessary matter is descriptive of that which is legally essential to charge a crime, it must be proven as alleged even though needlessly stated.

3. Receiving Stolen Goods ⇌1

Elements of the offense of theft by receiving are: a person, with the intent to deprive the owner of property, appropriates property, which is stolen property, knowing it to be stolen, by another. V.T.C.A., Penal Code § 31.03(b)(2).

4. Receiving Stolen Goods ⇌7(6)

In indictment for theft by receiving, allegation that defendant knew property was stolen and obtained from owner by another was descriptive of what was legally essential to charge the crime, because it elaborated on and described element of offense of theft by receiving which required that property be stolen, and element of offense requiring that defendant know that it was stolen, and therefore State was bound to prove that defendant knew the property was obtained from the named owner, even though the allegation was needlessly stated in the indictment. V.T.C.A., Penal Code § 31.03(b)(2).

5. Criminal Law ⇌192

Reversal of conviction for theft by receiving for insufficient evidence required dismissal of prosecution.

Randy Schaffer, Houston, court-appointed on appeal, for appellant.

John B. Holmes, Jr., Dist. Atty., Winston E. Cochran, Jr. and Wm. Paul Mewis, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

W.C. DAVIS, Judge.

Appellant was found guilty of felony theft by receiving, enhanced by a prior conviction. The jury assessed punishment at seventy-five years' confinement.

Appellant urges nine grounds of error. In view of the disposition of the sufficiency of evidence contention, no other grounds need be addressed.

Appellant was charged under V.T.C.A. Penal Code, § 31.03(b)(2). The indictment alleged in pertinent part that appellant did unlawfully "appropriate stolen property, namely five hundred rings, owned by Elmer L. Herzberg, hereafter styled the complainant, of the value of over ten thousand dollars, with the intent to deprive the complainant of the property and knowing the property was stolen and obtained from the complainant by another whose name is unknown."

Appellant argues that the indictment alleges that appellant knew that the property was stolen and obtained specifically from Elmer L. Herzberg. Del Vandiver, an F.B.I. agent, testified that appellant told him that the rings came from a robbery in Dallas. Herzberg testified that he did not get a look at the people who robbed him at his home in Houston and he could not identify them. Another State witness, Donald Laird, testified that appellant told him that appellant had a jeweler who was going out of business, and he was going to liquidate his inventory. Appellant testified that he did not know Herzberg and that was acting as a middleman for someone else who had bought the rings from a jewelry store that was closing.

There was no evidence that appellant knew that the rings were obtained from Herzberg.

[1, 2] If a variance exists between the allegations and the proof, it may render the evidence insufficient to sustain a conviction. *Seiffert v. State*, 501 S.W.2d 124 (Tex.Cr.App.1973). Unnecessary words or allegations in an indictment may be rejected as surplusage if they are not descriptive of that which is legally essential to the validity of the indictment. *Windham v. State*, 638 S.W.2d 486 (Tex.Cr.App.1982). But where the unnecessary matter is descriptive of that which is legally essential to charge a crime, it must be proven as alleged even though needlessly stated. *Weaver v. State*, 551 S.W.2d 419 (Tex.Cr.App.1977). We must determine whether the additional allegation in the instant indictment is descriptive of that which is legally essential or merely surplusage. *Burrell v. State*, 526 S.W.2d 799 (Tex.Cr.App.1975).

[3] The elements of the offense with which appellant is charged are: (1) a person, (2) with the intent to deprive the owner of property, (3) appropriates property, (4) which is stolen property, (5) knowing it was stolen, (6) by another. *Dennis v. State*, 647 S.W.2d 275 (Tex.Cr.App.1983). The State pled more than they needed to in the instant indictment regarding element (4), describing the property as that property "obtained from the Complainant"; and pled more than they needed to regarding element (5), by alleging that appellant knew the property was stolen and obtained from Herzberg.

[4] A commonsense reading of the indictment leads to the conclusion that the State alleged that appellant knew that the property was stolen and knew that it was obtained from Herzberg. The unnecessary phrase "obtained from the Complainant", is descriptive of both the stolen property element and the intent element of knowledge—knowledge not only that the property was stolen, as must be alleged under § 31.03(b)(2), but also that it was stolen from Herzberg. Both elements modified by

the additional allegation are legally essential to an indictment charging an offense under § 31.03(b)(2).

In *McLaurine v. State*, 28 Tex.App. 530, 13 S.W. 992 (1890) the defendant was charged with willfully killing dumb animals. The indictment alleged that the defendant "did unlawfully, willfully, and wantonly kill four (4) cows, the property of L.T. White." The evidence revealed that the cows did not belong to White. The court held that while ownership of the property need not be alleged, it must be proved if pled because it is descriptive of the identity of that which is legally essential to the charge in the indictment. See also *Roberts v. State*, 513 S.W.2d 870 (Tex.Cr.App.1974). Compare *McClure v. State*, 163 Tex.Cr.R. 650, 296 S.W.2d 263 (1956) in which the State alleged a sale "on the premises at the Alamo Cafe located at Cleveland and Second Streets, City of Memphis, Texas." The State was required to prove the unnecessary detailed location; *Ewing v. State*, 163 Tex.Cr.R. 517, 294 S.W.2d 107 (1956). Where the State alleged that the defendant transported whiskey in a "two door" automobile; fatal variance not to prove "two door" automobile; *Cohen v. State*, 479 S.W.2d 950 (Tex.Cr.App.1972) in which the State was required to prove as alleged, that defendant transported fireworks "in the 12,300 block of Westheimer Road."; *Weaver v. State*, 551 S.W.2d 419 (Tex.Cr.App. 1977) involves an allegation of a "Ruger" gun but proof showed the gun was a "Luger." Held to be a fatal variance. In the instant case knowledge of the particular owner was alleged and, like those cases where ownership must be proved because (it has been) alleged, so too must knowledge of the particular owner be proved if alleged.

The State contends that the additional allegation describes the original armed robbery at Herzberg's house, not appellant's subsequent appropriation of the rings by receiving, and that the allegation says nothing more than that appellant knew the rings were stolen from the owner. This argument is not convincing. The indictment alleged "Elmer L. Herzberg, hereafter styled the Complainant", and specified, as

part of the intent element phrase of the indictment that appellant knew "the property was stolen and obtained from the Complainant. . . ." [Emphasis added]

Furthermore it seems evident that the attorneys, the judge, and the jury all apparently believed the indictment alleged knowledge that the property was Herzberg's. The application paragraph of the court's charge authorized the jury to convict only if they found as follows:

"Therefore, if you believe from the evidence beyond a reasonable doubt that Elmer L. Herzberg was the owner of the property, namely, five hundred rings of the value of over ten thousand dollars, and that the defendant, Jack Gordon Franklin, did, in Harris County, Texas, on or about May 17, 1979, appropriate said property, knowing that said property was stolen and obtained from Elmer L. Herzberg by another whose name is unknown, and with intent to deprive the said Elmer L. Herzberg of said property, you will find the defendant guilty."

The court instructed the jury that they must find that appellant knew that the property was "stolen and obtained from Elmer L. Herzberg" before it could convict appellant. So, not only is there a variance between the indictment and the proof, but there is also a variance between the application paragraph of the charge—the paragraph which authorizes the jury to find guilt—and the proof. Indeed, the jury recognized the problem during deliberation at the guilt-innocence stage when they sent out a note stating:

"We are uncertain with the meaning in the portion of the charge to the jury where it states: 'Knowing that said property was stolen and obtained from Elmer L. Herzberg'. Our question is whether we are charged with passing on the defendant's knowing the property came from Elmer L. Herzberg on or about May 17, 1979. Can you please clarify this point for us."

1. As shown *infra*, such a careful reading could only have informed the jury that the answer to

The court responded to the note by instructing the jury "to read the charge and study it carefully."¹

The allegation in the indictment is descriptive of that which is legally essential to charge a crime because it elaborates on and describes essential elements of the offense that must be pled. The State was bound to prove the allegations in the indictment. *Taylor v. State*, 637 S.W.2d 929 (Tex.Cr.App.1982); *Seiffert*, *supra*. No evidence was presented demonstrating that appellant knew the property was obtained from Elmer L. Herzberg.

[5] Because we reverse for insufficient evidence, *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), we must order dismissal of the prosecution. *Gibbs v. State*, 610 S.W.2d 489 (Tex.Cr.App.1980).

The judgment is reversed and an acquittal ordered.



Eldon Ray ROCHESTER, Appellant,

v.

The STATE of Texas, Appellee.

No. 281-83.

Court of Criminal Appeals of Texas,
En Banc.

Nov. 16, 1983.

Defendant was convicted in the 54th Judicial District Court, McLennan County, Walter Smith, Jr., J., of aggravated robbery, and he appealed. The Court of Appeals, 10th Supreme Judicial District, — S.W.2d —, affirmed, and defendant filed

their query was affirmative.