

SUPREME COURT OF NEBRASKA

State v. Fernandez

313 Neb. 745 (2023) · No. No. S-22-416 · Decided March 10, 2023

SUMMARY

The Nebraska Supreme Court affirmed Mary Rose Fernandez’s conviction and sentence for theft by deception. The court held that the jury could determine the value of stolen property by unanimously selecting a statutory value range rather than a specific dollar amount, and that the supplemental instruction and amended verdict form were not prejudicial. The court also concluded that Fernandez’s ineffective-assistance assignment failed to specifically allege deficient performance.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| WRITING FOR THE COURT | Cassel, J.; Heavican, C.J.; Miller-Lerman, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.                                                                                                                                                                                                                                                                                                                                                                   |
| JURISDICTION          | Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| DECIDED               | March 10, 2023                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| DOCKET                | No. S-22-416                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| PROCEDURAL POSTURE    | Mary Rose Fernandez appealed directly from her conviction and sentence for theft by deception, challenging a supplemental jury instruction and amended verdict form permitting the jury to determine property value by range, and alleging ineffective assistance of trial counsel.                                                                                                                                                                               |
| STANDARD OF REVIEW    | The correctness of jury instructions and whether an ineffective-assistance claim may be resolved on direct appeal are questions of law reviewed independently. An appellant challenging a jury instruction bears the burden of showing prejudice or an adverse effect on a substantial right. A fact finder's valuation of property in a theft case is reviewed for clear error. Assignments of error must be both specifically assigned and specifically argued. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| PARTIES               | Mary Rose Fernandez v. State of Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                          |

## TOPICS

jury instructions

criminal procedure

ineffective assistance

sixth amendment

appellate procedure

## PRACTICE AREAS

criminal law

criminal procedure

appellate practice

## QUESTIONS PRESENTED

1. Whether the district court erred by giving a supplemental instruction and amended verdict form permitting the jury to determine the value of stolen property by statutory range rather than requiring agreement on a specific dollar amount.
2. Whether the supplemental instruction and amended verdict form violated Fernandez's constitutional right to a unanimous jury verdict.
3. Whether the jury's valuation of the stolen property was clearly erroneous.
4. Whether Fernandez sufficiently assigned and argued ineffective assistance of trial counsel on direct appeal.

## HOLDINGS

1. A theft conviction does not require the jury to agree on a specific dollar amount. The State must prove and the jury must find that the property had some value to support a theft conviction, and a value within the statutory range must be found to grade the offense above a Class II misdemeanor. Therefore, the supplemental instruction and amended verdict form allowing a unanimous range determination were legally permissible.
2. The supplemental instruction and amended verdict form did not violate Fernandez's constitutional right to a unanimous jury verdict because the instructions required unanimity as to guilt and the selected value range, and the record showed that the jury reached a unanimous verdict.
3. The jury's finding that the stolen property was worth between \$1,500 and \$4,999.99 was not clearly erroneous.
4. Fernandez's ineffective-assistance assignment of error was insufficient because it did not specifically allege deficient performance; the court would not search the remainder of the brief for the required specificity.

## KEY QUOTATIONS

*“The statute does not require that proof of a specific value must be presented in order for the conviction to be sustained, although the State must prove the specific value of the stolen property at the time of the theft beyond a reasonable doubt in order to obtain a conviction for any offense greater than a Class II misdemeanor.” (755)*

*“We understand § 28-518(8) and the foregoing cases interpreting that subsection to require the State to prove and the jury to find only that the property at issue had some value in order to convict Fernandez of a theft offense.” (757)*

## FACTUAL BACKGROUND

While Fernandez's sister was in a coma, Fernandez used her sister's debit card for purchases and ATM withdrawals totaling more than \$2,000, and she admitted withdrawing \$2,900 from the account. The State introduced the sister's bank statement, surveillance videos, photographs, and witness testimony linking Fernandez to the transactions. Fernandez claimed she had permission to use the card and returned the cash, but her sister denied giving permission and did not find the money in her purse. The jury found the property value fell between \$1,500 and \$4,999.99.

## PROCEDURAL HISTORY

The State charged Fernandez with theft by deception involving property valued at \$1,500 or more but less than \$5,000. After a jury trial, the district court gave a supplemental instruction and amended verdict form allowing the jury to select a value range if it could not agree on an exact value. The jury found Fernandez guilty and selected the \$1,500-to-\$4,999.99 range; the district court imposed a 14-month sentence. The Nebraska Supreme Court moved the timely appeal to its docket and affirmed.

## DISPOSITION

affirmed

## CASES CITED

- State v. Garcia, 311 Neb. 648, 974 N.W.2d 305 (2022)
- State v. Figures, 308 Neb. 801, 957 N.W.2d 161 (2021)
- State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992)
- State v. Dixon, 306 Neb. 853, 947 N.W.2d 563 (2020)
- State v. Greer, 312 Neb. 351, 979 N.W.2d 101 (2022)
- State v. Jennings, 312 Neb. 1020, 982 N.W.2d 216 (2022)
- State v. Morgan, 286 Neb. 556, 837 N.W.2d 543 (2013)
- State v. Freemont, 284 Neb. 179, 817 N.W.2d 277 (2012)
- State v. Gartner, 263 Neb. 153, 638 N.W.2d 849 (2002)
- State v. Almasaudi, 282 Neb. 162, 802 N.W.2d 110 (2011)
- State v. Brunzo, 248 Neb. 176, 532 N.W.2d 296 (1995)
- State v. Frandsen, 199 Neb. 546, 260 N.W.2d 206 (1977)
- State v. Smith, 284 Neb. 636, 822 N.W.2d 401 (2012)
- Ramos v. Louisiana, 590 U.S. 83 (2020)
- State v. Sandoval, 280 Neb. 309, 788 N.W.2d 172 (2010)
- State v. Childs, 309 Neb. 427, 960 N.W.2d 585 (2021)
- State v. Miranda, ante p. 358, 984 N.W.2d 261 (2023)