

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	CASE CR09-396
	)	ORDER
v.	)	
	)	
NEBRASKA DIAMOND SALES	)	
COMPANY, INC.,	)	
	)	
Defendant.	)	

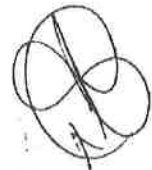
This matter came on for consideration on May 6, 2010, on the pretrial motions of the Defendant. The State was represented by a Lory Pasold and Lori Maret. The Defendant was present through its agent with Council Sean Brennan. The Motion to Define "Willfully" (Filing 9), Motion to Define the Material Elements (Filing 8), Motion to Allow Depositions (Filing 7) and the Motion for Bill of Particulars (Filing 6) were argued and taken under advisement.

*a. Preliminary matters - 404 and depositions.*

First, the State originally intended to introduce evidence of uncharged misconduct pursuant to Rule 404 and the hearing was to set to allow introduction of evidence regarding the same. The State withdrew that request for 404 evidence and therefore 404 evidence will not be permitted.

The State did not object to the motion for depositions and that motion was sustained. The State asked that the order be reciprocal, the Defendant did not object and it was so ordered.

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*b. Request for Bill of Particulars.*

The Defendant argues that it does not have clarity as to what affirmative acts the State is relying on to assert the elements of the crime set forth in the Amended Information to accuse the Defendant of the particular crime. Generally the request for a Bill of Particulars asserts a due process right.

Pursuant to constitutional considerations of due process and prohibition against double jeopardy, an information must inform an accused, with reasonable certainty, of the charge being made against him or her in order that the accused may prepare his or her defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. See, *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986). An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Furthermore, where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

*State v. Smith*, 269 Neb. 773, 787 (Neb. 2005).

It appears in this case that the information properly charges the offense and alleges the commission of a crime using language of the statute is therefore sufficient. The motion of the Defendant should be, and hereby is, overruled.

*c. Definition of "willfully".*

As defined in the criminal context, "Intentionally means "willfully" or "purposely," and not accidentally or involuntarily." *State v. Hemmer*, 3 Neb.App. 769, 531 N.W.2d 559 (Neb.App. 1995).

The Nebraska Supreme Court has said that "[intentionally means 'willfully' or 'purposely,' and not accidentally or involuntarily." *State v. Coca*, 216 Neb. 76, 81, 341 N.W.2d 606, 610 (1983). In Nebraska, descriptions of the mental state element of intentional crimes use language of intent, not language of purpose or willfulness. Since the meanings of "intentional," "purposeful," and "willful" are the same, the Committee recommends using intent language whenever purpose or willful language appears in a statute.

Nebraska Jury Instructions, 2d Ed., Criminal, Chapter 4. Definitions.

The Defendant suggests that the word "willfully" within the meaning of NEB. REV. STAT. § 77-2713(1) should be defined as "the intentional, voluntary violation of a known legal duty" pursuant to *Cheek v. United States*, 498 US 192 (1991).

The Defendant submitted an excellent analysis of the law on this issue. State was given an opportunity to respond and did not do so suggesting the State had no opposition to the proposed definition. The Nebraska Legislature has enacted a statute giving preference to the Federal statutory interpretation. See NEB. REV. STAT. § 77-2714. The court is not inclined to restate the argument made in the Defendant's Brief but generally concurs with the proposition that the Nebraska statutory authority as to criminal tax statutes is modeled after the Federal counterparts.

The motion of the Defendant to define the word "willfully" as stated in the motion should be, and hereby is, sustained.

*d. Material elements.*

The Defendant has asked the court to let it know what the court thinks the material elements of the crime are. The motion, brief and the argument of defense counsel, suggest the court provide the Defendant an understanding of what the court believes the State has to prove beyond a reasonable doubt. The Defendant acknowledged this request was out of the ordinary suggesting this was not a typical criminal case. The Defendant argues that due process and facilitating the Defendant's preparation for trial require that the Defendant know what the material elements are as they prepare for trial.

The Defendant's motion included an outline of the proposed material elements for the crime of willfully attempting to evade sales tax or payment thereof and for the crime of failing to

collect, truthfully account for or pay over sales tax. The motion reasoned for the adoption of the proposed elements. Each of the proposed elements included authority for the respective proposition.

The State has determined not to weigh in on the issue. However, the court could not find, and Defendant does not cite to, any Nebraska authority that stands for the proposition that court should proceed in this way at this time. The court declines to accept the Defendant's invitation to define the material elements at this point and that portion of the motion is overruled.

SO ORDERED THIS 21<sup>st</sup> day of July, 2010.

BY THE COURT:



ROBERT R. OTTE  
DISTRICT JUDGE

cc: Lory Pasold  
Sean Brennan