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NO. 66659-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
JUL 15 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JERRY RAMSEUR

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There is insufficient evidence to support appellant's robbery conviction.

Issue Pertaining to Assignment of Error

The State charged appellant with robbery in the second degree. The "to convict" instruction required the State to prove that appellant "unlawfully took personally property from the person or in the presence of another" and "the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another." Where the State failed to offer evidence supporting these elements, should appellant's conviction be reversed and dismissed?

B. STATEMENT OF THE CASE

1. The Crime

The King County Prosecutor's Office charged Jerry Ramseur with one count of robbery in the second degree. CP 1-3. A jury found him guilty, the court imposed a standard range 15-month sentence, and Ramseur timely filed his notice of appeal. CP 44, 52, 58-67.

The charge arose from events on June 24, 2010. 3RP[1] 31. Security guard Jennifer Turol was on duty at the Rainier Avenue Safeway when Ramseur attracted her attention in one of the aisles. 3RP 31-34. Turol was wearing a uniform – not unlike those worn by police officers – and a badge. 3RP 31. She walked past Ramseur and took inventory of the items he was carrying in a basket. One of those items was a package of steaks. 3RP 35.

Turol pretended to leave the aisle but then looked back as Ramseur walked away and toward the front of the store. 3RP 35-36, 69-70, 85-86. From a distance possibly as great as 40 feet, she followed and watched as Ramseur removed the steaks from the basket, held them down by his side, and then slipped them into his coat. 3RP 36, 90-96. Turol saw Ramseur set the basket on the floor. As Ramseur went to exit the store, Turol confronted him and asked him to show her what he had done with the steaks. Ramseur agreed and Turol followed him back into the aisles. 3RP 37.

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – October 11, 2010; 2RP – October 20, 2010; 3RP – October 25, 2010; 4RP – October 26, 2010; 5RP – January 21, 2011.

Ramseur was looking around as if he were lost. Turol told him that if he was looking for the steaks, they were no longer in his basket and she knew that he had them. 3RP 37, 39. In response, Ramseur turned and walked toward the exit. 3RP 37, 39-40. Turol followed and repeatedly asked Ramseur not to leave. 3RP 38. When Ramseur had walked past the registers, Turol stepped in front of him and told him he had to wait for police to arrive. Ramseur said "no," ran around a display, and exited the store. 3RP 38-39.

In the parking lot, Turol grabbed Ramseur, reached into his jacket, and put her hand on the steaks. As she attempted to pull them out, Ramseur grabbed her wrist with a firm grip. 3RP 41-42. Turol flipped Ramseur over and placed him in a loose headlock. 3RP 42-43. Turol ordered Ramseur to stop resisting and to get on his knees. Ramseur complied. As Turol went to place handcuffs on Ramseur, however, Ramseur elbowed Turol in the stomach, knocking the wind out of her. He then jumped up and began to run away. Ramseur paused briefly, told Turol that she had hurt him, and left the area. 3RP 43, 46-47.

Turol merely suffered a scratch to her arm and did not require any medical attention. 3RP 52. During the struggle, certain

items had fallen out of Ramseur's clothing, including a slip of paper with his name on it. 3RP 48-49. Turol later identified Ramseur in a photomontage and at trial. 3RP 53-55.

Ramseur testified in his own defense and denied many of Turol's claims. According to Ramseur, he entered the store to buy salad dressing. 3RP 167. He located the dressing and placed it in his basket, but ultimately decided not to purchase it and set the basket down. 3RP 169-172. Before he had even left the aisle, Turol stopped him and asked him about steaks. He had not taken any steaks and told her he knew nothing about them. 3RP 170-172, 183-184. He showed her the basket he had been carrying, which still contained the salad dressing. 3RP 173-174.

According to Ramseur, Turol first pulled out her handcuffs while the two were still in the store. She also grabbed Ramseur, ripping his jacket. 3RP 174, 177, 185-188. Ramseur testified that he did not know that Turol was a security guard and tried to get away from her. 3RP 189. Ramseur walked out of the store with Turol following. 3RP 190. Once beyond the exit doors, Turol took him "to the ground." 3RP 178, 190-192. Ramseur denied elbowing Turol in the stomach or otherwise striking her. 3RP 178-179, 195-196. He testified that he simply left the parking lot. 3RP 193-194.

Ramseur was impeached under ER 609 with prior theft convictions. 3RP 197.

2. Instructions and Argument

Jurors received instructions on robbery in the second degree and lesser included offenses – assault in the third degree, assault in the fourth degree, and theft in the third degree. CP 34-40.

The "to convict" instruction for robbery provides:

> To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 24th day of April, 2010, the defendant unlawfully took personally property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;
>
> (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
>
> (5) That any of these acts occurred in the State of Washington.

CP 35.

At the close of the State's evidence, defense counsel moved for dismissal of the robbery charge, arguing the prosecution had failed to satisfy elements 1 and 3 because the steaks were not initially taken from the person or in the presence of another; nor were they taken through force or threats of any kind. Ramseur simply placed them in his coat. 3RP 157-159. The motion was denied. 3RP 163-164. Defense counsel made a similar argument to the jury during closing, i.e., neither element 1 nor element 3 had been proved beyond a reasonable doubt. Counsel argued that even if jurors believed that Ramseur placed the steaks in his jacket, his crime was merely a theft. 3RP 224-225, 228-229, 236-238.

C. ARGUMENT

THERE IS INSUFFICIENT EVIDENCE TO PROVE THE ROBBERY CHARGE CONTAINED IN THE "TO CONVICT" INSTRUCTION.

Due process requires that the State prove every element of an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Whenever an allegation is included in the "to convict" instruction, it becomes the law of the case and must be proved by the State beyond a reasonable doubt, just like any other element. See State v.

Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); see also State v. Nam, 136 Wn. App. 698, 706-707, 150 P.3d 617 (2007) (applying doctrine to robbery instruction).

Similarly, in reviewing the sufficiency of the evidence on appeal, an allegation, statutorily required or otherwise, that is included in the "to convict" instruction becomes an element of the offense that must be supported by sufficient evidence:

> It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge. . . .

Tonkovich v. Dept. of Labor and Industries, 31 Wn.2d 220, 225, 195 P.2d 638 (1948); see also Nam, 136 Wn. App. at 706-707 (determining sufficiency based on elements in "to convict" instruction).

The Washington Supreme Court's decision in State v. Hickman provides a good example of the proper application of these principles. Hickman was charged with insurance fraud for presenting a fraudulent insurance claim regarding the theft of his car. Hickman, 135 Wn.2d at 100. Although there was no

requirement that the State prove the county in which the crime occurred, the "to convict" instruction required the State to prove:

> (1) That the defendant, James Hickman, on or about the 1st day of July, 1992, . . . did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such a claim, for the payment of a loss under a contract of insurance; and
>
> (2) That the false or fraudulent claim was made in the excess of . . . ($1,500); and
>
> (3) That the act occurred in Snohomish County Washington.

Hickman, 135 Wn.2d at 101.

Hickman was convicted and, on appeal, challenged the sufficiency of the evidence pertaining to the third element – that the fraudulent act occurred in Snohomish County. Hickman had been in Hawaii when he phoned in the claim and the insurer was located in King County. Based on the absence of evidence that the crime occurred in Snohomish County, the Supreme Court reversed and dismissed Hickman's conviction. Hickman, 135 Wn.2d at 105.

The result should be the same here. Even in the light most favorable to the State, the trial evidence did not satisfy element number 1 in the "to convict" instruction, which required proof that "the defendant took personal property from the person or in the presence of another," or element number 3, which required proof

that "the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another[.]" CP 35.

These elements are drawn from the statutory definition of the crime:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; . . . .

RCW 9A.56.190.

This statute has been interpreted to criminalize any taking of property by force, even when force is only used to retain property that has already been stolen. Thus, for example, where a shoplifter initially takes property without use of force, exits the store, and then uses force to retain the property once confronted, the crime committed is still robbery despite the absence of force used to take the property at the outset. See State v. McIntyre, 112 Wn. App. 478, 481-482, 49 P.3d 151 (2002) (discussing State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992) and State v. Manchester, 57 Wn. App. 765, 790 P.2d 217, review denied, 115 Wn.2d 1019

(1990)). Support for this interpretation is found in the robbery statute's legislative history. When the Legislature adopted the current definition of robbery, it deleted a phrase indicating that use of force "merely as a means of escape . . . does not constitute robbery." McIntyre, 112 Wn. App. at 482 (quoting Manchester, 57 Wn. App. at 770).

While McIntyre and the cases on which it relies make it clear the Legislature intended to treat Ramseur's conduct as robbery, it does not control the outcome in this case because the "to convict" instruction in Ramseur's case required greater proof than that required under the statutory definition of robbery.

Jurors are presumed to interpret instructions in a normal, common sense manner rather than a strained one. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, review denied, 164 Wn.2d 1035 (2008). Jurors were not made aware of the history of the robbery statute or legislative intent. Their only guide was the instructions in this case. And read in a normal, common sense fashion, the "to convict" instruction for robbery – and element numbers 1 and 3 in particular – required a taking from the presence of another and the use of force when the property was *first* taken.

Specifically, element number 1 required proof that Ramseur "unlawfully took personal property from the person or in the presence of another." CP 35. Jurors would have interpreted this as a reference to the initial taking in the store when Ramseur placed the steaks in his jacket. See 3RP 209-210 (prosecutor references initial taking in arguing element satisfied). Jurors would have contrasted this element with element 4, which discusses force used to "retain possession," further supporting their interpretation that element 1 addresses the initial taking. But there was no proof Ramseur initially took the steaks from the person of another. Nor was there proof he initially took them in another's presence.

In Manchester, this Court defined "presence" as a taking of something:

> so within [the victim's] reach, inspection, observation or control, that he could, if not overcome with violence or prevented by fear, retain his possession of it.

Manchester, 57 Wn. App. at 769 (quoting 4 C. Torcia, Wharton's Criminal Law § 473 (14th ed. 1981). The Manchester Court found it questionable whether property was taken in the presence of another where the store manager observed the taking from 15 to 18 feet away on one occasion and store security watched from an unknown distance on another occasion. Id. at 766-769. Here,

Turol watched Ramseur take the steaks from a distance. 3RP 90-91. And although another shopper was apparently somewhere in the vicinity, there was no testimony regarding how far she was standing from Ramseur. 3RP 36, 96-97. Thus, the steaks were not taken in the presence of another.

Like element 1, element number 3 also refers to this initial taking because it required proof that "the taking," meaning the same initial taking mentioned in element 1, "was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury . . . ." CP 35. There simply was no evidence to support this element. Ramseur placed the steaks in his jacket and began to leave the store.

The next element, element number 4, required proof "[t]hat force or fear was used by the defendant to obtain or retain possession of the property or to overcome or prevent resistance to the taking." CP 35. Taking the State's evidence as true, there is no doubt Ramseur used force to retain the property he had already taken when he grabbed Turol by the wrist and later used his elbow to knock the wind out of her. But there was no evidence he used force or fear to obtain the property at the outset.

Summarized, the problem is this: while case law makes it clear the robbery statute only requires the use of actual or threatened force to retain property, the jury instructions in this case – when read in a straightforward and commonsense manner – also required an initial taking in the presence of another and actual or threatened force during that taking. There was no proof of either element.

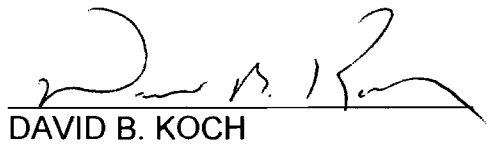
D. CONCLUSION

There is insufficient evidence to support the robbery conviction. Ramseur's conviction must be reversed and dismissed with prejudice. Hickman, 135 Wn.2d at 103.

DATED this 15th day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66659-2-III
	)	
JERRY RAMSEUR,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JULY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JERRY RAMSEUR
DOC NO. 783104
WASHINGTON CORRECTIONS CENTER\
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY, 2011.

x Patrick Mayovsky