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Court of Appeals
Division III
State of Washington

No. 31239-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROBERT M. HOGUIN,

Defendant/Appellant.

Appellant's Reply Brief

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A. ARGUMENT

Issue No. 1. The case should be dismissed because the State failed to prove the crime as charged in the information.

The State argues that when Mr. Hogue shoplifted the items with the security guard, Lennartz, watching him, he took items from Lennartz' person because the items in the store were under Lennartz' observation and control. In support of this contention the State cites State v. Manchester, 57 Wash. App. 765 790 P.2d 217 (1990). The State maintains the argument in Manchester is similar to the one presented in this case. The State also contends that Manchester argued that since he did not know he was being watched, he could not be found guilty of taking from a person. Respondent's Brief pp. 2-3.

The State is wrong in both its contentions and misstates the argument and holding in Manchester. The argument in Manchester is *not* similar to the one presented in this case. Manchester argued he did not take property from another *or in their presence*¹ because he was unaware of any persons near him and the employees were a significant distance from him. He also argued that even if he took the property in the presence of another, he did not use immediate force, violence, or fear of injury

¹ The State conveniently leaves out this italicized portion in its characterization of the argument in Manchester.

against that person because the crimes were completed before he displayed or used a weapon. Manchester, 57 Wash. App. at 768, 790 P.2d 217. The Court held Manchester was guilty of robbery because he used force to retain possession of the stolen items, as provided in the plain language of the robbery statute. Manchester, 57 Wash. App. at 769, 790 P.2d 217.

Mr. Hoguin did not argue that he did not take property in the presence of another. Nor did he argue that he did not use immediate force, violence, or fear of injury against that person. Instead, Mr. Hoguin's argument is that the State failed to prove the crime it charged, an issue not even alluded to in Manchester.

Mr. Hoguin argued that by the use of the word "*and*" instead of "*or*" between "from the person of another" and "in the presence of" in the information, the State had to prove that Mr. Hoguin took the shoplifted items from Lennartz' person. The State presented no evidence that Mr. Hoguin took anything from Lennartz' person. Instead, the evidence unequivocally showed that Mr. Hoguin shoplifted the items from the shelves of a Safeway store and walked out the door with Lennartz watching him. RP 67-68. Thus, while the State proved that Mr. Hoguin did unlawfully take and retain personal property that he did not own in the

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presence of Lennartz, it did not prove that he took the shoplifted items from Lennartz' person, as charged in the information.

The State's argument that Mr. Hoguin took items from Lennartz' person because the items in the store were under Lennartz' observation and control is nonsensical and without any credible legal authority.

Manchester certainly does not stand for such a proposition.

Issue No. 2. Mr. Hoguin was denied his constitutional right to a unanimous jury verdict because the State relied on numerous criminal acts as a basis for conviction and a Petrich instruction on jury unanimity was not given.

On this issue the State maintains Mr. Hoguin misunderstands the function of a unanimity instruction and that no such instruction is needed because there was only one count of robbery charged. Respondent's Brief pp. 3-4. Again, the State is incorrect.

Petrich clearly states, "When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with *only one count* of criminal conduct, jury unanimity must be protected."

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (emphasis added). Contrary to the State's assertion, the need for a Petrich instruction

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typically arises when only one count is charged² but there are multiple criminal acts, as in the present case.

The State presented evidence of six different acts by Mr. Hoguin that it argued constituted use or threatened use of immediate force, violence and fear of injury to Martin H. Lennartz.³ RP 72-76. Moreover, in closing argument the State argued, “We have six separate uses and threatened uses of force by Mr. Hoguin to overcome the resistance of the taking on that particular day.” RP 199. The State also argued that any one of these acts would satisfy the “to convict” instruction for second degree robbery. See RP 196.

The State did not elect one of these acts to satisfy the “use or threatened use of immediate force” element of the robbery charge. Without a Petrich instruction there was no way to assure that all the members of the jury were relying on the same act when voting to convict Mr. Hoguin. Therefore, the verdict must be reversed.

² But not always, as illustrated in State v. Holland, 77 Wn. App. at 422, 424, 891 P.2d 49.

³ The State wrongly contends the defendant “converted his action into separate acts of robbery” as a basis for this issue. Respondent’s Brief p. 4. But see RP 196-99.

B. CONCLUSION

For the reasons stated herein, and in appellant's opening brief, the conviction should be reversed and the case dismissed.

Respectfully submitted June 27, 2013,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on June 27, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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