

31239-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT M. HOGUIN, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove the crime as charged in the information.
2. The trial court erred in failing to give a jury unanimity instruction.

II.

ISSUES

- A. DO THE FACTS ELICITED BY THE STATE SHOW A “TAKING” FROM THE PERSON OF THE STORE SECURITY GUARD?
- B. IS A UNANIMITY INSTRUCTION NEEDED ON A SINGLE CHARGE CASE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant’s version of the Statement of the Case.

#### IV.

#### ARGUMENT

#### A. THE FACTS OF THIS CASE SHOW THAT THE DEFENDANT TOOK ITEMS FROM THE PERSON OF THE STORE SECURITY OFFICER.

The defendant has presented a two part argument. The first claim is that the State used the word “and” in its amended information<sup>1</sup>, thus requiring the State to prove that the defendant took items from the person of the Safeway security person. Brf. of App. 9. The instructions read to the jury did not contain the “and” and used “or” instead. RP 189.

The defendant’s arguments have several flaws. The State notes that as the security guard was in charge of all store merchandize, the defendant’s departure from the store was a “taking from the person.” Certainly, the defendant cannot argue that the taking of the objects from the store was *not* in the presence of the security guard as Mr. Lennartz watched the defendant throughout the theft and continuing outside the store.

Focusing on the issue of “taking from a person,” brings this case squarely under the opinion in *State v. Manchester*, 57 Wn. App. 765, 790 P.2d 217 (1990) (reconsideration denied). The defendant in *Manchester* raised an argument similar to the one being raised here. The defendant in the *Manchester* case argued

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<sup>1</sup> For the sake of clarity, the State is unable to find any amendment to the original information.

that since he did not know he was being watched, he could not be found guilty of taking from a person. *Manchester, Id.* at 768.

The court in *Manchester* evaluated this claim and held that “[t]he word ‘presence’ in this context has been defined as a taking of something 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. 4 C. Torcia, *Wharton's Criminal Law* § 473 (14th ed.1981).” *Manchester, supra* at 768-69. The definition refers to inspection, observation or control. The State maintains that the items within the Safeway store were so within Mr. Lennartz’ inspection, observation or control that the defendant’s removal of the items from the store followed by his use of physical threats and actions made the items taken by the defendant as property taken from the person of the security guard.

B. THERE IS NO *PETRICH* INSTRUCTION NEEDED IN THIS CASE.

The defendant’s second set of claims is somewhat light on logic. The defendant argues that his trial was faulty because the State relied on numerous criminal acts without electing one act or including a *Petrich*<sup>2</sup> instruction. The defendant mixes the actuality of this case with a faulty understanding of what a unanimity instruction is supposed to do. In his argument on this topic, the

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<sup>2</sup> *State v. Petrich*, 1001 Wn.2d 566, 572, 683 P.2d 173 (1984).

defendant claims that the State must either elect the act for conviction or a *Petrich* instruction is required. No such instruction was given to the jury on this case and the State did not “elect” any particular act on the part of the defendant upon which the State would pursue the robbery charge.

The point at which the defendant’s argument goes astray is at the point where the defendant confuses physical actions with charges. The State only charged one robbery. The defendant further confuses the situation by citing to *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49 (1995.) The court in *Holland* was addressing the problem of ensuring a jury reached unanimity on multiple charged counts. The holding in *Holland* has nothing whatever to do with this case. There was only *one* charged crime in this case.

The defendant sets up a “straw-man” argument by pulling arguments from *Holland* and then applying those arguments to this case. The State is unaware of any caselaw that permits a defendant to pull arguments applicable to multiple charges and then insert those arguments in a case with only a single charge.

Essentially the defendant wants to convert his actions (after he left the Safeway) into separate acts of robbery and then cry foul because there was no unanimity instruction. Interestingly, the very physical acts the defendant now wishes to use to construct a trial error are the very same physical acts that trial defense counsel argued did not exist during defense closing. Trial defense counsel spent the majority of her closing argument on attempts to refute the

existence of the very acts which the defendant now embraces and twists into a *Petrich* argument.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's conviction be affirmed.

Dated this 29<sup>th</sup> day of May, 2013.

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