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No. ~~65815-11~~

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

2011 APR 29 AM 10:31

COURT OF APPEALS
FILED


STATE OF WASHINGTON, Respondent,

v.

ABRAM MICHAEL VELIZ, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. FACTS 1

 1. Procedural Facts. 1

 2. Substantive Facts. 3

D. ARGUMENT 7

 1. Defense counsel was not ineffective for failing to propose a lesser-included instruction for third degree theft because the evidence did not support the inference that Veliz had committed only the lesser included offense and Veliz cannot demonstrate actual prejudice from the lack of any such instruction because the jury found all the elements of the greater offense of second degree organized retail theft. 8

 a. *Veliz was not entitled to a third degree theft instruction on the offense of second degree organized retail theft.* 11

 b. *The absence of a lesser included offense instruction did not result in prejudice because there is no likelihood that the failure to request such an instruction had an effect on the outcome of the case.* 13

 2. Taking the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. 15

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington State Court of Appeals

State v. Carrier, 36 Wn. App. 755, 677 P.2d 768 (1984)..... 21

State v. Fischer, 40 Wn. App. 506, 699 P.2d 249, *rev. denied*, 104 Wn.2d 1004 (1985)..... 20

State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009)..... 12

State v. Vining, 2 Wn. App. 802, 472 P.2d 564 (1970)..... 20

State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2005) 12

State v. Wilson, 117 Wn. App. 1, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003)..... 13

Washington State Supreme Court

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999)..... 21

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993)..... 13

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997)..... 14

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000), *accord*, Grier, 171 Wn.2d at 42 14

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 12, 17

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 19

State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993) 19

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)..... 13

State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) 13

<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997)	14
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	19
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<u>State v. Ward</u> , 148 Wn.2d 803, 64 P.3d 640 (2003).....	20
<u>State v. West</u> , 139 Wn.2d 37, 983 P.2d 617 (1999).....	17

Federal Authorities

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	12, 17
<u>U.S. v. Titterington</u> , 374 F.3d 453 (6 th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1153 (2005).....	20

Other Authorities

<u>Autrey v. State</u> , 700 N.E. 2 nd 1140 (Ind. 1998)	17
--	----

Rules and Statutes

RCW 9.94A.350(4) (2009), (2010).....	22
RCW 9A.56.020(1)(a)	15
RCW 9A.56.050.....	15
RCW 9A.56.050(1)(a)	15
RCW 9A.56.350(1)(c)	15
RCW 9A.56.350(4).....	22
RCW 10.61.006, .003	14

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective for failing to request a lesser included instruction on theft in third degree where the evidence did not show that he committed only theft in the third degree and whether defense counsel's failure resulted in actual prejudice to the defendant where the jury found all the elements of organized retail theft in the second degree and the defendant was caught shoplifting and confessed to having committed three of the other four shoplifting incidents, the total value of which was over the \$750 value amount for organized retail theft in the second degree.
2. Taking the evidence in the light most favorable to the State whether there was sufficient evidence for a rational trier-of-fact to find the elements of organized retail theft in the second degree beyond a reasonable doubt where the defendant was caught shoplifting and confessed to having committed three of the other four shoplifting incidents, the total value of which was over the \$750 value amount for organized retail theft in the second degree under the amended statute, where defendant did not object below to the jury instructions and the information and hasn't challenged them on appeal.

C. FACTS

1. Procedural Facts.

On September 23, 2009 Appellant Abram Veliz was charged with Organized Retail Theft in the Second Degree, in violation of RCW 9A.56.350, and Unlawful Possession of a Controlled Substance, to-wit:

Heroin, in violation of RCW 69.50.4013(1), for his acts between June 1st, 2009 through September 18, 2009. CP 99-100. Veliz pleaded guilty to the reduced, amended charge of Theft in the Second Degree and Unlawful Possession of a Controlled Substance, but after a mistake regarding his offender score was discovered, Veliz moved to withdraw his plea, chose to represent himself and despite the State's offer to permit him to plead to the reduced charges on a revised offender score of 8, opted to proceed to trial. CP 68-71, 73; 5/10/10RP 3, RP¹ 3-11, 18-19, 56-63. Veliz's conviction was vacated, and the State amended the information back to the original charges, clarifying some of the language regarding the organized retail theft count. CP 62-63, 73, 95-96; RP 15, 64-66. Just prior to trial after the CrR 3.5 hearing, Veliz changed his mind and requested standby counsel to represent him at trial. RP 130. A jury convicted Veliz of both counts. CP 34.

Before sentencing Veliz filed a motion to arrest judgment asserting an ex post facto violation based on the change in the statute. CP 29-33. The State responded, in part, that there was no ex post facto violation because the crime was not complete until Sept. 18, 2009 as a course of conduct that was charged. Supp. CP __, Sub Nom. 75. The court

¹ RP refers to Volume I – IV of the trial and sentencing proceedings. 5/10/10 RP refers to the proceedings on May 10, 2010.

ultimately denied the motion. RP 502-03. At sentencing, Veliz faced a standard range of 33-44 months on the second degree retail theft charge based an offender score of 8, to which counsel stipulated, and 12-24 months on the unlawful possession controlled substance count based on an offender score of 8. CP 17; RP 485. The court imposed the State's recommendation for mid range of the standard range, 38 months, on the retail theft count and the top of the range, 24 months, on the drug conviction. CP 20; RP 498.

2. Substantive Facts.

On June 21, 2009 Christopher Onyon, an assets protection employee for Walmart in Bellingham, responded to a report of some packaging found in a cart in the children's clothing section of the store. RP 182-85. The cart was hidden from view amongst racks of children's clothing and contained packaging for Kodak HD video cameras and the spider web-like security devices² for the cameras. RP 189-90. The three video cameras were valued at a total of \$479.52. RP 225, 244. Onyon reviewed the surveillance camera video footage for the store that day and observed a man with a cart in that area and then observed the same person putting the three handheld palm unit cameras into the cart earlier in the

² The security devices would sound an alarm if the merchandise were taken from the store without the device being removed. RP 192.

electronics department and heading to the area where the cart was found. RP 199, 208, 219. He also observed the man leave that area without the cart, with his hands in his pockets. RP 207-08. Once the man exited the store, he started to run and got into a car with two other people, and as one of them, a female, was driving away, she almost ran into a van. RP 210.

On July 7, 2009 Onyon responded to another report of packaging found discarded in an area near where the cart had been left in the prior incident. RP 228. Like the items previously taken, it was a handheld video camera, about the size of an iPod which could fit inside a pocket, and the security device had been removed. RP 230-31. Onyon recognized the person in the video footage as the same person in the June 21st incident and noticed that he left in the same manner as the prior incident, with hand in pocket. RP 233, 235. The retail value of that camera was \$129.84. RP 238.

On July 15, 2009 Onyon again responded to a report of packaging found near the same area where the other packaging had been found. RP 245-46. There was packaging for five Wii system or video games and a digital photo frame. RP 246-47. The security device on the photo frame had been removed in the same manner as the devices in the prior incidents. RP 248. When Onyon reviewed the surveillance video, he recognized the person as the same one who was in the video footage from the prior

incidents. RP 250. This time the footage showed the man leaving the store with one of the store's bags, which he didn't have with him when he entered, in the same manner as the other two incidents. RP 259-61. The retail value of the items taken was \$263.70.

On August 30, 2009 Onyon responded to a security device alarm going off and was informed that a male had run out of the store with a backpack, a backpack the store carried. RP 266-67. After reviewing the surveillance footage and observing the same person in the electronics department, he found the security device and packaging for a RCA multimedia recorder in the domestics items area of the store. RP 267-70. The retail clearance value of the recorder was \$299.

After the August incident, Onyon put out a "be on the look out notice" to other stores with information regarding the four incidents. RP 280-81. Then on September 18, 2009 while he was walking the store's floor, Onyon saw the male he had observed in the video footage, Veliz, in the electronics department and saw him head to the children's clothing area. RP 284-85. After calling his supervisor to alert the supervisor, Onyon saw Veliz quickly selecting girls clothing items without really looking at them and putting them in the cart. RP 286-87. Veliz then went into the men's department, took out a large JC Penny's bag and put the

clothing in the bag, and left the store without paying for the items. RP 287-88, 290-91. The retail value of the clothing was \$235.50. RP 309.

Onyon followed Veliz out the entrance to the store and confronted him in the parking lot area, informing Veliz that he was with Walmart security and that he needed to talk to Veliz about the unpaid merchandise. RP 291-92. Veliz pushed Onyon back and ran about 15-20 feet before Onyon and his supervisor caught him. RP 293-95. Veliz resisted their efforts, but was finally taken to the ground and handcuffed. RP 294-96.

Bellingham police officer Christopher Brown arrived at the Walmart store minutes later. RP 299. After having read Veliz his Miranda rights, Veliz gave a wrong name when Officer Brown asked him his name. RP 300, 335-36. When he was asked again for his name, he gave another name, again not his true name. RP 336-37. Officer Brown was finally able to identify Veliz by contacting the registered owner of the car that had been associated with a number of the previous theft incidents, who gave them Veliz's name, and by confirming his identity through scars and tattoos.³ RP 321-22, 338. Veliz then confirmed who he was. Id. Veliz admitted taking the clothing that day and admitted to having been the one who stole the items in three of the other incidents. RP 303-05, 326, 339-

³ Three different cars were associated with all the incidents, and one, a white Chevy sports car, had been associated with three of them. RP 321-22.

41. The only incident he didn't confess to was the June 21st incident. RP 305, 341. The total amount taken among all five incidents was \$1407.56. RP 305, 309, 342. Onyon identified Veliz at trial as the one who had been in the video footage on each of the incidents. RP 233, 240, 267, 273.

When Veliz was searched incident to arrest, heroin, nine syringes and another store's receipt was found on him. RP 300, 345-50, 353, 383. Veliz said that he would steal items for other people, that they would give him shopping lists of items they wanted, and that he had stolen from other retailers. RP 300-01.

D. ARGUMENT

Veliz asserts that his defense counsel was ineffective for not offering a lesser-included to-convict instruction on theft in the third degree and that there is insufficient evidence to support his conviction on second degree organized retail theft. Veliz was not legally entitled to such a lesser offense instruction under the facts of this case as the evidence did not support an inference that he was only guilty of the lesser included offense of third degree theft. Therefore counsel was not ineffective in not proposing such an instruction. Furthermore, even if counsel's failure to propose such an instruction was not a legitimate strategic decision, Veliz cannot prove prejudice because the jury found him guilty of the greater

offense of second degree organized retail theft and the evidence was overwhelming that he committed that offense.

Veliz also asserts that the evidence at trial was insufficient to convict him of the crime of second degree organized retail theft. The evidence was sufficient to convict him under the jury instructions given and as charged in the information, and Veliz does not contend otherwise. Veliz essentially contends that effective date of the amendment to the statute was an element of the offense, however he has not challenged the jury instructions or the amended information on appeal. Veliz did not object to the jury instructions below either and is bound by the law of the case. As instructed there was sufficient evidence to convict him of organized retail theft in the second degree.

- 1. Defense counsel was not ineffective for failing to propose a lesser-included instruction for third degree theft because the evidence did not support the inference that Veliz had committed only the lesser included offense and Veliz cannot demonstrate actual prejudice from the lack of any such instruction because the jury found all the elements of the greater offense of second degree organized retail theft.**

Veliz asserts that defense counsel was ineffective for failing to request a lesser included instruction of third degree theft on the charge of second degree organized retail theft. Defense was not entitled to a lesser included instruction under the facts of this case. Although Veliz was

caught with less than the \$750 value amount required for second degree retail theft on one day during the charging time period, Veliz confessed that day to having committed three of the other four incidents of retail theft, the total value of which exceeded the \$750 amount. As Veliz was not entitled to a lesser included instruction because the evidence did not support an inference that he had only committed the lesser offense, counsel was not ineffective for failing to propose one. Moreover, Veliz cannot demonstrate prejudice where the jury found beyond a reasonable doubt all the elements for second degree organized retail theft and there is no reasonable probability that but for defense counsel's decision the outcome of the case would have been any different.

The Washington State Supreme Court recently reaffirmed adherence to the Strickland⁴ analysis in evaluating ineffective assistance of counsel claims based on the failure to propose lesser included instructions, rejecting a different analysis developed by the Court of Appeals decisions in State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009) and State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2005). State v. Grier, 171 Wn.2d 17, 32-41, 246 P.3d 1260 (2011). Under the Strickland standard in order to demonstrate ineffective assistance of

⁴ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15. A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

- a. *Veliz was not entitled to a third degree theft instruction on the offense of second degree organized retail theft.*

A defendant is entitled by statute to an instruction for a lesser included offense if the lesser offense meets both the factual and legal prongs of the test. RCW 10.61.006, .003; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000), *accord*, Grier, 171 Wn.2d at 42. The lesser included offense analysis applies to the offenses as charged, not as broadly proscribed by statute:

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Under the factual test the factual showing required is more particularized than that required for other jury instructions, and the evidence must show that *only* the lesser offense was committed, to the exclusion of the greater offense. Fernandez-Medina, 141 Wn.2d at 455. In addition, “the evidence must

affirmatively establish the defendant's theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt in the case." Id. at 456.

Veliz was charged with Organized Retail Theft in the Second Degree under subsection (1)(c) of RCW 9A.56.350. As charged and instructed in this case, the State had to prove that the defendant (1) wrongfully obtained or exerted unauthorized control over property from one or more mercantile establishments; (2) that the theft of property occurred over a period of 180 days; (3) that the defendant intended to deprive the mercantile establishment(s) of the property; and (4) that the property taken had a value of at least \$750. RCW 9A.56.350(1)(c); CP (Inst. 11). Theft in the third degree under subsection (1)(a)⁵ of the statute requires proof of theft of property with a value that does not exceed \$750. RCW 9A.56.050(1)(a). Wrongfully obtaining or exerting unauthorized control over the property with the intent to deprive the owner of the property is one means of committing theft. RCW 9A.56.020(1)(a). As charged and prosecuted in this case, the State does not contest that theft in the third degree was a lesser included of organized retail theft in the second degree.

⁵ Subsection (1)(b) of the statute relates to theft of merchandise pallets and/or beverage crates. RCW 9A.56.050.

However, under the facts of this case, the evidence does not support the inference that Veliz only committed theft in the third degree to the exclusion of organized retail theft in the second degree. Veliz was caught taking \$235.50 in merchandise on September 18, 2009. He confessed that day to having stolen the merchandise on July 7th and 15th and August 30th, although he denied taking anything on June 21st. The amount of the items stolen on the three other days he confessed to were valued at \$692.54, for a total value of \$928.04. Defense counsel's failure to request a lesser included instruction on third degree theft was not ineffective because Veliz was not entitled to such an instruction under the facts of the case.

b. The absence of a lesser included offense instruction did not result in prejudice because there is no likelihood that the failure to request such an instruction had an effect on the outcome of the case.

Even if this Court were to decide that counsel's failure to propose a lesser included offense instruction was not a legitimate strategic decision, reversal would not be warranted. The defendant must also establish prejudice. Veliz cannot show prejudice here because there is no likelihood that defense counsel's decision not to request the instruction affected the outcome of the case. The jury's verdict reflects that it found *all* the elements for organized retail theft in the second degree beyond a

reasonable doubt. Moreover, Veliz was caught stealing some of the property and confessed to three of the four theft incidents, which incidents together had a value of over \$750, without consideration of the incident to which he did not confess.

As required by Grier, in order to show prejudice under the Strickland standard, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. Grier, 171 Wn.2d at 43-44. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999). In the context of an ineffective assistance of counsel claim, the court must assume that the jury would not have convicted the defendant of the greater offense unless the State had met its burden of proof. Grier, 171 Wn.2d at 43-44. As the court in Grier noted:

The jury found the defendant guilty of murder beyond a reasonable doubt. Had the jury been instructed on lesser included offenses to murder, they would have been presented with the same evidence and heard the same testimony. Therefore, there is no reason to believe that the inclusion of lesser included offenses would have raised a reasonable doubt as to defendant's culpability for murder.

Id. at 41-42 (*quoting* Autrey v. State, 700 N.E.2nd 1140, 1142 (Ind. 1998)).

In the present case, the jurors were instructed that they could convict the defendant only if they found beyond a reasonable doubt each element of second degree retail theft. CP 49. This court is required to presume that the jurors did in fact find that second degree retail theft was proved beyond a reasonable doubt. Given that mandatory assumption, there is no possibility that an instruction on a lesser offense would have changed the result. Moreover, the evidence was overwhelming that Veliz committed organized retail theft in the second degree. Given the jury's verdict, no instruction on a lesser offense would have changed the result. Even if counsel's actions could be considered deficient, no prejudice could have resulted or did result.

2. Taking the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

In his supplemental brief Veliz asserts that the evidence was insufficient to establish the elements of the offense, but does not contest any factual evidence. Instead he asserts a legal argument that the evidence was insufficient to satisfy the statute because some of the events occurred prior to the change in the statute. However, Veliz did not object to the jury instructions, and does not challenge the instructions on appeal, and

therefore the instructions became the law of the case. As such he cannot contest the sufficiency of the evidence at this time.

Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Instructions not excepted to at the time of trial become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Both parties are bound by the instructions given if no objections are made to them. *Id.*

Veliz does not contend that the evidence presented was insufficient to convict him under the jury instructions given. He contends that the State failed to prove all the elements of the charged crime because the statute was amended effective Sept. 1, 2009. He argues essentially that the effective date of the amendment to the statute was an element of the crime. It is not. An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v.

Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). Generally the date of the offense is not an essential element. State v. Fischer, 40 Wn. App. 506, 511, 699 P.2d 249, *rev. denied*, 104 Wn.2d 1004 (1985); *see also*, U.S. v. Titterington, 374 F.3d 453, 457 (6th Cir. 2004), *cert. denied*, 543 U.S. 1153 (2005) (time is not an element of the offense and the court will not quash an indictment because it does not appear on the face of the indictment that it is found to be within the statute of limitations). Nowhere does the alleged “element” of “beginning on or after September 1, 2009” appear in the information and nowhere does it appear in the instructions. The jury found Veliz guilty of all of the required elements of the offense, as charged in the information.

Moreover, Veliz did not object to the information or the amended information, he was aware of the change in the statute, and he did not object to the instructions. RP 13-15, 36-38, 65-67, 162-66; *see*, State v. Vining, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970) (question as to whether the defendant’s separate thefts could be aggregated into a greater charge under theory of a single continuing criminal impulse is a factual question for the jury that should be addressed in the jury instructions). Defense counsel was aware that the amendment to the statute did not take effect until Sept. 1, 2009 and when specifically asked if she had an alternative to-convict instruction to propose because there was no WPIC

addressing the amendment to the statute, she indicated she did not. RP 166, 424-26. Veliz has not asserted on appeal that the information was insufficient or contested the sufficiency of the jury instructions and does not contend that the trial court erred in denying his motion to arrest judgment on ex post facto grounds. He also does not make a due process argument that he cannot be convicted of the crime charged because some of the events occurred prior to the effective date of the statute.⁶ Veliz waived any right to challenge the sufficiency of the jury instructions by failing to object below and failing to demonstrate manifest error of constitutional magnitude on appeal.

Furthermore, as the State argued in response to the ex post facto allegations, a criminal impulse does not end until the last incident when a course of conduct is charged. *See, State v. Carrier*, 36 Wn. App. 755, 758, 677 P.2d 768 (1984). Prior to the amendment to the statute, the legislature specified:

For purposes of this section, a series of thefts committed by the same person from one or more mercantile establishments over a period of one hundred eighty days may be aggregated in one count and the sum of the value of all the property shall be the value considered in determining the degree of the organized retail theft involved.

⁶ *See, State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999).

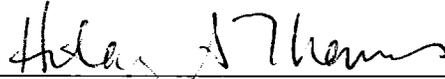
RCW 9A.56.350(4). This aggregation provision applied pre- and post- the amendment to the statute. RCW 9.94A.350(4) (2009), (2010). The legislature intended to allow for aggregation for purposes of determining value both before and after the effective date of the amendment.

Even if the court believes that Veliz's conviction for organized retail theft in the second degree should be reversed, dismissal with prejudice would not be the appropriate remedy. Veliz could have been charged with at least one count of second degree organized retail theft based on the first four incidents, as there was evidence in at least one of the prior incidents that someone was waiting in a car for him, Veliz said he was essentially filling orders for other persons and the State would have only had to prove a value of \$250. Veliz also could have been charged with theft in the second degree based on the incidents that occurred before Sept. 1, 2009. In fact, that is the offense to which he originally pleaded guilty. As there was not insufficient evidence to convict Veliz as charged and instructed, dismissal with prejudice would not be the appropriate remedy.

E. CONCLUSION

For the foregoing reasons, the State requests that Veliz's appeal be denied and his convictions affirmed.

Respectfully submitted this 28th day of April, 2011.

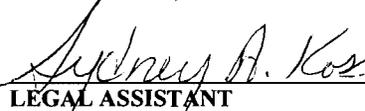


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, CHRISTOPHER GIBSON, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122

 04/28/2011
LEGAL ASSISTANT DATE