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DEC 27 2012

King County Prosecutor
Appellate Unit

NO. 68443-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH HALL,

Appellant.

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DIVISION ONE
1000 4TH AVENUE
SEATTLE WA 98101

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mariane C. Spearman, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE STATE FAILED TO PROVE THE PREDICATE OFFENSE OF ATTEMPTED ROBBERY BEYOND A REASONABLE DOUBT.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Handburgh

119 Wn.2d 284, 830 P.2d 641 (1992)..... 1, 2, 3

State v. Moultrie

143 Wn. App. 387, 177 P.3d 776,
review denied, 164 Wn.2d 1035 (2008) 3

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.56.190 2, 3

WPIC 37.50 3

A. ARGUMENT IN REPLY

THE STATE FAILED TO PROVE THE PREDICATE OFFENSE OF ATTEMPTED ROBBERY BEYOND A REASONABLE DOUBT.

Hall challenges his felony murder conviction, contending the State failed to prove the predicate offense of attempted first degree robbery because his attempt to take money from the convenience store was not "from the person or in the presence of another against that person's will by the use or threatened use of immediate force" Brief of Appellant (BOA) at 8-14. In response, the State argues the plain language of the robbery statute, and cases interpreting the statute, make clear that force need not necessarily occur at the time of the taking, but may also occur at the time of property retention. Brief of Respondent (BOR) at 9-13.

The State relies primarily on State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). BOR at 10-12. In Handburgh, the Court considered a hypothetical situation in which a person takes money from an unattended cash register but then points a gun at the store owner who emerges from another room and confronts him. 119 Wn.2d at 290-91. Rejecting the position that the thief committed theft and assault, the Court held "[t]he robbery statute was intended to punish this very combination of crimes." 119 Wn.2d at 291.

Handburgh is readily distinguishable from Hall's case. There the Court considered only the language of RCW 9A.56.190, which defines robbery as follows:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her 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; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The Court reasoned the third sentence of the provision, beginning with "[s]uch taking", modifies the second, which discussed retention by force or fear. 119 Wn.2d at 291. "A reasonable construction," according to the Court, indicates "the Legislature intended to include 'retentions' in 'takings'". Id.

In Hall's case, the jury instruction defining robbery omits the third sentence. Rather, instruction nine provided:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial. The taking constitutes robbery, even

if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

CP 56.¹

The third, or "modifying" sentence, upon which the Handburgh Court relied for its holding, was therefore not available for Hall's jurors. Handburgh's emphasis on the plain language of RCW 9A.56.190 fails to address the differences in the instruction given in Hall's case.

Furthermore, regardless of what else instruction nine says, it still requires the alleged robber to take "personal property from the person or in the presence of another against that person's will." This Court must view this phrase as would an ordinary juror. See, State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (an ordinary juror gives a jury instruction an ordinary, rather than strained, reading), review denied, 164 Wn.2d 1035 (2008). And as jurors were also instructed, all the instructions were important. CP 45-48 (instruction one).

Plainly, Hall did not attempt to take anything from or in the presence of the store clerk. The clerk was in a back room when Hall tried to open the cash register and fumbled through items underneath the

¹ This instruction follows WPIC 37.50, which makes use of the third sentence optional by placing it in brackets: [The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.]

counter. Given this fact and the plain language of instruction nine, the State failed to prove the predicate attempted robbery offense beyond a reasonable doubt.

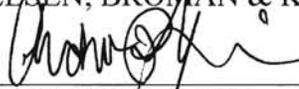
B. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, Hall requests this Court to reverse his conviction and remand for dismissal with prejudice.

DATED this 27 day of December, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

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COA NO. 68443-4-1

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 27TH DAY OF DECEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLYBRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ELIJAH HALL
DOC NO. 356353
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF DECEMBER, 2012.

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