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NO. 63344-9-I

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

STATE OF WASHINGTON,
Respondent,
v.
JOSEPH WIEGERT,
Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to prove beyond a reasonable doubt Mr. Wiegert committed organized retail theft.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In order for a person to be found guilty of the crime of organized retail theft as charged in this case, the State must prove beyond a reasonable doubt that the defendant or an accomplice wrongfully obtained property from a mercantile establishment, that the defendant intended to deprive the mercantile establishment of the property, and that the crime was committed by the defendant acting together with an accomplice. Here, the State presented evidence that Joseph Wiegert went into Home Depot, selected a tile saw and rolled it on a cart to the checkout area, communicated with the cashier, left the merchandise inside, and went to get his car. Then, another person retrieved the cart and rolled it to Mr. Wiegert's car, which was in the parking lot of the loading area. Mr. Wiegert argued that he thought the other person paid for the saw. Did the State fail to prove Mr. Wiegert intended to deprive Home Depot of property?

C. STATEMENT OF THE CASE

On the evening of October 29, 2007, Joseph Wiegert went to the Bitter Lake Home Depot to shop for a saw. RP 25-28. He chose a tile saw that was on a flat cart, and rolled the cart through other departments as he browsed. RP 28-29. He then went to the checkout area, communicated something to the clerk, and left the cart by the register. RP 29, 56.

Mr. Wiegert then retrieved his car and parked it in the parking lot of the loading area. RP 38-39. A young woman retrieved the cart with the saw, and rolled it out to Mr. Wiegert's car. RP 37-39. Home Depot loss prevention officer Bryan Perkins then contacted the two, and they were later arrested. RP 40, 84.

Mr. Wiegert was charged by amended information with organized retail theft in the second degree, with second-degree theft as an alternative charge. CP 4-5. At trial, Mr. Perkins testified to the events described above. Mr. Wiegert argued that the State failed to prove intent, because he thought his companion paid for the saw. RP 107.

The jury found Mr. Wiegert guilty of organized retail theft in the second degree. CP 59. Mr. Wiegert was sentenced to 43 months of confinement. CP 63. He appeals. CP 68-76.

D. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. WIEGERT COMMITTED ORGANIZED RETAIL THEFT.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Wiegert was charged with second-degree organized retail theft, in violation of RCW 9A.56.350(1)(a) and (3) (2006). CP

4. The statute provides, in relevant part:

(1) A person is guilty of organized retail theft if he or she:

(a) Commits theft of property with a value of at least two hundred fifty dollars from a mercantile establishment with an accomplice; ...

(3) A person is guilty of organized retail theft in the second degree if the property stolen or possessed has a value of at least two hundred fifty dollars, but less than one thousand five hundred dollars. Organized retail theft in the second degree is a class C felony.

RCW 9A.56.350 (2006). To convict Mr. Wiegert of this crime, the State was required to prove the following elements:

(1) That on or about October 29, 2007, the defendant or an accomplice wrongfully obtained property from a mercantile establishment;

(2) That the defendant intended to deprive the mercantile establishment of the property;

(3) That the crime was committed by the defendant acting together with an accomplice;

(4) That the property had a value of at least \$250; and

(5) That any of these acts occurred in the State of Washington.

CP 10 (emphasis added). “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); CP 15.

b. The State produced insufficient evidence to prove intent.

In this case, the State failed to prove intent beyond a reasonable doubt. The State presented evidence that Mr. Wiegert chose a saw, rolled it around the store while he browsed in other departments, then left it in the checkout area after communicating something to the cashier. The State also presented evidence that Mr. Wiegert was waiting by his car in the parking lot of the loading area when his companion arrived with the saw.

But the State presented no evidence that Mr. Wiegert knew that his companion had failed to pay for the saw before taking it to the car. Although a jury may infer the existence or nonexistence of facts based on circumstantial evidence, “an inference should not arise where there are other reasonable conclusions that would follow from the circumstances.” State v. Bencivenga, 137 Wn.2d 703, 708, 974 P.2d 832 (1999). Plenty of other reasonable conclusions follow from the State’s evidence here – primarily the conclusion that, as Mr. Wiegert argued, he thought his companion

had paid for the saw. Under these circumstances, the State failed to prove Mr. Wiegert committed organized retail theft.

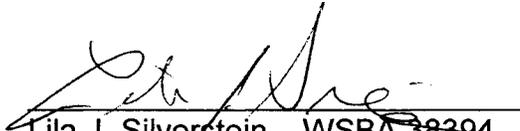
c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Wiegert committed organized retail theft, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is reversal and dismissal of the charge with prejudice.

E. CONCLUSION

For the reasons set forth above, Mr. Wiegert respectfully requests that this Court reverse his conviction and dismiss with prejudice.

DATED this 21ST day of September, 2009.

Respectfully submitted,



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