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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.

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Appellant's Brief

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A. 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.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this case be dismissed because the State failed to prove the crime as charged in the information?

2. Was Mr. Hoguin denied his constitutional right to a unanimous jury verdict where the State relied on numerous criminal acts as a basis for conviction and a Petrich instruction on jury unanimity was not given?

C. STATEMENT OF THE CASE

The information, filed 8/3/12, charged Mr. Hoguin with second degree robbery. Specifically, “That the defendant. . . with the intent to commit theft, did unlawfully take and retain personal property that the defendant did not own, from the person and in the presence of Martin H. Lennartz, against such person’s will, by use or threatened use of immediate force, violence and fear of injury to Martin H. Lennartz.” CP 1.

Lennartz, a loss prevention officer, observed Mr. Hoguin shoplift some items from the shelves of a Safeway Store and walk out the door.

RP 67-68. Lennartz followed Mr. Hoguin outside and confronted him about the stolen items. A scuffle ensued and Mr. Hoguin was eventually subdued and arrested with the help of a second loss prevention officer, Bickley. RP 68-77.

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. RP 72-76. In closing argument the State argued in pertinent part:

Mr. Lennartz put his hand, held Mr. Hoguin by the shirt, and at this point the testimony was that Mr. Hoguin spun and hit Mr. Lennartz in the chest. Ladies and gentlemen, that there was all the force that the State needs to prove that there has been a robbery . . . But th[at] wasn't the only force. There was more used, according to the testimony of Mr. Lennartz. At this point, after being elbowed in the chest, Mr. Lennartz testified Mr. Hoguin had pushed him after that in the chest, and subsequently after he continued to follow Mr. Hoguin, Mr. Hoguin turned at one point and he swung at him with his fist. And later he took out that bottle of Vodka in his hand and he swung it at Mr. Lennartz. Either [sic] one of those supports the force that's required to convict Mr. Hoguin of robbery.

In total, ladies and gentlemen, we have being hit with the elbow when Mr. Hoguin hit Mr. Lennartz with his elbow, when he pushed Mr. Lennartz. We have the swinging of the fist, number three. We have the swinging of the bottle, number four. Even at this point in the picture you see him holding up the bottle, and the testimony of Ms. Oquendo when he was holding that bottle with such force. We have what Mr. Bickley saw at the end when he saw Mr. Hoguin swing the bottle. And if you remember, Mr. Lennartz said he didn't remember a swing, but what did Mr. Lennartz testify when they approached Mr. Hoguin by Ash? He said Mr. Hoguin grabbed the bottle and reared back. That's a threatened use of force. That's

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five, ladies and gentlemen, in addition to the fist after he put the shopping cart down. 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 196, 198-99.

The jury was not given a Petrich instruction on jury unanimity. CP 16-31. The jury convicted Mr. Hoguin of second degree robbery. CP 32. This appeal followed. CP 55-56.

D. ARGUMENT

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

The State must prove the essential elements of a crime. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). If the State elects, even through inadvertence, to charge a defendant with different alternative of the crime than it intends to prove, that is what it has to prove. State v. Goldsmith, 147 Wn. App. 317, 324-25, 195 P.3d 98, (2008) (citing State v. Bryant, 73 Wn.2d 168, 171, 437 P.2d 398 (1968) ("It is axiomatic that the state has the burden of proving every element of the crime charged.")).

In Goldsmith, the State charged Mr. Goldsmith with child molestation in the first degree by the second of two alternative means. Goldsmith, 147 Wn. App. at 322, 195 P.3d 98. The State charged the second alternative means of committing first degree child molestation

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only. But it offered only evidence to show the first alternative means. Id. This Court held the State was required to prove the essential elements of the crime it charged. Goldsmith, 147 Wn. App. at 325, 195 P.3d 98.

The Court did not buy the argument that the problem was "merely a problem of notice." Id. It held that the information adequately notified Mr. Goldsmith of the necessary elements of the crimes the State says he committed. The State simply failed to prove those crimes. Id., citing State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (finding that one cannot be tried for an uncharged offense). The Court went on to hold that the information adequately charged and notified the defendant of the essential elements of the crime the State charged, just not the elements that the State proved or that the court instructed on. Id. The fact that the court's instructions set out the correct elements of the crime does not resolve the problem. Id., citing State v. Holt, 104 Wn.2d 315, 323, 704 P.2d 1189 (1985) ("an information which is constitutionally defective because it fails to state every statutory element of a crime cannot be cured by a jury instruction which itemizes those elements" (emphasis omitted)).

In Goldsmith, the State also complained that the defendant "sandbagged" the prosecutors, presumably by not complaining about the information when the State could have done something about it.

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Goldsmith, 147 Wn. App. at 326, 195 P.3d 98. But the Court held there is no authority for the proposition that the defendant has an affirmative obligation to notify the State that he did not commit the crime by the means charged, but that he did commit the crime by another means. Id.

Finally, the Court held that when the State charged one crime and proved another, it cannot now amend the information and again prove the same crime it proved during Mr. Goldsmith's first trial, as this violates constitutional prohibitions against double jeopardy. Id. The proper remedy is dismissal. Id.

Turning then to the facts of the present case, RCW 9A.56.190 provides:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his 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. (emphasis added)

RCW 9A.56.210 provides in pertinent part: “A person is guilty of robbery in the second degree if he or she commits robbery.”

The jury was instructed consistent with the definition for robbery and elements of second degree robbery. See CP 25-26. But the information charged “That the defendant. . . with the intent to commit theft, did unlawfully take and retain personal property that the defendant did not own, from the person and in the presence of Martin H. Lennartz, against such person’s will, by use or threatened use of immediate force, violence and fear of injury to Martin H. Lennartz.” CP 1. (emphasis added).

By the use of the word “*and*” before “in the presence of” in the amended 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 presence of Lennartz, it did not prove that he took the shoplifted items from Lennartz’ person, as charged in the information.

As in Goldsmith, the State charged one crime and proved another. The problem is not a defective information or lack of notice. The

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information adequately notified Mr. Hoguin of the necessary elements of the crime the State says he committed. The State simply failed to prove that crime. As in Goldsmith, the State cannot now amend the information and again prove the same crime it proved during Mr. Hoguin 's trial without violating double jeopardy. Therefore, the proper remedy is dismissal. Goldsmith, 147 Wn. App. at 326, 195 P.3d 98.

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.

"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). The State may, in its discretion, elect the act upon which it will rely for conviction. Id. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. Id. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. Id. The failure to follow one

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of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. State v. Beasley, 126 Wn.App. 670, 682, 109 P.3d 849 (2005), *citing* State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged Petrich error may be raised for the first time on appeal. State v. Holland, 77 Wn.App. 420, 424, 891 P.2d 49, *rev. denied*, 127 Wn.2d 1008, 898 P.2d 308 (1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? State v. Russell, 69 Wn.App. 237, 249, 848 P.2d 743 (1993).

In Holland, the defendant was charged with three separate counts of first degree child molestation, but convicted of only two. No unanimity instruction was given. State v. Holland, 77 Wn.App. at 422, 424, 891 P.2d 49. The “to convict” instruction on each count was identical, i.e., same time period, same victim, and same general statutory description of the offense without any specific details. Id. at 423 (footnote 2). In reversing and remanding the case, the Court of Appeals held: “It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support

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convictions on each count....There is no way given this verdict to assure that all the members of the jury were relying on the same incident when considering each count.” Id. at 425.

The circumstances in the present case are indistinguishable from Holland. One “to convict” instruction was given for the one charged count of second degree robbery that did not describe specific conduct other than the general statutory language. (CP 26) The jury was not given a Petrich instruction on jury unanimity. CP 16-31. Yet 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. 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. As in Holland, there is no way to assure that all the members of the jury were relying on the same act when voting to convict Mr. Hoguin. Therefore, since there was no assurance that the jury verdict was unanimous, the verdict must be reversed.

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E. CONCLUSION

For the reasons stated, the conviction should be reversed and the case dismissed.

Respectfully submitted April 25, 2013,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on April 25, 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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