

No. 94712-1

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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34032-5-III

STATE OF WASHINGTON, Respondent,

v.

EDWARD LEON NELSON, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The State's argument that Meinhold had the ability to possess the controlled substances is completely unfounded in the record.

The State cites to provisions of the Washington Administrative Code that permit pharmacy technicians who meet “established criteria . . . specified in the utilization plan of the pharmacy” to perform certain specialized functions including unit-dose medication checking and intravenous admixture preparations. *Respondent's Brief* at 3. At no point did the trial testimony establish that Meinhold met established criteria, that Rite Aid had the required utilization plan in place, or that Meinhold performed any of the specialized functions identified in the State's citation. Without such a foundation, the State's citation is a *non sequitur* that completely fails to overcome the trial testimony that *only* the licensed pharmacist had access to the Oxy 30 medication. V RP 335.

The State also argues, without any evidentiary support in the record, that Meinhold had the legal authority to handle the controlled substances required by law and by Rite Aid's policies to be dispensed by a license pharmacist. *Respondent's Brief* at 15. Because the State's argument does not cite to any factual support, it is inadequately briefed and should not be considered on appeal. *See Norcon Builders, LLC v.*

GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011)
(allegations lacking citation to the record or legal authority will not be considered by reviewing court).

B. The State's argument that the instructions were adequate notwithstanding the omission of an essential element under *Richie* is incomprehensible.

The State appears to contend that the omission of an essential element of robbery from the to convict instructions is unproblematic because in charging the robbery as an attempt, the State would not have to prove Meinhold had the requisite relationship with the property and therefore, that element can be omitted from the instructions. *Respondent's Brief* at 8-9. Even if the State is correct that it need prove only a substantial step toward a completed robbery, this does not mean that it need not properly instruct the jury on what a robbery is. Indeed, evaluating whether a substantial step has been taken requires the jury to understand the elements of the completed crime.

The State further suggests that the court's instruction satisfied the requirements of *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015) because it required the jury to find that Meinhold was an employee of the owner of the property. *Respondent's Brief* at 6. But the State overlooks

how the court's instruction reduces the State's evidentiary burden by creating a mandatory presumption that any employee will thereby have a representative interest in the employer's property, even if the employee has no access to it or authority to deal with it. And the instruction, together with the court's express limitations on defense counsel's argument, prevented Nelson from arguing in his defense that the State failed to prove the charge because Meinhold lacked the necessary access and authority over the controlled substances.

The State's refusal to acknowledge the instructional deficiency and respond directly to well-established due process principles requiring a properly advised jury likely stems from the State's fear that any concession of error will result in a violent offender going free. But this difficulty is the State's own making. Knowing the *Richie* requirements, nothing prevented the State from exercising its discretion to charge Nelson with assault and theft crimes, neither of which requires proof of the *Richie* property nexus. But the State elected to charge Nelson with attempting to take property by force from an individual with an appropriate relationship to the property, and now urges this court to make bad law to protect its conviction by reducing its burden under *Richie*. *Richie* itself acknowledges that an employee has a sufficient representative interest in the employer's property "if he or she has care, custody, control, or

management of the property.” 191 Wn. App. at 925 (*citing State v. Latham*, 35 Wn. App. 862, 865, 670 P.2d 689 (1983)). This court should not disregard the requirement of “care, custody, control, or management” of the property simply because it works to the State’s advantage to do so.

C. Nelson withdraws Assignment of Error 4 and the argument pertaining thereto as the State correctly notes that the jury was properly, if confusingly, instructed.

Before filing its brief, the State contacted defense counsel to point out that the definitional instruction for a “firearm” was included, unusually, in a longer concluding instruction. CP 83. Upon review, the State is correct that “firearm” was properly defined for the jury. Accordingly, Nelson withdraws the fourth assignment of error and the argument in the Appellant’s Brief pertaining thereto.

II. CONCLUSION

Nelson respectfully requests that the court REVERSE his conviction for attempted robbery in the first degree with a firearm enhancement.

RESPECTFULLY SUBMITTED this 6th day of December,
2016.



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DECLARATION OF SERVICE

340325

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mailing a copy to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6th day of December, 2016 in Walla Walla,
Washington.


Breanna Eng