

NO. 65819-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAM VELIZ,

Appellant.

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

The Honorable Ira Uhrig, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of second degree organized retail theft as charged and tried.

Issue Pertaining to Supplemental Assignment of Error

Prior to September 1, 2009, to convict a person of second degree organized retail theft the State had to prove the accused and an accomplice: (1) stole at least \$250 worth of merchandise from a mercantile establishment; or (2) possessed at least \$250 worth merchandise stolen from a mercantile establishment. RCW 9A.56.350(1)(a), (b). From September 1, 2009 forward, however, legislative amendments increased the value of the merchandise the State had to prove to \$750, and added a third way to commit the offense that, unlike the other two alternatives, did not require proof of an accomplice, i.e., "theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days." RCW 9A.56.350(1)(c). Here, the State charged and tried appellant only under the third alternative.

Where the evidence showed appellant stole less than \$250 worth of merchandise after September 1, 2009, was the evidence insufficient to convict appellant of second degree organized retail theft as charged and tried?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The Whatcom County Prosecutor charged appellant Abram Veliz with second degree organized retail theft as follows:

That on or about [sic] June 1st, 2009 through September 18th, 2009, the said defendant, ABRAM MICHAEL VELIZ, then and there being in said county and state, did wrongfully obtain or exert unauthorized control over property with a cumulative value of at least seven hundred and fifty dollars (\$750) from one or more mercantile establishments within a period of up to one hundred and eighty (180) days, with intent to deprive said mercantile establishment of the property; in violation of RCW 9A.56.350, which violation is a Class B [sic] Felony;

CP 63.

The instruction defining the charge for the jury provides:

A person commits the crime of organized retail theft in the second degree when he or she wrongfully obtains or exerts unauthorized control over property from one or more mercantile establishments; within a period of 180 days, with intent to deprive the mercantile establishment[s] of the property, such property having a total cumulative value of at least \$750.

CP 48 (Instruction 10).

The associated 'to-convict' instruction provides:

To convict the defendant of the crime of organized retail theft in the second degree, Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 21, 2009, through September 18, 2009 the defendant wrongfully obtained or exerted unauthorized control over

property from one or more mercantile establishments;

(2) That these acts occurred over a period of 180 days;

(3) That the defendant intended to deprive the mercantile establishment[s] of the property;

(4) That the property had a cumulative value of at least \$750; and

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

...

CP 49 (Instruction 11).

As noted in the previously filed Brief of Appellant at pages 4-5, the date of the alleged thefts and value of the of the property taken were as follows:

<u>Date of Theft</u>	<u>Value</u>
June 21, 2009	\$479.52
July 7, 2009	\$129.84
July 15, 2009	\$263.70
August 30, 2009	\$299.00
September 18, 2009	\$235.50

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT VELIZ
OF ORGANIZED RETAIL THEFT AS CHARGED AND TRIED

The effective date of the crime the State charged Veliz with committing was September 1, 2009. Because the State failed to prove Veliz committed acts on or after that date sufficient to constitute the crime, the evidence is insufficient and his conviction must be reversed and the charge dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A defendant may challenge the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

Here, the State charged Veliz with second degree organized retail theft. CP 63. Prior to the 2009 amendments, the relevant statute provided:

(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; or

(b) Possesses stolen property, as defined in RCW 9A.56.140, 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.

...

Former RCW 9A.56.350 (emphasis added).

After the 2009 amendments, however, the statute provides:

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

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

(b) Possesses stolen property, as defined in RCW 9A.56.140, with a value of at least seven hundred fifty dollars from a mercantile establishment with an accomplice; or

(c) Commits theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days.

...

(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 seven hundred fifty dollars, but less than

five thousand dollars. Organized retail theft in the second degree is a class C felony.

...

Current RCW 9A.56.350(emphasis added); Laws of 2009, Chapter 431, §15. This version of the statute only "applies to crimes committed on or after September 1, 2009." Laws of 2009 Chapter 431, §20.

The State charged Veliz under that part of the current version of the statute that criminalizes committing "theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days." RCW 9A.56.350(1)(c); CP 63. Consistent with this charge, the jury was not instructed on the other two alternative ways of committing the crime, both of which require proof the accused had an accomplice. CP 48-49 (Instructions 10-11); RCW 9A.56.350(1)(a), (b). Because the State charged Veliz under the *current* version of the statute, to convict it had to prove he committed "theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days" ***beginning on or after September 1, 2009***. It failed to do so.

The only evidence of Veliz committing any crime *on or after* September 1, 2009, was that he stole \$235.50 worth of clothing from a Walmart on September 18, 2009, and that he possessed heroin at the same

time. RP 285-91, 309, 345-53. 383. This is insufficient to convict Veliz of second degree organized retail theft because it fails to prove the value of items stolen was at least \$750, which is a required element. Although the State may have proved Veliz committed a third degree theft (see Brief of Appellant at 6-11), it failed to prove all the elements necessary to convict him of the charged crime. Therefore reversal and dismissal with prejudice is required. *Hickman*, 135 Wn.2d at 103.

D. CONCLUSION

For the reasons stated herein, this Court should reverse Veliz's conviction for second degree organized retail theft and dismiss the charge with prejudice.

DATED this 8th day of February, 2010.

Respectfully submitted,

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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 8TH DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*