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Court of Appeals No. 325105-III

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IN THE SUPREME COURT, STATE OF WASHINGTON

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BEYONCE NIEVES,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

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RESPONSE TO PETITION FOR REVIEW

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Troy Y. Nelson, WSBA #27274  
RANDALL | DANSKIN, P.S.  
Attorneys for Respondent

601 West Riverside Avenue  
Suite 1500  
Spokane, WA 99201  
(509) 747-2052

 ORIGINAL

**TABLE OF CONTENTS**

I. IDENTITY OF RESPONDENT.....1

II. ANSWER TO THE ISSUES PRESENTED FOR REVIEW .....1

III. COUNTER STATEMENT OF THE CASE.....1

    A. The Event .....1

    B. The Investigation .....4

    C. Shoplifter Apprehension And Detention Policy .....6

    D. Litigation History .....7

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED.....9

    A. Ms. Nieves’ Petition For Review Does Not Satisfy The  
        Requirements of RAP 13.4(b).....9

    B. The Court Of Appeals Properly Held That The Trial  
        Court Did Not Abuse Its Discretion By Giving The  
        Shopkeeper's Privilege Instruction In This Case .....10

V. CONCLUSION.....14

**TABLE OF AUTHORITIES**

**Cases**

*Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 788, 6 P.3d 583  
(Division II, 2000), *review granted* 142 Wn.2d 1016, 16 P.3d 1263,  
*affirmed* 144 Wn.2d 907, 32 P.3d 250 (citing RCW 4.24.220).....10

*State v. Johnson*, 85 Wn.App. 549, 933 P.2d 159 (1978).....10

*State v. Tyler*, 138 Wn.App. 120, 155P.3d 1002 (2007).....13

**Statutes**

RCW 4.24.220 .....1, 9, 11, 13

**Rules**

RAP 13.4(b).....9

**I. IDENTITY OF RESPONDENT**

Wal-Mart Stores Inc., by and through its attorneys, Randall | Danskin, respectfully requests this court deny review of the September 1, 2015 Unpublished Opinion of the Court of Appeals. The Court of Appeals decision upheld the jury verdict in this case.

**II. ANSWER TO THE ISSUES PRESENTED FOR REVIEW**

1. The jury was properly instructed on RCW 4.24.220, the shopkeeper privilege statute, and the jury properly found that no assault had been committed.

2. The decision of the Court of Appeals in this case is not in conflict with a decision of any other Court of Appeals decision.

**III. COUNTER STATEMENT OF THE CASE**

**A. The Event**

On December 9, 2011, Jeremiah Blackwell was working at his job as an Asset Protection Associate at the Shadle Wal-Mart store. The apprehension and detention of suspected shoplifters is part of his job. RP 124-125. He is trained to lawfully execute shoplifting investigations and detentions. RP 162. Detaining shoplifting suspects is a daily occurrence for Mr. Blackwell and he has detained over 2000 suspects as an Asset Protection Associate. RP 126.

Mr. Blackwell observed Ms. Nieves shortly after she entered the store. RP131. He noticed she was wearing a hoodie jacket with the hood up. RP 131. Her head was down. RP 131. As she walked underneath the security camera, he thought she was attempting to conceal her face. RP 131. He thought that was suspicious behavior so he decided to initiate an investigation by following her and observing her activities. RP 131.

Ms. Nieves immediately proceeded to an aisle displaying women's stockings for sale. RP 132. Mr. Blackwell observed Ms. Nieves select three boxes of stockings, size 4X. RP 225. She proceeded to open the boxes, remove the stockings, and conceal the stockings inside her clothing near her shoulder. RP 174. He believed she concealed the stockings inside her bra or undergarment. RP 205. After concealing the stockings inside her clothing, Mr. Blackwell observed her discard the empty boxes into a shopping cart and leave the area. RP 174.

Mr. Blackwell continuously observed Ms. Nieves from the moment of concealment until she passed the last point of sale. RP 137. During his time of observation, she did not discard the stockings. RP 142. As Ms. Nieves walked past the last point of sale, she was texting on her phone. RP137. She was distracted by her phone. RP 229. As she exited the store, she was still texting on her phone. RP 34, RP 138.

Mr. Blackwell caught up with her outside the store and approached her from behind. RP 138, RP 37. As he approached her, he stated, "excuse me ma'am." RP 157. Ms. Nieves either did not hear him or ignored him, because she did not respond and kept walking. RP 138. As she walked away, Mr. Blackwell reached out and put a single finger through the top loop of her backpack and identified himself as being "with security." RP 138. At that point, she stopped and turned around to face Mr. Blackwell. RP 138.

With his finger still in the top loop of her backpack, and Ms. Nieves facing him, Mr. Blackwell commanded that she returned to the store so he could recover the unpurchased merchandise. RP 140. She refused, resisted and pulled away. RP 140. Mr. Blackwell continued to hold onto the backpack until she pulled free of the bag. RP 144. Still holding the backpack, Mr. Blackwell offered it back, but Ms. Nieves refused, stating as she was leaving that she was going to call her lawyer and the police. RP 148.

Mr. Blackwell returned to the store and collected the empty stocking boxes from the shopping cart. RP 151. He placed her backpack behind the courtesy desk at the front of the store. RP 186 -187. He also collected and preserved surveillance video footage of the subject incident. RP 151. He took that evidence to his office and began preparing his report

relating to the subject incident. RP 151. His report was admitted into evidence at trial. RP 150-151.

**B. The Investigation**

Ms. Nieves returned to the store and lodged a complaint against Mr. Blackwell. RP 151. She called the police and reported an assault. RP 47. A member of management assisted Ms. Nieves in completing a store incident report. RP 92. She complained of “slight scratches” to her neck from the backpack straps. RP 92. Officer Nathan Donaldson of the Spokane Police Department arrived on the scene and contacted Ms. Nieves. RP 241. She told Officer Donaldson that as she was leaving the store, she was attacked and assaulted by an employee of Wal-Mart, who accused her of shoplifting. RP 241-242. She stated she was grabbed by the neck and dragged backwards by Mr. Blackwell. RP 243.

In addition to interviewing Ms. Nieves, Officer Donaldson interviewed Mr. Blackwell, who denied grabbing her by the neck or dragging her backwards. RP 141, RP 245. Officer Donaldson also observed the empty stocking boxes collected after the incident and he watched the store’s surveillance camera footage of the incident. RP 245, RP 243. The surveillance camera footage was admitted into evidence at the trial. RP 264. Officer Donaldson determined, after his investigation, that probable cause did not exist to arrest Mr. Blackwell for assault. RP

244. His basis for that determination was that the video surveillance footage did not corroborate Ms. Nieves' story. RP 244. Officer Donaldson determined that probable cause did exist to cite Ms. Nieves for city theft. RP 245. Accordingly, he cited Ms. Nieves for city theft and released her. RP 245.

Over a month later, Ms. Nieves tried again to have Mr. Blackwell charged with assault. On January 27, 2012, she called the Spokane Police Department wishing to report an assault that occurred back in December at the Shadle Wal-Mart. RP 246. Recognizing Ms. Nieves' name and the incident, Officer Donaldson decided to respond to the call. RP 246. This time, Ms. Nieves claimed that Mr. Blackwell choked her for ten minutes and dragged her backwards four feet. RP 247-249.

Officer Donaldson investigated her claim that she had been choked for ten minutes and dragged backwards four feet. RP 248. He went back to the Shadle Wal-Mart store and took another statement from Mr. Blackwell. RP 248-249. Mr. Blackwell denied assaulting Ms. Nieves. RP 141. Officer Donaldson again attempted to corroborate Ms. Nieves' claims with the surveillance video footage, but he could not. RP 249. Instead, it appeared to him that Ms. Nieves was pulling against her own backpack, which in turn may have accounted for the slight scratches to her neck, which by this point had resolved. RP 250. For a second time,



Officer Donaldson determined there was no probable cause to charge Mr. Blackwell with assault. RP 251.

**C. Shoplifter Apprehension and Detention Policy**

Wal-Mart had in place at the time of the subject incident a written policy regarding the investigation and detention of suspected shoplifters. RP 162. This policy, AP-09, sets forth acceptable methods of investigating and detaining a suspected shoplifter. RP 162, RP 196-197.

Mr. Blackwell was trained to lawfully execute shoplifting suspect apprehensions and detentions, within AP-09. RP 162. Mr. Blackwell has AP-09 memorized. RP 162.

Any type of suspicious behavior creates reasonable cause for initiating a shoplifting investigation. RD 127. Reasonable cause to apprehend and detain exists when a suspect is observed selecting and concealing unpurchased merchandise continuously until passing the last point of sale. RD 127. Authorized detention methods include verbal requests to stop, physical redirection and physical restraint. RP 127-128. An example of physical redirection is putting an arm on the suspect and redirecting him/her back into the store. RP 128.

Physical restraint is also an authorized detention method. RP 128. It is lawful and within AP-09 to grab any portion of a suspected shoplifter who is attempting to flee or attempting to resist. RP 128. An example of

authorized methods of physical restraint would be to grab the suspect's arm, or something closely associated with their person, such as a bag or jacket. RP 128. An example of an unauthorized method of detention would be to pin a suspect against a wall or throw a suspect to the ground. RP 128.

Policy AP-09 requires the Asset Protection Associates to use the least amount of force necessary to detain a suspected shoplifter, and that amount of force can include physically limiting or physically controlling the movement of a suspected shoplifter. RP 196-197.

#### **D. Litigation History**

Ms. Nieves filed this lawsuit on November 16, 2012. CP 1-6. Wal-Mart answered, denying liability. CP 7-10. On March 21, 2014, the trial court granted Wal-Mart's motion for leave to file an amended answer, and an amended answer was filed that day, which added as an affirmative defense the shopkeeper's privilege defense found in RCW 4.24.220. CP 80-83.

This case was tried to a jury of 12 persons from April 14, 2014 to April 16, 2014, with Hon. Harold D. Clarke III, presiding. CP 62-63. At the jury instruction conference, which occurred on April 15, 2014, argument was heard relating to Wal-Mart's proposed instruction relating to the shopkeeper's privilege statute. CP 210. Ultimately, Judge Clarke

decided to instruct the jury on the shopkeeper's privilege defense because "it is clearly an applicable statute designed for precisely these types of cases..." CP 215.

The jury returned a defense verdict on April 16, 2014. CP 45-46. Through the special verdict form, the jury found the defendant did not commit (1) assault; (2) outrage; or (3) false imprisonment. CP 45-46.

After the trial court accepted the jury verdict and the jury was dismissed, Ms. Nieves moved the court for a "judgment notwithstanding the verdict." RP 234. The record on appeal reveals that at no time prior to the case being submitted to the jury did Ms. Nieves bring a motion for judgment as a matter of law. The court did not rule on the oral motion, but instead suggested that Ms. Nieves file a written motion. RP 234. On April 24, 2014, Ms. Nieves filed a written motion "for an order granting judgment in favor of plaintiff as a matter of law pursuant to CR 50(b)." CP 47.

On May 2, 2014, the trial court denied Ms. Nieves' motion for judgment as a matter of law and entered judgment in favor of the defendant, dismissing her claims with prejudice and awarding \$495.55 in costs and statutory attorneys' fees against her. CP 60-63. Ms. Nieves appealed on May 29, 2014 and the Court of Appeals affirmed the judgment in an unpublished opinion.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

##### **A. Ms. Nieves' Petition For Review Does Not Satisfy The Requirements of RAP 13.4(b).**

Ms. Nieves assigns error to the trial court's decision that the Washington's "shopkeeper's privilege" statute, RCW 4.24.220, applied to this case, and to the trial court's subsequent jury instruction explaining the shopkeeper's privilege defense.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions outlined by RAP 13.4(b). The Division III Court of Appeals holding in this case is not in conflict with any decisions of either the Washington Supreme Court or another division of the Court of Appeals.

**B. The Court Of Appeals Properly Held That The Trial Court Did Not Abuse Its Discretion By Giving The Shopkeeper's Privilege Instruction In This Case.**

The shopkeeper's privilege statute creates a "reasonable grounds" defense for retailers in civil actions arising from a shoplifting investigation taking place at their retail establishment. *See e.g. State v. Johnson*, 85 Wn.App. 549, 933 P.2d 159 (1978).

In any civil action arising from a shoplifting investigation or detention, the shopkeeper's privilege statute creates a defense that the "person was detained in a reasonable manner and for not more than a reasonable time..." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 788, 6 P.3d 583 (Division II, 2000), *review granted* 142 Wn.2d 1016, 16 P.3d 1263, *affirmed* 144 Wn.2d 907, 32 P.3d 250 (citing RCW 4.24.220).

The civil shopkeeper's privilege statute permits store personnel to detain a suspected shoplifter (1) in a reasonable manner (2) for a reasonable time (3) if they have reasonable grounds to believe the person is committing or attempting to commit larceny or shoplifting. *State v. Johnson*, 85 Wn.App. at 554. On appeal, Ms. Nieves took issue with only the first prong: arguing that the protection of the statute does not apply here because Wal-Mart's employee committed an assault against her, and an assault is never a "reasonable manner."

Ms. Nieves's argument is based on a conclusion that an assault was committed against her. Conversely, the jury by special verdict found that no assault had occurred. Indeed, it is stated by Ms. Nieves that the sole issue on appeal is the reasonableness of Mr. Blackwell's actions in initially detaining her.<sup>1</sup> Appellant's brief, page 8. At trial, the court gave a jury instruction that recited RCW 4.24.220 in its entirety, and added a further instruction that it was the defendant's burden to prove the defense by a preponderance of the evidence. CP 41.

Here, the evidence allowed the jury to find that an assault did not occur. The evidence at trial demonstrated the following – Ms. Nieves entered the store in a manner that made Mr. Blackwell suspicious, so he initiated a shoplifting investigation. RP 131. Shortly after he started observing her, he saw her select three pair of women's stockings, remove the stockings from their packaging and place the stockings inside her clothing, near her shoulders. RP 174. She then discarded the empty boxes in a shopping cart and left the area.<sup>2</sup> Mr. Blackwell continuously observed Ms. Nieves and until she passed the last point of sale. RP 137.

At no time during his observation did he see her discard the stockings

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<sup>1</sup> Ms. Nieves is not challenging whether Mr. Blackwell had reasonable grounds to initiate the shoplifting investigation, nor is she challenging the wording or content of the instruction.

<sup>2</sup> The discarded stocking boxes collected during the investigation were size 4X, the size recommended by the manufacturer for Ms. Nieves' weight as recorded on the police report. RP 71. Photographs of the actual discarded boxes were admitted at trial (RP 150-151), as well as exemplar boxes. RP 71.

hidden inside her clothing. RP 137. After passing the last point of sale, Mr. Blackwell attempted to get her attention by stating "excuse me ma'am." RP 157. Ms. Nieves was distracted because she was texting on her cell phone. RP 229. She kept walking. RP 138.

Outside the store, Mr. Blackwell placed one finger inside the top loop of Ms. Nieves' backpack, which caused her to stop, turn and face him. RP 138. Ms. Nieves denied shoplifting and pulled away from Mr. Blackwell by wiggling out of the backpack. RP 144. Per AP-09, Mr. Blackwell did not attempt to re-engage Ms. Nieves. RP 144.

The incident was investigated by the Spokane Police Department after Ms. Nieves made an assault complaint against Mr. Blackwell. After conducting a police investigation on two separate occasions, including interviewing witnesses, watching the surveillance video footage and observing the empty stocking boxes, it was determined that no assault charge was warranted against Mr. Blackwell, instead probable cause existed to cite Ms. Nieves with theft. RP 56.

Here, the testimony and evidence admitted led the jury to conclude no assault occurred. CP 45. That evidence included the testimony of Ms. Nieves, Mr. Blackwell and Officer Donaldson, who concluded on two

occasions that no assault occurred.<sup>3</sup> The evidence also included video footage of the subject incident and Mr. Blackwell's report. The jury had multiple opportunities to observe the surveillance footage and weigh the credibility of the witnesses with regard to the incident between Ms. Nieves and Mr. Blackwell.

Based on these facts admitted into evidence at the trial, the trial court properly determined RCW 4.24.220 applied to the facts of this case and properly instructed the jury accordingly. The trial court, in its ruling to instruct the jury on the shopkeeper's privilege statute, acknowledged that the reasonableness of the investigation and detention was a factual question. RP 215. The trial court found "plenty of facts" admitted into evidence relating to the question of whether the subject incident rose to the level of an assault, or whether it was a reasonable investigation and detention of an uncooperative shoplifting suspect. RP 215. The court went further and indicated that RCW 4.24.220 is "clearly an applicable statute designed for precisely these types of cases where somebody is detained..." RP 215.

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<sup>3</sup> As opposed to State v. Tyler, 138 Wn.App. 120, 155P.3d 1002 (2007), the criminal case that Ms. Nieves argues is inconsistent with the court of appeals decision in this case, where the defendant was actually charged with assault and convicted by a jury. In that case, the defendant was convicted of fourth degree assault by a jury after they heard testimony the defendant repeatedly tried to grab the victim from behind and that the victim was resisting and appeared visibly upset. Based on that evidence, the Court of Appeals elected not to disturb the conviction. That case is factually distinguishable.



The Court of Appeals properly determined that the trial court's decision to instruct the jury on the shopkeeper's privilege instructions was not an abuse of its discretion. The Court of Appeals went further and agreed with the trial court that this is precisely the fact pattern that was envisioned by the Legislature when it enacted the statute. The Court of Appeals should be affirmed.

**V. CONCLUSION**

For the above stated reasons and those shown in the record, the Court is asked to deny the appeal of Ms. Nieves on all grounds and affirm the trial court for the reasons supported by the record and this briefing.

RESPECTFULLY SUBMITTED, this 23 day of November, 2015.

RANDALL | DANSKIN, P.S.

By: 

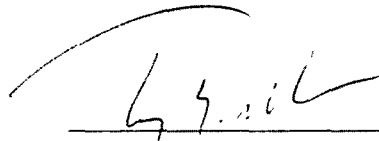
Troy Y. Nelson, WSBA #27274  
Attorneys for Respondent

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I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 23 day of November, 2015, addressed to the following:

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Party filing: Respondent Wal-Mart Stores, Inc.

Party's counsel: Troy Y. Nelson (WSBA 27274)

**Attached is one pleading to be filed:**

1) Response to Petition for Review

Please confirm receipt.



**Kim Tritt**

Legal Assistant to Robert P. Hailey, Troy Y. Nelson and Brook L. Cunningham

Randall | Danskin  
A Professional Service Corporation  
601 W. Riverside Avenue, Suite 1500

Spokane, WA 99201  
Phone: (509) 747-2052  
Fax: (509) 624-2528  
[www.randalldanskin.com](http://www.randalldanskin.com)

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