NO. 74027-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MICHAEL JERUE,

Appellant.

BRIEF OF RESPONDENT

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1. Did the State produce sufficient evidence that the defendant retained possession of a stolen bottle of alcohol by threatened use of force, when the defendant raised the bottle over his head while asking the victim, "Have you ever been hit over the head with a bottle? I'm a convicted felon, and I'm not scared to do it!"?

2. Was the court correct to prohibit defense counsel from cross-examining the loss-prevention officer about the fact that he violated Safeway's corporate policy against engaging in physical contact with shoplifters, when the loss-prevention officer never denied that fact, the defense theory of bias was illogical, and when State law allows citizens to use reasonable force in effecting a lawful arrest?

3. Should the defendant have to pay appellate court costs if this Court determines that the State substantially prevailed on appeal?

II. STATEMENT OF THE CASE

On April 15, 2015, the defendant was arrested by Marysville Police when they located him a few blocks away from a Safeway store in possession of a stolen bottle of whiskey. The police

investigation established that a loss prevention officer had originally prevented the theft, but that the thief escaped after threatening to strike the loss prevention officer in the head with the stolen bottle. CP 74-75.

On May 29, 2015, the State charged the defendant with Third Degree Assault under the theory that the assault was intended to prevent or resist his lawful apprehension or detention. CP 79; RCW 9A.36.031(1)(a). On July 1 the State added a count of Second Degree Robbery. CP 79.

A. PRETRIAL MOTIONS

Prior to trial the State moved in limine to prohibit the defense from cross-examining any witnesses about the fact that Safeway's loss prevention officers are prohibited by company policy from going "hands on" with shoplifting suspects. It was uncontested and fully anticipated that the loss prevention officer, Mitchell Irons, would acknowledge at trial that he initiated physical contact by grabbing the defendant by the jacket as he exited the store. __ CP __ (Sub #27, State's Trial Memorandum at 2). The prosecutor argued that the internal company policy was not only irrelevant to the elements of the charged crimes, it also contradicted Washington State law which specifically allows loss prevention officers to use reasonable force in

apprehending or detaining shoplifters. 8/17/15 RP 9-10; __ CP __ (Sub #27, State's Trial Memorandum at 5-6).

The defendant argued that the loss prevention officer's violation of company policy was relevant to establish his bias. The defendant's theory was that the loss prevention officer lied about the defendant threatening to hit him with the stolen bottle "because he did not want to get in trouble" for violating the company policy. He also argued that the violation of company policy was the "only possible reason" that Mr. Irons did not preserve the surveillance video of the incident. 8/17/15 RP 10, 12.

The prosecutor responded that the defendant's threat happened well after Mr. Irons grabbed the defendant by the jacket; between those two events, the defendant calmed down and returned inside the store before he wiggled out of his jacket, grabbed one of the whiskey bottles he had unsuccessfully tried to steal the first time, and ran away. See 8/17/15 RP 13; CP 74-75.

The court ruled that the violation of Safeway policy was not relevant because Mr. Irons never denied that his actions violated the policy. However, the court allowed the defendant to revisit the issue depending on the results of the defense interview of Mr. Irons. 8/17/15 RP 15.

At the beginning of the trial's second day the defendant asked the court to reconsider its ruling, citing new facts learned during the defense interview of Mr. Irons. During that interview Mr. Irons estimated that he had been involved in approximately 60 shoplifting apprehensions since January, 2015, and in 5 to 10 of those cases (i.e. 8% to 17% of the time) he went "hands on" in violation of company policy. This fact prompted the defense to articulate a new theory that Mr. Irons was "the aggressor." 8/18/15 RP 4. But the prosecutor and the trial court noted that such a theory would only be relevant if the defendant asserted self-defense. When pressed, the defendant confirmed that his defense was general denial, not self-defense. 8/18/15 RP 6.

The trial court asked for any case law authority supporting the defendant's new theory, but the defendant's counsel admitted that she had none. The court maintained its original ruling that "the mere violation of the policy does not seem to me in and of itself to be relevant to anything." 8/18/15 RP 7-9.

B. EVIDENCE AT TRIAL

Mitchell Irons was an employee of U.S. Securities, a subcontractor of loss prevention and security services for Safeway. On April 15, 2015, he was working in that capacity at the Marysville

Safeway store, wearing plain clothes and standing by the store's south entrance. 8/18/15 RP 13-15. His attention was drawn to a man wearing "floppy white pants," a red bandana and a camouflage tee shirt who walked with a distinctive "back and forth swagger." Mr. Irons identified the defendant in court as the one and only man involved in the incident. Mr. Irons observed the defendant walk directly to the alcohol aisle and select two bottles of Fireball whiskey from the shelves – one was the large 1.75 liter size, the other was the standard .750 liter size. Holding one bottle in each hand, the defendant walked passed all points of sale and exited the store through the south exit. Mr. Irons had observed the theft from a distance of about 20 feet, and quietly closed that distance as the defendant left the store. As soon as the defendant exited the store, Mr. Irons put both of his hands on the back of the defendant's shoulders, identified himself as a loss prevention officer, and "swung him around." Unprompted, the defendant said that his grandmother had paid for the alcohol. 8/18/15 RP 22-26, 86.

Somehow the defendant and Mr. Irons both ended up on the ground outside the south exit, but Mr. Irons could not remember the details of how that occurred. He did remember bringing the defendant back inside the store by placing his right hand on the

defendant's left shoulder. Once back inside, a group of 6 to 8 customers had gathered due to the commotion. One of them was on the phone, presumably to 911. At that point the defendant unzipped his jacket, slipped out of it while Mr. Irons held it, and ran the length of the store, leaving through the north exit. 8/18/15 RP 28-31.

Mr. Irons pursued the defendant, who then returned to the area just outside the south exit of the store where the two had originally scuffled and left the two stolen whiskey bottles on the ground. The defendant slowed down just enough to pick up the smaller .75 liter whiskey bottle and took off running through the Safeway parking lot. Mr. Irons continued to chase after him. 8/18/15 RP 34-35. When the pair reached the corner of the parking lot the defendant turned around, held the whiskey bottle by the neck about 12-16 inches above his head, and yelled at Mr. Irons from a distance of 8 to 10 feet away. The defendant asked Mr. Irons if he'd ever been hit over the head with a bottle, then added that he's a convicted felon and wasn't scared to do it. 8/18/15 RP 36, 38-39.

The defendant's threat worked; Mr. Irons felt afraid and that the defendant would strike him with the bottle if he continued to pursue him. He backed away and simply observed as the defendant

ran out of the parking lot towards Grove Street. Mr. Irons called 911 and provided a description of the suspect. 8/18/15 RP 39-40.

Police detectives located the defendant nearby and arrested him. He was carrying a liquor bottle with a Safeway security tag still on it. 8/18/15 RP 140-141.

Officer Joe Belleme was one of the first officers to respond to the incident, which was described by dispatch as a robbery in progress. 8/18/15 RP 92, 94. He tried but failed to locate anyone matching the suspect's description in the area surrounding the Safeway, so he went back to Safeway where he encountered Mr. Irons. Mr. Irons confirmed that there should be video surveillance footage of the incident, but that only the store manager could access it and provide it to law enforcement. Officer Belleme said he has routinely encountered difficulties obtaining video surveillance footage from Safeway. 8/18/15 RP 102.

The Safeway manager confirmed that loss prevention employees like Mr. Irons do not have access to the surveillance system other than viewing it while in the store. Any law enforcement requests for copies of video surveillance are directed to the manager or the assistant manager, who in turn request a copy from the security division employees at the Safeway's division office located

in Bellevue. In this case, by the time the store manager tried to access the footage from this incident it had been over-written because of limited space on the system's hard drive. 8/19/15 RP 7-10.

The defendant brought a Green motion to dismiss both counts after the State rested. The court denied the motion and found sufficient evidence to establish both Second Degree Robbery and Third Degree Assault. The court ruled that the defendant's threatened use of force was sufficient to place Mr. Irons in fear of immediate injury, and that this helped the defendant retain possession of the stolen whiskey bottle. 8/19/15 RP 27-28.

C. VERDICT AND SENTENCING

The jury found the defendant guilty of both charged offenses. CP 35-37. The State conceded at sentencing that double jeopardy protections prohibited the court from entering judgment on the Third Degree Assault charge. CP 66-67. The defense conceded that Mr. Irons had been "momentarily intimidated" by his encounter with the defendant. 8/21/15 RP 5. The court followed the State's recommendation for a mid-range sentence of 38 months in prison, followed by 18 months of community custody. 8/21/15 RP 7; CP 27-28.

Neither the State, the defendant, nor the trial court addressed legal financial obligations in any great detail. The State requested only mandatory LFO's totaling $600. 8/21/15 RP 2-3. Neither the defendant nor his attorney addressed LFO's at all. 8/21/15 RP 4-6. The court assumed from the defendant's extensive criminal history that he must be "buried under financial obligations" and imposed only the $600 requested by the State. 8/21/15 RP 8.

III. ARGUMENT

A. WHEN THE DEFENDANT RAISED A GLASS BOTTLE OVER HIS HEAD AND YELLED, "HAVE YOU EVER BEEN HIT OVER THE HEAD WITH A BOTTLE? I'M A CONVICTED FELON AND I'M NOT SCARED TO DO IT!" HIS THREAT OF VIOLENCE WAS SUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT ON SECOND DEGREE ROBBERY.

The defendant argues there was insufficient evidence to find him guilty of Second Degree Robbery. Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly

against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

RCW 9A.56.190 defines the crime of robbery as follows:

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

"Robbery encompasses any taking of ... property [that is] attended with such circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person." State v. Witherspoon, 180 Wn.2d 875, 884, 329 P.3d 888 (2014), quoting State v. Shcherenkov, 146 Wn. App. 619, 624–25, 191 P.3d 99 (2008). Reviewing courts use an objective test to determine whether "the defendant used intimidation" and "an ordinary person in the victim's position could reasonably infer a threat

of bodily harm from the defendant's acts." Witherspoon, 180 Wn.2d at 884. A threat can be communicated "directly or indirectly" and a threat of immediate force may be implied. RCW 9A.04.110(28); Shcherenkov, 146 Wn. App. at 624. "Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

Washington has adopted a "transactional" analysis of robbery, whereby the force or threat of force need not precisely coincide with the taking. State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). The taking is ongoing until the assailant has effected an escape. The definition of robbery thus includes "violence during flight immediately following the taking." Id.

In this case it was undisputed that the defendant committed theft. In closing argument defense counsel asked the jury to convict the defendant of Third Degree Theft. 8/19/15 RP 92. Therefore the controlling question is whether a jury could conclude that under the circumstances, a reasonable person in Mr. Irons' position would have felt sufficiently threatened by the defendant's raised bottle and the prospect of being smashed in the head with it, to induce that

person to cease efforts to retrieve the stolen alcohol or apprehend the thief. The record is clear that Mr. Irons felt exactly that way:

Q. Were you afraid?

A. Yes

Q. Did you feel like you would get hit if you continued to approach him?

A. Absolutely.

Q. Did you back away?

A. Yes.

8/18/15 RP 39. Notwithstanding defendant's current argument that his threat was not "sufficiently serious or forceful" to have an impact on Mr. Irons, the jury was entitled to believe otherwise and their unanimous verdict was far from unreasonable. Any reasonable person would interpret the combination of the defendant's words and actions as a *direct* threat to beat Mr. Irons in the head with a full glass bottle if he continued to pursue the defendant. The fact that the defendant expressed his threat with a question did nothing to mitigate the impending violence he was suggesting.

The defendant offers no comparisons between the facts of this case and any published opinion reversing a robbery conviction

due to insufficient evidence of threatened violence. One of the cases he does cite supports the State's position. In Witherspoon,

> The victim testified at trial that she noticed an unknown car in her driveway when she arrived home. As she exited her car, she saw Witherspoon come around the side of her home with one hand behind his back. She testified that she asked him what he had behind his back, and he said he had a pistol. A rational jury could have found that this was an implied threat that he would use force if necessary to retain her property.

Witherspoon, 180 Wn.2d at 885. When compared to this case, Mr. Jerue did not keep the glass bottle behind his back. He raised it above his own head and threatened to strike Mr. Irons on his head with it. This is a much more direct and overt threat of physical violence than the defendant displayed in Witherspoon. While it's true that a gun is a much more inherently dangerous weapon than an unopened .75 liter bottle of Fireball whiskey, the bottle was still used in a manner which would meet the definition of a deadly weapon under the law. See State v. Shilling, 77 Wn. App. 166, 171-172, 889 P.2d 948 (1995) (defendant's use of a bar glass to strike victim in the head was sufficient under the circumstances to classify the bar glass as a deadly weapon). A full glass bottle of whiskey carries greater potential for harm than a bar glass does. See Ex. 5; 8/18/15 RP 45.

The evidence was sufficient to sustain the jury's verdict that the defendant committed Second Degree Robbery.

B. THE COURT PROPERLY EXCLUDED QUESTIONS ABOUT MR. IRONS VIOLATING SAFEWAY'S CORPORATE POLICY AGAINST LOSS PREVENTION OFFICERS PHYSICALLY ENGAGING WITH SHOPLIFTERS.

The defendant asserts that his constitutional right to present a defense and cross examine witnesses was violated when the trial court granted the State's motion in limine to prohibit inquiry into whether the loss prevention officer violated company policy by initiating physical contact with him. Br. App. 8-13. A trial court's ruling on a motion in limine is reviewed for abuse of discretion, and should be reversed "only if no reasonable person would have decided the matter as the trial court did." State v. O'Connor, 155 Wn.2d 335, 351, 119 P.3d 806 (2005).

While the State acknowledges the wide latitude generally afforded to criminal defendants to cross-examine State's witnesses for evidence of bias, the right to cross-examine adverse witnesses is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A court may deny cross-examination if the evidence sought is vague, argumentative, or speculative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). The confrontation

right and associated cross-examination are limited by general considerations of relevance. See ER 401, ER 403; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). There is no constitutional right to admission of irrelevant evidence. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

The evidence at trial was uncontroverted that the loss prevention officer, Mr. Irons, initiated his interaction with the defendant by approaching him from behind, grabbing the defendant's shoulders with both hands, and swinging him around. 8/18/15 RP 25, 81. Mr. Irons admitted in his defense interview that this initiation of physical contact violated his employer's corporate policy. The policy was established in January, 2015, and Mr. Irons estimated that he violated the policy in 5 to 10 of the roughly 60 shoplifting incidents he had been involved in since that time. 8/18/15 RP 4.

The trial court excluded the proposed line of questioning on relevance grounds, but gave the defendant ample opportunity to revise his theory regarding how the violation of corporate policy tended to show that Mr. Irons was a biased or incredible witness.[1] The various arguments boiled down to two assertions; first, that the

[1] See 8/17/15 RP 10; 8/18/15 RP 4-7

policy violations showed a "pattern of behavior" supporting a theory that Mr. Irons was overly aggressive and that the defendant's threat of violence was therefore justified as self-defense, and second, that the policy violation in this specific incident gave Mr. Irons a motive to lie about the defendant's threat in order to justify the policy violation. None of the defendant's theories were persuasive to the trial court, and it rejected each theory by addressing it head-on.

Regarding the self-defense argument, the court confirmed that the defendant had not formally asserted self-defense and was relying instead on a defense of general denial. 8/18/15 RP 6. While he could have asserted self-defense as to the Third Degree Assault charge, he chose not to. The same is not true for the Second Degree Robbery charge. Because robbery does not require proof of intent to inflict bodily injury, self-defense is not available as a defense to robbery. See State v. Lewis, 156 Wn. App. 230, 239, 233 P.3d 891 (2010); RCW 9A.56.190.

The defendant's next theory was that Mr. Irons had reason to fabricate the defendant's threat because he did not want to get into trouble for violating the company policy. The trial court noted the irrelevance of the policy violation based on the facts and timing of the incident itself. 8/17/15 RP 11. For example, the policy violation

occurred much earlier in time than the defendant's threat. Between Mr. Irons' shoulder grabbing and the defendant's threat with the bottle, a whole series of events intervened. After Mr. Irons grabbed the defendant's shoulders, which ultimately resulted in the defendant and Mr. Irons going down to the ground together, the pair returned inside the store where they were surrounded by 6 to 8 customers. One of these customers appeared to be in the process of calling 911. 8/18/15 RP 28-29. The defendant then unzipped his jacket, slipped out of it, ran out the north exit, returned to the south exit to steal one of the whiskey bottles yet again, then ran away through the parking lot with Mr. Irons pursuing from behind. 8/18/15 RP 31-35. It was only at that point, in the far corner of the parking lot, that the defendant turned around and made threats to hit Mr. Irons with the stolen bottle. 8/18/15 RP 36.

The court was correct to observe that the timing of the policy violation (i.e. Mr. Irons grabbing the defendant's shoulders), occurring well before the bottle threat, did not support the defendant's theory that the second event was a fabricated attempted to justify the first. Mr. Irons had no way of predicting that the defendant would ultimately threaten to strike him in the head with a bottle when he decided to place his hands on the defendant's

shoulders in violation of corporate policy. The defendant has yet to explain with any logical nexus, either at trial or on appeal, how a fabricated threat occurring after Safeway's policy had already been violated could serve Mr. Irons' interest in justifying his actions and therefore make him a biased witness.

The trial court also noted that Mr. Irons could not be effectively impeached by his violation of corporate policy because he had never denied it: "I'm going to tell you, I do not see any relevance as to that point, because he never denied it. Now, it might be different if he had denied having contact with Mr. Jerue, he didn't deny having contact." 8/17/15 RP 13. Without a prior inconsistent statement to expose any self-contradiction on Mr. Irons' part, the policy violation had no impact on his credibility.

Moreover, the speculative motive for Mr. Irons to lie about the bottle threat to get out of trouble for "going hands on" became even more attenuated when it came out at trial that Roberta Holman, the store manager and therefore Mr. Irons' superior, witnessed the policy violation herself and told 911 "that a male had been tackled over alcohol theft." 8/18/15 RP 112-113. If Mr. Irons' superior witnessed first-hand that he had gone hands on in violation of store policy, there was no reason to lie under oath in an effort to convince her otherwise.

The defendant's theory of bias simply did not make sense. It was irrelevant to the issues the jury needed to decide.

Finally, even if the defendant's illogical bias theory was minimally relevant, the court's ruling was necessary to avoid the inevitable confusion that would have flowed from the conflict between Safeway's internal policy and the common law right of any citizen to make a lawful arrest using reasonable force. See RCW 9A.16.080; State v. Miller, 103 Wn.2d 792, 794-795, 698 P.2d 554 (1985); State v. Gonzales, 24 Wn. App. 437, 439, 604 P.2d 168 (1979) ("The owner of a mercantile establishment or his employee may make a warrantless arrest of a thief who he has observed shoplifting...").

In this case the State alleged that the defendant committed one of his crimes, Third Degree Assault, by resisting a lawful apprehension or detention. CP 72. The lawfulness of Mr. Irons' attempted detention is a question of law, not a question of fact for the jury. State v. Garcia, 146 Wn. App. 821, 827, 193 P.3d 181 (2008). Nonetheless, the jury instructions still called for the jury to determine whether "the assault was committed with the intent to prevent and resist the lawful apprehension or detention of the defendant." CP 55. The introduction into evidence of a corporate policy which is in direct

conflict with the common law right of citizens' arrest would have confused the issues and misled the jury in violation of ER 403.

C. EVEN IF EVIDENCE OF SAFEWAY'S CORPORATE POLICY WAS EXCLUDED IN ERROR, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Where a trial court denies a defendant's right to confrontation, the court on appeal must determine "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986). Factors important to this determination include the importance of the witness's testimony to the State's case, whether the testimony is cumulative, whether there is evidence corroborating or contradicting the witness's testimony on material points, the extent of cross-examination that was permitted, and the strength of the State's case in general. Id. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Id.

In this case the defendant's attorney skillfully cross-examined Mr. Irons even without the excluded line of questioning on the topic of Safeway's corporate policy. For example, on cross Mr. Irons acknowledged that he called 911 immediately after the defendant escaped by threatening him with a bottle, yet he didn't mention this threat at all in his statements to the 911 operator. 8/18/15 RP 72. This omission alone was enough to diminish the credibility of Mr. Iron's testimony about the defendant's threat. But Mr. Irons then denied the fairly obvious importance of "notify[ing] 911 who are sending a proportionate response if something has escalated to violence...". Mr. Irons said, "No, it's not important." 8/18/15 RP 73. The defense would later impeach Mr. Irons on this point when the defense investigator, Rhonda Massey, told the jury how he answered those questions in his defense interview the day before he testified:

> A. I asked him, don't you think that's important information for [the] 911 operator to know, and his reply was yes.
>
> Q. And did you follow up on that any further?
>
> A. I did. I said, why didn't you tell them you were threatened with a bottle.
>
> Q. And what was his response?
>
> A. His response was I just didn't tell them.

8/19/15 RP 44.

The impeachment continued when the Mr. Irons was unwilling to reconsider the accuracy of his memory that a male customer called 911. The State's next witness, Officer Belleme, confirmed that the only people who called 911 were Roberta Holman (a female) and Mr. Irons himself. 8/18/15 RP 58-59, 112-113. The defense attorney impeached Mr. Irons yet again when she inquired about why he went back to the manager's office to review the store's video surveillance recordings after the incident. Mr. Irons claimed he could not recall telling the defense investigator that he didn't know why he tried to look at the video – he was "just doing it." 8/18/15 RP 69-70. The defense investigator impeached this testimony with evidence that he twice said he "just wanted to" during the defense interview. 8/19/15 RP 43-44.

Despite a thorough cross-examination and successful impeachment of Mr. Irons' testimony, the jury believed in the truth of the charges. It bears repeating that the theft aspect of the case was never contested, and wisely so. The credibility of defense counsel's arguments would have suffered if she did not concede that her client stole the bottle of whiskey, as he was caught shortly after the incident with the very same bottle, including the security tag, concealed in his pants pocket. The theft itself was brazen; after he was caught the

defendant wiggled out of his jacket, escaped the physical custody of Mr. Irons, and ran out of the store despite being observed by 6 to 8 customers. He then returned immediately to the store just to steal the same bottle of whiskey he had just been caught and prevented from stealing. 8/18/15 RP 28-35.

All of these uncontested points painted a picture of a daring and desperate man. The jury did not have to strain its imagination to believe that the defendant completed his escape by turning around and threatening to strike Mr. Irons in the head with a bottle. The threat was entirely consistent with the manner in which the defendant committed the theft, and the jury believed it despite defense counsel's effective impeachment of the loss prevention officer. It is true beyond a reasonable doubt that allowing one more avenue of cross-examination, about whether Mr. Irons violated Safeway's corporate policy against touching shoplifters, would have done nothing to change the jury's overall impression of the evidence. Although the court did not err in limiting the defendant's cross-examination of Mr. Irons, any error would have been harmless.

D. THE COURT SHOULD IMPOSE APPELLATE COSTS.

RCW 10.73.160 authorizes the court to exercise its discretion to require an adult offender to pay appellate costs. State v. Sinclair,

192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The statute expressly applies to indigent persons and expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

"In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs. Prior to 1995, the rules governing appellate costs in criminal cases and civil cases were the same. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1,

66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.2d 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case and refused to award costs because the case involved not a personal consequence to either party but instead an issue of public interest. NECA, 66 Wn.2d at 23.

In Moore, the Supreme Court reversed a lower court's judgment because the action was brought prematurely and refused to award costs: "While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal." Moore, 65 Wn.2d at 393.

Each of those cases illustrates that the denial of appellate costs is appropriate when based on the issues and when unusual circumstances render an award inequitable. That makes practical sense since the appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The Blank court said that costs could be awarded without a prior determination of the

defendant's ability to pay. Id. at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal, something to which the Legislature silently acquiesced for almost 20 years.

In State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015), the Supreme Court based its decision on the statute that governs imposition of costs at sentencing. Under that statute, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The court construed the statute as requiring an individualized inquiry into the defendant's current and future ability to pay. Id.

RCW 10.73.160 contains no comparable provision. To the contrary, that statute provides that the costs "be requested in accordance with the procedures contained in Title 14 of the rule of appellate procedure." That procedure involves no consideration of indigence. State v. Obert, 50 Wn. App. 139, 142-43, 747 P.2d 502 (1987); see State v. Nolan, 141 Wn.2d 620, 623, 8 P.3d 300 (2000). The statutory basis for the holding in Blazina is thus absent in this case. Within constitutional limits, the wisdom of imposing costs must be determined by the Legislature, not the courts. Blank, 131 Wn.2d at 252.

There is nothing unusual in this case. The issues raised were not moot and were not of public interest. Therefore, the State should be awarded costs on appeal.

This court addressed the issue of appellate costs in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Sinclair was 66 years old and sentenced to a minimum of 280 months in custody, indigent at sentencing and with no prospects that his indigence would improve. In fact, the court said there was "no realistic possibility" that Sinclair would ever be released and be able to find "gainful employment that will allow him to pay appellate costs." Id. at 393.

The facts of the present case are entirely different. This defendant is only 33 years old, decades younger than Sinclair. CP 80. Unlike Sinclair, he is going to be released, with good time credit, in a couple of years. There is no reason in the record to presume he will be unable to obtain employment when released.

There is no basis for this court to assume the defendant's financial declaration from August, 2015, when he was in custody and about to begin a 38 month prison sentence, will have any bearing on his ability to pay in the months and years after he is released. The Blank court acknowledged this problem. There is no evidence that he is disabled, either mentally or physically. The only apparent

impediment to employment is his felony record. If the court uses that as a per se determination of future ability to pay, no indigent felon would ever be required to pay costs.

The costs sought by the State in this case are authorized by RCW 10.73.160. If the State prevails, costs should be awarded.

IV. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm the defendant's conviction for Second Degree Robbery.

Respectfully submitted on June 22, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. BRIAN MICHAEL JERUE, Appellant.	No. 74027-0-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 22nd day of June, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Maureen Cyr, Washington Appellate Project, maureen@washapp.org; and wapofficemail@washapp.org.

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

Dated this 22nd day of June, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office