

No. 47406-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DWAYZSHA CANTLEY,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 14-1-00876-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether, in the absence of any evidence of self-defense, the trial court abused its discretion by rejecting Cantley's argument that she struck the victim in self-defense.

2. Whether sufficient evidence was produced at trial to support Cantley's conviction for third degree assault.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On June 4, 2014, at approximately 11:43 a.m., James VanHoute was working as a loss prevention officer (LPO) at the JC Penney store in the Capital Mall in Olympia, Washington. RP 18, 21.¹ VanHoute had worked in the security field, off and on, for 20 years. RP 13. He had had extensive training in retail store loss prevention and had dealt with more than 1000 shoplifters in his career. RP 13-14. On this day he was in the junior women's department. He was not wearing a uniform or a badge, but was unable to recall specifically what he wore that day. He testified that sometimes he wore a suit and sometimes jeans, sometimes a hooded sweatshirt. It "[c]ould have been anything." RP 73-74. He observed Cantley, who was carrying a large purse which appeared to be empty. She selected merchandise from the racks without

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the one-volume trial transcript dated January 27, 2015.

regard to size or price, which VanHoute knew from his training and experience was characteristic of shoplifters. RP 14, 21. Cantley selected a pair of white overall shorts, a skirt, and five shirts, and took them into the fitting room. RP 22. VanHoute remained outside the fitting room. When Cantley emerged after approximately ten minutes, she carried three shirts in her hand but VanHoute could not see any of the other items she had taken into the fitting room. RP 23-24.

Cantley walked directly to the cash registers and approached a cashier. VanHoute ascertained that no one was in the fitting room and checked the stall that Cantley had used. There was no merchandise in the stall, only empty hangers. RP 24-25. VanHoute also observed that Cantley's purse, which had been flat when she entered the fitting room, was noticeably fuller when she came out. RP 25. It only took a short time to check the fitting room and Cantley was still at the cash register when he came out. He saw her hand the three shirts to a sales associate and walk away. VanHoute later determined that Cantley had put the shirts on hold. RP 26-28.

Cantley walked directly to the exit door without stopping at any other register or making any purchase. She did not return any

merchandise to the racks. She walked out through the doors leading to the parking lot. RP 27-28. There are two sets of doors leading out of the store, separated by a vestibule. VanHoute followed after Cantley and by the time he reached her she was walking out of the second set of doors to the outside. RP 28. VanHoute approached her and said "Loss prevention, you're being detained for theft, do you understand?"² Cantley said "Nuh-uh," indicating to VanHoute that she was not going to return to the store with him. He asked her to return to the store and took hold of her arm. Cantley said "Fine, fine, I'll reenter the store." "Okay, okay." VanHoute let go of her arm but instead of walking toward the store, Cantley began to move quickly away from the store. RP 29-30. VanHoute then grabbed hold of Cantley's purse, and a tug-of-war ensued. Cantley wrapped her arms around the purse and tucked it against the side of her body. RP 30-31, 93. VanHoute again took hold of Cantley's arm, and as soon as he did so she drew her arm back, and with fingers extended and nails pointed at his face, swung her arm toward him. She opened her hand and slapped him across the left side of his face. RP 30-31, 74.

² VanHoute testified that he identified himself to Cantley as a loss prevention officer three to five times. RP 101.

VanHoute used an “arm bar” technique to force Cantley to the ground. He held her there and called 911 on his cell phone. A mall security guard arrived and assisted VanHoute in putting handcuffs on Cantley. RP 32-33. Cantley persisted in attempting to stand up and VanHoute repeatedly pushed her back down. VanHoute recovered the purse and escorted her into the loss prevention office inside the store. In the purse were a blue skirt, a pair of white overall shorts, and two shirts, all with tags still attached. The retail value of the clothing was \$116. RP 33-25.

Olympia Police Officer Jonathan Leavitt arrived as VanHoute and Cantley reached the loss prevention office in the JC Penney store. RP34. Leavitt obtained information about the incident from VanHoute, then placed Cantley in the back of his patrol car. RP 112-13. He arrested her and advised her of the *Miranda*³ warnings. Cantley said that she understood her rights and agreed to speak with Leavitt. She told him that she got scared, adrenalin had affected her, and she may have struck VanHoute. RP 115, 127. She also told Leavitt that she was wearing a swim suit, which came from JC Penney, under her clothing. RP 118, 128, 132. When

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Cantley was booked into the jail and changed into jail clothing, the swim suit was recovered and given to Leavitt. It was Arizona brand, a brand carried only by JC Penney stores, and the store tags were still attached. He returned it to JC Penney. RP 39, 43, 121, 123-24. The swim suit was priced at \$56. RP 41.

Cantley did not complain of any injuries or excessive force by VanHoute. RP 119. Leavitt did not observe any injuries. RP 120.

VanHoute testified that he had been disciplined by JC Penney for using an aggressive tone of voice to an associate, which made her cry. RP 71, 83. He was also disciplined following an apprehension in July of 2012 for failing to follow the store policy regarding shoplifters in some unspecified manner. RP 83, 85. He was required to re-read that section of the policy manual and take some training classes. RP 85-86, 88, 91.

2. Procedural facts.

Cantley was tried to the bench on a first amended information charging her with third degree assault and third degree theft. RP 5, 9; CP 6. The court granted the State's oral motion to amend again during trial to correct the date of the offense from June 3 to June 4, 2014. RP 20, 134. VanHoute and Leavitt

testified for the State. Cantley did not testify or offer any other witnesses. RP 137. During trial Cantley objected to Officer Leavitt testifying about statements she made to him. RP 115-117. The court reserved ruling until the close of the evidence, when it found the challenged statements admissible. RP 151-55. The court found Cantley guilty of both charges. RP 187. Findings of Fact and Conclusions of Law Following Bench Trial were not entered until October 9, 2015.⁴ Supp. CP ____.

Cantley now appeals.

C. ARGUMENT.

1. Cantley produced no evidence that she acted in self-defense. The trial court correctly declined to consider her argument that she acted in self-defense.

Cantley claims that “throughout the proceedings, Ms. Cantley claimed self-defense, arguing that she was justified in slapping VanHoute when he grabbed her arm.” Appellant’s Opening Brief at 6. It is true that she raised this defense in her trial memorandum in the context of resisting an unlawful arrest. CP45-46. She did not testify at trial. RP 137. During closing argument,

⁴ Findings of fact and conclusions of law may be entered while an appeal is pending if the defendant is not prejudiced by the late entry. *State v. Garcia*, 146 Wn. App. 821, 826, 193 P.3d 181 (2008). Cantley did not assign error in her opening brief to the failure to file the findings and conclusions before she filed her brief.

defense counsel argued that Cantley was justified in using force to resist an unlawful detention by VanHoute. RP 172. Counsel conceded that there was not "a solid, well articulated . . . instruction that the defense would have submitted to a jury . . . because the law isn't completely well articulated . . . as to a use of self-defense or justifiable defense by a defendant when there has been a non-police officer's use of unlawful force against that person." RP 172. The trial court disregarded any claim of self defense.

Folks, let me tell you that there is no evidence of self-defense. I think that that was conceded by the defense, but had this been a jury trial, I would not have given an instruction on self-defense because there was no evidence that any force used by the defendant was to prevent injury to her and that it was justified. There is no evidence of self-defense and I'm disregarding that.

Secondly, based upon her statements, she struck at the officer not because she believed he was some creep that was trying to take her somewhere or otherwise interfere with her wellbeing. He had identified himself and she indicated that the adrenaline kicked in and she may have struck him. I've already ruled that that statement would be admissible and it does have some weight in this case because it indicates that the reason she lashed out was not to defend herself or not to prevent someone from touching her inappropriately, but, rather, to resist the detention or apprehension, which I've ruled was lawful, of her for shoplifting.

RP 193-94.

The lawful use of force is addressed in RCW 9A.16.020, which reads in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.....

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

The defendant has the “low burden” of presenting “some evidence” of self-defense. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). The evidence must be credible. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). There must be evidence that “(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; . . . (3) the defendant exercised no greater force than was reasonably necessary, . . . and (4) the defendant was not the aggressor. . . .” In addition, there must be evidence that the defendant intentionally used force. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) (internal cites omitted).

When deciding whether to instruct the jury on the law of self-defense, a trial court must first determine if the defendant has presented evidence of self-defense. If the court finds sufficient evidence to require a self-defense instruction, even if that determination is erroneous, the inquiry is ended. The State cannot shift the burden to the defendant to prove self-defense; the State must disprove it. State v. McCreven, 170 Wn. App. 444, 471, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). If a trial court refused to give a requested jury instruction based upon a factual dispute, that ruling is reviewed for abuse of discretion. If the refusal is based on a ruling of law, the review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Here, of course, a jury instruction was not at issue. The court indicated, as quoted above, that if this had been a jury trial, it would not have given the self-defense instruction; the analysis is essentially the same.

Cantley argues that she produced "some evidence demonstrating self-defense," but that the court failed to consider it in the light most favorable to her. Appellant's Opening Brief at 7-8. But where there is no credible evidence to support self-defense, viewing it in the light most favorable to Cantley does not help her.

She refers to the fact that VanHoute was not wearing a uniform or displaying a badge, but she is incorrect that he did not identify himself. He testified that he did so at least three times and as many as five times. RP 101. That VanHoute had been disciplined for using an "aggressive tone of voice" to an employee of JC Penney at some unspecified time, RP 71, has no conceivable bearing on Cantley's state of mind on June 4, 2014. Cantley also relies, ironically, on a statement she made to Leavitt and which she sought to suppress at trial. Appellant's Opening Brief at 8; RP 116, 143-45. Leavitt testified that after her arrest and the *Miranda* warnings had been read to her she said "[s]omething to the effect of her adrenalin getting to her and that she may have struck him." RP 110. On cross examination, this exchange occurred:

Q: And you testified that she stated she got scared, her adrenaline kicked in and she may have hit him; is that accurate, or something similar?

A: Sounds right.

RP 127.

Cantley did not testify and therefore the court had nothing but this recitation of her statement. As the trial court noted, that statement indicated to it that she was not defending herself from harm but rather trying to prevent being apprehended. RP 193-94.

That is a factual determination, rather than a legal conclusion, and the standard of review is abuse of discretion. Walker, 136 Wn.2d at 771-72. Cantley takes issue with the court's statement that she had conceded the self-defense claim, Appellant's Opening Brief at 8, but defense counsel had essentially conceded that there was no "well-articulated" legal basis for her claim. RP 172. Whether she conceded or not, however, is irrelevant because the court made its own determination; it did not rely on any concession. RP 193.

Cantley argues that the trial court erroneously required proof of actual danger when rejecting her self-defense argument. Appellant's Opening Brief at 8. The record does not support that claim. As argued above, there is both a subjective and objective component to a claim of self-defense, and the court recognized both. "[T]here was no evidence that any force used by the defendant was to prevent injury to her and that it was justified." RP 193. Further, Cantley's theory of the case was that the detention was unlawful, not that she was in fear of injury, whether reasonably or not. RP 173-74. She does not make that argument on appeal.

The trial court was correct to refuse to consider Cantley's self-defense claim.

2. The evidence was sufficient to support Cantley's conviction for third degree assault.

a. Self-defense.

Cantley first reargues her self-defense claim, maintaining that the State failed to disprove it. The State will not repeat the argument above, but incorporates it by reference into this portion of the response brief. Cantley then argues that the State failed to prove that VanHoute's use of force was reasonable, that VanHoute had no grounds to detain her, or that she had the intent to resist apprehension. Appellant's Opening Brief at 10-16.

b. Reasonable use of force.

The trial court admitted, as Exhibit 7, Chapter 4 of the JC Penney's Loss Prevention Handbook. RP 104, 107. The gist of Cantley's argument is that because VanHoute's actions differed in some respects from the procedures contained in JC Penney's Loss Prevention Handbook, those actions were necessarily unreasonable and therefore his detention of Cantley was unlawful.

Cantley provides no authority for the proposition that the policy manual of a retail business supersedes the law regarding the reasonableness of the force used to detain a shoplifter. Washington law does not define what reasonable force is; that is

left to the trier of fact to determine. State v. Miller, 103 Wn.2d 792, 795, 698 P.2d 554 (1985).

“Since relatively few arrests are with the consent of the criminal, the authority to make the arrest, whether it be with or without a warrant, must necessarily carry with it the privilege of using all reasonable force to effect it. Whether the force used is reasonable is a question of fact, to be determined in the light of the circumstances of each particular case.”

Id., quoting W. Prosser, *Torts* § 26, at 137 (3rd ed. 1964).

RCW 9A.16.080 provides legal protection for a person who detains a shoplifter with reasonable force.

In any criminal action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer, by the owner of the mercantile establishment, or by the owner's authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft or shoplifting on such premises of such merchandise. As used in this section, “reasonable grounds” shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a “reasonable time” shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile

establishment relative to the ownership of the merchandise.

The only evidence regarding VanHoute's detention of Cantley came from VanHoute. He testified that he first contacted Cantley as she was going through the second set of doors leading from the store to the parking lot. RP 28. He identified himself as an LPO and asked her if she understood she was being detained for theft. RP 29, 72. Cantley began to move toward the parking lot again so VanHoute grabbed hold of her arm and asked her to return to the store with him. She agreed to do so and he let go of her arm. Again Cantley began to move toward the parking lot. RP 29 74. This time VanHoute took hold of Cantley's purse, not her arm, and tried to pull the purse away from her. She wrapped her arms around the purse and held it against her side with one arm. RP 30, 74. VanHoute reached out to take hold of her arm again. Cantley drew back her arm, fingers extended and nails pointed at VanHoute, but as her hand came toward him she opened her hand and slapped him. RP 30-31. Cantley never let go of the purse. VanHoute used an arm bar technique, forcing her to go to the ground where he held her, despite her attempts to get up, until a

mall security officer arrived and helped him control her with handcuffs. RP 32-33.

Cantley did not dispute this account at trial and does not dispute it on appeal. She claims that the force used by VanHoute was unreasonable because the loss prevention manual instructs LPOs not to make apprehensions alone, used an aggressive tone of voice to an associate at some earlier time, and did not obtain her consent before searching her purse. Appellant's Opening Brief at 12. She cites to K-Mart Corp. v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993), to support her argument that a store's manual is relevant to determine what is reasonable. Appellant's Opening Brief at 12. But K-Mart Corp., a Nevada Supreme Court case, discussed at length the split of opinion among states as to this proposition. Some states find it relevant and some do not. Id. at 1188-89. The State has been unable to locate any Washington case which holds store manuals relevant to the issue of reasonableness, and presumably Cantley did not either, hence her cite to a Nevada case. In Washington the trier of fact determines what force is reasonable, and in this case the trial court found that store policy did not determine lawfulness. RP 188. Under the facts

of this case, it cannot be said that the court lacked sufficient evidence to find the amount of force used reasonable.

c. Grounds to detain Cantley.

Cantley again argues that because VanHoute failed to follow strictly the policies in the JC Penney handbook, he lacked sufficient evidence to support a belief that she had stolen merchandise and therefore her detention was unlawful. Appellant's Opening Brief at 13-14. Again, a retail store's policy manual does not supersede state law.

Again, the only evidence of the theft came from VanHoute's testimony. Again, Cantley did not dispute it at trial and does not dispute it now. VanHoute testified that he was walking around the junior women's department in JC Penney, observing the activity in that department. RP 18-19. His attention was drawn to Cantley because she was carrying a large purse that appeared to be empty and was selecting merchandise quickly without apparent regard for size and price. RP 21. Based upon his training and experience, he recognized those as actions common to shoplifters. RP 14. VanHoute watched Cantley select a pair of white overalls, a blue skirt, and five shirts, which she took into a fitting room. RP 22, 24. VanHoute remained outside the fitting room. After approximately

10 minutes, Cantley emerged with three shirts in her hand but the other items she had taken into the fitting room were not visible. The purse she carried was noticeably fuller than it had been before. RP 22-24. She walked directly to the cash registers and approached a cashier. There was no one in the fitting room, so VanHoute, probably in the company of a female trainee, checked the fitting room for the other items. RP 24-25. None of them were in the fitting room; in fact, the room was completely empty except for some hangers. RP 25, 60.

VanHoute saw Cantley hand three shirts to a cashier and walk toward the exit doors. He learned later that she had placed the shirts on hold. RP 26. Having seen the other clothing items go into the fitting room, knowing they were no longer in the fitting room, but not seeing them in Cantley's possession when she came out of the fitting room, and observing that her large, previously flat purse now appeared to be much fuller, VanHoute could reasonably conclude that Cantley had concealed the missing merchandise in her purse and was attempting to steal it. Any failure to follow the guidelines of the store policy manual did not affect those observations. VanHoute had reasonable grounds to believe that

Cantley had concealed “unpurchased merchandise of a mercantile establishment.” RCW 9A.16.080.

There is no specific statute which gives employees of a store the authority to arrest shoplifters. That comes from the common law right of citizen arrest. The right to use force to effect such arrests also comes from the common law. Miller, 103 Wn.2d at 794-95. RCW 9A.16.080 protects the store employees who make such arrests if they are reasonably effected. The authority to detain shoplifters does not come from a store manual; it comes from the law.

There was sufficient evidence to permit the trial court to find that VanHoute has reasonable grounds to detain Cantley.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof

exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

d. Intent to resist apprehension.

Finally, Cantley argues that there was insufficient evidence presented at trial to prove that she struck VanHoute with the intent to resist apprehension. Appellant's Opening Brief at 15-16. Third degree assault, as Cantley was charged, requires the following:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another.

RCW 9A.36.031(1)(a); CP 6.

Because Cantley did not testify at trial, the only evidence of her intent is derived from her actions and her statement to the police officer that she “got scared” and “her adrenaline kicked in.” Cantley maintains that her statement should be interpreted to mean she was frightened and struck VanHoute out of fear, although she does not identify what she was afraid of, not because she was trying to escape with stolen merchandise and hitting the LPO seemed to be the only way to break his hold on her purse. But circumstantial evidence is as probative as direct evidence. Dellmarter, 94 Wn.2d at 638. The circumstances indicating her intent reveal a person who, when approached by an LPO who identified himself and his reason for contacting her, said, “Nuh-uh,” and began running for the parking lot. RP 29, 94.

The evidence supports the conclusion that Cantley struck VanHoute out of fear that she was going to get into trouble for shoplifting. She was trying to get away. Fleeing with stolen merchandise is evidence of intent to “prevent or resist . . . lawful apprehension or detention . . .”. RCW 9A.36.031(1)(a).

The evidence was sufficient to support Cantley’s conviction for third degree assault.

D. CONCLUSION.

The trial court correctly disregarded Cantley's claim of self defense. The evidence was sufficient to support convictions for third degree assault and third degree theft. The State respectfully asks this court to affirm those convictions.

Respectfully submitted this 13th day of October, 2015.



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I certify that I served a copy of the Brief of Respondent on the date below as follows:

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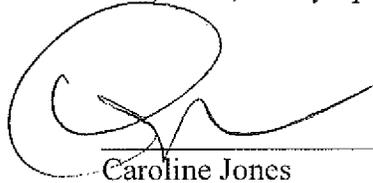
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of October, 2015, at Olympia, Washington.



Caroline Jones

THURSTON COUNTY PROSECUTOR

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