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**Nov 30, 2015**  
Court of Appeals  
Division III  
State of Washington

**NO. 32993-3-III**

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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIE ARREDONDO, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

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BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

- A. *Did the "unless" clause included in Jury Instruction 12, WPIC 60.05, improperly shift the State's burden of proving all elements of second degree burglary by creating a mandatory presumption of criminal intent?*
- B. *Was the constitutional instructional error harmless beyond a reasonable doubt when overwhelming evidence necessarily led the jury to find Arredondo intended to steal Walmart merchandise?*

II. STATEMENT OF THE CASE.<sup>1</sup>

The State adopts facts from the Statement of the Case recited in Willie Arredondo's brief. RAP 10.3. The jury also learned the following facts, presented through security camera video clips introduced during testimony of Walmart asset protection officer Eric Paulson<sup>2</sup> and from the testimony of asset protection officer Amber Troupe and Corporal Thomas Tuft of the Moses Lake Police Department.

The Moses Lake Walmart has a Pantel Zoom Camera (PTZ) system capable of remote control zoom, pan and tilt functions. 1RP 29.

Paulson noticed Willie Arredondo and a female companion, Shara

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<sup>1</sup> The trial Verbatim Report of Proceedings consists of two separately paginated transcripts, one for November 19, 2014 and one for November 20, 2014. The State refers to November 19, 2014 as 1RP and November 20, 2014 as 2RP.

<sup>2</sup> State's Trial Exhibit 1 is a digital disc containing 14 video clips from various security cameras throughout the Moses Lake Walmart store. 1RP 31. The State did not play all of the video clips at trial, although in closing the State urged the jury to review all of the videos during their deliberations. 2RP 124. The State cites to two of those video clips, labeled PTZ Monitor 1\_5.20.14.12.4.17\_5.20.14.12.24.21 (cited as Ex. 1A) and PTZ Monitor 2\_5.20.2014.12.10.24\_5.20.14.12.11.58 (cited as Ex. 1B).

Bates, as soon as they were caught on the PTZ system entering the Moses Lake Walmart. 1RP 29. They caught Paulson's attention because they each carried a large, "very empty" bag. *Id.* Troupe referred variously to Bates' bag as "luggage," a "suitcase," and "a tote." 2RP 42-43.

Arredondo and Bates split up shortly after entering the store. 1RP 46. Paulson tracked both Arredondo and Bates on the PTZ system as they made their way, separately and together, through the store. 1RP 29. Paulson was able to identify specific items of merchandise as they were placed into the couple's shopping cart. 1RP 24. Bates put a Coca-Cola and some candy into the cart, including a large package of Reese's candy. 1RP 34. Bates took a drink of the cola. 1RP 34. Arredondo joined her a few minutes later. 1RP 47. Arredondo placed various items into the shopping cart, including a bottle of shampoo, razors and deodorant. 1RP 39, 36.

After separating again, Bates, pushing the cart, joined Arredondo as he sat on a bench by the pharmacy. 1RP 47; Ex. 1A (12:04:40). Merchandise items were visible in the bottom of the cart, as were the empty satchels stacked vertically in the top basket. *Id.* The couple talked for a minute or so, then Arredondo left. Ex. 1A (12:05:31). Bates took another drink of Coca-Cola. Ex. 1A (12:04:40).

Arredondo returned after a couple of minutes and the two left the bench. Arredondo in the lead as they turned into a nearby aisle. Ex. 1A

(12:07:00–12:07:30). Merchandise was still visible in the bottom of the cart; the satchels were still in the top basket. *Id.* Once they were in the aisle, only the couple's heads were visible. Ex. 1A (12:07:30–12:07:45). They stopped near the far end of the aisle as Arredondo leaned over the side of the cart closest to the camera and Bates moved to the other side, facing the camera. Ex. 1A (12:07:45–12:07:53). They were having an animated conversation. Ex. 1A (12:07:46–12:07:53). They moved to the end of the aisle, the front end of the cart now visible to the zooming PTZ camera. Ex. 1A (12:08:00–12:08:20). Arredondo's head bobbed down toward the cart. Ex. 1A (12:08:09). The camera zoomed in on the front end of the cart, various items of merchandise visible. Ex. 1A (12:08:25–12:08:43). A hand reached down and removed an item of merchandise, then appeared again and took the last remaining item out of view. *Id.* Only the partially consumed Coca-Cola remained. *Id.*

As the camera panned back, Arredondo could be seen at the rear of the cart, apparently folding something. Ex. 1A (12:08:55). Bates was talking to him as she hoisted a satchel, pivoted out of the aisle and walked away from the camera, the full satchel resting against her back and hips. Ex. 1A (12:09:20–12:09:33). Arredondo followed, pushing the cart. Ex. 1A (12:09:37). The cart was empty but for a second empty satchel, some discarded candy wrappers, and the Coca-Cola. *Id.* Arredondo took a piece

of Reese's from a package in his hand and put it in his mouth. *Id.* He stopped the cart briefly, put something underneath the remaining satchel, then continued pushing the cart as the two walked away from the camera and split up. Ex. 1A (12:09:37–12:10:15).

Bates walked alone through the store carrying her loaded satchel. Ex. 1A (12:10:28–12:11:40). Arredondo, his mouth full of candy, pushed the cart into another aisle, removed the remaining satchel, and walked toward the exit. Ex. 1B (12:10:26–12:11:55). The abandoned cart was empty but for three large candy wrappers and the partially consumed Coca-Cola. *Id.*

Paulson stopped Arredondo at the vestibule and took him to the asset protection office. 1RP 48. Paulson confirmed no unchecked merchandise was in Arredondo's bag or on his person. 1RP 48–49. Arredondo admitted to Paulson he had been trespassed from the Moses Lake Walmart. 1RP 44. Paulson confirmed Arredondo's trespass status. *Id.* A Walmart trespass encompasses all Walmart and Sam's Club property and is for life. 1RP 45.

Bates was stopped as she left the store twelve minutes after Arredondo's apprehension. 1RP 51. Officers found Walmart merchandise worth about \$200 inside her satchel, including items Arredondo had put in the cart. 2RP 41. None of the items had been paid for. *Id.* Bates was also

taken to the asset protection office. 2RP 56. While there, Arredondo and Bates argued in front of Troupe. 2RP 57. Arredondo told Bates he knew she came to the Walmart intending to steal, adding that he had told her not to do it. 2RP 45, 56–57. Corporal Tufte asked whether Arredondo had any money with him, to which Arredondo replied he had nothing but change. 2RP 64. He did not have enough money to pay for the merchandise in Bates' satchel. 2RP 69.

### III. ARGUMENT.

A. *The “unless” clause included in Jury Instruction 12, WPIC 60.05, improperly shifted the State’s burden of proving all elements of second degree burglary by creating a mandatory presumption of criminal intent.*

The State concedes the “unless” clause in WPIC 60.05, Jury Instruction 12, impermissibly shifted the State’s burden of production and violated Arredondo’s due process rights. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996, 1001 (1996).

B. *The constitutional instructional error was harmless beyond a reasonable doubt because overwhelming evidence necessarily led the jury to find Arredondo intended to steal Walmart merchandise.*

Instructional errors violating a defendant’s right to due process are of constitutional magnitude, presumed to be prejudicial. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020

(1986). The State has the burden of proving the error was harmless. “The error cannot be declared harmless unless it was ‘harmless beyond a reasonable doubt.’” *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372, 378 (1997). To find error harmless beyond a reasonable doubt, “the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Guloy*, 140 Wn.2d at 426; *see also State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996, 1001 (1996) (constitutional error harmless if court convinced beyond reasonable doubt that same result would be reached absent the error); *State v. Savage*, 94 Wn.2d 569, 578, 618 P.2d 82 (1980) (reviewing court must find beyond reasonable doubt the error in no way affected case outcome). In *Deal*, the issue was whether the defendant unlawfully entered a residence before intentionally assaulting a person inside. 128 Wn.2d at 703. Evidence that Deal broke a window after unsuccessfully kicking the door was sufficient to overcome a presumption of prejudice arising from the instruction’s burden shifting “unless” clause. *Id.*

The Court of Appeals, in another second degree burglary case in which the offending instruction was given, found from the defendant’s admission of his intent to steal cigarettes “that the verdict [was] surely unattributable to the error, and therefore that the error [was] harmless.” *State v. Schloredt*, 97 Wn. App. 789, 800, 987 P.2d 647 (1999).

Here, the State had to prove Arredondo unlawfully entered the Walmart intending to commit a crime. RCW 9A.52.030(1). The only element at issue was Arredondo's criminal intent. He admitted having been trespassed from the store. Paulson confirmed his trespass status and told the jury a Walmart trespass is for life.

Evidence is sufficient if, when viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Arredondo intended to steal merchandise during his foray into Walmart. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Criminal intent may be inferred from conduct, giving equal weight to circumstantial and direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Compelling evidence of Arredondo's criminal intent was sufficient for the jury to find Arredondo guilty of second-degree burglary beyond a reasonable doubt without having to resort to the mandatory presumption. The evidence is also sufficient for this Court to find, beyond a reasonable doubt, the instructional error in no way affected the jury's guilty verdict.

Troupe testified she heard Arredondo tell Bates he knew she entered the Walmart intending to steal. Troupe also heard him comment that he had told Bates not to steal. Issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence are for the

trier of fact. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). The jury saw and heard ample evidence to conclude Arredondo knew Bates intended to steal. The jury also saw and heard enough evidence to disbelieve Arredondo was anything but a willing participant. The jury was free to conclude Arredondo knew Bates was planning to steal—why else would he have said so in front of Troupe—yet disbelieve his self-serving statement that he had told Bates not to do it.

Arredondo and Bates entered the store together, each carrying a large, “very empty,” satchel. Each of them placed various items into a single cart. Bates pushed the cart as they shopped. By the time Bates joined Arredondo on the bench by the pharmacy, the empty satchels were stacked vertically in the cart’s upper basket. Various items of merchandise were clearly visible on the cart’s bottom. After talking briefly, the couple went together with the cart to an aisle in which only their heads were visible to security cameras. They spent several minutes next to the cart, leaning over it and moving around it. They had an animated conversation. The jury could see that whatever they were doing, they were doing together.

The zoom camera close-up clearly showed items being removed from the front end of the cart until nothing was visible but the bottle of Coca-Cola. A few seconds later, the camera caught Bates hoisting her

satchel as she stood next to Arredondo. She left the aisle first, the satchel obviously full against her back. Right behind her, Arredondo pushed the cart into full camera view as he crammed another Reese's cup into his mouth. The cart was empty but for a flat satchel, some candy wrappers, and the partially consumed Coca-Cola. The jury could draw only one conclusion: Arredondo and Bates had transferred all the merchandise from the cart into Bates' satchel. They had done it together.

The second satchel now lay on the bottom of the cart. Arredondo stopped, lifted the satchel, and appeared to put something underneath it. After briefly walking side by side, Bates and Arredondo separated. As Bates walked through the store by herself, Arredondo pushed the cart around for another minute or so before retrieving his satchel and ditching the cart. All that remained in the cart were candy wrappers and the unfinished Coca-Cola. Arredondo carried the empty satchel directly to the exit. Again, the jury could reach only one conclusion: Arredondo was helping Bates walk out of the Walmart with a satchel full of stolen merchandise.

Arredondo's conduct from entry to attempted exit refutes his "clueless bystander" argument. From one set of facts alone—empty satchel and full cart going into the aisle, full satchel and empty cart coming out—any reasonable juror would have concluded Arredondo

actively participated in secreting the merchandise recovered from Bates. The jury reasonably could have concluded Arredondo and Bates planned to take more items than they did, having brought two satchels into the store. They could have reasonably concluded Arredondo took responsibility for ditching the cart to keep Bates from carrying a suspiciously full satchel while pushing an empty cart. The jury could also have reasonably deduced Arredondo set up the circumstances of his exit—nothing on his person, not even a candy wrapper—such that he could later claim his own innocence while attempting to cast all blame on Bates. There is no other plausible reason for his having admonished her in front of Troupe.

Bates and Arredondo were partners in criminal intent. There is no other rational conclusion. The jury did not need any presumption, mandatory or permissive, to support its finding that Arredondo entered Walmart intending to help Bates walk out with stolen merchandise, merchandise he helped choose. Evidence of Arredondo's intent is sufficient for this Court to conclude his burglary conviction is in no way attributable to the burden-shifting presumption contained in an erroneous and unfortunate jury instruction.

#### IV. CONCLUSION.

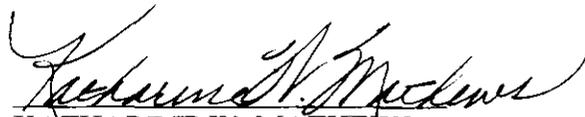
Bates, Arredondo, two empty satchels and a full shopping cart

entered a deserted aisle. A few minutes later, Bates and Arredondo left the aisle with a full satchel and an empty cart. The State respectfully requests that this Court find the evidence of Arredondo's intent sufficient to overcome beyond a reasonable doubt any lingering presumption of unconstitutional prejudice and affirm his second-degree burglary conviction.

DATED this 30<sup>th</sup> day of November, 2015.

Respectfully submitted,

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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32993-3-III
	)	
vs.	)	
	)	
WILLIE ARREDONDO,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

Dated: November 30, 2015.

  
\_\_\_\_\_  
Kaye Burns