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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS MADISON CAREY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether RCW 9A.16.110 authorizes the trial court to determine the amount of reasonable fees and costs incurred?
2. Whether the State is entitled to costs on appeal as the prevailing party pursuant to RAP 14.2?

II. STATEMENT OF THE CASE

On May 21, 2019, Thomas M. Carey was acquitted by a jury on the charge of second degree assault. CP 65. The jury further found his actions were in self-defense. CP 65.

On December 6, 2019, Carey filed a Motion for Reimbursement of Legal Fees and Costs Pursuant to RCW 9A.16.110. CP 1-47. The Motion sought reimbursement as follows: \$10,000 for an attorney flat fee pretrial retainer; \$2,000 for a Pulver Investigation fee; \$10,000 for a Chapdelaine Consulting fee; \$50 for GT Investigations; \$150 for Rachel Bos Investigation; \$250,000 for an attorney flat fee trial retainer; \$1.31 for a Sheriff's Department document fee; \$150 for Behind the Gavel (technology assistance with videos); and \$6,528.53 for closing costs on Carey's home mortgage refinancing. CP 6. In sum, Carey requested \$278,879.84, of which \$260,000 was for attorney fees. CP 6.

On December 17, 2019, the State submitted a response objecting to the amount sought. CP 48-58. On December 18, 2019, Carey submitted a reply. CP 59-64.

On January 27, 2020, Spokane County Superior Court Judge Michael Price issued an Order on Attorney's Fees and Costs Pursuant to RCW 9A.16.110(2). CP 65-72.

The Superior Court reviewed each requested cost and fee. The Superior Court found the \$10,000 pretrial flat fee reasonable and awarded that amount *in toto*. CP 68. The Superior Court denied the request for \$12,000 in investigative and consulting fees to Pulver and Chapdelaine because Carey did not provide "any information which would allow for the required analysis necessary to determine reasonableness." CP 68. The Superior Court awarded the requested costs for GT Investigations, Rachel Bos Investigation, and Behind the Gavel. CP 69. The court denied recovery for home refinancing costs based on the lack of information "which conclusively demonstrates that Mr. Carey refinanced his house for the specific purpose of paying counsel." CP 69.

The court rejected the request for \$250,000 for a flat fee trial retainer agreement. CP 69-72. In rejecting this request, the court noted even though Carey might have found the amount reasonable, "the Court would still need to apply a '*lodestar*' [sic] analysis to that fee, and independently determine

the appropriateness of the amount.” CP 70. The court also observed “it is clear that Mr. Carey *has not* actually paid this amount to his lawyer, and actually paid significantly less.” CP 70 (emphasis in original). Further, the court stated it “is unaware of any authority cited by counsel or discovered in any independent review, which supports the theory that the Court may consider a flat fee retainer independently agreed to between counsel and his client, when such amount bears no semblance to actual attorney’s fees incurred.” CP 70.

Having declined to award the full amount solely based on it being the amount agreed-to by counsel and Carey, the Superior Court proceeded to conduct a *Lodestar* analysis on the total hours recorded by counsel. CP 70-71. The Superior Court found a reasonable hourly rate of \$300 for counsel and \$125 for paralegal and office staff. CP 67, 70. The Superior Court found the total of 420 hours reported by counsel reasonable and using the *Lodestar* rates awarded \$119,280 for attorney time and \$2,800 for paralegal and office staff time. In total, the Superior Court awarded \$122,431.31 to Carey. CP 72. Carey appeals.

III. ARGUMENT

A. STANDARD OF REVIEW

Issues of statutory interpretation are reviewed *de novo*. *State v. Villaneuva*, 177 Wn. App. 251, 254, 311 P.3d 79 (2013). When interpreting

a statute, the court must “discern and implement” the legislature’s intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). “The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, [the court] give[s] effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). In determining a provision’s plain meaning, the court looks to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.*

When a statute is unambiguous, “there is no room for judicial interpretation ... beyond the plain language of the statute.” *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000). The fact that two interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

“Statutes must be construed to avoid strained or absurd results.” *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003). Regarding RCW 9A.16.110, the Supreme Court has held “the statute’s purpose is to insure that costs of defense shall befall ‘[n]o person in the state’ if he or she acts in self-defense; and ... reimbursement is available when such person incurs costs in defending against some kind of ‘legal jeopardy.’” *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 500,

909 P.2d 1294 (1996). Further, pursuant to RCW 9A.04.020, “[t]he provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.” RCW 9A.04.020(2); *State v. Lee*, 96 Wn. App. 336, 341, 979 P.2d 458 (1999).

B. RCW 9A.16.110 ALLOWS THE COURT TO DETERMINE THE AMOUNT OF AN AWARD OF COSTS AND FEES

RCW 9A.16.110 provides:

When a person charged with [assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030] is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.

RCW 9A.16.110(2). The statute further states “[i]f the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.” RCW 9A.16.110(2).

RCW 9A.16.110(2) permits recovery for reasonable costs incurred from arrest through self-defense acquittal, regardless of when formal charges were filed. *See Villanueva*, 177 Wn. App. at 258. Recovery is also allowed for reasonable costs and fees related to mistrials, if, at the subsequent trial the defendant was acquitted and self-defense found by the

trier of fact. *See State v. Jones*, 92 Wn. App. 555, 964 P.2d 398 (1998). Recovery also includes reasonable appellate costs for a successful appeal. *Villanueva*, 177 Wn. App. at 258.

It is the claimant's burden to establish facts supporting the requested costs and fees pursuant to RCW 9A.16.110. *State v. Anderson*, 72 Wn. App. 253, 260, 863 P.2d 1370 (1993). In *Anderson*, Division Two addressed the recoverable categories of costs and attorney fees. Regarding attorney fees, the Court held RCW 9A.16.110 is an "indemnification-reimbursement statute" and not a reasonable attorney's fee statute. 72 Wn. App. at 263. As such, "an award of reasonable legal fees under RCW 9A.16.110 must include but shall not exceed the sum of (a) legal fees the defendant has paid in the past, plus (b) legal fees the defendant has become legally obligated to pay in the future." *Id.* at 264. However, the court also noted:

We do not consider the situation in which the sum of the amounts a defendant has paid and become legally obligated to pay is alleged to exceed a reasonable attorney fee. Here, it is undisputed that the sum of what each defendant paid and became legally obligated to pay did not exceed a reasonable attorney fee.

Id. at 264 n.18. There, the court awarded fees and costs to a defendant even though he had been engaged in a drug transaction leading to the use of self-defense. *Id.* at 259-60.

In response to *Anderson*, the Legislature amended RCW 9A.16.110 to allow the trial court to deny recovery where the defendant engaged in criminal conduct substantially related to the events giving rise to the self-defense charges. *See* S.S.B. FINAL BILL REP. on S.S.B. 5278, 54th Leg. Reg. Sess. (1995). In the same amendment, the Legislature removed the word “indemnify” from RCW 9A.16.110. *See* Laws of 1995, ch. 44 (S.S.B. 5278). While the legislative history sheds no light on why the word “indemnify” was removed, its removal constitutes a material change suggesting an intent to change the statute to a reasonable fee statute.

Nevertheless, even if it remains an indemnification statute, both the text of RCW 9A.16.110 and case law addressing it recognize the court’s authority to evaluate not only the types of fees sought, but the amount sought for reasonableness. Further, reading RCW 9A.16.110 to prohibit any judicial review of the amount requested would lead to absurd results.

The statute plainly states if self-defense is found by the trier of fact, “*the judge* shall determine the amount of the award.” RCW 9A.16.110(2) (emphasis added). This can be read in no other way than to authorize the court to independently review a requested award. Further, the categories of recoverable costs are prefaced by the word “reasonable.” It is not the situation where any and all claimed costs falling under the recoverable categories *must* be awarded; rather, it includes only those amounts that are

reasonable and supported by sufficient evidence. Thus, a plain reading of RCW 9A.16.110(2) establishes a successful self-defense claimant may recover reasonable costs and fees incurred, as determined by a judge, for qualifying types of costs.

Nothing in *Anderson* contradicts the plain language of the statute. As the Court of Appeals stated in the footnote, it was not reviewing the amounts awarded because the parties stipulated to its reasonableness. 72 Wn. App. at 264 n.18. If, as Carey contends, judicial review of the amount of fees is impossible, there was no reason for the footnote suggesting review is allowed. Contrary to Carey's argument, *Anderson* cannot be read to hold the trial court is categorically forbidden from reviewing the sum of fees sought for reasonableness.

Carey does not merely argue the Superior Court erred by using a *Lodestar* analysis to review the fee request; rather, Carey argues the court erred in using *any* analysis to determine if the amount of fees requested was reasonable.¹ Br. at 3. As shown above, RCW 9A.16.110 specifically

¹ While Carey takes umbrage with the use of the *Lodestar* analysis, that analysis was only used to evaluate the \$250,000 trial flat fee. Carey's brief does not provide argument or authority addressing the Superior Court's conclusions that certain costs were not sufficiently proven.

Further, Carey's brief focuses solely on whether the Superior Court had the statutory authority to conduct any review, and does not argue a different analytical method of awarding costs and fees should have been used. To the extent Carey might take issue with the Superior Court's award amounts or

authorizes judicial determination of the sum of fees, and no case law suggests otherwise.

Under Carey's reading of the statute, the trial court could never review fees or costs for the reasonableness of the amount. However, Carey's insistence that the Superior Court look no further than the amount on the retainer renders both the statutory language requiring the court to determine the amount of the award and the word "reasonable" superfluous. *See In re Nichols*, 120 Wn. App. 425, 431, 85 P.3d 955 (2004) (Each word in a statute must be given effect rather than interpreting in such a way that "renders words useless, superfluous, or ineffectual").

Moreover, Carey would substitute the judgment of counsel and the defendant for that of the court. Reasonableness would apparently be determined by the amount a defense attorney offered and a defendant was willing to agree to. Such a reading leads to absurd results and incentivizes fraudulent practices. This reading would allow a defense attorney to obtain a flat fee trial retainer for \$1,000,000 for a straightforward second degree assault case with the implicit understanding with the client that the full amount would only be paid by the State upon a successful self-defense acquittal. The attorney could further pad costs frivolously with no threat of

conclusions regarding proof of certain costs, he fails to show the Superior Court abused its discretion. *See Villanueva*, 177 Wn. App. at 254 n.1.

review or reduction, provided there are receipts establishing the costs were actually incurred. The same retainer agreement could be entered for a charge of fourth degree assault, which qualifies for recovery under RCW 9A.16.110. *See Lee*, 96 Wn. App. at 342.

It defies logic and common sense to say this is the intended result of RCW 9A.16.110 or is supported by the plain language of the statute. Yet, under Carey's reading, a trial court would have no role other than to rubberstamp the request and order the State to pay the requested amount as an incurred cost, regardless of whether it is reasonable and regardless of whether the client was actually expected to pay it.

Further, simply because a contract has been signed does not *ipso facto* mean the contract is enforceable. In the example of the million-dollar misdemeanor retainer, if the attorney sought to enforce the contract against their client, a court could very well find the contract unenforceable because it was either illusory or unconscionable. This Court need not engage in an analysis of the enforceability of Carey's retainer because RCW 9A.16.110 provides the Superior Court with the authority to review a claimed fee for reasonableness independent of whatever fee arrangement exists between counsel and the defendant. Deference to a patently unreasonable fee arrangement is not warranted when the trial court is making a determination of reasonable costs and fees.

RCW 9A.16.110 allows the court to determine the amount of an award, which furthers the statutory purpose to allow recovery for *reasonable* costs and fees. Construing RCW 9A.16.110 otherwise leads to unintended and absurd outcomes. The Superior Court acted within this statutory grant of authority. Accordingly, this Court should enforce the plain reading of the statute and affirm the Superior Court.

C. THE STATE, NOT CAREY, IS ENTITLED TO COSTS ON APPEAL

While reasonable costs incurred on appeal are recoverable under RCW 9A.16.110, here none are warranted. First, as shown above, Carey should not prevail on this appeal and should not be awarded costs. *See Jones*, 92 Wn. App. at 567 and n.21. Second, as counsel concedes, there is no fee agreement for this appeal. Thus counsel, and not Carey, has incurred the fees and costs of appeal. Even should Carey prevail, he has not incurred any costs or fees for this appeal.

Pursuant to RAP 14.2, the State requests this Court award its costs as the prevailing party on appeal. There is no evidence that Carey is indigent.

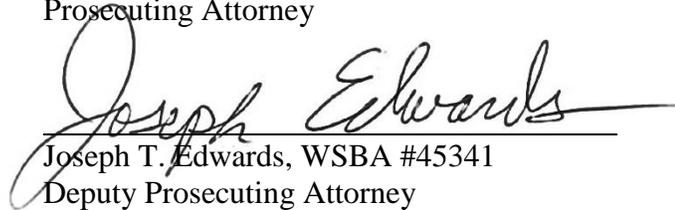
IV. CONCLUSION

By its plain text, RCW 9A.16.110(2) authorizes judicial determination of the amount of a fee award upon acquittal by self-defense.

It is the trial court, not counsel or the defendant, who determines the amount of reasonable costs and attorney fees. The Superior Court acted within its authority when it declined to award unsubstantiated costs and conducted a *Lodestar* analysis of Carey's attorney fee request. Therefore, this Court should affirm the Superior Court's award of \$122,431.31, not the \$278,879.84 requested by counsel.

Dated this 29 day of June, 2020.

LAWRENCE H. HASKELL
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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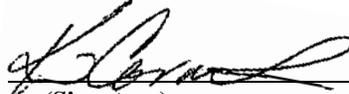
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