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No. 325105

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

BEYONCE NIEVES,

Appellant,

vs.

WAL-MART STORES, INC.,

Respondent.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Giving Defendant's Proposed Instruction Based on Washington's "Shopkeeper's Privilege" statute, RCW 4.24.220.

ISSUE: Whether a merchant is entitled to claim the Shopkeeper's Privilege under RCW 4.24.220 as a defense to an action for assault and battery brought by a customer where the undisputed testimony at trial established that the merchant's employee assaulted the customer from behind as she was leaving the store.

2. The Trial Court Erred by Failing to Grant Plaintiff's Motion for Judgment as a Matter of Law on her Claim for Assault and Battery.

ISSUE: Whether, in a civil action for assault and battery brought against a store by a customer, the customer is entitled to a directed verdict where the uncontroverted testimony at trial establishes that the store's employee initiated contact with the customer by assaulting her from behind.

II. STATEMENT OF THE CASE

On the evening of December 9, 2011, Appellant Beyonce Nieves went to the Wal-Mart Store on Wellesley Avenue in Spokane, Washington, to get some stockings and to look for a Christmas tree for her sister. RP 28 - 29. Nieves was dressed in a hooded sweatshirt and sweatpants and was not wearing makeup. Her hair was not done, so she had the hood of her sweatshirt up covering her head. RP 30. She was also wearing a small backpack that served as her purse. RP 36. The entire time Nieves was inside the store, her movements were recorded on the store's video surveillance system. RP 129 - 138.

Nieves first went to the stockings section of the store to look for the stockings she needed. She was able to find stockings in her size, but not in the color she needed, so she took several boxes of stockings to a clerk and asked her if the store had that type of stocking in her color. RP 31 - 32. The clerk told her that all the stockings they had would be out on the shelves. Nieves then left the boxes with the clerk. RP 32.

While Nieves was looking for the stockings she needed, she was being watched from a distance by Jeremiah Blackwell, a Wal-Mart Loss Prevention Associate. RP 132 - 133. Believing he had seen Nieves conceal some stockings under her clothing, Blackwell began following her as she continued her shopping. RP 132 - 137. Nieves eventually went to

the garden center of the store, where she took a photograph of an artificial tree using her cell phone. She then sent the picture to her sister. RP 33 - 34. Nieves then walked to the front of the store and exited through the front doors without making a purchase. RP 35.

As she was leaving the store, Nieves was texting on her phone. When she was a few steps outside the doors, she felt a presence behind her as if something was wrong. RP 35. She was then suddenly grabbed from behind and "yanked" by the strap of the backpack she was wearing. RP 35 -36. Nieves was taken completely by surprise. Not knowing who had grabbed her or why, she turned to face her attacker and immediately tried to pull herself loose from the person's grasp. RP 36. Eventually, she was able to free herself from her backpack. RP 36. She later discovered that she had a welt and scratches on her neck as a result of the straps rubbing against her neck. RP 44.

After she had freed herself, Nieves confronted the person who had grabbed her. That person was Mr. Blackwell. According to Blackwell, he followed Nieves as she was leaving the store and ran up to her with the intent of getting in front of her so he could stop her. RP 138. He was not able to catch up to her until she was a few steps outside the store. At that time, he could see that Nieves was texting on her phone. As he

approached her from behind, Blackwell called out to her, but could not tell whether she had heard him. RP 138.

As Nieves was about to step out into the parking lot, Blackwell reached out and took hold of the top loop of her backpack and at the same time said, "[M]a'am, I'm with security." RP 138. At that moment, Nieves was still texting on her phone and had her back to Blackwell, so she could not see him. RP 178. Blackwell did not walk forward with Nieves, but instead held his ground while holding onto the backpack. RP 142. Nieves immediately spun around toward him. RP 138. Blackwell continued to hold on to the backpack and restrain Nieves as she tried to pull away while telling her she needed to come back into the store. RP 140. According to Blackwell, once he had taken hold of Nieves' backpack, he "wasn't going to just let her go." RP 141, 144.

As Nieves was trying to free herself from the backpack, Blackwell was yelling at her and telling her she needed to come back into the store. RP 38. Blackwell then accused Nieves of taking merchandise from the store without paying for it. RP 39. Blackwell continued to hold on to Nieves' purse, refusing to return it to her unless she came back into the store. RP 39. Nieves protested and tried to demonstrate to Blackwell that she did not have any Wal-Mart merchandise on her. RP 39. Blackwell continued to insist that she had stolen items from the store.

Eventually, Blackwell offered to returned Nieves' backpack to her and told her she could leave. RP 40. All of this took place in full view of other customers who were going in and out of the store. RP 40.

Instead of taking her backpack and leaving, Nieves told Blackwell to keep it because she was going to call the police and come back to the store with her mother. RP 44. Nieves then got into her car and went to go pick up her mother to bring her back to the store. RP 44. After Nieves had told her mother what had happened, Nieves' mother called the police. RP 52.

Although no merchandise was found on Nieves and the video from the store's surveillance cameras did not show her concealing any items under her clothes, she was cited for theft. RP 55. Nieves was also asked to sign a paper acknowledging that she was trespassed from the store. She refused to sign, saying she had done nothing wrong. RP 55 -56. No charges were brought against Mr. Blackwell. The theft charge against Ms. Nieves was dismissed at her first appearance in court. RP 57.

Nieves then brought the present action against Wal-Mart alleging causes of action for assault, unlawful imprisonment, and outrage. CP 1-6. Over Nieves' objection, the trial court gave Wal-Mart's proposed jury instruction based on Shopkeeper's Privilege as codified in RCW 4.24.220. Nieves argued that the instruction was not supported by the evidence

because Mr. Blackwell's act of grabbing Nieves from behind without warning constituted an assault as a matter of law. RP 211 - 214. The trial rejected that argument, stating that whether Blackwell had committed an assault was a question to be resolved by the jury. RP 15.

The jury returned a defense verdict. Nieves then moved pursuant to CR 60(b) for entry of judgment as a matter of law on her assault claim, arguing again that Blackwell had committed an assault as a matter of law when he grabbed her from behind. CP 47 - 54. The trial court denied the motion and entered judgment in favor of Wal-Mart. CP 61 - 62. Nieves now appeals.

III. STANDARD OF REVIEW

A trial court's decision to give a jury instruction is reviewed de novo, if based upon a matter of law. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). The denial of a motion for judgment as a matter of law is reviewed de novo. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wash.App. 443, 454, 158 P.3d 1183 (2007)

IV. ARGUMENT

1. The Shopkeeper's Privilege Does Not Apply When the First Contact Between the Store's Employee and a Suspected Shoplifter is Accomplished by Means of an Assault.

a. **The Shopkeeper's Privilege Applies Only When the Means Used to Detain a Suspected Shoplifter is Reasonable.**

RCW 4.24.220 states:

In any civil 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 or by the owner of the mercantile establishment, his or her 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 larceny 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. (Emphasis added)

By its plain language, RCW 4.24.220 applies only when a person suspected of shoplifting is detained "in a reasonable manner and for not

more than a reasonable time." Here, Nieves does not claim that she was detained for an unreasonable time. In fact, she returned to the store after being told she was free to leave because she wanted to press charges against Blackwell for assaulting her. The sole issue here is whether the means employed by Blackwell to initially detain Nieves was reasonable. Nieves contends that Blackwell's actions were unreasonable as a matter of law. Therefore, the defense provided by RCW 4.24.220 does not apply.

b. It is Unreasonable as a Matter of Law for a Shopkeeper to Commit an Assault Against a Person Suspected of Shoplifting.

Under Washington law, an assault can be either criminal, tortuous, or both. *See, State v. Frazier*, 81 Wn.2d 628, 630-31, 503 P.2d 1073 (1972)(discussing the distinction between criminal assault and civil assault). Whether a particular assault is considered a crime or merely a tort, the act of committing any kind of assault can never be considered "reasonable" under the law. Otherwise, the law itself would be unreasonable. Therefore, an assault of any kind can never be a "reasonable manner" of detaining a suspected shoplifter.

c. The Act of Grabbing Nieves From Behind Without Warning in Order to Prevent her From Leaving the Store Was an Assault as a Matter of Law.

Assault is an intentional touching or striking of another person that is either harmful or offensive, regardless of whether it causes an injury. *State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007). The actor need not intend that the contact be harmful or offensive, so long as the actor intends to cause the contact. *State v. Shelley*, 85 Wn.App. 24, 29, 929 P.2d 489 (1997).

Unless done for the purpose of preventing injury to the person, such as holding someone back as they are about to step in front of moving traffic, any person would find the act of being grabbed and held from behind without warning as was done here to be offensive. This is especially true if the person doing the grabbing is a complete stranger.

This Court has previously held that even the attempt to grab someone from behind as they are walking away constitutes an assault as a matter of law. In *State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007), the defendant was found guilty by a jury of committing an assault. On appeal, the defendant challenged the admission at trial of the victim's hearsay statements to police that the defendant had slapped her on the face and struck her with a flashlight. The court ruled that the trial court had erred by admitting those statements. *Id.*, at 128. Nevertheless, the court held that the error was harmless because the officer had observed the defendant grab at the victim's back as she was walking away from him,

she resisted, and she appeared to be upset. *Tyler*, 138 Wn. App. at 124. The court concluded that any reasonable jury would have found beyond a reasonable doubt that the defendant had committed fourth degree assault by grabbing at the victim from behind. *Id.* Thus, any error in admitting the victim's statements to the police was harmless.

If no reasonable jury could have found that the defendant in *Tyler* did not commit an assault, where the standard of proof was beyond a reasonable doubt, then no reasonable jury could have concluded in this case that the same conduct did not constitute an assault where the standard of proof is by a preponderance of the evidence. Like the defendant in *Tyler*, Blackwell grabbed at Nieves from behind as she was walking away from him. Nieves was not aware of Blackwell's presence behind her until the moment he grabbed her backpack. Not only did Blackwell grab at Nieves from behind, he actually took hold of her backpack and held on to it, causing Nieves to be suddenly restrained by her neck and shoulders as she was walking out of the store.

The grabbing and restraining of Nieves from behind was done without consent and without warning. Blackwell himself testified that Nieves was texting on her phone as he approached her from behind and he could not tell whether she heard him call out to her. Blackwell also testified that he grabbed Nieves from behind at the same time as he

identified himself as store security. Thus, it is clear that Nieves had no prior warning that she was about to be grabbed and restrained.

Nieves testified that she felt a presence behind her as she was walking out of the store and then felt someone suddenly grab her from behind by her backpack. She had no idea who it was or why they were grabbing her until after she was able to turn and eventually free herself from the person's grasp. She was shocked and frightened by Blackwell's actions, as any normal person would be. RP 36. In struggling to free herself from Blackwell's grasp, Nieves sustained injuries to her neck.

Under these facts, it cannot be seriously argued that Blackwell did not commit an assault under Washington law. Blackwell initiated physical contact with Nieves by intentionally grabbing her from behind. Nieves did not consent to being grabbed or touched in any manner. The grabbing was clearly offensive to Nieves and ultimately resulted in injury to her.

It is anticipated that Wal-Mart will argue that the force used by Blackwell to detain Nieves was a reasonable means of stopping Nieves from leaving the store. That argument must fail for the simple reason that no force may be used against a person unless and until it is shown that such force is reasonably necessary to accomplish a lawful purpose. Even a police officer may use force to effectuate a lawful arrest only when such

force is necessary to overcome resistance or to prevent escape. *See, Smith v. Drew*, 175 Wash. 11, 18, 26 P.2d 1040 (1933).

Here, there is no evidence that Nieves resisted being detained or attempted to flee prior to being grabbed by Blackwell. Nieves was completely unaware of Blackwell's presence until after she was grabbed from behind. Nieves did not say or do anything to indicate that she would not willingly comply with a lawful request to stop and be questioned or even return to the store. She was not given any opportunity to comply with such a request prior to being assaulted by Blackwell. Thus, Wal-Mart cannot claim that it was necessary to use force against Nieves to accomplish a lawful detention.

The Shopkeeper's Privilege statute should not be interpreted and applied to allow a merchant to use force against a suspected shoplifter in a preemptive manner without first giving the person a chance to voluntarily comply with a lawful request to stop. Allowing a preemptive use of force would be extremely bad policy and could not have been intended by the Legislature when enacting RCW 4.24.220. Initiating contact through forceful means is highly likely to result in a physical confrontation between a store's employee and the customer, since the customer will almost certainly perceive a sudden and unprovoked use of force against their person as an attack and react accordingly.

Here, Blackwell grabbed Nieves' backpack from behind causing Nieves to spin around. Her reaction in trying to free herself from an unknown assailant who had grabbed her purse was natural and to be expected. As a result of trying to free herself from Blackwell's grasp, she sustained minor injuries. It is simply a matter of good fortune that Nieves did not sustain more serious injuries or that a more violent confrontation did not occur between her and Blackwell.

Because the manner in which Nieves was detained was unreasonable as a matter of law, the trial court erred by giving Wal-Mart's proposed instruction based on RCW 4.24.220. The error in giving the instruction clearly prejudiced Nieves, because it allowed the jury to conclude, contrary to the law, that Wal-Mart was entitled to the defense provided by the statute. The error is therefore reversible and Nieves is entitled to a new trial. *See, Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

2. A Plaintiff in a Civil Action for Assault and Battery is Entitled to a Directed Verdict When the Testimony at Trial Establishes as a Matter of Law that the Defendant Committed an Assault.

A motion for judgment as a matter of law should be granted when, viewing the evidence most favorable to the non-moving party, the court

can say as a matter of law there is no substantial evidence to support a verdict for the non-moving party. *Sing v. Johns L. Scott, Inc.* 134 Wn.2d 24, 29, 948 P.2d 323 (1997). Substantial evidence exists if it the evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887 (1980).

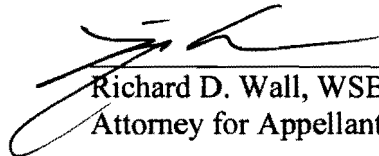
Here, as noted above, the uncontested evidence at trial establishes that Blackwell committed an assault against Nieves. No evidence was presented at trial that the assault was committed in self-defense, defense of others, or was otherwise privileged. *See, Garratt v. Dailey*, 46 Wn.2d 197, 201, 279 P.2d 1091 (1955). Blackwell's own testimony was that he grabbed Nieves from behind to stop her from leaving the store. Even viewing the evidence in a manner most favorable to Wal-Mart, no reasonable jury could conclude that Blackwell did not commit an assault. The trial court erred by denying Nieves' motion for judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the judgment in favor of defendant Wal-Mart should be reversed and this case remanded to the trial court with

instructions to enter judgment as a matter of law in favor of plaintiff Nieves on her claim for assault. Nieves should be granted a new trial on her claims for unlawful imprisonment and outrage.

Respectfully submitted this 2nd day of November, 2014.


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