Supreme Court No. 93960-3
COA No. 74027-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MICHAEL JERUE,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Brian Michael Jerue requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Jerue, No. 74027-0-I, filed November 14, 2016. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. An essential element of second degree robbery is that the accused took property through the use of actual or threatened force, violence or fear of injury. Here, the evidence showed only that Jerue held up a bottle and asked the complaining witness if he had ever been hit with a bottle, and stated he was not afraid to do it. But Jerue used no actual force and uttered no direct threat. Did the State fail to prove the essential force element beyond a reasonable doubt?

2. An accused in a criminal trial has a fundamental constitutional right to confront his accusers and present evidence in his defense. This includes the right to cross-examine prosecution witnesses with evidence of their possible biases and motives. Here, the State's principal witness was a loss prevention officer who alleged Jerue threatened him with a stolen liquor bottle when the officer confronted him outside the store. The defense sought to cross-examine

the loss prevention officer with evidence that he violated store policy when he grabbed Jerue by the shoulders as he exited the store. The evidence was relevant to show the officer had a motive to downplay his own role in the confrontation and exaggerate Jerue's threatening behavior. Did the trial court violate Jerue's constitutional rights to present evidence in his defense and confront his accuser when it prevented him from cross-examining the loss prevention officer with evidence that he violated store policy?

C. STATEMENT OF THE CASE

On the afternoon of April 15, 2015, Mitchell Irons was working as a loss prevention officer at the Safeway in Marysville. 8/18/15RP 12-15. He observed Brian Jerue enter the store, walk to the liquor aisle, take two bottles of liquor from the shelf, and then walk out of the store without paying for the items. 8/18/15RP 23-25.

Irons followed Jerue, who was walking at a normal pace. 8/18/15RP 25, 51. He caught up to Jerue outside the door, put his hands on his shoulders, and swung him around forcefully to face him. 8/18/15RP 25, 53. Irons identified himself as a loss prevention officer. 8/18/15RP 26. According to him, the two then somehow ended up on the ground, although he does not recall what happened or why they fell

to the ground. 8/18/15RP 26, 56. Irons took Jerue back inside the store. 8/18/15RP 28, 32. He had his hand on Jerue's shoulder as he led him inside. 8/18/15RP 28, 32.

Irons admitted he violated store policy when he grabbed Jerue by the shoulders. 8/17/15RP 11. The store prohibited its loss prevention officers from placing their hands on shoplifting suspects. 8/17/15RP 9.

Soon after Irons and Jerue re-entered the store, Jerue managed to slip out of his jacket and break free of Irons' grasp. 8/18/15RP 31, 62. He ran out the other door and into the parking lot. 8/18/15RP 31. He dropped the bottles but picked one of them up again. 8/18/15RP 34. Irons ran after him and caught up to him at the corner of the parking lot. 8/18/15RP 36. According to Irons, Jerue turned around, held up the bottle by the neck and asked Irons if he had "ever been hit with a bottle," and said he was "a convicted felon" and was "not scared to do it." 8/18/15RP 36.

Irons stopped following Jerue and called 911. 8/18/15RP 40, 80. Jerue took off running. 8/18/15RP 40. Irons told the 911 operator there had been a theft but did not mention any supposed threat. 8/18/15RP 40.

A police officer stopped Jerue a short distance away. 8/18/15RP 136, 139. Jerue was relaxed and cooperative. 8/18/15RP 148-49. He had fresh scratches on his arm. 8/18/15RP 105.

Jerue was charged with one count of second degree robbery.[1] CP 72.

Before trial, the defense moved to admit evidence that Irons violated store policy when he placed his hands on Jerue. 8/17/15RP 10. The defense theory was that Irons lied when he claimed Jerue threatened him with the bottle because he did not want to get in trouble for violating store policy. 8/17/15RP 10-11. Irons admitted he had violated the policy at least five to ten times and that he probably did so due to adrenaline. 8/18/15RP 4-5. He tended to get so excited that he could not always control his actions. 8/18/15RP 4-5. The evidence that Irons violated store policy by grabbing Jerue supported the defense theory that Irons was the aggressor and that Jerue ran away because Irons was hurting him. 8/18/15RP 4-6. Irons was motivated to lie about Jerue's threat so that he would not appear to be the aggressor. 8/17/15RP 10; 8/18/15RP 4-5.

---

[1] Jerue was also charged with one count of third degree assault and the jury found him guilty. CP 35, 72. At sentencing, the court vacated the

The court denied the motion, finding the evidence that Irons violated store policy was not relevant. 8/17/15RP 11-12; 8/18/15RP 7-8.

The jury found Jerue guilty of second degree robbery as charged. CP 37.

Jerue appealed, arguing the State did not prove beyond a reasonable doubt he used force or the threat of force to retain possession of the property, and that the trial court abused its discretion and violated Jerue's constitutional rights to present a defense and confront his accusers by precluding him from cross-examining the complaining witness with evidence that he violated store policy by placing his hands on Jerue. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The State did not prove beyond a reasonable doubt that Jerue used force or the threat of force to retain possession of the property.

The essential element that distinguishes a robbery from a theft is that the accused took personal property "from the person of another or in his or her presence against his or her will *by the use or threatened*

---

third degree assault charge on double jeopardy grounds and did not enter judgment on that charge. 8/21/15RP 6.

use of immediate force, violence, or fear of injury to that person." RCW 9A.56.190 (emphasis added); see CP 47-48 (jury instructions). Here, the State did not prove Jerue committed a robbery as opposed to a theft because it did not prove he used or threatened to use force or violence in committing the theft.

The State was required to prove this essential element beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on review is whether a rational fact finder could have found the State proved the element beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Although the Court considers the evidence and all reasonable inferences from the evidence in the light most favorable to the State, the State may not rely upon evidence that is "patently equivocal." State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"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) (alterations in Shcherenkov)). The Court applies 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." RCW 9A.04.110(28); Shcherenkov, 146 Wn. App. at 624.

Although a threat of immediate force may be implied, the evidence must show the threat was sufficiently serious and forceful to induce a reasonable person to part with his property. State v. Clark, 190 Wn. App. 736, 756-57, 361 P.3d 168 (2015).

Here, the State did not prove Jerue uttered a threat that was sufficiently serious or forceful to induce a reasonable person to part with his property. Jerue did not utter a direct threat. According to Irons, Jerue merely held up a bottle and asked if Irons had ever been hit

with a bottle. 8/18/15RP 36. He did not actually threaten to hit Irons with the bottle.

Moreover, there was no *implied* threat that was sufficient to induce a reasonable person to part with his property. It was *Irons* who used force when he grabbed Jerue by the shoulders and swung him around to face him as he was exiting the store. 8/18/15RP 25, 53. Irons continued to maintain a hold on Jerue as he led him back into the store. 8/18/15RP 28, 32. Jerue was merely trying to get away. 8/18/15RP 31, 62. Although he held up the bottle and asked Irons if he had ever been hit with a bottle, he did not lunge toward him or otherwise act as if he was going to hit him. 8/18/15RP 36. He then ran away. 8/18/15RP 40. He never touched Irons.

In sum, the evidence is not sufficient to prove beyond a reasonable doubt that Jerue used "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.'" Witherspoon, 180 Wn.2d at 884. Thus, the State did not prove the elements of second degree robbery beyond a reasonable doubt and the conviction must be reversed.

2. The court abused its discretion and violated Jerue's constitutional rights to present a defense and confront his accusers by precluding him from cross-examining the complaining witness with evidence that he violated store policy by placing his hands on Jerue.

Irons' testimony was the only evidence presented by the State to prove the essential force element that allegedly transformed this simple shoplifting incident into a robbery. No other witnesses observed the interaction between Jerue and Irons in the parking lot. The State did not present any videotape evidence from the surveillance cameras at the store. Thus, it was crucial that Jerue be given a full and fair opportunity to challenge Irons' testimony and explore his possible biases and motives.

The trial court unfairly and unreasonably limited Jerue's right to confront Irons by precluding him from presenting evidence that Irons had a motive to lie. It was undisputed that Irons violated store policy when he placed his hands on Jerue and forcefully led him back into the store. 8/17/15RP 9, 11. The fact that the store had a policy precluding its loss prevention officers from touching shoplifting suspects supports the defense theory that Irons was overly aggressive and confrontational. Irons' violation of the policy created a motive for him to underplay his

role in the encounter and overplay Jerue's supposed dangerousness. Jerue should have been given an opportunity to cross-examine Irons with evidence showing he had a motive to exaggerate his testimony.

A defendant's right to cross-examine a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); U.S. Const. amend. VI; Const. art. I, § 22.

In addition, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. A defendant's right to present a defense includes the rights to examine witnesses against him, which is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294).

The constitutional right to confrontation encompasses the right to reveal the witness's possible biases, prejudices, or ulterior motives. Davis, 415 U.S. at 316-18. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness

and affecting the weight of his testimony." Id. (internal quotation marks and citation omitted).

Moreover, "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

The accused has "great latitude" to present evidence showing the possible motives or biases of prosecution witnesses. State v. Spencer, 111 Wn. App. 401, 410, 45 P.3d 209 (2002). The evidence need be only "minimally relevant" to the witness's bias. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). The court may exclude "minimally relevant" evidence of a witness's bias only if the State's countervailing interest is "compelling." Id.

Here, the evidence that Irons violated store policy by placing his hands on Jerue was at least "minimally relevant" to Irons' possible bias and motive to lie. The store's policy prohibiting employees from physical contact with shoplifting suspects demonstrates the store's judgment that such physical contact can exacerbate an already volatile situation. Irons' violation of the policy shows his actions were

improper and overly aggressive. It gave him a motive to exaggerate Jerue's dangerousness and downplay his own culpability.

Whether or not Jerue uttered a threat was the central issue in the case. The case turned on the jury's belief or disbelief of essentially one witness—Irons. Thus, Irons' "credibility or motive [was] subject to close scrutiny." Roberts, 25 Wn. App. at 834.

The trial court should have allowed Jerue to cross-examine Irons with evidence that he had a motive to exaggerate the alleged threat. Denying Jerue that opportunity violated his fundamental constitutional rights.

Because a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, any error in excluding such evidence is presumed prejudicial. Spencer, 111 Wn. App. at 408. The State must prove the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In assessing harmlessness, the Court may not "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." Davis, 415 U.S. at 317. Instead, the Court must conclude

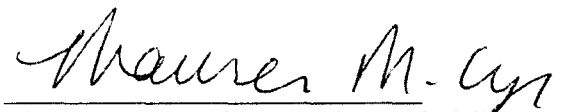
"the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony." Id.

Here, the jury should have been permitted to consider the defense theory that Irons had a motive to exaggerate Jerue's supposedly threatening behavior. Irons was the key prosecution witness and his testimony about Jerue's alleged threat was the only evidence of an essential element of the crime. The State cannot prove beyond a reasonable doubt that precluding the jury from considering whether Irons had a motive to exaggerate his testimony was harmless. The conviction must be reversed.

E. CONCLUSION

For the reasons stated, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 13th day of December, 2016.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74027-0-I
Respondent,	)	DIVISION ONE
v.	)	
BRIAN MICHAEL JERUE,	)	UNPUBLISHED
Appellant.	)	FILED: November 14, 2016

Cox, J. — Brian Michael Jerue appeals his jury conviction of robbery in the second degree. He argues that insufficient evidence supports his conviction because the State failed to prove that he used or threatened to use force when stealing liquor from a store. He also contends that the trial court violated his constitutional right to confrontation by precluding him from cross-examining a witness about his violation of company policy prohibiting physical confrontation. We hold that there is sufficient evidence to support Jerue's conviction. We also hold that the trial court properly exercised its discretion by excluding irrelevant evidence of the witness's actions. We affirm.

On April 15, 2015, Mitchell Irons was working as a loss prevention officer at a Safeway store in Marysville. That night he observed a man, who was later identified as Brian Jerue, enter the store, walk to the liquor aisle, and take two bottles of whiskey. Irons watched the man walk out of the store without paying for the bottles. Irons was about twenty feet away when he followed Jerue out of the store through the south exit. When they were both outside, Irons confronted Jerue. He put both of his hands on the back of Jerue's shoulders, identified

himself as a loss prevention officer and "swung him around." Irons' employer has a company policy against physical contact with those being apprehended.

Jerue and Irons engaged in a physical confrontation that resulted in both of them ending up on the ground. Irons brought Jerue back inside the store, keeping his hand on Jerue's left shoulder. At least one of the two whiskey bottles had been left outside the store. Once inside, however, Jerue unzipped his jacket, slipping out of it and out of Irons' grasp. He ran through the store and out through the north exit. Irons followed him back to the south exit, where Jerue grabbled the smaller whiskey bottle and started running through the parking lot. Irons chased after him until the pair reached the southeast corner of the parking lot.

At that point Jerue turned around and raised the whiskey bottle over his head. He yelled at Irons, asking if Irons had ever been hit over the head with a bottle. Jerue also stated that he was a convicted felon and he wasn't afraid to hit Irons with the whiskey bottle.

Irons was scared that Jerue would hit him with the bottle if he continued to pursue him. He backed away and watched Jerue run out of the parking lot toward the street. Irons called 911 and provided the dispatcher with a description of Jerue.

Police located Jerue walking nearby and apprehended him. They found a bottle of whiskey in his possession that still had the Safeway security tag on it.

Jerue was charged with one count of second degree robbery and one count of third degree assault. Before trial, the State moved to exclude evidence that Irons violated his employer's company policy when he used physical contact to apprehend Jerue. The defense opposed the motion. It did so on the theory that Irons lied or exaggerated events when he told police that Jerue threatened him because he did not want to get in trouble for his own aggressive actions.

The trial court concluded Irons' violation of employee policy was not relevant because Irons never denied it. The court was willing to allow Jerue to revisit the issue depending on the results of Irons' defense interview.

The next day, Jerue argued that Irons admitted during his interview violating policy at least 5 to 10 times when trying to apprehend shoplifters, due to excitement and adrenaline. The trial court concluded that while Irons' prior incidents of aggressive contact could be analyzed under ER 404 as character evidence, the violation of policy had no relevance.

The jury found Jerue guilty on both charges. However, on double jeopardy grounds, the court sentenced Jerue solely on the conviction for second degree robbery. The trial court also found him to be indigent and appointed an attorney for this appeal.

Jerue appeals.

EVIDENCE OF USE OR THREATENED USE OF FORCE

Jerue first argues that the evidence was insufficient to prove that he "used or threatened to use force or violence in committing the theft." We disagree.

Due process requires the State to prove all necessary facts of the crime charged beyond a reasonable doubt.[1] The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.[2] Upon reviewing a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.[3] Direct and circumstantial evidence are equally reliable; however "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation."[4]

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."[5] Second degree robbery requires that the accused take 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."[6] We use an objective test to determine whether "the defendant used intimidation" and "an ordinary

---

[1] State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).
[2] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[3] Id.
[4] State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).
[5] State v. Witherspoon, 180 Wn.2d 875, 884, 329 P.3d 888 (2014).
[6] RCW 9A.56.190.

person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts."[7]

RCW 9A.04.110(28) defines "threat" as it applies to robbery offenses. Under the statute, to "'[t]hreat[en]' means to communicate, directly or indirectly the intent" to take the applicable action.[8] In the robbery context, therefore, the "threatened use of immediate force, violence, or fear of injury" means a direct or indirect communication of the intent to use immediate force, violence, or cause injury.[9] A threat need not be explicit to qualify but may be implied by words or conduct.[10]

Here, it is undisputed that Jerue raised the bottle over his head and indicated that he "wasn't scared" to hit Irons in the head with it. Irons testified that he was afraid and that he "[a]bsolutely" felt like he would get hit if he continued to approach Jerue. An ordinary person in his position would likewise reasonably infer that Jerue threatened to use force. In addition, Jerue's statements that he was "not afraid to do it," and that he did not care about the consequences, because of his prior conviction, reinforced the seriousness of his threat.

Jerue argues that insufficient evidence supports the finding that he used or threatened to use force, violence, or the fear of injury to obtain the liquor. According to Jerue, there was no threat of violence or injury to Irons when he

---

[7] Witherspoon, 180 Wn.2d at 884.
[8] RCW 9A.04.110(28).
[9] State v. Shcherenkov, 146 Wn. App. 619, 624, 191 P.3d 99 (2008).
[10] State v. Farnsworth, 185 Wn.2d 768, 771, 374 P.3d 1152 (2016).

asked whether Irons had "ever been hit over the head with a bottle." In view of the undisputed evidence we just discussed, this argument is untenable.

Jerue argues that raising the bottle and asking Irons if he had ever been hit with a bottle before was not an implied threat because "he did not lunge toward him or otherwise act as if he were going to hit him." This is unpersuasive.

The classic example of a legitimate implied threat is brandishing a weapon.[11] Here, Jerue brandished the bottle over his head and implied his intent to use it to hit Irons if he continued his pursuit. Whether Jerue refrained from making additional physical advances toward Irons is of no consequence. "Any ... threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction."[12] Viewed in the light most favorable to the State, the evidence was sufficient to support the jury's finding that Jerue obtained store property through the use of or threatened use of "immediate force, violence, or fear of injury."

RIGHT TO CONFRONTATION

Jerue next argues that the trial court violated his right to confrontation by excluding from his cross-examination of Irons the latter's violation of company policy regarding physical contact with those being apprehended. We hold there was no violation of his right to confrontation.

---

[11] Shcherenkov, 146 Wn. App. at 626 (citing State v. Demery, 144 Wn.2d 753, 755, 30 P.3d 1278 (2001)).

[12] State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

We review de novo constitutional claims, as questions of law.[13] A defendant has a constitutional right to present testimony in his defense and to confront and cross-examine adverse witnesses.[14] However, "the right to cross-examine adverse witnesses is not absolute."[15]

The confrontation right and associated cross-examination are limited by general considerations of relevance.[16] Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] Relevant evidence is admissible unless otherwise prohibited; a defendant does not have a constitutional right to present irrelevant evidence.[18]

Generally, evidence of bias is relevant to a witness's credibility.[19] Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny.[20]

Jerue argues that the evidence was at least minimally relevant to Iron's possible bias and motive to lie. He contends that Irons' credibility was central to the case because he was the only witness. According to Jerue, the jury was

---

[13] State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

[14] Washington v. Texas, 388 U.S. 14, 19, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), *accord* State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

[15] State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

[16] Id. at 621 (citing ER 401, 403; Hudlow, 99 Wn.2d at 15).

[17] ER 401.

[18] ER 402; Hudlow, 99 Wn.2d at 15.

[19] State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996).

[20] State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971); State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970); State v. Tate, 2 Wn. App. 241, 247, 469 P.2d 999 (1970). See also State v. Wilson, 70 Wn.2d 638, 642-43, 424 P.2d 650 (1967).

entitled to consider whether Irons had exaggerated Jerue's use of force to justify his own aggressive actions and mitigate any consequences of violating his employer's policy.

The central question is whether Jerue used or threatened to use force, violence, or injury to person in his commission of the offense. Irons' admitted violation of company policy is not relevant to this question. This is particularly true because Jerue does not argue that he acted in self-defense.[21]

We also note that Irons admitted to violating the policy and the store manager witnessed the violation when she saw him "tackle" Jerue. So, the jury was aware of this information when deciding this case.

Finally, Jerue had other opportunities to cross-examine Irons and raise questions about his credibility. For example, Jerue's attorney questioned Irons about his failure to mention Jerue's threat to the 911 dispatcher as well as other discrepancies in Irons' testimony regarding the incident.

There was no violation of Jerue's right to confrontation.

APPELLATE COSTS

Jerue argues that no costs should be imposed because the trial court found him to be indigent. We agree.

In State v. Sinclair,[22] this court recently determined that RAP 15.2(f) created a presumption of continued indigency throughout review. Unless a trial

---

[21] The State correctly points out self-defense is not available as a defense to robbery (State v. Lewis, 156 Wn. App. 230, 239, 233 P.3d 891 (2010), and that Jerue could have asserted self-defense as to the assault charge, but he chose not to.

[22] 192 Wn. App. 380, 393, 367 P.3d 612 (2016).

court finds that an indigent defendant's financial condition has improved, we presume that the defendant continues to be indigent.[23] Here, the trial court imposed only what it deemed to be mandatory legal financial obligations, finding that Jerue was "absolutely buried under financial obligations given his criminal history." The trial court also entered an Order of Indigency authorizing Jerue to seek review at public expense.

On this record, there is a presumption of continued indigency that the State has failed to overcome. The State argues that "[t]here is no reason in the record to presume [Jerue] will be unable to obtain employment when released" based on his age and his sentence length of 38 months. Jerue's financial declaration, however, shows that he was unemployed and receiving public assistance, with no financial assets and liabilities of around $10,000. We therefore exercise our discretion to deny appellate costs to the State.

We affirm the judgment and sentence. No appellate costs shall be awarded to the State.

Cox, J.

WE CONCUR:

Trickey, ACJ

Schindler, J.

[23] Id.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74027-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrew Alsdorf, DPA
[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 13, 2016