

NO. 46233-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA J. BESSEY,

Appellant.

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BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated RCW 9A.16.110 when it refused to enter an order reimbursing the defendant for all his reasonable legal fees involved in defending against a charge of burglary and assault after a jury determined by a preponderance of the evidence that he had acted in self-defense.

2. Under RCW 9A.16.110, the defendant is entitled to reasonable costs and attorney's fees on appeal.

### ***Issues Pertaining to Assignment of Error***

1. Under RCW 9A.16.110, does a trial court err if it refuses to grant a defendant's reimbursement request for attorney's fees in a criminal case in which the state charged the defendant with burglary and assault, the jury acquitted the defendant of those charges, and the jury then returned a special verdict finding by a preponderance of the evidence that the defendant had acted in self-defense?

2. Is a defendant entitled to reasonable costs and attorney's fees on appeal if a trial court erroneously denies that defendant reimbursement for all his reasonable costs and attorney's fees under RCW 9A.16.110 and the defendant is then forced to appeal in order to obtain a reversal of that erroneous order?

## STATEMENT OF THE CASE

By information filed May 29, 2013, and later amended three times, the Cowlitz County Prosecutor charged defendant Joshua J. Bessey with first degree burglary by assault, second degree assault, fourth degree assault and interfering with the reporting of a domestic violence offense. CP 1-3, 25-27, 28-30, 117-119. These charges all arose out of a single incident on May 23, 2013, in which the defendant's ex-girlfriend alleged that he broke into her home, assaulted her, assaulted her new boyfriend and broke her cell phone in order to prevent her from calling the police. CP 115-116. The probable cause statement given in support of these charges alleged the following:

On 5-23-13 at approx. 2129 hrs. I responded to 4334 Sires Ln. for a 911 hangup with the sounds of a dispute heard in the background. Once on scene I contacted Kristie A. Morgan (5-2-87) who said that her ex-boyfriend, Joshua J. Bessey (12-13-83) came to the residence uninvited. She locked the door and would not let Joshua inside, but he started pounding on the door and was angrily questioning who was in the house with her. Kristie tried to brace the door, but Joshua kicked it in, breaking part of Kristie's toenail off. Joshua then attacked Kristie's male friend, Ty Keele, and punched, kicked and kneed him several times. Kristie tried to get Joshua off of Ty, but was unable to. At that point Kristie said she was calling the police and after she dialed 911, Joshua grabbed the phone from her hand up against her head and pulled her hair in the process, then smashed her phone. Joshua left shortly after that. The Motorola cell phone was completely damaged and its replacement value is about \$500. The front door and door jam were also damaged and the cost to replace them is about \$500.00.

CP 115-116.

The defendant later retained counsel who set up interviews with the

two complaining witnesses at the office of the deputy prosecuting attorney in charge of the case. CP 4-5. Counsel gave the following affirmation concerning what happened during those interviews:

1. My name is Duane Crandall, I am of attorneys for Defendant herein and make this declaration in support of the foregoing motion for an Order allowing deposition of two critical State's witnesses: Kristie Morgan and Ty Keele.

2. I substituted in for Defendant on December 10, 2013. At that time I requested an opportunity to interview the two complaining witnesses. I would bring a court reporter. The deputy prosecutor was reminded a number of times and he reported to me that the two were not returning his calls. I have no reason to doubt this as he has always been cooperative regarding discovery. The trial was set to commence on Monday, February 3, 2014. The interviews were set to occur on January 29, 2014, Wednesday afternoon, at the Prosecutor Attorney's office one at 3:30 and one at 4:00. Kristie Morgan appeared and simply would not answer questions.

3. I had prepared my interview for three hours and had a number of critical areas to make inquiry of and firmly establish Kristie Morgan's version of events. Instead, she chose to provide a diatribe. Attached as *Exhibit A* is a complete true and accurate verbatim report of my interview. It lasted approximately seven minutes. Her boyfriend, Ty Keele, failed to appear entirely.

CP 4-5.

The last portion of this abbreviated interview went as follows:

Q. Okay.

A. So I'm the victim here. And that should not have happened to me. And right now I'm six months' pregnant and I've been on bed rest twice and I don't want to deal with the stress. It should have been over with. It's not fair to me to drag it out when he did this to me.

MR. CRANDALL: Move to Strike.

Q. Are you done with your narrative at this point? Can I go back to asking you questions?

A. I'm kind of feeling done with this whole meeting right now.

Q. So you don't want to answer any more questions?

A. I don't really. No.

Q. Will you answer any more questions?

A. What are you going to ask me?

Q. A lot of questions.

A. Well, I want to go home.

MR. CRANDALL: I guess we'll get a deposition

THE WITNESS: I don't feel comfortable talking to you.

MR. CRANDALL: That's a shame.

THE WITNESS: It's not a shame. It's a shame not – this person did what he did to me.

MR. CRANDALL: Oh, I know.

MR. LAURINE: All right. That's enough, Duane. Kristie, Let's –

MR. CRANDALL: No, I'm done.

CP 12-13.

The interview began at 3:30 pm and ended at 3:38 pm. CP 6, 13.

Based upon Ms Morgan's refusal to answer questions, Mr. Keele's failure to

even appear for the interview and their failure to stay in contact with the deputy prosecuting attorney in charge of the case the defense moved for a deposition with both of the state's witnesses. CP 15-17. A court commissioner later denied that request. CP 23-24. Thus, the defense did not have the opportunity to interview either witness and ended up going to trial based upon their statements to the police. RP 359-361, 551-554.

The case later came on for a three day jury trial beginning on April 2, 2014. RP 1.<sup>1</sup> During the first two days of trial the state called seven witnesses, including Kristie Morgan and Ty Keele. RP 71, 157, 185, 197, 218, 235, 265. The state then rested its case during the second day of trial. RP 291. At that point the defense called three witnesses prior to the court adjourning at the end of the day. RP 300, 316, 322.

During her testimony at trial Kristie Morgan explained that prior to April 19, 2013, she had been living with the defendant in a rental home her parents owned and that they had been planning to get married. RP 74-75. However, they got into a argument on that day and she broke off the engagement, telling the defendant that she hated him and that he had to move out. RP 77-79. The defendant then took some of his clothing and

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<sup>1</sup>The record on appeal includes four continuously numbered verbatim reports of the trial held on April 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup>, 2014, and the hearing held on April 21, 2014. They are referred to herein as "RP [page #]."

possessions and left. RP 84-88. According to Ms Morgan, over the next few weeks the defendant continually sent text messages and flowers to her in an attempt to reestablish their relationship. RP 90-100. However, she rebuffed his attempts and refused to consider any involvement with him at all. *Id.* Ms Morgan then testified that on the evening of May 23, 2013, the defendant came to her home uninvited, kicked in the front door, severely beat her new boyfriend, and then assaulted her and destroyed her phone as she tried to call the police. RP 105-121.

At the end of the second day of trial the defendant informed his attorney that he had some text messages Kristie Morgan sent him a few days prior to May 23<sup>rd</sup> that would contradict her claim that she had terminated their relationship prior to May 23<sup>rd</sup> and would contradict her claim that he had moved out prior to that date. RP 359-361, 551-554. Counsel instructed the defendant to find them and bring them to court the next day. RP 551-554. The next morning the defendant brought printouts of a number of text messages that Kristie Morgan had sent him on May 18<sup>th</sup> and May 19<sup>th</sup>, 2013. RP 551-554; CP 107-112. Counsel made copies of these printouts and gave them to the deputy prosecutor in charge of the case. RP 357-358.

Prior to calling the jury in for the third day of trial the state moved to exclude the text messages on the basis that the defendant's failure to previously provide them constituted a discovery violation. RP 357-358. In

response defense counsel explained that (1) he did not know of their existence until his client mentioned them the previous evening, (2) that since the defense had not been able to interview Kristie Morgan they had no idea that she would be claiming that she had broken up with the defendant on April 19<sup>th</sup>, well before the alleged incident on May 23<sup>rd</sup>, and (3) as a result the text messages did not even become relevant until Kristie Morgan made her claims during her testimony. RP 359-361; 549-551, 551-554. Thus, the defense argued that there had been no discovery violation and no basis upon which to suppress this evidence. *Id.*

The trial court granted the state's motion, after which the defendant took the stand and testified on his own behalf. RP 362, 370-431. According to the defendant (1) he and Kristie had not broken up prior to May 23<sup>rd</sup>, (2) that when he came home that day he saw a stranger in the house he thought was an intruder, (3) that he burst through the front door and grabbed the intruder and held him on the floor, and (4) that it wasn't until this point that he saw Kristie in the house and determined that the man he had just tackled was her new boyfriend. RP 370-395. The defendant then testified that Kristie grabbed her phone and told him that she was calling someone to come over and kill him. RP 396-397. In response he grabbed the phone and broke it. *Id.* Thus, the defendant claimed that he was acting in self-defense in all of these actions. RP 370-397.

Following the state's cross-examination the defense rested its case. RP 432. The court then instructed the jury and the parties presented closing arguments. RP 434-454, 454-500. The jury later returned verdicts of acquittal on all counts. CP 64-68. At that point the court provided supplemental instructions to the jury on the defendant's claim of self-defense and the parties presented supplemental closing arguments. CP 70-73; RP 531-543. Following further deliberations the jury returned special verdicts finding that the defendant had proved by a preponderance of the evidence that his use of force was lawful and that he had not engaged in any criminal conduct substantially related to the events giving rise to the criminal allegations. CP 74.

The parties later returned to court on the defendant's motion for an order for costs and attorneys fees pursuant to RCW 9A.16.110. RP 547-555. At that time the state did not argue that the defendant was not entitled to costs and attorneys fees or that the amounts the defense claimed were not reasonable. *Id.* Rather, the state argued that the defendant's failure to produce the text messages from his cell phone constituted a discovery violation for which the defendant should be sanctioned with a reduction in legal fees even though the court had ultimately excluded the text messages from evidence. RP 547-549; CP 98-102. The trial court agreed and reduced the award of attorneys fees by \$5,000.00. CP 96-97. The court stated the

following concerning its ruling:

JUDGE HAAN: Anything further? Based on everything, in regard to the attorney's fees and the costs, I agree that under civil recovery for those costs, because of the findings of the jury, that reasonable attorney's fees and costs are to be awarded. And the State has brought up the issue of whether or not those attorney's fees and costs would have even been incurred had the discovery been turned over of the text messages. And this Court does believe that, had those been timely turned over, that there would have at least been a different looking trial. And being that at least one of those charges would have gone away.

And I don't fault Mr. Crandall for this; I fault his client because he was the one that had control of that cellphone. He knew what the charges were that he was facing, he knew in what was being alleged here, and it was Mr. Bessey who, just on the last moment, decides to tell his attorney about these listing of text messages that, had they been brought forward, probably would have been a very different, as I say, looking trial. But that's not to say a trial wouldn't have gone forward on either different charges or other charges.

So although I am not going to zero out these fees as some kind of penalty, that I also don't see that Mr. Bessey should benefit by having all of his attorney's fees paid when there was fault on his as to the amount of attorney's fees, and was it reasonable, had he turned over those documents? So I'm going to reduce it somewhat, but not a lot. I'm going to reduce it by \$5,000.00 as a penalty for Mr. Bessey, and so the total amount will be \$35,206.13, and I am going off the fact that the State has stated the original amount was, in fact, reasonable fees. So I'm going to reduce it by some.

RP 554-556.

Following entry of this order the defendant filed timely notice of appeal. CP 103-106.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED RCW 9A.16.110 WHEN IT REFUSED TO ENTER AN ORDER REIMBURSING THE DEFENDANT FOR ALL OF HIS REASONABLE LEGAL FEES INVOLVED IN DEFENDING AGAINST A CHARGE OF BURGLARY AND ASSAULT AFTER A JURY DETERMINED BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAD ACTED IN SELF-DEFENSE.**

Under Washington Constitution, Article 1, § 24, the citizens of this state have the right to bear arms in their own defense. In recognition of this right, the Washington legislature has adopted a policy that no person shall be placed in legal peril based upon the reasonable use of force in defense of self, others or property. This policy is stated in RCW 9A.16.110(1), which provides:

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

RCW 9A.16.110(1).

In recognition of this policy, the Washington legislature has provided that the state shall reimburse the reasonable costs, lost wages, and attorney's fees of any person put in legal peril through criminal prosecution based upon that person's reasonable use of force in defense of self, others, or property. This self-defense reimbursement provision is found in RCW 9A.16.110(2),

which states:

(2) When a person charged with a crime listed in subsection (1) of this section 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. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

RCW 9A.16.110(2).

The only limitation the legislature placed upon this right to reimbursement is found in subsection 3 of the statute, which states as follows:

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

RCW 9A.16.110(3).

Our courts have liberally construed this statute to allow a defendant to recover all reasonable fees associated with a criminal prosecution that ends with a verdict of acquittal and a finding by a preponderance that the defendant acted in self defense. *State v. Jones*, 92 Wn.App. 555, 964 P.2d 398 (1998). For example, in *State v. Jones, supra*, the first trial of a defendant charged with second degree assault ended in a mistrial after the

jury disclosed that it was hopelessly deadlocked. The second trial ended in acquittal on a claim of self defense, and the jury then returned a special verdict that the defendant had proven by a preponderance of the evidence that he had acted in self-defense. The defendant then sought reimbursement for all of his legal fees, including those associated with the first trial and those associated with his post trial motions seeking reimbursement.

The trial court denied the majority of the defendant's requested fees, holding that since the first trial did not result in an acquittal, the defendant was not entitled to attorney's fees. Further, since the criminal proceeding ended with the entry of the judgment of acquittal, the post trial attorney's fees were not part of the criminal prosecution. On review, the court of appeals rejected both of these arguments, holding as follows:

When the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to "reimburse the defendant for all reasonable costs ... involved in his or her defense." The italicized word connotes the defendant's participation in the entire prosecution process; it is not limited to participation in a specific part of the process, such as one of two or more trials. Accordingly, RCW 9A.16.110 entitles a defendant to reasonable fees and costs related to the entire prosecution process, including all trials, if, after the last trial, the trier of fact acquitted and entered the required finding of self-defense.

*State v. Jones*. 92 Wn.App. 561-562.

The court then went on to state the following concerning the defendant's right to post-trial attorney's fees under RCW 9A.16.110.

Having held that Jones may recover reasonable fees and costs

related to the first trial, because the prosecution process is to be viewed as a whole, we next address when the prosecution process ends for purposes of RCW 9A.16.110. According to Jones, it ends when all disputes in the case, including fees and costs, have been finally resolved; thus, a defendant may recover post-acquittal fees and costs reasonably incurred in the trial and appellate courts. According to the State, the process ends at the moment of acquittal; thus, a defendant may not recover fees or costs related to the special verdict proceeding in the trial court, or an appeal in an appellate court.

When the Legislature commanded the State to reimburse the defendant “for all reasonable costs ... incurred in his or her defense,” it expressly and deliberately made reasonable fees and costs a part of the criminal case in which they are incurred. Indeed, it even provided by subsequent amendment that such fees and costs must be claimed in the criminal action, and that they cannot be claimed in an independent civil action. At least as a general rule, the “defense” of a case continues until all claims have been finally resolved. Accordingly, we hold that the State must compensate for post-acquittal fees and costs reasonably incurred in the trial or appellate courts.

*State v. Jones*, 92 Wn.App. 563-564.

As is apparent from a reading of RCW 9A.16.110(2), a jury’s verdict of acquittal alone is insufficient to entitle a defendant to an award of fees because the statute conditions reimbursement upon the defendant’s ability to prove to the jury by a preponderance of the evidence that the defendant acted in self defense. Thus, upon acquittal in a case in which the defendant argued self defense, the statute requires the court to submit a special verdict form to the jury asking two questions: (1) whether or not the defense had proven by a preponderance of evidence that the defendant acted in self defense, and (2)

whether or not the defendant “was engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?” *See* RCW 9A.16.110(4)&(5). While an affirmative verdict on the second question does not preclude reimbursement given an affirmative verdict on the first question, it does allow the trial court to reduce the reimbursement to the defendant. However, under the statute, an affirmative verdict on the first question and a negative verdict on the second question leaves the court with no discretion: it must enter an order reimbursing the defendant for all reasonable costs and fees.

Although not explicitly required in the statute, there is one further requirement in the procedure for submitting the reimbursement question to the jury. That requirement is that the defense must prove by a preponderance of the evidence that the claim of self-defense was “objectively” reasonable as opposed to only “subjectively” reasonable. *State v. Manuel*, 94 Wn.2d 695, 619 P.2d 977 (1980); *see also State v. Watson*, 55 Wn.App. 320, 777 P.2d 46 (1989). In other words, the defense has the burden of proving by a preponderance “that a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant.” *See State v. Walden*, 131 Wn.2d 439, 932 P.2d 1237 (1998) (“[T]he objective [standard for self defense] requires the jury . . . to determine what a reasonably prudent person similarly situated

would have done.”)

As was mentioned above, a trial court has no discretion in deciding whether or not to award costs, lost wages and attorney’s fees once the jury returns a special verdict that (1) the defendant proved by a preponderance of the evidence that the use of force was lawful, and (2) the defendant did not engage in criminal conduct substantially related to the events giving rise to the crime with which the defendant was charged. As the court noted in *State v. Jones*, “[w]hen the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to ‘reimburse the defendant for all reasonable costs ... involved in his or her defense.’” *State v. Jones*, 92 Wn.App. 561-562.

The only discretion the court has in the context of RCW 9A.16.110 is in determining the reasonableness of the defendant’s request for costs, lost wages, and attorney’s fees. However, as in all other circumstances at law, the court’s exercise of discretion is not unfettered and it is subject to appellate review when the trial court abuses that discretion. An abuse of discretion occurs “when the trial court’s decision is arbitrary or rests on untenable grounds or untenable reasons.” *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

In the case at bar the defendant argues that the trial court erred in this case when it (1) found that the defendant himself had committed a discovery violation when he failed to inform his attorney of the text messages the

complaining witness had sent him on May 18<sup>th</sup> and May 19<sup>th</sup>, 2013, (2) when it ruled that it had authority under RCW 9A.16.110 to reduce the defendant's award of attorney's fees as a discovery violation sanction after having already evidence at issue, and (3) when it abused its discretion in reducing attorney's fees. The following addresses these arguments.

***(1) The Trial Court Erred When it Found That the Defendant Had Committed a Discovery Violation.***

Discovery requirements for a defendant in criminal cases is governed by CrR 4.7(b), which states as follows:

**(b) Defendant's Obligations.**

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to: (i) appear in a lineup; (ii) speak for identification by a witness to an offense; (iii) be fingerprinted; (iv) pose for photographs not involving reenactment of the crime charged; (v) try on articles of clothing; (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof; (vii) provide specimens of the defendant's handwriting; (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination; (ix) state whether there is any claim of incompetency to stand trial; (x) allow inspection of physical or documentary evidence in defendant's possession; (xi)

state whether the defendant's prior convictions will be stipulated or need to be proved; (xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses; (xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense; (xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

CrR 4.7(b).

Under the first section of part (b) of the rule a defendant has the duty to disclose the following material within the defendant's control: (1) "the names and addresses of persons whom the defendant intends to call as witnesses." and (2) "any written or recorded statements and the substance of any oral statements of such witness." In this case there is no claim that the defendant ever had the intent to call Kristie Morgan as a witness. Thus, he had no duty under the rule to produce any of Kristie Morgan's "recorded statements" such as prior text messages he possessed. Consequently, the defendant did not violate CrR 4.7(b)(1).

It is true that under CrR 4.7(b)(2)(x) a defendant has the duty to "allow inspection of physical or documentary evidence in defendant's possession." Certainly the text messages Kristie Morgan sent the defendant on May 18<sup>th</sup> and May 19<sup>th</sup>, 2013, would fall within the broad definition of "physical or documentary evidence in defendant's possession." However, the defendant's failure to provide the text messages prior to trial was no

discovery violation under CrR 4.7(b)(2)(x) because a defendant's duty under subsection (b)(2) is only triggered "on the motion of the prosecuting attorney." In the case at bar the state did not make any specific oral or written discovery requests for any of the information on the defendant's cell phone. Indeed, trial record reveals that the defendant was the only party who even filed a written omnibus request relating to discovery. *See Omnibus Application by Defendant, CP 120-121.*

Apart from the requirements of the rule, two additional facts adduced at trial speak volumes concerning why the defendant's failure to produce the text messages here at issue was not a discovery violation. The first fact is that the state was well aware that Kristie Morgan and the defendant had routinely exchanged text messages during the relevant time to this case and the state at no point attempted to gain access to the defendant's cell phone or cell phone account. Indeed, prior to trial the prosecutor had no idea that the defendant's cell phone had any messages on it relevant to the issues presented in the case. The reason the prosecutor had no such idea was that Kristie Morgan had apparently lied to him by denying any contact with the defendant for two week prior to the incident. In addition, the defendant had no idea of the relevance of the text messages because the defense was unaware that Kristie Morgan was actively deceiving the prosecutor with her claim of no contact for the two weeks prior to the incident.

Second, it was not until the prosecutor in this case unwittingly suborned Kristie Morgan's perjury concerning her lack of contact with the defendant for the two weeks prior to the incident that the defense first became aware that the text messages she sent the defendant were in any way relevant. Once that relevance became clear the defendant produced the messages in as timely a manner as possible. Thus, in the case at bar the defendant at no point violated CrR 4.7 in failing to produce text messages that only became relevant upon hearing Kristie Morgan's perjury during trial. As a result, the trial court in this case erred when it found that the defendant had committed a discovery violation.

***(2) The Trial Court Erred When it Ruled That a Reduction of Attorney's Fees Was Allowed Under RCW 9A.16.110 as a Discovery Violation Sanction.***

As was mentioned previously, an award of costs and attorneys fees under RCW 9A.16.110 is not discretionary; it is mandatory once the court finds that the defendant has met the requirements of the statute. Although the court certainly retains discretion in determining the reasonableness of those fees, the court does not have discretion to refuse or reduce those reasonable fees. *See State v. Jones, supra* at 561-562 (“[w]hen the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to ‘reimburse the defendant for all reasonable costs ... involved in his or her defense.’”

In the case at bar the court has attempted to circumvent this

requirement by claiming the discretion to limit or reduce the defendant's right to reimbursement of all of his attorney's fees based upon the court's perception that the defendant committed a discovery violation. By so holding the court directly contravened the intent of the legislature under RCW 9A.16.110 as recognized in *Jones*. Thus, the court acted in excess of its authority.

***(3) The Trial Court Abused its Discretion When it Imposed a \$5,000.00 Discovery Violation Sanction Against the Defendant.***

Sanctions for discovery violations in criminal cases are governed under CrR 4.7(h)(7), which states as follows:

(7) Sanctions. (i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances. (ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

CrR 4.7(h)(7).

The imposition of sanctions under this rule lies within the sound discretion of the trial court. *State v. Ramos*, 83 Wn.App. 622, 922 P.2d 193 (1996). That discretion is abused when the trial court exercises it in a manifestly unreasonable manner, on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993). As the

following explains, this is precisely what the trial court did in this case.

During the defendant's motion requesting costs and attorney's fees in this case the prosecutor claimed that had he known about the text messages Kristie Morgan sent the defendant he would not have filed the charges or would have dismissed had they already been filed. The prosecutor stated:

We did not have the time to request sanctions against Defense Counsel for the late – late discovery, but in further review of those text messages, and Your Honor has had – had the opportunity to review them at the time that you excluded them, it became clear to myself and both of my superiors that, had we had those text messages that were in the Defendant's control, which presumably is within the control of Defense Counsel, we would not have gone forward with the case.

I think litigation could have been prevented and indeed, jeopardy that the Defendant faced would have been eliminated.

RP 548-549.

Although the court did not completely accept this statement, it apparently did have a fairly large effect upon the decision to reduce the defendant's attorney's fees. The court stated:

JUDGE HAAN: Anything further? Based on everything, in regard to the attorney's fees and the costs, I agree that under civil recovery for those costs, because of the findings of the jury, that reasonable attorney's fees and costs are to be awarded. And the State has brought up the issue of whether or not those attorney's fees and costs would have even been incurred had the discovery been turned over of the text messages. And this Court does believe that, had those been timely turned over, that there would have at least been a different looking trial. And being that at least one of those charges would have gone away.

And I don't fault Mr. Crandall for this: I fault his client because he was the one that had control of that cellphone. He knew what the charges were that he was facing, he knew in what was being alleged here, and it was Mr. Bessey who, just on the last moment, decides to tell his attorney about these listing of text messages that, had they been brought forward, probably would have been a very different, as I say, looking trial. But that's not to say a trial wouldn't have gone forward on either different charges or other charges.

So although I am not going to zero out these fees as some kind of penalty, that I also don't see that Mr. Bessey should benefit by having all of his attorney's fees paid when there was fault on his as to the amount of attorney's fees, and was it reasonable, had he turned over those documents? So I'm going to reduce it somewhat, but not a lot. I'm going to reduce it by \$5,000.00 as a penalty for Mr. Bessey, and so the total amount will be \$35,206.13, and I am going off the fact that the State has stated the original amount was, in fact, reasonable fees. So I'm going to reduce it by some.

RP 554-556.

The problem with this ruling and using the prosecutor's claim as a basis to reduce the defendant's attorney's fees is that it ignores one critical fact: Up until the jury returned its verdict the prosecutor had the power to move to dismiss the charges. In spite of this fact and even after disclosure of the text messages the prosecutor cross-examined the defendant, proposed and argued jury instructions, presented closing argument, sat through defendant's closing, presented rebuttal argument, and sat and waited for the jury to return verdicts. In this case the jury did not return its verdicts of acquittal until 3:10 pm on the afternoon of the third date of trial. RP 513. Thus, it is specious indeed for the prosecutor to argue that the defendant's failure to produce text

messages until 8:30 on the morning of the third day of trial somehow prevented him from moving to dismiss the charges for the next six and one-half hours. Indeed, it was also well within the state's power to request a continuance based upon the discovery of the text messages in order to confer with its witness or decide what action to take. The prosecutor made no such request. Rather, he continued on with a prosecution based upon palpably false evidence.

The irony of the prosecutor's claim and the court's adoption of it is that had the prosecutor done what he somehow claimed he couldn't do (dismiss the charges once he found out that his complaining witness had perjured herself), he would have completely eliminated defendant's ability to recover costs and attorney's fees under RCW 9A.16.110. The reason is that under the statute a defendant's right to recovery is only operative upon a jury's verdict of acquittal followed by the same jury's finding that the defendant had proved by a preponderance of the evidence that he had acted in self-defense. Consequently, in this case the trial court's decision reducing the defendant's attorney's fees was "manifestly unreasonable" and therefore an abuse of discretion. As a result this court should reverse that decision.

**II. UNDER RCW 9A.16.110, THE DEFENDANT IS ENTITLED TO REASONABLE COSTS AND ATTORNEY'S FEES ON APPEAL.**

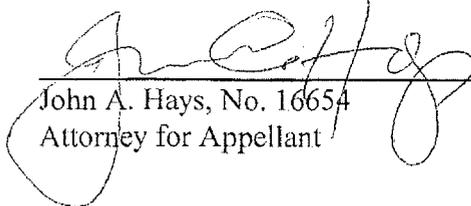
In *State v. Jones, supra*, the court specifically addressed the issue whether or not post-acquittal fees and costs reasonably incurred in the trial or appellate courts are compensable under RCW 9A.16.110. As the court noted in that case, under the statute the Legislature intended to command the State to reimburse a defendant for reasonable fees and costs involved in “his or her defense,” not just “his or her criminal defense.” *State v. Jones*, 92 Wn.App. at 565. Accordingly, in *Jones*, the court held that the State must reimburse the defense for reasonable costs and fees incurred in this case through final appeal. *See also State v. Lee*, 96 Wn.App. 336, 979 P.3d 458 (1999). Consequently, in the case at bar, if the defendant prevails upon his claims, he is entitled to costs and attorney’s fees on appeal.

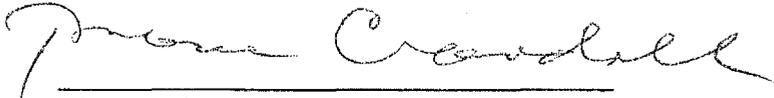
**CONCLUSION**

The trial court erred when it reduced the defendant's request for attorney's fees because (1) the defendant did not violate any discovery rules, (2) RCW 9A.16.110 does not allow for such a reduction, and (3) the trial court's decision was manifestly unreasonable.

DATED this 13<sup>th</sup> day of January, 2015.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

  
\_\_\_\_\_  
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## APPENDIX

### RCW 9A.16.110

#### Defending against violent crime – Reimbursement

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

(2) When a person charged with a crime listed in subsection (1) of this section 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. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

Nothing in this section precludes the legislature from using the sundry claims process to grant an award where none was granted under this section or to grant a higher award than one granted under this section.

(4) Whenever the issue of self-defense under this section is decided by a judge, the judge shall consider the same questions as must be answered in the special verdict under subsection [(5)] of this section.

(5) Whenever the issue of self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty, the court shall instruct the jury to return a special verdict in substantially the following form:

answer yes or no

1. Was the finding of not guilty based upon self-defense?
2. If your answer to question 1 is no, do not answer the remaining question.
3. If your answer to question 1 is yes, was the defendant:
  - a. Protecting himself or herself?
  - b. Protecting his or her family?
  - c. Protecting his or her property?
  - d. Coming to the aid of another who was in imminent danger of a heinous crime?
  - e. Coming to the aid of another who was the victim of a heinous crime?
  - f. Engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?

**CrR 4.7**  
**Discovery**

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses; (ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one; (iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed; (iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons; (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and (vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof; (ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney; (iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) Defendant's Obligations.

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

(i) appear in a lineup; (ii) speak for identification by a witness to an offense; (iii) be fingerprinted; (iv) pose for photographs not involving reenactment of the crime charged; (v) try on articles of clothing; (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof; (vii) provide specimens of the defendant's handwriting; (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination; (ix) state whether there is any claim of incompetency to stand trial; (x) allow inspection of physical or documentary evidence in defendant's possession; (xi) state whether the defendant's prior convictions will be stipulated or need to be proved; (xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses; (xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense; (xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) Additional Disclosures Upon Request and Specification. Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

- (1) Specified searches and seizures;
- (2) The acquisition of specified statements from the defendant; and
- (3) The relationship, if any, of specified persons to the prosecuting authority.

(d) Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary Disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv).

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be

denied.

(g) Medical and Scientific Reports. Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) Regulation of Discovery.

(1) Investigations Not to Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) Continuing Duty to Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under

this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

(i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**

**NO. 46233-8-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

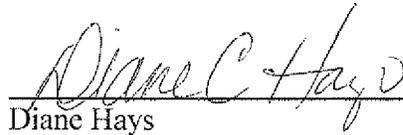
**JOSHUA J. Bessey,**  
**Appellant.**

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The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 4<sup>th</sup> day of November, 2014, at Longview, WA.

  
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Diane Hays