

**NO. 46233-8-II**

**IN THE 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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**RESPONDENT'S BRIEF**

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**I. STATEMENT OF THE CASE**

The state agrees with appellant's rendition of the facts.

**II. ISSUE**

1. Whether the trial court abused its discretion by reducing the fees awarded to the appellant for a ruled discovery violation when the court ruled that had the appellant turned over the evidence earlier he would have avoided any jeopardy thus making his request for fees unnecessary?

**III. ARGUMENT**

RCW 9A.16.110(1) states, "[n]o 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(2) adds that "[w]hen 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."

"The statute does not set out the specific procedure to be followed in determining whether a defendant qualifies for the reimbursement. The Supreme Court of Washington devised such a procedure when the need arose in *State v. Manuel*, 94 Wash.2d 695, 619 P.2d 977 (1980)." *State v. Watson*, 55 Wash.App. 320, 321 (1989).

"First, the jury must be instructed that the burden is upon the defendant to prove by a preponderance of the evidence that his acts were reasonably necessary to defend himself or another against an attack which he did not provoke or invite. *Manuel*, 94 Wash.2d at 700, 619 P.2d 977. Second, the statute requires an objective determination that the defendant's actions were justified. *Manuel*, 94 Wash.2d at 699, 619 P.2d 977. Third, the statute requires a full determination of the facts by considering evidence which may have been inadmissible at trial. *Manuel*, 94 Wash.2d at 699, 619 P.2d 977." *Id.* at 321-323.

In RCW 9A.16.110(2), the section at issue, the legislature gave trial courts the discretion to determine the total amount of the award. "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); *State v. Villanueva*, 177

Wash.App. 251, 255, 311 P.3d 79 (2013); *see State v. Anderson*, 72 Wash.App. 253, 259, 863 P.2d 1370 (1993)(the peculiar terms of RCW 9A.16.110 are very broad) *citing Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297 2301, 85 L.Ed.2d 692 (1985)(a statute must be construed according to its terms).

Other sections of the chapter comport with the idea the trial court has the discretion to judge what is an appropriate award. In RCW 9A.16.110(3) the legislature gave trial courts the discretion to “deny or reduce the amount of the award” based on the defendant’s own culpability.

The issue before the court then is whether or not the trial court abused its discretion when it reduced the appellant’s award because it found the appellant engaged in trial-ambush tactics, tactics that subverted a likely dismissal of the charges against him. An abuse of discretion occurs when a 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 (2011).

Where a party fails to comply with an applicable discovery rule or a trial court order pursuant to an applicable discovery rule, the trial 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.” CrR 4.7(h)(7)(i). Exclusion or suppression of evidence or dismissal for a discovery violation

is an extraordinary remedy and should be applied narrowly. *State v. Hutchinson*, 135 Wash.2d 863, 882, 959 P.2d 1061(1998); *State v. Smith*, 67 Wash.App. 847, 852, 841 P.2d 65 (1992).

Here, the trial court was not impressed with the appellant's behavior and was unconvinced by his claim that he forgot about the existence of the evidence, noting that he was the sole person in possession of this evidence and therefore in control of when and how it was produced. But even in its incredulousness the court still awarded the appellant \$30,000 in attorney's fees, which reduced the requested fees by only \$5000. The trial court complied with RCW 9A.16.110, but reasoned the appellant should not "benefit by having all his attorney's fees paid when there was fault on his [part]." RP 555-556.

Given the appellant withheld evidence, the reduction in fees was not unreasonable nor was it an abuse of discretion. RCW 9A.16.110 is not a statute intended to award defendants windfalls for going to trial, it is an indemnification-reimbursement statute. *Anderson*, 72 Wash.App. at 263, 863 P.2d 1370. The State reimburses a defendant's actual legal fees by paying an amount equal to the fees that a defendant paid in the past. 72 Wash.App. at 263. The evidence would have resulted in a likely dismissal of charges and reduced the jeopardy the appellant faced. It seems counterintuitive that a defendant would withhold favorable evidence until

the last minute but that is what the appellant did. Even still, the trial court did not reduce the entirety of the reward; it made a reasoned and just reduction of the fees based on the facts of the special circumstances before it at the time.

Moreover, appellant provided information not of the actual attorney fees he paid, billed out hourly with specific references to his attorney's efforts on his behalf, but rather a lump sum accompanied by affidavits in support of the reasonableness of the fees requested. This is not the result anticipated by RCW 9A.16.110, nor is it the proper procedure under *Anderson*, where the court ruled fees are determined by what a defendant actually paid, not by what is reasonable. 72 Wash.App. at 263. In that sense, the court's ruling did not upset the statute because a court cannot give an award for a nebulous number; it must have specific facts and assurances in order to make a determination of the actual fees it awards.

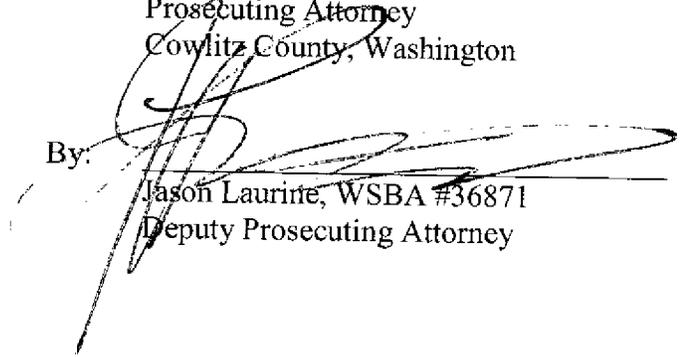
IV. CONCLUSION

Based on the above, the Court should find that the trial court did not abuse its discretion by reducing the appellant's awarded fees by a nominal amount to address his failure to provide crucial evidence.

Respectively submitted this 6 day of January, 2015.

RYAN JURVAKAINEN  
Prosecuting Attorney  
Cowlitz County, Washington

By:



Jason Laurite, WSBA #36871  
Deputy Prosecuting Attorney

## CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 7<sup>th</sup> day of January, 2015.

  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**January 07, 2015 - 10:56 AM**

## Transmittal Letter

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