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Court of Appeals
Division I
State of Washington

NO. 73949-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,
Respondent/Cross-Appellant,

v.

BRIAN DECKER,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SAMUEL CHUNG

BRIEF OF RESPONDENT/CROSS-APPELLANT

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A. CROSS-ASSIGNMENTS OF ERROR

1. The trial court erred by awarding Decker \$11,760 in self-defense reimbursement based solely on a “lodestar” estimate of reasonable attorney fees.

2. The trial court erred by ordering reimbursement without any evidence of actual costs that Decker had paid or became legally obligated to pay in his case.

3. The trial court erred by setting an arbitrary reimbursement amount.

B. ISSUES PRESENTED

1. Is the Confrontation Clause irrelevant to a determination of probable cause at the initiation of a criminal case?

2. Did the trial court act within its discretion in denying Decker a trial continuance after the State amended the information to add joinder language without changing the charges, elements, or alleged facts?

3. Did the trial court properly reject a jury instruction on defense of property because Decker did not show any evidence that he used lawful force in defense of property in his lawful possession?

4. Did the trial court properly allow Decker's case to proceed to the jury?

5. Has Decker failed to show any discovery violations, where all discovery was provided before omnibus, he can point to no undisclosed material evidence, and his accusation that the trial prosecutor committed a felony by conferring with a witness is frivolous at best?

6. Does Decker fail to show cumulative error?

7. Did the trial court err by awarding any amount of self-defense reimbursement to Decker, where Decker provided no evidence that he had paid or was legally obligated to pay any legal costs?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Brian Decker was charged by amended information with two counts of assault in the third degree, both alleged to have occurred in King County, Washington, on or about December 21, 2014. CP 93. In Count One, the State charged that Decker, with criminal negligence, caused bodily harm to Camryne O'Brien by means of pepper spray. Id. In Count Two, the State charged Decker with identical conduct against Theodore Chandler. Id.

A jury acquitted Decker of Count One but convicted him of Count Two. CP 194-95. The jury answered affirmatively that Decker had proved that the use of force in Count One was lawful. CP 196. For Count Two, the trial court imposed a standard-range sentence of 35 days in jail, with credit for time served and 30 days converted to community service. CP 242.

Decker moved for reimbursement under RCW 9A.16.110, demanding \$78,400 in reasonable attorney's fees. CP 222-25. The trial court awarded \$11,760 in attorney's fees to Decker. CP 281. The trial court denied Decker's motion to reconsider. CP 287-301.

Decker timely appealed his conviction and the trial court's reimbursement order. CP 220. The State timely cross-appealed the trial court's Order on Award of Attorney's Fees. CP 282.

2. FACTS OF THE CRIME

In the city of Mercer Island, no apartment complex compares in size to Shorewood, a sprawling neighborhood of 30 to 40 buildings with hundreds of rental units, built around a large oval drive with side streets, parking lots and spaces for hundreds of

vehicles. 6RP 561-62; 8RP 986.¹ The community has ball courts, a recreation center and a nature trail. 6RP 562.

As midnight approached on December 20-21, 2014, two friends, Theodore Chandler, 18, and Camryne O'Brien, 19, were sharing a cigarette and chatting in Chandler's sport-utility vehicle (SUV) at a parking lot next to the tennis/basketball court. 6RP 634-38; 7RP 817. The teens lived near Shorewood, and went there often to hang out. 6RP 636-37.

An hour or so earlier, Shorewood tenant Brian Decker had returned home to his apartment and mixed himself at least three or four stiff whiskey cocktails. 8RP 940, 1010-11. As midnight approached, Decker went to the parking lot to smoke. 8RP 940. He had a flashlight and a can of pepper spray in his pockets. Id. Decker had been bothered by vandalism and people smoking and drinking in the lot. 6RP 563; 8RP 941.

As Chandler and O'Brien chatted in the SUV, someone suddenly shined a bright flashlight in their eyes and held it there for what seemed like a couple of minutes. 6RP 637-39; 7RP 818-19.

¹ The verbatim report of proceedings is sequentially numbered but divided into nine volumes. The State has numbered the pages following the volume numbers: 1RP (January 7 and 21, 2015; February 11, 2015); 2RP (March 11 and 15, 2015; June 4, 2015); 3RP (June 12 and 17, 2015; July 2, 2015); 4RP (July 13, 2015); 5RP (July 14, 2015); 6RP (July 16, 2015); 7RP (July 20, 2015); 8RP (July 21, 2015); 9RP (July 22, 2015; September 4, 2015).

As the light neared, the teens saw a silent stranger, Decker, who had a cigarette dangling from his lips and seemed “quite intoxicated.” Id. O’Brien yelled to find out what Decker wanted. 6RP 637; 7RP 819. Decker slurred something about suspicious activity and walked away to speak with a woman across the lot. 6RP 637-39; 7RP 819. Decker told the woman, a neighbor, to leave and call the police. 8RP 946.

Chandler and O’Brien were confused and “a bit frightened,” so they decided to leave. 6RP 639; 7RP 819. O’Brien got into his own pickup and followed Chandler’s SUV across the parking lot to the one-lane outlet. 6RP 640; 7RP 819. Decker suddenly stepped out in front of Chandler’s SUV. 6RP 640.

O’Brien got out of his pickup and approached Decker, who remained in the middle of the driveway with a blank look on his face. 6RP 642-43; 7RP 819-20, 833. O’Brien yelled and cursed angrily at Decker to find out why he was bothering them. 7RP 820-22, 835-36. Decker sighed, then pepper-sprayed O’Brien in the face. 6RP 643; 7RP 820.

O’Brien retreated to his truck with his eyes burning “like hell.” 7RP 820, 824. Decker turned to Chandler, who was still sitting in the driver’s seat of his SUV, and “hosed [him] down” with pepper

spray through the open window. 6RP 641-44; 7RP 820. "I was scared for my life," Chandler later testified. 6RP 645. Chandler got out and punched Decker once in the face, and the spraying stopped. Id.

O'Brien tried to flee by driving his truck onto a lawn, but got stuck in the mud. 7RP 820. He called 911. 7RP 826-33. Chandler steered his vehicle out of the parking lot and around a corner, but he was blinded and hyperventilating. 6RP 646. He sideswiped a parked car. Id.

When Decker heard O'Brien calling 911, he decided to call 911 too. 6RP 575; 8RP 969. Decker told the dispatcher that he had shined a flashlight on two young men, so they "confronted" him to find out why, "and it escalated." 6RP 577. "I don't know why they were trying to escape," Decker told the dispatcher. 6RP 576. "I mean, I don't even know why they were there in the back apartment building in the first place." 6RP 576-77.

Police arrived quickly and found Decker inebriated, reeking of alcohol, slurring his words and not able to follow conversation. 5RP 313-14; 6RP 580-81; 7RP 704-05. Chandler and O'Brien showed no signs of alcohol consumption but were heavily affected by pepper spray. 6RP 582-85, 591; 7RP 703-04.

Decker told officers that “he was tired of crimes being committed in the parking lot, and he didn’t want [Chandler and O’Brien] to get away.” 7RP 702. Decker repeatedly said he had “fucked up,” and “he screwed up and he should have let them leave.” 7RP 707. Decker claimed he felt threatened by O’Brien but did not remember spraying Chandler. 6RP 581; 7RP 702-03.

Additional facts are presented as relevant to specific issues.

D. ARGUMENT

1. DECKER’S CONFRONTATION-CLAUSE RIGHTS WERE NOT VIOLATED BY THE CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE.

Decker’s demand for reversal of his conviction begins with a contention, made for the first time here and devoid of supporting authority, that he had a right under the Sixth Amendment’s Confrontation Clause to cross-examine the police sergeant who wrote the initial Certification for Determination of Probable Cause. This argument is frivolous.

The Sixth Amendment’s Confrontation Clause confers upon an accused the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. It generally bars admission of testimonial hearsay *at trial*. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The

Confrontation Clause does not apply to the admission of hearsay at pretrial hearings. State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). See also 5C Wash. Prac., Evidence Law and Practice § 1300.6 (5th ed.) (“Within the context of a criminal proceeding, the clause applies only to evidence offered at trial.”).

An alleged violation of the Confrontation Clause is reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Failure to assert the confrontation right at or before trial forfeits the right. State v. O’Cain, 169 Wn. App. 228, 279 P.3d 926 (2012).

The Certification for Determination of Probable Cause by Mercer Island Police Detective Sgt. J. Magnan, submitted at initial charging pursuant to CrR 2.2, was based on Magnan’s review of patrol officers’ reports, written statements of O’Brien and Chandler, photos of their injuries and a can of pepper spray recovered from Decker’s pocket. CP 3-4. Probable cause may be based on hearsay and other unscrutinized evidence that would be inadmissible at trial. State v. Chenoweth, 160 Wn.2d 454, 475, 158 P.3d 595 (2007).

Decker did not ask to examine Sgt. Magnan pretrial and did not call him as a witness at trial.² Decker did not raise a Confrontation Clause challenge to the probable-cause document below. He has waived this issue even if it were not frivolous.

The State did not offer the certification or any other out-of-court statements of Sgt. Magnan at trial. Magnan was not called as a trial witness by either party. Decker's confrontation rights were not implicated. Decker has provided no authority for his claim that the State had to present Sgt. Magnan for in-court examination before Decker's case could be docketed for trial. This argument should be rejected as frivolous.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DECKER A CONTINUANCE AFTER THE STATE AMENDED THE INFORMATION WITHOUT AFFECTING THE CHARGES.

Decker next claims this Court should reverse his conviction because the trial court denied his motion for a continuance after the State amended the information without changing the charged offenses, the alleged elements or the underlying facts. This

² However, Decker did make a pretrial motion to dismiss under CrR 8.3(c) that relied entirely on assuming the truth of Magnan's hearsay statements in the probable-cause certification, an argument he repeats on appeal.

argument fails because he has not shown any prejudice, and thus no abuse of the trial court's discretion.

a. Additional Relevant Facts.

The State initially charged Decker with one count of third-degree assault naming both O'Brien and Chandler as victims. CP 1. At an omnibus hearing on May 15, 2015, the State moved to amend the Information to charge two counts of third-degree assault, one for each victim, and it provided a copy to Decker. 2RP 27; CP 51. Decker complained about notice and moved to continue omnibus, so the State reserved the motion to amend. 2RP 27-28. At the next omnibus a month later, the State filed the First Amended Information and the court arraigned Decker on the two counts. 3RP 56-58; CP 51.

The First Amended Information inadvertently lacked boilerplate joinder language. 4RP 91-92; CP 5. Decker did not object to this or object to joinder at the time of amendment. 3RP 56-58. Nor did he complain about joinder at the next omnibus on July 2, when both counts were set for trial together on July 13. 3RP 77-80; CP 63-64.

On the morning of trial, Monday, July 13, before the presiding judge,³ the State moved to amend the information to add the correct joinder language. 4RP 91. Decker moved to dismiss the case for “government misconduct,” but his attorney added, “We’re not asking for a continuance now.” 4RP 93-96. The presiding judge noted that it was “pretty clear” all along that the State’s intent was to divide one count naming two victims into two joined counts. 4RP 92. The court denied the motion to dismiss and sent the case to the trial judge. 4RP 99.

There, Decker again moved for dismissal. 4RP 127. Decker’s lawyer claimed that even though he had been notified of the proposed Second Amended Information the previous Thursday (July 9), Decker had come to court believing that he was going to face trial on one count or the other, but not both, or perhaps that evidence of one assault would not be part of the evidence of the other. 4RP 124-29.

The trial court granted the Second Amended Information. 4RP 129; CP 91-93. The court said, “I don’t see substantial rights of the defendant are prejudiced” and that the missing joinder language was a scrivener’s error. 4RP 129. Decker moved “for us

³ The Hon. Jim Rogers.

to be given that Information and adequate time to prepare our defense thereunder.” Id. The trial court replied that it was time to “move forward.” 4RP 130.

b. Decker Fails To Demonstrate Prejudice.

Under CrR 2.1, the trial court may permit an amendment of the information at any time before verdict if substantial rights of the defendant are not prejudiced. The defendant has the burden of showing prejudice. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993). When the amendment does not change the principal elements or the factual circumstances, impermissible prejudice is unlikely. Id. at 621-23.

A grant or denial of a motion for a continuance is within the sound discretion of the trial court. State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982). The trial court may consider “surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). This court reviews a trial court’s denial of a motion to continue for an abuse of discretion. Id. at 272. A denial of a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial

would likely have been different had the motion been granted.

Kelly, 32 Wn. App. at 114.

An amendment to the information on the morning of trial may be cause for a continuance. State v. Purdom, 106 Wn.2d 745, 748-49, 725 P.2d 622 (1986). But the discretion to grant or deny one still lies soundly with the trial court. Id. at 748. Decker's entire argument relies on the erroneous assertion that Purdom created a bright-line rule requiring a continuance upon request, regardless of the circumstances. The supreme court's holding in Purdom was that under those particular facts, Purdom needed a continuance "to prepare to meet the actual charge made against him."

This case is distinguishable from Purdom. In Purdom, the amendment involved an entirely new criminal charge under a separate section of the criminal code. Id. at 746-47. Here, the number of charges and the elements did not change.

On appeal, Decker does not mention prejudice, so his claim is a dead letter. His arguments to the trial court were disingenuous and illogical. If Decker, with his private, licensed attorney, had truly come to court that morning not knowing which assault charge would be tried, he would, presumably, have been prepared for

both.⁴ Decker knew for days of the State's proposed amendment to add the standard joinder language, and he had known for months that he faced two assault counts that were docketed for trial together.⁵ He prepared an aggressive defense to both counts that resulted in an acquittal on one of them. Decker fails to show prejudice. The trial court did not abuse its discretion by denying a continuance due to the addition of joinder language.

3. THE TRIAL COURT PROPERLY REJECTED A JURY INSTRUCTION ON DEFENSE OF PROPERTY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT IT.

Next, Decker seeks reversal by claiming the jury should have received a defense-of-property instruction. This argument fails because Decker presented no evidence to support his claim that he had a possessory right to forcibly patrol the common parking lot of the Shorewood apartment complex, or that either teenager posed any threat to Decker's personal property when he pepper-sprayed them.

⁴ After all, Decker's lawyer later submitted an affidavit claiming to have spent 136 hours preparing for this trial, and an additional 20 hours conferring with Decker. CP 222-25.

⁵ CrR 4.3.1 requires mandatory joinder where the crimes are "related offenses." CrR 4.3.1(b); State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Offenses are "related" under the rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1); Lee, 132 Wn.2d at 501.

a. Additional Relevant Facts.

Pretrial, the State moved to preclude Decker from pursuing an affirmative defense of lawful force against malicious trespassers because, as a renter, he had no lawful possession of the common parking lot and driveway. CP 129; 5RP 418-20. See RCW 9A.16.020(3). Decker argued he possessed the parking lot. 5RP 421-27. The trial court allowed evidence on whether Chandler and O'Brien were trespassing, but reserved ruling on the jury instruction. 6RP 524.

Decker proposed a self-defense instruction that contained the entirety of WPIC 17.02, including a paragraph that said:

The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

CP 163; see WPIC 17.02. After the State rested, the trial court ruled that it would give WPIC 17.02 except the paragraph on defense of property, because "the possessory interest argument doesn't apply." 8RP 898-99.

Decker then testified that when he first shined a flashlight on the teens he was "a bit suspicious" and was "concerned about my vehicle," which was 25 to 35 feet away. 8RP 941. But when his

attorney asked him whether he believed that “these people presented a threat to your car,” Decker replied:

There was no way of telling that. I mean, I don't know. They were just sitting there in the parking lot, at the very end of the parking lot. I don't know what they were up to. I don't know what they were doing or why they were there. I just wanted to know if -- the only reason I walked back there, ladies and gentlemen of the jury, is that I wasn't sure if I saw that red light or not.

8RP 946. Decker agreed that he did not see the teens car-prowling or vandalizing anything. 8RP 987.

Decker claimed that after O'Brien yelled at him, he made a terrified retreat by walking through the parking lot and up the driveway toward his apartment, but the two vehicles rushed up on him and O'Brien charged at him. 8RP 955. Decker said he “was actually bracing for this guy to hit me,” so he pepper-sprayed O'Brien. 8RP 959. Decker told the jury that he was afraid Chandler might run him over, or maybe was armed, and Chandler “had every chance to get his scummy — he could have taken it out of park and whatever and just drove off,” but instead was “still sitting there.” 8RP 966. In explaining why he pepper-sprayed the teens, Decker did not mention his own vehicle or other property at all. 8RP 947-1011.

Decker testified that he had a normal landlord-tenant relationship with Shorewood management and was not an employee. 8RP 985, 1023.

Decker then rested his case and asked the trial court to reconsider the defense-of-property instruction. 8RP 1031. The trial court denied the instruction “for the reasons that I stated earlier.”

Id.

b. Decker Did Not Meet His Burden Of Showing Evidence To Support The Defense.

A defendant is entitled to have the jury instructed on his theory of the case if there was evidence to support that theory, and failure to do so is reversible error. State v. Fisher, ___ Wn.2d ___, 374 P.3d 1185, 1192, 2016 WL 3748944 (July 7, 2016). To be entitled to a jury instruction on lawful force, the defendant must produce some evidence demonstrating lawful force. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). See also State v. Vander Houwen, 163 Wn.2d 25, 35, 177 P.3d 93 (2008) (defendant bears burden of production for affirmative defense of protection of property). This evidence may come from whatever source tends to show that the defendant is entitled to the instruction, including the State’s evidence. Fisher, 374 P.3d at

1192-93. "A defendant may not, however, point to the State's absence of evidence in order to satisfy her burden" of production. Id. at 1193.

The trial court is justified in denying a request for an instruction only where no credible evidence appears in the record to support it. Id. at 1192. When a trial court's refusal to give a jury instruction is based on lack of evidence supporting an affirmative defense, the standard of review is de novo. Id.

In relevant part, RCW 9A.16.020 permits the use of force "in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession." Accordingly, WPIC 17.02 provides that the use of force is lawful when "used in preventing or attempting to prevent a *malicious trespass or other malicious interference* with real or personal property *lawfully in that person's possession*, and when the force is not more than is necessary." WPIC 17.02 (emphasis added).

- i. Decker did not show defense against malicious trespass because he did not have lawful possession of the common parking lot and driveway.

If an owner of real estate demises a portion of it, to which access is had by areas or approaches used in common with the owner or other tenants, the owner "retains as to the tenant the possession and control" of those undemised common areas.

Schedler v. Wagner, 37 Wn.2d 612, 615, 225 P.2d 213 (1950), adhered to on reh'g, 37 Wn.2d 612, 230 P.2d 600 (1951), overruled on other grounds by Geise v. Lee, 84 Wn.2d 866, 529 P.2d 1054 (1975). The tenant is a licensee of such undemised common areas. Id.

Similarly:

It is a general rule of law that, when premises are leased, a stairway necessary to be used with them, and which is intended shall be **for the exclusive use of the tenant** and his invitees, passes as an appurtenant to the leased premises and is covered by the lease, though not specifically mentioned or described therein; **but, when premises are leased to several tenants and it is necessary, in the enjoyment thereof, that they use a common stairway** and no mention is made of it when the lease is made, **it is not deemed to be appurtenant to the leased premises and covered by the lease**, but the tenants and their invitees have the right to use the same as a means of access to the leased property.

Resident Action Council v. Seattle Hous. Auth., 162 Wn.2d 773, 779, 174 P.3d 84 (2008) (quoting Andrews v. McCutcheon, 17 Wn.2d 340, 344-45, 135 P.2d 459 (1943)).

In other words, a tenant has lawful possession only of leased property that is *for the exclusive use of the tenant*, not common areas. A malicious-trespasser defense was not available to Decker because the parking lot and driveway of the Shorewood apartments were common areas and not for Decker's exclusive use. Whether Chandler and O'Brien might have been trespassing at Shorewood does not matter.

Decker's insistence that the common parking lot was his "personal real property" because he lived at Shorewood relies entirely on a single paragraph in Resident Action Council that he has taken out of context:

This same reasoning would apply if the leased premises involved a single family residence. The general rule is that the tenant receives the right to possess and use the house, the yard, and everything else necessary to the use of the leased premises. An apartment lease operates on the same principle as does a lease of a single family residence.

Resident Action Council, 162 Wn.2d at 780.

In Resident Action Council, a free speech case, the issue was whether the tenants of an apartment building had possession

of their outer doors. Id. at 775. The supreme court held that “[w]hen a door is *necessary* to a tenant’s use of the premises, *and is for the exclusive use of the tenant* and the tenant’s invitees, it passes as an appurtenant to the leased premises and is part of the leased premises” unless the lease says otherwise. Id. at 779-80 (emphasis added). The next paragraph of the opinion, quoted *supra*, explains that an apartment door is treated the same as if it were the door of a single-family residence. The paragraph does not apply to common areas such as a parking lot.

As an apartment tenant who had no agency with the landowner, Decker could not lawfully use force to defend the common parking lot and driveway of Shorewood against cigarette-smoking teenagers. The trial court properly denied the defense-of-property jury instruction.

- ii. Decker also failed to show malicious trespass or a threat to his personal property.

Moreover, even if Decker owned the lot, he failed to show evidence that the teenagers were malicious trespassers. Access routes to a house are impliedly open to the public. See State v. Rose, 128 Wn.2d 388, 393, 909 P.2d 280 (1996) (front porch of mobile home accessible from large parking lot impliedly open to the

public). Malicious means “an evil intent, wish, or design to vex, or injure another person.” RCW 9A.04.110(12); WPIC 2.13.

O’Brien and Chandler were in an open parking lot, and there was no evidence that they were doing anything malicious — unless chatting and sharing a smoke is evil or vexatious. Decker’s photo of a no-trespassing sign did not help him, because the police testified that the sign was on a walking path, invisible to drivers, and did not apply to the parking lot and drives.⁶ 6RP 601-04; 7RP 719-25, 732-34.

Additionally, Decker presented no evidence of defense of personal property. RCW 9A.16.020(3) allows force in attempting to prevent “malicious interference with real or personal property lawfully in that person’s possession. See also WPIC 17.02. But there was no evidence in the record that Decker pepper-sprayed either O’Brien or Chandler out of fear of interference with Decker’s personal property. Decker said he first illuminated the teens out of

⁶ Further, Decker’s suggestion that the teens were transformed into malicious trespassers when O’Brien “confronted” Decker for shining a light on them is without merit. Even if the teens had instigated the affray, the entry or remaining in a location open to the public is not rendered unlawful by the person’s intent to commit a crime, nor does it revoke any license or privilege to be present. State v. Miller, 90 Wn. App. 720, 725-26, 954 P.2d 925 (1998) (“Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining”). To hold otherwise, courts have stated, would turn every shoplifter into a burglar. State v. Klimes, 117 Wn. App. 758, 767-68, 73 P.3d 416 (2003), overruled in part by State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005).

concern for his own car, but he saw no signs of any threat to it. His proffered reasons for using pepper spray were entirely about fear of personal injury. Decker pointed to no evidence to support a defense-of-property instruction, so his claim of error is meritless.

4. PROBABLE CAUSE WAS NOT NEGATED BY THE WORD “CONFRONTED” IN THE AFFIDAVIT.

Decker next seeks reversal by averring that the trial court should not have found probable cause in the first place because the Certification for Determination for Probable Cause said O'Brien “confronted” Decker. This argument is without merit.

Decker supplies no authority for the notion that a case may not proceed to trial unless a court finds probable cause from a certification for determination of probable cause. Under CrR 2.1, a prosecution is initiated by the filing of an information that is “a plain, concise and definite written statement of the essential facts constituting the offense charged.” The rule does not require a judicial probable-cause finding to proceed. Such a finding is required by CrR 2.2 before a court may issue a warrant for the arrest of the defendant, but that has no bearing on whether a trial may be held.

Nevertheless, probable cause “boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.” State v. Fisher, 145 Wn.2d 209, 221 n.47, 35 P.3d 366 (2001). “An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.” State v. Fry, 168 Wn.2d 1, 10, 228 P.3d 1 (2010). A self-defense claim does not vitiate probable cause. McBride v. Walla Walla Cty., 95 Wn. App. 33, 40, 975 P.2d 1029 (1999).

Any judicial official could reasonably believe from the probable-cause document in this case that Decker assaulted Chandler and O'Brien. CP 3-4. Decker's argument that the use of the word “confronted” in itself proved self-defense per se is unsupported and untenable. Affirmative defenses are not part of a probable-cause determination. This argument has no merit.

5. DECKER SHOWS NO DISCOVERY VIOLATIONS OR FELONIOUS CONDUCT BY THE TRIAL PROSECUTOR.

Decker also challenges his conviction by listing a litany of perceived but nonexistent discovery violations and accusing the trial prosecutor of a felony. This argument, too, is meritless.

Discovery is governed by CrR 4.7, but trial courts are afforded the sound discretion to manage discovery and determine how to deal with alleged violations. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). This Court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Discretion is abused when a trial court's decision is exercised on untenable grounds or for untenable reasons or is manifestly unreasonable. Id. at 830.

a. Decker Fails To Show That Discovery Violations Affected His Speedy Trial Rights.

Decker begins with the assertion that discovery violations forced him to waive his speedy trial rights in order to prepare a defense. Decker has failed to cite to anything in the record to support this conclusory claim, so it is essentially unreviewable. This Court has no obligation to search the record for evidence supporting his arguments. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Nor does the State.

Nonetheless, the record below shows that the State met its discovery obligations under CrR 4.7, which requires the State to

disclose all its material evidence “no later than omnibus.” See, e.g., 1RP 15-16 (at case setting, Decker complains of missing discovery; State says it has provided everything it is aware of); 2RP 40 (State provided Cpl. Kramp’s report on June 3, pre-omnibus, immediately upon learning of it); CP 59-60 (Decker’s attorney signed June 12, 2015, Omnibus Order agreeing “Plaintiff has provided the defense with all discovery required by CrR 4.7(a)”); CP 63-64 (a second Omnibus Order on July 2, 2015, making no mention of missing discovery or discovery orders).

Decker fails to identify any facts or evidence that were not disclosed before omnibus. Decker’s attorney did not seek to interview any of the police witnesses pretrial and had to be ordered to interview Chandler and O’Brien before the trial court would grant Decker a trial continuance. See 3RP 59, 65-71; 6RP 522. It is unclear from Decker’s Brief of Appellant what he believes the trial court should have done differently.⁷ He fails to show any discovery violations or any abuse of the trial court’s discretion in managing discovery, so this claim is baseless.

⁷ Decker’s implication is that the trial court should have dismissed the case altogether. But even if there were any discovery violations, “dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution’s actions.” State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

b. Decker Fails To Show Any Undisclosed Material Evidence.

Next, Decker complains that the trial court should have taken some kind of “action” against the State for failing to provide Decker with details of “multiple contacts” it had with witnesses in preparation for trial. BOA 43-44. This argument appears to be a Brady⁸ claim, but Decker fails to show that there was any undisclosed evidence, let alone that it was material and favorable to his defense.

i. Additional relevant facts.

At trial, Decker repeatedly complained that he had not been given written summaries of “contact” between the prosecutor’s office and the witnesses. 6RP 566-68, 677-80. Decker moved to exclude the testimony of Cpl. Kramp because of these alleged violations. 6RP 567-68. The State repeatedly told the trial court that its contacts with the witnesses were for scheduling purposes, and it had received no new substantive information. 6RP 567, 677-78. The trial court denied the motion to exclude Kramp’s testimony, finding “no basis” for Decker’s claim of discovery violations. 6RP 567-68.

⁸ Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

ii. Decker Fails To Show Undisclosed Evidence.

The prosecutor has a duty to disclose “any written or recorded statements and the substance of any oral statements of such witnesses.” CrR 4.7(a)(1)(i). The State must disclose “material or information within the prosecuting attorney’s knowledge” that tends to negate the defendant’s guilt. CrR 4.7(a)(3).

A defendant’s constitutional due process right to disclosure relates only to evidence that is favorable to the defendant and material to guilt or punishment. Brady, 373 U.S. at 87; see also State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). If an accused requests disclosure beyond what the prosecutor is obliged to disclose, he or she must show that the requested information is material to the preparation of his or her defense. Blackwell, 120 Wn.2d at 828. “The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial ... does not establish ‘materiality’ in the constitutional sense.” Mak, 105 Wn.2d at 704-05.

Decker has not shown that any material witness statements or other evidence were not disclosed to him. Scheduling conversations are not material to his defense. His claim is baseless.

c. Decker Fails To Show The Prosecutor Committed A Felony By Conferring With Witnesses.

The third part of Decker's discovery-violation claim is a contention that his trial was tainted by "coaching" of prosecution witnesses that amounted to tampering with a witness.⁹ The trial court wisely rejected Decker's frivolous motions on this point.

i. Additional relevant facts.

Pretrial, the trial court granted a State's motion to preclude evidence of O'Brien's criminal history. 5RP 434-37. Under cross-examination, O'Brien testified that the prosecutor had "called me to talk to me to tell me about what's going to happen in court." 7RP 873. O'Brien agreed with Decker's lawyer that the prosecutor "helped you prepare your testimony." 7RP 874.

Decker moved to "dismiss and/or terms and sanctions and attorney's fees" because witnesses were "coached." 7RP 875. Decker further moved to exclude the testimony of every State's

⁹ RCW 9A.72.120.

witness. 7RP 877. The prosecutor replied that her conversations with O'Brien were limited to scheduling and "I did tell him not to bring up his prior criminal history no matter what," per the court's pretrial order. 7RP 878.

The trial court denied Decker's motions, saying that Decker's lawyer "had adequate time to cross-examine" on the issue. 8RP 892. Decker then accused the prosecutor of the crime of witness tampering, demanded to call her as a defense witness, and advised her to hire an attorney and "take the Fifth Amendment." 8RP 894-96. The trial court again denied Decker's motions. 8RP 896-97.

ii. Decker's accusations are frivolous.

It should go without saying here that conferring with witnesses is within the scope of a prosecutor's traditional duties. McCarthy v. Cty. of Clark, 193 Wn. App. 314, ___ P.3d ___, 2016 WL 1448352 (2016). There is an important ethical distinction between discussing testimony and seeking to improperly influence it. Geders v. United States, 425 U.S. 80, 90 n.3, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976).

Decker accuses the State of felonious conduct without the slightest evidence of wrongdoing. Decker cites no authority to

support the impropriety — let alone the criminality — of explaining the court process to a witness, helping a witness prepare to testify, or directing a witness to avoid inadmissible testimony. This Court should reject Decker's argument.

6. THERE WERE NO ERRORS TO ACCUMULATE.

Decker asserts that his litany of claimed errors justify reversal under the doctrine of cumulative error. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 64 (2006). Decker must show not only error, but he must prove that the combined errors affected the outcome of his trial. Id. He has done neither. This claim fails.

7. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING DECKER \$11,760 IN UNSUBSTANTIATED REIMBURSEMENT.

The State cross-appeals the trial court's Order on Award of Attorney's Fees because Decker failed to meet his burden of proving actual costs that he had paid or became legally obligated to pay. The trial court abused its discretion by issuing an arbitrary award based solely on vague and unreasonable estimates from Decker's attorney using a so-called "lodestar" method for estimating

reasonable attorney's fees. This Court should vacate the trial court's award of legal fees to Decker.

a. Additional Relevant Facts.

In seeking \$78,400 in attorney's fees, Decker's attorney, Andrew Magee, submitted an affidavit with a 12-item list of broadly described activities, such as "Pre-trial Hearings" and "Legal Research and Trial Preparations," totaling 196 hours. CP 223-34. Magee asserted that a "reasonable hourly rate" for his legal services was \$400, but he did not attest that he had actually billed Decker at that rate. CP 223. The defense submitted no documents or contracts to prove Decker had paid or was legally obligated to pay Magee any amount of money.

The State objected to Decker receiving any reimbursement because he was convicted of assaulting Chandler, he had failed to prove that he had actually incurred any costs, and because Decker's fee estimates were flawed and unreasonable. CP 249-57. For example, the State noted that Magee claimed exactly four hours each for eight pretrial hearings (totaling 32 full hours of pretrial hearings, or \$12,800), two of which lasted 22 minutes and

15 minutes, respectively.¹⁰ CP 223-24, 254, 259, 261. Magee claimed eight hours each (\$6,400 total) for interviews of O'Brien and Chandler that lasted 15 minutes and 17 minutes, respectively. CP 224, 254-55. Magee also claimed 136 hours — the equivalent of 17 uninterrupted eight-hour work days — to prepare for the trial. CP 224, 255. He also claimed to have spent 20 full hours conferring with Decker. CP 224.

The defense argued that the trial court was obliged to accept the “lodestar” estimate of reasonable attorney’s fees, and that Magee’s hours were “conservative estimates.” CP 267-77.

In awarding Decker \$11,760, the trial court said “Mr. Decker is entitled to recover only for those costs incurred in his defense” of Count One. CP 280. It also found that Magee had not segregated his work between Counts One and Two, and “does not state that the attorney actually billed Mr. Decker such an amount, nor that Mr. Decker has paid or owes that amount.” Id. It agreed that “the

¹⁰ Arraignment on January 7, 2015, and an aborted Knapstad hearing on June 4, 2015. The others included a May 15, 2015, defense motion to continue trial that lasted about 14 minutes; a June 12, 2015, omnibus that lasted a total of 19 minutes; and a July 2, 2015, omnibus that lasted four and a half minutes. CP 28-29, 58-60, 63-65. The elapsed time of the other three pretrial hearings was not noted in the clerk’s minutes, but they were all similarly brief, routine case-settings and continuance requests before the presiding criminal judge. CP 20-21 (January 21, 2015, defense motion to continue case scheduling); CP 22-23 (February 11, 2015, defense motion to continue case scheduling); CP 24-27 (March 11, 2015, case scheduling).

State must reimburse a defendant only for legal fees that he or she has already paid, and indemnify the defendant only for legal fees that the defendant legally owes but has not yet paid.” Id.¹¹

Nevertheless, the trial court said that Decker’s failure to establish actual costs left the court to “attempt to ascertain a reasonable award.” Id. The trial court then arrived at \$11,760 (15 percent of \$78,400), but it did not say how, except that “much of the work performed by Mr. Decker’s attorney was necessary to defend against the charge in which Mr. Decker was in fact convicted.” CP 281.

Decker moved for reconsideration, again asserting that the trial court was bound to award the full amount of the lodestar estimate. CP 287-95. The trial court denied the motion, but explained in its order that it had indeed considered the lodestar estimates. CP 300. However, the court reminded Decker that he “did not state any amount that Mr. Decker actually paid or owed.” CP 300-01. “Rather, Decker left it to the Court to fashion an award from the limited information provided.” CP 301.

¹¹ Citing State v. Anderson, 72 Wn. App. 253, 863 P.2d 1370 (1993).

- b. The Court Abused Its Discretion Because The Award Was Unsubstantiated And Arbitrary.

Under RCW 9A.16.100(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. ... [T]he judge shall determine the amount of the award.

(emphasis added).

Additionally:

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 supreme court has said that under RCW 9A.16.110, "reimbursement is available when such person *incurs costs* in defending against some kind of 'legal jeopardy.'" City of Seattle v. Fontanilla, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996) (emphasis added). RCW 9A.16.110 is an indemnification-reimbursement statute, as opposed to a reasonable attorney's fee statute. Anderson, 72 Wn. App. at 263. Nothing in the plain meaning of the

statute “commands the State to pay fees that a defendant has neither paid nor become legally obligated to pay.” Id. at 263-64. Thus, “an award of reasonable legal fees under RCW 9A.16.110 must include *but shall not exceed* the sum of (a) legal fees the defendant *has paid* in the past, plus (b) legal fees the defendant *has become legally obligated to pay* in the future.” Id. at 264 (emphasis added).

Decker has the burden of proving the facts necessary to support his claim under RCW 9A.16.110. Id. at 260. The amount of an award of attorney fees is reviewed for abuse of discretion. See State v. Villanueva, 177 Wn. App. 251, 254 n.1, 311 P.3d 79 (2013) (interpretation of the statute is subject to de novo review, but determination of the amount of an award is discretionary). A trial court abuses its discretion in awarding attorney fees if it is manifestly unreasonable or based on untenable grounds. Hanson Indus., Inc. v. Kutschkau, 158 Wn. App. 278, 296, 239 P.3d 367 (2010).

The trial court here certainly had the discretion to award Decker some attorney fees — or not¹² — if they were based on actual evidence that Decker had paid legal fees or was legally obligated to pay some in the future. But because Decker failed to offer any such evidence, the trial court abused its discretion by awarding any reimbursement at all. An award of \$11,760 was manifestly unreasonable and entirely untenable because it was arbitrary and unsupported by proof of Decker's real costs. The trial court essentially picked a number out of thin air, with no basis in evidence that Decker himself had really incurred a single dollar in costs.

In arguing on appeal that the trial court abused its discretion by not awarding him the full \$78,400, Decker continues to insist that the court is bound to accept whatever "lodestar" estimate he submits, relying on reasonable attorney's fees case law. He makes the same mistake as the consolidated appellants in Anderson, who argued wrongly that RCW 9A.16.110 "mandates payment of a reasonable attorney's fee, regardless of what the defendant has

¹² Under RCW 9A.16.110(3), the trial court "may deny" reimbursement if the defendant was "engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant." Decker's conviction in Count Two allowed, but did not require, the trial court to deny any reimbursement for Count One.

paid or agreed to pay his counsel.” 72 Wn. App. at 263. The Anderson court’s rejection of that argument was logical and sound, because a mere estimate of reasonable fees, by lodestar or any other method, does not follow the legislature’s mandate of reimbursement.¹³ RCW 9A.16.110 is a compensation statute for acquitted defendants. It is not a payday statute for lawyers.

Decker counters that Anderson’s proof requirement applies only to publicly represented defendants. This is wrong. In Anderson, there were two appellants — Anderson and Sampson. 72 Wn. App. at 264. Anderson was not reimbursed because he had a public defender and thus had no evidence he actually paid or became legally obligated to pay any fees. Id. But Sampson had met his burden of proving he “actually paid \$2,800 to retained counsel and legally bound himself to pay an additional \$1,700 that has not yet been paid,” but not the \$26,455 he claimed as an estimated reasonable attorney’s fee. Id. at 258, 264. Anderson’s

¹³ “Reimburse” in this context means “to pay back, to make restoration, to repay that expended ...” Anderson, 72 Wn. App. at 263 (quoting Black’s Law Dictionary 1287 (6th ed. 1992)).

holding requires all defendants to prove they personally incurred actual costs.¹⁴

Because Decker failed to prove actual costs for reimbursement, this Court should vacate the trial court's order awarding \$11,760 in attorney's fees to Decker. This matter should not be remanded for additional costly proceedings. The trial court gave Decker ample chance to prove his actual costs of defense, and he conspicuously failed.

But if this Court were to hold that remand is appropriate, the trial court should be instructed that no reimbursement may be ordered unless Decker meets his burden of proving, under oath, the actual costs he personally has paid or is genuinely bound to pay. Without such evidence, the trial court has no basis to award reimbursement.

¹⁴ Decker claims that State v. Jones "affirms" his misreading of Anderson because Jones cited to Anderson for a basic point of law. Jones, 92 Wn. App. 555, 561, 964 P.2d 398 (1998) (holding that the State is not required to compensate for attorney's fees incurred by the defendant while he had public counsel). Decker's argument is *non sequitur*. Jones neither narrowed Anderson nor held that only publicly represented defendants must prove their actual legal fees. In fact, Jones essentially holds the opposite: if publicly represented defendants can never receive reimbursement of legal fees, then only privately represented defendants must prove their actual legal fees.

E. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Decker's judgment and sentence and to vacate the trial court's Order On Award Of Attorney's Fees.

DATED this 16TH day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Andrew L. Magee, the attorney for the appellant, at amagee@mageelegal.com, containing a copy of the BRIEF OF RESPONDENT/CROSS-APPELLANT, in State v. Brian Thomas Decker, Cause No. 73949-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of August, 2016.


Name:
Done in Seattle, Washington