



No. 325105-III

**COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

BEYONCE NIEVES,

Appellant,

v.

WAL-MART STORES, INC.,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COUNTER STATEMENT OF THE CASE.....	1
	A. The Event.....	1
	B. The Investigation	4
	C. Shoplifter Apprehension and Detention Policy	6
	D. Litigation History.....	7
III.	ARGUMENT.....	9
	A. Standard of Review.....	9
	B. The Shopkeeper’s Privilege Statute Applies to This Case.....	10
	1. Retail Merchants in Washington Have an Affirmative Right to Detain Shoplifters During a Shoplifting Investigation.....	11
	2. The Trial Court Properly Found Sufficient Evidence to Instruct the Jury on the Shopkeeper’s Privilege Statute	12
	3. The Jury Did Not Reach the Shopkeeper’s Privilege Defense on the Special Verdict Form; Therefore, There Was No Prejudice.....	16
	C. The Trial Court Properly Denied Ms. Nieves’ Motion For Judgment as a Matter of Law	18
	1. Ms. Nieves’ Motion Was Untimely and, Thereby, Waived	18

2.	The Trial Court Properly Denied Ms. Nieves’ Motion for Judgment As a Matter of Law Because There Was Substantial Evidence to Support the Verdict.....	20
IV.	CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

<i>Brown v. Spokane Cy Frie Protec. Dist. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	16
<i>Davis v. Early Const. Co.</i> , 63 Wn.2d 252, 386 P.2d (1963).....	20
<i>Gammon v. Clark Equip. Co.</i> , 104 Wn.2d 613, 707 P.2d 685 (1985)	11
<i>Goodman v. Boeing Co.</i> , 75 Wn.App. 60, 877 P.2d 703 (1994), affirmed 127 Wn.2d 401, 899P.2d 1265 (1995)	11
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 101 Wn.App. 777, 6 P.3d 583 (2000), review granted 142 Wn.2d 1016, 16 P.3d 1263, affirmed 144 Wn.2d 907, 32 P.3d 250.....	11, 13
<i>Hanks v. Grace</i> , 167 Wn.App. 542, 273 P.3d 1029 (2012)	19, 20
<i>Havens v. C&D Plastics Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994).....	10
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	9, 10
<i>In re Guardianship of Way</i> , 79 Wn. App, 184, 901 P.2d 349 (1995).....	10
<i>Lambert v. Smith</i> , 54 Wn.2d 348, 340 P.2d 774 (1959)	21
<i>Moore v. Pay'N Save</i> , 20 Wn.App. 482, 581 P.2d 159 (1978).....	12
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997).....	21
<i>State v. Goree</i> , 36 Wn.App. 205, 673 P.2d 194 (Div. 3, 1983)	11
<i>State v. Hall</i> , 74 Wn.2d 726, 446 P.2d 323 (1968).....	21
<i>State v. Johnson</i> , 85 Wn.App. 549, 933 P.2d 159 (1978)	10, 12
<i>State v. Kuhn</i> , 74 Wn.App. 787, 875 P.2d 1225 (1994), review denied, 127 Wn.2d 1017 (1995).....	9

<i>State v. Mohamoud</i> , 159 Wn.App. 753, 246 P.3d 849 (2011).....	20
<i>State v. Sunich</i> , 76 Wn.App. 202, 884 P.2d 1 (1994)	9
<i>State v. Tyler</i> , 138 Wn.App. 120, 155 P.3d 1002 (2007).....	21

Statutes

RCW 4.24.220	7, 8, 10, 12, 13, 14, 16
--------------------	--------------------------

Rules

CR 50	18, 19, 20
CR 50(a)(2)	18, 19
CR 50(b).....	8

Other Authorities

4 Karl B. Tegland, Washington Practice: Rules Practice, CR 50 drafters' cmt. at p. 225 (6 th ed. 2013)	20
15A Karl B. Tegland, Washington Practice: Washington Handbook on Civil Procedure, § 68.8 (2013-2014 ed.).....	20
Black's Law Dictionary (9 th ed. 2009)	20

I. INTRODUCTION

Appellant Beyoncé Nieves initiated a lawsuit against Wal-Mart alleging assault, false imprisonment and outrage. A Spokane County jury returned a defense verdict in favor of Wal-Mart. Ms. Nieves challenges the verdict arguing Wal-Mart was not entitled to Washington's shopkeeper's privilege defense. She also challenges the verdict arguing the trial court should have granted her motion for judgment as a matter of law.

In this case, there was substantial evidence that Wal-Mart had reasonable grounds to detain Ms. Nieves, and was therefore entitled to an instruction on the shopkeeper's privilege defense. The trial court also properly denied her motion for judgment as a matter of law because the motion was untimely and there was substantial evidence to support the jury's verdict.

II. COUNTER STATEMENT OF THE CASE

A. The Event

On December 9, 2011, Jeremiah Blackwell, was working at his job as Asset Protection Associate at the Shadle Wal-Mart store. The apprehension and detention of suspected shoplifters is part of his job. RP 124-125. He is trained to lawfully execute shoplifting investigations and detentions. RP 162. Detaining shoplifting suspects is a daily occurrence

for Mr. Blackwell and he has detained over 2000 suspects as an Asset Protection Associate. RP 126.

Mr. Blackwell observed Ms. Nieves shortly after she entered the store. RP131. He noticed she was wearing a hoodie jacket with the hood up. RP 131. Her head was down. RP 131. RP 131. As she walked underneath the security camera, he thought she was attempting to conceal her face. RP 131. He thought that was suspicious behavior so he decided to initiate an investigation by following her and observing her activities. RP 131.

Ms. Nieves immediately proceeded to an aisle displaying women's stockings for sale. RP 132. Mr. Blackwell observed Ms. Nieves select three boxes of stockings, size 4X. RP 225. She proceeded to open the boxes, remove the stockings, and conceal the stockings inside her clothing near her shoulder. RP 174. He believed she concealed the stockings inside her bra or undergarment. RP 205. After concealing the stockings inside her clothing, Mr. Blackwell observed her discard the empty boxes into a shopping cart and leave the area. RP 174.

Mr. Blackwell continuously observed Ms. Nieves from the moment of concealment until she passed the last point of sale. RP 137. During his time of observation, she did not discard the stockings. RP 142. As Ms. Nieves walked past the last point of sale, she was texting on her

phone. RP137. She was distracted by her phone. RP 229. As she exited the store, she was still texting on her phone. RP 34, RP 138.

Mr. Blackwell caught up with her outside the store and approached her from behind. RP 138, RP 37. As he approached her, he stated, "excuse me ma'am." RP 157. Ms. Nieves either did not hear him or ignored him, because she did not respond and kept walking. RP 138. As she walked away, Mr. Blackwell reached out and put a single finger through the top loop of her backpack and identified himself as being "with security." RP 138. At that point, she stopped and turned around to face Mr. Blackwell. RP 138.

With his finger still in the top loop of her backpack, and Ms. Nieves facing him, Mr. Blackwell commanded that she returned to the store so he could recover the unpurchased merchandise. RP 140. She refused, resisted and pulled away. RP 140. Mr. Blackwell continued to hold onto the backpack until she pulled free of the bag. RP 144. Still holding the backpack, Mr. Blackwell offered it back, but Ms. Nieves refused, stating as she was leaving that she was going to call her lawyer and the police. RP 148.

Mr. Blackwell returned to the store and collected the empty stocking boxes from the shopping cart. RP 151. He placed her backpack behind the courtesy desk at the front of the store. RP 186 -187. He also

collected and preserved surveillance video footage of the subject incident. RP 151. He took that evidence to his office and began preparing his report relating to the subject incident. RP 151. His report was admitted into evidence at trial. RP 150-151.

B. The Investigation

Ms. Nieves returned to the store and lodged a complaint against Mr. Blackwell. RP 151. She called the police and reported an assault. RP 47. A member of management assisted Ms. Nieves in completing a store incident report. RP 92. She complained of “slight scratches” to her neck from the backpack straps. RP 92. Officer Nathan Donaldson of the Spokane Police Department arrived on the scene and contacted Ms. Nieves. RP 241. She told Officer Donaldson that as she was leaving the store, she was attacked and assaulted by an employee of Wal-Mart, who accused her of shoplifting. RP 241-242. She stated she was grabbed by the neck and dragged backwards by Mr. Blackwell. RP 243.

In addition to interviewing Ms. Nieves, Officer Donaldson interviewed Mr. Blackwell, who denied grabbing her by the neck or dragging her backwards. RP 141, RP 245. Officer Donaldson also observed the empty stocking boxes collected after the incident and he watched the store’s surveillance camera footage of the incident. RP 245, RP 243. The surveillance camera footage was admitted into evidence at

the trial. RP 264. Officer Donaldson determined, after his investigation, that probable cause did not exist to arrest Mr. Blackwell for assault. RP 244. His basis for that determination was that the video surveillance footage did not corroborate Ms. Nieves' story. RP 244. Officer Donaldson determined that probable cause did exist to cite Ms. Nieves for city theft. RP 245. Accordingly, he cited Ms. Nieves for city theft and released her. RP 245.

Over a month later, Ms. Nieves tried again to have Mr. Blackwell charged with assault. On January 27, 2012, she called the Spokane Police Department wishing to report an assault that occurred back in December at the Shadle Wal-Mart. RP 246. Recognizing Ms. Nieves' name and the incident, Officer Donaldson decided to respond to the call. RP 246. This time, Ms. Nieves claimed that Mr. Blackwell choked her for 10 minutes and dragged her backwards four feet. RP 247-249.

Officer Donaldson investigated her claim that she had been choked for 10 minutes and dragged backwards four feet. RP 248. He went back to the Shadle Wal-Mart store and took another statement from Mr. Blackwell. RP 248-249. Mr. Blackwell denied assaulting Ms. Nieves. RP 141. Officer Donaldson again attempted to corroborate Ms. Nieves' claims with the surveillance video footage, but he could not. RP 249. Instead, it appeared to him that Ms. Nieves was pulling against her own

backpack, which in turn may have accounted for the slight scratches to her neck, which by this point had resolved. RP 250. For a second time, Officer Donaldson determined there was no probable cause to charge Mr. Blackwell with assault. RP 251.

C. Shoplifter Apprehension and Detention Policy

Wal-Mart had in place at the time of the subject incident a written policy regarding the investigation and detention of suspected shoplifters. RP 162. This policy, AP-09, sets forth acceptable methods of investigating and detaining a suspected shoplifter. RP 162, RP 196-197.

Mr. Blackwell was trained to lawfully execute shoplifting suspect apprehensions and detentions, within AP-09. RP 162. Mr. Blackwell has AP-09 memorized. RP 162.

Any type of suspicious behavior creates reasonable cause for initiating a shoplifting investigation. RD 127. Reasonable cause to apprehend and detain exists when a suspect is observed selecting and concealing unpurchased merchandise continuously until passing the last point of sale. RD 127. Authorized detention methods include verbal requests to stop, physical redirection and physical restraint. RP 127-128. An example of physical redirection is putting an arm on the suspect and redirecting him/her back into the store. RP 128.

Physical restraint is also an authorized detention method. RP 128. It is lawful and within AP-09 to grab any portion of a suspected shoplifter who is attempting to flee or attempting to resist. RP 128. An example of authorized methods of physical restraint would be to grab the suspect's arm, or something closely associated with their person, such as a bag or jacket. RP 128. An example of an unauthorized method of detention would be to pin a suspect against a wall or throw a suspect to the ground. RP 128.

Policy AP-09 requires the Asset Protection Associates to use the least amount of force necessary to detain a suspected shoplifter, and that amount of force can include physically limiting or physically controlling the movement of a suspected shoplifter. RP 196-197.

D. Litigation History

Ms. Nieves filed this lawsuit on November 16, 2012. CP 1-6. Wal-Mart answered, denying liability. CP 7-10. On March 21, 2014, the trial court granted Wal-Mart's motion for leave to file an amended answer, and an amended answer was filed that day, which added as an affirmative defense the shopkeeper's privilege defense found in RCW 4.24.220. CP 80-83.

This case was tried to a jury of 12 persons from April 14, 2014 to April 16, 2014, with Hon. Harold D. Clark III, presiding. CP 62-63. At

the jury instruction conference, which occurred on April 15, 2014, argument was heard relating to Wal-Mart's proposed instruction relating to the shopkeeper's privilege statute. CP 210. Ultimately, Judge Clark decided to instruct the jury on the shopkeeper's privilege defense because "it is clearly an applicable statute designed for precisely these types of cases..." CP 215. That jury instruction was designated as "INSTRUCTION NO.12." CP 41.

The jury returned a defense verdict on April 16, 2014. CP 45-46. Through the special verdict form, the jury found the defendant did not commit (1) assault; (2) outrage; or (3) false imprisonment. CP 45-46. The fourth question on the special verdict form, which the jury did not reach, related to whether the detention of Ms. Nieves was conducted in a reasonable manner and for not more than a reasonable time, encapsulating the defense contained in the shopkeeper's privilege statute, RCW 4.24.220. CP 45-46.

After the trial court accepted the jury verdict and the jury was dismissed, Ms. Nieves moved the court for a "judgment notwithstanding the verdict." RP 234. The record on appeal reveals that at no time prior to the case being submitted to the jury did Ms. Nieves bring a motion for judgment as a matter of law. The court did not rule on the oral motion, but instead suggested that Ms. Nieves filed a written motion. RP 234. On

April 24, 2014, Ms. Nieves filed a written motion "for an order granting judgment in favor of plaintiff as a matter of law pursuant to CR 50(b)." CP 47.

On May 2, 2014, the trial court denied Ms. Nieves' motion for judgment as a matter of law and entered judgment in favor of the defendant, dismissing her claims with prejudice and awarding \$495.55 in costs and statutory attorneys' fees against her. CP 60-63. Ms. Nieves filed this appeal on May 29, 2014.

III. ARGUMENT

A. Standard of Review

Courts of appeal review instructions de novo, and reverse only when an error is prejudicial. Stevens v Gordon, 118 Wn.App. 43, 53, 74 P.3d 653 (2003).

Appellate courts review a trial court's determination of the meaning of a statute de novo, with the primary purpose of giving effect to the intent of the Legislature. State v. Sunich, 76 Wn.App. 202, 205, 884 P.2d 1 (1994) (*citing State v. Kuhn*, 74 Wn.App. 787, 790, 875 P.2d 1225 (1994)), *review denied*, 127 Wn.2d 1017 (1995).

When reviewing a motion for judgment as a matter of law (formerly JNOV), the appellate court applies the same standard of review as the trial court. Hizey v. Carpenter, 119 Wn.2d 251, 271, 830 P.2d 646

(1992). "A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party."

Hizey, 119 Wn.2d at 271-72. Substantial evidence is evidence that would convince an unprejudiced, thinking mind of the truth of a declared premise. In re Guardianship of Way, 79 Wn. App, 184, 191, 901 P.2d 349 (1995).

B. The Shopkeeper's Privilege Statute Applies to this Case

Ms. Nieves assigns error to the trial court's decision that the Washington's "shopkeeper's privilege" statute, RCW 4.24.220, applied to this case, and to the trial court's subsequent jury instruction explaining the shopkeeper's privilege defense.

The shopkeeper's privilege statute creates a "reasonable grounds" defense for retailers in civil actions arising from a shoplifting investigation taking place at their retail establishment. *See e.g. State v. Johnson*, 85 Wn.App. 549, 933 P.2d 159 (1978).

Although jury instructions must accurately reflect the underlying law, the trial court has considerable discretion in determining the number of the instructions given and the specific language used. Havens v. C&D Plastics Inc., 124 Wn.2d 158, 876 P.2d 435 (1994). It is often said that

instructions are proper if they (1) permit each party to argue the theory of its case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. Goodman v. Boeing Co., 75 Wn.App. 60, 877 P.2d 703 (1994), *affirmed* 127 Wn.2d 401, 899 P.2d 1265 (1995).

An instruction that follows the words of a statute is proper unless the statute is not reasonably clear or is misleading. State v. Goree, 36 Wn.App. 205, 208, 673 P.2d 194 (Div. 3, 1983). Such an instruction permits parties to argue even dramatically opposing interpretations of a statute. Id. A trial court has considerable discretion in deciding how instructions will be worded and whether more specific or clarifying instructions are necessary to guard against misleading the jury. Gammon v. Clark Equip. Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

1. Retail Merchants in Washington Have an Affirmative Right to Detain Shoplifters during a Shoplifting Investigation

The affirmative right to detain shoplifters contained in the shopkeeper's privilege statute derives from the common law right of citizen arrest. Guijosa v. Wal-Mart Stores, Inc., 101 Wn.App. 777, 6 P.3d 583 (Division II, 2000), *review granted* 142 Wn.2d 1016, 16 P.3d 1263, *affirmed* 144 Wn.2d 907, 32 P.3d 250. Store security personnel are permitted to detain suspected shoplifters in a reasonable manner if they

have reasonable grounds to believe the suspect is committing or attempting to commit theft or shoplifting. State v. Johnson, 85 Wn.App. 549, 933 P.2d 159 (1978). This affirmative right has been codified as RCW 4.24.220, and has become known as the "shopkeeper's privilege" statute or defense. Mr. Blackwell described the privilege in a nutshell as "a right by any type of business, a retailer, to investigate or detain a possible shoplifter." RP 126.

The existence of "reasonable grounds" within the meaning of RCW 4.24.220 to detain a person because of a belief that shoplifting has occurred requires a determination of whether probable cause existed for such a belief, and is generally a question of fact. Moore v. Pay'N Save, 20 Wn.App. 482, 581 P.2d 159 (1978).

2. The Trial Court Properly Found Sufficient Evidence to Instruct the Jury on the Shopkeeper's Privilege Statute

The trial court determined that in applying the shopkeeper's privilege statute, what was at issue was a determination of whether Mr. Blackwell's actions were reasonable. RP 215. Indeed, it is stated by Ms. Nieves that the sole issue on appeal is the reasonableness of Mr. Blackwell's actions in initially detaining her.¹ Appellant's brief, page 8. At trial, the court gave a jury instruction that recited RCW 4.24.220 in its

¹ Ms. Nieves is not challenging whether Mr. Blackwell had reasonable grounds to initiate the shoplifting investigation, nor is she challenging the wording or content of the instruction.

entirety, and added a further instruction that it was the defendant's burden to prove the defense by a preponderance of the evidence. CP 41.

In any civil action arising from a shoplifting investigation or detention, the shopkeeper's privilege statute creates a defense that the "person was detained in a reasonable manner and for not more than a reasonable time..." Guijosa v. Wal-Mart Stores, Inc., 101 Wn.App. 777, 788, 6 P.3d 583 (Division II, 2000), *review granted* 142 Wn.2d 1016, 16 P.3d 1263, *affirmed* 144 Wn.2d 907, 32 P.3d 250 (citing RCW 4.24.220).

In Guijosa, the Court of Appeals heard a case involving an action for false imprisonment and battery brought by an alleged shoplifter against Wal-Mart. The jury was instructed on the shopkeeper's privilege statute and it found that Wal-Mart proved by a preponderance of the evidence that it detained the plaintiffs for a reasonable time on reasonable grounds, and thus it was allowed to use the defense. Guijosa, 101 Wn.App. at 784. The jury found for Wal-Mart on the false imprisonment and battery claims. Id.

In affirming the trial court's determination to apply the shopkeeper's privilege statute, and instruct the jury on the same, the Court of Appeals evaluated the evidence before the court on whether the detention was reasonable. Guijosa, 101 Wn.App. at 794-795. Evidence was considered that the store's Loss Prevention Associate saw the suspected shoplifters approach a sale bin. Id. The sale bin contained

baseball hats. Id. One of the alleged shoplifters approached the bin without a hat, retrieved a hat from the sale bin, tore off the price tag and placed the hat on his head. Id. Then he exited the store without paying. Id. The plaintiffs were confronted by the Loss Prevention Associate and they returned to the store upon verbal request. Id. Police found probable cause to charge the customers with theft based on the same information. Id. This evidence was sufficient to support the instruction on the shopkeeper's privilege. Id.

Here, the trial court, in its ruling to instruct the jury on the shopkeeper's privilege statute, acknowledged that the reasonableness of the investigation and detention was a factual question. RP 215. The trial court found "plenty of facts" admitted into evidence relating to the question of whether the subject incident rose to the level of an assault, or whether it was a reasonable investigation and detention of an uncooperative shoplifting suspect. RP 215. The court went further and indicated that RCW 4.24.220 is "clearly an applicable statute designed for precisely these types of cases where somebody is detained..." RP 215.

The evidence at trial demonstrated the following – Ms. Nieves entered the store in a manner that made Mr. Blackwell suspicious, so he initiated a shoplifting investigation. RP 131. Shortly after he started observing her, he saw her select three pair of women's stockings, remove

the stockings from their packaging and place the stockings inside her clothing, near her shoulders. RP 174. She then discarded the empty boxes in a shopping cart and left the area.² Mr. Blackwell continuously observed Ms. Nieves and until she passed the last point of sale. RP 137. At no time during his observation did he see her discard the stockings hidden inside her clothing. RP 137. After passing the last point of sale, Mr. Blackwell attempted to get her attention by stating "excuse me ma'am." RP 157. Ms. Nieves was distracted because she was texting on her cell phone. RP 229. She kept walking. RP 138.

Outside the store, Mr. Blackwell placed one finger inside the top loop of Ms. Nieves' backpack, which caused her to stop, turn and face him. RP 138. Ms. Nieves denied shoplifting and pulled away from Mr. Blackwell by wiggling out of the backpack. RP 144. Per AP-09, Mr. Blackwell did not attempt to re-engage Ms. Nieves. RP 144. Wal-Mart's apprehension and detention policies prohibited Mr. Blackwell from attempting to re-engage Ms. Nieves after she disengaged. RP 144. The reason behind this policy is shoplifting suspects often get violent when asset protection associates attempt to reacquire after there has been a disengagement. RP 146.

² The discarded stocking boxes collected during the investigation were size 4X, the size recommended by the manufacturer for Ms. Nieves' weight as recorded on the police report. RP 71. Photographs of the actual discarded boxes were admitted at trial (RP 150-151), as well as exemplar boxes. RP 71.

The incident was investigated by the Spokane Police Department after Ms. Nieves made an assault complaint against Mr. Blackwell. After conducting a police investigation on two separate occasions, including interviewing witnesses, watching the surveillance video footage and observing the empty stocking boxes, it was determined that no assault charge was warranted against Mr. Blackwell, instead probable cause existed to cite Ms. Nieves with theft. RP 56.

Based on these facts admitted into evidence at the trial, the trial court properly determined RCW 4.24.220 applied to the facts of this case and properly instructed the jury accordingly.

3. The Jury Did Not Reach the Shopkeeper's Privilege Defense on the Special Verdict Form; Therefore, There Was No Prejudice

Courts of appeal review instructions de novo, and reverse only when an error is prejudicial. Stevens v Gordon , 118 Wn.App. 43, 53, 74P.3d 653 (2003). Accordingly, and in the alternative, even if it was an error to instruct the jury on the shopkeeper's privilege statute, for the erroneous instruction to require reversal, prejudice must be shown. Brown v. Spokane Cy Frie Protec. Dist. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is not prejudicial "unless it of affects, or presumptively affects, the outcome of the trial." Id.

In this case, the trial court gave the shopkeeper's privilege defense instruction and placed the defense on the special verdict form as QUESTION 4. CP 45-46. In completing the special verdict form, the jury answered "NO" to QUESTION 1, QUESTION 2 and QUESTION 3, finding that no assault, outrage or false imprisonment occurred. After it was found that no tort was committed, the jury properly signed and returned the special verdict form without answering QUESTION 4.

There has been no showing that the outcome of the trial would have been different if the jury had not been instructed on the shopkeeper's privilege defense. The jury reached its verdict through its application of Instructions 8-11 to the evidence and found no torts were committed. For instance, the jury could have determined that Mr. Blackwell's action of slipping his finger in the top loop of Ms. Nieves' backpack (after she ignored his verbal request) was not harmful or offensive, and that the scratch on her neck was caused by her own actions in attempting to pull free.

Since the jury did not reach QUESTION 4, there was no prejudice. The jury's decision that no tort was committed is based upon substantial evidence, as detailed above.

C. The Trial Court Properly Denied Ms. Nieves' Motion for Judgment as a Matter of Law

Ms. Nieves' second assignment of error is that the trial court did not grant her motion for judgment as a matter of law. As an initial matter, this motion was untimely because it was made for the first time after the jury returned its verdict. RP 234. Additionally, the testimony of Mr. Blackwell, Ms. Nieves and Officer Donaldson, in addition to the video footage of the subject incident, is substantial evidence and creates reasonable inferences to sustain the jury's verdict.

1. Ms. Nieves' Motion Was Untimely and, Thereby, Waived.

After the jury returned its verdict, Ms. Nieves, for the first time, made an oral motion for a "judgment notwithstanding the verdict." RP 234. The court did not deny the motion at that point; instead the court suggested to Ms. Nieves that she file a written motion. RP 234. Then on April 24, 2014, Ms. Nieves filed a written motion for judgment as a matter of law per CR 50. CP 47. That motion was denied. CP 60.

A motion for judgment as a matter of law may be made at any time before submission of the case to the jury. CR 50(a)(2). By the plain language of CR 50, Ms. Nieves' motion was untimely.

The Court of Appeals, Division I, recently determined that "[CR 50] makes clear that a party must move for judgment as a matter of law

before the trial court submits the case to the jury to preserve any opportunity to renew its motion after the case is submitted.” Hanks v. Grace, 167 Wn.App. 542, 552, 273 P.3d 1029 (2012).

CR 50 is not ambiguous. In Hanks, the appellant argued that CR 50(a)(2) was ambiguous because the rule states a party “may,” rather than “must,” move for judgment as a matter of law before submission of the case to the jury. Hanks, 167 Wn. App. at 553. The court was not impressed and responded, in pertinent part, as follows:

[Appellant’s] argument is not well-taken. A rule is not ambiguous simply because it employs optional, rather than mandatory, language... Because [appellant] failed to timely move for judgment as a matter of law, we do not review his claims’ merits.

Hanks, 167 Wn. App. at 553.

Furthermore, the drafters of 2005 Amendments to CR 50 explicitly expressed their intention that a motion for judgment as a matter of law be waived if it is not made prior to submission of the case to the jury. The drafters stated, in pertinent part, as follows:

The Committee concluded that requiring a motion for judgment as a matter of law before the case is submitted to the jury enhances the administration of justice because the parties and/or the court can correct possible errors before the verdict. Absent such a motion before submission of the case to the jury, a party may not bring a motion for judgment as a matter of law thereafter.

4 Karl B. Tegland, *Washington Practice: Rules Practice*, CR 50 drafters' cmt. at p. 225 (6th ed. 2013).

Ms. Nieves first moved for a judgment as a matter of law after the jury returned its verdict. CP 47. The Record on Appeal otherwise does not contain any CR 50 motion³ from Ms. Nieves prior to the submission of the case to the jury. The untimely filing creates a procedural bar which precludes Ms. Nieves from raising this issue on appeal. *See Hanks*, 167 Wn.App. at 553.

2. The Trial Court Properly Denied Ms. Nieves' Motion for Judgment As a Matter of Law Because There Was Substantial Evidence to Support the Verdict.

Generally, when ruling on a motion for judgment as a matter of law, the moving party's evidence will be disregarded and the nonmoving party's evidence and all reasonable inferences therefrom will be accepted as true. 15A Karl B. Tegland, *Washington Practice: Washington Handbook on Civil Procedure*, § 68.8 (2013-2014 ed.) (*citing Davis v. Early Const. Co.*, 63 Wn.2d 252, 386 P.2d 958 (1963)). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to

³ The plain and ordinary meaning of motion is "[a] written or oral application requesting a court to make a specified ruling or order." *State v. Mohamoud*, 159 Wn.App. 753, 763, 246 P.3d 849 (2011) (citing Black's *Law Dictionary* (9th ed. 2009)).

sustain a verdict for the nonmoving party." Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest." State v. Hall, 74 Wn.2d 726, 727, 446 P.2d 323 (1968).

The court does not weigh the evidence when ruling on a motion for judgment as a matter; factual issues are solely for the jury to decide.

Lambert v. Smith, 54 Wn.2d 348, 351, 340 P.2d 774 (1959).

Here, the testimony and evidence admitted led the jury to conclude no assault occurred. CP 45. That evidence included the testimony of Ms. Nieves, Mr. Blackwell and Officer Donaldson, who concluded on two occasions that no assault occurred.⁴ The evidence also included video footage of the subject incident and Mr. Blackwell's report. Based upon that evidence, there is more than a mere inference that an assault did not occur. There is also more than an inference that Mr. Blackwell's actions were reasonable in all respects.

⁴ As opposed to State v. Tyler, 138 Wn.App. 120, 155P.3d 1002 (2007), a criminal case cited in Appellant's brief (pp. 9-10), where the defendant was actually charged with assault and convicted by a jury. In that case, the defendant was convicted of fourth degree assault by a jury after they heard testimony the defendant repeatedly tried to grab the victim from behind and that he victim was resisting and appeared visibly upset. Based on that evidence, the Court of Appeals elected not to disturb the conviction.

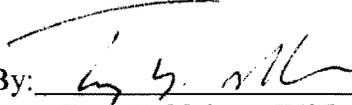
The jury had multiple opportunities to observe the surveillance footage and weigh the credibility of the witnesses with regard to the incident between Ms. Nieves and Mr. Blackwell. There is substantial evidence to support the jury's verdict; therefore the trial court properly denied Ms. Nieves' motion for judgment as a matter of law.

IV. CONCLUSION

For the above stated reasons and those shown in the record, the Court is asked to deny the appeal of Ms. Nieves on all grounds and affirm the trial court for the reasons supported by the record and this briefing.

RESPECTFULLY SUBMITTED, this 24th day of December, 2014.

RANDALL | DANSKIN, P.S.

By: 

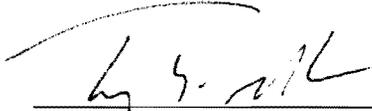
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 24th day of December, 2014, addressed to the following:

Richard D. Wall
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- Hand Delivered
- U.S. Mail
- Overnight Mail
- Fax Transmission



Troy Y. Nelson