

92468-6

FILED

No. 325105-III

OCT 29 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT OF THE STATE
OF WASHINGTON

BEYONCE NIEVES,

Appellant,

vs.

WAL-MART STORES , INC.,

Appellants.

FILED
NOV 12 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

RICHARD D. WALL
Attorney for Appellant

Richard D. Wall, WSBA# 16581
RICHARD D. WALL, P.S.
505 W. Riverside Avenue, Suite 400
Spokane, WA 99201-3700
(509) 747-5646

ORIGINAL



TABLE OF CONTENTS

Table of Authoritiesii

Identity of Petitioner.....1

Decision to be Reviewed1

Issues Presented for Review.....1

1. Whether the Shopkeeper's Privilege Provided by RCW 4.24.020
Allows a Store's Loss Prevention Employee to Commit an Assault
in Order to Detain a Customer Suspected of Shoplifting.....1

2. The Court of Appeals Decision is in Direct Conflict with
State v. Tyler, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007)1

Statement of the Case2

Argument Why Review Should Be Accepted4

Conclusion 7

Certificate of Service8

Appendix:

 Text of RCW 4.24.020.....App 1

 Order Denying Motion for ReconsiderationApp 2

 Unpublished OpinionApp 3

TABLE OF AUTHORITIES

Cases:

Washington Court of Appeals:

State v. Tyler, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007)5

Laws and Statutes:

RCW 4.24.0201, 4

A. Identity of Petitioner:

Beyonce Nieves, Appellants, ask this court to accept review of the decision designated in Part B.

B. Decision to be Reviewed:

The decision of the Court of Appeals, Division III, filed September 1, 2015, and Order Denying Motion for Reconsideration filed on October 1, 2015.

C. Issues Presented for Review:

This case presents the following questions of substantial interest to the citizens of this state:

1. Whether the Shopkeeper's Privilege Provided by RCW 4.24.220 Allows a Store's Loss Prevention Employee to Commit an Assault in Order to Detain a Customer Suspected of Shoplifting.
2. The Court of Appeals Decision is in Direct Conflict with *State v. Tyler*, 138 Wn.App. 120, 155 P.3d 1002 (2007).

D. Statement of the Case:

On the evening of December 9, 2011, Appellant Beyonce Nieves went to the Wal-Mart store on Wellesley Avenue in Spokane, Washington, to get some new stockings. RP 28-29. Nieves was dressed in sweat pants and a hooded sweatshirt with the hood

pulled up over her head to hide her hair, which was not done up. RP 30. Nieves was also wearing a small backpack that she used as her purse. RP 36.

Upon entering the store, Nieves went to the women's section to look for stockings in her size and color. She was not able to find any on the shelf, so she consulted with a female clerk behind the counter near several dressing rooms. Nieves was told that the all the stocking the store had would be out on the shelf, so she returned the stockings to the shelf and continued shopping in other areas of the store. RP 31-32. At one point, Nieves took a photograph of a Christmas tree that she then sent to her sister because her sister had been looking for a similar type of tree. RP 32.

Wal-Mart loss-prevention Associate Jeremiah Blackwell saw Nieves enter the store and immediately became suspicious of her. From a distance of about 75 feet, Blackwell watched Ms. Nieves as he concealed himself behind a rows of merchandize. RP 132-33. According to Blackwell, he saw Nieves take three pairs of stockings out of their packaging and conceal the stockings under her sweatshirt. He then followed her throughout the store until she eventually left without making any purchases. RP 133-37.

Just as Nieves had exited the store and was about to step out into the parking lot, Blackwell grabbed her from behind by taking hold of the loop on the top of her backpack. RP 35. He then held on and stood his ground to prevent Nieves from proceeding any further. RP 142.

Nieves was taken completely by surprise. As she exited the store, she felt a presence behind her and was then suddenly "yanked" from behind. RP 35. Nieves had no idea who had grabbed her or why. She turned to face her attacker and immediately tried to pull herself free from the person's grasp. RP 36. Eventually, she was able to free

herself from her backpack. RP 36. She later discovered that she had a welt and scratches on her neck as a result of the straps of the backpack rubbing against her neck. RP 44.

According to Blackwell, Nieves appeared to be texting on her cell phone as he approached her from behind. At the same time as he grabbed hold of her backpack, he said, "Ma'm, I'm with security," but he did not know whether she had heard him. RP 138. Blackwell was dressed in plain clothes and was not displaying any identification. After grabbing the backpack, Blackwell continued to hold on to it to prevent Nieves from leaving and refused to let go. RP 39, 142. After freeing herself from the backpack, Nieves opened her sweatshirt to show she did not have any store merchandise on her. RP 39. She also told Blackwell to go ahead and search the backpack. Eventually, Nieves told Blackwell to keep the backpack and that she was going to call the police. RP She then left. She later came back with her mother after having contacted the police. RP 44-52.

Surveillance video of the incident does not show Nieves at the moment she was grabbed from behind by Blackwell. However, the video does show Blackwell reaching out to grab at Nieves and shows him holding the strap of the backpack and pulling backward toward the store. The video also shows Nieves struggling to get away from Blackwell and finally wriggling free from the backpack. Exhibits 101-108.

Despite the fact that no merchandise was found on Nieves or in her backpack and the surveillance video from the store did not show her taking any items, Nieves was cited for theft. RP 55. No charges were filed against Blackwell. The theft charge against Nieves was dismissed at her first court appearance. RP 57.

Nieves sued Wal-Mart for assault and false imprisonment. At trial, the defense offered an instruction based on RCW 4.24.220, Washington's enactment of the shopkeeper's privilege, which allows a merchant to use reasonable means to detain a person suspected of theft. Nieves objected to the instructions on the grounds that the manner in which she was detained constituted an assault as a matter of law. Therefore, the manner of her detention was not reasonable. RP 211-14. The trial court overruled the objection and gave the proposed instruction. RP 215. The jury returned a verdict in favor of Wal-Mart. The trial court also denied Nieves' motion for judgment as a matter of law as to her claim for assault. CP 61-62. Division III of the Court of Appeals affirmed in an unpublished opinion.

E. Argument Why Review Should Be Accepted:

This case raises a simple question: should a store employee be permitted to commit an assault in order to detain a customer suspected of shoplifting? This Court should answer that question emphatically "No!"

Violence begets violence. A law that allows merchants and/or their employees to assault a customer based on suspicion of shoplifting is a law that invites violent confrontation between employees and customers with potentially serious consequences for the customer, the employee, or both. Where the manner in which a customer is detained constitutes an assault as a matter of law, the merchant should not be allowed to claim the protection of the shopkeeper's privilege.

RCW 4.24.220 provides:

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any

merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his or her authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. (emphasis added)

Here, Ms. Nieves was grabbed from behind without warning as she was leaving the Wal-Mart store by a "loss prevention associate." The associate grabbed hold of her backpack, which she used as a purse, while she was walking toward her car. The associate then stood his ground pulling backward on the backpack in order to prevent Nieves from taking another step. The effect on Ms. Nieves was the same as if someone had come up behind her, grabbed her purse, and suddenly jerked her backwards. For all Ms. Nieves knew, someone was trying to steal her purse. She reacted as any normal person could be expected to react under the circumstances. As a result, she sustained injuries to her neck and shoulder.

The grabbing of Ms. Nieves from behind as she walked toward her car clearly constitutes an assault as a matter of law. No reasonable jury could conclude that grabbing someone from behind without warning for the purpose of stopping them from walking away is not, at an absolute minimum, a form of physical contact that would be offensive to an ordinary person. See, *State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007)(error in admission of hearsay evidence was harmless because defendant's act of grabbing at victim from behind as she walked away constituted assault as a matter of law). There is no question that Blackwell committed an assault.

This was not a case where reasonable force was used to overcome resistance. Ms. Nieves was unaware that Blackwell was behind her until after he had grabbed hold of her

backpack from behind. She had no idea that she was suspected of shoplifting or that anyone from the store wanted to speak to her. She was not given any warning or opportunity to comply with a request to stop and be questioned or to return to the store. She was simply assaulted. Under the circumstances, it is fortunate that Nieves was not more seriously injured or that the incident did not result in a more serious physical confrontation between her and Blackwell, or possibly between Blackwell and other nearby customers who could easily have interpreted Blackwell's conduct as an attempted theft or robbery.

By giving the shopkeeper's privilege instruction, the trial court allowed the jury to decide whether the manner in which Nieves was detained was "reasonable," despite the fact that it clearly constituted an assault. In upholding the trial court's decision to instruct the jury as to the shopkeeper's privilege, the Court of Appeals simply ignored, without explanation, its own prior pronouncement in *State v. Tyler* that such action constitutes an assault as a matter of law.

The Court of Appeals decision creates a rule that puts all shoppers in Washington at risk of assault by store loss prevention employees. Loss prevention associates, like Blackwell, are generally not law enforcement officers, and often lack the any real training with regard to when it is appropriate to use force or the type and amount of force that is appropriate under particular circumstances. Allowing juries to decide in each case whether the force used against a suspected shoplifter is reasonable when the undisputed facts establish an assault, places too much discretion in the hands of the store employee. It also allows juries to absolve merchants from liability to customers who are injured by

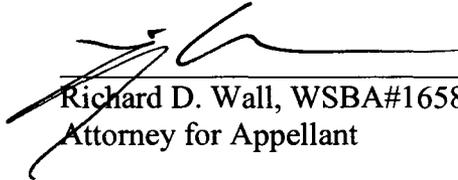
the merchant's employees, even where the employee's conduct clearly violates both civil and criminal law.

This Court should accept review of this case and issue a firm ruling that the shopkeeper's privilege cannot be used by merchants as a shield against liability for the unnecessary and unjustified the use of violence against customers who have not been given any opportunity to comply with a request to stop and be questioned. The fact that a customer is suspected of shoplifting should not excuse conduct that is clearly both dangerous and unlawful.

F. Conclusion:

For the foregoing reasons, this court should accept review, reverse the decision of the Court of Appeals, and remand to the trial court for a new trial.

Respectfully submitted this 24th day of October, 2015.


Richard D. Wall, WSBA#16581
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of October, 2015, a true and correct copy of the foregoing PETITION FOR REVIEW was sent via legal messenger to the following:

Troy T. Nelson
RANDALL DANSKIN, P.S.
1500 Bank of America Fin. Ctr.
601 W. Riverside Avenue
Spokane, WA 99201-0653

Alyson Mahle

RCW 4.24.220

**Action for being detained on mercantile establishment premises for investigation —
"Reasonable grounds" as defense.**

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his or her authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

[2011 c 336 § 96; 1967 c 76 § 3.]

FILED
OCTOBER 1, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

BEYONCE NIEVES,)	No. 32510-5-III
)	
Appellant,)	
)	ORDER DENYING
v.)	MOTION FOR
)	RECONSIDERATION
WAL-MART STORES, INC.,)	
a foreign corporation,)	
)	
Respondent.)	

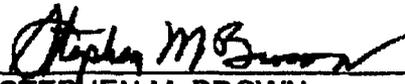
The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of September 1, 2015, is denied.

DATED: October 1, 2015

PANEL: Judges Lawrence-Berrey, Brown, and Fearing

FOR THE COURT:



STEPHEN M. BROWN
ACTING CHIEF JUDGE

FILED
SEPTEMBER 1, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BEYONCE NIEVES,)	No. 32510-5-III
)	
Appellant,)	
)	
v.)	UNPUBLISHED OPINION
)	
WAL-MART STORES, INC.,)	
a foreign corporation,)	
)	
Respondent.)	

LAWRENCE-BERREY, J. — Beyonce Nieves filed suit against Wal-Mart Stores. She claimed that Wal-Mart was liable under a theory of respondeat superior for torts committed by its security employee who restrained her in the course of his shoplifting investigation. The jury returned a defense verdict. On appeal, Ms. Nieves contends that the trial court erred (1) in giving a jury instruction based on the shopkeeper's privilege statute, RCW 4.24.220, and (2) by failing to grant her motion for judgment as a matter of law on her claim of assault. We disagree with her contentions and affirm.

FACTS

On the evening of December 9, 2011, Beyonce Nieves entered the Wal-Mart store on Wellesley Avenue in Spokane. She was wearing a hooded jacket and sweatpants. The hood of her sweatshirt was raised and covered her head. She was also wearing a small backpack that served as her purse. The store's video surveillance system began recording her movements once she entered the store. One of the store's asset protection associates, Jeremiah Blackwell, observed Ms. Nieves when she walked past him with her hood up and her head down. Mr. Blackwell decided to follow her and observe her activities because he thought she was attempting to conceal her face in a suspicious manner. At trial, Ms. Nieves testified that she was looking down when she entered the store because she was tying the string on her sweatpants.

Ms. Nieves first went to the section of the store where women's stockings were displayed for sale. She checked to see if she could find her size and color of stockings. When she could not find her size or color, she took two boxes to a store associate and asked if the associate could find that color or size size for her. Ms. Nieves testified the store associate told her all the stockings would be out on the shelves. Ms. Nieves stated she left the two boxes of stockings with the store associate who said she would put them back on the shelves. Ms. Nieves walked back to the shelves where she had found the

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

stockings to double check that her size and color of stockings were not there. Ms. Nieves testified that after checking the stocking display a second time and not finding anything, she browsed through a couple other areas of the store. Ms. Nieves walked to the section where Christmas trees were displayed. She took a picture of a tree and sent it to her sister along with several other texts. She then decided to leave and continued texting as she was walking out of the store. She testified that she did not have any merchandise concealed on her person as she was walking out of Wal-Mart.

Mr. Blackwell's testimony at trial contradicted Ms. Nieves's as to what happened while she was in the store. From his own observations, he testified that she threw a box of stockings into a shopping cart that was in the aisle with her. She approached the fitting room associate and talked with the associate about two boxes of stockings that she was holding in her hands. Rather than leaving the two boxes of stockings with the store employee, Ms. Nieves carried them back to the stocking aisle and concealed them underneath her jacket. She discarded the two empty boxes into the same shopping cart she had placed the other box of stockings previously. He believed she concealed stockings from the first box as well, but he only saw her conceal stockings from the second and third boxes. He also believed she concealed the stockings inside her bra or

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

undergarment. He followed Ms. Nieves the entire time she was in the store. He testified she never discarded the stockings.

Ms. Nieves testified that after she passed through the front doors, and while she was still texting, she felt somebody grab and pull on her backpack. She had not heard any one speaking to her prior to feeling someone pull on her backpack. While the person was pulling on her backpack, she was pulling the other direction and asking who was doing so and why. She testified that the person began holding onto the handle of the backpack as well as her jacket and was twisting them to prevent losing hold of her, and in the process of holding and twisting these items, she was being choked. She started trying to get out of the backpack and was able to slip out of the straps. She turned around to see Mr. Blackwell standing there. Mr. Blackwell told her to return store merchandise. Ms. Nieves said she did not have any to return. She testified that she then unzipped and opened her coat, lifted up her shirt, and also dropped her pants to prove she did not have anything concealed.

Mr. Blackwell's testimony again differed from Ms. Nieves's as to the events outside the store's front doors. He testified that he called to Ms. Nieves to get her attention after she passed through the front doors. After not getting a response, he reached out saying he was with security, and then grabbed the loop on the top of her

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

backpack with his left index finger. Ms. Nieves turned around to face him and told him to let go of her. He asked her to come back inside the store with him so he could recover the merchandise, but she refused and continued to pull away toward the parking lot. He testified that he continued holding onto her backpack while waiting for her to comply with his request to return to the store. He denied ever choking Ms. Nieves or dragging her backwards. She wiggled out of the backpack and faced him, still holding onto the strap while he was holding onto the handle. She released the strap and started to remove her clothes to show him that she did not have anything concealed. Although he never saw any items concealed on her person when she removed her clothing, he testified he believed she still had items concealed in her clothes in parts that she did not reveal.

Ms. Nieves asked Mr. Blackwell to return her backpack, which he was still holding. He replied that he would not and that Ms. Nieves needed to come back into the store so they could talk. Ms. Nieves said she would not go back into the store because she had not done anything wrong. Ms. Nieves told Mr. Blackwell she was going to call the police to report that he had assaulted her. She started to walk away, and Mr. Blackwell offered to return her bag. But she left her bag with Mr. Blackwell, saying she was going to get her mother, and she would return. She and her mother both called the police several times about the incident.

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

After Ms. Nieves left the store, Mr. Blackwell wrote a report on the incident and pulled video footage of what happened. He also went back and retrieved three empty stocking packages from the shopping cart. He took a picture of the boxes and attached it to his report.

After returning to the store, Ms. Nieves talked to a member of management and asked to file an incident report, which she did. While at the store the second time, she discovered she had “bruising and slight scratch marks” on her neck. Report of Proceedings (RP) at 92.

Officer Nathan Donaldson of the Spokane Police Department arrived at the Wal-Mart and talked to Ms. Nieves, who told him she had been assaulted by a Wal-Mart employee. Officer Donaldson took Ms. Nieves’s statement. He went inside the store to investigate the incident. Officer Donaldson took Mr. Blackwell’s statement in the store’s security office. Mr. Blackwell also gave Officer Donaldson the report he had written about the incident and let him review the video he had compiled.

Officer Donaldson determined from his on-scene investigation that probable cause did not exist to arrest Mr. Blackwell for assault. He based his determination on the surveillance video Mr. Blackwell had compiled, which he said was in conflict with what Ms. Nieves had told him. Officer Donaldson did find probable cause to cite Ms. Nieves

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

for theft based on statements from Mr. Blackwell and the physical evidence of the empty women's stocking containers. The State, however, dismissed the charge very early in the criminal proceedings.

On January 27, 2012, Ms. Nieves contacted the police to file another report about the incident on December 9, 2011, claiming again that she was assaulted by Mr. Blackwell. Officer Donaldson responded. Officer Donaldson testified that Ms. Nieves gave a similar statement about the incident with Mr. Blackwell, but added that Mr. Blackwell had choked her for approximately 10 minutes during their struggle, and that he had also dragged her backwards with enough force that it required her to take about four steps to keep from being pulled off her feet. In contrast, Ms. Nieves testified she told Officer Donaldson that it *seemed like* Mr. Blackwell was choking her for 10 minutes. Ms. Nieves also told Officer Donaldson that she sustained some bruising on the right side of her neck from the incident.

Officer Donaldson took additional statements from Mr. Blackwell and reviewed the video again. Officer Donaldson attempted to corroborate Ms. Nieves's new statement with the video footage but found they were inconsistent. He believed based on the video that Ms. Nieves's neck injury was possibly caused by the backpack straps rubbing against

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

her neck, from her own action. The officer again did not find probable cause to recommend any charges against Mr. Blackwell.

Ms. Nieves filed a complaint for damages against Wal-Mart under the doctrine of respondeat superior related to the actions of its employee, Mr. Blackwell, in detaining her on December 9, 2011. Ms. Nieves asserted (1) assault and battery, (2) unlawful imprisonment, and (3) outrage.

During the jury instruction conference, Wal-Mart proposed that the jury be instructed on the shopkeeper's privilege statute, RCW 4.24.220. Both sides presented arguments. Ms. Nieves objected to the instruction arguing that it was not supported by the evidence because Mr. Blackwell's actions constituted an assault as a matter of law, which is not privileged under the statute. Additionally, she argued that the "reasonable means" requirement under the statute meant that one could not claim the protection of the statute if one committed an assault (by way of an offensive touching) to accomplish the detention. The trial court ultimately decided to give the contested instruction, stating that the statute's reasonableness requirements set up factual questions for the jury, and that there were "plenty of facts" presented by each side from which the jury could decide "whether this was an assault or a reasonable act in terms of stopping somebody." RP at 215. Additionally, the court determined that RCW 4.24.220 was "clearly an applicable

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

statute designed for precisely these types of cases where somebody is detained.” RP at

215. The contested instruction stated:

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his or her authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, “reasonable grounds” shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a “reasonable time” shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

It is the defendant’s burden to prove this defense by a preponderance of the evidence.

Clerk’s Papers (CP) at 41.

The jury returned a defense verdict. The jury answered “no” to the first three questions on the special verdict form, finding that the defendant did not commit (1) assault, (2) outrage, or (3) false imprisonment. Because they answered “no” to the first three questions, the jury did not answer question 4 on the special verdict form, which summarized the defense contained in the shopkeeper’s privilege statute.

After the jury reached its verdict and the trial court dismissed the jury, Ms. Nieves brought an oral motion for “judgment notwithstanding the verdict.” RP at 234. The court did not rule on the oral motion, but instead suggested that Ms. Nieves file a written motion. On April 24, 2014, Ms. Nieves filed a written motion for judgment as a matter of law pursuant to CR 50 on her assault claim. Ms. Nieves contended that Mr. Blackwell had committed an assault as a matter of law when he grabbed her from behind. The trial court denied Ms. Nieves’s motion for judgment as a matter of law and entered judgment in favor of the defendant.

Ms. Nieves appeals.

ANALYSIS

Ms. Nieves contends that the trial court erred (1) in giving the shopkeeper’s privilege instruction, and (2) in denying her motion for judgment as a matter of law on her claim for assault.

1. *Whether the trial court erred in giving the shopkeeper’s privilege instruction*

Ms. Nieves assigns error to the trial court’s giving of the shopkeeper’s privilege instruction and asks this court to remand for a new trial. Ms. Nieves contends that as a matter of law, the shopkeeper’s privilege can never be given when facts establish an assault because an assault is never a reasonable manner of detaining a suspected

No. 32510-5-III
Nieves v. Wal-Mart Stores, Inc.

shoplifter. She also contends that giving the shopkeeper's privilege instruction prejudiced her by allowing the jury to conclude, contrary to law, that while Mr. Blackwell's conduct amounted to an assault, it was nevertheless reasonable under the circumstances and privileged under the statute.

The standard of review of this alleged error depends on whether the trial court's decision to give the instruction was based upon a matter of law or a matter of fact. If based upon a matter of law, our review is de novo; if based upon a factual dispute, our review is abuse of discretion. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

The civil shopkeeper's privilege statute permits store personnel to detain a suspected shoplifter (1) in a reasonable manner (2) for a reasonable time (3) if they have reasonable grounds to believe the person is committing or attempting to commit larceny or shoplifting. *State v. Johnston*, 85 Wn. App. 549, 554, 933 P.2d 448 (1997); RCW 4.24.220. Ms. Nieves takes issue only with the first prong. She argues that the protection of the statute does not apply here because Wal-Mart's employee committed an assault against her, and an assault is never a "reasonable manner."

Ms. Nieves's argument presupposes that an assault was committed against her. As mentioned above, the jury by special verdict found that no assault had occurred.

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

Instruction 8 defined assault as “a harmful or offensive contact.” CP at 37. Ms. Nieves does not assign error to this instruction, so it becomes the law of the case. *State v.*

France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). A reviewing court will not disturb the verdict if there is substantial evidence to support it. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Substantial evidence is ““sufficient evidence to persuade a rational, fair-minded person of the truth of the premise.””

Parrott-Horjes v. Rice, 168 Wn. App. 438, 445, 276 P.3d 376 (2012) (quoting *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 557, 166 P.3d 813 (2007)). “In reviewing the evidence, the appellate court does not reweigh the evidence, draw its own inferences, or substitute its judgment for the jury.” *Westmark Dev.*, 140 Wn. App. at 557.

Here, the evidence allowed the jury to find that an assault did not occur. Wal-Mart presented evidence that once Ms. Nieves exited the doors, Mr. Blackwell attempted to get her attention. When this attempt failed, Mr. Blackwell identified himself as security and grabbed the loop on her backpack to prevent her from continuing. A jury could reasonably find that this “contact” was neither harmful nor offensive. A jury could also find that Ms. Nieves’s continuing struggle to free herself rather than complying with security was an unreasonable response which acted as a superseding cause to any injury

No. 32510-5-III

Nieves v. Wal-Mart Stores, Inc.

sustained by her. Because disputed facts allowed the jury to find that no assault occurred, we review the giving of the instruction under an abuse of discretion standard.

In deciding to instruct the jury on the shopkeeper's privilege statute, the trial court determined that the statute's reasonableness requirements set up factual questions for the jury and, that in this case, there were "plenty of facts" presented by each side from which the jury could decide "whether this was an assault or a reasonable act in terms of stopping somebody." RP at 215. Additionally, the court found RCW 4.24.220 to be "clearly an applicable statute designed for precisely these types of cases where somebody is detained." RP at 215.

We agree with the trial court that this factual pattern was the type envisioned by the legislature when it enacted this statute. We hold that the trial court did not abuse its discretion by giving the shopkeeper's privilege instruction in this case.

2. *Whether the trial court erred in denying Ms. Nieves's motion for judgment as a matter of law*

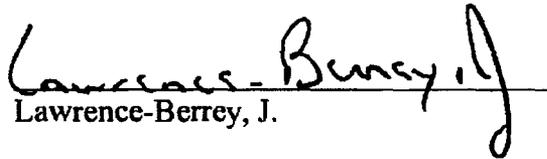
Ms. Nieves assigns error to the trial court's denial of her motion for judgment as a matter of law on her assault claim. She argues that she was entitled to this remedy when the testimony at trial established as a matter of law that an assault was committed. Again, Ms. Nieves presupposes that Wal-Mart's employee committed an assault against her, and as explained above, substantial evidence supports the jury's finding that no assault

No. 32510-5-III
Nieves v. Wal-Mart Stores, Inc.

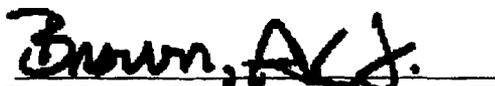
occurred. We conclude that the trial court did not err in denying her motion for judgment as a matter of law.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, J.

WE CONCUR:


Brown, A.C.J.


Fearing, J.