72960-8

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June 23, 2015
Court of Appeals
Division I
State of Washington

No. 72960-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN SAKAWE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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2. The trial court erred by placing the burden of proof of the absence of an element of the crime on Mr. Sakawe in violation of his constitutional right to due process.

3. Appellant assigns error to Conclusion of Law 4.[1]

4. Appellant assigns error to Finding of Fact 12.

5. Appellant assigns error to Finding of Fact 14.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. XIV. Mr. Sakawe was found guilty of second degree assault with a deadly weapon for flailing a bread knife at Abdikadir Elmi. There was no evidence that the bread knife was sharp, and Mr. Elmi was not cut when he took the knife away from Mr. Sakawe by grabbing the blade. There was no evidence that Mr. Sakawe tried to forcefully stab Mr. Elmi with the bread knife. Did the State prove beyond a reasonable doubt that, in the circumstances in which it was

[1] A copy of the Findings of Fact and Conclusions of Law, CP 16-22, is attached as an appendix.

used, the bread knife was capable of inflicting death or substantial bodily injury?

2. The State bears the burden of disproving any fact which negates an element of an offense. U.S. Const. amend. XIV. A defendant's diminished capacity, whether due to mental illness or the use of drugs, negates the mental element of an offense. Mr. Sakawe was charged with second degree assault, which required proof of the specific intent to inflict bodily injury or cause reasonable apprehension of bodily injury. The trial court found that Mr. Sakawe had not produced sufficient evidence that he lacked the capacity to form the intent to assault. Did the court violate Mr. Sakawe's constitutional right to due process when it relieved the State of its burden of proving the absence of diminished capacity beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Abdikadir Elmi found Abdirahman Sakawe, a man he did not know, in the kitchen of the Seattle home Mr. Elmi shared with his siblings and mother. 10/8/14 RP 74, 77, 80. Mr. Sakawe was not wearing shoes or a shirt, and a torn shirt was covering his face. Id. at 78. Mr. Elmi confronted Mr. Sakawe and asked why Mr. Sakawe was in his home, but Mr. Sakawe's only response was to ask, "Where is

your dad?"[2] Id. at 77, 82, 89. The men began struggling in the living room, and Mr. Elmi's screaming drew the attention of one of his brothers who helped him subdue Mr. Sakawe. Id. at 77, 82-84, 130.

Mr. Sakawe, however, returned to the kitchen where he picked up a bread knife. 10/8/13 RP 77, 100. Mr. Elmi ran at Mr. Sakawe and grabbed the knife as Mr. Sakawe swung it at him or his brother. Id. at 77-78, 84, 86-87. Mr. Elmi's other brother arrived, and the three men were able to hold Mr. Sakawe. Id. at 78. When they let Mr. Sakawe go, he went out the back door and jumped off the balcony. Id. at 78. Mr. Elmi called the police. Id. at 105.

With the assistance of a K-9 dog, Seattle Police officers soon located Mr. Sakawe sleeping underneath a table on the deck of a neighboring house. 10/9/14 RP 48-50, 55-56, 66-67. As Mr. Sakawe was transported by the police to jail, he made bizarre statements, giggled and laughed inappropriately. Finding of Fact 8; 10/13/14 RP 85, 88, 93; Ex. 7 (No. 5096@2014060815439 and No.

[2] Mr. Elmi's father did not live at the house, but was there that evening because Mr. Elmi's mother was out of the country. 10/8/14 RP 80.

5096@2014060815440; Ex. 8 (No. 5096@2014060834937 and No. 5096@2014060834939).[3]

The King County Prosecutor charged Mr. Sakawe with first degree burglary and two counts of second degree assault with deadly weapon enhancement allegations. CP 6-7. At a bench trial before the Honorable William L. Downing, Mr. Sakawe argued his conduct was not criminal due to involuntary intoxication and, in the alternative, diminished capacity. CP 13; 10/14/15 RP 19-20.

Psychologist Robert Deutsch opined that Mr. Sakawe was in a delusional state at the time of the incident and could not appreciate his own actions. 10/13/14 RP 31-33, 45, 95; Ex. 19 at 5-6. Mr. Sakawe had been homeless and had not had adequate sleep or nourishment prior to his arrest; he had also smoked marijuana with acquaintances and reacted strangely. 10/13/14 RP 33-34, 39, 59-60; Ex. 19 at 4, 5-6. Dr. Deutsch suspected Mr. Sakawe's delusional state was triggered by the ingestion of marijuana laced with PCP. 10/13/14 RP 64-64; Ex. 19 at 5-6.

[3] Exhibits 7 and 8 contain the video and audio recordings from four different patrol cars that responded to Mr. Elmi's 911 call. The recordings from two cameras in the car that transported Mr. Sakawe from the scene to the Regional Justice Center are labelled number 5096.

Judge Downing found Mr. Sakawe not guilty of first degree burglary and guilty of the lesser-included offense of criminal trespass in the first degree. Findings of Fact 9-13; Conclusion of Law 3. The court found Mr. Sakawe guilty of second degree of assault of Mr. Elmi, with a deadly weapon enhancement, but not guilty of second degree assault of his brother Abdikhadar. Findings of Fact 14-16; Conclusions of Law 4-6.

The court reasoned that Mr. Sakawe's actions did not show he entered or remained in the Elmi residence with the intent to commit a crime, but that Dr. Deutsch's testimony did not establish that Mr. Sakawe could not form "the rudimentary intent necessary for a trespass or an assault." Finding of Fact 12. Judge Downing also concluded that the defense had not proved by a preponderance of the evidence that Mr. Sakawe's intoxication was involuntary. Id.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Sakawe committed the crime of assault in the second degree by use of a deadly weapon.**

a. The State was required to prove every element of first degree burglary beyond a reasonable doubt.

The due process clause requires the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530

U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970); U.S. Const. amend. XIV. On appellate review of a criminal conviction, the court must reverse if, after viewing the evidence in the light most favorable to the prosecution, it determines that a rational trier of fact could not have found an element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Sakawe was charged with second degree assault for assaulting another person "with a deadly weapon." CP 7; RCW 9A.36.021(1)(c). The superior court found Mr. Sakawe guilty of second degree assault for "brandishing the bread knife at Abdikadir Elmi." Finding of Fact 14; Conclusion of Law 4. The State, however, did not prove beyond a reasonable doubt that the bread knife was a deadly weapon.

b. The State did not prove beyond a reasonable doubt that Mr. Sakawe used a deadly weapon, an essential element of second degree assault.

For purposes of second degree assault by means of a deadly weapon, "deadly weapon" includes a knife only if the knife is readily

capable of causing death or substantial bodily harm. RCW 9A.04.110(6). Substantial bodily harm is bodily injury that involves a temporary but substantial disfigurement, loss or impairment of a part of the body or organ, or a fracture. RCW 9A.04.110(4)(b).

The definition of "deadly weapon" reads:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, or instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6) (emphasis added). The statute creates two categories of deadly weapons: (1) explosives and firearms, which are deadly weapons per se, and (2) any other weapon which, under the circumstances in which it is used or attempted or threatened to be used, is readily capable of causing death or substantial bodily harm. In re Personal Restraint of Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011). Because the bread knife was not an explosive or a firearm, its status as a deadly weapon "rests on the manner in which it is used, attempted to be used, or threatened to be use." Id. at 366.

In this case, the State did not prove beyond a reasonable doubt that the bread knife Mr. Sakawe grabbed and threatened to use was a

deadly weapon. The knife itself was not introduced as evidence. 10/8/14 RP 118. It was described as a bread knife with a serrated blade. Id. at 86, 100; 10/9/14 RP 19; Finding of Fact 4. Officer Liston estimated the entire knife was twelve inches long. 10/9/14 RP 19. The court concluded the knife blade was more than six inches long and that it did not have a sharp point. Id; Findings of Fact 4, 9.

Photographs of the knife do not include a ruler. Ex. 1, photograph no. 18; Ex. 11. While the photographs give some idea of the knife's size in comparison to kitchen items of unidentified size, the photographs in Exhibit 11 appear to depict different knives; in one the knife blade is less than half the length of the knife and in the other is it approximately the same length as the handle. Ex. 11.

Moreover, there was no testimony that the knife was sharp enough to cut a person in a manner that would cause death or substantial injury. In fact, when Mr. Elmi grabbed the knife with his hands, he was not even cut. Finding of Fact 5.

Concerning the manner in which Mr. Sakawe used the knife, the court found that he "flailed with it in the direction of" Mr. Elmi. Finding of Fact 5. This is supported by Mr. Elmi's testimony that Mr.

Sakawe swung the knife at him or his brother.[4] 10/8/14 RP 84, 86-87. The evidence did not show that Mr. Sakawe forcefully lunged at Mr. Elmi.

Division Two's decisions addressing first and second degree assault with a deadly weapon are instructive. In Skenandore, a prison inmate assaulted a corrections officer with a homemade spear that was a two-and-one-half to three feet long reinforced paper shaft with a golf pencil at the end. State v. Skenandore, 99 Wn. App. 494, 496, 94 P.2d 291 (2000). When the corrections officer bent down to place Skenandore's breakfast in the "cuff port" in his cell door, the inmate used the spear to strike the guard on the chest and arms, leaving pencil marks on the guard's clothing and temporary marks on his chest. Id. at 496-97. The spear itself was not in evidence. Id. at 497. Skenandore appealed his conviction for second degree assault with a deadly weapon. Id. at 496.

The Court of Appeals concluded that, while the homemade weapon could have inflicted serious bodily harm if it had hit the officer's eye, Skenandore was unable to reach that part of the officer's body from his position inside his cell. Id. at 500. Thus, "the

[4] Mr. Elmi also demonstrated how Mr. Sakawe was holding the knife. 10/8/14 RP 84-85, 85, 87.

surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm." Id.

In contrast, a jail inmate's conviction for first degree assault for stabbing a fellow inmate with a pencil was affirmed in State v. Barragan, 102 Wn. App. 754, 756-57, 9 P.3d 942 (2000). In that case, Barragan began hitting the other inmate, telling him, "You're gonna die." Id. at 757. He then struck the inmate in the head with the pencil with so much force that it was embedded in the man's temple, missing his eye only because the man deflected the blow. Id. at 757, 761. Because the pencil could have seriously injured the inmate's eye in the manner in which it was used, the Court of Appeals upheld the jury determination that the pencil was a deadly weapon. Id. at 761-62.

c. Mr. Sakawe's conviction for second degree assault should be reversed and dismissed.

The State did not prove that the bread knife in this case was capable of inflicting death or substantial bodily injury. As in Skenandore, the weapon at issue was described but not introduced as evidence, and there was no testimony as to the sharpness or length of the blade.

Nor did the manner in which the bread knife was used show it was capable of inflicting death or substantial bodily injury. The court

found that Mr. Sakawe "flailed" with the knife in the direction of Mr. Elmi, not that he lunged at him. When Mr. Elmi grabbed the knife, his skin was not cut and, like the corrections guard in in Skenandore, he was left with only marks on his skin.

Looking at the bread knife and the manner in which it was used, the State did not prove beyond a reasonable doubt that the kitchen knife was capable of inflicting death or substantial bodily harm. Mr. Sakawe's conviction for second degree assault should be reversed and dismissed. Skenandore, 99 Wn. App. at 501.

2. **Mr. Sakawe's second degree assault conviction should be reversed because the trial court relieved the State of its burden of proving intent beyond a reasonable doubt.**

a. Burdening the defendant with proving a defense that negates an element of the crime charged violates due process.

The due process clause of the Fourteenth Amendment requires the State to prove every element of a charged crime beyond a reasonable doubt. Apprendi, 530 U.S. at 476-77; Winship, 397 U.S. at 364; State v. W.R., 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014). While the State may require the defendant carry the burden of proving an affirmative defense which does not negate an element of the crime charged, the burden of proof of elements of the crime may never be

shifted to the defendant. Smith v. United States, ___ U.S. ___, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013); Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

> When a defense necessarily negates an element of the crime charged, the State may not shift the burden of proving that defense onto the defendant. To hold otherwise unconstitutionally relieves the State of its burden of proving every element of the crime beyond a reasonable doubt.

W.R., 181 Wn.2d at 770-71 (holding State has burden of disproving consent in a prosecution for rape by means of forcible compulsion).

Mr. Sakawe was charged with second degree assault for assaulting Mr. Elmi with a deadly weapon. CP 7; RCW 9A.36.021(1)(c). Dr. Deutsch testified that Mr. Sakawe was in a delusional state at the time of the incident, thus undermining any proof provided by the State that Mr. Sakawe had the specific intent to commit the crime of second degree assault. The trial court erred by placing the burden of disproving intent on Mr. Sakawe.

b. Diminished capacity negates the element of specific intent to create a reasonable apprehension of harm or to cause bodily harm.

The specific intent to either create a reasonable apprehension of harm or to cause bodily harm is an essential element of second degree assault with a deadly weapon. State v. Eastmond, 129 Wn.2d 497, 500,

919 P.2d 577 (1996), overruled on other grounds, State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); State v. Abaun, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011). At issue in Mr. Sakawe's case was his capacity to form that intent.

Diminished capacity is a mental condition not amounting to insanity that prevents the defendant from forming the mental state necessary to commit a crime. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993).

Each division of this Court has recognized:

> [D]iminished capacity allows a defendant to negate the culpable mental state element of a crime "by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished."

State v. Stumpf, 64 Wn. App. 522, 525, 827 P.2d 294 (1992) (emphasis added) (quoting State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028, rev. denied, 112 Wn.2d 1026 (1989)); State v. Marchi, 158 Wn. App. 823, 835, 243 P.3d 556 (2010); accord State v. Nuss, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988) ("A claim of diminished capacity merely

negates one of the elements of the alleged crime; it is not an affirmative defense.")

Similarly, voluntary or involuntary intoxication is a "factor the jury may consider in determining if the defendant acted with the specific mental state necessary to commit the crime charged." Furman, 122 Wn.2d at 454; accord State v. Coates, 107 Wn.2d 882, 899, 735 P.2d 64 (1987); RCW 9A.16.090. This rule is applicable to both voluntary and involuntary intoxication. State v. Mriglot, 88 Wn.2d 573, 576, 564 P.2d 784 (1977) ("If a defendant is so intoxicated (voluntarily or involuntarily) as to be unable to form the requisite intent, he cannot be guilt of a specific intent crime."); State v. Corwin, 32 Wn. App. 493, 497, 649 P.2d 119 (1982). Diminished capacity and intoxication defenses may overlap. See Furman, 122 Wn.2d at 454 (diminished capacity defense based upon interaction between defendant's mental illness and use of marijuana); State v. Griffin, 100 Wn.2d 417, 419, 680 P.2d 265 (1983) (defendant suffered from schizophrenia and chronic alcoholism).

As the W.R. Court explained, a defense negates an element where the two cannot coexist. W.R., 181 Wn.2d at 765. This describes the relationship between diminished capacity and mens rea. When a

person lacks the ability to form the requisite mental state, he by definition cannot have the culpable mental state. As an example:

> [w]herever, "intent" as defined in RCW 9A.08.010(a) is an element of a crime, it may be challenged by competent evidence of a mental disorder that causes an inability to form "intent" at the time of the offense.

State v. Edmon, 28 Wn. App. 98, 104, 621 P.2d 1310 (1981). Just as consent negates forcible compulsion, diminished capacity negates intent.

The State must always bear the burden of disproving a defense that necessarily negates an element of the charged offense. W.R., 181 Wn.2d at 764 (citing Smith, 133 S. Ct. at 719). Thus, the court was required to put the burden on the State to prove the absences of diminished capacity.

c. The trial court improperly placed the burden of proving diminished capacity on Mr. Sakawe.

Forensic psychologist Robert Deutsch testified that Mr. Sakawe was in a delusional state at the time he entered the Elmi home. 10/13/14 RP 31-33, 45, 95; accord Ex. 19 at 5-6. Dr. Deutsch suspected that the delusional state was triggered by Mr. Sakawe's ingestion of marijuana laced with PCP. Id. at 32, 72-73, 79; Ex. 19 at 5-6. The impacts of the drug were exacerbated by Mr. Sakawe's lack

of adequate sleep, food, and shelter during the prior few days. Id. at 32-33, 39-40, 60, 64-65; Ex. 19 at 5-6. Mr. Sakawe's attorney therefore argued that his conduct should be excused because he was unable to form the intent to commit the charged offenses. 10/14/15 RP 20.

The trial court placed the burden of proof on Mr. Sakawe to prove that he lacked the capacity to form the intent to assault Mr. Elmi. Finding of Fact 12. In addressing Mr. Sakawe's alternative defenses of involuntary intoxication and diminished capacity, the court found that Mr. Sakawe had not proved involuntary intoxication or that he was incapable of forming the intent to commit assault or criminal trespass:

> Dr. [R.] Eden Deutsch, Ph.D., testified to the opinion that, on the night in question, Mr. Sakawe was under the influence of a controlled substance and that would appear to be the case. However, the Court could no more find that Mr. Sakawe was incapable of forming the rudimentary intent necessary for a trespass or assault than it could find – on the testimony of Dr. Deutsch alone – that a preponderance of the evidence supported a conclusion that the intoxication was involuntary.

Finding of Fact 12.

In addition to placing the burden of proving lack of intent on Mr. Sakawe, the court's finding reflects the court misunderstood the intent required to prove second degree assault. The "rudimentary

intent" reference in Finding of Fact 12 appears to refer to the intent to do the act which underlies the assault, grab a knife, rather than the specific intent to create a reasonable apprehension of harm or to cause bodily injury as required by Washington law. See Byrd, 125 Wn.2d at 713; Abaun, 161 Wn. App. at 154-55. No other findings address the required specific intent, thus indicating the trial court misunderstood the specific intent required to be guilty of second degree assault.

The trial court violated Mr. Sakawe's constitutional right to due process when it placed the burden on the defense to prove that he did not have the intent to cause a reasonable apprehension of harm or to cause bodily harm.

d. Mr. Sakawe's case must be reversed and remanded for a new trial.

Placing the burden on Mr. Sakawe to prove he lacked the capacity to form the requisite intent violated his constitutional right to due process of law. W.R., 181 Wn.2d at 770. Constitutional errors are presumed to be prejudicial, and the State has the burden of proving the error was harmless beyond a reasonable doubt. Id; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Here, ample evidence supported a conclusion that Mr. Sakawe lacked the ability to form the intent to place Mr. Elmi in reasonable fear or

harm or to cause him bodily harm, and the State cannot prove the error was harmless beyond a reasonable doubt.

As the trial court noted, the State did not produce evidence of "words or conduct" demonstrating that Mr. Sakawe entered the Elmi home with the intent to commit a crime against a person or property. Finding of Fact 9. Nor was there any evidence that he formed that intent while inside the home. Finding of Fact 11. As. Dr. Deutsch opined, Mr. Sakawe's actions that night were "disorganized and purposeless." 10/13/14 RP 42.

For example, there was no apparent reason for Mr. Sakawe to enter the house or ask for Mr. Elmi's father, who did not reside there. Id. at 42-43. Mr. Sakawe took off not just his shoes, but also his shirt before he entered the house, again showing a lack of purpose. Id. at 43-44. And, Mr. Sakawe was unable to answer when Mr. Elmi asked him what he was doing there, instead asking for Mr. Elmi's father, who did not live there. 10/8/14 RP 128, 135-36. Nor was it clear who initiated Mr. Elmi and Mr. Sakawe's initial physical altercation and whether Mr. Sakawe was using the bread knife to defend himself from the two brothers. 10/13/14 RP 44-45.

Instead of fleeing the area after he left the Elmi residence, Mr. Sakawe went to sleep on the balcony of the house next door, wearing only pants. 10/9/14 RP 47-50, 52. It took several minutes for the police officers and the barking of the K-9 dog to rouse Mr. Sakawe. Id. at 53-54, 70-71.

Mr. Sakawe's behavior after his arrest was also remarkable. 10/13/14 RP 93. The video tapes from inside the police car transporting Mr. Sakawe to jail show a strange affect; he was sometimes giggling or laughing, smiling inappropriately, and making loud expulsions of air. 10/13/14 RP 85, 88, 93; Ex. 7 (No. 5096@2014060815439 at 2:28-2:20, 2:31-2:34; No. 5096@2014060815440 at 2:26-2:34); Ex. 8 (No. 5096@2014060834937 at 3:50-3:58; No. 5096@2014060834939 at 3:503:58).

Mr. Sakawe's comments while in police custody also show a distorted view of reality. 10/13/14 RP at 83-85, 93. At one point he asked the officers, "Wouldn't it be crazy if I told you good and evil joined forces to take on the world?" Id. at 47, 83; Ex. 7 (No. 5096@2014060815439 at 2:29; No. 5096@2014060815440 at 2:29. He ruminated about heaven and hell, truth and forgiveness. Ex. 8 (No.

5096@2014060834939 at 3:54-3:56). Mr. Sakawe rambled about praying like a Muslim, stated he was "the truth for the people God created," and mentioned that people were worshipping the one-eyed god of money. 10/13/14 RP 48, 54; Ex. 8 (No 5096@2014060834937 at 3:57; No. 5096@2014060834939 at 3:53-54, 3:57).

Finally, Mr. Sakawe was not able to provide a rational description of the events of the evening to Dr. Deutsch. 10/13/14 RP 57, 59. Mr. Sakawe told the psychologist that before he entered the house, he was a lion king, listening to his head, trying to mark his territory but instead urinating on himself, and following a mosquito with his eyes. Id. at 60-61, 74. He told Dr. Deutsch about the one-eyed god with a changing eye and mentioned he had tried to poke out his own eye. Id. at 48. He also described hearing voices. Id. at 61-63.

Dr. Deutsch had significant experience assessing people to determine if they should be involuntarily committed. 10/13/14 RP 20-22, 63. His professional opinion was that Mr. Sakawe appeared to be in a delusional state while being transported by the police. Id. at 42. His professional opinion is supported by the facts of the incident and Mr. Sakawe's unusual behavior afterwards.

This Court cannot be convinced beyond a reasonable doubt that the trial court's decision would not have been different if the court had properly placed the burden of proof of specific intent on the State. "Creating a reasonable doubt for the defense is far easier than proving the defense by a preponderance of the evidence. W.R., 181 Wn.2d at 770. Mr. Sakawe's second degree assault conviction must be reversed and remanded for a new trial. Id.

E. CONCLUSION

Mr. Sakawe's conviction for second degree assault should be reversed and dismissed because the State did not prove beyond a reasonable doubt that he assaulted Mr. Elmi with a deadly weapon.

In the alternative, his conviction should be reversed and remanded for a new trial because the trial court improperly placed the burden on Mr. Sakawe to prove he lacked the capacity to form intent to inflict bodily harm or cause the reasonable apprehension of bodily harm.

Respectfully submitted this 22nd day of June 2015.

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

STATE OF WASHINGTON, Respondent, v. ABDIRAHMAN SAKAWE, Appellant.	)))))))))	NO. 72960-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT (TO INCLUDE DATE AND SIGNATURE ONLY)** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW

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