72960-8

FILED
December 18, 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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State failed to prove beyond a reasonable doubt that, under the circumstances, the rounded-tip knife was a deadly weapon.

Where the State alleges assault based on "a deadly weapon," it can rely on a knife only if it proves the knife allegedly used "is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Moreover, possession of such a knife is insufficient to prove this deadly weapon element. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 366, 256 P.3d 277 (2011). The manner and circumstance of the use are also critical to determining whether the element has been satisfied. *Id*. at 366-68. "Circumstances" include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995).

Here, neither the knife itself nor the circumstances in which it was used substantiate this element beyond a reasonable doubt. First, outside of the context, the knife standing alone was not readily capable of causing death or substantial bodily injury. It lacked a sharp point. Findings of Fact 9; Ex. 11. When Mr. Elmi grabbed the blade, he was not cut. Finding of Fact 5. While there was testimony that the knife

was used by Mr. Elmi's family to cut bread and meat, the State did not elicit more specific testimony about the type of meat or bread it could cut or how recently it had been sharpened. Resp. Br. at 1; 10/8/14 RP 100.

Moreover, even if the saw-like knife could be used as a deadly weapon, the circumstances in the light most favorable to the State do not amount to a deadly weapon. Intent is one of the circumstances this Court should consider. *Shilling*, 77 Wn. App. at 171. According to the trial court, Mr. Sakawe wielded the knife in an attempt to leave, not with intent to kill or even harm. Finding of Fact 11. Mr. Elmi's injuries also do not support a deadly weapon finding: he was able to grab hold of the blade and ended up with only a scratch on his face and some skin on his hand got snagged. Finding of Fact 5; Exhibit 3; 10/8/14 RP 84, 102. Even in the light most favorable to the State, the evidence did not show Mr. Sakawe's "present ability" supported the knife being used as a deadly weapon. *Shilling*, 77 Wn. App. at 171.

With regard to the manner of use, the State argues it proved Mr. Sakawe swung the knife at Mr. Elmi. Resp. Br. at 9-10; *see* Finding of Fact 5. But the State relies on no evidence that the degree of force used or the distance between the individuals was such that Mr. Sakawe could

have inflicted substantial bodily injury with his swings. The actual injuries sustained counsel otherwise. Further, given the knife's likeness to a saw, and apparently a dull one, it would have to be used in a very particular manner to b readily capable of causing death or substantial bodily harm. The evidence does not bear that out.

In *Shilling*, a bar glass was held to have ready capability to cause substantial bodily harm under the circumstances. 77 Wn. App. at 172. There, the defendant admitted the glass could be a deadly weapon but challenged whether it was so used in that case. *Id*. This Court pointed to key facts showing its use as a deadly weapon: the victim was struck from behind on the back of the head, the force of the blow knocked the victim's glasses off, glass shards flew as far as 15 feet away, the victim suffered lacerations requiring stitches, glass was imbedded in the victim's head, and "[e]xpert testimony established that a blow to the head using the glass could fracture the nose and/or cause lacerations requiring stitches and producing permanent scarring." *Id*. at 172.

In comparison, the evidence here was lacking. The State did not present expert testimony to support its argument that under the circumstances the knife could have caused substantial bodily injury.

Further, Mr. Elmi was barely injured throughout the encounter. *See* Ex. 3; 10/8/14 RP 84, 102. The knife lacked a sharp point. Exhibit 11; Finding of Fact 9. Mr. Sakawe was found only to have swung in the direction of Mr. Elmi, not to have actually made forceful contact against the skull like in *Shilling*. Here, the State did not prove the direction, distance or the degree of force used.

In light of the rounded-tip knife and the manner in which it was used, the State did not prove beyond a reasonable doubt that it was readily capable of inflicting death or substantial bodily harm, requiring the conviction be reversed and dismissed. *State v. Skenandore*, 99 Wn. App. 494, 501, 94 P.2d 291 (2000).

2. The assault conviction must be reversed because the court improperly allocated the burden to Mr. Sakawe to disprove that he possessed specific intent.

The State's argument fails to take into account that Mr. Sakawe argued that the court should find either that he was involuntarily intoxicated by a preponderance of the evidence, thus lacking criminal capacity, or that the State failed to prove intent because Mr. Sakawe was unable to form the specific intent to assault due to his intoxication. *Compare* CP 13 (setting forth trial issues in alternative); 10/14/14 RP 19-20 (closing argument posited in the alternative), 26-27; *State v. Box*,

109 Wn.2d 320, 323-30, 745 P.2d 23 (1987) (discussing difference between these arguments); *State v. Mriglot*, 88 Wn.2d 573, 574-75, 564 P.2d 784 (1977) (same) *with* Resp. Br. at 14-16 (arguing Sakawe argued only involuntary intoxication). On appeal, Mr. Sakawe does not challenge whether there was sufficient evidence to excuse criminality altogether. Mr. Sakawe argues, instead, that, in considering Mr. Sakawe's intoxication, the court improperly placed the burden on Mr. Sakawe to disprove the specific intent element. In the context of this argument, the burden could not be placed on Mr. Sakawe because the State bears the burden of proving all elements beyond a reasonable doubt. *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). The burden had to be on the State to show that Mr. Sakawe's intoxication did not interfere with his ability to form specific intent. *See State v. Coates*, 107 Wn.2d 882, 899-900, 735 P.2d 64 (1987) (Pearson, C.J., dissenting).

To satisfy its burden on assault, the State was required to show more than that Mr. Sakawe intentionally grabbed a knife in order to flee. The State had to prove Mr. Sakawe had the specific intent to create a reasonable apprehension of harm or to cause bodily injury.

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). Despite this specific intent, the court called the necessary intent "rudimentary." Finding of Fact 12. Further indicating a lack of specific intent, the trial court also found "that Mr. Sakawe only assaulted Mr. Elmi in the course of seeking to extricate himself from a situation he understood as little as everyone else present." Finding of Fact 11. Thus, the trial court failed to hold the State to its burden both because it assigned the burden to Mr. Sakawe and because it required the State to prove only a lesser form of intent.

This constitutional error is presumed prejudicial. *State v. W.R.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State does not carry its burden to show the error was harmless beyond a reasonable doubt. In fact, it presents no responsive argument. *See* Resp. Br. at 12-17 (arguing only that burden was properly assigned).[1]

[1] Mr. Sakawe disagrees with the State's statement that Mr. Sakawe demonstrated intent by "cover[ing] his face with a mask and le[aving] his shoes outside on the deck." Resp. Br. at 14, n.10. The court found Mr. Sakawe lacked intent to commit a crime when he entered, which is the most covering his face with a tattered t-shirt and removing his shoes could show. Findings of Fact 9, 13; Conclusion 3; 10/8/14 RP 78. Moreover, removing shoes before entering is at least as

Because the State fails to argue otherwise and based on the extensive argument and evidence in Mr. Sakawe's opening brief, this Court cannot be convinced beyond a reasonable doubt that the result would have been the same if the trial court had held the State to its burden on the correct specific intent for assault. *See* Op. Br. at 17-21.

Accordingly, the second degree assault conviction should be reversed and remanded for a new trial. *W.R.*, 181 Wn.2d at 770.

B. CONCLUSION

For the reasons set forth herein and in Mr. Sakawe's opening brief, the Court should reverse the conviction for assault and dismiss the charge. The State failed to meet its burden on the deadly weapon element of assault in the second degree. In the alternative, the court should reverse and remand that count for a new trial because the trial court improperly placed the burden on Mr. Sakawe to disprove the intent element.

DATED this _18th_ day of December, 2015.

Respectfully submitted,

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likely to show Mr. Sakawe's diminished capacity because it would prevent a quick exit and could be evidence Mr. Sakawe thought he was entering a comfortable space, like his own home. In any event, the evidence is far from sufficient to show specific intent to commit assault as neither fact goes to creating bodily injury or fear of physical harm.

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Attorney for Appellant

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DIVISION ONE

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF DECEMBER, 2015.

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