72960-8

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October 26, 2015
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Division I
State of Washington

NO. 72960-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN SAKAWE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM L. DOWNING

BRIEF OF RESPONDENT

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A. ISSUE

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. For purposes of assault with a deadly weapon, the State had to prove that, under the circumstances in which it was used, or attempted or threatened to be used, the weapon was readily capable of causing death or substantial bodily harm. The State presented evidence that Sakawe swung a serrated knife, with a blade approximately six inches long and sharp enough to cut meat, toward the face and neck of the victim. Was the trial court's conclusion that the knife was a deadly weapon rational?

2. Where a defendant raises a defense of involuntary intoxication to support a finding that he was in a delusional state and thus excused from criminal liability, he must establish the defense by a preponderance of the evidence. The trial court held Sakawe to this burden, but placed the burden on the State to prove the requisite intent for the crimes charged beyond a reasonable doubt. Should Sakawe's claim that his right to due process of law was violated by improper placement of the burden of proof be rejected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Abdirahman Sakawe was charged by information and amended information with Burglary in the First Degree and two counts of Assault in the Second Degree. The State alleged that in the early morning hours of June 8, 2014, Sakawe entered the Elmi residence without permission and assaulted both Abdikadir Elmi and his brother Abdikhadar Elmi with a knife. The State further alleged that Sakawe was armed with a deadly weapon (knife) at the time of the assaults. CP 1-7.

Sakawe informed the court and the State that he would proffer a defense of involuntary intoxication. Supp. CP ___ (sub #32, Order on Omnibus Hearing). He waived his right to a jury trial and chose to proceed with a bench trial. 4RP[1] 66-69; CP 15. Sakawe did not testify at his trial, but offered the testimony of Dr. Robert Deutsch, a psychologist, in support of his chosen defense. 6RP 19. Dr. Deutsch testified to his belief that Sakawe was in a "delusional state" at the time of the incident in question,

[1] The verbatim report of proceedings will be referred to in this brief as follows: 1RP (August 14, 2014); 2RP (September 10, 2014); 3RP (September 23, 2014); 4RP (October 8, 2014); 5RP (October 9, 2014); 6RP (October 13, 2014); 7RP (October 14, 2014); 8RP (October 28, 2014).

likely due to having smoked marijuana that had been laced with PCP[2] or "sherm."[3] 6RP 32-34.

The trial court found Sakawe not guilty of Burglary in the First Degree, but guilty of the lesser-included crime of Criminal Trespass in the First Degree; guilty of Assault in the Second Degree as to Abdikadir Elmi (while armed with a deadly weapon); and not guilty of Assault in the Second Degree as to Abdikhadar Elmi. 7RP 34-40; CP 16-22.

Based on Sakawe's offender score of seven, the court imposed a mid-range sentence of 48 months for the assault conviction, plus the mandatory 12-month enhancement for the deadly weapon finding, for a total of 60 months of confinement. 8RP 12; CP 92-100. A sentence of 364 days in jail for the gross misdemeanor was ordered to run concurrently. CP 101-03.

2. SUBSTANTIVE FACTS.

Abdikadir Elmi ("Elmi") got home from work at about 1:00 a.m. on June 8, 2014. 4RP 76. After taking a shower, he sat down to watch television. 4RP 76. Hearing a noise in the kitchen, he went to check on it. 4RP 77. Opening the kitchen door a little

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[2] Phencyclidine.

[3] Dr. Deutsch testified that "sherm" is "supposedly another word for or another form of PCP." 6RP 34.

way, Elmi saw someone walking around. 4RP 77, 121. At first Elmi thought it was his brother, but when he opened the door a second time, he saw that the man was wearing a mask that appeared to be fashioned out of a torn shirt. 4RP 77, 78. The man was not wearing a shirt or shoes. 4RP 78.

The intruder got right up in Elmi's face and grabbed him by the shoulders. 4RP 77, 79, 121, 122. He asked Elmi, "Where's your dad?"[4] 4RP 79. When Elmi stepped back, the intruder grabbed him by the neck and pulled him onto the couch. 4RP 77, 79. With the man on top of him, holding him down, Elmi's screams roused his brother Abdikhadar, who pulled the man off Elmi. 4RP 77, 83-84.

The intruder ran into the kitchen and grabbed a knife.[5] 4RP 77, 84. He swung the knife near Elmi's face, but Elmi managed to duck and grab the knife. 4RP 77, 84-85. Elmi got a scratch on his face; the knife also took some skin off his hand. 4RP 84, 102;

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[4] While Elmi's father did not live at the house, he happened to be there that night. 4RP 80, 123.

[5] The serrated bread knife was approximately 12 inches long. 4RP 99; 5RP 19; Ex. 1 (photo #18). Elmi testified that the family used the knife to cut meat as well as bread. 4RP 100.

Ex. 3. Elmi was not sure if the intruder swung the knife at his brother.[6] 4RP 86-87.

The intruder ran outside to the balcony and dropped to the ground. 4RP 88-89. Responding police officers located a pair of shoes and a black sweatshirt on the balcony, and a black shirt inside the house.[7] 5RP 19, 32-33. A K-9 team located the suspect in an adjacent yard, under a picnic table on a deck. 5RP 48. The man appeared to be sleeping, and did not respond immediately when summoned by police. 5RP 50. The man seemed groggy; he might have been drunk. 5RP 50, 52. He was eventually pulled out from underneath the table, and taken into custody. 5RP 50-51.

The suspect was brought to the front of Elmi's house. 5RP 30. The victims, standing at their front door, were asked if he was the person who had been fighting with them inside their house. 5RP 30. They responded in the affirmative "without hesitation." 4RP 118-19; 5RP 30. In addition, Abdikadir Elmi identified Sakawe in court as the intruder who came into his home. 4RP 120.

Sakawe did not testify at his trial.

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[6] Photos of Elmi's brother, Abdikhadar, show lacerations on his arms, indicating that the intruder did indeed swing the knife at him. Abdikhadar did not testify at trial, however, and the court found Sakawe not guilty of assaulting him. Ex. 4; CP 18, 21, 22.

[7] Elmi had pulled the shirt off the intruder's face as they struggled on the couch. 4RP 78-79.

3. DR. DEUTSCH'S EXPERT OPINION.

The defense presented the testimony of psychologist Dr. Robert Deutsch, who had conducted a forensic evaluation of Sakawe. 6RP 19, 26. Dr. Deutsch had been asked to determine Sakawe's mental state at the time of the incident in question. 6RP 28.

Based primarily on his interview with Sakawe, Deutsch believed that, while Sakawe had set out to smoke marijuana with some friends, the marijuana may have been laced with PCP or sherm. 6RP 27-28, 33-35. Deutsch characterized this as involuntary intoxication. Ex. 19 at 6. He concluded that this had caused Sakawe to be in a delusional state at the time of the incident. 6RP 32-34.; Ex. 19 at 5, 6.

Dr. Deutsch acknowledged that Sakawe had either made up or greatly exaggerated symptoms of post-traumatic stress disorder when faced with criminal charges in the past. 6RP 74-76. Nevertheless, Deutsch did not administer any test for malingering. 6RP 77.

Dr. Deutsch repeatedly and unequivocally stated his ultimate conclusion: that Sakawe was in a "delusional state" during the

incident in question, and that he was unable to appreciate his actions due to that delusional state. 6RP 45, 95.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND SAKAWE GUILTY OF ASSAULT IN THE SECOND DEGREE BY USE OF A DEADLY WEAPON.

Sakawe contends that the State failed to prove that the bread knife he used to assault Abdikadir Elmi was readily capable of causing death or substantial bodily harm. In making this argument, Sakawe ignores some of the evidence introduced at trial, as well as reasonable inferences from that evidence. The court made a rational decision based on the evidence in finding Sakawe guilty of assault with a deadly weapon.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. (quoting Salinas, 119 Wn.2d at 201).

Circumstantial evidence is as reliable as direct evidence. Id. (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). The reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 874-75 (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

The State charged Sakawe with intentionally assaulting Abdikadir Elmi with a deadly weapon ("to-wit: a knife"). CP 7; RCW 9A.36.021(1)(c). For purposes of the substantive crime, the State had to prove that the knife Sakawe wielded in his assault on Elmi was a "weapon, device, instrument, article, or substance . . . which, under the circumstances in which it [was] used, attempted to be used, or threatened to be used, [was] readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). "Substantial bodily harm" is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

There was sufficient evidence to support the trial court's finding of guilty. The serrated knife that Sakawe brandished was

approximately 12 inches long; the blade was approximately half of the total length.[8] 4RP 92, 99; 5RP 19; Ex. 1(photo #18). The Elmi family used the knife to cut meat as well as bread. 4RP 100. While Sakawe contends that there was no testimony as to the sharpness of the blade (BOA at 10), the trier of fact was entitled to infer that a knife used to cut meat was sufficiently sharp to inflict substantial bodily harm on a human being.

The circumstances of its use also support the finding that the knife was a deadly weapon for purposes of the crime of second degree assault. Elmi testified that Sakawe swung the knife at his face. 4RP 77, 85. The knife apparently made some contact, as Elmi received a scratch on his face. 4RP 84. Sakawe also swung the knife at Elmi's neck area. 4RP 85. Contact with Elmi's eye or his throat could easily have resulted in substantial bodily harm.

Sakawe points out that the trial court found that he had "flailed" the knife toward Elmi, and not that he had "lunged" toward

[8] Sakawe disputes this, contending that "the photographs in Exhibit 11 appear to depict different knives," and that, in one of the photos, "the knife blade is less than half the length of the knife." BOA at 8. The difference in apparent length appears to be due to differences in the angle from which each photo was taken. Moreover, Elmi identified the knife in Ex. 1 (photo #18) as the knife that Sakawe used to assault him; the blade on this knife appears to be at least half of the total length of 12 inches. 4RP 92, 99; Ex. 1 (photo #18). In any event, unlike for the deadly weapon allegation, the length of the blade is not dispositive of the issue here. *See* RCW 9.94A.825 (for purposes of deadly weapon special verdict, any knife having a blade longer than three inches is a deadly weapon).

Elmi with the knife. BOA at 8-9, 10-11; CP 18 (Finding of Fact #5). This hardly furthers Sakawe's argument. "Flail" is another way of saying "swing." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 863 (1993). The swinging motion that Elmi testified to, and that the court found, exposed Elmi to the greatest harm, given the serrated blade of this knife. "Lunging" with a knife that had no point would not have carried the same potential for substantial bodily harm.

Nor is Sakawe's reliance on State v. Skenandore, 99 Wn. App. 494, 994 P.2d 291 (2000) helpful to him. In that case, the home-made spear fashioned by prisoner Skenandore left marks on a corrections officer's chest when Skenandore wielded the weapon through the "cuff port" in his cell door. Id. at 496-97. The prosecutor argued in closing that "[a] sharpened pencil in the eye could cause substantial bodily injury." Id. at 498. A jury found Skenandore guilty of assault in the second degree. Id.

The Court of Appeals reversed, finding the evidence insufficient to support the charge. Id. at 500-01. However, the court's conclusion that "no rational trier of fact could have found that Skenandore's spear was readily capable of causing death or substantial bodily harm under the circumstances in which it was

used" (id. at 501) was not based on the fact that the victim *suffered* no such harm, but rather on the fact that the circumstances *precluded* such harm. The evidence showed that the corrections officer was looking through a vertical window that was higher and to the side of the cuff port through which he was serving Skenandore breakfast. Id. at 500. The small opening of the cuff port, which was about a third of the way up from the floor, restricted the spear's movement. In other words, the victim's eye was not even *exposed* to injury from the weapon.

By contrast, Abdikadir Elmi's eyes and throat were fully exposed to the knife that Sakawe swung at him. By great good fortune, and due to Elmi's success at blocking the knife with his hands, the knife did not connect with these vulnerable areas of Elmi's body. Based on the way Sakawe wielded the knife, the knife was readily *capable* of causing substantial bodily harm. The trial court thus properly found that the knife was "an instrument capable of causing substantial bodily harm," and that Sakawe was thus guilty of second degree assault. CP 20 (Finding of Fact #14), 22 (Conclusion of Law #4).

2. BASED ON THE DEFENSE THAT HE PRESENTED, THE TRIAL COURT PROPERLY PLACED THE BURDEN ON SAKAWE TO PROVE INVOLUNTARY INTOXICATION BY A PREPONDERANCE OF THE EVIDENCE.

Sakawe contends that the trial court, in violation of his right to due process of law, placed a burden on him to prove diminished capacity. His argument depends on a misreading of the record as to the defense raised at trial, and of the trial court's findings. The record shows that the trial court properly placed the burden of proof as to intent on the State.

Sakawe announced before his trial began that his defense would be involuntary intoxication. Supp. CP ___ (sub # 32, Omnibus Order). The assertion of this defense, and the way in which it was used, determined the burdens of proof.

Our supreme court long ago elucidated the difference between voluntary and involuntary intoxication. Voluntary intoxication does not excuse the criminality of an act, but may tend to negate specific intent when intent is an element of the offense. State v. Mriglot, 88 Wn.2d 573, 574-75, 564 P.2d 784 (1977).[9] In

[9] The Washington Pattern Jury Instructions make this clear: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with [the requisite mental state]." WPIC 18.10.

such a case, the burden remains on the State to prove intent beyond a reasonable doubt. *See* State v. W.R., 181 Wn.2d 757, 765, 336 P.3d 1134 (2014) (when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant). There is no practical difference between voluntary and involuntary intoxication as to crimes that require proof of a specific intent. Mriglot, 88 Wn.2d at 576.

Involuntary intoxication may also operate as a complete defense, however, in that it can excuse the criminality of an act. Mriglot, 88 Wn.2d at 575. In such a case, it must rise to the level of insanity, i.e., that the defendant was unable to perceive the nature and quality of his act or to tell right from wrong with reference to the act. Id. at 575, 576-77. Like insanity, involuntary intoxication in these circumstances is an affirmative defense, which the defendant must establish by a preponderance of the evidence. State v. Box, 109 Wn.2d 320, 322, 745 P.2d 23 (1987); State v. Gilcrist, 25 Wn. App. 327, 328, 606 P.2d 716 (1980); State v. Riker, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994) (citing Gilcrist, supra); 13B Seth A. Fine & Douglas J. Ende, WASHINGTON PRACTICE: CRIMINAL LAW § 3204, at 237 (2d ed. 1998) ("When a defendant intends to use involuntary intoxication as a general defense, and not merely as an

evidentiary challenge to a mental state, it will be necessary for the defendant to prove that the intoxication was in fact involuntary."). *See* W.R., 181 Wn.2d at 762 (defense that merely excuses conduct that would otherwise be punishable is an affirmative defense, and the burden of proving it may be allocated to the defendant).

There is no question that Sakawe chose to use involuntary intoxication as a general defense, and not simply as a challenge to the intent element of assault.[10] Counsel repeatedly elicited from Dr. Deutsch the opinion that Sakawe was in a delusional state at the time of the incident, precipitated by smoking marijuana that may have been laced with PCP, and that this delusional state prevented Sakawe from appreciating his actions. 6RP 32-34, 42, 45, 95; *see also* Ex. 19 at 5-6.

The defense was discussed at length by both sides during closing argument. The State argued that Sakawe, by asserting involuntary intoxication, had taken on the burden of proving both that he had ingested the drugs by force or fraud, and that he was in

[10] While counsel could have avoided the burden of proof by simply arguing that Sakawe's involuntary intoxication prevented him from forming the requisite intent, counsel may have perceived that this would not be a winning strategy. After all, the facts that Sakawe covered his face with a mask and left his shoes outside on the deck – actions ostensibly aimed at avoiding detection – were strong evidence of his intent. Better to claim a completely delusional state, based on statements that Sakawe had made to Deutsch about his actions that night (*see* Ex. 19 at 4-5), and avoid criminal responsibility altogether.

such a state of mind that he could not appreciate the nature and quality of his acts or know that his acts were wrong.[11] 7RP 8-9. The State pointed out that there was no substantive evidence of involuntary intoxication, as Sakawe had not testified. 7RP 9. The State then spent considerable time discussing the evidence of Sakawe's intent. 7RP 10-14 ("So the question becomes is [sic] was his conduct intentional, was he acting with an objective purpose to accomplish the result.").

Defense counsel, for her part, contended that *the preponderance of the evidence standard had been met as to involuntary intoxication*, based on Dr. Deutsch's testimony.[12] 7RP 19. Counsel maintained that Sakawe did not know the nature and quality of his acts, or that his acts were wrong. 7RP 20. Counsel argued that, *if the court were to find that Sakawe's intoxication was voluntary*, the question would be whether he had the capability to form the specific intent required for the crimes charged. 7RP 20.

In rebuttal, the State reiterated that Sakawe had the burden to show by a preponderance of the evidence that he ingested drugs

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[11] Notably, Sakawe did not object to this argument.

[12] This statement would likely support invited error. *See* State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendant is precluded from claiming reversible error on appeal where error was committed at defendant's invitation).

by either force or fraud, and that he did not know the nature and quality of his acts or that the acts were wrong. 7RP 30.

In spite of this record, Sakawe discusses diminished capacity at length in his appeal, and claims that the trial court improperly placed a burden on him to prove that he did *not* have the requisite intent for the crime of assault.[13] BOA at 12-17. He bases this claim on a misunderstanding of the following finding made by the trial court:

> Dr. [Robert] Eden Deutsch, PhD, testified to the opinion that, on the night in question, Mr. Sakawe was under the influence of a controlled substance and that would indeed 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 evidence supported a conclusion that the intoxication was involuntary.

CP 20 (Finding of Fact #12); BOA at 16.

Sakawe interprets this finding as "placing the burden of proving lack of intent on Mr. Sakawe." BOA at 16. However, read logically, the court's reference to a finding of intent is completely separate from the reference to the burden of proof on involuntary

[13] Raising the defense of diminished capacity, of course, places no such burden on a defendant, as evidenced by the Washington Pattern Jury Instruction on diminished capacity: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form [the requisite mental state]." WPIC 18.20.

intoxication. The reference to Dr. Deutsch's testimony, and to the burden of proof, is tied explicitly to the finding on involuntary intoxication. The court in no way placed a burden on Sakawe to show lack of intent as to the charged crimes.[14]

In fact, in its very next findings, the trial court focused on the State's burden to prove intent. The court concluded that "[t]he state has failed to prove the specific intent required for a burglary charge in Count 1 but has proven beyond a reasonable doubt the crime of criminal trespass in the first degree." CP 20 (Finding of Fact #13). The court further concluded that "[t]he state has proven beyond a reasonable doubt that, in brandishing the bread knife at Abdikadir Elmi, the defendant intentionally assaulted him with a deadly weapon, i.e., an instrument capable of causing substantial bodily harm." CP 20 (Finding of Fact #14).

The record clearly demonstrates that the trial court properly allocated the burdens of proof. Sakawe's claim of a due process violation should be rejected.

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[14] Sakawe further accuses the trial court of misunderstanding the intent required to prove second degree assault. BOA at 16. He speculates that, because the court used the term "rudimentary," it was referring only to the intent to grab a knife, rather than the specific intent for assault. BOA at 16-17. This unsupported interpretation of the court's meaning flies in the face of the basic principle that, in a bench trial, "the trial court is presumed to know the law." Douglas Northwest v. O'Brien & Sons Constr. Inc., 64 Wn. App. 661, 681, 828 P.2d 565 (1992). There is no basis here to presume otherwise.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 26th day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Elaine L. Winters at elaine@washapp.org, c**ontaining a copy of the **Brief of Respondent**, in **STATE V. ABDIRAHMAN SAKAWE,** Cause No. **72960-8-I**, in the Court of Appeals, Division I, for the State of Washington.

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

Name

Done in Seattle, Washington

10-26-15

Date