

62502-1

62502-1

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2009 JUL -2 AM 10:32

NO. 62502-1-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

SERGEY S. CHEPURKO,

Appellant.

---

BRIEF OF RESPONDENT

---

JANICE E. ELLIS  
Prosecuting Attorney

MATTHEW R. PITTMAN  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 8

A. THE COURT ENTERED SUFFICIENT FINDINGS OF FACT TO CONCLUDE THE ELEMENTS OF ASSAULT IN THE SECOND DEGREE WERE SATISFIED..... 10

1. Sufficient Findings Were Entered To Support The Court's Legal Conclusion The Victim In Fact Reasonably Apprehended Imminent Bodily Harm. .... 12

2. Sufficient Findings Were Entered To Support The Court's Legal Conclusion The Assault Was Committed With a Deadly Weapon. 13

3. Sufficient Findings Were Entered To Support The Court's Legal Conclusion Defendant Acted With The Intent To Create Apprehension And Fear Of Bodily Injury In Another. .... 15

B. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S FINDINGS RESPONDENT INTENDED TO PLACE DEAN IN APPREHENSION OF IMMEDIATE PHYSICAL INJURY..... 16

IV. CONCLUSION..... 21

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

Brown v. Superior Underwriters, 30 Wn. App. 303, 632 P.2d 887 (1980) ..... 17

Matter of Estate of Lint, 135 Wn.2d 518, 957 P.2d 755 (1998) ..... 10

Pilcher v. State, 112 Wn. App. 428, 49 P.3d 947 (2002)..... 12, 21

State v. Brown, 68 Wn. App. 480, 843 P.2d 1029 (1993) ..... 18

State v. Byrd, 72 Wn. App. 774, 868 P.2d 158 (1994) ..... 17

State v. Hupe, 50 Wn. App. 277, 748 P.2d 262 (2007) ..... 8

State v. Karp, 69 Wn. App. 369, 848 P.2d 1304 (1993) ..... 18

State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006)..... 14

State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003)..... 8

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).. 9, 14, 16, 17

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) ..... 12, 21

State v. Tilli, 148 Wn.2d 350, 60 P.3d 1192 (2003)..... 13

State v. Trasvina, 16 Wn. App. 519, 557 P.2d 368 (1976)..... 17

**WASHINGTON STATUTES**

RCW 9A.08.020(3)(a)(ii) ..... 14

RCW 9A.36.021(1)(c) ..... 9

**COURT RULES**

RAP 10.3 ..... 10

RAP 10.3(g) ..... 10

RAP 10.4(c) ..... 11

**OTHER AUTHORITIES**

WPIC 35.50 ..... 9

## **I. ISSUES**

Was sufficient evidence presented to support the trial court's determination that respondent was guilty of assault in the second degree?

## **II. STATEMENT OF THE CASE**

On March 22, 2009, Rodney Dean was at the Alderwood Mall in Lynnwood, WA, when he encountered the respondent by chance. RP 91-92. Prior to the events in question, respondent Sergey Chepurko had been involved in a dating relationship with Cheyenne Dean, Rodney's sister. RP 90. The Dean family did not approve of respondent seeing their daughter. Respondent was 17 years old and Cheyenne was 14. RP 90-92.

Seeing respondent, Dean called his parents. They informed him to tell respondent to stay away from Cheyenne. RP 92-93. Dean approached respondent and told him to stay away from his sister and their family's house. He told him his parents would call the police and that he would "come after you." Respondent's only response was to smirk and claim that he did not know Dean. RP 94.

Present with respondent during the interaction was Kayla Harris. She too was involved in a romantic relationship with

respondent. RP 38. When Dean walked away, Harris went with him, abandoning respondent. RP 95. Dean and Harris walked about the mall, eventually encountering three mutual friends. The three were members of a Lynnwood High School gang called the "Juggalos." Neither Dean nor Harris were Juggalos, but were friendly with many individuals who were. RP 44; 99. The five began to walk about the mall together. RP 95. Eventually, respondent approached their group. He began to follow them, calling out to Dean, repeatedly questioning him as to why he could no longer see Cheyenne. RP 97.

The group walked outside the mall, respondent still following. The Juggalos did not have a good relationship with respondent. They had been involved in previous episodes with respondent and a group of his acquaintances known to them as the "Russian mob" or "Russian mafia." RP 57, 103, 106. The situation had developed into an "ongoing feud." RP 143. Eventually, the three Juggalos turned about and challenged respondent to step off the curb with the apparent intention of goading him into a fight. Respondent walked away. RP 51.

Afterward, the group found their way across a street to an area called "the Hill." "The Hill" is sloping wooded area running

along the boundary of Lynnwood High School property below and a commercial parking lot area above. A main path leads down from the parking lot area through the woods. There are other paths trailing off in various directions through the treed area as well. RP 41-42.

Once at the Hill, one of the Juggalos got involved in a verbal dispute with another pair of youths walking through the wooded area. Ms. Harris stated the two were "Russians." RP 54. It eventually escalated to violence, the Juggalo arming himself with a stick or log from the woods, one of the Russians brandishing brass knuckles. RP 104. The Juggalo hit the person armed with the brass knuckles with the stick, bloodying him. The Russians walked away. RP 105. Dean saw this interaction, but did not participate. RP 56, 105.

Subsequently, the Juggalos came up with the idea of calling the respondent on a cell phone and inviting him to come join them in the wooded area and "smoke some weed." In truth, the Juggalos were hoping to lure respondent there for a fight. Dean did not participate in the call, but nonetheless hoped he would arrive so he could fight him. RP 105-07. After the call, other Juggalos were called. RP 57. Dean observed more Juggalos begin to arrive,

hoping to get even with the "Russian mob." RP 105-06. Some of the Juggalos began to collect sticks to use as weapons. RP 115, 128-29.

Approximately an hour after the call, respondent arrived in the parking lot above the Hill. He was not alone. Three to five cars had arrived in total, brakes screeching, car doors slamming. RP 60, 109. He was accompanied by ten or fifteen individuals or more. RP 60, 108. They chased down the stairs together after Dean and the Juggalos. RP 60-61, 66. They were arming themselves as they did so, trading off weapons. RP 109. There was at least one individual with a baseball bat and one with brass knuckles. RP 109. The youth with the brass knuckles who had been hit with the stick earlier was amongst their group. He again had brass knuckles. RP 63. Their demeanor indicated they wished to fight, looking in "a rough way." RP 112. They clearly outnumbered Dean and the Juggalos. RP 61. The Juggalos and Dean ran. RP 63. Dean was chased through the wooded area by at least one individual with a baseball bat. RP 115-16.

While Dean testified that it was respondent *personally* wielding the bat during the chase through the woods (in fact testifying that he had been struck by Chepurko), the court did not

find this to be the case beyond a reasonable doubt. RP 115-16.

The court nonetheless found that:

there were individuals that were chasing [Dean]; that they had brass knuckles and bats, and I would find that was the case.

RP 247.

Dean eventually raced back to the mall across the street, stopping at a Marine recruiting station there. Once inside, he placed a call to 911. RP 116. A recording of that 911 was admitted into evidence. Ex. 5. Dean is heard to be out of breath and vomiting while talking to the dispatcher. He explained he had been chased with a bat and described several members of the Russian group by the clothes they were wearing. Ex. 5; RP 119-20.

Lynnwood Police Officer Tyler Mellema responded to area, seeing Dean briefly at a distance. Dean gestured the officer toward the trails area on Lynnwood High School grounds. He proceeded there. RP 147-49.

Arriving on school grounds, he observed three youths grouped together running across a field. RP 150. The three were wearing clothing fitting the clothing description of the individuals Dean described to 911. RP 152. The officer stopped them. One was respondent. RP 153. A pat down of respondent's

companions revealed a pair of brass knuckles. RP 153, 155. Each member was out of breath. An aluminum baseball bat was found directly along the path on which they had been running, lying on a soccer field. RP 185.

Two stragglers were detained near the three who were stopped. They were also out of breath. RP 159. Dean arrived and identified all five suspects as having chased him, including Chepurko. RP 161-62. In court, Dean also identified the aluminum baseball bat retrieved by the officer as the one used in chasing him. RP 116-17.

Respondent did not testify nor offer any evidence in his defense. RP 188.

The court found defendant guilty of Assault in the Second Degree and Misdemeanor Riot. 2 CP \_\_ (“Order on Adjudication”).

In its oral findings, the court stated:

Mr. Chepurko had a pretty good idea he was being set up, so he got ready for the fight and brought ten or 15 of his friends with him to join in. Mr. Chepurko and these other ten or fifteen ... showed up at the area... with the intention of fighting whoever was there. ... [S]ome of them were armed. There was at least one individual with brass knuckles and at least one individual armed with a baseball bat.

RP 245-46.

Further, the court stated:

I would find Mr. Dean was placed in reasonable fear or apprehension of bodily injury when he saw the group approaching him and some of the members being armed with bats. ... it's clear from the fact that he ran, and also from the 911 tape, that he was in fear and apprehension.

RP 249-50.

Further:

[Dean testified] that there were individuals that were chasing him; that they had brass knuckles and bats, and I would find that was the case.

RP 247.

Summarizing, the court stated:

I think what is clear is that both respondents were among the participants... that they arrived the scene; they knowingly used and threatened to use force; that the use and threat to use was unlawful; and that the use and threat to use force was against other persons. And I would make those findings beyond a reasonable doubt based on the evidence.

RP 247.

The court further entered written Findings of Fact and Conclusions of Law. 1 CP 3-7. (The Court's written Findings of Fact and Conclusions of Law are included as Attachment #1).

### **III. ARGUMENT**

Respondent challenges one of his convictions arguing “there is insubstantial, insufficient evidence upon which to find Chepurko guilty of the charge Assault 2<sup>nd</sup> Degree.”<sup>1</sup> Br. of Appellant, p. 10.

Whether sufficient evidence was presented necessarily depends upon the elements of the particular crime. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). The elements of assault in the second degree, in turn, depend upon the type of assault committed. Assault may be committed in one of three ways: battery, attempted battery or “common law assault.” State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 262 (2007). “Common law assault” criminalizes intentionally placing another in reasonable apprehension of bodily injury. Id. at 282. Defendant was convicted under this alternative:

Respondent Chepurko is guilty of the crime of Assault in the Second Degree.

Mr. Chepurko intended to place [victim] and others in his group in apprehension of [and] imminent fear of bodily injury and Mr. Dean reasonably apprehended such.

---

<sup>1</sup> Defendant was also convicted of, but does not contest, a charge of misdemeanor riot in this same cause. Defendant also does not challenge his convictions by stipulation to the police reports in the consolidated matter of COA No. 62503-9-1, arising from Snohomish County Cause 08-8-00463-5. Accordingly, the State’s response is limited solely to the issues actually raised, the conviction for second degree in COA No. 62502-1-I.

Findings of Fact, Conclusions of Law, 1 CP 5.

Proof of assault in the second degree under this means consists of three elements: (1) defendant acted with the intent to create in another apprehension and fear of bodily injury; (2) reasonable apprehension and imminent fear actually resulted; and (3) that the assault was committed with a deadly weapon. WPIC 35.50; RCW 9A.36.021(1)(c).

After a bench trial, in determining whether sufficient evidence has been presented to support the essential elements of the crime, an appellate court reviews the trial court's findings of fact. Where a specific finding of act is challenged by an appellant, the appellate court will engage in a review of the record to determine whether the finding is supported by "substantial evidence."

After a bench trial, we determine whether substantial evidence supports the trial court's findings of fact and, in turn, whether the findings support the conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *We consider unchallenged findings of fact verities on appeal...*

State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)

(emphasis added).

**A. THE COURT ENTERED SUFFICIENT FINDINGS OF FACT TO CONCLUDE THE ELEMENTS OF ASSAULT IN THE SECOND DEGREE WERE SATISFIED.**

The Supreme Court has noted the importance of raising *specific* challenges to findings of fact in a sufficiency review:

As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with arguments as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3.

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb through the record with a view toward construction arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Matter of Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

The Rules of Appellate Procedure referred to by the Supreme Court above make clear that an appellant must affirmatively and specifically challenge the court findings it wishes to contest. RAP 10.3 (g) requires:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Additionally, RAP 10.4(c) requires:

If a party presents an issue which requires study of a... finding of fact... the party should type the material portion of the text out verbatim or include them by copy in the text or in an appendix to the brief.

Here, the court entered extensive Findings of Fact and Conclusions of Law. 1 CP 3-7. Respondent does not comply with the appropriate Rules of Appellate Procedure in contesting any of these findings. Indeed, respondent entirely ignores the court's findings, never once even referring to their existence, much less citing to a specific finding as erroneous.

To the contrary, respondent's arguments appear entirely to involve a reurging of his version of events on the appellate court, pointing to various reasons why the State's witnesses should not have been believed. Br. of Appellant, pp. 9-12. These claims are not only too generalized to constitute specific challenges to findings of fact after a bench trial, they are entirely inappropriate for a substantial evidence review:

Under the substantial evidence standard, we will not substitute our judgment for that of the fact finder. Instead, this Court accepts the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences.

Pilcher v. State, 112 Wn. App. 428, 435, 49 P.3d 947 (2002).

Indeed they are entirely inappropriate to any sufficiency of the evidence review, jury trial or bench trial:

Credibility determinations are for the trier of fact and are not subject to review. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

Given respondent's complete failure to specifically or appropriately challenge the trial court's findings of fact, those findings should be accepted as verities for purposes of this sufficiency review.

**1. Sufficient Findings Were Entered To Support The Court's Legal Conclusion The Victim In Fact Reasonably Apprehended Imminent Bodily Harm.**

Here, the court found "Mr. Dean was in imminent fear of bodily injury from [respondent]... and with being harmed with the baseball bat." Finding of Fact No. 13, 1 CP 5.

Additionally, in its oral findings, the court stated:

Here, I would find that Mr. Dean was placed in reasonable fear or apprehension of bodily injury when

he saw the group approaching him and some of the members being armed with a bat. I don't think he was specifically asked if he was in fear or apprehension, but it's clear from the fact that he ran, and also from the 911 tape, that he was in fear and apprehension.

RP 249-50. State v. Tilli, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003) (“[A]n appellate court may consider a trial court’s oral decision in interpreting its written findings of fact... so long as there is no inconsistency”).

Defendant raises no specific challenge to these findings, nor does he otherwise appear to contest this element was satisfied. The court’s findings are thus taken as verities for this appeal. They ably support the court’s conclusion that the victim, in fact, reasonably apprehended imminent physical harm.

**2. Sufficient Findings Were Entered To Support The Court’s Legal Conclusion The Assault Was Committed With a Deadly Weapon.**

The court found, “Mr. Dean was in imminent fear of bodily injury from Mr. Chepurko... and [his] group with being harmed with the baseball bat. “ Finding of fact No. 13, 1 CP 5.

Further:

The baseball bat as it was used and threatened by member of Mr. Chepurko’s group was a Deadly Weapon readily capable of causing substantial bodily injury.

1 CP 5. State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)  
("A finding of fact denominated as a conclusion of law will be treated as a finding of fact.)

Also, in its oral ruling, the court added "[a] baseball bat can certainly qualify as a deadly weapon when it's threatened to be used in the way it was here." RP 247.

Defendant raises no specific challenge to these findings. Again, the court's findings are thus taken as verities for this appeal. Stevenson, 128 Wn. App. at 193. They ably support the court's conclusion as a matter of law that respondent assaulted the victim with a deadly weapon.

Moreover, any challenge based on the notion that defendant did not *personally* possess or threaten the use of the baseball bat is without legal consequence. Respondent acted as a knowing accomplice, aiding in the threatening use of that baseball bat and is therefore as culpable as the principle of second degree assault. RCW 9A.08.020(3)(a)(ii).

Here, the court found:

Mr. Chepurko. And the others who had arrived with them fully expected to engage in the fight with the "Juggalos" traveling there specifically for that purpose.

...

Several member of Mr. Chepurko's group were armed with weapons. At least one individual in his group was armed with a baseball bat. Mr. Chepurko... was aware of this fact.

Findings of fact No.s 9, 10, 1 CP 4.

Additionally, the court found:

Though it was unclear which specific member of Chepurko's group possessed and threatened Dean and his group with the deadly weapon, that member and Mr. Chepurko acted as knowing accomplices in the threatening use of such, creating in Mr. Dean the reasonable apprehension he would be harmed with such.

1 CP 5.

Respondent raises no specific challenge to any of the points above. Even if he had, the court entered sufficient findings of fact to support its conclusion the assault was committed with a deadly weapon.

**3. Sufficient Findings Were Entered To Support The Court's Legal Conclusion Defendant Acted With The Intent To Create Apprehension And Fear Of Bodily Injury In Another.**

Here, the court entered the following written findings of fact with regard to respondent's intent:

[Respondent] ... and ten to fifteen friends descended the slope and made contact with the group of Juggalo's including Mr. Dean, clearing threatening the Juggalo's and Dean with force and the weapons. The baseball bat was obviously *intended and threatened*

as [a] weapon which could be swung to strike another individual causing a substantial injury.

[...]

[Respondent] *intended* to place Dean... in apprehension of imminent fear of bodily injury and Mr. Dean reasonably apprehended such.

The baseball bat as it was *used and threatened* by [respondent's] group was a Deadly weapon and readily capable of causing substantial bodily injury.

1 CP 5 (emphasis added).

As noted above, respondent raises no specific factual challenge to any of these findings. Given that defendant does not specifically challenge these findings, they are taken as verities.

Stevenson, 128 Wn. App. at 193.

**B. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S FINDINGS RESPONDENT INTENDED TO PLACE DEAN IN APPREHENSION OF IMMEDIATE PHYSICAL INJURY.**

Respondent argues the court erred in finding sufficient evidence presented of intent to assault, claiming that the facts supported nothing more than that defendant was involved in the "mere display" of a deadly weapon. Br. of Appellant, p. 7 ("...it was a 'mere display' and thus no specific intent may be inferred.")

Here, even if respondent had specifically challenged the relevant findings of fact, those findings are supported by substantial

evidence. Substantial evidence is evidence “sufficient to persuade a fair-minded rational person of the finding’s truth.” Stevenson, 128 Wn. App. at 193. Further, substantial evidence review does not involve a reweighing of the evidence:

When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support them, an appellate court will not substitute its judgment even though it might have resolved the factual dispute differently.

Brown v. Superior Underwriters, 30 Wn. App. 303, 305, 632 P.2d 887 (1980).

Ultimately, “substantial evidence” examines legal sufficiency:

Substantial evidence is evidence which is legally sufficient to establish an element of the crime in question. That is, it is some proof – not proof beyond a reasonable doubt.

State v. Trasvina, 16 Wn. App. 519, 525, 557 P.2d 368 (1976).

To the extent sufficiency of evidence with regard to intent is discussed in any of the cases cited by respondent, it was done in the appellate decision in State v. Byrd, 72 Wn. App. 774, 868 P.2d 158 (1994). There, in a gun case, the court distinguished unlawful display from the intent to cause apprehension necessary for a second degree assault charge. In doing so, the court wrote “the

intent to cause apprehension and fear of bodily injury speaks to an immediate reaction or result from the unlawful conduct.” Id. at 778.

This same intent was examined using the relevant example of a baseball bat in State v. Karp, 69 Wn. App. 369, 848 P.2d 1304 (1993). There the court wrote:

A demonstrator for a cause might carry a baseball bat on a public street under circumstances that cause a person to be concerned about the safety of other person on the street. Such conduct might well run afoul of the unlawful display statute. It would not, however, be an assault, unless the act was directed at some person and the actor had the apparent physical ability to inflict harm.

Id. at 374.

In making its finding with regard to intent, the court can infer specific intent as a matter of logic or probability given the sum total of the evidence before it. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1029 (1993) (“Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances as a matter of logical probability.”)

Here, there were sufficient facts presented to the court to support a logical inference that defendant intended to cause the victim an apprehension or fear of immediate injury.

Rodney Dean testified that respondent arrived at his location, descending the hill with a group of accomplices, and that that group was armed with brass knuckles and bats. RP 109. It was clear to Dean from their demeanor and the circumstances that they were prepared to assault Mr. Dean and his companions with the weapons. RP 111-12. Mr. Dean was alarmed and ran, fearing for his safety and being attacked with the weapons. RP 113-120. He was ultimately chased through the woods by at least one individual brandishing a baseball bat, the deadly weapon. RP 115-16.

Moreover, this was supported by more than just Mr. Dean's in court testimony. The State admitted a recording of the 911 tape Mr. Dean made immediately after being chased by respondent with a baseball bat. He is heard to be alarmed and out of breath, vomiting at points. Ex. 5.

Additionally, respondent was found by law enforcement nearby after the event. He was discovered running with a group of accomplices as described on the 911 tape by Dean. One of respondent's companions was still carrying brass knuckles. RP 151-53. A baseball bat was found along the direct path they had been taking. RP 159. Dean identified it as the weapon he was

chased with. RP 116. On scene, Dean identified respondent and his then companions as the individuals that were chasing him. RP 161. Ultimately, the court accepted this version of events.

[Mr. Dean] did mention that there were individuals that were chasing him; that they had brass knuckles and bats, and I would find that was the case.

RP 247.

These circumstances, supported by the record, clearly support the court's inferred findings that respondent intended to place Dean in reasonable apprehension of *immediate* bodily injury.

It was entirely reasonable for the court to find, as it did:

[Respondent] ... and ten to fifteen friends ... *threatened* the Juggalo's and Dean with force and the weapons. The baseball bat was obviously *intended and threatened* as [a] weapon which could be swung to strike another individual causing a substantial injury.

[...]

[Respondent] *intended* to place Dean... in apprehension of imminent fear of bodily injury and Mr. Dean reasonably apprehended such.

The baseball bat as it was *used and threatened* by [respondent's] group was a Deadly weapon and readily capable of causing substantial bodily injury.

1 CP 5 (emphasis added).

As noted above, Defendants claims that the court should not have believed the State's evidence or that it should have agreed with respondent's theory of the case are inappropriate for a substantial evidence review and any appellate review. Pilcher, 112 Wn. App. at 435; Thomas, 150 Wn.2d at 874-875.

#### **IV. CONCLUSION**

Based on the foregoing, the State requests this court dismiss Respondent's appeal.

Respectfully submitted on July 1, 2009.

JANICE E. ELLIS  
Snohomish County Prosecuting Attorney

By:



MATTHEW R. PITTMAN, WSBA #35600  
Deputy Prosecuting Attorney  
Attorney for Respondent

**FILED**

**08 SEP 26 AM 10:40**

**SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH**



**CL12719042**

**SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY  
JUVENILE DIVISION**

**THE STATE OF WASHINGTON,**

**Plaintiff,**

**v.**

**CHEPURKO, SERGEI,**

**Respondent.**

**No. 08-8-00542-9**

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

**This matter came before the court on August 13-15, 2008, for trial. The court considered all of the testimony provided by the witnesses, the admitted exhibits, the arguments of counsel, and applied the standard that the State bore the burden of proving the charges beyond a reasonable doubt. Regarding the defense of self-defense and defense of others, the State bore the burden of proving the respondent's actions were not lawful beyond a reasonable doubt.**

**Being fully advised, the court now makes the following findings of fact and conclusions of law.**

**I. FINDINGS OF FACT**

- 1. Prior to March 22, 2007, respondent Sergei Chepurko was involved in a dating relationship with the sister of Rodney Dean. Mr. Dean and Mr. Chepurko knew each other and were not friendly, Dean disapproving of the relationship.**
- 2. On March 22, 2007, Rodney Dean encountered Sergei Chepurko at the Alderwood Mall. Dean spoke with Chepurko, informing him that Dean's family wished Chepurko to have no further contact with his sister. Present at this time was Kayla Harris, a juvenile female also involved in a dating relationship with Chepurko. Harris accompanied Dean when he turned and left Chepurko's presence.**

**1**  
*[Handwritten signature]*  
**26**

3. Dean and Harris walked about the mall and encountered a group of young males of previous acquaintance. These males referred to themselves as "Juggalos." Both Dean and Harris were friendly with several males in this group.
4. Chepurko made contact with this group - Dean, Harris and the "Juggalos" - as they walked about the mall, following behind. The "Juggalos" and Chepurko had previous encounters with each other and were not on friendly terms. When the "Juggalos," Dean and Harris were walking out to the mall toward the parking area, the "Juggalos" challenged Chepurko to a fight. Chepurko declined.
5. Lynnwood High School is located across a street from Alderwood Mall and is situated next to another commercial center. The center includes a "Mervyn's" department store and parking lot which are situated on higher ground than the Lynnwood High School immediately next door. A path runs downward from a corner of the parking lot to a wooded area on Lynnwood High School grounds. The sloping path and the immediate wooded area are colloquially referred to as "the Hill" by the juveniles involved in this matter. All of the above locations are in Snohomish County, Washington.
6. Subsequent to leaving the Alderwood Mall property, Dean, Harris and the "Juggalos" arrived at the Hill. At some point, one of the "Juggalo's" and another juvenile walking through the area exchanged words. That "Juggalo" and the juvenile fought, the "Juggalo" striking the juvenile with a piece of wood.
7. After a further period, a "Juggalo" placed a telephone call to Mr. Chepurko asking him to join them there in the neighborhood of the hill. The call was a ruse and an attempt to lure Mr. Chepurko there so they could fight him. Mr. Dean was aware of the call and that such was a ruse.
8. Mr. Chepruko agreed to meet them there, but was not fooled by the invitation. He anticipated a fight and prepared for such, contacting ten or fifteen of his friends to join him at "the Hill."
9. Approximately an hour after the call, Mr. Chepurko arrived with those ten or fifteen individuals in the Mervyn's parking lot near "the Hill." Those individuals included Micah Jansen, a friend of Mr. Chepurko's. Mr. Chepurko, Mr. Jansen and the others who had arrived with them fully expected to engage in a fight with the "Juggalos," traveling there specifically for that purpose. Also present was the individual who had been struck with the piece of wood by the "Juggalo" earlier.
10. Several members of Mr. Chepruko's group were armed with weapons. At least one individual in his group was armed with a baseball bat. Mr. Chepurko and Mr. Jansen were aware this fact. At least one individual was armed with "brass knuckles."
11. The "Juggalos" were laying in wait at the bottom of the sloping path and had armed themselves with sticks.

12. Mr. Chepurko , Mr. Jansen and their remaining ten to fifteen friends descended the slope and made contact with the group of "Juggalos" including Mr. Dean, clearly threatening the "Juggalos" and Dean with force and the weapons. The baseball bat was obviously intended and threatened as weapon which could be swung to strike another individual causing a substantial injury.
13. Mr. Dean observed that the size of their group outnumbered his friends and also saw that they were armed, at least one of their number being armed with a baseball bat. Mr. Dean was in imminent fear of bodily injury from Mr. Chepurko, Mr. Jansen and their group and with being harmed with the baseball bat.

## II. CONCLUSIONS OF LAW

1. Respondent Chepurko is guilty of the crime of Assault in the Second Degree.

Mr. Chepurko intended to place Dean and others in his group in apprehension of imminent fear of bodily injury and Mr. Dean reasonably apprehended such.

The baseball bat as it was used and threatened by members of Mr. Chepurko's group was a Deadly Weapon readily capable of causing substantial bodily injury.

Though it was unclear which specific member of Chepurko's group possessed and threatened Dean and his group with the deadly weapon, that member and Mr. Chepurko acted as knowing accomplices in the threatening use of such, creating in Mr. Dean the reasonable apprehension he would be harmed with such.

2. Respondent Chepurko is guilty of the crime Misdemeanor Riot, a lesser included offense of Felony Riot.

Mr. Chepurko knowingly acted in concert with three or more individuals to threaten the use of force against others, including Rodney Dean. Respondent committed the offense of Riot.

The State has not proved beyond a reasonable doubt that it was the respondent, personally, who was armed with a deadly weapon, the baseball bat, though it has proved that at least an accomplice of respondent's was so armed.

To elevate Riot to a felony, the relevant statute requires that "*the actor* is armed with a deadly weapon." RCW 9A.84.010(2)(b) (emphasis added). Based on the language of the statute, an accomplice's possession of a deadly weapon will not suffice to elevate Riot to Felony Riot. The individual charged must personally be armed with a deadly weapon.

As Mr. Chepurko is the relevant "actor" for the charge and the State has not proven beyond a reasonable doubt that he, personally, was so armed, the offense does not rise to a felony.

3. Respondent, by his actions, may not avail himself of the defense of Lawful Use of Force: Self-defense or Defense of Others.

Respondent was in a place of safety and traveled to the location of the "Hill" with the knowing purpose of engaging in a riot. Respondent knew that the "Juggalos" intended to assault him if he arrived at "the Hill" Respondent had the time and ability to notify police that the "Juggalo's" intended to assault him if he traveled to that location, but chose not to do so. Respondent's and his accomplices' use of force here was not "necessary" under the law.

While the law does not impose a duty to retreat a safe location, it does not permit one to leave a safe location for a planned assault and riot on another individual where such actions are not "necessary."

4. Respondent's appeal to the notion the victim, Rodney Dean, was the "Aggressor" is without consequence.

WPIC 16.04 Aggressor – Defense of Self, states:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense *[or] [defense of another]* and thereupon *[kill] [use, offer, or attempt to use force upon or toward]* another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense *[or] [defense of another]* is not available as a defense.

Even were the court satisfied that Rodney Dean was the "aggressor" in this episode, the only potential legal consequence of this finding is that Dean would be unable to claim self-defense were Dean charged with Assault for Dean's actions.

In short, that Dean may have been an "aggressor" does not render Dean an outlaw, subject to no protections under the law. Respondent may still not commit an assault or riot on Mr. Dean, even if Dean was the aggressor, unless respondent's own actions were legally permissible as self-defense or defense of others.

Where, as here, respondent's assaultive and riotous behavior toward Mr. Dean was not "necessary" (as detailed in 3. above) self-defense or defense of others, the law will not excuse respondent's assaultive and riotous behavior.

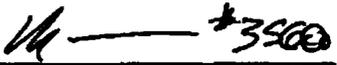
Done in open court this 26<sup>th</sup> day of September, 2008.



JUDGE  
L. McKEEMAN

Presented by:

Approved for entry:

  
MATTHEW R. PITTMAN #35600  
Deputy Prosecuting Attorney

  
GENE PICULELL  
Attorney for Respondent

  
2002W