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STATE OF WASHINGTON

NO. 34894-2-II

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

STATE OF WASHINGTON, Respondent

v.

ROBBIE PHILLIP HOELDT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00566-0

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is the novel concept that a trained pit-bull dog cannot be considered as a deadly weapon under the assault statutes.

As indicated in the Court's Instructions to the Jury (CP 38) and specifically under Instruction No. 12, this jury was instructed as follows concerning the definition of a deadly weapon:

Deadly weapon means any weapon, device, instrument, substance, or article, 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.

This is in line with the definition of "deadly weapon" as found in RCW 9A.04.110(6).

The defendant, in his brief, gives definitions from Webster's New Collegiate Dictionary as to the five terms (weapon, device, instrument, article, and substance). (Appellant's Brief, Page 9).

The State submits that the definition of "substance" would include an animate object such as a dog or other animal that is specifically trained

to attack and can kill. As the defendant sets forth in his brief, substance means “physical material from which something is made or which has discrete existence.” Clearly, a dog has discrete existence.

When we look at the concept of “substance” as defined in Black’s Law Dictionary, we find the following definition:

Substance. Essence: the material or essential part of a thing, as distinguish from “form.”

- Black’s Law Dictionary 1597 (4th rev. ed. 1968).

The State submits that the key to the concept of a deadly weapon is the intent on the part of the defendant and the circumstances in which he is using or attempting to use the thing.

Detective Acee described, and discussed with, the jury how it was that this dog attacked him. The questioning was as follows:

QUESTION (Mr. Fairgrieve, Deputy Prosecutor): Mr. Acee - - Detective Acee, could you come out here and stand next to this microphone (inaudible). Can you describe or - - for the jury what Mr. Hoeldt’s body posture was and how he was actually holding his dog as you saw him through the front door.

ANSWER (Detective Acee): Yes, sir. Assuming you are me at the doorway in terms of positioning, what I saw was the defendant holding the dog in this manner (indicating).

I couldn’t see his right hand, and it looked like he was focusing on something kinda behind him and looking about the area as quickly as he could and looking at me. It was kind of an intense moment (indicating throughout).

QUESTION: Okay. I'm going to have you remain there because I'm gonna want you to demonstrate something else in a second.

Could you see what Mr. Hoeldt was holding onto the dog -
- how he was holding onto the dog?

ANSWER: He was holding the dog around the neck area. Again, I - - I don't know if he just had a hold of the - - the extra skin or the fur of the dog or if he actually had a collar, I - - I couldn't tell. But his hand was on the top part of the dog (indicating throughout).

QUESTION: Okay. As he's standing there, what is the dog doing?

ANSWER: It was silent. The dog hadn't made any noise on our approach or when I first knocked. It wasn't until the door came open, the dog saw me and then it started going crazy (indicating throughout).

QUESTION: Can you describe for the jury what it actually did once it saw you in the doorway.

ANSWER: It started snarling and just barking in a really aggressive manner. I - - it's hard to characterize one bark from another, but I was definitely concerned that that was a big dog and that wasn't a friendly bark.

QUESTION: Okay. Can you describe now from the point where you saw Mr. Hoeldt holding the dog by its collar what's the next event that occurred?

ANSWER: Again, the - - the - - the defendant was holding the dog like this and looking about the area. Within a split second, he moved his arm like this and in that manner, sending the dog toward me, and took off into the depths of the house, where it was darker (indicating throughout).

QUESTION: Okay. You've described a motion where it looked like your left hand traveled or forced the dog to travel forward in your direction. Is that accurate?

ANSWER: Yes. There was no mistake in my mind that that was a direction, a physical direction for which way the dog was to go while he went the other way (indicating).

- (RP 37, L.2 – 39, L.2)

Detective Acee went on to indicate that after the defendant had released the dog and it began to run towards him, that he was able to use his firearm to kill the animal before it was able to make physical contact with him. The dog fell at the officer's feet. (RP 40-41). The officer also indicated that at the time that he fired, the dog was airborne and was approximately at his chest area when he fired the weapon. The officer indicated he is 6'2". (RP 42). The officer estimated that the dog weighed approximately 80 pounds. (RP 48).

The State submits that the animal does fit the definition of a deadly weapon in the State of Washington. It is a "substance" in that it has discrete existence and is a thing. The State submits that there was sufficient evidence for a jury to conclude that the defendant released this animal for the purposes of attacking the detective with deadly force.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel.

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the Appellate Court de novo. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335 899 P.2 1251 (1995). The reasonableness of the defense attorney's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The area of claimed improper questioning is part of the long quote from transcript that is found in the response to the first assignment of error. The State submits that put into the context of the overall questioning of the officer, it is not an improper comment nor is it giving an opinion that is inappropriate. The officer is describing the activity that he observed and indicating what influence or impact it had on him at that time. All he is telling the jury is basically that the defendant let the dog go and it appeared to him that the defendant was motioning the animal towards him and he took off in the other direction. It is no different than

an officer describing a gun pointed at him and what he thought was going to happen.

Further, the State maintains that this has absolutely nothing to do with the nature of the defense that was being offered. The defendant was categorically denying the officer's statements as to what he had done or why he was doing it. The defendant's version of events, when he testified was as follows:

QUESTION (Thomas Ladouceur, Defense Attorney): All right. And how did you first become aware that a police officer was even, you know, at your door?

ANSWER (Mr. Hoeldt): I was standing in my kitchen, and my cell phone in my back pocket rang, and I had a lantern in my hand and the Officer Acee pushed open the door, told me to put my hands on my head, and I - - and I did, I set the lantern down, put my hands up on my head, and - - and he asked me where my dog was now. That's how I knew that the cops were there.

QUESTION: All right. And what happened at that point?

ANSWER: My dog ran around to the front door and Officer Acee took a step back and he shot my dog and then told me to put my hands back up on my head.

'Cause I turned - - I mean, he shot - - as he shot my dog, I turned my head, and it was a pretty traumatic sight, you know.

QUESTION: Now, going back to one of the photographs, the one showing some furniture in that room, were any of those items of furniture between where you were standing and the front door?

ANSWER: Like I said, that board was. That board would have been at right about my knee level and the loveseat was still in the way, and I was standing back by the - - the chairs, the - - the kitchen table chairs, which I don't know what else would have been in there, but there was a TV by the door where the - - where the one couch actually sits that would - - would have been, okay, a TV and a stove. I could show you right here (indicating), if - -

QUESTION: All right, is there a pointer there?

ANSWER: There's a - - there would have been a TV right here, and then a wood stove right here (indicating).

QUESTION: All right. Now, did you intentionally release the dog at Officer Acee as he described and threw, you know, have - - having a grip on it and then throwing it?

ANSWER: Absolutely not.

QUESTION: What would you have expected to happen if you did so?

ANSWER: Well, I would have expected him to shoot my dog - -

MR. FAIRGRIEVE (Deputy Prosecutor):
Objection, this is speculation.

THE COURT: It does call for speculation. Perhaps you can rephrase your question.

BY MR. LADOUCEUR: (Continuing)

QUESTIONS: Were you aware that Officer Acee was armed?

ANSWER: Yes, sir.

QUESTION: Okay. Did you have - -

ANSWER: He - -

QUESTION: - - any concerns about what might happen because of his being armed.

ANSWER: Yeah, he had his gun drawn, I knew what the - - I mean, in a split second that it was taking - - or, I mean, that he came to the door and that I saw him I knew what would happen because my dog, he's - - he's not aggressive towards people, but anybody hostile, I mean, he's definitely going to protect our home, so, I mean, I was - - I was frantically looking for my dog, you know, and knew what the outcome would be.

QUESTION: Would that have been something that you wanted to see happen, your dog being shot?

ANSWER: Never.

QUESTION: Were you seeking to, you know, avoid capture because of these misdemeanor warrants by siccing your dog on Officer Acee?

ANSWER: No, actually, the - - the capture of misdemeanor warrants was almost a comfort that I didn't have to deal with it anymore, you know, I mean, I would actually have to face a time and I didn't have to go down and turn myself in or anything, you know, it was - - it was - - that's why - - I mean, I was home alone, you know, the - - I mean, that's - -

MR. LADOUCEUR: All right, thank you, sir, I don't have any other questions.

- (P. 97, L.9 – P.100, L.5)

The State submits that this was part of tactics on the part of the defense. As the questioning of the defendant would indicate, it became a credibility question between the detective and the defendant. The

defendant was maintaining that he did not have control of the animal nor would he have done what the officer had indicated that he would do because he knew that his dog potentially could be killed. The defense did not want to raise an objection to the recitation by the detective because they wanted to utilize it for their own purposes later on during direct examination of the client. The State submits that there has been no showing of ineffective assistance of counsel.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 29 day of Nov., 2006.

Respectfully submitted:

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