

NO. 41520-8-II

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

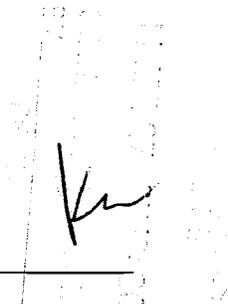
STATE OF WASHINGTON,

Respondent,

v.

DESMOND SHEPARD, JR.,

Appellant.

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

The Honorable Jill Johanson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to sustain appellant's conviction for Assault in the Third Degree.

Issue Pertaining to Assignment of Error

Assault in the Third Degree requires use of "a weapon or other instrument or thing likely to produce bodily harm." Although a stationary object does not meet this definition, the State relied on such an object (furniture into which the victim was shoved) to prove this crime. Must this Court reverse appellant's conviction for Assault in the Third Degree?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Cowlitz County Prosecutor's Office charged Desmond Shepard, Jr., with four criminal offenses: (count 1) Assault in the Second Degree – DV; (count 2) Assault in the Third Degree – DV; (count 3) Assault in the Fourth Degree – DV; (count 4) Malicious Mischief in the Third Degree – DV. CP 1-3.

A jury convicted Shepard on counts 1 through 3, but found him not guilty on count 4. CP 35, 37-39. By special verdict, jurors found that the victim – Natasha Pipgras – was a family or household member. CP 27. The court imposed a composite standard-range

sentence of 25 months, and Shepard timely filed a Notice of Appeal.
CP 34, 37, 44.

2. Substantive Facts

Natasha Pipgras and Desmond Shepard had a four-year relationship that was usually just a friendship but sometimes sexual. RP 27-28. The weekend of March 6, 2010, Pipgras drove from her home in Kelso to Portland, picked up Shepard, and drove him back to Kelso so they could spend the weekend together. RP 25, 28-29.

Pipgras put her three young children to bed for the evening and she and Shepard began to drink. RP 26, 29. Eventually, Pipgras fell asleep on the living room couch. At some point, Shepard removed bank cards and ID cards from Pipgras' purse and began "flicking" them at her. RP 31-32. When Pipgras awoke, Shepard was angry. He had found a letter that Pipgras wrote to a male friend who was serving time in jail. He called Pipgras names and said other hurtful things. RP 33-35.

According to Pipgras, the two argued and Shepard slapped her in the face. RP 35. Pipgras screamed at Shepard, who demanded that she wake the children and drive him back to Portland. RP 36. As Pipgras turned and headed for the children's bedroom, Shepard grabbed her by the hair and threw her against an

armoire, causing her to hit her head. RP 37, 39.

One of the children came running out and told Shepard not to hit Pipgras. After Pipgras told the child to go back to his room, Shepard pushed Pipgras into the bedroom, told her to get the kids dressed, and repeated his demand that she drive him home. RP 37-38. In the bedroom, Shepard pushed Pipgras into a dresser and threw her up against a playpen. RP 38. As Pipgras got the kids into the car, Shepard pulled on her hair and pushed her into the wall. RP 38.

Once in the car, Pipgras got on I-5 heading south and the children fell asleep in the back seat. RP 44-45. Shepard used the back of his hand to strike Pipgras in the stomach, face, and head. RP 44. At one point, he also poured beer on her. RP 45.

Pipgras had to stop for gas. RP 45. While Pipgras was seated in the car at a Chevron station, Shepard accused her of smiling and hit her in the head, causing her left ear to hit the window. She experienced a burning sensation and the sound of rushing water. RP 44, 49-50, 207. At some point, Shepard also destroyed Pipgras' cell phone by smashing it against the dashboard. RP 52-53.

Once they arrived in Portland, Shepard was unable to contact

the people with whom he hoped to stay the night, so he had Pipgras drive him back to Kelso. Unlike the drive south, the drive back north was uneventful. RP 49, 53-54. Upon arriving back in Kelso, Pipgras took the children inside and Shepard chose to remain in the car, initially refusing to come into the house before finally doing so some time later. RP 54, 56.

Pipgras' mother was staying with Pipgras at the time and was home when Pipgras arrived. She saw that Pipgras had injuries to her face and asked what happened. Pipgras told her that she was mugged while stopped at a gas station and that Shepard had been unable to help her because he was passed out at the time. RP 54-55.

The following morning, Pipgras' mother insisted that she report to police what had happened. RP 59. Shepard said he wanted to return to Portland, so Pipgras left the children with her mother, and drove him back. The two did not speak the entire trip. As Shepard got out to the car, however, he told Pipgras she would never hear from him again. RP 59.

After arriving back home, Pipgras saw a doctor. RP 61. She told the doctor her boyfriend had assaulted her, and complained of pain to her face, shoulders, arms, and neck. She also complained

about her hearing in one ear. RP 101-102. Pipgras had multiple bruises on her face and body. She had swelling around one eye and the eyeball had a subconjunctival hemorrhage, causing a blood spot on the conjunctiva (white part of the eye). RP 102-105. She also had a perforated tympanic membrane in her left ear, which can be caused by a sudden pressure change (as might occur if an ear hit against glass and formed a suction seal). RP 104-106. All injuries were expected to heal within several weeks and Pipgras was simply told to apply ice to tender areas and take Ibuprofen. RP 91-92, 107-108, 117-118.

Pipgras reported what happened to police, and an officer took several photographs to document her injuries. RP 63-71, 154-156.

During closing argument, the prosecuting attorney explained which acts were associated with which charge. Assault in the Second Degree in count 1 was based on the blow to Pipgras' head that caused her ear to hit the window and perforated her tympanic membrane. RP 233, 244. Assault in the Third Degree in count 2 was based on Shepard pushing Pipgras into the armoire, dresser, and playpen. RP 236-237, 241-242, 264-265. Assault in the Fourth Degree in count 3 was based on flicking the cards at Pipgras, pouring beer on her, or striking her other times during the course of

the evening. RP 240, 243. Malicious Mischief in the Third Degree – for which Shepard was acquitted – was based on breaking the cell phone. RP 238-239.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN SHEPARD'S CONVICTION FOR ASSAULT IN THE THIRD DEGREE.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Shepard was charged with Assault in the Third Degree under RCW 9A.36.031, which provides:

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second

degree:

.....

- (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm

RCW 9A.36.031(1)(d); CP 2 (charging the assault “by means of an instrument or thing” but not alleging use of any weapon).

As noted above, the State contended that some of the furnishings in Pipgras’ home (armoire, dresser, playpen) satisfied the “instrument or thing” element of the charge. See RP 236-237, 241-242, 264-265. Defense counsel argued that the assault merely involved an open hand and, therefore, there was no “instrument or thing.” RP 258. In response, the prosecutor argued that even an open hand would suffice. RP 265.

As an initial matter, it has long been recognized in Washington that a bare hand – fisted or not – does not qualify as “a weapon or other instrument or thing likely to produce bodily harm.” See State v. Donofrio, 141 Wash. 132, 137-138, 250 P. 951 (1926). Moreover, based on the Supreme Court’s recent opinion in State v. Marohl, 170 Wn.2d 691, 246 P.3d 177 (2010), the furniture at issue in this case does not qualify, either.

In Marohl, the defendant and victim were involved in a struggle in a casino. The defendant placed the victim in a chokehold and caused the victim to hit the ground, scraping and bruising his face and breaking his prosthetic arm. Marohl, 170 Wn.2d at 694-696. The defendant was convicted of Assault in the Third Degree and he appealed, claiming the floor was not an “instrument or thing likely to produce bodily harm.” Id. at 694.

The Supreme Court agreed. After noting the absence of any statutory definition for “instrument or thing,” the Court turned to the dictionary, defining “instrument” as a “utensil” or “implement” and defining “thing” as “an entity that can be apprehended or known as having existence in space or time,” “an inanimate object,” or “whatever may be possessed or owned or be the object of a right distinguished from person.” Id. at 699 (quoting Webster’s Third New Int’l Dictionary 1172, 2376 (2002)). The Court found that a floor is a thing and can be an instrument. Id.

The determinative question, then, was whether a floor was an instrument or thing “likely to produce bodily harm,” as required under RCW 9A.36.031(1)(d). Id. Examining the dictionary definition of “likely,” the Court held that “[o]nly assaults perpetrated with an object likely to produce harm by its nature or by

circumstances fall within the subsection's purview." *Id.*

Moreover, the Court found a further limitation. Noting that the more general words "instrument" and "thing" followed the more specific word "weapon" in the statute, the Court construed the general words according to the specific. *Id.* at 699-700. Thus, "an 'instrument or thing likely to produce bodily harm' under RCW 9A.36.031(1)(d) must be similar to a weapon[,] meaning "an instrument of offensive or defensive combat: something to fight with." *Id.* at 700 (citing Webster's, *supra*, at 2589).

Regarding the circumstances in Marohl's case, the Court ruled:

Where the defendant causes the victim to impact the floor and makes no effort to proactively use the floor to injure the victim, the defendant has not used the floor like a weapon because he had not used it as an "instrument of . . . combat" or "something to fight with." The language of RCW 9A.36.031(1)(d) does not include the casino floor within the meaning of instrument or thing because, under the circumstances of this case, it was not likely to produce harm and it was not used as a weapon.

Id. at 700.

The Supreme Court noted its decision was consistent with that from some other jurisdictions, including cases where the defendant repeatedly struck the victim's head against the

pavement. *Id.* at 700 n.3 (citing cases from Florida and Louisiana).

The Court also distinguished decisions from jurisdictions holding that a stationary object could be a weapon. First, in those cases, the defendant “took hold of the victim’s head and repeatedly struck it against the ground.” *Id.* at 702. Second, there were key distinctions in the language of the foreign statutes, evincing a broader intent in those states to elevate assaults involving injuries sustained on a stationary object. *Id.*

Marohl controls the outcome here. While the items of furniture into which Pipgras was pushed are “things” could be “instruments,” they do not qualify under Washington’s assault statute as “instruments or things likely to produce bodily harm” because these stationary objects are not similar to weapons; *i.e.*, they are not for combat or fighting. Therefore, the evidence is insufficient to sustain Shepard’s conviction for Assault in the Third Degree.

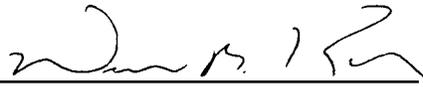
D. CONCLUSION

This Court should reverse and vacate Shepard's assault conviction in count 2. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice).

DATED this 26th day of April, 2011.

Respectfully submitted,

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

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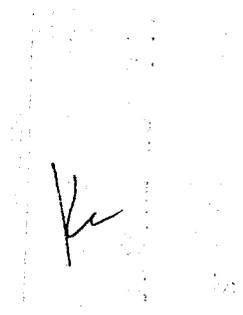
DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SUSAN BAUR
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- [X] DESMOND SHEPARD
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SHELTON, WA 98584



SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF APRIL, 2011.

x Patrick Mayovsky