

NO. 41699-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

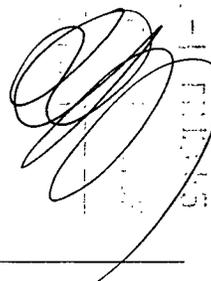
CHEYENNE HESS,

Appellant.

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RECEIVED  
COURT OF APPEALS  
DIVISION TWO  
JAN 13 2010  
SEATTLE, WA



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

The Honorable Jill M. Johanson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support appellant's third degree assault conviction.

Issue Pertaining to Assignment of Error

The state alleged appellant used his dog to attack a police officer. Where the evidence showed the dog acted on its own, however, and that appellant actually tried to prevent it from charging the officer, was the evidence insufficient to support the assault conviction?

B. STATEMENT OF THE CASE

Following a jury trial in Cowlitz County Superior Court, appellant Cheyenne Hess was convicted of third degree assault, allegedly committed against deputy Fred Taylor, resisting arrest and possession of a dangerous weapon. CP 36-51. Regarding the assault of Taylor, the state alleged Hess committed it through the use of his dog, Tank. RP 168;<sup>1</sup> CP 1-3.

At trial, the evidence showed that on October 8, 2010, Charles Hess called police to report that his son Cheyenne<sup>2</sup> could be located at home. RP 44, 97. After receiving this information

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<sup>1</sup> The verbatim report of proceedings are contained in one bound volume, consecutively paginated, dated December 20-21, 2010.

from dispatch, Taylor contacted Charles. Charles reportedly explained Cheyenne was at home and had an outstanding arrest warrant. RP 45. According to Taylor, Charles said Cheyenne had a pit bull that was aggressive, but that it could be controlled. RP 45, 61, 101.

Taylor took another officer with him to 610 Melton Road in Castle Rock, where Cheyenne reportedly lived. RP 44-48, 67. As Taylor described the property, there were numerous residences located on it, as well as a shop and "various vehicles and campers[.]" RP 47. Taylor was unable to confirm Cheyenne was actually at his trailer on this occasion, however, so he and the other officer left. RP 46, 67. Taylor testified he did not see the dog while he was there, but heard it inside Cheyenne's residence. RP 46, 48.

Charles called back later to report Cheyenne had just returned home. RP 48, 68, 99. Apparently, Charles also lived on the Melton Road property. RP 48, 97-98.

Taylor returned to 610 Melton, this time with deputy Brad Bauman. RP 48, 81. They parked their police cars down the driveway, away from the trailer. RP 48. Taylor testified that as they approached, he saw Cheyenne in the yard near where Tank was

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<sup>2</sup> First names are used to avoid confusion. No disrespect is intended.

chained up. RP 48-49. Taylor told Cheyenne he had an outstanding warrant and was under arrest. RP 49.

According to Taylor, Cheyenne initially walked away from Tank but turned around and walked back toward him. RP 70. Taylor and Bauman directed Cheyenne not to unleash the dog and to step over towards them. RP 52. Both deputies testified they explained that if the dog got loose, they might have to shoot it. RP 70-71, 84. Bauman even took out his firearm. RP 84.

Taylor testified Cheyenne continued toward Tank and unhooked him. Cheyenne held the dog in one hand and a cordless drill in the other. Taylor claimed the dog was barking and lunging. RP 53. As Cheyenne moved with Tank back towards his residence, the deputies directed him to put the dog inside and return towards them. RP 71.

Cheyenne opened the door and stepped in behind Tank. RP 72. At this point, Bauman went around back to prevent any potential escape from the rear. RP 73, 85, 92. Taylor positioned himself behind the backswing of the front door, apparently near an opening to the shop. RP 56. Taylor claimed he could hear the dog at the door, scratching and barking. RP 56.

Taylor continued to tell Cheyenne he was under arrest and directed him to come outside. RP 57, 75. Occasionally, Cheyenne would say something, such as "Wait a minute, I'll be there in a minute, I need to shut down the house. I told you I'd come out." RP 57.

Taylor testified that after about five minutes, "[t]he door kind of cracked and then the door came open and the dog came out." RP 75. Taylor was still positioned behind the door. RP 58. According to Taylor, "[t]he dog kind of came out straight at an angle with the swing of the door and Mr. Hess came out after at kind of an angle headed over in this direction, so kind of an angle." RP 58. Taylor clarified: "The dog came out, he came out after the dog. The dog was on this trajectory. He was on a slightly different trajectory, but he was yelling at the dog." RP 59. Taylor testified Cheyenne was yelling, "Tank and no and Tank." RP 59.

According to Taylor, the dog went up the driveway about 15 feet, but either heard him or saw him and looped back around and headed for Taylor. Taylor claimed Tank was charging and growling. RP 59. Fearful the dog was going to bite him, Taylor "was able to Tase it probably here to the front portion of the jury box." RP 59, 65.

Taylor testified Tank was immediately immobilized by the stun gun, which made a "pop" sound like a small caliber firearm. Taylor continued stunning the dog for two cycles or approximately ten seconds. RP 60. Hearing Taylor yell out in an excited voice, Bauman came around front, just as Taylor was stunning Tank. RP 87.

Meanwhile, Cheyenne apparently believed Taylor shot Tank and ran to its aid. RP 60, 77, 88. He was "kicking at the leads and grabbing at them, trying to pull them out." RP 77, see also RP 88. Taylor testified Cheyenne was yelling, crying and hysterical, lying on the ground cradling Tank. RP 77-78.

Taylor and Bauman ordered Cheyenne away from Tank. When they tentatively believed Tank would be okay, they asked Charles, who was watching nearby, to remove and secure the dog, which he did. RP 61, 88.

Taylor testified Cheyenne was still very upset. RP 61. He and Bauman ordered Cheyenne to stand up and put his hands behind his back, but Cheyenne did not comply. RP 61. The deputies eventually took Cheyenne to the ground and handcuffed him. RP 61-62, 89. He wasn't really resisting anymore at that point. RP 61-62.

According to the deputies, Cheyenne had a "variety of hand tools" on his person. RP 61, 63. Bauman located a dagger tucked into Cheyenne's waistband. RP 64, 90-91. Cheyenne said it was a tool, like the others. RP 65.

Charles was watching when Tank came out of the house. RP 101. He testified that one of this deputies pounded on the door, and Cheyenne opened it. RP 101. Charles explained, "sometimes it's hard to open the door, and "Tank took off out the door." RP 101. As Charles further described, he saw Cheyenne coming out "and Tank just pfft, right out the door." RP 108. To Charles, it did not appear Cheyenne let Tank out: "[Tank] makes up his mind he wants to go outside, he just brushes by. He's done it with my grandson. He had his own mind." RP 108.

According to Charles, Tank headed up towards the carport and Cheyenne took off after him. RP 102, 109. "[Cheyenne] was following Tank. He was trying to catch him." RP 109. When asked why he believed so, Charles responded, "Because I've seen Cheyenne trying to grab Tank. . . . In the middle of the carport." RP 109.

Charles testified that as Tank neared the carport, he "did a 180" and headed back down, and that's when the officer Tased

him.” RP 102, 109. It all happened “[j]ust quick.” RP 102. Cheyenne followed, screaming: “You Tased my dog, you Tased my dog.” RP 103. Cheyenne “went down and grabbed Tank and pulled the Tasers out of him and he was hollering: I love my dog. I love my dog.” RP 103. Charles testified he went over and got Tank’s rope, put it on him and led him “back up the hill some and tied him on a short rope about 10 feet on a rope by an older trailer.” RP 103.

Following Charles’ testimony, the state was allowed to recall Taylor in its case in chief to elicit a statement Cheyenne made as the deputies were leading him to one of the patrol cars. RP 112-114. Taylor testified that as he was escorting Cheyenne to the car, he asked Charles whether the dog was secured. RP 124. Charles said yes, and at the same time, Cheyenne reportedly said, “Get them, boy.” RP 124. Taylor acknowledged, however, the dog could not have attacked them at that point. RP 127.

Tank was destroyed as a result of this case. RP 191. Cheyenne timely appeals. CP 52.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO PROVE TANK ACTED UNDER CHEYENNE'S DIRECTION RATHER THAN OF HIS OWN ACCORD.

The only person who actually saw Tank escape Cheyenne's residence was Charles. He testified the dog brushed by Cheyenne, as was his habit when he made up his mind to go outside, and that Cheyenne came out after him trying to catch him. RP 109. Taylor corroborated that the door cracked open, Tank came rushing out with Cheyenne running after it, yelling "Tank and no and Tank." RP 59. Whether Cheyenne should have known better and should have taken extra precautions to ensure Tank would not escape, Cheyenne was not charged with reckless endangerment. Because the state failed to prove Tank acted at Cheyenne's direction when he charged toward deputy Taylor, the evidence was insufficient to support the assault charge.

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).

Cheyenne was charged with third degree assault under RCW 9A.36.031, which provides in relevant part:

(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:

...  
(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]

See CP 4-6 (Information).

The statute does not define "assault"; thus, the courts must resort to the common law definition. State v. Byrd, 125 Wash.2d 707, 712, 887 P.2d 396 (1995). Washington recognizes three common law definitions of assault: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." State v. Elmi, 166 Wash.2d 209, 215, 207 P.3d 439 (2009).

In keeping with the common law definition, the jury here was instructed:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault, is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that the bodily injury be inflicted.

As assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 25 (Instruction 7).

The first definition of assault – actual battery – was not at issue here. RP 174. Rather, the prosecutor argued Cheyenne let Tank out of the house with the intent he inflict bodily injury on deputy Taylor or that he did so with the intent to scare Taylor. RP 167-168, 170, 182; see also RP 174. The evidence supports neither conclusion, however.

As an initial matter, there is scant case law in Washington regarding a situation such as here, where the state alleges an

assault was committed by dog. Research unearthed two cases: State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995); and State v. Hoeldt, 139 Wn. App. 225, 160 P.3d 55 (2007). In both of these cases, there was evidence the defendant encouraged or incited the dog to act in the manner constituting the assault. That is not what the evidence shows here.

For instance, in Hoeldt, Robbie Hoeldt was convicted of second degree assault with a deadly weapon, based on an assault by his dog. In that case, police went to Hoeldt's home to serve an outstanding warrant. Hoeldt, 139 Wn.2d at 227. According to detective Acee, who approached Hoeldt's home and knocked on the partially opened door, the house was dark, but he could see Hoeldt inside holding what appeared to be a large pit bull by either the collar or neck. Hoeldt, at 227.

The dog started barking and growling at Acee. Hoeldt motioned with his arm and the dog charged toward Acee. Acee retreated, but when the dog lunged at his throat and chest, Acee shot and killed him. Id.

At issue before this Court was whether the dog qualified as a dangerous weapon. Hoeldt, at 227-28. This Court concluded the dog could be viewed as a deadly weapon, depending upon the

circumstances. Id. at 230. More importantly here, though, this Court described the circumstances of use and found:

The evidence here established that Hoeldt used his pit bull as a deadly weapon. Detective Acee described a large, powerful dog that was barking and growling at him. Hoeldt was holding the dog by its neck or collar, and when Hoeldt released the dog, it charged Detective Acee, lunging at his throat and chest. A large powerful dog that, by training or temperament, attacks a person in this manner when intentionally released or directed to do so by its handler, meet the instrumentality “as used” definition of deadly weapon.”

Hoeldt, 139 Wn. App. at 230 (emphasis added).

In Mierz, the defendant Mierz was suspected of unlawfully possessing coyotes. Wildlife agents came to Mierz’s home to investigate. They asked for his help in caging the animals, who were running loose in the fenced yard with Mierz’s two dogs. Mierz eventually put the coyotes in a kennel, but locked the gate and threw away the key. Mierz, 127 Wn.2d at 465.

The wildlife agents then came over the fence into the yard. As they came in, Mierz reportedly yelled, “attack them, attack them, attack them.” Mierz, at 465 (citation to the record omitted). The larger dog, a Husky mix, bit one of the agents on the leg and drew blood. Mierz later bit one of the agents when he tried to put Mierz

in a patrol car. Id. at 465-466. Mierz was thereafter charged with two counts of third degree assault. Id.

On appeal, Mierz argued inter alia he should have been charged with third degree assault, based on RCW 9A.36.031(1)(a) – assaulting another with the intent to prevent or resist the execution of any lawful process – as opposed to RCW 9A.36.031(1)(g) – assault of a law enforcement officer. Mierz, at 477-79. The court concluded, however, that because subsection (1)(a) is not a special statute with respect to subsection (1)(g), the state was not prohibited from charging Mierz with a assaulting a law enforcement officer. Mierz, at 478.

Granted, whether Meirz's actions constituted an assault was not at issue in Miertz. But together with Hoeldt, it instructs that assault by dog in Washington involves evidence that the defendant actually encouraged or incited the dog to attack the alleged victim/s, which is not the case here.

While not authoritative to this Court, a decision from Indiana is instructive. State v. Gilbert, 874 N.E.2d 1015 (Ct. App. Indiana 2008). Gilbert argued the evidence was insufficient to establish that she caused the victim's injuries in the state's case against her for aggravated battery. Gilbert, 874 N.E.2d at 1016.

In Gilbert's case, the evidence showed that Veronica McAtee arrived at the home of her daughter's great grandmother, Ella Williams, to drop off some medication for her daughter. Williams was also great grandmother to Gilbert, who was living with Williams, after Gilbert kicked her out. Gilbert, 874 N.E.2d at 1016.

After a verbal confrontation with Gilbert, McAtee walked away from the house but heard something behind her. She turned around and observed Gilbert in a confrontational stance. Gilbert began swinging her fists at McAtee and yelled, "Get'er. Get'er. Sic. Sic. Get'er. Get'er." Gilbert, 874 N.E.2d at 1016. Within seconds, the pit bull that lived with Williams and Gilbert lunged at McAtee and grabbed her by the arm, causing her to suffer extreme pain. Id. Ultimately, after more conflict, Williams pulled the pit bull off McAtee. Id. at 1017. Gilbert was convicted of aggravated battery. Gilbert, 874 N.E.2d at 1017.

On appeal, Gilbert argued that the dog caused the most serious injuries to McAtee and that Gilbert's own actions caused only minimal injuries. The Indiana Court disagreed:

If a defendant shoots the victim with a gun, we would certainly not find insufficient evidence merely because it was the gun, rather than the defendant, that injured or killed the victim. Similarly, if a defendant incites and encourages a dog to attack the victim, it is logical

and just to hold the defendant, who knowingly or intentionally pulled the metaphorical trigger, responsible for the injuries caused by the weapon she wielded.

Gilbert, 874 N.E.2d at 1018.

What these cases all have in common is holding a defendant responsible for the actions of his or her dog when those actions are taken at the incitement or encouragement of the defendant. Those circumstances are noticeably absent here.

As defense counsel argued at his half-time motion, the state's evidence – at most – showed recklessness:

You know, the State is essentially alleging that my client for lack of a better word "sicked" his dog on the cops or on the deputies. You Honor, there is no evidence to support that my client intentionally released this dog with the intention that the dog attack the police. That was frankly the only way that assault could have been committed in this situation. In fact, there's evidence to the contrary. After he was alerted that he was going to be placed under arrest, he took his dog to put inside the residence, informed the officers he was putting the dog up and when he came out, you know, his father's testimony is the dog simply ran past him.

There is no affirmative representation that my client did anything to actively, you know, put these officers in harm's way with the dog. Am I saying the officers were not in harm's way with the dog? No, that's not what I'm saying. I'm saying that this is not a situation where they're accusing him of reckless behavior, of not securing the dog up well enough. There has to be an intentional act to support assault, and in this situation there is simply no allegation, no

evidence that my client intentionally let this dog out so that it could attack, you know, an officer.

RP 127-28.

Defense counsel was correct. The trial court erred in allowing the charge to go to the jury, where there was no evidence Cheyenne encouraged or incited Tank to go after the deputies. The evidence was insufficient to support the state's assault allegation.

Principles of double jeopardy bar retrial when evidence insufficiently supports a conviction. Burks v. U.S., 437 U.S. 1, 10-11, 98 S. Ct. 2141, 57 L.Ed.2d 1, remanded to 579 F.2d 1013 (1978); State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Accordingly, this Court should reverse and dismiss with prejudice Cheyenne's conviction of third degree assault.

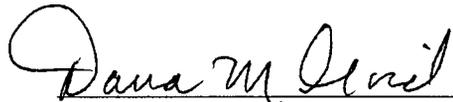
D. CONCLUSION

Because the state failed to prove Tank acted at Hess's behest, the evidence was insufficient to support the assault conviction. This Court should reverse and dismiss that count.

Dated this 30<sup>th</sup> day of June, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

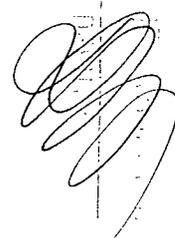
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41699-9-II
	)	
CHEYENNE HESS,	)	
	)	
Appellant.	)	

**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 30<sup>TH</sup> DAY OF JUNE, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES SMITH  
HALL OF JUSTICE  
COWLITZ COUNTY PROSECUTOR'S OFFICE  
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KELSO, WA 98626
  
- [X] CHEYENNE HESS  
609 E 5<sup>TH</sup> STREET  
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STATE OF WASHINGTON  
JUN 30 2011  
11:00-11:15 AM  
CLERK OF COURT

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JUNE, 2011.

x Patrick Mayovsky