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Court of Appeals  
Division II  
State of Washington  
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NO. 51815-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN TIMMONS,

Appellant.

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

The Honorable Bernard Veljacic, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

The State disagrees with the interpretation of State v. Marohl, 170 Wn.2d 691, 246 P.3d 177 (2010), advanced by Division Three in State v. Shepard, 167 Wn. App. 887, 275 P.3d 654 (2012), and therefore urges this court to pay Shepard little regard. Brief of Respondent (BOR) at 5-7. But while this Court may not be bound by Division Three's opinion, Shepard is nonetheless owed "respectful consideration". In re Personal Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). In any event, this Court is bound by Marohl. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (lower courts are bound by ruling of Washington Supreme Court).

Relying heavily on the unpublished case, State v. Glen, 175 Wn. App. 1071, 2013 WL 4010252 (2013), the State urges this Court to decline to find "that an 'instrument or thing' cannot be considered 'likely to produce harm' unless the instrument or thing is wielded like a weapon against a victim." BOR at 6. As discussed fully in the opening brief however, Morahl clearly stated that "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.” Brief of Appellant (BOA) at 13 (citing Morahl, 170 Wn.2d at 700). It was precisely because the casino floor "was not likely to produce harm and *it was not used as a weapon*[,]” that Morahl found the evidence insufficient to uphold the conviction for third degree assault. 170 Wn.2d at 700, 703 (emphasis added).

Notwithstanding the unequivocal conclusion reached in Morahl, the State's reliance on Glen is misplaced for several reasons. First, although Shepard predates Glen by more than one year, Glen fails to cite, much less distinguish Shepard. This makes sense, because as discussed below, Glen is not actually in conflict with Shepard.

Second, Glen supports the argument that Timmons makes here: As in Marohl and Shepard, because Timmons made no effort to proactively use the drywall to injure McPherson, the evidence is insufficient. BOA at 14-15. In contrast, because Glen used the car door as a weapon it was likely to produce bodily harm in that instance. This Court noted that unlike Morahl, the evidence in Glen's case established that "Glen 'took hold of the door' and was 'intensely shaking it,' and 'used her hand to slam the car door on [Grant's] head.'" 2013 WL 4010252 \*5 (internal citations omitted). As Glen properly recognized, "the car door was an instrument or thing likely to cause bodily harm because it was used proactively to cause serious injury to Grant." Id.; See also State v. Tucker, 46 Wn. App. 642,

643, 731 P.2d 1154 (1987) (although not asked to address whether the evidence was sufficient to support Tucker's conviction for third degree assault, Division One noted that "Tucker threw a glass at Ward. The glass hit her either whole or in fragments and seriously cut her face.").

While the car door was used proactively to cause injury in Grant, in Shepard, Division Three found the evidence insufficient because Shepard "did not pick up the armoire, the dresser, or the playpen or any other object or instrumentality and strike her [his girlfriend] with it or *deliberately* beat her against it. 167 Wn. App. at 890 (emphasis added). Glen and Shepard are not at odds with one another. Rather, they further illustrate the point that while proactive or deliberate use of an object is sufficient evidence of an assault, a stationary object, such as drywall, which is not proactively used as an "instrument of . . . combat" or "something to fight with," remains insufficient. Morahl, 170 Wn.2d at 700.

For the reasons discussed above, this Court should reject any attempt to distinguish the holdings of Morahl and Shepard from what transpired in Timmons's case. This Court should reverse and vacate Timmons's third degree assault conviction for insufficient evidence. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice).

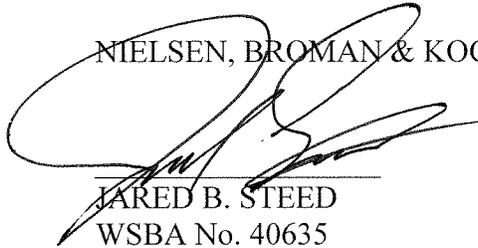
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse and dismiss Timmons's conviction for third degree assault.

DATED this 13<sup>th</sup> day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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