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

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

STATE OF WASHINGTON, Respondent

v.

STEPHEN NEIL TIMMONS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02190-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State presented sufficient evidence to sustain Timmons' conviction for Assault in the Third Degree because under the circumstances the harm Timmons caused was by an instrument or thing likely to produce bodily harm.**
- II. Timmons is correct that the three discretionary legal financial obligations and the \$100 DNA fee should be stricken from his judgment and sentence.**

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), and for the purposes of this responsive brief only, the State is satisfied with Appellant's statement of the case. While the State may have emphasized different facts or testimony, e.g., text messages sent from Timmons to the victim, Appellant's statement of the case accurately lays out the main facts of the case.

Furthermore, the State will discuss the facts of the case related to the assignments of error with citations to the report of proceedings in the argument section.

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ARGUMENT

I. The State presented sufficient evidence to sustain Timmons' conviction for Assault in the Third Degree because under the circumstances the harm Timmons caused was by an instrument or thing likely to produce bodily harm.

Timmons was charged and convicted of the crime of Assault in the Third Degree for “[w]ith criminal negligence, caus[ing] 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 26, 38. Timmons does not contest the fact that he acted with criminal negligence and in so doing caused bodily harm to Ofc. McPherson. *See* Br. of App. at 8-15. Instead, Timmons, relying on *State v. Marohl* and *State v. Shepard*, argues that the drywall or part of the flooded second floor ceiling that fell onto Ofc. McPherson’s head cannot, as a matter of law, constitute an “instrument or thing likely to produce bodily harm. *Id.*; 170 Wn.2d 691, 246 P.3d 177 (2010); 167 Wn.App. 887, 275 P.3d 654 (2012). Therefore, Timmons claims that insufficient evidence supports his conviction. Timmons’ argument fails because a piece of drywall or ceiling in a purposefully flooded home becomes “an object likely to produce harm by its nature or by *circumstances*” and properly “fall[s] within the . . . purview” of the third degree assault statute. *Marohl*, 170 Wn.2d at 699 (emphasis added). Thus, sufficient evidence supports his conviction.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Our Supreme Court in *Marohl* examined whether a floor constituted an “instrument or thing likely to produce bodily harm” where the defendant and victim were involved in a struggle and the defendant placed the victim in a chokehold, which caused the victim to hit the floor and break his prosthetic arm. 170 Wn.2d at 694-96. First, *Marohl* noted that “[o]nly assaults perpetrated with an object likely to produce harm by its nature *or by circumstances* fall within the [statute]’s purview.” *Id.* at 699 (emphasis added). Next, in looking to the facts of the case, *Marohl* concluded that:

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 has 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 (internal citation omitted) (emphasis added).¹ As a result, the Supreme Court reversed the defendant's conviction for Assault in the Third Degree.

Washington courts have, however, affirmed convictions where a car door and a drinking glass constituted "a weapon or other instrument or thing likely to produce bodily harm" RCW 9A.36.031(1)(d); *State v. Glen*, 175 Wn.App. 1071, 2013 WL 4010252²; *State v. Tucker*, 46 Wn.App. 642, 731 P.2d 1154 (1987). For example, this Court in *Glen*, relying on and distinguishing *Marohl*, stated that "objects not traditionally or naturally considered 'weapon[s]'" can constitute "instrument[s] or thing[s] likely to produce harm" given the right circumstances" and then concluded that the manner in which a car door was used against the victim was sufficient to sustain a conviction for Assault in the Third Degree. 2013 WL 4010252 at 4-5 (alterations in original). Moreover, because the mens rea of Assault in

¹ *Marohl* also states that "'an instrument or thing likely to produce bodily harm' under RCW 9A.36.031(1)(d) must be similar to a weapon." *Id.* But this sentence is inconsistent with the rest of the Court's analysis in which it (1) focuses on the "circumstances" of how the instrument or thing was employed and whether in that circumstance the instrument or thing was or was not "likely to produce bodily harm;" and (2) distinguishes the case from foreign cases in which defendants were found guilty of similar assaults but where the sidewalk or pavement was properly found to have been used as a weapon. *Id.* at 699-703; see also *Shepard*, 167 Wn.App. at 892-93 (Korsmo, J., dissenting).

² This Court's opinion in *Glen* is unpublished. Pursuant to GR 14.1 the opinion "may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

the Third Degree is criminal negligence³, this Court noted that the defendant “whether she *intended to do so or not*, used [the victim]’s car door as a weapon and it was likely to produce bodily harm in that instance.” *Id.*

On the other hand, *Shepard*, an opinion from Division III, concluded that furniture did not constitute an “instrument or thing likely to produce bodily harm” where the defendant threw the victim into the furniture because “[t]he evidence here shows that Mr. Shepard brutally pushed or threw [the victim]. He did not pick up the armoire, the dresser, or the playpen or any other object or instrumentality and strike her with it or deliberately beat her against it.” 167 Wn.App. at 890. The majority’s conclusion, and the limited substantive reasoning in reaching that conclusion, drew a dissenting opinion from Judge Korsmo.

As to the majority’s treatment of *Marohl*, Judge Korsmo opined that:

[t]he majority goes further than *Marohl* and seems to conclude that the item must be in the fundamental nature of a weapon before it can be treated as such. That is not the holding of *Marohl*, and would be inconsistent with the rule of that case. The court began its review of the problem by looking to the statutory definition of “weapon or other instrument or thing likely to produce bodily harm” found in

³ “A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(d).

RCW 9A.36.031(1)(d). The court concluded that the definition covered “assaults perpetrated with an object likely to produce harm by its nature or by *circumstances* fall within the subsection’s purview.” In other words, the object itself can be in the nature of a weapon, or it can be used as a weapon. This case is in the latter category, and nothing in *Marohl* limits the definition to objects that are inherently weapon-like. . . .

No authority is cited for the proposition that an object must be used as a club to constitute a weapon. Such a view is inconsistent with the cases distinguished by *Marohl*, where the fact that the floor could not be picked up did not factor into the analysis of whether it was used as a weapon. Surely if a defendant tosses a person out of an upper story window, leaving the hard ground below to do the damage, he “used” the ground even if he did not club the victim with it.

167 Wn.App at 892-93 (Korsmo, J., dissenting) (internal citations omitted) (emphasis in original). Because our State does not embrace horizontal stare decisis, this Court is not bound by the holding in *Shepard*. *In re Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). Instead, this court need only give “respectful consideration to the decisions of other divisions of the [] Court of Appeals.” *Id.*

This Court should decline to follow *Shepard* to the extent that it holds 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. Such a holding is not dictated by *Marohl*, *supra* n.2, is inconsistent with this Court’s interpretation of *Marohl* in *Glen*, and as

noted by Judge Korsmo “[n]o authority is cited for the proposition that an object must be used as a club to constitute a weapon” let alone an “instrument or thing likely to produce harm.” 2013 WL 4010252 at 4-5; 167 Wn.App at 893 (Korsmo, J., dissenting).

Here, Timmons intentionally and maliciously flooded the upstairs of Andrews’s home by running a garden hose through an upstairs window and leaving the water turned on. RP 172, 288-89, 293, 323-24. After the flooding began, Timmons called Andrews and told her something like “[y]ou’d better go rescue your cats because I just ruined the house.” RP 165. Officers arrived at the scene of the flooding about an hour after it began and observed water running through the ceiling and dripping from it, sheetrock that had fallen and was hanging from the ceiling, drywall that caved in with water running through it, floor that was squishy and soft from the soaking, and general water damage everywhere. RP 172, 288-290, 313, 323-24, 326. Officers also observed that the electricity was on in the home and retreated to turn off the power and avoid electrocution. RP 290.

Upon reentry, Ofc. McPherson was hit in the head by a piece of drywall that had detached and fell from the ceiling. RP 296, 314-15. This left him dazed and confused, in pain, covered in white chalky material,

and with a concussion. RP 315-17, 324-25. As a result of the concussion, Ofc. McPherson missed five days of work. RP 318.

Viewing all of the evidence in the light most favorable to the State, Timmons “[w]ith criminal negligence, cause[d] 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). Timmons intentionally created a dangerous situation at the home whereby the police would, of course, respond and have to enter the home and face the dangers and risks associated with entering a home flooded from the second floor. The weakened and falling drywall created by Timmons became an object or thing likely to produce bodily harm under the circumstances of this case. This conclusion is in harmony with the holding of *Marohl* because, unlike the stationary, non-utilized, and undamaged casino floor, falling drywall is likely to produce bodily harm if it lands on a person.

Nonetheless, there is no requirement that the State prove that Timmons intended that falling drywall would strike first responders in order for him to be guilty of Assault in the Third Degree. *Glen* 2013 WL 4010252 at 5; RCW 9A.36.031(1)(d). That an officer could end up injured in such a situation is plainly foreseeable. *Cf. State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (holding that a firefighter’s “death that is caused by an arson fire before it is extinguished occurs in furtherance of the arson and

renders the arsonist liable for felony murder” even where the firefighter was negligent); *State v. Levage*, 23 Wn.App. 33, 35, 594 P.2d 949 (1979) (noting that “[d]anger inheres in fire fighting. In setting a hostile fire, the arsonist can anticipate that firemen will be endangered.”). Furthermore, there were no intervening causes or acts between Timmons’ crime(s) and the injury sustained by Ofc. McPherson. And because Timmons weakened the ceiling, structure, and/or drywall of the second floor through his intentional flooding, under the *circumstances* of this case, the drywall that fell from the ceiling can constitute a thing or object that was likely to produce harm to those who responded to the scene. *Marohl*, 170 Wn.2d at 699. Sufficient evidence supports Timmons’ conviction.

II. Timmons is correct that the three discretionary legal financial obligations and the \$100 DNA fee should be stricken from his judgment and sentence.

The State agrees with Timmons’ analysis of the legal financial obligations issues. Br. of App. at 15-19. This Court should remand to the trial court to strike the \$200 criminal filing, the \$250 jury demand fee, the \$100 domestic violence penalty assessment, and the \$100 DNA fee.

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CONCLUSION

For the reasons argued above, this Court should affirm Timmons' conviction but remand to strike the assessed legal financial obligations.

DATED this 8th day of April, 2019.

Respectfully submitted:

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