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NO. 53712-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND RUDY,

Appellant.

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

The Honorable William Houser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict Appellant of assaulting a police officer with a deadly weapon.

Issues Pertaining to Assignment of Error

The prosecution charged Appellant with two counts of second degree assault with a deadly weapon, to wit a machete. One of the counts involved a police officer who had intervened in an altercation between Appellant and another person. Where the evidence shows Appellant never used or intended to use the machete in a manner towards the officer that could be considered threatening, did the prosecution fail to present evidence sufficient to convict Appellant of assaulting the police officer with a deadly weapon because it failed to prove;

1. the machete was a “deadly weapon”; or
2. that Appellant had the intent to assault the officer?

B. STATEMENT OF THE CASE

1. Procedural Facts

On May 12, 2019, the Kitsap County Prosecutor charged Appellant Raymond Rudy with first degree robbery and first degree assault. CP 1-8. The prosecution alleged that on April 10, 2019, Rudy first robbed Port Orchard Safeway employee Zachary Wade Dunmire with a deadly weapon by stealing products from Safeway and threatening

Dunmire with a machete as he fled the store. CP 5. The prosecution alleged Rudy then assaulted Zachary Mann, a bystander outside of the Safeway, by wielding the machete and threatening to injure Mann with it. CP 5-6.

Shortly before trial the prosecution amended the information to add a charge of second degree assault with a deadly weapon (the machete) against Donna Main, the Port Orchard Police Sargent who responded to the 911 call about the alleged robbery. CP 35, 37-41; 1RP¹ 4, 28.

A jury trial was held August 5-13, 2019, before the Honorable William Houser, Judge. 1RP. The jury found Rudy guilty of the assault charges but could not reach a unanimous verdict as to the robbery charge. CP 70; RP 526-27.² The robbery charge was dismissed without prejudice. CP 75; 2RP 2.

Rudy was sentenced to concurrent 24-month standard range terms for each assault, plus consecutive 12-month deadly weapon sentence

¹ There are three volumes of verbatim report of proceeding referenced as follows: 1RP – two-volume consecutively paginated set for the dates of August 5-8, 12 & 13, 2019; and 2RP – August 23, 2019 (sentencing).

² The jury initially submitted verdict finding Rudy not guilty of the robbery, not guilty of the assault against Main and guilty of the assault against Mann. CP 66-68; 1RP 490-91. When jurors were subsequently polled, however, it became apparent they were not unanimous and were therefore ordered to resume deliberations. 1RP 491-97.

enhancements for a total sentence length of 48 months. CP 76-86; 2RP

10. Rudy appeals. CP 88-89.

2. Substantive Facts

At Rudy's trial the jury heard from six witnesses and were presented with eleven exhibits, including surveillance video from when Rudy was inside the Port Orchard Safeway and recordings from two 911 calls associated with the incident. Exs. 2 & 8. Two of the six witnesses, Assistant Manager at the Port Orchard Safeway Jeffrey Gardner and Administrative Specialist for Kitsap 911 Stephanie Browning, were called merely to authenticate the instore video and 911 call recordings introduced at trial. 1RP 259-63, 266-69. The remaining four witnesses were eye-witnesses to some or all of the events that led to the charges against Rudy.

According to Zachary Dunmire, the head night stocker at the Port Orchard Safeway and complaining witness as to the robbery charge, Rudy came into the store just before midnight on April 9, 2019 and went to the meat department, grabbed several items, put them in his coat and then went into the store bathroom. 1RP 273-76. Dunmire recalled Rudy coming out of the bathroom about five minutes later and head towards the exit. 1RP 276. Dunmire could see store merchandise in Rudy's jacket and pant pockets, so he confronted Rudy and asked for him to return what he had taken. 1RP 276-77. When Rudy acted as if he did not know what

Dunmire was talking about, Dunmire said he would call police if Rudy did not comply. 1RP 277. Dunmire claimed Rudy immediately became agitated at the mention of police and tried to start a physical altercation by luring Dunmire out of the store to fight. 1RP 277-78. Dunmire kept his distance and called 911 while Rudy left the store. 1RP 278-79.

Once Rudy was outside the store, Dunmire noticed he was swinging a machete around as he interacted with another person in the parking lot. Dunmire recalled that individual also calling 911 and then following Rudy as he tried to leave the area. 1RP 279.

According to Dunmire, when a police officer arrived, the officer held Rudy at gun point and ordered him to drop the machete, which Rudy eventually did. 1RP 280.

Zachary Mann, the complaining witness to the first count of second degree assault, testified he went to the Port Orchard Safeway late on April 9, 2019 to get grocery. 1RP 330. When he parked, he saw two people outside the entrance, one on a cell phone and another wearing a backpack with "something dangling from their belt." 1RP 331. At some point the person with the backpack started yelling, either at Mann or the person on the cell phone, Mann could not tell for sure. 1RP 331-32. The person seemed to be making threats and wanting to get into a fight, so Mann returned to his car, retrieved his cell phone and called 911. 1RP

332. Mann testified it was Rudy that was acting aggressive that night. 1RP 333.

While Mann was talking to 911, a police officer pulled into the Safeway parking lot and Mann pointed out to the officer where he had seen Rudy go. 1RP 333. After the officer drove in the direction Mann provided, Rudy came out of the shadows on the side of the Safeway and started coming at Mann as he “waggled” the machete in the sheath on his belt and made threatening remarks. 1RP 336, 339, 352, 355. Mann said he feared for his safety as Rudy got within striking distance. 1RP 338-39. Rudy had unsheathed the machete at that point. 1RP 357.

As Rudy approached Mann, the police officer drove back up, turned on emergency lights and ordered Rudy to drop the machete. 1RP 341. Rudy continued towards Mann but then turned and walk alongside the patrol car before dropping the machete and submitting to the officer. 1RP 340-43. Mann recalled that before submitting to the officer, Rudy asked what he was being arrested for. 1RP 362.

Sargent Donna Main was the officer that first appeared at the scene and is the complaining witness to other second degree assault charge. 1RP 372. After speaking briefly with Mann, Main went in search of the suspect, only to see him returning to Mann’s location. 1RP 372-74. Main turned her patrol car around and quickly headed back to Mann’s location

in the Safeway parking lot. 1RP 374. Main recalled pulling up as Rudy was approaching Mann, getting out of her patrol car, drawing her gun, and ordering Rudy to drop the machete. 1RP 375-76. Rudy did not immediately comply with Main's orders. 1RP 377, 379. Main claimed she was concerned for the safety of Rudy, Mann, and herself at the time. 1RP 378.

Main recalled that once she started yelling for Rudy to drop the machete, Rudy seemed to turn his attention away from Mann and towards her, getting closer but with a "blank" look on his face. 1RP 379-81. As Rudy approached, Main was concerned for her safety. 1RP 383.

Main recalled Rudy did not hold the machete over his head at this point, but instead "[j]ust out to his side." 1RP 380. After Rudy turned away from Mann towards Main, he walked past Main's patrol car and Main followed for a short distance before Rudy eventually complied by dropping the machete, moving away from it, and then getting on the ground as ordered. 1RP 385-86. Main held Rudy on the ground at gun point until another officer arrived, Port Orchard Police Officer Patrick Pronovost, and Rudy was then handcuffed and arrested, albeit with a minor struggle. 1RP 386-88.

On cross examination, Main admitted Rudy never swung or lunged at her with the machete, nor did she ever see Rudy do that towards Mann. 1RP 397, 399-400.

According to Officer Pronovost, when he arrived at the Safeway parking lot, Rudy was already disarmed and on the ground with Sgt. Main holding him at gun point. 1RP 317. After a minor struggle, Pronovost was able to handcuff Rudy and take him into custody. 1RP 318.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO CONVICT RUDY OF ASSAULTING SGT. MAIN WITH A DEADLY WEAPON.

The charge of second degree assault involving Sgt. Main was predicated on Rudy's alleged use of a "deadly weapon." CP 39. The only possible evidence of a deadly weapon presented at trial was a machete. But a machete is not a per se "deadly weapon." Instead, it is only a "deadly weapon" if used in a manner readily capable of causing death or substantial bodily harm. Because the prosecution failed to present any evidence that Rudy used the machete in such a manner toward Sgt. Main, the evidence was insufficient to convict Rudy of assaulting Sgt. Main with a deadly weapon.

The prosecution also had to prove Rudy had the intent to assault Sgt. Main. The prosecution failed to do so because it presented no evidence allowing for a reasonable inference that Rudy had such intent.

Because the prosecution failed to present evidence sufficient to conclude Rudy used the machete as a deadly weapon towards Sgt. Main, or that he had an intent to assault Sgt Main, this Court should reverse and dismiss the charge of assault involving Sgt. Main with prejudice.

Due process demands the prosecution prove all the elements of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing whether the prosecution has met this burden, the appellate court analyzes “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). While inferences are drawn in the prosecution’s favor, these inferences must be reasonable and cannot be based on speculation or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

Rudy was charged with second degree assault under RCW 9A.36.021(1)(c), (CP 39), which provides:

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

...

(c) Assaults another with a deadly weapon;

1. The Prosecution failed to prove Rudy used the Machete as a “deadly weapon” towards Sgt. Main.

“Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, 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;

RCW 9A.04.110(6).³

The Washington Supreme Court has noted RCW 9A.04.110(6)

creates two categories of deadly weapons: deadly weapons per se, namely “any explosive or loaded or unloaded firearm,” and deadly weapons in fact, namely “any other weapon, device, instrument, article, or substance ... 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.”

³ In this regard, Rudy’s jury was instructed:

Deadly weapon means 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.

CP 56 (Instruction 12).

In re Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011) (quoting State v. Taylor, 97 Wn. App. 123, 126, 982 P.2d 687 (1999)).

Under Martinez, a machete is not a “per se” deadly weapon because it is not a firearm. Thus, if Rudy’s machete was a deadly weapon for purposes of the assault charge involving Sgt. Main, it must fall within the “under the circumstances in which it is used, attempted to be used, or threatened to be used” category. “[T]here must be some manifestation of willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6).” Martinez, 171 Wn.2d at 366 (quoting State v. Gotcher, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988)). The evidence presented at Rudy’s trial failed to include such evidence.

At Rudy’s trial, the prosecution failed to present any evidence to support finding Rudy used, attempted to use or threatened to use the machete against Sgt. Main in a manner “readily capable of causing death or substantial bodily harm.” To the contrary, neither Mann nor Sgt. Main provided any testimony supporting a finding that Rudy ever threatened to use the machete against Sgt. Main.

On direct examination, Mann testified he was relieved when Sgt. Main intervened in his confrontation with Rudy, and that once she arrived Rudy walked by him and then initially ignored Sgt. Main’s orders to drop the machete and get on the ground, and appeared to be planning to simply

walk away from the scene. 1RP 341-44. On cross examination, Mann explained that Rudy stopped stalking him as soon as Sgt. Main pulled up, even before she was out of the car. 1RP 359, 361. On redirect, Mann noted that when Rudy appeared to stop coming directly at him, Rudy first altered his course such that he would have walked into Sgt. Main, but then altered it again so that he went around the patrol car instead of at Sgt. Main. 1RP 363-64.

Nothing in Mann's testimony supports an inference that Rudy use of the machete towards Sgt Main fell within the "under the circumstances in which it is used, attempted to be used, or threatened to be used" category of "deadly weapon." Such an inference from Mann's testimony would necessarily require speculation and conjecture, which is improper. Vasquez, 178 Wn.2d at 16.

Sgt. Main's testimony also fails to provide a basis to infer Rudy used the machete as a deadly weapon towards her. According to Sgt. Main, once she started ordering Rudy to drop the machete, Rudy seemed to turn his attention away from Mann and towards her, getting closer but with a "blank" look on his face. 1RP 379-81. Main admitted she never saw Rudy hold the machete over his head, but instead held it "[j]ust out to his side." 1RP 380. After Rudy turn away from Mann towards Sgt. Main, he did not come at her, but instead walked past her patrol car, which

allowed Sgt. Main to follow him a short distance before he eventually complied with her commands by dropping the machete, moving away from it, and getting prone on the ground. 1RP 385-86.

Like Mann's testimony, Sgt. Main's testimony fails to provide a basis to reasonably conclude Rudy wielded the machete in such a manner towards Sgt. Main that it constituted a "deadly weapon" for purposes of the second degree assault charge. Such a conclusion would require engaging in improper speculation and conjecture. Vasquez, 178 Wn.2d at 16.

2. There was an absence of proof that Rudy had the specific intent to assault Sgt. Main.

Rudy's jury was instructed:

An assault is an act 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 53 (Instruction 9) (emphasis added).

This instruction reflects that to commit an assault, a person must have a specific intent to cause bodily harm or to create a reasonable apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Thus, specific intent is an essential element of assault in

the second degree. Byrd, 125 Wn.2d at 713. Specific intent means intent to produce a specific result, as opposed to intent to perform the physical act that produces the result. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent cannot be presumed, but it can be inferred as a logical probability from the facts and circumstances. State v. Pedro, 148 Wn. App. 932, 951, 201 P.3d 398 (2009).

Here, the jury was instructed only on the reasonable apprehension portion of the common law definition of assault. CP 53. Thus, in order to convict Rudy of assault in the second degree by assaulting Sgt. Main with a deadly weapon, the prosecution was required to prove beyond a reasonable doubt that he specifically intended to cause reasonable apprehension in Sgt. Main by his use of the machete. The evidence presented fails to support such a finding.

Rudy did not testify, nor did he ever admit to an intent to assault Mann or Sgt. Main. There was evidence Rudy had an intent to assault Mann, as Mann testify that early on in the encounter Rudy stated, "I'll kick your ass," or, you know, I'll eff you up sort of thing." 1RP 332. And Mann claimed on his 911 call that Rudy was threatening him with a machete. Ex. 8. Mann specifically recalled Rudy threatening to "cut" him as he approached. 1RP 340.

There are no such threats by Rudy towards Sgt. Main. Rather, Rudy had a “blank” look on his face when he turned away from Mann and appeared to be simply trying to walk away from the scene without ever coming at Sgt. Main in an assaultive manner. 1RP 342, 380-81, 397-400.

Any argument that it can be inferred that since he had a machete, Rudy specifically intended to cause apprehension is an inference based on circumstantial evidence which must be reasonable and cannot be based on speculation. Vasquez, 178 Wn.2d at 16; State v. Hummel, 196 Wn. App. 329, 357, 383 P.3d 592, 607 (2016), review dismissed, 187 Wn.2d 1021 (2017), citing Jackson v. Virginia, 443 U.S. at 319 (holding that triers of fact may draw only reasonable inferences); Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911) (“To justify conviction, it was necessary that this intent [to injure or defraud] should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.”). Here, such an inference is not reasonable, is based solely on speculation and which is insufficient to prove the intent element of second degree assault.

Thus, no rational jury could conclude that the evidence produced here was sufficient to prove reasonable apprehension by use of a deadly

weapon. Accordingly, Rudy's conviction for assaulting Sgt. Main must be reversed.

3. Rudy's conviction for assaulting Sgt. Main must be reversed and dismissed with prejudice.

Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), quoting Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

D. CONCLUSION

For the reasons stated, Rudy's conviction for assaulting Sgt. Main should be reversed and dismissed with prejudice.

DATED this 29th day of May, 2020.

Respectfully submitted,

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