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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

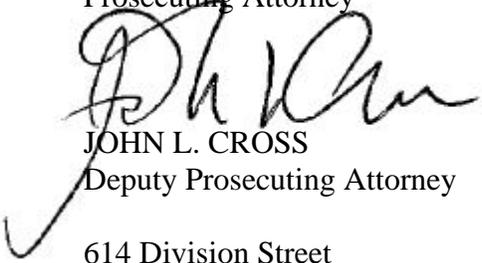
RAYMOND J. RUDY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 19-1-00464-18

BRIEF OF RESPONDENT

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Prosecuting Attorney

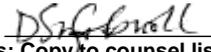

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DATED July 22, 2020, Port Orchard, WA 

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to establish second degree assault by use of a deadly weapon?
 - a. Is a machete in the manner used a deadly weapon?
2. Whether the evidence was sufficient to establish intent to assault the police victim?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Raymond J. Rudy was charged by information filed in Kitsap County Superior Court with first degree robbery and second degree assault of Zachery Mann. CP 1-2. The information was amended to charging second degree robbery, second degree assault on Mr. Mann with a special allegation of being armed with a deadly weapon, and second degree assault on Donna Main with special allegations of being armed with a firearm and crime against a law enforcement officer. CP 30-33. Finally, a “corrected” information was filed maintaining the same charges but changing the date range on the robbery count. CP 37; RP, 8/6/19, 28.

A verdict form shows that the jury returned a verdict of not guilty on robbery count. CP 66. But later it developed that the jury was not unanimous on that count and a second verdict form gave no decision on

the robbery count. CP 70. Later, the state's motion to the dismiss the robbery count was granted. CP 75.

The jury convicted on the two assault charges. CP 70. The jury also made affirmative findings that on both crimes Rudy was armed with a deadly and that on count III the assault was committed against a law enforcement officer. CP 71-72.

With the two consecutively sentenced deadly weapon enhancements, Rudy received a sentence of 48 months. CP 78.

A notice of appeal was timely filed. CP 88.

B. FACTS

Rudy was observed by a Safeway store employee. RP 274-75. The employee saw Rudy put some items in his jacket and go to the bathroom. RP 276. After Rudy left the bathroom, the employee could see merchandise in his pockets. RP 277. As Rudy passed the register, the employee confronted him and asked him to return the merchandise. Id.

The employee threatened to call police and Rudy "started to try and start an altercation." RP 277-78. Rudy offered to fight the employee. Id. The employee backed off while calling 911 and followed Rudy from 20 or 30 feet behind. Id. Outside, the employee saw Rudy waiving a

machete around above his head. RP 279. A customer approached Rudy inquiring as to the problem and followed Rudy. Id. Eventually, the employee saw a police officer with a drawn weapon ordering Rudy to drop the machete. RP 280. Rudy initially refused to drop it but he eventually did. Id.

The machete was admitted; it was approximately 16 inches long. RP 322.

The customer who had approached Rudy, victim Zachary Mann, had stopped at the Safeway on his way home from work. RP 330. Mr. Mann saw the store employee on the phone and Rudy leaving the store. RP 331. Rudy was yelling (e.g., “I’ll kick your ass”) and Mr. Mann asked if Rudy was yelling at him. RP 332. Rudy appeared to be looking for a fight and Mr. Mann retrieved his phone to call 911. Id. When Mr. Mann realized that Rudy was making threats armed with a machete, he was concerned. RP 334.

Rudy was walking toward Mr. Mann with the machete out when police arrived. RP 336-37. Rudy was near striking distance when the officer turned on her patrol car lights. RP 337. When Rudy approached Mr. Mann with machete drawn, Mr. Mann “knew [his] life was in danger at that moment in time.” RP 338. Rudy was gesturing with the machete as he approached and Mr. Mann felt that he was in “serious danger” if the

responding officer did not see his situation. RP 339.

Sergeant Main initially pursued Rudy by Mr. Mann's directions. RP 372. She saw Rudy walking back toward Mr. Mann. RP 374. Sergeant Main drew her firearm and ordered Rudy to drop the machete. RP 342; 375.

Rudy turned his attention from Mr. Mann to Sergeant Main. RP 379. Rudy refused commands to drop the machete as he approached Sergeant Main. *Id.* The sergeant was concerned by his approach (RP 380); Rudy's approach gave her concern for her safety. RP 383. She had to retreat to the other side of her patrol car to place an obstacle between them. RP 384. Specifically, the sergeant retreated "[b]ecause I don't want to get injured with this weapon.". RP 384.

II. ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT A 16 INCH MACHETE USED IN THE MANNER THAT IT WAS USED BY RUDY IS A DEADLY WEAPON.

Rudy argues that there was insufficient evidence to prove that the machete wielded by Rudy is a deadly weapon as an element of the second degree assault charge on Sergeant Main. This claim is without merit because the machete, although not a deadly weapon per se, is a deadly when used, threatened to be used, or attempted to be used as Rudy did.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Rudy was charged with the second degree assault based on his use of the machete. The assault element of the offense was defined to the jury as

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 54 (instruction 9). This is taken directly from WPIC 35.50, third

paragraph. 11 WAPRAC WPIC 35.50. The “note on use” advises that this instruction should be used “in cases in which there is evidence that the actor's intent was not to inflict bodily injury but only to create the apprehension or fear of bodily injury in the victim.” Id.

In *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (En Banc)(2008), the Supreme Court held that the assault by reasonable apprehension instruction placed “reasonable fear of bodily injury” in issue. 164 Wn.2d at 183. Such fear must be objectively reasonable because “the charged act does not itself conclusively establish reasonable fear of bodily injury.” Id.

The deadly weapon part of the charge was defined to the jury as

Deadly weapon means any 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 57 (instruction 12).

The state agrees that the machete is not a per se deadly weapon under *In re Martinez*, 171 Wn.2d 354, 368, 256 P.3d 277 (2011)(in footnote 6 the Court says its not). The jury was not instructed that the machete was a deadly weapon as a matter of law. *But see* CP 60 (instruction 15 (16-inch machete is deadly weapon as matter of law on the deadly weapon enhancement)).

Rudy does not dispute that if “used” in an assault the machete is

“readily capable of causing death or substantial bodily harm.” *See State v. Shilling*, 77 Wn. App. 166, 171, 889 p.2d 948 (1995)(“Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm.”) *review denied* 127 Wn.2d 1006 (1995). A pencil satisfies that phrase depending on the way it is used. *State v. Barragan*, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000) (pencil swung with force at victim is deadly weapon). A machete has the potential to cause great bodily harm.

A jury may rely on circumstantial evidence. Here, the circumstances the jury considered included Rudy’s clear use of the machete in assaulting Mr. Mann shown by Rudy’s waiving it over his head as he threatened Mr. Mann. The jury would consider that when Sergeant Main arrived she saw Rudy quickly approaching Mr. Mann with the machete drawn, that is, she saw Rudy assaulting Mr. Mann.

In *Magers, supra*, evidence of the defendant’s prior violent acts was held admissible on the reasonable fear element of proof. This under circumstances where the victim recanted her initial report. 164 Wn.2d at 179-80. In *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (En Banc)(2014), it was emphasized “we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise

inexplicable recantation or conflicting account of events.” 181 Wn. 2d at 925. But the general principle in *Magers*, that instruction 9 in the present case places the victim’s state of mind in issue, is undisturbed in *Gunderson*. Thus, Rudy’s actions toward Mr. Mann, seen by Sergeant Main, were probative of the reasonableness of Sergeant Mann’s fear.

Then, the jury got Sergeant Main’s testimony that she was able to take Rudy’s attention from Mr. Mann and turn it towards her. Rudy did not comply with commands to drop the machete. He approached Sergeant Main still holding the machete. Then, crucially, the jury would consider that a trained and experienced police officer with her weapon drawn testified that she had to retreat behind her patrol car because of her apprehension of being injured by Rudy’s machete.

These facts are distinct from those in *In re Martinez*. There,

No one saw Mr. Martinez with the knife, and he manifested no intent to use it. Furthermore, no one saw Mr. Martinez reach for the knife at any time after he was apprehended.

171 Wn.2d at 368. Further, “Viewed in the light most favorable to the State, the only evidence that Mr. Martinez attempted to use the knife was the unfastened sheath.” 171 Wn.2d at 369. In the present case, both the victims were very aware that Rudy was holding the machete. Sergeant Main knew this as she saw Rudy rapidly approach Mr. Mann. Sergeant Main knew this as Rudy turned his attention to and approached her—she

retreated in fear of injury from the machete. The present case has the facts that were missing in *In re Martinez*.

Also of significance in *In re Martinez* is that the Court sought to answer only whether Matinez “attempted to use” the knife, actual or threatened use not being in issue. 171 Wn.2d at 368. In *Shilling, supra*, which is discussed with approval in *In re Martinez*, a drunken patron hit a bar bouncer with a drink glass. The glass was not a deadly weapon per se. 77 Wn. App. at 171. The Court of Appeals focused on the circumstances of use, which include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *Id.*

When the issue is actual use--actual battery--the degree of force and injuries inflicted matter. Those considerations do not fit a case as the present one where the assault is based on reasonable apprehension. Rudy’s intent and present ability are relevant. Rudy’s behavior falls somewhere between the Supreme Court’s holding in *In re Martinez* that there be “more than mere possession” and *Shilling* with actual battery. *In re Martinez*, 171 Wn.2d at 366. Rudy did more than merely possess the machete but, fortunately, never physically injured anyone with it.

In the light most favorable to the state, the evidence shows that under the circumstances Rudy used, attempted to use, or threatened to use

the machete. Drawing a machete and holding it while aggressively approaching an antagonist is threatening behavior. The law requires only “some manifestation of willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6).” *State v. Gotcher*, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988).

The *Gotcher* Court engaged the same analysis as *In re Martinez* and found that a knife is not per se a deadly weapon. 52 Wn. App. at 354. The phrase ““used, attempted to be used, or threatened to be used” would be a nullity if there was no “manifestation of willingness.” *Id.* *Gotcher* claimed that the evidence was insufficient to establish the deadly weapon element of first degree burglary. The Court of Appeals disagreed

It is undisputed that *Gotcher* had a switchblade knife in his right coat pocket while he was committing the burglary. A police officer testified that: (1) he found the two suspects hiding behind an automobile in the garage; (2) he ordered the suspects to place their hands on a wall; (3) *Gotcher* removed his right hand from the wall and moved it toward his right coat pocket; (4) *Gotcher* “fumbled” with something on his right side; (5) *Gotcher* disregarded several verbal commands to place his hands back on the wall; and (6) a police dog was released to subdue *Gotcher*. A second officer testified that the safety was off the switchblade when he removed it from *Gotcher's* pocket and that the switchblade was partially opened. Viewing this evidence in the light most favorable to the State, there was sufficient evidence from which the jury could have found all the essential elements of the crime beyond a reasonable doubt.

Gotcher, 52 Wn. App. at 357-58 (page break omitted).

Similarly, Sergeant Main came upon Rudy while he committed assault against Mr. Mann. She ordered him multiple times to stop and

drop the weapon. He failed to comply. Rudy didn't fumble with an unseen knife in his pocket; Rudy advanced on the victim clearly grasping a 16-inch machete.

In a light most favorable to the state, the evidence was sufficient to establish that Rudy's assault of Sergeant Main was done with a deadly weapon.

B. THE JURY REASONABLY INFERRED RUDY'S SPECIFIC INTENT TO ASSAULT SERGEANT MAIN.

Rudy next claims that the evidence was insufficient to establish his intent to assault Sergeant Main. He claims that the machete and his behavior do not allow a reasonable inference of his intent. This claim is fails because under all the facts and circumstances, taken in a light most favorable to the state, there is a reasonable and logical inference of specific intent.

The same standards outlined above apply to this sufficiency of the evidence claim.

The jury was instructed that Rudy must have acted with the specific intent to create in Sergeant Main reasonable apprehension of substantial bodily harm. CP 54 (instruction 9 *supra* ("an act done with intent to create in another. . .")). The jury was further instructed that

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 56 (instruction 11; RCW 9A.08.010(1)(a); 11 WAPRAC WPIC 10.01). Rudy concedes that instruction 9 properly placed the issue of specific intent before the jury. Brief at 12.

Neither instruction 9 nor instruction 11 require proof that an assault defendant verbalize her intentions to assault the victim. “A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability.” *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). If one does verbalize intent, as Rudy did to Mr. Mann, the proof is easier; Rudy does not here contest the verdict with regard to Mr. Mann. A moment after Rudy’s behavior established unchallenged specific intent to assault Mr. Mann, and with the weapon still held by his side and while moving toward Sergeant Main, Rudy expects the jury to infer that Rudy’s objective or purpose to achieve a result that constitutes a crime suddenly changed.

In *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017), the Supreme Court considered a claim of insufficient evidence to support the specific intent element of second degree theft of an access device. 188 Wn.2d at 762. A woman had left her purse unattended in a store and Johnson was caught trying to place the purse in a plastic bag. 188 Wn.2d

at 748. Johnson argued that specific intent was not proven because, not knowing credit cards were in the purse, he could not have intended to steal them.

The Supreme Court disagreed. The Court noted that specific intent may not be presumed but “it can be inferred as a logical probability from all the facts and circumstances.” 188 Wn.2d at 762-63 (internal quotation omitted). The Court reasoned that it was reasonable for a jury to infer that Johnson took the purse because he believed that it would contain credit cards. 188 Wn.2d at 764. Further, in the sufficiency of the evidence posture of the case the competing hypothesis that Johnson intended to steal the purse only failed:

We acknowledge that a reasonable jury could find Johnson intended to steal only Kendra’s purse and not her credit cards. But whether a reasonable jury could disagree with the inference that Johnson intended to steal a credit card when he stole the purse is not the standard for finding insufficient evidence. The standard is whether *no* reasonable jury could find beyond a reasonable doubt that Johnson intended to steal Kendra’s credit cards when he stole her purse.

188 Wn.2d at 764 (emphasis by the court).

Rudy, like Johnson, argues a plausible inference that in the case of Sergeant Main, his intent was flight rather than assault. In fact the get-away intent provides motive: Rudy specifically intended to assault the officer in the hopes that her reasonable apprehension of the weapon would allow him to escape. But the jury rejected the inference that Rudy would

have liked them to draw. Sergeant Main's unrebutted testimony of her reasonable fear provide substantial evidence from which the jury could infer intent. Taken in a light most favorable to the state, the evidence is sufficient to prove the specific intent to assault.

III. CONCLUSION

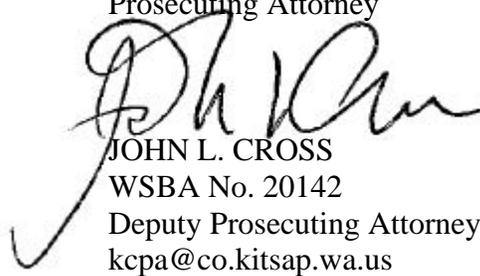
For the foregoing reasons, Rudy's conviction and sentence should be affirmed.

DATED July 22, 2020.

Respectfully submitted,

CHAD M. ENRIGHT

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A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

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