

FILED
DECEMBER 20, 2016
Court of Appeals
Division III
State of Washington

NO. 34001-5-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

State of Washington,

Respondent / Plaintiff,

v.

Erik Clifford Luden,

Appellant / Defendant.

Appeal From The Superior Court
Of Whitman County
Case No. 15-1-00082-3
The Honorable David Frazier

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENT OF ERROR

The defendant argues that there was insufficient evidence upon which the jury could have found the defendant to have been armed with a deadly weapon during the commission of the underlying crime of murder, for purposes of the deadly weapon sentence enhancement.

The State believes there was sufficient evidence to support the jury's verdict that defendant was armed with a deadly weapon, for purposes of the sentence enhancement.

II. STATEMENT OF THE CASE

The State agrees with Appellant's Statement of the Case, and offers the following additional facts that support the jury's verdict:

The defendant murdered his father, in a fit of rage. The defendant then called 911 and told the dispatcher that the defendant had hit his father with a pot after his father had supposedly stabbed the defendant with a knife. RP 74. The father was found on the floor of defendant's apartment, and declared dead at the scene. RP 95-100.

A cooking pot was found by the responding officers, within 12 inches of the victim's head. RP 183-184. This pot was later admitted at trial as Exhibit 103, and was argued by the State to have been a "deadly weapon" for purposes of the sentencing enhancement. After trial, the pot

was returned to the police department, and a photo was substituted. See CP 78: “Order GR 20 Evidence Substitution”. A copy of that photo / exhibit 103 is attached hereto as Appendix A.

The pathologist testified that the cause of death was blunt force trauma to the head and neck. RP 288-289. There were at least 15 blows to the head and neck. In one area of the head, there was a “complex laceration of the scalp” caused by more than one blow. RP 297-301. This injury was caused by a “blunt force injury causing tearing.” RP 297. It was not caused by a fist. RP 299. It could have been caused by a pot, but required more than one blow. RP 299. The injury at that site was consistent with being caused by the pot. RP 299, 312-313. The pathologist could not say which blow was the fatal blow, but rather it was “a cumulative effect of the blows” that caused the death. RP 312-313.

The handle of the pot (exhibit 103) had the victim’s blood on it, RP 225, and the rim of the pot had the victim’s dna on it, RP 228. As noted in Appellant’s brief, the pot had significant amount of blood stain spatter on it. RP 246.

III. ARGUMENT

There was sufficient evidence to support the jury's verdict that defendant was armed with a deadly weapon at the time he committed the murder.

The question on review, as noted by Appellant's counsel, is whether, taking the evidence in the light most favorable to the State, a reasonable juror could find beyond a reasonable doubt that defendant was armed with a deadly weapon during the commission of the murder. *See eg State v. Eckenrode*, 159 Wn.2d 488 (2007).

The Appellant first points out that the deadly weapon verdict could not be based on the use of defendant's fists. The fist is not a deadly weapon as that term is used in the sentence enhancement scheme. The State agrees.

The 'deadly weapon' in this case, for the purposes of the jury's special verdict that defendant was 'armed with a deadly weapon' is the cooking pot: Exhibit 103.

Appellant argues that there is insufficient evidence for a juror to conclude that the pot (exhibit 103) is an instrument "which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825 and Jury Instruction 17 at RP 351-352.

But in this case, a reasonable juror should not have to disregard their common sense, nor the input of their five senses, nor their common experiences that they bring to the jury room. In this case, a cooking pot was introduced into evidence. The jury got to look at it. They got to examine it during deliberations if they wanted to; they got to feel its heft. The victim's blood was on the pot; it was laying next to the victim's bashed-head; the defendant told the 911 dispatcher that he'd hit the victim with a pot; the pot was consistent with the type of instrument that was used at least twice in blows to the victim's head; and it was the cumulative effect of all the blows to victim's head and neck that actually caused the death here.

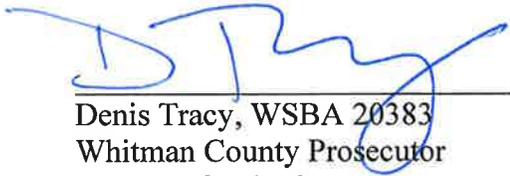
“[A] juror is expected to bring his or her opinions, insights, common sense, and everyday life experiences into deliberations.” *State v. Carlson*, 61 Wash.App. 865, 878 (1991). In *Carlson*, a jury was able to use their common sense and life experience to determine that horses were suffering pain and suffering due to dehydration – they didn't need a vet to tell them that explicitly. This was “a matter of common knowledge and ordinary experience which the jury could determine without the aid of expert testimony.” *Id.* See also *State v. Peterson* 174 Wn.App. 828 (2013).

There was sufficient evidence upon which to conclude that this cooking pot had the capacity to inflict death, and from the manner in which it was used that it was likely to produce, or might easily and readily have produced, death. The State believes the jury didn't need an expert to explicitly say so in those words.

IV. CONCLUSION

There was sufficient evidence to support the jury's verdict that defendant was armed with a deadly weapon at the time he committed the murder.

Respectfully submitted this 20 day of December, 2016.



Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

APPENDIX 1

Exhibit 103 – the cooking pot

PLAINTIFF
EXHIBIT NO. 103
For Identification
No. 15-1823
Date 12-14-15
Admitted [Signature]

POT



CAUTION
HANDLE WITH CARE
EVIDENCE

Evidence
Pullman Police Case # 15-05186
Item # 6
Barcode: 1009393
Category: HOUSEHOLD & APPLIANCES
Submitted by officer: Gok, Suet - 436
Date: (blank) (blank) (blank) (blank) (blank) (blank)

Barcode: 1009393
Case # 15-05186
Item # 6
Category: HOUSEHOLD & APPLIANCES
Submitted by officer: Gok, Suet - 436
Date: (blank) (blank) (blank) (blank) (blank) (blank)

215-001075
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215-001075

EVIDENCE

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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

Court of Appeals No. 34001-5-III
No. 15-1-00082-3

v.

AFFIDAVIT OF DELIVERY

ERIK CLIFFORD LUDEN,
Defendant,

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

Kristina Cooper, being first duly sworn, deposes and says as follows: That on the 20th day of December, 2016 I caused to be delivered a full, true and correct copy(ies) of the original on file herein to the following named person(s) using the following indicated method:

- Emailed to Janet Gemberling at admin@genberlaw.com
- Mailed to Janet Gemberling at PO Box 8754, Spokane, WA 99203
- Mailed to Erik Clifford Luden #387696, Monroe Corrections Complex, PO Box 888, Monroe WA 98272

DATED this 20th day of December, 2016

Kristina Cooper

Kristina Cooper

SIGNED before me on the

Lori E Nails



NOTARY PUBLIC in and for the State of Washington, residing at: *Colfax*
My Appointment Expires: *Oct 1, 2018*