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Court of Appeals
Division III
State of Washington

No. 34574-2-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON

Respondent

v.

CARLO M. CERUTTI,

Appellant

Initial Brief of Appellant

Appeal from Spokane County Superior Court No. 15-1-04323-5

The Honorable Harold D. Clarke III

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INTRODUCTION

On November 14, 2015, tensions between neighbors McGlother Parker and Carlo Cerutti escalated into a conflict which left Mr. Parker with a small laceration in his hand. That laceration was inflicted by a sword utilized by Mr. Cerutti, though the parties differ as to how the sword was used, and whether it was self-defense. The events were observed by at least two eye-witnesses – each of whom agreed with one of the combatants. Nevertheless, Mr. Cerutti was arrested and charged with Second Degree Assault, and subsequently found guilty and sentenced within the standard range. This appeal timely followed, and challenges the sufficiency of the evidence finding Mr. Cerutti guilty.

ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports the jury verdict insofar as the State failed to establish that Mr. Cerutti committed assault with a deadly weapon.

ISSUES

- 1. Whether sufficient evidence supports the verdict?**
- 2. Whether, if the State should prevail upon appeal, this Court should nonetheless decline to award fees and costs to the State?**

MATERIAL FACTS

On November 14, 2015 McGlother Parker placed some of his garbage in his neighbors' garbage can. Verbatim Report of Proceedings (VRP) at 54, 117. Both his garbage can, and the can belonging to his neighbors, Carlo and Joyce Cerutti,¹ were located in a duplex garage shared by the neighbors. VRP at 117. The neighbors had a long, contentious history of animosity towards each other. VRP at 51, 113-115.

On this day, after Mr. Parker placed his garbage upon the Cerutti's can, Joyce² discovered the trash and apparently threw it back at Mr. Parker's door. VRP at 56. Mr. Parker then put the trash back in her can. VRP at 57. When she again threw the trash at his door, Mr. Parker then threw the trash directly at her. He was unsure as to whether he struck her with the trash. *Id.* Hearing the commotion and angry words, Carlo and a few others went outside. VRP at 58, 117. Carlo told Joyce to return inside the house, and everyone returned inside their respective houses. VRP at 58, 117.

When the trash was yet again thrown at his door, Mr. Parker came out of his house and began arguing with Carlo yet again. VRP at 58. The two argued on the shared front porch. VRP at 58-59. At this point, Mr.

¹ Mr. and Ms. Cerutti will henceforth be referred to by their first names in this section for ease of reference. No disrespect is intended.

Parker and Carlo differ as to what occurred next. According to Mr. Parker, Carlo told him to wait there, and stepped briefly inside his house, from where he returned with a four-bladed sword. VRP at 59-60. Carlo then swung the sword down at Mr. Parker, who instinctively grabbed the blade with his hands, suffering a small two-centimeter laceration to his hand. VRP at 60-61. He then took the sword from Carlo, throwing it in the yard. Carlo then went back into his home, and Mr. Parker called 9-1-1. VRP at 59-61. This version of events was largely corroborated by a neighboring eyewitness, Bernard Mallory. VRP at 88.

According to Carlo, once he and Joyce were inside and their door shut, Mr. Parker trespassed into the Cerutti residence and continued hurling abuses. VRP at 117-18. Carlo grabbed the first thing that came to hand – a knife hung just inside the door on display – and pushed at Mr. Parker to get him to leave the residence. VRP at 118. Once that was accomplished, he let go of the sword, closed the door, and called police. *Id.* This version of events was also corroborated by a different neighboring eyewitness, Julie Rodriguez. VRP at 152-56.

When police arrived, they talked with Mr. Parker, the Ceruttis, and eyewitnesses. Carlo was then placed under arrest. VRP at 108. Carlo was charged by information with Second Degree Assault. Clerk's Papers (CP) at 3. After trial, a jury returned a verdict of guilty, and Carlo was sentenced

within the standard range. CP at 79, 144-159. This appeal timely followed.
CP at 160-178.

ARGUMENT

1. Insufficient Evidence Supports Mr. Cerutti's Conviction for Assault in the Second Degree Because There Was Insufficient Evidence that the Sword was Intended to be Used as Deadly Weapon.

It is axiomatic that, in order to determine whether sufficient evidence was adduced at trial to support a conviction, this Court looks to whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201 P.2d 1068 (1992). As such, the State's evidence is taken as true, and all reasonable inferences therefore drawn in its favor. *Id.* The State may prove its case through either direct or circumstantial evidence, which are weighed equally. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Here, insufficient evidence was adduced to demonstrate the Crime of Assault in the Second Degree

RCW 9A.36.021(1)(c) provides in pertinent part:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree [...] assaults another with a deadly weapon.”

The crime of assault is not defined by statute in Washington, and so under the common law three types of assault are recognized (1) attempted battery: an attempt to inflict bodily injury upon another using unlawful force; (2) actual battery, that is, the unlawful touching of another with criminal intent; and (3) common law assault: putting another in fear of harm, whether or not the actor intends to inflict or is capable of inflicting that harm. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Further, a “deadly weapon” is defined as “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).

Here, insufficient evidence was adduced at trial to permit the jury to determine that Carlo either intended, or did, utilize the sword as a deadly weapon within the meaning of RCW 9A.04.110(6). Indeed, a sword is a not a deadly weapon *per se* since it is neither a firearm nor an explosive. RCW 9A.04.110(6); *State v. Winings*, 126 Wn. App. 75, 88, 107 P.3d 141 (2005). Accordingly, this Court may consider the circumstances of the weapon’s use, including the intent and present ability of the use, the degree of force utilized, the part of the body to which it was applied, and the

physical injuries inflicted. *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948, *review denied*, 127 Wn.2d 1006 (1995).

At trial, the expert testimony regarding the wound inflicted stated that the laceration was only two centimeters long. VRP at 46. He also confirmed that Mr. Parker stated that the injury was caused by a sword. *Id.*

Moreover, Mr. Parker himself testified that he did not have time to really think during the conflict, and so did not know what was in Mr. Cerutti's hand during the scuffle. VRP at 60. He also stated that although he believes Mr. Cerutti swung the sword three times, he ceased the conflict once the sword was removed from his hand. VRP at 60-61. He did not testify as to how hard Mr. Cerutti appeared to swing the sword, or whether he felt a substantial threat from the weapon – indeed, he only indicated uncertainty and the need to disarm Mr. Cerutti, who was admittedly much older than Mr. Parker, who himself “worked out.” VRP at 67, 70, 78.

Further, Mr. Mallory, an eyewitness, testified that Mr. Cerutti simply thrust the sword out, and hit Mr. Parker in the hand. VRP at 86. Finally, the other eyewitness, Ms. Rodriguez, stated that she observed Mr. Parker enter the Cerutti's residence, and did not observe the use of the sword outside the residence. VRP at 156.

It is true that on cross-examination Mr. Cerutti testified that the sword was a deadly weapon, and that it was capable of even killing

someone. VRP at 124-25. However, this testimony, elicited upon cross-examination, simply sought his agreement that the sword was a deadly weapon *per se*. Such a line of questioning is of course, contrary to the law and not instance-specific as any inquiry must be. *Winings*, 126 Wn. App at 88. Indeed, when pressed further, Mr. Cerutti testified that he did not grab the sword because it was a deadly weapon, but merely because it was the first thing he could find to repel the intruder. VRP at 125.

Critically, the State did not introduce evidence regarding Mr. Cerutti's intent as to the *use* of the sword, the amount of force used, or even that amount necessary to actually cause harm. While certainly the jury is free to infer from the admission of the sword itself, the necessary testimony accompanying the exhibit was lacking. Accordingly, even when viewed in a light most favorable to the State, the evidence adduced at trial was insufficient to establish that, as used in this instance, the sword was intended to be a deadly weapon, or was capable of such use as utilized by Mr. Cerutti. This Court should therefore vacate and dismiss Mr. Cerutti's conviction for Second Degree Assault.

2. If, *arguendo*, the State nonetheless prevails on appeal, Mr. Cain request that the Court exercise its discretion and decline to award costs to the State.

RCW 10.73.160 and RAP Title 14 provide for the recoupment of appellate costs from a convicted defendant upon request by the State. However, this court has discretion to waive costs if it determines that the award will work a hardship upon the defendant or his or her immediate family. RCW 10.73.160(1); RAP Title 14.

This court presumes a defendant's indigency throughout the review or his or her appeal, unless the court finds that a party's financial condition has improved so that he or she is no longer indigent. RAP 15.2(e). However, that need not be the case once review is completed, and therefore, this Court has enacted a general rule requiring information confirming the ongoing indigency of the appellant, consistent with the Supreme Court's holding in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

In this matter, the trial court found Mr. Cerutti to be indigent, and signed an order permitting his appellate costs to be forwarded at public expense. CP at 160-178. However, as his Report as to Continued Indigency will demonstrate,³ he is not only unable to repay the obligation, but is likely to be unable to repay the obligation in the foreseeable future given his

³ To be filed shortly after this brief.

substantial obligations. As such, this Court should find that Mr. Cerutti's indigency is ongoing, and exercise its equitable discretion to decline the award of costs to the State should it substantially prevail on appeal.

CONCLUSION

In sum, the State introduced no evidence that demonstrates Mr. Cerutti's intent to utilize the sword as a deadly weapon, nor that the sword was even capable of being utilized by Mr. Cerutti in such a fashion. Even taking all evidence in a light most favorable to the State, a reasonable trier of fact could not conclude that the sword was intended to be a deadly weapon merely from the actual injury sustained – to wit: a small cut in Mr. Parker's hand created when he acted to take the sword from Mr. Cerutti. Further, the evidence of the conflict does not demonstrate either an intent by Mr. Cerutti to use the weapon to cause substantial bodily harm, or the ability to actually do so. Accordingly, this Court should vacate Mr. Cerutti's conviction and dismiss.

Should the Court affirm Mr. Cerutti's conviction, it should nonetheless exercise its equitable authority and decline to award fees and costs on appeal should they be requested.

Respectfully submitted this 1st day of May, 2017 by:

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