

FILED
Court of Appeals
Division III
State of Washington
6/27/2018 3:07 PM

COA NO. 35374-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE PEDRO LINARES,

Appellant.

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

The Honorable Richard Bartheld, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEADLY WEAPON ELEMENT OF THE SECOND DEGREE ASSAULT CONVICTION AND THE DEADLY WEAPON ENHANCEMENT	1
a. The State did not prove the "deadly weapon" element because the evidence does not show the cutting implement was readily capable of causing death or substantial bodily harm under the circumstances in which it was used	1
b. The State did not prove the deadly weapon enhancement because the evidence does not show the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.....	1
2. THE TERM FOR THE DEADLY WEAPON ENHANCEMENT EXCEEDS THE ONE-YEAR STATUTORY MAXIMUM	6
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla City,</u> 82 Wn.2d 138, 508 P.2d 1361 (1973).....	3
<u>State v. Cobb,</u> 22 Wn. App. 221, 589 P.2d 297 (1978), <u>review denied</u> , 92 Wn.2d 1011 (1979)	1-4
<u>State v. Delgado,</u> 148 Wn.2d 723, 63 P.3d 792 (2003).....	3
<u>State v. Enloe,</u> 47 Wn. App. 165, 734 P.2d 520 (1987).....	3
<u>State v. Sorenson,</u> 6 Wn. App. 269, 492 P.2d 233 (1972).....	5
<u>State v. Thompson,</u> 88 Wn.2d 546, 564 P.2d 323 (1977).....	4-5

OTHER AUTHORITIES

RCW 9.94A.825	2-5
RCW 9.95.040	1, 4
RCW 9.95.040(2).....	2

A. ARGUMENT IN REPLY

1. **THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEADLY WEAPON ELEMENT OF THE SECOND DEGREE ASSAULT CONVICTION AND THE DEADLY WEAPON ENHANCEMENT.**

- a. **The State did not prove the "deadly weapon" element because the evidence does not show the cutting implement was readily capable of causing death or substantial bodily harm under the circumstances in which it was used.**

Linares relies on the argument set forth in the opening brief.

- b. **The State did not prove the deadly weapon enhancement because the evidence does not show the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.**

Linares relies on the argument set forth in the opening brief but stresses the need to focus on the manner in which the instrument was used, not on the manner in which it could have been used but wasn't. The point needs to be made because the reasoning in State v. Cobb, 22 Wn. App. 221, 589 P.2d 297 (1978), review denied, 92 Wn.2d 1011 (1979), an older case cited by the State, is infirm when applied to the statutory definition of deadly weapon at issue in this case.

In Cobb, a jackknife with a blade length of 2 and 3/8 inches was determined to be a deadly weapon. Id. at 223-24. Cobb involved a different definition of "deadly weapon" under RCW 9.95.040, which

authorizes the parole board to fix a minimum sentence upon such a finding.¹ Id. at 223. The victim suffered three wounds: a cut in the forehead, a cut in the chest over the sternum, and a cut in the muscle structure under the arm. Id. at 223. Cobb reasoned "While perhaps a stab directly to the forehead may be unlikely to penetrate the skull, a blow with equal force directed to the throat area can easily reach major blood vessels. Likewise, a stab to the chest, but for the fortuitous striking of the sternum or a rib, can inflict a penetrating wound to the chest cavity and endanger major structures. Similarly, a blow to the area of the underarm musculature can, with a slight change of direction, sever a major blood vessel." Id. at 223-24.

This reasoning, when applied to the definition of a deadly weapon under RCW 9.94A.825, plays fast and loose with the need to consider "the manner in which [the instrument] is used." When someone stabs another in the forehead, that action is the manner in which the instrument is used. To equate that action with "a blow with equal force directed to the throat area [that] can easily reach major blood vessels," Cobb, 22 Wn. App. at

¹ RCW 9.95.040(2) provides: "The words 'deadly weapon,' as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas."

223, is to impermissibly substitute "the manner in which it is used" for a broader notion of "the manner in which it could have been used." Instead of striking the person in the forehead, the assailant could have struck him in the throat, thereby demonstrating a capability to inflict life-threatening injury. That's what Cobb says. Id. at 223-24.

The plain language of RCW 9.94A.825 does not permit this kind of loose reasoning. "When we interpret a criminal statute, we give it a literal and strict interpretation." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The legislature is assumed to mean exactly what it says; no words or clauses can be added to plain language. Id. "Criminal statutes involving a deprivation of liberty must be strictly construed against the State." State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987). "To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option." Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla Cty., 82 Wn.2d 138, 141, 508 P.2d 1361 (1973).

The statute defining deadly weapon for enhancement purposes is "an implement or 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. Whether an instrument "is

likely to produce or may easily and readily produce death" is tied to "the manner in which it is used." With the foregoing principles of statutory construction in mind, "the manner in which it is used" must be strictly construed to mean the manner in which the instrument is actually used, as opposed to how the instrument could have been used but wasn't. Using an instrument to cut Ruiz in the back is the manner in which Linares used the instrument. He did not cut Ruiz's throat or some other part of his anatomy. He did not cut a vital organ or an artery. 2RP 404. Whether the instrument was "likely to produce or may easily and readily produce death" depends entirely on the instrument's actual use.

Here, the actual use is a stab in the back with a cutting instrument of unknown length. The State posits the length of the blade is irrelevant. How could it be, when the State's theory for why the instrument constituted a deadly weapon was that it could have reached a vital organ? 2RP 446-470, 470, 474, 710-11. Without knowing the length of the blade, there is no way of knowing whether it could have reached a vital organ once put into Ruiz's back.

State v. Thompson, 88 Wn.2d 546, 564 P.2d 323 (1977), also cited by the State, is distinguishable. Like Cobb, Thompson addressed the definition of "deadly weapon" under RCW 9.95.040. Id. at 547. The evidence in that case showed the defendant held a knife with a 2 or 3-inch

blade against a robbery victim's neck and cut her neck. Id. at 550. Assuming Thompson's analysis of what constitutes a deadly weapon transfers to RCW 9.94A.825, it is easily observed that placing a 2 or 3-inch blade against someone's neck and then cutting it has both the capacity to inflict death and is readily capable of producing death based on the manner of use. The neck is a particularly vulnerable area. Major blood vessels rest just under the skin and the airway is needed to breathe. See State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972).

That is not Linares's case. Location matters. The State emphasizes Ruiz's blood loss and temporary hospitalization, but in the absence of medical testimony on their significance, there is no evidentiary basis to conclude beyond a reasonable doubt that the instrument "was likely to produce or may easily and readily produce death." RCW 9.94A.825. Not even Detective Barry, who played the role of a doctor on the stand, so much as suggested Ruiz could have bled out if left untreated. In fact, testing revealed there was no internal bleeding. 2RP 403-04. The State failed to prove a stab to the back with a cutting instrument of unknown length was "likely to produce or may easily and readily produce death" where there is no evidence, only speculation, that the blade could have reached a vital organ.

2. THE TERM FOR THE DEADLY WEAPON ENHANCEMENT EXCEEDS THE ONE-YEAR STATUTORY MAXIMUM.

The State concedes the deadly weapon enhancement term exceeds the statutory maximum and requests correction of the judgment and sentence to reflect the authorized 12-month term. Linares agrees with this remedy.

B. CONCLUSION

For the reasons stated above and in the opening brief, Linares requests that this Court (1) vacate the second degree assault conviction due to insufficient evidence; or (2) vacate the deadly weapon enhancement due to insufficient evidence; or (3) order reduction of the deadly weapon enhancement term.

DATED this 27th day of June 2018

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

June 27, 2018 - 3:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35374-5
Appellate Court Case Title: State of Washington v Jose Pedro Linares
Superior Court Case Number: 16-1-00255-8

The following documents have been uploaded:

- 353745_Briefs_20180627150550D3130463_8693.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 35374-5-III.pdf

A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- joseph.brusic@co.yakima.wa.us
- nielsene@nwattorney.net

Comments:

Copy mailed to: Jose Linares, 330280 Monroe Corrections Center - SOU PO Box 514 Monroe, WA 98272

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Casey Grannis - Email: grannisc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180627150550D3130463