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FILED
Oct 13, 2015
Court of Appeals
Division I
State of Washington

No. 73010-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIKA ANNE SOERENSEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The State did not prove the elements of the crime beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To prove second degree assault with a deadly weapon, the State was required to prove either that Erika Soerensen intentionally struck Jacob Vanderplas with a deadly weapon, or that she used a deadly weapon with the specific intent to create in Mr. Vanderplas an apprehension and fear of bodily injury. Did the State fail to prove the crime beyond a reasonable doubt, where Ms. Soerensen did not intentionally strike Mr. Vanderplas with her car, she did not specifically intend to cause him to fear bodily injury, and she did not use her car in a manner that was readily capable of causing substantial bodily injury?

C. STATEMENT OF THE CASE

On July 8, 2013, Ms. Soerensen was living in West Seattle. RP 467. That day was an ordinary work day. Ms. Soerensen drove her black Nissan four-door five-speed car, with manual transmission, to work in the International District in Seattle. RP 468-69, 520. When she left the house at around 7:30 a.m., she noticed that construction on

Delridge Way was causing significant traffic delays. RP 469. She was afraid of being late for work so she decided to take side streets that she had never taken before. RP 470, 472. She drove down a side road and then turned onto 26th Avenue. RP 470.

Twenty-sixth Avenue is a narrow street with speed bumps and roundabouts at every intersection. RP 471. The street had recently been designated a “greenway,” which is a non-arterial road developed as a bicycle route. RP 170. Greenways generally have speed bumps and reduced speed limits to help slow automobile traffic. RP 170.

Ms. Soerensen was driving slowly, about 20 miles per hour. RP 471. When she came to a roundabout, she noticed a bicyclist behind her. RP 472. She did not want the bicyclist to get stuck in the roundabout with her so she waved him through. RP 472-73. He went around her and then rode in front of her. RP 472-73. As soon as he went around her, he pointed up at the speed limit sign, which indicated the speed limit was 20 miles per hour. RP 472. Ms. Soerensen was confused when he did that because she was not exceeding the speed limit. RP 477.

Rather than riding on the side of the road, the bicyclist rode directly in front of Ms. Soerensen so that she did not have room to pass.

RP 477. She was forced to slow down, well below the speed limit. RP 478, 503. The bicyclist seemed to be veering from side to side in the road, trying to control the traffic in an odd manner. RP 345-47, 481, 504. Ms. Soerensen was confused and frustrated; she did not understand what he was doing and was afraid he might cause a collision. RP 478. She honked her horn a couple of times and, when the bicyclist did not react or try to share the road, she laid on the horn. RP 478-79.

Ms. Soerensen honked her horn because she wanted to alert the bicyclist that she would soon need to get to the right side of the lane to make a right turn. RP 502. Ms. Soerensen planned to turn right at the corner of 26th and Andover Street. When she and the bicyclist stopped at the corner, he looked at her and yelled, “What the f___ are you doing?” RP 479. She yelled back at him, “What are you doing? I don’t understand, what are you doing?” RP 479. Her windows were closed and the bicyclist could not hear what she was saying. RP 184.

Ms. Soerensen and the bicyclist both turned right onto Andover Street, continuing to yell at each other as they made the turn. RP 482. Ms. Soerensen’s engine sounded as though it was revving because she was trying to keep the car from going out of gear. RP 480. After

turning right onto Andover, she continued on her way to work. RP 482-83. She did not intentionally veer into the bike lane in front of the bicyclist. RP 483. It is possible, though, that she unintentionally drove too close to the bicyclist when she made the turn. RP 483, 504.

The bicyclist, Jacob Vanderplas, also lived in West Seattle and regularly rode his bike to work. RP 162-63. He was an advocate who had been instrumental in helping to establish 26th Avenue as a greenway in that neighborhood. RP 170. He said that after he turned right onto Andover and got into the bike lane, Ms. Soerensen overtook him on the left and then veered suddenly to the right. He said the front of her car unexpectedly entered the bike lane in front of him. RP 187-88, 191-94, 218. He said she was blocking his way and he had to brake suddenly. RP 194, 219. He thinks his left handlebar struck the side of her car. RP 194. He does not recall the details of the collision but believes his left hand must have hit the car because he ordinarily rides with his hands on the outside of the handlebars and his left hand hurt after the incident. RP 222.

Mr. Vanderplas was knocked to the ground although he was able to soften the fall with his foot. RP 194-96. He was not injured but later he noticed his left hand was sore. RP 197, 203. The soreness

went away after a couple of days and he received no medical treatment. RP 202-03. His bike was not damaged although the gearing was knocked a little bit out of true, which was something he could easily adjust at the scene. RP 200.

Another man, Brent Spencer, was driving his car on Andover at the same time. RP 291. He said he saw Ms. Soerensen's car turn into the bike lane and then drive off. RP 292-93, 303. He assumed she hit the bicyclist because the bicyclist fell over. RP 294, 303-04. Her car was partially blocking his view. RP 304.

Rebecca Moxley was driving her car on Andover in the opposite direction. RP 381. She saw the front part of Ms. Soerensen's car go into the bike lane in a quick motion and then correct itself. RP 382, 398. Ms. Moxley thought the car hit the bicyclist. RP 382, 397-98. She saw the driver drive away as if nothing had happened. RP 398.

Ms. Soerensen did not try to hit the bicyclist or try to scare him. RP 483, 498-99. She was just trying to get away from an uncomfortable situation. RP 483. She did not see the bicyclist fall down or hear any noise to suggest that he had hit her car. RP 484, 505. There was no noticeable damage to her car. RP 122, 127, 332-35, 458-59, 519. Ms. Soerensen had no idea that anything had happened to the

bicyclist and no one around tried to communicate with her or tell her he had fallen. RP 485, 490, 498-99. If she had known he had fallen, she would have stopped to help him. RP 498-99. She regrets engaging with the bicyclist after he yelled at her. RP 490.

Mr. Vanderplas noted Ms. Soerensen's license plate number and immediately called 911 to report the incident. RP 197, 200. It took a police officer at least 25 minutes to respond. RP 200. The officer did not inspect Mr. Vanderplas's bike or take any photographs. RP 226. The officer told him that this was not the kind of case the police typically pursued. RP 232. This made Mr. Vanderplas feel frustrated. RP 232. When he got home, he wrote a summary of the incident from his point of view and posted it on the Seattle Bike Blog. RP 227. He sent an email to the Seattle Greenways email listserv, directing people to read his blog post, in an effort to push the case forward. RP 228-30. Two city council members responded and asked the city prosecutor to prioritize the case. RP 228-29. Mr. Vanderplas was even interviewed on camera by a television news reporter.¹ RP 233.

¹ As a result of the publicity, Ms. Soerensen was harassed by countless bicyclists, who insisted she was guilty before she even went to trial. RP 620-22. She was forced to change her telephone number and, eventually, move from the area. RP 620-22.

Ms. Soerensen was charged with second degree assault with a deadly weapon, which is a class B felony. CP 1; RCW 9A.36.021(1)(c). After a jury trial, she was convicted as charged. CP 56.

At sentencing, the court imposed an exceptional sentence downward of 240 hours of community restitution. CP 86. The court found the facts of the offense were less serious than similar crimes of this nature. CP 103. The court found Ms. Soerensen's conduct was "significantly different from conduct the Court typically sees . . . for assault second degree with a deadly weapon." CP 103. The court specifically noted that imposing a jail sentence would serve no beneficial purpose. RP 626. Ms. Soerensen had no criminal history and was not at risk of committing another crime. RP 627; CP 84. The court believed that using this case to send a political message was not appropriate. RP 626.

D. ARGUMENT

- 1. The State did not prove beyond a reasonable doubt that Ms. Soerensen intentionally assaulted Mr. Vanderplas with a "deadly weapon."**

Ms. Soerensen was charged with one count of second degree assault with a deadly weapon. CP 1. The State was required to prove

she “assaulted Jacob Vanderplas with a deadly weapon.”² CP 40;
RCW 9A.36.021(1)(c).

The second degree assault statute does not define “assault” and thus courts resort to the common law definition. State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). Washington recognizes three common law definitions of assault: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

Here, the jury was instructed on all three common law definitions of assault.³ CP 41. But during closing argument, the deputy

² “Deadly weapon” was defined for the jury as “any weapon, device, instrument, substance, or article including a vehicle, 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 43; see RCW 9A.04.110(6).

³ The jury instruction defined the three kinds of assault as follows:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to

prosecutor informed the jury that only the first and third definitions of assault applied. RP 544-45. Thus, the State was required to prove either that Ms. Soerensen intentionally struck Mr. Vanderplas with a “deadly weapon,” or that she used a “deadly weapon” with the intent to cause him to fear bodily injury and that he actually did fear bodily injury.

The State bore the burden to prove these elements beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on appeal is whether, after viewing the evidence in the light most favorable to the State, a 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); State v. Green, 94 Wn.2d 216, 221, 616

accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented.

An assault is also 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 41.

P.2d 628 (1980). To find Ms. Soerensen guilty beyond a reasonable doubt, the jury was required to “reach a subjective state of near certitude of the guilt of the accused.” Jackson, 443 U.S. at 315.

a. The State did not prove beyond a reasonable doubt that Ms. Soerensen intentionally struck Mr. Vanderplas.

To prove second degree assault by actual battery, the State was required to prove Ms. Soerensen intentionally struck Mr. Vanderplas with her car. State v. Baker, 136 Wn. App. 878, 883-84, 151 P.3d 237 (2007).

Although a person can commit an actual battery through indirect means, she must still act with an intent to touch or strike, and there must be an actual touching. Baker, 136 Wn. App. at 883-84; State v. Bland, 71 Wn. App. 345, 356, 860 P.2d 1046 (1993), disapproved of on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

“A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 42.

Here, any evidence that Ms. Soerensen intended to strike Mr. Vanderplas with her car was, at best, equivocal. When viewed in the light most favorable to the State, the evidence shows only that she

veered suddenly into the bicycle lane in front of Mr. Vanderplas, and then quickly corrected course and drove away without noticing that he had fallen to the ground. RP 191-94, 218-19, 292-93, 303, 382-83, 398, 485, 490, 498-99. Mr. Vanderplas did not say Ms. Soerensen struck him with her car. He said only that he might have collided with her car because, although he applied his brakes, he could not stop in time. RP 194, 219. He felt pain only in his hand and nowhere else on his body. RP 197, 202-03. He thinks his hand must have bumped into her car. RP 222. Witnesses did not see Ms. Soerensen strike Mr. Vanderplas on the hand. RP 294, 303-04, 397. They only assumed she struck him because he fell off of his bicycle. RP 294, 303-04.

This evidence is not sufficient to prove beyond a reasonable doubt that Ms. Soerensen intended to strike Mr. Vanderplas. Thus, the evidence was insufficient to prove second degree assault by actual battery.

b. The State did not prove beyond a reasonable doubt that Ms. Soerensen specifically intended to cause Mr. Vanderplas to fear bodily injury.

In the alternative, the State bore the burden to prove beyond a reasonable doubt that Ms. Soerensen acted with a specific intent to create in Mr. Vanderplas an apprehension or fear of bodily harm. Byrd,

125 Wn.2d at 713. The State also bore the burden to prove Mr. Vanderplas experienced such “fear in fact.” State v. Abuan, 161 Wn. App. 135, 159, 257 P.3d 1 (2011).

“[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.” State v. Louthier, 22 Wn.2d 497, 502, 156 P.2d 672 (1945). In other words, to prove Ms. Soerensen had a specific intent to cause Mr. Vanderplas to fear bodily injury, the State had to prove more than that her actions actually produced that result.

Typically, specific intent is proved through circumstantial evidence. State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). “[I]ntent to commit a crime may be inferred if the defendant’s conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.” Id. (internal quotation marks and citation omitted). Although specific intent may be inferred from the surrounding facts and circumstances, it may *not* be inferred from evidence that is “patently equivocal.” Id. (internal quotation marks and citation omitted).

An intent to intimidate is not sufficient to prove a charge of second degree assault. Byrd, 125 Wn.2d at 715.

Here, when viewed in the light most favorable to the State, the evidence does not show beyond a reasonable doubt that Ms. Soerensen acted with an intent to cause Mr. Vanderplas to fear bodily injury. Again, the evidence shows that she veered suddenly into the bicycle lane in front of Mr. Vanderplas. RP 191-94, 218-19, 292-93, 303, 382-83, 398, 485, 490, 498-99. She did not drive toward him or otherwise threaten him with the car. She made no threatening statements. She drove off immediately and did not interact with him any further. RP 398, 483-84, 490. Mr. Vanderplas collided with the car inadvertently and experienced only a minor injury. RP 194, 219. Under these circumstances, the State did not prove beyond a reasonable doubt that Ms. Soerensen intended to cause Mr. Vanderplas to fear bodily injury.

c. The State did not prove beyond a reasonable doubt that Ms. Soerensen used her car as a “deadly weapon.”

Finally, under either common law definition of assault, the State bore the additional burden to prove beyond a reasonable doubt that Ms. Soerensen used a “deadly weapon” to commit the assault. CP 1, 40.

When an instrument is not a “deadly weapon” per se, that is, it is not an explosive or a firearm, see RCW 9A.04.110(6), the State must prove the defendant used it as a “deadly weapon” under the circumstances. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). “Circumstances” 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. The instrument must be used in a manner “readily capable of causing death or substantial bodily harm.”⁴ RCW 9A.04.110(6). Ready capability is determined in relation to potential substantial bodily harm. Shilling, 77 Wn. App. at 171.

In determining whether a thing was used as a “deadly weapon” under the circumstances, the court must consider the user’s intent. State v. Barragan, 102 Wn. App. 754, 761, 9 P.3d 942 (2000); State v. Gotcher, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988). In Barragan, for example, the Court held a pencil was readily capable of causing substantial bodily harm where, during a fight, Barragan picked up a pencil from the floor and swung it toward his adversary’s left eye,

⁴ “‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

saying, “You’re gonna die.” Barragan, 102 Wn. App. at 757. The pencil shattered as it hit the man’s head, and over one-half inch of it was embedded in his temple. Id. Relevant considerations were the force of the attack and the defendant’s verbal threat to kill. Id. at 761. These circumstances indicated the defendant intended to commit great bodily harm or death with the pencil. Id.

Also important is the force of the attack and the nature of the injury inflicted. In Shilling, for example, the defendant used a glass as a deadly weapon, where he hit the victim on the head with the glass with such force that the blow knocked the man’s glasses off, caused glass shards to fly 15 feet, and caused multiple lacerations requiring five stitches. Shilling, 77 Wn. App. at 172.

In contrast to those cases, here, Ms. Soerensen did not use her car with an intent to cause substantial bodily harm, nor did she use the car with a degree of force that was likely to inflict such harm. As stated, when viewed in the light most favorable to the State, the evidence shows only that she veered suddenly into the bike lane in front of Mr. Vanderplas, causing him to collide with her car, then immediately drove away. RP 191-94, 218-19, 292-93, 303, 382-83, 398, 485, 490, 498-99. He suffered minor pain in his hand, which

lasted only a couple of days. RP 197, 203. This injury did not nearly rise to the level of “substantial bodily harm” as defined by the Legislature. See RCW 9A.04.110(4)(b).

Undoubtedly, a car may be readily capable of causing substantial bodily injury under many circumstances. But in this case, Ms. Soerensen did not use her car with sufficient force or intent. She merely veered in front of a bicyclist, causing him to make contact with her car through indirect means. Under these circumstances, Ms. Soerensen did not intentionally use her car as a “deadly weapon.” In short, the evidence was insufficient to prove second degree assault with a deadly weapon.

2. The judgment and sentence contains a scrivener’s error that must be corrected

Ms. Soerensen was charged and convicted of second degree assault with a deadly weapon under RCW 9A.36.021(1)(c). CP 1, 40, 56. Yet, the judgment and sentence states she was convicted of second degree assault under two alternatives: RCW 9A.36.021(1)(a) and (c). CP 83. Because Ms. Soerensen was not convicted of second degree assault under RCW 9A.36.021(1)(a), the judgment and sentence must be corrected to eliminate this statutory reference.

E. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Ms. Soerensen intentionally assaulted Mr. Vanderplas with a “deadly weapon,” the conviction must be reversed and the charge dismissed.

Respectfully submitted this 13th day of October, 2015.

s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	NO. 73010-0-I
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ERIKA SOERENSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ERIKA SOERENSEN 3295 HILDALE AVE OROVILLE, CA 95956	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF OCTOBER, 2015.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710