

FILED
COURT OF APPEALS
DIVISION II

11 AUG - 1 PM 2:09

STATE OF WASHINGTON

BY [Signature]
DEPUTY

NO. 41520-8-II
Cowlitz Co. Cause NO. 10-1-00337-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DESMOND SHEPARD, JR.,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
AMIE HUNTER/#31375
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

11/16/11 ind

TABLE OF CONTENTS

	PAGE
A. ANSWER TO ASSIGNMENT OF ERROR.....	1
B. STATEMENT OF THE CASE	1
C. ARGUMENT	6
THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT ON THE THIRD-DEGREE ASSAULT CHARGE.....	6
D. CONCLUSION	11

TABLE OF AUTHORITIES

Page

Cases

People v. Galvin, 65 N.Y.2d 761, 481 N.E.2d 565 (1985) 8

State of New Mexico v. Montano, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, 862 (1998)..... 8

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 6

State v. Cord, 103 Wn.2d 361, 693 P.2d 81 (1985)..... 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 6

State v. Marohl, 170 Wn.2d 691, 246 P.3d 177 (2010)..... 7, 9, 10

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977)..... 6

State v. Reed, 101 Or. App. 277, 790 P.2d 551, 551 (Or. Ct. App. 1990).. 9

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 6

State v. Theroff, 25 Wn.App. 590, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)..... 6

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 6

Statutes

RCW 9A.36.031(1)(d) 7, 9, 10

RCW 9A.36.301(1)(d) 8

Other Authorities

Black’s Law Dictionary 1593 (6th ed.1990)..... 8

Webster’s Third New Int’l Dictionary 2589(2002) 10

APPENDIX A.....i

A. ANSWER TO ASSIGNMENT OF ERROR

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT ON THE THIRD-DEGREE ASSAULT CHARGE.

B. STATEMENT OF THE CASE

1. Procedural History

The State agrees with the Statement of Procedural Facts provided by the appellant Desmond Shepard, Jr.

2. Evidence Presented to the Jury

Desmond Shepard and Natasha Pipgras had a four-year relationship that was sometimes sexual. RP 27-28. On March 6, 2010, Ms. Pipgras drove from her home in Kelso, Washington, to Portland, Oregon, and picked up Mr. Shepard, then drove him back to her home in Kelso to share the weekend together. RP 25, 28-29.

After putting her three young children to bed, Mr. Shepard and Ms. Pipgras drank some alcoholic beverages and Ms. Pipgras fell asleep on the couch after some time. RP 26, 29-30. Ms. Pipgras awoke to Mr. Shepard "flicking" bank cards and identification cards at her. RP 31. Mr. Shepard informed Ms. Pipgras that he had found some letters that Ms. Pipgras had written a different male and proceeded to insult Ms. Pipgras with hurtful language. RP 33-35.

Mr. Shepard then demanded that Ms. Pipgras wake up her kids, get them dressed, and that she drive him back to Portland. RP 35. Ms. Pipgras did not comply immediately so Mr. Shepard proceeded to slap Ms. Pipgras across the face with an open hand. RP 35. Still refusing to take Mr. Shepard home, Ms. Pipgras stood up and moved toward her children's room and that is when Mr. Shepard grabbed Ms. Pipgras by her hair and threw her into a large wooden armoire. RP 37. Ms. Pipgras's head struck the armoire with great force, causing injuries and hair loss later documented by a physician. RP 37, 39, 102-105.

After this event, Ms. Pipgras's son came out of his room and pleaded for Mr. Shepard to stop attacking his mother. RP 37. Mr. Shepard continued to insist that Ms. Pipgras drive him back home to Portland and pushed her into the children's room. RP 38. As Ms. Pipgras began dressing her children, Mr. Shepard pushed Ms. Pipgras into a wooden dresser and then intentionally slammed Ms. Pipgras's head into a drawer. RP 38. Soon thereafter Mr. Shepard forcibly pushed Ms. Pipgras against her baby's crib; her contact forced the crib to overturn. RP 38, 42. After dressing her children, Ms. Pipgras approached the door to leave and Mr. Shepard again tugged on Ms. Pipgras's hair and threw her against the walls inside her home. RP 38.

Mr. Shepard, Ms. Pipgras and her three children then got into Ms. Pipgras's car and headed southbound on Interstate 5. RP 43-44. With Ms. Pipgras driving, Mr. Shepard continuously struck Ms. Pipgras in the face, head and stomach with the back of his hand. RP 44. Mr. Shepard also poured beer on Ms. Pipgras as she drove. RP 45.

The car's gas light turned on so Ms. Pipgras stopped at a Chevron along I-5. RP 45-46. During this stop, Mr. Shepard demanded that Ms. Pipgras retrieve money using her Quest Card and give it to Mr. Shepard. RP 48. Ms. Pipgras denied this request. RP 48. Mr. Shepard then accused Ms. Pipgras of smiling and hit the right side of Ms. Pipgras's head, which forced the left side of her head to impact the side window. RP 44, 49-50. Ms. Pipgras experienced a loud popping noise in her left ear, then the sound of rushing water, followed by a noticeable loss of hearing in her that ear. RP 44, 49-50, 207. A doctor who later examined Ms. Pipgras's injuries concluded that the contact with the window had perforated the tympanic membrane of Ms. Pipgras's inner left ear. RP 108. Also during this car ride, Mr. Shepard destroyed Ms. Pipgras's cell phone by smashing it against the dashboard. RP 52-53.

Once they reached Portland, Mr. Shepard was unable to contact the people whom he had planned on staying the night with so he had Ms. Pipgras drive him back to Kelso. RP 49, 53-54. There were no further

assaults during the drive back to Kelso. RP 53-54. After they arrived at Ms. Pipgras's home in Kelso, Mr. Shepard remained in the car while Ms. Pipgras took the children inside. RP 54. Upon entering the house, Ms. Pipgras encountered her mother, who was watching a movie in the dark. RP 54. Ms. Pipgras's mother observed the injuries to Ms. Pipgras's face and questioned her on what had caused the swelling and bruising. RP 54. Ms. Pipgras told her mother that she had been mugged while gassing up the car and that Mr. Shepard was unable to offer protection because he was passed out in the car. RP 54-55.

The following morning, Ms. Pipgras's mother insisted that Ms. Pipgras report her mugging to police in Portland; concurrently, Mr. Shepard stated that he wanted to return to Portland. RP 59. Ms. Pipgras obliged and, leaving her kids with her mother, drove Mr. Shepard to Portland. RP 59. During this ride to Portland the two didn't speak except for when he departed, Mr. Shepard told Ms. Pipgras that she would never hear from him again. RP 59.

Ms. Pipgras then drove north on I-5 and went to her father's house and told him about the assault. RP 60. Ms. Pipgras then returned home and told her mother about the assault. RP 61. Ms. Pipgras then went to the hospital and met with Dr. Kranz. RP 61. Ms. Pipgras told Dr. Kranz that she was assaulted by her boyfriend and the two discussed the

numerous injuries and symptoms she had experienced. RP 62. Ms. Pipgras complained of pain in her face, shoulders, arms, and neck, as well as a lack of hearing in her left ear. RP 101-103. Dr. Kranz observed bruising on Ms. Pipgras's face, arms, shoulders and body. RP 102. Dr. Kranz noted that Ms. Pipgras had sustained chest contusions and a chest wall muscle strain. RP 108. Also observed and documented was massive swelling around the eye (periorbital contusion) and the eyeball itself had a subconjunctival hemorrhage, causing a blood spot to form throughout the white of her eye. RP 102-105, 108. Ms. Pipgras's ear was diagnosed with a perforated tympanic membrane, which could have been caused when Ms. Pipgras's ear formed a seal against the car window during the assault in the car. RP 104-106. Dr. Kranz recommended that Ms. Pipgras apply ice to tender areas and take ibuprofen as needed for pain. RP 91-92.

Ms. Pipgras then reported the assault by Mr. Shepard to police and Office Sarah Hoffman took evidentiary photographs which were later admitted at trial. RP 63-71, 154-156.

C. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT ON THE THIRD-DEGREE ASSAULT CHARGE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Reviewing courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75, 83 P.3d 970 (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm. RCW 9A.36.031(1)(d). In Mr. Shepard's case, there is no dispute that the appellant intentionally threw Ms. Pipgras into multiple pieces of furniture throughout her household, causing numerous physical injuries. See RP 37-39, 42, 65-69, 236-237, 241-242, 264-265. The defendant's appeal hinges on determining whether the pieces of furniture that the victim was intentionally thrown against (armoire, dresser, playpen) satisfy the "instrument or thing likely to produce bodily harm" element of the charge of assault in the third degree. RP 37-38, 236-237, 241-242, 264-265.

In *State v. Marohl*, the Supreme Court of Washington applied the language of the applicable third degree assault statute to a case where a defendant choked a victim into an unconscious state and then released the chokehold, thus allowing the victim's limp body to fall to the floor causing injuries from the contact with the floor. 170 Wn.2d 691, 694-695, 246 P.3d 177 (2010). The Court held that the specific facts in *Marohl* were not sufficient evidence to establish the floor as an "instrument or thing likely to produce bodily harm" as required by the third degree assault statute. 170 Wn.2d at 703. Because the victim's contact with the

floor was incidental to the physical contact between the defendant and the victim, and further because Mr. Marohl did not “proactively use the floor to injure the victim,” the floor in the fact pattern of the *Marohl* case was held to not be within the scope of RCW 9A.36.301(1)(d). *Id.* at 691.

The issue of determining if the floor was an “instrument or thing likely to produce bodily harm” in the *Marohl* case was a matter of first impression for the Supreme Court of Washington, and its analysis considered other states’ application of similar laws of assault. *Id.* at 697, 701-702. The Court discussed *People v. Galvin*, a New York case in which the defendant “was atop the victim, holding the latter’s head with both hands and striking it against the sidewalk.” 65 N.Y.2d 761, 481 N.E.2d 565 (1985). The Court noted that the *Galvin* court determined the sidewalk was a “dangerous instrument” by factoring in the “circumstances in which it (the sidewalk) was used” during the assault. *Marohl*, 170 Wn.2d at 701.

In its discussion of *State of New Mexico v. Montano*, the Supreme Court of Washington again examined the actions of a defendant who in that case shoved and banged the victim’s head against a “brick wall two or three times.” 1999-NMCA-023, 126 N.M. 609, 610, 973 P.2d 861, 862 (1998). The New Mexico Court of Appeals upheld the conclusion that the brick wall was a weapon, citing Black’s Law Dictionary 1593 (6th

ed.1990), which defines a “weapon” as “[a]n instrument of offensive or defensive combat, or anything used, or designed to be used, in destroying, defeating, threatening, or injuring a person.” *Montano*, 126 N.M. at 610, 973 P.2d at 862.

The *Marohl* court also studied *State v. Reed*, an Oregon Court of Appeals case in which the defendant repeatedly struck his girlfriend’s head against a concrete sidewalk. 101 Or. App. 277, 279, 790 P.2d 551, 551 (Or. Ct. App. 1990). The Oregon court affirmed any object, “no matter how harmless it may appear when used for its customary purposes, becomes a dangerous weapon when used in a manner that renders it capable of causing serious physical injury.” *Reed*, 101 Or. App. at 279, 790 P.2d at 551-52.

After considering these cases, the Supreme Court of Washington returned to the specific facts of *Marohl* and concluded that Marohl “did not take hold of Peterson’s head (or prosthetic arm) to strike it against the ground,” and further, “there is no evidence his use of the ground transformed it into an object similar to a weapon.” 170 Wn.2d 691, 702. In its fact-specific holding, the Supreme Court distinguished *Marohl* from other states’ cases and held that under those facts, the ground was not an instrument or weapon as defined by RCW 9A.36.031(1)(d). *Id.* at 703.

In direct contrast, Shepard used the furniture and wall proactively and intentionally to cause bodily harm to a victim. The Washington Supreme Court stated in *Marohl* that “an “instrument or thing likely to produce bodily harm” under RCW 9A.36.031(1)(d) must be similar to a weapon.” *Id.* at 700. To further explain this classification, the Court defined “weapon” as “an instrument of offensive or defensive combat.” *Id.* (quoting Webster’s Third New Int’l Dictionary 2589(2002)). In Shepard’s case, Shepard grabbed the victim by her hair and threw her into a large wooden armoire, causing injuries to the victim’s head. RP 37, 39, 66. The State established at trial that this violent act occurred during one of Mr. Shepard’s multiple physical attacks on the victim. As the definition of a weapon allows for an “instrument of offensive” combat, a reasonable trier of fact could conclude that the armoire was used, proactively, by Mr. Shepard as a weapon, and therefore qualifies as an “instrument or thing likely to produce bodily harm.” *Marohl*, 170 Wn.2d at 700. Unlike *Marohl*, Shepard’s use of the armoire did “transform it into an object similar to a weapon.” *Id.* at 702. Mr. Shepard repeatedly used furniture in the house as a means to cause physical injury to his victim. Later in the ongoing attack, Mr. Shepard violently pushed his victim against a dresser, threw her against her baby’s crib, and continued to grip her head by her hair and throw her against the walls of the house. RP 37-39, 42, 65-67,

69. The multiple violent attacks, in which Mr. Shepard intentionally injured his victim by forcing her to violently crash into pieces of furniture and house walls, are distinguishable from the facts in *Marohl*. Through acts of offensive combat, Mr. Shepard proactively transformed normal household items into weapons, carrying out his attack by using furniture as a weapon to injure his victim. The jury correctly concluded that Mr. Shepard's violent use of an armoire, dresser, house wall, and crib were done with criminal negligence, and caused bodily harm to his victim, satisfying the elements of RCW 9A.36.031(1)(d).

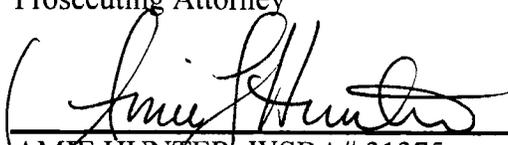
D. CONCLUSION

For the reasons argued above, Shepard's third-degree assault conviction should be affirmed.

Respectfully submitted this 28 day of July, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By:



AMIE HUNTER, WSBA# 31375
Attorney for Respondent

APPENDIX A

RCW 9A.36.031. Assault in the third degree

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
- (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or
 - (b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or
 - (c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or
 - (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or
 - (e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or
 - (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or
 - (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or
 - (h) Assaults a peace officer with a projectile stun gun; or

- (i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: “Nurse” means a person licensed under chapter 18.79 RCW; “physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.
- (2) Assault in the third degree is a class C felony.

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 DESMOND SHEPARD, JR.,)
)
 Appellant.)

NO. 41520-8-II
Cowlitz County No.
10-1-00337-9

CERTIFICATE OF
MAILING

FILED
COURT OF APPEALS
DIVISION II
11 AUG -1 PM 2:00
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I, Julie Despain, certify and declare:
That on the 20th day of July, 2011, I deposited in the mails of the

United States Postal Service, first class mail, a properly stamped and
address envelope, Brief of Respondent, addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

David B. Koch
Attorney at Law
1908 E. Madison Street
Seattle, WA 98122

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 20th day of July, 2011.

Julie Despain