

NO. 41699-9-II
Cowlitz Co. Cause NO. 10-1-01020-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHEYENNE HESS,

Petitioner.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
KATHERINE GULMERT/WSBA #28462
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

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I. IDENTITY OF RESPONDENT

The State of Washington is the respondent.

II. SHORT ANSWER

Issue I - The State proved beyond a reasonable doubt that the appellant intentionally assaulted Deputy Fred Taylor, a law enforcement officer with the Cowlitz County Sheriff's Department while he was performing his official duties in the State of Washington, and that the instrument of the assault was the appellant's dog Tank.

III. STATEMENT OF THE CASE

On October 8, 2010, in Cowlitz County, State of Washington, Deputies Bauman and Taylor attempted to peacefully serve an arrest warrant on Cheyenne Hess. The appellant's father, Mr. Charles Hess, called dispatch to inform law enforcement that his son, was at the house. Deputy Fred Taylor called Mr. Charles Hess back, as a matter of routine, to determine the security, number of individuals present, known weapons at the location before proceeding to the residence. RP 45 at 8. Charles Hess said that Cheyenne Hess had an aggressive pit bull. RP 45 at 12. Based on the information received from Charles Hess, Deputy Taylor determined that when he returned he would bring a second deputy with him and inform that deputy to be on the alert as to the dangerous nature of

the dog. RP 45 at 16. Deputy Taylor had not met the defendant before. RP at 19. The deputies arrived at 610 Melton Road in Castle Rock, Washington. There were several structures on the property. Charles Hess pointed out which structure was used by Cheyenne Hess as a residence. However, the Deputies could not determine if Mr. Cheyenne Hess was present and left. (RP at 46 at 7-10) The deputies returned because Charles Hess called again to let law enforcement know that the Cheyenne had returned.(RP at 48).

When the deputies first contacted Mr. Hess and informed him of his warrant, he initially went into an open area between the residences. (RP at 51) Mr. Hess then changed directions and started back toward where the dog was secured outside.(RP 51, at 24) The deputies repeatedly instructed the Mr. Hess to leave the dog alone.(RP 52 at 4) The dog was described as barking and lunging.(RP 52 at 19) Mr. Hess unsecured the dog and refused to return it to his tether. Mr. Hess began to step towards the deputies with the unsecured dog. Id. Mr. Hess took the dog, Tank, into his residence where he remained for approximately five minutes (RP 57 at 19)

However, the testimony reflected that the dog never left the inside of the front door the entire time Mr. Hess was in the residence. (RP 52 at 25 and 57 at 1) Further, when the door opened the dog ran out at one

angle while Mr. Hess ran another way away from the dog and the deputy at the door. (RP at 57 and 58) The deputy said he was fearful when the dog changed direction and “came straight at me.” (RP at 58) The dog “was on a charge and was growling.” (RP at 59) Right before the dog was on the deputy he tased it and the dog stopped. The deputy said that his only option was either shooting or tasing the dog. (RP at 60) The deputy stated that even if he had not been previously informed to the dog’s aggressive nature he would have been afraid of the dog (RP 65 at 21-25) He believed that this dog “was going to bite me”. (RP 66 at 1) After the dog had been tased Mr. Hess’s father was able to secure the dog to the same tether he had been secured to before Mr. Hess unhooked it. (RP 61 at 14). The jury reviewed State’s Exhibits 1 – 10. (RP at 54, 55, 56)

After the dog was removed Mr. Hess failed to comply with the deputies instructions and had to be taken to the ground in order to be arrested. (RP at 62) During the search incident to the arrest the Deputy Bauman discovered a large knife tucked into Mr. Hess’s waistband. (RP at 90). The jury found Mr. Hess guilty on all three counts.

IV. ARGUMENT

- 1. PETITIONER HAS FAILED TO SHOW THAT THE DEFENDANT WAS NOT POSITIONING HIS DOG TO ATTACK THE DEPUTY.**

Based on the facts of the case, the petitioner had ample opportunity to secure his dog prior to opening the door to his residence. The petitioner ran in a different direction from the dog. The dog turned on the deputy within 15 feet and the petitioner continued in a different direction for 30 feet until the dog was tased whereupon the petitioner turned around to check on the dog under the belief that the dog had been shot. Even if his decision to fail to secure the dog was only to use the dog as a distraction his actions were sufficient to meet the definition of Assault in the Third degree of a law enforcement officer.

This court has held that “evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980)). We draw all reasonable inferences from the evidence in the State's favor when testing for sufficient evidence. Salinas, 119 Wash.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977)). The State bears the burden of proving all elements of a crime beyond a reasonable doubt. State v. Teal, 152 Wash.2d 333, 337, 96 P.3d 974 (2004).

The State argues that the deputy's testimony more than adequately establishes the State's theory and assuming the truth of the State's evidence that the pit bull qualified as a weapon within the statutory meaning.

As is Holdt (State v. Holdt, 139 Wash App. 225, 160 P.3d 55 (2007), Hess contends that a pit bull is not a “weapon, device, instrument, article, or substance.” because he did not give the dog any “specific” direction in the circumstance of this case. However, the jury agreed from the evidence presented that Mr. Hess’s decision to release the dog from a secure tether and then subsequent failure to control to dog equated to use of the dog as a weapon with apparent present ability sufficient to cause reasonable apprehension and fear to the Law Enforcement Officer. Further this court in Holdt (id) state that a dog is an instrument that can be used to cause death or substantial bodily harm, and held that a dog can be a “deadly weapon” under RCW 9A.04.110(6).

The evidence here established that Hess used his pit bull as a weapon. Deputy Taylor and Deputy Bauman described a large, powerful dog that was barking, lunging, and growling. The deputies testified that the dog was secure when they arrived and that Hess released the dog from a secure position. That Hess was holding the dog by its neck or collar when he drug the lunging dog into the house. Further, Deputy

Taylor said he could hear that the dog always barking and scratching at the door and never secured anywhere else in the home prior to Hess opening the door. When Hess released the dog, it turned and charged Deputy Taylor, lunging at him, while Hess utilizing the dog as a distraction went in a different direction. A large, powerful dog that, by training or temperament, attacks a person in this manner when intentionally released meets the instrumentality “as used” definition of a weapon.

Defense counsel argued that evidence presented by the defendant’s father and Hess showed that the dog simply ran past the defendant so there was no intentional act committed by Hess. However, the jury found that this was not a simple accident. The jury found that the State had proven beyond a reasonable doubt that Hess acted intentionally by removing the dog from a secure location and failing to secure the dog during the five minutes Mr. Hess was within the home and prior to opening the door. The jury found that this was not simple recklessness but that there were facts sufficient to define intent on behalf of Mr. Hess. Therefore, Appellant’s appeal should be denied and the decision of the Cowlitz County Superior Court should be affirmed.

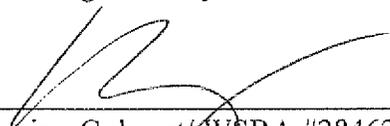
V. **CONCLUSION**

For the above reasons, the Appellant's appeal should be denied.

Respectfully submitted this 18th day of October, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By



Katherine Gulmert/ WSBA #28462
Deputy Prosecuting Attorney
Representing Respondent

COWLITZ COUNTY PROSECUTOR

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Transmittal Letter

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Case Name: State of Washington v. Cheyenne Hess

Court of Appeals Case Number: 41699-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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Personal Restraint Petition (PRP)

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Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

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sloanej@nwattorney.net