

No. 72133-0-I

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

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STATE OF WASHINGTON,

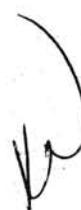
Respondent,

v.

MOWLID Y. MOHAMED,

Appellant.

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APPELLATE DIVISION  
JAN 10 11 12 AM '07  


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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State did not prove beyond a reasonable doubt that Mowlid Y. Mohamed assaulted another with a deadly weapon.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In order to prove the crime of second degree assault as charged in this case, the State was required to prove beyond a reasonable doubt that Mr. Mohamed intentionally assaulted another by using, attempting to use, or threatening to use his dog in such a manner that the dog was “readily capable of causing death or substantial bodily harm.” Did the State fail to meet its burden of proof, where Mr. Mohamed’s dog bit the complaining witness after the complaining witness approached the dog and kicked him?

C. STATEMENT OF THE CASE

On the evening of March 24, 2014, Mr. Mohamed was standing outside a coffee shop in SeaTac that serves Somali food and caters to Somali immigrants. RP 106, 207. He was with his new friend Tyler Webster and holding his dog “Snoopy” by a leash. RP 135, 213-15. Mr. Mohamed had just acquired the dog a couple of days before. RP 207. The dog was a pit bull and was around six months old. RP 208.

At that time, several people were milling around outside the coffee shop, talking and “hanging out.” RP 211-13. As Mr. Mohamed stood talking to Mr. Webster and others, a man named Ali Ali approached him and asked why he had a dog. RP 213. Mr. Mohamed had seen Mr. Ali at the coffee shop before but had never talked to him. RP 223. Mr. Ali told Mr. Mohamed that Muslim people are not supposed to have dogs. RP 214. When Mr. Mohamed said he did not care about that, Mr. Ali threatened to break the dog’s neck and then approached the dog and kicked it. RP 214, 225.

Mr. Mohamed stepped back and told Mr. Ali to leave the dog alone. RP 225. Mr. Mohamed continued talking to others and did not notice when the dog slipped out of its collar and charged toward Mr. Ali. RP 215, 226. Mr. Mohamed realized what had happened only after he heard Mr. Ali yell and saw him on the ground. RP 215. Mr. Mohamed ran toward the dog and regained control over him. RP 216. He never said “get him” to the dog, and he did not intentionally let go of the leash or otherwise encourage the dog to attack Mr. Ali. RP 216, 228-29.

Mr. Ali said that he was standing outside the coffee shop when Mr. Mohamed, Mr. Webster and the dog approached him. RP 109. He

said that, out of the blue, without any preliminary conversation or other provocation, Mr. Mohamed let go of the dog's leash and said "get him, get him." RP 112-14, 185. Mr. Ali admitted that he was Muslim and believed his religion did not allow Muslims to own dogs. RP 201.

The dog bit Mr. Ali's arm and knocked him to the ground. RP 114. Mr. Mohamed saw that Mr. Ali was on the ground and seemed to be crying; he thought he was joking. RP 217. He did not think the dog had bitten Mr. Ali and he did not think Mr. Ali had been hurt. RP 217-18. Mr. Mohamed, Mr. Webster and the dog walked away at a normal pace. RP 217. Mr. Ali called the police, who contacted Mr. Mohamed about a block away. RP 133.

The dog had bitten Mr. Ali's arm through his jacket. RP 128, 188-89. He was taken to a hospital, where he received stitches. RP 190.

The State charged Mr. Mohamed with one count of assault in the second degree, alleging he intentionally assaulted Mr. Ali with a deadly weapon, "to-wit: a dog." CP 1; RCW 9A.36.021(1)(c). After a jury trial, he was convicted as charged. CP 30.

D. ARGUMENT

**The State did not prove beyond a reasonable doubt that Mr. Mohamed intentionally assaulted Mr. Ali with a “deadly weapon”**

Constitutional due process requires that the State bear the burden to prove every element of the charged offense 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.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any 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 P.2d 628 (1980). In order to find a defendant guilty beyond a reasonable doubt, the trier of fact must “reach a subjective state of near certitude of the guilt of the accused.” Jackson, 443 U.S. at 315. On review, the Court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Colquitt, 133 Wn. App. 789, 796,

137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

To prove second degree assault with a deadly weapon, the State was required to prove that Mr. Mohamed “assaulted<sup>[1]</sup> Ali Ali with a deadly weapon.” CP 26; RCW 9A.36.021(1)(c). “Deadly weapon” was defined as

any weapon, device, instrument, substance, or article, 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 27; see RCW 9A.04.110(6).

In determining whether an instrument is a “deadly weapon” under the statute, the Court examines the totality of the circumstances, including the actual, attempted or threatened use of the instrument. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 368 n.6, 256 P.3d 277 (2011). Mere possession of an instrument that may be capable of

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<sup>1</sup> “Assault” was defined for the jury as follows:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. 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, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented.

CP 24.

causing substantial bodily harm is insufficient to render the instrument “deadly” under the circumstances. Id. at 365-66. Instead, the State must prove the defendant actually used, attempted to use, or threatened to use the object in a manner readily capable of causing death or substantial bodily harm. Id.

In Martinez, the Supreme Court held the evidence was insufficient to prove a knife was a “deadly weapon.” There, police officers chased Martinez out of a building while responding to a burglar alarm. Id. at 357-58. When they caught him, they found an empty knife sheath on his belt and a knife in the mud nearby. Id. But no one saw Martinez use the knife, reach for it, or manifest any intent to use it. Id. at 368. The only evidence that he attempted to use the knife was the unfastened sheath, which was insufficient as a matter of law to find beyond a reasonable doubt that he intended to use it. Id. at 369.

As in Martinez, the evidence here was insufficient to prove beyond a reasonable doubt that Mr. Mohamed’s dog was a “deadly weapon.” The evidence showed that Mr. Mohamed had possession of the dog, holding it by its leash, which is insufficient to prove he intentionally used the dog as a “deadly weapon.” Id. at 365-66. Mr. Mohamed testified the dog broke free from its leash after Mr. Ali

approached the dog and kicked it. RP 214-15, 225-26. Mr. Mohamed did not intentionally let go of the leash or encourage the dog to attack Mr. Ali. RP 216, 228-29. He did not intentionally use, attempt to use, or threaten to use the dog in any manner that was readily capable of causing death or substantial bodily harm. The dog acted of its own volition. It was therefore not used in a manner that rendered it a “deadly weapon” under the statute. Martinez, 171 Wn.2d at 365-66, 368-69.

The case of State v. Hoeldt, 139 Wn. App. 225, 160 P.3d 55 (2007) is distinguishable. There, when a police detective knocked on Hoeldt’s door to serve an outstanding arrest warrant, he looked through the partially opened door and saw Hoeldt standing inside holding a dog by the collar or neck. Id. at 227. The dog started barking and growling at the detective, then Hoeldt motioned with his arm and the dog charged toward the detective, lunging at his throat and chest. Id. The Court held the evidence was sufficient to prove Hoeldt used his dog as a deadly weapon because Hoeldt intentionally released the dog and directed it to attack the detective. Id. at 230.

Here, by contrast, Mr. Mohamed did not intentionally release the dog or direct it to attack Mr. Ali. The dog broke free from its collar

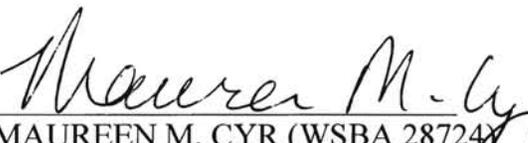
and charged Mr. Ali, as a natural reaction to Mr. Ali's aggressive and violent action in approaching the dog and kicking it. RP 214-15, 225-26. The dog was not an inanimate object that Mr. Mohamed had complete control over. He did not intentionally use the dog as a "deadly weapon."

The absence of proof beyond a reasonable doubt of an element of the crime requires reversal and dismissal. Jackson, 443 U.S. at 319; North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); Green, 94 Wn.2d at 221. Reversal and dismissal are required here.

F. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Mr. Mohamed intentionally used his dog as a "deadly weapon," the conviction must be reversed and the charge dismissed.

Respectfully submitted this 9th day of December, 2014.

  
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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72133-0-I
v.	)	
	)	
MOWLID MOHAMED,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF DECEMBER, 2014, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> MOWLID MOHAMED 14434 34 <sup>TH</sup> AVE S TYKWILA, WA 98168	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF DECEMBER, 2014.

X \_\_\_\_\_ 

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