No. SC95629

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

PHILLIP L. RANSBURG.

Appellant.

Appeal from Henry County Circuit Court
Twenty-Seventh Judicial Circuit
The Honorable James K. Journey, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

This is an appeal from a Henry County Circuit Court judgment convicting Appellant ("Defendant") of one count of felony assault in the second degree and one count of armed criminal action ("ACA"), for which he was given a sentence of seven years for the assault and five years for the ACA to run concurrently. L.F. 1, 3, 9-10, 32, 36, 40; STr. 20-21.[1]

Defendant was charged as a persistent offender with one count of first degree burglary for knowingly remaining unlawfully in a building possessed by T.M. ("Ex-girlfriend") for the purpose of committing assault, (§569.160 RSMo 2000[2]), one count of domestic assault in the second degree for punching Ex-girlfriend in the head with his fist (§565.073 RSMo Cum. Supp. 2012), one count of assault in the second-degree (§565.060 RSMo Cum. Supp. 2006), one count of ACA (§571.015) for attempting to cause physical injury to James Blackman ("Victim") by means of a dangerous instrument by advancing toward Victim with a large stick in Defendant's hand, and one misdemeanor count of violation of an order of protection. (§455.010 RSMo Cum. Supp.

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[1] Citation to the four transcripts is as follows: Legal file (L.F.); arraignment (ATr.); bench trial (Tr.); and sentencing (STr.).

[2] All further citations will be to RSMo 2000 unless otherwise noted.

2013). L.F. 9-10. All charged offenses occurred on March 3, 2014. L.F. 9-10. Defendant waived his right to a trial by jury and was tried on November 19, 2014, by Judge James K. Journey. L.F. 25, 31-33; Tr. 1.

The court found Defendant guilty as charged and sentenced him to 8 years for first-degree burglary, 7 years for second-degree domestic assault, 7 years for second-degree assault on Victim, 5 years for ACA, and 1 year for violation of an order of protection, with all sentences running concurrently. L.F. 36; STr. 21. The court found Defendant was a persistent offender. L.F. 9; Tr. 5-8. Defendant contests the sufficiency of the evidence to support his conviction for second-degree assault and ACA. Viewed in the light most favorable to the verdict, the following evidence was presented at trial:

Defendant registered as a sex offender for the first time on March 3, 2014, then again in June and October 2014, using the same Clinton, Missouri address for all three registrations. Tr. 16-17. He was required to register within three days of moving to Clinton, which occurred on September 19, 2013. Tr. 98.

Defendant had been in a relationship with Ex-girlfriend, and lived with her in her trailer at the Clinton address he later provided when registering as a sex offender. Tr. 33. On September 6, 2013, for unknown reasons, Ex-girlfriend's uncle called her to tell her that Defendant was inside Ex-

girlfriend's trailer and the police were called to escort him out. Tr. 35-36, 39. Defendant became violent in that same month. Tr. 34.

Defendant again became violent on November 24, 2013, brandishing a serrated kitchen knife about an inch from Ex-girlfriend's neck, after an argument regarding her daughter. Tr. 34, 36, 40, 53, 85, 88. She sought and received a protective order on November 25, 2013, which was still in effect on March 3, 2014. Tr. 34, 46. Defendant had gone to jail, and he was released on March 3, 2014. Tr. 74-75, 105, 110.

Victim and Defendant had a conversation early on March 3, 2014, in which Defendant told Victim that Ex-girlfriend was his girl and that they were engaged. Tr. 67. After the phone call, Victim thought the situation had resolved. Tr. 76.

Defendant's relationship with Ex-girlfriend had ended prior to March 3, 2014, when between 10:00 and 10:30 p.m., Defendant kicked in the door of Ex-girlfriend's trailer, despite Ex-girlfriend's attempts to keep him out. Tr. 63-64, 68, 76-77. Ex-girlfriend testified that the trailer door was locked and the lock was broken when Defendant kicked in her door. Tr. 63-64. Victim, who was Ex-girlfriend's fiancé, was inside the trailer at the time with Ex-girlfriend and Ex-girlfriend's daughter. Tr. 11, 43, 68.

Defendant carried a large stick, a broom handle, and charged directly at Victim with the stick when he came into the trailer. Tr. 44, 61-62, 69, 73, 78. Defendant "was charging at [him] like a football player would hit another attacker." Tr. 78. Defendant had both hands on the stick with his fists facing Victim when Defendant charged at him. Tr. 70.

Victim ran into the bedroom with Ex-girlfriend's daughter, but was only in the bedroom "a couple seconds. It wasn't long." Tr. 45, 60-61,70, 78-79. Defendant tried to grab Ex-girlfriend by her wrist and drag her outside. Tr. 45. Victim heard Ex-girlfriend say "No, Phillip, don't put – I don't want to go out of the house." Tr. 79. Victim said Defendant "was trying to drag her, trying to kidnap her out of the house." Tr. 79. Defendant dropped the stick on the floor, and punched Ex-girlfriend in the face with his fist. Tr. 44-45, 60-61, 71, 84. Victim came out of the bedroom and saw Defendant hit Ex-girlfriend. Tr. 71, 79-80.

Defendant then picked up the stick and left the trailer. Tr. 63, 72, 80. Defendant often carried the stick and treated it like a dancing partner, dancing with it all over town. Tr. 83. The police were called, and City of Clinton Police Officer Patrick Meeks responded. Tr. 82. The officer found an indention in Ex-girlfriend's door and two screws that had come out of the

sliding latch. Tr. 72, 83. Officer Meeks also noted that Ex-girlfriend had a "large swelling contusion area on her left forehead." Tr. 84.

At trial, Defendant testified that on March 3rd, he got out of jail at 3:00 in the afternoon when his friend, Brian Selley ("Selley") bonded him out. Tr. 105. Defendant said that Victim and Ex-girlfriend called Selley's house, threatening Selley. Tr. 105, 121. Defendant testified that he had lunch and dinner at Selly's house, then went dancing with his stick to Second Street, until he ended up at the trailer park. Tr. 106-107. He continued to dance back to Selly's house, but was arrested for kicking in the front door of Ex-girlfriend's trailer. Tr. 107. Defendant denied the incident. Tr. 108.

ARGUMENT

There was sufficient evidence to support Defendant's convictions of second-degree assault and ACA because a fact finder could reasonably find that Defendant broke into Ex-girlfriend's trailer and charged Victim with a dangerous instrument, intending to physically harm him. (Responding to Defendant's Points 1 and 2).

Defendant challenges the sufficiency of the evidence. In his first point, Defendant asserts there was insufficient evidence that he "attempted to cause physical injury to [Victim] by means of a dangerous instrument." He argues more specifically that the State "failed to prove, beyond a reasonable doubt, that [his] conscious object was to use his stick as a dangerous instrument." He asserts in his second point that since there was insufficient evidence to support a second-degree assault conviction the evidence was also insufficient to support his conviction for ACA.

The State did not have to prove, however, that it was Defendant's conscious object to use his stick as a "dangerous instrument." Rather, to prove that he was guilty of assault in the second degree, the State was required to prove that Defendant's conscious object was to cause "physical injury" to Victim, and that he attempted to cause physical injury by means of a dangerous instrument. Whether an ordinary object like a broomstick is a

"dangerous instrument" depends upon the manner in which it is used. Here, rational jurors could have inferred both that Defendant's purpose was to cause "physical injury" and that the broomstick was used in a manner that was "readily capable of causing death or other serious physical injury."

A. Standard of Review

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. 2008). "This is not an assessment of whether the [appellate court] believes that the evidence at trial established guilt beyond a reasonable doubt but [is] rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder 'could have found the essential elements of the crime beyond a reasonable doubt.'" *Nash*, 339 S.W.3d at 509 (quoting *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. 2010)).

"In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence." *Nash*, 339 S.W.3d at 509. "All evidence and inferences to the contrary are disregarded." *Id. See also State v. O'Brien*, 857 S.W.2d 212, 215–16 (Mo. 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[t]o

ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ 'a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.'").

"An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 53-54 (Mo. 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. 2002)); *see also Nash*, 339 S.W.3d at 509.

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. 1993); *State v. Chaney*, 967 S.W.2d at 52; *Nash*, 339 S.W.3d at 509; *Freeman*, 269 S.W.3d at 425. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. 1992). It is within the trier of fact's province to believe

all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405–06.

B. There was sufficient evidence to convict Defendant of second-degree assault and ACA.

As charged in this case, "[a] person commits the crime of assault in the second degree if he…[a]ttempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument." Section 565.060. "Physical injury" is defined as "physical pain, illness, or any impairment of physical condition[.]" (§556.061(20), RSMo Cum. Supp. 2008.)

"A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards commission of the offense. A '**substantial step**' is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." (§564.011); *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. 1999).

Armed criminal action is defined in part as "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty

of the crime of armed criminal action…" (§571.015 (1)).

A dangerous instrument "means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." §556.061(9). "Serious physical injury" is defined as a "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body." (§556.061(28)).

1. Defendant's stick was a "dangerous instrument."

"The key to determining whether an object is a dangerous instrument is whether the object can kill or seriously injure under the circumstances in which it is used." *State v. Coram*, 231 S.W.3d 865, 868 (Mo. App. S.D. 2007)(internal quotation omitted). "A dangerous instrument is not intended to be a weapon and may have a normal purpose in ordinary circumstances." *State v. Reese*, 436 S.W.3d 738 (Mo. App. W.D. 2014)(internal citations omitted). "Additionally, a defendant does not need to have the subjective intent to use the item with the purpose of causing death or serious physical injury; he or she only has to be aware that the object is being used in circumstances that are "readily capable of causing death or serious physical injury." *Id.* (internal citations omitted). "[I]t is irrelevant whether the victim actually suffered serious physical injury because the pertinent inquiry is

what injuries the alleged dangerous instrument is readily capable of causing under the circumstances." *State v. Eoff*, 193 S.W.3d 366, 374 (Mo. App. S.D. 2006); *See also State v. Terrell,* 751 S.W.2d 394, 395 (Mo. App. E.D. 1988).

Here, Defendant kicked in and broke through Ex-girlfriend's locked trailer door, forced himself inside the trailer, and charged toward the Victim, while gripping with clenched fists spaced about a foot and a half apart, a taped-up four-foot broomstick across the front of his body. Defendant's fists were facing Victim and Defendant charged Victim, "like a football player would hit another attacker." Victim fled to safety in the bedroom with Ex-girlfriend's daughter and did not come back out until the daughter told him to help her mother. A rational juror could find that Defendant was aware that by breaking through a locked door, and charging another person with a four-foot long broomstick held out toward the other person, his stick was readily capable of causing death or serious physical injury. Defendant could have easily broken Victim's nose, damaged his throat, broken his neck if pushed up against a wall or hard object, hit Victim's head against the wall causing a concussion or numerous other serious physical injuries that created a substantial risk of death, disfigurement or protracted loss or impairment of the function of any part of the body. (§556.061(28))

"Missouri courts have repeatedly held that a seemingly innocuous item

may constitute a dangerous instrument by considering the circumstances under which the object is used. In these cases, the standard for determining whether an ordinary object constituted a dangerous instrument turned on whether the defendant knowingly used the object in a manner in which it was readily capable of causing death or serious physical injury." *State v. Williams,* 126 S.W.3d 377, 385 (Mo. banc 2004). "The state is not required to prove that the defendant intended to cause death or serious physical injury." *Id.*

Missouri courts have found multiple ordinary items that have been used in a manner that is "readily capable of causing death or serious physical injury." (§556.061(28)). *See State v. Carpenter,* 72 S.W.3d 281, 283-84 (Mo. App. S.D. 2002)(handcuffs used to strike a victim's face after a defendant shoved the victim and flipped him over a bed); *State v. Seagraves,* 700 S.W.2d 95, 97 (Mo. App. E.D. 1985)(a weightlifting bar 12 to 15 inches in length and 1 to 1½ inches in diameter used to strike a victim's head and neck until she was rendered unconscious); *State v. Williams,* 857 S.W.2d 530, 533 (Mo. App. S.D. 1993)(a club or boat oar used to strike a victim's face when he was robbed of money bags); *State v. Terrell,* 751 S.W.2d at 396 (a beer bottle used to harm); *State v. Arnold,* 216 S.W.3d 203, 209 (Mo. App. S.D. 2007)(an ink pen held to a victim's throat); and *State v. Reese,* 436 S.W.3d at 740 (a pencil used to make jabbing motions).

The defendant in *Terrell* hit the victim over the head with a beer bottle, breaking it, and cutting her head and neck. *Terrell*, 751 S.W.2d at 395. The victim "received no stitches for the cuts left from the blow from the beer bottle[,]" and the defendant argued that since she did not sustain a serious physical injury, the beer bottle was not a dangerous instrument. *Id.* The Court disagreed and found that it must "look to its use under the circumstances[,]" and found that while a beer bottle is normally a harmless object, in the defendant's hands it became a dangerous instrument. *Id.* at 396. Likewise, in the *Arnold* case, the defendant held an ink pen to victim's throat, pulling her up and down a hallway. *Arnold*, 216 S.W. 3d at 205-206. When confronted and told to put the pen down, the defendant said he was going to kill victim if he was not allowed to leave. *Id.* at 206. The defendant claimed that the ink pen was not a dangerous instrument because it "did not create a danger of death or serious injury[,]" but the court disagreed and found that defendant's actions made the ink pen "readily capable of causing death or serious physical injury." *Id.* at 207-208. (internal quotation marks omitted).

In *Reese,* the incarcerated defendant refused to put his hands behind his back to be handcuffed and refused to drop the pencil he was holding. The defendant then began making stabbing motions with the pencil toward a law

enforcement officer. The Court found that defendant, who was charged with second-degree assault on a corrections officer never voluntarily retreated, and that his "conscious object to injure [victim] is also evidenced by his continued movement toward [victim] after being sprayed with mace…." *Reese,* 436 S.W.3d at 740-741. "Even though Reese may not have been,…holding the pencil after being sprayed with mace, we may look at defendant's conduct before, during, and after the incident to determine a defendant's state of mind." *Id.* "Additionally, a defendant does not need to have the subjective intent to use the item with the purpose of causing death or serious physical injury; he or she only has to be aware that the object is being used in circumstances that are 'readily capable of causing death or serious physical injury.'" *Reese,* 436 S.W.3d at 742-743. "[T]he stabbing motions [the defendant] made would allow a juror to reasonably infer that he was going to use it in a manner capable of causing death or serious physical injury." *Id.* at 743. "The jury only had to find that Reese was using the pencil in a manner 'readily capable of causing death or serious physical injury,' not that he had the specific intent to kill or seriously injure [victim]." *Id.*

Defendant argues that because Defendant did not swing or jab at Victim, did not touch Victim, or make any oral threats against Victim, he did not prove Defendant's conscious objective was to use the stick as a dangerous

instrument. But the absence of these circumstances does not render the evidence insufficient.

Defendant compares his case to *State v. Eoff,* 193 S.W.3d at 373-74, to suggest that Defendant's broomstick was not a dangerous instrument. He points out that in *Eoff* a piece of wood was used to bludgeon the victim. But there doesn't have to be evidence of bludgeoning. The statute requires only that an instrument be used in a manner "readily capable of causing death or other serious physical injury." (§556.061(9)). *Eoff* demonstrated one way in which a piece of wood, which had a normal purpose in ordinary circumstances, was turned into a dangerous instrument. Here, Defendant's taped-up broomstick, which had a normal purpose in ordinary circumstances as part of a broom, became a dangerous instrument when he held it out in front of his body and charged toward Victim.

2. Defendant intended to cause physical injury to Victim.

"Direct proof of the required mental state is seldom available, and such intent is usually inferred from circumstantial evidence." *State v. Shaffer,* 439 S.W.3d 796, 799 (Mo. App. W.D. 2014), *citing State v. Letica,* 356 S.W.3d 157, 166 (Mo. banc 2011). "The defendant's mental state may be determined from evidence of the defendant's conduct before the act, from the act itself, and from the defendant's subsequent conduct." *Id.* "Moreover, intent is a question

of fact for the fact-finder to decide." *State v. Lammers,* 479 S.W.3d 624, 636 (Mo. banc 2016). "Even where evidence of a defendant's guilt is solely circumstantial, the evidence is sufficient to support a conviction if the evidence is such that a reasonable juror would be convinced beyond a reasonable doubt of the defendant's guilt." *State v. Stiegler,* 129 S.W.3d 1, 4 (Mo. App. S.D. 2003)(internal citation omitted).

Here, the evidence showed that Defendant kicked in the door of Ex-girlfriend's trailer, despite Ex-girlfriend's attempts to keep him out. Tr. 63-64, 68, 76-77. The trailer door was locked and the lock was broken when Defendant kicked in her door. Tr. 63-64. Defendant carried a large stick, a broom handle, and charged directly at Victim with the stick when he came into the trailer. Tr. 44, 61-62, 69, 73, 78. Defendant "was charging at [him] like a football player would hit another attacker." Tr. 78. Defendant had both hands on the stick with his fists facing Victim when Defendant charged at him. Tr. 70. Victim ran into the bedroom with Ex-girlfriend's daughter, but was only in the bedroom "a couple seconds. It wasn't long." Tr. 45, 60-61,70, 78-79. Rational jurors could have inferred that breaking through the locked door and charging at Victim with the stick evinced a purpose to cause physical injury to Victim. (§556.061.1(9)).

Defendant's intent here is further revealed by his actions after Victim

ran into the bedroom and Defendant attacked Ex-girlfriend, by first grabbing her arm and then punching her forehead. Defendant tried to pull Ex-girlfriend out of the trailer. Defendant's intent to commit assault with his stick is clear from his actions before, during, and after the act when he went to the trailer, broke open the locked door, charged the Victim with the stick, then beat up Ex-girlfriend when he could not easily reach Victim with the momentum he had when charging inside the trailer.

When Victim came out of the bedroom, he saw Defendant hit Ex-girlfriend, then pick up his stick and leave. Defendant's conduct of charging at Victim after breaking through the locked door, then attacking Ex-girlfriend when Victim was in the bedroom, was "strongly corroborative of the firmness of [Defendant's] purpose to complete the commission of the offense" of assault on Victim, and most likely would have caused Victim physical injury but for Victim running into the bedroom. (§564.011); *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. 1999).

3. Armed criminal action.

Defendant committed second-degree assault with the aid of his stick, a dangerous instrument, and thus, there was sufficient evidence of ACA. This Court recently found in *State v. Jones,* 479 S.W.3d 100, 106 (Mo. banc 2016), that §571.015 should be interpreted by the Court "to give effect to legislative

intent as reflected in the plain language of the statute at issue." The Court stated that the "three prepositions (by, with, or through) and the three nouns those prepositions modify (use, assistance, or aid) demonstrate that section 571.015 was intended to reach as broadly as possible." *Id.* The Court said that the defendant was guilty of ACA in connection with his crime "if the evidence was sufficient for the jury to find beyond a reasonable doubt ***any one*** of at least…nine permutations[.]" *Id.* The ACA statute "does not require that the defendant actually attack or threaten an imminent attack with the weapon. It only requires that the defendant commit a crime 'by, through, or with' the 'use, assistance, or aid' of a weapon." *Id.* at 108. In *Jones,* "[e]ven though C.H. did not see Jones at the precise moment he crossed the threshold of the garage, she did see Jones an instant later and–at that time—Jones already was holding his gun…. As a result, the evidence was sufficient for the jury to find that Jones crossed the threshold of the garage with the aid or assistance of his gun regardless of whether Jones first broke the plane of garage's entrance with his gun, foot or knee." *Id.* at 107-108.

Here, not only did Defendant break through the front door of the trailer with his stick, but Victim immediately saw Defendant with the stick as he came through the door and charged Victim so that Victim fled to the bedroom. It was Defendant's intent to cause "physical injury" to Victim, and

he attempted to do so with a dangerous instrument. Thus, there was sufficient evidence to find Defendant guilty of ACA. Defendant's points should be denied.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,464 words, excluding the cover, certification, and appendix, as determined by Microsoft Word software; and that a copy of this brief was sent through the electronic filing system on August 3, 2016, to:

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