

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHEYENNE HESS,

Appellant.

No. 41699-9-II

UNPUBLISHED OPINION

Quinn-Brintnall, P.J. — A jury found Cheyenne Hess guilty of third degree assault. Hess appeals his conviction, asserting insufficient evidence supports the jury’s verdict finding that he directed his dog, Tank, to charge or attack a police officer. Because a pit bull may be a weapon, and the jury could have reasonably inferred that Hess released Tank to provide a dangerous diversion while he eluded arrest, we affirm.

FACTS

On October 8, 2010, Charles¹ Hess called police to report that his son, Hess, had an outstanding arrest warrant and could be located at Charles’s home in Castle Rock, Washington. Charles also told police that his son had an aggressive pit bull dog. Deputies Fred Taylor and

¹For clarity, we refer to Charles Hess by his first name. No disrespect is intended.

Brad Bauman of the Cowlitz County Sheriff's Department responded to the call and went to the Hess property.

As Deputies Taylor and Bauman approached, Taylor saw Hess and a chained-up pit bull (Tank) in the yard. After Taylor informed Hess that he was under arrest, Hess walked toward Tank. Taylor and Bauman directed Hess to keep the dog chained, explaining that if the dog got loose, they might have to shoot it. Despite the warning, Hess released Tank, who then barked and lunged at the deputies. The deputies directed Hess to secure the dog inside the house and then come back outside. Hess and Tank went inside, where Hess remained and the dog continued to scratch and bark at the door.

Deputy Taylor continued to tell Hess he was under arrest and directed him to come outside. After about 45 minutes, the front door cracked open and Tank bounded out. Hess ran out after the dog, yelling, "Tank and no and Tank." Report of Proceedings (RP) at 59. Tank initially went up the driveway but looped back around toward Taylor, charging and growling. Taylor used a stun gun on the dog as it came toward him. Hess, who believed Taylor had shot Tank, ran to the dog's aid, yelling and crying hysterically. The deputies ordered Hess away from the dog and asked Charles, who was watching nearby, to secure the dog.

The deputies ordered Hess to put his hands behind his back. Hess did not comply and the deputies took him to the ground and handcuffed him. Hess had a variety of hand tools on his person including a dagger in his waistband.

At trial, Charles testified that he had seen Tank take off out the front door in the past. He also testified that on the day of the incident, he saw that Tank ran out as Hess started opening the door and that Hess "took off out the door after Tank" trying to catch the dog. RP at 102. The

State argued that the evidence showed Hess ran a different direction than Tank and that he was using Tank as a diversion. *See* RP at 59 (Deputy Taylor testified that Hess “was running out after [Tank] and he wasn’t right behind it. He was kind of at an angle away, kind of at an angle from him.”). Taylor also testified that after he arrested Hess and was walking him toward the patrol car, Hess said to Tank, “Get them, boy.” RP at 124.²

On October 13, the State charged Hess with third degree assault of a law enforcement officer, unlawful possession of a dangerous weapon, and resisting arrest. RCW 9A.36.031(1)(g); former RCW 9A.41.250 (2007); RCW 9A.76.040(1). On December 21, a jury found Hess guilty as charged. Hess timely appeals only his third degree assault conviction.

DISCUSSION

Sufficiency of Evidence

Hess argues that there is insufficient evidence to support his third degree assault conviction because the dog, Tank, acted on its own and that he tried to prevent the dog from charging Officer Taylor. The State contends that the evidence showed that Hess did not genuinely try to prevent the dog from charging the officer and that sufficient evidence supports the jury’s guilty verdict.

In considering the sufficiency of the evidence, we construe the evidence in the light most favorable to the jury’s verdict and determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “We consider circumstantial evidence to be as reliable as direct evidence.” *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (citing *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102

² Charles had secured the dog at that point and Tank could not have attacked.

(1997)), *review denied*, 171 Wn.2d 1025 (2011). We defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To convict Hess of third degree assault, the State had to prove beyond a reasonable doubt that Hess had the specific intent to cause bodily harm or create a fear of bodily harm using a weapon or other instrument against a law enforcement officer.³ RCW 9A.36.031(1)(g); *Williams*, 159 Wn. App. at 307. Washington does not define "assault" statutorily, instead applying the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). The trial court instructed the jury that an assault is "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." Clerk's Papers at 25; *see also* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008). We can infer a defendant's intent from the circumstances. *Williams*, 159 Wn. App. at 308. A dog can be a weapon because it can be used to cause death or substantial bodily harm. *State v. Hoeldt*, 139 Wn. App. 225, 230, 160 P.3d 55 (2007). "A large, powerful dog that, by . . . *temperament*, attacks a person . . . *when intentionally released* or directed to do so by its handler, meets the instrumentality 'as used'

³ RCW 9A.36.031(1) provides, in relevant part,

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:

. . . .

(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.

definition of ‘deadly weapon.’” *Hoeldt*, 139 Wn. App. at 230 (emphasis added).

Here, Tank is a pit bull, a large, powerful dog breed, with an aggressive temperament. *Hoeldt*, 139 Wn. App. at 230. Both deputies and Charles testified that Hess unhooked Tank despite numerous directives from the deputies to leave Tank chained. Hess entered the residence and closed the door despite the deputies’ directives to Hess that he come back outside. Deputy Taylor testified that he heard Tank scratching and barking at the front door while Hess and Tank were in the residence. Hess then opened the door, and Tank ran out of the residence ahead of Hess. Charles testified that he saw the door open and that Tank “took off” out the front door. RP at 102. Charles also testified that Tank had taken off in a similar way in the past when Hess would open the door.

Although Hess asserts he did not direct the dog to attack Deputy Taylor and was trying to catch Tank, a rational trier of fact could reasonably infer that Hess intentionally released Tank to cause bodily harm, or create a fear of bodily harm, and as a diversion for his escape. Hess (1) unhooked Tank from his chain despite being directed not to do so, and (2) opened the door while Tank was scratching and barking at the front door, even though he knew Tank had taken off out the door in the past. *See, e.g., Williams*, 159 Wn. App. at 307-08 (jury could reasonably infer defendant intentionally stabbed officer because he held scissors in his fist and when officers approached him from behind one of the officers was stabbed in the leg); *see also State v. Johnson*, 29 Wn. App 307, 309-10, 628 P.2d 479 (1981) (intent to resist or prevent arrest was inferred when defendant repeatedly tapped officer’s head during the drive to the police station). Taylor was forced to use a stun gun on Tank as the dog attacked him, and Hess continued to resist arrest. Taken in a light most favorable to the jury’s verdict, the evidence is sufficient to support

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Hess's third degree assault conviction. *Salinas*, 119 Wn.2d at 201.

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Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

PENOYAR, J.