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STATE OF CONNECTICUT *v.* PAUL OVECHKA
(AC 26077)

Bishop, Rogers and Hennessy, Js.

Argued November 15, 2006—officially released February 27, 2007

(Appeal from Superior Court, judicial district of
Fairfield, geographical area number two, J. Fischer, J.)

Ruth Daniella Weissman, special public defender,
for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant
state's attorney, with whom, on the brief, were *Jona-*
than C. Benedict, state's attorney, and *Nicholas J. Bove,*
Jr., senior assistant state's attorney, for the appellee
(state).

Opinion

HENNESSY, J. The defendant, Paul Ovechka, appeals from the judgment of conviction, rendered after a jury trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (2).¹ On appeal, the defendant claims that the evidence was insufficient to support the verdict because the state did not prove that he used a dangerous instrument. We agree with the defendant and, therefore, reverse the judgment of conviction and remand the matter with direction to render judgment of not guilty.²

The following facts and procedural history are necessary for the resolution of the defendant's appeal. The defendant and Michael Rynich, a Bridgeport police officer, were next door neighbors.³ Three separate incidents occurred between the neighbors resulting in charges being brought against the defendant. These incidents occurred on December 26, 2002, and June 10 and July 2, 2003. The July 2, 2003 incident, in which the defendant sprayed Rynich in the eyes with either pepper spray or weed killer after Rynich had entered the defendant's yard, is the incident we are concerned with in this appeal.

On July 23, 2003, the defendant was charged in an information⁴ with assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1), both in connection with an incident on December 26, 2002; public indecency in violation of General Statutes § 53a-186 (a) (2) in connection with an incident on June 10, 2003; and assault in the second degree in violation of § 53a-60 (a) (2) in connection with an incident on July 2, 2003. On September 10, 2003, following a jury trial, the defendant was found not guilty of assault in the third degree, breach of the peace in the second degree and public indecency, and guilty of assault in the second degree. On February 18, 2004, the court denied the defendant's written motion for both a judgment of acquittal and a new trial and sentenced the defendant to a term of five years imprisonment, execution suspended after twenty-eight months, with five years of probation. On December 10, 2004, the defendant appealed from the judgment of conviction. Additional facts will be set forth as necessary.

The defendant claims that there was insufficient evidence to support the verdict because the state did not prove that he used a dangerous instrument. Specifically, the defendant contends that the state failed to prove that the substance,⁵ under the circumstances it was used, was capable of causing death or serious physical injury, and, therefore, it failed to prove, as it was required to, that the substance, as actually used, was a dangerous instrument. We agree.

Our standard of review is well settled when the sufficiency of the state's evidence is challenged after a conviction. "In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact . . . may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . As we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State v. Berger*, 249 Conn. 218, 224–25, 733 A.2d 156 (1999).

To prove the defendant guilty of assault in the second degree pursuant to § 53a-60 (a) (2), the state was required to prove beyond a reasonable doubt that the defendant, with intent to cause a physical injury to Rynich, caused such injury to Rynich by means of a dangerous instrument. General Statutes § 53a-3 (7) defines "dangerous instrument" in relevant part as "any instrument . . . which, under the circumstances in which it is used . . . is capable of causing death or serious physical injury" General Statutes § 53a-3 (4) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ"

We turn now to the evidence elicited at trial, construed in the light most favorable to sustaining the verdict, from which the jury concluded that the defendant was guilty of assault in the second degree. The defendant conceded that he was on his lawn spraying weed killer on weeds, within the fence line of his property, when he saw Rynich leave his house and get into his vehicle. The jury also heard testimony from Rynich. Rynich testified that when he stopped his vehicle at the stop sign near the defendant's property, he saw the defendant's wife. Because Rynich wanted to talk with the defendant's wife about the issues that had occurred between the defendant and himself, Rynich drove his car to the side of the road in front of the defendant's

house and got out of his vehicle. Rynich walked onto the defendant's property. The defendant and Rynich exchanged insults. Rynich yelled to the defendant's wife about the defendant being crazy. The defendant sprayed Rynich in the eyes and face. The defendant retreated onto his porch and eventually into his house. Rynich continued to follow the defendant up to the defendant's front door, even after being sprayed in the face and eyes. The defendant sprayed Rynich for the last time when the defendant was inside his house. The defendant claims he sprayed pepper spray, which he had in his pocket. The state claims the defendant may have sprayed weed killer, which he had in his hands. The defendant testified that he intended to spray Rynich and that he did in fact spray Rynich. Rynich testified to severe pain and burning in the chest, neck, face and eyes along with temporary blindness. Rynich testified that he subsequently drove himself home. From this evidence, the jury could have found that the defendant intended to harm Rynich and that Rynich did suffer "physical injury," which is defined by statute as "impairment of physical condition or pain" General Statutes § 53a-3 (3). The state, however, did not proffer evidence sufficient to establish that the substance sprayed by the defendant was a dangerous instrument.

The state argues that "the severity of the injuries Rynich suffered permitted the jury to infer that Rynich's injuries were attributable to weed killer and that weed killer was a 'dangerous instrument.'" A review of the record reveals that the state did not provide sufficient evidence to establish that Rynich suffered serious injuries.⁶ Rynich testified that he had burns on his face, neck and chest. On the day of the incident, Sergeant Melody Pribesh of the Bridgeport police department saw Rynich at the emergency room at St. Vincent's Hospital in Bridgeport and observed that he was "fiery red, burnt . . . from the waist up in his face, and his eyes were very irritated, red and swollen and tearing." Jeffrey Pellenberg, the physician who treated Rynich at the emergency room, testified that Rynich complained of eye irritation and of skin redness and burning. Pellenberg described the redness as skin irritation and testified that Rynich complained of his skin burning. Although there was testimony to establish that Rynich suffered eye irritation as well, the facts show that Rynich, after being sprayed, was able to follow the defendant as well as drive himself home at the end of the incident. The evidence proffered by the state established only that Rynich suffered physical injury, i.e., skin and eye irritation, not serious physical injury. Therefore, the jury reasonably could not have concluded that the severity of Rynich's injuries was consistent with the defendant having sprayed Rynich with a "dangerous instrument."

The state also argues that the manner in which the defendant used the spray made the instrument a dangerous instrument. Our cases have recognized, and experi-

ence has shown, that almost an infinite number of seemingly innocuous implements can, by the circumstances and manner of their use, become dangerous instruments. See, e.g., *State v. Prat*, 66 Conn. App. 91, 102–103, 784 A.2d 367 (2001) (baseball bat); *State v. Pierce*, 64 Conn. App. 208, 214, 779 A.2d 233 (2001) (crowbar); *State v. Barnett*, 53 Conn. App. 581, 591, 734 A.2d 991 (metal vacuum cleaner pipe, screwdriver, ice pick, two by four, cane, scissors, television antenna), cert. denied, 250 Conn. 918, 738 A.2d 659 (1999). The recognition, however, that an otherwise innocuous instrument can become a dangerous instrument by the circumstances of the assault does not eliminate the state’s burden of proving beyond a reasonable doubt that the circumstances were such that the instrument, as used in the case at hand, was a dangerous instrument. This the state did not do. In fact, the only evidence proffered by the state in this regard was that the defendant sprayed Rynich in the eyes and about the neck and face with the substance. This evidence, without more,⁷ did not prove that it was a dangerous instrument, i.e., capable of causing death or serious physical injury.

We determine that on the facts construed in the light most favorable to sustaining the verdict, along with the inferences reasonably drawn therefrom, the jury reasonably could not have found the defendant guilty of assault in the second degree. There was not sufficient evidence that the defendant used a dangerous instrument in causing the injury. The defendant admitted that he intended to harm Rynich, which established beyond a reasonable doubt that the defendant intended to physically injure another person. Pellenberg, Rynich and Pribesh testified that Rynich was physically injured, which established beyond a reasonable doubt that the defendant caused injury to his intended victim. The state, however, never demonstrated facts showing that the instrumentality that the defendant used and the manner in which it was used was capable of causing death or capable of causing serious physical injury. We conclude that the evidence was insufficient to establish one of the necessary elements of assault in the second degree, namely, that the spray, as used, was a dangerous instrument. Accordingly, the evidence was insufficient to support the defendant’s conviction of assault in the second degree.

The judgment is reversed only as to the charge of assault in the second degree and the case is remanded with direction to render judgment of not guilty on that charge. The judgment is affirmed in all other respects.

In this opinion BISHOP, J. concurred.

¹ General Statutes § 53a-60 (a) provides in relevant part: “A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm”

² Although the defendant makes other claims challenging his conviction, because this claim is dispositive, we do not address his remaining claims.

³ The defendant lived at 190 Lynn Place, located on the corner of Lynn Place and Barkley Street, and Rynich lived at 126 Barkley Street in Bridgeport. At the time of the trial, they had been next door neighbors for about four years.

⁴ The charges originally had been brought in three separate files which, upon the state's motion, the court, *J. Fischer, J.*, joined for trial on September 5, 2003.

⁵ There was conflicting testimony regarding the substance that the defendant sprayed into Rynich's eyes. The defendant testified that he sprayed pepper spray, which had been in his pocket, at Rynich. The state introduced evidence to establish that the spray used was weed killer, which the defendant had been spraying on his property. We decline to determine whether sufficient evidence existed to establish whether pepper spray or weed killer was sprayed in Rynich's eyes. Regardless of the substance involved, the state did not prove that whichever substance was involved had the potential character of a dangerous instrument capable of inflicting physical injury.

⁶ We note that the state need prove only that the victim suffered physical injury to prove assault in the second degree. See General Statutes § 53a-60 (a) (2). The state, however, must prove that a dangerous instrument was used. Because a dangerous instrument is an instrument with the potential for causing serious physical injury, if the state had provided evidence that the spray, in the circumstances in which it was used, did in fact cause serious physical injury, the state necessarily would have proven that the defendant used a dangerous instrument in the assault.

⁷ The state argues in its brief that the ingredients listed on the container of the weed killer, which was a full exhibit at trial, would alert a reasonable person that the weed killer was a dangerous instrument, as used. In its brief, the state argued that one of these ingredients was a pesticide and another ingredient was an herbicide, and it supported this argument with citations to cases outside this jurisdiction. The state, however, did not introduce evidence to the jury of the nature or classification of specific ingredients in the weed killer. Also in its brief, the state argued that pesticides and herbicides are subject to extensive regulation in Connecticut because of their potentially harmful uses. This evidence, however, was not before the jury.
