FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,		No. 30504-0-III
Respondent,	)	
v.	)	
DESMOND BERNARD SHEPARD, JR.,	)	
Appellant.	)	PUBLISHED OPINION

Sweeney, J. — Conviction for third degree assault, as charged here, requires a showing that the defendant used an "instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d). Here, the defendant assaulted his former girl friend by striking her and pushing her. She struck furniture and was seriously injured. The question before the court is whether the furniture she struck satisfies the statutory requirement of an instrument or thing likely to produce bodily harm. Our Supreme Court has already answered that question in a unanimous opinion in *State v. Marohl*, 170 Wn.2d 691, 246

P.3d 177 (2010). And, the answer is no. We therefore reverse the conviction for third degree assault.

FACTS

Desmond Shepard and Natasha Pipgras drank together in Ms. Pipgras's home. Mr. Shepard became angry. He threw Ms. Pipgras. She struck an armoire. He threw her again and she struck a dresser and also a child's playpen. The assault resulted in serious injuries to Ms. Pipgras including bruises to her face, head, and body.

The State charged Mr. Shepard with third degree assault. Mr. Shepard was also convicted of second and fourth degree assault for other acts of violence that night, and acquitted of third degree malicious mischief. Since those charges are not at issue in this appeal, the facts underlying those matters are not discussed here.

A jury convicted Mr. Shepard of third degree assault.

ANALYSIS

Our review is de novo. *Marohl*, 170 Wn.2d at 697.

As charged here, the State was required to prove that Mr. Shepard, acting with criminal negligence, caused "bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d). Mr. Shepard contends that *Marohl* establishes that he did not assault Ms. Pipgras with "an instrument or thing likely to produce bodily harm." The State responds that Mr. Shepard

used the furniture to assault Ms. Pipgras and that satisfies the requirement of the statute. The Supreme Court's decision in *Marohl* resolves the dispute.

In *Marohl*, the defendant took the victim in a choke hold and both men fell to the floor. 170 Wn.2d at 696. "The impact with the casino floor caused [the victim] to suffer bruises and scrapes on his face, and his prosthetic arm broke off above the elbow joint." *Id*. The State charged Mr. Marohl with third degree assault under the same statute at issue here (RCW 9A.36.031(1)(d)) and alleged, and the court later correctly instructed, that the injuries had to be the result of "'a weapon or other instrument or thing likely to produce bodily injury.'" *Id.* The jury found Mr. Marohl guilty, he appealed, and the Court of Appeals affirmed the conviction. *Id.* at 697.

The Supreme Court accepted review and reversed the conviction. *Id.* at 694-95. And, in doing so, the court made a number of observations and holdings that are controlling here:

- "Only assaults perpetrated with an object likely to produce harm by its nature or by circumstances fall within the subsection's [RCW 9A.36.031(1)(d)] purview." *Id.* at 699.
- "Thus, an 'instrument or thing likely to produce bodily harm' under RCW 9A.36.031(1)(d) must be similar to a weapon." *Id.* at 700.
- "RCW 9A.36.031(1)(d) makes no reference to the defendant's use of an 'instrument or thing likely to produce bodily harm.'. . . The casino floor was not within the scope of RCW 9A.36.031(1)(d)." *Id.* at 703.

And, even in those jurisdictions whose statutes do consider the actual use of the

instrument or thing, as opposed to just focusing on the object itself independent of its use, the court noted that "each defendant in *Galvin*, *Reed*, and *Montano* took hold of the victim's head and repeatedly struck it against the ground."[1] *Id.* at 702. The evidence here shows that Mr. Shepard brutally pushed or threw Ms. Pipgras. He did not pick up the armoire, the dresser, or the playpen or any other object or instrumentality and strike her with it or deliberately beat her against it. The Supreme Court authority is clear and its application here is clear—the furniture "must be excluded from the definition of 'instrument or thing likely to produce bodily harm,'" and the conviction here for third degree assault, then, must be reversed. *Id.* at 703.

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Sweeney, J.

I CONCUR:

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Siddoway, J.

[1] *People v. Galvin*, 65 N.Y.2d 761, 481 N.E.2d 565, 492 N.Y.S.2d 25 (1985); *State v. Reed*, 101 Or. App. 277, 790 P.2d 551 (1990); *State v. Montano*, 1999 NMCA 23, 126 N.M. 609, 973 P.2d 861.