

No. 30504-0-III

Korsmo, C.J. (dissenting) — The jury determined that Desmond Shepard’s repeated actions of throwing his victim into various fixed objects constituted an assault with a weapon. Because the record supports the determination that these fixtures were the instrumentalities of the crime, the conviction for third degree assault should be affirmed.

The facts relevant to the third degree assault count can be briefly stated. After a night of drinking, Mr. Shepard became angry with Natasha Pipgras when she did not respond as rapidly as he desired to his request that she drive him from her home in Kelso to his home in Portland. He threw her headfirst into an armoire. Report of Proceedings (RP) at 37. She began dressing her children for the late night car trip, but his anger continued. In turn, he then threw her into a dresser, a wall, and also into a child’s playpen. RP at 38. Ms. Pipgras sustained bruises on her face, head, and body.

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 does not dispute that he acted with criminal negligence or that he caused bodily harm to Ms. Pipgras. He contends that *State v. Marohl*, 170 Wn.2d 691, 246 P.3d 177

(2010), establishes that he did not assault her with a “weapon or other instrument.”

In *Marohl*, the defendant was walking the victim out of a bar when the two crashed to the ground; the victim struck his head on the floor and was knocked unconscious. 170 Wn.2d at 695-96. The defendant was convicted of third degree assault based on a theory that he used the floor to assault the victim. *Id.* at 696-97. The Washington Supreme Court reversed the conviction, concluding that “based on the facts of this case,” the floor did not meet the statutory definition. *Id.* at 697. The court examined cases from other states. It noted that in some states, a stationary object could not by definition constitute a weapon. *Id.* at 700. In other states, whether such an object could constitute a weapon was dependent upon the manner in which the item was used. *Id.* at 701-02. For instance, repeatedly striking the victim’s head against the ground was commonly determined to be “use” of a weapon. *Id.* at 702. The court determined that a single fall to the floor did not demonstrate intentional use of the floor as a weapon in Mr. Marohl’s case. *Id.* at 700, 703.

Mr. Shepard argues that the four items into which he threw Ms. Pipgras similarly were not instruments for purposes of third degree assault. The jury disagreed. Mr. Shepard repeatedly threw his victim into different pieces of furniture or the wall. He was in fact using them as instrumentalities to injure Ms. Pipgras. While perhaps a one-time

use of a single piece of furniture could be likened to *Marohl*, here repeated use of multiple pieces of furniture permitted the jury to reach the opposite conclusion—Mr. Shepard intentionally was using the furniture as the instruments of his attack on Ms. Pipgras.

Under these facts, the jury concluded—and was entitled to do so—that Mr. Shepard did assault Ms. Pipgras with a “weapon or other instrument or thing likely to produce bodily harm.” RCW 9A.36.031(1)(d). The evidence was sufficient to support the third degree assault verdict.

The majority goes further than *Marohl* and seems to conclude that the item must be in the fundamental nature of a weapon before it can be treated as such. That is not the holding of *Marohl*, and would be inconsistent with the rule of that case. The court began its review of the problem by looking to the statutory definition of “weapon or other instrument or thing likely to produce bodily harm” found in RCW 9A.36.031(1)(d). 170 Wn.2d at 698-99. The court concluded that the definition covered “assaults perpetrated with an object likely to produce harm by its nature *or by circumstances* fall within the subsection’s purview.” *Id.* at 699 (emphasis added). In other words, the object itself can be in the nature of a weapon, or it can be used as a weapon. This case is in the latter category, and nothing in *Marohl* limits the definition to objects that are inherently

weapon-like.<sup>1</sup>

As noted previously, *Marohl* distinguished its facts from cases where the defendant “used” a floor by repeatedly striking the victim’s head into the floor or other object. *Id.* at 702. The construction of the statutory definition included a “use” component. *Id.* at 699, 703. If the *Marohl* court had intended to exclude “use” cases, it could easily have done so without having to discuss and distinguish other states where use of a fixed object such as a floor constituted a weapon.

In a single sentence in its final paragraph, the majority seems to discount any “use” of the furniture in this case by noting that Mr. Shepard had not “picked up” the armoire (or other piece of furniture) and used it to strike Ms. Pipgras. No authority is cited for the proposition that an object must be used as a club to constitute a weapon. Such a view is inconsistent with the cases distinguished by *Marohl*, where the fact that the floor could not be picked up did not factor into the analysis of whether it was used as a weapon. Surely if a defendant tosses a person out of an upper story window, leaving the hard ground below to do the damage, he “used” the ground even if he did not club the victim

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<sup>1</sup> The court also would have needed to overrule other decisions in which everyday objects constituted weapons because they were used as instrumentalities to assault another. *E.g.*, *State v. Tucker*, 46 Wn. App. 642, 731 P.2d 1154 (1987) (drinking glass thrown at victim); *State v. Pomeroy*, 18 Wn. App. 837, 573 P.2d 805 (1977) (broken beer glass).

with it.

Although the evidence could be seen in another light—that Mr. Shepard was throwing Ms. Pipgras around without regard to where she landed—the jury decided that he repeatedly had used the furniture to injure her by smashing her into the various furnishings. This was not a single fall to the floor as in *Marohl*, but a series of assaults by crashing the victim into fixed objects.

The jury concluded that the items were used as weapons. The evidence supported that determination. Accordingly, I would affirm the conviction for third degree assault.

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Korsmo, C.J.