Op-Ed

Sticks, Stones, and... Snakes? Unusual Deadly Weapons and Threatening Objects

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What do garden hoses, sticks, pencils, and saliva all have in common? Within the right context and jurisdiction, they are considered by the courts to be a threat to others. The following represents a brief survey of unusual objects (mostly inanimate—but not all) found to be threatening by American courts.

The Garden Hose: *Roell v. Hamilton Cnty. Bd. of Comm'rs*, No. 16-4045 (6th Cir. Sept. 5, 2017).

Ronald Roell, who suffered from schizoaffective disorder and paranoid delusions, stopped taking his medication in June 2013. Predictably, he began exhibiting signs of mental decompensation which culminated in a condition known as excited delirium. In his frenzied state, Roell damaged his own condominium and then threw a flower pot through the window of his neighbor. The latter called 911 and reported that Roell appeared angry, his face red and his eyes bulging, as he muttered unintelligible things, while pacing in front of the broken window, peering into her residence.

Deputies arrived and found Roell, half-naked and brandishing a garden hose with a metal nozzle in one hand and a basket in the other. According to the officers, Roell was swinging the hose around as if trying to hit someone. Roell approached the deputies, and was warned to stop and lie on the ground or he would be tased. Roell twice ignored the deputies' demands and kept moving towards the officers.

While attempting to subdue Roell, the officers struggled with him unsuccessfully, tasing him multiple times. Roell stopped breathing during the encounter and was pronounced dead shortly thereafter. His death was documented by the coroner as natural, resulting from his excited delirium. Included with the Death Record was a report drafted by the coroner stating that Roell had a history of "physical altercation with police officers" and that the "use of a conducted energy device against decedent" had occurred. Also noted were Roell's various abrasions and contusions, injuries from the taser barbs, and four broken ribs—but the report did not find that any of these injuries contributed to Roell's death.

In applying the three *Graham* factors (severity of crime, presence of immediate threat, and active resistance of arrest) the court concluded that the deputies' use of force was lawful. Within this context, Roell's demeanor, when combined with the fact that he had thrown a potted plant through his neighbor's window, supported the finding that he had committed a series of crimes that could escalate. Further, and most importantly for our purposes, Roell's use of a garden hose and garden basket amid a scene of property destruction provided deputies with a reasonable basis to believe Roell presented an immediate threat to himself and others.

In other words—menacing your neighbors with a gardening basket and metal hose nozzle can lawfully get you tased.

The Stick: *In re Fortney*, 832 N.E. 2d 1257 (Oh. Ct. App. 2005).

Zachariah Mugrage and John Fortney, both aged 15, spent the evening with a third teenager, during which time Mugrage punched Fortney for making unwanted sexual advances towards him. The following day, Fortney made threats to come to Murgrage's residence to assault him. Mugrage began walking down the street towards Fortney's home and encountered Fortney, who was wielding a large stick.

Fortney swung the stick at Mugrage several times. Mugrage ordered him to put it down and "fight like a man" and then grabbed a baseball bat from a friend. A fracas ensued. Undeterred by the bat, Fortney swung his stick again. Mugrage blocked the blow with his left arm, sustaining a hairline fracture.

Under Ohio R.C. 2923.11(A), a deadly weapon is "any instrument, device, or thing capable of inflicting death, and designed or specially adaptable for use as a weapon, or possessed, carried, or used as a weapon." The state must therefore meet a two-pronged test to prove an object is, in fact, a deadly weapon. First, the weapon must be an "instrument, device, or thing capable of inflicting death."[1] Second, the weapon must be "designed or specially adaptable for use as a weapon, or possessed, carried, or used as a weapon."[2] Whether a weapon constitutes a deadly weapon (and thus a threat to others) depends on the facts and circumstances of each case.[3]

In this scenario, Fortney's stick, unsurprisingly, qualified as a deadly weapon under Ohio law.

Given the injuries involved, perhaps this case best validates the first part of the old adage "sticks and stones may break my bones. . . ."

The Stone: *Faircloth v. State*, No. 3-12-00133 -CR (Tex. App. May 30, 2013).

It is only appropriate that a case implicating sticks should be followed one involving stones.

Billy Gene Faircloth attacked Kathy McWilliams from behind as she exited her vehicle on the lowest level of a five-story underground parking garage in Austin. The weapon was a smooth river rock "a little bigger than a softball."[4]

The stone used in the assault was determined to be a "deadly weapon," within the meaning of Tex. Penal Code Ann. § 1.07(a)(17)(B): The evidence showed that McWilliams sustained injuries from multiple blows to the head, and she was attacked from behind. Thus the jury could infer close proximity and that the rock was capable of inflicting death or serious injury.[5]

The Pencil: The below cases support the notion that the pen (or pencil) is, in fact, *at least* as mighty as the sword.

People v. Page, 123 Cal. App. 4th 1466 (2004).

Craig Lucas was walking home from his job at Taco Bell one evening when he came across a half-dozen people standing outside his building. Two of these individuals—a man and a woman—approached Lucas and asked him in a hostile manner what he was looking at. The woman then started emptying out a petrified Lucas's pockets

The woman took his wallet, which contained about $ 32.00, and a case he was holding, containing a CD player and some

Continued on page 34

Op-Ed Sticks, Stones Cont'd from page 22

CD's. She also took his glasses off and stomped on them. Next, the young man patted Lucas down, took other things from his pockets, and asked "if [he] had anything else on [him]."

"[A]fter they took everything," the woman held "a sharp[,] pointy object" up to the side of Lucas's neck, touching him, and told him not to involve the police. She said that if he did, she knew where he lived. Defendant laughed. The two then walked off together. When Lucas got home, he called the police.

The court held that there was sufficient evidence of an assault with a deadly weapon. In particular, the court noted the pencil qualified as a deadly weapon because the woman did not threaten to break it or write a note with it but, instead threatened to stab Lucas in the neck with it. The court added that, while the accomplice was threatening the victim, defendant went through his pockets; therefore, the jury could have reasonably found that the accomplice continued to hold the pencil to the victim's neck as a present conditional threat, so that defendant could accomplish the robbery.

People v Molnar, 234 A.D.2d 988 (N.Y. App. Div. 4th Dep't 1996).

New York has also weighed in on this important issue. In *Molnar*, a pen constituted a dangerous instrument under CLS Penal § 120.05(2) where the defendant used it in menacing manner and tried to stab police officer with one.[6]

The Dog: *People v. Kay*, 328 N.W.2d 424, 424, 121 Mich. App. 438, 439, 1982 Mich. App. LEXIS 3666, *1;

Defendant commanded his German shepherd to attack a store employee that had accused defendant of larceny. On appeal, defendant argued that because only inanimate objects had been found to be dangerous weapons in Michigan, a dog could not fit that category under Mich. Comp. Laws § 750.82. This happened to be an issue of first impression before the court. The court affirmed the conviction and rejected defendant's claim that § 750.82 per se excluded animate objects from being a dangerous weapon. The test was whether the instrumentality was used as a weapon and, when so employed in an assault, whether it was dangerous. The legal character of a "dangerous weapon" attached by adoption when the instrumentality was applied against another in furtherance of an assault. In other words, the court reasoned, because the dog had been trained to attack people, it could be considered a dangerous weapon.

People v Garraway, 187 A.D.2d 761 (N.Y. App. Div. 3d Dep't 1992).

Meanwhile, in New York. a pit bull terrier weighing 65 to 75 pounds was also found by a court to constitute a "dangerous instrument," this time within meaning of CLS Penal § 10.00(13). Defendant was holding his leashed but agitated animal when police, in response to complaint, came to ask defendant to turn down the music in his apartment. As the officers backed away from the threatening animal, they drew their service revolvers and pointed them at dog, whereupon defendant stated "It will take you at least six of those to stop him."[7]

So much for a "bullet proof" defense. . .

The Snake: *State v. Roullier*, 977 P2d 970 (MT. 1999).

In September 1996, Officer John Stevens of the Polson, Montana Police Department responded to a domestic disturbance report. Defendant Michael Roullier had broken a window and an aquarium during a dispute with his girlfriend, and then left the apartment prior to Stevens' arrival. Stevens noted the damage, and in the process also noticed a number of snake cages to which were attached "Caution: Venomous snake" warnings. No charges were filed at that time.

A short time after Stevens left, Roullier returned to the apartment, where he broke a door and appeared very upset; his girlfriend testified that she thought he was suicidal. Roullier grabbed a snake from a cage and left the apartment, at which point the girlfriend again called the police. Stevens and his partner, Officer Tina Schlalie, returned to the apartment building and chased Roullier back inside. .

The officers found Roullier holding the snake, with one hand on the reptile's head. Stevens, who was approximately six feet away from Roullier, told him to put the snake down, but Roullier refused. Roullier told the officers to get out of his way because he wanted to leave the apartment. He advanced toward the officers while motioning with the snake's head, telling them "if this snake bites you, you're dead." The officers backed up, but refused to let Roullier leave.

Schlalie prepared to hit the snake's head with her baton, but the defendant drew the reptile close to his body. Stevens then threatened to use his pepper spray, whereupon Roullier yelled, "If you spray me, then I will let it bite me and I will be dead." He continued to hold the snake's head to his arm as if he was going to let it bite him, while the officers repeated their requests that he put the snake down. Roullier eventually relented and was handcuffed by the officers. He told them how to handle the snake and how to return it to its cage; the officers later learned that the animal was a Rhinoceros Viper, an extremely toxic African species.

Roullier was convicted of felony assault, and the district court ordered him to serve an additional, consecutive two-year sentence for using a dangerous weapon under Mont. Code Ann. § 46-18-221(1).[8] The appellate court agreed that Roullier's behavior amounted to more than mere possession of a deadly weapon since, during his encounter with the officers, the defendant not only refused to put the snake down, but also moved towards the officers while warning them that the snake was venomous.

The Telephone: *State v. Lindsey*, 755 N.W.2d 752 (Minn. 2008).

Given the above examples of ordinary household items being used to induce blunt force trauma, it's no surprised that telephones also fall into this category. *Lindsay* is also useful, however, in that it stands for the proposition that you as an attorney are with the bounds of ethical and professional conduct to assert this in court—at least in Minnesota.

Ultimately in *Lindsey*, the court held that no prosecutorial misconduct had occurred as a result of the prosecutor arguing that the telephone was a deadly weapon within the meaning of Minn. Stat. 609.02 subd. 6(2004).

The Saliva: *State v. Price*, 834 N.E.2d 847, (Ohio Ct. App., 2005).

In April 2003, Tommy Price, an HIV and Hepatitis C positive hemophiliac, made numerous harassing and nonsensical phone calls to the police. Eventually two officers were dispatched to Price's home to investigate. During the course of the investigation, Price became agitated and swore at the officers. Eventually this exchange escalated, with Price spitting into the officer's mouth and biting one of the officers, causing abrasions.

At trial, Price was found guilty of felonious assault, attempted felonious assault, and assault of a peace officer and was sentenced to six years in prison. On appeal, he argued that his convictions for

felonious assault and attempted assault weren't supported by sufficient evidence. The court disagreed, affirming the trial court's ruling and holding that Price had been properly convicted given that he was afflicted with HIV and Hepatitis C and had spit on and bit an officer, knowing that his saliva was a deadly weapon capable of inflicting physical harm to another. His expectorant thus fulfilled the provisions of R.C. 2903.11(A)(2), "[n]o person shall knowingly cause or attempt to cause physical harm to another. . . by means of a deadly weapon. . . ."

The Body Parts: *State v. Kuperus*, 241 Ore. App. 605, 251 P.3d 235, 2011 Ore. App. LEXIS 396 (2011).

Note that in Oregon, teeth do not qualify as a deadly or dangerous weapon. Why? Because you can't "arm" yourself with your teeth... they are already in your mouth of course! The big question now is whether this analysis would also apply to dentures.

Conclusion

If it is not already apparent, courts often resist being bound by a concrete list of objects that may qualify as a "deadly weapon." As an example, California courts recognize that "[a]n instrumentality is a deadly weapon if it is capable of being used to inflict death or great bodily injury, and if its possessor intends to use it as a weapon should the circumstances require it," however, whether an object is a threat to others remains a question of fact that must be decided by a jury on a case-by-case basis.[9]

As this brief essay demonstrates, the consideration of what constitutes a deadly weapon, and under what circumstances, would seem to be excellent subject matter for presentation to enterprising law students around the country in their law school examinations.

Notes

1. Ohio R.C. 2923.11(A).
2. *Id.*
3. Fortney, 832 N.E. at 1268.
4. Faircloth, 2013 Tex. App. LEXIS 6513 *4.
5. *Id.*
6. 1996 N.Y. App. Div. LEXIS 13764 (N.Y. App. Div. 4th Dep't 1996).
7. 187 A.D.2d 761, 589 N.Y.S.2d 942, 1992 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 3d Dep't 1992).
8. State v. Roullier, 1999 Mont. LEXIS 37, *1.
9. *Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 Hastings Women's L.J. 25, 27 (2017).

Cases Cont'd from page 31

commands to drop the knife, an officer discharged a taser at Frederick, which she blocked with her purse and then followed up with charging the officers. At that point an officer shot and killed Frederick, prompting her estate to file suit alleging, among other things, excessive force Fourth Amendment claims under § 1983. The district court performed an analysis with the *Graham* factors and granted summary judgment to the police and associated municipality, leading the estate to appeal the dismissal. In focusing on the excessive force claim the estate argued the district court erred under the Ninth Circuit's "provocation rule," which holds that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Eighth Circuit noted first that during the pendency of this appeal the Supreme Court rejected the provocation rule in *Mendez*, deeming it fundamentally flawed because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Supreme Court further clarified in *Mendez* that the "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Applying these clarifications to the facts at hand, the Eighth Circuit found that it was objectively reasonable for an officer to use deadly force against an individual wielding a knife and charging another police officer.

The estate did not contest this, but instead argued the tasing was a distinct Fourth Amendment violation (from the latter deadly force applied), thus requiring the Circuit to follow Supreme Court guidance and assess this alleged violation of Frederick's Fourth Amendment rights independently. In doing so the Circuit found this non-lethal application of force was objectively reasonable as well because when it was applied the officers faced Frederick in a "small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers." It affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/17/10/163523P.pdf

Inside Canada Cont'd from page 33

by choosing to wear running shoes despite observing the icy sidewalk conditions.

HELD: City is grossly negligent, and the Plaintiff is contributorily negligent.

DISCUSSION: The Court began by laying out the City's responsibility under section 44 to keep highways (which includes sidewalks) in a state of reasonable repair and highlighted section 44(9) which indicates that a City will not be liable for personal injury caused by snow or ice on the sidewalk unless the City is grossly negligent. To clarify the definition of grossly negligent, the Court looked to *Crinson v. City of Toronto* 2010 ONCA 44 that found that it does not require proof of misconduct that is willful, wanton or flagrant. The weather reports that were available to the City confirmed a significant wind chill which would contribute to the freezing of the precipitation in an overnight thaw-freeze cycle. In addition, upon further evidence it became clear that the City did not have a minimum winter maintenance standards policy which means there was no indicator which would determine when it was necessary for the snow removal operator to remove snow or ice from high pedestrian areas on sidewalks. Lastly, the Court accepted the evidence of the Plaintiff that there was significant ice and snow on the sidewalk.

The Court held that the plaintiff had established on a balance of probabilities that the City was grossly negligent in its failure to maintain its sidewalks at the time of the fall. The Court concluded that the City must have been aware of the weather reports and conditions and should have responded accordingly. Relying on past case law, the Court found this to be unreasonable; the Ontario Court of Appeal in *Dorschell v. Cambridge (City)* (1980) 1980 CanLII 1743 (ONCA) confirmed that the lack of a policy by a municipality or a policy of not taking any systematic or regular action to remedy snow or ice conditions was evidence of serious negligence. The Court further held that the Plaintiff's actions for choosing to wear running shoes, instead of winter boots despite observing the sidewalk conditions before she left her residence, constitute negligence and contributed to her injuries. The Court assessed the contributory negligence at 50%.