

68746-8

68746-8

NO. 68746-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FREEDMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINBGTON

BRIEF OF RESPONDENT

Daniel T. Satterberg  
King County Prosecuting Attorney

MARGARET E. NAVE  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUE PRESENTED**

In order to answer a special verdict that a defendant was armed with a deadly weapon at the time he committed an assault, the jury must find that the instrument used by the defendant during the assault was either a deadly weapon as a matter of law, or that the instrument had the capacity to inflict death and, from the manner in which it was used, was likely to produce or could have easily and readily produced death. The evidence in this case was that the defendant, Robert Freedman, repeatedly struck the victim, Anthony Lemon in the torso with a metal baseball bat, using a full two-handed swing and hitting him in the ribs and stomach, as well as his arms and leg, with such force that it caused Lemon to stagger backwards and caused welts and bruising. Was this evidence, when viewed in the light most favorable to the state, sufficient to allow any rational trier of fact to find, for the purposes of answering the special verdict, that the defendant was armed with a deadly weapon at the time he committed the assault?

**B. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS**

Anthony Lemon is a longshoreman with twenty years of experience. 2RP 157, 167.<sup>1</sup> He is a clerk supervisor. 2RP 158. On August 5, 2011, at the end of his shift, Mr. Lemon left the dock where he had been working, and drove out of the parking lot. 2RP 184, 185. He was on his way home, but intended to stop first at a nearby Super Supplements vitamin store. 2RP 186, 188, 196. As Lemon drove out of the lot, he was followed by the defendant, Robert Freedman. 4RP 3. Lemon and Freedman had known each other and worked together as longshoreman for many years. 2RP 167; 4RP 27.

On the way to Super Supplements Lemon stopped at a red light. 2RP 187-188. Freedman also stopped at the light. 4RP 4. His car was right behind Lemon's. 2RP 17, 4RP 4. While Lemon was waiting for the light to change, Freedman suddenly appeared at Lemon's open driver's side window. 2RP 17, 2RP 189. Freedman stuck his head in the window, and began yelling angrily at Lemon. 2RP 18, 2RP 189. He was angry about the pressures of being a

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<sup>1</sup> The Verbatim Report of the Jury Trial consists of five volumes referred to in this brief as 1RP (March 5, 2012); 2RP (March 7, 2012); 3RP (March 8, 2012); 4RP (March 12, 2012); 5RP 9 (March 13, 2012) and 6 RP (May 7, 2012).

crane operator and claimed that Lemon was not giving him enough respect. 2RP 189. He claimed that a week earlier, while he was operating a large gantry crane; Lemon had made what he believed were some "nasty" and "smart aleck" comments about him over the radio. 3RP 178-179, 4 RP5, 28. Freedman claimed that these comments distracted and upset him so much that he made a mistake in the operation of the crane, causing it to crash. 3RP 177-179.

When Freedman appeared at the window and began yelling, Lemon was surprised. 2RP 189. He told Freedman, "Get the hell away from me." 2RP 191. When Freedman did not stop yelling, Lemon tried to get out of his car, but Freedman was leaning against the car door blocking him in and continuing to yell. 2RP 191.

A UPS truck was stopped behind Freedman's car at the light. 2RP 25. The driver of the truck, Richard Greytak, saw Freedman standing at Lemon's window. 2RP 16-17. At first Greytak thought Freedman might be a panhandler, but he quickly realized that Freedman was angry. 2RP 18-19. Freedman appeared so angry that Greytak believed "it might be road rage." 2RP 17.

Greytak then saw Freedman walk back to his own car and retrieve an aluminum baseball bat from backseat through an open

window. 2RP 21 - 25, 2RP 124, 192. As he did this, Lemon got out of his car. 2RP 21. Freedman went back towards Lemon holding the bat with both hands, cocked back over his shoulder in a swinging stance. 2 RP 24. Greytak heard Lemon say to Freedman, "You don't want to do this." 2RP 25. Greytak testified that it looked as if Freedman was going to hit Lemon with the bat. 2RP 25. He told his co-worker, "This isn't going to end good." 2RP 25. Freedman continued to swing the bat in a threatening manner as the two exchanged more words. 2RP 25. Greytak honked his horn. 2RP 26. The light turned green and both men returned to their separate cars. 2RP 26.

Lemon resumed his trip to Super Supplements, which was about a block away from the stoplight where the encounter with Freedman had occurred. 2RP 195. He pulled into the parking lot and got out of his car to go into Super Supplements. 2RP 201. Freedman pulled into the parking lot and stopped his car right behind the bumper of Lemon's car. 2RP 116, 143,195.

A witness, Thomas Fleischer, happened to be loading his car in an adjoining parking lot about 25 yards away from where the assault occurred. 2RP 110 – 127, 2RP 119. Fleischer testified that he saw Lemon get out of his car and start to walk towards

Freedman's car, looking puzzled. 2RP 122. He then saw Freedman jumped out of his vehicle and rush up to Lemon with the bat in his hand. 2RP 119 -122. Freedman had an angry look on his face. 2RP 115. Fleischer dialed 911 on his cell phone as soon as he saw this, because it was clear to him that Lemon was about to get hurt. 2RP 122.

Fleischer watched as Freedman took a full two-handed swing with the bat and struck Lemon in the ribs, causing Lemon to stagger backward. 2RP 123 -124. He then quickly struck Lemon with the bat twice more in the stomach. 2RP 124. Lemon tried to defend himself by getting in between swings and grabbing at Freedman, yelling "quit hitting me, quit hitting me, quit hitting me." 2RP 125-126. Freedman continued to strike Lemon with the bat. 2RP 125-126. He struck Lemon at least six hits with the bat, hitting him in the abdomen, torso, leg and arm; releasing the bat only when police arrived, drew their guns and demanded three times that he drop the weapon. 2RP 129-130.

Anthony Lemon was hit hard enough that his left arm would not move. #RP 7. He suffered welts and bruises from the blows. 3RP 8. He went to the emergency room that night because of pain



and swelling. 3RP 76. He subsequently has seen a surgeon because of a torn bicep muscle. 3RP 77.

Freedman testified at trial that he was angry at Lemon and had followed Lemon into the parking lot for the sole purpose to fight with him. 4RP 15 – 16. When he approached Lemon in the parking lot on August 5, 2011, he intended to “settle the matter.” 4RP 16.

## **2. PROCEDURAL FACTS**

On August 11, 2011, the State filed charges of Assault in the 2<sup>nd</sup> Degree, with a deadly weapon enhancement, against Robert Freedman. CP 1 – 5. Trial was conducted March 5 - 12, 2012. 1RP 1 – 5RP 1. The jury returned a verdict of guilty as charged and found by special verdict that the defendant was armed with a deadly weapon at the time he committed the assault. CP 54-55.

### **C. ARGUMENT**

#### **1. STANDARD OF REVIEW**

Freedman argues that there was insufficient evidence presented at trial to support the jury’s special verdict that he was armed with a deadly weapon at the time he committed the assault against Anthony Lemon.

A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the

prosecution and to reverse the conviction *only* if it finds that no reasonable trier of fact could have found the person guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). An appellant's claim of insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Furthermore, "all reasonable inferences from the evidence must be drawn in favor of the State and against the defendant." State v. Gallagher, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201).

In conducting a review for sufficiency of evidence, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Furthermore, in determining whether sufficient evidence was presented, reviewing courts need not be convinced of the Appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact *could* so find. Gallagher, 112 Wn.App. at 613. Finally, in any appeal, the credibility of witnesses and the weight to be given the evidence are matters for the finder of fact. Bender v. City of Seattle, 99 Wn.2d 582, 594-95, 664 P.2d 492 (1983); See also WPIC 1.02. Appellate courts must defer to the trier

of fact to resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the evidence. State v. Gerber, 28 Wn.App. 214, 216, 622 P.2d 888 (1981); State v. Ong, 88 Wn.App. 572, 576, 945 P.2d 749 (1997).

**2. VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO ALLOW A REASONABLE TRIER OF FACT TO FIND THAT FROM THE MANNER AND CIRCUMSTANCES IN WHICH IT WAS USED THE METAL BAT WAS A DEADLY WEAPON.**

For the purposes of a special verdict a deadly weapon is defined as follows:

[A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce **or may easily and readily produce death.**

RCW 9.94A.825.

Freedman impliedly argues that because the injuries to Lemon were, in fact, not serious, the bat used to inflict those injuries could not be a deadly weapon. The focus of his argument is that because bat did not cause death, it was not used in a manner "likely" to produce death. This is an incorrect interpretation of the law. A jury need only find that the bat had the **capacity** to cause

death and, in the manner in which was used, **it *could* have caused death.**

There is ample evidence supporting a finding by any reasonable trier of fact that the instrument used by Freedman had the capacity to inflict death: it was a metal bat. 2 RP 23.

There is equally ample evidence that the manner in which the bat used was could easily have produced death: Freedman struck Lemon with the bat repeatedly in a vulnerable part of his body – his ribs and abdomen -- with sufficient force to cause him to stagger backwards. 2RP 123 -124. He then continued to strike Lemon at least six times in the torso, arm and leg, with sufficient force that the blows caused welts and bruises. 2RP 123 -126, 3RP 8, 3 RP 76. Lemon was not seriously hurt only because he was somewhat effective at deflecting the blows, not because Freedman stopped his attack. 2RP 125-126. Indeed, Lemon did not stop striking Lemon until the police showed up, drew their guns, and ordered him to stop. 2RP 129-130. The bat was clearly used in a manner that could easily cause death – it was used to strike the victim in the gut.

Furthermore, contrary to Freedman's contention, there is no authority requiring that an expert witness must testify before a jury may find that a bat is a deadly weapon. Rather, a jury may find the

evidence is sufficient if a witness to the crime has testified to the presence and use of such a weapon. State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). Given the fact of this case, a reasonable trier of fact with only an ordinary understanding of the human body could easily find that the metal baseball bat as it was used by Freedman against Lemon could have caused fatal injuries to Anthony Lemon – because the blows were forceful and aimed at a vulnerable part of his body. Simply stated, while the actual injuries to Anthony Lemon turned out to not be deadly, they easily could have been, given the instrument itself, and the manner in which it was used.

**3. VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO ALLOW A REASONABLE TRIER OF FACT TO FIND THAT THE METAL BAT USED BY FREEDMAN TO ATTACK ANTHONY LEMON WAS A DEADLY WEAPON AS A MATTER OF LAW.**

For the purposes of a deadly weapon special allegation, the legislature has found certain instruments to be so inherently dangerous that they are termed “deadly” regardless of the circumstances of their use -- i.e. they are deadly weapons as a matter of law. State v. Thompson, 88 Wash. 2d 546, 549, 564 P.2d 323, 325 (1977). These include “**any** metal pipe or bar used or

intended to be used as a club.” RCW 9.94A.825. (Emphasis added.) A pipe is commonly defined as a “tubular or cylindrical object”, while a club is defined as a heavy, usually tapering, staff wielded as a weapon. **Merriam–Webster Online** Dictionary, [http://www. Merriam–Webster.com/dictionary/pipe](http://www.Merriam–Webster.com/dictionary/pipe) and [/club](http://www.Merriam–Webster.com/dictionary/club) (February 8, 2013).

In this case, the instrument used by Freedman to beat Anthony Lemon was a tubular, cylindrical, metal baseball bat. Freeman wielded the metal bat as a club, in that he held it two fisted and struck the victim with it repeatedly. With this evidence before the jury, any reasonable trier of fact could find that the bat was a “metal pipe used as a club” i.e. that it was a deadly weapon, per se, as defined in RCW 9.94A.825.

**D. CONCLUSION**

For all the foregoing reasons, Freedman's conviction and sentence should be affirmed.

DATED this 11<sup>th</sup> day of February, 2013.

Respectfully submitted,


DANIEL T. SATTERBERG  
King County Prosecuting Attorney

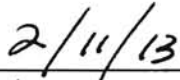
By: Margaret E. Nave 19004  
MARGARET E. NAVE, WSBA #19004  
Senior/Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROBERT FREEDMAN, Cause No. 68746-8-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name Margaret E. Nave  
Done in Seattle, Washington

  
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Date