Supreme Court No. 89520-1
Court of Appeals No. 68746-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

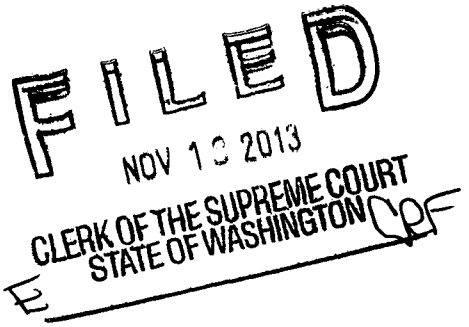
Respondent,

v.

ROBERT FREEDMAN,

Petitioner.

PETITION FOR REVIEW



SUSAN F. WILK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Constitutional Provisions

United States Supreme Court Decisions

Statutes

Rules

A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Robert Freedman, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 68746-8-I, filed September 16, 2013. A copy of the Court's slip opinion is attached as an Appendix.

B. ISSUE PRESENTED FOR REVIEW

Whether the State presented insufficient evidence to prove that a tee ball bat that caused minor bruising was "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" as required to support the deadly weapon special verdict and sentencing enhancement. RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Robert Freedman is a registered longshoreman. 3RP 159.[1] After becoming registered in 2000, Freedman became a "B man." Freedman is currently an "A man," which requires 1300 hours of work for a qualifying year. Id.

---

[1] The verbatim report of proceedings is cited herein as follows:

March 5, 2012	-	1RP	
March 7, 2012		-	2RP
March 8, 2012		-	3RP
March 12, 2012	-	4RP	
March 13, 2012	-	5RP	

Freedman has pursued and completed the necessary training to do the highly demanding work of operating cranes. 3RP 165-69, 175. A gantry crane carries a maximum weight of 78,000 pounds; empty, they weigh 4,000 – 5,000 pounds. 3RP 165. The cranes range in height from 100 to 140 feet. 3RP 166. Operating a crane is very dangerous; people can and do get killed. 3RP 169. Freedman describes operating a crane as an extremely difficult job which requires concentration and focus. 3RP 178.

On July 30, 2011, Freedman was working a gantry crane on Pier 18, in Seattle. 3RP 176. Anthony Lemon, another longshoreman who started at approximately the same time as Freedman, was yard supervisor that day. 2RP 167; 3RP 176. At some point during the shift, Lemon came over the radio and made some comments that Freedman found insulting and disrespectful.[2] 3RP 177. The comments upset Freedman and broke his concentration. 3RP 177, 179. Because of his broken concentration, Freedman brought in a crane too low and too fast, which could have resulted in death or serious injury to other persons. 3RP 179. The experience "scared the hell out of" him. Id.

[2] Lemon admitted to making insulting remarks to Freedman with the intention of irritating him, but believed that the incident happened on August 5, 2011, the same day that Freedman confronted him. 2RP 168, 174-76. An independent witness was not sure of the date of Lemon's comments but testified it was "a couple of weeks" before the charged incident. 5RP 11.

On August 5, approximately a week later, Freedman and Lemon were again working together. Freedman was the crane operator and Lemon was the supercargo. 3RP 180. They did not have any interactions during their shift that day, but as they were leaving Freedman saw Lemon and decided he wanted to talk to him about what had happened on July 30th. 3RP 182, 184. He intended to ask Lemon not to come over his radio anymore. 3RP 185. He explained that Lemon had a habit of making "smart-aleck" comments over the radio whenever Freedman was a crane operator, and the last time he did so Freedman made a mistake. 3RP 185; 4RP 5.

Freedman attempted to flag Lemon as Lemon was driving away from work, but Lemon did not respond. 3RP 184. They both drove in the same direction, Freedman following Lemon's Jeep in his Mercedes, and stopped at a red light. 4RP 4. Freedman got out of his car and approached Lemon. He hoped to have a reasonable conversation. 4RP 6.

When Freedman reached Lemon's car, Lemon rolled down his window. Freedman asked Lemon to not come over his radio anymore, but Lemon's response was disrespectful; he told Freedman to "get the F out of [his] face" and said he could say anything he wanted, anytime he wanted. 2RP 191; 4RP 7. He said that if Freedman was scared maybe he "shouldn't be up there." 4RP 7.

Initially Freedman responded by telling Lemon that he could say anything any time he wanted and any place he wanted, except when Freedman was in the cab of a gantry crane. 3RP 8. He explained that when Lemon came over the radio on July 30th, he caused Freedman to make a mistake. Id.

Lemon became agitated and, according to Freedman, took a swing at him from inside his car. 3RP 8-9. Lemon cursed at Freedman and attempted to exit his vehicle and approach him. 2RP 190, 192; 4RP 9. Lemon later explained that he wanted to get out of his car "for emphasis," to underscore his intention that Freedman should "get out of [his] face" and go back to his vehicle. 2RP 192.

Lemon is a large man and a former United States Marine. 2RP 18. At the time of the incident, Lemon weighed 215 pounds. 2RP 15. When the incident occurred, Freedman was 59 years old and 5'11" tall, and weighed 170 pounds. 3RP 158.

As Lemon became increasingly agitated, he began to complain that Freedman might be damaging his car. 4RP 10. Freedman decided to return to his own car, but as he left his position by Lemon's door, Lemon aggressively got out of his vehicle. Id. Aware that Lemon was a former Marine, and given the differences in their size, Freedman was fearful for his safety and pulled out an aluminum tee ball bat he kept in his car. 4RP

11. When Lemon saw the bat, he said, "Let's go settle this like men." 4RP 13.

Freedman interpreted this comment as an invitation to fight. 4RP 13-15. He felt that he had raised a legitimate health and safety issue with Lemon which Lemon had failed to acknowledge, that Lemon had instead responded by challenging him to a fight, and that he was not going to back down. 4RP 15. Lemon drove to a nearby parking lot near a Super Supplements store and hastily parked his jeep. 2RP 17. Freedman watched Lemon get out of his car and exited his own vehicle, taking the bat with him. 4RP 18-19.

Freedman later explained that he brought the bat because there was going to be a fight; since Lemon was a larger man than him, he wanted an "equalizer." 4RP 12, 19. Freedman was worried that Lemon would take the bat away from him and use it against him. 4RP 19. He swung at Lemon's side with the bat, hoping to knock the wind out of him and end the confrontation. 4RP 20. However Lemon grabbed him, and the two men grappled for a few moments. 4RP 21. Freedman hit Lemon with the bat at least twice more, in the thigh and in the arm. 2RP 206; 4RP 21. Lemon struck Freedman more than once in response with his fists, hitting him as hard as he could. 3RP 70-71. Soon after the fight started, the

police arrived and broke the fight up. 3RP 122-23; 4RP 25. Lemon suffered bruising and soreness as a result of the fight. 3RP 7-10.

The King County Prosecutor charged Freedman with one count of assault in the second degree with a deadly weapon enhancement. CP 1-5. Following a jury trial Freedman was convicted as charged. CP 54-55. On appeal, Freedman argued that the State failed to present sufficient evidence to prove that the tee ball bat met the definition of a deadly weapon, as required to sustain the deadly weapon special verdict.

D. ARGUMENT

This Court should review the question of substantial public interest whether an aluminum tee ball bat qualifies as a deadly weapon for purposes of a deadly weapon special verdict.

1. The State bears the burden of proving the essential elements of a criminal offense.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. 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 decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22,

616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. A deadly weapon enhancement requires the State to prove that the defendant was armed with an *actual* deadly weapon.

The State is permitted to seek a deadly weapon special verdict under RCW 9.94A.825. According to the statute,

> [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.

Certain items are *per se* deadly weapons according to the statute. Id.[3] A bat is not one of those items. Thus, in order to obtain a deadly weapon special verdict where the item is not a *per se* deadly weapon, the State bears the burden of proving that the defendant was armed with an actual deadly weapon. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980).

---

[3] The statute reads:

> The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

3. A tee-ball bat is not an implement or instrument which has the capacity to inflict death, and, from the manner in which it was used in this case, it was not likely to produce death.

The definition of "deadly weapon" for purposes of a sentencing enhancement is very specific and differs markedly from the definition of this term when it is an element of the crime of assault in the second degree. For purposes of a prosecution for assault in the second degree,

> "Deadly weapon" ... shall include any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). "Substantial bodily harm," in turn, is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4).

In drafting the deadly weapon sentence enhancement statute, the Legislature did not include the expansive term, "substantial bodily harm." Instead, it required the State to explicitly prove (a) that the item used had the capacity to inflict actual death, and (b) that it was *likely* to cause death. RCW 9.94A.825. Here, the tee ball bat did not meet either prong of the statute.

The Court of Appeals nevertheless held that the State presented sufficient evidence to support the enhancement. The Court first held that the bat had the capacity to inflict death. Slip Op. at 3. But this determination was based in part on the Court's mischaracterization of the tee ball bat as "an aluminum baseball or softball bat." Id. The bat in question was a "tee ball bat." 4RP 11. Freedman described it as a "kiddie bat." The bat was admitted into evidence.

The Court of Appeals concluded the question of the bat's capacity to inflict death was a jury question, Slip Op. at 4, but it was more appropriately the subject of expert testimony, as a topic beyond the understanding of the average lay juror. State v. Cheatam, 150 Wn.2d 626, 646, 81 P.3d 830 (2003) ("expert ... testimony may be admitted to assist juries in understanding phenomena not within the competence of the ordinary lay juror").

And, the State never introduced testimony showing that in the manner in which it was used in this case, the bat was likely to cause death. Indeed, the evidence at trial supported the conclusion that the bat was not likely to cause death. Freedman testified that even when Lemon was holding his arm, he never lost control of the bat. 4RP 22. Further, he testified that he never tried to hit Lemon in the head, and that in fact there were places that he tried to avoid hitting him because he did not want to

inflict serious injury. Id. Lemon testified that he believed Freedman was swinging the bat anywhere he could hit him and complained about the bruising and swelling he suffered as a result of the blows, 2RP 206; 3RP 7, 103, but he never testified that he was in fear for his life or that he thought Freedman was likely to kill him.

Thomas Fleischer, an independent eyewitness who saw the fight, described seeing Freedman inflict a few body blows and said that he was able to hear Lemon saying, "quit hitting me." 2RP 123-25. As Lemon began to physically grapple with Freedman, Fleischer said that Freedman continued to try to hit Lemon, but because they were struggling over the bat he could not use much force. 2RP 126. By the time the police arrived a couple of minutes later, the two men were engaged in a "tug of war." 2RP 128.

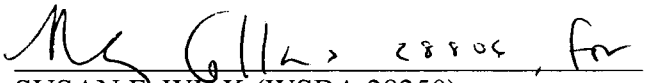
As the facts of this case illustrate, requiring the State to prove that an item is a deadly weapon for purposes of a deadly weapon special verdict and sentence enhancement is not a tick-box exercise. Rather, the State must present proof beyond a reasonable doubt that the item had the capacity to actually cause death, and was used in such a manner that it was likely to produce death. This Court should grant review of this question of substantial public interest, and hold the evidence was insufficient to support the deadly weapon special verdict.

E. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4(b)(4), this Court should grant review.

DATED this 11th day of October, 2013.

Respectfully submitted:



SUSAN P. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 68746-8-I
Respondent,	)	DIVISION ONE
v.	)	
ROBERT MICHAEL FREEDMAN,	)	UNPUBLISHED
Appellant.	)	FILED: September 16, 2013

Cox, J. – Robert Freedman challenges the deadly weapon enhancement portion of his judgment and sentence for second degree assault, claiming there was insufficient evidence to find that the aluminum bat he used in the assault qualified as a deadly weapon. In his Statement of Additional Grounds, he argues that he received ineffective assistance of counsel. We disagree with both claims and affirm.

Freedman and Anthony Lemon worked together for a number of years as longshoremen. One day in August 2011, both men left work around the same time in their vehicles. Freedman testified that he wanted to talk to Lemon about a recent incident at work.

At a stoplight on Elliott Avenue in Seattle, Freedman got out of his car and walked to the driver side window of Lemon's van. A UPS truck driver, who was stopped behind Freedman's car, testified that it appeared that Freedman and Lemon were in a verbal argument. At one point, Lemon got out of his van and

Freedman went back to his car to grab an aluminum bat. The men eventually got back into their vehicles and drove into a nearby parking lot.

In the parking lot, an eyewitness called 911 when he saw Freedman get out of his car with an aluminum bat and approach Lemon. This witness testified that Freedman struck Lemon approximately six times with the bat before law enforcement arrived on the scene.

Lemon testified that he suffered welts and bruises, and he had to go to the emergency room because of pain and swelling. He also had to see a surgeon because of a torn bicep muscle.

The State charged Freedman with second degree assault. It also alleged the Freedman used a deadly weapon for the purpose of a deadly weapon enhancement.

A jury convicted Freedman as charged, including the deadly weapon allegation.

Freedman appeals.

DEADLY WEAPON ENHANCEMENT

Freedman argues that the deadly weapon enhancement must be reversed because the evidence was insufficient to establish that the aluminum bat qualified as a deadly weapon. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find guilt beyond a reasonable doubt.[1] "A claim of insufficiency admits the truth of the State's

[1] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

evidence and all inferences that reasonably can be drawn therefrom."[2] Matters pertaining to credibility of witnesses, conflicting testimony, and persuasiveness of the evidence are the exclusive province of the fact finder.[3]

For a deadly weapon allegation, the State must prove that an "implement or instrument . . . 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."[4] Whether a weapon is deadly is a question of fact that the State must prove beyond a reasonable doubt.[5]

Here, there was sufficient evidence that the weapon used in this case had "the capacity to inflict death."[6] Eyewitness, Thomas Fleischer, testified that he saw Freedman use an "aluminum baseball or softball bat" to strike Lemon. Common sense supports the view that an aluminum bat has the capacity to inflict death.

Additionally, we note that such a bat is sufficiently similar to a "metal pipe or bar used or intended to be used as a club," which would make it a deadly weapon as a matter of law.[7]

---

[2] Id.

[3] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

[4] RCW 9.94A.825.

[5] State v. Tongate, 93 Wn.2d 751, 753-55, 613 P.2d 121 (1980).

[6] RCW 9.94A.825.

[7] See id. ("The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer

In sum, the jury properly determined that the aluminum bat used in this assault had the "capacity to inflict death."[8]

The remaining question is whether there was substantial evidence that the manner in which Freedman used the bat "[was] likely to produce or [could have] easily and readily produce[d] death."[9] We conclude there was such evidence.

Fleischer, the eyewitness, observed Freedman deliver three "quick" strikes with the bat. For the first strike, Freedman used two hands on the bat and hit Lemon in the ribs or abdomen with a force that made Lemon move "backwards." Fleischer testified that Freedman quickly hit Lemon two more times with the bat in the abdomen using one hand. In total, Fleisher testified that Freedman hit Lemon six times with the bat though the last three strikes did not look as forceful as the first three.

Lemon testified that before Freedman started swinging the bat he said he was going to "teach [Lemon] a lesson." He also testified that Freedman "tried to hit [him] in the head," but Lemon was able to block him from doing so.

As noted above, Lemon testified that he suffered welts and bruises. He also stated that he had a torn bicep muscle.

Taking this evidence in the light most favorable to the State, there was sufficient evidence presented for a rational finder of fact to decide that the

---

than three inches, any razor with an unguarded blade, ***any metal pipe or bar used or intended to be used as a club***, any explosive, and any weapon containing poisonous or injurious gas.") (emphasis added).

[8] See id.

[9] Id.

manner in which Freedman used the bat could have "easily and readily produce[d] death."[10]

Freedman argues that the State presented "no evidence of the bat's capacity to inflict actual death." He points out that the State "did not introduce expert or other testimony regarding how such a bat could be used to inflict actual death." As we already discussed, the capacity of the aluminum bat to inflict death is well supported by the evidence. And, as the State points out, Freedman does not cite any authority requiring an expert witness to testify about an instrument's capacity to inflict death. This is particularly apparent where the jury could assess whether the bat had the required capacity without expert testimony.

Freedman also contends that the evidence did not show that the manner in which he used the bat was "likely to produce or may easily and readily produce death."[11] He points to his testimony that he never tried to hit Lemon in the head and he avoided hitting him in the head because "he did not want to inflict serious injury." But, as discussed above, Lemon testified that Freedman tried to hit him in the head with the bat. We do not review the jury's credibility determinations on appeal.[12]

Freedman also highlights the fact that Lemon did not testify that he "fear[ed] for his life" during the altercation. But absence of this type of testimony

---

[10] Id.

[11] Brief of Appellant at 11-12 (citing RCW 9.94A.825).

[12] Recreational Equip., Inc. v. World Wrapps Nw., Inc., 165 Wn. App. 553, 568, 266 P.3d 924 (2011).

is irrelevant to the jury's charge. Rather, the jury properly determined, based on the evidence before it, that Freedman was armed with a deadly weapon when he committed the crime.

In sum, the State presented sufficient evidence for a rational finder of fact to conclude that Freedman was armed with a deadly weapon when he assaulted Lemon.

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Freedman raises one issue. He argues that his counsel was ineffective for not calling any character witnesses to testify about Freedman's reputation for "peacefulness." This argument is not persuasive.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[13] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[14] Failure on either prong defeats a claim of ineffective assistance of counsel.[15]

---

[13] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[14] McFarland, 127 Wn.2d at 336.

[15] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Freedman fails to show that his counsel's decision not to call any character witnesses was objectively unreasonable. Freedman's counsel explained to the trial court that he was not calling any character witnesses to testify as to Freedman's reputation for peacefulness because it was not disputed that the physical altercation occurred. Rather, Freedman asserted that he acted in self-defense. Because Freedman fails to establish deficient performance, we need not reach the question of prejudice.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68746-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Margaret Nave, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 11, 2013