

APPELLANT'S BRIEF
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STATE OF WASHINGTON
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NO. 41241-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT R. SPRAGUE, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

PM 3-17-11

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I. ASSIGNMENTS OF ERROR

1. The jury erred by finding without sufficient evidence that Mr. Sprague was armed with a “deadly weapon.”
2. The court erred by imposing a deadly weapon enhancement without sufficient evidence that Mr. Sprague was armed with a deadly weapon.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The jury erred by finding without sufficient evidence that a bamboo skateboard is a “deadly weapon” without any evidence that the skateboard had the “capacity to inflict death” nor that it was “likely to produce death.”

III. STATEMENT OF THE CASE

On the evening of October 10, 2009, Robert Sprague, his wife, Christine Sprague, and their friend, Nathan Murphy, were leaving the bar of a private club in Tacoma when they encountered Amy Dupree and her husband, Robert Dupree, outside in the smoking shelter. RP 91, 133, 297. Mrs. Dupree approached Mr. Murphy when she saw he was carrying a

skateboard. RP 55, 14. Apparently, earlier in the evening, Mrs. Dupree took the skateboard and rode it down the halls of the club without permission or Mr. Murphy's knowledge. RP 12. Mrs. Dupree said something to Mr. Murphy, about having ridden his skateboard. RP 14, 55. There is a dispute about how Mr. Murphy responded; he may have called Mrs. Dupree a "bitch." RP 14, 55, 134, 446.

Mr. Dupree took offense, and came out of the shelter following after the Spragues and Mr. Murphy, who had continued walking past to the parking lot. RP 15, 134. Mr. Dupree said that when he confronted Mr. Murphy, Mr. Murphy said "bring it on you f---ing gorilla," although that is disputed by Mr. Murphy. RP 56, 134. However, it is undisputed that the Spragues and Mr. Murphy were walking away as Mr. Dupree continued to follow them. RP 304.

Mr. Dupree said his only motive in following the Spragues and Mr. Murphy was to obtain an apology for his wife. Whatever his motives, Mr. Dupree was a physically threatening man—very large and imposing at six foot three inches tall and 320 pounds.¹ RP 63, 248-49. When Mr. Dupree followed the retreating Spragues and Mr. Murphy all the way down the block, they felt concerned and threatened. RP 305, 407. The Spragues

¹ Mr. Sprague is only five feet ten inches tall, 215 pounds, RP 432, and Mr. Murphy is only five feet eight inches tall, RP 412.

and Mr. Murphy testified that Mr. Dupree repeatedly called Mr. Murphy a “faggot,” and threatened to “kick your punk ass.” RP 303-4, 306, 406, 446, 468. Mrs. Sprague said she asked Mr. Dupree to leave them alone. RP 306.

At the end of the block, Mr. Dupree caught up to the three. Again, there is a dispute about what occurred. Mrs. Dupree could only see Mr. Murphy from where she stood, and could see that Mr. Dupree was still berating Mr. Murphy for insulting his wife. RP 17. At some point, Mr. Murphy handed his skateboard to Mr. Sprague because he was preparing to fight Mr. Dupree, who he thought was about to hit him. RP 409.

Mr. Sprague and Mr. Murphy testified that Mr. Dupree had Mr. Murphy cornered and was bumping up against him in a threatening manner, then turned on Mr. Sprague, saying, “how about you, tough guy?” RP 324, 415-416, 469, 470, 471.

Mr. Sprague said he threw the skateboard at Mr. Dupree to force him to leave them alone, but did not hit him deliberately. RP 472. The Duprees testified that Mr. Sprague swung the skateboard at Mr. Dupree and hit him in the head, knocking him to the ground. RP 17, 57-58.

Mr. Sprague testified that he acted out of fear that Mr. Dupree would hit him. RP 488. Mr. Sprague was afraid to physically fight Mr.

Dupree because he had a cancerous tumor in his eye that was unstable and could be dislodged by fighting, causing blindness or death. RP 472.

After the skateboard hit Mr. Dupree, the Spragues and Mr. Murphy saw Mr. Dupree start to get up, still yelling at the Spragues. RP 59, 383, 473. Mr. Murphy retrieved the skateboard and he and the Spragues quickly got into their truck and drove away. RP 59, 383, 473. Once home, the Spragues called the club manager about the incident. RP 383.

When the skateboard hit Mr. Dupree, he suffered injury to his ear, which was lacerated, a fractured cheekbone, and a fractured eye socket. RP 61. Declining an offer of an ambulance, Mr. Dupree was driven by a friend to the hospital and released the same evening. RP 21. The treating physician testified that Mr. Dupree did not have any “significant intracranial injury” and the neuro exam was normal. RP 32. He testified that the injury was similar to that one would suffer from a fist fight, or from a bat or hitting the dashboard of a car. RP 34. No one testified that the injury was or could have been life threatening.

Mr. Sprague was charged with second degree assault, with a special allegation that he was armed with a deadly weapon.² CP 1. He was convicted and sentenced to six months for assault, with a deadly

² Mr. Sprague was also charged with, and acquitted of, third degree assault for allegedly shoving a witness. CP 1-2, RP 559.

weapon enhancement of twelve months. CP 39. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE JURY ERRED BY FINDING WITHOUT SUFFICIENT EVIDENCE THAT A BAMBOO SKATEBOARD IS A “DEADLY WEAPON” WITHOUT ANY EVIDENCE THAT THE SKATEBOARD HAD THE “CAPACITY TO INFLECT DEATH” NOR THAT IT WAS “LIKELY TO PRODUCE DEATH.”

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, Mr. Sprague was found guilty of second degree assault under RCW 9A.36.021(a), specifically, recklessly inflicting substantial bodily harm. CP 1. The State further charged Mr. Sprague of committing this crime with a “deadly weapon,” as defined by RCW 9.94A.825, to wit—the bamboo skateboard. CP 1. The jury found that the bamboo skateboard that hit Mr. Dupree met the definition of “deadly weapon.” RP 559. Therefore, Mr. Sprague’s six month sentence for assault was extended to eighteen months. CP 580. The imposition of the deadly

weapon sentence enhancement was in violation of due process because the State failed to prove beyond a reasonable doubt that the alleged “weapon” used here, the bamboo skateboard, met the definition of a “deadly weapon.”

In order to impose a deadly weapon enhancement under RCW 9.94A.825, the State has the burden of proving that the skateboard was a deadly weapon. A skateboard is not one of the enumerated per se deadly weapons, which are:

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. Therefore, the State must prove that the bamboo skateboard used here meets the definition of a “deadly weapon.”

RCW 9.94A.825 provides that a “deadly weapon,” for purposes of the sentence enhancement, “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.” Mr. Dupree did not suffer a mortal injury in this case. There was no testimony that his injury could have produced death. The skateboard was described as a bamboo board, three to four feet long, made of half inch thick bamboo, with plastic

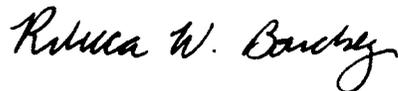
wheels. RP 413-414. There is no evidence of how much it weighed. There is no evidence in the record that this board had the capacity to inflict death. Further, there is no evidence that the manner in which it was used “is likely to produce or may easily produce death.” No one testified that death could have resulted from this “weapon.”

The State has failed in this case to produce *any* evidence whatsoever that the skateboard here could have or was likely to cause death. Thus, the imposition of the sentence enhancement violates due process and must therefore be reversed and this matter remanded for the reduction of the sentence.

V. CONCLUSION

There was no evidence produced in this case that the bamboo skateboard met the legal definition of a “deadly weapon” because there is no evidence that it could have or was likely to cause death. Therefore, the deadly weapon sentence enhancement must be reversed.

DATED: March 17, 2011



Rebecca Wold Bouchey #26081
Attorney for Appellant

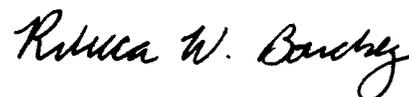
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CERTIFICATE OF SERVICE

I certify that on March 17, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Appellant:
Robert Ralph Sprague
DOC# 343369
Monroe Corrections Center
P.O. Box 777
Monroe, WA 98272



Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant