

NO. 41241-1

COURT OF APPEALS
DIVISION II
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT RALPH SPRAGUE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 09-1-04599-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence for the jury to find that a skateboard was a deadly weapon where the defendant used the board to strike the victim's head in a manner which was likely to produce or may have easily and readily produced death?

B. STATEMENT OF THE CASE.

1. Procedure

On October 13, 2009, the State charged ROBERT RALPH SPRAGUE, hereinafter, "defendant," with one count of assault in the second degree and one count of assault in the fourth degree. CP 1-2. The State alleged that defendant committed the felony assault with a deadly weapon other than a firearm, to wit: a skateboard. CP 1-2.

Jury trial commenced July 22, 2010, before the Honorable Thomas J. Felnagle. RP 1. The court gave the jury defendant's proposed self-defense instructions, over the State's objection. CP 3-28 (Jury Instruction 13, 14, 15); RP 495-96. The jury found defendant guilty of assault in the second degree and that he was armed with a deadly weapon. CP 29, 30; RP 559. The jury found defendant not guilty of assault in the fourth degree. CP 31; RP 559.

On September 3, 2010, the court held a sentencing hearing. RP 566. Defendant requested an exceptional sentence downward. RP 572.

The court denied defendant's request, finding no legal justification for a departure from the standard range. RP 578. The court sentenced defendant¹ to six months for the assault, together with a twelve-month deadly weapon enhancement for a total sentence of eighteen months. CP 34-46; RP 580.

Defendant filed a timely notice of appeal. CP 47-58.

2. Facts

On October 10, 2009, Robert and Amy Duprie were at the Puyallup Eagles club to celebrate Mrs. Duprie's uncle's birthday. RP 11. During the party, Mrs. Duprie noticed a skateboard leaning against the wall and briefly rode it in the hallway. RP 12. When she was finished, she placed the skateboard back against the wall and went back to the party. RP 12.

Later that evening, the Dupries were outside at the designated smoking area with friends when they saw defendant, his wife, and another man exit the Eagles. RP 14, 54, 91, 133. The second man, later identified as Nathan Murphy, was carrying the skateboard. RP 14, 401. When Mrs. Duprie saw Mr. Murphy with the skateboard, she thanked him for

¹ Defendant had an offender score of zero, giving him a standard range of three to nine months for the assault charge. CP 34-46; RP 566. With the addition of the deadly weapon enhancement, defendant's standard range totaled 15-21 months. RP 566.

allowing her to ride it earlier in the evening. RP 14, 55, 92, 134. Mr. Murphy expressed his displeasure at her use of his skateboard without his permission with a series of obscene statements. RP 14, 55, 92, 134. Mr. Duprie was startled by Mr. Murphy's behavior and demanded that he apologize to Mrs. Duprie. RP 55-56.

Defendant's group walked away from the Dupries, but continued to shout taunts and expletives as they went. RP 56, 94, 136-37. Mr. Duprie followed, still demanding an apology. RP 56. Mr. Duprie was briefly distracted by one of his friends and when he returned his attention to Mr. Murphy, he noticed that the skateboard was gone. RP 57. Defendant stepped out from behind the building and swung the skateboard and Mr. Duprie's head. RP 17, 137. Mr. Duprie never saw the blow coming. RP 57-58.

The next thing Mr. Duprie knew was that he was on the ground with Mrs. Duprie standing over him. RP 58. He believed he had been shot, but Mrs. Duprie told him he had been hit with the skateboard. RP 58. They went back into the Eagles building and a friend called 911. RP 99.

After striking Mr. Duprie, defendant's group ran to defendant's truck and left the scene. RP 59, 98, 141.

Puyallup Police Officer Chris Davis responded to the call. RP 221. After the witnesses at the club identified defendant as a member, Officer Davis went to defendant's house. RP 222. Officer Davis knocked on the

door and saw a man matching defendant's description through the window. RP 222. No one ever answered the door, so the officers left the house. RP 223, 236.

Mr. Duprie's grandfather drove him to the hospital. RP 60. He was diagnosed with significant head trauma, consistent with blunt force trauma like being hit with a bat. RP 30-31, 34. Mr. Duprie had a lacerated ear, blood in his sinus cavity, a broken eye socket, broken sinus, and a broken cheekbone. RP 33-34. Mr. Duprie also had damage to his teeth. RP 61.

Defendant, his wife, and Mr. Murphy testified on defendant's behalf. RP 288, 401, 432. According to defendant, his group did not engage Mr. Duprie, and Mr. Duprie was the aggressor. RP 444-449, 468. Neither Mr. Murphy or defendant's wife saw defendant hit Mr. Duprie with the skateboard, and defendant claimed that he threw the board at Mr. Duprie because Mr. Duprie was charging him. RP 382, 409, 472.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVINC A RATIONAL FACT-FINDER THAT DEFENDANT WAS ARMED WITH A DEADLY WEAPON WHEN HE ASSAULTED THE VICTIM BY STRIKING THE VICTIM'S HEAD WITH A SKATEBOARD.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State*

v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the

testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

For deadly weapon sentence enhancements, there must be sufficient evidence that the defendant was armed with an actual deadly weapon. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). RCW 9.94A.125 defines a deadly weapon as "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.125; CP 3-28 (Jury Instruction 21). Whether a weapon is deadly is a question of fact, which the State must prove beyond a reasonable doubt. RCW 9.94A.125; *State v. Pam*, 98 Wn.2d 748, 753-54, 659 P.2d 454 (1983). The circumstances of a weapon's use include the intent and present ability of the use, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted. *State v. Winnings*, 126 Wn. App. 75, 88, 107 P.3d 141 (2005).

Here, the State presented sufficient evidence to convince a rational fact finder that defendant was armed with a deadly weapon when he assaulted Mr. Duprie. The description of the skateboard indicates it was a substantial weapon. The skateboard was approximately four feet long, as it was described as upper-chest height on a five-foot-two-inch woman and chest height on a five-foot-eight-inch man. RP 13, 413. Mrs. Duprie described the skateboard as “heavy.” RP 13. Mr. Martin referred to it as a “lightweight” board, but admitted it was made from half inch bamboo and had metal trucks which attached the wheels to the body of the board. RP 414, 421. Depending on the way the skateboard was used, it is not unreasonable to find that a four foot long, half inch thick plank of bamboo is capable of causing death.

The circumstances of the skateboard’s use support a finding that the skateboard was a deadly weapon. As defendant ambushed Mr. Duprie and swung the board at his head, it is reasonable to infer that defendant intended to hit Mr. Duprie in the head with the skateboard. *See* RP 17, 58. The force of the strike immediately dropped Mr. Duprie, a six-foot-two-inch 320 pound man, to the ground and caused him to briefly lose consciousness. RP 58, 60, 63. Mr. Duprie believed that the impact of the board to his head was actually a gunshot. RP 58.

Defendant struck Mr. Duprie on the side of the head, causing significant head trauma to the left side of Mr. Duprie’s face. RP 30-31. The blow lacerated Mr. Duprie’s ear, requiring a double layer of stitches.

RP 31-32. Mr. Duprie also suffered multiple facial fractures, including fractures to his eye socket, sinus, and cheekbone. RP 33-34. The blow caused damage to the left side of Mr. Duprie's dental structure, ultimately resulting in five root canal procedures. RP 22. At the time of trial, Mr. Duprie indicated that he continued to have difficulty with his teeth and his ear. RP 61, 63-64. Mr. Duprie was able to avoid surgery on his cheekbone, but was informed by his doctor that the blow would likely have killed a smaller man. RP 63.

Taken in the light most favorable to the State, there was sufficient evidence presented at trial for the jury to find that a blow to the head with a heavy, solid object had the capacity to inflict death. It was also reasonable for the jury to infer that the way defendant used the skateboard may have easily and readily caused Mr. Duprie's death.

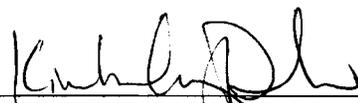
D. CONCLUSION.

As the State presented sufficient evidence for a reasonable fact finder to conclude that defendant was armed with a deadly weapon when

committed assault, the State respectfully requests this court to affirm the jury's verdict and defendant's sentence.

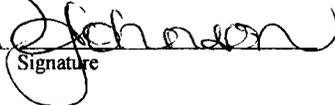
DATED: MAY 20, 2011

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/20/11 
Date Signature