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NO. 53081-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Respondent,

v.

JAMES GARRETT BALDWIN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE DAVID L. EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

1. **Substantial evidence supports a finding that the club the Defendant used to assault the victim was a deadly weapon.**
2. **The trial court did not abuse its discretion by allowing evidence of the Defendant's prior convictions.**

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

With the exceptions of the passages quoted below, the State is satisfied with the Defendant's statement of the case for the purposes of this appeal.

## **ARGUMENT**

1. **Substantial evidence supports the jury's finding that the lead-weighted fish club was a deadly weapon.**

The Defendant first challenges the sufficiency of the evidence supporting the jury's finding that the fish club the Defendant battered Mr. Phillips' head with was a deadly weapon. That finding was supported by substantial evidence, including the actual weapon, which was admitted into evidence for the jury's inspection.

### **Standard of review for a challenge to sufficiency of the evidence.**

“When the sufficiency of the evidence is challenged in a criminal case, 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, 1074 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) A reviewing court need not be convinced beyond a reasonable doubt, so long as enough evidence exists so that any rational trier of fact could have found guilt beyond a reasonable doubt. *Id.* at 201.

Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).)

Circumstantial and direct evidence are accorded equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

**The jury was presented with sufficient evidence to determine the club was a deadly weapon.**

The relevant definition of “deadly weapon” as used in RCW 9A.36.021(1)(c) “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). When deciding if a weapon is deadly based on the circumstances of use, “the intent and ability of the user, the degree of force, the part of the body to

which it was applied, and the actual injuries that were inflicted.” *State v. Barragan*, 102 Wn. App. 754, 761, 9 P.3d 942, 947 (2000) (citing *State v. Shilling*, 77 Wn.App. 166, 171-72, 889 P.2d 948 (1995).) Given all these factors, even a pencil can be a deadly weapon. *Id.*

Mr. Phillips stated that he was familiar with the weapon, and it was to kill fish. RP at 56. Mr. Phillips stated that the club had a lead end on it. RP at 56. The weapon in question here was described as being 12 to 14 inches in length. RP at 35.

Clubs of this kind have long been held to be deadly weapons in this state. For example, billy clubs are defined as *per se* deadly weapons in RCW 9.94A.825. From the description given by the witnesses, this club would appear to be similar to a billy club, except with a deadlier, lead weighted end. The lead end is similar to other weighted clubs, such as a sand club, which is also defined as a deadly weapon in RCW 9.94A.825.

The jury were able to inspect the weapon, which was admitted into evidence as Exhibit #12. RP at 41. They were correctly instructed as to the definition of “deadly weapon.” CP at 42. This Court should not second-guess the jury’s determination based on a cold record.

**The victim suffered impairment from the attack.**

In relevant part, a deadly weapon in fact is one that inflicts substantial bodily harm. RCW 9A.36.021(1)(c). “Substantial bodily harm,” is defined as “bodily injury which... causes a temporary but substantial loss or impairment of the function of any bodily part or organ....” RCW 9A.04.110(4)(b).

In *State v. McKague* the Defendant was charged with Assault in the Second Degree and Robbery in the First Degree after striking a shopkeeper repeatedly while stealing a tin of oysters. *McKague*, 159 Wn.App 489, 497-98, 246 P.3d 558 (2011). On appeal, the defendant challenged the sufficiency of the evidence of the “temporary substantial impairment” caused by the assault, as the shopkeeper had been diagnosed with a concussion, but suffered no loss of consciousness. *Id.* at 503.

The shopkeeper testified that he was dizzy for a while after the assault and could not stand up. *Id.* at 504. An officer testified that the shopkeeper was disoriented and “a little bit off.” *Id.* This Court held that, in a light most favorable to the State, a rational trier of fact could find a brain impairment that was “a temporary but substantial loss or impairment of the function of any bodily part or organ” based on this testimony. *Id.*

In this case, Mr. Laumen testified that he believed the club capable of rendering Mr. Phillips unconscious, and stated he thought it did render him unconscious. RP at 39. Mr. Phillips said he thought the Defendant would kill Mr. Phillips with the club. RP at 39. Mr. Laumen testified that he was surprised to see Mr. Phillips walking after the police arrived, which Mr. Laumen estimated at twenty minutes after the incident. RP at 38-40. Deputy Wells later testified that it was in fact 25 minutes. RP at 59. Mr. Laumen testified that, after the assault, Mr. Phillips appeared dazed and confused. RP at 40.

Deputy Wells testified that when he finally entered the house where the assault took place, which must have been over thirty minutes after the assault, Mr. Phillips was still slow in his movements. RP at 66.

In a light most favorable to the State, given that Mr. Phillips was still stunned up to thirty minutes after the assault, this Court should hold that the jury's determination that the club was a deadly weapon is supported by substantial evidence, and leave the conviction undisturbed.

**2. The trial court properly used its discretion to decide that the Defendant's prior felony convictions should be used to impeach his testimony.**

The Defendant also assigns error to the trial court's decision to allow the State to impeach him with his prior felony convictions.

However, the trial court performed an on-the-record balancing test before deciding that the prior convictions were probative. This is within the trial court's discretion.

**Standard of review for admitting impeachment evidence.**

The Defendant's prior conviction was admitted pursuant to ER 609(a)(1). Rulings made under ER 609 are reviewed for an abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 705, 921 P.2d 495, 498 (1996) (citing *State v. King*, 75 Wn.App. 899, 910 n. 5, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995).) "A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court." *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001) (citing *State v. Sutherland*, 3 Wn.App. 20, 21, 472 P.2d 584 (1970).) If reasonable people could differ on the issue, there is no abuse of discretion. *Id.* (citing *Sutherland* at 22.)

Because the admission of impeachment evidence is not a constitutional issue, it is subject to harmless error analysis. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).

**The trial court properly applied the *Alexis* factors and decided that the evidence of the Defendant's prior convictions should be admitted.**

ER 609(a) provides, in relevant part,

For the purpose of attacking the credibility of a witness... evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime... was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered...

The test for whether the probative value outweighs the prejudice has become known as the *Alexis* factors. *See State v. Gonzales*, 83 Wn.App. 587, 590-94, 922 P.2d 210 (1996). The *Alexis* factors are:

(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant [at the time of the crime that is being offered for admission]; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

*State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269, 1271 (1980).

In the instant case, the trial court decided that the *Alexis* factors weighed in favor of admissibility in an on-the-record analysis. The trial court noted that the Defendant has a lengthy criminal history, as was enumerated in the State's trial brief. RP at 81 *and see* CP at 20-22. However, the State was seeking to admit only two of the Defendant's prior convictions. Those prior convictions were only four and seven years prior, making them fairly recent, and favoring admissibility. RP at 78. The Defendant was an adult at the time of those offenses, in his late thirties and early forties, so this factor favors admission. RP at 79. And the Defendant had denied hitting anyone with the fish club, so his credibility was central to the issue, again favoring admission. RP at 79-80.

The Defendant performs the same analysis, but comes to the opposite conclusion. Even if this is a point on which reasonable people could differ, this is not an abuse of discretion, and the trial court's decision should be upheld. *Demery* at 758.

**The prior convictions were not described as “domestic violence” or cumulative.**

The Defendant argues that admission of the prior convictions was unduly prejudicial because the prior convictions were for “violating

domestic violence no-contact orders.” *See* Brief of Appellant at 12.

However, the State only referred to the Defendant’s prior convictions as being for “felony violation of a court order.” RP at 84. Even assuming, *arguendo*, that use of the term “domestic violence” would have rendered the prior convictions too prejudicial to be admissible, those words were never used in front of the jury.<sup>1</sup>

The Defendant cites to *State v. Gomez* 75 Wn.App 648, 652, 880 P.2d 65 (1994) for the proposition that admission “unnecessarily cumulative” convictions is prejudicial. However, in *Gomez*, that trial court admitted evidence of *six* prior felony convictions. *Gomez*, 75 Wn.App 648, 652, 880 P.2d 65 (1994). In that case, with the number of convictions introduced, the court was concerned that the jury might convict the defendant based on his record, rather than his culpability. *Id.*

In the instant case, evidence of only two prior convictions were admitted. RP at 84. This is hardly the overly cumulative evidence as in *Gomez*.

After the Defendant chose to testify, the trial court performed an on-the-record balancing test and decided that the Defendant’s prior two felony convictions should be admitted. The State referred to these two

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<sup>1</sup> The prior convictions were, however, crimes of domestic violence. *See* RP at 111.

convictions as “felony court order violations,” and did not use the term “domestic violence” or “assault” or any other words that would imply a use of force.

**The jury needed the evidence about the Defendant’s past to evaluate his testimony.**

In *State v. Millante*, a murder case, the defendant claimed self-defense, and took the stand. *State v. Millante*, 80 Wn.App 237, 243, 908 P.2d 374 (1995). The State wanted to introduce the defendant’s five prior felony convictions to impeach his testimony. *Id.* at 244. The court used the *Alexis* factors, and decided that, because credibility was paramount in the case, and without evidence of his prior convictions, the jury would have no way to judge the Defendant’s testimony, and admitted the evidence. *Id.* at 245. Division 1 of this court upheld that decision. *Id.*

In this case, the Defendant testified that he did not strike Mr. Phillips with a club. Without the impeachment evidence, the jury would have little to evaluate the Defendant’s testimony. The fact that he is a convicted felony was probative, as the trial court found. This Court should uphold the trial court’s decision and uphold the conviction.

## CONCLUSION

The Defendant assaulted Allen Phillips with a fish club, a lead-tipped wooden club that is intended to kill animals. The witness to the assault stated that he believed that the Defendant was going to kill Mr. Phillips, and that he believed the weapon would render Mr. Phillips unconscious. When Officer Wells arrived twenty five minutes later, Mr. Phillips still appeared dazed and confused from the beating. The weapon in question was admitted into evidence, and the jury were permitted to inspect it. Rather than second-guess that determination, this Court should decline the invitation to second-guess the jury, whose constitutional mandate is to determine the facts of a case.

Nor should this Court overturn this conviction based on the Defendant's claim of an abuse of discretion. The law regarding admitting felony convictions is clear, and the trial court here performed the balancing test and made a determination that the jury should know of the Defendant's prior convictions when evaluating his testimony. Even if this Court can see the logic in the Defendant's counter-evaluation, this still does not constitute an abuse of discretion. Only if the trial court's decision was manifestly unreasonable, and resulted in prejudice would this be grounds to reverse the conviction.

The Defendant received a fair trial. His rights were not violated.

The trial court did not err. His conviction should be affirmed.

DATED this 26<sup>th</sup> day of September, 2019.

Respectfully Submitted,

BY: 

\_\_\_\_\_  
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JFW/lh

# GRAYS HARBOR PROSECUTING ATTORNEY

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## Transmittal Information

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