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OCTOBER 28, 2016
Court of Appeals
Division III
State of Washington

34001-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERIK CLIFFORD LUDEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF WHITMAN COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENT OF ERROR1

B. ISSUE1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT4

 1. EVIDENCE IS INSUFFICIENT TO SUPPORT THE
 DEADLY WEAPON SENTENCE ENHANCEMENT4

E. CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. DEVRIES, 149 Wn.2d 842,
72 P.3d 748 (2003)..... 4

STATE V. ECKENRODE, 159 Wn.2d 488,
150 P.3d 1116 (2007)..... 4, 5

STATE V. MILLS, 80 Wn. App. 231,
907 P.2d 316 (1995)..... 4

STATE V. SALINAS, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 4

STATE V. SCHELIN, 147 Wn.2d 562,
55 P.3d 632 (2002)..... 4

STATUTES

RCW 9.94A.825..... 5, 6

A. ASSIGNMENT OF ERROR

1. The court erred in imposing a 24-month sentence enhancement based on the jury verdict finding the defendant was armed with a deadly weapon.

B. ISSUE

1. Was the evidence, which showed the victim died from a series of blunt impact blows likely inflicted with a fist, sufficient to support the deadly weapon sentence enhancement?

C. FACTS

Eric Luden's father, Virgil Luden, went to Pullman to help Eric move a large item of furniture. (RP 31-32) In the afternoon, Eric's neighbor heard loud thumping and screaming noises coming from his apartment. (RP 51, 57) This lasted for several minutes. (RP 55)

Not long after that, the 911 dispatcher in Pullman received a call from Eric. (RP 68, 72) He told her that his father had attacked him with a knife, he had hit his father with a pot to defend himself, and his father needed an ambulance. (RP 73-74)

The dispatcher instructed Eric on giving his father CPR. (RP 75-76) Meanwhile emergency medical services and law enforcement were dispatched to the scene. (RP 89, 99)

When Officer Shane Emerson arrived he found Virgil lying on a suitcase on the floor and Eric still on the phone with dispatch. (RP 95-97) Officers administered CPR briefly, until medics arrived and determined that Virgil was dead. (RP 95-97, 99) A pot lying near Virgil's head had a "significant amount of blood stain spatter on it." (RP 246)

The coroner, forensic pathologist Erik Kiesel, examined the victim's body and determined he had died as the result of blunt force trauma of the head and neck. (RP 288-89)

Dr. Kiesel noted a series of injuries to the forehead, around the eyes, mouth, chin and jaw line as well as a broken nose. (RP 289-90) He explained the dark purple in these areas as bruising by blunt force. (RP 290-91) In Dr. Kiesel's opinion, these injuries were likely consistent with repeated striking with knuckles or a fist. (RP 292) He pointed out additional blunt force injuries near the eyebrow that were caused by a blunt object consistent with a fist. (RP 292-93)

The pathologist noted some neck injuries and hemorrhaging that could be evidence of strangulation or blunt impact. (RP 296-97) He described in detail injuries to the neck and skull which could have been

caused by strangulation or more likely by the subject having been held by the neck while being punched. (RP 304-07)

Dr. Kiesel observed a tearing injury to the scalp that was not caused by a fist but by some other blunt force that could have been a pot. (RP 298-99)

Dr. Kiesel described in some detail what he called a “boxer’s fracture.” (RP 291) He explained that, “if you make a fist,” the little finger and ring finger remain mobile so that, if “you strike with the last two knuckles . . . you can get a spiral fracture.” (RP 291-92)

Dr. Aaron Scott testified that he had examined Eric and determined that his right hand had “fourth and fifth metacarpal fractures.” (RP 130-31) He described the injuries as “a boxer’s fracture,” which often results from “hitting something.” (RP 134)

The jury was instructed as follows:

For purposes of the special verdict, the State must prove, beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime

A deadly weapon is an implement or instrument that 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.

(RP 351-52)

The jury convicted Eric of second degree murder and found by special verdict that at the time of the homicide he was armed with a deadly weapon. (RP 395) The court imposed a maximum standard range sentence of 220 months plus an additional 24-month mandatory sentence for the deadly weapon verdict. (RP 408, 412) Eric appealed. (CP 81)

D. ARGUMENT

1. EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEADLY WEAPON SENTENCE ENHANCEMENT.

The deadly weapon enhancement cannot be sustained unless, “viewing the evidence in the light most favorable to the State,” any rational trier of fact could have found the defendant was armed. *State v. Eckenrode*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007) (citing *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003)); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Whether the defendant was armed is “a mixed question of law and fact.” *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632 (2002) (quoting *State v. Mills*, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995)). Whether the evidence for a deadly weapon enhancement is sufficient is a legal question reviewed de novo. *Id.* at 566.

The deadly weapon sentence enhancement is authorized by statute:

In a criminal case . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, 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. 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.

The deadly weapon special verdict could not be predicated on Eric's use of his hands or fist to "produce death." *See* RCW 9.94A.825. ("[A] deadly weapon is an implement or instrument . . .") Parts of the human body are not implements or instruments. The legislative purpose of the deadly weapons enhancement is "to recognize that armed crime, including having weapons available to protect contraband, imposes particular risks of danger on society." *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Since nearly everyone has hands, an individual's having hands available does not impose "particular risks of danger on society." *Id.*

The only implement or instrument mentioned in, or suggested by, the evidence as having any involvement in Virgil's death was the pot. No evidence supports the inference that the pot was used in a manner that was "likely to produce or may easily and readily produce death." RCW 9.94A.825.

Apart from Eric's statement to the 911 dispatcher, the only evidence that he hit his father with a pot was Dr. Kiesel's description of a single scalp injury as the result of blunt impact, and testimony that that injury could possibly have been caused by striking with a pot. The pathologist did not state that this injury caused, or was likely to have caused, Virgil's death.

The pathologist's testimony focused on, and emphasized, the substantial number of blunt impact injuries that had been inflicted and his conclusion that those injuries were consistent with striking with a fist. This testimony does not support the inference that the pot had the capacity to inflict death or that it was used in a manner that was likely to produce death. Based on the pathologist's testimony a jury might infer that the pot was an instrument that was used in a manner that caused a scalp injury; no testimony supports the inference that such a scalp injury was likely to cause death. The evidence establishes that repeated strikes to the head and neck with a closed fist likely produced the death in this case.

E. CONCLUSION

The evidence is insufficient, as a matter of law, to support the 24-month deadly weapon sentence enhancement. The sentence enhancement should be stricken.

Dated this 28th day of October, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 34001-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ERIK CLIFFORD LUDEN,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on October 28, 2016, I served a copy of the Appellant's Brief in this matter by email on the following parties, receipt confirmed, pursuant to the parties' agreement:

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