

No. 36322-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

ERICA MAY TOEBE

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 17-1-01029-8

REPLY OF APPELLANT

GARY METRO
Attorney for Appellant
719 Jadwin Avenue
Richland, Wa. 99352
509-943-7011

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8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

- I. REPLY TO RESPONDENT'S RESPONSE TO ASSIGNMENT OF ERROR: ARGUMENT
 - a. The respondent errs in its reading of *State v. Allen*.....3
 - b. Even if this Court believes as respondent asserts that...4

Pge State v. Allen does not forbid a distinction between elements and sentencing factors, the legislature did not intend to classify a decorative towel rack as a club.

TABLE OF AUTHORITES

WASHINGTON CASES

State v. Allen, 192 Wn.2d 526, 534, 431 P.3d 117, 121 (2018)

FEDERAL CASES

North Carolina v. Pearce, 395 U.S. 711, 717 (1969)

WASHINGTON STATUTES

R.C.W. 9.9A.825

ARGUMENT

- a. The Respondent errs in its reading of *State v. Allen*

In *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117, 121 (2018) our Supreme Court closely analyzed recent opinions by the United States Supreme Court and came to conclude that the distinctions between sentencing enhancements and elements of a crime could no longer be sustained by logic or case law. Here, respondent argues that case law has established the rule that the legislature can determine that certain acts can result in multiple punishments. The Washington Supreme Court in *State v. Allen* provides a history of the evolution of the use of the term “sentencing enhancement” and comes to conclude that “although our cases have previously indicated that RCW 10.95.020 aggravating circumstances are not elements for purposes of the Fifth Amendments double jeopardy clause; the legal underpinnings for these statements have changed dramatically...” This Court should follow the reason and logic of *State v. Allen* and find that sentencing enhancements which increase the maximum amount of time one must spend time in prison are subject to Fifth Amendment protections which prohibit double jeopardy. The Double Jeopardy Clause of the Fifth Amendment commands that “no person shall be subject for the same offence to be twice put in jeopardy of life and

limb.” Under this clause, once a defendant is placed in jeopardy for an offense and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Respondent argues the legislature decides if a person can be punished for assault in the second degree-for assaulting someone with a deadly weapon and that the sentence can be enhanced by two full years by the same element. The holding in *State v. Allen* curbs the legislature's power to diminish an individual's basic rights under the Fifth and Sixth Amendments to the United States Constitution. Appellant is being punished twice for the same offense; the sentencing enhancement should be stricken.

- b. The legislature did not intend for a towel bar to be considered a deadly weapon.

Even if this Court believes that sentencing enhancements are not subject to the appellant's fifth amendment rights, language and logic deny respondents contention that a decorative towel rod is a deadly weapon. R.C.W. 9.9A.825 defines a deadly weapon “as an implement or instrument that has the capacity to inflict death and from the manner in which it is used is likely to produce and may easily and readily produce death.” A

deadly weapon can be “any metal pipe or bar used or intended to be used as a club.” It is not reasonable to assume that the legislature intended that literally any object that appears to be a metal pipe or bar, irrespective of weight and hence force-producing capability, would constitute a per se “deadly weapon.” Here, the defendant hit the victim with a decorative towel bar. This cannot be what the legislature means to be a deadly weapon or anything and everything could be characterized as a deadly weapon. “Club” is not defined the statute. Dictionary.com defines club as “a heavy stick, usually thicker at one end than at the other, suitable for use as a weapon, a cudgel,” This is the plain language meaning of a club. A decorative towel bar is not a heavy stick, it is not thought of as suitable for use as a weapon.” A decorative towel bar is not a club. As a result, the enhancement must be stricken.

Respectfully submitted this 30th day of September, 2019

A handwritten signature in black ink, appearing to read 'G. Metro', is written over a horizontal line.

Gary Metro 37919

Attorney for Respondent Erica Toebe

METRO LAW OFFICE

September 30, 2019 - 2:04 PM

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