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NO. 363228

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

STATE OF WASHINGTON.

Respondent.

ERICA MAY TOEBE

Appellant.

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

APPELLANT'S OPENING BRIEF

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I. **ASSIGNMENT OF ERROR**

The evidence is insufficient to support the deadly weapon enhancement.

The State charge of Assault with a Deadly Weapon has the same elements as the deadly weapon enhancement. Consequently, it violates the defendants right under the United States Constitution and the Constitution of the State of Washington.

Issue Pertaining to Assignment of Error

Whether the State failed to prove the deadly weapon enhancement because the evidence did not show the instrument had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it is used.

Whether the States pleading of a crime and an enhancement with the same elements violates the defendant's rights under the United States Constitution.

II. **STATEMENT OF THE CASE**

Appellant went out drinking with her roommate. The two drank too much: unpleasant words led to a fight. During the course of the fight the roommates punched one another with their fists. The

defendant grabbed a towel rod. She hit her roommate with the towel rod several times.

III. ARGUMENT

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

The State did not prove the deadly weapon enhancement because the evidence did not show the instrument had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it is used.

"Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty." State v. Lua, 62 App. Wn. 34, 42, 813 P.2d 588 (1991), disapproved on other grounds by State v. Coria, 120 Wn.2d 156 839 P.2d 890 (1992). Even if the evidence is sufficient to prove the "deadly weapon" element of second degree assault, the evidence is still insufficient to meet the heightened standard for the deadly weapon enhancement. For purposes of proving the "deadly weapon" element of the crime, the State need only prove "the weapon had the capacity to cause death or serious bodily injury. When seeking an enhanced sentence, however, the State must prove that the weapon had the capacity to cause death and death alone." State v. Cook, 69 Wn. App. 412, 417-18, 848 P.2d 1325 (1993)(footnote omitted).

The State must prove beyond a reasonable doubt every element of the offense charged. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). The deadly weapon enhancement statute, RCW 9A.04.040, does not set forth the elements of a crime. State v. Jackson, 70 Wn.2d 498, 502, 424 P.2d 313 (1967); State v. Slaughter, 70 Wn.2d 935, 940, 425 P.2d 876 (1967). This provision provides for an enhanced penalty for an underlying offense based on a special verdict finding that must be considered by the Board of Prison Terms and Paroles. The special verdict is a separate finding made after the guilt-determining stage of the jury's deliberations. It cannot be assumed that a reasonable *jury*, in the absence of an explicit instruction on the standard of proof, will understand the applicable standard to be applied to the separate finding where, as here, the fact to be found is not an element of the crime as charged. See Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979).

The enhancement statute defines "deadly weapon" as follows:

" 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.]

In determining the sufficiency of evidence, existence of a fact

cannot rest upon guess, speculation, or conjecture. State v.

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Based on

the evidence present to the jury, it is speculation that the

instrument was used in a manner likely to cause death.

a. STATE EVIDENCE

In his closing argument, the prosecutor made clear that the

lightweight towel rod lacked weight to be used in a manner to

easily and readily produce death.

•It's just not a heavy item. It's not going to generate a lot of force when you swing it. unless you deliberately put some force behind it.....(Closing argument by Mr. Hultgrenn, page 259, lines 23-25)

The State, in its case, failed to prove that the lightweight towel rod was used in a manner likely to produce death and even conceded that the towel rod is *“not very heavy”* and that it's *not going to generate a lot of force when you swing it.* “

- The State failed to prove that the lightweight towel rod could be effectively used as a club to easily and readily produce death.

- The State failed to prove that the towel rod can be used to easily and readily generate the necessary force to be likely to produce death when swung
- The State failed to prove how the defendant could deliberately put some force behind it in a manner to be likely to produce death.

The State failed to produce any record indicating that specific injuries were caused by the towel rod using a degree of force likely to cause death. The presence of bruises, swelling and abrasions is insufficient to show that the towel rod was used as a deadly weapon.

The State further failed to demonstrate that deadly blows were delivered to the head, let alone directly from the towel rod.

All of these superficial injuries could have been caused during the conflict without the benefit of the towel rod and were readily treated.

The State did not call the doctor that performed treatment to testify. In her testimony, the nurse contradicted the information in the doctor's report by telling the jury that the doctor

"couldn't take her for surgery that day because her face was so swollen. So he told her to wait five or six days for the swelling to go down... then he would see her in the office to arrange another day to have surgery."

No direct scientific or medical evidence was presented to the jury attesting that the towel rod caused specific injuries. Despite a laceration to the head, no evidence of concern or injury to the skull or the brain was documented by the State. **Even if skull fracture had been possible, skull fracture does not equate to brain injury, nor does it automatically confer a likelihood of death.**

Inferences in the criminal setting must be based on likelihood, not possibility. State v. Jameison, Wn. App. 2d . 421 P.3d 463, 472

(2018). Reasonable inferences may be drawn from the evidence.

but

"an inference is not reasonable if based on speculation or conjecture." Id . At 471.

..'[C]ould' is not the relevant standard in determining sufficiency of the evidence." Hundley, 126 Wn.2d at 421.

"We are not justified in inferring, from mere possibilities, the existence of facts." Jameison. 421 P.3d at 471.

Because there is no evidence demonstrating the degree of force applied with the towel rod in this case, the only basis is guesswork for concluding that the towel rod was

"likely to produce or may easily and readily produce death" based on the manner in which it is used." [RCW 9.94A.825]

➤ The State failed to show that the degree of force used was sufficient to cause skull fracture or brain injury

b. FORENSIC LITERATURE

*It is rarely the skull fracture itself that is a danger to life, but the concomitant effect of transmitted force upon the cranial contents. The presence of a skull fracture is, however, an indication of the severity of the force applied to the head and it is uncommon for a head injury that is sufficiently severe to crack the skull not to cause some intracranial effect, even if it is only a transient concussion, though, once again, there are many remarkable exceptions to this generalization. [Krught's Forensic Pathology, 3rd Edition . page 182 - **bold in original**]*

“Unlike less reliable subjective estimates of the force required to cause other injuries, objective quantitative measurements have [been] obtained, for adult skull fractures...

In spite of these experimental data, it must never be forgotten that like all biological phenomena, great variation is encountered and skull fractures, though they may be caused by as little as 5 ft-lb (73N), may be absent when the impact exceeds 90 ft-lb (1314N). The area of the skull struck, the thickness of the skull, scalp and

hair, the direction of the impact and other imponderables, all affect the outcome.'

"It has been emphasized that, in the majority of cases the significance of a fractured skull is an indicator of substantial insult to the head, with possible injury to the vital contents, rather than the fracture itself being a danger to life...The neuroathology of brain damage is a large and complex subject, the more subtle varieties requiring both specialist techniques for demonstration and expert knowledge for interpretation." (From Knight's Forensic Pathology, Third Edition, pages 187-188 and 204).

The wide range of forces identified in the experimental data (73 N - 1314 N) complicates efforts to consistently identify the likelihood of skull-fracturing capability, which further complicates efforts to consistently identify death-causing capacity for a number of scenarios.

The cranium is a strong bony box. The degree of damage to the human brain is mitigated by the skull.

From a medical perspective, the injuries are not consistent with those that would necessarily require a club to inflict. Such injuries could be caused by blows from fists or feet, falling or being pushed into a wall. The towel rod did not significantly add to an average person's ability to inflict harm according to the evidence regarding the manner in which it was used.

The towel rod was not a deadly weapon based on the following facts

1. The towel rod's capacity to produce a sufficiently heavy impact to easily and readily produce death by swinging it as a club is severely limited because of the difficulties presented in attempting to swing it and make effective high speed contact.
2. The presence of hair and scalp markedly cushions the skull so that a far heavier impact is required to cause the same damage compared to a bare skull.
3. Even if the towel rod could be used to fracture the skull, it is rarely skull fracture itself that is a danger to life, but the

concomitant effect of transmitted force upon the cranial contents.

Bone that is cushioned by hair and scalp requires an even far heavier blow to cause the same damage compared to a bare skull. These facts demonstrate the lack of force-producing capability of the ordinary towel rod and highlight the ludicrousness of blindly declaring the towel rod a deadly weapon.

**2. THE STATE HAS VIOLATED THE DEFENDANT'S DUE
PROCESS RIGHTS BY SEEKING MULTIPLE PUNISHMENTS
FOR SAME OFFENSE**

Double jeopardy claims are questions of law that are reviewed de novo.

State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009), the double jeopardy clause of the Fifth Amendment to the United States Constitution provides that

"[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb."

Article I, section 9 of the Washington State Constitution) provides that

"[n]o person shall ... be twice put in jeopardy for the same offense."

The two clauses provide the same protection. In re Pers. Restraint of B01Tero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); State v. Weber, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Borrero, 161 Wn.2d at 536

⁹ In Blockburger v. United States, 284 U.S. 299, 304, 51 S. Ct. 308, 75

L. Ed. 136 (1932), the Supreme Court outlined a test to determine whether

Or not a criminal defendant was being subject to double jeopardy). Under this test.

“where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” ..

Blockburger, 284 U.S. at 304. . If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes.:

Here, the defendant was charged .. with Assault in the Second Degree .. which is defined in the either/or WPIC as follows:

WPIC 35.12 Assault- Second Degree (Alternate Means) - Inflict
Substantial Bodily Harm Or With Deadly Weapon - Elements.

To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant:

(a) intentionally assaulted (name of person) and thereby) recklessly inflicted substantial bodily harm:] [or]

[(b) assaulted (name of person) with a deadly weapon:) and

(2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either alternative element (1) (a) or (1) (b) have been proved beyond a reasonable doubt, then

it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

The Court in the case at bar read this instruction to the jury as follows:

Instruction number 5. To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable

doubt. One. that on or about September 6, 2017 the defendant. A. intentionally assaulted Anna Dowd and thereby recklessly inflicted substantial bodily harm, or. B assaulted Anna Dowd with a deadly weapon. And. two. that this act occurred in the State of Washington.

If you find from the evidence that element 2 and either alternative element 1-A or 1-B have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 1-A or 1-B has been proved beyond a reasonable doubt, as long as each juror finds that either 1-A or 1-B has been proved beyond a reasonable doubt. Trial Transcript P. 245.

The Court then defined deadly weapon for purposes of the enhancement.

The Court read to the

jury as follows:

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 and may easily or readily produce death. The following instruments are examples of deadly weapons: Blackjack, slingshot, 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, and any metal pipe or bar used or intended to be used as club, any explosive, and any weapon containing poisonous or injurious gas. Trial Transcript P. 252.

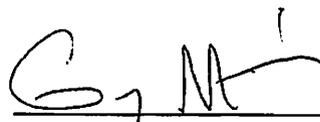
Applying the Blockburger test it is clear that the deadly weapon is an essential element to the charge of Assault in the Second Degree. The element of a deadly weapon is an element of the enhancement. Consequently, Ms. Toebe is being punished twice for the same crime. As a result, the enhancement must be stricken to preserve her due process rights.

The defendant expects that the State will counter this argument with the legislature has the power to punish a person twice if it so chooses. Recent United States Supreme Court cases and the Washington Supreme Court are questioning that power. See State v. Allen 192 Wn. 2.d 526 (2018)

CONCLUSION

The State's putting forth the jury instruction which calls for conviction of assault with the element of a deadly weapon and a deadly weapons enhancement is an attempt by the State to punish the defendant multiple times for the commission of one offense. The instructions clearly violate the defendant's due process rights. The enhancement must be stricken

Respectively submitted this 9th day of September, 2019.



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