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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

BRIEF OF RESPONDENT

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I. INTRODUCTION

“I’m not crazy. How dare you call me crazy. I’m not crazy. Don’t ever call me crazy.” Anna Dowd, the defendant’s roommate, said the defendant said this as she “whaled” on Ms. Dowd with a towel bar. Ms. Dowd was able to get away from the defendant and ran out of their apartment. She knocked on the door of strangers, who took her in and called the police. Ms. Dowd was bloody, she had a fracture around her left orbital eye, needed six staples to close a head wound, and her arms and legs were bruised.

The defendant claimed self-defense but was found guilty of Assault in the Second Degree with a Deadly Weapon Enhancement. She appeals the enhancement claiming the towel bar could not be a deadly weapon and that it constitutes double jeopardy to punish her for both the crime and the enhancement.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. In the light most favorable to the State, a rational jury could conclude the towel bar was a deadly weapon considering since it was a metal bar and the defendant was using it as a club.
- B. A deadly weapon enhancement does not violate double jeopardy.

III. STATEMENT OF FACTS

On September 6, 2017, roommates Anna Dowd and the defendant decided to get out of their apartment. RP at 75. They went to an Applebee's at about 5:00 P.M. *Id.* They went to a bar after that and stayed until around midnight. RP at 78. When they were ready to leave, Ms. Dowd wanted to separate the bill. *Id.* But, the defendant insisted on paying for the entire bill. RP at 79. Thinking she would reimburse the defendant from cash she saved as a waitress, Ms. Dowd went outside. *Id.*

The version of events from Ms. Dowd and the defendant then diverge. Ms. Dowd stated that the defendant came outside and was upset at the amount of the bill. *Id.* The defendant said, "You're just like everybody else. Like my friends always turn on me and abusing me, and you're just like them. . . . You're just like everyone else betraying me and using me and victimizing myself." RP at 80. Ms. Dowd told the defendant she was acting crazy and to shut up. RP at 81.

At their apartment, the defendant attacked Ms. Dowd. RP at 82. Ms. Dowd fought back by hitting and pulling the defendant's hair. *Id.* Ms. Dowd was knocked down. *Id.* The defendant picked up a towel bar that had come off the wall about a week earlier and started whaling on Ms. Dowd, hitting her repeatedly in the head, saying, "I'm not crazy. How dare you call me crazy? I'm not crazy. Don't ever call me crazy." *Id.* Ms.

Dowd estimated the defendant probably hit her with the towel bar 10 times. RP at 83.

There was a pause in the beating and Ms. Dowd was able to run for the door and escape. *Id.* She did not know her neighbors. RP at 85. But she ran to a neighboring apartment of Jessica Donovan and Nicholas Wood, who were watching a movie at about 1:00 A.M. when Ms. Dowd knocked on their door. RP at 54-55. Ms. Donovan, a nurse, stated that Ms. Dowd had blood matted on her head and was crying and visibly shaken. RP at 66. She said, “My roommate just beat the shit out of me.” *Id.* Mr. Wood called the police. RP at 58.

The police knocked on the defendant’s apartment door to try to contact her. RP at 41. There was no response. RP at 42. Officer Anthony Santana saw the defendant inside the apartment and knocked on a window. *Id.* The defendant yelled something unintelligible at him. *Id.* The police eventually obtained a search warrant and had to use a battering ram to force the door open. RP at 43, 131. They found the defendant in the bathroom. RP at 29.

Ms. Dowd was seen at Kadlec Medical Center in Richland, WA. RP at 135. Laura Reka, a physician’s assistant, testified that Ms. Dowd’s head was “full of blood” and blood was running down her face. RP at 135, 138. Ms. Dowd’s right upper eyelid was swollen and bruised. RP at 138.

Both sides of her cheek bones were very swollen. *Id.* There was a cut on her upper right lip. *Id.* She had bruises on both upper arms and her legs. RP at 138, 152. She had a fracture to her left orbital bone just below the eye. RP at 142. It took six staples to close her scalp wound and another four sutures for her right upper lip. RP at 141-42.

The defendant's version of events was that after paying the bar bill, Ms. Dowd was angry at her for no apparent reason. RP at 175. At their apartment, Ms. Dowd tried to attack her, so the defendant used the towel rod "a couple of times," maybe "two or three." RP at 180-83. She did not open the door for the police because she did not know they were police officers. RP at 191. She did admit that she did not cooperate with the police when they tried to document any of her injuries. *Id.*

The trial court gave the defendant's proposed self-defense instructions. See CP 29-32 and CP 56-59. The trial court also gave the defendant's proposed voluntary intoxication defense. See CP 33 and 55. Nevertheless, the defendant was found guilty of Assault in the Second Degree with a Deadly Weapon Enhancement. CP 68-69.

IV. ISSUES

- A. In the light most favorable to the State, is there sufficient evidence that the defendant used a deadly weapon while committing the Assault in the Second Degree?

1. What is the standard on review regarding deadly weapon enhancements?
 2. How is a deadly weapon defined?
 - a. Does a towel bar, and the way the defendant was hitting Ms. Dowd in the head with it, meet the per se definition of a deadly weapon because it is “a metal bar used or intended to be used as a club”?
 - b. Does the towel bar meet the definition of a deadly weapon in fact based on the manner the defendant was hitting Ms. Dowd in the head?
- B. Is there any double jeopardy violation if the defendant is punished for Assault in the Second Degree and a Deadly Weapon Enhancement if the legislature clearly has so intended?
1. What is the standard on review?
 2. Has the legislature clearly stated that it wants defendants’ sentences to be enhanced when they use deadly weapons, even where use of a deadly weapon is an element of the crime?

V. ARGUMENT

- A. **In the light most favorable to the State, there was sufficient evidence that the defendant used a deadly weapon while committing a Second-Degree Assault.**

1. Standard on review

The standard on review regarding a challenge to the sufficiency of evidence for an enhancement is the same for a guilty verdict. In the light most favorable to the State and drawing all inferences in its favor, would any rational trier of fact have found the elements of the deadly weapon enhancement beyond a reasonable doubt? *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 823, 425 P.3d 807 (2018).

2. In the light most favorable to the State, the towel bar constituted a deadly weapon.

a. Definitions of “deadly weapon” under RCW 9.94A.825.

RCW 9.94A.825 is attached as an appendix. There is a two-tiered system, under RCW 9.94A.825, to determining whether an instrument is a deadly weapon: per se deadly weapons and deadly weapons in fact. *State v. Samaniego*, 76 Wn. App. 76, 80, 882 P.2d 195 (1994). In *Samaniego*, the defendant had a 4-inch knife wedged between the driver’s seat and the arm rest of the car in which he was arrested for possession of a controlled substance with intent to deliver. *Id.* at 79. The *Samaniego* court held it did not matter how Samaniego used the knife; it was a deadly weapon because it was over 3-inches in blade length.

Putting together RCW 9.94A.825 and the jury instructions, the following are the elements for a deadly weapon enhancement:

1. The deadly weapon is easily accessible and readily available for offensive or defensive use;
2. There is a connection between the deadly weapon and the defendant;
3.
 - a) 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; or
 - b) The following are per se deadly weapons: a blackjack, sling shot, billy or 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 is a deadly weapon;
4. The above must be proved beyond a reasonable doubt.

CP 64-65; RCW 9.94A.825.

- b. The towel bar constituted a per se deadly weapon as a “metal bar used or intended to be used as a club.”**

Drawing all inferences in favor of the State, the towel bar is a metal bar and the defendant used it as a club. The defendant has argued on

appeal that the towel bar was lightweight and was not easily gripped.

These issues are not relevant because the jury could have reasonably

concluded that the towel bar met the per se definition of deadly weapon.

c. The towel bar could also be considered at deadly weapon in fact.

In this light most favorable to the State, the defendant did not stop beating Ms. Dowd because she felt she had inflicted sufficient injuries on her. The beating stopped when Ms. Dowd escaped by running out of the apartment and to strangers who took her in. RP at 83, 85-86. Ms. Dowd's injuries were "limited" to a fracture around her right eye, a cut to her lip, bruises on both arms and legs, blood matted to her hair, and a scalp wound requiring six staples to close because she was able to get away from the defendant, not because the defendant took pity on her. The jury could have concluded that Ms. Dowd's injuries would have been much more severe, including death, had she not escaped.

The legislature noted the danger of head injuries in enacting the Zackery Lystedt law, RCW 28A.600.190. Section (1)(a) of that law states, "The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed." *Id.*

The defendant has made numerous statements about things not in the record, including the weight of a towel bar, how easy it is to grip, the

strength of bone, and the average weight of a human head, and she concludes that it would be difficult for a towel bar to fracture a skull. This misses the point. The way the defendant was pounding Ms. Dowd in the head with the towel bar could likely have caused a head injury leading to Ms. Dowd's death, whether or not there was a skull fracture. Ms. Dowd was lucky to escape before the defendant inflicted even more damage on her.

B. There is no double jeopardy violation because the legislature clearly provided for an enhanced sentence when a person uses a deadly weapon in a crime, even where the deadly weapon is an element of the crime.

1. Standard of proof on review

Double jeopardy claims are questions of law that are reviewed de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). The double jeopardy clause of the U.S. Constitution and the Washington State Constitution provide the same protection. *Id.* A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 77.

If there is clear legislative intent to impose multiple punishments for the same act or conduct, there is no double jeopardy violation and the inquiry ends. *Id.* If the legislative intent is not clear, courts should consider a test in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76

L. Ed. 306 (1932). As argued below, the legislative intent is clear that multiple punishments can be imposed for defendants who use deadly weapons in the commission of their crimes.

2. **The legislature clearly intended for an enhanced sentence when a person uses a deadly weapon and caselaw has consistently held there is no double jeopardy violation, including when possession of a deadly weapon is an element of an offense.**

This issue has been resolved at least since the Sentencing Reform Act of 1981 took effect in 1984. See RCW 9.94A.020 and RCW 9.94A.905.

One case dealing with Second Degree Assault and deadly weapon enhancements is *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010). That court stated that “Washington courts repeatedly have held that double jeopardy is not offended by weapon enhancements even when being armed with the weapon is an element of the underlying crime.” *Id.* at 366. The *Aguirre* court affirmed the sentence, which included an enhancement on top of the sentence for Assault in the Second Degree. *Id.* at 367.

Kelley, 168 Wn.2d also dealt with a Second-Degree Assault and a firearm enhancement. That court found that “cumulative punishment was clearly intended.” *Id.* at 80.

There are numerous cases on point. *State v. Caldwell*, 47 Wn. App. 317, 318, 734 P.2d 542 (1987) involved a defendant charged with First Degree Burglary on the basis that he entered a dwelling armed with a deadly weapon. He was convicted of the Burglary with a deadly weapon enhancement. The *Caldwell* court rejected a double jeopardy claim noting that the legislature clearly expressed its intent that crimes committed by people armed with deadly weapons will receive an enhanced sentence, even where being armed with a deadly weapon is an element of the offense. *Id.* at 320.

State v. Pentland, 43 Wn. App. 808, 719 P.2d 605 (1986) had the same result. The defendant was charged with Rape which was elevated to First Degree Rape because he was armed with a weapon during the offense. The double jeopardy clause did not prevent a punishment for the underlying crime and the deadly weapon enhancement. *Id.* at 811.

The defendant cites *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018) for the proposition that courts are questioning the power of legislatures to impose multiple punishments. Br. of Appellant at 24. In *Allen*, the defendant was convicted of four counts of First-Degree Murder. The jury did not find aggravating factors of “law enforcement officer performing duties” and “common scheme”. The convictions were reversed due to prosecutorial misconduct. *Id.* at 530-31. The issue was whether on

retrial the State could again charge the aggravating factors. The *Allen* court held that would be double jeopardy. The *Allen* decision had nothing to do with the legislature's authority to impose multiple punishments for the same conduct or act.

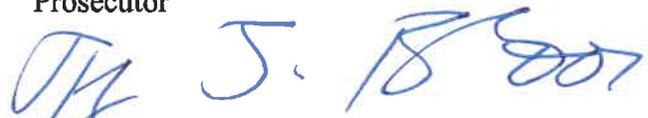
VI. CONCLUSION

The sentence which includes the deadly weapon enhancement should be affirmed. The towel bar, and the way the defendant used it, should qualify as a per se deadly weapon because it is a "metal bar used or intended to be used as a club." There is no double jeopardy issue in sentencing the defendant for both the underlying Assault in the Second Degree and the Deadly Weapon Enhancement. That is what the legislature intended.

RESPECTFULLY SUBMITTED on June 25, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement
was made to the following
parties:
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Signed at Kennewick, Washington on June 25, 2019.


Demetra Murphy
Appellate Secretary

Appendix

RCW 9.94A.825

RCW 9.94A.825**Deadly weapon special verdict—Definition.**

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice 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.

[1983 c 163 § 3. Formerly RCW 9.94A.602, 9.94A.125.]

NOTES:

Effective date—1983 c 163: See note following RCW 9.94A.505.

BENTON COUNTY PROSECUTOR'S OFFICE

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