

68746-8

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No. 68746-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FREEDMAN,

Appellant.

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

The Honorable Chris Washington

FILED
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STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Robert Freedman was convicted of assault in the second degree with a deadly weapon enhancement based upon his use of an aluminum tee-ball bat to inflict injuries on a larger, stronger, younger man that were no worse than those sustained in a misdemeanor assault. He was careful not to strike the man in the head or in a way that might seriously endanger him. On appeal, he contests the sufficiency of the evidence to support the deadly weapon enhancement.

In its response brief, the State overstates and occasionally misstates the facts. The State also misapplies the relevant legal standard. This Court should reject the State's arguments and reverse.

1. **The State repeatedly mischaracterizes the facts.**

In its effort to overcome Freedman's sufficiency challenge, the State exaggerates and misstates the facts. For example, the State repeatedly describes the item Freedman used during his fight with Lemon as a "baseball bat." See Br. Resp. at 1, 3, 10. The bat was actually a tee-ball bat, or

a “kiddie bat,” as Freedman described it. 4RP 11. The State also claims that Lemon suffered a torn bicep as a result of the incident, Br. Resp. at 6, but Lemon did not produce medical records to substantiate this hearsay diagnosis. See 3RP 77, 110-111. The bat was a tee-ball bat, and the injuries Lemon sustained were relatively insignificant.

2. The evidence was insufficient to support the deadly weapon enhancement.

The standard for a deadly weapon special verdict is stringent. For purposes of a special verdict, the jury must find:

[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.

RCW 9.94A.825.

The State does not claim that the bat was a deadly weapon per se. The State therefore had to prove that the tee-ball bat was an actual deadly weapon. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). The State does not explain how the tee-ball bat (1) had the capacity to inflict death; (2) was likely to produce death; or (3) could easily and

readily produce death other than by pointing to the fact that Lemon was struck in the ribs and abdomen in a manner that caused welts and bruises – i.e., injuries that, but for the bat, would have been consistent with misdemeanor assault charges. The State cites no cases in which an item used under like circumstances met the standard of a deadly weapon.

The State, as the party with the burden of proof, had the duty to adduce sufficient evidence for the jury to conclude that the deadly weapon allegation had been proven. Lemon weighed 215 pounds and was an ex-Marine. 3RP 15, 18. He was not a frail or delicate person. Save for claiming that the evidence to support the deadly weapon allegation was “ample,” Br. Resp. at 9, and relying on its mischaracterization of the bat as a baseball bat, the State did not present such evidence. The deadly weapon special verdict must be reversed.

B. CONCLUSION

For the foregoing reasons and for the reasons argued in Freedman's opening brief, the State's claim that it presented sufficient evidence to prove the metal tee-ball bat was a deadly weapon for purposes of a special verdict must be rejected. The enhancement must be reversed.

DATED this 15th day of March, 2013.

Respectfully submitted:


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68746-8-I
v.)	
)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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