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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Insufficient evidence supported the jury's special verdict on the deadly weapon enhancement, requiring reversal and vacation of the 12-month deadly weapon sentencing enhancement.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

For purposes of a special verdict on a deadly weapon enhancement, the State must prove that the defendant was armed with "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." Appellant Robert Freedman used an aluminum tee ball bat to defend himself in a fight against a larger, younger man. Freedman did not swing the bat at the larger man's head and specifically tried to avoid inflicting serious injuries. The larger man suffered some bruising. Did the State present insufficient evidence to support the deadly weapon special verdict?

C. STATEMENT OF THE CASE

Robert Freedman is a registered longshoreman. 3RP 159.[1] After becoming registered in 2000, Freedman became a "B man." Freedman is currently an "A man," which requires 1300 hours of work for a qualifying year. Id.

Freedman has pursued and completed the necessary training to do the highly demanding work of operating cranes. 3RP 165-69, 175. A gantry crane carries a maximum weight of 78,000 pounds; empty, they weigh 4,000 – 5,000 pounds. 3RP 165. The cranes range in height from 100 to 140 feet. 3RP 166. Operating a crane is very dangerous; people can and do get killed. 3RP 169. Freedman describes operating a crane as an extremely difficult job which requires concentration and focus. 3RP 178.

On July 30, 2011, Freedman was working a gantry crane on Pier 18, in Seattle. 3RP 176. Anthony Lemon,

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[1] The verbatim report of proceedings is cited herein as follows:

March 5, 2012	-	1RP
March 7, 2012	-	2RP
March 8, 2012	-	3RP
March 12, 2012	-	4RP
March 13, 2012	-	5RP

another longshoreman who started at approximately the same time as Freedman, was yard supervisor that day. 2RP 167; 3RP 176. At some point during the shift, Lemon came over the radio and made some comments that Freedman found insulting and disrespectful.[2] 3RP 177. The comments upset Freedman and broke his concentration. 3RP 177, 179. Because of his broken concentration, Freedman brought in a crane too low and too fast, which could have resulted in death or serious injury to other persons. 3RP 179. The experience "scared the hell out of" him. Id.

On August 5, approximately a week later, Freedman and Lemon were again working together. Freedman was the crane operator and Lemon was the supercargo. 3RP 180. They did not have any interactions during their shift that day, but as they were leaving Freedman saw Lemon and decided he wanted to talk to him about what had happened on July 30th. 3RP 182, 184. He intended to ask Lemon not

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[2] Lemon admitted to making insulting remarks to Freedman with the intention of irritating him, but believed that the incident happened on August 5, 2011, the same day that Freedman confronted him. 2RP 168, 174-76. An independent witness was not sure of the date of Lemon's comments but testified it was "a couple of weeks" before the charged incident. 5RP 11.

to come over his radio anymore. 3RP 185. He explained that Lemon had a habit of making "smart-aleck" comments over the radio whenever Freedman was a crane operator, and the last time he did so Freedman made a mistake. 3RP 185; 4RP 5.

Freedman attempted to flag Lemon as Lemon was driving away from work, but Lemon did not respond. 3RP 184. They both drove in the same direction, Freedman following Lemon's Jeep in his Mercedes, and stopped at a red light. 4RP 4. Freedman got out of his car and approached Lemon. He hoped to have a reasonable conversation. 4RP 6.

When Freedman reached Lemon's car, Lemon rolled down his window. Freedman asked Lemon to not come over his radio anymore, but Lemon's response was disrespectful; he told Freedman to "get the F out of [his] face" and said he could say anything he wanted, anytime he wanted. 2RP 191; 4RP 7. He said that if Freedman was scared maybe he "shouldn't be up there." 4RP 7.

Initially Freedman responded by telling Lemon that he could say anything any time he wanted and any place he

wanted, except when Freedman was in the cab of a gantry crane. 3RP 8. He explained that when Lemon came over the radio on July 30th, he caused Freedman to make a mistake. Id.

Lemon became agitated and, according to Freedman, took a swing at him from inside his car. 3RP 8-9. Lemon cursed at Freedman and attempted to exit his vehicle and approach him. 2RP 190, 192; 4RP 9. Lemon later explained that he wanted to get out of his car "for emphasis," to underscore his intention that Freedman should "get out of [his] face" and go back to his vehicle. 2RP 192.

Lemon is a large man and a former United States Marine. 2RP 18. At the time of the incident, Lemon weighed 215 pounds. 2RP 15. When the incident occurred, Freedman was 59 years old and 5'11" tall, and weighed 170 pounds. 3RP 158.

As Lemon became increasingly agitated, he began to complain that Freedman might be damaging his car. 4RP 10. Freedman decided to return to his own car, but as he left his position by Lemon's door, Lemon aggressively got out

of his vehicle. Id. Aware that Lemon was a former Marine, and given the differences in their size, Freedman was fearful for his safety and pulled out an aluminum tee ball bat he kept in his car. 4RP 11. When Lemon saw the bat, he said, "Let's go settle this like men." 4RP 13.

Freedman interpreted this comment as an invitation to fight. 4RP 13-15. He felt that he had raised a legitimate health and safety issue with Lemon which Lemon had failed to acknowledge, that Lemon had instead responded by challenging him to a fight, and that he was not going to back down. 4RP 15. Lemon drove to a nearby parking lot near a Super Supplements store and hastily parked his jeep. 2RP 17. Freedman watched Lemon get out of his car and exited his own vehicle, taking the bat with him. 4RP 18-19.

Freedman later explained that he brought the bat because there was going to be a fight; since Lemon was a larger man than him, he wanted an "equalizer." 4RP 12, 19. Freedman was worried that Lemon would take the bat away from him and use it against him. 4RP 19. He swung at Lemon's side with the bat, hoping to knock the wind out of

him and end the confrontation. 4RP 20. However Lemon grabbed him, and the two men grappled for a few moments. 4RP 21. Freedman hit Lemon with the bat at least twice more, in the thigh and in the arm. 2RP 206; 4RP 21. Lemon struck Freedman more than once in response with his fists, hitting him as hard as he could. 3RP 70-71. Soon after the fight started, the police arrived and broke the fight up. 3RP 122-23; 4RP 25. Lemon suffered bruising and soreness as a result of the fight. 3RP 7-10.

The King County Prosecutor charged Freedman with one count of assault in the second degree with a deadly weapon enhancement. CP 1-5. Following a jury trial Freedman was convicted as charged. CP 54-55. This appeal follows.

D. ARGUMENT

The State presented insufficient evidence to support the jury's special verdict on the deadly weapon enhancement.

1. The State bears the burden of proving the essential elements of a criminal offense.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In

re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. A deadly weapon enhancement requires the State to prove that the defendant was armed with an *actual* deadly weapon.

The State is permitted to seek a deadly weapon special verdict under RCW 9.94A.825. According to the statute,

> [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.

Certain items are *per se* deadly weapons according to the statute. Id.[3] A bat is not one of those items. Thus, in order to obtain a deadly weapon special verdict where the item is not a *per se* deadly weapon, the State bears the burden of proving that the defendant was armed with an actual deadly weapon. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980).

> 3. A tee-ball bat is not an implement or instrument which has the capacity to inflict death, and, from the manner in which it was used in this case, it was not likely to produce death.

The definition of "deadly weapon" for purposes of a sentencing enhancement is very specific and differs markedly from the definition of this term when it is an element of the crime of assault in the second degree. For purposes of a prosecution for assault in the second degree,

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[3] The statute reads:

> 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.

> "Deadly weapon" ... shall include any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). "Substantial bodily harm," in turn, is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4).

In drafting the deadly weapon sentence enhancement statute, the Legislature did not include the expansive term, "substantial bodily harm." Instead, it required the State to explicitly prove (a) that the item used had the capacity to inflict actual death, and (b) that it was *likely* to cause death. RCW 9.94A.825. In this case, the State met neither requirement.

First, the State presented no evidence of the bat's capacity to inflict actual death. The State did not introduce expert or other testimony regarding how such a bat could be used to inflict actual death. Expert testimony in this

circumstance would have been appropriate, as the conclusion when an item can actually kill, rather than injure, is surely outside the range of facts known to the average lay juror. State v. Cheatam, 150 Wn.2d 626, 646, 81 P.3d 830 (2003) ("expert ... testimony may be admitted to assist juries in understanding phenomena not within the competence of the ordinary lay juror").

Second, the State never introduced testimony showing that in the manner in which it was used in this case, the bat was likely to cause death. Indeed, the evidence at trial supported the conclusion that the bat was not likely to cause death. Freedman testified that even when Lemon was holding his arm, he never lost control of the bat. 4RP 22. Further, he testified that he never tried to hit Lemon in the head, and that in fact there were places that he tried to avoid hitting him because he did not want to inflict serious injury. Id. Lemon testified that he believed Freedman was swinging the bat anywhere he could hit him and complained about the bruising and swelling he suffered as a result of the blows, 2RP 206; 3RP 7, 103, but he never testified that he was in

fear for his life or that he thought Freedman was likely to kill him.

Thomas Fleischer, an independent eyewitness who saw the fight, described seeing Freedman inflict a few body blows and said that he was able to hear Lemon saying, "quit hitting me." 2RP 123-25. As Lemon began to physically grapple with Freedman, Fleischer said that Freedman continued to try to hit Lemon, but because they were struggling over the bat he could not use much force. 2RP 126. By the time the police arrived a couple of minutes later, the two men were engaged in a "tug of war." 2RP 128.

As the facts of this case illustrate, requiring the State to prove that an item is a deadly weapon for purposes of a deadly weapon special verdict and sentence enhancement is not a tick-box exercise. Rather, the State must present proof beyond a reasonable doubt that the item had the capacity to actually cause death, and was used in such a manner that it was likely to produce death. Here the State showed neither. The deadly weapon special verdict was not supported by sufficient evidence.

4. The remedy is reversal and dismissal of the deadly weapon enhancement and remand for resentencing.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Because the evidence was insufficient to support the jury's special verdict on the deadly weapon, the finding must be reversed and dismissed. Freedman is entitled to be resentenced without the enhancement.

E. CONCLUSION

For the foregoing reasons, Robert Freedman requests this Court reverse and dismiss the deadly weapon enhancement, and remand this matter for resentencing.

DATED this 30th day of October, 2012.

Respectfully submitted:

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING 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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[X] ROBERT FREEDMAN 358484 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF OCTOBER, 2012.

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