

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT R. SPRAGUE,

Appellant.

No. 41241-1-II

UNPUBLISHED OPINION

Penoyar, C.J. — A jury convicted Robert Ralph Sprague of second degree assault while armed with a deadly weapon. Sprague appeals his deadly weapon enhancement, arguing that the evidence was insufficient to find that the skateboard used in the assault qualified as a deadly weapon. We affirm.

Facts

On October 10, 2009, Robert “Rusty” and Amy Duprie were at the Puyallup Eagles club to celebrate a relative’s birthday. During the party, Amy noticed a skateboard leaning against the wall and briefly rode it in the hallway. When she was finished, she placed the skateboard back against the wall, went outside for a smoke, and then returned to the party.

Later that evening, the Dupries were outside at the designated smoking area with friends when they saw Sprague, his wife Christine, and another man exit the club. The second man, Nathan Murphy, was carrying the skateboard. Witness testimony varied widely about what took place thereafter. When Amy saw Murphy with the skateboard, she thanked him for allowing her

to ride it earlier in the evening. Murphy purportedly responded by swearing at her.¹ Duprie testified that Amy was standing beside him when Murphy leaned in close to her face and swore at her. Duprie testified that he was “startled” by the expletives Murphy hurled at his wife, but he remained calm and asked for an apology. 1 Report of Proceedings (RP) at 56. Duprie testified, “I said, dude, you got to apologize. I was really calm. I said, you can’t talk to my wife like that, and I remember the stockier guy [Sprague] saying, well, bring it on, you fucking gorilla.” 1 RP at 56.

Sprague, Christine, and Murphy walked away from the Dupries, but purportedly continued to shout taunts and expletives as they went.² Duprie testified that he followed Sprague, Christine, and Murphy down the sidewalk along the club building toward the parking lot, walking about 10 feet behind them. Duprie said that he remained calm, but insisted on an apology. A club member eyewitness testified that Duprie followed the Sprague group saying “you owe my wife an apology,” and while he did so, Duprie had his hands in his pockets, he did not raise his voice, and he did not run after or threaten the Sprague group. 1 RP at 94.

Duprie was briefly distracted by one of his friends and when he returned his attention to the Sprague group, he saw Murphy standing under a street light without the skateboard. Sprague

¹ Amy Duprie testified that she said, “I’m sorry for riding your skateboard earlier.” 1 Report of Proceedings (RP) at 55. Murphy responded, “I can’t believe you rode my skateboard you fucking bitch.” 1 RP at 55. Amy and another witness testified that Murphy also responded “Fuck you, you fucking bitch.” 1 RP at 14, 134. Murphy testified that Amy thanked him for letting her use his skateboard, but he just shook his head and walked away. He said that she was intoxicated and “flirty,” and as he walked away he asked Sprague, “who was that drunk bitch[?]” 3 RP at 404, 406.

² Another club member and family friend of the Dupries testified that she heard Sprague say, “come on you fat boy, you fat fuck.” 1 RP at 94.

then stepped out from behind the building and swung the skateboard hitting Duprie on the side of the head and face. Duprie did not see the blow coming. Duprie briefly lost consciousness; he remembered a loud “bang” and then “waking up” on the ground with his wife standing over him. 1 RP at 57, 60.

Duprie believed that he had been shot, but Amy told him he had been hit with a skateboard. They went back into the club and a friend called 911.

Sprague, Christine, and Murphy testified for the defense, telling a very different story about how the events transpired. Murphy testified that as Duprie followed him down the sidewalk, Duprie called him “faggot, and punk ass and skateboard punk.” 3 RP at 406. Murphy testified that Duprie was a big man,³ acting aggressively, and that Duprie got in his face and was chest bumping him. Murphy expected a fight and handed the skateboard to Sprague. When Duprie turned toward Sprague, Murphy and Christine tried to get to Sprague’s truck, and neither Murphy nor Christine saw Sprague hit Duprie with the skateboard.

Christine Sprague testified that Duprie pursued them down the sidewalk yelling at Murphy, saying “skateboard punk, you little faggot . . . I’m going to kick your punk ass.” 3 RP at 308. She said Sprague told her and Murphy not to make eye contact or say anything, and to walk to the truck. Christine testified that she was scared because Duprie was a very large man and as they tried to get away, Duprie was kicking the back of her shoes and yelling at Murphy. Duprie confronted Murphy, threatening and yelling at him. Murphy handed the skateboard to Sprague. When Duprie was focused on Murphy, Sprague pushed Christine up the ramp to the parking lot. Christine yelled at Duprie to leave them alone, he turned to look at her, then turned to Sprague

³ Duprie testified that he is 6 feet 2 ½ inches tall and weighs 320 pounds.

saying, “how about you, tough guy, you want some[?]” 3 RP at 324. Christine explained that Sprague had a visual impairment and she was terrified for him. As Duprie was yelling at Sprague, Christine turned around to look for Sprague’s truck and did not see Sprague hit Duprie with the skateboard.

Sprague testified that his group did not engage Duprie, and that Duprie was the aggressor. Sprague testified that Duprie chased them down the sidewalk “screaming gay faggot skateboarder, . . . [I’m] going to beat his gay faggot punk ass.” 4 RP at 468. Sprague said that Duprie bumped Murphy and tripped Christine as they tried to get away. Sprague said that after Murphy shoved the skateboard into his hands, Duprie then charged at Sprague saying, “how about you tough guy, you want some too[?]” 4 RP at 471. Sprague testified that he thought he was going to be killed or blinded⁴ in a fight with Duprie and threw the skateboard at Duprie as Duprie charged him. After Sprague struck Duprie, Sprague, Christine, and Murphy ran to Sprague’s truck and left.

Puyallup Police Officer Chris Davis responded to the 911 call. Witnesses at the club identified Sprague, and Davis went to Sprague’s house. Davis knocked on the door of Sprague’s residence, but he left when no one answered.

Duprie’s grandfather drove him to the hospital. Duprie was diagnosed with significant blunt force head trauma, presenting injuries consistent with being hit with a bat. Duprie had a lacerated ear, blood in his sinus cavity, fractured bones around his eye socket, a fractured sinus, and a fractured cheekbone.

On October 13, 2009, the State charged Sprague with second degree assault.⁵ CP 1. The

⁴ At the time of the incident, Sprague had an eye tumor.

State alleged that Sprague committed the felony assault “with a deadly weapon, other than a firearm to-wit: a skateboard.” Clerk’s Papers (CP) at 1.

Jury trial commenced on July 22, 2010. Witnesses testified to events as above described. Over the State’s objection, the trial court gave the jury Sprague’s proposed self-defense instructions. The jury found Sprague guilty of second degree assault while armed with a deadly weapon.

Sprague was sentenced on September 3, 2010. Sprague requested an exceptional sentence downward, but the trial court denied that request, finding no legal justification for a departure from the standard range. The trial court sentenced Sprague to 6 months for the second degree assault, together with a 12-month deadly weapon enhancement for a total sentence of 18 months. Sprague appeals.

analysis

I. Sufficiency

Sprague contends that his deadly weapon enhancement must be reversed because the evidence is insufficient to establish that the skateboard qualified as a deadly weapon. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34–35, 225 P.3d 237 (2010). An appellant challenging the sufficiency of evidence

⁵ The State also charged Sprague with one count of fourth degree assault. The jury acquitted Sprague on that count, and that determination is not challenged. We do not address it further.

necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wn.2d at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

For deadly weapon sentence enhancements, there must be sufficient evidence that the defendant was armed with an *actual* deadly weapon. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). RCW 9.94A.825 defines a deadly weapon as “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.” Whether a weapon is deadly is a question of fact that the State must prove beyond a reasonable doubt. *Tongate*, 93 Wn.2d 754-55. “The circumstances of a weapon's use include the intent and present ability of the use, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted.” *State v. Winnings*, 126 Wn. App. 75, 88, 107 P.3d 141 (2005).

Here, the State presented sufficient evidence to convince a rational factfinder that Sprague was armed with a deadly weapon when he assaulted Duprie. The description of the skateboard indicates it was a substantial weapon. The skateboard was approximately four feet long, and it was described as “heavy.” 1 RP at 13. It was made of bamboo, it was one-half-inch thick, and it had metal trucks that attached the wheels to the body of the board. Depending on the way the skateboard was used, it is not unreasonable to find that a four foot long, half inch thick, heavy plank of bamboo is capable of causing death.

The circumstances of the skateboard's use here support a finding that the skateboard was a deadly weapon. Although the testimony conflicted, substantial evidence was presented to the jury that Sprague swung the heavy board at Duprie's head, and it is reasonable to infer that Sprague intended to hit Duprie in the head with the skateboard. The force of the strike immediately dropped Duprie, a six-foot-two-inch 320-pound man, to the ground and caused him to briefly lose consciousness. Duprie believed that the impact of the board to his head was actually a gunshot. The blow to the side of Duprie's head caused significant trauma, including multiple facial fractures to his eye socket, sinus, and cheekbone.

Taken in the light most favorable to the State, there was sufficient evidence presented at trial for the jury to find that a blow to the head with a heavy, solid object had the capacity to inflict death. It was also reasonable for the jury to infer that the way Sprague wielded the skateboard like a club may have easily and readily caused Duprie's death. We hold that the State presented sufficient evidence for a reasonable factfinder to conclude that Sprague was armed with a deadly weapon when he assaulted Duprie.

II. Statement of Additional Grounds (SAG)

In his SAG, Sprague seems to argue that he was prejudiced by the prosecutor's misstatement of the law during closing argument. He contends that the prosecutor improperly instructed the jury to "judge [him] as [it] would a normal person" even though at the time he had a cancerous tumor in his eye and that disability should have been considered. SAG at 1. He contends that the trial court removed the jury, reprimanded the prosecutor and "told her she was wrong," but the jury was never reinstructed when they were brought back in. SAG at 1. We see no prejudice warranting reversal.

Sprague misconstrues the record and the trial court's comment. While discussing the instructions during closing argument the State said:

This is a word I want you to pay very close attention to: Reasonable. You are going to find it in a majority of your instructions. Reasonable doubt, a reasonable person, reasonable testimony. It's important, because of the type of case that this is. You are going to be asked to decide what a reasonable person would do under the same circumstances as Mr. Sprague was in.

4 RP at 506.

The State then discussed the to convict instruction and the related definitional instructions, and then turned to the self-defense instruction,⁶ stating:

Now, Mr. Sprague testified that maybe he was a little more afraid than he would have been because he had a health issue, so he wanted to make sure that he wasn't injured because he had the problems with his eye, so maybe his belief about his injury might be reasonable, but that is not enough. Again, the belief needs to be a reasonable belief.

But, the defendant is not entitled to use any more force than is necessary.

....

You are also told exactly what necessary means in that same instruction. The person using the force may only use such force and means as a reasonably prudent person would under the same or similar circumstances. *So, you don't decide this case based on what Mr. Sprague reasonably believed.* We have this other person out here called the reasonably prudent person, and would a reasonably prudent person, even if you believe Mr. Sprague's version of events, think that he was about to be injured to the degree of using that skateboard the way that he did, and with the force that he used, and where he hit the man. Hit him in the stomach, push him back with the board, hit him in the knee, but he chose to use an extreme amount of force, enough force to take a six foot four, 320-pound man straight to the ground, and he hit him in the head. And those are things that you should keep in mind when deciding whether or not a reasonably prudent person would have done the same thing that Mr. Sprague did.

4 RP at 510-12 (emphasis added).

⁶ The self-defense instruction stated in relevant part, "The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident." CP at 18; Instr. 13.

While the jury was out on break after the State's lengthy closing argument, the trial court commented that the above-highlighted statement might be misleading in isolation, but the statement was not improper here because it appeared in the context of the State's discussion about the reasonable person standard. The trial court made clear that it thought further instruction to the jury was not required, but it pointed out that both sides still had oral argument left and if either side felt that any clarification was necessary each side had an opportunity to do so.

After the trial court's comment, the defense in closing argument argued that Sprague knew he had cancer in his eye and knew that he had to protect his eye; and because Duprie was so much larger in physical stature than Sprague, the degree of physical force that Sprague used was both necessary and reasonable. In other words, defense counsel argued that Sprague acted reasonably under the circumstances as Sprague knew them.

In rebuttal, the State concluded by urging the jury to apply the standards and the law "set out in your instructions." 4 RP at 550. The trial court had instructed the jurors in part that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP at 5; Instr. 1.

Here, the jury heard testimony about Sprague's eye condition and it was instructed to take into account "all of the facts and circumstances known to [Sprague] at the time of the incident" when considering how a reasonably prudent person would have responded. CP at 18; Instr. 13.

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We presume that the jury followed the court's instructions. *State v. Swan*, 114 Wn.2d 613, 662, 790 P.2d 610 (1990). Sprague's SAG identifies no error. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Johanson, J.