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No. 71218-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PEDRO MENDOZA-ESCATEL,

Appellant.

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

BRIEF OF APPELLANT

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1. There was insufficient evidence presented by the State to support the jury verdict finding Mr. Mendoza-Escatel guilty of second degree assault by strangulation.

2. The deputy prosecutor committed misconduct in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove each element of the charged offense beyond a reasonable doubt. When the State charges a defendant with assault by strangulation, the State must prove either the defendant compressed the person's neck and actually obstructed either their blood flow or ability to breath, or that he compressed the victim's neck with the intent to obstruct the blood flow or their ability to breathe. Here, despite testimony Mr. Mendoza-Escatel grabbed Ms. McAlpin near the neck, there was a lack of evidence he restricted her ability to breathe or that he intended to do so. Is Mr. Mendoza-Escatel entitled to reversal of the second degree assault conviction with instructions to dismiss?

2. The State's duty to ensure a fair trial precludes a deputy prosecutor from misstating the law or shifting the burden of proof

during trial. Where the deputy prosecutor misstated the law during closing argument, did this prosecutorial misconduct require reversal?

C. STATEMENT OF THE CASE

Pedro Mendoza-Escatel and Katie McAlpin were romantically involved for approximately five years. 10/8/13 RP 140-43. Katie and her older sister, Molly McAlpin, were both waitresses at Mama's Mexican restaurant, a Belltown establishment owned by their father. Id. at 65-66.[1]

On May 7, 2013, Mr. Mendoza-Escatel and Katie went out for the evening; on this particular night, Molly came along, as well. Id. at 73. All three individuals shared some food and drinks at the Little Water Cantina on Eastlake, and then Katie and Molly walked over to Pazzo's Pizzeria. Id. at 146-48. Katie thought that Mr. Mendoza-Escatel had been behaving in a jealous manner, so she told him not to come along to the second restaurant with her and her sister. Id. At Pazzo's, Katie and Molly had two additional vodkas, bringing their

[1] Because Katie and Molly McAlpin share a last name, they are referred to by first name; no disrespect is intended.

consumption to four drinks apiece in approximately two hours. Id. at 148-49.[2]

Afterwards, Katie and Molly walked back to the apartment that Katie and Mr. Mendoza-Escatel shared. Id. at 149-50. According to Katie, the sisters ran into him in the street in front of the apartment building and had a confrontation. Id. at 150. According to Molly, the young women had already reached the apartment and had been sitting around for half an hour before Mr. Mendoza-Escatel arrived, and the confrontation occurred in the living room. Id. at 77. Although the recollections of the two sisters were completely different, perhaps due to their alcohol consumption, the jury found it credible that a confrontation occurred.[3]

Katie testified that when Mr. Mendoza-Escatel appeared at their apartment, his trousers were undone. 10/8/13 RP 150. Katie was immediately upset and made accusations. Id. Mr. Mendoza-Escatel told Katie he had cheated on her, and they began to argue. Id. at 78-79, 150. At some point, the two began arguing inside the apartment –

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[2] As far as the effect of the alleged victim's alcohol consumption on her ability to recall the incident, there are several references to Katie's apparent slightness in the record. Katie testified that Mr. Mendoza-Escatel was "way bigger than me." 10/8/13 RP 152. Molly also described Katie's size, "But he's definitely a bigger man; she's a little girl." 10/8/13 RP 98.

[3] The trial took place just five months after the alleged incident.

Katie acknowledged at trial that Mr. Mendoza-Escatel must have come up from the street to the apartment eventually, although her memory was hazy – and the argument escalated. Id. at 151-52.

Katie became so furious about the infidelity that she began hitting and "smack[ing]" Mr. Mendoza-Escatel on the sofa. Id. at 97. As the two were in the living room arguing, Molly slipped into the bathroom to call a friend and ask him to come take Mr. Mendoza-Escatel out of the apartment. Id. at 81-82. Molly then called 911 and reported that while she was in the bathroom, Mr. Mendoza-Escatel had tried to choke Katie three times. Id. at 83.

However, Molly admitted when she testified at trial that although she could hear a commotion, she was unable to actually see what happened from her position in the bathroom. Id. at 84-85, 88 ("I walked out when it was ending twice"). Molly maintained at trial, "[Katie] told me it was three times, and I trust her." Id. at 88.

Katie testified that she grabbed at Mr. Mendoza-Escatel in order to get him off the couch and because she wanted him to leave their apartment. Id. at 151-53. She tried to pull him off the couch and yelled at him for having sex with someone else. Id. at 153. According to Katie, Mr. Mendoza-Escatel then grabbed her throat and squeezed it, to

get her to sit down next to him. Id. at 154. She stated that she felt she could not breathe, and so she kicked him in the genitals to make him let go. Id. at 154-55. Katie stated that Mr. Mendoza-Escatel grabbed her around the throat two additional times, causing her pain, but that she never lost consciousness. Id. at 156-57.

Mr. Mendoza-Escatel was charged with second degree assault. CP 1-2.[4] Following a jury trial, Mr. Mendoza-Escatel was convicted as charged. CP 6-7; 10/10/13 RP 3. As a first-time offender with a criminal history of zero, he was sentenced to six months incarceration. CP 56-61; 11/1/13 RP 7.

He timely appeals. CP 62-67.

D. ARGUMENT

1. THE SECOND DEGREE ASSAULT CONVICTION MUST BE REVERSED, AS THERE IS INSUFFICIENT EVIDENCE OF STRANGULATION

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; Apprendi v. New

[4] The domestic violence aggravator was charged, as Mr. Mendoza-Escatel and Katie were living together. CP 1-2; RCW 10.99.020.

Jersey, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. Strangulation requires proof of restriction of the airflow or the intent to restrict.

The State charged Mr. Mendoza-Escatel with a single alternative of second degree assault: assault by strangulation. CP 1-2. Mr. Mendoza-Escatel submits the State failed to prove he strangled Katie McAlpin, thus the conviction must be reversed.

A person is guilty of the crime of assault in the second degree by strangulation where he intentionally "[a]ssaults another by strangulation." RCW 9A.36.021(1)(g). "'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow

or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. . . ." RCW 9A.04.110(26). Thus, a person is guilty of second degree assault by strangulation in two circumstances: first, if he intentionally assaults another by compressing that person's neck and actually obstructing either the person's blood flow or ability to breath; and second, if he intentionally assaults another by compressing that person's neck with the intent to obstruct the person's blood flow or ability to breathe. Therefore, intent is necessary when the defendant does not actually obstruct either the victim's blood flow or ability to breathe.

Here, there was insufficient evidence Mr. Mendoza-Escatel intentionally assaulted Katie in either manner. Mr. Mendoza-Escatel was certainly faced with an angry girlfriend, as well as her enraged sister, both admitted attempting to evict him from his own apartment. 10/8/13 RP 83, 97-102, 107-08, 111, 153. He also may have been angry himself, since both women conceded they were hitting and smacking him, and Molly was sneaking into the bathroom to call people to take Mr. Mendoza-Escatel away. Id. Even if Mr. Mendoza-Escatel grabbed Katie's neck in order to restrain her or to keep from

getting "smacked" again, there was insufficient evidence that he did so with the intent to obstruct Katie's blood flow or her ability to breathe.

Katie claimed that Mr. Mendoza-Escatel grabbed her throat and squeezed it, so that she was having trouble breathing. 10/8/13 RP 154-55. Although she stated that she was "losing my breath" during this incident, Katie acknowledged that she never lost consciousness. Id. at 156. Further, Katie's overall testimony was not corroborated by her sister Molly's testimony, who was not in the living room during the alleged assault. Id. at 84-85, 88.

The evidence presented at trial failed to establish that Mr. Mendoza-Escatel obstructed Katie's ability to breathe, or that he intended to restrict her ability to breathe. Because the State failed to prove Mr. Mendoza-Escatel assaulted Katie by strangling her, thus his conviction for second degree assault must be reversed.

c. Mr. Mendoza-Escatel is entitled to reversal of his second degree assault conviction with instructions to dismiss.

Since there was insufficient evidence to support the conviction for second degree assault, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129

(1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), quoting Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. MR. MENDOZA-ESCATEL'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. Prosecutorial misconduct deprived Mr. Mendoza-Escatel of his right to a fair trial.

Prosecutorial misconduct violates the due process right to a fair trial when there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) ("only a fair trial is a constitutional trial"); U.S. Const. amend. XIV; Const. art. I, § 3.

A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71

Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood" exists that the comments affected the jury." Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

b. The prosecutor committed misconduct by misstating the law and lowering the burden of proof.

The prosecutor "has no right to mislead the jury." State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor's office, are substantially likely to taint the jury's verdict. Id.; State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997) (finding manifest constitutional error and reversing conviction, where prosecutor

misstated nature of reasonable doubt and shifted burden of proof to defense). After all, the role of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Here, the deputy prosecutor argued in rebuttal, "There has been no evidence in this case whatsoever to disprove that he strangled her-" 10/9/13 RP 90 (emphasis added). The trial court sustained Mr. Mendoza-Escatel's timely objection. Id. However, following the above statement, the deputy prosecutor concluded his rebuttal argument by continuing to shift the burden to the defense:

> Okay. There has been – you have heard no evidence in this case that strangulation did not occur, and there has been numerous cross-examination of these witnesses. They all said the same thing: that he choked her or that Ms. McAlpin reported that she was choked. You heard from none of them that, well, she never claimed she was choked, or I thought he was choking her, but I might have been mistaken ... that's what I'm implying when I say there is no evidence. You've heard nothing to contradict that – those assertions.

10/9/13 RP 90-91 (emphasis added).

Following the State's rebuttal, the trial court reminded the jury that the defense objection to the argument that Mr. Mendoza-Escatel had not disproved the strangulation had been sustained. Id. at 92. The court also read portions of Instruction No. 3, reminding the jury that the

State has the burden of proof and must prove each element charged beyond a reasonable doubt. Id. at 92.

Despite the court's additional instruction to the jury, however, the State's flagrant and repeated assertions during rebuttal that Mr. Mendoza-Escatel had not presented evidence to refute the accusation undermined the presumption of innocence and shifted the burden of proof. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (reversal granted where misconduct prejudicial and impervious to curative instruction).

c. Reversal is required because the misconduct was prejudicial and impervious to curative instruction.

Although a curative instruction was ultimately given by the trial court, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. Glasmann, 175 Wn.2d at 707. Here, as in Glasmann, the cumulative effect of repeated burden-shifting during rebuttal was so flagrant that no instruction or series of instructions could have erased its combined prejudicial effect. Id.; see State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

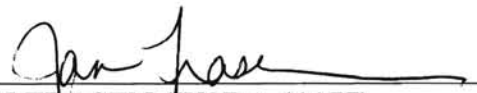
Due to the remarks constituting misconduct in the closing argument, there is a substantial likelihood the remarks affected the jury's verdict; therefore, this Court should reverse Mr. Mendoza-Escatel's conviction. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

E. CONCLUSION

For the reasons stated, Mr. Mendoza-Escatel requests this Court reverse his conviction for second degree assault and order it dismissed. In addition, Mr. Mendoza-Escatel requests this Court reverse his conviction.

DATED this 7th day of July, 2014.

Respectfully submitted,



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DIVISION ONE

STATE OF WASHINGTON, Respondent, v. PEDRO MENDOZA-ESCATEL, Appellant.	)))))))))	NO. 71218-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JULY, 2014, 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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