

SC#93802.4

Court of Appeals No. 73624-8-1

FILED

NOV 04 2016

WASHINGTON STATE
SUPREME COURT

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON SCHWIESOW,

Appellant.

PETITION FOR DISCRETIONARY REVIEW

Appeal from the Superior Court of King County,
Cause No. 14-1-02258-6
The Honorable Thomas J. Wynne, Presiding Judge

2016 OCT 18 2:11 PM 14-92
FILED
CLERK OF COURT
STATE OF WASHINGTON

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I. Identity of Petitioner

Petitioner Jason Schwiesow asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. Court of Appeals' Decision

Mr. Schwiesow seeks review of the October 10, 2016 decision denying his appeal in this matter. A copy of the October 10 decision is in the Appendix at pages A-1 to A-4.

III. Issue Presented for Review

Did the State present sufficient evidence to convict Mr. Schwiesow of interference with domestic violence reporting where the State presented no evidence that Mr. Schwiesow knew the phone he destroyed was going to be used to report a crime of domestic violence?

IV. Statement of the Case

Factual and Procedural Background

On October 4, 2014, Ms. Angelica Zumbroich ended her relationship with Mr. Jason Schwiesow.¹ The couple had been living together in a single-family house.² Mr. Schwiesow moved out that day, and on October 7 or 8, 2014, his name was removed from the lease on the home.³

¹ RP 40-42.

² RP 40-42.

³ RP 43-44.

On October 10, 2014, Mr. Schwiesow returned to the home to retrieve his belongings.⁴ Mr. Schwiesow called Ms. Zumbroich to inform her that he was retrieving his belongings.⁵ Mr. Schwiesow was angry on the phone and hung up on Ms. Zumbroich, so Ms. Zumbroich went to the home to make sure nothing happened.⁶

Ms. Zumbroich and Mr. Schwiesow got into an argument and Ms. Zumbroich slapped Mr. Schwiesow in his face.⁷ Mr. Schwiesow slapped Ms. Zumbroich in her face then began punching her in her head.⁸ Ms. Zumbroich went to the ground but Mr. Schwiesow wrapped his arm around her neck and continued punching her in the side of her head.⁹ As Ms. Zumbroich went to the ground, she dropped her purse and her cell phone fell out of her purse.¹⁰ Ms. Zumbroich reached for her cell phone but Mr. Schwiesow grabbed the phone and threw it against the wall, breaking it.¹¹

When Mr. Schwiesow threw the phone, Ms. Zumbroich got off the ground and ran to a neighbor's house where the neighbor called the

⁴ RP 44.

⁵ RP 44.

⁶ RP 44.

⁷ RP 45-47.

⁸ RP 48.

⁹ RP 48.

¹⁰ RP 49.

¹¹ RP 50.

police.¹² Mr. Schwiesow drove away while Ms. Zumbroich was at the neighbor's house.¹³

Ms. Zumbroich was taken to the hospital where it was determined that the hand she had used to protect her head was broken.¹⁴

On November 10, 2014, Mr. Schwiesow was charged with second-degree assault in violation of RCW 9A.36.021(1)(a) and interfering with domestic violence reporting in violation of RCW 9A.36.150, both charges with a domestic violence allegation.¹⁵ An Amended Information was filed on May 11, 2015, that dropped the domestic violence allegation from the interference with domestic violence reporting charge.¹⁶

Mr. Schwiesow's trial began on May 11, 2015.¹⁷

The jury found Mr. Schwiesow guilty of both charges.¹⁸

Notice of appeal was filed on June 22, 2015.¹⁹

On appeal, Mr. Schwiesow argued that the State presented insufficient evidence to prove Mr. Schwiesow destroyed Ms. Zumbroich's phone while she was using it to report an act of domestic violence.

The Court of Appeals denied Mr. Schwiesow's appeal, finding that

¹² RP 51-53.

¹³ RP 54.

¹⁴ RP 56-57, 98.

¹⁵ CP 176.

¹⁶ CP 163.

¹⁷ RP 30.

¹⁸ CP 71, 74.

¹⁹ CP 17.

the testimony that Ms. Zumbroich was reaching for her phone with the intent to use it to call 911 was a sufficient factual basis to support a finding that Mr. Schwiesow interfered with the reporting of domestic violence.²⁰ Mr. Schwiesow now seeks discretionary review in this court.

V. Argument Why Review Should Be Accepted

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or**
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or**
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or**
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

(Emphasis added.)

The Court of Appeals' decision conflicts with numerous decisions of the Court of Appeals and the Supreme Court regarding the State presenting sufficient evidence to convict an individual of a crime²¹

²⁰ Court of Appeals Decision, p. 3-4.

²¹ *E.G. State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

because the Court of Appeals failed to hold the State to its burden of proving that Mr. Schwiesow's actions interfered with the reporting of domestic violence. Additionally, as will be discussed further below, whether the crime of interfering with the reporting of domestic violence has an implied element that the defendant know he or she is actually interfering with the reporting of domestic violence, is a significant question of law under the State and Federal constitutions and is an issue of substantial public interest that should be determined by this court.

A. The crime of interfering with the reporting of domestic violence includes the element that the individual accused of the crime know he is interfering with the reporting of domestic violence.

RCW 9A.36.150 provides, in pertinent part,

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system

The State and the Court of Appeals interpret this statute to define a "strict liability" crime with no proof of mens rea required to find a defendant guilty of the crime. This is an improper reading of the statute.

as a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. *State v. Utter*, 4 Wn.App. 137, 139, 479 P.2d 946 (1971); *see also United States v. Apfelbaum*, 445 U.S. 115, 131, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). The actus reus is “[t]he wrongful deed that comprises the physical components of a crime.” Black’s Law Dictionary 39 (8th ed.2004). The mens rea is “[t]he state of mind that the prosecution ... must prove that a defendant had when committing a crime.” Black’s Law Dictionary 1006 (8th ed.2004).

Some crimes, though, including the crime of possession of a controlled substance, have no mens rea requirement. See RCW 69.50.4013(1). Our Supreme Court has “specifically construed the statute not to include knowledge.” *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005). Thus, the State simply has the burden of proving the nature of the controlled substance and the fact of possession. *Bradshaw*, 152 Wn.2d at 538, 98 P.3d 1190.

Similarly, the sentence enhancement under RCW 9.94A.533(5) has no mens rea requirement. See RCW 9.94A.533(5). In fact, this sentence enhancement is not a separate sentence or a separate substantive crime. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 253, 955 P.2d 798 (1998). Rather, it presupposes that the defendant's behavior already constitutes a crime, such as possession of a controlled substance. *See State v. Barnes*, 153 Wn.2d 378, 385, 103 P.3d 1219 (2005).

But even strict liability punishments, i.e., those crimes and sentence enhancements having no mens rea requirement, require something of an element of volition. “There is a certain minimal mental element required in order to establish the actus reus itself. *This is the element of volition.*” *Utter*, 4 Wn.App. at 139, 479 P.2d 946 (emphasis added). At least one author has noted:

At all events, it is clear that criminal liability requires that the activity in question be

voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.

1 Wayne R. La Fave, *Substantive Criminal Law* § 6.1(c), at 425–26 (2d ed.2003) (footnote omitted).²²

Eaton was arrested for DUI and transported to the county jail where he was searched and police found methamphetamine on his person.²³ Eaton was convicted of unlawful possession of a controlled substance and the trial court imposed a sentence enhancement under RCW 9.94A.533(5) for possession of methamphetamine while in a county jail.²⁴ While acknowledging that the sentence enhancement under RCW 9.94A.535(5) has no mens rea requirement, the Court of Appeals vacated the sentence enhancement and remanded for resentencing because Eaton was brought to the jail involuntarily making his possession of the methamphetamine in the jail an involuntary act.²⁵

In reaching its ruling, the *Eaton* court relied on and favorably cited *State v. Tippetts*, 180 Or.App. 350, 43 P.3d 455 (2002). Specifically, the

²² *State v. Eaton*, 143 Wn.App. 155, 160-161, 177 P.3d 157 (2008), *affirmed* 168 Wn.2d 476 (2010).

²³ *Eaton*, 143 Wn.App. at 157, 177 P.3d 157.

²⁴ *Eaton*, 143 Wn.App. at 157, 177 P.3d 157.

Eaton court cited with approval the *Tippetts* court's reasoning that, "'a voluntary act requires something more than awareness. It requires an ability to choose which course to take—i.e., an ability to choose whether to commit the act that gives rise to criminal liability.'"²⁶

Tippetts and *Eaton* were both cases where the defendants were punished for possessing controlled substances in a jail after being transported to the jail by police. In both cases the court vacated the punishment for the possession because while the possession was voluntary, the location of the possession was not, i.e. the defendant was involuntarily transported to the jail by the police and did not voluntarily possess the controlled substances in the jail.

Like the crimes in *Eaton* and *Tippetts*, RCW 9A.36.150 appears to be a strict liability crime, but there is an unwritten mens rea element that the defendant know he or she is interfering with the reporting of domestic violence to 911. For example, it is not disputed that Mr. Schwiesow picked up Ms. Zumbroich's phone and destroyed it by throwing it against a wall. Had Mr. Schwiesow performed this action outside of the context of a domestic violence incident there would be no question that the act would be punished most likely as malicious mischief in the third degree.²⁷

²⁵ *Eaton*, 143 Wn.App. at 161-165, 177 P.3d 157.

²⁶ *Tippetts*, 43 P.3d at 458, cited in *Eaton*, 143 Wn.App. at 163, 177 P.3d 157.

²⁷ RCW 9A.48.090.

However, what would transform this act from an act of malicious mischief to an act of interfering with the reporting of domestic violence is if Mr. Schwiesow destroyed the telephone with the knowledge that Ms. Zumbroich was using it or about to use it to contact 911 to report domestic violence.²⁸

This case is like *Eaton* and *Tippets* in that Mr. Schwiesow is being punished for a crime he did not knowingly chose to commit. In *Eaton* and *Tippets* the defendants chose to possess the controlled substances but the courts held the defendants could not be punished for possessing the controlled substances in a jail because defendants did not knowingly chose to possess those controlled substances in a jail. In this case Mr. Schwiesow may have chosen to destroy Ms. Zumbroich's phone but he had no basis to believe that she was reaching for the phone to call 911. Ms. Zumbroich's purse had spilled during the couples' heated struggle. Mr. Schwiesow had no reason to think that Ms. Zumbroich was doing anything other than reaching for her phone to put it back in her purse. There is no evidence to suggest that Mr. Schwiesow destroyed her phone with the intent to prevent her from reporting the domestic violence to 911 because there is no evidence that Mr. Schwiesow knew Ms. Zumbroich's

²⁸ See, e.g. *State v. Nonog*, 145 Wn.App. 802, 187 P.3d 335 (2008), upholding conviction for interfering with the reporting of domestic violence where defendant grabbed victim's cell phone out of her hands as she was dialing 911 and threw the phone against a wall.

intent regarding the phone when she reached for it.

RCW 9A.36.150 includes an implicit mens re requirement that the interference with the reporting of domestic violence be done knowingly. Without such a requirement, a defendant, like Mr. Schwiesow, may chose to rip a phone from a wall or destroy a cell phone intending to do nothing more than destroy property during a domestic dispute but be convicted of interfering with the reporting of domestic violence if someone, unbeknownst to the defendant, intended to use that phone to contact police at a later time. Like the crimes in *Eaton* and *Tippets*, a defendant in such circumstances cannot be found guilty of interfering with the reporting of domestic violence because the defendant did not make the volitional choice to interfere with the reporting of the domestic violence.

B. The State presented insufficient evidence to convict Mr. Schwiesow of interfering with the reporting of domestic violence.

When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.²⁹ “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn

therefrom.”³⁰ If there is insufficient evidence to prove an element, reversal is required and retrial is “unequivocally prohibited.”³¹

Mr. Schwiesow was charged with one count of interfering with domestic violence reporting in violation of RCW 9A.36.150.³² RCW 9A.36.150 provides, in pertinent part,

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

(2) Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.

RCW 10.99.020(5)(b) includes second-degree assault in the definition of a crime of domestic violence when it is committed by one household member against another. RCW 10.99.020(3) defines “household members: as including “adult persons who are presently residing together or who have resided together in the past.”

²⁹ *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

³⁰ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³¹ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

As discussed above, the crime of interference with the reporting of domestic violence includes the implicit mens rea element that the defendant know his or her actions are interfering with the reporting of domestic violence.

The facts introduced at trial established that Ms. Zumbroich's telephone, along with all the other contents of her purse, fell out of her purse when she fell to the ground, that she reached towards the contents of her purse, and that Mr. Schwiesow immediately grabbed the phone and threw it against the wall.³³

No evidence was introduced indicating that Mr. Schwiesow actually interfered with Ms. Ms. Zumbroich "calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official" or knew that his action might cause such interference. Rather, before Ms. Zumbroich even had the phone in her hand, Mr. Schwiesow picked it up threw it against the wall. Again, Mr. Schwiesow's conduct was a criminal act, most likely malicious mischief in the third degree, but since the phone was not actually being used to call police, medical aid, or to report an act of domestic violence, and there was no evidence that Mr. Schwiersow knew Ms. Zumbroich intended to use the phone to do so, his conduct did not violate RCW 9A.36.150.

³² CP163.

Even viewed in the light most favorable to the State, the evidence introduced at trial does not establish that Mr. Schwiesow's actions constituted the crime of interference with reporting of domestic violence.

VI. CONCLUSION

The Supreme Court should accept review of this case to determine whether there is a presumptive mens rea element of RCW 9A.36.150 that requires the defendant to know that his or her actions are actually interfering with the reporting of domestic violence to 911. This is an issue of substantial public interest and is a significant question of law given the large number of domestic violence prosecutions that occur in this state every year.

DATED this 20th day of October, 2016

Respectfully submitted,

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³³ RP 49, 144.

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73624-8-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
JASON CARL SCHWIESOW,)	
)	
<u>Appellant.</u>)	FILED: October 10, 2016

TRICKEY, J. — Jason Schwiesow appeals his conviction for interference with the reporting of domestic violence. He argues that, because Angelica Zumbroich was not holding her cell phone or dialing 911 when Schwiesow destroyed it, the State did not present sufficient evidence to show that he prevented or attempted to prevent Zumbroich from reaching emergency services. Because the State's evidence at trial established that Schwiesow prevented Zumbroich from contacting emergency services by destroying her phone, we affirm.

FACTS

On October 4, 2014, Schwiesow and Zumbroich ended their relationship and Schwiesow moved out of their shared house. On October 10, 2014, Schwiesow returned to the house to retrieve several of his belongings while Zumbroich was at work. Zumbroich joined him at the house to make sure that Schwiesow did not damage any of her property.

When Schwiesow and Zumbroich met at the house, they argued and Schwiesow quickly became violent. During the attack, Schwiesow pushed Zumbroich to the ground and her cell phone fell out of her purse. Schwiesow grabbed Zumbroich around her neck and repeatedly punched her in the head.

Zumbroich reached for her cell phone to call 911. Schwiesow saw Zumbroich reaching for the cell phone, grabbed it, and threw it against a wall; the cell phone broke into pieces. While Schwiesow was distracted with the cell phone, Zumbroich ran to her neighbors' house and immediately asked them to call 911.

Schwiesow was charged with second degree assault and interfering with the reporting of domestic violence. The jury convicted him on both counts. He appeals only his conviction for interfering with the reporting of domestic violence.

ANALYSIS

Sufficiency of the Evidence

Schwiesow argues that there was insufficient evidence that he prevented Zumbroich from contacting emergency services to support his conviction for interfering with the reporting of domestic violence under RCW 9A.36.150. We disagree.

Evidence is sufficient to sustain a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the State charged Schwiesow with interfering with the reporting of domestic violence. It had to prove that Schwiesow committed a crime of domestic violence, as defined in RCW 10.99.020, and "[p]revent[ed] or attempt[ed] to prevent the victim of or a witness to that domestic violence crime from calling a

911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.” RCW 9A.36.150(1)(a), (b).

Washington courts have held that a range of actions constitute preventing or attempting to prevent the reporting of domestic violence. See, e.g., State v. Clowes, 104 Wn. App. 935, 939, 18 P.3d 596 (2001) (defendant disconnected the victim’s phone during an argument and blocked her attempts to leave), disapproved of on other grounds by State v. Nonog, 169 Wn.2d 220, 223, 237 P.3d 250 (2010) (defendant grabbed victim’s cell phone from her hand while she was attempting to call the police and destroyed it by throwing it against a wall); State v. Laramie, 141 Wn. App. 332, 336, 169 P.3d 859 (2007) (defendant grabbed a phone away from victim when she tried to call 911 and threatened to “get her” when he got out).

Schwiesow argues that the statute requires the victim to be in the process of contacting emergency services when the prevention or attempt to prevent occurs to support a conviction. He argues that, because Zumbroich had not yet begun to call 911 when he destroyed the cell phone, he did not prevent her from contacting emergency services within the meaning of the statute. He cites no authority for this position. We decline to adopt such a narrow reading of the statute.

Here, the State established that Zumbroich was reaching for the cell phone in response to Schwiesow repeatedly hitting her.¹ Zumbroich testified at trial that

¹ The parties dispute whether the evidence at trial established that Zumbroich was holding the cell phone when Schwiesow grabbed it and destroyed it. This is irrelevant because neither the statute nor Washington case law require the victim to have physical control of the means of communicating or to be presently using the means of communication to contact emergency services when the defendant acts.

she was “trying to get the phone to call 911” when Schwiesow destroyed it.² Following Schwiesow’s destruction of the cell phone, Zumbroich escaped from the house and immediately contacted 911.

Viewing this evidence in a light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt that, by grabbing Zumbroich’s cell phone and destroying it, Schwiesow prevented Zumbroich from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official, thereby satisfying the essential element of the crime at issue. Therefore, we find that Schwiesow’s actions prevented Zumbroich from contacting emergency services in violation of RCW 9A.36.150.

We affirm the judgment and sentence.

Trickey, J

WE CONCUR:

[Signature]

Reach, J.

² Report or Proceedings (May 11, 2015) at 49.

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