675401

675401

No. 67540-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE KIMMER,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB -3 PM 4:59

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

1. THE STATE DID NOT PROVE THE ELEMENTS OF ASSAULT BY STRANGULATION BEYOND A REASONABLE DOUBT 5

2. THE TRIAL COURT MISCALCULATED MR. KIMMER'S OFFENDER SCORE 8

F. CONCLUSION 11

TABLE OF AUTHORITIES

Constitutional Provisions

Const. amend. XIV 6

Washington Supreme Court

In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)9, 11

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 6

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 8

State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995) 8

State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) 9

United States Supreme Court

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 6

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 6

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) 8

Statutes

RCW 9.94A.030(11) 9

RCW 9.94A.030(54) 10

RCW 9.94A.030(54)(viii) 9, 10

RCW 9.94A.525 9

RCW 9.94A.525(8) 10, 11

RCW 9.94A.530(1) 9

RCW 9A.04.110(26) 6

RCW 9A.08.010(1)(a) 7

RCW 9A.36.021(g) 6

Rules

ER 613 6

ER 801(d)(1)(i) 5

A. SUMMARY OF ARGUMENT

Michael Kimmer was convicted of second degree assault by strangulation but the only evidence presented of strangulation was that the complainant had bruises on her neck and told a physician her ex-boyfriend grabbed her around the neck. Because this evidence was insufficient to prove beyond a reasonable doubt that Mr. Kimmer compressed her neck and obstructed her blood flow or ability to breathe, or compressed her neck with the intent to obstruct her blood flow or ability to breathe, the conviction must be reversed and the charge dismissed.

In addition, Mr. Kimmer's offender score was miscalculated and he is entitled to be resentenced.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove assault by strangulation.
2. Mr. Kimmer's offender score was miscalulated.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove every element of the charged offense beyond a reasonable doubt. To prove second degree assault by strangulation, the State must prove the defendant compressed a person's neck and obstructed that person's blood flow or ability to breathe, or compressed a person's neck with the intent to obstruct the person's blood flow or ability to breathe. Was the evidence insufficient to prove

assault by strangulation where the only evidence presented was that the complainant had bruises on her neck and told a physician her ex-boyfriend grabbed her around the neck?

2. Was Mr. Kimmer's offender score miscalculated, where his criminal history as found by the court supported an offender score of seven, but the court calculated his offender score as eight?

D. STATEMENT OF THE CASE

Carolyn Bradbury and Michael Kimmer have known each other for about 20 years and have dated off and on. 4/25/11RP 80. They have one biological child together and Mr. Kimmer acts as a father to Ms. Bradbury's other child. 4/25/11RP 80. In October 2009, Ms. Bradbury was dating Mr. Kimmer and wanted their relationship to be exclusive. But because Mr. Kimmer refused to date Ms. Bradbury exclusively, she was also dating Ty James out of retaliation. 4/25/11RP 81-82.

On the evening of October 30, 2009, Mr. James met Ms. Bradbury and a friend at a bar. 4/25/11RP 62. After he sat with them for awhile, he noticed Ms. Bradbury's leg was bleeding, with blood seeping through her pant leg and onto the floor. 4/25/11RP 63. He asked her what happened but she did not want to tell him. 4/25/11RP 64. He took her to Overlake Hospital. 4/25/11RP 65.

At the hospital, Ms. Bradbury told the emergency room physician "that she had been stabbed by her ex-boyfriend" a couple of hours earlier. 4/21/11RP 9. She said the knife was a jackknife with a blade three or four inches long. 4/21/11RP 9. She said "that she was thrown onto the bed and she attempted to put her legs up to protect herself and that's when the stab occurred into the leg." 4/21/11RP 13. Ms. Bradbury sustained two stab wounds to the back of her leg, which the physician sutured closed. 4/21/11RP 10, 14.

Ms. Bradbury also had bruises on her face, beneath her right eye on her cheekbone, and on her neck. 4/21/11RP 17. She told the physician she received the bruises "from an assault the previous day by the same individual." 4/21/11RP 17. She said "[s]he'd been grabbed around the neck." 4/21/11RP 17. The doctor testified the bruises on her neck were consistent with being choked.[1] 4/21/11RP 18.

Renton police officer Donald Myers went to Overlake Hospital to talk to Ms. Bradbury. 4/21/11RP 39. While there, he took her written statement. 4/21/11RP 41; Exhibit 5.

In her written statement, signed under penalty of perjury, Ms. Bradbury said she had gotten into an argument with Mr. Kimmer. Exhibit 5. When he came at her throat, she kicked up her leg and hit him in the

[1] The hospital social worker, Chandra Kinnee, also noticed bruises on Ms. Bradbury's neck and said "it looked like she'd been choked." 4/25/11RP 23.

head. Id. He "raged and grabbed his knife out of his sweater pocket," and when she rolled over to protect herself, "he stabbed the back of [her] thigh." Id. When he realized what he had done, he was immediately apologetic, cried, and helped her put band-aids on the cuts. Id.

In her written police statement, Ms. Bradbury said nothing about an earlier assault or how she sustained bruises on her face and neck. Id.

The State charged Mr. Kimmer with one count of second degree intentional assault by strangulation, RCW 9A.36.021(1)(g) (count I) and one count of second degree assault with a deadly weapon or, in the alternative, intentional assault thereby recklessly inflicting substantial bodily harm, RCW 9A.36.021(1)(a), (c) (count II).[2] CP 8-9.

At the jury trial, Ms. Bradbury testified she did not remember telling either Mr. James, the hospital physician, the police officer, or the social worker that Mr. Kimmer had stabbed her or otherwise assaulted her. 4/25/11RP 83-84, 86-88, 90. She remembered going to the hospital but could "barely remember anything from the hospital." 4/25/11RP 84-85. She was intoxicated and had been given painkillers. 4/25/11RP 84; 4/265/11RP 5-6.

---

[2] For both counts, the State alleged the offenses involved domestic violence and there was evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time, RCW 9.94A.535(3)(h)(i). CP 8-9. But the State later abandoned the aggravating factor and no exceptional sentence was imposed. 4/27/11RP 46.

After Ms. Bradbury testified, the State offered her written statement to police, exhibit five, as substantive evidence under ER 801(d)(1)(i).[3] 4/26/11RP 58. The court granted the motion, over defense objection. 4/26/11RP 60.

The State also recalled several of its witnesses to recount Ms. Bradbury's other out-of-court statements, which were offered to impeach her trial testimony.[4] The State acknowledged those hearsay statements were not admitted as substantive evidence. 4/26/11RP 36.

The jury found Mr. Kimmer guilty of both counts of second degree assault as charged. CP 38-39.

At sentencing, the court found Mr. Kimmer had an offender score of eight for each count and imposed a standard-range sentence based on that score. CP 66, 68.

E. ARGUMENT

1. THE STATE DID NOT PROVE THE ELEMENTS OF ASSAULT BY STRANGULATION BEYOND A REASONABLE DOUBT

The only substantive evidence of assault by strangulation was the emergency room physician's and the hospital social worker's testimonies

[3] ER 801(d)(1)(i) provides a statement is not hearsay, and may be admitted as substantive evidence, if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

that Ms. Bradbury had bruising on her neck and said she'd been grabbed around the neck by an ex-boyfriend. That evidence was insufficient to prove strangulation beyond a reasonable doubt.

Constitutional due process requires the State prove every element of a criminal offense beyond a reasonable doubt. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When reviewing a sufficiency challenge on appeal, the question is "'whether, 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.'" State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

To prove second degree assault by strangulation as charged in count I, the State was required to prove Mr. Kimmer "intentionally assaulted Carolyn Bradbury by strangulation." CP 60 (to-convict instruction); RCW 9A.36.021(g). "Strangulation means to compress a person's neck in a manner that obstructs the person's blood flow or ability to breathe, or to compress a person's neck with the intent to obstruct the person's blood flow or ability to breathe." CP 55; RCW 9A.04.110(26).

---

[4] ER 613 permits a party to offer extrinsic evidence of a witness's prior inconsistent statements in order to impeach her testimony at trial.

Thus, the State was required to prove Mr. Kimmer intentionally compressed Ms. Bradbury's neck and either successfully obstructed her blood flow or ability to breathe, or compressed her neck with an intent to obstruct her blood flow or ability to breathe. "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 52; RCW 9A.08.010(1)(a).

The emergency room physician testified only that Ms. Bradbury told him "[s]he'd been grabbed around the neck" by an ex-boyfriend. 4/21/11RP 17. She had bruises on her neck that the physician testified were consistent with being choked. 4/21/11RP 18. The social worker also noticed bruises on Ms. Bradbury's neck and said "it looked like she'd been choked." 4/25/11RP 23.

Even if this evidence is sufficient to prove Mr. Kimmer grabbed Ms. Bradbury by the neck, it is insufficient to prove he either successfully obstructed her blood flow or ability to breathe or acted with an intent to do so. There was simply no evidence at all that Ms. Bradbury's ability to breathe was impaired. There was simply no evidence that her blood flow was affected. Simply grabbing a person by the neck in the middle of a fight cannot be sufficient to prove beyond a reasonable doubt an intent to obstruct the person's blood flow or ability to breathe. Therefore, the State

did not prove beyond a reasonable doubt that Mr. Kimmer strangled Ms. Bradbury.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Therefore, Mr. Kimmer's conviction for second degree assault by strangulation must be reversed and the charge dismissed.

2. THE TRIAL COURT MISCALCULATED MR. KIMMER'S OFFENDER SCORE

The trial court calculated Mr. Kimmer's offender score as eight for each count. CP 66, 68. But the criminal history as found by the court supported only an offender score of seven. Therefore, Mr. Kimmer must be resentenced.

This Court reviews the trial court's calculation of the offender score de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). Mr. Kimmer did not waive his right to challenge the calculation of his offender score by not objecting below. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525. When a person is sentenced for more than one current offense, the sentence range for each current offense is determined by using all other current convictions as if they were prior convictions for the purpose of the offender score, unless the court finds they encompass the same criminal conduct. RCW 9.94A.525(1), 589(1)(a).

Here, Mr. Kimmer was convicted of two counts of second degree assault, which is a "violent offense" for purposes of the Sentencing Reform Act (SRA). RCW 9.94A.030(54)(viii). When a person is convicted of a "violent offense," each prior conviction for a violent

offense is counted as two points in the offender score.[5] RCW 9.94A.525(8). Otherwise, each prior nonviolent adult felony conviction is counted as one point and each prior nonviolent juvenile felony conviction is counted as 1/2 point. Id.

The court found Mr. Kimmer had the following adult prior felony convictions:

Crime	Sentencing date
Controlled substance possession	9/14/2007
Controlled substance possession	9/14/2007
Identity theft	6/09/2006
Violation of a no-contact order	6/14/2002
Unlawful possession of a firearm	6/14/2002

CP 71. None of these crimes is a "violent offense" for purposes of the SRA. See RCW 9.94A.030(54). Therefore, each prior offense counted as only one point in the offender score. RCW 9.94A.525(8).

Mr. Kimmer had two current convictions for second degree assault which, as stated, is a "violent offense." RCW 9.94A.030(54)(viii). Therefore, each of those convictions counted as two points in the offender score for the other. RCW 9.94A.525(8)

Thus, the trial court should have counted each of Mr. Kimmer's five prior felony convictions as one point in the offender score and his other current conviction for second degree assault as two points, for a total

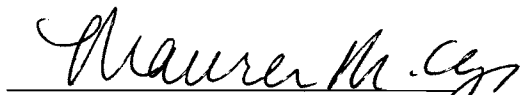
[5] This rule is subject to certain exceptions that are not relevant here. See RCW 9.94A.525(8).

of seven. The court therefore erred in calculating Mr. Kimmer's offender score as eight and imposing a sentence based on that score. Mr. Kimmer must be resentenced. Goodwin, 146 Wn.2d at 877-78.

F. CONCLUSION

Because the State did not prove assault by strangulation beyond a reasonable doubt, that conviction must be reversed and the charge dismissed. Also, because the court miscalculated Mr. Kimmer's offender score, he must be resentenced.

Respectfully submitted this 3rd day of February 2012.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant