

NO. 36675-4-II
Cowlitz Co. Cause NO. 07-1-00655-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

KURTIS R. J. MATHIS

Respondent.

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ERRED WHEN IT GRANTED MATHIS'S MOTION TO DISMISS THE CHARGE OF ASSAULT IN THE THIRD DEGREE BASED ON A FINDING THAT THE STATUTE IS VOID FOR VAGUENESS.**
- B. THE TRIAL COURT ERRED WHEN IT GRANTED MATHIS'S MOTION TO DISMISS THE CHARGE OF ASSAULT IN THE THIRD DEGREE BASED ON A FINDING OF INSUFFICIENT EVIDENCE.**

II. ISSUE PRESENTED

- A. IS THE STATUTE DEFINING THIRD DEGREE ASSAULT VOID FOR VAGUENESS?**
- B. DID THE STATE PRESENT SUFFICIENT EVIDENCE TO FIND THE DEFENDANT COMMITTED ASSAULT IN THE THIRD DEGREE?**

III. SHORT ANSWER

- A. No.**
- B. Yes.**

IV. STATEMENT OF THE CASE

On May 11, 2007, the Cowlitz County Sheriff's Department responded to an address at 4460 Sunset Way in Cowlitz County. 2RP107-108¹. Deputies arrived at the incident at 1918 hours, which was approximately 7:18 pm. 2RP 108. The call from dispatch was received at 1904 hours, deputies were dispatched at 1907 hours. 2RP 108. When Deputies arrived, they contacted victim, Shelly Devon, who had been crying, she had red marks on her neck, and Deputy Hanberry testified Shelly told him that she had been in an argument with her son. 2RP 110-111. During the course of the argument Deputy Hanberry testified that Shelly told him that her son had grabbed her by the throat and pinned her against the wall. 2RP 111. Deputy Hanberry testified that Shelly indicated that she had been strangled with the defendant's hands, she'd been pinned against a wall, and she indicated that the defendant had used enough pressure so that she could not breath. 2RP 113. Deputy Hanberry testified that Shelly also indicated to him that she had pain in her throat, a hoarse

¹ There are three verbatim reports in this case. Report one, "RP", refers to the verbatim reports from August 15, 2007. Report two, "2RP", refers to verbatim reports from August 16, 2007, and report three, "3RP", refers to verbatim reports from August 17, 2007.

and raspy voice, and that she had trouble swallowing, and she felt dizzy. 2 RP 113-114. Deputy Hanberry testified that Shelly showed him marks on her neck as well as her back from the altercation. 2RP 114.

Brian Jones, the neighbor in the adjacent duplex to Ms. Davon, testified that Shelly had at one point burst through his door and told Mr. Jones that the defendant had choked her. 2RP 7. Mr. Jones testified that he noticed red marks on Shelly's neck. 2RP 7.

Shelly Devon testified that she had gone over to Brian Jones's about twenty to thirty minutes after her altercation with the defendant and that the officers arrived approximately twenty minutes after that. 2RP 102. Shelly Devon testified that the defendant had grabbed her with one hand around her throat and that she could not breath for a couple of seconds. 2RP 38. Shelly also testified that her neck was still sore a few days later. 2RP 61. Shelly testified that she indicated to the officer that she had difficulty breathing during the strangulation temporarily for a few seconds. 2RP 88. Shelly also testified that she might have indicated to the officer that she had trouble swallowing. 2RP 88. Shelly indicated in a written statement she later submitted to the officer that the defendant's girlfriend had to help him let go. 2RP 92. In the statement she had also indicated to the officer that she thought the defendant wanted to kill her. 2RP 94. Shelly testified that at the time she answered the officer's questions about

the altercation with the defendant it was about forty-five minutes after the altercation had occurred. 2RP. 103. Shelly testified that she was honest with the officer. 2RP 96.

The defendant was charged by Information with the crime of assault in the second degree domestic violence, or in the alternative, assault in the third degree domestic violence. 2 RP 65. Specifically the defendant was charged with having intentionally assaulted Shelly Devon, a family or household member, and thereby recklessly inflicted substantial bodily harm by interfering with Shelly Devon's ability to breath. 2RP 65. In the alternative, that on the same date (May 11, 2007), the defendant was alleged to have with criminal negligence caused substantial bodily harm accompanied by pain that extended for a period sufficient to cause considerable suffering by interfering with Shelly Devon's ability to breath. 2 RP 65-66. At the close of the State's case, the defendant made a motion to dismiss for lack of evidence as to assault in the second degree and assault in the third degree. 2RP 131. The trial court found that there had been insufficient evidence about "substantial pain that extended for a period of time to cause considerable suffering." 2RP 132. The Court queried what qualifies as "substantial pain" and what is "considerable suffering" under the statute. 2RP 136. The trial court granted the defense motion to dismiss as it related to the charge of assault in the third degree.

2RP 140. The trial court found that where assault in the second degree requires that the loss of the ability to breathe is a substantial loss even where it is temporary, assault in the third degree requires in addition to substantial pain, that it extend for a period to cause considerable suffering. 2RP 141. The trial court then struggled with the sufficiency of the statute with considerable suffering as some sort of test. 2RP 141. Ultimately, the trial court dismissed the charge of assault in the third degree based on statutory vagueness. 3RP 5.

The State objected to not submitting the assault in the third degree charge, elements, and definition, to the jury. 3RP 3. Assault in the second degree, and the lesser-included charge of assault in the fourth degree were submitted to the jury. 3 RP 13-14. The jury returned a verdict of guilty as to assault in the fourth degree domestic violence. 3RP 58.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE DEFINING THIRD DEGREE ASSAULT WAS VOID FOR VAGUENESS.

RCW 9A.36.031 prohibits the negligent causation of “bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031. “Bodily harm” is defined in RCW 9A.04.110(4)(a) as “physical pain or injury, illness, or an

impairment of physical condition,” however, “substantial pain” and “considerable suffering” are not defined in the criminal code. RCW 9A.04.110(4)(a).

In *State v. Saunders*, after having been convicted of assault in the third degree, Saunders argued that the third degree assault statute was void for vagueness. *State v. Saunders*, 132 Wash. App. 592, 599, 132 P.3d 743 (2006). The Court held that the terms “substantial pain” and “considerable suffering” as used in RCW 9A.36.031(f), qualify the term “bodily harm,” which is defined as a matter of physical sensation. *State v. Saunders*, 132 Wash. App. 592, 599, 132 P.3d 743 (2006). Furthermore, the court held that the statute is not void for vagueness because it provides adequate notice of the proscribed conduct and possesses ascertainable standards to prevent arbitrary enforcement. *State v. Saunders*, 132 Wash. App. 592, 600, 132 P.3d 743 (2006).

The trial court in the case at bar, granted the defense motion to dismiss as it related to the charge of assault in the third degree. 2RP 140. The trial court found that where assault in the second degree requires that the loss of the ability to breathe is a substantial loss even where it is temporary, assault in the third degree requires in addition to substantial pain, that it extend for a period to cause considerable suffering. 2RP 141. The trial court then struggled with the sufficiency of the statute with considerable

suffering as some sort of test. 2RP 141. Ultimately, the trial court dismissed the charge of assault in the third degree based on statutory vagueness. 3RP 5.

B. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE AS TO THE CHARGE OF ASSAULT IN THE THIRD DEGREE.

A reviewing court reviews a challenge to the sufficiency of the evidence by considering the evidence in the light most favorable to the State, affording it all reasonable inferences, and asking whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Goodman*, 150 Wash.2d 774, 781, 83 P.3d 410 (2004). Direct evidence and circumstantial evidence are considered equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

In *State v Saunders*, the defendant was convicted of assault in the third degree where the testimony was that upon arrival at the victim's home the victim was found crying, nervous, and frightened. *State v. Saunders*, 132 Wash. App. 592, 597, 132 P.3d 743 (2006). The responding Deputy saw fresh red marks in the shape of a hand print on the victim's neck and swelling around her eye. *Id.* The Deputy testified that the victim had told him that she and Saunders argued that morning and that he grabbed her by

her hair and throat, threw her against the wall, hit her right eye, and choked her to the point where she felt dizzy. *Id.* On appeal, in addition to arguing that the statute was void for vagueness, Saunders argued that there was insufficient evidence to find injuries which constituted substantial pain and considerable suffering. *Id.* at 600. The Court disagreed finding that a rational trier of fact could conclude that Saunders caused the victim substantial pain and considerable suffering because there was evidence that she complained of neck pain lasting for more than three hours, and that she had swelling on her cheek and an abrasion on her forehead, all of which was consistent with her claim that Saunders threw her against a wall and choked her. *State v. Saunders*, 132 Wash. App. 592, 600, 132 P.3d 743 (2006).

Additionally, in *State v. Robertson*, in a consolidated appeal defendants argued that there was insufficient evidence in the record that the victim suffered substantial pain extending for a period sufficient to cause considerable suffering where the record showed that the victim had suffered a severe headache that lasted for two weeks and had bruising as well as a black eye. *State v. Robertson*, 88 Wash. App. 836, 841, 947 P.2d 765 (1997). They contended that because the statute requires “bodily harm,” which is defined in the criminal code to include physical pain, that the court should construe “substantial pain” as something more than mere

physical pain of the sort that typically accompanies an assault. *Id.* The Court disagreed and found there was substantial evidence supporting the finding. *Id.*

Similarly, in the case at bar, as was the case in *State v. Robertson*, the victim, Shelly Devon could not breath for a short period of time, her pain lingered after the incident, and marks were observed at least forty five minutes later. 2 RP 38, 61, 103. Specifically, according to Shelly Devon's account of the events, she indicated to the officer at least forty five minutes after the assault, that she had pain. 2RP. 103. Shelly Devon testified that the defendant had grabbed her with one hand around her throat and that she could not breath for a couple of seconds. 2RP 38. Shelly also testified that her neck was still sore a few days later. 2RP 61. Deputy Hanberry testified that Shelly showed him marks on her neck as well as her back from the altercation. 2RP 114. And Brian Jones also testified that Shelly had at one point burst through his door and told Mr. Jones that the defendant had choked her, and that he noticed red marks on Shelly's neck. 2RP 7. Shelly Devon testified that at the time she burst through Mr. Jones's door, it was about twenty to thirty minutes after the assault. 2RP 103. Based on these circumstances, the Appellant submits when viewed in the light most favorable to the State that there was

substantial evidence to find that the victim suffered substantial pain and considerable suffering.

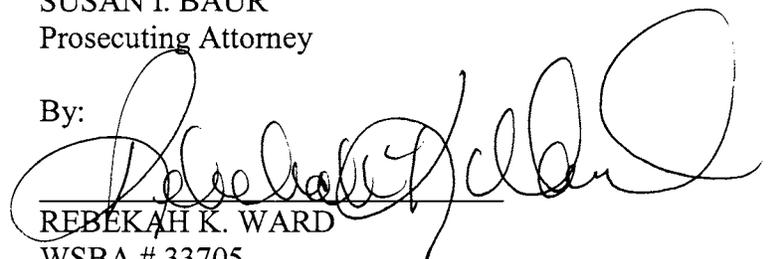
VI. CONCLUSION

The trial court erred in granting Mathis's motion to dismiss and in failing to submit the charge of assault in the third degree to the jury. As such, the State asks this court to remand the case for a new trial on the charge of assault in the third degree.

Respectfully submitted this 1st day of February, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:



REBEKAH K. WARD
WSBA # 33705
Deputy Prosecuting Attorney
Representing Appellant

COURT OF APPEALS, STATE OF WASHINGTON
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CERTIFICATE OF
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BY [Signature]
DEPUTY

I, Audrey J. Gilliam, certify and declare:

That on the 4th day of February, 2008, I deposited in the mail of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Appellant addressed to the following parties:

LISA E. TABBUT
Attorney at Law
P. O. Box 1396
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of February, 2008.

[Signature]
Audrey J. Gilliam