

NO. 47743-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER KENDRICK

Appellant.

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

The Honorable Phillip Sorensen, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENTS</u>	4
1. KENDRICK WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	4
a. <u>Counsel’s Performance Was Deficient</u>	4
b. <u>Prejudice Presumed</u>	5
2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT KENDRICK STRANGLED BIGGS.....	7
a. <u>The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt</u>	7
b. <u>Strangulation requires proof of restriction of the airflow or the intent to restrict</u>	8
c. <u>Reversal Required</u>	10
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>In re Pers. Restraint of Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	6
<i>State v. Abuan</i> , 161 Wn.App. 135, 257 P.3d 1 (2011).....	8, 10
<i>State v. Carson</i> , 184 Wn.2d 207, 357 P.3d 1064 (2015).....	4
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	10
<i>State v. Hosier</i> , 157 Wn.2d 1, 133 P.3d 936 (2006).....	8, 10
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	4
<i>State v. Webbe</i> , 122 Wn. App. 683, 94 P.3d 994(2004).....	6

FEDERAL CASES

<i>Anders v. California</i> , 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).....	6
<i>Apprendi v. Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	8
<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).....	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....4, 6

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....8

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....8

Stano v. Dugger,
921 F.2d 1125 (11th Cir. 1991).....5

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984).....4-7

United States v. Ash,
413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973).....5

United States v. Cronic,
466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....4-6

United States v. Swanson,
943 F.2d 1070 (9th Cir. 1991).....5-7

Wiley v. Sowders,
647 F.2d 642 (6th Cir. 1981)

STATUTES, RULES AND OTHERS

Const. Amend. VI.....4

Const. Amend. XIV.....8

RCW 9A.04.110(26).....9

TABLE OF AUTHORITIES

Page

STATUTES, RULES AND OTHERS

RCW 9A.36.021(g).....8

A. ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element of strangulation in the assault in the second degree charge by strangulation.

2. Kendrick was denied his right to effective assistance of counsel when his attorney argued in closing that he was guilty of assault in the third degree.

Issues Presented on Appeal

1. Was the state unable to prove strangulation beyond a reasonable doubt where the complainant could not remember the incident, and testified that her mother, who was not present during the incident told her what to say to the police and what to write in her police statement?

2. Was Kendrick denied his right to effective assistance of counsel when his attorney argued in closing that he was guilty of assault in the third degree?

B. STATEMENT OF THE CASE

Sara Biggs took her children to a friend's house and drank shots of Fireball until she was too drunk to remember the details of her later physical altercation with her boyfriend Christopher Kendrick. RP 38-39, 42-44, 49-52, 60, 63-65. Several days after the incident a friend insisted

that Biggs call the police to report the incident. RP 46-47. Bigg's mother arrived after the police were called and accompanied Biggs to the hospital. RP 47-49. In the hospital, in her mother's presence, Biggs was given painkillers and asked to write a statement for the police. RP 48. Biggs was numb and could not remember details so her mother told her what to write, even though Bigg's mother was not present during the incident. RP 50, 59, 64-65.

Biggs remembered telling the officer that Kendrick was responsible but had no memory of any specific details other than Kendrick was on top of her with his hands on her neck but she did not remember having any difficulty breathing and was not in pain. RP 58-60. Biggs did not have any lasting injury. RP 71-72.

Officer Boyd testified that Biggs told him that Kendrick was responsible for her bruises. RP 92-93. According to Boyd, he remembered talking to Biggs' mother at Biggs apartment but was unsure if he also spoke with her at Bigg's apartment. RP 103-04. Boyd testified that Biggs told him that Kendrick choked her and she blacked out four times. RP 94, 95, 100, 103-104.

Detective Kim testified interviewed Biggs several days later. RP 77. Over objection, Detective Kim was permitted to testify to what Biggs

told him for impeachment purposes but not for the truth if the matter asserted. RP 77-81. Kim testified:

From there she was kind of unsure of exactly the sequence of events. Pretty much she stated that what she initially told the responding officer, including in my initial interview, she was assaulted throughout the night, choked. She couldn't remember if she was punched or kicked. Knew she blacked out or was choked at least four times and lost consciousness in and out throughout the night. Also, she remembers being thrown by Mr. Kendrick.”

RP 82.

Kendrick testified that when he came home from work late at night to find Biggs and the children gone, he went to Biggs friend's to bring her home. RP 118-19. After Kendrick put the children to sleep he said that he was leaving. RP 42-43, 119, 120. Biggs repeatedly tried to stop Kendrick from leaving and Kendrick repeatedly pushed Biggs away in an effort to get away from her so that he could leave. RP 119-123, 127. Kendrick admitted that Biggs was bruised by his pushing her away. RP 119. According to both Biggs and Kendrick, Biggs would not let Kendrick leave, and Biggs physically blocked Kendrick's exit and insisted on arguing with him. RP 42-43, 119-20, 127.

During closing argument, counsel argued that Kendrick was guilty of assault in the third degree. RP 159-60. Kendrick was charged and convicted by a jury of assault in the second degree by strangulation.

CP 61-63. This timely appeal follows. CP 1.

C. ARGUMENTS

1. KENDRICK WAS DENIED HIS
CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNSEL.

The test for ineffective assistance of counsel is whether (1) defense counsel's performance fell below the objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *State v. Carson*, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

a. Counsel's Performance Was Deficient.

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." *U.S. v. Cronin*, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)(quoting *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). Counsel is the "means through which the other rights of the person on trial are secured". *Id.*

The text of the U.S. Const. amend. VI requires not merely the

provision of counsel to the accused, but “Assistance,” which is to be “for his defense.” *Cronin*, 466 U.S. at 654 (quoting, *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)).

Thus, “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.” *Id.* When counsel argued against Kendrick, informing the jury that Kendrick was guilty of assault in the third degree, counsel did not provide “Assistance”. *Id.*

b. Prejudice Presumed.

In *Cronic*, decided on the same date as *Strickland*, “the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed.” *Stano v. Dugger*, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc) (citing, *Cronic*, 466 U.S. at 658)) “*Cronic* presumes prejudice where there has been an actual breakdown in the adversarial process at trial”. *State v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991) (internal citation omitted).

A lawyer who informs the jury that it is his view of the evidence

that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to “subject the prosecution’s case to meaningful adversarial testing.” *Cronic*, 466 U.S. at 659.

There is an actual breakdown in the adversarial process when counsel concedes that his client is guilty. *Id.*; *Anders v. California*, 386 U.S. 738, 742-43, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *Gideon*, 372 U.S. at 343-44; *Swanson*, 943 F.2d at 1073-74 (9th Cir. 1991).

In *Swanson*, the Federal Court of Appeals held that no proof of prejudice is required when defense counsel repeatedly concedes that the prosecution has proved its case beyond a reasonable doubt. *Swanson*, 943 F.2d at 1075. Here as in *Swanson*, counsel informed the jury that the state presented sufficient evidence to prove its case beyond reasonable doubt. Following *Cronic*, and *Swanson*, here, prejudice is presumed because counsel’s arguing guilt annihilated the adversarial process. *Cronic*, 466 U.S. at 659 *Swanson*, 943 F.2d at 1075.

Prejudice is also presumed when defense counsel breaches his duty of loyalty to his client, the “most basic of counsel’s duties.” *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 890, 952 P.2d 116 (1998) (quoting *Strickland*, 466 U.S. at 692). Counsel is never permitted to abandon his “overarching duty to advocate the defendant’s cause” and join

the state's prosecution effort. *Benn*, 134 Wn.2d at 890 (quoting *Strickland*, 466 U.S. at 688); *Carson*, 184 Wn.2d at 225 (quoting, *State v. Webbe*, 122 Wn. App. 683, 695, 94 P.3d 994(2004)).

Here, counsel abandoned his duty to Kendrick by arguing Kendrick's guilt, thus condemning him in front of the jury by expressly informing the jury that counsel did not believe his own client. *See, e.g., Wiley v. Sowders*, 647 F.2d 642, 649-50 (6th Cir. 1981) (lawyer's comments in closing argument that are functional equivalent of a guilty plea may deprive a defendant of effective assistance).

Kendrick testified that he repeatedly pushed Biggs away in an effort to get her to let go of him so that he could leave. RP 42, 119-123, 127. Kendrick's testimony did not vary. RP 106-127. Kendrick did not admit that he intentionally harmed Biggs but acknowledged that Biggs was bruised by his pushing her away. RP 119. Counsel argued against Kendrick and did not provide the constitutionally required "Assistance" for his "Defense". *Cronin*, 466 U.S. at 654. Under the Sixth Amendment, *Cronin, supra*, and *Swanson, supra* prejudice is presumed. Accordingly, this Court must remand for reversal and a new trial.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT KENDRICK STRANGLED BIGGS.

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

The state bears the burden of proving beyond a reasonable doubt all essential elements of the crime charged. U.S. Const. amend XIV: *Apprendi v. Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Winship*, 397 U.S. at 364. 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); *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

When the state fails to present sufficient evidence to support each essential element, the charges must be reversed and dismissed with prejudice. *State v. Abuan*, 161 Wn.App. 135, 159, 257 P.3d 1 (2011).

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

As charged in this case, RCW 9A.36.021(g) provides that: a

person is guilty of the crime of assault in the second degree by strangulation where that person intentionally “[a]ssaults another by strangulation.” RCW 9A.36.021(g). Strangulation is defined by statute as “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).

Accordingly, in order to convict Kendrick of assault in the second degree by strangulation, the State was required to prove beyond a reasonable doubt that Kendrick intentionally assaulted Biggs and that Kendrick either actually “obstruct[ed] [Biggs’] blood flow or ability to breathe” by compressing her neck or that Kendrick compressed Biggs’ neck with the specific intent to cause this result. RCW 9A.04.110(26).

Here, Biggs’ was so intoxicated when this incident occurred, she could not remember any of the details, other than that Kendrick caused the injuries. RP 39, 42-44, 49, 58, 62-65. Biggs remembered that Kendrick had his hands on her neck, but she did not remember any pain and did not have any difficulty breathing. RP 60. Biggs did not have any lasting injuries. RP 71-72.

When Biggs’ was asked to write a statement in the hospital, she was so numb and drugged, that she could not think. RP 49, 51-52. Biggs’

mother told Biggs what to write, rather than Biggs relying on her failed memory. RP 49-50, 59, 64. Biggs mother told the police and the doctor that Kendrick was responsible for the injuries, but Biggs' mother was not present during the incident. RP 50, 59.

According to Officer Boyd, Biggs told him that Kendrick choked her four times and she lost consciousness. RP 94-95. To the contrary, Biggs stated that her mother told Biggs what to say to the police. RP 59, 64. Accordingly, the only testimony of strangulation came from the mother who informed the police, not Ms. Biggs. And the testimony of Kim was not admitted for the truth of the matter asserted. RP 80-81.

In sum, even taking the evidence in the light most favorable to the state, the state failed to prove beyond a reasonable doubt, the element of strangulation. *Hosier*, 157 Wn.2d at 8.

c. Reversal Required.

Since there was insufficient evidence to support the conviction for second degree assault, this Court must reverse the conviction with instructions to dismiss. *Abuan*, 161 Wn.App. at 159. 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

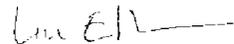
prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”) (*quoting Burks v. United States*, 437 U.S. at 10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

D. CONCLUSION

Mr. Kendrick respectfully requests this Court reverse his conviction and remand for dismissal with prejudice or in the alternative for a new trial.

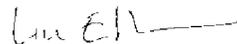
DATED this 5th day of February 2016.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us a and Christopher Kendrick *DOC# 321759* Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326-9723, a true copy of the document to which this certificate is affixed, on February 5, 2016. Service was made electronically.



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