

NO. 49595-3-II

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

STATE OF WASHINGTON
v.
MARIE STOUT

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

The Honorable William C. Houser, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Stout was denied her due process right to a fair trial where the state failed to prove an essential element of the crime charged.
2. The state failed to prove beyond a reasonable doubt the essential element of strangulation in the assault charge.
3. The trial court erred in ordering forfeiture in the judgement and sentence.

Issues Presented on Appeal

1. Was Stout denied her due process right to a fair trial where the state failed to prove an essential element of the crime charged?
2. Did the state fail to prove the essential element of strangulation in the assault charge where the complainant testified that she was able to breathe at all times and there was no evidence that Stout intended to strangle the complainant?
3. Did the trial court err in ordering forfeiture based on two inapplicable statutes?
4. Did the trial court err in ordering forfeiture without

requiring the state to show that the trial court had statutory authority to order the forfeiture?

5. Did the trial court err in ordering forfeiture where the state did not carry its burden to produce a record demonstrating that the trial court provided notice prior to ordering?

B. STATEMENT OF THE CASE

Marie Stout was charged with one count of assault of a child in the second degree, domestic violence and with driving under the influence (not at issue on appeal). CP 1-12, 77-80.

Marie Stout's daughter, 9 year old KRS was sexually molested two weeks prior to the incident in this case. RP 363-364. Stout was distraught by this incident and decided to visit friends after her children's school to relax, drink and spend the night. RP 362, 385. Stout drank too much the night of the incident and shouted at her daughter "don't be retarded" when KRS told her that she was drunk and needed to lie down. RP 369, 370.

KRS was offended. RP 290-91. KRS told her mother to stop saying "F" you. RP 292. According to KRS, during this incident,

Stout grabbed KRS by the neck and pushed KRS into the refrigerator. RP 292-93. KRS also testified that her mother grabbed her from behind with her arm on her neck causing her neck to feel "kind of tight." RP 294. When asked to describe how it felt to be squeezed, KRS stated that

It felt tight. But I can breathe a little. It just felt, like, pressure. It wasn't hurting in the inside. I just felt pressure, like -- I don't really know. There was pressure on it. It was just hard.

RP 294.

When asked if it was hard to breathe, KRS started:

A. No, not -- yes, actually -- it wasn't like, when I'm when I'm full breathing, it was kind of hard to breathe because it was tight, kind of.

Q. Do you remember for how long she held your throat?

A. About 30, 50 seconds before I punched her.

Q. So was there a struggle with her?

A. Yes, because I was just moving and -- she wouldn't let go until I just finally punched her.

RP 294.

In terms of airflow, KRS was clear that she could breathe at all times but experienced a tightness, "kind of" making it "kind of" hard to breathe RP 294, 301-02.

Stout was not angry with her daughter but grabbed KRS to console her as she has done in the past but KRS traditionally pulls away and screams. RP 371-77. Stout indicated that she fell backwards and grabbed onto KRS to steady herself and both ended up on the ground. RP 383-84, 388-89. Stout has no recollection of ever putting her hands on KRS's neck and never intended to hurt or restrain KRS, particularly because her daughter has asthma. Id. As a mother and nurse, Stout would never strangle her daughter. Id. Stout never intentionally squeezed KRS's neck. RP 389.

Stout summarized the details of the incident as: (1) Stout tried to hold onto KRS; (2) Stout grabbed KRS and both fell backwards; (3) KRS ran upstairs, again both fell down and Stout fell forward on top of KRS and; (4) Stout hit her head on the door. RP 399.

KRS called her father Thomas Stout in a panic and asked him to come and retrieve her and her little brother. RP 293, 267. Thomas Stout and Marie Stout were estranged and when Thomas Stout arrived he observed KRS with what he described as bruising

on her neck. RP 264, 274-75. KRS did not need any medical attention and KRS never said that her mother choked her. RP 27, 282.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE CRIME OF ASSAULT IN THE SECOND DEGREE BY STRANGULATION.

The state failed to prove beyond a reasonable doubt that Stout committed assault of a child in the second degree by strangulation.

The due process clause of the federal and state constitutions requires that the State prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable

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

Reasonable inferences from the evidence are drawn in favor of the state. *Id.* Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*

In relevant part, the state by amended information charged Marie Stout with domestic violence assault of a child in the second degree by strangulation under RCW 9A.36.130(1)(a). CP 77-80.

In this case, jury instruction 13 defined “strangulation as follows:

“Strangulation” means to compress as person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with intent to obstruct the person’s blood flow or ability to breathe”.

CP 85-108.

“Strangulation” means to compress as person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with intent to obstruct the person’s blood flow or ability to breathe”. RCW 9A.04.110(26). Division One defined “obstruct” to include “to hinder or block to some degree.” *State v. Rodriguez*,

187 Wn. App. 922, 935, 352 P.3d 200 (2015). Division III agreed with this definition in an unpublished opinion in *State v Carlos*, 190 Wn. App. 1045, ___ P.3d ___ (2015) (not cited as legal authority or precedent).

It is undisputable that the state failed to present any evidence that Stout intended to obstruct KRS' blood flow or ability to breathe. The only question is whether the state presented proof beyond a reasonable doubt that Stout actually obstructed KRS' blood flow or ability to breathe.

The state did not present any expert evidence of petechial bruising or effect and there was no evidence that KRS blood flow was ever obstructed. KRS testified that when her mother's arm was on her neck, it hurt but she was not turning "blue". RP 30. KRS stated that her head hurt and she felt pressure because her head was "like pressured on the floor and there's blood rushing to my head" with Stout on top of her with one hand on her neck "squeezing hard, but not too hard." RP 303. KRS testified that her mother banged KRS's head on the floor 5-6 times. RP 305. KRS did not have a sore throat from this incident. RP 308-09.

KRS also testified that her mother grabbed her from behind with her arm on her neck causing her neck to feel “kind of tight.” RP 294. When asked to describe how it felt to be squeezed, KRS stated that she felt pressure but could breathe and her neck did not hurt. RP 294. When asked if it was hard to breathe, KRS started “no”, “yes”, and “kind of. RP 294.

In terms of airflow, KRS was clear that she could breathe at all times but experienced a tightness, “kind of” making it “kind of” hard to breathe RP 294, 301-02. “Kind of” hard to breathe and feeling a tightness “kind of” does not meet the definition of strangulation under RCW 9A.04.110(26), which requires some actual obstruction of the ability to breathe. *Rodriguez*, 187 Wn. App. at 935. KRS could breathe at all times- even to such an extent that she was able to gather air to scream loudly during the entire incident. RP 61, 373.

Viewing the evidence in the light most favorable to the state including all inferences that reasonably flow therefrom, the evidence does not meet the proof beyond a reasonable doubt standard. *Salinas*, 119 Wn.2d at 201.

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.” *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Accordingly, to avoid a double jeopardy violation, this Court must reverse the assault conviction and remand for dismissal with prejudice. *Id.*; *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996).

2. THE TRIAL COURT FAILED TO PROVIDE THE REQUIRED NOTICE AND HEARING PRIOR TO ORDERING FORFEITURE IN THE JUDGEMENT AND SENTENCE.

The trial court ordered forfeiture of property in Ms. Stout’s judgment and sentence without appropriate legal authority. CP 138-150. A sentencing court has no inherent authority to order forfeiture. *State v. Rivera*, ___ Wn.2d ___, ___ P.3d ___ (2017) (WL 986205); *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014). The authority to order forfeiture of property as part of a judgment and sentence is purely statutory. *Id.*

This Court reviews de novo whether the trial court had statutory authority to impose a sentencing condition. *State v.*

Almendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *Roberts*, 185 Wn. App. at 96. In *Rivera*, this Court, citing to its unpublished opinion in *State v. Trevino*, 195 Wn. App. 1002 (2016) (WL 3866082), affirmed that this Court will consider forfeiture challenges even when there is no property has been identified for forfeiture. *Rivera*.

The Legislature has carefully crafted forfeiture procedures and has included protections against governmental abuse of the authority of taking away the property of a citizen. See, e.g., RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474, *review denied*, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its

relation to a crime. See RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 day notice, etc.).

CrR 2.3(e) governs property seized with a warrant, issued by a judge and supported by probable cause, which also requires serving the person when the item is seized and providing a written inventory and information on how to get their property back if the person believes their property was improperly seized under the warrant. But that rule is limited to items deemed “(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]”

To satisfy due process and legislative requirements, prior to forfeiture, RCW 9.41.098 and RCW 69.50.505 require notice and a hearing before the court orders forfeiture. See, e.g., *State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992) (rejecting the idea that the sentencing court had “inherent power to order how property used in criminal activity should be disposed of”).

Accordingly, the state has the burden to show that the trial court had statutory authority to order the forfeiture, and the state

bears the burden to produce a record demonstrating that the trial court provided notice prior to ordering forfeiture. *Roberts*, 185 Wn. App. at 96-97; RCW 10.105.010; RCW 69.50.505.

Here the state cited to forfeiture under RCW 9.41.098 or RCW 69.50.505. Neither applies to the instant case. RCW 9.41.098 applies to forfeiture of weapons and RCW 69.50.505 applies to property used in the manufacture or delivery of controlled substances. The state also did not produce a record demonstrating that the trial court provided notice before ordering forfeiture in the judgment and sentence. *Roberts*, 185 Wn. App. at 96-97.

Here, the forfeiture provision must be stricken because the statutes cited do not apply in this case and the state failed to produce a record demonstrating that the trial court provided notice prior to ordering forfeiture in the judgment and sentence. *Rivera, supra; Roberts*, 185 Wn. App. at 96; RCW 10.105.010; RCW 69.50.505.

D. CONCLUSION

Ms. Stout respectfully requests this Court reverse her conviction for assault of a child in the second degree for insufficient evidence and remand for dismissal with prejudice. Ms. Stout also requests this Court remand to vacate the forfeiture provision in the judgment and sentence.

DATED this 23rd day of March, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", with a horizontal line extending to the right.

LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor at kcpa@co.kitsap.wa.us and Marie Stout/DOC#394131, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed, on March 23, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Marie Stout.

A handwritten signature in blue ink, appearing to read "Lise Ellner", with a horizontal line extending to the right.

Signature

APPENDIX A

FINANCIAL OBLIGATIONS

41-LEGAL FINANCIAL OBLIGATIONS-RCW 9.94A.760. The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations. The Defendant shall pay by cash, money order, or certified check to the Kitsap County Superior Court Clerk at 614 Division Street, MS-34, Port Orchard, WA 98366, as indicated-

X	\$500 Victim Assessment, RCW 7.68.035 [PCV]	\$ _____ Sheriff service/sub. fees [SFR/SFS/SFW/SRF]
X	\$125 Court-appointed attorney fees [PUB]	\$ _____ Witness Costs [WFR]
X	\$200 Filing Fee; \$110 if filed before 7/24/2005 [FRC]	\$ _____ Jury Demand fee [JFR]
X	\$100 DNA / Biological Sample Fee, RCW 43.43.7541	\$ _____ Court-appointed defense fees/other costs
	<input type="checkbox"/> \$1,000 <input type="checkbox"/> \$2,000 Mandatory fine for drug crimes, RCW 69.50.430	\$100 Domestic Violence Assessment, RCW 10.99.080 <input type="checkbox"/> Kitsap Co. YWCA <input type="checkbox"/> Kitsap Sexual Assault Cr
	\$ _____ Contribution to SIU-Kitsap County Sheriff's Office, RCW 9.94A.030, 9.94A.760.	X \$100 Contribution-Kitsap County Expert Witness Fund [Kitsap County Ordinance 139.1991]
	\$100 Crime Lab fee, RCW 43.43.690(1)	\$500 Contribution-Kitsap Co. Special Assault Unit
	\$3,000 Methamphetamine / amphetamine Cleanup Fine, RCW 69.50.440 or 69.50.401(2)(b)	\$100 Contribution-Anti-Profitting Fund of Kitsap Co. Prosecuting Attorney's Office, RCW 9A.82.110
X	Emergency Response Costs - DUI, Veh. Homicide or Veh. Assault, RCW 38.52.430, per separate order. 700.00	\$200 DUC-DUI/DP Account Fee - Imposed on any DUI, Physical Control, Vehicular Homicide, or Vehicular Assault. RCW 46.61.5054.

15 RESTITUTION-To be determined at a future date by separate order(s). If the defendant has waived his or her presence at any future restitution hearing, either through the terms of any applicable plea agreement in this case or by voluntary waiver indicated on the judgment and sentence, the court hereby accepts that waiver by the defendant.

16 REMAINING LEGAL FINANCIAL OBLIGATIONS AND RESTITUTION-The legal financial obligations and/or any restitution noted above may not be complete and are subject to future order by the Court.

17 PAYMENT SCHEDULE - All payments shall commence immediately within 60 days from today's date, and be made in accordance with policies of the Clerk or DOC and on a schedule as follows: pay ~~\$500~~ \$50 \$25 \$5.00 per month, unless otherwise noted- RCW 9.94A.760.

20 12% INTEREST FOR LEGAL FINANCIAL OBLIGATIONS/ADDITIONAL COSTS- Financial obligations in this judgment shall bear interest from date of the judgment until paid in full at the rate applicable to civil judgments. An award of costs of appeal may be added to the total legal financial obligations. RCW 10.82.090, RCW 10.73.160. INTEREST WAIVED FOR TIMELY PAYMENTS-The Superior Court Clerk has the authority to waive the 12% interest if the Defendant makes timely payments under this payment schedule.

22 50% PENALTY FOR FAILURE TO PAY LEGAL FINANCIAL OBLIGATIONS- Defendant shall pay the costs of services to collect unpaid legal financial obligations. Failure to make timely payments will result in assessment of additional penalties, including an additional 50% penalty if this case is sent to a collections agency due to non-payment. RCW 36.18.190.

OTHER

- 27 42-HIV TESTING-The Defendant shall submit to HIV testing. RCW 70.24.340.
- 28 42-DNA TESTING-The Defendant shall have a biological sample collected for DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency or DOC shall obtain the sample prior to the defendant's release from confinement. RCW 43.43.754. If the defendant is out of custody, he or she must report directly to the Kitsap County Jail to arrange for DNA sampling.
- 30 FORFEITURE-Forfeit all seized property subject to forfeiture under RCW 9.41.098 or RCW 69.50.505 to the originating law enforcement agency unless otherwise noted.

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[Form revised August 23, 2016]



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