NO. 49595-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARIE E. STOUT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00065-5

BRIEF OF RESPONDENT

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SERVICE	Lise Ellner Po Box 2711 Vashon, Wa 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 25, 2017, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence adduced was sufficient to prove the strangulation element of second degree assault of a child?

2. Whether Stout was aggrieved by a sentencing condition that she was not subject to?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marie E. Stout was charged by information filed in Kitsap County Superior Court with assault of a child in the second degree with a domestic violence special allegation. CP 1-2. Before trial a first amended information was filed adding the charge of driving under the influence with a special allegation of BAC above 1.5. CP 78-79.

At trial, the jury was instructed on the assault of a child count

> A person commits the crime of assault of a child in the second degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person commits the crime of assault in the second degree against the child.

CP 96, instruction 9. The "to convict" instruction provided that the state must prove beyond a reasonable doubt that Stout (1) committed the crime of second degree assault on the victim, (2) that Stout was eighteen years of age or older and that the victim was under thirteen years of age. CP 97, instruction 10. Relevant to the present appeal, the jury was instructed that

"A person commits the crime of assault in the second degree when he or she intentionally assaults another by strangulation." CP 99, instruction 12. And that ""Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breath, or doing so with the intent to obstruct the person's blood flow or ability to breath." CP 100, instruction 13.

Stout was convicted on both counts. CP 113. The jury gave an affirmative answer on the domestic violence special verdict (CP 114), on the BAC above .15 special verdict (CP 115), and the combined alcohol and drug intoxication special verdict. CP 116.

Stout was given a standard range sentence. CP 139. She timely filed notice of appeal. CP 156.

B. FACTS[1]

A neighbor heard a girl screaming at about 8:30 in the evening on January 14, 2016. 2RP 132. The screaming stopped but soon started up again. 2RP 133. The second time, the screaming sounded frantic like someone who was frightened or in danger. 2RP 133. Approaching the house from which the screaming came, the neighbor saw a young girl in the garage and a woman who appeared to talking to the girl. 2RP 134. The girl had stopped screaming and the situation did not look dangerous

[1] The VRP are referred to herein as Vlm. I "1RP" Vlm. II "2RP" etc.

so the neighbor started to walk back home. Id.

The neighbor got back home but then heard some "really intense screaming and yelling, this time by an adult." 2RP 135. A male voice was telling someone to leave. Id. The neighbor called 911. Id.

Responding police found a car that had flipped over near the house the screaming had come from. 2RP 142. There was a female inside the flipped car. 2RP 143. A records check revealed that the car belonged to Marie Stout. Id. Police spoke to the woman trapped inside; she was hysterical and on her hands and knees inside the flipped car. 2RP 144. Deputies helped her out of the car. 2RP 145; 2RP 193-94. She was in shock and the police had her sit down. Id. Fire and Rescue arrived and tended to Stout as deputies investigated the accident. 2RP 146.

Stout told deputies at the crash scene that she did not know what happened. 2RP 184. She said she came from the house up the road. Id. Stout had a strong odor of intoxicants on her breath. Id. She admitted having a couple of shots before she left. 2RP 185. Medics evaluated her and she was transported to the hospital. Id.

At the hospital, the deputy sought and was granted a telephonic search warrant for a sample of Stout's blood. 2RP 187. A hospital technician collect blood samples from Stout. Id. Testing of the blood revealed a .18 ethanol level. 2RP 219. The tests were also positive for the presence of cannabinoids. 2RP 226.

After the accident investigation, police went to the original call and were told by the neighbor who had called where the screaming had come from. 2RP 152. Discussions with a witness at the house led deputies to seek KS, who was nine years old at the time of the incident (3RP 264), at her father's house some distance away. 2RP 52-53. They spoke with the father, Thomas Stout, and KS and took pictures of KS. Id.

Deputies observed marks on KS's neck and scratches on her body. Id. Pictures were shown at trial with a scratch mark on KS's collarbone and scratches on her lower abdomen. 2RP 156. There were scratches on the back of her arms and bruising on her left arm. 2RP 156-57. Scratches and a finger impression were on her forearms and a scratch mark went across her back. 2RP 157. Pictures also revealed redness on KS's neck. 2RP 158.

One deputy described the neck marks as appearing to be handprints. 2RP 170. The marks appeared to be the size of an adult hand. 2RP 171. The marks were midway between the jaw and the shoulder and on both sides of the neck. Id. There were four clear fingerprints on KS's neck. 2RP 173. The finger prints appeared as though the hands had been applied from the front of KS. 2RP 175.

The incident occurred at the residence of Stout's friend and coworker. 2RP 239. The husband of the co-worker had left to go to the store and upon returning found KS in the garage. 2RP 244. KS "seemed

frantic," breathing hard, hyperventilating. Id. KS said that her mom had choked her. Id. After that, KS called her father, who spoke with the husband at the house and said he was coming to pick up his kids. 2RP 244.

The father, Thomas Stout, arrived and picked-up his children. 2RP 247-48. Soon after the pick-up, the co-worker's husband swore at Stout and ordered her to leave. 2RP 249. She left. Id.

Mr. Stout had been awoken by a call from his daughter who was frantically saying she had been assaulted. 3RP 265. Mr. Stout described KS on the phone as "in a state of panic." 3RP 267. When he picked-up the children, Mr. Stout saw Stout and described her as drunk. 3RP 272. Back at his home, Mr. Stout looked over KS and observed "petechial bruising around the neck. Scratches on her abdomen. Bruises on her arms." 3RP 274. Elaborating, Mr. Stout, a nurse, said he noted shallow bruising around the neck. 3RP 275.

KS described how she got the neck bruising. She had gone to the kitchen seeking something to eat. 3RP 291. Stout was looking in the refrigerator and KS asked what she was doing. 3RP 291. Stout responded telling KS, in KS's words, "eff off." Id. This made KS angry and she told her mother to stop. 3RP 292. This made Stout very angry and "she grabbed [KS's] neck and pushed [her] into the fridge." 3RP 292 (alteration added). Stout was holding KS's neck and squeezing. Id. KS

described the neck grab as "kind of tight." 3RP 294. KS could breathe a little but there was pressure; "it was kind of hard to breath because it was tight, kind of." 3RP 294. Stout held her throat for 30 to 50 seconds. Id. KS said Stout was really angry—more angry than when KS is in trouble. 3RP 295.

An affray ensued where KS punched Stout and got away from Stout's grasp and ran to another room. 3RP 293. Stout followed yelling that KS was in trouble and trying to recapture her. Id. KS got scratched and was bleeding as she again escaped and fled outside the house and called her father. Id. As Stout approached again, KS ran to the front door, which was locked, and Stout caught up and again grabbed KS by the neck. 3RP 293-94. Stout also put her other hand over KS's mouth. Id.

After more chasing inside the house, Stout again captured KS and again applied her hand to KS's throat and squeezed harder and harder. 3RP 301. This squeezing hurt and made it hard to breath; KS was only able to breathe "a tiny bit." 3RP 302. She felt like blood was rushing to her head like she was hanging upside down. 3RP 302. Stout persisted alternately releasing her hand and then putting her hand back on KS's neck and squeezing. 3RP 304. There was a break in the assault but as KS tried to stand up, Stout grabbed her hair, slammed her head to the floor, and continued the choking. 3RP 305.

II. ARGUMENT

A. STOUT CHOKED HER DAUGHTER CAUSING SOME OBSTRUCTION OF HER ABILITY TO BREATHE AND THE EVIDENCE ON THE STRANGULATION ELEMENT WAS THEREFORE SUFFICIENT.

Stout argues that the evidence adduced at trial was insufficient to support conviction. This claim is without merit because the evidence simply was sufficient.

In a challenge to the sufficiency of the evidence, the record is reviewed to determine whether any rational finder of fact could have found that the State proved each element beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of all of the State's evidence. *State v. Homan*, 181 Wash.2d 102, 106, 330 P.3d 182 (2014). The evidence is viewed in the light most favorable to the State, drawing reasonable inferences in the State's favor. Id. Circumstantial and direct evidence are considered equally reliable. *State v. Thomas*, 150 Wash.2d 821, 874, 83 P.3d 970 (2004).

It is unassailably clear on this record that Stout viciously assaulted

her nine year old daughter and a large part of that vicious assault was choking. The properly instructed jury found that this choking behavior constituted the legal term strangulation. *See State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012) (appellate court defers to jury on question of persuasiveness of the evidence). It seems predictable that the nine year old victim's testimony can be cherry-picked to allow an argument that there is some equivocation regarding blood flow or breathing. But when the evidence, particularly the victim's testimony, is viewed in a light most favorable to the state and all reasonable inferences are drawn in the state's favor, there is no doubt the jury was correct.

Assault of a child in the second degree requires proof of second degree assault and an age component—the perpetrator must be over eighteen years of age and victim under thirteen years of age. RCW 9A.36.130. There is no dispute here that Stout was over eighteen and KS was nine years old at the time of the incident. Assault in the second degree requires an intentional assault not amounting to assault first degree and may be proven, inter alia, if the person "Assaults another by strangulation or suffocation." RCW 9A.36.021 (1) (g). Stout's argument turns on the definition of the single term "strangulation."

That word is statutorily defined as "to compress a person's neck, thereby obstructing the person's blood flow or ability to breath, or doing

so with the intent to obstruct the person's blood flow or ability to breath." RCW 9A.04.110 (26). The seeming lack of an intent requirement in the first clause does not render that permutation of second degree assault a strict liability crime since it only defines a particular type of assault and assault is an intent crime. *See State v. Reed*, 168 Wn. App. 553, 575-76, 278 P.3d 203 (2012) *review denied* 176 Wn.2d 1009 (2012). Stout's definitional argument here is further reduced to the meaning of "obstructing" found in the above definition.

Stout cites to *State v. Rodriquez*, 187 Wn. App. 922, 352 P.3d 200 (2015) *review denied* 184 Wn.2d 1011 (2015), in her endeavor to define "obstructing." But she ignores the facts of that case which are substantially the same as the present case. There the victim had been choked two or three times during the assault. Id. at 927. The victim said "no, not really..." when asked if she could breath at one point in the assault but said the defendant's choking caused her difficulty in breathing at another point in the assault. While being cross-examined, the victim said she "had trouble breathing." Id. On appeal there, as here, Rodriquez argued insufficient evidence based on the meaning of the word "obstruct." Id at 931.

In deciding this issue the *Rodriquez* Court reviewed the law on discerning the meaning of a statute. Questions of statutory meaning are

reviewed de novo. 187 Wn. App. at 931. The goal is to discern and implement legislative intent. Id. If the meaning is plain on its face, it expresses the legislature's intent as written. Id. A reviewing court does not add words to a statute and construes the statute so that none of it is rendered meaningless or superfluous." 187 Wn. App. at 931-32.

Applying these principles, the *Rodriquez* Court considered the meaning of the word "obstruct" in connection with RCW 9A.36.021 (1) (g). First, the term does not mean to completely obstruct. The word is broader often modified by the word "partial" or "complete." Thus without a modifier the word broadly covers either partially or completely and thus "[t]he word describes acts of obstruction to some—that is, any—degree." 187 Wn. App. at 932. This holding stood in comparison to dictionary definitions of the word "obstruct." Id. at 933-934.

At bottom, the "obstruction to any degree" holding comports with legislative intent as declared by the legislature:

> The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and

> psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW.

Laws of 2007, ch. 79, sec. 1. The Court glossed on this declaration:

> The legislature's stated motivation applies equally to both categories of victims. Like a victim whose breathing is completely obstructed, a victim whose breathing is partially obstructed may be immobilized, lose consciousness, or—as demonstrated by the facts of this case—suffer other physical injuries, including injuries that leave permanent physical scars. In fact, a victim of repeated and sustained—but partial—obstructions might suffer greater lasting damage than a victim of a single, brief—but complete—obstruction. Nothing in the legislative declaration indicates that the enactment was intended to protect victims whose ability to breathe or blood flow was cut off completely while not protecting victims whose breathing or blood flow was hindered to a lesser degree.

187 Wn. App. at 934-35. Thus

> We conclude that the plain meaning of obstruct in the strangulation statute is to hinder or block to some degree. That is, the statute applies equally to complete and partial obstructions of either a victim's ability to breathe or to experience blood flow.

Id. Thus in the present case, evidence is sufficient if it was proven that Stout's choking of KS served to partially obstruct KS's breathing. *See also State v. Carlos*, 190 Wn. App. 1045, ___ P.3d___ (2015) (UNPUBLISHED AND UNBINDING) (Following *Rodriguez* and finding sufficient evidence of strangulation where victim testified that he could not breathe normally.)

Stout need not have completely obstructed KS's breathing. And the record is clear that Stout compressed KS's neck and caused partial

obstruction to her breathing to some degree. Of the many parts of this incident that satisfy the elements of second degree assault, one in particular more than satisfies the required proof. KS testified that at one point when she was fleeing her mother she was captured, her mother squeezed her neck harder and harder until KS could breathe only a "tiny bit." 3RP 20. Thus Stout obstructed her breathing to some degree. And, if that is not enough, when Stout initially choked KS in the kitchen "it was kind of hard to breathe because it was tight, kind of." 3RP 294.

At least twice, then, in this continuing assault Stout choked her daughter and obstructed her breathing to some degree.[2] The evidence on this element was more than sufficient.

B. THE TRIAL COURT'S ORDER ON FORFEITURE HEREIN IS DISTINCT FROM THE ORDERS IN THE CASES AND STOUT IS NOT AN AGGRIEVED PARTY UNDER RAP 3.1.

Stout next claims that the trial court erred in checking a box in the Judgment and Sentence which allowed forfeiture of seized property. This claim lacks merit because nothing in the record and no argument on appeal indicates that any of Stout's property was either subject to forfeiture or

[2] It should also be noted that KS testified to blood flow obstruction saying that the choking made her feel like hanging upside down. 3RP 302.

was in fact forfeited and Stout therefore asserts no justiciable claim and is not an aggrieved party on this issue.

However, on at least two occasions this Court has allowed review of claims by none-aggrieved parties concerning forfeiture provisions in judgment and sentences. *State v. Rivera*, ___ Wn. App. ____, ____ P.3d ____, 2017 WL 986205, (March 14, 2017); *State v. Trevino*, 195 Wn. App. 1002, (2016) (UNPUBLISHED AND UNBINDING). In *Trevino*, the forfeiture provision allowed that "All property is hereby forfeited." In *Rivera*, "Rivera was required to forfeit "all property"." The state would be constrained to concede the issue were the order here at issue not factually distinct from the order in the *Rivera* case.

In the present case, the forfeiture provision is not as all-inclusive—the Judgement and Sentence provided that Stout should "Forfeit all seized property *subject to* forfeiture under RCW 9.41.098 or RCW 69.50.505…" CP 144 (emphasis added). RCW 9.41.098 allows a court to order forfeiture of a firearm under certain listed circumstances. RCW 69.50.505 allows forfeiture of controlled substances and various containers and instrumentalities having to do with drugs. The present case involves no seized guns or drugs. Therefore, there was nothing in this case that was "subject to" forfeiture under the statutory provisions cited in the Judgement and Sentence. Put another way, Stout has not identified any

guns or drugs or drug paraphernalia that would be "subject to" the trial court's order or that would require any particular procedures in the forfeiting of her property.

Stout is not an "aggrieved party" on this record. RAP 3.1. An aggrieved party is "one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). Taylor was being prosecuted for manufacturing marijuana. 150 Wn.2d at 600. The trial court dismissed his case without prejudice, allowing the state to refile at a future date within the statute of limitations. Id. at 601. The Supreme Court held that Taylor was not an aggrieved party, saying

> In our judgment, Taylor is not currently an aggrieved party. Until the State refiles charges against Taylor, if indeed it does, he is under no restriction, and he has the benefit of a running statute of limitations. We cannot conclude, therefore, that he has been injured in any legal sense.

150 Wn.2d at 603. Similarly, nothing in the present record shows that Stout "has been injured in any legal sense." She, presumably, because the record reveals none, had no drugs or guns that were seized and subject to forfeiture. Thus she asks for a remedy here when she was not injured below.

Moreover, Taylor was not aggrieved because he was presently under no danger of legal injury by way of prosecution, even though he may have been later so aggrieved should the state reinstitute the charges

against him. But this possible future injury is absent from the present case. Stout is not presently aggrieved because she had no guns or drugs that are subject to forfeiture. And there is no possibility, as with Taylor, that that situation may change in the future. On this judgment, no personal right or pecuniary interest of Stout's was affected. There simply was no injury because nothing belonging to Stout was taken or, in light of the trial court's order, subject to being taken.[3]

Stout presents no controversy and can establish no injury resulting from a checked box on the Judgement and Sentence that simply had no application in her case and seems merely to have evinced the trial court's policy to assure forfeiture of guns and drugs when involved with a crime. This case need not be remanded for the purpose of correcting a provision that by its terms is a nullity herein.

III. CONCLUSION

For the foregoing reasons, Stout's conviction and sentence should be affirmed.

DATED April 25, 2017.

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[3] It should be noted that under RCW 69.50.505 "no property right exists" in the drugs or instrumentalities of the drug trade.

Respectfully submitted,

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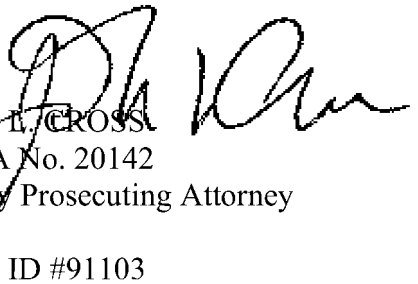

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