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NO. 54228-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

JASON KEITH CISSNER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. MISTACHKIN, JUDGE

BRIEF OF RESPONDENT

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE TO ASSIGNMENTS OF ERROR 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE..... 1

Factual History 1

Procedural History..... 4

ARGUMENT..... 5

1. There was sufficient evidence to support the jury’s verdict of guilty..... 5

Standard of review..... 5

Application..... 6

Conclusion. 9

2. The State concedes that resentencing is appropriate in this case. 9

3. The Judgment & Sentence lawfully gives the Department of Corrections authority to impose a non-cost legal financial obligation. 10

a. The community custody supervision assessment is not a cost that must be waived..... 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

State v. Abarca, No. 51673-0-II, 2019 WL 5709517, *11 (2019) 12

State v. Cate, 194 Wash. 2d 909, 453 P.3d 990 (2019) 10

State v. Clark, 191 Wn. App. 369, 362 P.3d 309 (2015) 11, 12

State v. Homan, 181 Wn. 2d 102, 330 P.3d 182 (2014) 6

State v. Hunley, 175 Wash.2d 901, 287 P.3d 584 (2012) 9

State v. Jones, 182 Wash. 2d 1, 338 P.3d 278, 283 (2014)..... 10

State v. Salinas, 119 Wn. 2d 192, 829 P.2d 1068 (1992) 5, 6

Statutes

Laws of 2018, ch. 269, § 6..... 12

RCW 10.01.160 10, 11, 12

RCW 9.94A.530..... 10

RCW 9A.04.110(4)(b)..... 9

RCW 9A.36.021(a). 9

RCW 9A.36.021(g)..... 4

Other Authorities

<https://www.dictionary.com>..... 7

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. There was sufficient evidence to support the jury's verdict of guilty.**
- 2. The State concedes that resentencing is appropriate in this case.**
- 3. The Judgment & Sentence lawfully gives the Department of Corrections authority to impose a non-cost legal financial obligation.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Factual History

At the time of the alleged assault, Jason Cissner and April Rognlin had been in a dating relationship for over eight years. RP¹ 63, 75. At the time of the alleged assault, Rognlin and Cissner were living in a house at 2557 Roosevelt Avenue in Ocean City, WA. RP 43, 63-64, 74. Rognlin's friend, Juanita Kenworthy, lived in a 5th wheel trailer on the property. RP 64, 74.

On the morning of July 15, 2019, Rognlin had been ill and was sleeping in Kenworthy's trailer. RP 65, 76. It was approximately 9:30 in the morning when Kenworthy heard Cissner "scream [Rognlin's] name

¹ Unless otherwise noted, the State is referencing the 10/22/2019 trial transcript prepared by Reporter Johnston.

really loud several times.” RP 65. Rognlin knew Cissner was “in a mood” so she left the 5th wheel to try and get him to quiet down. RP 76.

As Rognlin approached Cissner, she said “something like, if you don’t knock it off, I am going to get a restraining order against you.” RP 76. This apparently enraged Cissner as he then “started attacking” Rognlin. *Id.*

Kenworthy heard Rognlin yelling and looked out the door of her trailer. RP 65. She saw that Cissner “had his hand around [Rognlin’s] neck and she was trying to get away...he just put a chokehold on her and dragged her towards the house.” RP 65. Kenworthy testified that Cissner had his hands around Rognlin’s neck and that he “put a chokehold” on Rognlin. RP 66, 67.

Rognlin described that Cissner had her “around the neck” and ended up hurting her eyebrow bone and cheek/jaw area by the pressure he was exerting trying to “drag” her into the house. RP 77. Cissner pulled Rognlin’s hair, but his hand was “on [her] neck mostly,” and, when asked if she had difficulty breathing, Rognlin answered “Yeah, it was...” RP 78. Ultimately, Rognlin summarized that she “was being confined and choked or whatever and drug and trying to get back in the house.” *Id.*

Kenworthy yelled at Cissner that she had called police. RP 67. At hearing this, Cissner went into the house, got dressed, and drove away from the residence. RP 68.

Deputy Peterson arrived on scene and took Kenworthy's statement; however, he observed that Rognlin "displayed redness in the face." RP 58.

Deputy Byron also responded to the residence. RP 43. Deputy Byron testified that, at the time of the assault, he had been a deputy for almost two years, during which time he conducted several domestic violence investigations. Prior to that, he underwent six months of training through the Washington State Criminal Justice Training Commission (CJTC). RP 42.

At the residence, Deputy Byron took several photographs of Rognlin "due to her injuries." RP 48. Deputy Byron testified to observing red marks on Rognlin's neck. RP 54. He further testified that, based on his training and experience, these marks were "consistent with someone being strangled or assaulted in the area of their neck." RP 50.

A short time later, Cissner was arrested by the Ocean Shores Police Department (OSPD). RP 51. Cissner was banging his head on the partition of the OSPD officer's car. RP 52.

Deputy Byron and Deputy Peterson responded to Cissner's location. *Id.* Cissner told the deputies that he "just wanted to go to jail." RP 52, 60. Cissner was described as "very hostile" and "very agitated." RP 52, 60. Cissner continued to not follow commands and was "combative" with the deputies. RP 52.

Cissner was placed into Deputy Peterson's car for transport to the hospital to have a laceration on his head evaluated, prior to being booked. RP 51, 60-61. Before they could even leave the city of Ocean Shores, Cissner began slamming his head on the partition of Deputy Peterson's vehicle. RP 61. Deputy Peterson stopped the vehicle to secure Cissner, and Cissner "began slamming his head down on the asphalt" three or four times. RP 53, 61. It took multiple officers to restrain Cissner so that he could not harm officers or himself. RP 53-54, 61.

Procedural History

Based on the above, Cissner was charged by Information on July 16, 2019 with one count of Assault in the Second Degree—Domestic Violence, pursuant to RCW 9A.36.021(g)². CP 1. An Amended Information was later filed that more narrowly defined the domestic violence relationship alleged. CP 17.

² There is a scrivener's error in the citation on the Information. Subsection (c) is listed, but no deadly weapon was alleged.

The case proceeded to jury trial on October 22, 2019 and Cissner was found guilty as charged. CP 24. Cissner was sentenced within the standard range November 1, 2019 to 50 months of confinement to be followed by 18 months of community custody. CP 30-31. As one of the conditions of community custody, the Court ordered Cissner to pay any supervision fees the DOC might assess. CP 31, Section 4.2(B)(7). Cissner timely appealed. CP 49.

ARGUMENT

1. There was sufficient evidence to support the jury’s verdict of guilty.

Standard of review.

“The test for determining the sufficiency of the evidence 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, 1074 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) “A

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).)

Application.

Cissner was charged with assault in the second degree by strangulation, pursuant to RCW 9A.36.021(g). CP 17. “‘Strangulation’ means 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); CP 21.

When the evidence in this case is viewed in a light most favorable to the State, there is clearly sufficient evidence to find that Cissner intentionally strangled Rognlin. Both women testified that the incident began with Cissner “screaming” for Rognlin. She then made a statement to him about getting a restraining order that provoked him to “attack” her.

Kenworthy was an eyewitness and testified that Cissner had Rognlin “around the neck.” She also stated more than once that Cissner “put a chokehold” on Rognlin. Kenworthy’s testimony with that given by the victim, Rognlin.

Rognlin described that Cissner had her “around the neck” and responded “yeah” when asked if she had difficulty breathing. Rognlin testified that she was “being confined and choked.”

As it was not defined, it should be assumed that the jury imported the usual meaning to the terms “choke” and “chokehold.” “Choke” is defined as “(1) to stop the breath of by squeezing or obstructing the windpipe; strangle; stifle....” <https://www.dictionary.com/browse/choke#>. “Chokehold” is defined as “(1) a restraining hold in which one person encircles the neck of another in a viselike grip with the arm, usually approaching from behind; (2) a stifling grip; stranglehold” <https://www.dictionary.com/browse/chokehold#>

Deputy Byron described seeing actual physical injury to Rognlin’s neck. He testified that the marks he observed were “consistent with someone being strangled or assaulted in the area of their neck.” The injuries were visible enough that he was able to photograph them and these photographs were submitted to the jury.

When Rognlin informed him that she had summoned police, Cissner fled the scene. When he was contacted by law enforcement, Cissner was “combative,” “very hostile,” and “very agitated.” He spontaneously stated that he “just wanted to go to jail” and continued to injure himself while in custody. It is reasonable that the jury would have inferred from this behavior that Cissner displayed actions consistent with a “consciousness of guilt.” It certainly does not comport with his argument that he was “nervous” about Rognlin being in the yard, and that he was trying to “encourage” Rognlin to get back in the house. RP 41.

There is abundant evidence to support the finding of guilt in this case. Both the victim and the eyewitness describe Cissner choking her. Rognlin specifically stated that her breathing was impeded during the assault. This testimony would be sufficient to support the verdict; however, the responding deputies also observed actual injury consistent with the “attack” described by Rognlin. Finally, Cissner’s own behavior shows that he was acting with criminal intent and he was aware of that.

Cissner wants to rely on comments made by the trial court to support his argument that the evidence of strangulation was insufficient. Appellant’s Brief at 10. However, this argument should be disregarded in its entirety. This was a jury trial and the court was not the finder of fact;

therefore, any comments made by the judge are irrelevant to the verdict. Further, in the statement cited by Cissner, the court misstates the element of strangulation and speaks to “whether or not she actually suffered a substantial impairment of bodily function or breathing.” RP 87. However, this conflates strangulation with “substantial bodily harm” which is an uncharged alternative means of committing assault in the second degree. RCW 9A.04.110(4)(b); RCW 9A.36.021(a).

Conclusion.

In this case, when the evidence is taken as a whole it certainly supports the jury’s finding that Rognlin was strangled by Cissner. As the jury was in the best position to judge the credibility and content of the witnesses’ testimony, and the verdict of guilty should be affirmed.

2. The State concedes that resentencing is appropriate in this case.

In calculating the offender score, the State must prove the criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wash.2d 901, 909-10, 287 P.3d 584 (2012). A prosecutor's unsupported summary of criminal history is not sufficient to satisfy the State's burden. *Hunley* at 910. Further, it is not sufficient that the defendant does not object to the

offender score calculation since such a rule would effectively shift the burden of proving criminal history to the defendant. *Hunley* at 912.

The defendant's failure to object is not the "affirmative acknowledgement" required and does not satisfy the State's burden of proof. *State v. Cate*, 194 Wash. 2d 909, 913, 453 P.3d 990, 992 (2019), as amended (Jan. 9, 2020). The record at sentencing in this case is scant at best. 11/1/2019 RP 3-10. At sentencing, neither party filed a sentencing memorandum, nor were exhibits proffered. Therefore, the State concedes that the sentence in this matter should be vacated and remanded for resentencing.

However, it is worth noting that on remand for resentencing the State shall have the opportunity to present all relevant evidence regarding criminal history, including criminal history not previously presented. RCW 9.94A.530; *See State v. Jones*, 182 Wash. 2d 1, 11, 338 P.3d 278, 283 (2014).

3. The Judgment & Sentence lawfully gives the Department of Corrections authority to impose a non-cost legal financial obligation.

RCW 10.01.160 defines certain legal financial obligations as "costs," and forbids a trial court from imposing them on indigent criminal

defendants. However, the community supervision fee that the Department of Corrections imposes on some defendants is not a “cost” as defined by that statute.

a. The community custody supervision assessment is not a cost that must be waived.

Judges may not impose discretionary costs on indigent defendants. RCW 10.01.160(3). But a community custody supervision assessment is not a “cost.”

RCW 10.01.160(2) defines “costs” as “expenses especially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” In *State v. Clark*, Division III of this Court found that a \$500 *fine* was not a “cost,” and so upheld its imposition upon an indigent defendant. *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309, 312 (2015). Because the fine was not an expense incurred by the State in prosecuting the defendant, no inquiry into the defendant’s ability to pay was necessary. *Id* at 376.

The legislature amended RCW 10.01.160(3) in 2018, establishing a bright-line rule that discretionary costs shall not be imposed on indigent defendants as defined by the statute. *Compare* RCW 10.01.160(3) (2015) *with* RCW 10.01.160(3) (2019). This was after the *Clark* decision, but the

definition of “cost” did not change with the amendment. *See* Laws of 2018, ch. 269, § 6. So the reasoning of *Clark* remains; the fact that a legal financial obligation is discretionary does not make that obligation a discretionary cost under the definition in RCW 10.01.160(2). *Clark*, 191 Wn. App. at 376. Just as inquiry on a defendant’s ability to pay was not be required for non-cost LFOs before the amendment, a finding of indigency does not prohibit non-cost LFOs now.

Recently, this Court used the *Clark* framework to address the exact same issue raised here, and found that “a community custody supervision assessment clearly does not meet the definition of a cost under RCW 10.01.160(2).” *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, *11 (November 5, 2019) (unpublished)³.

However, the State concedes above that this case should be remanded for re-sentencing. Therefore, it only makes sense to ask the trial court to make a record on this issue. In this case, the neither the imposition nor the waiver of this legal financial obligation was specifically addressed.

³ Pursuant to GR 14.1(a) this case is presented as persuasive authority and the Court may accord it such value as it deems appropriate.

CONCLUSION

Based on the foregoing, the State asks that the guilty verdict in this matter be affirmed. The State further requests that the matter be remanded for resentencing so that the parties can place a complete record of Cissner's criminal history before the trial court. This will also allow the trial court to make a clear record as to the Department of Corrections supervision fee issue.

DATED this 17th day of September, 2020.

Respectfully Submitted,

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