

No. 66316-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DERRICK M. MORRIS,

Appellant.

FILED
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jean Rietschel

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's instructions relieved the State of its burden of proof.

2. There was insufficient proof presented that Mr. Morris intentionally strangled Ms. King.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense beyond a reasonable doubt. The trial court's instructions, which presumed an element of the offense and relieved the State of its burden of proof, violated due process. Here, the State was required to prove Mr. Morris intentionally assaulted Ms. King *and* intentionally strangled her. The trial court's instructions conflated the two intent elements thereby relieving the State of proving these elements. Is Mr. Morris entitled to reversal of his conviction for a violation of his right to due process?

2. Where a statute's meaning is open to two or more reasonable interpretations, the rule of lenity requires the statute be construed in the defendant's favor. Second degree assault by strangulation is open to two reasonable interpretations regarding the intent necessary to prove strangulation. Under the rule of

lenity, is this Court required to interpret the statute in Mr. Morris' favor thereby requiring reversal of his conviction?

C. STATEMENT OF THE CASE

On February 10, 2010, Derrick Morris was looking for the services of a prostitute on Aurora Avenue in Seattle. 9/29/2010RP 9-10. Mr. Morris admitted using the services of prostitutes on two other occasions. 9/29/2010RP 11. Mr. Morris contacted Niah King, a prostitute working on Aurora near 100th Street. 9/28/2010RP 81, 9/29/2010RP 12. Ms. King directed Mr. Morris around the corner off Aurora where Ms. King entered his car. 9/29/2010RP 84-86

To determine whether Mr. Morris was a police officer, Ms. King asked him to touch her breasts and genitals. 9/29/2010RP 86. According to Ms. King, Mr. Morris touched her arm but would not touch her breasts. 9/28/2010RP 86. It was at this point according to Ms. King that Mr. Morris told her he was a police officer, that she was under arrest, but that he would let her go if she had sex with him. 9/28/2010RP 87-88. Ms. King initially pleaded not to be arrested, but then told Mr. Morris she knew he was not a police officer. 9/28/2010RP 88. Ms. King opened the car door and as she started to get out of the car, she claimed Mr. Morris grabbed her by the neck and began to choke her. 9/28/2010RP 88.

According to Ms. King, Mr. Morris had her neck in the bend of his elbow and was attempting to bring her back into the car. *Id.* at 90. Ms. King claimed Mr. Morris was pressing so hard she started to lose consciousness. *Id.* at 91. Ultimately, Ms. King was able to free herself from Mr. Morris and fled. *Id.* at 89.

Mr. Morris denied he told Ms. King he was a police officer, but agreed the two had a dispute when Ms. King quoted a price for a sex act he considered too high. 9/29/2010RP 14-15, 19. The two argued and Ms. King struck Mr. Morris in the head with an open hand and then across the face. 9/29/2010RP 15-16. When she opened the door to leave, Mr. Morris stated he pushed her out of the car and shouted rudely at her. 9/29/2010RP 17. Mr. Morris denied strangling Ms. King. 9/29/2010RP 20.

Mr. Morris was charged with assault in the second degree under alternative manners; assault with the intent to commit rape, and assault by strangulation. CP 6-7. The amended information also alleged the offense was committed with sexual motivation. *Id.* The trial court's instruction 5 instructed the jury on assault:

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive

if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intent to inflict bodily injury.

CP 34.

Court's instruction 6 instructed on intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 35.

The "to convict" instruction, instruction 15, stated in relevant part:

To convict the defendant of the crime of assault in the second degree as charged in Count II, each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That on or about February 11, 2010, the defendant *intentionally assaulted N.W.K. by strangulation*; and
- (2) That the act occurred in the State of Washington.

CP 44 (emphasis added).

Finally, court's instruction 13 defined strangulation:

Strangulation means to compress a person's neck in a manner that obstructs the person's blood flow or ability to breathe, or to compress a person's neck with the intent to obstruct the person's blood flow or ability to breathe.

CP 42.

The court did not instruct on the intent, if any, necessary for strangulation. Nevertheless, during deliberations, the jury sent a note to the court asking about the intent necessary for strangulation:

On No. 15 in the Court's Instructions to the Jury, does it require intentional strangulation or can the strangulation be accidental as a result of the intentional assault?

CP 55. Mr. Morris urged the court to instruct the jury that the strangulation had to be intentional. 9/30/2010RP 13. The court rejected the defense request, feeling that was not "the state of the law." *Id.* The trial court told the jury to reread its instructions, specifically numbers 5, 6, 13 and 15. CP 56.

The jury subsequently acquitted Mr. Morris of second degree assault under the intent to rape alternative, but convicted him of second degree assault under the strangulation alternative. CP 62-

63. The jury rejected the sexual motivation aggravator as well. CP

64.

Mr. Morris moved for a new trial based upon discussions with several of the jurors after the verdict was announced who indicated they had a reasonable doubt about whether Mr. Morris intentionally strangled Ms. King or merely accidentally strangled her. CP 67-68. Mr. Morris also argued assault by strangulation required the State to prove the strangulation was intentional as opposed to merely accidental, which in light of the court's instructions to the jury, was a burden the State had not met. CP 69-76. The trial court denied the motion, ruling that the Legislature in enacting the statute did not include a *mens rea* for strangulation, thus, no instruction was required and the State was not required to prove the intent necessary for strangulation. 11/3/2010RP 12-13.

D. ARGUMENT

THE COURT'S INSTRUCTIONS ON ASSAULT
RELIEVED THE STATE OF THE BURDEN OF
PROVING THE ESSENTIAL ELEMENT OF INTENT
FOR STRANGULATION VIOLATING MR. MORRIS'
RIGHT TO PROOF OF EVERY ELEMENT BEYOND
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The court's instructions did not delineate the intent necessary for the assault and the strangulation, but conflated the two into one instruction. Mr. Morris submits this amounted to a mandatory presumption regarding the intent to strangle element violating his right to due process and mandating reversal of his conviction.

1. Mandatory presumptions violate due process as they relieve the State of its burden of proof. Due process requires the State bear the burden of proof beyond a reasonable doubt for every essential element of a crime. U.S. Const. amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A misstatement of the law or a mandatory presumption in a jury instruction that relieves the State of its burden of proof on every element of an offense is a violation of due process and requires automatic reversal. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d

970 (2004); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996), *citing Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In order to determine whether a jury instruction creates a mandatory or permissive presumption, courts must examine whether a reasonable juror might interpret the presumption as mandatory. *Deal*, 128 Wn.2d at 701. The constitutionality of mandatory presumptions is examined in light of the jury instructions read as a whole to make sure that the burden of persuasion on any element of the crime does not shift to the defendant. *Id.* The burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should not be drawn. *Id.*, *citing Sandstrom*, 442 U.S. at 517.¹

¹ While Mr. Morris did not object specifically on mandatory presumption grounds, he may nevertheless raise this issue for the first time on appeal. Mandatory presumptions that relieve the State of its burden of proving an essential element of the offense are subject to review on appeal for the first time. *State v. Goble*, 131 Wn.App. 194, 203, 126 P.3d 821 (2005). See also *Deal*, 128

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when as a whole properly inform the trier of fact of the applicable law.” *State v. Gerdtz*, 136 Wn.App. 720, 727, 150 P.3d 627 (2007)(internal quotation marks omitted), *quoting State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). When reviewing the effect of specific jury instruction phrasing, the instruction is considered as a whole and within the context of all the instructions given. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). The trial court must instruct the jury that the State has the burden to prove all essential elements of the charged offense beyond a reasonable doubt. *Id.* A jury instruction that relieves the State of its burden of proof is reversible error. *Id.* Alleged errors of law in jury instructions are reviewed by this Court *de novo*. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *Pirtle*, 127 Wn.2d at 656.

Wn.2d at 699 (mandatory presumptions violate due process if they relieve the State of the burden of proving an element of the offense).

2. The court's instruction conflated the intent required for the assault and strangulation creating a mandatory presumption which relieved the State of proving intent. The trial court instructed the jury that it must find Mr. Morris intentionally assaulted King but did not instruct regarding the intent for strangulation. Mr. Morris contends the court's instruction acted as a mandatory presumption as to the strangulation element, thus requiring reversal of his conviction.

RCW 9A.36.021(1)(g) states:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...

(g) Assaults another by strangulation.

RCW 9A.04.110(26) defines strangulation:

"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;

The statute does not specifically include an intent for the element of strangulation. Nevertheless, Mr. Morris submits the State bore the burden of proving he intentionally strangled Ms. King.

Instructive on this issue are the decisions in *State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009), and *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Hayward*, the instruction provided in part that “[r]ecklessness also is established if a person acts intentionally.” 152 Wn.App. at 640. The appellate court held that this instruction conflated the *mens rea* for assault with that required for the resulting harm, thereby relieving the State of its burden of proving the separate element of reckless infliction of substantial bodily harm. *Hayward*, 152 Wn.App. at 645. “[T]he jury instruction here impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted [the victim].” *Id.* at 645.

In *Goble*, the Court of Appeals determined that identical “knowledge” language contained in a third degree assault “to convict” jury instruction created an impermissible mandatory presumption. 131 Wn.App. at 203-04. The Court held that the “knowledge” language was confusing because it potentially allowed the jury to find Goble guilty of third degree assault against a law enforcement officer performing his official duties if it found the defendant intentionally assaulted the victim. *Goble*, 131 Wn.App. at 203. The Court agreed with Goble's that the challenged jury

instruction allowed the jury to presume Goble knew the officer's status at the time of the incident if it found the assault was intentional. *Id.* at 203. Thus, its instructions conflated the intent and knowledge elements required under the "to convict" instruction into a single element and relieved the State of its burden of proving that Goble knew the officer's status if it found the assault was intentional. *Id.*

The issue here involving the subsection on assault by strangulation appears to be an issue of first impression. There appear to be no reported Washington cases dealing with the intent, if any, necessary for the element of strangulation.

Nevertheless, Mr. Morris submits that as in *Hayward* and *Goble*, intent must be proven as to both the assault and the strangulation. The act of strangulation is the element which elevates a standard assault, a gross misdemeanor, to second degree assault, a Class B felony. Thus not only must the act of strangulation be proven, but the intent necessary for strangulation as well. As in *Hayward* and *Goble*, the trial court's instruction here conflated the intent elements which are two separate elements: the intent to assault and intent to strangle. The court's instruction presumed that proof of the intent to assault proved the intent to

strangle. As stated in *Hayward* and *Goble*, this acted as a mandatory presumption which violated due process.

Further, in reading the instructions as a whole as this Court must to determine whether the jury was instructed on the element of intent to strangle, none of the trial court's instructions addressed the intent necessary to prove strangulation. The jury itself was confused by this omission and sought guidance from the court in its jury note. Instead of instructing the jury as sought by the defense, that the intent must be the specific intent to assault and the specific intent to strangle, the court compounded the error by telling the jury to reread its instructions, which did not define the intent to strangle at all. As a result, the jury was never instructed regarding the intent to strangle and Mr. Morris is entitled to reversal of his conviction as the court's instructions relieved the State of proving this element.

3. The Legislature did not intend RCW 9A.56.021(1)(g) to be a strict liability crime as to the element of strangulation. Since 9A.36.021 is silent regarding the intent necessary for the strangulation element, it may be argued this element is one of strict liability: once proof of the intent to assault is proven there is no requirement of proof of intent to strangle. Mr. Morris submits this interpretation of RCW 9A.36.021 renders the statute ambiguous

regarding the intent necessary for strangulation since there are two reasonable interpretations of the statute; one requires proof of the intent to strangle, the other does not. Since the statute is ambiguous, it is proper to look to principles of statutory construction to attempt to glean the Legislature's intent when enacting this subsection of the statute.

If a statute's plain language is ambiguous, courts look "to principles of statutory construction and legislative history to discern the legislature's intent." *State v. Wofford*, 148 Wn.App. 870, 877, 201 P.3d 389 (2009). "A statute is ambiguous if its language is susceptible to more than one reasonable interpretation." *Wofford*, 148 Wn.App. at 878, *citing State v. Bunker*, 144 Wn.App. 407, 415, 183 P.3d 1086 (2008), *aff'd*, 169 Wn.2d 571, 238 P.3d 487 (2010).

Courts review statutory construction issues and constitutional issues *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). The Legislature has the authority to create a crime without a *mens rea* element. *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). To determine whether the legislature did so, courts consider the language and legislative history of a statute. *Id.*; *State v. Bash*, 130 Wn.2d 594, 604-05, 925 P.2d 978 (1996).

“Strict liability” crimes criminalize conduct regardless of whether the actor possesses a culpable mental state. *State v. Rivas*, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). Strict liability crimes are disfavored:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), quoting *Morrisette v. United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

In *Anderson, supra*, the Supreme Court was called upon to decide whether second degree unlawful possession of a firearm was a strict liability offense - one where knowledge of unlawful possession was not an element. *Id.* The Court recognized that the legislature may create strict liability crimes. *Id.* at 361. To determine whether it did, the Court looked to the language of the statute and any legislative history. *Id.* The Court found the statute and legislative history inconclusive on the *mens rea* element. *Id.* at 362. Given that offenses with no *mens rea* element are disfavored and “that a statute will not be deemed to be one of strict liability

where such construction would criminalize a broad range of apparently innocent behavior,” the Court found that the Legislature did intend for the State to prove a culpable *mens rea*. *Id.* at 364.

Again, as noted, above, here the issue concerning the intent necessary for strangulation appears to be one of first impression as it relates to this particular subsection of RCW 9A.36.021(1)(g). The plain wording of RCW 9A.36.021 does not address the intent necessary for the element of strangulation. In looking to the legislative history, in adding the “assaults another by strangulation” subsection to RCW 9A.36.021, the Legislature stated:

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 2007 ch. 79 § 1.

This statement of intent does nothing to determine the intention of the Legislature regarding the intent element. The

statement does *not* evidence a clear intent by the Legislature for there to be no *mens rea* element as to the intent necessary to strangle. Following *Anderson, supra*, and keeping in mind the fact that crimes without *mens rea* are disfavored, the Legislature must have intended there be evidence of an intent to strangle.

4. Regardless of the outcome of statutory construction, under the rule of lenity any ambiguity in RCW 9A.36.021(1)(g) must be resolved in favor of Mr. Morris. Since RCW 9A.36.021(1)(g) is ambiguous, the rule of lenity applies and this Court must construe the statute in Mr. Morris' favor. Mr. Morris is entitled to reversal of his conviction for the trial court's failure to instruct on an essential element of the offense.

If a statute is ambiguous, the appellate court must apply the "rule of lenity," under which any ambiguity must be resolved against the State and in favor of the defendant. See *United States v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) (criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity"); *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005) ("If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary."). If

the statute remains ambiguous after both attempting to determine the plain meaning and resorting to tools of statutory construction, the rule of lenity applies and this Court must interpret any ambiguities in favor of the defendant. *In re Personal Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *State v. Johnson*, 159 Wn.App. 766, 776, 247 P.3d 11 (2011).

Here there are two reasonable interpretations of RCW 9.36.021(1)(g), one posited by the State and the trial court, one by Mr. Morris. As a result, as noted above, the statute is ambiguous. Further, after looking to the language of the statute and engaging in statutory construction, the statute remains ambiguous regarding whether the State must prove the defendant intended to strangle the victim. Given the ambiguity in the statute, this Court must interpret the statute in Mr. Morris' favor. *Jacobs*, 154 Wn.2d at 600. As a result, the trial court was required to instruct the jury that the State had to prove beyond a reasonable doubt Mr. Morris intended to assault *and* intended to strangle Ms. King. Since the jury was never instructed it had to find the latter, Mr. Morris' conviction must be reversed. *See State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986) (“[F]undamental fairness requires that a penal statute be literally and strictly construed in favor of the accused

although a possible but strained interpretation in favor of the State might be found.”).

E. CONCLUSION

For the reasons stated, Mr. Morris requests this Court reverse his conviction and remand for a new trial.

DATED this 15th day of August 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66316-0-I
v.)	
)	
DERRICK MORRIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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