

66745-9

NO. 66745-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CLEO REED,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

---

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the trial court correctly ruled that the victim's two 911 calls and initial spontaneous statements to the responding police officer were not testimonial, and thus, not subject to the Confrontation Clause.

2. Whether the victim's availability or lack thereof is immaterial where her out-of-court statements were not testimonial and admitted under a hearsay exception that does not require a showing that the declarant is unavailable.

3. Whether the trial court exercised sound discretion in refusing the defendant's request for a "missing witness" instruction because the victim was not a witness who was peculiarly available to the State.

4. Whether the trial court's instructions to the jury regarding assault in the second degree by strangulation were proper because they accurately stated the law.

5. Whether the prosecutor's misstatement of the law in rebuttal does not require reversal because the remark was isolated, not flagrant or ill-intentioned, and would have been cured by an instruction if the defendant had objected.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Cleo Reed, with one count of assault in the second degree (strangulation) and one count of tampering with a witness based on Reed's conduct towards his girlfriend, Nat Emily Ta, in June and July 2010. The State also alleged the aggravating circumstances that Ta was pregnant when the defendant assaulted her. CP 1-7, 78-79. A trial on these charges was held in December 2010 and January 2011 before the Honorable Theresa Doyle.

As will be discussed further below, the trial court admitted portions of Ta's two 911 calls and her initial spontaneous statements to the police officer who responded to her second call. The trial court ruled that these statements were non-testimonial for purposes of the Confrontation Clause, and that they were admissible as excited utterances under ER 803(a)(2). RP (1/3/11) 55-57, 63-65; RP (1/10/11) 23-25. Ta did not testify at trial because she refused to cooperate with the prosecution, and the State chose not to seek a material witness warrant for her arrest. RP (1/3/11) 66-67; RP (1/4/11) 4.

At the conclusion of the trial, the jury convicted Reed of second-degree assault and witness tampering as charged, but rejected the aggravating circumstance. CP 113-15. The trial court imposed a standard-range sentence totaling 84 months in prison. CP 150-58; RP (2/11/11) 9-10. Reed now appeals. CP 159-69.

## **2. SUBSTANTIVE FACTS**

At approximately 2:00 in the afternoon on June 23, 2010, Nat Emily Ta called 911 for help because her boyfriend was "choking," "scratching," and "threatening" her. The call was disconnected before the operator could ascertain where the assault was taking place. Ex. 16 (track 1); Ex. 21 (pgs. 1-3); RP (1/10/11) 128-29. At approximately 11:00 p.m., Ta called 911 again. RP (1/10/11) 128-29. This time, she told the operator that "this mother fucker he just beat me up right now," and that she was injured, pregnant, and walking somewhere by the side of the road in Renton.<sup>1</sup> Ex. 16 (track 6); Ex. 21 (pgs. 4-6). Renton Police Officer Robert Bagsby was dispatched in response to the second call. RP (1/10/11) 43. Upon arrival in the parking lot of a

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<sup>1</sup> The first 911 call was admitted in its entirety; the trial court admitted only approximately the first half of the second call. RP (1/3/11) 55-57, 63-65.

McDonald's restaurant, Ta ran up to his patrol car and exclaimed that "my boyfriend beat me up, choked me, wouldn't let me out of my car."<sup>2</sup> RP (1/10/11) 43-45. Ta was "hysterical" and crying uncontrollably. RP (1/10/11) 45.

After Officer Bagsby questioned Ta and determined that the assault had occurred within the city limits of Seattle, Seattle Police Officer John Marion assumed responsibility for the initial investigation. RP (1/10/11) 48-49, 57. Officer Marion took photographs of Ta's injuries, which included a bleeding lip and fresh red marks and scratches on her neck, face, and hands. RP (1/10/11) 59-71. Officer Marion interviewed Ta, took a written statement, and then drove her home. RP (1/10/11) 72-76.

After Reed was booked, he called Ta from the jail on at least two occasions. In both calls, Reed instructed Ta to write a letter stating that she had lied to the police, and that Reed had never "hit" her, "choked" her, or "smacked" her. Reed instructed her to have the letter notarized and to make several copies. He also told her to come to court and to make it clear that he was not forcing her to recant. RP (1/11/11) 165-94.

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<sup>2</sup> Although Ta made additional statements to Officer Bagsby in response to questioning, only her initial, spontaneous statements were admitted at trial.

When Reed was arraigned on July 15, 2010, Ta appeared at the hearing and gave a copy of the notarized letter to the prosecutor. RP (1/10/11) 136-38. Ta asked the court not to issue a no-contact order, and asked for Reed to be released. RP (1/10/11) 137. Despite the efforts of the trial prosecutor and his paralegal to persuade Ta to appear at Reed's trial to testify, Ta refused to cooperate. RP (1/3/11) 67; RP (1/4/11) 1-4. The trial prosecutor decided against asking for a material witness warrant for Ta's arrest. RP (1/3/11) 66. Accordingly, Ta did not testify at trial.

**C. ARGUMENT**

**1. THE TRIAL COURT CORRECTLY RULED THAT TA'S 911 CALLS AND INITIAL STATEMENTS TO THE RESPONDING OFFICER DID NOT IMPLICATE THE CONFRONTATION CLAUSE BECAUSE THEY WERE NOT TESTIMONIAL.**

Reed first argues that Ta's calls to 911 and initial statements to Officer Bagsby were admitted in violation of the Confrontation Clause of the Sixth Amendment. Appellant's Opening Brief, at 5-22. This claim should be rejected. The trial court correctly concluded that Ta's statements were made for the purpose of enabling a response from police to assist with an ongoing emergency. Additionally, Ta's initial statements to Officer Bagsby

were completely spontaneous, and not the product of any form of interrogation. Accordingly, the statements at issue were not testimonial, and this Court should affirm.

The United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the focus of federal Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under Crawford, a witness's "testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that witness. However, Crawford "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. at 68.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911 call made by a domestic violence victim was not testimonial because the statements were made to assist the police in responding to an emergency, not to assist in a later court proceeding:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Accordingly, non-testimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause entirely. Id.

The Washington Supreme Court then applied these principles in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007).

In further defining the test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency, the Ohlson court identified four factors that courts should consider:

1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality or lack of formality of the questioning. Ohlson, 162 Wn.2d at 15. Based on these factors, the court concluded that statements that the victim had made to the first officer on the scene following a serious assault with racial overtones were not testimonial; thus, they were admissible as excited utterances despite the victim's failure to

testify at trial. Id. at 16-19. In so holding, the court found it significant that the assailant was still at large when the statements were made, and therefore, the threat posed was greater than it would have been otherwise. Id.

The Washington Supreme Court again attempted to clarify what constitutes a testimonial statement for purposes of the federal Confrontation Clause in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). In Koslowski, the victim of a home-invasion robbery made statements in response to questioning by the police officers who responded to her home in response to her 911 call after the crime. She made some statements initially to the first officer who arrived, and then made far more detailed statements several minutes later when a second officer arrived. Koslowski, 166 Wn.2d at 414-15. The victim died prior to trial, so the issue was whether her statements were testimonial such that they were admitted in violation of the Confrontation Clause in the absence of cross-examination.

In considering the issue, the Koslowski court expanded on the factors from Davis, as utilized in Ohlson, that courts should consider in distinguishing testimonial statements from statements

made for the primary purpose of enabling a response to an ongoing emergency:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate that the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnote and citation omitted). In summary, the timing of the statements, the nature of the questions and answers, the formality of the questioning (or lack thereof), and whether an objective listener would interpret the statements as requests for immediate assistance are all relevant in determining whether statements are testimonial under Crawford and Davis. In

Koslowski, the court ultimately determined that the victim's statements were testimonial, because they were made in response to police questioning after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance. Koslowski, 166 Wn.2d at 421-22.

More recently, the Washington Supreme Court considered whether a recording of a 911 call was admissible under both the federal and state confrontation clauses in State v. Pugh, 167 Wn.2d 825, 255 P.3d 892 (2009). In Pugh, the victim called 911 to report that the defendant had just assaulted her, that he was no longer in the house, and, in response to the operator's questions, she provided a description of the defendant. Pugh, 167 Wn.2d at 829. After a brief analysis of the "ongoing emergency" analysis from Davis, the Pugh court concluded that the 911 call was clearly not testimonial because it was a request for immediate assistance, and thus, that the call was properly admitted under the federal Confrontation Clause. Pugh, 167 Wn.2d at 831-34.

In addition, the Pugh court considered whether the victim's 911 call was admissible under article I, section 22 of the

Washington Constitution.<sup>3</sup> In conducting this analysis, the court discussed the historical underpinnings of the "res gestae" exception to the requirement for cross-examination, which existed when the state constitution was ratified, and held that the admission of "res gestae" statements without cross-examination or a showing that the declarant was unavailable did not violate the state Confrontation Clause. Id. at 834-43.

As the court explained, "res gestae" statements relate to the main event at issue, are natural declarations growing out of the event, are statements of fact rather than opinion, are spontaneous or instinctive rather than premeditated, and are made by a participant or witness to the event. Id. at 839 (citing Beck v. Dye, 200 Wn. 1, 9-10, 92 P.2d 1113 (1939)). As such, the "res gestae" doctrine "evolved into several present day hearsay exceptions," including present sense impressions and excited utterances. Pugh, 167 Wn.2d at 839. Ultimately, the court held that the victim's 911 call was properly admitted against the defendant at trial because it consisted of traditional res gestae statements. Id. at 843.

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<sup>3</sup> Although Reed's claim on appeal is made solely under the Sixth Amendment of the federal constitution, the court's state constitutional analysis in Pugh is instructive.

Even more recently, the United States Supreme Court performed further analysis regarding the Confrontation Clause in Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Unlike Crawford, which involved a formal police interrogation, and unlike Davis, which involved a 911 call, Bryant concerned statements made by a shooting victim to the first officers to arrive on the scene where the victim was found bleeding in a parking lot. In response to questioning by the officers, the victim identified the shooter and told them where and how the shooting had occurred. The victim later died, and his statements were admitted at the defendant's murder trial. Bryant, 131 S. Ct. at 1150.

The Court observed that in resolving the question of whether statements to police are testimonial, the "primary purpose of the interrogation" must be objectively ascertained, and that the existence of an ongoing emergency "is among the most important circumstances" in making that determination. Bryant, 131 S. Ct. at 1156-57. The Court further observed that "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and that "[t]his logic is not unlike that justifying the excited utterance exception in hearsay law." Id. at 1157. The Court recognized that

the question of whether an emergency exists "is a highly context-dependent inquiry," and that factors such as whether the suspect is still at large, whether the victim is injured, whether weapons are involved, and whether there may be a threat to the public or the officers themselves must all be taken into consideration. Id. at 1158-59.

Further, the Court emphasized that the level of formality of the questioning is an important consideration, and that a lack of formality often signals that the statements at issue are not testimonial. Id. at 1160. Significantly, the Court recognized that the officers' questioning of the shooting victim "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." Id. After examining all relevant factors, the Court concluded that there was an emergency, and that the victim's statements were the product of questioning designed to assist the officers in responding to that emergency. As such, the statements were not testimonial, and their admission did not violate the Sixth Amendment. Id. at 1166-67.

Based on the standards as set forth above, the statements at issue in this case were properly admitted against Reed.

First, with respect to Ta's first 911 call, Ta was relating events as they are actually happening or immediately thereafter (e.g., "he choking me," "he punched my lip," "and he threatening me right now"), and she was clearly frantic and often nonresponsive to the operator's questions.<sup>4</sup> Ex. 16 (track 1); Ex. 21 (pgs. 1-3). These factors show that Ta was seeking help, not providing testimonial information for a prosecution. Further, the questioning is informal and disorganized, as the operator struggled to obtain pertinent information for a response to Ta's call for help (e.g., "I wanna send you help as soon as possible"). Ex. 16 (track 1); Ex. 21 (p. 2). But perhaps most dispositive is the fact that Reed was present when the call was made and he can be heard shouting angrily in the background. Ex. 16 (track 1). All of these considerations demonstrate that the primary purpose of the call was to seek assistance with an ongoing emergency, not to provide "testimony" against Reed. Accordingly, the trial court correctly ruled that the statements made during Ta's first 911 call were not

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<sup>4</sup> Reed argues that Ta's failure to give her address in response to the operator's questions shows that the call is testimonial. Appellant's Opening Brief, at 9. This argument is without merit, as Ta's nonresponsive statements show her obvious distress, not a desire to give testimony against Reed.

testimonial, and thus, their admission did not implicate the Confrontation Clause. RP (1/3/11) 55-57.

Second, with respect to Ta's second 911 call, Ta was upset, and again was relating events as they were happening or immediately thereafter (e.g., "this mother fucker he just beat me up right now," "I'm at Renton right now somewhere," "I'm bleeding on my nose," and "I'm pregnant right now"). Ex. 16 (track 6); Ex. 21 (pgs. 4-5). She struggled to tell the operator where she was so that an officer could assist her. Again, the questioning was informal, and all of the operator's questions were designed to ascertain the basics of what had happened and where Ta was located so that the operator could send assistance. Ex. 16 (track 6); Ex. 21 (pgs. 4-6). All of these circumstances show that the purpose of the second call to 911 was to enable a response to Ta's emergency. Ta was alone and injured, having been kicked out of a car at night in an area with which she was obviously unfamiliar, and her assailant was still at large. Again, the trial court correctly ruled that this first portion of Ta's second 911 call was not testimonial. RP (1/3/11) 63-65.

Nonetheless, Reed argues that the second portion of the second 911 call, which the trial court excluded, demonstrates that the entire call is testimonial in nature. In particular, Reed notes that

in the excluded portion of the call, Ta stated that she wanted Reed put back in jail, and she related past events. Appellant's Opening Brief, at 12-14. This argument is without merit. As the Supreme Court observed in Bryant,

Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated.

Bryant, 131 S. Ct. at 1161. Such is the case here, as Ta stated that she wanted Reed back in jail, but she also stated that he needed help with his drug problem. Ex. 16 (track 6). In addition, as the Supreme Court further explained,

Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Bryant, 131 S. Ct. at 1159-60 (footnote, citations, and internal quotation marks omitted). This is precisely what the trial court did in this case, and no error occurred.

Finally, with respect to Ta's initial statements to Officer Bagsby as he was arriving on scene, these statements were wholly

spontaneous and were not the product of any form of interrogation, whether formal or otherwise. Rather, as Officer Bagsby was getting out of his patrol car, Ta ran up to him and told him she had been assaulted and choked by her boyfriend, and that he would not let her get out of the car. She made these statements without any questioning or prompting by the officer. RP (1/10/11) 11-15. Officer Bagsby noted that Ta was "very distraught," she was bleeding from the mouth and had fresh red marks and scratches on her neck, and that she was crying so hard she couldn't speak in complete sentences. RP (1/10/11) 10, 12. Ta also said "thank you" repeatedly. RP (1/10/11) 12.

Given that Crawford, Davis, Ohlson, Koslowski, Pugh, and Bryant all concern statements given in response to some form of interrogation, it is questionable whether the Confrontation Clause is implicated at all when the statements in question are wholly spontaneous and *not* the product of interrogation. But in any event, Ta's frantic state, her fresh injuries, and the spontaneity and content of her initial statements to Officer Bagsby demonstrate that these statements were made for the purpose of obtaining immediate assistance, and thus, they were not testimonial. The

trial court's ruling in this regard was correct, and should be affirmed.  
RP (1/10/11) 23-25.

Nonetheless, Reed argues that Ta was speaking about past events for the purpose of prosecution, that there was no emergency, and that "[a] statement about a past event made to a police officer conducting a criminal investigation meets the Sixth Amendment's formality and solemnity requirement for a testimonial statement." Appellant's Opening Brief, at 15. To the contrary, there was neither formality nor solemnity when Ta ran up to Officer Bagsby, bleeding and crying, in the parking lot of a McDonald's with her assailant still at large. This argument is without merit.

In sum, the trial court ruled correctly that Ta's first 911 call, the first portion of her second 911 call, and her initial spontaneous statements to Officer Bagsby were not testimonial, and hence, admissible as excited utterances despite Ta's failure to testify at trial. This Court should affirm.

**2. THERE IS NO FREESTANDING CONFRONTATION  
CLAUSE VIOLATION BASED ON THE STATE'S  
FAILURE TO PRODUCE A WITNESS AT TRIAL.**

Reed next claims that his right to confrontation was violated by the State's failure to produce Ta as a witness at trial. More

specifically, Reed argues that because the State did not demonstrate that Ta was "unavailable" in a legal sense, his right to confrontation was violated by her absence from trial. Appellant's Opening Brief, at 22-26. This claim should be rejected. Ta's unavailability or lack thereof would be relevant only if her out-of-court statements were testimonial, or if they were admitted under a hearsay exception requiring a showing of unavailability. Neither being the case, Reed's claim is without merit.

No authority stands for the proposition that the State has a constitutional obligation to call any particular person to testify at trial. Obviously, however, if the State fails to call enough essential witnesses as are necessary to prove its case, the State suffers the consequences of that failure. As explained above, what the Confrontation Clause requires is that any persons who *do* testify as witnesses must be made available for cross-examination at trial. Moreover, the Confrontation Clause does not allow the introduction of *testimonial* hearsay unless the hearsay declarant either testifies and is cross-examined at trial, or the declarant is unavailable but has previously been made available for cross-examination.

Put another way, if the State introduces testimonial hearsay at trial, yet the hearsay declarant does not testify as a trial witness

and there has been no showing of unavailability *and* a prior opportunity for cross-examination, the Confrontation Clause is violated. On the other hand, if non-testimonial statements are offered as evidence, the hearsay rules govern their admissibility, and a showing of unavailability is required only if dictated by those rules. The United States Supreme Court explained these concepts as follows in Crawford:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford, 541 U.S. at 68.

As discussed at length above, the trial court correctly ruled that Ta's 911 calls and her initial, spontaneous statements to Officer Bagsby were not testimonial. Accordingly, those statements were properly admitted at trial under ER 803(a)(2) as excited utterances. Under this hearsay exception, statements are admissible whether the witness is unavailable or not. ER 803(a). Thus, Ta's unavailability or lack thereof was immaterial, as the trial court recognized in making its ruling. RP (1/4/11) 20.

Nonetheless, Reed asserts a Confrontation Clause claim based on what he claims is an insufficient showing of Ta's unavailability, citing three cases in support of that argument. Appellant's Opening Brief, at 24 (citing Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002), and State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988)). These cases are not on point, as each addresses the admission of statements under rules that *require* a showing of unavailability as a prerequisite for admissibility. See Barber, 390 U.S. at 720-22 (transcript of pretrial testimony admitted, which requires both a showing of unavailability and a prior opportunity for cross-examination); Smith, 148 Wn.2d at 133-34 (child hearsay statements admitted under RCW 9A.44.120, which requires either live testimony or a showing that the child is unavailable); Rivera, 51 Wn. App. at 558-59 (tape-recorded, transcribed statement admitted under ER 804(b)(3), which requires a showing that the witness is unavailable).

In sum, there is no freestanding Confrontation Clause violation based on a witness's purported availability for trial if non-testimonial statements are at issue, and the statements are admitted under an evidence rule that does not require a showing of

unavailability. Such is the case here. Therefore, the trial court's rulings were correct and this Court should affirm.

**3. THE TRIAL COURT EXERCISED SOUND DISCRETION IN REFUSING REED'S REQUEST FOR A "MISSING WITNESS" INSTRUCTION.**

Reed next claims that the trial court abused its discretion by refusing his request for a "missing witness" instruction. More specifically, he claims that this instruction was required because Ta was available to testify and should have been called by the State. Appellant's Opening Brief, at 26-32. This claim should be rejected, as the record shows that Ta was not peculiarly available to the prosecution as required. To the contrary, Ta had made it clear she had no intention of cooperating with the prosecution. The trial court exercised its discretion appropriately in rejecting the instruction, and this Court should affirm.

When a party fails, without explanation, to call a witness it would naturally call if the witness's testimony would be favorable, the "missing witness" doctrine permits the jury to draw an inference that the uncalled witness's testimony would have been unfavorable to that party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968).

However, a jury instruction regarding this permissive inference is appropriate only if the witness is "peculiarly available" to the party in question. Davis, 73 Wn.2d at 276-77 (quoting McClanahan v. United States, 230 F.2d 919, 926 (5th Cir. 1956)). A witness is "peculiarly available" if there is a "community of interest between the party and the witness," or if the party has "so superior an opportunity for knowledge of a witness" as to make it likely that the witness would have testified unless his or her testimony would have been damaging. Davis, 73 Wn.2d at 277.

A trial court's refusal to give a jury instruction is reviewed for manifest abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). Accordingly, the trial court's decision will be upheld unless it was manifestly unreasonable or based on untenable grounds. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

In this case, Reed asked for a "missing witness" instruction due to Ta's failure to testify. The trial court refused this request because Ta was not within the control of the State. RP (1/11/11) 232-33. Moreover, when the trial court asked defense counsel for any authority supporting a missing witness instruction in these

circumstances, counsel admitted that she was not aware of any.

RP (1/11/11) 233-34.

This record shows that the trial court exercised its discretion on an appropriate basis in refusing to give a "missing witness" instruction. As the trial court observed, Ta was not a witness who was peculiarly available to the State. To the contrary, Ta had made it abundantly clear that she was refusing to come to court to testify despite the prosecutor's efforts to persuade her otherwise.

RP (1/3/11) 67; RP (1/4/11) 4. Nor was there a "community of interest" between Ta and the State. Rather, by the time of trial, Ta's interests and the State's interests were squarely at odds, as Ta did not want Reed to be prosecuted.

Moreover, the State did not have "so superior an opportunity for knowledge of a witness" that it would justify a missing witness instruction. Indeed, Reed had far greater knowledge and influence in this regard, as his efforts to induce Ta's recantation were successful. See RP (1/11/11) 165-94. In sum, Reed cannot show that the trial court abused its discretion in finding that Ta was not a witness peculiarly within the State's control, and thus, that a missing witness instruction was not warranted.

Nonetheless, Reed argues that a missing witness instruction should have been given because victims of domestic violence are not available as witnesses for the defense, citing State v. David, 118 Wn. App. 61, 74 P.3d 686 (2003), *rev. granted and remanded on other grounds*, 154 Wn.2d 1032 (2005), and 160 Wn.2d 1001 (2007). But in David, neither the prosecution nor the defense had direct access to the victim, who was disabled as a result of the defendant's abuse. Rather, any contact with either party was arranged through the trial court and the victim's legal guardian. As this Court explained, "[f]or Linda's protection, at the request of her guardian, only the court had knowledge of her whereabouts," yet either party could have called her as a witness had it chosen to do so. David, 118 Wn. App. at 66-67. Accordingly, this Court held that the trial court properly exercised its discretion in refusing the defendant's request for a "missing witness" instruction. Id. In short, David is an unusual case that does not stand for the proposition that victims in domestic violence cases are categorically unavailable to the defense, as Reed suggests.

In sum, the trial court exercised its discretion properly in refusing Reed's request for a "missing witness" instruction because

Ta was not peculiarly available to the State. This Court should reject Reed's arguments to the contrary, and affirm.

**4. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT REQUIRED THE STATE TO PROVE ALL ESSENTIAL ELEMENTS OF ASSAULT IN THE SECOND DEGREE.**

Reed next claims that the jury instructions relieved the State of its burden of proving all the essential elements of assault in the second degree. More specifically, he argues that the trial court's instructions did not require the jury to find that Reed had the specific intent to strangle Ta, and that this violated due process because the Legislature did not intend assault by strangulation to be a "strict liability" offense. Appellant's Opening Brief, at 32-44. This claim is without merit. The trial court's instructions comport with the language of the relevant statutes, including the requisite *mens rea*. Moreover, because any form of assault requires a *mens rea*, it is by definition not a "strict liability" offense. This Court should reject this claim, and affirm.

It is axiomatic that the State bears the burden of proving all essential elements of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.

2d 368 (1970). By definition, an assault is a willful act. See State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992).

Accordingly, the trial court was required to instruct the jurors regarding the requisite *mens rea*.

Reed was charged with assault in the second degree by strangulation under RCW 9A.36.021(1)(g), which simply provides that a person is guilty if he or she intentionally "[a]ssaults another by strangulation." The Legislature further defined strangulation as follows:

"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). In other words, assault by strangulation is committed when the perpetrator intentionally assaults the victim in a particular way (*i.e.*, by compressing the victim's neck), and the perpetrator either actually causes a particular result or intends to cause that particular result (*i.e.*, obstruction of the victim's blood flow or breathing).

The trial court's instructions to the jury precisely mirrored the relevant statutes and applicable common law. The "to convict" instruction for assault in the second degree stated that the jury

must find that "the defendant intentionally assaulted Nat E. Ta by strangulation" in order to return a guilty verdict. CP 132. An assault was correctly defined as "an intentional touching or striking of another person, with unlawful force," and intent was correctly defined as "acting with the objective or purpose to accomplish a result that constitutes a crime." CP 127-28. The instruction defining strangulation came straight from the language of the statute:

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 130. Accordingly, as the statute dictates, the trial court's instruction regarding strangulation allowed the jury to find either actual obstruction of blood flow or breath, or the intent to cause the obstruction of blood flow or breath. These instructions were accurate, and thus, no error occurred.

Nonetheless, Reed appears to argue that additional instructions on intent were required. More specifically, it appears that he contends that the first portion of the definition of strangulation -- *i.e.*, actual obstruction of blood flow or breathing -- must also be specifically intentional. But this interpretation is

directly contrary to the express language of the statute, which defines strangulation in two ways: 1) by the actual injury suffered by the victim, regardless of the specific intent of the perpetrator; and 2) by the specific intent of the perpetrator, regardless of the actual injury suffered by the victim. Reed cites no relevant authority standing for the proposition that a crime cannot be defined by the injury suffered by the victim without regard to the perpetrator's specific intent to cause that injury. Indeed, such crimes are relatively common. See, e.g., RCW 46.61.520 (vehicular homicide); RCW 46.61.522 (vehicular assault); RCW 9A.32.030(1)(c) (first-degree felony murder); RCW 9A.32.050(1)(b) (second-degree felony murder). This argument is without merit.

Reed also argues that the Legislature did not intend to create a strict liability offense when it created the crime of assault by strangulation. Appellant's Opening Brief, at 39-43. But a strict liability offense is a crime that contains no *mens rea* element whatsoever. See, e.g., State v. Chhom, 128 Wn.2d 739, 741-43, 911 P.2d 1014 (1996) (rape of a child has no *mens rea* element; it is a strict liability offense); State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (possession of a controlled substance is a strict liability offense, and thus, the defense of unwitting possession

must be proved by the defendant by a preponderance of the evidence). Assault by strangulation is *not* a strict liability offense, because in all cases the assault itself must be intentional. Reed's discussion of strict liability offenses is inapposite.

Lastly, Reed argues that the rule of lenity requires this Court to imply an additional element of intent for assault by strangulation. Appellant's Opening Brief, at 43-44. But the rule of lenity applies only when a statute is ambiguous, and is subject to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). On the other hand, if a statute's plain language is clear, no further interpretation is permitted. Id. In this case, the Legislature's definition of strangulation is clear and unambiguous: either the perpetrator actually obstructs the victim's blood flow or breathing, or the perpetrator intends to obstruct the victim's blood flow or breathing. No further interpretation is necessary to discern the Legislature's intent, and the rule of lenity does not apply.

In sum, the trial court's instructions to the jury regarding assault in the second degree by strangulation accurately stated the law. This Court should reject Reed's arguments to the contrary, and affirm.

**5. THE PROSECUTOR'S REMARKS IN REBUTTAL REGARDING THE PRESUMPTION OF INNOCENCE WERE NOT FLAGRANT, ILL-INTENTIONED, OR INCURABLY PREJUDICIAL.**

Lastly, Reed claims that he was deprived of a fair trial by prosecutorial misconduct. Specifically, Reed argues that the prosecutor misstated the duration of the presumption of innocence during rebuttal, and that this remark was so prejudicial that reversal is required. Appellant's Opening Brief, at 44-50. This claim should be rejected. Although the prosecutor was incorrect when he said that the presumption of innocence ends when the jury's deliberations begin, the remark was not flagrant or ill-intentioned, would have been cured by an instruction, and was not unduly prejudicial in light of the prosecutor's correct statements regarding the State's burden of proof and the evidence produced at trial. Therefore, a new trial is not warranted and this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *rev. denied*, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668,

718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect."

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Moreover, a defendant who did not object at trial has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. A defendant's failure to object "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury.

Stenson, 132 Wn.2d at 727. Arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Lastly, a prosecutor's remarks must not be viewed in isolation, but "in the

context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

In this case, defense counsel devoted a substantial portion of her closing argument to discussing the presumption of innocence. RP (1/11/11) 259-60, 267. In response, the prosecutor stated in rebuttal that the presumption of innocence is "incredibly important," and "that presumption does last all the way until you walk into that jury room and start deliberating." RP (1/11/11) 267-68. Defense counsel did not object.

The prosecutor's statement that the presumption of innocence lasts until the jury starts deliberating was an incorrect statement of the law. As the jurors were specifically instructed by the trial court, the presumption of innocence "continues throughout the entire trial unless you find *during* your deliberations that it has been overcome by the evidence beyond a reasonable doubt." CP 122 (WPIC 4.01A) (emphasis supplied). However, the prosecutor's remark in this case does not constitute flagrant and ill-intentioned misconduct that could not have been ameliorated by a curative instruction in light of the record as a whole.

The purpose of a presumption of innocence instruction is to emphasize two concepts that are already made clear to the jury in other instructions: 1) that the State bears the burden of proving the elements of a crime beyond a reasonable doubt; and 2) that the jury must arrive at its verdict based solely on the evidence produced at trial. United States v. Velez-Vasquez, 116 F.3d 58, 61 (2nd Cir. 1997); United States v. Payne, 944 F.2d 1458, 1465-66 (9th Cir. 1991). In fact, the United States Supreme Court has described the presumption of innocence instruction in rather disparaging terms as “an inaccurate, shorthand description” of these constitutional concepts. Taylor v. Kentucky, 436 U.S. 478, 483 n.12, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). Accordingly, the Court has also observed that “use of the particular phrase ‘presumption of innocence’ -- or any other form of words -- may not be constitutionally mandated[.]” Taylor, 436 U.S. at 485; *see also* Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (noting that “the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution”).

Given that the purpose of a presumption of innocence instruction is to emphasize the State's burden of proving the

defendant's guilt beyond a reasonable doubt, it makes sense that recent cases finding flagrant, ill-intentioned and incurable misconduct in closing argument regarding the presumption of innocence also involve remarks that far more directly undermine the State's burden of proof.

For example, in State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011) -- a case upon which Reed relies -- the prosecutor's remark that the presumption of innocence "kind of stops once [the jurors] start deliberating" was found to be improper. Evans, 163 Wn. App. at 643-44. However, this remark was coupled with other obviously improper arguments, including that the jurors had to "fill in the blank" with a reason in order to find the defendant not guilty.<sup>5</sup> Id. at 645-46. This argument directly undercuts the State's burden of proof because it suggests that the defendant is presumed guilty and that he must supply a reason for the jury to acquit him. Id. In sum, Evans involves repeated misstatements of law that undermined both the presumption of innocence *and* the burden of proof.

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<sup>5</sup> The prosecutor also stated that the jury's role is "to get to the truth" and suggested that "the jurors [should] disregard weaknesses in the State's case." Id. at 644-45.

Similarly, in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813, *rev. denied*, 170 Wn.2d 1003 (2010) -- upon which Reed also relies -- the prosecutor stated that the presumption of innocence "erodes each and every time you hear evidence that the defendant is guilty." This remark is obviously erroneous. But the prosecutor further compounded the error by using the same "fill in the blank" argument that was used in Evans. Venegas, 155 Wn. App. at 519. As in Evans, the court in Venegas concluded that these remarks misstated both the presumption of innocence and the burden of proof. Id. at 524-25. Accordingly, the court found that the prosecutor committed flagrant, incurable misconduct "by *repeatedly* attacking Venegas's presumption of innocence with improper arguments that had no basis in law." Id. at 525 (emphasis supplied).

In this case, by contrast, the prosecutor did not make multiple, repeated misstatements of law. To the contrary, the prosecutor's incorrect statement in this case was isolated and not repeated. Moreover, unlike the "fill in the blank" arguments made by the prosecutors in Evans and Venegas, the prosecutor in this case correctly stated the State's burden of proof, and noted that "it is the highest burden . . . in the land and it should be."

RP (1/11/11) 243. Moreover, the jury was clearly and correctly instructed by the trial court regarding the presumption of innocence and the State's burden of proof. CP 122, 132, 135, 139. In sum, the record in this case does not demonstrate flagrant, ill-intentioned and incurably prejudicial misconduct based on a "multi-pronged and persistent attack on the presumption of innocence, the State's burden of proof, and the jury's role." Evans, 163 Wn. App. at 648. Rather, the record shows an isolated remark in rebuttal that would have been cured by an instruction if the defendant had objected and asked for one.

Furthermore, unlike Evans<sup>6</sup> and Venegas,<sup>7</sup> the evidence in this case was strong. Although Ta did not testify, her excited utterances were compelling evidence of Reed's guilt. Even more damaging were the jail phone calls, during which Reed specifically instructed Ta to write and notarize a letter stating that "he never hit [her], he never choked [her], he never smacked [her]," and that the police had told her what to say, while never once denying that he

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<sup>6</sup> See Evans, 163 Wn. App. at 647 (noting that the State's evidence was not strong enough to find multiple improper arguments harmless).

<sup>7</sup> See Venegas, 155 Wn. App. at 526-27 (noting that the case "turned on witness credibility," and "the accumulation of errors" in the case required reversal).

had, indeed, hit, choked, and smacked her. RP (1/11/11) 170. The evidence also included photographs of the injuries Ta received as a result of Reed's assaulting her. RP (1/10/11) 59-71. Moreover, the jail phone calls provided overwhelming evidence of the witness tampering charge. RP (1/11/11) 165-94. In sum, the prosecutor's misstatement was not unduly prejudicial in light of the record as a whole, and thus, Reed should not be granted a new trial on this basis.

Nonetheless, Reed argues that the prosecutor's misstatement was intentional, and was "designed to mislead the jury and lessen the State's burden of proof." Appellant's Opening Brief, at 50. The record does not support this accusation, and this Court should reject it. Indeed, this allegation belies the record, wherein the prosecutor correctly stated and emphasized the State's burden of proof. RP (1/11/11) 243, 250, 258. In sum, the record does not support Reed's contention that the prosecutor intentionally misstated the law in order to obtain an unlawful conviction. Rather, the record shows that the prosecutor's misstatement was a mistake, and nothing more. This Court should reject Reed's claim, and affirm.

**D. CONCLUSION**

The trial court properly admitted non-testimonial statements as excited utterances, and thus, the victim's unavailability was immaterial. The trial court also exercised sound discretion in refusing the defendant's request for a "missing witness" instruction. The trial court's instructions regarding assault by strangulation followed the language of the relevant statutes and were entirely proper. Lastly, the prosecutor did not commit flagrant, ill-intentioned and incurably prejudicial misconduct in rebuttal. For all of the reasons set forth above, Reed's convictions for assault in the second degree and witness tampering should be affirmed.

DATED this 10<sup>th</sup> day of January, 2012.

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