No. 30834-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

RUSSELL HARRINGTON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

BRIEF OF APPELLANT

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B. Was The Evidence Insufficient To Sustain A Conviction For First Degree Kidnapping?

III. STATEMENT OF FACTS

Mr. Harrington was charged on December 31, 2009 with kidnapping in the first degree, (domestic violence) with use of a firearm and an allegation of deliberate cruelty based on events that occurred on December 30, 2009. CP 1.

In June 2003, Russell Harrington was electrocuted while at work. He burned his sciatic and sympathetic nerves and the myelin

coating. RP 451.[1] The accident caused him to be unable to work, or be physically active. RP 451-52. He used and began to abuse opiate type prescription medications to manage his pain. RP 454-55. He later developed lesions on his brain and had a stroke. RP 451.

Around the Thanksgiving/ Christmas holidays in 2009, Mr. Harrington's wife told him she wanted a divorce, ending their 20-year marriage. RP 52. He became despondent and contemplated taking his own life on December 13, 2009. RP 456;459; 462. He prepared a will, instructions for his burial, as well as a number of letters addressed to people who were important to him. RP 462-466. He made a suicide attempt four days later. RP 468. On the advice of mental health professionals, his extended family removed all the guns from his home. RP 61; 465. He purchased another gun shortly thereafter. RP 475.

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[1] For purposes of this brief, the jury trial dates of 4/16, 4/17, 4/18, 4/19, 4/20/2012 will referenced as RP page no.; 5/19, 7/ 21, 9/1 and 9/22 2010; 9/11/ 2011; 1/30/ 2012 and 4/25,/2012 will be referenced as 1RP page no; Hearing dates of 2/27/10, 12/15/10,2/2/2011; 3/30/2011; 5/25/2011; 6/8/2011; 6/15/2011;10/26/2011 will be referenced as 2RP; hearing dates 4/21/2010;5/5/2010;5/12/2010;3/9/2011;8/31/2011;11/2/2011;11/16/2011; 11/23/2011;1/4/2012;1/18/2012/1/25/2012;2/1/2012;2/8/2012;2/15/2012;4/4/2012 will be referenced as 3RP page no. Hearing Date 8/18/2010 and 7/6/2011 will referenced as 4RP page no; Hearing dates 1/6/2010, 3/3/2010, 11/17/2010; 5/4/2011; 5/18/2011; 6/22/2011; 7/20/2011; 8/3/2011;10/19/2011 and 1/30/2012 will be referenced as 5RP page no.

On December 30, again despondent, Mr. Harrington met with his wife met to discuss selling their home and filing divorce papers. RP 71; 482-84. He testified that he gathered a syringe, some pills, and his internet instructions on how to kill himself. RP 484. He and his wife were in the bedroom when he heard "a couple of clicks" and turned around to see his wife pointing her .357 gun at him. RP 484. He turned away and removed his coat; she saw the 40-caliber gun he wore on his hip. RP 485.

He told her to calm down and drink from the bottle of scotch whiskey that they had been saving. RP 75;485. He told her he only wanted to kill himself. RP 486. Mrs. Harrington, meanwhile, dialed a number on her phone and tossed the phone onto the bed. RP 486. A co-worker from Mrs. Harrington's place of employment answered the call. RP 7. She heard yelling and crying and Mr. Harrington threatening to kill himself. RP 8,9,15-16. She and another worker called 9-1-1. RP 34.

At some point during the interaction, Mr. Harrington left the bedroom to see if the police were outside. RP 486. When he returned, Mrs. Harrington was still in the room, but he did not see her gun. RP 487. He left the room again and saw police cars in

front of his home. RP 487. Concerned that he would not have enough time to inject himself with the liquid mixture of his medications, he pulled his gun and put it in his mouth. RP 487. He thought he heard someone say ”no” so he laid it on the bed. He instead inserted the syringe and “hit the plunger”. He also swallowed 168 Oxycodone pills. RP 487. He carried his gun down the hallway, and dropped it and the clip.

He crawled out onto the front porch, and remembers telling officers the gun was in the hallway. RP 488. On the porch, he blacked out and when he awoke from a medically induced coma, he was in Sacred Heart hospital. RP 174; 488. He later testified that his intention that day was to kill himself. He had no intention of assaulting or killing his wife. RP 515; 517. Responding officers testified that as he emerged from the house he kept yelling for officers to shoot him and told them he wanted to die. RP 160. Deputies found Mr. Harrington’s suicide letters the next day. RP 165.

Mrs. Harrington’s testimony painted a different picture of the events. She stated that morning they agreed to discuss contracting with a realtor to sell their home. RP 71. Her husband met her at the car and asked to use her phone. Once inside the home, he

closed the door behind her and told her to get on the floor. RP 71-72. She saw a syringe, pill bottle, an alcohol shot glass, a Pepsi can, tape and a gun lying on the bed. She managed to use her cell phone to dial her work number and leave the line open.

She testified at one point he grabbed her throat, pushed her against the wall and put his gun to her forehead. RP 76. He then put the gun in his own mouth and injected himself with the syringe. He collapsed and she ran out of the house. RP 78. Experts later testified only Mr. Harrington's DNA was found on the gun. RP 151-52. The entire ordeal lasted about twenty minutes. RP 29. Immediately after the event, she told officers:

> "[H]e said multiple times there was options on how this would end up either M [their son] would end up having one parent or working it all out and end in a divorce….Said he is going to kill himself and do it right this time. If I did what he said I would only end up with a hangover."
> RP 123-24.

Thirteen months later, in a deposition, she said:

> "It's not physical emotion (sic) abuse. He had it in his head there was some other reason why I would divorce him. He said we can do this the easy way or the hard way but this is going to work out. Either M will have one parent or two

parents and he said 'if you cooperate with me all you will have is a hangover.'" RP 124-25.

At trial, however, she testified that he said he was going to kill her and then himself. RP 125.

Three years passed between the time Mr. Harrington was charged and the time of trial. A psychologist evaluated him and found him incompetent to stand trial. 4RP 6. The court granted numerous continuances while awaiting other evaluations or counsel's schedules. At one point there was an insufficient number of jurors available for the jury pool and the court declared a mistrial. CP 10-76; 79-80; 83-89; 105; 1RP 19.

Dr. Scott Mabee, an expert for the defense, testified that kidnapping in the first degree specifically required intentional abduction of a person, with an additional specific intent to inflict bodily injury or extreme mental distress. He stated it was possible that Mr. Harrington "kidnapped" his wife, in the sense of holding her against her will, but not with the intent to cause bodily injury or extreme mental distress. RP 415. Rather, in his opinion, because Mr. Harrington suffered from chronic physical pain, misused his medications to cope with that pain, and battled major depression,

his intent was to demonstrate his hopelessness, not inflict bodily injury or extreme mental distress on his wife. RP 415-16.

The court gave the following pertinent jury instructions:

> Instruction No. 6:
> A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with the intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or on a third person. CP 123.
>
> Instruction No. 9:
> Bodily injury means physical pain or injury, illness, or an impairment of physical condition. CP 126
>
> Instruction No. 13:
> A person commits the crime of kidnapping in the second degree kidnapping when he or she intentionally abducts another person. CP 131.
>
> Instruction No. 15:
> A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception. The offense is committed only if the person acts knowingly in all these regards. CP 133.

The jury submitted one question to the court: "What is the definition of extreme mental distress?" The court instructed the jury to use its collective memory of the evidence and the court's instructions. CP 151.

Mr. Harrington was found guilty of kidnapping in the first degree, (domestic violence), with use of a deadly weapon[2]. CP 170. He makes this timely appeal. CP 185.

IV. ARGUMENT

A. The Statute Defining First Degree Kidnapping By The Alternative Means of "Intent To Inflict Extreme Mental Distress" Is Void For Vagueness.

Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Watson,* 160 Wn.2d 1, 6, 154 P.3d 909 (2007). A statute fails to provide the required notice if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed.322 (1926); *State v. Halstien,* 122 Wn.2d 109,116-17, 857 P.2d 270 (1993).

[2] The judgment and sentence reflects a finding of guilt for the use of a deadly weapon under RCW 9.94A.602. That law has been recodified as RCW 9.94A.825 effective August 2009.

A statute does not meet constitutional requirements if persons of ordinary intelligence cannot understand what the ordinance proscribes, notwithstanding some possible areas of disagreement. *City of Spokane v. Douglass,* 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

A statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt and the party challenging the statute bears the burden of proof. *Halstien,* 122 Wn.2d at 118. A vagueness challenge to a statute that does not implicate the First Amendment must be viewed in light of the particular facts of that case. *State v. Stevenson,* 128 Wn.App. 179, 189, 114 P.3d 699 (2005). Here, because the facts of Mr. Harrington's case do not implicate the First Amendment, this Court should evaluate the challenge as applied to these facts.

The State charged Mr. Harrington with kidnapping in the first degree, in violation of RCW 9A.40.020(1)(c)(d). That statute provides in pertinent part:

> 1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:
> (c) To inflict bodily injury on him or her; or
> (d) *To inflict extreme mental distress* on him, her, or a third person; or

The terms “abduct”, “restrain”, and “bodily injury” are defined by statute. RCW 9A.04.110 (4)(a),(9);RCW 9A.40.010(1). A crucial term, “inflict extreme mental distress” is not defined. Because the statute does not define what it means to “inflict extreme mental distress” it is ambiguous and susceptible to arbitrary enforcement. Juries are left to wonder what the term means and how it could even be measured. In this case, the jury was obviously unclear as to the meaning of “inflict extreme mental distress” because it sent a note to the judge requesting a definition. People of common intelligence were left to guess at its meaning and application. The consequence of such guessing results in a statute that is inherently overly subjective and likely to be arbitrarily applied.

The Washington State Supreme Court found the criminal harassment statute unconstitutionally vague because it contained no meaningful definition of the term “mental health”. The statute there provided: “A person is guilty of harassment if: without lawful authority, the person knowingly threatens: to cause bodily injury in the future to the person threatened or to any other person; or maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her

physical or *mental health* or safety…" Former RCW 9A.46.020(1)(a)(i),(1)(a)(iv)(b) (1992)." (Emphasis added). *State v. Williams,* 144 Wn.2d 197, 203, 26P.3d 890 (2001).

In *Williams,* the Court posited the following questions: Does the statute prohibit a person from making threats which cause others mere irritation or emotional discomfort or does it only prohibit those threats which cause others to suffer a diagnosable mental condition? A plain reading of the statue provided no answer. *Id.* at 204. Because there was no definition as to mental health, the requirement that one intentionally commit an act designed to substantially harm the mental health of another did nothing to define the nature of the act or the meaning of mental health. *Id.* The Court held that the statute offered no guide beyond subjective impressions and as such, was unconstitutionally vague to the extent it referenced mental health. *Id.* at 206.

Similarly, here the average citizen has no way of knowing what conduct is prohibited by the statute because each person's perception of what constitutes extreme mental distress will differ based on each person's subjective impressions. This is the very reason the vagueness doctrine exists. This statute, as written is unconstitutionally vague.

B. The Evidence Was Insufficient To Sustain A Conviction For Kidnapping In The First Degree.

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. Aver,* 109 Wn.2d 303, 310, 745 P.2d 479 (1987). In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fat could have found the essential elements of first degree kidnapping beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

As charged here the crime of first degree kidnapping had two essential elements: (1) intentional abduction and (2) intent to inflict bodily injury or extreme mental distress on that individual. RCW 9A.49.020 (c),(d). "Abduct" means to restrain a person by either (a) secreting or holding her in a place where she is not likely to be found, or (b) using or threatening to use deadly force. "Restraint " means to restrict a person's movement without consent and without legal authority in a manner which interferes substantially with her liberty. Restraint is "without consent" if it is

accomplished by (a) physical force, intimidation, or deception. *Green*, 94 Wn. 2d at 225.

Mrs. Harrington voluntarily followed her husband into their house. Here, the indictment for kidnapping alleges a purpose to either inflict bodily injury or to inflict extreme mental distress. The circumstantial evidence necessary to establish Mr. Harrington's intent was the events and statements that occurred after she entered the house.

1. Mr. Harrington did not intend to inflict bodily injury.

His stated intent was to either get his wife to agree to continue living as a family or to kill himself. Immediately after the event and later, in a deposition, Mrs. Harrington stated that he intended to kill himself if she did not agree to stay married to him. It was not until she testified at trial, some three years later, that her version of events included the idea that he might kill her instead of, or along with himself.

When Mr. Harrington had the opportunity to inflict bodily injury on her, rather than injure her, he placed the gun in his own mouth and then followed that with the overdose injection of his medication. Mr. Harrington gave his wife some scotch and Pepsi to

drink. She reported that he told her that if she cooperated the worst that would happen to her was that she would have a hangover.

He twice left the bedroom to check on whether officers had arrived, fearful they would interrupt his suicide process. His suicide notes were in the later found in the room. Although Mrs. Harrington testified that her husband put the gun to her head at one point, the forensic photograph did not show any red mark and her DNA was not found on the muzzle of the gun. It was clear that he did not intend to inflict bodily injury on his wife.

2. The evidence was insufficient to support a conviction on the basis of the alternative means of intent to inflict extreme mental distress.

Based on the argument in Section A above, Mr. Harrington contends the evidence was insufficient to support a conviction based on intent to inflict extreme mental distress.

V. CONCLUSION

Because the jury verdict form demonstrates only that Mr. Harrington was found guilty of first degree kidnapping, it is impossible to know whether the jury found he violated the statute based on intent to inflict extreme mental distress and/or intent to inflict bodily injury. Because the statute as written is

unconstitutionally vague, there is a presumption that Mr. Harrington has been prejudiced. *State v. Lorang,* 140 Wn.2d 19, 33, 992 P.2d 406 (1999). Based on the foregoing facts and authorities, Mr. Harrington respectfully requests this Court to reverse his conviction and remand for a new trial.

Dated this 19th day of March 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Russell Harrington, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Brief was sent by first class mail, postage prepaid on March 19, 2013 to Russell Harrington, DOC # 358414, H2-B62, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520; and by email per agreement between the parties to: Andrew K. Miller, Benton County Prosecutor's Office at: prosecuting@co.benton.wa.us.

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