71341-8

71341-8

COA No. 71341-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PETER RODRIGUEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Bruce E. Heller

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

REFERENCE MATERIALS

A. ASSIGNMENTS OF ERROR

1. In Mr. Rodriguez's trial on a charge of second degree assault by strangulation, his right to a unanimous verdict was violated.

2. The evidence of assault by strangulation was insufficient.

3. The trial court erred in admitting the complainant Ms. Hendon's hearsay 911 call recording as an excited utterance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Strangulation requires blockage of breathing or blood flow. Ms. Hendon testified she was able to breathe and her blood flow was not blocked. Was the evidence of assault by strangulation insufficient to convict under Due Process?

2. The defendant is entitled to a unanimous verdict. The State alleged multiple acts but no unanimity instruction was given, and there was no election. Was Mr. Rodriguez's right to a unanimous verdict violated under State v. Petrich?

3. The excited utterance rule requires the declarant to be under the stress of the event to preclude fabrication. Did the trial court abuse its discretion in admitting Ms. Hendon's 911 call recording as an excited utterance, where it was inadmissible hearsay?

C. STATEMENT OF THE CASE

Peter Rodriguez was charged with second degree assault by strangulation. CP 1-2. Police had received a 911 call from Lori Hendon, claiming that Mr. Rodriguez choked her on several occasions in the apartment that they shared. CP 3-4 (affidavit of probable cause); 12/4/13RP at 212, 216 (testimony of Seattle Police Officer Mark Body).

At trial, the complainant Lori Hendon testified that she was choked several times on September 15, 2013, by Mr. Rodriguez, a man she had been seeing on a regular but on and off dating basis for the past 15 years. 12/3/13RP at 123. On September 15, she lived in King County in an apartment with her daughter, where Mr. Rodriguez stayed with them at times. At 4 a.m., Mr. Rodriguez pulled his car into the driveway a little crooked, and appeared at the door; Ms. Hendon believed he was likely intoxicated. 12/3/13RP at 124.

Hendon claimed that when Mr. Rodriguez arrived and she opened the door, he "grabbed her" by the throat or neck -- with one hand -- and said once or twice that he "was going to fuck me up." 12/3/13RP at 124-27. She stated that she went upstairs and then Mr. Rodriguez "socked me and choked me there." Then, in the

kitchen, she testified, he was making different threats to her. Hendon stated that she later woke her sleeping teenage daughter and ran down the stairs and out the door. 12/3/13RP at 125-26. Hendon claimed that scars on her neck were from where Rodriguez grabbed her. 12/3/13RP at 126.

The jury rejected the defense contention that, at most, the lesser included offense of fourth degree assault was merely committed, and found Mr. Rodriguez guilty of second degree assault by strangulation. CP 26; 12/5/13RP at 347. Following the verdict, the defense stipulated to the aggravator of an ongoing pattern of domestic violence, which the parties had agreed would be bifurcated from the guilt phase. 12/5/13RP at 349-50. Mr. Rodriguez was given an exceptional sentence of 25 months incarceration on a 15-20 month standard range. 12/20/13RP at 360-61. CP 78-88. He appeals. CP 94.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. RODRIGUEZ'S GREEN MOTION TO DISMISS AT THE CLOSE OF THE STATE'S CASE, AND THE TRIAL EVIDENCE AS A WHOLE WAS INSUFFICIENT.

a. The State bears the burden of proof.[1] The guarantee of Due Process requires that the State bear the burden of proof to a jury beyond a reasonable doubt on every essential element of a crime charged in the information. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The State's evidence in the present case was not enough to convict. Evidence of a crime at trial is only sufficient if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. I, § 22; State v. Killingsworth, 166 Wn. App. 283, 286–87, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012); Jackson v.

---

[1] Following the close of the State's case, Mr. Rodriguez sought dismissal of the charge of second degree assault by strangulation pursuant to State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 12/4/13RP at 249-50. Counsel argued that there was insufficient evidence to allow a jury to decide that Mr. Rodriguez acted to strangle or with intent to strangle Ms. Hendon, because he did not completely block her breathing or blood flow and he never intended to do so. 12/4/13RP at 249, 251. The court stated that this was not required and denied the motion to dismiss. 12/4/13RP at 252-53.

Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. at 365–66. That standard is not met here and Mr. Rodriguez's second degree assault conviction should be reversed.

b. The evidence was insufficient. Here, there was insufficient evidence for a jury to find Mr. Rodriguez guilty of assault by strangulation. Pursuant to RCW 9A.36.021(g), the instructions of law required the jury to find that on September 15, 2013, the defendant intentionally assaulted Lori Hendon by strangulation. CP 63-65. The instructions defined strangulation as follows:

> 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 63. At trial, Ms. Hendon was asked by the prosecutor if, when Mr. Rodriguez squeezed her neck after she opened the apartment door as she claimed, she was unable to breathe. Hendon answered that by "the grace of God" she was not, and confirmed this on cross-examination. 12/3/13RP at 126, 173. Ms. Hendon did not faint. 12/3/13RP at 173.

Mr. Rodriguez argues that this testimony was not enough to meet the State's burden of proof. The statute requires obstruction

of blood flow or breathing, or intent to create that obstructed condition.[2]

In looking to the plain language of a statute for its meaning, a nontechnical term left undefined in a statute is given its plain and ordinary meaning, as defined in a standard dictionary. State v. Sullivan, 143 Wn.2d 162, 174–75, 19 P.3d 1012 (2001); State v. Athan, 160 Wn.2d 354, 369, 158 P.3d 27 (2007). According to the dictionary, obstruct means to "block or close up by an obstacle." See www.merriam-webster.com/dictionary/obstruct. Similarly, Black's law dictionary defines obstruct this way:

> 1. To block up; to interpose obstacles; to render impassable; to fill with barriers or impediments; as to obstruct a road or way. *U. S. v. Williams, 23 Fed. Cas. 033; Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 5G0, 15 L. R. A. 553, 29 Am. St. Rep. S98; Overhouser v. American Cereal Co., 118 Iowa, 417, 92 N. W. 74; Gorham v. Withey, 52 Mich. 50, 17 N. W. 272.*
> 2. To impede or hinder; to interpose obstacles or impediments, to the hindrance or frustration of some act or service; as to obstruct an officer in the execution of his duty. *Davis v. State, 70 Ga. 722.*
> 3. As applied to navigable waters, to . . ..

---

[2] The jury later inquired during deliberations if the definition of strangulation and the compression required meant that a person strangled a person simply by hands around the neck or any type of assault around the neck. CP 74.

See http://thelawdictionary.org/obstruct (Black's Law Dictionary).

As counsel argued, Mr. Rodriguez did not obstruct or act with intent to obstruct Ms. Hendon's breathing, and even any knowledge that his conduct (which he disputes) would make it *difficult* for her to breathe is inadequate to pass the second degree assault charge to the jury. The trial court reasoned that obstruct means only to impede or partially block, but impede means to block from passing. See also Staats v. Brown, 139 Wn.2d 757, 787, 991 P.2d 615 (2000) (Talmadge, J., dissenting) ("The word 'obstruct' means 'to be or come in the way of: hinder from passing, action, or operation: IMPEDE, RETARD.' Webster's Third New International Dictionary 1559 (1986)").

c. Dismissal is required if there is any ambiguity.

Dismissal is required on the basis of the plain language of the statute. Alternatively, the statute defining second degree assault by strangulation is at least ambiguous as to this question. The definitional section applicable to Title 9A, at RCW 9A.04.110, subsection (26), defines "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). "A statute is ambiguous if its language is susceptible to more than one reasonable interpretation." State v. Bunker, 144 Wn. App. 407, 415, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571 (2010).

Here, the word "obstruct" could be deemed ambiguous. If a statute's 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). Here, the Legislature has indicated that it intended to punish potentially lethal conduct. In looking to the legislative history, in adding the "assaults another by strangulation" subsection to RCW 9A.36.021, the Legislature stated that "[s]trangulation is one of the most lethal forms of domestic violence." Laws 2007 ch. 79 § 1. This indicates that the Legislature intended to punish actually strangling, which is a lethal action or intent.

Finally, the Rule of Lenity would also apply. If it remains ambiguous whether the "obstruct" requirement of the statute requires complete blocking, then the Rule of Lenity requires that the statute be interpreted as requiring the more severe conduct before conviction can result. Absent Legislative history indicating

otherwise, an appellate court should 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) (same).

Mr. Rodriguez's conviction is not supported by sufficient evidence; the conviction should be reversed and the charge dismissed. U.S. Const. amend. 14.

2. THE TRIAL COURT ERRED IN NOT GIVING A PETRICH INSTRUCTION OR REQUIRING AN ELECTION, VIOLATING MR. RODRIGUEZ'S RIGHT TO UNANIMITY UNDER THE WASHINGTON CONSTITUTION.

a. The evidence showed allegations of discrete acts of assault, requiring an election or a *Petrich* instruction. Ms. Hendon testified that Mr. Rodriguez put his hand or hands on her neck several different times. 12/3/13RP at 172. According to her allegations this first occurred at the door of the apartment when he arrived. 12/3/13RP at 124. Ms. Hendon stated that she had cooked for Mr. Rodriguez, and she tried to calm him down and get

him to eat something. 12/3/13RP at 125-26. However, this did not work, and Ms. Hendon proceeded upstairs. She stated that Mr. Rodriguez then "choked" her when she was upstairs. 12/13/13RP at 129. Ms. Hendon also stated that Mr. Rodriguez put his hands on her throat when the two of them were in the kitchen. 12/3/13RP at 130.

Although these events occurred in the same home during an episode that night, they were discrete incidents. In these circumstances, a Petrich unanimity instruction was requested, and was required. 12/5/13RP at 301.

The state constitution guarantees an expressly unanimous verdict. A jury must unanimously agree on the act that underlies a conviction. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984). Where multiple facts are presented that might prove the crime, the trial court should instruct the jury that its verdict must be based on a unanimous finding as to the fact satisfying the criminal allegation, which must be found by agreement of all 12 jurors, beyond a reasonable doubt. Wash. Const. art. 1, § 21 and 22; Petrich, 101 Wn.2d at 572; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich).

Here, no unanimity instruction was given in Mr. Rodriguez's case. The defense requested a unanimity instruction or an election by the prosecutor, both to ensure that the jury did not rely on any past allegations concerning a recent assault a week earlier, and to ensure unanimity as to guilt on the charge involving September 15. 12/4/13RP at 284, 291; 12/5/13RP at 301, 305.

In determining whether there are adequate assurances of unanimity, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010).

These were discrete incidents, and not a continuing course of conduct as the trial court ruled. 12/5/13RP at 342-43. The Petrich rule does not apply where the evidence indicates a "continuing course of conduct." Petrich, 101 Wn.2d at 571. Acts are considered a continuing course of conduct when they occur within a short time frame and are an ongoing enterprise with a single objective. State v. Gooden, 51 Wn. App. 615, 619–20, 754 P.2d 1000 (1988). To determine whether criminal conduct constitutes a continuing course of conduct, the facts must be evaluated in a commonsense manner. State v. Handran, 113

Wn.2d 11, 17, 775 P.2d 453 (1989) (citing Petrich, 101 Wn.2d at 571). Under this analysis, there were separate allegations of assault. Importantly, here, even though these allegations of assault occurred in a contemporaneous time frame on the date in question, they were individual assaults, as alleged by Ms. Hendon. See, e.g., State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995) (unanimity error where jury could have deliberated, following lack of jury unanimity instruction, to find the defendant passenger possessed cocaine found in the car, or in his backpack).

A Petrich instruction was required.

c. The *Petrich* error was not harmless. A Petrich error is constitutional, and is presumed to be prejudicial. In Petrich cases, sufficiency of the evidence on the claims does not render the error constitutionally harmless. Rather, the presumption of reversible prejudice can be overcome only

> if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

(Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich constitutional harmless error analysis) (citing State v. Loehner, 42

Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)).

Here, the evidence below was controverted as to at least one or more of the alleged assaults. Crucially, a central defense theme was that Ms. Hendon had originally alleged merely one instance of choking. 12/5/13RP at 328-30 (defense closing argument). Ms. Hendon alleged a singular assault by choking during the 911 call. See Supp. CP ___, Sub # 24 (trial exhibit 13 – 911 DVD); Supp. CP ___, Sub # 25 (pretrial exhibit 4 – 911 transcript). Yet at trial, she alleged at least one more assaultive incident, and cross-examination of Ms. Hendon and at least one police witness controverted whether this alleged instance was claimed at the time or ever occurred. Ms. Hendon admitted that her police report contained only an allegation of one instance of alleged choking. 12/3/13RP at 170-72; Supp. CP ___, Sub # 24 (trial exhibit 14 – Hendon witness statement). Further, Officer Douglas Beard indicated that he did not report multiple instances of alleged strangulation in his report and Hendon did not tell him she was strangled on a second or third occasion. 12/3/13RP at 199; Supp. CP ___, Sub # 23 (trial exhibit 15 – Beard police statement).

Affirmance in the face of a Petrich error requires the Court of Appeals to be able to conclude that the jury could unanimously come to only one conclusion: that each of Ms. Hendon's assault allegations was incontrovertibly proved. Only in such instance would the Petrich error be harmless. For example, in Kitchen,

> the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.

Kitchen, at 412. Because the trial evidence in Mr. Rodriguez's case conflicted as to whether one, or more, of the alleged assaults occurred, this Court should reverse as did the Kitchen Court. See also State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995) (reversal required where evidence that defendant burglarized one of the buildings alleged as a basis for the conviction was controverted). Reversal is required.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE 911 TAPE.

a. The trial court admitted a recording of Ms. Hendon's 911 call. The trial court admitted a DVD recording of Lori Hendon's 911 call in which she alleged that Mr. Rodriguez had assaulted her. See Supp. CP ___, Sub # 24 (trial exhibit 13 – 911 DVD); Supp. CP

___, Sub # 25 (pretrial exhibit 4 – 911 transcript). Mr. Rodriguez objected to admission of the recording on hearsay grounds, but the State argued and the trial court ruled that it met the requirements for admission as an excited utterance. 12/3/13RP at 137.

The 911 call was accordingly played for the jury during trial. 12/3/13RP at 148.

b. <u>The 911 call was hearsay and inadmissible.</u> The basic definition of hearsay is set forth in ER 801(c):

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). ER 802 states "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute."

However, under the ER 803(a)(2) exception employed by the court in Mr. Rodriguez's case, a court may admit into evidence a witness' testimony repeating another person's statement where that statement is

> relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

ER 803(a)(2). This is the "excited utterance" exception to the hearsay rule. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The basic theory is that a genuinely "excited" utterance is so spontaneous that it is highly unlikely to be a fabrication. The key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. See State v. Owens, 78 Wn. App. 897, 899, 899 P.2d 833 (1995). Here, there was no showing that Ms. Hendon was under the continuing stress of excitement caused by the alleged assault when she called 911. State v. Owens, 78 Wn. App. at 899.

The stress and excitement experienced by the out of court declarant must exist from the time of the startling event and at the time of the statement. Here, Ms. Hendon had left the home and gone to a nearby restaurant, from which she called 911. 12/3/13RP at 148-49. She did not ask for medical help on the call. 12/3/13RP at 150. Instead, she made allegations of crime. 12/3/13RP at 150 ("I wanted to make sure he was arrested.").

The circumstances in the hearsay hearing showed time for reflection, and the audio evidence did not show the excitement that is necessary to overcome the hearsay bar. See Supp. CP ___, Sub # 24 (trial exhibit 13 – 911 DVD); Supp. CP ___, Sub # 25 (pretrial exhibit 4 – 911 transcript).

In fact, Ms. Hendon admitted on *voir dire* that she smoked cigarettes and was out of breath from her departure from the house when she made the 911 call. 12/3/13RP at 127-28, 149.

Further, Ms. Hendon admitted that she worked for Therapeutic Health Services with the courts and was very familiar with domestic violence reporting. 12/3/13RP at 168-69. There was a defense concern that she fabricated the allegations against Mr. Rodriguez, and the time passing after the alleged event and before the 911 call allowed time for that thought process. 12/5/13RP at 329, 332. The 911 telephone call recording was not an excited utterance and was inadmissible based on an inadequate level of upset or any other indices of reliability. See State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984) ([i]f [the victim's] statement to the police were to be admissible as an excited utterance simply because she was "upset", virtually any statement given by a crime victim within a few hours of the crime would be admissible).

c. Reversal is required. The trial court misapplied the excited utterance rule and abused its discretion. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The applicable harmless error test is whether, within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred. State v. Braham, 67 Wn. App. 930, 939, 841 P.2d 785 (1992). Here, absent Ms. Hendon's statements on the 911 call, there would have been meager if not insufficient evidence to convict the defendant, leaving only the complainant's trial testimony that appeared to add allegations never made to the investigating police. There is a reasonable probability that the hearsay of the victim's 911 call prejudiced the outcome of Mr. Rodriguez's criminal trial, requiring reversal.

E. CONCLUSION

Based on the foregoing, Mr. Rodriguez respectfully requests that this Court reverse his conviction.

DATED this 30 day of September, 2014.

Respectfully submitted

Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. PETER RODRIGUEZ, Appellant.	)))))))))	NO. 71341-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PETER RODRIGUEZ 723682 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710