71341-8

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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

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE TRIAL EVIDENCE AS A WHOLE WAS INSUFFICIENT TO PROVE ASSAULT BY STRANGULATION.

a. Strangulation requires obstruction of the airway or intent to do so, under the plain language, statutory construction, or the rule of lenity.

The Respondent State of Washington argues that the plain meaning of strangulation as used in RCW 9A.36.021(g) and RCW 9A.04.110, subsection (26) does not require that the defendant cause, or act with intent to cause, total obstruction of the person's airway. Brief of Respondent ("BOR"), at p. 10. The State contends further that even if statutory construction is required, the statute's history shows that complete blockage of the airway is not required. BOR, at 19-20.[1]

Mr. Rodriguez argues that these contentions should be rejected. If the State's overall argument was correct, then even *de minimis* disturbance of the airflow through a person's airway would

[1] The State responds to Mr. Rodriguez's argument that the Rule of Lenity must apply to read the strangulation statute and definition in the manner more favorable to the appellant, contending that the statute is not ambiguous and that therefore the Rule does not apply. BOR, at pp. 21-22.

render a defendant who placed his hands on a person's neck guilty of second degree assault.[2]

The instructions provided for assault by strangulation – solely – and that term was defined 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. This did not occur.

The complainant, Ms. Hendon testified at trial that by "the grace of God" she was not unable to breather as a result of Mr. Rodriguez's claimed actions -- and she testified similarly on cross-examination. 12/3/13RP at 126, 173. Importantly, Ms. Hendon also did not faint. 12/3/13RP at 173.

Mr. Rodriguez argues that obstruction of blood flow or breathing, or intent to create that obstructed condition, is required for guilt.

The State agrees that a word in a statute may be given its plain and ordinary meaning, as defined in a standard dictionary. BOR, at pp. 13-14; State v. Sullivan, 143 Wn.2d 162, 174–75, 19

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[2] Notably, the jury asked while it was attempting to decide the case whether a person was guilty of strangulation simply of they placed their hands around the neck of another. CP 74 (jury question).

P.3d 1012 (2001). 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 as to block up or impede. See http://thelawdictionary.org/obstruct (Black's Law Dictionary).

The Respondent cites other, secondary portions of definitions of obstruct from these accepted sources, such as "retard" or "hamper." BOR, at pp. 15-16. But these are not the primary definitions of the term found in these sources, which Mr. Rodriguez has cited in his briefing and which he contends should control. See Appellant's Opening Brief, at pp. 6-8.

Finally, the State notes that the second degree assault by strangulation statute was amended in 2011 to allow for a charge of assault by "suffocation." BOR at pp. 17-18. But Mr. Rodriguez was neither charged with assault by suffocation, nor of course, was the jury instructed on assault by strangulation. CP 1-2 (information); CP 63-65 (jury instructions).

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 case does not involve "suffocation," despite the State's attempt to import that concept into the issues.

Indeed, as counsel argued in his motion to dismiss before presenting a defense case, Mr. Rodriguez did not obstruct or act with intent to obstruct Ms. Hendon's breathing, and even any knowledge that his conduct (which he disputed) would make it *difficult* for her to breathe is inadequate to pass the second degree assault charge to the jury.

On appeal of the sufficiency of the evidence *in toto*, the evidence was inadequate to prove strangulation. This is further the case, alternatively, because the statute defining second degree assault by strangulation is at least ambiguous as to this question. "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). And in turn, the Legislature has indicated that it intended to punish potentially lethal conduct. Laws 2007 ch. 79 §

1. This indicates that the Legislature intended to punish actually strangling, which is a lethal action or intent.

b. Reversal is required. Reversal is required. 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. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

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 DISCRETE INCIDENTS WERE NOT A CONTINUING COURSE AND THE TRIAL COURT ERRED IN NOT GIVING A PETRICH INSTRUCTION OR REQUIRING AN ELECTION.

a. The evidence showed allegations of discrete acts of assault, requiring an election or a *Petrich* instruction.

Although the events claimed by Ms. Hendon allegedly occurred in the same home during an episode on the night in question, they were discrete incidents. AOB, at pp. 9-13.[3]

In these circumstances, a Petrich unanimity instruction was requested, and was required. 12/5/13RP at 301. 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; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

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[3] The clear testimony from the complainant was that Mr. Rodriguez allegedly 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. Later, 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.

Importantly, the defense viewed the case as involving discrete incident -- 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 response on appeal, the State argues that these incidents were a "continuing course." BOR, at pp. 26-209. However, 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). Here, as alleged by Ms. Hendon, these were discrete incidents, and not a continuing course of conduct as the trial court ruled. 12/5/13RP at 342-43. It is true that 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). But 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).

Under this analysis, there were separate allegations of assault -- 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, who claimed to police there was one assault, and then claimed at trial that there were two or more. 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 believe one alleged act of conduct, and/or disbelieve the other). A Petrich instruction was required for Peter Rodriguez's trial.

b. The *Petrich* error was not harmless. In Mr. Rodriguez's case, the evidence below was controverted as to at least one or more of the alleged assaults. As noted, Mr. Rodriguez's lawyer ably argued that Ms. Hendon had originally alleged merely one instance of choking. 12/5/13RP at 328-30 (defense closing argument). And again, Ms. Hendon alleged a singular assault by choking, during the 911 call. See trial exhibit 13 – 911 DVD; pretrial exhibit 4 – 911 transcript. Yet at trial, she alleged at least a

further 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. Finally, Ms. Hendon admitted that her police report contained only an allegation of one instance of alleged choking. 12/3/13RP at 170-72; trial exhibit 14 – Hendon witness statement. Even a police officer stated similarly -- Officer 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; 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 beyond a reasonable doubt. That standard is not met here and reversal is required. See 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 911 TAPE, RECORDING AN INDIVIDUAL WHO ADMITTED SHE WAS TRYING TO GET MR. RODRIGUEZ ARRESTED, DID NOT QUALIFY AS AN "EXCITED UTTERANCE."

Mr. Rodriguez relies primarily on his argument in his Appellant's Opening Brief. AOB, at pp. 14-18. ER 802 states "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute." The ER 803(a)(2) exception must be one

> 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); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

Although it is true that the evidentiary determination in question under ER 803(a)(2) is a matter of trial court discretion, Mr. Rodriguez argues that Ms. Hendon's statement was not an "excited" utterance, because, under the better weight of the evidence about the statement before the trial court, it was not so spontaneous that it is highly unlikely to be a fabrication. It is crucial to note that Ms. Hendon 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."). 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, and Mr. Rodriguez argues that her conscious statement that this state of being out of breath was a result of panic and not cigarettes indeed shows the conscious calculation that is anathema to the bases of admissibility of an excited utterance. 12/3/13RP at 127-28, 149; see BOR, at pp. 33. This sort of deliberative, explanatory thought by a person who understands the dynamics of reporting domestic violence – in which the complainant is plainly attempting to explain to the 911 operator that she is indeed upset – cannot be consistent with an excited utterance. State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (excited utterances must be spontaneous statements and not indicative of reflection or calculation).[4]

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.

[4] In this same respect, it is very relevant that 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.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Rodriguez respectfully requests that this Court reverse his conviction.

DATED this 16 day of January, 2015.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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PETER RODRIGUEZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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] NAMI KIM, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JANUARY, 2015.

X_____

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