71341-8

71341-8

NO. 71341-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PETER RODRIGUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NAMI KIM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. To prove the crime of assault in the second degree by strangulation, the State had to prove that the defendant either compressed his girlfriend's neck, obstructing her ability to breathe, or that he did so with the intent to obstruct her ability to breathe. The word "obstruct," after both a plain meaning and statutory construction analysis, does not require a total sealing of the airway. When asked if she could breathe when the defendant strangled her, the victim said, "No, not really; with the grace of God." The defendant told her he was going to "fuck [her] up" before strangling her "so hard" that it left permanent scars on her neck. Viewed in the light most favorable to the State, was the evidence sufficient to permit any rational trier of fact to find that the defendant obstructed or intended to obstruct his girlfriend's ability to breathe?

2. Where multiple acts are part of a continuous course of conduct, neither a unanimity instruction nor an election by the State is required. A continuous course of conduct is supported when it involves the same time period, parties, location, and ultimate purpose. Here, the defendant strangled his girlfriend multiple times during a short period of time, inside her home, with the same stated objective each time: "to fuck [her] up." Evaluating the evidence in a

common-sense manner, does the evidence show that the episodes of strangulation were part of the same continuous course of conduct?

3. A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement caused by the event, and (3) the statement relates to the event. Here, the victim called 911 only 8-10 minutes after being strangled, while hiding behind a bush in bare feet and pajamas, and begging frantically for help during the call. Did the trial court properly admit the 911 statements as excited utterances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Peter Rodriguez was charged by information with assault in the second degree – domestic violence. CP 1-2. The State also charged the aggravating factor of a history of domestic violence. CP 1-2. The State alleged that Rodriguez assaulted his girlfriend, Lori Hendon, by strangulation. CP 1. A jury found Rodriguez guilty as charged of assault in the second degree. CP 26-27. Rodriguez stipulated to the existence of the aggravating factor. CP 25. The court sentenced Rodriguez to an exceptional sentence of 25 months. CP 81.

2. SUBSTANTIVE FACTS.

Lori Hendon dated defendant Peter Rodriguez on-and-off for 15 years, intermittently letting him stay at her house. RP 123.[1] In September 2013, he was staying at her home at 711 North Motor Place in Seattle, which she shared with her 15-year-old daughter, Latasha. RP 123, 266. The relationship was troubled. In the week prior to the charged incident, Rodriguez had grabbed Hendon by the neck and hit her on the side of her legs with a stick, leaving bruises "[a]ll up and down my body." RP 134-35; Ex. 2, 3. She described herself as "traumatized" by this incident. RP 146-47.

On the night of September 14, 2013, Rodriguez went out to watch a boxing match at a friend's house. RP 260. He testified that he was "all riled up from the fight" so he went to a sports bar and drank "pitchers of beer" there with friends until 1:30 a.m. RP 261, 273. He then drove to an after-hours club in Georgetown, where he drank more alcohol and became involved in a "full on fight" with someone whom he associated with Hendon. RP 275-76. After being escorted out by security staff, Rodriguez headed to Hendon's house

[1] The verbatim report of proceedings consists of five consecutively numbered volumes, which will be referred to as RP.

"maybe somewhere around 3:00, 3:15 [a.m.]." RP 277. He described himself as injured and upset. RP 276-77.

Hendon awoke at around 4:00 a.m. to see Rodriguez parking the car crookedly outside. RP 124. Believing that he was intoxicated, she met him at the door to offer him some food. RP 124-25. Rodriguez instead grabbed her by the throat with one hand and squeezed, threatening to "kick [her] ass" and telling her, "I'm going to fuck you up, bitch." RP 125-27, 161. When asked at trial if she could breathe, Hendon said, "No, not really; with the grace of God." RP 126. She followed Rodriguez upstairs to the hallway "trying to plead a case because I don't want him to jump on me" when he "socked" her in the jaw and "choked" her again. RP 125-27. Moving into the kitchen, he began threatening her and repeating "how he was going to fuck me up and this, that, and the other." RP 126. Rodriguez struck her and put his hands around her throat again, causing her difficulty breathing. RP 129-31. These assaults happened within "seconds" of each other. RP 131.

During cross-examination, Hendon clarified that Rodriguez strangled her "two to three times" on September 15 and that "I know to [sic] sure it's twice," noting that "I was also traumatized at the time as well, but I know it was between two and three." RP 172-73. When

asked again about whether he "cut off" her breathing, she repeated twice, "Through the grace of God." RP 173.

After the last instance of strangulation, Hendon awoke her sleeping daughter in a state of terror and fled the house: "I felt like Tina Turner running for my life with my daughter. I was frantic." RP 125-26, 131. She ran around the corner and hid in a bush in her pajamas with no shoes on, despite the cold, having left her keys and coat behind in a state of panic. RP 131-32. She testified that "I was scared that he was going to come around the corner and come out of the house." RP 150. Hendon called 911 from the bushes. RP 132. She recalled the pain in her neck and her difficulty breathing while making the 911 call, which she described as separate and distinct from that caused by her cigarette smoking. RP 127-28. The episodes of strangulation left permanent scars on her neck that she displayed to the jury. RP 127-28, 159-60. Hendon attributed the scars to the assaults on both September 15th and the week prior. RP 159, 172, 175; Ex. 1, 4, 9.

On the 911 call, Hendon is heard breathing heavily and whispering urgently to the operator in an effort to keep her hiding place secret. Ex. 13. She immediately tells the operator, "I'm scared . . . I'm around the corner. Me and my daughter are scared." Ex. 13;

Pretrial Ex. 4 at 1. When asked what happened, she says that "[h]e put his hands around my throat" and urges, "Hurry up. He- he came in drinkin' and every – please I got bruises and everything, so please come help me." Pretrial Ex. 4 at 2. When the operator tells Hendon to take a deep breath to better understand her words, Hendon replies, "'Cause I'm scared." Pretrial Ex. 4 at 6.

Throughout the call, Hendon begs the operator to send help, reiterates her fear that Rodriguez may be in pursuit, and repeatedly asks how soon the police will arrive. Pretrial Ex. 4 at 1-10. She tells the operator that she needs to stay hidden because she is too "scared to be out [there] cause it's a main street" and instructs her daughter, "Can you see a police car up here, no? Then get back." Pretrial Ex. 4 at 8. It is not until she catches sight of the police that she emerges from her hiding place. Pretrial Ex. 4 at 10; RP 148.

Seattle Police Officer Mark Body was dispatched at around 4:26 a.m. and arrived within minutes, flagged down by Hendon near her hiding spot. RP 211-13. Body described Hendon as "very, very upset," "very emotional," and "close to tears when she was describing what had happened." RP 212. Her description of the incident was consistent with her injuries, which included swelling along both sides of her jaw line, minor discoloration on one side, and marks on her

neck "that appeared to have been a grabbing of some sort." RP 216-17. Body photographed her injuries. RP 216; Ex. 1-4, 9. Hendon also told him about the previous week's attack with a stick, but not the prior week's strangulation. RP 217. Body recalled that she had only mentioned being choked once on that day. RP 221.

Seattle Police Officer Douglas Beard joined Body at the scene 7 minutes after receiving the dispatch. RP 192. Beard confirmed that Hendon was dressed only in pajamas and had left without even her keys, and that she displayed injuries consistent with the described assault. RP 190-91, 193. He observed darkness around her neck on both sides of her trachea, and some swelling on one side. RP 196. He also saw bruising on her leg and left arm, which she attributed to the prior incident. RP106. Beard noted that those bruises appeared to be older, "whereas the – around the neck and jaw line it appeared more vibrant red and swollen." RP 196.

Beard testified "that [Hendon] was rattled, that she was fearful of going back into her residence" and "really insistent on wanting police to go with her and make sure that it was safe for her to back into her own home." RP 193. He recalled Hendon's "repeat [sic] statements about concern for her safety and just her overall body language, a little bit of the shaking and trembling." She kept asking

him, "Are you going to be able to help me? Can you go to my home and check and make sure everything's okay? What am I going to do, I mean I have nowhere to go. My daughter and I don't even have shoes on." RP 193. Hendon described one instance of strangulation to Beard. RP 197. Her daughter appeared "very upset." RP 193.

The officers pounded on Hendon's front door so loudly that her neighbors emerged from their homes and a man from a separate building asked if the pounding was necessary. RP 194. Beard announced his presence as a police officer and called out Rodriguez' name several times. RP 194. The officers also called Rodriguez' cell phone repeatedly. RP 215. The police even directed bullhorns at the house in an attempt to get Rodriguez to leave. RP 233-34. Despite this, Rodriguez did not respond or answer the door. RP 194. It was not until almost five hours later, at around 9:00 a.m. that Rodriguez emerged from the house and submitted to arrest.[2] RP 219.

Rodriguez testified after the trial court denied his motion to dismiss for lack of sufficient evidence at the close of the State's case. RP 249-53. In addition to describing his drinking and fighting at the

[2] The trial court suppressed evidence that the officers entered the home forcefully after receiving written consent from Hendon, announced themselves loudly inside, saw a couch shoved against the front door, and heard movement upstairs but received no response to their verbal commands before retreating and waiting for a SWAT team. RP 28-58, 95-101.

bars that evening prior to the incident, Rodriguez admitted that he was "maybe a little loud in my talking to [Hendon]. . . and everything, because I felt like the guy who I had got into it with, one of her girlfriends knew him." RP 263. He described the evening as "a bad night" and confessed that he "started getting loud" about whether she knew the man who had fought with him, and that she was trying to calm him down. RP 263. He testified that he told her "fuck you" when she offered him something to eat: "I'm hell with it [sic], she's going to ask me do I want to eat some food. . . I jumped on her trying to explain to you that I don't want to eat." RP 264.

Rodriguez then claimed that Hendon simply left for an unknown reason at 4:00 a.m., "probably now thinking that I'm belligerent towards her." RP 264-65. When asked why she might have thought this, Rodriguez said, "Because it's easy for anyone to see that you're going to be – or out of hand if you tell them you just been jumped on and you you're [sic] sweating your face is swollen." RP 271. He described Hendon as "a real timid person" and that "she looked at me like you still huffing and puffing, hey, the fight is over. I'm – that's how I'm saying that she may have perceived." RP 271.

Rodriguez admitted that he pulled the couch across the floor to block the door, claiming that he did so only so that "I could hear

[Hendon] upon entry to the house." RP 265, 278-80. When pressed further about this, he explained that he set up the blockage to make sure that she couldn't leave him: "[S]o she wouldn't creep up in there, get dressed, get her stuff and leave out of there." RP 280. After barricading the door, he claimed that he fell asleep and did not hear any of the pounding or yelling by the officers outside, waking only when he heard a bullhorn. RP 265.

C. ARGUMENT

1. THE WORD "OBSTRUCT" IN THE STRANGULATION STATUTE DOES NOT REQUIRE TOTAL BLOCKAGE OF THE AIRWAY.

Rodriguez contends that there was insufficient evidence to prove that he strangled Hendon because he interprets the word "obstruct" in the strangulation statute to require a total sealing of a person's airway. He is incorrect. The plain meaning of the word "obstruct," as well as the strangulation statute's legislative history and the canons of statutory construction, all dictate that the word means to hinder or impede one's ability to breathe and does not require total blockage. Even if this Court adopts Rodriguez' interpretation, there was sufficient evidence to establish that Rodriguez compressed Hendon's neck with the intent to totally block her breathing.

Rodriguez assigns error to both the sufficiency of the evidence supporting the jury's verdict, and the trial court's denial of his motion to dismiss for lack of sufficient evidence at the close of the State's case. He is procedurally barred from the latter challenge. "When a defendant presents evidence in his or her behalf after the trial court has denied the defendant's motion to dismiss a charge because of insufficient evidence, the defendant waives his or her right to challenge the sufficiency of the evidence presented by the State." State v. Chavez, 65 Wn. App. 602, 605, 829 P.2d 1118 (1992). In such a case, he may only proceed on a challenge to the sufficiency of the evidence as a whole, including the evidence he presented on his own behalf. Id.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the State. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Mehrabian, 175 Wn. App. 678, 699, 308 P.3d 660, review denied, 178 Wn.2d 1022 (2013).

RCW 9A.36.021(1)(g) states that "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another by strangulation or suffocation." Under RCW 9A.04.110(26), "'strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." The term "obstruct" is not defined in the statute.

a. The Word "Obstruct" Does Not Require Complete Closure Of The Throat.

Rodriguez' claim hinges on the meaning of the word "obstruct" in RCW 9A.04.110(26). Questions of statutory interpretation are reviewed de novo. State v. Bunker, 169 Wn.2d

571, 578, 238 P.3d 487 (2010). When interpreting a statute, the court's "primary objective is to 'ascertain and give effect to the intent of the Legislature.'" State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) (internal citations omitted). Statutory interpretation begins by first examining a statute's plain meaning. State v. Hirschfelder, 170 Wn.2d 536, 543, 242 P.3d 876 (2010). "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" Id. (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

"To determine the plain meaning of a statute, we look to the text, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (quoting Campbell, 146 Wn.2d at 9-10)). Statutes "must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous." Bunker, 169 Wn.2d at 578 (internal quotations omitted).

"An undefined statutory term should be given its usual and ordinary meaning." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). A court "may discern the plain meaning of

nontechnical statutory terms from their dictionary definitions." Kintz, 169 Wn.2d at 547. "If necessary, it is also appropriate to rely on the thesaurus when interpreting statutes." Id. If the plain meaning of the statute is subject to only one interpretation, the inquiry ends. State v. Marohl, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). "If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant caselaw for assistance in discerning legislative intent." Christensen, 162 Wn.2d at 373. Only if a criminal statute is still deemed ambiguous does the rule of lenity apply. Kintz, 169 Wn.2d at 548.

The plain language of RCW 9A.04.110(26) shows unambiguously that the word "obstruct" means to impede or hinder, not to block completely. The word "obstruct" is not defined in the strangulation statute. Although he cites the dictionary definition of "obstruct," Rodriguez isolates a single fragment to limit its meaning to "block up or close up." App. Br. at 6. However, the relevant portions of that definition, cited in its entirety, read as follows:

> **1 :** to block up: stop up or close up **:** place an obstacle in or fill with obstacles or impediments to passing <veins ~ed by clots> **2 :** to be or come in the way of **:** hinder from passing,

> action or operation : IMPEDE, RETARD <constant interruptions ~*ed* our progress> . . . **syn** see HINDER

Webster's Third New International Dictionary 1559 (1993).

As Webster's states plainly, the word "obstruct" does not mean to close up completely. Nowhere does the definition require a completely sealed passage. Even if Rodriguez were to read that requirement into the word "block," its use in subsection (1) of the obstruction definition describes a positive obstacle being inserted internally into a passageway ("stop up . . . place an obstacle *in* or *fill* with obstacles"), which clearly does not apply to the external act of strangulation. Rather, it is the second clause of the definition ("hinder from passing, action or operation: IMPEDE, RETARD") that corresponds with the act of strangulation. "Obstruct" therefore means to hinder or impede.[3]

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[3] This conclusion is further bolstered by Webster's definition of the word "block," cited in relevant part below, which nowhere requires complete closure:

> **1 a :** to render (as a way) unsuitable for passage or progress by obstruction . . . **c :** to obstruct the passage, progress, or accomplishment of (someone or something) esp. by a positive obstacle . . . **e :** to prevent normal function of (a bodily element) . . . <~ a nerve with novocaine> . . . **syn** see HINDER."

Id. at 236. Subsection (c) is inapplicable because no positive obstacle is introduced in the act of strangulation. "Block," therefore, in the context of a compression of the neck, would mean "to render [one's airway] unsuitable for passage" or "to prevent normal function (of a bodily element)," such as breathing. This is consistent with the definition of obstruct as to hinder or impede.

Nor does Webster's accord with Rodriguez' narrow definition of the word "impede" as "to block from passing," instead defining it as: "to interfere with or get in the way of the progress of <storms *impeded* the vessels> . . . **:** hold up **:** BLOCK <his progress was *impeded* by sickness and poverty> . . . **syn** see HINDER." Id. at 1132. As its plain language suggests, "impede" in the context of the strangulation statute means to interfere with or hold up the progress of something - in this case, the ability to breathe.

This in turn corresponds with the definition of "hinder," which is repeatedly referenced as the common root synonym for all of the definitions cited above: "**1 :** to do harm to : IMPAIR, DAMAGE . . . **2 :** to make slow or difficult the course or progress of : RETARD, HAMPER . . . <was greatly ~*ed* in his efforts by bad weather> . . ." Webster's 1070. "Hinder," as used most appropriately in the context of 9A.04.110(26), means only to "do harm to," "impair," or "make slow or difficult the course or progress of" breathing, not to prevent it completely.

In sum, the ordinary, plain meaning of "obstruct" is to prevent the normal function of, impede or interfere with, or hinder or make slow or difficult the progress of breathing. Nowhere is there a requirement of complete closure. If the legislature had intended to

define strangulation as the total inability to breathe or a complete blockage, as suggested by Rodriguez, it would have used those words. A court may not "add[] words or clauses to an unambiguous statute when the legislature has chosen not to include that language." Kintz, 169 Wn.2d at 549-50.

The rejection of Rodriguez' narrow definition is further supported after analyzing the word in "the context of the statute in which [the] provision is found, related provisions, and the statutory scheme as a whole." Jones, 172 Wn.2d at 242. In 2011, the legislature amended RCW 9A.36.021(g), the strangulation provision of the assault in the second degree statute, to include "[a]ssaulting another by strangulation *or suffocation.*" Substitute H.B. 1188, 62nd Leg., Reg. Sess. (2011) (emphasis added). The legislature further defined "suffocation" under RCW 9A.04.110(28) as follows: "to *block* or *impair* a person's intake of air at the nose and mouth, whether by smothering or other means, with the intent to *obstruct* the person's ability to breathe." (emphasis added).

This word selection is significant. The fact that the legislature chose to use three different words ("block," "impair," and "obstruct") in its definition of "suffocation" demonstrates its keen awareness of the distinction between those three terms and its

intent for them to mean different things. Since the words are used in contrast with one another to denote different concepts, it is instructive to refer back to the definition of the common root synonym of "hinder," which draws critical distinctions between the words "obstruct" and "block" when they are used opposite one another:

> **syn** IMPEDE, OBSTRUCT, BLOCK, BAR, DAM **:** HINDER indicates a checking or holding back from acting, moving, or starting, often with harmful or annoying delay or interference . . . *OBSTRUCT indicates hindering free and easy passage by obstacles in the way or by interference* . . . BLOCK indicates *complete* obstruction to egress, passage, or exit . . . IMPEDE suggests checking motion or progress by or as if by clogging or fettering so that forward activity is difficult.

Webster's 1070 (emphasis added). The above language clarifies first that, vis-à-vis the other terms, "obstruct" means "hindering free and easy passage," not total blockage. Second, the fact that Webster's describes the term "block" as "*complete* obstruction" compared to the word "obstruct" proves that "obstruct," on its own, must therefore mean an *incomplete* blockage.

Had the legislature meant the word "obstruct" to mean "completely obstruct" in either RCW 9A.04.110(26) or (27), it could have done so. Rodriguez' attempt to prove otherwise flies in the face of the court's directive that "[s]tatutes must be read together to

achieve a harmonious total statutory scheme maintaining the integrity of the respective statutes." Jones, 172 Wn.2d at 243.

Reading the statute in this manner avoids absurd results. "It is fundamental that in construing any statute we avoid absurd results." Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). If this Court accepted Rodriguez' interpretation of the word "obstruct," then a person could be guilty of felony assault for compressing someone's neck and completely obstructing her ability to breathe for only a single second, while someone who compressed another's neck and almost completely cut off her oxygen for ten minutes would not be guilty of strangulation. The legislature could not have intended this result.

However, even if this Court decides that a plain reading of the word "obstruct" is ambiguous and susceptible to more than one reasonable interpretation, Rodriguez' definition still fails under canons of statutory construction, legislative history, and relevant caselaw. Employing those next steps in analysis, it is clear that the legislature intended "obstruct" to mean to impede or hinder, not to totally cut off. As discussed *supra*, the legislature's adoption of the suffocation statute in 2011 indicates its intent to give "obstruct" a different meaning from "block"/"complete obstruction." A court "may

refer to a statute's subsequent history to clarify an ambiguous statute's original intent." Bunker, 169 Wn.2d at 581.

Rodriguez also misinterprets the legislature's intent when it added strangulation as a method of committing assault in the second degree in 2007. Laws of 2007, ch. 79, S.B. 5953, § 2. He seizes upon the legislature's characterization of strangulation as "one of the most lethal forms of domestic violence" as evidence that they intended "to punish actually strangling, which is a lethal action or intent." Laws of 2007, ch. 79, S.B. 5953, § 1[4]; App. Br. 8. This proposition is incorrect for two reasons.

First, Rodriguez cannot establish how the legislature's single use of the word "lethal" means that they only intended to punish a total closing of the throat as opposed to the impairment of one's ability to breathe. Both are obviously dangerous and damaging to one's health and safety. The legislature's formal declaration of intent accompanying the strangulation provision acknowledges this reality, citing several reasons for its adoption of the amendment, including strangulation's "particular cruelty" and "its *potential effects* upon a victim *both physically and psychologically*." Laws of 2007, ch. 79, S.B. 5953, § 1 (emphasis added). The statement of intent

[4] This legislative finding can be found under the "Historical and Statutory Notes" in RCW 9A.36.021 as "Finding -- 2007 c 79."

further broadly describes the possible consequences of strangulation as "loss of consciousness, injury or even death." Id. These statements indicate the legislature's intent to punish acts that cause a broad array of damage and do not require a "lethal" cutting off of the ability to breathe. This makes sense, given that an appropriate charge (murder) already exists for a total and lethal sealing of the throat.

Second, Rodriguez' characterization of legislative intent ignores the fact that the legislature enacted *two ways* to commit strangulation: compression of the neck resulting in obstruction of the ability to breathe, and compression *without actual obstruction* accompanied only by the intent to do so. If the legislature's sole concern was lethality, it would not have penalized conduct in which no obstruction of the throat ever even occurs. Furthermore, if Rodriguez implies that the legislature meant to penalize only compression plus "lethal intent," i.e., intent to totally close the throat, he again ignores the fact that this conduct already constitutes an existing crime (attempted murder).

Rodriguez requests that this Court apply the rule of lenity in favor of his interpretation. However, the rule of lenity only applies when a statute is ambiguous. Given the plain and unambiguous

meaning of the word "obstruct" in both the strangulation statute and its related provisions, and the clear legislative history, this Court should reject Rodriguez' request to add language requiring total blockage of the ability to breathe.

b. There Was Sufficient Evidence That Rodriguez Impeded Or Hindered Hendon's Ability To Breathe.

Using the correct definition of the word "obstruct," there was considerable evidence that Rodriguez compressed Hendon's neck and thereby obstructed her ability to breathe. Hendon testified that Rodriguez strangled her at least twice; when asked if she could breathe during the first strangulation at the door, she answered, "No, not really; with the grace of God." RP 126. She also said that she had a "hard time breathing" during his second act of strangulation in the kitchen, testifying that "[i]t sure did" disrupt her breathing at that time. RP 131. During cross-examination, she reiterated twice that during each of the strangulation episodes, she was only able to breathe "[t]hrough the grace of God." RP 173.

Hendon further testified that the strangulation caused pain in her neck and that her "throat was hurting very bad." RP 128, 150. They caused her continued difficulty breathing outside, contrary to Rodriguez' claim that this was due to cigarette smoking: "I was out of

breath from him choking me so hard, and then I smoke cigarettes, too, but – and I was running for my life like Tina Turner, and that's what my breathing was at that time." RP 149-50. She also testified at least some of the scars on her neck, present two and a half months later during the trial, were caused by the strength of Rodriguez' grip when he strangled her on September 15. RP 127-28, 155, 159, 172. The photographs taken four hours after the incident also depicted marks, swelling, and bruising on her neck and jawline that Hendon attributed to the strangulations. RP 155-59; Ex. 1, 4, 9.

Both officers corroborated Hendon's testimony, noting that her physical injuries were consistent with her description of what had just happened. RP 191, 216. Officer Beard described the "vibrant red and swollen" injuries on her neck and jawline, noting darkness around her neck on both sides of her trachea, and some swelling one side. RP 196. While he agreed that this could be consistent with a blow to the jaw, Officer Body, who also noted the swelling on her jawline and the marks on her neck, said it appeared to be a "grabbing of some sort." RP 200, 216-17, 221-22. Both officers described Hendon's distraught and deeply shaken state. RP 131, 212. The jury also heard Hendon's frantic statement on her 911 call that Rodriguez had just strangled her, causing her such fear that she hid behind a

bush in her pajamas with no shoes on at 4:00 a.m. until the police arrived. RP 190, 193; Pretrial Ex. 4; Ex. 13.

Evaluating the evidence in the light most favorable to the State, there was sufficient physical and testimonial evidence that Rodriguez obstructed Hendon's ability to breathe by impeding, interfering with, preventing the normal function of, or hindering the free and easy passage of her breathing.

c. There Was Sufficient Evidence That Rodriguez Compressed Hendon's Neck With The Intent To Totally Block Her Ability To Breathe.

Even if this Court accepts Rodriguez' limited definition of "obstruct" as a total suspension of the ability to breathe, Rodriguez explicitly announced his intent to do just that immediately before strangling Hendon. Hendon testified that as soon as Rodriguez got to the front door, he unambiguously informed her that his intent was to "fuck [her] up" and "kick [her] ass" before grabbing her throat with his hands. RP 124, 161. He continued to tell her that "he was going to fuck [her] up and this, that and the other." RP 126.

While Rodriguez can ask this Court to interpret his exhortations as a mere desire to compress Hendon's throat *almost*, but not quite enough, to stop her breathing, the evidence must be

viewed in the light most favorable to the State. A rational trier of fact would reject Rodriguez' labored reading of his own declarations of intent and permit the finding that his purpose was to cut off her ability to breathe.

There is also other evidence that Rodriguez intended to cut off Hendon's ability to breathe, regardless of whether he achieved his objective. Hendon testified that Rodriguez grabbed her by the neck and squeezed so hard he nearly cut off her airway. RP 126. He compressed her neck so tightly that she stated three times that it was only by "the grace of God" that she could still barely breathe. RP 123, 126. The intensity of his compression gave rise to vivid redness, swelling and marks on her neck that morning and left permanent scars visible three months later.

Rodriguez' own testimony also provided strong proof of his intent. By his own admission, he began the night "all riled up" from the boxing match and proceeded to fuel his aggression with alcohol as the night progressed until he erupted into a "full-on fight" at a club. He described approaching Hendon that night "huffing and puffing" and "sweating," such that even he acknowledged that it was understandable why Hendon would need to tell him, "[H]ey, the fight

is over." His anger about her association with the man who had assaulted him further formed circumstantial evidence of his intent.

These facts are sufficient for a reasonable juror to conclude that Rodriguez compressed Hendon's throat with the intent to obstruct her airway, even using Rodriguez' limited definition of "obstruct."

2. RODRIGUEZ' RIGHT TO JURY UNANIMITY WAS PROTECTED WHERE HIS MULTIPLE ACTS OF STRANGULATION WERE PART OF THE SAME COURSE OF CONDUCT.

Rodriguez contends that the trial court violated his right to a unanimous jury verdict when it denied his request for a unanimity instruction and the State failed to elect which strangulation formed the basis for the charge. Rodriguez' argument fails because the strangulations were part of a continuing course of conduct. Thus, neither a unanimity instruction nor election was necessary.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of several acts that could constitute the crime charged, the jury must unanimously agree on a specific act. State v. Kitchen, 110 Wn.2d 403, 422, 756 P.2d 105 (1988).

To ensure jury unanimity, "[t]he State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." Kitchen, 110 Wn.2d at 409; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

However, the State need not make an election and the court need not give a unanimity instruction if the evidence shows that the defendant was engaged in a continuous course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether the defendant's conduct constitutes one continuing criminal act, "the facts must be evaluated in a commonsense manner." Petrich, 101 Wn.2d at 571.

When distinguishing distinct criminal acts from a continuing course of conduct, the court considers factors such as "(1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). The acts need not happen immediately after one another. See e.g., State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (holding that assaults occurring over a 2-hour period constituted a continuing course of conduct). This Court has held that a series of assaults occurring over a period of three weeks constituted a continuing

course of conduct. State v. Craven, 69 Wn. App. 581, 587-89, 849 P.2d 681 (1993).

"'[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct....'" Brown, 159 Wn. App. at 14. See also Handran, 113 Wn.2d at 17 (the kissing and hitting of defendant's ex-wife was a continuous course of conduct over a short period of time, intended to secure sexual relations with the victim); State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) (threatening statements directed at different people during a ninety-minute time period formed a continuing course of conduct that did not require a unanimity instruction or election by the State); Brown, 159 Wn. App. at 15 (numerous phone calls and in-person contacts over multiple days were a continuous course of conduct involving the same parties, locations, and ultimate purpose of contacting and confronting the victim).

Here, a common-sense evaluation of the evidence shows that Rodriguez' multiple acts of strangulation were part of a continuous course of conduct. They were intended to achieve the same common objective, as stated by Rodriguez himself: to "fuck [Hendon] up" and "kick her ass." RP 124, 161. Rodriguez

reiterated this singular purpose throughout the incident, repeating that he was "going to fuck [her] up and this, that and the other" after the first strangulation and "making all these different threats to [her]" in the kitchen. RP 124-26. He admitted at trial that he was in a foul mood, beset with hostility toward Hendon for her supposed association with the man who had beaten him, which supported his motive and intent to hurt her. The assaults occurred over an extremely short period of time; Hendon described them as happening within "seconds" of one another and emphasized that "[t]hings were happening fast." RP 131. The assaults also involved the same parties (Rodriguez and Hendon), and occurred in the same place, "just within the house." RP 131.

An evaluation of the multiple acts of strangulation in a common-sense manner demonstrates that they were part of the same course of conduct. Thus, neither a unanimity instruction nor election was necessary.

3. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS ON THE 911 TAPE AS EXCITED UTTERANCES.

Rodriguez next contends that the trial court erred in admitting Hendon's excited utterances from the 911 tape. This argument fails.

Evidence of Hendon's frantic state and her continued stress and excitement were pervasive throughout the record.

Under ER 803(a)(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be admissible as a an exception to the hearsay rule. A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event. State v. Magers, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008). The determination of the first and second elements can be established by circumstantial evidence such as "the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." State v. Young, 160 Wn.2d 799, 809-10, 161 P.3d 967 (2007).

The key determination is often "whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). The exception is based on the idea that the "stress of nervous excitement . . . stills the

reflective faculties and removes their control" and constitutes "'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest." Young, 160 Wn.2d at 807 (internal quotations omitted).

A trial court's application of the excited utterance exception to the hearsay rule is reviewed for an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). Abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

Rodriguez argues that there was "no showing that Ms. Hendon was under the continuing stress of excitement . . . when she called 911." App. Br. 16. His contentions are not supported by the evidence. The first words out of Hendon's mouth after telling the operator her location are that she has fled her own home and that "I'm scared . . . I'm around the corner. Me and my daughter are scared." Pretrial Ex. 4 at 1. She begs the operator repeatedly to send help as soon as possible. Id. at 2, 6-10. She emphasizes her fear, saying, "He's scarin' me, so please come,"

a sentiment that she repeats eight times throughout the call. Id. at 1, 5-6, 8-10.

Hendon's present and continuing stress are evident throughout the call. So frightened is she that when asked what happened, Hendon simply urges, "Hurry up. He- he came in drinkin' and every- please, I got bruises and everything, so please come help me." Id. at 2. She tells the operator, "He puts his hands around my throat" and confirms that "[she] called right when [she] walked out," indicating that no time had passed since the event. Id. at 2, 8. She reiterates her concern several times that Rodriguez is close by and might be in pursuit, telling the operator "I got a hide" and repeats that she is "hiding" around the corner because she's "scared to be out cause it's a main street." Id. at 3-5, 8. Toward the end of the call, as they both hide together, she asks her minor child, "Can you see a police car up here, no? Then get back." Id. at 8.

At no point does Hendon's urgency or fear abate during the conversation. Midway through the call, she demands of the operator, "Are they on their way? How fast are they gonna be here?" Id. at 6. Immediately before the police finally arrive, Hendon repeats twice more that she is "scared" and needs to talk to the officer when he arrives. Id. at 9-10. Only when she sees the police does she venture

from her hiding place. Id. at 10. During the call, Hendon is breathing hard and her voice is frantic and hushed in an attempt to prevent Rodriguez from hearing her as she hides in the bushes, such that the operator is forced to ask her, "Can you take a deep breath cause I can barely hear yeah [sic]." Ex. 13; Pretrial Ex. 4 at 6. Hendon replies, "Cause I'm scared," and the operator responds, "I know, so take a deep breath." Id.

Hendon's testimony refutes Rodriguez' claim that her difficulty breathing was due to her cigarette-smoking: "And I remember when he did choke me that it was hard because when I made the 911 call -- I do smoke cigarettes, but at the same time it's a little more extenuous (sic) than normally, my breathing." RP 127. She later added, "I was out of breath from him choking me so hard, and then I smoke cigarettes, too, but – and I was running for my life like Tina Turner, and that's what my breathing was at that time." RP 149-50.

Rodriguez nevertheless contends that the 911 "showed time for reflection" because Hendon "had left the home and gone to a nearby restaurant, from which she called 911." App. Br. 16. This is factually incorrect. The 911 call and the testimony of Hendon and the officers show that Hendon was calling from her cell phone outside in a bush near her house. During the call, Hendon repeats her concern

about her dying battery, and the fact that she was not at a restaurant, but hiding behind some apartments "a block from Motor Place" and that she "can *see* Uneeda Burger." Pretrial Ex. 4 at 8 (italics added).

Rodriguez cannot cite to any evidence in the record, only to defense counsel's closing argument, to support his contention that "time passing after the alleged event and before the 911 call allowed time for . . . thought process." In fact, Hendon testified that only 8-10 minutes had passed between her last physical contact with Rodriguez and her 911 call, that she called right after fleeing the house, and that mere "seconds" had separated the assaults. RP 131, 149; Pretrial Ex. 4 at 8. She further confirmed that she was so panicked at the time that she had left her keys at the house and was hiding in a bush in her pajamas with no coat and no shoes in the cold during the 911 call: "[W]e ran around the corner[,] I felt like Tina Turner running for my life with my daughter. I was frantic." RP 131.

Both responding officers confirmed Hendon's disheveled demeanor and appearance when they arrived. Officer Body described how Hendon flagged him down and was "very, very upset," "very emotional," and "close to tears when she was describing what happened." RP 212. He also confirmed that Hendon had told him that she had been choked soon before his arrival, further establishing

the very short period of time between the incident and the 911 call. RP 223. Officer Beard confirmed that Hendon wore only pajamas, that she was shaking and trembling, and that she was "rattled . . . [and] fearful of going back into her residence" and "really insistent on wanting police to go with her and make sure that it was safe for her to back into her own home." RP 193.

Rodriguez nevertheless insists that Hendon was no longer under the stress and excitement of the incident because "she did not ask for medical help." This argument fails for two reasons. First, it misinterprets the facts. When the operator asked Hendon if she needed a medic, Hendon replied, "No. I want him out of there," apparently believing that the operator was only going to send her one type of aid. Pretrial Ex. 4 at 5. Sensing the misunderstanding, the operator explains, "This is . . . two separate things, though. I understand. We're gonna have police come out for the assault, but I'm talkin' about you, your medical issue or if you have one." Id.

Even if the above exchange had not been based on a misunderstanding, Hendon's point at the time was well-taken. Medical help would have been of no use to her without someone there to subdue the immediate affront to her safety: Rodriguez. During the trial, Hendon explained that she did, in fact, believe that

she needed a medic's attention because "[m]y throat was hurting very bad" but told the operator that she did not because "I was just traumatized, so, at the time." RP 150.

Rodriguez next argues that Hendon's statements did not meet the requirements of the excited utterance exception simply because she made allegations of a crime. If this was enough to be a disqualifying factor, then most 911 calls would be inadmissible in criminal cases because the report of a crime will almost always be the subject of the call. Rodriguez seems to posit that only calls requesting medical assistance alone merit consideration as excited utterances. No such limitation exists under ER 803(a)(2). As Hendon explained succinctly when asked why she had inquired if he was going to be arrested: "Because . . . I was fearing for my life. I wanted to go back home to my house and be at my house peacefully." RP 150.

Finally, Rodriguez argues that the statements did not comply with the requirements of ER 803(a)(2) because Hendon worked for a counseling agency and was thus trained in how to fabricate allegations. This argument is based on pure speculation. Rodriguez points to no evidence that supports his proposition, only

"a defense concern that she fabricated the allegations against Mr. Rodriguez." App. Br. 17.

The record is replete with direct and circumstantial evidence supporting the admission of Hendon's excited utterances, including her panicked behavior, appearance, and condition, as well as the circumstances under which the statements were made. The Court should find that the trial court properly exercised its discretion in admitting these statements.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rodriguez' conviction.

DATED this 12 day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
NAMI KIM, WSBA #36633
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to OLIVER DAVIS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PETER RODRIGUEZ, Cause No. 71341-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

12-12-14
Date

Done in Seattle, Washington