NO. 99936-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

_____

STATE OF WASHINGTON,
Respondent,

v.

JASON KEITH CISSNER,
Appellant.

_____

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

_____

THE HONORABLE DAVID L. MISTACHKIN, JUDGE

_____

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

_____

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

Decision Below

ISSUES PRESENTED

1. **Should review be granted when the petition does not satisfy the conditions governing the acceptance of review in RAP 13.4(b)?**

2. **Should review be granted when the evidence, viewed in a light most favorable to the State, and taking all reasonable inferences in the State's favor therefrom, is sufficient to support petitioner's conviction for second degree assault by strangulation?**

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual History

At the time of the alleged assault, Jason Cissner and April Rognlin had been in a dating relationship for over eight years. RP[1] 63, 75. At the time of the alleged assault, Rognlin and Cissner were living in a house at 2557 Roosevelt Avenue in Ocean City, WA. RP 43, 63-64, 74. Rognlin's friend, Juanita Kenworthy, lived in a 5th wheel trailer on the property. RP 64, 74.

On the morning of July 15, 2019, Rognlin had been ill and was sleeping in Kenworthy's trailer. RP 65, 76. It was approximately 9:30 in the morning when Kenworthy heard Cissner "scream [Rognlin's] name

[1] Unless otherwise noted, the State is referencing the 10/22/2019 trial transcript prepared by Reporter Johnston.

really loud several times." RP 65. Rognlin knew Cissner was "in a mood" so she left the 5th wheel to try and get him to quiet down. RP 76.

As Rognlin approached Cissner, she said, "something like, if you don't knock it off, I am going to get a restraining order against you." RP 76. This apparently enraged Cissner as he then "started attacking" Rognlin. *Id.*

Kenworthy heard Rognlin yelling and looked out the door of her trailer. RP 65. She saw that Cissner "had his hand around [Rognlin's] neck and she was trying to get away…he just put a chokehold on her and dragged her towards the house." RP 65. Kenworthy testified that Cissner had his hands around Rognlin's neck and that he "put a chokehold" on Rognlin. RP 66, 67.

Rognlin described that Cissner had her "around the neck" and ended up hurting her eyebrow bone and cheek/jaw area by the pressure he was exerting trying to "drag" her into the house. RP 77. Cissner pulled Rognlin's hair, but his hand was "on [her] neck mostly," and, when asked if she had difficulty breathing, Rognlin answered, "Yeah, it was…" RP 78. Ultimately, Rognlin summarized that she "was being confined and choked or whatever and drug and trying to get back in the house." *Id.*

Kenworthy yelled at Cissner that she had called police. RP 67. At hearing this, Cissner went into the house, got dressed, and drove away from the residence. RP 68.

Deputy Peterson arrived on scene and took Kenworthy's statement; he observed that Rognlin "displayed redness in the face." RP 58.

Deputy Byron also responded to the residence. RP 43. Deputy Byron testified that, at the time of the assault, he had been a deputy for almost two years, during which time he conducted several domestic violence investigations. Prior to that, he underwent six months of training through the Washington State Criminal Justice Training Commission (CJTC). RP 42.

At the residence, Deputy Byron took several photographs of Rognlin "due to her injuries." RP 48. Deputy Byron testified to observing red marks on Rognlin's neck. RP 54. He further testified that, based on his training and experience, these marks were "consistent with someone being strangled or assaulted in the area of their neck." RP 50.

A short time later, Cissner was arrested by the Ocean Shores Police Department (OSPD). RP 51. Cissner was banging his head on the partition of the OSPD officer's car. RP 52.

Deputy Byron and Deputy Peterson responded to Cissner's location. *Id.* Cissner told the deputies that he "just wanted to go to jail." RP 52, 60. Cissner was described as "very hostile" and "very agitated." RP 52, 60. Cissner continued to not follow commands and was "combative" with the deputies. RP 52.

Cissner was placed into Deputy Peterson's car for transport to the hospital to have a laceration on his head evaluated, prior to being booked. RP 51, 60-61. Before they could even leave the city of Ocean Shores, Cissner began slamming his head on the partition of Deputy Peterson's vehicle. RP 61. Deputy Peterson stopped the vehicle to secure Cissner, and Cissner "began slamming his head down on the asphalt" three or four times. RP 53, 61. It took multiple officers to restrain Cissner so that he could not harm officers or himself. RP 53-54, 61.

Procedural History

Based on the above, Cissner was charged by Information on July 16, 2019 with one count of Assault in the Second Degree—Domestic Violence, pursuant to RCW 9A.36.021(g)[2]. CP 1. An Amended

[2] There is a scrivener's error in the citation on the Information. Subsection (c) is listed, but no deadly weapon was alleged.

Information was later filed that more narrowly defined the domestic violence relationship alleged. CP 17.

The case proceeded to jury trial on October 22, 2019 and Cissner was found guilty as charged. CP 24. Cissner was sentenced within the standard range November 1, 2019 to 50 months of confinement to be followed by 18 months of community custody. CP 30-31. As one of the conditions of community custody, the Court ordered Cissner to pay any supervision fees the DOC might assess. CP 31, Section 4.2(B)(7). Cissner timely appealed. CP 49.

The Court of Appeals, Division Two, affirmed Cissner's conviction in an unpublished opinion filed June 15, 2021, *State v. Cissner* No. 54228-5-II. The court found there was sufficient evidence to support Cissner's conviction for second degree assault by strangulation, but remanded for resentencing based on the offender score and for the trial court to reconsider imposition of DOC supervision fees.

ARGUMENT

1. The petition does not satisfy the requirements of RAP 13.4(b) for the granting of discretionary review.

RAP 13.4(b) reads as follows (emphasis added):

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court *only*:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant questions of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the decision involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner cites U.S. Const. amend. XIV, Washington State Const. art. I, sec. 3, *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1079) for the proposition that the State must prove each element a charged crime beyond a reasonable doubt (in this case intentional strangulation). Petition for Review, page 3. That goes without saying and applies in every case. That that is so does not turn every case into one involving a *significant* question of law under either the U.S. or state constitutions or one involving an issue of *substantial public interest.* RAP 13.4(b)(3), (4). The issue in this case is sufficiency of the evidence, a fairly common issue in criminal appeals.

Nor has petitioner shown that the decision below is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals. Petitioner has cited two Court of Appeals cases, *State v. Reed*, 168 Wn. App. 553, 278 P.3d 203 (2012), Petition for Review, page 4, and

State v. Rodriguez, 187 Wn. App. 922, 352 P.3d 200 (2015), Petition for Review, pages 4, 6. Petitioner has not demonstrated that the decision below conflicts with either of these cases. In fact, the Court of Appeals cited *Rodriguez* in support of its decision affirming petitioner's conviction. *State v. Cissner*, No. 54228-5-II at 4.

At issue in *Rodriguez* with regard to strangulation was the sufficiency of the evidence, which depended on the correct meaning of the word "obstruct." Rodriguez argued that it "necessarily [meant] to *completely* obstruct." *Rodriguez*, 187 Wn. App. at 932 (emphasis in the original). The Court of Appeals rejected that argument:

> In common parlance, "obstruct" is frequently modified by some variant of either "partial" or "complete." Thus, it is often said that traffic is either completely or partially obstructed by an accident, or that a person's artery is either partially or completely obstructed by plaque. This usage suggests, in accordance with the interpretation urged by the State, that the word obstruct – without a relevant limiting modifier – may mean to obstruct either partially or completely. *The word describes acts of obstruction to some – that is any – degree.*

Rodriguez, Id. (emphasis added). The court adopted a Webster's Dictionary definition that defined "obstruct" as "to be or come in the way of: hinder from passing, action or operation: IMPEDE, RETARD." *Id.* This definition, the court held, comported with the legislature's intent: "The second definition more clearly communicates the reality that, in the

strangulation context, a person's breathing or blood flow is obstructed in degrees, not discrete intervals." *Rodriguez,* 187 Wn. App. at 933. "[T]he second definition better conveys that a person's breathing and blood flow may be obstructed *to any degree." Id.* at 934.

Rodriguez, supra, does not require a certain quantum, degree or quality of injury, nor does it require "evidence from medical professionals," Petition for Review, page 4, nor particular statements of intent from a defendant. Petition for Review, page 6. Similar to the facts in *Rodriguez,* Rognlin testified that she had difficulty breathing and that she was attacked by Cissner. She had visible marks on her neck evidencing the attack, which a deputy was able to photograph.

The issue in *State v. Reed,* 168 Wn. App. 553, 278 P.3d 203 (2012) was whether or not the jury was properly instructed on all the elements of assault in the second degree. The court found the jury instruction accurately stated the law, *Reed,* 168 Wn. App. at 575, as did the instructions regarding assault and strangulation in this case.

The decision below was consistent with both of the cases cited by petitioner as required by RAP 13.4 (b)(1) and (2).

2. There was sufficient evidence to support the jury's guilty verdict.

Standard of review.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green,* 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff,* 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wn. App. 95, 109, 117 P.3d 1182 (2005).)

Application.

Cissner was charged with assault in the second degree by strangulation, pursuant to RCW 9A.36.021(g). CP 17. "'Strangulation' means to intentionally 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); CP 21.

When the evidence in this case is viewed in a light most favorable to the State, there is clearly sufficient evidence to find that Cissner intentionally strangled Rognlin. Both Rognlin and Kenworthy testified that the incident began with Cissner "screaming" for Rognlin. Rognlin then made a statement to him about getting a restraining order that provoked him to "attack" her.

Kenworthy was an eyewitness and testified that Cissner had Rognlin "around the neck." She also stated more than once that Cissner "put a chokehold" on Rognlin. Kenworthy's testimony was consistent with that given by the victim, Rognlin.

Rognlin described that Cissner had her "around the neck" and responded "yeah" when asked if she had difficulty breathing. Rognlin testified that she was "being confined and choked."

As it was not defined, it should be assumed that the jury imported the usual meaning to the terms "choke" and "chokehold." "Choke" is defined as "(1) to stop the breath of by squeezing or obstructing the windpipe; strangle; stifle…." https://www.dictionary.com/browse/choke#. "Chokehold" is defined as "(1) a restraining hold in which one person encircles the neck of another in a viselike grip with the arm, usually approaching from behind; (2) a stifling grip; stranglehold" https://www.dictionary.com/browse/chokehold#

Deputy Byron described seeing actual physical injury to Rognlin's neck. He testified that the marks he observed were "consistent with someone being strangled or assaulted in the area of their neck." The injuries were visible enough that he was able to photograph them and these photographs were submitted to the jury.

When Rognlin informed him that she had summoned police, Cissner fled the scene. When he was contacted by law enforcement, Cissner was "combative," "very hostile," and "very agitated." He spontaneously stated that he "just wanted to go to jail" and continued to injure himself while in custody. It is reasonable that the jury would have inferred from this behavior that Cissner displayed actions consistent with a "consciousness of guilt." It certainly does not comport with his argument

that he was "nervous" about Rognlin being in the yard, and that he was trying to "encourage" Rognlin to get back in the house. RP 41.

There is not only sufficient, but abundant evidence to support a finding of guilt beyond a reasonable doubt in this case. Both the victim and the eyewitness describe Cissner choking her. Rognlin specifically stated that her breathing was impeded during the assault. This testimony would be sufficient to support the verdict; however, the responding deputies also observed actual injury consistent with the "attack" described by Rognlin. Finally, Cissner's own behavior shows that he was acting with criminal intent and he was aware of that.

CONCLUSION

The petition herein does not satisfy the requirements or RAP 13.4(b). Furthermore, there was sufficient evidence to support petitioner's conviction for assault by strangulation. As the Court of Appeals correctly found below:

> The responding officer testified he saw injuries to Rognlin's neck and the jury saw pictures of those injuries. In addition, both Rognlin and Kenworthy testified that Cissner put his hands around Rognlin's neck, choked her, and put her in a choke hold. Rognlin briefly confirmed that she had difficulty breathing and this testimony was undisputed.
>
> * * * * *

> Viewing the evidence in the light most favorable to the State and drawing all inferences in the State's favor, the evidence presented in this case was sufficient for the jury to find that Cissner obstructed Rognlin's ability to breathe. We conclude that the evidence was sufficient to support Cissner's conviction for second degree assault.

State v. Cissner, No. 54228-5-II at 5.

Based on the foregoing, the State asks that the Petition for Review be denied.

DATED this 14th day of July, 2021.

Respectfully Submitted,

BY: 

WILLIAM A. LERAAS
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WSBA # 15489

WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

July 14, 2021 - 9:07 AM

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