

66745-1

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No. 66745-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLEO REED,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa Doyle
The Honorable Ronald Kessler

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The complainant's two 911 calls and later oral statement to a Renton police officer, in which Ms. Ta alleged that the defendant Cleo Reed "choked" her, and stated that she needed to "put his ass back in jail," were testimonial. Their admission into evidence violated Mr. Reed's Sixth Amendment confrontation rights, and the error was not harmless.

2. The trial court violated Mr. Reed's right to confrontation where he repeatedly demanded the right to confront his accuser, but the prosecutor refused to make genuine efforts to bring in the recanting complainant for trial, thus failing to show she was "unavailable" for confrontation and cross-examination.

3. The trial court abused its discretion in denying the defense request for a missing witness instruction.

4. The jury instructions failed to require the State to prove every element of the crime of second degree assault, including the requirement of proof that Mr. Reed intentionally strangled Ms. Ta.

5. The prosecutor committed flagrant misconduct in closing argument by telling the jury that the presumption of innocence ends when the jury begins deliberations, because the evidence at trial was insurmountable.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in ruling that Ms. Ta's two 911 calls and her police statement were non-testimonial, where they indicate the absence of any ongoing emergency, or any actual call for help, and instead demonstrate Ms. Ta's knowledge, and her fervent desire, that her accusations of choking should be used prosecutorially against Mr. Reed, in order to "put his ass back in jail"?

2. Does the confrontation error require reversal where Ms. Ta's photographed but untreated injuries, and her vague claims of having been "choked," without any allegation or proof that her blood flow or breathing were ever obstructed, do not constitute "overwhelming" evidence of strangulation?

3. The State made a tactical choice to prosecute Mr. Reed for assault by strangulation without calling the complaining witness to testify at trial, because she did not wish to come in, and because the prosecutor feared that she would testify consistent with her recantation letter that her original allegations were false. Was Ms. Ta, the complainant, "unavailable" for purposes of the Sixth Amendment confrontation clause?

4. Given that the complainant was the State's witness, and the prosecutor admitted he was choosing not to call Ms. Ta

because she would testify unfavorably, did the court err when it denied the request for a missing witness instruction?

5. Did the jury instructions fail to require proof of the essential element of the crime that Mr. Reed must be shown to have intentionally strangled Ms. Ta, or is the offense of second degree assault by strangulation a strict liability crime?

6. Is reversal required where the prosecutor flagrantly told the jury that the presumption of innocence ended when the jury started deliberating, because the evidence introduced at trial was insurmountable?

C. STATEMENT OF THE CASE

In two 911 calls and a police interview spanning the course of approximately 10 hours on June 23, 2010, Mr. Reed's girlfriend, Ms. Ta, used the words "he choked me," claiming physically abusive acts by Mr. Reed, allegedly occurring that day when he was briefly a guest in her home, and later in a vehicle in which they were passengers. CP 5-6; Exhibit 16.¹

¹ Exhibit 16 is a CD which contains the unredacted 911 calls, which Mr. Reed urges this Court to listen to. Supp. CP ____, Sub # 66A (exhibit list). No transcript of the unredacted calls was entered into evidence. Exhibit 21 is a transcript of the 911 calls as redacted. Appendix A.

In the first 911 call, Ms. Ta is not being choked at the time of the call and the trial court did not so find. Instead of giving the operator her address in response to multiple requests, she angrily and repeatedly tells the operator that Mr. Reed has been in jail before. Exhibit 16.

The second 911 call was made nine hours later after Mr. Reed dropped her off out of the car he was riding in, near a McDonalds restaurant. In a lengthy diatribe, Ms. Ta tells the operator "he choked me" – referring to a second assault -- and angrily states, "And I need to put his ass back in jail." Exhibit 16.

When multiple Renton police officers responded to Ms. Ta's location, Ms. Ta made the same allegation of choking. 1/10/11RP at 10. The trial court found all three statements to be "non-testimonial," over the objection that the redactions of portions the court deemed "testimonial" were inadequate because the entirety of all of the statements were testimonial. 1/3/11RP at 55-57, 63-65.

The State refused to request a material witness warrant, and told defense counsel she could get one. 1/3/11RP at 66.

At the end of trial, the defense sought a missing witness instruction, which was denied on the basis that Ms. Ta was not the State's witness. 1/11/11RP at 232. In closing argument, the State

told the jury that the presumption of innocence ends when the jury starts deliberating. 1/11/11RP at 267.

Mr. Reed was convicted of the strike-level offense of second degree assault by strangulation, and witness tampering for having Ms. Ta provide the prosecutor with a letter of recantation. CP 113, 114. He was sentenced to concurrent terms of 84 and 51 months. CP 150.

Mr. Reed appeals. CP 159.

D. ARGUMENT.

1. **MS. TA'S INSISTENCE THAT HER ASSAULT REPORTS BE USED TO PUT MR. REED'S "ASS BACK IN JAIL," AND THE LACK OF ANY ONGOING EMERGENCY OR CRY FOR HELP, RENDERED HER 911 CALLS AND HER POLICE STATEMENT TO OFFICER BAGSBY "TESTIMONIAL."**

a. The State failed to meet its burden to prove that Ms.

Ta's assault reports were "non-testimonial." The essence of the criminal defendant's Sixth Amendment right to confrontation is the right to meaningful cross-examination of anyone who bears testimony against him. Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); U.S. Const. amend. 6. Under this rule, "testimonial" accusations, including 911

calls and statements to police primarily reporting the defendant's conduct, rather than seeking help for an ongoing emergency, are therefore inadmissible against a defendant unless the accuser appears and testifies at the defendant's trial, which Ms. Ta did not.²

Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford, 541 U.S. 53-54.

"Testimonial" statements always include:

statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52.³

In her 911 calls and in her police statement, Ms. Ta not only knew that her accusations could be used in a criminal prosecution of Mr. Reed, she actively expressed her desire that Mr. Reed be found and put back in jail. Particularly in the second 911 call, and in her subsequent statement to Officer Bagsby, Mr. Reed has

² The State affirmatively foreswore any contention that Mr. Reed was precluded from asserting his confrontation rights under a theory of forfeiture by wrongdoing. 1/4/10RP at 10.

³ Confrontation clause challenges are reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). In addition, the State has the burden on appeal of establishing that the statements made by the non-testifying witness are nontestimonial. Id. at 417 n. 3. The Respondent on appeal must therefore prove that the 911 recordings and police statement were testimonial, or they were not, without any deference to the trial court.

driven away in a vehicle, and was “nowhere to be found.”

Furthermore, the absence of any actual cry for help to resolve an ongoing emergency, and Ms. Ta’s knowledge that her accusations could be used prosecutorially, render the trial court’s ruling error as to all three admitted statements.

b. The first 911 call. During the first 911 call, made at approximately 2 in the afternoon, the first thing Ms. Ta says, after asking “can you bring somebody here,” is to complain that Mr. Reed’s wallet is in her house somewhere and he won’t tell her where. Ms. Ta then states that she asked the defendant to go, states that he punched her and scratched her, and states, “and he choking me.” Exhibit 16. Listening to the recorded 911 call makes clear that Ms. Ta is not being choked at that time. Exhibit 16. The trial court did not find that Ms. Ta was being choked at that time.⁴

The Crawford Court declined to provide a definitive description of what qualifies as a “testimonial” statement, but indicated that the “core class of testimonial statements” certainly

⁴ As will be seen by this Court’s review of the 911 recordings, Ms. Ta frequently used the word “choking” in the present tense, when clearly referring to past acts. Officer Bagby confirmed that Ms. TA spoke in broken English, in this respect. 1/10/11RP at 53. Seattle Police Officer Marion, who received Ms. Ta from the Renton police, said that although Ms. Ta was able to effectively communicate, her use of English did not make sense. 1/10/11RP at 73-74. Thus, in the second 911 call, made after the defendant had driven away from the McDonalds restaurant where he left her, Ms. Ta states “he choking me” in the present tense, referring to the plainly absent defendant. Exhibit 16.

includes statements that the declarant "would reasonably expect to be used prosecutorially." Id. at 51-52.

The Supreme Court in Davis later addressed whether a complainant's statements to a 911 operator about a domestic violence incident were "testimonial." The Court set forth a test classifying statements as non-testimonial if they were made during questioning posed "to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. However, statements are "testimonial" when the circumstances objectively indicate that there is no such ongoing emergency, because in such instance, the primary purpose of the statements is therefore to establish or prove past events potentially relevant to later criminal prosecutions. Davis, 547 U.S. at 822.

Thus in Davis, a 911 call made while there was an ongoing emergency in the form of the defendant's presence in the home and continued risk of assault of the caller, was non-testimonial. The Davis Court held that because the 911 call described events as they occurred, and was a frantic cry for help, the call was not testimonial because the primary purpose was to seek help from the police to meet the threat. Davis, 547 U.S. at 828.

Mr. Reed argues that it was untenable for the trial court to characterize Ms. Ta's first 911 call as a "call for help," when the call is listened to in its entirety. Ms. Ta's first 911 call is essentially describing past events, as opposed to seeking help for an ongoing emergency. Although she later states in the call that the defendant "is threatening me right now," she does not specifically indicate that she is at risk of harm. Her call's obvious purpose is to angrily report recent, but past conduct by Mr. Reed.

In the call, the complainant *repeatedly* fails to give the operator her address, despite multiple requests to do so. Instead, Ms. Ta is more interested in telling the operator that Mr. Reed has previously been in jail – which she repeats twice instead of responding to requests for her address -- and no address is ultimately given.⁵ Exhibit 16. The fact that Ms. Ta includes a request for police in her call does not defeat the fact that she knows her statements can be used prosecutorially – i.e., to put Mr. Reed in jail. Because the ultimate test is whether Ms. Ta knew that her statements were the sort that could be used to prosecute Mr. Reed, the first 911 call was "testimonial" and was inadmissible at trial over

⁵ The State's trial memorandum indicates the police came to the address shown on the 911 computer system, but were persuaded by her to leave. CP 8.

the defendant's repeated requests that the State bring its complaining witness in for trial, confrontation, and cross-examination by Mr. Reed.

c. The second 911 call and Ms. Ta's statement made to Officer Bagsby. The circumstances of the second 911 call and Ms. Ta's police statement are identical – the defendant is gone, and there is no ongoing emergency. More importantly, Ms. Ta's awareness that her statements can be used to prosecute Mr. Reed has now ripened into an adamant desire that they be so used.

Mrs. Ta's second call to 911 came 9 hours later, at approximately 11 at night. Ms. Ta states she had been in a vehicle with Mr. Reed, and that the defendant has now dropped her off in Renton, near a McDonalds. She states she was "choked," which apparently occurred when the defendant, who has now driven away, originally picked her up in the vehicle, which was being driven by his cousin. Exhibit 16.

Statements are testimonial when they are made with the objective understanding that they can be used as relevant to a criminal prosecution of the accused, as opposed to having the primary purpose of resolving an ongoing threat or emergency. Crawford, supra. This standard applies equally to statements by

the accuser that are volunteered, as it does to statements in direct response to questioning. Davis, 547 U.S. 813, 822 n.1; see United States v. Cromer, 389 F.3d 662, 675 (6th Cir.2004).

In the call, Ms. Ta is upset and angry. But there is no emergency. Instead, Ms. Ta is primarily focused on reciting a litany of recent and less-recent past conduct by the absent defendant, and her various other grievances against him. During this call, Ms. Ta not only knows her statements can be used to prosecute Mr. Reed, she affirmatively is seeking to put him back in jail.

The first thing Ms. Ta tells the 911 operator is “this mother fucker he just beat me up right now”. Exhibit 16. The operator repeatedly attempts to determine Ms. Ta’s location, with difficulty. Only thereafter does Ms. Ta say, regarding the plainly absent defendant, “Because, he choking me, he beat me up.” Exhibit 16. She then states:

- that she needs a ride home from a police officer;
- that the defendant is supposed to be her fiancé and they have a child;
- that she is pregnant⁶;
- that Mr. Reed “just got out of jail.”

⁶ The jury rejected the State’s allegation of an aggravator based on Ms. TA’s claim that she was pregnant at the time of the alleged assault. CP 115.

Exhibit 16. Notably, Ms. Ta states she does not need any medical help, but instead wants a “cop.” Exhibit 16. She would later also refuse medical help from the Renton police officers, and then the Seattle police officer, neither of whom insisted that she receive aid or treatment. 1/10/11RP at 47, 70-76.

Below, the trial court deemed the above portion of 911 call number 2, including Ms. Ta’s allegation that Mr. Reed choked her, to be “non-testimonial,” when certain portions it deemed testimonial were excised. The court also excised the second half of the phone call as being testimonial.⁷ 1/3/11RP at 55-57, 63-65. The defense had argued, unsuccessfully, that the entirety of both 911 calls was testimonial. 1/3/11RP at 53-55, 60-63.

These redactions were inadequate. As shown by Ms. Ta’s statements and the circumstances of the call, the entire 911 call including the first portions thereof, was testimonial. See 1/3/11RP at 61-63 (argument of counsel). The later, excised portions indicate the nature of the entire call, including the absence of an emergency, and Ms. Ta’s purpose to report past events, and to list her various grievances against Mr. Reed. More importantly, Ms.

⁷ At trial, however, the defense was allowed to read a stipulation to the jury that Ms. Ta stated during the second half of the second 911 call that she needed the police to put Mr. Reed back in jail. 1/11/11RP at 91.

Ta's statements reflect not only her knowledge that her assault report can be used to prosecute Mr. Reed, but affirmatively demonstrates her desire that the defendant indeed be prosecuted.

She states:

- that she didn't need aid from the fire department, just a "cop;"
- that Mr. Reed is a "black man" and a "big guy"
- that Mr. Reed and the other car occupant have driven to Kent;
- that he just got out of jail;
- that "he doing drugs;"
- that he has been drinking alcohol
- that he beat up his cousin "earlier" and the cousin ended up in the hospital;
- that she is scared and needs to get home;
- that she wants someone go to her home and see if the defendant is there;
- that the defendant had been in prison and the operator could "run his name you . . . you'll see it"

Exhibit 16. The second 911 call cannot tenably be deemed a cry for help which only later becomes a testimonial diatribe against the defendant. Instead, the above interjections span, and color, the entire call from beginning to end. Ms. Ta's motive is clear and it pervades the entire second call to 911.

There is plainly no presence or proximity of the defendant at any time during this call – he has driven away. Davis, 547 U.S. at 822; see People v. Trevizo, 181 P.3d 375, 379 (Colo.Ct.App.2007) (holding that statements made in a 911 call were testimonial where

“there was no immediate threat to the victim, [and] defendant had left the scene”). Ms. Ta makes clear that she is walking down the street and that the defendant is not there (having dropped her off), and that she wants a cop to take her home. Exhibit 16. There is no cry for help -- Ms. Ta is focused on the goal that the defendant be apprehended and jailed. Indeed, she states early in the second call to 911:

“Yeah, his cousin live in Kent. And I need put his ass back in jail.”

(Emphasis added.) Exhibit 16.

No matter how recently the alleged assault occurred, once the defendant is gone, and the complainant is now making accusatory statements to the 911 operator with openly expressed knowledge and desire that they be used to get Mr. Reed in trouble with the criminal justice system, such a call cannot be the proof of assault at a trial where the caller does not testify.

The subsequent statement to Officer Bagsby is similarly testimonial. After speaking with 911, Ms. Ta waited for the Renton police to arrive at the McDonalds restaurant. When they arrived, Ms. Ta simply continued with her allegations about Mr. Reed, making accusatory statements about the absent defendant to

Officer Bagsby, stating that he “choked me, wouldn’t let me out of my car.” 1/10/11RP at 45.

This was testimonial. A statement about a past event made to a police officer conducting a criminal investigation meets the Sixth Amendment’s formality and solemnity requirement for a testimonial statement. Crawford, 541 U.S. at 51–52; Davis, 547 U.S. at 826 (noting that solemnity requirement satisfied by criminal penalties for making “a deliberate falsehood” to law enforcement).

As Officer Bagsby indicates in his *voir dire* testimony, Mr. Reed was not at the scene when he and other uniformed, armed officers arrived, and he had no idea where the defendant was, except that Ms. Ta indicated on the call he had driven away. 1/10/11RP at 10; Exhibit 16.

As in the companion case reviewed in Davis, Hammon v. Indiana, Ms. Ta’s statements to Officer Bagsby involved a situation in which police responded to a report of domestic violence in the past. In Hammon, “[w]hen the officer questioned [the woman], and elicited the challenged statements, he was not seeking to determine . . . what is happening, but rather what happened.” Davis, 547 U.S. at 830. The same is true here.

For further example, in State v. Koslowski, statements made by one Alvarez accusing the defendant of an armed robbery were testimonial, because the defendant had fled, the police were now present, and thus there was no ongoing emergency. The Washington Supreme Court in Koslowski *rejected* the State's argument that "the mere fact that the suspects were at large and that Sergeant Wentz relayed [that] information . . . to officers in the field" showed there was still an ongoing emergency. Koslowski, 166 Wn.2d at 421, 428 (victim's statements were testimonial, because they were made after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance).

The absence of an emergency renders the entirety of Ms. Ta's second 911 call and her police statement to Officer Bagsby both testimonial. In Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), the Court stated that whether an "ongoing emergency" actually existed at the time of the encounter between the witness and the police "is among the most important circumstances informing the 'primary purpose' of an interrogation." Id. (citing Davis, 547 U.S. at 828-30; Crawford v. Washington, 541 U.S. at 65).

Here, there was no ongoing emergency, including to anyone else, such as in Bryant where a shooter, though he had fled, appeared to be on a random public rampage of violence and needed to be caught for public safety reasons. Bryant, 131 S. Ct. at 1157. That is plainly not the case here. Officer Bagsby did not broadcast any description or BOLO (“be on the lookout”) for Ms. Ta’s boyfriend. 1/10/11RP at 16. There was no allegation Mr. Reed was armed or a threat to others. There was no proximate danger to anyone, much less Ms. Ta.

Notably, in Bryant, the accuser’s answers to the officers’ questions were punctuated with inquiries about when emergency medical services would arrive to give him aid; this showed the victim did not have a “primary purpose’ ‘to establish or prove past events potentially relevant to later prosecution.” Bryant, 131 S. Ct. at 1157 (quoting Davis, 547 U.S. at 822).

The present case is dramatically different. As shown by her own words and actions, Ms. Ta was refusing medical help – thus her focus, her motive, and her primary (if not sole) purpose, was, instead, that Mr. Reed be apprehended, prosecuted and jailed on the basis of her criminal accusations.

The second 911 call, and Ms. Ta's statement to Officer Bagsby, were decidedly testimonial, in their entirety, and they should have been excluded in their entirety, rather than having the portions that confirmed their testimonial nature "redacted."

d. Reversal is required absent "overwhelming evidence" that Mr. Reed committed assault by strangulation.

Constitutional error is presumed to be prejudicial, and the State that bears the burden of proving that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

That burden cannot be met. Once the erroneously admitted evidence is removed, the untainted evidence alone must be "so overwhelming" that it would still, necessarily, lead to a finding of the defendant's guilt on the charged offense. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In this case, the totality of the evidence at trial was far from overwhelming. Once the improperly admitted, unfronted statements are removed from consideration, the remainder of the evidence certainly is not.

Even if the first 911 call (in which Ms. Ta states that Mr. Reed "choked" her) is deemed non-testimonial and properly admitted, the remaining evidence of actual assault by strangulation

was underwhelming once the second 911 call and the statement to Officer Bagsby are removed from consideration.

There was in fact never any allegation by Ms. Ta that she had been unable to breathe, or that her blood flow had been restricted. See RCW 9A.36.021(1)(g).⁸ Had the State not made the tactical choice to prosecute without Ms. Ta, defense counsel could have inquired of the witness and shown that the claim of choking was untrue, and could have demonstrated the absence of all these essential aspects of the State's required proof. See Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized,

⁸ Strangulation does not occur merely by placing one's hands on a person's neck, or even by causing the compression of a person's neck. Rather, one must compress a person's neck and thereby obstruct blood flow or breathing. RCW 9A.36.021(1)(g) states:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

* * *

(g) Assaults another by strangulation.

RCW 9A.04.110(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 reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”).

Importantly, the defendant’s alleged acts of Tampering with a Witness (resulting in Count II) consisted of vague, non-specific statements by Mr. Reed in jail phone calls, requesting Ms. Ta speak or write to the prosecutor and tell the truth that Mr. Reed had not done anything to her, but they contained no statements that added anything to support the State’s factual proof of assault by “strangulation.” Exhibit 13.

There was certainly no expert medical testimony explaining whether certain injuries showed there surely must have been obstruction of Ms. Ta’s blood flow or breathing.

There were also no eyewitnesses called to trial to describe any claimed strangulation of Ms. Ta, despite the apparent presence of other persons at both locations where the alleged physical abuse occurred. Ms. Ta can be heard talking to others (not the defendant) in the first 911 call, and in the second call she states that others were present in the vehicle where the alleged second assault occurred. Exhibit 16. None of these individuals testified.

Given all these circumstances, it is unsurprising that the jury needed to listen to the 911 calls again before it reached a verdict,

which in this supposedly simple case required that deliberations resume for a second and almost full day. CP 145 (jury note); Supp. CP ____, Sub # 73 (minutes of January 11, 2011 and January 12, 2011). If the evidence presented had been overwhelming, it would not have taken the jury this amount of time to reach a verdict. Absent the improperly admitted evidence, the remaining evidence certainly does not meet that standard.

Indeed, the jury's rejection of the "pregnancy" aggravating factor demonstrates that the jurors certainly did not find Ms. Ta's believability in those 911 calls to be substantial. Yet her claim of pregnancy was supported by nothing more than the 911 recordings, in which she also claimed, with similar anger and fervency, to have been "choked."

Based on the photographs of Ms. Ta's apparent facial-area injuries (for which she refused all medical treatment), the jury in this case plainly concluded that Mr. Reed had done *something* to Ms. Ta. But in order to survive confrontation error, there must be overwhelming evidence, not of "something," but of assault by strangulation. There was not.

Notably, the prosecutor's own assessment of the strength of its strangulation case was so very low, that the prosecutor

requested a lesser degree offense instruction of simple assault, and the trial court deemed such instruction warranted. CP 133-35 (fourth degree assault instructions); Supp. CP ____, Sub # 54 (State's Proposed Jury Instructions). This fact seems utterly incompatible with any claim by the Respondent on appeal that the remaining evidence of a strike-level assault by strangulation is "overwhelming." This Court should reverse.

2. MR. REED'S RIGHT TO CONFRONTATION WAS VIOLATED WHERE THE STATE SIMPLY CHOSE FOR TACTICAL REASONS TO NOT CALL MS. TA, AND SHE WAS NOT SHOWN TO BE "UNAVAILABLE."

a. The prosecutor "chose" not to bring the complaining witness, Ms. Ta, into court for tactical reasons. Before and during trial, the defense repeatedly argued to no avail that Mr. Reed's rights to confrontation and to a fair trial required the State to bring in the complaining witness for trial and confrontation by the accused. See, e.g., 1/3/11RP at 38-39.

[The] State has basically announced that they're not going to use Ms. Ta and, therefore, are going to proceed without her. But I have requested that the witness be produced so that my client can exercise his right to confrontation.

1/3/11RP at 38-39. See also 1/3/11RP at 69-70 (arguing that confrontation, Mr. Reed's right to a fair trial, and due process required the State to "produce the witness").

The prosecutor refused to obtain Ms. Ta for trial and confrontation, announcing, "We're not going to do a material witness warrant. Counsel could do a material witness warrant. We're not going to." 1/3/11RP at 66. The prosecutor conceded that the State simply did not believe it was a "good idea" to seek a warrant to obtain Ms. Ta's presence, and instead was simply choosing to "go forward without her" once she indicated she would not come to court on the basis of her subpoena. 1/3/11RP at 69 (also stating, "We just are not choosing to have her arrested to come and testify").

Discerning the issue as a troubling one, the trial court required further information from the State regarding its efforts if any to seek Ms. Ta's presence. Remarkably, all the prosecutor could offer at that point was to tell the court that Ms. Ta "wants to be left alone" and that she was "too busy with work and school." 1/4/11RP at 3-4. Additionally, the prosecutor stated that he himself had called Ms. Ta "yesterday," and she told him that she was sick ("she was blowing her nose and she seemed kind of congested").

b. The right to confrontation was violated where Ms. Ta was not shown to be “unavailable.” Absent this Court’s adoption of the “Greta Garbo” doctrine of unavailability, Ms. Ta’s desire to be “left alone” is inadequate to show she was unavailable for Sixth Amendment purposes. A witness is unavailable under the Confrontation Clause only if the witness was demonstrably unable to testify in person. Crawford, 541 U.S. at 45. Before a witness can be declared unavailable, the State must make a good-faith effort to obtain the witness’ presence and the witness must rebuff that effort. Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). Good faith requires untiring efforts in good earnest. State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988).

The prosecutor’s efforts in this case were neither untiring nor in earnest. Rather, the State made only symbolic efforts to obtain her presence, desiring as it did, as a matter of trial strategy, that Ms. Ta not appear. “[C]ourts have required prosecutors to utilize available statutory procedures to produce a witness for trial before the witness may be considered unavailable.” Smith, 148 Wn.2d at 133.

Ms. Ta's flouting of the subpoena did not allow the prosecutor to abandon his responsibility to procure her for trial and cross-examination. A witness' mere failure to honor a subpoena is insufficient to show unavailability. Rivera, 51 Wn. App. at 560.

Issuance of a warrant, coupled with other efforts, may satisfy the standard. Rivera, 51 Wn. App. at 560. But here, the prosecutor refused to seek a material witness warrant, and told the defendant to get one, over counsel's protestations it was not her job to secure the trial attendance of the complainant in an assault case. 1/3/11RP at 66. "If it becomes apparent that a witness is no longer cooperating, resort to statutory mechanisms to compel attendance must be utilized." Rivera, 51 Wn. App. at 560 (citations omitted). Here, they were not.

For example, in Rivera, the complaining witness, Pearrow, was subpoenaed by the State but failed to appear. Pearrow's statement was admitted over Rivera's objection. Her statement was the only evidence connecting Rivera with the charged burglary. Rivera, 51 Wn. App. at 558. Finding admission of Pearrow's statement was error, the Court held that the State could not claim good faith solely on the issuance of the subpoena, where police failed to question Pearrow's mother about her daughter's

whereabouts. The Court noted that police knew of Pearrow's whereabouts. The Court further noted that "good faith" required more than the issuance of the subpoena, particularly where Pearrow's statement was the only evidence connecting Rivera with the burglary. Rivera, at 560-61.

Here, the State's reliance on having issued a subpoena failed in this case to establish Ms. Ta's unavailability for constitutional purposes. Ms. Ta's strong desire not to testify was certainly insufficient. As in Rivera, where the complainant's 911 statements and police statement were the only substantive evidence suggesting her photographed, untreated injuries were a result of assault by strangulation, the State cannot claim good faith solely on the issuance of the subpoena. Mr. Reed's confrontation rights were violated.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. REED'S REQUEST FOR A MISSING WITNESS INSTRUCTION.

a. The trial court denied Mr. Reed's request for a "missing witness" instruction. As noted supra, the State made a tactical choice to not call Ms. Reed, and admitted as much, over the defendant's repeated objections. Then, at the end of trial, to add

insult to injury, the State argued against the defense request for a “missing witness” instruction, and the court refused the defense’s formal request for such an instruction despite the complainant being plainly the State’s witness. 1/11/11RP at 232-33. The court ruled:

I don’t see that Ms. Ta is in the control of the State, because they’ve talked to her several times and tried to get her in as a witness, and she keeps saying she doesn’t want to come to court.

1/11/11RP at 232-33. The court denied the defense request for a missing witness instruction, and this ruling was in error.

b. A criminal defendant is entitled to a missing witness instruction where the State fails to produce an available witness that would naturally be expected to testify for the State. Pursuant to the “missing witness” rule, where a party fails to call a witness, when it would be natural for that party to produce the witness, the jury may infer that the witness’s testimony would have been unfavorable to that party. State v. Russell, 125 Wn.2d 24, 90, 882 P.2d 747 (1994); State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). The missing witness instruction, which Mr. Reed requested, allows the party requesting it to tell the jury it may so assume. WPIC 5.20.

If a party does not produce the testimony of a witness who is within the control of that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

Washington Pattern Jury Instructions: Criminal 5.20. The required inference – that a party is not calling a witness as a result of its belief she will testify unfavorably -- arises when the witness is peculiarly available to the party failing to call her. State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968); see Blair, 117 Wn.2d at 489.

Here, the complaining witness, Ms. Ta, was peculiarly available to the State. In the course of detailing the State's reasons for choosing not to bring in Ms. Ta, the prosecutor described his and his office's constant contacts with the complainant that demonstrated she was closely connected with the State. The State of course knew where Ms. Ta was and how to reach her. 1/3/11RP at 69. Ms. Ta had spoken with another deputy prosecutor, Atchison, and indicated her original allegations were false, and further, Ms. Ta had also "been in contact with the victim's advocate for the entire case." 1/3/11RP at 67. The advocate served as a liaison between Ms. Ta and the prosecutor's office, communicating

matters such as the fact that she did not “wish to participate.”

1/3/11RP at 67. Ms. Ta had been served with a subpoena and knew of the trial date, but she told the prosecutor’s paralegal that she would not come to trial. 1/3/11RP at 68.

These facts demonstrate both that Ms. Ta was the State’s witness, and that the prosecutor was not actively seeking to obtain her presence for the very reason that it feared she would testify unfavorably to the State.

Certainly, Ms. Ta was not Mr. Reed’s witness to call or not call. A defendant is not barred from obtaining a missing witness instruction merely because it was possible the defendant could have also subpoenaed the witness. State v. McGhee, 57 Wn. App. 457, 462, 788 P.2d 603, review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990). Furthermore, because Mr. Reed was not in a position to contact Ms. Ta, she certainly should not be seen as particularly available to him. See e.g., State v. David, 118 Wn. App. 61, 67, 74 P.3d 683 (2003), reversed on other grounds, 160 Wn.2d 1001 (2007) (victim of domestic violence not accessible to defense counsel because of domestic violence allegations).

The State will likely argue that it would not be “naturally expected” to call a witness who has recanted her allegations, and

that therefore Ms. Ta was not the “State’s witness.” This Court should once and for all reject this cynical, circular contention, which turns the missing witness rule on its head, attempting to employ the very justification for the instruction as a means of circumventing it.

The State did not call Ms. Ta because it believed, if required to attend, she would give live testimony unfavorable to its case. Under this classic scenario, the defense asked to be allowed to tell the jury it could so assume. The State cannot avoid operation of the rule by contending that Ms. Ta was not “its witness” under the rationale that it believed she would testify unfavorably. That is precisely the reason why the defendant is entitled to a missing witness instruction, and the State’s circular reasoning should be rejected, outright, by this Court.

A missing witness instruction would have allowed the defense to tell the jury it could assume that the State’s failure to call Ms. Ta for live testimony was because it believed that testimony would have hurt the State’s case. That is to say, the instruction would have allowed the defense to tell the jury the truth.

c. The trial court’s failure to give Mr. Reed’s proposed missing witness instruction requires reversal. As a result of the trial court’s erroneous ruling, in closing argument, the prosecutor

escaped the burden of the missing witness instruction that should properly have been given.

Quite remarkably, in closing, the State instead usurped for itself the benefit of the accuser's absence. Referring to the traditional ways a jury evaluates the credibility of a live trial witness, the prosecutor told the jury that Ms. Ta had demonstrated her demeanor and believability to the jury through the 911 operators and Officer Bagsby, because she had been upset during her accusations. 1/11/11RP at 246-48. Additionally, over objection, the prosecutor told the jury that Ms. Ta was not needed at trial, and that for all essential purposes she did "testify:"

Didn't need to hear from Ms. Ta, nor is there a requirement in any of the elements that show we're required to produce her. So, let's look at her testimony, because she did testify. She testified through the 911 calls and she testified through the jail calls, because that was admitted into evidence, the 911 tape.

MS. THOMAS: Objection. I'd ask that the last remarks be stricken for characterization of testimony.

1/11/11RP at 245-46.⁹ Thus the prosecutor cleverly obtained the benefit of rhetorically proffering "live" testimony by Ms. Ta – without

⁹ The court instructed the jury that counsel's argument was not evidence. 1/11/11RP at 246.

the detriment of submitting her for confrontation and cross-examination by the defendant.

If the trial court had properly granted Mr. Reed's request for a missing witness instruction, his counsel would have been able to tell the jury that not only had Ms. Ta taken back her accusations in writing in the form of the recantation letter, but that the State could be assumed to have failed to call her as a witness because it feared her live, in-court testimony would have been similar. This unquestionably would have had a powerful affect on a conflicted jury, had the defense been able to make such argument with support from the trial judge's instructions of law. Reversal of Mr. Reed's convictions is required.

4. THE COURT'S INSTRUCTIONS ON ASSAULT BY STRANGULATION RELIEVED THE STATE OF THE BURDEN OF PROVING THE ESSENTIAL ELEMENT OF INTENT TO STRANGLE, VIOLATING MR. REED'S RIGHT TO PROOF OF EVERY ELEMENT BEYOND A REASONABLE DOUBT.

a. The jury instructions failed to instruct the jurors that intent is required for strangulation. The trial court's jury instructions in Mr. Reed's case did not delineate the intent necessary for the assault and the alleged strangulation, but instead conflated the two into one instruction. The jury was given the

standard definition of assault as an intentional touching, and was instructed that a person acts intentionally “when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 127 (Jury instruction 7); CP 128 (Jury instruction 8).

The “to convict” instruction stated in relevant part:

To convict the defendant of the crime of assault in the second degree in count one, each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That on or about January 23, 2010, the defendant intentionally assaulted Nat E. Ta by strangulation; and
- (2) That the act occurred in the State of Washington.

CP 132 (jury instruction 12). Jury instruction 10 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 130 (Jury instruction 10). The trial court did not instruct on the intent, if any, necessary for strangulation. This amounted to a mandatory presumption regarding the intent to strangle element of the crime, violating Mr. Reed’s right to due process.

b. Mandatory presumptions relieve the State of its burden of proof on every element of the offense, and violate due process. Due process requires that the State bear the burden

of proof beyond a reasonable doubt on every essential element of a crime. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A misstatement of the law or a “mandatory presumption” in a jury instruction that relieves the State of its burden to prove every element of an offense is a violation of due process, and requires automatic reversal. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Mandatory presumptions violate a defendant's right to due process because they relieve the State of its obligation to prove all of the elements of the crime charged. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996) (citing Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

Specifically, a mandatory presumption is constitutionally improper because, by instructing the jury that one element is proved upon proof of another, it relieves the State of its burden to prove each and every element of the crime. Deal, 128 Wn.2d at 701; Sandstrom, 442 U.S. at 517.10

¹⁰ Mandatory presumptions that relieve the State of its burden of proving an essential element of the offense are subject to initial challenge on appeal. State v. Goble, 131 Wn. App. 194, 203, 126 P.3d 821 (2005).

In general, jury instructions must properly inform the trier of fact of the applicable law. State v. Gerdtz, 136 Wn. App. 720, 727, 150 P.3d 627 (2007); State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). When reviewing the effect of specific jury instruction's phrasing, the instruction is considered as a whole and within the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). Alleged errors of law in jury instructions are reviewed by this Court *de novo*. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); Pirtle, 127 Wn.2d at 656.

c. The court's instructions conflated the intents required for the assault and strangulation, creating a mandatory presumption which relieved the State of proving the latter. The trial court properly instructed the jury that it must find that Mr. Reed intentionally assaulted Ms. Ta, but it did not instruct the jurors regarding the intent required for strangulation. The court's instructions, as a whole, acted as a mandatory presumption of intent as to the strangulation element, thus requiring reversal of his conviction for second degree assault.

The second degree assault statute, RCW 9A.36.021(1)(g), provides in relevant part:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

* * *

(g) Assaults another by strangulation.

RCW 9A.36.021(1)(g). 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). The statutes do not specifically note an intent for the element of strangulation. Nevertheless, the statutes of second degree assault and strangulation can only be interpreted as criminalizing acts of strangulation that are intentional, and under due process, the State bore the burden of proving that Mr. Reed intentionally strangled Ms. Ta, in order to secure conviction.

Instructive on this issue are the decisions in State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009), and State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). In Hayward, a challenged instruction provided in part that “[r]ecklessness is also established if a person acts intentionally.” Hayward, 152 Wn. App. at 640. The Court of Appeals held that this instruction – whose

purpose is to indicate that a person who intentionally did an act is certainly guilty of having recklessly done that act -- resulted in conflation of the *mens rea* for assault with that required for the result, thereby relieving the State of its burden of proving the separate element of reckless infliction of substantial bodily harm. Hayward, 152 Wn. App. at 645. Specifically, “the jury instruction . . . impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted [the victim].” Hayward, at 645.

Similarly, in Goble, the Court of Appeals determined that identical “knowledge” language contained in a third degree assault “to convict” jury instruction created an impermissible mandatory presumption. Goble, 131 Wn. App. at 203-04. The Court held that the “knowledge” language was confusing because it potentially allowed a lay jury, not schooled in deciphering legal enactments, to find Goble guilty of third degree assault against a law enforcement officer performing his official duties if it found the defendant intentionally assaulted the victim. Goble, 131 Wn. App. at 203.

Applying those principles and proscriptions here, the jury instructions in this case erroneously told the jury that if Mr. Reed intentionally placed his hands on Ms. Ta’s neck, he must also be

deemed to have intentionally cut off her breathing or blood flow. It should be immediately obvious that in this case, this instructional error carried significant consequences, in a case where (if the jury believed Ms. Ta's tape recorded accusations) the defendant plainly touched Ms. Ta, but there was no specific proof he intentionally strangled her.

The act of strangulation is the element which elevates a harmful touching (simple assault, a gross misdemeanor), to second degree assault, a Class B felony. Under due process not only must the act of strangulation be proven, but the intent necessary for strangulation as well. As in Hayward and Goble, the trial court's instruction here conflated the two required intent elements – telling the jury that if it found Mr. Reed had intent to assault (harmful or offensive touching), he also necessarily had an intent to strangle. Similar to Hayward and Goble, this acted as a mandatory presumption of one element from the proof of another, which violates due process. And there was no other instruction in the Court's packet which might clarify that the State was required to prove that Mr. Reed had an intent to strangle.

As a result, the jury was never instructed regarding the requirement of "intent to strangle" and Mr. Reed is entitled to

reversal of his conviction, obtained as it was by instructions which relieved the State of proving each and every element of the crime.

The only means available for the State to avoid the consequences of the erroneous jury instructions would be to contend that the prosecution was not required to prove intent to strangle in the first place.

d. The Legislature did not intend RCW 9A.56.021(1)(g) to be a strict liability crime as to the element of strangulation.

Since the statute is silent regarding the intent necessary for the strangulation element, it might be argued that this element is one of strict liability: once proof of the intent to assault is proven, there is no requirement of proof of intent to strangle. The statute certainly does not say this, and Mr. Reed argues that it plainly requires intent to strangle. At worst, the statute is ambiguous regarding whether intent is necessary for strangulation since there are two reasonable interpretations of the statute.

If the statute is ambiguous, principles of statutory construction must be employed to discern the Legislature's intent when enacting the statute. Those canons indicate that the statute must be interpreted to require intent, and therefore, the foregoing

analysis, indicating that the jury instructions mandated that the second intent is established by proof of the first, applies.

If a statute's plain 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). “A statute is ambiguous if its language is susceptible to more than one reasonable interpretation.” Wofford, at 878 (citing State v. Bunker, 144 Wn. App. 407, 415, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010)).

The Legislature does have the authority to create criminal offenses without a *mens rea* element. State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). When the Legislature does so, it is creating “strict liability” crimes, that criminalize conduct regardless of whether the actor possessed a culpable mental state. State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). To determine whether the legislature did so in a particular instance, courts consider the language and legislative history of the law. State v. Bash, 130 Wn.2d 594, 604-05, 925 P.2d 978 (1996).

However, strict liability crimes are heavily disfavored, because society punishes persons only for purposeful wrongdoing. Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128

L.Ed.2d 608 (1994) (quoting Morissette v. United States, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). Consequently, the Washington courts generally resist the enthusiasm of prosecutors to pounce upon hastily-drafted criminal statutes and use them to prosecute defendants for acts unaccompanied by wrongful intention.

A well-know recent example is the VUFA offenses. In Anderson, supra, the Supreme Court was called upon to decide whether second degree unlawful possession of a firearm was a strict liability offense -- one not requiring any knowledge. Anderson, at 361. To determine whether the Legislature intended to create VUFA as a strict-liability crime, the Court first looked to the language of the statute and its legislative history, but found these inconclusive on the question. Anderson, at 362. However, given that offenses with no *mens rea* element are disfavored, and “that a statute will not be deemed to be one of strict liability where such construction would criminalize a broad range of apparently innocent behavior,” the Court found that the Legislature did intend the statute to require proof of a culpable *mens rea*, there, knowledge. Anderson, at 364.

Looking to the legislative history, in adding the “assaults another by strangulation” subsection to RCW 9A.36.021, the Legislature stated:

The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW.

(Emphasis added.) Laws 2007 ch. 79 § 1.

This statement, read in conjunction with the language of the statute, indicates that the conduct targeted by RCW 9A.36.021(1)(g) is the purposeful strangulation of a person – a physical act of compression of the neck, purposefully causing the delineated harm of obstructing blood flow or breathing. See RCW 9A.36.021(1)(g). Certainly, the legislative statement does not evidence a clear intent by the Legislature for there to be no mens rea element as to strangulation. Absent such expression of clear intent to establish a strict liability crime, following Anderson, supra,

and keeping in mind the fact that crimes without *mens rea* are disfavored, the Legislature must have intended there be evidence of an intent to strangle.

e. Regardless of the outcome of statutory interpretation, under the rule of lenity, any ambiguity in RCW 9A.36.021(1)(g) must be resolved in favor of Mr. Reed. Since RCW 9A.36.021(1)(g) is ambiguous, the rule of lenity applies and this Court must construe the statute in Mr. Reed's favor. Mr. Reed is therefore entitled to reversal of his conviction for the trial court's failure to instruct on an essential element of the offense.

If a statute is ambiguous, the appellate court must 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). If the statute remains ambiguous after both attempting to determine the plain meaning and after resorting to tools of statutory construction, the rule of lenity applies. In re Personal Restraint of Sietz, 124 Wn.2d

645, 652, 880 P.2d 34 (1994); State v. Johnson, 159 Wn. App. 766, 776, 247 P.3d 11 (2011).

Here, there are two reasonable interpretations of RCW 9.36.021(1)(g). This ambiguity is not resolved by resort to plain language or statutory construction analysis, and this Court must interpret the statute in Mr. Reed's favor. Jacobs, 154 Wn.2d at 600. As a result, the trial court was required to instruct the jury in a manner that made clear that the State had to prove beyond a reasonable doubt that Mr. Reed intended to assault, and intended to strangle, Ms. Ta. Since the jury was never instructed it had to find the latter intent, Mr. Reed's conviction must be reversed. See State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986) ("[F]undamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.").

5. THE PROSECUTOR'S INTENTIONAL MISSTATEMENT REGARDING THE DURATION OF THE PRESUMPTION OF INNOCENCE VIOLATED MR. REED'S RIGHT TO DUE PROCESS.

Lay jurors tend to trust the prosecutor when he explains to them what the important legal principles are that apply in criminal cases, because he is a representative of the State and the

community, with an obligation to do justice, not to just win the case. See United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934).

That trust was misplaced in this case. When the prosecutor misstates the law about something as important as the presumption of innocence, his obligation to do justice has been ignored. “[A] misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.” State v. Johnson, 158 Wn. App. 677, 243 P.3d 936, 940-41 (2010) (finding misconduct in arguing to the contrary so flagrant and ill-intentioned that it could not have been cured by objection and a curative instruction, and therefore reversing)); U.S. Const. amend. 14.

Here, in rebuttal closing argument, the deputy prosecutor misstated this bedrock principle of law in a particularly prejudicial manner -- not only did the prosecutor state the law incorrectly, he contradicted defense counsel’s proper statement of the law. Defense counsel stated -- in her sole and only opportunity to address Mr. Reed’s jury -- that the presumption of innocence lasts

up to, if, and until the jury finds a defendant guilty, at the end of deliberations. See 1/11/11RP at 259-60. Defense counsel properly told the jury:

The only way for a cloak of innocence to be removed from a Defendant in any courtroom in this country, is after careful deliberation by a jury, a jury is convinced beyond a reasonable doubt of each and every element of a crime that the Defendant is guilty, and only at the conclusion of such deliberations can that cloak of innocence be removed.

1/11/11RP at 259-60. Astonishingly, the deputy prosecutor then stood up and told the jury that the opposite was true. The prosecutor first misrepresented what defense counsel had correctly told the jury, and then seriously misstated the law regarding the bedrock principle that the presumption of innocence lasts until the end of deliberations.

Counsel is absolutely right; the presumption of innocence is something we all take very seriously. It's an – incredibly important, and that presumption does last all the way until you walk into that room and start deliberating. Let's – let's look at that cloak. Let's look at that protective cloak and see if counsel's contention has destroyed the insurmountable evidence that State has already showed.

(Emphasis added.) 1/11/11RP at 267-68. Not only did the State misrepresent how long the presumption of innocence lasts, he bolstered this incorrect statement by telling the jury that in Mr.

Reed's case, the presumption had been destroyed by the "insurmountable" evidence that he had proffered during the evidence phase.

But the presumption of innocence lasts longer than the time the jury first walks into the jury room to begin deliberating.

This principle is, of course, no new concept. See, e.g., United States v. Fleischman, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950); see also U.S. Const. amend. 14.

However, recent Washington cases have emphasized the flagrancy of misconduct where a prosecutor tells the jury differently. As was emphatically stated by the Court in 2010, the presumption of innocence continues throughout the entire trial and is only overcome, if it is overcome at all, when deliberations end with a result of a jury decision finding guilt. State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)).

In Venegas, the prosecutor stated in closing that the presumption of innocence "erodes" every time the jury hears evidence of the defendant's guilt. The Court of Appeals held that

the prosecutor committed flagrant misconduct by making this improper argument. Venegas, 155 Wn. App. at 525.

And in State v. Evans, ___ Wn. App. ___, 260 P.3d 934 (2011), the Court of Appeals specifically held that a prosecutor's statement during closing argument, claiming that the presumption "kind of stops once you start deliberating," was yet another example of a "flagrant" prosecutorial misstatement contrary to law. Evans, 260 P.3d at 938-39.

The prosecutor's remarks in Mr. Reed's case were virtually identical. Regrettably, the Evans decision came too late, in September of 2011, to apprise the deputy prosecutor of the flagrant misconduct of his precise misstatement. But as noted these principles regarding the durability of the presumption of innocence are not new. See also State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt. Yet the prosecutor's comment invited the jury to disregard the presumption once it began deliberating, a concept that seriously dilutes the State's burden of proof.

(Emphasis added.) Evans, 260 P.3d at 938-39.

The prosecutor's argument warrants reversal. Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." United States v. Young, 470 U.S. at 18-19. That is exactly what likely occurred here.

In this case, the prosecutor's comments were made in the State's rebuttal arguments. Defense counsel, in her closing, had properly and eloquently told the jury that the presumption of innocence lasts until this jury assessed the evidence and actually reached a verdict of guilty. 1/11/11RP at 259-60.

When the prosecutor followed the defense argument with rebuttal argument contradicting counsel's statement of the law, this left a lasting impression – here, an incorrect one – as to the presumption of innocence. Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereignty, his improper suggestions were "apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S.

at 88. This lay jury would have concluded that the prosecutor was either (a) correcting the defense advocate's wrong or imprecise statement of the law, and/or (b) that the defendant's lawyer had agreed that the presumption ends at the beginning of deliberations.

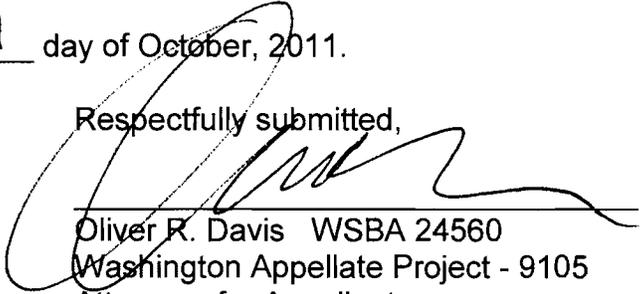
Particularly given the fact that the prosecutor's argument contradicted defense counsel's previous, correct statement of the law, and should have reminded the prosecutor of his burden to state the law correctly and reminded the prosecutor what that law is, it was clearly an intentional misstatement of the presumption of innocence, designed to mislead the jury and lessen the State's burden of proof. As in Johnson, 158 Wn. App. 677, supra, this Court should reverse.

E. CONCLUSION

Based on the foregoing, Mr. Reed respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 31 day of October, 2011.

Respectfully submitted,



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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CLEO PALMER REED
AKA CLEO REED PALMER,

Defendant.

No. 10-1-06063-1 SEA

TRANSCRIPT OF 911 CALLS

(Track #1)

OPERATOR: 911.

FEMALE: You know...hello yeah, yeah, yeah. [talking to someone in background].

OPERATOR: Yeah.

FEMALE: Can you...can you bring somebody here because...

OPERATOR: What address?

FEMALE: ...I...he um, he...eh, he um, try...

OPERATOR: Okay, what address are you at?

FEMALE: Uh, is in...in Kent right by...

OPERATOR: Can you give me your address?

1 FEMALE: (Unintelligible) I don't know where he put his wallet in my house. And you know
2 and I asked him (unintelligible) to go and he choking me...
3 OPERATOR: Can you...
4 FEMALE: ...he scratching me (unintelligible)...
5 OPERATOR: ...what...what address are you at?
6 FEMALE: ...you know he punched my lip, yeah.
7 OPERATOR: I need...I need your address.
8 FEMALE: I live right by (unintelligible).
9 OPERATOR: What is your street address?
10 FEMALE: Yeah, right by (unintelligible).
11 OPERATOR: Give...give me...give me the address that you're at right now.
12 FEMALE: (Unintelligible) [talking to someone in background].
13 OPERATOR: Talk...talk...don't talk to them.
14 FEMALE: Look, look, look, look and he threatening me right now he (unintelligible).
15 OPERATOR: Okay, but I...I wanna send you help as soon as possible...
16 FEMALE: Yeah, he...
17 OPERATOR: ...I need...I need to know your...
18 FEMALE: ...(unintelligible) my whole family.
19 OPERATOR: I need...
20 FEMALE: You know I...I love him. He...he...
21 MALE: [Talking in background].
22 FEMALE: ...you know he...he...
23
24

1 OPERATOR: I really need to know your address in order to send people so what is your
2 address?

3 FEMALE: Yeah...

4 OPERATOR: Okay, alright but what's your address?

5 FEMALE: Yeah...

6 OPERATOR: I need to know...

7 FEMALE: [Talking to someone in background].

8 OPERATOR: ...what your address is. What is your address?

9 FEMALE: [Phone disconnects].

10

11 -Call Ends-

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1 (Track #6)

2 OPERATOR: 911.

3 OPERATOR: (Unintelligible) with a transfer.

4 OPERATOR: Thank you, hello?

5 FEMALE: Hello?

6 OPERATOR: Hi, how can I help you?

7 FEMALE: Yeah, yeah, yeah this mother fucker he just beat me up right now because you
8 know he...

9 OPERATOR: At what address?

10 FEMALE: ..he mu...I don't know he drop me off here at the Renton somewhere.

11 OPERATOR: You're (unintelligible)?

12 FEMALE: Yeah, I'm Ren...I'm at Renton right now somewhere.

13 OPERATOR: Okay, what (unintelligible)?

14 FEMALE: Um, his name...his name uh...

15 OPERATOR: Okay, ma'am I don't need his name yet. What address are you at?

16 FEMALE: I don't know, I'm...I'm...I'm lo...I'm right by um, the...I'm right by the uh,
17 what cha call...I'm right by um, uh, what you call uh, the...I'm right by um...

18 OPERATOR: You see a street sign anywhere?

19 FEMALE: Yeah, I'm...I'm...I'm walking down the street right now I need to get home too.
20 And...and I need somebody (unintelligible) take uh, come back and take me...I
21 mean get me home. Because, he choking me, he beat me up, I'm bleeding on my
22 nose and he's supposed to be my...my fiancée and...and we have kid together...

23 OPERATOR: Okay.

1 FEMALE: I'm pregnant right now.
2 OPERATOR: Can you find a street sign?
3 FEMALE: I am at the bus stop right now at um, what you call...um, uh, I don't really know
4 um....
5 OPERATOR: Is there a business nearby?
6 FEMALE: Yeah, it's um, and I got his uh, I don't know where (unintelligible) but I got uh,
7 I'm right by Freddie Renton.
8 OPERATOR: By what?
9 FEMALE: I'm on...I'm in Renton...Renton uh, what you call uh, I am on Renton Street,
10 they say Renton Avenue exit.
11 OPERATOR: Renton Avenue, what's the nearest cross street?
12 FEMALE: Uh, it's...it's you know right by the Freddie Club Casino?
13 OPERATOR: Freddie's Club?
14 FEMALE: Yeah, yeah right by there.
15 OPERATOR: Are you right in front of that address?
16 FEMALE: No, I'm...I'm walking towards there right now.
17 OPERATOR: Okay, how long will it take you to get to Freddie's Club?
18 FEMALE: Uh, I don't know how...it is not that long but I'm...I'm not there right now.
19 OPERATOR: A couple of minutes?
20 FEMALE: Yeah, a couple minutes, please....
21 OPERATOR: Where did he actually hit you at?
22 FEMALE: Wh...when he pick me up from uh, (unintelligible) in uh, Seattle right by his
23 mom's house.
24

1 OPERATOR: So, it happened in Seattle?
2 FEMALE: No, it happened on the way to...
3 OPERATOR: In the car?
4 FEMALE: ...to my house. Yeah, in the car and his cousin driving. I know his cousin phone
5 number...cell phone number too.
6 OPERATOR: Okay, hang on, hang on.
7 FEMALE: Yes.
8 OPERATOR: How long ago did this actually happen?
9 FEMALE: Just now, just now. He beat me up he...
10 OPERATOR: Like a minute or five minutes ago?
11 FEMALE: Yeah, yeah, yeah, yeah just right now (unintelligible).
12 OPERATOR: How many minutes?
13 FEMALE: Just like 5 minutes just right now, yeah. And...and...and I'm pregnant with his
14 baby too.
15 OPERATOR: Is he still there?
16 FEMALE: No, he in the car with his cousin. He um, drive...
17 OPERATOR: Hang on a minute, you need any medical help?
18 FEMALE: You know I'm...I'm good you know. I don't know because um...
19 OPERATOR: You need me to...
20 FEMALE: ...my nose is bleeding.
21 OPERATOR: ...send the fire department or no?
22 FEMALE: I...I need a cop to come here and just...
23 -Call Ends-