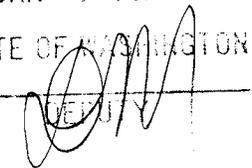


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 40992-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

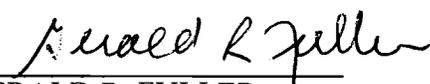
JARROD A. AIRINGTON,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 

GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural Background

The defendant was charged by Information on May 6, 2010, with Assault in the Second Degree - Domestic Violence, RCW 9A.36.021(1)(g); RCW 10.99.020. The information alleged that the defendant intentionally assaulted his live-in girlfriend, Hannah E. Goedker, by strangulation (CP 1-2). The defendant waived his right to trial by jury and the matter was tried to the court. The defendant was found guilty of Assault in the Fourth Degree - Domestic Violence, RCW 9A.36.041, RCW 10.99.020. Written findings were entered by the court (CP 30-32).

FACTUAL BACKGROUND

At about 8:35 p.m. on April 22, 2010, Officer Gary Sexton of the Aberdeen Police Department was dispatched to a domestic violence assault in progress at 110 North Mill Street, Aberdeen, Grays Harbor County, Washington (RP 59). Upon arrival, Officer Sexton contacted Teddy Moore who was standing out on the street. Moore directed him to the defendant's apartment (RP 60). Sexton pulled up to the apartment and walked up on foot. At that point, he was the only officer who had arrived (RP 61). As he prepared to knock on the door, the defendant came around the building and contacted him (RP 62). Sexton observed that the defendant's face was red and swollen. The defendant explained that he had been punching himself in the face (RP 62-63).

By this time, two other officers had arrived. Sexton directed the defendant to Officer Parkinson and Officer Glaser. Sexton went to the door and contacted Hannah Goedker (RP 63). Ms. Goedker was crying, breathing heavily and having a hard time catching her breath. She told Sexton that she had been choked by the defendant. She said she thought she was going to die (RP 64-65, Finding of Fact 4, CP 31). Sexton observed injuries to Ms. Goedker's neck consistent with her statement that she had been choked. There was reddening around both sides of her neck (RP 65). Those injuries were still present the following morning when Ms. Goedker spoke to Detective Jon Hudson of the Aberdeen Police Department (RP 75).

Ms. Goedker testified at trial. She explained that she and the defendant had been living together at 110 Mill Street, Apartment No. 2 in Aberdeen for approximately a month prior to the incident (RP 41-42, Findings of Fact 1, CP 30). She described the defendant as her boyfriend (RP 42). By the time of trial, however, the victim purported to lack a recollection of the events (RP 43-44). She did recall that she and the defendant were having an argument and that at one point the defendant came over and straddled her as she was sitting on the couch (RP 44). The defendant was punching himself and later grabbed her arms (RP 45-46). At one point he let go of her and she slid onto the floor and the defendant sat on top of her as the argument continued (RP 46).

The upstairs neighbor heard the argument, looked outside, and saw the defendant grab Ms. Goedker and pull her back into the apartment (Findings of Fact 2, CP 31).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The defendant was properly convicted of Assault in the Fourth Degree (Response to Assignments of Error 1 and 2)

Contrary to the assertions of the defendant, this is not about separation of power. This is not about a trial court acting as the prosecutor. The defendant has a basic misunderstanding of the responsibilities of the trier of fact.

The verdict herein is governed by statute, RCW 10.61.003, which provides as follows:

“Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.”

The statute means what it says. It applies to both jury trials and bench trials. State v. Peterson, 133 Wn.2d 885, 948, P.2d 381 (1997). An accused may be convicted of a crime which is an inferior degree of the charged crime. State v. Fernandez-Medina, 141 Wn.2d 448, 454 P.3d 1150 (2000). This is without regard to whether the lesser degree is a lesser included offense under RCW 10.61.006. Peterson, supra, 133 Wn.2d at page 892. The only limitation is that the crime must be one which is

divided into degrees and there must be evidence from which the trier of fact could conclude that the lesser degree of the crime was committed.

State v. McJimpson, 79 Wn.App. 164, 901 P.2d 354 (1995).

The trier of fact may return a verdict as to an inferior degree of an offense so long as the charged offense and the inferior offense, “proscribe but one offense.” Assault is a crime divided into degrees and the various degrees of assault “proscribe but one offense.” State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

The only other requirement is that there be evidence that the defendant committed the inferior offense. State v. Daniels, 56 Wn.App. 646, 651, 784 P.2d 579, review denied, 114 Wn.2d 1015 (1990). There certainly was evidence in this case that the victim was assaulted. She had red marks on her neck. She was crying and hysterical. The neighbor saw her being grabbed and pulled back into the apartment. Ms. Goedker told the officer, while still under the influence of the event, that she had been choked, had trouble breathing, and thought she was going to die.

RCW 10.61.003 does not limit the entry of a verdict for a lesser degree offense to those cases in which the defendant requests the trier of fact to do so. Peterson, supra, 133 Wn.2d at page 888. In the case at hand, counsel for the defendant argued that if any assault occurred it was Assault in the Fourth Degree (RP 98). A defendant may be convicted of any inferior offense of assault, even though the inferior degree may not be a lesser included degree of the charged crime, so long as there is evidence to

support a finding that the defendant committed the lesser degree. State v. Peterson, 133 Wn.2d at page 892.

This assignment of error must be denied.

2. There is ample evidence to support the verdict.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, the evidence permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence is insufficient, admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. Salinas, 119 Wn.2d at page 201.

As outlined, the evidence is clear. The victim, while still under the influence of the event, told the officers that she had been choked by the defendant and that during that time she was having trouble breathing (Finding of Fact 4, CP 32). She had injuries to her neck that were visible at the time the incident was reported and the following morning. She obviously had been choked.

While there may have been, given the testimony of the victim at trial, some question concerning whether there had been an obstruction of her blood flow or her ability to breathe, there is no doubt that there is evidence to support that she had been choked. This conduct was certainly harmful and offensive, even though it may not have amounted to assault by strangulation. The court properly found that her statements were

excited utterances and admissible. Her statements are substantive evidence and may support the verdict. State v. Young, 123 Wn.App. 854, 859-60, 99 P.3d 1244 (2004). Teglund, Wash. Prac. Evidence Section 803.5. Ms. Goedker's statements were corroborated by the injuries to her neck.

This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

DATED this 3 day of January, 2011.

Respectfully Submitted,

By: Gerald R. Fuller

GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/lh

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BY [Signature]
DEPUTY

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STATE OF WASHINGTON,

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DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 3rd day of ~~December, 2010~~, I mailed a copy of the Brief of
JANUARY 2011
Respondent to Jordan B. McCabe, Attorney at Law, P. O. Box 6324, Bellevue, WA 98008-0324,
and Jarrod A. Airington, 120 Fillmore, Hoquiam, WA 98550, by depositing the same in the
United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman