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NO. 66316-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DERRICK MORRIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN RIETSCHER

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV -3 PM 3:59

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A. ISSUES

1. The legislature defined strangulation as compressing 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. Did the trial court properly instruct the jury that specific intent to strangle was required for an unsuccessful attempt to strangle, and that no additional intent was required for a completed strangulation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Derrick Morris, was charged with assault in the second degree (with intent to commit rape) with sexual motivation. CP 1. The State alleged that on February 11, 2010, Morris picked up N.W.K.¹, a prostitute, strangled her, and attempted to rape her. CP 3-4. The State amended the information adding

¹ The victim's initials are used in an effort to protect her privacy.

another count of assault in the second degree (by strangulation), as an alternative. CP 6-7; 1RP 6.² The jury found Morris not guilty of assault in the second degree with intent to commit rape, and declined to find the special verdict of sexual motivation. CP 62, 64. The jury convicted Morris of assault in the second degree by strangulation. CP 63.

Morris moved for an arrest of judgment and a new trial. CP 63-95. Morris argued there was insufficient evidence that he intended to strangle N.W.K. CP 63-95. The trial court denied the motion finding that the statute was clear and unambiguous, and the definition of strangulation did not require intent for a completed strangulation. CP 96. Morris was sentenced on November 5, 2010. CP 115-21. The court imposed a standard range sentence of six months of confinement. CP 115-21.

² The verbatim report of proceedings consists of ten volumes, which will be referred to in this brief as follows: 1RP (9/21/10), 2RP (9/22/10), 3RP (9/27/10 - including voir dire), 4RP (9/28/10), 5RP (9/29/10), 6RP (9/30/10), 7RP (10/1/10), 8RP (11/3/10), 9RP (11/5/10), and 10RP (11/12/10).

2. SUBSTANTIVE FACTS

a. Facts Of The Assault.

On February 11, 2010, Derrick Morris was cruising Aurora Avenue in Seattle looking for a prostitute. 5RP 10. Morris spent thirty to forty five minutes circling Aurora Avenue looking for a girl to pick up. 5RP 44-45. He saw N.W.K. at a bus stop. 5RP 12.

N.W.K. was a 29 year old woman addicted to heroin. 4RP 62, 65. She worked as a prostitute on Aurora Avenue. 4RP 67-68. She prostituted herself to pay for her drug habit and the hotel room she lived in. She described that it was obvious when a man was looking for a prostitute. 4RP 70-71. She would see a car driving back and forth on Aurora Avenue looking at the girls. 4RP 71, 82. The driver would ask if she wanted a ride. 4RP 70. N.W.K. would touch the customer's genitals and ask them to touch her breast as a way of verifying the customer was not a police officer. 4RP 69. N.W.K. had been arrested for prostitution on only one occasion. 4RP 70.

On February 11, 2010, N.W.K. was with a friend on Aurora Avenue to buy drugs. 4RP 114. N.W.K. did not have any money. 4RP 114. N.W.K. saw Morris driving up and down Aurora Avenue and decided to prostitute herself to obtain money for drugs.

4RP 114. Morris pulled up to the bus stop and asked N.W.K. if she wanted a ride. 4RP 84. N.W.K. told Morris to pull off Aurora. 4RP 83. She got into Morris's car and he drove westbound. 4RP 86. N.W.K. touched Morris's genitals and asked him to touch her. 4RP 86. She became suspicious when he touched her arm rather than her breast. 4RP 86. At some point N.W.K. offered Morris oral sex for thirty dollars. 4RP 123. Morris stopped the car off Aurora and said, "I have some bad news for you. You're busted." 4RP 87. N.W.K. believed Morris was a police officer and pleaded with him not to arrest her. 4RP 87. Morris pretended to make a call on his cell phone and told N.W.K. that another officer was on the way. 4RP 87-88. He told N.W.K. he would let her go if she had sex with him for free. 4RP 88.

N.W.K. had been arrested before and knew a police officer will show a badge when making an arrest. 4RP 88. She also knew that there would be a police officer behind them and that officer would also show a badge. 4RP 88. She did not believe Morris was a police officer. N.W.K. told Morris he was not a cop, and she grabbed her purse and started to get out of the car. 4RP 88. Morris grabbed N.W.K. from behind. 4RP 90. He used the bend of his elbow to place pressure on N.W.K.'s neck, strangling her.

4RP 90, 118. N.W.K. had difficulty breathing. 4RP 92. She started to pass out and saw "spots." 4RP 91, 120. Finally, N.W.K. managed to break free and run. 4RP 89.

N.W.K. ran to the doorstep of a nearby house. 4RP 89. Morris initially ran after N.W.K. but stopped when she got to the doorstep. 4RP 89. N.W.K. quickly noted Morris's license plate number and called 911. 4RP 89. She provided police a description of the car and the license number. 4RP 89.

Officer Jason Dewey was on patrol on Aurora Avenue. 4RP 35-36. Dewey was aware that Aurora Avenue was known as a prostitution area and he had seen Morris's car earlier in the evening "doing laps" on Aurora which was typical of someone looking for a prostitute. 4RP 46. He had even written down Morris's license plate number intending to investigate further prior to N.W.K.'s 911 call. 4RP 48. When he was dispatched to N.W.K.'s 911 call he recognized the description of Morris's car from his earlier observations. 4RP 48. Dewey spotted Morris's car and called for back up. 4RP 49. Morris was stopped and arrested. 4RP 49.

Morris admitted that he picked up N.W.K. but claimed he did not know N.W.K. was a prostitute. 4RP 58, 60. He said that

N.W.K. quoted him a price but he claimed he did not have any money. 4RP 58. According to Morris, N.W.K. became angry and slapped him, so he shoved her out of the car. 4RP 58. During later interviews Morris admitted that he was looking for a prostitute and knew N.W.K. was a prostitute when he picked her up. 5RP 24.

Morris testified at trial and admitted that he lied to the police when he claimed he did not know N.W.K. was a prostitute. 5RP 10. He acknowledged that he was looking for a prostitute when he picked up N.W.K. and he acknowledged that he had used prostitutes twice in the past. 5RP 10-11. Morris testified that there was a dispute about the price for sex and he was rude to N.W.K., calling her names. 5RP 14-15. According to Morris, N.W.K. shoved the side of his head with her hand and started to get out of the car. 5RP 15-17. Morris claimed he shoved N.W.K. out of the car, then he got out and pursued her yelling more insults. 5RP 17-18, 54. Morris denied that he told N.W.K. he was a police officer and denied ever strangling N.W.K. 5RP 19-20. Morris denied touching N.W.K.'s neck at all. 5RP 20. Morris acknowledged that he had only one dollar that night, despite knowing that the services of a prostitute would cost forty to one hundred dollars. 5RP 47-49.

Officer David Sullivan responded to the 911 call. 4RP 11. He transported N.W.K. to the location where Morris had been arrested. 5RP 13. N.W.K. immediately identified Morris. 5RP 18, 94, 97.

b. The Jury Instructions.

The jury was instructed on assault in the second degree by strangulation. The "to convict" instruction for that crime (number 15) stated:

That on or about February 11, 2010, the defendant intentionally assaulted N.W.K. by strangulation.

CP 43. Instruction number five defined assault:

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear

of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 33. Instruction number six defined intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 34. Instruction number thirteen defined strangulation:

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 41.

The jury began deliberations on September 29, 2010.

8RP 113. The following day, the jury asked if intentional strangulation was required or if it could be an accidental result from an intentional assault. CP 55. The trial court referred the jury back to instructions numbered 5, 6, 13, and 15. CP 56. The jury found Morris guilty of assault in the second degree by strangulation.

CP 63.

Morris moved for an arrest of judgment and a new trial.

CP 65-95. During the argument, Morris asserted that assault in the second degree required an intent to assault and intent to strangle.

8RP 11. The court denied the defense motion noting, "It does

appear that the legislature had a plain meaning, that there was no intent if there was an actual [strangulation] instruction [sic] that there was intent if there was not an actual [strangulation] instruction [sic] and that it was -- there is plain meaning to what the legislature proscribed." 8RP 12. The trial court observed "I don't see that this court can craft on to the legislature a mens rea that they did not put in the statute. I don't see any basis for that." 8RP 12-13.

C. **ARGUMENT**

1. **ASSAULT BY STRANGULATION REQUIRES AN INTENTIONAL ASSAULT, BUT DOES NOT REQUIRE AN INTENT TO STRANGLE IF THE STRANGULATION IS COMPLETED.**

Morris argues that the statutory elements of assault in the second degree by strangulation includes an intent to strangle. Brief of Appellant at 10. In the alternative, Morris argues the statute is ambiguous as to the mens rea required for assault by strangulation so the element should be implied by the court. Neither of Morris's contentions have merit. The plain language of the definition of strangulation does not require intent when there is a completed strangulation. Assault in the second degree by strangulation requires only the intent to assault if strangulation is completed.

a. Statutory Construction And The Standard Of Review.

Issues of statutory construction are reviewed de novo. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). If the plain words of a statute are unambiguous, the Court need not inquire further. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The Court derives the meaning of an unambiguous statute from the wording of the statute itself. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). The court assumes the legislature means exactly what it says. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 608-09, 998 P.2d 884 (2000). The legislature is presumed not to use nonessential words and each word must be accorded meaning and interpreted so that no portion of the statute is rendered meaningless or superfluous. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). A statute is only considered ambiguous if it is susceptible to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

b. The Plain Language Of The Statute Is Clear
And Unambiguous.

The statute defining assault in the second degree by strangulation clearly and unambiguously sets forth the mens rea required to commit the crime. The Court need look no further than the plain language of the statute to find assault in the second degree by strangulation requires the defendant to intentionally assault another person. If the defendant succeeds in cutting off the victim's flow of blood or air, no further intent is required. RCW 9A.04.110(26). If the defendant attempts but fails to cut off the flow of blood or air to the victim, then State must prove he intended to do so. Id.

Assault in the second degree by strangulation is defined as follows:

(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 or suffocation.

RCW 9A.36.021(g). The statute does not define "assault"; thus, the courts have applied the common law definition. State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). Assault is defined as an intentional act. Id. at 712. The legislature defined strangulation as:

(26) "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

RCW 9A.04.110(26)(emphasis added). The legislature's definition sets out two distinct ways of committing strangulation: either successfully obstructing the blood or airflow regardless of intent to strangle, or attempting to do so with the intent to obstruct blood flow or breathing. Id. Both means require an intentional assault. Morris's assertion that the statute is silent as to intent is incorrect. Brief of Appellant at 13. Not only does the statute reference intent, but it is placed within the definition of strangulation specifically in such a way that makes clear that an attempt to strangle requires intent and successfully strangling does not. The statute is not silent on intent; the legislature consciously chose where to include a requirement of intent.

It is noteworthy that the statute as a whole demonstrates the legislature's choice to apply varying mens rea to different means of committing assault in the second degree. RCW 9A.36.021. Assault in the second degree can be committed in a number of ways, with different mens reas for different means of committing the crime. For example, the crime is committed when a person

intentionally assaults and recklessly inflicts substantial bodily harm. RCW 9A.36.021(a). It is also committed when a person knowingly inflicts bodily harm causing pain as to be the equivalent of torture. RCW 9A.36.021(k). It is also committed when a person merely intentionally assaults another with a deadly weapon. RCW 9A.36.021(c). The deadly weapon prong of assault in the second degree requires an intentional assault and no further mens rea. Id. The deadly weapon is a particularly lethal means of committing assault, just like strangulation.

The Washington Supreme Court reached a similar conclusion regarding assault in the third degree, refusing to imply any further mens rea than the intent to assault. State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000). In Brown, the defendant was charged with assault in the third degree for assaulting a police officer under RCW 9A.36.031(1)(g), which defined the crime as:

Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

The defendant argued that the statute required the State to prove that the defendant knew the victim was a law enforcement officer engaged in performing official duties, despite the absence of any such mens rea requirement in the language of the statute. Brown,

140 Wn.2d at 465. The Court declined to infer such a requirement and held, "Under the plain meaning of RCW 9A.36.031(1)(g), knowledge that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault. The State was not required to prove such knowledge on the part of Petitioner." Id. at 467. In Brown, the statutory construction analysis ended because the Court found the language was clear and unambiguous. The Court did not go on to examine the legislative intent. In the present case, the statute is even clearer than Brown because the legislature chose to include a mens rea for an attempt to strangle but chose not to include a mens rea for a completed strangulation.

c. Assault In The Second Degree By Strangulation Still Requires The Intent To Assault, Hence It Is Not A Strict Liability Offense.

Morris next argues that the statute is silent as to intent so the Court must determine if the legislature intended to create a strict liability offense noting that the Court will not interpret a statute to impose strict liability without the express intent of the legislature. Brief of Appellant at 13. However, assault in the second degree

would not be a strict liability crime without the intent to strangle. The statute still requires an intent to assault. Strangulation is simply a means of committing assault. It is a means that is dangerous enough to warrant elevating the seriousness of the crime, much the same as assault with a deadly weapon.

Morris relies on State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000), to argue that the legislature's failure to specify the mens rea indicates they intended to attach an intentional mens rea to strangulation. Brief of Appellant at 15. Anderson is distinguishable in two important ways. First, Anderson addressed unlawful possession of a firearm which makes no reference to any mens rea at all. Id. at 361; see RCW 9A.41.040. In contrast, assault in the second degree specifies different mens reas for different means of committing the crime. RCW 9A.36.021. Second, the definition of strangulation does require an intent to strangle but limits it to specific conditions. RCW 9A.04.110(26).

In Anderson, the Court concluded that without an implicit mens rea "there is a distinct possibility that entirely innocent behavior would fall within the sweep of this statute." Anderson, 141 Wn.2d at 364. Specifically, the Court was concerned that because the statute requires only possession or control of a firearm, a

defendant could be convicted even if he did not know about the firearm. (E.g., if the defendant was driving a friend's car in which a gun was hidden unbeknownst to the defendant.) Id. at 362-63. There is little danger that "entirely innocent" conduct would be swept up in assault in the second degree because an intentional assault is required.

Morris argues that the Court should apply the rule of lenity because the statute is ambiguous. Brief of Appellant at 17. Morris is incorrect. As noted above, the plain language of the statute is clear and the rule of lenity does not apply. If language in a statute is subject to only one interpretation then the rule of lenity does not apply and the Court's inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The plain meaning of the definition of strangulation is clear and subject to only one reasonable interpretation. Consequently, the rule of lenity does not apply.

Assault in the second degree by strangulation is not a strict liability offense. The State is required to prove an intentional assault, and the court should not imply any additional mens rea when the strangulation is completed.

d. The Jury Instructions Do Not Create A
Mandatory Presumption Of Intent To Strangle.

Morris argues that the jury instructions conflated the intent to assault with the intent to strangle. Brief of Appellant at 7. He further argues that this error created a mandatory presumption that Morris intended to strangle N.W.K. Brief of Appellant at 7. However, as noted above, there is no separate intent to strangle requirement when the strangulation is completed. Furthermore, even if Morris only attempted to strangle N.W.K., the instructions clearly set forth the additional intent to strangle required for an attempt.

This Court reviews alleged errors of law in jury instructions de novo. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). “Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.” Id. at 382. “It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden” to prove “every essential element of a criminal offense beyond a reasonable doubt.” State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The instructions must be

considered as a whole when analyzing a challenge to the jury instructions. Id. at 656-57.

A mandatory presumption is one that requires the jury "to find a presumed fact from a proven fact." State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). To determine whether a jury instruction creates a mandatory presumption, the court examines whether a reasonable juror would interpret the presumption as mandatory. Deal, 128 Wn.2d at 701, 911 P.2d 996. Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

In the present case, the jury was instructed that to convict Morris they must find he "intentionally assaulted N.W.K. by strangulation." CP 43. The jury was given separate definitions for assault, intent, and strangulation. CP 33, 34, 41. The definition of strangulation did not require intent to strangle if the jury found Morris intentionally assaulted N.W.K. and succeeded in obstructing N.W.K.'s blood flow or ability to breathe. CP 41. Hence, if the jury found Morris successfully strangled N.W.K. there was no further mens rea to conflate or presume. The definition of strangulation

was also clear that if the attempt to strangle was not successful there must be "*intent to obstruct the person's blood flow or ability to breathe.*" CP 41(emphasis added). The instruction clearly indicated that if the attempt to strangle was not successful, the defendant must specifically intend to obstruct the blood flow or ability to breathe. It would be clear to the jury that under those circumstances more than intent to assault was required. The instructions did not conflate the intent to assault with the intent to strangle.

Morris relies on State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) and State v. Gobles, 131 Wn. App. 194, 126 P.2d 821 (2005)³. Both cases involved charges that required two mens reas applied to two separate elements of a crime. In Hayward, the defendant was charged with assault in the second degree by intentionally assaulting the victim and recklessly causing substantial bodily harm. Hayward, 152 Wn.2d at 640. The jury was instructed that "recklessness is also established if a persons acts intentionally." Id. at 641. Division Two of the Court of Appeals

³ While Morris relies heavily on Division Two's Hayward decision, this Court has criticized Hayward's conclusion that the jury instructions did not adequately state the law. State v. Holznecht, 157 Wn. App. 754, 765, 238 P.3d 1233 (2010).

found this definition may have allowed the jury to presume the defendant recklessly inflicted substantial bodily harm if they found he intentionally assaulted the victim. Hayward, at 644-45.

In Gobles, the defendant was charged with assault in the third degree. Gobles, 131 Wn. App. at 196. The State was required to prove the defendant intentionally assaulted the victim and that he had knowledge that the victim was a police officer that was performing his official duties.⁴ Id. at 201. The jury was instructed that “acting knowingly or with knowledge also is established if a person acts with intent.” Id. at 202. Again, Division Two of the Court of Appeals found this definition may have led the jury to presume the defendant knew the victim was a police officer if they found he intentionally assaulted the victim. Id. at 203-04.

The problem in Hayward and Gobles were definitions of a mental state that may have suggested that if the jury found intent as to one element, the jury could presume the mens rea required for a different element. Hayward, 152 Wn. App at 644-45; Gobles, 131 Wn. App. at 203-04. The instructions in Morris’s case did not

⁴ RCW 9A.36.031(1)(g) does not require knowledge that the victim was a police officer, but the jury instruction submitted by prosecution in Gobles included knowledge as an element and therefore the State assumed the burden of proving it. Gobles, 131 Wn. App at 201 fn 2, citing State v. Brown. 140 Wn.2d 456, 998 P.2d 321 (2000).

require the jury to presume an intent to strangle based on a finding of intentional assault. The instructions did not require any finding of intent to strangle if the strangulation was completed, but explicitly required a specific "intent to obstruct the person's blood flow or ability to breathe" if there was only an attempt to strangle. CP 41. No reasonable juror would conclude that it did not need to find the assault was intentional or that no intent was required for an attempt to strangle.

The jury asked whether they must find Morris intentionally strangled N.W.K. CP 55. The correct legal answer is that it depends on whether he succeeded in obstructing her breathing or blood flow. That was properly articulated in the instruction defining strangulation, and the trial court correctly referred the jury to their instructions, including referring them to the instruction defining strangulation.⁵ CP 56.

⁵ Morris points to an affidavit submitted by his investigator that summarized some of the jurors' comments after the verdict. Morris points to jurors' remarks that intent to strangle was not required. CP 91-95. First, the court should not consider information that inheres in the verdicts. State v. Marks, 90 Wn. App. 980, 986, 955 P.2d 406 (1998). Second, the jury's comments do not undermine the verdict. The jury may have concluded that Morris successfully obstructed N.W.K.'s breathing or blood flow and properly concluded intent to strangle was not required.

The jury instructions properly stated the law in a clear manner. The instructions did not conflate the intent requirements of assault in the second degree, nor create a mandatory presumption. Morris's challenge to the jury instructions should be rejected.

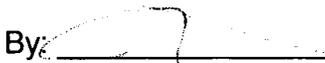
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Morris's conviction for assault in the second degree.

DATED this 3 day of November, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DERRICK MORRIS, Cause No. 66316-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

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