In The

Supreme Court of Virginia

RECORD NO. 141650

TALMAGE DONNELL RICKS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The Court of Appeals erred when it affirmed defendant's conviction for violating § 18.2-51.6 of the 1950 Code of Virginia, as amended because the Commonwealth failed to prove at trial through direct or circumstantial evidence that a wounding or bodily injury occurred as required by said Code section. (preserved at A. 39, 53-54, 58-60, 65).

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

At a Bench Trial on October 17, 2013, before The Honorable Robert H. Sandwich, Jr., the defendant entered pleas of not guilty to one (1) count of strangulation[1], in violation of § 18.2-51.6 of the 1950 Code of Virginia, as amended, and one (1) county of assault and battery of a family member, in violation of § 18.2-57.2 of the 1950 Code of Virginia, as amended. At the conclusion of the Commonwealth's case, defense counsel moved to strike the felony strangulation charge as the Commonwealth failed to prove that a wounding or bodily injury occurred. The Court overruled appellant's motion to strike and the trial proceeded.

[1] THE INDICTMENT CONTAINING THE LANGUAGE "UNLAWFULLY AND FELONIOUSLY AND WITHOUT CONSENT IMPEDED THE BLOOD CIRCULATION AND RESPIRATION OF ANOTHER PERSON BY KNOWINGLY, INTENTIONALLY AND UNLAWFULLY APPLYING PRESSURE TO THE NECK OF SUCK PERSON RESULTING IN THE WOUNDING OR BODILY INJURY OF SUCH PERSON" IS HEREINAFTER REFERRED TO AS STRANGULATION. SECTION 18.2-51.6 OF THE 1950 CODE OF VIRGINIA, AS AMENDED, IS ALSO SOMETIMES REFERRED TO HEREIN AS STRANGULATION.

At the conclusion of all the evidence, defense counsel renewed his motion to strike as to the strangulation charge on the same grounds and was overruled by the Court and, additionally moved to strike on the assault and battery charge, based on conflicting testimony between the appellant and victim. At this point, the Court heard arguments and then found the defendant guilty of strangulation and assault and battery of a family member, 3rd of subsequent offense. A presentence report was ordered.

The sentencing hearing was held on January 16, 2014 and after the arguments of counsel, with respect to the strangulation charge, Court sentenced the defendant to five years in the Virginia State Penitentiary with three years suspended. With respect to the felonious assault and battery of a family or household member charge, the Court sentenced the defendant to five years in the Virginia State Penitentiary with four years suspended. Additionally, the two suspended sentences were suspended based upon ten years of supervised probation, substance abuse counseling, anger management as deemed necessary by the probation and parole office and no contact with the victim.

The Appellant filed Notice of Appeal on February 14, 2014. The Clerk's Office of the Court of Appeals of Virginia received the record of the proceedings in this case on April 3, 2014. The Petition for Appeal was

filed with the Court of Appeals on May 13, 2014. On October 15, 2014, in a *per curiam* opinion, the Court of Appeals denied the Petition for Appeal, stating that the trial court found the appellant strangled the victim as defined by § 18.2-51.6 of the 1950 Code of Virginia, as amended. The defendant's convictions were affirmed by the Court of Appeals on October 15, 2014, Record No. 0293-14-1 (A. 91-94). The defendant filed a timely Notice of Appeal to the Supreme Court of Virginia. (A. 89).

STATEMENT OF FACTS

On May 11, 2013, Nichole Hyman the alleged victim, alleged that Talmage Ricks came home angry because he had been in a fight (A. 10). Ms. Hyman further alleged that on the same day, the defendant hit her with a belt and choked her. (A. 10-1). As a result of the altercation, Ms. Hyman called the police and left her home. (A. 12). By Ms. Hyman's own testimony, the only injuries she received from her altercation with Mr. Ricks were bruises on her neck. (A. 12-13). Additionally, by her own admission, Ms. Hyman kicked the defendant in the stomach. (A. 17-18). On cross-examination, Ms. Hyman admitted that although she testified that this was a fight and they were hollering, the child in the room did not wake up. (A. 18). Additionally, on re-cross, Ms. Hyman admitted that she did not any permanent injuries from the alleged choking. (A. 21-22).

The Commonwealth then called Deputy Blythe of the Southampton County Sheriff's Office. Deputy Blythe testified on direct examination that he noticed a faint red mark on the right side of Ms. Hyman's neck. (A. 23). Upon cross-examination, Deputy Blythe testified that the mark on Ms. Hyman's neck was "just a red mark. It wasn't a scratch or cut or anything", in fact, he testified that it was just a "small area" (of her neck) that was red (A. 27). Deputy Blythe additionally testified that he did not take a picture of the red mark on Ms. Hyman's neck because it was faintly visible and "you could see it, but if I'd have took a picture with a camera the flash would have whited it out and it wouldn't have showed up." (A. 27). Deputy Blythe additionally elaborated that it was a faint red mark and that Ms. Hyman did not complain of any other injuries or mention a belt. (A. 28).

The Commonwealth then briefly recalled Ms. Nichole Hyman and rested. (A. 33-35).

At this point, defense counsel made a motion to strike on the grounds that considering the evidence in the light most favorable to the Commonwealth, the Commonwealth still failed to present evidence that defendant's action created a wounding or bodily injury. (A. 35-36). Defense counsel further argued in his motion to strike that "a bodily injury or wounding is probably more than a red mark" and that there was no

evidence of any injury other than the testimony of a slight red mark (A. 36). After argument, the Court ruled that the faint red mark was a contusion and overruled defense counsel's motion to strike. (A. 39).

At this point, defense counsel called the defendant, Talmage Donnell Ricks. (A. 39-52). The defendant stated on direct examination that there was an altercation but denied "technically" choking her. (A. 44). Nowhere else on cross-examination or direct examination was any choking mentioned. At this point, defense counsel renewed his motion to strike, arguing that the Commonwealth failed to meet its burden as to each and every element of the strangulation statute and there was no injury (A. 53). Defense counsel also moved to strike with respect to the assault and battery on a family member, third or subsequent offense charge, based on the differing stories of the defendant and alleged victim. (A. 53-54).

After argument, the Court overruled the motion to strike (T.T. 57, lines 22 through 24). Defense counsel then argued that the Commonwealth failed to prove beyond a reasonable doubt that the defendant knowingly and feloniously strangled Ms. Hyman, impeding her blood flow and causing bodily wounding or bodily injury. Defense counsel further argued that by the facts, it appeared that the defendant may have been guilty of assault and battery but did not have the intent to commit the strangulation.

Defense counsel then argued that the Court should dismiss the strangulation indictment. (A. 58-60).

After argument, the Court found the defendant guilty of both charges beyond a reasonable doubt and a presentence report was ordered. (A. 65).

A sentencing hearing was held on January 16, 2014 and after arguments of counsel, with respect to the strangulation charge, the Court sentenced the defendant to five years in the Virginia State Penitentiary with three years suspended. With respect to the felonious assault and battery of a family or household member charge, the Court sentenced the defendant to five years in the Virginia State Penitentiary with four years suspended. Additionally, the two suspended sentences were suspended based upon ten years of supervised probation, substance abuse counseling, anger management as deemed necessary by the probation and parole office and no contact with the victim. (A. 83-84).

ARGUMENT

The Court of Appeals erred when it affirmed defendant's conviction for violating § 18.2-51.6 of the 1950 Code of Virginia, as amended because the Commonwealth failed to prove at trial through direct or circumstantial evidence that a wounding or bodily injury occurred as required by said Code section.

This Court applies a de novo standard when addressing a question of statutory interpretation. *Bennett v. Commonwealth*, 60 Va. App. 656, 665,

731 S.E.2d 40, 44 (2012); *Wright v. Commonwealth*, 257 Va. 77, 80-81, 655 S.E.2d 7, 9 (2008). In reviewing the sufficiency of the evidence, the Standard of Review is "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008).

The Commonwealth's evidence was insufficient to prove "bodily injury". At trial, the Commonwealth enlisted testimony from the complainant, the victim and the police officer, describing a faint red mark on the victim's neck, far from "a bodily injury."

The Virginia strangulation statute, § 18.2-51.6, provides that "any person who, without consent, impedes the blood circulation or respiration of another person by knowingly, intentionally, and unlawfully applying pressure to the neck of such person resulting in the wounding or bodily injury of such person is guilty of strangulation, a Class 6 felony."

The testimony of the victim, which was denied by the defendant under oath, was that the defendant "choked" or applied pressure to the neck of the victim. The only consequence observed by the investigating officer, Deputy Blythe, or complained of by the victim was a faint red mark on the victim's neck. In fact, Deputy Blythe did not even photograph the red

mark, because he didn't think it would show up in the picture. (A. 11, 12, 23, 27 and 44).

The strangulation statute, § 18.2-51.6 is a relatively new statute, therefore there is limited case law with respect to said statute. There is, however, an unpublished Virginia Court of Appeals opinion, which clearly defines the meaning of the statutory language ("bodily injury").

The unpublished opinion, *Moore v. Commonwealth*, Va. Record No. 0828-13-1, analogizes the strangulation statute to the malicious wounding statute, § 18.2-51 of the 1950 Code of Virginia, as amended, and compares the two by the following analysis:

> "Code Section 18.2-51, often labeled the malicious wounding statute, and Code Section 18.2-51.6, are part of the same statutory scheme, and were adopted to protect the physical well-being of persons. Concluding that the term 'bodily injury' has one meaning in the context of Section 18.2-51, but has another meaning within the context of Code Section 18.2-51.6, when the two statutes are part of the same legislative scheme and the relevant language of the two statutes is identical would be illogical. Accordingly, reading these statutes in P*ari Matenia*, it is clear that the legislature intended the term 'bodily injury' to hold its 'everyday, ordinary meaning' throughout the entire statutory scheme." *Moore*, page 4.

The evidence in *Moore*, is that a police officer observed a small laceration or scratch on the victim's neck, minor swelling to her forehead, and blood on her left shoulder, sufficient that the police officer arranged for a rescue squad to evaluate the victim. There was also swelling on the

victim's neck. The instant case is distinguishable as taking the evidence and testimony of the victim at face value and the observations of the police officer, the victim, Ms. Hyman, suffered no more than a small or faint red spot to the neck, falling substantially short of "a bodily injury", applying the ordinary meaning of "bodily injury". *Moore*, further discusses *English v. Commonwealth*, 58 Va. App. 711, 715 S.E.2d 391 (2011) which says "a victim, need not experience any observable wounds, cuts, or breaking of the skin" to prove a bodily injury. *Id.* at 719.

While under *English* the wounds need not be observable to prove a bodily injury, in the instant case, the Commonwealth wholly failed to prove that any "wound" existed, much less that a wound was caused by the actions of the defendant. Furthermore, a faint red mark, barely observable on a person's neck, is far from proof that there was any impediment to their blood circulation or respiration, as required by the strangulation statute. If the plain meaning of the statutory language is appropriately analogized to the "malicious wounding" statute, then a slight red mark on one's neck would not qualify as a "bodily injury" as contemplated by the malicious wounding statute. There is no evidence presented of swelling, bleeding, lacerations or otherwise, therefore the Commonwealth failed to meet its burden as to the bodily injury element of the strangulation statute.

This analysis is bolstered by a Memorandum Opinion of the Court of Appeals, *Chilton v. Commonwealth*, Record No. 1531-13-3, the Court held that the mere application of pressure to the victim's neck did not constitute a bodily injury. *Id.* at 2. This elaborates upon the definition of bodily injury, but carries no precedential value.

In short, the Commonwealth did not prove that the defendant inflicted a bodily injury upon the victim as required by the statute he stands convicted of violating.

CONCLUSION

Defendant prays that his conviction for strangulation under Virginia Code Section 18.2-51.6 of the 1950 Code of Virginia, as amended, shall be vacated and the indictment dismissed.

Respectfully submitted,
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By Counsel

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CERTIFICATE AND REQUEST FOR ORAL ARGUMENT

I hereby certify that pursuant to Rule 5:26(h), one electronic version in PDF of the Brief of Appellant and Appendix have been filed, via VACES, and ten printed copies of the Brief of Appellant and three printed copies of the Appendix, were hand-filed with the Clerk of the Supreme Court of Virginia on June 5, 2015. On this same day, one electronic version of the Brief of Appellant in PDF format was served, via email, and one electronic version of the Brief of Appellant and Appendix in PDF format on a CD, were served, via UPS Ground Transportation on:

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Counsel is appointed.

Counsel hereby requests oral argument.

This Brief contains 2,209 words.

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