SCV: Submitted on 06-30-2015 14:20:04 EDT for filing on 06-30-2015

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141650

TALMAGE DONNELL RICKS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

ROSEMARY V. BOURNE
Senior Assistant Attorney General
Virginia State Bar No. 41290

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071 (phone)
(804) 371-0151 (fax)
rbourne@oag.state.va.us

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENT OF ERROR 2

STATEMENT OF FACTS 2

ARGUMENT 4

THE TRIAL COURT AND COURT OF APPEALS DID NOT ERR IN FINDING THAT HYMAN SUFFERED A BODILY INJURY AS THE RESULT OF STRANGULATION. 4

A. Standard of Review 4

B. Merits 6

CONCLUSION 9

CERTIFICATE OF TRANSMISSION AND SERVICE 10

TABLE OF AUTHORITIES

Page

Cases

Barson v. Commonwealth,
284 Va. 67, 726 S.E.2d 292 (2012) 8

Bass v. Commonwealth, 209 Va. 422,
164 S.E.2d 667 (1968) 8

Belew v. Commonwealth,
284 Va. 173, 726 S.E.2d 257 (2012) 6

Belew v. Commonwealth, 62 Va. App. 55,
741 S.E.2d 800 (2013) 7

Brooks v. Commonwealth, 282 Va. 90,
712 S.E.2d 464 (2011) 6

Bryant v. Commonwealth, 189 Va. 310,
53 S.E.2d 54 (1949) 8

Campbell v. Commonwealth, 12 Va. App. 476,
405 S.E.2d 1 (1991) 7

Commonwealth v. Hudson, 265 Va. 505,
578 S.E.2d 781 (2003) 6

Dawson v. Commonwealth, 63 Va. App. 429, 758 S.E.2d
94 (2014)..... 9

English v. Commonwealth, 58 Va. App. 711,
715 S.E.2d 391 (2011) 7

Glenn v. Commonwealth, 275 Va. 123,
654 S.E.2d 910 (2008) 6

Hancock v. Commonwealth, 12 Va. App. 774,
407 S.E.2d 301 (1991) 5

Jackson v. Virginia, 443 U.S. 307 (1979)..... 4, 5

Jett v. Commonwealth, 29 Va. App. 190,
510 S.E.2d 747 (1999) 5

Johnson v. Commonwealth, 184 Va. 409,
35 S.E.2d 594 (1945) 8

Luck v. Commonwealth, 32 Va. App. 827,
531 S.E.2d 41 (2000) 8

Martin v. Commonwealth, 4 Va. App. 438,
358 S.E.2d 415 (1987) 5

Montague v. Commonwealth, 40 Va. App. 430,
579 S.E.2d 667 (2003) 5

Viney v. Commonwealth, 269 Va. 296,
609 S.E.2d 26 (2005) 4

Other Authorities

18 U.S.C. § 1515 (a)(5)(A-E) 7

Rule 5A:12 7

Webster's Third New or
International Dictionary (1993) 8

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141650

TALMAGE DONNELL RICKS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

This appeal from Talmage Donnell Ricks's conviction for strangulation calls upon this Court to decide the sufficiency of the evidence. After a bench trial, the Circuit Court of Southampton County convicted

Ricks of strangulation in violation of Virginia Code § 18.2-51.6.[1] The court sentenced Ricks to five years in prison, but suspended three years of that sentence.

The Court of Appeals did not grant Ricks an appeal of the sufficiency issue, but affirmed his conviction in an unpublished order, holding that the evidence was sufficient under the statute. (App. 91). (Record No. 0193-14-1). This appeal followed.

ASSIGNMENT OF ERROR

Ricks assigns the following error on appeal:

> **THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DEFEDANT'S CONVICTION FOR VIOLATING VA. CODE § 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.**

STATEMENT OF FACTS

In the early morning hours of May 11, 2013, Nicole Hyman awoke to find her boyfriend, Talmage Ricks, had returned home drunk and angry

[1] The court also convicted Ricks of assault and battery of a family or household member, third offense for his behavior during this incident that was distinct from the strangulation. That conviction is not the subject of this appeal.

about a fight he had with a neighbor. (App. 10, 13). After Ricks threatened to "shoot somebody up," Hyman asked him to "leave it alone, and to go to sleep" because her child was in the house and she had to work the next morning. (App. 10). Ricks then became angrier and began to hit Hyman on her side with a belt. (App. 10).

When Hyman tried to get up out of bed, Ricks jumped on top of her and began choking her so that she could not breathe. (App. 11). Ricks choked the victim for "about four seconds" until Hyman was able to kick him off of her. (App. 10).

Ricks followed Hyman to the bathroom and began choking her again. (App. 11). Hyman testified at trial that by "choking," she meant Ricks "cut off [her] breath completely" with his hand. (App. 12). When she finally made it to the front door, Ricks choked her again saying, "B, I'm'a (sic) leave you for dead tonight." (App. 12). Hyman then was able to kick Ricks and escape next door to call the police. (App. 12).

Hyman testified that she received bruises on her neck. (App. 13). She testified that after the attack she did not "have a voice" and "couldn't even talk when [she] went next door to call police." (App. 18). Her voice did not return for several days. (App. 18). Hyman took medication for pain, but did not go to the hospital. (App. 19).

When Deputy Blythe of the Southampton Police Department arrived at the scene he noticed a red mark on the right side of Hyman's neck. (App. 27).

ARGUMENT

THE TRIAL COURT AND COURT OF APPEALS DID NOT ERR IN FINDING THAT HYMAN SUFFERED A BODILY INJURY AS THE RESULT OF STRANGULATION.

A. Standard of Review

When the sufficiency of evidence is challenged on appeal, the Court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, including drawing all reasonable inferences in the Commonwealth's favor from the facts proved. *See Viney v. Commonwealth*, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). The Court must affirm the judgment of the circuit court unless that judgment is "plainly wrong or without evidence to support it." *Viney*, 269 Va. at 299, 609 S.E.2d at 28.

Under this standard, "a reviewing court does not 'ask itself whether ***it*** believes the evidence at the trial establishes guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (emphasis in

original and citation omitted). Rather, the relevant question is whether "***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original). "The judgment of a trial court sitting without a jury is entitled to the same weight as a jury verdict and will not be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it." *Montague v. Commonwealth*, 40 Va. App. 430, 435, 579 S.E.2d 667, 669 (2003) (quoting *Martin v. Commonwealth*, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)).

Such deference applies not only to the historical facts, but to the inferences from those facts as well. "The inferences to be drawn from proven facts, so long as they are reasonable, are within the province of the trier of fact." *Hancock v. Commonwealth*, 12 Va. App. 774, 782, 407 S.E.2d 301, 306 (1991).

Circumstantial evidence may be more compelling and persuasive than direct evidence and be entitled to just as much weight. *See Jett v. Commonwealth*, 29 Va. App. 190, 194, 510 S.E.2d 747, 748-49 (1999). Moreover, as the Supreme Court of Virginia emphasized in *Commonwealth v. Hudson*:

> The statement that circumstantial evidence must exclude every reasonable theory of innocence is simply another way of stating

> that the Commonwealth has the burden of proof beyond a reasonable doubt.
>
> * * *
>
> The issue upon appellate review is not whether 'there is some evidence to support' these hypotheses. The issue is whether a reasonable jury, upon consideration of all the evidence, could have rejected [the defendant's] theories in his defense and found him guilty . . . beyond a reasonable doubt. . . .

Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003).

The Court affords the "Commonwealth the benefit of all inferences fairly deducible from the evidence."' *Brooks v. Commonwealth,* 282 Va. 90, 95, 712 S.E.2d 464, 466 (2011) (quoting *Glenn v. Commonwealth,* 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008)).

To the extent this Court is being asked to interpret the statute, the appropriate standard of review is *de novo*. *Belew v. Commonwealth*, 284 Va. 173, 177, 726 S.E.2d 257, 259 (2012) (interpretation of statutes and the Rules of this Court *de novo*).

B. Merits

Code § 18.2-51.6 provides:

> 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 defendant argues the Commonwealth failed to prove that Hyman suffered a wound or bodily injury as the result of the strangulation.[2] He contends that the red mark on her neck was insufficient to qualify as a wound or other bodily injury. (Def. Brf. 5-10).

The Commonwealth need not prove that Hyman suffered a break in the skin, because under Virginia law a bruise or soft tissue injury is a "bodily injury." *English v.* Commonwealth, 58 Va. App. 711, 718-19, 715 S.E.2d 391, 395 (2011); *see, e.g., Campbell v. Commonwealth*, 12 Va. App. 476, 483, 405 S.E.2d 1, 4 (1991) (holding bruises from belt were bodily injury). *See also Belew v. Commonwealth*, 62 Va. App. 55, 741 S.E.2d 800 (2013) (holding that injury in the context of hit and run statute includes soft tissue injury, where the victim suffered back pain as the result of the accident).[3]

---

[2] Ricks also cursorily mentions on brief that the evidence also did not show "that there was any impairment to [Hyman's] blood circulation or respiration." (Def. Brf. at 9) This argument is clearly not encompassed by his assignment of error, which only asserts insufficient proof of bodily injury. *See* Rule 5A:12. In any event, Hyman testified that she could not breathe during the choking, which would satisfy this portion of the statute, even if this issue were properly before the Court. (App. 11, 12).

[3] Similarly, the United States Code has defined "bodily injury" as "a cut, abrasion, ***bruise***, burn, or disfigurement; ***physical pain***; illness; impairment of the function of a bodily member, organ, or mental faculty; or any ***other injury to the body, no matter how temporary***." 18 U.S.C. § 1515 (a)(5)(A-E) (emphasis added).

Although this Court has not defined the term "bodily injury" in a case involving the recently enacted strangulation statute, it has held that in the context of the malicious wounding statute, a "bodily injury comprehends, it would seem, any bodily hurt whatsoever." *Bryant v. Commonwealth*, 189 Va. 310, 316, 53 S.E.2d 54, 57 (1949). It includes any '"detriment, hurt, loss, impairment' that could fairly be considered an injury to the human body." *Johnson v. Commonwealth*, 184 Va. 409, 416, 35 S.E.2d 594, 596 (1945). "It is a common canon of statutory construction that when the legislature uses the same term in separate statutes, that term has the same meaning in each unless the General Assembly indicates to the contrary." *Barson v. Commonwealth*, 284 Va. 67, 74, 726 S.E.2d 292, 295 (2012) (internal citations omitted).

Also when possible, words in a statute should be given their everyday "natural and familiar" meaning. *See Bass v. Commonwealth*, 209 Va. 422, 426, 164 S.E.2d 667, 670 (1968). Both the words "bodily" and "injury" are in everyday usage, and should be given their everyday meaning, that is, a "hurt or damage" "of or relating to the body." *See* Webster's Third New or International Dictionary (1993). *See also Luck v. Commonwealth,* 32 Va. App. 827, 832, 531 S.E.2d 41, 43 (2000) ("[C]ourts have been reluctant to

give juries a definition [of bodily injury] because the phrase has an 'everyday, ordinary meaning.'").

And recently, in *Dawson v. Commonwealth*, the Court of Appeals held that the evidence was sufficient to prove bodily injury in the context of the strangulation statute where the victim had red ligature marks around her neck after her son grabbed her around the neck. 63 Va. App. 429, 758 S.E.2d 94 (2014).

Here, the evidence showed that Hyman received bruises and a red mark on her neck as the result of the strangulation. She testified that she had to take pain medication and that she could not talk for days after the attack. (App. 13, 19). Such testimony was sufficient to establish that she suffered bodily injury from Ricks intentionally, and unlawfully, applying pressure to her neck.

CONCLUSION

No reversible error occurred in Ricks's trial. Accordingly, the judgment appealed from the Court of Appeals upholding the judgment of the Circuit Court for Southampton County should be affirmed.

Respectfully submitted,

By S/_____
COMMONWEALTH OF VIRGINIA

Appellee herein.

MARK R. HERRING
Attorney General of Virginia

ROSEMARY V. BOURNE
Senior Assistant Attorney General
Bar No. 41290
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On June 30, 2015, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5A:19(f). A copy was emailed to R. Edward Railey, III, counsel for appellant, at edward@raileyandrailey. In accordance with Rule 5A:4(d), I certify that this document contains words 1,812, in compliance with Rules 5A:19(a) and 5A:21(g).

The Commonwealth desires to present oral argument in this case.

By S/_____
Rosemary V. Bourne
Senior Assistant Attorney General