

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-145

JANUARY TERM, 2018

In re Jason Naylor

} APPEALED FROM:  
}  
} Superior Court, Orleans Unit,  
} Civil Division  
}  
} DOCKET NO. 49-3-16 Oscv

Trial Judge: Michael J. Harris

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the superior court’s order granting summary judgment to the State with respect to his petition for post-conviction relief (PCR). He argues that he was entitled to summary judgment because the court at his change-of-plea hearing, incorrectly stated the mens rea element of the offense to which he pled no contest, thereby making his plea involuntary. We affirm.

Petitioner was originally charged with first-degree aggravated domestic assault, second-degree aggravated domestic assault, interference with emergency services, and twenty counts of violations of conditions of release. The first-degree-aggravated-domestic-assault count alleged that petitioner “attempted to cause or willfully or recklessly caused serious bodily injury to a family or household member, to wit: causing [the complainant] difficulty breathing, in violation of 13 V.S.A. § 1043(a)(1).” Pursuant to a plea agreement reached with the State, petitioner pled no contest to this charge and guilty to the violations of conditions of release, while the other charges were dropped. Under the agreement, the State could argue for a sentence of up to five-to-fifteen years to serve, and petitioner could argue for a lesser sentence.

At the change-of-plea hearing, the prosecutor stated that “the basis for aggravated domestic assault would be that he sat on her, which caused her difficulty breathing.” According to the prosecutor, “the difficulty breathing” would satisfy the “serious bodily injury” element of the charge. The court then stated to defendant:

In order to sustain a charge of aggravated domestic assault, the State does need to prove that you [acted] either willfully or recklessly . . . with the potential of really hurting somebody. And here, the State says you shut off this person’s ability, at least for a period of time, to breathe. And that does qualify as serious bodily injury.

Five months after the hearing, in which he pled no contest to the charge, petitioner filed his PCR petition. In the amended petition filed after he obtained counsel, petitioner argued that he did not enter the plea knowingly and voluntarily because the court incorrectly advised him on the mens rea element of the crime to which he was pleading. Following the parties' filing of cross motions for summary judgment, the superior court denied petitioner's motion and granted the State's motion. On appeal, petitioner makes the same legal argument that he made before the superior court—that the court at the change-of-plea hearing incorrectly stated the mens rea element of the charged offense, resulting in his involuntary plea. He contends that the court should have granted his motion for summary judgment and denied the State's motion.

To better explain petitioner's position, we set forth the relevant law. First-degree aggravated domestic assault requires that the defendant "attempt[ed] to cause or willfully or recklessly cause[d] serious bodily injury to a family or household member." 13 V.S.A. § 1043(a)(1). "Serious bodily injury" may be found in one of two ways. The first is a "bodily injury"—meaning "physical pain, illness or any impairment of physical condition"—that created "(i) a substantial risk of death; (ii) a substantial loss or impairment of the function of any bodily member or organ; (iii) a substantial impairment of health; or (iv) a substantial disfigurement." 13 V.S.A. § 1021(a)(1)-(2)(A). The second is "strangulation by intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." *Id.* § 1021(a)(2)(B). The latter basis for finding serious bodily injury, strangulation, does not require a showing of bodily injury but does require a showing that the perpetrator intentionally impeded breathing or blood circulation by putting pressure on the throat or neck or by blocking the nose or mouth.

As indicated above, in this case the State charged that petitioner "attempted to cause or willfully or recklessly caused serious bodily injury" by impairing her breathing by sitting on her. In petitioner's view, because the alleged serious bodily injury is "causing . . . difficulty breathing," the State was required to prove "strangulation by intentionally impeding normal breathing," *id.* § 1021(a)(2)(B), which the court failed to explain during the plea colloquy at the change-of-plea hearing. In support of this argument, petitioner cites a recent case in which we described the statutory definition of strangulation "as conduct that 'intentionally [impedes] normal breathing or circulation.'" State v. Carter, 2017 VT 32, ¶ 18 (quoting 13 V.S.A. § 1021(a)(2)(B)).

We find petitioner's argument unavailing. The strangulation alternative for causing serious bodily injury explicitly requires that strangulation result from intentionally impeding breathing or blood circulation "by applying pressure on the throat or neck or by blocking the nose or mouth of another person." 13 V.S.A. § 1021(a)(2)(B). The State neither alleged nor charged such conduct—nor could it have done so, given the statutory explanation of strangulation and the alleged facts of this case. Rather, the State alleged that petitioner sat on the complainant's chest, causing her difficulty breathing, which, as the superior court concluded, constituted an allegation that petitioner created "a substantial loss or impairment of the function of [a] bodily member or organ"—namely, the lungs. As we stated in Carter, in situations involving choking, the State can charge the perpetrator with causing serious bodily injury either by strangulation, as explained in § 1021(a)(2)(B), or by causing bodily injury in any of the four ways set forth in § 1021(a)(2)(A), depending on the circumstances of the case. 2017 VT 32, ¶ 16. Because the court at the change-of-plea hearing did not err in stating the

mens rea element of the charged offense, we affirm the superior court's grant of summary judgment to the State with respect to petitioner's PCR petition.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice