



Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SEPTEMBER TERM, 2026

State of Vermont v. Kisha Parson*	}	APPEALED FROM:
	}	Superior Court, Orleans Unit,
	}	Criminal Division
	}	CASE NO. 24-CR-01978
		Trial Judge: Rory T. Thibault

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

Defendant appeals from her conviction by jury of first-degree aggravated domestic assault of her minor daughter.¹ We affirm.

I. Procedural History

Defendant is the mother of six children. She was charged with the crime above based on an incident that allegedly occurred in June 2023 when daughter was eleven years old. The State alleged that defendant either willfully or recklessly caused daughter serious bodily injury by sitting on top of her and shoving a sock in her mouth.

At trial, daughter testified as follows. Daughter was cleaning when defendant got mad at her. Defendant “sat on [daughter] and put a sock in [her] mouth,” which made daughter “gag.” She “could barely breathe.” Defendant was sitting on daughter’s lap and leaning back on daughter when defendant “shoved [the sock] down [her] throat.” The sock went “to the back” of her mouth. Daughter testified that she was unable to “breathe through [her] nose . . . [b]ecause [she] was sick.”

Daughter told a friend’s mother about defendant’s conduct, and the mother took daughter to the sheriff’s office. Daughter’s maternal aunt met her there. Aunt testified that daughter was traumatized by defendant’s behavior and she was concerned about daughter’s physical safety. Aunt previously had to intervene in an altercation between defendant and daughter. She also

¹ Defendant was charged with three counts of domestic assault and two counts of aggravated assault against daughter and daughter’s twin sister. Two domestic assault charges and one aggravated domestic assault charge were dismissed at trial. Defendant was acquitted of one count of domestic assault and convicted of the charge at issue here.

witnessed defendant physically assault daughter, hitting her with a brush and sitting on top of her. Defendant's son had to remove defendant from daughter during this incident. Aunt did not think it was safe for daughter to return to mother's home.

An investigator for the Department for Children and Families (DCF) also testified. The investigator was contacted by law enforcement, and she created a safety plan for daughter who (along with her twin sister) went to stay with aunt after the alleged incident. The investigator interviewed defendant in September 2023. During the interview, defendant "said that she had been asking the girls to clean their rooms, and that they wouldn't do it" and that she "held [daughter] down and put a sock from the clean laundry basket into her mouth" because defendant wanted daughter "to shut up." Defendant further claimed that she didn't put the sock farther than daughter's teeth and did not "try to intentionally gag or stop her from breathing."

At trial, defendant testified that she was arguing with daughter about chores and daughter "all of a sudden . . . physically attack[ed]" her. She told daughter to stop but daughter did not. Defendant said this went on for an hour. Defendant told daughter she couldn't talk to defendant that way and that defendant would "help [her] stop talking" because she "need[ed] to shut up." Defendant said she was standing while daughter was on the couch. Defendant tried to "put a sock in [daughter's] mouth" changed her mind, threw the sock down, and walked away.

The jury found defendant guilty of first-degree aggravated domestic assault in violation of 13 V.S.A. § 1043(a)(1). The jury was provided a special verdict form on which it could elect "not guilty", or guilty of aggravated domestic assault: (1) "willfully by 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" or (2) "recklessly by causing a substantial loss or impairment of the function of any bodily member or organ, or a substantial impairment of health." The jury found defendant guilty based on the second theory. This appeal followed.

II. Arguments on Appeal

Defendant raises two arguments on appeal, neither of which she preserved below. First, she challenges the sufficiency of the evidence to establish the element of serious bodily injury. Second, she argues that the trial court's instructions essentially directed a guilty verdict and precluded the jury from considering a lesser-included offense. Because these arguments are made for the first time on appeal, we review them under the plain-error standard.

A. Standard of Review

A defendant must overcome a "very high bar" to establish plain error. State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292. "Plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Kuhlmann, 2021 VT 52, ¶ 26, 215 Vt. 290 (quotation omitted). A defendant must show "that there is an error, the error is obvious, and the error affects substantial rights and results in prejudice to defendant." Id.

In addition to the plain-error standard, we also recognize "the standard applied to claims that the trial court erred by failing to sua sponte move for acquittal on its own motion." Id. ¶ 27 (quotation omitted). A "court should move for acquittal only when the record reveals that the evidence is so tenuous that a conviction would be unconscionable." Id. (quotation omitted); cf.

State v. Davis, 2018 VT 33, ¶ 14, 207 Vt. 346 (explaining that when defendant preserves sufficiency-of-evidence argument, Supreme Court “view[s] the evidence in the light most favorable to the State, excluding any modifying evidence, and determine[s] whether it is sufficient to fairly and reasonably convince a trier of fact that the defendant is guilty beyond a reasonable doubt”).

B. Sufficiency of the Evidence

Defendant first argues that the State failed to show that daughter suffered serious bodily injury. As far as we can tell, there appear to be two facets to defendant’s argument.

First, defendant reads the court’s instruction to have allowed the jury to convict her if she “ignored a substantial and unjustifiable risk that her conduct would cause [daughter] to have difficulty breathing.” Building on this premise, defendant contends that difficulty breathing, without more, cannot constitute “serious bodily injury” under the statute.

Next, defendant also appears to suggest that because a defendant can be charged with aggravated domestic assault based on willful strangulation, there must be a heightened requirement to prove “serious bodily injury” in cases where a defendant is charged with recklessly causing a “substantial loss or impairment of the function of any bodily member or organ, or a substantial impairment of health.” Defendant contends that in defining “serious bodily injury” to include strangulation, the Legislature eliminated the need to show “bodily injury” in strangulation cases, but in a “critical tradeoff” imposed a heightened mens rea to convict under the second theory. To allow defendant’s conviction under 13 V.S.A. § 1043(a)(1) for causing her child “difficulty breathing,” defendant reasons, “runs counter to the balance the Legislature struck” in adding ‘strangulation’ to the definition of ‘serious bodily injury.’ ”

We conclude that both parts of defendant’s challenge to the sufficiency of the evidence fall short of the plain-error threshold. Pursuant to 13 V.S.A. § 1043(a)(1), “[a] person commits the crime of first degree aggravated domestic assault if the person . . . attempts to cause or willfully or recklessly causes serious bodily injury to a family or household member.” “Bodily injury” means “physical pain, illness, or any impairment of physical condition.” *Id.* § 1021(a)(1). “Serious bodily injury” means “bodily injury that creates . . . a substantial loss or impairment of the function of any bodily member or organ . . . [or] a substantial impairment of health.” *Id.* § 1021(a)(2)(A)(ii), (iii). “Serious bodily injury” also includes “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 State presented both theories to the jury, and the court instructed the jurors as to the elements of each. See State v. Carter, 2017 VT 32, ¶¶ 16, 18, 204 Vt. 383 (recognizing that where State alleged that “defendant’s act caused serious bodily injury by choking,” it was not required to charge that strangulation occurred, explaining that “alternative definition of serious bodily injury by strangulation was added to the statute in 2006, but [it] did not replace the preexisting elements of the crime if the State chose to charge the crime in that way,” and recognizing different mental elements in various definitions). There was no omitted mens rea element.

Moreover, if defendant is arguing—as a matter of plain error—that the statute imposes an unwritten and heightened standard of proof upon the State when it pursues aggravated domestic assault charges under the second theory, we reject that contention as inconsistent with the face of the statute and our precedent. See *id.* With those inconsistencies, defendant cannot, by definition, satisfy the plain-error standard with her statutory interpretation argument.

The State also admitted evidence sufficient to prove the element of serious bodily injury. The prosecution provided evidence that defendant sat on her eleven-year-old daughter, leaned back on her, and shoved a sock down her throat. The sock went to the back of her mouth. It made daughter gag and impeded her breathing. Defendant contends that causing someone “momentary” breathing difficulty cannot be considered “serious bodily injury.” She suggests that something worse must occur, without specifying what degree of emergency might be required. But we have never held that a person must lose consciousness, go to the hospital, see a doctor, or worse, to establish “serious bodily injury” and, thus, the trial court did not commit plain error by failing to require such proof.

Defendant points to other cases where victims suffered different types of injuries, but each jury will make its decision based on the unique record before it, and the facts of one case therefore cannot control the outcome of the next, at the trial level or at this stage of review. Here, the State presented sufficient evidence to satisfy the plain language of the statute and the evidence sufficed to support the jury’s verdict. Defendant continues to disagree with the jury’s assessment of the evidence. But we leave it to the jury, as factfinder, to assess “the credibility of the witness[es] and the weight of the evidence,” State v. Hinchliffe, 2009 VT 111, ¶ 22, 186 Vt. 487, and “we will not substitute our judgment for that of the jury,” State v. Johnson, 2013 VT 116, ¶ 27, 195 Vt. 498. Accordingly, because defendant fails to show that “the evidence [here] is so tenuous that a conviction would be unconscionable,” State v. Davis, 2020 VT 20, ¶ 21, 211 Vt. 624 (quotation omitted), her challenge to the sufficiency of the evidence also falls short of the “very high bar” to establish plain error, Herrick, 2011 VT 94, ¶ 18. See State v. Provost, 2014 VT 86A, ¶ 14, 199 Vt. 568 (explaining “[w]e have held that errors in unsettled areas of law are not obvious, and therefore not plain” and citing cases); see also State v. Gilbert, 2009 VT 7, ¶ 7, 185 Vt. 602 (mem.) (finding no plain error where Court had not yet decided issue raised by defendant for first time on appeal, and thus “defendant [could not] show that any error of law the trial court may have made was obvious”).

C. Jury Instructions

Defendant next challenges the jury instructions for the first time on appeal. She argues that the instructions effectively directed a verdict for the State and that they removed a lesser-included offense from the jury’s consideration. She focuses on the following language from the court’s instructions:

Regarding the State’s alternate theory, for you to find that [defendant] recklessly caused serious bodily injury to [daughter] by causing a substantial loss or impairment of the function of any bodily member or organ, to include the lungs, or a substantial impairment of health by sitting on top of [daughter] in a chair and shoving a sock in her mouth, you must find that [defendant] acted recklessly. You may find that she acted recklessly if she consciously ignored a substantial and unjustifiable risk that her conduct would cause [daughter] to have difficulty breathing.

Her disregard of the risk, when considered in light of the nature and purpose of her conduct and the circumstances known to her, must have been a gross deviation from how a law-abiding person would have acted in the same situation. The mental state with which a person does an act may be shown by the way in which he

or she expresses it to others or by his or her conduct. In determining her mental state, you should consider all the surrounding facts and circumstances.

(Emphasis added.) According to defendant, by using the language emphasized above, the trial court impermissibly directed a verdict for the State and prevented the jury from considering a lesser-included offense.

We apply a well-established standard in reviewing this argument:

When reviewing alleged plain error in a jury instruction, we determine whether there was obvious error affecting the defendant's substantial rights, thereby resulting in prejudice to the defendant and seriously affecting the fairness or integrity of the judicial proceedings. We examine the instructions in light of the record evidence as a whole and determine if any error would result in a miscarriage of justice. This is a very high bar—we find plain error only in rare and extraordinary cases.

State v. Nicholas, 2016 VT 92, ¶ 13, 203 Vt. 1 (citations and quotations omitted).

We have reviewed the record and do not repeat the court's full jury instructions here. The court instructed the jury on the required elements for aggravated domestic assault, including providing the jury with the above statutory definition of "serious bodily injury." The language cited by defendant is consistent with the Model Penal Code's definition of "recklessness," which we have endorsed. State v. Brooks, 163 Vt. 245, 251 (1995). The State's theory of the crime was that defendant impeded or impaired daughter's breathing, whether intentionally or recklessly, and the court's instructions did not give "a definition of substantial bodily injury that basically directed verdict for the State," as defendant suggests. The court's instructions, together with the verdict form, clearly communicated to the jury that to find defendant guilty under a recklessness theory, it must conclude that defendant's act of shoving a sock in daughter's mouth to the point where daughter could barely breathe resulted in either a substantial risk of death, substantial loss or impairment of the function of any body member or organ, substantial impairment to daughter's health, or substantial disfigurement.

The court similarly did not preclude the jury from considering whether defendant committed a lesser-included offense, as she suggests. The jury was specifically instructed that it could consider a lesser-included offense if it did not find defendant guilty of first-degree aggravated domestic assault. "We presume that jurors follow the law as set forth in the instructions given to them." State v. Webster, 2017 VT 98, ¶ 22, 206 Vt. 178. Accordingly, defendant fails to show plain error. See State v. Pelican, 160 Vt. 536, 540 (1993) (rejecting defendant's plain-error assertion that court directed verdict where "instruction carefully informed the jury about the elements of the crime charged and the lesser-included offenses, and expressly informed the jury that it must acquit if it had a reasonable doubt that defendant was guilty").

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Christina E. Nolan, Associate Justice