

Third District Court of Appeal

State of Florida

Opinion filed August 14, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-545
Lower Tribunal No. 15-6-A-M

Yandri Lopez-Macaya,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Monroe County, Ruth L. Becker, Judge.

Carlos J. Martinez, Public Defender, and Stephen J. Weinbaum, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Kayla Heather McNab, Assistant Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ and MILLER, JJ.

EMAS, C.J.

Yandri Lopez-Macaya was arrested and charged by information with two felonies: domestic battery by strangulation (Count I) and aggravated assault with a deadly weapon (Count II). A jury convicted him of domestic battery by strangulation (as charged) and misdemeanor assault (as a lesser-included offense of aggravated assault). The trial court sentenced him to concurrent terms of five years in prison and sixty days in jail.

On appeal, Lopez-Macaya raises three issues. We find no merit in any of the issues raised, but write to address Lopez-Macaya's claim that "the trial court fundamentally erred in failing to reduce [the domestic battery by strangulation count] to simple battery because the element of great bodily harm, or the risk thereof, was not established by competent and substantial evidence."¹

¹ The remaining issues raised on appeal are that: 1) the police detective improperly testified about the cause and age of the victim's injuries; and 2) the State made improper comments in closing argument. As to the first, the defendant failed to make a contemporaneous objection and thus waived the issue on appeal unless the error was fundamental. J.B. v. State, 705 So. 2d 1376 (Fla. 1998); Major v. State, 979 So. 2d 243 (Fla. 3d DCA 2007). If the detective's testimony was in any respect improper or erroneous, it was not fundamentally so.

As to the claim of improper closing argument, Lopez-Macaya contends that the State's comments shifted the burden of proof to the defendant and bolstered the testimony of the victim. Again, the defendant failed to make a contemporaneous objection and thus waived the issue absent fundamental error. Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). Further, and on the merits, we find that the State's comments were neither burden-shifting nor bolstering; instead they were fair and proper comments on the evidence presented at trial, including the testimony of Lopez-Macaya himself, who directly contradicted the testimony of K.S. When read in context, the State's argument comparing these witnesses' versions of events, and

We first note that Lopez-Macaya failed to preserve this error in the trial court below and has thus waived the issue for appeal unless it rises to the level of fundamental error. See Monroe v. State, 191 So. 3d 395, 400 (Fla. 2016) (reiterating that “unless the evidence was insufficient to show that any crime had been committed, claims of insufficient evidence must be properly preserved” (citing F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003))); Stephens v. State, 787 So. 2d 747, 753 (Fla. 2001) (observing that “a bare bones motion for judgment of acquittal” is insufficient to preserve a specific argument on appeal).

We find no fundamental error and, indeed, no error at all. Even had defense counsel offered more than a “bare bones” motion for judgment of acquittal, it would properly have been denied, given that the State presented competent substantial evidence to support the jury’s verdict finding Lopez-Macaya guilty of domestic battery by strangulation. The evidence presented at trial, in a light most favorable to upholding the verdict, established:

Lopez-Macaya and K.S. were in a dating relationship and living together on the night in question. They began arguing when Lopez-Macaya pushed K.S, and then left the house and went outside to smoke a cigarette.

discussing the credibility, motive and bias of these two witnesses, was proper and did not shift the burden of proof to Lopez-Macaya nor vouch for, or improperly bolster the credibility of, K.S.

Once Lopez-Macaya was outside, K.S. locked the doors and ran to the bathroom to hide. Lopez-Macaya discovered he was locked out and began banging on the doors. He broke a window, reached inside the broken window, and opened a door. When Lopez-Macaya saw K.S. was in the bathroom, he attempted to open the door and K.S. tried to prevent him from doing so. Lopez-Macaya eventually gained entry to the bathroom and punched K.S. several times with his fist.

Lopez-Macaya had a knife in his possession and held that knife to K.S.'s throat, threatening K.S. he was going to kill her. He then dragged K.S. by her hair into the bedroom and onto her bed, where he got on top of her and strangled her with his hands around her neck. K.S. could not breathe. Lopez-Macaya threatened to cut her face and told her she was going to die. K.S. believed Lopez-Macaya was going to kill her that night.

When Lopez-Macaya left the room for a moment to get another knife, K.S. retrieved her cell phone and attempted to dial 911. When Lopez-Macaya returned, he grabbed the phone from K.S. and broke it. K.S. was uncertain whether the 911 call had gone through before Lopez-Macaya grabbed the phone from her hand and broke it. Lopez-Macaya then continued his attack on K.S., including choking her a second time, as well as poking her in the stomach with a knife and hitting her in the face with a knife.

The 911 call had apparently gone through, because police soon arrived and pulled Lopez-Macaya off K.S. Although both he and K.S. were fully clothed, Lopez-Macaya told police that he and K.S. were simply having (or about to have) sex.

K.S. was reluctant to go to the hospital that night, because she felt embarrassed and confused and was still scared and in shock. However, the next day K.S. did go to the hospital because she was still having trouble breathing and swallowing. Her head and neck were swollen, she had scrapes on her legs from being dragged on the floor, and there were bruises on her face from Lopez-Macaya punching her multiple times. At the time of the trial (three years after the crime) K.S. acknowledged she still has difficulty swallowing because of the injuries sustained in Lopez-Macaya's attack on her.

Lopez-Macaya argues there was insufficient evidence to prove great bodily harm. However, he largely ignores the fact that the State need not prove great bodily harm to establish the crime of domestic battery by strangulation; instead, the State can prove this crime by establishing defendant's actions **created a risk of** great bodily harm.² Section 784.041(2)(a), Florida Statutes (2015) provides in pertinent part:

² This distinction also renders Lopez-Macaya's reliance on D.M. v. State, 237 So. 3d 1096 (Fla. 3d DCA 2017) inapt. The defendant in D.M. was charged with felony battery. The crime of felony battery cannot be established by proof that defendant

A person commits domestic battery by strangulation if the person knowingly and intentionally, against the will of another, impedes the normal breathing or circulation of the blood . . . of a person . . . so as to **create a risk of or cause great bodily harm** by applying pressure on the throat or neck of the other person or by blocking the nose or mouth of the other person.

(Emphasis added). See also Fla. Std. J. Inst. (Crim.) 8.5(a).³

We conclude that the State presented competent substantial evidence to satisfy this element.

Affirmed.

created a risk of great bodily harm; it requires proof that the defendant caused “great bodily harm, permanent disability, or permanent disfigurement.” § 784.041(1), Fla. Stat. (2015).

³ The trial court provided the jury with the following standard jury instruction:

8.5(a) DOMESTIC BATTERY BY STRANGULATION

§ 784.041(2)(a), Fla. Stat.

To prove the crime of Domestic Battery by Strangulation, the State must prove the following three elements beyond a reasonable doubt:

1. YANDRI LOPEZ-MACAYA knowingly and intentionally impeded the normal breathing or circulation of the blood of K.S. against her will by applying pressure on the throat or neck of K.S.
2. In so doing, YANDRI LOPEZ-MACAYA created a risk of great bodily harm to K.S.
3. YANDRI LOPEZ-MACAYA was in a dating relationship with K.S.

"Dating relationship" means a continuing and significant relationship of a romantic or intimate nature.