100120-7

Supreme Court No. ____
(COA No. 80943-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE BROWN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Shane Brown asks this Court to review the opinion of the Court of Appeals in *State v. Shane Brown*, 80943-1-I (issued on July 26, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether a defendant's right to a unanimous jury is violated where the jury was presented with alternative means of committing a charged offense but one or more of those means is not supported by sufficient evidence.

2. Whether it violates the confrontation clauses of the state and federal constitutions to admit a complainant's out-of-court statements made to police who were investigating a completed crime.

C. STATEMENT OF THE CASE

One night in March 2019, a woman called 911. RP 466. She was upset, reporting being followed and yelling at someone to get away from her. Ex. 9. She told the operator her location while a male voice in the background asked her to, "Give me the phone." Ex. 9. The woman did not request any medical aid or report injuries. Ex. 9.

Officers Todd Olson and Mark Powell responded to the call and met Paula Goebel on the sidewalk in the SODO busway. RP 466. Both officers were using body-worn cameras which recorded their involvement.

Ex. 10, 14, 34, 35. The videos show Ms. Goebel and her children were the only people at the scene when the officer arrived. Ex. 10, 35. Ms. Goebel was crying but able to relay the events and answer the officers' questions. Ex. 10, 35. Ms. Goebel told officers that Shane Brown, her children's father, followed her, pushed her to the ground, pushed his daughter to the ground, and took her phone and left. Ex. 10. She said there was a no-contact order between her and Mr. Brown. Ex. 10. The children were calm and uninjured. Ex. 10, 35.

While Ms. Goebel spoke, Officer Olson took out a notepad and began writing things down. Ex. 10. Neither officer drew a weapon, looked around for Mr. Brown, or ushered Ms. Goebel and the children off the street to a "safer" location. Ex. 10, 35. The responding officers were calm and lingered as other police agencies responded to the scene. Ex. 10, 35. Officer Powell joked with other officers, ate Tic-Tacs, and stated they were looking for probable cause for a felony. Ex. 35.

Only after speaking with Ms. Goebel did the officers search the area for Mr. Brown. 496. They located him several blocks away, and when the officers called to him, Mr. Brown turned around and engaged with them. RP 509-10. The officers placed Mr. Brown in handcuffs and began questioning him. RP 121-22. They did not Mirandize Mr. Brown until after he had already answered several questions about the incident. RP

122. He later waived his rights and made various nonsensical statements. CP 16-17. A search of Mr. Brown and his backpack did not reveal a phone belonging to Ms. Goebel. RP 531-32.

The State charged Mr. Brown with robbery in the second degree predicated on the taking of Ms. Goebel's phone, violation of a no-contact order predicated on an assault, and interfering with domestic violence reporting. CP 1-2. The State alleged the felony offenses were committed against a family or household member, and were committed within the sight and sound of Ms. Goebel's minor children. CP 1-2.

At trial, the court excluded from the State's case-in-chief Mr. Brown's pre-*Miranda* statements to police while he was in custody. CP 17-18. Although the State failed to produce Ms. Goebel in person, it moved to admit her statements captured on the officers' body-worn video. RP 26-36.

The court acknowledged the proper test for admission of these statements under the Confrontation Clause, stating that it agreed "that certainly from the police side of things, from law enforcement side, the effort from the beginning is to see if there's probably cause for a crime . . . I completely agree with the defense that from the moment the officers arrived on the scene, they were looking to see if they had probable cause to believe that an offense had occurred." RP 37.

But, the court reasoned, "that doesn't tell me whether or not the statements that [the police] received from the victim, that they obtained from the victim were for purposes of a legal proceeding or whether they were for purposes of doing other things." RP 37-38. The court noted Ms. Goebel was "on the street in a bus area and there's no indication that there's anything more than the temporary encounter with the officers to resolve the situation. RP 39. Without properly applying the test set out under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) and *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the court found there was an ongoing emergency and ruled Ms. Goebel's out-of-court statements admissible.

The court instructed the jury on three alternative means of committing interfering with domestic violence reporting. Instruction 22, CP 44. However, the State presented no evidence Mr. Brown prevented Ms. Goebel from completing her 911 call, or that she ever requested medical assistance. The jury acquitted Mr. Brown of robbery, rejecting the State's contention that Mr. Brown took Ms. Goebel's phone. CP 50. It convicted him of the remaining two charges, finding both were domestic violence offenses, and the no-contact order violation was an aggravated domestic violence offense. CP 50-55.

On review, the Court of Appeals determined sufficient evidence supported all the alternative means of committing interfering with domestic violence reporting, and found not Confrontation Clause violation. Slip Op. at 3-7.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether a defendant's right to a unanimous jury is violated by the State's failure to prove all alternative means of committing an offense presents a significant constitutional question.

a. To sustain a conviction where the State alleges an offense was committed via one or more alternative means, there must be sufficient evidence to support each alternative means presented to the jury.

Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Alternative means crimes are those which may be accomplished and proved in more than one way. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (citing *State v. Arndt*, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976)). Where a charged offense may be committed by multiple means, and a jury is instructed on every alternative means, a conviction may stand only if each and every alternative is supported by sufficient evidence. *State v. Woodlyn*, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017); *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The rule's benefit is two-fold: (1) to prevent the jury

becoming confused about what criminal conduct has to be proved beyond a reasonable doubt, and (2) "to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict." *Smith*, 159 Wn.2d at 789; *accord State v. Petrich*, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984).

b. The State failed to prove two of the alternative means of committing interfering with domestic violence reporting.

The crime of interfering with domestic violence reporting is an alternative means crime. *State v. Nonog*, 145 Wn. App. 802, 813, 187 P.3d 335 (2008), *review granted and aff'd on other grounds*, 169 Wn.2d 220 (2010). A person commits the crime of interfering with the reporting of domestic violence if the person:

> (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
>
> (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

RCW 9A.36.150(1).

Here, the jury was instructed on all three alternative means of interfering with domestic violence reporting. Instruction 22 provided:

> A person commits the crime of interfering with the reporting of domestic violence if the person commits a

> crime of domestic violence and prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.
>
> Robbery in the second degree and violation of a court order are crimes of domestic violence when committed by one family or household member against another.

CP 44. The to-convict instruction also required the jury to find:

> That the defendant prevented or attempted to prevent Paula Jo Goebel from calling a 911 emergency communication system or obtaining medical assistance or making a report to any law enforcement officer.

CP 45, Instruction 23. Thus, the State was required to present substantial evidence of each of those means. *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988).

The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 410-11; *see also Woodlyn*, 188 Wn.2d 162-63.

Here, the jury was instructed that a person commits the crime of interfering with the reporting of domestic violence if he or she prevents or attempts to prevent the victim of a domestic violence crime from "calling a 911 emergency communication system," or "obtaining medical assistance." CP 44. The Court of Appeals found there was sufficient

evidence of both of these alternatives, yet the State presented no evidence to support these two means. Slip Op. at 4-5.

There is no evidence Mr. Brown prevented or attempted to prevent Ms. Goebel from calling 911. In fact, it is clear she successfully placed a call to 911 because the court admitted the 911 call at trial. RP 484; ex. 9. The Court of Appeals found it was sufficient that, *after* Ms. Goebel had successfully completed a call to 911, Mr. Brown appeared to have attempted to stop the call. Slip Op. at 4.

But, this is contrary to the plain meaning of the statute, which clearly criminalizes the action of preventing or attempting to prevent "the victim or a witness to that domestic violence crime from calling a 911 emergency communication system." RCW 9A.36.150(1). Once a 911 call has successfully been placed, a person can no longer commit the crime of interfering with domestic violence reporting via that alternative mean absent sufficient evidence that he or she interfered before the call was made in the first place.

Here, Ms. Goebel did not appear at trial and thus did not testify that Mr. Brown prevented or attempted to prevent her from making the phone call. Likewise, no law enforcement officers who interacted with her that day testified to any interference with Ms. Goebel placing the call. Indeed, the evidence shows, and the Court of Appeals acknowledged, that

is it is only *after* Ms. Goebel made the 911 call and began relaying her location and stating Mr. Brown was offending her did he apparently take the phone and leave. Slip Op. at 4.

Additionally, during the 911 call, Ms. Goebel does not report any injuries, does not report Mr. Brown hurting her or their children, and does not request medical assistance. The Court of Appeals reasoned that the interference statute "contains no such requirement that the communication [for medical assistance] be completed," and the jury "was entitled to infer" Ms. Goebel was prevented from requesting medical assistance. Slip Op. at 4-5. This is contrary to the available evidence and requires a reliance pure assumptions, not inferences. To find this alternative mean proven beyond a reasonable doubt, the jury would have had to assume Ms. Goebel was injured sufficient to warrant medical assistance, and further assume she intended to request medical assistance but for Mr. Brown's actions, despite the fact that she neglected to make such a request both on the 911 call and after police arrived to the scene. With this evidence, the jury could not have inferred that Ms. Goebel was trying to request medical assistance, and thus the State failed to prove this alternative means of interfering.

Because the State did not present substantial evidence of either of these two relied-upon alternatives, this Court should grant review to

determine whether Mr. Brown's right to a unanimous jury verdict was violated, requiring reversal of the conviction. *Kitchen*, 110 Wn.2d at 410-11; *see also Woodlyn*, 182 Wn.2d at 162-63; RAP 13.4(b)(3).

2. Whether the trial court's admission of the complainant's out-of-court statements violated Mr. Brown right to confront the State's witnesses presents a significant constitutional question under both the State and Federal constitutions.

a. The state and federal constitutions require criminal prosecutions to rest on accusations from witnesses who testify in person before the jury.

The constitutional right of an accused person to confront witnesses against him bars the use of out-of-court statements as a substitute for live testimony. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend. VI; Const. art. I, § 22.

The Sixth Amendment's Confrontation Clause forbids the use of "testimonial" out-of-court statements at trial unless the defendant had the opportunity to confront the person who made the statement, and that person is unavailable to testify. *Crawford*, 541 U.S. at 68. That a statement is admissible under the rules of evidence does not satisfy the requirements of the confrontation clause. *Id* at 61. The prosecution bears the burden of proving a statement does not violate the confrontation clause. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

Statements to police officers who are primarily interrogating a witness to "establish or prove past events potentially relevant to later criminal prosecution" are clearly testimonial statements. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Even statements made during a 911 call are testimonial when no ongoing emergency exists. *Id*. at 828-29.

In *Davis*, the accuser made statements to a 911 operator describing "events *as they were actually happening*, rather than describing past events," rendering them non-testimonial. *Id*. at 827 (emphasis in original). The caller was not attempting to give a statement for purposes of a future criminal prosecution, but rather was attempting to relay an ongoing emergency. *Id*. In the companion case in *Davis*, however, the accuser's statements to responding police were testimonial because the incident was not in progress, and "there was no immediate threat to her person." *Id*. at 829-30.

To prove a statement to a police officer is not testimonial, the prosecution must show, objectively, that a reasonable person in the declarant's shoes would not understand the statement would be conveyed to the prosecutors and available for use in a criminal case. *Michigan v. Bryant*, 562 US. 344, 360, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011); *Crawford*, 541 U.S. at 52.

b. Ms. Goebel's interviews with police after the incident ended were testimonial.

Ms. Goebel did not testify at trial, and the record does not reflect any specific efforts the State made to bring her to court. Rather, it appears they intended to proceed solely based on her statements in the body-worn video and the 911 call. RP 13.

The State asked the court to find Ms. Goebel's statements from the videos non-testimonial because "the officers' questions are specifically tailored to getting the bare minimum information that they need to give this woman the assistance she needs." RP 30. It maintained the emergency was ongoing. RP 30. The trial court's confrontation clause analysis incorrectly determined Ms. Goebel's statements were non-testimonial. The court stated, "I completely agree with the defense that from the moment the officers arrived on the scene, they were looking to see if they had probable cause to believe than an offense had occurred, but that doesn't tell me whether or not the statements that they received from the victim . . . were for purposes of a legal proceeding or whether they were for purposes of doing other things." RP 37-38. The court's analysis misapplies the test under *Crawford* and *Davis*.

Nevertheless, on review, the Court of Appeals, relying on *Bryant*, found the primary purpose of police questioning Ms. Goebel was to meet

an ongoing emergency because they "did not know Brown's identity, if he would arrive again on the scene, or what they would encounter if they located him." Slip Op. at 6-7. This is incorrect.

Under *Davis*, the question is whether "the primary purpose of the *interrogation* is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. at 822 (emphasis added). Here, the trial court agreed the primary purpose of the officer's interrogation was to determine whether there was probable cause to believe a crime had occurred and to investigate that crime. RP 37-38. Yet, the court shifted the focus from the purpose of the interrogation to the purpose of Ms. Goebel making the statement. The confrontation clause analysis, however, does not ask *why* a witness is making a particular statement – rather, it asks whether law enforcement is attempting to enable police assistance to an ongoing emergency, or whether, as the court found here, the police are interrogating for purposes of a criminal prosecution. *Davis*, 547 U.S. at 822.

Moreover, like in the companion case to *Davis*, *Hammon*, no ongoing emergency existed when the police arrived to speak to Ms. Goebel. Evidence obtained during a police investigation falls squarely within the "core class" of testimonial statements. 547 U.S. at 822. In *Hammon*, the Supreme Court determined no ongoing emergency existed

because (1) the incident was over by the time police arrived, (2) the officer expressly acknowledged the interrogation was part of an investigation into *past* criminal conduct, (3) the officer did not see or hear any further disturbance when he arrived, like arguing or people throwing things, (4) and there was no immediate threat to the complainant's person. 547 U.S. at 829-30. Additionally, when police arrived, the complainant was outside of the house on the porch, while her husband was inside, and she appeared frightened. *Id*. at 819. Taken together, the Court determined the out-of-court statements were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation," and "the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. *Id*. at 832; *see also State v. Ellis*, 13 Wn. App. 2d 1130 (2020) (Div. 1, at p. 5) (No. 80127-9)[1] ("A reasonable listener would not believe that the primary purpose of Deputy Chapman's questioning was to meet an ongoing emergency. B.S. had recovered her car and the scene was secure. Although deputies did not locate Ellis in the area, there was no evidence to suggest that he posed 'a threat of harm, thereby contributing to an ongoing emergency.'" *State v. Ohlson*, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007)).

[1] Unpublished, cited pursuant to GR 14.1.

The Court of Appeals here found an ongoing emergency because the police "did not know Brown's identity, if he would arrive again on the scene, or what they would encounter if they located him." Slip Op. at 6-7. However, there was even less potential that an ongoing emergency existed here than in *Hammon*. By the time police arrived at the scene, Mr. Brown was long gone, rather than just a few feet away inside a house, and the officers did not see any ongoing altercation between Ms. Goebel and Mr. Brown. The body-worn videos clearly show no sign of any other people on the sidewalk. Ex. 10, 34, 35. Ms. Goebel's statements on the videos are all in the past tense, describing an emergent situation that was already over when police arrived. *Id*. The officers acknowledged, and the trial court explicitly found, they were trying to obtain enough information to establish probable cause that a crime had occurred. RP 37-38.

Importantly, there was no immediate threat to Ms. Goebel or to the officers; although Ms. Goebel is upset in the videos, neither she nor the officers behave as though there is still an ongoing emergency. Ex. 10, 34, 35. The two responding officers do not have their weapons drawn, do not usher Ms. Goebel and her children off the street or to some other place of safety, and do not attempt to secure the scene in any way. *Id*. Instead, they ask Ms. Goebel, "What's going on?" and take out their notepads to write down Ms. Goebel's answers. Ex. 10. Contrary to the court's assessment

that this was a "temporary encounter" with police, the responding officers and well as several back up units remain with Ms. Goebel for over 26 minutes, but likely more.[2] Ex. 35. Under these circumstances, no ongoing emergency existed when police obtained Ms. Goebel's statements.

The State did not prove that the primary purpose of gathering Ms. Goebel's statements was to resolve a presently occurring threat to her or the public. The videos capture Ms. Goebel relating what had already happened to her rather than what was happening presently, and the trial court found the officers were primarily seeking to establish probable cause for a crime. These post-event, out-of-court statements to police are testimonial, and the trial court violated Mr. Brown's right to confront his accuser by admitting the statements without giving him an opportunity to cross-examine Ms. Goebel.

c. The State's reliance on out-of-court statements resulted in a fundamentally unfair trial.

A violation of the confrontation clause is presumptively prejudicial and requires reversal unless the State proves the error was harmless beyond a reasonable doubt and did not contribute to the verdict obtained. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012), citing *Chapman*

[2] The body-worn video footage in Ex. 35 ends after approximately 26 minutes and 35 seconds, but the video shows police and medical aid remain at the scene as the video ends.

v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). On review, the court must "assum[e] that the damaging potential of cross-examination [was] fully realized," and consider the importance of the witness's testimony to the State's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Ms. Goebel's statements to police were crucial to the State's case. No officers or other witnesses observed the incident, and although the 911 call was admitted, Ms. Goebel does not identify herself or Mr. Brown during that call. Ex. 9. Without the body-worn video, the State could not have proved its case because there was no other first-hand account of the incident, and Mr. Brown's pre-*Miranda* statements about the incident were inadmissible during the State's case-in-chief.

Because the State's case relied exclusively on Ms. Goebel's recorded statements, and because Mr. Brown was denied his right to confront her when the State failed to make her available for trial, the prosecution cannot show this error is harmless beyond a reasonable doubt. The confrontation clause violation and the irredeemable prejudicial effect of that violation denied Mr. Brown a fair trial. This Court should grant review to determine whether Mr. Brown's right to confrontation and a

fundamentally fair trial were violated by the erroneous admission of the complainant's out-of-court statements. RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, Mr. Brown respectfully requests that review be granted. RAP 13.4(b)(3).

DATED this 25th day of August, 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. SHANE MATHEW BROWN, Appellant.	No. 80943-1-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Brown appeals from a judgment and sentence for interfering with domestic violence reporting and violation of a no-contact order. First, he argues he was denied his right to a unanimous jury. Next, he argues the court admitted out-of-court statements in violation of his right to confront his accuser. Further, he argues the court erred in imposing no-contact orders for his children. Finally, he argues the order of restitution should be vacated. We remand for reconsideration of the no-contact orders, and otherwise affirm.

FACTS

Paula Goebel and Shane Brown have two minor children together. On March 2, 2019, Goebel called the 911 emergency system. Goebel told the operator, "He keeps following me!" and "Help me!" On the call recording, a male voice can be heard saying, "Give me the phone."

Responding officers found Goebel and her two children on the sidewalk. She told police that before fleeing, Brown followed her, pushed her and her child down, threatened to kill her, and stole her phone. She let them know there was an

existing no-contact order between her and Brown. Later, medics arrived to treat Goebel.

Police located Brown a quarter mile away. They handcuffed and searched him, recovering one phone.

Brown was charged with interfering with the reporting of a crime of domestic violence, robbery in the second degree, and felony violation of a no-contact order. At trial, he testified that he was riding the bus that day when he was approached by his children, and that an argument occurred between him and Goebel. He exited the bus, returning to the bus stop 20 to 30 minutes later. There, he saw his family on a bench and claimed Goebel asked to borrow his phone. When he heard her stating her location and that he was "offending her," he began telling her to give him the phone. He said Goebel threw his phone to the ground, which he retrieved before running away. He denied assaulting Goebel.

Goebel did not testify at trial. The court allowed her out-of-court statements to be admitted via police body-worn camera footage and a recording of the 911 emergency service system call.

The jury acquitted Brown of robbery in the second degree, but found him guilty of the other two charges. The court imposed no-contact orders for his children. Following a restitution hearing, it also ordered him to pay Goebel restitution for her lost cell phone.

Brown appeals.

DISCUSSION

First, Brown argues he was denied his right to a unanimous jury. Next, he argues the court admitted the victim's statements in violation of his right to confront his accuser. Third, he argues the court erred in imposing no-contact orders barring him from any contact with his minor children for five years. Finally, he argues the order of restitution should be vacated because it was unsupported by substantial credible evidence.

I. Unanimous Jury

Brown argues the conviction for interfering with domestic violence reporting violated his right to a unanimous jury. He argues substantial evidence did not support each of the means of accomplishing the offense.

Criminal defendants have the right to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). In alternative means cases, where the criminal offense can be committed in more than one way, an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence. Id. But, when insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed. Id. We review the sufficiency of the evidence de novo. State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Interfering with the reporting of a crime of domestic violence is an alternate means crime. See State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010). A person may interfere with

domestic violence reporting by committing a crime of domestic violence, and preventing or attempting to prevent the victim from: (1) calling a 911 emergency communication system, (2) obtaining medical assistance, or (3) making a report to any law enforcement official. RCW 9A.36.150(a), (b). The jury was instructed on all three means, so each must be supported by substantial evidence.

Brown argues the evidence did not support the alternative means of "calling a 911 emergency communication system" or "obtaining medical assistance." RCW 9A.36.150(b). He notes that Goebel successfully called 911. But, this is irrelevant, attempt alone is criminalized under the statute. Id. The statute does not distinguish between placing a call to 911 and continuing to carry on the communication that was the purpose of that call. Id. And, the call evidenced Brown's interference. On the call, scuffling could be heard, as well as Goebel saying, "'Leave me alone'" and "'[S]top following me.'" At trial, Brown admitted he was the voice at the beginning of the call saying, "'Give me the phone'" to Goebel. He testified that, at least initially, she would not give him the phone. He testified to hearing her on the phone relaying her location and that he was offending her. The jury also heard statements from Goebel to police that Brown took the phone and ran away. There was sufficient evidence for it to conclude Brown prevented or attempted to prevent her from calling 911.

Next, Brown contends Goebel did not attempt to obtain medical assistance because she did not report her injuries or directly request medical assistance to the 911 operator. The interference statute contains no such requirement that the communication be completed. See id. This is not surprising since the interference

or attempted interference with the communication with 911 may prevent the victim from doing so.

When officers contacted Goebel, they noted she was crying. The jury heard Officer Todd Olson describe Goebel holding her hand as he approached. It was able to observe this on police bodycam footage. It heard Goebel's statements that Brown had knocked her to the ground, causing injury. It heard Officer Michael Drazio describe admitted photographs of injuries to Goebel's right knee from being thrown to the ground. The jury was entitled to infer from the evidence that Goebel was prevented from communicating the injury and a request for medical assistance. This evidence was sufficient to support Brown's conviction for interference by preventing or attempting to prevent a victim from seeking medical assistance.

We hold that Brown's right to a unanimous jury was not violated.

II. Confrontation Clause

Next, Brown argues admitting Goebel's out-of-court statements to police violated his right to confront his accuser.

The constitutional right of an accused person to confront witnesses against them bars the use of out-of-court statements as a substitute for live testimony. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. CONST. amend. VI; CONST. art. I, § 22. The confrontation clause forbids the use of "testimonial" out-of-court statements at trial unless the defendant had the opportunity to confront the person who made the statement, and that person is unavailable to testify. See Crawford, 541 U.S. at 68. We review

confrontation clause violation claims de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

"In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" Ohio v. Clark, 576 U.S. 237, 245, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015) (alteration in original) (quoting Michigan v. Bryant, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)).

Here, Goebel did not testify at trial. The court admitted Goebel's statements to police via body-worn camera footage. It excluded everything beyond the point when officers started checking on the no-contact order and Goebel's medical condition, stating the inquiry transitioned from being nontestimonial and the emergency began to dissipate.

Brown argues Goebel's statements to police at the scene that were admitted were testimonial. He argues they were conducted after the incident had ended and no ongoing emergency existed.

Upon arrival, officers ask Goebel, "What's going on?" In her 911 call, Goebel had not communicated Brown's criminal history or what threat level he posed. Brown was still at large. Police did not know Brown's identity, if he would arrive again on the scene, or what they would encounter if they located him. Their

questions largely centered on identifying the assailant, such as his name and birthdate. Police were then able to run this information through their database to ascertain "whether they would be encountering a violent felon." Davis, 547 U.S. at 827-28 (holding a 911 operator's effort to identify an assailant was necessary to enable responding officers to meet an ongoing emergency).

In Bryant, where police arrived on the scene of a shooting by an unknown suspect, questions about "what had happened" were held to be necessary to allow the police to "'assess the situation, the threat to their own safety, and possible danger to the potential victim.'" Bryant, 562 U.S. at 376 (quoting Davis, 547 U.S., at 832).

Viewed objectively, the primary purpose of police questioning in the beginning of the contact was to meet an ongoing emergency. The admittance of Goebel's statements did not violate Brown's Sixth Amendment right to confront his accuser.

III. No-Contact Orders

Brown asserts the trial court erred by imposing no-contact orders for his children without analyzing on the record the need for such orders and considering less restrictive alternatives.

This court reviews the imposition of sentencing conditions for an abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Applying the wrong legal standard is an abuse of discretion. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

Parents have a fundamental liberty interest in the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Sentencing conditions that interfere with fundamental rights must be reasonably necessary to achieve a compelling state interest. State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The State concedes that the trial court did not apply the correct legal standard in issuing the no-contact orders. Its concession is well taken.

We remand to the sentencing court for reconsideration of the terms of the no-contact orders.

IV. Restitution

Finally, Brown argues the order of restitution was not supported by substantial, credible evidence. The order of restitution shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. RCW 9.94A.753(3). Trial courts are granted broad powers of restitution by the legislature. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Restitution is permitted for losses that are causally connected to the crime. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008). Generally, losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Id. at 966. Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct.

2546, 165 L. Ed. 2d 466 (2006). A trial court's restitution order will not be disturbed on appeal absent an abuse of discretion. State v. Deskins, 180 Wn.2d 68, 77, 322 P.3d 780 (2014).

The court ordered Brown to pay restitution to Goebel in the amount of $132.59 for her cell phone. In its order, the court,

> noted the [d]efendant's objection, i.e.[,] that the jury acquitted the [d]efendant of the property-related offense in Count 1 (Robbery). However, the [c]ourt overruled the objection and concluded that based on the evidence presented at trial, there was a causal connection between the [d]efendant's conduct and the disappearance of the victim's cell phone.

That the jury acquitted Brown of robbery does not foreclose the possibility that there was a causal connection between the loss of Goebel's phone and the crimes for which Brown was convicted. The jury instructions for robbery required it to find not only that Brown took Goebel's phone, but that he took it "against her will with use or threatened use of immediate force, violence, or fear of injury." Regardless of the jury's reasons for acquittal on robbery, the relevant question is whether sufficient evidence demonstrated that but for Brown's crimes of conviction, Goebel would not have incurred the loss of her phone. See Griffith, 164 Wn.2d at 966.

The 911 call is evidence she was in possession of a phone. In her victim impact statement, Goebel said that he "stole [her] phone and ran off." This matched her statements on police video admitted at trial that Goebel had taken her phone. The jury verdict necessarily supports that he interfered with the call.

There was sufficient evidence to conclude that Goebel's phone was gone as a result of Brown's interference.

The amount of restitution was also reasonably inferred from the evidence. Goebel signed a victim loss statement indicating her "LG G Stylo-8 GB (Boost Mobile)" cell phone was still unrecovered property. The restitution amount came from the State's documentation from an online retailer showing the same phone model valued at $194.99 and offered for a sale price of $132.59. The court did not abuse its discretion in awarding restitution for the loss of Goebel's phone.

We remand for reconsideration of the no-contact orders, and otherwise affirm.

Leppelwick, J.

WE CONCUR:

Mann, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80943-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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