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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court properly refuse to instruct the jury concerning the uncontrollable circumstances defense on the bail jumping charge? [Combining Assignment of Error No. 1 and No. 2]
2. Was there sufficient evidence elicited at trial to support Mr. Escobano's criminal conviction for assault in the second degree?
3. Was the trial court correct in finding that Mr. Escobano and his victim were family or household members as defined by RCW 10.99.020?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

1. Facts related to the conviction for assault in the second degree.

Mr. Escobano described his relationship with the victim

Brenna Youckton as follows:

We were actually really – we were good friends, because we just kind of – we talked a lot, and we hung out a lot, and we had similar interests like Harry Potter and Star Wars and things like that, and we connected on that level. And, from there, we were just friends, good friends.

[RP 186].

Mr. Escobano also testified that he and Ms. Youckton had lived together in Olympia for approximately 3 months earlier in

2009. [RP 186]. He subsequently described their friendship as “a little strained” because there “was a little bit of tension there”. [RP 187]. Even so, Mr. Escobano visited with Ms. Youckton on September 15, 2009 and stayed the night at her home. [RP 188-189]. Ms. Youckton testified that Mr. Escobano brought his clothes and lap-top for the night-over. [RP 35]. Ms. Youckton also testified that she and the defendant had had a conversation about their relationship becoming a romantic relationship prior to their September 15 night-over. [RP 36].

After an argument broke out on September 16, some pushing occurred. [RP 57-58]. Ms. Youckton described that defendant as getting “real mad” at this point. [RP 58]. The defendant then pushed her harder in the chest with both hands knocking her back on her back on the couch. [RP 59].

The defendant then “started choking” her with both of his hands around her neck. [RP 61-62]. She described the position of his hands as “his left hand was over his right hand” using his body weight to press forward into her. [RP 62-63]. Ms. Youckton described the effect of the “choking” on her as follows:

I started – it was really, really hard to breathe. I started to see stars.

[RP 63].

Ms. Youckton fought and kicked as she was being “choked” and was ultimately able to get him to loosen his grip on her neck. [RP 64]. After she loosened his grip on her neck she was able to speak and she told him she could get his things if he got off of her and let go of her. [RP 64]. The defendant got off her and backed away from the couch. [RP 65]. She tried to discuss things with the defendant; he responded by stating, “Shut the fuck up, bitch, or I’m going to punch you.” [RP 67]. After the defendant said this, he began taking off his jewelry and Ms. Youckton feared that the defendant was going to assault her again; she used her cell phone to call 911. [RP 67].

As Ms. Youckton started to talk on the phone, Mr. Escobano “tried to come and end the phone call” by closing her phone. [RP 69]. But, because the phone was on speaker, he was unsuccessful in his effort to terminate the call; he then tried to whisper to her repeatedly to “get off the phone”. [RP 69-70]. When Ms. Youckton told the 911 dispatcher that Mr. Escobano had “choked” her, Mr. Escobano ran out of her residence. [RP 70].

Ms. Youckton described her neck and throat as being sore; at trial, using photographs, she described the visible marks on her

neck from where the defendant had gripped her neck with both hands and “choked” her. [RP 70-73].

When the police arrived on September 16 around 11:45 p.m., Deputy Mike Hovda described Ms. Youckton, “[S]he was crying, tears were coming down, and she was very upset.” [RP 109]. Deputy Hovda testified that he saw obvious injury marks on both sides of her neck. [RP 109]. Deputy Hovda described the mark on the right side of her neck as “a round, very red mark, and it really stood out”. [RP 110]. On the left side of her neck, Deputy Hovda described “two real distinct marks” lengthwise across her neck; the deputy opined that they looked like finger-sized bruise marks across her neck. [RP 110]. Based on his twenty-five years of experience in law enforcement, Deputy Hovda opined that the injuries to her neck were recent. [RP 110-112].

Deputy Watkins testified that the defendant saw him and immediately changed direction and walked away from the deputy. [RP 125]. Deputy Watkins contacted Mr. Escobano who told the deputy that he was staying at Ms. Youckton’s apartment for a couple of days; Deputy Watkins then described what Mr. Escobano said happened between Ms. Youckton and himself:

He said that he had wanted a friend to come pick him up. She didn't want him to do that. She wanted to talk to him some more about what was going on, but he just didn't want to talk to her, and he said, at some point, she had taken what belongings he had there and set them just outside her apartment. They, in turn, had gotten into an argument outside the apartment, just outside the apartment, and he said that she was being loud and that, at one point, he had grabbed on to her.

And he explained to me it was in a non-assaultive manner, that he was trying to prevent further disturbance to her neighbors and to prevent her from further embarrassing herself. He said he tried pulling her into the apartment at one point. She pushed him back. They ended up inside the apartment and got into a small wrestling match – or into a wrestling match.

[RP 127-128].

Deputy Watkins asked Mr. Escobano if he had put his hands around her neck; Deputy Watkins testified to the defendant's response:

What he told me was that, something like that may have happened during their wrestling match, but if it did, he did not intentionally try to choke her, if it did.

[RP 129].

2. Facts related to conviction for bail jumping.

The defendant failed to appear for his pre-trial hearing at 10:30 a.m. on October 19, 2009; based on that failure to appear, the trial court ordered a bench warrant. [RP 155-157]. On October

20, 2009 at 3:30 p.m., there was a hearing scheduled for Mr. Escobano to appear voluntarily in Thurston County Superior Court to address the warrant; witness deputy prosecutor Jack Jones testified to this procedure as follows:

That process is that a person who has failed to appear for a hearing that's been scheduled in court can go to the sheriff's office by a certain time in the morning, I think it's 9:00 o'clock or something in the morning, and they can ask to have their matter placed on the afternoon preliminary appearance calendar so that it can be dealt with. And they can do that and have that done without actually being taken into custody on that warrant.

[RP 162].

Mr. Jones testified that the person is directed to return to court at 3:00 o'clock for the 3:30 court hearing. [RP 162]. The procedure of addressing a warrant without being arrested on it is referred to as the "walk-on procedure" in Thurston County Superior Court; this procedure was so named because it allowed people to "actually walk into court on their own power, rather than be taken into custody, placed into jail, stay in jail overnight, and then be brought in by court staff." [RP 163]. Unfortunately, Mr. Escobano also failed to appear for the walk-on calendar hearing at 3:30 p.m. on October 20 and the trial court ordered another bench warrant. [RP 163-164].

Nearly two weeks later, Mr. Escobano's bail bond company, Jail Sucks Bail Bonds, surrendered Mr. Escobano to the Thurston County Sheriff's Office on November 2, 2009 and Mr. Escobano was taken into custody. [RP 167-168].

Mr. Casanova Escobano reluctantly admitted that he has also used the name Rolando Lattimore. [RP 220]. The defendant testified that he knew that he had a court hearing in Thurston County Superior Court on October 19 and that he did not go to Thurston County Superior Court as ordered on October 19. [RP 220-221]. He testified that he did not appear in Thurston County because he had a court hearing in Kitsap County District Court. [RP 223]. However, during cross-examination, Mr. Escobano admitted that he never appeared before a judge in Kitsap County District Court. [RP 223]. He claimed that he did not know that he had been charged under the name of Rolando Lattimore in Kitsap County District Court and did not provide that name to court personnel stating, "I had no reason to". [RP 224].

Mr. Escobano testified that he went to Thurston County to take advantage of the walk-on procedure but he left because he was told he would be called when it was his time to go to court. [RP 226]. Mr. Escobano stated that no one called him from the

court. [RP 226]. He then agreed that his bail bondsman was concerned about his bond and that Mr. Escobano turned himself in to the bondsman in November, 2009. [RP 226-227].

C. ARGUMENT.

1. Because the evidence at trial was insufficient for a reasonable juror to find that the defendant had proved the affirmative defense of uncontrollable circumstances by a preponderance of the evidence, the trial court properly refused to instruct the jury concerning this defense.

At trial, the defendant proposed jury instructions which would have allowed Mr. Escobano to argue that uncontrollable circumstances prevented him from appearing in court for his pre-trial hearing on October 19, 2009, when he was required to do so. The court refused to give those instructions. On appeal, the defendant contends that this was error.

The defense of uncontrollable circumstances is set forth in RCW 9A.76.170(2). It is an affirmative defense. *State v. Frederick*, 123 Wn. App. 347, 353-354, 97 P.3d 47 (2004). An affirmative defense admits the defendant committed the unlawful act but pleads an excuse for doing so. The defense does not negate an element of the crime, but rather pardons the conduct even though it violates the literal language of the law. *State v. Riker*, 123 Wn.2d 351, 367-368, 869 P.2d 43 (1994). Consequently, the defendant

has the burden of proving an affirmative defense by a preponderance of the evidence. *Riker*, 123 Wn.2d at 366-367; *Frederick*, 123 Wn. App. at 352-354.

To establish a defense of uncontrollable circumstances the defendant must prove each of the following: (1) that uncontrollable circumstances prevented him from appearing or surrendering; (2) that he did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender; and (3) that he appeared or surrendered as soon as such circumstances ceased to exist. RCW 9A.76.170(2).

The requirement of “uncontrollable circumstances” is defined as follows:

“Uncontrollable circumstances” means an act of nature, such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

At trial, the defendant sought to have the jury instructed concerning this affirmative defense. However, the defendant was not entitled to such instructions unless the evidence presented at

trial was sufficient for a reasonable juror to find that the defendant had proved, by a preponderance of the evidence, the three elements of the defense of uncontrollable circumstances set forth above. See *State v. Buford*, 93 Wn. App. 149, 152-153, 967 P.2d 548 (1998). No such evidence was presented in this case.

The testimony of Mr. Escobano is that he chose to not attend the Thurston County Superior Court because of the possibility of another court hearing in Kitsap County District Court; he explained his thought process as follows in the following exchange:

Q. So October 19th, what did you do?

A. Well, first, I tried to call this court to tell them, because the other court was earlier. It was at 8:30 or – 8:30 or 9:00 o'clock, and this one was at 10:00, and being that I'm unable to drive and I take the train or bus wherever I need to go, I needed – so I called here, because it's later, to see if I could move it to the evening. If I could move it to the evening, like around 2:00 o'clock or 3:00 o'clock, I could make it by the bus.

Q. And what was the response?

A. They told me – the response was that I can go talk to the other court, because the date cannot be moved, the time cannot be moved.

[RP 214].

Mr. Escobano never contacted Kitsap County District Court to verify or attempt to change this hearing regarding his misdemeanor charge. [RP 223]. Mr. Escobano went on to explain that he never appeared before a judge in Kitsap District Court

because someone in “records office” told him there was no case for a Casanova Escobano. [RP 215-216]. He claimed that he did not know that he had been charged under the name of Rolando Lattimore in Kitsap County District Court and did not provide that name to court personnel stating, “I had no reason to”. [RP 224]. Mr. Escobano explained that he then missed court in Thurston County Superior Court because of his reliance on the public bus.

Based on his testimony, while he says he called Thurston County Superior Court to try and change that court date, he never attempted to call Kitsap County District Court to verify that he did have a court date or to change his supposed court date in Kitsap County. Also, Mr. Escobano presented no evidence to corroborate his version of events. Finally, he knew of the supposed court conflict, by his own testimony, approximately a week before October 19, 2009; yet he still made no effort to arrange for a friend or family member to drive him to both court hearings as, based on his own testimony, the hearings were two hours apart. His testimony does not support that uncontrollable circumstances prevented him from appearing in Thurston County Superior Court as ordered at 10:30 a.m. on October 19, 2009.

Assuming for the sake of argument that this court disagrees and finds that there was sufficient evidence of uncontrollable circumstances, this defendant then failed to appear or surrender as soon as such circumstances ceased to exist as required pursuant to statute. After he knowingly missed court in Thurston County Superior Court on October 19 at 10:30 a.m., he testified that the next day he travelled to an office in Thurston County:

Q. Right. And you contacted somebody in the morning so you could appear at court in Thurston County?

A. I went to the office, and they told me to go to the police station. It's in the next – like across the hallway. So I went there.

Q. And having contacted somebody about the fact that you needed to appear before the court in Thurston County, you were told to leave?

A. No, I never said they told me to leave. He had me fill out some paperwork, and he asked me if the information is correct. I said the information is correct, and he told me that I would be called when it's my time to go to court.

[RP 225-226].

Mr. Escobano then testified that he assumed that they would call him on the phone so he left Thurston County and took a “three-hour bus ride” to Bellevue. [RP 226 and 219]. Clearly, Mr. Escobano never appeared in court in Thurston County Superior Court on October 19 for his pre-trial court hearing or on October 20 to address his bench warrant; in fact, on October 20 he left before

the court hearing and, by his own testimony, took a three hour bus ride. Mr. Escobano was arrested on November 2, 2009 and appeared in Thurston County Superior Court on November 4, 2009 for his first court appearance since the court ordered a bench warrant on October 19 and October 20, 2009. [RP 169].

As Mr. Escobano failed to demonstrate that uncontrollable circumstances prevented him from appearing in Thurston County Superior Court on October 19, 2010, the court properly refused to give the defendant's proposed instructions because there was not sufficient evidence to support the defense of uncontrollable circumstances.

2. There was sufficient evidence elicited at trial to support Mr. Escobano's criminal conviction for assault in the second degree.

The State's evidence against Mr. Escobano was more than sufficient to support his conviction for assault in the second degree for intentionally assaulting Ms. Youckton. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

A reasonable fact finder could certainly find guilt beyond a reasonable doubt based on the strength of the evidence the State

produced at trial. In order to find the defendant guilty of assault in the second degree as charged in Count I, the jury had to find beyond a reasonable doubt each element of the crime. The jury must have found (1) that on or about September 16, 2009, the defendant intentionally assaulted Brenna Youckton by strangulation; and (2) that these acts occurred in the state of Washington. [CP 55].

The testimony of Ms. Youckton was that the defendant put both of his hands around her throat and “choked” her to the point that she was “seeing stars”. The defendant described the incident as a “wrestling match” but acknowledged that if he strangled Ms. Youckton it was not intentional. [RP 129]. Law enforcement saw finger-sized bruise marks, consistent with strangulation, on both sides of Ms. Youckton’s necks; photographs were taken and these photographs of Ms. Youckton’s injuries were shown to the jury.

The defendant argued self-defense to the jury and the trial court instructed the jury correctly regarding lawful force. [CP 57]. The jury, weighing the credibility of all of the witnesses and viewing the physical direct evidence of Ms. Youckton’s injuries, believed Ms. Youckton’s version of events and disbelieved Mr. Escobano’s version of events. There clearly was sufficient evidence presented

at trial to support the jury's determination of guilt beyond a reasonable doubt on the charge of assault in the second degree.

3. The trial court was correct in finding that Mr. Escobano and his victim were family or household members as defined by RCW 10.99.020.

The appellant's next claim is that he had a right to a jury determination that he and the victim were "family or household members", arguing a domestic violence finding must be made by a jury upon proof beyond a reasonable doubt. [Brief of Appellant, page 20-21]. The appellant claims that he is objecting to the court having imposed a \$100 domestic violence assessment as well as a domestic violence no contact order.

However, the Court of Appeals Division One in *State v. Felix*, 125 Wn. App. 575; 105 P.3d 427 (2005) disagreed with the appellant's position. In *Felix*, a consolidated case, the appellant argued that there were three consequences of the trial court's domestic violence finding that improperly increased the punishment for their crimes in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 403 (2004); the three consequences alleged were: the possibility of an exceptional sentence, the

issuance of a domestic violence no contact order, and the revocation of firearms rights. *Felix*, at 576-581.

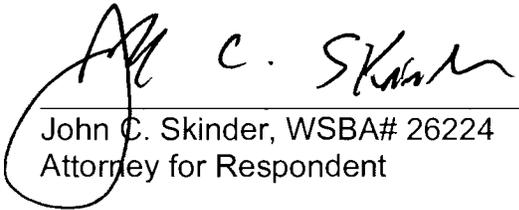
However, the Court disagreed with the appellant on all three grounds and upheld the non-jury finding of domestic violence. On the first claim, the Court ruled that a finding of domestic violence alone does not authorize an exceptional sentence and does not impermissibly increase the punishment potential. *Id.*, at 578. Regarding the issuance of a domestic violence no contact order, the Court found that these orders were regulatory and stated that RCW 10.99.050 did not authorize no contact orders that might not otherwise be imposed (the statute only specified additional enforcement measures for no-contact orders that may already be issued as a sentencing condition). *Id.*, at 579-580. Finally, on the third claim, the Court, citing to *State v. Schmidt*, 143 Wn.2d 658, 23 P.3d 462 (2001), rejected the appellant's firearm prohibition argument finding that the prohibitions were not punishment and were regulatory in nature. *Id.*, at 580-581. Mr. Escobano does not raise the firearm prohibition claim as he was also convicted of a felony offense which independently prohibited him from possessing a firearm.

Mr. Escobano's claim that the non-jury domestic violence finding violated *Blakely* should fail because he did not suffer any confinement beyond the standard range for the offense. The trial court's domestic violence finding was based on the unrefuted testimony of both Mr. Escobano and Ms. Youckton that as adults they resided together; under RCW 10.99.020(1) this relationship qualifies them as "family or household members". As the finding did not increase Mr. Escobano's punishment, the court was correct when it entered the domestic violence finding. Therefore, the defendant's argument fails under the rationale of *Felix*.

D. CONCLUSION.

For all of the above reasons, the State respectfully requests that this Court affirm Mr. Escobano's convictions for assault in the second degree and bail jumping and affirm Mr. Escobano's sentence in all regards.

Respectfully submitted this 07th day of December, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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- Hand delivered by to Supreme Court

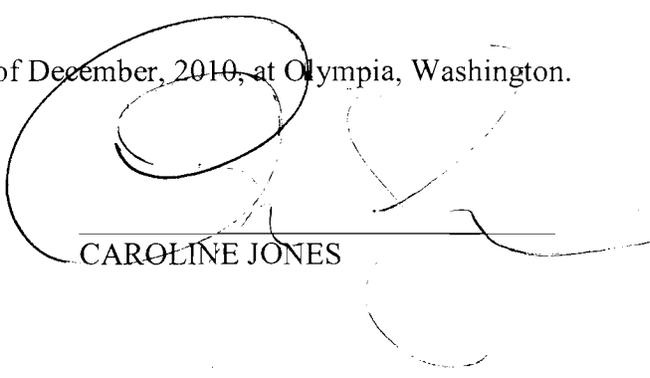
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of December, 2010, at Olympia, Washington.



CAROLINE JONES