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Court of Appeals
Division III
State of Washington

NO. 32461-3-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

FRANCISCO JAVIER SORIA-NANAMKIN, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

- A. Was there sufficient evidence to support the unlawful imprisonment conviction?
- B. Did the trial court correctly admit 404(b) evidence?
- C. Was Soria-Nanamkin provided effective assistance of counsel?
- D. Was ordering domestic violence perpetrator treatment within the court's discretion?

ANSWERS PRESENTED BY THE ASSIGNMENTS OF ERROR

- A. There was sufficient evidence to support the unlawful imprisonment conviction.
- B. The trial court correctly admitted 404(b) evidence.
- C. Soria-Nanamkin was provided effective assistance of counsel.
- D. Ordering domestic violence perpetrator treatment was within the court's discretion.

II. STATEMENT OF THE CASE

The appellant, Francisco J. Soria-Nanamkin, was charged with first degree burglary, unlawful imprisonment, theft of a motor vehicle, and second degree assault. CP 11-12. The charges stemmed from the following facts:

Soria-Nanamkin and Tanya Abrego had a dating relationship for about two years. RP 218, RP 455, 463. Ms. Abrego ended the relationship because he started being abusive by hitting her and threatening her. RP 218. After being split up for 2-3 weeks, he called her at 1 a.m. and woke her up. RP 222, 224, 226. He didn't have a car and

wanted a ride. RP 226, 242-3. She told him no. RP 226. He threatened to show up at her house if she didn't do what he said so she went and picked him up. RP 226. When she picked him up, he appeared drunk. RP 227. She took him to get cigarettes at a gas station and afterwards he walked away on his own. RP 228-9. She drove home and fell back asleep. RP 230.

She then awoke to a loud banging on her back door. RP 230. Soria-Nanamkin had broken in by knocking down her back door. RP 234. She ran to her roommate's room and told him to call the cops. RP 231. She then felt Soria-Nanamkin hit her on the back of her head. RP 231. He repeatedly hit her in her head and then started kicking her after she went down to the floor. RP 231. At one point she tried to get up but he squeezed her neck to the point where she couldn't breathe. RP 271-2.

Ms. Abrego's roommate, Jose Martinez, witnessed the assault. RP 379-80. Soria-Nanamkin told Mr. Martinez to stay out of it and threatened, "call the cops, see what happens." RP 388. Mr. Martinez couldn't find his phone to call 911 and left. RP 394.

After assaulting her, Soria-Nanamkin started taking things from her house including a television and video game system. RP 240. At that point, Ms. Abrego had her son's stepmom come pick up her son. RP 241.

Soria-Nanamkin then ordered Ms. Abrego to get in her car. He told her, “Bitch, get in the car. We’re going somewhere.” RP 242. He told her she had to go break the windows out of his girlfriends’ car because he was mad at his girlfriend. RP 243. Ms. Abrego didn’t want to go but obeyed him because she was scared and thought she was going to die that day. RP 243. He drove erratically to his girlfriend’s house and ran stop signs along the way. RP 242, 244.

When he got to the back of his girlfriend’s house, he told Ms. Abrego, “Fucking get off the car and throw---grab a big rock. Find a big rock and throw it at the car.” RP 244. She at first told him no she couldn’t but he didn’t care. RP 244. She then tried throwing a rock but missed because she couldn’t see. RP 244. She tried again but missed. RP 245. A neighbor came out and started yelling at them so Soria-Nanamkin told Ms. Abrego, “Get f---in the fucking car again and let’s go.” RP 245.

When they got back to her house, he told her he wanted to have sexual intercourse with her but she told him no. RP 246. She was crying and he told her to call into work. RP 246. He then left and took her car without her permission, after saying that he wanted to crash it. RP 248.

Ms. Abrego was taken to the hospital. RP 250. She had prominent swelling, abrasions and extensive bruising all over her body. RP 310, 434.

One eye was bruised, almost swollen shut, and had blood pooling in it.

RP 315-6.

A detective spoke to Soria-Nanamkin who denied assaulting Ms. Abrego. RP 363. He admitted to being at her house but said that he never touched her and that she was trying to throw stuff at him. RP 366. He also denied kicking the door down and said he was let inside. RP 367.

At trial, Soria-Nanamkin called two witnesses, his grandmother, Danita Nanamkin, and Ms. Abrego's neighbor, Wanda Dupre. He testified as well. He admitted that he and Ms. Abrego got into a physical altercation and that he assaulted Ms. Abrego. RP 459.

After the trial, Soria-Nanamkin was convicted and sentenced. (CP 360-4, RP 567). This appeal followed.

III. ARGUMENT

A. There was sufficient evidence to support the unlawful imprisonment conviction.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319,

99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of unlawful imprisonment that the State had to prove beyond a reasonable doubt are as follows:

- (1) That on or about September 6, 2012, the defendant restrained the movements of

Tanya Abrego in a manner that substantially interfered with her liberty; (2) That such restraint was (a) without Tanya Abrego's consent; or (b) accomplished by physical force, intimidation, or deception; (3) That such restraint was without legal authority; (4) That, with regards to elements (1), (2), and (3), the defendant acted knowingly; and (5) That any of these acts occurred in the State of Washington.

CP 344. Soria-Nanamkin challenges the first element: that “the defendant restrained the movement of Tanya Abrego in a manner that substantially interfered with her liberty.” (Appellant’s Brief at 15). Restraint means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. RCW § 9A.40.010(6). Restraint is “without consent” if it is accomplished by “physical force, intimidation, or deception...” RCW § 9A.40.010(6)(a). In order for restraint to be “substantial,” there must be a real or material interference with another’s liberty, not merely a petty annoyance, a slight inconvenience, or an imaginary conflict. State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978). Although the presence of a means of escape may help to defeat prosecution for unlawful imprisonment, the means of escape must not present a danger or more than a mere inconvenience. State v. Kinchen, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998).

Here, the restraint was caused by physical force and intimidation. Soria-Nanamkin broke down Ms. Abrego's door to get inside her home. She then suffered a serious assault when Soria-Nanamkin beat her, squeezed her neck, and kicked her repeatedly. The victim testified as follows regarding Soria-Nanamkin holding her down:

ABREGO: When I tried---the first time to get off the floor after he was hitting me he tried to push me back down so I wouldn't get up. Like he got on top of me and kept repeating, "Where do you think you're going?" And put his hands around my neck.

PROSECUTOR: Alright. And do you remember now his hands being around his neck?

ABREGO: Yes.

PROSECUTOR: Alright. What did he do with his hands around your neck?

ABREGO: He squeezed a little.

RP 271. Ms. Abrego testified that she could not breathe and was afraid she was going to pass out. RP 272.

After assaulting her, Soria-Nanamkin started taking things from her house out to her car. RP 240. He then told her, "Bitch, get in the car. We're going somewhere." RP 242. She said that she obeyed him:

PROSECUTOR: **Did you want to go anywhere with him?**

ABREGO: **No.**

PROSECUTOR: So what happened---what did you do?

ABREGO: I obeyed him. I followed him. I had to. I was scared. I honestly thought I was gonna die that day.

RP 243 (emphasis added). He then drove to his girlfriend's house where he ordered Ms. Abrego out of the car and to throw rocks at his girlfriend's car. RP 244. However, due to her injuries, she wasn't able to hit anything. RP 244-5. He yelled at her to "Get in the fucking car again. And let's go." RP 245. He continued to drive without following any of the rules of the road, and without regard for lights or stop signs. RP 246. After taking her car and crashing it, he then texted her to tell her not to call the cops. RP 272-3.

From this testimony, the evidence is overwhelming that this was more than a "petty annoyance, a slight inconvenience, or an imaginary conflict." Her liberty was interfered with substantially by both physical force and intimidation. She did have a means of escape but it would have presented a clear prospect of danger. If she had told him no, that she wasn't getting in the car with him and tried to run, she would have placed herself in danger of another violent attack from him.

The concept of intimidation is not limited to mere words, but includes conduct. State v. Lansdowne, 111 Wn. App. 882, 46 P.3d 836 (2002) (construing intimidation in unlawful imprisonment context).

“‘Intimidate’ is defined as: ‘to make timid or fearful: inspire or affect with fear: frighten ... to compel to action or inaction (as by threats).’” *Id.* at 891 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1993)). Here, Soria-Nanamkin got Ms. Abrego to get into the car by using intimidation. The restraint was without her consent because of her well-founded fears based on violence that day as well as Soria-Nanamkin’s conduct in the past.

She knew from prior experiences that he had hit her before on her face and body and had threatened to make her and her son disappear. RP 218-9. In the past, he had driven her out in the middle of nowhere and threatened to leave her with no way to get help. RP 221. On one occasion, she tried jumping out of the car and he pulled her by the hair, punched her in the face, and threw her back in the car. RP 221. Her prior experience with Soria-Nanamkin was additional proof that his actions on September 6, 2012 amounted to restraint by intimidation and were without her consent.

B. The trial court correctly admitted 404(b) evidence.

In applying ER 404(b), a trial court is required to engage in a three-step analysis: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence; and (3) balance on the record the probative value of the evidence against the prejudicial

effect. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

An appellate court will review a trial court’s admission of ER 404(b) for abuse of discretion. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Soria-Nanamkin argues that the evidence was inadmissible because of the jury’s finding as to the special verdict. However, it was undisputed that the victim and Soria-Nanamkin had a prior dating relationship. RP 218, 449, 463. Soria-Nanamkin argues that this was “not a domestic violence case.” (Appellant’s Brief at 19). However, the prior dating history makes this a domestic violence case. See RCW § 10.99.020(3).¹

The jury was never questioned as to whether the parties had a prior dating relationship. The jury was only asked whether they resided together in the past **and** had a prior dating relationship. CP 358 (emphasis

¹ “Family or household members” means....persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.” RCW 10.99.020(3).

added). Furthermore, the jury's special verdict came *after* the decision to admit the 404(b) evidence. This Court considers the information the trial court had at the time it admitted the evidence.

Regardless of how the relationship is characterized, the 404(b) evidence was relevant to prove "that such restraint was...accomplished by physical force, intimidation, or deception." CP 344. Evidence of Soria-Nanamkin's prior threatening conduct tended to make Ms. Abrego's assertion that she was restrained by fear of him more probable.

Soria-Nanamkin argues that the victim's state of mind was not a necessary element. However, her restraint was caused by intimidation. This put into issue the victim's state of mind. The jury had to decide whether she was intimidated. Intimidate, as defined earlier, means "to make timid or fearful: inspire or affect with fear: frighten...to compel to action or inaction (as by threats)." State v. Lansdowne, 111 Wn. App. at 891 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1993)). Thus, the victim's mental state was highly relevant. Why did she get in the car with him as opposed to just running away? Because she was afraid and intimidated by Soria-Nanamkin. If she wasn't afraid and intimidated by him, then any restraint was not "accomplished by ...intimidation." As such, the State was required to

prove her state of mind in order to show that the restraint was without her consent and caused by intimidation.

In State v. Ragin, the Court of Appeals held that it was not error to admit evidence of prior acts in order to show that the victim was fearful of the defendant's threats. 94 Wn. App. 407, 972 P.2d 519 (1999).

Similarly, in State v. Barragan, prior acts were admitted to show that the victim feared that the defendant's threats would be carried out. 102 Wn.App. 754, 9 P.3d 942 (2000). In State v. Magers, our State Supreme Court approved of the reasoning in both of these cases. 164 Wn.2d 174, 182, 189 P.3d 126 (2007). In Magers, the Court found that evidence of prior misconduct was admissible if "necessary to prove a material issue." 174 Wn.2d at 184 (citations omitted).

Personal history with a violent person can certainly be relevant to whether a particular action or behavior amounts to intimidation from the victim's perspective. The defendant's prior violence against the victim explained the dynamics of their relationship and helped the jury understand why Soria-Nanamkin was able to control the victim's behavior without any express threats and why the victim complied with his directions and did not yell for help or try to escape. And although the acts of violence occurred in the past, these acts were still relevant because the

victim was aware that Soria-Nanamkin was capable of violence against her if she didn't obey him.

Here, a material issue was whether the restraint was without the victim's consent and accomplished by physical intimidation. CP 344. In order to prove that the victim did not consent and that the restraint was caused by intimidation, the victim's state of mind necessarily was at issue. One has to be intimidated in order for acts of intimidation to work. If she did not fear the defendant, then her getting into his car was with her consent. As such, as in Magers, the prior misconduct was "necessary to prove a material issue."

Soria-Nanamkin also argues that the prejudicial effect of the evidence outweighed its probative value. (Appellant's Brief at 21). Here, the probative value was quite high given that it explained why she got in the car with him—it was due to prior threats and prior abuse. She knew that she would be assaulted if she refused to obey his order when he said, "Bitch, get in the car." Here, given the highly relevant value of the prior history, it cannot be said that trial court's decision was manifestly unreasonable or based on untenable grounds or reasons. As such, there was no abuse of discretion in admitting the evidence.

C. Soria-Nanamkin was provided effective assistance of counsel.

The defense must show deficient performance of the part of his trial attorney and that but for the deficient performance, the outcome of the trial would have been different. Strickland begins with a “strong presumption that counsel’s performance was reasonable.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. Id. at 863. To rebut the presumption of reasonable performance, a defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel’s initial calculus; hindsight has no place in an ineffective assistance analysis. See

Strickland, 466 U.S. at 689. A defendant cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off. State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991).

Soria-Nanamkin claims that his attorney was ineffective when he failed to object to statements he made to the detective. (Appellant's Brief at 23). However, his attorney most likely did not know if Soria-Nanamkin was going to testify and not objecting would get in the fact that he denied committing the assault. This would have been a reasonable strategy on the part of the attorney because his client's denial of the crime would come in without his client having to testify. As indicated previously, the fact that his strategy ultimately proved unsuccessful is immaterial to ineffective assistance analysis. See Strickland, 466 U.S. at 689. It was a reasonable strategy and Soria-Nanamkin has not shown the absence of any conceivable legitimate tactic explaining his attorney's performance.

Defense opening statement was reserved until after the State's case in chief. RP 215. This was likely because Soria-Nanamkin had not made a decision to testify. He likely wanted to see how the evidence came out during the State's case before making that decision. If the victim had

minimized or recanted, it may not have been necessary for him to testify.

The following dialogue took place before the defense put on their case:

JUDGE: what witnesses are---is the defense intending on calling?

DEFENSE: Uh, we have Danita Nanamkin and Wanda Dupre.

JUDGE: Okay. Now, Miss Dupre was the late add.

DEFENSE: Yes.

JUDGE: And so those are the two witnesses other than the defendant, if he chooses to testify---

DEFENSE: That is correct.

RP 437. Importantly, the defense did not assert that “two witnesses and the defendant” would testify. Or indicate in any way that Soria-Nanamkin had already decided to testify. The defense agreed that there would be two witnesses other than the defendant **if he chooses to testify**. From this, one can infer that Soria-Nanamkin had not made the decision to testify. This would explain the trial strategy to not object to certain statements he made to the detective that were elicited during the State’s case.

Furthermore, Soria-Nanamkin has not established prejudice. To satisfy the prejudice prong of the Strickland test, the defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” Kyllo, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Strickland, 466 U.S. at 694. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” Id. at 694-95.

Here, Soria-Nanamkin’s statement would have come in anyway as impeachment after he testified. This was conceded in his opening brief. (Appellant’s Brief at 26) (“the statement was not properly admitted as impeachment evidence; it could only be used as impeachment evidence after Mr. Soria-Nanamkin testified and gave a contradictory statement”). He testified and said he assaulted Ms. Abrego. The prosecutor cross-examined him with his statement to the contrary. Therefore, as conceded, the denial would have come in as impeachment evidence regardless. Thus, Soria-Nanamkin has failed to establish that the result would have been different but for ineffective assistance on the part of his attorney. His claim of prejudice necessarily fails.

D. Ordering domestic violence perpetrator treatment was within the court’s discretion.

At sentencing, the Court ordered Soria-Nanamkin to “[r]eport promptly to a Washington State Certified Domestic Violence Perpetrator

Treatment Program for evaluation and promptly enter into and complete any recommended treatment by the end of supervision.” CP 373.

When a court sentences a person to the custody of the Department of Corrections for a crime against persons, it is required to sentence the offender to community custody. RCW § 9.94A.715(1). The conditions may include discretionary conditions found in RCW § 9.94A.703(3) such as rehabilitative programs:

Discretionary conditions. As part of any term of community custody, the court may order an offender to...

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community;

...

(f) Comply with any crime-related prohibitions.

RCW § 9.94A.703(3). See also State v. Winston, 135 Wn.App. 400, 410, 144 P.3d 363 (2006).

Under Blakely,² a jury finding is not required to order domestic violence treatment. State v. Hagler, 150 Wn. App. 196, 201, 208 P.3d 32, rev. denied, 167 Wn.2d 1007, 220 P.3d 209 (2009); Winston, 135 Wn.

² Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

App. at 410. The trial court had discretion to order Soria-Nanamkin to participate in rehabilitative programs reasonably related to the circumstances of the offense. RCW § 9.94A.703(3).

The record supports the ordering of a domestic violence program for Soria-Nanamkin. As indicated previously, persons 16 years or older who have had a prior dating relationship are considered family or household members. RCW § 10.99.020(3). Here, the jury was never asked to determine whether the victim and defendant were persons 16 years or older who had a prior dating relationship, CP 358, but the record shows that they clearly were. RP 218, 455, 463. The defendant admitted on the stand that they had a dating relationship. RP 455, 463. Their ages were also established by the record. RP 214, 363. As such, it was within the court's discretion to order a domestic violence treatment evaluation.

In a similar case, State v. O'Brien, 115 Wn. App. 599, 63 P.3d 181 (2003), a trial court ordered a domestic violence no contact order between the victim and the defendant. The defendant challenged the order on appeal. This Court found:

It is undisputed that Mr. O'Brien was over the age of 16 and had had a "dating relationship" with [the victim] who was also over the age of 16. See RCW 10.99.020(2); RCW 26.50.010(3). The court therefore was authorized to enter the domestic violence

no-contact order barring Mr. O'Brien from contacting [the victim].

Id. at 602. Similarly, here, the fact is undisputed that the defendant and victim dated previously and were well over the age of 16. As such, the court had discretion to order the treatment evaluation.

IV. CONCLUSION

For all the above reasons, the State asks that Soria-Nanamkin's conviction be affirmed. First, there was sufficient evidence to support the unlawful imprisonment count. Second, the trial court did not abuse its discretion in admitting 404(b) evidence. Thirdly, Soria-Nanamkin has not established ineffective assistance of counsel. And finally, the trial court acted within its discretion in imposing a domestic violence treatment evaluation.

Respectfully submitted this 20th day of April, 2015,


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