Supreme Court No. 95971-4
(COA No. 74438-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THERESA SCANLAN,

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

Theresa Scanlan, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision terminating review, dated March 12, 2018, for which reconsideration was denied on May 9, 2018, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies are attached as Appendix A and B.

B. ISSUES PRESENTED FOR REVIEW

1. The complainant and sole eyewitness did not testify against Ms. Scanlan at trial. At the police's request, he signed three explicit privacy waivers giving the "Police Department," "the assigned detective" and "the offices of the King County Prosecutor and/or the Federal Way City Attorney," full access to any statement he made to all medical providers about the "reported crime" and any related injuries. The prosecution relied on his out-of-court allegations to medical professionals and police officers at trial.

a. In several other cases, the Court of Appeals has ruled out-of-court statements to medical professionals may be testimonial for confrontation clause purposes depending on the

nature of police involvement.[1] Here, in a published decision, the Court of Appeals disavowed these other Court of Appeals cases and applied a different test based on the intent of the medical professionals when they questioned a patient. Should this Court grant review under RAP 13.4(b)(2), based on the conflicting Court of Appeals opinions regarding when out-of-court statements given to medical professionals are testimonial?

b. Article I, section 22 guarantees an accused person the right to "meet the witnesses against him face to face" and the Sixth Amendment provides all accused persons the right "to be confronted with the witnesses against him." The complainant declined to give live, sworn testimony against Ms. Scanlan but knew the prosecution would have full access to his out-of-court statements made during medical appointments. The Court of Appeals deemed unconfronted allegations admissible based on "the medical providers' purpose." The test used by the United States Supreme Court requires objectively viewing of the circumstances from the declarant's shoes. Did the Court of Appeals apply the wrong test and does this published decision

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[1] *State v. Hurtado*, 173 Wn. App. 592, 294 P.3d 838 (2013);

raise a significant question of constitutional law, favoring review under RAP 13.4(b)(1), (3), and (4)?

c. The right of confrontation ensures the fairness of the trial based on fully vetted allegations. The complaining witness came to the sentencing hearing and disavowed his earlier allegations. The jury never heard his true memory of events. Ms. Scanlan was unable to expose lies and exaggerations in his allegations or discredit his testimony. Should this Court grant review because it is undermines the constitutionally guaranteed right to a fundamentally fair jury trial when the prosecution relies on unconfronted allegations made by a competent and available adult who voluntarily choose not to testify?

2. A conviction for unlawful imprisonment requires proof that the person was unable to use available means to exit the place he is purportedly being held against his will. Roy Bagnell was in his own home, which had many doors, and able to walk around without assistance. Although he was bruised, the wounds were superficial and he did not require emergency

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State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271 (2007).

medical care. Did the State fail to prove that he was unlawfully restrained where there were available means of exit?

C. STATEMENT OF THE CASE

After Theresa Scanlan befriended Leroy Bagnell, he invited her to live in his home. 7RP 963-64. Mr. Bagnell was a widower in his early 80s, while Ms. Scanlan was in her late-50s. 7RP 958. Mr. Bagnell's adult children did not like their father falling in love with Ms. Scanlan. 7RP 958; 8RP 1053.

Mr. Bagnell was "physically fit and strong for his age" but had some chronic health problems. 7RP 812-13, 839, 958, 966-67. He took medications that left him particularly vulnerable to skin tears and superficial bruising. 7RP 824; 11RP 1369, 1381-82, 1384.

On October 16, 2014, police responded to Mr. Bagnell's home after 911 reported a hang-up phone call. 6RP 443. Because Mr. Bagnell seemed injured, they arrested Ms. Scanlan. 6RP 746, 749-50. She was taken to jail. 6RP 728. Mr. Bagnell came to her arraignment and asked the court not to impose a no-contact order, but the court entered the order over his objection. 6RP 638; 8RP 1131-32.

To investigate this case, Detective Adrienne Purcella had Mr. Bagnell sign a medical release waiver. 3RP 286-87, 309; 6RP 635-36. This form told Mr. Bagnell that "in furtherance of the investigation and any resulting prosecution," the "police" and "prosecution" would have "a complete copy of all records" and may "discuss" all aspects of his care with any medical providers. 6RP 635-36. Mr. Bagnell authorized the police and prosecution to get his medical records for one year. 3RP 317.

Three weeks later, Mr. Bagnell's son called 911 at 5:30 p.m. 7RP 976. Mr. Bagnell was sitting in a chair in his living room with bruises covering his face. 7RP 974-75. The house was in disarray and he seemed dazed. *Id.*

Police arrested Ms. Scanlan, who was hiding in a car in the garage. 6RP 766. Medics found him alert, oriented and in good spirits. 9RP 1213, 1268. He was able to walk on his own and was not actively bleeding. 9RP 1269. They drove him to the hospital, but his condition was not urgent. 9RP 1213.

At the hospital, a detective had Mr. Bagnell sign another medical release waiver identical to one he signed a few weeks earlier, again specifying that he was "the victim of a reported

crime," and the police and prosecution would obtain any medical records from the incident for the purpose of investigating the reported crime. 3RP 317; 6RP 635-36, 643.

Several days later, Detective Purcella went to Mr. Bagnell's home. 3RP 301; 6RP 645-46. She let Mr. Bagnell know she spoke to his doctor and knew he had an up-coming appointment.

The detective had Mr. Bagnell sign a third, identically phrased waiver form, this one to ensure the police and prosecution could access future records for up-coming appointments at Virginia Mason. 3RP 301; 6RP 646-47. Immediately after signing this third waiver, several medical professionals at Virginia Mason who asked him how he received his injuries and who caused them. 7RP 906; 8RP 1178.

Mr. Bagnell did not testify and the prosecution told the jury it could not speculate about why he was not there. 12RP 1567. A social worker and five medical providers testified variously that Mr. Bagnell claimed Ms. Scanlan beat him with household objects. 7RP 909, 925; 8RP 1108-09. A forensic

pathologist explained his injuries were superficial and the product of his age and medications. 11RP 1376-93.

Despite skipping the trial, Mr. Bagnell appeared at the sentencing hearing. 14RP 1678-79. He told the judge he trusted Ms. Scanlan and did not remember the incident. *Id.*

Pertinent facts are further explained in the relevant argument sections below as well as the Court of Appeals briefs and opinion, incorporated herein by reference.

D. ARGUMENT

1. **The published Court of Appeals decision refuses to apply a test for confrontation clause violations used in other Court of Appeals decisions and misconstrues the test used by the United States Supreme Court.**

   a. *Confrontation is a bedrock right guaranteed to a person accused of a crime.*

When an out-of-court statement is testimonial, the Confrontation Clause prohibits it from being used at trial unless the person who made the statement is unavailable to testify and the accused has had a prior opportunity to confront that person. *Crawford v. Washington,* 541 U.S. 36, 68, 124 S. Ct. 1354, 158

L.Ed.2d 177 (2004); *State v. Rohrich*, 132 Wn.2d 472, 939 P.3d 697 (1997).

While the Sixth Amendment guarantees an accused person the right "to be confronted with the witnesses against him," article I, section 22 more broadly guarantees an accused person the right "to meet the witnesses against him face to face." U.S. Const. amend. 6; Const. art. I, § 22. Its scope is independent of the federal confrontation clause. *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009). A violation is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The right of confrontation is a procedural guarantee that the prosecution must present its witnesses in court, so the jury can observe their demeanor and the defense has the opportunity to cross-examine. *Crawford*, 541 U.S. at 43, 50-51 (explaining common law requirement of "live testimony in court subject to adversarial testing"). Hearsay rules do not define the protections at the root of the confrontation clause. *Id.* at 61.

The linchpin for triggering the right to confrontation is that an out-of-court statement has the same function an in-court

testimony. *State v. Wilcoxon*, 185 Wn.2d 324, 332, 373 P.3d 224 (2016). The confrontation clause bars the prosecution from shielding the accuser from cross-examination while procuring a conviction through out-of-court, ex parte claims in lieu of live testimony at trial.

Determining whether a statement is testimonial under the confrontation clause is not the product of a single firm rule. *See Crawford*, 541 U.S. at 68; *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Instead, it depends on the context in which the statements arose and rests on whether this context objectively shows an awareness that the allegations of a past event is being memorialized and available for a future prosecution. Consequently, the Court of Appeals has recognized that sometimes, statements to medical providers are made without any appreciation of the records generated and their potential use outside of the treatment facility, but conversely, they could also occur with participants who fully expect this information will be conveyed to and used in a later prosecution.

b. The Court of Appeals decision conflicts with other cases that recognize a statement to a medical provider may be testimonial, if police are involved in when or how the information is obtained.

Witness statements to a medical provider may be testimonial. *State v. Hurtado*, 173 Wn. App. 592, 604-06, 294 P.3d 838, *rev. denied*, 177 Wn.2d 1021 (2013). The statement's testimonial nature arises from the measure of involvement of governmental authorities who are investigating a potential crime. *Id.* The State must prove out-of-court statements to medical professionals are not testimonial. *Id.* at 600.

Hurtado relied on a test culled from "all three divisions of this court." *Id.* Under this test, the State proves allegations about a completed crime to medical providers are non-testimonial when: (1) "made for diagnosis and treatment purposes"; (2) there is "no indication that the witness expected the statements to be used at trial" or available for such use; *and* (3) the medical professional is not employed by the State.

Here, the Court of Appeals rejected *Hurtado*'s test and its reasoning. Slip op. at 7. It claimed that because Sixth Amendment confrontation clause case law has been in "flux,"

since *Crawford*, it would simply disregard the approach relied on in *Hurtado*. *Id.* This Court should take review to resolve the conflict and explain what test governs accusations of completed criminal conduct made to medical professionals, when as here, many statements were made long after the completed crime, at a time the declarant is fully aware that all medical reports will be obtained and used by the prosecution. RAP 13.4(b)(2).

c. The Court of Appeals decision is contrary to decisional law from the United States Supreme Court.

A statement is testimonial when it describes past events and an objectively reasonable person would understand the statement would be available for use in a later prosecution. *Davis*547 U.S. at 827. For example, in *Davis*, a call to 911 in the middle of the incident was not testimonial because the emergency was ongoing, but a statement to a responding, investigating officer after the incident is testimonial. *Id.* at 829-30.

In *Ohio v. Clark*, the Supreme Court held that a three-year-old's statement to a preschool teacher about who injured him was not testimonial, particularly because the statement

was from a "very young child." *Ohio v. Clark,* _U.S. _, 135 S. Ct. 2173, 2182, 192 L.Ed.2d 306 (2015). But the Supreme Court emphasized the Sixth Amendment test for a testimonial statement must rest on the court examining "all the circumstances" in which the statement was obtained and declined to adopt a categorical rule. *Id.* at 2180.

Various each medical or social work professional claimed some type of treatment-related purpose in questioning Mr. Bagnell about what happened during the incident. But critical aspects of Mr. Bagnell's allegations were elicited *weeks after* the incident. They were obtained after the police got three explicit waivers clearly highlighting the government's on-going interest in and access to all of his descriptions of events purposes of this prosecution. The police expressly conveyed the prosecutorial relevance of his statements to medical providers.

But the Court of Appeals focused on the medical provider's stated purpose in questioning Mr. Bagnell about the long-completed incident. It looked past Mr. Bagnell's purpose, the police officer's purpose, and did not assess an objectively reasonable person's purpose in Mr. Bagnell's shoes. It did not

assess the investigatory purpose of gathering details about an incident that happened weeks earlier.

The Court of Appeals misapplied the test for confrontation clause violations. Review should be granted.

d. It is fundamentally unfair to rest a conviction on unreliable ex parte allegations obtained with the involvement of the police.

The "principal evil" the confrontation clause guards against is using "ex parte examinations as evidence against the accused" in a criminal case. *Crawford*, 541 U.S. at 50. It rests on the fundamental notion that the prosecution must prove its case through in-court testimony, rather than allegations made out-of-court. *Id.* Due process further protects against the admission of unreliable evidence. *Michigan v. Bryant*, 562 U.S. 344, 370 n.13, 131 S. Ct. 1143, 179 L.Ed.2d 93 (2011); U.S. Const. amends. 5, 14; Const. art. I, § 3.

Article I, sections 3, 21, 22 independently protect and strongly guarantees a fair trial by jury. *Pugh*, 167 Wn.2d at 835. In *Pugh*, this Court reserved the question of whether an excited utterance would violate the confrontation clause if it was expanded beyond the historical antecedents of the rule. *Id.* at

846. Here, the Court of Appeals published decision expands the medical treatment hearsay rule beyond the confrontation clause limitations.

Further, the decision encourages the use of unreliable allegations made by people who are fully aware they can skip the trial, avoid confrontation, and still see the defendant convicted. The State made little to no effort to bring Mr. Bagnell to court, after giving him uniquely explicit information about the police and prosecution's on-going interest in and access to any statements during medical appointments for use in the case against Ms. Scanlan. The prosecution's charges of second degree assault and unlawful imprisonment rested on the specific detailed allegations made during these medical appointments. Ms. Scanlan was unable to probe his lies and exaggerations about the details of the incident without any opportunity to confront him. But after trial, he discounted and distanced himself from these very allegations at the sentencing hearing.

Ms. Scanlan was denied a fair trial by jury due to the unreliable and unconfronted allegations at the core of the State's case. This Court should grant review as a matter of substantial

public interest and due to the significant legal questions presented.

2. This Court should grant review to decide whether a person is unlawfully restrained when he is in his own home with an available means of exit, as other Court of Appeals cases have held.

As a matter of due process, the prosecution must prove, beyond a reasonable doubt, all essential elements of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Const. art. I, §§ 3, 21, 22. For evidence to be legally sufficient, a "modicum of evidence" on an essential element is "simply inadequate." *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Unlawful imprisonment requires proof Ms. Scanlan knowingly restrained Mr. Bagnell by substantially interfering with his liberty. RCW 9A.40.040; CP 14. Restraint requires both (1) the accused "restrict a person's movements without consent and without legal authority," and (2) she does so "in a manner which interferes substantially with that person's liberty." *State*

v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000); RCW 9A.40.010(1).

To prove "restraint," the substantial interference with a person's liberty must be a "real or material interference," as contrasted with an inconvenience or annoyance. *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 857 (1979). The word "substantial" indicates the serious nature of the act, requiring more than simply delaying a person's freedom of movement. *Id.*

When there is a means of escape, it will defeat a prosecution for unlawful imprisonment if escape is not dangerous and does not require significant effort beyond that which is inconvenient. *State v. Kinchen*, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998); *see also State v. Washington,* 135 Wn. App. 42, 50, 143 P.3d 606 (2006) (available avenue of escape is a defense to a charge of unlawful imprisonment unless "the known means of escape ... present[s] a danger or more than a mere inconvenience").

Furthermore, the necessary element of substantial interference with a person's freedom of movement may not be

consensual, and it must not be incidental to the commission of another crime. *State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) (construing "restraint" to be incidental where complainant in visible location and movement was incidental to other offenses).

Here, the entire incident occurred at Mr. Bagnell's home, with many doors and windows available to escape. 7RP 970; 10RP 1307-08; *See Kinchen*, 92 Wn. App. at 542.

Despite Mr. Bagnell's purportedly told one medical provider he was locked in his room at some point, there was no evidence of how, where, or when this occurred, or whether it was for more than a fleeting moment in time. *See* 8RP 1181. Since internal doors lock from the inside, there is no evidence he could not turn the knob and open a door. He did not report being afraid to leave. He was sitting in his living room when family arrived, and was alert and oriented to "[p]erson, place and time." 9RP 1268. He was able to walk. 9RP 1269. He did not complain of significant pain, and his vital signs were appropriate. 9RP 1213-15. He was not actively bleeding and the medics did not bandage or clean any wounds. *Id.*

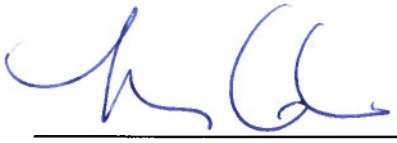
The known means of escape, such leaving out of a door to the home, was not presented as a danger or substantial obstacle for Mr. Bagnell. *See Kinchen*, 92 Wn. App. at 452 n.16. This Court should grant review based on the conflict between this decision and other cases defining the essential elements of unlawful imprisonment.

E. CONCLUSION

Theresa Scanlan respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 8th day of June 2018.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. THERESA GAIL SCANLAN, Appellant.	)	No. 74438-1-I DIVISION ONE PUBLISHED OPINION FILED: March 12, 2018

MANN, J. — Theresa Scanlan appeals her convictions for assault in the second degree, felony violation of a court order, and unlawful imprisonment of Leroy Bagnell, her domestic partner. Scanlan contends that (1) the trial court erred in admitting testimonial statements made by Bagnell to medical treatment providers, (2) there was insufficient evidence to support the charge of unlawful imprisonment, and (3) her convictions for both felony violation of a no-contact order and assault in the second degree were based on the same course of conduct and violate double jeopardy.

We hold that because the primary purpose of Bagnell's statements to his treatment providers was for medical treatment, the admission of the statements did not violate Scanlan's rights under the confrontation clause. We further conclude that there was sufficient evidence to support Scanlan's conviction for unlawful imprisonment. We

therefore affirm Scanlan's convictions for assault in the second degree and unlawful imprisonment. However, we accept the State's concession and reverse Scanlan's conviction for felony violation of a no-contact order. We remand for resentencing on the crimes of assault in the second degree, unlawful imprisonment, and misdemeanor violation of a no-contact order.

FACTS

In 2013, Bagnell, an 82-year-old widower, was living independently in the Federal Way home that he had shared with his wife of more than 50 years. Sometime in 2013, Bagnell met Scanlan, a woman 30 years his junior. They quickly became friends and about two months later, Scanlan moved in with Bagnell.

On October 16, 2014, the Federal Way Police Department responded to Bagnell's home after receiving a 911 hang-up call. The officers found Bagnell and Scanlan inside the home. Scanlan was uninjured, but Bagnell, who was dressed in a t-shirt and underwear, had wounds on his head, arms, and legs. After questioning Scanlan, the officers arrested her. As a result of the incident, a court order was issued prohibiting Scanlan from contacting Bagnell.

A few weeks later, on November 6, 2014, Bagnell's adult children grew concerned after Bagnell missed a scheduled meeting with them. After trying and failing to reach him on his cell phone and home phone, Bagnell's children went to Bagnell's house to check on him.

When Bagnell's children arrived at his house, they found it dark. Its blinds were drawn and all of the interior and exterior lights were out. The children thought this was odd and moved up to the front porch to try to see inside. From the porch they could see

the glow of the television and shadowy movements. They rang the doorbell and knocked but received no answer. Bagnell's children were alarmed and opened the door with an emergency key.

Inside, they found Bagnell's home in disarray. Trails of blood ran across the carpet and up the stairs, gouges marked the walls, and broken household items and debris lay on the floor. A golf club leaned against a wall, and a hammer lay on a coffee table. A crowbar was on the dining room table, and a broken broom handle stood in a garbage bucket in the middle of the family room's floor. Bagnell sat alone in a chair in the family room, dazed, bleeding from several wounds, and severely bruised such that "[h]is face was black." Bagnell at first appeared to be unconscious, but he began to respond to their attempts to rouse him as they called 911.

Roughly 15 minutes later, Federal Way Police Officer Brian Bassage arrived at Bagnell's home. Just as Officer Bassage arrived, Scanlan was found hiding under a blanket in the front seat of a car in the garage. As Officer Bassage removed her from the car, Bagnell's daughter yelled out at her that she had "just beat her father half to death, that there was blood everywhere." Scanlan shouted back, "It's not that bad."

At the police station, Scanlan claimed to be injured. The police took pictures, but did not detect any significant injuries. Scanlan did not receive medical treatment.

Bagnell was transported to the hospital where he was treated in the emergency room for his injuries which included: extensive bruising all over his body, four large open wounds on his legs, wounds on his arms, and fractures on both hands. Bagnell was treated in the emergency room on November 6 by emergency room Nurse Catherine Gay and Dr. Robert Britt. Bagnell also met with social worker Jemina Skjonsby. After

treatment, but prior to his release, Bagnell met with Federal Way Police Department Detective Adrienne Purcella from about midnight to 1:00 a.m. Bagnell signed a form medical records waiver at 12:55 a.m.

Bagnell did not testify at trial. However, the trial court admitted statements that Bagnell made to medical providers in the emergency room, as well as subsequent statements made to his primary care physician and wound care medical team.

In November 2015, the State charged Scanlan with assault in the second degree (count 1), felony violation of a court order (count 2), unlawful imprisonment (count 3), and assault in the fourth degree (count 4). All counts contained a domestic violence allegation. The jury found Scanlan guilty of assault in the second degree, felony violation of a court order, and unlawful imprisonment. Scanlan appeals.

ANALYSIS

Right to Confrontation

Scanlan contends first that her right to confront the primary witness against her was violated. She argues that the trial court erred in admitting testimonial statements made by Bagnell to medical providers and two law enforcement officers.

A. Testimony of Medical Providers

The trial court allowed testimony from five medical providers concerning statements that Bagnell made to them during the course of treatment.

Nurse Gay was the first person to speak with Bagnell. Gay testified that when she asked Bagnell how he was injured, Bagnell told her that "his girlfriend had beaten him up, and that he'd had a no-contact order with that individual." Gay testified that when she asked Bagnell why his neck had a "ring mark around the back of [it]," Bagnell

told her that "his girlfriend had . . . tried to strangle him with his sweatshirt and had pulled the sweatshirt so hard, it had left this permanent ring around the back of his neck." Gay clarified during cross-examination that Bagnell had not used the word "strangled."

Dr. Britt, the emergency room doctor who treated Bagnell, testified that when he asked Bagnell what happened, Bagnell responded that he had been imprisoned in his home for two days:

> [Dr. Britt]: The patient did state that he had been in his home for two days, that he had been imprisoned, or at least held in his home against his will. He did state that he hadn't really eaten in a couple of days. He wasn't allowed to talk to his family.
>
> [State]: And did he tell you about how he sustained his injuries?
>
> [Dr. Britt]: He said that he was hit with fists, that he had been bitten in a couple of places and that he had been hit with a broom.

After Bagnell was medically cleared at about 9:00 p.m., an emergency room social worker named Jemina Skjonsby met with him. Skjonsby testified that when she asked him why he felt okay to return home, Bagnell told her "[t]hat he was relieved that this person had been removed from the home by police and that he wouldn't have to worry about it again."

On November 13, Bagnell met with his primary care physician Dr. Curtis Endow to follow up on his earlier injuries. Dr. Endow testified he observed that Bagnell had "[b]ruises, and swelling over the face, bruises over the upper chest, lower trunk and legs, and in the extremities, multiple bruising and open wounds in various levels of—or depth of degree." Dr. Endow testified that as part of his treatment he asked Bagnell how he had been injured and that Bagnell responded that "he received the injuries

during an assault" and that his girlfriend had assaulted him. Dr. Endow referred Bagnell to a wound care clinic for follow up care.

On November 18, Bagnell met with Stacy Friel, a physician's assistant at the wound care clinic, about his wounds. Friel examined multiple wounds, including one wound on Bagnell's left arm, two wounds on his right arm, one wound on his right leg and three wounds on his left leg. Friel testified that as part of her treatment she asked Bagnell how he was injured and that he responded that he "was living with a girlfriend at the time who had locked him in a room and had beat him with a candlestick, a broom, and a hammer over multiple areas."

On November 26, 2017, Bagnell returned to the wound care clinic to see Dr. Jessica Pierce. As part of her treatment, Dr. Pierce asked Bagnell how his injuries happened. She testified that Bagnell told her his injuries were "a result of domestic violence," that "he was hit with a candlestick, a broom," and that he was "punched or hit [with] . . . a hammer, something hard."

B. The Primary Purpose Test

A confrontation clause challenge is reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Koslowski, 166 Wn.2d at 417 (alterations in original) (quoting U.S. Const. amend. VI.) "[T]he Sixth Amendment's right of an accused to confront the witnesses against him . . . is made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 12 L. Ed. 2d 923 (1965). The confrontation clause prohibits

the "introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 2179, 192 L. Ed. 2d 306 (2015) (quoting Crawford v. Washington, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004)).

Neither Scanlan nor the State dispute that Bagnell was unavailable to testify or that Scanlan had no prior opportunity to cross-examine him. The central issue, therefore, is whether the admitted statements were testimonial.

Scanlan urges that we follow the three-part test for determining when statements made to medical providers are testimonial set out in State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007), and followed in State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838 (2013). Statements in this context are nontestimonial when the following factors exist: "(1) where they are made for diagnosis or treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State." Sandoval, 137 Wn. App. at 537. Scanlan argues that because Bagnell signed medical record waivers prior to making his statements to medical providers he had an expectation that his statements would be used at trial and are therefore testimonial. We disagree.

As we have previously recognized, confrontation clause jurisprudence has been in rapid flux since the U.S. Supreme Court's 2004 decision in Crawford. See State v. O'Cain, 169 Wn. App. 228, 234-35, 289 P.3d 926 (2012) (acknowledging "uproar" in confrontation clause jurisprudence); State v. Robinson, 189 Wn. App. 877, 882-92, 359, P.3d 874 (2015) (applying recent United States and Washington Supreme Court

jurisprudence to testimony of a 911 call). Most recently, in Clark, which was issued after both Sandoval and Hurtado, the United States Supreme Court made clear that:

> under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimony. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."

Clark, 135 S. Ct. at 2180 (quoting Michigan v. Bryant, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)). We hold, therefore, that the proper test to apply in determining whether the statements made to medical providers are testimonial is the "primary purpose" test.[1] .

In Crawford, the United States Supreme Court explained that "witnesses" under the confrontation clause are those "who bear testimony" and defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (internal quotation marks and alterations omitted). The Court concluded in Crawford that statements by a witness during police questioning at the station house were testimonial and could not be admitted. The Crawford court did not, however, offer an exhaustive list or definition of testimonial statements. Crawford, 541 U.S. at 68.

In 2006, the Supreme Court further defined testimonial statements in Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), two cases that it decided together. Both cases addressed statements given to law enforcement officers by victims of domestic abuse. Davis addressed statements

[1] We note, that at least in dicta, the United States Supreme Court has characterized statements made to medical providers for purposes of diagnosis or treatment as nontestimonial. Bryant, 562 U.S. at 362 n.9; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009); Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

made by a victim to a 911 operator during, and shortly after, a boyfriend's violent attack. In contrast, Hammon concerned statements made by the victim to police after being isolated from her abusive husband. Davis, 547 U.S. at 820. The Court held that the statements in Hammon were testimonial, while the statements in Davis were not. In doing so, the Court announced the "primary purpose" test and explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Because both cases addressed statements made to law enforcement officers, the Court expressly reserved the question of whether similar statements made to individuals other than law enforcement officers raised similar issues under the confrontation clause. Davis, 547 U.S. at 823.

In 2011, the United States Supreme Court expounded on the primary purpose test in the law enforcement context in Bryant. "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Bryant, 562 U.S. at 360. When "the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation Clause]." Bryant, 562 U.S. at 358. But "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry."

Bryant, 562 U.S. at 374. Instead, "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the primary purpose of an interrogation." Bryant, 562 U.S. at 366.

Another factor is the informality of the situation and interrogation. And, again, while formality is not the "sole touchstone" of the primary purpose test, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." Bryant, 562 U.S. at 366. 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.'" Clark, 135 S. Ct. at 2180 (quoting Bryant, 562 U.S. at 358).

In Clark, the Supreme Court was presented with the question it had repeatedly reserved: "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." Clark, 135 S. Ct. at 2181. In Clark, the Court considered whether statements made by a three-year-old child to his preschool teacher were testimonial. The child's teacher noticed injuries on the child and asked him what happened. Clark, 135 S. Ct. at 2178. The child indicated that Clark had caused the injuries. The teacher called a child abuse hotline and reported the suspected abuse. Clark, 135 S. Ct. at 2178.

Clark was charged with multiple counts of assault and endangering a child. Clark, 135 S. Ct. at 2178. The child did not testify at trial but the trial court allowed the State to introduce the child's statements to the teacher. Clark, 135 S. Ct. at 2178. The Supreme Court held that the child's statements were not testimonial, and that their

admission without cross-examination of the child did not violate the confrontation clause. Clark, 135 S. Ct. at 2183.

In reaching its decision, the Supreme Court declined to adopt a black letter rule that statements to individuals that are not law enforcement officers are outside of the Sixth Amendment. Clark, 135 S. Ct. at 2182. The Court explained, however, that the person that the victim is speaking to remains highly relevant and that:

> Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L.P.'s statements at trial.

Clark, 135 S. Ct. at 2182 (internal citations omitted).

C. Application to Statements to Medical Providers

Applying Clark and the primary purpose test to Bagnell's statements to his medical providers supports the trial court's conclusion that the statements were not testimonial. The primary purpose of the statements was to obtain proper medical care for his injuries.

Bagnell's statements were not made to law enforcement officers, and law enforcement officers were not present during any of Bagnell's statements to his medical providers.[2] Bagnell's statements were further made in the relatively informal setting of

[2] In Hurtado, which this court decided prior to the United States Supreme Court's decision in Clark, we found that statements made to medical providers while a police officer was present and actively gathering evidence violated the defendant's Sixth Amendment right to confront his witnesses. But because properly admitted evidence overwhelmingly established the defendant's guilt, we concluded that the error was harmless. Hurtado, 173 Wn. App. at 597, 608.

the emergency room and treating doctors' offices, not at the police station or an interrogation room. See Davis, 547 U.S. at 820 (statements made to police in a "battery affidavit"); Crawford, 541 U.S. at 65-66 (statements made by witness during police questioning at the station house were testimonial). And while Bagnell's life was not in immediate danger, he had extensive bruising, wounds, and fractures that required treatment in the emergency room for several hours along with follow up treatment by his primary care physician and the wound care clinic.

Further, each of the medical providers testified that their questioning of the cause of Bagnell's injuries was important to their medical treatment. Nurse Gay explained that knowing how an injury occurred is important for managing the patient's care in the hospital and determining property treatment, discharge, and follow up. Dr. Britt testified that it was important to determine the mechanisms of injuries in treating a patient. For example, a bite from a human would be treated differently from a bite from a dog. He explained further that the cause of injuries determines the patient's medical needs, and is important in formulating a discharge plan for safely releasing a patient from the hospital and determining whether a social worker is necessary. Skjonsby testified that knowing how a patient was injured is important for providing the correct social work services and a safe discharge.

Dr. Endow testified that it was important for treatment purposes to determine how Bagnell's injuries occurred and whether they had been caused by fainting, falling, or by some other mechanism. Dr. Endow also needed to determine if an elderly patient like Bagnell was safe to return home. Dr. Pierce testified that wound care requires a comprehensive evaluation of the patient. Dr. Pierce explained that emotional status

plays an important role in the healing process and that depression can be a problem. He explained further that the mechanisms of the injury plays an important role in choosing proper treatment when wounds are not healing properly. For example, if the patient has fallen, the risk of future falls must be assessed and treated.

Scanlan's right to confrontation was not violated by the testimony of Bagnell's medical providers because the medical providers' primary purpose in asking Bagnell how he was injured was not to create an out-of-court substitute for trial testimony. The medical providers' primary purpose in asking Bagnell, a severely injured elderly man, about how he was injured was to diagnose his injuries and treat them. When Bagnell arrived at the hospital, he was "bruised from head to toe, bleeding from several skin tears," and had "a couple of deformit[ies] of the hands." Faced with this situation, any medical provider would ask the patient what happened in order to treat the patient properly. The primary purpose of describing how a patient is injured is to inform the medical provider about the nature and extent of the injuries. Viewed objectively, no medical provider in this situation would be primarily concerned with "creat[ing] an out-of-court substitute for trial testimony." Clark, 135 S. Ct. at 2180 (quoting Bryant, 562 U.S. at 358).

Scanlan counters that the medical waivers Bagnell signed would have made a reasonable declarant aware that his statements made to medical providers would be used in a future trial. But the medical waivers are irrelevant to the primary purpose of why Bagnell was speaking with the doctors. The primary purpose of Bagnell's interactions with his medical providers was for treatment and diagnosis. Under Clark's primary purpose test, the secondary purpose is irrelevant. Clark, 135 S. Ct. at 2183 ("It

is irrelevant that the [preschool] teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution.").

In sum, the medical providers' testimony of what Bagnell told them was nontestimonial because the primary purpose of the conversation was for treatment and diagnosis. Bagnell's statements to his medical providers were not testimonial and were properly admitted.

D. Statements to Law Enforcement Officers

Scanlan argues further that Bagnell's statements elicited through Officer Giger and Detective Purcella's testimony were testimonial statements.

On November 6, Officer Giger responded to Bagnell's house after Scanlan's alleged assault. Giger testified that while assessing the scene she asked Bagnell if Scanlan hurt him:

> [Officer Giger]: Okay. I asked [Bagnell] if Theresa [Scanlan] had done that to him.
>
> [State]: Okay. Did he provide you an answer to that question?
>
> [Officer Giger]: Yes.

Here, Officer Giger's statement is testimonial because when viewed objectively, the primary purpose of a police officer's question in this scenario would be to gather evidence for trial and "creat[e] an out-of-court substitute for trial testimony." Bryant, 562 U.S. at 358. There was no emergency at this point because Scanlan had already been arrested. Similarly, Officer Giger was at Bagnell's house to investigate Bagnell's assault and gather evidence, not track down the assailant. Accordingly, this statement was testimonial.

On November 11, four days after Bagnell's assault, Detective Purcella met with Bagnell at his home. The purpose of her meeting was "to see injuries and things like that, how they had progressed, and check on [Bagnell] as well." During this meeting, Purcella saw Bagnell walking with a cane. She testified that she "asked him if that was typical for him, and he said that it was not and that he was using it as a result of the assault."

Here, again Detective Purcella's statement was testimonial because when viewed objectively, the primary purpose of a detective in her position would be to gather evidence for trial and "creat[e] an out-of-court substitute for trial testimony." Bryant, 562 U.S. at 358. There was no emergency when Detective Purcella asked Bagnell this question, and like Officer Giger, Purcella knew the identity of Bagnell's assailant.

We agree with Scanlan that the statements elicited through Detective Purcella and Officer Giger were testimonial. We disagree, however, that the introduction of the officers' statements requires reversal of Scanlan's assault and unlawful imprisonment convictions.

The harmless-error standard applies to confrontation clause errors. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Jasper, 174 Wn.2d at 117.

> Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The reviewing court looks to the "untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt." Hurtado, 173 Wn. App. at 608.

Here, any error was harmless. The improper testimony from Officer Giger and Detective Purcella was cumulative of other evidence of assault. Circumstantial evidence that Scanlan assaulted Bagnell was overwhelming. Scanlan was the only other person with Bagnell when he was found severely injured on November 6. In addition, Scanlan tacitly admitted that she assaulted Bagnell. A police officer testified at trial that when he pulled Scanlan out of the car she was hiding in, Bagnell's children yelled at her that "she had just beat her father half to death." The police officer testified that Scanlan shouted back, "It's not that bad." This is a tacit admission of guilt. In addition, Officer Giger and Detective Purcella's improper testimony did not affect the unlawful imprisonment charge.

Sufficiency of the Evidence

Scanlan next contends that there was insufficient evidence of her conviction for unlawful imprisonment.

When reviewing a claim for the sufficiency of the evidence, we consider "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." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quotation omitted). "When the sufficiency of the evidence is challenged in a criminal case, all

reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. "Circumstantial evidence is as reliable as direct evidence." State v. Jackson, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The State charged Scanlan with unlawful imprisonment under RCW 9A.40.040 which states: "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." To prove restraint, the State had to prove that Scanlan restricted Bagnell's movements "(a) without consent and (b) without legal authority, in a manner which interfered substantially with his liberty." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000); RCW 9A.40.010(6). Restraint is without consent if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(6).

There is sufficient evidence of unlawful imprisonment. First, Bagnell told Dr. Britt that "he had been in his home for two days, that he had been imprisoned, or at least held in his home, against his will." Physician's assistant Friel testified that Bagnell told her that Scanlan locked him in a room: "[h]e was living with a girlfriend at the time who had locked him in a room and had beat him with a candlestick, a broom, and a hammer over multiple areas."

Second, circumstantial evidence supports the inference that Scanlan used force or the threat of force to restrain Bagnell. Bagnell's children found the front door locked,

their father in a stupor, the house in disarray, and a broken broom, hammer, golf club, and crowbar. Bagnell's children were also unable to contact their father by phone. Additionally, Bagnell's cell phone was found broken, a battery was found to have been removed from a cordless phone in the home, and another phone was found to have no dial tone. Viewed in the light most favorable to the State, this is sufficient evidence of unlawful imprisonment.

Scanlan, relying on State v. Kinchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998), argues that there was insufficient evidence of unlawful imprisonment because there was a means of escape. In Kinchen, we held that there was insufficient evidence of unlawful imprisonment where the victims were able to get in and out of a locked apartment. 92 Wn. App. at 451-52. Stacey Kinchen locked his two badly behaved children in his apartment, but the boys were able to enter and exit the apartment through a window and, when it was unlocked, a sliding glass door. Kinchen, 92. Wn. App. at 444-45. Kinchen was convicted of unlawful imprisonment, but we reversed his conviction. We reasoned that there was insufficient evidence of unlawful imprisonment because the boys could and did get out. Kinchen, 92 Wn. App. at 451-52. We held that there was insufficient evidence to support a charge for unlawful imprisonment in the apartment. Kinchen, 92 Wn. App. at 452.

Scanlan's argument fails because there was evidence that Bagnell was held against his will: he told Dr. Britt that "he had been in his home for two days, that he had been imprisoned, or at least held in his home, against his will." We affirm Scanlan's conviction for unlawful imprisonment.

Double Jeopardy

Scanlan argues finally that her convictions for assault in the second degree and felony violation of a no-contact order violate double jeopardy because they are based on the same assaultive conduct. The State concedes this point. We accept the State's concession and remand for the imposition of a conviction for misdemeanor violation of a no-contact order and resentencing if necessary.

Otherwise we affirm Scanlan's conviction for second degree assault and unlawful imprisonment.

WE CONCUR:

APPENDIX B

FILED
5/9/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. THERESA GAIL SCANLAN, Appellant.	No. 74438-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Theresa Scanlan has filed a motion for reconsideration of the court's opinion filed on March 12, 2018. Respondent the State of Washington has filed a response. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.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. 74438-1-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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MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 8, 2018
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

June 08, 2018 - 4:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74438-1
Appellate Court Case Title:	State of Washington, Respondent v. Theresa Scanlan, Appellant
Superior Court Case Number:	14-1-06460-4

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