

No. 95971-4

NO. 74438-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THERESA SCANLAN,

Appellant.

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Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

When Leroy Bagnell entered into a relationship with Theresa Scanlan, his adult-aged children disapproved. When Mr. Bagnell's children found him bruised and his house in disarray, they called the police and blamed Ms. Scanlan. Although Mr. Bagnell told several medical providers that Ms. Scanlan assaulted him, he refused to testify. Instead, he came to the sentencing hearing and told the judge he did not know what happened and did not blame Ms. Scanlan.

The prosecution's case rested on out-of-court statements to medical providers. Mr. Bagnell made these statements after the police told him they would use these medical records to investigate and prosecute the case. Ms. Scanlan was unable to challenge his out-of-court accusations because he did not testify, violating the confrontation clause.

In addition, Ms. Scanlan's convictions for assault in the second degree and felony violation of a no-contact order are based on the same assault, violating double jeopardy. Insufficient evidence of unlawful imprisonment requires reversal of that conviction.

B. ASSIGNMENTS OF ERROR.

1. Ms. Scanlan was denied her right to confront witnesses against her as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution.

2. Ms. Scanlan's convictions for second degree assault and felony violation of a no-contact order based on the same conduct violate double jeopardy and are not statutorily authorized.

3. Because the State did not prove separate and distinct acts to a unanimous jury, her convictions for second degree assault and felony violation of a no-contact order violate the due process and unanimity requirements of the Fourteenth Amendment and article I, sections 3, 21, and 22 of the Washington Constitution.

4. There was legally insufficient evidence to convict Ms. Scanlan of unlawful imprisonment, violating the Fourteenth Amendment and article I, sections 3 and 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The confrontation clause bars the State from relying on testimonial statements from a non-testifying witness. The complaining witness did not testify. The police told him they would use his statements to medical providers in their investigation and prosecution.

When the State relied on statements made with the understanding they would be available for use in a prosecution, does the admission of these testimonial statements violate the confrontation clause?

2. The State conceded the alleged assault constituted a single uninterrupted course of conduct amounting to one count of second degree assault. By statute, second degree assault may not be used to elevate a no-contact order violation to a felony. Does the State's reliance on the same second degree assault violate the statutory and double jeopardy prohibitions on imposing separate punishments for the same assaultive conduct?

3. Unlawful imprisonment requires substantial interference with a person's freedom of movement, including the unavailability of a reasonable means of escape. The incident occurred in Mr. Bagnell's home. He was alert, oriented, and able to walk. Without evidence that he could not use the available means of escape, was there insufficient evidence of unlawful imprisonment?

D. STATEMENT OF THE CASE.

In 2013, Theresa Scanlan befriended Leroy Bagnell. 7RP 963.¹ Because she needed a place to live, he invited her to live in his home. 7RP 964.

In his early 80s, Mr. Bagnell was “physically fit and strong for his age” but had some chronic health problems. 7RP 812-13, 839, 958, 966-67. His long-term use of certain medications impacted his response to injuries. 7RP 822; 11RP 1359, 1362. He took aspirin and prednisone for many years, which are blood thinners that make him readily bruise from minor contact. 7RP 838-39; 11RP 1359, 1364. His skin is thin due to his age and medication history, which means it easily tears and separates from underlying tissue. 7RP 824; 11RP 1369, 1381-82, 1384.

Mr. Bagnell was in love with Ms. Scanlan. 14RP 1679. But Mr. Bagnell’s children did not feel the same way. 8RP 1053. Mr. Bagnell’s wife of over 50 years died ten years earlier. 7RP 958. They had four children who were in their late-50s and early 60’s, similar in age to the 58-year-old Ms. Scanlan. *Id.*

¹ The verbatim report of proceedings (RP) consist of 14 consecutively paginated volumes, referred to herein by the volume number designated.

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 attended 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.

As part of the police investigation from the October incident, Detective Adrienne Purcella had Mr. Bagnell sign a medical release waiver. 3RP 286-87, 309. 6RP 635-36. This release form stated, "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 obtain his medical records for the next year in their investigation. 3RP 317.

On November 6, 2014, Mr. Bagnell's son called 911 at about 5:30 p.m. 7RP 976. Mr. Bagnell's children went to his home after he did not answer his phone and because they pre-arranged to meet that evening. 7RP970-71. The door was locked but they saw a light inside. 7RP 974. They entered with their own key. *Id.* Mr. Bagnell was sitting

in a chair in the living room, with bruises covering his face. 7RP 974-75. The house was in disarray and he seemed dazed. *Id.*

Police responded and arrested Ms. Scanlan, who was hiding in a car in the garage. 6RP 766. Medics examined Mr. Bagnell. He was 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 did not need to use lights or sirens because his condition was not urgent. 9RP 1213.

At St. Francis Hospital, several staff members asked Mr. Bagnell what happened to ascertain the need for police involvement and they recorded his responses in records accessible to police. 6RP 642-43. A detective had Mr. Bagnell sign another medical release waiver identical to one he signed a few weeks earlier, again specifying that 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 visited Mr. Bagnell at his home. 3RP 301; 6RP 645-46. She let Mr. Bagnell know she spoke to his doctor and had Mr. Bagnell sign another identical waiver form to enable the police and prosecution to access records from Virginia

Mason. 3RP 301; 6RP 646-47. During the next few weeks, Mr. Bagnell saw several medical professionals at Virginia Mason, who asked him how he received his injuries and who caused them. 7RP 906; 8RP 1178.

Mr. Bagnell refused to testify against Ms. Scanlan. 8RP 1192; 9RP 1259. The State charged her with assault in the fourth degree for the October 16, 2014, incident; and assault in the second degree, felony violation of a no-contact order based on assault, and unlawful imprisonment for the November 6, 2014, incident. CP 13-14.

The court dismissed the fourth degree assault allegation after the State rested its case due to insufficient evidence. 10RP 1317. Ms. Scanlan was convicted of the remaining charges. CP 160-64. Each contained a domestic violence allegation. CP 160-61.

Mr. Bagnell came to court for the sentencing hearing. 14RP 1678-79. He told the judge he trusted Ms. Scanlan, did not want a no-contact order, and did not remember the incident. *Id.* Mr. Bagnell's children told the judge the incident was traumatic for the family. 14RP 1676-77. The court imposed a standard range sentence. 14RP 1707.

Pertinent facts are further explained in the relevant argument sections below.

E. ARGUMENT.

1. The State’s reliance on unsworn, out-of-court allegations denied Ms. Scanlan her right to confront the primary witness against her.

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); U.S. Const. amend. 6. 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.” Its scope is independent of the federal confrontation clause. *State v. Pugh*, 167 Wn.2d 825, 834–35, 225 P.3d 892 (2009). Under both clauses, a violation is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

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. Erroneous evidentiary rulings, including admitting unreliable hearsay evidence, may “rise to the level of a due process violation.” *Bryant*, 562 U.S. at 370 n.13 (citing inter alia *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).

b. Statements are testimonial when obtained for the purpose of assisting the State’s criminal investigation.

Statements are testimonial for purposes of the Confrontation Clause when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

This test requires a “combined inquiry that accounts for both the declarant and the interrogator.” *Bryant*, 562 U.S. at 367. “[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." *Id.* at 360.

Witness statements to a medical professional may be testimonial when given in the course of treatment. *State v. Hurtado*, 173 Wn.App. 592, 604-06, 294 P.3d 838 (2013). The statement's testimonial nature arises from the involvement of governmental authorities who are simultaneously investigating a potential crime. *Id.* The test is based on all relevant circumstances, which may include whether reasonable declarants may know that medical professionals are mandatory reporters, statutorily required to keep records and report potential crimes to the police, particularly when the police explain they will seek these records in the course of their investigation. *See Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173, 2180, 2183, 192 L.Ed.2d 306 (2015) (preschool teacher's mandatory reporting to social services does "alone" do not transform 3 year-old's statement into testimonial declaration).

The State must prove out-of-court statements to medical professionals are not testimonial. *Hurtado*, 173 Wn.App. at 600. To meet this burden, they must show the statements are: (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.

State v. Sandoval, 137 Wn.App. 532, 537, 154 P.3d 271 (2007).

In *Hurtado*, medics took the victim of an assault to the hospital. 173 Wn.App. at 596. A responding police officer met her there, collected evidence such as her clothes, and otherwise investigated the case. *Id.* The officer was in the room when the victim told medical personnel that her boyfriend hit her. *Id.* at 605.

While the hospital room statement was made for treatment purposes and not elicited by a state employee, the *Hurtado* Court focused on the second prong of the test: whether the State proved there was no indication that the witness expected the statements to be used in a prosecution. *Id.* at 602. Because the police continued to actively investigate the case while the complainant was at the hospital and getting treated, it would be “reasonable for J.V. to assume from these circumstances that her statements in the officer’s presence would be used for prosecution.” *Id.* at 605. The State did not meet its burden of proving the statements were nontestimonial. *Id.* at 606.

On the other hand, in *Sandoval*, the complainant called the police and reported her boyfriend assaulted her. 137 Wn.App. at 535. A fire truck responded and the medic told the complainant to go to the

hospital. *Id.* at 536. Her sister drove her to the hospital. *Id.* at 536. At the hospital, she told the emergency room doctor how the assault occurred and this doctor testified at trial, while the complainant did not. *Id.*

The police in *Sandoval* played no role in eliciting or arranging the doctor-patient interaction. *Id.* at 536, 538. The police did not come to the scene or the hospital when the complainant sought medical treatment for her injuries. *Id.* at 535-36. The court concluded that the later involvement of the police in investigating did not reasonably convey to a reasonable declarant that her statements to the doctor would be available for use in a later prosecution. *Id.* at 538.

Similarly to *Hurtado* and unlike *Sandoval*, the police immediately responded to Mr. Bagnell's home when his family called 911 to report he had been injured by Ms. Scanlan. 2RP 22-24, 31 (911 call). They arrested Ms. Scanlan. 2RP 95. They arranged for medics to examine him. 2RP 25. When the medics drove him to the hospital, they did not use lights or sirens because he was not in pain and his vital signs were appropriate. 9RP 1213, 1215.

Less than three weeks earlier, the police came to Mr. Bagnell's home and arrested Ms. Scanlan for an alleged assault. 2RP 78, 89. At

that time, Mr. Bagnell signed a medical waiver allowing the police and prosecution broad access to his medical records “in furtherance of the investigation and any resulting prosecution.” 6RP 635, 637; see 3RP 317. This earlier incident was based on acts connected to and part of a common scheme as the later incident, according to the prosecution. CP 13-14.

After the second incident, Mr. Bagnell again signed the same waiver two more times, expressly authorizing all his medical providers to give any information about his injuries to the police and prosecution. Pretrial Exs. 8, 9. These waivers explicitly set forth the State’s intent to obtain and use medical records in investigation and prosecution:

I, Leroy Bagnell, *the victim of a reported crime being investigated by the Federal Way Police Department, in furtherance of the investigation and any resulting prosecution*, do hereby request and grant permission to [the medical facility] . . . and any attending physicians, assistants, nurses or other staff to release *to officers of the Federal Way Police Department and/or the offices of the King County Prosecutor and/or the Federal Way City Attorney*, a complete copy of all records, charts, notes, reports, memoranda, correspondence, comments, test data, photos, treatment, and opinions acquired and developed in the course of treating me for my injuries

This authorization includes also information obtained . . . at the scene or during transport to and from a medical facility by EMTs, medics, or other responding

aid providers that may not be directly associated with the above-named medical facility.

In addition, my care providers may discuss my medical condition and any treatment *with the assigned detective, his or her designee, and the prosecuting attorney*. I understand that this authorization will extend to all aspects of treatment

Once disclosed, the recipient may not be required to maintain the confidentiality of the health care information. . . . This written authorization expires one year from the below date.

6RP 635-36 (emphasis added).

These waivers show Mr. Bagnell knew, and a reasonable person in his circumstances would know, that the police and prosecution would use his medical records in furtherance of investigating and prosecuting the assault allegations. He knew there was an on-going investigation stemming from the closely related October incident, and Ms. Scanlan's subsequent arrest in early November would at the least constitute a no-contact order violation. 6RP 638; 8RP 1131-32. When he was questioned about the incident by police and medical providers, he was forewarned by police that State authorities would access his medical records and reports to medical providers "in furtherance of the investigation and any resulting prosecution." 6RP 635; 3RP 317; *Hurtado*, 173 Wn.App. at 605-06. The police continued to actively investigate and the State maintained its prosecution of both incidents as

part of a single course of conduct throughout the time that Mr. Bagnell made his accusations against Ms. Scanlan. *See* CP 13 (charging document treating both incidents are part of a single scheme).

Officers Bagnell and Giger questioned Mr. Bagnell at his home after Ms. Scanlan was arrested and before the medics drove him to the hospital. CP 45. Detectives interviewed Mr. Bagnell's family members and then met with Mr. Bagnell at the hospital for a more formal interview. *Id.*; 9RP 1241. Mr. Bagnell was already the accuser in a pending prosecution against Ms. Scanlan, for which she had been arrested and jailed, at the time the police questioned and investigated these additional allegations against her. 6RP 635, 728, 749. At the hospital, the police spoke with the medical staff, collected evidence, and took photographs. 6RP 642.

Under these circumstances, a reasonable participant would have ascertained that Mr. Bagnell's statements about how his injuries occurred and who did it would be obtained and used by the State in any later prosecution. *See Bryant*, 562 U.S. at 360; *Davis*, 547 U.S. at 822. It was objectively and subjectively reasonably apparent after Ms. Scanlan's arrests in October and November that police and prosecution would obtain Mr. Bagnell's statements to medical providers and use

them in furtherance of their investigation or prosecution. *See Hurtado*, 173 Wn.App. at 605. Therefore, the testimonial statements were improperly admitted absent Mr. Bagnell's testimony at trial.

c. Here, the State's case was based on unfronted, testimonial statements of the complainant.

Over Ms. Scanlan's repeated objections, the State elicited Mr. Bagnell's testimony solely through other witnesses who recounted out-of-court statements. CP 37-62; 3RP 272-317; 6RP 633-71, 683-87; 7RP 802. The following statements are testimonial and their admission violates the confrontation clause:

Social worker Jemina Skjonsby saw Mr. Bagnell after he was medically cleared at the hospital on November 6, 2014. 7RP 880. Her job involves ascertaining whether a person wants the police involved if they have not yet been contacted. 7RP 878. She testified that when she asked Mr. Bagnell about his desire to involve State authorities, he said he was relieved the perpetrator was removed from his home by police and he would not have to worry about his safety again. 7RP 883-84. This interaction would reinforce Mr. Bagnell's understanding of the role hospital staff plays in furthering police investigations and his expectation that information obtained would be provided to the police.

Dr. Robert Britt evaluated Mr. Bagnell at the hospital. He considers his role as “part detective, part doctor.” 7RP 921. He keeps records of allegations, including the identity of alleged perpetrators, so that it is available for later use by police. CP 46. He also includes photographs if injuries may be “going to go to court.” CP 46. His notes state the police had been to the scene and came to the hospital shortly after Mr. Bagnell, where they collected evidence and took photographs. 6RP 642.

Dr. Britt also took photographs of Mr. Bagnell and kept a record of his statement that he was imprisoned or “held in his home, against his will,” he “hadn’t really eaten in a couple of days” and was not allowed to speak to his family. 7RP 925; CP 46. His injuries occurred when he was “hit with fists,” bitten in a couple of places and had been hit with a broom. 7RP 925-26. Mr. Bagnell was with a concerned family member during this conversation. 7RP 923-24.

Nurse Catherine Gay was the first medical professional to speak with Mr. Bagnell after medics brought him to the hospital. 6RP 642. Her role includes asking people how they were injured to know if “the police need to be called” as well as to know about where the injuries occurred. 8RP 1106. She generally receives a report from the

ambulance personnel about why the person had come to the hospital before meeting the person. 8RP 1107-08. According to Ms. Gay, Mr. Bagnell said “his girlfriend had beaten him up” and they had a no-contact order. 8RP 1108. She asked how he got an injury to his neck and he said his girlfriend had tried to strangle him, or pulled a sweatshirt tightly on his neck. 8RP 1110.

While at the hospital, Detective Purcella obtained another medical release waiver identical to the one Mr. Bagnell signed a few weeks earlier, similarly informing him the police and prosecution may access any medical records for the “reported crime” over the course of the next year. 6RP 635-37. The police obtained a third waiver on November 12, 2014, to ensure the police and prosecution would have access to medical reports obtained from any additional providers. Pretrial Ex. 9. Detective Purcella told Mr. Bagnell she reviewed his medical records and spoke to emergency room personnel. 3RP 287, 301; 6RP 642, 646-47.

On November 13, 2014, the day after Mr. Bagnell signed the third medical release form directing the police to obtain medical records about the November incident from Virginia Mason medical providers, he met with Dr. Curtis Endow from Virginia Mason. 7RP 814.

According to Dr. Endow's records, Mr. Bagnell said he "received the injuries during an assault" perpetrated by "his girlfriend." 7RP 818.

Dr. Endow referred Mr. Bagnell to a Virginia Mason wound clinic where physician's assistant Stacy Friel and Dr. Jessica Pierce examined and questioned him. 7RP 833. Dr. Pierce's assistant, Ms. Friel, met with Mr. Bagnell on November 18, 2014, after he authorized the police and prosecution to obtain and use his medical records. 8RP 1178; CP 54. Ms. Friel reported that Mr. Bagnell said he was living with his girlfriend, who locked him in a room, beat him with a candlestick, broom, hammer, over multiple areas. 8RP 1181.

On November 26, 2014, having already authorized the police and prosecution to access his medical records pertaining to his injuries and knowing the police had spoken to his treating doctors, Mr. Bagnell told Dr. Pierce he was injured "as a result of domestic violence." 7RP 906, 909; *see* 6RP 646-47. He said he was "hit with a candlestick, a broom" and possibly a hammer. 7RP 909.

While these statements may have also been obtained for treatment purposes, the declarant reasonably understood they would be available for use in the investigation and prosecution relating to this incident. *See Hurtado*, 173 Wn.App. at 605. The emergency room

staff's role included ascertaining the involvement of police and prosecution as part of their primary purpose. CP 45-46 (records kept with expectation assault will go to court); CP 61 (social worker called in to assess law enforcement role in abuse allegation); 7RP 878, 921; 8RP 1106. The later medical interviews occurred after Mr. Bagnell had signed three medical release forms clearly stating the police and prosecution would access these records for the purpose of prosecution.

The court declined to find these statements testimonial because the detective did not say to Mr. Bagnell that his statements to medical providers would be used "in court." 7RP 802. But it is the statement's availability for use in the criminal investigation and potential trial that is required for a statement to be testimonial, not the explicit warning that they will be used "in court." *See Hurtado*, 173 Wn.App. at 605; *see also Davis*, 547 U.S. at 822 (explaining testimonial statements include those elicited to "to establish or prove past events potentially relevant to later criminal prosecution"). The court applied the wrong test when ruling the statements were not testimonial.

d. Mr. Bagnell's post-incident statements to police were also testimonial.

Statements to police investigating a completed offense fall within the core class of testimonial statements. *See Bryant*, 562 U.S. at 373. Several days after the incident, Detective Purcella met with Mr. Bagnell as part of the continuing investigation. 8RP 1144-45. Detective Purcella questioned Mr. Bagnell about why he was walking with a cane and “he said that it was not [typical] and that he was using it as a result of the assault.” 8RP 1146.

Mr. Bagnell's statement about his injury to the detective, in a case where the degree of his injury was central to the prosecution, constitutes a testimonial statement. In addition to having objected pretrial, the defense promptly objected and the prosecution agreed to “move on” but this information remained before the jury. 8RP 1146-47; *see* CP 40-41; 6RP 640, 650-53, 680 (pretrial objections).

The State also elicited Mr. Bagnell's implied admission that he accused Ms. Scanlan of assaulting him after Ms. Scanlan was arrested, over objection. 8RP 1168-69; CP 42. Officer Joell Giger testified that she asked Mr. Bagnell “if Theresa had done that to him” and he “answered” this question. 8RP 1169. Ms. Scanlan had been separated

and arrested by another officer at this time. 6RP 767, 770. Statements elicited by the police about the perpetrator are testimonial when the parties are separated and the incident is not “in progress.” *Davis*, 542 U.S. at 829-30.

The plain implication of the officer’s testimony was that Mr. Bagnell had affirmatively agreed that Ms. Scanlan was responsible for having “done that to him.” 8RP 1169; *see People v. Berry*, 854 N.Y.S.2d 507, 509 (N.Y. App.Div. 2008) (“implicit allegation” obtained by police from non-testifying witness violates confrontation clause); *see also People v. Fairweather*, 894 N.Y.S.2d 81, 82 (N.Y. App.Div. 2010) (detective’s testimony he “determined the defendant was a suspect after he interviewed the injured complainant” directly implies complainant identified him as perpetrator and violates confrontation clause). These additional testimonial statements were improperly admitted.

e. Because the State’s case rested on the credibility of unfronted out-of-court statements that Ms. Scanlan could not meaningfully challenge, the violation of the confrontation clause requires reversal.

The State must prove a confrontation clause violation is harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117. “Under

this standard, the State must show ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This analysis includes “assuming that the damaging potential of the cross-examination were fully realized” and examining the importance of the non-testifying witness to the State’s case. *Delaware v. Van Arsdall*, 457 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

The State pursued its prosecution without Mr. Bagnell’s testimony, even though he was the sole eyewitness and was able to come to court. In fact, he came to Ms. Scanlan’s sentencing and told the court he was not sure what happened, did not remember the incident due to alcohol, he had been able to leave his home and had gone on a walk, he trusted Ms. Scanlan, and he did not believe she intended any harm. 14RP 1678-79. The court advised him he was not permitted to talk about the facts of the case because the trial was over. 14RP 1677-78.

The State made little effort to bring him to court. They did not seek a material witness warrant. CrR 4.10(a). Mid-trial, a detective visited his home, asked him if he would like to testify, and he declined.

9RP 1259. The State did not try any other mechanism to encourage his testimony.

Central to the unlawful imprisonment allegation was testimony from two medical providers who were the only witnesses to claim Mr. Bagnell was locked in his own home and kept from leaving against his will. 7RP 925; 8RP 1181. Central to the second degree assault allegation was the State's claim he was assaulted by household objects, yet the evidentiary support arose solely from his out-of-court statements to three medical providers. 7RP 909, 925-26; 8RP 1181. Similarly, the felony violation of a no-contact order rested on these same out-of-court allegations of assault or dangerous conduct essential to enhancing the misdemeanor to a felony. CP 148.

These out-of-court statements undoubtedly contributed to the verdict obtained. *See Jasper*, 174 Wn.2d at 112. Although Mr. Bagnell's injuries were readily observable, his concurrent health problems and medication usage made them appear worse than they were. His injuries were caused by "minimal force" and were "superficial" even though they looked terrible, according to forensic pathologist Dr. Carl Wigran. 11RP 1369, 1453-54. The wounds were magnified by Mr. Bagnell's age and medical condition, which meant he

would bruise easily, his skin would tear readily, and his bones could break without significant pressure being applied. 7RP 935-36, 943, 950. Had Mr. Bagnell testified, Ms. Scanlan could have explored how he received these injuries and how they affected him.

Moreover, Ms. Scanlan was unable to elicit that Mr. Bagnell had retracted his allegations. He sent a letter of apology to Ms. Scanlan that the court ruled inadmissible; had he testified it could have been used to impeach him. 3RP 250-52; 4RP 339-41. Ms. Scanlan was unable to elicit the tension between Mr. Bagnell and his children, which demonstrated the bias and motives of the State's witnesses. 3RP 246-48 (court bars admission of video showing Mr. Bagnell and son arguing, son assaulting Mr. Bagnell). Ms. Scanlan was unable to question Mr. Bagnell about his bias and motive to lie regarding his jealousy of her contact with other men. CP 83-84; 3RP 241-45. The defense was unable to show Ms. Scanlan was reacting to his assaultive conduct, even though Mr. Bagnell had said in an interview that he grabbed Ms. Scanlan, threw her on the floor, and punched her. 11RP 1494, 1498-99. Because she was unable to elicit this testimony, the court denied the defense request for self-defense instructions. 12RP 1516-19.

Ms. Scanlan was left without the necessary means to challenge the State's case because she could not cross-examine the complainant even though he was not endorsing the State's allegations against her. The State's reliance on unopposed allegations contributed to the verdict and requires reversal. *Jasper*, 174 Wn.2d at 117.

2. Second degree assault and felony violation of a non-contact order were predicated on the same conduct, violate double jeopardy, and may not be separately punished.

a. The State may punish a person only for offenses that are statutorily authorized, based on separate units of prosecution, and expressly proven to a unanimous jury.

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). Rational inferences from the evidence "must be reasonable and 'cannot be based on speculation.'" *State v. Hummel*, _ Wn.App. _, _

P.3d __, 2016 WL 6084101, at *14 (2016) (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend. 5; Const. art. I, § 9.² When an accused person’s conduct constitutes a single unit of prosecution, the prosecution may not divide that conduct into multiple charges for which it seeks separate punishment. *State v. Adel*, 136 Wn.2d 607, 610, 40 P.3d 669 (2002).

b. Assaultive conduct at the same time and place is a course of conduct that constitutes a single unit of prosecution.

“[A]ssault should be treated as a continuing course of conduct crime.” *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014). Multiple assaultive acts constitute one course of conduct, and therefore one assault, if they occur at the same location, uninterrupted by intervening acts, without different intents, and when there is no

² The double jeopardy clause of the federal constitutions similarly provide that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. amend. 5; Const. art. I, § 9.

significant break during which the accused person could reconsider his or her conduct. *Id.* at 985.

In *Villanueva-Gonzalez*, the defendant head butted, grabbed, and strangled the complainant over a short but undefined period of time, without evidence showing he had different intentions in the course of the incident or intervening events occurred between various assaultive conduct. *Id.* at 986. He was charged with two counts of second degree assault but convicted of one count and the lesser offense of fourth degree assault. The Supreme Court held that the two assault convictions violate double jeopardy because they were part of a single course of conduct constituting one unit of prosecution for second degree assault. *Id.*

Ms. Scanlan was accused of assaulting Mr. Bagnell at the same time and place, without evidence of intervening acts or separate intents. 12RP 1513-14. Despite the defense request for a unanimity instruction, the court did not ask the jury to unanimously agree on the underlying act. 12RP 1512-15. The court did not give the jury a special verdict form to explain the basis of its verdict. As dictated by *Villanueva-Gonzalez*, assaultive conduct at the same undefined time and place,

without evidence of different intents or intervening circumstances, constitutes a single unit of prosecution for assault.

c. The prosecution agreed the assaultive conduct occurred in a single, uninterrupted incident.

It is constitutional to convict a person of both assault and felony violation of a no-contact order only if the felony violation of a no-contact order is predicated on an act other than that forming the basis of the assault conviction. *State v. Leming*, 133 Wn.App. 875, 891, 138 P.3d 1095 (2006).

To be convicted of felony violation of a no-contact order based on assaultive conduct, the underlying conduct must not amount to a first or second degree assault. RCW 26.50.110(4). An assault qualifies as the predicate for the felony offense only if it both violates a specified court order and “does not amount to assault in the first or second degree under RCW 9A.36.011 or RCW 9A.36.021” to constitute this class C felony offense. *Id.*

If a defendant is convicted of second-degree assault, that conviction cannot serve as the basis to elevate a violation of a no-contact order to a felony. *State v. Ward*, 148 Wn.2d 803, 812, 64 P.3d 640 (2000). “The statute clearly states that second degree assault cannot

serve as the predicate to make the violation a felony.” *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000).

When a defendant is charged with and convicted of a greater assault, it may not be used to enhance a no-contact violation to a felony. *Ward*, 148 Wn.2d at 812; *see State v. Hutton*, COA No. 73945-0-I, Slip op. at 8-9 (Nov. 14, 2016) (unpublished decision holding that RCW 26.50.110(4) bars imposition of separate punishment for second degree assault and felony violation of no-contact order based on based assaultive conduct, cited as relevant authority under RAP 14.1(a)).

Villanueva-Gonzalez explains that each individual punch or hit cannot be parsed as a separately prosecuted offense. 180 Wn.2d at 985-86. The State conceded that Ms. Scanlan was charged with and convicted of second degree assault based on a single course of conduct. 12RP 1513-14. The prosecutor explained:

all of the events happened at the same place. . . . There’s no intervening event. There’s no separate place. There’s really no distinction between when these acts happened. This is a continued course of conduct.

12RP 1514. The court agreed that the evidence was not divided into separate incidents and was “a continuous course of conduct.” 12RP 1515. By properly conceding the incident constitutes a single episode of

assaultive conduct, acts that might be less serious cannot be separately prosecuted under the plain terms of RCW 26.50.110(4) and *Villanueva-Gonzalez*, 180 Wn.2d at 986.

The jury was also instructed it could convict Ms. Scanlan of felony violation of a no-contact order under the alternative that the “defendant’s conduct was reckless and created a substantial risk of death or serious physical injury.” CP 148. This alternative similarly elevates the punishment for a no-contact order violation based on the single episode of assaultive conduct that is separately prosecuted as second degree assault. Ms. Scanlan’s second degree assault conviction rested on the claim she assaulted another and recklessly caused substantial bodily harm. CP 13-14. Thus, under both means of elevating the no-contact order violation, the same reckless and assaultive conduct formed the basis of both charged offenses.

The jury was not directed to predicate its verdict on an act separate from the second degree assault. CP 148. It did not base its verdict on separate and distinct conduct and the State agreed that the evidence would not have supported such a finding because the incident was a single course of assaultive conduct.

Because the second degree assault conviction rests on the same reckless behavior during what the State conceded was a single episode with “no distinction between when these acts happened,” separate punishments are not authorized by statute and violate double jeopardy. 12RP 1514; *see Adel*, 136 Wn.2d 607, 610.

d. The remedy for a double jeopardy violation is reversal and dismissal of the lesser offense.

“The remedy for a violation of double jeopardy protections is to vacate the ‘lesser’ offense -- meaning either the offense that forms part of the proof of the other (greater) offense or the offense that triggers the lesser sentence.” *State v. Albarran*, _Wn.2d _, 2016 WL 6651576 (2016). When the jury is instructed on a lesser offense, and that lesser offense does not violate double jeopardy, the court may remand for imposition of a conviction on that lesser offense. *See Hutton*, COA No. 73945-0-I, Slip op. at 9 (unpublished); *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012). Because the State did not establish separate statutorily authorized offenses, the felony violation of a no-contact order conviction must be vacated and the case remanded to imposition of a conviction for the misdemeanor offense of violation of a no-contact order.

3. Absent reliable evidence of physical restraint without an available means of escape, the State did not prove the essential elements of unlawful imprisonment.

a. The State was required to prove the essential elements of unlawful imprisonment.

As discussed above, due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime. *Winship*, 397 U.S. at 364; 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*, 443 U.S. at 320 “[I]t could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Id.*

Rational inferences from the evidence “must be reasonable and ‘cannot be based on speculation.’” *Hummel*, 2016 WL 6084101 at *14, quoting *Vasquez*, 178 Wn.2d at 16.

To convict Ms. Scanlan of unlawful imprisonment, the prosecution needed to show beyond a reasonable doubt that 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 Legislature used the word “substantial” to indicate the serious nature of the act and to show it intended to embrace conduct more significant 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”).

In *Kinchen*, a father locked his two sons inside their apartment but there was an available means of exit. 92 Wn.App. at 542. The boys could leave through a window without harming themselves or through a sliding glass door. *Id.* at 445, 452. These means of escape were reasonable and accessible. *Id.* at 452 n.16. The court rejected the State's claim that being locked inside the apartment amounted to unlawful imprisonment in this circumstance. *Id.* at 452.

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); *see also State v. Allen*, 94 Wn.2d 860, 863-64, 621 P.2d 143 (1980) (where force and threats used for purpose of committing robbery, restraint during robbery is incidental and separate offense of kidnapping does not start until robbery is complete); *Cf. State v. Phuong*, 174 Wn.App. 494, 509-10, 299 P.3d 37 (2013) (where sufficiency of evidence not at issue, incidental nature of restraint does not require unlawful imprisonment to merge into other simultaneous offense).

b. There was insufficient evidence proving the essential elements of unlawful imprisonment.

The allegation of unlawful imprisonment rested on speculation, unreasonable inferences, and patently unreliable evidence. *See Hummel*, 2016 WL 6084101 at *14. The entire incident occurred at Mr. Bagnell's home, when he knew his children would be coming to his home for a pre-arranged meeting, without evidence that he was unable to use the available means of escape. 7RP 970; 10RP 1307-08.

Despite Mr. Bagnell's purported out-of-court statement he was locked in his room at some point, there was no evidence of how, where, or when this occurred. *See* 8RP 1181. He did not report being afraid to leave. The responding medics found him 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.* When driving him to the hospital, the medics did not feel his condition was urgent and did not use lights or sirens. 9RP 1213.

There was no evidence his bedroom door locked from the outside so he could not open the door. Such a locking mechanism

would be unusual as most bedrooms are locked from the inside for privacy and not from the outside for security. When Mr. Bagnell's children arrived around 5:30 p.m., he was sitting in a living room chair, not locked in a room. 10RP 1292. Although Mr. Bagnell was not answering his cell phone, the home had landline telephones, including Mr. Bagnell's bedroom, and the police did not check all of them. 7RP 858 (photograph of cordless phone in living room), 864 (bedroom landline phone); 8RP 1034 (phone in picture might have some damage to it). Even without a phone, there was no evidence Mr. Bagnell was unable to leave of his own accord: he could walk, had appropriate vital signs, and did not complain of significant pain. 9RP 1268-69.

Taking as true Mr. Bagnell's statement that he was locked in a room at some undefined point in time, there was no evidence that it lasted more than a moment or was more than a minor delay in his freedom of movement. *See Kinchen*, 92 Wn.App. at 542.

Mr. Bagnell also told a medical provider that he was not permitted to eat, but this was uncorroborated and unreasonable under the evidence. The doctor did not find any noticeable malnourishment. 11RP 1365. He did not need special nutrients or show physical manifestations of withheld food such as elevated ketones. *Id.*

If Mr. Bagnell was locked in a room by his own actions, Ms. Scanlan did not commit unlawful imprisonment. If he was only detained momentarily, he was not substantially restrained as required. *See Green*, 94 Wn.2d at 227. There were available means of leaving the home and no evidence he was threatened with harm if he tried to leave.

He was in the living room when his children arrived. 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.

Taking the evidence in the light most favorable to the prosecution, the State's case rested on vague allegations from an unopposed witness. The prosecution did not show Ms. Scanlan made it too dangerous for Mr. Bagnell to leave his home or that she barred him from leaving for more than a moment in time. The State did not produce sufficient evidence for a conviction.

c. Reversal is required.

Absent proof of every essential element, the conviction must be reversed and the charge dismissed. *Hummel*, 2016 WL 6084101 at *15; *Vasquez*, 178 Wn.2d at 17. The prosecution's failure to prove Ms. Scanlan restrained Mr. Bagnell by significantly interfering with his

liberty and preventing him from using available means of escape requires reversal and dismissal of the unlawful imprisonment charge.

4. Ms. Scanlan lacks the financial ability to pay the costs of appeal in the event she does not substantially prevail.

Ms. Scanlan was 59 years old at sentencing and the court ordered her to spend over two years in prison. 14RP 1705; CP 219. She was homeless, unemployed, and owned no assets. Supp. CP __, sub. no. 115. The court did not impose any non-mandatory legal financial obligations “because the defendant lacks the present and future ability to pay them.” CP 218; 14RP 1707. The court found her indigent for purposes of appeal because she “is unable by reason of poverty to pay for any of the expenses of appellate review.” Supp. CP __, sub. no. 112.

The presumption of indigency enshrined in RAP 15.2(f) continues unless the State can prove there is good cause to disrespect the trial court’s finding. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see State v. Grant*, __ Wn.App. __, 2016 WL 6649269, *3 (Nov. 10, 2016) (“Once indigency is established, the RAPs establish a presumption of continued indigency throughout review.”).

An individualized inquiry demonstrates Ms. Scanlan is indigent, without a home or assets. There is no basis to conclude she is able to escape from poverty in the near future given her age, criminal history, and lack of assets or means of support. Consequently, in the event she does not prevail on appeal, no costs should be awarded due to her indigence. *See Sinclair*, 192 Wn.App. at 390, 393.

F. CONCLUSION.

Ms. Scanlan's convictions must be reversed due to the violation of the confrontation clause. Alternatively, the felony violation of a no-contact order must be reduced to a misdemeanor. In addition, the unlawful imprisonment allegation must be dismissed due to the insufficiency of the evidence.

DATED this 18th day of November 2016.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74438-1-I
v.)	
)	
THERESA SCANLAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2016.



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