

No. 95971-4

NO. 74438-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THERESA SCANLAN,

Appellant.

FILED
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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 REPLY BRIEF

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A. ARGUMENT.

1. Ms. Scanlan was denied her right to confront the central witness against her when the prosecution used her accuser's out-of-court statements as the sole basis for her convictions.

a. The prosecution implicitly concedes Mr. Bagnell's statements to the police are testimonial.

The Response Brief explains the core class of testimonial statements occurs when police investigate a completed offense. At Theresa Scanlan's trial, Detective Purcella and Officer Giger repeated statements Leroy Bagnell made to them while they were investigating a completed crime. Opening Brief at 21-22. The prosecution's brief does not address this testimony.

Because the prosecution correctly explains that statements to law enforcement officers investigating a completed crime are most certainly testimonial (absent an ongoing emergency, which was not present here), it implicitly concedes Mr. Bagnell's statements to these officers should not have been admitted under the confrontation clauses of the Sixth Amendment and article I, section 22.

The prosecution must prove beyond a reasonable doubt these improperly admitted statements did not "contribute to" the verdict, which it has not attempted to do. *State v. Jasper*, 174 Wn.2d 96, 117,

271 P.3d 876 (2012), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *see also See State v. Smith*, __ P.3d __, 2017 WL 977004, at *3 (Ariz. Ct. App. 2017) (when testimony violates Confrontation Clause, reviewing court must be satisfied “the guilty verdict actually rendered in this trial was surely unattributable to the error.”).

b. Ohio v. Clark is not dispositive precedent, but it helpfully underscores why the complainant’s post-incident statements to medical professionals were testimonial.

The substantial differences between *Ohio v. Clark*, __U.S. __, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015), and the case at bar, make *Clark* far from dispositive. But *Clark* underscores why Mr. Bagnell’s many statements to others were testimonial and inadmissible when Ms. Scanlan had no opportunity to confront Mr. Bagnell’s out-of-court allegations.

Clark involved a preschool teacher who, concerned that a three-year-old was being abused by his guardian, questioned the child about his injuries. 135 S.Ct. at 2178. This emergency scenario is the crux of the Court’s confrontation clause analysis – the teacher needed to resolve whether the child could be safely sent home with his guardian at the end of the school day. *Id.* at 2181 (child’s “statements occurred in

the context of an ongoing emergency involving suspected child abuse”). The teacher’s questions were focused on “identifying the abuser” to secure the child’s safety. *Id.* Although the teacher was a “mandatory reporter” under the law, this information was not conveyed to the child and no reasonable three-year-old would understand what this meant. *Id.* at 2182.

The Response Brief’s emphasis on *Clark* is befuddling given its obvious differences with the case at bar. Unlike *Clark*, Ms. Scanlan had been accused and arrested *before* Mr. Bagnell made any of his statements to medical professionals about the November incident. Based on an incident a few weeks earlier, Mr. Bagnell had already signed a medical release giving the police and prosecution access to his statements to medical staff for what the State alleged was part of a common scheme. CP 13-14; 3RP 317; 6RP 635-37. The detective told Mr. Bagnell she had reviewed the medical records *before* he made numerous statements admitted at trial. 6RP 645. Further, Mr. Bagnell’s statements were elicited over the course of several weeks *after* the incident, unlike *Clark* where the teacher questioned the child before any police involvement.

The prosecution tries to paint the “ongoing emergency” in *Clark* as similar to this case because both complainants had medical needs, but this misconstrues the “ongoing emergency” doctrine’s application under the confrontation clause. This doctrine applies when questions are focused on “ending a threatening situation.” *Michigan v. Bryant*, 562 U.S. 344, 361, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

A pending public threat “significantly diminish[es]” the complainant’s “prospect of fabrication” due to the urgency of the unresolved threat.

Id. On the other hand, when the perpetrator’s identity is known and she has been separated from the accused by the authorities, subsequent questions of the accuser are testimonial. *Id.*, citing *Davis v.*

Washington, 547 U.S. 813, 832, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Thus, the teacher in *Clark* needed to know whether the child was injured by someone else. 135 S.Ct. at 2181. But Ms. Scanlan was already arrested when Mr. Bagnell met with numerous medical professionals and investigating detectives. 6RP 766. He was not questioned for the purpose of “enabling officers immediately to end a threatening situation.” *Davis*, 547 U.S. at 832. The emergency doctrine does not render the statements nontestimonial when the alleged

perpetrator's identity was known, her location was established, she had been arrested, and she posed no threat to anyone else. *Id.*

The *Clark* Court also emphasized that the teacher's questions were focused on the immediate emergency. 135 S. Ct. at 2181. But Mr. Bagnell was not simply questioned to secure his present safety. He was asked about an array of information regarding his interactions with Ms. Scanlan, and while they may have had a medical purpose, any person in his shoes would understand they were also important to the police, would officially document how the incident occurred, and would be available at trial in which Mr. Bagnell refused to participate.

The prosecution notes the informal setting undercut the testimonial nature of the child's statements to his preschool teacher in *Clark*. But unlike *Clark*, Mr. Bagnell's statements were elicited in the formal setting of doctors' offices by professionals who took notes and preserved them. Not only had Mr. Bagnell been told *beforehand* that his medical records would be used by police and prosecutors, a reasonable person in Mr. Bagnell's position would understand the medical records were being generated, preserved, and available to the police and prosecution. 3RP 286087, 309. A degree of formality attached in the case at bar that was not present in *Clark*. *See, e.g., Davis*, 547 U.S. at

830 (sufficient formality under confrontation clause when complainant separated from accused by police at scene, questioned about incident, and signed affidavit); *see also Bryant*, 562 U.S. at 377 (questioning at scene lacked formality when unchoatic setting and unstructured questioning)

The most significant difference between this prosecution and *Clark* is the overt, express, and repeated explanation to Mr. Bagnell that his statements to medical professionals would be directly delivered to the police and prosecution and used to press charges against Ms. Scanlan. Where in *Clark* no one ever “hinted” that the child’s statements would be used for prosecutorial purposes, Mr. Bagnell signed three written medical release forms, was told by the investigating detective that they accessed his records, and was asked to sign one of these release forms the day before the detective knew he was going to a nonemergency medical appointment. *See Clark*, 135 S. Ct at 2176; 6RP 645-47.

The Response Brief ignores the explicit language used in the medical release forms, accompanied by the detective’s oral explanation that the release would let the police obtain these records. 6RP 635-36; 7RP 801-02. The police concretely informed Mr. Bagnell they were

gathering any medical reports generated regarding the November and October incidents and any person would understand they would be available for the ongoing prosecution of Ms. Scanlan.

The prosecution also misunderstands the requirements of the confrontation clause by asserting the police did not recall telling Mr. Bagnell that his statements to his doctors “would be used in court.” Resp. Brief at 17. But “testimonial” statements occur when an objectively reasonable person in the shoes of the speaker would understand the statements would be “potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. The speaker does not need to have been told they will be used in court, as the State misleadingly suggests.

Police officers plainly informed Mr. Bagnell that any information he gave to “any attending physicians, assistants, nurses or other staff” (including “EMTs, medics, or other responding aid providers”) would be available “*to officers of the Federal Way Police Department and/or the offices of the King County Prosecutor and/or the Federal Way City Attorney.*” 6RP 635-36; Pretrial Exs. 8, 9. This same information was given to Mr. Bagnell three times by investigating officers. 6RP 636-37.

The prosecution “has the burden of establishing that a statement is nontestimonial.” *State v. Hurtado*, 173 Wn. App. 592, 600, 294 P.3d 838 (2013). Its Response Brief ignores the plain language informing Mr. Bagnell that his statements to and records kept by his doctors would be available for the prosecution of Ms. Scanlan.

c. The prosecution ignores that critical allegations were gathered from Mr. Bagnell weeks after the incident, following several medical releases to police.

The prosecution obscures the timeline of the numerous testimonial statements elicited from Mr. Bagnell, underscoring its failure to meet its burden of proving each statement nontestimonial. Resp. Brief at 17.

All interviews occurred at a time when Mr. Bagnell was fully informed that any statements made to or reports generated by medical providers would be forwarded to the police any prosecution. The confrontation clause plainly applies to the Virginia Mason visits in mid and late November.

On both November 11 and 12, Detective Purcella re-interviewed Mr. Bagnell. 8RP 1145-46. Two detectives re-examined his injuries and he signed another medical release form for additional medical providers at Virginia Mason because the detectives knew he had further

appointments at Virginia Mason. 6RP 636; 8RP 1145-46; Pretrial Ex. 9.

On November 13, Virginia Mason doctor Endow examined Mr. Bagnell's injuries and elicited statements about how the injuries occurred. 7RP 814. He repeated Mr. Bagnell's description of the incident in his trial testimony, over objection. 7RP 818.

Mr. Bagnell was next examined and interviewed about his injuries by two other Virginia Mason medical providers. These professional's medical records' were expressly covered by the medial release form that Detective Purcella obtained from Mr. Bagnell. Pretrial Ex. 9. Mr. Bagnell knew, as would anyone in his shoes, that the police "*and/or the offices of the King County Prosecutor and/or the Federal Way City Attorney*" would be provided "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" for any injuries "suffered on or about 11/5/14 – 11/6/14." *Id.*; see 6RP 635-36. "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*" for "all aspects of treatment." *Id.* (emphasis added). Mr. Bagnell was informed repeatedly, and persistently, by investigating police that it

would access any records gathered by medical staff and the keen interest the police showed in gathering this information, by repeatedly obtaining additional releases, sent the message that this information would be at the forefront of the prosecution.

d. The prosecution does not pretend Mr. Bagnell's unfronted allegations could be harmless if there was a confrontation clause violation.

The prosecution does not offer any argument that these out-of-court allegations could be harmless, even though it bears the burden of proving any confrontation clause violation is harmless beyond a reasonable doubt. *See Jasper*, 174 Wn.2d at 117. Its failure to even discuss its burden of proving the error harmless demonstrates the central nature of Mr. Bagnell's claims to each alleged offense.

Had Mr. Bagnell testified, he would have explained that his children disliked Ms. Scanlan from the outset of the relationship, gave incorrect statements to police, and would say whatever they could to "hang her," as he told the defense in a lengthy interview. Ex. 41 at 133-34, 138 (exhibit identified but not admitted). Mr. Bagnell described his children as interested in his money, disinterested in caring for him, and concerned Ms. Scanlan would receive his money. *Id.* at 176, 183-84. His testimony would have cast doubt on his children's credibility and

exposed their biases. It also would have explained he was not seriously injured by household tools, could physically restrain Ms. Scanlon during the incident, and took away household items such as a broom and golf club when she held or used them, thus undercutting the assault and unlawful imprisonment allegations. *Id.* at 94-95, 108. If Mr. Bagnell had testified, he would have challenged the prosecution's witnesses and Ms. Scanlan could have contested his claims about her behavior, thus substantially altering the jury's perception of the evidence. Her inability to confront the central witness, whose testimony would not have supported the prosecution's rendition of events, requires reversal.

2. The prosecution appropriately concedes the double jeopardy violation.

The direct overlap between the convictions for second degree assault and felony violation of a no contact order, elevated to a felony based on this same assault, violates double jeopardy. The felony offense must be stricken.

3. There was insufficient evidence of the restraint required to prove unlawful imprisonment.

As explained in Appellant's Opening Brief, there is not sufficient reasonable, non-speculative evidence that Mr. Bagnell was held in his home in a manner that rendered him unable to locate a means of escape. Opening Brief at 36-38. He was not physically bound and had no injuries suggesting he was. If his bedroom door was locked, he would be able to exit because the door would not lock from the outside, but rather from the inside. Although he suffered many bruises, these injuries were labelled superficial by medical personnel and did not render him unable to leave of his own free will. No one testified he was unable to walk or to open a door. When his children appeared at the home, Mr. Bagnell was sitting in a chair in the living room.

The prosecution's case rests on impermissible speculation. *State v. Hummel*, 196 Wn.App. 329, 357, 383 P.3d 592 (2016), *rev. denied*, 187 Wn.2d 1021 (2017) (inferences "must be reasonable and cannot be based on speculation" (internal citation omitted)). The lack of reasonable evidence demonstrating Mr. Bagnell had no ability to leave his own home of his own will requires reversal. *Id.* at 358-59.

B. CONCLUSION.

For the forgoing reasons and those presented in Appellant's Opening Brief, Ms. Scanlan's convictions should be reversed and vacated.

DATED this 18th day of April 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", written in a cursive style.

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THERESA SCANLAN,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF APRIL, 2017, I CAUSED THE ORIGINAL **REPLY 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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