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No. 95971-4

NO. 74438-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THERESA SCANLAN,

Appellant.

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Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly admitted statements made by the elderly victim to medical providers while he was being treated for his extensive injuries, where the totality of circumstances show that the statements were not testimonial, and thus, not in violation of the Confrontation Clause, because their primary purpose was to obtain medical treatment.

2. Whether the convictions for felony violation of a no-contact order and assault in the second degree violate the prohibition against double jeopardy where both crimes were based on the same course of assaultive conduct.

3. Whether there was sufficient evidence to support the conviction for unlawful imprisonment where the elderly victim's statements and corroborating evidence established that the defendant restrained him in his home during the course of the lengthy assault and prevented him from seeking help.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Theresa Scanlan was found guilty by a jury of the crimes of assault in the second degree, felony violation of a no-contact order,

and unlawful imprisonment. CP 162-64. The jury also found that these were crimes of domestic violence because the victim and defendant were household members. CP 160-61. The court imposed a standard range sentence of 25 months of total confinement. CP 219.

2. FACTS OF THE CRIMES.

In November of 2014, 82-year-old Leroy Bagnell was a widower. RP 819, 958. His wife of more than 50 years had died of cancer ten years earlier. RP 958, 1409. Leroy[1] continued to live in the Federal Way home he had shared with his wife, and was able to live independently, walking for exercise every day, taking care of the house and yard, and seeing to his own finances. RP 964, 1054, 1086, 1221, 1304, 1309. Although he suffered from a number of medical issues not uncommon to people of his age, he was relatively vital. RP 812, 839-40. He had regular weekly contact with his four children. RP 960, 1052, 1219.

Sometime in 2013, Leroy met the defendant, Theresa Scanlan. RP 962. They quickly became friends, although Scanlan,

[1] Several of the witnesses share the last name of Bagnell, and will be referred to by their first name to avoid confusion. No disrespect is intended.

in her fifties, was much younger than Leroy. RP 963, 1054. Scanlan was unemployed and without a home of her own at the time that she met Leroy, and, as their relationship progressed into a romance, she moved into his home. RP 963, 1076, 1228.

On October 16, 2014, a 911 call was made from Leroy's home, but the caller hung up. RP 726. Police responded to Leroy's home and found him injured, with wounds to his head, arms, and legs. RP 728, 746. Scanlan appeared relatively uninjured and was placed under arrest. RP 727, 749. A judicial order was issued that prohibited Scanlan from contacting Leroy. RP 1132.

A few weeks later, on November 6, 2014, Leroy's children became concerned because none of them could reach him by phone. RP 970, 1061, 1234, 1290. All three of his sons, Doug, Dano and Dennis, made multiple unsuccessful attempts to call him on his cell phone and on the landline at his house, which was very uncharacteristic. RP 971, 1235, 1290. The four siblings eventually decided to meet at Leroy's house to check on him. RP 972, 1236, 1291.

When they arrived at approximately 5:30 p.m., both the exterior and interior lights of the home were dark, and the blinds

were all drawn, which was unusual. RP 763, 1062, 1236, 1291. However, they could see the glow of a television set and some shadowy movements inside the house as they stood at the front door. RP 1064, 1292. They knocked and rang the doorbell, but received no answer. RP 1064, 1236, 1292. They used a key to enter the home, and upon entering, turned on the lights. RP 1064, 1236, 1294.

They found their father's house in disarray, with blood stains on the floor throughout the house, and their father, Leroy, sitting in a chair in the family room with extensive bruising all over his body. RP 974, 1065, 1237, 1294. He at first seemed to be unconscious, but he began to respond to their attempts to rouse him as they called 911. RP 975, 1066, 1238. Believing Scanlan to be in the house, they looked around for her but were at first unable to find her. RP 977, 1240, 1295-96. As police arrived, the siblings had located Scanlan hiding under a blanket in the front seat of her car in the garage. RP 766, 1068, 1240. Police removed Scanlan from the car and placed her under arrest. RP 767-68. Leroy's daughter, Debbie, upset at the condition of her father, screamed at Scanlan something to the effect that she had beaten Leroy "half to death." RP 769. Scanlan responded that "It's not that bad." RP 769, 1071.

At the police precinct, Scanlan claimed to have injuries. RP 779-80. The police took pictures, but could detect no significant injuries. RP 775, 779-82. Scanlan did not receive medical treatment. RP 789.

In contrast, Leroy was transported by ambulance to the hospital, where he was treated in the emergency room for his injuries. RP 910, 922, 936, 1205-13. His injuries included: extensive bruising all over his body, four large open wounds on his legs, wounds on his arms and fractures on both hands. RP 822-24, 910-11, 922, 928-38.[2] Leroy did not testify at trial. However, the trial court admitted statements that Leroy made to medical providers. Leroy told the doctors and nurses that treated his injuries that his girlfriend had beaten him. RP 818, 1108-09. He told the nurse in the emergency room that his girlfriend had beaten him up when he agreed to let her come over to collect her belongings. RP 1108-09. He said she also tried to strangle him with his sweatshirt. RP 1110. He told Dr. Britt, the physician who treated him in the emergency room, that he had been hit with fists and a broom, and he had been bitten. RP 925-26. He told the

[2] Dr. Britt testified that Leroy was "bruised from head to toe." RP 922.

social worker at the hospital that he was relieved that "this person had been removed from the home by police." RP 883-84.

A week later he told his primary care physician, Dr. Endow, that his injuries occurred when he was assaulted by his girlfriend. RP 818. At the end of November, he told Dr. Pierce, a wound care specialist that treated Leroy because the open wounds on his legs were not healing, that his injuries were the "result of domestic violence" and that he had been hit with a candlestick and broom. RP 909.

Leroy also told Dr. Britt, the emergency room physician who treated him, 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." RP 925. He told the physician assistant for Dr. Pierce that his girlfriend had "locked him in a room" and beaten him. RP 1181. The statements were corroborated by the fact that Leroy's children could not reach him by phone on November 6th despite numerous attempts; by the fact that when they arrived at Leroy's home it was dark, the blinds were drawn and there was no answer at the door; and by the fact that the phones in

the home were broken or disabled. RP 971, 973, 1031, 1036, 1080, 1153, 1235, 1290.

In addition to the injuries to Leroy, there was significant damage to his house as well. There were holes in the drywall, blood stains on the carpet, and broken items strewn throughout the house. RP 974, 1074-75, 1142-43, 1237, 1242, 1294-96. Police found a hammer on the coffee table, and a crowbar on the dining room table. RP 1027, 1038. Police found a trash can placed in the middle of the living room, as if someone had started to clean up before she was interrupted by the arrival of Leroy's children. RP 1027. Police found a broken broom and a broken golf club in that trash can. RP 1027-28, 1030.

The only defense witness offered was Dr. Carl Wigren, a forensic pathologist. RP 1346. Dr. Wigren testified that Leroy's medical conditions and medications caused him to bruise easily and could also cause his bones to be weaker than normal. RP 1361, 1363. He opined that the bruising seen on Leroy could have been caused with minimal force, although he admitted that experts cannot testify as to the amount of force used to create a particular bruise. RP 1369, 1434. He opined that Leroy would have sustained greater injuries if he had been punched or beaten

with a hard object. RP 1377, 1384. However, Dr. Wigren conceded that Leroy's injuries were caused by some sort of blunt force trauma, and that Leroy had no history of falling, breaking bones, or having extensive bruising. RP 1450-59, 1471, 1480.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY CONCLUDED THAT THE VICTIM'S STATEMENTS TO MEDICAL PROVIDERS WERE NOT TESTIMONIAL.

Scanlan contends that her right to confrontation was violated by the admission of Leroy's statements to his medical providers. This claim should be rejected. Utilizing the proper test, known as the primary purpose test, the relevant circumstances surrounding the statements show that the primary purpose of the medical providers' questions and Leroy's answers was to determine the appropriate medical treatment for Leroy's extensive injuries, and to ensure his safety. The primary purpose, objectively viewed, was not to create a record for trial. As such, the statements were not testimonial, and their admission did not violate Scanlan's right to confrontation.

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to

be confronted with the witnesses against him." Similarly, article I, section 22 of the Washington constitution provides that the accused shall have the right to "meet the witnesses against him face to face." The meaning of the parallel clauses is substantially the same. State v. Lui, 179 Wn.2d 457, 468, 315 P.3d 493 (2014); State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271 (2007).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court reformulated the analysis of Confrontation Clause claims. Crawford held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. Because Leroy did not testify at trial, Scanlan's right to confrontation was violated if Leroy's statements were testimonial. Conversely, Scanlan's right to confrontation was not violated if Leroy's statements were not testimonial.

In Crawford, the Supreme Court expressly declined to offer a comprehensive definition of "testimonial" but declared that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a

former trial; and to police interrogations." 541 U.S. at 68. In subsequent cases, the Court has given further meaning to the term. In Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court set forth what has come to be known as the primary purpose test. In regard to statements to police officers, the Court explained the primary purpose test as follows:

> 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.

Id.

In Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), the Court further expounded on the primary purpose test. The Court explained that the inquiry as to the primary purpose of statements must consider "all of the relevant circumstances." Id. at 369. For example, when "the primary purpose of an 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." Id. at 358.

However, the Court noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. (emphasis in original). "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." Id. at 374. Instead, "whether an ongoing emergency exists is simply one factor ... that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." Id. at 366.

In Ohio v. Clark, __U.S. __, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015), the Court considered whether statements made by a three-year-old child to his preschool teachers were testimonial. The child's teachers noticed injuries to the child and asked him what happened. Id. at 2178. The child indicated that Clark had caused the injuries. Id. One teacher called a child abuse hotline and alerted authorities about the suspected abuse. Id. Clark was charged with multiple counts of assault and endangering a child. Id. The child did not testify at trial, but the State was allowed to introduce the child's statements to the teachers. Id. The Court held that the child's statements were not testimonial, and their admission without cross-examination of the child did not violate the Confrontation Clause. Id. at 2183.

In reaching its conclusion, the Court addressed whether statements made to persons other than law enforcement can ever be testimonial. Id. at 2181. The Court declined to adopt a categorical rule, but opined that statements that are not made to law enforcement officers are "much less likely to be testimonial" than statements made to law enforcement officers. Id. In the Court's view, the child's statements were made in the context of an ongoing emergency. Id. The teachers' immediate concern was "to protect a vulnerable child who needed help." Id. They were concerned with securing his safety and determining whether other children might be at risk. Id. As such, viewing the totality of the circumstances, the primary purpose of their questions and the child's answers was identifying and ending the threat. Id. The child was never informed that his answers would be used to arrest or punish Clark. Id. In addition, the classroom setting was informal, and "nothing like the formalized station-house questioning in Crawford or the police interrogation and battery affidavit in Hammon[3]." Id. Most importantly, the Court factored in the questioner's identity: "Statements made to someone who is not principally charged with uncovering and prosecuting criminal

[3] Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Id. at 2182.

Clark argued that the teacher's legal mandatory reporting obligations rendered the questioning equivalent to an official interrogation. Id. However, the Court held that mandatory reporting statutes alone cannot convert a conversation between a teacher and her student into a law enforcement mission. Id. It was irrelevant to the Court that the statements had "the natural tendency to result in Clark's prosecution." Id.

Applying the analysis from Clark to Leroy's statements to his medical providers, the relevant circumstances support the trial court's conclusion that they were not testimonial because the primary purpose of the providers' questions and Leroy's answers was to obtain proper medical care for his injuries. The statements were not made to law enforcement, and law enforcement was not present at the time the statements were made. RP 292. The statements were made in the informal setting of the emergency room and the doctors' offices. While Leroy's life was not in immediate danger, there was an ongoing emergency similar to the

ongoing emergency in Clark, in that Leroy had extensive injuries that required medical treatment.[4]

The primary purpose of the medical providers' questions to Leroy, and Leroy's answers, was to determine what medical treatment was necessary and how to keep Leroy safe from further harm. Dr. Britt, the emergency room physician, testified that it was important to determine the mechanism of injuries in treating a patient. RP 920. For example, a bite from a human would be treated differently from a bite from a dog. RP 920. 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 needed. RP 921. Dr. Endow, Leroy's primary care physician, testified that it was important for treatment purposes to determine how Leroy's injuries had occurred, and whether they had been caused by fainting or falling or by some other mechanism. RP 816. Dr. Endow also needed to determine whether his elderly patient, like the child in Clark, was safe to return home. RP 816. Dr. Pierce, the wound care specialist, testified that wound care

[4] The child's injuries in Clark were a bloodshot eye and red marks on the child's face. 135 S. Ct. at 2178. More injuries suggestive of belt marks were found under the child's shirt. Id. Like Leroy, the child had bruises all over his body. Id.

requires a comprehensive evaluation of the patient. RP 900. Emotional status plays an important role in the healing process, and depression can be a problem. RP 902-05. Determining the mechanism of the injury plays an important role in choosing the proper treatment when wounds are not healing properly. RP 907-08. For example, if the patient had fallen, the risk of future falls must be assessed and treated. RP 908. If the patient has engaged in self-harm, that too must be addressed. RP 134, 672.

At trial and on appeal, Scanlan relies heavily on the fact that Leroy had signed medical releases to argue that his statements to medical providers were testimonial. This argument should be rejected, as it is analogous to the argument rejected in Ohio v. Clark that mandatory reporting statutes render statements made to those subject to such statutes testimonial. Scanlan relies primarily on State v. Sandoval, supra, 137 Wn. App. at 537. In Sandoval, Division 3 of this Court wrestled with the emerging definition of testimonial and concluded that in order for a statement to be non-testimonial, there must be "no indication that the witness expected the statements to be used at trial." Id. However, Sandoval preceded Michigan v. Bryant and Ohio v. Clark, and this formulation is now in question. While the expectations of a person

in the declarant's position can factor in to the analysis, the inquiry under the primary purpose test is objective. Michigan v. Bryant, 562 U.S. at 360. "[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 circumstance in which the encounter occurred." Id. at 360. In light of this recent formulation of the primary purpose test, it is inaccurate to say that there must be "no indication" that a declarant expected the statements to be used at trial. The declarant's subjective expectations are not controlling.

For example, the victim in Michigan v. Bryant made statements to the police while mortally wounded. 562 U.S. at 348. He told the police officers that Bryant shot him. Id. The Court concluded that, objectively viewed, the primary purpose of a person in the victim's situation would not be to "establish or prove past events potentially relevant to later criminal prosecution." Id. at 375. It is likely that the victim had some expectation that his identification of Bryant as the shooter might be used by the police to prosecute Bryant. However, the statements were not testimonial. As the Court noted, interrogators and declarants may often have mixed

motives, but the focus of the inquiry remains on the primary purpose of the encounter, objectively viewed, not on a declarant's various subjective motives. Id. at 368.

Moreover, even under Sandoval's analysis, Leroy's statements were not testimonial. In Sandoval, the court concluded that because the police were not present when the victim made statements to the doctor, and because the doctor did not discuss whether the report would be used in a criminal investigation, the victim's statements were not testimonial. 137 Wn. App. at 538. The same is true in this case. Police were not present when Leroy spoke to the medical providers[5] and there is no evidence that those providers told Leroy his statements would be used in a criminal investigation. In regard to signing the medical releases, the detective told Leroy only that the release would allow her to get his medical records. RP 801. Leroy was not advised that statements he made to his doctors would be used in court. RP 801.[6] Moreover, the fact that Leroy was uncooperative with the

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[5] No patrol officers accompanied Leroy to the hospital, and detectives did not arrive at the hospital until hours later, after Leroy had received treatment. RP 308.

[6] Scanlan did not dispute this point below, but argued that the fact that Leroy knew police would see his medical records rendered anything he said to medical providers testimonial. RP 802.

prosecution is evidence that Leroy did not intend his statements to be used in court to further the prosecution. See RP 124, 298, 638, 680.

Objectively viewed, the primary purpose of the medical providers' questions and Leroy's answers was to determine the proper medical treatment for his injuries and ensure his future safety. As such, Leroy's statements were not testimonial, and their admission did not violate Scanlan's right to confront witnesses.

2. THE CONVICTION FOR BOTH FELONY VIOLATION OF A NO-CONTACT ORDER AND ASSAULT IN THE SECOND DEGREE BASED UPON THE SAME COURSE OF ASSAULTIVE CONDUCT VIOLATES DOUBLE JEOPARDY.

Scanlan contends that her convictions for felony violation of a no-contact order and assault in the second degree violate double jeopardy because both convictions are based on the same assaultive conduct, and the legislature did not intend punishment for both crimes under such circumstances. Scanlan is correct.

RCW 26.50.110 states that a willful violation of a no-contact order is a gross misdemeanor except as provided in subsections (4) and (5). Subsection (4) provides that:

> Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and *that does not amount to assault in the first or second degree* under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

RCW 26.50.110(4) (emphasis added). Thus, when the violation is accompanied by any assault "that does not amount to assault in the first or second degree" the violation is a class C felony. In interpreting this language, the Washington Supreme Court has concluded that the statute excludes the use of first and second degree assaults to elevate violation of a no-contact order from a gross misdemeanor to a felony. See State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Thus, second degree assault cannot serve as the predicate to make the violation a felony. Id.

In cases where it can be determined that the conviction for violating the court order was not predicated upon a concurrent second degree assault conviction, but rather on separate and distinct reckless conduct, then two convictions can stand without violating double jeopardy. State v. Olsen, 187 Wn. App. 149, 157-58, 348 P.3d 816 (2015). However, in this case, only one

course of assaultive conduct was presented to the jury. The jury was not instructed that the felony violation of a no-contact order must be based on conduct separate and distinct from the second degree assault.[7] For this reason, Scanlan is correct that the felony violation of a no-contact order verdict must be set aside, because the jury likely relied on the same conduct that formed the basis of the second degree assault conviction in finding her guilty of both crimes. Azpitarte, 140 Wn.2d at 142.

This is true even though the assault of Leroy consisted of multiple physical acts. For purposes of double jeopardy analysis, a single course of assaultive conduct supports only a single conviction for assault. As the supreme court in State v. Tili, 139 Wn.2d 107, 114, 985 P.2d 365 (1999), stated:

> [T]he assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature defined assault only as that occurring when an individual 'assaults' another. A more extensive definition of 'assault' is provided by the common law, which sets out many different acts as constituting 'assault,' some of which do not even require touching. Consequently, the Legislature clearly has not defined 'assault' as occurring upon *any* physical act.

[7] In contrast, in Olsen, the instructions "did not allow the jury to consider the second degree assault to support the [felony violation of a no-contact order] conviction." 187 Wn. App. at 154.

Because assault is not defined in terms of each separate physical act, the various acts that form the basis for a single course of assaultive conduct can support only one conviction for assault. State v. Villanueva-Gonzalez, 175 Wn. App. 1, 6-7, 304 P.3d 906 (2013). Thus, in Villanueva-Gonzalez, the defendant could not be convicted of both assault in the second degree and assault in the fourth degree for head-butting and strangling the victim in the course of the same assault. Id. In this case, evidence of one assault, amounting to assault in the second degree, was presented to the jury. Because RCW 26.50.110(4) does not allow conviction for both assault in the second degree and felony violation of a no-contact order based on the same assaultive conduct, the two convictions violate double jeopardy here.

The remedy is remand for vacation of the felony violation of a no-contact order conviction and entry of misdemeanor violation of a no-contact order. This is the appropriate remedy under In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012). In re Heidari held that where a jury is instructed on a lesser included offense, and in finding the greater offense committed the jury necessarily found all the elements of the lesser offense, if the greater offense is vacated, entry of the lesser offense is warranted. Id. at 293-94. Here, the

jury was instructed that it could return a verdict on the lesser included offense of the misdemeanor violation of a no-contact order. CP 152. In finding the defendant guilty of the greater offense, the jury necessarily had to find all of the elements of the lesser offense. The parties agree that the remedy for the double jeopardy violation is remand for imposition of a conviction for misdemeanor violation of a no-contact order. See Brief of Appellant, at 32.

3. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S CONCLUSION THAT SCANLAN UNLAWFULLY IMPRISONED THE VICTIM.

Scanlan contends that there was insufficient evidence to support her conviction for unlawful imprisonment. Her claim should be rejected. Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences from that evidence, the victim's statements to medical providers, his physical condition, the condition of the house and his family's inability to contact him support the jury's conclusion that the State proved that Scanlan unlawfully imprisoned Leroy Bagnell.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to

the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id. Circumstantial evidence and direct evidence are deemed equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Unlawful imprisonment is defined as knowingly restraining another person. RCW 9A.40.040. "Restrain" is defined as restricting a person's movement without consent in a manner that substantially interferes with his liberty. RCW 9A.40.010(6). Restraint is without consent if it is accomplished through physical force or intimidation. Id.

Leroy made statements to two medical treatment providers that support the conclusion that he was unlawfully restrained in his home through force and intimidation. He told Dr. Britt that Scanlan

had held him in his home against his will and did not let him contact his family. RP 925. He told Dr. Pierce's assistant that Scanlan had locked him in a room. RP 1181. His assertion that he had been restrained inside his home against his will and prevented from contacting his family was strongly corroborated by the fact that Leroy's children were unable to contact him by cell phone or home phone despite repeated attempts throughout the day on November 6th. Once they arrived at his home, the lights were dark and the blinds were drawn, which was unusual, and there was no answer at the door, further corroborating Leroy's assertion that he was restrained inside the home and prevented from reaching out to his family for help. Leroy's injuries and the extensive damage inside the home, apparently caused by the golf club, broom, hammer and crowbar found inside the home, support the inference that Scanlan used force and threats of force to restrain him. Indeed, the force used was enough to actually break the golf club and the broom. The state of the telephones inside the home supports the inference that Scanlan prevented Leroy from calling for help. In searching the home, police found a cell phone that had been broken in two. RP 1031. In the master bedroom, the battery had been removed from a cordless phone found in that room. RP 1036. Another

phone was located on a bedside table in that room, but Leroy's daughter testified that she tested that phone while cleaning up the house after November 6th and found that it had no dial tone. RP 1043, 1080. Even if there were a working phone in the house somewhere, the jury could reasonably conclude that Scanlan prevented Leroy from using the phone to call his family.

Scanlan's reliance on State v. Kinchen, 92 Wn. App. 442, 963 P.2d 928 (1998), is misplaced. In Kinchen, the defendant was the father of the two young boys, age eight and nine, whom he often left alone. Id. at 444-46. The door to the apartment was locked from the outside, but the boys could and did enter and exit the apartment through a window and they had access to a phone in case of an emergency. Id. at 452. This Court held that such evidence was insufficient to support a conviction that Kinchen unlawfully imprisoned the boys in the apartment. Id.

In contrast, Leroy Bagnell was not left alone in his home with access to a working phone so that he could either freely leave or reach out for help. Rather, viewed in the light most favorable to the State, Leroy was beaten and threatened by Scanlan, who used force and intimidation to keep him from either leaving the home or reaching out to family members for help. There was sufficient

evidence that Scanlan knowingly restrained Leroy by restricting his movement by use of force and intimidation, and substantially interfered with his liberty.

D. CONCLUSION

Scanlan's convictions for assault in the second degree and unlawful imprisonment should be affirmed. Scanlan's conviction for felony violation of a no-contact order should be reversed. The matter should be remanded for resentencing on the crimes of assault in the second degree, unlawful imprisonment and misdemeanor violation of a no-contact order.

DATED this 13th day of February, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
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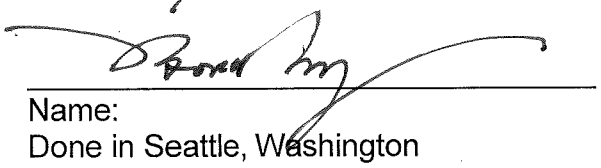
Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent, in State v. Theresa Gail Scanlan, Cause No. 74438-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 13 day of February, 2017.



Name:
Done in Seattle, Washington