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SUPREME COURT
STATE OF WASHINGTON
12/21/2018 3:32 PM
BY SUSAN L. CARLSON
CLERK

NO. 95971-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THERESA SCANLAN,

Appellant.

SUPPLEMENTAL 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 because their primary purpose was to obtain necessary medical treatment.

2. 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 through a combination of force and intimidation.

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 Court of Appeals affirmed the convictions for assault in the second degree, unlawful imprisonment and misdemeanor violation of a no-contact order.¹

¹ In the Court of Appeals, the State conceded that convictions for both assault in the second degree and felony violation of a no contact order violated double jeopardy in this case. The Court of Appeals decision remanded for imposition of misdemeanor violation of a no contact order. This issue is not before this Court.

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. Bagnell continued to live in the Federal Way home he had shared with his wife, and was able to live independently. 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 active. RP 812, 839-40.

Sometime in 2013, Bagnell met the defendant, Theresa Scanlan. RP 962. They quickly became friends, although Scanlan, in her fifties, was much younger than Bagnell. RP 963, 1054. Scanlan moved into his home. RP 963

On October 16, 2014, a 911 call was made from Bagnell's home, but the caller hung up. RP 726. Police responded to Bagnell'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 court issued an order that prohibited Scanlan from contacting Bagnell. RP 1132.

A few weeks later, on November 6, 2014, Bagnell's children became concerned because none of them could reach him by phone. RP 970, 1061, 1234, 1290. The day before, they had agreed to meet with Bagnell at his house. RP 970. All three of his sons made multiple unsuccessful attempts to call him that day on both his cell phone and on the landline at his house. RP 971, 1235, 1290. Unable to reach him and worried about his well-being, they all met at his 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 movement 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 Bagnell 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. RP 977, 1240, 1295-96. As police arrived, the siblings located Scanlan hiding in the garage. RP 766, 1068, 1240. Police placed her under arrest. RP 767-68. Bagnell's daughter, upset at the condition of her father, screamed at Scanlan something to the effect that she had beaten Bagnell "half to death." RP 769. Scanlan responded, "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 require medical treatment. RP 789.

In contrast, Bagnell 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, and wounds on his arms and fractures on both hands. RP 822-24, 910-11, 922, 928-38. The emergency room physician, Dr. Britt, testified that Bagnell was "bruised from head to toe." RP 922.

Bagnell did not testify at trial. The trial court admitted statements that Bagnell made to medical providers. Bagnell 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 told Dr. Britt that he had been hit with fists and a broom, and he had been bitten. RP 925-26. He told the 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 Bagnell 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.

Bagnell 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.

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. RP 1027. Police found a broken broom and a broken golf club in the trash can. RP 1027-28, 1030. The phones in the home were broken or disabled. RP 971, 973, 1031, 1036, 1080, 1153, 1235, 1290.

C. ARGUMENT

1. THE VICTIM'S STATEMENTS TO MEDICAL PROVIDERS WERE NOT TESTIMONIAL BECAUSE, VIEWING THE TOTALITY OF THE CIRCUMSTANCES, THE PRIMARY PURPOSE WAS NOT TO SERVE AS AN OUT-OF-COURT SUBSTITUTE FOR TRIAL TESTIMONY BUT TO OBTAIN AND PROVIDE NECESSARY MEDICAL TREATMENT.

Scanlan contends that her right to confrontation was violated by the admission of Bagnell'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 Bagnell's answers was to determine the appropriate medical treatment for Bagnell'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).²

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was

² In her briefing at the Court of Appeals and in her petition for review, Scanlan has not argued that the state constitution provides an independent ground for excluding the testimony. Nor did the Court of Appeals engage in independent state constitutional analysis. Even where a state constitutional provision has been interpreted more broadly in certain contexts, this Court will not engage in independent state constitutional interpretation where a litigant has not explained why enhanced protections are appropriate in a specific application. State v. Ramos, 187 Wn.2d 420, 454, 387 P.3d 650 (2017).

unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Crawford, 541 U.S. at 53-54. Because Bagnell did not testify at trial, Scanlan’s right to confrontation was violated if Bagnell’s statements were testimonial.

In Crawford, the Supreme Court expressly declined to offer a comprehensive definition of “testimonial.” 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. Under that test, statements are testimonial when the circumstances objectively indicate 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 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).

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. The teachers alerted authorities and Clark was charged with 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 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.” 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 classroom setting was informal, and “nothing like the formalized station-house questioning in Crawford or the police interrogation and battery affidavit in Hammon.” 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 behavior are significantly less likely to be testimonial than statements given to law enforcement officers.” Id. at 2182.

Clark argued that the teachers’ 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” that the statements had “the natural tendency to result in Clark’s prosecution.” Id.

Bagnell's statements to his medical providers were not testimonial because the primary purpose of the providers' questions and Bagnell'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 292-93, 307-11. The statements were made in the informal setting of the emergency room and the doctors' offices. While Bagnell's life was not in immediate danger, there was an ongoing emergency similar to the ongoing emergency in Clark, in that Bagnell had extensive injuries that required medical treatment.³ Providers were also concerned about keeping him safe from further injury, as in Clark. RP 816-17, 908, 921.

In Bryant, the Court noted that the medical condition of the declarant is "important to the primary purpose" and provides "important context." 562 U.S. at 365. In addition, the Court has twice opined that medical reports created for treatment purposes are by their nature not testimonial. Bullcoming v. New Mexico, 564 U.S. 647, 672, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011);

³ The child's injuries in Clark were a bloodshot eye and red marks on the child's face. Clark, 135 S. Ct. at 2178. More injuries suggestive of belt marks were found under the child's shirt. Id. Like Bagnell, the child had bruises all over his body. Id.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

The primary purpose of the conversations at issue—the medical providers’ questions to Bagnell and his answers—was to determine what medical treatment was necessary and how to keep Bagnell 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, Bagnell’s primary care physician, testified that it was important for treatment purposes to determine how Bagnell’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 816-17. Dr. Pierce, the wound care specialist, testified that wound care 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. She also need to ensure her patient was safe in his home. RP 908.

Utilizing the primary purpose test, other states have concluded that statements made to medical providers for the primary purpose of obtaining medical treatment for injuries are not testimonial. Ward v. State, 50 N.E.3d 752, 759 (Ind. 2016); State v. Koederitz, 166 So. 3d 981, 986 (La. 2015); State v. Porter, 390 Mont. 174, 181-82, 410 P.3d 955 (2018) (finding statements non-testimonial where declarant had signed a medical release); Villarreal v. State, 398 P.3d 512, 520 (Wyo. 2017).

Scanlan relies on the fact that Bagnell 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 Clark that mandatory reporting statutes rendered any statements to the teachers in that case testimonial. Likewise, in this case, the medical releases are not sufficient to conclude that the primary purpose of Bagnell's statements to his

doctors was to provide a substitute for trial testimony. The detective told Bagnell only that the release would allow her to view his medical records. RP 801-02. Bagnell was not advised that statements he made to his doctors would be used in court. RP 801-02. And they did not change the fundamental nature of the medical providers' interaction with Bagnell. All of the statements were made within the context of Bagnell's need for medical treatment for serious injuries.

Scanlan relies primarily on State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007). In Sandoval, Division Three of the Court of Appeals wrestled with the emerging definition of testimonial and concluded, incorrectly, 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. Sandoval preceded Bryant and Clark, and this formulation cannot be squared with those cases. In light of the 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. For example, the victim in Bryant made statements to the police about who shot him while mortally wounded. 562 U.S. at 348. 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 expected or even hoped that his identification of Bryant as the shooter might be used by the police to prosecute Bryant. Nevertheless, the statements were not testimonial because that was not the primary purpose. 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 from the viewpoint of all participants, not on a declarant's various secondary motives. Id. at 368

Scanlan has also cited to State v. Hurtado, 173 Wn. App. 592, 294 P.3d 838 (2013). However, in that case, Division One of the Court of Appeals misunderstood that the primary purpose test applies in all contexts, not just when statements are made to law enforcement officers. In Hurtado, the Court of Appeals found statements to the emergency room nurse to be testimonial because the victim, whose nose was broken, would have thought that her statements "would be used at trial" solely because a police officer was present. Id. at 602-04. By not applying the primary purpose

test and not considering the totality of the circumstances, Division One erred.

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

2. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S CONCLUSION THAT SCANLAN UNLAWFULLY IMPRISONED THE VICTIM THROUGH FORCE AND INTIMIDATION.

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 had proven that Scanlan unlawfully imprisoned 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.

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.

Bagnell made statements 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 was strongly corroborated by the fact that Bagnell's children were unable to contact him by cell phone or home phone. 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 Bagnell's assertion that he was restrained inside the home and prevented from reaching out to his family for help. RP 973, 1062, 1236, 1292-93. Bagnell'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. RP 1026-38. The state of the telephones inside the home, all of which were broken or disabled, supports the inference that Scanlan prevented Bagnell from calling for help. RP 1031, 1036, 1043, 1080. Even if there were a working phone in the house somewhere, the jury could reasonably conclude that Scanlan prevented Bagnell from using the phone to call for help.

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. In contrast, 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.

Any reliance on State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), is misplaced because Green does not require the conclusion Bagnell was not under restraint. This Court found that there was insufficient evidence of *abduction* to support the aggravating circumstance of kidnapping in Green. Id. at 226-28. Scanlan was not charged with kidnapping, and the State was not required to prove abduction. The focus in this case must be on the definition of *restraint*, which is the use of physical force or intimidation to restrict of the victim's movements in a way that substantially interferes with his liberty. RCW 9A.40.010(6). Moreover, because there is no merger issue in regard to the crimes of assault in the second degree and unlawful imprisonment, it is immaterial to the sufficiency analysis whether the restraint used was "incidental" to the assault conviction. State v. Berg, 181 Wn.2d 857, 872, 337 P.3d 310 (2014).

Viewed in the light most favorable to the State, the evidence established that Bagnell was beaten and threatened by Scanlan. Scanlan used force and intimidation to keep him from either leaving the home or reaching out for help. A rational trier of fact could find

beyond a reasonable doubt that Scanlan knowingly restrained Bagnell 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, and the case remanded for dismissal of the conviction for felony violation of a no-contact order and imposition of a conviction for misdemeanor violation of a no-contact order.

DATED this 21st day of December, 2018.

Respectfully submitted,

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Superior Court Case Number: 14-1-06460-4

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