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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THERESA GAIL SCANLAN, Petitioner.	)	No. 95971-4 EN BANC Filed AUG 0 1 2019

FAIRHURST, C.J.—In this case, we consider whether a crime victim's statements to his medical providers were testimonial and, if so, whether their admission at trial violated the defendant's right of confrontation under the Sixth Amendment to the United States Constitution.[1] We hold that the victim's statements in this case were nontestimonial because they were not made with the primary purpose of creating an out-of-court substitute for trial testimony. We separately hold

[1] *See Crawford v. Washington*, 541 U.S. 36, 53, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (If an out-of-court statement by a nontestifying declarant is "testimonial," then its admission at trial violates the Sixth Amendment's confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.).

that there was sufficient evidence to support the petitioner's unlawful imprisonment conviction. We affirm the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

A. Factual background

Roughly a decade after his wife of over 50 years died, 82 year old Leroy Bagnell met a woman in a bar. He initially introduced 57 year old Theresa Gail Scanlan to his children as a friend, and within a month or two she moved into his house. At some point, he began referring to her as his girlfriend.

About a year later on October 16, 2014, the police responded to a 911 hang-up call made from Bagnell's house. Scanlan answered the door and told the police she had been having an argument with her roommate. Bagnell then appeared at the top of the stairs wearing a T-shirt and underwear. His head and forearm were bleeding, and he had a big, bloody, and bruised lump on his leg. When the police asked Bagnell how he had been injured, Scanlan replied that Bagnell had fallen out of his car. As a result of this incident, the Federal Way Municipal Court issued a domestic violence no contact order prohibiting Scanlan from coming within 1,000 feet of Bagnell's house. Bagnell did not seek medical care for his injuries.

On November 6, 2014, Bagnell's children became concerned when they were unable to reach him all day on either his cell phone or landline. All four children went to the house, arriving around 5:30 p.m. They found the lights out and the shades

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drawn, and they got no answer when they knocked and rang the bell. They let themselves in with a key. There was blood on the entryway carpet, on the stairs, and throughout the upstairs bedrooms. The stairway wall had been dented and gouged, and the kitchen floor was littered with shattered glass and broken ceramic figurines.

There was more blood in the family room, along with a large trash can containing a broken, bloodstained broom handle and a broken golf club. There was a hammer on the coffee table and a crowbar on the dining table. Bagnell was also in the family room, sitting in a chair in the dark with his eyes closed. Bagnell was severely bruised from head to toe. His children called 911. All four children and the responding police officer testified that Bagnell was initially nonresponsive, then dazed and in a state of shock and confusion. Three of his children thought that he was dead or possibly unconscious.

Scanlan was found in the garage underneath a blanket in her car with the doors locked. When the police arrived and removed Scanlan from the car, Bagnell's daughter shouted at her that she could have killed him. Scanlan replied that it was "not that bad." 6 Transcript of Proceedings (TP) (Nov. 18, 2015) at 769; 8 TP (Nov. 23, 2015) at 1071.

Bagnell was taken to the emergency room, where he was treated by Nurse Catherine Gay, Dr. Robert Britt, and social worker Jemima Skjonsby. In addition to extensive bruising, he also had two broken fingers and several skin tears on his legs

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and arms. The police subsequently arrived around midnight, spoke to Bagnell, and had him sign a medical release form authorizing St. Francis Hospital and its staff to release his medical records to police and prosecutors.

On November 12, 2014, the police met with Bagnell at his house and obtained a second medical release form for Virginia Mason Medical Center. The next day, Bagnell met with Dr. Curtis Endow, his primary care physician, at Virginia Mason. Dr. Endow referred Bagnell to a wound care clinic at Virginia Mason, where he subsequently received care from physician assistant Stacy Friel and Dr. Jessica Pierce.

B. Procedural history

Scanlan was charged with second degree assault, felony violation of a no contact order, unlawful imprisonment, and fourth degree assault. Neither Bagnell nor Scanlan testified at trial, but the court admitted several statements that Bagnell made to his medical providers.

Nurse Gay testified that when she asked what had happened to him, Bagnell told her "that his girlfriend had beaten him up, and that he'd had a no contact order on this individual." 8 TP at 1108-09. When she asked him about a ring mark that she noticed on the back of his neck, "[h]e told me that his girlfriend . . . had tried to strangle him with his sweatshirt and had pulled the sweatshirt so hard, it had left this permanent ring around the back of his neck." *Id.* at 1110. She clarified on cross-

examination that she could not recall whether he had used the word "strangled," but that "she, you know, did whatever with the sweatshirt and had it really tight." *Id.* at 1118. Gay testified that knowing how a patient's injury occurred and the identity of his assailant is important for monitoring hospital security and patient safety, determining whether to refer him to a social worker, and ensuring that he has the follow-up care he needs, including having a safe place to go after discharge.

Dr. Britt testified that Bagnell stated "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," that "he hadn't really eaten in a [] couple of days," and that "[h]e wasn't allowed to talk to his family." 7 TP (Nov. 19, 2015) at 925. Dr. Britt also testified that Bagnell "said that he was hit with fists, that he had been bitten in a couple of places[,] and that he had been hit with a broom." *Id.* at 925-26. Dr. Britt stated that it was important to determine how patients' injuries occur because the mechanism of the injury determines how serious it is and affects which tests he runs, and it impacts discharge planning.

Social worker Skjonsby testified that when she asked Bagnell whether he felt safe to go home, he responded "[t]hat he was relieved that this person had been removed from the home by police and that he wouldn't have to worry about it again." *Id.* at 883-84. Skjonsby stated that knowing about a patient's relationship with his

assailant and knowing whether the assailant is in police custody helps her assess for safe discharge and connect the patient with appropriate social work services.

Dr. Endow testified that when he asked how Bagnell had been injured, Bagnell "stated that he received the injuries during an assault" by "[h]is girlfriend." *Id.* at 818. Dr. Endow stated that to effectively treat patients he needs to know how an injury occurred—whether the injury is related to underlying medical conditions, is due to accidents, occurred from fainting or in the course of medical care, and so on. Dr. Endow further stated that it is important to know the identity of a patient's assailant to know whether the patient is still in potential danger and to know whether to refer the patient to Virginia Mason's social services department.

Physician assistant Friel testified that when she asked Bagnell how his injuries occurred, he told her that "[h]e was living with a girlfriend at the time who had locked him in a room and had beat him with a candlestick, a broom, and a hammer over multiple areas." 8 TP at 1181. Friel explained that it was important to know for treatment purposes whether an injury had been caused by an object (versus, say, a hand) to make sure that no foreign bodies remain in the wound. Friel stated that knowing the identity of an assailant influences treatment because she wants to ensure that the patient has a safe place to go and is not returning to an environment that could result in more wounds.

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Dr. Pierce testified that when she asked Bagnell how his injuries occurred, "[h]e said that it was as a result of domestic violence. . . . He told me he was hit with a candlestick, a broom. He was punched or hit—I want to say a hammer, something hard." 7 TP at 909. Dr. Pierce stated that it was important to know the mechanism of injury because there is a high recidivism rate for wound patients. Accordingly, her practice involves not only treatment of existing wounds but also prevention of new wounds by, for example, having patients install grab bars in their homes. In addition, Dr. Pierce testified that knowing whether patients are returning to a safe environment is important from a treatment standpoint because more wounds result in more surface area to bandage and treat, which results in longer healing time, more potential for infection, and other complications.

The jury convicted Scanlan of second degree assault, felony violation of a no contact order, and unlawful imprisonment. On appeal, Scanlan argued that admitting Bagnell's hearsay statements to his medical providers violated her confrontation clause rights and that there was insufficient evidence to support her unlawful imprisonment conviction. The Court of Appeals held that Bagnell's statements to medical personnel were nontestimonial[2] and therefore not subject to the

[2] In contrast, the Court of Appeals held that two statements made by Bagnell to police officers were testimonial but that their admission at trial constituted harmless error. *State v. Scanlan*, 2 Wn. App. 2d 715, 731-33, 413 P.3d 82 (2018). The State has not sought our review of this holding.

confrontation clause, and it sustained her unlawful imprisonment conviction.[3] We granted Scanlan's petition for review and now affirm the Court of Appeals. *State v. Scanlan*, 191 Wn.2d 1026 (2018).

II. ANALYSIS

A. Bagnell's statements to his medical providers were not testimonial because they were not made with the primary purpose of creating an out-of-court substitute for trial testimony

Scanlan first contends that Bagnell's statements to his medical providers were testimonial and that admitting them therefore violated the confrontation clause of the United States Constitution. We review confrontation clause challenges de novo. *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

1. *The primary purpose test governs our analysis*

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment,[4] states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Court of Appeals below correctly observed that "confrontation clause jurisprudence has been in rapid flux since the United States Supreme Court's 2004 decision in *Crawford* [*v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)]." *State v.*

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[3] The Court of Appeals also reduced Scanlan's felony violation of a no contact order to a misdemeanor violation of a no contact order on double jeopardy grounds. *Scanlan*, 2 Wn. App. 2d at 735. The State conceded this issue below and does not now challenge it.

[4] *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

Scanlan, 2 Wn. App. 2d 715, 725, 413 P.3d 82 (2018). In *Crawford*, the Supreme Court held that whether admission of an out-of-court statement by a declarant who does not testify at trial violates the confrontation clause depends on whether the statement was *testimonial*—not, as it had previously held, whether the statement was *reliable*. 541 U.S. at 53, 68 (abrogating *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)). If the statement was testimonial, then it is inadmissible unless the witness is unavailable at trial and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59, 68. Reasoning that "the principal evil at which the Confrontation Clause was directed" was the use, in traditional civil-law systems, of "ex parte examinations as evidence against the accused" in criminal proceedings, the Court held that a hearsay declarant's statements to police during a station house interview were testimonial. *Id.* at 50, 68.

The Court in *Crawford* declined to fashion a legal test or "to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. And so in *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), we articulated our own "declarant-centric" test for determining whether a statement was testimonial.[5] At the same time, the Court of Appeals began struggling with the very question we face today: whether crime

[5] *Shafer*'s declarant-centric test asks "whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. The inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made." 156 Wn.2d at 390 n.8; *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011) (describing this test as a "declarant-centric standard").

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victims' statements to their medical providers are testimonial. *See, e.g.*, *State v. Fisher*, 130 Wn. App. 1, 10-13, 108 P.3d 1262 (2005); *State v. Moses*, 129 Wn. App. 718, 729-30, 119 P.3d 906 (2005) (published in part); *State v. Saunders*, 132 Wn. App. 592, 603, 132 P.3d 743 (2006). The Court of Appeals' deliberation eventually coalesced into a three-factor test:

> Witness statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State.

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

Meanwhile in *Davis v. Washington*, the United States Supreme Court announced what has since become known as the primary purpose test:

> 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*.

547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (emphasis added). Applying this test, the Court held that a wife's 911 call identifying her assailant in the midst of a domestic violence episode was nontestimonial because the call's primary purpose was to enable police assistance to meet an ongoing emergency. *Id.* at 823-29. On the other hand, another domestic violence victim's interview

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statements to the police after they had arrived and separated her from her assailant were testimonial because the primary purpose of the interrogation was "to investigate a possible crime." *Id.* at 830.

In *Michigan v. Bryant*, the Court further clarified that to determine the primary purpose of a police interrogation, courts should "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d (2011). "[T]he statements and actions of both the declarant and interrogators" are relevant to this inquiry. *Id.* at 367; *cf. id.* at 381-82 (Scalia, J., dissenting) (stating, contra the majority, that only the declarant's state of mind is relevant to the primary purpose inquiry).

In light of *Davis* and *Bryant*, we held that the primary purpose test, rather than our earlier declarant-centric test as announced in *Shafer*, applies to statements made to law enforcement officers. *State v. Beadle*, 173 Wn.2d 97, 109, 265 P.3d 863 (2011) ("Based on the evolution of the law since *Shafer*, we conclude that the *Shafer* standard does not apply to statements made to law enforcement."); *see also State v. Ohlson*, 162 Wn.2d 1, 16, 168 P.3d 1273 (2007) ("*Davis* indicated that the objectively determined primary purpose of a police interrogation is decisive in evaluating whether a resulting statement is testimonial.").

But the Court of Appeals continued to struggle with the question of how to analyze statements made to nongovernmental witnesses—i.e., witnesses other than

law enforcement officers. *See Davis*, 547 U.S. at 823 n.2 (United States Supreme Court declining to "consider whether and when statements made to someone other than law enforcement personnel are 'testimonial'"); *Bryant*, 562 U.S. at 357 n.3 ("We have no need to decide that question in this case either."). In *State v. Hurtado*, the Court of Appeals acknowledged that the primary purpose test governs analysis of statements made to law enforcement officers but reasoned that *Shafer*'s "'declarant-centric standard'" still governed statements made to "nongovernmental witness[es]," including medical providers. 173 Wn. App. 592, 599-600, 294 P.3d 838 (2013) (analyzing statements made by a crime victim to an emergency room nurse) (quoting *Beadle*, 173 Wn.2d at 107-08). The court further reasoned that the second and third factors of the *Sandoval* test "incorporate *Shafer*'s 'declarant-centric standard' because the declarant must make the statement to a nongovernmental witness." *Id.* at 600. *Hurtado* thereby synthesized *Shafer*'s declarant-centric test and *Sandoval*'s three-factor test into a single test to analyze whether statements made to medical providers were testimonial.

Although it was originally formulated in the context of police interrogation, the United States Supreme Court has now clarified that the primary purpose test also governs courts' analysis of hearsay statements made to nongovernmental witnesses. In *Ohio v. Clark*, the Court held that a three year old's statements to his preschool teachers, when asked about the identity of his abuser, were not testimonial. __ U.S.

__, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015). The Court reasoned that "[s]tatements 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," and noted that "the relationship between a student and his teacher is very different from that between a citizen and the police." *Id.* at 2182.

The Court held that the facts in *Clark* constituted an ongoing emergency involving suspected child abuse. *Id.* at 2181. "The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks." *Id.* Moreover, the child's age made it unlikely that such a declarant "would intend his statements to be a substitute for trial testimony." *Id.* at 2182. Nor did the fact that the teachers were mandatory reporters of child abuse render the statements testimonial: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." *Id.* at 2183. "[C]onsidering all the relevant circumstances," the Court concluded that the child's statements "were not made with the primary purpose of creating evidence for Clark's prosecution." *Id.* at 2181.

Notwithstanding *Clark*, the trial court and both parties in this case appear to have agreed at the trial court level that the *Sandoval* test, as reapplied and synthesized with *Shafer*'s declarant-centric test in *Hurtado*, governed their analysis

of whether Bagnell's statements to his medical providers were testimonial. On appeal Division One disagreed, holding that in light of *Clark*, "the proper test to apply in determining whether the statements made to medical providers are testimonial is the 'primary purpose' test." *Scanlan*, 2 Wn. App. 2d at 725.[6] Scanlan now urges us to reinstate *Hurtado*'s synthesis of the *Sandoval* three-factor and *Shafer* declarant-centric tests.

The United States Supreme Court in *Clark* declared that "the primary purpose test is a *necessary . . . condition* for the exclusion of out-of-court statements under the Confrontation Clause." 135 S. Ct. at 2180-81 (emphasis added). "[U]nder our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Id.* at 2180. Any legal test for determining whether a statement was testimonial that is inconsistent with the primary purpose test is thus no longer good law.

Shafer's declarant-centric test is inconsistent with the primary purpose test, which considers "the statements and actions of *both* the declarant *and interrogators*." *Bryant*, 562 U.S. at 367 (emphasis added). *Sandoval*'s three-factor test is also inconsistent since it permits a statement to be nontestimonial only if, inter

[6] Division Two has followed suit. *See State v. Burke*, 6 Wn. App. 2d 950, 965, 431 P.3d 1109 (2018) ("In *Scanlan*, Division One adopted the primary purpose test from *Clark* and applied it to a victim's statements to a variety of medical providers. We agree with Division One." (citation omitted)).

alia, there is "*no indication* that the witness expected the statements to be used at trial." *Sandoval*, 137 Wn. App. at 537 (emphasis added). In contrast, the primary purpose test asks "whether, in light of all the circumstances, viewed objectively, the '*primary purpose*' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 135 S. Ct. at 2180 (emphasis added) (alteration in original) (quoting *Bryant*, 562 U.S. at 358).

It is therefore time to fully put these tests to rest. We hold that *Shafer*'s declarant-centric test, *Sandoval*'s three-factor test, and *Hurtado*'s synthesis of the two have all been superseded by the primary purpose test. Accordingly, we consider whether Bagnell's statements to medical personnel were testimonial by applying the primary purpose test.

2. *Application of the primary purpose test*

At issue are Bagnell's statements to emergency room personnel Gay, Dr. Britt, and Skjonsby, and his statements to follow-up care providers Dr. Endow, Friel, and Dr. Pierce. We hold that none of these statements were testimonial because their primary purpose was to meet an ongoing emergency and obtain medical treatment, not to create an out-of-court substitute for trial testimony.

Under the primary purpose test, courts objectively evaluate the circumstances in which the encounter occurs, as well as the parties' statements and actions. *Bryant*, 562 U.S. at 359. The Court has variously declared that a statement is testimonial if

its primary purpose was "to establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822, "to investigate a possible crime," *id.* at 830, "to create a record for trial," *Bryant*, 562 U.S. at 358, or to "creat[e]" or "gather[] evidence for . . . prosecution," *Clark*, 135 S. Ct. at 2181, 2183. "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 135 S. Ct. at 2180 (alteration in original) (quoting *Bryant*, 562 U.S. at 358).

As a threshold matter, Bagnell's statements are "significantly less likely to be testimonial than statements given to law enforcement officers" because medical personnel are "not principally charged with uncovering and prosecuting criminal behavior." *Clark*, 135 S. Ct. at 2182. We also note that the United States Supreme Court has consistently said in dicta that statements made to medical providers for the purpose of obtaining treatment have a primary purpose that does not involve future prosecution and that such statements are therefore nontestimonial. *See Giles v. California*, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) ("[O]nly *testimonial* statements are excluded by the Confrontation Clause. . . . [S]tatements [by domestic abuse victims] to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) ("[M]edical reports

created for treatment purposes . . . would not be testimonial under our decision today."); *Bullcoming v. New Mexico*, 564 U.S. 647, 672, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (Sotomayor, J., concurring in part) ("[T]his is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the [blood alcohol concentration] report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment.").

Bagnell's statements to medical providers describing the cause of his injuries were elicited for the purpose of obtaining medical treatment. Dr. Britt, Dr. Endow, Friel, and Dr. Pierce all testified that knowing the mechanism of a patient's injury is important because it affects the course of treatment. Dr. Britt stated that the mechanism of injury determines how serious it is and affects which tests he runs. Dr. Endow stated that knowing how the injuries occurred and the timing of the injuries is important for treatment. Friel testified that when treating patients, she needs to know whether she might need to do imaging to look for foreign bodies in the wound. Dr. Pierce stated that knowing the cause of wounds is important to help prevent wound recidivism, for which the rate among her patients is "unbelievably high." 7 TP at 908.

Like the preschooler's statements identifying his abuser in *Clark*, Bagnell's statements identifying Scanlan as his assailant were elicited by "questions . . . meant to identify the abuser in order to protect the victim from future attacks." 135 S. Ct.

at 2181. While Bagnell knew that Scanlan had been taken into police custody, his medical providers did not. His statements were elicited by questions whose purpose was to determine whether there was an ongoing emergency and, if so, to respond to it. Gay, Dr. Britt, Skjonsby, Dr. Endow, Friel, and Dr. Pierce all testified that they were concerned about patient safety and that one of their purposes in speaking with patients is to help ensure that the patient has a safe place to go after discharge. Gay testified that her questioning was also important for hospital security purposes. "[I]n light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation" was not "to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2180 (second alteration in original) (quoting *Bryant*, 562 U.S. at 358).

Scanlan asserts that Bagnell's statements were testimonial because he signed three medical release forms authorizing his care facilities and their staff to release his medical records to police and prosecutors.[7] But just as the preschool teachers' mandatory reporting obligations in *Clark* did not "convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution," neither did Bagnell's signing medical release forms transform his medical care provider-patient relationships into law enforcement missions. *Id.* at 2183. This is true for all of Bagnell's medical providers,

[7] Scanlan introduced two of these forms as pretrial exhibits. Scanlan alleges, and the State does not appear to contest, that Bagnell signed an additional medical release form on October 16, 2014 after the no contact order incident.

and it is especially true for the St. Francis providers. At the time Bagnell received emergency room care at St. Francis on November 6, 2014, he had signed only a release form for *Virginia Mason* for injuries related to the *October 16, 2014* incident.[8] But even for the later follow-up care at Virginia Mason, it seems implausible that the primary purpose of his interactions was to create an out-of-court substitute for trial testimony. *Cf. id.* at 2183 ("It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution."). To the contrary, the primary purpose of Bagnell's interactions with Dr. Endow, Friel, and Dr. Pierce was to periodically debride and redress the wounds on his arms and legs, which by that point had developed into ulcers. The fact that Bagnell had signed waivers allowing the police to obtain his medical records did not alter the primary purpose of these interactions.

Bagnell's statements to medical personnel were therefore nontestimonial, and their admission at trial did not violate Scanlan's Sixth Amendment right of confrontation.

[8] Since this first release form is not in the record, we must rely on Scanlan's attorney's statement to the trial court that the form granted Virginia Mason permission to release Bagnell's medical information. And since the second and third forms authorize the release of medical records "acquired and developed in the course of treating me for my injuries and/or illness suffered on or about _____," with the blank on those forms filled in as "11/5/2014-11/6/2014" and "11/5/14-11/6/14" respectively, it follows that on the first form the police would have filled in this blank as October 16, 2014—the date on which the earlier incident occurred. Def.'s Pretrial Exs. 8, 9.

B. There is sufficient evidence to support Scanlan's unlawful imprisonment conviction

Scanlan next contends that there is insufficient evidence to support her unlawful imprisonment conviction. To determine whether there is sufficient evidence to support a criminal conviction, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When a criminal defendant challenges sufficiency of the evidence, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). "'Circumstantial evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). However, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

"A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(6).

Bagnell's statements to medical personnel provide sufficient direct evidence to support Scanlan's unlawful imprisonment conviction. Dr. Britt testified that Bagnell told 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," that "he hadn't really eaten in a [] couple of days," and that "[h]e wasn't allowed to talk to his family." 7 TP at 925. Friel testified that Bagnell told her "[h]e was living with a girlfriend at the time who had locked him in a room and had beat him with a candlestick, a broom, and a hammer over multiple areas." 8 TP at 1181.

The conviction is further supported by circumstantial evidence. Bagnell's children testified that they had been unable to reach him by cell phone or landline for roughly 24 hours before they arrived on November 6, 2014. They testified that his cell phone said it was disconnected or went to voice mail and that his landline either rang indefinitely or went to voice mail. Witnesses testified that in Bagnell's house the police found a cell phone broken in two, a cordless phone missing its

battery cover and batteries (which were found in the trash), and a second damaged cordless handset, and that the upstairs bedroom cordless phone did not emit a dial tone.

All four children and multiple police officers testified that there was blood throughout the house, that the wall had been dented and gouged, and that there were broken and weapon-like items throughout the house—including a broken golf club; a broken, bloodstained broom; a hammer; and a crowbar. The nature and extent of Bagnell's injuries were supported by testimonial and photographic evidence and were not in dispute. Scanlan was found hiding on the scene and responded to Bagnell's daughter's accusation by stating that his injuries were "not that bad." 6 TP at 769; 8 TP at 1071. Taken together, the circumstantial evidence supports a reasonable inference that Scanlan knowingly restrained Bagnell, restricting his movements to his house by means of physical force or intimidation.

Citing *State v. Kinchen*, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998), Scanlan asserts that she could not have unlawfully imprisoned Bagnell because there were multiple means of escape. In *Kinchen*, the Court of Appeals held that evidence that the victims were locked in their apartment was insufficient to support an unlawful imprisonment conviction when uncontested evidence also showed that the victims regularly entered and exited through a window and that a sliding glass door was sometimes left unlocked. 92 Wn. App. at 451-52. The court reasoned that for an

unlawful imprisonment theory to succeed despite a known means of escape, "the known means of escape must present a danger or more than a mere inconvenience." *Id.* at 452 n.16. Here, Scanlan argues, "Mr. Bagnell was at his home, with multiple entrances and windows, including a three-car garage." Pet'r's Suppl. Br. at 19.

But the evidence, viewed in the light most favorable to the prosecution, supports a reasonable inference that leaving would have presented more than a mere inconvenience for Bagnell. Multiple witnesses testified that Bagnell was initially in a nonresponsive stupor, unaware of his surroundings. Moreover, Bagnell's injuries, the state of the house, and his prior history with Scanlan support a reasonable inference that leaving presented a danger.

Because both the direct and circumstantial evidence support Scanlan's conviction for unlawful imprisonment, we affirm her conviction.

III. CONCLUSION

Clark makes clear that the primary purpose test governs analysis of whether statements to nongovernmental witnesses, including medical personnel, were testimonial. Under the primary purpose test, Bagnell's statements to medical personnel were nontestimonial and, therefore, their admission at trial did not violate the federal constitution's confrontation clause. In addition, there is sufficient evidence in the record to support Scanlan's unlawful imprisonment conviction.

We affirm the Court of Appeals.

Fairhurst, C.J.

WE CONCUR:

Madsen, J.

González, J.

Stephens, J.

Jr, J

No. 95971-4

GORDON McCLOUD, J. (concurring)—I concur in the majority's analysis of federal constitutional law with two observations.

First, I note that the majority's analysis is limited to "the defendant's right of confrontation under the Sixth Amendment to the United States Constitution." Majority at 1; U.S. CONST. amend. VI. Theresa Scanlan failed to argue for a different outcome under article I, section 22 of the Washington State Constitution,[1] which we analyze independently from the federal constitution. *State v. Lui*, 179 Wn.2d 457, 468-70, 315 P.3d 493 (2014) ("This court has concluded that article I, section 22 merits an independent analysis as to both the manner and the scope of the confrontation right." (citing *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009))); *State v. Martin*, 171 Wn.2d 521, 528-33, 252 P.3d 872 (2011) (conducting

[1] "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." WASH. CONST. art. I, § 22.

a *Gunwall*[2] analysis and concluding that an independent analysis of article I, section 22 was necessary); *Pugh*, 167 Wn.2d at 834-35 (stating that "a *Gunwall* analysis is no longer necessary" and independently analyzing article I, section 22). Whether article I, section 22 provides greater protections to defendants than the federal constitution in this context remains unanswered.

Second, I note that the United States Supreme Court has not "adopt[ed] a categorical rule excluding [statements to individuals who are not law enforcement officers] from the Sixth Amendment's reach." *Ohio v. Clark*, __ U.S. __, 135 S. Ct. 2173, 2181, 192 L. Ed. 2d 306 (2015). Although "such statements are much less likely to be testimonial than statements to law enforcement officers," *id.*, "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony,'" *id.* at 2180 (alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)).

In this case, however, I cannot say that the *primary* purpose of the statements at issue was to create an out-of-court substitute for trial testimony. This is particularly true of the statements made to Nurse Catherine Gay, Dr. Robert Britt, and social worker Jemima Skjonsby at the emergency room on the night of the

[2] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

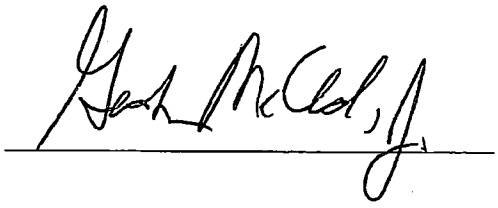
incident. All three saw Leroy Bagnell in the informal, spontaneous setting of an *emergency* room shortly after his children discovered him nonresponsive in his home, majority at 2-4, and all three were primarily concerned with Bagnell's safety—they did not want to release him into a potentially dangerous situation, *id.* at 4-6, 17-18. In this way, the situation at the emergency room is not unlike the situation at the school in *Clark*, where "the teachers needed to know whether it was safe to release [the child] to his guardian at the end of the day." 135 S. Ct. at 2181.

I am more concerned with Bagnell's statements to Dr. Curtis Endow, physician assistant Friel, and Dr. Jessica Pierce, which he made 7, 12, and 20 days after the incident, respectively. By the time Bagnell met with these three medical providers, he had signed multiple medical release forms authorizing police and prosecutors to obtain his medical records "in furtherance of the investigation and any resulting prosecution." Majority at 3-4, 18-19; Pet'r's Suppl. Br., App. A. The forms also authorized his "care providers" to "discuss [his] medical condition and any treatment with the assigned detective, his/her designee, and the prosecuting attorney." Pet'r's Suppl. Br., App. A. After meeting with the police and signing all these forms, Bagnell was well aware that the police were heavily involved, would almost certainly review his medical records, and might even talk with his medical providers. And unlike the child in *Clark*, who was too young to "understand the

details of our criminal justice system," 135 S. Ct. at 2182, Bagnell is old enough to understand those details. Bagnell likely knew that anything he said to his medical providers about the incident would end up in his medical records, records that the police or prosecutors would then obtain. He also may have known that prosecutors might use those records in a future trial, should one occur. It is therefore probable that his conversations with medical providers served a *dual* purpose: to ensure adequate medical treatment *and* to create an out-of-court substitute for trial testimony.

But it is a stretch to say that the *primary* purpose of those conversations was to create an out-of-court substitute for trial testimony. Bagnell most likely would have seen the same medical providers, even if he had not signed the release forms, for the sole purpose of receiving follow-up care. After signing those forms, his follow-up visits may have taken on an additional purpose. But it is unlikely that this additional purpose was ever primary, over and above his purpose of receiving medical treatment. And the record before us suggests that the medical providers were also primarily, if not solely, concerned with Bagnell's well-being. Majority 4-7.

With these observations, I respectfully concur in the majority's analysis of federal constitutional law.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

Right to Confrontation

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

A. Testimony of Medical Providers

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

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

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

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

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

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

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

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

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

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

B. The Primary Purpose Test

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another factor is the informality of the situation and interrogation. And, again, while formality is not the "sole touchstone" of the primary purpose test, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." Bryant, 562 U.S. at 366. In the end, the question is "whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" Clark, 135 S. Ct. at 2180 (quoting Bryant, 562 U.S. at 358).

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

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

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

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

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

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

C. Application to Statements to Medical Providers

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

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

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

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

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

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

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

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

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

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

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

D. Statements to Law Enforcement Officers

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

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

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

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

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

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

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

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

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

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

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

Sufficiency of the Evidence

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

When reviewing a claim for the sufficiency of the evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quotation omitted). "When the sufficiency of the evidence is challenged in a criminal case, all

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

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

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

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

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

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

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

Double Jeopardy

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

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

WE CONCUR:

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

APPENDIX 49