IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CASANOVA ROLANDO F. ESCOBANO, Appellant.	))))))))))	No. 67138-3-I DIVISION ONE UNPUBLISHED OPINION FILED: August 1, 2011

Spearman, J. — Escobano was convicted by a jury of assault in the second degree-domestic violence and bail jumping. He claims that (1) the trial court erred in refusing to instruct the jury about the affirmative defense of "uncontrollable circumstances" to bail jumping; (2) insufficient evidence supports his conviction for assault; and (3) the sentencing court erred in finding that the assault involved domestic violence, imposing a $100 domestic violence (DV) assessment, and entering a no-contact order, where the jury was not instructed to make a DV finding. We disagree with Escobano as to all three claims and affirm.

FACTS

On September 15, 2009, Brenna Youckton invited Casanova Escobano, her friend and former roommate, to visit her at her apartment in Thurston County. Youckton drove to Parkland to pick up Escobano, who stayed the night. The next evening, they had dinner together, went to a store, and returned to the apartment. According to Youckton, they had oral sex at some point that evening. She went to bed

while Escobano talked on his cell phone in the living room. Escobano was speaking loudly, so Youckton asked him to quiet down. He asked her to drive him to Lakewood. She was hurt and angry that he was ignoring her and talking with another woman on the phone. Youckton told Escobano how she was feeling but he ignored her because she wanted to talk about the two of them pursuing a romantic relationship, a topic he wanted to avoid. Youckton refused to drive Escobano to Lakewood and he told her he was leaving, that he was done with her, and that she was a "psycho." She asked him to leave and he went outside, continuing to talk on his cell phone. She gathered his belongings and took them out of her apartment to him.

Youckton testified that as she returned to her apartment, Escobano shoved her from behind and followed her back inside. The two began arguing and the argument became physical. They pushed each other and she fell onto her back on the couch. Escobano got on top of her, put his hands around her throat, and began choking her. Youckton testified that he used his body weight to press forward into her and that his left hand was over his right hand. She testified that it was hard to breathe and that she started to see stars. She kicked him and said she could not gather his belongings for him unless he let go of her. Escobano released her. She attempted to talk to him but he said, "Shut the fuck up, bitch, or I'm going to punch you." He began taking off his jewelry and she thought he was going to punch her, so she called 911. Escobano testified that he took off his necklace because she was grabbing at him and he did not want it to break. As Youckton began talking to the operator, Escobano attempted to end the phone call by closing her phone, but because the call was on speaker, he did

not terminate the call. He asked her repeatedly to get off the phone. When Youckton told the 911 dispatcher that Escobano had choked her, he ran out of the apartment.

Police arrived around 11:45 p.m. and spoke with both Youckton and Escobano. Deputy Mike Hovda described Youckton as crying and "very upset." He testified he saw obvious injury marks on both sides of her neck, and the mark on the right side was "a round, very red mark, and it really stood out." On the left side, he described two distinct, finger-sized bruise marks. He testified that based on his twenty-five years of experience in law enforcement, the injuries on Youckton's neck were recent. Deputy Watkins spoke with Escobano. Watkins testified that Escobano said that he and Youckton got into an argument outside and that he tried to pull her into the apartment to avoid disturbing neighbors and prevent her from embarrassing herself. Escobano said they ended up wrestling in the apartment. When asked whether he had put his hands around Youckton's neck, he said something like that may have happened but he did not intentionally try to choke her.

Police arrested Escobano. He posted bail and was arraigned on September 29, 2009. An order was entered that required his appearance in Thurston County Superior Court at 10:30 a.m. on October 19, 2009. He did not appear, and a bench warrant was ordered. Escobano planned to appear voluntarily at 3:30 p.m. the next day to address the warrant, under Thurston County's "walk on" procedure.[1] But he failed to appear on October 20 and the trial court ordered another bench warrant. Almost two weeks later,

[1] This procedure permits a person who has failed to appear for a hearing to go to the sheriff's office and request to have his matter placed on a preliminary appearance calendar so that he can walk into court on his own power and avoid being arrested and brought into court on the warrant.

on November 2, Escobano was surrendered to the sheriff's office by his bail bond company. He appeared before the trial court on November 4.

Escobano was charged by fourth amended information with one count of assault in the second degree (strangulation)-domestic violence and one count of bail jumping. He testified in his own defense. He stated that he and Youckton had been good friends and had lived together, along with other roommates, for approximately three months in early 2009. He testified that on the evening of the incident, Youckton wanted to talk to him about their relationship but he was not interested in her as a girlfriend. He took a phone call from a female friend and Youckton yelled at him. Escobano testified that their argument turned physical, with the two of them ending up tangled on the floor, but he denied choking Youckton. He told Youckton she was "fucking crazy" and she responded by calling the police. He denied they had sexual contact that evening.

Escobano admitted that he did not appear for his court hearing in Thurston County Superior Court on October 19, 2009. He testified that he did not appear because he had an appearance scheduled in a Kitsap County court on the same date. He testified that he called the Thurston County court to explain the problem but was told to call the Kitsap County court. He tried to make both appearances because they were scheduled for different times. He first went to the Kitsap County court because his appearance there was scheduled for 8:30 a.m. Upon arriving, he was told there was no one by the name of "Escobano" scheduled to appear. He testified that he did not know this at the time, but his case was under "Rolando Lattimore," another name he went by. Around 10 a.m., he called the Thurston County court to explain that he would

be late and was trying to catch a bus, but was told he was too late and should appear the next day. The next day, he went to the court, which directed him to the police department. The police department told him he would be called when he needed to appear in court, but he was never called. He turned himself in through his bail bondsman.

The trial court gave the jury Escobano's proposed instruction on self-defense to the assault charge but refused his proposed instruction on uncontrollable circumstances, a statutory affirmative defense to bail jumping.[2]

The jury found Escobano guilty on both counts. The jury was not asked in a special verdict form to determine whether the assault charge was committed against a family or household member for a "domestic violence" finding. The court sentenced Escobano to a standard-range sentence and found that the assault involved domestic violence, accordingly ordering a DV assessment of $100 and entering a no-contact order. Escobano appeals.

DISCUSSION

Escobano makes three claims on appeal: (1) the trial court erred in refusing to instruct the jury about the affirmative defense of "uncontrollable circumstances" to the bail jumping charge; (2) the evidence was insufficient to support his conviction for

[2] The proposed instruction stated:

> It is an affirmative defense to a prosecution for bail jumping if uncontrollable circumstances prevented the person from appearing or surrendering and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender and that the person appeared or surrendered as soon as such circumstances ceased to exist.

assault in the second degree; and (3) the sentencing court erred in finding that the assault involved domestic violence, imposing a DV assessment, and ordering a no-contact order, where the jury was not instructed to make a DV finding. We find no merit in his claims and affirm.

Uncontrollable Circumstances Defense

The first issue is whether the trial court erred in refusing to instruct the jury on the affirmative defense of "uncontrollable circumstances" to the bail jumping charge. A trial court must give an instruction on a party's theory of the case if the law and evidence support the instruction. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613, (2009). In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusively functions of the jury. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). The court's failure to give such an instruction constitutes reversible error. Otis, 151 Wn. App. at 578.

"Uncontrollable circumstances" is an affirmative defense to bail jumping under RCW 9A.76.170(2), which provides:

> It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender and that the person appeared or surrendered as soon as such circumstances ceased to exist.

"Uncontrollable circumstances" is defined as follows:

> "Uncontrollable circumstances" means an act of nature, such

> as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

Escobano contends the uncontrollable circumstance was that he had two court appearances on the same day and that the predicament was not of his making because the courts scheduled the hearings. He further contends that he immediately contacted the Thurston County court on October 19 about being late to his hearing and went to that court on October 20, then contacted the police department as directed. He claims he thereby "surrendered" as soon as the uncontrollable circumstance ceased to exist.

This claim has no merit. The circumstances he describes are not the kind contemplated by the statute, and the trial court did not err in refusing to give the instruction. Moreover, the hearings were two hours apart, and Escobano admitted that he never contacted the Kitsap County court to attempt to reschedule his hearing date or time.

Sufficiency of the Evidence

Escobano next argues that the evidence was insufficient to support his conviction for assault in the second degree. On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307,

319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences 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 of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Id. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990)).

Here, the State was required to prove beyond a reasonable doubt that (1) on or about September 16, 2009, Escobano intentionally assaulted Brenna Youckton by strangulation; and (2) this act occurred in the State of Washington. Escobano argued self-defense to the jury, and the jury was correctly instructed on the lawful use of force.

Escobano argues that Youckton's testimony that he attacked her, and not the other way around, is called into question by her admission that she wanted to be his girlfriend and that he was not interested. He points out that she admitted to being hurt that he was ignoring her and talking on the phone to another woman. Furthermore, he testified that it was Youckton who escalated their verbal argument into a physical one

when he rejected her desire for a romantic relationship, and he was simply defending himself against her.

But Escobano's claim involves issues of witness credibility, which we do not review. He and Youckton testified as to what happened and the jury was entitled to believe her version of events over his. Moreover, law enforcement testified about marks on Youckton's neck that were consistent with her being choked. Photographs of these marks were shown to the jury. The evidence was sufficient to support the jury's verdict on assault in the second degree.

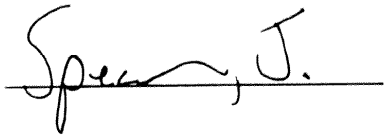
Domestic Violence Finding

Finally, Escobano argues that the sentencing court erred in finding that the assault involved domestic violence, imposing a $100 DV assessment, and ordering a DV no-contact order, where the jury was not instructed to find whether the assault was committed against a "family or household member." He cites the rule that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 425 (2000)). The relevant statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis omitted).

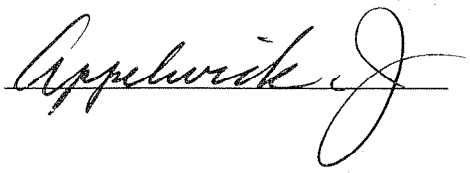
We disagree with this claim. This court, in State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006), rejected the defendant's argument that the trial court violated

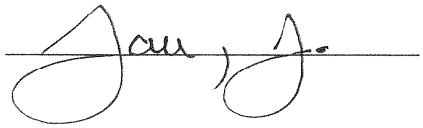
Blakely by imposing a DV protection order, ordering a DV evaluation, and imposing a $100 DV fine because the jury was not asked to find whether his crimes involved domestic violence. See also State v. Hagler, 150 Wn. App. 196, 201, 208 P.3d 32, rev. denied, 167 Wn.2d 1007, 220 P.3d 209 (2009) ("The [DV] designation need not be proven to a jury under Blakely."). The sentencing court did not err in entering a no-contact order and DV assessment.[3]

Affirmed.



WE CONCUR:





[3] Moreover, we note that the facts supporting a DV designation were admitted by Escobano. "Domestic violence" includes the crime of assault in the second degree when committed by one family or household member against another. RCW 10.99.020(5). "Family or household members" includes "adult persons who are presently residing together or who have resided together in the past." RCW 10.99.020(3). Escobano testified that he and Youckton had been roommates for several months.