

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ALBERT THOMASON,

Appellant.

No. 38675-5-II

UNPUBLISHED OPINION

Penoyar, A.C.J. — Albert Thomason appeals his convictions for second degree assault and unlawful imprisonment of Angela Wilde and unlawful imprisonment of TRW,<sup>1</sup> Wilde’s 14-year-old daughter. Thomason argues that the trial court erred by failing to instruct the jury on the inferior offense of third degree assault and by imposing exceptional sentences on the two counts involving Wilde based on the jury’s finding of “deliberate cruelty.” Thomason also contends that the trial court’s 10-year no contact order protecting TRW is improper because it exceeds the maximum statutory sentence for unlawful imprisonment. We affirm Thomason’s assault conviction, but reverse his exceptional sentences. We remand for resentencing and entry of an amended no contact order.

**FACTS**

At about 11:00 p.m. on June 13, 2008, Angela Wilde met her boyfriend Jeremiah Thomason,<sup>2</sup> his father Albert Thomason, and co-workers at a bar for drinks. Jeremiah and

---

<sup>1</sup> TRW’s initials are used to protect her privacy.

<sup>2</sup> To avoid confusion, this opinion refers to Jeremiah Thomason by his first name and to Albert Thomason by his surname. We intend no disrespect.

Thomason had been drinking and playing pool for a couple of hours before Wilde arrived. At trial, Thomason stated that he became intoxicated after drinking Jägermeister, an herbal liqueur, and “washing [it] down with rum and cokes.” Report of Proceedings (RP) (Nov. 24, 2008) at 108. Over the next three hours, the group shared “a couple pitchers of beer.” RP (Nov. 24, 2008) at 24. Wilde testified that she had some shots of Jägermeister before she left and “was feeling good.” RP (Nov. 24, 2008) at 45-46. Wilde testified that Thomason seemed “[a] lot more” intoxicated than her at the bar, but that he had no trouble walking or communicating. RP (Nov. 24, 2008) at 25.

Jeremiah, Thomason and Wilde stayed until the bar closed. After the bar closed, Wilde, Jeremiah, Thomason and Akrista Grier, the bartender’s friend, drove to Wilde and Jeremiah’s home for “a few beers.”<sup>3</sup> RP (Nov. 24, 2008) at 26. At trial, Grier testified that Thomason was noticeably affected by alcohol but that he had no trouble keeping his balance or communicating. During this time, Thomason spoke to his son about rumors that Wilde had been going out with other men. Grier left at about 3:00 a.m. Wilde cleaned up the kitchen, put on her pajamas and got ready for bed.

Wilde testified that after she lay down on her mattress in the living room to go to sleep, Thomason kicked her one time in the eye “out of the blue” with his cowboy boot. RP (Nov. 24, 2008) at 48. Wilde testified that there had been no arguments or disagreements leading up to the assault. After the assault, “there was blood everywhere,” and Thomason “scream[ed] and

---

<sup>3</sup> Wilde testified that each person drank about one beer each whereas Thomason testified that the group drank “a six-pack or two.” RP (Nov. 24, 2008) at 110.

yell[ed]” at Wilde, calling her “filthy names.” RP (Nov. 24, 2008) at 32-33. Thomason grabbed Wilde by the throat and accused her of cheating on his son.

Thomason admitted assaulting Wilde, but disputed her version of events and denied kicking her. Thomason testified that “[t]here was a lot of shouting going on” after Grier left and that he punched Wilde once in her eye with his fist after she insulted his wife and daughter with vulgar language.<sup>4</sup> Thomason hit Wilde because her comments “pissed [him] off.” RP (Nov. 24, 2008) at 115. Thomason repeatedly testified at trial that the strike was “instantaneous.” RP (Nov. 24, 2008) at 115, 122, 124, 135. On cross-examination, the following exchange occurred:

STATE: You’re saying you punched [Wilde] and caused that injury to her eye?

THOMASON: Yes, sir.

STATE: And you fully admit that you did that?

THOMASON: Yes, sir.

STATE: And you did that on purpose, right?

THOMASON: I admit to hitting her. I didn’t mean to.

STATE: You hit her on purpose, right?

THOMASON: Yes, sir.

RP (Nov. 24, 2008) at 124-25.

After Thomason assaulted Wilde, she ran upstairs to look for a phone to call the police because the downstairs phones had been disabled.<sup>5</sup> Thomason chased her up the stairs and grabbed her leg, but Wilde “shook him off.” RP (Nov. 24, 2008) at 34. Wilde entered her 14-year-old daughter TRW’s bedroom and Thomason “threw [Wilde] on [the] bed,” waking up

---

<sup>4</sup> According to Thomason, Wilde called his wife a “\$20 whore” and his daughter “a thieving cunt.” RP (Nov. 24, 2008) at 112.

<sup>5</sup> Wilde testified that Thomason had put her home phone in a “glass of water” and had hidden her cell phone. RP (Nov. 24, 2008) at 34-35. Thomason denied this.

TRW. RP (Nov. 24, 2008) at 35. TRW testified that Wilde's eye was "gushing out blood" and that Thomason held Wilde by her wrists. RP (Nov. 24, 2008) at 55. Wilde told TRW to call 911 on her cell phone. Thomason grabbed the phone out of TRW's hand so that she could not call the police for help.

Thomason prevented Wilde and TRW from leaving TRW's bedroom by "standing in the doorway with both hands against the doorway." RP (Nov. 24, 2008) at 59. Thomason told Jeremiah to load up his things in the truck. At trial, the witnesses disagreed about how long Thomason prevented Wilde and TRW from leaving the bedroom and whether he spoke to them.<sup>6</sup>

At one point, Wilde asked to use the bathroom across the hall. Thomason told her she could use the bathroom if she left the bathroom door open. Thomason testified that he made Wilde leave the door open so she would not escape through another bathroom door into the adjacent master bedroom. After using the bathroom, Wilde ran into the master bedroom to yell out the window for help. Thomason grabbed her by her ponytail and pushed her back into TRW's bedroom.<sup>7</sup>

After Jeremiah finished loading the truck, the two men left the house. On the way out, Thomason hid TRW's phone in the cushions of a couch in the garage. He told TRW that her

---

<sup>6</sup> Wilde testified that Thomason kept Wilde and TRW in the bedroom for a "good two hours," and that he did not speak to them during that time. RP (Nov. 24, 2008) at 41. TRW estimated that one to one and a half hours passed from the time she woke up until she called the police at about 4:17 a.m. TRW testified that Thomason called Wilde "filthy names" while he restrained them. RP (Nov. 24, 2008) at 60. Thomason admitted to holding Wilde and TRW against their will for about "[10] to [15] minutes." RP (Nov. 24, 2008) at 113.

<sup>7</sup> Thomason testified that Wilde did not run into the master bedroom and he denied grabbing her ponytail.

phone was somewhere in the garage, but told her to find it. TRW spent about 20 minutes searching before she found her phone and called the police. The responding police officer testified that Wilde's eyes were bleeding and swollen shut and that she could not open her injured eye when asked. As a result of the assault, Wilde has two scars, permanent ringing in one ear, and "problems focusing" while reading. RP (Nov. 24, 2008) at 52. Medical evidence admitted at trial revealed that Wilde received a "[n]ondisplaced fracture, left inferior orbital floor."<sup>8</sup> RP (Nov. 24, 2008) at 124.

On July 29, 2008, the State charged Thomason by amended information with first degree robbery,<sup>9</sup> second degree assault,<sup>10</sup> and two counts of unlawful imprisonment,<sup>11</sup> one each for restraining Angela Wilde and TRW. The State sought exceptional sentences for all charges involving Wilde because Thomason "manifested deliberate cruelty or intimidation of the victim." Clerk's Papers (CP) at 8. Prior to trial on November 24 and 25, 2008, the trial court dismissed the robbery charge.

The trial court ruled that there was sufficient evidence for the State's proposed instruction on deliberate cruelty,<sup>12</sup> and Thomason took exception. The trial court rejected Thomason's

---

<sup>8</sup> The medical records are not included in the record on appeal.

<sup>9</sup> RCW 9A.56.190; .200.

<sup>10</sup> RCW 9A.36.021(1).

<sup>11</sup> RCW 9A.40.040(1).

<sup>12</sup> The challenged instruction reads: "'Deliberate cruelty' means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime." CP at 80.

proposed instructions on third degree assault and criminal negligence, and Thomason took exception. Thomason argued his theory of intoxication and provocation in closing argument, and the trial court instructed the jury that intoxication “may be considered in determining whether the defendant acted intentionally.” CP at 69.

On November 25, 2008, the jury found Thomason guilty of the second degree assault and both unlawful imprisonment counts. The jury returned special verdicts finding that Thomason committed the assault and unlawful imprisonment of Wilde with deliberate cruelty.

The trial court imposed a 48-month exceptional sentence for the assault, a 48-month exceptional sentence for unlawfully imprisoning Wilde, and a 12-month standard range sentence for unlawfully imprisoning TRW, with all sentences to run concurrently to one another.<sup>13</sup> Additionally, the trial court imposed 10-year no contact orders prohibiting Thomason from contacting either Wilde or TRW. The trial court subsequently issued findings of fact and conclusions of law justifying Thomason’s exceptional sentence. The trial court denied Thomason’s motion for a new trial.

Thomason now appeals.

## ANALYSIS

### I. Instruction on Inferior Degree Offense

Thomason argues that the trial court denied him a fair trial by refusing to instruct the jury on third degree assault. Thomason contends that he struck Wilde due to his intoxication and her

---

<sup>13</sup> The standard range sentences were 13-17 months for the assault and 9-12 months for each unlawful imprisonment.

provocation, and that the trial court's failure to instruct the jury on the inferior offense "disarmed" his theory that he acted with criminal negligence, rather than intent. Appellant's Br. at 14. He asserts that without the third degree assault instruction, "the jury was required to choose between convicting Thomason of second degree assault and acquitting him." Appellant's Br. at 14. We disagree.

A. Standard of Review

A trial court's decision about whether to instruct on an inferior degree offense involves the application of law to facts, which we review de novo. See *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (stating three-part test that includes legal and factual components); *State v. Dearbone*, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo). We review the facts in the light most favorable to Thomason. See *Fernandez-Medina*, 141 Wn.2d at 455-56.

B. Inferior Degree Offense

A defendant is entitled to instruction on an inferior degree offense when (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense," (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense, and (3) there is evidence that the defendant committed *only* the inferior offense. *Fernandez-Medina*, 141 Wn.2d at 454 (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). We find that Thomason has failed to establish the third prong.

With regard to the third prong, a trial court should only administer an instruction on an inferior degree offense "[i]f the evidence would permit a jury to rationally find a defendant guilty

of the lesser offense and acquit him of the greater.” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). The evidence must affirmatively establish the defendant’s theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt. *Fernandez-Medina*, 141 Wn.2d at 456. The trial court must examine all of the evidence presented at trial, not merely the defendant’s testimony. *Fernandez-Medina*, 141 Wn.2d at 456.

The jury convicted Thomason of second degree assault. The second degree assault statute states in relevant part: “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a). “Substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]” RCW 9A.04.110(4)(b). A person has “intent” when he or she “acts with the objective or purpose to accomplish a result which constitutes a crime.” Former RCW 9A.08.010(1)(a) (Laws of 1975, ch. 260, § 9A.08.010). Intent to commit a crime may be inferred from all the facts and circumstances of a case. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (quoting *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993)).

Thomason argues that the jury should have been instructed on third degree assault. The statute for that crime reads in relevant part:

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

.....



(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]

RCW 9A.36.031(1), (1)(f)

A person is criminally negligent if he “fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable [person] would exercise in the same situation.” Former RCW 9A.08.010(1)(d).

Reviewing the facts of the assault in the light most favorable to Thomason, the record establishes that Thomason struck Wilde with his fist after becoming angry with her for insulting his wife and daughter. At the time, both Thomason and Wilde were intoxicated. Thomason had just told his son that he thought Wilde was seeing other men. The blow fractured Wilde’s “left inferior orbital floor” and caused other injuries. RP (Nov. 24, 2008) at 124. Thomason testified that the strike was “instantaneous,” and Wilde testified that it was “out of the blue.” RP (Nov. 24, 2008) at 48, 115, 122, 124, 135. Thomason also agreed that he hit Wilde “on purpose.” RP (Nov. 24, 2008) at 125.

These facts unequivocally support Thomason’s conviction for second degree assault. A key distinction between second and third degree assault is the defendant’s state of mind while committing the crime. Second degree assault requires a defendant’s specific intent to inflict substantial bodily harm. RCW 9A.36.021(1)(a). A defendant may commit third degree assault merely by failing to be aware of a substantial risk of assault. RCW 9A.36.031(1), (1)(f); Former RCW 9A.08.010(1)(d). Thus, the burden was on Thomason to point to evidence that would support a finding that he acted less than intentionally. Here, Thomason agreed that he hit Wilde

in the face “on purpose” after an argument, which reveals his intent to assault Wilde. RP (Nov. 24, 2008) at 125. The additional facts that Thomason was intoxicated and that the punch was “instantaneous” simply do not support the conclusion that he acted without intent. RP (Nov. 24, 2008) at 115, 122, 124, 135. The fact that the assault followed quickly upon the insults only adds to the proof that Thomason acted intentionally. Thomason did not testify that he was so intoxicated that he did not know what he was doing.<sup>14</sup> Rather, he testified that he was angry at Wilde and purposefully punched her after her insults.

In sum, the record does not support Thomason’s assertion that he committed *only* the inferior offense of third degree assault. Therefore, Thomason was not entitled to instruction on third degree assault and the trial court did not err by declining to instruct the jury on that offense.

## II. Exceptional Sentences

Thomason argues that the trial court’s reasons for imposing his two exceptional sentences do not justify a departure from the standard range. We find that two of the five reasons provided by the trial court are “substantial and compelling reasons” that justify Thomason’s exceptional sentences. RCW 9.94A.535. Because the trial court may have imposed a different sentence on

---

<sup>14</sup> Thomason’s extensive reliance on *State v. Coates*, 107 Wn.2d 882, 892-93, 735 P.2d 64 (1987) is misplaced. In that case, our Supreme Court affirmed the trial court’s decision to preclude the jury from considering voluntary intoxication as a defense to third degree assault, reasoning that criminal negligence—the *mens rea* for that crime—is based on an objective standard that cannot be negated by a defendant’s subjective intoxication. 107 Wn.2d at 893. In contrast, the *Coates* court noted, knowledge and intent are subjective states of mind, and a “particular defendant may not act with intent or [knowledge]” due to intoxication. 107 Wn.2d at 892. *Coates* assuredly does not stand for the proposition that a defendant may *never* intend to commit a crime if he is intoxicated, as Thomason implies. Rather, it merely acknowledges that “intent” is measured by a subjective standard whereas negligence has an objective component.

the basis of these two reasons alone, we remand for resentencing.

The jury returned special verdicts finding that Thomason assaulted and unlawfully imprisoned Wilde with “deliberate cruelty.” CP at 84-85. Deliberate cruelty is “gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.” *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the crime. *Tili*, 148 Wn.2d at 369; accord *State v. Armstrong*, 106 Wn.2d 547, 550-51, 723 P.2d 1111 (1986). Once a jury returns a special verdict of deliberate cruelty, a trial court may impose a sentence outside the standard range—up to the statutory maximum—if the court finds “substantial and compelling” reasons justifying an exceptional sentence. RCW 9.94A.535, .537(3).

A. Standard of Review

We review a trial court’s imposition of an exceptional sentence in three steps. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); see RCW 9.94A.585(4). First, we analyze, under a clearly erroneous standard, whether the reasons given for the exceptional sentence are supported by the record. *Law*, 154 Wn.2d at 93 (quoting *State v. Ha’mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). Second, we engage in de novo review to determine whether those reasons are substantial and compelling reasons that justify a departure from the standard range. *Law*, 154 Wn.2d at 93 (quoting *Ha’mim*, 132 Wn.2d at 840). Third, we determine, under an abuse of discretion standard, whether the sentence is clearly too excessive or too lenient. *Law*, 154 Wn.2d at 93 (quoting *Ha’mim*, 132 Wn.2d at 840). Because Thomason does not assign error to his

38675-5-II

sentences on the basis that they are clearly too excessive, we do not address this argument.

B. Trial Court's Reasons for Exceptional Sentences

As a preliminary matter, Thomason correctly asserts that portions of three findings of fact are clearly erroneous.<sup>15</sup> However, the remaining portions of the three challenged findings are supported by the record and are not clearly erroneous. Unchallenged findings are verities on appeal. *State v. Eriksen*, 166 Wn.2d 953, 959 N. 5, 216 P.3d 382 (2009).

The more significant question in Thomason's appeal is whether there are "substantial and compelling" reasons justifying his exceptional sentences, a question that we review de novo. *RCW 9.94A.535; Law*, 154 Wn.2d at 93 (quoting *Ha'mim*, 132 Wn.2d at 840)). In its conclusions of law, the trial court gave the following reasons for Thomason's exceptional sentence:<sup>16</sup> (1) Wilde's injuries "are more than [the] substantial bodily harm" required for second degree assault and her "fracture is greater than the norm," (2) the assault was unprovoked, (3) the assault of Wilde while she lay on the ground was "deliberate cruelty,"<sup>17</sup> (4) Thomason exhibited

---

<sup>15</sup> The following list corrects the clearly erroneous portions of findings of fact 5, 7, and 9, which are the only findings to which Thomason assigns error and thus the only findings that we review under RAP 10.3(g):

- Finding 5: TRW was 14 years old—not 12—at the time of the crimes.
- Finding 5: Thomason did not "take control" of Wilde as she attempted to flee up the stairs; rather, she "shook him off." CP at 115; RP (Nov. 24, 2008) at 34.
- Finding 7: TRW—not Wilde—testified that Thomason called Wilde "filthy names" while Thomason restrained them. RP (Nov. 24, 2008) at 60.
- Finding 9: Although Thomason required Wilde to keep the bathroom door open, he did not insist on watching her on the toilet.

<sup>16</sup> The trial court's conclusions of law do not clearly state which reasons support which sentence. Additionally, although Thomason challenges some of the trial court's oral "findings" from the December 5 sentencing hearing, we only address the trial court's written findings since they embody the essence of the trial court's December 5 oral ruling.

<sup>17</sup> The trial court noted that the jury had not been asked to find that the victim was "particularly

deliberate cruelty by preventing Wilde from summoning aid for 45 to 60 minutes, including by hiding the cell phone, while Wilde “[bled] profusely,” (5) [TRW] witnessed Wilde being “dragged by the hair and detained,”<sup>18</sup> and (6) the above reasons cumulatively are “beyond the norm” of second degree assault and “violate[] the sense of decency particularly when the incident is prolonged by hiding the cell phone.” CP at 117. We analyze only the first five reasons are analyzed since the sixth reason is a restatement and summary.

1. Exceptional Sentence for Assault

The trial court’s first justification for Thomason’s exceptional sentence is impermissible. Injuries that “substantially exceed the level of bodily harm necessary to satisfy the elements of the offense” are an aggravating circumstance that the State must prove to a jury beyond a reasonable doubt. RCW 9.94A.535(3)(y), .537(3)(y). Here, the State did not submit this issue to the jury. Therefore, the trial court’s determination that Wilde’s injuries exceeded the norm cannot be a basis for imposing the exceptional sentence.

An “unprovoked” assault, the trial court’s second reason, is also insufficient to impose an exceptional sentence based on deliberate cruelty. CP at 117. This factor does not satisfy the standard that the “cruelty must go beyond that normally associated” with assault. *Tili*, 148 Wn.2d at 369. As Division One of this court has noted, an unprovoked attack is characteristic of “many, if not most assaults,” and therefore cannot support a finding of deliberate and extreme cruelty.

---

vulnerable,” which is an aggravating circumstance that the jury must find beyond a reasonable doubt. RCW 9.94A.535(3)(b), .537(3).

<sup>18</sup> TRW did not witness her mother being “dragged by the hair” so that portion of the trial court’s conclusions of law is clearly erroneous. CP at 117.

*State v. Kidd*, 57 Wn. App. 95, 105, 786 P.2d 847 (1990).

However, the trial court’s third and fourth reasons are “substantial and compelling” reasons that support Thomason’s exceptional sentence. Thomason attacked Wilde while she lay in her bed in a defenseless position after she had invited him inside her home as a guest. Such conduct exhibits cruelty that goes beyond that normally associated with assault. Additionally, Thomason prolonged Wilde’s suffering from the assault for a protracted period by not permitting her to seek medical attention as she bled profusely. *See Armstrong*, 106 Wn.2d at 551 (quoting former RCW 9.94A.390(1) (rejecting defendant’s argument that taking assault victim to hospital was a mitigating factor in sentencing because leaving the victim to suffer would have “manifested deliberate cruelty”). Moreover, Thomason took and hid TRW’s cell phone, the only available means that Wilde and TRW had to summon aid. Thomason’s actions inflicted physical, psychological, and emotional pain on Wilde and TRW.

The fifth reason that the trial court provided—that Thomason detained Wilde in front of her daughter—should not be considered with regard to Thomason’s sentence for assault because it directly pertains to the unlawful imprisonment of Wilde, an offense for which Thomason was separately charged. Thomason also asks us to disregard the trial court’s fourth reason on this basis as well. However, as discussed in the preceding paragraph, Thomason’s actions in prolonging Wilde’s suffering and preventing her from seeking help clearly exacerbated the effect of the assault.

Next, we must determine whether remand for resentencing is necessary since only two of the trial court's reasons for imposing the exceptional sentence for the assault conviction are "substantial and compelling." Remand is necessary when the trial court places significant weight on an inappropriate factor, or where some factors are inappropriate and the exceptional sentence significantly deviates from the standard range. *State v. Pryor*, 115 Wn.2d 445, 456, 799 P.2d 244 (1990). We need not remand for resentencing if we are confident that the trial court would impose the same sentence when considering only the valid reasons. *State v. Post*, 118 Wn.2d 596, 616, 826 P.2d 172, 837 P.2d 599 (1992).

We find that the trial court's third and fourth reasons justify an exceptional sentence. However, we are not confident that the trial court would have sentenced Thomason to 48 months for assault on the basis of these two reasons alone. Therefore, we remand to the trial court for resentencing on the assault conviction.

## 2. Exceptional Sentence for Unlawful Imprisonment

We also find that the trial court's fourth and fifth reasons are "substantial and compelling" reasons that justify imposing the exceptional sentence for Thomason's unlawful imprisonment of Wilde. Thomason prevented Wilde, who was bleeding profusely, from calling for help to treat her injuries. TRW witnessed Thomason unlawfully detain her mother. After Thomason left the house, Wilde and TRW had to search for about 20 minutes in order to find the phone. All the while, Wilde bled from her injury. Unlawful imprisonment is defined as "knowingly restrain[ing] another person." RCW 9A.40.040(1). Contrary to Thomason's assertion, the trial court's reasons are not inherent in the crime itself such that the legislature already considered them in



establishing the standard range for the crime.

As with the assault conviction, we find that the trial court's fourth and fifth reasons support an exceptional sentence for the unlawful imprisonment conviction. Again, because we cannot be confident that the trial court would have imposed a 48-month sentence for these two reasons alone, we remand to the trial court for resentencing on the unlawful imprisonment conviction.

### III. No Contact Order

Thomason argues that the 10-year no contact order protecting TRW<sup>19</sup> is unlawful because it exceeds the five-year maximum statutory sentence for unlawful imprisonment, the crime for which T.R.W was a victim. The State counters that TRW “was a witness to and victim of various crimes,” including the second degree assault of her mother, and the trial court therefore had authority to issue the order. Resp't's Br. at 7. We agree with Thomason and remand to the trial court for entry of an amended no contact order.

#### A. Standard of Review

No contact orders are “crime-related prohibitions”<sup>20</sup> that a trial court may impose as part of any sentence. Former RCW 9.94A.505(8) (Laws of 2006, ch. 73, § 6); *State v. Armendariz*, 160 Wn.2d 106, 119, 156 P.3d 201 (2007). We generally review the imposition of crime-related prohibitions for abuse of discretion. *Armendariz*, 160 Wn.2d at 110. In this case, however,

---

<sup>19</sup> Thomason does not challenge the 10-year no contact order protecting Wilde.

<sup>20</sup> A “crime-related prohibition” is an “order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . . .” Former RCW 9.94A.030(13) (Laws of 2008, ch. 276, § 309).

Thomason challenges the trial court's statutory authority to impose the challenged order, which is a question of law that we review de novo. *See Armendariz*, 160 Wn.2d at 110.

B. 10-year no contact order

No contact orders imposed under former RCW 9.94A.505(8) may not exceed the maximum statutory sentence for the defendant's crime. *Armendariz*, 160 Wn.2d at 120. Second degree assault is a class B felony with a maximum 10 years' confinement. RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). Unlawful imprisonment is a class C felony with a maximum five years' confinement. RCW 9A.40.040(2); RCW 9A.20.021(1)(c).

The trial court did not state its rationale for imposing the 10-year order protecting TRW. The trial court had clear legal authority to impose a five-year order protecting TRW as a victim of Thomason's unlawful imprisonment. Former RCW 9.94A.505(8); RCW 9A.40.040(2); RCW 9A.20.021(1)(c). Furthermore, the trial court had clear legal authority to impose a five-year no-contact order protecting TRW in her capacity as a witness to Wilde's unlawful imprisonment. RCW 9A.40.040(2); RCW 9A.20.021 (1)(c); *Armendariz*, 160 Wn.2d at 120 (upholding five-year no contact order protecting witness of class C felony); *accord State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001). However, TRW did not witness the assault<sup>21</sup> so the 10-year order is improper.

---

<sup>21</sup> TRW was sleeping in her bedroom upstairs when Thomason assaulted her mother. TRW did not wake until Thomason threw her mother onto her bed. Although TRW witnessed the assault's gruesome effects—including her mother's eye "gushing out blood"—and witnessed Thomason grabbing Wilde by the wrists and pushing her into the bedroom, it cannot be fairly said that TRW witnessed the second degree assault. RP (Nov. 24, 2008) at 55.

38675-5-II

We affirm in part, reverse in part and remand for resentencing and entry of an amended no contact order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.