No. 100786-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

NAVIN AVERY MILKO,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 55267-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 18-1-04203-0
The Honorable Philip Sorensen, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Navin Avery Milko, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the published portion of the opinion of the Court of Appeals, Division 2, case number 55267-1-II, which was filed on March 15, 2022. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate Navin Milko's constitutional right to confront witnesses by allowing two State's witnesses to testify remotely via video conference?
2. Was allowing two out-of-state witnesses to testify remotely via video conference necessary to further the valid public policy of ensuring the health and safety of trial participants and the general public

during the COVID-19 pandemic, where their reasons for not appearing in person were based primarily on their own convenience or individual discomfort with traveling, but where all of the other witnesses, including another who traveled from out-of-state, were able to take precautionary measures and safely testify in person?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Navin Avery Milko with twelve crimes related to five incidents at two locations on five different days. (CP 16-25) The charges were as follows:

INCIDENT DATE	LOCATION	VICTIM	RELATED CHARGES	COUNT
10/18/18	5703 128th St. E	B.P.	Rape 1º Burglary 2º	1 3
10/17/18	5703 128th St. E	A.Q.	Att. Rape 1º Burglary 2º	2 4
08/26/18	12602 62nd Ave E	A.B.	Burglary 1º Att. Kidnapping 1º Att. Robbery 1º Felony Harassment	5 6 7 8

08/24/18	12602 62nd Ave E	C.D.	Att. Rape 1º Att. Robbery 1º Att. Burglary 1º	9 10 11
09/24/18	12602 62nd Ave E	K.T.	Att. Kidnapping 1º	12

(CP 16-25) The State also alleged that the offenses were aggravated on several grounds: (1) that the offenses were committed shortly after being released from incarceration; (2) that the presumptive sentence is clearly too lenient due to unscored misdemeanor or foreign criminal history; (3) and that the multiple current offenses results in some crimes going unpunished. (CP 16-25)

The jury found Milko not guilty of the attempted robberies charged in counts seven and ten (against A.B. and C.D.), but found Milko guilty of the remaining charges and aggravators. (CP 339-63; 08/03/20 RP 9-13)[1] The trial court imposed an exceptional sentence of 602 months. (CP 525, 527-28, 566-71; 10/02/20 RP 18-19,

[1] The transcripts will be referred to by the date of the proceeding contained therein.

20) Milko timely appealed. (CP 551) The Court of Appeals affirmed Milko's conviction and sentence.

B. SUBSTANTIVE FACTS

B.P., A.Q., A.B., C.D., and K.T. all work as paid "escorts," otherwise known as prostitutes. (07/15/20 RP 45; 07/16/20 RP 12, 80; 07/20/20 RP 7, 94) They do not walk the streets, but instead advertise their services on personal websites or on websites known as sources for sexual services. (07/15/20 RP 47, 49-50; 07/16/20 RP 15-16, 83-84; 07/20/20 RP 11) The women follow the same general process for arranging "dates" with clients. They communicate through email or text, or occasionally talk on the telephone. (07/15/20 RP 52, 53; 07/16/20 RP18; 07/20/20 RP 12, 96) They arrange a meeting place, and agree to their fee upfront. (07/15/20 RP 56, 58, 61; 07/16/20 RP 20, 90-91; 07/20/20 RP 13) The women all have certain acts they will and will not engage in, and do not engage in any sex acts until after they have

received payment from the client. (07/15/20 RP 62-63, 64-65, 67; 07/16/20 RP 21, 23, 90-91; 07/20/20 RP 14, 96-97, 98)

Milko contacted C.D. on the night of August 24, 2018 through her website, and requested a two-hour booking with C.D. and a second woman. (07/15/20 RP 77) C.D. and her friend agreed to meet Milko at an address he provided, 12602 62nd Avenue East in Puyallup. (07/15/20 RP 77, 79, 94; Exh. 125) Milko came outside to meet C.D., and together they went into the house while the second woman finished putting on her makeup in the car. (07/15/20 RP 80-81)

A total lack of furniture inside the house made C.D. suspicious, and she questioned Milko about it. (07/15/20 RP 72, 82-83) According to C.D., Milko pulled out a knife and told her she was getting robbed. (07/15/20 RP 72, 84) C.D. told Milko that she only had $20.00, and he responded, “"Well, if you’re not getting robbed, you are

getting raped." (07/15/20 RP 73) C.D. testified that Milko held the knife to her abdomen, so she began bluffing and blustering in the hope that he would back off and not hurt her. (07/15/20 RP 73-74, 88, 89) C.D.'s tough talk seemed to surprise Milko, and C.D. was able to walk outside and get into her car and drive away. (07/15/20 RP 89)

A few days later, C.D. decided she wanted to "strike vengeance" against Milko, so she and a male friend went back to the house to look for him. (07/15/20 RP 99, 100) C.D. armed herself with a tire iron and her friend armed himself with a machete. (07/15/20 RP 104) They saw Milko walking his dog in the neighborhood. (07/15/20 RP 103) When they confronted Milko, he ran away. (07/15/20 RP 104, 181) The ensuing chase ended with Milko's dog being run over by a passing car and C.D.'s friend being cut by Milko, who was forced to defend himself against C.D.'s machete-wielding friend. (07/15/20

RP 107-08, 122, 183) Milko later told his mother that C.D. and her friend attacked him and tried to steal the dog. (07/23/20 RP 71)

Milko contacted A.B. on the night of August 26, 2018, and asked A.B. to meet him at the 12602 62nd Avenue East residence. (07/16/20 RP 25) Milko greeted A.B. from the porch when she arrived, and he followed A.B. inside. (07/16/20 RP 26) According to A.B., she turned around to talk to Milko, and saw that he was holding a knife. (07/16/20 RP 26) She asked Milko if he was robbing her, and Milko said no and told her to go into the bathroom. (07/16/20 RP 26) A.B. tried to leave but Milko grabbed her and pulled her towards the bathroom. (07/16/20 RP 29-30) The knife cut A.B.'s hand during the struggle, and she bled on the floor of the bathroom. (07/16/20 RP 26, 30; Exh. 142-45) A.B. slipped and fell onto the floor, and Milko released her and told her to "get the fuck out of here before I kill you." (07/16/20 RP 30)

Milko contacted K.T. on the night of September 24, 2018 and she agreed to meet him at the 12602 62nd Avenue East residence. (07/16/20 RP 95, 96) Milko came outside and opened the gate to let her into the property. (98) The property was dark and the house looked empty, so K.T. was apprehensive. (07/16/20 RP 98-99) Milko told K.T. that he was doing construction on the house and lived in the lower level. (07/16/20 RP 99) He told her she could walk along the side of the house to get to the entrance. (07/16/20 RP 100) K.T. suggested that they go to a hotel instead, but Milko insisted that they could go to his level of the house. (07/16/20 RP 99-100)

K.T. testified that she took a step to the side so she could look around the corner of the house to where he was telling her to go. (07/16/20 RP 101) According to K.T., Milko then grabbed her by the arm. (07/16/20 RP 101-02) She could see that he was holding something in his hand and he had a “murderous” look in his eyes.

(07/16/20 RP 102) K.T. screamed and ran away. (07/16/20 RP 102-03)

The house located at 12602 62nd Avenue East is owned by Caleb Booth and his family. (07/22/20 RP 138) The house is used as a rental property, but will sometimes be vacant for several months at a time. (07/22/20 RP 138-39) It was vacant during the summer of 2018. (07/22/20 RP 142-43) Booth did not give anyone permission to be inside his house during that time. (07/22/20 RP 146) Booth would occasionally check on the property, and during these visits he noticed broken windows, found blood in the bathroom, and a woman he assumed was a prostitute stopped by. (07/22/20 RP 143, 152)

Joshua Newton can see the Booth house from his home on 126th Street. (07/22/20 RP 107, 111) He saw Milko enter and exit the Booth property a number of times during the Summer of 2018. (07/22/20 RP 110, 114, 122,

123, 124-25, 126) He also saw "provocatively" dressed women arrive and leave. (07/22/20 RP 118) He assumed the home was being used for drugs and prostitution. He called the police several times, tried to secure the broken gate, and put up signs telling trespassers to keep out, but the activity continued for several months until it abruptly stopped. (07/22/20 RP 109, 119, 120-21, 122-23)

Milko contacted A.Q. on the night of October 17, 2018, and asked her to meet him at a house at 5703 128th Street East in Puyallup. (07/20/20 RP 17, 19, 22) Milko met her outside and told her his residence was in the back of the house. (07/20/20 RP 17) As they walked along the side yard, Milko pushed A.Q. against the fence and drew a knife. (07/20/20 RP 17) A.Q. began to scream, and Milko told her to "shut the fuck up." (07/20/20 RP 18, 24) A.Q. continued to scream, and Milko punched her on her lip and ran away. (07/20/20 RP

18, 56)

Milko contacted B.P. on the night of October 18, 2018 and asked her to meet him at the 5703 128th Street East house. (07/20/20 RP 99, 113) Milko came from behind the house and escorted her to the backyard porch. (07/20/20 RP 99, 113) When B.P. turned to face Milko, she saw that he had a knife. (07/20/20 RP 100) According to B.P., Milko asked her if she wanted to die, then put a knife to her throat and told her to kneel down. (07/20/20 RP 100) B.P. testified that Milko forced her to perform oral sex on him, then he forced her to turn around and he vaginally penetrated her from behind. (07/20/20 RP 100, 102) After Milko was done, he told her to leave. (07/20/20 RP 103-04) B.P. testified they never discussed what acts she would perform, and Milko did not pay her. (07/20/20 RP 104-05)

B.P. went to the hospital and registered nurse Jenny Biddulph conducted her sexual assault

examination. (07/21/20 RP 18) Swabs that Biddulph collected during the exam were later tested for DNA and matched to reference samples from B.P. and Milko. (07/21/20 RP 24, 26; 07/28/20 RP 134) Biddulph also testified that B.P. told her that Milko "pulled out a knife and stuck it to my throat and told me to do whatever he said or he was going to kill me, and then he pulled out his wiener and made me get on my knees and suck it. And then he stood me up, turned me around, made me bend over and pulled my pants downward. He raped me." (07/21/20 RP 21)

The house located at 5703 128th Street East belongs to an elderly couple, Marvin and Virginia Keiper. (07/21/20 RP 101-02) They were home on the nights of October 17 and 18, but were neither awakened by nor aware of any incidents occurring on their property. (07/21/20 RP 106, 107) Virginia Keiper did notice that the gate, which they always leave closed to secure their dog,

was open three mornings in a row. (07/21/20 RP 106) The Keipers had not given anyone permission to enter their yard. (07/21/20 RP 107)

Milko was involved in two similar incidents committed in Florida in 2010. One of the victims, J.A., testified that she worked as an escort or prostitute in Florida. (07/21/20 RP 49) Milko contacted her and they agreed to meet at an address Milko suggested. (07/21/20 RP 49)54, 55) The house was "run down" and in "terrible" shape. (07/21/20 RP 55, 60) After he escorted her inside, Milko held J.A. at knifepoint and forced her to give him oral sex. (07/21/20 RP 55, 57) Then Milko ordered J.A. to turn around and he penetrated her from behind. (07/21/20 RP 60)

Michael Zimmerman is a police officer with the City of Temple Terrace in Florida. (07/29/20 RP 10) He investigated the case involving J.A. (07/29/20 RP 17) Officer Zimmerman also questioned Milko about a similar

incident where C.M., a prostitute, was raped at knifepoint. (07/29/20 RP 23-24, 26) Milko acknowledged committing that crime as well. (07/29/20 RP 30, 35) Milko was convicted of the crime against C.M, served time, and was released from Florida Department of Corrections' custody on August 19, 2018. (07/29/20 RP 48; CP 153, 304)

When Milko was questioned by the investigating detective, he acknowledged that he had arranged dates with the women in order to engage in consensual sex, and that he had used the Booth and Keiper properties for the dates. (07/28/20 RP 21-25)

V. ARGUMENT & AUTHORITIES

The issues raised by Milko's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

The Court of Appeals held that "the trial court did

not err when it allowed the two out-of-state witnesses to testify by video based on necessity for public policy reasons because they both had significant health-related concerns about contracting COVID-19 if forced to travel to Washington by air." (Opinion at 1-2) The Court was incorrect. The admission of J.A.'s and Nurse Biddulph's testimony remotely via internet video conference violated Milko's right to confront witnesses. Because the State cannot demonstrate that the error was harmless beyond a reasonable doubt, reversal is required.

A. HEARING ON USE OF REMOTE VIDEO CONFERENCE TESTIMONY

Milko's trial began in June of 2020, as the COVID-19 pandemic was ongoing and Pierce County was still reporting relatively high infection rates. (CP 510, Findings 4 and 5) The State moved the court to permit two out-of-state witnesses, J.A. and SANE nurse Jenny Biddulph, to testify remotely at trial via video conferencing. (CP 180-

90; 07/07/20 RP 7, 9-10) The State asserted that both witnesses were material and necessary to the State's case. (CP 180-81; 07/07/20 7) According to the State, J.A.'s testimony was necessary to help establish Milko's intent or motive during the Washington incidents, and Biddulph's testimony was necessary because she conducted the sexual assault examination of B.P.. (07/07/20 RP 7, 11; 04/23/20 RP 8; CP 180-81)

Both witnesses were reluctant to travel during the pandemic. At a pretrial hearing held to test the quality of their remote video testimony, J.A. explained that she was concerned about traveling to Washington because she had asthma, diabetes and high blood pressure. (07/14/20 RP 4, 23-24) She explained that asthmatics cannot wear masks because it constricts their breathing. (07/14/20 RP 26)

Biddulph explained that she was concerned about traveling and potentially exposing herself and her family

to the virus. (07/14/20 RP 8-9) Biddulph did not have any underlying health issues, but one of her children was less than one year old and did not have a fully developed immune system. (07/14/20 RP 18) She was also concerned that she would be required to quarantine upon return, and her extended family was not available to assist with child care. (07/14/20 RP 10) Biddulph was not working at the time, and her husband was participating in on-line school. (07/14/20 RP 17)

Milko objected to allowing either witness to testify remotely. (07/07/20 RP 81; 07/14/20 RP 34-36; CP 170-74) But the trial court ruled that they could, finding that their concerns were "warranted given the current circumstances involving COVID-19." (07/07/20 RP 75, 80; 07/14/20 RP 37-39; CP 511 (Finding 14), CP 512 (Finding 18)) The court's written conclusions of law state:

> 1. There is a compelling interest that has been demonstrated that due to the COVID-19 pandemic, there is a need to maintain

appropriate social distancing in the courtroom.

2. This compelling interest has been recognized by the emergency proclamations made by Governor Jay Inslee and the Washington Supreme Court.

…

4. As a result, there is a compelling interest requiring the court to conduct trial in a manner that will protect the health and safety of the parties, jurors, counsel, court staff, witnesses, and the public.

5. This compelling interest in health and safety in the midst of a global pandemic is an important public policy that requires the court to utilize remote testimony to ensure the safety of witnesses.

6. The utilization of remote testimony necessarily furthers this important public policy of ensuring the health and safety of the parties, jurors, counsel, court staff, witnesses and the public.

7. The utilization of technology to accomplish remote testimony provides clear evidence to the court that the reliability of the testimony is assured.

8. The State's motion to authorize remote testimony is granted.

(CP 514-15)

B. THE USE OF REMOTE VIDEO CONFERENCE TESTIMONY VIOLATED MILKO'S CONFRONTATION RIGHTS

While preventing the spread of COVID-19 during this global pandemic is inarguably an important and compelling public policy, allowing J.A. and Biddulph to testify remotely was not necessary to further that policy, and therefore violated Milko's right to confront these witnesses face-to-face.

An accused person has both state and federal constitutional rights to confront witnesses. Washington's Article I, section 22 guarantees an accused "shall have the right... to meet the witnesses against him face to face[.]" Likewise, the Sixth Amendment of the Federal constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Live testimony is preferred because face-to-face confrontation enhances the

accuracy of fact finding. *State v. Rohrich*, 132 Wn.2d 472, 479, 939 P.2d 697 (1997); *accord Coy v. Iowa,* 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). Indeed, witnesses are often judged by the "manner in which they enter the courtroom, their willingness to make eye contact with trial participants, and their ability to control nervous gestures as they deliver their testimony." James W. Kraus, *Virtual Testimony and Its Impact on the Confrontation Clause,* 34 CHAMP 26, 29 (May 2010).

This confrontation requirement may be satisfied absent a physical, face-to-face confrontation only where (1) the "denial of such confrontation is necessary to further an important public policy," and (2) "the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *see also United States v. Carter*, 907 F.3d 1199, 1205-06 (9th Cir. 2018). Before dispensing with the

accused's right, the trial court must engage in a case specific, individualized determination of the necessity for testimony by other means. *Craig*, 497 U.S. at 855-56.[2]

The first prong of the *Craig* test requires the State to show both (1) the presence of an important public policy, and (2) that remote testimony necessarily furthers the public policy. *State v. Sweidan*, 13 Wn. App. 2d 53, 72, 461 P.3d 378 (2020). While the public policy of preventing the spread of a serious respiratory virus is certainly valid, allowing J.A. and Biddulph to testify remotely was not necessary to further this policy.

In very limited circumstances, prosecution witnesses have been permitted to testify remotely due to severe illness. The *Sweidan* Court noted that "[m]any decisions support the proposition that an illness of the

[2] This Court reviews constitutional questions, including claims under the confrontation clause, de novo. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

witness suffices to permit a witness to testify by video." 13 Wn. App. 2d at 70 (discussing *Horn v. Quarterman*, 508 F.3d at 313 (5th Cir. 2007); *Harrell v. Butterworth*, 251 F.3d at 931 (11th Cir. 2001), *State v. Sewell*, 595 N.W.2d 207 (Minn. Ct. App. 1999); and *Stevens v. State*, 234 S.W.3d 748 (Tex. App. Fort Worth 2007)). But no decision was found to date where a court has permitted virtual testimony based on the prospect that a witness might become ill in the future.

Nobody would seriously dispute that a witness who was actually suffering from the coronavirus should be permitted to testify remotely. But here, the trial court permitted remote testimony for witnesses that were not sick, but merely risked becoming sick if they provided in-court testimony. And the Court of Appeals agreed, finding that the "risk of contracting a virus that had killed hundreds of thousands of people was sufficient to establish necessity." (Opinion at 13) The Court of

Appeals is incorrect, because mere speculation is insufficient to establish necessity.

While the general concerns that J.A. and Biddulph had about travel may have been "warranted," they did not justify special treatment. Other witnesses, including Detective Zimmerman who traveled to Washington from Florida, appeared in the courtroom in person to testify. Counsel, the judge, the jury, and court staff came to the courthouse every day for trial. They were undoubtedly concerned for their health as well, but they took precautionary measures and came to court to do the important and constitutional work that was required. J.A.'s and Biddulph's concerns did not present a "necessity" to forego Milko's confrontation rights.

Travel and post-travel quarantine would have been inconvenient, but "[b]ecause the use of video conference testimony implicates an accused's critical constitutional right, we do not consider the word 'necessity' to connote

mere convenience[.]" *Sweidan*, 13 Wn. App. 2d at 72. Furthermore, an unwillingness to travel is also not a sufficient reason to dispense with the physical presence requirement. *Sweidan*, 13 Wn. App. 2d at 69 (citing *Carter*, 907 F.3d at 1208); *United States v. Yates*, 438 F.3d 1307, 1317-18 (11th Cir. 2006). And J.A.'s assertion that she could not take the precautionary step of wearing a mask while traveling because she was asthmatic is not supported by medical research.[3]

The Court of Appeals also Court asserted that "[c]ases from other jurisdictions support the conclusions regarding the necessity of Biddulph's and JA's video testimony." (Opinion at 12) But the Court overlooked the plethora of cases concluding the opposite. For example,

[3] The CDC's web site specifically states that, "If you have asthma, you can wear a mask." *Guidance for Wearing Masks*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html (viewed 06/22/2021).

in *State v. Tate*, 969 N.W.2d 378 (Minn. Ct. App. 2022), the Minnesota Court of Appeals held that a generalized concern regarding the COVID-19 pandemic is not a sufficient furtherance of an important public policy to dispense with a defendant's right to confront a witness face-to-face.

In *United States v. Pangelinan*, 2020 WL 5118550 at *4 (US Dist. Ct. D. Kan. 2020), the United States District Court in Kansas held that, although two witnesses were undergoing medical treatment and resided with children or elderly persons who had underlying health issues, there was no evidence that they are physically unable to travel, therefore "the government has not shown that it is necessary to present the witnesses' testimony by video to further important public policies".

In *United States v. Casher*, 2020 WL 3270541 at *3 (US Dist. Ct. D. Mont. 2020) the United States District Court in Montana held that, although witness had medical

conditions that placed him at high risk of complications if he were to contract COVID-19, such risks "do not represent a 'necessity' to forego physical confrontation," where the witness had not contracted COVID-19 and did not have another ailment preventing him from traveling and physically appearing.

And in *State v. Comacho*, 309 Neb. 494, 960 N.W.2d 739, cert. denied, 142 S. Ct. 501 (2021), the Supreme Court of Nebraska found that there was a necessity for remote testimony, but only because "the witness had actually tested positive for COVID-19 and was experiencing symptoms" and because the "main purpose of [the witness'] testimony was to translate portions of the phone calls in which Comacho spoke in Spanish," and therefore "was not testimony in which an assessment of credibility was as vital or as nuanced as it would be for testimony by the victim of the crime charged or by an eyewitness."

Even though there exists the valid public policy of preventing the spread of COVID-19, the courthouse was open and trials were being held in person. Excusing only J.A. and Biddulph from testifying in person was not necessary to further the goal of this public policy. Accordingly, the trial court erred when it concluded that the "utilization of remote testimony necessarily furthers [the] important public policy of ensuring the health and safety of the parties, jurors, counsel, court staff, witnesses, and the public." (CP 515) Allowing the State to present their testimony via video conferencing violated Milko's constitutional right to confront these witnesses face-to-face.

C. THE ERROR IN ALLOWING THE REMOTE TESTIMONY WAS NOT HARMLESS.

Confrontation clause violations are subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "[I]f trial error is of

constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Watt*, 160 Wn.2d at 635. In making this determination, this court "looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Watt*, 160 Wn.2d at 636.

The State cannot meet its burden here. Milko was charged with three counts of burglary and one count of attempted burglary. (CP 16-25) To convict, the State had to prove that Milko intended to commit a felony while on the Booth or Keiper properties. (CP79, 80, 84, 87, 88) Milko was also charged in six different counts with

attempting to commit rape, kidnapping, or robbery. (CP 16-25) To convict, the State had to prove that Milko intended to commit the completed felony crime. (CP 77, 78, 89-93, 398-402) Milko's intent was therefore a critical issue for the jury to consider.

Testimony from J.A. describing a strikingly similar incident was specifically admitted to bolster the State's argument that Milko intended to commit the various crimes.[4] The prosecutor reminded the jury of this purpose several times during closing arguments, and relied heavily on this evidence to establish Milko's intent:

- "[A]nd you heard about the incidents that the defendant was involved in in Florida. As the Judge instructed, you can consider these incidents when considering Navin Milko's intent in these incidents, his common scheme or plan … you do have that ability to relate those Florida incidents to make those determinations when you try to decide what -- what was the

[4] The limiting instruction given to the jury stated that the evidence "was offered by the State to attempt to prove identity and/or a common scheme or plan and/or Modus operandi and/or intent." (CP 370)

defendant's intent in this case …. You can use those Florida incidents to make that decision." (07/30/20AM RP 19-20)

- "[A]s with all of these crimes, you can use those Florida incidents that were discussed to determine his intent, his modus operandi, his identity and his common scheme or plan." (07/30/20AM RP 34)

- "With regard to Ms. Quimby's incident, again, defense counsel suggests that his intention was not to rape her. Again, I am going to keep harping on this because it is part of the case, that you can use his Florida incidents to make that decision, to make the decision of what he intended to do, that it was him, and that he had the same MO that he did when he was 15 and 16." (07/30/20PM RP 35)

And Biddulph's testimony recounting B.P.'s description of the single completed rape charge only served to bolster B.P.'s credibility.

The jury was not able to observe these witnesses in person, and to judge their credibility. Considering that J.A.'s and Biddulph's testimony was highly prejudicial, and was relied on by the State to enhance the alleged victims' credibility and as evidence of Milko's propensity

to commit crimes, the violation of Milko's confrontation rights was not harmless beyond a reasonable doubt. Reversal is required.

VI. CONCLUSION

The trial court violated Milko's right to confront witnesses by allowing two witnesses to testify remotely by video conference. Because the error was not harmless beyond a reasonable doubt, reversal is required. This Court should accept review, and reverse and remand Milko's case for a new trial.

I hereby certify that this document contains 4775 words, excluding the parts of the document exempted from the word count, according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: April 1, 2022

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Attorney for Petitioner Navin Avery Milko

CERTIFICATE OF MAILING

I certify that on 04/01/2022, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Navin Avery Milko, DOC# 367067, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Navin Avery Milko*, No. 55267-1-II

Filed
Washington State
Court of Appeals
Division Two

March 15, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NAVIN AVERY MILKO, Appellant.	No. 55267-1-II PART PUBLISHED OPINION

MAXA, P.J. – Navin Milko appeals his multiple convictions arising from five incidents in which he accosted paid escorts he had arranged to meet. Specifically, he challenges on confrontation clause grounds the trial court's ruling allowing two out-of-state witnesses to testify by video because of COVID-19 concerns. In a statement of additional grounds (SAG), Milko challenges his convictions and his exceptional sentence.

A criminal defendant's right to have witnesses physically present at trial is meaningful and important. But it is not an indispensable element of the constitutional right of confrontation, and may be overridden when (1) "excusing the physical presence of the particular witness is necessary to further an important public policy" and (2) "the reliability of the testimony is otherwise assured." *State v. Foster*, 135 Wn.2d 441, 466, 957 P.2d 712 (1998). The trial court entered findings supporting both prongs of this test with regard to the two witnesses.

We hold that the trial court did not err when it allowed the two out-of-state witnesses to testify by video based on necessity for public policy reasons because they both had significant

health-related concerns about contracting COVID-19 if forced to travel to Washington by air. In the unpublished portion of this opinion, we reject Milko's SAG claims. Accordingly, we affirm Milko's convictions and sentence.

FACTS

Background

In 2018, Milko on five separate occasions contacted women who worked as paid escorts and arranged to meet them at houses in Puyallup that he did not live in or own. When each woman arrived, Milko displayed a knife in an attempt to take their money or to rape them.

Milko raped one woman, BP. BP was examined at the hospital by Jenny Biddulph, a sexual assault nurse examiner, who completed a rape kit. A forensic scientist later confirmed that the samples from the rape kit matched Milko's DNA. The police eventually detained Milko, who admitted during a police interview that he had sex with BP.

The State charged Milko with 12 felony offenses related to the five incidents and five victims: one count of first degree rape of BP, two counts of second degree burglary of BP and a woman named AQ, two counts of attempted first degree rape of AQ and a woman named CD, one count of first degree burglary of a woman named AB, two counts of attempted first degree kidnapping of AB and a woman named KT, two counts of attempted first degree robbery of AB and CD, one count of attempted first degree burglary of KT, and one count of felony harassment of AB. The State also alleged three aggravating factors.

In 2009 and 2010, Milko had engaged in two similar incidents in Florida involving paid escorts. There, Milko had contacted a woman named JA and another woman on separate occasions and asked them to meet him at a house that he did not live in or own. Milko raped both women at knifepoint. Milko pled guilty to charges related to both incidents.

Request to Allow Video Testimony

Milko's trial was set for July 2020, after COVID-19 had been declared a global pandemic and a national emergency in the United States. In February 2020, Governor Jay Inslee had proclaimed a state of emergency in Washington. He issued a number of proclamations designed to help curb the spread of COVID-19. The Supreme Court ordered all courts to follow the most protective public health guidance applicable in their jurisdiction and to use remote proceedings for public health and safety whenever appropriate.

During this state of emergency, the Center for Disease Control and Prevention (CDC) and the Washington Department of Health recommended social distancing measures of at least six feet between people and encouraged vulnerable individuals to avoid public spaces. The CDC encouraged people to avoid traveling because travel increased a person's chance of getting infected and spreading COVID-19. The CDC noted that older adults and people of any age with serious underlying medical conditions, such as diabetes and asthma, were at a higher risk for severe illness from COVID-19.

Before trial, Biddulph and JA informed the State that they were not able to fly to Washington to give their trial testimony in person because of significant health concerns related to COVID-19. Biddulph had moved to Virginia since examining BP and JA now lived in North Carolina. The State requested that the trial court allow Biddulph and JA to testify remotely by two-way video. In its request for video testimony, the State included several exhibits related to the pandemic, declarations from Biddulph and JA, and a letter from Biddulph's nurse practitioner. The court tentatively granted the motion, subject to an offer of proof as to why Biddulph and JA could not testify in person and a test run of the video and audio set-up.

The trial court held a hearing where it tested the video and audio equipment for remote testimony. Biddulph and JA both provided testimony about their concerns about flying to Washington, and the State and Milko questioned them about why they could not testify in person.

Biddulph stated in her declaration and at the hearing that she was concerned about flying because it would place her and her family at a significantly higher risk of exposure to COVID-19. Biddulph explained that she had three children and a husband who was attending school. She stated that she had stopped working as a nurse for her family's safety and to take care of her children, including a one-year-old baby who required specialized care due to feeding and weight gain issues. Biddulph's health care provider stated in a letter that it was not safe for Biddulph to travel because she had an infant at home.

Biddulph also stated that she and her husband had no local support system because their families lived abroad and that there would be no one available to take care of their children if either of them contracted COVID-19 or if she was to comply with the Virginia Department of Health's recommendation to self-quarantine for two weeks after returning home.

JA stated in her declaration and at the hearing that she was concerned about flying from South Carolina to Washington while wearing a mask because she had asthma, which made her a high-risk individual who was vulnerable to suffering severe health complications if she contracted COVID-19. She also explained that she could not wear a mask for a long period of time because wearing a mask constricted her breathing. She stated that her doctor had suggested that she avoid traveling or comingling around other people because of her status as a high-risk person. JA explained that she also had hypertension and diabetes, which were two additional medical conditions that made her a high-risk person.

The trial court granted the State's request to allow Biddulph and JA to testify remotely and entered detailed findings of fact and conclusions of law.

The court made the following finding regarding Biddulph:

> 15. The court finds that Ms. Biddulph's testimony is necessary and that she cannot travel to Washington to testify because travel will place her at a significantly higher risk of exposure to the virus and that, in turn, will require her to quarantine, which she lacks the wherewithal to do while maintaining custody of her dependent children. Live testimony by Ms. Biddulph will place her and her children at an unreasonable risk of family separation and financial hardship.

Clerk's Papers (CP) at 512.

The court made the following finding regarding JA:

> 18. The court finds that J.A.'s testimony is necessary. The court finds that J.A.'s health concerns are warranted given the current circumstances with COVID-19. The court also finds that J.A.'s health is currently compromised, and she is at a higher risk of serious medical complications should she contract COVID-19. The court also finds that the witness cannot travel to Washington to testify because her health does not permit her to abide by airline mask requirements.

CP at 512.

The court entered the following conclusions of law:

> 1. There is a compelling interest that has demonstrated that due to the COVID-19 pandemic, there is a need to maintain appropriate social distancing in the courtroom.
>
> 2. This compelling interest has been recognized by the emergency proclamations made by Governor Jay Inslee and the Washington Supreme Court.
> . . . .
>
> 4. As a result, there is a compelling interest requiring the court to conduct trial in a manner that will protect the health and safety of the parties, jurors, counsel, court staff, witnesses, and the public.
>
> 5. This compelling interest in health and safety in the midst of a global pandemic is an important public policy that requires the court to utilize remote testimony to ensure the safety of witnesses.
>
> 6. The utilization of remote testimony necessarily furthers this important public policy of ensuring the health and safety of the parties, jurors, counsel, court staff, witnesses, and the public.

CP 514-15.

The court also entered the following findings of fact regarding the technology used to present the remote testimony:

> 22. Using an enhanced audio system in trial, the audio presentation of witnesses during trial was sufficient to allow the parties and the jurors to hear and understand what was being said by the witnesses, and it allowed the court reporter to make an adequate record of the language being used. The audio presentation allowed parties and the jurors to understand the words, emotions, speech patterns, and articulation of each witness.
> . . . .
>
> 26. The technology utilized during each witness' testimony provided the functional equivalent of the temporal and physical proximity of face-to-face testimony.

CP at 513-14. The court concluded that "[t]he utilization of technology to accomplish remote testimony provides clear evidence to the court that the reliability of the testimony [was] assured." CP at 515.[1]

Jury Trial

At trial, the five victims and several investigating officers testified in person about the incidents giving rise to the charges against Milko.

Biddulph testified by two-way video about examining BP and completing a rape kit for her. JA testified by two-way video about Milko contacting her for her paid escort services in Florida and raping her at knifepoint. The trial court instructed the jury that the State was offering JA's testimony only to establish identity, a common scheme or plan, and/or modus operandi.

The jury found Milko guilty of all charges except for attempted first degree robbery of AB and CD and found in special verdict forms the existence of certain aggravating factors.

[1] The trial court later entered amended findings of fact and conclusions of law that included the findings and conclusions quoted above.

Milko appeals his convictions and sentence.

ANALYSIS

Milko argues that the trial court violated his constitutional right to confront Biddulph and JA by allowing them to testify by video. We disagree.

A. LEGAL PRINCIPLES

The confrontation clause of the Sixth Amendment to the United States Constitution provides that a person accused of a crime has the right "to be confronted with the witnesses against him." Article I, section 22 of the Washington Constitution states that an "accused shall have the right . . . to meet the witnesses against him face to face."

The United States Supreme Court in *Maryland v. Craig* addressed whether the Sixth Amendment prohibited a child witness in a child abuse case from testifying by one-way closed circuit television. 497 U.S. 836, 840, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Court acknowledged that having witnesses physically present at trial – face-to-face-confrontation – was one of the core elements of the confrontation clause. *Id.* at 846-47. However, the Court stated that face-to-face confrontation was only a "*preference*," and the preference " 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.* at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243, 15 S. Ct. 337, 39 L. Ed. 409 (1895)).

As a result, the Court stated that "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Craig*, 497 U.S. at 849-50. However, the Court emphasized that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy

and only where the reliability of the testimony is otherwise assured." *Id.* at 850. A procedure that does not require face-to-face presence of a witness does not violate the confrontation clause if it "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Id.* at 857.

Our Supreme Court in *Foster* also addressed a child witness testifying through one-way closed circuit television and held that such a procedure did not violate the Washington Constitution. 135 Wn.2d at 444. The court discussed *Craig* at length, and concluded that in this context the right to confrontation under article I, section 22 of the Washington Constitution was identical to that right under the Sixth Amendment. *Id.* at 466.

The court in *Foster* agreed with the analysis and approach adopted in *Craig*:

> The confrontation clauses of the state and federal constitutions guarantee the right of an accused to confront witnesses against him or her "face to face." This is a preferred right of physical presence, or "face-to-face" confrontation, which may be dispensed with only if (1) excusing the physical presence of the particular witness is necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured.

Id.

In *State v. Sweidan*, Division Three of this court applied the *Craig* test in a case in which the trial court allowed an out-of-state witness to testify by videoconference because she was the sole care provider for her mother, who had cancer and who recently had undergone open heart surgery. 13 Wn. App. 2d 53, 58-59, 64, 461 P.3d 378 (2020). The court held that caring for an ailing family member was an important state interest supporting remote testimony, but the State had not shown and the trial court had made no finding that it was necessary for the witness to testify remotely. *Id.* at 71-73. However, the court concluded that allowing the remote testimony was harmless. *Id.* at 56.

Both *Craig* and *Foster* involved one-way closed-circuit television testimony of a child witness. However, the *Craig* two-prong test also logically applies to two-way video testimony. *See Sweidan*, 13 Wn. App. 2d at 66; *see also Craig*, 497 U.S. at 854 (noting that several states "authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony").

B. STANDARD OF REVIEW

Both *Craig* and *Foster* involved the constitutionality of statutes allowing a child witness to testify by closed-circuit television and the application of the statutory language, so those cases do not inform the standard of review here. The court in *Sweidan* declined to resolve this issue, in part because its decision was the same regardless of the standard of review. 13 Wn. App. 2d at 60-61.

In general, we review de novo alleged violations of the confrontation clause. *State v. Burke*, 196 Wn.2d 712, 725, 478 P.3d 1096, *cert. denied*, 142 S. Ct. 182 (2021). However, we conclude that the question of necessity – the only portion of the *Craig* test at issue here – is a mixed question of law and fact. Under a mixed standard of review, we review the trial court's factual findings relating to necessity for substantial evidence and review de novo the trial court's legal conclusion that video testimony is necessary. *See State v. Davila*, 184 Wn.2d 55, 75, 357 P.3d 636 (2015) (standard of review for *Brady* claims).

C. NECESSITY OF VIDEO TESTIMONY

Milko concedes that there was a valid public policy of preventing the spread of COVID-19. And he does not address the second prong of the *Craig* analysis, the reliability of the

testimony. Milko challenges only the trial court's conclusion that the use of video testimony was *necessary* to further COVID-19 public policy.

1. Necessity of Case-Specific Analysis

In *Craig*, the Court stated that the finding of necessity must be case specific. 497 U.S. at 855. In the context of a child witness in a sex abuse case, the findings must include:

> (1) a finding by the trial court that the use of the closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) a finding by the trial court that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) a finding by the trial court that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus.

Foster, 135 Wn.2d at 467 (citing *Craig*, 497 U.S. at 855-56). The essence of the first and third factors are applicable here. Video testimony must be necessary to protect the witness's health because of the COVID-19 pandemic, and the risk to the witness's health must be more than de minimis.

In *Sweidan*, the court declined to adopt a specific definition of necessity for purposes of that appeal. 13 Wn. App. 2d at 73. But the court concluded that "necessary" in the context of allowing remote testimony means more than merely convenient but less than an absolute physical necessity. *Id.* at 72-73. We agree with those parameters.

We emphasize that even though the *Craig* test allows the use of video testimony in some circumstances, there remains a strong preference for face-to-face confrontation of witnesses. "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. at 850. Video testimony should be allowed only for compelling reasons. Therefore, the trial court must thoroughly consider the proffered reasons why a witness cannot appear in person and conduct an evidentiary hearing if appropriate. And

the court must critically analyze those reasons to determine if they actually are necessary to further an important public interest.

2. Analysis

The trial court here thoroughly addressed this issue, heard evidence, and entered detailed findings supporting its decision to allow video testimony.

Milko does not challenge the trial court's factual findings regarding Biddulph, and substantial evidence supports those findings. The trial court found that Biddulph's concerns that traveling to Washington would place her and her children at risk of negative health consequences regarding COVID-19 were warranted. Biddulph in particular had health concerns about her one-year-old daughter, who had compromised health. And the court made a finding that Biddulph's health care provider "advised against travel in order to protect the health of Ms. Biddulph and her small child." CP at 511. The court's ultimate finding was that Biddulph "cannot travel to Washington to testify because travel will place her at a significantly higher risk of exposure to the virus." CP at 512.

We conclude that these findings support the conclusion that video testimony was necessary to protect the health of Biddulph and her health compromised child. Accommodating Biddulph's health concerns was more than a matter of convenience. In addition, concern for the health of a third person may be sufficient to support a finding of necessity. See *Sweidan*, 13 Wn. App. 2d at 71. This is especially true in a pandemic. Given the nature of the COVID-19 pandemic, the risk to the health of Biddulph and her child if Biddulph was required to travel to Washington was significant and more than de minimis.[2]

[2] Because of this holding, we do not address whether the trial court's findings that travel would cause family separation and financial hardship because Biddulph would have had to quarantine, supported the conclusion that video testimony was necessary.

Milko does not challenge the trial court's factual findings regarding JA, and substantial evidence supports those findings. The trial court found that JA's health concerns due to her diabetes and asthma were warranted. The court also found that these conditions would "place her at a higher risk of suffering severe health consequences if she were to contract COVID-19." CP at 512. Further, the court found that JA's conditions "make it difficult, if not impossible, to wear a face mask for an extended period of time, including on a cross-country flight." CP at 512. The court's ultimate finding was that "J.A.'s health is currently compromised, and she is at a higher risk of serious medical complications should she contract COVID-19." CP at 512.

We conclude that these findings support the conclusion that video testimony was necessary to protect JA's health. Accommodating JA's health conditions was more than a matter of convenience. Given the nature of the COVID-19 pandemic, the risk to JA's health if she was required to travel to Washington was significant and more than de minimis.

Cases from other jurisdictions support the conclusions regarding the necessity of Biddulph's and JA's video testimony. In *Horn v. Quarterman*, an out-of-state prosecution witness was hospitalized with liver cancer and was not expected to improve. 508 F.3d 306, 313 (5th Cir. 2007). His doctor stated that it would be medically unsafe for him to travel. *Id.* The state trial court allowed the witness to testify through two-way, closed circuit television. *Id.* The Fifth Circuit stated, "[I]t is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness's inability to testify invokes the state's interest in protecting the witness . . . from physical danger or suffering." *Id.* at 320. Therefore, the court concluded that the state court's ruling that television testimony did not violate the constitution "was not an unreasonable application of clearly established federal law." *Id.*

In *Bush v. State*, the Wyoming Supreme Court addressed a situation in which an out-of-state prosecution witness had suffered congestive heart failure a week before trial, was in profoundly poor condition, and was unable to travel to Wyoming. 2008 WY 108, ¶¶ 44, 46, 193 P.3d 203, 214. The trial court allowed the witness to testify by video conference. *Id.* ¶ 47. The Supreme Court reviewed the decision under the *Craig* test, and concluded that video testimony "was necessary to further the important public policy of preventing further harm to his already serious medical condition." *Id.* ¶ 53. Therefore, the video testimony did not violate the defendant's confrontation right. *Id.*

In *State v. Seelig*, the trial court found that an out-of-state witness who had a history of panic attacks had suffered a severe panic attack on the day he was scheduled to fly from his home to North Carolina for trial, was hospitalized as a result, and was unable to travel because of his medical condition. 226 N.C. App. 147, 158, 738 S.E.2d 427 (2013). The trial court allowed the witness to testify by "live closed-circuit web broadcast." *Id.* at 153. The North Carolina Court of Appeals concluded that "the trial court's findings were sufficient to establish that allowing [the witness] to testify by way of live two-way video was necessary to meet an important state interest." *Id.* at 158.

Milko argues that necessity can be found only when a witness has an actual health condition that prevents them from travelling, and that it was speculative whether either Biddulph or JA would actually contract COVID-19 if they travelled to Washington for trial. We disagree. In the midst of the pre-vaccine COVID-19 pandemic, a significant risk of contracting a virus that had killed hundreds of thousands of people was sufficient to establish necessity. And it is important to recognize that in July 2020, there still was significant uncertainty as to whether air travel was safe. The rapid evolution of the scientific knowledge about this pandemic further

underscores why trial courts must critically analyze on a case by case basis the issue of necessity for remote testimony.[3]

We hold that the trial court did not err in allowing Biddulph and JA to testify remotely by video and their testimony did not violate Milko's confrontation right.

CONCLUSION

We affirm Milko's convictions and sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In his SAG, Milko challenges the sufficiency of the evidence for his conviction of first degree attempted rape of one victim and his exceptional sentence. We reject these claims.

A. SUFFICIENCY OF THE EVIDENCE

Milko asserts that the State failed to provide sufficient evidence to prove all elements of first degree attempted rape with respect to AQ. We disagree.

1. Additional Facts

AQ testified that Milko contacted her for her escort services and told her to meet him at a house in Puyallup. When she arrived, Milko walked behind her and tried to get AQ to go through a fence in the backyard. However, she refused and he pushed her against the fence with a knife in his hand. She stated that she screamed repeatedly and that Milko proceeded to punch her in the face before running away. After she reported the incident to the police, an officer asked AQ to pick out her attacker from a photomontage. AQ stated that she could not remember

[3] In any event, for JA the trial court did make an unchallenged finding that JA did have a health condition – asthma – that prevented her from wearing a mask in an airplane as required by law.

exactly what her attacker looked like at the time and picked out someone other than Milko. She told the officer that the person she picked looked like someone she had seen on a television show. At trial, AQ identified Milko as her attacker.

BP testified that Milko contacted her for her escort services and told her to meet him at a house in Puyallup. The address was the same address that Milko gave to AQ. BP testified that Milko was walking behind her while she walked towards the backyard through a gate. She stated that after she walked through the gate, Milko had a knife out and proceeded to put it against her throat as he began raping her.

2. Legal Principles

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266. Circumstantial evidence is as equally reliable as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

RCW 9A.44.040(1)(a) provides that a person is guilty of first degree rape "when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator . . . [u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon." RCW 9A.28.020(1) provides that "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."

3. Analysis

Milko relies on the fact that AQ conceded that he never said that he wanted to rape her and that he never grabbed at her clothes or her private parts. However, just like BP, AQ testified that Milko contacted her for her escort services. The address that Milko gave her was the same address that he gave BP. AQ testified that when she arrived, Milko stood behind her and tried to get her to go through a fence located in the backyard. Milko then pushed her from behind against the fence while drawing a knife out. BP similarly testified that Milko was walking behind her when he took her to the backyard through a gate, that he had a knife when she turned around, and that he then raped her. A jury reasonably could conclude that Milko made a substantial step toward raping AQ at knifepoint based on the similarity between Milko's behavior with AQ and with BP.

Milko also emphasizes that AQ picked the wrong person in the photomontage. However, she testified at trial that the person who attacked her was the same person in the courtroom – Milko. We do not reweigh testimony on appeal. *Cardenas-Flores*, 189 Wn.2d at 266.

Accordingly, we hold that sufficient evidence supports Milko's conviction of attempted first degree rape of AQ.

B. EXCEPTIONAL SENTENCE

Milko asserts either that the trial court failed to explicitly state that his exceptional sentence was indeterminate rather than determinate, or that the trial court could not impose an indeterminate exceptional sentence. We disagree.

1. Additional Facts

At sentencing, the State recommended that the trial court impose an indeterminate exceptional sentence of 602 months to life in prison. Defense counsel acknowledged that first

degree rape warranted an indeterminate sentence. The trial court adopted the State's recommendation of an exceptional sentence based on the aggravators that the jury found and entered detailed findings of fact and conclusions of law. Relevant here, the court stated in its findings of fact that first degree rape and attempted first degree rape required an indeterminate sentence.

2. Legal Principles

RCW 9.94A.507(3)(a) provides that trial courts "shall impose a sentence to a maximum term and a minimum term" for criminal defendants who are convicted of certain sex offenses. Relevant here, these sex offenses include first degree rape and attempted first degree rape. RCW 9.94A.507(1)(a)(i), (iii). When a defendant has been sentenced under RCW 9.94A.507, the Indeterminate Sentence Review Board will hold a hearing to determine the defendant's likelihood to reoffend and whether he or she should be released into community custody for the remaining time left under the maximum term. RCW 9.95.420(3)(a); *In re Post Sentence Review of Hudgens*, 156 Wn. App. 411, 421-22, 233 P.3d 566 (2010).

RCW 9.94A.507(3)(c)(i) states that "the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence." A trial court may impose a sentence that deviates from the standard sentencing range "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence" RCW 9.94A.535[4]. When imposing an exceptional sentence, the trial court must set forth the

[4] RCW 9.94A.535 has been amended since the events of this case transpired. Because these amendments are not material to this case, we do not include the word "former" before RCW 9.94A.535.

reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535; *see also State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

3. Analysis

First, RCW 9.94A.507 and RCW 9.94A.535 do not require trial courts to make a written finding that an exceptional sentence is an indeterminate sentence. Regardless, the trial court here stated in its written findings of fact that first degree rape and attempted first degree rape required "an indeterminate sentence pursuant to RCW 9.94A.507." CP at 568-69. And both the State and defense counsel acknowledged at sentencing that Milko was subject to an indeterminate sentence.

Second, the plain language of RCW 9.94A.507(3)(c)(i) clearly allows trial courts to impose exceptional indeterminate sentences pursuant to RCW 9.94A.535. And Milko does not challenge any of the trial court's written findings of fact and conclusions of law or the jury finding the existence of several aggravating factors.

Accordingly, we reject Milko's claim regarding his exceptional sentence.

CONCLUSION

We affirm Milko's convictions and sentence.

Maxa, J.
MAXA, P.J.

We concur:

Price, J.
PRICE, J.

Bassett, JPT
BASSETT, J.P.T.*

* Judge Jeffrey Bassett is serving as a judge pro tempore of the court pursuant to RCW 2.06.150(1).

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