No. 101161-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 55392-9-II)

STATE OF WASHINGTON,

Respondent,

vs.

TRE JORDAN BUTTERFIELD,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

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A. IDENTITY OF CROSS-PETITIONER

State of Washington respectfully requests that if this Court should grant Tre Butterfield's petition for review that this Court also accept review of the State's issue identified in part C of this answer/cross-petition.

B. COURT OF APPEALS DECISION

Division Two of the Court of Appeals affirmed Butterfield's conviction in its unpublished opinion in *State v. Tre Jordan Butterfield,* Court of Appeals, Division II, No. 55392-9-II, (Wash. Crt. App. May 24, 2022)(unpublished), reconsideration denied July 29, 2022. A copy of the decision, and denial of reconsideration, are attached for the Court's convenience as Appendix A, B. The Court of Appeals found the admittance of double hearsay testimony from the SANE nurse was harmless error due to the overwhelming evidence presented at trial and Butterfield's trial strategy. *Butterfield,* No. 55392-9-II, Slip Op. at 10-11 (cited pursuant to GR 14.1 and due to it being the

underlying opinion). However, the Court of Appeals declined to accept the State's primary argument that the SANE nurse's testimony was admissible under the hearsay exception for the purpose of medical diagnosis pursuant to ER 803(a)(4). *Id.* at 9.

C. ISSUES PRESENTED IN THIS ANSWER/CROSS-PETITION:

1. The petition claims the Court of Appeals incorrectly conclude the double hearsay admitted by the trial court was harmless. Should review be denied as Butterfield only cursorily mentions RAP 13.4 but fails to provide a direct and concise statement to this Court why review should be accepted under one or more of the subsections of RAP 13.4(b)?

2. If this Court should grant review of Butterfield's petition for review, the State respectfully request this Court also accept review of the following question: Does the use of second hand information for an incapacitated patient for the purpose of medical diagnosis fit within the ER 803(a)(4) hearsay exception, thereby making the Court of Appeals' opinion appropriate for review per RAP 13.4(b)(4).

D. STATEMENT OF FACTS

Two high school girls, BB, and LR,[1] attended a house party in Centralia, Washington, in May 2015. RP 33, 91. LR was 15 years old, and both girls were most likely sophomores in high school. RP 30, 105. BB was good friends with Matt McMillan, and the girls arrived at the party with him. RP 106-07.

Mr. McMillan knew the homeowner, Cory Owens. RP 72. Mr. Owens was approximately 25 years old and attending college. RP 65, 72. Mr. Owens met Tre Butterfield while attending college and the two became close friends. RP 72. Through Butterfield, Mr. Owens met Mr. McMillan and Josh Norcott. *Id*. Mr. Norcott and Mr. Butterfield were also at the house party. RP 90-91.

They listened to music. RP 74. The men smoked marijuana and drank beer. RP 73-74, 215. BB and LR

[1] The minor victim, LR, and the minor witness, BB, are referred to by their initials.

began consuming alcohol. RP 34-35, 108. BB had drank alcohol many times before and could handle her alcohol. RP 109. In contrast, LR became intoxicated quickly because she had not previously drank much alcohol. RP 39.

LR and BB were together throughout the party. RP 109. LR was very intoxicated and got sick. RP 110. Someone had LR lay down on Mr. Owens's bed. *Id*. LR was dressed, wearing a sweatshirt and spandex pants. RP 36, 111. LR fell asleep and BB checked on LR several times. RP 110-12.

At some point during the party, Mr. Owens realized Butterfield had left the living room where everyone was hanging out. RP 75, 112. Mr. Owens decided to check to see if Butterfield was all right. RP 75, 113. Mr. Owens went into his bedroom, heard moaning and kissing sounds, left the room, walked out to the living room and stated, he thought Butterfield was, "messing with that girl." RP 75-76.

Mr. McMillan and BB ran to the bedroom and turned on the light. RP 113. Butterfield rolled off LR. RP 96, 114. Butterfield's pants were unzipped and you could see his penis through his zipper. RP 96, 114. LR was still asleep. RP 113. BB was yelling at LR to wake LR up and LR "did not know what was going on." *Id*. LR was rubbing her eyes and appeared confused. *Id.* LR had her sweatshirt still on but her pants and underwear were around her ankles. RP 113-14.

The next morning LR woke up, feeling sore in her vaginal area, as if she had sex the night before. RP 41. LR had other physical signs of having intercourse the previous night. RP 42. LR did not give Butterfield consent to have sex with her. RP 43.

Law enforcement was contacted a couple of days later, and the case was investigated. RP 152-61, 180-200, 203-10. LR went to Providence St. Peter's Hospital for a sexual assault exam. RP 126-31. Potential evidence was

collected. RP 134. The nurse took information from LR to assist in treating LR. RP 137, 143-48. Nurse Rathbun noted in her report, LR had been drinking and had a loss of consciousness. RP 147-48. As a result, LR did not know if the person who raped her wore a condom, used lubricant, and LR could not relay if her assailant had ejaculated inside of her. RP 148. For the most part, the only information LR could relay about the sexual assault and the surrounding events was information LR had been told by others. RP 143-45.

Butterfield was convicted of Rape of Child in the Third Degree and Rape in the Second Degree. CP 126-27. The two counts merged and Butterfield was sentenced to 210 months in prison. The Court of Appeals affirmed the Rape in the Second Degree conviction (the State conceded Count I should be vacated).

E. ARGUMENT.

The Court of Appeals applied the proper legal analysis when it determined the admission of the double hearsay statements through the testimony of the SANE nurse was harmless. The Court of Appeals followed the established precedent. Butterfield fails to cite or adequately discuss the enumerated considerations for review set forth in RAP 13.4(b). This Court should deny review.

1. Butterfield Fails To Identify Which Consideration Governing Acceptance Of Review He Is Asking This Court To Consider, And Further Fails To Present A Concise Statement Of The Reasons For Review In Light Of Considerations For Review Pursuant to RAP 13.4(b).

A person seeking review must choose from the four enumerated reasons for review found in RAP 13.4(b). This Court accepts review for the following reasons:

> Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). A petition should contain, "A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." RAP 13.4(c). Butterfield's petition fails to follow RAP 13.4.

Butterfield fails to specifically cite to one of the RAP 13.4(b) subsections or explain how the Court of Appeals decision, finding the admission of the double hearsay harmless, falls into any of these grounds. Rather, Butterfield cursorily cites to RAP 13.4 twice in his petition.

Petition at 1, 12. First, Butterfield mentions RAP 13.4 in the "Identity of Petitioner" section, asking this Court to accept review pursuant to RAP 13.4. Petition at 1. Butterfield also mentions RAP 13.4 in his Conclusion, stating, "Based on the foregoing, Mr. Butterfield respectfully request that review be grated pursuant to RAP 13.4(b)." This is not sufficient to meet the requirements of RAP 13.4(b).

Butterfield asserts the Court of Appeals declined to address the issue raised by him, and rather held that even if the statements were improperly admitted they were harmless. Petition at 8. Butterfield's argument to the Court of Appeals was that the trial court erroneously admitted hearsay within hearsay, that the statements met none of the hearsay objections, and that it was not harmless. *Butterfield,* Slip Op. at 8-9. The State put forward two alternative arguments. *Id.* at 9. The State asserted the statements were properly admitted under the hearsay exception under ER 803(a)(4). *Id.* The State asserted in the

alternative “that any impermissible testimony from Nurse Rathbun was harmless error because Butterfield admitted to have sexual intercourse with LR on the night of the crime.” *Id.* The Court of Appeals stated, “We agree with the State’s alternative argument. Even assuming without deciding that Rathbun’s testimony was improper double hearsay under ER 805, that testimony was plainly harmless.” *Id.*

The Court of Appeals proceeded with its opinion “assuming” that the testimony was improper double hearsay, and applying the test to find if it harmless using the assumption that the evidence was improperly admitted under ER 805. The State cannot understand how Butterfield can state that the Court of Appeals proceeding as though he had proven his claim is insufficient. Butterfield is simply displeased with the ultimate result.

Butterfield argues that the facts of his case, if properly applied in a harmless error test, should not

produce the result obtained by the Court of Appeals. See Petition. Yet, Butterfield fails to give a reason why this meets this Courts criteria for review as set forth in RAP 13.4(b). *Id.*

Finally, Butterfield also makes a statement, "[w]ithout an understanding of the scope and outer boundaries of ER 803(a)(4) in relation to ER 805, trial courts will continuously admit double hearsay statements, prejudicing other defendants as it prejudiced Mr. Butterfield." Petition at 12. This almost appears to be an additional issue presented for review, but given that Butterfield only specifically stated he was asking for review regarding the harmless error ruling by Court of Appeals, the State is viewing this as a summation statement to that argument. This statement still fails to explain which criteria for review Butterfield is asserting. Butterfield's argument meets none of the criteria of RAP 13.4(b) and this Court should decline to accept review.

2. The Use Of Second Hand Information For An Incapacitated Patient For The Purpose Of A Medical Diagnosis Falls Within The ER 803(a)(4) Hearsay Exception.

An out of court statement offered to prove the truth of the matter stated is hearsay. ER 801(c). Absent an exception under the evidentiary rules, hearsay is inadmissible. ER 802. Medical providers may be able to testify regarding statements made by another party under certain circumstances. ER 703; ER 803(a)(4). Under the hearsay exceptions:

> *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). There is also a provision regarding hearsay, within hearsay, or what is commonly referred to as "double hearsay." ER 805. "Hearsay included within hearsay is not

excluded under the hearsay rule if each part of the combined statements conform with an exception to the hearsay rule provided in these rules." *Id.*

The State acknowledges the Court of Appeals' decision in *State v. Alvarez-Abrego* would appear to foreclose the State's position that LR's statements to the medical provider, relaying third party information regarding what happened the night of the sexual assault, are admissible because the statements rely on hearsay within hearsay. *State v. Alvarez-Abrego,* 154 Wn. App. 351, 368-69, 225 P.3d 396 (2010). In *Alvarez-Abrego*, the mother of an injured six-month-old child relayed to the physician, that RRR, her four-year-old child, stated Alvarez-Abrego threw the baby against the wall. *Alvarez-Abrego,* 154 Wn. App. at 356. The *Alvarez-Abrego* court held the admissibility of the medical provider's statements, retelling the statements mom attributed to RRR, was impermissible hearsay, and therefore fell outside of the hearsay exception in ER

803(a)(4). *Id.* at 368-69. The Court of Appeals concluded it was error to admit, using the exception in ER 803(a)(4), double hearsay statements from an uninjured declarant. *Id.* at 369. Yet, the *Alvarez-Abrego* court did not consider how medical providers treat patients who are incapacitated. Therefore, this overly narrow ruling should be broadened to be consistent with how medical treatment is actually provided.

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.3d 508 (1970). It does not preclude this Court from consideration of arguments to the contrary, however, as it does not require this Court to continue to uphold a law in perpetuity that is incorrect and harmful. *Id.* The rule of law is a fluid thing, and must change when reason requires it to do so. *Id.*

A medical provider will use sources, when necessary, outside of the patient for obtaining pertinent information to assist in diagnosing and treatment of the patient. *Alvarez-Abrego,* 154 Wn. App. at 356. This is universally understood in the practice of medicine. One just needs to look to the World Health Organization (WHO) for confirmation. WHO, as part of their Basic Emergency Care Course, has an entire 76-slide power point on Altered Mental Status that includes reminder for practitioners to consult with third parties for information.[2] (see slide 11).

A medical provider must look outside the patient for relevant information to treat an incapacitated person. The same is true for the person who is incapacitated, as they are unable to relay the necessary information to assist in their medical treatment. Nurse Rathbun noted in her report,

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[2] *See* Basic Emergency Care Course, Altered Mental Status located at https://www.who.int/publications/i/item/basic-emergency-care-approach-to-the-acutely-ill-and-injured (last visited 9/9/22).

LR had been drinking and had a loss of consciousness. RP 147-48. As a result, LR did not know many of the events of the sexual assault first hand, she had to rely on information provided by others to assist in her medical treatment. RP 143-45, 148. This is necessary because a rape victim receives medical treatment based upon the information gathered by a SANE nurse. There is medication administered, other services recommended, and other tests that may need to be performed. LR received medical treatment in this case based upon the third party information she shared with Nurse Rathbun.

The public has a substantial interest in incapacitated victims of crimes third party's statements to medical providers being included within the hearsay exception of ER 803(a)(4). A medical provider collecting information in their normal course should not be prohibited from testifying in court regarding statements relied upon for treatment purposes. Therefore, if this Court should grant Butterfield's

petition for review, this Court should accept review regarding this issue of substantial public interest. RAP 13.4(b)(4).

F. CONCLUSION

The State respectfully requests this Court not accept review of Butterfield's petition.

If this Court were to accept review, the State would respectfully request this Court accept review of the State's cross-petition, and give the State an opportunity to submit supplemental briefing on the issues.

This document contains 2,543 words, excluding the parts of the document exempted from the words count by RAP 18.17.

RESPECTFULLY submitted this 9th day of September, 2022.

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Appendix A

Filed
Washington State
Court of Appeals
Division Two

May 24, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TRE JORDAN BUTTERFIELD Appellant.	No. 55392-9-II UNPUBLISHED OPINION

WORSWICK, J. — Tre Butterfield appeals his convictions and sentence for one count of third degree child rape and one count of second degree rape. The victim was unconscious during the crime and was told of the crime by witnesses when she regained consciousness. The victim then told a sexual assault nurse examiner (SANE) that she had been raped, based in part on the information told to her by the witnesses. At trial, Butterfield admitted to sexual intercourse and admitted his guilt to third degree child rape, but disputed he committed second degree rape. On appeal, Butterfield argues that the trial court erroneously merged his two convictions without dismissing the lesser offense in violation of the prohibition against double jeopardy, and that the trial court abused its discretion when it admitted portions of the SANE's testimony in violation of the rule against double hearsay.

The State concedes that the trial court erroneously merged Butterfield's convictions, and that his third degree child rape conviction must be vacated. We accept the State's concession.

Next, the State argues that because Butterfield admitted to sexual intercourse at trial, the only issue remaining for the jury was the issue of consent. Thus, any double hearsay admitted describing sexual intercourse was harmless. We agree with the State. Accordingly, we affirm Butterfield's conviction for second degree rape and remand to the trial court to vacate the third degree child rape conviction and to resentence Butterfield.

FACTS

I. BACKGROUND

On May 2, 2015, Butterfield, then age 20, attended a house party at Cory Owens's house. LR, BB, Owens, and Matt McMillan were also there. LR was 15 at the time and BB was approximately the same age.

At the party, LR drank alcohol, quickly drinking a Four Loko and multiple shots of rum. LR became drunk and got sick to the point of throwing up. BB, McMillan, and Owens took LR to Owens's bedroom to lay down, and LR passed out. BB, McMillan, and Owens left LR alone in the bedroom. When they left LR, she was wearing a sweatshirt and spandex pants. BB went to check on LR several times during the night.

At some point, Owens noticed Butterfield was missing from the party and went to look for him. Owens heard moaning and kissing sounds coming from his bedroom, returned to the party, and told the others that he thought Butterfield was in the bedroom "messing with that girl." Verbatim Report of Proceedings (VRP) (Sept. 29, 2020) at 75-76. BB and McMillan went to the bedroom and discovered Butterfield on top of LR. Butterfield rolled off of LR, and BB and McMillan saw Butterfield's penis though his zipper. LR's pants and underwear were around her

ankles. LR was still asleep. BB attempted to wake LR up by yelling at her. LR briefly woke up when she heard BB screaming and realized her pants and underwear were off, but she fell back asleep.

The next morning, LR discovered her underwear on inside-out and physically felt as if she had sex the night before. She had not given Butterfield consent to have sex with her.

On May 4, BB and LR visited a school counselor, who contacted law enforcement. That evening, LR visited Providence St. Peter's Hospital in Olympia, where Nurse Marnie Rathbun, a SANE nurse, examined LR. During the examination, LR provided Rathbun with information about the rape.

II. TRIAL AND SENTENCING

The State charged Butterfield with rape of a child in the third degree and rape in the second degree. The matter proceeded to a jury trial.

During his opening statement, Butterfield's counsel conceded that Butterfield had sexual intercourse with LR, stating, "Tre Butterfield, on May 2nd, 2015 had sex with [LR]. She was less than 16 years old. That was five years and almost five months ago. He is guilty of rape of a child in the third degree." VRP (Sept. 29, 2020) at 24. Counsel concluded his opening statement with:

> But, you know, today my client is stepping forward. This is the first day that he is stepping forward and he's looking at you and he's telling you, ladies and gentlemen of this fine jury, Ladies and Gentlemen of Lewis County jury, we are in fact—he is, in fact, accepting responsibility for rape of a child.

VRP (Sept. 29, 2020) at 26.

Witnesses testified as above. LR additionally testified that she remembered drinking, passing out, and waking up at some point in the night to BB screaming at her. She testified she did not remember anything other than being shouted awake from the time she passed out until waking up the next morning.

Nurse Rathbun testified as to LR's comments to her during the SANE examination. Rathbun testified that LR told her that her friends said they moved her to the bedroom when she fell asleep, then later found Butterfield in the room with LR. Rathbun testified, in pertinent part:

> [LR] told me she had been at a friend's house on that night drinking. They were watching movies, that she had gotten sleepy, fallen asleep on the couch. Her friends then transferred her to a bedroom. Friends went to search for the male that she identified. They weren't able to find him in the bathroom after he said he was getting up to go. And then they found him in the room with her.
>
> . . . .
>
> [LR] said that she had been drinking, she was asleep. That when had [sic] her friends came in the room, they turned on the light, started yelling that [Butterfield] was having sex with her and he rolled off of her. She then was crying and upset. . . .
>
> . . . .
>
> She said she could just hear yelling and screaming. And then yelling for her to wake up, telling her to wake up.

VRP (Sept. 30, 2020) at 144-45.

Butterfield objected, arguing that LR's statements to Rathbun were double hearsay because they included statements from BB and others to LR following the rape. The trial court admitted Rathbun's testimony as an exception to hearsay, ruling her testimony was reasonably pertinent to medical diagnosis or treatment.

In his closing argument, Butterfield's counsel did not deny that Butterfield had sexual intercourse with LR, but rather argued only that there was a reasonable doubt regarding LR's lack of consent.

The jury found Butterfield guilty of count I: third degree child rape, and count II: second degree rape.

At sentencing, the court noted:

> Count I either merges or I dismiss it. I think probably the appropriate thing at this point would be to dismiss Count I. That's—that was the rape of a child in the third degree, but because they were the same conduct, that's the one that we went to trial on. And because they were the same conduct, the rape in the second degree is the controlling one, as it's the one carrying the highest range.

VRP (Dec. 9, 2020) at 60-61.

Later in the sentencing hearing, the court revisited this topic. The following exchange occurred between the court and the parties:

> THE COURT: Okay. The other thing procedurally, I'm trying to figure out the best way to, in [this case], I don't know that it would be best or even procedurally correct to dismiss Count I, just because a jury has already rendered a verdict on that. I suppose there could be a motion under [CrR] 7.8.
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> [Defense counsel], have you seen this before? I agree it's same similar conduct and that it shouldn't count as a point.
>
> [DEFENSE COUNSEL]: The appropriate thing would be to have it merged.
>
> [STATE]: That's completely fine by me.
>
> THE COURT: I think that that procedurally would be the cleanest and most appropriate way to do that so. Okay.

VRP (Dec. 9, 2020) at 68-69.

In the judgment and sentence form, the court recorded both counts I and II, but did not include count I in calculating Butterfield's offender score. The court sentenced Butterfield to 60 months on count I and 210 months on count II, but entered only count II in the portion of the form for confinement for sex offenses.

Butterfield appeals.

ANALYSIS

Butterfield argues that the trial court violated double jeopardy principles when it merged his third degree child rape and second degree rape convictions without dismissing the lesser charge. The State concedes that Butterfield's two convictions violate double jeopardy, and we accept its concession. Next, Butterfield argues that the trial court erred when it admitted Nurse Rathbun's testimony because her testimony included double hearsay. The State argues that the trial court properly admitted Rathbun's testimony as a statement made for the purpose of medical treatment. In the alternative, the State argues that Rathbun's testimony was harmless because it described sexual intercourse, which Butterfield admitted to at trial. We agree with the State's alternative argument. Even assuming that the trial court erred in admitting Rathbun's testimony, it was plainly harmless.

I. DOUBLE JEOPARDY

Butterfield argues that double jeopardy bars his conviction for both third degree child rape (count I) and second degree rape (count II), and that we should vacate the lesser offense. The State concedes that count I must be vacated, and we accept the State's concession.

We review double jeopardy claims de novo as a question of law. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The double jeopardy principles bar multiple punishments for the same offense. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. We examine statutory language to determine if the relevant statutes expressly permit punishment for the same act or transaction. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

RCW 9A.44.079(1) provides: "A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and the perpetrator is at least forty-eight months older than the victim."

RCW 9A.44.050(1)(b) provides: "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." A child is legally incapable of consent. *State v. Clemens*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995).

In *State v. Hughes*, 166 Wn.2d at 683-84, our Supreme Court held that second degree child rape and second degree rape convictions were the same in fact and law and convictions for both crimes violated the prohibition against double jeopardy because the crimes were based on

one act of sexual intercourse with the same victim.[1] The *Hughes* court reasoned that "both statutes require proof of nonconsent because of the victim's status." 166 Wn.2d at 684.

The State agrees that *Hughes* controls here and concedes that Butterfield's convictions for count I and II violated double jeopardy. "The remedy for a double jeopardy violation is vacation of the conviction for the lesser offense." *State v. Albarran*, 187 Wn.2d 15, 18, 383 P.3d 1037 (2016). Here, the lesser of the two offenses is rape of a child in the third degree.[2] Accordingly, the trial court must vacate the third degree child rape conviction.

II. HEARSAY WITHIN HEARSAY

Butterfield next argues that the trial court erred when it admitted portions of Nurse Rathbun's testimony because it contained hearsay within hearsay—or double hearsay—in violation of ER 805.[3] The first level of hearsay contained the statements BB and others made to

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[1] "A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1).

[2] RCW 9A.44.050(2) establishes that rape in the second degree is a Class A felony. RCW 9A.44.079(2) establishes that rape of a child in the third degree is a Class C felony.

[3] Butterfield appears to object to Rathbun's testimony where she said:

> [LR's] friends then transferred her to a bedroom. Friends went to search for the male that she identified. They weren't able to find him in the bathroom after he said he was getting up to go. And then they found him in the room with her.
>
> . . . .
>
> [LR] said that she had been drinking, she was asleep. That when had [sic] her friends came in the room, they turned on the light, started yelling that [Butterfield] was having sex with her and he rolled off of her. She then was crying and upset.

VRP (Sept. 30, 2020) at 144-45.

LR about the rape and the events surrounding it. The second level contained LR's statements to Rathbun, in which LR told Rathbun the information that BB must have told LR because LR was unconscious at the time. Butterfield argues that there is no hearsay exception for the first level of statements that BB and others made to LR to fill LR in on what occurred while she was unconscious. Butterfield further argues that the statements were not made for medical diagnosis but to attribute fault to Butterfield by identifying him as the assailant.

The State argues that the trial court properly admitted Rathbun's testimony based on LR's account of the rape under the exception to hearsay for the purposes of medical diagnosis under ER 803(a)(4). In the alternative, the State argues that any impermissible testimony from Nurse Rathbun was harmless error because Butterfield admitted to having sexual intercourse with LR on the night of the crime.

We agree with the State's alternative argument. Even assuming without deciding that Rathbun's testimony was improper double hearsay under ER 805, that testimony was plainly harmless.

We review the trial court's evidentiary rulings for an abuse of discretion. *State v. Burke*, 196 Wn.2d 712, 740, 478 P.3d 1096, *cert. denied*, 142 S. Ct. 182, 211 L. Ed. 2d 74 (2021). "We will not reverse the trial court's decision 'unless we believe that no reasonable judge would have made the same ruling.'" *Burke*, 196 Wn.2d at 740-41 (quoting *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007)). "A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds." *State v. Alvarez-Abrego*, 154 Wn. App. 351, 362, 225 P.3d 396 (2010). But any such error is harmless "[i]f the untainted evidence is so

overwhelming that it necessarily leads to a finding of the defendant's guilt." *Burke*, 196 Wn.2d at 739 (alteration in original) (quoting *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009)).

An out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay unless an exception applies. ER 801(c), 802. Statements made for the purposes of medical diagnosis or treatment are an exception to the bar on hearsay. ER 803(a)(4) (allowing statements "describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."). "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ER 805.

A trial court's admission of testimony from a SANE nurse that identifies an assailant is harmless where the assailant's identity was established through other means. *Burke*, 196 Wn.2d at 742-43. Even where there is nothing in the record to suggest that portions of a victim's statement were made to promote medical treatment, those statements are harmless when the untainted evidence otherwise establishes the defendant's guilt. *Burke*, 196 Wn.2d at 742-73; *Alvarez-Abrego*, 154 Wn. App. at 369-70.

Here it was clear from Butterfield's opening statement and closing argument that his trial strategy was to admit to third degree child rape and avoid the second degree rape conviction. In those statements, Butterfield admitted to everything that Rathbun testified to, with the exception of LR's unconsciousness and, therefore, LR's consent. He admitted to having sex with LR. He

admitted being guilty of third degree child rape. The identity of the assailant was never in doubt. Accordingly, Rathbun's testimony identifying Butterfield as the assailant was harmless.

Moreover, any error here was harmless because the untainted evidence of Butterfield's guilt of second degree rape was overwhelming.[4] *Burke*, 196 Wn.2d at 739. Eyewitnesses testified consistently with the SANE testimony. BB and LR both testified that LR drank to the point of being sick and falling asleep. LR, BB, and McMillan all testified that LR was drunk and incapacitated. LR testified to her intoxication and to not remembering portions of the night. Owens testified to hearing noises coming from his bedroom and telling the others that he thought Butterfield was in the bedroom with LR. McMillan and BB both testified to seeing Butterfield on top of LR with his penis out, while LR was asleep with her pants around her ankles.

This corroborating testimony was overwhelming evidence of all elements of second degree rape, especially of LR's inability to consent. And Butterfield's strategy was not to contest the child rape and admit to sexual intercourse. Accordingly, we hold that even assuming the trial court erred when it admitted portions of Rathbun's testimony, such admission was harmless.

[4] RCW 9A.44.050(1)(b) provides: "A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated."

CONCLUSION

We accept the State's concession that the trial court erroneously merged counts I and II of Butterfield's convictions. Accordingly, we reverse Butterfield's third degree child rape conviction because it is the lesser offense. We hold that any double hearsay that the trial court admitted coming from Nurse Rathbun's testimony was harmless because the evidence against Butterfield was overwhelming, and any testimony identifying Butterfield as the assailant was harmless because he admitted to having sex with LR on the night of the crime. Accordingly, we affirm Butterfield's conviction for second degree rape, and remand to the trial court to vacate his conviction for third degree child rape and for resentencing.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Veljacic, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

July 29, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TRE JORDAN BUTTERFIELD, Appellant.	No. 55392-9-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jordan Butterfield, filed a motion for reconsideration of this court's unpublished opinion filed on May 24, 2022. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, Lee, Veljacic

Worswick J

WORSWICK, JUDGE

LEWIS COUNTY PROSECUTORS OFFICE

September 09, 2022 - 1:24 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,161-0
Appellate Court Case Title:	State of Washington v. Tre Jordan Butterfield
Superior Court Case Number:	19-1-00902-5

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