NO. 99772-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANDREW WILLIAMS,

Petitioner.

Petition for Review

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Defendant Michael Williams poured baby oil over his young, vulnerable, inebriated roommate and violently raped him causing the victim to urinate on himself. The victim fled, was rescued, and was put up in a hotel overnight. He submitted to a rape exam the next day where petechiae and blood pooling in his eyes proved that he had been strangled. Police arrested the Defendant two years later, locating him after he assaulted another roommate. The victim testified in front of a jury subject to cross-examination. The nurse examiner testified as to the examination including statements which the victim had already admitted under cross-examination. The court of appeals found the nurse's testimony was not testimonial or, if it was, harmless beyond a reasonable doubt because it only repeated what was already in evidence. Judge Glasgow's analysis relies upon and is consistent with this Court's recent opinion in *State v. Burke*, 196 Wn.2d 712, 478 P.3d 1096 (2021). The Petition for Review does not demonstrate a conflict. RAP 13.4(b).

II. RESTATEMENT OF THE ISSUES

A. Does the nurse's testimony describing her examination of the rape victim, repeating statements which the victim had already testified to without objection and under cross examination, demonstrate reviewable prejudicial error where the court of appeals' finding of admissibility and harmless error is consistent with this Court's recent opinion in *Burke*?

B. Consistent with precedent, the court of appeals found that the unpreserved challenge to the use of a rape victim's initials in the jury instruction did not demonstrate a comment on the evidence. Where such finding reflects a cultural norm and a constitutional mandate to treat crime victims with respect, does the approval of the use of initials in an instruction present a significant constitutional question?

C. Is a constitutional question or issue of public interest raised where, after diligent investigation, defense counsel does not call witnesses to testify that they observed the Defendant and victim many hours before the rape, for the reason that the witnesses cannot be located and the allegation of what these witnesses may have seen cannot be substantiated?

III. STATEMENT OF THE CASE

The Defendant Michael Williams has been convicted by a jury, as charged, of the second degree rape of JP. CP 1-2, 38, 58.

JP was a vulnerable young man. He had spent time in foster care. RP[1] at 334. He had been homeless. RP 336-37. In the past year, his adoptive mom had passed away. RP 372. He had fallen out with his father. RP 404, 414. And on his 20th birthday, his fiancé Aislinn Turner ended their engagement. RP 332, 338-41.

The next day, JP's coworker Defendant Michael Williams offered to let JP sleep on a loveseat in the Defendant's apartment for $50/week. RP 342-43, 337-38, 343, 348-51, 414-15. JP brought a backpack of clothes and

[1] Unless otherwise indicated, "RP" refers to the Official Court Report Raelene Semago's consecutively numbered Verbatim Report of Proceedings.

a suitcase with childhood photos, all that was left to him by his adoptive mom. RP 372.

The 47-year-old Defendant told JP he had been in the military for twenty years. RP 411, 502. He "seemed like a good person," an "uncle type." RP 342, 344. However, the Defendant soon expressed a sexual interest in JP, frequently commenting on his looks and calling him a pretty boy. RP 343-44, 346, 416-17. JP had "nowhere else to go." RP 346. He let the Defendant know that he was straight and did not "get down that way." RP 345, 417. JP thought the Defendant respected his refusal. RP 346, 417.

The day before Valentine's Day, the Defendant said he was going to invite friends over, but none ever appeared. RP 356-57, 407-08, 418. Instead, the Defendant served the underage JP alcohol at home and then took him to a bar. RP 357, 359, 418. JP had never been to a bar before, but the Defendant provided him a fake ID that night. RP 361-62, 421. JP bought himself six shots of tequila and beer, went out for a smoke break, and when he returned there was a drink waiting for him as the Defendant bought him more. RP 365, 367-68. While the older man could hold his liquor, JP was inebriated. RP 369, 424, 426 (as drunk as he could get while still functioning). They returned home where JP had yet another cup of liquor and lay down, feeling unwell and "very intoxicated." RP 369-71.

The Defendant paced quickly and then suddenly began to choke JP and pulled off JP's jeans and underwear in a single motion. RP 374-77. JP tried to resist and yell out, but the Defendant was on top of him, choking him, and telling him to shut up. RP 375, 383. Four or five times JP tried to crawl away only to be dragged back. RP 381. The Defendant called JP a bitch, told him to bend that ass over, poured baby oil over him, and orally and anally raped JP without using a condom. RP 380, 390-91, 395. It "really, really hurt," and JP urinated on himself. RP 395.

When the Defendant got off him, JP dressed, took his suitcase of photos, and ran. RP 383, 396, 400-01; RP (9/4/18) at 26, 30. He went to Wright Park and called his ex-fiance for help. RP 401. Ms. Turner could hear him crying before she saw him. RP (9/4/18) at 27. It was a cold winter night, but JP was not wearing a jacket. RP (9/4/18) at 36. He was terrified of everyone who passed by and was holding his pants tight. RP (9/4/18) at 26, 31. He covered his rear as if he was in pain. RP (9/4/18) at 34. JP could not stop crying, and all he could get out was that he had been raped. RP (9/4/18) at 31-32. He kept repeating this. RP (9/4/18) at 32. He would not go back to the Defendant's apartment. *Id*.

Ms. Turner and her grandmother drove JP to a hotel and checked him in for the night. RP 402-04 RP (9/4/18) at 32, 45. The next morning, JP was still in pain. RP 395. His father Curtis Craft took him to the UW

Valley Medical Center in Renton. RP 320, 404-06, 454, 457-58; RP (9/4/18) at 66.

The sexual assault nurse examiner (SANE) Monica Brown was part of the ambulatory float pool between various hospitals. RP (9/4/18) at 54-55, 57-58. Her interview with JP informed her examination which included documenting observations, taking swabs, and photographing and measuring wounds. RP (9/4/18) at 62-63, 68. JP was distant, stoic, polite, only making brief eye contact. RP (9/4/18) at 70-71. Although intoxication can cause redness in the eyes, JP had petechiae and blood pooling indicative of strangulation. RP (9/4/117) at 88, 94, 100, 117.

Two days later, the case was assigned to Detective Hoshouer, who arranged to interview JP the next day. RP 500. The interview was recorded. RP 364, 389.

The police department struggled to locate the Defendant, but he had been terminated from his job and he did not answer his door or respond to voice mails or letters or messages left with third parties. RP 505-12, 524, 526-27. When charges were filed, a bench warrant issued at the same time. CP 3, 107-08. However, the Defendant was not arrested on the warrant until almost two years after the rape. CP 111. It appears he was found after another roommate, JSB, accused him assault and obtained a protection order. CP 89-90, 103-04; RP 630.

RN Brown testimony: In pretrial motions, defense had asked the State to bring any hearsay statements to the court's attention outside the presence of jury so that the Defendant would have an opportunity to request appropriate limiting instructions. CP 11. The motion was granted. CP 15.

Prior to RN Brown's testimony and outside the presence of the jury, the prosecutor proposed to admit the SANE report with quotations from the patient interview and asked if defense counsel would be objecting to any portion of her testimony. CP 17-20; RP (9/4/18) at 5-7. The prosecutor solicited any proposed limitations " as to what it was that was told to her that's contained in that report so that before she testifies she can be told you can say this but not this." RP (9/4/18) at 9-10.

The court had suggested that the statements "would likely come in as an exception to the hearsay rule," but that defense counsel might challenge "whether this information that's contained in the report or what she testifies to is necessary for the purpose of her treating the patient." RP (9/4/18) at 8.

Defense counsel stated that the nurse could testify as to the contents of this record. RP (9/4/18) at 10, l. 6. That record included the patient's description of what transpired. CP 18; Exh. 19. Counsel only challenged a few statements as not "necessary for the purposes of their diagnosis or doing any kind of protection that they need." *Id*. at 11-16. After discussion and at

the defense request, the prosecutor redacted JP's statements (for the Defendant's previous overtures, JP's belief that the Defendant had been trying to get him drunk in order to rape him, and JP's belief that no one could hear him scream during the rape). RP (9/4/18) at 16; *Compare* Exh. 19 (original) at 2 *with* Exh. 19A (redacted) at 2.

When RN Brown took the stand a little later that morning, defense counsel objected on when the prosecutor asked the nurse what JP told her had happened. RP (9/4/18) at 71. The objection was overruled. *Id.* This answer was contained in the exhibit which the Defendant had already agreed was appropriate for admission. Exh. 19A at 2.

The prosecutor repeated the question for the victim's response, and defense counsel robotically objected on the same grounds which the court had just overruled. RP (9/4/18) at 72. The objection was overruled again. *Id*. The prosecutor asked the question a third time followed by a third objection and overruling. RP (9/4/18) at 73. Finally, the nurse was permitted to speak. *Id.*

Counsel made hearsay objections to questions asking how long JP had known the Defendant, who was buying drinks, where the rape took place, what the Defendant had said to the victim during the rape, where on the victim's body the Defendant had poured baby oil, where the victim fled to and in what state. RP (9/4/18) at 74, 81-83, 87. The objections were

overruled. *Id*. These were topics about which the victim and Ms. Turner had already testified at length, without objection, and subject to cross-examination. RP 339, 342-44, 363, 365-66, 371, 373, 391, 424-25, 428, 436, 438; RP (9/4/18) at 26-27, 30-32.

Motion for new trial: After the jury convicted the Defendant, as a result of the verdict, attorney-client communication broke down and a new attorney was appointed. CP 38, RP 630, 632-33. New counsel was appointed who filed a motion for new trial, alleging that the previous attorney had failed to call specific witnesses identified by the client. CP 44-47. A continuance was permitted for the new attorney Mr. Quillian to obtain affidavits from proposed witnesses and trial counsel. RP 640, 644, 648. However, many months later, the defense investigator was unable to locate any of the Defendant's alleged witnesses. RP 652. The court denied the motion, finding that the motion was untimely, relied entirely on inadmissible hearsay, and lacked merit. RP 654. The court further found that even if such testimony had been presented at trial and was found credible, it would not have affected the verdict. CP 74; RP 656. There were no witnesses who would have been present during the rape. RP 656.

IV. ARGUMENT

A. The court of appeals' opinion demonstrates no conflict with *Burke* in holding that any error in admitting some of the victim's statement through the SANE would be harmless beyond a reasonable doubt where the victim had already testified to the same facts without objection and subject to cross-examination.

After this appeal was briefed, this Court issued an opinion in *State v. Burke*, 196 Wn.2d 712, 478 P.3d 1096 (2021), reversing a decision of Division Two. The Defendant argues that *Burke* conflicts with the Unpublished Opinion here. Petition for Review ("Pet.") at 7. It does not. In fact, the State's brief relied on the WAPA amicus brief which would support this Court's decision in *Burke*. Brief of Respondent at 14-18; Brief of WAPA, *State v. Burke*, 196 Wn.2d 712, 478 P.3d 1096 (2021) (No. 96783-1) (filed Apr.24, 2020).[2] And the court of appeals discussed *Burke* in its analysis at some length. Unpub. Op. at 8-10, 13.

The two cases have many similar facts: a forcible rape in downtown Tacoma not far from Wright Park; a victim who was vulnerable by reason of being frequently homeless; a rapist who would elude arrest for years; and a Confrontation Clause challenge to the SANE's trial testimony. An important factual difference is that, unlike JP, the victim in the *Burke* case did not testify. K.E.H. passed away three years before Burke was identified by his DNA and charged. *Burke*, 196 Wn.2d at 718.

[2] https://bit.ly/3wkGXo2

The challenged SANE testimony in Williams' trial merely restated what JP and Ms. Turner had already testified to without objection and often in response to cross-examination questions by defense counsel. RP 339, 342-44, 363, 365-66, 371, 373, 391, 424-25, 428, 436, 438; RP (9/4/18) at 26-27, 30-32. In other words, JP's statements had been subject to testing by confrontation. The court of appeals found that the SANE's testimony was largely admissible under ER 803(a)(4), and, where it was not, it was harmless error. Unpub. Op. at 8.

In the *Burke* case, where the victim had not testified, the court of appeals found the admission of her statements through the SANE could not be harmless. *State v. Burke*, 6 Wn. App. 2d 950, 953, 431 P.3d 1109 (2018). Upon review, a majority did not reach the question of harmless error, holding that "all of K.E.H.'s statements were nontestimonial because their primary purpose was to guide the provision of medical care." *Burke*, 196 Wn.2d at 729. "[W]e view Nurse Frey as a medical provider, to whom statements "are 'significantly less likely to be testimonial than statements given to law enforcement officers' because medical personnel are 'not *principally* charged with uncovering and prosecuting criminal behavior.' " *Id.* at 733 (citing *State v. Scanlan*, 193 Wn.2d 753, 445 P.3d 960 (2019), *cert. denied,* 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020)). The concurring opinion would have found harmless error where there was

physical evidence supporting the allegation of force. *Burke*, 196 Wn.2d at 763-64 (Gordon McCloud, J., concurring).

The Defendant argues that no court can find a medical purpose exception in a patient's disclosures to a nurse in the course of the medical examination unless the patient first testifies that he went to the nurse with the specific intent of obtaining medical treatment. Pet. at 8-10. But *Burke* says no such thing. K.E.H. had died before trial. The court did not require K.E.H. to testify about why she met with a SANE after she had been treated and medically released by other treatment providers. *Burke*, 196 Wn.2d at 718. This Court looked to the contents of the conversation and the SANE program itself.

> [N]early all of the statements were made primarily for medical purposes. K.E.H. made these statements in a medical exam room in a hospital. She needed medical treatment specific to her sexual assault, which Nurse Frey provided. Although K.E.H. had been medically cleared from the emergency department, this did not mean that she was no longer in need of *any* medical treatment. Instead, she was no longer in need of *emergency* medical treatment and was cleared to go on to the next step for her: the sexual assault exam. While some patients in this situation may choose to leave the hospital and not attend this exam, it is uncontroverted that this is part of the process of treating a sexual assault patient. This was this patient's next step, and the fact that the hospital did not have the staff to address this step immediately does not mean the statement was nonmedical in purpose. Additionally, while the consent form K.E.H. signed indicated that *general* medical care would not be provided during the sexual assault exam, Nurse Frey did

> provide treatment and prescribe medication *specific* to the sexual assault during her exam.

Burke, 196 Wn.2d at 734-35 (emphasis added). *See also Scanlan*, 193 Wn.2d at 728-29 (where medical providers in follow up appointments inquired as to the identity of the domestic abuser, such inquiry was necessary to understand how to treat injuries and whether the patient would be safe upon discharge). The information which the Defendant claims supported the holding in *Burke* (Pet. at 14) is general information about the SANE program. *See* Brief of WAPA, *supra*. While the *Burke* record provided different detail, the procedure and purpose of a SANE exam and interview does not change from patient to patient.

The Defendant argues that Exhibit 19A is irrelevant, because it was not published to the jury. Pet. at 15. But the defense explicitly agreed that the information in this exhibit was admissible, and it was from this exhibit (redacted per the defense request) that the prosecutor drew questions and the nurse drew her answers. RP (9/4/18) at 10, l. 6. It indicates what the nurse found medically relevant, and is a proper subject of the court's attention.

B. A court does not express an opinion on the defendant's guilt by using the rape victim's initials in a publicly filed writing.

The Defendant's subsequent roommate JSB requested an order of protection after the Defendant headbutted him, breaking JSB's nose and

fracturing his teeth, and stalked him with online apps that provided location access. CP 89-90, 103-04. JSB told the court that the Defendant was capable of holding a grudge for a long time and taking revenge long after the slight occurred. *Id*. (alleging that on several occasions, the Defendant had threatened to shoot people with his shotgun and to kill their animals and mail them back in pieces.) That appears to be the motive for the Defendant's perseverance on naming his earlier victim JP in publicly accessible documents that will be available on the internet.

In his appeal, the Defendant has argued that using JP's initials rather than his full name in the jury instructions was a judicial comment on the evidence and violated his public trial right. The victim testified openly before a jury under his own name, and the Defendant did not preserve error by making this objection below. He does not renew his public trial claim, but asserts that the use of JB's initials in a jury instruction presents a significant constitutional question. Pet. at 17. It does not.

The court of appeals followed precedent in finding the use of initials was not a comment on the evidence. Unpub. Op. at 14. Although the Defendant cites RAP 13.4(b)(1) and (2), he offers no contrary precedent. Pet. at 17. Crime victims have a constitutional right to be treated with respect and dignity. WASH. CONST. art. 1, sec. 35 . That respect begins with the courts, but it is also a part of our culture. As the State has explained,

there is no reason that the jury would interpret a comment from the use of initials. Brief of Respondent at 24-29. The jury lives in a society where it is an established and common practice not to name alleged victims of sexual abuse without their permission and for social media terms of service to sanction those who would dox them. The claim is frivolous, unpreserved, and does not demonstrate manifest constitutional error. RAP 2.5.

C. The trial court did not abuse its discretion in denying a motion for new trial premised upon an unsubstantiated claim that witnesses had seen the victim and defendant many hours before the rape would occur.

The Defendant continues to allege that his attorney neglected to call specific witnesses. Pet. at 20. This is simply not the record. The attorney did not neglect to call them. He searched for them and could not find them.

In the motion for new trial, the Defendant alleged that witnesses had observed him in an argument with an inebriated JP early in the evening many hours before the rape. CP 46-47. After eight months with an investigator, his second attorney had no better luck than the first: the alleged witnesses could not be found to validate this allegation. RP 632-33, 652-53. And the trial court found that, even if the Defendant's allegation were true, it would not bear on events which occurred later that night when the Defendant and victim were alone. CP 74; RP 656. The finding is tenable. It does not implicate any constitutional question or involve an issue of substantial public interest.

V. CONCLUSION

The Petition for Review does not present a consideration permitting review under RAP 13.4(b). It must be denied.

RESPECTFULLY SUBMITTED this 14th day of June, 2021.

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6-14-21 *s/ Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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