Supreme Court No. 97660-1
Court of Appeals No. 77719-0-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO JIMENEZ,

Petitioner.

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

COMES NOW the Petitioner, D'ANGELO JIMENEZ, through his attorneys at law, ESPADA CRIMINAL DEFENSE, and undersigned counsel, ARTURO D. MENENDEZ, and asks that this Court accept review of the decision of the Court of Appeals. In support of such petition, Mr. Jimenez submits:

CITATION OF THE COURT OF APPEALS DECISION

Mr. Jimenez seeks review of the decision of Division I of the Court of Appeals in *State v. Jimenez*, No. 77719-0-I. (July 15, 2019). *See* App. A. Motion for reconsideration was denied on August 16, 2019. *See* App. B.

ISSUES PRESENTED FOR REVIEW[1]

I. There was insufficient evidence to show that D.J. and A.B. engaged in sex.

Mr. Jimenez, "D.J.," as he is known, was friends with A.B. He was nineteen and she was fifteen. One day, they went out for frozen yogurt. A.B. testified that D.J. pulled over on Tester Rd., in Snohomish County, and gave her some "Molly."[2] D.J. then had oral and vaginal sex with A.B.

A.B. testified that D.J. pulled the bag of Molly out of the car door before putting it on a key and then putting it on her tongue. Testing of D.J.'s BMW found no trace of any drugs.

A.B. testified that D.J. placed her on the console of his car while giving her oral sex. No DNA matching A.B. or D.J. was found in D.J.'s BMW. When asked on cross-examination, if it was possible that the oral sex did not happen, A.B. testified it was possible, "but it's just my

[1] Citations are omitted in this section, but are provided in "Statement of the Case" and "Argument" sections.

memory."

A.B. testified that D.J. was inside of her when she felt a "pop." She could not remember if he wore a condom or ejaculated. A sexual assault examination showed only that A.B. had redness around her vagina. There was no blood in A.B.'s underwear. On cross-examination, A.B. testified she "could be wrong" about the sexual intercourse.

None of the texts between D.J. and A.B. mention sex. The Court of Appeals points to these texts as circumstantial evidence that the two had sex, but they must stand on their own. Asking about going to the bathroom is not the same as asking about sex.

Texts between Brooks and D.J. only mention rape only once Ms. Brooks accuses D.J. of raping A.B. If anything, D.J. asked that Brooks call him or pick up phone calls he made to her.

II. The nurse who administered the sexual assault examination on A.B. should not have been allowed to testify that A.B. identified D.J. as the assailant.

A.B.'s answers to Nurse Perry, the nurse who examined her, were hearsay. They were admitted into evidence under ER 803(a)(4) as being made for the "purpose 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. Case law has developed in such a way as to allow an exception for children in the treatment and diagnosis of injuries to allow for the identification of the assailant, where such statements would not be otherwise allowed for adults. *See State v. Williams*, 137 Wn.App. 736, 746, 154 P.3d 322 (2007); *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989).

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[2] The drug "ecstasy," as it is more commonly known.

This body of case law is predicated on cases of child molestation or abuse where a parent or close relative is the abuser and the treatment provider is concerned about sending the child home with an abuser. *Butler*, 53 Wn.App. at 215 (defendant was two-and-a-half-year-old victim's mother's boyfriend); *State v. Bouchard*, 31 Wn.App. 381, 382, 639 P.2d 761 (1982) (defendant grandfather perforated his three-year-old granddaughter's hymen); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986) (same); *United States v. Renville*, 779 F.2d 430 (8th Cir.1985) (defendant sexually abused his 11-year-old stepdaughter).

Renville, 779 F.2d 430, is cited as a case that "refined" the general exclusion on hearsay statements which assigned guilt and were made to a medical practitioner. *Butler*, 53 Wn.App. at 219. But the Court in *Renville* made clear that it was setting out a very specific rule: ""[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment." *Id*., citing *Renville*, 779 F.2d at 436. This case law was later expanded to include adults. *Williams*, 137 Wn.App. at 740, 746 (defendant was eighteen years old rape victim's former boyfriend).

The exception has basically swallowed the rule. Here, A.B. was available to testify and could be crossed examined. There was no need to introduce her statements made to the nurse regarding the identity of the assailant, as she was available to testify.

III. Because there was so little evidence against Mr. Jimenez, it was not harmless for the nurse who administered the sexual examination to be allowed to testify to A.B.'s complaints about her chastity.

The Court of Appeals held that while it was error to admit A.B.'s statements to the nurse regarding her chastity, such error was harmless because A.B.'s testimony, along with the texts between D.J. and Brooks and Nurse Perry's testimony about vaginal redness is made it

insufficiently prejudicial.

But the fact of the matter is that A.B.'s vaginal redness and the texts between D.J. and Ms. Brooks are only the most circumstantial of evidence and could be read any which way a trier of fact chooses. There is no way the Court of Appeals could know which part of which improperly admitted evidence was the straw that broke the camel's back.

STATEMENT OF THE CASE[3]

On September 7, 2017, Mr. D'Angelo Jimenez was charged with Rape in the Third Degree of his friend and schoolmate, "A.B." Mr. Jimenez, "D.J." as he is known, was nineteen years old, and A.B. was fifteen. After trial, the jury found Mr. Jimenez guilty of that charge.

At trial, A.B. testified that on July 22, 2015, D.J. picked her up under the guise of getting some frozen yogurt, but he instead pulled over to the side on Tester Road, in Snohomish County. D.J. then gave A.B. some "Molly" and had oral and vaginal sex with her. A.B. testified D.J.'s penis went inside her and she felt a "pop" inside her stomach. (BOA at 5). She did not see D.J.'s penis enter her vagina, and did not remember how it felt, but saw him holding it afterwards. (BOA at 5). A.B. testified that thought D.J. stopped having sex with her when her mother texted him to bring her home.

A.B. testified that D.J. had pushed his penis inside her and it "felt like her skin ripped." (BOA at 7). A sexual assault examination showed only some redness to A.B.'s vagina. (BOA at 9). Swabs of her vagina showed no male DNA. Swabs of D.J's BMW did not show any traces of either D.J. or A.B.'s DNA. (BOA at 8).

A.B. later testified that she could not remember if D.J. had in fact had oral sex with her.

3 A full statement of facts is set for in the Brief of the Appellant ("BOA") at App. C.

(BOA at 5).

A.B. testified that D.J. pulled the bag of "Molly" out from the driver's door (RP at 111). Testing of D.J.'s BMW did not find any residue of any drugs. (BOA at 8).

A.B. and D.J. texted later in the night after this incident and those texts were introduced at trial. None of the texts discussed sex. (BOA at 5). A.B. testified she did not remember texting D.J. (BOA at 7).

Days later, on July 25, 2015, A.B.'s mother, Sara Brooks, texted D.J. (BOA at 7). She told D.J. he had to stop dating her daughter, to which D.J. replied they were friends and were not dating. (BOA at 7). On August 6, 2015, when Brooks learned of the incident, she texted D.J. again, accusing him of raping A.B. Nowhere in those texts did D.J. say he had sex with A.B. He asked Brooks to call him or answer his calls but she would not.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

STATEMENTS ASSIGNING GUILT ARE BEING ADMITTED PURSUANT TO ER 803(a)(4) ARE SWALLOWING THE EXCEPTION TO THE RULE: THERE IS NO INDICIA OF TRUSTWORTHINESS TO SUCH STATEMENTS

The reasons hearsay statements which would otherwise be inadmissible are admitted into evidence is because of a "particularized guarantees of trustworthiness." *State v. Florczak*, 76 Wn.App. 55, 67, 69, 882 P.2d 199 (1994), citing *Idaho v. Wright*, 497 U.S. 805, 815, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (where the evidence falls within a firmly rooted hearsay exception, reliability can be inferred; otherwise, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness). "We agree that in the context of child hearsay, ER 803(a)(4) is not a firmly rooted hearsay exception." *Florczak*, 76 Wn.App. 55, 68, 882 P.2d

199, 207 (1994).

But again, here, the exception has swallowed the rule. The Court of Appeals has made it so that any statement given to a medical treatment provider is admissible, regardless of any test of trustworthiness or reliability.

F. CONCLUSION

THEREFORE, because the Court of Appeals committed error in affirming Mr. Jimenez' convictions, he appeals the decision of the Court of Appeals and requests that this Court reverse its holding, and remand the case to the Snohomish County Superior Court for further proceedings.

RESPECTFULLY SUBMITTED this 23rd day of SEPTEMBER 2019.

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APPENDIX TO PETITION FOR REVIEW

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Appendix A:

Decision of the Court of Appeals

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. D'ANGELO JAIME JIMENEZ, Appellant.	No. 77719-0-I DIVISION ONE UNPUBLISHED OPINION FILED: July 15, 2019

LEACH, J. — D'Angelo Jaime Jimenez appeals his conviction for rape of a child in the third degree for raping A.B. At the time of the incident, 19-year-old Jimenez and 15-year-old A.B. were friends. Jimenez challenges the sufficiency of the evidence supporting his conviction and asserts two evidentiary errors. First, A.B.'s testimony, her mother's testimony about the text messages her mother exchanged with Jimenez, and nurse examiner Kristine Perry's testimony that A.B. had some vaginal redness after the incident, in addition to the fact that this court defers to the trier of fact on witness credibility, mean sufficient evidence supports Jimenez's conviction. Second, Perry's testimony that A.B. identified Jimenez as the assailant is admissible under the medical diagnosis or treatment exception to the hearsay rule because A.B. is a child. Last, Perry's testimony

about A.B.'s chastity violated the trial court's ruling in limine barring the admission of evidence about A.B.'s character but was not prejudicial. We affirm.

BACKGROUND

A.B. and Jimenez met during the summer of 2015 when A.B. was 15 years old and Jimenez was 19. A.B. told Jimenez that she was 15. A.B.'s mother, Sara Brooks, reminded Jimenez regularly that A.B. was 15. Brooks did not know Jimenez's exact age but knew that he had graduated from high school, so she assumed that he was at least 18. A.B. did not have her own phone, so she used Brooks's phone to text Jimenez. When A.B. wanted to text Jimenez, she asked for Brooks's permission. A.B. testified that she and Jimenez never discussed being more than friends or having sex "because [she] knew [she] wasn't ready."

On July 22, A.B. and Jimenez went to get frozen yogurt in Snohomish. Jimenez picked up A.B. in his car and parked on the side of Tester Road. A.B. testified that Jimenez pulled a bag of "Molly"[1] from the driver's side door and asked if she wanted some. A.B. stated that when she asked him what it did, he said it would make her "happy." He put some Molly on a key and then put it on her tongue. Then he told her that it would make her "horny." A.B. testified that

[1] Detective Joan Gwordske testified that "Molly," also known as "Ecstasy" or "MDMA," is methylenedioxymethamphetamine. "[I]t's a stimulant and a hallucinogen and it affects the production of serotonin, dopamine, and norepinephrine inside the body."

this made her feel "terrified." She could hear him snorting Molly after he put some on her tongue.

A.B. testified that Jimenez asked to perform oral sex on her and she said no. After he asked twice more, she said, "[W[hatever, sure." Jimenez pulled off her pants and underwear and put them on the passenger side floor. She stated that he "put my bottom on the middle of the console, and I don't remember what happened after that." She said the Molly "made me feel like I wasn't there. Like—as if I were talking and I didn't know I was talking. . . . [A]nd my vision was just wavy." She testified that the next thing she remembered was "slouching" in the back seat "with my legs going to the left of the back seat and my head was against the window against the right side." She remembered the back driver's side door was open, Jimenez was standing there, and then he got on top of her. She "felt like a pop" and "heard a pop" inside her stomach. When she felt the "pop," "it hurt" and "felt really weird." She did not see Jimenez's penis go inside of her, but she did see him holding his penis standing in the open back driver's side door. She did not know whether he ejaculated or used a condom.

On cross-examination, Jimenez's trial counsel asked A.B. about her written statement to police. A.B. testified that her written statement did not include her testimony that Jimenez asked to perform oral sex on her to which she said no or that he put her on the center console naked from the waist down. She could not explain why she remembered those details during direct examination but not when she was writing her statement for police. Jimenez's trial counsel

asked, "Is it possible that the oral sex didn't actually happen?" A.B. responded, "It could be possible, but it's just my memory." She also did not know why she did not include in her statement but remembered during direct examination that she told Jimenez to stop when she was in the front seat. And she testified she "could be wrong" about intercourse happening in the backseat.

A.B. testified that she thinks Jimenez was still on top of her and inside of her when her mother texted him saying that she had to come home. Right after the incident, she thought Jimenez had raped her but did not immediately tell anyone. She remembered being scared to do so when she got home because she did not know how her family would react to her doing Molly. She also remembered sitting on the couch when she got home but did not remember about the two days following the incident, like if she felt any pain or if there was any blood in her underwear. Three days after the incident, she felt a burning pain when she urinated. She then told her grandmother what had happened. Her grandmother told Brooks who contacted the police.

Although A.B. testified that she did not remember texting Jimenez the night of the incident, a record of their text messages shows that A.B. texted Jimenez on July 22 around 7:00 p.m., stating, "It's [A.B.] and don't worry, I am ha, ha." He asked her what she was doing and to message him on Facebook. He also asked her if she used the bathroom. In response, she stated, "No, I was cleaning my room, LOL." Jimenez responded, "Well then, LOL, you better, ha, ha, ha." After they exchanged a number of messages about Jimenez watching

soccer and A.B. cleaning, Jimenez again asked her, "[D]id you use the bathroom yet, LOLOL?" A.B.'s last message to Jimenez on July 22 stated, "Yeah, I just did, LOL."

Brooks testified that she also texted with Jimenez on July 22. She first texted Jimenez around 6:00 p.m. when he and A.B. were still together and stated, "[A.B.] ran off without doing her housework. She needs to get home and get her stuff done." Jimenez responded, "Okay, right now?" She responded, "Yeah, right now." And he stated, "Okay. Well we just got to Snohomish, so I guess we will go back." Brooks responded, "Yep. Why did you guys go to Snohomish." And he said, "Get ice cream from this yummy froyo place I know." Brooks stated, "Well, sorry, but she needs to get her stuff done, plus she never asked to go anywhere. She just told me what she was doing." Jimenez replied, Oh, okay," and Brooks stated, "She is not an adult yet, only 15." Jimenez said, "Sorry, I thought you knew we were going." Brooks responded, "Nope." And at 6:40 p.m. Jimenez stated, "On our way." After Jimenez had taken A.B. home, he texted, "Hope she does her chores."

Brooks also testified that the day of the incident, she saw some photographs of A.B. and Jimenez together on Facebook that made her concerned that they were dating. Because of these photos, on July 25, Brooks texted Jimenez, "You need to stop dating my daughter. She just turned 15. You are 19, way too old to even think of my daughter in that way. You do realize that my daughter is under the age of [consent], so you just touching my daughter is

child molestation." He responded, "We are not even dating, we are just good friends. Everyone thinks we are dating because of what people see on Facebook. I already had told her to stop posting. . . . Sorry that we can't be good friends and please don't ever use those words again, very unnecessary." Brooks replied, "[S]he already admitted to it, but she says she broke it off . . . already. You can't bullshit a bullshitter." He stated,

> Yeah, I had told her that we couldn't date because she is younger than me and I am not bullshitting. But, yeah, she liked me, but I couldn't really do much about how someone feels about me. Oh, can only control my feelings. Do you get me? . . . Guess I will just have to not talk to her because of this, I'm sorry.

Brooks responded, "It's more like there will be a sit down with [my fiancé] Darrell and I."

Brooks next texted Jimenez on August 6, after she had learned of the incident. She stated, "I know everything you gave and did to my daughter. You are . . . not the only person who knows. You are not getting away with it, I promise." Jimenez responded,

> [W]hat are you talking about? . . . [W]e really liked each other. She was my best friend I have ever met but now we can't even talk because of something stupid. I'm sorry, please understand. We can talk about this in a calm manner. No need for this to get angry.

Brooks stated,

> You gave her Molly and then proceeded to have oral sex with her and then actual sex. Her clothes have already been taken in to test for DNA [deoxyribonucleic acid]. I also took her in for [a] sexual assault examine [sic]. Tomorrow is her last pregnancy test since you raped her without a condom.

Jimenez replied, "Oh, my God, please don't say that. You know I am the nicest soul you have ever met. Please stop and let's talk about this. . . . Please answer me." Brooks stated, "There isn't anything left to talk about. It is now out of my hands. Quit driving past her waving. Don't pass by our . . . house anymore."

After he repeatedly asked Brooks to call him or answer his call, Brooks texted, "She is 15 and you are almost 20. She is a child and under the age of consent. Do not contact any of us again." Jimenez replied,

> There is no need for you to talk charg[ing] me with rape for a teenage fuck up. I am not some old man in his 30s. I just graduated from high school. Okay, I'm sorry, but I honestly didn't rape or even try to rape your daughter. I even assured her that I didn't want to because it might not be the right time, and she said it was all right. But yes, I understand where you are. . . . I understand where you are coming from. I'm sorry. Bye.

On July 26, Kristine Perry, a forensic nurse examiner, performed a sexual assault exam on A.B. Perry observed some vaginal redness caused by an inflammatory response to some irritation. Perry testified that the location of the redness meant that the assault most likely occurred while A.B. was on her back.

Detective Joan Gwordske searched Jimenez's car using an alternative light source that illuminates any biohazard material like body fluid inside the vehicle. She took swabs from three different locations in the back seat that luminesced under the light. Washington State Patrol lab technician Carol Vo found that none of the DNA swabbed from Jimenez's car matched his DNA. Vo also analyzed the vaginal swabs taken from A.B. and did not find any male DNA in them.

On October 27, 2017, a jury found Jimenez guilty of rape of a child in the third degree. He appeals.

ANALYSIS

Sufficiency of the Evidence

First, Jimenez challenges the sufficiency of the evidence to support his conviction for rape of a child in the third degree. We disagree.

Whether the State presented sufficient evidence is an issue of law that this court reviews de novo.[2] In reviewing the sufficiency of the evidence, this court determines "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."[3] "'When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.'"[4] A sufficiency claim admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence.[5] We view circumstantial evidence equally as reliable as direct evidence.[6] We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.[7]

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[2] State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).
[3] State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).
[4] Kintz, 169 Wn.2d at 551 (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).
[5] Kintz, 169 Wn.2d at 551.
[6] Kintz, 169 Wn.2d at 551.
[7] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

As a preliminary issue, the State appears to claim that this court should not review Jimenez's sufficiency challenge because he did not make this claim in the trial court. But a defendant may raise a constitutional claim for the first time on appeal.[8] A sufficiency claim is a question of constitutional magnitude because its purpose is to "'ensure that the trial court fact finder rationally appl[ied] the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt.'"[9]

Jimenez relies on State v. Alexander,[10] in which a jury convicted Alexander of two counts of first degree rape of a child. On appeal, he asserted that the evidence on count one was insufficient to prove that more than one act of sexual intercourse occurred during the charging period or that digital penetration occurred.[11] In reversing his convictions, this court held that without multiple witnesses' improper testimony and the prosecutor's improper statements, the inconsistencies in the victim's testimony were too extreme and the evidence presented to the jury was too confused to allow the jury to find

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[8] RAP 2.5(a)(3); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

[9] Berg, 181 Wn.2d at 867 (alterations in original) (internal quotation marks omitted) (quoting State v. Rattana Keo Phuong, 174 Wn. App. 494, 502, 299 P.3d 37 (2013)).

[10] 64 Wn. App. 147, 149, 822 P.2d 1250 (1992).

[11] Alexander, 64 Wn. App. at 157.

Alexander guilty on either count.[12] These inconsistencies related to when the alleged rapes occurred and whether he had touched her inappropriately.[13]

Here, the State had to prove each of the following elements beyond a reasonable doubt to secure a conviction for third degree rape of a child: (1) On July 22, 2015, Jimenez had sexual intercourse with A.B.; (2) A.B. was at least 14 years old but was less than 16 years old at the time of the sexual intercourse and was not married to Jimenez; (3) A.B. was at least 48 months younger than Jimenez; and (4) the rape occurred in Washington state.

Jimenez claims that the State did not prove the first element beyond a reasonable doubt. He asserts that similar to Alexander, A.B.'s testimony was inconsistent and contradictory. Jimenez notes that she did not remember how she got on the console or anything thereafter until she was slouched in the backseat. She felt a "pop" and saw Jimenez holding his penis, but she did not see his penis go inside of her or remember how it felt. She did not include all the details in her written statement to police that she testified about, and she testified that it was possible the oral and vaginal sex might not have happened.

First, unlike the victim's testimony in Alexander, A.B.'s testimony was not contradictory. Although A.B. does not remember many details surrounding the incident and testified that she "could be wrong" that Jimenez had sex with her, her testimony did not contradict what she testified she remembered did happen.

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[12] Alexander, 64 Wn. App. at 158.
[13] Alexander, 64 Wn. App. at 149-50.

Second, Jimenez's repeated questioning of A.B. by text message on the night of the incident about whether she had gone to the bathroom and the text messages between Brooks and Jimenez provided circumstantial evidence that Jimenez and A.B. had sex. Last, Perry testified that she observed some redness on A.B.'s vagina. Because this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence, and any alleged inconsistencies in A.B.'s testimony were not bolstered, like the victim's in Alexander, by improper statements, sufficient evidence supports Jimenez's conviction.

Medical Diagnosis or Treatment Exception to the Hearsay Rule

Next, Jimenez asserts that the trial court improperly admitted Perry's testimony about A.B.'s identification of Jimenez as the assailant and A.B.'s chastity. We conclude that although Perry's testimony about A.B.'s chastity was error, it was not prejudicial.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14] Hearsay evidence is inadmissible unless an exception applies.[15] We review a trial court's decision on the admissibility of statements under the hearsay rules for an abuse of discretion.[16] We will not disturb the trial

[14] ER 801(c).
[15] ER 802.
[16] State v. Woods, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001).

court's ruling unless we believe that no reasonable judge would have made the same ruling.[17]

At issue here is ER 803(a)(4), the medical diagnosis or treatment exception to the hearsay rule. This exception allows the admission of "[s]tatements 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."[18] A party demonstrates that a statement is "reasonably pertinent to diagnosis or treatment" when "(1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment."[19]

A. Perry's Testimony about A.B.'s Identification of the Assailant

First, Jimenez contends that the trial court erred in admitting Perry's testimony about A.B.'s identification of Jimenez as the assailant. "Because ER 803(a)(4) pertains to statements 'reasonably pertinent to diagnosis or treatment,' it allows statements regarding causation of injury, but generally not statements attributing fault."[20] Jimenez cites State v. Redmond,[21] in which our Supreme Court held that the trial court abused its discretion by admitting two attributions of

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[17] Woods, 143 Wn.2d at 595-96.
[18] ER 803(a)(4).
[19] State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).
[20] State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003).
[21] 150 Wn.2d 489, 497, 78 P.3d 1001 (2003).

fault in the victim's medical records, including the statements that "'an ex-student accosted and dragged Mr. Johnson from his auto'" and "'[Johnson] was accosted in the parking lot by another male.'" When the declarant is a child, however, statements about the identity of the abuser are reasonably necessary to the child's medical treatment because a medical provider needs to know who abused a child to avoid potentially sending her back to the abusive relationship and to treat any psychological injury.[22] For example, in State v. Hopkins,[23] Division Two of this court held that a doctor's testimony about the 13-year-old victim's identification of her abuser was admissible under ER 803(a)(4) because the victim was a child.

Here, the trial court granted the State's motion in limine to allow Perry's testimony about A.B.'s description of the crime but stated, "[W]ith regard to any questions about who did it, the State will have to show authority that allows it." During Perry's direct examination, the prosecutor asked her what A.B. told her about what had happened to her and why she was there. Perry responded, "She told me that she was there because she—her boyfriend had forced intercourse with her." Later, Perry identified A.B.'s boyfriend as Jimenez. Jimenez's trial counsel objected to Perry's first statement and, outside of the presence of the jury, asserted that Perry's testimony violated the court's ruling in limine about the issue. He also asked for a mistrial. The prosecutor responded that Perry's

[22] State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006).
[23] 134 Wn. App. 780, 787-88, 142 P.3d 1104 (2006).

statement was for purposes of medical diagnosis or treatment because it was pertinent for Perry to know that she was not sending A.B. home with her abuser.

The court denied Jimenez's counsel's request for a mistrial and ruled that Perry's testimony was admissible under ER 803(a)(4) based on our Supreme Court's reasoning in State v. Woods.[24] In Woods, the Court rejected the argument that ER 803(a)(4)'s application is limited to statements related to the diagnoses and treatment of physical injuries and established that it also includes statements related to the diagnoses and treatment of psychological issues.[25]

A.B. was 15 years old at the time of the incident and was thus a child. This means Perry's testimony that A.B. identified Jimenez as the assailant was admissible under ER 803(a)(4) because this information was reasonably related to A.B.'s potential physical and psychological treatment. The trial court did not abuse its discretion by admitting this testimony.

B. Perry's Testimony About A.B.'s Chastity

Second, Jimenez claims that the trial court erred in admitting Perry's testimony stating what A.B. told her about her virginity.

During her direct examination, Perry testified that A.B. told her that she and Jimenez broke up two days after the incident. Reading from her report, Perry stated, "'The patient states'—would you like me to say this next part?" The prosecutor told Perry to "[g]o ahead." And Perry testified, "'The patient states

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[24] 143 Wn.2d 561, 23 P.3d 1046 (2001).
[25] Woods, 143 Wn.2d at 602-03.

she would never have given up her virginity at the age of 15, stating that she was planning on waiting 'a lot longer than this.'"

Outside the presence of the jury, Jimenez's trial counsel objected, claiming this evidence violated the trial court's ruling in limine barring either party from introducing character evidence about A.B.'s "sexual tendencies or sexual history or reputation in the community for sexual morality." He stated Perry's testimony was also a violation of RCW 9A.44.020, the rape shield law, and ER 404(a) and ER 412, concerning the admissibility of character evidence and the victim's past sexual behavior, respectively. He additionally claimed a violation of Jimenez's Sixth Amendment right to confront witnesses against him.[26] He asserted that the State was improperly "back dooring credibility evidence about [A.B.'s] chastity . . . to bolster her credibility." He asked the court to dismiss the case based on a violation of Jimenez's due process rights. The State responded that Perry's testimony was admissible under ER 803(a)(4) because in a rape case, whether a victim has had sex before the incident may relate to her diagnosis or treatment. The trial court did not rule on the objection but, instead, reserved it.

On appeal, Jimenez does not assert a confrontation clause violation and appears to raise only the evidentiary issues that his trial counsel raised below. He also appears to claim cumulative error based on both of his assertions of

[26] "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend VI.

evidentiary error. Perry's testimony that A.B. told her she had been a virgin before the incident does, in fact, violate the trial court's ruling in limine prohibiting either party from introducing evidence about A.B.'s sexual history. Testimony that violates a ruling in limine may require a mistrial if it prejudiced the jury.[27] In determining whether an "irregularity" may have influenced the jury, we evaluate (1) its seriousness, (2) whether the statement was cumulative of other evidence properly admitted, and (3) whether an instruction to disregard it cured any prejudice.[28]

Here, Perry's challenged testimony was not cumulative of other admitted evidence and the trial court did not give a curative instruction because it reserved its ruling on Jimenez's trial counsel's objection. But it is not a serious irregularity. Because A.B.'s testimony about the incident, Brooks's testimony about her text messages with Jimenez, and Perry's testimony about A.B.'s vaginal redness provide sufficient evidence to support Jimenez's conviction, Perry's improper testimony is not sufficiently prejudicial to require a mistrial. Because this testimony is the only error Jimenez identifies, we do not address any claim of cumulative error.

CONCLUSION

We affirm. Sufficient evidence supports Jimenez's conviction for rape of a child in the third degree. And Perry's testimony about A.B.'s identification of the

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[27] State v. Escalona, 49 Wn. App. 251, 253-55, 742 P.2d 190 (1987).
[28] Escalona, 49 Wn. App. at 254.

assailant as Jimenez was admissible under ER 803(a)(4). Although Perry's testimony about A.B.'s chastity violated one of the trial court's rulings in limine, it was not prejudicial.

Leach, J.

WE CONCUR:

Mann, A.C.J.

Andrus, J.

Appendix B:

Order Denying Motion for Reconsideration

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. D'ANGELO JAIME JIMINEZ, Appellant.	)	No. 77719-0-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, D'Angelo Jiminez, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Leach, J.
Judge

Appendix C:

Appellant’s Brief on Appeal

77719-0

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

NO. 77719-0-I

State of Washington,

Respondent,

v.

D'Angelo Jimenez,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Lucas, Judge

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I. The Charges

On September 7, 2017, the Prosecutor's Office filed an Amended Information charging against D.J. to Rape of a Child Third Degree.

II. Pre-Trial Motions

On October 23rd, 2017, the Court held a hearing on motions in limine. (RP at 1, 4.)

a. State's Motion in Limine Number Seven

The State's motion in limine number seven sought to prevent the defendant from introducing evidence regarding character evidence "about the defendant's or victim's sexual tendencies or sexual history or reputation in the community for sexual morality." (RP at 9.) Mr. Jimenez agreed, stating that he was only interested in cross examining the victim for truthfulness. (RP at 9-10.)

b. State's Motion in Limine Number Eight

The State's motion in limine number eight was to prevent the defense from inquiring about marijuana use by the A.B. or by her mother, Sara Brooks. (RP at 15.) The State argued that the issue was whether or not Mr. Jimenez had sex with A.B., not whether she smoked marijuana or any other drug use on her part. (RP at 10-11.) Mr. Jimenez countered that this was about credibility. (RP at 11.) During witness interviews, both A.B. and her mother mentioned marijuana use, and Ms. Brooks stated that she had used marijuana with her A.B. (RP at 12.) The State argued that the interviews Mr. Jimenez referred to had not been recorded, and disagreed with the content of those interviews. (RP

at 12-13.) The State argued that A.B. did not contradict herself during those interviews, and so could not be questioned as to her credibility through her marijuana use. (RP at 13.) The Court reserved on ruling. (RP at 15.)

c. State's Motion in Limine Number Nine

State's motion in limine number nine was to prevent the defense from inquiring into A.B.'s mental health history. (RP at 15.) Part of the sexual assault examination done by Nurse Kristine Perry included a recitation of A.B.'s history. (RP at 16.) There was evidence of attempted suicide, self-harm, and cutting. (RP at 16.) Defense objected because these were part of statements made by A.B. to the Nurse which the State was trying to introduce. (RP at 23.) The State argued that A.B.'s mental health was not relevant to whether or not sex occurred between her and the defendant. (RP at 16.) The State accused Mr. Jimenez of attempting to "back door" A.B.'s marijuana use through her mental health issues. (RP at 17-18.) The Court granted the State's motion. (RP at 23.)

d. State's Motion in Limine Number Eleven

State's motion in limine number eleven was to allow Nurse Kristine Perry to testify about the victim's description of the crime to the Nurse during the sexual assault examination. (RP at 25.) Defense objected: A.B. was going to testify, it was cumulative evidence, and introducing it through Nurse Perry served only to enhance its credibility in the eyes of the jury. (RP at 25.) Moreover, because the defense was prevented from inquiring into the complaining witness' mental health history, it was unfairly prejudicial to let Nurse Perry recite statements made by A.B. (RP at 26.)

The State argued that A.B.'s mental health history was completely separate and irrelevant to the allegations she made against Mr. Jimenez. (RP at 28.) "Defense wants to bring this up and throw this in the victim's face[.]" (RP at 28.) "Just because we are getting in information that was provided to the nurse does not mean that every aspect of that is, therefore admissible and relevant." (RP at 28-29.) Defense noted it was the State who was seeking to introduce statements to the Nurse by A.B. through the nurse, when A.B. herself was going to be testifying. (RP at 29.) The Court held that Nurse Perry could testify to A.B.'s description of the crime. Nurse Perry could not, however, testify to who committed the crime, without the State showing the Court authority allowing such. (RP at 30.)

III. Trial

a. A.B. Testified She Didn't Remember Having Oral Sex, Didn't Remember Having Vaginal Sex.

A.B. was born on May 2, 2000. (RP at 93-94.) A.B. lived with her mother, Sara Brooks, as well as Ms. Brooks' fiancé and A.B.'s brother, T.B. (RP at 222.) A.B. and D'Angelo Jimenez met at the beginning of the summer of 2015. (RP at 96-97.) She knew D'Angelo as "D.J." RP at 110. She was 15 years old that summer. (RP at 110.) She knew D.J. was 19, but didn't know his date of birth. (RP at 95-96.) When they met, A.B. told D.J. she was 15.

A.B. took D.J. to meet her mom the same day she met him. (RP at 99.) A.B.'s mom liked knowing who A.B. was with. (RP at 99.) Ms. Brooks didn't know D.J.'s exact age, but he had graduated high school and had a full time job so she figured he must be 18. (RP at 224.) Ms. Brooks reminded D.J. regularly that A.B. was 15. (RP at 225.)

D.J. and A.B. texted and talked every day. (RP at 100.) A.B. saw D.J. every day after he got off work and they would hang out together afterwards. (RP at 101.) D.J. was always respectful to Ms. Brooks and came to the door to say hello. (RP at 228.)

A.B. did not have a phone of her own; she used her mother's phone to text D.J. (RP at 200.) If A.B. wanted to text D.J., she would have to ask for Ms. Brooks permission first. (RP at 200.) A.B. would have to let D.J. know it was her instead of her mom when she was texting D.J. (RP at 201.)

On July 22, 2015, A.B. and D.J. went out to get frozen yogurt in Snohomish. (RP at 102.) A.B. testified she asked her mom first, who said it would be O.K., and set a time for her to be home. (RP at 102.) A.B.'s mom testified that A.B. did not ask her, but rather just told her she was leaving with D.J., without getting permission. (RP at 228, 229.)

D.J. picked up A.B. in his BMW. (RP at 102.) A.B. didn't know where they were going, but they parked on the side of the road on Tester Rd. (RP at 102, 105.) A.B. testified D.J. pulled out a bag of "Molly" from the driver's door and asked if she wanted some. (RP at 111.) A.B testified she asked D.J. what it did, and D.J. said it makes you happy. (RP at 111.) D.J. put some Molly on a key and put it on her tongue. (RP at 112.) Then he told her it would make her horny. (RP at 112.) A.B. testified this made her feel "terrified." (RP at 112.) A.B. testified she could hear D.J. snorting the Molly after he put it on her tongue. (RP at 130.)

A.B. stated that D.J. then asked to perform oral sex on her and she said no. (RP at 112.) Then he asked again, and again, and then she said "whatever, sure." (RP at 112.) D.J. pulled her pants off, "and put my bottom on the middle of the console, and I don't

remember what happened after that." (RP at 112.) Her pants and underwear were on the front passenger floor. (RP at 133-34.)

A.B. remembers her vision was "wavy." (RP at 112.) Next thing she remembered she was slouching in the back seat with her head against the window. (RP at 113.) She didn't remember how she got there. (RP at 113.) D.J. was back there but she didn't remember how he got there either. (RP at 113.) A.B. did not know whether D.J. was in the back seat with her during the incident, or standing just outside of the car. (RP at 204-05.)

As she was reclined in the back seat, she felt "like a pop and I heard – I heard a pop and then I look up and then I just remember seeing his face. . . . It was going like in waves." (RP at 134.) A.B. testified D.J.'s penis was inside of her when she felt the "pop" in her stomach. (RP at 136.) She didn't see his penis go in, and she didn't remember how it felt, she only saw him holding it afterwards. (RP at 136.) A.B. doesn't know if D.J. ejaculated inside of her. (RP at 138.) A.B. testified she couldn't remember if D.J. reacted to the "popping." (RP at 157.)

A.B. testified it was possible the oral sex didn't happen. (RP at 150.) A.B. agreed that it is possible that she was never on the console with her pants off. (RP at 163.) She didn't know what happened. (RP at 163.) She didn't remember how it is that D.J. got her from the passenger seat on to the console. (RP at 164.) She didn't remember how it was that he took her pants off. (RP at 164.) A.B. admitted she could be wrong about what happened. (RP at 165.)

At 6:14 pm, Ms. Brooks – A.B.'s mother – texted D.J.: "[A.B.] ran off without doing her housework. She needs to get home and get her stuff done." (RP at 231.) D.J.

responded "Okay, right now?" Ms. Brooks responded "yeah, right now." (RP at 231.) D.J. responded "Okay. Well we just got to Snohomish, so I guess we will go back." (RP at 231.) Ms. Brooks asked why they went to Snohomish, and D.J. replied they went to "get ice cream from this yummy froyo place I know." (RP at 231.) Ms. Brooks told him that A.B. "needs to get her stuff done, plus she never asked to go anywhere. She just told me what she was doing." (RP at 231-32.) At 6:23 pm, D.J. texted "sorry, I thought you knew we were going," and by 6:39 pm, D.J. texted "on our way." (RP at 232.) At 7:04 pm, DJ texted Ms. Brooks: "hope she does her chores." (RP at 233.)

A.B. texted D.J. later that day. (RP at 186-87.) At 7:03 pm on that same day, D.J. asked if A.B. had done her chores and asked "what's up." (RP at 188.) A.B. said she was cleaning her room, and she could message him on Facebook when she was done with her chores. (RP at 188-89.) D.J. asked her if she used the bathroom, to which she replied "No, I was cleaning my room, LOL." (RP at 189.)

Later, at 7:20 pm, A.B. asked D.J. what he was doing, and he said "Watching soccer, LOL, LOL." (RP at 193.) A.B. called D.J. a "Mexican" and he replied "LOL, LOL, LOL, stop, not nice." (RP at 193.)

At 7:36, D.J. asked her how her room was looking. (RP at 198.) A.B. said it was going great, and she was doing the dishes. (RP at 196.) D.J. asked her again "did you use the bathroom yet, LOLOL," to which A.B. replied "Yeah, I just did, LOL." (RP at 198.)

The text messages mentioned nothing about sex. (RP at 198.)

When questioned about the texts on the stand, A.B. did not remember that the texts had happened. (RP at 187.) A.B. testified that the next thing she remembered was "[w]alking in my front door, sitting on the couch." (RP at 113.) She didn't remember doing chores later that night. (RP at 160.) She didn't remember texting Mr. Jimenez. (RP at 160.) Counsel had shown her the text messages, but she didn't remember sending them. (RP at 161.)

Sometime between July 22nd and 25th, Ms. Brooks saw some pictures on Facebook of D.J. and A.B. that she didn't like. (RP at 255.) On July 25th, 2015, at 2:36 pm because of these pictures, Ms. Brooks texted D.J.: "You need to stop dating my daughter, she just turned 15." (RP at 235.) D.J. responded: "We are not even dating, we are just good friends." (RP at 235.) Ms. Brooks responded: "DJ, she already admitted to it, but she says she broke it off with already. You can't bullshit a bullshitter." (RP at 236.) D.J. stated he told A.B. they couldn't date and he was "not bullshitting." (RP at 236.)

At that time, A.B. had not yet told Ms. Brooks what supposedly happened on Tester Rd. (RP at 236.) Two days after the alleged incident, A.B. reported to her grandmother that she felt a burning sensation when she peed. (RP at 167.) Ms. Brooks was at her mother's house the day she came to "understand" everything. That's the day they went to the hospital. (RP at 237.)

A.B. wrote a statement, had a rape kit done, and gave detectives the clothes she was wearing. (RP at 115.) When A.B. talked to the police she told them that D.J. had "pushed his penis into her vagina really hard," and it "felt like her skin ripped." (RP at 184.) She also told the police that she did not see any blood at that time or afterwards. (RP at 184.)

She had examined her underwear after the incident and there was no blood. (RP at 184.) A.B. couldn't remember if she felt any pain in any parts of her body afterwards. (RP at 139.) She only remembered it burned when she urinated. (RP at 139.)

On August 6th, 2015, Ms. Brooks texted D.J.: "I know what you gave and did to my daughter. . . you are not getting away with it, I promise." (RP at 240, 242.) D.J. texted "she was my best friend I have ever met but now we can't even talk because of something stupid. I'm sorry, please understand. We can talk about this in a calm manner. No need for this to get angry." (RP at 243.) Ms. Brooks texted that D.J. had given A.B. some Molly, and then "proceeded to have oral sex with her and then actual sex." (RP at 243.) D.J. text back that he did not rape her, and he wanted to "stop and . . . talk about this." (RP at 243-44.) Ms. Brooks made it clear that D.J. was not to contact her anymore. (RP at 244-45.)

b. No Drugs Were Found in Mr. Jimenez' BMW, None of the DNA found in the BMW matched Mr. Jimenez or A.B., and No Male DNA was Found on Swabs of A.B.'s private areas.

Det. Gwordske searched D.J.'s BMW. (RP at 279.) Using a special "alternative light source, which illuminates biohazard material that would be inside the vehicle, any body fluid," she identified areas to take sample swabs. (RP at 280.) A diagram of the car showed the areas in the car from which she took swabs. (RP at 282-83.) Det. Gwordske took four samples; three from areas that bio-luminesced, and another from an area that had a "white powdery substance." (RP at 283, 295.) Nevertheless, WSP Lab Technician Carol Vo found that the white powdery substance was not a match for any illicit drugs. (RP at 298.) Furthermore, none of the DNA swabbed from the BMW matched any DNA for Mr.

Jimenez or A.B. (RP 314, 316, 325-332.) Ms. Vo also analyzed vaginal swabs taken from A.B. and did not find any male DNA in those swabs. (RP at 311-12.)

c. Sexual Assault Examination Revealed Only Some Redness to Part of A.B.'s Vagina; Nothing Else was Out of the Ordinary.

On July 26th, 2015, A.B. took a sexual assault exam. (RP at 362.) Kristin Perry was the Forensic Nurse Examiner. (RP at 333.) Nurse Perry made only two relevant observations as part of her testimony: (1) A.B.'s vagina had some redness at the bottom (RP at 425-26); and (2) A.B's hymen was redundant, meaning it was typical for a 15 year old girl (RP at 429). There was no redness or anything out of the ordinary on the rest of her vagina. (RP at 446.)

Nurse Perry asked A.B. background questions to get A.B.'s medical history. (RP at 364.) When asked why A.B. was there, Nurse Perry stated it was because "her boyfriend forced intercourse with her." (RP at 365.) During her examination, A.B. denied she had been penetrated orally. (RP at 458.)

Mr. Jimenez objected to the Nurse's testimony about A.B.'s "boyfriend" forcing intercourse – it violated the Court order on motions in limine number 11. (RP at 366.) The State argued it was an exception to the hearsay rule for medical diagnosis or treatment: "it's important for Ms. Perry to know that she is not sending the victim home with their abuser, which is why it's important for her to ask that question and have an honest answer." (RP at 366-67.)

Upon review of the order on motions in limine, the trial court noted that the State's motion in limine 11 was granted, but that "with regard to any questions about who did it,

the State will have to show authority that allows it. . . . You just launched right into it and I still haven't heard authority." (RP at 367.)

Mr. Jimenez argued that was a blatant violation of the court's pretrial rulings. (RP at 368.) "It was actually the State's motion and the State knew well enough that they wanted to get this testimony in from the nurse about what the complaining witness said to her." (RP at 368).

The trial court held that the Nurse's testimony was not improperly prejudicial because the suspect in this case was not a mystery:

> Improper prejudice has to do with unsupported allegations. And in this situation, the testimony that's already in the record is sufficient support that points the finger at the defendant as the causer of this situation.

(RP at 377-78.)

Nurse Perry then continued testifying to statements given to her by A.B. regarding the background of the incident that brought her there. (RP at 398.) Nurse Perry stated that A.B. identified D.J. as her assailant and the one who had sex with her. (RP at 415.)

At one point in her testimony, Nurse Perry, reviewing her report, asks the State if it would like her to "say this next part?" Counsel for the State says "go ahead:"

> The patient states she would never have given up her virginity at the age of 15, stating that she was planning on waiting "a lot longer than this."

(RP at 403.)

Mr. Jimenez objected to this testimony as a violation of the court's order on motions in limine number 7. (RP at 408.) "That's a violation of ER 404(a). It's also a violation of ER 412[.]" (RP at 408.) "What the State is basically doing is back dooring credibility evidence about the chastity of their complaining witness to bolster her credibility. It's completely improper." (RP at 409.) Mr. Jimenez asked for a dismissal pursuant to CrR 8.3. (RP at 410.) The trial court reserved on Mr. Jimenez' motion. (RP at 414.)

IV. Verdict

On October 27, 2017, the jury found Mr. Jimenez guilty of Rape of a Child in the Third Degree at 565.

ARGUMENT

I. THE COURT ERRED WHEN FAILED TO DISMISS THE CHARGE AGAINST MR. JIMENEZ FOR INSUFFICIENCY OF THE EVIDENCE.

The State must produce substantial evidence to support the elements of a crime. *State v. Werneth*, 147 Wn.App. 549, 552, 197 P.3d 1195 (2008). Whether the State has met that burden, a burden of production, is a question of law that the Court must review de novo. *Id*. Whether there is sufficient evidence to support a conviction turns on "'whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime].'" *State v. Vladovic*, 99 Wn.2d 413, 424, 662 P.2d 853 (1983) (*quoting State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)). Deference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the general persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

In *State v. Kaylor*, 155 Wn.App. 1048, 2010 WL 1759458 (2010) (unpub.), the Court of Appeals upheld the defendant's conviction, noting ample evidence to convict:

> when she was 15 years old and Kaylor was 36 years old, (1) Kaylor gave her a drink that intoxicated her; (2) Kaylor penetrated her vagina with his penis; (3) she attempted to kick Kaylor off but passed out; (4) she woke up with her legs off the bed, her pants across the room, and her underwear twisted; (5) her vagina felt sore; (6) when she went to the bathroom, she experienced discharge that looked like sperm; and (7) Kaylor warned her not to tell anyone about the incident. B.A.H.'s description of Kaylor's penis matched identically Kaylor's self-description. Kaylor admitted to Detective Harry Heldreth that he thrust two of his fingers inside B.A.H.'s vagina at least twice. And Kaylor admitted to Sergeant Cheryl Stines that he engaged in seven potentially sexual incidents with B.A.H.

By comparison, in *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1992), the Court reversed the defendant's conviction for rape of a child in the first degree based on insufficient evidence. There, the Court found there was insufficient evidence to convict the defendant for Rape of a Child where the alleged victim's testimony was too inconsistent and confused for a jury to find the defendant guilty. *Id*. at 157 "[T]he inconsistencies in M's testimony regarding when the abuse occurred, and whether the bathtub or baby oil incidents occurred at all, were extreme." *Id*.

A.B.'s testimony was inconsistent and extremely contradictory. First, she did not remember anything after Mr. Jimenez placed her on the center console. But she also did not remember how she got onto the center console. She remembers being slouched in the back seat, and that Mr. Jimenez was there, but could not recall if he was in the car with her or outside. She felt and heard a "pop" inside her. She testified Mr. Jimenez penis was inside her, but she did not see it go in, did not remember how it felt, and only saw him holding it afterwards. A.B. did not know if Mr. Jimenez ejaculated, or reacted to the "popping."

A.B. testified that Mr. Jimenez asked her for oral sex and then had oral sex with her. She later testified it was possible that oral sex did not happen. And that it was possible that she was never on the console with her pants off. A.B. testified she could be wrong about what happened.

No DNA belonging to A.B. or Mr. Jimenez was found in his car. No drugs were found in Mr. Jimenez car. Swabs of A.B.'s private areas revealed no male DNA.

The only evidence that exists which could satisfy the elements of the charge in this case are A.B.'s own statements. However, she repeatedly contradicted herself during her testimony, stating that it could be possible that oral and other sex happened, or did not happen, and that she could not remember anything. No other evidence supports her allegations. Mr. Jimenez therefore asks that this Court vacate his conviction.

II. THE COURT ERRED WHEN IT ALLOWED NURSE PERRY TO TESTIFY TO STATEMENTS MADE BY A.B. TO THE NURSE DURING DIAGNOSIS WHICH IDENTIFIED MR. JIMENEZ AS THE ASSAILANT.

Because ER 803(a)(4) pertains to statements "reasonably pertinent to diagnosis or treatment," it allows statements regarding causation of injury, but generally not statements attributing fault. *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001, 1005 (2003) (citing *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001)). "For example, the statement 'the victim said she was hit on the legs with a bat," would be admissible, but "the victim said her husband hit her in the face" would not be admissible." *Redmond*. 150 Wn.2d at 496-97. A court reviews *de novo* whether a statement was hearsay or in violation of the Confrontation Clause. *State v. Gonzalez*, 193 Wn.App. 683, 370 P.3d 989 (2016) (hearsay, except for excited utterances,

reviewed for abuse of discretion); *State v. Hurtado*, 173 Wn.App. 592, 597, 294 P.3d 838 (2013) (Confrontation Clause).

In *Redmond*, the Court held that the trial court abused its discretion when it introduced evidence of hearsay statements made during a medical diagnosis. *Id*. at 497. Those hearsay statements identified the assailant, even though assailant's identity was not a mystery.

Mr. Jimenez cited *Redmond* during his argument regarding introduction of A.B's statements through the Nurse. While A.B. had alleged that D.J. was the source of whatever injury had occurred to her, the defense did not admit to such as part of their case, and no other evidence was presented showing Mr. Jimenez had sex of any sort with A.B.

The trial court relied *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) in ruling against Mr. Jimenez. But *Woods* is not inapposite of *Redmond*. In *Woods* (overruled on other grounds), the Court held that statements made by the victim to medical personnel were properly introduced for two different reasons. First, because the victim passed away, statements made close in time to her death were admitted as excited utterances. *Id*. at 597-98. These statements included not only the details of the assault that led to her death, but also identified the perpetrators. *Id*. at 596 ("In response to the paramedic's question, "who did it," Jade responded, "a man named Dwayne," and "'[i]t was a guy that Venus had been going out with and his name was Dwayne.'").

The second set of hearsay statements in *Woods* from the victim were introduced under the medical diagnosis exception. *Id*. at 601. These statements did not identify the perpetrator, but provided information pertinent to either the physical or psychological treatment of the victims. *Id*. The relevant statements were that the deceased victim "was

awakened by this person who apparently had gotten in bed with her," the deceased victim was shown the beaten body of another victim by the assailant, and the deceased victim heard a bat swing and hit another victim's head. *Id*.

Here, the trial court clearly contradicted the holdings in *Woods* and *Redmond* when it permitted Nurse Perry to testify that A.B. told her that "her boyfriend" had forced intercourse with her. *Woods* does not permit the medical hearsay exception to allow the identities of assailants to be introduced. *Woods* does not overrule *Redmond*. In *Woods*, the Court allowed the identity of the assailants to be introduced into evidence because they were admissible under the *excited utterance exception*, not because of the medical diagnosis exception.

Nurse Perry's statements prejudiced Mr. Jimenez because they served to bolster A.B's weak testimony as to the events of the date in question. A.B. undoubtedly remembered very little of what happened, and the State presented A.B.'s statements through Nurse Perry as a way to give those statements credibility. Otherwise, why not simply introduce A.B.'s statements through A.B.?

Statements to Nurse Perry from A.B. should not have been introduced as evidence. They were not admissible under the medical diagnosis exception, and were not introduced under the excited utterances exception. Their introduction only served to improperly bolster the State's weak evidence against Mr. Jimenez. Therefore, this Court should reverse the trial court's ruling, and remand with instructions that such evidence should be excluded.

III. THE COURT ERRED WHEN IT ALLOWED NURSE PERRY TO TESTIFY TO STATEMENTS MADE BY A.B. TO THE NURSE DURING DIAGNOSIS WHICH SPOKE TO THE COMPLAINING WITNESS'S CHASTITY.

A court may, on the motion of a defendant, grant a new trial where it affirmatively appears that a substantial right of the defendant was material affected by any order of the court or any error of law occurring at the trial which was objected to by the defendant. CrR 7.5(a)(5), (6).

As noted in Issue II, the State violated the trial court order on motion in limine number eleven. There, the trial court explicitly told the State it was not to inquire as to the identity of the assailant without laying a proper foundation. The State nevertheless did so, and admitted to the error, but the trial court did not sanction the State, and reserved ruling, but never ruled. (*See also, Defendant's Motion for New Trial*, at 5, ¶6 (Decl. by Conom.)). The trial court then allowed the State to continue questioning on the matter.

After violating the trial court's order on motion in limine number eleven, the State once again violated the trial court's order on motions in limine, this time number seven. There, the trial court ruled that the sexual history of the complaining witness could not be inquired into upon the examination of Nurse Perry. Nevertheless, the State elicited from the Nurse information regarding A.B.'s virginity. That was a violation of the trial court's order on motion in limine number seven. (*See, id*., at 6, ¶7.) The trial court held that the statements were for medical diagnosis, and there was therefore no confrontation clause or due process violation. (*Id*. at 6, ¶¶7, 8.)

But what medical purpose did eliciting that statement serve? What was its relevance? No evidence or testimony was produced by the State to lay the foundation as to why it was that A.B.'s statement concerning her virginity somehow made it more or less likely that Mr. Jimenez drugged and raped her. *See* ER 403 (relevance generally), 404(a) (character evidence not relevant), & 412(d)(1) (requiring notice and motion 14 days before

trial if seeking to introduce victim's past behavior). The trial court simply relied on the Nurse and the State's proffer that the purpose of the questioning was for medical diagnosis, but never showed how or why that diagnosis was relevant to the charges levied against Mr. Jimenez. Nurse Perry was not a licensed mental health professional, and did not take any action regarding A.B.'s virginity.

Therefore, because the State violated the trial court's pretrial orders twice in a row, affecting Mr. Jimenez' due process rights, Mr. Jimenez asks that reverse the trial court's ruling, and remand with instructions to exclude testimony of Nurse Perry altogether, as a sanction for such violations.

CONCLUSION

Therefore, because the trial court:

(I) erred when it did not dismiss the case against Mr. Jimenez for insufficiency of the evidence, Mr. Jimenez asks that this Court vacate the judgment against him;

(II) erred when it allowed Nurse Perry to testify to statements made by A.B. regarding the identity of the assailant, this Court should reverse the trial court's ruling and reverse with instructions excluding such testimony;

(III) erred when it allowed Nurse Perry to testify to statements made by A.B. regarding her own sexual history and sexuality, this Court should reverse the trial court's ruling and reverse with instructions to exclude Nurse Perry as a witness.

RESPECTFULLY SUBMITTED, this 21st day of SEPTEMBER, 2018.

/s/ ARTURO D. MENÉNDEZ
Arturo D. Menéndez, WSBA No. 43880
Attorney for Appellant, D'Angelo Jimenez

COURT OF APPEALS – DIVISION I
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. D'ANGELO JIMENEZ, Appellant.	NO. 77719-0-I **APPELLANT'S DECLARATION OF MAILING**

1. I am the age of eighteen and competent to testify to the facts contained herein.

2. I mailed a copy of the document in this case entitled "Appellant's Brief" to the following parties or their attorney(s) at the following address(es):

Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Way
Everett, WA 98201

3. I swear under the penalties of perjury of the State of Washington that the foregoing are true and correct.

DATED this 21 of SEPTEMBER, 2018.

/s/ ARTURO D. MENÉNDEZ
Arturo D. Menéndez, WSBA No. 43880
Attorney for Appellant, D'Angelo Jimenez

ESPADA CRIMINAL DEFENSE

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