

67478-1

67478-1

No. 67478-1-I

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

STATE OF WASHINGTON,
Respondent,
v.
HECTOR R. HURTADO,
Appellant.

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CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
B

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. MS. VERA'S OUT-OF COURT STATEMENTS TO AN EMERGENCY ROOM NURSE WERE TESTIMONIAL AND THEIR ADMISSION IN VIOLATION OF THE SIXTH AMENDMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT 1

 2. MR. HURTADO'S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF MS. VERA'S OUT-OF-COURT STATEMENT THAT HER BOYFRIEND ASSAULTED HER..... 10

 3. MS. VERA'S IDENTIFICATION OF HER BOYFRIEND AS HER ASSAILANT WAS INADMISSIBLE HEARSAY 14

 4. THE JURY DID NOT FIND MR. HURTADO COMMITTED A CRIME OF DOMESTIC VIOLENCE, AND THE PORTION OF THE JUDGEMENT AND SENTENCE STATING IT DID MUST BE STRICKEN..... 17

B. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>1000 Virginia Ltd. Partnership v. VerTECS Corp.</u> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	14
<u>Kraettli v. North Coast Transp. Co.</u> , 166 Wash. 186, 6 P.2d 609 (1932).....	12
<u>State v. Anderson</u> , 171 Wn.2d 764, 254 P.3d 815 (2011).....	4
<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.23d 595 (2007).....	11
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	10
<u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 227 (1984).	14
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	10
<u>State v. Pugh</u> , 167 Wn.2d 825, 225 P.3d 892 (2009).....	10, 11
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	14, 16
<u>State v. Stenz</u> , 30 Wash. 134, 70 P. 241 (1902).....	13
<u>State v. White</u> , 72 Wn.2d 524, 433 P.2d 682 (1967).....	15
<u>Young v. Liddington</u> , 50 Wn.2d 78, 309 P.2d 761 (1957).....	16

Washington Court of Appeals Decisions

<u>Concerned Coupeville Citizens v. Town of Coupeville</u> , 62 Wn.App. 408, 814 P.2d 243, <u>rev. denied</u> , 118 Wn.2d 1004 (1991).....	3
<u>In re Detention of Stout</u> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	3
<u>Kennedy v. Monroe</u> , 15 Wn.App. 39, 547 P.2d 899 (1976).....	12

<u>State v. Fisher</u> , 130 Wn.App. 1, 108 P.3d 1262 (2005), <u>rev. denied</u> , 156 Wn.2d 1013 (2006);	6, 15
<u>State v. Jones</u> , 118 Wn.App. 199, 76 P.3d 258 (2003)	18
<u>State v. Moses</u> , 129 Wn.App. 718, 119 P.3d 906 (2005), <u>rev. denied</u> , 157 Wn.2d 1006 (2006)	7, 15
<u>State v. Sandoval</u> , 137 Wn.App. 532, 154 P.3d 271 (2007)	6, 15
<u>State v. Saunders</u> , 132 Wn.App. 592, 603, 132 P.3d 743 (2006), <u>rev. denied</u> , 159 Wn.2d 1017 (2007)	6
<u>State v. Williams</u> , 137 Wn.App. 736, 154 P.3d 322 (2007).....	15

United States Supreme Court Decisions

<u>Central Virginia Community College v. Katz</u> , 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed2d 945 (2006)	3
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	1
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	8
<u>Giles v. California</u> , 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)	2, 3
<u>Lockyer v. Andrade</u> , 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)	5
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)	2, 3
<u>Michigan v. Bryant</u> , ___ U.S. ___, 131 S.Ct. 1143, 1165, 179 L.Ed.2d 93 (2011)	2
<u>Williams v. Illinois</u> , ___ U.S. ___, 132 S.Ct. 2221, ___ L.Ed.2d ___ (2012)	2, 4

Federal Decision

Moses v. Payne, 555 F.3d 742 (9th Cir.)..... 4

Decisions of Other States

Hartsfield v. Commonwealth, 277 S.W.3d 239 (Ky. 2009)..... 8

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (2008) 8

State v. Bennington, 293 Kan. 503, 264 P.3d 440 (2011) 7, 8

State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)..... 8

State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010)..... 9

State v. Hooper, 145 Idaho 139, 176 P.3d 911 (2007)..... 8

State v. Miller, 293 Kan. 535, 264 P.3d 461, 488-90 (2011)..... 7

State v. Romero, 141 N.M. 403, 156 P.3d 694 (2007) 8

United States Constitution

Sixth Amendment..... 1, 3, 4, 8, 10, 11

Washington Constitution

Const. art. I § 22..... 10, 13

Washington Statute

RCW 9.94A.525 17

Washington Court Rule

ER 803(a)(4)..... 14, 15, 16

Federal Statute

28 U.S.C. § 2254.....5

A. ARGUMENT IN REPLY

1. MS. VERA'S OUT-OF COURT STATEMENTS TO AN EMERGENCY ROOM NURSE WERE TESTIMONIAL AND THEIR ADMISSION IN VIOLATION OF THE SIXTH AMENDMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

While in the company of a police officer, Jennifer Vera spoke to a nurse at the Overlake Hospital emergency room and said that her boyfriend had assaulted her. Ms. Vera did not testify at Mr. Hurtado's trial, and Mr. Hurtado argues the introduction of her statement violated his Sixth Amendment right to confront the witnesses against him. Brief of Appellant (BOA) at 8-22.

The United States Supreme Court decisively changed the analysis of the Sixth Amendment's Confrontation clause in Crawford, holding that the constitution forbids the introduction of a witness's "testimonial" statements unless the witness appears at trial or the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Court declined to provide a complete definition of "testimonial," except to say term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. Subsequent decisions have done little to shed light on a precise definition. See

Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2260, ___ L.Ed.2d ___ (2012) (Thomas J., concurring in judgment) (“formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue such as custodial interrogation”); Michigan v. Bryant, ___ U.S. ___, 131 S.Ct. 1143, 1165, 179 L.Ed.2d 93 (2011) (courts must determine whether the “primary purpose” of police interrogation is to enable the police to meet an on-going emergency or to establish past events potentially relevant to later criminal prosecution); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009) (an assertion is testimonial if “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”).

The State does not suggest what test this Court should utilize in determining if the statements in this case are testimony, but instead asks this Court to rely upon dicta in Melendez-Diaz and Giles indicating that statements to medical personnel are not testimonial. BOR at 7 (citing Melendez-Diaz, 129 S.Ct. at 2533 n.2 and Giles v. California, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)). This Court, however, need not follow dicta.

Central Virginia Community College v. Katz, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed2d 945 (2006); In re Detention of Stout, 159 Wn.2d 357, 372 n.12, 150 P.3d 86 (2007) (chiding dissent from relying on dicta in footnote); Concerned Coupeville Citizens v. Town of Coupeville, 62 Wn.App. 408, 416, 814 P.2d 243, rev. denied, 118 Wn.2d 1004 (1991).

The comment and footnote cited by the State are dicta. The Melendez-Diaz Court addressed whether a sworn certificate of a state laboratory analyst was testimonial. In a footnote, the Court stated that cases cited by the dissent involving “medical reports created for treatment purposes” were “simply irrelevant” and would not be testimonial “under our decision today.” Melendez-Diaz, 129 S.Ct. at 1533 n.2. The Giles Court found that there is no “forfeiture by wrongdoing” doctrine exception to the Sixth Amendment’s Confrontation Clause prohibition against the introduction of testimonial statements in the absence of the opportunity to cross-examine the witness. Giles, 554 U.S. at 355, 377. Whether statements made to friends or medical providers are testimonial was not addressed in either case, and the Court’s brief comments do not address statements made while a police officer is present. Id. at 376; Melendez-Diaz, 129 S.Ct. at 1533 n.2.

The State's suggestion that this dicta is a "strong indication" of how the Court would rule is especially precarious in light of the Court's inability to reach a consensus on whether statements were testimonial for purposes of the Confrontation Clause in Williams. There, Justice Thomas agreed with Justice Alito's plurality opinion that the statement in question was not testimonial, creating a five-vote holding, but Justice Thomas rejected the plurality's reasoning in total, agreeing instead with the dissent. Williams, 132 S.Ct. at 2255 (Thomas, J., concurring in the judgment). This Court may as well rely upon Anderson, where the Washington Supreme Court found the Sixth Amendment violation caused by the admission of a child's testimonial statements to a sexual assault clinic nurse was harmless beyond a reasonable doubt. The Court, however, based the conclusion that the evidence violated the federal constitution only upon the State's concession that the statements were testimonial. State v. Anderson, 171 Wn.2d 764, 669-70, 254 P.3d 815 (2011).

The State similarly finds it significant that the defendant in a Washington case where this Court found statements to a doctor were not testimonial was denied review on federal habeas. BOR at 10 (citing Moses v. Payne, 555 F.3d 742 (9th Cir. 2009)). A

petitioner cannot succeed in challenging a state court conviction under the Anti-Terrorism and Death Penalty Act, however, unless he can demonstrate the state court decision is “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The Supreme Court has never addressed the issue of statements to a physician and has not yet provided a definitive definition of testimonial. It is hardly noteworthy that the petitioner could not meet this exacting standard. See Lockyer v. Andrade, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (petitioner could not show an unreasonable application of federal law as set forth an opinion of the Supreme Court where Supreme Court decisions “have not been a model of clarity”); Moses, 555 F.3d at 754-55 (denying habeas relief “[b]ecause the [state] court did not arrive at a result different from the result reached by the Supreme Court in an indistinguishable case, we concluded that the state appellate court’s decision was not ‘contrary to’ clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1).”)

The State refers this Court to four Court of Appeals decisions finding that statements to medical providers are not

testimonial. Brief of Respondent (BOR) at 8-10. In each of these cases the court reviewed whether (1) the purpose of the statement was to create evidence for trial, (2) the declarant would reasonably expect his or her statement would be used at trial, and (3) the doctor was working for or with the government. In none of the cases, however, were police officers present for the questioning and thus they do not control Mr. Hurtado's case. State v. Sandoval, 137 Wn.App. 532, 536, 154 P.3d 271 (2007) (statements to emergency room physician not testimonial because (1) they were made for diagnosis and treatment, (2) witness did not expect they would be used at trial, and (3) doctor not working for government; police not present); State v. Saunders, 132 Wn.App. 592, 597-98, 603, 132 P.3d 743 (2006) (statements to emergency room physician and paramedics not testimonial because no reason for declarant to believe statements would be used in future prosecution), rev. denied, 159 Wn.2d 1017 (2007); State v. Fisher, 130 Wn.App. 1, 13, 108 P.3d 1262 (2005) (child's statements to family practice physician in hospital not testimonial because doctor's questions for use in treatment and there was no government involvement or reason to believe it would be used in a future prosecution), rev. denied, 156 Wn.2d 1013 (2006); State v.

Moses, 129 Wn.App. 718, 730, 119 P.3d 906 (2005) (statements to investigating police officers were testimonial but statements to emergency room doctor and hospital social worker were not), rev. denied, 157 Wn.2d 1006 (2006).

The presence of a police officer, however, is critical. The presence of a police officer was crucial in the Kansas Supreme Court's recent decisions addressing whether statements to a sexual assault nurse examiner (SANE) were testimonial for purposes of the Confrontation Clause. Looking objectively at the totality of the circumstances, the Kansas jurists found that a four-year-old's statements to a SANE nurse were not testimonial, even though the nurse was acting as an agent of law enforcement in collecting evidence, because the primary purpose was for medical diagnosis and treatment. State v. Miller, 293 Kan. 535, 264 P.3d 461, 488-90 (2011). They came to the opposite conclusion, however, in a case where a police officer was present for the SANE's interview of an elderly woman and even posed a few questions. State v. Bennington, 293 Kan. 503, 264 P.3d 440, 451-54 (2011). Because the SANE nurse's interview was conducted with the police officer, the questions were about past events, and there was no on-going emergency, the Bennington Court concluded that the statements

were testimonial and admitted in violation of the Sixth Amendment.¹
Id. at 453-54.

Mr. Hurtado referred this Court to an Illinois case in which the court concluded that a rape victim's statements to her doctor that she was "tied and raped" were testimonial. People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675, 688 (2008). BOA at 15-16. The State criticizes Spicer as an "outlier with highly questionable reasoning" because it utilizes the Supreme Court's analysis from Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). BOR at 13. The Spicer Court is not alone, however, in utilizing the Davis standard when determining if statements made to medical personnel at the behest of law enforcement are testimonial. See Bennington, 264 P.3d at 520-23; Hartsfield v. Commonwealth, 277 S.W.3d 239, 244-45 (Ky. 2009); State v. Cannon, 254 S.W.3d 287, 305 (Tenn. 2008); State v. Hooper, 145 Idaho 139, 176 P.3d 911, 915-18 (2007); State v. Romero, 141 N.M. 403, 156 P.3d 694, 698-99 (2007).

The State also refers this Court to cases that hold a witness would not expect her statement to a doctor to be used at trial

¹ The Court also found the woman's answers to a Kansas Bureau of Investigation questionnaire administered by the SANE nurse after the law enforcement officer left were testimonial because the nurse was acting as an agent of law enforcement. Bennington, 264 P.3d at 454-55.

because she had already provided a statement to the police. BOR at 15-16 (citing State v. Fry, 125 Ohio St.3d 163, 181, 926 N.E.2d 1239 (2010)). This logic is not applicable here, as Ms. Vera was still in the company of the officer to whom she had made a statement. 7/7/11RP 15-16.

Finally, this Court should reject the State's argument that the error is harmless beyond a reasonable doubt. The evidence connecting Mr. Hurtado to the assault of Ms. Vera was limited. The State stresses that the police observed what appeared to be blood in Ms. Vera's kitchen and on Mr. Hurtado's jacket when he was arrested. None of the blood stains were tested, and even the officer who seized Mr. Hurtado's jacket admitted that the possible big blood stain he remembered was not on the jacket, only small spots on the sleeve. 7/6/11RP 25; 7/7/11RP 36-38, 40. The State also relies upon the telephone calls recorded by the King County Jail, but none of those conversations establish that Mr. Hurtado assaulted Ms. Vera.

A Bellevue Police officer followed Ms. Vera to the hospital and remained with her the entire time, sometimes holding Ms. Vera's baby. 7/6/11RP 54; 7/7/11RP 7, 15-16. Thus, a reasonable

person in Ms. Vera's position would expect that her statements that her boyfriend assaulted her could be used in a future prosecution. Mr. Hurtado's conviction must be reversed and remanded for a new trial. State v. Koslowski, 166 Wn.2d 409, 432, 209 P.3d 479 (2009).

2. MR. HURTADO'S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF MS. VERA'S OUT-OF-COURT STATEMENT THAT HER BOYFRIEND ASSAULTED HER

The Washington Constitution provides criminal defendants the right to confront and cross examine the witnesses against him and provides greater protection of the right to confrontation than does the Sixth Amendment. Const. art. I § 22; State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); State v. Foster, 135 Wn.2d 441, 473-74, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting). In response to Mr. Hurtado's argument that the introduction of Ms. Vera's statement to the emergency room nurse violated article I, section 22, the State engages in a lengthy Gunwall analysis. BOR at 20-25. No Gunwall analysis is needed, however. Pugh, 167 Wn.2d at 835.

Instead, this Court looks to the text of the constitutional provision, the historical treatment of the issue, and the current implications of recognizing or not recognizing a state constitutional interest in determining whether “the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.” Pugh, 167 Wn.2d at 835 (quoting State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.23d 595 (2007)). This Court may therefore ignore the State’s rehashing of the Gunwall factors already held to warrant an independent state analysis by a majority of the Washington Supreme Court. Moreover, the State’s attempt to equate Washington’s guarantee of “face to face” confrontation with the Sixth Amendment’s requirement of confrontation for testimonial statements was not adopted by the Pugh Court, which instead looked to whether the hearsay exceptions at issue had historically been admitted under the state constitution. Pugh, 167 Wn.2d at 835-45.

The State points out that prior to the adoption of the Rules of Evidence, Washington courts distinguished between treating physicians and physicians hired for purposes of trial in determining whether the doctor could relate the patient’s hearsay statements to the jury. However, the State incorrectly asserts that hearsay

statements to treating physicians were admissible as substantive evidence. BOR at 25-26. Treating physicians could testify concerning their patient's "past pain and suffering," but could not mention the patient's attributions of causation or fault. Additionally, the testimony was only admitted to show the basis of the doctor's opinion and not as substantive evidence.² Kraettli v. North Coast Transp. Co., 166 Wash. 186, 190-92, 6 P.2d 609 (1932). This rule was later extended to doctors retained for purposes of trial. "[A]n otherwise qualified physician . . . may relate what the plaintiff told him regarding (1) the general nature or cause of the injury insofar as it pertains to treatment and not fault, (2) the plaintiff's past and present subjective complains and symptoms and (3) the course of medical treatment followed by the plaintiff." Kennedy v. Monroe, 15 Wn.App. 39, 47, 547 P.2d 899 (1976) (emphasis added). Again,

² The Kraettli jury was informed:

Doctors Kelton and Stewart, of the physicians called as witnesses on behalf of the plaintiff, were permitted by the court to testify as to what the plaintiff stated to them regarding her condition. The sole purpose of the court in admitting this testimony and the sole purpose for which you are to consider it is in order to enable you to determine the weight to be given by you to the opinions or conclusions stated by such physicians. In other words, you are not to consider such testimony for the purpose of determining whether or not the plaintiff actually experienced these symptoms or in fact was in the condition claimed. . . .

Kraettli, 160 Wash. at 190-91.

the hearsay information provided by a physician was not admissible as substantive evidence:

By so holding we do not expand upon the limited purpose for which such a narrative of the patient's history is admitted. The historical recitation by the doctor is not admitted as proof of the facts recited, but as proof only that the statements were made and utilized in part by the doctor for reaching his medical conclusions.

Id. at 48.

Washington never permitted a physician to relate a patient's hearsay statements attributing fault or causation, and any hearsay was admitted only to show the basis of the doctor's expert opinion. Here, a nurse testified that Ms. Vera told a different nurse that her boyfriend hit her in the face. 7/6/11RP 55. The State has provided no Washington case prior to the adoption of the Rules of Evidence that permit a doctor to relate a similar attribution of fault or uphold the jury's use of such hearsay as substantive evidence. Nor has the State provided a treatise from the time of the adoption of Washington's Constitution to counter those cited by Mr. Hurtado. AOB at 26.

Article I, section 22 guarantees the right to meet witnesses in open court and cross-examine them. State v. Stenz, 30 Wash. 134, 142, 70 P. 241 (1902). The historical treatment of statements

to a physician demonstrates that this constitutional right precluded the introduction of Ms. Vera's statement to the emergency room personnel that her boyfriend hit her in the face. Mr. Hurtado's second degree assault conviction must be reversed.

3. MS. VERA'S IDENTIFICATION OF HER BOYFRIEND AS HER ASSAILANT WAS INADMISSIBLE HEARSAY

Mr. Hurtado argues that Ms. Vera's identification of her boyfriend as her assailant was not admissible under ER 803(a)(4), citing State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003). AOB at 28-32. The State responds that this Court need not follow Redmond, suggesting that a line of Court of Appeals decisions overrules Redmond or creates a "domestic violence" exception to the rule it applies. BOR at 31-35. This Court, however, is obligated to follow the decisions of the Washington Supreme Court interpreting Washington law. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006); State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In addition, the cases relied upon by the State for a "domestic violence and child abuse" exception to Redmond do not address Redmond and do not support the State's argument. Three of the four cases cited address the argument that evidence

admitted under ER 803(a)(4) may not include statements attributing fault, but one does so only in dicta. In Williams, Division Two addressed a rape and kidnapping victim's answers that did not identify her assailant. The court's conclusion that such a disclosure "would have been admissible under ER 803(a)(4)" is thus dicta. State v. Williams, 137 Wn.App. 736, 737, 154 P.3d 322 (2007). In two other cases, the Court of Appeals found exceptions to the rule excluding attributions of fault because the information is relevant to treatment, but made no reference to Redmond. Fisher, 130 Wn.App. at 14 (addressing challenge to a child's hearsay statements on the grounds that the doctor's examination of child was "forensic" rather than for treatment); Moses, 129 Wn.App. at 728-29. The fourth case does not even address the argument presented here. Sandoval, 137 Wn.App. at 537-40 (addressing only constitutional arguments). None of the cases mentions or distinguishes Redmond.

Similarly, Ms. Vera's statement that her boyfriend hit her in the face would not be an admissible part of Ms. Vera's medical records, as it was not a record of an act, condition or event. State v. White, 72 Wn.2d 524, 529-30, 433 P.2d 682 (1967) (portion of medical records containing narrative of events antedating the

making of the records inadmissible, conviction reversed because medical records containing child's hearsay statements that defendant raped her improperly admitted); Young v. Liddington, 50 Wn.2d 78, 83-84, 309 P.2d 761 (1957) (doctor's opinion as to cause of child's medical problems was inadmissible as business record because based upon patient history related by mother). The business record act does not make inadmissible evidence admissible simply because it is included in a business record. Young, 50 Wn.2d at 84.

The State also argues that the unanimous Redmond opinion did not address a domestic violence situation. The Redmond Court, however, cited a domestic violence example, explaining that the statement "the victim said her husband hit her in the face' would not be admissible." Redmond, 150 Wn.2d at 498. This example is almost exactly what Ms. Vera told the nurse. Ms. Vera's statement that her boyfriend hit in the face with his fists was not admissible under ER 803(a)(4).

4. THE JURY DID NOT FIND MR. HURTADO
COMMITTED A CRIME OF DOMESTIC VIOLENCE,
AND THE PORTION OF THE JUDGEMENT AND
SENTENCE STATING IT DID MUST BE STRICKEN

The jury was never asked to determine if Mr. Hurtado's second degree assault was a crime of domestic violence, but the court signed a Judgment and Sentence that indicated the jury found it was. CP 98-99. The court also found Mr. Hurtado was found guilty of "ASSAULT IN THE SECOND DEGREE – DOMESTIC VIOLENCE." CP 98. The State does not argue the Judgment is accurate, but nonetheless argues it should not be corrected to reflect the truth. This Court should strike the purported jury finding and designation of second degree assault as a crime of domestic violence.

The State wants to retain the incorrect information on Mr. Hurtado's Judgment because "it is not possible" for the domestic violence designation to carry additional sentencing consequences for Mr. Hurtado because he was sentenced three days before the effective dates of amendments to RCW 9.94A.525(21). BOR at 46-47. This Court is well aware that prosecutors, defense attorneys, and criminal courts are busy and sometimes make mistakes. This is especially true as the Sentencing Reform Act becomes more and

more complex. See, e.g., State v. Jones, 118 Wn.App. 199, 210-11, 76 P.3d 258 (2003) (observing trial court could not be faulted for sentencing error due to increasing complexity of sentencing scheme and noting the statute had been amended an average of eight times per year since its enactment).

The State presents no valid reason why a misstatement of the jury verdict should not be corrected. The State similarly does not explain why the domestic violence designation should not be stricken when there is no statute authorizing the trial court to make such finding. The portions of Mr. Hurtado's Judgment stating that the jury found his second degree assault conviction was a crime of domestic violence and referencing the crime as "assault in the second degree assault – domestic violence" must be stricken.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Hurtado asks this Court to reverse his convictions for second degree assault, witness tampering, and two counts of violation of a court order and remand for a new trial.

In the alternative, the portions of Mr. Hurtado's Judgment and Sentence designating the assault conviction, Count 1, as a

crime of domestic violence and incorrectly stating the jury found it
was a crime of domestic violence must be stricken.

DATED this 13th day of July 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67478-1-I
v.)	
)	
HECTOR HURTADO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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