

NO. 69751-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FELIPE JOSEPH RAMOS,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly conclude that police officers' entry into a residence was justified by the emergency aid exception, where officers were told a young girl had just been raped inside, and the suspect and the victim were still inside?

2. Did the trial court properly conclude that statements made by a 9-year-old to a doctor during an examination in the emergency room after a sexual assault were nontestimonial, because they were statements made for the purpose of medical treatment, so no constitutional Confrontation Clause violation occurred?

3. Was the prosecutor's discussion of the presumption of innocence in the State's rebuttal closing argument, which drew no objection, a proper response to the defense closing argument, and could any error have been cured, so that any impropriety was not reversible error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Felipe Ramos, was charged by second amended information with rape of a child in the first degree and

child molestation in the first degree as to N.S.,¹ both counts relating to a single incident on August 1, 2009.² CP 49-50. Ramos was tried in King County Superior Court, the Honorable Beth Andrus presiding. 5/17/12 RP 1, 4. A jury found Ramos guilty as charged on both counts. CP 77-78. The trial court vacated the child molestation conviction solely to avoid a double jeopardy violation. CP 95. The trial court sentenced Ramos to the mandatory indeterminate term of life for rape of a child in the first degree, with a standard range minimum term of 147 months. CP 83-88.

2. SUBSTANTIVE FACTS.

On August 1, 2009, Joshua Sykes had a small bachelor party at his condominium. 9/18/12RP 10-11. As guests socialized on the second floor deck about dusk, some of them noticed the lights come on in the garage of a condominium across a shared drive. 9/18/12RP 14, 100, 141; 9/19/12RP 20. They could clearly see the interior of the garage through windows in the garage door.

¹ The child will be referred to by initials in an attempt to protect her privacy. For the same reason, the State will not use the names of her relatives, instead identifying each relative by that relationship.

² Originally additional counts were charged based on prior incidents of sexual contact. CP 23-25. N.S. was suicidal as the trial approached and was hospitalized. 5/29/12RP 4-7. The trial was recessed but after N.S.'s release, she and her family could not be located. 9/10/12RP 8. Therefore, the charges based solely on the statements of N.S. were dismissed without prejudice. 9/10/12RP 47. Additional details of the trial proceedings relating to those charges will not be included in this brief.

9/18/12RP 21, 65, 101, 144-45, 161; 9/19/12RP 19-20; Ex. 9. An adult male in a bathrobe came into the garage with a young girl. 9/13/12RP 136; 9/18/12RP 101; 9/19/12RP 21. A few minutes later, they were shocked to see the two having sexual intercourse. 9/13/12RP 140-42; 9/18/12RP 18-22, 62-65, 104-08, 143-45; 9/19/12RP 24-30.

Sykes knew the people who lived in that condominium, as neighbors; he saw that the people who came into the garage were residents of that home; he recognized Ramos as the man and recognized the young girl as N.S., who he thought was eight years old. 9/13/12RP 128-32, 136. N.S. actually was nine years old on that day. 9/17/12RP 57, 177. Sykes left the deck before the sexual intercourse began but a guest alerted him and he returned and observed what he had no doubt was sexual intercourse between the two. 9/13/12RP 139-42. He was upset and quickly walked away. 9/13/12RP 142.

Michael Soden, a guest at Sykes' party, saw the two people in the garage having sexual intercourse. 9/18/12RP 18-22. He initially thought they were both adults but then realized the girl was a child. 9/18/12RP 34-35. He described intimate details of the sexual activity that he saw. 9/18/12RP 18-22, 37. After 10 to 15

minutes of sexual intercourse, the man carried the girl upstairs.

9/18/12RP 25.

Michael Stewart, another guest at Sykes' party, was good friends with Sykes, had visited often, and had seen Ramos before and had seen the young girl at least ten times before this evening. 9/18/12RP 45, 50, 61. Stewart recognized Ramos and N.S. as the people in the garage. 9/18/12RP 52, 61, 65. Then he noticed that the two were having sex. 9/18/12RP 63-65. When other men on the deck confirmed that was what he was seeing, he called police. 9/18/12RP 65. There seemed to be confusion about what he told the police; when they had not arrived in ten minutes, he called back. 9/18/12RP 66-69. Stewart identified Ramos in court as the man he saw in the garage. 9/18/12RP 52.

Matthew Soden, another guest, saw the two people come into the garage and quickly realized the female was a young girl. 9/18/12RP 101-03. Within five minutes, the two were having intercourse. 9/18/12RP 104. Soden described the details of their sexual activity in detail. 9/18/12RP 104-10. Matthew Soden identified the photograph of Ramos taken the night of his arrest as the man in the garage. 9/18/12RP 101, 114. He also identified

Ramos in court as the man he saw having sex with the little girl.
9/18/12RP 115.

William Castonguay, Sykes' uncle, also was at Sykes' condominium that evening. 9/18/12RP 134-35. He became aware that other guests were seeing an underage female engaged in sexual intercourse, so he went over to see. 9/18/12RP 142-44. He saw the sexual intercourse as well, describing intimate details. 9/18/12RP 144-48. He saw the man carry the girl up the stairs when it was over. 9/18/12RP 147.

William Weil, another guest, noticed the light come on in the garage, and saw the man and a little girl walk in. 9/19/12RP 20-22. He described the sexual intercourse between the two in very graphic detail. 9/19/12RP 23-28. He had no doubt about what he was seeing. 9/19/12RP 30. Weil testified that he recognized the man and the girl when the police brought them out of the townhome. 9/19/12RP 32-34.

The first police officer dispatched to respond to Stewart's 911 call, Deputy Thiede, was dispatched after the second call, at about 10:35 p.m. and arrived at about 10:43. 5/17/12 RP 78, 97. Thiede understood that a stepfather had called to report his underage stepdaughter was having sex with an adult. 5/17/12RP

79. He met the men from the Sykes party when he arrived and learned that it was Stewart who had called. 5/17/12RP 81-82. Thiede called for backup units to help him interview witnesses and clarify the situation; he could not attempt to enter the residence alone for officer safety reasons. 5/17/12RP 82, 85-86. The witnesses told him that they had been watching and no one had left the condominium. 5/17/12RP 84. He concluded the suspect and the victim were inside and after more units arrived and assisted with the investigation, the police decided they needed to enter to make sure the girl was safe. 5/17/12RP 85-86, 149.

Deputy Fitchett arrived at about 11:09 p.m. 5/17/12RP 24, 42. Within 20 seconds he was at the front door of the residence, continuously knocking and saying "police." 5/17/12RP 27-28. He understood the suspect and victim were inside. 5/17/12RP 46. No one inside responded. 5/17/12RP 28.

At 11:36 p.m. after a number of other units had arrived, including a sergeant, the police decided to enter to make sure the girl was safe. 5/17/12RP 29-31, 49, 84-86. They gathered at the front door and knocked again, saying they were coming in; at that point a teenager opened the door for them and they went inside, guns drawn. 5/17/12RP 49-51.

Deputy Fitchett encountered Ramos on the stairs inside, and handed him to Deputy Abbot, who handcuffed him. 5/17/12RP 31, 34, 138, 141. When Ramos was brought outside, he was identified by Michael Soden and other witnesses. 5/17/12RP 137-41. N.S. also was in the condominium and was brought outside, and the witnesses confirmed that she was the victim. 5/17/12RP 142-43. At trial, many witnesses identified the victim by a photograph that was taken that night. Ex. 11; 9/13/12RP 137; 9/17/12RP 119; 9/18/12RP 26, 52, 102.

A photograph was taken of Ramos in the clothing he was wearing when he was brought out of the residence – boxer shorts and a white tank t-shirt. Ex. 10; 9/13/12RP 137, 144; 9/17/12RP 92, 131. Penile swabs were taken from Ramos. 9/17/12RP 134-36. A forensic DNA examiner from the State Crime Lab analyzed those swabs and found a DNA profile that was a mixture of two people. 9/13/12RP 42-43. N.S. was a possible contributor. 9/13/12RP 43. Based on the United States population, it is estimated that one in 2.7 million individuals is a potential contributor to the profile. 9/13/12RP 43.

C. ARGUMENT

1. POLICE ENTRY INTO THE RESIDENCE WAS JUSTIFIED BY THE NEED TO PROVIDE EMERGENCY AID TO THE CHILD VICTIM OF RAPE.

Ramos contends that the trial court erred in concluding that warrantless entry into the victim's home was justified by the need to provide emergency aid. This claim is without merit. When police officers learned that neighbors had observed a child being raped inside a condominium and that the suspect and the victim were still inside, and when no one responded to knocks at the door, police were justified in entering the home without a warrant to ensure the safety of the child.

- a. Standard of Review.

On appellate review of a decision on a motion to suppress evidence, the trial court's findings of facts are reviewed for substantial evidence, "a sufficient quantity of evidence in the record to persuade a rational, fair-minded person of the truth of the finding." State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011) (quoting State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). The trial court's conclusions of law are reviewed de novo. Schultz, 170 Wn.2d at 753. This trial court's findings of fact and

conclusions of law are attached as Appendix 1. CP 96-99. The trial court in its written findings incorporated its oral findings by reference. CP 99; 5/22/12RP 64-78 (oral findings).

b. The Entry Into The Home To Protect The Safety Of A Child Rape Victim Falls Within The Emergency Aid Exception To The Warrant Requirement Of The Washington Constitution.

The Washington Constitution prohibits police entry into a private home without authority of law. WA Const. art. I, §7. “Authority of law” may be provided by a warrant or by one of the carefully drawn exceptions to the warrant requirement. Schultz, 170 Wn. 2d at 753-54. The State bears the burden of establishing that an exception to the warrant requirement applies. Id. at 754.

The trial court concluded that the emergency aid exception to the warrant requirement authorized the entry into Ramos’s residence. CP 98; 5/22/12RP 72-78. That exception is based on the police community caretaking function. Schultz, 170 Wn.2d at 754. The exception allows the police to intrude on constitutionally protected privacy interests when necessary to render aid or assistance. Id.

To establish the emergency aid exception applies, the State must show that “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched; ... (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.” *Id.* at 754-55 (citations omitted). This six-factor test was applied by the trial court in the case at bar and it made specific findings that each factor was met; those findings are supported by the record. CP 98.

Ramos assigns error to only two of the trial court’s Findings of Fact, findings 12 and 15. App. Br. at 1. Ramos has not provided any argument relating to Findings 12 and 15. Where a defendant fails to support an assignment of error with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. RAP 10.3(a)(4, 6)); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Moreover, Findings of Fact 12 and 15 are both supported by substantial evidence. Finding 12 was: "Deputy Fitchett wanted to check on the welfare of the minor female." CP 97. That was Deputy Fitchett's uncontradicted testimony. 5/17/12RP 31, 49.³ Finding 15 was: "Deputies entered with guns drawn. One officer yelled 'Police conducting a welfare check.'" CP 97. That was the uncontested testimony of the officers. 5/17/22RP 30, 35, 112.

The remainder of the Findings of Fact are unchallenged, so they have become verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Ramos assigns error to any factual component of the trial court's Conclusions of Law as to each of the six factors. App. Br. at 1-3 (Assignments of Error 5-10). Ramos has not provided any argument relating to the assignments of error relating to factors one through three. For that reason, this court should decline to consider these assignments of error as well. Cowiche Canyon, 118 at 809. Nevertheless, each conclusion of the trial court is supported by facts in the record and the relevant citations are supplied below for each in turn.

³ "Q: And in your mind what was your motivation in going into that home at that time without a warrant? A: It was to ensure the safety of the young girl inside, based on the allegations." 5/17/12RP 31.

Factor (1): “Deputies Thiede, Fitchett and Abbott subjectively believed they needed to enter to assist N.S. after knocking and receiving no response for at least 20 minutes.” CP 98 (2(a)(2)).

That was the testimony of the officers. 5/17/12RP 31, 49, 85, 89, 101, 131, 149. Deputy Thiede testified that he believed the suspect and victim were inside, that they knocked to check on the welfare of the girl, and “Our primary interest was checking on the girl and making sure she was safe.” 5/17/12RP 84-85. Deputy Fitchett testified that his motive in entering was “to ensure the safety of the young girl inside.” 5/17/12RP 31. He testified that he knocked continuously from within 20 seconds of his arrival at 11:04 p.m., until 11: 36 p.m. when a group of deputies approached, prepared to enter; no one responded until police knocked and said they were going to come in. 5/17/12RP 24, 27-30, 48-49.

Ramos concedes that “there is no reason to doubt that the deputies subjectively believed that entry was necessary or that they acted in good faith.” App. Br. at 14.

Factor (2): “A reasonable person in the position of the officers would have similarly concluded the same thing, especially after knocking and receiving no response.” CP 98 (2(a)(3)).

Ramos does not contest that a reasonable person would believe there was a need to ensure the safety of the young girl who

witnesses had seen raped. He does not challenge the reliance of the police on the reports of multiple witnesses on the scene that a rape had just occurred.

Factor (3): "Deputies had a reasonable basis to associate the need for assistance with the place entered because no one had entered or left the condominium since the time of the alleged rape." CP 98 (2(a)(4)).

Ramos does not contest the court's Finding of Fact that "The witnesses confirmed that neither the adult male suspect nor the female child had left the condominium." CP 97 (Finding 8); 5/17/12RP 45-46, 84. The trial court observed that it was undisputed that the child was inside. 5/22/12RP 74. Ramos does not contest that the unit entered by the police was where the rape had been observed.

Factor (4): "There was an imminent threat of substantial injury to N.S. Deputies did not immediately enter the condominium after arriving on scene but they acted prudently in waiting long enough to gather sufficient information about the crime and the suspect and to have a sufficient number of officers on scene to ensure officer safety. They entered only after receiving no response to repeated knocking." CP 98 (2(a)(5)).

Deputy Thiede, who was the first deputy to arrive at the scene, at 10:43 p.m., testified that these were the reasons that he did not immediately enter. 5/17/12RP 85-86. Deputy Fitchett personally knocked on the door continuously for about 30 minutes

without a response before police officers advised the occupants that police were coming in. CP 97 (1(11)); CP 98 (2(a)(2)); 5/17/12RP 24, 27-30, 48-49.

Factor (5): "Deputies reasonably believed that N.S. was in immediate need of help based on the belief that she and the defendant were still inside and based on the nature of the crime witnessed." CP 98 (2(a)(6)).

Ramos does not contest that a reasonable person would believe there was a need to ensure the safety of the young girl who witnesses had seen raped.

Factor (6): "The entry was not a pretext to conduct an evidentiary search." CP 98 (2(a)(7)).

The trial court observed that there was no evidentiary search of the condominium, although Ramos's clothing was seized pursuant to a warrant obtained after his arrest. 5/22/12RP 78; see CP 17-19 (warrant). The trial court found credible the officers' testimony that they delayed entry for officer safety reasons (needing additional officers) and to obtain sufficient information to corroborate the report of a child rape and obtain a clear description of the suspect. 5/22/12RP 74-75.

The argument upon which Ramos relies to dispute emergency aid factors four through six is that the delay before police entered the condominium establishes that there was no

imminent threat of harm or immediate need of help; he concludes that the articulated motive to ensure the safety must have been a pretext for an evidentiary search. The suggestion that delay in responding to an emergency eliminates that emergency defies logic. As the trial court observed, with a visible and audible police presence outside the residence, there was a risk that the child would be harmed in order to prevent her revealing the assault as well as the ongoing risk that she would be sexually assaulted again. 5/22/12RP 75. That the police officers present felt the need to confirm what the witnesses saw and to wait for a sufficient number of officers to be able to enter relatively safely did not eliminate the danger to the victim.

While an “imminent threat” of harm is required, that does not mean that the police must immediately act. The Supreme Court has observed in the self-defense context that an imminent threat of harm might exist for days, noting the definition of “imminent” is “ready to take place: near at hand: ... hanging threateningly over one’s head: menacingly near.” State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993).

Ramos argues that the time between the first 911 call and the entry into the condominium was sufficient to obtain a warrant,

so the court should conclude there was no emergency. The first problem with this claim is the premise that a search warrant could have been obtained based on the initial 911 call. The contents of the call are not in the record, but it appears that the dispatcher did not accurately understand the facts, as the information provided to Deputy Thiede was that the stepfather of the child had called. 5/17/12RP 79-80. No officer was even assigned to the incident until Thiede was dispatched at 10:35; he was the first officer to arrive to speak to witnesses in person; he arrived at about 10:43 p.m. CP 96; 5/17/12RP 78-82. The lack of available police officers to respond to a child who was in danger also does not diminish the risk of harm to the victim that existed.

The facts of this case are similar to those in State v. Sadler, in which a 14-year-old girl had been missing two weeks, was suspected to be involved in sado-masochistic sex, and was inside the home of an older man who took some time to come to the door, was sweating and looked surprised when he opened the door. 147 Wn. App. 97, 124, 193 P.3d 1108 (2008). The court in Sadler concluded that the officers' warrantless entry into the home was justified given the potentially dangerous situation. Id. at 124-25. It held that a reasonable person would believe that the situation

justified immediate entry into the home to determine whether the girl was in need of aid. Id. The court found that a reasonable person could easily conclude that leaving the child in the presence of the man to wait for a warrant would potentially expose her to additional risks. Id. at 125. The facts here establish even more compelling risks, as the officers had reports that a man who had raped N.S. that night was in the residence with her, surrounded by police.

Ramos argues that the police should have asked to talk to N.S. so they could check on her safety. An officer acting in a community caretaking capacity is not required to use the least intrusive means. State v. Hos, 154 Wn. App. 238, 248-49, 225 P.3d 389 (2010). In any event, here the police could not get anyone to respond to loud knocking on the door, so they could not have communicated any such request. The lack of response to the continuous knocking was further evidence of a potentially dangerous situation, as the trial court observed. CP 98; 5/22/12RP 75-76.

The emergency aid doctrine is distinct from the exigent circumstances exception to the warrant requirement. State v. Kinzy, 141 Wn.2d 373, 386 n. 39, 5 P.3d 668 (2000). Thus,

Ramos's reliance on cases describing the requirements of the exigent circumstances doctrine is misplaced. For example, State v. Hinshaw⁴ and State v. Wolters.⁵ both address the exigent circumstances required for a warrantless entry to arrest a suspect, not emergency aid pursuant to the police caretaking function. Further, Ramos cites two cases for the proposition that the State must show that immediate police action was required, but those cases only confirm the general rule that the State has the burden of establishing an exception to the warrant requirement. App. Br. at 10; see Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 89 L. Ed. 2d 732 (1984); State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

The police focused their efforts on confirming the available information and amassing the force necessary to enter with reasonable assurance of officer safety. That course of action did not negate the victim's need for aid. The trial court properly concluded that the peaceful entry was justified by the need to provide emergency aid to the young girl in the residence with a man who had just raped her. The victim had an immediate need for

⁴ 149 Wn. App. 747, 205 P.3d 178 (2009).

⁵ 133 Wn. App. 297, 135 P.3d 562 (2006).

assistance. That the police were unable to come to her aid for over an hour does not eliminate the justification for doing so.

- c. The Entry Into The Home To Protect The Safety Of A Child Rape Victim Falls Within The Emergency Aid Exception To The Warrant Requirement Of The United States Constitution.

The emergency aid exception to the warrant requirement of the Fourth Amendment⁶ also was satisfied. The federal standard is less rigorous than the Washington standard. Under the United States Constitution, a warrantless entry is permitted under the emergency aid doctrine if there was an objectively reasonable basis to believe that medical assistance was needed or a person was in danger. Michigan v. Fisher, 558 U.S. 45, 49, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009). The ultimate touchstone of the Fourth Amendment is reasonableness, and an officer may enter a home without a warrant to protect an occupant from imminent injury. Brigham City v. Stuart, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). The officer's subjective motivation is irrelevant, as long as the circumstances objectively justify the action. Id. at 404. As discussed in the previous section of this brief, the reports

⁶ U.S. Const. amend. IV.

that a victim of a rape that evening was with her assailant in the residence, which was surrounded by police, along with the circumstance that no one was responding to police knocking on the door, established that N.S. was in danger and warrantless entry was justified.

2. N.S.'S STATEMENTS MADE TO A DOCTOR IN THE EMERGENCY ROOM FOR THE PURPOSE OF MEDICAL TREATMENT WERE NOT TESTIMONIAL, SO THEIR ADMISSION DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Ramos asserts that statements that N.S. made to Dr. Turcotte while she was receiving treatment in the emergency room were admitted in violation of the federal confrontation clause.⁷ Because statements made for the primary purpose of medical diagnosis or treatment are not testimonial and these statements were for that purpose, no confrontation clause violation occurred. Even if the statements were improperly admitted, any error was harmless given the vagueness of the statements and the overwhelming evidence of six independent eyewitnesses that Ramos raped the child.

⁷ Ramos has not claimed a violation of the Confrontation Clause of the Washington Constitution. WA Const. art. I, §22.

The Confrontation Clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court explicitly limited the reach of the Confrontation Clause to testimonial statements. Id. at 68. The opinion in Crawford deferred any effort to set out a comprehensive definition of "testimonial," holding only that at a minimum it includes prior testimony and police interrogations. Id.

Two years later, the Supreme Court further defined which police interrogations produce testimonial statements, in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822 (footnote omitted).

The Supreme Court reviewed the developments in application of the Confrontation Clause in Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 1152-55, 179 L. Ed. 2d 93 (2011). It noted that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. at 1155. The Court held: "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. at 1155, 1166-67. The relevant inquiry is the primary purpose that reasonable participants in a particular encounter would have had. Id. at 1156, 1162. The existence of an ongoing emergency is relevant to determine the primary purpose of the statements because the emergency focuses the declarants on something other than proving past events potentially relevant to later criminal prosecutions. Id. at 1157. The Court in Bryant listed statements for purposes of medical diagnosis or treatment as an example of statements that by their nature are made for a purpose other than for use in prosecution. Id. at 1157 n. 9. The primary purpose test has been repeatedly applied by the Supreme Court and that test should be applied here.

The Supreme Court in other cases also has recognized in dicta that statements made by a victim to a physician in the course of receiving treatment are not subject to the Confrontation Clause because they are not testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n. 2, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009); Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008); accord, United States v. Santos, 589 F.3d 759, 763 (5th Cir. 2009).

Washington courts have repeatedly recognized that statements made for the purpose of medical diagnosis or treatment are not testimonial. State v. O'Cain, 169 Wn. App. 228, 249, 279 P.3d 926 (2012); State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007); State v. Fisher, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005); see also State v. Doerflinger, 170 Wn. App. 650, 285 P.3d 217 (2012) (statement of one medical provider to another). The one exception to that conclusion is a case in which the investigating police officer was with the victim in the hospital room during the examination and was actively collecting evidence at that point. State v. Hurtado, 173 Wn. App. 592, 604-06, 294 P.3d 838 (2013). The court in Hurtado distinguished its holding from cases in

which no police officer was present when the victim made the statements. Id. at 604-05.

At issue here are statements by 9-year-old N.S. to the emergency room physician treating her, in response to that doctor's question whether someone had hurt her that night, and who had done so. The questions were asked by the doctor to determine the appropriate physical and psychological treatment for N.S. and to establish that she would be safe. 9/17/12RP 31-33, 36, 44. The trial court properly concluded that the statements were not testimonial. 9/17/12RP 48-49.

Asked if someone hurt her that night, N.S. said yes, that someone had touched her privates. 9/17/12RP 58. Asked who did that, N.S. responded that it was her mother's boyfriend. 9/17/12RP 58-59. N.S. did not answer when asked if she had seen his penis and if there had been penetration. 9/17/12RP 59. When asked, N.S. also told the doctor that "it hurt to pee" and that had been happening for one day. 9/17/12RP 60. Statements identifying the perpetrator are properly considered statements for purposes of medical treatment when that identity is relevant to possible need for counseling and to ensuring that the victim will be safe. Sandoval,

137 Wn. App. at 537; State v. Saunders, 132 Wn. App. 592, 607-08, 132 P.3d 743 (2006).

No police officer was in the examination room. 9/17/12RP 38, 62. It is clear that the primary purpose for the questions and answers was to direct appropriate treatment. Even if the standard articulated in Sandoval is applied, as Ramos proposes, the statements are not testimonial, because there is no indication that the 9-year-old victim had any expectation that the statements would be used at a trial. Sandoval, 137 Wn. App. at 537.

While Ramos cites the previous police activity at the residence as suggesting awareness that these statements to the doctor would be used at trial, the opposite inference is more persuasive. N.S. knew that her neighbor Josh had seen Ramos raping her that night and had called the police. 5/21/12RP 116, 119 (the jury did not hear this pretrial testimony). N.S. already had provided a statement to a detective that night – reporting that she was afraid of Ramos because he was touching her, and that Ramos had pulled his and her pants down while they were in the garage and that he rocked back and forth with his private against hers. 5/21/12RP 131 (the jury did not hear this pretrial testimony). The conclusion an ordinary person in the position of N.S. would

draw is that the neighbor's observations and N.S.'s statements to the detective would be used in the prosecution. There would be no reason to conclude that statements made to a doctor in the emergency room, without any police officers present, could be used at trial. Objectively viewed, the primary purpose of N.S.'s statements was to obtain appropriate treatment, not to assist in prosecution. Thus, her statements were not testimonial.

Even if N.S.'s statements to Dr. Turcotte were improperly admitted, any error was harmless given the vagueness of the statements and the overwhelming evidence from the six independent eyewitnesses who testified that they saw Ramos rape the child. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Six eyewitnesses, including two who knew N.S. and her stepfather (Ramos) by sight before this incident, testified that they saw Ramos have sexual intercourse with N.S. on August 1, 2009. (Facts detailed at pp. 3-5, *infra*.) Five of those witnesses described the act in very similar terms, in graphic detail. 9/18/12RP 18-22, 37, 63-65, 104-10, 144-48; 9/19/12RP 23-28. None of the witnesses knew any member of the family more

than casually, and there was no suggestion that any of them had any bias. When the police responded, no one would answer the door to the residence where the rape occurred. 5/17/12RP 27-28. When the police said they were coming in, about an hour later, a teenage boy opened the door. 5/17/12RP 49-51. Ramos was the only adult male found inside. 9/18/12RP 153. A swab of Ramos' penis yielded a DNA profile that was a mixture of two people, with N.S. a possible contributor. 9/13/12RP 42-43. Based on the United States population, it is estimated that one in 2.7 million individuals is a potential contributor to the profile. 9/13/12RP 43. Given the overwhelming evidence, the vague statements N.S. made to the doctor, if they were admitted to the doctor, were harmless beyond a reasonable doubt.

3. THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT DID NOT DRAW AN OBJECTION AND DID NOT CONSTITUTE REVERSIBLE ERROR.

Ramos contends that the trial prosecutor's comments about the presumption of innocence in his rebuttal closing argument constitute intentional misconduct and warrant reversal. Ramos invited these comments by his own closing argument. He did not

object to the prosecutor's comments he now identifies as error and if any of the comments was error, any prejudice was easily curable.

A defendant who claims on appeal that prosecutorial misconduct deprived him or her of a fair trial generally bears the burden of establishing that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756-59, 764 n.14, 278 P.3d 653 (2012); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A defendant who does not make a timely objection at trial waives any claim on appeal unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

The Supreme Court recognizes that the absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." McKenzie, at 53 n.2 (emphasis

in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That Court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal." State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007).

Remarks that are invited or provoked by defense counsel, even if improper, generally are not grounds for reversal unless the remarks go beyond a pertinent reply, or are so prejudicial an instruction would not cure them. Russell, 125 Wn.2d at 86.

a. Relevant Facts.

At the start of the trial, the court orally advised the jurors that the lawyers' statements and arguments were not evidence or a statement of the law and "you must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions."

9/13/12 RP 14. The court's first written instruction informed the jury that it was their duty to accept the law from the court's instructions.

CP 71. It also stated that the lawyers' statements and arguments did not constitute the law to be applied, as follows:

The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 72.

In its second written instruction, the court informed the jury of the burden of proof, in pertinent part as follows:

The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 72. In its instructions setting out the elements of each crime, the court advised the jury, twice in each instruction, that they must be convinced of each element beyond a reasonable doubt in order to return a verdict of guilty. CP 74-75.

In closing argument, defense counsel argued as follows:

If a person who is a close friend of yours were accused of something like this, I -- the particular kind of charge, you might be able to fall back on what you know about them as a person. You might be more inclined to say to the State, "Prove this to me because I know this person didn't do it".

Well, I submit to you that the presumption of innocence should be what you find comfort in as you do the difficult work of sifting through the State's evidence and coming to a thoughtful and reasoned conclusion about whether the State has proven its case here.

The presumption of innocence means you have to treat Mr. Ramos as if you know he's not the sort of person who would do something like this. And you cannot find him guilty unless and until you're actually convinced beyond a reasonable doubt, that he did, based on the evidence that the State has presented.

9/24/12RP 66.

The prosecutor responded with the remarks to which Ramos now objects, as follows:

First, with the presumption of innocence, the basic presumption of innocence. The defendant had the presumption of innocence until I proved, State proved that beyond a reasonable doubt that he committed this crime, which I have done.

But he does not have the presumption for you to believe that, as defense said, that he is the sort of person who would not commit a crime like this. That is not true, that is not accurate, that is not in your jury instructions.

You don't have to presume that he's a nice guy, that he's a good guy, he's got great character. Because you didn't hear any of that.

You presume that he's innocent until the charge is proven beyond a reasonable doubt, and that's all.

Now from the evidence, I'm sure you can conclude he's not such a nice guy given what he did to [N.S.]. But you certainly don't have some presumption that he's a stellar member of the community coming in here.

Simply, that he is not guilty until I proved it beyond reasonable doubt, which I did.

9/24/12RP 89.

b. The Remarks Of The Prosecutor Are Not Reversible Error.

Ramos asserts that the prosecutor argued that the presumption of innocence dissipated at the beginning of deliberations. That is not the force of the remarks, however. The remarks accurately communicated that the presumption of innocence remains until the State proves beyond a reasonable doubt that the defendant committed the crime. 9/24/12RP 89. This is the exact statement of the law endorsed by Ramos: "The presumption of innocence continues to operate until overcome by proof of guilt beyond a reasonable doubt." App. Br. at 23 (citing United States v. Fleischman, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950)). The legal standard articulated by the prosecutor is not error.

There could be an argument that the prosecutor's choice of verb tense, that the presumption continued until the State "proved"

the crime beyond a reasonable doubt, “which I have done,” suggested that the presumption of innocence already had dissipated because the proof had been presented. This would be a fine distinction, as the prosecutor is permitted to argue that the crime has been proven beyond a reasonable doubt.

The context of these remarks demonstrates that the prosecutor was arguing that the defendant did not enjoy a special presumption of innocence, in response to the defense argument that the jury should consider it equivalent to evaluating the evidence as if the defendant was a close friend of the juror, as to whom the juror would say “I know this person didn’t do it.” 9/24/12RP 66.

The two cases upon which Ramos relies to establish impropriety both involved statements that the presumption of innocence does not apply during jury deliberations. State v. Evans, 163 Wn. App. 635, 260 P.3d 964 (2011) (the presumption “kind of stops once you start deliberating”); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010) (the presumption “erodes” as evidence is heard, and at the conclusion of the evidence no longer exists). In contrast, the prosecutor here did not convey the idea that the jury should not consider the presumption in its deliberations.

If the prosecutor's remarks could be interpreted to suggest that the presumption already had disappeared because the State already had put on its proof, that improper suggestion certainly was curable. Because there was no objection to these remarks in the trial court, they are not reversible error unless they were not curable. Emery, 174 Wn.2d at 762-63. The court in Emery observed that a remark that could confuse the jury about the burden of proof did not have an inflammatory effect. Id. at 763. The court stated that if there had been an objection, the trial court could have properly explained the jury's role and the State's burden of proof, and such an instruction "would have eliminated any possible confusion and cured any potential prejudice" from the improper remarks. Id. at 764. The Court in Emery found multiple, much more direct misstatements of the burden of proof clearly curable. Id.

This Court recently found a single comment that was a clear misstatement of the presumption of innocence (stating that it lasts until the jury walks into the jury room and starts deliberating) curable, holding it had "no doubt that a simple instruction" indicating that the presumption of innocence may be overcome only during deliberations would have been sufficient to overcome any

prejudice. State v. Reed, 168 Wn. App. 553, 579, 278 P.3d 203 (2012). Any error in the prosecutor's remarks here also was curable with a simple instruction. The prosecutor's remarks were not inflammatory and any possibility of prejudice would have been eliminated.

Even if the remarks are found to be incurable, Ramos has not shown a substantial likelihood that the statements affected the jury's verdict. The jury was clearly instructed that the State bears the burden of proof beyond a reasonable doubt and the prosecutor's argument was consistent with that principle. An isolated remark that improperly suggests the burden of proof is the defendant's need not create a pervasive taint. Emery, 174 Wn.2d at 764 n. 14. The isolated remarks here did not do so. Ramos has not shown a substantial likelihood of prejudice, particularly in light of the overwhelming evidence against him.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Ramos's conviction and sentence.

DATED this 28 day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix 1

Appendix 1

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KING COUNTY, WASHINGTON

DEC 12 2012

SUPERIOR COURT CLERK
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 09-1-05091-7 KNT
vs.)	
)	COURT'S WRITTEN FINDINGS OF
)	FACT AND CONCLUSIONS OF LAW
FELIPE RAMOS,)	ON CrR 3.6 MOTION TO SUPPRESS
)	EVIDENCE
)	
)	Defendant,
)	
)	
)	

A hearing on the admissibility of statements and identification evidence was held on May 17 and May 21, 2012, before the Honorable Judge Beth Andrus. After considering the testimony of the witnesses, evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. FINDINGS OF FACT:

1. At 10:07 p.m. on August 1, 2009, Michael Stewart called 911 to report a rape of a child that he and other witnesses observed from a nearby condominium approximately 10 minutes earlier.
2. A second 911 call was made by Mr. Stewart approximately 20 minutes later, and Deputy Paul Thiede was dispatched to the scene at 10:35 p.m.
3. Deputy Thiede arrived at 10:43 and spoke to Mr. Stewart, who told him that he had seen an adult male neighbor having sex with a minor.
4. He described the male as a white male, in his 30s, 5'8", dark hair and wearing a robe.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
SUPPRESS EVIDENCE- 1

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- 1 5. Deputy Thiede decided he needed backup to interview all the witnesses, to
- 2 contact a possible suspect, and to check on the status of a possible vulnerable
- 3 child.
- 4 6. Deputy Abbott arrived at 10:53 p.m. and began taking a statement from Mr.
- 5 Steward at 10:56 p.m. He then took a statement from Michael Soden, another
- 6 witness, at 11:06 p.m.
- 7 7. Deputy Smithmyer arrived at 10:54 p.m. and took a statement from Matthew
- 8 Soden at 10:56 p.m.
- 9 8. The witnesses confirmed that neither the adult male suspect nor the female child
- 10 had left the condominium. By the time these statements were finished, other
- 11 deputies, Milne, Hall and Fitchett had arrived, at 11:01, 11:07 and 11:09
- 12 respectively.
- 13 9. Deputies set up in front and back of the condominium where the suspect was
- 14 believed to be inside.
- 15 10. Deputy Smithmyer watched the back of the condominium to make sure no one
- 16 left that way.
- 17 11. Deputy Fitchett went to the front door and began knocking and indicating that he
- 18 wanted to talk to the occupants of the condominium. He received no response.
- 19 12. Deputy Fitchett wanted to check on the welfare of the minor female.
- 20 13. At 11:37 p.m., deputies approached the front door. One officer began to knock
- 21 very loudly and yelled to the occupants that the police were going to enter the
- 22 house.
- 23 14. Someone looked out from the balcony of the condominium, and a minute or two
- later the front door was opened by a teenage male.
- 15 15. Deputies entered with guns drawn. One officer yelled "Police conducting a
- 16 welfare check."
- 17 16. They detained the defendant, who matched the description given by witnesses of
- 18 the man seen sexually assaulting the minor female.
- 19 17. Deputy Smithmyer came around from the back.
- 20 18. At 11:44 p.m., the defendant was brought outside in handcuffs for a show-up with
- 21 the witnesses.
- 22 19. Deputy Abbott was standing next to Michael Soden for the show-up.
- 23 20. Deputy Abbott advised Mr. Soden that the person he was about to see may or may
- not be the suspect.
- 21 21. Mr. Soden immediately identified the defendant as the person he saw sexually
- 22 assaulting the minor female. He said he was 100% sure.
- 23 22. The other witnesses, who were nearby, also said they recognized the defendant as
- the person they saw sexually assaulting the minor female, within 10 to 12
- seconds.
- 21 23. N.S. was then brought out and all the witnesses identified her as the minor female
- 22 they had seen being sexually assaulted by the defendant.
- 23 24. Deputy Smithmyer then took the defendant to his patrol car.
- 24 25. Deputy Fitchett read the defendant his Miranda rights. The defendant indicated
- verbally that he understood his rights.
- 25 26. Deputy Fitchett asked the suspect if he knew why the police were there, and the
- defendant said "no."

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
SUPPRESS EVIDENCE- 2

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- 27. At 11:47 p.m., the CAD report indicates that the suspect had been mirandized.
- 28. After the defendant was informed of his Miranda rights, Deputy Smithmyer told him that he was under arrest for alleged rape of a child.
- 29. The defendant asked Deputy Smithmyer if they were going to test the little girl.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

a. STATEMENTS AND PHOTOGRAPHS

- 1. Police were justified in entering the condominium without a warrant under the emergency aid exception to the warrant requirement, based on the factors in State v. Schultz, 170 Wash. 2d 746 (2011).
- 2. Deputies Thiede, Fitchett and Abbott subjectively believed they needed to enter to assist N.S. after knocking and receiving no response for at least 20 minutes.
- 3. A reasonable person in the position of these officers would have similarly concluded the same thing, especially after knocking and receiving no response.
- 4. Deputies had a reasonable basis to associate the need for assistance with the place entered because no one had entered or left the condominium since the time of the alleged rape.
- 5. There was an imminent threat of substantial injury to N.S. Deputies did not immediately enter the condominium after arriving on scene but they acted prudently in waiting long enough to gather sufficient information about the crime and the suspect and to have a sufficient number of officers on scene to ensure officer safety. They entered only after receiving no response to repeated knocking.
- 6. Deputies reasonably believed that N.S. was in immediate need of help based on the belief that she and the defendant were still inside and based on the nature of the crime witnessed.
- 7. The entry was not a pretext to conduct an evidentiary search.
- 8. The motion to suppress statements and photographs resulting from the entry into the home is denied.

b. IDENTIFICATION

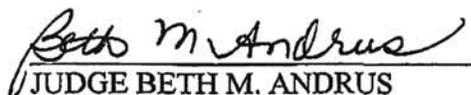
- 1. The legal standard for suppression of an out of court identification is found in State v. Kinard, 109 Wash. App. 428 (2001).
- 2. Under that standard, the Court must first find that the identification procedure is suggestive.
- 3. If no suggestiveness is found, the inquiry is over.
- 4. Second, the Court must determine whether the identification procedure is so impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification.

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- 5. Here, the show-up procedure was suggestive in that it directed undue attention at the defendant.
- 6. It was not, however, impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification.
- 7. Five factors are considered to make this determination. These factors are found in State v. Barker, 103 Wash. App. 893 (2000).
- 8. First, all five men had an ample opportunity to witness the defendant as they could all see him through the window of the garage.
- 9. Second, their degree of attention was high because they could not believe what they were seeing. In addition, one of the witnesses knew the defendant because he was his neighbor.
- 10. Third, the witnesses provided accurate descriptions of the defendant before the show-up.
- 11. Fourth, all the witnesses indicated they were 100% certain that the defendant was the person they saw committing the crime.
- 12. Fifth, there was very little time, under two hours, between the time when they saw the crime being committed and the show-up.
- 13. The motion to suppress the identification is denied.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 12th day of December, 2012.



 JUDGE BETH M. ANDRUS

Presented by:



 Charles Sergis, WSBA #29364
 Senior Deputy Prosecuting Attorney
 As to forum;



 Attorney for Defendant

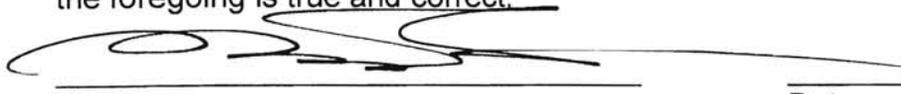
WRITTEN FINDINGS OF FACT AND
 CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
 SUPPRESS EVIDENCE- 4

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief Of Respondent, in STATE V. FELIPE JOSEPH RAMOS, Cause No. 69751-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

 _____ 10-28-13

Name

Date

Done in Seattle, Washington