

No. 43075-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Tanya Quinata,**

Appellant.

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Clark County Superior Court Cause No. 10-1-01713-5

The Honorable Judge John Wulle

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. RCW 9A.36.011 is unconstitutional because it was enacted in violation of Wash. Const. Article II, Section 19's single subject rule.
2. RCW 9A.36.011 is unconstitutional because it was enacted in violation of Wash. Const. Article II, Section 19's subject in title rule.
3. Ms. Quinata was convicted of violating an unconstitutional statute.
4. Ms. Quinata's conviction violated her Sixth and Fourteenth Amendment right to confront witnesses.
5. The trial court erred by admitting testimonial hearsay.
6. The trial court erred by admitting hearsay over Ms. Quinata's objection in violation of ER 802.
7. The trial court erred by admitting Kama's statements to Patty Morgan of "psych services," through the testimony of Cassandra Sappington.
8. The trial court erred by admitting hearsay testimony about an anonymously transcribed statement dictated by Patty Morgan, most likely from her own handwritten notes of a conversation she had with Kama at an undisclosed time.
9. The prosecutor committed misconduct requiring reversal.
10. The prosecutor improperly expressed a personal opinion in closing arguments, in violation of Ms. Quinata's right to due process under the Fourteenth Amendment and Wash. Const. Article I, Section 3.
11. The prosecutor improperly "testified" in violation of Ms. Quinata's right to a jury trial and her right to a decision based solely on the evidence under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 3, 21, and 22.

12. The prosecutor improperly highlighted Ms. Quinata's exercise of her constitutional right to be present at trial and her right to confront the evidence against her.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The constitution requires that bills enacted into law embrace a single subject, and that the subject be expressed in the title. The statute defining and criminalizing first-degree assault was passed as part of an act addressing the sentencing of adult felons. Was RCW 9A.36.011 enacted in violation of the single-subject rule and the subject-in-title rule of Wash. Const. Article II, Section 19?
2. In a criminal case, the Sixth Amendment's confrontation clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and the accused person had a prior opportunity for cross-examination. Here, the trial court admitted Cassandra Sappington's testimony about a report dictated by Patty Morgan (of "psych services"), which was prepared following Morgan's interview of Kama in the hospital. Did the admission of this testimonial hearsay violate Ms. Quinata's Sixth Amendment right to confront the witnesses against her?
3. Hearsay evidence is generally inadmissible. Here, the trial judge overruled Ms. Quinata's hearsay objection to the testimony of a witness reading from a transcribed report prepared by an anonymous transcriptionist, dictated by Patty Morgan (of "psych services"), most likely from her handwritten notes, which purported to summarize and quote statements made by Mr. Kama at an undetermined date and time. Did the trial judge abuse his discretion by admitting hearsay in violation of ER 802?

4. A prosecutor may not express a personal opinion, “testify” to facts not in evidence, or make an unconstitutional tailoring argument that infringes the accused person’s right to be present and to confront the state’s witnesses. Here, the prosecutor expressed her personal belief in Ms. Quinata’s guilt, gave the jury information that had not been introduced into record, and improperly highlighted Ms. Quinata’s exercise of her right to be present and to confront the state’s evidence. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Ms. Quinata’s state and federal constitutional rights to a jury trial, to due process, to be present during trial, and to confront her accusers?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Samuel Kama suffered a serious knife wound on October 14, 2010. RP 60-61, 127. Paramedics arrived, and Mr. Kama was taken to the hospital. RP 66.

His partner, Tanya Quinata, was too distraught to provide information to the first responders. RP 64, 72, 92. She initially told the 911 operator (and later, the police) that Mr. Kama had stabbed himself.<sup>1</sup> RP 136-139; 145; 153, 168, 177, 216-217, 345-355. She later admitted that she'd accidentally poked him with the knife when he came around a corner and ran into her, and that she'd panicked and lied because Mr. Kama had started yelling that she'd intentionally stabbed him. RP 489-492, 494, 500, 501-502, 510.

At the hospital, Mr. Kama was intubated and unable to speak for several days. RP 302, 317. On the day he was extubated (October 15<sup>th</sup> or 16<sup>th</sup>), he was visited by a psychiatric nurse named Patty Morgan. RP 129-130; 306-310, 313. Kama told Morgan that he'd been expecting her, and that he'd been waiting to tell his side of the story. RP 307. He "absolutely denie[d]" that he'd tried to kill himself, and told her he'd never suffered

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<sup>1</sup> Although the couple had argued that day, and although Mr. Kama admitted he was an abusive partner, Ms. Quinata did not allege that she had acted in self defense. RP 176, 185, 216, 483, 497 ; 669-671.

from depression. RP 307. Instead, he told Morgan that he came “around the corner” and “was poked” by his girlfriend (Ms. Quinata). RP 310. He told Morgan that he did not even know he’d been injured “until [he] saw the blood.” RP 310.

Morgan likely took handwritten notes during this interview. RP 303-304. At some point on October 16<sup>th</sup> she dictated a report, likely based on her handwritten notes. RP 303, 313, 315. The dictated report was later transcribed, and Morgan “authenticated” the report on October 17<sup>th</sup>. RP 313.

Ms. Quinata was charged with attempted second-degree murder and first-degree assault. CP 1. The prosecution also alleged that she was armed with a deadly weapon at the time of the offense. CP 1. The case went to trial in December of 2011. See RP generally.

Mr. Kama did not testify at the trial. See RP, generally. Instead, his statement to Morgan was introduced over defense objection through a physician’s assistant named Cassandra Sappington.<sup>2</sup> RP 8-11; 307-310. Sappington testified that she read Mr. Kama’s chart, that the chart contained a report transcribed from Morgan’s dictation, and that Morgan’s dictated report was likely based on handwritten notes made during the

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<sup>2</sup> An EMT also testified that Kama had denied harming himself. RP 66.

interview. RP 307-313. She acknowledged that the report was derived from Morgan's "generalized impression," and thus was probably not "word-for-word," but pointed out that some phrases in quotation marks were likely verbatim. RP 311-312. Despite Ms. Quinata's objection, Sappington's testimony was admitted without any limitation. RP 300-318.

Ms. Quinata testified that she'd accidentally poked Mr. Kama in the chest as he came around the corner in their shared residence. RP 484-493. She described where she'd been standing in the hall, and showed how she'd turned at the same time that Mr. Kama came around the corner. RP 489, 502-503. She explained to the jury that she'd panicked when Mr. Kama accused her of intentionally stabbing him, and as a result had lied to the 911 operator and to the police. RP 494, 500-502, 504, 510.

During closing argument, the prosecutor made numerous comments suggesting that Ms. Quinata had not only tailored her testimony to the evidence she'd heard at trial, but also that she'd fabricated her entire defense after trial had commenced:

After watching three days of testimony in which every little piece was picked apart... [O]nce all of the evidence was laid out what happened was, she realized it wasn't reasonable what she originally said. It wasn't reasonable that a person would take a knife and stick it in their chest to commit suicide. That wasn't reasonable after hearing all the evidence. She realized that nobody was going to believe that story. That nobody was going to think that it was reasonable. She knew how ridiculous it sounded. And, she also got to hear how her deceptions would sound to the jury.

RP 584-585.

She couldn't -- she heard the testimony -- so what she did is she heard the testimony. She sat here three days, she heard the testimony and she decided to use that testimony that she heard -- the pieces of that testimony to fit her -- her account, her story, what she was going to say happened... So, what happens today when we hear her testimony? Every time she is talking about a knife that enters, passes through the skin, passes through the ribs, hits an artery, punctures the wall lining of the heart and then actually enters the heart, every time she calls it a poke. Because it suits her. That's what the doctor said he said, poke. That sounds good. That sounds little. That sounds like something that could happen.  
RP 588.

That suits her purposes today. She was faced with certain types of evidence and she sat here and listened to it and then, she had to shape her story around it.  
RP 595.

She sat here three days and then she got her story together.  
RP 625.

It was only today when she saw how unreasonable all of the other evidence was that she had to change her story.  
RP 627.

During rebuttal closing, the prosecutor told jurors that one deficiency in the government's case stemmed from Ms. Quinata's alleged last-minute fabrications:

The State does not -- did not bring in a -- a person to testify about how much force it would take for someone to accidentally stab someone in the chest because the State did not know that the Defendant was going to change her story until today, until you sat here today.  
RP 632.

Ms. Quinata was acquitted of attempted murder, but convicted of first-degree assault. RP 637-639; CP 3; Verdict Form A, Verdict Form B, Supp. CP. The jury also returned a special verdict finding her armed with a deadly weapon. CP 3; Special Verdict Form B, Supp. CP. Ms. Quinata, who had no felony history, was sentenced to 117 months in prison, and she appealed. CP 3, 17.

## ARGUMENT

**I. RCW 9A.36.011 IS UNCONSTITUTIONAL BECAUSE IT WAS ENACTED IN VIOLATION OF WASH. CONST. ARTICLE II, SECTION 19.**

A. Standard of Review

Constitutional issues are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Statutes are presumed constitutional; the party challenging a statute’s constitutionality “bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.” *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205, 11 P.3d 762 (2000) opinion corrected, 27 P.3d 608 (2001). This standard is met when “argument and research show that there is no reasonable doubt that the statute violates the constitution.” *Id.*

B. The statute defining and criminalizing first-degree assault is unconstitutional because it was enacted in violation of the single-

subject rule and the subject-in-title rule, as part of a bill entitled “AN ACT Relating to the sentencing of adult felons...”

Under Wash. Const. Article II, Section 19, “No bill shall embrace more than one subject, and that shall be expressed in the title.” The provision is intended (a) to prevent “logrolling” (where a law is pushed through by attaching it to other legislation), and (b) “to notify members of the Legislature and the public of the subject matter of the measure.” *Amalgamated Transit Union*, at 207.

The title of a bill may be general or restrictive. *Id.*, at 207-208.<sup>3</sup> Restrictive titles are “narrow, as opposed to broad;” the label applies whenever “a particular part or branch of a subject is carved out and selected as the subject of the legislation.” *State v. Broadaway*, 133 Wash.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n*, 35 Wash.2d 1, 23, 211 P.2d 651 (1949)), overruled on other grounds by *State ex rel. Washington State Finance Commission v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963)).

Restrictive titles will not be regarded as liberally as general titles; any provision not fairly within a restrictive title will not be given force.

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<sup>3</sup> General titles are “broad rather than narrow,” they “may be comprehensive and generic rather than specific.” *Amalgamated Transit Union*, at 207-208. *Id.* A statute enacted under a general title requires only “rational unity between the general subject and the incidental subjects.” *Id.*, at 209. Examples of general titles include “An Act relating to violence prevention,” “An Act relating to tort actions.” *Id.*, at 208 (providing examples).

Amalgamated Transit Union, at 210. Violations of Article II, Section 19 “are more readily found where a restrictive title is used.” *Id.*, at 211. Examples of restrictive titles include “An act relating to the acquisition of property by public agencies,” “An act relating to local improvements in cities and towns,” “An act relating to increasing penalties for armed crime.” *Id.*

RCW 9A.36.011, which criminalizes assault in the first degree, was enacted by the legislature in 1986. Laws of 1986, Chapter 257. The provision was included in an act captioned “Sentencing of adult felons” and titled “AN ACT Relating to the sentencing of adult felons...” Laws of 1986, Ch. 257. This title is restrictive rather than general: the act did not relate to “crimes” or “criminal justice” as a whole, or to “sentencing” or “sentencing of adults” generally; instead, it specifically referenced “sentencing of adult felons.” Laws of 1986, Ch. 257. Thus, the title carved out and selected a particular branch of a subject as the topic of legislation.<sup>4</sup>

Section 4, a new section creating the crime of first-degree assault, did not fall within that particular subject (sentencing of adult felons).<sup>5</sup>

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<sup>4</sup> Significant portions of the statute did, in fact, address the sentencing of adult felons. See, e.g., Laws of 1986, Ch. 257 §§ 1, 15, 17-30.

<sup>5</sup> Even if the title were found to be a general title, Section 4 would not fit within it: there is no “rational unity” between title and subject such that legislators and the public

Instead of addressing sentencing issues, Section 4 defined first-degree assault, altering the elements required to prove the crime of first-degree assault. Laws of 1986, Ch. 257 § 4.

Under the former statute (RCW 9A.36.010), the prosecution was required to prove, *inter alia*, “intent to kill a human being, or to commit a felony...” See Laws of 1975, Ch. 260 § 9A.36.010. Under the 1986 statute, the *mens rea* changed, such that the prosecution was required to prove only “intent to inflict great bodily harm.” Laws of 1986, Ch. 257 § 4. In addition, the 1986 statute added a third alternate means of committing the offense. Laws of 1986, Ch. 257 § 4. Thus, RCW 9A.36.011 did not fit within the title of the legislation, and is unconstitutional under Wash. Const. Article II, Section 19.

The statute was amended in 1997. See Laws of 1997, Ch. 196, § 1. Ordinarily, this amendment might have operated to save the law from subsequent challenge.

[S]uch a challenge is precluded when the allegedly constitutionally infirm legislation has been subsequently reenacted or amended pursuant to properly titled legislation. Such amendment or reenactment cures the article II, section 19 defect.

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would understand that a sentencing bill includes within it provisions that create substantive crimes. *Amalgamated Transit Union*, at 209.

Morin v. Harrell, 161 Wash.2d 226, 228, 164 P.3d 495 (2007). However, in this case, the amending statute does not cure the defect, because the 1997 legislation itself suffered from a defective title. Broad as it was, the title affixed to the amending legislation (“AN ACT Relating to crimes...”) was not broad enough to encompass procedural changes to civil detention hearings afforded HIV-infected people who engage in behaviors dangerous to public health. See Laws of 1996 Ch. 196 § 5 (2)-(3).<sup>6</sup>

For all these reasons, RCW 9A.36.011 was enacted in violation of Wash. Const. Article II, Section 19. Because she was convicted under a statute that is unconstitutional, Ms. Quinata’s conviction must be vacated and the charge dismissed with prejudice.

**II. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MS. QUINATA’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.**

**A. Standard of Review**

Constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S.A manifest error affecting a constitutional right may be raised

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<sup>6</sup> Section 5 was vetoed by the governor. This should make no difference to the analysis, because Article II, Section 19 contains no exception allowing the governor to “cure” a defective title by vetoing those portions of the legislation unrelated to that title.

for the first time on review.<sup>7</sup> RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wash.2d 874, 886, 246 P.3d 796 (2011); *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. Reversal is required unless the state can prove that any reasonable factfinder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

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<sup>7</sup> In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

B. The introduction of testimonial hearsay violated Ms. Quinata's constitutional right to confrontation.

Testimonial hearsay includes statements made “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford v. Washington, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Id.* This is so even if the hearsay is otherwise admissible: “To survive a hearsay challenge ‘is not, per se, to survive a confrontation clause challenge.’” State v. Fraser, 170 Wash.App. 13, 23, 282 P.3d 152 (2012) (citation omitted).

The proponent also bears the burden of establishing that admission does not violate the confrontation clause.<sup>8</sup> *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). This means that the prosecution bears the burden of showing that a particular statement is nontestimonial. *State v. Koslowski*, 166 Wash.2d 409, 417 n. 3, 209 P.3d 479 (2009).

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<sup>8</sup> The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against her.” U.S. Const. Amend. VI. This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

A Crawford issue is “unquestionably constitutional in nature,” and thus qualifies for review under RAP 2.5(a) if it is manifest. *State v. Kronich*, 160 Wash.2d 893, 901, 161 P.3d 982 (2007), overruled on other grounds by *State v. Jasper*, 174 Wash. 2d 96, 271 P.3d 876 (2012).

C. The trial court erroneously admitted testimonial hearsay in violation of Ms. Quinata’s right to confrontation.

In this case, the court admitted evidence through Sappington that included multiple layers of testimonial hearsay, one produced by Kama, a second by Patty Morgan of “psych services,” and a third by an unnamed transcriptionist who typed up Morgan’s dictated report.<sup>9</sup> Sappington’s testimony regarding these multiple layers of hearsay should have been excluded under the Sixth and Fourteenth Amendments.

First, Kama gave his statement after being unable to speak for several days (because he’d been intubated); during that time he’d been “waiting to tell his side of the story.” RP 307, 310. According to Morgan’s general impression, Kama accused Ms. Quinata of intentionally stabbing him during an argument. RP 300-318. The state did not prove when the interview took place, except that it occurred on the day he’d been extubated, on or before October 16<sup>th</sup>. RP 300-318. Nor did the

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<sup>9</sup> The prosecution did not establish that the three declarants were unavailable; nor did Ms. Quinata have a prior opportunity for cross-examination. *Crawford*, at 68.

prosecution establish other circumstances attending the statement—such as whether or not police officers were present during the interview. RP 300-318. Given the absence of any testimony outlining the circumstances, the prosecution failed to prove the statement was nontestimonial, especially in light of Kama’s pent-up desire to tell his side of the story.

Although the statement was (apparently) given to a provider at the hospital, the circumstances that are known—including the content of the statement—suggest that Kama would have understood the likely consequences: that the police would be summoned, that Ms. Quinata would be arrested and charged, and that the statement would be available for later use during a criminal prosecution. Thus, Kama’s statement constituted inadmissible testimonial hearsay (even if it might otherwise have been admissible under ER 803(a)(4) as a statement made for the purpose of diagnosis and treatment.)

Second, the summary report contained in Kama’s chart constituted testimonial hearsay. Patty Morgan from “psych services” (or “psychiatry”) dictated this report, most likely from handwritten notes. RP 303-304. The report purported to summarize Kama’s statements: it was predominantly her “generalized impression,” and was not “word-for-word.” RP 311. The prosecutor failed to produce any evidence of the

circumstances surrounding preparation of this report, and thus did not prove the statements were nontestimonial. *Koslowski*, at 417 n. 3.

In addition, it is likely that any person making a record of an accusation of murder would understand that the record would be available for later use at a criminal trial. This is especially true of medical personnel, who understand that medical records are often used in legal proceedings, whether in the administrative context (i.e. worker's compensation claims), civil litigation (i.e. tort law), or criminal prosecutions. Given the declarant's occupation ("psych services"), it is highly likely she knew that medical records of domestic violence are especially important, because of the frequency with which domestic violence victims recant prior statements. Thus the dictated summary report constituted testimonial hearsay.

Third, the dictated report was transcribed by an unknown person at an unknown time. Again, the prosecution introduced no evidence establishing the circumstances under which the transcript was produced; nor did the state establish how Morgan "authenticated" the report. RP 313. Regardless of the actual circumstances, the nameless transcriptionist would have understood that her or his 'statement'—the transcript itself—would be available for use at a later trial: first, because it apparently contained an accusation of attempted murder, and second, because

medical records are often used in legal proceedings. For these reasons, the transcript of the dictated summary report was also testimonial hearsay.

The erroneous admission of Sappington's testimony had practical and identifiable consequences at Ms. Quinata's trial.<sup>10</sup> Sappington's testimony provided jurors the only version of Kama's out-of-court statement to Morgan that they heard. Furthermore, Sappington's account of Kama's statement to Morgan—although consistent with Ms. Quinata's testimony in its description of the incident—also implied that the injury may not have been inflicted accidentally. RP 300-318. Accordingly, Respondent cannot prove that the error was harmless beyond a reasonable doubt. *Burke, supra*.

The admission, through Sappington's testimony, of the anonymous typist's transcript of Morgan's dictated report (derived, most likely, from Morgan's handwritten notes of her conversation with Kama) violated Ms. Quinata's Sixth and Fourteenth Amendment right to confrontation. Accordingly, the conviction must be reversed and the case remanded for a new trial, with instructions to exclude testimonial hearsay. *Crawford*.

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<sup>10</sup> Accordingly, the error is manifest, and may be addressed for the first time on review if not preserved by Ms. Quinata's objection at trial. RAP 2.5(a)(3). In the alternative, if the issue is not "manifest," the court should exercise its discretion and review the argument on its merits. RAP 2.5(a); *Russell*, at 122.

- D. Morgan's report was not admissible under any purported exception for expert testimony based on reports from non-testifying individuals.

Under certain circumstances, the rules of evidence permit an expert to testify about underlying facts that support the expert's testimony. ER 703. Where these underlying facts are not themselves admissible, they must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject..." ER 703; see also *In re Keefe*, 159 Wash. 2d 822, 154 P.3d 213 (2007).

In this case, Sappington did not rely on Morgan's report to provide an expert opinion at trial. Accordingly, ER 703 did not provide a basis for admission of Morgan's report.<sup>11</sup> In addition, the Supreme Court has agreed to decide whether testimony derived from information provided by non-testifying sources violates the confrontation clause. *State v. Lui*, 153 Wash. App. 304, 221 P.3d 948 (2009), review granted, 168 Wash. 2d 1018, 228 P.3d 17 (2010). The Supreme Court's decision in *Lui* will likely have an impact on the issue presented here.

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<sup>11</sup> The prosecution elicited testimony that Sappington review of the notes was a normal part of providing care. RP 304. This does not make the notes admissible; providing care to a patient is not the same as providing an expert opinion to a jury.

**III. THE TRIAL COURT VIOLATED ER 802 BY ADMITTING HEARSAY THAT DID NOT FIT WITHIN AN EXCEPTION TO THE RULE AGAINST HEARSAY.**

**A. Standard of Review**

The interpretation of an evidence rule is a question of law, reviewed de novo. *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). Where no constitutional rights are infringed, evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009). An erroneous evidentiary ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

**B. The trial court should not have admitted three layers of inadmissible hearsay over Ms. Quinata's objection.**

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." ER 801(c). Hearsay evidence is generally inadmissible. ER 802. So-called "double hearsay" is addressed in ER 805. Under that rule, "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ER 805.

A statement's proponent bears the burden of establishing an exception to the rule against hearsay. *State v. Nieto*, 119 Wash.App. 157, 161, 79 P.3d 473 (2003). In this case, the prosecution failed to establish an exception for any of the three layers of hearsay; accordingly, Sappington's testimony regarding the typist's transcript of Morgan's report of Kama's statement should have been excluded.

First, the prosecutor apparently relied on the medical exception for Kama's statement to Morgan. Under the rule, the proponent of the evidence must establish that the statements were "made for purposes of medical diagnosis or treatment," that they described "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof," and that they were "reasonably pertinent to diagnosis or treatment." ER 803(a)(4).

Here, the prosecution provided only minimal evidence regarding the circumstances under which the statement was made. The chart note indicates that Kama was "was waiting to tell his side of the story." RP 307, 310. He'd been unable to speak since the incident, because he'd been intubated, and he made his statement on the day he was extubated. The record does not show who else was in attendance, and leaves open the possibility that the interview occurred in the presence of the police. Under these facts, it is likely that Kama's purpose in making the statement was

not for the purpose of diagnosis or treatment, but rather to get Ms. Quinata in trouble.

Second, the prosecution apparently relied on the business records exception for the introduction of Patty Morgan's dictated report.

However, Sappington's testimony did not establish the foundation for admission as a business record. RP 300-318. This is so because Kama's statement was not an "act, condition, or event," as required under the statute. RCW 5.45.020. In addition, Sappington was not able to say with certitude when the report was dictated in relation to the interview itself. RCW 5.45.020; RP 300-318. Furthermore, the court did not make a finding that the "sources of information [and] method and time of preparation were such as to justify" admission of the information. RCW 5.45.020. Finally, narrative reports of the type dictated by Morgan are generally inadmissible under the business records exception. See, e.g., *State v. Hines*, 87 Wash.App. 98, 101, 941 P.2d 9 (1997).

Third, the prosecution failed to prove that the unnamed transcriptionist's "statement"—the written transcript itself—qualified for admission under any exception to the rule against hearsay. No information was provided as to how or when the transcript was prepared from Morgan's dictation. RP 300-318. Nor did the prosecution establish how Morgan "authenticated" the transcribed report. RP 313.

The outcome of trial turned on the jury's assessment of Ms. Quinata's mental state. Kama's statements that Ms. Quinata "poked" him during an argument and that there was a history of domestic violence suggested to jurors that the stabbing was not an accident. Without the erroneously admitted evidence, Ms. Quinata might well have decided not to testify, leaving little evidence that she'd intentionally inflicted the injuries suffered by Kama.

The error prejudiced Ms. Quinata, and materially affected the outcome. *Asaeli*, at 579. Her conviction must be reversed, and the case remanded for a new trial. *Id.*

#### **IV. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.**

##### **A. Standard of Review**

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In *re Glasmann*, \_\_\_ Wash.2d \_\_\_, \_\_\_, 286 P.3d 673 (2012).<sup>12</sup> Even absent an objection, error may be

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<sup>12</sup> Citations are to the lead opinion in *Glasman*. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers "agree[d] with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct." *Glasmann*, at \_\_\_ (Chambers, J., concurring). Justice Chambers wrote separately because he was "stunned" by the position taken by the prosecution. *Id.* Furthermore, even the dissent recognized that the prosecutor committed flagrant misconduct; the dissent's disagreement centered on the degree of prejudice suffered by the defendant. *Id.*, at \_\_\_ (Wiggins, J., dissenting).

reviewed if it is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Id.* at \_\_\_\_.

B. The convictions must be reversed because the prosecutor engaged in misconduct that was flagrant and ill-intentioned.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann*, at \_\_\_\_; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann*, at \_\_\_\_.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Wash. Const. Article I, Sections 21 and 22. The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence, or to give a personal opinion on the guilt of the accused. *State v. Reed*, 102 Wash.2d 140, 684 P.2d 699 (1984). A prosecutor may not ““throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”” *State v. Monday*, 171 Wash.2d 667, 677, 257

P.3d 551 (2011) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956))

The state constitution further guarantees an accused person “the right to appear and defend in person... [and] to meet the witnesses against him face to face.” Wash. Const. Article I, Section 22. These state constitutional rights are broader than their federal counterparts, in that Washington prosecutors are prohibited from making certain arguments that are permissible under the federal constitution.<sup>13</sup> *State v. Martin*, 171 Wash. 2d 521, 533-536, 252 P.3d 872 (2011). In *Martin*, the Supreme Court rejected the federal standard, and specifically adopted a standard based on Justice Ginsburg’s dissent in *Portuondo*. *Martin*, at 533-536 (citing *Portuondo*, at 76-78 (Ginsburg, J., dissenting)).

The *Martin* court quoted extensively from Justice Ginsburg’s opinion, noting that she “criticized the majority for ‘transform[ing] a defendant’s presence at trial from a Sixth Amendment right into an automatic burden on his credibility.’” *Martin*, at 534 (quoting *Portuondo*, at 76 (Ginsburg, J., dissenting)). Importantly, the *Martin* court highlighted Justice Ginsburg’s opinion “that a prosecutor should not be permitted to make such an accusation during closing argument because a

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<sup>13</sup> The U.S. Supreme Court allowed such arguments in *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

jury is, at that point, unable to ‘measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case.’” Martin, at 534-35 (quoting Portuondo, at 78 (Ginsburg, J., dissenting)).

Here, the prosecutor repeatedly highlighted Ms. Quinata’s exercise of her right to be present and to confront the prosecution witnesses. The argument was not merely that Ms. Quinata tailored parts of her testimony to the evidence, but rather that she created her whole version of events from the testimony she heard at trial. See, e.g., RP 584-585, 588, 595, 626, 627. Topping it off, the prosecutor told jurors (referring to herself as “the state”) that she

did not bring in [a] person to testify about how much force it would take for someone to accidentally stab someone in the chest because the State did not know that the Defendant was going to change her story until today.  
RP 632.

There was, of course, no indication in the record that Ms. Quinata had changed her story “today,” or that “the State did not know” how Ms. Quinata planned to testify. By making this statement, the prosecutor effectively testified, throwing “the prestige of [her] public office ... into the scales against the accused.” Monday, at 677 (citation and internal quotation marks omitted.)

The prosecutor also expressed her own personal opinion regarding Ms. Quinata's thought processes and credibility. Thus, the prosecutor combined argument about Ms. Quinata's opportunity to tailor her testimony (such as "[a]fter watching three days of testimony..." "once all of the evidence was laid out..." "[s]he sat here three days, she heard the testimony..." "[s]he was faced with certain types of evidence and she sat here and listened to it..."<sup>14</sup>) with her own personal assessment of Ms.

Quinata's credibility and testimony:

[S]he realized it wasn't reasonable what she originally said... That wasn't reasonable after hearing all the evidence. She realized that nobody was going to believe that story. That nobody was going to think that it was reasonable. She knew how ridiculous it sounded. And, she also got to hear how her deceptions would sound to the jury.

RP 584-585.

[S]he decided to use that testimony that she heard – the pieces of that testimony to fit her – her account, her story, what she was going to say happened... [E]very time she calls it a poke. Because it suits her... That sounds good. That sounds little. That sounds like something that could happen.

RP 588.

That suits her purposes today. She was faced with certain types of evidence and she sat here and listened to it and then, she had to shape her story around it.

RP 595.

She sat here three days and then she got her story together.

RP 625.

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<sup>14</sup> RP 584-585, 588, 595, 625, 627.

It was only today when she saw how unreasonable all of the other evidence was that she had to change her story.  
RP 627.

Each of these statements reflects the prosecutor's own personal belief regarding Ms. Quinata's testimony. Rather than argument, the statements comprise unchallenged testimony that Ms. Quinata assessed the evidence against her, found her prior statements unreasonable, manufactured a false story that fit the evidence (and did so "today," moreover), and presented these lies to the jury.

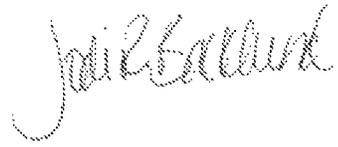
The prosecutor's misconduct was flagrant and ill-intentioned. Glasmann, at \_\_\_\_\_. It pervaded the entire closing argument, thus an objection could not have cured any prejudice. *Id.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

### **CONCLUSION**

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on December 11, 2012.

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Tanya Quinata, DOC #355473  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
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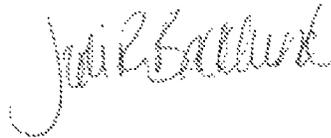
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 11, 2012.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**December 11, 2012 - 4:50 PM**

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