

NO. 45602-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIN THOMAS MITCHELL BONG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 13-1-00880-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

John A. Hays
1402 Broadway
Longview, WA 98632
Email: jahays@3equitycourt.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 6, 2014, Port Orchard, WA _____
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether ML's Statements to the 911 operator were nontestimonial where ML was seeking police assistance to protect her from Bong, who had just beaten her severely, taken her phone and money, and was still angry and outside the door of the room in her home where she had sought refuge?

2. Whether even if the statement were testimonial, there would be no confrontation clause violation because ML testified at trial and Bong was given a constitutionally adequate opportunity to cross-examine her?

3. Whether ML's statement to the Social worker was properly admitted under ER 803(a)(4) as a statement for purposes of medical treatment, because statements regarding the cause of injuries are medically relevant to the treatment of domestic violence victims?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Erin Thomas Mitchell Bong was charged by information filed in Kitsap County Superior Court with one count of second-degree assault (domestic violence) of ML. CP 1-2. A jury found Bong guilty as charged. CP 104-05. The trial court imposed a standard-range sentence. CP 108-09.

B. FACTS

Bremerton Police Officer William Prouse responded to a domestic disturbance call at 1551 Olympic Avenue. RP 52-53. When Prouse arrived, he first encountered Bong, who appeared slightly intoxicated. RP 53. Prouse told Bong why he was there and Bong invited him into the house. RP 53.

Inside, Prouse spoke with ML. RP 53-54. ML was crying and had a swelling on the right side of her face. RP 54. She was upset and also appeared slightly intoxicated. RP 54. Bong had no injuries. RP 57.

Prouse arrested Bong. RP 58. After waiving his rights, Bong asserted that they had a verbal dispute but that nothing physical had occurred. RP 58. Prouse searched Bong and recovered ML's cell phone, which apparently had been the subject of the dispute. RP 58. The dispute had arisen because Bong would not give ML's SSI card and cell phone to her. RP 60. She identified the phone Bong had as hers. RP 60. Prouse did not find the card when he searched Bong. RP 61.

Dr. Robert Ast treated ML at the emergency room. RP 99. She did not appear to be significantly intoxicated. RP 104.

ML had bruises on her arms, and a large area of swelling on her cheek. RP 99. ML reported that she had been assaulted. She stated that she had been getting ready for bed and her boyfriend came in. He called

her worthless and punched her in the face. RP 100. She ran out of the room and sat down in a chair. RP 100. He dumped the chair over and she fell to the ground, where he pushed and grabbed her several more times. RP 100-01.

Ast ordered an x-ray of her lower back and wrist and a CT scan of her facial bones. RP 101. ML had a fresh fracture through the floor of her eye socket. RP 101, 103. Ast referred ML to a specialist to track the healing of the eye fracture. RP 103. She had multiple bruises on both legs, abrasions on both arms, swelling and bruising on her cheek and soreness on her right wrist. RP 101. The appearance of the injuries was consistent with the timeline ML related. RP 110.

Ast explained that when person comes into ER with injuries like ML's, the staff would first take a history of what happened. RP 101. They would then do a physical examination and decide if any imaging studies were needed. RP 101.

The cause of the injury was relevant to the hospital's treatment of the patient. RP 105. In a case such as this, they would have the patient evaluated by a social worker, to make sure the patient had appropriate resources on discharge and had a safe place to go where she would not be reinjured. RP 105. ML spoke with a social worker. RP 106. Ast reviewed ML's chart and her statements to the social worker were

consistent with what ML had told Ast about the incident. RP 106.

ML testified that she had lived with Bong for about a year. RP 114. She “barely” recalled the incident.

They were arguing. RP 115. Bong began to verbally abuse ML. RP 127. She left and went into the bedroom and took two clonazepam. RP 115-16, 123. She had a prescription for them for anxiety. RP 127.

Bong came into the room, angry. RP 117. He grabbed her wrist. RP 118. She did not really recall what happened next. RP 118. She had had a lot to drink. RP 119. After that she recalled being in the computer room, with the door locked. RP 119.

Then the police came and took pictures of her. RP 118, 121. After that she went to the ER. RP 121. Her cheek was painful for a month and a half after the injury. RP 122. She still had a cyst in it from the injury. RP 122.

She did not specifically remember making a 911 call. RP 120. However, she listened to the recording, and identified the voice on it as hers. RP 120. A recording of the call was played for the jury. RP 120; *see* CP 138 et seq. The contents of the call will be discussed in the argument portion of the brief.

III. ARGUMENT

- A. **ML'S STATEMENTS TO THE 911 OPERATOR WERE NOT TESTIMONIAL WHERE ML WAS SEEKING POLICE ASSISTANCE TO PROTECT HER FROM BONG, WHO HAD JUST BEATEN HER SEVERELY, TAKEN HER PHONE AND MONEY, AND WAS STILL ANGRY AND OUTSIDE THE DOOR OF THE ROOM IN HER HOME WHERE SHE HAD SOUGHT REFUGE; FURTHER, EVEN IF THE STATEMENT WERE TESTIMONIAL, THERE WOULD BE NO CONFRONTATION CLAUSE VIOLATION BECAUSE ML TESTIFIED AT TRIAL AND BONG WAS GIVEN A CONSTITUTIONALLY ADEQUATE OPPORTUNITY TO CROSS-EXAMINE HER.**

Bong argues that the recording of ML's call to the 911 operator should not have been admitted. He claims its admission violated his rights under the Sixth Amendment. However, this claim is without merit because the statements were not testimonial where ML was seeking police assistance to protect her from Bong, who had just beaten her severely, taken her phone and money, and was still angry and outside the door of the room in her home where she had sought refuge. Moreover, even if the statement were deemed testimonial, there would be no confrontation clause violation because ML testified at trial and Bong was given a constitutionally adequate opportunity to cross-examine her. Finally, any error would be harmless in light of the other evidence that Bong severely assaulted ML.

1. The 911 call was not testimonial where ML was clearly seeking assistance.

The confrontation clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The confrontation clause embodies the belief that criminal defendants should have the opportunity to test evidence against them in the adversarial “crucible of cross-examination.” *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 1157, 179 L. Ed. 2d 93 (2011). To this end, where the confrontation clause applies, it excludes a declarant’s out-of-court statements unless the declarant either appears at trial for cross examination¹ or is unavailable for trial but the defendant had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The confrontation clause, by its own terms, however, applies only to witnesses, meaning those who “bear testimony” against the defendant. *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). To determine whether one making a statement to law enforcement has become a witness, the Court looks to the speaker’s primary purpose in making the statement. *Bryant*, 131 S. Ct. at 1153, 1156; *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266,

¹ As discussed *infra*, the declarant, ML, also testified at trial.

165 L. Ed. 2d 224 (2006). A witness's statements are testimonial because he or she makes "[a] solemn declaration or affirmation ... for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (*quoting* 2 N. Webster, *An American Dictionary of the English Language* (definition of "testimony")). But "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Davis*, 547 U.S. at 828. Following this logic, statements "are testimonial when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. Conversely, "[s]tatements are nontestimonial when made ... under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822.

"To determine whether the 'primary purpose' of an interrogation is 'to enable police ... to meet an ongoing emergency,' ... [the Court] objectively evaluate[s] the circumstances in which the encounter occur[red] and the statements and actions of the parties." *Bryant*, 131 S. Ct. at 1156 (*quoting* *Davis*, 547 U.S. at 822). The Supreme Court first defined its primary purpose test in its disposition of a set of consolidated cases: *Davis*, 547 U.S. at 813 and *Hammon v. Indiana*, 546 U.S. 976, 126

S. Ct. 552, 163 L. Ed. 2d 459 (2005). The court later refined this test in *Bryant*.

The facts presented here are similar to those in *Davis*, which also involved a 911 call reporting a domestic violence assault. *Davis*, 547 U.S. at 817. The woman making the call stated that her ex-boyfriend, Davis, had just assaulted her and told the operator that the boyfriend was still on the scene. *Davis*, 547 U.S. at 817-18. The officers arrived to find the woman frightened and preparing to flee the residence. *Davis*, 547 U.S. at 817-18.

Here, ML immediately told the 911 operator, “My boyfriend just...just beat me up.” CP 138. She went on to explain that he had stolen her money and phone, CP 138, which concerned her, because “yeah –he, he- he’s got my money ... He’s got my phone... I can’t leave.” CP 139. She further explained that she need the her SSI card: “I wanted to leave so I could go and get a hotel room and he wouldn’t give it back to me.” CP 139. She also stated at the beginning of the call that she was “hiding in the computer room.” CP 138. She told the operator, “My whole face is swollen. I...I ... Scrapes and bruises.” CP 138.

The reminder of the conversation was primarily devoted to the operator’s questions that pertained to ML’s ongoing safety, and presumably the safety of the police when they arrived. The operator

determined ML's location, her name, Bong's name and description, whether anyone else was there, how Bong was reacting to her calling the police, where she was in the house at the moment, how they could track the assailant if he left, the extent of ML's injuries, and whether Bong was still angry (he was). CP 138-41. After determining that ML was safe for the moment, the operator told ML the police were on the way, and that she should try to stay away from Bong if possible, and offered to stay on the line. CP 142. ML stated that she thought she would be all right until the police arrived. CP 142. The operator told her to call back if she changed her mind or if the situation changed, and then ended the call. CP 142. After the police arrived, they arrested Bong and took ML to the ER.

On the other hand, the facts here are clearly distinguishable from those in *Hammon*. There, police responded to a domestic violence call and found Amy Hammon sitting on the porch. *Davis*, 547 U.S. at 819. Hammon appeared shaken, but, in response to police questioning, insisted that nothing was wrong and declined medical aid. *Davis*, 547 U.S. at 819. Police nonetheless convinced her to let them in the house, where they found a broken heater surrounded by pieces of glass. *Davis*, 547 U.S. at 819; *Hammon*, 829 N.E.2d at 819. The officers then questioned Ms. Hammon away from her husband, and she told them that her husband had broken the heater and then shoved her into the pieces of glass, beaten her,

attacked her daughter, and destroyed some of her property. *Davis*, 547 U.S. at 819.

The Supreme Court reversed the conviction, finding the statements testimonial under the factors it laid out in *Davis*. First, Ms. Hammon did not narrate presently occurring events when she spoke with police; the assault had ended and she initially told the officers that everything was fine. *Davis*, 829 N.E.2d at 829-30. Second, since the police had secured Ms. Hammon's safety and she had declined medical aid by the time she spoke with the officers, an objectively reasonable listener would realize that she was not facing an ongoing emergency when she made her statements. *Davis*, 547 U.S. at 829-32. Third, the court determined that the police questions were necessary to prove past events, the purpose and hallmark of testimony, not to resolve any emergency Hammon faced. *Davis*, 547 U.S. at 830. Finally, the court found Hammon's interaction with police was formal; the officers separated her from other witnesses and the interview produced a signed affidavit introduced into evidence. *Davis*, 547 U.S. at 830. Unlike Ms. Hammon's statements, ML's statements to the 911 operator were made to help resolve an ongoing emergency. ML was still in the home, and Bong was still angry. Indeed, he can be heard talking her while she was locked in the computer room and on the phone.

Finally, in *Bryant*, 131 S. Ct. at 1150, police asked Covington, a man found dying from a gunshot wound, “what had happened, who had shot him, and where the shooting had occurred.” Covington told them he had, around a half-an-hour before, been conversing with an acquaintance, Bryant, through the door to Bryant’s house. *Bryant*, 131 S. Ct. at 1150. At the end of the conversation, when Covington turned to leave, Bryant shot him through the door. *Bryant*, 131 S. Ct. at 1150. After 10 minutes of questioning, police went to Bryant’s house where they found blood, a bullet, a hole in the door, and the victim’s wallet outside.

Bryant appealed his murder conviction on confrontation clause grounds and the Supreme Court affirmed his conviction after holding that Covington’s statements were nontestimonial. *Bryant*, 131 S. Ct. at 1167. The Court rested this conclusion on the circumstances of the police interaction with Covington and the statements made by both Covington and the police. *Bryant*, 131 S. Ct. at 1166-67. Although Bryant had shot Covington more than 30 minutes before police interrogated Covington, Bryant remained at large while Covington spoke to the police. *Bryant*, 131 S. Ct. at 1166. Given Bryant’s unknown location and possession of a firearm, and Covington’s medical condition, the Court concluded that any objective listener would realize that Covington faced an ongoing emergency. *Bryant*, 131 S. Ct. at 1165-66. The Court reasoned that the

police officers' questions, those intended to help them identify and assess the threat posed by Bryant, "were the exact type of questions necessary" to resolve the emergency Bryant posed. *Bryant*, 131 S. Ct. at 1166. Finally, the court noted that Covington's interaction with police, occurring in an unsecured, chaotic scene and in an unstructured way, lacked the formality associated with testimony. *Bryant*, 131 S. Ct. at 1166.

ML's statements to the 911 operator were nontestimonial because, objectively viewed, she made them to seek police aid in the face of an ongoing emergency. The facts in *Davis* are closely analogous to the facts here. Both cases involve 911 calls made to report incidents of domestic violence. *Davis* provides four criteria: whether the speaker's statements narrate contemporaneous events or describe past events, whether a reasonable listener would understand the speaker faced an ongoing emergency, whether the police officer's questions and the speaker's answers are necessary to resolve the ongoing emergency, and the formality of the interaction. *Davis*, 547 U.S. at 827.

The first *Davis* factor looks to whether the witness is narrating ongoing events or making statements about past events. A speaker may speak contemporaneously of past events if the speaker connects the past events with ongoing ones. *State v. Koslowski*, 166 Wn.2d 409, 422 n.8, 209 P.3d 479 (2009) ("[I]t is not inconsistent to speak of past events in

conjunction with an ongoing emergency and, in appropriate circumstances, considering all of the factors the Court identified [in *Davis*], the fact that some statements are made with regard to recent past events does not cast them in testimonial stone.”).

While ML spoke of the assault, a past event, her statements were made in fear for her immediate safety due to the continuing threat from Bong. ML had locked herself in a room to get away from him, and wanted to leave but could not because he had taken her phone and money. She had noticeable injuries, and objectively could have suffered further assaults from Bong, whom she described as still angry. In this sense, the threat Bong posed to ML was current and continuing when she spoke with the 911 operator. *Koslowski*, 166 Wn.2d at 422 (statements are contemporaneous where the speaker is “still in danger” from the suspect).

The second *Davis* factor looks to whether an objective listener would recognize that the witness faced an ongoing emergency. This evaluation “is a highly context-dependent inquiry.” *Bryant*, 131 S. Ct. at 1158. Relevant factors include whether police have “neutralized” the risk a suspect poses to the witness, the general public, or the police themselves; the type of risk posed by any weapons the suspect might have; and the victim’s medical state. *Bryant*, 131 S. Ct. at 1158–59.

A reasonable listener would recognize that ML faced an ongoing

emergency when she spoke with the 911 operator.² ML was not sure if needed medical assistance, she reported that her whole face was swollen, that she had scrapes and bruises, and that she was locked in a room with an angry Bong outside the door. As in *Davis*, ML was asking for police protection from the threat Bong posed. The police had not yet arrived, and Bong was still in the home. In this context, the 911 call objectively looks “plainly [like] a call for help against [a] bona fide physical threat.” *Davis*, 547 U.S. at 827.

The third *Davis* factor looks to whether the questions police ask and the answers the witness gives are necessary to resolve an ongoing emergency the witness faced. The fact that police ask about the identity of the perpetrator or the facts of the crime does not necessarily make the witness’s answers testimonial. *Bryant*, 131 S. Ct. 1165–66; *Davis*, 547 U.S. at 827. Questions intended to allow the police to “assess the situation and the threat to the safety of the victim and themselves” may elicit nontestimonial answers. *Koslowski*, 166 Wn.2d at 425-28. This is especially true where the questions involve an at-large suspect posing a threat to the safety of the victim or police officers. *Bryant*, 131 S. Ct. at 1166; *Koslowski*, 166 Wn.2d at 427-28.

The questions and answers found in the 911 call were plainly

² A principal role of 911 operators is to respond to emergencies.

oriented towards addressing the threat Bong posed to ML and the police. ML only described the assault twice in the call: when the operator asked her what she had called to report and when the operator asked if Bong had hit her in the face. While the second question appears, when viewed in isolation, as an attempt to elicit testimony, the sequence of questions indicates that the operator asked the question to determine whether ML needed medical assistance. The questions about Bong's name, description, whereabouts, possession of weapons, state of mind, and the police's ability to track him were necessary for the operator to determine whether police would "be encountering a violent felon" when responding and how they might resolve the situation. *Davis*, 547 U.S. at 827.

The final *Davis* factor looks to the formality of the speaker's interactions with law enforcement personnel. To evaluate the formality of an interaction, the Court looks to the location of the interaction, whether police isolated the person from others for individual questioning, and whether the speaker makes any kind of signed attestation. *Crawford*, 541 U.S. at 51-53 n.4; *Davis*, 547 U.S. at 830. Interactions with 911 operators are typically deemed informal. *Davis*, 547 U.S. at 827 (contrasting the solemnity of a formal police interrogation with a 911 call); *see also Commonwealth v. Galicia*, 447 Mass. 737, 745, 857 N.E.2d 463 (2006) ("[T]he questions occurred in the highly informal setting of a telephone

call to a 911 dispatcher.”). ML made the statements at issue in the context of a 911 call. She called 911 “hiding” in a room in a home where her assailant was still present. The police had not yet arrived. Given these facts, ML’s statements share nothing with the formality that customarily attends testimony.

Viewed objectively in light of the surrounding circumstances, ML’s statements to the 911 operator were “plainly a call for help against [a] bona fide physical threat.” *Davis*, 547 U.S. at 826. Just as the woman in *Davis* made nontestimonial statements by speaking to police to obtain help in an emergency, ML made nontestimonial statements by speaking to the 911 operator to obtain protection from a present and continuing threat from Bong. Under *Davis* and *Bryant*, the trial court did not err in admitting ML’s statements to the 911 operator. *See also State v. Reed*, 168 Wn. App. 553, 567-568, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012).

2. Even were the call testimonial, ML testified at trial, was asked about the event and the 911 call, and was subject to cross-examination, which is all the Sixth Amendment requires.

Bong next argues that ML did not “testify” because she had memory lapses and did not recall making the 911 call. The Supreme Court has rejected this argument:

[A]ll of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is

unable to recall. Thus, we hold that when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause. We conclude that a witness's inability to remember does not implicate *Crawford* nor foreclose admission of pretrial statements. Admission of R.T.'s out-of-court statements to her mother and to Detective Berg did not violate the confrontation clause in this case. Indeed, R.T. was physically present in the courtroom and she confronted Price face to face, she was competent to testify and testified under oath, the defense retained the full opportunity to cross-examine her and in fact called attention to her lack of memory in closing, and the judge, jury, and defendant were able to view R.T.'s demeanor and body language while she was on the stand such that they could evaluate for themselves whether R.T. was being truthful about her lack of memory.

State v. Price, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006) (citations omitted).

Here, ML appeared at trial. The prosecutor asked her to describe the events surrounding the assault. She recalled portions of it, but noted that she had taken two sedatives after the altercation began. Moreover, although she testified that she did not recall calling 911, she listened to the recording of the call and affirmed that it was her voice on the CD. Finally, she was thoroughly cross-examined, including what medications she took, her lack of memory, her pre-existing medical conditions, her alcohol consumption on the day of the assault, that Bong apparently did not actually have her SSI card, and that she was angry at Bong also. RP 122-

26. Bong's right to confront was satisfied.

3. Harmless error.

Finally, even if the call should have been excluded, any error would be harmless. "Confrontation Clause errors [are] subject to *Chapman* harmless-error analysis." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684. This court employs the "overwhelming untainted evidence" test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011).

Clearly if the 911 call were excluded, the remaining evidence is so overwhelming that any error would be harmless. The police were called

to Bong's residence. ML told them the altercation was over possession of her phone and SSI card. ML was upset and crying and had obvious fresh injuries.

She was then taken to the ER, where she told the ER physician that she had been getting ready for bed and her boyfriend came in. He called her worthless and punched her in the face. She ran out of the room and sat down in a chair. He dumped the chair over and she fell to the ground, where he pushed and grabbed her several more times.³ Her injuries were consistent with this account.

ML testified that she had an argument with Bong and went to her bedroom and took some sedatives. Although her recollection was hazy, she did recall him grabbing her by the wrist, being in the computer room, and then be photographed by the police.

Even if the 911 tape should have been excluded the remaining evidence was uncontradicted except by Bong's statement at the time he was arrested that the altercation had not been physical. Given the extent of ML's injuries, however, that claim was simply not credible. There was no evidence whatsoever of an assault by anyone but Bong. This claim should be rejected.

³ Although he challenges the social worker's note, *see infra*, Bong does not argue that the testimony or treatment notes of the ER doctor were improperly admitted.

B. ML'S STATEMENT TO THE SOCIAL WORKER WAS PROPERLY ADMITTED AS A STATEMENT FOR PURPOSES OF MEDICAL TREATMENT BECAUSE STATEMENTS REGARDING THE CAUSE OF INJURIES ARE MEDICALLY RELEVANT IN THE TREATMENT OF DOMESTIC VIOLENCE VICTIMS.

Bong next claims that statements ML made to a social worker should not have been admitted ER 803(a)(4) because they were not statements for purposes of medical treatment or diagnosis. The claim is without merit because statements regarding the cause of injuries are medically relevant in the treatment of domestic violence victims. Moreover, any error would be harmless.

Under Washington precedent, statements to medical personnel, including those attributing fault, are often held admissible in domestic violence and sexual abuse cases as reasonably pertinent to diagnosis and treatment. "A declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

Williams held that a forensic nurse's testimony regarding a rape victim's answers to a questionnaire was admissible, even though the victim did not initially feel she needed treatment. *Williams*, 137 Wn. App. at 746-47. Similarly, a victim's statement to a doctor that her boyfriend

kicked her, hit her with his fists, and hit her several times with a belt was admissible where the doctor said the manner in which an injury occurs, including whether it was inflicted by a stranger or a family member, impacts diagnosis and treatment. *State v. Sandoval*, 137 Wn. App. 532, 538, 154 P.3d 271 (2007). A victim's statements to a paramedic and emergency room physician, including those identifying her assailant, were admissible "because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan." *State v. Saunders*, 132 Wn. App. 592, 608, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 403 (2007). *See also State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005); *State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005).

Here, Dr. Ast testified that the relationship between the perpetrator and the victim of an assault was relevant to the treatment of the victim. RP105. He explained that the referral of the patient to a social worker was part of that treatment: to make sure the patient had appropriate resources on discharge and had a safe place to go where she would not be reinjured. RP 105.⁴

⁴ Although not raised by Bong in his brief, no *Crawford* issue is presented either. *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 1157 n.9, 179 L. Ed. 2d 93 (2011) (statements made for purpose of medical diagnosis are "by their nature, made for a purpose other than use in a prosecution"); *Melendez-Diaz*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2533 n.2, 174 L. Ed. 2d 314 (2009) (discussing cited cases: "[o]thers are simply irrelevant, since they involved medical

Moreover, as discussed with regard to the 911 call issue, if the admission of the social worker's note were improper, the remaining evidence is so overwhelming that any error would be harmless. Notably, the social worker's note was entirely cumulative to the statement ML made to Dr. Ast, which has not been challenged. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Bong's conviction and sentence should be affirmed.

DATED August 6, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

reports created for treatment purposes, which would not be testimonial under our decision today"); *Giles v. California*, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) ("[O]nly testimonial statements are excluded by the Confrontation Clause.... [S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."). See also Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brooklyn L. Rev. 311, 348 (Fall 2005) (finding that statements for medical diagnosis and treatment are "staples in child abuse and domestic violence cases.").

KITSAP COUNTY PROSECUTOR

August 06, 2014 - 8:29 AM

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