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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD DELESTER BURKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener

No. 14-1-04008-5

Brief of Respondent

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the admission of a rape victim's hearsay "what happened" statements to a nurse in the course of a sexual assault examination following a rape were properly admitted as a statement for purposes of medical diagnosis or treatment pursuant to ER 803(a)(4).
2. Whether a rape victim's "what happened" statements made to a nurse in the course of a sexual assault examination following the rape were testimonial statements for purposes of Confrontation Clause analysis?
3. Whether a rape victim's statement to a nurse in the course of a sexual assault examination following a rape about where the rape happened was a statement for purposes of medical diagnosis or treatment?
4. Whether a rape victim's statement to a nurse in the course of a sexual assault examination following a rape about where the rape happened was a testimonial statement for purposes of Confrontation Clause analysis?
5. If the statement about where the rape happened was erroneously admitted, was the admission of that statement harmless beyond a reasonable doubt because the statement was merely cumulative to other admitted rape location evidence?
6. Whether miscellaneous medical statements which were purely for medical purposes were testimonial statements?
7. The State concedes that the victim's description of her assailant was a testimonial statement. Was the admission of that description harmless beyond a reasonable doubt?

8. If the victim's relation of her rapist's threat was a testimonial statement, was the admission of that threat harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Evidentiary hearing

K.E.H. lived on the streets. 6 VRP 527. She died of cancer before appellant's trial. 6 VRP 528-29. During her lifetime she stayed near the vicinity of the Wright Park horseshoe area. 6 VRP 530. K.E.H.'s sister briefly described K.E.H.'s problems with alcohol. 6 VRP 537.

On July 3, 2009, in the middle of the night, K.E.H. came into Tacoma General Hospital. 6 VRP 544. The next day, at 4:15 p.m., Kay Frey examined K.E.H. *Id.* at 556. Kay Frey was a sexual assault nurse examiner at Tacoma General Hospital. 6 VRP 542. Ms. Frey's examination of K.E.H. concluded at 6:30 p.m. 6 VRP 556. Ms. Frey described the purposes behind her examination:

The purposes are to do the forensic piece: Photographing, taking a history, doing any DNA retrieval that could be done. Another purpose is to provide them with the medical care they need, subsequent to their assault, and provide support and connections for them via advocates and social workers and that kind of thing. So it's to basically manage their case.

6 VRP at 545. Patient history is probably the most important thing in the examination. *Id.* When asked why, Ms. Frey responded:

Well, this is just medical training in general. History guides everything, and that's true for sexual assault patients as well. So what they tell you, what they can tell you, what they aren't

able to tell you, directs you further to what they might need, medically, to figure it out.

Id. Ms. Frey obtained her history in this case directly from K.E.H. 6 VRP at 548-49. Ms. Frey took K.E.H.'s history word for word. 6 VRP 549. In the course of her examination of K.E.H. examination, Ms. Frey discovered a bleeding cervical laceration which required the intervention of an OB-GYN doctor. 6 VRP 547. Ms. Frey also gave K.E.H. some medications. 6 VRP 557. A safety plan was also discussed. Exhibit 19A.¹

Law enforcement was not present during K.E.H.'s examination. 6 VRP 548. K.E.H. had already been visited by a law enforcement prior to her sexual assault examination. *Id.* However, Ms. Frey's examination also had a forensic, evidence-gathering component. 6 VRP 557-58. K.E.H. at the time of her forensic examination was also motivated "[b]ecause [she did not] want him to be out there doing this to someone else." Exhibit 19F.

A record of Ms. Frey's examination of K.E.H. is memorialized in Exhibits 19A through 19J admitted at the ER 104 motion. 6 VRP 563. Ms. Frey was with K.E.H. from 4:15 p.m. to 6:30 p.m. 6 VRP 556.

¹ Unless otherwise stated, references in this brief to the MultiCare forms filled out by Ms. Frey reference the pretrial motion exhibits and their numbering.

Ms. Frey obtained the consent for forensic evaluation and treatment before providing the treatment and the forensic evaluation.

Exhibit 19B. 6 VRP 555, 564.

After the consent was obtained, the patient narrative, Exhibit 19E was next obtained. 6 VRP 560. Ms. Frey asked K.E.H. what happened in Wright Park, and K.E.H. responded:

I was sitting there rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don't know if he tried choking me or not. The next thing I knew I was taken to the ground, my pants were off and stuff and he was inside me. It was over and done with. I think he told me to keep my mouth shut. That's all I remember, then I came here. I walked over to the hospital.

Exhibit 19E.

The trial found that K.E.H.'s statements to Ms. Frey were nontestimonial ER 803(a)(4) statements for purposes of medical diagnosis and treatment and found that the Confrontation Clause did not bar their admission.

2. Trial.

At trial, the following statements of K.E.H. to Ms. Frey, apparently in the order they were obtained, were admitted without contemporaneous objection:

- 6 VRP 605 K.E.H. said that she wanted to wait for Ms. Frey for her examination.
- 6 VRP 605 K.E.H. said that she did not want to leave her clothes behind at the hospital to Ms. Frey.
- 6 VRP 612 The narrative statement, Exhibit 19B (Pretrial Exhibit 19E), quoted verbatim.
- 6 VRP 614 K.E.H. said that the location of the assault was “Wright’s Park . . . close to 6th Avenue at a table.” This is referenced in Exhibit 19C.²
- 6 VRP 614 K.E.H. provided a description of the suspect: “He was tall, a light black, no hair or short hair. He had a white t-shirt and jeans. No jacket.”
- 6 VRP 614-15 When asked whether her vagina was penetrated by a penis, a finger, a foreign object, K.E.H. responded “yes” to the penis.
- 6 VRP 616 When asked whether her anus was penetrated, K.E.H. responded “no.”³
- 6 VRP 616 When asked whether ejaculation occurred, K.E.H. responded “I don’t think so.”
- 6 VRP 616 K.E.H. responded “no” to the use of foams, jellies, or lubricants.
- 6 VRP 616 K.E.H. reported that her position during the attack itself was “On the ground. On my back.”
- 6 VRP 616 K.E.H. stated “I left my crutches in the park. I need them to walk.”
- 6 VRP 616 When asked about her pain level, K.E.H. stated “5 out of 10.” She stated “I hurt in my same old place. . . My vaginal area.”⁴

² Exhibits 19C and 19D are the same exhibits, at pretrial and trial.

³ K.E.H. also answered “no” when asked if anything happened in her mouth. 6 VRP 621.

⁴ It is a standard medical practice to ask about pain. 6 VRP 617.

- 6 VRP 617 K.E.H. said that she was allergic to both Tylenol and ibuprofen.
- 6 VRP 618 K.E.H. said that she was “doing a bit of drinking” when asked whether drugs or alcohol were associated with the assault.
- 6 VRP 618 K.E.H. said that she wasn’t sure whether she’d lost consciousness.
- 6 VRP 619 When asked about strangulation, K.E.H. said “He put his hand over my mouth.”
- 6 VRP 619 K.E.H. stated that there were no weapons and no physical blows involved in the assault.
- 6 VRP 619 When asked if there was any grabbing, grasping or holding during the incident, K.E.H. said “He was laying on me.”
- 6 VRP 620 When asked if there were any intimidations or threats during the incident, K.E.H. responded: “To keep my mouth shut and don’t report it.”
- 6 VRP 620 K.E.H. said that her last consensual sexual experience was 15 years earlier.
- 6 VRP 621 When asked about hygiene, K.E.H. said that she had urinated twice. She ate and drank three hours before.
- 6 VRP 621 K.E.H. said that she had a bowel movement.
- 6 VRP 621 K.E.H. said that she had not done anything hygiene-wise in her mouth and had not put anything in her vagina.
- 6 VRP 621 K.E.H. said that she had not showered, changed her clothes, or brushed her teeth.

Exhibits 19B-E were admitted at trial. 6 VRP 654. Exhibit 19B is K.E.H.’s narrative statement. Exhibit 19C is labeled “Forensic Evaluation: Patient History A.” Exhibit 19C includes a quotation “I think his penis was all the way in.” Exhibit 19D is labeled “Forensic

Evaluation: Patient History B.” Exhibit E is labeled “Forensic

Evaluation: Female Bodygram.”

Ms. Frey, at trial, testified to the order in which the sexual assault exam proceeded:

The first step is to get consent from the patient to proceed forward. The next step is to obtain a history from them about what happened, and then you do a complete exam, and then the forensic pieces: DNA collection and photography. And, finally, medical care related to their sexual assault is provided, in terms of medications they might need. And, finally, setting them up with a support system in the community for follow-up care, advocacy, things like that.

6 VRP 597.

Bettye Craft, a social worker at Tacoma General Hospital in the emergency department, came into contact with K.E.H. on July 3, 2009. 8 VRP 853. Ms. Craft was called to triage and met with K.E.H. at 1:42 a.m. 8 VRP 854. Triage was the initial assessment of K.E.H. at the hospital. 8 VRP 854-55. Ms. Craft observed that K.E.H. was very upset. 8 VRP 855. K.E.H. was crying, she had leaves and grass in her hair, and she was alone. *Id.* K.E.H. said that she was raped while in Wright Park. 8 VRP 856. Ms. Craft stated that law enforcement came out to take a report after Ms. Craft called. 8 VRP 856.

Carol Aquino-Smith was a Tacoma General Hospital emergency room nurse on the morning of July 3, 2009. 7 VRP 683. On that day she tended to K.E.H. 7 VRP 684. K.E.H. arrived at the hospital at 1:24 a.m.

7 VRP 686. She saw K.E.H. sometime around 8:00 a.m. 7 VRP 684. She testified to K.E.H.'s height (5'3") and weight (100 lbs), and that K.E.H. was still intoxicated to a degree when she saw her. 7 VRP 687. When Ms. Aquino-Smith asked K.E.H. why she was there, K.E.H. "stated she was here because she was raped last night in the park." 7 VRP 689. Ms. Aquino-Smith monitored K.E.H.'s level of pain. 7 VRP 690. Ms. Aquino-Smith testified that at 11:13 that morning, K.E.H. was medically cleared, meaning "that the physician has done her exam and ordered the appropriate testing and made the decision, based on her results, that she is medically, meaning injury-free as far as any further treatment by the emergency room, and cleared to follow through with the next step which, in her case, was the sexual assault exam." 7 VRP 694-95.

Tacoma Police Officer Khanh Phan testified that on July 3, 2009 he responded to Tacoma General Hospital as part of a rape investigation. 8 VRP 834. He arrived at 3:17 a.m. that morning.⁵ 8 VRP 836. He met the victim, K.E.H. 8 VRP 838. He observed that she was intoxicated and kind of incoherent at that time. 8 VRP 838. The victim told him that the crime happened at Wright Park. 8 VRP 841. Officer Phan observed dirt stained on K.E.H.'s pants. 8 VRP 840.

⁵ The call came in at 2:41 a.m. Testimony of Det. Yglesias. 8 VRP at 866.

K.E.H.'s rape case was 09-1-84055-1. 8 VRP 868. The rape kit for that case was sent to Orchid Cellmark, a laboratory on July 27, 2009. 8 VRP 869. Orchid Cellmark found a DNA profile. 8 VRP 871. The results were sent to the Washington State Patrol Crime Lab for entry into a database. 8 VRP 871. No match was initially found. 8 VRP 872. The rape kit was returned to the investigating detective. 8 VRP 872. A DNA match was reported in 2011. 8 VRP 874. The match was with Ronald D. Burke, DOB: 1/17/1960. 8 VRP 874.

Kelli Byrd, a forensic DNA analyst employed by Bode Cellmark Forensics (a successor to Orchid Cellmark), testified. 7 VRP 708-09. She did the analysis of the data in this case and wrote the report. 7 VRP 720. Cellmark received a sexual assault kit, in this case, "that contained vaginal swabs and a cervical swab, some unlabeled swabs, perineal/vulvar swabs, oral swabs, anal swabs, panties, and then reference hairs from Kathy Hunt, and then some other uncollected envelopes as well." 7 VRP 720. For each item submitted, they first looked for the presumptive presence of semen using an acid phosphatase test. 7 VRP 721-22. The panties presumptively tested positive for semen. 7 VRP 723. Spermatozoa were then microscopically observed on a slide prepared from the panties. 7

VRP 723-24. The skin cells and the sperm cells in the sample were separated into the epithelial fraction and the sperm fraction.⁶ 7 VRP 726.

The epithelial fraction of the sample was a mixture consistent with K.E.H. and the male from the sperm fraction of the sample. 7 VRP 727. The epithelial fraction was a mixture consistent with two individuals. 7 VRP 741.

The sperm fraction of the sample was a mixture of K.E.H. and a male. 7 VRP 727-28. The major profile in the sperm fraction was the male, and the minor profile was K.E.H. 7 VRP 727. The major profile in the sperm fraction was a match for appellant. 7 VRP 744.

In that case, what I'm doing is determining what other random person in the population could possibly have that DNA profile. It's a little different calculation than when we're dealing with a mixture. So the numbers are quite different, but the probability of randomly selecting an unrelated individual with this DNA profile, at 12 of 13 locations tested, is 1 in 4.3 quintillion in the U.S. Caucasian population; 1 in 170 quadrillion in the U.S. African-American population; and one in 2.6 quintillion in the U.S. Hispanic population.

7 VRP 743-44.

Chain of custody was stipulated to for both the DNA evidence taken from K.E.H. and the DNA evidence taken from the reference sample obtained from appellant. CP 50-52, 55-57.

⁶ The separation is not always complete. 7 VRP 727.

Detectives Graham spoke with appellant on September 5, 2014. 8 VRP 801. Appellant stated that he moved to Washington State in 1988. 8 VRP 805. Appellant said that he lived at 13th and Market Street in Tacoma. 8 VRP 806. This address referenced a 2009 time frame. 8 VRP 807. Appellant said that he was familiar with Wright Park, and that the apartment that he stayed in with his girlfriend was near Wright Park, and that they had visited Wright Park together. 8 VRP 806. Appellant said that he never went to Wright Park without his girlfriend. 8 VRP 808. Appellant said that he had never had sex in Wright Park. 8 VRP 808. Appellant said that he had not had outdoor sex. 8 VRP 808. Appellant said that he had not had sex in any park in the city of Tacoma. 8 VRP 808-09. Appellant said that there was no reason for his DNA to end up as part of a crime scene for a sexual assault, in 2009, in Wright Park. 8 VRP 811.

Tacoma Police Detective Yglesias testified regarding the mailing of the sexual assault kit to the processing facility and reception of the results of the test and the later match that identified appellant. 8 VRP 868-873.

Exhibit 9A, a map, was used at trial by Detective Yglesias to demonstrate that appellant had lived in the vicinity of Wright Park in the past. 8 VRP 880-83.

Appellant was found guilty of rape in the second degree at trial.

CP 91. Appellant timely appealed.

C. ARGUMENT

1. THE ADMISSION OF STATEMENTS MADE FOR SOLELY PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT DID NOT VIOLATE THE CONFRONTATION CLAUSE.

“[N]ontestimonial statements are outside of the scope of the confrontation clause.” *State v. Wilcoxon*, 185 Wn.2d 324, 331, 373 P.3d 224 (2016) (citing *Davis v. Washington*, 547 U.S. 813, 821–24, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

On three occasions since the filing of the *Crawford* opinion, the United States Supreme Court has characterized statements made to medical providers for purposes of diagnosis or treatment as nontestimonial and, therefore, not subject to a confrontation clause objection. *Michigan v. Bryant*, [562] U.S. [344, 362] 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 [v. Massachusetts]*, 557 U.S. 305, 129 S.Ct. 2527, 312 n.2, 174 L.Ed.2d 314 (2009) (discussing cited cases: “[o]thers are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today”); *Giles [v. California]*, 554 U.S. 353, 376, 28 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.”).

State v. O’Cain, 169 Wn. App. 228, 241-42, 279 P.3d 228 (2012). See also, *State v. Fisher*, 130 Wn. App. 1, 10-13, 108 P.3d 1262 (2005); *State*

v. Saunders, 132 Wn. App. 592, 603, 132 P.3d 743 (2006); *State v. Kimball*, 117 A.3d 585, 595 (Maine 2015); *State v. Muttart*, 116 Ohio St.3d 5, 18, 875 N.E.2d 944, 957 (2007).

The following two statements were non-testimonial and unambiguously focused solely on medical care:

- 6 VRP 605 K.E.H. told Ms. Frey that she wanted to wait for Ms. Frey for her examination.
- 6 VRP 616 K.E.H. stated “I left my crutches in the park. I need them to walk.”
- 6 VRP 616 When asked about her pain level, K.E.H. stated “5 out of 10.” She stated “I hurt in my same old place. . . My vaginal area.”⁷
- 6 VRP 617 K.E.H. said that she was allergic to both Tylenol and ibuprofen.

2. K.E.H.’S “WHAT HAPPENED” STATEMENTS WERE MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. THEIR ADMISSION DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Kay Frey was a nurse practitioner employed by MultiCare, who examined K.E.H. 6 VRP 547-48. Ms. Frey did not recall meeting law enforcement, in any way, on K.E.H.’s case. 6 VRP 548. Law enforcement was not present during Ms. Frey’s examination of K.E.H. *Id.*

⁷ It is a standard medical practice to ask about pain. 6 VRP 617.

Ms. Frey stated the purpose of the examination:

The purposes are to do the forensic piece: Photographing, taking a history, doing any DNA retrieval that could be done. Another purpose is to provide them with the medical care they need, subsequent to their assault, and provide support and connections for them via advocates and social workers and that kind of thing. So it's to basically manage their case.

6 VRP 545.⁸ The examination's medical purpose component was also evidenced by objective facts. First, as the last event in the course of her examination of K.E.H., Ms. Frey discovered a bleeding cervical laceration which required the intervention of an OB-GYN doctor. 6 VRP 547, 550. Second, Ms. Frey also gave K.E.H. some medications. 6 VRP 557. Third, a safety plan needed to be worked out for K.E.H. Exhibit 19A⁹ (paragraph 3).

- a. K.E.H.'s "what happened" statements were properly admitted hearsay as statements made for medical diagnosis or treatment.

After Ms. Frey obtained K.E.H.'s consent, the "very next thing she obtained" was the patient narrative in K.E.H.'s own words.¹⁰

Kay [Frey]: "Can you tell me what happened in Wright Park?"

[K.E.H.]: "I was sitting their rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don't know if he tried choking me or not. The next thing I knew I was taken

⁸ The medical component of the examination, focused on sexual assault, is further explained at 6 VRP 564-66.

⁹ Motion exhibit number.

¹⁰ It was done next. 6 VRP 560 (trial); 6 VRP 549 (motion). It was verbatim/in her own words. 6 VRP 549 (motion); 6 VRP 612 (trial).

to the ground, my pants were off and stuff and he was inside me. It was over and done with. I think he told me to keep my mouth shut. That's all I remember, then I came here. I walked over to the hospital."

Exhibit 19B¹¹; 6 VRP 612. Ms. Frey then obtained other "what happened" statements from K.E.H.:

6 VRP 614-15 When asked whether her vagina was penetrated by a penis, a finger, a foreign object, K.E.H. responded "yes" to the penis.

Exhibit C "I think his penis was all the way in."

6 VRP 616 When asked whether her anus was penetrated, K.E.H. responded "no."¹²

6 VRP 616 When asked whether ejaculation occurred, K.E.H. responded "I don't think so."

6 VRP 616 K.E.H. responded "no" to the use of foams, jellies, or lubricants.

6 VRP 616 K.E.H. reported that her position during the attack itself was "On the ground. On my back."

6 VRP 618 K.E.H. said that she was "doing a bit of drinking" when asked whether drugs or alcohol were associated with the assault.

6 VRP 618 K.E.H. said that she wasn't sure whether she'd lost consciousness.

6 VRP 619 When asked about strangulation, K.E.H. said "He put his hand over my mouth."

6 VRP 619 K.E.H. stated that there were no weapons and no physical blows involved in the assault.

¹¹ This was Exhibit 19E admitted in the evidentiary motion (6 VRP 560) and Exhibit 19B admitted at trial. 6 VRP 654.

¹² K.E.H. also answered "no" when asked if anything happened in her mouth. 6 VRP 621.

- 6 VRP 619 When asked if there was any grabbing, grasping or holding during the incident, K.E.H. said “He was laying on me.”
- 6 VRP 620 K.E.H. said that her last consensual sexual experience was 15 years earlier.
- 6 VRP 621 When asked about hygiene, K.E.H. said that she had urinated twice. She ate and drank three hours before.
- 6 VRP 621 K.E.H. said that she had a bowel movement.
- 6 VRP 621 K.E.H. said that she had not done anything hygiene-wise in her mouth and had not put anything in her vagina.
- 6 VRP 621 K.E.H. said that she had not showered, changed her clothes, or brushed her teeth.
- Exhibit F ““Stayed for hours in ED—SANE nurse with another cae—because I don’t want him to be out there doing this to someone else.”

A “what happened” statement made in the course of a medical examination for sexual assault is properly admitted as a statement made for purposes of medical diagnosis or treatment.¹³ *State v. Moses* 129 Wn. App. 718, 728-29, 119 P.3d 906 (2005) (citing cases). *Madere v. State*, 794 So.2d 200, 213-14 (Miss. 2001); *State v. Butler*, 258 Ga. 448, 449 fn. 1, 349 S.E.2d 684 (1986). “The rationale for allowing such testimony under the hearsay exception for medical treatment or diagnosis is that a declarant should be aware that a practitioner's understanding of what happened to the patient is reasonably pertinent to the patient's diagnosis

¹³ The State does not assert that K.E.H.’s statements describing her assailant are statements made for purposes of medical diagnosis or treatment.

and treatment.” *State v. Almanza*, ___ S.E.2d ___, A17A1270, 2017 WL 4900565, at 4 (Ga. App. Oct. 31, 2017).

Statements that have both a medical component and a forensic component are admissible hearsay as statements made for purposes of medical diagnosis and treatment. *State v. Williams*, 137 Wn. App. 736, 745-47, 154 P.3d 322 (2007); *State v. Payne*, 225 W. Va. 602, 608, 694 S.E.2d 935, 941 (2010); *North Carolina v. Isenberg*, 148 N.C.App. 29, 557 S.E.2d 568, (2001), *cert. denied*, 355 N.C. 288, 561 S.E.2d 268 (2002); *Torres v. Texas*, 807 S.W.2d 884, 886–87 (Tex.Ct.App.1991); *State v. Vigil*, 21 Neb 129, 810 NW.2d 687 (2012).

The crucial distinguishing factor, as identified in *State v. Payne* is whether the victim perceived the visit to be medical in nature. In this case the visit clearly was medical in nature. K.E.H.’s vagina hurt (6 VRP 616) and she walked to the hospital right after she was raped (6 VRP 612). K.E.H.’s vagina still hurt when she spoke to Ms. Frey. Exhibit 19D. K.E.H.’s desire for medical assistance overbore any desire to have her clothes saved as potential evidence (VRP 605) and law enforcement played no role in the examination. 6 VRP 548. The trial court did not abuse its broad discretion in evidentiary matters when it admitted K.E.H.’s “what happened” statements as statements made for purposes of medical diagnosis or treatment.

- b. The admission of K.E.H.'s statements to Ms. Frey did not offend the Confrontation Clause because the primary purpose of those statements was medical diagnosis and treatment.

The trial court concluded that Ms. Frey's sexual assault examination of K.E.H. had a medical purpose and a forensic purpose. 6 VRP 588. This finding is supported by substantial evidence (6 VRP 545), no error has been assigned to it, and it is a verity on appeal. *State v. Olsen*, 175 Wn. App. 269, 281, 309 P.3d 518, 523 (2013), *affirmed*, 180 Wn.2d 468, 325 P.3d 187 (2014). The trial court also concluded that the consent form signed by K.E.H. only allows the release of physical evidence collected during the course of the exam. This finding is supported by substantial evidence (Motion Exhibit 19B, admitted at 6 VRP 563), no error has been assigned to it, and is a verity on appeal. *Olsen*, supra. This was important to the trial court when contrasted with the way the "detailed medical records (*photographs, lab results, written documentation*)" completed that day were treated. 6 VRP 589-90. Those materials were to be "kept confidential, secured at MultiCare Health System and may only be disclosed as allowed by law." Motion Exhibit 19B. The trial court stated: "I don't believe it is clear that the alleged victim in this case was under the -- was put on notice that her statements would be used at trial." 6 VRP 590. No error has been assigned to this

finding, and it is a verity on appeal. *Olsen, supra*. The trial court also found that Ms. Frey was neither employed by or working for the State and that Ms. Frey worked for Multicare, which is separate from the law enforcement agency involved in the case. This finding was also supported by substantial evidence (6 VRP 547-48.), and is an unchallenged verity on appeal. *Olsen, supra*.

The dual forensic and medical purposes of Ms. Frey's examination of K.E.H. require Confrontation Clause scrutiny. If all the "what happened" statements made by K.E.H. to Ms. Frey were exclusively for medical purposes, there would be no Confrontation Clause issue presented at all for the reason expressed by the Ohio Supreme Court in *State v.*

Muttart: "Statements made to medical personnel for purposes of diagnosis or treatment ... are not even remotely related to the evils that the Confrontation Clause was designed to avoid." 116 Ohio St. at 18.

However, since Ms. Frey's examination of K.E.H. had both a medical and a forensic purpose, *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015) requires an examination of the primary purpose of the statements admitted at trial.

Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015) addressed the Confrontation Clause in the context of statements made by a three year old child describing abuse to a teacher with a

mandatory duty of reporting those statements. *Clark*, 135 S. Ct. at 2177-2179. *Clark* is the Supreme Court’s first opinion applying the Confrontation Clause to statements made to persons other than law enforcement officers. *Clark*, 135 S. Ct. at 2181.

The Supreme Court, in *Clark*, stated that the “primary purpose test” is a necessary condition for the exclusion of out-of-court statements under the Confrontation Clause. *Clark*, 135 S. Ct. at 2180-81. “In the end, the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’” *Clark*, 135 S. Ct. at 2180 (quoting *Michigan v. Bryant*, 562 U.S. at 358).

It is also clear that statements are to be considered individually in the Confrontation Clause analysis: “Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. ‘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.’” *Clark*, 135 S. Ct. at 2180 (quoting *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)).

It no longer appears correct to assert that the Confrontation Clause analysis is “declarant-centric,” as the Washington Supreme Court

expressed eleven years ago in *State v. Shafer*, 156 Wn.2d 381, 390, 128 P.3d 87, 92 (2006).

[t]he proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. The inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

Shafer, 156 Wn.2d at 390. After *Bryant* and *Clark*, the *Shafer* test appears to remain a useful tool, but should no longer be considered an outcome-determinative test.

All relevant circumstances are to be considered in the primary purpose inquiry, and the existence, *vel non*, of an ongoing emergency is “simply one factor” that informs the inquiry. *Clark*, 135 S. Ct. at 2180. The factors examined in *Clark*, applied to this case, demonstrate that the admission of K.E.H.’s “what happened” statements at trial did not offend the confrontation clause.

i. K.E.H.’s “what happened” statements were made in a nontestimonial context.

Context is important when evaluating whether the Confrontation Clause bars the admissibility of a statement. *Clark*, 135 S. Ct. at 2181. The “what happened” statements made in this case were made in the context of the provision of medical help.

K.E.H. presented herself at a hospital because she had just been raped. 6 VRP 544. She arrived at the hospital at 1:24 a.m. 7 VRP 686. K.E.H. received treatment in the emergency room. 7 VRP 688-89.¹⁴ 6 VRP 548. Officer Phan, responding to K.E.H.'s complaint of rape, contacted K.E.H. at 3:17 in the morning. 8 VRP 836. Officer Phan asked K.E.H. questions about what happened, then he went to Wright Park, where K.E.H. indicated that the crime happened. 8 VRP 841. At 11:13 a.m., K.E.H. was "medically cleared" from the emergency room, which meant that she was "injury-free, as far as any further treatment by the emergency room." 7 VRP 694-95.

K.E.H. waited at the hospital for her sexual assault exam, which commenced at 4:15 p.m. 6 VRP 544. K.E.H. waited "[b]ecause [she did not] want him to be out there doing this to someone else." Motion Exhibit 19F. Given that K.E.H. had by this time already told Officer Phan what happened in Wright Park, and that her rapist was unknown—it appears that K.E.H. wanted to make sure that the physical evidence was collected.

The sexual assault exam was performed by Kay Frey, a sexual assault nurse examiner. 6 VRP 542. The examination's purpose, as discussed above, was both medical and forensic. 6 VRP 545. Physical

¹⁴ The doctor who treated K.E.H. in 2009 did not testify. She apparently had moved out of the area. 7 VRP 694.

evidence was gathered, to be shared with law enforcement (Motion Exhibit 19B), but detailed medical records (including all the statements admitted in this case) were to be “kept confidential, secured at MultiCare Health System and may only be disclosed as allowed by law.” Law enforcement played no part in the sexual assault exam. 6 VRP 548.

K.E.H.’s “what happened” statements can be grouped into seven categories: (1) objects and materials inserted into K.E.H.’s vagina; (2) K.E.H.’s physical position during the rape; (3) drug and alcohol consumption during the rape; (4) loss of consciousness during the rape; (5) nature of violence applied during the rape; (6) last prior consensual sexual experience; and (7) hygiene questions; and (7) the narrative “what happened” statement. These questions have straightforward focus. How could K.E.H. have been hurt? How recent were any genital injuries? Was her ability to perceive any injury compromised? The primary purpose of these questions—asked by a nurse, in a hospital, to a patient seeking treatment, was medical help—not the preservation of evidence that could be used against an unknown rapist at some unknown later date.¹⁵

These “what happened” statements informed Ms. Frey’s subsequent medical acts. In the course of her cervical examination of

¹⁵ The collection of physical evidence by Ms. Frey from K.E.H. was, however certainly intended to be used for forensic purposes.

K.E.H., Ms. Frey discovered a bleeding cervical laceration which required the intervention of an OB-GYN doctor. At the time of the rape, K.E.H. was homeless.¹⁶ K.E.H. was raped in Wright Park in the early morning hours. 6 VRP 544. Toward the end of her life, K.E.H. “lived or stayed” in Wright Park. 6 VRP 530. The provision of a safety plan for K.E.H. was a component of K.E.H.’s treatment.¹⁷

ii. The primary purpose of K.E.H.’s sexual assault examination questions was not the gathering of evidence for prosecution.

In *Clark*, the Supreme Court considered whether the primary purpose of the conversation between a teacher and the 3-year-old student assault victim was to gather evidence for prosecution. 135 S. Ct. at 2181. In this inquiry, the Supreme Court considered whether the declarant child was informed that his statements would be used to arrest or punish his abuser and whether the child intend his statements to be used by police or prosecutors. *Id.* The informality of the setting was evaluated in this regard:

The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the

¹⁶ Motion Exhibit 19A.

¹⁷ Motion Exhibit 19A. See the discussion in *Ward v. State*, 50 N.E.3d 752, 762-63 (Ind. 2016) for a thorough discussion of patient safety as a “critical” part of a comprehensive standard of care for treating victims of domestic violence. Obviously, the provision of a safety plan is also vitally important in the treatment of patients who are victims of rape.

victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

Id.

In this case, K.E.H. was advised that her statements would be confidential, and may only be disclosed “as allowed by law.” Motion Exhibit 19B. This was in direct contrast to the physical evidence collected by Ms. Frey, which was going to be released to law enforcement. As the trial court stated: “I don't believe it is clear that the alleged victim in this case was under the -- was put on notice that her statements would be used at trial.” 6 VRP 590. K.E.H.'s statements were not obtained in a formalized police station setting—they were obtained in a hospital where K.E.H. had sought medical help.

iii. There is no suggestion in this case that K.E.H. intended her statements to be a substitute for trial testimony.

In considering the victim's age in *Clark*, the Supreme Court concluded:

Thus, it is extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

Clark, 135 S. Ct. at 2182. In this case there is no suggestion that K.E.H. intended her statements to be a substitute for trial testimony. She told Ms.

Frey that she wanted the rapist stopped. Motion Exhibit 19F.

Furthermore, the record does not suggest that K.E.H. would not voluntarily appear for trial. Nor is there any reasonable basis for concluding that Ms. Frey ever did anything to lead K.E.H. to believe that her sexual assault exam was a substitute for trial testimony.

iv. The “what happened” statements were reliable and admissible hearsay.

The Supreme Court in *Clark* also stated that the “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” *Clark*, 135 S. Ct. at 2180. Statements made for the purpose of medical diagnosis or treatment are both firmly rooted and reliable. *White v. Illinois*, 502 U.S. 346, 356-57, 112 S. Ct. 736, 743, 116 L. Ed. 2d 848 (1992).¹⁸

v. The “what happened” statements were not made to a law enforcement official.

It is “highly significant” that K.E.H.’s statements were made to a nurse and not made to a law enforcement official:

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and

¹⁸ The vitality of this factor is highlighted by the vigor of Justice Scalia’s objection to it. *Clark*, 135 S. Ct. at 2184, 192 L. Ed. 2d 306 (2015).

prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police.

(citation omitted) *Ohio v. Clark*, 135 S. Ct. 2173, 2182, 192 L. Ed. 2d 306 (2015).

vi. Similar cases in other jurisdictions have found statements made nurse-conducted sexual assault examination to be non-testimonial.

Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011) (cited with approval in *Ward v. State*, 50 N.E.3d 752 (Ind. 2016), a post *Ohio v. Clark* Confrontation Clause case), involved a victim who went to the police station first to report a rape. *Perry*, 956 N.E.2d at 45. The victim was then taken to the hospital and examined by an emergency/forensic nurse pursuant to a protocol. *Perry*, 956 N.E.2d at 45-46. That examination was very similar to the examination Ms. Frey performed in this case. The Court in *Perry* concluded that the victim's statements to the nurse performing the sexual assault exam were non-testimonial for Confrontation Clause purposes. *Perry*, 956 N.E.2d at 57.

State v. Slater, 285 Conn. 162, 180-86, 939 A.2d 1105 (2008) is another case similar to this case where the Connecticut Supreme Court found statements made to medical personnel who administered a rape kit

and adhered to a protocol were not testimonial statements.¹⁹ In reaching this conclusion, the Connecticut Supreme Court had to address a statute that mandated rape kit collection:

The defendant contends that the administration of a rape kit for the collection of evidence necessarily would have made it apparent to the victim that her statements could be used later at trial. Under the facts of this case, we cannot agree. Section 19a-112a does require that medical personnel administer a rape kit to collect and preserve *physical* evidence related to the assault. That fact, however, does not eviscerate the medical treatment purpose of the exam for the victim.

Slater, 285 Conn. at 183–84. Unlike in *Slater*, the rape kit in this case was entirely voluntary, after informed consent. Motion Exhibit 19B. Furthermore, in *Slater*, the victim was brought to the hospital by police, while in this case K.E.H. walked to the hospital herself following the rape. *Slater*, 285 Conn. at 185.

State v. Hill, 236 Ariz. 162, 336 P.3d 162 (2014) presents facts similar to this case where a sexual assault victim died before she could testify. In *Hill*, the court held:

To be sure, the examination the nurse performed had an investigative component. The nurse was specially trained to conduct forensic examinations of sexual assault victims. She collected DNA samples to forward to law enforcement,

¹⁹ On this particular point, the record was slightly better in *Slater* than in this case because the court in *Slater* found that every statement made by the victim was related to the treatment of a potential injury. *Slater*, 285 Conn. at 183. In this case the question pertaining to the description of the victim was not related to the treatment of potential injury.

and she recorded the results of her examination, including the victim's statement, on a form issued by the state. The statement recounted above, however, came at the outset of the victim's encounter with the nurse and before the nurse commenced her assessment of the injuries the victim had suffered and before she had collected any biological evidence of those injuries. The open-ended question ("Tell me why you are here"), posed to the victim in the emergency room, was not aimed at collecting evidence but at gathering information about the victim's medical condition. The objective circumstances of the exchange that produced the statement thus indicate that its primary purpose was medical treatment, not the collection of evidence of a crime.

Hill, 236 Ariz. at 168-69. *Hill* distinguished *Hartsfield v.*

Commonwealth, 277 S.W.3d 239, 242-45 (Ky. 2009):

Like the witness in *Hartsfield*, the forensic nurse in this case followed a law enforcement protocol by using a rape kit to gather evidence. But unlike in *Hartsfield*, where the nurse only interviewed the victim about her assault and collected biological samples, *see id.* at 241-42, 244-45, the forensic nurse in this case also provided medical care to the victim.

State v. Hill, 236 Ariz. at 167.²⁰

In *State v. Miller*, 293 Kan. 535, 264 P.3d 461 (2011) a sexual assault nurse examiner, acting as an agent of the State for purposes of evidence collection and completion of the rape kit did not elicit

²⁰ In *Hartsfield*, there was also a direct linkage between the sexual assault nurse and law enforcement which is not present in this case. *Hartsfield*, 277 S.W.3d at 244. *State v. Medina*, 122 Nev. 346, 143 P.3d 471 (2006) was also distinguished in *Hill*. 236 Ariz. at 167. In *Medina*, the sexual assault nurse examiner also did not provide medical treatment. *Medina*, 122 Nev. at 350. Both *Hartsfield* and *Medina* were decided well before *Michigan v. Bryant* in 2011.

testimonial statements from a child rape victim. *Miller*, 293 Kan. at 578-

82. The Kansas Supreme Court held:

We conclude the S[exual]A[ssault]N[urse]E[xaminer] was acting as an agent of law enforcement when performing the role of collecting evidence and completing the KBI evidence kit. Any inquiries made solely for the purpose of recording answers on a KBI form would produce testimonial statements in most circumstances. However, inquiries made for the sole purpose of medical treatment, or even for a dual purpose that includes treatment, may produce nontestimonial statements, depending on other circumstances.

Miller, 293 Kan at 578.

Ward v. State made an important point about forensic nurses:

Forensic nurses are *nurses* first and foremost,” even though they are also specially trained in injury identification, evaluation, and documentation. *Int'l Ass'n of Forensic Nurses*, (available at <http://www.forensicnurses.org/?page=whatisfn>) (last visited February 19, 2016).

Ward, 50 N.E.2d at 761. *Ward* also pointed out that safety planning is also a component of the hospital’s duty of care. *Ward*, 50 N.E.2d at 762.

vii. Admission of K.E.H.’s “what happened” statements did not offend the Confrontation Clause.

K.E.H.’s “what happened” statements to Ms. Frey were primarily for a medical purpose. They are nontestimonial and their admission did not offend the confrontation clause.

3. THE ADMISSION OF K.E.H.'S "WHERE IT HAPPENED" STATEMENT TO MS. FREY WAS NONTTESTIMONIAL, GIVEN THE FACTS OF THIS CASE. ALTERNATIVELY ITS WAS CERTAIN STATEMENTS WAS HARMLESS ERROR BEYOND A REASONBLE DOUBT AND CUMULATIVE TO EVIDENCE ALREADY ADMITTED.

6 VRP 614 K.E.H. told Ms. Frey that the location of the assault was "Wright's Park . . . close to 6th Avenue at a table." This is referenced in Exhibit 19C.

The admission of this statement was relevant to K.E.H.'s care.

K.E.H. lived on the streets. 6 VRP 527. During her lifetime she stayed near the vicinity of the Wright Park horseshoe area. 6 VRP 530. A safety plan was part of K.E.H.'s care. Motion Exhibit 19A.

Alternatively, the admission of this statement was merely cumulative to what Officer Phan and Bettye Craft testified to without objection.²¹ If error does subsist in K.E.H.'s statement to Ms. Frey about where K.E.H. was attacked, such error is harmless beyond a reasonable doubt.

²¹ Officer Phan (nonresponsively and without objection) testified that the victim indicated that the "crime" happened in Wright Park. 8 VRP 841. This testimony violated an earlier court order (5 VRP 514), but defense counsel cross-examined Officer Phan on the absence of evidence consistent with crime found at the reported crime scene. 8 VRP 846-47. K.E.H. also told Bettye Craft, without objection, that she was raped while in Wright Park. 8 VRP 856. Ms. Craft's testimony about K.E.H.'s statements to her strongly suggests admissibility as a nontestimonial past recollection recorded / excited utterance. *Id.*

4. THE ADMISSION OF K.E.H.'S STATEMENT THAT SHE DID NOT WANT TO LEAVE HER CLOTHES BEHIND AT THE HOSPITAL, WAS HARMLESS EVIDENTIARY ERROR.

6 VRP 605 K.E.H. told Ms. Frey that she did not want to leave her clothes behind at the hospital to Ms. Frey.

The admission of this statement did not offend the Confrontation Clause because it is plainly non-testimonial. It was not a statement pertaining to medical treatment, but it wasn't relevant to any material fact in the trial.

Evidentiary error is grounds for reversal only if it results in prejudice. An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.

(citations and internal quotation omitted) *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255, 1261 (2001), as amended (July 19, 2002). Its admission was harmless evidentiary error.

5. THE ADMISSION OF THE RAPIST'S DESCRIPTION AND THE RAPIST'S THREAT WERE HARMLESS BEYOND A REASONABLE DOUBT.

6 VRP 614 K.E.H. provided a description of the suspect: "He was tall, a light black, no hair or short hair. He had a white t-shirt and jeans. No jacket."

6 VRP 620 When asked if there were any intimidations or threats during the incident, K.E.H. responded: "To keep my mouth shut and don't report it."

The standard for harmless constitutional error is well settled:

A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. 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.

(citation omitted) *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011).

- a. Admission of K.E.H.’s description of her assailant was harmless beyond a reasonable doubt.

K.E.H. described her rapist to Ms. Frey: “He was tall, a light black, no hair or short hair. He had a white t-shirt and jeans. No jacket.” 6 VRP 614. The State agrees that this description should not have been admitted at trial, because it did not relate to medical care in the context of a dual purpose forensic-medical examination.

The description of the rapist’s hair length and his clothing were harmless beyond a reasonable doubt because no other contemporaneous evidence of the appellant’s hair length or clothing was introduced at trial. Those unconnected details had no probative value. However, the description of the rapist as “tall” and “light black” did have probative value and must be considered.

The State recognized the weakness of the “tall” and “light black” description in its closing argument:

That certainly wasn't enough to go comb the area any further for suspects. They didn't know who he was until that profile was matched in the database, and it matched the defendant, Ronald Burke, who happens to be a tall, black male.

9 VRP 911. Later in the closing,

And how do we know that he's the one who committed this crime? Well, we know that he's a tall black male who frequented Wright Park, and we know that from his admissions, officers who spoke to him. We know from the addresses he's associated with; they are in the vicinity of Wright Park. The address that he gave the detectives is down there at the bottom of the map, eight blocks or so from Wright Park. Other addresses are along there. Some are bordering the park, including the 502 address, which is an apartment right on the park itself.

With just that information, we wouldn't, obviously, have enough. We have enough because his DNA was found on underwear belonging to Ms. Hunt during this incident on July 3rd, 2009. . . .

9 VRP 913.

In *United States v. Ford*, 683 F.3d 761 (7th Cir. 2012) the Seventh Circuit held that no reasonable jury might have acquitted the defendant given an impermissibly suggestive identification of the defendant and DNA evidence identifying the defendant.²² 683 F.3d at 768-69. In *Ford*, the defendant was arrested two years after the crime. 683 F.3d at 763.

²² In this case the likelihood that DNA on K.E.H.'s panties was from someone other than appellant was one in 170 quadrillion. 7 VRP 743-44. In *Ford*, the probability that the DNA evidence was not the defendant's was "only 1 in 29 trillion." *Ford*, 683 F.3d at 768.

In *Lawson v. State*, 884 So. 2d 540 (Fla. App. 2004) the court summarily adopted a harmless error argument: “We do not know whether the motion to suppress would have been granted on the merits had an evidentiary hearing been held, but even if it had, the improper admission of the pretrial identification would have been harmless given the very strong DNA evidence connecting Lawson with the crimes.” *Lawson*, 884 So. 2d at 547.

In *State v. Herrman*, 679 N.W.2d 503, 510 (S.D. 2004) the Court held that a child hearsay confrontation clause error was harmless because the child hearsay did not identify the defendant, and there was overwhelming DNA evidence that the defendant was the rapist.²³

Herrmann, 679 N.W.2d at 510.

The scanty and nonspecific identification evidence provided by K.E.H. was harmless beyond a reasonable doubt when compared with the DNA evidence in this case.²⁴ This case would succeed or fail only on the identification evidence provided by the DNA evidence presented. *See Wilcoxon*, 185 Wn.2d at 335-36.

²³ The defendant’s semen was found in the victim’s panties. 679 N.W.2d at 506. In coming to its harmless error conclusion, the South Dakota Supreme Court did not rely on the fact that there was also accomplice testimony identifying defendant as the perpetrator. 679 N.W.2d at 510.

²⁴ Appellant’s closing argument did not challenge the DNA evidence. 9 VRP 942-43. Appellant argued the possibility that K.E.H. could have had consensual sexual intercourse outside of Wright Park with appellant, with a mind impaired by intoxication. *Id.*

- b. Ms. Frey's testimony of K.E.H.'s relation of her rapist's threat was harmless beyond a reasonable doubt.

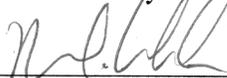
When asked if there were any intimidations or threats during the incident, K.E.H. responded: "To keep my mouth shut and don't report it." 6 VRP 620. If this statement was admitted in error, any error was harmless because the statement resulted in no prejudice.

D. CONCLUSION

K.E.H. was raped and hurt. She went to a hospital for help. She received emergency room aid and a specific sexual assault exam which also provided her aid. Medical assistance—and the need for medical assistance—was always a primary concern for K.E.H. and her caregivers. The "what happened" and "where it happened" statements K.E.H. made to her caregivers were primarily nontestimonial statements made for purposes of medical diagnosis and treatment. Their admission did not violate the Confrontation Clause. The trial court should be affirmed.

DATED: November 9, 2017

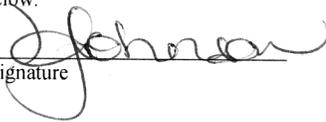
MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/9/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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