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

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STATE OF WASHINGTON,  
Respondent,

v.

LARRY FRENCH,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE STEPHEN E. BROWN, JUDGE

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

### 1) Abuse of Discretion Claims

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wash.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wash.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wash.2d 538, 663 P.2d 476 (1983). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wash.2d 244, 259, 893 P.2d 615 (1995).

#### a) Excited Utterance Statements Claim

ER 803(a)(2) allows admission of an out-of-court statement offered to prove the truth of the matter asserted if it relates to “a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Before the trial court may

admit a statement as an excited utterance, the proponent must satisfy three closely-related requirements. “First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition.” *State v. Chapin*, 118 Wash.2d 681, 686, 826 P.2d 194 (1992). “The key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’ ” *State v. Strauss*, 119 Wash.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wash.2d 398, 406, 457 P.2d 194 (1969)). Furthermore, the key to the second requirement is “spontaneity.” *State v. Williams*, 137 Wash.App. 736, 748, 154 P.3d 322 (2007), citing *Chapin*, 118 Wash.2d at 688, 826 P.2d 194.

Statements may be the result of an excited utterance even when made in response to a question. *Johnston*, 76 Wash.2d at 406, 457 P.2d 194; *State v. Williamson*, 100 Wash.App. 248, 258, 996 P.2d 1097 (2000). In *State v. Williams*, Williams challenged the spontaneity of the victim’s statements who, after being driven home by her assailant, washed her hair, changed her clothes, collected her cell phone and camera, and stayed at

her house for 20 minutes, then walked to a friend's house where she disclosed being raped. The Court of Appeals found that the totality of the evidence established that the victim was still under the influence of the event or condition when she made her statements to her friends about what had happened and neither the passage of time nor her attempts to clean herself up following the attack allowed the emotional impact and stress to abate. *Williams*, 137 Wash.App. 736 at 749, 154 P.3d 322 (2007).

The statements made by B.I. as an excited utterance were addressed in the State's Trial Memorandum in which the State provided the trial court with essentially the same cases as cited above. C.P. at 47-48. The Court briefly addressed this issue before jury selection began, but left the matter to be addressed during testimony. RP December 19, 2017 at 101. The testimony from B.I. was that the Appellant had touched her on her vagina, nipples, and butt and she described in detail about the touching. *Id.* at 107, 108, 109-113. B.I. testified that she had told her mom and when asked how long it had been from when she told her mom since the touching had happened, B.I. testified that it happened that day because she had just got back from his house. *Id.* at 114. B.I. testified that she told her mom on that day in particular because she didn't want it to happen to her sister. *Id.*

The testimony at trial from the mother was that B.I. had seemed very upset after she got back from the Appellant's home on the day B.I.'s disclosed the abuse. RP December 19, 2017 at 129. The mother described that B.I. seemed very, very upset...very shaky, wanting to cry, but that she hadn't. *Id.* The mother testified that B.I. was at the Appellant's home that day after school for five or more hours. *Id.* With schools generally getting out around 3 p.m., that would have put B.I.'s return home around 8 p.m or later. The mother testified that at bedtime, B.I. told her mother about the abuse. *Id.* at 130. Defense counsel objected as to hearsay and Prosecutor Svoboda responded that she was asking for B.I.'s statements at that time to be allowed as an excited utterance. *Id.* The Court overruled the objection and allowed the statements to come in. *Id.*

Like in *State v. Williams*, based on the totality of the evidence, B.I. was still under the influence of the event or condition. Certainly, being touched on her vagina by a person she considered to be her grandfather would be a startling event or condition and her statements that the Appellant had been hurting her, touching her, and touching her vagina were related to that startling event or condition. Furthermore, B.I. was described as being very, very upset, very shaky, and wanting to cry after coming home from the Appellant's home and she disclosed to her mother

within a short time of being home. As such, all three requirements were met and the trial court did not abuse its discretion in allowing the mother to testify about B.I.'s statements to her as requested by the State.

b) SANE Evaluation Statements Claim

The confrontation clause bars the admission of testimonial hearsay statements where the declarant does not testify at trial and the defendant had no prior opportunity to confront the witness under oath. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). While leaving “for another day any effort to spell out a comprehensive definition of ‘testimonial,’” *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354, the Court did identify three acceptable formulations of the “core class” of testimonial statements. *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354.

Testimonial statements may be (1) “*ex parte* in-court testimony or its functional equivalent” *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354, (2) “extrajudicial statements ... contained in formalized testimonial materials,” *Crawford*, 541 U.S. at 51–52, 124 S.Ct. 1354 (alteration in original) (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)), or (3) “statements that were 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*, 541 U.S. at 52, 124 S.Ct. 1354.

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, 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*, 129 S.Ct. 2527, 2533, 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, 128 S.Ct. 2678 (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.”).

Washington authorities are in accord. *State v. Sandoval*, 137 Wash.App. 532, 538, 154 P.3d 271 (2007); *State v. Fisher*, 130 Wash.App. 1, 13, 108 P.3d 1262 (2005); *State v. Moses*, 129 Wash.App.

718, 730, 119 P.3d 906 (2005). The medical diagnosis hearsay exception is also found in ER 803, which applies to statements that are “reasonably pertinent to diagnosis or treatment.” ER 803(a)(4). A party demonstrates that a statement is reasonably pertinent to medical treatment when (1) the declarant’s motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment. *State v. Williams*, 137 Wn.App. 736, 746, 154 P.3d 322 (2007). Statements during a medical examination conducted for a combination of purposes – medical as well as forensic – are admissible. *Id.* at 746-47.

The Appellant appears to be confusing the forensic interview with the SANE evaluation/examination, which was what was testified to at trial. The issue of the statements made by B.I. to ARNP Nancy Young during the SANE evaluation were also addressed in the State’s Trial Memorandum. C.P. at 48-49. In the Trial Memorandum, the State cited to similar case law as cited above, including ER 803(a)(4) and *State v. Williams*. At trial, Ms. Young testified about what a SANE evaluation/examination consists of, which she explained. RP December 19, 2017 at 149-150. Ms. Young’s explanation included that, while they do forensic interviews at the location where she practices at, her purpose in the SANE evaluation/examination as a medical professional is to collect

medical history. *Id.* at 150. Ms. Young also testified that her primary purpose as a medical provider was to assess medical conditions, provide treatment, and refer the child for any further testing, or counseling, or whatever might be a result of the assessment of the child. *Id.* at 151.

Ms. Young went on to explain what happened in her evaluation/examination of B.I. on May 10th, which included an explanation about the questions generally asked initially of the child being examined such as “why do you think you are here, what do you think the purpose is for you to come to our clinic today.” RP December 19, 2017 at 152-153. At this point, Ms. Young stated that B.I. had told her that she was there to “make sure that he didn’t hurt me physically” and when asked who he was, B.I. had said it was Larry French, the Appellant. *Id.* at 153. Defense counsel then objected as to hearsay and Ms. Svoboda advised the trial court that she was asking the testimony to be admitted under the medical exception to the hearsay rule. *Id.* The trial court overruled the object and the testimony continued. *Id.*

As testified at trial, part of the SANE evaluation/examination is to determine what conditions exist that need to be addressed medically, which would include physical, mental, and emotional well-being and what safety risks exist to the patient. Safety risks and on-going treatment

necessitate identifying who the alleged abuser was of the patient. While the Appellant argues that B.I. didn't live at the French household so therefore any information about the identity of her abuser was not applicable, that is simply not the case. The testimony at trial from B.I. and her mother clearly established that B.I. was in the French household a great deal, which certainly is a risk factor to the patient's continued physical, mental, and emotional well-being and safety.

B.I. testified that she was at the Appellant's house a lot and that she stayed the night there. RP December 19, 2017 at 108. B.I.'s mother testified that B.I. would spend time at the Appellant's house every time he or she would want to go over or when she and her husband would ask. *Id.* at 128. B.I.'s mother testified that the Appellant and his wife would babysit B.I./the other children, that B.I. went to the Appellant's home afterschool, and that B.I. also spent the night, including staying multiple nights. *Id.* B.I.'s mother testified that these things were a regular occurrence and that the Appellant and his wife wanted her a lot. *Id.* The testimony clearly goes against the Appellant's argument that B.I. was not part of his household.

The Appellant additionally argues that the admission of Ms. Young's testimony about what B.I. told her may have influenced the

jury's decision, claiming that Ms. Young's testimony was more detailed than B.I.'s testimony at trial. While this is impossible to ascertain as to what weight the jury gave any particular testimony or piece of evidence, the fact remains that Ms. Young's testimony came after the jury had already heard from B.I. herself about the Appellant being the person who touched her, specifically going into detail about how he touched her vagina, nipples, and butt. RP December 19, 2017 at 107, 108, 109-113. In comparing B.I.'s testimony to what Ms. Young testified B.I. told her as part of her medical evaluation/examination of her, the information is essentially the same. See *Id.* and RP December 19, 2017 at 154-155. It seems unlikely then that the jury was anymore influenced by Ms. Young's testimony about what B.I. told her than what B.I. herself told the jury at trial.

Regardless of the Appellant's irrelevant and/or unfounded arguments that B.I. was not part of the Appellant's household and that the jury may have been influenced by Ms. Young's testimony, the fact remains that the statements given by Ms. Young were clearly allowed under the hearsay exception allowed for medical purposes. Therefore, the trial court did not abuse its discretion in allowing Ms. Young to testify about B.I.'s statements to her as requested by the State.

## 2) Fee Claims

In supplemental briefing, the Appellant additionally moves this court to waive the criminal filing fee pursuant to *State v. Ramirez*. While the Appellant relies on *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (2018) to argue that the court should waive his court-ordered financial legal obligations, it is unclear to the State how the decision in *State v. Ramirez* applies to the Appellant. The Appellant had hired counsel throughout the trial process, including sentencing. While the Defendant was found to be indigent following sentencing for the purpose of appeal, there is otherwise nothing in the record that indicates that the rulings in *State v. Ramirez* would apply to the Appellant. As such, the State requests that all of the financial legal obligations ordered by the trial court remain.

The Appellant further moves this court, also under *State v. Ramirez*, in a separate supplemental brief, to waive his DNA fee because he claims that he already paid a DNA fee and submitted to DNA collection in an earlier felony charge. The State, however, has no record that the Appellant was previously convicted of a felony and the Appellant provided no proof of any such conviction and/or proof of prior payment/submission. Therefore, based on the same lack of indigency status as argued above, the State does not believe the rulings in *State v.*

*Ramirez* apply so the State again requests that all of the financial legal obligations ordered by the trial court remain.

## II. CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the conviction and uphold the conditions of the judgment and sentence in this case as indicated.

DATED this 19<sup>th</sup> day of November, 2018.

Respectfully Submitted,

By:   
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ECR/ecr

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