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Division II
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NO. 52513-5-II

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

STATE OF WASHINGTON, Respondent

v.

NIKOLAY IVANOVICH KALACHIK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01138-8

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Statements made to Officer Suvada were properly admitted and did not violate the Confrontation Clause.**
- II. The statements to the nurse were properly admitted and did not violate the Confrontation Clause.**
- III. The admission of S.B.'s statements was harmless**
- IV. The admission of S.B.'s statements to Officer Suvada and the nurse did not violate the defendant's right to confrontation under Article I, section 22 of the Washington constitution.**
- V. The trial court properly admitted S.B.'s hearsay statements under ER 803(a).**
- VI. The prosecutor did not commit misconduct**

STATEMENT OF THE CASE

Nikolay Kalachik (hereafter 'Kalachik') was charged by information with Rape in the First Degree and Rape in the Second Degree of S.B. CP 14-15. The matter proceeded to trial in July 2018. *See* RP 197-895. The victim was not present at trial, but the State proceeded without her. Prior to trial the State moved to admit S.B.'s statements to a police officer and to a nurse. CP 17. The trial court admitted the statements S.B. made to the police officer as excited utterances and found the statements were not testimonial, and the trial court found that the nurse's primary purpose in examining S.B. was to provide prophylactic medication options that would address potential STIs, emergency contraceptives, and to assess for other injuries, and thereby admitted the statements S.B. made to the

nurse as well, and also found they were not testimonial. RP 147-48, 154, 184. The court noted that the victim's statements to the nurse better enabled the nurse to assess whether the victim would benefit from the treatment options. RP 185.

At trial, the evidence showed the following:

Kerri Lind is the site director for courthouse security in Clark County. RP 390. She was on duty on April 20, 2018. RP 390. At about 7:30 am she came into contact with S.B. in the breezeway near a payphone. RP 390-91. S.B. approached her and asked her to get a deputy. RP 391. The deputies were not on duty until 8 am, so Ms. Lind explained to S.B. that she could call 911 for her, which she did. RP 391. S.B. appeared "definitely upset" to Ms. Lind. RP 392. During Ms. Lind's testimony, defense elicited that S.B. told her that she was raped and thrown from a car or kicked out of a car. RP 393-94.

Kendrick Suvada is an officer for the Vancouver Police Department. RP 367. Officer Suvada was on duty on April 20, 2018. RP 368. At about 7:30 am Officer Suvada received a call to respond to the area of the Clark County Courthouse. RP 368-69. He made contact in the breezeway between the jail and the courthouse with a woman. RP 369. He approached the woman and asked how he could help her. RP 370. The woman, identified at trial by her driver's license was S.B. RP 370-71. The

woman began speaking very rapidly, in an excitable way. RP 371. The woman appeared alarmed. RP 372. The woman told Officer Suvada that she had been taken to a place past the Vancouver Port and raped by a guy named Nikolay. RP 372. She told Officer Suvada that “he told me to put my seat back. He climbed on top of me. He had sex with me. When he finished, he grabbed some wipes, told me to clean” and then yelled at her. RP 372. He called her a “fucking bitch,” and said he would come after her. RP 372. S.B. was telling all of this to Officer Suvada very rapidly and “kind of all over the place.” RP 372. Officer Suvada asked follow up questions of what the man’s name was, where was he, what he was driving, where he lived, etc. RP 373. S.B. described the male as Nikolay, a white Russian male, really tall and big with black hair. RP 373-74. S.B. gave Officer Suvada the phone number she had for Nikolay. RP 374. Officer Suvada asked if she was friends with Nikolay or had dated him. RP 378. S.B. explained they had not dated and were not friends, but that Nikolay had been at the house of some friends in the past. RP 378.

Officer Suvada gave the phone number he obtained from S.B. to another officer to have that officer look up any records associated with that number. RP 374. The investigation showed that number was associated with Nikolay Kalachik.

Another officer arrived at the scene to assist. RP 375. During this time, S.B. came back up to Officer Suvada and thrust her hands at him and said her fingernails had broken off and that they were probably in the man's car. RP 375. Officer Suvada took a picture of her hands, which was admitted at trial. RP 375. Officer Suvada passed on the information he had obtained to Sergeant Martin, the other officer who had arrived at the scene. RP 377. They had an idea of a crime scene and that S.B. had wiped herself with wipes and thrown them out the window at the location where the rape occurred, so Officer Suvada suggested the investigation continue in an attempt to locate the crime scene. RP 377.

Officer Suvada asked S.B. if she was willing to do a medical examination; she agreed and was transported to the hospital via ambulance. RP 378.

Cynthia Stern is a registered nurse and a sexual assault nurse examiner. RP 401. Ms. Stern works for an agency that contracts with different area emergency departments to perform sexual assault exams. RP 402-03. In performing her sexual assault examinations, Ms. Stern gathers a patient history which guides her medical treatment and evidence collection. RP 404. The primary purpose of her examination is to "make sure the patient's ok" and to treat the patient. RP 163-64. Ms. Stern performs a head-to-toe examination, checking for injuries, and also offers

patients medications for STIs, emergency contraception, etc. RP 163. Ms. Stern examined S.B. on April 20, 2018 at Legacy Salmon Creek Hospital at about 10:30 am. RP 171, 409. S.B. told Ms. Stern that the sexual assault had occurred early that morning, around 6 or 7 am somewhere past Vancouver Lake and past the Port of Vancouver. RP 412. S.B. told Ms. Stern that she “got into his car at 5:45 this morning and he drove from Hazel Dell to the Port of Vancouver. He drove and threatened me the whole time that he would shoot me or kill me and then was saying ‘shut the fuck up.’ We went past the lake. He had me do oral sex on him.” RP 415. When she told Ms. Stern this statement S.B. made a motion as if one was having their head pushed down. RP 415. S.B. went on to tell Ms. Stern that “he then pulled down my pants. He was in the driver’s seat and I moved to the passenger – the passenger floor.” RP 416. S.B. also told Ms. Stern that she was trying to move as far away as she could from the man. RP 416. S.B. also said that he told her to “lie back on the seat” and also that he “got on top of me. I tried to cover and protect myself. I just tried to cover myself. I don’t know if he came. I covered myself and he’d say ‘let me see your fucking pussy.’ I couldn’t do anything. He said he’d throw me out on I-5. He’s big, like 6’2”. I couldn’t do anything.” RP 416. Ms. Stern asked if she had been threatened and S.B. said that the man said “I’ll blow your brains out. I’ll shoot you.” RP 416. S.B. told Ms. Stern that the

man had a gun, and gestured behind her and down. RP 417. S.B. was crying at times throughout the exam and spent a lot of the time with her arms crossed over her chest trying to cover herself up. RP 417-18.

Ms. Stern observed a bruise on S.B.'s right thigh and an abrasion on her left thigh. RP 421. And when Ms. Stern was swabbing in S.B.'s vagina there was a little bit of blood with the swab collection. RP 421. S.B. reported that she had been bleeding a little when she wiped herself. RP 421. S.B. had also lost a fake fingernail off her right hand. RP 421-22. Ms. Stern took a number of swabs from S.B.'s body for potential evidence collection. RP 423. Police were not present during S.B.'s sexual assault examination. RP 166.

Police found wet wipes at the scene of the crime which tested positive for Kalachik's DNA. RP 574-80. Kalachik's DNA was also found to be present in the samples collected by Ms. Stern during the sexual assault examination of S.B. *Id.*

When police went to find Kalachik, they located him at his home. RP 482. Police set up a perimeter around the house to contain it. RP 482. Police then used a loud speaker to call out to the occupants of the residence that it was the police department and to come out with his hands visible. RP 482. Kalachik ran out the back door of the residence. RP 495. When he saw police were out in the back side of his residence as well, he

turned and jumped a fence to get back into his apartment. RP 495.

Additionally, police found a B.B. gun in the trunk of Kalachik's car. RP 521-22.

Kalachik testified in his defense and claimed that he had consensual intercourse with S.B. that morning. RP 683-88. He denied threatening S.B. with a gun or otherwise. RP 697-98.

The jury convicted Kalachik of both Rape in the First Degree and Rape in the Second Degree. RP 900; CP 122-23. At the time of sentencing, the Court vacated the Rape in the Second Degree conviction, and sentenced Kalachik to a standard range sentence on Rape in the First Degree. CP 125-39. Kalachik timely filed the instant appeal. CP 144.

ARGUMENT

I. The Statements made to Officer Suvada were properly admitted and did not violate the Confrontation Clause.

Kalachik contends that the admission of S.B.'s out-of-court statements to Officer Suvada about the rape violated his right to confront the witnesses against him. He argues the statements were testimonial hearsay and were inadmissible as S.B. did not testify at trial. The statements S.B. made to Officer Suvada were nontestimonial and were

made when she was trying to obtain help. Their admission did not violate the Confrontation Clause and the trial court should be affirmed.

This Court reviews alleged violations of the Confrontation Clause de novo. *State v. Manion*, 173 Wn.App. 610, 616, 295 P.3d 270 (2013). The Sixth Amendment to the United States Constitution 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. This applies to those who “bear testimony” against the defendant. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Generally, admission of a testimonial out-of-court statement violates the Confrontation Clause if the declarant is not available to testify at trial. *Id.* at 68. However, nontestimonial statements are not subject to the Confrontation Clause. *State v. Wilcoxon*, 185 Wn.2d 324, 332, 373 P.3d 224 (2016). The State bears the burden of establishing that statements are nontestimonial. *State v. O’Cain*, 169 Wn.App. 228, 235, 279 P.3d 926 (2012).

Statements fall within the Confrontation Clause if their “primary purpose” was testimonial. *Ohio v. Clark*, ___ U.S. ___, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015). The primary purpose test asks what the primary purpose that “reasonable participants would have had” in making the statement. *Michigan v. Bryant*, 562 U.S. 344, 360, 131 S.Ct. 1143, 179

L.Ed.2d 93 (2011). The primary purpose test does not depend on the subjective or actual purpose of the person who made the statement or received the statement; it is an objective test. *Id.* The test is highly “context-dependent.” *Id.* at 363.

In the context of statements made to law enforcement officers, if there are circumstances which objectively show that the primary purpose of the statements were to enable police assistance to meet an ongoing emergency, then the statements are nontestimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). However, “whether an ongoing emergency exists is simply one factor – albeit an important factor – that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.” *Bryant*, 562 U.S. at 366. Another factor to consider is the formality of the interrogation. *Clark*, 135 S.Ct. at 2180. The ultimate question in the primary purpose test is whether the primary purpose of the conversation with law enforcement was to create “an out-of-court substitute for trial testimony.” *Id.* (quoting *Bryant*, 562 U.S. at 358).

Here it is clear that the statements S.B. initially made to Officer Suvada, which were admitted at trial, were not made for the primary purpose of creating “an out-of-court substitute for trial testimony.” In determining whether the primary purpose of the statements was to create

“an out-of-court substitute for trial testimony,” this Court looks to the circumstances in which the interrogation occurred, including the timing of the statement relative to when the event occurred. *State v. Reed*, 168 Wn.App. 553, 563, 278 P.3d 203 (2012) (citing *Davis*, 547 U.S. at 827). Here, S.B. made the statement to Officer Suvada shortly after the rape occurred and at a time when she did not yet feel safe. Though she was no longer with her assailant, he was out there and could have found her or followed her as she left his vehicle on foot. S.B.’s demeanor also indicated a recent attack and a potentially ongoing threat.

This Court also considers the statements and actions of the parties, including the nature of what was asked and answered during the interrogation. Officer Suvada approached S.B. and asked her how he could help. “[I]nitial inquiries at the scene of a crime might yield nontestimonial statements when officers need to determine with whom they are dealing in order to assess the situation and the threat to the safety of the victim and themselves.” *State v. Koslowski*, 166 Wn.2d 409, 425-26, 209 P.3d 479 (2009). The nature of the exchange between S.B. and Officer Suvada shows that the primary purpose was not an investigation into past facts, but was a response to an ongoing threat and recent attack. Establishing who the suspect was, how the victim was attacked or hurt, and whether there was a weapon involved provided police with important information

regarding the dangerousness of the situation, the victim's medical condition, and the appropriate police response.

This Court also considers the level of formality of the interrogation. *Reed*, 168 Wn.App. at 564; *Bryant*, 562 U.S. at 366. "The greater the formality of the encounter, the more likely it is that a statement elicited during that encounter is testimonial." *Reed*, 168 Wn.App. at 564. In this case, the interaction between the police and S.B., at the time of the initial statements, the only statements that were admitted at trial, was informal. S.B. was still upset, speaking rapidly, and while the defendant was still at large. The conversation occurred in public, on a sidewalk near the courthouse. It is important to note the officer took a full statement from S.B. at a later time and thus this shows the initial encounter was not a formal police questioning.

This Court also considers the threat of harm posed by the situation. *Koslowski*, 166 Wn.2d at 419. This Court considers whether a reasonable listener would conclude that the declarant was facing an ongoing emergency that required help. While it may appear that S.B. was fully out of harm's way, she had no way to know where her assailant was at the time, whether he had followed her, or may find her if she returned home. The officer's presence offered S.B. protection, but that protection was contingent upon the officers' finding her attacker.

While one reason Officer Suvada talked to S.B. and asked her questions was to establish past facts, when viewed objectively in light of all the circumstances, it is clear that the primary purpose of the initial encounter between S.B. and Officer Suvada was to address an ongoing emergency in an informal setting. S.B. made the statements soon after the attack and at the first possible time as she sought police help immediately after escaping her assailant. Officer Suvada did little prompting and questioning and S.B. rapidly came out with the statements. This shows that her primary purpose was not to prove past facts or provide a substitute for testimony. The statements S.B. made to Officer Suvada at that initial encounter were not testimonial and their admission did not violate the Confrontation Clause.

II. The statements to the nurse were properly admitted and did not violate the Confrontation Clause.

Kalachik claims the admission of statements the victim made to the sexual assault nurse examiner violated his right to confront the witnesses against him. The statements the victim made to the nurse examiner were nontestimonial and thus did not violate the Confrontation Clause. The trial court's ruling was proper and this Court should affirm its admission of the victim's statements to the nurse examiner.

This Court reviews confrontation clause challenges de novo. *State v. Scanlan*, ___ Wn.2d ___, 2019 WL 3484283 (August 1, 2019) (citing *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006)). The Sixth Amendment to the U.S. Constitution provides that criminal defendants “shall enjoy the right ... to be confronted with the witnesses against him.” Under this guarantee, testimonial out-of-court statements by non-testifying witnesses are not admissible at trial. *Crawford v. Washington*, 541 U.S. 36, 53, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). An out-of-court statement is only testimonial if its primary purpose was testimonial. *Clark*, 135 S.Ct. at 2180. In *Scanlan*, our Supreme Court made it clear that the primary purpose test applies to all out-of-court statements, no matter to whom they were made. *Scanlan*, slip op. at 6. The State has the burden of establishing that the statements were nontestimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

“Under the primary purpose test, courts objectively evaluate the circumstances in which the encounter occurs, as well as the parties’ statements and actions.” *Scanlan*, slip op. at 6 (citing *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)). In determining what a statement’s primary purpose was, courts have looked to whether its primary purpose was to establish past events, to create a record for trial, to gather or create evidence for prosecution, or to create an

out-of-court substitute for trial testimony. *Scanlan*, slip op. at 6 (citations omitted).

We start from the position that statements to non-law enforcement are “significantly less likely to be testimonial.” *Scanlan*, slip op. at 6 (citing *Clark*, 135 S.Ct. at 2182). Even our Supreme Court has noted, in dicta, that statements to medical personnel are unlikely to be testimonial:

...only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded if at all only by hearsay rules....

Giles v. California, 554 U.S. 343, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) (emphasis original). In *Ohio v. Clark*, the U.S. Supreme Court held that a child’s statements to his preschool teachers were not testimonial as “[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.” *Clark*, ___ U.S. ___, 135 S.Ct. 2173, 2182, 192 L.Ed.2d 306 (2015). The Court also noted that the relationship between a student and teacher is “very different” from the relationship a citizen has with police. The same is true with a relationship between a medical provider and a citizen and that of a citizen and the police.

In *State v. Scanlan, supra*, the Supreme Court addressed whether admission of a victim's statements to medical personnel violated the Confrontation Clause. There the victim was found in his house, by his children, severely bruised and initially nonresponsive. *Scanlan*, slip op. at 1. The victim went to the emergency room where he was treated by a nurse, a doctor, and a social worker. *Id.*, slip op. at 2. The police arrived at the hospital that evening and the victim signed a medical release authorizing the hospital to release his medical records to police. *Id.* Six days later, the police met with the victim at his house and obtained a second medical release for a different medical center. *Id.* Following that, the victim met with his primary care physician and obtained treatment at a wound care clinic. *Id.*

At trial, the nurse, doctor, and social worker from the hospital testified to statements the victim made to them. *Id.* They testified that knowing how a patient's injury occurred and the identity of the assailant is important for monitoring hospital security and for patient safety, and also for determining whether to refer the patient to a social worker and ensuring proper follow-up care. *Id.* The doctor also noted that how a patient's injuries occur is important to know because the mechanism of injury determines how serious the injury is and impacts which tests the doctor will run. *Id.*

The victim's primary care physician also testified to statements the victim made to him during the course of treatment many days after the assault took place. *Id.*, slip op. at 3. The primary care physician testified that in order to effectively treat patients he needs to know how an injury occurred. *Id.*

The medical personnel at the wound care clinic where the victim received follow-up care also testified to statements the victim made to them. *Id.* They likewise testified that knowing the mechanism of the injury was important for their treatment of the patient. *Id.*

Our Supreme Court noted that the U.S. Supreme Court "has consistently said in dicta that statements made to medical providers for the purpose of obtaining treatment have a primary purpose that does not involve future prosecution and that such statements are therefore nontestimonial." *Scanlan*, slip op. at 7 (citing *Giles v. California*, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647, 672, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)). Likewise, the Court found the statements that the victim in *Scanlan* made to his medical providers were for the primary purpose of obtaining medical care. *Scanlan*, slip op. at 7. The fact that the victim had signed three medical release forms authorizing his

medical providers to release his records to the police and prosecutor did not render his statements testimonial. *Scanlan*, slip op. at 7. Our Court held that the victim's signing of medical release forms did not "transform his medical care provider-patient relationships into law enforcement missions." *Id.* The fact that these statements were later used by police and prosecutors does not change the fact that the statements, at the time they were made, were made for the primary purpose of obtaining medical care.

The same is true in Kalachik's case. The victim went by ambulance, not police cruiser, to the hospital to receive medical care. While she may not have known whether she was injured, she at least knew she had wiped some blood away from her vaginal area when the defendant forced her to use wipes to clean herself after the rape. The police did not attend the nurse examination with S.B. The victim went through the invasive examination for primarily medical purposes.

Kalachik likens this case to *State v. Burke*, 6 Wn.App.2d 950, 431 P.3d 1109 (2018). However, this case differs from the facts of *Burke* in important ways. In *Burke*, the victim went to the hospital at nearly 1:30am after being raped. *Burke*, 6 Wn.App.2d at 954. The victim was seen by a physician and appropriate testing had been ordered. *Id.* By 11:13am, the victim was medically cleared to leave the emergency department. *Id.* However, the sexual assault nurse examiner was not available to start the

victim's sexual assault examination until 4pm. *Id.* at 955. The sexual assault nurse examiner testified at trial to statements the victim made during the sexual assault examination; the victim was absent at trial. *Id.* This Court found that the primary purpose of the victim's sexual assault examination was to provide evidence for criminal prosecution. *Id.* at 969.

In coming to the conclusion that the sexual assault examination in *Burke* was done for the primary purpose of providing evidence for a criminal prosecution the Court considered that the victim waited nearly five additional hours after she was medically cleared to leave the hospital in order to obtain a sexual assault examination, and that there was evidence that the victim understood that the information she gave to the nurse examiner would be used by law enforcement, in addition to the fact that the sexual assault examination was forensic in nature and that the nurse examiner's role was to collect evidence for use by law enforcement. *Id.* at 970. Specifically, the Court noted that the victim stayed those extra hours at the hospital, waiting for the nurse examiner, because she did not want her attacker to do the same thing to someone else. *Id.* at 970.

While both the *Burke* case and this case involve rape victims who went to the hospital and while there obtained sexual assault examinations, the similarities end there. In the instant case, S.B. was taken to the hospital by ambulance and was nearly immediately seen by a sexual assault nurse

examiner. She did not wait over 14 hours to see the nurse examiner, but was seen within 3 hours of escaping her attacker and calling police. In addition, the nurse examiner in this case testified that her primary purpose in conducting examinations is to provide treatment and counseling. *See* RP 163-64. This was not the case in *Burke*. Here, unlike in *Burke*, the objective facts demonstrate that the primary purpose of the examination was to provide medical care and tending to S.B. She had blood when she wiped her vaginal area; she came to the hospital via ambulance; the nurse examiner's primary purpose was to provide medical treatment; S.B. was shaken and crying during her examination at the hospital and she was folding her arms over herself as if to protect herself. Police were not involved in the sexual assault examination; they did not direct it or make any suggestions about what the nurse should or should not ask or what tests the nurse should or should not perform. *See* RP 166. Unlike in *Burke*, the rape was still very recent and fresh, the victim had injuries, and was in need of medical care to prevent and test for STIs and pregnancy. In addition, the nurse examiner's form for the statements from S.B. indicates that it is done for "the purposes of diagnosis and treatment." *See* Br. of Appellant, Appendix B.

Only the admission of testimonial statements violate the confrontation clause. The primary purpose of the sexual assault

examination was the treatment and medical care of S.B. While a dual purpose existed, this does not offend the Confrontation Clause. The statements S.B. made to the nurse examiner were properly admitted and did not violate the defendant's right to confront the witnesses against him as the statements were nontestimonial.

III. The admission of S.B.'s statements was harmless

Any error in admitting S.B.'s statements to either Officer Suvada or to the nurse was harmless. Confrontation Clause violations are subject to harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd by Davis v. Washington*, 546 U.S. 975, 126 S.Ct. 547, 163 L.Ed.2d 458 (2006). A constitutional error, such as a Confrontation Clause violation, is harmless if the Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *See State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). In determining if the jury would have reached the same result, the Court considers the untainted evidence to determine if it is so overwhelming that it would necessarily lead to a finding of guilt. *State v. Moses*, 129 Wn.App. 718, 732, 119 P.3d 906 (2005).

Here, the victim's statements to both Officer Suvada and the nurse were substantially the same. Thus if it was error for the statements to the officer to be admitted, the same substance was admitted through the nurse's testimony and thus the jury heard the same evidence, and vice versa. Accordingly, any potential error in admitting either the officer's testimony or the nurse's testimony was harmless.

IV. The admission of S.B.'s statements to Officer Suvada and the nurse did not violate the defendant's right to confrontation under Article I, section 22 of the Washington constitution.

Our Supreme Court has recognized that the confrontation clauses of the federal and Washington state constitutions are subject to independent analyses. *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006). It is Kalachik's burden to establish that "the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result." *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). Kalachik has not done so here.

In *State v. O'Cain*, 169 Wn.App. 228, 279 P.3d 926 (2012), Division I of this Court considered whether statements to medical

providers would violate Washington's confrontation clause in circumstances in which it does not violate the federal constitution. The Court examined the constitutional text, the historical treatment of the clause, and the current implications of recognizing such an interest. *O'Cain*, 169 Wn.App. at 253. The Court noted that for the 76 years in which the federal Confrontation Clause was inapplicable to our state, there was no evidence of differences in interpretation or application of the Washington confrontation clause. *Id.* Our Supreme Court, in fact, noted that the federal confrontation clause and the state confrontation clause "appear to be the same." *Id.* at 254 (quoting *In re Pettit v. Rhay*, 62 Wn.2d 515, 519-20, 383 P.2d 889 (1963)). However, our Supreme Court later ruled that the state confrontation clause requires a separate analysis. *Id.* at 255. In *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) the Court explained that the state confrontation clause requires a demonstration of witness unavailability coupled with assurances of the reliability of the out-of-court statement. *Ryan*, 103 Wn.2d at 170 (citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). In *Ryan*, the Court held that as long as out-of-court statements of a non-testifying witness had sufficient assurances of reliability, then "cross examination would be superfluous," and the "right of confrontation is not offended." *Id.* at 175. Eventually, Division I of this Court held that the *Ohio v. Roberts*

reliability analysis, “though discredited under federal constitutional analysis, remains a proper method by which to conduct an article I, section 22 confrontation analysis.” *O’Cain*, 169 Wn.App. at 257.

While Kalachik argues that statements for purposes of medical diagnosis would not have been admissible at the time our state constitution was adopted. However the Court in *O’Cain* addressed this very argument and found that there is no requirement that hearsay exceptions must have been well-established at the time of statehood in order to withstand the confrontation clause analysis. *O’Cain*, 169 Wn.App. at 258. The Court found that a finding that the hearsay exception was well-established at the time of statehood was sufficient to demonstrate that the exception satisfies the confrontation clause, but not that it was necessary in order to satisfy the confrontation clause. *Id.* In addition, the Court found that there was no pre-1889 territorial decisions in which statements made for the purpose of medical treatment were held inadmissible. *Id.* And finding evidence that Washington intended to adopt Oregon’s confrontation clause when it split from Oregon, the Court notes an Oregon Supreme Court case which indicates that statements to medical attendants “are always received as original evidence.” *Id.* at 259 (citing *State v. Glass*, 5 Or. 73, 79 (1873)).

The Court in *O’Cain* ultimately held that “[t]he substantive guaranty of our state’s confrontation clause is likewise satisfied when

statements are made for purposes of medical treatment.” *Id.* at 260. The declarant’s desire for proper diagnosis and treatment supplies the element of trustworthiness. *Id.* (citing *State v. Butler*, 53 Wn.App. 214, 220, 766 P.2d 505 (1989)). Here, S.B.’s statements to the nurse were accompanied by sufficient indicia of reliability. It was in her best interest to be honest and forthcoming with the nurse so that she could be treated medically, and also so that any evidence remaining on her body could be found and obtained by the nurse. S.B. only had cause to be honest with the nurse and thus her statements are reliable.

The same is true for S.B.’s statements to the officer, made at a time when she was under stress and excitement from the attack, her statements were reliable because of her desire and need to seek help and to assure police would apprehend her attacker. Thus her statements to the officer met the required indicia of reliability for admission under article I, section 22 despite her unavailability at trial.

Additionally, for the same reasons discussed above, if this Court finds either the statements to Officer Suvada or the statements to the nurse violated Article I, section 22 of the Washington constitution, then the error was harmless beyond a reasonable doubt. *See* Section III above.

V. The trial court properly admitted S.B.'s hearsay statements under ER 803(a).

Kalachik contends the trial court committed reversible error in admitting S.B.'s hearsay statements to Officer Suvada and the nurse as excited utterances under ER 803(a)(2). The trial court did not abuse its discretion in admitting the hearsay statements and its decision should be affirmed.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

ER 803(a)(2) provides that statements "relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition, are not excluded by the hearsay rule." ER 803(a)(2). There are essentially three conditions to admission of statements as excited utterances: 1) a startling event occurred; 2) the declarant made the statement while under the stress or excitement of the event; and 3) the statement relates to the event. *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008); *see also State v. Flett*, 40 Wn.App. 277, 699 P.2d 774 (1985). The amount of time that has passed

between the startling event and the statement is not determinative of whether the statement is admissible as an excited utterance; instead, whether the declarant is still under the stress of excitement when making the statement is the key to admissibility. For example in *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) the Supreme Court held admissible statements made an hour and a half after the startling event because the declarant was visibly shaken and he shed a tear. *Thomas*, 150 Wn.2d at 853-55. In another example, in *State v. Guizzotti*, 60 Wn.App. 289, 803 P.2d 808 (1991), a rape victim who had been hiding for seven hours, sure her assailant was looking for her, made a 911 call after those seven hours had passed. Her statements were deemed to be excited utterances because she was still under the continuing stress of the event when she made the call. *Guizzotti*, 60 Wn.App. at 295-96. In *State v. Fleming*, 27 Wn.App. 952, 621 P.2d 779 (1980), a rape victim's statements to a friend three hours after the incident and to police six hours after the incident were admissible as excited utterances. And in *State v. Woodward*, 32 Wn.App. 204, 646 P.2d 135 (1982), a child victim's statements made 20 hours after the startling event were held admissible as excited utterances. Thus the passage of time appears to be of little significance to the admission of out-of-court statements as excited utterances.

Instead, spontaneity of the statements is key to whether the declarant made the statement while still under the stress or excitement of the startling event. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). In determining spontaneity of statements the court considers, among other things, the declarant's emotional state. *State v. Briscoeray*, 95 Wn.App. 167, 173-74, 974 P.2d 912 (1999). Here, S.B.'s statements to Officer Suvada were clearly made while under the stress and excitement of the startling event (the rape). The victim was speaking very rapidly, in a very excitable way and she appeared alarmed. RP 371-72. This was much different than the calm demeanor she showed to police during her official, more formal interview with police hours later.

Kalachik also argues that the responses to the officer's questions were not admissible as excited utterances, it appears, because they were in response to questioning. However, excited utterances can be made in response to questions. *State v. Hieb*, 39 Wn.App. 273, 693 P.2d 145 (1984), *rev'd on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986); *State v. Williams*, 137 Wn.App. 736, 748-49, 154 P.3d 322 (2007). From Officer Suvada's testimony it is clear that the victim's demeanor remained alarmed and excited during the initial encounter, including after his questions. She was haphazard and spontaneous, remembering details and interrupting him to furnish certain facts, like that some of her finger nails

had been broken off. Further the fact that the victim had time to walk the one mile to the courthouse, to obtain assistance for what had just happened to her, does not render her statements non-excited utterances. In *Williams*, the victim had washed her hair, changed her clothes, collected her cell phone and camera, and then walked to a friend's home and the Court upheld admission of statements she made at her friends' home as excited utterances. *Williams*, 137 Wn.App. at 749. The victim was still upset, crying and shaking; the Court noted that "neither the passage of time nor her attempts to clean herself up following [the] attack allowed the emotional impact and stress of the kidnap and rapes to abate...." Rape is an incredibly stressful event and it is unlikely that a one mile walk will automatically abate the stress of that event. S.B. was still under the stress of the rape when she made the statements to Officer Suvada.

In addition, S.B.'s statements to the nurse were admissible as both excited utterances and statements made for purposes of medical diagnosis or treatment under ER 803(a)(3) and (a)(4). S.B. was tearful throughout much of the sexual assault exam and her demeanor suggested she was still under the stress of the rape: she was hunched with her arms folded over her body as if to protect herself. As emotional state is the key to spontaneity, it is clear that S.B.'s emotional state was still excited, scared, and emotionally upset.

Furthermore, S.B. was seeking medical care from the nurse and her statements were admissible as statements made to a medical provider for the purpose of receiving a diagnosis or treatment. ER 803(a)(4) provides that “[s]tatements made for the purposes of medical diagnosis and treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded under the hearsay rule. The statements that S.B. made fit squarely under this hearsay exception.

In *Williams, supra*, this Court found a rape victim’s statements made to a nurse at a hospital were admissible under this hearsay exception even though the nurse was employed by the hospital as a forensic nurse and even though the victim acknowledged that one of her reasons for going to the hospital was to provide evidence against the defendant and that the victim did not feel she needed specific medical treatment. *Williams*, 137 Wn.App. at 746-47. Even though the nurse had two purposes in obtaining statements from the victim, that it was to identify treatable injuries was sufficient to satisfy the hearsay exception. *Id.* In finding the statements admissible, this Court noted that the medical exception applies to statements that are “reasonably pertinent to diagnosis and treatment.” This is shown when the declarant’s motive in making the

statements was to promote treatment and the medical professional reasonably relied upon the statements for purposes of treatment. *Id.* at 746 (citing *State v. Butler*, 53 Wn.App. 214, 220, 766 P.2d 505 (1989)). The same is true in this case. While S.B. may have had a dual purpose in going to the hospital, and the nurse may have had a dual purpose in examining S.B., the statements were still made for diagnosis and treatment and were therefore “reasonably pertinent to diagnosis and treatment.” The statements were properly admitted as they qualify as hearsay exceptions under ER 803(a)(4).

VI. The prosecutor did not commit misconduct

Kalachik claims the prosecutor committed misconduct in closing argument. The prosecutor’s argument, when taken as a whole, was proper and did not constitute flagrant and ill-intentioned misconduct. Kalachik’s conviction should be affirmed.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor’s complained of conduct was “both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239

(1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Kalachik argues that the prosecutor misstated the law during closing argument. "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). The prosecutor made the following, now-complained of statements:

And that's the same thing we have here. The defendant didn't need to use force because his threats worked; therefore, there wouldn't be any black eyes, any tearing of the vagina, anything like that because [the victim] submitted based on the threats. However consent based on fear is not consent.

And I want to talk a little bit about the fact that you have a consent instruction because you have an instruction here that talks about consent, but I want you to notice something about that. The word consent is not written anywhere else in your jury instructions.

So it says consent means that at the time of the act of sexual intercourse contact, there are actual words or conduct indicating freely-given agreement to have sexual intercourse contact. So under this definition we don't have [the victim] consenting because consent cannot be freely given if there are threats.

But you really don't even get there because consent or proving lack of consent is not an element to rape in the first degree, and it is not an element to rape in the second degree.

You won't see on those to convict sheets that I have to prove she did not consent. The reason for that is somebody cannot consent once they've been threatened. Once fear is in the room, there can be no consent. So with that instruction, I mean, again she did not freely give consent, but other than that, there's nowhere to apply that instruction in the elements because we do not have to prove that she didn't consent.

And again that makes sense when you think about it from a policy standpoint because when somebody is threatened to – if somebody threatens somebody else to kill them, to shoot them, to throw them onto I-5, that is rape.

RP 827-29. Kalachik takes a single statement in isolation and now, for the first time on appeal, argues it is improper. Statements within a prosecutor's argument are not to be considered in isolation, but rather in

context of the entire closing argument. While the single statement, in isolation, is arguably a misstatement of the law, in context, the argument was proper and the total argument was a correct statement of the law. One cannot consent if forced to do something by forcible compulsion, which includes threat of force. The prosecutor's theme that consent does not exist when there is fear of force is accurate and proper.

The law at issue here is the relation between forcible compulsion and consent. Appellant is correct that the relationship between forcible compulsion and consent is complicated. "Consent negates the element of forcible compulsion." *State v. Teas*, ___ Wn.App.2d ___, 2019 WL3927426, slip op. at 17 (citing *State v. W.R.*, 181 Wn.2d 757, 763, 336 P.3d 1134 (2014)). And similarly, proving forcible compulsion necessarily disproves consent. "...[T]he State must prove lack of consent as part of its burden of proof on the element of forcible compulsion." *Id.* (citing *W.R.*, 181 Wn.2d at 763). Thus by proving forcible compulsion, the State necessarily disproved consent. So even if the prosecutor's statement was improper, it bore no prejudice on the outcome of the trial and, it is surely something that a curative instruction to the jury would have obviated.

The jury was instructed on the elements of the crimes, which included forcible compulsion. The jury was also instructed that the State bore the burden of proving the elements of the crimes beyond a reasonable

doubt. There can be no doubt then that the State actually did disprove consent as it proved forcible compulsion. And even if the jury was confused about where the consent instruction fit in, they cannot have found the victim consented or else they could not have found forcible compulsion was present beyond a reasonable doubt. Thus despite what the prosecutor said, there could have been no prejudice to Kalachik.

Additionally, had Kalachik actually objected at the time, the jury could have easily been admonished or instructed to disregard the prosecutor's argument or on the relationship between consent and forcible compulsion and the jury would have followed that instruction. The prosecutor's conduct was not so flagrant and ill-intentioned so as to cause an unfair trial to Kalachik. Indeed, the prosecutor's statement was fleeting, it was surrounded by proper argument and was but two sentences within many pages of transcript worth of closing argument.

In *State v. Swanson*, 181 Wn.App. 953, 327 P.3d 67 (2014), the prosecutor misstated the law in closing argument in an Indecent Exposure case. *Swanson*, 181 Wn.App. at 958-59. The prosecutor told the jury that it had to find only that the defendant intended the act, but not that it had to find the defendant intended the act to be open and obscene. *Id.* at 963. Despite the prosecutor's misstatement of the law, the Court affirmed the conviction, finding no prejudice to the defendant's rights from the

prosecutor's misstatement of the law. *Id.* at 964-68. The Court found the defendant was still able to argue his theory of the case. *Id.* at 967. And the Court found there was ample evidence that the defendant committed the crime. *Id.* at 968. Accordingly, the Court found no prejudice which warranted reversal and affirmed, despite the prosecutor's misstatement of the law and the defendant's timely objection to the misstatement. *Id.*

The prosecutor here made a far less improper argument than did the prosecutor in *Swanson*, and the review here is under a more favorable review to the prosecutor than was in *Swanson*, as there the defendant objected. The Court of Appeals in *Swanson* found there was no prejudice to the defendant in part because he was still able to argue his theory of the case; the same is true here. Kalachik was not deprived of his ability to argue that it was consensual intercourse and did indeed so argue. *See* RP 850-67. Indeed, the prosecutor's argument when taken as a whole did not deprive the defendant of a fair trial, did not misstate the law to the point that a curative instruction could not have obviated any potential prejudice, and did not cause prejudice to the defendant. Kalachik's claim of prosecutorial misconduct should be denied.

CONCLUSION

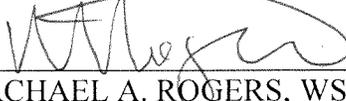
As discussed in each section above, the trial court should be affirmed in all respects and Kalachik's conviction for Rape in the First Degree should be affirmed.

DATED this 30 day of August, 2019.

Respectfully submitted:

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