FILED
Court of Appeals
Division II
State of Washington
6/11/2020 1:14 PM

NO. 53518-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANDREW WILLIAMS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Michael E. Schwartz

No. 16-1-03955-5

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

The Defendant Williams alleges that it was an abuse of discretion for the court to admit the rape victim's statements through a sexual assault nurse examiner. However, under direct and even cross examination, the same testimony had already been elicited from the victim himself and another witness. The defense had implied that the victim's testimony was false or fabricated. Therefore, not only were the statements properly admitted under the medical treatment exception to the hearsay rule, but they were no longer hearsay – offered to rebut the claim of fabrication as a prior consistent statement. They were admissible.

For the first time on appeal, the Defendant challenges the use of the victim's initials in the to-convict jury instruction. He claims this amounts to a judicial comment on his guilt although the case law squarely holds this is not possible where the victim's initials are neither an element of the crime nor a contested factual issue. He claims that this single use of initials violated his right to a public trial. This right is not implicated in the absence of a complete and purposeful closure of the courtroom during which no one may enter and no one may leave. Here the victim testified before the jury, and his name was used throughout trial. There was no closure.

The Defendant challenges the denial of his untimely motion for new trial during which he alleged that his trial attorney failed to call witnesses

in his defense. However, his new attorney also could not locate any witnesses despite an eight-month attempt.

There are no claims of merit which would undermine the Defendant's judgment and sentence.

II. RESTATEMENT OF THE ISSUES

A. Did the court abuse its discretion in admitting testimony which was admissible under the medical treatment exception and as a prior consistent statement?

B. Does the use of a rape victim's initials in the to-convict instruction express a judicial opinion on the defendant's guilt, where the victim's initials are neither a contested factual issue nor an element of the crime?

C. Does the use of a rape victim's initials in the to-convict instruction effectuate a complete closure of the courtroom notwithstanding the fact that the victim testified in open court providing his full name?

D. Did the court abuse its discretion in denying a motion for new trial which was untimely under CrR 7.5 and where it was predicated on a claim that counsel's performance was deficient for failing to call witnesses who could not be found and who would not contradict the victim's testimony?

E. Should the Court decline to review unpreserved and frivolous LFO claims?

III. STATEMENT OF THE CASE

The Defendant Michael Williams has been convicted by a jury, as charged, of the second degree rape of JP. CP 1-2, 38, 58.

JP was a vulnerable young man. He had spent time in foster care. RP[1] at 334. He had been homeless. RP 336-37. In the past year, his adoptive mom had passed away. RP 372. He had fallen out with his father. RP 404, 414. And on his 20th birthday, his fiancé Aislinn Turner ended their engagement.[2] RP 332, 338-41.

The next day, Defendant Michael Williams offered to let JP stay with him in his apartment. RP 342-43, 348. The two men were co-workers at a logistics company, where they loaded freight and palletized merchandise at night by the Port. RP 337-38, 343, 350-51.

The Defendant had a studio with a futon at the Florence Apartments in Tacoma, not far from the courthouse and Wright Park. RP 321-22, 348, 350-53, 498. The Defendant offered to let JP sleep on a loveseat for $50/week. RP 342-43, 349-50, 414-15. JP brought a backpack of clothes and a suitcase with childhood photos, all that was left to him by his adoptive mom. RP 372.

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[1] Unless otherwise indicated, "RP" refers to the Official Court Report Raelene Semago's consecutively numbered Verbatim Report of Proceedings.

[2] The Defendant misrepresents that Ms. Turner "kicked" JP out "because" of an accidental grease fire. Appellant's Opening Brief (AOB) at 5; RP 342. This is not the record. The breakup had already occurred at that time, and Ms. Turner had moved out except for some bedding she had left for JP to use. RP (9/4/18) at 24. With the breakup, JP was losing their shared apartment. RP 341. Ms. Turner intended to lease another apartment from the same landlord. *Id*. The couple had not been communicating, but JP had been hoping to work things out. RP (9/4/18) at 23; RP 341. They had been together off and on since middle school. RP (9/4/18) at 21. After the fire, because of the fire, Ms. Turner decided to bring JP a birthday cake to console him, and this is when he realized the relationship was really at an end. RP (9/4/18) at 24; RP 342.

The few weeks JP spent at the Florence Apartments had been quiet – working, chatting the Defendant, but never going out. RP 322, 358. He smoked marijuana and once the Defendant gave him a beer, but JP did not get drunk with the Defendant. RP 359, 417. The 47-year-old Defendant told JP he had been in the military for twenty years. RP 411, 502. He "seemed like a good person," an "uncle type," and JP trusted him. RP 342, 344. They talked about JP getting his GED. RP 415.

However, the Defendant soon expressed a sexual interest in JP, frequently commenting on his looks and calling him a pretty boy. RP 343-44, 346, 416-17. JP had "nowhere else to go." RP 346. He let the Defendant know that he was straight and did not "get down that way." RP 345, 417. JP thought the Defendant respected his refusal. RP 346, 417.

The day before Valentine's Day, the Defendant said he was going to invite friends over, but none ever appeared. RP 356-57, 407-08, 418. Instead, the Defendant served the underage JP alcohol at home and then took him to a bar. RP 357, 359, 418. JP had never been to a bar before, but the Defendant provided him a fake ID that night. RP 361-62, 421. JP bought himself 6 shots of tequila and beer, went out for a smoke break, and when he returned there was a drink waiting for him as the Defendant bought him more. RP 365, 367-68. The Defendant could hold his liquor, but JP was inebriated. RP 369, 424, 426 (as drunk as he could get while still

functioning). They returned home where JP had yet another cup of liquor and lay down, feeling unwell and "very intoxicated." RP 369-71.

The Defendant paced quickly and then suddenly began to choke JP and pulled off JP's jeans and underwear in a single motion. RP 374-77. JP tried to resist and yell out, but the Defendant was on top of him, choking him, and telling him to shut up. RP 375, 383. Four or five times JP tried to crawl away only to be dragged back. RP 381. The Defendant called JP a bitch, told him to bend that ass over, poured baby oil over him, and orally and anally raped JP without using a condom. RP 380, 390-91, 395. It "really, really hurt," and JP urinated on himself. RP 395.

When the Defendant got off him, JP dressed, took his suitcase of photos, and ran. RP 383, 396, 400-01; RP (9/4/18) at 26, 30. He went to Wright Park and called his ex-fiancé for help. RP 401. Ms. Turner could hear him crying before she saw him. RP (9/4/18) at 27. It was a cold winter night, but JP was not wearing a jacket. RP (9/4/18) at 36. He was terrified of everyone who passed by and holding his pants tight. RP (9/4/18) at 26, 31. He covered his rear as if he was in pain. RP (9/4/18) at 34. JP could not stop crying, and all he could get out was that he had been raped. RP (9/4/18) at 31-32. He kept repeating this. RP (9/4/18) at 32. He would not go back to the Defendant's apartment. *Id*.

Ms. Turner and her grandmother drove him to a hotel and checked him in for the night. RP 402-04 RP (9/4/18) at 32, 45. The next morning, JP was still in pain. RP 395. His father Curtis Craft took him to the UW Valley Medical Center in Renton. RP 320, 404-06, 454, 457-58; RP (9/4/18) at 66.

Monica Brown is a registered nurse at Harborview Medical Center and was the sexual assault nurse examiner (SANE) assigned to the ambulatory float pool who examined JP at Valley Medical Center. RP (9/4/18) at 54-55, 57-58. As part of her examination, she interviews the patient and, based in part on the interview, takes swabs and photographs and measures wounds. RP (9/4/18) at 62, 68. She documents her observations in the patient chart. RP (9/4/18) at 62-63. JP was distant, stoic, polite, only making brief eye contact. RP (9/4/18) at 70-71.

Two days later, the case was assigned to Detective Hoshouer, who arranged to interview JP the next day. RP 500. The interview was recorded. RP 364, 389.

The police department struggled to locate the Defendant, but he had been terminated from his job and he did not answer his door or respond to voice mails or letters or messages left with third parties. RP 505-12, 524, 526-27. When charges were filed, a bench warrant issued at the same time. CP 3, 107-08. However, the Defendant was not arrested on the warrant until

almost two years after the rape. CP 111. It appears he was found after another roommate, JSB, accused him of assault and obtained a protection order. CP 89-90, 103-04; RP 630.

RN Brown testimony: In pretrial motions, defense had asked the State to bring any hearsay statements to the court's attention outside the presence of jury so that the Defendant would have an opportunity to request appropriate limiting instructions. CP 11. The motion was granted. CP 15.

Prior to RN Brown's testimony and outside the presence of the jury, the prosecutor proposed to admit the SANE report with quotations from the patient interview and asked if defense counsel would be objecting to any portion of her testimony. CP 17-20; RP (9/4/18) at 5-7. The prosecutor solicited any proposed limitations " as to what it was that was told to her that's contained in that report so that before she testifies she can be told you can say this but not this." RP (9/4/18) at 9-10.

The court had suggested that the statements "would likely come in as an exception to the hearsay rule," but that defense counsel might challenge "whether this information that's contained in the report or what she testifies to is necessary for the purpose of her treating the patient." RP (9/4/18) at 8.

Defense counsel stated that the nurse could testify as to the contents of this record. RP (9/4/18) at 10, l. 6. That record included the patient's

description of what transpired. CP 18; Exh. 19. He challenged only a few statements as not "necessary for the purposes of their diagnosis or doing any kind of protection that they need." *Id*. at 11-16. After discussion, the prosecutor redacted JP's statements regarding the Defendant's previous overtures, JP's belief that the Defendant had been trying to get him drunk in order to rape him, and JP's belief that no one could hear him scream during the rape. RP (9/4/18) at 16; *Compare* Exh. 19 (original) at 2 *with* Exh. 19A (redacted) at 2.

When RN Brown took the stand a little later that morning, notwithstanding the earlier discussion, defense counsel objected on hearsay grounds when the prosecutor asked the nurse what JP told her had happened. RP (9/4/18) at 71. The objection was overruled. *Id.* This answer was contained in the exhibit which the Defendant had already agreed was appropriate for admission. Exh. 19A at 2.

The prosecutor repeated the question for the victim's response, and defense counsel robotically objected on the same grounds which the court had just overruled. RP (9/4/18) at 72. The objection was overruled again. *Id*. The prosecutor asked the question a third time followed by a third objection and overruling. RP (9/4/18) at 73. Finally, the nurse was finally permitted to speak. *Id.*

Counsel made hearsay objections to questions asking how long JP had known the Defendant, who was buying drinks, where the rape took place, what the Defendant had said to the victim during the rape, where on the victim's body the Defendant had poured baby oil, where the victim fled to and in what state. RP (9/4/18) at 74, 81-83, 87. The objections were overruled. *Id*. These were topics about which the victim and Ms. Turner had already testified at length, without objection, and even under cross-examination. RP 339, 342-44, 363, 365-66, 371, 373, 391, 424-25, 428, 436, 438; RP (9/4/18) at 26-27, 30-32.

Motion for new trial: The jury reached a verdict on September 6, 2018. CP 38. As a result of the verdict, attorney-client communication broke down. RP 630. On October 5, 2018, on the day scheduled for sentencing, the Defendant surprised his attorney by asking for new counsel. RP 630-31. A new attorney was appointed. RP 632-33.

On February 1, 2019, the Defendant with the assistance of a new attorney Quillian filed a motion for new trial, alleging his previous attorney Currie had provided ineffective assistance by failing to call specific witnesses. CP 44-47. The Defendant provided a declaration which stated what he believed others could testify to. CP 46-47.

On March 15, 2019, Mr. Quillian advised that he had not requested a trial transcript and had not interviewed Mr. Currie. RP 637-38. The court

permitted a continuance for counsel to obtain affidavits from proposed witnesses and trial counsel. RP 640, 644, 648. The court found the Defendant had waived attorney-client privilege. CP 53; RP 645-47.

On May 24, 2019, Mr. Quillian advised the court that his investigator had not been able to locate any of the Defendant's alleged witnesses. RP 652. Counsel's interview of Mr. Currie "unfortunately led to no useful information to supplement our previous motion with, so we are essentially left with simply submitting the motion as it stands now." RP 653.

The court denied the motion, finding that the motion was untimely, relied entirely on inadmissible hearsay, and without merit. RP 654. The court further found that even if such testimony had been presented at trial and was found credible, it would not have affected the verdict. CP 74; RP 656. There were no witnesses who would have been present during the rape. RP 656.

The Defendant had not testified; nor did he participate in the presentencing investigation. CP 85; RP 528, 630. The report explains that a second roommate JSB accused the Defendant of a serious assault approximately two years after JP's rape. CP 89-90, 103-04. In petitioning for a protection order, JSB alleged that the Defendant had headbutted him, breaking JSB's nose and fracturing his teeth, and that the Defendant had

stalked him with online apps that provided location access. JSB believed the Defendant was capable of holding a grudge for a long time and taking revenge long after the slight occurred. JSB alleged that on several occasions, the Defendant had threatened to shoot people with his shotgun and to kill their animals and mail them back in pieces. (21-22)

The Defendant was sentenced and now appeals. CP 56-73, 75-76.

IV. ARGUMENT

A. The court did not abuse its discretion in admitting the victim's statements to a registered nurse which had already been admitted through the victim himself.

The Defendant challenges the admission of the victim's hearsay statements through RN Monica Brown. Appellant's Opening Brief (AOB) at 8. Such decisions are within the trial court's discretion.

> We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless " 'no reasonable person would take the view adopted by the trial court.' " *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (internal quotation marks omitted) (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)).

State v. Horn, 3 Wn. App. 2d 302, 311, 415 P.3d 1225, 1229 (2018).

The Defendant complains that the evidence is not admissible under ER 803(a)(4). AOB at 12, 17. This Court does not need to entertain the complaint. A reviewing court may affirm for any reason supported by the record and the law. *State v. Mitchell*, 190 Wn. App. 919, 924, 361 P.3d 205,

207 (2015). The statements were admissible under more than evidentiary theory.

1. The statements were admissible under the medical treatment exception.

Under ER 803(a)(4), hearsay statements may be admitted if they are made "for purposes of medical treatment and diagnosis and describing medical history, … symptoms, … or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The scope of this exception is broad.

> The key to admissibility is a showing that the statement in question was "reasonably pertinent" to medical diagnosis or treatment. The test is deliberately imprecise, giving the trial court considerable discretion to do what seems fair on a case-by-case basis.

5C Wash. Prac., Evidence Law and Practice § 803.19 (6th ed.). The exception is not limited to physical ailments or physicians. *In re M.P.*, 76 Wn. App. 87, 93, 882 P.2d 1180 (1994). The court will consider the declarant's motive and whether the statement's content is of the kind reasonably relied upon for treatment or diagnosis. *Id*.

In a case involving a different Michael Williams in Pierce County charged with rape, the court upheld the admission of the victim's statement through the SANE under ER 803(a)(4). *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322, 325 (2007). There the forensic nurse "testified about JAD's answers to the questions on the history questionnaire and read

her notes on JAD's general narrative." *Williams*, 137 Wn. App. at 741. The court of appeals noted that in a sexual abuse case, naming the assailant to a medical professional is "part of reasonable treatment and therapy," because disclosure of this information may "prevent recurrence and future injury." *Williams*, 137 Wn. App. at 746 (citing *State v. Ackerman,* 90 Wn. App. 477, 482, 953 P.2d 816 (1998); *State v. Sims,* 77 Wn. App. 236, 239, 890 P.2d 521 (1995)). The court held that JAD's statement that she did not feel like she needed specific medical treatment "at first," was not enough to show that she intended to "exclude medical diagnosis and treatment as a result of the hospital examination." *Williams*, 137 Wn. App. at 747.

In our own case, on the morning of RN Brown's testimony, the trial judge stated, "under *Williams*, the statements of the victim would likely come in as an exception to the hearsay rule." RP (9/4/18) at 8.

On appeal, the Defendant alleges that nothing in the record indicates JP understood his statements would further his diagnosis or treatment. AOB at 11. In fact, this is not the record.

At the time that the victim went to the medical center and met with the SANE, he was an independent adult who had been injured and was experiencing pain. He understood the difference between law enforcement and the hospital. RP 392. He chose to go to the hospital where they checked him out "from head to toe." RP 406. It may be inferred fairly that an adult

understands that a hospital is where you go for emergent medical care. JP knew the hospital was not the Tacoma Police Headquarters where he would go some days later and provide a recorded investigative interview. RP 500.

The Defendant alleges that RN Brown did not reasonably rely on the declarant's statements for purposes of treatment. AOB at 12. This again is not a fair reading of the record.

RN testified that she is a nurse, that she met JP in the hospital, examined the patient for over four hours, and made recommendations for follow-up assessment and care, diagnostics and medication to the patient, his family, and the providers who would be continuing to care for him. *Id*. at 62, 68-69. As a medical professional, RN Brown's communications with a patient are privileged. RCW 5.62.020. Here, the testimony was sufficient to establish that the nurse provided care. There is no requirement that more private details be elicited.

When medical professionals elicit the cause of injuries, they do so for treatment purposes. *State v. Scanlan*, 193 Wn.2d 753, 768, 445 P.3d 960, 967 (2019), *cert. denied,* 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020). Knowing the mechanism, manner, and timing of injury determines how serious it is and affects what the provider looks for, what tests they run, and the course of treatment. whether they might need to do imaging to look for foreign bodies in the wound. *Id*.

The Defendant minimizes the value of RN Brown's care, for the reason that other medical professionals would provide follow-up. AOB at 18. In fact, "[a]n essential part of the medical examination is the discharge plan." Lynn Hecht Schafran, *Medical Forensic Sexual Assault Examinations What Are They, and What Can They Tell the Courts?*, JUDGES' JOURNAL, 16, 18 (2015). This may include wound care, treatment and information to prevent STD's and pregnancy, referrals, and recommendations for follow-up examinations, counseling, advocacy services, and safety planning. Schafran, JUDGES' JOURNAL at 18-19. These referrals for follow-up and counseling "are extremely important because of the significant physical and mental health consequences of sexual violence, ranging from chronic pain to suicide." *Id*. at 19.

RN Brown testified that a SANE is on-call, paged from hospital to hospital within the county. RP (9/4/18) at 55-57. After this examination, a SANE does not become each victim's general physician and provide follow-up care. RN Brown talked "to the medical personnel at the hospital, which is standard, let them know what my recommendations were in terms of follow-up assessment and care, what kind of diagnostics and medication he might need" for continuing treatment. *Id*. at 62, 68-69. She also talked to JP's family about his follow-up care. *Id*. at 69.

The primary mission of a SANE exam "is to meet the immediate needs of the sexual assault victim by providing compassionate, culturally sensitive, and a comprehensive forensic evaluation and treatment by a trained professional nurse." Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1078 (2018). As RN Brown testified, this entire 4+ hour exam is itself treatment. *Id*. at 69-70.

> The SANE program was developed in the 1970s, after emergency room doctors, nurses, and nurse practitioners recognized a striking deficiency in emergency medicine: treatment resources for sexual assault victims reporting to emergency departments were inadequate and below the standard of care of other emergency department patients. Emergency room staff were rarely trained to conduct medico-legal exams, and were often ill-equipped to address sexual assault victims' emotional trauma.

Julia Chapman, *Nursing the Truth: Developing A Framework for Admission of Sane Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 279 (2013).

> [V]ictims were often made to wait for hours because their cases were not seen as urgent. Uneducated medical staff asked victim-blaming questions and did not understand that absence of bodily injury did not mean the victim was not profoundly injured psychologically. Untrained medical personnel were inept at evidence collection and sometimes resentful of the complex, hours-long examination and detailed documentation required.

Schafran, JUDGES' JOURNAL at 17.

> Specialized sexual assault treatment training emerged to fill this void in emergency medicine. Thus, SANE programs began not as an investigative tool, but as a specialized treatment option for an underserved group of emergency room patients and sexual assault emergency nursing has grown into the largest specialty of forensic nursing in the United States.

Chapman, 50 AM. CRIM. L. REV. at 279–80.

The typical SANE program is housed in a hospital and staffed by nurses. Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1078 (2018). The SANE provides "emotional support, post-exposure prophylaxis for sexually transmitted diseases and emergency contraception, and referral to counseling services." Chapman, 50 AM. CRIM. L. REV. at 279.

RN Brown's training is not in law or law enforcement. It is special *medical* training in interviewing, sample collection, and sample storage. RP (9/4/18) at 56. As part of the medical history, the SANE asks the patient for all the details of what occurred. The nurse needs to know what happened in order to treat the patient. The interview informs the examination, wound measurement, sample collection, and areas photographed. RP (9/4/18) at 61-62. The four-hour exam is a "laborious process" that emergency rooms have neither the time nor expertise to perform. *Id*. at 63, 69; Allen, at 1078 (The SANE examinations are "more thorough and complete than those provided by standard emergency rooms."). It is, as JP testified, a "head-to-

toe, front-to-back assessment" using body maps and photographs, documenting "any injuries observed, from tenderness to trauma, including location, size, shape, color, swelling, redness, tears, abrasions, and bruising." Schafran, JUDGES' JOURNAL at 18. This includes any pain or change in range of motion. *Id*. It also includes a detailed genital and pelvic examination. *Id*. The nurses "utilize special forensic equipment such as colposcopes which can detect microlacerations, bruises, and other injuries." Allen, 87 FORDHAM L. REV. at 1078-79.

SANEs provide their patients with better explanations throughout the exam. *Id.*, at 1079. Victims "receive more thorough medical care and recover more quickly." *Id*., at 1078.

> The medical forensic sexual assault examination is first of all a medical examination focused on the patient's immediate and longterm health and safety needs, physical and mental. The examination integrates evidence collection into the medical examination because combining these steps is best practice from the viewpoint of patient-centered care, sparing the patient from a subsequent long and harrowing examination if she decides to report to law enforcement. SANEs report that *many, if not most, of their patients want medical care, but do not engage with the criminal justice system*.

Schafran, JUDGES' JOURNAL, at 17 (emphasis added). As RN Brown testified, in the three years that she worked as a SANE, she conducted approximately 100 examinations, but only testified in a single trial. RP

(9/4/18) at 59-60. The exam is patient care. Both the nurse and patient understand this.

The court did not abuse its discretion in admitting the statements under ER 803(a)(4).

2. Prior consistent statements are not hearsay.

The statements would also have been admissible under ER 801.

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if--
>
> > (1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is … (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, …

ER 801(d)(1). When the inferences raised in cross-examination would allow counsel to argue that the victim had reason to fabricate his story, a prior consistent statement may be admitted to rebut those inferences. *State v. Dictado*, 102 Wn.2d 277, 290, 687 P.2d 172, 181 (1984); *State v. Smith*, 30 Wn. App. 251, 255-56, 633 P.2d 137 (1981), *aff'd*, 97 Wn. 2d 801, 803-04, 650 P.2d 201 (1982); *United States v. Provenzano*, 620 F.2d 985, 1001 (3d Cir. 1980).

Where the defense is an attack on the credibility of the victim, the prior consistent statement may be admitted even before impeachment occurs. *State v. Makela*, 66 Wn. App. 164, 169-73, 831 P.2d 1109 (1992).

The statement will not be defeated merely because defense alleges that, too, was falsified. *Makela*, 66 Wn. App. at 173 ("The mere assertion that motives to lie may have existed at the time of the prior statement is insufficient to prevent their admission.").

In this case, the Defendant Williams did not testify or offer any witnesses. The defense, from start to finish, was an attack on the credibility of the victim. RP 584-613.

The victim testified two years after the event. It was not something he wanted to remember. RP 445. On several details, JP's script memory took over. His episodic memory had to be refreshed with the transcript of his statement to the detective. RP 355, 363-65, 389, 391-93, 395, 403, 405-07, 413, 427-28, 455-56. When the prosecutor caught the inconsistencies, that "[took] a little wind out of [defense counsel's] sails," because the defense was to catch and magnify any memory errors. RP 595. If any detail was misremembered, the defense argued "[h]e is either telling the truth or he is not." RP 586.

In the direct examination, JP had testified that they ordered pizza delivered to the apartment, and he had eaten one slice. RP 370-71. In cross-examination, the defense forced JP to acknowledge that in his earlier statement to police he had said they had decided to have drinks before picking up a pizza on the walk back to the apartment, and JP actually had

three slices. RP 420, 427-28. Counsel suggested that JP had misrepresented these details in order to fit a narrative that the Defendant had forced drinks on him causing him to be "stupidly" drunk. RP 421, 426, 428.

When JP had to be reminded of the baby oil, defense counsel implied that JP was omitting facts which suggested the sex may have been invited and consensual. RP 434-38 (whether JP had laid down on the Defendant's futon or the floor, whether his belt had been loosened, whether the lights were low). JP testified that he had made clear that he had no sexual interest in the Defendant. The defense responded, "we thinks he does protest too much a little bit there maybe." RP 591.

In this context, the victim's statement to a nurse was admissible as a prior consistent statement, rebutting the defense implication that JP had invented facts or had an improper motive in reporting the crime to police. Such a statement is not hearsay at all. This would be a tenable basis for admission and a further reason to affirm the lower court's discretionary decision to admit the statements.

3. The challenged statements had already been admitted through other witnesses without objection and even under cross-examination by the Defendant.

The court overruled objections to:

> (1) what happened on the evening of the alleged rape; (2) who gave Mr. Pulliam drinks; (3) the names Mr. Williams allegedly called Mr. Pulliam and the commands he made during the alleged rape; (4) where the alleged rape occurred;

> (5) where Mr. Williams allegedly put oil on Mr. Pulliam's body; (6) where Mr. Pulliam went after the alleged rape; and (7) what Mr. Pulliam did at the park after the alleged rape.

AOB at 16. All of this information had already been admitted during the testimony of previous witnesses, frequently in response to defense questioning. The court did not abuse its discretion in overruling the objections to statements which had already been admitted through other witnesses without objection.

This is a tenable basis to overrule the objections. Once the evidence had been admitted, it cannot be said that that its mere repetition was prejudicial. "A nonconstitutional evidentiary error is reversible only if 'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Doerflinger*, 170 Wn. App. 650, 665, 285 P.3d 217, 224 (2012). Where the evidence has been already been admitted through one witness, the identical testimony from another witness cannot materially affect the outcome of the trial.

The superior court did not abuse its discretion in admitting statements which were already in evidence and which would have been admissible under ER 801 and ER 803.

B. A court does not express an opinion on the defendant's guilt by using the rape victim's initials in a publicly filed writing.

The prosecutor prepared the jury instructions. RP 465. The defense offered no objection. RP 535-51. For the first time on appeal, the

Defendant argues that the judge expressed an opinion on the Defendant's guilt by using a to-convict instruction, which refers to the victim by initials only. AOB at 22. The instruction reads:

> To convict the defendant of the crime of rape in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 13 of February, 2016, the defendant engaged in sexual intercourse with J.P.; and
>
> (2) That the sexual intercourse occurred by forcible compulsion
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2) and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of the elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

CP 34.

1. Where the victim's initials are neither a contested factual issue nor an element of the offense, the Defendant cannot demonstrate either a judicial comment or manifest constitutional error.

Because the alleged error was not preserved for review, the Defendant must show a manifest constitutional error. RAP 2.5(a)(3). He cannot show that the common practice of referring to a rape victim by initials in a publicly filed document is manifest error.

A judge is prohibited from commenting to a jury on the factual merits of a case. WASH. CONST. art. IV, §16. A jury instruction which does not accurately state the law, and instead essentially resolves a contested

factual issue constitutes an improper comment on the evidence. *State v. Sinrud*, 200 Wn. App. 643, 649, 403 P.3d 96, 100 (2017). However, the victim's initials are not a contested factual issue. Nor are they elements of the crime. *See* RCW 9A.44.050; *State v. Ieremia*, 78 Wn. App. 746, 751, 899 P.2d 16, 18 (1995).

This is a decided issue. The Washington Supreme Court has held that where the victim's name is not an element of the offense, the use of initials is not a comment on the evidence. *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076, 1082 (2006). Recent unpublished[3] cases have followed this decision, holding that the use of victim's initials in jury instructions is not a judicial comment. *State v. Airhart-Bryon,* No. 78805-1-I, 2020 WL 1853477 (Wash. Ct. App. Apr. 13, 2020); *State v. Staples*, 11 Wn. App. 2d 1057 (2019). There was no comment.

2. It is common and prudent legal practice to exercise caution and respect for the individual's privacy when drafting publicly filed documents.

The Defendant claims that the use of initials was a departure from the court's and parties' practice. AOB at 23. This is false. Crime victims have a constitutional right to be treated with respect and dignity. WASH. CONST. art. 1, § 35. Jury instructions are court filings. CP 23-37. In all court filings, the court, prosecutor, defense counsel, and community

[3] Cited under GR 14.1 for persuasive value only.

corrections officer have only referred to the victim by his initials. CP 1-3, 17, 34, 46-47, 83-85, 88, 90-91, 109, 112, 114.

It is a standard practice to avoid naming vulnerable witnesses in court filings. *See e.g. State v. Romero-Ochoa*, 193 Wn.2d 341, 440 P.3d 994 (2019); *Matter of James*, 190 Wn.2d 686, 416 P.3d 719 (2018); *State v. Burke*, 6 Wn. App. 2d 950, 431 P.3d 1109 (2018), *review granted,* 194 Wn.2d 1009, 452 P.3d 1240 (2019)*; Matter of Burlingame*, 3 Wn. App. 2d 600, 416 P.3d 1269 (2018) (recent opinions in which adult victims of second degree rape are referred to only by initials or as "victim").

In a recent unpublished case, the trial court explained to the jury that the use of initials was due to the jury instructions being publicly filed documents. *State v. Brown*, 7 Wn. App. 2d 1061 (2019) (offered under GR 14.1 for persuasive value only).

Courts are not agencies within the meaning of the public records act, but the common law provides a right of access to court case files. *Nast v. Michels*, 107 Wn.2d 300, 304, 730 P.2d 54, 56 (1986). The clerk is unable to redact court records for sensitive information. There are two ways to protect an individual's privacy in the court record: (1) through a motion and hearing under GR 15 or (2) by parties' wise choices in the language of their filings.

Jury instructions are generally drafted by the prosecutor, as happened here (RP 465), and a copy is normally held in the prosecutor's file. The prosecutor's file is a public record. RCW 42.56.010(1). A records disclosure can quickly result in the widespread publication and distribution of private information. Therefore, the prosecutor's office is careful about creating records which contain sensitive information. *See also* General Order of Division II, 2018-2 (requiring recaptioning and the use of initials to protect the privacy of vulnerable persons); General Order of Division II, 2011-1 (requiring the use of initials for child sex victims).

An agency may be required to redact records before disclosure, e.g. for crime victim information. *See. e.g.* RCW 7.69A.030(4) (the identifying information of child victims and witnesses of any crime); RCW 42.56.240(5) (the identifying information of minor aged victims of sexual abuse); RCW 42.56.050; RCW 42.56.070(1) (where disclosure violates an individual's right of privacy). But redaction is an imperfect safeguard where the public records act is an unfunded mandate and public records officers are perennially overworked. Therefore, it is appropriate to treat writings with caution <u>at the time of their creation</u>.

3. The respect for the privacy and anonymity of sexual assault victims is a well-established, cultural norm.

The Defendant believes that the jury would have misinterpreted the use of initials to imply a judicial opinion. Such an interpretation divorces

jurors from the society and culture they inhabit. All of American society, not just the criminal justice system, treats rape victims differently – particularly as to the disclosure of their identities. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1114 (1993). This is a fact generally known in the territorial jurisdiction and not subject to reasonable dispute.

For example, it has long been the standard practice in journalism not to name victims of sexual assault. Philip B. Corbet, *When We Name Names*, NY TIMES (Apr. 15, 2017).[4] In 1991, the NBC Nightly News departed from societal norms by naming William Kennedy Smith's rape victim without her consent, thus setting off a national debate. Denno at 1114.

Sharing personal information can be sanctionable and even criminal as harassment. CR 11; RCW 9.61.260. *See also* Spencer S. Hsu, *Ex-Senate staffer sentenced to 4 years for "doxing" GOP senators in Kavanaugh confirmation fight*, WASH. POST (June 19, 2019).[5] It may also result in censure and ejection from social media platforms.[6] Emma Grey Ellis, *Whatever Your Side, Doxing is a Perilous Form of Justice*, WIRED (Aug.

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[4] https://www.nytimes.com/2017/04/15/insider/sexual-assault-naming-victims-standards.html

[5] https://www.washingtonpost.com/local/legal-issues/ex-senate-staffer-sentenced-to-4-years-for-doxing-gop-senators-in-kavanaugh-confirmation-fight/2019/06/19/31a977a8-92aa-11e9-b58a-a6a9afaa0e3e_story.html

[6] https://help.twitter.com/en/rules-and-policies/personal-information

17, 2017);[7] Emily Birnbaum, *Facebook and YouTube to Remove "Any and All" Mention of Potential Whistleblower's Name*, THE HILL (Nov. 8, 2019).[8]

The social norm protects victims who would be deterred from reporting and who are further traumatized by others' responses to their disclosure. A three-year longitudinal survey of a national probability sample of 4008 by the National Women's Study found 71% of female victims were concerned about their family knowing that they were raped. Denno, at 1125. A smaller, but still significant percentage (68%) of victims were concerned about non-family members knowing they were raped. And 69% worried people would think that the rape was their fault or that they were responsible for it. Those who do disclose are generally from empowered groups, less likely to suffer stigma, e.g. white, middle class, in steady relationships, and, most significantly, are raped by strangers. *Id*. A large majority of victims (78%) favor legislation that prohibits the disclosure of their names. Denno, at 1130-31. 66% report they would be more likely to report rapes if the media were prevented by law from acquiring and revealing their names and addresses; and 86% said they

[7] https://www.wired.com/story/doxing-charlottesville/
[8] https://thehill.com/policy/technology/469653-facebook-to-remove-any-and-all-mention-of-potential-whistleblowers-name

would be less likely to report if they believed their information would be reported. *Id*.

This is the world the jurors live in. It is not tenable to imagine that they would interpret the use of initials as anything but a standard precaution.

4. No precedent supports this claim.

The Defendant relies on civil cases where the named parties were permitted to use pseudonyms in pretrial proceedings. AOB at 24. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000); *Doe v. Cabrera*, 307 F.R.D. 1 (D.D.C. 2014). The cases do not support the Defendant's argument.

In *Does I thru XXIII v. Advanced Textile Corp.*, 23 foreign garment workers on behalf of 25,000 similarly situated workers in Saipan sued their employer for FLSA violations. *Does I thru XXIII*, 214 F.3d at 1063. Fearing physical and financial retaliation and deportation, the plaintiffs used pseudonyms. Before the plaintiffs could send notice to potential class members, the defendant attempted to unmask them, asking that the court dismiss the case if the plaintiffs did not reveal their true names. The district court granted the motion and dismissed the case. *Id*. at 1064. The 9th Circuit reversed, holding pseudonyms may be necessary to protect a person from harassment, injury, ridicule or personal embarrassment. *Id*. at 1067-68.

The *Cabrera* ruling, which the Defendant quotes at length, comes from the federal district court, i.e. the trial court. *Doe v. Cabrera*, 307 F.R.D. 1 (D.D.C. 2014). When concerns are raised in a timely fashion, a prudent trial court will take reasonable precautions to preserve a trial outcome. But a trial court's order does not establish a principle or a rule; it is not a court of precedent.

In that case, 27-year-old Jane Doe filed a detailed sexual assault complaint against a professional baseball player and issued a public statement. It was at the initiation of the lawsuit and in response to this public statement that the defendant made a motion to preclude Doe from using a pseudonym. The district court ruled that the use of a pseudonym was proper during pretrial proceedings as the case involved highly personal and sensitive matter and disclosure was likely to result in Doe's psychological trauma and undermine her treatment. *Cabrera*, 307 F.R.D. at 6. If the case went to trial, however, the court ruled that Doe's identity would be not be hidden from jurors. *Id*. at 10.

Both cases are certainly distinguishable in that they involve civil litigants seeking monetary damages. JS is not a litigant or a party to the case. He is only a witness. He did not choose to file the charges; the State did. There is no allegation that JS went to the media to make a statement. And the Defendant made no complaint to the trial court below.

Notwithstanding the differences, the outcome here is no different than it was in *Cabrera*. JS did not appear for trial in a wig and sunglasses. His identity and full name were made known to the jurors throughout the trial.

There is no precedential authority which would interpret a judicial opinion on guilt from the normal custom of referring to rape victims by initials in publicly filed writings, especially where the victim's name is not an element of the crime. There was no comment.

C. Where the victim testifies openly and is named in full throughout the trial, the use of his initials in a single jury instruction does not implicate the public trial right.

The Defendant claims a violation of his right to a public trial under WASH. CONST. art. I, §10. AOB at 28. Specifically, he alleges that after all the evidence had been presented in an open courtroom, after JP had been named in full and testified openly, the single use of initials in the to-convict instruction effected a courtroom closure and denied him a public trial. On its face, the claim is without merit.

The public's right to an open trial is mirrored federally by the First Amendment. *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624, 627 (2011) (citing *Press–Enter. Co. v. Superior Court,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly

condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed2d 31 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270, n. 25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

1. No redaction occurred.

The Defendant appears to argue that any use of initials in a filing requires a motion to "redact." AOB at 30. A redaction occurs when some party seeks to alter an already completed writing. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 5, 330 P.3d 168, 171 (2014) (plaintiffs seeking to replace their names with initials in the SCOMIS indices). But the author's choice of language in an original document is not a "redaction." A drafting choice does not "remove" or "obscure" text from a document prior to publication or release.[9] GR 15(b)(5) ("To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record").

How JP was identified is a rhetorical choice. JP could have been referred to as "the victim," "the roommate," "the co-worker," "the foster child," or "the young man." He could have been referred to by his first

[9] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/redact (last visited May 7, 2020).

name only, last name only, nickname, pseudonym, or AKA. Here nothing was removed. Nothing was sealed. Nothing was closed. The parties simply made a personal compositional choice, identifying JP in one of many possible ways. A party's choice of language does not implicate GR 15 or the public trial right.

2. The single instance of initials does not effectuate a complete closure of public proceedings.

There is a three-step framework for analyzing whether a trial court violated the defendant's public trial right:

> [W]e determine (1) whether the portion of the proceeding at issue implicates the public trial right, which we analyze using an "experience and logic" analysis, (2) *whether there was a closure of that proceeding*, and (3) whether the closure was justified (did the court conduct a *Bone–Club* analysis on the record prior to closing the proceeding?).

State v. Gomez, 183 Wn.2d 29, 33, 347 P.3d 876, 878 (2015) (citing *State v. Smith,* 181 Wn.2d 508, 513–14, 334 P.3d 1049 (2014)) (emphasis added). The *Bone-Club* analysis is also referred to as an *Ishikawa* analysis. *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325, 327–28 (1995).

The Defendant fails to address the necessary second step, jumping to the third. AOB at 28-30. However, the requirement for a *Bone–Club* analysis only "comes into play when the public is *fully* excluded from proceedings within a courtroom.'" *Gomez*, 183 Wn.2d at 33-34 (quoting *Lormor,* 172 Wn.2d at 92 ((citing *Bone–Club,* 128 Wn.2d at 257, 906 P.2d

325)). *See also State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) ("a trivial closure does not necessarily violate a defendant's public trial right").

In *Gomez*, the trial court had commented that, as a matter of courtroom security and to promote decorum and minimize distraction, the courtroom doors would be locked during testimony. *Gomez*, 183 Wn.2d at 31-32. The defendant alleged that this comment (in the context of a ruling denying his motion to change venue) violated the public trial right.

The Washington Supreme Court disagreed because, in fact, there had been no closure. The appellant has the burden of providing "a record that reveals that the court took action amounting to a closure," i.e. "that the court acted to close the courtroom to the public, as opposed to acting to manage the in-court proceedings." *Id*. at 35-36. Gomez could not show the judge's comment effected a complete closure where the record showed that the courtroom was "rather full of spectators and none were asked to leave." *Id*. at 36.

Three months later, the Washington Supreme Court considered jury selection in which spectators could not hear the challenges for cause and could not see the struck juror sheet. *State v. Love*, 183 Wn.2d 598, 606–07, 354 P.3d 841, 845 (2015). The court noted two types of closures, one "when the courtroom is completely and purposefully closed to spectators so that

no one may enter and no one may leave," and the other "where a portion of the trial is held someplace 'inaccessible' to spectators, usually in chambers." *Love*, 183 Wn.2d at 606–07. The jury selection procedure was neither of these. "[N]o portion of the process was concealed from the public" where the challenge process "occurred in open court, on the record, and in full view of any observer in the courtroom" such that "the public had ample opportunity to oversee the selection of Love's jury." *Love*, 183 Wn.2d at 601, 607. This was not a closure.

In the same way here, the use of the victim's initials on a single instruction does not amount to a complete courtroom closure where the record shows that JP had testified and provided his full name to the jury in open court. His identity was not obscured from the public in the trial.

The identical issue has been resolved against the defendant in two recent unpublished[10] cases. *State v. Airhart-Bryon,* No. 78805-1-I, 2020 WL 1853477 (Wash. Ct. App. Apr. 13, 2020); *State v. Staples*, 11 Wn. App. 2d 1057 (2019), *review denied,* 98210-4, 2020 WL 2950662 (Wash. June 3, 2020) (use of initials did not violate the public trial right). Both opinions rely upon the analysis in *Love*.

In *Staples*, the court opined:

[10] Cited under GR 14.1 for persuasive value only.

> Here, as in *Love*, information that was temporarily inaccessible to the public was made readily available elsewhere in the record. The victim's name was used at the CrR 3.5 hearing. She testified under her full name and was referred to by her full name throughout trial. As in *Love*, the goals of transparency that animate article I, section 10 are served here because the public was able to monitor the proceedings and observe the victim testify under her full name in open court.
>
> We hold that the Staples has failed to establish that a closure has occurred.

Staples, 11 Wn. App. 2d 1057, 2019 WL 7373500, at *3.

In *Airhart-Bryon*, a different panel reached the same conclusion.

> Here, R.F. testified under his full name in open court and was consistently referred to by his full name. R.F.'s name was fully accessible to spectators and open to any member of the public who appeared in court or read a transcript of court proceedings. Because Airhart fails to show a closure occurred, no *Ishikawa* analysis was necessary.

Airhart-Bryon, 2020 WL 1853477, at *4.

The use of initials is not a closure; the Defendant's right to a public trial is not implicated.

D. The trial court did not abuse its discretion in denying the motion for new trial predicated on a failure to call witnesses who could not be located.

The Defendant challenges the lower court's denial of his motion for new trial. A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion, *State v. Hawkins,* 181 Wn.2d 170, 179, 332 P.3d 408 (2014) (citing *State v. Williams,* 96 Wn.2d 215, 221, 634 P.2d 868 (1981)). The trial court's wide discretion is justified, because the trial

judge has seen and heard the witnesses both and "is in a better position to evaluate and adjudge than can [appellate courts] from a cold, printed record." *Id.* (quoting *State v. Wilson,* 71 Wn.2d 895, 899, 431 P.2d 221 (1967)). Here the judge heard from all the state's witnesses so as to weigh the impact of their testimony against the Defendant William's alleged witnesses and their hypothetical testimony.

A motion for new trial is controlled by CrR 7.5. Such a motion must be brought within ten days of the verdict, however, the trial court has discretion to extend that time CrR 7.5(b). Here the Defendant first expressed dissatisifaction with his attorney on October 5, 2018 (RP 630), a month after the September 6, 2018 verdict. CP 38. Rather than summarily denying the Defendant's motion on this ground, the lower court granted the Defendant more time to develop the merits of his claim and then denied the motion on the merits. RP 640, 644, 652-53. Nevertheless, this Court may affirm for any reason supported by the record and the law. *State v. Mitchell*, 190 Wn. App. 919, 924, 361 P.3d 205, 207 (2015). It would have been appropriate to deny the motion on this procedural ground.

The Defendant alleged that his trial counsel Currie's assistance had been ineffective. CP 44-47. A claim of ineffective assistance of counsel must demonstrate deficient performance and prejudice. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260, 1268 (2011). Performance is deficient if

it falls below an objective standard of reasonableness. *Id.* This is a high threshold to meet. There is a strong presumption that counsel's performance was reasonable. *Id.* The court affords deference to counsel's choices, especially where they can be characterized as tactical or strategic. *Id.* Prejudice is a reasonable probability sufficient to undermine confidence in the outcome that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *Id.*

The Defendant alleges that Mr. Currie's performance was deficient for failing to obtain the testimony of James Bloom and Jesse Ramirez. AOB at 35; CP 46. However, Mr. Quillian, who was appointed to replace counsel Currie, informed the court that, despite his best efforts over eight months, he had been unable to locate any of the witnesses which the client identified. RP 632-33, 652-53. It is not objectively unreasonable to fail to subpoena witnesses which cannot be found.

Because they could not be found, the court was not able to evaluate the credibility of their testimony. CP 74. Nor could the court accept the Defendant's hearsay as substantive testimony. CP 74. We do not know what they would actually testify to or even if they exist. A defendant's bare allegation about the existence of phantom testimony cannot undermine a jury's verdict.

The Defendant alleges that he was prejudiced by the absence of these witnesses. AOB at 36-37. Because there is no deficient performance, we do not reach the prejudice prong.

In any case, the lower court found that even if counsel had been able to locate the witnesses and they had testified as the Defendant alleged they would, such testimony could not have affected the outcome of the trial. CP 74; RP 656. The finding is tenable.

The Defendant claims Mr. Bloom would have been able to testify that JP was under the influence of an intoxicating substance at 7:30 on the evening of the rape. CP 46. But this does not undermine the victim's testimony. He himself testified that he was heavily intoxicated when he was raped.

The Defendant claims that Mr. Ramirez would have been able to testify that he observed JP leave the apartment after some angry words between the roommates. CP 46-47. Again, this does not undermine JP's testimony. He testified that he left the apartment after the Defendant viciously raped him.

The Defendant claims that Mr. Ramirez would be able to testify that the Defendant said that JP had assaulted him. CP 47. In fact, he would not. This is not an admission of fault under ER 801(d)(2), but self-serving

hearsay. It would not have been admissible. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967, 988 (1999).

The court's denial of the motion may be affirmed on any of several, tenable bases. First, the motion was untimely under CrR 7.5. Second, it is not objectively unreasonable to fail to subpoena witnesses which cannot be found. And third, the alleged testimony, if it existed, would not have changed the trial outcome.

E. The Court should decline to review unpreserved LFO challenges which, while without merit, may be raised before the superior court upon release as the Legislature intended.

For the first time on appeal, the Defendant challenges the imposition of $300 in legal financial obligations (LFOs). AOB 40-41.

1. The Court should decline review under RAP 2.5(a)(3).

The Defendant was sentenced on May 24, 2019. CP 58. This was more than four years after *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015) and a year after *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) and Laws of 2018, ch. 269 (HB 1783). Even so, the Defendant made no timely objection.

Having failed to preserve error below, he is subject to RAP 2.5(a)(3). There is no plausible argument that the challenged $300 is a constitutional matter, much less manifest constitutional error. The Legislature has never intended LFO matters to be the proper or common

subject of appellate courts. They are the province of *superior courts*, from which the Defendant may seek remission "after release from total incarceration." RCW 10.01.160(4). This Court should decline review.

The court of appeals properly exercises its right to decline review of unpreserved LFO matters, which do not command review as a matter of right. *Blazina*, 182 Wn.2d 83-334, 344 P.3d 680 (2015). *See also State v. Duncan*, 180 Wn. App. 245, 253, 327 P.3d 699, 702 (2014), *aff'd and remanded,* 185 Wn.2d 430, 374 P.3d 83 (2016) (declining state's offer to remand, "we view this as precisely the sort of issue we should decline to consider for the first time on appeal."). When parties are required to raise and preserve error below, trial courts have an opportunity to correct errors thereby making effective use of judicial resources by avoiding unnecessary or wasteful appeals.

This Court should decline to review $300 in costs where the Defendant, despite having the benefit of published cases like *Blazina* and *Ramirez*, did not preserve error and where the Defendant may seek remission, if merited, upon his release from custody.

2. The court did not abuse its discretion in imposing the criminal filing fee, which is mandatory upon a defendant who has not been found indigent as defined in RCW 10.101.010 (a) through (c).

The Defendant challenges what he calls discretionary costs. AOB at 40-41. The statute references costs, not discretionary or mandatory costs.

"The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) *(a) through (c)*." RCW 10.01.160(3) (emphasis added). A "cost" is defined as an expense specially incurred in the prosecution of the defendant. RCW 10.01.160(2). The criminal filing fee is such a cost.

The Defendant alleges that is indigent. AOB at 40-41. For purposes of this discussion, he must have been found indigent under subsection (a), (b), or (c) as defined in RCW 10.101.010(3).

> (3) "Indigent" means a person who, at any stage of a court proceeding, is:
>
> > *(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or*
> >
> > *(b) Involuntarily committed to a public mental health facility; or*
> >
> > *(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;* or
> >
> > (d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

RCW 10.101.010(3) (emphasis added).

The Defendant points to the order of indigency at CP 77-79. AOB at 41. However, this order does not establish indigency under RCW 10.101.010(3)(a) through (c). It demonstrates that the Defendant was previously found indigent "for purposes of appointment of counsel," therefore the superior court would find that indigency continuing for purposes of appointment of appellate counsel. CP 77-79. In other words, the Defendant was only and ever found indigent under RCW 10.101.010(3)**(d)**, the subsection that is specifically excluded as relevant to the imposition of costs. *See also* RCW 36.18.020(2)(h)(indicating only that the criminal filing fee is mandatory unless the court has found indigency as defined under subsections (a) through (c)). The amendments to the statute that result from HB 1783 do not apply to a defendant whose indigency falls under RCW 10.101.010(3)(d) only. *State v. Jenks*, -- Wn. App. 2d --, 459 P.3d 389, 396 (2020). *See also State v. Kalama*, No. 52964-5-II, 2020 WL 2128696, at *3 (Wash. Ct. App. May 5, 2020) (unpublished – cited under GR 14.1) (affirming imposition of criminal filing fee where order of indigency reflects indigency under subsection (d) only).

Sometimes a defendant's ability to pay may be gleaned from their testimony or presentencing interview (PSI). But the Defendant did not speak with police; he did not testify at his trial; and he refused to meet with the community corrections officer who prepared the PSI. CP 84-85.

Sometimes the record may reflect the basis for the first indigency finding. *See e.g. State v. French*, 2 Wn. App. 2d 1052, 36642-1-III, 2019 WL 2764429, at *3 (2019), *review denied,* 194 Wn.2d 1020, 455 P.3d 136 (2020) (unpublished – cited under GR 14.1) (finding in the record that the original appointment was based on a finding under RCW 10.101.010(3)(c)). The Defendant Williams has not provided such a record. No such inference exists.

The court did not abuse its discretion. The claim is without merit.

3. The court properly imposed the DNA fee which was mandatory in this case.

The DNA fee imposed under RCW 43.43.7541 is not used in the prosecution of the defendant. The fee funds the creation, ongoing operation, and maintenance of the state DNA database and the agencies which collect the samples. *State v. Lewis*, 194 Wn. App. 709, 720, 379 P.3d 129, 134 (2016); *State v. Thornton*, 188 Wn. App. 371, 374-75, 353 P.3d 642 (2015); *State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). It is therefore, not a "cost" under RCW 10.01.160(2).

HB 1783 amended RCW 43.43.7541 so that the sentencing court now has discretion to waive the fee "if the defendant's DNA has been collected because of a prior conviction." Laws of 2018, ch. 269, §18; *State v. Anderson*, 9 Wn.App. 2d 430, 461, 447 P.3d 176, 191 (2019), *review granted, cause remanded,* 195 Wn.2d 1001, 458 P.3d 786 (2020). The fee

is only imposed on felony convictions and select misdemeanors listed at RCW 43.43.754. RCW 43.43.7541. Therefore, when the record reflects that the defendant has had a qualifying conviction and the record does not reflect whether the sentencing court recognized it had discretion to waive the fee, higher courts have remanded to allow the lower court to exercise its discretion. *State v. Catling*, 193 Wn.2d 252, 259, 438 P.3d 1174, 1177 (2019) (remanded where Catling had three prior felony convictions and where the record did not reflect whether collection of the DNA fee had occurred in any of those matters); *Jenks*, 459 P.3d at 396 (remanding where record did not reflect whether the DNA fee had been collected in the defendant's two prior felony cases).

In this case, there is no such discretion. It is not possible that the fee has been collected before, because the Defendant has no qualifying prior conviction which would have required a DNA sample to have been taken. CP 59. The court was required by law to impose the fee.

4. The interest provision is not a basis for remand.

The Defendant complains about a provision in the judgment which states: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP61. The state's

attorneys frequently concede that this may be addressed on remand where other errors have been conceded. Where no error is conceded, this is not a good use of public resources, because remand does not actually accomplish anything.

First, the language is not incorrect. RCW 10.82.090 provides the law. Under this law, interest shall accrue on restitution at the rate applicable to civil judgments, and no interest will accrue on nonrestitution legal financial obligations.

Second, regardless of any party's miscontrual of this provision, the Judicial Information System software used throughout the state has been updated such that interest can only accrue on nonrestitution after the effective date of HB 1783. The court's clerk (or any person with a JIS account and JIS training) can view the information at JIS and tell that the interest accrual provisions have all been turned off in the Defendant's case.

Therefore, a remand on this language expends public monies to effectuate nothing. The Court should decline to entertain these claims.

V. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

RESPECTFULLY SUBMITTED this 11th day of June, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ TERESA CHEN
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
Pierce County Prosecutor's Office
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
Telephone: (253) 798-7400
Fax: (253) 798-6636
teresa.chen@piercecountywa.gov

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06/11/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 11, 2020 - 1:14 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Michael A. Williams, Appellant
Superior Court Case Number:	16-1-03955-5

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