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

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE JOSEPH PERRY,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 17-1-01750-9

BRIEF OF RESPONDENT

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I. INTRODUCTION

Antoine Perry faced charges of rape in the second degree from two separate jurisdictions involving two different fifteen-year-old victims: T.G. and C.B. In both cases, Perry used the same criminal scheme where he introduced himself to fifteen-year-old girls on Snapchat using a false name, spent months developing a rapport with the victims by commenting on their posts and stories, drove to their homes in a car that did not belong to him, lured the girls out to his car using the promise of free food, intimidated the girls into sexual acts using violence or the threat of violence, strangled the girls to subdue any resistance, and then took their cell phones to prevent them from calling for help. The two incidents took place only three weeks apart. The court correctly analyzed the issues and properly exercised its discretion in admitting the evidence of Perry's prior sexual misconduct against C.B. as proof of a common scheme or plan, which was relevant to prove the element of forcible compulsion, Perry's intent to assault T.G., and to rebut his claim of consent.

Appellant's second claim that the court abused its discretion by admitting hearsay statements made to the sexual assault nurse examiner (SANE) is contrary to existing case law, which allows for the admission of hearsay statements through the medical diagnosis exception even when there is a dual purpose for the examination. The trial court properly admitted

the statements because they were reasonably pertinent to diagnosis and treatment. Even if the statements should have been excluded, any error is harmless because there is not a reasonable probability that the outcome of the trial would have been different considering the overwhelming evidence of Perry's guilt. This Court should affirm Perry's convictions.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court abuse its discretion by admitting evidence of Perry's sexual assault of another fifteen-year-old girl under ER 404(b) as a common scheme or plan where the sexual assaults occurred merely three weeks apart and were markedly and substantially similar?
- B. Did the court abuse its discretion when it admitted statements made by T.G. during her sexual assault examination when they were reasonably pertinent to diagnosis and treatment?

III. STATEMENT OF THE CASE

A. Procedural History

On May 4, 2017, the State charged Perry with rape in the second degree, assault in the second degree, and unlawful imprisonment. CP 5-6. The State alleged the assault and unlawful imprisonment charges were sexually motivated. CP 6. At the omnibus hearing, defense noted it was pursuing a defense of consent. CP 246-48.

The State filed a motion to introduce testimony regarding Perry's sexual misconduct against an uncharged victim, C.B., pursuant to ER

404(b). 5/28/19 RP 4-44.¹ As an offer of proof, the State provided four exhibits: (1) police reports from C.B.'s case, (2) police reports from T.G.'s case, (3) a transcript of C.B.'s defense interview, and (4) the transcript of T.G.'s defense interview. CP 49; Motion Ex. 1-4.² Perry did not object to the court relying on these exhibits to make its factual determinations for the 404(b) hearing and asked that they be admitted as exhibits for the record. 5/28/19 RP 11-12. The court determined that these exhibits were sufficient to issue a ruling and did not require an evidentiary hearing. 5/28/19 RP 11-14.

The trial court found by a preponderance of the evidence that Perry committed the sexual assault against C.B. and ruled that the evidence was admissible under ER 404(b). 6/10/19 RP 49-57; CP 178-81. The court compared the accounts of T.G. and C.B. and found that there are a number of “markedly and substantially similar common features which show a manifestation of a general plan,” including the following:

- a) Perry used a false name on “Snapchat” to contact girls that enabled him to hide his identity from them while he groomed them to gain their trust and confidence. CP 179; 6/10/19 RP 53.

¹ For the Court's convenience, the State is using the same verbatim report of proceedings (RP) citation system as set forth in the Brief of Appellant at 2, n. 1.

² For the sake of clarity, exhibits used during the 404(b) hearing will be cited to as Motion Ex. followed by the page number; exhibits used at trial will be cited to as Trial Ex. followed by the page number or bates number listed at the bottom of the page.

- b) Both victims were fifteen years old, which is an age that is susceptible to online manipulation and curiosity about the opposite sex. CP 180; 6/10/19 RP 53.
- c) Perry used a car that did not belong to him. *Id.*
- d) Perry parked in front of the home but required the girls to come out to his car in order to isolate them from other people. *Id.*
- e) Perry used food as a ruse to meet the girls and gain their trust. *Id.*
- f) The sexual acts occurred in the vehicle after Perry pretended to be their friend. *Id.*
- g) Perry strangled both girls in order to subdue their resistance. CP 180; 6/10/19 RP 53-4. Perry invoked fear in both girls that if they did not stop resisting, he would kill them. CP 180; 6/10/19 RP 54.
- h) Both girls had to eventually flee from the vehicle. CP 180; 6/10/19 RP 54. Perry's change in demeanor after the act was completed was identical in both cases. *Id.*
- i) Perry attempted to prevent communication of both girls by not allowing them access to their cell phones. *Id.*
- j) The two events took place less than a month apart making it less likely to be a coincidence or random similarity. *Id.*

The court concluded that the evidence was relevant to prove (1) Perry utilized a common scheme or plan, (2) the elements of forcible compulsion and Perry's intent to assault T.G., and (3) the victim's lack of consent. 6/10/19 RP 52. The court also conducted an ER 403 analysis and determined that the probative value of the prior misconduct outweighed any danger of unfair prejudice. 6/10/19 RP 52, 55. In recognition, however, of

the potential prejudice, the court offered to provide the jury with a cautionary limiting instruction. 6/10/19 RP 55. The State did not object to the language of Perry's proposed limiting instruction, which stated:

You are going to be hearing evidence of the defendant's alleged prior sexual misconduct which is not the basis for the charges in the present case. This evidence is being admitted only for a limited purpose. This evidence may be considered by you only for the purpose of considering whether such evidence constituted a common plan or scheme and for purposes of showing intent or lack of consent. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

7/22/19 RP 547-49. The court read the limiting instruction to the jury immediately before C.B. testified. *See* 7/22/19 RP 548-49.

The court also provided a jury instruction regarding the limited purpose of Perry's prior sexual misconduct. *See* CP 133. The jury instruction added an additional admonition that stated: "The evidence about the defendant's alleged actions against C.B. have not been admitted, and cannot be considered, to prove the character of the defendant in order to show that he acted in conformity therewith." CP 133.

Trial commenced on July 9, 2019. 7/9/19 RP 4. During trial, Perry objected to the admission of T.G.'s hearsay statements to the SANE nurse. 7/22/19 RP 583-86. The court ruled that T.G.'s statements to the SANE nurse are admissible under ER 804(a)(4). 7/23/19 RP 608-15. At the

conclusion of trial, the jury returned a verdict convicting Perry of all three counts and both aggravators. 7/25/19 RP 875-76; CP 156-60. The court imposed a standard range sentence totaling 161 months to life in custody. CP 224. Perry timely appealed. *See* CP 236.

B. Substantive Facts:

1. Perry Raped and Strangled T.G.

On November 4, 2016, Perry strangled and forcibly raped T.G. after luring her into his car with the promise of food. 7/18/19 RP 388-92. Perry first contacted T.G. months earlier through her Snapchat account. 7/23/19 RP 710. He used the name “Free Game AP” to hide his identity. 7/18/19 RP 384. In the following months, Perry and T.G. exchanged messages and commented on each other’s posts. 7/18/19 RP 391-92. T.G. was fifteen years old. 7/18/19 RP 417. Perry told T.G. that he was around twenty-two or twenty-three years old. 7/18/19 RP 417. He was actually twenty-seven years old. *See* CP 219.

On November 4, 2016, the fire department came to T.G.’s home to put out a fire. 7/18/19 RP 392, 480. T.G. created a Snapchat “story³” about how she accidentally burned down her kitchen and commented that “it sucks because I didn’t even get to eat my food.” 7/18/19 RP 392. Perry responded

³ A “story” is something on Snapchat that is visible to all of the user’s friends/contacts. 7/18/19 RP 386.

and offered to bring her food. 7/18/19 RP 392-93. Initially, T.G. said no because she did not want to give her address to a stranger. 7/18/19 RP 393. T.G. described how Perry dropped the subject to make her feel more comfortable in an effort to manipulate her:

“[H]e just kind of like kept texting me, so I just kept responding, and he ended up just making me comfortable, like just making me feel comfortable, just kind of like talking to me nice, talking to me sweet, kind of like dropped the food situation for a second and just kind of talked and then got back to the food situation, like “I can still bring you food.”

See Id. T.G. was still concerned that Perry was flirting with her so she told him that she was only fifteen years old. Perry responded: “What does that have to do with me bringing you food, silly?” 7/18/19 RP 394. This successfully put T.G. at ease, and she agreed to let him bring her food. *Id.*

T.G. gave Perry her address, and he brought her food from McDonald’s. 7/18/19 RP 393; 7/24/19 RP 758-59. Perry arrived at her house and waited for T.G. to come out to the car. 7/18/19 RP 413. She was still nervous, so she kept the door open as she ate. 7/18/19 RP 416. But she eventually closed the door as Perry made her feel more comfortable. *Id.* Once she closed the door, the conversation became more flirtatious. 7/18/19 RP 417.

Perry tried to kiss T.G. and touch her breasts. 7/18/19 RP 417. T.G. never had any intention of engaging in sexual intercourse with Perry.

7/18/19 RP 416. She told him that she did not want to be touched. 7/18/19 RP 420. Perry ignored her and continued to try to touch her. *Id.* When she started to exit the vehicle, Perry asked her what she was doing and started to open the arm rest area. Motion Ex. 2 at 8, 19. Perry then patted his waist band area and started reaching under the driver seat. *Id.* T.G. thought Perry was upset at her for denying his advances and that he was reaching for a gun. 7/18/19 RP 420-21. Perry told her to get in the back seat. 7/18/19 RP 420; Motion Ex. 2 at 8. T.G. complied out of fear. 7/18/19 RP 420; Motion Ex. 4 at 6.

Once they were both in the backseat, Perry fondled T.G.'s breasts and pushed her head down onto his penis, forcing her to perform oral sex on him. 7/18/19 RP 421; Motion Ex. 2 at 9, 19. Afterwards, Perry removed T.G.'s pants even though she repeatedly told him no. 7/18/19 RP 424. Perry then performed oral sex on her and digitally penetrated her vagina. 7/18/19 RP 422. She told him to stop and that she was a virgin, but he would not stop. 7/18/19 RP 422. She then started physically fighting back and said, "No, I'm not going to do this; it's not okay." 7/18/19 RP 424.

When T.G.'s resistance became physical, Perry put his hands around her neck and squeezed until she struggled to breath. *Id.* Perry could hear T.G. gasping for breath, but he kept squeezing. *Id.* She repeatedly told him to stop but he continued to strangle her. 7/18/19 RP 426; Motion Ex. 2 at 9.

T.G. stopped fighting once Perry strangled her to the point that she started to lose vision. 7/18/19 RP 426, 429.

T.G. tried to open the car door to escape three separate times. 7/18/19 RP 422-25. Each time, Perry shut the door and told her that “he’s in charge; he’s running this” and that she is not going anywhere. 7/18/19 RP 422-23. T.G. could not use her phone to call for help because her phone did not have a service plan. 7/18/19 RP 457. She tried to connect her phone to the house Wi-Fi to call for help, but Perry took her phone and threw it up to the front of the car. 7/18/19 RP 425-28.

Perry’s initial attempts to insert his penis into T.G.’s vagina were unsuccessful because T.G. was not “wet enough for him.” 7/18/19 RP 425. Perry repeatedly spit on his hands for lubricant and eventually forced his penis into T.G.’s vagina without a condom. 7/18/19 RP 425, 429. T.G. described the penetration as “the worst pain ever.” 7/18/19 RP 425. When T.G. told Perry that he was raping her, he responded: “Ain’t nobody raping you.” 7/18/19 RP 430.

Perry continued raping T.G. even after she started crying. 7/18/19 RP 427-28. She told him: “No, like I’m bleeding, like stop, like it’s not working.” *Id.* Perry finally stopped and told her that her “begging was a mood killer.” *Id.*

When T.G. attempted to get her phone back from the front seat, Perry started driving away while she still had one foot out of the car. 7/18/19 RP 431-33. As Perry was driving away with her, T.G. confronted him—“You’re going to rape me and then you’re going to kidnap me?” 7/18/19 RP 433. Perry stopped the car, and T.G. jumped out of the car and fled. *Id.* Perry still had her phone. 7/18/19 RP 434.

As she entered her home, T.G. immediately locked the front door and stared at the ground. 7/18/19 RP 437-48. She felt numb as if “there was nobody inside of [her].” *Id.* She went upstairs and cleaned the blood off of her vagina with a washcloth. *Id.* The washcloth was introduced into evidence as exhibit 2A. 7/18/19 RP 405.

T.G. snuck into her mom’s room to get her mom’s cell phone. 7/18/19 RP 440. T.G. called her friend who encouraged her to tell her mother. *Id.* T.G. woke up her mother and told her that she needed to tell her something. 7/18/19 RP 482. Her mother, Deana Gakpe, immediately knew that something was wrong because T.G. was shaking and her voice was trembling. *Id.*

Ms. Gakpe testified at the trial. 7/18/19 RP 478-97. She testified that she called 911 after T.G. told her that she had been raped. 7/18/19 RP 484-85. Ms. Gakpe saw the bloody washcloth and observed redness and bruising on T.G.’s neck. 7/18/19 RP 486-87. An ambulance took T.G. to the hospital.

7/18/19 RP 443. Over the following few weeks, Ms. Gakpe noticed that T.G. struggled to sleep at night and could not find the will to get up and go to school in the morning. 7/18/19 RP 489.

2. Perry Raped and Strangled C.B.

There is no indication in the record that T.G. ever knew or spoke with C.B. On November 26, 2016, C.B. was visiting her friend when Perry contacted her over Snapchat using the screen name “Miguel.” Motion Ex. 1 at 5; 7/22/19 RP 551. A month earlier, “Miguel” first contacted her claiming that he knew her when she attended Ford Middle School. Motion Ex. 1 at 5. He showed her a middle school yearbook photograph of her as proof that he knew her. *Id.* When they exchanged messages, Perry brought up things that only people who went to her middle school would know. 7/22/19 RP 554. On November 26th, Perry offered to bring her food and asked if he could come see her. Motion Ex. 1 at 5. C.B. agreed. *Id.*

Perry arrived around 11:10 PM. Motion Ex. 1 at 5. C.B. went out to his car to get the food he brought her. *Id.* Once in the car, Perry offered her marijuana, but she declined. *Id.* Perry stated that he needed “Swisher Sweet” cigarettes so he drove them both to a nearby gas station. *Id.*; 7/22/19 RP 555. After buying the cigarettes, he drove back toward her house and parked up the street. Motion Ex. 1 at 5.

Once parked, Perry got out of the car claiming that he needed to look for his I-phone and asked for her help. *Id.*; 7/22/19 RP 555. As they were looking, Perry came up behind her and started touching her. 7/22/19 RP 556. C.B. asked him to stop and said, “I’m not like that. Please do not touch me.” *Id.* Perry said, “It’s okay. It will be fine.” *Id.* C.B repeated, “No, please stop.” *Id.* Perry grabbed her and pushed her into the car. Motion Ex. 1 at 5. He began kissing and touching her without her permission. *Id.*; 7/22/19 RP 556. She repeatedly told him no and asked him to stop. *Id.* Perry told her to “just let it happen.” Motion Ex. 1 at 2 of 8.⁴ She told him that she had a boyfriend and that she was only fifteen years old *Id.* ; 7/22/19 RP 556. He told her that he did not care. Motion Ex. 1 at 2 of 8. He pushed her head between the seats with one hand and pulled her pants down with the other. Motion Ex. 1 at 5; 7/22/19 RP 562.

When she kept saying no, Perry grabbed her by the throat and began to strangle her. Motion Ex. 1 at 2 of 8; 7/22/19 RP 556. As she told Perry to stop, he squeezed her neck harder until he cut off her ability to breath. *Id.* She started seeing black dots and began to pass out. 7/22/19 RP 556. She told him that she could not breathe. Motion Ex. 1 at 2 of 8; 7/22/19 RP 556. Perry said that he did not care. Motion Ex. 1 at 2 of 8. Perry continued to

⁴ Because the page numbers in Motion Exhibit 1 are out of order and duplicative, the State will use the listed page numbers “2 of 8” to distinguish from earlier pages.

strangle her for a couple minutes while she pleaded for him to stop. *Id.*; 7/22/19 RP 556, 562.

Perry was very rough and forced his penis into C.B.'s vagina. 7/22/19 RP 556; Motion Ex. 1 at 2 of 8. She started to cry and begged him to stop. Motion Ex. 1 at 2 of 8. After he finished, she began looking for her phone. Motion Ex. 1 at 2 of 8. When she went into the backseat to get her phone, Perry pushed her out of the vehicle and started to drive off. Motion Ex. 1 at 3 of 8. C.B. was still holding onto the car door so she fell out onto the concrete. *Id.* Her phone was still in Perry's vehicle. 7/22/19 RP 565.

C.B.'s friend called 911 to report that C.B. had been raped. Motion Ex. 1 at 5. Officer Henry contacted C.B. who was distressed and crying. *Id.* She had a road rash scrape on her left hip. *Id.* C.B. went to the hospital where she was given a sexual assault examination. Motion Ex. 1 at 6. The exam revealed multiple tears in her vagina, petechial hemorrhage in her eyes, and bruising on her face and throat. Motion Ex. 1 at 20. An officer took photographs of the injuries. Motion Ex. 1 at 18.

An investigation, including video surveillance from the gas station and credit card receipts, revealed Perry as the suspect. Motion Ex. 1 at 6, 20. Perry was arrested and admitted to digitally penetrating C.B., but claimed that it was payment for the marijuana he provided. Motion Ex. 1 at 20. Perry provided a similar explanation at trial. 7/24/19 RP 794-95. Police

located five cell phones on Perry when they arrested him. Motion Ex. 1 at 20. Perry admitted that one phone belonged to C.B. *Id.*; 7/24/19 RP 804-09. A search warrant of Perry's vehicle revealed a "clump" of long dark hair with pink or red highlights that was similar to C.B.'s hair. Motion Ex. 1 at 21. The hair was located near the center console where C.B. described being pinned down and strangled by Perry. *Id.* Motion Ex. 1 at 21. Officers also located a presumptive positive test for semen on the passenger side seat. *Id.*

3. Perry's Trial Testimony

Perry testified at trial. *See* 7/23/19 RP 677-735; 7/24/19 RP 746-810. He testified that he met both C.B. and T.G. on Snapchat around March or April, 2016. 7/23/19 RP 710. He communicated with both girls approximately five times before he met up with them. 7/23/19 RP 683, 711. On the night of each incident, he offered to bring each girl food after they posted about being hungry on Snapchat. 7/23/19 RP 687, 715. Perry acknowledged that it took a significant amount of time before either girl was willing to send him their address. 7/24/19 RP 781. Once they told him where they lived, he drove a long distance to bring them food. 7/23/19 RP 688-89, 718. Perry admitted to engaging in sexual intercourse with both of them but claimed that it was consensual. 7/23/19 RP 696-701, 727-30. After both incidents, Perry argued with each girl about their cell phone and

eventually drove away from the scene with their cell phone still in his possession. 7/23/19 RP 702-08, 733.

4. SANE Examination.

Ms. Gakpe called 911 and an ambulance took T.G. to the emergency room. 7/18/19 RP 443. When T.G. arrived at the hospital, she was examined by SANE Shelly Pollock. 7/23/19 RP 641. T.G. was “caught off guard” when she learned that Ms. Pollock was going to swab her for DNA. 7/18/19 RP 444.

Before Ms. Pollock testified, Perry brought a motion to bar her from testifying to any hearsay statements made by T.G. during the examination. 7/22/19 RP 582-93. Perry based his objection on a consent waiver signed by the victim, which he claimed showed that the primary purpose of the exam was for the collection of evidence. 7/22/19 RP 584-85. The trial court noted that the form states, “I, [T.G.], have come to Mary Bridge for a forensic evaluation to be performed by a forensic nurse examiner and to include documentation of the assault, collection of evidence...”, but that it goes on to include “nursing care and treatment by a MultiCare Health System forensic nurse examiner.” 7/23/19 RP 610; *See* Trial Ex. 31 at 155. The court explained that although Ms. Pollock had special training in forensics, she is a nurse and a medical care provider. 7/23/19 RP 610. The court determined that there was a dual purpose to the examination of T.G.

that included both medical and forensic ends. 7/23/19 RP 611. The court admitted T.G.'s statements under ER 803(a)(4) finding that the dual forensic and medical purpose of the exam was reasonably pertinent to diagnosis and treatment. 7/23/19 RP 609-614.

Ms. Pollock was a registered nurse for fifteen years before she worked as a SANE nurse for three years. 7/23/19 RP 641-42. She conducted a full medical examination of T.G. in the emergency room in addition to the forensic swabbing. 7/23/19 RP 642, 646. Before the examination began, Ms. Pollock explained the process, what the examination entails, and obtained T.G.'s consent. 7/23/19 RP 647; *See* Ex. 31 at 155. She then began the examination by asking T.G. questions to obtain a verbatim narrative of the incident. 7/23/19 RP 648-49. Ms. Pollock explained that this narrative guides the steps she takes in her examination and what she is looking for. 7/23/19 RP 648. She recounted T.G.'s responses to the jury, which were consistent with T.G.'s testimony at trial. *See* 7/17/19 RP 382-477; 7/23/19 RP 649-55.

Ms. Pollock went through the "strangulation protocol" after learning that T.G. had been strangled. 7/23/19 RP 653-54; Ex. 31 at 146. This protocol exists because strangulation injuries can become more serious even without signs of a current injury. 7/23/19 RP 654. Ms. Pollock asked T.G. medical follow up questions about whether or not she had pain or other

related symptoms. 7/23/19 RP 655. T.G. described a loss of consciousness at the time followed by some loss of memory as well as pain and tenderness in her neck area. 7/23/19 RP 654-55. Based on T.G.'s responses, Ms. Pollock went through a safety plan and an abuse assessment. *See* Ex. 31 at 146.

Ms. Pollock conducted a head to toe medical examination of T.G. to check for any injuries. 7/23/19 RP 655. She noted pain to the front of T.G.'s neck. 7/23/19 RP 656. She did not see any bruising or redness but noted that is not uncommon following a strangulation incident. *Id.*

Based on T.G.'s disclosure of vaginal penetration, Ms. Pollock conducted a visual examination of T.G.'s vagina and did not observe any obvious signs of injury. 7/23/19 RP 656-57. Ms. Pollock did not do an interior examination of the vagina with a speculum, however, because T.G. was under 18. *Id.* Ms. Pollock continued her medical analysis by conducting an HIV risk assessment. *See* Ex. 31 at 154. In her final treatment recommendations, Ms. Pollock referred T.G. for follow up with a crisis intervention agency, a social worker for counseling, and a pediatrician for additional medical follow up. *Id.*

The DNA from the swabs were sent to the Washington State Patrol Crime Laboratory where they were analyzed by forensic scientist Jennifer Hayden. 7/22/19 RP 524-27. She found semen on the vaginal, perineal

vulvar, and perianal swabs. 7/22/19 RP 527. She compared these samples to the DNA database, which came back with a presumptive match to Perry. 7/22/19 RP 530. Ms. Hayden compared a reference sample from Perry to the semen found on the swabs from T.G.'s rape kit. 7/22/19 RP 533; 7/23/19 RP 630. It was a match with only a one in 780 decillion probability of error. 7/22/19 RP 533.

IV. ARGUMENT

A. The trial court did not abuse its discretion in admitting evidence of a markedly and substantially similar rape Perry committed against another fifteen-year-old girl.

Perry argues that the trial court committed reversible error by admitting testimony of his prior sexual misconduct against C.B. Br. of App. at 1. Contrary to Perry's argument, C.B.'s testimony was not admitted nor used as "propensity" evidence to prove Perry's character in order to show action in conformity therewith. Rather, the prior misconduct was admitted as evidence of the common plan or scheme Perry used to isolate and rape teenage girls. The trial court's decision to admit the testimony of C.B. under Evidence Rule (ER) 404(b) is reviewed under an abuse of discretion standard because the trial court properly analyzed and applied the evidentiary rule. The trial court did not abuse its discretion in admitting the prior misconduct because the crimes Perry committed against C.B. and T.G.

bore markedly and substantially similar features that demonstrated a common scheme or plan.

1. The trial court's decision to admit ER 404(b) evidence is reviewed under an abuse of discretion standard.

A trial court's interpretation of an evidentiary rule such as ER 404(b) is a question of law appellate courts review de novo. *State v. Arredondo*, 188 Wn. 2d 244, 256, 394 P.3d 348 (2017). But as long as the trial court interprets the rule correctly, the appellate court reviews the ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* The appellant bears the burden of proving the trial court abused its discretion. *State v. Ashley*, 186 Wn.2d 32, 39, 375 P.3d 673 (2016). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013); see *Arredondo*, 188 Wn.2d at 256 (finding an abuse of discretion only when "no reasonable judge would have ruled as the trial court did.").

When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists if the evidence is sufficient to persuade a fair-minded person of the truth of the finding. *Id.*; *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776

(2018). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *Id.* at 874-75.

“It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal.” *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000); *Scherf*, 192 Wn.2d at 370; *State v. Betencourt*, 190 Wn.2d 357, 363, 413 P.3d 566 (2018). Failure to assign error to a finding of fact entered by the trial court precludes appellate review of that fact and renders it binding on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *but see SentinelC3, Inc. v. Hunt*, 181 Wn. 2d 127, 138, 331 P.3d 40 (2014) (noting a “technical failure to assign error on appeal does not waive an issue that is clearly argued in the briefs.”) Perry does not assign error to any of the findings of fact making them verities upon appeal. *See Br. of App.* at 1.

The trial court lists ten findings of fact under conclusion of law number three. Findings of fact erroneously labeled as a conclusion of law are still treated as findings of fact by the reviewing court. *Scott’s Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013); *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Perry argues against the weight that the court gave some of these

findings of fact, but he failed to formally assign error to any of them. *Br. of App.* at 17-19. Since the findings of fact are uncontested, they are verities on appeal. *Scherf*, 192 Wn.2d at 370. Substantial evidence supports the findings of fact and those findings support the court's conclusions of law.

Washington courts use a four-part test to determine if prior misconduct is admissible under ER 404(b). To admit evidence of prior misconduct, "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012)).

Here, the trial court properly analyzed this four-part test when it determined that the evidence was admissible under ER 404(b). First, the court determined by a preponderance of the evidence that Perry committed the alleged misconduct against C.B. 6/10/19 RP 52; CP 179. Because Perry does not dispute this finding, it is a verity on appeal. *See Scherf*, 192 Wn.2d at 370. Second, the court outlined the purpose of admitting the evidence including: (1) proof of Perry's common scheme or plan, (2) proof of the elements of forcible compulsion and Perry's intent to assault T.G, and (3) evidence to negate Perry's claim that the sexual acts were consensual.

6/10/19 RP 52; CP 179-80. Third, the court found that these purposes were all highly probative. 6/10/19 RP 52-55; CP 180. Lastly, the court weighed the probative value against the potential for prejudice against Perry and found that the “probative value of the testimony outweigh[ed] any potential prejudice.” 6/10/19 RP 55; CP 180-81.

Perry does not allege that the trial court misinterpreted ER 404(b). Rather, he appears to argue that the trial court’s factual findings do not support its legal conclusion that these two incidents constituted a common plan or scheme. *See* Br. of App. 17-19. Therefore, since the court properly interpreted and analyzed the evidentiary rule, its decision is reviewed for abuse of discretion. Perry fails to meet this high burden of demonstrating that the trial court abused its discretion in finding that the sexual assaults of C.B. and T.G. were sufficiently similar to demonstrate the manifestation of a common plan or scheme.

2. The acts Perry committed against C.B. and T.G. exhibited “markedly and substantially similar features” that demonstrated the manifestation of a general scheme Perry used to isolate and rape teenage girls.

Under ER 404(b), a court is prohibited from admitting “[e]vidence of other crimes, wrongs, acts ... to prove the character of a person in order to show action in conformity therewith.” Evidence of prior misconduct is presumptively inadmissible. *Gresham*, 173 Wn.2d at 421. However, the rule

allows such evidence to be admitted for other purposes, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). These are not limited “exceptions” to the rule; instead, there is one improper purpose and an undefined number of proper purposes. ER 404(b); *Gresham*, 173 Wn.2d at 421; *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011) (finding that the “list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.”). The court did not admit the testimony of C.B. to prove Perry’s character in order to show action in conformity therewith. Rather, the court admitted C.B.’s testimony as evidence of the common scheme Perry used to isolate and rape teenage girls, which was relevant to prove the elements of forcible compulsion and Perry’s intent to assault T.G. as well as to rebut his claim of consent. 5/28/19 RP 14.

ER 404(b) specifically enumerates that evidence of prior misconduct may be admissible to show the existence of a plan. *See Gresham*, 173 Wn.2d at 421. There are two instances when evidence of misconduct is admissible to prove a common scheme or plan. *Id.* at 421-22. The first is when several crimes constitute part of a plan in which each crime is a piece of a larger plan. *Id.* at 422. This is inapplicable here. The second type occurs when an individual has developed a plan and has again put that particular plan into action. *Id.* Evidence of this second type is admissible if

the prior misconduct and the charged crime demonstrate sufficient similarities that the two acts are naturally explained as caused by a general plan where each act is an individual manifestation of that general plan. *Id.*

The similarity between the prior bad act and the charged offense must be substantial. *State v. DeVincentis*, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). Although mere similarity in results is insufficient, the existence of a plan may be proved circumstantially through common features that signify that the various acts are naturally explained by a general plan with multiple manifestations. *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995). The State is not required to prove that Perry used a novel or unique method of committing the crime; rather substantial similarities is sufficient. *DeVincentis*, 150 Wn.2d at 19-21; *Gresham*, 173 Wn.2d at 422.

Here, the trial court outlined ten different similarities connecting the acts Perry committed against C.B. and T.G. to a common scheme or plan of how he contacted, isolated, and raped teenage girls. Perry fails to show that the court's analysis is manifestly unreasonable or based on untenable grounds. The similarities between the two acts in the present case are greater than the similarities between prior misconduct upheld as a common scheme or plan in *State v. Gresham*.⁵ In *Gresham*, the Court upheld admission of

⁵ *State v. Gresham* is a consolidation of two separate cases: *State v. Gresham* and *State v. Scherner*. 173 Wn.2d at 413. The analysis relevant to this case is the legal reasoning of *Scherner*.

four separate accounts of prior child molestation. *Id.* at 405. The Court found that the prior misconduct bore markedly similar features to the charged crime because the defendant took a trip with the girls' family, approached the girls while the adults were asleep, and fondled the girls' genitals. *Id.* at 422. Much like *Gresham*, Perry had a common scheme for how to initiate contact with his victims, isolate them from their friends and family, and then forcibly rape them.

The few differences between C.B. and T.G.'s accounts do not diminish the clarity of the common scheme Perry used to isolate and rape teenage girls. In *Gresham*, the Court recognized that the presence of multiple differences including the sexual act (molestation versus oral sex), did not "dissuade a reasonable mind from finding that the instances are naturally to be explained as 'individual manifestations' of the same plan." *Id.* at 423. Similarly, the fact that Perry forced T.G. to engage in oral sex, but there was no indication of oral sex with C.B., does not alter the many similarities that reveal the common scheme Perry used to rape T.G. and C.B. The focus of the Court's analysis should be on "the *similarity* between the prior acts and the charged crime rather than the *uniqueness* of the individual acts." *DeVincentis*, 150 Wn.2d at 19 (emphasis in original). There is sufficient similarity between the two acts if the various acts are naturally

explained by a general plan in which each act is an individual manifestation. *Id.* at 21; *State v. Lough*, 125 Wn.2d at 856.

The comparison of the accounts of T.G. and C.B. reveal a number of additional similarities that are not present in *Gresham* that further support the court’s decision to admit them as evidence of a common plan or scheme. First, Perry used the same physical force—strangulation—to secure the compliance of his victims. CP 180; 7/18/19 RP 424; 7/22/19 RP 556. There was no pattern of physical force in *Gresham*. Second, Perry exhibited a pattern of manipulation in how he coaxed his victims to let him bring them food. CP 180. There was no pattern of grooming or manipulation in *Gresham*. Additionally, Perry appeared to have a very specific target age range of his victims—fifteen-year-old girls. CP 180. Meanwhile, the victims in *Gresham* ranged from four to thirteen years old. *Gresham*, 173 Wn.2d. at 414-17. Each of these similarities further reveal that Perry utilized a common scheme to identify, contact, and rape his victims.

Further, the proximity between the sexual assault of C.B. and T.G. supports the admission of Perry’s prior sexual misconduct. The Court in *Gresham* recognized that “closeness in time of the prior acts to the acts charged” is an important factor in determining whether the prior misconduct should be admitted. *Id.* at 426 n.3. The Court upheld the admission of prior misconduct even though some instances occurred nearly fifteen years

before the current charge. *Id.* at 415. Meanwhile, Perry raped C.B. only three weeks after he raped T.G. 7/18/19 RP 388; 7/22/19 RP 551.

Perry's reliance on *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984), is misplaced. In *Harris*, the only similarities between the two instances were that the victims entered the defendant's vehicle willingly and the defendant drove them to a location where the rapes occurred. *Id.* at 751. The two incidents contained a number of extremely divergent facts that undermined any argument they utilized a common plan or scheme. In the first incident, the two defendants took the victim to one of their houses, had sex with her throughout the night while holding her down, and refused to let her leave until the next morning. *Id.* at 747. In the second incident, they drove to a dead-end street, forced the victim into the back seat, raped and performed "other indignities," and then released her in a nearby residential area. *Id.* at 748. Therefore, the location, duration, method and sexual acts were all different. Further, the individuals involved in the crime were not the same. In the first incident, the victim was raped by two men: Gibbs and Harris. *Id.* at 747. In the second incident, the victim was raped by three men: Gibbs, Harris, and an unidentified third male. *Id.* at 748. In other words, there was no common plan other than the fact that Gibbs and Harris raped women together.

That fact pattern is simply not comparable to the present case where the court listed ten distinct and specific similarities that lay out a clear general plan Perry used to isolate and rape teenage girls. The rapes committed by Gibbs and Harris were opportunistic and unplanned. They took place in the spur of the moment: Once, after they dropped off another couple and found themselves alone in a car with a woman, and again, when a woman was fleeing a fight she got into at a bar. *Id.* Perry, on the other hand, sought out teenage girls over Snapchat using made up names to hide his identity. CP 179; 7/18/19 RP 384; Motion Ex. 1 at 5.

Further, Gibbs and Harris did not have a distinct method for how they selected or isolated their victims. Perry, on the other hand, used a ruse where he offered to bring them food late at night in order to isolate them in his vehicle. CP 180; 7/18/19 RP 392-93; Motion Ex. 1 at 5. While there was no noted similarity between the victims of Gibbs and Harris other than that they were female, Perry specifically sought out fifteen-year-old girls who are “susceptible to online manipulation and curiosity about the opposite sex.” CP 180; RP 394; Motion Ex. 1 at 19.

Unlike *Harris*, Perry had a distinct method for how he committed the sexual acts once he isolated his victims. In each instance, he started by grabbing and touching the two girls without their permission. 7/18/19 RP 417; 7/22/19 RP 561. When the girls mentioned their age, he ignored them

and continued to grab and touch them. 7/18/19 RP 417-20; 7/22/19 RP 556. Once the girls began to physically resist, he strangled them to the point they struggled to breath. 7/18/19 RP 424; 7/22/19 RP 556. He continued to strangle them while he forced his penis into their vaginas. 7/18/19 RP 425-26; 7/22/19 RP 562.

Further, Perry exhibited a plan for how he would not get caught committing the crimes, which was not present in *Harris*. While it is unclear whether Perry intentionally separated C.B. from her phone before the rape as he did with T.G., both girls could not call for help when he raped them. 7/18/19 RP 428; Motion Ex. 1 at 2 of 8. After he raped them, Perry kept the phones of both of the girls, which meant that they could not call the police while he drove away. 7/18/19 RP 433-34; 7/22/19 RP 565. Each girl tried to get her phone back but eventually had to flee Perry's car as he drove off with them still half-way in the vehicle. 7/18/19 RP 433-34; 7/22/19 RP 566.

Perry attempts to combat these similarities by arguing that the trial court "mistakenly found similarities where none existed." This argument is not supported by the record. Perry, for example, argues that he did not "hide his identity" because both T.G. and C.B. could see photos and messages he posted to his account. Br. of App. at 18. But the record indicates that Perry lied to them about his age and identity. Perry told T.G. that he was only 22 or 23 years old even though he was 27. 7/18/19 RP 417; 7/23/19 RP 678.

He used the screenname “Free Game AP” to hide his true identity. 7/18/19 RP 384. Perry’s claim that these screennames are common does not carry weight considering Perry simultaneously used a second screen name—“Miguel”—to pursue C.B. Motion Ex. 1 at 5.

With C.B., Perry used a photograph that made him look like he was only seventeen years old, used the screen name “Miguel,” and claimed that he knew C.B. when she attended Ford Middle School. Motion Ex. 1 at 5; 7/22/19 RP 581. Perry even showed C.B. a middle school yearbook photo as proof that he knew her from school and wrote messages that only people from her middle school would know. Motion Ex. 1 at 5; 7/22/19 RP 554. Perry was convincing enough that C.B. believed that he was a person she knew from middle school named Miguel. 7/22/19 RP 558. Each of these facts demonstrate that there was substantial evidence supporting the trial court’s conclusion that Perry specifically sought these girls out and hid his identity in order to groom them and gain their confidence. CP 179.

Similarly, Perry’s argument—that his “use of food is more coincidental than a scheme on Perry’s part” because “both girls independently posted about being hungry”—fails to acknowledge the complete record. Br. of App. at 18. He neglects the fact that he commented on each of the girls’ Snapchat accounts for months in order to gain their confidence and seek out an opportunity to gain access to them. 7/18/19 RP

391-92; Motion Exhibit 1 at 5; 7/22/19 RP 554. Perry argues that it is only coincidental because the girls independently posted about being hungry. Br. of App. at 18. Perry, however, initiated contact and used their messages as an opportunity to contact, isolate, and rape them. 7/18/19 RP 392-93; 7/22/19 RP 555-57. He drove long distances to bring them food. 7/23/19 RP 688, 718. And by his own admission, he spent a significant amount of time talking to each girl before gaining their trust and obtaining their addresses. 7/23/19 RP 781. There is substantial evidence to support the court's conclusion that Perry used "food as an excuse to meet the girls or gain their friendship or trust." CP 180.

There is substantial evidence to support each of the court's ten listed similarities between Perry's sexual misconduct against C.B. and the charges involving T.G. The close proximity of the timing of the two incidents in combination with the immense number of marked similarities demonstrates that the trial court did not abuse its discretion in finding that Perry utilized a common scheme for how he contacted, isolated, and forcibly raped teenage girls.

Perry's argument that the evidence improperly invited the jury to decide the case on propensity evidence is not supported by the record. The court provided an oral limiting instruction drafted by defense counsel immediately before C.B. testified. 7/22/19 RP 548-49. Additionally, the

court provided a written jury instruction with the added protective language—“The evidence about the defendant’s alleged actions against C.B. have not been admitted, and cannot be considered, to prove the character of the defendant in order to show that he acted in conformity therewith.” CP 133. Courts presume that jurors follow the judge’s instructions. *State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016). There is no evidence to support the notion that the jurors did not follow these limiting instructions.

3. The court properly admitted evidence of Perry’s prior sexual misconduct to rebut his claim that the sexual intercourse was consensual.

Evidence of Perry’s prior sexual misconduct is not only relevant to show he used a common scheme, but also to rebut his claim that the sexual intercourse was consensual. Prior acts of misconduct may be admissible to rebut a defendant’s claim of consent. *See Ashley*, 186 Wn.2d at 42 (holding that prior incidents of domestic violence were admissible to establish lack of consent as an element of unlawful imprisonment). Washington courts have specifically found this applicable to cases involving prior acts of sexual misconduct. *State v. Momah*, 141 Wn. App. 705, 716, 171 P.3d 1064 (2007) (finding that prior acts of sexual misconduct were relevant and admissible to rebut the defendant’s claim that the sexual intercourse was consensual); *State v. Williams*, 156 Wn. App. 482, 492, 234 P.3d 1174

(2010) (finding that admission of a prior rape conviction was “necessary to help rebut the defense of consent.”). In the present case, Perry affirmatively brought a defense of consent. CP 246-48. Perry then testified that he engaged in consensual intercourse with T.G. 7/24/19 RP 696-701. Perry’s non-consensual acts with C.B. under similar circumstances were relevant to rebut Perry’s defense that T.G. consented to have sex with him. *See Momah*, 141 Wn. App. at 716. The trial court did not abuse its discretion in admitting this evidence.

B. The trial court did not abuse its discretion in admitting T.G.’s statements to the SANE nurse where the statements were reasonably pertinent to medical diagnosis and treatment.

An out-of-court statement offered to prove the truth of the matter is admissible at trial if it is a statement “made for purposes of medical diagnosis or treatment.” ER 803(a)(4). Medical diagnosis and treatment includes both physical and psychological treatment. *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). The medical treatment exception applies to any statement that is reasonably pertinent to diagnosis or treatment. *Id.*; ER 803(a)(4). A trial court’s decision to admit testimony under this exception is reviewed under an abuse of discretion standard. *Woods*, 143 Wn.2d at 602.

In order to establish a statement is reasonably pertinent to diagnosis or treatment, (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004). The court did not abuse its discretion by admitting the statements T.G. made to the sexual assault examiner under the medical hearsay exception.

1. T.G. provided statements to Nurse Pollock to promote treatment following a violent rape.

In order to be admitted under the medical diagnosis exception to hearsay, a statement to a treatment provider need not be solely related to medical diagnosis or treatment; it may be for "a combination of purposes," including medical and forensic purposes. *State v. Williams*, 137 Wn. App. 736, 746-47, 154 P.3d 322 (2007); *State v. Urbina*, No. 76890-5-I, 2018 WL 5982983 at * 4 (Wash. Ct. App. Nov. 13, 2018), *review denied*, 192 Wn.2d 1028, 435 P.3d 284 (2019).⁶ There is no requirement that medical treatment be the primary purpose for the declarant's statements. In *Williams*, the Court upheld the admission of statements under the medical

⁶ *Urbina* is an unpublished opinion that has no precedential value and is not binding on any court. But unpublished opinions filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

diagnosis exception even after the rape victim stated that she went to the hospital to “gather evidence about what had happened” and that she did not feel like she needed “any specific medical treatment.” 137 Wn. App. at 746-47. The Court found that that the trial court did not abuse its discretion in admitting the statements noting that the rape victim did not state that her *only* purpose for going to the hospital was to gather evidence. *Id.* at 747.

The record reflects that T.G. made her statements to Nurse Pollock in order to obtain medical treatment. T.G. was transported to the hospital emergency room in an ambulance. 7/18/19 RP 443. Both an ambulance and a hospital setting convey to a fifteen-year-old girl that she is there to receive medical treatment. *See State v. Kilgore*, 107 Wn. App. 160, 183, 26 P.3d 308 (2001) (finding that a court can assume a treatment motive when an 11-year-old makes statements while at a hospital). When asked if she knew why she was going to the hospital, T.G. responded: “I didn’t actually know. I mean, I knew I was going there, but I didn’t know I was going there to get swabbed and stuff. I did not know that. That caught me off guard.” 7/18/19 RP 444. Although T.G. may have learned at some point that there was a secondary purpose for the examination, she started out believing that she was there for medical treatment.

Furthermore, the reliability of T.G.’s statements are marked by other indicia of reliability such as the blood covered washcloth that supports a

violent sexual encounter, the testimony of C.B. showing a common scheme of forcible rape, and the DNA evidence proving semen was located in C.B.'s vagina. 7/18/19 RP 402; Trial Ex. 2; 7/22/19 RP 533, 548-81. It is reasonable to conclude that T.G. was seeking medical treatment considering she had just been violently raped to the point that she had to use a washcloth to wipe blood off of her vagina.

Once at the hospital, T.G. spoke to a number of nurses and doctors including the SANE nurse. T.G. could not differentiate her conversation with Ms. Pollock and what she said to the other doctors and nurses. *See* 7/18/19 RP 445. But she was able to distinguish between talking to the medical personnel and talking to the police officer about what happened to her. *Id.* This implies that, in her mind, T.G. saw the SANE nurse as any other medical personnel who was there to provide medical care.

Before the SANE examination began, Nurse Pollock went over the consent form with T.G. The consent form is titled "Consent for Forensic Evaluation *and Treatment.*" Trial Ex. 31 at 155 (emphasis added) The first paragraph of the form states that the evaluation will include "documentation of the assault, collection of evidence, *nursing care and treatment* by a MultiCare Health System Forensic Nurse Examiner. *Id.* (emphasis added) The section on medical care notes that the evaluation does not include "*general* medical care," but it then continues to detail that the evaluation

may result in medications being prescribed including “immunizations, anti-nausea medications, emergency contraception and medications to treat sexually transmitted infections.” *Id.* (emphasis added) Following the SANE exam, T.G. then signed a discharge form that noted she was provided medication, emergency contraception, and recommended post-assault care. *Id.* at 156. Although there was a dual forensic purpose to this examination, it was also reasonably pertinent to medical treatment—physical and psychological. Therefore, the court did not abuse its discretion in admitting the statements T.G. made to Nurse Pollock.

2. Nurse Pollock reasonably relied upon T.G.’s statements to enable her and other medical staff to provide proper medical care.

The SANE nurse and other medical staff reasonably relied upon T.G.’s statements to provide comprehensive medical care. The medical diagnosis exception to hearsay is not limited to statements regarding the patient’s physical symptoms but extends to psychological and trauma treatment as well. In *State v. Woods*, for example, the Court upheld the admission of a child’s statements regarding the details of a sexual assault disclosure that went far beyond the physical injuries because the physician needed to know what happened to the child from the child’s perspective in order to arrange counseling services. 143 Wn.2d at 602.

Similarly, Washington courts have held that in domestic violence and sexual abuse cases, a victim's statements regarding the identity of a closely related perpetrator is admissible under ER 803(a)(4) "because part of reasonable treatment and therapy is to prevent recurrence and future injury." *See Williams*, 137 Wn. App. at 746; *see also State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998); *see also State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521 (1995) (identity is admissible where the abuser has an "intimate relationship" with the victim). Under this same line of reasoning, courts have held that the exception is not limited to medical doctors, but extends to nurses, therapists and social workers. *State v. Woods*, 143 Wn.2d at 601-02; *Dependency of M.P.*, 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994) (holding that statements made to a sexual abuse therapist were admissible under ER 803(a)(4)); *State v. Sims*, 77 Wn. App. at 239-40 (medical hearsay exception extends to hospital social workers).

Washington courts have long held that the medical diagnosis exception to the hearsay rule extends to nurses performing sexual assault examinations. *See e.g., State v. Woods*, 142 Wn.2d 601-02; *State v. Williams*, 137 Wn. App. at 746-47; *Urbina*, 2018 WL 5982983 at *4-5. This extends to federal case law whose medical hearsay exception also utilizes the "reasonably pertinent to medical diagnosis or treatment" standard. Fed. R. Evid. 803(4). Although not directly reviewed by the United States

Supreme Court, the 6th, 9th and 10th circuits have all found that statements made during a sexual assault examination may be admitted under the medical hearsay exception. *United States v. Kootswatewa*, 893 F.3d 1127, 1133-34 (9th Cir. 2018); *United States v. Underwood*, 859 F.3d 386, 394-95 (6th Cir. 2017); *United States v. Durham*, 902 F.3d 1180, 1234 (10th Cir. 2018).

SANE nurses are specially trained medical professionals who provide medical and psychological care to particularly vulnerable patients:

The medical forensic sexual assault examination is first of all a medical examination focused on the patient's immediate and long-term 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.

54 Judges' Journal 16 (2015). SANE examinations serve multiple purposes, only one of which is forensic in nature. Alena Allen, Rape Messaging, 87 Fordham L. Rev. 1033, 1078 (2018) ("The primary mission of a SANE program is to meet the immediate needs of the sexual assault victim by providing compassionate, culturally sensitive, and comprehensive forensic evaluation and treatment by a trained professional nurse."). One of the

primary purposes of the SANE program has been to improve the health care outcomes for rape victims. *Id.*

Proper medical treatment cannot be given without input from the patient about what happened to them.

“A lab test is one tool among many that a health care provider uses to form a diagnosis. Other tools include the history of present illness, family history, social history, and past medical history, as well as findings from a physical exam. Only after the provider has used these tools to make a diagnosis can he or she inform the patient about possible treatments and the risks associated with each.”

Gomez v. Sauerwein, 180 Wn.2d 610, 620, 331 P.3d 19 (2014). Likewise, Ms. Pollock could not possibly be expected to provide T.G. proper medical care without first obtaining a history from her of what took place. A history of present illness as provided to a nurse performing a sexual assault examination naturally includes statements that are not directly tied to medical treatment of physical injuries. It ties into emotional and psychological trauma as well.

Statements that are not directly tied to treatment of physical injuries are not excluded from the medical hearsay exception. In *State v. Woods*, the Court upheld the introduction of statements from the child victim regarding the context of the assault such as the suspect telling her “if you don’t do what I say, I’m going—you are going to end up looking just like your friend Venus” as well as statements regarding other victims such as “I heard the

bat swing and heard it hit Telisha's head." 143 Wn.2d at 601. These statements are not directly tied to treating any physical injury of the victim, but the Court held that the definition of "medical treatment" is far broader than just physical injuries and included potential psychological treatment as well. *Id.* at 602.

Much like *State v. Woods*, the treatment provided to T.G. extended beyond the treatment of simple physical injuries. Treatment involving alleged sexual abuse will necessarily contain a trauma element. This was the case with T.G. who described coming home and just staring at the ground because she felt numb as if there was "nobody really in [her]." 7/18/19 RP 438. The entire context of her account was necessary for the medical staff to provide comprehensive medical care, including the mental and psychological trauma she endured. Indeed, the aftercare treatment plan recommended by Ms. Pollock included counseling/social worker services, a crisis intervention agency, and medical follow up with her pediatrician. Trial Ex. 31 at 154.

The vast majority of the sexual assault examination was directly tied to medical care provided by either Ms. Pollock or follow up from the emergency room doctor. For example, T.G. described the various sexual acts including (1) licking/biting her neck and breast, (2) forced oral sex, and (3) vaginal penile sex. Trial Ex. 31 at 143; 7/23/19 RP 649. Ms. Pollock

followed up with questions regarding whether there was penetration and ejaculation and whether or not the suspect used a condom. Trial Ex. 31 at 145. 7/23/19 RP 652. These questions are all tied to the potential treatment of sexually transmitted diseases and pregnancy.

Ms. Pollock opted not to do a full genital exam of T.G. due to her age and the trauma she endured, but she did perform a head to toe visual examination for injury as well as an HIV risk assessment based on T.G.'s disclosures. Trial Ex. 31 at 154; 7/23/19 RP 656-67. The fact that she did not find any "obvious" physical injury during the visual examination does not negate that one of the main purposes of head to toe physical examination is to check for any potential injuries that may require medical treatment. If Ms. Pollock had located a severe injury to T.G.'s genitals, for example, there is no question that would have resulted in additional medical treatment either by her or other medical professionals.

Perry argues that Ms. Pollock testified that it is not her job to treat or diagnose the patient. Br. of App. at 24. This misstates the record. Ms. Pollock clarified that it is not her job to diagnose, but she does conduct treatment and described T.G. as her patient. 7/23/19 RP 667. She testified that doctors and nurses follow up with the patient to treat any physical injuries and prescribe medications based on what they learn during the SANE examination. 7/23/19 RP 668.

Ms. Pollock conducted further medical examinations based upon the answers that T.G. provided, which further proves the medical purpose of the examination. Based on T.G.'s disclosure of strangulation, for example, Ms. Pollock went through an additional strangulation protocol. 7/23/19 RP 653-54; Trial Ex. 31 at 146. According to Ms. Pollock, this follow up medical examination is essential “[b]ecause strangulation, even if they don’t present [symptoms] at the moment, can progress into something more serious.” 7/23/19 RP 654.

Ms. Pollock reasonably relied upon T.G.'s statements to guide her and other medical staff in their determination of how to provide comprehensive medical care to both T.G.'s potential physical and emotional injuries. Therefore, T.G.'s statements to Ms. Pollock were reasonably related to medical diagnosis and treatment. The court did not abuse its discretion in admitting these statements.

3. Any statements that were improperly admitted are harmless in the context of the overwhelming evidence of Perry's guilt.

As argued above, the trial court properly admitted the statements T.G. made to Ms. Pollock, but even if this Court finds that they were improperly admitted, any error is harmless. An error is harmless if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. A.M.*, 194 Wn.2d 33, 41, 448

P.3d 35 (2019) (internal quotation marks omitted). The State has the burden to prove beyond a reasonable doubt that an error is harmless. *State v. Delbosque*, 195 Wn.2d 106, 129, 456 P.3d 806 (2020). An error is not harmless, if “there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.” *Id.* T.G.’s statements made to Ms. Pollock did not add any new information considering that T.G. testified at trial and was subject to cross examination regarding the exact same subject matter. Further, the other evidence against Perry was so overwhelming that there is not a reasonable probability that the outcome of the trial would have been different without those statements.

Admission of improper testimony is not prejudicial error if similar evidence was admitted earlier without objection. *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999). Courts have repeatedly found the improper admission of a victim’s hearsay disclosure to be harmless error when it is consistent with the victim’s testimony on the stand. *See, e.g., State v. Williams*, 137 Wn. App. at 747; *State v. Dixon*, 37 Wn. App. 867, 874-75, 684 P.2d 725 (1984).

Further, when the victim is subject to cross-examination, it diminishes, if not extinguishes, the type of prejudice that might result from the admission of hearsay statements. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 293, 263 P.3d 1257 (2011). This is because jurors are the sole

judges of credibility. *State v. Kirkman*, 159 Wn.2d 918, 937 155 P.3d 125 (2007); *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (4th Ed. 2016); CP 121. And appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014); *Ramirez-Estevez*, 164 Wn. App. at 294.

Here, T.G.'s statements to Ms. Pollock did not reveal any details that T.G. did not testify to on the stand. Therefore, those statements added little, if any, evidentiary value to the State's case. If any statement was improperly admitted it would not have changed the result of the trial.

The limited evidentiary value of the hearsay statements made to Nurse Pollock must also be weighed against the overwhelming evidence of Perry's guilt. If the untainted evidence against a defendant is so overwhelming that it necessarily leads to a finding of guilt, then admission of the improper evidence is harmless. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011).

Even if the court excluded all of the statements made to Nurse Pollock, the remaining "untainted" evidence of Perry's guilt would still be overwhelming. The DNA evidence confirms by a ratio of one in 780 decillion that Perry had sexual intercourse with T.G. 7/22/19 RP 533. The only remaining question is whether the sexual intercourse was forced or

consensual. T.G. provided compelling testimony regarding how Perry slowly manipulated her into letting her guard down to the point that she was alone in a car with a total stranger despite her best judgment. 7/18/19 392-94, 416. T.G. vividly detailed how she tried to fight back, but Perry strangled her to the point that her vision started going dark. 7/18/19 RP 429. T.G. described making multiple attempts to leave the car, but Perry shut the door and refused to let her leave because he was “in charge.” 7/18/19 RP 422-23. And Perry took her phone when she tried to call for help. 7/18/19 RP 428. She had nowhere to go and no ability to escape. Based on her testimony, there is no question that this amount of force constitutes forcible compulsion.

The jury did not convict Perry on T.G.’s testimony alone. T.G.’s testimony was corroborated by Perry’s second victim, C.B., who described how Perry used a similar scheme to rape her including the same method of initial contact, the same ruse of bringing food, and the same force to subdue her resistance—strangulation. CP 178-81. All of the details were the same even though there is no indication that T.G. and C.B. had ever met or spoken to one another. Additionally, T.G.’s account of forcible compulsion is supported by her disclosure to her mother the next morning, the bloody washcloth she used to clean herself off with, and the bruising her mother saw on her neck. 7/18/19 RP 438, 484, 487; Trial Ex. 2A.

Further, the jury had multiple other avenues for assessing T.G.'s credibility including her demeanor on the stand during cross examination, her mother's description of her depression in the days and weeks that followed, Perry's testimony regarding the night in question, Perry's admission that she immediately accused him of raping her, and Perry's admission that he took her cell phone from her before driving away from the scene. 7/18/19 RP 489; 7/23/19 RP 702, 708. The jurors are the sole judges of credibility and the court must defer to the jury on issues of credibility, conflicting testimony, and persuasiveness of the evidence. *Andy*, 182 Wn.2d at 303.

The jury had the opportunity to hear both T.G. and Perry testify about whether the sexual intercourse was forced or consensual. They had the opportunity to gauge their demeanor on the stand, the reasonableness of their statements in the context of the evidence, any bias they might have, and the quality of their memory. *See* WPIC 1.02; CP 121. They believed T.G. They convicted Perry because the evidence of his guilt was overwhelming. There is not a reasonable probability that the outcome of the trial would have been different had the court excluded T.G.'s statements to the SANE nurse.

V. CONCLUSION

For the foregoing reasons, the trial court did not abuse its discretion in admitting evidence of Perry's markedly and substantially similar sexual assault of another fifteen-year-old girl under ER 404(b). The court properly admitted T.G.'s statements during her sexual assault examination because they were reasonably pertinent to her diagnosis and treatment. Therefore, the State respectfully requests this Court affirm Perry's convictions.

RESPECTFULLY SUBMITTED this 26th day of June, 2020.

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06/26/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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