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NO. 96783-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RONALD DELESTER BURKE,

Respondent.

**BRIEF OF THE WASHINGTON ASSOCIATION OF
PROSECUTING ATTORNEYS AS AMICUS ON BEHALF OF THE
STATE OF WASHINGTON**

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, where a decision by the Court of Appeals would restrict the admissibility of an entire category of evidence – the use of statements made to nurses by patients being treated after a sexual assault – by establishing the contours of the Confrontation Clause of the Sixth Amendment. This brief will focus on the proper test for determining the admissibility of such statements.

B. ISSUE

Are statements made to specially trained nurses who examine patients reporting a history of sexual assault generally distinct from statements made to law enforcement, because the *primary* purpose of the nurse’s examination is to provide medical, emotional and psychological support, not to gather evidence?

C. FACTS

The facts were adequately set forth in the briefing in both the court of appeals and in this Court.

D. THE PRIMARY PURPOSE OF STATEMENTS TO A SEXUAL ASSAULT NURSE EXAMINER ARE TO FACILITATE MEDICAL TREATMENT AND, THUS, ARE GENERALLY NOT TESTIMONIAL UNDER THE CONFRONTATION CLAUSE

Burke and Amicus WACDL argue that because there is a forensic component to the work of a sexual assault nurse, statements made by a rape victim to that nurse are necessarily testimonial. The Court of Appeals concluded that the statements were testimonial because the nurse had dual purposes, independent funding was available for the examination, and because the victim had consented to release of records to law enforcement. WAPA respectfully suggests that these arguments should be rejected because they are inconsistent with Supreme Court precedent and would exclude important evidence that does not violate the Confrontation Clause. Statements to nurses are not like statements to law enforcement personnel. Specialized sexual assault nurses, like all medical providers, are primarily focused on treating patients. Their primary focus does not change simply because they have a secondary role. A statement to a medical provider should be considered testimonial only where the statement was gathered primarily for a law enforcement purpose.

This Court is familiar with the evolving Confrontation Clause analysis over the last 15 years, so the twists and turns of that analysis will not be repeated here. See State v. Scanlan, 193 Wn.2d 753, 761-66, 445

P.3d 960 (2019), cert. denied, 140 S. Ct. 834 (2020). This Court has also recognized that the most recent Confrontation Clause decision from the Supreme Court clarified that statements made to people who are not engaged in law enforcement are much less likely to be testimonial under the “primary purpose” test. Scanlan, 193 Wn.2d at 765. This Court embraced the holding that “[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers,” and the recognition that “the relationship between a student and his teacher is very different from that between a citizen and the police.” Scanlan, 193 Wn.2d at 765, *quoting* Ohio v. Clark, 576 U.S. 237, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015). See also Testimonial and Nontestimonial Hearsay: Clark’s “Primary Purpose” Test and Recent Developments, 30A Fed. Prac. & Proc. Evid. § 6371.9 (1st ed.) (“Statements made at the behest of law enforcement officers skew toward the testimonial while those to persons not in law enforcement, especially statements by young children to teachers, parents, and social workers, lean decidedly toward the nontestimonial.”).

These holdings are wholly consistent with the Supreme Court’s use of the term “primary” in the primary purpose test. Police officers are “principally charged with uncovering and prosecuting criminal behavior,”

so statements made to police are likely to be made primarily to fulfill that goal. Clark, at 2182. Statements to people not principally charged with uncovering and prosecuting criminal behavior will act according to their own purposes. Id.

The question in this case is whether the primacy of the medical responsibilities of a sexual assault nurse examiner is diminished by the presence of a forensic motive, such that all statements by a patient to the nurse become “testimonial.” The answer is “no.” The primary work of the nurse is to provide medical assistance. The existence of a subsidiary purpose does not make a statement testimonial.

The special nature of the nurse-patient relationship is already recognized under Washington law. RCW 5.62.020. Sexual assault nurse examiners are specially trained medical professionals trying to deliver 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). These examinations serve multiple purposes, only one of which is forensic in nature. Alena Allen, Rape Messaging, 87 Fordham L. Rev. 1033, 1078-79 (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 a comprehensive forensic evaluation and treatment by a trained professional nurse."); Chapman, Nursing the Truth: Developing a Framework for Admission of SANE (Sexual Assault Nurse Examiner) Testimony under the Medical Treatment Hearsay Exception and the Confrontation Clause, 50 Am. Crim. L. Rev. 277 (2013). Nurses are simply not akin to police officers or detectives.

This reasoning is consistent with Supreme Court decisions. In evaluating whether a 911 call was testimonial in Davis v. Washington, for instance, it was obvious to both the 911 caller and to responding police that a criminal investigation would likely occur after the police had arrived, because police have a duty to investigate and arrest perpetrators of domestic violence. 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). So, too, in Clark it was obvious that the teacher was going to report to police the physical abuse of her student, because she was a mandatory reporter. Clark, 135 S. Ct. at 2182-83. To this extent, there was a forensic component to inquiries made by the officers in Davis and

the teacher in Clark. Still, the forensic component of their work did not, standing alone, make a statement by officers or a teacher “testimonial,” because at the time the officers or the teacher recorded the victim’s statements, their primary purpose was non-forensic. The officers were attempting to diffuse an emergency and the teacher was attempting to protect her student from future abuse. As the Supreme Court said in Ohio v. Clark, “mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.” Clark, 135 S. Ct. at 2183.

So, too, it is with sexual assault nurse examiners. They are practicing nurses. Like teachers, they have a special relationship with those under their care. They work mostly in hospitals. Their primary duties are to treat and comfort patients seeking medical and emotional support. They need to know what happened to the patient in order to treat them. They must address both existing medical and emotional trauma and to help the patient avoid future or continuing trauma. They are trained to perform these tasks in the specialized circumstances surrounding victims of sexual abuse. These varied and compelling purposes are their primary purposes. The fact that there is a forensic component to their duties does not transform that subsidiary purpose into a primary purpose.

If this court were to rule that all statements to medical providers are inadmissible in court, medical providers will not stop asking rape victims what happened to them. They will continue asking because it is central to the patient's treatment. This alone demonstrates that the questioning is primarily medical, not forensic.

Recent appellate decisions from around the country are consistent with the view that sexual assault nurse examiners are primarily medical practitioners and only secondarily forensic evidence gatherers. For example, the Oklahoma Court of Criminal Appeals held that a victim's statements to a nurse were non-testimonial. Thompson v. State, 438 P.3d 373, 377 (Okla. Crim. App. 2019), cert. denied, 140 S. Ct. 171 (2019).

The court observed:

Sane nurses perform both a medical and investigatory function in almost every interaction with an alleged sexual assault victim. These nurses are specially trained and carry out the dual role of providing medical treatment to alleged victims of sexual assault and collecting evidence for possible use in a criminal prosecution. It is the duality of the SANE nurse's role that calls into question the primary purpose of the sexual assault examination.

Thompson, 438 P.3d at 377. Surveying recent decisions, the court noted that most courts had deemed statements to nurses to be non-testimonial, unless a law enforcement officer had some special involvement with the examination, or was present at the examination, or where there was no medical purpose served by the nurse's examination. Thompson, 438 P.3d

at 377. The court found the statements at issue in that case to be non-testimonial.

When the relevant circumstances are considered, the balance tips in favor of finding that A.T.'s statements—that Thompson raped her, penetrated her anus with his fingers, forced his penis into her mouth, punched her in the face and chest and strangled her—were made for the primary purpose of medical treatment rather than creating evidence for Thompson's prosecution. The exam was performed in the emergency room once A.T.'s pain was under control. Although the SANE nurse was not involved in A.T.'s initial medical treatment and stabilization, a portion of the exam was devoted to treating the issues associated with the assault including disease and prophylaxis. Law enforcement was not involved in the exam. In fact, A.T. provided inconsistent answers on the consent form concerning whether she gave permission to report the event to law enforcement. The SANE nurse was a medical professional whose exam involved evidence collection as a secondary purpose. The primacy of the exam that she described was for medical treatment. Based on this record, we find that despite the existence of an investigative component, the sexual assault exam served the primary purpose of furnishing medical care, making A.T.'s statements about the attack—including the identification of her attacker—admissible under the medical-diagnosis hearsay exception, and non-testimonial for purposes of the Confrontation Clause.

Thompson, at 378.

The Thompson court's holding is consistent with other recent federal circuit court decisions and decisions from state appellate courts.

See e.g. United States v. Barker, 820 F.3d 167, 169 (5th Cir. 2016);

Dorsey v. Cook, 677 Fed. Appx. 265, 267 (6th Cir. 2017); Murray v.

State, ___ S.W.3d ___, 2020 WL 938980, at *7-8 (Tex. App. Feb. 27,

2020); People v. Jurewicz, ___ N.W.2d ___, 2019 WL 3642973, at *4

(Mich. Ct. App. Aug. 6, 2019); Ward v. State, 50 N.E.3d 752, 760 (Ind. 2016); State v. McLaughlin, 246 N.C. App. 306, 322-23, 786 S.E.2d 269, 282 (2016).

Amicus WACDL argues that nurse examiners are “agents of the State” and, thus, statements made by victims must be considered testimonial. WACDL Brief at 12 (citing State v. Miller, 293 Kan. 535, 264 P.3d 461, 487 (2011)). This argument was rejected by the Kansas Supreme Court in Miller and it should be rejected by this Court, too. The court in Miller recognized “the polarity of the circumstances” and held that “inquiries made for the sole purpose of medical treatment, or even for a dual purpose that includes treatment, may produce nontestimonial statements, depending on other circumstances.” The Miller court expressly reversed the decision of the Court of Appeals, that a sexual assault nurse’s “examination was for the sole purpose to collect evidence that would be used against Miller at trial, even though [the SANE] was not a law enforcement officer and her questioning had no apparent formalities usually accompanying a testimonial statement.” Miller, at 478. The New Mexico Supreme Court has also rejected the view that statements made to sexual assault nurse examiners should be categorically excluded based on the nurse’s status. State v. Mendez, 148 N.M. 761, 242 P.3d 328 (2010). Thus, Miller undercuts rather than supports WACDL’s argument.

The decision of the Court of Appeals in this case seems to have assumed that having a dual purpose, receiving funding from crime-related sources, and the fact that consent was given for a forensic examination all transformed this sexual assault nurse examiner's primary purpose from medical to forensic. State v. Burke, 6 Wn. App. 2d 950, 431 P.3d 1109 (2020). These assumptions were incorrect.

First, as described above, a nurse can have multiple purposes without requiring the conclusion that the nurse's primary purpose has shifted from medical to forensic.

Second, the fact that a hospital might be reimbursed by a crime victim fund is not as significant as the court seems to have believed. Supplemental funding simply confirms what is not contested, to wit: that the role of a sexual assault nurse examiner includes a forensic component. That funding does not, however, transform the forensic function into the nurse's primary purpose. Nurses would ask a patient what occurred to her even if there was not independent funding. Moreover, crime victim compensation funds are not doled out based on whether either the victim or the nurse *participates* in a criminal investigation, prosecution, or trial. In fact, the Violence Against Women Act specifically provides that states may not "require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided

with a forensic medical exam, reimbursed for charges incurred on account of such an exam, or both.” 34 U.S.C. § 10449. A hospital is reimbursed when it conducts a sexual assault examination because *the patient is a crime victim*, not because the nurse’s primary function is to gather evidence.

Finally, the Court of Appeals placed too much weight on the consent form. See State v. Scanlan, 193 Wn.2d at 770 (“The fact that Bagnell had signed waivers allowing the police to obtain his medical records did not alter the primary purpose of these interactions.”). It should not be surprising that a patient who is a sexual assault victim would be asked to consent to release of information to law enforcement authorities. The consent form simply confirms the forensic component to the interview; the form does not mean that the forensic component assumes primacy.

These arguments are not meant to suggest, however, that an examination by a nurse will never produce testimonial statements. As the State of Washington has acknowledged in its briefing, some statements to Nurse Frey in this case are likely testimonial. But this Court should make clear that sexual assault nurse examiners are primarily concerned with medical treatment, and conversations with patients who are victims of sexual assault will likely be non-testimonial unless the objective

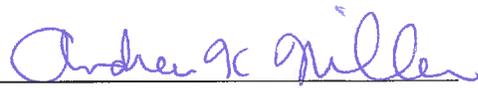
circumstance show that particular statements were made primarily for a forensic purpose.

E. CONCLUSION

For these reasons, WAPA respectfully asks this Court to hold that statements made to sexual assault nurse examiners are not testimonial where the primary purpose of the nurse's examination is to conduct a full medical examination specifically tailored to sexual assault survivors. Such nurses are "not principally charged with uncovering and prosecuting criminal behavior [so statements made to them] are *significantly* less likely to be testimonial than statements given to law enforcement officers." Clark, at 2182 (italics added). To the extent this Court finds that statements in this case are testimonial, WAPA respectfully asks that its holding recognize that generally, statements to sexual assault nurse examiners are made primarily for medical rather than forensic purposes.

DATED this 24th day of April, 2020.

Respectfully submitted,

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