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No. 96783-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

RONALD DELESTER BURKE,

Respondent.

Court of Appeals No. 50053-1-II
On Appeal from the Pierce County Superior Court
Cause No. 14-1-04008-5
The Honorable G. Helen Whitener, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT BURKE
RE: *STATE v. SCANLAN*

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I. ISSUES PRESENTED

1. Should the State's Petition for Review be denied because the Court of Appeals applied the correct standard as recently stated by this Court *State v. Scanlan*?
2. Should the State's Petition for Review be denied because it fails to meet any of the legal grounds for review as provided by RAP 13.4?

II. STATEMENT OF THE CASE

A more detailed statement of the case is contained in the Court of Appeals' Opinion and in the Opening Brief of Appellant, on file with this Court.

At 1:24 AM on July 3, 2009, an intoxicated and disheveled K.E.H. walked into the emergency room at Tacoma General Hospital. (7RP 684, 686, 687, 692; 8RP 855) She told hospital personnel that she had just been raped in nearby Wright Park. (7RP 689; 8RP 856)

After K.E.H. was examined by a physician and medically cleared for release, sexual assault nurse examiner Kay Frey conducted a forensic examination. (6RP 602; 7RP 694) During the examination, Frey observed abrasions on K.E.H.'s elbow and knee, some redness on her thigh, a laceration on her vulva and the upper

part of her cervix. (6RP 628-29)

K.E.H. passed away before trial for reasons unrelated to the alleged rape (6RP 529; 8RP 875), so the trial court allowed Frey to read K.E.H.'s description of the incident to the jury.

The jury convicted Burke as charged, and Burke appealed. (11/09/16 RP 5; CP 91, 126) The Court of Appeals found that K.E.H.'s statements to Frey were testimonial because they "were made under circumstances that objectively demonstrate that the primary purpose of the exam was to provide evidence for a criminal prosecution." (Opinion at 18) The Court also determined that the admission of these testimonial statements was not harmless error, and reversed Burke's conviction. (Opinion at 22)

The State filed a Petition for Review. This Court has requested supplemental briefing to address its recent decision in *State v. Scanlan*.

III. ARGUMENT & AUTHORITIES

1. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *SCANLAN* OR WITH ANY OTHER DECISION OF THE SUPREME COURT OR THE COURT OF APPEALS.

The Court of Appeals applied the "primary purpose" test to determine whether the statements K.E.H. made to Frey were testimonial. (Opinion at 18-20) This is consistent with prior Federal

and State case law and with this Court's recent decision in *State v. Scanlan*, 193 Wn.2d 753, 445 P.3d 960 (2019).

In *Scanlan*, this Court addressed whether admission of statements to medical providers violate a defendant's confrontation right, and held the primary purpose test governs the analysis. 193 Wn.2d at 767. Under the primary purpose test, courts should "objectively evaluate the circumstances in which the encounter occurs, as well as the parties' statements and actions." 193 Wn.2d at 767 (citing *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)).

A statement is testimonial if its primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution," to "investigate a possible crime," to "create a record for trial," or to create or gather evidence for prosecution. 193 Wn.2d at 767.¹

In *Scanlan*, the victim, Leroy Bagnell was discovered in his home severely bruised from head to toe, and nonresponsive. Bagnell initially went to the emergency room where he was treated by a nurse, a doctor, and a social worker. 193 Wn.2d at 757. The

¹ Quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Bryant*, 562 U.S. at 358; *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2181, 192 L. Ed. 2d 306 (2015).

police arrived at the hospital that evening and Bagnell signed a medical release authorizing the hospital to release his medical records to police. 193 Wn.2d at 757. Several days later, Bagnell met with his primary care physician and also obtained treatment at a wound care clinic. 193 Wn.2d at 758.

Bagnell did not testify at trial. Instead, the nurse, doctor, and social worker from the emergency room, and Bagnell's primary care physician the medical personnel from the wound care clinic all testified to statements the victim made to them. They each testified that knowing the cause and mechanism of the injury was important for treatment of their patient. 193 Wn.2d at 758-59.

The *Scanlan* Court found that, under the circumstances of that case, the primary purpose of Bagnell's statements to the emergency room medical providers "was to meet an ongoing emergency and obtain medical treatment, not to create an out-of-court substitute for trial testimony." 193 Wn.2d at 767.

But even for the later follow-up care with the primary care physician and wound care clinic, this Court found that "it seems implausible that the primary purpose of his interactions was to create an out-of-court substitute for trial testimony" because "the primary purpose of Bagnell's interactions with [those doctors] was

to periodically debride and redress the wounds on his arms and legs, which by that point had developed into ulcers. The fact that [the victim] had signed waivers allowing the police to obtain his medical records did not alter the primary purpose of these interactions.” 193 Wn.2d at 769-70.

Here, the Court of Appeals applied the primary purpose test to the specific facts of this case and concluded that “the record shows that KEH’s statements were made under circumstances that objectively demonstrate that the primary purpose of the [forensic] exam was to provide evidence for a criminal prosecution.” (Opinion at 18, footnote omitted).

The Court of Appeals’ conclusion was correct, and the circumstances were quite different from those present in *Scanlan*. First, Frey was not gathering information in response to an ongoing emergency. (Opinion at 19) K.E.H. was medically cleared from the emergency room several hours before Frey started her exam. (Opinion at 19; 6RP 564) K.E.H. could have gone home but volunteered to stay at the hospital for several hours specifically for the examination because K.E.H. did not want her attacker “to be out there doing this to someone else.” (Ex. 19F; Opinion at 19)

Unlike the follow-up visits Bagnell had with his primary and

wound care clinic providers, K.E.H.'s examination with Frey was not medically necessary and would not have occurred but for K.E.H.'s desire to provide law enforcement investigators with evidence to aid in apprehending her assailant.²

In *Scanlan*, Bagnell signed general medical release forms after treatment. But here, K.E.H. signed a consent form *before* the exam that clearly explained to K.E.H. that she was agreeing to a forensic evaluation, that the examination “does not include general medical care,” and that evidence will be collected and shared with law enforcement. (Exh. 19B; 6RP 553, 554, 558-59)

Finally, unlike the health care providers in *Scanlan*, Frey's evidence gathering responsibilities during the forensic examination are similar to those of a government official collecting evidence from a crime victim or from a crime scene. (Opinion at 19) Frey testified that a victim's description of the sexual assault helps her know where to look for evidence. (6RP 567) Frey collects swabs and samples in a specific way so as to properly preserve them, then seals and signs the packaging, then places the evidence in a

² See Justice Gordon McCloud's concurrence in *Scanlan*, noting that “Bagnell most likely would have seen the same medical providers, even if he had not signed the release forms, for the sole purpose of receiving follow-up care.” 193 Wn.2d at 775–76 (Gordon McCloud, J., concurring).

locked refrigerator so law enforcement investigators can retrieve it. (6RP 559-60) And the expense of these forensic exams are covered by Federal and State funds, not by the hospital or by the victim's health insurance company. (6RP 558)

The State argues that this case requires review because the Court of Appeals did not identify and address each and every statement individually to determine its primary purpose. But the State does not identify the statements it claims have a different primary purpose, and does not discuss why those statements are nontestimonial and relevant.

Furthermore, the Court of Appeals did not hold that *all* statements made during a forensic sexual assault examinations are *always* testimonial. The Court merely held that, under the circumstances of this case, the *primary* purpose for the examination, and for the statements K.E.H. made to Frey describing the attack, was to provide evidence for investigation and prosecution.

The primary purpose test, as expressed by *Scanlan* and cases cited therein, was the test applied by the Court of Appeals in this case. The Court of Appeals applied the proper test and came to the correct conclusion. The Court of Appeals' decision is not in

conflict with *Scanlan* or any other State or Federal case, and the State's request for review based on this ground should be denied.

2. ADMISSION OF THE TESTIMONIAL STATEMENTS WAS NOT HARMLESS ERROR AND THERE IS NO SIGNIFICANT CONSTITUTIONAL QUESTION OR SUBSTANTIAL PUBLIC INTEREST AT ISSUE IN THIS CASE.

The State argues that review should be granted because the Court of Appeals, in its harmless error analysis, "omitted two relevant statements admitted at trial made by K.E.H. on the night" of the incident. (Petition at 16) The State incorrectly categorizes this supposed omission as a "significant question of law under the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3)." (Petition at 17) If the State believes that the Court of Appeals omitted or overlooked specific evidence, the proper procedure would have been to file a Motion for Reconsideration, where the State could have argued "with particularity the points of ... fact which ... the court has overlooked or misapprehended." RAP 12.4(c).

Nevertheless, the Court of Appeals did not err when it found that admission of K.E.H.'s statements was not harmless. Without K.E.H.'s description of the event and the perpetrator, the only evidence the State had was Burke's DNA, K.E.H.'s ambiguous

injuries, and an assertion by a highly intoxicated K.E.H. to emergency room personnel that she had been raped in Wright Park. This evidence would not have been sufficient to prove, beyond a reasonable doubt, that Burke used forcible compulsion.

The prosecutor also relied heavily on K.E.H.'s statements in his closing arguments to the jury. The prosecutor read K.E.H.'s description of the incident, word-for-word, and continually referred to its contents when arguing that the elements of the crime had been proved. (9RP 910, 912, 917) The State's substantial reliance on K.E.H.'s statements to Frey emphasized their importance in the minds of the jury.

Finally, the State's Petition should be denied because this case does not present issues of significant public interest under RAP 13.4(b)(4). Trial courts have long been required to analyze and potentially exclude statements to medical providers that were not made for the purpose of medical treatment, on both constitutional and evidentiary rules-based grounds.³ There is no

³ See e.g. *State v. O'Cain*, 169 Wn. App. 228, 249, 279 P.3d 926 (2012) (noting that the if a statement was made to medical providers for purposes of diagnosis or treatment, it is nontestimonial and, therefore, not subject to a confrontation clause objection); ER 803(a)(4) and Fed. R. Evid. 803(4) (providing an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment).

reason to believe that application of the primary purpose test will suddenly cause a breakdown in the treatment, investigation or prosecution of sexual assault cases.

Application of the primary purpose test may preclude a forensic nurse from testifying about a victim's statements in a limited number of cases where the victim is unavailable to testify or be cross-examined. But that should not, and likely will not, stop forensic nurses from doing their jobs. They can still ask the questions they need to ask a victim, and can still provide referrals for medical care or social services as they see fit. And the State will still be able to present any physical or documentary evidence gathered as a result of a forensic examination.

The State's fear, that there will be a "substantial societal cost" when a limited number of testimonial statements are excluded under the primary purpose test, is unfounded. (Petition at 18)

IV. CONCLUSION

For the reasons argued above, Burke respectfully requests that this Court deny review.

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