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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

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I. ISSUES PRESENTED

1. Were statements made by the victim during the course of a forensic examination testimonial?
2. Was the primary purpose of statements made by the victim during the course of a forensic examination to provide evidence for use in investigating and prosecuting a crime?
3. Was Ronald Burke's right to confrontation violated where the trial court admitted the non-testifying victim's testimonial hearsay statements, but Burke never had an opportunity to cross examine the victim about the statements?
4. Were hearsay statements made by the victim during the course of a forensic examination inadmissible because they did not meet the requirements of the medical diagnosis or treatment exception to the hearsay rule?
5. Was it harmless error to admit statements made by the victim during the course of a forensic examination in violation of the confrontation clause and the rules of evidence?

II. STATEMENT OF THE CASE

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)

Tacoma Police Officer Khanh Phan was dispatched to the hospital, and contacted K.E.H. in her room at about 3:17 AM. (8RP 835, 838) He testified that K.E.H. was intoxicated and incoherent. She did not appear injured, but had dirt on her clothing. (8RP 840) After interviewing K.E.H., Officer Phan went to Wright Park, but did not find the suspect or any corroborating evidence. (8RP 841, 843, 844, 847)

After K.E.H. was medically cleared to leave the emergency room, 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) All of these injuries, except for the laceration on the cervix, are consistent with both consensual and nonconsensual intercourse. (6RP 637, 643) As part of the examination, Frey took a description of the incident from K.E.H., and collected samples of items that could contain DNA evidence. (6RP 612, 645-48)

A forensic scientist was able to develop two DNA profiles,

one male and one female, from a sample taken from K.E.H.'s underpants. (7RP 723, 726, 727) The female profile matched K.E.H., but the male could not be matched to any individual known to law enforcement at that time. (7RP 727; 8RP 871-72) But when the unknown male profile was reevaluated in 2011, it matched a profile then on file for Ronald Delester Burke. (7RP 733, 735, 741; 8RP 875)

Tacoma Police investigators found and interviewed Burke. He lived in Tacoma in 2009 and was familiar with and had visited Wright Park. (8RP 799, 806-08, 819, 876, 882) But he denied ever having sexual intercourse with a woman at Wright Park. (8RP 808-09, 819-20)

The State charged Burke with one count of second degree rape (RCW 9A.44.050(1)(a)). (CP 1) K.E.H. passed away before trial for reasons unrelated to the alleged rape. (6RP 529; 8RP 875) Because K.E.H. was unavailable to testify at trial, the State wanted to introduce the statements K.E.H. made to Frey during the forensic examination. (6RP 540, 568-71) The State asserted that K.E.H.'s statements were admissible under the medical exception to the hearsay rule. (6RP 568-71) Burke objected, arguing that admission of the statements would violate his confrontation rights.

(6RP 572-81; CP 43-49)

At a hearing on the issue, Frey testified that she responds to various area hospitals when there has been a report of a sexual assault. (6RP 542, 543) For her the purpose of the examination is twofold; forensic (to gather DNA and other physical evidence), and medical (treatment and referrals for medical care and emotional support services). (6RP 545) But the primary medical care for the complaining party remains with the treating physician. (6RP 564) The complaining party must be medically cleared by the treating physician before the forensic examination can begin. (6RP 564)

Frey also explained that she collects and packages potential evidence according to law enforcement standards, and stores any collected samples in a refrigerator for investigators to collect at a later date. (6RP 559-60)

Frey began the forensic examination at 4:14 PM, about 15 hours after K.E.H. first arrived at the hospital. (6RP 545, 555-56) K.E.H. had already been treated by the emergency room nurse and physician, and had already given a statement to Officer Phan. (6RP 548, 553, 556-57; 8RP 836, 838)

Frey has several forms she must use as part of her evaluation, which all include the phrase "forensic nurse examiner

service” in their heading. (Exh. 19A-19J) The first is a consent form. (Exh. 19B) That form specifically states that “a medical screening examination and care must be provided by an emergency department or primary care provider prior to the forensic evaluation. A forensic evaluation does not include general medical care.” (Exh. 19B; 6RP 554)

The consent form states that evidence may be collected and photographs taken, and such items may be used for legal purposes or forensic analysis. (Exh. 19B; 6RP 558) The form also gives the nurse examiner permission to speak to the investigating officer if the assault is reported to the police. (Exh. 19B; 6RP 558-59)

The consent form states that the information collected will remain confidential but will potentially be “disclosed by law.” (Exh. 19B; 6RP 559) Another form tells K.E.H. that, if the assault was reported to the police, the evidence will be transferred directly to Tacoma Police Department. (Exh. 19I; 6RP 562-63) K.E.H. initialed the consent form before Frey began the examination. (Exh. 19B; 6RP 548-49, 550, 554)

The trial court found that K.E.H.’s statements were admissible under the medical treatment exception to the hearsay rule because one purpose of the exam was to provide medical

care. (6RP 585-89) The court also found that her statements were not testimonial because the consent form stated that the information would remain confidential, therefore it was not clear that K.E.H. was “put on notice that her statements would be used at trial.” (6RP 589-90)

Subsequently, Frey read K.E.H.’s description of the incident to the jury:

I was sitting there rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don’t know if he tried choking me or not. The next thing I knew, I was taken to the ground, my pants were off and stuff, and he was inside me. It was over and done with. I think he told me to keep my mouth shut. That’s all I remember. Then I came here. I walked over to the hospital.

(6RP 612) K.E.H. told Frey that the man had penetrated her vagina with his penis, she thought he ejaculated, and he did not wear a condom. (6RP 614-15) K.E.H. also described her assailant: “He was tall, a light [skinned] black, no hair or short hair. He had a white t-shirt and jeans. No jacket.” (6RP 614)

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’s Petition for Review was granted.

III. ARGUMENT & AUTHORITIES

1. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT K.E.H.’S STATEMENTS TO FREY WERE TESTIMONIAL BECAUSE THEY WERE MADE FOR THE PRIMARY PURPOSE OF PROVIDING EVIDENCE TO LAW ENFORCEMENT.

Admission of K.E.H.’s statements violated Burke’s right to confrontation. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them. The confrontation clause prohibits admission of “testimonial” statements unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); see also *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

A statement is testimonial when its primary purpose is to

establish or prove past facts potentially relevant to later criminal prosecution. See *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2179-80, 192 L. Ed. 2d 306 (2015) (citing *Davis*, 547 U.S. at 822).

In this case, the Court of Appeals applied this “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 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

¹ Quoting *Davis*, 547 U.S. at 822; *Bryant*, 562 U.S. at 358; *Clark*, 135 S. Ct. at 2181.

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)

Frey contacted K.E.H. in the waiting room around 4:00 PM and took her to a separate unit for the examination, on a different floor and different wing of the hospital. (6RP 597-98, 602) By this time, the allegation had been reported to law enforcement and K.E.H. had given a statement to an investigating police officer. (8RP 835, 837-38, 841)

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

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).

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 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 government funds, not by the hospital or by the victim’s private health insurance company. (6RP 558)

A finding that statements made during a forensic examination are testimonial 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.

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 reason to believe that exclusion of statements made during a forensic sexual assault examination because of the primary purpose test will suddenly cause a breakdown in the treatment, investigation or prosecution of sexual assault cases.

Thus, the State's fear, that there will be a "substantial societal cost" when a limited number of testimonial statements are

³ See e.g. *State v. O'Cain*, 169 Wn. App. 228, 249, 279 P.3d 926 (2012) (noting that 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).

excluded under the primary purpose test, is unfounded. (Petition at 18) Nevertheless, though the confrontation clause may be inconvenient for prosecutors, that cannot stop the courts from upholding and applying its protections.

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. K.E.H.'s statements were testimonial and their admission was a violation of Burke's rights under the confrontation clause.

2. K.E.H.'S STATEMENTS TO FREY WERE ALSO INADMISSIBLE UNDER THE RULES OF EVIDENCE.

Alternatively, K.E.H.'s statements to Frey should not have been admitted because they were hearsay.⁴ A statement offered to prove the truth of the matter asserted is hearsay, and is not admissible at trial unless one of the well-established exceptions apply. ER 801; ER 802. ER 803(a)(4) creates an exception for out-of-court statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present

⁴ Burke raised this issue in the Court of Appeals, but the Court declined to reach it because the Court was reversing Burke's conviction based on the confrontation clause violation issue. (Opening Brief of Appellant at 1, 8-10; COA Opinion at 23)

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

The medical diagnosis exception applies only to statements that are “reasonably pertinent to diagnosis or treatment.” ER 803(a)(4). A statement is reasonably pertinent when (1) the declarant’s motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). Thus, the critical inquiry is not whether the interviewer might provide diagnosis or treatment or refer for the same, but whether the declarant made the statements “for purposes of medical diagnosis or treatment.” ER 803(a)(4).

In *State v. Williams*, Division 2 found that statements made to a forensic nurse during a medical examination were admissible under ER 803(a)(4) because the examination was conducted for “a combination’ of purposes—medical as well as forensic,” *and* because the evidence indicated that the declarant’s motive was not purely forensic. 137 Wn. App. 736, 746-47, 154 P.3d 322 (2007). The trial court in this case also found that K.E.H.’s statements to Frey had a dual purpose, medical and forensic, and therefore

qualified for admission under ER 803(a)(4). (RP 585-86, 587) But the evidence did not show that K.E.H. had a dual motive for making her statements to Frey.

Although Frey may have found the statements pertinent to her treatment of K.E.H., the evidence does not show that K.E.H.'s motive in making the statements was to promote treatment. Rather, the evidence shows that K.E.H.'s motive was to provide evidence to aid in the apprehension and prosecution of her assailant.

K.E.H. was treated by an emergency room nurse and doctor after she arrived at 1:24 AM. (6RP 556-57; 7RP 686, 688-89, 694) She was medically cleared to leave the emergency room at 11:15 AM, but decided to wait so that she could participate in a forensic examination. (6RP 605; 7RP 694) K.E.H. signed a consent form that specifically informed her that the evaluation does not include medical care, and that any evidence collected may be turned over to law enforcement. (Exh. 19B) Unlike in *Williams*, there was no evidence presented to show that K.E.H.'s motive in speaking to Frey was to obtain medical care and treatment.

Furthermore, statements attributing fault are generally inadmissible under the medical diagnosis exception. *Williams*, 137

Wn. App. at 746 (citing *In the Matter of the Dependency of Penelope B.*, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985)). K.E.H.'s description of her assailant was not reasonably necessary for medical diagnosis and treatment, it was only necessary for apprehension and prosecution of a suspect. Accordingly, all of K.E.H.'s statements about the incident, but particularly this portion, failed to meet the requirements for admission under ER 803(a)(4).

3. ADMISSION OF K.E.H.'S STATEMENTS WAS NOT HARMLESS ERROR IN THIS CASE.

The Court of Appeals correctly found that the erroneous admission of K.E.H.'s statements was prejudicial and required reversal of Burke's conviction. (Opinion at 20-22)

The improper admission of evidence under the evidence rules requires reversal "where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict." *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). But confrontation clause errors are subject to the stricter constitutional harmless-error analysis. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224 (2016), cert. denied, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016) (citing *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *Delaware v. Van*

Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Before a constitutional error can be harmless, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Wilcoxon*, 185 Wn.2d at 335-36 (citing *Chapman*, 386 U.S. at 24).

Under either standard, the admission of K.E.H.’s statements to Frey were not harmless error in this case. 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. (7RP 687, 689; 8RP 838) 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.

Without her statements, all the State can show is that Burke

and K.E.H. likely had intercourse. The State cannot prove that the intercourse was forcible, and therefore cannot prove the charge of second degree rape.

IV. CONCLUSION

K.E.H.'s statements, at least in Frey's mind, may have had a mixed purpose, in that there was both an evidence-gathering and a medical-treatment purpose to the questions and information sought. But the *primary* purpose was quite obviously investigative, and the examination would not have occurred but for this purpose. K.E.H.'s statements were testimonial. The statements were also inadmissible hearsay because K.E.H.'s motive in making the statement was not to promote her medical treatment.

Accordingly, for the reasons argued above, Burke respectfully requests that the opinion of Court of Appeals be affirmed and that Burke's conviction be reversed.

DATED: December 9, 2019



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CERTIFICATE OF MAILING

I certify that on 12/09/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald D. Burke, DOC# 951546, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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