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NO. 67478-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Respondent,  
v.  
HECTOR HURTADO,  
Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL HEAVEY

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether Hurtado's claim under the federal Confrontation Clause should be rejected because statements made for purposes of medical diagnosis or treatment are not "testimonial" statements.

2. Whether Hurtado's claim under the Washington Constitution should be rejected because state confrontation rights are no broader than federal confrontation rights, and because statements made for purposes of medical diagnosis or treatment were historically admissible under the common law.

3. Whether Hurtado's claim under the hearsay exception for statements made for purposes of medical diagnosis or treatment should be rejected because statements attributing fault, although inadmissible in most cases, are admissible in domestic violence cases because the identity of the abuser is pertinent to the victim's medical care.

4. Whether this Court should reject Hurtado's claim that recording jail phone calls violates the state constitution, as this Court has already done in two previous published cases.

5. Whether a recording of the 911 call was properly authenticated where the custodian of records identified the recording and verified its accuracy, and where circumstantial

evidence identifies Hurtado and the victim as the voices on the recording.

6. Whether this Court should hold in accordance with prior case law that there is no basis to strike the domestic violence designation from the judgment and sentence because it is not an element of the crime and does not result in additional punishment.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Hector Hurtado, with assault in the second degree (domestic violence), tampering with a witness, and two counts of misdemeanor violation of a court order based on Hurtado's assault upon his girlfriend, Jennifer Vera, on December 30 or 31, 2010, and his ensuing direct and indirect contact with her from the jail. CP 1-6, 14-16. A jury trial on these charges was held in July 2011 before the Honorable Michael Heavey.

Jennifer Vera did not appear for trial, and the prosecution went forward in her absence based on other evidence. At the conclusion of the trial, the jury convicted Hurtado of all four counts as charged. CP 39-43. The trial court imposed standard-range

sentences on the felony charges and suspended sentences on the gross misdemeanors. CP 98-110, 125. Hurtado now appeals. CP 111-24.

## **2. SUBSTANTIVE FACTS**

Just before 5:00 a.m. on December 31, 2010, Bellevue Police officers were dispatched in response to a 911 call that had been placed from the residence of Jennifer Vera. RP (7/6/11) 67-68; RP (7/7/11) 7-8. Most of the 911 call is unintelligible due to interference; however, over the open phone line, a man and a woman can be heard arguing. Ex. 2. Early in the recording, the male voice states, "Jenny, I told you to shut the fuck up." Ex. 2. Later in the recording, the woman repeatedly states that her daughter is important to her. Ex. 2. After several minutes, the call was disconnected. Ex. 2; RP (7/6/11) 69.

Bellevue Officers Rachel Neff and Andrew Hanke arrived at Jennifer Vera's residence and found Vera outside in the driveway. RP (7/7/11) 33. Vera had obvious injuries to her face; one of her eyes "was almost swollen shut," her other eye was bruised, and her nose was red and swollen. RP (7/7/11) 8-9. Officer Neff checked inside the house and found that the only other person at the scene

was Vera's 8-month-old daughter, Julia Hurtado. RP (7/7/11) 10. Officer Neff and Officer Hanke also both noticed what appeared to be drops of blood in the kitchen and the living room area. RP (7/7/11) 11-12, 34-35.

The suspect was not at the scene, but Officer Hanke broadcast a name and a description. RP (7/7/11) 34. Officer Ryan Lange performed an area check and located Hurtado at a bus stop near Vera's residence. RP (7/6/11) 42-43. When Officer Lange contacted Hurtado and placed him under arrest, he noticed what appeared to be bloodstains on one of Hurtado's sleeves. RP (7/6/11) 43-44.

Jennifer Vera was transported to the emergency room at Overlake Hospital for treatment of her injuries. Nurse Venus Chenoweth, who was involved in Vera's treatment, explained that all ER patients are asked about domestic violence because it affects the services they are offered by the hospital. RP (7/6/11) 53-54. Vera's treating physician, Dr. Marcus Trione, explained that the medical team needs to know about domestic violence because it would not be medically sound "to send somebody who was in a dangerous situation initially back out into the same dangerous situation." RP (7/7/11) 48. Accordingly, the first nurse who

contacted Vera asked her what had happened, and Vera stated that she "was assaulted by her boyfriend" and "was hit in the face with his fists." RP (7/6/11) 55. Vera was diagnosed with a broken nose caused by "domestic abuse," and was referred to a specialist to determine if further treatment was necessary. RP (7/7/11) 52-53.

After Hurtado was arrested, he began making telephone calls from the jail, which were recorded in accordance with standard jail protocols. RP (7/6/11) 89-93. In one call, much of which was translated from Spanish to English by a certified interpreter, Hurtado admitted that he had "beat the hell out of" someone and discussed the fact that she was taken to the hospital. RP (7/6/11) 114-15. Hurtado also asked one of the people he called to "tell her not to show up on that day" and to warn "her" that "they" would be wanting to "pick her up and bring her here." RP (7/6/11) 116.

Hurtado also had several recorded conversations with Jennifer Vera in violation of the no-contact order. In several of these calls, Hurtado and Vera discussed their infant daughter, "Julia." Ex. 7. Hurtado also urged Vera to leave the area "2 or 3 days before. Because if not they'll hold you. They'll hold you." RP (7/6/11) 124. Hurtado and Vera also discussed Hurtado's court

dates, and the fact that Vera would not be coming to court to testify.

Ex. 7.

Additional facts will be discussed further below as necessary for argument.

**C. ARGUMENT**

**1. THE VICTIM'S STATEMENTS TO MEDICAL PERSONNEL DO NOT IMPLICATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BECAUSE THEY ARE NOT "TESTIMONIAL" STATEMENTS.**

Hurtado first claims that his federal constitutional right to confront witnesses was violated by the admission of Jennifer Vera's statement to medical personnel in the emergency room that she had been assaulted by her boyfriend. Brief of Appellant, at 8-22. This claim should be rejected. Statements made for purposes of medical diagnosis or treatment are not testimonial statements. Accordingly, the Sixth Amendment right of confrontation is not implicated by the admission of such statements at trial.

The Confrontation Clause of the Sixth Amendment bars the admission of "testimonial" out-of-court statements in the absence of an opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Accordingly, the key to any post-Crawford analysis under the federal constitution begins with the question of whether the statement at issue is "testimonial" or not.

The United States Supreme Court has not yet expressly decided whether statements made for the purpose of medical diagnosis or treatment are testimonial or not. However, in two recent decisions, the Court has strongly indicated that it will *not* view such statements as being testimonial. In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in a footnote distinguishing cases relied upon by the dissent, the Court stated that some of those cases were "simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today." Melendez-Diaz, 129 S. Ct. at 2533 n.2. In another recent decision, the Court observed that "only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules[.]" Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (emphasis in original). Although these pronouncements are dicta, they strongly

signal that the Court does *not* view statements made to medical providers during the course of treatment as being testimonial.

There is no such lack of directly controlling authority in Washington. Although the United States Supreme Court has not yet issued a decision squarely on point, all three divisions of this Court *have* directly addressed the issue and have concluded uniformly that statements made for the purposes of medical treatment are not testimonial, and hence, they do not implicate the federal Confrontation Clause.

In State v. Moses, 129 Wn. App. 718, 730-31, 119 P.3d 906 (2005), rev. denied, 157 Wn.2d 1006 (2006), a domestic violence victim told the treating physician and a social worker at the emergency room that the defendant had hit her and kicked her in the face. These statements were held not to be testimonial because the purpose of these statements was the treatment of the victim's injuries, not investigating and gathering evidence of a crime. In reaching this conclusion, this Court specifically noted that the doctor "had no role in the investigation of the assault and he was not working on behalf of or in conjunction with the police or governmental officials to develop testimony for the prosecution." Id. at 730; see also State v. Saunders, 132 Wn. App. 592, 603,

132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007) (wherein this Court held that "there is no reason to believe that a reasonable person in [the victim's] position would think she was making a record of evidence for a future prosecution when she told paramedic Keyes and [treating physician] Dr. Andrews that her injuries occurred as a result of her boyfriend choking her and throwing her against the wall").

Similarly, in State v. Fisher, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005), rev. denied, 156 Wn.2d 1013 (2006), the child victim's statements to a treating physician that the defendant struck him were held not to be testimonial where it was clear that the doctor's questions were part of her efforts to provide proper treatment for the victim. As was true in Moses, the Fisher court observed that "there was no indication of a purpose to prepare testimony for trial and no government involvement" in the doctor's questioning of the victim at the hospital. Id.

And in State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007), the domestic violence victim's statements to emergency room staff that the defendant "kicked her, hit her with his fists, and hit her several times with a belt" were held not to be testimonial. The Sandoval court explained that statements are not

testimonial when they are made for diagnosis and treatment purposes, when there is no indication that the witness expected the statements to be used at trial, and when the medical provider is not an agent of the State. Id. at 537.

Significantly, the Ninth Circuit has upheld this Court's conclusion in Moses that statements for purposes of medical diagnosis are not testimonial. Moses v. Payne, 555 F.3d 742 (9th Cir. 2009). On habeas review, the circuit court held that this Court's conclusion -- that statements made by the victim to her doctor following an incident of domestic violence were not testimonial -- was a reasonable application of established federal law. Id. at 755. At least two other federal circuit courts that have addressed this issue are in agreement that statements made for the purpose of medical diagnosis and treatment are not testimonial. U.S. v. Santos, 589 F.3d 759, 763 (5th Cir. 2009); U.S. v. Peneaux, 432 F.3d 882 (8th Cir. 2005).<sup>1</sup>

In sum, Washington appellate decisions have uniformly held that statements made to medical providers for the purposes of

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<sup>1</sup> See also T. Harbinson, Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 Mercer L. Rev. 569, 632 (2007).

diagnosis and treatment are not testimonial, and thus, their admission does not violate the Confrontation Clause of the Sixth Amendment. Moreover, the Ninth Circuit and other federal circuit courts have reached the same conclusion, and the United States Supreme Court has strongly signaled its agreement with this conclusion. Accordingly, Hurtado's claim under the federal constitution should be rejected, as the record shows that Jennifer Vera's statement that she was assaulted by her boyfriend was made for the non-testimonial purpose of receiving treatment.

In this case, emergency room nurse Venus Chenoweth and treating physician Dr. Marcus Trione both testified that it was necessary for the emergency room medical team to determine how Jennifer Vera had sustained her injuries and who had inflicted them in order to provide her with proper treatment and to ensure her continuing safety after her release from the hospital. RP (7/6/11) 53-57; RP (7/7/11) 46-52. There was no evidence that the emergency room staff was working on behalf of the police to gather evidence or testimony. Rather, the record establishes that Vera's statements were made for the purpose of receiving medical treatment. As such, they are not testimonial in accordance with Washington law.

Nonetheless, Hurtado argues that Vera's statements to the medical providers were testimonial, citing People v. Spicer, 379 Ill. App. 3d 441, 884 N.E.2d 675, 318 Ill. Dec. 707 (2008). Brief of Appellant, at 15-16. However, in reaching the conclusion that statements made for purposes of treatment were testimonial, the Spicer court applied the wrong analysis. Specifically, the Spicer court applied the "primary purpose" test for statements made during police interrogations from Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), which is inapplicable when statements to medical personnel are at issue. Thus, Hurtado's reliance on Spicer is misplaced.

In Spicer, the Illinois appellate court determined that the "primary purpose" of taking a medical history from a rape victim at the hospital was to "prove past events" rather than to "meet an ongoing emergency." Spicer, 379 Ill. App. 3d at 453 (citing Davis, 547 U.S. at 827). In reaching this conclusion, the court observed that by the time the victim was at the hospital, she was calm and no longer in immediate danger. The Spicer court also found that the doctor was an "agent" of the police because "he took no further action" to provide treatment to the victim other than collecting a

rape kit. Spicer, 379 Ill. App. at 455-56. Spicer's reasoning should not be applied here for at least two reasons.

First, unlike in Spicer, there is no evidence in this case that the medical staff was collecting evidence (such as a rape kit) for the police; therefore, this case is readily distinguishable from Spicer on its facts. Second, Spicer is an outlier with highly questionable reasoning. Certainly, no Washington case has concluded that a doctor is performing a police interrogation when taking a medical history from a patient at the hospital. Moreover, no Washington case has held that statements made for purposes of medical treatment are testimonial unless they are made during an acute emergency situation at the hospital. Indeed, Hurtado acknowledges that Washington courts have reached very different conclusions. Brief of Appellant, at 18-19. Spicer's application of the analysis for police interrogations in the medical hearsay context amounts to trying to force a square peg into a round hole. This Court should decline Hurtado's invitation to apply Spicer's faulty reasoning.

Hurtado also argues that Jennifer Vera's statements to the medical staff were testimonial because someone in Vera's position would have anticipated that these statements would be used

against the defendant at trial, citing State v. Shafer, 156 Wn.2d 381, 389-90, 128 P.3d 87 (2006). Hurtado bases this argument on the fact that a police officer was present with Vera at the hospital, and on the fact that Vera had given a statement to that police officer before she went to the hospital. Brief of Appellant, at 13-15. This argument should be rejected for two reasons.

First, although Hurtado is correct that Officer Neff accompanied Vera to the emergency room, there is no evidence that Officer Neff was involved in Vera's treatment by the medical staff, and there is no evidence that the medical staff was acting on behalf of Officer Neff. In fact, the evidence is to the contrary. ER nurse Venus Chenoweth testified that Officer Neff was merely standing nearby, holding Vera's baby, while Vera was being treated for her injuries. RP (7/6/11) 54. And although Officer Neff collected Vera's tank top as evidence while she was at the hospital, there was no testimony that she did anything else other than remain nearby while the medical staff interacted with Vera. RP (7/7/11) 16. In sum, there is no evidence that Officer Neff participated in or was involved with Vera's contact with the medical staff, and thus, there is no evidence that Vera would think that her statements to the

medical staff would be used for prosecutorial purposes.<sup>2</sup> The mere presence of a police officer in an emergency room (certainly a common occurrence) should not transform medical treatment into a police interrogation, and this Court should reject Hurtado's suggestion to the contrary.

Second, other courts that have considered this issue have concluded that domestic violence victims would *not* expect that their statements to medical providers would be used at trial if they have already given a statement to the police. As the Ohio Supreme Court has observed, when a victim has already given a statement to the police identifying her assailant, "the victim 'could reasonably have assumed that repeating the same information to a nurse or other medical professional served a separate and distinct medical purpose.'" State v. Fry, 125 Ohio St. 3d 163, 181, 926 N.E.2d 1239 (2010) (quoting State v. Stahl, 111 Ohio St. 3d 186, 198, 855 N.E.2d 834 (2006)). This conclusion is objectively reasonable. Any rational crime victim would understand that police officers investigate crimes and gather evidence, whereas doctors, nurses,

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<sup>2</sup> In fact, during one of Hurtado's recorded telephone conversations with Vera, they discuss whether or not "they have a statement" to use at trial, and Hurtado expresses his doubts. Ex. 7 (call made 1/14/11 at 1539 hrs.).

and other hospital staff provide treatment and services for sick and injured people. Hurtado's claim fails for this reason as well.

Hurtado also argues that his right of confrontation was violated because Vera and the original nurse that Vera spoke with were not shown to be "unavailable" for confrontation. Brief of Appellant, at 19-20. But when non-testimonial statements are at issue, the hearsay rules govern their admissibility, and a showing of unavailability is required only if dictated by those rules. The United States Supreme Court explained these concepts as follows in

Crawford:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford, 541 U.S. at 68. As discussed at length above, the trial court correctly ruled that Vera's statements to medical treatment providers were not testimonial. Accordingly, those statements were properly admitted under ER 803(a)(4). Under this hearsay exception, statements are admissible whether the witness is unavailable or not. ER 803(a).

In sum, Hurtado's claim fails under a federal constitutional analysis. This Court should hold in accordance with Washington case law that Vera's statement to the medical providers that her boyfriend had assaulted her with his fists was a non-testimonial statement that does not implicate the Confrontation Clause of the Sixth Amendment.

But even if this Court were to conclude that Vera's statement was testimonial, any possible error is harmless. The admission of evidence in violation of the Confrontation Clause can be harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Such error is harmless if the State can show that there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). Factors bearing on this inquiry include the importance of the testimony, whether the testimony was cumulative, whether the testimony was corroborated, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Van Arsdall, 475 U.S. at 686-87. Stated another way, "if the untainted evidence is

overwhelming, the error is deemed harmless." State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).

In this case, it was undisputed that Jennifer Vera's face was swollen, puffy, and bruised, and that she had a bloody nose. RP (7/7/11) 8-9, 63. It was also undisputed that Vera's nose was broken. RP (7/7/11) 52-53. Although Hurtado tried to suggest that Vera's nose might have been broken on some earlier occasion, Dr. Trione explained that this was unlikely "given the amount of blood that was present" in her nose. RP (7/7/11) 59-60. The police officers who responded to Vera's 911 call observed fresh drops of what appeared to be blood inside Vera's house. RP (7/7/11) 11-12, 34-35. In addition, the officer who arrested Hurtado observed what appeared to be blood on one of his sleeves. RP (7/6/11) 44. Hurtado admitted during one of his recorded telephone calls from the jail that he had "beat the hell out of" someone and she went to the hospital. Ex. 7 (call made 1/11/11 at 822 hrs.). And in Hurtado's calls to Vera, he did not deny assaulting her; instead, he repeatedly urged her not to come to court and told her to leave the area so that the authorities would not find her. Ex. 7.

This record contains ample evidence that Hurtado assaulted Vera and broke her nose, and there is no reasonable probability

that the outcome of the trial would have been different if the trial court had not admitted Vera's statement to the medical personnel that her boyfriend had assaulted her. Vera's obvious injuries, the fresh blood in Vera's house and on Hurtado's clothing, and Hurtado's highly incriminating statements to Vera and others in the jail phone calls overwhelmingly prove Hurtado's guilt. This Court should affirm for this reason as well.

**2. THE VICTIM'S STATEMENTS TO MEDICAL PERSONNEL ALSO DO NOT IMPLICATE THE CONFRONTATION CLAUSE OF THE WASHINGTON CONSTITUTION.**

Hurtado also claims that his right of confrontation under the Washington Constitution was violated by the admission of Vera's statement at the hospital that her boyfriend had assaulted her with his fists. Brief of Appellant, at 22-28. This claim should be rejected as well. Analysis of the Gunwall<sup>3</sup> factors does not support an independent state constitutional analysis in these circumstances. Moreover, the common law historically recognized that statements made to treating physicians have long been admissible as substantive evidence.

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<sup>3</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Division Three of this Court has already rejected a claim that the admission of medical hearsay violates article I, section 22 of the Washington Constitution. Sandoval, 137 Wn. App. at 538-40. This Court should reach the same conclusion in this case. And although two recent state supreme court cases have *suggested* that the state constitution could be interpreted independently in some circumstances, the court ultimately held that the state constitution was, under the facts of those cases, no broader.

In Shafer, 156 Wn.2d at 392, the court held that the child victim's statements to her mother and a family friend violated neither the federal constitution nor the state constitution. In State v. Pugh, 167 Wn.2d 825, 845, 225 P.3d 892 (2009), the court held that the victim's statements to the 911 operator also did not violate either the federal constitution or state constitution. Thus, while both of these cases suggest that an independent analysis of the state constitution may be warranted, neither of them actually interpreted the state constitution to provide broader protection than the federal constitution under the facts presented.

Even where an independent analysis of the state constitution has previously been employed, consideration of the Gunwall factors helps guide the court's inquiry under the facts presented in a

particular case. Madison v. State, 161 Wn.2d 85, 93 n.5, 163 P.3d 757 (2007); Pugh, 167 Wn.2d at 846-47 (Chambers, J., concurring). The Gunwall factors are 1) the textual language, 2) differences in the texts, 3) constitutional and common law history, 4) preexisting state law, 5) structural differences and 6) matters of particular state and local concern. State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

Turning to the first two factors, which focus on the text of the federal and state constitutions, independent state constitutional analysis is not warranted because the critical term is the same in both constitutions. Article I, section 22 of the state constitution provides that "[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face." It is similar, but not identical, to the Confrontation Clause of the Sixth Amendment, which reads, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI . While the state provision guarantees the accused the right to "meet face to face" and the federal provision guarantees the accused the right to "confront," both constitutional provisions apply to "witnesses" against the accused. Because the drafters of the state constitution

adopted the term "witnesses" from the federal constitution, it should be presumed that the drafters intended the term to have the same meaning.

As the United States Supreme Court has reasoned, only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. Davis, 547 U.S. at 821. If a statement is not testimonial, it is not subject to the Confrontation Clause because the declarant is not "bearing witness" by making the statement. Id. The result should be the same under the state constitution, because the critical term, "witness," is the same. The fact that the state constitution requires a "face to face" confrontation with "witnesses" does not alter the definition of "witness" itself. Accordingly, Vera's statements to the medical providers would not violate either the federal or state constitution because the statements were not testimonial and admission of the statements did not make Vera a "witness against the accused." Therefore, factors one and two do not favor a broader interpretation of the state constitution in this case.

Turning to the third factor, a plurality of the state supreme court has previously noted that constitutional history is not helpful in determining whether the drafters intended the state constitution to

be broader than the federal Confrontation Clause. Foster, 135 Wn.2d at 460. In his dissent in Foster, Justice Johnson looked to Massachusetts, after determining that the "face to face" language in the Washington constitution was indirectly derived from that state's 1780 constitution, which was one of the original state declarations of rights. Foster, 135 Wn.2d at 490 (Johnson, J., dissenting). The Massachusetts Supreme Court has held that its constitution is not broader than the federal right to confrontation in cases involving the hearsay rule and its exceptions. Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158 (2005). Therefore, constitutional history also does not favor a broader interpretation of the state constitution in this case.

The fourth factor is preexisting state law. The question of whether out-of-court statements violate the state constitution may be informed by examining Washington law at the time that the state constitution was adopted. The state constitution was adopted in 1889. As of that time, there were only nine years of reported decisions by the Supreme Court of the Washington Territory. Obviously, the court did not address all possible constitutional issues in those nine years.

Hurtado has cited to no pre-1889 Washington case in which statements for the purpose of medical treatment were held to violate the right to confront witnesses. However, in State v. Glass, 5 Or. 73, 79 (1873), the Oregon Supreme Court recognized that statements made by a sick person to a medical attendant as to the nature of her malady were admissible.<sup>4</sup> Also, in White v. Illinois, the United States Supreme Court referred to the hearsay exception for statements made for the purpose of medical treatment as a "firmly-rooted" exception. White v. Illinois, 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). Moreover, in State v. Ortega, 22 Wn.2d 552, 563, 157 P.3d 320 (1945), the state supreme court noted that the law can evolve, stating "the privilege of confrontation has at all times had its recognized exceptions, and these exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right to confront the witnesses against him."

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<sup>4</sup> In his opinion in Foster, Justice Alexander noted that Washington's confrontation clause is identical to Oregon's. Foster, 135 Wn.2d at 474 (Alexander, J., concurring in part and dissenting in part). Therefore, Oregon's case law is instructive as to this issue.

The fifth factor supports an independent constitutional analysis in every case. Foster, 135 Wn.2d at 458. In regard to the sixth factor, the concerns underlying the right to confrontation are not unique to Washington; rather, they are national concerns. Id. at 465.

In sum, only the fifth Gunwall factor supports an independent analysis of the state constitution in regard to the question presented here. Therefore, as it regards statements for the purpose of medical treatment, the state constitution should not provide broader protection than the federal Confrontation Clause. Because Vera's statements to the medical providers were not testimonial, their admission did not violate either the federal or the state right to confront witnesses.

Nonetheless, Hurtado cites several cases and claims that they stand for the proposition that statements made for the purpose of medical diagnosis or treatment were not admissible prior to the adoption of ER 803(a)(4) in the late 1970s. Appellant's Opening Brief, at 24-26. A closer examination of these cases demonstrates that Hurtado has misconstrued them. Rather than exclude medical hearsay statements, as Hurtado claims, these cases draw a clear distinction between statements made by a patient to a treating

physician, which were admissible as substantive evidence, and statements made to a physician solely for the purpose of qualifying the physician as an expert witness who would render an opinion at trial, which were not admissible as substantive evidence.

For example, in Kraettli v. North Coast Trans. Co., 166 Wn. 186, 6 P.2d 609 (1932), the injured plaintiff called several doctors to testify in her favor at trial. At least one of the plaintiff's treating physicians, Dr. Dickerson, testified about the plaintiff's statements regarding her injuries without objection. One of the other doctors, Dr. Stewart, testified as both an expert witness and a treatment provider. In addressing the defendant's claim on appeal that Dr. Stewart's testimony regarding the plaintiff's hearsay statements should not have been admitted, the court held:

The objection to the testimony of Dr. Stewart is easily determined. He did not make his examination for the purpose solely of testifying as a witness. He was called by Dr. Dickerson, her attending physician in Seattle, to examine respondent and make suggestions as to what to do for her, purely from the mental side. He was therefore called as a consultant with Dr. Dickerson, and appellant makes no objection to the testimony of Dr. Dickerson as to her statements to him concerning past pain and the condition of respondent after the accident, nor any pretense that his testimony was inadmissible. The testimony of Dr. Stewart stands upon the same ground.

In no decision or text that we have been able to find, after reading most of the many cases cited by appellant, has it ever been held that physicians called for the purpose of effecting a cure of a patient are not permitted to testify as to statements of the patient's past pain and suffering made to them by the patient, which are, of course, statements of subjective symptoms.

Kraettli, 166 Wn. at 189-90. Further, although the trial court had instructed the jury that it could not consider the plaintiff's hearsay statements to the two doctors who testified as *experts* for the truth of the matters asserted, no such instruction was necessary regarding the plaintiff's statements to her *treating physicians*. Id. at 190-01.

The other cases cited by Hurtado (and the cases cited by those cases) stand for the same proposition: statements made to doctors for the purpose of qualifying them as expert witnesses for trial were not admissible as substantive evidence, whereas statements made to treating physicians for the purposes of diagnosis or treatment *were* admissible as substantive evidence. See Estes v. Babcock, 119 Wn. 270, 274, 205 P. 12 (1922) (statements made to a doctor called as an expert witness were

admissible only for the purpose of allowing jurors to determine the weight to be given to the expert's opinion, not as substantive evidence); Peterson v. Dept. of Labor & Industries, 36 Wn.2d 266, 268, 217 P.2d 607 (1950) (noting that "one rule applies when the medical testimony is given by a doctor who examines a patient for the purpose of treating him, while a different rule applies when the testimony is given by a doctor who examines an individual for the sole purpose of qualifying himself to be a witness"); Foulkrod v. Standard Accident Ins. Co., 343 Pa. 505, 509, 23 A.2d 430 (1942) (statements by patients to doctors regarding symptoms for purposes of treatment are admissible); Reid v. Yellow Cab Co., 131 Or. 27, 32-33, 279 P. 635 (1929), *overruled on other grounds*, Skultety v. Humphreys, 247 Or. 450, 431 P.2d 278 (1967) (doctors may testify to statements connected to diagnosis or treatment, not for the purpose of qualifying them as a witness); Barber v. Merriam, 11 Allen 322, 93 Mass. 322, 325 (1865) (statements to treating physicians are made with "a strong and direct interest to adhere to the truth," and "[t]here can be no doubt that testimony of this

character has always been received in the courts of this commonwealth without any serious doubt or question").<sup>5</sup>

In sum, these cases held uniformly that statements made for the purposes of medical diagnosis or treatment were admissible as substantive evidence. On the other hand, statements made to medical experts for the purpose of rendering an expert opinion at trial did not carry the same guarantees of trustworthiness, and thus, they were admitted only for the limited purpose of allowing the jury to decide what weight the expert's opinion deserved. This analysis, which Washington cases adopted, closely resembles the federal analysis as to whether a statement is "testimonial," *i.e.*, whether it has been made in anticipation of testimony at trial. Accordingly, Hurtado's claim under the state constitution fails.

Hurtado also argues that even if some medical statements are admissible, statements of causation and attribution are not. See Appellant's Opening Brief, at 25-26 ("a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light") (citation omitted).

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<sup>5</sup> Again, the fact that courts in both Oregon and Massachusetts have historically admitted statements to treating physicians is significant, given that those states have the same confrontation clause language as Washington. See Foster, 135 Wn.2d at 474-76 (Alexander, J., concurring in part and dissenting in part), and at 490 (Johnson, J., dissenting).

Although this is true as a general rule, Washington case law is clear on this point: "In domestic violence and sexual abuse situations, a declarant's statement disclosing 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." State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). The record in this case is in accordance with this principle, as both the nurse and the doctor testified that determining the abuser's relationship to the victim is a necessary component of treatment. RP (7/6/11) 53-54; RP (7/7/11) 48-50. Hurtado's claim is without merit.

Hurtado also suggests in passing that the trial court erred in admitting Vera's hospital records under the statutory hearsay exception for business records (Chapter 5.45 RCW). Hurtado states that medical records "were not routinely admitted as evidence" prior to the enactment of the statute, citing State v. Rutherford, 66 Wn.2d 851, 853-54, 405 P.2d 719 (1965). Brief of Appellant, at 27-28. But Rutherford concerns business records regarding product testing; medical records are not mentioned. This argument should not be considered further. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

(arguments unsupported by citations to authority or persuasive reasoning will not be considered on appeal).

In sum, Hurtado's claim under the Washington Constitution should be rejected, because consideration of both the Gunwall factors and preexisting common law leads to the conclusion that statements made for purposes of medical treatment are admissible. Hurtado's claim fails.

Lastly, for the reasons stated in the previous argument section regarding the federal Confrontation Clause, any possible error in admitting Vera's statement that her boyfriend assaulted her is harmless beyond a reasonable doubt. See Mason, 160 Wn.2d at 927 (holding that constitutional error is harmless if the "untainted" evidence overwhelmingly proves the defendant's guilt).

**3. THE VICTIM'S STATEMENT TO MEDICAL PERSONNEL IDENTIFYING HER ASSAILANT WAS ADMISSIBLE UNDER THE HEARSAY RULES.**

In another related claim, Hurtado argues that the trial court erred in admitting Vera's statement that she was assaulted by her boyfriend under ER 803(a)(4). Brief of Appellant, at 28-32. This claim is without merit. As discussed above, Washington law unequivocally holds that statements attributing fault are admissible

in domestic violence cases because the identity of the abuser is relevant to the victim's medical treatment.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Under ER 803(a)(4), hearsay is admissible if the statements in question are "reasonably pertinent" to medical diagnosis or treatment. All divisions of this Court have held uniformly that although statements attributing fault are generally inadmissible under this rule, such statements *are* admissible in domestic violence and child abuse cases because the identity of the abuser is pertinent to the victims' treatment in such cases. *See, e.g., Williams*, 137 Wn. App. at 746 (holding that "a declarant's statement disclosing the identity of a closely-related perpetrator is admissible . . . because part of reasonable treatment and therapy is

to prevent recurrence and future injury"); Sandoval, 137 Wn. App. at 537 (holding that the rule encompasses "statements of fault in domestic violence cases since the identity of an abuser may affect the witness's treatment"); Fisher, 130 Wn. App. at 15 (holding that statements of fault are admissible in child abuse cases because such information is necessary in order to properly treat the child and prevent further abuse); Moses, 129 Wn. App. at 729 (holding that "statements attributing fault to an abuser in a domestic violence case are an exception [to the general rule] because the identity of the abuser is pertinent and necessary to the victim's treatment").

The rationale behind this rule is sound. Although Hurtado is correct that the identity of the other driver or the fact that the other driver ran a red light is generally irrelevant to the treatment of a car crash victim, the identity of the abuser in a domestic violence or child abuse case is information that is necessary to ensure that the abuse does not continue, as Dr. Trione explained in this case. RP (7/7/11) 48-50. Thus, the trial court exercised its discretion properly in accordance with Washington law.

Nonetheless, Hurtado argues that the trial court erred, citing State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003). But Redmond is not a domestic violence or child abuse case; rather, it

involves two students fighting in the parking lot of a school. Id. at 491. In addition, although Redmond gives an example of "the victim said her husband hit her in the face" as allegedly inadmissible hearsay, this statement appears to be nothing more than careless dicta. Id. at 497. Indeed, this statement in Redmond is especially puzzling in light of the fact that Redmond cites State v. Woods, 143 Wn.2d 561, 601-02, 23 P.3d 1046 (2001) -- a capital murder case in which the victim's statements identifying the perpetrator were ruled *admissible*. Hurtado's reliance on Redmond is misplaced.

In sum, Hurtado has not shown that the trial court abused its discretion in ruling in accordance with controlling authority that Vera's statement that she was assaulted by her boyfriend was admissible under ER 803(a)(4). Accordingly, this Court should affirm.

Lastly, even if this Court were to conclude that the trial court manifestly abused its discretion, any possible error is harmless for the reasons set forth in the first two argument sections. In fact, the harmless error standard is more stringent for a non-constitutional evidentiary claim, and thus, the burden is on Hurtado to demonstrate how the alleged error is harmful. See State v. Russell,

125 Wn.2d 24, 94, 882 P.2d 747 (1994) (holding that the defendant must show a reasonable probability that a non-constitutional error affected the outcome of the trial). Hurtado's claim fails for this reason as well.

**4. WASHINGTON LAW HOLDS THAT HURTADO HAD NO CONSTITUTIONAL PRIVACY INTEREST IN TELEPHONE CALLS MADE FROM THE JAIL; ALSO, BOTH HURTADO AND THE PERSON CALLED CONSENTED TO BEING RECORDED.**

Hurtado next claims that he had a privacy interest in the telephone calls he placed while he was incarcerated at the King County Jail, and thus, the recording of these calls without a warrant violated Article I, Section 7 of the Washington Constitution. Brief of Appellant, at 32-40. This Court has previously rejected this claim, and should do so in this case as well.<sup>6</sup> Specifically, Hurtado's challenge to the jail phone recordings under Article I, Section 7 of

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<sup>6</sup> As a preliminary matter, Hurtado argues this issue at length based on case law that is not on point. See Brief of Appellant, at 32-38 (and cases cited therein). Of the many cases cited in this portion of Hurtado's brief, only one of them concerns inmates, who have drastically reduced privacy rights compared with non-incarcerated citizens. Brief of Appellant, at 38 (citing *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). However, even this case does not support Hurtado's argument. See *id.* (holding that although a state regulation prohibiting marriage by prison inmates was invalid, a complete ban on inmate-to-inmate correspondence was proper because it was reasonably related to legitimate prison security interests). This portion of Hurtado's brief will not be discussed further.

the Washington Constitution has been rejected by this Court in State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009), and again in State v. Haq, \_\_\_ Wn. App. \_\_\_, 268 P.3d 997 (2012). These cases are dispositive, and Hurtado's claim fails.

This Court concluded in Archie that jail phone calls made under circumstances virtually identical to those present in this case (*i.e.*, calling the victim in violation of a no-contact order) were not "private affairs" protected by Article I, Section 7. Archie, 148 Wn. App. at 204. The Court further noted that the Washington Supreme Court has found no invasion of privacy when other forms of inmate communication are inspected, so long as inmates have been informed of that practice. Id. at 204 (citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967)).

This Court reached the same conclusion in Haq, despite the defendant's attempt to distinguish Archie on grounds that there was no evidence that defendant Haq was violating no-contact orders or engaging in ongoing criminal behavior while in the jail. Haq, 268 P.3d at 1015-16. This Court held that although Haq's recorded conversations did not contain evidence of ongoing criminal conduct, "the holding in Archie was based on the defendant's limited privacy

rights as a detainee," not on the fact that defendant Archie's telephone calls constituted evidence of ongoing crimes. Hag, at 1015.

In this case, it was undisputed that both Hurtado and each person he called from the jail were separately informed at the beginning of each telephone call that the call would be monitored and recorded. Ex. 7. Moreover, both Hurtado and the person receiving the call were required to acknowledge and agree to the recording by pressing "1" before the call could continue; if either Hurtado or the person called did not consent to the recording, they could press "2" to terminate the call. Ex. 7. It was also undisputed that each King County inmate is given an inmate handbook, which informs the inmate that telephone calls will be recorded.

RP (7/6/11) 89.

In accordance with Archie and Hag, there is no basis for Hurtado to claim that his telephone calls were "private affairs" due to his limited privacy rights as a pretrial detainee. Moreover, Hurtado received ample notice that the calls would be recorded, and both Hurtado and each person who received a call were required to consent to the recording of that call. Indeed, it is well-established that if *one* party to a conversation consents to a

recording, the recording does not violate Article I, Section 7. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996). In addition, as was the case in Archie (although it was not required for this Court's ultimate holding), Hurtado's telephone calls constituted evidence of ongoing criminal behavior, *i.e.*, witness tampering and no-contact order violations. Hurtado's calls were properly recorded by the jail for this reason as well.

Nonetheless, Hurtado argues that the evidence did not establish that recording his telephone calls was necessary for jail security, order, or discipline, and that his calls were "private affairs" because he discussed his infant daughter's day care, the state of her health, and her "developmental milestones" with "the child's mother." Brief of Appellant, at 39. This argument is specious for at least four reasons. First, Hurtado's argument directly conflicts with Archie and Haq, which hold that recording jail phone calls is constitutionally permissible. Second, Hurtado's argument is contrary to the record, which establishes that his calls constituted evidence of ongoing witness tampering and no-contact order violations, and thus, there was a security interest at issue. Third, Hurtado cites no relevant authority standing for the proposition that a conversation in which both parties have consented to being

recorded may be transformed into a "private affair" based on the content of the conversation. And fourth, "the child's mother" to whom Hurtado was speaking was *the crime victim*, with whom Hurtado was barred from having contact by a court order.

Furthermore, Hurtado offers no authority for his claim that a recording properly obtained by the jail can still be a "private affair" protected by Article I, Section 7. To the contrary, the Washington Supreme Court has concluded that once the State has properly seized an item, an inmate no longer has a privacy interest in it. State v. Puapuaga, 164 Wn.2d 515, 523-24, 192 P.3d 360 (2008); State v. Cheatam, 150 Wn.2d 626, 641-43, 81 P.3d 830 (2003).

In sum, Hurtado's claim that his telephone calls from the jail were "private affairs" is wholly without merit and contrary to controlling authority from this Court. This Court should reject the claim, and affirm.

**5. THE 911 CALL WAS SUFFICIENTLY AUTHENTICATED.**

Hurtado next argues that the trial court erred in admitting the 911 call that was placed from Jennifer Vera's residence because it was not sufficiently authenticated. Brief of Appellant, at 40-43.

This claim should be rejected. The custodian of records who copied the recording from the 911 database testified that the recording was authentic and accurate, and circumstantial evidence shows that Vera and Hurtado were the speakers on the recording. Hurtado has not shown an abuse of discretion on this basis.

Evidentiary rulings are addressed to the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 914. A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. Enstone, 137 Wn.2d at 679-80. An abuse of discretion occurs only if no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Under ER 901, the proponent of tangible evidence is required to show that the evidence is what it purports to be. This requirement is satisfied if the proponent makes a prima facie showing of authenticity, meaning that there is enough evidence to permit a reasonable juror to find that the item in question is authentic. 5C K. Tegland, Wash. Prac., Evidence § 901.2 (5th ed. 2007). This evidence rule "does not limit the type of evidence allowed to authenticate" the questioned item; rather, "[i]t merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be."

State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (quoting United States v. Jiminez Lopez, 873 F.2d 769, 772 (5th Cir. 1989)). Moreover, a trial court making a determination of authenticity is not bound by the rules of evidence; in other words, the evidence used to establish authenticity need not be admissible at trial. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007).

Generally speaking, an item of tangible evidence may be authenticated in one of two ways: 1) a witness with knowledge testifies that the item is what it purports to be; or 2) the witness who produced the item testifies that the equipment that was used produces reliable results, and that the item has not been altered since it was produced. See State v. Jackson, 113 Wn. App. 762, 766, 54 P.3d 739 (2002). Again, however, the rule does not limit what evidence the trial court may consider in determining authenticity. As this Court has stated with respect to sound recordings,

A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.

Williams, 136 Wn. App. at 500.

In this case, Meredith Munk testified as a records custodian for the North King County Regional Communications Center ("NORCOM"). RP (7/6/11) 62. Munk's duties include producing copies of recorded 911 calls from the NORCOM database and the corresponding Computer Aided Dispatch reports ("CAD" reports) upon request. RP (7/6/11) 63. Munk explained that it is not possible for her to alter recordings of 911 calls. RP (7/6/11) 63. Munk also explained that she reviews the CAD report in conjunction with the 911 recording to ensure that she is copying the correct recorded information. RP (7/6/11) 64-65. Munk testified that the CD of the 911 call in this case (Exhibit 2) was a recording that she had copied using this system, and that she had listened to the recording and verified its accuracy utilizing the corresponding CAD report. RP (7/6/11) 64-65.

Munk further explained that King County has an enhanced 911 system. With this enhanced system, when someone calls 911, the dispatcher automatically receives identifying information including the phone number, the address, and the name of the telephone service subscriber. This information comes directly from the phone company, and it appears automatically in the CAD report. RP (7/6/11) 67. In this case, the enhanced 911 system

reported that the caller was Jennifer Vera and that the address was 709 143rd Place SE in Bellevue. RP (7/6/11) 68. Munk confirmed that the responding officers were dispatched to this address, and the officers themselves confirmed that they contacted Jennifer Vera at that location. RP (7/6/11) 68-69; RP (7/7/11) 7-8, 22-23, 33.

The recording itself contains further evidence of its authenticity. Although most of the recording is unintelligible due to interference, the portions that can be heard provide further evidence of the identity of the speakers. For example, the male voice states fairly early in the call, "*Jenny*, I told you to shut the fuck up." Ex. 2. Moreover, although much of the conversation cannot be understood, it is clear that the man and the woman are having an argument about their daughter. Ex. 2. Other evidence established that Vera and Hurtado have a daughter. Ex. 7; RP (7/7/11) 10. Furthermore, the voices on the 911 recording are consistent with Hurtado's and Vera's voices on the jail phone recordings. Ex. 2; Ex. 7.

This evidence is sufficient to establish a prima facie showing that the recording is authentic. The records custodian verified the accuracy of the recording and duplication process, and the evidence from the CAD report, the police officers, and the recording

itself provided proof of the identity of the speakers. In sum, the record contains prima facie evidence of the 911 call's authenticity, and Hurtado has not shown that the trial court abused its discretion in admitting it.

But even if this Court holds that the trial court abused its discretion in admitting the recording on these grounds, any possible error is harmless. A non-constitutional error will be deemed harmless unless the defendant demonstrates a reasonable probability that the error actually affected the outcome of the trial. Russell, 125 Wn.2d at 94. Hurtado has not made that showing.

The 911 call in this case proves little, if anything, aside from the fact that Hurtado and Vera were arguing. Most of the call is unintelligible, and the portions that can be heard certainly do not establish that Hurtado committed an assault against Vera. Ex. 2. Moreover, as discussed in the first argument section, the other evidence of Hurtado's guilt is substantial and compelling. Hurtado has not shown that the outcome of the trial would have been different if the 911 call had not been admitted. This Court should affirm for this reason as well.

**6. THERE IS NO BASIS TO STRIKE THE DOMESTIC VIOLENCE DESIGNATION FROM THE JUDGMENT AND SENTENCE.**

Lastly, Hurtado argues that the domestic violence designation for his conviction for assault in the second degree should be stricken from the judgment and sentence because it is not based on a jury finding in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Brief of Appellant, at 43-48. This Court has previously rejected this claim, and it should be rejected in this case as well. Moreover, because this case was tried before the effective date of a new statute authorizing jury findings for the domestic violence designation, a jury finding was neither necessary nor authorized, and there will be no consequences in the future under the express language of the new statute even if Hurtado reoffends.

Two divisions of this Court have already rejected Hurtado's claim that a domestic violence designation must be found by a jury in the wake of Blakely. In State v. Felix, 125 Wn. App. 575, 105 P.3d 427, rev. denied, 155 Wn.2d 1003 (2005), this Court held that a judicial finding that a crime involves domestic violence did not violate Blakely because the domestic violence designation was not an element of the crime and did not result in additional punishment

for Blakely purposes. Division Two reached the same conclusion in State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006). The same conclusion should be reached in this case, as there was no additional punishment imposed as a result of the domestic violence designation.

Nonetheless, Hurtado argues that the domestic violence designation should be stricken from the judgment and sentence because there is a possibility of additional punishment in the future due to recent amendments to the Sentencing Reform Act ("SRA"). Brief of Appellant, at 47-48. But the plain language of the new statutory amendment at issue precludes its application to this case, now and in the future. As such, this argument fails.

The SRA scoring provisions have recently been amended to provide as follows:

(21) If the present conviction is for a felony domestic violence offense where domestic violence is defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011 . . . ;

(b) Count one point for each second and subsequent juvenile conviction where domestic

violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011 . . . ;

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.525(21). In accordance with the plain language of this statute, no additional punishment can stem from a domestic violence designation unless the following three requirements are satisfied: 1) the domestic violence designation for the *current* offense was charged in the information and found by the jury; 2) the domestic violence designation for any *prior* offense was charged in the information and found by the jury; and 3) the domestic violence designations for *both* the current offense *and* any prior offense were charged in the information and found by a jury *after August 1, 2011*.

In this case, Hurtado committed his crimes before August 1, 2011, and his trial was completed before August 1, 2011. Accordingly, it is not possible for the domestic violence designation in this case to carry additional sentencing consequences in the future under the new scoring statute because the new statute is categorically inapplicable. Therefore, even assuming that Hurtado

commits another domestic violence crime in the future, he will suffer no additional consequences as a result of his convictions in this case. Hurtado's arguments to the contrary are without merit.

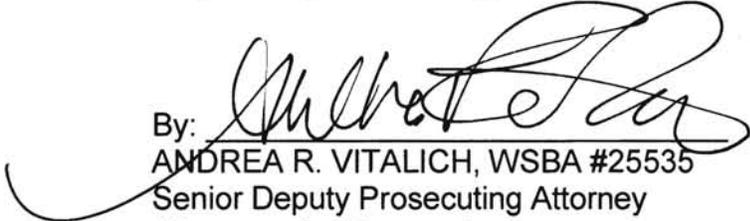
**D. CONCLUSION**

For the reasons set forth above, Hurtado's convictions and sentence should be affirmed.

DATED this 18<sup>th</sup> day of April, 2012.

Respectfully submitted,

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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HECTOR HURTADO, Cause No. 67478-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

4/18/12  
Date