FILED
Court of Appeals
Division I
State of Washington
12/3/2019 4:50 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
12/4/2019
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97926-0
(COA No. 78482-0-I)

THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SALAH MAHAMUD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 6

1. Mr. Mahamud was deprived of his right to a fair trial by the court's decision to allow the jury to hear threats of self-harm alleged by the complaining witness that were unrelated to the charged offense. 7

a. Evidence of A.M.'s threats of self-harm were not relevant and were overly prejudicial. 8

b. The Court of Appeals erred when it declined to reach the issue of whether the statements of self-harm were admissible. 10

2. The court's error in allowing the jury to hear statements made by the complaining witness to medical personnel not made for the purpose of medical diagnosis and treatment deprived Mr. Mahamud of his right to a fair trial. 12

a. Statements made for medical diagnosis do not include statements attributing fault, which were allowed here. . 12

b. As agreed to by the treating nurse, statements of identity were not relevant to A.M.'s treatment. 14

3. The errors in admitting irrelevant and overly prejudicial evidence were not harmless beyond a reasonable doubt, as the question of whether the crime described actually occurred depended on the credibility of the complaining witness. 15

4. Even if these errors are not sufficient on their own, the cumulative error doctrine required the Court of Appeals to reverse Mr. Mahamud's convictions. 17

F. CONCLUSION 19

TABLE OF AUTHORITIES

United States Supreme Court

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 15

Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) 6

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 16

Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) 6

Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) 18

Williams v. Taylor, 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) 13, 18

Washington Supreme Court

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) 18

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) 15

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 15

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) 8

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) 13

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) 11

Washington Court of Appeals

State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989) 14

State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001)........... 13

State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995)............ 13

State v. Venegas, 153 Wn. App. 507, 228 P.3d 813 (2010) 18

State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007) ... 13

Statutes

RCW 9A.44.086 16

Rules

ER 403 .... 5, 8

ER 404 8

ER 803 .... 12, 13

RAP 13.3 1

RAP 13.4 .... 1, 19

RAP 2.5 11

Constitutional Provisions

Const. art. I, § 3 17

U.S. Const. amend. XIV 6, 17

A. IDENTITY OF PETITIONER

Salah Mahamud asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Mahamud seeks review of the Court of Appeals decision dated November 4, 2019, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court deprived Mr. Mahamud of his right to a fair trial by the court's erroneous ruling allowing the jury to hear testimony that the complaining witness harmed herself, when this evidence was not related to the charged crime.

2. Whether the trial court's error in allowing the jury to hear statements of identification made to a treating nurse not relied on for medical treatment deprived Mr. Mahamud deprived him of his right to a fair trial.

3. Whether the cumulative error of the trial court's rulings deprived Mr. Mahamud of his right to a fair trial.

D. STATEMENT OF THE CASE

A.M. had a history of running away and self-harm. RP 408. A.M.'s threats to kill herself predated this case. RP 14. She made threats to kill herself when she was taken to Valley Medical Center to determine whether she should be committed for her own safety. RP 331. These threats were not tied to the evidence in this case. RP 14.

The government charged Mr. Mahamud with rape of a child in the second degree based on A.M.'s disclosures. CP 1. The government alleged Mr. Mahamud had sex with A.M. about a week before her treats of self-harm. RP 37. A.M. and her self-described cousin decided to run away from their homes. RP 359-60. Her cousin's boyfriend picked them up in his car. RP 360-61. They drank a Four Loko alcoholic beverage. RP 656-66. The girls then shoplifted a few more from a store, before going to the house the cousin's boyfriend shared with Mr. Mahamud. RP 369. Drunk, A.M. went to sleep in Mr. Mahamud's bedroom. RP 373, 376, 379. She

alleged Mr. Mahamud later came into the room and had sexual intercourse with her. RP 380, 382.

The government also introduced DNA evidence recovered from A.M.'s underwear, statements she made to a nurse who treated A.M. when she threatened to kill herself, and statements she made to a sexual assault nurse. RP 486, 333, 423-25. At the time of this incident, Mr. Mahamud was twenty-three years old. CP 1. Based on the age difference between A.M. and Mr. Mahamud, the government charged him with rape of a child in the second degree. CP 1.

In pre-trial motions, the prosecutor told the court he intended to introduce evidence of A.M.'s suicidal ideation to the jury. RP 14. The prosecutor did not believe he could directly tie the suicidal threat to what happened in this case. RP 14. Nevertheless, he asked the court to allow the jury to hear of it because it would explain why A.M. went to the hospital. RP 14.

Defense counsel objected, asking the court to reserve on the ruling. RP 12. The court expressed its concerns over

allowing the jury to hear this type of evidence. RP 15. The court recognized that "there could be the inaccurate impression that this was completely new type of conduct, when it fact it wasn't." RP 15.

In his opening statement, however, the prosecutor tied the threats directly to the rape allegations. RP 279. The prosecutor stated:

> And [A.M.'s mother] shall tell you that when her daughter, finally, was brought back to the house by the police, that her daughter seemed somewhat different. She seemed distant and removed and, at a certain point, her daughter even threatened to commit suicide. And so [A.M.]'s mom took her to Valley Medical Center, to the emergency room to be checked out. And that's when [A.M.] disclosed what had happened to her.

RP 279. He returned to this theme in his closing argument, asserting that what happened to A.M. made her suicidal and caused her to have trouble sleeping. RP 531.

Before the nurse who saw A.M. at Valley Medical Center testified, Mr. Mahamud asked the court to exclude the disclosures A.M. made to her because the statements were not prepared for purposes of medical treatment and diagnosis. RP

306. A.M. was taken to the hospital involuntarily for a potential mental health commitment and not to be treated for a sexual assault. RP 307.

Mr. Mahamud argued that the statements were not for medical diagnosis and treatment. RP 305. There were no treatment recommendations and no follow-up at Valley Medical Center. RP 307. There was "just basically a consultation and she was released." RP 307. The court determined A.M.'s disclosures fell within the hearsay exception for statements made for diagnosis or treatment under ER 403(a)(4). RP 310.

At trial, the nurse who treated A.M. admitted A.M.'s disclosure of sexual assault was not for medical treatment and diagnosis. RP 333. When the prosecutor asked the nurse why she asked for the identity of the perpetrator, the nurse stated that who committed the crime was not important to treatment and was "more of a police issue." RP 333. After further questioning, the nurse told the prosecutor she

included Mr. Mahamud's name in the report for the police, "to make sure they know who did it." RP 333.

The jury found Mr. Mahamud guilty of the charged crime. RP 580. The court sentenced him to an indeterminate sentence of 90 months to life. RP 594, CP 37.

E. ARGUMENT

An evidentiary ruling violates due process when it deprives a defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

The court allowed the jury to hear irrelevant and highly prejudicial evidence when it allowed the prosecutor to elicited testimony of self-harm unrelated to any crime Mr. Mahamud may have committed and when it allowed medical personnel to testify about statements the complaining witness made that were not related to medical diagnosis or treatment. These errors deprived Mr. Mahamud of his right to a fair trial because, without this evidence, it is unlikely the government

could have proven the charged crime, rather than a lesser included offense.

The Court of Appeals declined to rule on whether allowing the jury to hear evidence of self-harm deprived Mr. Mahamud of his right to a fair trial, finding the error was not preserved and was not manifest. APP 5. Because this error is of constitutional magnitude, this Court should accept review of the Court of Appeals erred in failing to reach this error.

The Court of Appeals also held the trial court did not err when it allowed statements made to the nurse to be admitted at trial, even though the nurse did not rely on the statements for purposes of treatment. APP 6. Because this error also deprived Mr. Mahamud of his right to a fair trial, this Court should accept review of this issue.

1. **Mr. Mahamud was deprived of his right to a fair trial by the court's decision to allow the jury to hear threats of self-harm alleged by the complaining witness that were unrelated to the charged offense.**

The Court of Appeals held that trial counsel failed to preserve the issue of whether statements of self-harm should have been introduced at trial. APP 5. This error was of

constitutional magnitude. And while defense counsel did object, this Court should accept review to determine whether allowing the jury to hear evidence of unrelated self-harm where the credibility of complainant was central to the government's case deprived Mr. Mahamud of his right to a fair trial.

a. *Evidence of A.M.'s threats of self-harm were not relevant and were overly prejudicial.*

Relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403; ER 404(b). The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

A.M.'s self-harm was not relevant to the government's case. A.M.'s threats of self-harm could not be directly tied to Mr. Mahamud. RP 14. A.M. had a history of running away and cutting herself pre-dating meeting Mr. Mahamud. RP 12-13. The prosecutor only argued the evidence should be admitted to complete the narrative because it was impossible

to explain otherwise why A.M.'s mother took A.M. to the hospital. RP 14.

Even if the reason A.M. went to the hospital was minimally probative background information, her statements about suicidal thoughts and acts were far more prejudicial and inflammatory than relevant. When asked A.M. what happened when she went first returned home, she told the jury, "I held a knife to my throat." RP 400. She was then allowed to testify that she felt "disgusted" with herself and dirty "because of what he did." RP 401.

This description of A.M. when she returned home was in stark contrast with the story the prosecutor tried to paint about the kind of person A.M. was before she ran away, introducing evidence A.M. went to church regularly, did general studies, and was involved in cheer outside school. RP 435. In fact, the history of self-harm pre-dated anything that happened with Mr. Mahamud. RP 408. Even the prosecutor agreed the changes in A.M. were not a result of what happened between her and Mr. Mahamud. RP 15.

By allowing the prosecutor to paint a picture of A.M. cutting herself because of what Mr. Mahamud may have done, the government distorted the evidence and unfairly prejudiced Mr. Mahamud. Defense counsel recognized the prejudice this would cause to Mr. Mahamud. The court should have precluded testimony on why A.M. went to Valley Medical Center, as it was not relevant and its prejudicial effect outweighed its probative value. Because this error by the trial court deprived Mr. Mahamud of his right to a fair trial, Mr. Mahamud asks this Court to accept review of this error.

b. The Court of Appeals erred when it declined to reach the issue of whether the statements of self-harm were admissible.

The Court of Appeals declined to reach the issue of whether the evidence of self-harm deprived Mr. Mahamud of his right to a fair trial, holding that trial counsel did not preserve the error. APP. 2. However, there was an extensive discussion about whether and how this evidence should have been introduced at trial. The court ultimately reserved on the

issue. RP 15. When the evidence was presented, defense counsel asked that the witness who would testify about the self-harm be excluded, referencing the cutting. RP 306-07.

Even if this discussion had not been heard by the court, the Court of Appeals should have addressed these issues because the error was manifest. A party may raise manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). This exception recognizes that "[c]onstitutional errors are treated specially because they often result in serious injustice to the accused." *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Because the decision of the trial court to allow the jury to hear evidence about self-harm affected the credibility of A.M. and made her a more sympathetic witness, it impacted Mr. Mahamud's right to a fair trial. Thus, even if the Court of Appeals was correct in holding that the error was not preserved, it was wrong in determining the error was not manifest.

2. **The court's error in allowing the jury to hear statements made by the complaining witness to medical personnel not made for medical diagnosis and treatment deprived Mr. Mahamud of his right to a fair trial.**

The Court of Appeals held that the statements made by A.M. at the hospital were reasonably pertinent to A.M.'s medical diagnosis. APP 5. The evidence at trial established the contrary. Allowing this evidence to be heard unnecessarily bolstered the complainant, whose credibility was the central issue in this case. Because this issue is of constitutional magnitude, this Court should accept review to correct the Court of Appeals error.

a. *Statements made for medical diagnosis do not include statements attributing fault, which were allowed here.*

Statements for medical diagnosis or treatment are admissible only when "describing medical history, or past or present 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." ER 803(a)(4). To be reasonably pertinent, the court must find the

declarant's motive in making the statement was to promote treatment, and the medical professional reasonably relied on the statement for purposes of treatment. *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

Because ER 803(a)(4) pertains to statements "reasonably pertinent to diagnosis or treatment," it allows statements regarding causation of injury, but not generally statements attributing fault. *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). For example, "the statement 'the victim said she was hit on the legs with a bat,' would be admissible, but 'the victim said her husband hit her in the face' would not be admissible." *Id.*, *see also State v. Huynh*, 107 Wn. App. 68, 74-75, 26 P.3d 290 (2001) (statements naming the alleged assailant not reasonably pertinent to diagnosis and treatment).

There are only two recognized exceptions to the doctrine that statements attributing fault are not admissible: cases of child abuse and cases involving domestic violence. *State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521 (1995);

State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989). These exceptions rest on the principle that the statements are pertinent to treatment. *Sims*, 77 Wn. App. at 240.

b. As agreed to by the treating nurse, statements of identity were not relevant to A.M.'s treatment.

Who assaulted A.M. was not relevant to her medical treatment, as the Valley Medical Center nurse made clear. RP 333. When asked by the prosecutor why the name of the perpetrator was important, she said:

> Q Now, why is it important to note who (sic) actually was the reason why the patient comes to the hospital? Wha -- who the perpetrator is. Why is that important to your treatment?
>
> A Who the perpetrator is is not necessarily important to why we're treating her. I'd say it's more of a police issue.

RP 333.

Despite the nurse's testimony that identity was not important, the court permitted the nurse to testify in detail about A.M.'s statements. RP 310.

Despite the Court of Appeals holding to the contrary, these statements were not relevant and should not have been

admitted. These statements were crucial to the government's case, as they corroborated A.M.'s statements in court. This Court should accept review of whether this error deprived Mr. Mahamud of his right to a fair trial.

3. **The errors in admitting irrelevant and overly prejudicial evidence were not harmless beyond a reasonable doubt, as the question of whether the crime described occurred depended on the credibility of the complaining witness.**

If the error is of constitutional magnitude, prejudice is presumed, and the government bears the burden of proving the error is harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *accord State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011). Moreover, while some fundamental constitutional errors "are so intrinsically harmful as to require automatic reversal," for "all other constitutional errors," this Court applies the harmless-error analysis to determine whether reversal is appropriate. *Id.* (citing *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d

35 (1999)). Because the errors made by the trial court deprived Mr. Mahamud of his right to a fair trial, the constitutional error standard should apply.

The only evidence of penetration was A.M.'s testimony. While the prosecutor introduced evidence that Mr. Mahamud's semen was in A.M.'s underwear, this did not establish penetration. Instead, the DNA evidence only established child molestation. *See* RCW 9A.44.086. A.M.'s testimony was critical to proving the charged crime of rape of a child in the second degree.

Allowing the prosecutor to paint A.M. as suicidal because of what Mr. Mahamud did and by corroborating her statements through the nurse's testimony was not harmless.

The allegations of self-harm created sympathy for her with the jury that was not necessary to prove the allegations and prejudiced Mr. Mahamud's ability to present a defense.

Allowing the Valley Medical Center nurse to corroborate A.M.'s testimony was also unfair. The nurse was an independent witness not otherwise involved in evidence

gathering, giving her credibility that A.M. lacked. She had no firsthand knowledge of the incident, but her testimony corroborating A.M.'s allegations vouched for A.M.'s credibility in a case where A.M.'s rendition of events was the critical issue for the jury.

The prosecution cannot demonstrate these errors were harmless beyond a reasonable doubt. Review of whether Mr. Mahamud was deprived of his right to a fair trial should be granted.

4. **Even if these errors are not sufficient on their own, the cumulative error doctrine required the Court of Appeals to reverse Mr. Mahamud's convictions.**

The Court of Appeals also held that the cumulative error doctrine does not apply. APP 6. This Court should accept review of whether the cumulative errors committed by the trial court deprived Mr. Mahamud of his right to a fair trial.

Even if no particular error would warrant reversal on their own, the cumulative effect of the court's errors merits reversal. U.S. Const. amend. XIV; Const. art. I, § 3; *Williams*

v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010).

Because the primary issue in this case was A.M.'s credibility, allowing the jury to hear evidence corroborating her story was critical. When the court allowed the jury to hear erroneously admitted evidence of A.M.'s prior accusations, it made it impossible for Mr. Mahamud to defend himself. By then creating sympathy for A.M. by allowing the jury to hear her threats of self-harm, the court created an unnecessary sympathy for A.M. that further deprived Mr. Mahamud of his ability to defend himself. This Court should grant review of

whether the trial court's cumulative error deprived Mr. Mahamud of his right to a fair trial.

F. CONCLUSION

Based on the preceding, Mr. Mahamud respectfully requests that review be granted under RAP 13.4 (b).

DATED this 3rd day of December 2020.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion .... APP 1

FILED
11/4/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SALAH A. MAHAMUD, Appellant.	No. 78482-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 4, 2019

CHUN, J. — A jury convicted Salah Mahamud of rape of a child in the second degree. On appeal, Mahamud contends the trial court erred in admitting prejudicial testimony and hearsay, and improperly imposed a sentencing provision barring him from contact with minors without making exception for any of his possible future children. We affirm.

I. BACKGROUND

According to A.M., Mahamud raped her at his apartment. The next morning, at the apartment, A.M. told her close friend T.M. about the incident.

When A.M. returned home, her mother opened the door, let her into the home, and the two walked into the living room. A.M.'s mother shortly left the room and came back to find A.M. holding a knife to her throat. At her mother's urging, A.M.'s sister called 911, and an ambulance took A.M. to the hospital.

A.M. told emergency room personnel that "on the first night when she was staying with [T.M.], [T.M.]'s boyfriend's uncle, who is reportedly a 22-year-old adult, sexually assaulted her."[1] Emergency room personnel helped schedule a follow-up appointment with a sexual assault nurse examiner. A.M. also told the sexual assault nurse examiner that she was raped.

Police collected and submitted A.M.'s clothing from the night of the rape to the Washington State Patrol Crime Lab. Sperm cells on A.M's underwear matched Mahamud's DNA. A.M. also identified Mahamud as her attacker in a police photo montage.

The State charged Mahamud with rape of a child in the second degree. The jury convicted Mahamud as charged. As a part of his sentence, the trial court prohibited Mahamud from having direct or indirect contact with minors. Mahamud appeals his conviction and the sentencing provision.

II. ANALYSIS

A. Evidentiary Issues

1. A.M's Threats of Self-Harm

Mahamud argues the trial court erred by admitting evidence that A.M. held a knife to her throat before being taken to the hospital. Mahamud contends this evidence prejudicially generated sympathy for A.M. The State argues Mahamud did not properly raise this issue to the trial court and that the evidence is relevant and non-prejudicial. We conclude that the asserted error cannot be raised for the first time on appeal.

---

[1] The record does not show any actual relation between Mahamud and T.M.'s boyfriend.

"An issue generally cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right." State v. Fenwick, 164 Wn. App. 392, 399, 264 P.3d 284 (2011) (internal quotation marks and citation omitted); RAP 2.5(a)(3). We determine whether an error constitutes a manifest error affecting a constitutional right through a two-part analysis:

> First, we determine whether the alleged error is truly constitutional. . . . Second, we determine whether the alleged error is "manifest." . . . "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. . . . To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequence in the trial of the case.

Fenwick, 164 Wn. App. at 399-400 (internal quotations marks and citations omitted). Evidentiary errors are not typically of a constitutional magnitude. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009).

At trial, Mahamud did not object to introduction of testimony that A.M. held a knife to her throat after arriving home.[2] Because Mahamud claims erroneous admission of evidence under ER 401 and ER 403, the asserted error is not of a constitutional magnitude.

Additionally, even if the asserted error is constitutional, it is not manifest. "The admission of evidence on an uncontested matter is not prejudicial error." Powell, 166 Wn.2d at 84 (internal quotation marks and citation omitted). In Powell, the defense agreed that the State could introduce testimony at trial

---

[2] Mahamud, the State, and the trial court discussed whether the fact that A.M. had a prior history of cutting would be admissible. The trial court concluded the defense would be allowed to elicit such evidence if, as expected, the State chose to elicit testimony that showed A.M. held a knife to her throat and threatened to kill herself shortly after arriving home. The State made clear its intention to elicit testimony that A.M. held a knife to her throat and threatened to kill herself, and Mahamud made no objection in limine or at trial.

regarding the defendant's drug use on the day of his attempted burglary. 166 Wn.2d at 84. Instead of arguing the testimony was prejudicial, the defense argued the witness at issue was not credible. Powell, 166 Wn.2d at 84. On appeal, the defense argued for the first time that this evidence prejudiced him; but because no objection as to prejudicial effect was made at trial, the court concluded the evidence's admission was an uncontested matter and thus not prejudicial. Powell, 166 Wn.2d at 85. The court further concluded that the error was not manifest because the testimony had no practical or identifiable consequences on the outcome of the trial because ample evidence supported the jury's guilty verdict. Powell, 166 Wn.2d at 85.

Here, as in Powell, Mahamud agreed the State could introduce testimony that A.M. held a knife to her throat before being sent to the hospital. But he sought to elicit testimony that A.M. had a prior history of cutting. Instead of arguing the testimony was prejudicial, Mahamud used the testimony to attack A.M.'s credibility. Because Mahamud did not object to this testimony's prejudicial effect at trial, the evidence's admission was an uncontested matter. And ultimately, Mahamud does not show how the testimony had practical or identifiable consequences on the outcome of the trial; ample evidence, such as A.M.'s testimonial identification of Mahamud as her rapist, her identification of Mahamud as her rapist to emergency room personnel, her statement to the sexual assault nurse examiner that she was raped, and presence of Mahamud's sperm cells on her underwear, supported the jury's guilty verdict. Thus, any error was not manifest.

Because Mahamud did not properly preserve his objection and any alleged error is not a manifest error affecting a constitutional right, he cannot raise the issue for the first time on appeal.

2. Medical Diagnosis Hearsay Exception

Mahamud argues the trial court erred when it admitted statements A.M. made to the nurse at Valley Medical Center, because they did not fall under the hearsay exception for medical diagnosis and treatment. The State argues the trial court properly admitted the testimony because it was reasonably pertinent to A.M's medical diagnosis. We agree with the State.

We review evidentiary rulings for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Hearsay is an out-of-court statement offered for the truth of the matter asserted. ER 801. Hearsay evidence is inadmissible unless an exception applies. ER 802. ER 803(a)(4) allows admission of hearsay statements that are made for the purpose of or are reasonably pertinent to medical diagnosis or treatment. A party demonstrates that a statement is reasonably pertinent to medical diagnosis or treatment 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. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). Under this exception, a medical provider can typically relay a patient's statements relating to causation of their harm, but

generally not identifications of the perpetrators of their harm. State v. Fitzgerald, 39 Wn. App. 652, 658, 694 P.2d 1117 (1985); State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006). But statements of identification may be admissible where the declarant is a child and they identify their abuser:

> Washington courts have determined that statements regarding the identity of [a child's] abuser are reasonably necessary to the child's medical treatment. The rationale is that a medical provider needs to know who abused a child in order to avoid sending the child back to the abusive relationship and to treat the child's psychological injury.

Hopkins, 134 Wn. App. at 788 (internal citation omitted).

Here, A.M. stated to the emergency room nurse that she was sexually assaulted by "[T.M.]'s boyfriend's uncle" on the first night that she stayed at his home. A.M. was a child of 13 years when she made her statement. Because A.M. was a child and the emergency room nurse needed to make sure she did not send A.M. back to her abuser, the nurse reasonably needed to know the abuser's identity. The nurse's testimony was admissible under ER 803(a)(4). The trial court did not abuse its discretion by admitting this testimony.

3. Cumulative Error

Finally, Mahamud alleges that even if no particular error warrants reversal on its own, the cumulative effect of the court's errors merits reversal.

Even where individual errors, "standing alone, might not be of sufficient gravity to constitute grounds for a new trial," the combined effect of the accumulation of errors may in some instances necessitate a new trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). But when a party fails to demonstrate any prejudicial error, we will not reverse a conviction. State v.

Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Here, Mahamud has not demonstrated any error by the trial court. Accordingly, we decline to reverse his conviction on a cumulative error theory.

B. No-Contact Order

For the first time on appeal, Mahamud moves to remand his sentence to the sentencing court and amend the sentencing provision that prohibits him from having contact with minors to allow for contact with his own potential children. The State argues Mahamud did not properly raise this issue at the sentencing phase and that his claim is not ripe. We agree.

Mahamud raised no similar objection to this sentencing provision at the sentencing hearing. Division Three recently outlined when we may review in instances such as this:

> For an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that . . . is "illegal or erroneous" as a matter of law, and (2) it must be ripe. If it is ineligible for review for one reason, we need not consider the other.

State v. Peters, No. 31755-2-III, slip op. at 5 (Wash. Ct. App. Sept. 17, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/317552_pub.pdf.

A preenforcement challenge to a community custody condition "is ripe for review on direct appeal if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (internal quotation marks and citation omitted). However, "before refusing to review a preenforcement challenge on direct appeal, a reviewing court must also consider the hardship to

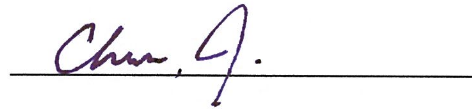
the offender. . . . [T]he risk of hardship will justify review before factual development if the challenged condition immediately restricts an offender's conduct upon release from prison." Peters, No. 31755-2-III, slip op. at 5 (internal citations omitted).

When reviewing whether a no-contact order with a defendant's own children is appropriate, we conduct a fact-based inquiry, weighing the State's compelling interest in preventing harm to children against the defendant's fundamental right to raise their children without State interference. See State v. Letourneau, 100 Wn. App. 424, 437-44, 997 P.2d 436 (2000); State v. Warren, 165 Wn.2d 17, 31-35, 195 P.3d 940 (2008). In conducting this inquiry, we will often consider whether the children were victims of the defendant's crime, whether they witnessed the defendant's crime, or whether they are of the same class or age as the victim of the defendant's crime. See State v. Ancira, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001) (declining to impose a no-contact order between defendant and his children where children were not the victims of his crime); State v. Howard, 182 Wn. App. 91, 102, 328 P.3d 969 (2014) (weighing propriety of a no-contact order where defendant's children witnessed his crime); Letourneau, 100 Wn. App. at 442 (declining to impose a no-contact order between the defendant and her children because there was no evidence she was a pedophile or posed a danger of molesting her children).

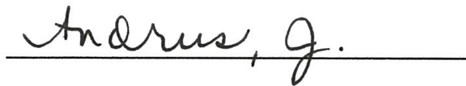
The State has not yet acted to separate Mahamud from his children, as he has no children. Thus Mahamud's challenge to the condition constitutes a preenforcement challenge. Because Mahamud has no children, conducting a

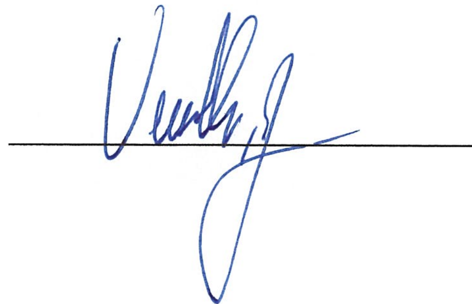
review of the community custody condition as applied to him would require further factual development. As his claim requires further factual development, his preenforcement challenge is not yet ripe. Additionally, no risk of hardship justifying immediate review exists, as the challenged condition will not immediately restrict Mahamud's conduct upon his release from prison; no restriction will occur until after Mahamud has children. Because his claim is not ripe and there is no risk of hardship, we decline to consider the merits.

Affirmed.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78482-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent James Whisman, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[Jim.Whisman@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 3, 2019

WASHINGTON APPELLATE PROJECT

December 03, 2019 - 4:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78482-0
Appellate Court Case Title:	State of Washington, Respondent v. Salah A. Mahamud, Appellant

The following documents have been uploaded:

- 784820_Petition_for_Review_20191203164957D1831059_5154.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.120319-10.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- richard@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20191203164957D1831059