

63548-4

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No. 63548-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAMES DERRICK RUFFIN,

Appellant.

2010 JAN 29 PM 4: 54

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON

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

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BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The introduction of Naomi Wilson's statements to an emergency room nurse through the testimony of her physician and her medical records violated Mr. Ruffin's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution.

2. The introduction of Ms. Wilson's statements to a 911 operator violated Mr. Ruffin's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution.

3. The introduction of Ms. Wilson's statements to an emergency room nurse through the testimony of her physician and her medical records violated Mr. Ruffin's right to confront the witnesses against him under article I, section 22 of the Washington Constitution.

4. The prosecuting attorney committed misconduct in closing argument by arguing Mr. Ruffin was responsible for Ms. Wilson's failure to testify when the prosecutor chose not to call her as a witness.

5. The prosecuting attorney committed misconduct by urging the jury to convict Mr. Ruffin for reasons other than finding

the State had proved the elements of the crime and absence of self-defense beyond a reasonable doubt.

6. The prosecuting attorney committed misconduct by arguing to the jury that the version of the events provided by the State's witnesses and the version testified to by the defendant were mutually exclusive and only one was true.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The confrontation clause of the Sixth Amendment to the United States Constitution prohibits the introduction of testimonial hearsay unless the declarant is not available to testify and the defendant had the prior opportunity to cross-examine the declarant. The doctor who examined Ms. Wilson read to the jury Ms. Wilson's description to a nurse of the assault and identification of the attacker and the same information was introduced through her medical records. Where Ms. Wilson was available but the State did not call her to testify, did the introduction of her statements to the nurse violate Mr. Ruffin's constitutional right to confront the witnesses against him?

2. The jury heard Ms. Wilson's statements to a 911 operator asking for the police because she had been assaulted by Mr. Ruffin. Where Ms. Wilson was available but the State did not call

her to testify, did the admission of the testimonial 911 call violate Mr. Ruffin's federal constitutional right to confront the witnesses against him?

3. Article I, section 22 of the Washington Constitution protects the right of a criminal defendant to "meet the witnesses against him face to face." Article I, section 22 is more protective of a defendant's right to confront witnesses than the federal constitution. Ms. Wilson's statements to a nurse describing an assault by her boyfriend would not have been admitted as substantive evidence at the time of the passage of the Washington Constitution. Was Mr. Ruffin's constitutional right to meet the witnesses against him face to face violated when the State introduced Ms. Wilson's description of the assault and identification of her attacker even though Ms. Wilson did not testify and Mr. Ruffin did not have the opportunity to cross-examine her?

4. It is misconduct for the prosecutor to urge the jury to convict the defendant based upon facts not in evidence. The prosecutor did not require Ms. Wilson to come to court and testify even though she had been subpoenaed. In closing, the prosecutor argued that Ms. Wilson did not appear in court because she was manipulated by the defendant. In the absence of evidence to refute

Mr. Ruffin's self-defense claim, must Mr. Ruffin's conviction be reversed because there is a substantial likelihood the prosecutor's misconduct affected the jury verdict?

5. The prosecutor commits misconduct when she urges the jury to convict the defendant for reasons other than the State's proof of the elements of the crime beyond a reasonable doubt. The prosecutor told the jury to give Mr. Ruffin his "just deserts" because he beat Ms. Wilson "like a dog," because he testified he acted in self-defense, and because "he attempted to assassinate the character of the mother of his children." Must Mr. Ruffin's conviction be reversed because there is a substantial likelihood the prosecutor's misconduct affected the jury verdict?

6. The jury is required to decide if the State proved every element of the crime beyond a reasonable doubt and is not required to determine the truth. The prosecutor argued that the version of events presented by the State's witnesses or the defendant's testimony were mutually exclusive and only one was true. The jury did not have to believe the State's witnesses were lying to find Mr. Ruffin acted in self-defense. Where this Court has repeatedly advised prosecutors this type of argument is improper,

was the prosecutor's argument so flagrant and ill-intentioned that no instruction would have cured the prejudice?

C. STATEMENT OF THE CASE

In December 2008, James Ruffin and Naomi Wilson had been in a relationship for approximately seven years and had a young daughter. 5/7/09RP 220, 272, 230. The couple lived in the upstairs portion of a split-level home, and Ms. Wilson's parents lived in the downstairs section. 5/5/09RP 70.

Mr. Ruffin and Ms. Wilson worked different shifts and shared child care responsibilities, but both were home on the evening of December 27; they watched television, drank beer, and cared for their daughter. 5/7/09RP 222-26. Mr. Ruffin drank about two and a half 24-ounce cans of beer. Ms. Wilson consumed one and a half cans and then went to the store for more beer; she returned with malt liquor which she then drank. 5/7/09RP 225-29. Mr. Ruffin put their daughter to bed while Ms. Wilson was gone. 5/7/09RP 224.

After Ms. Wilson returned, the couple talked, and Mr. Ruffin expressed his concern because Ms. Wilson had left their daughter home alone earlier that month when she went to the store to get beer. 5/7/09RP 251. The two discussed separating. 5/7/09RP 230. During the discussion, Ms. Wilson became loud and verbally

abusive, and she threw a cup of beer at Mr. Ruffin. 5/7/09RP 230-31. When Mr. Ruffin walked into another room and sat on the couch, Ms. Wilson followed and stood over him, agitated and yelling. 5/7/09RP 232-33. Ms. Wilson hit Mr. Ruffin with both hands, and he told her to stop while trying to cover his head with his hands. 5/7/09RP 233.

Ms. Wilson's personality changes when she has too much to drink, and she becomes loud, verbally abusive, and physically aggressive. 5/7/09RP 255-56, 258-59, 325. Mr. Ruffin was afraid that she would not stop her physical attack. 5/7/09RP 258-60. He described prior incidents where Ms. Wilson had attacked him, although Mr. Ruffin pled guilty to assaulting Ms. Wilson following most of the incidents. 5/7/09RP 251-57, 316, 320, 331.

Mr. Ruffin explained that Ms. Wilson was standing with her body leveraged so that all of her weight, approximately 165 pounds, was on him and he could not get up. 5/7/09RP 233-34, 238. He tried unsuccessfully to push Ms. Wilson off of him using both of his hands on her chest; one hand slipped to her neck. 5/7/09RP 234, 245. The struggle continued, but Mr. Wilson could not free himself. 5/7/09RP 234-35.

Eventually Ms. Wilson stood up. Mr. Ruffin was still holding her away from him and she was continuing to hit him in the head. 5/7/09RP 236. Mr. Ruffin started to get off of the couch, and Ms. Wilson landed a punch that knocked Mr. Ruffin's glasses off of his face. 5/7/09RP 236, 238. Mr. Ruffin then hit her back, causing Ms. Wilson to step back long enough for Mr. Ruffin to stand up. 5/7/09RP 236-37. Ms. Wilson became more aggressive, however, and threw wild punches at him while holding his shirt. 5/7/09RP 239. Trying to get out of Ms. Wilson's grasp, Mr. Ruffin hit her back with an open hand. 5/7/09RP 239.

Ms. Wilson then grabbed Mr. Ruffin and tried to pull him to the ground, but she fell to the floor first. 5/7/09RP 240. Ms. Ruffin did not block her fall and her face hit the floor and her nose immediately began to bleed. 5/7/09RP 240-41. Mr. Ruffin was concerned about Ms. Wilson's injury, but he went to the other side of the room to separate himself from her because he did not want the fight to continue. 5/7/09RP 241-42.

Meanwhile, Ms. Wilson's mother Judy Neumann came to the top of the stair after hearing a loud thud. 5/5/09RP 72-73. She saw her daughter bent over and bleeding and Mr. Ruffin walking toward the picture window. 5/5/09RP 73. Ms. Wilson said, "He hit me. He

hit me.” 5/5/09RP 73. Mrs. Neumann got a towel for Ms. Wilson, and Ms. Wilson called 911. Ms. Neumann then took her granddaughter downstairs. 5/5/09RP 73-74, 78, 88. Mrs. Neumann thought her daughter had a broken nose and did not notice any other injuries. 5/5/09RP 78.

As a result of the incident, the King County Prosecutor charged Mr. Ruffin with assault in the second degree.<sup>1</sup> CP 1-4, 32-33. At trial before the Honorable Jay V. White, the jury learned that two King County sheriff’s deputies and medics responded to Ms. Wilson’s 911 call. Deputy David Cissna arrived shortly after the 911 call, and he and Mr. Ruffin talked calmly on the front steps of the home. Deputy Duane Goding arrived shortly thereafter and went inside to talk to Ms. Wilson. 5/5/09RP 36-37, 96.

Both deputies described Ms. Wilson’s appearance. Her nose was red and puffy and there was blood on her clothing as well as on the floor in the living room and kitchen. Her eye was also red and swollen and she had scratches on her neck. 5/5/09RP 39-40, 58-59, 98-99. Ms. Wilson was excitable, upset and crying, but calmed down while the officers were there. 5/5/09RP 39, 49-50,

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<sup>1</sup> At trial the prosecutor amended the information to add the aggravating factor that the assault occurred within the sight or sound of a minor, but the jury did not return a guilty finding. 5/4/09RP 8; 5/12/09RP 392-93; CP 32-33.

56, 100-01. Ms. Wilson smelled like alcohol; Deputy Goding explained she could carry on a conversation and walk but he would not want her to drive a car. 5/5/09RP 39, 100-01.

The deputies did not see any injuries on Mr. Ruffin, and he did not report any when booked into jail. 5/5/09RP 102-03; 5/6/09RP 119-21. He testified, however, that he was cut on the inside of his cheek but the bleeding quickly stopped; he reported this to the arresting officer. 5/7/09RP 257, 278.

Medics came to the home and checked Ms. Wilson while the police were there, but none testified at trial. 5/5/09RP 60-61. Later, however, Ms. Wilson drove to the emergency room where it was discovered she had a fracture of the floor of her left orbit, the bone going around her left eye. 5/5/09RP 77-78; 5/6/09RP 145, 157-58. The fracture was treated with pain medication. 5/6/09RP 161, 172. The treating physician David Sternfeld also noted bruising on Ms. Wilson's abdomen, but a CT scan revealed no injury to her internal organs. 5/6/09RP 161-62.

Dr. Sternfeld opined that the fractured orbital bone could have been caused by blunt force trauma and is a common injury for people who are struck in the face. Ms. Wilson's fracture, however,

could have been caused by “many, many things.” 5/7/09RP 162, 166-67.

Dr. Sternfeld did not remember treating Ms. Wilson, so his testimony mainly consisted of reading her medical chart, including items written by a nurse. 5/6/09RP 164-65, 173-74. In the “lead complaint” section of the medical report, the nurse wrote that “it was an assault, and that she was hit in the stomach, the face, and the neck.” 5/6/09RP 147. In the “presenting complaint” section, the nurse reported Ms. Wilson told her:

[S]he’s been with her boyfriend of seven years. She “told him to move out tonight and he assaulted me. He punched me in the face and abdomen. I was also strangled. My nose was bleeding. The fire department came and checked me out and thought I was okay, but now it’s hard to breathe and it really hurts in my abdomen and left ribcage area.

5/6/09RP 148. When the nurse asked Ms. Wilson about her pain, Ms. Wilson reported the bridge of her nose was very painful.

5/6/09RP 149. Dr. Sternfeld read the portion of the report where the nurse noted Ms. Wilson’s more detailed response:

“It was gushing out blood. My house has blood everywhere, and it was from my nose. My face hurts real bad, too. If I even make any kind of expression with my face, it hurts really bad. My whole abdomen hurts, especially in the middle. He sat on me and kneed me in the stomach, too. My head hurts really bad in this area,” pointing to her forehead, that at

worst was 8/10.<sup>2</sup> Describes as aching, throbbing “penetration.” Began suddenly. “It seems to be slowing getting worse.” Is continuous. Radiates to “my legs. I don’t know how to describe it.”

5/6/09RP 149.

The jury was also provided with the medical records, Ex. 25.

5/6/09RP 143, 146. In addition to the above testimony, the exhibit contains the nurse’s injury description and the doctor’s notes further repeating Ms. Wilson’s statements.

Ex. 25 at 2, 5.

The State did not call Ms. Wilson to testify. The jury rejected Mr. Ruffin’s self-defense claim and found him guilty of second degree assault. 5/12/09RP 392. This appeal follows. CP 78-85.

#### D. ARGUMENT

1. MR. RUFFIN’S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS VIOLATED WHEN THE STATE INTRODUCED MS. WILSON’S TESTIMONIAL STATEMENTS TO A NURSE AND A 911 OPERATOR EVEN THOUGH SHE WAS AVAILABLE TO TESTIFY

The State did not call the alleged assault victim Naomi Wilson as a witness, but nonetheless elicited hearsay testimony of her statements to an emergency room nurse and a 911 operator.

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<sup>2</sup> This refers to 8 on a scale of 1 to 10, with 10 being the most severe pain. 5/6/09RP 149-50.

Ms. Wilson's description of how she was assaulted and identification of the assailant were testimonial. Because Ms. Wilson was available as a witness, the admission of the testimonial hearsay violated the confrontation clause of the United States Constitution. In light of Mr. Ruffin's self-defense claim and the lack of evidence that he did not act in self-defense, Mr. Ruffin's conviction must be reversed and remanded for a new trial.

a. The Sixth Amendment guarantees the accused the right to confront and cross-examine the witnesses against him. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>3</sup> The essence of the Sixth Amendment's right to confrontation is the right to meaningful cross-examination of anyone who bears testimony against him. Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); United States v. Owens, 484 U.S. 554, 557, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony

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<sup>3</sup> This guarantee applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

are tested.” Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

“A witness’s testimony against a defendant is thus inadmissible against a defendant unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314, (2009); accord, Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford, 541 U.S. 53-54. This Court reviews Mr. Ruffin’s confrontation clause challenge de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

b. Ms. Wilson’s statements to the emergency room nurse were testimonial. Emergency room physician Sternfeld read the nurse’s notes from Ms. Wilson’s medical chart, which was also admitted as an exhibit. 5/6/09RP 143-44, 148-49; Ex. 25. According to the notes, Ms. Wilson said she told her boyfriend of seven years to move out and he assaulted her. 5/6/09RP 148; Ex. 25 at 1. Ms. Wilson further related to the nurse that the boyfriend punched her in the face and abdomen and that she was strangled. 5/6/09RP 148; Ex. 25 at 1. Ms. Wilson later related that “he sat on

me and kneed me in the stomach.” 5/6/09RP 149; Ex. 25 at 1. Mr. Ruffin’s objections to the testimony were overruled. 4/21/09RP 40-44; 4/22/09RP 4-8; 5/6/09RP 138, 148.

The United States Supreme Court has not addressed under what circumstances statements to medical personnel are testimonial for purposes of Confrontation Clause analysis. Lower courts have reached divergent results when deciding whether statements to medical personnel describing criminal activity are testimonial. Jeffrey L. Fisher, What Happened – And What is Happening – to the Confrontation Clause, 15 J.L. Pol’y 587, 619 (2007). This Court should find Ms. Wilson’s statements describing the assault and identifying the perpetrator were testimonial.

*i. The United States Supreme Court has declined to provide a definitive definition of what statements are “testimonial” for purposes of the Confrontation Clause.* “[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused . . .” Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring). In Crawford, the United States Supreme Court announced the Confrontation Clause forbids the introduction of “testimonial” hearsay against the accused unless the declarant is

unavailable and the defendant had the prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54.

The Crawford Court, however, declined to provide a definitive definition of what qualifies as a “testimonial” statement, instead offering examples of the “core class of testimonial statements,” such as “pretrial statements that declarants would reasonably expect to be used prosecutorially.” Id. at 51-52. The Supreme Court again failed to provide a complete definition of testimonial statements in Davis, but offered further insight into its meaning. Davis, 547 U.S. at 822. The Davis Court explained that statements made in response to police interrogation are not testimonial if the primary purpose of the interrogation is to address an on-going emergency rather than to establish past events. Id.

ii. *The historical treatment of statements to medical personnel demonstrate Ms. Wilson’s description of the assault were testimonial.* This Court has previously found a domestic assault victim’s statements to a physician were not testimonial because (1) they were made for diagnosis and treatment, (2) the speaker did not expect the statements would be used a trial, and (3) the doctor was not working with the State. State v. Sandoval, 137 Wn.App. 532, 537, 154 P.3d 271 (2007) (citing State v. Moses, 129 Wn.App.

718, 729-30, 119 P.3d 906 (2005), rev. denied, 157 Wn.2d 1006 (2006)). This analysis, however, did not take into account Crawford's return to the original principles of Sixth Amendment jurisprudence in addressing the Confrontation Clause, which was designed as a break from prior English practices. Crawford, 541 U.S. at 50, 60-61. Looking at the history of the medical exception to the hearsay rule demonstrates Ms. Wilson's statements to the emergency room nurse would not have been considered admissible against Mr. Ruffin by the Framers of the Constitution.

At the time of the drafting of the United States Constitution, doctors were permitted to give their opinions as to medical conditions, but hearsay statements to physicians were not generally admissible. Only spontaneous expressions of pain and suffering were admissible because they were viewed as more reliable than the patient's later testimony in court. Similarly, a woman's statements while undergoing the pain of childbirth were admissible to show parentage. David J. Carey, Reliability Discarded: The Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Jurisprudence, 64 N.Y.U. Ann. Surv. Am. L. 653, 679-80 (2009).

The Confrontation Clause was intended to strengthen the right of confrontation as it existed at the time of the writing of the Constitution, not replicate common law. Id. at 682-83 (citing inter alia Crawford, 541 U.S. at 47-50). Ms. Wilson's statements describing the assault and naming her boyfriend as the person who inflicted her injuries would not have been admitted in a criminal trial in colonial America, and they are the kind of testimonial statements forbidden by the Sixth Amendment.

iii. The Davis factors demonstrate Ms. Wilson's description of the assault was testimonial. Use of the factors utilized to review hearsay statements to the police in Davis also demonstrates Ms. Wilson's description of an assault by Mr. Ruffin is testimonial. In Davis, the Court provided a generalized test for statements made to government agents such as the police or 911 operators who are responding to a call for help.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicated that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

Davis, 547 U.S. at 822.

By utilizing the Davis analysis to review a woman's statements to her doctor that she was "tied and raped," the Illinois appellate court found they were testimonial. People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (2008). There the victim was unavailable to testify and her statements to her doctor fit within the medical diagnosis exception to the hearsay rule. Spicer, 884 N.E.2d at 685. The appellate court turned to the four Davis factors and found they all supported the conclusion the statement was made to prove past events since the victim was relating past events, was safe in the hospital and not trying to address a current emergency, and was upset but not frantic. Id. at 687. Since the victim had been transported to the hospital by the police, the court could find no reason to distinguish between "a note-taking policeman" and "a note-taking doctor." Id. at 688.

Here, while Ms. Wilson was not transported to the hospital by the police, the same analysis applies. Ms. Wilson went to the hospital after the police and medics had left her residence, and she was interviewed at least two hours after the incident. 5/5/09RP 77-78; 5/6/09RP 171; Ex. 25; Ex. 24 (911 call begins at 00:00). Thus, the statements were made when Ms. Wilson was not under an

immediate threat but was safely in the hospital. In addition, the nurse questioned Ms. Wilson about past events in part to determine if she was a crime victim, how the crime occurred, and who was responsible. See 5/6/09RP 154, 167-68 (Ms. Wilson offered domestic violence screening, counselors called talked to her at time of discharge). Even though the questioning medical personnel were not employed by the police, they had the ethical obligation to intervene if they suspected Ms. Wilson was the victim of abuse. Intervention includes not just discussing options but also “documenting the situation for future reference.” American Medical Association Ethics Opinion 2.02.<sup>4</sup>

Additionally, the information relayed to the nurse was like that of criminal testimony, as it described what happened in the past and identified Ms. Wilson’s boyfriend as her attacker. If Ms. Wilson’s statements in this case had been made to a police officer, they clearly would be considered testimonial. See Spicer, 884 N.E.2d at 688; Carey, Reliability Discarded, 64 N.Y.U. Ann. Surv. Am. L. at 690 (declarant’s identification of her assailant should not be treated differently merely because given to doctor and not police officer). Ms. Wilson’s statements that her boyfriend assaulted her

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<sup>4</sup> Available at [www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion202.shtml](http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion202.shtml) (last viewed January 21, 2010).

by hitting her in the face and stomach and strangling her are testimonial.

Commentators on the confrontation clause also view statements to medical personnel describing past crimes as testimonial. Professor Friedman, for example, posits a crime victim's description of the crime, whether made to authorities or to a private party, is normally testimonial. Richard Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1101, 1042-43 (1998). Professor Fisher agrees that description of past events as part of an interview with medical personnel is testimonial:

When a person submits to a detailed and structured interview with someone who is trying, at least in part, to discern whether they have been criminally harmed, that should be all we need to know. The declarant is not under any immediate threat and is narrating purely past events. Furthermore, the evidentiary product that results is functionally equivalent to testimony on direct examination. Even if certain snippets of medical interviews – such as descriptions of physical symptoms – are nontestimonial, descriptions, as Davis puts it, of “how potentially criminal past events began and progressed” and especially who perpetrated them, must be considered testimonial.

Fisher, What Happened, 15 J.L. & Pol’y at 622 (quoting Davis, 547 U.S. at 829-30). Ms. Wilson’s description of the assault and who assaulted her were testimonial statements.

c. Ms. Wilson's answers to interrogation by the 911 operator were testimonial. The trial court admitted portions of Ms. Wilson's 911 call as excited utterances and did not address whether the statements were testimonial because the court anticipated Ms. Wilson would testify and Mr. Ruffin would have the opportunity to cross-examine her. 4/21/09RP 22-23.

When Ms. Wilson called 911, she initially asked twice for the police. Ex. 24; Appendix at 1.<sup>5</sup> In response to direct questions, Ms. Wilson provided her name and address. Appendix at 2-4. She also responded that she was bleeding and that her boyfriend Derrick hit her "real bad." Appendix at 3-5. Ms. Wilson did not request medical attention and at one point said, apparently to the others in the room, "I'm not drunk. I've had two beers." Appendix at 3.

Interrogation by law enforcement officers clearly falls within the definition of testimonial. Crawford, 541 U.S. at 53. As mentioned above, the Davis Court created an exception for a non-testifying witness's statements to police or 911 operators when the primary purpose of the interrogation is to meet an ongoing

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<sup>5</sup> The State prepared a written transcript of the redacted 911 call, but it was not made part of the record. Appellant therefore prepared a redacted transcript for this Court's convenience, taken from the transcript prepared by the prosecutor and admitted at the pretrial hearing.

emergency rather than establish or prove past facts. Davis, 547 U.S. at 822.

In Davis, the Court addressed statements in two cases. In one case, the Court found the statements made to a 911 operator were not testimonial because the call was obviously a cry for help in addressing a present emergency. The speaker described events as they were occurring and the 911 operator asked questions designed to resolve the present crisis. Davis, 547 U.S. at 817-18, 827-28. The court noted that questions and answers obtained after the emergency was resolved, however, could be testimonial as the operator turned to asking questions designed to elicit testimonial evidence. Id. at 828-29.

In the other case before the Davis Court, a nontestifying spouse made statements to police officers who came to her home in response to a domestic disturbance call. There was no on-going emergency when the officers arrived and they questioned the woman about past events. Id. at 819-20, 829-30. The Court held the witness's responses to the investigatory questions were testimonial. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely

what a witness does on direct examination; they are inherently testimonial.” Id. at 830 (emphasis in original).

Ms. Wilson’s responses to the 911 operator’s questions were not like the call for help in Davis and thus were testimonial. Ms. Wilson called 911 to report a recent past event and ask for the police to come. Ex. 24; Appendix. Ms. Wilson asked for the police four times but never requested medical attention even though the 911 operator questioned her and learned she was bleeding. Id. While Mr. Ruffin was still in the home at the time of the call, so was Ms. Wilson’s mother. The fight was over and nothing indicated Mr. Ruffin was a current threat to Ms. Wilson. 5/5/09RP 73-74, 88. In fact, Mr. Ruffin waited on the porch for the police to arrive, greeted Deputy Cissna upon the officer’s arrival, and had a calm conversation with the officer. 5/5/09RP 36-37, 55, 96.

Ms. Wilson was not talking in the course of an on-going emergency and she described past, not currently-occurring, events, much like a witness. Her statements also functioned like a witness statement at trial. The statements to the 911 operator were testimonial and their admission violated the Confrontation Clause.

d. The State did not demonstrate that Ms. Wilson was unavailable to testify. The State intended to call Ms. Wilson as a

witness to Mr. Ruffin's alleged assault upon her, and some of the court's pretrial rulings were premised on the assumption Ms. Wilson would testify for the State. 4/20/09RP 26-27; 4/21/09RP 22-23; 4/22/09RP 48-49; 5/4/09RP 9; 5/5/09RP 109.

At the beginning of the day upon which the State planned to call Ms. Wilson, however, the deputy prosecuting attorney informed the court that Ms. Wilson, who was about five months pregnant, was going to the hospital for evaluation. 5/5/09RP 79-80, 109; 5/6/09RP 111-12. Later in the day the prosecutor reported Ms. Wilson had not been kept in the hospital. Ms. Wilson told the prosecutor she would come to court but did not want to because stress was having a negative impact on her pregnancy. However, Ms. Wilson told her advocate she would not come to court because it was physically taxing. No further information was offered to demonstrate Ms. Wilson was actually physically incapable of testifying in the case. 5/6/09RP 137.

The prosecutor's decision not to call Ms. Wilson appears to have been a tactical one. The prosecutor elected not to request a material witness warrant and rested without calling Ms. Wilson, but left open the possibility of requesting a warrant in time for Ms. Wilson to be a rebuttal witness. 5/6/09RP 137. The State offered

no explanation for its decision not to call Ms. Wilson on rebuttal.

5/6/09RP 174; 5/7/09RP 352.

Testimonial statements like Ms. Wilson's hearsay statement may be admitted at trial only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 68. Neither prong is met here. Clearly, Mr. Ruffin had no opportunity to cross-examine Ms. Wilson when she called 911 or spoke to the hospital nurse. Nor did the State prove their star witness was not available to testify.

The burden is on the State to show the witness is unavailable. State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003). To demonstrate unavailability for purposes of the confrontation clause, the State must show a "good faith effort" to obtain the witness's presence at trial. DeSantiago, 149 Wn.2d at 411. The State must therefore "avail itself of whatever procedures exist to bring a witness to trial." State v. Smith, 148 Wn.2d 122, 133, 59 P.3d 74 (2002) (quoting State v. Goddard, 38 Wn.App. 509, 513, 685 P.2d 674 (1984)).

In DeSantiago, witnesses were unavailable for purposes of the confrontation clause when the prosecutor's attempts to reach them at their last known address and through a family member

were unsuccessful and it appeared they had moved to Mexico or Texas. DeSantiago, 149 Wn.2d at 411-12. The State, however, did not meet the good faith requirement when it failed to explore having a child witness testify via closed-circuit television, as provided by statute, even though there was no closed-circuit television set in the courtroom. Smith, 148 Wn.2d 135-38.

Here, the State did not exercise good faith in using established procedure to procure Ms. Wilson's presence at trial. In contrast, the decision not to call Ms. Wilson appears to have been a tactical one. Because Mr. Ruffin was asserting he acted in self-defense, the prosecution wanted to hear his testimony and see if it could obtain a conviction based upon the other State's witnesses and cross-examination of Mr. Ruffin. While the State's plan worked, it violated Mr. Ruffin's constitutional right to confront the witnesses against him.

e. Mr. Ruffin may raise this constitutional issue for the first time on appeal. Mr. Ruffin's counsel objected to the hearsay statements at issue, but did not argue they violated the confrontation clause, as all parties anticipated Ms. Wilson would appear and Mr. Ruffin would have the opportunity to cross-examine her. CP 14; 4/21/09RP 11-14, 40-44; 4/22/09RP 4-6; 5/6/09RP

146, 148. Normally appellate courts will not review issues not brought to the attention of the trial court, but the rules provide an exception for constitutional issues because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). This exception applies to the confrontation clause violation in Mr. Ruffin's case.

In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Kirkpatrick, 160 Wn.2d at 879-80; Scott, 110 Wn.2d at 688. Put another way, an error is manifest if it has "practical and identifiable consequences in the trial of the case." Kirkpatrick, 160 Wn.2d at 879 (quoting State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

The error in introducing Ms. Wilson's statements that Mr. Ruffin struck and strangled her is constitutional. The Sixth Amendment guarantees the right to confront witnesses in a criminal trial, and appellate courts have addressed confrontation clause issues for the first time on appeal. See State v. Kronich, 160

Wn.2d 893, 900, 161 P.3d 982 (2007); State v. Clark, 139 Wn.2d 152, 155-57, 985 P.2d 377 (1999); State v. Rohrich, 132 Wn.2d 472, 476 n.7, 939 P.2d 697 (1997).

The admission of evidence in violation of the confrontation clause was a manifest error in this case. The critical issue in this case was whether Mr. Ruffin acted in self-defense. The only evidence the State presented to describe the assault were testimonial statements of a non-testifying witness who was available to testify. The jury never had an opportunity to hear Ms. Wilson tell them what happened and Mr. Ruffin never had the opportunity to cross-examine her. Mr. Ruffin may raise this issue on appeal.

f. The State cannot demonstrate the introduction of Ms. Wilson's hearsay statements was harmless beyond a reasonable doubt. When the defendant's constitutional right to confront witnesses is violated, the appellate court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Koslowski, 166 Wn.2d at 431. Thus, the State must demonstrate that there is no reasonable probability that the outcome of the trial would have been different if the error had not occurred. Smith, 148 Wn.2d at 139. The appellate court utilizes

the “overwhelming untainted evidence” test to make this determination. Koslowski, 166 Wn.2d at 139.

Here, Mr. Ruffin testified that Ms. Wilson was drinking and became angry when they discussed ending their seven-year relationship. Ms. Wilson stood over him and repeatedly hit him in the head. Mr. Ruffin tried to push Ms. Wilson away, and she fell on the floor and hit her face in the struggle. In contrast, the State presented evidence that Ms. Wilson had injuries on her face, neck, and abdomen. Without the hearsay descriptions of the assault, the State could not prove the absence of self-defense beyond a reasonable doubt as required. CP 52, 61; State v. Acosta, 101 Wn.2d 612, 618-19, 683 P.2d 1069 (1984). Mr. Ruffin’s conviction must be reversed and remanded for a new trial. Koslowski, 166 Wn.2d at 432.

2. MR. RUFFIN’S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF MS. WILSON’S STATEMENTS TO MEDICAL PERSONNEL

The Washington Constitution provides criminal defendants the right to confront and cross examine the witnesses against him. Const. art. I, § 22. In relevant part, article I, section 22 states, “[I]n criminal prosecutions the accused shall have the right to . . . meet

the witnesses against him face to face.” This constitutional provision provides greater protection for the right to confrontation than does the Sixth Amendment. State v. Pugh, \_\_\_ Wn.2d \_\_\_, 2009 WL 5155364 at 4 (No. 80850-3, 12/31/09); State v. Foster, 135 Wn.2d 441, 473-74, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting).<sup>6</sup> Construction of the state constitution is a question of law that is reviewed de novo. Pugh, 2009 WL 5155364 at 5.

In interpreting Washington’s confrontation clause, the appellate court looks at the history of the constitutional provision and Washington law at the time of the adoption of the constitution. The Pugh Court, for example, determined that statements to a 911 operator did not violate the Washington Constitution because similar statements would have been admitted in court at the time of the passage of the constitution’s adoption. Pugh, at 9-10. The law at the time of the passage of our constitution demonstrates Washington’s confrontation clause does not permit a prosecution

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<sup>6</sup> In Foster, five justices agreed that the state confrontation clause is more protective than the federal confrontation clause: the one-justice concurrence/dissent and the four-justice dissent. The concurrence/dissent created a plurality that the conviction should be affirmed.

based primarily upon statements made by a nontestifying witness for purposes of medical treatment.

The State's case was based in large part upon statements Ms. Wilson made to an emergency room nurse, admitted under the hearsay exception for statements for medical diagnosis and treatment, ER 803(a)(4). This modern hearsay exception became part of Washington's evidence law in 1978, when the Rules of Evidence were adopted by the Washington Supreme Court. Judicial Council Task Force on Evidence Comment, ER 803(a)(4) (found in Robert H. Aronson, The Law of Evidence in Washington § 803.02, p. 803-6.1 (4<sup>th</sup> Ed. 2008)).

Prior to 1978, a patient's description of past symptoms and medical history to a treating physician was not admissible in Washington courts as substantive evidence, although a physician could testify as to his medical conclusion based in part upon the patient's description. Petersen v. Dept. of Labor & Industries, 36 Wn.2d 266, 269, 217 P.2d 607 (1950); Kraettli v. North Coast Transp. Co., 166 Wash. 186, 189-94, 6 P.2d 609 (1932); Task Force Comment (Aronson, The Law of Evidence at §803.02) (citing Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962) and Kennedy v. Monroe, 15 Wn.App. 39, 547 P.2d 899

(1976)). A patient's statements to her physician were "admissible for the purpose of affording the jury some means of determining the weight to give to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time." Kraettli, 166 Wash. at 191 (quoting Estes v. Babcock, 119 Wash. 270, 274, 205 P. 12 (1922)).

Thus, prior to the adoption of ER 803(a)(4), a treating physician could relate a patient's description of symptoms only to show the basis for his expert opinion. The patient's statements were not admissible as substantive evidence, nor would a medical treatment provider relate a patient's description of a crime or identification of the perpetrator of a crime. FRE Advisory Committee Note to Fed.R.Evid. 803(a)(4) (found in Aronson, The Law of Evidence in Washington, § 803.09, p. 803-13).<sup>7</sup> As the Advisory Committee to the Federal Rules of Evidence explained, "Thus, 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." Id.

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<sup>7</sup> Washington's evidence rules were patterned after the Federal Rules of Evidence, and the comments of the drafters of the federal rules are therefore enlightening. State v. Sua, 115 Wn.App. 29, 40, 60 P.3d 1234 (2003).

This rule was consistent with the common law at the time of the adoption of Washington's Constitution. A hearsay exception existed for a person's exclamation of pain and terror at the time of an injury, similar to the current exception for excited utterances. Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 271, pp. 202-03 (9<sup>th</sup> Ed. 1884). This exception did not extend to the patient's hearsay statements as to the cause of her injury. Id. at 202 n.4. As one respected commentator of the day noted, a doctor could not testify as to his patient's description of the cause of an injury because the physician "would merely repeat what the patient said." John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 688, p. 784 (1909). While an exception existed for the "fact of complaint" of a sexual assault to demonstrate the prosecutrix made a timely report, this exception could not be used to identify the perpetrator, and it did not extend to a non-sexual assault. Wharton, Treatise at § 273, pp. 204-05.

The Washington Supreme Court has long held that article I, section 22's guarantee of due process include the right to meet the witnesses in open court and cross-examine them. State v. Stentz, 30 Wash. 135, 142, 70 P. 241 (1902) ("This means that the

examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him.”); State v. Eddon, 8 Wash. 292, 301, 305, 36 P. 139 (1894) (error for trial court to instruct jury that dying declaration may be given same weight as live testimony). As demonstrated above, the Washington courts in 1889 would not have permitted a physician to read to the jury Ms. Wilson’s statements identifying Mr. Ruffin as her assailant. Instead, her description of her pain would be admissible only to explain the doctor’s expert opinion as to the nature of her injuries.

Moreover, modern science and social science demonstrate the theory behind the modern hearsay exception for medical diagnosis is flawed and undermine its continued use in the absence of cross-examination. The justification for a hearsay exception for statements for medical treatment is that a patient is motivated to be truthful in seeking medical treatment. Petersen, 36 Wn.2d at 269; Judicial Task Force Comment on ER 803(a)(4) (Aronson, Law of Evidence at § 803.03, p. 803-12). But this is not always true. Many patients do not accurately report their conditions to treating physicians. John J. Capowski, An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or

Treatment Hearsay Exception, 33 Ga. L. Rev. 353, 385-86 (1999)  
(and studies cited therein, comparing misrepresentation among  
somatic and mental health patients).<sup>8</sup>

Ms. Wilson did not testify at Mr. Ruffin's trial because the State chose not to call her. The jury was never able to evaluate her demeanor and credibility, and Mr. Ruffin never had the opportunity to cross-examine her. The admission of Ms. Wilson's statements to the nurse through the testimony of her physician and her medical reports violated Mr. Ruffin's state constitutional right to confront the witnesses against him. The State cannot demonstrate the error is harmless beyond a reasonable doubt in light of the absence of evidence to prove Mr. Ruffin did not act in self-defense. His conviction must be reversed

3. MR. RUFFIN'S CONSTITUTIONAL RIGHT TO A  
FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL  
MISCONDUCT IN CLOSING ARGUMENT

A public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. State v. Charlton, 90 Wn.2d 657, 664-65,

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<sup>8</sup> Other studies show physicians are poor at discerning patient dishonesty. Id. at 386, (citing Douglas Woolley, M.S. & Thad Clements, M.D., Family Medical Residents' and Community Physicians' Concerns about Patient Truthfulness, 72 Acad. Med. 155, 156 (1997)).

585 P.2d 142 (1978). Here, the theme of the prosecutor's closing argument was that Ms. Wilson did not appear in court and testify because Mr. Ruffin controlled her, even though there was no such evidence in the record. The prosecutor also urged the jury to convict Mr. Ruffin for reasons other than the proof of the elements of the charged crime and argued the jury had to determine whether the State's witnesses or the defendant were telling the truth. The prosecutor's misconduct denied Mr. Ruffin a fair trial, and his conviction must be reversed.

a. Prosecutorial misconduct may violate a defendant's constitutional right to due process of law. A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). When a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial may be violated. Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the

comments were improper and, if so, whether a “substantial likelihood” exists that the comments affected the jury verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id.

b. The deputy prosecuting attorney made improper arguments in closing. The prosecutor began her closing argument:

So I guess conflicted is accurate. She didn't come.  
It's hard to understand.

5/11/09RP 19. Defense counsel's objection “as to comment” was overruled, 5/11/09RP 19, so the prosecutor continued:

Thank you. It's disappointing. It's hard to understand, hard to relate to, hard to grasp. They have been talking for months on a weekly basis.

5/11/09RP 19. Defense counsel's objection was again overruled, 5/11/09RP 19-20, and the prosecutor argued:

They have been talking for months on a weekly basis, never about this case, he says. But when trial rolls around she does not appear. He smugly testifies about the years of abuse he suffered at the hands of Naomi Wilson, this drunk, violent woman. Never mind the fact that he had no injury . . . Never mind the fact that he said absolutely nothing to Jeannie Neumann when she rounded those stairs . . .

5/11/09RP 20. Later the prosecutor argued that Mr. Ruffin could not be believed, that he was a bully who beat Ms. Wilson “like a dog.” 5/11/09RP 26. She then claimed this explained Ms. Wilson’s absence at trial:

Ladies and gentleman, let’s be clear about one thing, no matter how you look at it, at best the defendant is a bully. He beat Naomi Wilson like a dog. He pinned her beneath the weight of his body. He landed blow after blow to her face and to her body with his fists and his knees and his hands; and he stood up and he let herself [sic] pick herself off the ground and he basically said, “you made me do it.” And clearly those statements became her truth. She didn’t come.

5/11/09RP 26.

The prosecutor ended her closing argument by claiming Mr. Ruffin had been “afforded every protection,” including confronting the witnesses, and “now it is time for him to get his just deserts.”

5/11/09RP 35-36. Defense counsel’s objection was overruled.

5/11/09RP 36. The prosecutor dramatically concluded by suggesting the jury convict Mr. Ruffin for reasons other than the evidence against him:

Convict the defendant because he beat Naomi Wilson like a dog. Convict the defendant because then he termed it her fault; that she deserved it. Convict the defendant because he attempted to assassinate the character of the mother of his children in the hope that

it would excuse or distract you from his conduct in the case.

But most of all I want you to convict the defendant because he is guilty.

5/11/09RP 36.

The prosecutor briefly returned to her theme of Mr. Ruffin's purported manipulation of Ms. Wilson in her rebuttal closing argument. The prosecutor argued that Mr. Ruffin had a pattern of abusing Ms. Wilson and committed the charged crime because she was going to end the relationship: "That's why we're here. She wasn't buying the game." 5/11/09RP 55.

c. The prosecuting attorney committed misconduct by arguing Mr. Ruffin was responsible for Ms. Wilson's failure to appear and testify. Attorneys have latitude in closing argument to argue reasonable inferences from the evidence, but counsel may not mislead the jury by misstating the evidence or arguing facts not in the record. State v. Magers, 164 Wn.2d 174, 192, 189 P.3d 126 (2008); State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); RPC 3.4(e). This is especially true of a public prosecutor due the prestige of her office; reference to facts not before the jury causes her to act as an unsworn witness for the State. Belgarde, 110 Wn.2d at 508-09; State v. Case, 49 Wn.2d 66, 69, 298 P.2d 500

(1956); People v. Hill, 17 Cal.4<sup>th</sup> 800, 952 P.2d 673, 687, 73 Cal.Rptr.2d 656 (1998) (misconduct for prosecutor to refer to facts not in evidence because the unsworn testimony is not subject to cross-examination and can be “dynamite” for the jury because of the jury’s special regard for the prosecutor); American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function § 3-5.9 (3<sup>rd</sup> ed. 2003).

Here, in an attempt to address the absence of her most important witness, the prosecutor suggested Ms. Wilson’s failure to testify was Mr. Ruffin’s fault. The argument was improper because there was no evidence before the jury to support it.<sup>9</sup>

On the day Ms. Wilson was scheduled to testify for the State, the prosecutor informed the court outside the presence of the jury that Ms. Wilson, who was pregnant, was going to the hospital for evaluation. 5/5/09RP 79-80, 109; 5/6/09RP 111-12. Later in the day the prosecutor reported Ms. Wilson had not been admitted to the hospital. Ms. Wilson told the prosecutor she would come to

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<sup>9</sup> After defense counsel’s objections were overruled, the prosecutor made other incorrect references to the facts. The prosecutor told the jury that Mr. Ruffin did not say anything exculpatory to Ms. Neumann, but no one asked Ms. Neumann that question and Mr. Ruffin testified he told her Ms. Wilson attacked him first. 5/11/09RP 20; 5/4/09RP 242. The prosecutor also argued Mr. Ruffin was not injured, but Mr. Ruffin testified the inside of his mouth was cut and he told the police when he was arrested. 5/11/09RP 20; 4/21/09RP 84.

court but did not want to because stress was having a negative impact on her pregnancy. However, Ms. Wilson told her advocate she would not come to court. 5/6/09RP 137. In light of this information, the prosecutor decided not to request a material witness warrant or call Ms. Wilson to testify. 5/6/09RP 137; 5/7/09RP 334. During this discussion, the prosecutor never presented any evidence Mr. Ruffin was encouraging Ms. Wilson not to appear or even suggest she suspected that to be the case.

While Mr. Ruffin was incarcerated awaiting trial, he was permitted contact with Ms. Wilson only for the purpose of seeing his daughter. SuppCP \_\_\_ (Order Prohibiting Contact Pretrial Order, 1/28/09, sub.no. 10). The prosecutor cross-examined Mr. Ruffin about the contact, and he said Ms. Wilson brought his daughter to see him one a week but they did not discuss the case. 5/7/09RP 267. In closing argument the prosecutor mocked Mr. Ruffin's testimony, implying he was responsible for Ms. Wilson not being present. 5/11/09RP 19-20.

The prosecutor also implied Mr. Ruffin must have been responsible for Ms. Wilson's failure to appear because of the history of their relationship, relying upon the juror's anticipated knowledge that domestic violence victims often do not want to

press charges against their partners. The State, however, did not present any expert testimony concerning domestic violence relationship patterns. Thus, the State could not rely upon patterns of domestic violence relationships to argue Mr. Ruffin had manipulated Ms. Wilson to prevent her from testifying against her. See, State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009) (prosecutor improperly referred to phenomenon of delayed disclosure in child sexual abuse cases in absence of expert testimony); Magers, 164 Wn.2d at 191-92 (prosecutor improperly asked jury to use what they knew about dynamics of domestic violence relationships to determine case at bar was such a relationship); Case, 49 Wn.2d at 69-70 (improper for prosecutor to tell jury about characteristics of people charged with sex crimes).

A prosecutor's argument that the jury could infer a witness did not testify because he was afraid of the defendant was found to be misconduct in the absence of supporting evidence in State v. Jones, 144 Wn.App. 284, 183 P.3d 307 (2008). There, the State did not call a confidential informant (CI) who allegedly purchased a controlled substance from the defendant, and its case rested upon the testimony of two police officers, surveillance tape, and the tape

from a body wire worn by the informant. Jones, 144 Wn.App. at 289. The jury learned the CI had “dropped out of sight” and there was a warrant for his arrest and, over defense objection, that the CI was afraid to testify. Id. at 294. In closing argument, the prosecutor argued the informant did not appear to testify because he was afraid of the defendant, that the defendant knew the CI’s identity, and the defendant was a threat to the CI and his family. Id. at 296-97. The prosecutor also argued the informant was credible and trustworthy. Id. This court found the argument “highly inflammatory and improper” and reversed the conviction. Id. at 297, 301. Similarly, here, the prosecutor’s argument that Mr. Ruffin manipulated Ms. Wilson not to testify was inflammatory and improper.

Cases involving the missing witness doctrine also demonstrate how improper the prosecutor’s argument was. In Washington, the court may instruct the jury that it may draw the inference that a missing witness’s testimony would be unfavorable to a party who did not call a witness if the witness is within that party’s control and the testimony would logically support that party’s position. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The use of a missing witness instruction is limited in

criminal cases because it may not be used when the instruction would shift the burden of proof to the defendant, and the instruction may only be given if the witness is peculiarly available to the party against whom the inference is to be drawn. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008); Blair, 117 Wn.2d 488-91. A prosecutor may only refer to the defendant's failure to call a witness when the missing witness doctrine applies and "it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case." State v. Dixon, 150 Wn.App. 46, 55, 207 P.3d 459 (2009) (quoting State v. Contreras, 57 Wn.App. 471, 476, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990)).

Clearly the missing witness doctrine does not apply here because Ms. Wilson was under subpoena to the State and not "particularly available" to either party. SuppCP \_\_\_\_ (Subpoena, sub.no. 18, 2/24/09). But the prosecutor nonetheless laid the blame for Ms. Wilson's failure to appear at the feet of Mr. Ruffin and led the jury to believe Ms. Wilson's testimony would have convicted him and proved he did not act in self-defense. Just as the State could not have received a missing witness instruction in this case, it

was misconduct to make the argument to the jury. Dixon, 150 Wn.App. at 55, 59. Especially when the prosecutor herself made the tactical decision not to bring Ms. Wilson to court to testify, her argument was unfair and improper. See United States v. Vavages, 151 F.3d 1185, 1191-93 (9<sup>th</sup> Cir. 1998) (reference in closing argument to absence of defendant's wife as alibi witness improper where government substantially interfered with her decision not to testify and she therefore asserted her Fifth Amendment privilege).

d. The prosecutor committed misconduct by urging the jury to convict Mr. Ruffin on grounds other than the evidence presented at trial. As part of the State's duty to ensure the accused is given a fair trial, the prosecutor may not invite the jury to convict the defendant on improper grounds. State v. Boehning, 127 Wn.App. 511, 518, 522, 111 P.3d 899 (2005). The prosecutor may not make heated partisan comments that appeal to the jury's passions or prejudices. Reed, 102 Wn.2d at 147. Thus, in Boehning, this Court reversed the defendant's conviction because the prosecutor's suggestion that the child victim's out-of-court statements actually supported convictions for uncharged crimes. Boehning, 127 Wn.App. at 522-23.

Here, the prosecutor urged the jury to give Mr. Ruffin his “just deserts.” 5/11/09RP 35-36. When defense counsel’s objection was overruled, the prosecutor told the jury to convict Mr. Ruffin because he “beat Naomi Wilson like a dog,” because he testified he acted in self-defense, and because he “attempted to assassinate the character of the mother of his children.” 5/11/09RP 36. This call for justice and to decide the case on grounds other than the evidence was an impermissible appeal to the jury’s passions and prejudices.

e. The prosecutor committed misconduct by arguing the jury had heard two mutually exclusive versions of what happened and only one could be true. The issue in this case was whether Mr. Ruffin acted in self-defense, and in order to resolve this issue, the jury was required to look at all of the evidence. The prosecutor committed misconduct by arguing to the jury they had heard “two versions” of what had happened – one presented by the State’s witnesses and one by Mr. Ruffin – and only one version was true. 2/11/09RP 23. The prosecutor argued:

And a nice thing about this case is that there are really only two versions of the incident that you heard. The version that Judy Neumann, Deputy Cissna and

Goding, Officer Bremmeyer<sup>10</sup> and David Sternfeld from the emergency room told you, and the version the defendant told you. And to a large degree they are mutually exclusive. One of them is true, and one of them is not.

Id. (Emphasis added).

The prosecutor's argument is incorrect. The jury was required to look at all the evidence and decide whether the State had proved every element of the crime beyond a reasonable doubt. State v. Anderson, \_\_\_ Wn.App. \_\_\_, 220 P.3d 1273, 1280 (2009); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. It is not the jury's job to determine the "truth" or solve the case, but to determine if the State proved its allegations beyond a reasonable doubt. Id.

This Court has held it is misconduct for the prosecutor to argue the jury must find the State's witnesses are lying or mistaken in order to find the defendant not guilty. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997) (and cases cited therein). For example, it was misconduct in a prosecution for sale of cocaine to an undercover police officer for the prosecutor to argue that the defendant

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<sup>10</sup> The State introduced a copy of a medical form filled out when Mr. Ruffin was booked into the King County Jail through Corrections Officer Lyle Bremmeyer. 5/6/09RP 117-23.

essentially called the police officers liars by giving testimony contrary to the officers' testimony. State v. Barrow, 60 Wn.App. 869, 874, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991). This Court found the argument mischaracterized both the evidence and the jury's role. The jurors did not need to "completely disbelieve" the officers' testimony in order to acquit Barrow; all they needed was to entertain a reasonable doubt that it was Barrow who made the sale to the undercover officer. Id. at 875-76.

Similarly, in Fleming the prosecutor told the jury it could only acquit the defendants in a rape case if the jury found the complainant was lying, confused or fantasizing. Fleming, 83 Wn.App. at 213. This Court explained the argument was improper because it misstated the law, the burden of proof, and the jury's function, as there were circumstances in which the jury would be required to acquit the defendant even if it did not believe the complaining witness was lying. Id.

It is not the jury's job to solve the case or determine the truth; rather the jury is required to determine if the State proved the elements of the crime beyond a reasonable doubt. Anderson, 220 P.3d at 1280. The prosecutor's argument that either the State's evidence or the defendant's was "true" was misconduct.

f. Mr. Ruffin's conviction must be reversed. Mr. Ruffin was the only participant in the fight in which Ms. Wilson was injured to testify, and he argued he acted in self-defense. The prosecutor improperly told the jury that Ms. Wilson did not appear because she was manipulated by the defendant and that either the State's witnesses or the defendant were telling the truth. In light of the limited evidence to refute Mr. Ruffin's self-defense claim, this Court must conclude there is a substantial likelihood the prosecutor's misconduct in closing argument affected the jury and reverse his conviction. Reed, 102 Wn.2d at 146-47.

Admittedly Mr. Ruffin's lawyer did not pose an objection to the prosecutor's argument that only one party's case was true. 2/11/09RP 23. This Court, however, has frequently cautioned prosecutors that an argument that suggests the jury must find certain witnesses are lying is improper. Anderson, 220 P.3d at 1282-83 (Quinn-Brintnall, J., concurring); Fleming, 83 Wn.App. at 214. Given the clear state of the law and the argument in this case, the comment was so flagrant and ill-intentioned that no limiting instruction could cure the prejudice.

The cumulative effect of various instances of prosecutorial misconduct may violate the defendant's right to a fair trial. State v.

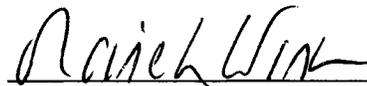
Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn.App. 254, 262-62, 554 P.2d 1069 (1976). Because the prosecutor's closing argument was riddled with misconduct, and there is a substantial likelihood the cumulative effect affected the jury verdict, and this Court should reverse Mr. Ruffin's conviction. Reed, 102 Wn.2d at 146-47.

E. CONCLUSION

The introduction of Ms. Wilson's testimonial statements describing an assault and identifying her assailant violated Mr. Ruffin's right to confront witnesses under both the federal and state constitutions. The introduction of Ms. Wilson's statements to the 911 operator also violated Mr. Ruffin's Sixth Amendment confrontation rights. In addition, prosecutorial misconduct in closing argument denied Mr. Ruffin a fair trial. His conviction must be reversed and remanded for a new trial.

DATED this 29<sup>th</sup> day of January, 2010.

Respectfully submitted,



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Elaine L. Winters – WSB # 7780  
Washington Appellate Project  
Attorneys for Appellant

**APPENDIX**

**REDACTED 911 TRANSCRIPT**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 08-1-14534-1 KNT
vs.	)	
	)	911 TAPE
JAMES RUFFIN,	)	
	)	
	)	Defendant.
	)	
	)	
	)	

This is Debbie Potter of the King County Sheriff's Office, Communications Section. The following taped incident has been recorded from the King County Sheriff's Office (unintelligible) 911 recording beginning at 0000 hours. This recording is made in real time and this statement is made with the intent to authenticate the tape for the purpose of complying with Evidence Rule 901A. Today's date and time is Thursday, January 8<sup>th</sup>, 2009 at 1248 hours. The department incident number is 08-314238.

911(1):                911. What are you reporting?

CALLER:                (Crying).

911(1):                Hello? Can I help you with something?

CALLER:                I need the police!

911(1):                At what address?

CALLER:                I need the police.

911(1):                At what address?

1 CALLER: 18845 129<sup>th</sup> Place [REDACTED]  
2 911(1): 129<sup>th</sup> Place...what? Southeast? Are you, are you in Renton? Hello?  
3 CALLER: (Crying).  
4 911(1): Hello? Can you hear me?  
5 CALLER: (Crying). Yes.  
6 911(1): Okay. Is this a house or an apartment?  
7 CALLER: (Crying).  
8 911(1): Hello?  
9 UNKNOWN MALE: (Unintelligible).  
10 CALLER: It's a house.  
11 911(1): Okay. Who are you fighting with? Who are you fighting with?  
12 CALLER: (Crying).  
13 911(1): What's your name? What is your name?  
14 CALLER: Naomi.  
15 911(1): Naomi. What's your last name?  
16 CALLER: Wilson.  
17 911(1): What is it?  
18 CALLER: Yes.  
19 911(1): What's your last name?  
20 CALLER: Wilson.  
21 911(1): How do you spell it?  
22 CALLER: It doesn't matter. I just need the police here now.  
23 911(1): 'Kay so tell me what's going on then if you need the police.

1 CALLER: I'm bleeding really bad.  
2 911(1): Who...what happened?  
3 CALLER: My...he hit me bad.  
4 911(1): Who did? Who hit you?  
5 CALLER: (Unintelligible).  
6 911(1): Who hit you?  
7 CALLER: My Derrick hit me.  
8 911(1): Your, your boyfriend or your parent?  
9 CALLER: Yes.  
10 911(1): Which one?  
11 CALLER: My boyfriend.  
12 911(1): Okay. Where did he hit you?  
13 CALLER: In my...everywhere.  
14 911(1): Okay. Does he have a weapon?  
15 CALLER: No.  
16 911(1): Okay. Did he hit you with his hand?  
17 CALLER: Yes.  
18 911(1): 'Kay. Is he still inside the house?  
19 CALLER: (Crying). Yes.  
20 911(1): Okay. And it's 18845 129<sup>th</sup> Place Southeast, right?  
21 CALLER: I'm not drunk. I've had two beers. I'm sorry what?  
22 911(1): It's 1...  
23 CALLER: I just need the police here!

1 911(1): Listen...Naomi? Naomi, it's 18845 129<sup>th</sup> Place Southeast, right? Hello?

2 CALLER: (Crying).

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 CALLER: I'm bleeding really bad. I need the police.

10 911(1): Where...okay. I understand that. Where you bleeding from? Hello?

11 CALLER: Yes.

12 911(1): Naomi, what's your last name?

13 CALLER: Wilson.

14 911(1): 'Kay. What's his name?

15 CALLER: He's gonna leave.

16 911(1): Okay. That's fine if he does. What's, what's his name?

17 UNKNOWN MALE: (Unintelligible)... I'm going to jail... (unintelligible).

18 CALLER: Good!

19 UNKNOWN MALE: (Unintelligible).

20 CALLER: I'm sorry. What?

21 911(1): What's his name?

22 CALLER: James Ruffin. R-U-F-F-I-N.

23 911(1): Okay. Where you bleeding from?

1 CALLER: My nose.  
2 911(1): 'Kay. Stay on the phone with me while I get the medics with us, okay?  
3 CALLER: (Crying)  
4 911(2): 911.

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