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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

MICHAEL WAYNE WILLIAMS,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,

Cause No. 03-1-04540-5

The Honorable James R. Orlando, Presiding Judge

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TABLE OF CONTENTS

Page

I. **ASSIGNMENTS OF ERROR** 1

II. **ISSUES PRESENTED**

1. Was Mr. Williams' right to confrontation violated where (1) the State did not elicit testimony of the alleged victim about hearsay statements, but instead presented the alleged victim's hearsay statements through another witness, thus precluding cross-examination of the alleged victim about the statements at trial, and (2) Mr. Williams did not have a pre-trial opportunity to cross-examine the alleged victim about the statements? 1

2. Was it error to permit a nurse to read questions from a forensic questionnaire and the alleged victim's answers thereto where (1) the answers merely corroborated the victim's testimony and (2) proper procedure for using a writing to refresh a witness' recollection was not followed? 1

3. Was it error to permit a nurse to read a "verbatim" report she had written during a forensic examination of the alleged victim where (1) the report merely corroborated the victim's own testimony and (2) the proper procedure for using a writing to refresh a witness' recollection was not followed? 1

4. Was it error to permit a witness to testify regarding hearsay statements of the alleged victim where she changed her clothes, washed her hair, showered, collected a camera from her car to "document her injuries," found a cell phone and phoned a neighbor, then "ditch

walked" to the neighbor's house before making the statements? 1

III. STATEMENT OF THE CASE 2

IV. SUMMARY OF TESTIMONY 4

V. ARGUMENT 15

A. The trial court erred in allowing a nurse to read to the jury questions asked and the victim's answers given during a forensic examination. 17

1. The hearsay statements were inadmissible. 19

(a) The statements were not made for the purpose of medical diagnosis or treatment. 20

(b) Ms. Dabson's statements made to Ms. Jacobsen merely corroborated her trial testimony 23
Proper procedure for refreshing

2. Ms. Jacobsen's memory of the interview was not followed 24

3. The hearsay evidence was highly prejudicial. 26

B. The trial court erred in permitting a "verbatim" report of an out-of-court statement of the victim to be read to the jury. 26

C. Mr. Williams' Sixth Amendment right to confront witnesses was violated 28

D. The trial court erred in admitting hearsay statements made by Jessi Dabson to Sharon Taylor. 31

E. This Court should reverse Mr. Williams' convictions and remand for a new trial.....35

1. Violation of Mr. Williams' confrontation right was not harmless. 35

2. A new trial should be granted under the cumulative error doctrine.....36

VI. CONCLUSION 37

TABLE OF AUTHORITIES

Page

Federal Cases

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 19, 29

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 30

Washington Cases

In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified,* 123 Wn.2d 737, *cert. denied,* 513 U.S. 849 (1994) 36

State v. Bargas, 52 Wn. App. 700, 763 P.2d 470 (1988), *review denied,* 112 Wn.2d 1005 (1989) 24

State v. Clark, 139 Wn.2d 152, 985 P.2d 377 (1999) 28, 29, 30

State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980) 36

State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984) 32, 33

State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) 32

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 35

State v. Lopez, 95 Wn. App. 842, 980 P.2d 224 (1999) 22

State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) 30

Other Authorities

ER 612 25

ER 803 ..... 20, 21, 32

5D Karl B. Tegland, WASHINGTON PRACTICE, *Courtoom Handbook on Washington Evidence* (2006) 25, 26

I. ASSIGNMENTS OF ERROR

1. Mr. Williams' Sixth Amendment right to confront witnesses was violated.

2. The trial court erred in admitting prejudicial hearsay evidence.

II. ISSUES PRESENTED

1. Was Mr. Williams' right to confrontation violated where the State did not elicit testimony of the alleged victim about hearsay statements, but instead presented the alleged victim's hearsay statements through another witness, thus precluding cross-examination of the alleged victim about the statements at trial, and Mr. Williams did not have a pre-trial opportunity to cross-examine the alleged victim about the statements? (Assignment of Error No. 1)

2. Was it error to permit a nurse to read questions from a forensic questionnaire and the victim's answers thereto where (1) the answers were cumulative of the victim's testimony, (2) proper procedure for using a writing to refresh a witness' recollection was not followed, and (3) the questionnaire was not admitted into evidence? (Assignment of Error No. 2)

3. Was it error to permit a nurse to read a "verbatim" report she had written during a forensic examination of the victim where (1) the report was cumulative of the victim's own testimony, (2) the proper procedure for using a writing to refresh a witness' recollection was not followed, and (3) the report was not admitted into evidence? (Assignment of Error No. 2)

4. Was it error to permit a witness to testify regarding hearsay statements of the victim where the victim changed her clothes, washed her hair, showered, collected a camera from her car to "document her injuries," found a cell phone and phoned a neighbor, then "ditch walked" to the neighbor's house before making the statements? (Assignment of error No. 2)

III. STATEMENT OF THE CASE

On September 28, 2003, Bonney Lake police officers were dispatched to the home of Sharon Taylor after receiving a report that a woman had been kidnapped and assaulted. RP 135; RP 171-172. When they arrived at the Taylor home, they found Jessi Dabson, who gave them a verbal statement about the incident, and identified Michael Williams as her attacker. RP 172-173. Mr. Williams was located and arrested later that same day. RP 174. The residence where Mr. Williams was living was searched and evidence collected from that location (RP 174; RP 271-291; RP 298-299) as well as from Jessi Dabson's home. RP 247-248; RP 249-251; RP 253-261.

On September 29, 2003, the Information was filed, accusing Mr. Williams of the following crimes: Count I – Burglary in the first degree; Count II – Kidnapping in the first degree; Count III – Assault in the second degree; Count IV – Rape in the first degree; Count V – Rape in the first degree; Count VI – Rape in the first degree. CP 1-5.

An Amended Information was filed on August 17, 2004, adding alternative means of kidnapping, alternative means of committing each of the three counts of first degree rape, and adding Count VII – felony harassment; Count VIII – intimidating a witness; and Count IX – possessing stolen property in the second degree.

Pretrial motions were heard on May 2, 2005. RP 19. The defense moved to exclude statements made by Ms. Dabson during a forensic medical examination and hearsay statements made to persons after she had showered, changed clothes, collected a camera to document her injuries, and walked approximately two blocks to a neighbor's house. RP 20-22. The Court denied the motions. RP 25; RP 139.

The defense also filed a motion to dismiss various alternatives and counts following the State's case in chief (RP 456-562). The motion was denied. RP 475; RP 480.

The jury returned guilty verdicts on Count I (burglary in the first degree) (CP 192); Count II (kidnapping in the first degree) (CP 193);Count III (assault in the second degree) (CP 196); Count IV (rape in the first degree) (CP 199); Count V (rape in the first degree) (CP 202); Count VI (rape in the first degree) (CP 205); Count VII (harassment) (CP 208); Count VIII (intimidating a witness) (CP 210); and Count IX (possessing stolen property in the second degree). CP 211.

The sentencing hearing was held on December 21, 2005. Mr. Williams was sentenced to 116 months on Count I, 68 months on Count II, 84 months on Count III, 57 months on Count VII, and 89 months on Count VIII, all to run consecutively; a minimum of 236 months to maximum of life on Count IV, minimum of 123 months to maximum of life on Count

V, and minimum of 123 months to maximum of life on Count VI, and 22 months on Count IX, all to run concurrently. CP 230-231.

Notice of Appeal was filed on January 4, 2006. CP 238-251.

IV. SUMMARY OF TESTIMONY

- *Lynda Dabson*

Lynda Dabson is the mother of Jessi Dabson. RP 46. Ms. Dabson testified that she had a romantic relationship with Mr. Williams, during which Mr. Williams moved into her house. RP 47. Ms. Dabson stated that she and Mr. Williams had one child together. RP 48. She testified that the relationship deteriorated, and Ms. Dabson told Mr. Williams he was no welcome in her home. RP 48-49. Ms. Dabson testified that Mr. Williams moved out of Ms. Dabson's home on May 17, 2003. RP 53.

Ms. Dabson described Jessi as "clearly upset" when she saw her on September 28, 2003 at the home of Sharon Taylor. RP 51. She stated that it was the police officer's idea for Jessi to go to the hospital. RP 53.

- *Jessi Dabson*

Jessi Dabson is the alleged victim of the crimes for which Mr. Williams was convicted. Ms. Dabson testified she did not approve of her mother's relationship with Mr. Williams and was "relieved" when he moved out of their house. RP 58-59. She testified that in the middle of September, 2003, she had placed her keys, cell phone, wallet, and the face

plate to her car radio on a hutch near the front door of the house before she went to bed, and when she got up the next morning, the wallet was gone. RP 60. Her ATM card was inside the wallet. RP 61.

Ms. Dabson testified that Mr. Williams had entered the house through the unlocked front door and "held [her] down and punched [her] in the face" as she lay on her bed (RP 71), then took her outside and put her in the trunk of a red car. RP 69-72. Ms. Dabson stated that she pulled some of her hair out "and stuck it in various corners of the trunk just to prove that I was there" in the event that she was killed, "so it could be figured out later," or if she "made it back home, then it would be proof that I was there[.]" RP 76.

She testified that Mr. Williams duct-taped her hands behind her back and put duct tape over her eyes and mouth, then took her into a house. RP 77-78. She stated that Mr. Williams took her clothes off and put her on a bed (RP 79-80), and asked her questions about her mother's new boyfriend (Tracy Dunivan) while Mr. Williams penetrated her vagina with his fingers and his tongue. RP 81-82. Ms. Dabson stated that he left for five or ten minutes, then came back (RP 83-84), then "climbed back on top" on her and "continued his actions, the same as before he left," penetrating her vagina with his finger, his tongue, and his penis. RP 86-87.

Ms. Dabson testified that he then took the duct tape off her eyes and mouth (RP 88), then took her to a car in the garage. RP 89. She got in the front seat, and she told him how to find Mr. Dunivan's house. RP 89. Ms. Dabson stated that during the drive, Mr. Williams told her that "he had the CIA . . . staking out each one of my family members, and all he has to do is give them the word and they will kill them," and that "he was going to chop off Tracy's head and send it in a box to my mom in the mail." RP 90.

Ms. Dabson stated that Mr. Williams then drove her back to the same house they had been in and took her clothes off again. RP 93. She testified that he "climbed on top of me and he used his penis" to penetrate her vagina. RP 94. She stated that she then got dressed and Mr. Williams drove her to her mother's house. RP 95-97.

Ms. Dabson testified that she then washed her hair, took a shower, got her cell phone from her bedroom and a disposable camera from the back of her car, and started "ditch walking" to Chrissie Taylor's house. RP 97-98. She reached Sharon Taylor, Chrissie's mother, by phone as she was walking, and Ms. Taylor was waiting for her in her doorway when she reached the Taylor home. RP 99. Ms. Dabson stated she was "hysterical" and "on the point of hyperventilation from crying." RP 100.

Ms. Dabson testified that Ms. Taylor reached her mother, who was at Tracy Dunivan's house, and Ms. Taylor told her mother what had happened. *Id.* Jessi Dabson stated that her mother arrived at the Taylor home within 10 minutes of Ms. Taylor's phone call, and subsequently the police arrived. RP 101. Ms. Dabson stated that she gave a statement to police and was then taken to Tacoma General hospital. *Id.*

Ms. Dabson testified that she "wasn't really concerned" about the injuries she had sustained while she was answering questions asked of her at the hospital. RP 102. She also stated that she understood the reason she was going to the hospital was so the police could gather evidence about what happened (RP 114-115), and that she didn't feel like she needed any specific medical treatment "right at first." RP 115.

Ms. Dabson identified her debit card and stated it had been in her wallet when it "went missing." RP 111. She stated that she took the disposable camera with her to the Taylor's house so she could "document" her injuries. RP 125; RP 136.

- *Sharon Taylor*

Ms. Taylor testified that Jessi called her at 7:00-7:30 a.m. on September 28, 2003, and was "hysterical and crying" during that call. RP 132. She stated that Jessi reached her house within about five minutes from initiating the phone call, that her hair was wet, her eyes were very

red and swollen, her wrists were red, and she was "very emotional." RP 132-133.

Ms. Taylor testified that Jessi Dabson told her that Mr. Williams took her of her house and put her in the trunk of a car, and when Ms. Taylor asked Jessi whether she had been raped, Jessi said yes. RP 139. She stated that Jessi Dabson told her she had been taken to another house and beaten there. RP 150. Ms. Taylor stated that she called Sharon Dabson, who came to the Taylor house (RP 134), and then called police. RP 135.

- *Christina Taylor*

Christina Taylor is a good friend of Jessi Dabson. RP 152. She described seeing Jessi Dabson in the Taylor home and stated she was "crying, shaking, beaten up." RP 154. Ms. Taylor stated that Jessi Dabson told her that Mr. Williams "had hit her and he had . . . taken her in his – trunk of his car and he had beaten her and then raped her." RP 155.

Ms. Taylor testified that Jessi Dabson thought Mr. Williams "would take her mom away from her," and was happy when he moved out of the Dabson house. RP 157. Ms. Taylor testified that Jessi Dabson said that Mr. Williams beat her before he took her out of the Dabson home. RP 158.

- *Bryan Byerley*

Bryan Byerley is a police officer for the City of Bonney Lake. RP 171. Officer Byerley was dispatched to the home of Sharon Taylor on September 23, 2003, where he found Jessi Dabson "sobbing." RP 171-172. Officer Byerley stated that Jessi Dabson gave him an oral statement and gave him a camera that she told Officer Byerley she had used to document her injuries. RP 172-173.

Officer Byerley testified about the arrest of Mr. Williams (RP 173-174) and his participation in the search of Mr. Williams' house. RP 174-176; RP 181-186.

Officer Byerley testified that Ms. Dabson told him she had been raped two times. RP 178.

Recalled to testify, Officer Byerley testified about evidence he had collected at theWilliams' home and from Mr. Williams' Toyota truck. RP 354-RP 356.

- *Lynne Berthiaume*

Lynne Berthiaume is the program coordinator for the forensic nurse examiner services at Tacoma General Hospital. RP 189-190. Ms. Berthiaume testified that she drew blood from Mr. Williams in relation to this case. RP 190.

- *Michael Cummings*

Michael Cummings is a Dupont police officer. RP 193. He testified that on September 28, 2003, he located and arrested Mr. Williams. RP 194-197.

- *Marguerite Y. Williams*

Ms. Williams is Michael Williams' mother. RP 199. Ms. Williams testified that she found Jessi Dabson's debit card in one of Mr. Williams' shirt pockets and turned it over to police. RP 202.

- *Donald Rodney Williams*

Mr. Williams is Michael Williams' father. RP 205. He confirmed that he and Ms. Williams had called police to come to their house and had turned over Jessi Dabson's debit card. RP 206-207.

- *Dana Powers-Hubbard*

Ms. Powers-Hubbard is a police detective with the City of Bonney Lake. RP 213. She testified about being called to the Taylor residence on September 28, 2003, to assist with a sexual assault investigation. RP 214. Officer Powers-Hubbard took photographs of Jessi Dabson, and identified the pictures for the jury. RP 215-221. She stated that she then took Jessi Dabson to Tacoma General Hospital in her police vehicle (RP 221), when more photographs were taken. RP 225. Officer Powers-Hubbard identified the pictures taken at the hospital. RP 226-227.

Officer Powers-Hubbard testified that she waited with Jessi Dabson for x-rays and CTs and took a tape-recorded statement as they waited. RP 228. Officer Powers-Hubbard stated that she then accompanied Jessi Dabson to the sexual assault examination room. RP 229.

Officer Powers-Hubbard took possession of the sexual assault examination kit (RP 231) and the tubes of blood drawn from Mr. Williams (RP 234) and transported them to the Washington State Patrol crime lab. RP 234.

Officer Powers-Hubbard testified that Jessi Dabson told her she had been raped twice. RP 237.

- *Steven Wilkins*

Steven Wilkins is the chief investigating forensic officer for the Pierce County Sheriff's Office. RP 246. Mr. Wilkins was called to the Dabson home to process the scene. RP 247-248. Mr. Wilkins identified photographs he had taken at the Dabson home (RP 249-251) and physical evidence he had collected at the Dabson home. RP 253-261.

Mr. Wilkins also processed the scene at Mr. Williams' home. RP 264. Mr. Wilkins identified photographs he had taken at Mr. Williams home (RP 265-271) and physical evidence he had collected at the Williams' home. RP 271-291; RP 298-299.

Mr. Wilkins testified that he lifted latent fingerprints from a roll of duct tape found on Jessi Dabson's bed and matched them to Mr. Williams' fingerprints. RP 303.

- *John Glenn Hopkins*

John Glenn Hopkins is a police officer with the Bonney Lake Police Department. RP 357-358. Officer Hopkins testified that he went to the Williams home on October 6, 2003 in response to Donald Williams' phone call (RP 358), where he was given the debit card belonging to Jessi Dabson. RP 359.

- *Teri Lee Jacobsen*

Teri Lee Jacobsen was a registered nurse employed at Tacoma General hospital in September of 2003. RP 362. Ms. Jacobsen explained the procedure she follows when doing a sexual assault examination (RP 363-367), and testified that she performed a sexual assault examination of Jessi Dabson on September 28, 2003. RP 367. Ms. Jacobsen read from her written report of questions asked and answers given during the examination. RP 370-375.

Ms. Jacobsen read to the jury the "verbatim" narrative report in its entirety. RP 391-396. Ms. Jacobsen testified about performing the sexual assault examination on Jessi Dabson. (RP 396-404; RP 406-409), and

stated that Jessi Dabson had redness on her fossa navicularis and that the opening to her cervix was "reddened without tenderness." RP 405.

- *Karen Lindell*

Karen Lindell is a forensic scientist with the Washington State Patrol crime lab. RP 431. Ms. Lindell explained what DNA is and how it is tested by the Washington State Patrol crime lab. RP 432-434. Ms. Lindell testified that she ran DNA tests on the blood samples taken from Michael Williams and Jessi Dabson, and on the vaginal, anal, and oral swabs from the sexual assault examination kit received with reference to Jessi Dabson. RP 434-435.

Ms. Lindell testified that she did DNA testing on the vaginal and anal swabs and found that the probability of a DNA profile matching Mr. Williams' DNA profile was one in 120 quadrillion. RP 439.

- *Michael Williams*

Michael Williams was the defendant below. Mr. Williams described his relationship with Tracy (Lynda) Dabson, who became his employee after they had become involved in a romantic relationship, and how they moved in together. RP 482-483.

Mr. Williams stated that on September 28, 2003, he had gone to the Dabson house to check on the welfare of his daughter, Maggie, and saw that Tracy Dabson's car was not at the house at 4:00 a.m. RP 488.

He testified that he became concerned about Maggie's safety, "pounded on the door," and Jessi Dabson opened it. *Id.*

Mr. Williams testified that Jessi Dabson told him that Maggie was fine and that she would show him where Maggie was staying and got in Mr. Williams' car. RP 489. Mr. Williams stated that he wrote down the address of the house that Jessi had shown him, asked Jessi who lived there, and was told it was "her mom's boyfriend." RP 490. Mr. Williams stated that learning about a new boyfriend "devastated" him. *Id.* He testified that he and Jessi "talked for awhile," that they "drove around" while Jessi was "being a sympathetic ear. *Id.*

Mr. Williams stated that he was "on auto-pilot," and "almost at Dupont, so we just swung into the house," and he showed Jessi around. RP 492. Mr. Williams stated that after he gave Jessi a hug and a kiss on the cheek, "[she] turned her head towards me. She kissed me, I kissed her back. One thing led to another." RP 493. Mr. Williams testified that he had sex with Jessi and believed it was "totally consensual." RP 494. He stated that they had consensual sex a second time, involving bondage because it was Jessi's "fantasy." RP 496-497.

Mr. Williams stated that he then showered and started driving her back home, during which time he asked her if she would like to go through some boxes that included pictures of Jessi's family and Jessi

responded that she would like to do that. RP 498-499. Mr. Williams stated that they went back to his parents' house, got duct tape and scissors so he could "tape up a couple boxes for her so she could put stuff in the boxes." RP 499. Mr. Williams then drove Jessi back to the Dabson house. RP 499-500. Mr. Williams testified that during a conversation with Jessi at her house, he "snapped" and hit her, she ran up the stairs, and tripped and fell. RP 500.

Mr. Williams stated that he did not rape, kidnap, or assault Jessi Dabson other than when he hit her one time, and did not enter into her residence unlawfully and take her away. RP 501.

- *Joshua Walrath*

The State called Joshua Walrath as a rebuttal witness. RP 565. Mr. Walrath is the husband of Jennifer Dabson, sister of Jessi. RP 565. He testified that Jennifer and he had lived in the Dabson residence between May 28, 2003 and July 17, 2003, and that Mr. had not been living in the Dabson residence during that period of time. RP 566-567.

V. ARGUMENT

This Court reviews rulings on the admissibility of evidence under the abuse of discretion standard. *State v. Tharp,* 27 Wn. App. 198, 205-206, 616 P.2d 693 (1980), *affirmed,* 96 Wn.2d 591 (1981). A trial court abuses its discretion if its decision is manifestly unreasonable or is based

on untenable grounds. *State v. Gonzalez-Hernandez,* 122 Wn. App. 53, 57, 92 P.3d 789 (2004).

A. The trial court erred in allowing a nurse to read to the jury questions asked and the victim's answers given during a forensic examination.

Terri Lee Jacobsen was employed at Tacoma General Hospital as a "forensic" nurse on September 28, 2003, and performed the sexual assault examination on Jessi Lee Dabson. Ms. Jacobsen testified that a forensic nurse obtains a "history" from the subject as part of a sexual assault examination, and described what "history" means in that context:

> History is the events that happened during the sexual assault, what led up to the sexual assault, what happened during the sexual assault, obtaining information such as what the perpetrator looked like, how many were there, things that were done during the sexual assault, where the sexual assault happened, how many times it happened, and things that were said during the sexual assault.

RP 366.

The history is obtained by questioning the subject and recording the answers given. RP 368. While Ms. Jacobsen was testifying, the prosecutor asked Ms. Jacobsen:

> Q. I will show you what's been marked as Plaintiff's 160[1] – and before I hand that, let me ask you this: Do you have an independent memory of everything that you asked of Jessi Dabson and her responses to your questions?

[1] Ex. 160 is the "Consent for and documentation of sexual assault examination, including victim history." CP 122.

RP 367.

Ms. Jacobsen answered, "Somewhat, yes." *Id.*

After briefly questioning Ms. Jacobsen about the procedure in this case, the following took place:

> Q. And why don't you go through with us the questions on the form that relate to history and what her responses were?
>
> A. Well, I asked her –
>
> MR. THOENIG: Your Honor, I object. There is no indication of lack of memory with respect to this.
>
> THE COURT: Go ahead ask the question.
>
> MR. THOENIG: Matter of fact, it is to the contrary.
>
> Q. Without looking at the exhibit, do you have an independent recollection of what the first history request was or what her response was?

RP 369.

Instead of answering the prosecutor's question, Ms. Jacobsen began again to explain her usual procedure in obtaining the history. *See* RP 369, lines 19-25; RP 370, lines 1-5. The prosecutor then asked:

> Q. Now, did you – did you ask her a series of questions from a history questionnaire that I was provided with the kit?

A. Yes, I did.

Q. Do you recall what the first question that you asked her was?

A. I believe the first questions are how was she penetrated, was she penetrated vaginally.

RP 370.

At this point, the prosecutor instructed Ms. Jacobsen to "refer to the exhibit that you have in front of you, page 2." *Id.* The prosecutor then asked Ms. Jacobsen about what her questions to Ms. Dabson had been and had Ms. Jacobsen read Ms. Dabson's responses to the questions to the jury. *See* RP 370, lines 23-25; RP 371-375, lines 1-6.

1. The hearsay statements were inadmissible.

Defense counsel made a pre-trial motion to exclude Ms. Dabson's statements to Ms. Jacobsen on two grounds: first, that admission of her statements would violate Mr. Williams' right to confrontation under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); and second, that the statements were not made for the purpose of medical diagnosis or treatment and no hearsay exception therefore applied. *See* RP 21-22.

Pre-trial, the prosecutor argued that *Crawford* would not apply because Ms. Jacobsen was going to testify and would "be available for cross-examination." RP 22-23. However, the hearsay statements were not

introduced by the State during its examination of Ms. Dabson, as the prosecutor implied to the court would happen during the pre-trial argument. Instead, the State presented Ms. Dabson's hearsay statements through the testimony of Ms. Jacobsen, and the defense had no opportunity to cross-examine Ms. Dabson about the statements.

(a) The statements were not made for the purpose of medical diagnosis or treatment.

Statements made "for purposes of medical diagnosis or treatment" are not excluded by the hearsay rule even if the declarant is available as a witness. ER 803(a)(4). However, the statements made by Ms. Dabson to Ms. Jacobsen were not made for purposes of medical diagnosis or treatment, as Ms. Jacobsen's description of the "history" makes clear. Ms. Dabson testified that it was her understanding that the reason she went to Tacoma General hospital was so evidence could be gathered (RP 114-115) and that she did not believe she needed any specific medical treatment at that time. RP 115. *See also* RP 22 (argument that "she signed a consent, that it was – the purpose was to gather evidence"); RP 118 (argument regarding Exhibit 112, Consent for Forensic Medical Examination: form signed by Ms. Dabson states she "knows that the examination is being done in order to preserve evidence of the assault, that it's not done for medical purposes.").

The prosecutor attempted to cast Ms. Dabson's statements made during the forensic interview as statements made for the purposes of medical diagnosis or treatment by asking Ms. Jacobsen whether she might "make referrals for possible follow-up care or treatment" based on the answers given and whether the questions she asked during the interview assisted her "in determining what kind of follow-up referrals, if any, might be helpful, necessary or appropriate." RP 368-369.

Ms. Jacobsen answered yes to both questions, but that does not bring Ms. Dabson's statements under ER 803(a)(4). The critical inquiry is not whether the **interviewer** might refer the subject to someone else for diagnosis or treatment, but whether the **subject** made the statements "for the purposes of medical diagnosis or treatment." Ms. Dabson's own testimony makes it clear that she did not answer Ms. Jacobsen's questions for the purposes of obtaining a medical diagnosis or treatment.

Rather, the statements made by Ms. Dabson to Ms. Jacobsen made in answer to specific pre-printed questions designed to elicit evidence about a sexual assault. Even if Ms. Jacobsen made a referral to another health care provider based on what Ms. Dabson told her, Ms. Jacobsen conducted the interview and performed the examination not to diagnose or provide treatment to Ms. Dabson, but to gather evidence. The statements made during the forensic interview are not admissible under ER 803(a)(4).

State v. Lopez, 95 Wn. App. 842, 848-850, 980 P.2d 224 (1999) (where nothing in the record indicated that children understood their statements would further diagnosis or treatment and nothing in the record indicated that the interviews were pertinent to diagnosis or treatment by any physician or counselor, statements made during a forensic interview were not admissible under ER 803(a)(4)).

Here, Ms. Dabson stated she did not believe she had any need for medical treatment at the time, and further, that she understood she was undergoing the forensic examination for the purpose of gathering evidence. Even though Ms. Jacobsen said that she might use answers given during the interview for the purpose of making a referral, there is nothing in the record to indicate that she did refer Ms. Dabson to a health care provider. There is also nothing in the record to indicate that any other health care provider diagnosed or treated Ms. Dabson based on the statements obtained during the forensic interview. The statements were pure hearsay, and the trial court erred in admitting them.

The trial court's decision to admit the statements made in the forensic interview was based on untenable grounds:

> As to the medical treatment issue, I don't think that the examination that Ms. Dabson was taken for was only for forensic purposes; I think it's really a combination. She was taken to the sexual assault center which offers not only the medical rape exam, collection of evidence, but also can

> often provide the ongoing basis for either counseling or referral to other resources.
>
> I think it's – if it was more clearly for forensic purposes only rather than for treatment as well as collection of evidence, then I would agree with defense. But I think that there is an underlying medical purpose for the exam in this case and I'll allow the statements to come in.
>
> Obviously wouldn't have cumulative evidence, but if they need to come in, there would be a basis to do that.

RP 24-25.

There was **nothing** before the court upon which to base its comment that there was an "underlying medical purpose for the exam in this case," and, as pointed out to the court by defense counsel, the consent form signed by Ms. Dabson clearly indicated that the examination was not for medical purposes. *See* RP 21-22.

(b) Ms. Dabson's statements made to Ms. Jacobsen merely corroborated her trial testimony.

Further, in spite of the trial court's ruling that the hearsay statements wouldn't be allowed if they were "cumulative evidence," Ms. Jacobsen's reading of Ms. Dabson's responses to questions during the forensic interview **was** cumulative evidence: Ms. Dabson had already testified at length about the alleged sexual assaults, identifying Mr. Williams as the assailant, describing what led up to the alleged assaults,

where the alleged assaults took place, what happened during the alleged assaults, and what was said during the alleged assaults. *See* RP 79-89.

"A statement that merely corroborates a witness' earlier testimony is generally inadmissible as irrelevant under ER 401-403." *State v. Bargas,* 52 Wn. App. 700, 702, 763 P.2d 470 (1988), *review denied,* 112 Wn.2d 1005 (1989), citing *State v. Harper,* 35 Wn. App. 855, 857, 670 P.2d 296 (1983), *review denied,* 100 Wn.2d 1035 (1984).

Ms. Dabson's hearsay responses to questions asked during the forensic interview constituted cumulative, inadmissible evidence.

2. Proper procedure for refreshing Ms. Jacobsen's memory of the interview was not followed.

The prosecutor asked Ms. Jacobsen whether she had "an independent memory of everything that you asked of Jessi Dabson and her responses to your questions," and Ms. Jacobsen answered, "Somewhat, yes." RP 367. Instead of asking Ms. Jacobsen any substantive questions about the interview, however, the prosecutor asked Ms. Jacobsen whether she had "an independent recollection of what the first history request was or what her response was." RP 369. This was not the proper inquiry: the prosecutor should have asked substantive questions about the interview itself rather than ask whether Ms. Jacobsen had memorized, by number, the questions and responses on the printed form.

The prosecutor's preliminary questions about Ms. Jacobsen's independent memory indicates that the prosecutor supposedly sought to use the written forensic report to refresh her memory pursuant to ER 612: defense counsel properly objected, "[t]here is no indication of lack of memory with respect to this. Matter of fact, it is to the contrary." RP 369.

Evidence Rule 612 governs use of a writing to refresh memory for the purpose of testifying. Citing *State v. Little,* 57 Wn.2d 516, 358 P.2d 120 (1961), Professor Tegland states three "general requirements of using the technique of refreshing memory":

> (1) that the witness's memory needs refreshing, (2) that opposing counsel has an opportunity to examine the writing, and (3) that the trial court is satisfied that the witness is not being coached – that the witness is using the notes to aid, and not supplant, his or her own memory.

5D Karl B. Tegland, WASHINGTON PRACTICE, *Courtoom Handbook on Washington Evidence* (2006), page 321.

Even if the writing itself had been admitted as a recorded recollection under ER 803(a)(5), Professor Tegland indicates that (a) "[t]he witness should first be questioned until his or her memory is exhausted and the witness indicates a need for the writing," (b) "[t]he writing must cause the witness to actually recall the occurrence or event in question, and the witness must thereafter testify from an independent recollection of the matter," (c) "[i]f an objection is made to the use of the

writing, the court must determine whether the witness's memory has actually been refreshed, or whether the witness simply intends to continue from the written material." *Id.* None of these steps were taken before Ms. Jacobsen "continued from the written material."

3. The hearsay evidence was highly prejudicial.

In *Harper, supra,* the 11-year old victim testified that the defendant "put his thing he goes to the bathroom with in your mouth." *Harper,* 35 Wn. App. at 856, 670 P.2d 296. Over defense objection, a DSHS caseworker was subsequently permitted to testify that the 11-year old victim said the defendant "had her suck his penis" and that she had been present a number of times when statements of the victim made consistent representations. *Id.* This Court noted that the caseworker's testimony was "highly prejudicial, perhaps devastating, to the defense of this heinous crime," and on that basis, reversed the conviction and remanded for new trial. *Id.* In this case as well, the testimony of Ms. Jacobsen was "highly prejudicial, perhaps devastating," to the defense.

B. The trial court erred in permitting a "verbatim" report of an out-of-court statement of the victim to be read to the jury.

Part of a sexual assault examination and interview is the process of obtaining a narrative statement of what happened from the subject. RP 389. This narrative statement is taken down "verbatim" by the examining

nurse. RP 390. It is solicited in addition to the pre-printed questions and answers. RP 389.

The prosecutor asked Ms. Jacobsen whether she recalled Ms. Dabson's exact words used in the narrative portion of the interview; Ms. Jacobsen replied, "I do at some points during her statements to me, I do remember exact words." RP 390. The prosecutor then said, "[t]oday, you don't recall exactly what she said." RP 391. Again, Ms. Jacobsen replied, "[n]ot verbatim through the whole process, but I do remember exact words at specific points in her statement, yes, I do." *Id.*

Defense counsel then stated:

> MR. THOENIG: Your Honor, in light of that, I would ask that the exact words be taken from Exhibit 160, marked separately, and be admitted into evidence. Best evidence of what was said rather than just reading it.

RP 391.

The prosecutor responded:

> Well, I think typically with written document [sic], the witness is allowed to read from the document, the document itself doesn't make its way back to the jury room. I see no reason to deviate from that procedure here.

Id.

The Court then ruled, "Witness may read from the document," and the entire narrative portion of the forensic interview was read to the jury. RP 391-396. This was the third time the jury heard Ms. Dabson's

statements regarding the alleged crimes: it was cumulative evidence that corroborated Ms. Dabson's previous testimony, and, as in *Harper*, *supra,* was highly prejudicial.

Again, the prosecutor's preliminary questions to Ms. Jacobsen indicate that the narrative portion of the forensic interview report was supposedly being used to refresh Ms. Jacobsen's memory of the exact words used by Ms. Dabson to describe the incident, pursuant to ER 612. Again, proper procedure was not followed to permit the initial or the continued use of the report to refresh Ms. Jacobsen's memory.

As with the pre-printed questions and Ms. Dabson's answers thereto, it was an abuse of discretion to permit the reading of the narrative portion of the forensic interview report because it was pure hearsay: the narrative provided by Ms. Dabson to Ms. Jacobsen was not given for the purpose of obtaining a medical diagnosis or treatment.

C. Mr. Williams' Sixth Amendment right to confront witnesses was violated.

"The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *State v. Clark,* 139 Wn.2d 152, 157, 985 P.2d 377 (1999). "The confrontation clause applies to state courts through the Fourteenth Amendment, (citation omitted), and

guarantees a criminal defendant the opportunity to cross-examine adverse witnesses." *Clark,* 139 Wn.2d at 157-158, 985 P.2d 377.

Defense counsel made a pre-trial motion to exclude the statements made by Jessi Dabson to Ms. Jacobsen not only because the statements were hearsay not subject to the exception for statements made for the purpose of medical diagnosis and treatment, but also because the statements "certainly don't meet *Crawford.*" RP 22. In *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the U.S. Supreme Court ruled that testimonial statements made by a witness outside of court are barred under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

The prosecutor argued that *Crawford* did not apply in this case because "the declarant in this case is going to testify." RP 22. However, when Jessi Dabson was on the stand, the prosecutor did not ask her about the statements she made to Ms. Jacobsen. Instead, the State presented Jessi Dabson's hearsay statements through the testimony of Ms. Jacobsen under the guise of refreshing her recollection. Mr. Williams had no opportunity to cross-examine Jessi Dabson at the time she made the statements to Ms. Jacobsen and had no opportunity to cross-examine Jessi Dabson about those statements during the trial.

In *State v. Rohrich,* 132 Wn.2d 472, 939 P.2d 697 (1997), the state called the alleged victim of rape and child molestation to the stand, but failed to ask her about the alleged sexual abuse. Mr. Rohrich was convicted "solely on the basis of hearsay statements the child witness had made to others." *Clark,* 139 Wn.2d at 160, 985 P.2d 377. The Supreme Court reversed, writing:

> The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. **It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses.**

Rohrich, 132 Wn.2d at 478, 939 P.2d 697 (emphasis added).

In *Clark,* the Supreme Court affirmed the rule: "the admission of hearsay statements will not violate the confrontation clause **if the hearsay declarant is a witness at trial, is asked about the event <u>and the hearsay statement</u>**, and the defendant is provided an opportunity for full cross-examination." *Clark,* 139 Wn.2d at 159, 985 P.2d 377 (emphasis added). Under *Rohrich* and *Clark,* it was not enough to meet the requirements of the Confrontation Clause merely to have Jessi Dabson present and testifying "about the event." *See also Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (confrontation means more than being allowed to confront the witness physically). The State was also required to "elicit the damaging testimony" from the declarant – i.e., Ms.

Dabson herself – in order to allow an opportunity for "full cross-examination" about the circumstances surrounding and the statements made during the forensic interview.

Instead, here the State was permitted to have Ms. Dabson's answers to specific questions as well as her entire narrative statement given during the forensic interview placed before the jury through Ms. Jacobsen without any opportunity for cross-examination of Ms. Dabson about the statements.

D. The trial court erred in admitting hearsay statements made by Jessi Dabson to Sharon Taylor.

Immediately after Jessi Dabson finished her testimony, in which she described her walk to Sharon Taylor's home, the State presented Sharon Taylor as a witness. RP 129. Over defense counsel's objection to hearsay, Ms. Taylor was permitted to testify about the statements that Jessi Dabson made to her on the morning of September 28, 2003. These hearsay statements corroborated what Jessi Dabson had already stated in her own testimony. *See* RP 135-140.

Defense counsel argued:

> In was, in addition with regards to the rape, it was in response to a question; it was not volunteered. In that manner she took a shower, she changed clothes, she was composed enough to – through the incident to put – to try and escape, to take a camera to document her injuries, to feel that she didn't want to call the police.

> And she may have been emotionally upset but I can't – I don't think you could classify them as excited utterances. She had time to reflect on the matter and time to gather her thoughts. And I object to their admission.

RP 138.

The trial court ruled:

> I think the testimony from this witness as well as the other witnesses provide a sufficient foundation for the court to conclude that she was under the startling nature of the events that had just occurred, and that the statements made were sufficiently spontaneous to quality as an excited utterance.

RP 138-139.

An "excited utterance" is admissible as an exception to the hearsay rule. ER 803(a)(2). An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* In *State v. Flett,* 40 Wn. App. 277, 699 P.2d 774 (1985), the Court identified the principal elements of the exception: a sufficiently startling event and a showing that the declarant was still under the stress of excitement while making the statement. In *State v. Dixon,* 37 Wn. App. 867, 872, 684 P.2d 725 (1984), the Court emphasized the necessity of spontaneity, quoting 6 J. Wigmore, Evidence § 1749 (Chadbourn rev.ed.1976):

> The circumstantial guarantee here consists in the consideration already noted (§ 1747 supra), that in the

> stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous," "natural," "impulsive," "instinctive," "generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate."

Dixon, 37 Wn. App. at 872, 684 P.2d 725.

The State argued that because "[w]hat we are talking about is a matter of minutes" and that Ms. Dabson was "hysterical after being raped three times, kidnapped, and beat up," the statements made to Ms. Taylor were "excited utterances." RP 138. However, the passage of time is but one factor to be considered in making the determination of whether a statement qualifies as an "excited utterance." *Dixon,* 37 Wn. App. at 873, 684 P.2d 725. Further, the characterization of Ms. Dabson as "hysterical" – even if true – likewise is not dispositive on the question of whether her statements to Sharon Taylor were "excited utterances":

> If Ms. M's statement to the police were to be admissible as an excited utterance simply because she was upset, virtually any statement given by a crime victim within a few hours of the crime would be admissible because many crime victims remain upset or frightened for many hours, and even days and months, following the experience.

Dixon, 37 Wn. App. at 873-874, 684 P.2d 725.

Although the State referred to a "matter of minutes," it is actually not known how long a time after Mr. Williams dropped Ms. Dabson off at

her home that Ms. Dabson arrived at the Taylor house. She testified that she showered, washed her hair, changed clothes, located a disposable camera from her own car in her garage so she could document her injuries, found her cell phone, then walked in a ditch (so she could lay down and not be seen in case Mr. Williams drove by) to the Taylor house before she made the statements to Ms. Taylor. *See* RP 125.

Although Ms. Taylor stated that Ms. Dabson was "hysterical," her actions belie that characterization. As defense counsel suggested, and as made clear by the *Dixon* Court, simply because a crime victim is upset is not a dispositive fact in determining whether statements are "excited utterances."

The trial court's finding that Ms. Dabson "was under the startling nature of the events that had just occurred" is not supported by the record, and the record does not support the court's finding that the statements made to Ms. Taylor about rape were "sufficiently spontaneous." RP 138-139. As pointed out by defense counsel, Ms. Dabson made no spontaneous statement whatsoever about rape: instead, she responded to Ms. Taylor's direct question of whether she had been raped. *See* RP 137.

It was an abuse of discretion for the trial court to admit the hearsay statements under the "excited utterance" exception, since the decision was based on untenable grounds.

E. This Court should reverse Mr. Williams' convictions and remand for a new trial.

1. Violation of Mr. Williams' confrontation right was not harmless.

Violation of Mr. Williams' right to confrontation is an error affecting a constitutional right. This Court applies "harmless error" analysis to determine whether a constitutional error requires reversal. *State v. Guloy,* 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

> A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.

Guloy, 104 Wn.2d at 425, 705 P.2d 1182.

The Court will use the "overwhelming untainted evidence" test, under which the Court "looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Guloy,* 104 Wn.2d at 426, 705 P.2d 1182.

Finding the "untainted evidence" in this case requires all references by Ms. Jacobsen to the answers and narrative report given by Ms. Dabson during the forensic medical examination and interview to be stricken. The State will argue that the untainted evidence is overwhelming: however, absent the cumulative and highly prejudicial

hearsay evidence, the case becomes a classic "he said/she said" contest. In his testimony, Mr. Williams presented an entirely different description of the events at issue which addressed the State's evidence, including Ms. Dabson's injuries. The untainted evidence is not so overwhelming that it "necessarily leads to a finding of guilt."

2. A new trial should be granted under the cumulative error doctrine.

Individual evidentiary rulings do not constitute reversible error unless they are prejudicial, i.e., within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Cunningham,* 93 Wn.2d 823, 613 P.2d 1139 (1980). Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord,* 123 Wn.2d 296, 332, 868 P.2d 835, *clarified,* 123 Wn.2d 737, *cert. denied,* 513 U.S. 849 (1994).

In this case, the trial court erroneously admitted Ms. Dabson's answers to specific questions asked during the forensic interview, permitted the reading of Ms. Dabson's entire narrative report made during the forensic interview, and admitted hearsay statements made to Ms. Taylor that were not "excited utterances." Through the inadmissible hearsay, the jury heard Ms. Dabson's story not just once, but three times,

assuring that her version of events was overemphasized in the jurors' minds. Absent the hearsay corroboration of Ms. Dabson's trial testimony, there is a reasonable probability that the outcome of the trial would have been materially affected.

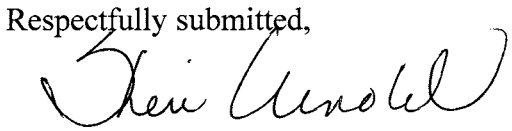
The violation of Mr. Williams' confrontation right together with the erroneous evidentiary rulings resulted in a trial that was fundamentally unfair.

Conclusion

This Court should reverse Mr. Williams' convictions on all charges and remand for a new trial with instruction that the hearsay statements made during the forensic interview are inadmissible.

DATED this 3rd day of July, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on July 3, 2006, she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by U. S. Mail to appellant, Michael W. Williams, DOC # 882945, Monroe Corrections Center - Washington State Reformatory, Unit C. Tier 4, Cell 33L, Post Office Box 777, Monroe, Washington 98272., true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 3, 2006.

Norma Kinter

Norma Kinter

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