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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL WAYNE WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 03-1-04540-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly admit the victim's statements to her neighbor as excited utterances when they were spontaneously made within twenty minutes of being dropped off while the victim was still hysterical?
2. Did the court properly admit the victim's statements to her nurse under the medical diagnosis exception when they were reasonably pertinent to treatment?
3. Was it appropriate for the trial court to allow the State to ask a question in reference to a witness's notes when the record shows the witness's memory would have been refreshed by referring to the notes?
4. Has defendant failed to show a violation of the confrontation clause by the admission of hearsay statements when the declarant was a witness at trial, was asked about the events and statements, and was subject to cross-examination?
5. Has defendant failed to show that he is entitled to a new trial when there was no cumulative error or egregious circumstances that would warrant reversal?

B. STATEMENT OF THE CASE.

1. Procedure

On September 29, 2003, the State charged defendant, MICHAEL WILLIAMS, with the following crimes: first degree burglary (Count I), first degree kidnapping (Count II), second degree assault (Count III), and three counts of first degree rape (Counts IV-VI). CP 1-5. On August 17, 2004, the State filed an amended information charging defendant with the

additional crimes: felony harassment (Count VII), intimidating a witness (Count VIII), and second degree possessing stolen property (Count IX). CP 21-29. After a jury trial, defendant was found guilty on all counts. CP 192, 193, 196, 199, 202, 205, 208, 210. Defendant filed a notice of appeal on January 4, 2006. CP 238-251.

2. Facts

At 4:00 AM on September 28, 2003, eighteen year-old Jessi Dabson awoke to the silhouette of a person in her doorway. RP 56, 70. By the time the person had got to her bed, Ms. Dabson realized it was defendant, her mother's ex-boyfriend who had been kicked out of the house three months earlier. RP 56, 58, 71. Defendant was the father of Ms. Dabson's three year-old half sister, Margaret Williams. RP 48. Ms. Dabson grabbed the phone to call 911, but defendant ripped it out of her hand, climbed on top of her and started punching her in the face. RP 71. Defendant was wearing rubber gloves. RP 71. Ms. Dabson was so terrified she wet herself. RP 79. Defendant asked Ms. Dabson if she wanted to die, then dragged her out of the house in a headlock and forced her into the trunk of a red car. RP 71-72. At first Ms. Dabson was too scared to move, but then she unsuccessfully tried to pull the brake lights out to signal somebody. RP 75. Ms. Dabson then pulled out her hair and stuck it in various corners of the trunk so that there was evidence she had been in the trunk in case she was killed. RP 76.

Defendant stopped the car. RP 76. Before opening the trunk, defendant told Ms. Dabson to lay on her stomach with her eyes closed and hands behind her back. RP 76. Ms. Dabson thought it was best to comply because she was afraid of being hit again or possibly killed. RP 78. Ms. Dabson also told defendant that she had to use the restroom. RP 77. Defendant then opened the trunk and duct taped her hands, eyes and mouth. RP 77. Defendant led Ms. Dabson into a house and then into a bathroom. RP 78. Defendant pulled Ms. Dabson's pajamas down and wiped for her. RP 78. Defendant then led Ms. Dabson into another room and pulled her pajamas and underwear back off. RP 79. Defendant also pulled Ms. Dabson's shirt up over her head and behind her back. RP 79. Ms. Dabson was crying and begging through the duct tape covering her mouth for defendant to stop. RP 80.

Defendant put his head on Ms. Dabson's stomach and started asking her questions about her mom's new boyfriend. RP 81. Defendant then began putting his fingers and tongue inside Ms. Dabson's vagina. RP 82. Defendant told her he would stop if she answered all of his questions. RP 79-80. Defendant also told her he had a gun and would use it if Ms. Dabson lied to him. RP 83. Ms. Dabson answered defendant's questions, including telling defendant that she knew where her mom's boyfriend lived. RP 82, 88. Defendant said he needed to verify the information and

then left the room for about five minutes. RP 83. Ms. Dabson was still bound and did not attempt to leave because she was afraid defendant would kill her. RP 84.

When defendant came back into the room he climbed on top of Ms. Dabson. RP 86. Defendant was naked and began using his fingers and tongue to penetrate Ms. Dabson's vagina. RP 86-87. Despite Ms. Dabson asking him to stop, defendant then penetrated Ms. Dabson's vagina with his penis. RP 87. After penetrating Ms. Dabson for about ten minutes, defendant stopped and asked Ms. Dabson to take him to the boyfriend's house. RP 87-88. Defendant took the duct tape off Ms. Dabson's face and threw it on the floor to the right side of the closet. RP 88. Defendant led Ms. Dabson, whose hands were still bound, into a garage and to the car she had been put in earlier. RP 89.

Defendant then began driving towards Bonney Lake so Ms. Dabson could show defendant where the boyfriend lived. RP 89. During the drive, defendant told Ms. Dabson that all he had to do was give the word and her whole family would be killed. RP 90. Defendant said he was going to chop off the boyfriend's head and send it in a box to her mom. RP 90. Ms. Dabson was crying and told defendant that her hands were hurt. RP 90-91. Ms. Dabson's hands were turning purple because they were taped behind her back and she was leaning against them. RP 90. When they got to the boyfriend's house, defendant used a box cutter to cut the duct tape on Ms. Dabson's hands. RP 91. Defendant also wrote

the boyfriend's address down on a piece of paper. RP 91. Ms. Dabson asked defendant to drop her off at home because she had given him all the information about the boyfriend, but defendant said he was going to take her back to his house for a couple days. RP 92. Ms. Dabson began feeling nauseous when defendant started driving back towards the house she had been raped in. RP 92.

Defendant drove back to the house and parked in the garage. RP 92-93. Defendant led Ms. Dabson back into the bedroom and took her clothes off, despite Ms. Dabson begging him not to. RP 93-94. Defendant said that if Ms. Dabson would have sex with him he would let her go. RP 94. Defendant was crying, said no and begged defendant to take her home. RP 94. Defendant then climbed onto Ms. Dabson and penetrated her vagina with his penis for about ten minutes. RP 94. Ms. Dabson continued crying and begging him to stop and take her home. RP 94.

When he was done raping her, defendant said he would take Ms. Dabson home, but only if she agreed to convince her mom to breakup with her boyfriend. RP 95. Defendant then began driving Ms. Dabson back to her mom's house in Bonney Lake. RP 95. During the drive, defendant was threatening to kill all of Ms. Dabson's family. RP 95-96. Defendant said he would spare Ms. Dabson's family for another twenty-four hours if she did not call the cops or tell anybody the truth. RP 96. Defendant also said Ms. Dabson had to make sure that her mom married him, signed the title of her house to him and signed custody of their daughter to him. RP

96. Defendant said no matter what Ms. Dabson did, he was still going to kill the boyfriend and her grandmother. RP 96. Defendant then apologized and dropped Ms. Dabson off at her mom's house at about 6:40AM. RP 97.

Ms. Dabson walked into the house and did not know what to do. RP 97. Ms. Dabson remembered that she had wet herself earlier and got into the shower. RP 97. She then realized she should not wash herself, but felt like she had to shampoo her hair because it smelled like defendant. RP 97. Ms. Dabson grabbed the cell phone out of her bedroom and was getting ready to leave in a car, but thought that defendant might see her if he drove by again. RP 97. Ms. Dabson grabbed a disposable camera out of the back seat and began walking in the ditch to her friend Chrissie Taylor's house. RP 98.

Ms. Dabson called the Taylor house hysterical and crying and left a high pitched wailing message. RP 98-99, 132. Ms. Dabson was able to get a hold of Chrissie's mom, Sharon Taylor, on the phone while she was walking over to her house. RP 139. Ms. Taylor could not understand the conversation because Ms. Dabson was hysterical and crying. RP 139. Ms. Dabson was still hysterical, crying, and also very emotional when she got to the Taylor house. RP 125, 133. Ms. Dabson's statements to Ms. Taylor were initially unintelligible because Ms. Dabson was on the point of hyperventilation from crying. RP 100. Ms. Dabson's eyes were very red and swollen. RP 133. Her wrists were also red. RP 133. Ms. Taylor

had never seen Ms. Dabson in that condition. RP 133. Ms. Dabson told Ms. Taylor that defendant put her in the trunk, then took her somewhere and beat her. RP 139, 143. Ms. Taylor asked Ms. Dabson if she had been raped and Ms. Dabson said yes. RP 139. Ms. Dabson was also unable to get composed shortly after her statements to Ms. Taylor, even when Ms. Taylor's daughter came down to comfort Ms. Dabson. RP 135, 142. Ms. Dabson could not really pronounce words because she was shaking so bad and could not keep her head still. RP 101, 154.

Ms. Taylor phoned Ms. Dabson's mother and the police. RP 100. Detective Dana Hubbard arrived at the scene and took Ms. Dabson to Tacoma General Hospital. RP 101. Ms. Dabson went through a rape examination, had her wrists x-rayed and went through a CAT scan. RP 102. The nurse that performed the rape examination, Ms. Jacobsen, took vaginal and anal swabs from Ms. Dabson. RP 401. The male DNA from the swabs was consistent with defendant's DNA. RP 438. At the end of the examination, Ms. Jacobsen provided Ms. Dabson with literature concerning sexually transmitted diseases, risk of pregnancy and other information concerning follow-up care. RP 408-409.

Later that day, police searched Ms. Dabson's house and found a duct tape roll on Ms. Dabson's bed with defendant's fingerprints on it. RP 303. The police also found some latex surgical gloves outside of the house. RP 253. Later that evening, defendant was pulled over and arrested in Dupont. RP 193-197. The police obtained a search warrant

and searched the residence defendant was staying in Dupont. RP 174. There was a Buick Regal in the garage that had a wad of hair in the trunk (RP 283), a Thomas Guide map opened to a map of Bonney Lake on the front seat (RP 269), and rolled up duct tape thrown near the right front corner (RP 267). There was also duct tape in the master bathroom trash. RP 276. Defendant's parents, who owned the house in Dupont, found Ms. Dabson's debit card in the house about a week later and gave it to the police. RP 206-207, 358-359.

At trial, defendant alleged that when he showed up at 4:00AM in the morning, Ms. Dabson voluntarily left the house with him to show him where his daughter was. RP 488-489. Defendant alleged that Ms. Dabson comforted him when he found out about her mom's new boyfriend. RP 490. Defendant alleged that he drove to the house in Dupont where they hugged and kissed. RP 492-493. Defendant alleged the Ms. Dabson had consensual sex with him where she asked him to bind her with duct tape to fulfill a bondage fantasy. RP 496-497. Defendant alleged that he snapped when he was dropping Ms. Dabson off and smacked her across the face. RP 500.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE VICTIM'S STATEMENTS TO HER NEIGHBOR AS EXCITED UTTERANCES WHEN THEY WERE SPONTANEOUSLY MADE WITHIN TWENTY MINUTES OF BEING RELEASED FROM CAPTIVITY WHILE THE VICTIM WAS STILL HYSTERICAL.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. State v. Moran, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. Moran, 119 Wn. App. at 218. The trial court's evidentiary ruling may be sustained on the grounds the trial court used or on other proper grounds supported by the record. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

ER 803(a)(2) allows the admission of excited utterances as an exception to the rule excluding hearsay statements. State v. Sunde, 98 Wn. App. 515, 520, 985 P.2d 413 (1999). 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." ER 803(a)(2). Three requirements must be met for a statement to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The key to the second factor is spontaneity. State v. Chapin, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). In determining spontaneity, a court considers the time interval between the startling event and the statement, the declarant's emotional state, and any other evidence bearing on the spontaneous quality of the statement. State v. Woods, 143 Wn.2d 561, 598-599, 23 P.3d 1046 (2001). A statement may still be an excited utterance even if made in response to a question. See State v. Woods, 143 Wn.2d 561, 598-599, 23 P.3d 1046 (2001) (statements made in response to paramedic's questions 45 minutes after the event were admissible).

In this case, defendant made a pretrial motion arguing that Ms. Dabson's statements to Ms. Taylor were not excited utterances. RP 20. The court reserved ruling on the issue. RP 20. During the trial, defendant renewed his objection when the State asked Ms. Taylor what Ms. Dabson had said to her. RP 135. After hearing argument from both parties, the court ruled that the testimony was admissible as an excited utterance. RP 139. The court stated that previous testimony provided a sufficient foundation to conclude that Ms. Dabson "was under the startling nature of

the events that had just occurred, and that the statements were sufficiently spontaneous to qualify as an excited utterance.” RP 139. Ms. Taylor then testified that Ms. Dabson had told her that Ms. Dabson had been taken out of her house by defendant who put her in the trunk. RP 139. Ms. Taylor testified that she then asked Ms. Dabson if she had been raped and Ms. Dabson had said yes. RP 139. Ms. Taylor testified that Ms. Dabson also told her that the defendant had asked where her mom’s boyfriend had lived so he could find the boyfriend because he wanted to kill him. RP 140.

Defendant continues to argue on appeal that these statements were not spontaneous and thus, they were inadmissible as excited utterances. Appellant’s Brief at 31-34. However, a complete review of the record shows the trial court did not abuse its discretion in finding that Ms. Dabson’s statements to Ms. Taylor were made spontaneously given the startling nature of events that had just occurred. The series of startling events (burglary, kidnapping, assault, and rapes) began at 4:00AM in the morning when defendant attacked Ms. Dabson in her bed and ended with defendant dropping Ms. Dabson off around 6:40AM. RP 70-71, 98. Ms. Dabson’s statements occurred within fifteen to twenty minutes of her release from her captor. RP 125. Washington courts have approved the admission of statements as excited utterances even when the statements were made many hours after the startling event occurred. See generally Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969); see also State

v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992) (statement given 3 1/2 hours after rape was excited utterance); State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (statements made after 6-7 hour time span qualified as excited utterances).

Ms. Dabson's emotional status also indicates that her statements were made under the stress caused by the events. Ms. Dabson was hysterical and crying when she called the Taylor house and left a high pitched wailing message. RP 98-99, 132. When Ms. Dabson was able to reach Ms. Taylor on the phone, her hysterical emotional state prevented Ms. Taylor from understanding what Ms. Dabson was saying. RP 139. Ms. Dabson was still hysterical, crying, and very emotional when she got to the Taylor house. RP 125, 133. Ms. Dabson's eyes were very red and swollen. RP 133. Her wrists were also red. RP 133. Ms. Taylor had never seen Ms. Dabson in that condition. RP 133. In sum, the court was given testimony that Ms. Dabson was (1) wailing, (2) hysterical, (3) crying, (4) very emotional, (5) not able to speak clearly enough to be understood, and (6) in a condition that Ms. Taylor had never seen before. All of these factors provide overwhelming support for the conclusion that Ms. Dabson's statements were made while she was still under the stress caused by being kidnapped, assaulted and raped multiple times.

Defendant relies upon State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984) to support his position that although Ms. Dabson may have been upset at the time of her statement to Ms. Taylor, the statement was

not an excited utterance. In Dixon, a defendant appealed the admission of the victim's four-page written statement recorded by a police officer over a two-hour period. Dixon, 37 Wn. App. at 871. The State argued that the statement should be admitted as an excited utterance because the victim was upset at the time she made the statement. This court held that the trial court erred in admitting the victim's statement as an excited utterance, explaining:

If [a victim's] statement to the police were to be admissible as an excited utterance simply because she was "upset", virtually any statement given by the 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 873-75. However, the Dixon court did not base its holding upon this general observation. Rather, the court noted that in that particular case, "[a] reading of [the victim's] statement makes it obvious that she had the ability to recall and narrate the details of her experience with Dixon." Dixon, 37 Wn. App. at 874.

The facts in Dixon are distinguishable from those in this case. In Dixon, the victim's statement was made over a two-hour time frame, whereas here, the victim made the statement less than twenty minutes after she was released by defendant and the statement itself did not take more than a few minutes. Moreover, unlike the victim's ability to "narrate the

details of her experience" in Dixon, here there is evidence that Ms. Dabson's "ability to reason, reflect, and recall pertinent details was . . . impeded." Dixon, 37 Wn. App. at 874. Ms. Dabson's demeanor and appearance both support this conclusion. Ms. Dabson's statements to Ms. Taylor were initially unintelligible because Ms. Dabson was "on the point of hyperventilation from crying." RP 100. Ms. Dabson was also unable to get composed shortly after her statements to Ms. Taylor, even when Ms. Taylor's daughter came down to comfort Ms. Dabson. RP 135, 142. Ms. Dabson could not enunciate her words due to the shaking of her body and head. RP 101, 154. These are sufficient indicia to support the conclusion that Ms. Dabson's statements to Ms. Taylor were spontaneous and admissible as excited utterances. The trial court did not abuse its discretion in making this finding.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE VICTIM'S STATEMENTS TO HER NURSE UNDER THE MEDICAL DIAGNOSIS EXCEPTION WHEN THEY WERE REASONABLY PERTINENT TO TREATMENT.

Under ER 803(a)(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible. For statements to be admissible

under ER 803(a)(4), the declarant's apparent motive must be consistent with receiving treatment, and the medical provider must reasonably rely on the information for diagnosis or treatment. State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999). A statement made to enable a forensic medical professional to make a diagnosis, even for court purposes, has been found to be within this hearsay exception. In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985) (exception has been applied to physicians who are consulted for the purpose of enabling the physician to testify).

In this case, defendant made a pretrial motion arguing that Ms. Dabson's statements to her nurse, Ms. Jacobsen, were not admissible under the medical diagnosis exception. RP 21-22. The court ruled that Ms. Dabson's statements to Ms. Jacobsen were admissible because there was "an underlying medical purpose for the exam." RP 25. Defendant continues to argue on appeal that the statements were not for the purpose of medical diagnosis and thus, were inadmissible. Appellant's Brief at 20-23. However, the court did not abuse its discretion in admitting Ms. Dabson's statements to her nurse under the medical diagnosis exception when they were reasonably pertinent to treatment.

Viewed in context, Ms. Dabson's statements imply that her motive in speaking with the nurse was consistent with receiving treatment. Initially, Ms. Dabson testified that going to the hospital was not the first thing on her mind. RP 114. When asked if she was concerned about the

injuries she sustained, Ms. Dabson responded, “I kind of -- I wasn’t really concerned, I was mostly in shock.” RP 102. However, when asked if she felt like she needed specific medical treatment, Ms Dabson answered, “Not right at first.” RP 115. These answers imply that Ms. Dabson was not concerned with going to the hospital at first, but as she calmed down she was concerned with obtaining medical treatment.

Further, the nurse’s testimony indicates that she reasonably relied on Ms. Dabson’s history of the event for the purposes of providing treatment. Ms. Dabson’s nurse, Ms. Jacobsen, affirmed that if a person reports a recent sexual assault it is appropriate to perform a sexual assault examination. RP 363. Ms. Jacobsen affirmed there is more likely to be evidence and injuries on recent victims, which forensic nurses are capable of treating. RP 364. Ms. Jacobsen testified that victims are asked about the history of the sexual assault because this information indicates to the nurses where to look for injuries. RP 366-367. Ms. Jacobsen affirmed that depending on the history the nurse will make referrals for possible follow-up care or treatment. RP 368. Ms. Jacobsen testified that Ms. Dabson was provided with literature concerning sexually transmitted diseases, risk of pregnancy and other follow-up care based off of the injuries she observed and history she obtained from Ms. Dabson. RP 408-409. Given that Ms. Dabson’s statements were reasonably pertinent to treatment, the trial court appropriately admitted them under the medical diagnosis exception.

Defendant alleges that Ms. Dabson's statements to Ms. Jacobsen were for forensic rather than treatment purposes, and thus not admissible under ER 803(a)(4). As support, he cites Division Three's refusal to admit hearsay statements made to a forensic interviewer for sexually abused children under ER 803(a)(4), where the State conceded that the interviews were for trial preparation rather than medical diagnosis or treatment. State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999). There is no such concession here. At trial, the State argued that Ms. Dabson made the statements in furtherance of the treatment she was receiving and that her nurse relied upon those statements in providing treatment. RP 23. Unlike Lopez, where there was nothing in the record about medical treatment, Ms. Dabson made statements implying her later concern for medical treatment. RP 115; Lopez, 95 Wn. App. at 850. The record here also shows the medical treatment Ms. Jacobsen provided depended on Ms. Dabson's statements (i.e., warning Ms. Dabson about sexually transmitted diseases and risk of pregnancy and advising her of follow-up treatment that might be needed). RP 408-409.¹ In sum, the trial court did not abuse its discretion in admitting Ms. Dabson's statements to Ms. Jacobsen under the medical diagnosis exception.

¹ Finally, contrary to Lopez, Ms. Dabson testified about all of the conduct upon which the counts were based. Contra Lopez, 95 Wn. App. at 848 (hearsay statements elicited by forensic interviewer covered conduct alleged in a rape count which the declarant did not testify about).

For the first time, defendant argues on appeal that Ms. Dabson's statements to her nurse merely corroborated Ms. Dabson's earlier testimony and were inadmissible because they were irrelevant. Appellant's Brief at 23-24. A party may assign error on appeal only on the specific ground of evidentiary objection made at trial. State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986). At trial defendant did not object to admission of Ms. Dabson's statements to her nurse under the evidence rules governing relevancy. Thus, defendant waived this issue and the court should not consider it.

Defendant also argues for the first time on appeal that the court should not have permitted Ms. Jacobsen to read a narrative from her medical report as it was highly prejudicial. Defendant did not object to admission of this evidence on the grounds that it was prejudicial.² Thus, defendant also waived this issue and the court should not consider it.

² In contrast, defendant asked that the narrative itself be marked as an exhibit and admitted into evidence. RP 391.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO INQUIRE AS TO WHAT A WITNESS'S NOTES INDICATED REGARDING THE SEQUENCE OF QUESTIONS.

Defendant relies on ER 612³ to argue that the proper procedure for refreshing Ms. Jacobsen's memory was not followed. Defendant originally objected when the State asked Ms. Jacobsen to go through a list of standard rape exam questions and Ms. Dabson's answers to them, which were documented in Ms. Jacobsen's report. RP 369. The court ruled that the State could ask the question. RP 369. After the objection, the State rephrased the question and asked, "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. Ms. Jacobsen did not refer to her notes when she answered this question. RP 369.

³ ER 612 states:

If a witness uses a writing to refresh memory for the purpose of testifying, either: while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

Later, when the State referred Ms. Jacobsen back to the exhibit, defendant did not object. RP 370. An issue is not preserved for appeal unless proper and particularized objection was made at the time of the ruling. ER 103; RAP 2.5(a); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Thus, defendant failed to preserve this issue and the court should not consider it.

Even so, there was no abuse of discretion on the part of the trial court in allowing Ms. Jacobsen to refer to her report when the record shows her memory would have been refreshed by referring to it. In State v. Little, 57 Wn.2d 516, 521, 358 P.2d 120 (1961), the court stated that the criteria for the use of notes or other memoranda to refresh a witness' recollection are: (1) that the witness's memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not being coached -- that the witness is using the notes to aid, and not to supplant, his own memory. The close supervision and sound discretion of the trial court is the most effective safeguard to determine if the use of notes will refresh the memory of witnesses. Little, 57 Wn.2d at 520.

During the direct examination, the State asked, "Without looking at the exhibit, do you have an independent memory of everything that you asked of Jessi Dabson and her responses to your questions?" RP 367. Ms. Jacobsen replied, "Somewhat, yes." RP 367. This answer implies that to some extent she did not remember all the questions and responses.

Further, nothing in the record indicates defense counsel was prevented from examining the report. Ms. Jacobsen's answers also indicate that she had an independent recollection of the events that night and was not supplanting her own memory with her report. The State asked, "[w]ithout looking at the exhibit, do you have an independent recollection of what the first history request was or what her response was?" RP 369. Ms. Jacobsen explained that she started off by obtaining a verbal statement of the incident from beginning to end. RP 369. In sum, (1) the trial court's ruling in response to defendant's objection was not an abuse of discretion when the witness did not refer to her report to answer the question, (2) defendant failed to renew his objection and preserve the issue when the State asked a similar question, and (3) the record shows the witness's memory would have been refreshed by referring to her report.

4. ADMISSON OF THE VICTIM'S HEARSAY STATEMENTS DID NOT VIOLATE THE CONFRONTATION CLAUSE WHEN SHE WAS A WITNESS AT TRIAL, WAS ASKED ABOUT THE EVENTS AND HEARSAY STATEMENTS, AND WAS SUBJECT TO CROSS-EXAMINATION.

Alleged violations of the confrontation clause are reviewed de novo. State v. Larry, 108 Wn. App. 894, 901-02, 34 P.3d 241 (2001) (citing United States v. Mayfield, 189 F.3d 895, 899 (9th Cir. 1999)). In Crawford v. Washington, the Supreme Court reformulated confrontation clause jurisprudence and held that testimonial hearsay may not be

admitted in a criminal case unless the defendant has had an opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

Crawford applies when three prerequisites are met. First, the challenged statement must be offered for the truth of the matter asserted, i.e., for a hearsay purpose. Crawford, 541 U.S. at 50-51 (noting that the Court was concerned with hearsay statements). Second, the statements must be testimonial. Crawford, 541 U.S. at 51-52. Third, the defendant must not have had an opportunity to cross-examine the declarant. Crawford, 541 U.S. at 59 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

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 and the hearsay statement, and the defendant is provided an opportunity for full cross-examination. State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999); see also In re Pers. Restraint of Grasso, 151 Wn.2d 1, 13-14, 84 P.3d 859 (2004) (there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination). It is sufficient to ask declarant about the event by asking whether they recalled speaking to someone about the incident. See State v. Price, 127 Wn. App. 193, 200-

201, 110 P.3d 1171 (2005), review granted in part, 156 Wn.2d 1005 (2006) (finding the State properly asked about declarant's hearsay statements by asking whether declarant recalled speaking with her mother and a detective about defendant).

At trial, defendant made a pretrial motion arguing that Ms. Dabson's statements to Ms. Jacobsen were not admissible under Crawford. RP 22. The court did not rule on the issue. RP 24-25. Defendant continues to argue on appeal that Crawford applies because the State did not ask Ms. Dabson about her statements to Ms. Jacobsen. Appellant's Brief at 10. However, admission of these statements did not violate the confrontation clause because Ms. Dabson was a witness at trial, was asked about the events and hearsay statements, and was subject to cross-examination.

Ms. Dabson, testified extensively in this case. RP 56-129. There was fifty-six pages of direct examination (RP 56-112), sixteen pages of cross-examination (RP 112-128), and one page of re-direct (RP 128-129). On direct examination, the State asked Ms. Dabson about events involving the burglary (RP 68-71), kidnapping (RP 71-77), assault (RP 71), rapes (RP 82, 86-87, 94), harassment (RP 96) and intimidating a witness (RP 96).

Despite defendant's contentions, the State sufficiently asked Ms. Dabson regarding her statements to Ms. Jacobsen. The State asked Ms.

Dabson if she had talked to the nurse and had underwent a rape exam.⁴ RP 102. Defendant was able to cross-examine Ms. Dabson and inquired about her statements to the nurse. RP 119. Accordingly, Crawford has no bearing on this case because the declarant testified as a witness and was subject to full and effective cross-examination. See State v. Thach, 126 Wn. App. 297, 309, 106 P.3d 782 (2005) (finding “when the declarant is available for cross-examination at trial” the confrontation clause is not implicated).

5. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE BECAUSE THERE WERE NO PREJUDICIAL ERRORS.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (three errors did not amount to cumulative

⁴ The State also asked Ms. Dabson about fleeing to the Taylor residence (RP 98-99). Ms. Dabson’s statements to Ms. Taylor were also excited utterances, which are considered non-testimonial and, therefore, do not run afoul of constitutional confrontation rights set forth in Crawford. State v. Ohlson, 131 Wn. App. 71, 81, 125 P.3d 990 (2005).

error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928. Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, rev. denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (defendant not deprived of a fair trial where no prejudicial error occurred).

Defendant has not established that any prejudicial errors occurred at his trial. The trial court properly found evidence admissible under the medical diagnosis exception or as excited utterances. Even if this court finds there were errors, a complete review of the record shows they could not have constituted egregious circumstances that denied defendant a fair trial.

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D. CONCLUSION.

For the foregoing reasons this court should affirm the defendant's convictions.

DATED: October 2, 2006.

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Kathleen Proctor
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

Ann

10.3.06 Theresa Kar
Date Signature