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STATE OF WASHINGTON

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

NO. 38151-6-II

STATE OF WASHINGTON,

Respondent.

vs.

JOSE ALVAREZ-ABREGO,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE..... 1

AURGUMENT 1

**A. SUFFICIENT EVIDENCE SUPPORTS ALVAREZ-
 ABREGO’S CONVICTION FOR ASSAULT OF A CHILD
 INTHE SECOND DEGREE.....1**

**B. ALVAREZ-ABREGO’S RIGHT TO CONFRONTATION
 WAS NOT VIOLATED WHEN THE TRIAL COURT
 ALLOWED DOCTOR DURALDE TO TESTIFY THAT
 KRISTINA RONDEAU TOLD HER THAT KRISTINA’S
 FOUR-YEAR-OLD DAUGHTER TOLD KRISTINA THAT
 THE INFANT VICTIM HAD BEEN THROWN AGAINST A
 WALL.....4**

 1. The Statement by the Four-year-old
 Sibling of the Infant Victim to Her Mother,
 Kristina Rondeau, Who Then Relayed the
 Statement to Dr. Duralde Was
 “Nontestimonial.”.....9

 2. Doctor Duralde’s Testimony That Kristina
 Rondeau told Her That Kristina’s Four-Year-
 Old Child Told Kristina That the Infant Had
 Been Thrown Against a Wall Is Admissible
 as a Statement for Purposes of Medical
 Diagnosis and Treatment Under ER
 803(a)(4).....12

 3. Even if it Was Error to Admit Doctor
 Duralde’s Testimony As to How the Infant
 was Injured, Any Error Should be
 Deemed Harmless.....22

CONCLUSION 28

TABLE OF AUTHORITIES

Washington Cases

Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983) 23

In re Pers. Restraint of Theders, 130 Wn.App. 422, 123 P.3d 489 (2005) 7

In re Personal Restraint of Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004) 12

Nghiem v. State, 73 Wn.App. 405, 869 P.2d 1086 (1994) 24

State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005)..... 6

State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1992)..... 13

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) 5

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997)..... 23

State v. Butler, 53 Wn.App. 214, 766 P.2d 505 (1989)..... 13

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850(1990) 1

State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005)..... 7, 8

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 2

State v. Florczak, 76 Wn.App. 55, 882 P.2d 199(1994). 21

State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) 7

State v. Hentz, 32 Wn.App. 186, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983)..... 6

State v. Justiniano, 48 Wn.App. 572, 576, 740 P.2d 872 (1987).....
.....14, 15, 17, 20

State v. Larry, 108 Wn.App. 894, 34 P.3d 241 (2001) 5

State v. Moses, 129 Wn.App. 718, 723, 119 P.3d 906, *rev. denied*,
157 Wn.2d 1006, 136 P.3d 759 (2006)8, 11, 13

State v. Ohlson, 131 Wn.App. 71, 125 P.3d 990 (2005)..... 8

State v. Perez, 137 Wn.App. 97, 151 P.3d 249 (2007)..... 9

State v. Perrett, 86 Wn.App. 312, 936 P.2d 426 (1997) 5

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), *cert. denied*,
518 U.S. 1026 (1996)..... 5

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)..... 5

State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993)..... 9

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 1

State v. Sandoval, 137 Wn.App. 532, 154 P.3d 271, 273
(2007)..... 6, 7, 8

State v. Saunders, 132 Wn.App. 592, 132 P.3d 743 (2006)..... 10, 23

State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006) 6, 11, 21

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973)..... 2

State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981)..... 23

State v. Walton, 64 Wn.App. 410, 824 P.2d 533 (1992)..... 2

State v. Woods, 561, 595, 602, 23 P.3d 1046 (2001) 9, 16

Federal Cases

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 6

Davis v. Washington, 547 U.S. 813126 S.Ct. 2266, 165 L.Ed.2d 224 (2005) 10

Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004)..... 10

United States v. Mayfield, 189 F.3d 895, 899 (9th Cir. 1999)..... 5

United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985) 13

Statutes

RCW 9A.36.021(1)..... 2

Court Rules

ER 801(c)..... 8

ER 802 9

ER 803(a)(4) 5, 9, 12, 13, 15, 16, 17, 19, 22, 23

STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS ALVAREZ-ABREGO'S CONVICTION FOR ASSAULT OF A CHILD IN THE SECOND DEGREE.

Alvarez-Abrego claims that his conviction for Assault of a Child in the Second Degree is not supported by substantial evidence, claiming that the State did not prove that Alvarez-Abrego was eighteen years of age or older at the time of the charged offense. This argument is without merit.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201, 829 P.2d 1068. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850(1990). The reviewing court must defer to the trier of fact on issues of conflicting

testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence is given equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). By Appellant's own admission, "'substantial evidence' in the context of a criminal case means evidence sufficient to persuade 'an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.'" Brief of Appellant 11, citing State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) (other citation omitted). The State has done that here.

The "element" that Alvarez-Abrego is challenging is "(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person. . . ." RCW 9A.36.021(1). Alvarez-Abrego claims that the State did not present sufficient evidence to prove that Alvarez-Abrego was eighteen years of age or older. Brief of Appellant 13.

The State did prove that Alvarez-Abrego was over the age of 18. RP 108. This was done when Detective Buster was shown State's exhibit 3, which is a certified copy of a Washington State Identification Card. RP 108. Detective Buster said that he had also

contacted “the Defendant” after the Detective returned from the hospital. RP 107. Detective Buster said “[l]ater on in the day after we spoke with everyone at the hospital . . . [w]e came back to Centralia and I went and looked for Mr. Alvarez. RP 107. Then, when shown the identification card, Detective Buster said, “This is a - - what appears to be a –letter from a records custodian from the Department of Licensing, certifying that this photo is a record of Jose Alvarez-Abrego, and it’s a copy of his identification card, Washington identification card. RP 108. Detective Buster was then asked to read the birth date printed on the card. Detective Buster replied, “April 12th, 1971.” RP 108. The trial court ruled that the exhibit was “admissible by statute.” RP 109.

In sum, there is nothing in the record to indicate that either the Detective or the jury was confused about whose picture was on the identification card. Surely, had the jury looked at the picture and found it to not be Alvarez-Abrego, the jury would have had a question for the Court as to what to do if the picture on the card did not appear to be Alvarez-Abrego. But there is nothing in the record about the jurors being confused about whose picture was on the card.

Furthermore, Alvarez-Abrego's argument on this point ignores the standard of view for challenges to the sufficiency of the evidence. Viewing the identification and date-of-birth evidence in the light most favorable to the State, including all inferences that reasonably can be drawn from it, the jury could have reasonably inferred from this evidence that Alvarez-Abrego was over the age of 18 at the time the assault occurred. Therefore, the evidence presented by the State sufficiently supported his conviction and his conviction should be affirmed.

B. ALVAREZ-ABREGO'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE TRIAL COURT ALLOWED DOCTOR DURALDE TO TESTIFY THAT KRISTINA RONDEAU TOLD HER THAT KRISTINA'S FOUR-YEAR-OLD DAUGHTER TOLD KRISTINA THAT THE INFANT VICTIM HAD BEEN THROWN AGAINST A WALL.

Alvarez-Abrego argues that his "right to confrontation" under both the Federal and State Constitutions was violated when the trial court allowed Doctor Duralde to testify that Kristina Rondeau told her that Kristina's other child (R.R.) told Kristina that the defendant had thrown the infant victim against a wall. Alvarez-Abrego's entire argument regarding R.R.'s statement to her mother is stated solely in terms of a violation of Alvarez-Abrego's Confrontation Clause rights. However, Alvarez-Abrego misunderstands the legal analysis

necessary for determining whether there has been a violation of a defendant's right to confrontation. As further set out below, Alvarez-Abrego's claim of error based upon the Confrontation Clause is incorrect because (1) Four-year-old R.R.'s statement to her mother that the infant had been thrown against a wall is nontestimonial and (2) R.R.'s statement qualifies as an exception to the hearsay rule because her statement is a statement made for purposes of medical diagnosis and treatment under 803(a)(4).

A reviewing Court reviews alleged violations of the confrontation clause *de novo*. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004); 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). A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn.App. 312, 319, 936 P.2d 426 (1997). A trial court's evidentiary ruling may be sustained on the grounds the trial court used or other proper grounds. 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 (1983).

The Confrontation Clause guarantees a criminal defendant the right to confront witnesses against him in a criminal prosecution. Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). When testimonial hearsay statements are the issue, the original declarant must be unavailable at trial and the defendant must have had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 68; State v. Abd-Rahmaan, 154 Wn.2d 280, 287, 111 P.3d 1157 (2005).

However, “[t]hese requirements do not apply to nontestimonial statements.” State v. Sandoval, 137 Wn.App. 532, 537, 154 P.3d 271, 273 (2007)(emphasis added), citing Crawford, 541 U.S. at 68.

A nontestimonial statement may be admitted whether or not the defendant had a prior opportunity to cross-examine the declarant. Indeed, “[w]here nontestimonial statements are at issue, ‘it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law. . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.’” State v. Shafer, 156 Wn.2d 381, 388, 128 P.3d 87 (2006), quoting Crawford, 541 U.S. at 68. Thus, “it follows that not

all hearsay implicates the confrontation clause.” Shafer, Id, citing State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005). As the Washington Supreme Court has noted, “[w]e recognized that neither the federal nor state confrontation clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule.” State v. Sandoval, 137 Wn.App. at 539, citing State v. Foster, 135 Wn.2d 441, 463-64, 957 P.2d 712 (1998).

In order to determine whether a statement’s admission violates the Confrontation Clause under Crawford, it must be determined (1) whether the challenged statement is hearsay; (2) whether the statement is testimonial; and (3) whether there was an opportunity to cross-examine the declarant. Moreover, when out-of-court assertions are not introduced to prove the truth of the matter asserted, confrontation clause concerns do not arise.

In re Pers. Restraint of Theders, 130 Wn.App. 422, 432-33, 123 P.3d 489 (2005)

Washington courts have defined “testimonial” as the functional equivalent of testimony in which the declarant bears witness. For example, in a case addressing the admissibility of 911 calls, the Washington Supreme Court indicated that the issue in Crawford was whether the declarant intended to “bear witness” and

“knowingly provided the functional equivalent of testimony to a government agent.” State v. Davis, 154 Wn.2d 291, 302, 111 P.3d 844, *cert. granted*, 546 U.S. 979, 126 S. Ct. 548, 163 L.Ed.465 (2005). Similarly, this Court followed Davis and held that Crawford applied to statements in which the declarant is “bearing witness.” State v. Ohlson, 131 Wn.App. 71, 82, 125 P.3d 990 (2005). Such an approach follows language in Crawford stating that, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Crawford, 541 U.S. at 51 (emphasis added). In determining whether a statement is nontestimonial, we may look “at the witness’s purpose in making the statements, specifically whether the witness expected the statements to be used at trial.” State v. Sandoval, 137 Wn.App. 532, 154 P.3d 271 (2007). If the statement at issue is nontestimonial, then we must also determine whether the statement qualifies under a firmly rooted exception to the hearsay rule. State v. Moses, 129 Wn.App. 718, 723, 119 P.3d 906, *rev. denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006)(emphasis added).

An out-of-court statement offered to prove the truth of the matter asserted is hearsay. ER 801(c). Hearsay is not admissible

unless it falls within an exception to the rules. ER 802. And hearsay included within hearsay is not excluded under the hearsay rule unless each “layer” of the double hearsay statements conforms with an exception to the hearsay rule. ER 805; State v. Rice, 120 Wn.2d 549, 564-65, 844 P.2d 416 (1993). One such exception allows hearsay to be admitted if the declarant made the statement for the purpose of a medical diagnosis or treatment. ER 803(a)(4); State v. Perez, 137 Wn.App. 97, 106-108, 151 P.3d 249 (2007). “The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment.” State v. Woods, 561, 595, 602, 23 P.3d 1046 (2001).

1. The Statement by the Four-year-old Sibling of the Infant Victim to Her Mother, Kristina Rondeau, Who Then Relayed the Statement to Dr. Duralde Was “Nontestimonial.”

In the instant case, the statement of four-year-old R.R. to her mother, Kristina Rondeau, telling Kristina that Alvarez-Abrego threw the infant victim against the wall, is hearsay. RP 23 (prosecutor explaining the statement to the court).

However, because four-year-old R.R.’s statement was made to her mother, Kristina Rondeau—rather than law enforcement, for example-- the statement is nontestimonial. Horton v. Allen, 370

F.3d 75, 84 (1st Cir. 2004) (finding statements made during a private conversation were nontestimonial), *cert. denied*, 543 U.S. 1093 (2005). “The admissibility of nontestimonial, out-of-court statements turns on the hearsay rule and its exceptions, without regard to the right to confrontation.” Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 *; State v. Saunders, 132 Wn.App. 592, 132 P.3d 743 (2006), *rev. denied*, 159 Wn.2d 1017, 147 P.3d 403 (2007)(“nontestimonial statements do not implicate the Confrontation Clause and are admissible if they fall within a hearsay exception”).

The statement at issue here is nontestimonial because the four-year-old sibling clearly was not making a “formal statement to government officers.” Crawford, 541 U.S. at 51. In other words, when the four-year-old sibling of the infant told her mother what happened to the infant, she was not providing the functional equivalent of testimony. Davis, 154 Wn.2d at 301-302. Instead, the statement was made by R.R. in a private conversation with her mother, Kristina Rondeau. RP 23; Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004)(finding statements “made during a private conversation” were nontestimonial), *cert denied*, 543 U.S. 1093 (2005). Here, we are dealing with a statement made by a four-

year-old to her mother, telling the mother how her infant brother was injured. RP 23. Thus, it is highly unlikely that four-year-old R.R. would “expect the statement to be used at trial.” Sandoval, Id.; see also, State v. Shafer, 156 Wn.2d at 390, n.8, where the Washington Supreme Court noted, “[a] three-year-old child . . . who tells her mother . . . in a private setting about . . . abuse is not making the statements in anticipation that the statements will later be used to prosecute the alleged . . . perpetrator.” Id.

The same is true here. Four-year-old R.R.’s statement to her mother regarding how her infant brother was injured surely was not said by R.R. in anticipation that her statement would later be used at trial. Shafer, supra. Accordingly, for the reasons set out in the recitation of the cases above, four-year-old R.R.’s statement to her mother regarding how her six-month-old brother was injured is nontestimonial. This does not end the analysis, however. Next, we must determine whether R.R.’s nontestimonial statement falls under an exception to the hearsay rule. State v. Moses, 129 Wn.App.at 723. The trial court found that it did, and Respondent agrees.

2. Doctor Duralde's Testimony That Kristina Rondeau told Her That Kristina's Four-Year-Old Child Told Kristina That the Infant Had Been Thrown Against a Wall Is Admissible as a Statement for Purposes of Medical Diagnosis and Treatment Under ER 803(a)(4).

The nontestimonial statement made by four-year-old R.R. to her mother regarding how the infant was injured and the mother's relating that statement to Dr. Duralde falls under the statements for medical diagnosis and treatment exception to the hearsay rule. ER 803(a)(4).

The trial court ruled that Dr. Duralde could testify that Kristina Rondeau told the Doctor that Kristina's other child, four-year-old R.R., told Kristina that the infant victim had been thrown against the wall. RP 30, 31. The trial court made this ruling based upon an exception to the hearsay rule for statements made for purposes of medical diagnosis and treatment. RP 30, 31. The trial court was correct. In general, to determine whether a statement was made for purposes of medical diagnosis or treatment, courts look to whether (1) the declarant's motive was to promote treatment, and (2) the medical professional reasonably relied on the statement for treatment purposes. In re Personal Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004)(citing State v. Butler, 53 Wn.App. 214, 220, 776 P.2d 505, *rev. denied*, 112 Wn.2d 1014

(1989). Thus, [w]itness statements made to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State.” State v. Moses, 129 Wn.App. 718, 729-30, 119 P.3d 906, *review denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006)(emphasis added); ER 803(a)(4). Usually, statements to medical providers identifying the perpetrator of a crime are not admissible under the medical diagnosis or treatment exception. State v. Ashcraft, 71 Wn.App. 444, 456, 859 P.2d 60 (1992). However, where the declarant is a child, Washington courts have determined that statements regarding the identity of the abuser are reasonably necessary to the child’s medical treatment. Ashcraft, 71 Wn.App. at 456-57. The rationale for such a position is that a medical provider needs to know who abused a child in order to avoid sending the child back to the abusive relationship and to treat the child’s psychological injury. State v. Butler, 53 Wn.App. at 221-22 (citing United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985).

More to the point, as it relates to the instant case, “statements made to the doctor by the mother are the equivalent of

statements made by the child to the doctor and are admissible under ER 803(a)(4) as statements made for purposes of diagnosis or treatment.” State v. Justiniano, 48 Wn.App. 572, 576, 740 P.2d 872 (1987)(emphasis added). In Justiniano, this Court—albeit when setting out the factual background of the case-- mentions that the doctor there had been allowed testify at trial about what the mother told the doctor that both the victim, and the victim’s brother had told the mother regarding the abuse. Id. Specifically, this Court in Justiniano noted that at trial, the Doctor “was allowed to relate certain statements attributed to the child by the mother concerning acts of . . . abuse, as well as the substance of the brother’s statement as stated by the motherIn addition to relating various statements attributed to the child and the brother, the doctor testified as to her finding on the physical examination.” Justiniano, at 576 (emphasis added).

The trial court in Justiniano had ruled that such statements were admissible as statements for the purpose of medical diagnosis or treatment under ER 803(a)(4). Id. And, while Justiniano involved application of the child hearsay statute, the trial Judge in that case apparently did allow the victim’s doctor to testify regarding statements attributed to the child by the mother, as well

as the substance of the brother's statement as stated by the mother. Justiniano, supra.

Just as the *trial* court had apparently done in Justiniano, so did the trial court do in the instant case, when it ruled that similar statements were admissible as statements for the purpose of medical diagnosis and treatment under ER 803(a)(4). As explained earlier, in this case the statement by R.R.-- the four-year-old sister to the infant victim--to her mother regarding how the infant was injured, is a nontestimonial statement. Crawford, supra. When the mother, Kristina Rondeau, passed on R.R.'s statement to Dr. Duralde, the statement became important to Dr. Duralde's treatment of the infant. RP 27 (the court discussing the proffered testimony as being "the mother tells the doctor that her other child says that the defendant threw the victim against the wall.") In analyzing whether it would allow the infant's Doctor to testify as to what the victim's mother said that R.R. told the mother about how the baby was injured, the trial court correctly observed:

Well, the problem I have . . . is that we're into the area of statements for medical diagnosis or treatment. And the test there is, is this reasonably pertinent to treatment, and if you have a young child, who can't speak for herself, brought into the hospital with a head injury, seems to me that a statement, from

whatever source, as to what caused the head injury is—definitely pertinent to treatment.

RP 27. The trial court then went on to say in response to argument by defense counsel:

Are you suggesting to me an ER physician treating an infant who can't speak for herself who's told by the mother that my other daughter told me that this happened because my boyfriend threw the child against the wall, you would not find that relevant on how to treat a child for a fractured skull?

RP 29,30 (emphasis added). Because it is important to see the trial court's analysis on this issue, Respondent is setting out the trial court's entire discussion regarding admissibility of R.R.'s statement to her mother as the mother related it to Doctor Duralde. The trial court explained:

[B]ased on State v. Woods and based upon Mr. Tegland's description of 803(a)(4) in his pamphlet, which is Washington Practice 5D, the 2007/2008 edition, specifically beginning at sub paragraph 3 on page 397, the things that are pertinent, as State v. Woods points out, is the medical treatment exception applies to statements as reasonably pertinent to the diagnosis for treatment. Thus statements as to causation, I was hit by a car, would normally be allowed, but statements as to fault, run a red light, would not.

Here, if the statement offered is the child was thrown against the wall, as far as I'm concerned, that's reasonably pertinent to medical diagnosis for treatment. On the other hand, to expand that and say, I was - - I was thrown against the wall by Mr.

Alvarez-Abrego, the “Mr. Alvarez-Abrego” part is not coming in, because who did it is not a statement for medical diagnosis.

But the fact that the child was thrown against the wall as an explanation for the fact that the child may have a fractured skull goes directly to medical diagnosis, and . . .[is] clearly admissible under 804 - -803 (a)(4).

And . . . as pointed out on Page 603, citing State v. Justiniano . . . according to Washington Appellant [sic] 572, a 1987 case, “Statements made to the doctor by the mother are the equivalent of statements made by the child to the doctor and are admissible under 803(a)(4).”

They’re reasonably pertinent to the immediate physical or eventual psychological treatment of the alleged victim here, who has a fractured skull and is of such tender years that the child is not able to communicate what happened to her [sic]. So I think that it’s admissible.

RP 30, 31 (all emphasis added). The trial court thus ruled that Dr. Duralde could testify about what she was told as to how the infant had been injured, but not “who” caused the injuries.

Before discussing this issue further, Respondent would like to point out a factual misrepresentation contained in Alvarez-Abrego’s brief as to the trial court’s ruling on the admissibility of R.R.’s statement that the child was thrown against the wall. On page 16 of the Appellant’s brief, Alvarez-Abrego states, “the trial court allowed Dr. Yolanda Duralde to testify that Kristina Rondeau

told her that Kristina's daughter told Kristina that the defendant had thrown Kristina's baby against a wall." (Emphasis added). This is not what the trial court ruled. Rather, the trial court ruled that the doctor could testify that she was told the baby was thrown against the wall, but that she could not testify as to who threw the baby against the wall. Specifically, the trial court stated, "[h]ere, if the statement offered is the child was thrown against the wall, as far as I'm concerned, that's reasonably pertinent to medical diagnosis for treatment. On the other hand, to expand that and say, I was - - I was thrown against the wall by Mr. Alvarez-Abrego, the "Mr. Alvarez-Abrego" part is not coming in, because who did it is not a statement for medical diagnosis. . . .I'm not going to let you go into the who did it." RP 31, 32 (emphasis added). Clearly, the trial court ruled that the doctor would not be allowed to testify about who threw the baby against the wall. Id. Accordingly, that portion of Alvarez-Abrego's brief misstating the judge's ruling should be stricken.

However, even if the trial court had allowed the doctor to testify as to "who" threw the baby against the wall—there is authority holding that the identity of a perpetrator is admissible when the perpetrator lives in the home with the victim. For

example, courts have allowed testimony about who abused the child “as an exception to the exception to the exception, we may admit the statements if the declarant is a child victim.” Perez, 137 Wn.App. at 106-108. This is partly because the identity of the abuser is crucial when treatment requires removing the child from danger. Id. ; State v. Butler, 53 Wn.App. 214, 221, 766 P.2d 505 (1989)(an out-of-court statement attributing fault to a family or household member may be reasonably pertinent to medical treatment where it is relevant to prevention of future injury.)

What this shows at this point is that even though it could have allowed testimony as to who injured the infant because this was a domestic violence crime, the trial court nonetheless was very careful to limit the scope of the doctor’s testimony about R.R.’s statement to her mother under ER 803(a)(4)—even when the identity of the abuser was most likely admissible as previously discussed. Butler, supra. Be that as it may, this Court should affirm the trial court’s decision allowing Dr. Duralde to testify that the Doctor was told that the child had been thrown against a wall as a statement made for purposes of medical diagnosis or treatment under ER 803(a)(4). And, contrary to what Alvarez-Abrego claims, it is clear from the record here that R.R.’s statement as to how her

infant brother was injured was crucial information that Dr. Duralde used to diagnose and treat the infant—and Dr. Duralde said as much during her testimony. RP 40, 41, 50, 51; See also, Justiniano, supra (doctor allowed to testify at trial that the mother of the victim told the doctor that the victim's *brother* told the mother how the abuse occurred).

Alvarez-Abrego frames his entire argument in terms of a Confrontation Clause error, citing to the ruling in Crawford, claiming that R.R.'s statement to her mother was testimonial because, “[i]n the mind of a four-year-old, her mother’s purpose in questioning her concerning who had hurt her brother bear all of the indicia that one would normally associate with the prosecutorial function.” Brief of Appellant 29. Alvarez-Abrego then inexplicably and without citation to authority says, “[i]n the mind of the child, the purposes of this questioning is not to obtain or seek aid. Rather, it is to determine guilt and apportion punishment. Thus, he claims, the child’s statements are “testimonial.” Apparently, according to Alvarez-Abrego, four-year-old R.R. knew that when she told her mother how the infant was injured, that the purpose of her statement was to determine guilt. This is absurd: “A three-year-old child . . . who tells her mother . . . in a private setting about . . . abuse is not

making the statements in anticipation that the statements will later be used to prosecute the alleged. . . perpetrator.” State v. Shafer, 156 Wn.2d at 390, n.8. The reasoning of Shafer applies equally to R.R.’s statement, who was just four-years-old when she told her mother what she saw. Moreover, statements made by young children-- even when the child is unable to comprehend that the statement is for medical purposes-- are admissible when indicia of reliability are present. State v. Florczak, 76 Wn.App. 55, 882 P.2d 199(1994).

Here, one indicia of the reliability of R.R.’s statement is that the infant’s physical injuries –as noted by Dr. Duralde—were entirely consistent with what R.R. said happened—that the baby was thrown against the wall. RP 40, 41. And, according to Dr. Duralde, such serious injuries were consistent with abuse rather than accidental injury. RP 40. Plus, there are the statements by the infant’s step brother Bradley Cox, who said that he had seen Avarez-Abrego swing the infant by his ankles—conduct that is further corroborated by the doctor’s testimony about the chip fractures in the infant’s ankles. RP 50, 51, 92. Dr. Duralde testified that the infant had a complex skull fracture and other injuries, and that she “was concerned that [the infant] . . . someone had hurt him.

. . the fractures were consistent with someone hurting him as opposed to having experienced accidental injury. RP 40. Dr. Duralde also noted that the infant had some old “healing fractures” of the rib, wrist, and chip fractures on both ankles. “ RP 50. The Doctor said that “chip fractures” is something one sees “specifically in children often particularly with abuse.” RP 51. The Doctor went on to say that the infant’s medical history “fitted his injury . . . that he had been thrown against the wall.” RP 41 (emphasis added). This testimony shows that Dr. Duralde used the information provided to her from R.R.’s mother (who told the Doctor what R.R. told the mother) to assist the Doctor in making her diagnosis of the infant’s injuries. RP 41. Accordingly, as the trial court ruled, the statement by R.R. to her mother that the infant was thrown against a wall was admissible through the testimony of the infant’s Doctor as a statement for purposes of diagnosis and treatment under ER 803(a)(4).

3. Even if it Was Error to Admit Doctor Duralde’s Testimony As to How the Infant was Injured, Any Error Should be Deemed Harmless.

If this Court finds that the trial court erred when it ruled that Doctor Duralde could testify that the infant had been thrown against the wall, any error should be found harmless. Alvarez-Abrego

claims constitutional error, based on his argument that admission of R.R.'s statement violated the Confrontation Clause under Crawford. However, as previously argued, R.R.'s statement to her mother is nontestimonial and furthermore was admissible under the statements for purposes of medical diagnosis and treatment exception to the hearsay rule. Crawford supra; Shafer, supra; ER 803(a)(4). Therefore, any alleged error was nonconstitutional so the more stringent "harmless error beyond a reasonable doubt" standard does not apply. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); State v. Saunders, 132 Wn.App. 592 (nontestimonial statements do not implicate the Confrontation Clause and are admissible if they fall within a hearsay exception).

Instead, "we apply 'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" State v. Bourgeois, 133 Wn.2d 389, 403-405, 945 P.2d 1120 (1997), *quoting*, State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d at 403, *citing* Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

In sum, “the improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” Bourgeois, supra, citing Nghiem v. State, 73 Wn.App. 405, 413, 869 P.2d 1086 (1994).

Here, Alvarez-Abrego has not shown that he was prejudiced by Dr. Duralde’s testimony which referenced part of R.R.’s statement to her mother (the statement was “sanitized” here because the witness was not allowed to testify about who threw the infant against the wall). RP 31. Alvarez-Abrego has not shown that he was prejudiced by this testimony because, even without the Doctor’s testimony that the infant had been thrown against a wall, the State presented a strong case, based upon both real and circumstantial evidence.

Kristina Rondeau identified Jose Alvarez-Abrego as the person in court on June 9, 1998. RP 75. Ms. Rondeau said that Alvarez-Abrego had lived with her from the time the infant was born, up to about August 30, 2007. RP 77. As to the day the crime took place, Kristina Rondeau said had gone to a doctor’s appointment on the day that the injuries to the infant occurred. RP 77. Ms. Rondeau left before 1:30 in the afternoon, and she left the

infant in the care of Alvarez-Abrego. RP 76. Also in the home when Kristina left that day besides the infant were three other children, the eldest being four-year-old R.R. RP 77. At the time Ms. Rondeau left for her appointment, she said the infant was fine and had no suspicious bruises or bumps. RP 81. But when Ms. Rondeau returned to the apartment around 6:00 p.m. on the same day she left, Ms. Rondeau noticed that the infant's head was bruised and swollen. RP 81. Ms. Rondeau screamed upon discovering the condition of the infant's head and said what happened to my baby?" RP 81. Alvarez-Abrego claimed he did not know, and that perhaps one of the children had hurt the baby. RP 81.

Even without Dr. Duralde's testimony that the infant had been thrown against a wall (the statement by R.R. to her mother), the medical evidence showed that the infant had a serious skull fracture, and older injuries including chip fractures to the ankles and other injuries. RP 40-43. Dr. Duralde said that such injuries were likely the result of someone hurting the child rather than from something like the infant's falling off of a couch on a carpeted floor. RP 42, 43. The Doctor also said that given the size of the infant, she did not believe that a four-year-old child could have dropped

the infant with enough force to cause these serious injuries. RP 43-45. Additionally, the infant's step brother, Bradley Cox, said that he had seen Alvarez-Abrego pick up the infant by his ankles and swing him around—the inference being that the older chip fractures of the ankles found by the Doctor could have been caused by Alvarez-Abrego's swinging the infant around by the ankles. RP 92.

Furthermore, the fact that when the police went back to the house after the child was taken to the hospital in order talk to Alvarez-Abrego, the officer asked, "do you know why we are hear?" and Alvarez-Abrego said "because of the baby" RP 97,98. This reaction infers consciousness of guilt. Similarly, Alvarez-Abrego's unusual, overly-affectionate behavior towards the infant when Ms. Rondeau got home that day, also shows evidence of a "guilty mind." RP 79,80.

What all of this evidence shows is that even without the testimony by the doctor that she was told the infant was thrown against the wall, there was sufficient evidence presented to prove that Alvarez-Abrego assaulted the infant. The evidence shows that during the time-frame the infant was hurt, Alvarez-Abrego was the only person who had the opportunity and physical strength to have inflicted such serious injuries. As mentioned above, the evidence

shows that on the day Kristina Rondeau left her six-month-old infant in the care of Alvarez-Abrego at 1:30 in the afternoon the infant was fine. But when Kristina returned at about 6:00 p.m. that same day, the infant had a horrendously swollen head and ear. There simply was no one else present in the apartment during that time period who could have caused these serious injuries to the baby. And, the medical evidence showed—even without the evidence of R.R.'s statement—that the infant's old and new injuries were more consistent with someone intentionally hurting the baby, rather than some accidental injury.

What all of this shows is that even if it was error for the trial court to allow the Doctor to testify as to what she was told by the infant's mother based upon R.R.'s statement, any error should be held harmless because that evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, supra. Indeed, Dr. Duralde's testimony would have been just as powerful even without the information from R.R.'s statement. Accordingly, Alvarez-Abrego's conviction should be affirmed in all respects.

CONCLUSION

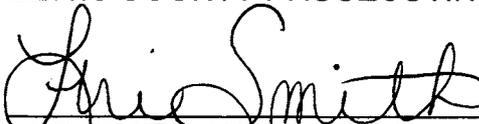
Alvarez-Abrego's rights under the Confrontation Clause were not violated by the admission of information relayed to Dr. Duralde by the infant's mother, that four-year-old R.R. said that the infant had been thrown against the wall. The statement was nontestimonial, and furthermore qualifies as a statement for purposes of medical diagnosis and treatment under ER 803(a)(4). Thus, admission of this evidence did not violate Alvarez-Abrego's right to confront witnesses.

But even if it was error to admit this nontestimonial evidence, the error was harmless, because even without this evidence, sufficient evidence remains to support the conviction. Accordingly, Alvarez-Abrego's conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 21 day of May, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By:



LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

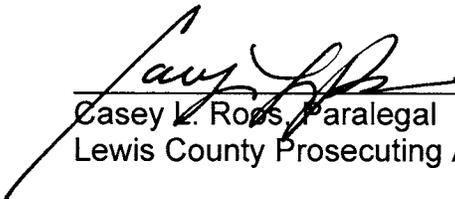
STATE OF WASHINGTON,) NO. 38151-6-II
Respondent,)
vs.)
JOSE ALVAREZ-ABREGO,)
Appellant.)
DECLARATION OF)
MAILING)

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 21, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hayes, Esq.
1402 Broadway Suite 103
Longview, WA 98632

DATED this 21st day of May 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office