

NO. 41999-8-II

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

STATE OF WASHINGTON, Respondent

v.

CARMEN LUCERO DIAZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 09-1-02073-6

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. The Court should decline review of the defendant's first assignment of error.
 - a. *The defendant waived any challenge to Irene Sheppard's opinion testimony when he did not object to it or when he affirmatively assented to it at the time of trial.*
 - b. *The defendant cannot demonstrate manifest constitutional error because Sheppard did not provide improper opinion testimony.*
- II. The defendant's right to confrontation was not violated when SANE nurse Irene Sheppard referred to facts and data in SANE nurse Barbara Bowers' report as the basis of her opinion.
- III. If any error occurred, the error was harmless.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "the defendant") was charged by Information with one count of Rape in the Second Degree (Domestic Violence) and one count of Felony Harassment (Domestic Violence). (CP 1-2). Following a four day trial by jury, the defendant was found guilty of Rape in the Second Degree (Domestic Violence) and not guilty of Felony Harassment (Domestic Violence). (CP 705-706). On March 30, 2011, the defendant was sentenced in the Clark County Superior Court to a mid-

range sentence of ninety months confinement. (CP 727, 730). This timely appeal followed. (CP 747).

II. Summary of Facts

The victim in this case, "L.S.S.," is a mother of three children and lives in an apartment in Vancouver, Washington. (RP 675-76). L.S.S. dated the defendant for approximately one year. (RP 676-77). The two lived in separate residences. (RP 676-77). L.S.S. and the defendant broke-up on December 6, 2009. (RP 678).

On December 16, 2009, around 10:00 p.m., L.S.S. heard someone "pounding" on her front door like "they wanted to tear [the door] down." (RP 681). Eventually the person at the door screamed "open the door" and identified himself with a Spanish word that means "it's your lover." (RP 690). By the sound of his voice, L.S.S. recognized it was the defendant. (RP 691). L.S.S. opened the door, after which, the defendant stormed into her home.¹ The defendant darted from room to room, as if he was looking for someone. (RP 693). The defendant called L.S.S. a "whore" and a "prostitute." (RP 704). To no avail, L.S.S. tried to calm the defendant and convince him to talk to her. (RP 707). The phone rang - it was L.S.S.'s friend, Colia Castellanos, calling. (RP 710). When L.S.S. told Colia the

¹ At this point in her testimony, L.S.S. said "I open the door and that was my biggest mistake." (RP 791).

defendant was at her home, the defendant became "really angry." (RP 710). After L.S.S. hung up the phone, the defendant turned off all of the lights in the apartment. (RP 710). He closed all of the doors and locked them. (RP 711). He shut all of the windows and closed the blinds. (RP 710-11). The defendant grabbed L.S.S. and started forcefully removing her clothes. (RP 711). L.S.S. told him to stop and to leave her alone. (RP 711). The defendant persisted. He pulled L.S.S. around the living room, "like a rag doll," and pushed her into the walls. (RP 711-12). L.S.S. "didn't recognize" the defendant. (RP 713). She was terrified of him and wanted to scream; however, she stopped herself from doing so because her children were asleep in the other room and she "didn't want them to see this." (RP 712, 717).

The defendant dragged L.S.S. between the two couches in the living room. (RP 714). L.S.S. repeatedly tried to break free from his grasp. (RP 714). The defendant threw L.S.S. on the couch, saying he wanted to have sex. (RP 712). L.S.S. told the defendant to leave her alone. (RP 712). The defendant held L.S.S.'s hands over her head with one of his hands, straddled her, and held her body down with his other hand. (RP 713). The defendant accused L.S.S. of "being with many men." (RP 714). He said "this is what you like." (RP 713). L.S.S. cried it wasn't true and she didn't like this. (RP 714). The defendant forced his

hand into L.S.S.'s vagina. (RP 714). L.S.S. tried to kick him away, but the defendant was too heavy to get him off of her. (RP 714-15). After he removed his hand from her vagina, the defendant inserted his penis into L.S.S.'s vagina. (RP 717). L.S.S. said the defendant was "so forceful, he wouldn't stop...he kept holding onto my hands...I kept trying to push him away...he was so heavy on top of me...I couldn't move." (RP 715-718).² As the defendant continued to force himself into her, L.S.S. said it was "hurting so bad...my vagina was hurting...it was burning." (RP 718-19). L.S.S. continued to beg the defendant to leave her alone. (RP 719). She did not know why this was happening to her or what she had done to deserve it. (RP 714).

Once the defendant finished, he laughed and told L.S.S. she "wasn't even good." (RP 723). The defendant left the living room and went into L.S.S.'s bedroom. (RP 723). In physical pain, L.S.S. followed the defendant into her bedroom. (RP 723-24). The defendant became angry when he saw L.S.S. had thrown out the clothes he left behind at L.S.S.'s apartment before they broke-up. (RP 724). The defendant threw a candle at L.S.S.'s face. (RP 724-25). The candle struck the wall, leaving a hole in it. (RP 725). The defendant picked up a flower pot and

² L.S.S. sobbed during trial as she recounted these events. (RP 718). At times, the court stopped the proceedings because the interpreter was unable to understand L.S.S. through her sobbing. (RP 715).

threw it at L.S.S.'s feet (leaving dirt on the floor). (RP 737). He dragged L.S.S. into the kitchen and told her to get some garbage bags to clean-up the bedroom. (RP 739). The defendant pulled thirty dollars from his pocket and told L.S.S. "that's what you're worth...you're not even worth that." (RP 73-40). The defendant retrieved the vacuum and started vacuuming the bedroom floor. (RP 739). The defendant said no one could know he was there. (RP 739).

L.S.S. put on pajamas to cover herself. (RP 741-42). The defendant dragged her outside with the garbage bags. (RP 741-42). L.S.S. fell to the ground and the defendant dragged her through mud. (RP 741-42).

After the defendant finally left, L.S.S. called her sister, Lidia Santiago, because she was afraid the defendant would return. (RP 745). Lidia heard L.S.S. was crying so hard, she could "hardly talk." (RP 372). L.S.S. told Lidia the defendant "had beat her really bad." (RP 380). Lidia drove to L.S.S.'s home immediately. (RP 380). While Lidia was on her way to L.S.S.'s home, L.S.S. called Colia, who lived a few blocks from her (RP 396).

Colia could barely understand L.S.S. when she spoke (RP 396). When Colia arrived, she observed L.S.S. sitting on the couch, screaming, shaking, and begging Colia to close the door. (RP 397). Colia observed

that L.S.S. was “so dirty.” (RP 397). L.S.S. told Colia she was in so much pain, she could not get up. (RP 399-400). Colia knew L.S.S. was normally very active. (RP 401). L.S.S. told Colia, “he hurt me...[he was] pulling me...[I was] scared.” (RP 399). Colia saw something like underwear on the living room couch. (RP 403). Colia asked L.S.S. about the underwear. (RP 403). L.S.S. told her this was where the defendant “abuse[d] her and hur[t] her.” (RP 403). L.S.S. told Colia the defendant “was holding up her legs.” (RP 403). L.S.S. told Colia she told the defendant to stop, but he would not stop. (RP 403).

Moments later, L.S.S.’s sister, Lidia, arrived. When Lidia saw L.S.S., she observed that L.S.S. could not stop crying, her clothes were dirty, and she was shaking. (RP 381). Lidia believed L.S.S. looked like “a defenseless child that couldn’t even hold herself together.” (RP 381).

L.S.S. called 911 because she was afraid the defendant would return. (RP 749). Vancouver Police Department Officer (“VPD”) Lee Yong was dispatched to L.S.S.’s apartment. (RP 409). When Officer Yong arrived, he observed that L.S.S. was very emotional, she was shaking, and she appeared to be “in crisis.” (RP 411-12). Officer Yong observed L.S.S.’s pajama bottoms were soiled and wet at the kneecaps (RP 413-14). Officer Yong saw a red mark on L.S.S.’s arm. (RP 423-24). Officer Yong observed that the apartment was generally clean; however,

the living room couches appeared to be disheveled. (RP 419). In L.S.S.'s bedroom, Officer Yong observed a hole in the wall and what appeared to be freshly-broken pieces of drywall lying on the floor below it. (RP 422). He saw dirt on the bedroom floor and tracks from a vacuum over the dirt. (RP 423). In the kitchen, Officer Yong observed cash stuck to a bulletin board on the wall. (RP 423-24).

L.S.S. was taken to the emergency room at Southwest Washington Medical Center for treatment. (RP 772). At that point, Officer Yong, VPD Officer William Pardue, and VPD Officer Denis Devlin went to the defendant's home to talk to him. (RP 429). Officer Yong asked the defendant what he did that night. (RP 429). The defendant said he wanted to buy gifts for L.S.S.'s children, but he did not have any money. (RP 429). He said he bought some sweetbreads and then went to L.S.S.'s apartment. (RP 429). The defendant said he and L.S.S. talked about some of their issues, watched TV, and kissed. (RP 430-31). The defendant said he became upset when he found one of his boots hanging in L.S.S.'s bedroom. (RP 430-31). The defendant said he threw a candle, put a hole in the wall, and tried to clean it up. (RP 430-31). The defendant said he left soon thereafter. (RP 430-31). The defendant said there were no problems that night. (RP 430-31). Officer Yong asked the defendant twice whether anything else happened at L.S.S.'s apartment that night.

(RP 429). Each time, the defendant said he had told the officers everything. (RP 429). Officer Pardue then asked the defendant whether he had sex with L.S.S. that night, to which he responded "oh, we had sex." (RP 432). The defendant did not have a reason why he had not originally mentioned this. (RP 433). The defendant said the sex was consensual. (RP 433). He did not describe it as being rough or forceful. (RP 433).

Meanwhile, at Southwest Washington Medical Center, L.S.S. was triaged to the sexual assault unit ("SANE unit") where SANE nurse Barbara Bowers conducted a sexual assault examination. (RP 535-36). L.S.S. could barely walk. (RP 399). Bowers examined L.S.S., internally and externally and documented her observations in a standardized SANE examination report. (RP 536). Bowers also photographed the injuries she observed on L.S.S.'s body. (RP 536). In her report, Bowers noted "multiple erythema" on L.S.S.'s right lower arm and forearm, erythema on her lower left leg, and erythema on her back. (RP 536). Bowers also documented a scratch and abrasion on L.S.S.'s left arm and an abrasion on her neck. (RP 536-37). Bowers examined L.S.S.'s vagina and documented one tear on her fossa navicularis and another tear on her labia minora. (RP 538).

L.S.S. had difficulty walking and her "private area" hurt for at least one and one-half weeks following the assault. (RP 777). Nearly two

weeks after the assault, L.S.S. saw Dr. Lucas Homer, a licensed chiropractor with twenty-three years' experience, because her neck and back were still hurting, she had persistent headaches, and she was experiencing numbness. (RP 849, 851). Dr. Homer saw bruises on L.S.S. when she arrived. (RP 851). In the course of his examination, Dr. Homer observed L.S.S.'s range of motion for her neck and back was poor, she was experiencing spasms along her cervical spine, there was "subluxation" in her spine (meaning the vertebrae were out of place), and her neck and back were tender to the touch. (RP 854-56, 860-63).

Prior to the night of the rape, the defendant had never ripped-off L.S.S.'s clothes when they had consensual sex. (RP 779). Prior to that night, L.S.S. never experienced shooting pain after consensual sex or sought medical treatment. (RP 779). L.S.S. would have never agreed to have consensual sex with the defendant in her living room because her children could walk in. (RP 780).

At trial, the State admitted the photographs that nurse Bowers took of L.S.S.'s body (on the night of the assault) through L.S.S. (RP 776). L.S.S. said the injury to her arm might have occurred when the defendant grabbed her by the arm, the injury to her leg might have occurred when the defendant pushed her into the mud, and the injury to her back might have occurred when the defendant pushed her into the wall. (RP 776-77).

L.S.S. said she continued to notice injuries on her body after the night of the sexual assault examination, including a bruise in the shape of a handprint. (RP 777).

When the defendant testified at trial, he added new facts to the story he originally told the officers. (RP 937-38). For example, the defendant testified that he gave L.S.S. thirty dollars because she said she needed help paying her rent. (RP 950). In addition, the defendant said, when he went into L.S.S.'s bedroom (after they "made love"), he discovered his boot with a candle burning in it, as well as his underwear on the floor next to the boot with cinnamon around it, and a picture of the two of them, which was "sticky" to the touch. (RP939, 951). The defendant said he threw the candle at L.S.S. because he believed L.S.S. was performing "witchcraft." (RP 952). The defendant said L.S.S. threw the flower pot at him. (RP 952). The defendant said L.S.S. fell to the ground, into the dirt from the tipped-flower pot, and begged the defendant for his forgiveness. (RP 955). The defendant said, when he tried to leave, L.S.S. came running outside and begged him to stay. (RP 956-57, 963-64). The defendant said L.S.S. dropped to her knees again and begged him to forgive her. (RP 964).

III. Testimony from State's Expert: Irene Sheppard and Defendant's expert: Dr. Philip Welch

SANE nurse Barbara Bowers was unavailable to testify at trial because she was suffering from the late stages of cancer. Consequently, Southwest Washington Medical Center SANE nurse Irene Sheppard testified for the State regarding L.S.S.'s sexual assault examination. (RP 519).

Sheppard testified to the following: she is employed at Southwest Washington Medical Center and has been a registered nurse since 1978. (RP 519). She specializes in ER and has worked in the emergency room for the past ten years. (RP 519-20). She has been a SANE nurse for the past five years. (RP 521). Since 2005, Sheppard as performed more than two hundred sexual assault examinations in Clark County, Washington. (RP 522). Sheppard knows that a person is immediately triaged to the SANE unit at Southwest Washington Medical Center, when he or she reports that he/she is a victim of sexual assault. (RP 523). Sheppard is familiar with how SANE interviews and examinations are conducted. (RP 524-25). She is also familiar with the standardized SANE templates that are used when a SANE nurse completes his or her report. (RP 524).

Sheppard said she did not participate in the SANE examination of L.S.S.; however, she reviewed Bowers' SANE report prior to trial. (RP

536). She also reviewed the entire medical file for L.S.S. as well as the photographs. (RP 536). Sheppard explained "erythema" are "flushed red cells" that normally develop into bruises. (RP 536). Based on her training and experience and her review of the records in this case, Sheppard testified the erythema on L.S.S.'s back could be consistent with being forcibly held down and the mark on L.S.S.'s neck could be consistent with being bitten. (RP 552-53). Sheppard explained that the fossa navicularis is located in the inner-opening of the vaginal wall and the labia minora is located in the inner folds of the vaginal opening. (RP 540-411). Sheppard testified the tears on L.S.S.'s fossa navicularis and labia minora could be consistent with sexual assault, child birth, blunt force trauma, or any kind of "straddling injury," including biking or riding a horse. (RP 552-53).

The defendant called Dr. Welch as its medical expert. (RP 632). Dr. Welch has over twenty years' experience in obstetrics and gynecology. (RP 632). Dr. Welch said, in his opinion, a vaginal tear could result from childbirth or from consensual sex. (RP 637). Dr. Welch testified that "erythema" is simply redness or "pinkishness" on the skin, which could result from consensual sex. (RP 651-52). Dr. Welch said erythema will not necessarily develop into a bruise. (RP 650).

C. ARGUMENT

I. The Court should decline review of the defendant's first assignment of error.

- a. *The defendant waived any challenge to Sheppard's opinion testimony when he did not object to it or when he affirmatively assented to it at the time of trial.*

The defendant claims his constitutional right to a fair and impartial trial was violated because Sheppard provided improper opinion testimony when she testified that the injuries to L.S.S.'s genitalia were consistent with either childbirth or sexual assault, the injuries to the neck were consistent with being bitten, and the injuries to her back were consistent with being forcibly held down. *See* Br. of Appellant at 1-2.

Pursuant to RAP 2.5(a), a defendant must object to an alleged error at the time of trial in order to preserve the issue for review. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An objection at the time of trial preserves judicial resources because it affords the trial court an opportunity to prevent or cure the error. *Kirkman*, 159 Wn.2d at 926. For these reasons, the appellate court will generally not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).

In addition, under the invited error doctrine, a party may not set-up an error, or assent to it, at the time of trial and then complain about the

issue on appeal. *See State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting *State v. LeFaber*, 128 Wn.2d, 896, 904 n.1, 913 P.2d 369 (1996) (Alexander, J., dissenting)) (finding defendant could not challenge jury instruction on appeal when he requested instruction at trial and noting “affirmatively assent[ing]” to an instruction may be the same as requesting it”).

Here, the defendant did not object when Sheppard testified that, based on her training and experience as a sexual assault nurse, “some causes of tears to the labia minora” can be “sexual assaults” and “child birth.” (RP 544). In contrast, the defendant did not hesitate to object moments later when the State used the phrase “invited coitus basic- -.” (RP 544). The court sustained the defendant’s objection to the State’s question and instructed the jury to disregard it. (RP 544-45). From this record, it is reasonable to infer that the court would have addressed a challenge to the expert’s testimony, if one had been made. It is also reasonable to infer that the defendant’s decision to *not* object was tactical. Pursuant to RAP 2.5(a), this Court should find the defendant waived any challenges to Sheppard’s testimony regarding potential causation of the injuries to L.S.S.’s labia minora or fossa navicularis.

The defendant also takes issue with Sheppard’s testimony that the injury on L.S.S.’s neck was consistent with being bitten and the injury on

her back was consistent with being forcibly held down. *See* Br. of Appellant at 16, *citing* RP 549-50. However, here the defendant is citing to Sheppard's offer of proof, which was made outside the presence of the jury. (RP 547-50). Before Sheppard testified before the jury regarding her opinion on the causation of the bruises and marks on the victim's arms, neck, back, and legs, the State presented Sheppard's testimony in an offer of proof. (RP 547-50). This offer of proof was made on the record, in the presence of the defendant, and outside the presence of the jury. (RP 247-50). In its offer of proof, the State walked Sheppard through each question it intended to ask her regarding the possible causation of L.S.S.'s injuries, based on Sheppard's training and experience. (RP 548-50). After the State completed its offer of proof, the court asked defense counsel "[d]o you have any objection to any of those questions?" (RP 550). Defense counsel responded, "I don't believe so your honor, I think that's it." (RP 550). Consistent with this statement, defense counsel did not object to Sheppard's testimony on these topics when Sheppard actually testified to them before the jury. (RP 551-52).

The defendant not only failed to object to the statements to which he now takes issue, he affirmatively assented to them when he told the court he would not be objecting to these statements when Sheppard testified before the jury. Pursuant to the invited error doctrine, the Court

should find the defendant waived any challenge to Sheppard's testimony regarding the potential causation of the injuries to L.S.S.'s neck and back.

- b. *The defendant cannot demonstrate manifest constitutional error because Sheppard did not provide improper opinion testimony.*

An exception to the rule requiring issue preservation applies only if the defendant can demonstrate manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). In order to demonstrate "manifest" error, the claimant must show he was "actually prejudiced." The burden shifts to the State to demonstrate the error was harmless only if the defendant can successfully make the threshold showing that manifest constitutional error, in fact, occurred. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Under ER 702, a witness qualified as an expert by knowledge, skill, training, experience, or education, may testify in the form of opinion if the expert's opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert's opinion is generally considered helpful to the trier of fact when the testimony concerns "matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *State v*

Jones, 59 Wn. App. 744, 750, 801 P.2d 263 (1990) *review denied*, 116 Wn.2d 1021 (1991). If the expert's theory is based on scientific theory or method, the theory or method should be one that is generally accepted by the scientific community. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

Under ER 704, an expert's opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. *Jones*, 59 Wn. App. at 747, 750 (in prosecution for manslaughter, finding no error occurred when the State's medical expert testified that in his opinion decedent's injury was caused by "non-accidental blunt injury" and defendant's explanation for causation of injury was not believable, based on the evidence); *State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012, 932 P.2d 1256 (1997) (in prosecution for assault, finding no error occurred when physician's assistant testified cuts on victim's face appeared to have been inflicted deliberately); *State v. Cunningham*, 23 Wn. App. 826, 854, 598 P.2d 756 (1979), *rev'd on other grounds*, 93 Wn.2d 823, 613 P.2d 1139 (1980) (finding no error occurred when State's expert provided an opinion as to the cause of death).

In contrast, it is improper for an expert to invade the exclusive province of the jury by rendering his or her personal opinion as to the

defendant's guilt. *State v. Montgomery*, 163 Wn.2d 577; 183 P.3d 267 (2008) (in prosecution for possession of pseudoephedrine with the intent to manufacture methamphetamine, finding it was improper for State's expert to testify that, in his opinion, the defendant possessed pseudoephedrine with the intent to manufacture it).

In addition, it is improper for an expert to invade the province of the jury by rendering an opinion as to the credibility of the witnesses. *State v. Black*, 109 Wn.2d 336, 348, 348-49, 745 P.2d 12 (1987); *State v. Fitzgerald*, 39 Wn. App. 652, 656-57, 694 P.2d 1117 (1985). For example, in *Black*, a prosecution for rape, the Court found the State's expert improperly commented on the credibility of the victim when she testified that the victim exhibited symptoms consistent with "rape trauma syndrome." *Black*, 109 Wn.2d at 339. The Court found this testimony was improper because "rape trauma syndrome" was not a condition that was generally accepted by the scientific community. *Black*, at 348-50. Consequently, when the expert told the jury the victim suffered from this condition, she essentially told the jury the victim was telling the truth. *Id.*; *see also Fitzgerald*, 39 Wn. App. at 656-57 (finding expert's testimony was improper when expert testified that, based on her interview with the two victims, she believed victims were credible).

In contrast, it is not improper for an expert to render an opinion that implicates the defendant's guilt or supports the victim's story, so long as the expert's opinion is based on the physical evidence and the expert's training and experience. *Baird*, 83 Wn. App. at 485-86 (finding, even though the experts' opinions supported the jury's conclusion the defendant was guilty, the testimony was not improper because the experts did not tell the jury what result to reach and their opinions did not rely upon a judgment about any witness's credibility).

Even if an expert provides improper opinion testimony, such testimony does not automatically constitute manifest constitutional error. *Kirkman*, 159 Wn.2d at 936. For example, in *Kirkman*, a prosecution for rape of a child in the first degree, the Court found the State's medical expert did not commit manifest constitutional error when he testified that "he found nothing in the physical examination to make him doubt A.D. but there was nothing to confirm." *Kirkman*, at 923, 930, 936 (finding expert did not testify that defendant was guilty or that he believed victim's account and "'manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim.")

Here, based on her training and experience, Sheppard was clearly qualified to render an opinion regarding the possible causation of L.S.S.'s injuries. Sheppard's testimony was helpful to the jury because an average

juror would not have common knowledge about the injuries that can develop following a sexual assault. Therefore, Sheppard's testimony was clearly admissible under ER 702.

Sheppard's testimony was also admissible under ER 704 because Sheppard based her opinion, regarding the potential causes for the L.S.S.'s injuries, on her training and experience and on a review of the material evidence. The facts in this case are wholly distinguishable from *Black* because Sheppard never rendered an opinion on L.S.S.'s credibility based on a syndrome that was not generally accepted by the scientific community.

Sheppard's testimony did not improperly invade the province of the jury because she never testified that the defendant caused L.S.S.'s injuries; she never testified that she believed the defendant was guilty; and she never testified that she believed the victim was credible. Even if Sheppard's testimony tended to implicate the guilt of the defendant, her testimony was permissible because it was based on the material evidence and her training and experience. Consequently, the defendant cannot meet his burden of demonstrating any error occurred, let alone constitutional error.

Assuming *arguendo*, the defendant can demonstrate constitutional error, he cannot meet his additional burden of demonstrating manifest

error because he cannot show he was “actually prejudiced” by Sheppard’s testimony. It is unlikely that Sheppard’s testimony carried much weight with the jury when Sheppard testified that vaginal-tearing can occur as a result of any “straddling injury,” including riding a horse or a bike; when Dr. Welch agreed that vaginal-tearing can occur as a result of childbirth; and when Dr. Welch testified that the “erythema” is simply redness to the skin that can occur as a result of consensual sex.

For these reasons, the defendant cannot demonstrate constitutional error or manifest error. Consequently, this Court should find the defendant waived any challenge to Sheppard’s opinion testimony when he did not object to it at the time of trial.

II. The defendant’s right to confrontation was not violated when Sheppard referred to facts and data in Bowers’ report as the basis of her opinion.

The defendant claims his right to confrontation under the sixth amendment to the United States Constitution and article 1, § 22 of the Washington Constitution were violated when Sheppard testified to facts and data contained in Bowers’ medical report as the basis of her opinion. See Br. of Appellant at 21. The defendant objected to Sheppard’s reference to Bower’s report at the time of trial, however, pursuant to *State v. Tim*, the trial court overruled the defendant’s objection. (RP 479-80);

State v. Lui, 153 Wn. App. 304, 322, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018, 228 P.3d 17 (2010).

The court reviews alleged violations of a defendant's confrontation rights *de novo*. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). The *Sixth Amendment confrontation clause* provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted by the witnesses against him." *U.S. Const. amend. VI*. In *Crawford v. Washington*, the Court held, pursuant to the *confrontation clause*, out-of-court testimonial statements are inadmissible at trial when the declarant is unavailable to testify, unless the opposing party has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), *review granted* 170 Wn.2d 1025 (2011). "'Testimony is...[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (citation omitted) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The "core class" of testimonial statements include "'affidavits, custodial examinations, prior testimony...[and] statements that the declarants would reasonably expect to be used prosecutorially.'" *Crawford*, at 51-52 (citations omitted) (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736 (1992)).

The Court's holding in *Crawford* did not create an absolute right to confront every statement made by a witness in a case. For example, there is no right to confrontation when the statements made are non-testimonial. *Crawford*, at 56 (noting business records are exempt from the *confrontation clause* because they are not testimonial by nature); *State v. Saunders*, 132 Wn. App. 592; 132 P.3d 743 (2006), *review denied*, 2007 Wash. LEXIS 225 (Wash., Apr. 4, 2007) (finding statements made to medical personnel for the purpose of diagnosis or treatment are not testimonial because the purpose is to obtain appropriate care). Similarly, even if a statement is testimonial, there is no right to confrontation when the statement is not offered for the truth of the matter asserted. *Crawford*, at 59 n.9 (finding the *confrontation clause* does not bar testimonial statements offered for some other purpose than proving the truth of the matter asserted).

Under ER 703, an expert is expressly allowed to base his or her opinion on facts or data that may not be admissible as evidence, so long as the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Under ER 705, the trial court may permit an expert to rely on hearsay or otherwise inadmissible evidence for the purpose of showing the basis of the expert's opinion. *State v. Brown*, 145 Wn. App. 62, 74, 184 P.3d 1284

(2008). Hearsay evidence is admissible under ER 705 because it is not admitted to prove the truth of the matter asserted. *Group Health Coop. v. Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986) (internal citations omitted) (stating “if an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration...[h]is explanation merely discloses the basis of his opinion...as if he answered a hypothetical question”).

In *Lui*, a prosecution for murder, the Court examined whether hearsay evidence that is admissible under ER 703 and ER 705 may nevertheless be inadmissible under the *confrontation clause* if the declarant does not testify at trial. *Lui*, 153 Wn. App. at 322. The State in *Lui* called Dr. Richard Haruff, chief medical examiner and pathologist for King County, to testify regarding cause of death and Gina Pineda, an associate director of Orchid Cellmark (a private DNA testing company), to testify regarding results of the DNA testing. *Lui*, at 307-08, 310-12. Dr. Haruff relied on an autopsy report prepared by another King County pathologist and Pineda relied on the notes and reports prepared by fellow technicians.⁵ *Id.* Both experts reviewed these reports, and any other

⁵ The defendant argues *Lui* is distinguishable because both of the State’s experts either supervised or participated in the examinations on which they relied. See, Br. of Appellant at 27. First, there is no evidence that Pineda supervised or participated in the notes or examinations on which she relied. More importantly, the Court in *Lui* never held

relevant materials, and testified that they agreed with the conclusions of the reports' authors. *Id.* The Court found the facts and data in the reports were not being offered for the truth of the matter asserted; rather, the reports were offered for the limited purpose of explaining how and why the experts arrived at their opinions. *Id.* at 322-23. Consequently, the Court held, because the State's experts were qualified by their training and experience to interpret the reports, there was no *confrontation clause* violation when the experts rendered their own opinions based on the facts and data contained in the reports. *Id.* (finding, even though the test for admissibility under the *confrontation clause* is different from the test for admissibility under the rules of evidence, here the result was the same).

The Court in *Lui* found the case was distinguishable from *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), because the State did not rely on the "bare-bones" affidavits of experts, in lieu of live testimony, in order to prove its case. *Id.* at 319. Rather, the evidence against the defendant was the opinions of the experts, who provided live testimony and were available for cross-examination (finding, in *Melendez-Diaz*, the State did nothing more than admit the affidavits of laboratory analysts in order to prove the substance
.....
an expert must supervise or participate in an examination in order to rely on it. There is simply no authority for the defendant's proposition.

tested was cocaine). *Id.* The Court found the case was also distinguishable from *State v. Hopkins*, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006), because the experts were not acting as “mere conduits for the testimonial assertions of their employees.” *Id.* at 320-21, *fn*15. Rather, the experts testified based on their own expertise and their own review of the records. *Id.* (finding, in *Hopkins*, there was no evidence that the State’s medical expert “did anything other than read the [non-testifying] nurse’s statements to the jury”).⁴

Here, Sheppard’s reliance on the facts and data in Bowers’ report did not violate the *confrontation clause* because Bower’s report was not testimonial. Bowers prepared the SANE report as part of a routine sexual assault examination. Bowers would have conducted the same examination and she would have prepared the same report irrespective of whether charges were filed in the case.

More importantly, Sheppard’s reliance on the facts and data in Bowers’ report did not violate the *confrontation clause* because Bowers’ report was not offered for the truth of the matter asserted. Irene Sheppard

⁴ This Court did not address a *confrontation clause* challenge in its recent decision in *State v. Lucas*, No. 41131-8-II (March 6, 2012), the Court reiterated that out-of-court statements are not hearsay when they are offered at trial as the basis of an expert’s opinion because the statements are not offered for the truth of the matter asserted. *Lucas*, No. 41131-8-II at 8-9. The court also cited to *Lui* for the proposition that the admission of out-of-court statements for this limited purpose does not violate the *confrontation clause*. *Id.* at 8.

was the State's expert witness at trial. Similar to the experts in *Lui*, Sheppard was qualified to interpret Bowers' report, based on her training and experience. Also similar to the experts in *Lui*, Sheppard considered the facts and data in Bowers' report, along with her training and experience, in order to render her own opinion as to how L.S.S.'s injuries could have been caused. Unlike *Hopkins*, Sheppard did not simply regurgitate Bowers' opinion; in fact, there is no evidence that Bowers rendered any opinions in her report. Unlike *Melendez-Diaz*, the State did not attempt to prove its case by admitting an unimpeachable affidavit; rather, Sheppard was available for cross-examination and she was thoroughly crossed on her opinions by the defendant.

Lui should control here. This Court should find the defendant's right to confrontation was not violated because he had an opportunity to cross-examine the expert witness who testified against him: Irene Sheppard.

III. If any error occurred, the error was harmless.

This Court should not review either of the defendant's assignments of error under a harmless error standard because no constitutional error occurred. However, assuming *arguendo*, this Court finds constitutional error, it should also find any error was harmless beyond a reasonable

doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (finding an 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). While the defendant's testimony was inconsistent and implausible, L.S.S.'s testimony was detailed and compelling. L.S.S.'s testimony was corroborated by Colia and Lidia's descriptions of L.S.S.'s hysterical and terrified demeanor immediately after the rape; by Colia's recounting of L.S.S.'s excited utterances; Officer Yong's observations of a recent struggle in the living room and bedroom of L.S.S.'s apartment; by the witness' descriptions of L.S.S.'s torn and dirty pajamas; by the witness' observations that L.S.S. could hardly walk; by the photographs that depicted injuries to L.S.S.'s neck, back, arms, and legs hours after the rape; and by Dr. Homer's assessment of the pain and injury that L.S.S. continued to endure two weeks after the rape. Sheppard's testimony was minimal in comparison to this evidence. There should be no doubt that the jury would have found the defendant guilty of rape in the second degree with or without Sheppard's testimony.

D. CONCLUSION

The defendant's conviction should be affirmed.

DATED this 15 day of March, 2012.

Respectfully submitted:

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