

**No. 96783-1**

No. 50053-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RONALD DELESTER BURKE,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 14-1-04008-5  
The Honorable G. Helen Whitener, Judge

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OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>III.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES .....</b>	<b>8</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>16</b>

## TABLE OF AUTHORITIES

### CASES

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) .....	11, 12
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....	11
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) .....	15
<i>State v. Beadle</i> , 173 Wn.2d 97, 265 P.3d 863 (2011).....	12
<i>State v. Butler</i> , 53 Wn. App. 214, 766 P.2d 505 (1989) .....	8
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	15
<i>State v. Mason</i> , 160 Wn.2d 910, 162 P.3d 396 (2007) .....	11
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992) .....	9
<i>State v. Saunders</i> , 132 Wn. App. 592, 132 P.3d 743 (2006).....	12-13
<i>State v. Shafer</i> , 156 Wn.2d 381, 128 P.3d 87 (2006) .....	11-12
<i>State v. Wilcoxon</i> , 185 Wn.2d 324, 373 P.3d 224 (2016) .....	15
<i>State v. Williams</i> , 137 Wn. App. 736, 154 P.3d 322 (2007) ....	9, 10

### OTHER AUTHORITIES

ER 801 .....	8
ER 802.....	8
ER 803.....	8-9

U.S. Const. amend. VI .....	11
Wash. Const. art. I, § 22 .....	11

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it found that hearsay statements made by the alleged victim were admissible under the medical diagnosis or treatment exception to the hearsay rule.
2. The trial court erred when it found that hearsay statements made by the alleged victim were not testimonial.
3. Ronald Burke's State and Federal right to confront witnesses was violated by the admission of testimonial hearsay.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was the alleged victim motivated by a desire to seek medical diagnosis and treatment when she made statements about the alleged crime to the sexual assault nurse who conducted her forensic exam, where the alleged victim had already received medical treatment and had been cleared to leave the hospital and she was told before the examination that it would not include general medical care. (Assignment of Error 1)
2. Was Ronald Burke's right to confrontation violated where the State presented the alleged victim's testimonial hearsay statements, but Burke never had an opportunity to cross

examine the alleged victim about the statements?

(Assignments of Error 2 & 3)

3. Were statements the alleged victim made to the sexual assault nurse during a forensic examination testimonial?

(Assignments of Error 2 & 3)

4. Would a reasonable person in the alleged victim's circumstances understand that statements she made to a sexual assault nurse during a forensic examination would be used to apprehend and prosecute a suspect, where the alleged victim had already given a statement to an investigating police officer and was informed before the examination that evidence would be collected and turned over to law enforcement? (Assignments of Error 2 & 3)

### **III. STATEMENT OF THE CASE**

At 1:24 AM on July 3, 2009, an intoxicated and disheveled K.E.H. walked into the emergency room at Tacoma General Hospital. (7RP 684, 686, 687, 692; 8RP 855)<sup>1</sup> She told hospital personnel that she had just been raped in nearby Wright Park. (7RP 689; 8RP 856)

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<sup>1</sup> The transcripts labeled volumes I through IX will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

Tacoma Police Officer Khanh Phan was dispatched to the hospital, and contacted K.E.H. in her room at about 3:17 AM. (8RP 835, 838) He testified that K.E.H. was intoxicated and incoherent. She did not appear injured, but had dirt on her clothing. (8RP 840) After interviewing K.E.H., Officer Phan went to Wright Park, but did not find the suspect or any corroborating evidence. (8RP 841, 843, 844, 847)

After K.E.H. was medically cleared to leave the emergency room, sexual assault nurse examiner Kay Frey conducted a forensic examination. (6RP 602; 7RP 694) During the examination, Frey observed abrasions on K.E.H.'s elbow and knee, some redness on her thigh, a laceration on her vulva and the upper part of her cervix. (6RP 628-29) All of these injuries, except for the laceration on the cervix, are consistent with both consensual and nonconsensual intercourse. (6RP 637, 643) As part of the examination, Frey took a description of the incident from K.E.H., and collected samples of items that could contain DNA evidence. (6RP 612, 645-48)

A forensic scientist was able to develop two DNA profiles, one male and one female, from a sample taken from K.E.H.'s underpants. (7RP 723, 726, 727) The female profile matched

K.E.H., but the male could not be matched to any individual known to law enforcement at that time. (7RP 727; 8RP 871-72) But when the unknown male profile was reevaluated in 2011, it matched a profile then on file for Ronald Delester Burke. (7RP 733, 735, 741; 8RP 875)

Tacoma Police investigators found and interviewed Burke. He lived in Tacoma in 2009 and was familiar with and had visited Wright Park. (8RP 799, 806-08, 819, 876, 882) But he denied ever having sexual intercourse with a woman at Wright Park. (8RP 808-09, 819-20)

The State charged Burke with one count of second degree rape (RCW 9A.44.050(1)(a)). (CP 1) K.E.H. passed away before trial for reasons unrelated to the alleged rape.<sup>2</sup> (6RP 529; 8RP 875) Because K.E.H. was unavailable to testify at trial, the State wanted to introduce the statements K.E.H. made to Frey during the forensic examination. (6RP 540, 568-71) The State asserted that K.E.H.'s statements were admissible under the medical exception to the hearsay rule. (6RP 568-71) Burke objected, arguing that admission of the statements would violate his confrontation rights.

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<sup>2</sup> K.E.H. had advanced stage cervical cancer at the time of her death. Notably, Frey testified that cervical cancer could make the cervix weak and more susceptible to injury from non-forceful intercourse. (6RP 659-60)

(6RP 572-81; CP 43-49)

At a hearing on the issue, Frey testified that she responds to various area hospitals when there has been a report of a sexual assault. (6RP 542, 543) The purpose of the examination is twofold; forensic (to gather DNA and other physical evidence), and medical (treatment and referrals for medical care and emotional support services). (6RP 545) But the primary medical care for the complaining party remains with the treating physician. (6RP 564) The complaining party must be medically cleared by the treating physician before the forensic examination can begin. (6RP 564)

Frey also explained that she collects and packages any potential evidence according to law enforcement standards, and stores any collected samples in a refrigerator for investigators to collect at a later date. (6RP 559-60)

Frey began the forensic examination at 4:14 PM, about 15 hours after K.E.H. first arrived at the hospital. (6RP 545, 555-56) K.E.H. had already been treated by the emergency room nurse and physician, and had already given a statement to Officer Phan. (6RP 548, 553, 556-57; 8RP 836, 838)

Frey has several forms she must use as part of her evaluation, which all include the phrase "forensic nurse examiner

service” in their heading. (Exh. 19A-19J) The first is a consent form. (Exh. 19B) That form specifically states that “a medical screening examination and care must be provided by an emergency department or primary care provider prior to the forensic evaluation. A forensic evaluation does not include general medical care.” (Exh. 19B; 6RP 554)

The consent form states that evidence may be collected and photographs taken, and such items may be used for legal purposes or forensic analysis. (Exh. 19B; 6RP 558) The form also gives the nurse examiner permission to speak to the investigating officer if the assault is reported to the police. (Exh. 19B; 6RP 558-59)

The consent form states that the information collected will remain confidential but will potentially be “disclosed by law.” (Exh. 19B; 6RP 559) Another form tells K.E.H. that, if the assault was reported to the police, the evidence will be transferred directly to Tacoma Police Department. (Exh. 19I; 6RP 562-63) K.E.H. initialed the consent form before Frey began the examination. (Exh. 19B; 6RP 548-49, 550, 554)

The trial court found that K.E.H.’s statements were admissible under the medical treatment exception to the hearsay rule because one purpose of the exam was to provide medical

care. (6RP 585-89) The court also found that her statements were not testimonial because the consent form stated that the information would remain confidential, therefore it was not clear that K.E.H. was “put on notice that her statements would be used at trial.” (6RP 589-90)

Subsequently, Frey read K.E.H.’s description of the incident to the jury:

I was sitting there rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don’t know if he tried choking me or not. The next thing I knew, I was taken to the ground, my pants were off and stuff, and he was inside me. It was over and done with. I think he told me to keep my mouth shut. That’s all I remember. Then I came here. I walked over to the hospital.

(6RP 612) K.E.H. told Frey that the man had penetrated her vagina with his penis, she thought he ejaculated, and he did not wear a condom. (6RP 614-15) K.E.H. also described her assailant: “He was tall, a light [skinned] black, no hair or short hair. He had a white t-shirt and jeans. No jacket.”<sup>3</sup> (6RP 614)

The jury convicted Burke as charged. (11/09/16 RP 5; CP 91) The trial court imposed a standard range sentence of 211

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<sup>3</sup> Burke is a black male and about six feet two inches or six feet three inches tall. (8RP 799; 9RP 912-13; CP1)

months to life, but found Burke was indigent and unable to pay any discretionary legal financial obligations. (02/17/17 RP 6, 22; CP 96-97, 102-03, 105) Burke timely appeals. (CP 126)

#### **IV. ARGUMENT & AUTHORITIES**

A statement offered to prove the truth of the matter asserted is hearsay, and is not admissible at trial unless one of the well-established exceptions apply. ER 801; ER 802. ER 803(a)(4) creates an exception for out-of-court statements “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.”

The medical diagnosis exception applies only to statements that are “reasonably pertinent to diagnosis or treatment.” ER 803(a)(4). A statement is reasonably pertinent when (1) the declarant’s motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). Thus, the critical inquiry is not whether the interviewer might provide diagnosis or treatment or refer for the same, but whether the declarant made the statements “for

purposes of medical diagnosis or treatment.” ER 803(a)(4).

In *State v. Williams*, this Court found that statements made to a forensic nurse during a medical examination were admissible under ER 803(a)(4) because the examination was conducted for “‘a combination’ of purposes—medical as well as forensic,” and because the evidence indicated that the declarant’s motive was not purely forensic. 137 Wn. App. 736, 746-47, 154 P.3d 322 (2007). The trial court in this case also found that K.E.H.’s statements to Frey had a dual purpose, medical and forensic, and therefore qualified for admission under ER 803(a)(4). (RP 585-86, 587) But the evidence did not show that K.E.H. had a dual motive for making her statements to Frey.<sup>4</sup>

Although Frey may have found the statements pertinent to her treatment of K.E.H., the evidence does not show that K.E.H.’s motive in making the statement was to promote treatment. Rather, the evidence shows that K.E.H.’s motive was to provide evidence to aid in the apprehension and prosecution of her assailant. K.E.H. was treated by an emergency room nurse and doctor after she arrived at 1:24 AM. (6RP 556-57; 7RP 686, 688-89, 694) She was

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<sup>4</sup> Evidentiary rulings are reviewed for abuse of discretion. See *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

medically cleared to leave the emergency room at 11:15 AM, but decided to wait so that she could participate in a forensic examination. (6RP 605; 7RP 694) K.E.H. signed a consent form that specifically informed her that the evaluation does not include medical care, and that any evidence collected may be turned over to law enforcement. (Exh. 19B) Unlike in *Williams*, there was no evidence presented to show that K.E.H.'s motive in speaking to Frey was to obtain medical care and treatment.

Furthermore, statements attributing fault are generally inadmissible under the medical diagnosis exception. *Williams*, 137 Wn. App. at 746 (citing *In the Matter of the Dependency of Penelope B.*, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985)). K.E.H.'s description of her assailant was not reasonably necessary for medical diagnosis and treatment, it was only necessary for apprehension and prosecution of a suspect. Accordingly, all of K.E.H.'s statements about the incident, but particularly this portion, failed to meet the requirements for admission under ER 803(a)(4).

But even if K.E.H.'s statements did meet the medical diagnosis exception to the hearsay rule, they should not be admitted if doing so would violate Burke's right to confrontation. The Sixth Amendment to the United States Constitution and article

I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them.<sup>5</sup> Unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of “testimonial” statements of a witness who does not take the witness stand at trial, even if the statements would otherwise be admissible under the rules of evidence. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); see also *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).<sup>6</sup>

In *State v. Shafer*, the Washington Supreme Court announced a “declarant-centric” standard for determining whether an out-of-court statement made to a nongovernmental witness is testimonial:

The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant’s position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This

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<sup>5</sup> “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. Const. amend. VI. The Washington Constitution provides: “In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . .” Wash. Const. art. I, § 22.

<sup>6</sup> Alleged confrontation clause violations are reviewed de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

156 Wn.2d 381, 390 n. 8, 128 P.3d 87 (2006) (citation omitted); *State v. Beadle*, 173 Wn.2d 97, 107-08, 265 P.3d 863 (2011); see also *Crawford*, 541 U.S. at 51-52 ("core class of 'testimonial' statements" includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial").

For example, in *State v. Saunders*, the trial court allowed a paramedic and emergency room physician to testify about statements that the victim made to them in the course of receiving medical care. 132 Wn. App. 592, 603, 132 P.3d 743 (2006). On appeal, the court rejected Saunders' claim that his confrontation rights were violated, finding the victim's statements were not testimonial. 132 Wn. App. at 603.

Typically, the purpose of giving a statement to a provider of medical diagnosis or treatment is to obtain appropriate care. Here, there is no reason to believe that a reasonable person in [the victim's] position would think she was making a record of evidence for a future prosecution when she told [the] paramedic [and doctor] that her injuries occurred as a result of her boyfriend choking her and throwing her against the wall. The responsibilities of these two medical

professionals bear no similarity to those of the government officials, historic and contemporary, whose activities are at the core of *Crawford's* holding.

132 Wn. App. at 603.

The trial court in this case similarly found that K.E.H.'s statements were non-testimonial because there was "no indication" that she expected them to be used for a criminal investigation or prosecution. (RP 589-90) But the record does not support this conclusion.

Frey contacted K.E.H. in the emergency room around 4:00 PM and took her to a separate unit for the examination, on a different floor and different wing of the hospital. (6RP 597-98, 602) By this time, the allegation had been reported to law enforcement and K.E.H. had given a statement to an investigating police officer. (8RP 835, 837-38, 841) So she would have known that a criminal investigation and possibly a criminal trial were forthcoming.

Before the examination began, Frey provided a consent form that clearly explained to K.E.H. that she was agreeing to a forensic evaluation, that the examination "does not include general medical care," and that evidence will be collected and shared with law enforcement. (Exh. 19B; 6RP 553, 554, 558-59)

Under these circumstances, a reasonable person in K.E.H.'s

position would anticipate her statements being used to investigate and prosecute the alleged crime. Unlike the victim in *Saunders*, K.E.H. had already received medical treatment and left the emergency room before she made statements to Frey. And unlike the paramedic and doctor in *Saunders*, Frey's evidence gathering responsibilities during the forensic examination are similar to those of a government official collecting evidence from a crime victim or from a crime scene.<sup>7</sup>

A reasonable person in K.E.H.'s position would anticipate that her statements to Frey would be used against the perpetrator in investigating and prosecuting the alleged rape. In fact, there is nothing in the record to show that K.E.H. had any other motive at that point than to provide evidence to catch the man who raped her. For that reason, K.E.H.'s statements do not qualify as statements made for medical diagnosis and treatment, and are also testimonial. The trial court erred when it allowed Frey to read K.E.H.'s statements to the jury.

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<sup>7</sup> Frey testified that the expense of these forensic exams are covered by Federal and State funds. (6RP 558) A victim's description of the sexual assault helps her know where to look for evidence. (6RP 567) She collects swabs and samples in a specific way so as to properly preserve them, then seals and signs the packaging, then places the evidence in a locked refrigerator so investigators can retrieve it. (6RP 559-60)

Reversal is required “where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict.” *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Confrontation clause errors are subject to the stricter constitutional harmless-error analysis. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224 (2016), *cert. denied*, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016) (citing *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Before a constitutional error can be harmless, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Wilcoxon*, 185 Wn.2d at 335-36 (citing *Chapman*, 386 U.S. at 24).

Under either standard, the admission of K.E.H.’s statements to Frey were not harmless error in this case. Without K.E.H.’s description of the event and the perpetrator, the only evidence the State had was Burke’s DNA and an assertion by a highly intoxicated K.E.H. that she had been raped in Wright Park. (7RP 687, 689; 8RP 838) These two pieces of evidence would not have been sufficient to prove, beyond a reasonable doubt, that Burke forced K.E.H. to have intercourse.

The prosecutor also relied heavily on K.E.H.'s statements in his closing arguments to the jury. The prosecutor read K.E.H.'s description of the incident, word-for-word, and continually referred to its contents when arguing that the elements of the crime had been proved. (9RP 910, 912, 917)

Without her statement, all the State can show is that Burke and K.E.H. likely had intercourse. The State cannot prove that the intercourse was forcible, and therefore cannot prove the charge of second degree rape.

#### **V. CONCLUSION**

The trial court erred when it found that K.E.H.'s statements to Frey were made for the purpose of medical diagnosis or treatment because the State did not show that K.E.H.'s motive in making the statement was to promote treatment. Furthermore, the statements were testimonial because any reasonable person in K.E.H.'s position would have understood that the statements would be used to investigate and prosecute the crime. The error in admitting K.E.H.'s statements was not harmless, and Burke's conviction must be reversed.

DATED: July 24, 2017



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**CERTIFICATE OF MAILING**

I certify that on 07/24/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald D. Burke, DOC# 951546, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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