SUPREME COURT NO. 103163-7
COURT OF APPEALS NO. 84455-5-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MURUGANANANDAM ARUMUGAM,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

LEESA MANION (she/her)
King County Prosecuting Attorney

IAN ITH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. IDENTITY OF RESPONDENT 1

B. COURT OF APPEALS OPINION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT 2

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW 3

a. The Court of Appeals' Determination of Harmless Error Was Sound 4

b. The Appellate Court's Determination That the Trial Court Properly Admitted Evidence of Arumugam's Prior Arrest for Unspecified Reasons Is Clearly Distinguishable from Acosta 5

c. Arumugam's Asserted Prosecutorial Misconduct Claim Does Not Constitute Flagrant and Ill-Intentioned Misconduct 6

d. The Court of Appeals Properly Rejected Arumugam's Ineffective-Assistance Claim 7

2. THE PUBLISHED HOLDING ILLOGICALLY NARROWS THE MEDICAL-TREATMENT HEARSAY EXCEPTION AND DISREGARDS THE TRIAL COURT'S BROAD DISCRETION 8

a. Relevant Trial Facts 10

b. The Court of Appeals' Opinion..... 13

c. The Opinion Illogically Narrows the Hearsay Exception's "Promote Treatment" Provision to Require a Child to Personally Seek or "Articulate a Desire" for Treatment, in Conflict with Relevant Precedent 16

d. The Opinion Invaded the Trial Court's Evidentiary Discretion..... 26

F. CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Nix v. Whiteside, 475 U.S. 157,
106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)..... 8

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 8

Washington State:

In re Pers. Restraint of Grasso, 151 Wn.2d 1,
84 P.3d 859 (2004)..... 19

In re Pers. Restraint of Phelps, 190 Wn.2d 155,
410 P.3d 1142 (2018)..... 7

State v. Acosta, 123 Wn. App. 424,
98 P.3d 503 (2004)..... 5, 6

State v. Arumugam, No. 84455-5-I,
___ Wn. App. 2d ___, 545 P.3d 363
(March 25, 2024).....1, 2, 4-7, 14, 15, 21, 25, 28

State v. Burke, 196 Wn.2d 712,
478 P.3d 1096 (2021)..... 17, 25, 26

State v. Butler, 53 Wn. App. 214,
766 P.2d 505 (1989)..... 16

State v. Carol M.D., 89 Wn. App. 77,
948 P.2d 837 (1997), withdrawn in part
on other grounds, 97 Wn. App. 355,
983 P.2d 1165 (1999)..... 4

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 27, 29

State v. Doerflinger, 170 Wn. App. 650,
285 P.3d 217 (2012)..... 18

State v. Fisher, 130 Wn. App. 1,
108 P.3d 1262 (2005)..... 18

State v. Lopez, 95 Wn. App. 842,
980 P.2d 224 (1999)..... 18

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 7

State v. Njonge, 181 Wn. 2d 546,
334 P.3d 1068 (2014)..... 29

State v. Ohlson, 162 Wn.2d 1,
168 P.3d 1273 (2007)..... 26

State v. Parris, 98 Wn.2d 140,
654 P.2d 77 (1982)..... 16

State v. Sutherland, 3 Wn. App. 20,
472 P.2d 584 (1970)..... 27

State v. Thang, 145 Wn.2d 630,
41 P.3d 1159 (2002)..... 29

Constitutional Provisions

Federal:

U.S. CONST. amend. VI 8, 17

Rules and Regulations

Washington State:

ER 404 5

ER 803 ..... 16, 17, 18, 22

ER 804 ..... 3, 17, 18, 21

RAP 13.4 ..... 3, 8

Other Authorities

5D Wash. Prac., Handbook Wash. Evid.
ER 803 (2023-2024 ed.) 16, 18, 22

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Arumugam, No. 84455-5-I, ___ Wn. App. 2d ___, 545 P.3d 363 (March 25, 2024).

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny the petition for review. If this Court grants review, the State requests cross-review of the Court of Appeals' published decision that the trial court abused its broad evidentiary discretion in admitting statements of an 11-year-old child to a nurse practitioner about being raped under the hearsay exception for statements made for purposes of medical diagnosis or treatment.

D. STATEMENT OF THE CASE

A jury convicted Murugananandam Arumugam of three counts of first-degree child rape, domestic violence, for acts involving his own child, and three counts of first-degree child

molestation for acts involving a child who lived in his neighborhood. CP 91-92, 140-66; RP 1029-39, 1177-85. The relevant facts are set forth in the State's briefing before the Court of Appeals. See Brief of Respondent at 3-11.

The Court of Appeals affirmed the convictions in a unanimous, published-in-part opinion. State v. Arumugam, No. 84455-5-I, ___ Wn. App. 2d ___, 545 P.3d 363 (March 25, 2024). However, in the published part of the opinion, the court held the trial court erred in admitting statements made by Arumugam's child to a nurse practitioner during a sexual-assault examination under the hearsay exception for medical diagnosis or treatment.[1] 545 P.3d at 371-74.

E. ARGUMENT

This Court should deny Arumugam's petition for review. If this Court grants review, this Court should also grant review of the Court of Appeals' holding that the trial court abused its

[1] The court also held the error was harmless.

discretion in admitting the child's hearsay statements made for purposes of medical diagnosis or treatment under ER 804(a)(4). RAP 13.4(d).

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be granted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State's briefing in the Court of Appeals adequately addressed the substantive issues raised by Arumugam, and the Court of Appeals' decisions on the issues on which Arumugam now petitions were sound. Arumugam fails to establish that his claims merit this Court's review.

a. The Court of Appeals' Determination of Harmless Error Was Sound.

The Court of Appeals erred in holding that the trial court abused its discretion in admitting medical-treatment hearsay, but the court's reasoning was sound in finding that purported error harmless. As the court observed, the child's limited statements to the nurse practitioner were far less detailed than the child's trial testimony. Arumugam, 545 P.3d at 374. Compare RP 925-28 (nurse's testimony of child's statements) with RP 1177-85 (child's testimony). And no great importance was given to the "generic" statements in the nurse's report. Arumugam, 545 P.3d at 374. Arumugam's petition for review claims the opinion conflicts with State v. Carol M.D.,[2] but the opinion extensively and correctly distinguished this case from Carol M.D. Arumugam, 545 P.3d at 374. This Court should not review this claim.

[2] 89 Wn. App. 77, 948 P.2d 837 (1997), withdrawn in part on other grounds, 97 Wn. App. 355, 983 P.2d 1165 (1999).

b. The Appellate Court's Determination That the Trial Court Properly Admitted Evidence of Arumugam's Prior Arrest for Unspecified Reasons Is Clearly Distinguishable from Acosta.

The Court of Appeals' determination that the trial court properly exercised its discretion in admitting evidence of Arumugam's previous arrest for unspecified reasons as *res gestae* evidence also was sound. Arumugam, No. 84455-5-I, Slip op. at 23-26 (unpublished portion). The court properly recognized that *res gestae* evidence is controlled by considerations of relevance and is separate from evidence controlled by ER 404(b). Id. And the court correctly observed that the trial court managed this evidence with appropriate limiting instructions that jurors are presumed to follow. Id.

Although Arumugam asserts that the opinion conflicts with State v. Acosta,[3] the court correctly distinguished Acosta, in which the jury was given a "laundry list" of the defendant's

[3] 123 Wn. App. 424, 98 P.3d 503 (2004).

past arrests and convictions. Arumugam, Slip op. at 26 (unpublished portion) (citing Acosta, 123 Wn. App. at 429, 432). Review of this issue is not warranted.

c. Arumugam's Asserted Prosecutorial Misconduct Claim Does Not Constitute Flagrant and Ill-Intentioned Misconduct.

Similarly, this Court should not review the Court of Appeals' determination that Arumugam failed to show flagrant, ill-intentioned and incurable misconduct by the prosecution in supposedly violating orders *in limine*. Arumugam, Slip op. at 26-29. The court correctly found no flagrant or ill-intentioned actions by the prosecution.[4] Slip op. at 28.

That holding comports with this Court's longstanding jurisprudence finding prosecutorial misconduct to be flagrant and ill-intentioned only "in a narrow set of cases where we

[4] Though the opinion characterizes the State's appellate briefing as having "conceded" a violation of an order *in limine*, the briefing instead argued, *arguendo*, that even if a violation were shown, Arumugam could not show flagrant, ill-intentioned and incurable misconduct from the State's unobjected-to questioning. Brief of Respondent at 58.

were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." In re Pers. Restraint of Phelps, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018). There was no such behavior by the prosecution here. Review is not merited.

d. The Court of Appeals Properly Rejected Arumugam's Ineffective-Assistance Claim.

This Court should not review Arumugam's claim of ineffective assistance of counsel. The Court of Appeals carefully considered Arumugam's complaints about his trial lawyer and properly determined that Arumugam failed to overcome the strong presumption of effective assistance and the burden of showing an "absence of a strategic basis for the challenged conduct." Arumugam, Slip op. at 30 (unpublished portion) (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Courts have long held that to show ineffective assistance of counsel, "it must be established that the

assistance rendered by counsel was constitutionally deficient in that 'counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment.'" Nix v. Whiteside, 475 U.S. 157, 164-65, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Arumugam has not raised a claim even close to that standard. Review is not merited.

In sum, none of the issues Arumugam raises in his petition merit review under RAP 13.4(b). This Court should deny the petition for review.

2. THE PUBLISHED HOLDING ILLOGICALLY NARROWS THE MEDICAL-TREATMENT HEARSAY EXCEPTION AND DISREGARDS THE TRIAL COURT'S BROAD DISCRETION.

If this Court grants Arumugam's petition on any issue, the State respectfully requests that this Court also review the Court of Appeals' holding that the trial court abused its broad evidentiary discretion in admitting statements by Arumugam's

child to a nurse practitioner during a sexual-assault examination. The Court of Appeals' opinion deemed an 11-year-old child's statements to a nurse practitioner inadmissible as statements made for purposes of medical diagnosis or treatment because the child showed a "disinclination" to have the examination, did not affirmatively "articulat[e] a desire" for it, and had not personally "sought" the examination. In doing so, the Court of Appeals created an artificial condition precedent to admissibility that incorrectly narrows the evidence rule, conflicts with this Court's precedent, and is untethered to the underlying justification of hearsay exceptions, which is the reliability and non-testimonial purpose of the statements. The published holding in this case has significant implications for this evidence rule well beyond the factual situation presented here. Moreover, by imputing thoughts and emotions to the child that are not in the record, and because reasonable people could view the same evidence differently, the opinion disregarded trial-court discretion, which this Court carefully

protects. If this Court grants review, it should review this issue, reverse the Court of Appeals on only this issue, and hold that the trial court did not abuse its discretion in admitting the statements.

a. Relevant Trial Facts.

The facts of the nurse practitioner's examination of the child are fully recounted in the State's Brief of Respondent below, at pp. 7, 26-31. To highlight the most relevant points:

The 11-year-old child's mother took the child for an examination by a registered nurse practitioner, Joanne Mettler. RP 858-92. Mettler performed a sexual-assault examination, which included checking for sexually transmitted diseases and assessing the child's mental health. RP 858-92. Mettler described the examination as strictly medical and therapeutic, not for gathering evidence. RP 858-92. Mettler testified that most of her patients are "school-age," meaning "anywhere from three to four years old to maybe 10 to 12 years old." RP 906. She testified that she asks the children for permission to

examine them and would not do so if the child said they did not want to be examined. RP 884-85. "It's really totally up to them whether they want to do it or not." RP 885. Mettler characterized the child as a cooperative participant. RP 892. Mettler answered affirmatively when asked by the defense if "[i]t was, 'I've been sexually molested or raped years ago and that's why I'm here, right?'" RP 906.

In Mettler's written report, she noted that the child told her that the child's father had raped the child until about age 10 when the child began puberty. RP 908. The child also told Mettler that the child "felt [the child's] body was fine, and that [the child] did not feel that [the child] needed to do the exam."[5] RP 909. But Mettler also testified that the child spoke with Mettler and provided a "medical history of approximately what

[5] The State is avoiding pronouns and the child's initials, somewhat awkwardly, because the child at the time was questioning gender identity, and because of privacy concerns.

happened," which was helpful for the medical treatment recommendation for the patient. RP 892.

Importantly, except for the child saying that the child did not "feel that [the child] needed" the examination, there is *nothing* in the record showing the child expressed unwillingness or attempted to refuse the examination, or that the child was anything other than cooperative in providing "medical history" regarding the sexual assaults to help guide the child's medical treatment.

Importantly, Arumugam did not argue at trial that the child's statements should be excluded because the child was an unwilling or uncooperative participant in the examination. CP 38-39; RP 917-19. Instead, Arumugam argued that because so much time had elapsed since the rapes, and because the child "never stated any present physical ailment," there was no medical purpose for the examination and it was strictly for gathering evidence. CP 38-39; RP 917-19. Arumugam also argued that because the child's mother had taken the child for

the examination on the advice of Child Protective Services, the examination must have been for evidence gathering instead of medical care. RP 917-19.

In admitting the child's statements under the hearsay exception for medical treatment, the trial court considered on the record that the child told Mettler that the child did not think an examination was necessary. RP 909. But the trial court also considered that the child was taken to the examination by the child's mother, not law enforcement, and that the child's answers to Mettler's questions "help[ed] guide her examination, and her diagnosis, and her treatment recommendations." RP 919-20. The trial court noted that Mettler's report also included mention that the child and the child's mother both willingly spoke to a therapist in the clinic. RP 920.

b. The Court of Appeals' Opinion.

In holding that the trial court abused its discretion in admitting the child's statements to Mettler, the Court of Appeals concluded that the State had failed to present any

evidence of the child's subjective motive for *undergoing the examination*. Arumugam, 545 P.3d at 372. The opinion interpreted the child's single statement that the child did not feel the examination was needed as "unmistakably establish[ing] that [the child] did not want to be physically examined" and thus the child's *statements* were inadmissible. Id.

The Court of Appeals also interpreted Mettler's testimony that she never examines children without their permission as showing proof that "Mettler did not follow what she testified to be her standard practice," rather than the other, more reasonable inference — that the child agreed to participate in the examination despite, as a child, "feeling" that it was not necessary. Arumugam, 545 P.3d at 372. From there, the Court of Appeals "infer[red] from the circumstances" that Mettler examined the child over the child's objections with the consent of the mother. Id. The opinion even characterized the examination as tantamount to "medical battery." Id., n.11.

Again relying on the child's single statement to Mettler, the Court concluded that "[o]n the record before us, there is no evidence of [the 11-year-old child] *articulating a desire* to obtain medical treatment as a result of being raped by Arumugam," and that the child had not "*sought to promote treatment* by submitting to an intrusive medical examination." Arumugam, 545 P.3d at 372 (emphasis added). The opinion concluded that the child had merely "acquiesced to adult authority" and surmised that the child "had a very good reason not to want a stranger to probe [the child's] genitalia or view [the child's] naked body" because of the child's gender-identity questions. Id. at 373. The court also characterized the child's statement about feeling the exam was not necessary as a "disinclination" to undergo the examination, thus invalidating the hearsay exception. Id.

c. The Opinion Illogically Narrows the Hearsay Exception's "Promote Treatment" Provision to Require a Child to Personally Seek or "Articulate a Desire" for Treatment, in Conflict with Relevant Precedent.

Hearsay exceptions are based on the presumptive reliability of certain out-of-court statements. State v. Parris, 98 Wn.2d 140, 145, 654 P.2d 77 (1982). ER 803(a)(4) provides a hearsay exception for "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 rationale for this rule is that courts presume a medical patient has a strong motive to be truthful and accurate, providing a significant guarantee of trustworthiness. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). See also 5D Wash. Prac., Handbook Wash. Evid. ER 803 (2023-2024 ed.) ("The rule is based upon the assumption that a person

making such a statement is motivated to be truthful by the hope of an accurate diagnosis and successful treatment.").

Hearsay statements admissible under the rules of evidence implicate the Confrontation Clause of the Sixth Amendment when they are testimonial, *i.e.*, the circumstances objectively indicate that the primary purpose is to establish past events potentially relevant to later prosecution. State v. Burke, 196 Wn.2d 712, 725-26, 478 P.3d 1096 (2021). If the statement's primary purpose is nontestimonial, admissibility is the concern of the evidence rules; the statement must comply with the rules of evidence to be admissible. Id. at 740.

The test for statements made for medical diagnosis or treatments under the evidence rule, ER 804(a)(4), considers the subjective purposes of both the declarant and the medical professional. Burke, 196 Wn.2d at 740. For the statement to be "reasonably pertinent" to medical diagnosis or treatment under ER 803(a)(4), the declarant's motive *in making the statement* must be to promote treatment and the medical professional must

have relied on it for the purposes of treatment. Id. (citing State v. Doerflinger, 170 Wn. App. 650, 664, 285 P.3d 217 (2012)) (emphasis added). The phrase "reasonably pertinent" in ER 804(a)(4) "is deliberately imprecise to give trial courts a measure of discretion." 5D Wash. Prac., Handbook Wash. Evid. ER 803 (2023-2024 ed.). To be admissible, the declarant's apparent motive *in making the statement* must be *consistent with receiving treatment*, and the statements must be information on which the medical provider reasonably relies to make a diagnosis. State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999).

For example, in State v. Fisher, the fact that a declarant had been transported by ambulance and was in a hospital bed after being X-rayed and sutured was enough to "indicate that [the declarant] would understand that he was being questioned for purposes of medical treatment." 130 Wn. App. 1, 13, 108 P.3d 1262 (2005)). The surrounding facts were sufficient to conclude the statements were "made in the context where a

declarant knows that his comments relate to medical treatment." Id. In other words, it is entirely proper to infer a declarant's motives in making statements from the surrounding circumstances.

Moreover, our courts treat school-age children differently from adults, recognizing that those children do not seek out medical care themselves. "Washington courts have recognized that 'it is not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability.'" In re Pers. Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004). "If corroborating evidence supports the hearsay statement of a very young child, and it appears unlikely that the child would have fabricated the cause of the injury, then the statement can be admitted under the medical treatment exception, even without evidence that the child understood the purpose of her statements." Id. at 20.

In this case, the record showed that Arumugam's child understood and appreciated that the *statements* to Mettler were made to promote treatment, i.e., to *assist* Mettler's treatment, and there was nothing to show they were not. In the case of an 11-year-old child who has been taken to the doctor by the child's mother, the fact that the child "felt" the examination was not needed or was "disinclined" to be examined does not detract from the nontestimonial nature of the child's statements or the subjective motive in giving the statements to the nurse practitioner, which is to assist the nurse with the medical diagnosis and treatment despite the child's reservations. An 11-year-old child is naturally "disinclined" to have a medical examination, but that does not mean that the child does not understand and appreciate that they should be truthful with the medical professional and have a motive to help the medical professional to provide treatment. The presumed reliability and the nontestimonial nature of the child's statements are not affected by a child's natural disinclination to go to the doctor.

The published opinion here removes the phrase "promote treatment" from the context of the purpose and nontestimonial nature of the *statements* the patient makes while the treatment is occurring and imposes the phrase on the impetus for the treatment. It imposes an artificial limitation on ER 804(a)(4) that excludes statements of an 11-year-old child to a medical provider unless there is evidence that *the child* had a motive for undergoing an exam and in fact was the one who "*sought* to 'promote treatment' by submitting to an intrusive examination" or "articulat[ed] a desire" for such. Arumugam, 545 P.3d at 372. The opinion reads the words "promote treatment" to mean an 11-year-old child must "promote" the medical examination in the first place by *instigating* it, even being eager about it, for the child's statements to be admissible under the hearsay exception. That is illogical, unrealistic and incorrect. No 11-year-old child personally and independently seeks a sexual-assault examination, much less "articulat[es] a desire" for it. But that does not mean the *statements* the child makes to the

medical provider during the examination do not "promote treatment." The phrase "promote treatment" refers to whether the *statements themselves* are given *to assist the medical professional in proper diagnosis and care*. And the evidence rule itself uses the term "reasonably pertinent," which is "deliberately imprecise to give trial courts a measure of discretion." 5D Wash. Prac., Handbook Wash. Evid. ER 803 (2023-2024 ed.). It is apparent from the record that is what occurred here. At the very least, reasonable minds could see the evidence that way.

The Court of Appeals' opinion also threatens to narrow ER 803(a)(4) well beyond the context of children and sexual-assault examinations. The opinion can easily be read to mean that if a person — any person, of any age — does not "want" to have an uncomfortable medical examination or treatment, or is "disinclined" to have a certain procedure, or if the person does not personally "seek" the treatment or "articulate a desire" for it, then no statements made in the course of "promoting," *i.e.*,

assisting, the treatment are admissible. That ignores that people would still be presumed to be *truthful* while undergoing such uncomfortable procedures or exams that they opt to undergo nonetheless and that their statements are still not testimonial.

There are myriad circumstances in which people do not "want" a certain treatment or may be "disinclined" to undergo a certain kind of examination, or personally do not think they "need" it, but they do it anyway — with full consent — because they appreciate the importance of the examination or treatment. It is fair to say that no one "wants" or "articulates a desire" to undergo an intrusive sexual-assault examination, or to be poked and scrutinized by medical personnel after suffering a domestic-violence assault, to cite only a couple of common examples. Most people would be "disinclined" to submit to such uncomfortable and embarrassing procedures. That does not have any bearing on the reliability and nontestimonial character of the statements to the medical professionals while "promoting" (*i.e.*, assisting) the treatment itself. But the Court

of Appeals' opinion would exclude such statements based on an artificial rule that is untethered to the reliability and nontestimonial character of the statements.

Candidly, the Court of Appeals here seemed uninterested in questions of reliability and whether the statements were nontestimonial. Instead, the opinion is primarily focused on a value judgment that this child should not have undergone an intrusive examination — which the court likened to battery. The opinion seems to regard the admission of the child's hearsay statements against the child's rapist as somehow further intruding against the child. The opinion seems driven by a sense of revulsion that a mother would have her 11-year-old child undergo such an examination after being raped by an adult, and that a nurse practitioner would conduct it.

But that is not the issue in considering this hearsay exception. The issue is whether the *statements themselves* were given in such circumstances that they "promoted treatment," meaning the motive was to assist the medical professional in

the assessing or providing the treatment. The record here is plain that despite the child's understandable "disinclination" to have a sexual-assault examination, the statements to Mettler were cooperative and promoted Mettler's treatment recommendations.

Additionally, the Court of Appeals' dismissal of Burke as not "factually on point" is misplaced. Arumugam, 545 P.3d at 373. Burke considered whether an adult rape victim's statements to a sexual-assault nurse examiner (SANE) were subjectively made with a "motive to promote treatment" as opposed to providing testimonial statements. 196 Wn.2d at 741. This Court concluded from the facts and circumstances that the victim's statements about the details of her rape "were also likely motivated by a desire to promote medical treatment" and that the nurse relied on those statements, and thus the trial court did not abuse its discretion in admitting them. Id. at 741-42. Similarly here, the evidence in the record provided a reasonable trial court with enough facts and circumstances to

conclude that Arumugam's child cooperatively provided statements to Mettler that promoted Mettler's treatment of the child, and that Mettler specifically relied on them. RP 892.

If this Court grants Arumugam's petition for review on any basis, this Court also should review this issue because the published portion of the Court of Appeals' opinion imposes artificial and unreasonable conditions on the medical-treatment hearsay exception that conflicts with this Court's prior cases and threatens to affect the exception in a broad array of contexts.

d. The Opinion Invaded the Trial Court's Evidentiary Discretion.

Appellate courts review evidentiary rulings for abuse of discretion. Burke, 196 Wn.2d at 741. This Court has long been careful to protect trial-court discretion by consistently holding that "[w]e will not reverse the trial court's decision 'unless we believe that no reasonable judge would have made the same ruling.'" Burke, 196 Wn.2d at 8 (quoting State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007)). "Where reasonable

persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing State v. Sutherland, 3 Wn. App. 20, 21, 472 P.2d 584 (1970)).

Such is the case here. The admissibility of the child's statements was a matter within the trial court's broad evidentiary discretion. It did not abuse it. The evidence in the record permitted a reasonable person to conclude that while the 11-year-old child voiced a "feeling" that the examination was not necessary, the child nonetheless willingly participated, as shown by the child's plain cooperation in answering Mettler's questions and speaking to a therapist, and Mettler's testimony that she would not examine a child who said they were unwilling. That is a reasonable way for a rational person to view the evidence. There was nothing in the record establishing that the child objected to or tried to refuse the

treatment, said it was unwanted, or that the child was unwilling to cooperate. At most, the child said the exam felt unnecessary.

On the other hand, the Court of Appeals looked at the same set of facts and testimony and concluded that it "*unmistakably* establishes that [the child] did not want to be physically examined." Arumugam, 545 P.3d at 372 (emphasis added). It concluded that Mettler must have violated her practice standards, implying she forced the child to undergo the exam. Id. It concluded that, but for state law about parental permission, the child suffered "medical battery." Id. It "infer[red] from the circumstances" that the child was examined only because the mother permitted it and that the examination could have happened only by the child's "acquiescing to adult authority." Id. at 372-73. And it imputed thoughts and emotions to the child that were not in the record, specifically, that the child did not "want a stranger to probe [the child's] genitalia or view [the child's] naked body" because the child was questioning gender identity. Id. at 373. But appellate

courts do not presume the existence of facts upon which the record is silent in order to find error. State v. Njonge, 181 Wn. 2d 546, 556, 334 P.3d 1068 (2014).

The point is that reasonable people can take differing rational views regarding the trial court's admission of this evidence. As such, the trial court has not abused its discretion. Demery, 144 Wn.2d at 758. Only when *no reasonable person* would take the trial court's position on admissibility should an appellate court reverse the trial court's decision. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If this Court grants Arumugam's petition for review, it should review this issue to reiterate and uphold its longstanding protection of trial-court discretion.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice, the State seeks cross review of the issue in Section E2 above.

This document contains 4,686 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 20th day of June, 2024.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By:
IAN ITH, WSBA #45250
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

June 20, 2024 - 11:02 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,163-7
Appellate Court Case Title:	State of Washington v. Muruganandam Arumugam

The following documents have been uploaded:

- 1031637_Answer_Reply_20240620105804SC366985_1672.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 103163-7 ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- nelsond@nwattorney.net

Comments:

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov
Filing on Behalf of: Ian Ith - Email: ian.ith@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20240620105804SC366985