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NO. 37346-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NIKOLAY KALACHIK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

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A. INTRODUCTION

After alleging Mr. Kalachik raped her, Ms. Basa agreed to undergo a sexual assault exam, stating she would do “whatever it took” to assist law enforcement in the investigation. Police escorted her to the hospital, waited with her for the sexual assault nurse to arrive, and told her to “be patient” when she wanted to leave before the exam. When Ms. Basa failed to appear for trial, the court found her statements to officers and the sexual assault nurse were nontestimonial and admissible under the rules of evidence.

This Court stayed Mr. Kalachik’s appeal pending our Supreme Court’s decision in *State v. Burke*, ___ Wn.2d ___, 478 P.3d 1096 (2021). Although the *Burke* Court ultimately concluded statements to a sexual assault nurse in that case were nontestimonial and not prohibited under the Confrontation Clause, the opinion as a whole actually strengthens many of Mr. Kalachik’s arguments. Specifically, it confirms Ms. Basa’s statements to a police officer – whose role is drastically different from that of a nurse – were testimonial. It also establishes Ms. Basa’s statements to the sexual assault nurse were not admissible under ER 803(a)(4) because she was not motivated by a desire to seek medical treatment. For the reasons argued herein and in Mr. Kalachik’s opening brief, this Court should reverse Mr. Kalachik’s conviction and remand for a new trial.

B. ARGUMENT

1. ***State v. Burke* confirms Ms. Basa's statements to Officer Suvada were testimonial and therefore prohibited under the Confrontation Clause.**

The Sixth Amendment right to confrontation prohibits the prosecution from using “testimonial” out-of-court accusations as a substitute for live testimony where the defendant has had no prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2014); U.S. Const. amend. VI. A statement is generally deemed testimonial if, when considering the totality of the circumstances, a reasonable person in the declarant's shoes would understand that the statement would be memorialized and available for use by prosecuting authorities. *Michigan v. Bryant*, 562 U.S. 344, 360, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011); *Crawford*, 541 U.S. at 52. The State bears the burden of establishing the statements are nontestimonial and thus outside the scope of the Confrontation Clause. *State v. Koslowski*, 166 Wn.2d 409 n. 3, 209 P.3d 479 (2009).

State v. Burke, while directly addressing statements made to a sexual assault nurse, confirms Ms. Basa's courthouse statements to Officer Suvada were testimonial. Namely, the *Burke* Court took great care to distinguish statements to medical professionals from those made to law enforcement, emphasizing that the identity of the person the declarant is

speaking to “is significant” in determining whether the statement is testimonial. 478 P.3d at 1107 (citing *Ohio v. Clark*, 576 U.S. 237, 249, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015)). After discussing the history of sexual assault examinations, the Court concluded that the statements were nontestimonial primarily because “we view [the sexual assault nurse] as a medical provider.” *See id.* at 1108-10.

Meanwhile, “[l]aw enforcement officers are ‘principally charged with uncovering and prosecuting criminal behavior’; thus, statements made to them are much more likely to be used as a substitute for trial testimony.” *Id.* at 1107 (quoting *Clark*, 576 U.S. at 249). While recognizing the limited exception for statements made to assist police in addressing an ongoing emergency, the *Burke* Court indicated the exception requires truly emergent situations. The opinion describes statements made to a 911 operator during “a domestic disturbance *in progress*” or “by a man bleeding from a gunshot wound” as nontestimonial because the situation presented an immediate danger for either the victim or “the public at large.” *Id.* at 1107 (emphasis in original). By comparison, statements made during a 911 call were testimonial “when the declarant described past events in the presence of police officers in order to help them investigate a crime and it was clear the declarant was in no immediate danger.” *Id.*

Mr. Kalachik's case falls squarely within the latter category.¹ Ms. Basa's responses to Officer Suvada's questions were dedicated exclusively to describing a past offense, not an ongoing crime. CP 30-31. She made the statements outside a courthouse, not in the hospital, because she walked over a mile to the courthouse in order to "tell a Sheriff what happened." CP 30, 33; RP 137. Officer Suvada testified Ms. Basa was no longer in danger at the time she made the statements. RP 118. Where the alleged crime was a sexual assault involving an acquaintance, her claim that Mr. Kalachik said he had a gun (without displaying one) does not create an imminent danger for the public at large. *See Koslowski*, 166 Wn.2d at 427-28.

Ms. Basa's statements were focused on "what happened" and not any arguable ongoing emergency, rendering the statements testimonial. *See Davis v. Washington*, 547 U.S. 813, 829-30, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Ms. Basa made her initial statements to Officer Suvada after he separated her from the other responding officers and asked her to

¹ Mr. Kalachik's opening brief also applies the four-factor test Washington courts use to determine the primary purpose of police questioning: (1) the timing of the statements and whether the speaker was describing events as they occurred or past events; (2) the nature of the questions and whether they were necessary to resolve a present emergency and not to determine what happened in the past; (3) whether a reasonable listener would conclude the threat of harm is so significant as to indicate an ongoing emergency; and (4) the formality of the investigation. *State v. Reed*, 168 Wn. App. 533, 564-63, 278 P.3d 203 (2012).

“explain what happened.”² App. at 1. While the question was open-ended, where statements are no longer cries for help or information that would enable officers to immediately address an ongoing emergency, “it is immaterial that the statements were given at an alleged crime scene and were ‘initial inquiries.’” *Koslowski*, 166 Wn.2d at 421 (quoting *Davis*, 547 U.S. at 832). The question was aimed at determining “what had happened, not what was happening.” *Koslowski*, 166 Wn.2d at 420 (citing *Davis*, 547 U.S. at 830). Even if this Court deems some of her claims as necessary to address an on-going emergency, that information is confined to the description of the perpetrator, not a rendition of her allegations. Her response is testimonial and should have been excluded.

Officer Suvada then asked Ms. Basa “how she came to know Nikolay.” App. at 1. The question apparently came after officers were already in the process of locating Mr. Kalachik. App. at 1. It was an effort to gain background information to further the investigation. Her response is testimonial and should have been excluded.

Officer Suvada next asked Ms. Basa if Mr. Kalachik “had intercourse with her,” and “if she would be willing to participate in a rape exam.” App. at 1. Whether penetration actually occurred was irrelevant to

² Officer Suvada’s written statement is attached as an appendix to this brief and Appellant’s Opening Brief for ease of reference.

any arguable emergency and aimed purely at prosecution. Her response is testimonial and should have been excluded.

A Confrontation Clause violation is presumed prejudicial and requires reversal unless the State proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). For the reasons argued in Appellant’s Opening Brief, the State cannot meet this high burden. Opening Br. of App. at 26-28. This Court should reverse and remand for a new trial.

2. Ms. Basa’s statements to Ms. Stern are distinguishable from those in *State v. Burke*.

The sexual assault evaluation in Mr. Kalachik’s case – while similar to that in *Burke* – was distinguishable in important ways. Specifically, in finding the victim’s statements nontestimonial, the *Burke* Court emphasized the exam included medical questions unrelated to the sexual assault. 478 P.3d at 1111-12. Here, the exam was dedicated entirely to questions about the assault and evidence collection. *See Ex. 27*.

Burke also relied on the consent form signed in that case, stating the medical records, including the written documentation, would remain confidential and would not be released to law enforcement. 478 P.3d at

1112. Thus, regardless of the forensic testing, “the primary purpose of eliciting nearly all of the *statements* K.E.H. made during the course of the exam was to guide the medical exam; the statements were used to create the documentation, which would become part of the highly confidential medical records.” *Id.* (emphasis in original). By comparison, Ms. Basa’s consent form requested her “entire medical file (all records)” be sent to law enforcement. Ex. 27, p. 16. In fact, the entire document appears to be a template generated by the Oregon Attorney General’s Sexual Assault Task Force.³ *See* CP 43.

For these reasons, and the reasons argued in Mr. Kalachik’s opening brief, the objective primary purpose of the evaluation was forensic in nature, and the admission of Ms. Basa’s statements to Ms. Stern violated Mr. Kalachik’s right to confrontation under the Sixth Amendment. Opening Br. of App. at 20-26.

Even if this Court finds Ms. Basa’s initial statements admissible, at least two of Ms. Stern’s questions served no purpose but to establish facts “potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. First, the primary purpose of asking Ms. Basa whether she had

³ Oregon Attorney General’s Sexual Assault Task Force, 2017 State Exam Form, <http://oregonsatf.org/wp-content/uploads/2016/12/Oregon-SA-Medical-Forensic-Exam-Form-2017-1.pdf>.

engaged in consensual sex “within the last five days (120 hours)” was to help interpret the collected evidence. Ex. 27, p. 4; RP 413-14. At trial, Ms. Stern testified the questions about consensual sex were related to DNA collection and later prosecution: if the declarant had consensual sex with the alleged perpetrator, the presence of that person’s DNA may not rule out a later sexual assault. RP 432. Alternatively, the presence of DNA from a consensual partner could wrongly “end up in a court case .. for their DNA being there.” RP 433.

Second, Ms. Stern’s questioning about verbal threats and weapons would not have assisted in assessing Ms. Basa’s medical needs. Ms. Stern testified that the identity of the person who committed the assault was not important to the examination. RP 165. Moreover, there is no reason that a verbal threat would assist in providing treatment. Ms. Basa’s statement that Mr. Kalachik said he had a gun is simply another way of describing a verbal threat – not the use of a weapon (which was the question asked on the exam form). RP 416-17; Ex. 27, p. 4. The responses are testimonial and prohibited under the Confrontation Clause.

For the reasons argued in Appellant’s Opening Brief, the State cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. Opening Br. of App. at 26-28. This Court should reverse and remand for a new trial.

3. *State v. Burke* confirms that statements allowed under the Sixth Amendment may still violate the right to confrontation guaranteed under article I, section 22.

This Court must independently analyze whether Ms. Basa's statements violated Mr. Kalachik's right to confrontation guaranteed under article I, section 22. Const. art. I, § 22. *Burke* explicitly declined to consider whether the admission of the victim's statements violated the Washington Constitution because the argument was not raised by the appellant. 478 P.3d at 1106 n. 5. For the reasons argued in Mr. Kalachik's opening brief, the admission of Ms. Basa's statements to Officer Suvada and Ms. Stern violated his right to confrontation guaranteed under article I, section 22. Opening Br. of App. at 28-35. This Court should reverse and remand for a new trial.

4. *State v. Burke* confirms Ms. Basa's hearsay statements to Ms. Stern were not admissible under ER 803(a)(4).

In order for out-of-court statements to be admissible, "they must be nontestimonial *and* comply with the rules of evidence." *Burke*, 478 P.3d at 1114 (emphasis in original). Thus, after concluding the statements to the sexual assault nurse were not testimonial, the *Burke* Court considered whether the statements were made for the purpose of medical diagnosis or treatment under ER 803(a)(4). 478 P.3d at 1113-15. Such statements are exempt from the prohibition against hearsay only if "(1) the declarant's

motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment.” *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004). The entire rationale for the rule is the presumption that “a medical patient has a strong motive to be truthful and accurate.” *State v. Perez*, 137 Wn. App. 97, 106, 151 P.3d 249 (2007). “Unlike the objective primary purpose test for the confrontation clause, the test for statements made for medical diagnosis or treatments considers the subjective purposes of both the declarant and the medical professional.” *Burke*, 478 P.3d at 1113-15.

Although the statements in *Burke* were ultimately deemed admissible, Mr. Kalachik’s case is easily distinguishable. First, unlike the trial court in *Burke*, the trial court in Mr. Kalachik’s case abused its discretion when it applied the wrong legal standard. *State v. Curry*, 91 Wn.2d 475, 484, 423 P.3d 179 (2018). The court failed to consider Ms. Basa’s subjective purpose for undergoing the exam, instead looking only at Ms. Stern’s stated purpose. RP 184-85. It ignored the very thing that makes a statement trustworthy – the declarant’s understanding that effective medical treatment depends on accurate information.

Even had the court applied the correct legal standard, the facts in Mr. Kalachik’s case are radically different from those in *Burke*:

- The victim in *Burke* (K.E.H.) went directly to the emergency room after the incident happened, presumably to seek treatment. It was the hospital that contacted law enforcement. Ms. Basa went to the courthouse to “tell a Sheriff what happened.” CP 33.
- K.E.H. actually received treatment by emergency room doctors, including a CT scan. Ms. Basa was not offered treatment prior to the exam, did not seek treatment, and was not seen by any doctor at the hospital. *See* CP 33; RP 102-03.
- It is not clear who asked K.E.H. whether she would like to participate in the exam. Ms. Basa agreed to do the exam at the request of law enforcement because she wanted to do “whatever it took” to make sure Mr. Kalachik was prosecuted. App. at 1.
- Law enforcement interviewed K.E.H. while she was waiting to be seen by emergency room doctors and left the hospital before the SANE nurse spoke with K.E.H. Ms. Basa was transported to the hospital at the request of law enforcement and Officer Suvada followed her to the hospital and continued to take her statement until the SANE nurse arrived. App. at 1-2; CP 33.
- K.E.H. chose to remain at the hospital for several hours – without the encouragement of law enforcement – in order to participate in the exam. Ms. Basa repeatedly told Officer Suvada she wanted to leave the hospital because she was afraid her friends would find out she was cooperating with law enforcement. She only decided to stay after Officer Suvada encouraged her to “be patient” and that they were trying to get the nurse there as soon as possible. RP 105-08.
- K.E.H. made statements during the exam about medical issues (crutches, allergies) relevant to treatment but not the sexual assault. Every question Ms. Basa answered was related to the assault. *See* Ex. 27.
- K.E.H. signed a consent form indicating that the written documentation (among other items) would be kept confidential and would not be released to the police. Ms. Basa signed a

consent form agreeing to release her “entire medical file (all information)” to police. Ex. 27, p. 17.

In short, every factor deemed important by the *Burke* Court only confirms Ms. Basa’s statements were not admissible under ER 803(a)(4). Ms. Basa complied with an officer’s request to complete a sexual assault examination to collect evidence as part of a rape investigation. She clearly saw this as a prolonged component of her cooperation with law enforcement. Given the facts of the case, it was manifestly unreasonable for the trial court to conclude “the motive was to *promote treatment.*” *Curry*, 91 Wn.2d at 484 (emphasis added).

An evidentiary error is prejudicial where there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The prejudice resulting from the erroneous admission of Ms. Basa’s statements to Ms. Stern was severe. Without Ms. Basa’s statements to Ms. Stern, there was no evidence that a firearm was involved – a necessary element of first degree rape as charged. It is highly likely the erroneous admission materially impacted the verdict, warranting reversal and remand for a new trial.

C. CONCLUSION

This Court should reverse Mr. Kalachik's conviction as it was obtained in violation of his state and federal constitutional right to confrontation and based upon inadmissible hearsay.

DATED this 9th day of March, 2021.

Respectfully submitted,

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APPENDIX

SUBJECT
NARRATIVE

On 4-20-18, at approximately 0734 hours, I was dispatched to the area of the Clark County Court House (1200 Franklin) on a report of a rape that had just occurred. When I arrived on location, I made contact with the female victim in the west entrance lobby. The female verbally identified herself as Shana Basa. I could see Shana was wearing leggings, a black top and carrying a large handbag. I saw no apparent injuries on her, but I did observe she was missing several red glue-on fingernails. I asked her if she had any injuries. She said no.

Shana followed me out to the west parking lot to talk about what happened. I asked Shana to explain what happened. She immediately started making rapid and excitable statements about having been taken to a place past the Vancouver Port and raped by a guy she knew as Nikolay. She said "he told me to put my seat back and he climbed up on top of me and had sex with me." When he finished he grabbed some wipes and told her to clean herself up. He then began yelling at her about not getting her mess on the car seat. Then he started telling her she was a "fucking bitch, I'll come after you." and calling her a dirty whore and asking her if she had any diseases. Shana was very excited and was talking haphazardly and quickly.

I asked her if she could describe the guy. Shana described Nikolay as a white Russian male, really tall and big. He "looked like a Russian guy, he had black hair." I asked her if she had any way to get hold of him or knew where he lived.

She said she had a phone number for him. Shana pulled out a small book from her bag and read off the phone number (360) 723-3395 as being for him. I gave that number to Ofc. Bokma and asked him to check with dispatch and see if they had any record for the owner of that. See other supplemental reports for the follow-up involving the number and the positive ID for Nikolay Kalachik.

I asked her what kind of car he was driving. She said it was a dark navy-blue 4 door car. She said it was newer and it said "hybrid" on it. I then asked her to describe what he was wearing. She said he was wearing a white thermal top, but she wasn't to clear on his other clothes.

I asked Shana how she came to know Nikolay. She said she lives in a house with a guy name Steven and a girl named Crystal (Shana refused to provide further details on her address or ID of her roommates.) According to Shana, Steven kind of knew Nikolay from around the neighborhood. She wouldn't say they were friends, but Nikolay has come over and smoked cigarettes with them before. I asked her if she was friends with him or had dated him. She said no. She does hang out with other Russian guys named Victor and Alex. In the past Nikolay had showed up at Victors house, but they didn't want him there and he didn't seem like he was friends with them.

I asked Shana if Nikolay had intercourse with her. She said yes, he raped me. I asked her if she would be willing to participate in rape exam. She said yes, what ever it took. I contacted dispatch and requested AMR to my location for a transport.

While AMR was enroute, Shana asked if she could sit down for a second.

There was a bench outside the courthouse where she took a seat to rest while I spoke with Sgt, T. Martin. Once I completed my conversation with Sgt. Martin, Shana walked up to me and thrust out her hands and said "my fingernails broke off, they are probably in the car." I took photos of her hands and placed the photos into evidence.

AMR arrived on scene and began assessing Shana. While this was going on, Ofc. Bokma and Cpl. Russell contacted me with a possible ID for Nikolay. They provided me a DOL photo for Nikolay Kalachik. Seeing how Shana is familiar with Nikolay and they have had previous contacts, I showed Shana the photo of Nikolay. She immediately stated "yes that's him." A records check of all vehicles registered to Nikolay, revealed a blue 2007 Toyota Camry linked to him. I asked her if it could be a 2007 Camry he drove her in. She said yes. AMR transported Shana to Legacy Salmon Creek Hospital.

At approximately 0850 hours, I drove to Legacy and re-contacted Shana who was in the ER awaiting her exam.

I asked Shana to explain from beginning to end how the entire day had gone leading up to me contacting her at the Court House.

Shana's statement:

Shana said she was up early in the morning and in the kitchen making coffee when Nikolay showed up at the house. He started talking with her in the house, but the previous evening she had been arguing with her roommate. She said she was worried about making noise with Nikolay in the house, so Nikolay asked if she wanted to have a smoke outside. She said they went out front and smoked in his car. Shana said as the morning went on, Nikolay became really nervous about all of the neighbors coming out of their homes and going to work.

She said Nikolay asked if she wanted to go get breakfast and he suggested they go to Hooters in Jantzen beach. She said he began driving her south on I5 like they were going to Oregon, but at the last minute he exited off the highway onto Mill Plain. She said she asked him where he was going, but he began to cuss at her and tell her to "be quiet, shut up." I asked her why he would start doing that, were they arguing about something. She said no, he just started cussing at her saying "I have a gun and I'll blow your head off, I'll come after you." Shana said she was completely shocked by this and was really scared. He kept motioning to the back of the car as he was saying that stuff which made her believe he had that gun in the back.

I asked her what happened next. She said he kept driving all the way past the Port. What she thought was strange was he kept telling her to shut up and he'd come after her and blow her brains out. Shana said she was so shocked and scared she didn't know what to say, so she just sat there while he drove. Eventually they got to Vancouver Lake Park and Nikolay got mad because the gate were closed for the park. She said he drove further down the road and finally pulled over to the right, where there was some kind of gate, but not at the very end of the road.

When they parked, Nikolay pulled down his pants and told her to "suck his cock". She said she was scared and "he is so big, I knew inside me that I

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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)	
Respondent,)	
)	
v.)	NO. 37346-1-III
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NIKOLAY KALACHIK,)	
)	
Appellant.)	

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