NO. 52513-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NIKOLAY KALACHIK,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Nikolay Kalachik has never faced his accuser. In April 2018, Shana Basa arrived at the Clark County courthouse; she reported that she was threatened and raped earlier that morning and asked to speak with a deputy. Officer Kendrick Suvada took Ms. Basa's preliminary statement, photographed Ms. Basa, and asked her to participate in a sexual assault exam. Although she denied any injuries, Ms. Basa agreed to do "whatever it took" and repeated her allegations to a Sexual Assault Nurse Examiner (SANE) Cynthia Stern. Neither law enforcement nor the prosecutor had subsequent contact with Ms. Basa and she did not testify at trial. Despite the clear purpose of the encounters to gather evidence, the trial court found the statements nontestimonial and admissible, in violation of Mr. Kalachik's constitutional right to confrontation.

At trial, Mr. Kalachik was candid that the two had consensual sex while adamantly denying that he raped Ms. Basa. In response, the prosecuting attorney misstated the law, arguing that consent is irrelevant as the State was not required to prove lack of consent to establish forcible compulsion. The jury thereafter convicted Mr. Kalachik of both first and second-degree rape. This Court should reverse Mr. Kalachik's conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The admission of Ms. Basa's statements to Officer Suvada and Ms. Stern violated Mr. Kalachik's constitutional right to confrontation guaranteed under the Sixth Amendment.

2. The admission of Ms. Basa's statements to Officer Suvada and Ms. Stern violated Mr. Kalachik's right to confrontation guaranteed under article I, section 22 of the Washington Constitution.

3. The trial court committed reversible error when it admitted Ms. Basa's statements to Officer Suvada and Ms. Stern under ER 803(a)(2).

4. The trial court committed reversible error when it admitted Ms. Basa's statements to Ms. Stern under ER 803(a)(4).

5. The prosecutor committed flagrant and ill-intentioned misconduct when she misstated the law on consent, impermissibly shifting the burden of proof to Mr. Kalachik.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Sixth Amendment prohibits the prosecution from using out-of-court testimonial statements in lieu of live testimony. Statements are considered testimonial where a reasonable person in the declarant's position would anticipate their statement being used against the accused in investigating and prosecuting the alleged crime.

(a) When Ms. Basa made her courthouse statements to Officer Suvada, the alleged incident was over and there was no ongoing emergency. Did the admission of Ms. Basa's statements to Officer Suvada violate Mr. Kalachik's Sixth Amendment right to confrontation where the primary purpose of the interaction was to obtain information of a past offense that would be used to investigate and prosecute Mr. Kalachik?

(b) Ms. Basa did not report any injuries and did not seek medical assistance, but agreed to participate in a sexual assault examination solely at the request of law enforcement. Officer Suvada waited with Ms. Basa at the hospital, Ms. Basa signed a release of information requesting the medical records be sent directly to the Vancouver Police Department, and many of Ms. Stern's questions were designed to illicit facts relevant solely to the criminal investigation. Did the admission of Ms. Basa's statements to Ms. Stern violate Mr. Kalachik's Sixth Amendment right to confrontation where the primary purpose of the examination was to obtain evidence that would be used to investigate and prosecute Mr. Kalachik?

2. Article I, section 22 independently precludes the prosecution from using out-of-court statements in lieu of live testimony if the admission would have violated the right to confrontation as it was understood at statehood.

(a) Under article I, section 22, reports of criminal conduct were admissible as "res gestae" only where the statement was spontaneous rather than a narrative of a past event. Did the admission of Ms. Basa's statements to Officer Suvada violate Mr. Kalachik's right to confrontation under article I, section 22, where the incident had ended and Ms. Basa walked over a mile to the courthouse prior to reporting the crime?

(b) Statements made for the purpose of medical diagnosis were inadmissible at statehood, and are thus inadmissible under article I, section 22. Even under an expanded view of article I, section 22, however, the reliability of such statement rests on the declarant's belief that honesty is required to obtain effective medical treatment. Where Ms. Basa was not injured and her statements to Ms. Stern were motivated by a desire to assist law enforcement in their criminal investigation, did their admission violate article I, section 22 of the Washington Constitution?

3. Hearsay is inadmissible as evidence at trial except as allowed by statute or pursuant to ER 803(a). To qualify as an excited utterance admissible under ER 803(a)(2), a statement must be made without the opportunity for reflection or the ability to fabricate. Did the trial court abuse its discretion in ruling Ms. Basa's statements to Officer Suvada were excited utterances where they were made approximately one hour after the incident concluded and after she walked over a mile to report the

offense? Did the trial court abuse its discretion in ruling Ms. Basa's later statements to Ms. Stern were admissible as excited utterances despite finding she was calm while waiting for the examination, during which time she gave an extended interview to Officer Suvada?

4. ER 803(a)(4) provides that out-of-court statements made for the purposes of medical diagnosis or treatment are admissible only where (1) the declarant's motive is to promote treatment and (2) the provider relies on the information in providing the treatment. Did the trial court abuse its discretion when it admitted Ms. Basa's statements without considering her motivation in making the statement? Under the correct legal standard, were the statements admissible where Ms. Basa was unaware of any injuries, did not request any medical treatment, and was motivated by her desire to do "whatever it took" to help law enforcement in their investigation of Mr. Kalachik?

5. It is prosecutorial misconduct to misstate the law or shift the burden of proof to the defendant. Mr. Kalachik's sole defense at trial was that the sex was consensual. The jury was also instructed on the definition of consent. Did the prosecutor commit flagrant and ill-intentioned misconduct and impermissibly shift the burden of proof to Mr. Kalachik by arguing that consent was irrelevant because the State was not required to prove its absence to establish forcible compulsion?

D. STATEMENT OF THE CASE

Nikolay Kalachik and Shana Basa first met one evening in early April 2018 shortly after she moved in with one of Mr. Kalachik's friends. RP 669. That evening, after the three drank beer and drove to Oregon for cigarettes, Mr. Kalachik and Ms. Basa decided to continue the night by getting more drinks and driving to Janzen Beach. RP 669-71. The two had sex on an unoccupied boat, after which Mr. Kalachik dropped Ms. Basa off at the home of her friend, Victor, near Vancouver Lake. RP 672-73. They met the following day, again picked up some drinks and went to a park near Vancouver Lake. RP 673-74. They were intimate at the park, but did not have sexual intercourse. RP 736-37.

Approximately two weeks later, on April 20th, Mr. Kalachik went to Ms. Basa's home sometime between 5:30 and 5:45 a.m. RP 675. Mr. Kalachik's friend was sleeping, but Ms. Basa was awake, so the two went to Mr. Kalachik's car to smoke a cigarette. CP 30; RP 677. According to Mr. Kalachik, he started driving to Victor's house, but Ms. Basa did not want to go there and began to touch him. RP 680-81. He drove towards the park near Vancouver Lake but stopped the car on the side of the road after seeing the park was not yet open. RP 680-81. Ms. Basa performed oral sex and then pulled down her pants for him to get on top of her. RP 682-83. As they began to have sex, he felt she was acting strangely, pulling him

towards her while also trying to use her shirt to cover her genitalia. RP 683, 686-87. Mr. Kalachik thought he saw a rash on her genitalia, pulled out and ejaculated on her shirt. RP 692. They both cleaned themselves with wet wipes, which he told her to throw out the window. RP 690, 693.

Mr. Kalachik later described how he immediately became scared and angry that Ms. Basa may have a sexually transmitted infection (STI) that she was attempting to hide from him. RP 692. The two began to fight as he drove, and he ultimately ordered her to get out of the car around F street and Fourth Plain Boulevard. RP 695-96.

After leaving Mr. Kalachik's car, Ms. Basa walked over a mile to the Clark County courthouse. *See* RP 137. There is no indication that she stopped to ask for assistance during this time. Once she arrived at the courthouse, she contacted security guard Kerri Lind and asked to speak with a deputy. RP 391. Ms. Lind informed Ms. Basa that no deputies were on duty and instead called 911 on Ms. Basa's behalf. RP 391. Ms. Basa reported to the 911 operator that Mr. Kalachik raped her and threatened to shoot her. RP 95.

Officer Kendrick Suvada arrived shortly thereafter. RP 294. He took Ms. Basa to the parking lot and asked her to explain what happened.[1]

[1] Ms. Basa's statements to Officer Suvada are contained in his police report and are attached hereto as Appendix A.

RP 96. Officer Suvada spent approximately 15 to 20 minutes discussing the incident with Ms. Basa. RP 385. According to Officer Suvada, Ms. Basa seemed alarmed and was speaking quickly and haphazardly. RP 371-72. She did not appear injured and denied any injuries. CP 30. She repeated that she was raped by Mr. Kalachik and provided Officer Suvada with Mr. Kalachik's phone number and other descriptive information. RP 98-99. Ms. Basa later approached Officer Suvada and informed him that her press-on nails came off during the incident and could likely be found in Mr. Kalachik's car. RP 101. Officer Suvada took photos of her hands and asked Ms. Basa whether she would be willing to participate in a sexual assault exam, which she agreed to do. RP 101.

Officer Suvada and Ms. Basa waited at the hospital for an hour-and-a-half for the SANE nurse to arrive. CP 31; RP 171. During this time, Officer Suvada completed a lengthy interview regarding the incident. CP 31-33. Ms. Basa added to her previous statement, including informing Officer Suvada that Mr. Kalachik repeatedly threatened to shoot her and motioned to the back of the car. CP 31. According to Ms. Basa, the two were going to Hooters for breakfast, when Mr. Kalachik unexpectedly drove her towards Vancouver Lake and forced her to perform both oral and vaginal sex. CP 32. He then gave her wipes to clean herself and ordered her to throw the wipes out the window. CP 32-33.

SANE nurse Cynthia Stern administered Ms. Basa's sexual assault examination. CP 35. Using an extensive sexual assault exam form, Ms. Stern elicited many of the same details relating to the alleged assault, and collected evidence in the form of Ms. Basa's clothing and swabs for a sexual assault kit.[2] CP 35-49. During the examination, Ms. Stern noted an abrasion and bruise on Ms. Basa's thighs and scant bleeding near her cervix. CP 40, 44. Ms. Basa was unaware of the injuries, which could have resulted from consensual sex. *See* RP 437.

Law enforcement located Mr. Kalachik at his home later that day. RP 482. He was sleeping when he heard officers on a loud speaker, instructing him to come outside and announcing that they had a warrant for his arrest. RP 712. Although unsure exactly what the police were referencing, Mr. Kalachik panicked and ran out the backdoor. RP 712-13. He sold a phone earlier that morning and believed the problem may have involved the phone, but he also thought that the police presence may have related to the incident with Ms. Basa. RP 715. After seeing additional police officers in his back yard, he reentered his home and voluntarily presented himself to the officers at his door. RP 713-14. The State charged Mr. Kalachik with first and second-degree rape. CP 14.

[2] Ms. Basa's statements to Ms. Stern are contained in her examination report and attached hereto as Appendix B.

1. Pretrial hearings

Unable to locate Ms. Basa to act as a witness at trial, the State moved in limine to admit Ms. Basa's courthouse statements to Officer Suvada. CP 17. The State argued that her statements were admissible as excited utterances under ER 803(a)(2) and did not implicate the Sixth Amendment as the primary purpose of the interaction was to gain facts necessary to resolve an ongoing emergency and not to collect information for future prosecution. CP 23-24; RP 129. The State similarly moved to admit Ms. Basa's statements to Ms. Stern, arguing the primary purpose of the examination was to diagnose and treat Ms. Basa, and that the statements were made for the purpose of medical treatment pursuant to ER 803(a)(4). CP 25-27; RP 179.

The Court granted the State's motion as to both statements. RP 147-48, 154, 184-87. However, the court excluded statements made by Ms. Basa to Officer Suvada while waiting for the examination at the hospital, noting that although an emergency was theoretically ongoing because Mr. Kalachik had not yet been located, the primary purpose of the interview was to obtain further details about the incident. RP 150.

2. Trial proceedings

Officer Suvada and Ms. Stern testified as to their roles in the investigation and the substance of Ms. Basa's statements. RP 367-79, 409-

29. The State additionally presented testimony by other arresting and investigating officers and by a forensic scientist from the Washington State Patrol who tested the wet wipes and Ms. Basa's sexual assault kit and confirmed that Mr. Kalachik's DNA was present in both samples. RP 574-75, 579-80. Finally, the State presented evidence of a BB gun that was located in Mr. Kalachik's trunk, along with various fishing and camping gear. RP 521-22. Ms. Basa did not testify at trial.

Mr. Kalachik testified on his own behalf. During his testimony, Mr. Kalachik openly acknowledged having consensual intercourse with Ms. Basa on the morning in question. RP 683-88. He was also candid that he became angry with Ms. Basa over what he perceived to be strange or deceptive behavior and that the two fought, but emphasized that the conflict occurred only after they had sex. RP 692-701. He unequivocally denied ever threatening Ms. Basa with a gun or otherwise. RP 697-98.

At defense counsel's request, the court instructed the jury on the definition of consent. RP 788. The prosecutor dedicated much of her closing argument to attacking Mr. Kalachik's defense, initially arguing that the facts did not support that the sex was consensual. RP 827-28. Having made the factual argument, she then egregiously misstated the law, informing the jury that Ms. Basa's consent was irrelevant because the State was not required to prove lack of consent in order to meet its burden.

RP 828. To support her claim, the prosecutor pointed to the jury instructions, arguing that the word "consent" was not used in the to-convict instruction and the instruction defining consent was therefore inapplicable to the question of whether the State met its burden. RP 828. The jury found Mr. Kalachik guilty on both counts.[3] CP 122-23. Mr. Kalachik timely appeals his conviction and sentence.

E. ARGUMENT

1. The admission of Ms. Basa's testimonial statements to Officer Suvada and Ms. Stern violated Mr. Kalachik's Sixth Amendment right to confrontation.

a. The Sixth Amendment demands that criminal prosecutions rest on accusations from witnesses who testify in person before the jury.

The Sixth Amendment right to confrontation prohibits the prosecution from using out-of-court accusations as a substitute for live testimony. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2014); U.S. Const. amend. VI. The right to confrontation is a "bedrock procedural guarantee" rooted in the common law. *Crawford*, 541 U.S. at 43; Matthew Hale, *The History of the Common Law of England* 164 (Charles M. Gray ed. 1713) (confrontation right requires "personal appearance and Testimony of Witnesses."). Because "cross-

[3] The trial court later granted the State's motion to vacate the conviction for the second-degree rape as it was based on the same criminal conduct. CP 129; RP 905-06.

examination is the most powerful instrument known to the law in eliciting the truth or in discovering error in statements made in chief," using an absent witness's out-of-court allegation for its truth works "an injustice to the defendant." *State v. Eddon*, 8 Wn. 292, 301-02, 36 P. 139 (1894).

Confrontation is a procedural rather than substantive guarantee; while evidence must be reliable, the Confrontation Clause guarantees the method by which reliability must be determined. *Crawford*, 541 U.S. at 61. A statement's admissibility under the rules of evidence does not in itself satisfy the requirements of the Confrontation Clause. *Id.* Indeed, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id*.

The Sixth Amendment specifically bars the State from introducing "testimonial" statements by a non-testifying witness where the defendant has had no prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. Although admissibility is considered on a case-by-case basis, 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 a 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. A declarant's subjective or actual purpose in making the statements is

irrelevant except in so far as it tends to corroborate the objective analysis. *See State v. Burke*, 6 Wn. App. 2d 950, 970, 431 P.2d 1109 (2018). Instead, the focus of the inquiry is "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 562 U.S. at 360.

The State bears the burden of establishing the statements were nontestimonial and thus outside the scope of the Confrontation Clause. *State v. Koslowski*, 166 Wn.2d 409 n. 3, 209 P.3d 479 (2009). A violation of the Confrontation Clause is reviewed de novo. *Id.* at 417.

b. Ms. Basa's courthouse statements to Officer Suvada were an after-the-fact report of criminal activity.

Ms. Basa's statements to Officer Suvada were made as part of a criminal investigation into a serious but non-emergent incident. Statements made in response to police questioning are testimonial under even a narrow standard. *Crawford*, 541 U.S. at 52. Namely, police officers, like the common-law English magistrates, serve an inherently investigatory and prosecutorial function. *See id*. at 53.

One limited exception exists for statements made under circumstances objectively indicating that the primary purpose of the interrogation is to resolve an ongoing emergency. *Davis v. Washington*,

547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Whether an ongoing emergency exists is a highly fact-dependent inquiry. *Bryant*, 562 U.S. at 363. Factors a court should consider in determining the primary purpose of police questioning include (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).

The State plainly failed to meet its burden in this case. As to the first factor, Ms. Basa's responses to Officer Suvada's questions were dedicated exclusively to describing a past offense, not an ongoing crime. CP 30-31. "[A] description of past events is less likely to demonstrate a present need for assistance." *Reed* at 563; *see also Hammon v. State*, 829 N.Ed.2d 444 (Ind. 2005), *rev'd sub. nom Davis*, 547 U.S. at 827-28. Although the exact timing is unclear, it appears Ms. Basa's statements were made up to an hour after the incident concluded, during which time Ms. Basa walked over a mile to the courthouse in order to "tell a Sheriff what happened." CP 30, 33; RP 137.

Ms. Basa's statements in this case are thus a far cry those made during an ongoing offense or its immediate aftermath. *Davis*, 547 U.S. at 828 (statements to 911 operator describing ongoing domestic violence assault nontestimonial); *State v. Robinson*, 189 Wn. App. 877, 891-92, 359 P.3d 874 (2015) (statements to 911 operator describing ongoing robbery nontestimonial); *State v. Perez*, 184 Wn. App. 321, 337 P.3d 352 (2014) (statements made to correctional officers nontestimonial where declarant still had bloody sheet around his neck, was gasping for air, and statement was made within minutes of the assault). Instead, Ms. Basa's statements are more akin to those made in *Hammon v. State*[4] or *State v. Koslowski*[5]; although proximate in time to a violent offense, the incident had decisively concluded.

The second factor also weighs heavily in favor of finding the statements testimonial. Although some of Officer Suvada's initial questions to Ms. Basa were designed to locate Mr. Kalachik, the majority of the interrogation was aimed at determining "what had happened, not what was happening." *Koslowski*, 166 Wn.2d at 420. It was clear upon the

[4] 547 U.S. at 827-28 (no ongoing emergency when officers responded to report of domestic violence but incident ended before officers arrived)

[5] 166 Wn.2d 409, 422, 209 P.3d 479 (2009) (statements made short time after robbery testimonial where assailants fled before police arrived).

officer's arrival that there was no ongoing crime and that Ms. Basa was uninjured. CP 30. After asking her to explain what happened and getting information to locate Mr. Kalachik, Officer Suvada's questioning veered back towards gathering the details of the incident, asking how she came to know Mr. Kalachik and whether the two had intercourse. CP 30. The interview then culminated in the collection of physical evidence when Officer Suvada asked Ms. Basa whether she would be willing to undergo a sexual assault examination and "took photos of her hands and placed the photos into evidence." CP 31.

Third, a reasonable listener would not conclude that that Ms. Basa was herself facing an ongoing emergency. She did not require emergency medical aid and none was given. CP 30-31. A declarant's medical needs "provides important context for first responders to judge the existence and magnitude of a continuing threat[.]" *Bryant,* 131 U.S. at 365. Although Ms. Basa appeared upset and her statements were somewhat chaotic, "the fact that the victim or other complainant is distressed is not dispositive of whether an emergency exists because in some cases … the victim may be upset long after the emergency situation has been resolved." *Koslowski,* 166 Wn.2d at 424. Thus, reliance on the victim's presentation risks undermining the distinction between past crimes and ongoing emergencies. *Id.*

Nor did Ms. Basa make any statements that she was in immediate fear for her safety. *See* CP 30-33. She was in a public place in broad daylight and was surrounded by police. *See Davis*, 547 U.S. at 831 (relying on, *inter alia*, whether police were present to protect victim as indicative of ongoing emergency). Officer Suvada's belief that Ms. Basa was safe further suggests no objective danger existed. RP 118. It was later confirmed that Ms. Basa did not seek to call 911 to report the incident as an emergency at all. *See* RP 390. She walked to the courthouse asking to speak to a deputy; courthouse security contacted emergency dispatch only because no deputies were on duty at that time. RP 390-91.

There was also no indication that Mr. Kalachik would return to harm Ms. Basa in the imminent future. *See State v. Ohlson*, 12 Wn.2d 1, 168 P.3d 1273 (2007) (emergency ongoing where there was reason to believe defendant would return to the scene to try and harm declarant); *State v. Pugh*, 167 Wn.2d 825, 225 P.3d 892 (2009) (ongoing threat where victim was alone and assailant directly outside the apartment). Mr. Kalachik did not follow Ms. Basa after she exited his car and did not convey a concrete intent to contact her again. *See* CP 30-33.

Similarly, there was no indication that Mr. Kalachik posed a threat to officers or any other particular person. That an individual may be armed and is in the community is insufficient in itself to establish an ongoing

emergency absent some evidence of danger to another person. *Koslowski*, 166 Wn.2d at 427-28 (citing *State ex rel. J.A.*, 949 A.2d 790 (N.J. 2008) and *State v. Lewis*, 648 S.E.2d 824 (N.C. 2007)). Mr. Kalachik and Ms. Basa knew each other, and there was no reason to believe he would choose to harm someone at random. *See Bryant*, 562 U.S. at 363 (domestic violence cases have narrower zone of potential victims than cases involving general threat to public safety). While Officer Suvada's subjective intent is not considered, it is telling that he did not ask Ms. Basa during their first encounter whether Mr. Kalachik was in fact armed or whether Ms. Basa ever saw a weapon. *See* CP 30-31.

However, should this Court find Mr. Kalachik's presence in the community constituted an ongoing emergency, the nature of the necessary information was limited to the need to locate Mr. Kalachik. Conversations that begin with nontestimonial statements may evolve to include testimonial statements once the information needed to address the emergency is obtained. *Koslowski*, 166 Wn.2d at 419; *Davis*, 547 U.S. at 828 (statements to 911 operator became testimonial once assailant left the home). Where the 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). Thus, anything outside of Ms. Basa's statements providing Officer Suvada with the information to resolve the immediate concern – Mr. Kalachik's phone number, physical description, and what kind of car he was driving – remains testimonial.

Finally, although the questioning did not occur in a police station, it contained some elements of a formal interview. Officer Suvada took Ms. Basa aside and asked her to describe the incident. He began to obtain background information and took photographs to place into evidence.

Viewed objectively, the totality of the circumstances reveal that the primary purpose of the questioning was to establish the facts of a past crime and not to resolve an ongoing emergency. Ms. Basa's statements to Officer Suvada are testimonial and prohibited under the Confrontation Clause.

c. The primary purpose of Ms. Basa's sexual assault examination was to collect evidence as part of the ongoing criminal investigation.

Ms. Basa's statements to Ms. Stern were likewise testimonial and should have been excluded under the Confrontation Clause. As with statements to law enforcement officers, courts look to the primary purpose of a declarant's statement to medical personnel to determine whether the statements are testimonial. *Ohio v. Clark*, __ U.S. __, 135 S. Ct. 2173, 2183, 192 L. Ed. 2d 306 (2015). Statements made during medical

examinations implicate the Sixth Amendment where they are made "under circumstances that objectively demonstrate 'that the primary purpose of the [questioning] is to establish or prove past events potentially relevant to later criminal prosecution.'" *Burke*, 6 Wn. App. 2d at 968-69 (quoting *Davis*, 547 U.S. at 822). Ms. Basa's statements to Ms. Stern unquestionably fall within that category.

Importantly, Ms. Basa did not present with a need for medical treatment, either at the courthouse or by the time she began the examination.[6] Instead, her participation in the exam was at the behest of law enforcement; Officer Suvada did not simply offer medical treatment as an option, but rather asked Ms. Basa whether she would be willing to complete a sexual assault examination, to which Ms. Basa responded she would do "whatever it took." CP 30. Officer Suvada waited with Ms. Basa in the emergency room for approximately an hour-and-a-half before the examination began. CP 31; RP 171. That Officer Suvada wasn't physically present for the examination does not change that fact that, at its core, the examination was a deliberate collection of statements and physical evidence relating to the allegations.

[6] Although Ms. Stern ultimately identified some bruising on Ms. Basa's thighs, Ms. Basa "was unaware of those injuries." RP 437. The bruising was discovered only after Ms. Basa made her statements. *See* CP 40. The other arguable injury – scant bleeding near Ms. Basa's cervix – was discovered during the forensic evidence collection, also after Ms. Basa made her statements. *See* CP 44.

Although not employed directly by the Vancouver Police Department (VPD), Ms. Stern works for a private organization called Rapid SAVE Investigations (RSI), whose examinations include both treatment and forensic evidence collection components. RP 162-63. RSI nurses work in both Oregon and Washington; they are not associated with a particular hospital, but are sent to hospitals when a sexual assault examination is requested. RP 163. The exam report form used by RSI is significant to the analysis. The front page has a space to insert a law enforcement case number and Ms. Stern personally included the VPD case number. CP 35. Indeed, looking at the footer on page 9, the examination report appears to be a template generated by the Oregon Attorney General's Sexual Assault Task Force. *See* CP 43; 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.

Consistent with the exam form, Ms. Stern's questions went far beyond assessing a need for treatment and providing medical advice, and were instead aimed at collecting information for the ongoing police investigation. Specifically, Ms. Stern asked Ms. Basa whether she had changed clothes or brushed her teeth since the assault. CP 35. Ms. Stern later testified that she asks the questions because "you have a better

chance of finding someone else's DNA if they haven't showered, if they haven't changed their clothes." RP 412. Ms. Stern also asked about the location of the alleged assault, Mr. Kalachik's identity and physical description, whether he had any injuries, and whether any verbal threats were made. CP 35, 37-38. In the pretrial hearing, however, Ms. Stern was candid that the identity of the assailant was not pertinent to her examination. RP 165. In drafting her report, Ms. Stern includes the basics of a victim's statement but does not write all of the details "because investigators follow up." CP 75-76.

The collection of physical evidence during the exam was also extensive. In addition to collecting the swabs for the sexual assault kit, Ms. Stern collected Ms. Basa's pants and tank top and packaged the clothing as evidence. CP 47. According to Ms. Stern, collecting clothing is important because "that may also have DNA evidence on it. … so I highly encouraged her to let us have the leggings." RP 406, 435. Indeed, two full pages of the exam report are dedicated to "evidence collection," and a third section requires both the signature of Ms. Stern and the law enforcement officer who receives the evidence." CP 47-49. The exam report also states that legal specimens must "follow a chain of custody and are given to law enforcement, **not** sent to the medical lab." CP 39 (emphasis in original).

Finally, before beginning the examination, Ms. Stern presented Ms. Basa with two, separate forms relevant to the investigation: a consent form to collect evidence of sexual assault and a release of information specifically requesting that her records be sent to the VPD. Ex. 27, pp. 16-17. *See* RP 175, 411. Ms. Basa signed both forms. Ex. 27, pp. 16-17. Again, while Ms. Basa's subjective intent is not relevant to the primary purpose test, the documents corroborate that the direct result of the examination would be to provide officers with evidence relevant to Mr. Kalachik's later prosecution.

In finding Ms. Basa's statements nontestimonial, the trial court relied on *State v. Scanlan*, 2 Wn. App. 2d 715, 728-29, 413 P.3d 82 (2018), *review granted*, 191 Wn.2d 1026 (2018), as standing for the broad proposition that all medical statements made to personnel in a hospital are nontestimonial. RP 186. The facts in this case, however, are significantly different than those in *Scanlan*. Although the hospital setting was the same, it was the victim's significant injuries in *Scanlan* that led to his encounters with treatment providers and their need to gather information: "When [he] arrived at the hospital, he was 'bruised from head to toe, bleeding from several skin tears,' and had 'a couple of deformit[ies] in his hands.' Faced with this situation, any medical provider would ask the patient what happened in order to treat the patient properly." *Id.* at 730.

Given the victim's advanced age, it was also critical that doctors understand the origins of the injury for discharge planning. Namely, if the injuries were the result of a fall, doctors would need to determine whether he was safe to return home. *Id.* at 729-30.

The facts in this case are instead directly analogous to – if not more compelling than – those in *State v. Burke*, in which this Court applied the primary purpose test to find that the victim's statements to a SANE nurse were testimonial. 6 Wn. App. 2d at 970. As in this case, the victim in *Burke* was not in need of any other hospital services while waiting for the examination to take place. *Id.* As in this case, law enforcement was already involved in the investigation. *Id.* As in this case, the nurse testified that the purpose of the exam was both to diagnose and provide treatment and to collect forensic evidence. *Id.* at 956. As in this case, the victim signed a consent form authorizing a forensic examination. *Id.* at 969. As in this case, the actual examination report was rife with information about the incident unrelated to treatment purposes, including the location and a description of the assailant. *Id.* at 959. And, as in this case, the examination form described a chain of custody and noted the evidence was released to law enforcement. *Id*.

It is true that Ms. Stern testified her primary purpose in conducting examinations is to provide treatment and counseling. RP 163-64. And that

may very well be her intent. It is the objective circumstances in this case, however, that is the proper focus of the inquiry. *Burke*, 6 Wn. App. 2d at 968. While every medical exam will and should contain a diagnoses and treatment component, the objective primary purpose may still be to assist law enforcement by establishing facts that could potentially be relevant to a later criminal prosecution. Here, Ms. Basa's lack of injuries, the active role of law enforcement, and the examination report all reveal that Ms. Basa's statements to Ms. Stern were testimonial and prohibited under the Confrontation Clause.

d. The State cannot establish that the admission of Ms. Basa's testimonial statements was harmless beyond a reasonable doubt.

A Confrontation Clause violation is presumed prejudicial and requires reversal unless the prosecution 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)). The error is harmless only where "the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt[.]" *Koslowski*, 166 Wn.2d at 431. Principles of due process further require reversal when unreliable hearsay evidence renders the proceedings

fundamentally unfair. *Bryant*, 562 U.S. at 370 n.13; U.S. Const. amend. XIV; Const. art. I, § 3.

Without Ms. Basa's statements to either Officer Suvada or Ms. Stern, the State presented no evidence of rape. Mr. Kalachik's statements and the remaining forensic evidence were consistent with his defense of consensual sex. As such, the exclusion of both sets of testimonial statements is fatal to the State's case.

Even, however, should this Court find that either Ms. Basa's statements to Ms. Stern or her statements to Officer Suvada are admissible, the State cannot establish that the admission of each statement, individually, did not contribute to the jury's finding of guilt.

First, the State cannot demonstrate that the jury would have found forcible compulsion based solely upon Ms. Basa's statements to Officer Suvada. In her courthouse interview, Ms. Basa stated that Mr. Kalachik raped her and that they had intercourse, but the description of the event was limited to "he told me to put my seat back and he climbed on top of me and had sex with me." CP 30. Ms. Basa did not make any statements to Officer Suvada regarding threats of harm or a weapon, or other statements describing physical force. Tellingly, the State conceded in closing arguments that the evidence did not support forcible compulsion by physical force. CP 811.

Second, although Ms. Basa's statements to Ms. Stern were more detailed, the State cannot establish beyond a reasonable doubt that the jury would have convicted Mr. Kalachik on these statements alone. This is not a case where the evidence is clear that a crime occurred and the question is the identity of the assailant. *See State v. Hurtado*, 173 Wn. App. 592, 607-09, 294 P.3d 838 (2013). Nor is it a case where the statements were irrelevant to the defense theory. *See State v. Watt*, 160 Wn.2d 626, 640, 160 P.3d 640 (2007). This is a case where the truth of Ms. Basa's statements to Officer Suvada and Ms. Stern was the *only* issue. Without Ms. Basa's statements to Officer Suvada, her statements to Ms. Stern stand in isolation. Where all of the forensic evidence was consistent with Ms. Kalachik's defense, the statements in themselves do not constitute overwhelming evidence of Mr. Kalachik's guilt. This Court should reverse and remand for a new trial.

2. The admission of Ms. Basa's statements violated Mr. Kalachik's right to confrontation under article I, section 22 of the Washington State Constitution.

Article I, section 22 has long guaranteed a right to confrontation independent of that protected by the Sixth Amendment. Const. art. I, § 22; *Pugh*, 167 Wn.2d at 835. Article I, section 22 protects the right to confrontation as understood at the time of statehood. *See id*. Like the Sixth Amendment, article I, section 22 may preclude statements otherwise

admissible under an exception to hearsay rule. *See id.* at 845. It remains the State's burden to establish that the statements are admissible given "the unique characteristics of the state constitutional provision and its prior interpretations." *State v. O'Cain*, 169 Wn. App. 228, 251, 279 P.3d 926 (2012) (internal quotation omitted).

a. Ms. Basa's statements to Officer Suvada would have been inadmissible at statehood.

Ms. Basa's statements implicate article I, section 22; regardless of modern evidentiary rules, the statements would not have qualified as res gestae at statehood and their admission violated Mr. Kalachik's right to confrontation.

In *State v. Pugh*, our Supreme Court took the opportunity to address this exact issue in examining whether a 911 call describing an ongoing crime and its immediate aftermath violated the defendant's right to confrontation under article I, section 22. 167 Wn.2d at 834-43. Noting that the excited utterance hearsay exception did not exist until modern times, the court nevertheless concluded that the conversation would have been admissible when the state constitution was adopted under the "well established" res gestae hearsay rule. *Id*. at 838, 843.

The *Pugh* Court nevertheless expressed reservations that statements admissible under ER 803(a)(2) would consistently qualify as

res gestae as the modern excited utterance exception appears to "have expanded beyond its historical antecedent." *Id*. at 845. Instead, the court adopted the standards in *Beck v. Dye*, 200 Wn. 1, 92 P.2d 1113 (1939), as setting forth "the essential requirements of the res gestae rule." *Pugh*, 167 P.3d at 838-39. Specifically,

> The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Id. (quoting *Beck*, 200 Wn. at 9–10).

In this case, Ms. Basa's statements to Officer Suvada fail three of the "essential requirements" laid out in *Beck*.[7] As discussed above, the

[7] Although historically there was special exception for sexual assault cases where the complaint was made immediately after the event, the admission was limited to the fact that the individual made a complaint and not to the content of the complaint. 2 Kenneth S. Broun, *McCormick on Evidence* § 272.1 (7th ed. 2016); *State v. Hunter*, 18 Wn. 670, 672, 52 P. 247 (1898).

entirety of Ms. Basa's statements are dedicated to describing a "completed affair," with up to an hour separating the incident and Ms. Basa's statements. *See Beck,* 200 Wn. at 9. Moreover, Ms. Basa's statements were not spontaneous as she had ample time to reflect during her mile-long walk to the courthouse. Her request to speak to a police officer further suggests that she had at least an opportunity to contemplate her statement before her report. While she appeared upset during the conversation, the manifestation of her stress or excitement does not automatically satisfy the more stringent requirement under *Beck* that the statement be "a spontaneous or instinctive utterance of thought." *See State v. Dixon*, 37 Wn. App. 867, 871, 684 P.2d 725 (1984) (noting that the *Beck* rule sets a higher standard for admissibility than ER 803(a)(2)).

Finally, like the 911 calls implicating the Sixth Amendment, the call in *Pugh* differed significantly from the report in this case: the statements to the 911 operator were not merely a narrative, instead describing an offense as it was ongoing and in the minutes of its aftermath. *Id*. at 843. Thus, they "were made at a time and under circumstances that exclude any presumption, based upon the passage of time, that they were the result of deliberation." *Id*. Ms. Basa's statements cannot enjoy the same presumption and are prohibited by article I, section 22.

b. Ms. Basa's statements to Ms. Stern would have been inadmissible at statehood.

Before Washington adopted ER 803(a)(4)[8] in 1979, statements to a physician relating medical symptoms or treatment issues were "inadmissible as substantive evidence." Karl Tegland, *Washington Practice: Evidence Law and Practice* § 803.1, at 5 n.3 (5th ed. 2007). Historically, courts admitted "much narrower" evidence from a medical professional. *Id*. A medical witness could offer a patient's out of court statements only as background for a medical opinion and not for its truth. *Id*. at § 803.19, at 66; *see also State v. Florczak*, 76 Wn. App. 55, 68-69, 882 P.2d 199 (1994) (before ER 803(a)(4), "statements made for the purpose of diagnosis and treatment were not admissible as substantive evidence but only for the limited purpose of supporting the testifying physician's medical conclusions").

It is true that, in *State v. O'Cain*, Division One concluded that the admissibility of a statement to a medical provider at the time the State constitution was adopted was not a prerequisite to satisfying article I, section 22. 169 Wn. App. at 258. While acknowledging that a statement's admissibility at statehood may be dispositive, the *O'Cain* Court was

[8] ER 803(a)(4) exempts out of court statements from the hearsay rule, regardless of the declarant's availability, if "made for purposes of medical diagnosis or treatment . . . ."

unconvinced that a statement's inadmissibility at that time was equally conclusive.[9]

Rather, the *O'Cain* Court concluded that the correct standard for admissibility under *Pugh* is whether the statement "amounts to a 'material departure from the reasoning underlying the constitutional mandate guaranteeing the accused the right to confront the witnesses against him.'" *O'Cain*, 169 Wn. App. at 258 (quoting *Pugh*, 167 Wn.2d at 837). The court reasoned that such standard was consistent with the substance of the constitutional protection to ensure the statements are inherently reliable as "[i]n such cases, it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted." *O'Cain*, 169 Wn. App. at 260. The court was satisfied that statements to medical professionals that are made for the purpose of treatment meet this guarantee as the declarant's desire for effective treatment supplies the necessary element of trustworthiness. *Id.* at 260.

This Court should decline to adopt the broad principle in *O'Cain* that, where evidence is independently reliable, it satisfies article I, section 22. Under this reasoning, there would be essentially complete overlap

[9] The court also expressed doubts that statements to medical providers were, in fact, inadmissible at the time the Washington Constitution was adopted. *Id*. at 259.

between hearsay exceptions under modern evidentiary rules and statements admissible under article I, section 22.

However, even should this Court adopt the bright-line rule that statements made to medical professionals for the purposes of treatment are not precluded by article I, section 22, the reliability of the statement hinges entirely on the principle that the statements are, in fact, made in situations in which a declarant ***is seeking treatment***. Such an interpretation would be consistent with rationale underlying the statement's admissibility and with the "sharp line" courts have historically drawn between statements made to physicians consulted for treatment and those made to physicians consulted solely with the anticipation that the physician would testify at trial. Kenneth S. Broun, *McCormick on Evidence* § 278 (7th ed. 2016). In the latter cases, declarants not only lack the self-interested motivation for effective treatment, but may actually have motivation to falsify or exaggerate symptoms if they believe it will be useful to subsequent litigation. *Id*.

Under this rubric of reliability, whether Ms. Basa's subjective intent in making the statements was to obtain treatment becomes critical. Ms. Basa had no apparent injuries and reported to officers that she was not injured. She did not request medical treatment and none was offered. Instead, law enforcement asked her whether she would be willing to

participate in an exam. Ms. Basa clearly understood that the exam would ideally yield evidence helpful to police. That Ms. Basa waited with law enforcement for Ms. Stern to arrive and signed two consent forms agreeing to the collection of forensic evidence and requesting that the records of the exam be released to the VPD further reflects her understanding that the examination was yet another step in the reporting and investigatory process.

Ultimately, because Ms. Basa did not believe she needed treatment and did not express a desire to obtain treatment, her statements lacked the reliability that comprises the substantive protection promised by article I, section 22.

c. The State cannot meet its burden to establish the violation was harmless beyond a reasonable doubt.

For the reasons argued in Section E(1)(d) above, the State cannot establish that the admission of Ms. Basa's statements to Officer Suvada and Ms. Stern were harmless beyond a reasonable doubt. Accordingly, this Court should reverse and remand for a new trial.

3. The trial court committed reversible error in admitting Ms. Basa's hearsay statements under ER 803(a).

The trial court abused its discretion in admitting Ms. Basa's statements to Officer Suvada and Ms. Stern us excited utterances under ER 803(a)(2). Evidentiary rulings are reviewed for an abuse of discretion.

State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable given the facts of the case or where it applies the wrong legal standard. *State v. Curry*, 91 Wn.2d 475, 484, 423 P.3d 179 (2018).

a. Ms. Basa's statements to Officer Suvada did not satisfy the hearsay exception for excited utterances under ER 803(a)(2).

While Ms. Basa clearly appeared upset during the conversation, her statements do not meet the standards of an "excited utterance" under ER 803(a)(2) and are inadmissible hearsay. A statement will qualify as an excited utterance only if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event. *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008).

Spontaneity is the key to admissibility. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). In considering whether a declarant is still under the stress of the event, courts should consider the amount of time that has passed between the event and the statement, the declarant's emotional state, and any other factors that indicate the witness may have had had an opportunity to reflect on the event and fabricate a story about it. *State v. Briscoeray*, 95 Wn. App. 167, 173-74, 974, 912 (1999). Although timing is not dispositive, the statement will ideally be made

contemporaneously with or soon after the startling event. *Chapin*, 118 Wn.2d at 688. "The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought." *Id.*

In this case, Ms. Basa and Mr. Kalachik left the home around 5:45 a.m. and she arrived at the courthouse around 7:30 a.m. Assuming the event ended when Mr. Kalachik dropped Ms. Basa off at F Street and Fourth Plain Boulevard, Ms. Basa then walked over a mile to the courthouse to make her statement. She did not stop and ask for assistance, or borrow someone's phone to call 911, and there is no indication that she ran to the courthouse. This walk gave her ample time to reflect upon the event and what statements she planned to make to law enforcement.

Acknowledging that there was a temporal gap, the trial court appeared to rest its conclusion on Ms. Basa's presentation during her conversation with Officer Suvada. Namely, because she was calm and logical in her subsequent hospital interview, the court had a baseline to assess her emotional state at the courthouse. RP 147.

It is uncontested that Officer Suvada and Officer Bomka perceived Ms. Basa as being upset, with haphazard speech that was not following a particular logical order. However, Ms. Basa was not crying or shaking, was not visibly afraid, and was not injured, all of which makes this case different than those admitting ***delayed*** reports of sexual assaults as excited

utterances. *See State v. Flett*, 40 Wn. App. 277, 279, 287, 699 P.2d 774 (1985) (statements admissible despite seven-hour delay where the victim was "shaking and crying," asked for medication, and had just had contact with the assailant's wife at her place of employment); *State v. Thomas*, 46 Wn. App. 280, 284-85, 730 P.2d 117 (1986) (statements made six-to-seven hours after rape admissible where victim crying and spent several of the hours sleeping at the assailant's home); *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 818 (1991) (statements admissible despite seven-hour delay where victim was hiding under a tarp the entire time and believed assailant was looking for her); *State v. Williams*, 137 Wn. App. 736, 749, 154 P.3d 222 (2007) (statements admissible despite short break where victim was crying, hysterical, had duct tape marks on her arms, and walked in ditches because she was afraid she would see assailant); *State v. Strauss*, 199 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (statements admissible despite three-and-a-half hour delay where victim had bruising and puncture marks consistent with statement that assailant used knife and broken bottle).

Moreover, the surrounding circumstances tend to suggest Ms. Basa's statements were not spontaneous. When she arrived at the courthouse, she asked to speak with a deputy, not 911. While speaking haphazardly, her answers were responsive to Officer Suvada's questions and appropriate in content. She was uninjured and her makeup was not

smeared. *See* CP 30; RP 113. Under these circumstances, the facts do not support the court's conclusion that the statements were admissible as excited utterances. Even if Ms. Basa's initial response to Officer Suvada's request that she explain what happened constituted an excited utterance, her subsequent responses are inadmissible hearsay. The questions were leading and her answers were concrete, detailed, and organized.

An evidentiary error is prejudicial where there is a reasonable probability that the error materially affected the outcome of the trial. *Thomas*, 150 Wn.2d at 871. Here, the trial was Ms. Basa's word – as told through others – against Mr. Kalachik's. Ms. Basa's statement to Officer Suvada was a critical piece of the puzzle and served to corroborate her statements to Ms. Stern.

b. Ms. Basa's statements to Ms. Stern were not made under the stress of excitement as required by ER 803(a)(2).

Nor do Ms. Basa's statements to Ms. Stern qualify as excited utterances pursuant to ER 803(a)(2). In finding the statements admissible, the trial court concluded that Ms. Basa's confusion when describing the event reflected a post-traumatic inability to process her emotions. RP 185. The court's ruling did not identify the examination as a subsequent or separate "startling event" from the incident itself. RP 185. Rather, the

court found that Ms. Basa reentered the "shock of the incident" when speaking with Ms. Stern. RP 185.

The trial court's conclusion is simply not supported by the facts. Again, the timing of the statement weighs against finding it an excited utterance, with the exam report noting the statements occurred up to four-and-a-half hours after the incident. CP 35.

Importantly, Ms. Basa's statements were strictly responsive to a series of questions asked by Ms. Stern. "An excited utterance may be made in response to questioning, but this tends to counter the element of spontaneity." *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002). Indeed, the exam report indicates that Ms. Basa "answered all questions." CP 40. In her answers, Ms. Basa's provided detailed information in a linear fashion, tending to show that she had a calm state of mind capable of reflection. *Ramires*, 109 Wn. App. at 758. The complete account, beginning when she got into the car at 5:45 a.m., included not only the entire incident, but a litany of answers to questions about what did and did not happen and specific statements made by Mr. Kalachik. In reality, Ms. Basa's statement to Ms. Stern is essentially indistinguishable from a statement crime victims routinely give to police. *See Dixon*, 37 Wn. App. at 873 (trial court abused its discretion in

admitting four-page statement given to police over the course of two hours despite fact that victim was upset throughout interview).

Overall, Ms. Basa's cognitive state was not inconsistent with reflective thought. Although Ms. Stern described Ms. Basa as confused in a "kind of post-traumatic event way," which may impact an individual's ability to process emotions or linear thought patterns, Ms. Stern also stated that Ms. Basa "was not expressing any confusion over the events."[10] RP 172. Ms. Basa cried at times, but truly seemed exhausted and just wanted to get through the exam. RP 169.

Perhaps most critical is the intervening event of Ms. Basa's lengthy interview with Officer Suvada while waiting for the examination. The crux of the court's ruling appears to be that Ms. Basa made excited utterances at the courthouse, calmed down over the next two hours, and then made later exited utterances when recounting the incident for the third time. RP 147-48. However, "[e]vidence that the declarant has calmed down before making a statement tends to negate a finding of spontaneity." *Ramires*, 109 Wn. App. at 758; *see also Warner v. Regent Assisted Living*, 132 Wn. App. 126, 140-41, 130 P.3d 865 (2006). As argued by the

[10] Ms. Stern described the confusion to the defense investigator as "she was not confused about what had happened. She was very clear about the events of what had happened. She more was expressing you know potentially some post traumatic behavior just feeling really like upset and confused that it had happened[.]" CP 82.

prosecutor, admissibility under ER 803(a)(2) hinges not on how much time has passed, but whether "there has been a break." CP 130-31.

What what makes this case unusual is not simply the fact there was a break, but what Ms. Basa did during this break. The entire rationale underlying ER 803(a)(2) is that the statement is made under circumstances that "operate to temporarily overcome the ability to reflect and consciously fabricate." *Dixon*, 27 Wn. App. at 872. Ms. Basa's interview with Officer Suvada did not simply give her a theoretical ability to reflect, the interview ***was a reflection***. The intervening circumstance was Ms. Basa calmly recounting the event, which built on her prior statement. Finally, the fact that Ms. Basa spent a significant amount of time recounting the event just prior to the examination undermines the trial court's conclusion that recounting it for a third time, albeit to a different audience, suddenly forced Ms. Basa to reenter the shock of the incident.

While Ms. Basa was upset, the significant time gap and intervening circumstances precluded her statements from qualifying as excited utterances under ER 803(a)(2). The trial court erred in ruling otherwise.

4. <u>The trial court committed reversible error when it applied the wrong legal standard to find Ms. Basa's statements to Ms. Stern were admissible under ER 803(a)(4).</u>

For a statement to be admissible under ER 803(a)(4), "(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 first prong is critical to the underlying concern of reliability. As discussed above the likelihood of reliability is predicated on the declarant's belief that accurate information is necessary to obtain the treatment she seeks. 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).

Here, the trial court applied the wrong legal standard when it found the statements admissible without considering Ms. Basa's motivation whatsoever. *See* RP 184-85. Instead, the court focused only on the second prong and appeared to conflate the analysis with the primary purpose test under the Confrontation Clause:

> The nurse here testified that the primary purpose is to provide prophylactic medication options at the time of the interview that would address potential STDs, emergency contraceptives, or, I guess, the brand is Plan B, that's the well-known option, and to assess other injuries. There were – again, not important to the analysis – there were, in fact, some injuries here, some cervical bleeding as well as the fingernail removed, an abrasion and bruising on either of her thighs, the front of her thighs.
>
> …

> And so the primary purpose being of her statements, the questions asked, you know, "What happened?" and the information she gives describing the incident do relate to treatment. She's telling what happened. That – those statements better enable the nurse to assess whether she might benefit from some of these treatment options. And so not only does the nurse state that that's the reason and – but the questions asked and the information gathered relate to treatment. And so I think 803(a)(4)is satisfied.

RP 184-85. The court's complete omission of the most critical legal consideration was clear error.

When applying the correct legal standard, it is clear that her statements do not bear the requisite reliability. Ms. Basa did not seek medical diagnosis or treatment and was unaware of any injuries; instead, she complied with an officer's request to complete a sexual assault examination to collect evidence as part of a rape investigation.

The prejudice resulting from the erroneous admission of Ms. Basa's statements to Ms. Stern was severe. Without her statements, the evidence was insufficient to establish forcible compulsion by either threat or physical force. It is highly likely their admission materially impacted the verdict, warranting reversal and remand for a new trial.

5. <u>The prosecutor committed flagrant and ill-intentioned misconduct when she informed the jury that the State was not required to prove lack of consent.</u>

The prosecutor committed misconduct when she explicitly informed the jury that (1) the State was not required to prove lack of

consent as an element of first-degree rape[11] and (2) the consent instruction was legally irrelevant to whether the State met its burden. Prosecutors represent the people "in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct impacted the jury. *Id.* at 676. Even where defense counsel fails to object, reversal is warranted where the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" which could not be cured by a jury instruction. *Id.*

a. The prosecutor's argument was contrary to published caselaw and shifted the burden of proof to Mr. Kalachik.

A prosecutor commits misconduct by misstating or misrepresenting the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) ("A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury."). Where a misstatement of law is contrary to published precedent, it is deemed flagrant and ill-intentioned. *See State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

[11] RCW 9A.44.040 provides that "(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon…"

Misstatements involving the State's burden to prove a defendant's guilt beyond a reasonable doubt or that shift the burden of proof to the defendant are also considered flagrant misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

Here, while initially arguing that the evidence did not support Mr. Kalachik's defense that the sex was consensual, the prosecutor then repeatedly misstated the law, arguing that the issue of consent was legally irrelevant because the State was not required to prove a lack of consent:

> And I want to talk a little bit about the fact that you have a consent instruction because you have an instruction here that talks about consent, but I want you to notice something about that. **The word consent is not written anywhere else in your jury instructions**.
> …
>
> But you really don't even need to get there because consent or proving **lack of consent is not an element to rape in the first degree**, and it is not an element to rape in the second degree. **You won't see on those to convict sheets that I have to prove she did not consent**. … So with that [consent] instruction, I mean, again she did not freely give consent, but other than that, **there's nowhere to apply that instruction in the elements because we do not have to prove that she didn't consent**.

RP 828 (emphasis added).

This argument is a misstatement of law that should have been known to the prosecutor. In *State v. W.R., Jr.*, our Supreme Court held that

consent negates the element of forcible compulsion and, where raised by the defense, the State bears the burden of proving lack of consent beyond a reasonable doubt. 181 Wn.2d 757, 336 P.3d 1134 (2014).

Here, the error in the prosecution's argument is two-fold: First, the prosecutor unequivocally misstated the law, explicitly negating the legal significance of the jury instructions to support her misstatement. By isolating the consent instruction from the to-convict instruction, the prosecutor informed the jury that the concept of consent had no legal bearing to the concept of forcible compulsion.

Second, in disavowing its burden of proof, the prosecutor shifted the burden to Mr. Kalachik. Due process demands that the prosecution prove every element of an offense. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The issue of consent was in front of the jury; the necessary companion to the State's argument that it did not need to prove a lack of consent was that Mr. Kalachik needed to prove its existence. While the argument did not include the specific language in former WPIC 18.25 rejected in *W.R., Jr.*, the significance remains the same. The fact of consent or lack thereof would necessarily serve as the basis of Mr. Kalachik's acquittal or a conviction; the core question was which party bore the burden of proof.

b. The misconduct was prejudicial

There is a substantial likelihood that the misconduct affected the verdict. In divorcing the legal concepts of consent and forcible compulsion and shifting the burden to Mr. Kalachik, the prosecutor's argument encouraged the jury to act upon a misunderstanding of the law of consent. *See W.R., Jr.*, 181 Wn.2d at 766; *see also State v. Ortiz-Triana*, 193 Wn. App. 769, 781-82, 373 P.3d 335 (2016).

Additionally, the prosecutor's argument rendered the instructions as a whole utterly confusing. Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Smith*, 174 Wn. App. 359, 369, 298 P.3d 785 (2013). Clarity is critical as jurors are not presumed to be legal experts and rely entirely on the plain language in the instructions to apply the law. "If the jury instructions read as a whole are [] ambiguous, the reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation." *State v. McLoyd*, 87 Wn. App. 66, 71, 87 P.2d 1255 (1997) (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

The interplay between consent and forcible compulsion is not simple. Indeed, our Supreme Court's analysis of the relationship between the two has shifted over the years. In *State v. Camara*, the court described

the two as being "conceptual opposites," while in *State v. Gregory* the court clarified that there was simply "conceptual overlap," which did not preclude placing the burden on defendant to prove consent as consent was an affirmative defense. *State v. Camara*, 113 Wn.2d 631, 637, 781 P.2d 483 (1989); *State v. Gregory*, 158 Wn.2d 759, 803, 147 P.3d 1201 (2006). In 2014, the court reversed course in *W.R., Jr.*, finding that its prior analysis misdescribed the relationship between forcible compulsion and nonconsent and that consent necessarily negates the element of forcible compulsion, requiring the State to prove its absence. 181 Wn.2d at 768. In short, the legal connection between the two concepts has required repeated analyses by even our highest court. With the prosecution's encouragement, the jury was likely stymied.

Any curative instruction would have only further confused the jury. The error could not have been remedied by the trial court simply informing the jury to disregard the prosecutor's comments or instructing the jury that the State has to prove each element beyond a reasonable doubt. It would have demand that the court attempt to explain a legal relationship between an element of the offense (forcible compulsion), a concept that negates the element (consent), and the State's burden of proof as it relates to each.

The entire case came down to the issue of consent. Ms. Basa was not present at trial, and none of the State's witnesses had any firsthand knowledge of the alleged incident. Mr. Kalachik's defense that Ms. Basa consented was consistent with the forensic evidence. Under these circumstances, there is a substantial likelihood that the prosecutor's argument that consent was legally irrelevant and that the State had no burden to prove lack of consent impacted the verdict. This Court should reverse Mr. Kalachik's conviction and remand for a new trial.

F. CONCLUSION

This Court should reverse Mr. Kalachik's conviction as it was obtained in violation of his state and federal constitutional right to confrontation, based upon inadmissible hearsay, and the result of flagrant and ill-intentioned misconduct by the prosecuting attorney.

DATED this 23rd day of May, 2019.

Respectfully submitted,

s/Devon Knowles
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APPENDIX A

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 enrout, 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 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

APPENDIX B

BASA, SHANA L
[redacted] Female
[redacted]
ADT LABEL
ADMIT DT: 4/20/2018

II. REPORT OF INCIDENT

This form is to be completed by ONE examiner.

- Report is not an exhaustive account of every detail of the sexual assault. It is a brief description for the purposes of diagnosis and treatment.
- Please recount the patient's own words in quotes when possible.
- Do not include personal opinion or conjecture.
- Include only information that directly relates to this sexual assault, such as a brief description of physical surroundings, threats, weapons, trauma, sexual acts demanded and performed, penetration or attempted penetration, ejaculation, patient's emotional states before, during, and after.
- Ensure that the patient understands your questions and vocabulary.
- Record patient's own terminology. Do NOT sanitize language.

"I got in his car at 6:45am This morning and he drove from Hazeldell to Port of Vancouver."
"He drove and threatened me The whole time That he would shoot me or kill me and saying 'shut the fuck up.'"
"We went past the lake."
"He had me do oral sex on him."
"Then he pulled down my pants. He was in the driver's seat and I moved away to the passenger floor."
"He said 'Lay back on the seat' and got on top me." "I tried to cover and protect myself" erased
"I just ~~covered~~ tried to cover myself" "I don't know if he came."
"I cover myself and he'd say 'Let me see your fucking pussy.' I couldn't do ~~see~~ anything"
"Said he'd throw me out on I-5."
"He's big, like 6'2". I couldn't do anything"

Cynthia Stern RN
(printed name of medical provider/nurse examiner)

[signature] RN
(signature of medical provider/nurse examiner)

4/20/18
Date

Revised 2018

Examiner initials LK

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 52513-5-II
v.	)	
	)	
NIKOLAY KALACHIK,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MAY, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[CntyPA.GeneralDelivery@clark.wa.gov]	(X)	E-SERVICE VIA PORTAL
PO BOX 5000		
VANCOUVER, WA 98666-5000		
[X] NIKOLAY KALACHIK	(X)	U.S. MAIL
372632	( )	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	( )	_____
PO BOX 769		
CONNELL, WA 99326		

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MAY, 2019.

X_____

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

May 23, 2019 - 4:30 PM

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Superior Court Case Number:	18-1-01138-8

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