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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The admission of Shana Basa's statements to Officer Suvada and Sexual Assault Nurse Examiner (SANE nurse), Cynthia Stern, deprived Nikolay Kalachik of his right to confrontation guaranteed under both the federal and state constitutions. In April 2018, Ms. Basa arrived at the Clark County courthouse to make a report that she was raped by Mr. Kalachik earlier that morning. Ms. Basa, uninjured, agreed to participate in a "rape exam" solely at the request of police. Despite the clear purpose of both encounters to provide evidence, when Ms. Basa failed to appear to testify, the court found the statements nontestimonial and admissible.

At trial, Mr. Kalachik was candid that the two had consensual sex but adamantly denied raping Ms. Basa. In response, the prosecutor misstated the law, arguing the State was not required to prove lack of consent to establish forcible compulsion. The jury thereafter convicted Mr. Kalachik of first-degree rape. Both the violation of Mr. Kalachik's constitutional rights and prosecutorial misconduct require reversal.

B. 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.

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 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. 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).

a. 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. 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). Ms. Basa's statements, however, do not meet this standard.

The Respondent points to facts outside the record and hypotheticals to argue the timing of the statements shows a continuing emergency. Specifically, that Ms. Basa's statements were made that "when she did not yet feel safe" and her demeanor indicated a "potentially ongoing threat." Br. of Resp't at 10. And, Mr. Kalachik "could" have found her or followed her after the incident. Br. of Resp't at 10.

In fact, Ms. Basa did not tell officers at the courthouse that she did not feel safe. *See* CP 30-31. Officer Suvada's report describes Ms. Basa's as making "excitable" statements, but does not note physical or verbal cues of fear, or concerns that Mr. Kalachik may be attempting to find or follow Ms. Basa. *See* CP 30-31. Although the time between the alleged assault and her statements was not exceedingly long, the assault was complete; she was not seeking safety at the courthouse, but went there in order to "tell a Sheriff what happened." CP 33.

This case is simply not analogous to a 911 call with statements describing events as they were occurring, but rather a clear description of events as they occurred earlier that day. *Comp. Koslowski*, 166 Wn.2d at 422 (statements made shortly after offense testimonial where record did not suggest perpetrator would return to the scene and victim was safely in

the presence of officers) *with Davis*, 547 U.S. at 831-32 (statements in 911 call nontestimonial where caller was in immediate danger, unprotected by police, and present-tense statements showed immediacy).

The Respondent also erroneously asserts that, as "initial inquiries," the nature of the questions rendered the statements nontestimonial. Br. of Resp't at 10-11. Although initial inquires can lead to nontestimonial statements, the fact that the statements were made during the initial encounter with police does not render them immune from the Confrontation Clause. Where the statements are neither a cry for aid nor provide officers the information necessary to immediately end a threatening situation, "it is immaterial that the statements were given at the alleged crime scene and were 'initial inquiries.'" *Koslowski*, 166 Wn.2d at 421. Conversations that begin with nontestimonial statements may also evolve to include testimonial statements once the information needed to address the emergency is obtained. *Id.* at 419; *Davis*, 547 U.S. at 828 (statements to 911 operator became testimonial once assailant left the home).

Thus, even if this Court deems a portion of Ms. Basa's interview with officers as necessary to end an ongoing threat to safety, these questions were, at most, limited to assessing Ms. Basa's injuries and locating Mr. Kalachik. After eliciting the basic information from Ms.

Basa, including a phone number and description of Mr. Kalachik, Officer Suvada provided that information to Officer Bokma in order to try and locate Mr. Kalachik. CP 30. At this point, the primary purpose of the interview shifted: Having dispatched other officers to neutralize any threat posed by Mr. Kalachik, Officer Suvada began his investigation, asking Ms. Basa how she came to know Mr. Kalachik. CP 30. Officer Suvada's specific question of whether the incident actually involved sexual intercourse was clearly asked with an eye towards later prosecution as it is necessary to prove rape versus other types of sexual assaults. *See* CP 30. And, it was immediately followed by a request that she complete a "rape exam," designed to gather evidence. CP 30.

The Respondent acknowledges that, in considering the threat of harm posed by the situation, a reviewing court should determine whether "a reasonable listener would conclude that the declarant was facing an ***ongoing*** emergency[.]" Br. of Resp't at 11 (emphasis added). Yet, Mr. Kalachik posed no immediate threat to Ms. Basa. He made no attempt to follow her during her walk to the courthouse. CP 33. Ms. Basa was uninjured, the incident was over, and she was in the presence of several officers, while additional officers worked to locate Mr. Kalachik. Ms. Basa did not mention a weapon in her initial statements, and Officer Suvada did not ask whether Mr. Kalachik was armed. *See* CP 30-31. In

fact, Officer Suvada testified that he believed that Ms. Basa was safe during the interview. RP 118.

Instead, the Respondent urges this Court to find the statements nontestimonial based upon conjecture about what could happen in the future, arguing that Mr. Kalachik may attempt to contact Ms. Basa at some later point in time. Br. of Resp't at 11. This Court has already rejected the proposition that an ongoing emergency exists whenever an alleged assailant has not been apprehended. *See Koslowski*, 166 Wn.2d at 428. Adopting the Respondent's argument would effectively render any statements between an offense and arrest admissible, gutting the right to confrontation.

Finally, while the interview was not inside a police station, it nevertheless contained some elements of a formal interrogation. The questioning did not occur at the scene of the crime, but while Ms. Basa was safe, outside of a government building. It lasted 15-20 minutes, during which time Officer Suvada collected background information about the alleged incident and took photographs to place into evidence. RP 385; CP 30-31. The Respondent's argument that Officer Suvada interviewed Ms. Basa a second time at the hospital in no way changes the analysis of whether statements made during the initial interview were testimonial; follow up questions cannot inoculate otherwise testimonial statements. Br.

of Resp't at 11. As with the interview in *Davis*, the interrogation here was "formal enough." 547 U.S. at 830.

The primary purpose of the post-assault questioning was not to resolve an ongoing emergency, but to establish events that occurred over an hour prior to the interview. *See* RP 114. Admission of the testimonial statements violated Mr. Kalachik's rights under the Confrontation Clause.

b. 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. 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. *State v. Scanlan*, 193 Wn.2d 753, 766, 445 P.3d 960 (2019); *Ohio v. Clark*, __ U.S. __, 135 S. Ct. 2173, 2183, 192 L. Ed. 2d 306 (2015). Courts should evaluate the circumstances in which the encounter occurs, as well as the parties' statements and actions. *Scanlan*, 193 Wn.2d at 767 (citing *Bryant*, 562 U.S. at 359). Although statements made to medical professionals are less likely to be testimonial, such statements nevertheless 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.'" *State v. Burke*, 6 Wn. App. 2d 950, 968-69, 431 P.3d 1109 (2018) (quoting *Davis*, 547 U.S. at 822).

The Respondent attempts to shield Ms. Basa's statements to Ms. Stern from the Confrontation Clause based almost entirely on Ms. Stern's status as a medical professional. Br. of Resp't at 14. Conveniently absent from the Respondent's argument is any mention of the unique status of a SANE nurse. A SANE nurse does not simply treat patients, but is perhaps the only type of medical professional who is also responsible for investigating crimes and collecting evidence for law enforcement. By their very nature, sexual assault examinations will always have the dual purpose of evidence collection and treatment. It is therefore critical that courts carefully assess the circumstances to determine ***which of the two purposes*** constituted the primary purpose in a particular case.

Importantly, neither *Scanlan* nor the Supreme Court cases cited by the Respondent involve this type of specialized forensic examination. As opposed to a preschool teacher or a doctor, the relationship between an individual participating in a sexual assault examination and a SANE nurse is dangerously close to the relationship between a citizen and law enforcement. Ms. Stern's role in this case simply proves the point. Ms. Stern works for a private organization called Rapid SAVE Investigation (RSI), whose nurses are called to hospitals for the specific purpose of

administering sexual assault examinations. RP 162-63. Ms. Stern confirmed that her role is more limited than a typical doctor inasmuch as her questions and treatment remain within the scope of a sexual assault exam. RP 165.

Indeed, Ms. Stern openly investigated the offense during the examination. Beyond collecting swabs and administering a physical examination, Ms. Stern asked questions about Mr. Kalachik's identity/physical description, information which she later admitted was not important to the medical examination. RP 165. She collected Ms. Basa's leggings and tank top, which may have had a stain relating to the offense, again actions utterly unrelated to treating Ms. Basa. CP 47; RP 174. The exam report and questionnaire used by Ms. Stern appears to be a template generated by the Oregon Attorney General's Sexual Assault Task Force. *See* CP 43. Ms. Stern wrote in the law enforcement case number in the exam report and personally delivered the evidence to police. CP 35, 49.

The Respondent's argument that this case is factually analogous to *Scanlan* is strained at best. Br. of Resp't at 16-17. The reality is that the circumstances in which the encounter occurred could not be more different. The victim in *Scanlan* went to the hospital because his children discovered him in his house, unresponsive, next to a broken, bloodstained broomstick, golf club, and hammer. 193 Wn.2d at 757. Believing he may

be dead, they immediately called 911. *Id.* He was treated by emergency room doctors, who found that his entire body was severely bruised, with several skin tears, and two broken fingers. *Id*.

In stark comparison, Ms. Basa went to the hospital at the request of Officer Suvada for the specific purpose of participating in a "rape exam." CP 30. She did so after telling Officer Suvada that she was uninjured, and his report noted that she had "no apparent injuries." CP 30. She agreed to the exam not to get treatment, but because she was willing to do "whatever it took" to cooperate with the investigation and prosecution of Mr. Kalachik. CP 30. There is simply no evidence to support the Respondent's contention that Ms. Basa participated in the examination "for primarily medical reasons." Br. of Resp't at 17.

The Respondent attempts to analogize the cases by arguing that both Ms. Basa and the victim in *Scanlan* went to the hospital by ambulance. Br. of Resp't at 17. This similarity is superficial at best. Whereas the victim in *Scanlan* was transported in an ambulance because he required emergent medical care, Ms. Basa went by ambulance presumably out of police department policy. She sat with Officer Suvada and waited for AMR to arrive, and, according to Officer Suvada, AMR is "our ambulance service." RP 378.

The role of law enforcement played throughout the encounters is also day and night. In *Scanlan*, police officers did not arrive at the hospital until after the victim received medical treatment. 193 Wn.2d at 757. Here, Officer Suvada requested Ms. Basa go to the hospital and actively assisted Ms. Basa's in obtaining an examination by calling AMR, following her in his car, and waiting with Ms. Basa ***in an exam room*** for an hour-and-a-half until Ms. Stern arrived. RP 103. He continued to interview her about the incident while the two waited for Ms. Stern, even as Ms. Basa expressed a desire to leave as she was concerned that her roommates would find out she was cooperating with law enforcement. RP 105.

The fact that Officer Suvada did not actually remain for the physical exam is not controlling; he did not need to be in the room because a more appropriate professional was handling the investigation during that period: Officer Suvada's role in the investigation was to ask questions while Ms. Stern's role was to collect the physical evidence. Indeed, Ms. Stern testified that it is the policy of most hospitals that officers are not allowed to be present in the room during the examination. RP 167. Even if Officer Suvada did not personally stand there and tell Ms. Stern what questions to ask, the questions on the exam report appear to be drafted by an out-of-state law enforcement agency.

Finally, although under *Scanlan*, the medical release forms may not be dispositive in assessing the primary purpose of the exam, the circumstances under which the forms were presented and signed are nevertheless important. Whereas the victim in *Scanlan* signed a release of information after receiving treatment, Ms. Basa signed a release of information ***before*** the examination occurred specifically requesting her records be sent to the VPD. RP 411. She also signed a second form, consenting to the collection of evidence of a sexual assault, evidence that, if useful, would clearly be used in future prosecution. Ex. 27, pp. 16-17. *See* RP 411. The forms do not reflect circumstances in which officers seek to review post-treatment records to assess a victim's injuries; the forms reflect that the purpose of the exam was to ***create*** records for the police and prosecution to use against Mr. Kalachik.

This Court should reject the Respondent's attempts to distinguish Mr. Kalachik's case from *Burke*, which actually involved a SANE nurse. If anything, the circumstances in this case are even more compelling than those in *Burke*. The victim in *Burke* went to the hospital of her own accord in order to receive medical treatment. Here, Ms. Basa went to the hospital for the sole purpose of participating in the exam, and Ms. Stern could not recall whether she accepted treatment. Both women expressed a subjective desire to participate in the exam to assist with prosecution. Both women

were medically cleared and waited a long period of time for a SANE nurse to arrive at the hospital. It is utterly unimportant that the victim in *Burke* waited four-and-a-half hours for the examination where Ms. Basa waited an hour-and-a-half. In both cases, the statements were testimonial.

Whether the exam ultimately revealed injuries does not – as the Respondent appears to argue – change the primary purpose of the exam. Br. of Resp't at 19. Ms. Basa's injuries – a small abrasion on one thigh, a bruise on the other, and scant bleeding near her cervix – were nearly identical to those in *Burke*, and consistent with both consensual sex and sexual assault. RP 169-70. The results of the exam were otherwise within normal limits. RP 169. Moreover, Ms. Basa's injuries were not discovered until ***after*** she made her statements to Ms. Stern.

The Respondent finally attempts to hang its hat on Ms. Stern's testimony that her subjective primary purpose was to provide treatment. Br. of Resp't at 19. However, it is the circumstances, actions, and statements at the time of the evaluation that are determinative. *Scanlan*, 193 Wn.2d at 767. Ms. Stern's later testimony about her personal priorities, no matter how credible, does not satisfy the Sixth Amendment.

This is not to say that statements or physical evidence obtained as part of a sexual assault examination will always be testimonial. Surely, many victims of sexual assault will go to the hospital for the purpose of

seeking treatment or counseling. Many will actually require and receive treatment, with or without the involvement of law enforcement. Agreeing to evidence collection or signing medical releases will not necessarily render the statements testimonial. Ultimately, which of the two purposes of a sexual assault exam is primary is necessarily a highly-fact dependent analysis. Here, although a purpose of the examination was for diagnosis and treatment, the ***primary*** purpose was not.

c. 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). 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.

The Respondent does not attempt to argue that admission of both Ms. Basa's statements to Officer Suvada and to Ms. Stern were harmless error. *See* Br. of Resp't at 19-20. Rightly so: without Ms. Basa's statements to either Officer Suvada or Ms. Stern, there were no allegations

that she was raped by Mr. Kalachik. The exclusion of both sets of testimonial statements is clearly fatal to the State's case.

Instead, the Respondent attempts to characterize Ms. Basa's statements to Officer Suvada and Ms. Stern as identical, rendering the admission of either one harmless error. Br. of Resp't at 21. This argument fails. The State's entire theory on forcible compulsion was that it was achieved via Mr. Kalachik's alleged threats to shoot Ms. Basa and not by physical force. The prosecutor argued in her opening statement that fear was Mr. Kalchik's weapon and explicitly conceded in closing that the evidence did not support forcible compulsion by physical force. RP 359, 811. Yet, only Ms. Basa's statements to Ms. Stern included references to a firearm and verbal threats; Officer Suvada did not ask whether Mr. Kalachik was armed and Ms. Basa did not mention the presence of a weapon. *See* CP 30. Instead, Ms. Basa described the event as "he climbed on top of me and had sex with me." CP 30.

Nor can the State establish beyond a reasonable doubt that the jury would have convicted Mr. Kalachik based solely on Ms. Basa's statements to Ms. Stern. The statements would be uncorroborated, and all physical evidence was consistent with Mr. Kalachik's defense. As such, they do not constitute overwhelming evidence of Mr. Kalachik's guilt. This Court must 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 of the Washington Constitution independently guarantees an accused the right to confront adverse witnesses. Const. art. I, § 22; *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009). Article I, section 22 is not governed by modern evidentiary rules, but rather protects the right as understood at the time of statehood. *See id* at 845.

a. Ms. Basa's statements to Officer Suvada are precluded under Article I, section 22.

The Respondent does not address Mr. Kalachik's argument that Ms. Basa's statements to Officer Suvada were inadmissible at statehood as res gestae – which encompassed what are now considered excited utterances under ER 803(a)(2) – or address the factors in *Beck v. Dye*, 200 Wn. 1, 92 P.2d 1113 (1939). *See* Br. of Resp't at 24. For the reasons argued in Appellant's Opening Brief, the statements do not meet the *Beck* factors and their admission violated Mr. Kalachik's right to confrontation.

b. Ms. Basa's statements to Ms. Stern did not satisfy the guarantee of reliability under Article I, section 22.

To satisfy Article I, section 22, the statements must be inherently reliable.[1] *State v. O'Cain*, 169 Wn. App. 228, 260, 279 P.3d 926 (2012).

[1] As argued in Mr. Kalachik's opening brief, Ms. Basa's statements to Ms. Stern would have been inadmissible as substantive evidence prior to the adoption of ER 803(a)(4) in 1979, and should therefore be excluded under Article I, section 22. Br. of

The Respondent attempts to present Ms. Basa's statements as having the necessary indicia of reliability because medical treatment and evidence collection "was in her best interest." Br. of Resp't at 24. What is in Ms. Basa's "best interest," however, is irrelevant; the reliability of statements made to medical providers required under Article I, section 22 is created only by the declarant's desire to get quality treatment. *O'Cain*¸ 169 Wn. App. at 260 (statements to medical providers admissible based upon "the declarant's desire for proper diagnoses and treatment[.]"). Thus, unlike the Sixth Amendment's primary purpose test, an Article I, section 22 analysis hinges on Ms. Basa's subjective intent.

Here, Ms. Basa neither requested nor desired treatment. To the contrary, Ms. Basa's motivation was to comply with law enforcement and to do "whatever it took" to assist efforts to detain and prosecute Mr. Kalachik. Under these circumstances, Ms. Basa lacked the requisite motivation for appropriate medical care and may even have had a motive to embellish her statements. *See* Kenneth S. Broun, *McCormick on Evidence* § 278 (7th ed. 2016) (courts have drawn sharp line between statements made to physicians for medical treatment and those made with

App. at 32-35. However, even if this Court adopts Respondent's argument that statements to medical providers need not have been admissible at statehood to satisfy Article I, section 22, the statements are nevertheless inadmissible under the Washington Constitution as they are not sufficiently reliable.

the anticipation that the physician would testify at trial). Article I, section 22 promises reliable evidence. Because Ms. Basa's only apparent motivation in participating in the exam was to provide information and evidence relating to Mr. Kalachik, the statements cannot meet this standard. Their admission violated Mr. Kalachik's right to confrontation under the Washington Constitution.

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 – individually or collectively – were harmless beyond a reasonable doubt. Accordingly, this Court should reverse.

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

a. Ms. Basa walked to the courthouse to report a crime which occurred at least an hour prior to her statements.

While Ms. Basa clearly appeared upset during her initial interview with Officer Suvada, 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).

The Respondent focuses exclusively on Ms. Basa's demeanor at the time of the courthouse interview to argue her statements to Officer Suvada are admissible. *See* Br. of Resp't at 27-28. However, "if [an alleged victim's] statement to the police were to be admissible as an excited utterance simply because she was 'upset,' virtually any statement given by a crime victim within a few hours of the crime would be admissible[.]" *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984). Thus, just as temporal gap between the startling event and the statement is not dispositive, the fact that a declarant is upset in recounting the event does not automatically render the statement an excited utterance.

Rather, a statement's spontaneity is the key to its admissibility. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). Here, although Officer Suvada described Ms. Basa as making "rapid and excitable statements," the statements were nevertheless made after ample time to reflect on the event. After the incident, she walked over a mile to the courthouse and asked to speak with a sheriff in order to report the incident. CP 33. Officer Suvada's report does not describe her as crying, shaking, or visibly afraid. *See* CP 30. The majority of Ms. Basa's statements consisted of her answering Officer Suvada's questions, and she was able to comply

with officers' requests for information, such as retrieving Mr. Kalachik's phone number. *See* CP 30. Ms. Basa's statements simply do not rise to the level of spontaneity demanded by ER 803(a)(2).

b. Ms. Basa's statements to Ms. Stern were made after significant reflection.

Nor do Ms. Basa's statements to Ms. Stern qualify as excited utterances under ER 803(a)(2). The Respondent oversimplifies the issue, arguing that, because Ms. Basa was tearful and upset during portions of the examination, all statements made therein are automatically admissible as excited utterances. *See* Br. of Resp't at 28. Yet, the Respondent declines to address several crucial facts. Ms. Basa was recounting the event for the third time, up to four-and-a-half hours after the incident. CP 35. Her statements – all of which were elicited by Ms. Stern – were detailed and coherent. Ms. Basa provided not only a complete account of the alleged incident, but also answered a series of follow-up questions, making her statements to Ms. Stern essentially indistinguishable from those crime victims routinely give to police. *See* CP 35-48.

Most importantly, Ms. Basa spent an hour-and-a-half prior to the examination calmly recounting and answering Officer Suvada's questions regarding the incident. According to Officer Suvada, Ms. Basa's demeanor during the second, exam-room interview was "a lot more calm, more

rational." RP 103. She was able to describe the event from the beginning to the end in a linear fashion, and her time frame and what happened was clear. RP 103. Although Ms. Basa may understandably have become somewhat more upset while answering Ms. Stern's during a physical exam, it is undebatable that she had spent a significant amount of time both reflecting on the event and documenting it via her police interview.

Under these circumstances, admitting Ms. Basa's statements would undermine the entire rationale underlying ER 803(a)(2), 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.

4. 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).

The Respondent declines to address Mr. Kalachik's argument that the trial court abused its discretion by misapplying ER 803(a)(4) in finding Ms. Basa's statemnets to Ms. Stern admissible. *See* Br. of Resp't at 29-31. Namely, the court failed to consider Ms. Basa's motivation whatsoever in making the statement, instead confusing an ER 803(a)(4) analysis with the primary purpose test under the Confrontation Clause. RP 184-85; *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004) (ER 803(a)(4) requires, *inter alia*, that the "declarant's motive in making the statement must be to promote treatment[.]").

Instead, the Respondent erroneously relies on *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007), to argue Ms. Basa's statements qualify under ER 803(a)(4). Br. of Resp't at 29-30. In *Williams*, the responding police officers observed obvious injuries, including bruising on the victim's forehead, eyes, and arms, and took her to the hospital for a medical examination. *Id.* at 740. Although a forensic nurse collected swabs and interviewed the victim during the examination, the *Williams* Court found the statement admissible largely because the victim's statement that she did not feel she needed medical treatment "at first" did not demonstrate that her subjective motivation for the examination was purely forensic. *See id.* at 747. Specifically, she did not state that her only purpose for undergoing the examination was to gather evidence, but rather she was "mostly in shock" and concerned about her family. *Id.*

By comparison, the Respondent's argument that Ms. Basa "had a dual purpose in going to the hospital" is unsupported by the evidence. Br. of Resp't at 30. Unlike the victim in *Williams*, Ms. Basa had no obvious injuries and told police that she was uninjured. And, unlike the victim in *Williams*, there is no indication that she believed she was in need of treatment at any time or ultimately accepted treatment. Rather, Ms. Basa's statements to Officer Suvada reveal that the ***only*** reason she participated in

the examination was at the request of law enforcement in order to assist in the collection of forensic evidence.

The erroneous admission of Ms. Basa's statements was not harmless. Ms. Basa did not appear at trial, and there was no other means of testing the reliability of these statements. Without her statements to Ms. Stern, 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. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

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

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[2] and (2) the consent instruction was legally irrelevant to whether the State met its burden. Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct impacted the jury. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor commits misconduct by

[2] 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…"

misstating or misrepresenting the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Where a misstatement of law is contrary to published precedent or undermine the State's burden to prove guilt beyond a reasonable doubt, it is deemed flagrant and ill-intentioned. *See State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

While conceding the prosecutor arguably misstated the law, the Respondent attempts to characterize the misconduct as a "single statement in isolation" and downplay the misconduct by arguing that the prosecutor's general "theme" regarding forcible compulsion was legally proper. Br. of Resp't at 33-34. Both arguments should be rejected by this Court. The prosecutor blatantly urged the jury to ignore the instruction on consent and then repeatedly stated that she was not required to prove a lack of consent because it is not an element of rape. RP 828. Moreover, the fact that the prosecutor's general "theme" that threats and fear undermine consent may be proper does not save her explicit statements that the State does not bear the burden of proving lack of consent where a defendant argues the sex was consensual.

The Respondent mistakenly assumes that, because consent negates the element of forcible compulsion, no prejudice could have resulted from the prosecutor's misstatement of law. Br. of Resp't at 34. It is precisely because consent negates forcible compulsion that "the State must prove

lack of consent as part of its burden of proof on the element of forcible compulsion." *State v. Teas*, ___ Wn. App. 2d ___, 447 P.3d 606, 617 (2019). Here, the prosecutor explicitly disavowed that burden and, in divorcing the legal concepts of consent and forcible compulsion, encouraged the jury to act upon a misunderstanding of the law of consent. *See State v. W.R., Jr.*, 181 Wn.2d 757, 766, 336 P.3d 1134 (2014).

Mr. Kalachik's entire defense came down to the issue of consent, which was consistent with the forensic evidence. There is a substantial likelihood that the prosecutor's argument that consent was legally irrelevant and the State had no burden to prove lack of consent impacted the verdict and could not have been cured by an instruction. This Court should reverse Mr. Kalachik's conviction and remand for a new trial.

C. CONCLUSION

For the reasons argued above, this Court should reverse Mr. Kalachik's conviction and remand for a new trial.

DATED this 25th day of November, 2019.

Respectfully submitted,

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

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

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