IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67478-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
HECTOR R. HURTADO,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: February 19, 2013
	)	
	)	

Cox, J. — Hector Hurtado appeals his judgment and sentence following his conviction of second degree assault, witness tampering, and two counts of domestic violence misdemeanor violation of a court order. He claims that his Sixth Amendment right to confront witnesses against him as well as his similar right under the state constitution were violated. He also claims that the trial court abused its discretion by admitting inadmissible hearsay, jail telephone recordings of him, and a 911 call recording from the home of the victim. He further claims the jail telephone recording violated his state constitutional right to privacy. Finally, Hurtado claims that the domestic violence designation in his judgment and sentence must be stricken because there was no jury finding that

the second degree assault conviction was a crime of domestic violence.

We hold that the domestic violence victim's statements to medical personnel at the hospital, which were made while a police officer was present and collecting evidence of the alleged crime, were testimonial. Admission of such evidence violated Hurtado's federal constitutional right to confront this witness against him. But the admission of such statements was harmless beyond a reasonable doubt. Hurtado's other claims have no merit. We affirm.

In 2010, the North King County Regional Communications Center received a 911 call. The dispatcher could hear an argument between a male and female, but no one responded to the dispatcher's questions. The 911 system identified the call as coming from J.V.'s residential address.

Two police officers went to this address and found J.V. standing outside the residence. J.V.'s face was swollen and bruised, and the officers called medics.

The police officers saw what appeared to be drops of blood in the kitchen and living room. One of the officers broadcasted a name and description based on information that J.V. provided when the officers responded to the call. Another officer found Hurtado at a bus stop near J.V.'s home. When the officer arrested him, the officer noticed what appeared to be blood on one of Hurtado's sleeves.

Meanwhile, the medics who responded to the officers' call took J.V. to a hospital. One of the responding police officers followed J.V. to the hospital.

Once there, the officer stayed with J.V. the entire time she was there except when she had "an MRI or a CAT scan." This officer also collected J.V.'s tank top at the hospital because it had blood on it. This clothing was admitted into evidence at trial.

During her examination at the hospital, J.V. told medical personnel that her boyfriend hit her. The police officer was in the hospital room when she made this statement. J.V. was diagnosed with a broken nose, and she was referred to a social worker.

After Hurtado was arrested, he made telephone calls from jail. The jail recorded these calls in accordance with standard jail protocols. This included warnings to Hurtado and the other parties to the calls that they were being recorded.

In one call, Hurtado told a woman, who was not J.V., that he "beat the hell out of" someone. He also said to "tell her not to show up on that day" because "they go and pick her up and they take her probably here."

Based on the recordings, the State determined that Hurtado had several conversations with J.V. when a no-contact order was in place.

By amended information, the State charged Hurtado with second degree assault – domestic violence, tampering with a witness, and two counts of domestic violence misdemeanor violation of a court order.

At trial, J.V. did not testify. It is not clear from the record why the State did not call her to testify. A jury convicted Hurtado of all charges.

Hurtado appeals.

CONFRONTATION CLAUSE

Hurtado argues that his second degree assault conviction should be reversed because his federal right to confrontation was violated. We hold that reversal is not warranted. Admission of J.V.'s statements to medical personnel during the course of treatment in the emergency room while the police officer was present and gathering evidence violated Hurtado's Sixth Amendment right to confront witnesses against him. But that error was harmless beyond a reasonable doubt.

The Sixth Amendment Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] "[T]he 'principle evil' at which the clause was directed was the civil-law system's use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases."[2] This practice "denies the defendant the opportunity to test his accuser's assertions 'in the crucible of cross-examination.'"[3]

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[1] U.S. Const. amend. VI.

[2] State v. Doerflinger, 170 Wn. App. 650, 655, 285 P.3d 217 (2012) (alteration in original) (quoting State v. Jasper, 158 Wn. App. 518, 526, 245 P.3d 228 (2010), aff'd, 174 Wn.2d 96, 271 P.3d 876 (2012)).

[3] Id. (quoting Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

In Crawford v. Washington, the U.S. Supreme Court held that the right to confrontation renders "testimonial" statements by a nontestifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant.[4] But the Crawford Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'"[5]

This court reviews an alleged violation of the Confrontation Clause de novo.[6] When a violation has occurred, this court engages in a harmless error analysis under the constitutional standard.[7]

Testimonial Statements

Hurtado argues that J.V.'s statements to the emergency room nurse that her boyfriend hit her were testimonial. We agree.

The Confrontation Clause only applies to testimonial statements or materials.[8] A testimonial statement is a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[9] The United States Supreme Court has not yet provided a comprehensive definition of what constitutes a testimonial statement.[1] But the Court has listed "three possible

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[4] Crawford, 541 U.S. at 59.

[5] Id. at 68.

[6] Jasper, 174 Wn.2d at 108.

[7] Id.

[8] Doerflinger, 170 Wn. App. at 655.

[9] Jasper, 174 Wn.2d at 109 (quoting Crawford, 541 U.S. at 51).

[1] Crawford, 541 U.S. at 68.

formulations for the 'core class' of testimonial statements:

> [1] *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[11]

In the absence of a comprehensive definition of "testimonial," the Washington supreme court has developed two tests to determine whether an out-of-court statement is testimonial. First, when a declarant makes a statement to a nongovernmental witness, a court uses the "declarant-centric standard" announced in State v. Shafer:

> "The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made."[12]

Second, when a declarant makes a statement to law enforcement, a court uses the "primary purpose" test:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

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[11] Jasper, 158 Wn. App. at 527 (quoting Crawford, 541 U.S. at 51-52).

[12] State v. Beadle, 173 Wn.2d 97, 107-08, 265 P.3d 863 (2011) (quoting State v. Shafer, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006)).

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[13]

For statements made to medical personnel, all three divisions of this court have held that these statements are nontestimonial when the following factors are present: "(1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State."[14] The second and third factors incorporate Shafer's "declarant-centric standard" because the declarant must make the statement to a nongovernmental witness.

The State has the burden of establishing that a statement is nontestimonial.[15]

Here, the emergency room nurse, Venus Chenoweth, who testified at Hurtado's trial, stated the following during direct examination:

> Q. So you said you changed nurses when you came to [J.V.]?
>
> A. Yes.
>
> Q. Did you receive information from the previous nurse or doctor before you talked to her?
>
> A. Yes. We're supposed to give a nurse-to-nurse report. Because the off-going nurse is supposed to report to the on-coming nurse.

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[13] Id. at 108 (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

[14] State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007) (citing State v. Moses, 129 Wn. App. 718, 729-30, 119 P.3d 906 (2005)); see also State v. Saunders, 132 Wn. App. 592, 603, 132 P.3d 743 (2006); State v. Fisher, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005).

[15] State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

Q. Okay. And is that information contained in exhibit 1?

A. Yes.

Q. What information were you given by this member of the team before you saw her.

A. I was—

DEFENSE COUNSEL: Objection; hearsay.

JUDGE: Overruled.

BY PROSECUTOR:

Q. Continue.

A. I was told the patient in room 123 was assaulted by her boyfriend; police is in there; she's got bruises every; she's got multiple abrasions and bumps all over her face; she was hit in the face with his fists. And so, it's my turn to make my assessment, so I went in and I talked to her briefly—

DEFENSE COUNSEL: Objection; narrative.

JUDGE: Sustained. Try to break it up a little bit.

Q. So you went in there and talked to her and then what?

A. Yes, to do my assessment of her. And yes, she did tell me that she was struck in the face—

DEFENSE COUNSEL: Objection; hearsay.

JUDGE: Overruled.

BY PROSECUTOR:

Q. Continue.

A. She was struck in the face. I asked her, "Are you in pain?" Because the fifth vital signs that we take—we take blood pressure, we take pulse, we take temperature, we take respiration. Pain is the fifth vital sign. You always should ask the patient if they're in

> pain regardless. And I did. And she said she was not in pain.
>
> Q. How about her other vital signs? How were they?
>
> A. They were normal.
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> . . .
>
> Q. Was there anything different about your diagnosis from what you had been told before?
>
> A. No.
>
> Q. Did you refer [J.V.] to a social worker?
>
> A. Yes. She was already referred, and I just checked in with the social worker.[16]

Based on this testimony, the first and third factors, that a statement is made for diagnosis and treatment purposes and that the statement is made to medical personnel who are not employed by or working for the State, are satisfied. For the first factor, J.V. answered the nurses' questions about who hit her, so they could refer her to a social worker and to ensure she had a safe place to go after leaving the emergency room.[17] For the third factor, there is nothing in the record to show that the testifying nurse was employed or working with the State.

The issue in this case is the second factor: Whether J.V. had any indication that her statements would be used at trial. The test is whether a "reasonable person in [J.V.'s] position would think she was making a record of

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[16] Report of Proceedings (July 6, 2011) at 55-57.

[17] Id. at 53, 57.

evidence for a future prosecution when she told" the nurse that her boyfriend hit her.[18]

In State v. Sandoval, a woman called the police to report that her boyfriend, Erik Sandoval, had assaulted her.[19] A fire truck went to the woman's home, and she was told to go to the hospital and an officer would meet her there.[2] At the hospital, the woman told the emergency room physician that she had been assaulted by Sandoval.[21] The woman did not appear for trial.[22] Division Two of this court concluded that her statements were nontestimonial.[23] One of the facts the court considered was that police officers were not present during the woman's conversations with the physician.[24]

Given the highly factual nature of this issue and the lack of other Washington cases with comparable facts, we look to other jurisdictions for guidance. In State v. Bennington, the Kansas Supreme Court concluded that a woman's statements to a nurse where a law enforcement officer was present and asked questions were testimonial.[25] There, the State charged Bennington with a

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[18] Saunders, 132 Wn. App. at 603.

[19] 137 Wn. App. 532, 535-36, 154 P.3d 271 (2007).

[2] Id. at 536.

[21] Id.

[22] Id.

[23] Id. at 538.

[24] Id.

[25] 264 P.3d 440, 521, 524 (2011).

number of crimes for sexually attacking and robbing V.B. in her home.[26] V.B. died of a stroke before Bennington's trial, but she made statements about the incident to various parties, including a sexual assault nurse.[27] The nurse asked V.B. to give a narrative statement about the incident while in the presence of a law enforcement officer.[28] At this time, the officer also asked V.B. questions.[29] The nurse's notes incorporated V.B.'s answers to both the nurse's and officer's questions.[3]

In determining whether V.B.'s statements to the nurse were testimonial, the court applied the "primary purpose" test and looked at the specific circumstances in that case:

> [T]he officer was listening to V.B.'s account of past events, with an eye toward gathering information relevant to prosecution. The officer, who asked questions, gathered this information in a formal setting at a time when there was no indication of an ongoing public safety or law enforcement emergency; the perpetrator had fled hours before the interview. . . . The fact the officer interjected questions makes it apparent from an objective viewpoint that the information was also being sought for potential use in a subsequent prosecution.[31]

While the Kansas Supreme Court applied a different test than the three-

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[26] Id. at 505-06.

[27] Id. at 506.

[28] Id. at 518.

[29] Id.

[3] Id.

[31] Id. at 521.

factor test that applies to the present case, the court concluded that V.B.'s statements to the nurse were testimonial.[32]

Here, in contrast to Sandoval, Officer Rachel Neff testified that she was with J.V. the entire time she was at the hospital "[e]xcept for when [J.V.] had . . . an MRI or a CAT scan."[33] While the record does not show that the officer asked J.V. questions at the hospital like the officer in Bennington, the officer did testify that she collected J.V.'s tank top as evidence because it had blood on it. The nurse also testified that the officer was in the hospital room with J.V. before the nurse went in to talk to J.V. Further, the officer testified that she took a written statement from J.V. at her home before J.V. went to the hospital in an aid car.

Given these circumstances, a reasonable person would believe that J.V.'s statements made in the presence of a police officer would be used as evidence in a future prosecution. The police officer began her investigation into the incident at J.V.'s home and continued to collect evidence in the examination room. J.V. made her statements to the nurse while the officer was present and gathering evidence. Thus, under the test enunciated by Washington courts, J.V.'s statements were testimonial.

In addition to Sandoval, the State cites several Washington cases to support the assertion that all statements made for the purposes of medical treatment are not testimonial and do not implicate the Confrontation Clause. But

[32] Id. at 521, 524.

[33] Report of Proceedings (July 7, 2011) at 15-16.

like Sandoval, those cases are distinguishable. In State v. Moses,[34] State v. Saunders,[35] and State v. Fisher,[36] there were no facts indicating that a police officer was present when the victims made their statements to medical personnel. And as discussed above, J.V. made statements to the nurse when a police officer was present and gathering evidence. The State also cites an Ohio Supreme Court case to support its assertion, but again in that case there were no facts signaling that a police officer was present when the victim made the statement.[37]

The State argues that the mere presence of a police officer in an emergency room should not transform medical treatment into a police interrogation. But, as discussed above, the officer was more than present. The officer was actively collecting evidence, continuing investigation of the incident

[34] 129 Wn. App. 718, 730, 119 P.3d 906 (2005) (explaining that there was "nothing in the record to indicate [the victim] believed or had reason to believe that her statements to [a doctor] would be used at a subsequent trial").

[35] 132 Wn. App. 592, 603, 132 P.3d 743 (2006) (explaining that there was "no reason to believe that a reasonable person in [the victim's] position would think she was making a record of evidence for a future prosecution when she told [a] paramedic . . . and [doctor] that her injuries occurred as a result of her boyfriend choking her and throwing her against the wall").

[36] 130 Wn. App. 1, 13, 108 P.3d 1262 (2005) (explaining that "there was no indication of a purpose to prepare testimony for trial and no government involvement").

[37] State v. Fry, 926 N.E.2d 1239, 1263 (2010) (explaining that a victim's statements to a nurse were nontestimonial because the victim "could reasonably have assumed that repeating the same information to [the nurse] was for a separate and distinct medical purpose"); see also State v. Stahl, 855 N.E.2d 834, 846 (2006).

that began at J.V.'s home. It would have been reasonable for J.V. to assume from these circumstances that her statements in the officer's presence would be used for prosecution.

Finally, the State argues that dicta in two United States Supreme Court cases "strongly signal that the Court does ***not*** view statements made to medical providers during the course of treatment as being testimonial."[38] But again these cases did not involve factual scenarios where a police officer was present and gathering evidence when the declarant made a statement to medical personnel. And, as Hurtado points out, this court need not follow dicta.[39]

In sum, we hold that the State failed to meet its burden in proving that J.V.'s statements were nontestimonial.

Unavailability

Hurtado argues that J.V.'s testimonial statements were inadmissible because the State failed to demonstrate that J.V. was unavailable as a witness and that Hurtado did not have an opportunity to cross-examine her. He contends that admission of J.V.'s testimonial statements violated his Sixth

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[38] Brief of Respondent at 7-8; see Melendez-Diaz v. Mass., 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (explaining that cases cited by one party were "simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today"); Giles v. Cal., 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) ("[O]nly ***testimonial*** statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules . . . .").

[39] See, e.g., Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 363, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006).

Amendment right to confront J.V. We agree.

As noted above, under the Sixth Amendment's Confrontation Clause, admission of a testimonial statement by a witness who does not appear at the criminal trial violates the Confrontation Clause unless "(1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross examination."[4] The State has the burden of proving that a witness is unavailable.[41]

"Under the constitutional standard, unavailability requires a 'good faith effort' to secure the presence of the witness at trial."[42] Whether the State has made a "good faith effort" is "'a question of reasonableness.'"[43] But if "the State makes no effort whatsoever to produce the witness, the State cannot rely on the mere possibility that the witness would resist such efforts."[44]

Here, the State listed J.V. as a potential witness in its Trial Memorandum. But the State did not call her as a witness at trial. In our independent review of the record, we cannot find any explanation for whether the State made a good faith effort to secure her presence. In the absence of any evidence on the point, we must conclude that the State failed to meet its burden to show that this

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[4] Beadle, 173 Wn.2d at 107 (citing Crawford, 541 U.S. at 53-54).

[41] Id. at 112; State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003).

[42] Beadle, 173 Wn.2d at 113.

[43] Id. (quoting State v. Smith, 148 Wn.2d 122, 133, 59 P.3d 74 (2002)).

[44] Id.

witness was unavailable.

Accordingly, under the controlling test, we conclude that the admission of J.V.'s testimonial statements without the required showing by the State was erroneous. But the admission of J.V.'s testimonial statements into evidence without a showing of unavailability does not end our inquiry.

Harmless Constitutional Error

Hurtado argues that the introduction of J.V.'s testimonial statements was not harmless beyond a reasonable a doubt and requires reversal of his second degree assault conviction. We disagree.

The Chapman v. California[45] harmless-error standard applies to Confrontation Clause errors.[46] "Under this standard, the State must show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[47]

> "Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[48]

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[45] 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[46] Jasper, 174 Wn.2d at 117 (citing Chapman, 386 U.S. at 24; Del. v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

[47] Id. (quoting Chapman, 386 U.S. at 24; State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

[48] Id. (alteration in original) (quoting Van Arsdall, 475 U.S. at 684).

The reviewing court looks at the "untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt."[49]

Here, neither Hurtado nor J.V. testified. But the State had recordings of a telephone call made with Hurtado's personal identification number. The State presented circumstantial evidence that Hurtado said in one call that he "beat the hell out of" J.V, and he repeatedly urged her not to come to court.

Further, the public records specialist from North King County Regional Communications Center testified that a 911 call was made from J.V.'s home. Police officers were dispatched to this address and upon arrival they found J.V. with a bruised and swollen face. One of the officers made a radio dispatch with a suspect's name and description. Based on this name and description, another officer found Hurtado at a bus stop near J.V.'s home. This police officer observed what appeared to be blood on Hurtado's sleeve. Back at J.V.'s residence, an officer noticed what appeared to be blood in the kitchen and in the living room. At the hospital, a nurse observed what appeared to be dried blood on J.V.'s nose.

The properly admitted evidence overwhelming established that Hurtado was the person who assaulted J.V. Accordingly, the confrontation violation was harmless beyond a reasonable doubt.

WASHINGTON CONSTITUTION

Hurtado next argues that his state constitutional right to meet the witnesses against him face-to-face precluded the admission of J.V.'s out-of-court

[49] Moses, 129 Wn. App. at 732.

statements. Given our determination that Hurtado's Sixth Amendment right to confront witnesses against him was violated but that this error was harmless beyond a reasonable doubt, we need not reach this argument on the basis of the state constitution.

The balance of this opinion has no precedential value. Accordingly, under RCW 2.06.040, it shall not be published.

ATTRIBUTIONS OF FAULT UNDER ER 803(a)(4)

Hurtado argues that the trial court abused its discretion in admitting J.V.'s identification of her boyfriend as her assailant because it was inadmissible hearsay. First, he argues that J.V.'s statement was not necessary for medical diagnosis and treatment. Second, he argues that J.V.'s attribution of fault should have been redacted from her medical record. We disagree.

This court reviews a trial court's evidentiary rulings for an abuse of discretion.[5] A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.[51]

Statements for Medical Diagnosis and Treatment

Hurtado argues that J.V.'s attributions of fault were not admissible as statements made for the purpose of medical diagnosis and treatment. We disagree.

Under Evidence Rule (ER) 803(a)(4), "[s]tatements made for purposes of

[5] In Re Personal Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

[51] Id.

medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule. "For statements to be admissible under ER 803(a)(4), the declarant's apparent motive must be consistent with receiving treatment, and the medical provider must reasonably rely on the information for diagnosis or treatment."[52] Generally, statements that attribute fault are not relevant to diagnosis or treatment and thus not admissible.[53] But for cases involving domestic violence, "this court has found statements attributing fault to an abuser in a domestic violence case are an exception because the identity of the abuser is pertinent and necessary to the victim's treatment."[54]

Here, the testimony demonstrated that the emergency room nurse and physician considered the information attributing fault to J.V.'s "boyfriend" was reasonably pertinent to her treatment. Both the nurse and physician testified that they ask their patients if they are in dangerous situations and whether they

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[52] Moses, 129 Wn. App. at 728-29.

[53] Id. at 729.

[54] Id.; see, e.g., State v. Sims, 77 Wn. App. 236, 239-40, 890 P.2d 521 (1995) ("The emergency room physician and the social worker testified that Providence Medical Center has a policy of routinely referring assault or domestic violence victims to the social work department. The social worker . . . ascertained that [the victim] viewed her relationship with Sims as a continuing one. As part of her treatment plan, [the social worker] encouraged [the victim] to change her relationship pattern and discussed with her how to avoid threatening situations.").

have a safe place to go after they leave the emergency room. They testified that this "screening tool" or "interview" affects the treatment the patient receives such as a referral to a social worker.

In this case, J.V. told a nurse that she was assaulted by her boyfriend. At a shift change, this first nurse told a second nurse of J.V.'s statement. J.V. confirmed this statement directly with the second nurse. The second nurse, Chenoweth, was listed as the primary nurse in J.V.'s medical record and testified at trial.

Chenoweth testified that J.V. was referred to a social worker because J.V. said her boyfriend hit her. Thus, J.V.'s statement attributing fault to her boyfriend was part of her medical treatment. Further, Hurtado does not argue that J.V. had an ulterior motive other than receiving treatment. The trial court did not abuse its discretion in admitting J.V.'s statements to the nurse and physician under ER 803(a)(4).

Hurtado argues that the person who assaulted J.V.'s was not pertinent to her treatment. He points to the physician's testimony in which he stated, "Strictly medical, it doesn't matter to me who assaulted her."[55] He also highlights the physician's testimony that asking whether J.V. had a safe place to go was a "social component" of her treatment.[56] But our supreme court has recognized that "medical treatment" is not limited to "only physical injuries" but can include

[55] Report of Proceedings (July 7, 2011) at 50.

[56] Id. at 48.

psychological treatment.[57] In State v. Woods, the emergency room physician testified that "he needed to have an idea of what happened 'the same way the patient knows the story' for the purpose of 'arranging for like counseling after the fact because people are going to have a certain amount of post traumatic distress.'"[58] Here, the nurse and physician wanted to know who assaulted J.V., so that they could refer her to a social worker and ensure that she had a safe place to go.

Hurtado also argues that our supreme court's decision in State v. Redmond controls this case.[59] There, the supreme court provided the general rule that statements that are "'reasonably pertinent to diagnosis or treatment'" are admissible while statements that attribute fault are not admissible.[6] Then, the court gave the following example: "[T]he statement 'the victim said she was hit on the legs with a bat,' would be admissible, but 'the victim said her husband hit her in the face' would not be admissible."[61]

Hurtado argues that this court has failed to distinguish Redmond, and thus it controls this case. He contends that Redmond does not allow for a domestic violence exception to the general rule that attributions of fault are not

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[57] State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

[58] 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

[59] 150 Wn.2d 489, 78 P.3d 1001 (2003).

[6] Id. at 496 (quoting ER 803(a)(4)).

[61] Id. at 496-97.

admissible. But, as the State points out, Redmond did not involve domestic violence; it involved a fight between students.[62] Further, the Redmond opinion cited State v. Woods, in which the supreme court held that statements to medical personnel that were reasonably pertinent to the declarant's physical or psychological treatment fell within the medical diagnosis and treatment hearsay exception.[63] As one commentator pointed out, "The Supreme Court's intent with respect to existing case law [in Redmond] was less than obvious, but perhaps significantly, the court did not overrule, or even specifically disapprove of, its decision in Woods . . . ."[64] Further, as we have noted previously, this court has repeatedly held that there is a domestic violence exception for attributions of fault when they are made to medical personnel because it is necessary to the declarant's medical treatment.[65]

Finally, Hurtado argues that J.V.'s statement was double hearsay. But as explained above, J.V. confirmed her statements directly with the second nurse when the nurses changed shifts. Thus, the fact that the first nurse stated the same thing to the nurse who testified at trial is analytically irrelevant.

Business Record

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[62] Id. at 490.

[63] Id. at 496 (citing Woods, 143 Wn.2d at 602).

[64] 5C Karl B. Tegland, Washington Practice, Evidence Law and Practice § 803.23 (5th ed. 2012).

[65] See Saunders, 132 Wn. App. at 607-08; Moses, 129 Wn. App. at 728-29; Sims, 77 Wn. App. at 239-40.

Hurtado argues that the trial court abused its discretion by admitting J.V.'s medical report without redacting her attributions of fault. We disagree.

Under the Uniform Business Records as Evidence Act, chapter 5.45 RCW, business records are admissible as evidence of an act, condition, or event.[66] "Business records are presumptively reliable if they are made in the regular course of business and with no apparent motive to falsify."[67] Properly identified medical records are admissible under the business records exception.[68]

The business records record rule "does not in all respects render admissible evidence contained in the records which should ordinarily be excluded."[69] Instead, hearsay contained in the records is not admissible unless it falls within a hearsay exception.[7]

Here, the trial court admitted J.V.'s medical record, which contained J.V.'s statements attributing fault to her boyfriend. On page one of the record, it stated, "Assault by male, facial bruising" and "This is the first time he has hit

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[66] RCW 5.45.020.

[67] Doerflinger, 170 Wn. App. at 662.

[68] State v. Ziegler, 114 Wn.2d 533, 538-39, 789 P.2d 79 (1990).

[69] State v. White, 72 Wn.2d 524, 530, 433 P.2d 682 (1967).

[7] See ER 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."); see, e.g., Doerflinger, 170 Wn. App. at 663-64 (concluding that a radiologist's findings in a report were admissible because they fell within the business record and statement for purposes of medical diagnosis or treatment hearsay exceptions).

her." On page four of the record, it stated, "Pt was assaulted by her boyfriend this morning."

One level of hearsay is J.V.'s statements. As discussed above, statements attributing fault in cases of domestic violence are admissible under ER 803(a)(4) if they are reasonably pertinent to the medical treatment.

The other level of hearsay is the medical record itself. Hurtado does not challenge the admissibility of the record on this ground and nothing in the record shows the trial court abused its discretion in admitting the record on this basis. And, for the reasons stated above, any argument as to the document's inadmissibility based on Redmond fails. Thus, the medical record with J.V.'s attribution of fault was admissible.

Hurtado also cites State v. White[71] and Young v. Liddington[72] to show where the trial court erred because it did not redact statements attributing fault. But these cases were decided before our supreme court recognized that a declarant's statements about a particular incident may be reasonably pertinent to the psychological treatment of the patient.[73] Further, these cases were also decided before this court held that attributions of fault in cases of domestic violence can fall within the hearsay exception of statements for medical treatment.[74] Thus, they are not helpful.

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[71] 72 Wn.2d 524, 433 P.2d 682 (1967).

[72] 50 Wn.2d 78, 309 P.2d 761 (1957).

[73] See Woods, 143 Wn.2d at 602-03.

[74] See Saunders, 132 Wn. App. at 607-08; Moses, 129 Wn. App. at 728-

Because the trial court did not abuse its discretion in admitting J.V.'s identification of her boyfriend as her assailant, we need not engage in a harmless error analysis.

JAIL TELEPHONE CALL RECORDINGS

Hurtado argues that the admission of jail telephone call recordings violated his right to privacy under article I, section 7 of the Washington Constitution. We disagree.

Right to Privacy

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." "'In determining whether a certain interest is a private affair deserving article I, section 7 protection, a central consideration is the ***nature*** of the information sought—that is, whether the information obtained . . . reveals intimate or discrete details of a person's life.'"[75]

In State v. Archie, this court held that this privacy interest does not protect "agreed to recordings or to the dissemination of a jail inmate's calls."[76] This court recently reaffirmed this holding in State v. Haq.[77] In Haq, this court

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29; Sims, 77 Wn. App. at 239-40.

[75] State v. Haq, 166 Wn. App. 221, 256-57, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012) (emphasis in original) (quoting State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)).

[76] Id. at 257 (citing State v. Archie, 148 Wn. App. 198, 203-04, 199 P.3d 1005 (2009)).

[77] 166 Wn. App. 221, 257-58, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012).

explained that "the holding in Archie was based on the defendant's limited privacy rights as a detainee, combined with warnings of possible recording."[78] In Archie and Haq, there were signs posted near the telephones warning the inmates that the call would be recorded.[79] And there was a recorded message at the beginning of the phone call with a similar warning.[8] In these cases, the defendants' rights to privacy were not violated because the trial court admitted recordings of jail telephone calls into evidence.[81]

Hurtado's case is analogous to Archie and Haq. Hurtado was a detainee at the King County Jail. The inmate handbook warned Hurtado that his phone calls made from the jail would be recorded. Further, Hurtado and the person receiving the call heard a recorded a message with the same warning. Hurtado had to push "1" to acknowledge receipt of the warning. Consequently, Hurtado's privacy right was not violated by the admission of the telephone recordings into evidence at trial.

Hurtado argues that his case is distinguishable from Archie and Haq because the jail sergeant did not give a reason for recording the telephone calls such as maintaining jail security, order, or discipline. Hurtado also points to the sergeant's testimony stating that the sergeant did not even listen to the calls.

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[78] Id. at 258.

[79] Archie, 148 Wn. App. at 201; Haq, 166 Wn. App. at 258.

[8] Id.

[81] Id.

But Hurtado ignores the sergeant's testimony stating that he worked in "special operations," which meant it was his job to "investigate criminal activity within the jail," which includes recording phone calls. Implicit in this testimony is the reason for recording the telephone calls that Hurtado claims is absent from this case. Thus, this argument is not persuasive.

Hurtado also argues that his fundamental liberty interest in raising his child bolsters his right to privacy in his telephone calls.[82] He points to the fact that his telephone calls include conversations about his child's welfare regarding "day care, the child's illness, and her developmental milestones, such as learning to clap and stand."[83] But, as discussed above, this argument directly conflicts with Archie and Haq's holdings. And, as the State argues, Hurtado fails to cite relevant authority to support "the proposition that a conversation in which both parties have consented to being recorded may be transformed into a 'private affair' based on the content of the conversation."[84]

Because the admission of the jail telephone call recordings did not violate Hurtado's privacy right, we need not engage in a harmless constitutional error analysis.

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[82] Brief of Appellant at 35-36 (citing U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 7; Troxel v. Granville, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); In re Custody of Smith, 137 Wn.2d 1, 13-15, 969 P.2d 21 (1998)).

[83] Id. at 39.

[84] Brief of Respondent at 38-39.

911 CALL RECORDING

Hurtado argues that the trial court erred in admitting a recording of a 911 call because it was not properly authenticated. He does not challenge the authenticity of the recording itself. Instead, he argues that no witness identified the voices on the recording as belonging to J.V. or Hurtado. We disagree.

Authentication and Identification

For a 911 call, ER 901 requires that the recording itself and the voice in the recording be authenticated or identified before it is admitted into evidence.[85] The party introducing the recording must present "evidence sufficient to support a finding that the matter in question is what its proponent claims."[86]

ER 901 provides a non-exclusive list of examples of authentication or identification that illustrates conformance with this rule.[87] In State v. Williams, this court concluded that the trial court did not abuse its discretion when it ruled that a 911 call was properly authenticated.[88] There, the trial court was able to directly compare the voice in the recording of the 911 call with the alleged speaker, who had spoken in court.[89] In State v. Jackson, Division Two of this

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[85] ER 901; State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007).

[86] ER 901.

[87] See, e.g., ER 901(b)(5) ("Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.").

[88] 136 Wn. App. 486, 501, 150 P.3d 111 (2007).

[89] Id.

court held that "a proponent can authenticate a tape recording with conversation on it by calling a witness who has personal knowledge of the original conversation and the contents of the tape; who testifies that the tape accurately portrays the original conversation; and who identifies each relevant voice heard on the tape."[9]

But these methods are not exclusive.[91] "Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic."[92]

Here, the trial court ruled that the 911 call was properly authenticated because there was enough "corroborating evidence" that the female's voice was J.V.'s voice. The trial court explained the J.V.'s name was identified in the 911 system, and police officers found J.V. at the address were the 911 call originated from. The trial court did not making a ruling regarding whether the male voice was Hurtado's voice.

The issue on appeal is whether the female voice ***and*** the male voice in the recording of the 911 call were properly identified. J.V. and Hurtado did not testify at trial, so the court was not able to hear testimony from a witness who had personal knowledge of the conversation. But the trial court was able to make a direct comparison of the voices in the 911 recording with the jail

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[9] 113 Wn. App. 762, 769, 54 P.3d 739 (2002).

[91] Id.

[92] Williams, 136 Wn. App. at 500.

telephone recordings.

Further, the State presented circumstantial evidence that also helped establish that J.V. and Hurtado were the woman and man speaking during the 911 call: (1) The 911 system reported that the caller was J.V. and the call was coming from a Bellevue address; (2) The responding officers found J.V. at that Bellevue address; (3) The man on the recording refers to the woman as "Jenny"; (4) The man and woman were having an argument about their daughter; and (5) One of the jail telephone recordings seemed to indicate that Hurtado and J.V. had a daughter together.

As the trial court concluded, there is more than sufficient prima facie evidence that J.V. was the female voice in the 911 recording. And while trial court did not make a specific finding about whether the male voice was Hurtado's voice, the trial court was able to directly compare the voices. Moreover, the State did not explicitly argue in its closing statement that the male's voice was Hurtado's voice. Thus, the trial court did not abuse its discretion in admitting the 911 call recording under ER 901.

Hurtado argues that either J.V. or Hurtado needed to testify at trial or another witness needed to testify that J.V. and Hurtado's voices were on the recording in order for the 911 call to be properly authenticated. But, as discussed above, circumstantial evidence is sufficient to identify the voices in a recording.[93] Thus, this argument is not persuasive.

[93] See also 5C Tegland, supra, § 901.11 ("In the absence of testimony of voice recognition, the foundation for admission of telephone conversations may be laid by means of circumstantial evidence indicating the identity of the person

Because the 911 call was properly admitted, we need not engage in a harmless error analysis.

DOMESTIC VIOLENCE DESIGNATION IN JUDGMENT AND SENTENCE

Alternatively, Hurtado argues that the portion of his judgment and sentence that designates his second degree assault as "domestic violence" should be stricken because the jury was never asked to determine whether the assault was a crime of domestic violence. He contends that this designation could lead to increased punishment if he is convicted of a new crime involving domestic violence. We disagree.

The Sixth Amendment of the United States Constitution and article I, sections 21 and 22 of the Washington Constitution's "jury trial right requires that a sentence be authorized by the jury's verdict."[94] In Apprendi v. New Jersey, the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[95] In Blakely v. Washington, the Supreme Court clarified "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose ***solely on the basis of the facts reflected in the jury verdict or admitted by***

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at the other end of the line.").

[94] State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

[95] 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

the defendant."[96] Our supreme court has provided similar protections:

> "Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty."[97]

In State v. Hagler, this court explained that the King County prosecutor designates crimes arising from "domestic violence" in charging documents, so that the justice system can "recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse."[98] This court also explained that this "designation need not be proven to a jury under Blakely."[99] A trial court can make this finding on its own because it "'does not itself alter the elements of the underlying offense . . . .'"[1] But the domestic violence designation would need to be proven to a jury if it "increases the defendants' potential punishment."[101]

Here, the trial court made a finding of domestic violence. The parties do not dispute that the jury was not asked to determine whether the second degree

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[96] 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[97] Williams-Walker, 167 Wn.2d at 896-97 (quoting State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)).

[98] 150 Wn. App. 196, 201, 208 P.3d 32 (2009).

[99] Id. (citing Blakely, 542 U.S. 296; State v. Winston, 135 Wn. App. 400, 406-10, 144 P.3d 363 (2006)).

[1] Id. (quoting State v. O.P., 103 Wn. App. 889, 892, 13 P.3d 1111 (2000)).

[101] State v. Felix, 125 Wn. App. 575, 577, 105 P.3d 427 (2005).

assault was a crime of domestic violence. The trial court's jury instructions and verdict forms did not address domestic violence. But the trial court's finding did not increase Hurtado's potential punishment. Thus, a jury finding was not required for the domestic violence designation.

Hurtado argues that the domestic violence designation must be vacated because it could lead to an increase in his potential punishment based on a 2010 amendment to the Sentencing Reform Act. He contends, "Now, when an offender is sentenced for a crime where domestic violence was 'plead and proven,' prior convictions where domestic violence was 'plead and proven' after August 2011 will count as two rather than one point in determining the SRA offender score and resulting standard sentence range."[102] But as the State points out, the plain language of the statutory amendment excludes it from affecting Hurtado's case. RCW 9.94A.525(21) only affects offender scores if the "domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011." Here, Hurtado was sentenced on July 29, 2011, which was before the statute's effective date. Thus, the domestic violence designation cannot increase Hurtado's potential punishment under this statutory amendment.

Hurtado also argues that the domestic violence designation should be stricken because "there is no statute authorizing the trial court to make such finding."[103] But, as discussed above, this court has explained that this

[102] Brief of Appellant at 47 (citing RCW 9.94A.525(21)).

[103] Reply Brief of Appellant at 18.

designation does not need to be proven to a jury if it does not increase the defendant's potential punishment.[104]

Finally, Hurtado cites State v. Recuenco[105] and State v. Williams-Walker[106] to support the principle that a trial court is bound by a jury's finding or lack of finding when sentencing a defendant. In both cases, the juries were only asked whether the defendant was armed with a deadly weapon, not a firearm.[107] Nonetheless, the trial court imposed a firearm enhancement during sentencing, which was error.[108] These cases are distinguishable because a sentencing enhancement was actually imposed in those cases, and they did not address a domestic violence designation.

We affirm the judgment and sentence.

Cox, J.

[104] See Hagler, 150 Wn. App. at 201.

[105] 163 Wn.2d 428, 180 P.3d 1276 (2008).

[106] 167 Wn.2d 889, 225 P.3d 913 (2010).

[107] Recuenco, 163 Wn.2d at 431-32; Williams-Walker, 167 Wn.2d at 893-94.

[108] Id.

WE CONCUR: