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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 50087-2022**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-21-34839**
v.	)	
	)	
AARON ANSON VON EHLINGER	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL J. REARDON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

"In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. Aaron Von Ehlinger was convicted of rape based entirely on the testimony of a FACES of Hope ("FACES") nurse, Ann Wardle, that interviewed the complaining witness two days after the alleged offense, while accompanied by two law enforcement officers. Aaron timely appeals following the district court's imposition of a unified sentence of twenty years, with eight years fixed. Aaron asserts the judgment should be vacated due to constitutional and evidentiary errors that were committed during his trial.

Statement of the Facts

In January of 2021, Aaron was a first year Representative from District 6 in the Idaho State House of Representatives. (Tr., p.528, L.5 – p.529, L.20.) Early in the legislative session, Aaron met J.V.,[1] a volunteer in Representative Christiansen's office.[2] (Tr., p.532, Ls.10-16, p.533, Ls.5-8.) After the initial meeting, J.V. and Aaron would occasionally have short, friendly conversations in passing after committee meetings or in the hallways. (Tr., p.533, Ls.19-23.) During the second or third week of January, Aaron gave J.V. his business card, with his phone number written on the back. (Tr., p.534, Ls.17-23.) This occurred after J.V. went to see the artwork and a diploma that had recently been hung in Aaron's Idaho State Capitol ("Capitol")

[1] J.V. was a 19-year-old single mother at the time of the charged offense. (R., pp.84-86, 759; Confidential Exhibit, pp.832-833.)

[2] There is some dispute in the record as to whether J.V. was an intern or volunteer during the legislative session, however, that distinction is irrelevant for purposes of the issues raised herein.

office. (Tr., p.535, Ls.2-11.) On February 7th, Aaron received a text message from J.V. (Tr., p.535, Ls.16-23, p.537, Ls.13-16.) Not recognizing the number, Aaron inquired and learned that the message was from J.V. (Tr., p.536, Ls.12-24.) After the initial text from J.V., they would have brief conversations in the hallways of the Capitol. (Tr., p.538, Ls.1-7.)

It was not until March 2nd that Aaron received another text from J.V. (Tr., p.540, Ls.18-24.) Aaron agreed to meet J.V. on the West side of the Capitol for a conversation and some fresh air. (Tr., p.540, L.25 – p.541, L.14.) During the conversation, Aaron and J.V. made plans to go out to dinner on March 9th. (Tr., p.541, L.20 – p.542, L.3.) Aaron was to meet J.V. around 6:00 p.m. in a parking lot to the West of the Capitol. (Tr., p.542, Ls.17-24.) They met in the lot and J.V. left her car, getting into the vehicle Aaron was driving. (Tr., p.544, L.8 – p.545, L.4.) They then drove to Barbacoa, arriving around 6:30 p.m., and leaving around 9:50 p.m. (Tr., p.525, Ls.7-25.) Neither party consumed alcohol. (Tr., p.525, Ls.19-21, p.547, L.19 – p.548, L.1.)

After dinner, J.V. and Aaron made plans to go back to his apartment to "hang out for a while." (Tr., p.548, Ls.19-24.) Aaron testified that during the car ride, J.V. grabbed his hand and put it on her thigh. (Tr., p.549, Ls.6-9.) At the apartment, Aaron and J.V. "ended up making out on the couch" for about 10 minutes or so. (Tr., p.554, L.10 – p.555, L.2.) Aaron testified that things "were going well," so he suggested they move into the bedroom, and they "both got up, held hands, and walked into the bedroom. . . ." (Tr., p.555, Ls.18-23.) Aaron got undressed, while J.V. sat at the foot of the bed, then their intimate contact moved onto the bed. (Tr., p.556, L.12 – p.558, L.15.) The physical intimacy progressed to Aaron feeling J.V.'s breasts inside her shirt while she stroked his penis. (Tr., p.560, L.9 – p.561, L.3.) As this point, Aaron's

underwear came off and J.V.'s bra and shirt were pulled up above her breasts. (Tr., p.561, Ls.9-18.) Eventually, J.V. "lifted herself up from laying down[,] . . . leaned over as [he] was laying on [his] back . . . [a]nd she performed oral sex on" Aaron for about 15 seconds. (Tr., p.562, Ls.3-10.) They then switched positions, with Aaron on top of J.V. (Tr., p.563, Ls.2-14.) After a period of kissing and continued physical touch, J.V. indicated that "tonight probably isn't a good night to have sex." (Tr., p.546, Ls.15-24.) Aaron manually stimulated himself and ejaculated on J.V.'s stomach. (Tr., p.566, Ls.5-15.)

Following the sexual activity, Aaron and J.V. got cleaned up and then talked for a while on the bed. (Tr., p.567, Ls.3-13.) After about 10 minutes, they got dressed and Aaron drove J.V. to her vehicle. (Tr., p.567, L.19 – p.568, L.7.) They kissed, said their goodbyes, hoping to meet up again. (Tr., p.567, L.24 – p.568, L.7.) A few days later, on March 11th, Detective Monte Iverson met with J.V. at the Capitol. (Tr., p.353, Ls.2-14.) Det. Iverson then arranged for J.V. to go to FACES to conduct a sexual assault evaluation on J.V., making contact with Ms. Wardle, a FACES nurse. (Tr., p.353, Ls.3-19, p.365, L.23 – p.366, L.4.) On March 15th, J.V. contacted Det. Iverson and indicated that she did not want to continue with the investigation. (Tr., p.368, Ls.4-7.) On April 16th, J.V. advised Det. Iverson that she now did want to prosecute, but she wanted him to talk to her lawyers. (Tr., p.369, Ls.4-7.)

Course of Proceedings

On November 11, 2021, Aaron was charged by Information with two felonies, Count I: Rape; Count II: Sexual Penetration by Use of a Foreign Object. (R., pp.84-86.) The State's Information alleged that Aaron:

> on or about the 9th day of March 2021 . . . did penetrate the oral opening of J.V., with a penis, and where J.V. resisted, but her resistance was overcome by force or violence and/or J.V. was prevented from resistance due to an objectively reasonable believe that resistance would be futile or that resistance would result in force or violence beyond that necessary to commit the act of rape.

(R., pp.84-86.) As to Count II, the State alleged that Aaron "willfully cause[d] the penetration of the genital opening of [J.V.] … by inserting a finger inside the genital opening of J.V." (R., pp.84-86.) The case proceeded to trial, where Aaron was acquitted of sexual penetration by use of a foreign object but was convicted of rape. (R., pp.182-183.)

Defense counsel then filed a Motion for Judgment of Acquittal or, in the Alternative, Motion for a New Trial ("JOA/New Trial Motion") and memorandum in support. (R., pp.220-221, 259-271.) The JOA/New Trial Motion alleged: (1) the evidence was insufficient to sustain a conviction; (2) there was error related to questions of statutory and constitutional law "that aro[]se during the course of the trial"; and (3) the "the verdict was contrary to the law or evidence." (R., p.221.) In addition, defense counsel stated he "anticipates there will be presentation of new evidence at a hearing on the alternative motion for a new trial. . . ." (R., p.211.) Defense counsel then submitted the Affidavit of Brandy Bentzinger. (Confidential Exhibits, pp.758-760.) Ms. Bentzinger indicated that she was a co-worker of J.V. (Confidential Exhibit, p.758.) According to the affidavit, J.V. told Ms. Bentzinger that she was flirting with

Aaron at dinner, they went back to his apartment and were kissing each other, and J.V. never acknowledged that she was scared and that "there was never a 'no.'" (R., p.759.) Additionally, Ms. Bentzinger wrote, "J.V. told me that she was actually going to spend the night with von Ehlinger but that she couldn't because she didn't have a babysitter and her boyfriend was waiting at home for her." (R., p.759.)

The district court denied Aaron's JOA/New Trial Motion. (R., p.302.) At sentencing, despite a recommendation by the Presentence Investigation Report ("PSI") evaluator that the district court retain jurisdiction over Aaron, the district court imposed a unified sentence of twenty years, with eight years fixed. (R., pp.318-320; Confidential Exhibit, pp.832-833.) Aaron filed a timely Notice of Appeal from the district court's Judgment of Conviction and Order of Commitment. (R., pp.329-331.)

ISSUES

I. Did the district court commit fundamental error by allowing the FACES nurse to offer testimonial statements allegedly made by J.V. at trial in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution?

II. Did the district court error in allowing leading questions on a central issue in the case during Ms. Wardle's testimony?

III. Did the State offer sufficient, admissible evidence to prove the crime of rape beyond a reasonable doubt?

ARGUMENT

I.

The District Court Committed Fundamental Error By Allowing The FACES Nurse To Offer Testimonial Statements Allegedly Made By J.V. At Trial In Violation Of The Confrontation Clause Of The Sixth Amendment To The United States Constitution

A. Introduction

All of J.V.'s limited testimony was stricken from the jury's consideration. Yet, her statements, purportedly made during an evaluation with Ann Wardle, a FACES nurse, were admitted at trial. Accordingly, Aaron asserts the district court violated his Sixth Amendment right to confront the witnesses against him by admitting the testimony of Ms. Wardle, who examined J.V. two days after the alleged incident. He asserts that, according to *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007) and *Crawford v. Washington*, 541 U.S. 36, 42 (2004), the statements were testimonial and inadmissible under the Confrontation Clause of the Sixth Amendment. As such, the admission of the Ms. Wardle's testimony violated Aaron's right to cross-examine his accuser. Because the error was not harmless, this Court should vacate the Judgment of Conviction and Order of Commitment.

B. Standard Of Review

When a violation of a constitutional right is asserted, the appellate court will defer to the trial court's factual findings unless those findings are clearly erroneous. *Hooper*, 145 Idaho at 142, 176 P.3d at 914. The appellate court exercises "free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts

found." *Id.* Whether admission of evidence violates a defendant's right to confront an adverse witness, under the Sixth Amendment's Confrontation Clause, is a question of law over which the appellate courts exercise free review. *Id.*

C. The District Court Committed Fundamental Error By Allowing The FACES Nurse To Offer Testimonial Statements Allegedly Made By J.V. At Trial In Violation Of The Confrontation Clause Of The Sixth Amendment To The United States Constitution

At trial, while defense counsel did object to Ms. Wardle's testimony on hearsay grounds, he did not object under the Confrontation Clause.[3] (*See* Tr., p.267, L.19 – p.268, L.14.) "If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine." *State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

Fundamental error review includes a three-prong inquiry, wherein Aaron must show that the alleged error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Perry*, 150 Idaho at 228, 245 P.3d at 980.

The Idaho Supreme Court recently held, with respect to the second prong of *Perry*, "that in order to satisfy this prong of *Perry* a defendant bears the burden of showing clear error in the

[3] As will be addressed below, the following day, defense counsel entered an objection to all of Ms. Wardle's testimony pursuant to "both the 6th and 14th Amendment of the United States Constitution" as Aaron is deprived of his ability to cross-examination the declarant of the testimonial statements. Defense counsel asked to strike Exhibit 5 and "any testimony related to J.V.'s statements to Ms. Wardle." (Tr., p.341, L.14 – p.344, L.13.)

record." *State v. Miller*, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019). The record "must contain evidence of the error and . . . must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object." *Id.* "If the record does not contain evidence regarding whether counsel's decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief." *Id.* The *Miller* Court clarified, "whether trial counsel made a tactical decision in failing to object is a claim that must be supported by evidence in the record. Appellate counsel's opinion that the decision could not have been tactical does not satisfy the second prong of *Perry*." *Id.*

As for the third prong of *Perry*, the *Miller* Court clarified that it "requires that the defendant demonstrate that the clear error in the record—i.e., the error identified in the first and second prongs—actually affected the outcome of the trial proceedings." *Id.* at 119-120, 443 P.3d at 133-134. The Court held, "Whether the error affected the trial proceedings must be clear from the appellate record." *Id.* at 120, 443 P.3d at 134.

1. Ms. Wardle's Testimony Violated Aaron's Unwaived Right To Cross-Examine Testimonial Evidence Under The Sixth Amendment Of The United States Constitution

The district court erred when it allowed a FACES nurse, Ms. Wardle, to testify to statements allegedly made by J.V. At trial, J.V. did briefly testify. (Tr., p.454, L.18 – p.463, L.10.) However, in the middle of the State's direct examination, J.V. abruptly left the courtroom, and did not return. (Tr., p.463, Ls.2-10, p.465, L.23 – p.466, L.3, p.469, L.8.) As a

result, the only evidence offered by the State as the events on the night of March 9th was through the testimony of Ms. Wardle.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (alternation in original) (quoting U.S. CONST. amend. VI). The Confrontation Clause "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. *Cf.* 2 MCCORMICK ON EVIDENCE § 253 at 169 (6th ed. 2006).

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE § 1367 (3d ed. 1940)). Thus, the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821 (2006)).

The United States Supreme Court's decision in *Crawford v. Washington*, is the source of the current meaning and proper analysis of the Confrontation Clause. 541 U.S. 36. *Crawford* instructs that the Confrontation Clause prohibits the admission of testimonial statements as

evidence at trial, unless the declarant is made available for cross-examination. *Id*. at 68. The *Crawford* Court identified three non-exclusive classes of testimonial statements: (1) *ex parte* in-court testimony or its functional equivalents (such as affidavits or custodial examinations); (2) extrajudicial statements contained in formalized testimonial materials; (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." *Id*. at 51-52.

In order to help lower courts determine whether a statement is testimonial, particularly when a statement did not clearly fall into one of the *Crawford* classes of testimonial statements, the Supreme Court subsequently adopted the "primary purpose" test. *Davis*, 547 U.S. at 822. In *Davis*, the Supreme Court held that the primary purpose test evaluates whether an interrogation statement was made with the primary purpose of establishing or proving past events potentially relevant to a later criminal prosecution, in which case the statements are testimonial; or if the statements are made as part of an ongoing emergency, in which case the statements are not testimonial. *Id.* In *Clark*, the Supreme Court expanded upon the "ongoing emergency" standard to include statements made to non-police. *Ohio v. Clark*, 576 U.S. 237 (2015).

In the instant case, the only evidence offered by the State as to the alleged events on the night of March 9th was offered by the FACES nurse, Ann Wardle. (*See* Tr., p.254, L.10 – p.288, L.23.) All of Ms. Wardle's testimony, recounting statements made by J.V. during the March 11th examination are testimonial hearsay under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

The events related to this criminal proceeding occurred on the night of March 9, 2021. (R., pp.84-86.) On March 11th, Det. Iverson visited the Capitol to meet with J.V. as he was "assigned to a case involving a suspect named Aaron von Ehlinger." (Tr., p.353, Ls.2-14.) After meeting with J.V., Det. Iverson made a referral for her to go to FACES and contacted the on-call FACES nurse, Ms. Wardle. (Tr., p.365, L.23 – p.366, L.4.) Det. Iverson then met with J.V. at FACES *before* her examination by Ms. Wardle. (Tr., p.367, Ls.10-12.) Additionally, before the examination, Det. Iverson met with Ms. Wardle and provided Ms. Wardle with a set of keys for Boise Police Department's "evidence refrigerator" so that Ms. Wardle can secure the "sexual assault kit and . . . any other evidence that may be booked." (Tr., p.354, Ls.7-20.) Both Det. Iverson and a second detective, Det. Brandon Joseph were in the building at the time of the exam and met with her at its conclusion. (Tr., p.293, Ls.7-15.) In fact, both the Boise Police Department and the Ada County Sheriff's Office have facilities in the FACES building. (Tr., p.290, L.13 – p.291, L.13.)

All the statements made by J.V. to Ms. Wardle are the very definition of testimonial hearsay contemplated by *Crawford* and its progeny. As mentioned above, the Confrontation Clause covers "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 date." *Crawford*, 541 U.S. at. at 51-52. This Court had an opportunity to further analyze the situations where statements become testimonial hearsay. *See State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007). In *Hooper*, the Court had to determine whether hearsay statements of an alleged victim, memorialized in a videotape of a nurse's forensic interview at a sexual trauma abuse response

center, were testimonial under *Crawford*. *Id.* 142-143, 176 P.3d at 914-915. Viewing the interview under the totality of the circumstance, the *Hooper* Court determined the statements were testimonial. *Id.* at 145-146, 176 P.3d at 917. The Court observed: "[t]he circumstances surrounding this particular case objectively indicate that the primary purpose of the interview was to establish or prove past events potentially relevant to a later criminal prosecution, as opposed to meeting the child's medical needs." *Id.* Moreover, "[u]nlike the situation in *Davis*, there is no evidence the statements were made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *Id*. at 146, 176 P.3d at 918.

It is readily apparent that J.V.'s statements to Ms. Wardle were testimonial hearsay. Det. Iverson was involved in an open investigation, where Aaron was the identified suspect. (*See* Tr., p.353, Ls.2-14.) Det. Iverson met with J.V. both at the Capitol and then again at FACES, where the Boise Police Department has an established office. (Tr., p.293, Ls.7-15, p.290, L.13 – p.291, L.13 p.365, L.23 – p.366, L.4.) Not only did he meet with J.V., but he facilitated her examination by Ms. Wardle and provided Ms. Wardle with keys to submit any evidence collected into the Boise Police Department's evidence refrigerator. (Tr., p.353, Ls.2-14, p.354, Ls.7-20.)

Accordingly, because the primary purpose of the examination "was to establish or prove past events potentially relevant to a later criminal prosecution," all statements offered by J.V., and later parroted by Ms. Wardle, are testimonial hearsay, offered in violation of the

Confrontation Clause of the Sixth Amendment to the United States Constitution. Aaron has proven the violation of an unwaived constitutional right.

2. The District Court's Decision Was A Clear Error

The district court's error, in allowing testimonial hearsay of an unavailable witness that had not been cross-examined, in violation of Aaron's unwaived right to cross-examination under the Confrontation Clause, was a clear error.

The record contains evidence of the district court's clear error. *See Miller*, 165 Idaho at 119, 443 P.3d at 133. As explained above, once Ms. Wardle testified to testimonial statements made by J.V., his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated. *See State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007); *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

The record also contains ample evidence that trial counsel did not fail to make a tactical objection but attempted to cure the mistake on the second day of trial, and again, after it became evident J.V. was unavailable to testify, and subject herself to cross-examination as required by the Sixth Amendment. Although defense counsel did not make a contemporaneous objection to the violation of Aaron's Sixth Amendment rights, his failure to object was not as a result of a strategic or tactical decision. Rather, once defense counsel discovered the mistake, he attempted to cure it. On the second day of the trial, defense counsel entered an objection to both Ms. Wardle's report and all testimony she offered under "both the 6th Amendment and 14th

Amendment of the United States Constitution." (Tr., p.341, L.14 – p.343, L.17.) Defense counsel stated:

> . . . I'm asking the Court to reserve the evidence because I will be further asking that if she doe not testify, and from my position the 14th and 6th Amendments of the Constitution are violated because we have not had an opportunity to cross-examine the statements made in the exhibit at this point. *I would also be asking that the Court strike any testimony related to J.V.'s statements related to Ms. Wardle.*

(Tr., p.344, Ls.4-13 (emphasis added).)

Then, at the conclusion of J.V.'s testimony, which was stricken due to her abrupt exit from the courtroom, defense counsel indicated that, in addition to a "motion to dismiss under Rule 48 . . . I'd like to make an additional argument – I'd like to make and additional argument under the 6th Amendment, confrontation, both the amendment and due process clause." (Tr., p.467, Ls.20-24.)

The record is clear that trial counsel did not make a tactical decision in failing to object. Rather, any failure to enter contemporaneous objection on Sixth Amendment grounds was as a result of an error by trial counsel, which should not be held against Aaron. Accordingly, Aaron has met his burden under the second prong of fundamental error review. *See Perry,* 150 Idaho at 228, 345 P.3d at 980.

3. The District Court's Clear Error Was Not Harmless, Because The Record Shows That It Actually Affected The Outcome Of The Proceedings

The introduction of inadmissible testimonial hearsay amounted to clear error that was not harmless, because the record shows that the result of the trial would have been different absent

Ms. Wardle's testimony. It is clear from the appellate record that the district court's error affected the outcome of the proceedings. *See Miller*, 165 Idaho at 119-120, 443 P.3d at 133-134. The *only* evidence offered by the State related to the offense Aaron was convicted of, was presented by the FACES nurse, Ms. Wardle. As such, the erroneous introduction of Ms. Wardle's testimonial hearsay cannot be harmless.

II.

The District Court Erred In Overruling Defense Counsel's Objection To The State's Leading Question On Whether A Forcible Rape Occurred

A. Introduction

At trial, the State offered the testimony of Ann Wardle, a FACES nurse that examined J.V. two days after the alleged criminal offense. Unable to get its desired testimony as to whether Aaron "forced his penis into [J.V.'s] mouth," the State asked leading questions, over defense counsel's objections. Although the district court initially sustained defense counsel's objection to the State's leading question, it mistakenly allowed a second leading question, ruling that the testimony was "already in." The district court erred in allowing the State to introduce evidence through leading questions, in violation of Idaho Rule of Evidence ("I.R.E.") 611.

B. The District Court Erred In Overruling Defense Counsel's Objection To The State's Leading Question On Whether A Forcible Rape Occurred

The State was unable to offer any admissible testimony from the complaining witness, J.V. Instead, the State offered the testimony of Ann Wardle, a FACES nurse that examined J.V.

two days after the events alleged in the State's Information. The central issue in the case was whether Aaron forcibly inserted his penis into J.V.'s mouth. (R., pp.84-86.) Aaron was convicted of rape, but acquitted on the charge of sexual penetration by use of a foreign object. (R., pp.182-183.) At trial, the following colloquy occurred:

> State: Did she describe - - you indicated she said he was sitting on her chest?
>
> Wardle: Yes.
>
> State: And where did she describe his knees being?
>
> Wardle: That they pinned her arms down so that she couldn't bring them up or forward.
>
> State: And did she indicate that he was in this position before he forced his penis into her mouth?
>
> Defense: I'm going to object to leading.
>
> District court: Sustained

…

> State: When did she describe that the defendant straddled her and used his knees to pin her arms down?
>
> Wardle: So she told me that when he pulled her head towards his penis and she said no, she aimed her head back, hit her head. And then she stopped, she said participating, and so he got on top of her at that point and pinned her arms down.
>
> State: And then he forced his penis into her mouth?
>
> Defense: Objection, your Honor; leading.
>
> Court: It seems to me that that testimony is already in, it was a question of timing that was being clarified. So, I'll overrule the objection.

(Tr., p.269, L.21 – p.272, L.1.)

The district court erred in overruling defense counsel's leading objection and the State was permitted to introduce evidence through its own testimony, rather than the witness on the stand, Ms. Wardle.

1. The District Court Erred In Overruling Defense Counsel's Objection To The State's Attempt To Elicit Testimony In Violation Of I.R.E. 611

Idaho Rule of Evidence 611 provides, in relevant portion,

> (a) The court should exercise control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue influence.
>
> . . .
>
> (c) Leading questions should not be used on direct examination except as necessary to develop a witness's testimony. Ordinarily, the court should allow leading questions:
>
> (1) on cross-examination; and
>
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

I.R.E. 611 (2022).

Aaron asserted that the district court abused its discretion when it effectively allowed the prosecution to offer testimony through leading questions on a central issue in the case, whether Aaron forcible penetrated J.V.'s mouth with his penis. The district court's decision to permit testimony under I.R.E. 611 is reviewed under an abuse of discretion. *State v. Koch*, 157 Idaho 89, 101-102, 334 P.3d 280, 292-293 (2014). Here, the district court ruled that the prosecutor's leading question, "[a]nd then he forced his penis into her mouth[]" was permissible because the it

concluded the evidence was already before the jury. The district court erred. Contrary to the district court's finding, at this point in the trial, the State had failed to offer any evidence that Aaron's penis had entered the oral opening of J.V.'s mouth, much less that it was done forcibly. (*See* Tr., p.267, L.16 – p.272, L.1.) Rather, Ms. Wardle had testified that Aaron "grabbed the back of her head with a handful of hair and pulled her head down towards his penis. And when she attempted to pull her head back, she hit her head on the wall or headboard." (Tr., p.269, Ls.15-18.) Unable to elicit the testimony it desired, the State turned to leading questions, effectively offering its own testimony in lieu of Ms. Wardle's. The district court should control the mode of examining witnesses to "make those procedures effective for determining the truth." I.R.E. 611(a)(1). The State was not cross-examining Ms. Wardle, she was not a hostile witness, and was not a witness identified with an adverse party. I.R.E. 611(c). Accordingly, the district court erred in overruling defense counsel's objection to this crucial testimony offered by the prosecuting attorney.

2. The District Court's Error In Overruling Defense Counsel's Objection To The State's Leading Question Was Not Harmless Beyond A Reasonable Doubt

The harmless error doctrine has been defined by this Court: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Where alleged error is raised, allowing the district court to rule upon the issue, and the appellant shows that a violation occurred, the State bears the burden of proving the error

was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. *See State v. Perry*, 150 Idaho at 227, 245 P.3d at 973. In this case, the State will be unable to prove that the admission of the prior testimony was harmless error.

Aaron was charged with rape and sexual penetration by use of a foreign object. (R., pp.84-86.) Aaron was acquitted of the sexual penetration charge but convicted of rape. (R., pp.182-183.) The rape charged alleged that Aaron "did penetrate the oral opening of J.V., with a penis. . . ." (R., pp.84-86.) As is discussed herein, the only evidence offered by the State of the alleged offense came through the testimony of Ms. Wardle, and the only evidence of any penetration offered by the State came when the prosecutor improperly elicited testimony through leading questions. As such, district court's error in overruling defense counsel's objection to the prosecutor's leading question cannot be harmless beyond a reasonable doubt.

III.

The State Failed To Offer Admissible Evidence To Prove The Crime Of Rape Beyond A Reasonable Doubt

A. Introduction

The complaining witness, J.V., briefly testified, but abruptly left the courtroom in the middle of the direct examination. The district court ordered that the jury not consider any testimony offered by J.V. The only evidence of the alleged criminal act came from Ms. Wardle, the FACES nurse. Ms. Wardle's testimony violated Aaron's rights under the Confrontation Clause of the Sixth Amendment and was elicited through leading questions. Accordingly, the

State failed to offer the admissible evidence necessary to support each element of the charged offense.

B. The State Failed To Offer Admissible Evidence To Prove The Crime Of Rape Beyond A Reasonable Doubt

Aaron asserts that there was insufficient evidence to convict him of rape. Specifically, the evidence was insufficient to prove beyond a reasonable doubt that Aaron did commit the act of rape by inserting his penis into J.V.'s mouth without her consent.

An accused's right to demand proof of the State's case beyond a reasonable doubt is of "surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). The right to demand proof beyond all reasonable doubt is a bedrock constitutional principle. *See In re Winship*, 397 U.S. 358 (1970) ("Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it is as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). "Simply stated, the fact that defendant is 'probably' guilty does not equate with guilt beyond a reasonable doubt." *People v. Ehlert*, 811 N.E.2d 620, 631 (Ill. 2004).

In *State v. Crawford*, 130 Idaho 592, 944 P.2d 727 (Ct. App. 1997), it was stated that:

> [a]ppellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction, entered upon a jury verdict, will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt . . . [w]e will not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the

> evidence . . . [m]oreover, we will consider the evidence in the light most favorable to the prosecution.

Id. at 594-595, 944 P.2d at 729-730 (citations omitted).

In *State v. Mitchell*, 130 Idaho 134, 937 P.2d 960 (Ct. App. 1997), it was noted that, "[e]vidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *Id.* at 135, 937 P.2d at 961. "The challenge to the sufficiency of the evidence is not based on a technical or subtle defect. The defense simply says that there was not enough admissible evidence to convict the defendant." *State v. Faught*, 127 Idaho 873, 877, 908 P.2d 566, 570 (Ct. App. 1995).

Here, the only evidence of the alleged criminal conduct was submitted by the State through the testimony of Ms. Wardle, the FACES nurse. The complaining witness briefly testified but was not subject to cross-examination. As a result, the district court ordered that the jury not consider any of her testimony. Even if Ms. Wardle's testimony did not violate the Confrontation Clause of the Sixth Amendment, the State was only able to elicit its intended testimony through leading questions, which the district court initially struck, but mistakenly later allowed. Accordingly, the State failed to offer any admissible evidence to prove Aaron committed the crime of rape beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, Aaron Von Ehlinger respectfully requests that this Court vacate his conviction and remand to the district court as necessary.

DATED this 12th day of July, 2023.

/s/ Eric D. Fredericksen
ERIC D. FREDERICKSEN
State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2023, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

EDF/eas