

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	Superior Court
Plaintiff,)	No. 14-1-04008-5
v.)	
RONALD DELESTER BURKE,)	Court of Appeals
Defendant.)	No. 50053-1-II
)	TRIAL VOLUME VI

VERBATIM TRANSCRIPT OF PROCEEDINGS
Trial
November 3, 2016

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MOTION

1 Go ahead and be seated. Should we turn off the
2 projector?

3 MR. NELSON: Yes.

4 THE COURT: Counsels, I believe we have a motion
5 to take up at this time, an offer of proof. And, State, is
6 your witness available?

7 MR. NELSON: Yes, she is.

8 MR. SEPE: Your Honor, for purposes of this
9 motion, I'd like to have some of the medical things marked
10 for exhibit -- brain's a little slow here.

11 THE COURT: Okay.

12 MR. SEPE: Actually, there's one I need to make
13 another copy of it, if that's okay.

14 THE COURT: Counsels, this is a motion in regards
15 to which one of the motions, motions in limine or trial
16 brief --

17 MR. SEPE: This is the hearsay confrontation issue
18 regarding the medical exception to the hearsay rule.

19 THE COURT: And it's identified as where on
20 your --

21 MR. SEPE: It's the State's motion in limine, one
22 of them.

23 THE COURT: State.

24 MR. NELSON: I can find that, Your Honor.

25 That would be No. 6, Your Honor.

MOTION

1 THE COURT: This is in your trial -- in your
2 motions in limine?

3 MR. NELSON: Correct.

4 THE COURT: Counsel, whenever you're ready.

5 MR. NELSON: Thank you, Your Honor. I have some
6 case law that I can pass forward. Most of the cases are
7 cited in Defense brief, but I wanted to make sure you got a
8 copy of them.

9 THE COURT: Let me know when you're ready,
10 Counsel.

11 MR. NELSON: Thank you, Your Honor.

12 Mr. Sepe, need some time?

13 MR. SEPE: One case I'm not familiar with that I'm
14 reading now.

15 (Pause)

16 Okay. Your Honor, I've read all the cases that
17 the State -- all but one I had not read.

18 THE COURT: Are you ready?

19 MR. SEPE: Yes.

20 THE COURT: Counsel for the State.

21 MR. NELSON: Thank you, Your Honor. The State
22 would call Kay Frey.

23 THE COURT: Good morning. Come forward. Raise
24 your right hand. Do you swear or affirm that the testimony
25 you're about to give will be the truth, the whole truth, and

KAY FREY, Direct by Mr. Nelson

1 nothing but the truth?

2 THE WITNESS: Yes.

3 THE COURT: Go ahead and be seated. You can move
4 the seat backward and forward if needed. The mic is also
5 adjustable. Speak slowly and clearly for the record.

6 And, Counsel, you may begin wherever you're ready.

7 MR. NELSON: Thank you, Your Honor.

8 KAY FREY,

9 having been duly sworn by the Court, did testify as follows:

10 DIRECT EXAMINATION

11 BY MR. NELSON:

12 Q Good morning. Can you please give the Court your name
13 and spell your first and last names for the record?

14 A My name is Kay Frey. First name K-A-Y, last name,
15 F-R-E-Y.

16 Q And where do you -- are you currently employed?

17 A No, I'm retired.

18 Q When did you retire?

19 A 2012.

20 Q Where did you retire from?

21 A Tacoma General.

22 Q What were -- what was your job at Tacoma General?

23 A I was a sexual assault nurse examiner for four years.

24 Q For four years?

25 A Four years there, yes.

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KAY FREY, Direct by Mr. Nelson

1 Q Where did you work prior to working at Tacoma General?

2 A Missoula, Montana.

3 Q What did you do in Missoula, Montana?

4 A A number of things. I was a faculty person for
5 pediatric students, including nurse practitioner
6 students. I did some clinical work, independent of
7 that, in sexual assault, as well, for six years.

8 Q What were your duties as a sexual assault nurse at
9 Tacoma General?

10 A We would get calls from -- I believe it was ten
11 emergency rooms at that time, for patients who had
12 presented there with a history of sexual assault, and
13 we went out to whichever hospital called and saw
14 patients and guided their emergency providers
15 through -- and did the forensic evaluations and medical
16 care for them.

17 Q I kind of skipped over it, and for the purpose of this
18 hearing, just a little bit, can you -- do you have an
19 educational background in this area?

20 A In sexual assault?

21 Q Well, nursing, actually.

22 A My bachelor's degree was from Oregon Health Science
23 University in 1973. My master's degree, including my
24 nurse practitioner education, was from the University
25 of Washington in 1976, and subsequent to that, lots of

KAY FREY, Direct by Mr. Nelson

1 training involved in my background is largely in
2 pediatrics, but it didn't stay that way.

3 Q Okay. Fair enough.

4 So I'm going to direct your attention to July 3rd,
5 2009. Do you recall if you were working that day?

6 A I was.

7 Q And what shifts were you working back then?

8 A I would have started at 7 in the morning and finished,
9 officially, at 7 at night, but sometimes longer. On
10 that day, that would have been the case.

11 Q On that date, did you have a patient by the name of
12 Kathy Elaine Hunt?

13 A I did.

14 Q And do you remember when you -- when you saw her that
15 day?

16 A She came in, in the middle of the night. I appeared at
17 7, in that particular emergency room, to see another
18 patient. I went down to meet Ms. Hunt and tell her I
19 would be a long time before things got started for her
20 because the case before her was really complicated. So
21 I think I met her in earnest and started her case
22 around 4 p.m.

23 Q Walking us through the exam you did, rather than walk
24 through the whole exam, what's the purpose of the exam
25 that you performed on Ms. Hunt?

KAY FREY, Direct by Mr. Nelson

1 A The purposes are to do the forensic piece:
2 Photographing, taking a history, doing any DNA
3 retrieval that could be done. Another purpose is to
4 provide them with the medical care they need,
5 subsequent to their assault, and provide support and
6 connections for them via advocates and social workers
7 and that kind of thing. So it's to basically manage
8 their case.

9 Q When you are doing that job, are you -- is it important
10 for you to take a history from the patient as to what
11 occurred?

12 A Yes. That's probably the most important thing.

13 Q Can you explain why that's most important?

14 A Well, this is just medical training in general.
15 History guides everything, and that's true for sexual
16 assault patients as well. So what they tell you, what
17 they can tell you, what they aren't able to tell you,
18 directs you further to what they might need, medically,
19 to figure it out.

20 Q And so when you speak to them, do you change what
21 examination you do based on what they tell you?

22 A Well, there are protocols, and you go through all of
23 that. So, not necessarily, but at least you can attend
24 to more details about their case. Sometimes it governs
25 medications, for example. Sometimes it governs where

KAY FREY, Direct by Mr. Nelson

1 you might look for injuries more closely; that kind of
2 thing.

3 Q And that's important for you to know so that you know
4 where to examine more closely. Is that fair to say?

5 A The history?

6 Q Yes.

7 A Absolutely. That's the tenet for healthcare in
8 general.

9 Q Because you go through and speak to the patients, such
10 as Ms. Hunt, are you asking about pain and about, um,
11 what she's currently experiencing?

12 A Yes.

13 Q And what's the reason for doing that?

14 A Asking about pain or --

15 Q Yes.

16 A -- how they're feeling?

17 To try to see if they can consent to an exam of
18 their own volition; to try to handle any acute concerns
19 they have before you dive into anything else; to see
20 what help they might need going forward.

21 Q What kind of treatment do you -- as a routine part of
22 an examination, once you've done the physical
23 examination, what kinds of things do you treat in terms
24 of a victim of a sexual assault?

25 A It depends on if and what injuries they have. So

KAY FREY, Direct by Mr. Nelson

1 sometimes there's treatment related to that. One
2 example might be if strangulation was involved, there's
3 a lot of details that need to be addressed right off
4 the bat with that. And then standard medications,
5 those are protocol-driven. Um, variations can occur
6 with that, depending on what the patient has had in the
7 past or what you find on the exam.

8 Q Fair to say that sometimes when you are -- well, I'll
9 ask about this case. When you examined Ms. Hunt, did
10 you find anything, in your examination of her, that you
11 needed some additional medical consulting about?

12 A I did.

13 Q And what was that?

14 A Specifically, a cervical laceration.

15 Q What was significant about a cervical laceration?

16 A Cervical lacerations are unusual, so that's for
17 starters. And they tend to bleed, which hers was, and
18 so further intervention by an OB-GYN doctor, for
19 example, was my question at the time.

20 Q Was that an injury that you were the first in the
21 hospital to find --

22 A Yes.

23 Q -- that day?

24 A Yes.

25 Q And you were capacity at Tacoma General. Who pays your

KAY FREY, Direct by Mr. Nelson

1 salary?

2 A MultiCare.

3 Q I'm sorry?

4 A MultiCare.

5 Q Is MultiCare a corporation?

6 A I believe so -- well, I believe they're nonprofit, but
7 I'm not sure, in answer to your question.

8 Q In this case, working with Ms. Hunt, did you take
9 direction from anybody in law enforcement on what steps
10 you should take as part of your job?

11 A No. She had been visited by law enforcement because
12 she wanted to make a report. To the best of my recall,
13 I don't remember meeting law enforcement, in any way,
14 on her case. The patients are often presented with a
15 card that has a case number, and I probably recorded
16 that and the officer who had taken the report.

17 Q And so, if you don't remember having conversations with
18 law enforcement, is it fair to say law enforcement
19 wasn't present all during your examination?

20 A No, they weren't.

21 Q How long did you spend in your examination of Ms. Hunt
22 that day?

23 A Approximately two-and-a-half to three hours.

24 Q When you talked about getting history and how important
25 getting the history is, did you get the history in this

KAY FREY, Direct by Mr. Nelson

1 case directly from the patient?

2 A Yes.

3 Q And can you tell the Court how you requested that
4 history from her, what words you used or how you listed
5 that information?

6 A I usually just start out with an open question like,
7 what happened last evening, or what happened, I believe
8 I asked her, in Wrights Park.

9 Q What happened in Wrights Park?

10 A Yes. And then I write down everything they say
11 verbatim.

12 Q And so she's not actually writing a statement in terms
13 of history. You're recording it, but are you recording
14 that statement word for word, or are you putting your
15 own editorial comments in there?

16 A That's a good question. In her case, it was word for
17 word. Sometimes if patients are particularly impaired
18 or not conscious, um, you know, you may, for the
19 history part, paraphrase some things that other people
20 have told you and cite that specifically, but it is a
21 disadvantage. And when they can talk and tell their
22 story, then you write it down word for word.

23 Q When you were -- you mentioned some folks are impaired.
24 When you were speaking with her at 4 p.m. for the
25 examination, was she impaired by anything?

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KAY FREY, Direct by Mr. Nelson

1 A No.

2 Q When you spoke to her earlier that morning, did you
3 notice any impairment from her at that time?

4 A Um, no. She was tired. Um, that had led to a scan. I
5 think they had trouble waking her up, was the report I
6 got from emergency staff. But for me, personally, no.

7 Q During the examination that you did of her, did you
8 tailor the areas where you did closer examination,
9 maybe took photographs depending on what she told you?

10 A There is a protocol. There's a standard way to -- you
11 do the general exam first. You look at the body, see
12 if you find anything. If you do, you take pictures,
13 first. So there's a standard way to do that. Um,
14 genital exams come last, and in her case, there was
15 additional photography and commentary based on the
16 cervical laceration I found. So that was unexpected.

17 Q To find those internal injuries --

18 A Yes.

19 Q -- as you did?

20 A Yes.

21 Q Because those weren't visible during an --

22 A Correct.

23 Q -- external exam?

24 A Correct.

25 Q You mentioned the area of the cervix. Did you do any

KAY FREY, Direct by Mr. Nelson

1 internal photographs of her anal region?

2 A Those are done externally. As far as -- you can do
3 that with a colposcope, which is the instrument I used,
4 the magnifying camera I used for the internal exam of
5 her vaginal area. I don't think I did that on her.
6 There was no history, and just on a visual exam, you
7 know, on the outside, I didn't see any injuries with
8 that. So, no, we didn't go any further. Sometimes
9 people need scopes, actually, to see inside, if there's
10 a history of anal penetration, for example.

11 Q You mentioned history. If Ms. Hunt had told you
12 something happened in that region, would you have done
13 further investigation, other than just looking
14 externally?

15 A I would. Sometimes patients don't know, actually, what
16 everything -- everything that happened to them. So it
17 deserves a look, and you do look on everyone. But
18 additional photographs or procedures were not
19 warranted, in my opinion, for that.

20 Q Because of what she told you?

21 A Correct. And what I saw.

22 Q And what you observed as well?

23 A Um-hmm.

24 MR. NELSON: I believe that's all the questions I
25 have for purposes of this hearing. Mr. Sepe may have some

KAY FREY, Cross by Mr. Sepe

1 questions for you.

2 THE COURT: Thank you. Counsel Sepe.

3

4 CROSS-EXAMINATION

5 BY MR. SEPE:

6 Q Ma'am, I'm going to --

7 MR. SEPE: May I approach, Your Honor?

8 THE COURT: Of course.

9 BY MR. SEPE:

10 Q I'm going to show you exhibits marked for purposes of
11 this hearing only, 19A through J. If you could go
12 through those for me and let me know when you finish.

13 A This would be a different order?

14 Q Yeah.

15 A Okay.

16 Q They're just, kind of, pages that I think are relevant
17 to my questions. I know it's not the entire -- it
18 might be the entire report, but I've got them a little
19 out of order. I know -- I just want to know if you
20 recognize them though.

21 A May I put them in a different order?

22 Q Yeah. Put them in any order that you feel is -- makes
23 sense to you.

24 A Okay. Thank you.

25 Appears to be...(pause.)

KAY FREY, Cross by Mr. Sepe

1 Q Okay. Could you tell me what these pages are? Not
2 individually, but what do they represent as a whole?

3 A This is the -- separate from other medical records --
4 sexual assault nursing evaluation. And so it's
5 entirely about her complaint of sexual assault.

6 Q Okay. Now, you said separate from other medical
7 records, meaning that she was in the ER for about 12
8 hours or so before she got to see you. Is that right?

9 A Correct.

10 Q And --

11 MR. SEPE: May I approach, Your Honor?

12 THE COURT: And both counsels, you're free to move
13 about the courtroom.

14 MR. SEPE: Just old-fashioned. I always ask
15 permission.

16 Q I want to start with 19B, if that's okay.

17 MR. SEPE: It's this one.

18 MR. NELSON: Okay.

19 BY MR. SEPE:

20 Q And could you tell the Court what that document is?

21 A This is the consent from the patient to proceed with a
22 formal evaluation and exam.

23 Q And I want to walk through this step by step. Okay?

24 MR. SEPE: Your Honor, I asked Mr. Nelson if I
25 could give the Court just a blank copy. We'll admit that

KAY FREY, Cross by Mr. Sepe

1 copy she has later so that the Court can see -- follow along
2 with me.

3 THE COURT: And Counsel Nelson, no objection?

4 MR. NELSON: No objection, Your Honor.

5 THE COURT: Thank you.

6 BY MR. SEPE:

7 Q Now, what is this document?

8 A This is the formal consent for care that the patient
9 agrees to before you --

10 Q Okay. And it's a consent form for a forensic nurse
11 examiner to do an examination. Is that right?

12 A That's correct.

13 Q Okay. And you're a forensic nurse examiner.

14 A Correct.

15 Q And the first thing there it tells her -- and those are
16 her initials, I assume?

17 A Um-hmm.

18 Q -- that under medical care, a medical screening
19 examination and care must be provided by an emergency
20 department or primary care provider prior to the
21 forensic evaluation. A forensic evaluation does not
22 include general medical care.

23 Now, this seems to say two things. One, that she
24 would have had to have been seen either by a personal
25 physician or by the ER before they can see you. Is

KAY FREY, Cross by Mr. Sepe

1 that right?

2 A Correct. They are screened medically by the emergency
3 room provider, and once they're deemed capable of going
4 forward, then we do our exam.

5 Q Okay. I'm going to approach here and show you 19A.

6 MR. SEPE: Again, Mr. Nelson's agreed to let me
7 show the Court a copy so that you can follow what I'm asking
8 her here.

9 THE COURT: And, Counsel Nelson, that's correct?

10 MR. NELSON: That's correct, Your Honor.

11 THE COURT: All right.

12 BY MR. SEPE:

13 Q And what is 19A?

14 A 19A is just an initial summary of what's taken place
15 already in the ER. This is where the police
16 documentation case number and such would go, and then
17 this is kind of used at the end for planning discharge,
18 things that they would need when they were finished
19 with me.

20 Q And you fill this out in your handwriting?

21 A Yes.

22 Q So it tells us several things; that your evaluation
23 started at 1615 hours and ended at 1830 hours?

24 A I don't have the --

25 Q Oh, on this one here.

KAY FREY, Cross by Mr. Sepe

1 A The history page where her statement is would have the
2 actual time. So the consent would have preceded that
3 by just a few minutes.

4 Q Okay. But what it says on that document -- this
5 document here: Evaluation start time 1615.

6 What does that mean?

7 A That means 4:15 in the afternoon.

8 Q Okay. But does that mean that's when you started
9 your --

10 A Yes.

11 Q Okay. And then the discharge time was 1830.

12 A Correct.

13 Q Is that when you would have completed your --

14 A Correct.

15 Q Okay. So a little bit more than two hours she was with
16 you, about two hours and 15 minutes?

17 A Um-hmm.

18 Q And prior to that, it mentions here that she was in the
19 ER being treated by Dr. Marshall.

20 A Yes.

21 Q And was it Carl Card (phonetic), RN?

22 A Carol.

23 Q Carol, RN. And it looks like that was from 1:24 in the
24 morning to 1600, which is 4 in the afternoon. So she
25 was there for --

KAY FREY, Cross by Mr. Sepe

1 A Correct.

2 Q -- the better part of, what, 15 hours, I guess?

3 A She was.

4 Q Okay. In the ER. And they did tests that you know of,
5 too. They did a CT scan, some blood works, did a bunch
6 of things. Is that right?

7 A Correct.

8 Q Did you read that?

9 A I did.

10 Q Okay. And -- so let's get back to this consent form
11 here. And the second part of that sentence there, a
12 forensic evaluation does not include general medical
13 care. That means that whatever medical care she needed
14 or -- was done by the ER people. Right?

15 A To a point. Um, medications related to her sexual
16 assault were on protocol, as well, and so those were
17 delivered and decided by me.

18 Q Okay. So you gave her some medications?

19 A I did.

20 Q But this statement here, forensic evaluation does not
21 include general medical care, is that standard for this
22 type of form? Is this the standard form that you used?

23 A This was, I think, exclusively the form we used, and it
24 was developed -- my understanding is that was developed
25 by the legal department.

KAY FREY, Cross by Mr. Sepe

1 Q Okay. And she initialed that?

2 A She did.

3 Q The second part of it that talks about what the
4 forensic evaluation is, and it says that it's available
5 to her at public expense, and there's a statute there.
6 Are these exams funded by the government, by state
7 funding or --

8 A It's supported through crime victims associations.

9 Q Okay.

10 A And Washington state has one. So I believe it's a
11 pass-through to the state's fund, the federal
12 government.

13 Q And then it says evidence such as swabs, blood, hair,
14 nail samples may be collected, and then it talks about
15 photographs --

16 A Um-hmm.

17 Q -- that may be taken and used for legal or educational
18 purposes, and lab studies, as well, and forensic
19 analysis, and a couple other things here. It says that
20 in assault cases that have been reported to law
21 enforcement, the forensic nurse examiner may speak to
22 the investigating officer, his representative. That
23 means if you wanted to speak to a police officer you
24 could. She's allowing you to do that. Is that fair to
25 say what that statement means?

KAY FREY, Cross by Mr. Sepe

1 A Yes. Yes.

2 Q Okay. And then it talks about the detailed medical
3 records, photographs, lab results are kept confidential
4 and may only be disclosed by law. And in this case,
5 you actually released a bunch of evidence to law
6 enforcement in this case. Right?

7 A I did not. I'd need to see the evidence sheet.

8 Q Let me find it. I think it's here somewhere. 19, 19H.

9 (Exhibit handed to the witness)

10 A So your question again, please?

11 Q Well, you connected a bunch of evidence -- let's start
12 there -- and that included things like swabs --

13 A Yes.

14 Q -- and samples, photographs --

15 A Yes.

16 Q -- obviously, this report, her statements?

17 A Um-hmm.

18 Q Um, and you turned over evidence -- or evidence was
19 turned over to, looks likes, the forensic fridge in
20 some of these cases?

21 A Yes.

22 Q Now, the purpose of that is to make that evidence
23 available for law enforcement if they need it. Is that
24 fair to say?

25 A Yes. So on a reported case, I watch every swab I take

KAY FREY, Cross by Mr. Sepe

1 all the time, the whole time I'm with the patient.
2 The -- I package it up in a certain way, a standard
3 way, and then it goes into a box, and the box is sealed
4 and signed by me, and it goes into the refrigerator,
5 which is also locked. It's in the department itself.

6 Q Okay.

7 A Then the police pick it up sometime later, usually. So
8 someone else would have taken it; one of my colleagues
9 would have taken it out of the forensic fridge and
10 passed it off to the police officer who signed.

11 Q Okay. And on the next section it talks about the
12 evidence and where it's kept, and she signed that as
13 well, and you signed it as well. And in your, um --
14 and you're taking down things that she's saying; you're
15 asking her a bunch of questions?

16 A Those are in the boxes?

17 Q Yeah, let me show you here. It's 19C and D.

18 A So these are more targeted questions about specifics of
19 the assault itself.

20 Q Okay. Now, you also, I guess, took a -- it's called a
21 forensic evaluation patient narrative, 19E. Ask if you
22 recognize that.

23 A Yes. So after the consent is obtained, this would be
24 the very next thing to obtain. This is the history
25 we've been speaking about.

KAY FREY, Cross by Mr. Sepe

1 Q Okay. Is that done at the beginning, in the middle?

2 A At the very beginning, after their consent, then this.

3 Q 19I is the -- looks like the final discharge. Show you
4 that as well. Do you recognize that?

5 A Yes.

6 Q And that's something that you filled out yourself.

7 A I think I filled it out twice because, as it says on
8 the top, she took both copies, originally, and so I did
9 it again.

10 Q I see. Okay.

11 A But this is my writing, yes.

12 Q And it talks about, the treatment that you received
13 during your care with MultiCare forensic nurse examiner
14 services included a forensic evaluation by Kay --
15 meaning you?

16 A Correct.

17 Q Okay.

18 A Patient should know who --

19 Q Second part of that says, collection of evidence for
20 investigative purposes. If your assault was reported
21 to the police, your evidence will be transferred
22 directly to Tacoma Police Department. Is that correct?

23 A Correct.

24 Q Did she sign this as well?

25 A She did not sign my copy.

KAY FREY, Cross by Mr. Sepe

1 Q Okay.

2 A She may have signed the two copies she took with her,
3 but --

4 Q Okay. Is it common practice for the patient to sign
5 it?

6 A Yes.

7 Q Because there's a place for a patient to sign it.

8 A It is.

9 Q Okay.

10 MR. SEPE: Well, thank you, ma'am. I don't have
11 any further questions.

12 Your Honor, I would ask that the exhibits that she
13 reviewed be admitted for the limited purpose of this hearing
14 and to make the record in the event one needs to look back
15 upon it.

16 THE COURT: And that would be Exhibits 19A through
17 J, or did you want, specifically, the ones --

18 MR. SEPE: Yeah. I didn't use them all. I
19 used --

20 THE COURT: Exhibit 19A.

21 MR. SEPE: 19A, 19B.

22 THE COURT: C and D.

23 MR. SEPE: C and D.

24 THE COURT: E, H and I.

25 MR. SEPE: H and I.

KAY FREY, Redirect by Mr. Nelson

1 THE COURT: Counsel for the State.

2 MR. NELSON: Your Honor, I'm a little concerned
3 about only introducing some of these. I guess I prefer to
4 have the whole --

5 MR. SEPE: That's fine.

6 MR. NELSON: -- packet marked as an exhibit. She
7 looked at it all while she was testifying. To have a
8 complete record, I would have the whole thing --

9 MR. SEPE: I would agree, Your Honor.

10 THE COURT: And I would agree. So Exhibit 19A
11 through J will be admitted for the purposes of this hearing.

12 (Plaintiff's Exhibit No. 19A-J admitted)

13 THE WITNESS: Would that include the genital?

14 BY MR. SEPE:

15 Q What's that, ma'am?

16 A Would that include the genital figure stand?

17 Q I think that's all in there, or if they're not, we can
18 mark that one. Is there one with a genital -- yeah,
19 it's there.

20 THE COURT: State, redirect?

21 REDIRECT EXAMINATION

22 BY MR. NELSON:

23 Q Just a few questions, Ms. Frey.

24 You indicated -- you were asked about the term
25 "general medical care" that was on the consent form.

KAY FREY, Redirect by Mr. Nelson

1 Do you recall that language on there?

2 You have to answer "yes" or "no" for the -- I can
3 show you the document if that would help.

4 A This is the consent?

5 Q Yes. On the consent form itself.

6 Showing you what's been marked as 19B, towards the
7 top of that document. And it indicates "medical care,"
8 with her initials by it, and one of the last sentences
9 in that paragraph reads: A forensic evaluation does
10 not include general medical care.

11 Can you interpret what that means for us?

12 A Let me clarify that. So the medical care, um, in
13 general, is provided by the emergency department, and
14 once they're cleared with their general medical care
15 there -- so, things like testing and, you know, a full
16 evaluation by the emergency room physician and any
17 testing that might be needed, that's medical care done
18 by the emergency department. Once they're cleared from
19 that, then the forensic piece starts.

20 So even though medications are given by me at the
21 end, based on protocols and such, um, the overall
22 medical responsibility is the emergency room provider.
23 I just do the --

24 Q But you also provide medical care, is that correct,
25 just not general medical care?

KAY FREY, Redirect by Mr. Nelson

1 A No, it's specific to their sexual assault. I hope that
2 helps.

3 Q Well, let me ask further clarifying question then. So
4 you do give medical care regarding their sexual
5 assault.

6 A Based on protocols, yes.

7 Q You're not going to help them with -- you're not going
8 to take the blood pressure and some of those things
9 that they do for the initial evaluation of someone's
10 medical health, but once they've identified as needing
11 your services because of a sexual assault, you do a
12 more thorough medical examination for that purpose. Is
13 that correct? For sexual assault purpose?

14 A Correct. Now, you know, we might take blood pressures
15 here and there if they're having trouble --

16 Q Right.

17 A -- in some way, um -- and, certainly, patients
18 sometimes need to go back to the emergency room because
19 other things show up that weren't expected, um, and
20 then they're readmitted for scans or whatever, but
21 usually, once they're medically cleared from their
22 general medical exam and emergency department, they
23 come to us and we finish based on --

24 Q But the medical part is not over just because they're
25 not in the hospital section there anymore, they're in

KAY FREY, Redirect by Mr. Nelson

1 your area, you are still performing medical services.

2 Is that fair?

3 A Correct. In her case, there was some dialogue that
4 needed to happen about the cervical injury, for
5 example, and so we were back and forth with the
6 emergency physician about that, but she did not get
7 readmitted to the ER.

8 Q Where is your unit located, your sexual assault --

9 A At that time, the old emergency department was kind of
10 in the middle of Tacoma General, and then my department
11 was in the west wing of Tacoma General, as well, and
12 the new emergency room, for example, is much further
13 afield from where my department was.

14 Q So your department didn't move, but the emergency
15 department did.

16 A Actually, my department did move.

17 Q Oh.

18 A But it ended up being further away.

19 Q But still in the hospital itself?

20 A Correct. Yes.

21 Q You were asked about some targeted questions, and there
22 are these pages that -- the boxes and so forth. When
23 you go through these -- and I'll hand you what we've
24 marked as Exhibits 19C and 19D. Now, you mention that
25 those were check boxes. When you're going through and

KAY FREY, Redirect by Mr. Nelson

1 checking the appropriate boxes, are you checking boxes
2 based on what the patient is telling you?

3 A Yes. You ask them specifics about their assault and
4 what they remember and what they don't. There are four
5 columns. The first is "yes." The second is "no." The
6 third is "attempted unsuccessfully," and the last is "I
7 don't know."

8 Q And is the information that's provided to you there,
9 does that help you in your examination of them?

10 A It does because the reason why quotes are next to the
11 "yes" responses are because they are "yes" responses.
12 And in her case, it would guide me in a direction to
13 look for evidence based on what she said happened.

14 Q And then looking for evidence, are you also looking for
15 injuries as well?

16 A Correct.

17 MR. NELSON: Thank you. That's all the questions
18 I have.

19 THE COURT: Counsel Sepe?

20 MR. SEPE: Nothing based on that, Your Honor.

21 THE COURT: All right. I'm going to have you step
22 out for a second. If you can hand the prosecutor the
23 exhibits.

24 (Witness exits courtroom)

25 All right. State, this is your motion in regard

ARGUMENT by Mr. Nelson

1 to admission of statements made for the purposes of medical
2 diagnosis.

3 MR. NELSON: Thank you, Your Honor.

4 The State would ask that the Court admit the
5 statements made, the evaluation that was done by Kay Frey
6 who, at the time, was the sexual assault nurse examiner for
7 Tacoma General Hospital, is now retired. She did a
8 comprehensive medical exam -- well, I guess I'll start with
9 the -- we're asking these be admitted as 803 (a)(4)
10 exceptions to the hearsay rule, the statements for medical
11 diagnosis or treatment. And we -- the rule goes on to read
12 that statements that are made for purposes of medical
13 diagnosis or treatment, and describing medical history, or
14 past or present symptoms, pain or sensations, are the
15 inception or general character of the cause, or external
16 source thereof, in as far as reasonably pertinent to
17 diagnosis or treatment.

18 As the witness testified, she was employed by
19 Tacoma General as an RN, does sexual assault nurse exams on
20 patients at the hospital -- and other hospitals -- that have
21 been involved in a sexual assault. She's not employed by
22 the state. She did a comprehensive medical exam, a
23 head-to-toe exam, and a lot of her examination is based on
24 the history that she obtains from the patient, as she
25 described just briefly, the history that she obtained from

ARGUMENT by Mr. Nelson

1 Ms. Hunt in this case.

2 She asks history questions in a very non-direct, a
3 leading way, but an open-ended question: What happened?
4 And her specific question was: Can you tell me what
5 happened in Wright Park? And then in the exhibit that's
6 before you is the alleged victim's response. That, again,
7 is going to help guide that examination as she goes through
8 the other parts her examination. She asks lots of questions
9 regarding the incident itself, and each of those questions
10 are designed to guide the rest of the examination
11 themselves. And as she explained, the examination started
12 externally, and then based on the nature of this incident,
13 there were examinations done on internal using additional
14 equipment, and diagrams were drawn and injuries discovered
15 during that medical examination.

16 One of the injuries was a very unusual injury, as
17 she described it, that she had to then consult with an
18 additional doctor, an OB-GYN, regarding bleeding in the
19 cervix of the victim, and that shows, I guess, without a
20 doubt, that this was a medical examination.

21 And it had dual purpose, as she was collecting
22 forensic evidence as well. Obviously, I didn't spend most
23 of my time talking about that. Defense certainly did, but
24 this was a dual exam. It was an exam that was designed to
25 give a comprehensive medical evaluation of the alleged

ARGUMENT by Mr. Nelson

1 victim, as well as to collect any evidence that would be
2 present.

3 The State provides some cases for Your Honor and
4 Counsel this morning. The *Williams* case is a Division II
5 case from 2007 that talks about the fact that the -- in that
6 case, the alleged victim went to the sexual assault nurse
7 examiner with the primary purpose of just getting evidence.
8 I don't think she had any reason for a medical exam, but was
9 trying to get evidence in that case, and the Court found
10 that that was admissible as a -- under this hearsay
11 exception, despite the fact that that's what the victim
12 alleged her primary purpose was. That's certainly not our
13 situation in this case. There's been no evidence that
14 that's why the alleged victim went there, was just to
15 collect evidence and wasn't concerned about any medical
16 issues that arise out of this situation.

17 We move then -- I would ask if the Court does find
18 that this is a -- does meet the exception to the hearsay
19 rule under 803 (a)(4), then we, again, have to address the
20 confrontation issues. And there's several cases that
21 address this issue. I provided those to the Court. I know
22 Counsel mentioned most of these cases in his brief that he
23 provided earlier. I would say that the *Moses* and *Sandoval*
24 cases stand for the proposition that witness statements made
25 to a medical doctor are not testimonial when this three-part

ARGUMENT by Mr. Sepe

1 test is made and -- whether they were made for diagnosis and
2 treatment purposes, where there's no indication of the
3 witness expects the statement to be used at trial, and where
4 the doctor's not employed by or working with the state.

5 Um, certainly, here we don't have any of those --
6 all those factors are met in the State's favor, and I would
7 further point out that, um, the *Cain* case, the -- *O'Cain*
8 case is actually a Division I case from 2012 that indicates
9 that the confrontation clause did not preclude the
10 admissions of statements made for purpose of medical
11 diagnosis of treatments, which is what -- the situation we
12 have here. But even if you follow the three-part test, the
13 State has met that -- its burden in that matter.

14 The other case that I provided was the *Hurtado*
15 case, and that was one of the cases that didn't follow the
16 *Sandoval* rule. And the reason why the Court did not follow
17 that rule is because they were -- this is a different
18 factual scenario that is not present in our situation and --
19 I lost my place and where I was going to talk about that. I
20 can certainly address that after Counsel argues, if the
21 Court has any questions regarding *the Hurtado* case.

22 Thank you.

23 THE COURT: Thank you.

24 Counsel Sepe.

25 MR. SEPE: Thank you, Your Honor.

ARGUMENT by Mr. Sepe

1 Summation of the facts, again, I think are
2 relevant for the record. On the 3rd of July, 2009, the
3 alleged victim, Ms. Hunt, appears at the Tacoma General
4 Hospital Emergency Room approximately 1:25, 1:24 in the
5 morning, claiming that she was the victim of a sexual
6 assault, but it happened previously, sometime recently, I
7 guess. The police investigated the case. It was some
8 medical procedures done. She was in the hospital from that
9 time, 0124, to 1830 that day, so some 17 hours or so in the
10 hospital, and most of it in the ER, two hours of that with
11 the forensic nurse examiner services.

12 Subsequent to this, the police were not able to
13 find a suspect, and it wasn't until 2014 that they had a DNA
14 match from the rape kit, that match they claim allegedly
15 matches my client, and he was charged.

16 MR. NELSON: Your Honor, if I can just stop the
17 record at this point. I believe it was 2011 that the DNA
18 match was made. They didn't contact him for three years
19 because he was in prison.

20 MR. SEPE: That's correct. He was charged in
21 2014. That's where I mixed it up. And for -- in 2011, in
22 April, the alleged victim passed away from natural causes
23 unrelated to this incident.

24 There are two things -- just like we did
25 yesterday -- the Court needs to determine: Are these

ARGUMENT by Mr. Sepe

1 statements for medical diagnosis and treatment, and if they
2 are, do they violate the right of confrontation?

3 The first part is a little easier to deal with
4 than the second. I could find no case in Washington that
5 deals with a deceased victim like this, in which statements
6 were made to, in this case, a forensic nurse examiner, where
7 the alleged victim actually was informed, specifically, and
8 signed documents saying that the evidence you present here
9 is going to be turned over to the police. It's in the
10 consent form and it's in the discharge form that she's
11 informed of that.

12 The issue of whether or not these are statements
13 for medical diagnosis and treatment, I think, focuses on --
14 and here's where it gets confusing, I think, or one can get
15 confused because we're focusing on the primary purpose of
16 the evaluation, but that's not the test we use for the
17 confrontation clause issue. That's a completely different
18 test -- unless, and only unless, the Court finds that the
19 forensic nurse examiner was basically an agent of the
20 police. In other words, if a police officer was present, or
21 the primary purpose of the exam was to provide evidence for
22 future criminal trial.

23 And like I say, it can get confusing, but that's
24 what we need to focus on first. And if you look at the
25 forms they had this woman sign -- they are in evidence, 19A

ARGUMENT by Mr. Sepe

1 through G or H, maybe J -- they all say that. They tell her
2 that the forensic evaluation doesn't include general medical
3 care. They tell her that you need to be screened at the ER,
4 and she was for the better part of 15 hours. They did a CT
5 scan, they did blood work -- done by a Dr. Marshall -- and
6 then she indicated that we're a separate and distinct part
7 of the hospital and that we deal with forensics.

8 Now, the word "forensic" means to apply scientific
9 and medical standards to the investigation of a crime. And
10 I think that's important in making that distinction here
11 because she is a forensic nurse examiner. All the documents
12 say that this is the forensic nurse examiner service. The
13 documents that she is -- Ms. Hunt signs tell her that
14 collection of evidence for investigative purposes -- if your
15 assault was reported to the police, your evidence will be
16 transferred directly to Tacoma Police Department. She's
17 told. She knows what the purpose of this examination is
18 for. The documents are signed by her. They are initialed
19 by her. They're signed by the forensic nurse examiner as
20 well, stated in no uncertain terms what the primary purpose
21 of this evaluation is for.

22 And based on that, I'm asking that the Court find
23 that this is not done for purposes of medical diagnosis and
24 treatment. That was already done earlier, from 1:00 in the
25 morning to 1615 when she was in the ER.

ARGUMENT by Mr. Sepe

1 Assuming the Court finds that these are purposes
2 of -- statements for the purposes of diagnosis and
3 treatment, you need to deal with the confrontation clause
4 issue because, obviously, the victim is deceased, and the
5 State, I think, was arguing the wrong standard. This is not
6 the primary purpose standard. If the Court finds that this
7 nurse examiner was not, basically, a state agent or
8 government agent and that -- some of these cases they were,
9 actually. One of the cases there was an officer right then
10 and there. I don't think that makes a distinction if you're
11 using the reasonable declarant-centric test or the
12 "reasonable belief" test, as *Crawford* put it.

13 This case is properly analyzed under the
14 reasonable belief formulation that came out of *Crawford*,
15 which is this: That the statements were made under
16 circumstances which would lead an objective witness, in the
17 declarant's position, to reasonably believe that the
18 statements would be used at a later criminal trial --
19 actually, it would be available for use at a later criminal
20 trial. That's the standard that we have to deal with if the
21 Court finds that this nurse examiner is not working in a
22 forensic government capacity and, therefore, we're not
23 dealing with a governmental witness, as we were yesterday
24 with the police officer. Different standard here. We don't
25 deal with whether there's an ongoing emergency. We don't

ARGUMENT by Mr. Sepe

1 deal with the other aspects that we had to deal with
2 yesterday.

3 So let's take a look at this. This is an
4 objective standard, a reasonable person in the declarant's
5 situation. So what did she know? Let's put ourself --
6 basically, you have to put ourself in her shoes. Look at
7 the documents she signed, assuming she read -- she finished
8 them. The first one is a consent for forensic evaluation,
9 which is 19A, I think it is. And it tells her that this
10 evidence is going to be used in a criminal case and it's
11 going to be given to the police and it's going to be
12 collected and used and given to the police. Not for
13 storage, but for investigation of a crime complaint, a
14 criminal investigation. She's told that. So we don't even
15 have to guess here what a reasonable declarant in Ms. Hunt's
16 position would have thought. She's told. In no uncertain
17 terms.

18 I've never had to deal with an issue like this
19 because in every case -- rape case that I ever tried -- and
20 I couldn't find any appellate case close to this -- where
21 the victim was not there to testify. I mean, even the
22 *Williams* case that the State provided was a juvenile, but
23 there wasn't a confrontation issue there because he
24 testified. The only issue in that case was whether or not
25 the statements that he made to the nurse at the hospital,

ARGUMENT by Mr. Sepe

1 the ER, forensic nurse, were -- would be admitted under
2 medical exception. And in that case, the Court found that
3 there was a mixed purpose of forensic and medical. But they
4 never had to deal with the confrontation issue because he
5 testified. So that case is really inapplicable to the
6 confrontation clause issue.

7 The other cases that were given by the State don't
8 deal with forensic agencies where you have statements and
9 forensic consent forms that were signed. These were
10 ordinary ER doctors where there was no evidence that the
11 person was told what the purpose of this evaluation is.
12 Normally, when a person's a victim of a crime -- they're
13 assaulted, for example. They go to an ER, regular ER.
14 They're not dealing with a forensic unit or forensic nurse.
15 It's assumed, under the medical exception, that their
16 statements would be admissible because they would have no
17 reason to believe, necessarily, that their statements would
18 be used in a criminal trial because they weren't told that.

19 Here, Ms. Hunt is told that, and she signed
20 documents that said so. And that's what makes this case
21 different. I think it makes it one of first impression in
22 this state. It kind of answers the question that the
23 court -- Supreme Court, in *Anderson*, refused to answer
24 because the State conceded the issue. So they just hunted,
25 basically. They said, we don't have to go there. We don't

ARGUMENT by Mr. Sepe

1 have to decide whether or not because this was, you know,
2 sort of textbook case. I mean, obviously, the victim wasn't
3 deceased in that case but, nonetheless, there were
4 statements made to a forensic nurse in a forensic setting.
5 The State conceded that those statements were testimonial,
6 in that case, and the Court said, well, we're not going to
7 address that issue, and they didn't.

8 This is the issue that *Anderson* didn't get to
9 address, and to do that I think we have to look at several
10 issues. But the main issue is, what would a reasonable
11 declarant in Ms. Hunt's position have thought? And I gave
12 the Court -- and the Court has the exhibits there. It's
13 pretty obvious what she would have thought. It doesn't
14 matter what the purpose of this evaluation is, whether it's
15 forensic, medical, or a combination thereof, for this
16 particular test of the declarant-centric test. It's an
17 objective test based on a reasonable witness in the
18 declarant's position.

19 And if you look at the discharge, she's also --
20 she didn't sign this one because, apparently, she ran off
21 with the one she signed. But Ms. Frey testified that it's
22 common for them to sign it, and there is a place for
23 patients to sign. So I think we can take for granted,
24 pretty much, that she did sign this, was read this, and it
25 tells her that, you received treatment that consisted of a

ARGUMENT by Mr. Sepe

1 forensic evaluation done by -- it says Kay, the nurse, and
2 then the second part says, collection of evidence for
3 investigative purposes. If your assault was reported to the
4 police, your evidence will be transferred directly to Tacoma
5 Police Department. What more statement does one need than
6 that? They're being told that if you reported it to
7 police -- and she did, and the nurse her testified that she
8 did -- that your evidence will be transferred to the police.

9 So then we take what documents she had to sign,
10 and these documents do not exist in any of the other cases
11 that were provided by the State. That's the distinguishing
12 difference between *O'Cain*, between *Sandoval*, between all the
13 cases that have been presented, *Hurtado*, and why this case
14 is different and unique in a lot of ways.

15 So under these objective standards, Ms. Hunt not
16 only reasonably would have known -- actually, would have
17 known that her statements could be used in a subsequent
18 criminal trial because she's told it in uncertain --
19 unambiguous terms. So any reasonable person in her
20 position, which is a test you have to use, would know that.
21 When we apply that test -- I mean, she authorizes the
22 release of this information to the police for the use and
23 prosecution -- investigation and prosecution of the crime.
24 As the consent form is written, it's written that way for
25 her to authorize that release. The discharge tells her that

ARGUMENT by Mr. Sepe

1 it's going to be released if it was reported to the police.

2 Evidence includes a lot of things. Statements are
3 evidence. I mean, that's uncontroverted from the case law.
4 Everything that was done in those forms, A through H, is
5 evidence. Statements are evidence, the swabs are evidence,
6 the other tests that were done are evidence. We have to
7 realize that confrontation deals only with statements.
8 That's all we're talking about here. We're not talking
9 about the swabs. We're not talking about whatever. We're
10 talking about what statements she made, not what other
11 evidence. It has nothing to do with whether the swabs are
12 admissible or not. It's only her statements because that's
13 what confrontation is all about, from the original
14 interpretation of it, from the constitution, is that you
15 have a right to confront your accusers in Washington, face
16 to face.

17 So it's those statements that we're talking about
18 here. So those statements are evidence, and she's told that
19 this is going to be turned over to the police for
20 investigation, prosecution of a potential crime if they ever
21 caught the suspect that was -- that they believed was
22 responsible for it.

23 So when we approach this case, we can't approach
24 it the way I think counsel for the State was trying to
25 approach it, as what's the primary purpose? The primary

REBUTTAL by Mr. Nelson

1 purpose is only to determine, in this particular case,
2 whether they were statements for medical treatment or
3 diagnosis. The test that we applied for, the right of
4 confrontation, is what a reasonable person, in declarant's
5 position, thinks or would have reason to believe that her
6 statements would be available for use in later criminal
7 trial.

8 The evidence, I think, is overwhelming from these
9 statements that she signed telling her that they're going to
10 be. What else could one conclude as a reasonable person?
11 It's not so much focusing on her, the individual. It's an
12 objective test. So it doesn't matter, per se, that maybe
13 she was under the influence of something, although it was
14 some 16 hours later. I'd like to think she wasn't, in the
15 hospital. It's what a reasonable person in the declarant's
16 position -- any reasonable person reading these forms,
17 signing them, would know overwhelmingly, yeah, these are
18 going to be turned over to the police. And if that's the
19 case, and it is the case, what we have here is testimonial
20 hearsay, and it's a violation of the right of confrontation.
21 It should be excluded.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Counsel.

24 State?

25 MR. NELSON: Thank you, Your Honor.

REBUTTAL by Mr. Nelson

1 I want to start with his -- Counsel's comments
2 about the *Anderson* case and how this is the -- *Anderson*
3 didn't address this issue. Well, *Anderson* is a complete
4 different factual scenario from ours. In *Anderson* the nurse
5 examiner did not speak to the alleged victim directly. The
6 nurse examiner got her information from the law enforcement
7 officer and wanted to use that at trial. That's obviously a
8 completely different scenario than what we have here. So I
9 would ask you not to take any weight in what *Anderson* holds
10 or doesn't hold because I don't believe that case is on
11 point.

12 The comments that Counsel makes about the consent
13 forms -- and I would argue that the actual reality is to the
14 contrary of what he says. What this information talks about
15 on the consent forms is that evidence such as swabs, blood,
16 hair, nail samples, may be collected; lab studies, forensic
17 analysis may be done. And then it talks about how all the
18 physical evidence collected, the sexual assault kit,
19 clothing, and so forth, might be released to law
20 enforcement -- or will be released to law enforcement, but
21 it -- when it references the written documentation in this
22 case, which is the point where she is making statements to
23 the forensic nurse examiner, it says in the last sentence of
24 the forensic evaluation paragraph that the detailed medical
25 records, photographs, lab result, written documentation

REBUTTAL by Mr. Nelson

1 completed today will be kept confidential, secured at
2 MultiCare Health System, and may only be disclosed as
3 allowed by law.

4 That doesn't sound to me like a reasonable person
5 reading this would conclude that statements that she makes
6 to the nurse who's going to then do a head-to-toe
7 examination and look for evidence is immediately going to go
8 off to law enforcement, and that's the purpose of this
9 examination. And that's, again, contrary to what the
10 witness has testified about the purpose of the examination
11 itself.

12 And when you read -- I mean, reading the statement
13 that was admitted, in terms of the initial conversation that
14 Ms. Frey had with the alleged victim, Ms. Frey asked the
15 question: Can you tell me what happened in Wright Park?
16 And the alleged victim's response was, I was sitting there
17 rolling myself a cigarette. I know he covered my mouth
18 because I would have been screaming for help. I was taken
19 to the ground. I don't know if he tried choking me or not.
20 The next thing I knew, I was taken to the ground, my pants
21 were off and stuff, and he was inside me. It was over and
22 done with. I think he told me to keep my mouth shut.
23 That's all I remember. Then I came here. I walked over to
24 the hospital. End of statement.

25 There's nothing in that statement itself that

REBUTTAL by Mr. Nelson

1 would give a reasonable person the thought that this
2 statement isn't really going to be turned over to police.
3 She had already spoken to the police earlier about what
4 happened, and there would be nothing that she would think
5 that this statement itself was going to be part of the
6 evidence. Part of the evidence such as swabs, blood, and
7 photographs and everything; physical evidence that was
8 collected in this case. She had no reason this statement
9 would be part of that evidence.

10 Furthermore, the checked boxes, as has been
11 explained, where questions are asked about different things
12 that happened during the assault, again, are made for the
13 nurse examiner to do a more -- to do a thorough examination,
14 nowhere to look, a "yes" both for forensic evidence, but
15 also for injuries that might need to be treated, such as the
16 injuries to the cervix that was found at the time. And so
17 there's no indication, again, that her responses to these
18 types of questions would be part of some forensic evidence
19 that needed to be disclosed immediately to law enforcement.
20 In fact, what it says is that it was to be kept
21 confidential, secure, and only be disclosed as allowed by
22 law.

23 That's, I think, where the crux of this is, and
24 the State has -- I indicated *Hurtado* case, that there was
25 some differences, and I couldn't recall, during my argument,

COURT'S RULING

1 what it was. After reading through this during Mr. Sepe's
2 arguments, there was a law enforcement officer in the room
3 while the examination was going on and -- which this Court,
4 *Hurtado*, which is at 173 Wn. App. 592. I thought that was
5 distinguishing from the other lines of cases, the *Sandoval*,
6 *Fisher*, *Moses* cases that are cited, and the *O'Cain* case.

7 I stand by the argument I made earlier, and I
8 would ask that the Court admit the statements both as
9 non-hearsay and also as not violative of the confrontation
10 clause, given the circumstances here.

11 THE COURT: Thank you.

12 I believe Defense Counsel is correct in that this
13 does appear to be a case of first impression. I will note
14 that *Anderson* case is not on point. I'd agree with the
15 State. The State has provided the Court with four cases:
16 State v. Sandoval, 137 Wn.App. 532, a 2007 case; State v.
17 Williams, 137 Wn.App. 736, a 2007 case; State v. Hurtado,
18 H-U-R-T-A-D-O, 173 Wn.App. 592, a 2013 case; and State v.
19 O'Cain, 169 Wn.App. 288, 2012 case. I will note none of
20 these cases are exactly on point because, again, this does,
21 in fact, appear to be a case of first impression.

22 What is clear is that we have a medical
23 examination being conducted by a sexual assault nurse
24 examiner, Ms. Frey, who testified that the purpose behind
25 her examination was two-fold: Forensic piece and medical

COURT'S RULING

1 care.

2 In regards to the forensic piece, she indicated
3 there's photograph that's being taken, collection of
4 evidence, things in line with that. And then in regards to
5 the medical care, um, she talks to the individual, and
6 specifically she stated, what they tell you direct you
7 further to what they might need medically. It can govern
8 giving of medication, where to look for injuries more
9 closely to see what they might need going forward.

10 In regards to treatment, she testified it would
11 depend on what injuries were found. If there is additional
12 medical consulting needed, for example, because of a
13 cervical laceration, which was present in this case, further
14 intervention would be needed and a referral would be made to
15 OB-GYN. She testified she didn't take any directions from
16 law enforcement. In fact, did not remember even meeting
17 with law enforcement, and they were not present during her
18 examination.

19 In regards to the statements made by the alleged
20 victim that she is examining, she indicates she tries to
21 take down, word for word, what is being said, and at the
22 time she conducted her evaluation, which appeared to be many
23 hours after the alleged victim was in the emergency room,
24 she did not note any impairment. I believe on
25 cross-examination she indicated the alleged victim was in

COURT'S RULING

1 the emergency room for about 12 hours before she was seen by
2 her, Ms. Frey.

3 Counsels have argued back and forth and elicited
4 information in regards to medical care. Defense Counsel, in
5 Exhibit 19B, draws the Court's attention to a document
6 titled Consent for Forensic Evaluation and Treatment, and
7 argues that because the alleged victim initialed the various
8 parts of this document that appear to be for a forensic
9 evaluation -- and basically states it's for a forensic
10 evaluation -- to be performed by forensic nurse examiner and
11 to include documentation of the assault, collection of
12 evidence, nursing care and treatment limited to the
13 MultiCare Health Systems forensic nurse examiner nursing
14 protocols, Defense Counsel's position is this is what
15 differentiates this case from others; because unlike the
16 other cases, first of all, in this case we have a
17 confrontation issue because the alleged victim is deceased.
18 And that does, in fact, appear to be what distinguishes this
19 case from all of the cases cited by Counsel.

20 I do find that because it is a sexual assault
21 case, a rape, and the purpose of a SANE examination is
22 two-fold -- one is to collect forensic evidence. The other
23 is to provide medical care -- I am finding that the
24 statements made do comport with Evidence Rule 803,
25 statements for medical diagnosis or treatment 803 (a)(4).

COURT'S RULING

1 That doesn't end the analysis in this particular case,
2 however, because unlike the other cases where the alleged
3 victim was present, or there was -- in this case, we don't
4 have the alleged victim being able to be present. She's
5 deceased through no fault of the defendant. We then have to
6 address the *Crawford* issue which deals with confrontation.

7 Are these statements, at the time they were made,
8 testimony or not testimonial? And I think we come back to
9 Exhibit 19B, keeping in mind a forensic SANE examination has
10 two aspects to it: One is medical. The other is forensic.
11 A close look at this document, Exhibit 19B, does, in fact,
12 appear to make the distinction between the two.

13 The first portion, medical care, does, in fact,
14 state a medical screening examination and care must be
15 provided by an emergency department or primary care provider
16 prior to the forensic evaluation. A forensic evaluation
17 does not include general medical care, and that is true. It
18 includes a sexually -- sexual assault focus medical care
19 examination, plus the forensic part.

20 The second aspect of Exhibit 19B, which deals with
21 the forensic evaluation, lays out what the evaluation
22 entails. Specific, it addresses, medication may be
23 recommended, including immunization, anti-nausea medication,
24 emergency contraception, and medications to treat sexually
25 transmitted infections. This supports the position that the

COURT'S RULING

1 medical care is still ongoing; it is just focused to a
2 sexual assault type of case.

3 Second, on the forensic evaluation that's relevant
4 here, is the detailed medical records, photographs, lab
5 results, written documentation completed today will be kept
6 confidential, secured at MultiCare Health System, and may
7 only be disclosed as allowed by law. So there's a
8 distinction being made between the evidence collected for
9 forensic purposes and the evidence collected for medical
10 purposes, even though this examination, the sexual assault
11 examination, is two-fold.

12 What's also relevant in the analysis is the
13 last -- the second to last section in Exhibit 19B which
14 deals with physical evidence disposition. That section only
15 allows the release of physical evidence collected -- the
16 sexual assault kit, clothing -- during the forensic
17 evaluation to be released to an agency investigating, and in
18 this case, law enforcement.

19 So I'll have to find that the statements that are
20 relevant to this motion are not testimonial and, therefore,
21 are admissible.

22 I do note that State v. Sandoval indicates that a
23 witness statements to a medical doctor -- in this case the
24 SANE nurse -- are not testimonial where they are made for
25 diagnosis and treatment purposes, and I'm finding that these

COURT'S RULING

1 statements were made for that. Where there's no indication
2 that the witness expected the statements to be used at
3 trial, because Exhibit 19B has a clause that addresses the
4 medical records remaining confidential, I don't believe it
5 is clear that the alleged victim in this case was under
6 the -- was put on notice that her statements would be used
7 at trial. And (3) where the doctor is not employed by or
8 working with the state, I do find that the nurse, the SANE
9 nurse, Ms. Frey, indicated that her organization, she was
10 paid by MultiCare, which is separate from the law
11 enforcement agency involved in this case.

12 This is, in fact, a case of first impression, and
13 we'll see what the analysis is going forward. However, the
14 Court's ruling is the statements are in.

15 Anything else from the State?

16 MR. NELSON: Thank you, Your Honor. No.

17 THE COURT: Defense Counsel?

18 MR. SEPE: No, Your Honor. Thank you.

19 THE COURT: All right. Counsel, we still have 30
20 minutes, so we can get the jurors out and continue.

21 (Recess 11:25 a.m.) (Resumed 11:31 a.m.)

22 Counsel for the State, are we ready to proceed?

23 MR. NELSON: Yes, Your Honor.

24 THE COURT: And, Counsel, do we need the exhibit
25 up?

COURT'S RULING

1 MR. NELSON: I was going to have her identify
2 where the hospital emergency department was, and then after
3 that we can take it down.

4 THE COURT: And, remember, you haven't moved to
5 have it admitted yet. It's just been marked and allowed to
6 be used in opening.

7 MR. NELSON: Right.

8 (Jury present)

9 THE COURT: Go ahead and be seated.
10 Counsel, your next witness.

11 MR. NELSON: State would call Kay Frey.

12 (Witness present)

13 THE COURT: Come forward. Raise your right hand.
14 Do you swear or affirm that the testimony you're about to
15 give will be the truth, the whole truth, and nothing but the
16 truth?

17 THE WITNESS: I do.

18 THE COURT: Go ahead and be seated. You can
19 adjust the seat as well as the mic. Speak slowly and
20 clearly for the record.

21 And, Counsel, you may begin when you're ready.

22 MR. NELSON: Thank you, Your Honor.

23 KAY FREY,

24 having been duly sworn by the Court, did testify as follows:

25 ////

KAY FREY, Direct by Mr. Nelson

DIRECT EXAMINATION

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BY MR. NELSON:

Q Good morning.

A Good morning.

Q Are you comfortable there?

A I am.

Q Sit back if you want to. Please state your full name and spell your last name for the record.

A My name is Kay Frey. First name K-A-Y. Last name F-R-E-Y.

Q What -- where do you live? Not your address, but what part of the state?

A I live on Vashon.

Q How long have you lived there?

A Nine years.

Q What's your current occupation?

A I'm retired.

Q Congratulations. When did you retire?

A Pardon me?

Q When did you retire?

A 2012.

Q What was your occupation before you retired?

A I was a nurse practitioner and a nurse for 40 years.

Q For 40 years?

A 40 years in nursing and 26 as a nurse practitioner.

KAY FREY, Direct by Mr. Nelson

1 Q Can you tell the Court where you were employed most
2 recently before you retired?

3 A I was employed by MultiCare based out of Tacoma
4 General.

5 Q In what capacity were you working at Tacoma General
6 Hospital?

7 A I was a sexual assault nurse examiner.

8 Q I'll come back to that -- well, actually, can you
9 explain what a sexual assault nurse examiner is, just
10 briefly?

11 A It's an RN or advanced practice nurse, a nurse
12 practitioner who sees patients who have a history of
13 sexual assault or, in some patients, domestic violence,
14 DV.

15 Q I'm going to go through some of your training and
16 education, and we'll come back to your job there at
17 Tacoma General. Can you give the jury a brief idea of
18 your training to become a nurse, initially, and your --
19 as you went on from there?

20 A Um, I was -- I received a bachelor's degree from Oregon
21 Health Sciences University in 1973, so I was an RN from
22 then on. My master's program, including my nurse
23 practitioner training, was at the University of
24 Washington in 1976. More relevant to this job,
25 subsequent certifications and training occurred over

KAY FREY, Direct by Mr. Nelson

1 the years.

2 Q What do you mean by nurse practitioner? Can you
3 explain that?

4 A A nurse practitioner is someone who gets advanced
5 training in graduate programs to evaluate and treat
6 patients. So many functions that physicians have,
7 nurse practitioners also do. The big exceptions would
8 be in-patient care.

9 Q Did you get any licenses required for being a nurse or
10 nurse practitioner?

11 A Yes.

12 Q Where did you get your license initially?

13 A Initially. As an RN, I worked initially in Oregon. I
14 was licensed in Washington after that and California
15 after that as a nurse practitioner. Um, I was licensed
16 officially in Montana, and I worked there until I moved
17 here.

18 Q So how long did you work in Washington state, in
19 Tacoma?

20 A Four years.

21 Q And most recently, and prior to that, where -- did you
22 come from Montana at that point?

23 A I did. Missoula.

24 Q How many years were you in Montana prior to coming to
25 Washington?

KAY FREY, Direct by Mr. Nelson

1 A 24.

2 Q What did you do in Missoula, Montana?

3 A My background's in pediatrics, so I mostly did a
4 combination of academics with pediatric students, and
5 then private practice in primary care.

6 Q And by academics do you mean teaching or --

7 A Teaching, um-hmm.

8 Q Teaching out of medical school or college?

9 A A nursing school, yes.

10 Q You said pediatrics. Can you just explain what -- who
11 that covers?

12 A That covers patients from zero to age 21.

13 Q And after getting your -- after working in pediatrics,
14 did you also work in sexual assault?

15 A In Missoula?

16 Q Yes.

17 A Yes, I did, for six years.

18 Q Can you tell the jury what you did there in Missoula?

19 A As a pediatric person, I mostly did children and adults
20 who had histories of sexual assault and child abuse in
21 general.

22 Q You said children and adults. So you didn't just do
23 pediatrics up to that point. You actually worked with
24 adult as well?

25 A I worked with teenagers; I worked with adults up to age

KAY FREY, Direct by Mr. Nelson

1 21.

2 Q How many years, specifically, did you do that aspect of
3 your job in Missoula?

4 A Six years.

5 Q Did you -- when you came to Washington, was Tacoma
6 General the first place that you worked?

7 A It was.

8 Q And what job did you start with at Tacoma General?

9 A I started as a sexual assault nurse examiner.

10 Q What were your duties as a sexual assault nurse
11 examiner?

12 A We see patients who have a history of sexual assault,
13 sometimes domestic violence, and we do their medical
14 care related to that, as well as their forensic
15 evaluations.

16 Q And when you say history of sexual assault exam, just
17 in layman's terms, does that mean that they have had
18 more than one -- like they have a full history of it
19 or -- what do you mean by that term?

20 A That means they present with that complaint, that
21 they've been sexually assaulted.

22 Q So their history is telling you that -- reporting that
23 this is what happened.

24 A Correct.

25 Q Can you walk us through what, kind of, a normal

KAY FREY, Direct by Mr. Nelson

1 examination would be, just kind of briefly. We'll walk
2 through it further in detail for this case, but just
3 generally, what kinds of things did you do in terms of
4 your examination?

5 A My work?

6 Q Yes.

7 A The first step is to get consent from the patient to
8 proceed forward. The next step is to obtain a history
9 from them about what happened, and then you do a
10 complete exam, and then the forensic pieces: DNA
11 collection and photography. And, finally, medical care
12 related to their sexual assault is provided, in terms
13 of medications they might need. And, finally, setting
14 them up with a support system in the community for
15 follow-up care, advocacy, things like that.

16 Q At Tacoma General Hospital, where do those exams take
17 place?

18 A They -- some take place in the emergency department,
19 others take place in a separate unit in the same
20 hospital but down the hall.

21 Q What's the difference, and why would one take place in
22 the emergency department versus a separate unit?

23 A Well, we saw patients in ten emergency rooms, so in
24 other emergency settings we would see them there. Um,
25 at Tacoma General there was a separate department with

KAY FREY, Direct by Mr. Nelson

1 special equipment for evaluations, and that was always
2 an advantage. So the patients were often cleared from
3 the emergency department at Tacoma General, and then we
4 would do the rest in our department.

5 Q And where -- in your department, if we go back to 2009
6 time frame, where was your department located in
7 relation to the emergency department at Tacoma General?

8 A It was one floor down and in the west wing of the
9 hospital.

10 Q I haven't prepped you on this at all, but look at that
11 diagram off to your -- I guess it's your right there.
12 Can you stand up and look at it?

13 Do you recognize, at all, what part of the -- what
14 that map shows?

15 A May I come down here?

16 So this is all of the hospital complex here.

17 Q I'll have you stand over to the side. I have a laser
18 pointer you can use. Push that red button; it should
19 shine a little dot for you --

20 Probably turn it on first. I'll back up so all
21 the jurors can see.

22 THE COURT: Thank you.

23 THE WITNESS: So this is the hospital complex all
24 in here, if I'm reading this correctly. There's parking
25 lots. Um, my building -- my department was in this part of

KAY FREY, Direct by Mr. Nelson

1 the hospital.

2 BY MR. NELSON:

3 Q And where is the emergency department on that?

4 A The emergency department then was right about here.

5 Q Okay. And is there a driveway that goes out towards
6 the park there from the emergency department?

7 A To the park?

8 Q Yeah, to the Wright Park there.

9 A Yes. Um, a driveway -- there are several ways to go to
10 Wrights Park out of the hospital itself. This would be
11 the main way here.

12 Q So from the emergency department, can you show on there
13 how -- a direct way to the Wright Park would have been
14 from?

15 A I'm guessing this would be the location of the old
16 emergency department, so there would be access to
17 Wrights Park this way as well as this way. The
18 ambulance entrance was right about here.

19 Q Thank you very much.

20 A And you can enter that way.

21 Q You can have a seat. Thank you for doing that.

22 (Witness seated)

23 In your -- when you're doing these examinations,
24 how long did they typically take for an exam?

25 A An average would be about three hours. If they're

KAY FREY, Direct by Mr. Nelson

1 complicated cases, they can take six or seven. If
2 they're more straightforward, less than that, but
3 rarely less than two hours.

4 Q How many medical personnel are involved in those type
5 of examinations?

6 A Usually just one.

7 Q That would be yourself or one of your colleagues?

8 A Correct.

9 Q Any idea how many of those sexual assault exams you
10 performed in your career? And I'll take both your time
11 in Missoula as well as your time at Tacoma General.

12 A 377.

13 Q You keep pretty close tabs on that, do you?

14 A I do for certification, how you track your cases, and
15 for court as well.

16 Q When you performed those examinations, are you under
17 the employment of law enforcement, or under employment
18 of the hospital, or who?

19 A Both programs I've worked in were hospital-based
20 programs.

21 Q So when you worked at Tacoma General you're employed
22 by, I guess, Tacoma General or MultiCare, the parent
23 company?

24 A Correct, MultiCare.

25 Q As you perform these examinations at the hospital, do

KAY FREY, Direct by Mr. Nelson

1 you document what you're doing as you go through the
2 examination?

3 A Um, part of it is done at the time the statement from
4 the patient, in particular, and then sometimes the
5 photography pieces, later on, are done after they
6 leave. You're just collecting the pictures and
7 labeling them properly and that sort of thing, so both.

8 Q Those records that you're keeping for this type of
9 examination, where are those records kept?

10 A In a very secret location. They are separate from
11 their medical records in general, and sequestered, if
12 you will, so they don't appear with other medical
13 records. If they should come back to the emergency
14 department, these records would not go there.

15 Q So they are medical records, but they're more
16 confidential.

17 A Very.

18 Q I'm going to direct your attention to the date back in
19 2009, July 3rd, 2009. Do you know if you were working
20 that day?

21 A I was.

22 Q And what would have been -- what was your shift that
23 day?

24 A My shift was 7 a.m. to 7 p.m. It was a longer day for
25 me that day, however.

KAY FREY, Direct by Mr. Nelson

1 Q Longer than that 12-hour period?

2 A Um-hmm.

3 Q Was the 7 to 7 your, kind of, normal shift that you
4 would be working?

5 A Yes.

6 Q And why would it go longer? What would be the reason
7 why you wouldn't be off at 7?

8 A I had two different patients that day, and so that's
9 what took a long time.

10 Q Okay.

11 A That's a lot.

12 Q On that day, was one of your patients by the name of
13 Kathy Elaine Hunt?

14 A Yes.

15 Q And would she have been your first patient that day or
16 a later patient?

17 A She was a later patient for me. I started out at 7
18 a.m. with a patient who was very complicated, and it
19 took a long time.

20 Q And about what time did you -- did you perform your
21 examination on Ms. Hunt?

22 A She went to my unit with me at approximately 4 p.m.

23 Q Do you remember where the examination of her took
24 place?

25 A For me?

KAY FREY, Direct by Mr. Nelson

1 Q Yes.

2 A In my department, so a separate location.

3 Q That's what you meant by came to you; she came to your
4 physical department and --

5 A Yes.

6 Q Do you know what -- where she physically came from to
7 get to your department?

8 A She came from the emergency department.

9 Q Do you know what time she was -- she came in the
10 emergency department initially?

11 A I believe she roughly was admitted to the ER at around
12 1-something in the morning. She was medically cleared,
13 meaning they did some things to evaluate her there
14 around 11 in the morning, and then she came to -- with
15 me, down to my department, at 4.

16 Q Would the -- would it refresh your recollection to read
17 documents to know the exact time she checked into the
18 hospital?

19 A Um, it could.

20 Q And which documents -- would those be your reports or
21 the general hospital reports?

22 A That would most likely be the general hospital reports.

23 Q Handing you what's been marked as Exhibit No. 20, and
24 I'll first have you take a look at that.

25 Do you recognize what -- what those pages are just

KAY FREY, Direct by Mr. Nelson

1 generally? Can you tell me what those are?

2 A These are vital signs, they're nursing notes, they're
3 commentary about allergies. There are several lab
4 tests here.

5 Q Can you tell, generally, what those documents relate to
6 or if they relate to a specific patient?

7 A They're labeled as relating to Kathy Hunt.

8 Q And are those from Tacoma General Hospital?

9 A Yes.

10 Q Can you tell if those are from the date for July 3rd,
11 2009, if those were the documents you were looking at
12 there, Exhibit No. 20?

13 A Each date on each page is July 3rd, 2009.

14 Q Okay. So would it help to look at documents if you
15 wanted to refresh your recollection as to what time the
16 patient arrived, specifically, at the hospital?

17 A She was triaged to the emergency room at 1:42 a.m, so
18 there was a process where she would check in at the
19 front desk of the emergency room, and then be evaluated
20 by a triage nurse there, and then put into a room. So
21 that occurred at 1:42.

22 Q So sometime before 1:42 then?

23 A Yes.

24 Q Okay.

25 A It depends on how many people are waiting, too.

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KAY FREY, Direct by Mr. Nelson

1 Q Thank you.

2 When did you first have any contact with her? You
3 mentioned that you started your examination at about
4 4 p.m. Did you -- did you see her between 7 a.m., when
5 you started -- and 4 p.m. when you started your exam?

6 A I did.

7 Q Tell us about your contact with her. Where was the
8 contact and so forth?

9 A She was still in the emergency department. I don't
10 remember what time, specifically, it was. I was there,
11 as well, with the other patient. So I went down to
12 meet her. I told her who I was. I asked her how she
13 was, if she needed anything. Told her that I would be
14 quite a while before we could get things started with
15 her case, and I got her some food and, um, let her
16 sleep. She said she wanted to wait.

17 Q She wanted to wait?

18 A She did.

19 Q And did -- how would you describe her demeanor or her
20 attitude at that time?

21 A She was totally able to speak. She was tired and, um,
22 able to tell me, you know, what she wanted and what she
23 didn't. She didn't want to leave her clothes, for
24 example; I remember that.

25 Q She did not want to leave her clothes?

State v Burke, Trial v.6 - 11/3/16

KAY FREY, Direct by Mr. Nelson

1 A No. No.

2 Q When you started with your examination -- then later
3 I'll flash you back forward to about 4 p.m. When she
4 came to your department in the hospital, walk us
5 through what happened. What was the first thing that
6 you did when you saw Ms. Hunt?

7 A Okay. The first thing would be to obtain her consent
8 for a forensic evaluation. You tell the patient what
9 that means. The consent form reviews that as well.
10 They are offered to answer any questions about what
11 they may or may not want to occur. Some patients want
12 everything; some people don't want some things, and
13 that's their prerogative.

14 The next step is to obtain a history about what
15 happened to them in their own words.

16 The next step is to --

17 Q I'm going to back you up. I'll take these kind of one
18 at a time and kind of walk through them. So when you
19 went through the consent form with her, did you -- did
20 she sign the documents where appropriate?

21 A She did.

22 Q Did she have any questions about the form that she was
23 signing or --

24 A She didn't.

25 Q You mentioned that you got -- you wanted to obtain a

KAY FREY, Direct by Mr. Nelson

1 history from her. Can you explain in more detail what
2 you mean by a history?

3 A A history is like any medical history would be. It
4 guides you forward with other things you do for
5 patients, so it's very important. It's a personal
6 statement, in her own words, about what happened.

7 Q And is that something that she writes out for you or
8 that you take verbally, or how -- how is that
9 statement -- the history given to you?

10 A It's -- she doesn't have to write it. I write it and
11 it's in her own words. So quotes are used, and I write
12 down everything she says.

13 Q And I take it you haven't memorized what she told you
14 that day this morning?

15 A It would be helpful to have her statement possibly.

16 THE COURT: And, Counsel, what I'm going to do --
17 it's 11:55 -- is stop for the noon hour at this time --

18 MR. NELSON: Okay.

19 THE COURT: -- and we'll resume at 1:30.

20 So, ladies and gentlemen of the jury, I'm going to
21 excuse you for your lunch break. Be back in the jury room
22 at 1:15 and we'll start up at 1:30. Leave your notepads on
23 your seat. Do not discuss this case with anyone, to include
24 amongst yourselves, and I'll see you at 1:30. Ms. Julie
25 will be in, in a second.

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KAY FREY, Direct by Mr. Nelson

1 (Jury absent)

2 If you can, be back at 1:30. The State will
3 probably have further information for you, so you're excused
4 at this time.

5 (The witness was excused from the witness stand)

6 Counsels, I'd like to address something with you
7 before the noon break.

8 MR. NELSON: Okay.

9 THE COURT: Go ahead and be seated.

10 Counsels, I'd like to bring to your attention my
11 observations in regards to Juror No. 6. Since she came back
12 out, I will note that Juror No. 6 has been falling asleep
13 during questioning. I had my judicial assistant pull her
14 questionnaire, and this is the juror that actually informed
15 us of her sleep apnea and that she would fall asleep at
16 times. So I'd ask that Counsels pay attention to that, and
17 in the event it becomes an issue, I will entertain a motion.
18 If not *sua sponte*, I may actually have to do one myself.
19 But I did notice Juror No. 6, unfortunately, has fallen
20 asleep a few times.

21 Anything before we take the break, State?

22 MR. NELSON: Your Honor, if the parties become
23 aware of it, how should we alert you that --

24 THE COURT: Outside the presence of the jury, you
25 indicate that you have something to raise outside the

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COLLOQUY

1 presence of the jury and we can address it then.

2 Anything else, Counsel?

3 MR. NELSON: No, Your Honor. Thank you.

4 MR. SEPE: No, Your Honor. Thank you for your
5 observation. I didn't see that. I will be vigilant.

6 THE COURT: Thank you.

7 All right. Court will be in recess. We'll resume
8 at 1:30.

9 (Recess 11:58 a.m.)

10

11 ***** A F T E R N O O N S E S S I O N *****

12 (Proceedings resumed 1:34 p.m.)

13 THE COURT: State of Washington v. Burke.

14 Anything from the State before we resume?

15 MR. NELSON: Your Honor, just regarding witness
16 scheduling and the Court's information, I had another
17 witness intending to start at 1:30 today and, obviously,
18 that's not happening. I expect this witness will probably
19 take the balance of the afternoon, and so I was intending to
20 kind of leave the other one on call, and if I needed her, I
21 would call her at the afternoon break and have her come in.
22 That would be Bettye Craft, social worker at Tacoma General.
23 Her testimony, again, I think, is going to require some
24 out-of-jury conversation about what it is she can and cannot
25 testify to, so I don't -- I guess we'll be doing that later

KAY FREY, Direct by Mr. Nelson

1 on in the case, but I just wanted to let you know.

2 Witnesses for Monday morning that are lined up,
3 another RN, Carol Aquino Smith, at 9, and then our DNA
4 expert approximately at 11 a.m.

5 THE COURT: Well, thank you, Counsel. Anything
6 else?

7 MR. NELSON: No, Your Honor.

8 THE COURT: Defense Counsel?

9 MR. SEPE: No, Your Honor.

10 THE COURT: Let's have the witness come back to
11 the stand.

12 And, Counsels, pay attention to No. 6.

13 MR. NELSON: Yes.

14 MR. SEPE: Yes, Your Honor.

15 (Jury present)

16 THE COURT: Go ahead and be seated. Counsel for
17 the State you may continue.

18 MR. NELSON: Thank you, Your Honor.

19 KAY FREY,

20 DIRECT EXAMINATION (Resumed)

21 BY MR. NELSON:

22 Q Good afternoon, Ms. Frey.

23 A Good afternoon.

24 Q We left off in the morning discussing -- starting to
25 discuss the history that you took from Ms. Hunt as you

KAY FREY, Direct by Mr. Nelson

1 started your examination. I'm going to hand you a
2 series of exhibits that are marked 19A through 19K.
3 Take a look at those briefly.

4 Do you recognize what that exhibit is in front of
5 you?

6 A Yes. It is the chart I did on this patient, Kathy
7 Hunt.

8 Q And would reviewing that chart while I'm asking you
9 questions, will that help refresh your memory as
10 specifically about things that were told to you and
11 documented by you during that exam?

12 A It would. Um, there's a lot of small details.

13 Q And how many years ago was this examination?

14 A Eight.

15 Q Long time?

16 A Um-hmm.

17 Q The history that you took from Ms. Hunt was done -- you
18 mentioned, before lunch, that you were the one that
19 wrote down exactly what was said. She did not write
20 down the statement that she gave you, but you wrote
21 that down as she told it to you. What was the question
22 that you asked her that started off her reciting to you
23 the history of this incident?

24 A My question for her was: Can you tell me what happened
25 in Wrights Park?

KAY FREY, Direct by Mr. Nelson

1 Q And did she respond to that question that you asked
2 her?

3 A She did.

4 Q And what was the response that she gave you?

5 A Would you like me to read her statement?

6 Q Yes.

7 A Okay. This is a quote:

8 I was sitting there rolling myself a
9 cigarette. I know he covered my mouth
10 because I would have been screaming for help.
11 I was taken to the ground. I don't know if
12 he tried choking me or not. The next thing I
13 knew, I was taken to the ground, my pants
14 were off and stuff, and he was inside me. It
15 was over and done with. I think he told me
16 to keep my mouth shut. That's all I
17 remember. Then I came here. I walked over
18 to the hospital.

19 End quote.

20 Q And you indicated there was a quotation mark at the
21 beginning of that statement that you read into the
22 record and also at the end of it. Was it a continuous
23 quote from her?

24 A Yes.

25 Q Looking back on this -- and I know we're looking back

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KAY FREY, Direct by Mr. Nelson

1 several years, as you mentioned -- do you remember the
2 demeanor of Ms. Hunt as she was telling you this
3 statement, or how you would describe her demeanor
4 during your contact with her?

5 A She was lucid and articulate. I would say it's not a
6 particularly long statement. She seemed like she
7 didn't want to elaborate a whole lot but was very
8 cooperative in telling me what I needed to know along
9 the way. Tired.

10 Q Tired, you say?

11 A Tired. Um-hmm.

12 Q What's the reason you take that history at the
13 beginning -- towards the beginning of your examination?

14 A Because it becomes more focused, um, on -- based on
15 what you hear, and then it cues me that I should ask
16 other things or look for things based on her statement.

17 Q What did you do next after taking that statement from
18 her?

19 A We went on to a couple pages of more targeted questions
20 from me about specific details about what happened.
21 And this is just a standard we use for certain -- more
22 pointed questions.

23 Q And what questions did you ask her to help you have a
24 better understanding of what happened?

25 A Okay. The location of her sexual assault.

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KAY FREY, Direct by Mr. Nelson

1 Q What was her answer to the location of the sexual
2 assault?

3 A Wrights Park. Quote. Close to 6th Avenue at a table.
4 End quote.

5 Q What did you -- what information did you ask next about
6 the incident?

7 A Um, a description of, um, the suspect. This is a
8 quote:

9 He was tall, a light black, no hair or
10 short hair. He had a white t-shirt and
11 jeans. No jacket.

12 End quote.

13 Q As she's giving this kind of information to you, are
14 you asking her to elaborate, or are you just writing
15 down what she tells you about each of these situations?

16 A In those two parts, just whatever she wanted to say.

17 Q What was the next part of your questioning of her?

18 A Okay. The next part is where the targeted questions
19 begin, and --

20 Q What do you mean by "targeted questions"?

21 A Okay. Um, so the first one is: Was your vagina
22 penetrated by a penis, a finger, a foreign object --
23 and her responses.

24 Q Okay. And what was her response to that question?

25 A Her response was a "yes" to the penis. This is a quote

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KAY FREY, Direct by Mr. Nelson

1 about that: Quote. I think his penis was all the way
2 in. Unquote.

3 The rest of the targeted questions like that were
4 negative. No answers.

5 Q And the other targeted questions, can you kind of
6 explain what you mean by that?

7 A Okay. Was the anus penetrated by a penis, a finger, or
8 a foreign object? Her response was "no." Was her
9 mouth penetrated by a penis, foreign object? No.

10 Do you want me to keep going?

11 Q No, just so the jury's understanding.

12 So you ask other questions about other body parts,
13 and is that important so that you can complete your
14 examination?

15 A It is. For example, um, one of the questions is:

16 Did ejaculation occur?

17 Her quote: I don't think so.

18 But that certainly is relevant to where you might
19 obtain swabs, for example.

20 Q Did you ask about the -- any use of contraceptives
21 during the incident?

22 A I did.

23 Q And what was the response to that -- those questions?

24 A "No" on use of condoms. "No" on the use of foams,
25 jellies or lubricants.

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KAY FREY, Direct by Mr. Nelson

1 Q Was there a question regarding the position of Ms. Hunt
2 during the attack itself?

3 A Yes.

4 Q And what is that?

5 A This is a quote: On the ground. On my back.

6 Q Were there any other sexual acts noted by her during
7 your questioning on this section?

8 A There are a few on the next page that are more
9 positioning kinds of things or other events that might
10 have occurred.

11 Q All right. Before we get to that, did she make any
12 other statements that you noted on the first page?

13 A Yes. She was very concerned about not having her
14 crutches any longer. She walked from the park without
15 them, felt she needed them to navigate because of
16 severe arthritis, and her comment was, quote: I left
17 my crutches in the park. I need them to walk.
18 Unquote.

19 Q And you mentioned that there was a following page that
20 you asked additional questions. Is that correct?

21 A Correct. This is where the pain level -- I asked the
22 patient the pain level, which she cited as 5 out of 10.
23 Her quote: I hurt in my same old place. Unquote. My
24 vaginal area.

25 Q Why do you ask the pain question?

KAY FREY, Direct by Mr. Nelson

1 A It's just a standard medical practice. You always ask
2 patients if they have any pain, and to rate it on a
3 scale of 0 to 10 for adults. For kids it's different.

4 Q Does that help focus your examination as well?

5 A Yes. It -- if it's an 8 out of 10, then they might
6 need pain medication to start. She was offered pain
7 medication and declined.

8 Q What kind of pain medication was she offered?

9 A She was offered Tylenol or ibuprofen. She said she was
10 allergic to both.

11 Q Did you ask additional questions to -- regarding
12 alcohol and drugs, whether they were present during the
13 incident?

14 A Yes.

15 Q Why do you ask those questions?

16 A Mostly it's to decide if blood or urine needs to be
17 taken for drug-facilitated sexual assault. It's also
18 to make sure that you have a patient who can consent to
19 what you're doing.

20 Q And at that point, were you aware of any alcohol
21 situation with this particular patient when she arrived
22 at the hospital?

23 A Yes. I don't know what her original blood alcohol was,
24 if there was one taken, even. She had one later that
25 was point 16.

KAY FREY, Direct by Mr. Nelson

1 Q And is point 16, is that legally drunk in the state of
2 Washington?

3 A It is. That was at -- yes. That was at 8 in the
4 morning, I believe, and I saw her at 4 without another
5 blood alcohol being drawn.

6 Q When you saw her at -- I'm sorry. I missed, I think,
7 the last part of your answer there. When you saw her
8 in the morning, you testified earlier that you didn't
9 notice any impairment. Is that fair to say?

10 A That is fair to say.

11 Q When you were doing your examination here, did you
12 notice any impairment at 4:00 when you were doing your
13 sexual assault exam?

14 A No.

15 Q What was her response when you asked her whether
16 alcohol or drugs were associated with this particular
17 assault?

18 A Her quote was: I was doing a bit of drinking.
19 Unquote.

20 Q Did you ask about lapse of consciousness?

21 A Yes.

22 Q What was her response to that?

23 A On that one she wasn't sure.

24 Q And did you write notes to help -- did she say anything
25 specific about it, the "I'm not sure"?

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1 A Um, she had -- this was from the emergency room
2 information I had. She had been somnolent, or sleepy,
3 hard to wake up, um, early on when she got to the
4 emergency room, and it's my belief that that's what led
5 to a scan she had.

6 Q You use the word somnolent.

7 A Somnolent means sleepy, hard to wake up.

8 Q Did you ask other questions about strangulation in this
9 case?

10 A Yes.

11 Q And what was the response to that one?

12 A Her response was she didn't know. Her quote was: He
13 put his hand over my mouth. Unquote.

14 Q Were there other questions about weapons, and so forth,
15 that were asked of her?

16 A Yes.

17 Q And what was response to that question?

18 A No weapons, no physical blows.

19 Q Did you ask her whether there was any grabbing,
20 grasping, or holding during the incident?

21 A Yes.

22 Q What was her response to that?

23 A The response was, quote: He was laying on me.
24 Unquote.

25 Q Did you ask about whether there was any intimidations

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1 or threats during this incident?

2 A Yes. Her quote was: To keep my mouth shut and don't
3 report it.

4 Q Do you ask about birth control during this portion of
5 your examination?

6 A Yes.

7 Q What's the purpose of doing that?

8 A Well, it's a standard question. Pregnancy after sexual
9 assault is certainly a concern, but she was
10 post-menopausal ten years before, so any kind of
11 pregnancy prevention would not be needed for her.

12 Q Did you ask about the date of her last consensual
13 sexual incident?

14 A I did. This is a quote: 15 years ago. End quote.

15 Q Why do you ask that question about the last consensual
16 sex episode?

17 A In case you have to sort out DNA from two potential
18 people or more.

19 Q With her last consensual sex being 15 years earlier,
20 would that have been a concern for the DNA samples in
21 this case?

22 A No.

23 Q You ask about hygiene after the sexual assault itself.

24 A Yes.

25 Q What's the purpose for asking those questions?

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1 A If patients have showered, for example, or wiped their
2 genital area going to the bathroom, it may influence
3 the DNA retrieval you can make later.

4 Q What were the responses to those questions that you
5 asked about the hygiene?

6 A She had urinated twice. She ate and drank three hours
7 before -- and I asked about that when I first met her,
8 did anything happen, you know, in your mouth, and she
9 said "no," so I went ahead and let her eat.

10 Q Otherwise, you would have encouraged her not to eat?

11 A Or just gotten swabs from her mouth then.

12 Q What other questions did you ask her at that time
13 during -- about hygiene?

14 A If she had changed her clothes, brushed her teeth,
15 taken a shower. She had a bowel movement, she said.
16 Swished her mouth, done anything hygiene-wise in her
17 mouth or put anything inside her vagina.

18 Q And had she done that?

19 A No.

20 Q Had she done any of the shower or changed her clothes
21 or brushed her teeth?

22 A No.

23 Q After you completed that portion of your examination,
24 what's the next step that you take -- you took with
25 Ms. Hunt?

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1 A The next step is to do her physical exam in a more
2 general way, looking at her body for things that might
3 show up, injuries there, and then the next step is
4 looking at a genital exam.

5 Q At a genital exam?

6 A Um-hmm.

7 Q Okay. Let's start with the physical exam first, and
8 I'll ask if you -- recording the information as you
9 begin your physical examination?

10 A I'm sorry. Could you repeat that?

11 Q Do you record anything when you start your physical
12 examination of, I guess in this case, Ms. Hunt?

13 A This top section is sometimes used for quotes like I
14 have here. Oftentimes it's just demeanor and physical
15 overall appearance that the patient has. And then
16 there's an explanation here that she was in the
17 emergency department for hours and that I had another
18 case. What she did say when we were talking about all
19 of that, this is a quote: Because I don't want him to
20 be out there doing this to someone else. End quote.
21 That's basically why she came, she said.

22 Q How many layers of clothing did she have on at that
23 time you started your examination?

24 A Two.

25 Q Describe what those layers of clothes looked like in

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1 terms of hygiene or --

2 A I don't remember specifically what she had on. Um, I
3 do remember quite a bit of dirt on the upper portions
4 of her clothing. I do remember that she didn't want to
5 give her clothing up.

6 Q She did not.

7 A No.

8 Q Okay. I take it when you start your examination, she
9 has her clothing on at that point. Do you -- part of
10 your examination, does she remove that clothing for
11 further exam?

12 A Usually, yes. I'm trying to remember if her -- she was
13 in a patient gown in the emergency department or not.
14 She may have been, but she didn't want to give up her
15 clothes there, either.

16 Q So if she saw you in a gown, she had her clothes with
17 her in a separate bag or something?

18 A Yes, she did.

19 Q But you looked at those clothing to determine that they
20 were --

21 A Yes.

22 Q -- dirt on them and so forth?

23 A Yes.

24 Q Walk us through how you did your physical exam.

25 A Okay.

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1 THE COURT: Counsel, at this time, I'm going to
2 stop you for a second.

3 Ladies and gentlemen of the jury, I'd ask that you
4 go into the jury room at this time. Leave your notepads on
5 your seat.

6 (Jurors absent)

7 Counsel, I'll just have your witness step outside
8 briefly.

9 (The witness exits courtroom)

10 Go ahead and be seated. Counsels, we started a
11 little after 1:30, about 1:35, and I've been paying
12 attention to Juror No. 6, and I do believe there is some
13 concern. Juror No. 6 has continuously been falling asleep,
14 not nodding off. She's trying, but I do think it's
15 something I'd ask Counsels to pay attention to during the
16 further questioning of this witness because it is something
17 I will be raising with both of you after this witness is
18 completed. But do try and occasionally keep an eye on Juror
19 No. 6.

20 I don't want it to just be this Court's
21 observation. I would like to get Counsels' input, and I
22 don't know if Counsels have had an opportunity to do so. I
23 do know the State, during your questioning, your head is
24 down. I don't believe I've seen you glance over at Juror
25 No. 6. But that's difficult to do when you're dealing with

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1 your witness on direct, and I don't know if Defense Counsel
2 has made any observations that you know.

3 MR. SEPE: My client wrote a note and showed it to
4 me on his pad there, No. 6 is asleep. I looked over, but I
5 didn't want to interrupt Mr. Nelson, so I was just going to
6 wait for an opportunity. But Your Honor, just a couple
7 minutes later, took care of that.

8 MR. NELSON: And, Your Honor, there was one point
9 when I did look over and she was looking down, and I thought
10 she might be asleep, but then it looked like she might have
11 been taking a note. But that was all I saw, and then I
12 looked back at my witness, so I didn't make any other
13 observations.

14 THE COURT: And I saw your observations as well.
15 She did look down and appeared to be writing, but fell
16 asleep in the middle of that note. So that's when I decided
17 I need to say something to Counsels, but we'll address it at
18 the end. We'll get the witness back on the stand, but I do
19 believe we have a concern regarding Juror No. 6, especially
20 since she did indicate to us, in her questionnaire, she does
21 have sleep apnea, and I believe we are seeing her exhibit
22 just that.

23 All right. Let's get the witness back on the
24 stand and the jurors back out.

25 (Witness seated) (Jury present)

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1 All right. Go ahead and be seated.

2 Thank you, Counsels. State, you may continue.

3 MR. NELSON: Thank you, Your Honor.

4 DIRECT EXAMINATION (Resumed)

5 BY MR. NELSON:

6 Q Ms. Frey, we were just starting to get into the
7 physical examination that you did. Can you walk us
8 through what steps you take during -- steps you took,
9 rather, during this physical examination?

10 A Okay. The first thing is to examine the outside of the
11 body, looking for any kind of injuries or issues that
12 might be problematic going forward; something like a
13 broken bone, maybe, or cuts on the skin, that kind of
14 thing.

15 Q And where do you start your examination for that?

16 A I usually start at the head and work there and go down
17 to the toes.

18 Q And what -- what did you find during your examination?

19 A Okay. On the right leg, at approximately the knee,
20 there was an abrasion.

21 Q Let me interrupt you and ask if looking at -- did you
22 take photographs of any of these injuries?

23 A I did.

24 Q Have you had a chance, before court this morning, to
25 take a look at the photographs that were provided in

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1 this case?

2 A Yes.

3 Q Would those help explain to the jury the exact injuries
4 that you observed?

5 A I don't feel either way would be bad, so --

6 Q Okay.

7 A There were a few, three, specifically, so I can either
8 describe those or we could look at pictures.

9 Q As long as we have the pictures, I will -- well, first,
10 let me show you what we marked here as Exhibit No. 13.

11 Peel back that 13 sticker there. Do you recognize
12 what that -- how that disk is labeled there?

13 A Yes. I was just checking the medical record number,
14 which is flattened out, so her name is correct.

15 Q The name's correct on there. Does it look like this
16 morning that you viewed some photographs on --

17 A It does.

18 MR. NELSON: Your Honor, I would ask to -- I would
19 offer Exhibit No. 13 and ask to display these for the jury.

20 THE COURT: Counsel?

21 MR. SEPE: Has the witness seen what's on that
22 disk yet today?

23 THE COURT: I believe Counsel indicated --

24 THE WITNESS: Yes.

25 MR. SEPE: Oh, okay. Fine. Yeah, as long as it

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1 is what she says it is and there's nothing to trick me
2 there. Yeah, no objection.

3 THE COURT: Okay. Exhibit 13 will be admitted and
4 can be published.

5 (Plaintiff's Exhibit No. 13 admitted)

6 MR. NELSON: Thank you, Your Honor.

7 Q I realize that you indicated these might not be as
8 helpful. Is that because maybe the focus is not as it
9 could be?

10 A The focus isn't as it could be, so my apologies.
11 That's my fault.

12 Q What is this, first?

13 A The first two slides will be of her sticker
14 identification which matches her chart.

15 Q Moving to the second picture, that's the second picture
16 chart, as well. Go ahead. What does this picture
17 show?

18 A This is a picture of Ms. Hunt, and that's another means
19 to identify that these are her photographs.

20 Q And what is she wearing in this photograph?

21 A She has a gown on.

22 So, for any injuries that are found on the outside
23 of the body, what you do is you take a picture far away
24 so you can tell what body part they're on, and then you
25 take a medium shot of that injury, and close-up of that

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1 injury. So this is the one we were discussing earlier.
2 It's an abrasion or scrape of the skin right below the
3 right knee, and then the next two pictures will be
4 closer of that.

5 Q And you mentioned an abrasion. "Abrasion" is a scrape?

6 A Scrape of the skin, um-hmm.

7 Q The next slide here then is just a closer-up, as you
8 mention?

9 A That's a medium shot, and then there should be one
10 closer there. And what you really can't see very well
11 is the measurement of -- which was two-by-two
12 centimeters. So the white thing is a way to measure
13 how big the injury is.

14 Q Can you -- I know these photographs are not very good,
15 but when you were looking at your -- at this live and
16 in person, did you make any assessments as to whether
17 that injury was a fresh injury or not?

18 A This injury, yes. Um, it would be red and scraped at
19 this point. It would likely bruise later, but on the
20 first day, like the day I saw her, you wouldn't expect
21 that yet.

22 Q Move forward to the next slide. It's kind of hard to
23 see, but what are we showing here on the slide?

24 A Okay. She has an abrasion of her left elbow. And we
25 might see it better on the next one, but the other

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1 thing of significance about this shot is that she had a
2 shoulder dislocation somewhere along the way, and her
3 left arm didn't work well because of that -- a swollen
4 joint as you can see.

5 Q So this is kind of far-off shot, the first shot here.

6 A This is the far-off shot.

7 Q And then moving forward to the next shot, what is that
8 showing, as far as you know?

9 A Okay. I call that an abrasion, but in this particular
10 photo I'm not seeing that.

11 Q Okay. I'll move forward.

12 A That's an abrasion there. Again, another scrape of the
13 skin. It would be right at the tip of the elbow and
14 some redness around it.

15 Q I'll move forward to the -- well, before we move into
16 this one, I'll move back one. Do you -- as you're
17 going through this -- obviously, you're documenting
18 with pictures, but are you also documenting it in
19 another fashion as well?

20 A Aside from in the camera and on this form?

21 Q So on that form, how are you using that form?

22 A Okay. On this form, each picture of each location is
23 clustered together and there's a description of that
24 injury.

25 Q So, for instance, on this one it's hard to tell where

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1 that is, but you can look at your diagram that you've
2 drawn to help you figure that out?

3 A Yes. This is a backup. So this is the left elbow
4 injuries clustered.

5 Q Moving forward to the next slide, what are we looking
6 at here?

7 A On the inner thigh there was an injury that isn't real
8 apparent here, but this is the long shot of the left
9 thigh, inner thigh.

10 Q Moving forward, that's a closer-up of the same?

11 A Yes. That's the medium shot, and there's just some
12 redness there. No broken skin, just some redness.

13 THE COURT: Counsel, let's cover the monitor.

14 Thank you.

15 BY MR. NELSON:

16 Q What did you -- what did you do next after you did
17 the -- took those pictures and made your notes on your
18 diagrams that you talked about?

19 A The next step is the genital exam, and at that time I
20 used a magnifying camera called a colposcope, which
21 magnifies things internally much better than just
22 looking with your eye.

23 Q And do you always use that device, or do you choose
24 whether or not to use it in certain situations?

25 A I was trained with that, and it's always been my

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1 preference. Digital cameras have largely replaced
2 that. It's a bigger, cumbersome instrument that isn't
3 portable, for example, and so since we were going to so
4 many hospitals, we decided to standardize with just
5 digital cameras, and the colposcope wasn't used as
6 much. But it was always my preferred way of doing
7 genital exams.

8 Q And in addition to then taking the pictures, the
9 colposcope, does that let you actually see better for
10 other charting purposes as well?

11 A It does. It has a circular light which lights up the
12 vaginal area much better than a single light behind
13 your head, like many people have seen in doctor's
14 offices. It also magnifies and stays in focus well.
15 So it magnifies something you might want to look at
16 more closely, and so the light source is excellent, and
17 the magnification is a big advantage. And then once
18 you find a certain thing, you take pictures of that.

19 Q When you're doing this kind of an examination, what
20 position is the patient in while this is happening?

21 A The patient lays on their back on the table, and their
22 feet go in stirrups, which are the leg things that
23 maybe we all know something of, especially women. So
24 it would be the things like women's legs go into for
25 having a child, and they're called stirrups. So what

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1 that does is your feet go in at table level, and the
2 knees can relax out, and it let's you look closely to
3 the external genitalia and internal as well.

4 Q Okay. Handing you what's been marked as Exhibit No.
5 19L, ask if you recognize that exhibit.

6 A Is this the same as 19F?

7 Q Yes. Do you recognize it?

8 A I do.

9 Q Would displaying this on the board help explain to the
10 jury what you did in your examination and what you
11 noted during your examination?

12 A I think it would. Is that possible?

13 Q Is 19 almost an accurate -- I'll hand it to you
14 again -- an accurate reflection of what you noted
15 during your examination?

16 A Yes.

17 MR. NELSON: Your Honor, I would offer 19L at this
18 time and ask to display it to the jury.

19 THE COURT: Counsel?

20 MR. SEPE: No objection.

21 THE COURT: 19L will be admitted and can be
22 published.

23 (Plaintiff's Exhibit No. 19L admitted)

24 BY MR. NELSON:

25 Q As we're looking at the screen now, is -- what is shown

KAY FREY, Direct by Mr. Nelson

1 in -- what is displayed at this point?

2 A This is the external genitalia.

3 Does this maybe turn off by itself?

4 Q There's an on/off switch on the side there.

5 A Okay. So this is, um, a straight-on view of female
6 genitalia in graphic form. Um, would you like me to
7 explain?

8 Q Yes. If you could use the pointer to explain what
9 parts we're looking at, first, before you describe the
10 injuries.

11 A Okay. So this is an opened up view of the female
12 genitalia as you're looking straight on. And let me
13 explain. We'll start in the middle. This is the
14 opening to the vagina. This is the opening to the
15 bladder. This is the hymen around here. This is the
16 clitoris up here. These are one set of labia that are
17 folded out, and the second set of labia are bigger, and
18 they're skin, rather than mucous membrane tissue, and
19 those are out here. The anus is down here.

20 Q Where is the anus?

21 A Down there.

22 Q And so as you're looking at that, I see that there are
23 some clock -- in digital format there, 12 at the top
24 and 3 to one side, what is that used for?

25 A That's just the face of a clock. So it helps you

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1 identify a location it would be, like at 2:00, um,
2 would be here. This injury here is at 10:00, for
3 example.

4 Q Okay.

5 A This injury is at 6:00.

6 And I would like to add one other thing, if that's
7 all right.

8 Q If it would help explain this to the jury.

9 A Yes. Um, once the stretchers are folded over and in a
10 normal position, instead of spread out like this, they
11 cover the opening to the vagina, and that's the point
12 of having them.

13 Q So if you were to take a picture without being in this
14 position and without using the tool that you used, you
15 wouldn't be able to see what's labeled A and B there.
16 Is that correct?

17 A No. And you wouldn't be able to see into the vagina,
18 for example, see the hymen, even.

19 Q What is being used, physically, to spread the vaginal
20 area open so it can be seen?

21 A The knee relaxation is probably the most helpful. So
22 if the woman can get the legs out as far as possible,
23 that's helpful to relaxing the pelvis. And then,
24 secondly, the examiner kind of needs to just spread
25 things open, like they are here, to see better on the

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1 outside first. And then you have to manage to take
2 pictures in that way.

3 Q Right. So there's something in this diagram that are
4 labeled A. Can you explain what that is referencing?

5 A Okay. A is an abrasion, again, a scrape. This is an
6 area of the inside of the smaller labia called the
7 vulva. It's like the tissue on the inside your mouth;
8 whereas, if you, you know, bite your cheek when you're
9 eating food, it heals up quickly and the next day you
10 don't know it's there.

11 But same tissue and just a scrape right here.

12 Q And you have a -- can you describe what that injury
13 looks like, what it looked like to you?

14 A Abrasion of the vulva adjacent to the hymen. So,
15 again, the hymen's here, the more oval thing, and the
16 vulva's the inside of the labia here when it's spread
17 apart, and so it's just right next to it.

18 Q It looks like a "B" on your diagram there as well.
19 What is that?

20 A Okay. A "B" is the lacerations; there were two. So
21 those are cuts, rather than scrapes. This is a really
22 common area to have injuries, as is this, but this one,
23 especially. And it's just more tender tissue, if you
24 will, still like the inside of your mouth, but -- so
25 these were deeper cuts, two of them.

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1 Q So they're both -- the top one's more of a scrape and
2 the bottom is more of a cut. Is that fair to say?

3 A Correct.

4 Q And by a "cut," it's a scrape that's deeper.

5 A Correct.

6 Q You indicated these are common places for injuries.
7 Can you describe what you meant by that?

8 A It's just a matter of these can happen both in sexual
9 assault and in consensual sex, but the amount of force
10 and positioning during intercourse usually affects
11 those areas the most, especially 6:00 here.

12 Q So the B injury is a more common spot for an injury.

13 A They both are, actually.

14 Q And what about the deepness of B. Does that give you
15 any reason to think that this would have been
16 consensual or not consensual?

17 A In and of themselves, neither can clarify that.

18 Q You indicated that it's -- the tissue is similar to the
19 inside of a mouth. And in referencing that, were you
20 talking about the quickness to heal aspects of the
21 inside of your mouth?

22 A Yes.

23 Q Is it similar in other ways or is it just --

24 A It's the same kind of tissue, so moist, thin; it's not
25 skin, and it's very similar to the inside of your

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1 mouth, your cheek.

2 Q And so in looking at these injuries, if healing
3 quickly, is it possible to -- for you to say, with your
4 experience, approximately when these injuries would
5 have gotten there?

6 A If I could see the pictures it might be clearer, but
7 within the past 24 hours, I would say, because any
8 longer than that, um, they may have healed already.
9 That's a hard thing to do, by the way, to date.

10 Q To date. So just a ballpark, within 24 hours is fair?

11 A I would say within 24 hours.

12 Q After doing the analysis in this region of the vaginal
13 area, what did you do next after that?

14 A Next after that is the patient's in the same position
15 in the stirrups, and then an instrument called the
16 speculum is inserted into the vagina. And that would
17 go in right here, and it would keep the opening to the
18 vagina open so you could see inside.

19 Q And was that done in this case?

20 A Yes. So some are metal, some are plastic.

21 Q We're still on the same exhibit here that's been
22 admitted, 19L, get to the bottom of that.

23 Can you orient us on this diagram that's on the
24 screen?

25 A Yes.

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1 Q Probably straighten that out, too. I'm sorry.

2 A All of this around here is the instrument I'm talking
3 about. This is the little bolt that keeps the upper
4 and the lower part separated.

5 Q So you're talking about at 3:00 there. There's a round
6 circle off to the side. Can you point that out with --

7 A Yes.

8 Q Because that's part of the instrument as opposed to
9 part of the vaginal area.

10 A It keeps it open.

11 Q Okay.

12 A So you can look internally.

13 This is the -- these are the walls of the vagina.

14 Q And those are on both sides --

15 A Those are on both sides and the bottom and the top.
16 And the round-shape thing in the middle with a slight
17 opening is the cervix. Most people know that that's
18 where pap smears are taken from.

19 Q And so the very center, that's a circle with a smaller
20 circle inside, that is the cervix area?

21 A That is.

22 Q And there is a mark showing a "C" there. What did you
23 observe in that area?

24 A The cervix is -- it's a laceration; again, a cut on the
25 upper part of the cervix just below -- or just above

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1 the opening to the uterus, which is higher up. So
2 because of the kind of tissue it is, the cervix is more
3 like a muscle and it's quite tough. And because of
4 where this is, it's just a more unusual injury. But
5 that's what this is.

6 So the cervix is different tissue entirely. It's
7 a very strong muscle. That's what dilates when women
8 have children. So it goes from about this size.

9 Q And by "this size," you're holding up your fingers. Is
10 that about the size of a half-dollar?

11 A Yeah, or a dollar.

12 Q A dollar?

13 A And then right in the middle is a potential opening to
14 the uterus. So it's not open all the time. It's
15 closed, usually, to protect the uterus from infections
16 and other things, but yeah. So it's a big muscle, a
17 tough muscle that dilates from this side to about here.

18 Q And by "here" you're holding this for the --

19 A Ten centimeters is the size it usually stretches for
20 delivery of a baby, for example.

21 Q And so you noted that there was a cut there. How would
22 you describe that injury there?

23 A I called it a laceration.

24 Q Okay. And was it -- could you tell if it was -- was
25 there blood present at that -- in that laceration?

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1 A There was. Lacerations are cuts of the cervix and do
2 tend to bleed. She had some mild bleeding from there.
3 There was quite a bit of blood all through this area
4 that I had to clean out in the -- you know, the vaginal
5 part, but the blood was coming from the cervical
6 laceration, the cut.

7 Q And in -- not giving us an exact time when that would
8 have occurred, could you tell if that was a recent
9 injury or if that was an old injury?

10 A The active bleeding suggests more recent, although
11 lacerations of the cervix do tend to last longer in the
12 way they heal. It takes longer for them to heal than
13 it would for the injuries we saw on the outside. But
14 the bleeding was suspicious for a more recent injury.

15 Q The bleeding itself in the cervix, did that concern you
16 as a nurse that was treating this patient?

17 A It did.

18 Q Why so?

19 A If you have a cervical laceration, either from child
20 birth, this kind of thing or something else, they tend
21 to bleed quite a bit. And so depending on how deep
22 they were -- hers was quite superficial so that it was
23 kind of oozing some blood and not actively bleeding.
24 But, yeah, I needed to get some feedback from doctors
25 about that, whether it would heal up on its own or

KAY FREY, Direct by Mr. Nelson

1 needed more attention.

2 Q And did you get feedback from other doctors?

3 A I did.

4 Q Who did you contact about that?

5 A Her original doctor from the emergency department had
6 gone home, so I talked to the surgeon or -- or the
7 emergency doctor in the ED, 6:30-ish, maybe, um, to see
8 what, if anything, we needed to do with that, if I
9 should send her back. He called an OB-GYN doctor, a
10 consultant, and, you know, asked that very question of
11 him as well. I don't know his name. But the
12 conclusion we all had was to let it heal on its own,
13 watch for more bleeding, and if there was any of
14 that -- because it had really settled down just from
15 the time I was doing this exam, once I found where it
16 came from, it had really started to subside. We just
17 decided the safest thing would be to leave it alone and
18 come right back if got worse. And I told her that.

19 Q Okay. You indicated in the previous diagram there that
20 the injuries present in A and B were injuries that
21 could be related to consensual sexual activity. Do you
22 have an opinion about whether or not injuries in C
23 would be consistent with normal consensual activity?

24 MR. SEPE: I'm going to object to the form of the
25 question. The word "normal," I don't know what that means.

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1 THE COURT: Sustained. Rephrase, Counsel.

2 BY MR. NELSON:

3 Q Ma'am, do you have an opinion as to whether or not the
4 injuries noted here in C are consistent with forcible
5 sexual intercourse?

6 A I believe they are for two reasons. They are unusual
7 to see. I've done pelvic exams on hundreds of women
8 who are having consensual sex and on a few hundred
9 women who haven't, and you rarely see this in anyone.
10 So the fact that it's there is unusual, and the fact
11 that it was actively bleeding, you know, suggests a
12 more recent injury. So on this level, I would say "no"
13 to this being a consensual thing. It's hard to do this
14 to a tough muscle.

15 Q Whereas the injuries in A and B, you referenced it as
16 muscle tissue here inside your mouth, which is softer.

17 A It's more fragile, yes.

18 Q During your -- or after doing this examination, what
19 was the next step in the process of doing your physical
20 exam?

21 A The next step is to provide any -- well, to record what
22 I saw in the genital exam, and then to provide the
23 patient with medications she might need.

24 Q And what kind of medications were prescribed or
25 suggested in this case?

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KAY FREY, Direct by Mr. Nelson

1 A Yeah. These are under protocol as well. Antibiotics
2 are given for prevention of gonorrhea and chlamydia.
3 In her case, she hadn't been immunized for Hepatitis B,
4 which can be sexually transmitted, so I gave her a shot
5 for that. And she hadn't had a Tetanus shot in a long
6 time, so I gave her one of those.

7 Um, if women are at risk for pregnancy, they would
8 get pregnancy prevention medicine at that point, also
9 called Plan B, which is a certain kind of birth
10 control.

11 Q Did you do anything in regards to her need for
12 crutches?

13 A I did.

14 Q And what was that?

15 A I called the emergency department and asked if there's
16 some crutches for her to leave with. We fitted her. A
17 nice physical therapy person came down to my department
18 with the crutches and we fitted her so she could leave.

19 Q Was she discharged with suggestion of returning for
20 follow-up?

21 A At that time we didn't do follow-up exams. Their
22 primary care people would do that, or Planned
23 Parenthood commonly does follow-up exams for sexual
24 assault patients. So that's always recommended that in
25 two weeks they should be examined. I did advise her

KAY FREY, Direct by Mr. Nelson

1 very clearly if there was any more bleeding, she should
2 come back to the hospital and we'd go further with
3 that.

4 Q During your examination of her, did you collect any
5 samples?

6 A I did.

7 Q And what point, in the physical exam we've been talking
8 about, did that take place?

9 A Okay. Thank you.

10 From the beginning of the physical part of the
11 exam. So if things were described being on the skin, I
12 believe I swabbed her mouth because her history had
13 hand over her mouth; so I swabbed her mouth.

14 So you do that all along the way. And then,
15 certainly, the most relevant DNA retrieval usually
16 comes from internally, on the pelvic exam.

17 Q When you say "swab," can you tell the jury what you
18 mean by a swab and what that is?

19 A Okay. It's white cotton, like a Q-tip in some ways.
20 They're all sterile. Each one of them comes out of a
21 package so they're not contaminated. And then you swab
22 the area of concern or interest, and then it goes onto
23 a dryer because you don't want to package up wet swabs.
24 And then they're dried for a period of time in a dryer
25 box, watching the entire time so your swabs are not out

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1 of your sight.

2 And then when they're packaged into the rape kit,
3 swabs from a certain area are put together in a little
4 box that's long and thin like the swab is. Those go
5 into a rape kit. Everything is sealed and signed and
6 timed, and then it goes into a bigger box, which is the
7 rape kit itself. And everything goes in there, and
8 it's sealed and signed and the evidence stickers go on.
9 And then you release it to the refrigerator.

10 Q You mentioned the words "rape kit." Can you explain
11 what a rape kit is for the jury?

12 A A rape kit is all of the envelopes and swabs and boxes
13 that they'll go in -- are in the big box called a rape
14 kit.

15 Q And during this procedure, do you know how many --
16 where you took swabs from when you went through the
17 process?

18 A I took 15 total swabs. Four from her mouth -- did you
19 want me to specify?

20 Q Yes.

21 A Four from her mouth. That wasn't so much for DNA,
22 other than her own. Two from around her anus. Two
23 from the outside genital area we had before this. Four
24 from the vagina, which is, again --

25 Q Want to go back to the previous slide or --

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KAY FREY, Direct by Mr. Nelson

1 A No. I'm just not getting this thing to come on again.

2 So the most productive swabs for DNA, if there was
3 a history of penetration into the vagina, will actually
4 be there. You take them from the walls of the vagina
5 and the face of the cervix and the closed-up little
6 hole inside. And four were taken from the vagina, and
7 one of the cervix in the middle there. I swabbed
8 around her lips, put her underwear -- she was willing
9 to give that up into the kit as well.

10 Q Is it common to put underwear into a kit such as this?

11 A Um-hmm.

12 Q What's the reason for that?

13 A Um, this is where the -- there's a lot of DNA potential
14 in underwear, so -- so it's all in one place, and it
15 tends to get lost less that way than with a pile of
16 clothing that might be external clothing.

17 Q So you've talked about how each of those Q-tip-like
18 things are separated and they're dried, and then
19 they're packaged up by themselves as well?

20 A Um, for example, the four from the vagina that I took,
21 I would put two in one box and two in another.

22 Q And what about the underwear, how is that packaged, for
23 lack of a better term?

24 A The underwear is put on a sterile piece of paper until
25 it's dried, if it's wet. Then it's put into a small

KAY FREY, Direct by Mr. Nelson

1 bag that actually fits into the kit and sealed with
2 evidence labels as well.

3 Q The process that you're describing there, is that
4 ongoing while the patient is kind of still with you in
5 the examination room?

6 A Um-hmm.

7 Q And what do you do with that once you've assembled all
8 those swabs and the underwear? You mentioned it's a
9 kit. Can you describe what it looks like physically?

10 A It is a white box -- let me -- this big, so half a
11 sheet of paper.

12 Q Half a size a sheet of paper?

13 A Um-hmm, maybe a little larger. It has a bunch of
14 writing on the front that's the chain of evidence. So
15 when I sign it off to the refrigerator I sign one spot.
16 When it comes out of the refrigerator to go to the
17 police, they sign on a different spot. So it has
18 writing on the front that maintains the chain of
19 custody for the evidence so it hasn't been broken, and
20 it's sealed with evidence tape and initialed so all
21 four sides of the box have seals of their own.

22 Q What's the reason for having it sealed up like that
23 and --

24 A Sealed up in a rape kit?

25 Q Right.

KAY FREY, Direct by Mr. Nelson

1 A So it's not lost, it's all together from one patient,
2 and nothing happens to it.

3 Q Does that prevent it from being tampered with as well?

4 A Yes.

5 Q You mentioned a refrigerator. What happens,
6 physically, to this box once it leaves your hands? Can
7 you walk us through that part of the process?

8 A Okay. Well, it's all sealed up, and the evidence
9 stickers are on there, and my signature's on the front.
10 And then it goes into a refrigerator that's got a
11 certain temperature range that you have to check all
12 the time to make sure it's right so the swabs stay
13 intact and ready to go somewhere else. And the
14 refrigerator is a locked refrigerator, so that's where
15 it stays until the police are called to come and pick
16 it up.

17 Q Had you -- in this case, how did the police know they
18 should come and pick it up?

19 A My night colleague that day called them -- that was at
20 7:30 -- and signed it off to them. And that's on this
21 form as well. It was on the front of the box.

22 Q And so your shift was supposed to end at 7 p.m. that
23 night. Do you know what time you ended that night
24 or...(pause.)

25 A I don't remember exactly, but I remember catching the

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1 last ferry to Vashon, so that would have been ten
2 something.

3 Q You mention a night colleague. So is there another
4 sexual assault nurse examiner who has kind of an
5 opposite shift than you do?

6 A That's right.

7 MR. NELSON: Your Honor, I would ask to admit
8 medical reports regarding exam in this case, and this would
9 be Exhibits 19A through K.

10 THE COURT: Counsel?

11 MR. SEPE: Your Honor, it's time for the afternoon
12 break. I'd like to discuss that with the Court.

13 THE COURT: All right. Ladies and gentlemen of
14 the jury, let's take the afternoon break. Leave your
15 notepads on your seats. We'll take about a 15-minute break.

16 (Jury absent)

17 I'll have you step outside.

18 (Witness exits the courtroom)

19 Go ahead and be seated.

20 Counsel, let's address the Defense's concern
21 regarding the exhibits before we take the afternoon break
22 ourselves.

23 MR. SEPE: These are documents that were filled
24 out by the nurse. They contain a lot of hearsay. And
25 documents, in and of themselves, while they could be

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1 business records, she hasn't laid the foundation for that.
2 But let's assume that they are. Even business records
3 contain amounts of hearsay in them. I mean, these are
4 things that she wrote in here that she, of course, testified
5 to, for the most part, but it's still hearsay. The
6 documents themselves might, again, be a business record, but
7 they contain other statements in there and other things in
8 there, but they're certainly hearsay in nature, and that's
9 my concern.

10 THE COURT: Counsel Nelson.

11 MR. NELSON: Your Honor, I believe that they are
12 an exception to the hearsay rule as a business record, for
13 one thing.

14 Just for clarification, I recall that we had some
15 discussion about 19L, and I believe that was admitted. Is
16 that correct? Just for completeness, I'm asking to admit
17 the rest of them. If there's objection to specific parts of
18 that, I think we can address those on a case-by-case basis.
19 I don't have any further argument though.

20 THE COURT: All right. The fact that 19L was
21 admitted without objection does not -- is not dispositive in
22 regards to Exhibits 19A through, I believe, K. So I believe
23 what we'll have to do in order to address them, since
24 they're individually marked, is address each one
25 individually so that I can make a ruling regarding whether

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1 or not there is an exception to the hearsay that
2 Counsel Sepe has raised as his concern.

3 So, Counsel, we can take the afternoon break, and
4 then we'll take that up first thing before having the jurors
5 come back in.

6 MR. SEPE: Thank you, Your Honor.

7 THE COURT: Also, Counsels, for the record,
8 Juror No. 6 continues to fall asleep. She fell asleep
9 during the portion of the questioning where her pad fell to
10 the floor and Juror No. 7 had to retrieve it for her. She
11 also fell asleep a number of times during the viewing of
12 Exhibit 19L and has continued to fall asleep during
13 testimony from this witness. We'll address that as well, as
14 I indicated, at the end of the session today.

15 All right. Court will be in recess.

16 (Recess 2:51 p.m.) (Resumed 3:04 p.m.)

17 Counsels, back to the motion. It's really an
18 objection in regards to State's Exhibit --

19 MR. NELSON: Your Honor, we reached an agreement
20 on this issue.

21 THE COURT: 19H through K.

22 MR. NELSON: Yes.

23 THE COURT: Thank you, Counsel.

24 MR. SEPE: We have, Your Honor. I went through
25 them. Some of them were, I concluded, really had no

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1 bearing, like the consent form issue. It certainly had
2 bearing on the Court's ruling this morning. As to whether
3 it's relevant as to the what the jury has to find here, it
4 has no relevance.

5 THE COURT: So what have we decided?

6 MR. NELSON: Your Honor, I will withdraw my
7 initial motion, and I will instead ask the Court to admit
8 Exhibits 19B, 19C, 19D, 19E, and 19L was previously
9 admitted.

10 THE COURT: And Counsel Sepe?

11 MR. SEPE: The bulk of those contain statements
12 that Your Honor's already admitted as for medical purposes.
13 They're exact quotes of the victim. So I don't -- I didn't
14 see an issue there.

15 THE COURT: Okay. So here's how I'm going to
16 address this. Counsel, there was a motion in regards to the
17 State moving to admit Exhibits 19A through K. Then there
18 was a request by Defense Counsel. An objection was made, so
19 I'm going to rule that the Defense's objection is sustained.

20 Counsel, at that time, you could move to
21 withdraw -- well, at that time, you can move to admit the
22 specific ones, and then I'll hear from Defense Counsel in
23 front of the jury.

24 MR. NELSON: Okay.

25 THE COURT: All right. Let's get the witness back

KAY FREY, Cross by Mr. Sepe

1 in.

2 (Witness seated) (Jury present)

3 Go ahead and be seated.

4 All right. There was an objection. The objection
5 is sustained.

6 State.

7 MR. NELSON: Your Honor, the State will, at this
8 time, ask for admission -- offer Exhibits 19B, 19C, 19D and
9 19E.

10 THE COURT: Defense Counsel?

11 MR. SEPE: Your Honor, I'll withdraw my objection
12 previously. No objection to the admission of these
13 documents.

14 THE COURT: Okay. So I'll admit 19B, 19C, 19D and
15 19E.

16 (Plaintiff's Exhibit Nos. 19B-E admitted)

17 MR. NELSON: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 MR. NELSON: Your Honor, that's all the questions
20 that I have at this time of this witness.

21 THE COURT: Counsel Sepe, cross-examination.

22 CROSS-EXAMINATION

23 BY MR. SEPE:

24 Q Good afternoon, ma'am.

25 A Hello.

KAY FREY, Cross by Mr. Sepe

1 Q Prior to the patient coming to your part of the
2 hospital, she was in the ER being treated there?

3 A Yes.

4 Q And is that a normal routine, that they come from the
5 ER there?

6 A Um, in Tacoma General, yes, because of the equipment
7 advantage. In other ERs we do cases there in the
8 department.

9 Q Now, when she got there, she had had a bunch of tests,
10 blood tests and other things done. And do you read
11 those reports and the notes by the ER physicians before
12 you do your work?

13 A The blood work is commonly reviewed as soon as it's
14 available. The physician reports may not even be done
15 yet. Those take some time. They're done the same day.
16 So feedback from the nurses or the doctor about certain
17 issues would have occurred verbally. But as far as
18 reading the reports, the entire ER report at the time,
19 no, because it wasn't completed.

20 Q Okay. Did you read it subsequently at all?

21 A Um-hmm.

22 Q Oh, you have?

23 A Um-hmm.

24 Q Okay. And when this woman appeared in the ER, she was
25 quite intoxicated. Is that fair to say?

KAY FREY, Cross by Mr. Sepe

1 A I wasn't there then, but that's what I heard, um-hmm.

2 Q You testified that she had a 1 -- point 16 at 8:00 in
3 the morning.

4 A Um-hmm.

5 Q And that's twice the legal limit to drive a motor
6 vehicle. Have you dealt with people that have come
7 into the ER -- or come into your part of the -- that
8 were intoxicated like that?

9 A Yes. Many times, yes.

10 Q And although by the time you got to see her, it was a
11 good 10, 12 hours later, more than that, I think. Let
12 me see. You got to see her at 1615, 4:15 in the
13 afternoon. So from 1:30 in the morning to 4 in the
14 afternoon.

15 A Other than that brief encounter I had when I introduced
16 myself?

17 Q Right.

18 A And I told her I would be a really long time and did
19 she want to wait or --

20 Q Sure.

21 A Yeah. She could have come back at that point, but she
22 wanted to stay.

23 Q And by the time you got to see her at 4:00, she had
24 pretty much, I don't know, I guess the word is "sobered
25 up"?

KAY FREY, Cross by Mr. Sepe

1 A She had.

2 Q Okay. Now, I want to talk about some of the injuries
3 you observed in particular. And I want to start by --
4 you mention that -- let me find your report here. One
5 second. That she was menopausal or post-menopausal.

6 A Um-hmm.

7 Q What does that mean, medically, to the jury. Before I
8 ask some more questions, let's kind of set that up.

9 A It means that she's no longer having periods and hadn't
10 for ten years --

11 Q Okay.

12 A -- by her report.

13 Q And as a result of that, is there a loss of estrogen?

14 A Yes.

15 Q And does estrogen provide lubrication for sexual
16 activity in post-menopausal women?

17 A It does.

18 Q So post-menopausal women that have lost estrogen may
19 not be as lubricated in that area, necessarily,
20 naturally --

21 A Um-hmm.

22 Q -- as premenopausal women, for example?

23 A Vaginal area, yes. You're right. The cervix itself
24 continues to be pretty active in terms of lubrication.

25 Q Okay. So if there's less lubrication, that might

KAY FREY, Cross by Mr. Sepe

1 account for some bleeding and injury, is that fair to
2 say, in sexual activity?

3 A I'm thinking in this particular case. Give me a couple
4 of minutes.

5 Q Please take your time.

6 A Based on my training and experience, after having done
7 multiple pelvic exams, my expectation from lubrication
8 issues might be medication driven, and you would see
9 vaginal injuries more commonly than anything on the
10 cervix.

11 Q And you had mentioned that the injuries that you saw to
12 the vulva, and the laceration, would result even from
13 consensual sex. I hate to word that consensual, but
14 non-forceful sex. Is that fair to say?

15 A Well, that's two different things, if I might
16 elaborate.

17 Q Sure.

18 A So consent is consent. You have permission to have sex
19 with that person. Forcibility is something else.

20 Q Sure. Consensual sex can be forceful. Correct?
21 People like rough sex. There's a book about it, 50
22 *Shades of Gray* or something?

23 A Oh, well, there's a good study about that, if I can
24 actually elaborate on that?

25 Q Sure.

KAY FREY, Cross by Mr. Sepe

1 A Um, in California they did a really pivotal study on
2 that very issue of consent and force and injuries that
3 occurred with consenting adults versus adults who had
4 been assaulted. And the number of injuries -- that was
5 in the '90s. It's still relevant. The number of
6 injuries, on average, for patients with a sexual
7 assault history were three; for patients with
8 consensual sex it was one.

9 Q Okay.

10 A And the injury, internally, was way down on the way for
11 everyone.

12 Q So forcible -- here, when we talk about the injury to
13 the cervix, you've seen that before, haven't you?

14 A Not often. I've seen that before, but not --

15 Q And it can occur with non-forcible -- with forcible sex
16 that's consensual.

17 A I have never seen that, no.

18 Q Okay.

19 A Not in my experience.

20 Q What about if the perp -- the male has a large genital.
21 It wouldn't cause that, in your opinion?

22 A A cervical laceration, no.

23 Q What if the woman has cervical cancer?

24 A If a woman had cervical cancer, it would be more
25 fragile. You're correct. If a woman had an infection,

KAY FREY, Cross by Mr. Sepe

1 the cervix would be more fragile.

2 Q Okay. 12A.

3 MR. SEPE: May I approach, Your Honor?

4 THE COURT: Sure.

5 BY MR. SEPE:

6 Q This is a certificate of death for Ms. Hunt in 2011,
7 April, and I was wondering if you could look at
8 number -- I think it's 35 -- 34 and 35 talks about
9 causes of death. One says heart attack?

10 A 34 says probable.

11 Q 35?

12 A End-stage cervical cancer.

13 Q So if a person, if they had cancer and maybe doesn't
14 know it at the time, that does make the cervix more, as
15 you said, vulnerable to injury?

16 A It could.

17 Q Okay. You had mentioned there were some bruises and
18 some scrapes that you were trying to date. It's very
19 difficult to do that in many cases, isn't it?

20 A It is, and I was not making an attempt to date them.
21 They do look a certain way the day they occur.

22 Q Yeah.

23 A And that was consistent.

24 Q And you had mentioned that you collect evidence as part
25 of the exam. Is that fair to say?

KAY FREY, Redirect by Mr. Nelson

1 A Um-hmm.

2 Q Swab various parts of the body, clothing, and she
3 wouldn't let you have her clothing?

4 A No.

5 Q Even though that it could be potential evidence on it.

6 A Yes. We had other clothing she could have worn. She
7 seemed fond of those clothes. She didn't seem to have
8 many clothing articles.

9 Q Thank you, ma'am.

10 MR. SEPE: No further questions, Your Honor.

11 THE COURT: Thank you. Redirect, Counsel Nelson?

12 MR. NELSON: Yes. Thank you.

13 REDIRECT EXAMINATION

14 BY MR. NELSON:

15 Q You were asked some questions about cervical cancer.
16 Do you have any experience with cervical cancer, in
17 terms of your training or -- is that -- you're nodding
18 "yes"?

19 A I do.

20 Q Okay.

21 A A little. Um -- go ahead.

22 Q And with regard to cervical cancer, how long -- do you
23 have information about how long normal cervical cancer
24 runs, from start to finish?

25 A I don't know that.

KAY FREY, Redirect by Mr. Nelson

1 Q You indicated that you had some information about -- or
2 that cervical cancer might make the cervix more tender
3 or -- I don't want to put words in your mouth. How
4 would you describe what that might do to the cervix in
5 terms of fragileness or --

6 A Early on it would be purely at the cellular level, so
7 you'd have to -- that's what Pap smears do. They take
8 a scraping of the cervix, the face of the cervix and
9 the internal opening, and look microscopically. So
10 that would be how you would find it early on.

11 If Pap smears come back abnormal, then you look
12 with the same instrument I was using. I didn't do this
13 in my practice. You look for an area on the cervix
14 that might be suspicious, with the colposcope, and I
15 did not see anything other than the laceration. So
16 there's a different look to that. For end-stage
17 cervical cancer, I honestly don't know what that looks
18 like, but she didn't have that when I saw her. So she
19 may have had some cellular version, at that point, that
20 would have been evaluated microscopically.

21 Q And when you say that you -- when you looked through
22 that instrument, that you didn't see any signs of that,
23 fair to say that end-stage cervical cancer, there would
24 likely be some visible signs in the cervix?

25 A Yes.

KAY FREY, Recross by Mr. Sepe

1 Q So the fact that you didn't see any indicated that if
2 present, it was kind of below the surface. Is that --

3 A It could have been.

4 Q -- the way you describe it?

5 A Could have been incubating at the cellular level, if
6 you will, when I saw her, and we weren't testing for
7 that. She wasn't getting a Pap smear, for example.

8 Q And when you went through her history and talked to her
9 about her medical history, did the cervical cancer come
10 up, at all, in any of the records that you saw or
11 information that you were aware of?

12 A No. The shoulder, the dislocated shoulder and elbow,
13 the arthritis she talked quite a bit about that. I had
14 no knowledge of cervical cancer, either by reading her
15 chart or seeing her that day.

16 Q And she certainly didn't complain to you about cervical
17 cancer.

18 A No.

19 MR. NELSON: That's all the questions I have.

20 THE COURT: Recross, Counsel?

21 RE CROSS-EXAMINATION

22 BY MR. SEPE:

23 Q Ma'am, did you try to get any kind of past medical
24 history, other than from her, to find out if she has a
25 PCP -- a personal physician, whatever they call them,

KAY FREY, Recross by Mr. Sepe

1 primary care physician, that kind of thing?

2 A You mean getting her primary care records, did I do
3 that? No.

4 Q Okay. Do you know if she even went to doctors in the
5 past?

6 A I don't know. Um, that would surprise me a bit.

7 Q You mentioned something that, you know, she talked a
8 little bit about her injuries. One of the statements
9 that she made in your notes here -- actually, these are
10 mine. Let me look at yours.

11 You asked her about pain and she said, I hurt in
12 my same old place, my vaginal area. And you have that
13 in quotes. Is that your understanding of what she
14 said?

15 A Um-hmm.

16 Q Now, it seems when someone says, I hurt in my same old
17 place, my vaginal area, that's an indication that
18 they've hurt there before, wouldn't it?

19 A Possibly.

20 Q Yeah. Okay.

21 MR. SEPE: Thank you, ma'am. I have no further
22 questions.

23 THE COURT: Any additional direct, Counsel?

24 MR. NELSON: Yes, just briefly.

25 ////

KAY FREY, Further Redirect by Mr. Nelson

1 FURTHER REDIRECT

2 BY MR. NELSON:

3 Q Ms. Frey, do you know what she meant by that statement?

4 A I don't.

5 MR. NELSON: That's all the questions I have.

6 Thank you.

7 THE COURT: Based on that, anything else?

8 MR. SEPE: No, Your Honor.

9 THE COURT: May this witness be excused?

10 MR. NELSON: Yes, Your Honor.

11 MR. SEPE: Yes, Your Honor.

12 THE COURT: Thank you. You're excused at this
13 time.

14 (The witness was excused from the witness stand)

15 Counsel for the State, I believe that's your last
16 witness for today.

17 MR. NELSON: It is, Your Honor.

18 THE COURT: Okay. And I'll just ask that you get
19 the exhibits and the -- what do you call that thing?

20 MR. NELSON: Yes.

21 THE COURT: What do you call it? The clicker?

22 All right. Ladies and gentlemen of the jury, I'm
23 going to excuse you for the rest of the afternoon. It's
24 been a long one. Thank you for hanging in there. Leave
25 your notepads on your seats. Do not discuss this case with

KAY FREY, Further Redirect by Mr. Nelson

1 anyone, to include amongst yourselves, unless you -- it's
2 Thursday. Enjoy your weekend. I will see you on Monday at
3 8:45 a.m., be in the jury room. Thank you.

4 (Jury absent)

5 Go ahead and be seated. Counsels, in regards to
6 Juror No. 6, any additional observations, State?

7 MR. NELSON: Your Honor, it did look -- as I
8 looked over there, at one time, she had her eyes down, but I
9 couldn't tell whether she was sleeping or not.

10 THE COURT: Counsel.

11 MR. SEPE: I was watching a little bit this most
12 recent time, and she seemed to be awake and alert, but I
13 can't say, you know, through the course of the day how much
14 she actually was awake and how much she was asleep, other
15 than Your Honor's been paying very good attention.

16 THE COURT: All right. Well, we're early in the
17 process. We have 14 jurors. She showed up today. She's
18 trying. So we'll just keep an eye on her. If it becomes an
19 issue next week, we'll address it at that time.

20 Anything else from the State before we end for the
21 week?

22 MR. NELSON: No, Your Honor.

23 THE COURT: Counsel Sepe?

24 MR. SEPE: One scheduling matter on Tuesday. I
25 have a trial set with possession of a firearm, and I'm going

KAY FREY, Further Redirect by Mr. Nelson

1 to have to go into presiding and probably continue it if I
2 can't settle it tomorrow with the deputy prosecutor.
3 There's an issue of first impression on the search, so I
4 don't know how we're going to figure it out. Hopefully, we
5 can, but if not, I may have to be here Tuesday for -- at
6 least continue the thing.

7 THE COURT: So let us know on Monday.

8 MR. SEPE: I will do so.

9 THE COURT: Thanks for giving us a heads-up.
10 Anything else?

11 MR. SEPE: No, Your Honor.

12 THE COURT: So it also appears I have something on
13 my docket Tuesday morning that I can take up, so we'll
14 probably start maybe a little later on Tuesday. 9:30 is
15 usually -- but I think I have another trial scheduled to
16 start on Tuesday morning.

17 All right. Enjoy your weekend.

18 Mr. Burke, I'll see you on Monday.

19

20 (Whereupon, the above-held proceedings were
21 concluded at 3:29 p.m.)

22

23

24

25

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