No. 76890-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

OSCAR LUIS URBINA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Oscar Urbina is a native Spanish speaker with only a limited ability to understand and communicate in English. His custodial interrogation was conducted entirely in English. Urbina requested the assistance of a Spanish-language interpreter but his request was denied. He did not fully understand the interrogation or his Miranda rights. Therefore, the admission of his custodial statements at trial violated the Fifth Amendment and the Due Process Clause.

The trial court also abused its discretion in admitting out-of-court statements made by the alleged victim to medical providers. Substantial portions of the statements were not reasonably pertinent to medical diagnosis or treatment and were not admissible under the hearsay exception for statements to medical providers.

Finally, the court abused its discretion in refusing to find the rape and the unlawful imprisonment were the same criminal conduct for purposes of sentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Urbina "has good [English] speaking and understanding ability." RP 85.

2. The trial court violated the Fifth Amendment and the Due Process Clause by admitting Urbina's custodial statements.

3. The trial court abused its discretion in admitting the complainant's out-of-court statements made to a social worker and a sexual assault nurse examiner under ER 803(a)(4).

4. The trial court abused its discretion in refusing to find the two offenses were the same criminal conduct at sentencing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth Amendment and the Due Process Clause preclude a trial court from admitting an accused's custodial statements if they were involuntary or obtained without a knowing and intelligent waiver of Miranda rights. An important circumstance to consider is whether the accused understood the language spoken by the interrogator. Here, Urbina was interrogated by a police detective entirely in the English language, which is not his native tongue. He unsuccessfully requested the assistance of a Spanish-language interpreter and informed the detective he did not fully understand the conversation. Did the trial court err in admitting Urbina's statements?

2. A complainant's out-of-court statements made to medical providers are admissible under ER 803(a)(4) only if they are reasonably

pertinent to medical diagnosis or treatment. Statements describing the events leading up to an assault, or details about the assault that are not reasonably pertinent to medical treatment, are not admissible. Here, the court admitted the complainant's out-of-court statements made to a social worker and a sexual assault nurse examiner, which included extensive details about the assault that were not reasonably pertinent to medical diagnosis or treatment. Did the court misapply ER 803(a)(4)?

3. Two offenses are the "same criminal conduct" and count as a single point in the offender score if they were committed at the same time and place, against the same victim, with the same objective criminal intent. The offenses of unlawful imprisonment and rape are the "same criminal conduct" if they were committed at the same time and place against the same victim, and the offender's purpose in restraining the victim was to facilitate the rape. Here, the complainant testified Urbina sexually assaulted her several times over a three-hour period while restraining her in his apartment. Did the trial court abuse its discretion in refusing to find the two offenses were the same criminal conduct?

D. STATEMENT OF THE CASE

1. Alma Rodriguez claimed Urbina sexually assaulted her while restraining her in his apartment.

Late in the evening of March 7, 2016, Alma Rodriguez was waiting at a bus stop in West Seattle. Oscar Urbina, a man she did not know, drove up and offered her a ride in his car. Rodriguez accepted. RP 618-20.

Rodriguez is a prostitute and a heroin addict. RP 605, 608-09. Urbina told her he wanted a "date" and she agreed to perform sexual services for money at his apartment. RP 621. In the car, Urbina gave her $40 and said he would give her more money after they were finished. RP 623.

They stopped at a 7-11 store close to Urbina's apartment, where he bought some beer. Then they went to his apartment. RP 622.

Rodriguez said when they got to the apartment, Urbina became "rude" and told her to take off her clothes. RP 623. He seemed intoxicated. RP 621. She tried to use her cell phone but he grabbed it and threw it, although he then helped her look for it. RP 624.

Urbina and Rodriguez had sexual intercourse. Rodriguez said Urbina was acting aggressively in a way that made her uncomfortable.

At first, she tried to do what he wanted so that she could leave. But he would not let her leave. Every time she tried to go the door, he blocked her way. RP 625, 635.

Rodriguez said she screamed for help but Urbina hit her in the face and head with his fist. While they were struggling, she grabbed a can of mace from her bag and sprayed him in the face. She said this just made things worse. He tried to strangle her and told her she was going to die. He asked her to help him get the mace out of his eyes. She tried to help, with water and milk, but this just made him more angry. RP 626-28.

Rodriguez said Urbina kept her in his apartment for about three hours while he repeatedly sexually assaulted her. RP 574, 630. She said he inserted his penis in her vagina, her mouth, and her anus. RP 630-31. She said every time she tried to leave, he hit her and blocked the door. RP 628.

Rodriguez said eventually Urbina fell asleep and she was able to leave. RP 631. She went back to the 7-11 and told the clerk what happened. He called 911. RP 633-34.

The police arrested Urbina later that day at his apartment. RP 51. He was charged with one count of second degree rape by forcible

compulsion and one count of unlawful imprisonment with sexual motivation. CP 11-12.

At trial, Urbina disputed Rodriguez's account of what happened. He testified that when he encountered Rodriguez at the bus stop, a man she was with offered her sexual services to him for money. RP 767. Urbina stopped at the 7-11 on the way to his apartment in order to buy beer for Rodriguez. RP 768, 784. When he got back to the car, she was injecting herself with heroin and said she did not want the beer. RP 769, 787.

After Urbina and Rodriguez got to his apartment, they had consensual sexual intercourse. RP 770-73. When they finished, Rodriguez looked for her phone but could not find it. She asked Urbina to help her look for it which he did for a while. RP 774. He went to the bathroom to urinate and when he returned, Rodriguez sprayed him in the face with pepper spray. RP 775. He thought she did that out of anger and frustration because she could not find her phone. RP 792.

The pepper spray in Urbina's eyes caused him great pain. He screamed and asked Rodriguez for help. When she approached him he grabbed her hair because he could not see. She guided him to the bathroom and tried to wash his face, but that just caused him more pain.

He asked her to bring him a t-shirt from the bedroom. Then he asked her to guide him to the living room. Again he pulled her hair because he could not see. RP 776-78.

Eventually the pain died down. RP 779. Urbina asked Rodriguez why she sprayed him with pepper spray and she apologized. RP 779. He asked her to bring him some lotion from the bedroom which she did. It was refreshing. RP 781.

Rodriguez and Urbina had consensual intercourse again. Then she gathered her things and left. RP 781-82.

Urbina did not strangle or punch Rodriguez. RP 794. He received the scratches on his neck earlier, while cutting trees and doing yardwork. RP 793.

The jury found Urbina guilty as charged of second degree rape and unlawful imprisonment with sexual motivation. CP 72-73.

At sentencing, defense counsel argued the two offenses were the "same criminal conduct" and should count as only a single point in the offender score. RP 899-900. The court disagreed. The court found the offenses did not take place at the same time because the restraint occurred over "a long period of time." RP 902. The court also found Urbina had two separate criminal intents: (1) to "have sexual relations

with the victim . . . against her will and by the use of force and threats" and (2) to "make sure she didn't go anywhere for as long as he could possibly hold her." RP 903.

2. Urbina requested but was not provided a Spanish-language interpreter during custodial interrogation.

Urbina's native language is Spanish. He is from Honduras and moved to the United States in 2001. RP 764-65. He was assisted by a Spanish-language interpreter throughout the trial. See RP 2.

At a pretrial hearing, Officer Andrew Bass testified he arrested Urbina and walked him to his patrol car where he read the Miranda rights in English. RP 51. Urbina "didn't understand fully what was going on, what was [sic] his rights." RP 51. He asked if someone could read the rights in Spanish. RP 56-57. Officer Bass asked Officer Carlson, "who has a little better grasp of the Spanish language," to read the Miranda rights in Spanish from a pre-printed form. RP 51. Carlson read the rights in Spanish while Urbina looked at the Spanish-language form. RP 51.

Urbina was taken to police headquarters where he was interrogated by two detectives. The interrogation took place in a small room with a table and chairs but no windows. RP 61.

Detective Maurice Washington read the Miranda rights to Urbina again in English, from a written form. Washington also provided Urbina a form that had the rights written in Spanish. Washington testified Urbina said he understood his rights and signed both forms. RP 62-63.

Urbina specifically requested the assistance of a Spanish language interpreter during the interrogation. He stated, "you put one person in, Spanish translator for me, more better. More better communication." RP 73. Detective Washington refused this request and conducted the interrogation entirely in English. RP 66. He did not even seek the assistance of an interpreter through the telephone "language line," which was "a tool that's available." RP 71.

Urbina did not testify at the pretrial hearing. At trial, he explained he and Washington could not understand each other during the interrogation because it was conducted in English. RP 785.

The trial court found it was "clear" that Urbina "is not fluent in English." RP 85-86. The court found that when Officer Bass read Urbina his rights at the patrol car, "[t]he defendant didn't understand his rights in English." RP 83. He understood his rights only when they were translated into Spanish. RP 83-85.

Nonetheless, the court incongruously found Urbina "has good [English] speaking and understanding ability." RP 85. The court concluded Urbina's custodial statement was voluntary and admissible. RP 87.

At trial, the State used portions of Urbina's custodial statement to impeach his testimony. RP 787-95. Urbina explained his trial testimony differed somewhat from his police statement because he and Detective Washington had not understood each other during the interrogation. RP 790.

3. The trial court admitted, over objection, Rodriguez's out-of-court statements made to a social worker and a sexual assault nurse examiner.

Rodriguez was taken by ambulance to Harborview Medical Center. RP 524. She had abrasions on her neck, bruising to one eye and swelling to the other eye, but no serious injuries. RP 552, 573, 666.

At Harborview, Rodriguez spoke to a social worker and a sexual assault nurse examiner and underwent a sexual assault examination. RP 561-76, 646-699.

Defense counsel objected to admission of Rodriguez's statements to the social worker and the sexual assault nurse examiner as

hearsay. CP 17-18; RP 103-04, 658, 662, 673-75. The court overruled the objection. RP 104-05, 676.

At trial, the social worker and the sexual assault nurse examiner testified in detail about statements Rodriguez made to them describing the alleged assault. RP 571-75, 659-62.

E. ARGUMENT

1. Urbina's limited ability to communicate in the English language rendered his custodial statement inadmissible.

Urbina's limited ability to understand English prevented him from fully understanding his Miranda rights. He did not knowingly, intelligently and voluntarily waive them. Also, his limited language ability rendered his statement involuntary in violation of constitutional due process.[1]

Urbina made plain during custodial interrogation that he could not understand or speak English very well. RP 73. The trial court agreed, finding it was "clear" that Urbina "is not fluent in English." RP

[1] Urbina's statement qualifies as a "confession" for constitutional purposes even if he did not specifically admit the criminal allegations. Miranda v. Arizona, 384 U.S. 436, 476-77, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If the prosecution uses the defendant's custodial statement for any purpose, such as to impeach the defendant's testimony at trial, it must prove the statement was the product of a knowing, intelligent and voluntary waiver of constitutional rights. Id.

85-86. Urbina specifically requested the assistance of a Spanish-language interpreter but the request was denied. RP 66. These circumstances demonstrate he did not fully understand his rights or intelligently and voluntarily waive them.

The trial court's findings of fact are verities on appeal only if supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The trial court's legal conclusions regarding the adequacy of the Miranda warnings and Urbina's waiver are issues of law reviewed *de novo*. State v. Mayer, 184 Wn.2d 548, 555, 362 P.3d 745 (2015). The ultimate determination of "voluntariness" is also a legal question reviewed *de novo*. Arizona v. Fulminante, 499 U.S. 279, 285, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

a. Admission of Urbina's statement violated the Fifth Amendment because he did not fully understand his rights and waive them.

The State may not use a defendant's custodial statements at trial unless it first proves the statements are the product of a knowing,

intelligent and voluntary waiver of Miranda rights. Mayer, 184 Wn.2d at 556; Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); U.S. Const. amend V.

Statements obtained from an individual in custody are presumed to violate the Fifth Amendment unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). "The requirement that the waiver be knowing necessitates the Miranda warnings." Id.

Before conducting a custodial interrogation, the police must advise a suspect (1) he has the right to remain silent and anything said to the police might be used against him, (2) he has the right to consult with an attorney prior to answering any questions and have the attorney present for questioning, (3) counsel will be appointed for him if requested, and (4) he can end questioning at any time. Miranda, 384 U.S. at 444-45.

The question of whether a person waived his rights under Miranda must be determined by looking at the particular facts and circumstances of the case, including the background, experience, and conduct of the accused. North Carolina v. Butler, 441 U.S. 369, 374-

75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979). "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Mayer, 184 Wn.2d at 556 (quoting Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). The dispositive inquiry is whether the warnings reasonably convey to a suspect his rights as required by Miranda. Mayer, 184 Wn.2d at 560.

A suspect's language difficulties are important to consider in deciding whether there has been a valid Miranda waiver. State v. Teran, 71 Wn. App. 668, 672, 862 P.2d 137 (1993). Even if a police officer reads a suspect his Miranda rights, if the suspect could not understand the officer and was not otherwise aware of the rights, then his statements are inadmissible. City of Seattle v. Gerry, 76 Wn.2d 689, 692, 458 P.2d 548 (1969). After all, "[o]ne cannot effectively waive . . . a constitutional right without knowledge of its existence." Id. (citation omitted).

Here, the record demonstrates that Urbina's limited ability to understand English prevented him from knowingly and intelligently waiving his Miranda rights. It was plain to the arresting officer that

Urbina was not fluent in English and "didn't understand fully what was going on, what was [sic] his rights." RP 51. Yet, before interrogating Urbina at the police station, Detective Washington read Urbina his Miranda rights in English. RP 62-63. Although Washington gave Urbina a form that had the Miranda rights written in Spanish, he did not converse with Urbina in Spanish. RP 62-63, 66. As a result, Urbina did not fully understand the conversation. RP 785. Urbina told Washington he needed the help of someone who could speak Spanish but Washington refused this request. RP 66, 71.

Because Washington conducted the interrogation entirely in English, without the assistance of a Spanish-language interpreter, he could not ascertain whether Urbina understood his rights. Due to Urbina's demonstrated lack of fluency in English, the State did not prove he knowingly and intelligently waived his Miranda rights. His statements should not have been admitted at trial. Mayer, 184 Wn.2d at 556; Miranda, 384 U.S. at 475.

b. Admission of Urbina's statement violated constitutional due process because the statement was involuntary.

A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary

confession. Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); U.S. Const. amends. V, XIV; Const. art. I, § 3.

The term "voluntary" means the statement is the product of the defendant's own free will and judgment. State v. Unga, 165 Wn.2d 95, 102, 196 P.3d 645 (2008). The inquiry is whether, under the totality of the circumstances, the statement was coerced by police conduct. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

There must be a causal relationship between the officer's coercive conduct and the suspect's statement. Broadaway, 133 Wn.2d 118, 132; Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The Court considers both whether the police exerted pressure on the defendant and the defendant's ability to resist the pressure. Unga, 165 Wn.2d at 101-02.

The impact of the police conduct or tactics must be determined in relation to the defendant's subjective experience of them. State v. Setzer, 20 Wn. App. 46, 49-50, 579 P.2d 957 (1978).

Custodial interrogation in itself is inherently coercive. "[T]he very fact of custodial interrogation exacts a heavy toll on individual

liberty and trades on the weakness of individuals." Miranda, 384 U.S. at 455. Aside from the mere fact of custodial interrogation, the Court should also consider the length and other particular circumstances of the interrogation. State v. Davis, 73 Wn.2d 271, 286-87, 438 P.2d 185 (1968), overruled on other grounds by State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012).

In determining whether the defendant's will was overborne, the Court considers the defendant's physical condition, age, mental abilities, and experience. State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). Inexperience, lack of education, and weak mental or physical condition can make a suspect particularly vulnerable to psychological coercion by police. Unga, 165 Wn.2d at 101.

A person's language difficulty is an important factor to consider in determining voluntariness. State v. Lopez, 74 Wn. App. 264, 270, 872 P.2d 1131 (1994). If the defendant is incapable of understanding his Miranda rights or the consequences of waiving them, his statement cannot be deemed voluntary. Unga, 165 Wn.2d at 108-09.

Here, the totality of the circumstances demonstrates Urbina's custodial statements were not voluntary. The interrogation itself was inherently coercive. Miranda, 384 U.S. at 455. That it was conducted

in a small room with no windows, RP 61, contributed to its coercive effect.

Urbina's limited English language ability prevented him from effectively withstanding the coercive effects of the interrogation. Urbina told Detective Washington that he could not communicate well in English. He requested the assistance of a Spanish language interpreter so that he could better understand and participate in the conversation. RP 73. Washington's refusal to provide an interpreter, or otherwise accommodate Urbina's language difficulties, rendered the interrogation unduly coercive and Urbina's statement involuntary.

Admission of Urbina's involuntary statement at trial violated constitutional due process. Jackson, 378 U.S. at 376.

c. The erroneous admission of Urbina's custodial statement requires reversal.

The State must prove beyond a reasonable doubt the erroneous admission of the custodial statements did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot prove the erroneous admission of Urbina's custodial statements did not contribute to the verdict. At trial, the deputy prosecutor cross-examined Urbina extensively through use of

his custodial statements. The prosecutor repeatedly asked Urbina about discrepancies between his custodial statements and his trial testimony. RP 786-95. By doing so, the prosecutor insinuated that Urbina's trial testimony was untrue. The case was essentially a credibility contest between Urbina and his accuser, Rodriguez. The prosecutor's ability to use Urbina's custodial statements against him substantially undercut his credibility and was very damaging. Thus, the erroneous admission of the statements was not harmless beyond a reasonable doubt.

2. The trial court abused its discretion in admitting Rodriguez's out-of-court statements made to the social worker and the sexual assault nurse.

Rodriguez's out-of-court statements made to the social worker and the sexual assault nurse were not admissible because they did not fall under an exception to the hearsay rule.

A "hearsay" statement is not admissible at trial unless it falls under a specific exception to the hearsay rule. ER 802. "Hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. ER 801(d). Rodriguez's out-of-court statements to the social worker and the sexual assault nurse were offered by the State to prove the truth of the matters asserted. They were inadmissible unless they fell under a specific exception to the hearsay rule.

A trial court's interpretation of an evidence rule is reviewed *de novo* as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets the rule correctly, the Court reviews the trial court's decision to admit the evidence for an abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule's requirements. Id.

a. Rodriguez's statements to the medical providers were admissible only to the extent they were reasonably pertinent to medical diagnosis or treatment.

The trial court admitted Rodriguez's statements to the medical providers, over objection, under ER 803(a)(4), the hearsay exception for statements made for the purposes of medical diagnosis or treatment. RP 104-05, 673-76.

ER 803(a)(4) provides,

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

By its express terms, the exception applies only to statements that are "reasonably pertinent to diagnosis or treatment." ER 803(a)(4); In re Pers. Restraint of Grasso, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004). To establish reasonable pertinence (1) the declarant's motive in

making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied upon the statement for purposes of diagnosis or treatment. Grasso, 151 Wn.2d at 2; State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).

The rationale for the rule is that we presume a medical patient has a strong motive to speak truthfully and accurately because her successful treatment depends upon it. State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997). This presumption provides the necessary, significant guarantee of trustworthiness to justify admission of the evidence. Id.

Because ER 803(a)(4) pertains to statements "reasonably pertinent to diagnosis or treatment," it allows statements regarding causation of injury, but not statements attributing fault. State v. Redmond, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003); Butler, 53 Wn. App. at 217. "As a general rule, statements attributing fault are not relevant to diagnosis or treatment." State v. Price, 126 Wn. App. 617, 640, 109 P.3d 27 (2005).

An exception to the general rule applies in cases of domestic violence, where statements attributing fault to an abuser can be reasonably pertinent to treatment because the medical provider "may

recommend special therapy or counseling and instruct the victim to remove him or herself from the dangerous environment by leaving the home and seeking shelter elsewhere." Id.; see also Butler, 53 Wn. App. at 221 (statement by child abuse victim to physician identifying abuser as member of her family or immediate household was admissible under ER 803(a)(4)).

But in cases not involving domestic violence, statements attributing fault are not admissible under ER 803(a)(4). Thus, those portions of a victim's statement describing the details leading up to an assault, or the manner in which the crime occurred, are not admissible under the rule. Redmond, 150 Wn.2d at 496-97; Butler, 53 Wn. App. at 217.

In sexual assault cases, statements by a victim that are "directly relevant to the act of sexual intercourse or injuries the victim may have suffered" are deemed reasonably pertinent to medical treatment and diagnosis. Roberts v. State, 990 So.2d 671, 674 (Fl. Ct. App. 2008).

But statements describing the events leading up to the assault, or details about the assault that the medical provider does not need to know in order to provide treatment, are not admissible. Id. (victim's statements to nurse about "the way in which the assailant gained access

to the victim's apartment" were not reasonably pertinent to medical diagnosis and treatment); Casica v. State, 24 So.3d 1236, 1241 (Fla. Ct. App. 2009) (victim's statement to nurse "that her attacker threatened her with a gun" was not reasonably pertinent to medical diagnosis or treatment"); State v. Hartman, 64 N.E.3d 519, 543, 2016 Ohio 2883 (2016) (statements by rape victim to nurse not admissible because "the nurse did not testify that the victim had any injuries requiring nursing treatment, or that she provided treatment"); State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408 (S.C. Ct. App. 1997) (victim's statement that defendant asked if he could have a hug before he assaulted her "in no way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment"); cf. State v. Gattis, 166 N.C. App. 1, 9, 601 S.E.2d 205 (2004) ("[a]lthough the fact that defendant had suffered a gunshot wound would be pertinent to treatment, . . . the manner in which the bullet wound occurred—such as a gun accidentally discharging during an altercation—was not pertinent to how the wound was treated"); O'Brien v. State, 45 P.3d 225, 235, 2002 WY 63 (WY 2002) (victim's statement to nurse that attack was "unprovoked" was not reasonably pertinent to treatment).

b. The trial court abused its discretion in admitting substantial portions of Rodriguez's statements to the medical providers because they were not reasonably pertinent to diagnosis or treatment.

The trial court admitted substantial portions of Rodriguez's statements to the medical providers that described the events leading up to the alleged assault and provided extensive details about the alleged assault. This was error because most of those details were not reasonably pertinent to medical diagnosis or treatment.

Most of Rodriguez's statements to the social worker were not reasonably pertinent to medical diagnosis or treatment. The social worker testified that Rodriguez told her she was a prostitute and went to a man's apartment for sex. RP 571. Rodriguez said the man became "bossy" and "demanded" she have sexual intercourse with him. She said she told him she changed her mind and tried to give him his money back. She told him she wanted to leave but he said, "The only way you're leaving is if I kill you." RP 572. She said he threatened to kill her several times and to "[t]hrow [her] body in the dumpster." RP 572. She said she tried to leave but he blocked her exit and physically assaulted her by punching her in the face and strangling her. He then assaulted her vaginally and anally with his penis. RP 572. She said she

retrieved a can of mace from her bag and sprayed him with it but he physically assaulted her again. She said eventually he fell asleep and she was able to leave. RP 573. She said she thought her life was in danger. RP 575.

All of these statements, aside from the portions "directly relevant to the act of sexual intercourse or injuries the victim may have suffered" were not admissible because they were not reasonably pertinent to medical treatment or diagnosis. Roberts, 990 So.2d at 674; see also Redmond, 150 Wn.2d at 496-97; Butler, 53 Wn. App. at 217.

Likewise, most of Rodriguez's statements to the sexual assault nurse were not reasonably pertinent to treatment or diagnosis. The nurse testified Rodriguez told her she is a prostitute and a man picked her up at a bus stop and took her to his apartment for sex. She said when they got to his place she started feeling "weird about everything." RP 659. She said she tried to give him his money back but he refused. She said he threw her on the bed and threatened to "throw [her] in the dumpster, and no one would know what he did to [her]." RP 659. She said she told him she had AIDS so that he would not have sex with her, but he "raped [her] in the butt, vagina, and put his penis in [her] mouth anyways." RP 660. She said she sprayed him with mace and he got

more violent. She said he "choked" her and she did not remember much after that. RP 660. She said he told her he would not let her leave until he was done with her. RP 660, 662. She said she was eventually able to calm him down and get out. RP 660.

Most of these statements were not pertinent to the nurse's ability to treat Rodriguez. To the contrary, the nurse testified she gathered much of this information in order to determine what evidentiary swabs to collect. RP 652-53. A rape victim's statements recorded by a nurse for the purpose of assisting a criminal investigation are inadmissible hearsay. Hartman, 64 N.E.3d at 543.

Moreover, the nurse did not need to know most of these details in order to provide the limited treatment she gave to Rodriguez. The only "treatment" the nurse provided was an antibiotic and a "morning after" pill, which were prophylactic measures the nurse offers to every alleged victim of sexual assault. RP 698-99. The nurse did not need to know any details about the alleged assault beyond the mere fact of sexual intercourse in order to provide this treatment.

Because most of Rodriguez's statements to the medical providers were not reasonably pertinent to medical diagnosis or

treatment, the court abused its discretion in admitting them. Redmond, 150 Wn.2d at 496-97; Butler, 53 Wn. App. at 217.

c. The erroneous admission of the hearsay evidence requires reversal.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983).

It is reasonably probable the outcome of the trial would have been different if the jury had not heard the extensive incriminating hearsay evidence from the medical providers. The evidence substantially bolstered Rodriguez's trial testimony. The convictions must be reversed.

3. The court abused its discretion in refusing to find the rape and the unlawful imprisonment were the "same criminal conduct" for purposes of sentencing.

According to the evidence presented, the rape and the unlawful imprisonment were committed at the same time and place, against the same victim, and with the same criminal intent. They therefore should have counted as only a single point in the offender score.

When a person is convicted of two or more offenses, they count as only one crime in the offender score if they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). Two crimes encompass the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a).

A trial court's determination of same criminal conduct is reviewed for abuse of discretion or misapplication of law. Graciano, 176 Wn.2d at 535. Here, the trial court abused its discretion in finding that the two offenses were not committed at the same time or with the same objective criminal intent.

a. The two crimes were committed at the same time.

Two offenses are committed at the same time if they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. State v. Young, 97 Wn. App. 235, 240-41, 984 P.2d 1050 (1999). Two offenses do not occur at the same time if they were committed on separate days and were not part of a single transaction or criminal episode. Id.

Also, two offenses do not occur at the same time if one offense is already completed by the time the other occurs. State v. Knight, 176 Wn. App. 936, 960-61, 309 P.3d 776 (2013).

Here, the two offenses occurred at the same time because they were part of a single transaction or episode over a short period of time. Rodriguez testified Urbina raped her multiple times over an approximately three-hour period while simultaneously restraining her in his apartment. RP 574, 630. Neither offense was completed at the time the other offense occurred. Thus, they satisfy the "same time" element of the same criminal conduct analysis. Young, 97 Wn. App. at 240-41; Knight, 176 Wn. App. at 960-61.

b. The two crimes were committed with the same criminal intent.

Whether two crimes involved the same criminal intent for purposes of RCW 9.94A.589(1)(a) is measured by determining whether the defendant's criminal intent, viewed objectively, changed from one crime to another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Intent, as used in this analysis, "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Two crimes are committed with the same objective criminal intent if during commission of the crimes "there was no substantial change in the nature of the criminal objective." State v. Edwards, 45 Wn. App. 378, 381-82, 725 P.2d 442 (1986), overruled on other grounds by State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987). If the second crime occurred while the first crime was still in progress, and the second crime was committed in furtherance of the first crime, they are the same criminal conduct. Id.

Where the two crimes at issue are rape and unlawful imprisonment, they are committed with the same criminal intent if the purpose of the restraint is to facilitate the rape. State v. Phuong, 174 Wn. App. 494, 548, 299 P.3d 37 (2013); State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). In Phuong, for instance, an attempted second degree rape and an unlawful imprisonment could have involved the same intent where Phuong's objective purpose in dragging the victim to his bedroom and locking the door was to rape her. Phuong, 174 Wn. App. at 548. In Saunders, a kidnap was committed with the same intent as a rape where the restraint of the victim allowed Saunders to accomplish his sexual agenda, and his

primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Saunders, 120 Wn. App. at 824-25.

This case cannot be distinguished from Saunders and Phuong. According to the evidence, Urbina raped Rodriguez multiple times while simultaneously restraining her in his apartment. RP 574, 630. The restraint facilitated the rapes. Urbina's apparent primary motivation for both crimes was to dominate Rodriguez and cause her pain and humiliation.

Moreover, the State specifically charged, and the jury found, the unlawful imprisonment was committed with sexual motivation. CP 11-12, 73. By charging the sexual motivation aggravator, the State acknowledged that Urbina's purpose in restraining Rodriguez was to commit a sexual offense.

Thus, viewed objectively, the crimes were committed with the same criminal intent. Phuong, 174 Wn. App. at 548; Saunders, 120 Wn. App. at 824-25.

The rape and the unlawful imprisonment encompassed the same criminal conduct because they were committed at the same time and place, against the same victim, with the same objective criminal intent.

The trial court abused its discretion in refusing to count them as a single offense in the offender score.

F. CONCLUSION

Admission of Urbina's custodial statement violated the Fifth Amendment and the Due Process Clause. Admission of Rodriguez's out-of-court statements to the medical providers violated the hearsay rule. These errors require that the convictions be reversed and remanded for a new trial. Also, the court abused its discretion in refusing to find the crimes were the same criminal conduct. Urbina must receive a new sentencing hearing at which the crimes are counted as a single point in the offender score.

Respectfully submitted this 14th day of December, 2017.

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