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3/28/2024 1:59 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY BRIEF OF APPELLANT

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

HONORABLE MICHAEL J. REARDON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Aaron Von Ehlinger was convicted of rape based almost exclusively on the out-of-court statements of the non-testifying alleged victim, as relayed through the testimony of a forensic nurse working with FACES of Hope ("FACES"). On appeal, Mr. Von Ehlinger argues that the admission of those out-of-court statements violated his Sixth Amendment right to confront his accuser, and that this violation rose to the level of fundamental error. He also contends the district court made an erroneous evidentiary ruling that allowed critical testimony to be admitted against him.[1]

Statement of Facts and Course of Proceedings

Mr. Ehlinger articulated the relevant facts and procedural history of this case in the Appellant's Brief. They are discussed herein only to the extent necessary to respond to the State's arguments.

[1] In his opening brief, Mr. Von Ehlinger asserted a third claim of error, arguing the State failed to present sufficient evidence to sustain his conviction. (*See* App. Br., pp.20-22.) The State's arguments on that issue are well-taken (*see* Resp. Br., pp.21-26), and Mr. Von Ehlinger withdraws his third claim of error.

ISSUES

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

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

ARGUMENT

I.

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

At trial, the alleged victim, J.V., provided only brief direct-examination testimony before fleeing the courtroom. (*See* Tr., p.454, L.25 – p.462, L.17.) Because the defense never had an opportunity to cross-examine her before she fled, the district court struck her brief testimony. (Tr., p.471, L.16 – p.472, L.8.) However, J.V.'s purported version of events was admitted through another witness—Ann Wardle, the FACES nurse who conducted a forensic interview of J.V. a few days after the alleged crime. (*See generally* Tr., p.254, L.10 – p.326, L.2.) These hearsay statements then served as the backbone of the prosecution's case.

Mr. Von Ehlinger asserts the admission of J.V's out-of-court statements violated his right to confront his accuser. According to *Crawford v. Washington*, 541 U.S. 36, 42 (2004), *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007), and *State v. Parsons*, __ Idaho __, 543 P.3d 465 (2024), the statements were testimonial and inadmissible under the Confrontation Clause of the Sixth Amendment. Further, this error was "fundamental" under the standard set forth in *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), and *State v. Miller*, 165 Idaho 115, 443 P.3d 129 (2019).

In response, the State argues Mr. Von Ehlinger has failed to satisfy any of the three prongs of the fundamental error test. (*See generally* Resp. Br., pp.6-18.) Specifically, it claims there was no Confrontation Clause violation in admitting the alleged victim's extensive un-cross-examined

out-of-court statements detailing the alleged crime, Mr. Von Ehlinger failed to prove that defense counsel's failure to object on Confrontation Clause grounds was not the result of a strategic or tactical decision, and that Mr. Von Ehlinger failed to show that any Confrontation Clause violation was prejudicial. (Resp. Br., pp.6-18.) The State's arguments are without merit.

A. Ms. Wardle's Testimony Violated Mr. Von Ehlinger's Unwaived Right To Confront And Cross-Examine His Accuser

The first prong of Idaho's fundamental error test requires Mr. Von Ehlinger to show a violation of an unwaived constitutional right. *Miller*, 165 Idaho at 119, 443 P.3d at 133. The State contends that Mr. Von Ehlinger has failed to establish a Confrontation Clause violation because, "No Idaho Supreme Court or Supreme Court of the United States decision directly address application of the Confrontation Clause to statements made to a nurse conducting a rape examination . . . ." (Resp. Br., p.8.) That is not accurate.

While the State did not have the benefit of *Parsons* when it filed its Respondent's Brief, it was aware of *Hooper*. Together, *Parsons* and *Hooper* stand for the proposition that statements elicited by a sexual assault forensic examiner working hand-in-hand with law enforcement are "testimonial" in nature and, therefore, cannot be admitted at trial absent the witness's unavailability and the defendant's prior opportunity to cross-examine that witness. *Parsons*, __ Idaho at __, 543 P.3d at 473-79; *Hooper*, 145 Idaho at 141-46, 176 P.3d at 913-18.

While *Parsons* and *Hooper* both involved alleged child victims, the forensic interviews in those cases were very similar to the one that occurred in this case. In both *Parsons* and *Hooper*, it was significant that the interviews were conducted by "a forensically trained interviewer . . . ."

Parsons, __ Idaho at __, 543 P.3d at 475. Here, Ms. Wardle testified extensively about her specialized training. In addition to being a registered nurse (Tr., p.257, Ls.14-16), she is certified as a SANE nurse (Tr., p.256, Ls.14-18). She is also the coordinator for the "Community Sexual Assault Team" for Saint Alphonsus and St. Luke's (Tr., p.255, Ls.5-23) and she testified that to become a member of that team a nurse must have two years of general nursing experience, and then take a week-long course "regarding sexual assault and domestic violence." (Tr., p.255, L.24 – p.256, L.4.) Once the course has been completed, the nurse will "start precepting with another forensic nurse." (Tr., p.256, Ls.4-6.) Further, members of the team engage in ongoing education—usually by attending a virtual conference hosted by the International Association of Forensic Nurses. (Tr., p.258, Ls.13-23.) Finally, Ms. Wardle and the other forensic nurses on her team conduct their interviews and evaluations in accordance with Idaho guidelines (which mirror national guidelines). (Tr., p.259, Ls.10-18.) Those guidelines touch upon trauma-informed care and walk nurses, "step by step, on how to collect the sexual assault evidence kit, what to look for in your medical exam, that sort of thing." (Tr., p.259, Ls.15-24.)

It was also significant in *Parsons* and *Hooper* that the evaluation was "arranged, and observed, by law enforcement," and that the evaluations occurred in a facility "specializing in treatment and evaluations for sexual abuse." *Parsons*, __ Idaho at __, 543 P.3d at 475. Here, Ms. Wardle testified that J.V. was referred to her by the detectives on Mr. Von Ehlinger's case.[2]

[2] One of Detective Joseph's reports indicates that he and Detective Iverson "spoke briefly with [J.V.] and advised her of *the investigation process, to include coming to FACES to complete a SAFE exam*. [J.V.] said she understood and agreed to respond to FACES." (Conf. Ex., p.43 (emphasis added).)

(Tr., p.293, Ls.3-6; Tr., p.365, L.23 – p.366, L.4.) The evaluation occurred at the FACES of Hope facility, which houses "different agencies that all provide resources for victims of domestic violence or sexual assault," including: the FACES Foundation, "[t]he CARES department from St. Luke's," staff from the Idaho Department of Health & Welfare, crisis counselors, "law students . . . to help with protection orders," the Boise Police Department, and the Ada County Sheriff's Office.[3] (Tr., p.264, L.24 – p.266, L.1, p.290, L.13 – p.291, L.5.) Finally, detectives were present for J.V.'s interview.[4] (Tr., p.293, Ls.7-12, p.312, Ls.7-12.)

[3] The FACES of Hope Victim Center in Boise was in the news recently. *See* Rachel Spacek, *There's More to Split Between Nonprofit Faces of Hope and Ada County than Was Revealed*, Idaho Statesman, Feb. 22, 2024 (available at https://www.idahostatesman.com/news/local/community/boise/article284746571.html). According to that reporting, the FACES of Hope Victim Center was created by the Ada County Prosecutor, "with partners," in 2006. *Id.* It was intended "to be a one-stop shop for people who have experienced abuse," and "[t]he Faces of Hope Foundation was one of 16 organizations providing help there." *Id*. Among the fifteen other organizations having a presence in the facility were the Ada County Sheriff's Office, the Ada County Prosecutor's Office, the Meridian Police Department, the Boise Police Department, and the Garden City Police Department. *Id*. However, in 2023, when it came time for the Faces of Hope Foundation to renew its licensing agreement with Ada County, the Foundation tried to negotiate for some autonomy from the County, and the County demurred. *Id.* Specifically, FACES of Hope sought to have its own computer server, so that its data would not be stored on the County's servers; it objected to the Ada County Prosecutor's Office participating in its board of directors; it objected to a requirement that it give the Ada County Prosecutor updates on its victim services; and it requested that a County employee be "relocated to a non-foundation space at the Victim Center." *Id*. Ada County then severed its relationship with the FACES of Hope Foundation, forcing that organization to move out of the facility, which Ada County then renamed the "Ada County Victim Services Center." *Id.*

Notwithstanding the foregoing reporting, Ms. Wardle testified that the Ada County Prosecutor's Office did *not* have a presence at the FACES of Hope Victim Center. (Tr., p.292, Ls.3-9.)

[4] Owing to defense counsel's poorly worded compound question, Ms. Wardle's cross-examination testimony was unclear as to whether the detectives were in the room for the interview or, instead, somewhere else in the building. (*See* Tr., p.293, Ls.7-15.) However, on redirect, Ms. Wardle seemed to suggest they were present in the room. (*See* Tr., p.312, Ls.7-12.) This is consistent with

In *Parsons* and *Hooper*, it was also significant that the timing and content of the interviews suggested they were not only for medical diagnosis and treatment, but also "to build a criminal case." *Parsons*, __ Idaho at __, 543 P.3d at 475. Although Ms. Wardle was very insistent that her interview of J.V. was aimed *solely* at providing medical care,[5] the objective facts demonstrate that her role in this case was—at least in part—as an investigator for the police. For example, she was very dismissive of the basic questions we all routinely answer during medical appointments. She explained that the first step of her interview is to "[g]et the personal details *out of the way*. You know, I have to register them as a patient, so I have to get name, date of birth, address." (Tr., p.260, Ls.7-11 (emphasis added).) Then she does "*a quick little* medical history; allergies, surgeries, medication, pain level. . . . It's basically a *really quick triage* to see if they're in the right place or we need to move them to a higher level of care." (Tr., p.260, Ls.11-17 (emphasis added).) But she slows down when it comes to the alleged victim's recitation of the crime: "I ask about the assault or event, and I ask them to relay a narrative . . . . And we do paper charting, so I attempt to write down *exactly* what they tell me." (Tr., p.260, Ls.20-23 (emphasis added).) In this case, that narrative—supposedly for medical purposes—included such details as where J.V. sat upon first

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Detective Joseph's report, which states that he, Detective Iverson, victim witness coordinator Norma Kukla, and Ms. Wardle all participated in J.V.'s FACES interview, and that at the end of the interview, J.V. "agreed to complete the medical portion of the SAFE exam," which was conducted by Ms. Wardle. (Conf. Ex., pp.43-45.)

[5] (*See, e.g.*, Tr., p.260, L.24 – p.261, L.5 (testifying that "the medical exam is guided by what the patient tells us," so, a detailed narrative of the alleged crime is critical); Tr., p.309, Ls.9-19 (claiming that she is "not an investigator, " and that she only asks "questions that are medically relevant"). *See also* Tr., p.263, Ls.16-19 (testifying the alleged victim's narrative directs her medical examination "[t]o some extent").)

entering Mr. Von Ehlinger's apartment, how Mr. Von Ehlinger used the restroom and then asked J.V. to join him on the couch, and how Mr. Von Ehlinger caressed J.V.'s thigh and kissed her, all before the couple even entered the bedroom where the sexual assault allegedly occurred. (*See* Tr., p.268, L.23 – p.269, L.11.)

More tellingly, Ms. Wardle's description of the physical exam revealed her investigative focus. She testified she engages in a "head-to-toe exam" of alleged sexual assault victims, looking for "for cuts, scrapes, abrasions, bruises, that sort of thing." (Tr., p.261, L.25 – p.262, L.3.) Anyone who has seen a doctor in the United States knows that examination of every square inch of the patient's body is not routine, and that medical professionals rely on patients to bring their attention to injuries or sources of discomfort. To examine an alleged victim from head to toe, looking for minor cuts, abrasions, or bruises, smacks of evidence gathering. Further, Ms. Wardle testified that forensic nurse examiners "document every injury, we measure every injury in centimeters." (Tr., p.262, Ls.7-11.) Again, that is not medical care; that is an investigation.

Finally, of course, there is the sexual assault kit, which Ms. Wardle freely admitted was for "evidence collection." (Tr., p.262, Ls.3-6.) This generally involves swabbing "the mouth, the external genitals, internal vaginally and anally." (Tr., p.262, Ls.12-20.) In this case, it also involved pricking J.V.'s finger to obtain a blood sample. (Tr., p.280, L.5 – p.288, L.23.) Ms. Wardle testified she also swabs "any suck marks, bite marks, [or] ejaculation areas . . . ." (Tr., p.262, Ls.20-22.) The purpose of the swabs, she said, is to look for "foreign DNA." (Tr., p.300, Ls.15-23.) After the swabs are taken, they are placed into an "evidence dryer" and, once dried, into an envelope. (Tr., p.263, Ls.2-13.) Everything is sealed in its own envelope, the envelopes are placed back in

the kit, and the kit itself is sealed. The seals on the kit are then signed and dated "for chain of custody." (Tr., p.284, L.23 – p.285, L.18.) In this case, Ms. Wardle then placed the entire evidence kit "in a secure evidence room that Boise Police Department has in their area at FACES." (Tr., p.288, L.s12-17.) She explained that a detective had given her a key to the "to that locker or fridge," and that she was able to "secure the evidence" and "fill out the log book." (Tr., p.288, Ls.15-23.) Throughout the entirety of this process, Ms. Wardle took steps to avoid cross-contamination of the evidence. (Tr., p.284, Ls.1-10.) In this regard, Ms. Wardle may as well have been a police detective.

Thus, just as the primary purpose of the statements at issue in *Parsons* and *Hooper* was to "establish or prove past events potentially relevant to a later criminal prosecution," *Parsons*, __ Idaho __, 543 P.3d at 476, so too was that the primary purpose of the statements made during the forensic interview here. Accordingly, the statements were testimonial for purposes of the Confrontation Clause analysis. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *State v. Stanfield*, 158 Idaho 327, 332, 347 P.3d 175, 180 (2015). And, as argued fully in Mr. Von Ehlinger's opening brief, the admission of testimonial hearsay violated his confrontation rights. (*See* App. Br., pp.10-14.)

B. The Confrontation Clause Violation Was Clear

The second prong of Idaho's fundamental error test requires Mr. Von Ehlinger to show that the constitutional violation was "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was

a tactical decision . . . ." *State v. Miller*, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019) (quoting *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010)). As to this prong, the State argues first that "this Court cannot be sure that all pertinent information for an appellate Confrontation Clause analysis was elicited," and it speculates that, had the prosecution been alerted to a potential Confrontation Clause issue, "the State would have and could have laid additional foundation showing the medical purpose of the examination." (Resp. Br., p.13.)

This is little more than fanciful speculation, however, as the State offers no cogent argument as to what else the prosecution could have done to prove that the forensic evaluation was for a medical purpose. Taking Ms. Wardle's testimony as a whole, it is readily apparent that the prosecution and Ms. Wardle fully anticipated, and prepared for, a Confrontation Clause challenge. As noted above, Ms. Wardle was very insistent that her interview of J.V. was aimed *solely* at providing medical care (*see, e.g.*, Tr., p.260, L.24 – p.261, L.5 (testifying that "the medical exam is guided by what the patient tells us," so, a detailed narrative of the alleged crime is critical))—undoubtedly because the prosecutor wanted to have Ms. Wardle's recitation of J.V.'s out-of-court statements to be admitted for their truth.

Indeed, the only thing the State can now come up with is that the prosecutor could have asked Ms. Wardle if she referred J.V. for medical care. (Resp. Br., p.13.) However, that topic *was* addressed during the trial, and we know that Ms. Wardle recommended that J.V. follow up with Dr. Ashley King.[6] (Tr., p.304, L.23 – p.305, L.4.) However, that does not aid the State's argument.

[6] It appears Ms. Wardle was referring to the St. Luke's family physician who serves as the medical director for the Sexual Assault Forensic Examiner (SAFE) team at FACES of Hope. *See* St. Luke's

If anything, the fact that a medical evaluation by a doctor was recommended for a later date tends to support the notion that Ms. Wardle's primary role was assisting the police in gathering evidence.

Second, the State argues there is no evidence that defense counsel's failure to object to the testimonial hearsay on Confrontation Clause grounds was not a strategic or tactical decision. (Resp. Br., pp.15-17.) Specifically, the State argues that there was no basis for defense counsel to interpose a Confrontation Clause objection when Ms. Wardle testified as to J.V.'s out-of-court statements, because the defense did not know at that time that J.V. would not be testifying (and thus subject to cross-examination) later in the trial. (Resp. Br., pp.15-16.) However, the record belies the State's reasoning.

At least by the time the jury was selected, the defense was on notice that J.V. might not testify, because the prosecutor had questioned many prospective jurors about how they would react if an alleged victim did not testify. (*See, e.g.*, Tr., p.163, L.18 – p.166, L.1, p.175, L.24 – p.176, L.22.) These questions were not lost on defense counsel. Later, when he was questioning the prospective jurors, he commented on it:

> Ms. Farley [the prosecutor] asked a series of questions regarding if [J.V.] does not testify but she believes she has proven her case beyond a reasonable doubt, would you be able to come to a verdict. I'm going to be honest, I've never heard a prosecutor ask that question before it makes me think what she's gonna do? I don't know. It's not my case, right, she gets to put on her case.

(Tr., p.194, Ls.18-25; *see also* Tr., p.198, Ls.18-24 (again referencing the prosecutor's questions about an alleged victim not testifying).)

Website (available at https://www.stlukesonline.org/health-services/providers/king-ashley) (last visited Mar. 27, 2024).

Following opening statements, outside the presence of the jury, defense counsel stated his belief that the State was not going to call J.V. to testify:

> I'm just attempting to anticipate how this is going to go. And then – based on Ms. Farley's questions in jury selection, what happens, what do you do if [J.V.] does not testify, I am making the assumption, and perhaps I could be wrong, but I'm making the assumption that she is calling Ms. Wardle to come in and testify as to the statements made by [J.V.] at the time of her [FACES] exam.
>
> . . .
>
> I don't know if the State is going to call [J.V.]. I assume if they do, it would be in rebuttal, should Mr. von Ehlinger testify. . . .
>
> . . .
>
> And my—the reason why I'm taking this up outside of the jury is because I anticipate that Ms. Farley is going to try to get Ms. Wardle to talk about everything that she [J.V.] said . . . .
>
> . . .
>
> I'm just learning this for the first time. And, again, I may be wrong. Perhaps Ms. Farley does call [J.V.] in her case in chief. But I'm anticipating at this point, the way this is going, that she's not going to.

(Tr., p.250, L.3 – p.252, L.19.) Indeed, defense counsel correctly surmised that J.V. would not testify and, instead, the State would attempt to offer her out-of-court statements through another witness, Ms. Wardle. So, at least by that point, he had every reason to make a Confrontation Clause objection; instead, he confined his arguments to Idaho Rule of Evidence 803. (*See* Tr., p.250, L.2 – p.252, L.22.) Of course, those arguments were to no avail and Ms. Wardle testified extensively as to J.V.'s out-of-court statements. (*See generally* Tr., p.254, L.10 – p.326, L.2.)

It was not until defense counsel had the evening to think things through that he finally hit upon the argument he should have made from the very beginning. At the outset of the proceedings

on the second morning of trial, defense counsel objected to the admission of State's Exhibit 5 (Ms. Wardle's notes) under the Confrontation Clause "insofar as it appears, at this point, the State does not intent to call J.V. to the stand." (Tr., p.341, Ls.7-24.) While his objection was initially limited to admission of the exhibit, he went on to move to "strike any testimony related to J.V.'s statements to Ms. Wardle" on the same grounds. (Tr., p.344, Ls.11-13.) Clearly, defense counsel's belated Confrontation Clause argument was based upon his recognition that the State did not intend to call J.V. to testify; however, as detailed above, this was clear to him by the time the jury had been selected. He simply had not connected the dots in the heat of the moment. The only thing that changed overnight was that he had an opportunity to reflect upon the trial and evidently realized he had missed the Confrontation Clause argument. An oversight is not a tactical decision.

C. The Error Was Prejudicial

The third and final prong of Idaho's fundamental error test requires Mr. Von Ehlinger to show that the Confrontation Clause violation "affected the defendant's substantial rights," *i.e.*, it "affected the outcome of the trial proceedings." *Miller*, 165 Idaho at 119, 443 P.3d at 133 (quoting *Perry*, 150 Idaho at 226, 245 P.3d at 978). The State argues Mr. Von Ehlinger cannot meet his burden in this regard because, even had defense counsel timely objected on Confrontation Clause grounds and argued that the out-of-court statements testified to by Ms. Wardle were testimonial, the district court would have rejected his argument based upon its finding that the statements were for medical diagnosis or treatment. (Resp. Br., pp.17-18.)

The State's argument is without merit because it improperly conflates the admissibility standard of Idaho Rule of Evidence 803(4) (hearsay exception for statements made for medical

diagnosis or treatment) with the standard for determining whether a statement is testimonial within the meaning of the Confrontation Clause. Certainly, these standards appear similar on a superficial level. Under the court rule, a hearsay statement may be admitted if it "is made for—and is reasonably pertinent to—medical diagnosis or treatment" and it "describes medical history; past or present symptoms or sensations; or their sources." I.R.E. 803(4). And, under the Confrontation Clause, a hearsay statement may be non-testimonial if it is made with the primary purpose of addressing a medical emergency. *Parsons*, __ Idaho at __, 176 P.3d at 478-79. However, as *Parsons* recently emphasized, statements that alleged victims make during sexual assault examinations often serve a dual purpose—identification and treatment of medical issues and development of evidence for a subsequent criminal prosecution. *Parsons*, __ Idaho at __, 543 P.3d at 474-79. Further, *Parsons* clarified that where there is a dual purpose, the out-of-court statements may be admissible under the evidentiary rule, but nonetheless excluded under the Confrontation Clause. *Parsons*, __ Idaho at __, 543 P.3d at 476-77 ("Our decision in *Christensen* remains the rule when addressing CARES interviews in the hearsay context. However, . . . it is not a case that stands for letting a medical hearsay exception eclipse a defendant's Sixth Amendment right to confront the witnesses against him."). That is precisely the situation in this case.

Below, the defense conceded, and the district court found, that many of J.V.'s out-of-court statements were sufficiently aimed at medical care that they were admissible under Rule 803(4). (*See* Tr., p.250, L.2 – p.253, L.15, p.344, Ls.16-22, p.468, Ls.5-19.) However, while that framework is "instructive . . . to understand and distinguish the dual medical and forensic nature of such interviews, and informs [the Court's] analysis of [J.V.'s] interview under the primary

purpose test," it is not dispositive of the Confrontation Clause issue. *Parsons*, __ Idaho at __, 543 P.3d at 477. Thus, it cannot be said that just because the district court found the out-of-court statements were admissible under Rule 803(4), it would have correctly admitted them under the Confrontation Clause as well.

Alternatively, the State suggests that there was other evidence to sustain the conviction besides Ms. Wardle's recitation of J.V.'s out-of-court statements: evidence of male DNA on J.V.'s person, evidence of Mr. Von Ehlinger's DNA specifically on J.V.'s abdomen, etc. (*See* Resp. Br., p.18.) However, none of that evidence is suggestive of rape, or any crime for that matter. Mr. Von Ehlinger freely admits that he had intimate *consensual* contact with J.V. (*See generally* Tr., p.525, L.13 – p.615, L.19.) But the only evidence of force, which is a necessary element of the rape charged in this case, came from J.V.'s out-of-court statements, as relayed through Ms. Wardle. Accordingly, Ms. Wardle's recitation of those out-of-court statements in contravention of Mr. Von Ehlinger's Sixth Amendment rights was critical to the verdict and, therefore, it "affected the outcome of the trial proceedings." *Miller*, 165 Idaho at 119, 443 P.3d at 133 (quoting *Perry*, 150 Idaho at 226, 245 P.3d at 978).

II.

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

While Ms. Wardle's recitation of J.V.'s out-of-court statements generally attempted to characterize the sexual encounter between J.V. and Mr. Von Ehlinger as a "sexual assault," Ms. Wardle did not initially testify to any forcible penetration (*see* Tr., p.266, L.9 – p.270, L.4),

which, of course, would be required for a rape conviction. So, the prosecutor resorted to use of a leading question to try to elicit the damning testimony: "[D]id she indicate that he was in this position before he forced his penis into her mouth?" (Tr., p.270, Ls.5-6.) Defense counsel objected to the improper leading question before Ms. Wardle could answer, and that objection was sustained. (Tr., p.270, Ls.7-8.) Undeterred, a few moments later the prosecutor asked essentially the same improper leading question: "And then he forced his penis into her mouth?" (Tr., p.271, Ls.21-22.) Again, defense counsel objected to the question as leading. (Tr., p.271, L.23.) This time, however, the district court overruled the objection, incorrectly believing the "testimony is already in" evidence. (Tr., p.271, L.24 – p.272, L.1.) That ruling was erroneous.

In its Respondent's Brief, the State argues first that the district court did not abuse its discretion in allowing the leading question to stand because leading was "necessary to develop the witness's testimony" on the physiological details of the alleged sexual assault. (Resp. Br., p.20 (quoting I.R.E. 611(c)).) However, there are at least three flaws in the State's argument.

First, the State's claim that a leading question was "necessary" is disproved by the State's own acknowledgement one paragraph later that "the exact same evidence would have been elicited through a non-leading question." (Resp. Br., p.20.) If the exact same evidence could have been elicited through a non-leading question, certainly the leading question was not "necessary" within the meaning of Rule 611(c).

Second, there is no reason to believe that a leading question was necessary under the circumstances of this case. Ms. Wardle was not the alleged victim, so there was no embarrassment or shame factor at play. Nor was she a child (in fact, she was a sexual assault team coordinator and

a nurse), so she was a sophisticated, educated witness who needed no help communicating about human anatomy in the proper terminology. Indeed, the authority relied upon by the State in support of its argument that a leading question was "necessary" involved a testifying minor victim. *See United States v. Grasshope*, 342 F.3d 866, 867 (8th Cir. 2003). Further, the Eighth Circuit Court of Appeals indicated in that case that leading questions are particularly appropriate in the case of testifying child victims, *see id*. at 869, thereby suggesting they are inappropriate in cases such as this one.

Finally, and most critically, the State's argument incorrectly presupposes that the district court engaged in the proper analysis, weighing whether the leading question was "necessary." *See* I.R.E. 611(c). It clearly did not do so. Instead, it allowed the leading question to stand because the court incorrectly believed the testimony had already been admitted. (Tr., p.271, L.24 – p.272, L.1.) That conclusion was clearly erroneous since, to that point, there was no evidence in the record that Mr. Von Ehlinger forced his penis into J.V.'s mouth.[7] (*See* Tr., p.254, L.10 – p.272, L.4.) Because of this misunderstanding of the state of the record, the district court neglected to engage in the requisite legal analysis—determining whether a leading question was *necessary*. Forgoing the required analysis was an abuse of discretion. *See Lunneborg v. My Fun Life, Inc.*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (holding that a failure to act consistently with applicable legal standards is an abuse of discretion).

[7] A factual finding is clearly erroneous if it is not supported by substantial and competent evidence in the record. *State v. Ish*, 166 Idaho 492, 515, 461 P.3d 774, 797 (2020).

Alternatively, the State argues that any error in allowing the leading question to stand was harmless beyond a reasonable doubt because, had the objection been sustained and the leading question disallowed, the prosecutor would have simply elicited the same testimony through a non-leading question. (Resp. Br., p.20.) This, however, is not the harmless error standard. The question is not what might have happened in a hypothetical case in which had no error occurred; it is how the error that did occur affected the trial. In *State v. Garcia*, the Idaho Supreme Court explained it as follows:

> Harmless error is "error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." Proper application of the *Yates* [*v. Evatt*, 500 U.S. 391 (1991)] two-part test requires weighing the probative force of the record as a whole while excluding the erroneous evidence and at the same time comparing it against the probative force of the error. When the effect of the error is minimal compared to the probative force of the record establishing guilt "beyond a reasonable doubt" without the error, it can be said that the error did not contribute to the verdict rendered and is therefore harmless.

166 Idaho 661, 674, 462 P.3d 1125, 1138 (2020) (citations to *Yates* omitted).

Applying the correct standard, it is evident the prosecutor's leading question, which elicited testimony confirming the prosecutor's assertion that Mr. Von Ehlinger "forced his penis into her [J.V.'s] mouth," contributed to the verdict. That was the *only* evidence to that point concerning a critical element of the crime—forcible penetration. And while, as the State points out, Ms. Wardle subsequently repeated that testimony (*see* Resp. Br., p.21), she did so on cross-examination and redirect-examination. Defense counsel would not have had to probe that testimony on cross-examination had it not been erroneously admitted over his prior objection.

Because the prosecutor's leading question elicited damning testimony concerning critical elements of the offense, the district court's error in allowing that question to be answered was prejudicial.

CONCLUSION

For the reasons detailed above, and in Mr. Von Ehlinger's opening brief, Mr. Von Ehlinger respectfully requests that this Court vacate his conviction and sentence and remand his case to the district court for a new trial.

DATED March 28, 2024.

/s/ Erik R. Lehtinen
ERIK R. LEHTINEN
State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 28, 2024, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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ERL/eas