

The court then reviewed the sufficiency of the jury instructions and found that the conviction instructions properly instructed the jury on the essential elements of bail jumping. Although the court had found error in the lower court's interpretation of the statute, since the jury instructions in Mr. Bergstrom's case were sufficient, the court did not need to address harmless error as applied to Mr. Bergstrom's missed court appearance on May 4.

The court specifically looked at Mr. Bergstrom's failure to appear on April 18, 2018. The court discussed the judiciary's role as being fair and impartial and recognized that people may have difficulty accessing the courts. The court accepted that Mr. Bergstrom experienced homelessness and substance use, which was noted by the lower court to have contributed to his offense. The court also recognized that a 2020 amendment to the bail jumping statute provided an avenue to quash such charges, but Mr. Bergstrom did not have the benefit of the amendment based on the timing of his offenses. The court, although expressing sympathy with Mr. Bergstrom's situation, said that his struggles "do not undercut the State's evidence that Mr. Bergstrom knew of each of the three court dates" (*Bergstrom*, p 849). The court reversed, in part, on the statutory interpretation and affirmed the sufficiency of the conviction.

#### Discussion

Under Washington law, the *Bergstrom* case suggests that individuals can be convicted of bail jumping for failing to appear in court if the state can prove that they, at some point, had knowledge of the requirement of a subsequent appearance. The state is not required to prove that the defendant ever had knowledge of the specific date, nor intentionally failed to appear on the date in question.

Perhaps the real significance of this case for psychiatrists is the implications for people who may have circumstances that challenge their ability to access the courts. People with serious mental illness (SMI) are over-represented in the criminal legal system. Additional factors commonly co-occurring with SMI, such as substance use, housing and financial insecurity, trauma, and hospitalization may further affect one's ability to remember and appear for court dates. The court recognized "the disproportionate effect" of criminalizing failures to appear in court on persons of a lower socioeconomic class. This case illustrates that effect. Despite being acquitted of his original charges,

Mr. Bergstrom found himself with three additional charges related to his failures to appear. Had he had stable housing, a reliable phone or mailing address, or had he not been hospitalized or influenced by substance use, his circumstances could have been very different.

Clinicians and policy makers may be in positions to reduce the likelihood and impact of persons failing to appear in court. The court system can take steps to clearly communicate that court dates are mandatory, feature dates prominently in correspondence, and send reminders prior to required appearances. Legislatures can take measures to reduce criminalization for failure to appear. Although not available to Mr. Bergstrom, the Washington State legislature amended the bail jumping statute to allow motions to quash warrants for failure to appear. Mental health clinicians may similarly be in positions to reduce the likelihood of clients' failing to appear in court by inquiring about any pending court dates, assisting with reminders, and helping them access social work, transportation, and legal resources. Through these mechanisms, clinicians and policy makers can help reduce the likelihood and negative effects of failure to appear charges.

## Nontestimonial Statements

**Joellyn Sheehy, MD**  
*Resident in Psychiatry*

**Jennifer Piel, JD, MD**  
*Associate Professor of Psychiatry*  
*Director, Center for Mental Health, Policy, and the Law*  
*Department of Psychiatry and Behavioral Sciences*  
*University of Washington*  
*Seattle, Washington*

### Statements Made to a SANE Examiner Are Not Testimonial and Are Admissible in Court

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In *State v. Burke*, 478 P.3d 1096 (Wash. 2021), the Washington Supreme Court considered whether statements made by a victim of sexual assault in a Sexual Assault Nurse Exam (SANE) constituted testimony, implicating the confrontation clause of the Sixth Amendment. The Washington Supreme Court

recognized that the exam had both medical and forensic purposes. The court ruled that nearly all of the statements were not testimonial and could be admitted in court.

#### Facts of the Case

In the early hours of July 3, 2009, K.E.H. arrived in the emergency department and reported that she had just been raped in a local park. A social worker notified the police, and an officer arrived to take her description of the incident. The officer went to the local park but found no witnesses or suspects at that time. K.E.H. was medically cleared and subsequently underwent a sexual assault exam that afternoon.

In the SANE exam, Nurse Frey collected evidence, including DNA on K.E.H.'s underwear. In 2011, the DNA testing was matched to Ronald Burke. Mr. Burke denied having sex with K.E.H. or getting in any fight with a woman at the park. K.E.H. died in 2011, and, thus, was not available to testify at Mr. Burke's trial.

Mr. Burke's case went to trial in 2016. The state sought to introduce statements made by K.E.H. to the SANE nurse during her exam, citing a hearsay exception for statements made for purposes of medical diagnosis or treatment. Mr. Burke objected to their admission, arguing that the statements were testimonial, and their admission would violate his Sixth Amendment right to confrontation.

The trial court held a hearing on the admissibility of the statements. During the hearing, Nurse Frey testified about her role as a SANE examiner and her encounter with K.E.H. She described the forensic and medical purposes of the exam, which entails taking a history, photographing evidence, providing medical care and counseling, and connecting patients with resources for further care. She noted that the exams are paid for by the state and federal crime victims' fund, but that her salary came from the health care system, and she did not take direction from law enforcement.

Regarding her encounter with K.E.H., Nurse Frey emphasized the importance of the patient history as it directed medical care. She explained her inclusion of direct quotations from K.E.H. about the nature of the assault and general medical information. K.E.H.'s responses to questions guided the physical exam, in which Nurse Frey discovered a previously untreated cervical laceration, an injury quite specific to sexual assault. K.E.H. told Nurse Frey that she waited for

the exam "because I don't want him to be out there doing this to someone else," (*Burke*, p 1103, citing Pretrial Ex. 19F) and K.E.H. wished to report the assault. Nurse Frey, herself, did not communicate with law enforcement regarding this case.

The court ruled that K.E.H.'s statements were admissible, and that Nurse Frey was permitted to testify to the jury about the statements K.E.H. made in her examination. At trial, Nurse Frey read K.E.H.'s statements aloud to the jury. The jury convicted Mr. Burke of rape in the second degree by forcible compulsion. Mr. Burke appealed, arguing that K.E.H.'s statements to Nurse Frey were, in fact, testimonial, and thus a violation of his Sixth Amendment right to confront his witness. The Court of Appeals agreed that K.E.H.'s statements to Nurse Frey were testimonial and that the error was not harmless. The state appealed to the Washington Supreme Court.

#### Ruling and Reasoning

The Washington Supreme Court reversed the Court of Appeals' decision and remanded to the trial court for further proceedings. The court found that nearly all of K.E.H.'s statements to Nurse Frey were nontestimonial and their admission, then, did not violate Mr. Burke's Sixth Amendment right to confrontation. Only K.E.H.'s description of the assailant was testimonial, but the court found this admission to be a harmless error in this case.

The court reviewed the purpose of Sixth Amendment's confrontational clause, which precludes admission of "testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination" (*Burke*, p 1106). Citing *Crawford v. Washington*, 541 U.S. 36 (2004), the court turned to the "primary purpose" test to determine if out-of-court statements are testimonial. Out-of-court statements are testimonial when the circumstances objectively indicate that their primary purpose is to establish past events relevant to a later criminal prosecution. The interrogator's motive is relevant in determining if the statements are testimonial. For example, questioning in the midst of an ongoing emergency is not typically undertaken to create a record for trial, but rather to solicit help and thus would not be subject to the confrontation clause.

The role of the person receiving a statement is also important for identifying the primary purpose. Because law enforcement officers are primarily "charged with uncovering and prosecuting criminal behavior" (*Burke*,

p 1107), statements made to them are more likely to be testimonial. By contrast, statements made primarily to guide medical care or assess a person's safety are nontestimonial. Although a statement may have multiple facets, the confrontation clause requires the court to identify a singular dominant purpose when evaluating whether statements are testimonial.

In the case of K.E.H.'s statements to Nurse Frey, the court found that nearly all of her statements were nontestimonial because the primary purpose was to guide medical care during a sexual assault exam. The primary medical purpose of the exam is supported by the facts that the examiner is a medical professional, specialized medical care was provided regardless of the patient's intent to report the crime, and the examiner herself did not take direction from law enforcement. The court said that obtaining medical treatment is a nontestimonial primary purpose, distinct from an ongoing emergency. Although K.E.H. had been cleared medically from the emergency department, that did not mean that she no longer required any medical treatment. She was still in need of treatment for her sexual assault. Although some patients at this point may elect to skip this exam, this fact does not negate that it is part of medical treatment, nor does the fact that she needed to wait for the treatment.

The court said that the primary purpose of K.E.H.'s statements were nontestimonial, with the exception of one statement describing the assailant, which was not for the purpose of directing medical care or addressing safety since K.E.H. was clear that she did not know her attacker. The court found that the trial court erred in admitting this statement, but this error was harmless since the male DNA found on K.E.H.'s underwear was compellingly proven to have belonged to Mr. Burke.

Mr. Burke also argued that K.E.H.'s statements should not be admitted because they were hearsay and not covered under a hearsay exception for statements made for primarily medical diagnosis or treatment. Nontestimonial statements must also comply with state and federal rules of evidence. Out-of-court statements used to prove the truth of a matter are typically inadmissible as hearsay under these rules. But, there are certain exceptions, including when statements are made for the purpose of medical diagnosis or treatment. In contrast to the primary purpose test of the confrontation clause, the test for these statements considers the intentions of both the declarant and the medical professional and how the statements relate to the medical diagnosis and treatment. In the

case of K.E.H., the court did not disagree with the trial court's assessment that statements and questions were primarily for medical treatment.

#### Discussion

The case of *State v. Burke* reviewed occasions when out-of-court statements could be considered testimony such that they could be barred from admission in court when the declarant is not available to testify. Although the *Burke* court acknowledged the predominantly medical nature of the SANE, the court recognized that there are both medical and forensic aspects to the evaluation. The ruling in this case recognized the preeminence of the medical portion of the SANE and qualifications of the examiner.

The *Burke* case serves as a reminder of the ways that medical documentation can be used in legal proceedings and its subsequent challenge to a defendant's Sixth Amendment rights. Similarly, in *People v. Sanchez*, 374 P.3d 320 (Cal. 2016), an expert's opinion was rejected by the California Supreme Court and the case remanded to the court of appeals because of the consultant's reliance on statements in past police reports in forming his opinion. Because witnesses in the previous events were not available for cross examination, the information used from these reports constituted hearsay and was a violation of the Sixth Amendment.

It is useful for forensic experts to be familiar with evidentiary rules and hearsay exceptions in their jurisdiction. The Federal Rules of Evidence generally permit experts to opine on "facts or data in the case that the expert has been made aware of" beyond those that the expert has "personally observed" if "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject" (Fed. R. Evid. 703 (2011)). But, as evidenced by the *Burke* and *Sanchez* rulings, courts do put limits on admission of hearsay evidence and experts' abilities to rely on hearsay.

## Driving under the Influence and Cannabis

**Nicola Park, MD**  
*Resident in Psychiatry*

**Jennifer Piel, JD, MD**  
*Associate Professor of Psychiatry*  
*Director, Center for Mental Health, Policy, and the Law*