

NO. 36642-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

EUGENE HUDSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
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BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

6-17-08 PM

SERVICE

Michelle Bacon-Adams
623 Dwight St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by allowing testimony regarding statements the victim made to medical providers?
2. Whether the trial court abused its discretion in allowing the SANE nurse testimony when expert testimony regarding the cause of physical injuries is admissible under Washington law and when the challenged testimony did not include a personal opinion as to the truthfulness of another witness or the guilt of the defendant?
3. Whether the trial court abused its discretion in denying the repetition of evidence that the victim found another man attractive?
4. Whether the cumulative error doctrine applies when the trial court committed no error?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Eugene Hudson was charged by an amended information filed in Kitsap County Superior Court with two counts of rape in the second degree and one count of rape in the first degree. CP 1. Following a jury trial, the Defendant was convicted of rape in the third degree. CP 33. This appeal followed.

B. FACTS

K.L.W., a single mother with two children, lived in a duplex in Bremerton. RP 332. K.L.W. worked as a childcare provider and was part of a social circle that included several women that she had worked with in this field. RP 335-39. The group included Lisa McHenry and her husband Jonathan and their children, and Nicole Tillis and her boyfriend (the Defendant) and their children.¹ RP 335-40. The group would occasionally get together for birthday parties for their kids, and the women would also go out to together on occasion. RP 335-39. On several occasion, the Defendant accompanied Ms. Tillis and their children to K.L.W.'s home for birthday parties and once for a barbeque. RP 341.

On January 27, 2007, the group was planning to get together at Ms. McHenry's home and possibly go out later that evening. RP 343. K.L.W. went to the McHenry's home, and Ms. Tillis and the Defendant also came to the home. RP 343. At the home, the men played CD's while the women caught up and talked about how their kids were doing. RP 347. Eventually the group decided to go out to a bar called Maaco's. RP 348.

At Maaco's, the group sat at a table talking, listening, and drinking. RP 349. Some members of the group also danced. RP 355. K.L.W.

¹ Although several witnesses described that the Defendant and Ms. Tillis were husband and wife, the Defendant testified that they were not legally married but stated that they sometimes referred to each other as husband and wife. RP 528, 552.

explained that she danced with the other females and did not dance with either the Defendant or Mr. McHenry. RP 355. K.L.W. also stated that she had not flirted with the Defendant, nor was she attracted to him, and that she had not ever had the impression that the Defendant was attracted to her. RP 356.

During the cross examination of Ms. McHenry, defense counsel asked if she recalled “an incident at Maaco’s where [K.L.W.] saw a gentleman on the other side of the dance floor that she thought was attractive?” RP 192. Ms. McHenry answered, “yes.” RP 192-93. Defense counsel then asked her if she recalled K.L.W. and the Defendant having a conversation about this man? Again, Ms. McHenry answered, “yes.” RP 193. When defense counsel started to ask about what K.L.W. had said, the State objected. RP 193. The defense argued that the expected testimony was that the K.L.W. said that she thought this other man was attractive and that this statement was being offered to prove that K.L.W. “was in a flirtatious mood that evening.” RP 194. The State argued that the defense had already elicited the fact that K.L.W. thought this man was attractive, and that further testimony was not needed, and that the Defendant’s argument was a “leap.” RP 194. The trial court sustained the objection. RP 195.

Later, the Defendant testified that when the group was at Maaco’s he saw a man that he knew from playing basketball and that he had a

conversation with K.L.W. about this man. RP 535. As “a result of this conversation,” the Defendant went over to this man and “asked him what she had wanted me to ask him.” RP 535-36. Specifically, the Defendant claimed he asked him if he wanted to “hook up” with K.L.W. RP 536. The Defendant, however, claimed that the man was not interested. RP 536. Later, the Defendant claimed he saw K.L.W. have a ten minute conversation with this man. RP 536.

The group later left the bar and returned briefly to the McHenry’s home. RP 356. Ms. McHenry then gave K.L.W. a ride home around 3:00 a.m. RP 360. Once home, K.L.W. changed into her pajamas, watched television for a few minutes, and then went to bed. RP 362-63.

Approximately 45 minutes later, K.L.W. was awakened by her doorbell ringing several times. RP 363. The doorbell startled her, as she was not expecting anyone and did not usually get visitors at that time of night, and she had no idea who it could have been at the door. RP 364. When she went to the door she found that it was the Defendant. RP 364-65. K.L.W. asked the Defendant if everything was okay and asked where Nicole was because K.L.W. was surprised to see the Defendant there without Nicole. RP 365. The Defendant said that Nicole was at the McHenry’s and explained that he had been driving home and saw a lot of cops around and that he didn’t feel comfortable driving with the police around. RP 365. K.L.W. was aware that

the Defendant had been drinking earlier in the night and told the Defendant that if he felt he was not in a condition to drive that he could come inside and sit down for a little bit. RP 366.

The Defendant and K.L.W. then sat down on a futon in the living room and turned on the television. RP 366. K.L.W. assumed that the Defendant just wanted to sit down for a little bit and relax until he felt he was able to drive home. RP 370. After flipping channels on the television, the Defendant told K.L.W. that she could just turn it off. RP 372. When K.L.W. noticed that the Defendant was "leaning back" on the futon couch, she asked him if he wanted her to lay the futon down so that he could relax. RP 372. The Defendant said, "yes," so K.L.W. lowered the futon. RP 373-74. K.L.W. then sat back down on the edge of the futon, and she then leaned over to put the remote control away. RP 374. When K.L.W. leaned over, her back was towards the Defendant and K.L.W. felt the Defendant put his arm across her waist. RP 374-75. K.L.W. asked the Defendant, "What are you doing?" RP 375. The Defendant replied, "Just relax." RP 375. K.L.W. then said, "What about Nicole," and the Defendant replied, "Don't worry, she won't know." RP 375.

The Defendant then grabbed the top of K.L.W.'s pajama pants and underwear and pulled them down. RP 375. K.L.W. kept saying, "What are you doing?" RP 376. The Defendant then flipped K.L.W. onto her stomach

and got on top of her. RP 376. The Defendant then began to have anal sex with K.L.W. RP 377. K.L.W. told him that he was hurting her and that she wanted him to stop. RP 377. K.L.W. began crying right away because it was hurting "really bad," and told the Defendant to stop, but the Defendant again responded by saying, "Just relax. Just relax. Just let me finish." RP 377-78. K.L.W. continued crying and told him to stop and that he was hurting her because she wanted him to get off of her. RP 438.

K.L.W. tried to push her arms up and was trying to kick her legs and told the Defendant to get up as he was hurting her, but the Defendant wouldn't stop. RP 379. K.L.W. testified that the anal intercourse hurt "real bad." RP 384. The Defendant continued to penetrate her anally for a couple of minutes and then flipped K.L.W. onto her back and started having sex with her vaginally. RP 379. K.L.W. was trying to fight the Defendant and was moving because it was hurting. RP 379-80. K.L.W. testified that eh vaginal intercourse was also painful, but not as bad as the anal intercourse, but noted that the Defendant was being "rough about it." RP 384. The Defendant later flipper K.L.W. over again and penetrated her vaginally again. RP 381. K.L.W. again told him to stop more than once. RP 381. The Defendant eventually stopped after he ejaculated, and then laid down on his back with one of his legs over the top of K.L.W.'s legs. RP 382.

K.L.W. laid on the futon and waited to see what the Defendant was going to do next. RP 382. When the Defendant did not move for a little while, K.L.W. got up and went into a bathroom RP 382-83. K.L.W. testified that she was scared and went into the bathroom because she could lock the door. RP 385. K.L.W. sat in the bathroom for a while trying to “figure out what had just happened,” and stayed in the bathroom for a period of time and “tried to calm down.” RP 385. Eventually she came out and saw that the Defendant was still on the futon, so K.L.W. went into her bedroom, shut the door, and laid down on her bed. RP 385-86. When asked why she didn’t call 911 right away, K.L.W. answered,

I don’t know. I think I was just scared and not understanding what had just happened, and why did he do that, and then just laid there.

RP 386.

K.L.W. awoke around 8:00 am the next morning when she heard a noise. RP 386. After finding that the Defendant and his car were gone, K.L.W. called her friend, Lisa McHenry. RP 386-87. Ms. McHenry did not answer, so K.L.W. left her a message asking her to call back as soon as she got the message. RP 387. K.L.W. wasn’t sure if she was going to tell anybody about what happened and didn’t know what to do, but she was scared and knew that she needed to do something. RP 387.

When Ms. McHenry returned the call, K.L.W. talked her briefly about what happened, and Ms. McHenry then came to K.L.W.'s home. RP 389-90.² The two then discussed the events in more detail, and that afternoon Ms. McHenry took K.L.W. to the hospital for an examination. RP 391-92. K.L.W.

At the hospital, K.L.W. was met by a sexual assault nurse examiner (a "SANE: nurse), and the nurse examined K.L.W., took colposcopic pictures of her injuries, and prepared a report. RP 229, 439, 446-47. Jolene Culbertson, an advanced nurse practitioner and a sexual assault nurse examiner, is the clinical coordinator of the SANE program at Harrison Hospital and she reviews all the examinations performed by SANE nurses. RP 210-12. In her role as clinical coordinator, Ms. Culbertson reviews the findings of the treating nurse, and examines the photographs that are taken. RP 228-29. Ms. Culbertson also looks to see if the colposcope pictures are consistent with the history reported by the patient and consistent with the nurse practitioner's report. RP 229.

² Defense counsel confronted K.L.W. on cross examination, asking her "isn't it true" that she in fact felt guilty at that time because she had had sex with her friend's husband and that her concern was how she was going to break the news to Nicole. RP 408-09. K.L.W. responded,

No. No. Not how I was going to – I was scared. I was in shock about what had happened to me. And what I was going to do next. Who was I going to tell? Was I going to call the police? Was I going to go to the hospital? What should I do? I've never been in that position before. I didn't know what to do.

RP 409.

Ms. Culbertson reviewed the treating nurse's report concerning K.L.W. RP 229. Ms. Culbertson explained that the SANE nurses take a "history" or a report of what had occurred from the patient and that this is needed in order to provide medical services to the patient. RP 227. In particular, the report is important to the nurses, as they need to find out generally what occurred and the location and circumstances regarding the incident. RP 243. In addition, the nurses need to know about what occurred in order to make a plan of care and to make sure that the patient is safe to go home, and thus the nurses need to know such things as whether the patient knew the person that assaulted them, does this person have access to the patient, and is the patient emotionally upset to the point that they will have trouble sleeping? RP 227-28.

The State asked Ms. Culbertson what history K.L.W. had reported, and the Defendant objected based on hearsay. RP 230. The State argued that the statement was admissible under ER 803(a)(4) as a statement for medical diagnosis or treatment. RP 230-231. The trial court overruled the objection. RP 236. Ms Culbertson then explained what K.L.W. reported without actually reading K.L.W.'s entire report, stating

[K.L.W.] reported that she had been out with friends. She went home. There was a knock on her door, and she opened the door. And it was a husband of a friend of hers. He said that he was uncomfortable because the police were following him, so he didn't feel comfortable driving and wanted to stay

there. She turned on the TV. He turned off the TV and pushed her down on a futon. And she started screaming. He said, "Just relax. It will be okay." And he attempted to penetrate her vaginally, and then turned her over and penetrated her anally. And then turned her back over and penetrated her vaginally. And the entire time she was screaming, "No. No." And he said, "Just relax. It will be okay."

RP 242-43.

Ms. Culbertson then testified that the colposcope pictures showed a number of vaginal lacerations including an eight millimeter laceration that she described as an "extensive genital injury from blunt-force trauma." RP 252-53. Lacerations of the anus were also found which also were from blunt-force trauma. RP 254-55.

During her direct examination, the State asked Ms. Culbertson for an opinion regarding the injuries, and defense counsel objected. RP 257. The jury was then excused and the court heard argument on this issue. RP 258-67. Defense counsel argued that opinion testimony in this area invaded the province of the jury. RP 258. The State argued that the witness was entitled to testify as to whether the injuries were consistent with all of the information she had, including the patient's report, and whether the injuries were consistent with nonconsensual sex. RP 259. The court asked the parties for authority on these issues and, as the day was ending, excused the jury for the weekend. RP 265-67.

On the next day of trial, the court again addressed the issue of Ms. Culbertson's testimony. RP 270. The Defendant argued that Ms. Culbertson's proposed testimony should be prohibited because it was an opinion regarding the victim's credibility. RP 271-73. The State agreed that it would be impermissible for the witness to state whether she believed the victim was telling the truth. RP 274. The State, however, argued that the expert was not going to state that she believed the victim. The State cited a case³ in which the court had allowed the state to call two medical experts to testify that the autopsy results were inconsistent with the defendant's version of events and consistent with the state's version. RP 275. The State also cited a case⁴ where a physician was allowed to testify that he victim's injuries were consistent with her claim that she had been sexually assaulted. RP 275-76. The State then argued that the proposed evidence in the present case was whether the expert found the injuries to be consistent with the history that was reported and not whether the expert believed the victim or thought that the victim was credible. RP 277.

The trial court noted that it had reviewed ER 704 and caselaw on the issue, and found that an expert can testify to an ultimate fact but cannot testify about the credibility of the witness or whether or not the expert

³ *State v. Jones*, 59 Wn. App. 744, 801 P.2d 263 (1990), *review denied*, 116 Wn.2d 1021, 811 P.2d 219 (1991).

believed the victim. RP 279-80. The court ultimately held that because the victim's reported history was broad in scope, the expert could not testify whether the findings were consistent with the reported history, but that the expert could testify as to her opinion regarding consensual versus nonconsensual sex. RP 280-81. The jury was then brought in. RP 302.

When the testimony resumed, Ms. Culbertson explained that the extent of the injuries led her to the conclusion that the injuries were caused by nonconsensual sex and that the extent of the injuries were not consistent with what she would expect to see in a woman who had engaged in consensual sex. RP 302-03. Ms. Culbertson also explained that over her career she had reviewed 300 sexual assault exams, and although she had seen similar vaginal injury, she had not previously seen such extensive vaginal injury coupled with anal injury and the at the combined injuries (which she described as "quite extensive injury") were more extensive than she had seen previously. RP 307. At the end of her direct examination, Ms. Culbertson was asked whether she had an opinion on the nature and cause of the injuries, and she explained that the exam showed "extensive injury related to nonconsensual sex." RP 311.

⁴ *State v. Garrett*, 76 Wn. App. 719, 887 P.2d 488 (1995).

On cross examination, defense counsel asked Ms. Culbertson to review K.L.W.'s report to the treating nurse. RP 312-13. Defense counsel then had Ms. Culbertson confirm that K.L.W.'s initial report only indicated that she used the word "no" once, and that this was in connection with her statement, "I told him no, that I was friends with his wife." RP 313. Defense challenged Ms. Culbertson regarding her previous testimony that K.L.W. had said "No. No." RP 313. Specifically, defense counsel asked,

So when you testified last Friday that [K.L.W.] told Ms. Sullivan she said, "No. No," there's nothing in Ms. Sullivan's notes that reflect that repetition of the word, "No?"

RP 313. Later, defense counsel again asked, "There's nothing in Miss Sullivan's notes that reflect that she repeated that?" RP 313. Ms. Culbertson said this was correct. RP 313. Defense counsel also had Ms Culbertson confirm that K.L.W.'s report indicated that the Defendant did not threaten to harm her, did not restrain her, did not use a weapon, did not choke or strangle her, and did not hit, kick, bite or throw her. RP 316-17.

On redirect examination, the State asked Ms. Culbertson to read K.L.W.'s initial report of the incident in its entirety. RP 327. The Defendant objected arguing that it wasn't proper to read it word-for-word. RP 327. The State argued that this was admissible, as defense counsel had pointed out portions of the report without providing their context. RP 327. The trial

court allowed the testimony. RP 327-28. Ms Culbertson then read the report as follows,

We all went out last night (friends) somebody came to my door about 4 a.m., it was my friend's husband. He said he was trying to drive but the police were following him. So I said he could crash on the couch. I turned the t.v. on. He said turn it off and pulled me over close to him. I told him no, that I was friends with his wife. He pushed me down on my face on the futon. I started screaming and told him, no. I started screaming and he told me to just relax, that I'd be okay. It was hurting and I screamed a lot. Then he turned me on my back and did it again. Then on my stomach so he could finish. I think he pulled out before he finished. He kept telling me to relax, that I'd be okay. I kept screaming. Afterwards I waited I waited until I thought he was asleep because his legs were still on me. I was afraid. Then I went into my room and waited until he left this morning and called my friend.

RP 328.

Ms. Sullivan, the SANE nurse who treated K.L.W. also testified. RP 445-46. She noted that K.L.W. appeared very upset and was flushed and appeared stressed. RP 448. K.L.W. spoke in a soft voice, and there were times during her conversations with Ms. Sullivan when she began to cry. RP 448.

During the examination Ms. Sullivan saw traces of vaginal and anal bleeding. RP 474-75, 483. Ms. Sullivan also found four lacerations of the fossa navicularis and posterior fourchette measuring from 2,3 millimeters to 9 millimeters and noted that these lacerations were "quite deep." RP 476.

There were also numerous anal lacerations, with the largest one measuring 11 millimeters. RP 476. In total there were at least 10 lacerations, and Ms. Sullivan noted that there were so many that it was difficult to accurately diagram each one and that she did not measure every one. RP 477. Ms Sullivan stated that the injuries she observed would have been “excruciatingly painful” and that the actual act of penetration would have also been “excruciating.” RP 477. Ms. Sullivan stated that she would not expect to see these types of injuries caused by a consensual encounter, and that it was her opinion that injuries were caused by nonconsensual penetration. RP 484-85.

The Defendant testified and admitted that K.L.W. was not flirting with him at Maaco’s. The Defendant, however, claimed that later, when the group left the bar, K.L.W. put her hand on his thigh while K.L.W., the Defendant, and Ms. Tillis were in the back seat. RP 537.

The Defendant also testified that when he and K.L.W.’s were at her home, K.L.W. turned of the t.v. and laid down turning her back towards him. RP 544. He also described that they were in a “spooning” position for five to ten minutes, and he then removed both of their pants. RP 544-45. The Defendant then stated that K.L.W. “reached back and grabbed my penis and inserted into her vaginally.” RP 545. The Defendant described that the two then had vaginal sex but that K.L.W. never told him to stop, and he said she

never said that the vaginal intercourse hurt. RP 549.

The Defendant also claimed that K.L.W. told him that the anal intercourse hurt, but did not tell him to stop. RP 548. He said he stopped when K.L.W. told him a second time (approximately two minutes later) that it was hurting. RP 548, 587-88. The Defendant, however, stated that in that two minute span K.L.W. was “moaning and groaning” from pleasure, and that, “It wasn’t like she said, ‘It hurts. Stop. Get off me.’” RP 588, 590-91.

The jury acquitted the Defendant on the two counts of rape in the second degree but found him guilty of rape in the third degree. CP (TBD)(State’s Supp. Designation of CP).

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING TESTIMONY REGARDING STATEMENTS THE VICTIM MADE TO MEDICAL PROVIDERS.

The Defendant argues that the trial court abused its discretion in allowing a nurse to read K.L.W.’s report of the rape because this evidence was not admissible under ER 803(a)(4). App.’s Br. at 9. This claim is without merit because the remainder of the report was admissible to rebut the brief portions of the report introduced during the cross examination of the nurse and because the report was admissible under ER 803(a)(4).

As a preliminary matter, it should be noted that in her direct testimony Ms. Culbertson summarized K.L.W. description of the events. RP 242-43. Later, in her redirect testimony, Ms. Culbertson read the actual report to the jury. RP 327-28. It appears that the Defendant's challenge on appeal is only to the reading of the report in the redirect examination. See App.'s Br. at 12-13.

A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed by this court under an abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). An appellate court, therefore, will not disturb a trial court's ruling unless it believes that no reasonable judge would have made the same ruling. *Woods*, 143 Wn.2d 595-96.

In addition, even if a statement might otherwise be inadmissible, the statement may still be admitted if the opposing party introduces a part of the statement and the remainder is admitted to explain or rebut the evidence previously introduced. For instance, the Washington Supreme Court has held that,

Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

In the present case, during his cross examination of Ms. Culbertson, defense counsel pointed out that that the notes regarding K.L.W.'s report of the incident only used the word "no" once. Defense counsel used this to challenge the fact that Ms. Culbertson had used the word "no" twice in her description of the victim's report, thus implying that Ms. Culbertson was exaggerating the victim's report of her objection to the sexual contact. These questions were directed at Ms. Culbertson's initial description of K.L.W.'s report, where the only indication of the victim's verbal protest after the sex began was summarized by Ms. Culbertson as, "And the entire time she was screaming, 'No. No.'" RP 242.

During cross examination on this issue, defense counsel had Ms. Culbertson admit that the actual notes of K.L.W.'s report did not indicate that the word "No" was used repeatedly. RP 313. Defense counsel also had Ms. Culbertson confirm that K.L.W.'s initial report only indicated that she used the word "no" once and that this was in connection with her statement, "I told him no, that I was friends with his wife." RP 313. Specifically, defense counsel asked,

So when you testified last Friday that [K.L.W.] told Ms. Sullivan she said, "No. No," there's nothing in Ms. Sullivan's notes that reflect that repetition of the word, "No?"

RP 313. Later, defense counsel again asked, "There's nothing in Miss Sullivan's notes that reflect that she repeated that?" RP 313. Ms. Culbertson said this was correct. RP 313.

This line of questioning, therefore, left the jury with the incorrect impression that K.L.W.'s report indicated little to no verbal protest, and potentially created the impression that there was no verbal protest at all after the sex began. In addition, defense counsel's questions also implied that Ms. Culbertson had exaggerated or overstated the victim's report regarding the extent of her verbal protest.

In direct response to this line of questioning, the State asked Ms. Culbertson to read the entire report in order to rebut the implication that victim reported minimal verbal resistance to the sexual contact, and the report in its entirety demonstrated that Ms. Culbertson description was quite reasonable and was, in fact, conservative in terms of describing the amount of verbal resistance reported by the victim. As the actual report noted, K.L.W. stated she had initially "told him no, that I was friends with his wife." RP 328. Then after the sex began, she "started screaming and told him, no." RP 328. In addition, K.L.W. reported that, "It was hurting and I screamed a lot." RP 328. Later, she again stated that, "I kept screaming." RP 328. Finally, the full report noted that K.L.W. stated that she was "afraid" after the incident.

RP 328.

This evidence, therefore, rebutted the defense's implication that K.L.W. only verbal resistance was a single use of the word "No" at the very beginning of the contact and before the sex actually began. In addition, the full reported demonstrated that Ms. Culbertson's summary was an extremely fair characterization of K.L.W.'s actual description that did include two uses of the word "no" and explained that she was screaming repeatedly and was afraid. As this evidence was properly admissible to explain, modify or rebut the evidence defense counsel emphasized in cross examination, the trial court did not abuse its discretion in allowing Ms. Culbertson to read the full report.

In addition, the reading of the report in Ms. Culbertson's redirect examination was not cumulative because it was not merely a repeat of Ms. Culbertson's summary but was a reading of the actual report which was necessary to clear up the confusion and misconceptions raised in the cross examination as noted above. In addition, the Defendant did not object based on the evidence being cumulative, thus that issue is not properly before this court. RP 327. Rather, the Defendant's objection was that the report was read word-for-word as opposed to counsel asking numerous questions about each part of the report. RP 327. As outlined above, the report in its entirety was relevant to rebut the issues raised in cross examination, as the Defendant has provided no authority, either on appeal or in the trial court, that

prohibited the state from reading the report into the record as a whole rather than breaking the testimony up.

Finally, although the use of the report to rebut the defendant's cross examination does not require that the report be admissible under another evidence rule, the report in the present case was also admissible under 803(a)(4).

The hearsay rule does not exclude "[s]tatements 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." ER 803(a)(4). A party demonstrates a statement to be reasonably pertinent when (1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).

In the present case, Ms. Culbertson explained that the SANE nurses need to obtain the history or report from the victim regarding the circumstances of the incident in order to provide their medical services and to prepare a plan of care for the patient. RP 227-28, 243. The brief report in the present case outlining the nonconsensual sexual contact, therefore was

reasonably pertinent to K.L.W.'s treatment.⁵

B. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE SANE NURSE TESTIMONY BECAUSE EXPERT TESTIMONY REGARDING THE CAUSE OF PHYSICAL INJURIES IS ADMISSIBLE UNDER WASHINGTON LAW AND BECAUSE THE CHALLENGED TESTIMONY DID NOT INCLUDE A PERSONAL OPINION AS TO THE TRUTHFULNESS OF ANOTHER WITNESS OR THE GUILT OF THE DEFENDANT.

The Defendant next claims that the trial court abused its discretion in by allowing the State to introduce the opinion testimony of two SANE nurses, claiming that such testimony provided an improper conclusion of law, was an opinion as to the Defendant's guilt, and was cumulative. These claims are without merit because the opinion evidence below was properly admitted because it was opinion it was expert testimony regarding the cause of the

⁵ Although K.L.W.'s did not use the Defendant's actual name, even if it had, any error would be harmless, as a witness' reference to the defendant's identity when testifying about the victim's complaint constitutes harmless error if the defendant's identity is not at issue in the case. *State v. Ferguson*, 100 Wn.2d 131, 136, 667 P.2d 68 (1983); *State v. DeBolt*, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). In addition, Ms. Culbertson outlined why it is necessary for the nurse to know whether the patient knew the person and whether he has access to the patient. RP 227-28. Washington courts have previously recognized in similar circumstances that the disclosure of a perpetrator's identity is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury. *See, State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998); *State v. Sims*, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). This court need not address this issue, however, since even if there had been error in this regard, any error would be harmless since identity was not an issue and the Defendant admitted having sex with the victim, but merely suggested that it was consensual.

victims injuries based on the actual physical injuries the victim and the testimony did not offer a personal opinion as to the truthfulness of another witness or the guilt of the defendant.

1. *The opinion of a medical expert regarding the cause of a victim's injuries is admissible under Washington law.*

Under ER 702, the court may permit “a witness qualified as an expert” to provide an opinion regarding “scientific, technical, or other specialized knowledge” if such testimony “will assist the trier of fact.” A trial court's admission of expert testimony is reviewed for an abuse of discretion. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Frost*, 160 Wn.2d 765, 771, 161 P.3d 361 (2007); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

It is well settled that a witness may not offer a personal opinion as to the truthfulness of another witness or the guilt of the defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). This is so because “the constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

But while it is improper to express an opinion as to another witness's truthfulness, it is not improper to make arguments or offer testimony which might bear on a witness's credibility. Thus, expert opinion testimony which "addresses an ultimate issue to be decided by the trier of fact," may not be excluded for that reason alone if the opinion is based upon inferences from the physical evidence and the expert's experience. *State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996) (citing ER 704), *review denied*, 131 Wn.2d 1012 (1997)(in prosecution for assault, physician was properly allowed to testify for the State that cuts on victim's face appeared to have been inflicted deliberately; court rejected defendant's argument that the testimony constituted an improper personal opinion on defendant's guilt); *State v. Sanders*, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992) (holding that it was proper for an experienced officer to opine in drug dealing case that the lack of drug paraphernalia in the defendant's home indicated that the defendant did not use drugs regularly); Similarly, testimony that is not a direct comment on the defendant's guilt, that is otherwise helpful to the jury, and that is based on inferences from the evidence, is not improper opinion evidence. *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994) (in prosecution for DWI and negligent driving, prosecution properly elicited testimony from the arresting officer that the defendant "was obviously intoxicated and ... could

not drive a motor vehicle in a safe manner"; appellate court said officer's opinion "was based solely on his experience and his observation of [defendant's] physical appearance and performance on the field sobriety tests"; court added, "The opinion was not framed in conclusory terms that merely parroted the relevant legal standard," and said that "the fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt").

Likewise, in *State v. Jones*, 59 Wn. App. 744, 801 P.2d 263 (1990), *review denied*, 116 Wn.2d 1021, 811 P.2d 219 (1991), the court held that the it was not error to allow a medical expert to give his opinion that the fatal head injuries suffered by a four-month-old child were, in the doctors' words, "a non-accidental blunt injury" and "sustained by some sort of inflicted manner, whether it be an object, including a hand or a fist or some other object." *Jones*, 59 Wn. App. at 747-48. One of the physicians explained in detail why the child's injuries were inconsistent with the defendant's version. *Jones*, 59 Wn. App. at 747. Finding the testimony admissible under ER 702 and 704, the *Jones* court said, "Here the evidence was helpful to the jury: under the facts and circumstances presented, the doctors were better qualified than jurors to adjudge the cause of death and whether the fatal blow was accidental or inflicted. Opinion evidence on these issues is commonly

allowed in homicide cases." *Jones*, 59 Wn. App. at 751.

The *Jones* court also pointed out that although previous courts had rejected testimony that a victim had been molested or that a victim fit the profile of someone suffering from rape trauma syndrome, those cases were distinguishable because in both, the experts testified directly on their opinions of the veracity of the victim. *Jones*, 59 Wn.App. at 748-49, citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), and *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985). In *Jones*, however, the doctors' opinion that the injury was inflicted, rather than accidental, was not based on their opinion of a witness' credibility but on inferences drawn from the physical evidence found at an autopsy. *Jones*, 59 Wn.App. at 749. Thus, the court concluded that the trial court was within its discretion in admitting the evidence. *Jones*, 59 Wn.App. at 751.

The holding in *Jones* is in accord with numerous Washington cases in which the courts have recognized that medical experts can testify regarding their opinions of what caused certain injuries. *See, e.g., State v. Cunningham*, 23 Wash. App. 826, 598 P.2d 756 (Div. 3 1979), reversed on different point, 93 Wash. 2d 823, 613 P.2d 1139 (1980) (expert in homicide prosecution permitted to express opinion on cause of death); *State v. Richardson*, 197 Wash. 157, 84 P.2d 699 (1938) (doctor could state opinion that from appearances of a body the person's hands had been tied); *State v. Mooradian*,

132 Wash. 37, 231 P. 24 (1924) (opinion of doctor as to how wounds were inflicted); *State v. Gruber*, 150 Wash. 66, 272 P. 89 (1928) (opinion of doctor as to distances from which shots must have been fired to cause wounds); *State v. Read*, 100 Wash. App. 776, 998 P.2d 897 (Div. 3 2000) (in prosecution for murder, pathologist properly allowed to testify that on the basis of his autopsy and the path of the bullet, he believed the shooter was "sighting right down the gun when it went off"; court rejected defendant's argument that the opinion should have been excluded as an impermissible opinion on guilt).

Washington courts have also allowed medical experts to explain that a victim's injuries demonstrate that a child suffered from battered child syndrome (thus, showing that the injuries were non-accidental) or that the injuries were consistent with sexual abuse. *See, e.g., State v. Mulder*, 29 Wn. App. 513, 515-16, 629 P.2d 462 (1981) (holding that doctors may testify with reasonable probability that a particular injury or group of injuries to a child is not accidental or is not consistent with the explanation offered therefore but is instead the result of physical abuse); *State v. Young*, 62 Wn. App. 895, 905-07, 802 P.2d 829, 817 P.2d 412 (1991) (examining physician may testify that child's injuries are consistent with sexual abuse); *State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539 (holding that a "qualified physician may testify that within reasonable probabilities, a particular injury or group of

injuries to a child is not accidental or is not consistent with the defendant's explanation, but is instead consistent with physical abuse by a person of mature strength”), *review denied*, 111 Wn.2d 1026 (1988).

Although there is authority that holds a medical expert may not give an opinion regarding the cause a sexual assault victim’s injuries when the opinion is based solely on the victim’s description of the events,⁶ the testimony in the present case is distinguishable because here the SANE nurses opinion was based on the actual physical injuries sustained by K.L.W.⁷

In the present case, the SANE nurses merely described K.L.W.’s extensive physical injuries, and gave their opinions, admissible under ER 702, as to the cause of these physical conditions. As was the case in *Jones*, these opinions were based on the physical injuries K.L.W. sustained, and the opinions were not based merely on the victim’s report that she had been raped. The trial court below noted this crucial distinction in its oral ruling.

⁶ For instance, in *State v. Carlson*, 80 Wn. App. 116, 906 P.2d 999 (1995), the State asked the victim's treating physician for her “assessment based upon a medical certainty on the issue of child sexual abuse.” *Carlson*, 80 Wn. App. at 121-22. The doctor replied that she had “concluded that {the victim} had been sexually abused.” *Carlson*, 80 Wn. App. at 122. On cross-examination, the doctor clarified that this opinion was based primarily on information provided by the victim and other witnesses. *Carlson*, 80 Wn. App. at 122. This court thus held that this was improper opinion testimony, and that “Washington law has never recognized the ability of a doctor or other expert to diagnose sexual abuse based only on the statements of an alleged victim.” *Carlson*, 80 Wn. App. at 123-25.

⁷ See, e.g., *State v. Borsheim*, 140 Wn. App. 357, 375, 165 P.3d 417 (2007)(holding that doctor’s diagnosis that victim had been sexually abused, based in large part on the presence of genital warts, conveyed only the witnesses’s opinion that sexual abuse had occurred, not that the witness believed the victim’s assertion that the defendant was guilty of the abuse and

RP 282. The trial court, therefore, did not abuse its discretion in admitting this evidence.

2. ***The Defendant has failed to show that no reasonable person would take the view adopted by the trial court because numerous courts from other jurisdictions have allowed evidence similar to the evidence admitted in the present case.***

As an abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court, the Defendant has failed to show that the trial court in the present case abused its discretion because numerous courts from around the country have admitted essentially identical expert testimony in previous cases. See, e.g., *Warner v. State*, 144 P.3d 838, 860 (Okla. Crim. App. 2006) (No error in admitting doctor's opinion that the victim had suffered physical and sexual abuse based upon doctor's experience and his observations of the victim's injuries); *State v. Boston*, 545 N.E.2d 1220, 1239 (Ohio 1989) (Doctors' testimony that victim had been sexually abused, based in part on physical examination, was properly admitted); *State v. Running Bird*, 649 N.W.2d 609 (S.D. 2002) (trial court did not err in allowing doctor to give his opinion that victim's injuries were the result of a "traumatic episode of intercourse."); *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006) ("In this case, we consider whether the trial court committed error in admitting a medical expert's opinion that a child had been

could not be characterized as manifest error).

sexually abused, based on the child's statements and physical evidence found during an examination. . . . [W]e conclude that the interlocking facts of the victim's history combined with the physical findings constituted a sufficient basis for the expert opinion that sexual abuse had occurred."); *State v. Santiago*, 557 S.E.2d 601, 604-05 (N.C. App. 2001)(Noting that N.C. courts have consistently upheld the admission of expert testimony that a victim was sexually abused when this conclusion is based on the expert's examination of the victim). *Commonwealth v. Fink*, 791 A.2d 1235, 1247 (Pa. Super. 2002) ("A physician is permitted to testify that his or her findings following examination are consistent with a victim's allegations of abuse."); *People v. Mendibles*, 199 Cal.App.3d 1277, 1293(Cal. Ct. App. 1988)("An expert medical witness is qualified 'to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself,' the diagnosis of sexual abuse or rape from the observation of certain marks or scarring is nothing new and doctor's opinion based entirely upon visual examination and the observations she made was proper); *Montoya v. State*, 822 P.2d 363 (Wyo. 1991)(Court did not abuse its discretion in permitting expert opinion testimony that child victim had been sexually abused); *People v. Hatch*, 991 P.2d 165 (Cal. 2000)(testimony of sexual assault nurse that injuries to genital area "indicated forcible sexual assault and not consensual sex"); *People v. Espinoza*, 838 P.2d 204 (Cal. 1992)

(expert testimony that vaginal injuries “were inconsistent with consensual intercourse”).

For all of the above mentioned reasons, the trial court did not abuse its discretion below.

3. *The trial court did not abuse its discretion in admitting the testimony despite the Defendant’s claims that the evidence was cumulative.*

Finally, the Defendant argues that the trial court erred because the admission of the testimony from two experts was cumulative. Admission of evidence which is merely cumulative alone, however, is not prejudicial error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970), citing *State v. Swanson*, 73 Wn.2d 698, 698-99, 440 P.2d 492 (1968). Furthermore, a trial court has wide discretion in admitting evidence, and numerous cases have allowed multiple witnesses under similar circumstances. *See, e.g., Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994)(A trial court had considerable discretion in the handling of cumulative evidence and will not be reversed except for abuse of discretion); *State v. Bedker*, 74 Wash. App. 87, 871 P.2d 673 (1994) (no error in allowing cumulative evidence of child abuse); *Bays v. St. Lukes Hosp.*, 63 Wash. App. 876, 825 P.2d 319 (1992) (no abuse of discretion in allowing cumulative expert testimony); *State v. Dunn*, 125 Wash. App. 582, 105 P.3d 1022 (2005) (when admitting child's out-of-court statements pursuant to statutory hearsay exception for

statements by abused children, no reversible error in allowing several witnesses to recount the same statements by the child); *State v. Smith*, 82 Wash. App. 327, 917 P.2d 1108 (1996) (in prosecution for rape, trial court did not err in allowing the use of out-of-court statements and the testimony of other witnesses to corroborate the alleged victim's testimony in court; the appellate court stated, "This was not a case where the State attempted to call numerous witnesses of the same type to say the same thing. Instead, each witness had a perspective that helped the State, in different ways, to rebut Smith's assertion that the sex was consensual. In much the same way, different eyewitnesses might help a jury to assemble its view of a fight or a car accident.").

Although the two SANE nurses each ultimately gave an opinion regarding K.L.W.'s injuries, the Defendant has failed to show that their testimony was otherwise cumulative. Rather, the trial court was careful to insure that the testimony was not unnecessarily repetitive or cumulative. See, RP 301, 468. The trial court also held that the evidence was not cumulative and that this was "not a situation with two hired experts coming in and essentially having a stack of experts." RP 301.

4. *Even if this court were to find error, any error was harmless.*

Finally, even if this court were to find that the trial court abused its

discretion below, any error was harmless. When the error results from violation of an evidentiary rule, not a constitutional mandate, the appellate court does not apply the more stringent “harmless error beyond a reasonable doubt” standard. *See State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Rather, the appellate court is to apply “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (*citing Tharp*, 96 Wn.2d at 599, 637 P.2d 961).

The record below demonstrates that there is not a reasonable probability that the outcome of the trial would have been materially affected by the introduction of the challenged testimony from the SANE nurses. The unchallenged testimony from the victim, coupled with the unchallenged testimony regarding the victim’s extensive vaginal and anal injuries, demonstrated the Defendant’s guilt. Furthermore, the fact that the jury acquitted the Defendant of the two counts of rape in the second degree demonstrates that the challenged evidence did not unreasonably persuade the jury. Thus, even if there had been error below, any error would have been harmless.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE REPETITION OF EVIDENCE THAT THE VICTIM FOUND ANOTHER MAN ATTRACTIVE.

The Defendant next claims that the trial court erred by not allowing the defense to present evidence that K.L.W. thought another man in the bar was attractive. App.'s Br. at 22-24. This claim is without merit because the trial court did allow the Defendant to present evidence on this issue and only disallowed a second mention of this evidence. In addition, the evidence was not relevant.

As outlined above, a trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *Woods*, 143 Wn.2d at 595.

In the present case, the Defendant was allowed to ask Ms. McHenry whether she recalled "an incident at Maaco's where [K.L.W.] saw a gentleman on the other side of the dance floor that she thought was attractive?" RP 192. Ms. McHenry answered, "yes." RP 192-93. In addition, the Defendant testified that when the group was at Maaco's he saw a man that he knew from playing basketball and that he had a conversation with K.L.W. about this man. RP 535. As "a result of this conversation," the Defendant went over to this man and "asked him what she had wanted me to ask him." RP 535-36. Specifically, the Defendant claimed he asked him if he wanted to "hook up" with K.L.W. RP 536. Later, the Defendant claimed he

saw K.L.W. have a ten minute conversation with this man. RP 536.

The only evidence that was excluded came after the defense counsel started to ask about what K.L.W. had said to Ms. McHenry. RP 193. After the State's objection, the defense argued that the expected testimony was that the K.L.W. said that she thought this other man was attractive and that this statement was being offered to prove that K.L.W. "was in a flirtatious mood that evening." RP 194. The State argued that the defense had already elicited the fact that K.L.W. thought this man was attractive, and that further testimony was not needed, and that the Defendant's argument was a "leap." RP 194. The trial court sustained the objection. RP 195.

Even assuming that the trial court erred, any error was harmless since the Defendant was allowed to introduce this same fact through the earlier testimony that K.L.W. had seen a man at the bar who she thought was "attractive." RP 192.

The trial court, however, did not err because the fact that victim may have found another man attractive is not relevant and does not show that she was attracted to the Defendant. Nor is the evidence relevant to the central issue of whether or not the sexual intercourse between the victim and the Defendant was consensual.

For these reasons, the trial court did not abuse its discretion, and even if there was error, any error was harmless.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE THE TRIAL COURT COMMITTED NO ERROR.

The Defendant next claims that that the cumulative error doctrine warrants reversal in this case. App.'s Br. at 27. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Examples include a cases in which there were five evidentiary errors along with discovery violations; *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), in which there were three instructional errors and improper remarks by the prosecutor during voir dire; *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), in which a witness impermissibly suggested the victim's story was consistent and truthful, the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing; *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), and in which the court severely rebuked the defendant's attorney in the presence of the jury, the court refused to allow the testimony

of the defendant's wife, and the jury was permitted to listen to a tape recording of a lineup in the absence of court and counsel. *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

Here, the Defendant has not established any error at all, and certainly even if he has, none of it combined is of the magnitude appearing in the cited cases. *Greiff*, 141 Wn.2d at 929. For all of these reasons, the Defendant's argument must fail.

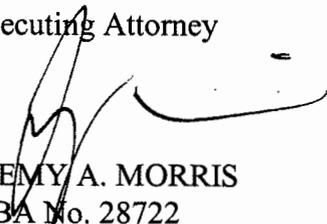
V. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 16, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

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