Supreme Court No. 96988-4
Court of Appeals No. 49985-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

AKEEN HEYER,

Appellant.

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# PETITION FOR DISCRETIONARY REVIEW

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## A. IDENTITY OF PETITIONER AND DECISION BELOW

Akeen Heyer, the petitioner, was found guilty of third degree assault after a bench trial. The Court of Appeals affirmed the conviction. Mr. Heyer asks this Court to review the Court of Appeals' decision terminating review.[1]

## B. ISSUES

1. Medical records may be admissible under the business records exception. The exception does not apply if professional judgement was necessarily involved in creating the record or if cross-examination would be of value. According to medical records, a physician diagnosed a patient with a nasal fracture. Over objection and without the testimony of the attending physician (or any witness), the court admitted the medical records. Does the business records exception permit admission of a medical record without the testimony of the attending physician? RAP 13.4(b)(1), (2), (4).

2. The trial court's written findings of fact, not its oral ruling, are controlling. Although concluding that Mr. Heyer was guilty of third degree assault, the trial court found facts only supporting conviction for

[1] A copy of the unpublished opinion, dated November 15, 2018, and the order denying Mr. Heyer's motion for reconsideration, dated February 20, 2019, are in the appendix.

fourth degree assault. Based on the trial court's unincorporated oral ruling, the Court of Appeals refused to remand for entry of conviction on fourth degree assault. In elevating the trial court's oral ruling over its written ruling, did the Court of Appeals depart from precedent? RAP 13.4(b)(1), (2).

## C. STATEMENT OF THE CASE

Based on events at an automobile auction, where Akeen Heyer punched another man in self-defense, the State charged Mr. Heyer with one count of second degree assault. CP 1-3. Mr. Heyer elected a bench trial. CP 6; RP 5.[2]

The man that Mr. Heyer punched was Anthony Jones. During his testimony and over Mr. Heyer's hearsay objection, Mr. Jones was permitted to testify about what medical professionals said to him, including that he had a nasal fracture. RP 74-75.

Over Mr. Heyer's objection that testimony from the attending physician was necessary for admission, the court admitted the hospital's record of the notes by the medical professionals who treated Mr. Jones. RP 112-13.

[2] Unless otherwise noted, the "RP" citations refer to proceedings from 1/23/17.

Mr. Heyer testified that he struck Mr. Jones in an act of self-defense. RP 129-31.

Although the trial court rejected Mr. Heyer's self-defense claim, the court acquitted Mr. Heyer of second degree assault. CP 20-21 (FF V; Conclusion of Law (CL) I-IV). The trial court found Mr. Heyer guilty of the lesser offense of third degree assault. CP 21 (CL IX).

In the Court of Appeals, Mr. Heyer argued that the trial court erred in overruling (1) his hearsay objection about what medical professionals said to Mr. Jones and (2) his objection to the admission of medical records. Br. of App. at 6-14. Accepting the State's concession as to the first issue, the court held the trial court erred in overruling Mr. Heyer's hearsay objection and admitting testimony about what medical professionals told Mr. Jones. Slip op. at 4-5. The Court of Appeals, however, rejected Mr. Heyer's second argument, reasoning that Mr. Heyer had "stipulated" to admission of the medial records because defense counsel conceded that testimony of the records custodian was unnecessary. Slip op. at 5-7. In light of this determination, the court held the hearsay error harmless. Slip op. at 5. The court also rejected Mr. Heyer's alternative argument that remand for entry of conviction on fourth degree assault was required because the trial court had only found facts

supporting conviction for that offense. Br. of App. at 14-16; slip op. at 7-8. The Court of Appeals denied Mr. Heyer's motion for reconsideration.

## D. ARGUMENT

### 1. The Court of Appeals improperly ruled that medical records were properly admitted under the business records exception without the testimony of the physician (or any witness).

#### a. Medical records are not admissible under the business records exception when cross-examination would increase reliability as to the entries or if skill or judgment is involved in their compilation.

The trial court admitted exhibit 10, which consisted of the hospital's record of the notes by the physician who attended Mr. Jones. RP 112-13. The court admitted this record under the business records exception. This exception is based on a statute, which provides for admissibility of a record if a number of requirements are met:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The types of records subject to admission under the business records exception are generally of a clerical nature. In re Welfare of J.M.,

130 Wn. App. 912, 923-24, 125 P.3d 245 (2005). "What such records have in common is that cross-examination would add nothing to the reliability of clerical entries: no skill of observation or judgment is involved in their compilation." Id. at 924. The business records exception does not apply if professional judgement was necessarily involved in creating the evidence or if cross-examination would be of value. Id. "The rule was not adopted to permit evidence of the recorder's opinion, upon which other persons qualified to make the same record might have differed." Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761 (1957).

Medical records may qualify for admission under the business records exception. State v. Hopkins, 134 Wn. App. 780, 789, 142 P.3d 1104 (2006). But the State must still lay the appropriate foundation. Id. In Hopkins, the exception did not apply because the testifying doctor "did not testify how reports were made or whether they were produced in the regular course of business." Id.

Here, the State moved to admit hospital records without calling *any* witness to lay the appropriate foundation. RP 112. Although defense counsel agreed the testimony of the "records custodian" was unnecessary, he argued the exhibit should not be admitted without the testimony of the attending physician because that physician exercised skill and discretion in their diagnosis:

THE COURT: Mr. Odell, any further witnesses for the State?

[prosecutor]: Well, at this time the State would ask to see Plaintiff's Exhibit No. 10.

THE CLERK: Here are all of the exhibits.

[prosecutor]: Thank you, sir. I'm going to show that now, counsel. And I'm going to move to admit Plaintiff's Exhibit No. 10, the records from Franciscan System Services at this time.

THE COURT: Thank you.

[defense counsel]: Your Honor, I don't have any objection as it relates to the -- to the fact that there are records and I didn't ask Mr. Odell -- in fact, told him he wouldn't have to bring in the records custodian to bring it in. But just seems to me without the testimony of the actual attending physician, that's my only issue, so...

[prosecutor]: So absent the objection to admitting it –

THE COURT: I'm going to admit it over objection.

[prosecutor]: It's a business record.

THE COURT: Defense has stipulated to not having the record custodian here to lay a foundation. Thank you. Anything else?

[prosecutor]: Given that that's been admitted, Your Honor, the State would rest.

RP 112-13.

The court erred. Mr. Heyer did not stipulate *no* witness would be required. He argued that testimony from attending physician was necessary. Mr. Heyer was correct because professional judgement was exercised by the physicians in treating Mr. Jones and giving their professional opinions. The report indicates that Mr. Jones was evaluated by a radiologist and physician. Ex. 10, p. 4-9. The radiologist provided a professional opinion that Mr. Jones had an acute minimally displaced right bone fracture. Ex. 10, p. 4. The physician believed that prescription pain medication was appropriate and prescribed hydrocodone-acetaminophen (Norco). Ex. 10, p. 4. Because these professionals used skill and discretion, the business records exception did not apply. See Hopkins, 134 Wn. App. at 789-90; J.M., 130 Wn. App. at 924.

In rejecting Mr. Heyer's argument, the Court of Appeals uncritically accepted the trial court's assertion that Mr. Heyer had provided a "stipulation." Slip. op at 6. A "stipulation is an agreement between the parties to which there must be mutual assent." State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). [T]o be effective, the terms of a stipulation must be definite and certain." Id.

As argued, Mr. Heyer did not provide any stipulation. Br. of App. at 12; Reply Br. at 1. That Mr. Heyer did not object to a lack of testimony from the records custodian is not equivalent to a stipulation. And the trial

court's statement that Mr. Heyer had "stipulated" does not make this true. State v. Hood, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016). In Hood, the State argued the invited error doctrine precluded review of a jury instruction because the trial court had stated the defendant had "joined in" or "stipulated" to the instruction. Hood, 196 Wn. App. at 131-34. Because there was "no record of Hood formally stipulating to the correctness of the instructions," the Court of Appeals rejected the argument:

> It is not clear why the trial court made a point of saying that Hood had "joined in" or "stipulated to" the State's proposed instructions. There is no record of Hood formally stipulating to the correctness of the instructions proposed by the State. The court's remarks may have simply been intended to memorialize the fact that Hood had not proposed a competing set of instructions. In any event, the court's remarks do not provide a basis for holding that Hood specifically invited the court to give the reasonable doubt instruction to which he now assigns error.

Id. at 134-35 (emphasis added).

As in Hood, Mr. Heyer did not provide a stipulation. The trial court's contrary oral remark was incorrect. Further, stating that a records custodian is unnecessary to admit a record is not the same as stating that no testimony is necessary.

As to the merits, the Court of Appeals reasoned Mr. Heyer's claim failed based on this Court's opinion in State v. Ziegler, 114 Wn.2d 533, 538-39, 789 P.2d 79 (1990). Slip op. at 6. In Ziegler, however, the

business record exception applied to test results from a lab because *a doctor testified* about the operating procedure of the lab. Id. at 540. That witness was subject to cross-examination. In contrast, there was no opportunity for cross-examination in this case because the State called *no witness* in support of admitting the medical records.

The Court of Appeals also mischaracterized Mr. Heyer's claim as being raised for the first time on appeal. Slip op. at 6. But Mr. Heyer objected to the admission of the record below, contending that testimony from the physician was necessary. And the trial court understood what defense counsel was arguing. RP 112-13. For this reason, the court stated, "I'm going to admit it over objection." RP 113. Thus, defense counsel's objection was sufficiently specific. ER 103(1)(a)("In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.") (emphasis added); State v. Swanson, 181 Wn. App. 953, 958, 327 P.3d 67 (2014) (specific ground was apparent from context and therefore the claimed error was preserved for review).

**b. Review is warranted to clarify how the business records exception applies to medical records.**

Applying its decision from Hopkins, which holds the business records exception does not apply where cross-examination would be

relevant in determining the reliability of entries in the record, the Court of Appeals should have held the trial court erred. See Hopkins, 134 Wn. App. at 789-90. The Court of Appeals failure to apply Hopkins and other precedent is a conflict meriting this Court's review. RAP 13.4(b)(1), (2).

Further, review is warranted because the issue is one of substantial public interest. RAP 13.4(b)(4). The issue concerning the admission of medical records under the business records exception will recur. Guidance from this Court on when the exception applies to medical records is evidently needed.

Alternatively, since the Court of Appeals plainly erred in holding that the business records exception applies without testimony from *any* witness, this Court should simply grant review, vacate the Court of Appeals decision, and reverse based on the briefing submitted in this case. Br. of App. at 13-14 (explaining why errors were prejudicial).

**2. The trial court only found facts to support conviction for fourth degree assault. The Court of Appeals should have vacated the conviction for third degree assault and remanded for entry of conviction for fourth degree assault.**

Alternatively, Mr. Heyer argued his conviction should be reversed because the written findings of fact and conclusions of law do not support the trial court's determination that Mr. Heyer was guilty of third degree assault. This is because the trial court did not find the person struck by Mr.

Heyer experienced harm "accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f); CP 20-23. Therefore, the trial court found facts supporting a conviction for the lesser offense of fourth degree assault, not third degree assault. Br. of App. at 14-16.

When a trial court fails to find the necessary facts to support a conviction, but the facts support conviction on a lesser offense, the remedy is remand to the trial court to enter judgment and sentence on the lesser offense. State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) (remanding for entry of fourth degree assault where trial court erroneously convicted defendant of third degree assault, and findings supported conviction for fourth degree assault); In re Heidari, 159 Wn. App. 601, 610, 248 P.3d 550 (2011) (reasoning this is appropriate only in cases tried to the bench), affirmed 174 Wn.2d 288, 274 P.3d 366 (2012).

The Court of Appeals refused to follow this precedent. Instead, the Court of Appeals reasoned the trial court had made the necessary findings in light of the court's oral ruling. Slip op. at 8. Because it is improper to use a trial court's oral ruling when there are unambiguous findings of fact and conclusions of law, Mr. Heyer respectfully asks this Court to grant review and reverse the Court of Appeals.

In reviewing a decision from a bench trial, the appellate court reviews the written findings of fact and conclusions of law. State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). "The written decision of a trial court is considered the court's 'ultimate understanding' of the issue presented." State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980). The "trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law and judgment." State v. Kilburn, 151 Wn.2d 36, 59 n.1, 84 P.3d 1215 (2004).

In its decision affirming, the Court of Appeals departed from this framework and relied on the trial court's oral ruling. The court stated that "if the trial court fails to enter sufficient findings and conclusions, it is harmless error if the trial court's oral ruling is sufficient to permit appellate review." Slip. op. at 7 (citing State v. Smith, 145 Wn. App. 268, 274, 187 P.3d 768 (2008)). In Smith, however, no findings of fact and conclusions of law were entered. Smith, 145 Wn. App. at 273-74. In contrast, here the trial court entered written findings of fact and conclusions of law. Mr. Heyer did not argue the trial court erred by failing to enter sufficient written findings. Rather, he argued that the findings and conclusions of law do not support the determination of guilt for third degree assault.

In turning to the trial court's oral ruling, the Court of Appeals reasoned that finding of fact VII was "ambiguous." Slip. op at 7. That finding reads:

> That as a result of being struck, the victim suffered injuries to his face, including what was designates [sic] as a 'minimally displaced right nasal bone fracture", without identifying what that means, medically. He suffers residual pain from being struck."

CP 20 (FF VII). There is nothing ambiguous about this finding. The trial court found that the person struck by Mr. Heyer was injured and suffers residual pain. The trial court, however, did not find this pain was substantial and that it extended for a period sufficient to cause considerable suffering. CP 20-21; RCW 9A.36.031(1)(f). The absence of this finding is a negative finding against the State because it bore the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). These written findings control.

Review is warranted because the Court of Appeals decision is in conflict with precedent. RAP 13.4(b)(1), (2). This Court should grant review.

Alternatively, because the Court of Appeals plainly erred, this Court should grant review, summarily reverse, and remand for entry of conviction on fourth degree assault.

## E. CONCLUSION

For the foregoing reasons, Mr. Heyer respectfully requests this Court grant his petition for discretionary review.

Respectfully submitted this 22nd day of March, 2019.

/s Richard W. Lechich
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# Appendix

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Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>AKEEN RAY HEYER,<br><br>Appellant. | No. 49985-1-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, J. – Akeen Ray Heyer appeals his third degree assault conviction, arguing the trial court erred by allowing hearsay testimony about the victim's alleged medical diagnosis and in admitting the victim's medical records. Heyer also argues the trial court should have convicted him of the lesser degree offense of fourth degree assault instead of third degree assault based on the trial court's findings of fact. Finally, Heyer seeks to have certain imposed legal financial obligations (LFOs) stricken. We affirm, but we remand to the trial court to amend Heyer's judgment and sentence by striking the imposed criminal filing fee and the DNA collection fee.

## FACTS[1]

While at a car auction, Heyer and Anthony Jones bid on the same vehicle. After Heyer won the auction, Jones made a comment that Heyer "could use his commissary money to buy the

[1] The factual background is taken primarily from the trial court's findings of fact, which are, with the exception of Finding of Fact VII, unchallenged and verities on appeal. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014).

vehicle" in reference to Heyer's prior incarceration. Clerk's Papers (CP) at 20. "[W]ithout thinking," Heyer punched Jones in the face "once or twice." CP at 20.

The State charged Heyer with second degree assault. Heyer waived his right to a jury trial and proceeded to a bench trial.

During trial, Jones testified his glasses were broken and his nose would not stop bleeding. He went to the hospital for treatment. Jones testified that while at the hospital, they "referred me to a specialist because they saw a fracture." Verbatim Report of Proceedings (VRP) (January 23, 2017) at 74. Heyer objected based on hearsay. The trial court overruled his objection. Jones then testified, "There was a fracture. He said that the—that my air nasal passage was—." CP at 75. Heyer again objected and the trial court overruled his objection. Jones testified that he was told, "I needed corrective surgery to correct the nasal passage." VRP (January 23, 2017) at 75.

Later during trial, the State sought to admit Jones's hospital records. Defense counsel stated:

> I don't have any objection as it relates to the—to the fact that there are records and I didn't ask [the prosecutor]—in fact, told him he wouldn't have to bring in the records custodian to bring it in. But just seems to me without the testimony of the actual attending physician, that's my only issue.

VRP (January 23, 2017) at 112. The trial court admitted the records, stating, "I'm going to admit it over objection. . . . Defense has stipulated to not having the record custodian here to lay a foundation." VRP (January 23, 2017) at 113. Jones's medical records showed he had a right nasal fracture with swelling and tenderness. The emergency room doctor advised Jones to follow up with an ears, nose and throat specialist.

The trial court convicted Heyer of the lesser degree offense of third degree assault. In its oral ruling, the trial court stated, "I think he acted with criminal negligence and caused bodily harm accompanied by substantial pain that extended for a long period of time." VRP (January 23, 2017) at 151. The trial court entered findings of fact and conclusions of law, finding "[t]hat as a result of being struck, the victim suffered injuries to his face, including what was designate[d] as a 'minimally displaced right nasal bone fracture', without identifying what that means, medically. He [suffered] residual pain from being struck." CP at 20. The trial court concluded, "Based on the medical records and the testimony of the victim, the state has demonstrated that the victim suffered bodily injury, which is defined as 'physical pain or injury.' " CP at 21. The trial court also imposed a $200 criminal filing fee and a $100 DNA collection fee.

Heyer appeals.

## ANALYSIS

Heyer argues that the trial court erred in allowing hearsay testimony about Jones's diagnosis and in admitting Jones's medical records. Heyer also argues the trial court's findings of fact only establish fourth degree assault and not third degree assault. We accept the State's concession regarding hearsay testimony but find the error was harmless, and we disagree with Heyer's findings of fact argument.

### A. EVIDENTIARY RULINGS

#### 1. Standard of Review

Generally, we review a trial court's evidentiary ruling for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). However, "[t]his court reviews whether a statement was hearsay de novo." *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688-89, 370

P.3d 989 (2016). An erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

2. Hearsay Testimony

Under ER 801(c), "hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay generally is inadmissible under ER 802, but ER 803 provides several exceptions to that rule of inadmissibility. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 366, 225 P.3d 396, *review denied*, 168 Wn.2d 1042 (2010).

ER 803(a)(4) provides a hearsay exception for "[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*." (Emphasis added) This exception applies to statements reasonably pertinent to medical diagnosis. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012), *review denied*, 177 Wn.2d 1009 (2013). Moreover, this exception "applies only to statements made by the patient to the doctor, not the reverse." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316 (9th Cir. 1985).

Here, the statements were from the victim regarding what a medical provider told the victim. This does not fall under the ER 803 exception. The State concedes that the trial court erred in admitting these statements. We accept the State's concession and turn to whether admitting these statements was harmless error.

For evidentiary errors not implicating a constitutional mandate, we reverse only if, " 'within reasonable probabilities, the outcome of the trial would have been materially affected

had the error not occurred.' " *Thomas*, 150 Wn.2d at 871 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). If the improperly admitted evidence is of minor significance in reference to the overall evidence, then the error is harmless. *Thomas*, 150 Wn.2d at 871.

Here, the improperly admitted testimony that Jones's nose was fractured was of minor significance in light of the medical records that were properly admitted. *See* discussion *infra* Section A.3. The medical records show that Jones had a broken nose and needed to follow up with a nose specialist. Thus, substantial evidence supports the trial court's finding that Jones suffered a " 'minimally displaced right nasal bone fracture' " and that he "suffers residual pain from being struck." CP at 20; s*ee State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (" 'Substantial evidence' is evidence sufficient to persuade a fair-minded, rational person that the findings are true."), *review denied*, 183 Wn.2d 1011 (2015) Since the outcome of the trial was not materially affected by allowing the hearsay testimony, the error was harmless.

3. Medical Records

Medical records are admissible under RCW 5.45.020, the business records exception to the hearsay rule. RCW 5.45.020 "does not create an exception for the foundational requirements of identification and authentication." *State v. DeVries*, 149 Wn.2d 842, 847, 72 P.3d 748 (2003) (citing 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.42, at 23 (4th ed. 1999)). "RCW 5.45.020 does not require examination of the person who actually made the record." *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005) (citing *Cantrill v. American Mail Line, Ltd.*, 42 Wn.2d 590, 607-08, 257 P.2d 179 (1953)). Testimony by the custodian of the records "or other qualified witness" will be sufficient to properly introduce the record. RCW 5.45.020.

> Here, when the State offered Jones's medical records, defense counsel stated:
>
> > I don't have any objection as it relates to the—to the fact that there are records and I didn't ask [the prosecutor]—in fact, told him he wouldn't have to bring in the records custodian to bring it in. But just seems to me without the testimony of the actual attending physician, that's my only issue.

VRP (January 23, 2017) at 112. The trial court allowed the records, stating, "Defense has stipulated to not having the record custodian here to lay a foundation." VRP (January 23, 2017) at 113. Heyer argues that he stipulated that the record custodian did not need to be called for foundational purposes but he did not stipulate to the treating physician being excused from testifying for foundational purposes. Heyer relies on the language in RCW 5.45.020, which states that the custodian "or other qualified witness" may testify. However, RCW 5.45.020 requires one or the other; not both. Once Heyer stipulated to the foundation of the records and that testimony from the records' custodian was unnecessary, the trial court had tenable grounds to admit the medical records, absent any other valid objection. Accordingly, the trial court did not abuse its discretion in admitting Jones's medical records.

Heyer argues, for the first time on appeal, that the trial court erred in admitting the medical records because the business records exception to the hearsay rule does not apply since the medical professionals "used skill and discretion." Br. of Appellant at 13. In general, we do not reach issues raised for the first time on appeal. RAP 2.5(a). Nevertheless, we note that under RCW 5.45.020, "[a] record of an act, condition, or event" is admissible under the business records exception to the hearsay rule. And, " 'A practicing physician's records, made in the regular course of business, properly identified and otherwise relevant, constitute competent evidence of a condition therein recorded.' " *State v. Ziegler*, 114 Wn.2d 533, 538-39, 789 P.2d 79 (1990) (quoting *State v. Sellers*,

39 Wn. App. 799, 806, 695 P.2d 1014, *review denied*, 103 Wn.2d 1036 (1985)). Therefore, because the records constitute evidence of a condition, they are admissible under the business records exception to the hearsay rule.

B. LESSER DEGREE OFFENSE

Heyer next contends the trial court's findings of fact only support the lesser degree offense of fourth degree assault. We disagree.

Following a bench trial, trial courts are required to enter written findings of fact and conclusions of law. CrR 6.1(d). But if the trial court fails to enter sufficient findings and conclusions, it is harmless error if the trial court's oral ruling is sufficient to permit appellate review. *State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008).

Under RCW 9A.36.031(1)(f), an individual is guilty of third degree assault if he or she, under circumstances not amounting to assault in the first or second degree, "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering."

Here, the trial court found "[t]hat as a result of being struck, the victim suffered injuries to his face, including what was designate[d] as a 'minimally displaced right nasal bone fracture', without identifying what that means, medically. He [suffered] residual pain from being struck." CP at 20. This finding of fact is ambiguous regarding whether the trial court found that there was substantial pain that extended for a period sufficient to cause considerable suffering. We, therefore, turn to the trial court's oral ruling for clarification. *Smith*, 145 Wn. App. at 274.

The trial court specifically stated in its oral ruling that Heyer "acted with criminal negligence and caused bodily harm accompanied by substantial pain that extended for a long

period of time." VRP (January 23, 2017) at 151. The trial court's oral ruling in conjunction with its written finding of fact support its ultimate conclusion that Heyer is guilty of third degree assault.

C. LFOs

Heyer seeks to have the $200 criminal filing fee and the $100 DNA collection fee stricken from his judgment and sentence. The State concedes that the imposed criminal filing fee and DNA collection fee should be stricken. We accept the State's concession.

The legislature recently amended former RCW 36.18.020(2)(h), and as of June 7, 2018, trial courts are prohibited from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, §17; *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714, 722 (2018). Our Supreme Court has held that the amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 426 P.3d at 722. The legislature also recently amended former RCW 43.43.7541, and as of June 7, 2018, states, in part:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction.

Here, there is no dispute that Heyer is indigent and that his DNA has previously been collected. Therefore, in light of the recent legislative amendments and the court's holding in *Ramirez*, we remand to the trial court to amend Heyer's judgment and sentence by striking the imposed criminal filing fee and DNA collection fee.

## CONCLUSION

We hold that the trial court did not commit reversible error in allowing the victim's hearsay statements. The trial court also properly admitted the victim's medical records. Lastly, the trial

court's oral ruling and written findings of fact support Heyer's third degree assault conviction. Accordingly, we affirm, but we remand for the trial court to amend Heyer's judgment and sentence by striking the imposed criminal filing fee and DNA collection fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Worswick, J.

Filed
Washington State
Court of Appeals
Division Two

February 20, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>AKEEN RAY HEYER,<br><br>Appellant. | No. 49985-1-II<br><br><br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant, Akeen R. Heyer, filed a motion for reconsideration of this court's unpublished opinion filed on November 15, 2018. After consideration, it is hereby

**ORDERED** that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, Maxa, Lee

J.

LEE, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 49985-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Mark von Wahlde, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 22, 2019
Washington Appellate Project

## WASHINGTON APPELLATE PROJECT

## March 22, 2019 - 4:43 PM

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| **Appellate Court Case Number:** | 49985-1 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Akeen Heyer, Appellant |
| **Superior Court Case Number:** | 16-1-01035-2 |

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