

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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DIVISION II
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STATE OF WASHINGTON
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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

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5. WAS THE TRIAL IRREDEEMABLY TAINTED BY MULTIPLE EVIDENTIARY ERRORS?

C. STATEMENT OF FACTS

1. PROCEDURAL HISTORY.

Mr. Hudson was charged by way of the First Amended Information filed on May 21, 2007. CP 1. Mr. Hudson was charged with two counts of Rape in the Second Degree and one count of Rape in the Third Degree.

CP 1. Following a trial by jury, Mr. Hudson was convicted of Rape in the Third Degree. CP 33. Mr. Hudson was sentenced to thirteen months confinement. CP 33. This appeal timely follows.

2. STATEMENT OF THE CASE.

Mr. Hudson met K.L.W. four to five years prior to trial. RP 529. (Although K.L.W.'s full name appears in the transcript, initials are used in this Brief to protect her privacy.) K.L.W. knew Ms. Tillis, who was Mr. Hudson's long-time girlfriend, through her employment. RP 340, 530. Consequently Mr. Hudson was acquainted with K.L.W.. *Id.* Mr. Hudson saw K.L.W. in social occasions several times. RP 530. K.L.W. estimated she had known Mr. Hudson for the past couple of years. RP 340. They met socially as well as at the daycare Mr. Hudson's son attended and K.L.W. worked. RP 341. Mr. Hudson was also acquainted with Lisa and John McHenry. RP 529.

On the evening of January 27, 2007, Mr. Hudson socialized with a group of friends. RP 531. The group included Ms. Tillis, K.L.W., Mr. and Mrs. McHenry. *Id.* The group gathered at the McHenry residence around 10:00 p.m. that evening. *Id.* The group socialized in what Mr. Hudson described as a "festive, happy mood" and consumed alcohol at the McHenry residence. RP 533. K.L.W. consumed two to three rum and cokes and a shot at McHenry's. RP 346, 349-350. After one hour of partying, the entire group moved on to a bar, Maaco's. RP 533. The

group, with the exception of Lisa McHenry, continued to drink alcohol at Maaco's. RP 349.

Mr. Hudson and K.L.W. had friendly conversations at Maaco's. RP 534-535. At one point in the evening while at Maaco's K.L.W. and Mr. Hudson had a conversation about a gentleman friend of Mr. Hudson's at Maaco's. RP 192, 535. Ms. McHenry was present during the conversation. Defense counsel was precluded from discussing the conversation regarding this gentleman with Ms. McHenry. RP 193. Mr. Hudson recalled approaching his friend on behalf of K.L.W. asking if he wanted to "hook up" with K.L.W.. RP 535-536.

K.L.W. recalled talking about a gentleman at the Maaco's bar. RP 423. She was not certain if she asked Mr. Hudson to speak to the gentleman. RP 423-424. K.L.W. first testified that she may have asked Mr. Hudson to speak with him. RP 423-424.

The party ended at Maaco's when the bar closed and the group drove to Taco Bell for some food. RP 357, 537-538. Mr. Hudson was in the back seat next to K.L.W. RP 537. During the car ride, K.L.W. placed her head near his crotch. *Id.* The group returned to the McHenry residence following the food run. RP 538. K.L.W. eventually went home and Mr. Hudson later reflected on the flirting that occurred between himself and K.L.W. RP 540. Mr. Hudson left the McHenry residence and went to K.L.W.'s residence in the early morning hours. RP 540. He had

been at K.L.W.'s residence one or two times before. *Id.* Mr. Hudson rang the doorbell at what he thought was K.L.W.'s side of the duplex. RP 541. The door was actually to the neighbor, Mr. Reardon's residence. RP 541, 520-521. Mr. Reardon answered the door and directed Mr. Hudson to K.L.W.'s residence. RP 541, 521.

K.L.W. let Mr. Hudson into her residence. RP 365. The time at this point was between 4:00 and 4:30 a.m. RP 364. Mr. Hudson identified himself before K.L.W. opened the door. RP 364. K.L.W. invited Mr. Hudson to sit on her futon and watch television. RP 542, 366, 370. The futon was in a bed position. RP 542. Mr. Hudson started rubbing K.L.W.'s thigh and the two laid together in a spooning position. RP 542-544. Mr. Hudson recalled engaging in consensual sexual relations with K.L.W. RP 546-548. The two first engaged in vaginal followed by anal sex. RP 376-377. K.L.W. recalled telling Mr. Hudson to stop when he had anal sex with her. RP 377. Mr. Hudson did not recall K.L.W. telling him to stop. RP 376-377. Both K.L.W. and Mr. Hudson fell asleep after the sexual activities. RP 386, 550. Mr. Hudson later woke up, saw that K.L.W. was still sleeping and he left the residence. *Id.* Mr. Reardon, K.L.W.'s neighbor, did not hear any noises coming from K.L.W.'s side of the duplex that night. RP 552.

The morning after the incident K.L.W. left a message with Ms. McHenry asking for a return call. RP 387. Ms. McHenry returned the

call later that morning. RP 388-389. K.L.W.'s mother arrived at the residence with K.L.W.'s son. RP 411. K.L.W. did not discuss the events of the night before or later morning with her mother. RP 412.

Ms. McHenry went to K.L.W.'s residence. RP 390-391. Ms. McHenry suggested to K.L.W. to go to the hospital for an examination. RP 416. The two of them decided to go to Denny's for lunch before going to the hospital for an examination. RP 391.

The State produced testimony of two sexual assault nurse examiners (SANE). Ms. Culbertson was the first SANE to testify. RP 210. Ms. Culbertson reviewed the chart created by Nodie Sullivan (another SANE) documenting K.L.W.'s exam. RP 229. Ms. Culbertson described K.L.W.'s description of her interaction with Mr. Hudson. RP 242-243. This testimony was allowed over the objection of defense counsel. RP 230. Specifically, counsel objected on hearsay grounds. *Id.*

Ms. Culbertson did not examine K.L.W., but did review Ms. Sullivan's notes of the exam. RP 231. Ms. Culbertson recited K.L.W.'s narrative description of the events between herself and Mr. Hudson. RP 242-243. Ms. Culbertson also described the injuries depicted in photographs taken of K.L.W.'s genitalia. RP 251-256. She testified as to the size and quality of lacerations and abrasions found in the examination. RP 299-257. Ms. Culbertson detailed the injuries depicted in multiple photographic exhibits taken of K.L.W. by

Ms. Sullivan. *Id.* Ms. Culbertson also described in detail the anatomy of the vaginal area and the bodies' responses during sexual activity. RP 246-247, 303-305. This included testimony reciting K.L.W.'s reported high level of pain. RP 257.

The State asked Ms. Culbertson if K.L.W.'s injuries were consistent with her report of non-consensual sex. RP 257. Defense counsel objected to the question. RP 257-258. The trial court overruled the objection and allowed the State to pursue a line of inquiry regarding evidence of non-consensual sex. RP 279-282. Ms. Culbertson testified that she believed her injuries were due to non-consensual sex. RP 302. Earlier in her testimony Ms. Culbertson testified that K.L.W.'s vaginal and anal injuries were due to blunt force trauma. RP 256. That opinion was repeated again later in her testimony. RP 307.

The court allowed Ms. Culbertson to read the narrative of the report over objection of defense counsel. RP 327. The narrative report discussed through direct examination. RP 242.

Ms. Sullivan, another SANE, testified as well. RP 439-486. Defense counsel sought to exclude Ms. Sullivan's testimony as cumulative. RP 283. The court allowed Ms. Sullivan to testify regarding her examination of K.L.W. and the conclusions based on her observations. RP 286, 301, 457.

Ms. Sullivan testified regarding examination procedures and the use of toluidine blue. RP 443-444. Ms. Sullivan described lacerations seen in the exam. RP 475-477. Ms. Sullivan testified as to the quality of the lacerations and abrasions throughout her testimony. RP 475-482. Ms. Sullivan testified as to the report of the incident made by K.L.W. RP 470-471. Ms. Sullivan recited K.L.W.'s description of her pain level. RP 472-473. Ms. Sullivan described the photographs of K.L.W.'s injuries. RP 478-484.

Ms. Sullivan was allowed to testify that the injuries she saw in K.L.W. came from a traumatic non-consensual sexual encounter over objection of defense counsel. RP 484-485.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MS. CULBERTSON TO RECITE K.L.W.'S NARRATIVE REPORT WHEN THE ENTIRE REPORT WAS NOT ADMISSIBLE UNDER ER 803(a)(4).

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). A trial court abuses discretion if no reasonable person would adopt the view of the trial court. *Id.* In this case, K.L.W.'s statements to medical personnel as to the cause of her injuries were intended to be part of the criminal investigation and were not medically

necessary for treatment, and the court erred in allowing Ms. Culbertson to recite the narrative report made by K.L.W. to the jury.

Under ER 803(a)(4), out of court statements made for the purpose of medical diagnosis or treatment may be admissible as an exception to the rule against hearsay. Statements identifying an assailant or attributing fault are ordinarily not permitted. In Re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985); State v. Huyuh, 107 Wn.App. 68, 74-75, 26 P.3d 290 (2001). To be admissible, the motive of the declarant for making the statement must be consistent with promoting treatment and the treatment provider must reasonably rely on the statement for diagnosis and treatment. In Re Dependency of M.P., 76 Wn.App. 87, 93, 882 P.2d 1180 (1984).

The trial court allowed Ms. Culbertson to read word for word K.L.W.'s description of her encounter with Mr. Hudson over objection of defense counsel. RP 327. The State's response to the objection was a claim of admissibility and the rule of completeness. RP 327. The court overruled the objection and allowed the testimony as follows:

- A. Okay. "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 home but the police were following him. So I said he could crash on the couch. I turned the TV 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 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."

The trial court abused discretion by allowing Ms. Culbertson to read the narrative report to the jury. K.L.W.'s statements to Ms. Sullivan regarding her encounter with Mr. Hudson were intended to shape a police the investigation and form a critical part of the case. K.L.W. undoubtedly understood her statements to Ms. Sullivan was a mechanism for supplying evidence to be used to prosecute Mr. Hudson, i.e., photographs were taken. The circumstances of the encounter were not necessary to provide treatment.

Much of the statement goes way beyond what was necessary for diagnosis and treatment. Specifically, the statements reciting Mr. Hudson's statements, K.L.W. screaming, fearfulness, and her description of going to her room until Mr. Hudson left were not statements admissible under ER 803(a)(4). Those statements could not have been useful in determining diagnosis or treatment and should not have been presented to the jury. The description of the SANE exam conducted on K.L.W. including the many photographs taken suggest the exam was for gathering evidence and providing treatment. However, the statements contained in the narrative section of the report should not have been read

to the jury as many statements in the report could not have any medical purpose as required by ER 803(a)(4). Additionally some of the statements, such as Mr. Hudson's concerns regarding the location of law enforcement were irrelevant and prejudicial. Mr. Hudson's reason for asking to stay at K.L.W.'s apartment was not relevant and his concerns about law enforcement as described in the statement was predical. The jury could conclude from the statement that Mr. Hudson had a reason to fear law enforcement.

The State argued at the time of trial that the word for word recitation was necessary under the rule of completeness. That analysis is not correct. Under ER 106 the entire recited statement may be admissible when a party introduces part of the statement and in fairness the other portion of the statement should be considered if the undue prejudice outweighs the relevance of presenting the other portion of the document the statement should not be admitted under ER 403. See Walker v. Bangs, 92 Wn.2d 854, 601 P.2d 1279, 1284 (1979). First, the presentation of the evidence was cumulative. The jury heard of K.L.W.'s description of the encounter with Mr. Hudson previously in the trial through Ms. Culbertson prior to the recitation of the report. RP 230. Consequently, all of pertinent information had been provided to the jury so "incompleteness" was not an issue. Secondly, although defense counsel did correct an error in Ms. Culbertson's testimony, defense counsel did

not take any statements out of context. RP 313. Specifically, defense counsel questioned the number of times K.L.W. said no in the narrative report. Ms. Culbertson reviewed the report and answered the questions posed. The testimony of Ms. Culbertson does not suggest that she believed that defense counsel took portions of the report out of context. There was no need to allow Ms. Culbertson to review the report under a claim of completeness. The State had the ability to ask specific questions regarding the report to clarify any perceived misconstruings. The trial court's decision to allow the testimony was an abuse of discretion. The evidence contained statements which were not admissible under ER 803(a)(4), and no other basis existed for the admission of the narrative report.

2. MR. HUDSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN TWO STATE'S WITNESSES EXPRESSED OPINIONS THAT K.L.W.'S INJURIES AROSE OUT OF A NONCONSENSUAL ENCOUNTER AND CONSEQUENTLY ON HIS GUILT.

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). A trial court abuses its discretion if no reasonable person would adopt the view of the trial court. *Id.* Generally witnesses are to state facts and not express inferences or opinions. State v. Haga, 8

Wn.App. 481, 491, 507 P.2d 159 (1973) (*citing State v. Dukick*, 131 Wn. 50, 228 P. 1019 (1924); *State v. Wigley*, 5 Wn.App. 465, 488 P.2d 766 (1971), *review denied*, 82 Wn.2d 1006 (1973)). However an exception to that rule as it applies to expert testimony has been created in ER 704.

ER 704 states as follows:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. ER 704.

The application of the rule is limited. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference". *State v. Black*, 109 Wn.2d 336, 248, 745 P.2d 12 (1987). Such testimony is excluded pursuant to the Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington State Constitution which guarantee the right to a fair trial before an impartial trier of fact. The presentation of a witness' opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. *State v. Thompson*, 90 Wn.App. 41, 46 950 P.2d 977, *review denied*, 136 Wn.2d 1002 (1998); *State v. Cavlin*, 40 Wn.App. 698, 701-702, 700 P.2d 323 (1985).

In the case of *State v. Black*, *supra*, the court held that an opinion that the victim suffered from rape trauma syndrome was in effect an opinion that the defendant was guilty of rape, and thus inadmissible. *State v. Black*, 109 Wn.2d at 348.

**A. THE TESTIMONY OF MS. CULBERTSON AND
MS. SULLIVAN PROVIDED AN IMPROPER CONCLUSION OF LAW.**

Although a witness may testify as to matters of legitimate issues, a witness may not give legal conclusions. *See Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. 893, 899, 700 P.2d 1164 (1985); *Everett v. Diamond*, 30 Wn.App. 787, 791-792, 638 P.2d 605 (1981). Improper legal conclusions include testimony that the defendant's conduct violated a particular law. *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. at 789, 700 P.2d 1164. Experts may not offer opinions of law in the guise of expert testimony. *Stenger v. State*, 104 Wn.App. 393, 407, 16 P.3d 655, *review denied*, 144 Wn.2d 1006, 29 P.3d 719 (2001). Improper expert testimony in this fashion violates a defendant's right to a fair and impartial trial under the Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution. An error of constitutional magnitude is presumed prejudicial. *State v. Spotted Elk*, 109 Wn.App. 253, 261, 34 P.3d 906 (2001). The State bears the burden of proving the error was harmless beyond a reasonable doubt. *Id.* A constitutional error is harmless only when the untainted evidence provides an overwhelming conclusion of guilt. *Id.* *State v. Olmedo*, 112 Wn.App. 525, 533, 49 P.3d 960 (2002).

In this case two of the State's witnesses were allowed to testify that K.L.W.'s injuries resulted from non-consensual sex. Ms. Culbertson

provided her opinion that K.L.W.'s injuries appeared to be the product of blunt force trauma to the vagina and anus. RP 256, 307. This latter testimony was not objectionable and sufficient to allow the State to argue its theory of the case, that the sex act between K.L.W. and Mr. Hudson was not consensual. The trial court allowed the state to provide further evidence of K.L.W.'s injuries. Ms. Sullivan also testified that trauma would cause the injuries to K.L.W.. RP 482-483. Both Ms. Culbertson and Ms. Sullivan presented testimony describing the extent of K.L.W.'s injuries.

The trial court abused its discretion by allowing both Ms. Culbertson and Ms. Sullivan to testify that the injuries were consistent with non-consensual sex. The trial court's decision to allow the witness to go one step further from providing opinion that the injuries were from a trauma to allowing testimony that the injuries were the product of non-consensual sex was in error. Ms. Culbertson testified that she believed K.L.W.'s injuries were the product of non-consensual sex. RP 302. Ms. Sullivan also testified K.L.W.'s injuries resulted from non-consensual sex. RP 484-485. This testimony were not statements of fact but were conclusory statements of legal opinion. The critical legal issue at Mr. Hudson's trial was whether the sexual encounter with K.L.W. was consensual. The jury instructions require the jury to resolve the issue of consent. CP 5. One by one, these witnesses expressed their opinion

on the ultimate legal question before the jury, because if the sex act was unconsensual, Mr. Hudson was legally guilty of the charged offenses. The jury instructions reference consent. CP 5. Specifically the "to convict instruction" for Rape in the Third Degree (No. 15) requires the jury to resolve the issue of consent. CP 5.

B. THE TESTIMONY OF MS. CULBERTSON AND MS. SULLIVAN PROVIDED AN IMPROPER IS AN OPINION AS TO MR. HUDSON'S GUILT

As described in the previous section, expert witnesses may not testify as to the guilt of a defendant either directly or by inference. City of Seattle v. Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993).

The determination of whether testimony constitutes an impermissible opinion on the defendant's guilt is to be determined from the facts of each case. State v. Cruz, 77 Wn.App. 811, 814-815, 894 P.2d 573 (1995). Factors to be considered include: type of witness, nature of charges, type of defense, and the other evidence. City of Seattle v. Heatley, 70 Wn.App at 579. Permitting a witness to testify regarding the defendant's guilt raises a constitutional issue because it invades the province of the jury and the defendant's constitutional right to a trial by jury. City of Seattle v. Heatley, *supra*. An error of constitutional magnitude is presumed prejudicial. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001). The State bears the burden of proving the error was harmless beyond a reasonable doubt. *Id.* A constitutional error

is harmless only when the untainted evidence provides an overwhelming conclusion of guilt. *Id.* State v. Olmedo, 112 Wn.App. 525, 533, 49 P.3d 960 (2002).

In the case at hand the evidence of guilt was not overwhelming. Both Mr. Hudson and K.L.W. admitted to sexual activity. The only issue for the jury to determine whether the activity was consensual. Mr. Hudson testified that the activity was consensual. RP 546-548. K.L.W. testified that the activity was not. RP 381. Ms. Culbertson testified that the injuries could have been the product of consensual sex or attributable to other factors. RP 321.

The neighbor Mr. Reardon heard nothing from K.L.W.'s side of the duplex. RP 541-542. K.L.W. consumed a high amount of alcohol. RP 421. K.L.W. let Mr. Hudson into her apartment. RP 365. All of these factors support Mr. Hudson's belief the sex was consensual.

Two State's witnesses, Ms. Culbertson and Ms. Sullivan, both testified that K.L.W.'s injuries appeared to be the product of non-consensual sex. RP 302, 484-485. Those opinions were allowed into evidence over repeated objections of defense counsel. The opinion offered by the witness constituted a direct comment on Mr. Hudson's guilt. The experts were allowed to testify that the injuries were the product of non-consensual sex. Mr. Hudson was charged with having unconsensual sex with K.L.W. CP 1. Therefore, the testimony was a comment interring

that K.L.W.'s the sex was unconsensual and therefore Mr. Hudson was guilty of the crimes charged.

The factors to be considered in determining this issue under the City of Seattle v. Heatley case suggest the evidence should be suppressed. First, the witnesses proffering the testimony were expert medical witnesses. The jury was likely to give high credence to their opinion. Secondly, the nature of the charges in this case were significant and the proffered evidence was a direct comment on Mr. Hudson's guilt. Third, the type of defense in this case was a "he said, she said" scenario. Mr. Hudson testified that the sexual encounter was consensual. K.L.W. testified that the encounter was non-consensual. The proffered evidence supported K.L.W.'s view of the events as unconsensual sex. Finally, the other evidence presented did not suggest that Mr. Hudson had unconsensual sexual relations with K.L.W.. The decision of the trial court to allow both Ms. Culbertson and Ms. Sullivan to testify as to legal conclusions and infer Mr. Hudson was guilty of the crimes charged was an abuse of discretion.

C. THE COURT IMPROPERLY RELIED ON THE CASE OF STATE V. JONES TO CONCLUDE THE OPINION TESTIMONY OF MS. CULBERTSON AND MS. SULLIVAN WAS ADMISSIBLE.

The court relied on the case of State v. Jones, 59 Wn.App. 744, 801 P.2d 263 (1990) from Division One of the Court of Appeals to

conclude that SANE witnesses could testify as to their conclusions that the injuries appeared to be the product of unconsensual sex. However the case of State v. Jones, *supra*, is distinguishable from the present case. In the case of State v. Jones, *supra*, the defendant was tried for the death of his four month son. *Id.* Mr. Jones was babysitting his son when his son stopped breathing and medical personnel were called in to response. State v. Jones, 59 Wn.App. at 746. An autopsy revealed a complex skull fracture. *Id.* Mr. Jones first told law enforcement that the baby may have hit his head in the previous week, the result of his brother pushing him off the couch. *Id.* When confronted with evidence of the baby's skull fracture, Mr. Jones told law enforcement that he "yanked" the baby out of his swing and accidentally bumped his head on the top bar of the swing. *Id.* Multiple physicians testifying for the State stated that the injury was "a non-accidental blunt injury". State v. Jones, 59 Wn.App. at 747-748. Division One of the Court of Appeals did not find error in the trial court allowing the expert witness testimony. The Court found that the expert witnesses could properly testify that the injuries appeared to be inflicted rather than accidental. State v. Jones, 59 Wn.App. at 751-751 The Court further concluded that the evidence was admissible because it did not indicate that Mr. Jones was the individual responsible for the injuries. *Id.*

The case of State v. Jones is distinguishable from the case at hand. First the charges in the two cases are different. Rape cases are

unique in several respects. As the Court identified in the case of State v. Jones, “As in most sex cases, credibility of the victim was the crucial issue because the testimony of the victim(s) and the defendant was indirect conflict.” State v. Jones, 59 Wn. App at 449, referencing State v. Black, 109 Wn.2d at 338; State v. Fitzgerald, 39 Wn.App. At 657. However, in the Jones case the expert witness testimony was helpful to the jury to understand the force necessary to create the child’s injuries.

In the case at hand the amount of force was not at issue and the testimony that the injuries were the product of unconsensual sex was beyond describing the injuries incurred. The various physiology of individuals (i.e. ability to lubricate) and sexual preferences (i.e. rough sex) prevent the expert’s ability to determine specifically whether the sex was consensual. Even Ms. Culbertson testified the injuries could have stemmed from factors other than consensual sex. RP 321. The experts in the case at hand went beyond the testimony that is conceivably allowable by the Jones case.

Furthermore in the Jones case, the defendant told law enforcement that the child had been pushed off the couch by a sibling. In the case at hand there was no issue of who may have created the injury. The only testimony on the subject of sexual partners presented was that K.L.W. and Mr. Hudson had sexual relations. There was no other individual that may have been involved. Therefore, the rational included in

the Jones case, the expert witness testimony was allowable because it did not comment on who caused the injury, is not applicable here. There was no other suspect evidence presented. The evidence provided by the SANE witnesses commented on K.L.W.'s testimony and bolstered her credibility. The evidence supported K.L.W.'s version of the events. Although the SANE witnesses could properly describe the injuries that they observed, the factual and legal conclusion of whether the injuries could have come from consensual versus non-consensual sex is an issue that should be left to the jury.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. HUDSON THE OPPORTUNITY TO PRESENT EVIDENCE OF STATEMENTS MADE BY THE ALLEGED VICTIM WHEN THE STATEMENTS WERE NOT HEARSAY, RELEVANT AND SUPPORTED MR. HUDSON'S THEORY OF THE CASE.

A trial court's decision to deny admissibility of evidence is reviewed under an abuse of discretion standard. State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). A trial court abuses discretion if no reasonable person would adopt the view of the trial court. *Id.*

During the course of the trial defense counsel attempted to present statements made by K.L.W. to Ms. McHenry. Those statements were comments made by K.L.W. indicating that she thought a gentleman in the bar where they were all gathered was attractive. The Court denied

Mr. Hudson from asking this line of questioning on hearsay grounds.

RP 192-193.

Hearsay is defined in ER 801 as follows: hearsay is an out of court statement offered to prove the matter asserted. ER 801. A statement which was made or heard and is relevant regardless of the truth or falsity of the statement is not barred by the hearsay rule. See State v. Rupe, 101 Wn.2d 664, 683 P.2d 571, 587 (1984); State v. Hamilton, 58 Wn.App 229, 792 P.2d 176, 179 (1990); State v. Smith, 56 Wn.App. 909, 786 P.2d 320, 322 (1990). The statement is admissible if it indirectly indicates the declarant's mental state and the declarant's mental state must be relevant to a provable issue. State v. Black, 46 Wn.App. 259, 730 P.2d 698, 671 (1986), *reversed on other grounds* 109 Wn.2d 336, 745 P.2d 12 (1987). Additionally, in the case of Patterson v. Public Hospital District No. 1, 57 Wn.App. 739, 790 P.2d 195, 199 (1998), the statement of a declarant was admissible when the statement was offered not prove the truth of the statement but rather its effect of another's subsequent actions.

In this case the statement is admissible to show K.L.W.'s state of mind. Out of court statements that are then offered as indirect proof of state of mind are not hearsay, if the statement is not offered to prove that the statement was true. See State v. Edwards, 131 Wn.App. 611, 128 P.3d 631, 633 (2006).

In the case at hand, the defense sought to introduce a statement made by K.L.W. to Ms. McHenry. In that statement K.L.W. indicated that she thought another gentleman in the bar was attractive. RP 192-193. The statement was not offered to prove that the gentleman was attractive, but to show that K.L.W. was in a flirtatious mood during the evening. Defense counsel was precluded from continuing the line of questioning with K.L.W. *Id.*

This evidence was not hearsay and was relevant to the defendant's theory of the case. Consequently, the evidence was admissible, as it did not fall within the rule prohibiting the statement as hearsay. The evidence shows K.L.W.'s state of mind that evening. This evidence is relevant as Mr. Hudson testified, as his theory of the case was, that he had a consensual sexual encounter with K.L.W.. The statement that K.L.W. was looking at gentlemen supports Mr. Hudson's testimony that K.L.W. was flirtatious with him. This also supports his claim that later the two had consensual sexual relations. Additionally, the statement was relevant as it explained Mr. Hudson's later actions including his arrival at K.L.W.'s residence and the physical contact between the two of them.

**4. THE TRIAL COURT ABUSED ITS DISCRETION BY
ALLOWING TWO SANE WITNESSES TESTIFY REGARDING THE**

NATURE OF K.L.W.'S INJURIES AND THE CONCLUSION THAT THE INJURIES WERE THE PRODUCT OF UNCONSENTUAL SEX.

In this case both Ms. Culbertson and Ms. Sullivan testified of K.L.W.'s injuries, the details of the incident as reported by K.L.W., and the ultimate conclusion that K.L.W. had been subjected to unconsensual sexual relations. The presentation of both witnesses was cumulative and objected to by defense counsel. The presentation of the cumulative evidence prevented Mr. Hudson from receiving a fair and impartial trial.

ER 403 states as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
ER 403.

The admissibility and scope of an expert's testimony is a matter within the court's discretion. Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 113 Wn.2d 123, 130, 776 P.2d 666 (1989); Orion Corp. v. State, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985). Similarly, the admissibility of cumulative evidence lies within the trial court's discretion. Mullin v. Builders Dev. & Fin. Serv., Inc., 62 Wn.2d 202, 206, 381 P.2d 970 (1963); Sons of Norway v. Boomer, 10 Wn. App. 618, 620-21, 519 P.2d 28 (1974).

The State may cite the case of Christensen v. Munsen, 123 Wn.2d 234, 867 P.2d 626 (1994) for the proposition that the Court may allow

multiple experts to present overlapping testimony without violating ER 403. In that the plaintiff claimed the defendant committed medical malpractice. The court found that the testimony of the experts overlapped to a small extent and to the extent the testimony was cumulative, it may have assisted the jury in that complex case. Christensen v. Munsen, 123 Wn.2d 241. That case is not similar to the case at hand.

In this case both SANE witnesses testified to the injuries found on K.L.W. and their testimony overlapped extensively. Specifically, both Ms. Culbertson and Ms. Sullivan described K.L.W.'s description of the incident. RP 242-243, 470-471. Both Ms. Culbertson and Ms. Sullivan described the injuries depicted in photographs. RP 251-256, 478-484. Both Ms. Culbertson and Ms. Sullivan testified as to the pain level reported by K.L.W. RP 257, 472-473. Finally, both Ms. Culbertson and Ms. Sullivan were allowed to testify that K.L.W.'s injuries resulted from non-consensual sex. RP 302, 484-485.

As to the other factor for consideration on this issue, the case at hand is not complex and the testimony of both Ms. Culbertson and Ms. Sullivan was not necessary to assist the jury in considering the extent of the injuries.

The presentation of both SANE witnesses over objection of defense counsel was in error. The evidence presented by Ms. Sullivan was cumulative and did not assist the jury. Additionally, the presentation of

both witnesses was prejudicial to Mr. Hudson as both of the witnesses testified that K.L.W.'s injuries showed that she had unconsensual sexual relations. The jury repeatedly heard of the extent of K.L.W.'s injuries as well as the conclusions made by the SANE witness. Undoubtedly, this information stayed in the minds of the jurors and emphasized as they heard it all twice. This error violated Mr. Hudson's right to a fair trial.

**5. THE CUMULATIVE EFFECT OF THE ERRORS DENIED
MR. HUDSON A FAIR TRIAL.**

Cumulative error may warrant reversal even if the Court finds each error standing alone does not. State v. Weber, 141 Wn.2d 910, 929, 10 P.3d 930 (2000).

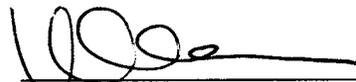
In this case the central issue facing the jury was whether to believe Mr. Hudson's claim that he had consensual sexual relations with K.L.W., or to believe K.L.W.'s claim that the sex was the not consensual, and possibly the result of forcible compulsion as claimed in Counts One and Two. The jury heard two expert witnesses, Ms. Culbertson and Ms. Sullivan, who both testified the physical evidence showed that K.L.W. had sex against her will. That testimony was both a legal and factual conclusion that Mr. Hudson was guilty of the crimes charged. The jury heard the same testimony from Ms. Culbertson and Ms. Sullivan. Undoubtedly, the repeated testimony added to its emphasis with the jury. The jury also heard the full narrative report K.L.W. provided to

Ms. Sullivan including statements that Mr. Hudson was concerned that cops were around. The jury did not hear that K.L.W. made comments about other bar patrons that evening which showed that she was in a flirtatious mood. These were all errors. Assuming, arguendo, that none of these errors standing alone warrants a reversal of the conviction, the cumulative impact of the errors resulted in a trial that was unfair. This Court should therefore reverse the conviction and remand for a new trial.

E. CONCLUSION

For the reasons previously stated, Mr. Hudson respectfully requests this Court to reverse the conviction entered in this matter and remand the case for a new trial.

Respectfully submitted this 11th day of March, 2008.



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STATE OF WASHINGTON

DEPUTY

NO. 36642-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

EUGENE HUDSON,

Appellant.

CERTIFICATION OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Hand-Delivered To:

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DATED this 11th day of March, 2008, at Port Orchard, Washington.

Jeanne L. Hoskinson
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