

No. 48827-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JESSE L. WILKINS,**

Appellant.

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On appeal from the Superior Court of Washington in and for the  
County of Lewis  
Honorable Judge James L. Lawler

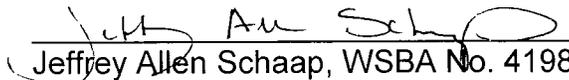
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**Respondent's Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES ..... iii

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 3

    A. WHEN THE STATE’S EXPERT TESTIFIED AS TO WHAT THE VICTIM SAID WITH REGARD TO THE FACT THAT SHE WAS ASSAULTED AND HOW SHE WAS ASSAULTED IT WAS NOT HEARSAY BECAUSE IT WAS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED ..... 3

    B. EVEN IF THE TWO STATEMENTS BY THE STATE’S EXPERT IN QUESTION WERE INADMISSIBLE HEARSAY THE COURT SHOULD AFFIRM THE CONVICTION BECAUSE WILKINS FAILS TO SHOW THAT THE VERDICT WAS UNSUPPORTED BY ADMISSIBLE EVIDENCE OR THAT THE JUDGE RELIED UPON INADMISSIBLE EVIDENCE TO MAKE ESSENTIAL FINDINGS IT OTHERWISE WOULD NOT HAVE MADE ..... 8

        1. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Trial Court’s Guilty Verdict After The Fact Finding Bench Trial..... 11

        2. Even If The Court Were To Agree With Wilkins Regarding The Alleged Hearsay Statements, The Record Shows That The Trial Court Did Not Rely Upon The Statements To Make Any Essential Findings That It Otherwise Would Not Have Made..... 16

C. APPELLATE COSTS ARE APPROPRIATE IN THIS  
CASE IF THE COURT AFFIRMS THE JUDGMENT .... 17

IV. CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>Group Health Cooperative of Puget Sound, Inc. v. Department of Revenue</i> , 106 Wn.2d 391, 722 P.2d 787 (1986) .....	6
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	11
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116 (1991).....	19
<i>State v. Barklind</i> , 82 Wn.2d 814, 557 P.2d 314 (1977) .....	17, 18
<i>State v. Black</i> , 46 Wn. App. 259, 730 P.2d 698 (1986) .....	4, 5, 6, 7
<i>State v. Blank</i> , 80 Wn. App. 638, 910 P.2d 545 (1996) .....	18
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	17, 18, 19, 20
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	20, 21, 22
<i>State v. Carlson</i> , 143 Wn. App. 507, 178 P.3d 371, review denied, 164 Wn.2d 1026 (2008).....	11
<i>State v. Crook</i> , 146 Wn. App. 24, 189 P.3d 811 (2008) .....	19
<i>State v. Edgley</i> , 92 Wn. App. 478, 966 P.2d 381 (1998) .....	18
<i>State v. Jackson</i> , 62 Wn. App. 53, 813 P.2d 156 (1991)...	12, 13, 15
<i>State v. Keeney</i> , 112 Wn.2d 140, 769 P.2d 295 (1989) .....	18
<i>State v. Lucas</i> , 167 Wn. App. 100, 271 P.3d 394 (2012) .....	3, 5
<i>State v. Lundy</i> , 176 Wn. App. 96, 104, n.5, 308 P.3d 755 (2013) .	20
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999) .....	17
<i>State v. Miles</i> , 77 Wn.2d 593, 464 P.2d 723 (1970) .....	9, 10, 11, 16

<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	17, 18, 19-20
<i>State v. Read</i> , 147 Wn.2d 238, 53 P.3d 26 (2002).....	9, 10
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	11
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016)	17, 19, 22
<i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009).....	19
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	11
<i>State v. Wineberg</i> , 74 Wn.2d 372, 444 P.2d 787 (1968).....	6
<i>State v. Woodward</i> , 116 Wn. App. 697, 67 P.3d 530 (2003).....	20
<i>State v. Wright</i> , 97 Wn. App. 382, 965 P.2d 411 (1999).....	20

**Federal Cases**

<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976).....	20
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	12
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).....	20

**Washington Statutes**

RCW 10.01.160.....	17, 20, 21, 22
RCW 10.73.160.....	17, 18, 19, 21, 22

**Other Rules or Authorities**

ER 703.....	5, 7
ER 801(c).....	4, 5

ER 802 .....	4
GR 34.....	21
RAP 14.2.....	17, 18
Laws of 1975, 2d Ex. Sess. Ch. 96 .....	17

## I. ISSUES

- A. Should the Court find that the statements made by the State's expert witness and objected to by Wilkins were not hearsay because they were not introduced to prove the truth of the matter asserted?
- B. Should the Court affirm Wilkins' conviction even if the Court were to agree with Wilkins that some testimony by the State's expert witness was hearsay, because Wilkins fails to show the verdict is unsupported by admissible evidence or that the trial court relied upon the inadmissible evidence to make essential findings that it otherwise would not have made?
- C. Should this Court impose appellate costs should the State prevail?

## II. STATEMENT OF THE CASE

C.W., a minor, lived in a hotel in Lewis County, Washington, with her mother, C.M.<sup>1</sup>, and siblings, including her brother, Jesse Wilkins. RP 10-12; CP 14. On July 1, 2014, C.W. was washing dishes in the bathtub while C.M. attended classes. RP 16; CP 15. Wilkins came into the bathroom, put his arms around C.W.'s neck, and choked her. RP 16-17; CP 15. C.W. attempted to leave but Wilkins forced her onto the bathroom floor, face down. RP 17, CP 15. Wilkins then tried to insert his penis into C.W.'s anus and vagina but was unsuccessful. RP 17-18; CP 15.

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<sup>1</sup> The State is using initials for the victim, as required and her mother to further protect the victim's identity.

C.M. received a phone call from C.W., who was in tears and upset. RP 20, 33; CP 16. The call was disconnected. RP 33. C.M. headed home, arriving at the hotel within two minutes, at which time C.W. came flying out the bathroom, into C.M.'s arms, crying and screaming that Wilkins had raped her. RP 33-35; CP 16.

C.M. took C.W. to the hospital, and then to Providence St. Peter Sexual Assault Clinic. RP 36-37; CP 16. At the sexual assault clinic C.W. was examined by registered nurse, Lisa Curt. RP 44-45; CP 16. A physical examination was performed on C.W. RP 44; CP 16. Nurse Curt observed some broken blood vessels on the lower left side of C.W.'s neck and some reddened areas of her private areas. RP 44-45; CP 16.

The State charged Wilkins in Lewis County Superior Court, Juvenile Division, by amended information with one count of Attempted Rape in the Second Degree. CP 3-4. The case proceeded to a fact finding bench trial on August 25, 2014. See RP 3-60. At the bench trial the State called the victim, C.W., her mother, C.M., and Lisa Curt to testify. Nurse Curt testified that C.W. told her that Wilkins had raped C.W. RP 46-47. Nurse Curt also testified that C.W. told her that Wilkins had wrapped his hands around C.W.'s neck, trying to choke her. *Id.* Wilkins objected to this testimony. *Id.* The objections

were overruled. *Id.* Nurse Curt also gave her opinion that the broken blood vessels she could see on C.W.'s neck could be consistent with being choked by an arm. *Id.*; CP 16.

Wilkins was found guilty as charged in the amended information with Attempted Rape in the Second Degree. RP 58-60; CP 16-17. Wilkins timely appeals his conviction. CP 30.

The State will supplement the facts as necessary throughout the argument below.

### III. ARGUMENT

#### A. WHEN THE STATE'S EXPERT TESTIFIED AS TO WHAT THE VICTIM SAID WITH REGARD TO THE FACT THAT SHE WAS ASSAULTED AND HOW SHE WAS ASSAULTED IT WAS NOT HEARSAY BECAUSE IT WAS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

The standard of review for the trial court's admission of evidence is abuse of discretion. *State v. Lucas*, 167 Wn. App. 100, 107, 271 P.3d 394 (2012). A trial court does not abuse its discretion unless it bases its decisions on unreasonable or untenable grounds. *Id.* The standard of review for interpretation of the evidentiary rules is *de novo*. *Id.*

Wilkins alleges the trial court erred by denying the defendant a fair trial when it admitted substantive hearsay under the physician-patient exception because Nurse Curt obtained the alleged hearsay

during a forensic examination, not a medical examination. Wilkins' argument fails because the challenged testimony was not hearsay, and thus, whether or not the hearsay exception for statements made for purposes of medical diagnosis or treatment applies is irrelevant. Wilkins also errantly states that the trial court admitted the alleged hearsay under the "physician-patient exception." This is incorrect, and is unsupported by the record.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally not admissible except as provided by the rules of evidence, court rules, or statute. ER 802.

An out of court statement testified to by a party other than the declarant is admissible if it is not introduced to prove the truth of the matter asserted. ER 801(c). In a similar case where the defendant was charged with Rape in the First Degree, the victim's mother testified as to what the victim had told her several days after the event in question. *State v. Black*, 46 Wn. App. 259, 266, 730 P.2d 698 (1986). The court agreed that the statements were not excited utterances, but the court instead found that the testimony was offered to explain the mother's actions in calling the Rape Crisis Clinic and

in taking R.J. immediately to the hospital. *Id.* The court ultimately held that the statements were not offered for the truth of the matter asserted, and therefore were not hearsay, and were admissible for the purpose offered. *Id.*

Moreover, out-of court statements on which an expert bases his or her opinions are not hearsay under ER 801(c) because they are not offered as substantive proof to prove the truth of the matter asserted; rather they are offered for only the limited purpose of explaining the expert's opinion. *State v. Lucas*, 167 Wn. App. 100, 109, 271 P.3d 394 (2012). ER 703 states an expert witness is allowed to base their opinions on facts otherwise inadmissible if the facts were relied upon by the expert in forming opinions or inferences upon the subject to which their testimony pertains to. ER 703.

In *Lucas*, the court unequivocally stated that ER 703 allows expert witnesses to base their opinions on facts otherwise inadmissible as long as the facts are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. *Lucas*, 167 Wn. App. at 108. Moreover, the Supreme Court has stated:

The trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion. The admission of these facts, however, is not proof of them.

[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.

*Group Health Cooperative of Puget Sound, Inc. v. Department of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986) (alteration in original) (citations omitted) (quoting *State v. Wineberg*, 74 Wn.2d 372, 382, 444 P.2d 787 (1968)).

The testimony of Nurse Curt was not hearsay because it was not introduced to prove the truth of the matter asserted. The testimony here is analogous to the *Black* case where the court found the victim's mother's testimony about what the victim had told her regarding the rape was not hearsay and was admissible for the purpose in explaining why the mother called Rape Crisis Clinic and why she took her daughter to the hospital immediately. When asked what the purpose of the C.W. visit was, Nurse Curt testified, "She came requesting a sexual assault exam, claiming that she was assaulted by her brother." RP 46. Moreover, when asked why she was looking at C.W.'s neck during the examination she stated, "She had made claims that the person that assaulted her had wrapped his

arms around her neck, trying to choke her.” RP 47. These statements, thus, were not admitted for the truth of the matter asserted but rather to demonstrate why Nurse Curt was even evaluating C.W. and why Nurse Curt was examining certain parts of C.W.’s body. This is directly analogous to the mother in *Black* testifying about what her daughter had told her about being raped. The statements were clearly admitted for the sole purpose of explaining why Nurse Curt did the medical evaluation and why Nurse Curt examined certain parts of C.W.’s person. Indeed, when Nurse Curt was asked why she was looking at C.W.’s neck and the defendant objected, the trial court allowed the testimony stating, “Well, I’ll allow it for the purpose which is intended which is why she was looking there.” RP 47. Thus, the statements objected to by the defendant were relevant for a limited purpose and were not hearsay because they were not admitted to prove the truth of the matter asserted.

Moreover, the statements were not hearsay under ER 703 because they were statements upon which the State’s expert, Nurse Curt, based her opinion upon. Nurse Curt provided testimony that she found a petechial bruise on the left side of the lower neck. RP 47. She testified that C.W. had told her she was assaulted by her

brother and the person who assaulted her had wrapped his arms around C.W.'s neck, trying to choke her. *Id.* These statements were not hearsay, but rather were facts upon which her ultimate expert opinion was based. Based on these statements, Nurse Curt testified when asked if the bruise on the neck was consistent with choking, "It is possible. If the skin is caught between an area, it can break blood vessels causing a pinched style petechial bruising." *Id.* Thus, these out of court statements were not hearsay because they were not offered for the proof of the matter asserted but rather for the limited purpose of explaining Nurse Curt's expert opinion as to the possible causation of the bruising in the context of the sexual assault C.W. reported.

**B. EVEN IF THE TWO STATEMENTS BY THE STATE'S EXPERT IN QUESTION WERE INADMISSIBLE HEARSAY THE COURT SHOULD AFFIRM THE CONVICTION BECAUSE WILKINS FAILS TO SHOW THAT THE VERDICT WAS UNSUPPORTED BY ADMISSIBLE EVIDENCE OR THAT THE JUDGE RELIED UPON INADMISSIBLE EVIDENCE TO MAKE ESSENTIAL FINDINGS IT OTHERWISE WOULD NOT HAVE MADE.**

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error because of the admission of inadmissible evidence, unless (1) all of the admissible evidence is insufficient to support the judgment or (2) unless the record supports an affirmative finding that the inadmissible evidence induced the

court to make a finding it otherwise would not have made. *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002).

In *State v. Miles*, 77 Wn.2d 593, 464 P.2d 723 (1970) the defendant was convicted of charges of rape and murder at a bench trial. The defendant appealed his conviction. *Id.* The defendant claimed the trial court erred by admitting a toy pistol into evidence; the Supreme Court held that the admission of the toy pistol was in error. *Id.* at 602. However, the Court held the admission of the toy pistol was not reversible error. *Id.* The court in *Miles* in making its holding noted that the case was tried before the court sitting without a jury. *Id.* at 601. The fact it was a bench trial was significant because the court said, "In such instances a liberal practice in the admission of evidence is followed in this state, supported, as it is, with a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings." *Id.* Thus, the Court held in nonjury proceedings a new trial ordinarily will not be granted for error in the admission of evidence, if there remains substantial admissible evidence to otherwise support the trial court's findings. *Id.*

Moreover, in a case where the reviewing court found the trial court had admitted irrelevant testimony at a bench trial the court held

reversal was not warranted because the court presumes the trial judge did not consider inadmissible evidence in rendering the verdict, and the remaining evidence supported the convictions. *Read*, 245 Wn.2d at 244. The court in *Read* established the *Miles* presumption is rebuttable, but that the burden is on the defendant to show that (1) the verdict is not supported by admissible evidence or (2) that the trial court relied upon inadmissible evidence to make essential findings that it otherwise would not have made. *Id.* at 245-46. Thus, in *Read* because the court found sufficient evidence to support the defendant's convictions, and found the defendant failed to show the trial judge relied upon inadmissible evidence to make essential findings that otherwise would not have been made, the defendant's conviction was upheld.

Wilkins fails to even cite to *Miles* or address the *Miles* presumption. Wilkins' essential argument is the trial court erred in admitting in what he argues was inadmissible evidence in the form of hearsay testimony made by the State's expert witness, and thus, without any further analysis this Court should simply remand for a new trial. Unfortunately for Wilkins, such a position is a grossly erroneous application of the law. Even if this Court finds it was hearsay and that no hearsay exception applied, the appellant still

fails to show that (1) the verdict is unsupported by admissible evidence or (2) the trial relied upon the inadmissible evidence to make essential findings that it otherwise would not have made.

**1. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Trial Court's Guilty Verdict After The Fact Finding Bench Trial.**

Arguendo, if this Court were to agree that the testimony was hearsay, with regard to the first prong of the *Miles* presumption it is clear that the verdict was supported by admissible evidence. The appellate court reviews a trial courts findings for evidence sufficient to persuade a fair-minded, rational individual that a finding is true and the evidence is viewed in the light most favorable to the plaintiff. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 352-53, 172 P.3d 688 (2007); *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371, review denied, 164 Wn.2d 1026 (2008). An insufficiency claim “admits the truth of the [prosecution's] evidence and all inferences that reasonably can be drawn there from.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, the appellate court relies on the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)

abrogated in part on other grounds, *Crawford v. Washington*, 541 U.S. 36 (2004).

In order to prove Attempted Rape in the Second Degree, the State must establish that the defendant took a substantial step toward the commission of the crime, with the intent to have sexual intercourse. *State v. Jackson*, 62 Wn. App. 53, 55-56, 813 P.2d 156 (1991). In *Jackson*, when presented with even less evidence than the case at hand, the court found that there were sufficient facts to support a conviction for Attempted Rape in the Second Degree.

In *Jackson*, the defendant was acquainted with the mother of the 14 year old minor victim. *Id.* at 55. The defendant came over to the home of the victim when she was alone and asked her if she could find out what size clothes her mother wore. *Id.* The defendant then followed the victim towards her mother's bedroom, and as she started to walk out of the bedroom he walked towards her. *Id.* The victim backed into the bedroom and when the defendant was within two feet of the victim he told her to lift up her skirt or he would kill her. *Id.* When she had backed up as far as she could, she screamed and the defendant said he "was just joking." *Id.* The victim told him to get out and the defendant left. *Id.* When the victim's mother returned home she told her what had occurred. *Id.* The defendant was

charged with Attempted Rape in the Second Degree and ultimately convicted by a jury. *Id.* The defendant argued, amongst other things, that there was insufficient evidence to sustain the conviction. See generally *Jackson*, 62 Wn. App.

The court found evidence relevant to both the defendant's intent and his taking of a substantial step is that the defendant convinced the victim to go into the bedroom, followed her into that room, and then approached her and ordered her to lift her skirt, and from this evidence, a jury could reasonably have found beyond a reasonable doubt that the defendant intended to have sexual intercourse with the victim, and that he took a substantial step toward that goal. *Id.* at 58. Thus, the Court held there was sufficient evidence to sustain a guilty verdict for Attempted Rape in the Second Degree.

Here, C.W. testified Wilkins came into the bathroom while she was washing dishes in the bathtub, pulled her pants down, put his arm around her neck and choked her. RP 16-17. C.W. further testified when she attempted to leave Wilkins put pressure on her to put her to the ground. RP 17. C.W. then stated Wilkins tried to put his "dick" in her butt and her vagina. RP 17-18. After being assaulted by Wilkins, C.W. stated she called her mother in tears and told her

what Wilkins had done. RP 20-22. C.W. also later received medical attention. RP 20-22.

The victim's mother, C.M., testified on the day of the incident, C.W. called her in tears and was upset. RP 33. C.M. said the call was disconnected, so she headed home arriving at the hotel room within two minutes, at which time C.W. came flying out of the bathroom, into C.M.'s arms, crying, and screaming, and stated her brother had raped her. RP 33-35. C.M. then testified she took her daughter to the hospital and then the next day took her to the Sexual Assault Clinic. RP 36-37.

Nurse Lisa Curt of the Providence Hospital Sexual Assault Clinic testified she performed a physical exam of C.W. RP 44. Nurse Curt stated she had an associate degree in nursing, had been a nurse for thirteen years in critical care ER, and for the last two years as a sexual assault examiner. RP 43. Nurse Curt observed some broken blood vessels on the lower left side of C.W.'s neck and some reddened areas down in her private areas. RP 44-45. Nurse Curt testified C.W. had told her she had been raped by her brother. RP 45-46. Nurse Curt also testified C.W. told her the person who assaulted her had wrapped his hands around her neck, trying to choke her. RP 46-47. Nurse Curt testified it was her opinion the

broken blood vessels on the neck could be consistent with being choked by an arm. *Id.*

The facts at hand (excluding the purported hearsay evidence) are sufficient to sustain a guilty verdict for Attempted Rape in the Second Degree. When compared to the *Jackson* case, the evidence presented here is stronger. Like *Jackson* there were no other witnesses other than the victim and the defendant, and the victim shortly after the incident told her mother what occurred. Unlike *Jackson*, in the present case the victim's allegations were able to be corroborated by medical examination. C.W. stated Wilkins tried to choke her. When Nurse Curt evaluated C.W. she found broken blood vessels on the left side of C.W.'s neck.

Admitting the truth of the State's evidence and all inferences that reasonably can be drawn there from it is clear that there is sufficient evidence, notwithstanding any alleged hearsay evidence, to sustain the conviction for Attempted Rape in the Second Degree. Accordingly, Wilkins fails to show that the trial court's verdict was not supported by admissible evidence.

**2. Even If The Court Were To Agree With Wilkins Regarding The Alleged Hearsay Statements, The Record Shows That The Trial Court Did Not Rely Upon The Statements To Make Any Essential Findings That It Otherwise Would Not Have Made.**

When the Court announced the verdict it referenced the testimony of C.W. and noted there was substantial corroboration of C.W.'s testimony. RP 58-59. The trial court acknowledged that C.W. had called her mother immediately after the incident and was upset and crying. RP 58. Moreover, the trial court noted the bruising on C.W.'s neck and the irritation and redness on her vaginal area observed by Nurse Curt were also consistent with C.W.'s testimony. RP 58. The trial court did not mention or rely upon the statements that Nurse Curt attributed to C.W. as corroborative evidence, or as a basis for any findings or conclusions.

In addition to the trial courts colloquy when rendering the verdict, formal findings of fact and conclusions of law were entered. See CP 14-17. In the findings of fact and conclusions of law following the fact finding the trial court did not mention any of the alleged hearsay from Nurse Curt as a basis for its conclusions of law. *Id.* Thus, the trial court did not rely upon the alleged hearsay statements to make any essential findings, and Wilkins fails to meet the second prong of the *Miles* presumption.

**C. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE  
IF THE COURT AFFIRMS THE JUDGMENT.**

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn. App. 380, 385, 367 P.3d 612 (2016); *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976<sup>2</sup>, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward

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<sup>2</sup> Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

*Nolan*, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, 112 Wn.2d at 142.

*Nolan* examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. *Nolan*, 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, prematurely raises an issue that is not before the Court. *Sinclair*, 192 Wn. App. at 390-91. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; see also *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*,

131 Wn.2d at 241–242. See also *State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See *State v. Lundy*, 176 Wn. App. 96, 104, n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. See *State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See *Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

*Id.*, at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should

excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Division I pointed out in *State v. Sinclair*, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair*, 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant's assertions. Without a factual record the State has nothing to respond to.

In this case the State has no information in regards to Wilkins' alleged indigency beyond that of the trial courts Order Providing an Attorney at Public Expense dated September 9, 2014. CP 31-35. This Court should award the State appellate costs as provided by court rule.

#### IV. CONCLUSION

The testimony of Nurse Curt that Wilkins challenges was not hearsay because it was not admitted to prove the truth of the matter asserted. Rather the out of court statements of C.W. were admitted for the purpose of explaining why Nurse Curt was evaluating C,W, and why she was examining certain parts of C.W., and additionally the statements were upon which she based her expert opinion. Finally even if the statements were hearsay the conviction should be affirmed because Wilkins fails to show that (1) the verdict was not supported by admissible evidence or (2) that the trial relied upon the

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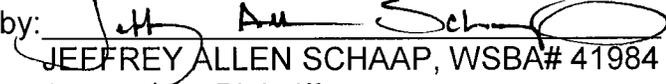
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inadmissible evidence to make essential findings that it otherwise would not have made. Lastly, this Court should impose costs on appeal if the State prevails.

RESPECTFULLY submitted this 19<sup>th</sup> day of September,  
2016.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

by:   
JEEFREY ALLEN SCHAAP, WSBA# 41984  
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  JESSE L. WILKINS,  Appellant.	No. 48827-2-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Jeffrey Allen Schaap, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On September 19, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: [jahayslaw@comcast.net](mailto:jahayslaw@comcast.net).

DATED this 19<sup>th</sup> day of September, 2016, at Chehalis, Washington.



\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

**LEWIS COUNTY PROSECUTOR**

**September 19, 2016 - 2:44 PM**

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