

62949-2

62949-2

COURT OF APPEALS NO. 62949-2-1

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

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUN 30 PM 3:46

REC'D

STATE OF WASHINGTON,

Respondent,

v.

CALVIN WILLIAMS,

Appellant.

JUN 30 2009  
King County Prosecutor  
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR KING COUNTY

The Honorable Gregory P. Canova

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper opinion testimony – admitted over defense counsel's objection – deprived appellant of his right to a jury trial and to the presumption of innocence.

2. Ineffective assistance of counsel during closing argument deprived appellant of his right to counsel and to a fair trial.

Issues Pertaining to Assignments of Error

1. In the state's prosecution against appellant for rape of a child, the lead detective was allowed to testify – over defense counsel's objection – that once the crime laboratory extracted DNA from a vaginal swab and generated a single source male profile matching that of the appellant, police had no reason to further investigate the case, because appellant's DNA could not have gotten on the swab unless he had sexual intercourse with the complainant. Did this testimony violate appellant's right to have a jury determine the facts and to the presumption of innocence?

2. Regarding the DNA evidence, the defense theorized the state's estimation that the chances a male other than Williams could be the contributor was based on the potential contributor being a *non-relative* of Williams. There was evidence of the DNA

presence of a relative in this case – Williams’ brother, who was never investigated. Despite this theory, defense counsel in closing argument incongruously conceded the male DNA profile generated from a swab of J.D.’s vagina was without a doubt appellant’s. Did defense counsel’s concession deprive appellant of his right to effective representation?

B. STATEMENT OF THE CASE

Following a jury trial in King County Superior Court, Calvin Williams was convicted of second degree rape of a child, allegedly committed against 12-year-old J.D. on April 18, 2007. CP 1, 42. He was sentenced to an indeterminate term of 250 months to life and now appeals. CP 43, 45-55.

On the evening of April 18, 2007, J.D. tied bed sheets together and climbed out her bedroom window at Ruth Dykeman, a group home facility in Burien. RP 233, 235. J.D. ran to the nearest bus stop and took a bus to downtown Seattle. J.D. testified that when she got downtown, she started “freaking out” because it was nighttime and she had no place to stay. RP 237. She thought if she met someone nice, he or she might offer her a place to stay. RP 239.

A guy who said his name was "Chris" yelled "Hey" at J.D. and told her to come over. Chris said he was 16 and invited J.D. to "hang out" with him. RP 241. J.D. testified Chris appeared to be age 16. RP 263. After walking around and talking, they waited to catch the bus to go to Chris' house in Skyway. RP 241. Chris said he would give J.D. a place to sleep. RP 241-42. J.D. claimed they caught the #27 bus to Chris' house. RP 242.

J.D. testified she met a 14-year-old girl at Chris' house who said she also was a runaway. RP 242. Chris told the 14-year-old to keep an eye out for the police; Chris said he was wanted. RP 244. The girl went outside by the driveway. RP 245.

J.D. testified that Chris showed her his brother's bedroom and said she could sleep there. RP 245. Chris said his brother would be home soon; J.D. testified she assumed the brother and Chris would sleep in Chris' room. RP 245-46, 268.

J.D. testified that while they were standing outside the brother's room, Chris told her to sit on the bed. Reportedly, he also told her to take off her pants. J.D. testified she said, "No, I am not like that." RP 247. J.D. testified Chris offered to pay, but she again said no. RP 247.

According to J.D., Chris pushed her down on the unmade bed and took off her pants and underwear. RP 248. He reportedly touched her vagina and breasts. RP 248, 272. J.D. testified she tried to push Chris off, but he was too heavy. RP 249. J.D. claimed Chris forced her to have vaginal sex for about 20 minutes. RP 249. At trial, J.D. was adamant only vaginal sex occurred. RP 250.

Afterward, Chris got dressed and left. RP 250. J.D. testified she looked out the window to make sure he was gone and ran out of the house and down the driveway. RP 251. J.D. testified she pounded on the doors of neighboring houses until someone finally answered. RP 252.

Elizabeth Aquino was getting ready for bed when J.D. appeared at her door. RP 78. She described J.D. as "pretty confused." RP 77, 81. Aquino and her mother tried to ascertain where J.D. came from, but gleaned little from her yes or no responses. RP 78-79. J.D. telephoned Ruth Dykeman, but the answering employee asked to speak to Aquino's mother and told her to call police. RP 253. Aquino and her mother called police. RP 77.

Seattle police officer Tom Umporowicz responded to Aquino's Skyway residence at about 1:00 a.m. RP 76, 88. It was his understanding he was going to pick up a runaway who showed up at the Aquino residence requesting to go to a shelter. RP 88, 90. J.D. was waiting on the porch. RP 89, 91. Umporowicz drove J.D. to the Spruce Street shelter in Seattle's Central District. RP 93.

Umporowicz described J.D.'s demeanor during the drive as "out of it" and not "completely lucid." RP 95. She was not tracking well and took a long time to answer simple questions. RP 95, 100.

J.D. testified that once they reached the shelter, she told Umporowicz she was raped. RP 254, 276. Umporowicz testified otherwise, however. According to Umporowicz, J.D. merely said she had been touched by a black male teen named Chris. RP 96-98. Umporowicz tried to elicit further information, but J.D. was not responsive. RP 97. Because "there was very little information to go on," Umporowicz did not take J.D. to Harborview for a medical examination, as he normally would if someone alleged he or she was raped. RP 101.

Spruce Street supervisor Janice Newton took J.D. to Harborview the next day for a sexual assault examination. RP 141-

42, 254. Newton brought the clothes J.D. was wearing when she arrived at the shelter, including J.D.'s underwear. RP 142.

Registered nurse practitioner Joanne Mettler performed the examination. RP 286, 291. She testified the examination includes a conversation with the patient, as well as a head-to-toe physical examination. RP 290. According to Mettler, J.D. said Chris licked her breast and genital areas. J.D. also said "he stuck his thing in her and also stuck his thing in her bottom." RP 294. However, J.D. did not recall these statements and testified there was no anal or oral sex. RP 272-73.

As part of the head-to-toe examination, Mettler collected evidence for a rape kit, including vaginal and anal swabs. RP 299, 333-334. The rape kit, along with J.D.'s underwear, was sent to the Washington State Patrol crime laboratory for DNA testing. RP 116-17.

At the laboratory, Denise Rodier initially tested the items in the rape kit for cellular material. RP 156. She testified sperm cells were present on the vaginal and anal swabs and on the underwear. RP 163-65, 172. Amy Jagmin conducted DNA testing of the items Rodier found to contain cellular material. RP 181, 203. Jagmin testified she detected a single source male profile within the sperm

fraction extracted from the vaginal swab. RP 206-207. The same single source male profile was detected from the sperm fraction extracted from the anal swab. RP 207. Jagmin testified she detected the presence of the same single source male on the underwear, although she was not able to obtain a full profile. RP 208.

Jagmin eventually obtained a reference sample from Calvin Williams and generated a profile.<sup>1</sup> RP 209, 356. According to Jagmin, Williams' profile matched that of the profile she generated from the vaginal and anal swabs. RP 210. She estimated the probability of selecting an individual unrelated to Williams at random in the United States population with a matching profile was 1 in 20 quadrillion. RP 210.

Detective Jess Pitts testified the crime lab came back with a possible suspect in September 2007, and as a result, Pitts interviewed 26-year-old Calvin Williams. RP 345-46, 352. To Pitts, Williams did not look age 16. RP 369.

During the interview, Williams said he went by the name of Chris, and gave his address as 5517 South Leo Street, which Pitts

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<sup>1</sup> Apparently, Williams became a suspect after Jagmin ran the single source male profile through the DNA database for felony offenders. See Supp. CP \_\_ (sub. no. 47, State's Trial Memorandum, 12/4/08).

determined is approximately .02 of a mile from Aquino's.<sup>2</sup> RP 352. Nevertheless, Pitts testified bus #27 does not go to the stop located near 5517 South Leo Street, according to a current bus schedule. RP 363.

On cross-examination, Pitts admitted he did not obtain a search warrant for the Leo Street house. RP 367. He claimed he knocked on the door once, but no one answered. RP 367. He also made no attempt to contact Chris' brother. RP 368. Nor did he offer J.D. the opportunity to identify Chris from a photomontage or line-up. RP 368-69. On redirect, Pitts testified he saw no need for further investigation, based on the DNA evidence. RP 373.

On re-cross, defense counsel returned to the detective's failure to further investigate the case:

Q. So essentially what you just said on redirect is that, once you had the DNA, that was all that was important? There was no reason to do any follow-up investigation?

MR. O'DONNELL [prosecutor]: Objection, argumentative.

THE COURT: Overruled.

A. No, we did follow up. Once we had that, that was when I went and spoke with him to try to get

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<sup>2</sup> Pitts previously drove J.D. around Aquino's neighborhood in an attempt to find Chris' house. RP 258. J.D. recognized Aquino's house, but was unable to find Chris' house. RP 258, 280.

his side of the story, to see if he could explain how the DNA might have arrived there. Now --

Q. (By Mr. Conant) [defense counsel] No more --

A. I'm sorry.

Q. No more follow up with Jennifer, no more follow up with investigating the house or other witnesses?

A. Again, we talked with him to see if he could explain to me how that DNA arrived there.

Q. Right, and we heard that.

A. Without an explanation from him as to how that DNA arrived there, with everything else that we had that corroborates Jennifer's side of the story, everything leads back to Mr. Williams who was the suspect.

Now if he can explain how it --

RP 375-76.

At this point, defense counsel objected. RP 376. The court allowed Pitts to continue, however, reasoning: "Counsel, you asked the question. He is answering the question." RP 376.

Pitts was allowed to continue and the following exchange occurred:

A. Mr. Williams can explain how his semen is in her rear end --

Q. (By Mr. Conant) And you heard his explanation -- was that he didn't know?

A. No, his explanation was he wasn't there. He didn't know her.

Q. Yes, he didn't know, so –

A. So that's not an explanation. All that is is a denial.

Q. So you are assuming guilt, then?

A. No, I am not assuming anything. I am assuming that her DNA, or excuse me, his DNA was in her body. How did it get there if he didn't know her – if he didn't have sex with her?

Q. So –

A. It is pretty difficult unless –

Q. You're asking –

A. Unless –

Q. So you are asking him to explain something that didn't happen?

A. No, I'm asking him to explain how it did happen. If his DNA is inside her, unless he is a sperm donor, and she made a withdrawal from the sperm bank and inserted it herself, how did it get in her.

Q. That is the presumption that you are operating from – is that he did deposit the DNA.

A. Yes, that is the assumption I am offering. Right.

Q. Okay. So you are asking him to explain that away?

A. I am asking him to give me a plausible explanation as to how that could have happened in some other form other than having sexual intercourse with a 12-year-old child. That is what I was asking.

Q. And he said he did not know?

A. No, he said he didn't do it.

Q. You just told me earlier that he said he didn't know?

A. He didn't know her. He didn't know anything about the situation. He didn't do it. He told me it was not him.

Q. Correct, so that would be that he did not know?

A. No, it doesn't mean –

MR. O'DONNELL: Objection, argumentative.

A. – to me he doesn't know.

THE COURT: Sustain the objection. It is argumentative. Don't answer the question.

RP 376-78.

B. ARGUMENT

1. DETECTIVE PITTS' TESTIMONY ABOUT WILLIAMS' FAILURE TO EXPLAIN THE DNA EVIDENCE VIOLATED WILLIAMS' RIGHT TO A JURY TRIAL AND TO THE PRESUMPTION OF INNOCENCE.

It is improper for a witness to comment on the credibility of another witness or the defendant's guilt. Detective Pitts improperly commented on Williams' guilt and improperly shifted the burden of proof when he testified Williams failed to explain how his DNA ended up on the vaginal swab taken from J.D., and that Williams' DNA could not have ended up on the swab unless Williams had sex with J.D.

Significantly, the state's DNA expert did not testify the male profile she generated from the swab was in fact Williams' or how the male profile she generated ended up on the swab:

What that probability is actually telling me is that I am not actually telling the Court that it came from that person – that the evidence profile came from that person. I am saying what are the odds of selecting somebody who is unrelated, at random, from the US population that has a matching profile? And those are what the odds are.

What this does not speak to is accessibility, and the location of the site. This does not speak to that. This tells me only what the probability of selecting somebody else – what that matching profile would be.

RP 217. As the state's DNA expert also acknowledged, "[T]here have been secondary transfers of DNA." RP 217.

Accordingly, whether the male DNA found on the swab was in fact Williams', as opposed to his brother's, for example, and whether it was placed there as a result of sexual intercourse, as opposed to a secondary transfer of some sort, such as sperm on Williams' brother's unmade bed, were fact questions for the jury. Pitts' testimony directly resolved these questions against Williams and thereby violated his right to have a jury determine his guilt or innocence.

Pitt's testimony expressed not only an opinion on guilt but advocated it was Williams' burden to prove his innocence, rather than the state's burden to prove his guilt beyond a reasonable doubt. A criminal defendant has no duty to present any evidence or otherwise "prove" his innocence. State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990). The detective's testimony was objectionable on this basis as well. See e.g. State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986) (overruled in part, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

Contrary to the trial court's reasoning, defense counsel's questions suggesting an inadequate investigation did not open the door to the detective's improper testimony.

An expert opinion is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact." ER 704. But a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wash.2d 577, 591, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion)); State v. Black, 109 Wash.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's "inviolable" constitutional right to a jury trial, which vests in the jury "the ultimate power to weigh the evidence and determine the facts." Montgomery, 163 Wash.2d at 590, 183 P.3d 267 (quoting Wash. Const. art. 1, § 21, and James v. Robeck, 79 Wash.2d 864, 869, 490 P.2d 878 (1971)).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

Montgomery, 163 Wash.2d at 591, 183 P.3d 267 (quoting Demery, 144 Wash.2d at 759, 30 P.3d 1278). Applying these factors to Pitts' testimony indicates the detective impermissibly opined on Williams' guilt.

First, a police officer's testimony may significantly impress a jury because of its special aura of reliability. Demery, 144 Wn.2d at 765.

Second, the specific language of Pitts' testimony was that the state's DNA evidence proved Williams had sexual intercourse with J.D., the main element of the offense the state was required to prove.

Third, the state's charge against Williams was based primarily on its DNA evidence. J.D. did not identify Williams as Chris in court or elsewhere. RP 414. Williams did not appear age 16, "by any stretch of the imagination[.]" RP 413. The only evidence suggesting Williams as the suspect was the DNA profile generated by Jagmin. Pitts' testimony was a direct comment on a key feature of the charge against Williams.

Fourth, Williams' defense was a mixture of general denial and identity. It was the jury's role to determine what weight to give the DNA testimony, not Pitts'.

Fifth, the evidence against Williams was not overwhelming. As previously indicated, J.D. never identified Williams as Chris. There was evidence J.D. was “out of it” on the night in question and therefore may not have perceived events as they actually occurred. RP 95, 408-09. J.D. made inconsistent statements about what occurred, casting doubt on her credibility. RP 272-73, 407. She testified the house was messy and the bed on which the intercourse occurred unmade. As counsel argued, a secondary transfer was therefore possible. RP 419. Also, the probability of another male matching the profile generated by Jagmin was based on an unrelated male. Here, there was evidence of the presence of a related male’s – Chris’ brother.

Pitts’ testimony therefore constituted an unconstitutional comment on Williams’ guilt when applying the above factors. This conclusion is supported by Division Two’s recent opinion in State v. Hudson, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2009 WL 1524901 (Wash. App. Div. 2), attached as an appendix. Hudson was charged with third degree rape. Over Hudson’s objection, the state was allowed to elicit testimony from the examining nurse that the complainant’s injuries were “extensive injury related to nonconsensual sex.” The

court held the nurse's testimony was a direct statement on guilt and required reversal. Appendix at 6-7.

Just as the main issue in Hudson was whether the sexual encounter was consensual, the main issue here was identity: whether the state proved it was Williams who had sexual intercourse with J.D. Pitts' testimony it was Williams' DNA on the swab was a direct statement on guilt and requires reversal.

Contrary to the trial court's reasoning, defense counsel did not open the door to Pitts' improper testimony. Defense counsel specifically asked Pitts about his lack of "follow up with Jennifer, no more follow up with investigating the house or other witnesses?" RP 375-76. Counsel's question called for a yes or no response, not the detective's opinion as to why no further investigation was necessary. The trial court erred in holding otherwise and allowing Pitts to continue testifying to his inadmissible opinion of Williams' guilt. Regardless of counsel's questions, a defendant has no power to "open the door" to prosecutorial misconduct. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). The same should hold true for the state's witness' misconduct.

Because counsel timely objected to Pitts' testimony, but was overruled, Williams need not show the error was manifest. See e.g.

RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d. 918, 155 P.3d 125, 135 (2007). Because the state cannot prove the constitutional violation was harmless beyond a reasonable doubt, this Court should reverse. See e.g. Hudson, supra, attached as an appendix; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

2. DEFENSE COUNSEL'S CONCESSION DURING CLOSING ARGUMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

To defend against the state's DNA evidence, the defense elicited from the state's expert her estimate another male could have contributed to the male profile generated from the swabs was based on males *unrelated* to Williams. RP 225. In closing, defense counsel argued the state's investigation was inadequate because it made no effort to find Chris' brother "who was referred to throughout this case." RP 415. Based on these two facts, counsel challenged the state's probability estimate:

We also heard that that probability is based on an unrelated individual. We heard testimony that there were related individuals, perhaps at this house.

RP 417. As counsel appeared to argue, the DNA could have belonged to Williams' brother. This is an argument counsel appeared to have been setting up throughout his cross-examination of Jagmin, as well as Pitts.

Incongruously, however, defense counsel – immediately after making this point – conceded the DNA was in fact Williams’:

The question here is not whether that DNA belonged to Calvin Williams, because I think there is very little doubt about that – that the DNA was Calvin Williams’s [sic] – despite the complicated science involved, the chemicals involved, the computers involved and the software involved – I don’t think we have any real reasonable doubt that the DNA matched to Calvin Williams’ DNA. He provided a sample and there was a match.

The question, though, is not who the DNA belonged to, it is how did the DNA get there?

RP 417. Counsel’s concession constituted ineffective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 686, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn.

App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, at 552.

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

Counsel's concession constituted deficient performance. The defense had set up two lines of defense against the state's DNA evidence: it could have belonged to the defendant's brother; or it could have been transferred to J.D. secondarily. There was no tactical reason for counsel to abandon the former mid-argument and rely solely on the latter. In fact, doing so was completely at odds with counsel's admonition to the jury regarding Pitts' testimony:

Now in this case you can't do what the detective did, and by that I mean you can't look and say, Well, I am assuming that he is guilty. We have got DNA. Therefore, he has to prove to me why he isn't guilty. He has to prove to me how that DNA got there. You can't do that because that would be shifting the burden to the defense.

RP 406.

In response, the state may argue counsel was attempting to gain credibility with the jury. In other words, by conceding the DNA belonged to Williams, he thought he might gain credibility regarding the secondary transfer argument. See e.g. State v. Silva, 106 Wn. App. 586, 599, 24 P.3d 477 (2001). However, the secondary transfer argument was weaker than unrelated individuals argument. It was based on counsel's theory that appellant's DNA might have been transferred by use of a discarded condom or tampon. RP 418-20. Counsel did not gain credibility. He appeared wishy-washy. Assuming counsel's concession was tactical, it was not legitimate. State v. Aho, 137 Wn.2d at 745, 975 P.2d 512 (1999) (only legitimate trial strategy or tactics constitute reasonable performance).

Williams was prejudiced by counsel's concession. The prosecutor seized on it during rebuttal closing describing it as "a remarkable concession." RP 422. Indeed it was. Had counsel not make this remarkable concession, the jury may have had a reasonable doubt the DNA belonged to Williams. Since it was the only evidence linking him to the offense, there is a reasonable probability counsel's deficient performance affected the outcome of the trial.

D. CONCLUSION

For the reasons stated above, this Court should reverse Williams' conviction.

Dated this 30<sup>th</sup> day of June, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

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--- P.3d ----

--- P.3d ----, 2009 WL 1524901 (Wash.App. Div. 2)

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Only the Westlaw citation is currently available.

Court of Appeals of Washington,  
Division 2.  
STATE of Washington, Respondent,  
v.  
Eugene HUDSON, Appellant.  
**No. 36642-8-II.**

June 2, 2009.

**Background:** Defendant was convicted in the Kitsap Superior Court, Leila Mills, J., of third degree rape, and he appealed.

**Holdings:** The Court of Appeals, Armstrong, J., held that:

- (1) expert testimony that victim's injuries were caused by nonconsensual sex was impermissible opinion that defendant was guilty, and
- (2) error was not harmless.

Reversed and remanded.

Penoyar, A.C.J., filed a dissenting opinion.

West Headnotes

**[1] Criminal Law 110 ↪ 1153.1**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.1 k. In General. Most Cited Cases

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion.

**[2] Criminal Law 110 ↪ 1147**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1147 k. In General. Most Cited Cases

A trial court abuses its discretion, so as to warrant reversal on appeal, when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, in other words, if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

**[3] Criminal Law 110 ↪ 470(3)**

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony

110k470 Matters Directly in Issue; Ultimate Issues

110k470(3) k. Occurrence of Crime; Defendant's Participation. Most Cited Cases  
Nurses' expert testimony in rape trial, that victim's injuries were caused by nonconsensual sex, was impermissible opinion testimony that defendant was guilty of rape, in violation of defendant's right to have jury make that determination, since victim had had no sexual encounters during relevant time period with anyone but defendant, and defendant did not dispute that sexual encounter caused victim's injuries. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 21.

**[4] Criminal Law 110 ↪ 450**

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k449 Witnesses in General

110k450 k. Matters Directly in Issue. Most Cited Cases

**Criminal Law 110 ↪ 470(3)**

110 Criminal Law

110XVII Evidence

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110XVII(R) Opinion Evidence  
 110k468 Subjects of Expert Testimony  
 110k470 Matters Directly in Issue; Ultimate Issues  
 110k470(3) k. Occurrence of Crime; Defendant's Participation. Most Cited Cases  
 A witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference; such an opinion violates the defendant's constitutional right to a jury trial, which vests in the jury the ultimate power to weigh the evidence and determine the facts. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 21.

**[5] Criminal Law 110 ↪450**

110 Criminal Law  
 110XVII Evidence  
 110XVII(R) Opinion Evidence  
 110k449 Witnesses in General  
 110k450 k. Matters Directly in Issue. Most Cited Cases

**Criminal Law 110 ↪470(3)**

110 Criminal Law  
 110XVII Evidence  
 110XVII(R) Opinion Evidence  
 110k468 Subjects of Expert Testimony  
 110k470 Matters Directly in Issue; Ultimate Issues  
 110k470(3) k. Occurrence of Crime; Defendant's Participation. Most Cited Cases  
 Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

**[6] Criminal Law 110 ↪470(3)**

110 Criminal Law  
 110XVII Evidence  
 110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony  
 110k470 Matters Directly in Issue; Ultimate Issues  
 110k470(3) k. Occurrence of Crime; Defendant's Participation. Most Cited Cases

**Criminal Law 110 ↪476**

110 Criminal Law  
 110XVII Evidence  
 110XVII(R) Opinion Evidence  
 110k468 Subjects of Expert Testimony  
 110k476 k. Cause and Effect. Most Cited Cases  
 Although medical experts generally may give their opinions on the cause of injuries, this rule does not allow them to testify that the defendant committed the charged crime.

**[7] Criminal Law 110 ↪1169.9**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1169 Admission of Evidence  
 110k1169.9 k. Opinion Evidence. Most Cited Cases  
 Trial court error in admitting expert testimony during rape trial that victim's injuries were caused by nonconsensual sex, in violation of defendant's right to have his guilt determined by jury, was not harmless; case turned on whether jury believed defendant or victim as to whether their sexual encounter was consensual. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 21.

**[8] Criminal Law 110 ↪1163(1)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1163 Presumption as to Effect of Error  
 110k1163(1) k. In General. Most Cited Cases

**Criminal Law 110 ↪1165(1)**

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## 110 Criminal Law

## 110XXIV Review

## 110XXIV(Q) Harmless and Reversible Error

## 110k1165 Prejudice to Defendant in General

## 110k1165(1) k. In General. Most Cited

## Cases

On appeal in a criminal case, an appellate court presumes that constitutional errors are prejudicial, and the state must convince the appellate court beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.

**[9] Criminal Law 110 1165(1)**

## 110 Criminal Law

## 110XXIV Review

## 110XXIV(Q) Harmless and Reversible Error

## 110k1165 Prejudice to Defendant in General

## 110k1165(1) k. In General. Most Cited

## Cases

A constitutional error in a criminal case is harmless if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt.

Michelle Bacon Adams, Attorney at Law, Port Orchard, WA, for Appellant.

Russell Duane Hauge, Jeremy Aaron Morris, Kitsap County Prosecutor's Office, Port Orchard, WA, for Respondent.

## PART PUBLISHED OPINION

ARMSTRONG, J.

\*1 ¶ 1 Eugene Hudson appeals his third degree rape conviction, arguing that the trial court improperly allowed two experts to opine as to his guilt. We agree and, therefore, reverse his conviction and remand for a new trial. Hudson raises other evidentiary issues; we address only those likely to arise on retrial.

## FACTS

¶ 2 One evening, Hudson and his wife,<sup>FN1</sup> Nicole Tillis, went to the home of Jonathan and Lisa McHenry to socialize. Krystal Whitcher, another friend of Lisa McHenry and Tillis, was also there. The group consumed alcohol together for a couple hours, then went to a bar where they continued drinking until the bar closed. Several of the group went to Taco Bell for some food; Whitcher and Hudson may have flirted while they sat together in the back seat of the car. Afterwards, the group returned to the McHenry residence, and Lisa McHenry drove Whitcher home at about 3:00 a.m.

¶ 3 At about 4:00 a.m., Hudson drove to Whitcher's residence. He told Whitcher that "there was a lot of cops out" so he "didn't feel comfortable out on the road." Report of Proceedings (RP) at 365. She invited him in to watch television until he felt better. A vaginal and anal sexual encounter ensued on a futon in Whitcher's living room. Hudson eventually fell asleep on the futon until around 8:00 a.m., then left.

¶ 4 The next morning, Whitcher called Lisa McHenry and told her what had happened. Lisa McHenry drove Whitcher to the hospital for a sexual assault examination. Nora Mary Sullivan, a sexual assault nurse examiner (SANE), examined Whitcher and documented her findings in Whitcher's medical chart.

¶ 5 The State charged Hudson with three counts of rape. Count One was for second degree rape relating to the anal penetration. Counts Two and Three related to vaginal penetration, one for second degree rape and the other for third degree rape.

¶ 6 The State introduced testimony by two expert SANE witnesses. One was Sullivan, who had examined Whitcher. The other was Jolene Mae Culbertson, who was the clinical coordinator of the SANE program at the hospital and had prepared a summary report based on Sullivan's examination. Hudson objected to the use of two witnesses, arguing that their testimony would be cumulative un-

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der ER 403 because both witnesses would say the same thing. The trial court overruled the objection.

¶ 7 The State called Culbertson first. She testified that she had reviewed Sullivan's written recording of Whitcher's account of what happened. The prosecutor asked her to relate the history Whitcher had given; the defense objected on hearsay grounds. The trial court overruled the objection because Whitcher's statements to Sullivan fell within the medical diagnosis or treatment exception and Sullivan's written report fell within the medical business records exception. Culbertson then paraphrased Sullivan's reported history:

Krystal Whitcher reported that she had been out with friends. She went home. There was a knock on her door, and she opened the door. And it was the husband of a friend of hers. He said that he was uncomfortable because the police were following him, so he didn't feel comfortable driving and wanted to stay there. And she allowed him to stay there. She turned on the TV. He turned off the TV and pushed her down on a futon. And she started screaming. He said, "Just relax. It will be okay." And he attempted to penetrate her vaginally, and then turned her over and penetrated her anally. And then turned her back over and penetrated her vaginally. And the entire time she was screaming, "No. No." And he said, "Just relax. It will be okay."

\*2 RP at 242-43.

¶ 8 During cross examination, defense counsel called attention to certain variations between Culbertson's paraphrase and Sullivan's report. On redirect examination, the prosecutor asked Culbertson to read Sullivan's narrative verbatim. Hudson objected, but the trial court overruled the objection under the "rule of completeness." RP at 327. Culbertson read:

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.

Clerk's Papers (CP) at 327-28.

¶ 9 Because Culbertson had comprehensively testified regarding Sullivan's report, the defense renewed its motion to exclude Sullivan's testimony as cumulative. The trial court allowed the testimony because Sullivan had been the treating medical provider and could therefore testify about what she had actually observed. Later, the prosecutor clarified the differences between Sullivan's and Culbertson's testimony: Sullivan would testify from her examination about the details of Whitcher's injuries; Culbertson had (1) offered expert opinions based on the photographs Sullivan had taken and (2) Whitcher's account of the assault.

¶ 10 When the State asked Culbertson, "Are the injuries that you observed in these photographs consistent with Krystal Whitcher's report of nonconsensual sex?" Hudson objected, arguing that the question called for opinion testimony that invaded the jury's province. RP at 257. The trial court overruled the objection, relying on *State v. Jones*, 59 Wash.App. 744, 801 P.2d 263 (1990). Culbertson testified that her opinion "as to the nature and cause of [Whitcher's] injuries" was that they were "extensive injury related to nonconsensual sex." RP at 311.

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¶ 11 Sullivan testified that she took colposcopic photographs of Whitcher's injuries and drew a "trauma-gram" of them. RP at 447. Vaginal lacerations ranged from 2.3 to 8 millimeters, which Sullivan characterized as "very significant" as well as "quite deep." RP at 476. Whitcher's anal lacerations ranged from 2.9 to 11 millimeters, which Sullivan testified "were very, very significant" and "would have been excruciatingly painful." RP at 477. There was also significant swelling around the anus caused by trauma.

\*3 ¶ 12 Defense counsel objected when the State asked Sullivan, "Would you expect to see the type of injuries that you noted in Miss Whitcher in a consensual encounter?" RP at 484. The trial court overruled the objection, and Sullivan answered, "No." RP at 484. She also testified that in her SANE experience, it was not common to see the extent of injury that she saw in Whitcher. Sullivan concluded over objection that "this was a very traumatic nonconsensual ... penetration." RP at 485.

¶ 13 The jury acquitted Hudson of Counts Two and Three and convicted him on Count One of the lesser included offense of third degree rape. The trial court sentenced Hudson to thirteen months' imprisonment.

#### ANALYSIS

[1][2]¶ 14 Hudson challenges several of the trial court's evidentiary rulings. We review such rulings for an abuse of discretion. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 691, 101 P.3d 1 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wash.2d 276, 283-84, 165 P.3d 1251 (2007).

#### Expert Opinions Regarding Consent

[3]¶ 15 Hudson argues that Culbertson and Sullivan improperly opined that he was guilty when they testified that Whitcher's injuries were caused by nonconsensual sex. The State responds that the testimony related only to causation and was not an opinion as to Hudson's guilt.

#### A. Impropriety of Opinions

[4][5]¶ 16 An expert opinion is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact." ER 704. But a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. *State v. Montgomery*, 163 Wash.2d 577, 591, 183 P.3d 267 (2008) (citing *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion)); *State v. Black*, 109 Wash.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's "inviolable" constitutional right to a jury trial, which vests in the jury "the ultimate power to weigh the evidence and determine the facts." *Montgomery*, 163 Wash.2d at 590, 183 P.3d 267 (quoting Wash. Const. art. 1, § 21, and *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971)). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery*, 163 Wash.2d at 591, 183 P.3d 267 (quoting *Demery*, 144 Wash.2d at 759, 30 P.3d 1278).

¶ 17 This case is similar to *State v. Black*, in which the Supreme Court reversed a rape conviction for improper opinion testimony on the defendant's guilt. *Black*, 109 Wash.2d at 349-50, 745 P.2d 12. In *Black*, the defendant admitted engaging in sexual intercourse with the alleged victim, but he contended that she had consented to it. *Black*, 109 Wash.2d at 338, 745 P.2d 12. An expert psychologist testified that the alleged victim suffered from "rape trauma syndrome," which the Supreme Court

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held “carrie[d] with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped.” *Black*, 109 Wash.2d at 349, 745 P.2d 12. And given that there was no suggestion of any other sexual encounter in the relevant time period, the expert’s opinion that the victim was raped “constitutes, in essence, a statement that the defendant is guilty of the crime of rape.” *Black*, 109 Wash.2d at 349, 745 P.2d 12.

\*4 ¶ 18 Here, the SANE experts *explicitly* testified that Whitcher’s injuries were caused by nonconsensual sex, i.e., rape.<sup>FN2</sup> See RCW 9A.44.060(1)(a). And because Whitcher had no sexual encounters other than with Hudson, who did not dispute that their encounter caused her injuries, these opinions amounted to statements that he was guilty of rape. Under *Black*, the opinions were improper.

¶ 19 The trial court relied on *State v. Jones*, 59 Wash.App. 744, 801 P.2d 263 (1990), to rule that opinion testimony regarding “consensual versus nonconsensual” was acceptable. RP at 280. *Jones* does not stand for that proposition. In that case, a defendant charged with the manslaughter of a baby claimed that he *accidentally* caused the fractured skull that killed the child. *Jones*, 59 Wash.App. at 746, 801 P.2d 263. The State offered testimony by two doctors that the baby’s death was caused by “a non-accidental blunt injury” that was “sustained by some sort of inflicted manner, whether it be an object, including a hand or a fist.” *Jones*, 59 Wash.App. at 747-48, 801 P.2d 263. On appeal, the defendant claimed that the witnesses had given improper opinions on guilt because they were based solely on his *credibility*. *Jones*, 59 Wash.App. at 748, 801 P.2d 263. We affirmed, holding that neither witness based his opinion on any witnesses’ testimony; rather, they based it on inferences from the physical evidence found during the autopsy. *Jones*, 59 Wash.App. at 749, 801 P.2d 263. But because the defendant’s argument was based solely on credibility, *Jones* is not applicable.

¶ 20 Even if *Jones* were applicable, it is distinguishable. The experts stopped one step short of

what the State elicited here. The *Jones*’ experts testified that the victim’s injuries were most likely not “accidental.” *Jones*, 59 Wash.App. at 747, 801 P.2d 263. Here, the experts did not limit their testimony to whether the victim’s injuries were caused by blunt force; they testified that the sexual encounter was not consensual—the essence of the rape charge and the only disputed issue. In addition, the *Jones* court specifically noted that the doctors’ opinions in that case were “helpful to the jury” under ER 702 because they were beyond the common knowledge of the average layperson. *Jones*, 59 Wash.App. at 751, 801 P.2d 263. The same is not true in this case where the nurses’ sole reason for believing Whitcher had not consented was that the sex must have been extremely painful. Such reasoning is not based in medical or any other specialized knowledge and can easily be done by the average layperson.<sup>FN3</sup>

[6]¶ 21 Finally, the State argues that the nurses’ opinions in this case were admissible because they constituted “expert testimony regarding the cause of physical injuries.” Br. of Resp’t at 22 (emphasis omitted). We agree that medical experts generally may give their opinions on the cause of injuries, but this rule does not allow them to testify that the defendant committed the charged crime.<sup>FN4</sup> Furthermore, in this case, it was undisputed that Whitcher’s injuries were medically “caused” by her sexual encounter with Hudson. Deciding whether Whitcher had consented was not necessary to that determination.

\*5 ¶ 22 The trial court abused its discretion in admitting the SANE witnesses’ opinion that Whitcher’s injuries were caused by nonconsensual sex.

#### B. Harmless Error

[7][8][9]¶ 23 Because improper opinions on guilt invade the jury’s province and thus violate the defendant’s constitutional right, we apply the constitutional harmless error standard set forth in *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182

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(1985), to determine if the error was harmless. *State v. Thach*, 126 Wash.App. 297, 312-13, 106 P.3d 782 (2005). We presume that constitutional errors are prejudicial, and the State must convince us beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007); *Thach*, 126 Wash.App. at 313, 106 P.3d 782 (quoting *Guloy*, 104 Wash.2d at 425, 705 P.2d 1182). This test is met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt. *Watt*, 160 Wash.2d at 636, 160 P.3d 640; *Thach*, 126 Wash.App. at 313, 106 P.3d 782.

¶ 24 The State does not attempt to show that admitting the improper opinion testimony was harmless. And because the case turned on whether the jury believed Hudson or Whitcher, we cannot find the error harmless. See *State v. Barr*, 123 Wash.App. 373, 384, 98 P.3d 518 (2004) (constitutional error not harmless because “[a]t its heart, the ultimate issue here revolved around an assessment of the credibility of [defendant] and [victim]”). We therefore reverse and remand for a new trial.

¶ 25 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

#### Cumulative Evidence

¶ 26 Hudson argues that the trial court abused its discretion by allowing two SANE witnesses to testify about Whitcher's injuries instead of just one. But the admission of merely cumulative evidence is not prejudicial error. *State v. Acheson*, 48 Wash.App. 630, 635, 740 P.2d 346 (1987) (citing *State v. Todd*, 78 Wash.2d 362, 372, 474 P.2d 542 (1970)). We therefore do not consider whether it was error to admit the testimony of both witnesses.

#### Hearsay-Medical Report

¶ 27 Hudson argues further that the trial court abused its discretion in allowing Culbertson to recite the narrative report Whitcher gave to Sullivan. Specifically, he argues that Whitcher's narration was not necessary for diagnosis and treatment and therefore was not admissible under the hearsay exception in ER 803(a)(4).<sup>FNS</sup> But trial counsel objected on a different basis below: Whether Sullivan's written report fell within the medical business records exception. Because Hudson never objected to the admission of this narrative under ER 803(a)(4), we do not consider the argument on appeal. RAP 2.5(a).

¶ 28 The trial court admitted the verbatim reading of the report under the “rule of completeness” in ER 106. RP at 327. That rule provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.” ER 106. The trial court did not abuse its discretion in concluding that because defense counsel had emphasized the disparities between Sullivan's report and Culbertson's paraphrase, the State was entitled to have the jury consider the entire report.

\*6 ¶ 29 Reversed and remanded.

I concur: BRIDGEWATER, J.

PENoyer, A.C.J.

¶ 30 I respectfully dissent. I find the analysis of *State v. Jones* compelling, and see no significant difference between the expert testimony in that case and the nurses' testimony in this case. 59 Wash.App. 744, 747-48, 801 P.2d 263 (1990).

¶ 31 Here, the nurses stated that they thought the victim's injuries were the product of a nonconsensual sexual encounter. They did not indicate that Hudson was responsible for the injuries, and thus, they did not comment on his guilt.

¶ 32 It appears to me that both nurses testified to a

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subject well within their area of expertise. Neither testified that they believed the victim's account of events, nor did they indicate a belief that the defendant was responsible for the injuries. Instead, they provided an analysis of the physical evidence, related the extent of the victim's injuries, explained how and why nonconsensual sex may result in injury and offered an opinion on whether the pain that would result from injuries such as those suffered by the victim was consistent with her consenting to the sexual activity, all based on their training and experience.

¶ 33 The majority indicates that we should also reject the nurses' evaluation because their conclusion was based "solely" on the amount of pain the victim would have experienced. They state that "[s]uch reasoning is not based in medical or any other specialized knowledge and can easily be done by the average layperson." Majority at ----. However, Culbertson's statement on the amount of pain experienced was based on her professional knowledge and experience with various sexual encounters. She testified that her expertise and opinion was based on viewing and evaluating hundreds of sexual assault victims. True, pain is a highly subjective sensation, but a juror would likely *not* know what level of pain accompanies various injuries. Culbertson's testimony was perfectly within the realm of appropriate expert testimony. Further, Sullivan never testified that her conclusion was based on level of pain. Sullivan's conclusion was based on the number, and severity, of lacerations as well as her "training and experience, [ ] review of the photographs and of [the victim's] chart, [and] the information in the chart." Report of Proceedings (RP) at 485. As with Culbertson's testimony, Sullivan's was well within the realm of appropriate expert testimony.

FN1. Hudson and Tillis are not legally married, but are referred to as husband and wife throughout the record.

FN2. The dissent asserts that the SANEs opined only that the evidence was consist-

ent with nonconsensual sex. Dissent at ----. We agree with the dissent that if this were the case, the testimony would probably have been proper under *Montgomery*, 163 Wash.2d at 592-93, 183 P.3d 267. However, the testimony was far more direct. Culbertson testified that "the nature and cause of [Whitcher's] injuries" was that "[t]hey're extensive injury related to nonconsensual sex." RP at 311. Sullivan testified that "this was a very traumatic nonconsensual ... penetration." RP at 485. These are overt and unambiguous opinions that Whitcher was raped. *Compare with Black*, 109 Wash.2d at 348, 745 P.2d 12 (rape trauma syndrome diagnosis improperly *implied* that victim had, in fact, been raped).

FN3. We do not hold, as the dissent suggests, that it was improper for the SANEs to testify about the amount of pain Whitcher suffered from her injuries. Dissent at ----. As experienced medical professionals, the SANEs were certainly qualified to testify as to Whitcher's level of pain from their training and experience. The conclusion that is *not* appropriate, however, is in connecting the medical issue of pain to the legal issue of consent. That inquiry is for the trier of fact alone.

FN4. None of the cases that the State cites in its brief suggests otherwise. Two of them are pre-ER 704 cases in which the court addressed the now obsolete inquiry of whether an expert opinion on causation was an improper opinion on ultimate *facts*. *State v. Richardson*, 197 Wash. 157, 84 P.2d 699 (1938) (doctor could opine from appearance of a body that the person's hands had been tied in murder case); *State v. Mooradian*, 132 Wash. 37, 231 P. 24 (1924) (doctor described injuries sustained by child in child rape case and opined as to

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how they might have been inflicted). One does not involve an opinion on the cause of injuries at all. *State v. Read*, 100 Wash.App. 776, 779, 998 P.2d 897 (in response to assertion that shooting was accidental, medical examiner testified regarding angle of the gun from bullet's trajectory saying "it is reasonable that the decedent was sighting right down the gun when it went off."), *rev'd on other grounds*, 142 Wash.2d 1007, 13 P.3d 1065 (2000). Others do not address whether the opinions are of guilt. *State v. Toennis*, 52 Wash.App. 176, 185, 758 P.2d 539 (1988) ("battered child syndrome" as cause of death is a well-recognized medical diagnosis and is not within common knowledge of jurors); *State v. Mulder*, 29 Wash.App. 513, 515-16, 629 P.2d 462 (1981) (same, citing ER 702). In others, the experts' opinions were not of guilt because their conclusions were not inconsistent with the defendant's theory of the case. See *State v. Cunningham*, 23 Wash.App. 826, 854, 598 P.2d 756 (1979) (opinion was the same as that of defendant's expert), *rev'd on other grounds*, 93 Wash.2d 823, 613 P.2d 1139 (1980). And the rest of the cases are not applicable. *State v. Borsheim*, 140 Wash.App. 357, 374-75, 165 P.3d 417 (2007) (issue was whether opinion was a manifest constitutional error because not objected to below).

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FN5. ER 803(a)(4) provides that "[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" are not excluded by the hearsay rule.

Wash.App. Div. 2, 2009.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62949-2-I
	)	
CALVIN WILLIAMS,	)	
	)	
Appellant.	)	

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FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 JUN 30 PM 3:46

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CALVIN WILLIAMS  
DOC NO. 827808  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JUNE, 2009.

x *Patrick Mayovsky*