No. 311147-III

WASHINGTON STATE COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOEL GONZALEZ,

Appellant.

RESPONSIVE BRIEF IN OPPOSITION TO APPEAL

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I. COUNTER STATEMENT OF THE CASE

Appellant was found guilty of raping his younger cousin, I.G. (RP Volume 3, at page 448: 21-25 and at pages 157-159 generally). Appellant, I.G. and D.G. were close family with many aunts, uncles and grandparents who spent significant amounts of time together. (RP Volume 1, at page 45-46 and at page 157-159 generally). The finding by the judge was based upon the testimony of the victim, I.G., the testimony of his sister, D.G. who witnessed a rape and the testimony of Karla Arroyo, I.G. and D.G.'s mother. Karla testified that she found I.G. and Appellant spooning in bed with their underwear pulled down. (RP Volume 1, at page 163: 7-9).

A. APPELLANT'S THEORY

Appellant's theory was that the rapes did not occur because I.G. and D.G did not show visible and obvious signs of fear in the presence of Appellant. (RP Volume 3, at page 431:10-22).

The Appellant also theorized that since Karla Arroyo (I.G. and D.G.'s mother) knowingly allowed them to be around Appellant after the rape allegation, the rapes did not occur.

The evidence showed that the rapes occurred while Appellant and I.G. were alone; no adults were present. (RP Volume 3, at page 383; 13-18). The evidence further showed that Josie Arroyo and Xochitl Arroyo would allow the Appellant to be around I.G. and D.G. without Karla's knowledge, in direct violation of a court order prohibiting contact. (RP Volume 2 at page 327-331 generally and page 359; 9-12) .

B. APPELLANT'S WITNESSES WERE NOT CREDIBLE

Appellant's main witnesses, Josie Arroyo (grandmother) and Xochitl Arroyo, (Appellant's mother) were both impeached during cross-examination and by the testimony of Karla Arroyo, Deputy Donald Foley and Appellant.

Josie testified that Karla always knew Appellant was at her house when she dropped off I.G. and D.G. because Appellant lived there. (RP Volume 2 at page 367; 17-22). This testimony was contradicted by Appellant who testified that he was frequently gone at his friend's house. (RP Volume 3, at page 409; 2-18). Karla testified that she would allow I.G. and D.G. to visit Josie when Appellant was at his friends. (RP Volume 1 at page 191; 9-15).

Xochitl Arroyo first testified that she personally knew that Karla was aware of Appellant's presence every time she took I.G. and D.G. to Josie's house. (RP Volume 2 at page 302; 18-22 and 328; 14-25 and 329; 1-15). Xochitl Arroyo then testified that she was not always at Josie's when Karla allowed I.G. and D.G. to visit Josie. (RP Volume 3 at page 329; 12-19).

Xochitl Arroyo testified on direct exam that she video taped D.G. and Appellant dancing, which showed D.G. reaching for Appellant's hands. (RP Volume 2 at page 324; 1-3). She then admitted on cross-examination that the video tape actually showed D.G. pushing Appellant's hands away. (RP Volume 2 page 332;23-25 and 333; 1).

C. APPELLANT'S MOTHER AND GRANDMOTHER DISREGARDED THE COURT ORDER PROHIBITING CONTACT IN ORDER TO CREATE EVIDENCE

Conditions on release were entered at Appellant's arraignment wherein he was prohibited from having any contact with I.G. and D.G. (RP Volume 1 at page 11;8-18 and Volume 2 at page 329; 20-25, Supp to CP). Josie Arroyo and Xochitl Arroyo admitted that they completely disregarded the courts order prohibiting any contact between Appellant,

I.G. and D.G. (RP Volume 2 at page 299; 9-18 and at page 330; 25 through 331; 1-4 and 358; 25 through 359 1-12).

Xochitl Arroyo admitted creating evidence by placing the Appellant with I.G. and D.G. and taking photographs and video of them together. (RP Volume 3, at page 332; 5-11).

During the fact finding testimony was provided by I.G., D.G., Karla Arroyo and Deputy Don Foley for the State. (RP Volume 1 at page 41, at page 137, at page 155 and Volume 2 at page 242, respectively).

D. TESTIMONY OF KARLA ARROYO

I.G. (DOB 3/29/2003) and D.G. (DOB 11/17/2004) are cousins of Appellant, Joel Gonzalez. (RP Volume 1, at page 158: 4-8). Karla Arroyo is the mother of I.G. and D.G. (RP Volume 1, at 156: 9-14). The cousins would spend the night together on occasion. (RP Volume 1, at 159: 15 – 160: 9). In the summer of 2011 Karla Arroyo became concerned for the safety of I.G. (RP Volume 1, at 161: 9-12). I.G. had begun to have accidents involving bowel movements. (RP Volume 1 at page 160: 10-18). In June of 2011, Appellant was spending the night with his aunt, Karla Arroyo and his cousins I.G. and D.G. when Karla went in the room where Appellant and I.G. were sleeping to check on the children. (RP Volume 1,

at page 161: 14-16). Karla found that both Appellant and I.G.'s boxers were down below their bottoms. (RP Volume 1 at page 161:14-17 and at 162: 6-17). Appellant and I.G. were "spooning" with I.G.'s back to Appellant's front. (RP Volume 1, at page 163:7-24). Karla could see Appellant's penis. (RP Volume 1, at page 164:9-10); She did not closely inspect his penis for fecal matter or seaman. (RP Volume 1, at page 180; 22-25 and page 229; 7-10).

Karla woke Appellant and told him that he better not be doing anything to I.G. or she would call the police. (RP Volume 1, at page 164: 5-8). Appellant denied that anything inappropriate happened. (RP Volume 1 at page 164:19-22 and Volume 3 at page 403:7-11). Karla did not see anything wet on the sheets and Appellant's penis was not erect. (RP Volume 1, at page 164: 9-15). Karla did not wake I.G. (RP Volume 1, at page 164:16-17). Appellant spent the rest of the night on the couch. (RP Volume 3, at page 403: 14-17).

Karla asked I.G. about the incident who, at first, denied that anything happened. (RP Volume 1, at page 164: 23-25 and 165:1-3). Approximately three weeks after the spooning incident, Karla asked I.G. about his bowel problems again. (RP, Volume 1 at page 165: 18-25). Karla started by telling I.G. that something had happened to her as a child.

(RP Volume 1, at page 166: 9-24). Karla asked I.G. yes or no questions to try to find out what was wrong. (RP Volume 1 at page 167: 2-4). Karla asked I.G. if anyone had ever touched him inappropriately. (RP Volume 1 at page 167: 5-7). I.G. looked at Karla with a blank stare and Karla asked if anybody had ever stuck anything in his bottom, I.G. said yes. (RP Volume 1, at page 167: 6-14). Karla then asked him to tell her who it was and explained that she needed to know so she could help him. (RP Volume 1, at page 167: 16-22). I.G. told her that it was Joel (Appellant). (RP Volume 1 at page 167: 16-24).

Karla told her mother (Josie Arroyo) and Appellant's mother (Xochitl Arroyo) and her family's counselor. (RP Volume 1 at page 169: 2-13). Karla wanted the family to go see the counselor so that the issue could be addressed as a family. (RP Volume 1 at page 169: 2-5 and 20-23). The counselor told Karla that a report had to be made. (RP Volume 1 at page 169:13-15). Karla wanted to get help for Appellant also. (RP Volume 1, at page 169: 20-23). Xochitl Arroyo, Appellant's mother, told Karla that she was willing to talk to the counselor and get Appellant help, she admitted that she knew it was happening and apologized. (RP Volume 1, at page 169:15-23). Karla reported the matter to the Sheriff Office. (RP Volume 1, at page 169: 24-25 and 170:1).

E. FORENSIC INTERVIEWS

Forensic interviews of I.G. and D. G. were conducted by Deputy Don Foley of the Columbia County Sheriff Office. (RP Volume 1 at page 170: 4-18 and Volume 2 at page 243; 9-14). A portion of the forensic interview of I.G. was admitted. (See Supplement to Clerk's Papers, filed herewith).

F. TESTIMONY OF I.G.

At the fact finding, I.G. was nine years old. (RP Volume 1, at page 43; 9-10). I.G. was subject to cross examination for over three hours. (RP Volume 1, at page 125; 20-25). I.G. testified consistently that Appellant raped him. (See generally testimony of I.G. RP Volume 1 at page 41-137).

I.G. testified that Joel is his cousin. (RP Volume 1 at page 45: 14-15). I.G. testified that Joel sticks his thingamajig in his (I.G.'s) butt. (RP Volume 1 at page 48:12-25 and page 49:1-9). I.G. testified that a thingamajig is a private part. (RP Volume 1, at page 48: 23-25 and page 49:1-6). I.G. testified that this began when he was in preschool. (RP Volume 1, at page 49:10-20). I.G. testified that this occurred more than five or six times. (RP Volume 1, at page 49: 22-25 and page 50: 1-2).

I.G. also testified that Joel said he was going to put a hanger in his butt, but he couldn't remember whether or not it happened. (RP Volume 1 at page 62:9-14). I.G. did state he remembered it hurt. (RP Volume 1 at page 63:7-17). I.G. testified that Joel would stick his thingymajig in I.G.'s butt whenever he spent the night at his grandma's house or when Joel spent the night at his house. (RP Volume 1 at page 65:7-13). I.G. testified that it would always happen in bed and that it happened over 100 times. (RP Volume 1 at page 65:14-23).

I.G. testified that it also happened at his aunt Xochitl's in the living room when they slept on the sofa. (RP Volume 1 at page 66:17-25).

I. G. testified that he did not remember where they were at the first time that Appellant stuck his thingymajig in his butt because it happened five years before. (RP Volume 1 at page 66:1-4). He testified that he could remember that it started when he was about three or four. (RP Volume 1 at page 67:5-12). I.G. testified that the last time he remembered something happening was after his interview with Deputy Foley, when he spent the night at his grandma's and Appellant was there. (RP Volume 1 at page 69:1-25). I.G. testified that when Appellant put his thingymajig in his butt, that it felt bad, gross and disgusting. (RP Volume 1 at page 70: 5-10). I.G. testified that he realized it was bad when he was five. (RP Volume 1

at page 70:7-10). I. G. testified that he probably remembered things better when he gave the forensic interview with Deputy Foley. (RP Volume 1, at page 136; 3-6).

G. TESTIMONY OF D.G.

D.G., DOB 11/17/2004, the sister of I.G. also testified at fact-finding. (RP Volume 1 at page 156:19-24 and RP Volume 1 at pages 137-155 generally). D.G. testified that she saw Appellant stick his private part in her brother's private part. (RP Volume 1 at page 146: 13-25).

H. TESTIMONY OF MARIA GUUITERRES

Maria Emma Saldivar Guuiterres, aunt to both Appellant and I.G. testified (out of order for Appellant) that she did not see I.G. exhibit fear or unhappiness when around Appellant. (RP Volume 2 at page 206 generally and at page 208;19-25 and 209:1).

I. TESTIMONY OF DEPUTY DONALD FOLEY

Columbia County Sheriff Deputy Donald Foley testified as to his investigation. (RP Volume 2 at page 242-278 generally).

J. TESTIMONY OF XOCHITL ARROYO

Xochitl Arroyo, Appellant's mother testified that I.G. and Appellant got along well together. (RP Volume 2 at page 306:2-23). She testified that she had never observed I.G. exhibit any fear around Appellant; and that he asks for Appellant when at his house. (RP Volume 2 at page 310:2-9). Xochitl Arroyo testified that I.G. and D.G were left with Appellant at his home on many occasions after the rape allegation was made. (RP Volume 2 at page 328:3-25 and 329: 19). She testified that she was personally aware that Karla Arroyo saw that Appellant was present every time she left I.G. and D.G. to visit Josie. (RP Volume 2 at page 328:3-25 and 329: 1-14). She then contradicted herself and stated that she was not there every time. (RP Volume 2 at page 328:12-19). She testified that Karla was making too big a deal out of the situation. (RP Volume 2 at page 327:21-25 and 328 1-2).

She testified Karla Arroyo never told her that I.G. and D. G. could not be around Appellant. (RP Volume 2 at page 327:16-20). She then testified that she knew Appellant was not to be in the presence of I.G. and D.G., but that they had been together at least 15 times since the court order was entered. (RP Volume 2 at page 329:20-25 and 330: 1-25 and331:1-4). She testified that she did not disregard the court order even though she

knew it was in effect and prohibited contact. (RP Volume 2 at page 331:5-12). Xochitl Arroyo admitted at fact finding that she had I.G. and D.G. with Appellant so she could take photos and videos of the children to create evidence. (RP Volume 2 at page 332:5-11).

K. TESTIMONY OF MARIA SALDIVAR

Maria Concepcion Saldivar, the aunt of I.G., D.G. and Appellant testified at fact finding. (RP Volume 2 at page 334:15-25). She testified that while out to eat, Appellant finished and went to sit in the van and that afterward I.G. asked to go sit in the van also, but that he was told "no". (RP Volume 2 at page 338:13-24 and at 339:8-14). She testified that she would not let them be alone together. (RP Volume 2 at page 346:2-13).

L. TESTIMONY OF JOSEPHINA (JOSIE) ARROYO

Josephina (Josie) Arroyo, the grandmother of I.G, D.G. and Appellant testified that Karla never told her I.G. and D.G. were not to be around Appellant. (RP Volume 2 at page 363:15-24). She testified that there were no occasions when I.G. expressed any discomfort or unhappiness around Appellant. (RP Volume 2 at page 361:3-7). She testified that every time Karla brought I.G. and D.G. to her house, Karla saw that Appellant was there and left the children anyway. (RP Volume 2

at page 367:17-22). Josie then contradicted herself when she testified that Karla usually waited in the car when she dropped off I.G. and D.G. (RP Volume 2 at page 369:1-22).

M. TESTIMONY OF APPELLANT

Appellant testified that since he returned from Mexico, he had been alone with I.G. probably more than a hundred times. (RP Volume 3, at page 397:4-13). Appellant testified that when his aunt caught him spooning with I.G. she said "cochino", Spanish for dirty one or pig and he got out of bed and kept saying oh, no; oh, no. (RP Volume 3, at page 403: 7-22).

1. APPELLANT'S TESTIMONY OF NO RAPES IN THE PRESENCE OF ADULTS

During his interview with Deputy Foley, Appellant stated that nothing bad would happen in the living room because his uncle was there, during his testimony, he admitted that the bad thing he referred to was the rape. (RP Volume 3, at page 408: 4-11).

2. APPELLANT'S TESTIMONY CONTRADICTED JOSIE AND XOCHITL ARROYO'S

Appellant testified that he spent a lot of time at his friend's house, especially during the summer. (RP Volume 3, at page 409; 2-19).

N. UNDISCLOSED DEFENSE EXPERT

On the morning of the last day of fact finding, Appellant brought his counselor to court and intended to call her as an expert witness. (RP Volume 3 at page 375: 18-24 and 376 -377 generally). No prior disclosure of this witness had been made to the State, who objected. (RP Volume 3 at page 375:8-14). The counselor was excluded on the grounds of relevance because the proposed testimony was not probative. (RP Volume 3 at page 38311-25 and 384:1-2).

II. ARGUMENT

A. JUDICIAL NOTICE WAS NOT TAKEN

The essence of Appellant's argument is that a defendant cannot be found guilty of rape of a child unless that child exhibits certain pre-determined behavioral characteristics of sexually abused children, as

determined by Appellant. The appellant argues that the judge should have found that without obvious signs of fear all the direct evidence that the rapes occurred was vitiated.

The court found that the rapes occurred based upon the testimony of the victim, I.G., his sister D.G. who actually saw a rape occur and their mother Karla. The finding of guilt was based upon properly admitted evidence which proved beyond a reasonable doubt that the rapes occurred.

1. TRIAL COURT'S FINDING OF GUILT WAS BASED ON PROPERLY ADMITTED EVIDENCE

The presumption in a bench trial, is that the judge only considered properly admitted evidence. *State v. Read,* 147 Wash.2d 238, 53 P.3d 26 (2002).

> Bench trials place unique demands on judges, requiring them to sit as both arbiters of law and as finders of fact. For example, judges in bench trial may be asked to exclude probative evidence on the ground it is unfairly prejudicial. No judge could rule on such a request without considering the challenged evidence. And yet, in a bench trial, it is the consideration of such evidence by the judge that the objecting party seeks to prevent. The same is true of all challenged evidence in a bench trial.

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> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

Builders Steel Co. v. Comm'r of Internal Revenue, 179 F.2d 377, 379 (8th Cir. 1950).

The trial judge did not base his finding of guilt on judicial notice. The judge stated that his finding of guilt was based upon the following evidence:

1. Testimony of Karla Arroyo, I.G.'s mother, that she found the boys spooning in bed with their underwear down. (RP Volume 3 at page 447; 15-17).
2. Testimony of I.G. who testified that the sexual contact happened every time they spent the night together, which was over the course of a long time. (RP Volume 3 at page 447; 19-21 and 448; 1-3).

3. Eyewitness testimony of D.G., I.G's sister, that she observed one sexual act taking place. (RP Volume 3 at page 447; 22-24).
4. The Findings of Fact and Conclusions of Law (CP 3); specifies the evidence considered by the judge and does not include any findings based upon judicial notice. The Findings of Fact and Conclusions are the established facts of the case. *Richert v. Handly*, 50 Wash.2d 356 , 311 P.2d 417 (1957).

2. THE FINDINGS OF FACT ARE THE ESTABLISHED FACTS OF THE CASE

No assignments of error were alleged regarding the findings. The findings are therefore the established facts of the case. *Richert v. Handly* 50 Wash.2d 356 , 311 P.2d 417 (1957). The findings of fact do not include any reference to the supposed judicial notice because judicial notice was not taken and was not part of the evidence considered by the court. The findings were signed by the judge without change. The findings make no reference to the alleged judicial notice. In the absence of a clear challenge, an appellate court treats findings of fact as verities on appeal. *In re Estate of Palmer*, 145 Wash.App. 249, 187 P.3d 758 (2008).

Where error was not assigned to the findings of fact, and error were raised for the first time in a responsive brief, the court of appeals

would not review allegations that the trial court erred. *State v. Vanderpool*, 99 Wash.App. 709, 995 P.2d 104 (2000).

The Findings of Fact and Conclusions of Law are part of the record on appeal. (CP 3). The Findings of Fact and Conclusions of Law are not alleged to contain error or to have been entered in error; thus the Findings of Fact and Conclusions of Law are verities on appeal. *In re Estate of Palmer,* 145 Wash.App. 249, 187 P.3d 758 (2008).

The Findings of Fact and Conclusions of Law do not reference any judicial notice because the judge did not take judicial notice during the trial or rely upon judicial notice in making his findings. The evidence upon which the judge relied in making his finding of guilt was set out in his oral findings at the conclusion of the fact finding and did not contain any reference to the alleged judicial notice. (RP Volume 3 at page 446: 1-25).

The written findings of the judge were presented, signed and entered. The findings contain the basis for the finding of guilt and are verities on appeal. *In re Estate of Palmer*, 145 Wash.App. 249, 187 P.3d 758 (2008). The findings are the established facts of the case and the basis for the finding of guilt, which does not include judicial notice. *Richert v. Handly,* 50 Wash.2d 356 , 311 P.2d 417 (1957).

The finding of guilt did not include any judicial notice. This appeal fails.

3. THE RECORD SHOWS THAT THE JUDGE DID NOT TAKE JUDICIAL NOTICE

The State will address each instance Appellant alleges judicial notice was taken by the court.

a- The citations to the record as cited on page 23 of appellant's brief are an explanation by the judge as to his ruling on the State's Motion in Limine to exclude evidence manufactured by defendant's family. The Appellant sought admission of photos and video of I.G. and D.G. while in family situations to show I.G and D.G did not show obvious fear in appellant's presence. Appellant's theory was that all direct evidence that the rapes occurred was vitiated because I.G. and D.G did not show obvious fear when they were all present at family gatherings. Appellant's citations to the record are the explanation by the judge for the ruling on the motion in limine. The explanation is in response to Appellant's argument. The explanation was not based upon judicial notice; the judge specifically said that he was not taking judicial notice of any facts. The judge was

explaining why he did not agree with an argument raised by appellant for admission of the photos and video. The Appellant, having raised an argument cannot now complain that the judge addressed Appellant's argument during the ruling on the motion in limine. An invited error is not reviewable by the appellate court. *State v.McLoyd,* 87 Wash.App. 66, 939 P.2d 1255 (1997).

The judge explained during the ruling that the evidence was not relevant since it "doesn't really help me decide the case at all." (RP Volume 1 at page 27:14-15). This is not judicial notice but an explanation of a ruling on the motion in limine. This appeal fails.

b- The citation to the record as cited on page 23 of Appellant's brief is not judicial notice. The judge explained why the "reasonable deduction or inference from the evidence" would not require that I.G. or D.G. show fear in the presence of Appellant at family gatherings. (RP Volume 3 at page 449:14-16). The judge addressed appellant's theory in his findings. Such is not judicial notice, but an explanation. An invited error is not reviewable by the appellate court. *State v.McLoyd*, 87 Wash.App. 66, 939 P.2d 1255 (1997). This appeal fails.

Since the appellant placed in issue the behavior of I.G and D.G. while in the presence of Appellant at family gatherings, he cannot now raise on appeal, as error, the fact that the judge addressed appellant's theory. *Sullins v. Sullins,* 65 Wash.2d 283, 396 P.2d 886 (1964).

4. APPELLANT'S PRESENTATION OF EVIDENCE TO SUPPORT HIS THEORY OF THE CASE SHOWS JUDICIAL NOTICE WAS NOT TAKEN

The purpose of judicial notice is to save time in trial. When judicial notice is taken, the purpose is to allow the court to accept evidence without the foundational requirements. Judicial notice is defined as follows:

> A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact.
>
> Black's Law Dictionary (9th ed. 2009).

The purpose of judicial notice is to admit evidence without foundational requirements being set forth on the record. If judicial notice had been taken by the court as argued by appellant, the evidence proffered by the appellant as to the lack of fear by I.G. and D.G. would not have been admitted. Judicial notice would have already established the fact in question. If judicial notice is taken of certain facts, the fact is established.

The court would not have heard three days of evidence submitted by Appellant of the lack of fear on the part of I.G. and D.G. (RP Volume 2 at page 298 generally at page 333 generally at page 347 and Volume 3 at page 417). The record is clear, no judicial notice was taken.

5. OBJECTION IS WAIVED ON APPEAL – NO OBJECTION WAS MADE TO JUDGE'S EXPLANATION OF RULINGS AND FINDING.

Appellant did not objected to the explanation provided by the trial judge as being an inappropriate taking of judicial notice. Failure to object to the explanation as judicial notice precludes the appellant from making his specious argument on appeal. Generally, the appellate court does not consider an evidentiary issue raised for the first time on appeal because failure to object deprives the court of the opportunity to prevent or cure any error. *State v. Curtiss,* 250 P.3d 496 (2011).

In *State v. Newbern,* 95 Wash.App. 277, 975 P.2d 1041 (1999) the appellant argued that the trial judge took judicial notice of a scientific basis to admit certain evidence. The appellate court held that because the trial judge did not specifically characterize its ruling as based upon judicial notice and because no objection was made at trial, the issue was not properly before the court. Such is the case herein.

Absence of an objection below deprives the trial court of the opportunity to make a proper record to sustain its observation and precludes appellate review. *Fusato v. Washington Interscholastic Activites Association,* 93 Wash.App. 762, 970 P.2d 774 (1999). Failure to object at trial to supposed judicial notice is a waiver of the right to appeal on that basis. *State v. Sly,* 58 Wash.App. 740, 794 P.2d 1316 (1990). Failure to object is waived on appeal. *State v. Warren,* 55 Wash.App. 645, 779 P.2d 1159 (1989).

a. NO ERROR OF CONSTITUTIONAL MAGNITUDE WAS ARGUED - NONE CAN BE SHOWN

The court will review an error raised for the first time on appeal only if it involves an issue of constitutional magnitude. *State v. Newbern*, 95 Wash.App. 277, 975 P.2d 1041 (1999). The analysis for whether an issue is of constitutional magnitude is set forth in *State v. Grimes*, 165 Wash. App. 172, 185-88, 267 P.3d 454, 461-63 (2011) review denied, 175 Wash. 2d 1010, 287 P.3d 594 (2012).

> Three steps are involved in analyzing whether an issue raised for the first time on appeal can benefit from RAP 2.5(a)'s manifest constitutional error exception. The defendant has the initial burden of showing that (1) the error was "truly of constitutional dimension" and (2) the error was "manifest." *State v. O'Hara*, 167 Wash.2d at 98, 217 P.3d 756. A defendant cannot simply assert that an error occurred at trial and label the error "constitutional"; instead, he must identify an error of constitutional magnitude and

show how the alleged error actually affected his rights at trial. *Gordon*, 172 Wash.2d at 676, 260 P.3d 884…

1. Is the Error "Constitutional"?

To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest as compared to another form of trial error. *O'Hara*, 167 Wash.2d at 98, 217 P.3d 756…

2. Is the Error "Manifest"? Did It Have an "Identifiable Consequence"?

"After determining the error is of constitutional magnitude, the appellate court must determine whether the error was manifest." *O'Hara*, 167 Wash.2d at 99, 217 P.3d 756. For an error to be "manifest," the defendant must show that the asserted error had practical and identifiable consequences at trial. *Gordon*, 172 Wash.2d at 676, 260 P.3d 884…

3. Is the Error "Harmless"?

If an alleged error has practical and identifiable consequences, i.e., if it is "manifest" and also of "constitutional magnitude," the reviewing court usually will address the merits of the claim and determine whether, in the context of the entire record, the error is harmless beyond a reasonable doubt. *O'Hara,* 167 Wash.2d at 99, 217 P.3d 756.

Appellant has not argued that any error of constitutional magnitude has occurred. Thus, there can be no review for the first time on appeal of the judge's explanation of his ruling and later his finding of guilt. The burden is on the appellant. The Appellant cannot base his appeal on

conclusory allegations that an alleged error was of constitutional magnitude. The appellant has failed to meet his burden, this appeal fails.

b. THERE WAS NO CONSTITUTIONAL ERROR

The labeling of the judges explanation of the motion in limine ruling and the finding of guilt as based upon judicial notice is not supported by the record. Appellant has not presented any argument that the judge's rulings involved an error of constitutional magnitude. Alleging that the rulings were based upon judicial notice does not create an error of constitutional magnitude. The record shows that judicial notice was not part of the ruling or the finding.

c. THERE IS NO IDENTIFIABLE CONSEQUENCE

The appellant has not argued or shown any identifiable consequence. Appellant cannot show error or identifiable consequence because the ruling on the motion in limine and the findings of guilt were based upon properly admitted evidence as set forth in the judge's ruling, oral findings and the findings of fact and conclusions of law. (RP Volume 1 at pages 22-29 and Volume 3 at pages 447-449 and CP 3). This appeal fails.

d. NO ERROR OCCURRED

The ruling on the motion in limine was based upon the Judge's finding that the photos and video were not relevant. Judicial notice was not the basis for the ruling and no error occurred. The finding of guilt was based upon the testimony of I.G., D.G. and their mother, Karla. Judicial notice was not part of the oral findings or the written findings.

(RP Volume 1 at page 26; 21-25 and pages 27 through 29). No error occurred. This appeal fails.

B. THE TRIAL JUDGE DID NOT TESTIFY OR RELY UPON PERSONAL KNOWLEDGE

Appellant has mischaracterized the explanation by the judge of his ruling on the motion in limine and the finding of guilt as testimony. The trial judge herein did not conduct any independent research and did not base his findings on his own personal knowledge.

The logical extension of appellant's argument is that any explanation of a ruling or finding is testimony by the judge. Such a holding would preclude a judge from providing his/her reasoning for the ruling or finding. A judge should not be precluded from giving an explanation for a ruling or finding.

1. MOTION IN LIMINE - PHOTOS AND VIDEO

The Appellant alleges the judge testified during his ruling on the State's motion in limine. The judge explained that he was granting the motion in limine to exclude the photos and video of I.G. and D.G. in the presence of Appellant at family gatherings. The judge specifically states that the basis for the ruling on the motion in limine is that the photos were not relevant. (RP volume 1 at page 26;21-23). The judge then addresses the Appellant's argument for admission of the photos, and his explanation as to why the appellant's argument does not meet the relevance requirement. (RP volume 1 at page 26;23-25 through page 29 generally). The judge stated that the photos were not helpful to him either way. (RP volume 1 at page 27; 11-15). The ruling on the motion in limine was a ruling on the relevance of the proposed evidence, not testimony.

The judge did not conduct an independent investigation or base his ruling on personal experience with child victims of sexual abuse. The judge said the information was not helpful either way, which means the judge made no finding either way that the photos were conclusive of anything. (RP volume 1 at page 27; 11-15).

Evenso, the judge indicated that he would allow the evidence to come in if the door was opened to show that I.G. and D.G. were afraid of Appellant. (RP volume 1 at page 28; 4-6). The judge did not preclude Appellant from fully arguing his theory of the case or evidence. The Appellant called several witnesses who testified as to the behavior of I.G. and D.G. in Appellant's presence at family gatherings.

2. APPELLANT'S UNDISCLOSED EXPERT WITNESS

The appellant cites on page 27 of Appellant's opening brief the portion of the record where in the judge addresses the state's objection to the request for testimony from an undisclosed expert witness on the final day of fact finding. (RP Volume 3 at page 377; 19-21). The appellant fails to cite the balance of the judge's reasoning wherein he explains that whether I.G. was afraid or not afraid of Appellant, when others were present, was not relevant.

> COURT: The allegations thus far have been it's always at night, it's always when we're alone in a room or after everybody is asleep in a room, that's when it happens, that's the allegation.

There is no indication that the judge relied on independent investigation or personal knowledge in making this comment. The judge in fact went on to require the state interview the witness and then allowed

both sides to argue whether she should be allowed to testify. (RP Volume 3 at page 377-378).

The judge explained his ruling on excluding the witness:

COURT: I exclude the testimony of the witness. Again, it's absolutely undisputed in the case that I.G. dearly loves his cousin. Joel. He loves to be around him, he worships the ground he walks on, he looks at him as the older brother he does not have, but he testifies there's something that goes on after dark in closed doors, in private, that he doesn't like at all.

But that during the daytime, he pleases him. He does things, interact, be able to interact, he loves being around him. That is undisputed in the record. I don't need an expert to tell me that.

The judge did not conduct any independent investigation or base his decision on personal knowledge. The judge's explanation does not include any of the errors alleged. The judge specifically cites testimony which was presented to the court during the fact finding. That is the only reference and the only basis for the court's decision.

3. FINDING OF GUILT

The appellant alleges the judge's finding of guilt was based upon judicial notice. (RP Volume 3 at page 449; 4-17). The judge states that his finding is based upon the testimony presented to the court during the fact finding and the reasonable deduction or inference from the evidence. No error occurred.

COURT: He testified it happened every time, upwards of 100 times, but minimal testimony was that even from Joel's (Appellant) testimony, he was, he spent the night with him at least twice a month, and from Karla's testimony, it was upwards of four to eight times a month, and as far as the lack of fear by someone who is 4 to 8 years old or 5 to 9 years old, if something has become so commonplace that it happens every time you spend the night with somebody, you may not like it, it may not geel good, but who says you're going to be afraid of it?

You just know it's coming. I mean, I think the evidence, as a reasonable deduction or inference from the evidence, why would you be afraid of it? I mean it's just commonplace. He reported it to one adult and nothing ever happened, the grandpa or whatever.

He reported it to one adult and he was poo-pooed away, brushed aside with trying to make the disclosure.

(RP Volume 3 at page 449;4-21)

The cases relied upon by appellant, *Elston* and *Lewis*, are distinguishable and not applicable to the facts herein. In *Elston v. McGlauflin*, 79 Wash. 355, 140 P. 396 (1914), the judge went to the location in question and viewed the premises without consent of the parties. The judge disregarded the defendant's evidence and made his inspection and observation an integral part of his judgment. (*Id.* at page 359). No such thing occurred herein. The trial judge, in this matter, specifically based his rulings and findings on the evidence presented, as set forth above. The *Elston* case in not applicable.

In *United States of America v. Lewis*, 833 F.2d 1380 (1987), the trial judge based his ruling on a motion to suppress on his own personal

experience of anesthesia. The *Lewis* judge did not cite to any evidence in his ruling, only to his own experience. This matter is completely opposite. The trial judge herein based his rulings and findings only on the evidence presented, as he stated in his explanation. (RP Volume 1 pages 26 through 29 and Volume 3 pages 447 through 449) and (CP 3).

The appellant cannot cite to any portion of the record herein where the judge states that his rulings or findings are based upon an independent investigation he conducted or upon his personal experience with child victims of sexual abuse.

4. THE JUDGE CONSIDERED ALL EVIDENCE PRESENTED

The Appellant presented evidence of the lack of fear on the part of I.G. and D.G. while in Appellant's presence through testimony of his witnesses, and through cross-examination of the state's witnesses. (Se generally the testimony of Karal Arroyo, Xochitl Arroyo, Maria Saldivar, Josie Arroyo and Maria Conception Saldivar). The appellant was able to fully argue his theory that the lack of fear of I.G. and D.G. was evidence that no rapes occurred. (Id). The judge weighed all of the evidence and his rulings and findings as set forth above were based solely on the evidence presented and the reasonable inferences therefrom. (RP Volume 1, at page 26; 21-25 through 29; 1-25 and Volume 3 at page 446 through 449). The

judge is presumed to consider only the properly admissible evidence. *State v. Read,* 147 Wash.2d, 238, 53 P.3d 26 (2002).

A judge is permitted to provide explanation of their rulings. *State v. Brown,* 19 Wash.2d 195, 142 P.2d 257 (1943), *State v. Whetstone*, 30 Wash.2d 301, 191 P.2d 818 (1948).

C. EXCLUSION OF APPELLANT'S UNDISCLOSED EXPERT WITNESS WAS PROPER

On the last day of fact finding, the Appellant sought to present testimony from his counselor. Appellant argued that his lack of confession to his counselor was relevant. Appellant also argued that Ms. Huett could testify that the lack of obvious fear by I.G. and D.G. proved the rapes did not occur. (RP Volume 3, at page 383; 3-10 and 382; 5-11).

1. HUTCHINSON FACTORS

Even though the factors were not raised by appellant at fact finding, and objection is therefore waived on appeal, the analysis of the factors shows that exclusion of the witness was proper. Admission of the undisclosed expert testimony would have been reversible error.

The *Hutchinson* factors, as set forth in *State v. Hutchinson*, 135 Wash.2d 863, 959 P.2d 1061 (1998), weigh in favor of exclusion.

The court sets out the factors as follows:

> Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988), and the factors to be considered in deciding *883 whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *Taylor*, 484 U.S. at 415 n. 19, 108 S.Ct. 646 (citing *Fendler v. Goldsmith*, 728 F.2d 1181, 1188–90 (9th Cir.1983)).

State v. Hutchinson, 135 Wash. 2d 863, 882-83, 959 P.2d 1061, 1071 (1998).

An analysis of the *Hutchinson* factors clearly supports exclusion:

(1) the effectiveness of less severe sanctions;

The exclusion was based upon Rule of Evidence 402, Rule of Evidence 702 and the Frye[1] standard. (See argument herein C.2.a-c). A continuance would serve no purpose since the proffered testimony was not admissible under ER 402 or 702 or the Frye standard.

[1] Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923)

Consistent behavioral characteristics of child victims of sexual abuse are not a generally accepted principal in the scientific community. *State v. Jones*, 71 Wash.App. 798, 819-820, 823 P.2d 85 (1993).

Since the proffered expert testimony was inadmissible under Evidence Rule 402 and Evidence Rule 702 and under the *Frye* standard, the argument that a lesser sanction was required is specious. The bottom line is that the proffered testimony was inadmissible. The *Hutchinson* factors need not have been considered.

(2) the impact of witness preclusion had no impact on the evidence at trial and the outcome of the case;

Since the judge indicated that the proffered testimony would not help him one way or the other there was no effect on the outcome of the case by preclusion of Ms. Huett. (RP Volume 3 at page 383; 12-22).

Additionally, Ms. Huett's testimony is inadmissible under the *Frye* standard. There is no basis for admission of Ms. Huett's testimony under any rule of evidence or under *Frye*. The exclusion of her testimony could not be error.

(3) Prosecution was surprised and would have been severely prejudiced by the witness's testimony;

Appellant admitted that Ms. Huett was an undisclosed witness. (RP Volume 3 at page 377; 5-7). Appellant sought to present her testimony after the State had rested and on the morning of the last day of fact finding. (RP Volume 3 at page 380; 15). The State would have been unable to present any expert testimony to counter the testimony proffered by Ms. Huett. The court would have committed reversible error in admitting Ms. Huett's testimony and reversible error if the court had allowed the State to present, by their own expert, inadmissible testimony under *Frye*. The only way to avoid such error was for the court to exclude the testimony, as it did.

(4) The violation was willful and in bad faith.

Appellant had been seeing Ms. Huett as counselor for ten months at the point of the fact finding. (RP Volume 3 at page 375; 21-25). Ms. Huett had spoken with Appellant's attorney one month prior to fact finding. (RP Volume 3 at page 380; 8-10). Appellant's attorney failed to reveal that fact to the court, but only informed the court that he spoke to Ms. Huett the night before the last day of fact finding. (RP Volume 3 at page 376; 2). The State explained that the Appellant's defense theory (which was to be the subject of Ms. Huett's testimony) was discussed many times with Appellant's counsel since charges were filed, which was

some five months previous. (RP Volume 3 at page 378; 23-25 through 379 1-4). Appellant's attorney set out the same defense theory in his argument on the State's motion in limine to exclude the photographs and video as he claims to have thought of just the night before he proffered Ms. Huett's testimony. (RP Volume 1 at page 16-18 generally). Appellant's attorney also cross-examined the State's witnesses and examined his own witnesses, a week prior, on the basis of that same theory he claimed to have thought of the night before. (RP Volume 1 at page 194; 25 through 195; 1-2 and page 224;22-25 through 225; 1-7 and page 204 – 210 and 333-345 and 347-363 generally).

Appellant's attorney was well aware of the theory of defense before the last morning of fact finding. Appellant's attorney spoke to Ms. Huett a month before the hearing. (RP Volume 3 at page 380; 8-12). The reasonable inference is that Appellant's attorney could have disclosed Ms. Huett a month before the fact finding.

The *Hutchinson* factors weigh in favor of exclusion. This appeal fails.

2. APPELLANT'S EXPERT WITNESS WAS PROPERLY EXCLUDED BASED UPON EVIDENCE RULE 402, EVIDENCE RULE 702 AND THE FRYE STANDARD

A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. *State v. Foxhoven*, 161 Wash.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002)).

State v. Venegas, 155 Wash. App. 507, 520, 228 P.3d 813, 820 (2010).

a. RELEVANCE- Evidence Rule 402

The testimony of Ms. Huett was not admissible under Evidence Rule 402.

Relevant evidence is defined in Evidence Rule 401.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible

ER 402Wash. R. Evid. 402.

The proffered testimony of Sue Huett was determined to not be relevant. The judge explained that since the witnesses in the State's and Appellant's cases testified that I.G. and D.G. did not show obvious fear when they were around Appellant in family gatherings, the testimony of Sue Huett would not add anything. (RP Volume 3 at page 383; 12-22). Ms. Huett's testimony was not relevant and inadmissible.

b. EXPERT TESTIMONY MUST ASSIST TRIER OF FACT – Evidence Rule 702

Ms. Huett's testimony was not admissible under Evidence Rule 702.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702Wash. R. Evid. 702

After considering the offer of proof made by Appellant, the judge made a specific finding that the proffered testimony would not assist him in understanding the evidence. (RP Volume 3 at page 383; 19-22). Expert testimony is only allowed when it is necessary to assist the trier of fact.

ER 702Wash. R. Evid. 702. If the proposed expert testimony is not relevant and not helpful to the trier of fact it is not admissible.

c. FRYE STANDARD

If an expert's opinion is based upon a scientific theory or method, the theory or method should be one that is general accepted in the scientific community. *Frye v. United States,* 293 Fed. 1013 (D.C. Cir. 1923).

Testimony on the general behavioral characteristics of sexually abused children is excluded under *Frye.* There is no generally accepted theory of behavioral characteristics of child victims of sexual abuse.

> Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse. (citations omitted).
>
> We find a majority of other jurisdictions have reached a similar resolution with regard to generalized testimony of behaviors of abused children. A number of courts have found that testimony regarding the behaviors of a class of abused children is not sufficiently established to meet the Frye standard or an equivalent test for scientific reliability under ER 702. (citations omitted).
>
> In sum, the use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under Frye. However, such

> testimony may be used to rebut an inference that certain behaviors of the victim, such as sexual acting out are inconsistent with abuse.

State v. Jones, 71 Wash.App. 798, 819-820, 823 P.2d 85 (1993).

The testimony of an expert as to behavioral characteristics of sexually abused children is subject to the *Frye* analysis and is not admissible. Ms. Huett's testimony was not admissible. No error occurred.

3. ANALYSIS OF THE HUTCHINSON FACTORS BY THE TRIAL COURT IS WAIVED ON APPEAL

Appellant failed to raise the issue of the *Hutchinson* factors at the ruling on the exclusion of Ms. Huett. Failure to raise any issue as to the analysis of the *Hutchinson* factors precludes the appellant from claiming error on appeal. The appellate court does not consider an evidentiary issue raised for the first time on appeal because failure to object deprives the court of the opportunity to prevent or cure any error. *State v. Curtiss*, 250 P.3d 496 (2011). Had Appellant raised the issue of the *Hutchinson* factors, the court would have been able to address each factor, and as set forth above the court would have been able to make a clear record that the *Hutchinson* factors weighed in favor of exclusion. This appeal fails.

Appellant failed to raise the issue of the *Hutchinson* factors at trial. (RP Volume 3, at pages 376 and 381-383 generally). Failure to raise the *Hutchinson* factors at the trial is a waiver on appeal.

D. THE DOCTRINE OF CUMULATIVE ERROR IS INAPPLICABLE

The doctrine of cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber,* 159 Wash.2d 252, 279, 149 P.3d 646 (2006).

The errors alleged in this appeal are specious. There are three errors alleged. First the alleged taking of judicial notice and second the allegation that the judge testified and third the exclusion of Ms. Huett.

The State has shown through the record that the judge did not take judicial notice of any facts. The ruling on the motion in limine and the finding of guilt were specifically based upon the evidence presented and the reasonable inferences therefrom. The findings of fact are the evidence of the case, judicial notice was not part of the findings. Appellant's argument that the court erred in taking judicial notice is specious. This appeal fails.

The second alleged error did not occur. The judge did not testify. The appellant's mischaracterization as testimony of the explanation of the ruling and findings does not make the explanation testimony. The appellant raised issues, the judge entered rulings and findings and explained his ruling and findings. The explanations referenced only properly admitted evidence. The judge did not testify.

The third alleged error is the failure of the court to analyze the exclusion of Ms. Huett based upon the *Hutchinson* factors. The State has shown that the testimony sought from Ms. Huett was inadmissible under Evidence Rule 402 and inadmissible under Evidence Rule 702 and inadmissible under the Frye test. Had the *Hutchinson* factors analysis been conducted, the factors would weigh in favor of exclusion.

> In reviewing the evidence, we give deference to the trier of fact, which resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415–16, 824 P.2d 533, review denied, 119 Wash.2d 1011, 833 P.2d 386 (1992).
>
> *State v. Beasley*, 126 Wash. App. 670, 689, 109 P.3d 849, 860 (2005).

The judge weighed the evidence before him and considered the credibility of each witness. The trier of fact has the right to weigh conflicting testimony and make findings based thereon. The rulings and

findings are supported by the evidence as set forth in the record. The appellate court should defer to the trier of fact.

The *Venegas* case, cited by Appellant is not applicable. The court in *Venegas* excluded testimony by a medical expert as a discovery sanction. The testimony of a medical expert as to cause of injuries would satisfy the *Frye* test. Such is not the case here, Ms. Huett's testimony would have been error to admit. Such testimony is inadmissible under the *Frye* test. The *Venegas* court found many significant errors, none of which exist in the within matter. The case does not apply.

The cumulative error doctrine requires actual cumulative errors. No errors were made by the trial judge herein. The cumulative error doctrine is not applicable. This appeal fails.

III. CONCLUSION

Based upon the foregoing it is respectfully requested that this appeal be denied.

Dated: Aug 6, 2013

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