907168-4

No. 311147-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JOEL GONZALES,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joel Gonzales, Appellant in the Court of Appeals, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Opinion filed by the Court of Appeals on August 7th, 2014, which affirmed Appellant's juvenile convictions. A copy of the decision is in the Appendix at pages A-1 through A-13.

C. ISSUES PRESENTED FOR REVIEW

1. Did Petitioner receive an unfair trial because of the trial judge's pre-existing opinions on the significance of an alleged victim's lack of fear of the accused?

2. Did the trial court err and deny Petitioner a fair trial by excluding an expert witness on the issue of the significance of the alleged victim's lack of fear of the accused?

D. STATEMENT OF THE CASE

Petitioner, thirteen-year-old Joel Gonzalez, was charged with three counts of first degree rape of a child, by allegedly anally raping his nine-year-old male cousin. (CP 1-3). No physical evidence was presented at trial.

In addition to the testimony of I.G., the alleged victim, the State presented testimony of D.G., his younger sister, and of their mother, Karla Arroyo.

The State originally charged Count II as occurring July 7th, 2011, but at trial changed he date to June 7th, 2011. CP 1, RP 296:2-14. On the night of June 7th, Joel spent the night at the home of Karla Arroyo. She entered the room and found them "spooning" with their pants down. At that time, both denied any sexual activity. RP 164-65, RP 177-80. Ms. Arroyo did not observe anything else to suggest otherwise. RP 164, 180-81.

At trial, I.G. denied any rape occurred during the June 7th, 2011 incident and could not remember if he was raped anytime during the summer of 2011. RP 50, 107-08.

Joel testified that on the night of June 7th, 2011, it was hot in the bedroom and he slept only in his underwear, which had slipped down while he slept. He denied committing any sexual activity. RP 23-25, RP 401, 402, 404. After Ms. Arroyo had come into the room, he offered to sleep on the couch, and she declined his offer, but he moved to the couch anyway. RP 403.

Joel denied ever committing any rapes against I.G. RP 404.

On June 23rd, 2011, Ms. Arroyo asked I.G. if he had been the victim of sexual abuse, and related to him that she had been a victim of sexual abuse. After some prodding, I.G. stated that he had been touched by Joel. RP 174-77. I.G. testified that Ms. Arroyo told him five to ten time of her own sexual abuse. RP 86.

Joel's mother, Ms. Arroyo's sister, testified that the day of the "spooning" incident that Ms. Arroyo took Joel and I.G. to see her brother, allowing them to spend most of the day together. RP 388-89.

Joel's mother and grandmother testified that Karla Arroyo continued to leave I.G. and his younger sister at the grandmother's home, even though Joel lived there. RP 299, 301, 328-29, 330, 358, 363, 367-68.

The State argued, and the Court found, that Count I occurred on June 19th, 2011, the last time the two boys spent the night together at their grandmother's home. RP 412, 449. I.G. had instead told a sheriff's deputy that the last rape occurred on June 7th, 2011, the last time Joel spent the night at the home of I.G. CP 49. I.G. gave conflicting accounts at trial of when the last rape occurred. RP 51, 54, 67, 71.

I.G. testified that Joel raped him whenever I.G. spent the night at his grandmother's home, and that it happened about 100 times. RP 65. I.G's younger sister testified that she observed a sexual act by Joel against I.G, at her grandmother's house, but could not remember when it occurred. RP 146-47. I.G. denied anyone else was present during any sexual acts. RP 111-12.

The defense theory was that I.G.'s claims of rapes were not credible, in light of his continued association with Joel, in fact, I.G. would seek out the company of Joel. CP 108-10, CP 148-60. The defense indicated its intent to offer testimony, photos and video of the interaction among Joel, I.G. and D.G. after the rapes were reported to the Sheriff's Office. CP 108-10.

The Superior Court judge initially ruled that he would not allow such evidence, unless the State opened the door to it. RP 26:21-23.

The trial judge reiterated that such evidence was not relevant, and that the defense position relied upon a false assumption that young children would know something wrong had occurred.

> Little kids don't know it's wrong when they're raped and molested. I'm sorry, I can't take judicial notice of that, but I go to the judge schools, like everybody else, and we get the education conferences and we are taught and learn that they don't know it's wrong, they don't know when things are morally incorrect about it.
>
> RP 26-27.

The trial judge suggested that expert testimony would be needed to support a conclusion otherwise. RP 29:14-20.

At trial, I.G. testified that rapes had caused him pain and bruising and that the rapes were a "[b]ad thing, bad thing" which made him feel bad. RP 47-49, 52, 58, 59, 61, 70, 71, 88.

After the State's case-in-chief, the trial judge acknowledged the State had opened the door "somewhat" to I.G.'s interactions with Joel, RP 201-02, and family members testified that I.G. never seemed reluctant or unhappy to be around Joel. RP 206-09, 341.

He would ask to spend time with Joel, even after the allegations were made. RP 306, 338-39.

After the allegations, Joel and I.G. continued to spend time together, and I.G. wanted to have his hair cut like Joel's. Joel's mother took photos and videos of them together after the allegations. RP 306, 316, 332. The photos and video depicts the two having fun together, and I.G. not wanting to leave his grandmother's because he wanted to stay and play with Joel. CP 126-44, RP 318.

The trial judge refused the defense request for him to view the video. RP 319-21. The judge explained that "there's been no significant or substantial evidence of fear or not wanting to be around by [I.G.] shown towards Joel. I find that has been proven beyond a reasonable doubt." RP 320:4-20.

After seeking and accepting the State's stipulation to the content of the videos, the trial judge stated that the interaction between I.G. and Joel did not "really mean a whole lot to the [the Court] because the 18th of July is nearly a month after the last allegation date." RP 316-18, 321.

The grandmother testified that I.G. had been to her home about 100 times since the allegations were made, and had showed no reluctance to be around Joel and in fact he was happy to be around Joel. RP 358-62. I.G.'s mother, Ms. Arroyo, confirmed that same fact. RP 194-95.

After a ten-day recess, the defense moved to introduce expert testimony from Joel's therapist, Sue Huett, to rebut the trial judge's theory regarding the behavior of child victims of sexual abuse. RP 375:18-24.

Defense counsel pointed out that the testimony was offered because of the State's and the court's comments on whether sexually abused children display fear or discomfort around their abusers. RP 376:5-20.

The State objected in part on the basis of lack of timely disclosure, but also on relevance. RP 379-80.

In argument and an offer of proof, it was indicated Ms. Huett had experience with 200-250 child victims of abuse and their abusers. RP 379-83. Ms. Huett was expected to testify that of victims, "virtually one hundred percent of them expressed a fear of the perpetrator and showed that." RP 383:5-9.

The trial judge ultimately excluded the Huett testimony on the basis that it was "just not probative enough for me to bend those rules" regarding timely disclosure of witnesses, because "it's absolutely undisputed in the case" that I.G. loves to spend time with Joel, "but he testifies there's something that goes on after dark in closed doors, in private, that he doesn't like at all." RP 383: 12-18, 25, to RP 384:2.

The Superior Court found Joel guilty of three counts, finding Count I occurred that last time I.G. spent the night at his grandmother's, Count II had occurred the last time Joel spent the night at I.G.'s, June 19, 2011, and Count III occurred June 27th, 2011. RP

In addressing the defense argument that I.G. was not afraid of Joel, the Court found that since the abuse had become so commonplace, that he may not have liked it, but he wouldn't have been afraid. RP 449:10-17.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Summary of Argument

The pre-existing opinions of the trial judge, formed from attendance at judicial trainings, that there is no relevance to whether an alleged victim displays fear or not of the alleged perpetrator, deprived Petitioner of a fair trial.

The trial court erred in excluding expert testimony offered to rebut the judge's own opinion on the relevance of the alleged victim's lack of fear of the accused, especially it was partly on grounds of late disclosure, when the defense could not have foreseen the need to rebut the judge's own opinion.

1. The trial court judge erred in using his own opinions from judicial training on a critical issue of credibility

A defendant has "a right to the free judgment of a court or jury, unclouded by bias, prejudice, or fixed or preconceived opinion." *Elston v. McGlauflin*, 79 Wash. 355, 359, 140 P. 396 (1914). Did that occur in this case? On a critical issue, credibility, the trial court

judge applied specific concepts said to have been acquired in judicial trainings; that child victims of sexual abuse do not realize anything wrong has occurred, and therefore would not have fear of their perpetrator. Conceding that may be true in some cases, the judge did not weigh whether it was the case here or not, he seemed to be saying it would never enter in. A fair judge would have considered the possibility that I.G.'s continued willingness to want to associate with Joel Gonzalez could reflect on the truthfulness of I.G.'s claims of awful acts carried out upon him by Joel.

It was more than just applying common sense, as if that were the case, why would it have to be covered in judicial seminars? Whether or not in a particular case a child's lack of fear of another person meant something would seem to be a factual inference, not a cut in stone rule that never varies.

In *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005), a judge's refusal to even consider imposing a Drug Offender Sentencing Alternative was reversed, where the judge stated there were no State funds to pay for the treatment, meaning the defendant would get less incarceration but without treatment.

> It is clear that the trial court relied on extrajudicial information at the sentencing hearing. Constitutional and

> statutory procedures protect defendants from being sentenced on the basis of untested facts. See generally *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004);
>
> *Grayson*, 154 Wn.2d at 338-39.

Similarly, in this case, the judge's own statements show he relied upon "extrajudicial information." Grayson is illustrative in that the Supreme Court of Washington draws a line between a judge not having to leave common sense at the door of the courtroom, but also not being allowed to use "adjudicative facts" gained outside that door. Judges don't have to "enter the courtroom with blank minds. Judges are not expected to leave their common sense behind." 154 Wn.2d at 339. But a hearing must be held on "adjudicative facts." "Adjudicative facts are usually those facts that are in issue in a particular case." *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D.Cal.1984); *Grayson*, 154 Wn.2d at 340.

> The court should only consider adjudicative evidence that the parties in an adversarial context have "the opportunity to scrutinize, test, contradict, discredit, and correct." George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 St. John's L.Rev. 291, 319 (1998) (citing *E.I. du Pont de Nemours & Co. v.*

Collins, 432 U.S. 46, 57, 97 S.Ct. 2229, 53 L.Ed.2d 100 (1977));

Grayson, 154 Wn.2d at 340.

Underlying the requirements laid out by the Court's ruling in *Grayson* was the "principle of due process." *Id.* Here the judge repeatedly said he did not doubt that I.G. had no fear of Joel. And, repeatedly said it could not have any significance. But it was the right of the Defendant to at least argue that fact had significance that was not afforded. The judge was dead-set that it simply could not mean anything.

It would be different if the judge had said, the lack of fear could mean there was reasonable doubt about I.G.'s allegations, but given all the circumstances, such as the child's youth, etc., he found in this particular case, that I.G. was still abused.

Instead the judge was saying there can be ***no*** circumstances under which an alleged victim's lack of fear of the alleged perpetrator may create reasonable doubt. He would not even consider it from the outset. That is not a fair trial.

Pursuant to ER 605, the defense was not required to object to the judge's expression of his opinions at the time.

The use by the judge of his pre-formed opinion on an adjudicate fact to convict Joel Gonzales violated his right to a fair trial as guaranteed by Const. Art. I, sec. 22.

Review should be accepted by the Court pursuant to RAP 13.4(b)(1) as the Court of Appeals decision violates the standards set forth in *Grayson*, supra, and in *Elston v. McGlauflin*, supra. And review should be accepted RAP 13.4(b)(3) because the decision of the Court of Appeals violates due process of law and the right to a fair trial as guaranteed by Const. Art. I, sec. 22.

2. <u>The trial court erred in excluding expert testimony offered by the defense on the issue of the alleged victim's lack of fear of the accused</u>

"Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." *State v Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

> Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988), and the factors to be considered in deciding 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.
>
> *Hutchinson*, 135 Wn.2d at 882-83.

Less severe sanctions should have been imposed, such as affording the State, after a ten day recess anyway, additional time to interview the witness and determine if the State wanted to procure its own expert on the subject. The impact upon the case is indeed heavy, as the trial court judge, as argued above, said he was relying upon knowledge gain in judicial trainings, not on common knowledge, and the defense had no way of knowing that until trial started, and no other way of countering it, since the judge indicated it was specialized knowledge. The prosecution was in fact not prejudiced as presumably the State knew at some point that I.G.'s continued association with Joel would be a factual issue. The State received an advantage of the judge's use of his own knowledge of adjudicative facts from judicial training that supported the State's theory, but countered the defense theory. The "violation"

was not in bad faith, as the defense did not know until the start of trial that the judge was relying upon adjudicative facts learned by him from judicial trainings.

Certainly the evidence was, at a minimum, relevant. "The standard for relevancy is whether the evidence gives rise to reasonable inferences regarding [a] contested matter or throws any light upon it." *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970).

Evidence of the behavior of child victims of sexual abuse is relevant to whether or not the abuse occurred and where necessary to rebut contrary theories explaining the behavior of the alleged victim. *State v. Stevens,* 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990).

The right to compulsory process guarantees defendants the right to present a defense and their version of the facts. *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967).

At some point, a court may so restrict a defendant's opportunity to present evidence to support a theory of the case that courts of review will step in and conclude that she was denied the

right to a meaningful defense. See *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

> " The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. Id. " The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).
>
> *Jones*, at 720.

"These rights are not absolute, of course. Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" Id., quoting *Darden*, 145 Wn.2d at 622.

The Supreme Court of Washington in Jones held: "The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment." *Jones*, at 721.

Review should be accepted of this issue under RAP 13.4(b)(3) as the ruling of the trial court in this case violates the right to call witnesses under the Sixth Amendment, and under Const. Art. I, sec. 22.

3. The cumulative effect of the errors requires reversal.

This Court may reverse a conviction when the combined effect of errors during trial denied the defendant his right to a fair trial, even if each error standing alone would be harmless. *State v. Venegas*, 155 Wn.App. 507, 520, 228 P.3d 813 (2010). The test is whether there is a substantial likelihood that the cumulative effect of the errors denied the accused a fair trial. *State v. Jones*, 144 Wn. App. 284, 301, 183 P.3d 307 (2008).

Where the case turns upon the credibility of witnesses, as here, the combined errors can have a greater impact on the verdict. *Venegas*, 155 Wn. App. at 526, *Jones*, 144 Wn. App. at 300-01; *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

F. CONCLUSION

The Court should accept review, reverse the convictions, and remand for a new trial before a different judge, at which the defense should be allowed to call their expert witness, and at which the trial judge shall give consideration to all appropriate factors in determining the credibility of I.G., the alleged victim.

Respectfully submitted,

Dated September 8th, 2014

William Edelblute
Attorney for Petitioner
WSBA 13808

Certificate of Mailing

I hereby certify that on the 8th day of September, 2014, I mailed a true and accurate copy of the foregoing Petition for Review to Rea Lynn Culwell, Prosecuting Attorney, 116 N. 3rd, Dayton, Washington, 99328-1149.

William Edelblute
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FILED
AUGUST 7, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 31114-7-III
v.	)	UNPUBLISHED OPINION
JOEL GONZALEZ, Appellant.	)	

CULP, J.* — Joel Gonzalez appeals his three juvenile adjudications for first degree rape of a child, arguing the trial judge's comments regarding the behaviors of child victims of sexual abuse constituted improper judicial notice of facts in violation of ER 201 as well as testimony from the judge contrary to ER 605. He also contends the trial court erred in excluding a defense witness and that cumulative error deprived him of a fair trial.

* Judge Christopher Culp is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

Finding no error, we affirm.

FACTS

Joel Gonzalez (D.O.B. 8/27/98) was 13 years old when the State charged him with three counts of first degree rape involving his younger male cousin, I.G. (D.O.B. 3/29/03).[1] The evidence showed that Joel and his cousins spent a significant amount of time together and that Joel anally raped I.G. at least three times when Joel and I.G. spent the night together at their homes or their grandmother's house.

Before trial, the State moved to exclude defense photographs and videos of Joel interacting with I.G. and D.G. during family gatherings on the basis that they were irrelevant. The State argued, "[t]he photos basically show children in the presence of other people, and we know that children who are abused do not necessarily behave in a manner that is obvious to us around their abusers. They don't necessarily cower in the corner." Report of Proceedings (RP) at 9. The defense responded that the photographs and videos were necessary to impeach the testimony of witnesses concerning I.G.'s and D.G.'s fear of Joel and to give the court the entire picture of the relationship between the cousins.

[1] After trial, the juvenile court dismissed a charge of attempted first degree rape of

The court granted the State's motion, concluding that the photographs and video were irrelevant to whether the alleged rapes occurred. The court explained that children do not necessarily know it is wrong when they are raped or molested, and the fact that I.G. and D.G. were comfortable around Joel at family gatherings had no bearing on whether the rapes occurred.

At trial, I.G., who was nine years old at the time of trial, testified that Joel put his "private part" in I.G.'s anus on more than five or six occasions. RP at 48. He testified that this happened when Joel spent the night at his house or at their grandmother's house. I.G.'s sister, D.G., who was seven years old at the time of trial, testified that she saw Joel put his "private part" in I.G.'s "private part." RP at 146.

Karla Arroyo, I.G. and D.G.'s mother, testified that in June 2011, Joel spent the night with I.G. and D.G. at her house. Ms. Arroyo testified that she got up in the night to go to the bathroom and checked on Joel and I.G. She saw that they "both had their boxers down" and "Joel was spooning [I.G.]." RP at 163. Ms. Arroyo woke Joel, who denied that anything inappropriate happened.

Part of the defense theory was that the rapes did not occur because I.G. did not show visible signs of fear in the presence of Joel. Maria Saldivar Guiterres, I.G.'s great

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a child against a female cousin, D.G. (D.O.B. 11/17/04).

aunt, testified that she observed Joel and I.G. interact on numerous occasions and never saw I.G. exhibit any fear or unhappiness around Joel.

Xochitl Arroyo, Joel's mother, testified that Joel and I.G. got along together and that she never observed I.G. exhibit any fear around Joel. Josephina Arroyo, Joel's and I.G.'s grandmother, also testified that she never saw I.G. express any fear or discomfort around Joel. She stated the boys are "wonderful together" and that "[I.G.] is happy to be with Joel." RP at 362.

Joel testified that he never attempted to have anal intercourse with I.G. or touch him in a sexually inappropriate manner.

On the last day of trial, Joel sought to introduce the expert testimony of Susan Huett, his counselor. Defense counsel explained that Ms. Huett had worked with 200 to 250 child sexual abuse victims and that she would testify that virtually all juvenile victims of sexual abuse showed fear in the presence of the perpetrator.

The court did not permit Ms. Huett to testify, finding the proposed testimony was not sufficiently probative. It stated, "it's absolutely undisputed in the case that [I.G.] dearly loves his cousin, Joel. He loves to be around him . . . . That is undisputed in the record. I don't need an expert to tell me that." RP at 383.

The juvenile court adjudicated Joel guilty of three counts of first degree child rape. Joel appeals the adjudications.

ANALYSIS

Judicial Notice/Testimony. We first address whether the trial court became a witness or improperly took judicial notice of certain facts during the bench trial. Joel argues that the trial judge's comments regarding the behaviors of child victims of sexual abuse constituted both improper judicial notice of facts in violation of ER 201 and testimony from the judge contrary to ER 605.

Initially, we note that Joel did not object to the trial court's statements on grounds of judicial notice and the trial court did not characterize its ruling as based on judicial notice. We review an issue raised for the first time on appeal only if it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To be manifest, Joel must show that the asserted error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). Joel does not identify an error of constitutional magnitude, provide a supporting constitutional theory, or show how the alleged error actually affected his rights at trial. Moreover, evidentiary issues are not errors of constitutional magnitude. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). The

issue is not properly before us.

However, even if we address Joel's arguments, they fail. Joel specifically points to the following comments as evidence of improper judicial notice:

> Little kids don't know it's wrong when they're raped and molested. . . . [T]hey don't know when things are morally incorrect . . . .
> And so that they weren't afraid of or didn't mind being around or absolutely enjoyed Joel's company after either, after the alleged incidents . . . doesn't really help me decide the case at all.

RP at 27.

> [G]iven the tender years of the victim, alleged victims in the case, it doesn't really prove anything one way or another to me that they are comfortable around him in family settings, especially playing video games.

RP at 29.

> [C]hildren rarely know or perceive or comprehend that anything is bad or wrong happening—they may not like it, they may find it uncomfortable, but from the moral code . . . they usually don't have any hint or clue that there's anything wrong going on.
> . . . [H]ow can comfortability around the accused have any bearing on whether or not the allegations have occurred in the first place.

RP at 31-32.

> [I]t'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.

RP at 383.

> [I]f something has become so commonplace that it happens every time you spend the night with somebody, you may not like it, it may not feel good, but who says you're going to be afraid of it?

RP at 449.

Citing *Elston v. McGlauflin*, 79 Wash. 355, 140 P. 396 (1914), Joel first argues on appeal that the judge inserted himself as a witness when he stated his theory that child victims of sexual abuse rarely comprehend that anything bad or wrong is happening. He argues the trial judge's statements were "based upon knowledge obtained independent of the proceedings before the court," were integral to his judgment and, therefore, the judgment must be reversed. Appellant's Br. at 28.

Under ER 605, "[t]he judge presiding at the trial may not testify in that trial as a witness." In *Elston*, during a trial in which negligent construction of an apartment building was at issue, the judge visited the site of the apartment building without the knowledge of the parties or counsel. *Elston*, 79 Wash. at 359. On appeal, the court held that the trial court's independent investigation denied the parties a fair trial because "[t]he court unwittingly became a witness in the case, and in some degree, at least, based his judgment upon his own independent experience and preconceived opinion." *Id.* at 360.

Elston is inapposite. The trial judge in this case did not conduct an independent investigation or make his decision based upon independent experience. The court's findings reflect that it based its decision upon the testimony of I.G., D.G., and their mother. Moreover, evaluated in context, the court's statements about the behavior of child victims of abuse were not "testimony" under ER 605; they were merely part of its explanations for evidentiary rulings regarding the admissibility of photographs of Joel with his cousins and the propriety of allowing a defense witness to testify.

Joel's judicial notice argument likewise fails. He contends, "[w]hether I.G. reacted to the alleged hundreds of rapes in a manner consistent with the behavior of most child victims of sexual abuse was an adjudicative fact that was not appropriate for judicial notice." Appellant's Br. at 22-23. "Judicial notice" means "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact." BLACK'S LAW DICTIONARY 923 (9th ed. 2009). ER 201(b) governs the scope and process for taking judicial notice of facts that are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." ER 201(e).

Contrary to Joel's argument, the trial court did not take judicial notice of disputed facts. As just explained, the court's statements were part of its oral explanation for its evidentiary decisions and did not provide the basis for its findings of fact or conclusions of law. The court simply explained that evidence that I.G. and D.G. were comfortable around Joel in public had no bearing on whether the rapes occurred. In this context, we conclude the court did not take judicial notice of disputed facts.

The trial court did not testify or take judicial notice of facts in violation of ER 605 or ER 201.

Exclusion of Expert Witness. Citing *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), Joel contends the trial court abused its discretion in excluding the testimony of Ms. Huett. He contends the court's exclusion of Ms. Huett's testimony both prevented the defense from rebutting the trial court's opinion regarding the behavior of child sex abuse victims and "severely limited the defense's ability to call the credibility of the State's witnesses into question in a case which depended entirely upon the testimony of lay witnesses." Appellant's Br. at 31. He contends the court should have allowed the State time to interview Ms. Huett and locate a rebuttal witness.

We review a trial court's decision to admit expert testimony for an abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). A trial court

abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds. *State v. Lamb*, 163 Wn. App. 614, 631, 262 P.3d 89 (2011), *aff'd in part, rev'd in part*, 175 Wn.2d 121, 285 P.3d 27 (2012). Where reasonable minds could take differing views, the trial court has not abused its discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Initially, we note that Joel did not argue at trial that the *Hutchinson* factors warranted admission of Ms. Huett's testimony; instead, defense counsel sought to admit the testimony as relevant for impeachment purposes. No error can be assigned to an evidentiary ruling that the court did not address. *See State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). Thus, he waives the argument on appeal.

However, even if we were to consider the issue, *Hutchinson* is inapplicable here. *Hutchinson* involved the propriety of excluding evidence as a sanction for a discovery violation under CrR 4.7. In deciding whether to impose sanctions, the court identified four factors a trial court must consider before excluding testimony: (1) the effectiveness of less severe sanctions, (2) the impact on the evidence at trial, (3) the extent to which the opposing party will be surprised or prejudiced by the evidence, and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-83. Here, the trial court did not exclude Ms. Huett's testimony as a sanction for a discovery violation; the

sole basis for exclusion was the court's determination that the evidence was irrelevant. *Hutchinson* does not apply.

Next, Joel argues that Ms. Huett's testimony was relevant to rebut the court's theory that child victims exhibit no fear around their abusers. He argues, "[e]vidence of the behavior of child victims of sexual abuse is relevant to whether or not the abuse occurred and where necessary to rebut contrary theories explaining the behavior of the alleged victim." Appellant's Br. at 33.

Only relevant evidence is admissible. Under ER 401, evidence is relevant if it makes "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." Joel argues the evidence was relevant under ER 702 because Ms. Huett's expert testimony would have helped the court "understand whether or not the accuser's behavior is consistent with that of victims of sexual assault." Appellant's Br. at 34.

The court was not asked to address whether Ms. Huett's testimony satisfied ER 702; it excluded the evidence as irrelevant under ER 401. It did not abuse its broad discretion in doing so. Ms. Huett would have testified that in her experience, child victims of sexual abuse typically show fear around their abusers. This evidence was of marginal, if any, relevance as to whether the rapes occurred in this case. Admittedly,

numerous witnesses testified that I.G. and D.G. did not show fear when they were around Joel in public during family gatherings. However, the evidence established that the sexual abuse occurred in private; thus, as the court correctly pointed out, the behavior of I.G. and D.G. in public was of little relevance in determining whether the rapes occurred. Accordingly, Ms. Huett's proposed testimony would not have been particularly helpful to the court. The trial court had a tenable basis for excluding the testimony.

The trial court did not abuse its discretion by excluding Ms. Huett's proposed testimony.

Cumulative Error. Joel argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of the trial errors effectively denies the defendant's right to a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). But cumulative error does not apply where there are no errors or the errors are few and have little or no effect on the trial's outcome. *Id.* Because there are no errors here, cumulative error does not apply.

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We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Culp, J.P.T.

WE CONCUR:

Brown, A.C.J.

Korsmo, J.