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Court of Appeal No. 35513-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS BALDERAS,

Appellant.

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APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT

Cause No. 16-8-00320-39

The Honorable Ruth Reukauf

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APPELLANT'S OPENING BRIEF

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### A. ASSIGNMENTS OF ERROR

1. Error is assigned to Finding of Fact No. 8. Circumstantial evidence supports the finding that S.J. used the tablet to view pornography.
2. Error is assigned to Findings of Facts No. 21 through 35. When inconsistencies in S.J.'s testimony are properly considered by the trier of fact and not disregarded for reasons outside of evidence, these findings are not supported by the evidence
3. Error is assigned to Conclusions of Law No. 5 and No. 6. The facts do not support the conclusion that the evidence was sufficient to prove beyond a reasonable doubt that Mr. Balderas was guilty of first degree child molestation.

### ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. The trial court improperly took judicial notice of its personal experience that children do not provide consistent statements in sexual abuse cases and relied on this presumption to disregard the multiple inconsistent statements of the child witness.
2. The trial court denied Mr. Balderas a meaningful opportunity to confront the witness against him when it excused the child witness from providing consistent testimony.

3. The State did not present sufficient evidence to prove guilt beyond a reasonable doubt.
4. The cumulative error doctrine supports reversal and remand for a new trial.

#### B. STATEMENT OF THE CASE

Nicolas Balderas, 14 years-old, was accused by eight-year old S.J. of touching her inappropriately at her home in mid-May 2016. (CP 101 FF 20)

Mr. Balderas's mother, Myra Contreras, and S.J.'s father, Armando Johnson, were in dating relationship. (CP 100 FF 6) In November 2015, about 6 months prior to the alleged incident, Ms. Contreras and her daughter, Isabelle, moved into Mr. Johnson's home where he and his children, S.J. and Lewis, lived. (RP 157-58, 169, 185, 204) Mr. Balderas moved in a few months later. (RP 158, 186) Mr. Balderas and Lewis shared a room, and S.J. and Isabelle shared a room. (RP 117, 118) Mr. Johnson and Ms. Contreras co-parented the children. (RP 178)

S.J. was very mature for her age and not like an ordinary eight year-old. (RP 200-201, 249) She was a very intelligent and advanced child. (RP 69-70, 201) She preferred to be with adults and have adult

conversations. (RP 192) S.J. was familiar with the “birds and the bees” because of her grandmother, Linda. (RP 200) Grandma Linda was very open on the topic. (RP 200) She took it upon herself to educate S.J. on “the birds and the bees” before Mr. Johnson had the opportunity to do so. (RP 200)

S.J. did not like having Ms. Contreras in the home. (RP 114-15) She was a “daddy’s girl.” (RP 196) S.J. found Ms. Contreras a little bossy and not always nice. (RP 114-15) S.J. wanted Ms. Contreras gone. (RP 115) S.J.’s biological mother, Carrie Sears, was no longer in S.J.’s life due to drug abuse. (RP 118, 193-94) S.J. was very upset about this and was seeing a counselor for abandonment issues. (RP 118, 141, 147, 166)

S.J. also did not get along with Ms. Contreras’s daughter, Isabelle, and was jealous of her. (RP 118, 142, 195) S.J. was mad at Isabelle for always trying to get Mr. Johnson’s attention. (RP 118) Isabelle, who was in kindergarten, was immature for her age and annoyed S.J. (RP 152-54) S.J. also wanted Isabelle out of the house. (RP 142)

By contrast, S.J. did not have issues with Mr. Balderas. (RP 192) After she made accusations against Mr. Balderas, S.J. expressed regret to Ms. Contreras that Mr. Balderas was gone, which really surprised Ms. Contreras. (RP 193)

Pornography was found on an electronic tablet at the Johnson's home. (CP 100 FF 7) The tablet did not have parental controls or restrictions. (CP 100 FF 7) Mr. Johnson found that someone in the household had accessed pornography with the tablet. (CP 100 FF 7, RP 160) S.J. had uncontrolled access to this tablet, and it was found in S.J.'s room, as well as Lewis and Mr. Balderas's room. (RP 160, 166, 197) S.J. denied using the tablet to view pornography. (RP 256) A pornographic magazine was also found hidden under the girls' dresser. (RP 149)

Around May 18, 2017, Mr. Johnson and Ms. Contreras got into an argument with Mr. Balderas regarding his cell phone. (CP 100 FF 9, RP 128, 210) Mr. Johnson tried to use physical force to take the cell phone from Mr. Balderas. (CP 100 FF 9) Mr. Balderas left the home and Mr. Johnson and Ms. Contreras were unsure if he was coming back. (RP 180, 188) Mr. Balderas reported the incident to the police, but an investigation found the complaint to be unfounded. (CP 100 FF 9, CP 101 FF 11) S.J. knew that Mr. Balderas and her father did not see eye to eye. (RP 115) S.J. overheard the argument over the cell phone. (RP 147-48, 165, 188-89)

Mr. Balderas, with the help of his older brother, Michael, obtained a temporary restraining order against Mr. Johnson. (CP 101, FF 11 & 12) On May 28, 2016, the police went to Mr. Johnson's home to serve him with the temporary restraining order. (RP 170) S.J. was present and very

upset when the police arrived. (RP 143, 170) She was afraid that her father might get arrested and go to jail or not come back. (RP 143, 189-90) S.J. blamed Mr. Balderas for the police coming to the house. (RP 191) She knew that her father had to go to court over the issue with Mr. Balderas. (RP 143)

On June 4, 2016, which was a week after the police came by the house and a few days before Mr. Johnson's court appearance, S.J. told Lewis that Mr. Balderas had touched her inappropriately. (CP 101 FF 14) Lewis and S.J. were at Grandma Linda's house when she made the disclosure. (RP 62) Lewis sent a text message to Mr. Johnson that Mr. Balderas said some inappropriate things to S.J. (RP 159)

The next day, after Lewis and S.J returned home, Mr. Johnson discussed the matter with them. (CP 101 FF 16) When Ms. Contreras heard about the allegations, she immediately thought there was a relationship between the allegations and the incident between Mr. Balderas and Mr. Johnson. (RP 203)

On June 6, 2016, Mr. Johnson reported the incident to the Moxee, WA police department. (CP 101 FF 18) The police interviewed Mr. Johnson and Lewis the same day. (RP 6) Lewis relayed what S.J. told them about the incident. (RP 6) On June 14, 2016, S.J. was interviewed

by Lisette Allan, a trained child forensic interviewer. (CP 101 FF 19) Ms. Allan's interview was recorded. (Exhibit DE 5)

Based on S.J.'s statements, Yakima County charged Mr. Balderas by amended information with first degree rape of a child, communication with a minor for immoral purposes, and first degree child molestation. (CP 2, 18) In September 2016, Defense counsel conducted interviews with S.J. and Lewis. (RP 88, 223, Exhibits DE 2 and DE 4)

A bench trial was held on April 17, 21, and 24, 2017. (See RPs) The inconsistencies in S.J.'s stories were exposed. S.J.'s first account of the alleged incident was made to Lewis a few weeks after it happened. Lewis remembered being at home with S.J. and S.J. approaching him with the allegation. (RP 132) She reported that Mr. Balderas was upstairs and she was downstairs on the sofa watching television. (DE 2, pg. 178) According to this account, Mr. Balderas came downstairs and forced S.J. to touch his penis. (DE 2 Pg 17) Then he put his hand underneath her pants, put his fingers in her vagina and pulled out a piece of bloody skin. (RP 138) Sophia said Ms. Contreras was sleeping upstairs when it happened and Lewis was outside. (RP 137, 139)

On June 14, 2016, about two weeks after telling Lewis, S.J. gave a different account to Ms. Allan during the child forensic interview. (RP 13-14, DE 5) In this account S.J. reported that she and Mr. Balderas was

sitting on opposite ends the couch watching television when he came over and pulled down his pants to his knees. (RP 35-36) S.J. said it looked hairy and nasty. (RP 36) Then she said Mr. Balderas told her how a man and a woman have sex. (RP 37) About sex, she said “They look like it’s just gross.” (RP 37) Mr. Balderas also allegedly told her that if the man and woman didn’t want to have a baby, they would put on a condom. (RP 37)

For the first time, S.J. reported that Mr. Balderas had a condom. (RP 37) She told Ms. Allan that she was unsure where Mr. Balderas got a condom, but that he put one on in front of her. (RP 37) She vividly described the condom as orange, like a long balloon, stretchy, and rolled up at the bottom. (RP 38) She said that when Mr. Balderas put it on, the condom changed color a little to more brown, and it looked nasty and stretchy. (RP 38) When he had the condom on, he was touching his private part, making it move up and down. (RP 40) She felt grossed out all over. (RP 39) Then, Mr. Balderas left for about two minutes and came back with his pants pulled up. (RP 39) S.J. thought that he may have thrown the condom away in the outside garbage. (RP 39)

S.J. told Ms. Allan that when Mr. Balderas returned, he touched her on top of her clothes and not underneath. (RP 40) Her pants were on and he pushed his fingers into her private area over the top of her clothes.

(RP 40) She also said that Mr. Balderas was making a sucking sound. (RP 41) She said the touching lasted five minutes. (RP 40)

S.J. said the touching stopped when she got up and went to her room. (RP 40-41) Mr. Balderas stayed down stairs watching TV. (RP 41) S.J. said when she checked her private area, it was red and inflamed. (RP 50) She also said there was no blood. (RP 50)

S.J. said that at the time of the incident, both Ms. Contreras and Mr. Johnson were at work, Isabelle was not home, and Lewis was at church. (RP 43)

S.J. verified to Ms. Allan that she told Lewis the same details about what had happened, including the part about the condom and touching her on the outside of her clothes. (RP 45-46, 48) Ms. Allan asked clarification questions, but S.J.'s story remained the same. (RP 46-51)

About three months later, in September 2016, S.J. recounted the alleged incident again in an interview with the defense. (DE 4, RP 246) In this account, S.J. said that Mr. Balderas pulled his pants down and did not allow her to look away. (DE 4, pg. 8) For the first time she said that he physically turned her around and held her down so she looked. (DE 4, pg. 8) He was not doing anything with his private part. (DE 4, pg. 8) Then he

pulled up his pants while still holding her down with one hand. (DE 4, pg. 8) S.J. did not mention a condom in this recollection.

S.J. said she tried to get away but Mr. Balderas touched her in her girl part. (DE 4, pg. 9) She said he put his hand on her privates, but over her clothes and put his fingers in her to about his knuckles. (DE 4, pg. 10) She said that it hurt, but she did not have any injuries and was not bleeding. (DE 4, pg. 10)

New in this interview, S.J. said that when Mr. Balderas finally let her go, she ran to her room and put a heavy box in front of the door. (DE 4, pg. 13) She sat with her back against the door and Mr. Balderas was banging on the door asking S.J. if she was “ready for round two” and saying “come out [S.J.], why are you hiding?” (DE 4, pg. 13) S.J. said she was telling the truth, and although she told little lies, she never told a big lie like this. (DE 4, pg. 13)

Finally, at trial in April 2017, less than a year after the alleged incident, S.J. testified that Mr. Balderas only flashed her for a second or two and touched her for about five seconds. (RP 81, 85) She said that he quickly pulled his pants down and pulled them back up. (RP 83, 89) She said she didn’t remember what it looked like because he did it really fast. (RP 83) She said he touched her outside of her clothes and it lasted five seconds. (RP 85)

Again, in contrast to her earlier vivid recollection, she said that Mr. Balderas never talked to her about sex and never put on a condom in front of her. (RP 83) She also said it stopped because Mr. Balderas stopped, and it didn't hurt afterward and she didn't check for marks. (RP 85-86) While in her earlier accounts she said Lewis approached her, in this account she approached Lewis and she told her dad while they were in his room at home. (RP 86-87)

On cross-examination, when asked about specific details that she told Lewis and Ms. Allan, S.J. was clear that these details did not occur:

Q: [DEFENSE COUNSEL] Now you said you told Lewis about a week after this happened?

A: [S.J.] Yes.

Q: Okay. And you told Lewis exactly what you told Ms. Thorn?

A: Yes.

Q: Did you tell Lewis that [Mr. Balderas] put his hands inside your pants?

A: No.

Q: Did you tell Lewis that he put his fingers inside you down there and pulled out a piece of skin?

A: No.

Q: Did you tell Lewis that [Ms. Contreras] wasn't at work that she was upstairs sleeping?

A: No.

Q: Did you tell Lewis that [Mr. Balderas] forced you to grab his dick?

A: No.

Q: And did you tell Lewis that the piece of skin that [Mr. Balderas] pulled out from your vagina was bloody and red?

A: No.

Q: Did you tell Lewis that [Mr. Balderas] was not on the couch but that he was upstairs?

A: No.

Q: And that he then came downstairs and forced you to touch his penis?

A: No.

Q: Did you tell Ms. Allan that Lewis was at church when this happened?

A: No.

Q: Now do you remember talking with me about this?

A: Yes.

Q: Do you remember telling me when [Mr. Balderas] stood up in front of you and pulled down his pants that you looked away?

A: Yes.

Q: Do you remember telling me, but he was really strong and he turned you around.

A: Yes.

Q: And that he made you look?

A: Yes.

Q: And he was holding you and made you look?

A: He made me look and he wasn't really holding me but just kind of pushing me back.

Q: But that's different than what you told Ms. Thorn, isn't it?

A: No.

Q: And that's different than what you told Lisette Allan, isn't it?

A: No.

Q: And that's different than what you told Lewis, isn't it?

A: No.

Q: You never told any of them that he held you or held you down?

A: (No audible response).

Q: Do you remember telling me that he was holding you down while he pulled up his pants?

A: He wasn't holding -- when he pulled them up, he wasn't holding me, he was using both his hands to pull his pants up.

Q: So you don't remember telling me that he pulled up his pants with one hand and held you down with the other hand?

A: No.

(RP 94-96)

Defense counsel used the prior transcripts from S.J.'s defense counsel interview and Ms. Allan's interview to establish the inconsistencies in her statements. (RP 96, 100) S.J., being an intelligent child and advanced reader, was able to read the transcripts. (RP 96) After reading parts of the transcripts where she gave contradicting reports, S.J. said that what she had just testified to at trial was true and added, "But this was just a big classic mix-up." (RP 98) After being confronted with more prior conflicting statements from the defense interview, S.J. started repeating that she didn't remember. (RP 98- 100)

When specifically asked why she did not tell Ms. Allan the detail about Mr. Balderas coming upstairs after the incident on the couch, S.J. said that she had never seen Ms. Allan before and was scared. (RP 101) However, she admitted that she was also afraid during the defense interview and still revealed the statement to the defense counsel. (RP 101) When asked if she told Lewis this detail, she did not give a clear reason for omitting this fact. (RP 101) When asked about the same detail and her

trial testimony moments earlier, she admitted that she did not testify that this occurred. (RP 101)

After this questioning of S.J. was complete, the court took a recess to discuss other matters. (RP 105) During the discussion, the topic of defense counsel's cross-examination of S.J. came up and the court commented on what had occurred. (RP 101)

THE COURT: This is a nine-year old who has been able to be essentially impeached with a transcript. I'm not sure I've ever seen that before. One, I've never seen defense counsel actually utilize that process, and quite frankly probably because they haven't is because there aren't very many nine-year olds who would be capable of reading the transcript. The fact that she, although nobody asked her if she knew what the word unintelligible meant, she was able to read unintelligible without probably understanding the significance of that. So, while I let that process continue because she seemed able to handle it, again, I'm not sure I've ever seen that utilized on a nine-year old before in this type of context, but then, again, I've indicated that she was able to at least go through that portion of the questioning because of her obvious reading skills....

So if you ask about a physical confrontation, you know, again, Mr. Cahn, was it a fight, you know what I mean. We're talking to a nine-year old here and I think we all have the mistake of getting very caught up in legalese and I'm going to encourage all of us not to under -- understand we got a nine-year old witness here. So whatever may refresh her recollection as to that, I don't know if there was a specific topic manner [sic] of the situation between [Mr. Balderas] and [Mr. Johnson] that might be more helpful to remind her if she's saying she doesn't remember.

(RP 101-02)

After the two-day trial, the trial court found Mr. Balderas not guilty of first degree child rape and communication with a minor for immoral purposes, but guilty of first degree child molestation. Ultimately, the court based its decision on S.J.'s child forensic interview with Ms. Allan only. (RP 256)

First, the court addressed the communication charge, essentially concluding that it could not convict Mr. Balderas of the crime if it found that he actually had sexual contact with the victim. (RP 257) Rather, the court determined that the crime was a separate offense appropriate only when someone was attempting to have sex with a minor. (RP 257) Thus, because the evidence supported a finding that Mr. Balderas had sexual contact or intercourse for the purpose of sexual gratification, there was no separate offense and the court found Mr. Balderas not guilty. (RP 257)

For the first degree child rape and first degree molestation charges, which were charged in the alternative, the trial court found that Mr. Balderas had sexual contact with S.J. (RP 257) However, the court found that the State did not prove sexual intercourse beyond a reasonable doubt. (RP 257) The court noted that S.J. said Mr. Balderas touched her outside of her leggings, that he was pushing hard, and that it hurt. (RP 258) But could it not find that this was proof of penetration beyond a reasonable

doubt. (RP 258) As a result, the court found Mr. Balderas not guilty of first degree rape but guilty of first degree molestation. (RP 258)

The trial court based its findings on S.J.'s child forensic interview. (RP 258) The court reasoned that the forensic interview happened most recent to the alleged offense and the details provided by S.J. during the interview were "compelling," especially S.J.'s statement about what Mr. Balderas's penis looked like and her vivid description of the condom. (RP 258-59)

Of importance, while the court acknowledged that S.J.'s stories had discrepancies, the court dismissed these inconsistencies based on its experience that this wasn't unusual in these types of cases. (RP 258)

So defense's arguments on this -- I guess I wanted to cover because I think it is important because as I've stated, there were discrepancies during Sofia's various testimonies which, again, as I've stated, is not unusual in these types of cases. In fact, whether it be in case law or actually having a case heard in front of me, I've never seen a case where the child gave consistent account to various interviewers. And, again, I think it's a reasonable inference to be drawn that reasons for that can include the recency of the interview to the incident, the child's comfort level with an interviewer. It can include embellishments like I certainly believe happened during the defense interview that [defense counsel] conducted in September of 2016 with [S.J.], which also could be indicative of a made up story or not. Again, I think that's why it is so important to look for things that would be hard for a child to make up or it could be based on other

exposure. In those types of -- again, in this case, those types of details I have outlined as the compelling nature for me. (RP 259-60)

The trial court discounted defense counsel's theory that S.J. fabricated the allegations to get Isabelle, Nicolas, and Ms. Contreras out of the house. (RP 260) The court found that Mr. Balderas had left the house by the time S.J. reported the abuse to Nicolas. (RP 260)

After the ruling, Mr. Balderas's counsel filed a motion to arrest of judgement pursuant to CrR 7.4, and in the alternative, a motion for a new trial pursuant to CrR 7.5. Counsel argued that the evidence was insufficient to support the judgment because the court's guilty finding for first degree molestation was based on the same statement from S.J. that was not reliable enough to support a guilty finding for first degree rape. (CP 45-46) Defense counsel also argued that the trial court used its own prior experiences with child interviews when explaining away S.J.'s discrepancies, and it allowed for embellishments even though it acknowledged that this could be indicative of whether the story was made up or not. (CP 46-47) The defense counsel argued that the trial court's acknowledgement of the numerous discrepancies in the story and embellishments is sufficient to raise reasonable doubt and arrest the judgement. (CP 47)

As for the motion for a new trial, defense counsel contended that the trial court inappropriately took notice of facts not in evidence to support its decision. (CP 47) Pertinent here, counsel argued that the court twice used independent knowledge of child sexual abuse cases when stating that children don't give consistent statements and their stories can include embellishments. (CP 48) Counsel maintained that the court used knowledge that it obtained independently of the proceedings and based its judgement on its independent and preconceived opinions. (CP 49) The result is that the trial court also became an unsworn witness, which is barred by ER 605. (CP 49)

Finally, defense counsel contended that relief was proper under CR 7.5(a)(7) because the verdict was contrary to law and evidence. Counsel argued that even when taking the evidence in a light favorable to the State, it was riddled with discrepancies, was inconsistent, and insufficient to support guilt beyond a reasonable doubt. (CP 51) Alternatively, counsel contended that cumulative error was severe enough to warrant a new trial. (CP 53)

The trial court denied both motions. (RP 277-298) In its oral decision, the trial court explained that it did not think it commented on whether S.J. was successfully impeached, but rather made a comment that it had never seen a nine-year old cross-examined with a transcript. (RP

277) The court noted that most 9 year-olds would not have the ability like S.J. to not only read the transcript, but also respond to defense counsel's questions based on what was read. (RP 277) "... I guess if there's any confusion in the record as to that point, that's what this Court was meaning with its comments about never seeing a nine-year old being impeached before because not -- this is the first nine-year old that I have ever witnessed that would have had the capability to, one, read the transcript with some of the complexities that's involved in it even by way of being asked to respond..." (RP 278)

The court also denied that it improperly took judicial notice of any facts. (RP 294) As for the comments about the inconsistent testimony in child sexual abuse cases, the court stated that it was looking at reasons why discrepancies come up. (RP 295) Then the court found it important to look at things that would be hard for a child to make up. (RP 295) The trial court reiterated that S.J.'s sensory details about the condom were compelling and convincing of guilt. (RP 295-96)

The trial court sentenced Mr. Balderas to 15-36 weeks confinement in a juvenile detention facility and ordered Mr. Balderas to register as a sex offender. (CP 107-08) Mr. Balderas maintains his innocence. (RP 306)

Mr. Balderas appeals. The trial court erred by concluding that Mr. Balderas was guilty of first degree child molestation, as noted in

Conclusions # 5 and 6. (CP 103) Furthermore, the trial court's findings numbers # 8 and 21 to 35 are not supported by the evidence. The trial court's errors at trial cast reasonable doubt as to whether the findings and conclusions can be relied upon.

In making these challenged findings and conclusions, the trial court improperly took judicial notice of its experience that a child witness's statements are never consistent, and used this preconceived notion to disregard S.J.'s multiple inconsistent versions of the alleged incident. Second, the trial court also infringed on Mr. Balderas's right to meaningful confrontation when it used personal experiences with child witnesses to find S.J. credible, thus making impeachment testimony useless. Finally, Mr. Balderas contends that the evidence is not sufficient to support the finding of guilt, or alternatively, cumulative error supports a new trial.

### C. ARGUMENT

1. The trial court improperly took judicial notice of its personal experience that children do not provide consistent statements in sexual abuse cases and relied on this presumption to disregard the multiple inconsistent statements of the child witness.

ER 201 permits a court to take judicial notice of "adjudicative facts ... not subject to reasonable dispute" in the sense that they are either "(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.” Similarly, when a matter is at issue, ER 605 prohibits a presiding judge from testifying at that trial as a witness.

In a criminal case, adjudicative facts generally relate to the facts of the crime and the defendant, but could also include social science and other research that directly affects the litigants before the court and are properly placed in contest by the parties. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005).

A judge's own knowledge should not be confused with judicial notice. *State v. K.N.*, 124 Wn. App. 875, 882, 103 P.3d 844 (2004). “A trial judge is prohibited from relying on his personal experience to support the taking of judicial notice.” *In re Estate of Hayes*, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015), citing *United States v. Berber–Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007).

While a judge may apply common sense to a matter when he or she is the trier of fact, illustrative comments phrased in the first person are improper when they show evidence bias, prejudice, or other impropriety. *Fernando v. Nieswandt*, 87 Wn. App. 103, 109, 940 P.2d 1380 (1997). “[P]arties deserve a decision based on evidence presented at trial and

subject to cross-examination rather than hidden or undisclosed perceptions of the trial judge.” *In re Hayes*, 185 Wn. App. at 599.

When the court makes evidentiary presumptions, this can have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of the crime and thus implicates due process principles. *State v. K.N.*, 124 Wn. App. 875, 881, 103 P.3d 844 (2004); *Francis v. Franklin*, 471 U.S. 307, 313, 105 S.Ct., 1965, 85 L.Ed.2d 344 (1985). “The court should only consider adjudicative evidence that the parties in an adversarial context have the opportunity to scrutinize, test, contradict, discredit, and correct.” *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005).

Here, the trial court took judicial notice that children do not provide consistent testimony in child abuse cases. It relied on personal observations and experiences in making this determination saying, “I wanted to cover because I think it is important because as I've stated, there were discrepancies during Sofia's various testimonies which, again, as I've stated, is not unusual in these types of cases. In fact, whether it be in case law or actually having a case heard in front of me, I've never seen a case where the child gave consistent account to various interviewers.” (RP 259) In his post-trial motion, Mr. Balderas objected to the trial court taking

judicial notice of this fact. He did not have an opportunity to present evidence on this issue.

The axiom that children never provide a consistent recollection is not proper fact for the court to take notice. It is an adjudicative fact subject to reasonable controversy because each child's capabilities are different. There is no universally accepted expectation that because the witness is a child, his or her story will not be consistent. To the contrary, there is an expectation that a witness will be able to perceive, remember, and truthfully relate the relevant details about which he or she is called to testify. *State v. Ryan*, 103 Wn.2d 165 171, 691, P.2d 197 (1984).

This is comparable to competency proceedings. The Washington Supreme Court in *State v. S.J.W.*, 170 Wn.2d 92, 239 P.3d 568 (2010), addressed the presumption of incompetency of a child. See *Id.* "Requiring a trial court to presume a witness is incompetent based solely on his age would be inconsistent with the current statutory scheme that gives no weight to the witness's age. A six-year-old child (as in *Allen*<sup>1</sup>) may be more competent to testify than an adult in a given case; no court should presume a child is incompetent to testify based upon age alone." *Id.* at 100. Instead, the court in *S.J.W.* concluded that all children are competent

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<sup>1</sup> *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

to testify, and the burden is on the party challenging the competency to rebut the presumption with evidence showing otherwise. *Id.* at 102.

Just as incompetency of a child cannot be presumed, nor can the inability of a child to provide a consistent statement. Each depends on the particular child's ability to perceive, remember, and truthfully relate the relevant details about which he or she is called to testify. Neither the State nor Mr. Balderas presented evidence regarding whether child victims usually give consistent statements.

Here, S.J.'s individual ability to provide consistent testimony was an adjudicative fact subject to debate. S.J. had the capability to recollect the event and provide consistent testimony. S.J. was a very intelligent, exceptional child. She could read the transcript at trial and competently answer the questions posed by both attorneys. The trial court commented that it had never experienced a child of S.J.'s age that could do this.

Her ability to give a consistent recollection of the incident was not hindered by the passage of time. There was only a matter of weeks between the alleged incident and her first reporting to her brother. In total, there was less than a year between the incident and her trial testimony. Yet, during this period, S.J. told at least four different version of events.

The inconsistencies in her stories were not minor or inconsequential, but instead details that an eight year old would be

expected to remember and relate when questioned. She gave different accounts of the incident which either included or omitted details about Mr. Balderas's explanation of sexual intercourse, his demonstration of the use of a condom, being touching underneath the clothes or above the clothes, being followed up to her room and taunted, and others. The trial court was improper to excuse these substantial inconsistencies in S.J.'s statements based on the capabilities of children in general.

Furthermore, the trial court's first-person comment regarding its experiences with child witnesses in abuse cases shows the court's bias toward accepting children's statements as credible, regardless of inconsistencies. The trial court excused S.J. from having to provide reliable testimony because it did not expect it from children. Instead, the court based S.J.'s credibility on its personal experiences and involvement in other cases where children's statements were inconsistent.

The trial court was required to judge S.J.'s individual capacity to recollect and communicate truthfully when determining credibility. The extent that a witness has the required capabilities to observe, recollect, and communicate truthfully affect credibility. *State v. Froehlich*, 96 Wn.2d 301, 307, 635 P.2d 127 (1981). When the trial court took judicial notice of what it experienced with children in general, it failed to conduct a complete, individual assessment of S.J.'s credibility. This was in error.

The trial court's error was not harmless. It is presumed that a trial court does not consider inadmissible evidence when making its findings. *State v. Gower*, 179 Wn.2d 851, 856, 321 P.3d 1178 (2014). However, when it is clear that the court affirmatively considered inadmissible evidence, a defendant can rebut the presumption by showing that the verdict is not supported by sufficient admissible evidence, or the trial court relied on impermissible evidence to make essential findings that it would have not otherwise made. *Id.* The error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. *State v. Ferguson*, 100 Wn.2d 131, 137, 667 P.2d 68 (1983). "[T]he analysis does not turn on whether there is sufficient evidence to convict without the inadmissible evidence. Rather, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Gower*, 179 Wn. 2d at 857.

Here, had the trial court not excused S.J.'s statements based on its personal experiences with children giving inconsistent statements, there is a reasonable probability that the outcome of trial would have been different. Defense counsel impeached S.J. at trial with her prior inconsistent statements given to Lewis and Ms. Allan. Without judicial notice, there was no basis for the court discard this testimony and presume

that S.J.'s four inconsistent versions the alleged incident was to be expected. There was no dispute that S.J. was competent at all stages of the proceeding, had the ability to recollect events, and could comprehend questions and respond skillfully. S.J. knew what it meant to tell a lie. The charges were based solely on S.J.'s allegations, making credibility the focus of the trial.

Moreover, in its oral ruling, the court gives general reasons to explain why children do not give consistent testimony, but it never analyzes these reasons in relation to Mr. Balderas's case. The court noted that discrepancies could occur because of the amount of time between the interview and the alleged incident, the child's comfort level with the interviewer, and embellishments of the incident. (RP 259-60) Still, even when applied to this case, these reasons don't provide a basis to excuse S.J.'s inconsistent statements and solely rely on S.J.'s interview with Ms. Allan to find guilt.

First, S.J.'s interview with Ms. Allan was not her recollection most recent to the event. S.J. told Lewis prior to Ms. Allan and reported a vastly different accounting of what occurred. S.J. reported that Mr. Balderas touched her under her clothes and pulled out a piece of bloody skin. However, just a couple of weeks later, she denied saying this to Ms. Allan. If recency is the basis to find one story credible, this does not

explain why S.J.'s recollection to Ms. Allan was given more credibility than what she reported before to Lewis.

Second, as to S.J.'s comfort level with the interviewer, there is no evidence whatsoever to conclude that S.J. was more comfortable with Ms. Allan than her brother and thus provided a credible recollection. To the contrary, S.J. testified at trial that she was uncomfortable in her interview with Ms. Allan. Also, S.J. appeared most comfortable with Lewis, as she openly provided more detail to them. Comfort level was no basis to choose Ms. Allan's interview over any other version.

Third, the court found that S.J. embellished her story to defense counsel, but did not support this finding or clarify if it indicated that S.J. was telling the truth or not. No evidence in the record indicates what was parts of S.J.'s story was embellishment. For instance, any part of S.J.'s story to Ms. Allan could have been embellished, as she denied many of the details described to Ms. Allan when asked at trial.

Finally, the compelling sensory detail regarding the condom does not support a finding of guilt beyond a reasonable doubt when all the evidence is properly considered, including S.J.'s competing recollections. S.J. told Ms. Allan with great detail what it looked like when Mr. Balderas allegedly put on the condom. Despite this detail being compelling and impressionable on an eight year-old, S.J. did not mention it at the defense

interview just three months later. Nor did she mention it at trial. In fact, when asked specifically, she denied that a condom was involved. The court provides no explanation as to how this compelling, sensory detail vividly described by S.J. could be easily forgotten within a short period of time, even when prompted at trial.

The court reasoned that it was important to look for things that were hard to make up or could be based on exposure. Here, S.J. had the capability of making it up based her exposure to pornography and the “birds and the bees.” Contrary to finding of fact no. 8, circumstantial evidence exists that S.J. could have used the tablet to view pornography because she kept the electronic tablet in her room and it had no parental controls to block the usage. Although she denied viewing pornography on the electronic tablet, the credibility of this statement must be judged in relation to the credibility of S.J.’s other testimony. In addition to the tablet, a pornographic magazine was hidden under S.J.’s dresser. Most of all, S.J.’s grandma very openly discussed “the birds and the bees” with S.J. to the point she overstepped the bounds of S.J.’s father.

Thus, the court’s reasons for relying on S.J.’s interview with Ms. Allan are not supported by the record. There is no basis to find S.J.’s statements here more credible and disregard her other statements.

Had the court not dismissed S.J.'s inconsistent statements based on its personal experiences with children, but instead given proper consideration to all the evidence in the record, there is a reasonable probability that the outcome of the case would have been different. Thus, the trial court's findings no. 21 to 35 are in error. They are predicated on the trial court's error and not supported by the evidence.

The trial court's reconsideration of the judicial notice issue in its post-trial motion ruling does not change this court's review of this issue. In the post-trial hearing, the court reiterated the general reasons why children give inconsistent testimony but did not give any explanation as to why the discrepancies in S.J.'s case were disregarded. Instead, it stated that its decision was based on the compelling sensory detail about the condom. Ultimately, the court relied on its reasons at trial for finding guilt and left the issue of judicial notice for appellate review.

In sum, judicial notice is to be used cautiously when the matter is beyond reasonable controversy. *State v. K.N.*, 124 Wn. App. 875, 881, 103 P.3d 844 (2004). Here, whether S.J. was capable of providing a consistent statement was subject to reasonable controversy. The trial court did not assess her individual ability to accurately recollect the events but instead took judicial notice that children in this situation do not provide consistent statements. Only by dismissing S.J.'s inconsistent statements because she

was a child could the trial court have reached a guilty finding. The error was not harmless. The trial court's finding of guilt must be reversed.

2. The trial court denied Mr. Balderas a meaningful opportunity to cross-examine the witness against him when it excused the child witness from providing consistent testimony, thus taking away any substantive right to confront his accuser

Article I, Section 22 of the Washington State Constitution gives the accused the right to confront the witnesses against him or her. WA CONST. ART. I, § 22. This includes the right to cross-examine the witnesses. *Pettit v. Rhay*, 62 Wn.2d 515, 520-21, 383 P.2d 889 (1963). “An opportunity to cross-examine must be real and not fanciful. It must be a meaningful opportunity and not a mere matter of form to be extended without regard to whether it can be exercised by the accused.” *Id.*

In *Pettit*, the court emphasized the role cross-examination played when concluding that the defendant's due process rights were violated in a sexual abuse case. *Pettit*, 62 Wn.2d at 522. “It was only through cross-examination that the conscience of the complaining witness could have been probed and her memory and reliability tested. Evidence of the testimony given by the complaining witness at the preliminary hearing was essential to the state's case to establish the corpus delicti of the alleged crime, its perpetrator, and the victim.” *Id.* at 522-23.

The court's dismissal of the discrepancies in S.J.'s prior statements because she was a child had the practical effect of nullifying Mr. Balderas's right to meaningful cross-examination of S.J. The case boiled down to the victim's word against the defendant's. The credibility of S.J. was essential to the State's case. By excusing S.J. from needing to provide consistent testimony, the court took away any real chance by Mr. Balderas to show that S.J. was not credible. This had the effect of presuming the credibility of S.J. based on her status as a child, and making it impossible for Mr. Balderas to prove otherwise through cross-examination.

The error was not harmless. Upon a showing by the appellant of constitutional error, the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). "A constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable [fact finder] would have reached the same result absent the error." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The error is not harmless. The State cannot prove that any reasonable fact finder would have reached the same conclusion, especially

considering the importance of cross-examination when the final determination is dependent on who is found credible. As in most sexual abuse cases, the respective credibility of the victim and the defendant is a crucial question because the testimony of each directly conflicts and the two are the only percipient witnesses. *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

The case was based entirely on S.J.'s testimony-- there was no physical evidence or other witnesses in the case. Accordingly, Mr. Balderas's only hope of maintaining his innocence was by scrutinizing S.J.'s testimony and revealing the inconsistencies to show reasonable doubt. Through cross-examination, Mr. Balderas impeached S.J. with her own testimony. S.J.'s inconsistencies were not minor discrepancies. Rather, S.J. adamantly denied at trial that the compelling details that she vividly recalled a few months earlier had occurred. It cannot be said that a reasonable fact finder would have reached the same result with the impeachment evidence.

And, as discussed earlier, the evidence was not overwhelming to establish that the trial court would have reached the same result. The trial court's reasoning for relying solely on S.J.'s interview with Ms. Allan does not stand when viewed in comparison to S.J.'s inconsistent statements. There is no overwhelming evidence of guilt.

When the crux of the State's case revolves around the testimony of a child, the trial court invades on a defendant's right to confrontation by relieving the child of the burden of providing a consistent recollection of events on the basis that the witness is a child. Here, the trial court denied Mr. Balderas a meaningful opportunity to confront S.J. and challenge her inconsistent statements. The result is a presumption of credibility of the child with no possibility of impeachment. The error is not harmless.

3. The State did not present sufficient evidence to prove guilt beyond a reasonable doubt.

The State's evidence was not sufficient to establish guilt beyond a reasonable doubt. The standard to be applied by an appellate court in reviewing the sufficiency of the evidence for conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the State's evidence and the inferences that reasonably can be drawn therefrom. *State v. Gear*, 30 Wn. App. 307, 310, 633 P.2d 930 (1981).

Here, even if the trial court's reliance on its experiences with other children was proper, the evidence is still not sufficient to establish that Mr. Balderas molested S.J. Considering the overwhelming evidence that raises doubt as to the veracity of S.J.'s statements, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt even when taking the evidence in the light most favorable to the State.

As stated earlier, S.J. repeatedly gave inconsistent accounts of the incident, could not recall sensory details that were found to be compelling, and unequivocally denied her earlier statements made to a number of people. She gave conflicting testimony about whether Mr. Balderas touched her inside her pants, whether there was blood, whether there was penetration at all, where everyone was when it happened, if he talked to her about sex, how he allegedly exposed himself, what she was able to see, if a condom was involved, how long it all lasted, whether he aggressively pursued her afterward, and how the story came out.

Again, these inconsistencies cannot be explained by a passage of time, because her first two accounts were given within two weeks of each other, and the rest within a year. It is implausible that she would not have remembered certain events or remembered them differently, like having a piece of bloody skin pulled out of her vagina or putting on a condom.

Moreover, she adds memorable incidents as time passes. Months after the event, she remembered her fear of Mr. Balderas following her up to her room, him pounding at the door, and the exact taunting words he told her. However, she omitted this fact all together in her first three recollections and at trial. This goes past embellishment of the event: this major inconsistency casts reasonable doubt on the veracity of S.J.'s allegations.

In addition, as Mr. Balderas emphasized at trial, S.J.'s motives and timing also cast doubt on her credibility. She wanted to get Ms. Contreras's family out of her home. She and Lewis found Ms. Contreras bossy and she was deeply irritated by Isabelle. Additionally, Mr. Balderas had just caused the police to come to her home and order her father to appear in court. This traumatically affected S.J. She was visibly upset and she was afraid that her father would be taken away. She already had abandonment issues from experiences with her mother. Her reporting of the incident with Mr. Balderas occurred a few days before S.J.'s father was to appear in court.

Next, the trial court recognized the problems with S.J.'s statements to Ms. Allan when it found Mr. Balderas not guilty of rape. Although S.J. told Ms. Allan that Mr. Balderas pushed his fingers into her vagina up to his knuckles, the court had doubts that the penetration occurred when S.J. was wearing leggings at the time and she claimed on this occasion that the

contact occurred outside her clothes. (RP 258) The court was able to find this part of the story implausible, and not proof beyond a reasonable doubt of penetration, but continued to rely on the very same specific recollection of contact to establish molestation.

Finally, as explained earlier, the trial court's reasons for relying on S.J.'s account to Ms. Allan are not supported by the evidence. The trial's court basis for selecting this one recollection is not supported by the evidence.

The evidence in this case hinges on S.J.'s credibility alone. There is more than sufficient evidence to call her credibility into doubt. Thus, when viewing the evidence in the light most favorable to the prosecution, no rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt.

4. The cumulative error doctrine supports reversal and remand for a new trial

Minimally, the cumulative error doctrine entitles Mr. Balderas to a new trial. Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of trial errors effectively deny 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),

In *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) the court found that the evidence was not sufficient to support the verdict when the inconsistencies in the victim's stories were extreme and the victim's testimony was improperly bolstered at trial. *Id.* at 157-58. The court found the victim gave inconsistent statements on when the abuse occurred and whether two of the events occurred at all. *Id.* at 158. The court found that without the inadmissible bolstering testimony and improper remarks from the prosecutor, the evidence was too confused to allow a jury to find guilt beyond a reasonable doubt. *Id.* The court reversed the judgement and remanded for a new trial. *Id.*

Like *Alexander*, the vastly inconsistent statement of the S.J. and the errors of the trial court made it impossible to determine guilt beyond a reasonable doubt. The cumulative impact on Mr. Balderas's trial was severe enough to warrant new proceedings.

#### D. CONCLUSION

The evidence is not sufficient to allow any trier of fact to find Mr. Balderas guilty of first degree child molestation beyond a reasonable doubt. Alternatively, the trial court's improper judicial notice and violation of Mr. Balderas's right to meaningful confrontation of S.J. were

error that affected the outcome of trial. A new trial is warranted to correct these errors.

Respectfully submitted this 17<sup>th</sup> day of January, 2018.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Opening Brief with postage paid to the indicated parties:

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