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Division III
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NO. 35513-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

NICHOLAS BALDERAS, Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Were the judge's comments about her observations of child witnesses in the court system proper where the comments did not evidence bias, prejudice, or other impropriety?
2. Because Balderas was able to thoroughly cross-examine all of the State's witnesses at trial, has he failed to provide persuasive legal authority that his right to cross examine was denied by comments made by the trial court?
3. Viewing the evidence in the light most favorable to the State, could any rational trier of fact have found the essential elements of first degree child molestation beyond a reasonable doubt?
4. Has Balderas failed to demonstrate an accumulation of errors of such a magnitude that retrial is necessary?

II. STATEMENT OF THE CASE

The appellant, Nicholas Balderas was convicted by bench trial of first degree child molestation in the juvenile division of Yakima County Superior Court. CP 106. The conviction stemmed from the following facts:

Balderas was charged by information with two counts: first degree rape of a child and communication with a minor for immoral purposes. CP 2. The information was later amended to add first degree child molestation. CP 18.

At trial, the State called six witnesses, Officer Burkett, Sergeant Lewis, Lisette Allan, Armando Johnson, and minors S.J. and L.J. S.J. testified that her step-brother, Balderas, flashed her by pulling down his pants, RP 88-89, 95, and

that he touched her vagina over her pants. RP 90. She reported this to family members, including her father and brother, who later gave statements to the Moxee Police Department. RP 6-7, 92-4, 101-2. Sergeant Lewis set up a child forensic interview at the police department with child forensic interviewer Lisette Allan. RP 13-14. S.J. was eight years old at the time of the interview. RP 27. Ms. Allan described S.J. as a very bright girl who was more articulate than most children her age. RP 69-70. A recording of the interview was admitted at trial. RP 15, 26.

During the interview, eight-year-old S.J. reported that while she was at home watching t.v., her older step-brother, Balderas, pulled his underwear and pants down in front of her. RP 33-36. After he exposed himself, he put on a condom and began rubbing himself up and down. RP 37-9. He then told S.J. how a man and woman have sex. RP 37. S.J. reported that he then left for a bit and came back and started touching her on her private area. RP 39. She described the touching as him doing it through her pants and as pushing. RP 40, 49. She said that that he was “taking his finger and pushing in there.” RP 40. She said that his fingers did not go inside of her pants. RP 40. She said he pushed really hard and that it hurt. RP 41. She told him, “...Nicko, stop it, please, that hurts.” RP 41. She said that this lasted “a painful five minutes.” RP 41. She then told her brother, L.J., who told her dad. RP 42, 62.

S.J., her brother, and father testified at trial as well. S.J., who was nine at the time of trial, testified that she was sitting on a couch with Balderas watching a

cartoon when he flashed her by pulling his pants and underwear down. RP 81-6. She testified that he then sat down next to her on the couch, and put two fingers in her vagina or “private parts.” RP 84, 90. She said the touching was on top of, rather than inside, her leggings. RP 83, 90. She described him as making a “sucking sound” while he touched her. RP 84. She said this lasted about five seconds and that it was painful. RP 84-6. Afterwards, she went to her room. RP 86. She testified that she told her brother, L.J, about what happened because she really trusts him. RP 86.

Thirteen-year-old L.J. testified that he noticed a change in his sister’s demeanor. RP 132. He said that she seemed scared and was shyer around the family. RP 132. He testified that he was the first person that S.J. told. L.J. told his grandmother and then told his dad. RP He relayed that S.J. told him that Nicko stuck his fingers inside of her while they were watching something together. RP 136.

Mr. Johnson, S.J.’s father, also testified. He testified that L.J. sent him a text that said Balderas had said some inappropriate stuff to S.J. RP 159. L.J. told him that S.J. was embarrassed and scared to tell him. RP 159. L.J. convinced S.J. to talk to her father. Mr. Johnson testified that S.J. was ashamed but told him everything. RP 159.

The defense called two witnesses, Myra Contreras, the appellant’s mother, and Balderas. Balderas testified that he did not do the things that S.J. accused him of doing. RP 223.

Balderas was acquitted on counts 1 and 2 but convicted of first degree child molestation. CP 41. When the court found Balderas guilty of third degree molestation, the court went through all the testimony and made verbal, as well as written findings. RP 244-63; CP 99-104. When going thru the testimony, the court noted discrepancies in the victim's testimony. First, the court noted that during the child forensic interview, S.J. initially said that the incident happened three to four weeks prior. RP 244. Later, she said that it could have been five to six weeks priors. *Id.* Second, when going thru the testimony of Ms. Allan, the forensic interviewer, the court noted that the interviewer "did acknowledge discrepancies in what [S.J.] had told her and what [L.J.] had reported that [S.J.] had told him..." RP 249. The court then went thru the discrepancies. *Id.*

The trial court also went through testimony elicited from S.J. on cross examination. RP 256. The court pointed out more discrepancies in S.J.'s testimony:

She denied telling [L.J.] that Nicholas's hand was inside her pants and that he pulled out a piece of bloody red skin, that Myra was upstairs sleeping, that Nicholas had forced her to grab his dick, that Nicholas had come downstairs and forced her to touch his penis. She also did not say that Lewis was at church..."

RP 256.

The trial court went on to analyze count 2, and found Balderas not guilty because cases dealing with the crime of communication with a minor for immoral purposes deal with cases that "generally have persons trying to have sex with a

minor, not actually doing it...” RP 257. The court then analyzed counts 1 and 3, and concluded that the State did not prove the element of sexual intercourse beyond a reasonable doubt. RP 257-8.

The court did find that the defendant was guilty of count 3, first degree child molestation. RP 258. The court explained that “the totality of the evidence supports the respondent had sexual contact with [S.F.] and that it was done for the purpose of gratifying his sexual desire, which there would be no other explanation for doing the things he did.” RP 257. The court indicated that its ruling was based upon not only the victim’s testimony, but also on the forensic interview, which was the most compelling evidence. RP 258. The court went through the very compelling details of the interview. RP 259.

The court pointed out that there were a number of discrepancies in the victim’s statement, but noted “That is not unusual in these types of cases, quite frankly.” RP 258. The judge went on to state,

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 include the recency of the interview to the incident, the child’s comfort level with an interview. It can include embellishments like I certainly believe happened during the defense interview that Mr. Cahn conducted in September of 2016 with [S.F.], 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 269-60. The court then went through the defense theories that were raised and why they were not compelling. RP 260-1.

On June 30, 2018, prior to sentencing, the defense made a motion to arrest judgment based on insufficient evidence and a motion for a new trial based on improper judicial notice. RP 270, 279. As to the first motion, the court found that the victim was credible and that there was sufficient evidence. RP 276-9.

With respect to the judicial notice motion, the defense claimed that the trial judge relied upon knowledge obtained independent of the proceedings and based upon the judge's own independent experience and preconceived opinions. RP 280. The defense claimed that the court took improper judicial notice when it stated that discrepancies in testimony are not unusual in these types of cases and when the judge stated that she had not seen in caselaw or in other cases before the court, a child give consistent accounts to various interviewers. RP 281.

The court denied the motion to arrest judgment based on the claim of improper judicial notice, RP 293-8. The court noted that a trier of fact should be especially careful because there are multiple reasons for discrepancies. RP 295. The court pointed to sensory details that convinced the court of the respondent's guilt. RP 295. The court then went through those specific sensory details on the record, and stated that the court's decision was only based on the evidence presented in the case during trial and nothing else. RP 295-6. Balderas was sentenced to 15 to 36 weeks at a JRA institution. CP 95.

Balderas filed a timely notice of appeal. CP 105.

III. ARGUMENT

A. The judge’s comments about her observations of child witnesses in the court system were not improper where the comments did not evidence bias, prejudice, or other impropriety.

Courts review de novo whether judicial notice was properly taken. *State v. Pippin*, 200 Wn. App. 826, 846, 403 P.3d 907, 917 (2017). While not every use of judicial notice is regulated by the rules of evidence, judicial notice of adjudicative facts is governed by ER 201. *State v. K.N.*, 124 Wn. App. 875, 103 P.3d 844 (2004). Adjudicative facts are usually those facts that are in issue in a particular case. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005). A judicially noticed fact is one “not subject to reasonable dispute in that it is 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.” ER 201(b).

However, a judge’s own knowledge should not be confused with judicial notice. Personal knowledge is not judicial knowledge and the judge may personally know a fact of which he cannot take judicial notice. *In re Estate of Hayes*, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015).

Courts recognize that judges do not operate in the courtroom with a blank mind. *State v. Disney*, 199 Wn. App. 422, 431, 398 P.3d 1218 (2017). Judges do not leave their common experience and common sense outside the courtroom door. *In re Estate of Hayes*, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015).

Judges are human; like all humans, their outlooks are shaped by their life experiences. *Id.* As explained in *In re Estate of Hayes*:

“We do not believe the legislature intended that judges leave their knowledge and understanding of the world behind and enter the courtroom with blank minds. Judges are not expected to leave their common sense behind. Nor do we believe the legislature expected judges to hold hearings on whether fire is hot or water is wet. We prize judges for their knowledge, most of which is obtained outside of the courtroom. Within the statutory and constitutional guidelines, judges may exercise their discretion to give a fair and just sentence.”

Id. at 599-600 (quoting *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005)). It is presumed that judges follow the law and consider the evidence solely for proper purposes. *Disney*, 199 Wn. App. at 432.

In *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997), the trial court declined to find that a video of a child stiffening when placed in a car seat constituted evidence of traumatization. The court stated “[f]or heaven’s sake, I had three children and ten grandchildren and a couple of great-grandchildren, and I’m telling you, I’ve seen that happen so many times. Just to deprive the child of some trivial little thing, and they’ll stiffen their back or they’ll swing or they’ll throw something.” 87 Wn. App. at 109 n.1. The court then rejected an expert’s testimony, finding that “an expert can be found to support any position.” Finally, the court opined that most children emerged from divorce “without any perceptible damage.” *Id.*

In that case, Division One explained that the judge made illustrative comments about his own experience on the bench and as a parent to explain his decision. The Court of Appeals concluded that the judge in no way compared the case to his own life to make a decision. *Fernando*, 87 Wn. App. at 109. Rather, the judge was acting as a trier of fact and applying common sense to the facts of the dispute to make a decision. *Id.* The court explained that when the judge is a trier of fact, illustrative comments phrased in the first person are not improper unless they evidence bias, prejudice, or other impropriety. *Id.*

Pursuant to GR 14.1, this court should consider nonbinding and unpublished authority, *In re Marriage of Conklin*, 2015 Wash. App. LEXIS 2742, 2015 WL 6951734 (2015), and accord such persuasive value as the court deems appropriate. In that case, involving an order modifying a parenting plan, the court found no error when the trial court stated that allegations are false in only four percent of sexual abuse cases and raised in less than 5 percent of child custody cases. *Id.* at *21. The trial judge also stated that he had not heard a case on its docket in two years where there were child sexual assault allegations in a custody case. *Id.* at *20. Division One reasoned that the judge was commenting on his personal experience in the court system, which was not improper. *Id.* at *21.

Similarly, our State Supreme Court has observed that “many child molestation cases” include a “‘he said, she said’ component.” *State v. Young*, 160 Wn.2d 799, 817, 161 P.3d 967, 977 (2007). In *Young*, the court pointed out that, “Additionally, although the child witness subsequently recanted her molestation

allegations, that is also not unusual, as children frequently recant allegations against family members.” *Id.* While noting what is frequently the case, our Supreme Court did not take improper judicial notice of any outside adjudicative facts. Similarly, neither did the trial court in the case at hand.

In this case, the trial judge, the trier of fact, while simply explaining her ruling, made a comment about what she had seen in her years of experience on the bench. She still conducted an individual assessment of the victim’s credibility. While acknowledging the inconsistencies in the victim’s testimony, RP 244-56, the trial judge merely indicated that inconsistencies are not uncommon and there may be numerous reasons for inconsistencies. She did not ignore the inconsistencies or presume the victim to be credible. Rather, she addressed the inconsistencies and embellishments, and found that there were possible reasons why the victim was inconsistent. Her comments did not evidence any bias, prejudice, or other impropriety. Nor did the court take judicial notice of any adjudicative facts, facts at issue in the case. As such, the court’s comments were not improper.

Furthermore, if there was any error in the trial court commenting about her experience on the bench, it was harmless. Judges are presumed to follow the law and consider the evidence solely for proper purposes. *Disney*, 199 Wn. App. at 432. The judge here made a record that she only considered the evidence that came out of the trial. RP 295-6. The record demonstrates that she conducted an individual assessment of the victim’s credibility. Any comments about what she

had seen were merely side comments, which did not rise to the level of a presumption that dictated a particular decision in the case.

B. Because Balderas was able to thoroughly cross-examine all of the State’s witnesses at trial, he provides no persuasive legal authority that his right to cross examine was denied by comments made by the trial court.

Balderas relies on one case, *Pettit v. Rhay*, 62 Wn.2d 515, 520-21, 393 P.2d 889 (1963), in arguing that his right to cross-examine witnesses was denied. In that 1963 rape case, the victim testified at a preliminary hearing. The defendant was given an opportunity to cross-examine her but told the trial judge that he did not know how to cross-examine and needed an attorney for that purpose. *Id.* at 517. The judge denied his request for counsel. *Id.* At trial, the prosecutor was allowed to relate from memory the rape victim’s testimony from the preliminary hearing. *Id.* Our Supreme Court held, “under the peculiar facts before us, the denial of counsel at the preliminary hearing in this case prevented the respondent from being able to confront the witnesses against him.” *Id.* at 522.

In contrast, here, the defense thoroughly cross-examined S.J. and all of the State’s witnesses. There are no similarities between this case and *Pettitt*. Balderas has provided no persuasive legal authority to support his argument that the court denied him a meaningful opportunity to cross-examine witnesses. As such, this claim should be rejected.

Balderas claims that the court’s ruling had the “practical effect of nullifying Mr. Balderas’s right to meaningful cross-examination of S.J.” Appellant’s Brief at 31. However, the court considered the victim’s

inconsistencies, and even found some to be embellishments. RP 244-256. The court did not disregard or ignore the information elicited on cross-examination.

Balderas claims that the trial court excused the victim from needing to provide consistent testimony. Appellant's Brief at 31. However, there is no requirement that a victim or any witness provide consistent testimony. Balderas cites no authority for any such requirement because there is none. Many victims and witnesses are inconsistent. The State does not have to call consistent witnesses. The State simply has to prove the elements of the crime beyond a reasonable doubt.

Balderas states that the victim was presumed credible based on her status as a child. Appellant's Brief at 31. However, the court made no presumptions that the victim was credible. Due process is implicated if the court uses an evidentiary presumption that relieves the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, L. Ed. 2d 344 (1985). In this case, however, there was no presumption made as to the victim's credibility. The court went through all of the victim's testimony, good and bad, consistent, and inconsistent. RP 244-56. The court did not start off with any presumptions. The court made reasonable inferences from the record in summing up the evidence. As such, Balderas' claim that he was denied a right to cross examine witnesses is without merit.

C. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of first degree child molestation beyond a reasonable doubt.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *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, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991). This court defers to the fact finder on issues of witness credibility and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The elements of first degree child molestation are as follows:

- (1) That on or about (date), the defendant had sexual contact with (name of child);

- (2) That (name of child) was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That (name of child) was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

WPIC 44.21. There was no dispute that the act occurred in the State of Washington and it was clearly established that the victim and Balderas were not married. Furthermore, the ages of the victim and defendant were proven at trial. The main issue at trial was the first element, whether there was sexual contact. “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

In order to convict a person of any crime defined in chapter 9A.44 it shall not be necessary that the testimony of the alleged victim be corroborated. RCW 9A.44.020. However, in this case, the victim’s testimony was corroborated in many respects, including her father’s testimony, as well as her brother’s testimony. In addition, it was corroborated by the recorded forensic interview that was admitted at trial. Her detailed description of sensory details surrounding the molestation also corroborated her testimony.

Based on the testimony and evidence, the trial judge weighed the evidence before her and reached a reasonable conclusion. It was reasonable to conclude that S.J.’s testimony as to count 3 was persuasive. In short, one could not argue that no rational trier of fact could have reached the same conclusion. *State v.*

Carver, 113 Wn.2d 591, 604-05, 781 P.2d 1308, 1315 (1989). The basis for the molestation count was Balderas's forced touching of the victim's vagina over her clothes. Although the victim made some inconsistent statements surrounding the incident, it was for the judge to assess the credibility of her trial testimony. See *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987). *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850, 855 (1990).

Accepting the victim's statement regarding the forced touching of her vagina, the judge could also infer that the touching had been for the gratification of the defendant's sexual desires. As such, the evidence was more than sufficient to find that Balderas had sexual contact with the victim. See generally *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (concluding that evidence was sufficient, although "far from strong," where the defendant grabbed the victim's private parts over his clothes and told victim not to tell).

D. Balderas has failed to demonstrate an accumulation of errors of such a magnitude that retrial is necessary.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, the cumulative error doctrine does not warrant reversal when a trial has

few errors with little or no impact on the outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Here, Balderas complains of just a few errors based on some brief statements made during the court's ruling. He has failed to demonstrate an accumulation of errors of such a magnitude that retrial is necessary.

Balderas argues that reversal is warranted by the cumulative effect of the errors he alleges. But considering the full scope of the trial, for sake of argument, if there were any errors, they did not materially affect the outcome. Because Balderas had a fair trial, the cumulative error doctrine does not warrant reversal of his convictions. *State v. Greigg*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

IV. CONCLUSION

In sum, the appellant's conviction for child molestation should be affirmed. There was sufficient evidence such that any rational trier of fact could have found the elements beyond a reasonable doubt. Furthermore, the judge's comments did not deprive Balderas of his right to cross examine the victim and did not evidence bias, prejudice, or other impropriety. In addition, Balderas has failed to demonstrate an accumulation of errors of such a magnitude that retrial is necessary.

Respectfully submitted this 14th day of May, 2018,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on May 14, 2018, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Cathy Helman at cathy@burkelg.com. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of May, 2018 at Yakima, Washington.

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us

YAKIMA COUNTY PROSECUTING ATTORNEY'S OFF

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