Supreme Court No. 90768-4
Court of Appeals No. 21114-7-III

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOEL GONZALES, Petitioner.

ANSWER OF RESPONDENT

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A. IDENTITY OF RESPONDENT

State of Washington, Respondent in the Court of Appeals, asks this court to deny review of the Court of Appeals decision terminating review designated in Part B of Petitioner, Joel Gonzales, brief filed in this matter.

B. COUNTER STATEMENT OF THE ASSIGNMENT OF ERRORS

1. Did the Court of Appeals err in terminating review and affirming the conviction?

C. COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did trial court base its findings of fact and conclusions of law on appropriate evaluation of witness testimony, thus Joel received a fair trial?

2. Did trial court properly exclude witness whose proposed testimony regarded the victim's lack of fear of Joel, thus Joel received a fair trial?

D. COUNTER STATEMENT OF THE CASE

Joel, age 13, repeatedly raped his 9 year old male cousin I.G. Joel was found guilty of three counts of first degree. (RP 448: 21-25 and 157-159 generally). Karla Arroyo is the mother of I.G. and his brother, D.G., then age 8, (RP 156: 9-14). The cousins, Joel, I.G. and D.G. spent significant amounts of time together and would spend the night together on occasion. (RP 159: 15 – 160: 9). In the summer of 2011, Karla became concerned for the safety of her son, I.G. (RP 161: 9-12). I.G. had begun to have accidents involving bowel movements. (RP 160: 10-18). In June of 2011, Karla discovered Gonzalez and I.G. with their boxers down below their bottoms, "spooning" with I.G.'s back to Gonzalez's front. (RP 161:14-17, 162: 6-17 and 163:7-24).

Karla confronted Gonzalez who denied that he had done anything wrong. (RP 164: 5-8, 164:19-22 and 403:7-11). Karla made Joel move out of the room with I.G. and sleep on the couch. (RP 403: 14-17). Approximately three weeks after the spooning incident, Karla asked I.G. about his bowel problems again. (RP, 165: 18-25). Karla asked I.G. if anyone had ever touched him inappropriately. (RP 167: 5-7). I.G. looked at Karla with a blank stare and Karla asked if anybody had ever stuck anything in his bottom, I.G. said yes. (RP 167: 6-14).

Karla then asked him to tell her who it was and explained that she needed to know so she could help him. (RP 167: 16-22). I.G. told her that it was Joel (Joel). (RP 167: 16-24).

Karla told her mother, Josie Arroyo and Joel's mother, Xochitl Arroyo and Karla's family's counselor. (RP 169: 2-13). Xochitl admitted she knew about the sexual abuse and apologized. (RP 169:15-23). Karla reported the rape to the Columbia County Sheriff Office. (RP 169: 24-25 and 170:1).

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

I.G. also testified that Joel said he was going to put a hanger in his butt, but he could not remember whether or not it happened. (RP 62:9-14). I.G. did state he remembered it hurt. (RP 63:7-17). I.G. testified that Joel would stick his thingymajig in I.G.'s butt whenever he spent the night at his grandma's house or when Joel spent the night

at his house. (RP 65:7-13). I.G. testified that it would always happen in bed and that it happened over 100 times. (RP 65:14-23).

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

I. G. testified that he did not remember where they were at the first time that Appellant stuck his thingymajig in his butt because it happened five years before. (RP 66:1-4). He testified that he could remember that it started when he was about three or four. (RP 67:5-12). I.G. testified that the last time he remembered something happening was after he talked with Columbia County Sheriff's Deputy Foley, when he spent the night at his grandma's and Joel was there. (RP 69:1-25). I.G. testified that when Joel put his thingymajig in his butt, that it felt bad, gross and disgusting. (RP 70: 5-10). I.G. testified that he realized it was bad when he was five. (RP 70:7-10). I. G. testified that he probably remembered things better when he talked with Deputy Foley. (RP 136; 3-6).

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

I.G.'s sister, D.G. also testified at the trial. (RP 156:19-24 and RP 137-155 generally). D.G. testified that she saw Joel stick his private part in her brother's private part. (RP 146: 13-25).

Joel denied ever raping his cousin. The defense's theory was that the rapes never occurred because I.G. continued to have contact with Joel after the rapes were reported to the Sheriff's Office, allegedly not showing any fear of Joel.

Prior to testimony being taken, the court considered the admissibility of testimony, photos and video of Joel, I.G. and D.G. interacting after the rapes were reported. CP 108-10. The judge stated " . . . I go to the judge schools, like everybody else, and we get the education conferences and we are taught and learn that [child sexual assault victims] don't know it's wrong, they don't know when things are morally incorrect about it." Despite initially denying the request, the judge permitted the testimony and evidence.

Maria Emma Saldivar Guuiterres, aunt to both Joel and I.G. testified that she did not see I.G. exhibit fear or unhappiness when around Joel. (RP 206 generally and 208;19-25 and 209:1). Both Xochitl and Josie testified that Joel and I.G. got along together and that I.G. did not express fear around Joel.

The trial judge found beyond a reasonable doubt that that there was no significant or substantial evidence of fear by I.G. of Joel or that I.G. did not want to be around Joel. RP 320:4-20. Joel sought to have the judge watch the video which the judge refused, however the judge accepted the State's stipulation that the videos showed positive interaction between Joel and I.G. RP 316-18, 321.

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. RP 375: 18-24.

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.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED.

1. Error claimed of Judge's use of "opinion" not raised at trial, not raised before Court of Appeals and not a

manifest error affecting a constitutional right; should not be reviewed.

Joel did not object to the trial court's statements regarding his education about child sexual assault at the time of trial. RAP 13.3(a) allows a party to seek discretionary review by the Supreme Court of a decision of the Court of Appeals. Here, Joel appealed his conviction to Division III of the Court of Appeals arguing 1) 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 and was judicial testimony contrary to ER 605; and 2) the trial court erred in excluding a defense witness; and 3) the cumulative error deprived Joel of a fair trial. *Petitioner's Brief* at Part B.

The Court of Appeals affirmed the decision, finding that the subject statements of the court were part of its oral explanation for its evidentiary decisions and not as a basis for its findings of fact or conclusions of law, which were based on witness testimony and that the court did not abuse its discretion by excluding the expert's testimony as not relevant. *Id.*

Now, Joel is attempting to argue a completely different issue before this court, an issue that was not addressed at the trial level, or at

the Court of Appeals level. Joel is now arguing that "the trial court judge erred in using his own opinions from judicial training on a critical issue of credibility." *Id.* Raising such issue now, is not permitted and should be denied. An issue not raised or briefed in the Court of Appeals and not of manifest constitutional error will not be considered by this court. *State v. Laviollette*, 118 Wn.2d 670, 679, 826 P.2d 684 (1992), (overruled on separate grounds as recognized by *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995); RAP 2.5(a).

This court does not review an issue raised for the first time on a request for review unless 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.

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 the court and request for review should be denied.

2. Judge appropriately based his findings of fact or conclusions of law on witness testimony.

The finding by the judge was based upon the testimony of the victim, I.G., the testimony of his sister, D.G. who witnessed a rape and the testimony of Karla, I.G. and D.G.'s mother and the State's stipulation to the content of the video. Joel argues that the judge improperly used his "opinions from judicial training" to determine the credibility of a witness. Evaluated in context, the court's statements about the behavior of child victims of abuse were merely part of its explanations for evidentiary rulings regarding the admissibility of photographs and video of Joel with his cousins and the propriety of allowing a defense witness to testify. The judge was explaining why he thought that evidence regarding the lack of fear of a very young victim was not probative to the issue of the rapes. Regardless, the judge allowed such testimony and stipulation and is presumed to consider all evidence when making his rulings and findings.

Joel cites to *Elston v. McGlauflin*, 72 Wash. 355, 359, 140 P. 396 (1994), for the proposition[1] that the judge here, was biased,

[1] Unlike here, at the Court of Appeals, Div. III, Joel cited *Elston* to argue that the judge "inserted himself as a witness" and "obtained independent

prejudiced or had a fixed or preconceived opinion. *Petitioner's Br.* at 9. In *Elston*, a negligent construction of an apartment building, the judge visited the site of an apartment building without the knowledge of the parties or counsel. *Elston*, 79 Wash. at 359. *Elston* is inapposite. The trial judge in this case did not conduct an independent investigation or make his decision based upon independent experience; he simply explained evidentiary rulings and made his decision based on the testimony before him.

Joel next relies on *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005) for the claim that the judge here used extrajudicial information to the prejudice of Joel. *Grayson* a trial court denied a Drug Offender Sentencing Alternative (DOSA) request because of the State's lack of funding for the DOSA program. *Id.* at 337. The Supreme Court, in a five to four decision stated that a trial court cannot categorically refuse to consider DOSA and, a lack of funding was not a fact in the record and was not a legitimate reason for denying the alternative sentence. *Id.* The court recognized, however, that general information about a sentencing alternative, such as for whom the

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knowledge" besides the proceedings before the court; the Court of Appeals rejected this argument.

program is intended, is the kind of information that helps a judge exercise discretion and the dissent noted that the trial court had determined that a DOSA sentence would not benefit Grayson or the community, so the court had properly exercised its discretion.

Here, the court properly exercised its discretion, considered the relevancy of evidence to make a ruling, one that ultimately placed all of Joel's relevant evidence of lack of fear before the court. The petition for review should be denied. Joel's argument is without merit and review should be denied.

3. Joel waived argument on appeal of admission of expert testimony.

On appeal, Joel claims that *State. v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), requires admission of his expert, Ms. Huett's testimony. *Hutchinson* involved the propriety of excluding evidence as a sanction for a discovery violation under CrR 4.7, requiring factors a trial court must consider before excluding testimony. *Hutchinson*, 135 Wn.2d at 882-83. At trial, Joel did not argue that *Hutchinson* warranted admission; 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). Joel waived this argument on appeal and his request for review should be denied.

4. Court properly excluded "expert" testimony.

Even if this court were to consider the issue, *Hutchinson* is inapplicable 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 not relevant. *Hutchinson* does not apply and the petition should be denied.

Joel also argues that the evidence of the behavior of child victims of sexual abuse is relevant. *Petitioner's Brief*, at p. 15. 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." The court did not abuse its discretion when it excluded the evidence as irrelevant under ER 401. 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. 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 when the children were alone, in private; thus, the actions and behavior of I.G. and D.G. in public was of little or no relevance in determining whether the rapes occurred. The trial court correctly pointed this out. The trial court had a basis for excluding the testimony and did not abuse its discretion in its exclusion; the petition for review should be denied.

Though Joel does not specifically cite ER 702[2], it appears that he argues that he had no way of "countering" the knowledge the trial court gained in judicial trainings except through expert testimony – in other words, through ER 702 evidence. The judge was not asked to address whether Ms. Huett's testimony satisfied ER 702; it excluded the evidence as irrelevant under ER 401. The court did no err and the petition for review should be denied.

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

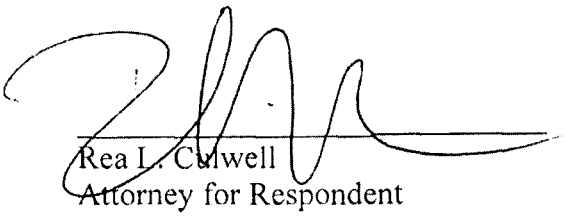
5. No error, therefore no cumulative error.

Under the cumulative error doctrine, a conviction may be reversed when the combined effect of 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). Cumulative error, however, 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. Joel's petition for review should be denied.

F. CONCLUSION

Based on the foregoing, the court should deny the petition for review.

Respectfully submitted,



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Please see attached Answer of Respondent and Declaration of Mailing for filing.

Thanks,
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