No. 311147-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOEL GONZALEZ,

Appellant.

# APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

After three days of testimony by family members, the trial court commented that the bench trial of Joel Gonzalez (Joel)[1] in Columbia County Juvenile Court was "almost as close to a swearing contest as the Court will see from time to time." (VRP 447:13-24) Nevertheless, the trial court found the State had proven three counts of First Degree Rape of a Child, against Joel's younger cousin I.G. beyond a reasonable doubt. In making this determination, the trial judge relied heavily on judicial training he had previously received regarding child sexual abuse victims and their behavior toward their abusers. Evidence supporting this theory was not admitted at trial.

The trial judge's reliance on his own theory about the behavior of child sexual abuse victims denied Joel a fair trial by (1) failing to subject this information to the procedural safeguards of ER 201, (2) allowing the trial judge to testify as an expert in a trial over which he was presiding and in which he was the fact finder in violation of ER 605 and 702, and (3) preventing Joel from rebutting the trial judge's own theory with a

[1] Many of the witnesses in this case are family members who share last names. For the sake of clarity, Appellant refers to those persons by their first name. No disrespect is intended.

defense expert. The individual and cumulative effect of these errors requires reversal of the trial court's judgment on all three counts.

## II. ASSIGNMENTS OF ERROR

A. The trial court erred in relying upon information that was not submitted into evidence as an exhibit or testimony or through judicial notice.

B. The trial judge erred by testifying in a trial over which he presided in violation of ER 605.

C. The trial judge erred by testifying to subject matter that must be admitted through expert testimony at a trial over which he was presiding.

D. The trial court erred in excluding expert testimony as a sanction for late disclosure.

E. The trial court erred in excluding expert testimony regarding the behavior of child victims of sexual abuse and child abusers as irrelevant to the determination of whether a juvenile had committed three counts of rape of a child.

F. The trial court erred in ruling evidence of the lack of fear or discomfort by child victim of sexual abuse around his abuser was irrelevant to the determination of whether the rapes occurred.

## III. STATEMENT OF THE CASE

The State charged Joel with three counts of first degree rape of a child, alleging the thirteen-year-old had anally raped his nine-year-old male cousin I.G. on June 19, 2011 (Count I), July 7, 2011 (Count II), and sometime between January 2008 and June 2011 (Count III), and with attempted rape of a child in the first degree of his seven-year-old female cousin D.G. (Count IV). (CP 1-3) The State voluntarily dismissed Count IV at trial for lack of sufficient evidence. (VRP 280:25-281:4)

No physical evidence was presented at trial. The only eye witness account of any sexual activity was by I.G.'s younger sister, D.G. Thus, the credibility of D.G., I.G. and Joel was critical to both parties' theories of the case.

To challenge the credibility of D.G. and I.G., the defense submitted exhibits and testimony establishing D.G. and I.G. enjoyed spending time with Joel and continued to seek out Joel (even time alone with Joel) after they made allegations of rape.

### A. The allegations of rape were based solely on the testimony of the alleged victims and their mother.

The State's evidence of the three counts consisted of the testimony of I.G., D.G., and their mother Karla Arroyo (Karla), and Deputy Donald Foley's account of his investigation.

### 1. I.G. and Karla's testimony regarding the June 7, 2011 "spooning" incident was contradictory and at odds with their conduct following the alleged rape.

The State alleged Count II occurred on July 7, 2011, but amended the date to June 7, 2011 at trial. (CP at 1; VRP 296:2-14) Karla testified that on June 7, 2011, Joel spent the night at her home. (VRP 178:14-15; 216:8) Joel and I.G. were sleeping in the same bedroom. (VRP 178:14-19, 179:10-11, 20-25) She entered the room while the boys were asleep and discovered them spooning with their pants down. (VRP 177:25-178:3, 180:12-18) She testified both Joel and I.G. denied any sexual activity occurred. (VRP 164:23-165:3; 178:18)

Although she suspected sexual activity, Karla testified Joel's penis was not erect and she observed nothing wet and no fecal matter on Joel's penis. (VRP 164:11-12; 180:22-181:2) During an interview on July 24, 2011, I.G. told Deputy Foley that the spooning incident on June 7, 2011 was the last time any sexual activity happened between himself and Joel. (CP 7-8) At trial, however, I.G. testified he could not remember whether any rape occurred during the summer of 2011, and that no rape occurred during the spooning incident. (VRP 50:12-14, 107:24-108:11)

Joel testified that he and I.G. were very hot and sweating while they were sleeping that night because Karla kept the heat up very high.

(VRP 401:12) Joel woke up because of the heat and removed his pants, leaving his underwear on. (VRP 401:16-18) Joel testified his underwear accidentally slipped down during the night. (VRP 401:18-19) While Joel and I.G. were sleeping, Karla came into the room, turned on the light, and started yelling. (VRP 401:20-23) Joel testified that it looked like he and I.G. were spooning because after he realized his underwear had slipped down, he was "kind of wiggling side by side to get it up because it was so hot, so I couldn't really just straight up, pull it up." (VRP 402:2-5) Joel denied taking any of I.G.'s clothes off. (VRP 23-25) Joel denied any sexual activity occurred on that occasion or at any time. (VRP 404:1-405:2)

Despite her testimony that she had observed the spooning incident on June 7, and had threatened to put Joel in jail (VRP 178: 14-2), Karla testified it was I.G.'s ongoing problem with soiling his pants that led her on June 23, 2011, to ask I.G. whether he had been sexually abused and by whom. (VRP 174:8-18; 175:16-23) On cross examination, however, Karla testified she never thought about the possibility that I.G.'s soiling his pants was related to sexual abuse. (VRP 225:12-18)

During her conversation with I.G., Karla informed I.G. about her experience as a child victim of sexual abuse. (VRP 175:24-175:8) Karla testified that after some prodding, I.G. finally admitted Joel had touched

him. (VRP 176:10-13; 177:5-19) I.G. would later testify that Karla told him "like five, six, five to ten times" that she had been sexually abused as a child. (VRP 86:17-20)

Family members testified to conduct by Karla that was inconsistent with her testimony that she had seen Joel and I.G. spooning with their underwear pulled down. Xochitl Arroyo (Xochitl), Karla's sister and Joel's mother, testified that the day of, and immediately after, the alleged spooning incident, Karla took Joel and I.G. to see her brother, allowing them to spent most of the day together. (VRP 388:18-389:4, 17-24) Joel testified that after Karla woke him up on the night of the spooning incident, he had offered to sleep on the couch, but Karla had said he did not need to. (VRP 403:7-15) Joel moved to the couch anyway. (VRP 403:16-17)

Xochitl and Karla and Xochitl's mother, Josephina Arroyo (Josie), testified Karla continued to leave D.G. and I.G. at Josie's home, even though Karla knew Joel lived at the house. (VRP 299:11-22; 301:11-14; 301:21-302:2; 328:21-329:19; 330:5-6; 358:25-359:5; 363:5-7; 367:17-368:8) Karla never told Josie that the children could not be together. (VRP 368:3-5)

**2. Although the last rape was alleged to have occurred on June 19, 2011, I.G. made various statements regarding when this may have occurred.**

The State argued and the trial court found Count I occurred the last time I.G. had spent the night with Joel at Josie's home, on or about June 19, 2011. (VRP 412:10-13; 449:1-2) During his July 17, 2011 interview with Deputy Foley, however, I.G. stated the last rape occurred the last time Joel had spent the night at I.G.'s home, on June 7, 2011. (CP at 49) At trial, I.G. claimed the last time Joel raped him was the last time I.G. had spent the night at his grandmother Josie's home. (VRP 51:15-18) I.G. testified that this was after the interview with Deputy Foley (VRP 67:17-24) and just a short time before trial, which began July 2, 2012. (VRP 54:2-8) A short time later, I.G. testified the last time might have been when I.G. and Joel were at Karla's home. (VRP 71:24-73:4)

Consistent with I.G.'s testimony that the last time he had spent the night with Joel was shortly before trial, Joel testified he had spent a full day alone with I.G. approximately four months before trial. (VRP 394:25-395:5; 396:19-397:3)

### 3. No physical or medical evidence, and only questionable eyewitness testimony, corroborated I.G.'s claims that he had been raped "hundreds of times" by Joel between 2008 and June 2011.

I.G. testified that Joel anally raped him "whenever [he] spent the night at grandma's [Josie's] house" and it happened approximately 100 times. (VRP 65:7-17) The only other witness to any of the alleged rapes was D.G. (VRP 146:23-25) D.G. testified the sexual act she had observed had occurred at her grandmother's house, but that she did not remember when it happened. (VRP 147:1-10) I.G., however, denied D.G. was ever in the room during any of the alleged rapes and asserted he would have seen D.G. if she were present. (VRP 111:16-112:4) Joel likewise denied D.G. had ever witnessed any anal intercourse. (VRP 404:19-21)

Joel testified he had never attempted to have anal intercourse with I.G. or touched him in a sexually inappropriate manner. (VRP 404:7-12) Deputy Foley testified that despite his numerous attempts to get Joel to confess to the rapes, Joel denied any inappropriate behavior with I.G. (VRP 255:22-25; 258:11-259:13)

No medical evidence of the alleged rapes was submitted at trial. (VRP 447:25-448:11) Joel's mother Xochitl testified that when Karla first told her of the allegations of rape, she told Karla to take D.G. and I.G. to the emergency room to be examined. (VRP 303:14-22) After Karla

reported the alleged rapes to the Columbia County Sheriff's Office, Deputy Foley reported "IG and DG where [sic] were taken to a medical doctor that was recommended by Officer Cooper. Officer Cooper told [Deputy Foley] that she would be able to get the medical records for the prosecuting attorney." (CP at 8) Nevertheless, Deputy Foley never received any medical records regarding I.G. or D.G., and testified he was not sure if I.G. and D.G. were ever taken to a doctor. (VRP 268:5-19)

I.G. testified he had never had any blood in his underwear that he knew of. (VRP 89:20-25; 90:5-8) No evidence was introduced contradicting the lack of any blood. Thus, the State's case was entirely dependent upon the testimony of I.G., D.G., and Karla.

### B. The trial court found beyond a reasonable doubt that I.G. exhibited no fear or discomfort around Joel despite the allegations of rape.

The defense theory of the case was that the allegations were not credible in view of the evidence showing I.G. did not express any fear or discomfort toward Joel, but, in fact, continued to seek out Joel's company. (CP 108-10, 148-60) The defense indicated its intent to submit testimony, photographs, and video showing the interaction between I.G., D.G., and Joel after Karla reported the alleged rapes to the Columbia County Sheriff's Office. (CP 108-10)

On the first day of trial, the trial judge ruled the photographs showing the interaction between Joel and I.G. would not come in absent the State opening the door. (VRP 26:21-23)

> [T]he photos are not relevant, in the Court's opinion. As I see the Respondent counsel's argument, there's almost an implication that these, however old they were, alleged victims at the time of the alleged crimes, that they knew something wrong was going on, and that's a presumption that's false.
>
> Little kids don't know it's wrong when they're raped and molested. I'm sorry, I can't take judicial notice of that, but I go to the judge schools, like everybody else, and we get the education conferences and we are taught and learn that they don't know it's wrong, they don't know when things are morally incorrect about it.
>
> And so that they weren't afraid of or didn't mind being around or absolutely enjoyed Joel's company after either, after the alleged incidents, in technical violation of this Court's order, doesn't really help me decide the case at all.

(VRP 26:22-27:15) The trial court also initially granted the State's motion to exclude testimony of family members as to the interaction of I.G. and D.G. with Joel after Karla had reported the alleged rapes to law enforcement. (VRP 29:4-25) The trial judge reiterated:

> And, again, given my training that children rarely know or perceive or comprehend that anything bad or wrong happening [sic]...So that's where I'm coming from. If, how can comfortability [sic] around the accused have any bearing on whether or not the allegations have occurred in the first place, so I do

> rule the video out, absent some door opening to let it in.

(VRP 31:19-32:6) The trial judge continued to rely on this theory at trial even after I.G. testified he did know something wrong was happening.

At trial, I.G. testified that Joel made him feel uncomfortable when he cussed at I.G. and when Joel allegedly anally raped him. (VRP 47:24-48:7, 49:7-9) I.G. testified it hurt when Joel anally raped him. (VRP 52:4-6) I.G. testified it made him feel "bad" when Joel allegedly tried to put a hanger in I.G.'s buttocks and testified he thought it was a "[b]ad thing, bad thing," and that I.G. knew it was wrong. (VRP 58:12-59:1; 61:1-20). I.G. testified that when he was five-years-old he decided that what Joel was doing was wrong. (VRP 59:16-19; 70:8-10) That was when I.G. told his grandfather what Joel was doing was "grosseros" or "gross." (VRP 59:23-60:17; 70:14-16; 71:11-15) I.G. testified the anal rape felt "[b]ad, gross, disgusting." (VRP 70:5-7) In an interview prior to trial, I.G. claimed the anal rapes left him bruised and in pain. (VRP 88:11-19)

Karla testified, however, that I.G. had never told her he was afraid to be in Joel's presence. (VRP 224:22-24) And, I.G. testified he knew Joel was going to be at their grandmother's home when I.G. was also there for two to three days at Thanksgiving, but I.G. did not mind. (VRP 75:12-

18; 76:1-3) Although I.G. claimed he did not get along well with Joel, I.G. attributed this to Joel calling him names, not to the alleged rapes. (VRP 78:25:79:7) I.G. denied having any fear of being trapped in a room with Joel. (VRP 116:11-117:10)

I.G. testified he was afraid to even play PlayStation without D.G.'s permission, but would "only be afraid [of Joel] if he trapped [I.G.] in a hospital or a circus...and if he were a clown." (VRP 77:19-21; 78:4-9; 117:13-21) I.G. denied Karla had ever told him that he should not be around Joel. (VRP 14-22)

After the State presented its evidence, the trial court ruled I.G.'s testimony had opened the door "somewhat" to allow testimony by family members regarding their observations of I.G.'s behavior. (VRP 201:11-202:3) Accordingly, the defense presented testimony from family members attesting they never observed I.G. acting reluctant or unhappy to spend time with Joel. (VRP 206:24-207:3-12; 208:19-209:3; 341:9-17) Xochitl testified that even after the allegations were made, I.G. continued to ask for Joel when I.G. came to Josie's home for a visit or to spend the night. (VRP 306:10-23) I.G. and Joel's great-aunt Maria Concepcion Salvadar testified that on Mother's Day 2012, I.G. wanted to leave the restaurant where the family was having dinner, so that he could

join Joel who was listening to music alone in a family member's van. (VRP 338:13-339:17)

After the allegations were made, Joel and I.G. continued to play, laugh, and talk together, and I.G. even wanted to get his hair cut like Joel's. (VRP 306:5-9) From the time the allegations were made to the date of trial, Xochitl testified she had never observed I.G. express fear around Joel or any discomfort. (VRP 310:2-9) She took photographs and videos to document D.G. and I.G.'s behavior around Joel after the allegations were made to the police. (VRP 313:7-9; 316:8-11; 332:5-11)

The photographs and video depict Joel, I.G., and D.G. enjoying spending time together. (CP at 126-144) The video records I.G.'s reluctance to leave Josie's home because he wants to stay to play with Joel. (VRP 318:1-4, 13-15) Although the defense asked the trial judge to actually watch the video in order to observe the demeanor of I.G. and his lack of fear, the court refused. (VRP 319:23-320:3; 321:7-9):

> Okay, let me just make this observation. I saw no signs of discomfort by [I.G.] during [direct or cross examination].
>
> He never shot eyes to Joel. Joel never gave him a dirty look or anything. . .
>
> But my point is, I understand you have driven your point home with a Mack truck, that there's been no significant or substantial evidence of fear or not

> wanting to be around by [I.G.] shown towards Joel. I find that has been proven beyond a reasonable doubt.

(VRP 320:4-20) Instead of viewing the footage, the trial court sought and accepted the State's stipulation to the content of the videos, stating that the interaction between the alleged victims and abuser "[did not] really mean a whole lot to [the court] because the 18th of July is nearly a month after the last allegation date." (VRP 316:22-317:4, 317:25-318:19, 321:7-9)

Josie testified that I.G had been at her home approximately 100 times since the allegations of sexual abuse. (VRP 358:25-360:11) During those times, I.G. expressed no discomfort about being around Joel. (VRP 361:3-7) "[I.G.] is not afraid of him and he's happy to, to be with Joel." (VRP 362:21-22) Karla confirmed that despite the allegations of anal rape occurring hundreds of times and every time I.G. and Joel spent the night in the same home, I.G. expressed no reluctance to spend time with Joel. (VRP 194:25-195:2)

### C. The trial court excluded expert testimony regarding the behavior of child victims of sexual abuse and abusers as irrelevant.

When trial reconvened after a ten-day recess, the defense moved to allow expert testimony from Joel's therapist, Sue Huett, to rebut the trial judge's theory regarding the behavior of child victims of sexual abuse. (VRP 375:18-24) Defense counsel explained the motion was triggered by

the State's and court's comments at trial regarding whether sexually abused children display fear or discomfort around their abusers. (VRP 376:5-20)

Previously, the trial court had explained its "company policy on late disclosed potential witnesses...is that the witness must be made available during the break to State's counsel...I'll never exclude her, in all likelihood, unless it's just totally cumulative or something that's totally irrelevant." (VRP 28:15-18, 29:1-3) Defense counsel, therefore, requested Ms. Huett be allowed to testify after the State had had an opportunity to examine her outside the presence of the court and that the State be allowed a continuance if the court deemed it necessary. (VRP 377:11-15)

The court responded:

> You know, at the risk of giving a partial advisory opinion, it doesn't matter to me whether he was afraid or not afraid of his cousin.
>
> I am absolutely one hundred percent satisfied that he is absolutely zero threat to the alleged victim in the case when there are other eyes around. The allegations thus far have been it's always at night, it's always when we're alone in a room or after everybody is asleep in a room, that's when it happens, that's the allegation.

(VRP 377:19-378:3) The trial court then acknowledged forbidding Ms. Huett's testimony would be an "extreme measure" and allowed the

State an opportunity to question the witness outside the presence of the court. (VRP 378:11-16)

After questioning Ms. Huett, the State objected on the basis of the defense's failure to timely disclose and relevance. (VRP 379:21-380:25) Mirroring the trial judge's statements, the State argued Ms. Huett's experience with 200 to 250 victims and their abusers was not relevant because it was in a setting where adults were present. (VRP 379:23-380:8) "It's not relevant. As the Court is very much aware, these incidents occurred when no other adults were present." (VRP 380:4-6)

During the defense offer of proof, defense counsel explained he had only discussed the subject matter of Ms. Huett's proposed testimony the previous evening, and explained the defense expected Ms. Huett's testimony to show the extent of her experience with child sexual abuse victim and perpetrators, the percentage of those victims whom she observed interacting with their abusers, as well as the percentage of abusers who confessed. (VRP 381: 20-383:20) Ms. Huett was expected to rebut the opinion expressed by the trial court regarding the lack of fear and discomfort on the part of child sexual abuse victims by testifying that in those cases where she had observed the interaction between the abuser and the victim, Ms. Huett had witnessed fear on the part of the victim. (VRP 38223-383:9) Defense counsel stated Ms. Huett would testify "that

virtually one hundred percent of them expressed a fear of the perpetrator and showed that." (VRP 383:5-9)

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

In ruling on the parties' motions in limine, the trial court had justified a ruling excluding evidence of the interactions between I.G. and Joel, stating:

> The main reason for my ruling in that regard, when you get into the area of, well, it didn't look like they had been raped or molested, don't we need an expert opinion, somebody with expert credentials or qualifications to be testifying in that regard, doesn't there need to be a qualified witness to make such conclusions?

(VRP 29:14-20) Nevertheless, the trial judge excluded Ms. Huett's expert testimony, reasoning he did not need an expert to tell him I.G. loved being around Joel in the daytime. (VRP 383:19-22)

### D. Based primarily upon the trial judge's theory that child victims of sexual abuse do not show fear or discomfort around their abusers, the court entered judgment against Joel on all three counts.

In finding Joel guilty on all three counts, the trial court relied upon Karla's testimony regarding the spooning incident, D.G's testimony that she had observed a sexual act, and I.G.'s testimony. (VRP 447:15-25) The trial judge speculated although they had heard no medical evidence, "as [I.G. and Joel] grew through the years anatomically, that might explain the lack of any sign or something to the like." (VRP 448:4-6) The court likewise speculated I.G.'s various versions of the hanger incident as to whether Joel threatened him with a comb or a hanger might be explained by the more common use of rat tail combs by persons "down south." (VRP 448:12-20) No evidence was admitted as to whether I.G. was referring to a rat tail comb or was from an area where such combs were more common.

The trial court found the rapes had occurred the last time Joel spent the night at I.G.'s home on or about June 19, 2011 (Count II), the last time I.G. had spent the night at Josie's (Count I), and one other incident occurring on or about June 7, 2011 (Count III). (VRP 44:21-3) The trial judge then addressed I.G.'s testimony regarding the number of rapes that

had occurred and the fact that, despite this testimony, I.G. had expressed no fear or discomfort around Joel:

> [I]f something has become so commonplace that it happens every time you spend the night with somebody, you may not like it, it may not feel good, but who says you're going to be afraid of it?
>
> You just know it's coming. I mean, I think the evidence, as a reasonable deduction or inference from the evidence, why would you be afraid of it? I mean it's just commonplace.

(VRP 449:10-17) Based upon the testimony of I.G., D.G., and Karla, and his determination that I.G.'s inconsistent behavior toward Joel had no relevance, the trial judge ruled: "So, yeah, I find he really did it." (VRP 449:21)

## IV. ARGUMENT

A defendant is "entitled not only to a fair trial, but to the semblance of fair trial. He has a right to the free judgment of a court or jury, unclouded by bias, prejudice, or fixed or preconceived opinion." *Elston v. McGlauflin*, 79 Wash. 355, 359, 140 P. 396 (1914). Joel Gonzalez was denied a fair trial by the individual errors of the trial court in relying on the hearsay knowledge of the trial judge in violation of ER 201, 602, 605, 702, and 703; and in barring expert testimony contrary to the trial judge's own assumptions. Even if these errors were not sufficient individually to reverse the judgment of the trial court, their

cumulative effect denied Joel a fair trial requiring reversal of all three counts.

### A. The trial court erred in relying on untested information regarding the behavior of child sexual abuse victims toward their abusers that was not properly admitted into evidence.

"A judge may not dispense with the requirement of formal proof simply because he or she already knows that something is true." Karl B. Tegland, *Evidence Law & Practice,* Vol. 5, §201.3 (5th ed. 2007). Due process requires the court to consider only those adjudicative facts the parties have had an opportunity to test through the adversarial process. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (citing George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's* Sua Sponte, Ex Parte *Acquisition of Social and other Scientific Evidence During the Decision-Making Process*, 72 St. John's L. Rev. 291, 319 (1998)).

Judges therefore may not rely upon their own personal knowledge of adjudicative facts in making a judicial determination and may take judicial notice of only those facts that are universal and beyond reasonable controversy. *Grayson*, 154 Wn.2d at 340; *State v. K.N.*, 124 Wn. App. 875, 881-82, 103 P.3d 844 (2004). Defendants are protected by due process and by procedural rules from being convicted on the basis of

untested facts. *Grayson*, 154 Wn.2d at 338 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). Although judges may rely on their common sense and experience, the law requires that adjudicative facts be subject to hearing. *Grayson,* 154 Wn.2d at 340. Parties are entitled to challenge the propriety of judicial notice of a specific fact at any stage in the proceedings. ER 201(e), (f). Where a judge presiding over a proceeding simply testifies rather than taking judicial notice, a party need not object to preserve the issue for appeal. ER 605.

**1. The trial judge's statements were not appropriate for judicial notice because they were subject to reasonable dispute.**

Courts may not take judicial notice of facts that are not universally known merely because they can be determined from publications or can be determined by resorting to expert testimony or other proof. *State v. Karsunky*, 197 Wash. 87, 98-99, 84 P.2d 390 (1938). A court is also prohibited from taking notice of a fact that cannot be readily evaluated by the reviewing court. *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986) (finding trial court erred in taking judicial notice of victim's size at sentencing). Thus, matters which a judge knows only as an individual are not proper subjects of judicial notice. *K.N.*, 124 Wn. App. at 882 ("The judge's own knowledge should not be confused with judicial notice.")

(citing 21 Charles A. Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure* §5104 (1977)); *Grayson*, 154 Wn.2d at 340 (finding reliance on extrajudicial information about the DOSA program known to the judge personally was not appropriate for judicial notice); *United States v. Lewis*, 833 F.2d 1380, 1385 (9th Cir. 1987) (quoting 9 J. Wigmore, *Evidence in Trials at Common Law*, §2569, at 723 (J. Chabourn rev. ed. 1981) ("It is therefore plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows *only as an individual* observer outside the court.").

Judicial notice is limited to those adjudicative facts that are not subject to reasonable dispute. ER 201(b). "In a criminal case, adjudicative facts generally relate to the facts of the crime and the defendant, but could also include social science or other research that directly affects the litigants before the court and are properly placed in contest by the parties." *Grayson,* 154 Wn.2d at 340. A specific fact may become adjudicative because its truth or falsity affects the parties before the court. *Grayson*, 154 Wn.2d at 341. The reactions of individuals to traumatic events is not a subject suitable for judicial notice. *State v. Way*, 88 Wn. App. 830, 833, 946 P.2d 1209 (1997).

Whether I.G. reacted to the alleged hundreds of rapes in a manner consistent with the behavior of most child victims of sexual abuse was an

adjudicative fact that was not appropriate for judicial notice. During evidentiary hearings and at trial, however, the trial court repeatedly expressed its conclusion that child victims of sexual abuse react to their abusers. (VRP 27:4-15; 29:4-13; 31:19-32:6; 449:10-17) While disclaiming judicial notice (VRP 27:5-6), the court relied upon these conclusions in determining what evidence to admit, what weight to give the evidence, and even in determining whether the abuse actually occurred, just as if the trial judge's conclusions had been judicially noticed. (VRP 28:4-6; 29:21-24; 32:2-6; 383:12-384:2; 449:21-23) Doing so deprived the defense of the opportunity to be heard regarding the propriety of the trial court relying upon information that was not generally known or capable of accurate and ready determination. ER 201(a), (e). Moreover, because the source of the trial court's conclusion was never entered into the record, this court has no way of reviewing the evidence or determining its reliability. *Payne*, 45 Wn. App. at 531. The findings and conclusions of the trial court as to all three counts made in reliance upon the trial court's theory must therefore be reversed. (*See* VRP 448:21-449:21; CP at 169, ¶¶1.10-.14, 2.1-.3, 2.7-.10)

### 2. The trial judge improperly testified as a witness and did not have personal or expert knowledge regarding the behavior of child sexual abuse victims.

"Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003) (Scalia, J., concurring in part and concurring in judgment). It is, therefore, a basic principle of jurisprudence that the court may not introduce its own evidence into a proceeding. *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 57, 97 S. Ct. 2229, 53 L. Ed. 2d 100 (1977) (holding appellate court clearly departed from its statutory function by relying on reports created for the court which had not been examined and tested by the adversary process); *Quercia v. United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) (holding trial court's comment on mannerism typical of untruthful witnesses denied defendant a fair trial); *Elston*, 79 Wash. at 357 (holding trial court's independent investigation compelled reversal); *In re Schrag*, 464 B.R. 909, 914 (Bankr. D. Or. 2011) (holding bankruptcy court's independent investigation into timeliness of filing was "clearly erroneous").

Testimony by the court in the form of conclusions based upon independent research or personal knowledge is prohibited because it

denies the parties the opportunity to test the basis for the trial court's assertions and denies the probative force of the testimony that is inconsistent with the statements by the bench. *Elston*, 79 Wash. at 360; *Lewis*, 833 F.2d at 1386 (holding trial judge's reliance on facts known to him from his personal experience denied the government the opportunity to test the court's opinion concerning the effect of anesthetic on a person's freedom of choice); *Schrag*, 464 B.R. at 914 n.3 (finding court's independent investigation denied the parties the opportunity to question the witnesses interviewed by the court or establish the foundation for their knowledge). Where the testimony is properly the subject of expert testimony, the parties are additionally denied the assurances of reliability provided by ER 702 and 703.

At issue in *Elston* was the cause of a landslide onto the plaintiff's property. 79 Wash. at 356. During the bench trial, the judge visited the property to make an independent investigation. *Id.* at 357. As here, the judge's comments at trial revealed he relied upon his own experience, observations of landslides in the area, and his visit to the property in making his determination and in rejecting the expert testimony proffered by the defendant. *Id.* 357-58. Following a verdict for the plaintiff, the defendant moved for a new trial. *Id.* at 358.

The Washington Supreme Court held the trial judge's application of his own theories based upon personal experience was sufficient to create doubt as to whether the defendants received a fair trial. *Id.* at 359. The *Elston* court found the judge unwittingly became a witness in the case and then based his judgment upon his own testimony and preconceived opinion. *Id.* at 360. "Clearly, the judge would have been rejected as a juror upon a challenge for cause, had the remarks been brought to the attention of the court, and for like reason the case should have been referred by him to another judge for a new trial." *Id.* at 359.

Based upon similar reasoning, the Ninth Circuit reversed the trial court's order on a suppression motion in *Lewis.* 833 F.2d at 1380. There, the defendant sought to suppress statements made to federal agents shortly after surgery. *Id.* at 1383. Before hearing argument, the trial court expressed its conclusion that one of the statements was not voluntary because "'anybody that has ever been under general anesthetic following an operation knows that as you come out of general anesthetic you are not accountable for what you say and do.'" *Id.* Similar to the facts of this case, although the trial judge allowed it would consider the parties' evidence, he interrupted the government's presentation to again state that based upon the trial court's personal experience and the hearsay statements of others, "[y]ou are not accountable for what you say or do."

*Id.* at 1383-84. On appeal, the Ninth Circuit found there was no evidence in the record to support the trial court's order to suppress the statements. *Id.* at 1385.

The *Lewis* court noted the trial judge acknowledged his determination was influenced by his personal experience, and ruled he was prohibiting from presenting such evidence by Rule 605, and even if not precluded, the trial judge had no personal knowledge of the effect of the defendant's condition at the time the defendant spoke with federal agents. *Id.* at 1385 (citing Fed. R. Evid. 602). The trial judge's reliance on facts known to him from his personal experience denied the government the opportunity to test the basis for the court's opinion and to probe its relevance by exploring the similarities between the trial judge's experience and the condition of the defendant. *Id.* at 1386.

Similar to the judges in *Elston* and *Lewis*, the comments of the trial judge here revealed his reliance on his personal experience or training that "children rarely know or perceive or comprehend that anything is bad or wrong happening." (VRP 31:19-21; *see also*, VRP 27:4-15; 32:2-5; 377:19-21; 383:12-384:2; 449:4-17) The trial judge had no personal knowledge of I.G.'s conduct or the particular circumstances of this case and had no expert knowledge or training qualifying him to opine on the significance or insignificance of I.G.'s conduct.

Nevertheless, the trial judge inserted himself as a witness in a trial over which he was presiding by submitting information at trial upon which he ultimately based his determination of guilt. (VRP 449:8-24) And, like the parties in *Lewis* and *Elston*, the defense was denied an opportunity to test the bases for the trial judge's conclusions. Where the trial judge holds a view based upon knowledge obtained independent of the proceedings before the court and that view is made an integral part of his judgment without the parties' consent, his judgment must be rejected on appeal because the appellate court cannot determine whether or not he erred in considering what was before him. *Elston*, 79 Wash. at 359. Because that is precisely what occurred here, the trial court must be reversed.

### B. The trial court erred in excluding the defendant's expert witness as a discovery sanction because exclusion is not supported by the *Hutchinson* factors.

"Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). When considering whether to exclude untimely disclosed evidence, the trial court must consider: (1) the effectiveness of less severe sanctions, (2) the impact of witness preclusion on the evidence at trial and the outcome of the case, (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony, and (4) whether the violation was willful or in bad faith. *Id.* at

882-83. The trial court abuses its discretion when it bases its decision on untenable grounds or for untenable reasons. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). Here, the application of the *Hutchinson* factors shows the trial court abused its discretion when it excluded Ms. Huett's testimony.

A continuance to allow the State time to interview Ms. Huett and locate a rebuttal witness would have been an effective sanction, and is consistent with the trial court's own stated policy. (VRP 28:14:-23). "Violations of that nature [that is, the failure to timely disclose witnesses] are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence." *Hutchinson*, 135 Wn.2d at 881. Here, a continuance would have provided the State the opportunity to more fully interview Ms. Huett and to admit through expert testimony the trial court's theories regarding the behavior of child sex abuse victims, as Evidence Rule 702 requires.

The enormous impact of excluding Ms. Huett's testimony weighs against exclusion. Fairness requires that where damaging statements are presented to the trier of fact, the defendant should not be prevented by a technical rule of evidence from presenting rebuttal testimony. *State v. Thacker*, 94 Wn.2d 276, 282, 616 P.2d 655 (1980). In *Thacker*, the State

elicited impeaching statements from the defendant using the transcript of her interview with a court-appointed psychiatrist. *Id.* at 277-78. When the defense announced it would be calling another psychiatrist as a rebuttal witness, the State objected based upon untimely disclosure. *Id.* at 279. The trial court ruled it was bound by the court's omnibus order prohibiting unlisted witnesses, therefore, the rebuttal witness could not testify. *Id.* The Washington Supreme Court reversed the trial court, holding that because the State received the benefit of the impeaching testimony without exposing the court-appointed psychiatrist to cross-examination, the trial court was required to allow the defendant to put on a rebuttal witness. *Id.* at 281.

Here, exclusion prevented the defense from rebutting the trial court's testimony regarding the behavior of child sex abuse victims toward their abusers. When the trial court ruled it would not allow the rebuttal testimony of Ms. Huett, the State received the benefit of the trial court's statements that child sex abuse victims do not fear their abusers (thus, bolstering the credibility of I.G. and D.G.) without exposing those same statements to contradictory expert testimony or cross examination of a State expert espousing the same theories. Moreover, according to the trial court's ruling, the State received this benefit **because** Ms. Huett's

testimony was contrary to the trial court's own statements. (VRP 383:12-384:2)

The position of the trial court thus severely limited the defense's ability to call the credibility of the State's witnesses into question in a case which depended entirely upon the testimony of lay witnesses. Because the case was "almost as close to a swearing contest as the court will see," the court may have ruled differently had he heard and considered Ms. Huett's testimony that in her experience, child sexual abuse victims ordinarily do exhibit fear or discomfort in the company of their abusers. (VRP 382:23-383:9; 447:12-14)

Despite the trial court's observation that the disclosure of Ms. Huett as a witness came "way late," the trial court did not find that Ms. Huett's testimony would surprise or prejudice the State. (VRP 383:23-24) The State admitted to having "extensive discussions" with defense counsel about I.G.'s conduct around Joel. (VRP 378:23-24) The State argued defense exhibits and testimony showing a friendly relationship between I.G. and Joel after the alleged rapes required expert testimony to lay a foundation. (CP 115) The State was aware that the trial court would allow such evidence if the State opened the door. (VRP 28:4-6) The State had also heard the trial court repeatedly interject its own theory regarding the behavior of child sex abuse victims. Having been apprised of the

defense theory of the case and heard the trial court's statements, the State could not be surprised by the defense attempt to admit testimony rebutting the court's comments that I.G.'s conduct had no relevance. The third factor does not support exclusion.

The trial court did not find the failure to timely disclose was willful or in bad faith. (*See* VRP 383:23-384:2) Defense counsel explained at trial that he had only considered Ms. Huett as a potential expert witness the previous evening when Ms. Huett contacted him to inquire about being present at trial to provide Joel with moral support. (VRP 376:2-4) Defense counsel explained he was concerned the trial court's comments about his experience at seminars which discussed the reactions of child abuse victims would play a more important role at trial than he had expected. (VRP 376:11-20) It was only during Ms. Huett's call that he realized she may be able to rebut the court's theory. (VRP 376:5-20) Despite the State's arguments that defense counsel's conduct was willful or in bad faith, defense counsel could not have known prior to trial that he would require an expert to rebut evidence regarding the behavior of child victims because no such expert testimony had been disclosed. (VRP 5:7-15) The fourth *Hutchinson* factor does not support exclusion.

Because none of the *Hutchinson* factors support exclusion, this court should hold exclusion of Ms. Huett's testimony was an inappropriate sanction, requiring reversal.

### C. The trial court erred in excluding expert testimony regarding behavior of sexually abused children and child abusers because the testimony was relevant and admissible only through expert testimony.

According to the trial court's ruling, it excluded Ms. Huett's testimony because it was not relevant, claiming the court did not need expert testimony to inform the court that I.G. loved spending time with his cousin in the day time, but did not like what Joel did to him at night. (VRP 383:25-384:2) "The standard for relevancy is whether the evidence gives rise to reasonable inferences regarding [a] contested matter or throws any light upon it." *State v. Whalon,* 1 Wn. App. 785, 791, 464 P.2d 730 (1970) (citing *State v. Schock*, 41 Wn.2d 572, 250 P.2d 516 (1952)). In nonjury cases including juvenile cases, liberality in the admission of evidence is encouraged. *In re Welfare of Noble*, 15 Wn. App. 51, 58, 547 P.2d 880 (1976).

Evidence of the behavior of child victims of sexual abuse is relevant to whether or not the abuse occurred and where necessary to rebut contrary theories explaining the behavior of the alleged victim. ER 401; *State v. Stevens*, 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990); *State v.*

*Maule*, 35 Wn. App. 287, 292, 667 P.2d 96 (1983) (finding testimony of expert's testimony concerning the typical characteristics of a sexually abused child and whether the alleged victims exhibited those characteristic was relevant to in trial for statutory rape of eight- and five-year-old victims).

An expert may offer testimony to help the trier of fact understand whether or not the accuser's behavior is consistent with that of victims of sexual assault, provided any generalized statements about the behavior of sexually abused children are supported by accepted medical or scientific opinion or by the expert's own experience in working in the field. ER 702; *State v. Jones*, 71 Wn. App. 798, 815, 863 P.2d 85 (1993); *State v. Cleveland*, 58 Wn. App. 634, 646, 794 P.2d 546 (1990); *Stevens*, 58 Wn. App. at 497. Expert testimony may not be offered to prove an element of the crime directly. *Stevens*, 58 Wn. App. at 497 (citing *State v. Madison*, 53 Wn. App. 754, 762-63, 770 P.2d 662, *review den'd*, 113 Wn.2d 1002, 777 P.2d 1050 (1989)).

Ms. Huett's proposed testimony was relevant to the credibility of the testimony of I.G. and Joel and to whether or not the alleged rapes had occurred. The defense's offer of proof stated Ms. Huett's testimony would include her observations from her experience in treating 200 to 250 child victims, that in the instances where she observed the interaction

between the perpetrator and the victim, the victims had invariably exhibited fear. (VRP 381:17-19; 382:23-384:9) Ms. Huett's testimony would also have included her observation that of the many perpetrators she had treated approximately 65 per cent confessed to the abuse during therapy. (VRP 382:12:-20)

The trial judge had already ruled the State had opened the door to evidence regarding the behavior of I.G. and D.G. (VRP 201:24-3) The trial judge's frequent reliance on a theory that child victims exhibit no fear or discomfort around their abusers likewise demonstrates the relevance of Ms. Huett's proposed testimony (VRP 27:4-10; 31:19-32:5; 449:8-17), as does the testimony of Deputy Foley regarding Joel's failure to make a confession. (VRP 266:25-267:11)

The trial court had already stated on the record that evidence concerning the typical behaviors of child victims of sexual abuse must be admitted through expert testimony. (VRP 29:14-20) Yet, when the defense sought to rebut the trial judge's own theory regarding the behavior of child victims, the trial judge ruled Ms. Huett's testimony was not relevant and opined that expert testimony was not necessary. (VRP 383:12-22) As *Stevens*, *Maule*, and *Jones* demonstrate, however, the subject matter of Ms. Huett's testimony was relevant and should have

come in as expert testimony rather than as the trial judge's lay comments regarding what he had learned in judicial training.

The trial judge's conclusion that Ms. Huett's testimony was not relevant could only be based upon his assumption that information he had received in judicial training trumped the testimony of an expert to the extent that the expert opinion was not merely given lesser weight, but was rendered irrelevant. This was an abuse of discretion because exclusion was based upon an untenable reason, and was reversible error because exclusion of Ms. Huett's testimony prevented the defense from rebutting a theory on which the court relied in assessing the credibility of Joel's accusers in a trial in which no physical evidence or medical testimony was presented to confirm the rapes.

### D. Even if the errors arising out of the trial judge's reliance on his own theory were not reversible errors individually, their cumulative effect denied Joel a fair trial.

This court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant of his right to a fair trial, even if each error standing alone would be harmless. *Venegas*, 155 Wn. App. at 520. The defendant must show that there is a substantial likelihood the cumulative effect of the errors denied the defendant a fair trial. *State v. Jones*, 144 Wn. App. 284, 301, 183 P.3d

307 (2008). Where the case turns upon the credibility of witnesses, the combined errors may have a greater effect on the verdict. *See, e.g.*, *Venegas*, 155 Wn. App. at 526; *Jones*, 144 Wn. App. at 300-01 (finding verdict depended substantially upon whether the jury found the officer's statement credible); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

In *Venegas*, as here, the trial court was presented with two different versions of events with the alleged victim testifying his step-grandmother physically abused him, and the defendant denying his claims. *Venegas*, 155 Wn. App. at 513. Although there were witnesses to the injuries, as to at least one count, only the victim testified they were inflicted by Venegas. *Id.* at 527. During trial, the State twice impinged on Venegas' presumption of innocence, and the trial court erred in excluding expert testimony rebutting the victim's causation testimony as a CrR 4.7(h)(7) discovery sanction. *Id.* at 526-27. The Court of Appeals found this error particularly serious because admission of the expert testimony might have undermined the victim's credibility as to the other counts, had it been admitted. *Id.* at 527. Lastly, the trial court erred in admitting other acts evidence. *Id.* at 525-26. The *Venegas* court held the cumulative effect of the errors was severe enough to warrant reversal. *Id.* at 527.

In *Alexander*, the defendant was accused of two counts of rape of a child. 64 Wn. App. at 149. There, as here, the credibility of the witnesses was a key issue due to the victim's and victim's mother's various statements about when the incidents occurred. *Id.* at 154. The State sought to establish the victim's credibility through her counselor's statements relaying what the victim told him. *Id.* at 152. The defendant contended the court erred in allowing statements which bolstered the victim's credibility, identified the abuser, and went to the ultimate fact issue. *Id.* at 152-54. The *Alexander* court held the errors denied the defendant a fair trial. *Id.* at 154.

In this matter, just as in *Alexander*, *Venegas*, and *Jones*, the verdict depended substantially on whether the trial judge gave more credibility to the testimony of I.G. and D.G., or to Joel and other family members who testified that I.G. and D.G. and their mother, Karla, continued to behave as if no rapes had ever occurred. The individual errors of the trial court in relying upon his own personal information, in not submitting that information to the requirements of ER 201, testifying as a witness in the case, relying on information that should have been admitted through expert testimony (but was not), and excluding the defense's proffered expert testimony all worked to bolster the credibility of the State's witnesses (even when they testified contrary to the court's theory), while

discounting or excluding any defense evidence that called their credibility into question as irrelevant. Thus, the cumulative effect of the trial court's errors denied Joel a fair trial. The trial court's judgment on all three counts should be reversed.

## V. CONCLUSION

For the reasons discussed above, Joel Gonzalez asks this court to reverse the judgment of the trial court as to all three counts and remand this matter for a new trial.

DATED this 15th day of May, 2013.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on May 15, 2013, I caused a true and correct copy of the foregoing document to be served on the defendant and counsel for the State of Washington in the manner indicated:

| | | |
|---|---|---|
| June Riley<br>Columbia County Prosecutor's Office<br>116 North Third Street<br>Dayton, WA 99328<br><br>Attorney for State of Washington | **VIA REGULAR MAIL**<br>**VIA EMAIL**<br>**HAND DELIVERED**<br>**BY FACSIMILE**<br>**VIA FEDERAL EXPRESS** | ☒<br>☐<br>☐<br>☐<br>☐ |
| Joel Gonzalez<br>Care of Echo Glen Children's Center<br>33010 SE 99 Street<br>Snoqualmie, WA 98065 | **VIA REGULAR MAIL**<br>**VIA EMAIL**<br>**HAND DELIVERED**<br>**BY FACSIMILE**<br>**VIA FEDERAL EXPRESS** | ☒<br>☐<br>☐<br>☐<br>☐ |

DATED at Spokane, Washington, on May 15, 2013.

Cheryl R. Hansen

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