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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________________

No. 311147-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOEL GONZALEZ,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Joel Gonzalez (Joel) did not receive a fair trial.

On appeal, Appellant presented evidence and argument that show the trial court relied upon theories regarding the behavior of child victims of sexual abuse that were not admitted into evidence. Citing these theories the trial court bolstered the credibility of the State's key witnesses and excluded expert testimony that would have rebutted the trial judge's theories. In response, the State argues the trial court did not violate due process or the rules of evidence because (1) the trial judge did not admit his theories through judicial notice; (2) the trial judge's theories were explanations for his evidentiary rulings and verdict; (3) the trial judge is presumed to have considered only admissible evidence regardless of his statements to the contrary; and (4) the defense invited the trial judge to violate ER 605 by presenting its theory of the case.

Despite the State's efforts to justify the interjection of expert testimony through the trial judge's own testimony, the comments on the evidence and testimony by the trial judge clearly denied Joel a fair trial. The trial judge essentially acted as an advocate for the State by basing his rulings and credibility determinations on his theory that child victims do not fear their rapists. The trial judge's explanations and comments on the closeness of the evidence establish that had he not relied upon outside

evidence, the verdict would likely have been different. The trial court's verdicts on all three counts should be therefore reversed.

II. ARGUMENT

The defense theory at trial was that there was insufficient evidence to prove any of the counts of rape because the State's eyewitnesses were not credible and because the State failed to come forward with any physical or medical evidence. In a case that was essentially a "swearing contest", these weaknesses in the State's case should have precluded a finding of guilt. The trial court's errors in testifying at trial, relying on inadmissible evidence, violating ER 702 and 703, excluding expert testimony, and ruling evidence of a lack of fear on the part of a child victim of rape is irrelevant, individually and cumulatively, denied Joel a fair trial.

A. The comparative credibility of the parties' witnesses establishes that Joel was prejudiced by the trial judge's reliance on theories that disregarded the State's witnesses' inconsistent conduct and statements.

Testimony established the alleged victims' mother Karla Arroyo (Karla) repeatedly left the victims (I.G. and D.G.) at the same home where their alleged rapist resided after she claimed she observed I.G. and Joel spooning with their pants down, after she claimed I.G. disclosed the alleged rapes to her, after the police warned her to not leave her children at

the home, and after the court entered a no contact order. The testimony of D.G. claiming to have observed one incident of rape was vehemently denied by I.G. And, the trial court found beyond a reasonable doubt that I.G. continued to seek out his alleged rapist's company and enjoyed spending time with his alleged rapist even after claiming Joel had raped him over a hundred times. The State does not dispute the problems with its witnesses' credibility, but instead argues D.G. and I.G.'s grandmother (Josie) and their aunt and Joel's mother (Xochitl) were not credible witnesses for the defense because they continued to babysit D.G. and I.G. after the trial court entered a protection order.

When these facts are not viewed through the lens of the trial court's assumptions regarding the conduct of rape victims, it is clear that the defense witnesses' conduct was consistent with their belief in Joel's innocence, while the State's witnesses' behavior suggests no rapes occurred.

1. The violation of the protection order is only relevant as to Karla's credibility, because other relatives did not claim to believe the alleged rapes occurred.

Karla's credibility was key to the State's case, in that the trial court found one of the counts of rape occurred during the spooning incident Karla claimed to have observed, even though I.G. testified no rape occurred during that incident. (VRP 107:24-108:11; 447:15-17; 448:23-25)

The record established Karla was instructed by Deputy Donald Foley, and signed a safety plan in which she agreed, to keep her children away from Joel and to not allow them to spend time at Josie's home where Joel also lived and where most of the rapes were alleged to have occurred. (VRP 262:1-6) The day after their interviews with Deputy Foley, he discovered D.G. and I.G. at Josie's home when he visited the residence to interview Joel. (CP 7) Deputy Foley reported he had already told Karla that she could not allow I.G. and D.G. to be around Joel or be at Josie's home, because according to Karla and I.G. nearly every sexual assault had taken place at Josie's home. (CP 7) The trial court later entered an order prohibiting contact between I.G. and D.G. and Joel. (CP 188-190)

Nevertheless, Karla continued to drop her children off at Josie's home, without verifying that Joel would not be present. (VRP 299:11-22; 301:11-14; 301:21-302:2; 328:21-329:19; 330:5-6; 352:22-23; 358:25-359:5; 362:23-363:7363:5-7; 367:17-368:8) Karla had I.G. and D.G. spend the night at Joel's home on numerous occasions, including immediately after I.G.'s interview with the police regarding the alleged rapes. (VRP 361:11-21; *see also* CP 133, 136-137 (photographic evidence admitted at trial showing D.G. and I.G. spending the night at Josie's home approximately six weeks prior to trial)) According to I.G., Karla did not tell I.G. and D.G. that they should not be around Joel. (VRP 133:14-20)

Josie testified that after she became aware of the trial court's protection order she texted Karla to let her know that Joel would be coming to the house, so that she could pick up I.G. and D.G. (VRP 368:14-21) Despite the order, Karla continued to simply drop her children off regardless of whether Joel was home or not without commenting on Joel's presence. (VRP 365:10-11; 366:6-8; 367:17-368:8, 22-25) Even the State concedes Karla would drop her children off at Joel's home, waiting in the car rather than going into the house to verify that Joel would not be home. (Resp. Br. at 16)

Xochitl testified specifically as to the dates following Karla's contact with the police when Karla left her children at Josie and Joel's home. (VRP 300:9-301:10) Xochitl testified that during "mostly all" of those occasions, Joel was home for at least part of the day. (VRP 301:11-14) Xochitl testified that Karla was aware Joel was at Josie's home when she dropped off I.G. and D.G. because Joel lived at Josie's home, Karla never asked whether Joel would be gone, and Karla would see Joel and I.G. together at Josie's home. (VRP 301:21-302:2; 328:16-24). Although the State led Xochitl to overstate her observations of Karla and Joel together, Xochitl corrected herself on cross-examination, explaining that either she or Josie would see Karla. (VRP 328:23-329:19)

The State attempts to impeach the defense witnesses by claiming

Josie and Xochitl allowed Karla to continue to leave her children at Josie and Joel's home "in order to create evidence." (Resp. Br. at 7) There is no evidence in the record to support this accusation. Further, Xochitl's taking photographs and video to document the interaction of I.G. and Joel is consistent with her statement that she knew her son was innocent. (VRP 332:10-15) More importantly, I.G.'s claims that Joel had raped him every time they were alone together, that it was gross, he knew it was wrong, and it hurt are inconsistent with the interactions between I.G. and Joel depicted in the photographs and video. (VRP 58:17-59:1; 59:16-60:20; 61:1-3; 65:9-16;70:5-7; CP 128-132, 134-135, 141-142, 144)

The State relies upon Joel's statement that he spent time at his friend's home in the summer to argue that Josie and Xochitl testified falsely that Karla knew Joel would be home when she dropped off I.G. and D.G. (Resp. Br. at 17) The State failed to include Joel's further explanation that he spent much less time at his friend's home after school started. (VRP 409:2-18) Further, the State assumes a thirteen-year-old boy spending time with his friend over the summer does not spend time at his own home. There is no evidence in the record supporting this assumption.

Despite evidence in the record establishing Karla's conduct was not consistent with the allegations of rape, the trial court relied upon Karla's eyewitness account in finding one count of rape. (VRP 447:15-21)

Had the trial judge not steadfastly clung to his theory that child victims do not fear their rapists, the children's mother's evident lack of concern would likely have led the trial judge to give less weight to Karla's testimony.

2. Only the trial judge's theories offered at trial supported a finding that I.G.'s conduct in seeking out Joel's company was consistent with his claims that Joel had raped him over one hundred times.

The trial judge's reliance on his theories regarding the behavior of child victims was particularly harmful because the court's verdict is based most heavily on the statements of the victim. (*See* VRP 448:2-20; 449:4-10) Yet, there was abundant evidence in the record calling I.G.'s credibility into question, including evidence that the accusation of rape was prompted by Karla and that I.G. continued to seek out Joel's company, even when no adults were present.

The record shows Karla pushed I.G. to make an allegation of rape both when she originally broached the subject with I.G. and during I.G.'s interview with Deputy Foley. (VRP 175:24-177:9; 262:17-263:10 CP 48) Deputy Foley testified he should have attempted to interview I.G. without Karla present and should not have allowed I.G.'s uncle to be present. (VRP 248:25-249:4)

The record also shows that the trial judge relied upon outside

theories about the behavior of child victims to bolster I.G. and D.G.'s credibility, even when his theories were contradicted by the evidence. Originally, the trial judge ruled he would exclude all evidence of a lack of fear because according to his training child victims do not know that the abuse is wrong. (VRP 26:22-27:15; 29:4-25) When I.G. testified that he had known sexual abuse was wrong since he was five-years-old, the trial judge clarified that a child victim's lack of fear in the presence of adults is irrelevant if the rapes occur when the victim and rapist are alone. (VRP 377:19-378:3; 383:12-22) When the testimony at trial established that I.G. sought out Joel's company regardless of whether adults were present, the trial judge testified that child victims of multiple rapes had no fear because the rapes became "commonplace":

> [I]f something has become so commonplace that it happens every time you spend the night with somebody, you may not like it, it might 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)

Again, the testimony by I.G. was that the rapes hurt, leaving him bruised and in pain (VRP 52:4-6; 88:11-19); the rapes were a "[b]ad thing, bad thing" and that he knew they were wrong (VRP 58:12-59:1; 61:1-20;

70:8-10); and the rapes felt "[b]ad, gross, disgusting" (VRP 70:5-7). No evidence admitted at trial suggested that despite I.G.'s very strong statements about the rapes, they had become "commonplace". No evidence admitted at trial suggested I.G. was not afraid of being raped. The trial judge did find, however, that it was undisputed that I.G. loved being around Joel. (VRP 383:20-21)

A reasonable deduction or inference from I.G.'s very negative statements about the rapes and his positive attitude toward Joel was not that I.G. was not afraid of being raped, but that I.G. had not been raped by Joel. It was only the trial judge's reliance upon evidence that was never admitted at trial that supported an inference that I.G. enjoyed spending time with his alleged rapist because the rapes had become commonplace.

B. The State concedes the trial judge's theories expressed at trial were not admitted into evidence through judicial notice.

The record establishes and the parties agree that the trial judge's theories were not admitted through expert testimony or through judicial notice. Appellant has not challenged the lack of a judicial finding regarding judicial notice because Appellant argues the trial judge's testimony was never admitted into evidence, despite the trial judge's reliance on his theories in finding the rapes occurred.[1] Having never been

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[1]Appellant's assignments of error and argument do challenge the Findings of Fact 1.10 through 1.14. The State's response makes clear that the State fully apprehends

admitted into evidence the information and theories expressed by the trial court were an improper basis for evidentiary rulings, determinations of credibility, and the court's verdict.

The State argues the trial judge did not rely on outside evidence because he did not judicially notice such evidence or cite it in his Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law identifies no specific evidence upon which the trial court relied. (*See* CP 168-70) The record, including the trial court's oral ruling, does establish the trial judge relied on his theory regarding the behavior of child victims in making evidentiary rulings, weighing the evidence, and entering a verdict. The presumption that the trial judge considered only properly admissible evidence, therefore, cannot be applied to this case. *See State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002).

C. The trial judge's "explanations" for his rulings were judicial testimony on which the trial judge relied in making evidentiary rulings, weighing the evidence, and entering a verdict.

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this challenge. Thus, any technical violation in failing to specifically identify Findings of Fact of 1.10 through 1.14 in the assignments of error has resulted in no prejudice to the State. In fact, the State makes no claim that Findings of Fact 1.10 through 1.14 are verities for purposes of this appeal. Thus, even if this court finds RAP 10.3(g) was violated, the court should nonetheless decide this case on the merits. *See State v. Olson*, 126 Wn.2d 315, 318-23, 893 P.2d 629 (1995) (citing RAP 1.2(a)). "RAP 1.2(a) makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review." *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979).

The State argues the trial judge was not testifying because (1) his theories were not based upon his personal experience or independent research, and (2) he was only providing a justification for his rulings when he referenced the outside information he was relying on. Even if the trial judge did testify, according to the State, the invited error doctrine and the defense's failure to object bar review. These arguments lack merit.

1. ER 605 bars judicial testimony regardless of whether it is based upon personal knowledge or an independent investigation.

The State seeks to narrow the scope of ER 605 by claiming a judge may testify at trial as long as that testimony is not based upon personal knowledge or an independent investigation. (Resp. Br. at 29, 30, 31) ER 605 does not specify a type of testimony the trial judge is prohibited from offering, but states simply, "The judge presiding at the trial may not testify in that trial as a witness." This clearly prohibits the trial judge from introducing any evidence into a proceeding, unless he does so through judicial notice, and even then judicial notice is subject to the requirements of ER 201. *United States v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007), *cert. den'd*, 555 U.S. 850, 129 S. Ct. 105 (2008). There is no exception for the introduction of hearsay evidence through judicial testimony. Yet, as the State concedes, the trial court repeatedly relied upon this outside knowledge in admitting and weighing the evidence. (*See* Resp.

Br. at 22-23, 25, 29, 31-32, 32-33 (characterizing reliance on theory as "explanation" for rulings))

2. The trial court's explanations for his rulings went to the weight and veracity of the evidence in violation of Washington law.

The State attempts to characterize the judicial testimony interjected into Joel's trial as merely an explanation for the judge's rulings and a reaction to the defense's theory of the case. (Resp. Br. at 22-23, 34-35) Washington law draws a sharp contrast between judicial testimony and explanations for rulings.

State v. Brown, 19 Wn.2d 195, 142 P.2d 257 (1943) and *State v. Whetstone*, 30 Wn.2d 301, 191 P.2d 818 (1948) are distinguishable. (*See* Resp. Br. at 35) In *Brown*, the judge explained his admission of a photograph over objection, stating the defense could cross examine the witness who had placed a marker in the photograph as she had visited the depicted site and knew where the alleged assault took place. 19 Wn.2d at 198. On appeal, the Washington Supreme Court rejected the defense's assignment of error, finding the statements did not express the judge's opinion as to the the truth or falsity of the evidence.

In *Whetstone*, the trial court ruled the prosecution could not introduce through his questioning a fact that had not been admitted into evidence, stating, "I don't think you can introduce in the record something

which has no particular basic proof as to its being a fact in the case." 30 Wn.2d at 338-39. The *Whetstone* court held this was not an impermissible comment on the evidence because it did not indicate the trial court's opinion on the truth or falsity of the fact. *Id.* at 339.

In contrast to the benign comments in *Brown* and *Whetstone*, the trial court's statements here go directly to the veracity and weight of the evidence. The trial court initially denied the admission of photographs and videos, testifying that children do not know that being sexually assaulted is wrong and that therefore whether I.G. and D.G. continued to enjoy spending time with Joel after they had allegedly been raped was irrelevant. (VRP 26:22-27:15; 31:19-32:6) The trial court repeatedly discounted evidence that I.G. was not afraid of Joel based upon the judge's theory, even though I.G. had testified he was uncomfortable around Joel, knew the rapes were wrong, and claimed they left him bruised and in pain. (*Compare* VRP 377:19-378:3; 383:10-22 *to* VRP 47:24-48:7, 49:7-9, 58:12-59:1, 59:23-60:17, 61:1-20, 70:5-7, 71:11-15)

In fact, the trial court specifically found beyond a reasonable doubt that D.G. and I.G. were not afraid of Joel, yet continued to give full weight D.G. and I.G.'s testimony. (VRP 320:4-10; 447:15-449:21) Further, the trial court commented on the value of the expert testimony the defense proffered to rebut the trial judge's theories, claiming he did not need an

expert to tell him I.G. enjoyed spending time with Joel. (VRP 383:12-22) The proffer had not stated the expert would testify as to whether I.G. was fearful of Joel, but stated the expert would testify regarding what she had observed in the hundreds of child victims of sexual abuse whom she had treated. (VRP 382:23-383:9)

The trial judge's conduct here is directly on point with that of the trial judge in *United States v. Lewis*, with the only exception being that here the trial judge relied upon hearsay information that should have been admitted through an expert; whereas, in *Lewis* the trial judge relied upon his own personal experience. *Compare, e.g.*, VRP 31:19-32:5 *with* 833 F.2d 1380, 1384 (9th 1987). Thus, the record establishes the trial judge did not merely explain his rulings and the weight he gave to evidence, but relied upon information that was not subjected to the Evidence Rules or the adversarial process in violation of due process and ER 605.

3. A defendant does not "invite" violations of ER 605 by asking the trial court to rule on the admission of evidence.

The State argues that by seeking to admit evidence relating to I.G.'s lack of fear, the defense invited the trial judge to violate ER 605. (Resp. Br. at 23-24) This is a gross misapplication of the invited error doctrine.

The invited error doctrine requires far more than a reaction from

the trial court; it requires a request for action, which is granted and then appealed by the requesting party. *State v. McLoyd*, 87 Wn. App. 66, 70, 939 P.2d 1255 (1977). The doctrine generally applies to jury instructions the defendant later argues are a misstatement of the law or evidence submitted by the defendant, which he then claims was admitted in error. *See, e.g.*, *State v. Hutchinson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990); *Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 866 (1964).

Appellant does not assign error to any evidence admitted which the defense proffered or any ruling made in the defense's favor. (*See* App't's Opening Br. at 2) Nevertheless, the State suggests the defense somehow induced the trial judge to testify at the proceeding: "Since the appellant placed in issue the behavior of I.G. and D.G. while in the presence of Appellant at family gatherings, he cannot now raise on appeal as error, the fact that the judge addressed appellant's theory." (Resp. Br. at 24)

This misses the point. It is not the job of the trial judge to respond to the defense's theory with rebuttal evidence; it is the State's job to do so. Placing a fact in issue at trial does not invite the court to violate the rules of evidence and due process by presenting an alternate theory that should have been presented through expert testimony proffered by the State. Presentation of the defense's theory of the case did not invite error.

4. ER 605 does not require objection at trial in order to preserve the issue for review.

ER 605 states: "The judge presiding at trial may not testify in that trial as a witness. No objection need by made in order to preserve the point." According to the clear language of the rule, Appellant is entitled to raise the issue of the trial judge's testimony during trial regardless of whether any objection was made. The State's repeated claims of waiver should be disregarded.

D. The trial court abused its discretion in excluding expert rebuttal testimony regarding the behavior of child victims and perpetrators.

The State claims Ms. Huett's expert testimony was inadmissible, and that even if admissible, that the defense waived review of the trial court's exclusion by failing to object to the exclusion of its proffered evidence. (Resp. Br. 35-44) The record shows it was the State that objected to the admission of Ms. Huett's testimony and that the defense made an offer of proof as to Ms. Huett's qualifications and her expected testimony. (VRP 375:18-376:2, 21-24; 381:17-383:9) The record further shows Joel was prejudiced by the trial court's decision to exclude expert testimony which contradicted the trial judge's theory regarding the behavior of child victims and which explained the significance of Joel's consistent claims of innocence.

1. ER 103 does not require a party to object to the exclusion of evidence it has proffered, but rather requires an offer of proof.

ER 103 requires a timely offer of proof to preserve error predicated on a ruling that excludes evidence and an objection to the admission of evidence. ER 103(a)(1), (2). Although here the error was the exclusion of evidence, the State argues the defense was required to object to the court's sustaining of the State's objection to Ms. Huett's testimony. (Resp. Br. at 35) The State further argues the defense was required to specifically raise the *Hutchinson*[2] factors in order to preserve the issue for appeal. (Resp. Br. at 35) The State overstates the requirements for an adequate offer of proof.

"An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence; and it creates a record for adequate review." *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). If the substance of the testimony is clear from the record, an adequate offer of proof is not required. *Id.* at 539.

The defense explained to the trial court that it wished to admit Ms. Huett as an undisclosed expert witness in order to rebut the trial judge's

[2] *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

statements throughout trial regarding the behavior of child victims.[3] (VRP 376:11-20) The parties and the trial court acknowledged the CrR 4.7 procedural concerns in their responses to the late disclosure, with the trial court using the "extreme measure" verbiage from the case law interpreting CrR 4.7, and suggesting the State interview the witness before the trial court considered the defense suggestion that the trial court order a continuance to allow the State to obtain a rebuttal witness. (VRP 37:7-15; 378:4-17; 379:6-9; 380:21-25)

In its objection, the State focused on relevance (*Hutchinson* factors one and two) and the lateness of the disclosure (factors three and four). (VRP 378:18-379:379:4; 380:7-18 (arguing bad faith on the part of defense and prejudice to State); 379:21-380:6 (arguing testimony would have no effect on verdict because of lack of relevance)). The trial judge's comments and ruling show the trial court also considered the *Hutchinson* factors. (VRP 383:23-384:2 (addressing lateness and relevance); 378:4-17 (considering continuance to allow State to obtain rebuttal expert))

Because the trial court had sufficient information before it to recognize it was addressing the propriety of excluding Ms. Huett's testimony under CrR 4.7, the offer of proof is sufficient to preserve an

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[3]The State claims the defense argued Ms. Huett would testify that the obvious lack of fear by D.G. and I.G. proved no rapes occurred. (Resp. Br. at 35) This is incorrect. No such claim was ever made by the defense, as demonstrated by its offer of proof. (*See* VRP 375:18-376:2, 21-24; 381:17-383:9)

objection on that basis. *See State v. Thacker*, 94 Wn.2d 276, 282, 616 P.2d 655 (1980).

2. The State did not object to the proffered expert testimony on the basis of *Frye*, and therefore cannot raise that objection on appeal.

ER 103 requires that objections state the specific ground of the objection if the ground is not apparent from the context. ER 103(a)(1). Although the State now claims the exclusion of Ms. Huett's testimony was based upon Rules of Evidence 402, 702, and *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), this is not the case. The State raised no objection based upon Ms. Huett's status as an expert, nor can any such basis for her exclusion be gleaned from the record. (*See* VRP 378:18-380:25; 383:12-384:2; 379:21-380:25)

3. Even if *Frye* were raised, it does not apply to experts who testify regarding what they have observed in their practice regarding the behavior of victims of sexual assault.

The defense's offer of proof stated Ms. Huett would testify as to the behaviors of sexually abused children and perpetrators she had observed in her practice as a counselor. (VRP 381:17-383:9) The offer of proof did not state Ms. Huett would testify that I.G. did not fit the profile of a victim of sexual abuse. *See id.* The distinction is an important one, as the case relied upon by the State discusses. *State v. Jones*, 71 Wn. App. 798, 817, 823 P.2d 85 (1993). According to this court's opinion in *Jones*,

if the expert intends, as did Ms. Huett, to testify only as to her observations of a specific group, "the *Frye* standard is not applicable." *Id.* at 818.

Trial courts may admit expert testimony describing the behaviors of sexually abused children in general, as long as the expert does not offer an opinion as to whether the alleged victim had been abused. *Jones*, 71 Wn. App. at 815-16. In fact, the *Jones* court observed that the prohibition against testimony regarding the characteristics of victims of sexual abuse had been called into question, and cited with approval cases in which the Court of Appeals had affirmed the admissibility of such testimony. *Id.* at 816 (citing *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988); *State v. Cleveland*, 58 Wn. App. 634, 794 P.2d 546 (1990); *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990)).

Ms. Huett's testimony was not subject to *Frye* and was admissible under *Jones* and the cases relied upon by the *Jones* court. The trial judge's testimony regarding the behavior of child victims of abuse, however, was subject to *Frye* because the trial judge's statements were not based upon his personal observations and went directly to the question of whether I.G. fit the profile of a victim. Thus, although Ms. Huett's testimony was admissible, the statements by the trial court on the same subject matter were not.

4. The State fails to establish the trial court did not abuse its discretion in excluding the defense's expert rebuttal testimony.

Relying primarily on its assumption that *Frye* applies to Ms. Huett's testimony, the State argues the trial court properly excluded her testimony under *Hutchinson*. (Resp. Br. at 35-41) The State fails to acknowledge that the trial court could have minimalized any prejudice to the State and, to a certain extent, cured its own errors by allowing the State to obtain rebuttal testimony through a qualified expert supporting the trial court's repeated theory regarding the lack of fear in child victims. (Resp. Br. at 37-38)

In arguing the late disclosure was willful, the State fails to acknowledge that the trial court's reliance upon expert theories not admitted into evidence likely was a surprise to the defense. (*See* Resp. Br. at 38-39; VRP 376:5-20) Further, the State's argument that the rebuttal testimony would have had no effect at trial because the trial judge had expressed his decision to rely upon his own theories over those of an expert establishes that the outcome at trial would have been different had the trial court not relied upon inadmissible evidence. It does not support a finding that exclusion was proper.

Because (1) a continuance to allow the State to locate a rebuttal witness would have been effective, (2) exclusion substantially impacted

the case by preventing the defense from rebutting the trial judge's theories, (3) the State was aware of the defense theory and could have submitted its own expert, and (4) the trial judge made no finding that the violation was willful or in bad faith, exclusion of Ms. Huett's testimony was improper.

5. <u>Had the trial court admitted the expert testimony of Ms. Huett, her testimony would have supported the defense theory that I.G.'s reaction to the hundreds of rapes was unusual and that Joel's consistent denials supported a finding that he did not rape I.G.</u>

The defense's offer of proof stated Ms. Huett would testify that of the 200 to 250 child sexual abuse victims she has treated over a 20 year period, she had observed interaction between the victim and the perpetrator in 15 per cent of the cases. (VRP 381:17-382:4) Of those cases, virtually all victims expressed and displayed a fear of the perpetrator. (VRP 382:23-383:9) Ms. Huett's expert experience, therefore, was directly contrary to the trial judge's repeated expressions of opinion that child victims show no fear, particularly when adults are present. (*See, e.g.*, VRP 377:19-378:3; 383:12-22)

Ms. Huett's testimony also would have supported Joel's steadfast claims that he did not rape I.G. (*See* VRP 258:11-259:13; 383:5-11; 403:7-404:12; 410:1-6) In Ms. Huett's experience in treating perpetrators, approximately 65 per cent confessed. (VRP 382:5-20) The only thing close to an admission of guilt the State can offer is an implied suggestion

by the State that because Joel agreed on cross-examination that nothing was going on when his uncle was present, something necessarily was going on when adults were not present. (Resp. Br. at 16 (citing VRP 408:4-11) This is insufficient for a finding of guilt. Thus, exclusion of Ms. Huett's testimony regarding her observations of child victims and perpetrators resulted in substantial prejudice to Joel.

E. The cumulative effect of the trial judge's errors denied Joel the protections of due process and resulted in the trial judge disregarding or prohibiting any evidence which would tend to undermine the credibility of the State's witnesses, and ultimately finding for the State on all three counts.

In response to Appellant's cumulative error argument, the State misstates the nature and number of errors in order to argue the errors were insufficient in number and effect to merit reversal. (Resp. Br. at 44 (citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006)).

Again, the Appellant does not allege the trial court erred in taking judicial notice of his theories regarding the behavior of child victims, but that the trial court erred in **not** attempting to enter this outside information under ER 201. As to the errors and prejudice arising out of the trial court's reliance on inadmissible information, the State concedes they had a direct effect on what evidence was admitted at trial and how much weight it was given by claiming the trial court's comments were explanations for his

rulings and comments on the defense evidence. Although the trier of fact may weigh conflicting evidence and make credibility determinations, the trier of fact is prohibited from considering information not admitted into evidence. *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002).

Yet, that is exactly what the trial judge did throughout the trial. (*See, e.g.*, VRP 26:22-27:15 and 31:19-32:6 (testifying regarding content of judicial training that children rarely know rape is wrong and do not fear their rapists); 318:5-12 and 319:23-321:9 (stating intention to disregard evidence concerning lack of fear by the victim); 377:19-378:3 (assuming child victim would only fear perpetrator when they are alone); 383:12-384:2 (ruling expert testimony was not relevant based upon unadmitted theory that a child victim of rape would only fear his rapist if they were alone together); 448:4-6 (testifying growth of I.G. and Joel over the years would explain lack of medical evidence); 448:12-20 (testifying that use of rattail combs in the south likely caused I.G.'s confusion regarding hanger incident); 449:10-17 (testifying if a child victim has been raped a sufficient number of times, the rapes become commonplace and the child no longer fears being raped). A potential juror expressing the same opinions during voir dire that were expressed by the trial judge in this matter would very likely have been stricken for cause. *See Elston v.*

McGlauflin, 79 Wash. 355, 359, 140 P. 396 (1914). Here, the trial judge was the sole arbiter of guilt.

The trial judge acknowledged the case was essentially a "swearing contest" with the verdict wholly dependent upon whose witnesses the trial judge found most credible. (VRP 447:13-24) As the defense theory went directly to the credibility of D.G., I.G. and their mother, Joel was necessarily prejudiced by the trial judge's decision to treat as irrelevant any conduct or statements that tended to call into question the testimony of those same witnesses. Joel was further prejudiced by the trial court's ruling excluding expert testimony that would have rebutted the trial judge's expressed theory regarding the behavior of child victims and that would have provided evidence regarding the significance of Joel's steadfast refusal to confess. These errors, individually and cumulatively, are manifestly severe enough to warrant reversal.

III. CONCLUSION

At trial, the trial judge expressed his intention to ignore evidence of a lack of fear in the victims based upon his judicial training and, based upon that same training, repeatedly disregarded and excluded evidence that went directly to the credibility of the State's evidence. These manifest violations of ER 605 and due process denied Joel a fair trial. Appellant therefore asks this court to reverse his convictions on all three counts.

RESPECTFULLY SUBMITTED this 4th day of September, 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 September 4, 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:

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DATED at Spokane, Washington, on September 4, 2013.

Cheryl R. Hansen

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