No. 32105-3

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent

v.

WILLIAM A. BROUSSEAU,
Appellant

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Because jurors believed the statements and testimony of then seven year old J.R., William Austin Brousseau was convicted of child rape and molestation.

J.R., who is now thirteen, admits she lied when she made those accusations. "The truth is Austin did not" rape or molest her. RP 22. J.R. recanted because she "was tired of holding in" that Brousseau was innocent and that "I just didn't feel right." RP 32. J.R. added: "It felt good to actually tell the truth that he did not molest me." RP 32. If believed, J.R.'s recantation creates more than a reasonable probability of a different trial outcome.

The reference hearing judge did not personally believe J.R. CP 1-2; RP 162-74. However, that is not the legal test for whether Brousseau is entitled to a new trial. The test is not whether a judge believes the recanting witness, but whether the recantation would be sufficiently persuasive to a reasonable juror if presented at a new trial. Because the trial judge's decision depends on an incorrect legal standard, this Court should reverse and remand for a new hearing.

II. ASSIGNMENTS OF ERROR

A. Did the trial judge employ an incorrect legal standard when he failed to decide whether there was a reasonable likelihood at least one reasonable juror would have found J.R.'s recantation sufficiently reliable to change the verdict, but instead personally concluded that J.R.'s recantation was unreliable?

B. Should a presumption of unreliability attach to a recantation made by a witness who was very young when she made an accusation and is now older and more mature and where there is no evidence presented that the recantation was brought about due to coercion or influence by others, but rather because the witness now understands that she lied and wants to tell the truth?

C. Does Brousseau's conviction and continued incarceration violate Due Process because he is actually innocent?

III. STATEMENT OF THE CASE

This is an appeal from an evidentiary hearing and decision denying Mr. Brousseau a new trial which was ordered by this Court after the victim's recantation was presented in a PRP.

Facts from Trial

Seven-year-old J.R. was staying alone with Brousseau, her mother's fiancé, while her mother was undergoing open-heart surgery. One morning when a neighbor gave J.R. a ride to school along with her own daughter, the neighbor asked a question about sleeping in the same bed and J.R. reportedly replied, "He asked me to play with his penis." Trial RP at 171. She also indicated that Brousseau had touched her previously. When J.R. was interviewed by the school guidance counselor, J.R. repeated her allegations. Later that day, J.R. was questioned for a third time, stating that defendant had touched her "privates," and that "[h]e opened it, and he put his finger in, and it hurt." *Id.* at 238–40.

Brousseau was convicted as charged.

In a timely PRP, Brousseau (through counsel) presented a signed statement by J.R. recanting her testimony against Brousseau. This Court remanded the PRP for an evidentiary hearing and a determination on the merits.

Facts from Evidentiary Hearing

At the evidentiary hearing, Brousseau presented the testimony of J.R., who unequivocally stated that Brousseau did not sexually abuse her. The State did not present any evidence that J.R's recantation was pressured or coerced or that J.R. was not a competent witness, but instead presented the original trial witnesses who repeated what J.R. had told them when she was seven.

J.R. testified that she recalled her testimony against Brousseau. RP 17. She explained that when she first accused Brousseau: "I was smaller; I was more scared of stuff easily; I did exactly what I was told; and now, I do half of that stuff." RP 21. When asked whether she told the truth when she testified previously, J.R. answered: "No." RP 22. J.R. further testified:

> Q. Let's talk, if we can, about what the truth is. Do you remember testifying that Austin molested you?
>
> A. Yes.
>
> Q. Was that the truth?
>
> A. No.

RP 22. Then, J.R. was specifically asked:

> Q. Did Austin ever molest you?
>
> A. No.

Q. Did Austin ever touch you on your vagina?

A. No.

Q. Did Austin ever touch you on your breasts?

A. No.

Q. Has he ever -- do you know what sex is?

A. Yes.

Q. Do you know what molestation means?

A. Yes.

Q. Are you sure that he's never done that to you?

A. Yes.

Q. How are you sure?

A. Because I think I would remember

RP 22-23. J.R. recalled testifying:

Q. How did you feel when you were testifying at the first trial?

A. I felt scared.

Q. Do you remember being asked to tell the truth by the Judge at the time?

A. Yes.

Q. When you think back on it, do you think that you were trying to lie?

A. No.

RP 31.

J.R. was then asked about her signed recantation:

Q. In the first part of the statement, you indicate that Austin has never touched me sexually or molested me; is that the truth?

A. Yes.

Q. And why did you want to say that in this statement?

A. Because I felt bad for putting an innocent man in jail.

Q. And do you remember them asking you the question that way? "Did your step-dad molest you?"

A. I don't remember what words they actually used.

Q. What did you think they were interested in hearing about?

A. If Austin, at the time, did it -- if he molested me.

Q. All right.

Q. And what did you tell them?

A. I told them that my step-dad did molest me.

RP 28. By "step-dad," J.R. was referring to her mother's previous boyfriend. J.R. continued:

Q. And why did you understand that you were going to talk to the doctor on that day?

A. To tell the truth about what actually happened.

Q. When you talked to the doctor, what did you understand the doctor wanted to hear from you?

A. Did Austin do it or not.

Q. Did you feel pressured by him to give a specific answer?

A. No.

Q. Has anyone pressured you recently to say that Austin did not molest you?

A. No.

Q. How do you feel about testifying today?

A. Scared.

Q. Why?

A. All the eyes watching me.

Q. When you told the doctor back in 2012 that Austin had not molested you, how did that make you feel?

A. Good. It felt good to actually tell the truth that he did not molest me.

Q. Why?

A. Because I was tired of holding in that he did and I just didn't feel right.

RP 32. In addition, J.R. was asked if anyone pressured her to recant:

Q. What did she (J.R.'s grandmother) tell you about your testimony today?

A. She said that I would have to testify and that be extremely honest about exactly what happened.

Q. Do you think your grandmother wants you to testify one way or another?

A. I don't know.

Q. Do you feel any pressure from her?

A. No.

RP 41. When asked to explain why J.R. previously persisted in accusing Brousseau, J.R. explained that she had been molested by another person, but felt pressured to say that person was Brousseau and that the CPS worker promised her

that everything would be better if she continued to repeat her accusations against Brousseau. J.R. stated: "I understood that if I said that Austin did do it, then I'd get everything that I wanted -- Barbies; I'd become a princess; he wouldn't get hurt. RP 41.

The State did not present any evidence regarding J.R.'s recantation. Instead, the State presented the trial witnesses who described the circumstances of J.R.'s original accusations.

The judge, who was not the trial judge, denied the motion. In his oral ruling, the judge rejected Brousseau's argument that the proper legal test is whether a reasonable juror could find J.R.'s recantation credible. RP 163 (rejecting defense counsel's request to evaluate whether the recantation could raise a reasonable doubt).

Instead, the trial judge began by stating that caselaw requires him to treat "a recantation [as] inherently questionable." RP 164. The judge continued: The Court, not a jury, is responsible for determining the recanting witness's credibility." RP 165. The judge made it clear that he viewed the law as the "trial court makes its own determination of credibility of recanting witness *without regard to whether a jury might find the witness credible*." RP 165 (emphasis added).

Employing that standard, the judge found: "What I'm seeing is tremendous remorse that her testimony, whatever it was, ah, put, ah, Mr. Brousseau away for a long time." RP 169.

IV. ARGUMENT

Introduction

When the defendant presents evidence of innocence such that a court cannot have confidence in the outcome of the trial, he is entitled to a new trial. When a witness recants, a trial judge should make a probabilistic determination about what reasonable jurors would do. See generally *House v. Bell*, 547 U.S. 518, 538-39 (2006).

The test is not what the judge personally believes after applying a presumption of unreliability. The concerns that have led courts to categorically distrust recantations are not found in this case. This is not a case in which a witness was coerced or threatened to tell a different story. J.R. had no contact with Mr. Brousseau since trial. No evidence was presented showing any external influence on her to recant. And, critically, this is not a case in which physical evidence contradicts the recantation. See *e.g.*, *Allen v. Woodford*, 395 F.3d 979, 994-95 (9th Cir. 2005). Indeed, the number of exonerations that have followed recantations should cause this Court to discard the presumption of unreliability. http://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf.

This Court reviews a trial court's decision whether to grant a new trial for abuse of discretion and issues of law de novo. *State v. Macon,* 128 Wash.2d 784, 799, 911 P.2d 1004 (1996). Given that the facts are inseparable from the legal

standard used by the trial judge, this Court should first determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir.2009) (en banc).

The Newly Discovered Evidence Test

The test generally applied when assessing motions for new trial on account of newly discovered evidence requires that a defendant satisfy each of the following five elements:

> (1) the evidence must be, in fact, newly discovered, *i.e.,* discovered since the trial;
>
> (2) facts must be alleged from which the court may infer diligence on the part of the movant;
>
> (3) the evidence relied on must not be merely cumulative or impeaching;
>
> (4) the evidence must be material to the issues involved; and
>
> (5) the evidence must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

This test has its genesis in *Berry v. State,* 10 Ga. 511 (1851), and is followed in almost all jurisdictions, including Washington. 5 Wayne La Fave *et al., Criminal Procedure* § 24.11(d) (2d ed.1999); *Macon, supra.*

Historically, Washington courts have not required a judge to determine the credibility of a recantation where the conviction is premised on an accusation—at least where the accusation is uncorroborated by independent evidence of guilt. "When a defendant is convicted solely on the testimony of the now recanting witness, this court has squarely held that it is an abuse of discretion not to grant a

new trial." *State v. Rolax*, 84 Wash.2d 836, 838, 529 P.2d 1078 (1974), citing *State v. Powell*, 51 Wash. 372, 98 P. 741 (1909).

In *Powell,* the Washington Supreme Court held that once a trial court determines a conviction was based solely upon the testimony of a recanting witness, it is an abuse of discretion not to grant a new trial. In *Powell,* the defendant was convicted of rape on the direct evidence of the prosecuting witness and slight corroborating circumstances. After a motion for a new trial for newly discovered evidence had been filed, the witness voluntarily wrote defendant's counsel that the story she told at the trial was false, a statement which she subsequently repeated in an affidavit, but this affidavit was contradicted by another affidavit made by her for the prosecuting attorney. On the hearing of the motion for a new trial, she testified that her first affidavit was correct; that she testified as she did at the trial to escape a sentence to the reform school; that her first affidavit was made voluntarily and the second one at the request of her mother. On appeal, the Washington Supreme Court held it was an abuse of discretion to refuse a new trial, noting that "a man ought not to be sent to the penitentiary until a jury has had an opportunity to pass upon [the reliability of the recantation], which has not been done here." *Id.* at 374-75.

The Washington Supreme Court reached a similar outcome in *State v. Rolax,* 84 Wash.2d 836, 529 P.2d 1078 (1974), often cited as the seminal Washington case on recantations. Because the reviewing court could not "definitively ascertain whether the defendant was convicted solely upon the basis

of the now recanted testimony or whether there was independent corroborative evidence upon which the conviction could rest, the reviewing court remanded to the trial court. *Id.* at 838-39.

In *State v. York,* 41 Wash.App. 538, 545, 704 P.2d 1252 (1985), the Court of Appeals applied these precedents and "disagree[d] that the trial court was required to find that [the victim] perjured herself at defendant's trial as a prerequisite to granting a new trial because of her recantation. This argument "would permit a trial judge to invade the jury's fact-finding function" and "virtually inject the trial judge as a thirteenth juror permitting that judicial officer to independently determine credibility and weigh evidence." *Id.*

State v. Macon, 128 Wash.2d 784, 911 P.2d 1004 (1996), appears to have slightly modified the test requiring a trial court to determine whether the original testimony of a recanting witness was perjured and, if so, whether the jury's verdict was likely influenced by it. Because "(i)t is not likely the recantation would have changed the outcome of the trial," the new trial motion was properly denied. *Id.* at 803. In other words, a trial judge is required to make a probabilistic determination about what reasonable jurors would do, not an independent factual determination about what likely occurred.

Likewise, in *State v. Smith,* 80 Wash.App. 462, 909 P.2d 1335 (1996), *reversed on other grounds,* 131 Wash.2d 258 (1997), the Court of Appeals stated that when a trial court determines whether recantation testimony is material, "[t]he question is not whether the trial court believes the recanting witness but

whether the recantation has such indicia of reliability or credibility as to be persuasive to a reasonable juror if presented at a new trial." *Id.* at 471. See also *State v. D.T.M.,* 78 Wash.App. 216, 896 P.2d 108 (1995) (the question is not whether the trial court believes the recanting witness, but, whether the recantation has such indicia of reliability or credibility as to be persuasive to a reasonable juror if presented at a new trial).

The trial judge completely ignored these cases.

Instead, the trial judge relied entirely on language drawn from *State v. Ieng*, 87 Wash.App. 873, 942 P.2d 1091 (1997). In *Ieng*, the defendant contended that the trial court abused its discretion by making its own subjective determination of the victim's credibility rather than determining whether the recantation would be persuasive to a reasonable juror. The Court of Appeals disagreed and held that the trial court is to make its own determination of the credibility of a recanting witness, whether or not there is corroborating evidence and without regard to whether a jury might find the witness credible.

This Court should not follow the test set forth in *Ieng,* but should follow the great weight of Washington authority. Because the trial judge did not determine whether reasonable jurors would have reasonable doubt, this Court should vacate the trial court's order denying Brousseau's new trial request.

However, the trial judge made a second error that this Court should correct. The trial judge applied a presumption of unreliability to J.R.'s recantation. RP 164.

A Presumption of Unreliability Should Not Attach to Recantations by Children

It is true that, general speaking, courts view recantation evidence with suspicion. However, while a presumption of unreliability may appropriately apply in some cases, in cases like the one at bar the justifications used to defend judicial suspicion of witness recantation are not applicable to the specific context of victim recantation in child sexual abuse cases.

First and most obviously, any judicial concern about the low and degraded character of a recanting witness is obviously not generally applicable in cases where the recanting witness is a child victim of sexual abuse.

Second, the idea that by the very act of recantation a witness destroys her credibility by admitting to perjury is also less applicable to child victims. While the basic inference is undoubtedly logical and is proper for courts to address in cases of adult witness recantation, it is arguably much less applicable in cases involving child witness recantation. The research surrounding the suggestibility of children and implantation of memories provides a reasonable basis for the possibility that some children's reports of sexual abuse are based on memories the children believe are true, but which are in fact created via suggestion. In such a case it would therefore be erroneous to view a child's recantation with suspicion based on the generally logical assumption that a recanting witness is a verified liar.

Likewise, in child sexual abuse cases courts should consider mitigating some of the thorny policy issues surrounding recantation. These cases are

particularly sensitive to the conflicting policy concerns of finality versus conviction of only guilty persons. This is because false convictions in child sexual abuse cases have, as one commentator observed, "particularly nasty consequences, including destruction of a family and exposure of the defendant to intense public opprobrium and even physical danger." See *Matter of Smith,* 509 N.Y.S.2d 962, 963 (N.Y. Fam. Ct. 1986) ("[A] child abuse finding against a parent or parents where no abuse has occurred is as harmful and as devastating to the subject child as is the failure to find child abuse where such has occurred." (emphasis added)), *order aff'd*, 513 N.Y.S.2d 483 (N.Y. App. Div. 1987).

Of course, wrongful acquittals have similarly dire consequences, especially in light of the general societal need to both protect children from the horrors of sexual abuse and punish those individuals who would abuse them. See, *e.g.*, *People v. Beckley*, 456 N.W.2d 391, 417 (Archer, J., dissenting in part) (stating that "sexual abuse of children is among the most cruel and heinous of criminal acts . . . [t]hus, society has the highest interest in protecting defenseless children from incurring substantial and permanent injury at the hands of a child abuser."). This natural protective instinct is one of the principles underlying research indicating the existence of general prejudice by jurors against people accused of child sexual abuse. See Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 Law & Hum. Behav. 5 (1997).

It should be noted that many of the other concerns expressed by courts regarding recantation evidence are indeed applicable to child sexual abuse cases.

Of great legitimate concern in child recantations is the possibility that fear or duress has coerced the witness into recanting her testimony. Courts should be greatly concerned about duress in cases of child recantation, particularly given the perception that children are especially vulnerable to coercion. However, while courts should be cognizant of this vulnerability when considering motions for the defense based on a child's recantation, it is not proper for courts to allow this cognizance to serve as a basis for the wholesale rejection of recanting testimony. Coercion should not be presumed, it should be proved.

Here, the trial judge took the presumption of unreliability and imagined that J.R. had recanted because she felt guilty about Brousseau's incarceration, especially the effect on her younger siblings. There was no proof that J.R. came to court and lied because she felt guilty about telling the truth. Instead, J.R. testified she "felt bad for putting an innocent man in jail." RP 28.

The presumption of unreliability employed by the trial judge provides a second reason this Court should reverse.

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V. CONCLUSION

This Court should reverse and remand for a new hearing where a trial judge should take testimony and determine whether there is a reasonable probability that J.R.'s recantation would be believed by a juror. If so, then Brousseau is entitled to a new trial.

DATED this 28th day of April, 2014.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of the attached *Opening Brief* on opposing counsel by attaching it to an email addressed to:

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April 28, 2014//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis