No. 32105-3

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

STATE OF WASHINGTON,

Respondent

v.

WILLIAM AUSTIN BROUSSEAU,

Appellant

APPELLANT'S REPLY BRIEF

Jeffrey E. Ellis #17139
Attorney for Mr. Brousseau

Law Office of Alsept & Ellis, LLC
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

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A. INTRODUCTION

A judge denied Mr. Brousseau's request for a new trial because he did not personally believe the victim's recantation. The judge did not determine whether reasonable jurors would find J.R.'s recantation credible.

The State does not argue otherwise. Instead, the State's *Response* argues that it was not an abuse of discretion for the trial judge to conclude that J.R.'s prior hearsay statements should be believed over her current testimony. The State's argument misses the point. Brousseau argues that the court employed an incorrect legal standard, not that the factual findings are unsupported by the record.

Because the trial judge applied the wrong legal standard, this Court should reverse.

B. ARGUMENT

The Trial Judge Did Not Decide Whether a Reasonable Juror Would Have Found J.R.'s Recantation Credible

The State does not claim that the trial judge employed a "reasonable juror" standard. It would be foolish to do so because the judge expressly rejected such a standard.

Instead, the trial judge made it clear in his oral ruling that he was denying Brousseau's motion because he personally did not believe J.R.'s recantation: "The Court, not a jury, is responsible for determining the

recanting witness's credibility;" the "trial court makes its own determination of credibility of recanting witness without regard to whether a jury might find the witness credible." RP 163-65.

The Trial Judge Concluded That He Did Not Believe the Recantation

The law requires a different standard.

A judge who is evaluating a recantation must determine whether a reasonable probability exists that a reasonable jury looking at both the recantation and the original accusation would have a reasonable doubt as to guilt. *State v. Smith,* 80 Wn.App. 462, 472, 909 P.2d 1335 (1996), *reversed on other grounds,* 131 Wn.2d 258, 930 P.2d 917 (1997).[1] The general objective of the remand hearing is to determine whether the recantation merits a new trial. The more specific question is whether the recantation evidence is material, that is, would it probably cause the trier of fact at a new trial to reach a different outcome. *State v. D.T.M.,* 78

[1] Perhaps because a recanting witness, in addition to typically offering a new version of pertinent events, necessarily impeaches his own prior testimony, some jurisdictions treat recantations as a distinct ground for ordering a new trial, subject to different standards of proof altogether. See *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928) (new trial following recantation where the prior testimony is false and without it the jury might have reached a different conclusion); e.g., *United States v. Willis*, 257 F.3d 636, 642-43 (6th Cir. 2001) (following *Larrison* for a recantation case, but requiring that new evidence would likely produce an acquittal in other newly discovered evidence cases); *United States v. Lofton*, 233 F.3d 313, 318 (4th Cir. 2000) (same). It has even been suggested that convictions shown to have been dependent in some measure on perjured testimony should be subject to reversal on a less stringent basis than would be permitted for other kinds of newly discovered evidence. 6 Wayne R. LaFave, Criminal Procedure § 24.11(d) (3d ed. 2007); cf. *United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) (criticizing *Larrison,* 24 F.2d 82, and other related cases as too lightly permitting a new trial).

Wash.App. 216, 896 P.2d 108 (1995). In other words, a judge must make only a threshold determination about the credibility of the recanting witness, that is, whether the witness is worthy of belief by the jury. If the recantation is not incredible, the Superior Court judge must then determine whether a reasonable probability exists of a different result at a new trial. See *People v. Schneider*, 25 P.3d 755 (Colo. 2001), for the proposition that a trial court must be "reasonably satisfied" that a reasonable person would probably believe the witness's new version of the events in order to grant a new trial.

The first step is for the circuit court to determine whether the recantation is credible, that is, worthy of belief. The trial judge does not determine whether the recantation is true or false. Such a holding would render meaningless the right to have a jury determine the ultimate issue of guilt based on all the evidence. The court merely determines whether the recanting witness is worthy of belief, whether he or she is within the realm of believability, whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial. In other words, the trial judge makes an objective assessment of the believability of the witness's new account of relevant events. See *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2001) (suggesting that victim recantation or eye witness testimony may be given more weight in assessing actual innocence than other types of evidence).

After considering all of the circumstances impinging on the recanting witness's credibility, including the existence of her prior inconsistent testimony, the court must determine whether it is more likely than not that reasonable jurors would believe her more recent testimony.

Washington courts have also employed the "reasonable juror" standard when a trial judge evaluates the prejudice from a defense attorney's deficient failure to present evidence at trial. The Court of Appeals in *State v. Maurice,* 79 Wash.App. 544, 903 P.2d 514 (1995) and *Dorsey v. King County,* 51 Wash.App. 664, 754 P.2d 1255 (1988) specifically recognized the importance of the court's role in evaluating the credibility and reliability of evidence at a hearing to determine whether the defendant was prejudiced under *Strickland.*

In *Dorsey,* Division One examined whether the petitioner made a sufficient showing of prejudice to support his claim that his counsel was ineffective for failing to call several witnesses at trial. *Dorsey,* 51 Wash.App. at 675, 754 P.2d 1255. In rejecting the defendant's claim, the court found that the defendant was not prejudiced because copious evidence presented at trial supported his guilt. In addition, the court stated that one of the witnesses proffered by the petitioner "would probably be viewed by the jury as untrustworthy" and that "it appears that [the other witness] was not telling the truth in her affidavit." *Dorsey,* 51 Wash.App. at 675.

Maurice also involved a defendant who argued that his counsel was

ineffective for failing to call a witness. Division Three remanded the case to allow the superior court to determine the veracity of the affidavit submitted by the proposed witness and whether there was a reasonable probability that, had the witness been called, the outcome of the trial would have been different. *Maurice*, 79 Wash.App. at 552, 903 P.2d 514.

Cases from multiple jurisdictions reinforce this approach. See *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) (in erroneously rejecting *Strickland* claim, "the state judge presiding over the post-conviction evidentiary hearing … found … [the] testimony [of an alibi witness presented at post-conviction hearing] to be `totally incredible' and to suggest `manufacturing testimony.' We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is `exactly the task to be performed by a rational jury'….") (citation omitted); *Saranchak v. Beard*, 616 F.3d 292, 309 (3d Cir. 2010) (pointing out distinction between judge's assessment of evidence while acting as fact finder and "the effect the same evidence would have had on an unspecified, objective factfinder, as required by *Strickland*.…"); *State v. Jenkins*, 848 N.W.2d 786, 797 (Wis. 2014) ("In assessing the prejudice caused by the defense trial counsel's performance, *i.e.*, the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible."); *Com.*

v. Johnson, 966 A.2d 523, 541 (Pa. 2009) ("credibility assessments in the *Strickland* context are not absolutes, but must be made with an eye to the governing standard of a `reasonable probability' that the outcome of the trial would have been different. Thus, we reject the Commonwealth's suggestion that the PCRA court `must necessarily find that if the evidence presented at the PCRA hearing had been presented at trial, it would have been found to be credible by the jury and would have resulted in [appellee's] acquittal.' … Such a high burden, it seems to us, does not comport with the *Strickland* reasonable probability standard."). See also *Wiggins v. Smith*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); *Rompilla v. Beard*, 545 U.S. at 393 ("although we suppose it is possible that a jury could have heard [the mitigation presented on post-conviction] and still have decided on the death penalty, that is not the test.").

Because the Judge Incorrectly Applied the Law, Reversal is Required.

A trial court abuses its discretion if it applies an incorrect legal standard or applies incorrect legal analysis. *Dix v. ICT Group, Inc.*, 160 Wn.2 826, 833, 161 P.3d 1016 (2007); *In re Welfare of B.R.S.H.*, 141 Wn. App. 39, 56, 169 P.3d 40 (2007). That is exactly what happened in

this case. The judge decided that he did not personally believe the victim; not whether a reasonable juror would have believed the recantation.

Brousseau does not contend that a trial judge is prohibited from evaluating the credibility of the recanting witness. The determination of whether there is a reasonable probability that a juror would find the recantation credible necessarily involves a credibility determination. However, that is different from and not the standard used by the judge in this case.

Because it is impossible to determine how the trial court would have ruled under the correct "reasonable juror" standard and because the State does not argue that the result would be the same if the judge had used the correct legal standard, reversal is required.

C. CONCLUSION

The crux of any motion for new trial premised on the post-trial recantation of a child victim's testimony of sexual assault must be an objective assessment of the believability of her new account of relevant events. After considering all of the circumstances impinging on the recanting witness's credibility, including the existence of her prior inconsistent testimony, the court must determine whether it is more likely than not that reasonable jurors would believe her more recent testimony.

Because the trial judge employed an incorrect legal standard when evaluating the evidence, reversal is required.

DATED this 29th day of September, 2014.

Respectfully Submitted:

/s/Jeffrey E. Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Brousseau
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of Appellant's Reply Brief on opposing counsel by electronically filing it and sending a copy to Asotin County Prosecutor Benjamin Nichols at:

bnichols@co.asotin.wa.us; lwebber@co.asotin.wa.us

September 29, 2014//Portland, OR /s/Jeffrey E. Ellis