No. 321053

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

WILLIAM A. BROUSSEAU, Appellant.

BRIEF OF RESPONDENT

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PREFACE

The Appellant has provided an insufficient statement of the case and "Facts" to allow for meaningful review. The Appellant also makes reference to the record without providing important contextual information. To clear any confusion and demonstrate the full extent of the factual basis of this matter the Respondent respectfully submits the following additional facts drawn from the record.

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I. STATEMENT OF THE CASE

The Appellant WILLIAM A. BROUSSEAU was tried and found guilty by a jury of Rape of a Child in the First Degree and Child Molestation in the First Degree. See: State v. Brousseau, 172 Wn.2d 331 (2011). The evidence presented at trial included the testimony of the child victim "J.R." and the testimony of several witnesses as to statements made by J.R. at the time of the sexual assaults. *Id*. The Supreme Court summarized the facts leading to the charges as follows:

> Seven-year-old J.R. was staying alone with Brousseau, her mother's fiancé, while her mother was undergoing open-heart surgery. Brousseau generally left for work at 6:30 a.m., and J.R. would stay with her next-door neighbor, Ellen Klein, whose granddaughter attended J.R.'s school. Ms. Klein testified that at 6:30 a.m. on December 4, 2006, she noticed that the lights were out in Brousseau's house, and she telephoned to make sure Brousseau was awake. Soon thereafter, J.R. arrived at Ms. Klein's house.
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> Ms. Klein testified that later, while driving her granddaughter and J.R. to school, she asked J.R. if Brousseau had been upset about the wake-up call. J.R. responded, "Oh, no, he wasn't mad. He wasn't asleep. He was still in my bed." Verbatim Report of Proceedings (VRP) (Sept. 12, 2007) at 170. Ms. Klein asked if Brousseau always slept in J.R.'s bed, and when J.R. responded that he only did so on occasion, Ms. Klein could hear her granddaughter urge J.R., in a whisper, to tell Ms. Klein what Brousseau had said that morning. At first J.R. refused, but after being reassured, she replied, "He asked me to play with his penis." Id. at 171. She also indicated that Brousseau had touched her previously.

> Ms. Klein contacted the school guidance counselor, Carla Metcalf. Ms. Metcalf met with J.R., who repeated her allegations and also indicated that Brousseau had requested that she play with his penis on previous occasions.
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> Later that day, Deputy Jackie Nichols interviewed J.R., with Ms. Metcalf and a representative from child protective services, Janet Beitelspacher, in attendance. After indicating that she could distinguish a truth from a lie, J.R. told Deputy Nichols essentially what she had told Ms. Klein and Ms. Metcalf. She also asserted, gesturing towards her vagina, 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.

State v. Brousseau, at 335 - 336. The Court of Appeals summarized the evidence presented at trial in its Order Transferring Personal Restraint Petition to Superior Court for Hearing and Determination on the Merits, issued by this Court on October 12, 2012 in the case In re the the Personal Restraint Petition of William A. Brousseau, Court of Appeals Division III, #308358 (2012).[1]

The Appellant herein filed a direct appeal challenging the procedure which the trial court used in determining the competency of J.R. to testify.[2] This appeal was certified to the Supreme Court,

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[1] Although citing to unpublished opinions as authority is not permitted, In Re the Personal Restraint of Brousseau is cited herein as a reference point for facts established in earlier proceedings in the same case or in a different case involving the same parties. This is a permitted purpose. See: In re Davis, 95 Wn.App. 917, 920 (Div. I, 1999)

[2] Brousseau did not question the competency of his victim, he merely challenged the procedure used. State v. Brousseau, at 334.

who ruled that the trial court had not erred in its procedural approach to the competency issue. *Id.* Following the rejection of his direct appeal and some four and a half years after the trial, J.R. was taken to the office of a forensic psychologist for the sole purpose of "recanting" her story. R.P. 36. During the period of time from shortly after the trial to the time of this visit J.R. had lived with her mother who had never believed J.R.'s claim and had testified for Brousseau at trial.

It should be noted that in his version of the events herein the Appellant argues that "No evidence was presented showing any external influence on [J.R.] to recant." Appellant's Opening Brief, at page 8. This is contrary to the evidence presented and the trial court's findings. See: R.P. 167 - 169, and Findings and Conclusions, page 2. The psychologist, Dr. Daniel J. Rybicki, Psy.D, according to his own report, is an expert who has testified "more than 25 times" concerning "sources of error in allegations of child sexual abuse." See: Personal Restraint Petition, #308358, filed May 2, 2012.

After a short introduction to Dr. Rybicki, J.R. signed a statement which was prepared by Appellant's Counsel's assistant. This statement alleged that Brousseau was not her attacker. R.P. 169. The statement contained characterizations and phrases which were out of character for J.R. and seemed "out of place" based on the facts and circumstances of the case and the Judge's own

observations. R.P. 170. As opposed to her statements made to friends, counselors, and investigators at the time of initial disclosure, or her trial testimony, the prepared statement from Dr. Rybicki's office was short and lacked details. R.P. 165 - 167. As with claims raised by J.R.'s mother at the time of trial in defense of Brousseau, this prepared statement attempted to shift the blame for the sexual assaults to "Oakley" (Oakley Parsons, J.R.'s step-father). Personal Restraint Petition, #308358, attachment page 1.

Premised on this "recantation" the Appellant herein then filed a Personal Restraint Petition with Division III (#308358). Therein he asserted that the recantation constituted newly discovered evidence. To resolve the issue this Court transferred the matter to the Asotin County Superior Court – specifically to a judge who was not involved in the trial proceeding – to "make a threshold determination whether the recantation is reliable." Order Transferring Personal Restraint, filed October 12, 2012 in #308358. This Court directed the trial court to consider the circumstances surrounding the case, including the possible reason for recanting, the circumstances under which the recantation was made, the time between the testimony and the recantation, and the credibility of the witnesses testifying about the recantation. *Id.*

The reference hearing was held before Judge John W. Lorman and the parties presented documentary evidence and the testimony

of several witnesses. Along with her testimony on direct and cross-examination by the attorneys, Judge Lorman personally questioned J.R. twice about the "recantation" statement. R.P. 42 - 62 and 139 - 144. Following the hearing Judge Lorman determined that J.R.'s recantation was not reliable, therefore it was not material, and denied the request for a new trail. In so doing the Trial Court relied heavily on the standard set forth in State v. Macon.[3] R.P. 172, see also: Findings of Fact and Conclusions of Law on Reference Hearing, filed November 19, 2013.

Contrary to the Appellant's claim, the judge did not rely "entirely on language drawn from State v. Ieng," 87 Wn.App 873 (Div. I, 1997).[4] The judge made a single reference to Ieng in his oral pronouncement, and that was when he read into the record the Court of Appeals' Order directing him to conduct a reference hearing. R.P. 165 *quoting* Order Transferring Personal Restraint Petition, page 3. By comparison, the Judge referred to Macon five times in his oral pronouncement (once at R.P. 6, twice on page 164, and twice on page 171), and no less than ten times in the written Findings of Fact and Conclusions of Law.

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[3] State v. Macon, 128 Wn.2d 784 (1996).

[4] Appellant's Opening Brief, page 12.

Following the trial court's ruling denying a new trial Brousseau filed this, his second direct appeal, stating that the reference hearing judge applied the incorrect legal standard and arguing for the creation of a different legal standard when addressing recantation in cases of child sexual abuse.

II. ISSUES

A. DID THE TRIAL COURT USE THE CORRECT LEGAL STANDARD TO DETERMINE THAT J.R.'S RECANTATION WAS UNRELIABLE BASED ON THE *MACON* FACTORS?

B. SHOULD THE PRESUMPTION OF UNRELIABILITY IN CASES OF RECANTATIONS BE LIMITED OR MODIFIED TO EXCLUDE CHILD SEX ABUSE CASES?

III. ARGUMENT

A. THE TRIAL COURT PROPERLY APPLIED THE APPROPRIATE STANDARD AS SET FORTH IN THE CASELAW AND AS DIRECTED BY THE COURT OF APPEALS.

B. MODIFICATION OR LIMITATION OF THE WELL-SETTLED PRESUMPTION OF UNRELIABILITY OF RECANTATIONS LACKS LEGAL SUPPORT OR LOGICAL JUSTIFICATION AND WOULD REQUIRE THE OUTRIGHT REVERSAL OF *MACON.*

DISCUSSION

A. THE TRIAL COURT PROPERLY APPLIED THE APPROPRIATE STANDARD AS SET FORTH IN THE CASELAW AND AS DIRECTED BY THE COURT OF APPEALS.

The Appellant asserts that Judge Lorman "relied entirely on language drawn from State v. Ieng" in reaching his decision on credibility of J.R.'s "recantation" in this matter and "completely ignored" the appropriate caselaw. Appellant's Opening Brief, page 12. As demonstrated above, this is not so. The Court of Appeals, in

directing the trial court to conduct a reference hearing, specifically required that the court use the standards set forth in State v. Macon (*supra*). Having "read and reread the case" prior to the hearing,[5] Judge Lorman expressly did so, structuring both his oral pronouncement and his written Findings on the test and factors enumerated in Macon. He did not ignore the "great weight of Washington authority"[6] - he followed it as directed.

This "authority" requires that, at a reference hearing to determine whether a new trial motion should be granted on the basis of victim recantation, the trial court should first determine whether the recantation is credible. See: State v. Macon, at 801. The trial must take into consideration the circumstances of the case, the victim's possible reasons for recanting, relevant facts at the time of recantation, and the passage of time between their testimony and their recantation. *Id.* at 802. Once a trial court has determined the recantation is unreliable, "its action will not be lightly set aside by an appellate court." *Id.* A new trial need not be granted when the recantation is not credible because an unreliable recantation is not material and is therefore not newly discovered evidence sufficient to support a new trial. *Id.* at 801.

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[5] R.P. 164.

[6] Appellant's Opening Brief, page 12.

In Macon, the victim of sexual abuse, "T.S." originally testified that her mother's boyfriend had sexually abused her. *Id.* at 785. After fifteen months of living with her mother, who believed the defendant was wrongly accused, T.S. recanted her testimony and claimed she had mistakenly identified Macon as the abuser. *Id.* at 795. Macon moved to vacate the judgment based on T.S.'s recantations. *Id.* at 786. After a hearing, the trial court determined that T.S.'s recantation was not reliable because the victim was very young, years had passed between the original trial and the recantation, and the fact that she had been living with her mother who did not believe Macon was the perpetrator. *Id.* at 803. Because the trial court found the recantation unreliable, the Supreme Court upheld the denial of the motion for a new trial. *Id.* at 805.

Using the same factors as the Macon trial court used, (and the same factors the Court of Appeals ordered the trial court herein to use), the trial court here found that J.R.'s recantation lacked any indicia of reliability and denied Brousseau's motion for a new trial and dismissed the Petition. In reaching this conclusion the trial court considered the circumstances of the case, pointing out that at the time of the incidents that gave rise to the charges J.R. described with "clarity and detail" the attack and the identity of her attacker. At that time and at the subsequent trial J.R. was clear and definite in naming Brousseau as the perpetrator of the assaults. The trial court also

found, based upon Judge Lorman's own personal observations and discussions with J.R. during the reference hearing, that the child victim appeared to feel guilty that her testimony sent Brousseau to prison and that the sense of guilt about coming forward about the abuse, rather than remorse for falsely reporting, was the motivation of the recantation. R.P. 168 - 169. The trial court found this factor in particular weighed "heavily against reliability of the recantation." Findings and Conclusions, page 2.

The circumstances of J.R.'s recantation also weighed against its reliability. The Appellant's attorney and J.R.'s mother initiated her visit to Dr. Rybicki, who works as a paid expert in criminal cases involving sexual abuse. Dr. Rybicki was not J.R.'s psychologist, and in fact J.R. was not seeing a psychologist for behavioral or mental issues at the time of her recantation. The sole reason J.R. was taken to Dr. Rybicki was to "tell him that the Defendant had not abused her." Also important to the court was that, although J.R. was a bright and capable 13 year old, she did not write the recantation statement and the language used was not consistent with the way J.R. spoke at the hearing.

The timing of the recantation, another Macon factor, also weighed against reliability. J.R.'s recantation occurred four and a half years after the trial. During those years, J.R. lived with her mother, who had never believed that Brousseau was the perpetrator. This

factor coincides with the facts of Macon with the notable difference that while Macon's victim lived with her mother, who did not believe the accusations, for 15 months prior to her recantation - a fact which the Supreme Court found significant - in our case the victim lived with her mother, who like the mother in Macon did not believe the accusations, for four and a half years before she was taken in to sign her recantation.

The trial court also found that the overall credibility of the witnesses cast doubt on the recantation. After careful deliberation and consideration of all of the Macon factors, the trial court found that J.R.'s recantation was not reliable. Because the trial court did not abuse its discretion in so finding, and applied the appropriate standard, this Court should uphold its decision.

B. MODIFICATION OR LIMITATION OF WELL-SETTLED PRESUMPTION OF UNRELIABILITY OF RECANTATIONS LACKS LEGAL SUPPORT OR LOGICAL JUSTIFICATION AND WOULD REQUIRE THE OUTRIGHT REVERSAL OF *MACON*.

According to well-settled Washington law, victim recantations should be presumed unreliable because they are inherently questionable. See: Macon, 126 Wn.2d at 801. This presumption applies in cases of child recantations as well as adult. *Id*. No Washington court has ruled that the presumption does not apply to child recantations. None-the-less the Appellant argues that a different

standard should apply when the recanting victim is a child who has been sexually abused. Opening Brief, page 13. Brousseau cannot, and does not cite, to any caselaw or statutory sources as justification for the modification or limitation of presumption of unreliability he argues for. Since no legal, or for that matter logical support for the creation of a different legal standard can be cited, the Court should decline to create such an exception.

In fact, it must be considered that the presumption of unreliability of recantations is as important, if not more so, in the area of child sexual assault victims than in adult recantations. Research does suggest that children are susceptible to recant testimony for reasons other than a desire to correct false testimony. Lindsay C. Malloy et al., Filial Dependency and Recantation of Child Sexual Abuse Allegations, 46:2 J. Am. Acad. Child Adolesc. Psychiatry 162, 167 (2007) ("*However, whereas [previous] research emphasizes the dangers of false allegations of abuse that can result from external pressures, our study suggests that pressures can lead truly abused children to recant.*"). Familial pressures have a large effect on recantations by children, a reason to attach a presumption of unreliability that doesn't exist at the same level for adult recantations. This fact was specifically found and discussed at length by Judge Lorman in his consideration of J.R.'s "recantation" herein. It must be recalled that Macon, the lynchpin case that all parties and Courts

involved at every level of this case recognize as the authority, involved a child sexual assault victim who allegedly recanted. To adopt the Appellant's proposed exclusion of child recantations from the Macon standard would require this Court to reject the specific ruling of the Macon decision by the Supreme Court and reject all of the subsequent cases which applied the standard therein.

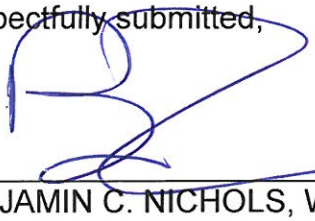
IV. CONCLUSION

In summary, the Appellant's claims in this matter, based upon the record, are clearly without. J.R.'s "recantation" is not reliable by any standard; the trial court so determined using the correct standard as set forth in State v. Macon and per the directive from this Court. There is no logical or legal reason to overturn Macon and create a new and different rule in cases of child victim "recantation." The Respondent respectfully requests that an order dismissing this appeal be entered.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 12th day of September, 2014.

Respectfully submitted,



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