IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, v. WILLIAM AUSTIN BROUSSEAU, Defendant/Appellant.	NO. 91838-4 CoA No. 32105-3-III PETITION FOR REVIEW

I. IDENTITY OF MOVING PARTY

William Austin Brousseau, Petitioner, seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Grant review of the decision of the Court of Appeals. RAP 13.4. A copy of that decision (dated June 9, 2015), is attached.

III. FACTS

This is a case about the evidentiary standard used to evaluate a post-trial recantation by a child.

Seven-year-old J.R. was staying alone with William 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 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 now 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. 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 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). "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.

IV. ARGUMENT

Introduction

This Court should accept review to clarify the standard a trial judge uses when evaluating the credibility of a recantation. In this case, the remand hearing 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 lower court affirmed, reasoning that this was the standard announced in *State v. Macon,* 128 Wash.2d 784, 911 P.2d 1004 (1996), which it characterized as having "squarely rejected" the "reasonable juror" standard. *Macon* is, at best, ambiguous on that point. *Macon* certainly did not "squarely reject" the reasonable juror standard. Other Washington appellate cases—decided after *Macon*—apply the "reasonable juror" test. This Court should accept review to clarify the split of authority on this issue. RAP 13.4.

In addition, this Court should accept review to determine whether recantations, especially a recantation by a child who was very young at the time of the accusation and is now older, more intelligent, and more mature, should be treated as "inherently" unreliable or suspect. Brousseau asserts there is no reason to attach a presumption of unreliability instead of evaluating the credibility of recantations on a case-by-case basis. Despite the fact that the reference hearing judge clearly started his evaluation of J.R.'s recantation with a presumption that it was inherently questionable, the Court of Appeals' decision overlooks the explicit statement of the judge and concludes: "This is a non-issue. Washington does not apply a presumption of unreliability." Once again, the lower decision misstates the law. In fact, the lower court misreads *Macon* for the second time, given that it held: "Recantation testimony is inherently questionable." *State v.*

Macon, 128 Wash.2d at 801. See also *State v. Young,* 62 Wash.App. 895, 900, 802 P.2d 829 (1991).

This Court Should Accept Review to Clarify the Standard of Review

This Court reviews a trial court's decision whether to grant a new trial for abuse of discretion, but it reviews issues of law *de novo*. *State v. Macon,* 128 Wash.2d at 799. 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).

Here, Brousseau claims both the trial court and the Court of Appeals applied the wrong legal test. This Court should conduct *de novo* review to determine if the correct legal rule was applied to the relief requested. *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir.2009).

Admittedly, there is a split of authority in Washington. *Macon* does not decide the issue. *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), applies the reasonable juror test. *State v. Ieng*, 87 Wash.App. 873, 942 P.2d 1091 (1997), instructs a trial judge to determine only whether she is persuaded that the recantation is credible.

Washington courts have not always 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,* this 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. However, *Macon* contains language that supports the "reasonable juror" test. This Court reasoned 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, *Macon* support the conclusion that 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.

That is certainly how it was understood in *State v. Smith,* 80 Wash.App. 462, 909 P.2d 1335 (1996), *reversed on other grounds,* 131 Wash.2d 258 (1997), where 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).

State v. Ieng, 87 Wash.App. 873, 942 P.2d 1091 (1997), departs from this approach. 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.

Brousseau asserts that the "reasonable juror" test is both the better rule and is required by federal constitutional due process.

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). 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. In other words, a remand hearing judge is making 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 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.").

In sum, 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).

Here, the remand hearing 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.

Recantations by Maturing Children Should Not Be Viewed as Inherently Suspect

The trial judge and the Court of Appeals made a second error that this Court should correct. The trial judge applied a presumption of unreliability to J.R.'s recantation. RP 164. The Court of Appeals ignored both the trial judge's statement and the clear law on the point.

The concerns that have led courts to categorically distrust recantations do not apply to a case like where the witness is now older, more intelligent, and more mature. This is not a case where there is any evidence that the witness was coerced or threatened to tell a different story (and the State had every opportunity to present such evidence if it existed). 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, given the number of exonerations that have followed recantations, this Court should discard the presumption of unreliability. http://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf.

It is true that, general speaking, courts view recantation evidence with suspicion. However, even if a presumption of unreliability may appropriately apply in some cases, in cases like this one 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 applicable in cases where the recanting witness is a child.

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.

This Court should accept review and address this issue.

V. CONCLUSION

This Court should accept review, reverse, and remand for a new hearing before a different judge applying a "reasonable juror" standard.

DATED this 19th day of June, 2015

Respectfully Submitted:

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

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served opposing counsel with a copy of this Petition for Review by filing it electronically and having a copy sent to opposing counsel at: lwebber@co.asotin.wa.us

June 19, 2015//Portland, OR /s/Jeffrey Ellis

FILED
JUNE 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. WILLIAM A. BROUSSEAU, Appellant.	)	No. 32105-3-III
	)	UNPUBLISHED OPINION

KORSMO, J. — William Brousseau appeals from the trial court's determination after a reference hearing that a victim's recantation was not credible. Concluding that the trial court applied the proper standards, we affirm.

FACTS

Mr. Brousseau was tried and convicted in 2007 of child rape and child molestation in the Asotin County Superior Court. The victim was seven year old J.R. She initially disclosed the abuse to her friend's grandmother and a school counselor, and then later to a Child Protective Services (CPS) investigator and a detective. The child also testified at trial.

Mr. Brousseau appealed directly to the Washington Supreme Court, primarily challenging whether a competency hearing had been required. The court affirmed the convictions. *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011).[1] Mr. Brousseau then timely filed a personal restraint petition (PRP) in the spring of 2012. The petition included an affidavit signed by J.R. in which she recanted the allegations of abuse. The Chief Judge of this court directed that a reference hearing be held to determine the credibility of the recantation and, if credible, whether the recantation constituted newly discovered evidence justifying a new trial under *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996).

The matter proceeded to hearing before the Honorable John Lohrmann, a visiting judge from Walla Walla County.[2] Mr. Brousseau called J.R. to testify and also relied on the report of defense expert, Dr. Daniel Rybicki. The State called the four witnesses before whom J.R. had made her disclosures—the grandmother, the school counselor, the CPS investigator, and the detective. Judge Lohrmann also considered the affidavit and a transcript of J.R.'s trial testimony.

---

[1] The facts of the case can be found in the published opinion and will not be repeated here.

[2] Reference hearings must be held before someone other than the judge whose rulings are at issue. RAP 16.12.

Judge Lohrmann found the recantation not credible under the circumstances. J.R. had been brought by her mother and an "aunt" to see Dr. Rybicki for the sole purpose of recanting her trial testimony. There she signed an affidavit prepared by a defense investigator who also happened to be present. The affidavit blamed the abuse on her previous stepfather. In contrast, the four State's witnesses reiterated her consistent identification of Mr. Brousseau as her abuser at the time of the disclosures.

Written findings were entered. Mr. Brousseau then timely appealed to this court.

ANALYSIS

Mr. Brousseau primarily argues that the trial court applied the wrong standard in its consideration of the matter at the reference hearing. He also argues that courts should not apply a presumption of unreliability to recantations made by a child. We address those issues in the noted order.

Standard Applied at Reference Hearing

Mr. Brousseau initially argues that the trial court erred in applying the *Macon* standard required by this court's order directing the remand hearing. He contends that the test should not be whether the trial judge finds the recantation credible, but whether or not the new testimony might have created reasonable doubt for a juror. *Macon*, which squarely rejected this argument, governs this action and we must follow it.

A trial court may grant a new trial based on newly discovered evidence if the defendant proves the new evidence "(1) will probably change the result of the trial; (2)

was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The trial court's ruling is reviewed for abuse of discretion. *Id.* at 221.

Macon expressly applied the *Williams* test to the recanting witness situation. 128 Wn.2d at 800. In *Macon*, the count of first degree child rape in question involved a five-year-old girl whose mother had married the defendant after sentencing and reclaimed custody of the child from the maternal grandmother. *Id.* at 796-97. A year later the child allegedly recanted the abuse allegation to a friend of the mother's. *Id.* at 797. The trial judge did not find the recantation credible and denied the motion for a new trial. *Id.* at 798-99.

The Washington Supreme Court ultimately heard the case and affirmed the ruling. In the course of its analysis, the court noted some of its prior decisions that held that a trial court abused its discretion in denying a new trial when a witness later recants and there was no corroboration. *Id.* at 800 (citing *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974) and *State v. Powell*, 51 Wash. 372, 374-75, 98 P. 741 (1909)). *Macon* then overruled *Powell*. 128 Wn.2d at 805. It also restated the rule of *Rolax*:

> *State v. Rolax* supports the conclusion that when a defendant's conviction is based solely upon the testimony of a recanting witness, the trial court does not abuse its discretion if it determines the *recantation is unreliable* and denies the defendant's motion for a new trial. But it also follows from *Rolax* that when a defendant's conviction is based solely upon the

> testimony of a recanting witness, and the trial court determines the *recantation is reliable*, the trial court must grant the defendant's motion for new trial.

Id. at 804. In reaching its results, the *Macon* court returned to the standard applied in *State v. Wynn*, 178 Wash. 287, 288-90, 34 P.2d 900 (1934) (recognizing that trial court can reject recantation testimony). 128 Wn.2d at 802.

Division One of this court thoroughly addressed the trial court's recantation assessment obligations the following year in *State v. Ieng*, 87 Wn. App. 873, 942 P.2d 1091 (1997), *review denied*, 134 Wn.2d 1014 (1998). There the court concluded that the existence of corroborating evidence is not a dispositive factor and that the trial court must make its own determination concerning the credibility of a recantation. *Id.* at 879-80. In particular, the determination must be made "without regard to whether a jury might find the witness credible." *Id.* at 880.

Despite the overruling of *Powell* and the restatement of *Rolax*, Mr. Brousseau urges us to follow those cases instead of *Macon* and *Ieng*. However, this court is not free to disregard controlling precedent from the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). *Macon* controls here. When a recantation is deemed not credible, it is not "material" evidence within the meaning of the new trial test. 128 Wn.2d at 800-01.

The trial court considered the totality of the circumstances and concluded, understandably, that the recantation was not credible. J.R. was brought to an expert witness for the purpose of recanting, not treatment. She expressed sadness about the effects of the disclosure on the defendant rather than any sadness due to falsely naming the defendant. The recantation occurred after she was returned to the custody of her mother, a supporter of the defendant. The misidentification of the offender claimed by the recantation was inconsistent with the earlier disclosure, on three occasions, to four witnesses, as well as with J.R.'s trial testimony. Under the circumstances, the trial judge was free to determine that the recantation was manufactured and not credible.

The trial court applied the correct standard to its analysis of the recantation. There was no error.

Presumption of Unreliability

Mr. Brousseau also argues that there should be no presumption that a recantation is unreliable when it comes from a small child. This is a non-issue. Washington does not apply a presumption of unreliability.

It appears that Mr. Brousseau is asking this court to change a legal standard that does not actually exist. When a party asks the court for a new trial because of newly discovered evidence, that party bears the burden of establishing its case. *See State v. Swan*, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990); *State v. Franks*, 74 Wn.2d 413, 418, 445 P.2d 200 (1968). In deciding whether to award a new trial based on any newly

discovered evidence, the trial judge must assess the credibility of proffered testimony. *State v. West*, 139 Wn.2d 37, 43, 983 P.2d 617 (1999). Effectively, the proponent of the recantation evidence must establish its believability.

It is in this context that Washington courts have expressed skepticism about recantation evidence. "Recantation testimony is inherently questionable." *Macon*, 128 Wn.2d at 801. While expressing that view, *Macon* nonetheless did not apply it to the trial court's new trial calculus when considering recantation evidence. *Macon* did not direct trial judges to start with a presumption against reliability or otherwise suggest that the recantation evidence was suspect. Instead, it made its observation explaining why this type of evidence was the subject of much litigation and careful scrutiny. However, it did not put its thumb on the trial court's scale.

Nothing in this record supports a suggestion that the trial court applied some presumption against J.R.'s recantation. Instead, the record shows that the visiting judge carefully considered the record of the case, J.R.'s brief recantation, and the testimony of the five witnesses before rejecting the new trial. Judge Lohrmann properly considered the recantation and assessed it as required by *Macon*. He reached his conclusion that it was not credible after a careful weighing of the evidence on the record. There is no sign that he applied any presumption against the evidence.

Again, there was no error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.