NO. 94220-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DETENTION OF JOSEPH PETERSON:

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PETERSON,

Petitioner

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In a commitment trial pursuant to RCW 71.09, a jury found Joseph Peterson did not meet commitment criteria. Despite his success in the trial court, he appealed the trial court's evidentiary ruling that a rape victim's prior out-of-court statements were admissible as recorded recollections under ER 803(a)(5). The trial court determined that the State met each of the required criteria for admitting a statement as a recorded recollection. The trial court entered findings of fact and conclusions of law, specifically finding that the rape victim's account of events was credible and that Peterson was not credible.

The Court of Appeals correctly determined that the trial court did not abuse its discretion in admitting the statements. Peterson seeks discretionary review.

II. COUNTERSTATEMENT OF THE ISSUE

There is no basis for this Court's review of the court of appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issue would be presented:

> **Whether the trial court abused its discretion in admitting a victim's statements as recorded recollections pursuant to ER 803(5).**

III. COUNTERSTATEMENT OF THE CASE

Joseph Peterson has been convicted of several criminal sexual offenses. At age 18, he was convicted of Assault of a Child in the Third Degree with

Sexual Motivation. CP 5-6. While he was still on community custody for that conviction, Peterson was charged with Rape in the First Degree. The rape charge was based on the victim's report to the Lakewood Police Department. *Id;* VRP 50. The victim, H.L.[1], reported that she met Peterson on a bus on the morning of February 14, 2007. Ex. 7; Ex. 8. They met up later that same day and went to his house. *Id.* Once inside his house, he held a small black pistol against her stomach and told her to be quiet. Ex. 8 pg. 10-11.[2] He pushed her down on the bed and held her hands together above her head. *Id.* at 14. He was on top of her, pulled her pants down and penetrated her vagina with his penis. *Id.* at 17-18. She repeatedly told him to stop and kneed him in the groin, at which point she got up off the bed, pulled up her pants, and fled the residence. *Id.* at 17; 19-20.

Peterson was charged with Rape in the First Degree. CP 5. Peterson later plead guilty to the amended charge of Assault in the Second Degree. CP 5. While he was still on community custody for that conviction, he was convicted of Child Molestation in the Third Degree and was sentenced to prison. CP 9. Prior to his release from prison, the state filed a petition alleging

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[1] The victim was H.L. At the time of the trial, she had re-married and was known as H.B. For purposes of this brief, she will be referred by the initials H.L. VRP (01/29/15) 72.

[2] H.L. reported that when she fled from the residence she could see the handgun and at that time she saw it had an orange dot on the barrel signifying to her it was a toy gun. Prior to that, she thought it was an actual handgun. Ex. 8, page 10; 20.

he was a Sexually Violent Predator.[3] Pursuant to statute, the State was required to prove that Peterson had been convicted of a qualifying crime of sexual violence. CP 1-2. "Crimes of sexual violence" are defined by the statute and include:

> [A]n act of . . . assault in the second degree, which act, either at the time of sentencing for the offense of subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030 . . ."

RCW 71.09.020(17)(c).

The State's petition was based on the theory that Peterson's conviction for Assault in the Second Degree involving H.L. was a sexually motivated offense. CP 1-3. The parties agreed to bifurcate the process and asked the trial court to make the threshold determination of whether Peterson's assault conviction was a sexually motivated offense, thereby constituting a "crime of sexual violence" for purposes of RCW 71.09. CP 230-310. The parties agreed that if the State prevailed on the preliminary, threshold issue, the remaining issues would be tried by a jury. *Id.* at 233.

Following several days of testimony, the trial court determined the victim's recorded recollections were admissible as substantive evidence. CP

[3] "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18).

311-13; VRP II 87-94. On the day of offense, February 14, 2007, H.L. had provided a handwritten statement to police. Ex. 7. A few days later, she gave a tape recorded statement to a police detective who interviewed her in much greater detail. Ex. 8. Peterson himself was interviewed by police when he was arrested for the rape. Ex. 85.

After determining that the victim's statements were admissible as substantive evidence, the trial court weighed the credibility of the witnesses, specifically finding that the victim's testimony was credible and that Peterson was not credible. CP 314-18. The court ruled that the State had met its burden of proving beyond a reasonable doubt that Peterson's conviction for assault in the second degree was a sexually motivated offense. CP 314-18; VRP II 94-5. The remaining issues were tried by a jury. Peterson prevailed at the jury trial when the jury determined that he did not meet the criteria as a sexually violent predator. CP 406.

Following the trial, Peterson appealed the preliminary determination that he has been convicted of a Sexually Violent Offense as defined by RCW 71.09.020(17). He assigned error to the trial court's decision to admit H.L.'s out-of-court statements under Evidence Rule 803(a)(5). The State argued that because Peterson prevailed at the jury trial, he was not an aggrieved party. The State also argued that in any event the trial court did not abuse its discretion in finding that the State met its evidentiary burden under the hearsay exception.

Division II of the Court of Appeals held that Peterson was an aggrieved party and affirmed the trial court in all respects. The decision upheld the trial court's discretionary decision to admit the victim's statements as recorded recollections pursuant to ER 803(a)(5). The Court of Appeals also affirmed the trial court's determination that the State proved beyond a reasonable doubt that the assault was sexually motivated, meaning Peterson had been convicted of a sexually violent offense. Peterson now seeks review only of the Court of Appeal's ruling that the statement was properly admitted pursuant to ER 803(a)(5).

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny review because Peterson has failed to show that any of the RAP 13.4(b) considerations governing review apply. Peterson seeks review only of the Court of Appeals' affirmance of a discretionary decision to admit evidence. He asserts that the court of appeals decision conflicts with *State v. Nava,* 177 Wn. App. 272, 311 P.3d 83 (2013), *review denied*, 179 Wn.2d 1019 (2014). He also argues that this case presents an issue of substantial public interest such that review by the Supreme Court is required. The Court of Appeals decision does not conflict with *Nava*, nor does this case involve an issue of substantial public interest, rather it involves the application of discretion in a routine evidentiary matter. Neither RAP 13.4(b)(2) nor (b)(4) is implicated.

A. The Trial Court Did Not Abuse Its Discretion When It Admitted the Victim's Statements as Recorded Recollections

Peterson contends the trial court erred when it admitted into evidence the victim's handwritten statement that she signed and provided to police on the day of the rape and the tape recorded statement she provided to police a few days later. The admission of recorded statements under ER 803(a)(5) is reviewed for an abuse of discretion. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831, 834 (1998) (citing *State v. Castellanos,* 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); 5B Karl B. Tegland, Wash. Practice § 368 at 186 (3rd ed.1989); *State v. Strauss,* 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based on untenable grounds. *State v. Hyder*, 159 Wn. App. 234, 246, 244 P.3d 454 (2011), 159 Wn. App. at 246; *see also Castellanos,* 132 Wn.2d at 97 ("An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.").

Generally, hearsay is not admissible. Evidence Rule (ER 802). There are, however, specific exceptions to the general rule. ER 803(a) provides as follows:

> (5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted the memorandum or record may be read into evidence

> but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a). For a recorded recollection to be admissible as an exception to the hearsay rule, the proponent of the evidence record must make a foundational showing of the following four factors:

> (1) The record pertains to a matter about which the witness once had personal knowledge, (2) The witness now has an insufficient recollection about the matter to testify fully and accurately, (3) The record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) The record reflects the witness's prior knowledge accurately.

State v. Mathes, 47 Wn. App. 863, 867, 737 P.2d 700, 703 (1987) (quoting 5A K. Tegland, Wash. Prac. § 368 (2d ed. 1982)).

Here, the State made a foundational showing of each of the required four factors. After a comprehensive evidentiary hearing spanning several days, the trial court ruled that both the hand written statement and the tape recorded statement were admissible as substantive evidence. The court entered Findings of Fact and an Order admitting the victim's hand written statement. CP 311-13. The court entered unchallenged findings that satisfy the first three factors of the above test. *Id.*

Peterson challenges only the fourth factor. Pet. at 13-15. As to that factor, the court found it had been satisfied for four reasons. The first three reasons are that (1) the declarant did not disavow her statements (Finding of Fact D1), (2) she averred the accuracy of the statement at the time of making the statement (Finding of Fact D2); and (3) the recording process was reliable

(Finding of Fact D3). *Id.* Peterson did not challenge these findings, and thus they are verities on appeal. *E.g.*, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002) (citing *State v. Stenson,* 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill,* 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994)).

In the Court of Appeals, Peterson challenged only Finding of Fact D4, that the totality of the circumstances establish the trustworthiness of the statements.[4] Findings of fact, when challenged, are examined to determine whether the findings are supported by substantial evidence and whether the findings of fact and conclusions of law support the trial court's order. *In re Det. of Rushton*, 190 Wn. App. 358, 370, 359 P.3d 935 (2015) (citing *In re Foreclosure of Liens,* 123 Wn.2d 197, 202, 867 P.2d 605 (1994); *Tacoma v. State,* 117 Wn.2d 348, 361, 816 P.2d 7 (1991)). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 284-85 (2009) (citing *Cingular Wireless, L.L. C. v. Thurston County,* 131 Wn. App. 756, 768, 129 P.3d 300 (2006)). In the end, "A trial court's findings of fact must justify its conclusions of law." *Id.* at 814

[4] That the "totality of the circumstances establish the trustworthiness of the statement" is not a specific requirement of ER 803(a)(5). It is instead an analysis from case law when the declarant is unable to establish that the record accurately reflects their prior knowledge. *Alvarado*, 89 Wn. App. at 551-52 (citing *United States v. Porter*, 986 F.2d 1014, 1017-18 (6th Cir. 1993)).

(citing *Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

Accordingly, the issue before the Court of Appeals, and the only issue now before this Court is whether substantial evidence supports the single challenged finding, D4, that the totality of the circumstances established the trustworthiness of the statements.

1. The first three factors are verities on appeal.

The evidence presented during the hearing established that the victim of the crime, H.L., suffered significant memory loss between the time she reported being raped in 2007 and the time she testified in the SVP trial in 2015. VRP I 72-75. On February 14, 2007, just after she reported the rape to the police, H.L. provided the officers with a handwritten statement detailing the event. Ex. 7; VRP I 76. A few days later, she was questioned in more detail by detectives when she provided a tape recorded statement to the detectives. Ex. 8; VRP I 51-4.

Det. Holmes testified that she first contacted H.L. a few hours after the rape occurred. VRP I 50. That day, H.L. showed the police the residence where the rape occurred. *Id.* at 51. While H.L. was seated in the police car, officers contacted Peterson who came outside. *Id.* H.L. could see Peterson and she identified him as the person who raped her. *Id.*

Det. Holmes testified that six days later, she took a detailed tape recorded statement from H.L. Ex. 8; VRP I 51-2. After taping H.L.'s statement,

the tape recording was transcribed into a written document. *Id.* at 52. Det. Holmes compared the written transcript to the recording and verified that the transcript was accurate. *Id.* at 52-53. During the course of the 40-minute tape recorded statement, H.L. described the rape in detail. Ex. 8. At the time the statement was recorded, H.L. affirmed that the contents of the statement were true and accurate. *Id.* at 27.

At the hearing in 2015, H.L. testified that she "kind of" remembered giving a tape recorded statement to the police. VRP I 79. She testified that she had reviewed a transcript of the tape recording a couple times, and it did refresh her memory about some of the events that day, but did not refresh her memory about the rape. *Id.* at 79-81. She testified that when she gave the police her tape recorded statement she believes the information she provided to the police was true and accurate. *Id.* at 81. She testified that she would have "nothing to gain from making up a story. To me, it doesn't seem like it would be smart." *Id.*

H.L. also testified at the hearing that she recognized her handwritten statement because she recognized her own handwriting. VRP I 76. She said that she does not remember the events, but she believes the content of her handwritten statement is accurate and true. *Id.* at 79. She confirmed that she remembered the event when she wrote the statement, "and I would have been able to recall exactly what had happened." *Id.* at 79. The two-page handwritten statement indicates it was written and signed on February 14, 2007 by H.L.

Ex. 7. The document described in detail a sexual assault perpetrated that same day by a male known to her as Joey. *Id.*

Based on her testimony and the contents of the document, the first three factors therefore were easily satisfied. *See Alvarado*, 89 Wn. App. at 549.

2. The records accurately reflect H.L.'s prior knowledge.

The fourth factor, only part of which is challenged here, is whether the recording accurately reflects her prior knowledge. "In most jurisdictions, the foundation testimony must come from the same person who made the out-of-court statement. In other words, the hearsay exception applies only if the out-of-court declarant is present in court and testifies to the probable accuracy of the statement in question." 5C Wash. Prac., Evidence Law and Practice § 803.29 (5th ed.) (citing Broun, McCormick on Evidence Sec. 283 (two volume 4th ed.) ("The witness must acknowledge at trial the accuracy of the statement"); and Mueller & Kirkpatrick, 4 Federal Evidence § 443 (2d ed.) ("While the exception does not expressly say that the maker of a statement must attest to its accuracy at trial, a live endorsement seems necessary.")).

Appellate courts have held that there is no particular method of establishing accuracy; rather the issue must be resolved on a case-by-case basis. *Alvarado*, 89 Wn. App. at 550-51 (citing cases). After reviewing the decisions of other courts, the court in *Alvarado* held as follows:

> We hold that the requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. The

> court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Id. at 551-52. Here, H.L. testified that she believed the hand written statement and the tape recorded statement were accurate and reflected her knowledge at the time it was written. VRP I 79-81. Further, the trial court found, and the evidence established, that H.L. has never recanted or disavowed the events in the statement. *Id.* at 82. The handwritten statement contains the printed proviso just above her signature that the statement is being made under penalty of perjury and "that the statements contained on this handwritten form (front and back and any additional pages) are true and correct." Ex. 7. In her tape recorded statement she says everything she reported was accurate and true. Ex. 8. The record contains substantial evidence to support the trial court's Findings of Fact D1, D2, and D3.

As for Peterson's challenge of the last finding, Finding of Fact, D4, the record supports the finding that the totality of the circumstances establishes the trustworthiness of the statements. The Court of Appeals in *Alvarado* noted that some jurisdictions have sanctioned admitting recorded recollections even in the absence of the declarant testifying to the probable accuracy of the statement, as H.L. did in this case, when sufficient indicia of reliability exist under a totality of the circumstances test. *Alvarado*, at 551. For example, a trial

court found a recorded recollection was reliable when the statement was given in close temporal proximity to the assault; it described the events chronologically and in detail; the witness spoke coherently and logically in giving it; the police officer's interviews with other witnesses corroborated the statement; and the victim never recanted. *Id.* at 551 (citing *State v. Marcy,* 680 A.2d 76, 78 (Vt. 1996)).

This case has all of the necessary components to satisfy the *Alvarado* analysis. The *Alvarado* court found sufficient indicia of reliability when the witness's two statements were given just eight days after the murder and two hours apart; the two statements were consistent with each other and reflect a detailed and fairly comprehensive knowledge of the crime. *Alvarado*, at 552. The witness answered all the questions lucidly and at no time suggested that he was unsure of what he remembered. *Id.* The witness acknowledged at the time of making the statement that it was true and correct. *Id.* Finally, the contents of the later statement were corroborated in varying degrees by the physical evidence and testimony of the other witnesses as well as the suspect's confession. *Id.*

Here, like the *Alvarado* case, H.L. gave two statements to the police, close in time to the crime and to each other. Ex. 7; Ex. 8. The content of the two statements is consistent with each other. *Compare* Ex. 7; Ex. 8. The content indicates that H.L. was lucid and she at no time suggested she did not remember the event. *Id.* She acknowledged at the time of each statement that

it was true and correct. Ex. 7; Ex. 8. The trial court noted in its oral ruling that both the handwritten statement and the tape recorded statement, which was played in open court, were cogent, tracked, detailed, responsive and corroborated. VRP II 92-4.

Furthermore, the trial court noted that the content of the two statements was largely corroborated by the physical evidence and the testimony of other witnesses, especially Peterson's statement to police. VRP II 92-3. For instance, the trial court noted Peterson testified he and H.L. were hanging out as his house (CP 468); his mom was asleep on the couch (CP 473;475); there was a toy gun with an orange tip at the scene (CP 475-76); Peterson held H.L.'s hands above her head (CP 481); Peterson confirmed there was some sexual contact, and they had genital contact (CP 480-83). These corroborated facts, along with H.L.'s testimony, provide sufficient evidence to support the court's finding that the statements were trustworthy.

The admission of H.L.'s handwritten statement and her tape recorded statement is within the sound discretion of the trial court and should not be reversed absent a manifest abuse of discretion. Given the fact that the statements are comprehensive, consistent and corroborated, the trial court's finding that the totality of the circumstances establish the trustworthiness of the statement is supported by substantial evidence. The court's ruling that the State properly met all of the criteria for a recorded recollection was not

manifestly unreasonable or based on untenable grounds. The trial court did not err in admitting the statements and this Court should affirm the ruling.

B. The Court of Appeals Decision Is Not in Conflict With Existing Case Law

Peterson contends that the decision of the Court of Appeals is in direct conflict with *State v. Nava*, 177 Wn. App. 272, 311 P.3d 83 (2013). Petition at 13-14.[5] He argues that the *Nava* trial court determined the credibility of the out-of-court statement as part of the analysis of whether the statement, under the totality of circumstances, had sufficient indicia of reliability, whereas the court of appeals in this case found that "the trial court properly distinguished between the accuracy of the record and the credibility of the witness." Petition at 13 (quoting slip opinion at 7). But the cases are not in conflict at all.

In *Nava*, four witnesses gave tape recorded statements to police. At the time of the trial, the witnesses claimed to lack memory about the event. *Nava*, 177 Wn. App. at 282-288. There was apparently no issue that all four tape recorded statements satisfied the first three elements for recorded recollection: (1) each record pertained to a matter about which the witness once had personal knowledge, (2) the witness now had an insufficient recollection about the matter to testify fully and accurately, and (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory. But none of the four witnesses testified at trial that the out-of-court, tape-recorded

[5] Peterson also argues that both courts applied the wrong analysis. Petition at 14.

statements reflected their prior knowledge accurately. *Id.* One of the witnesses, Mr. Orozco, resolutely disavowed the out-of-court recorded statements. *Id.* at 282-84, 295. Mr. Orozco testified at trial that he was a liar, and that when he gave the tape recorded statement to police, he was probably lying to the police because he just wanted to go home. *Id.* at 283. Nonetheless, the trial court admitted all four statements as recorded recollections, which the Court of Appeals held was not an abuse of discretion. *Id.* at 298.

The *Nava* court did not base its decision on a finding that the out-of-court statements were credible; rather the court found that Mr. Orozco's in-court disavowal was not credible. Further the trial court found other indicia of reliability that all four of the out-of-court statements reflected the witnesses' prior knowledge accurately. For instance, just like this case, the recorded recollections in the *Nava* case were tape-recorded interviews of the witnesses, most of which were audible and clear, with the witnesses answering questions in their own words. *Nava,* at 296; Ex. 8.

Here, the trial court listened to the tape recorded statement in court and found that it was cogent, tracked, responsive, detailed, and corroborated. VRP II 92-3. Also, like this case, each of the recorded statements in *Nava* was acknowledged by the witness at trial. *Nava*, at 296; VRP I at 76, 79. Each witness in *Nava* audibly vouched for the truth of his or her statement when it was recorded, as did H.L. in this case. *Nava*, at 296; Ex. 7; Ex. 8. The statements in *Nava* were recorded within days of the event, as is the case with

H.L.'s statements. *Nava*, at 296; Ex. 7; Ex. 8. The *Nava* court was able to observe each witness's demeanor at trial, and compare that to the witness's demeanor in the tape-recorded interview, as the trial court did with H.L. *Nava,* at 297; VRP II 93. Rather than being "diametrically opposed," the various indicia of reliability relied upon by the *Nava* court and the trial court here are remarkably alike.

Similarly, each witness in the *Nava* case provided details that were largely consistent with each other and with the physical evidence. *Nava,* at 297; VRP II 93. The reviewing court acknowledged that although Mr. Nava disputed that the statements were consistent with each other and with the physical evidence, as Peterson does here, the *Nava* court found that "what [Nava] characterizes as inconsistencies and contradictions are either facts addressed with some witnesses but not with others; inconsistencies that are minor or admit of a ready explanation; or a global dispute" regarding the event. *Nava,* at 296-97.

Like *Nava*, Peterson specifically argues that the trial court erred by not considering inconsistencies, motive to fabricate, and reputation for dishonesty when making the threshold determination regarding admissibility. Petition at 15. But Peterson's alleged inconsistencies, contradictions, motives, and global disputes were explored by the trial court and argued at length by his attorney during the evidentiary hearing. VRP II 60-82. After hearing the evidence and testimony first hand, after hearing the argument of counsel, and after having

specifically considering the *Nava* case, the trial court did not find Peterson's arguments persuasive. VRP II 91-4.

Nor is this case in conflict with *State v. Alvarado*, 89 Wn. App. 543, 949 P.2d 831 (1998), or *State v. Derouin*, 116 Wn. App. 38, 64 P.3d 35 (2003), as Peterson suggests. Petition at 15. In *Alvarado*, the indicia of reliability included the facts that the out-of-court statements were close in time to the event; the two statements were detailed and were consistent with each other; the deponent seemed lucid and acknowledged the statements were true and correct at the time he made the statements; and the content of the statements was corroborated to varying degrees by other witnesses, physical evidence and Alvarado's confession. *Alvarado*, at 552. In *Derouin*, the indicia of reliability included the fact that the recorded recollection was consistent with earlier accounts provided by the deponent to a witness, and consistent with the physical evidence. *Derouin,* at 47. Consistent with *Alvarado* and *Derouin*, H.L.'s out-of-court statements were recorded close in time to the event and to each other. The trial court found the tape recorded statement was corroborated both by physical evidence and by Peterson's own statements. VRP II 92-3.

Even assuming the trial court should consider the credibility of the deponent in making a threshold determination regarding admissibility, the trial court did consider the testimony of Peterson's witnesses who testified that at the time she made the out-of-court statements, H.L. had a reputation for dishonesty. VRP II 89-90.

Most significantly, the Peterson trial court was also the trier of fact. After admitting the recorded recollection, the trial court weighed the evidence and specifically found that H.L.'s out-of-court statements were credible. CP 316. The trial court did not give credulity to Peterson's various attacks on H.L.'s memory, alleged inconsistencies and motive to fabricate, nor to his attack on her character and instead specifically found that Peterson's accounts "contain many inconsistencies and lack credibility." CP 316. The trial court did not abuse its discretion in finding that the criteria for recorded recollection had been met. The Court of Appeals decision is not in conflict with, but rather in accord, with *Nava*, *Alvarado*, and *Derouin.*

C. This Case Does Not Involve an Issue of Substantial Public Interest That Should Be Determined by the Supreme Court

Peterson argues that trial courts need a consistent standard for guidance such that this case presents an issue of substantial public import warranting review. Petition at 14. But trial courts exercising discretion to admit or exclude evidence is a routine occurrence. Case-by-case discretionary decisions regarding the admissibility of evidence do not invite unnecessary litigation or create confusion generally. *See State v. Watson,* 155 Wn.2d 574, 578, 122 P.3d 903 (2005) (granting review based on substantial public interest).

The three cases relied upon by Peterson all hold that if a witness does not attest at trial to the accuracy of the recorded recollection, the accuracy of a recorded recollection should be determined on a case-by-case basis by

examining the totality of the circumstances. *Alvarado*, 89 Wn. App. at 836; *Derouin*, 116 Wn. App. at 46; *Nava,* 177 Wn. App. at 293-4. Here, not only did the trial court follow this method of determining accuracy, but it had the additional benefit of the witnesses' testimony to more deeply assess the factors as well as credibility of witnesses. Peterson has cited nothing to support the argument that trial courts need a more consistent standard for further guidance of the exercise of discretion on determining admissibility of recorded recollections. Review should be denied.

V. CONCLUSION

Peterson has not demonstrated that review is warranted. His claimed conflict among court of appeals' decisions does not exist. Nor does this routine discretionary ruling raise an issue of substantial public interest. Because Peterson cannot meet any of the RAP 13.4 criteria, this Court should deny review.

RESPECTFULLY SUBMITTED this 31st day of March, 2017.

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NO. 94220-0

WASHINGTON STATE SUPREME COURT

In re the Detention of: JOSEPH PETERSON.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On March 31, 2017, I sent, via electronic mail, true and correct copies of Answer to Petition for Review, and Declaration of Service, postage affixed, addressed as follows:

Casey Grannis
Nelson Broman & Koch
sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of March, 2017, at Seattle, Washington.

ELIZABETH JACKSON