

NO. 34312-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR JOHNSON,

Appellant.

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ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01178-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Eric Fong
Ste. A, 569 Division St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 1, 2006, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial abused its discretion in allowing testimony at trial concerning the child hearsay statements when the court had already held a child hearsay hearing and found the statements admissible under RCW 9A.44.120?

2. Whether the trial court abused its discretion in overruling the defense objection to the state's reading of portions of the child interviewer's report during closing argument when the state is allowed to discuss the evidence and trial testimony during closing argument, and when the child interviewer had testified at trial concerning the specific statements referenced by the state in its closing argument?

3. Whether the trial court abused its discretion in denying Johnson's motion for relief from judgment when the affidavits in support of the motion were insufficient and did not allege facts sufficient to support the motion and did not show any potential prejudice, and when Johnson failed to show that the newly discovered evidence: (1) would probably have changed the result of the trial; (2) was discovered after the trial; and (3) was not merely impeaching evidence, as required?

4. Whether the remainder of Johnson's claims raised in his pro se statement of additional grounds and personal restraint petition should be

rejected when they are either meritless on their face or are conclusory arguments that are not supported by the record or by citations to authority?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Arthur Johnson was charged by second amended information filed in Kitsap County Superior Court with rape of a child in the first degree, two counts of child molestation in the first degree, assault of a child in the third degree, and two counts of bail jumping. CP 110. Following a jury trial, Johnson was found not guilty of the assault count, but was convicted on the remaining counts. CP 182, 261. Johnson received a standard range sentence. CP 261. This appeal followed. Johnson later filed a personal restraint petition (COA No. 35526—3-II), which this court consolidated with his direct appeal (COA No. 34312-6-II).

B. FACTS

A child hearsay hearing was held on October 19, 2005. RP (10/19) 1-92. On October 28, Judge Costello issued his oral ruling on the child hearsay issue. RP (10/28) 2-5. Judge Costello found that KLM was available as a witness and was competent. RP (10/28) 2. The trial court also went through a lengthy discussion concerning the indicia of reliability, and ultimately found that “each of the statements that was testified to has sufficient indicia of reliability to allow admissibility at the time of trial.” RP (10/28) 5.

Written findings of fact and conclusions of law were entered in which the trial court found that KLM was competent to testify, and that the child hearsay statements showed indicia of reliability. CP 100-01. The trial court further found that KLM had no motive to lie, that her general character was truthful, and that she made the statements to more than one person relatively close in time. CP 101. The trial court thus concluded that the statements displayed sufficient indicia of reliability and particular guarantees of trustworthiness when analyzed using the *Ryan* guidelines, and that the statements were admissible at trial subject to the relevant rules of evidence. CP 102.

At trial, KLM testified that she was nine years old and that her birthday was July 25, 1996. RP 51. Johnson is the father of one of KLM's friends, and lives on the same street as KLM. RP 55-56. KLM would go to Johnson's house to visit his daughter from time to time, and on occasion, KLM would go to Johnson's home to wait for her friend and, at those times, would be alone with Johnson. RP 55-58.

KLM testified that on one occasion, when she and Johnson were alone in Johnson's house, Johnson touched her while the two were in the living room. RP 58. Johnson had cooked "pizza rolls," and after the two had eaten the food, Johnson was sitting next to KLM on the couch. RP 59. KLM described that Johnson touched her somewhere private, underneath her

shorts, on the place where she went to the bathroom from. RP 60-61. When asked if Johnson touched her on her skin or on her clothes, KLM stated it was on her skin, and that he rubbed his hand on the place where she goes to the bathroom. RP 62-63. KLM stated that the first person she told about this encounter was her father. RP 64.

When asked if Johnson had touched her on other occasions, KLM stated, “No,” and also stated she did not remember any other times when Johnson might have kicked her private place or put his foot on her where he shouldn’t have, or put his finger in her. RP 64-65.

Kevin Marsh is KLM’s father. RP 97. He stated that KLM became friends with Johnson’s daughter around the beginning of 2003 when Johnson moved into a house on their street. RP 97-99. KLM would go to Johnson’s home a couple of times a week to play with her friend. RP 99. In June 2003, Mr. Marsh was driving KLM and her brother to a church function when KLM mentioned that she and Johnson had a “secret.” RP 100-01. Mr. Marsh pulled off to the side of the road, and had KLM get out of the car so that he could talk to her alone. RP 102. KLM was hesitant to talk to him, which was unusual, but Mr. Marsh told her that it was alright to tell her father any secrets she had. RP 102-03. KLM then stated that Johnson had touched her in her private area. RP 103, 108. Mr. Marsh did not ask her for any details, but told KLM that everything was going to be okay, drove home, and

immediately called the police. RP 103. Mr. Marsh also stated that he later talked to KLM a little bit and determined that the event she described occurred right around April, approximately one month before she disclosed the abuse. RP 111.

The next witness called by the State was Sasha Mangahas, a child interviewer. RP 114. Prior to her testimony, the State addressed an issue regarding how to best present the testimony concerning the interview she had conducted with KLM for the jury. RP 114. The prosecutor suggested providing copies of the interviewer's report (with the interviewer's summarization of the interview redacted) for the jury to read and follow along with as he and the witness read the transcript of the interview. RP 114-16. The suggestion was that, at the end of this procedure, the copies would be collected from the jurors. RP 115. The defense objected, arguing that just because the report was "near-verbatim" in the child interviewer's opinion didn't "mean it is so." RP 116. The court stated that providing a written copy of the report seemed to unnecessarily highlight testimony in light of the fact the judge had previously instructed the jury that they would not be receiving transcripts of witness testimony. RP 117-18. The court then asked if the State had any other proposals. RP 118. Another alternative suggested by the State was to simply read the report but not give the jurors a copy to follow along with. RP 119.

The court stated that her ruling, one which would allow testimony without constant interruption and undue emphasis, was to allow the State to lay a foundation for how the report was created, and then allow the prosecutor to read the questions asked by the interviewer in the child interview and for the witness to “play the part” of the child. RP 120-21. The court also ruled that the written report would not be given to the jury. RP 121. The defense did not object to this procedure once the court proposed it. RP 121.

When Ms. Mangahas testified in front of the jury, she explained her background and training, and the procedure she followed in interviewing KLM and creating her “near-verbatim” report. RP 127-132. She stated that “near-verbatim” recording means that she would write down every question she would ask the child and every answer the child gave as close to verbatim as she could possibly make it. RP 132. Ms. Mangahas identified the child interview report and confirmed that she herself had interviewed KLM on June 7th, 2004, and that the report represented the near-verbatim notes of that interview. RP 134. She also stated that the report was accurate. RP 155. Ms. Mangahas stated she remembered doing an interview with KLM, but needed to refer to her report to recall other information, such as the date of the interview. RP 133. After Ms. Mangahas identified her report, the State asked the court for permission to read the report. RP 134. Although the defense did object at this point, the objection was not to the procedure the

court had proposed, but rather, the objection was as follows:

At this point, your honor, for the record, object to hearsay, confrontation, and ER 403.

RP 134. The State and the witness then read the interview for the jury. RP 135.

In the interview, KLM described that Johnson rubbed her tummy and that he touched her “right here,” and pointed to her vaginal area. RP 143. When asked what she called the place she pointed to, KLM stated she didn’t want to say it and didn’t like to say it, but stated she used that part of her body to go to the bathroom. RP 143. She described that this event took place in the living room of Johnson’s house, and that no one else was present. RP 143. She also stated that Johnson touched her under her clothes and inside of her underwear, and was “rubbing” his hand. RP 145-46. She stated that this took place before spring vacation, “when spring first started.” RP 144. She stated that Johnson gave her some pizza sandwiches. RP 145.

KLM also described a different occasion when Johnson “licked his thumb and put it on the place I go to the bathroom with.” RP 147. When asked to clarify whether Johnson put his thumb inside the place she went to the bathroom or if he touched her there on the outside, KLM stated it was, “inside.” RP 149. She denied that it hurt, but said she didn’t like it and that it

“tickled.” RP 150. She specifically stated that this was a different time than, and occurred before, the above-mentioned incident involving the “rubbing.” RP 147-48. She also stated that on this occasion she was on the floor, while in the previous encounter she was sitting on a couch. RP 145, 149. Johnson also told KLM to “keep it a secret.” RP 148.

KLM stated that Johnson touched her “a hundred times,” and that it started a long time ago, when she had first met him. RP 148, 150. KLM, however, did not give any details about the other encounters, but stated that those encounters were all the same. RP 150. Later, the interviewer asked KLM if in those other times she could describe which time was the “worst.” RP 152. KLM stated that the touching got worse every time, and that Johnson started to hurt her and was touching her “really hard.” RP 152. When asked to describe what part of her was getting hurt, she described the part she “went pee” with. RP 152.

At the conclusion of the reading of the interview, Ms. Mangahas stated that this was an accurate, near-verbatim, recording of her interview with KLM. RP 155. She acknowledged on cross examination that the report was not a transcript of an audio or mechanical recording, and stated that it wasn’t the protocol to record the interviews with a tape-recorder. RP 157, 159.

Damion Hart testified that he had been an inmate at the Kitsap County jail and had been “cellmates” with Johnson. RP 172. He explained that while in the jail, his girlfriends sister had tried to run a background check on him and found a person with a similar name was listed as having been convicted of rape and child molestation. RP 174-75. When he found out that his girlfriend’s parents had incorrectly believed he was a sex offender he was upset. RP 175-76. Hart stated that he talked to Johnson who could see something was bothering him. RP 177. Although Hart at first declined to talk with Johnson about it, he later explained the situation to Johnson. RP 177-78. After Hart explained his situation, Johnson told Hart about his experiences with a “little girl.” RP 178. Johnson stated he had seen a neighbor girl in front of his house and that she was all wet, so he brought her inside and took her clothes off. RP 179. He also described another instance where he had found the girl in the kitchen by the refrigerator and had “got after her,” and thought she had wet her pants. RP 180. He then described that he took her to the bathroom to determine if she had wet her pants, and had stuck his hands inside her pants to feel if she was wet and had then “smelt his hand.” RP 180. He also said he had “touched her vagina.” RP 180. Afterwards explaining these encounters, Johnson asked Hart what had happened with him, and Hart explained again that,

Dude it was all bull. It’s – I mean, that ain’t me. Didn’t you

get that? And at that point he's like, What? What do you mean? I tell you – I open up to you and I tell you everything, and he kind of snapped. I was like, whoa, and I turned around and walked off, because you know, at that point –

RP 182. After debating whether to “choke him out myself” or “throw him to the guys in the pod,” Hart decided to “do the proper thing and go to the authorities.” RP 183. Mr. Hart then filled out a request stating that he would like to talk to the detectives handling the Arthur Johnson child molestation case. RP 183.

Johnson also testified at trial, and admitted he had talked to Hart and admitted that he had told him about “checking for urine, urine smell.” RP 254. Johnson stated that he had found a wet spot in his couch and found some blue panties on the bathroom floor that did not belong to his daughter. RP 257. Johnson confronted KLM, and noticed she had pink panties on with part of the waist sticking through the zipper of her pants. RP 257. Johnson “reached down there” and noticed that the panties were huge and that KLM had both of her legs through one leg hole. RP 257. Johnson also admitted that the “reached down the back” and checked the back of her panties to see if she had wet on his couch. RP 258. Johnson stated he didn't think of just asking the child if she was wet. RP 266. Johnson denied touching her skin, and denied molesting or raping the child. RP 258.

During the State's closing argument, the prosecutor discussed some of

the specific statements that the child made during the child interviewer. RP 319-326. The defense objected, and the trial court overruled the objection. RP 320. The specific statements referenced by the State in closing all came from the testimony presented by the child interviewer at trial. See, RP 135-154, 319-326.

On November 14, the jury found Johnson guilty of the rape of a child, child molestation, and bail jumping charges, but found him not guilty of the assault of a child charge. CP 182.

On December 16, 2005, Johnson filed a motion for relief from judgment pursuant to CrR 7.8, and attached an affidavit from Erin Johnson. CP 273. Ms. Johnson claimed that she saw KLM look at her mother while testifying. CP 274. Ms. Johnson claimed that KLM's mother was nodding or shaking her head, and that KLM changed her answer. CP 274. Ms. Johnson, however, did not ever state what questions these alleged actions were related to and gave no indication of how KLM changed her testimony or what answers were given. CP 274.

On January 26, 2006, Johnson filed an affidavit from his brother, Patrick Johnson. CP 286. Patrick Johnson's affidavit indicated he noticed KLM looking at her mother, and claimed he saw this woman shaking her head. CP 286. Mr. Johnson, however, indicated that the question he recalled

being asked was if the defendant had “touched her down there,” and that KLM answered, “no.” He also recalled the prosecutor asking if the defendant had kicked her, and KLM again answered, “no.” CP 286-87. Mr. Johnson did not claim that KLM gave any incriminating testimony after looking at her mother. CP 286-87.

In the brief in support of the motion for relief from judgment, Johnson cited CrR 7.8 and 7.5, and admitted that the affiants could not recall what questions were “changed.” CP 289. As a result, Johnson was unable to point to any specific prejudice. Johnson also admitted that the motion was not filed within ten days as required under CrR 7.5.

At a hearing on February 3, 2005, Johnson’s trial counsel argued the motion, but indicated it did not have any additional facts to present to the trial court. RP (2/3) at 3. The trial court held that the affidavits were not sufficient to support the extraordinary relief that Johnson was seeking. RP (2/3)at 5. The court noted that she was looking for information regarding what question had been asked and what answer was changed after the alleged contact. RP (2/3) at 5. The trial court also stated that it was clear to everyone in the room that the jury did not rely on the testimony of KLM in reaching a verdict. RP (2/3) at 5. The trial court, therefore, held that there was both an insufficient factual declaration and that there was no showing of any prejudice. RP (2/3) at 6. The trial court, therefore, denied the motion

without requiring a further evidentiary hearing. RP (2/3) at 6. The trial court then signed a written order denying the defense motion, stating that there were insufficient facts to grant relief, and that,

Specifically, the supporting affidavits are not specific with regard to alleged witness coaching. The court finds that alleged irregularities are not supported, nor is an evidentiary hearing required. Furthermore, there is insufficient prejudice to the defendant to warrant the relief, as the jury convicted the defendant despite the testimony of the witness in question.

CP 302.

III. ARGUMENT

A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY AT TRIAL CONCERNING THE CHILD HEARSAY STATEMENTS BECAUSE THE COURT HAD ALREADY HELD A CHILD HEARSAY HEARING AND FOUND THE STATEMENTS ADMISSIBLE UNDER RCW 9A.44.120.**

Johnson argues that the trial court erred in allowing the admission at trial of the contents of a child interview with the minor victim and allowing the prosecutor and the child interviewer to read aloud the contents of the interview at trial. This claim is without merit because the trial court specifically found that the statements were admissible under RCW 9A.44.120 after a child hearsay hearing.

Evidentiary rulings and the admissibility of child hearsay lies within the trial court's sound discretion, and will not be reversed absent manifest

abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); *State v. Pham*, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002, 891 P.2d 37 (1995). Judicial discretion is abused if exercised on untenable grounds or for untenable reasons. *State v. Lawrence*, 108 Wn. App. 226, 233, 31 P.3d 1198 (2001), *review denied*, 145 Wn.2d 1037 (2002).

Child hearsay statements concerning sexual contact are admissible in criminal proceedings if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120.

Here, the trial court conducted a child hearsay hearing, and KLM testified and was cross-examined at trial. The record supports the trial court's findings that KLM was competent to testify and was competent when she made the hearsay declarations to others. The court, therefore, did not abuse its discretion in allowing the hearsay testimony concerning KLM's statements to her father and to the child interviewer. Furthermore, Johnson has not challenged the trial court's findings of fact following the child hearsay hearing. If a trial court enters findings of fact and the defendant does not

assign error to those findings, they become verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

As the trial court properly found that the child's statements were admissible under RCW 9A.44.120, Johnson's only argument appears to be the manner in which the statements were introduced at trial.

Under ER 611, a trial court is given reasonable control over the presentation of evidence so as to make the presentation effective and to avoid needless consumption of time.

In the present case, the State offered to provide the jury with copies of the interviewer's report which would be collected at the end of the testimony. RP 114-16. The court stated that this proposal would not be used since the jury had already been instructed that they would not be receiving transcripts of testimony. RP 117-18. The State then suggested that the interviewer's report be read to the jury without giving the jurors a copy to follow along with. RP 119. The trial court then ruled that her ruling, one which would allow testimony without constant interruption and undue emphasis, was to allow the State to lay a foundation for how the report was created, and then allow the prosecutor to read the questions asked by the interviewer in the child interviewer and for the witness to "play the part" of the child. RP 120-21. The court also ruled that the written report would not be given to the jury.

RP 121. The defense did not object to this procedure once the court proposed it. RP 121.

As the trial court had the discretion under ER 611 to control the presentation of evidence so as to make the presentation effective and to avoid needless consumption of time, the trial court here did not abuse its discretion. Rather, the trial court allowed the witness to read the interview report rather than engage in a needless series of questions such as, “What was your next question to the child,” and “How did the child respond.” The trial court’s ruling required the State to lay a foundation for the interview report and then simply allowed the evidence to be presented in a way that was efficient and fair. The trial court, therefore, did not abuse its discretion.

Additionally, ER 803(a)(5) provides that,

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.

The admission of 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 (1998).

In the present case, the child interviewer testified that the report was

an accurate near verbatim recording of her personal interview of the child, and explained the procedure she used in preparing the report. RP 132-34, 155. The child interviewer also stated that she recalled the interview itself, but needed to refer to the report to recall other information. RP 133. Given this foundation, the report was admissible and could be read into the record pursuant to ER 803(a)(5). The trial court, therefore, did not abuse its discretion in allowing the witness and the prosecutor to read the report for the jury.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S READING OF PORTIONS OF THE CHILD INTERVIEWER'S REPORT DURING CLOSING ARGUMENT BECAUSE THE STATE IS ALLOWED TO DISCUSS THE EVIDENCE AND TRIAL TESTIMONY DURING CLOSING ARGUMENT AND THE CHILD INTERVIEWER HAD TESTIFIED AT TRIAL CONCERNING THE SPECIFIC STATEMENTS REFERENCED BY THE STATE IN ITS CLOSING ARGUMENT.

Johnson next claims that the trial court erred in permitting the State to read portions of the interview to the jury during closing arguments. App.'s Br. at 18. This claim is without merit because the State may discuss the evidence and testimony presented at trial during its closing argument.

As mentioned above, evidentiary rulings and the admissibility of child

hearsay lies within the trial court's sound discretion, and will not be reversed absent manifest abuse of discretion. *Markle*, 118 Wn.2d at 438. Similarly, a trial court's rulings based on allegations of prosecutorial misconduct are reviewed under the abuse of discretion standard. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Similarly, at trial, an attorney is permitted latitude to argue the facts in evidence. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

Furthermore, the use of demonstrative evidence is encouraged when it accurately illustrates facts sought to be proved. *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). The demonstrative evidence must be substantially similar to the evidence at issue, 'but any dissimilarity goes to the weight of the evidence, to be evaluated by the jury.' *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986); *See also, State v. Cole*, 67 Wn.2d 522, 535, 408 P.2d 387 (1965), *certiorari denied* 385 U.S. 858, 87 S. Ct. 105, 17 L. Ed. 2d 84 (1966)(Trial court did not abuse its

discretion in permitting deputy prosecutor to read from transcript not in evidence containing contents of defendant's exhibit, a tape recording, during argument to jury in murder prosecution).

Johnson's claim appears to be that the actual written interview report was not admitted as an exhibit, and thus the State was precluded from reading from the report during closing. App.'s Br. at 19. The contents of the report, however, were admitted at trial through the oral testimony of the child interviewer. As such, the contents of the interview were unquestionable evidence that was properly before the jury, and the state was allowed to discuss the contents of the report, as this portion of closing argument was supported by testimony within the record.

Johnson argues that the trial court improperly characterized the State's reading of the report as demonstrative evidence because the report was not admitted. App.'s Br. at 19. As mentioned above, however, the contents of the report were admitted, and it appears that the trial court's discussion regarding demonstrative evidence came at a point when the prosecutor was using a display to highlight certain statements for the jury. See RP 319-20. As the statements had come in through testimony, showing the statements in a written form was a proper use of demonstrative evidence, as it accurately relayed the evidence at issue. There is no argument that the demonstrative aid used by the state was inaccurate or did not accurately follow the actual

oral testimony of the child interviewer. For these reasons, the trial court did not abuse its discretion in allowing the State to discuss the testimony before the jury during closing argument.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING JOHNSON'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE THE AFFIDAVITS IN SUPPORT OF THE MOTION WERE INSUFFICIENT AND DID NOT ALLEGE FACTS SUFFICIENT TO SUPPORT THE MOTION AND DID NOT SHOW ANY POTENTIAL PREJUDICE, AND BECAUSE JOHNSON FAILED TO SHOW THAT THE NEWLY DISCOVERED EVIDENCE: (1) WOULD PROBABLY HAVE CHANGED THE RESULT OF THE TRIAL; (2) WAS DISCOVERED AFTER THE TRIAL; AND (3) WAS NOT MERELY IMPEACHING EVIDENCE, AS REQUIRED.

Johnson next claims in his Personal Restraint Petition that his claims regarding witness "coaching" were dismissed by the trial court. PRP at 2. Johnson makes a similar claim regarding alleged witness "coaching" in his pro se Statement of Additional Grounds for Review. Statement of Additional Grounds at 4-5. These claims appear to be a claim that the trial court erred in denying his motion for relief from judgment. These claims are without merit because the affidavits in support of Johnson's motion were insufficient under the law.

CrR 7.5 provides a mechanism for a defendant to bring a motion for a

new trial, but specifically requires that the motion be brought within ten days of the verdict, and be “disposed of before judgment and sentence or order deferring sentence.” CrR 7.5(b),(e).

Similarly, CrR 7.8(b)(2) permits a court to relieve a party from a final judgment for newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5. CrR 7.8, *State v. D.T.M.*, 78 Wn. App. 216, 219, 896 P.2d 108 (1995). The court may not grant a defendant a new trial based upon newly discovered evidence unless he demonstrates the 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. D.T.M.*, 78 Wn. App. at 219 (emphasis in original), *citing*, *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). A trial court may deny a CrR 7.8 motion without a hearing if the facts alleged in the supporting affidavits do not establish grounds for relief. *State v. Dallman*, 112 Wn. App. 578, 582, 50 P.3d 274 (2002). A trial court’s CrR7.8 decision is reviewed for abuse of discretion. *State v. Olivera-Avila*, 89 Wn. App. 313, 317, 949 P.2d 824 (1997), *citing* *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994)).

In the present case, Johnson was found guilty on November 14, 2005, and was sentenced on December 16, 2005. CP 163, 261. Johnson,

however, did not file his motion for relief from judgment until December 16, 2005, and did not file the brief in support of the motion until January 26, 2006. CP 273, 288. Furthermore, the motion for relief was not disposed of prior to the entry of the judgment and sentence. The motion, therefore, was not timely under CrR 7.5, and was more properly characterized as a CrR 7.8 motion.

The trial court did not abuse its discretion in denying Johnson's CrR7.8 motion for several reasons. First, Johnson failed to show that the newly discovered evidence outlined in the supporting affidavits would probably change the result of the trial or was discovered since the trial. Furthermore, Johnson failed to show that the new evidence was not merely impeaching evidence; rather, the alleged evidence was impeachment evidence that claimed that a witness was somehow coached.

In addition, in his brief in support of the motion for relief from judgment, Johnson admitted that the affiants could not recall what questions were "changed." CP 289. The affidavits themselves did not state what questions the alleged "coaching" related to and gave no indication of how KLM changed her testimony. As a result, Johnson was unable to point to any specific prejudice. The only specific questions mentioned in either affidavit references questions where the child denied inappropriate touching and thus caused no prejudice to Johnson. CP 286-87.

Given the paucity of information in the supporting affidavits and Johnson's inability to allege any prejudice, the trial court did not abuse its discretion in denying the defense motion, because the affidavits did not provide a factual basis for the extraordinary remedy sought by the defendant. In addition, Johnson failed to show that the newly discovered evidence would probably change the result of the trial or was discovered since the trial, and failed to show that the new evidence was not merely impeaching evidence. For all of these reasons the trial court did not abuse its discretion in denying Johnson's motion for relief from the judgment.

D. THE REMAINDER OF JOHNSON'S CLAIMS RAISED IN HIS PRO SE STATEMENT OF ADDITIONAL GROUNDS AND PERSONAL RESTRAINT PETITION SHOULD BE REJECTED BECAUSE THEY ARE EITHER MERITLESS ON THEIR FACE OR ARE CONCLUSORY ARGUMENTS THAT ARE NOT SUPPORTED BY THE RECORD OR BY CITATIONS TO AUTHORITY.

The remainder of Johnson's claims raised in his pro se statement of additional grounds and personal restraint petition are either meritless on their face or are conclusory arguments that are not supported by the record or by citations to authority. These claims, therefore, should be rejected. *State v. Berry Smith*, 87 Wn. App. 268, 279, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008 (1998) (appellate court need not reach pro se argument that is

unsupported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990), *cert. denied*, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990) (appellate court need not consider claims that are insufficiently argued); *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (pro se defendant must comply with all procedural rules); *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory or unsupported).

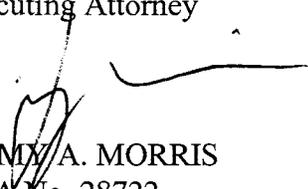
IV. CONCLUSION

For the foregoing reasons, Johnson's conviction and sentence should be affirmed.

DATED November 1, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

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