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STATE OF WASHINGTON
BY *[Signature]*

NO. 36234-1-II

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

IN RE THE PERSONAL RESTRAINT OF BOB R. KASEWETER

BOB R. KASEWETER,

Petitioner/Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert A. Lewis, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Kaseweter's personal restraint petition. CP 32-33.

2. The trial court erred in entering Finding of Fact 11 in the absence of substantial evidence: "At trial Ogle testified that she recognized the gun carried by Donovan Shirk as a .45 caliber pistol owned by Kaseweter. Ogle testified that Kaseweter carried this .45 with him almost everywhere during their relationship." CP 37.¹

3. The trial court erred in finding, in the absence of substantial evidence, that "James Shirk's testimony at the reference hearing contradicted his declaration." CP 42 (Finding of Fact 23).

4. Insofar as it implies more than a temporal connection, the trial court erred in entering Finding of Fact 25 in the absence of substantial evidence: "At the reference hearing, James Shirk indicated that he had not seen Donovan Shirk with the gun used in the incident, or the car key used to start the Berretta, until after Donovan and James stopped at the Kaseweter residence." CP 43.

5. The trial court erred in concluding that "James Shirk appears to be inordinately influenced by the statements of his brother with regard to this incident." CP 45 (Conclusion of Law 7).

¹ The trial court erred in including this same finding in Conclusion of Law 9. CP 47.

6. The trial court erred in concluding that James Shirk's recantation was not credible. CP 45 (Conclusion of Law 8).

7. The trial court erred in concluding that there was independent corroborative evidence of Mr. Kaseweter's involvement in the crimes committed by Donovan and James Shirk. CP 45 (Conclusion of Law 9).

8. The trial court erred in concluding that James Shirk's recantation does not justify overturning Mr. Kaseweter's convictions and granting a new trial. CP 46 (Conclusion of Law 10).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A new trial must be granted where a conviction depends on perjured testimony. Bob Kaseweter's convictions depended on the testimony of his alleged accomplice, James Shirk. Where the trial court concluded after a reference hearing that James Shirk "has changed his version of events on several occasions, in each instance to coincide with Donovan Shirk's version of events," must a new trial be granted? (Assignments of Error 1, 2, 4, 7, 8)

2. A new trial must be granted where a witness reliably recants his testimony and insufficient independent corroborative evidence exists to support the convictions. In 1993, James Shirk was addicted to methamphetamine and alcohol and testified

against Bob Kaseweter in exchange for a 97% sentence reduction. His testimony was the only evidence directly implicating Mr. Kaseweter as an absent accomplice to the crimes that James Shirk and his brother, Donovan, committed. At a reference hearing in 2006, James Shirk recanted his trial testimony, and five people who have known him for the last six to ten years testified that he has transformed himself from a selfish, angry, immature young man into a hard-working, trustworthy, responsible, caring, and credible adult. Did the trial court err in failing to consider the testimony of these five character witnesses, concluding the recantation was unreliable, and denying a new trial? (Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8)

C. STATEMENT OF THE CASE

In 1989, Bob Kaseweter, Donovan Shirk and Roberta Ogle worked together at Schuck's Auto Supply. 6/15/93 RP 15. Mr. Kaseweter and Ms. Ogle began dating and eventually contemplated marriage. 6/15/93 RP 2. The pair broke off their engagement in 1992 and Ms. Ogle began dating Andy Kington. 6/15/93 RP 2.

Donovan Shirk and Roberta Ogle did not get along. She thought he was "scum," and he said he "hate[d] that fucking bitch more than anything in the world." 6/15/93 RP 116.

At about 3:00 in the morning on April 23, 1992, Donovan Shirk and his brother, James, drove to the apartment building where Roberta Ogle and Andy Kington were staying. James Shirk knocked on their door and asked if they owned a burgundy Chevrolet Beretta because somebody was pushing it out of the parking lot. 6/15/93 RP 11. Ms. Ogle was concerned because she had recently discovered her car keys were missing. 6/15/93 RP 6-7, 10. Ms. Ogle and Mr. Kington followed James Shirk outside, at which point Donovan Shirk pulled out a gun and told them to get in the car. 6/15/93 RP 12. Ms. Ogle got in on the driver's side, Mr. Kington got in on the passenger's side, and Ms. Ogle started the car and tried to drive away from the Shirk brothers. 6/15/93 RP 20. As she did so, Donovan Shirk fired a couple of shots from the gun, hitting Mr. Kington in the hand. 6/15/93 RP 21, 26.

Donovan Shirk was charged with first-degree attempted murder, first-degree assault, taking a motor vehicle without permission, and two counts of first-degree kidnapping. State v. Shirk, Clark County Superior Ct. Cause No. 92-1-00471-2. At Donovan Shirk's trial, James Shirk testified that neither he nor Donovan was near the scene of the crime on the night in question. 6/15/93 RP 105. Despite this testimony, the jury convicted Donovan

Shirk of two counts of first-degree assault, two counts of first-degree kidnapping, and taking a motor vehicle without permission. State v. Shirk, Clark County Superior Ct. Cause No. 92-1-00471-2.

While awaiting sentencing, Donovan Shirk attempted to escape from jail. 6/15/93 RP 101. After his arrest on the escape charge, he told law enforcement for the first time that James Shirk was also involved in the crimes against Ms. Ogle and Mr. Kington. 6/15/93 RP 102.

James Shirk then struck a deal with the prosecution: in exchange for implicating Bob Kaseweter and pleading guilty to second-degree kidnapping and second-degree assault, he would be sentenced to nine months instead of the 25 years he faced on the original charges against him. 6/15/93 RP 100, 102, 104. The State wanted to prosecute Bob Kaseweter because, although he was not at the scene of the crime with the Shirk brothers, Ms. Ogle had told police she thought Mr. Kaseweter might be involved in light of their acrimonious breakup. 6/15/93 RP 27.

At Mr. Kaseweter's trial, the principal evidence against him came from two witnesses: Ms. Ogle and James Shirk. No physical evidence was presented connecting Mr. Kaseweter to the crime.

Donovan Shirk invoked his Fifth Amendment privilege and did not testify. App. 5 to PRP.

Ms. Ogle testified about her romance and breakup with Mr. Kaseweter. She stated that Mr. Kaseweter was upset about her terminating the engagement. She said that Mr. Kaseweter had left a note on her car stating that she “had problems and that [she] needed to talk to [her] friends and that God had a plan for [her], and [she] didn’t know what it was.” 6/15/93 RP 9. Ms. Ogle testified that she suspected Mr. Kaseweter of stealing her car keys. The keys had been left in the console of a car she usually kept unlocked. 6/15/93 RP 7. Nevertheless, she suspected Mr. Kaseweter of taking them because he had admitted to taking her birth control pills from the console. When Ms. Ogle confronted Mr. Kaseweter, he acknowledged taking the birth control pills but denied taking the keys. 6/15/93 RP 8.

As to the night in question, Ms. Ogle did not have any direct evidence linking Mr. Kaseweter to the crimes Donovan and James Shirk committed. She testified that after Donovan Shirk told her and Mr. Kington to get in the car, Mr. Kington said, “What’s going on?” 6/15/93 RP 39. Donovan Shirk replied, “Somebody wants to talk to you.” 6/15/93 RP 39. Mr. Kington said, “If Bob wants to talk, why

doesn't he come here?" 6/15/93 RP 39. Donovan Shirk did not acknowledge that he had been referring to anyone named Bob. 6/15/93 RP 70; CP 37. Ms. Ogle testified that although the gun Donovan Shirk used was similar to one of Bob Kaseweter's guns, it "looked a lot longer than Bob's gun," so she had told police officers she was "relatively certain" it was not Bob Kaseweter's gun. 6/15/93 RP 17, 68-69.

James Shirk testified pursuant to his plea bargain. He stated that he and his brother went to Bob Kaseweter's house the night of April 22, 1992, and that Mr. Kaseweter had given them a gun, a key, and a set of handcuffs. 6/15/93 RP 81-84. James Shirk did not hear Mr. Kaseweter say anything other than not to use the gun because he wanted it back. 6/15/93 RP 94. James did not know "what Donovan's plan was" but later that night they went to the apartment complex and committed the crimes discussed above. 6/15/93 RP 86-87, 93.

The court instructed the jury that "an accomplice, having agreed to participate in a criminal act, runs the risk of having another participant exceed the scope of the preplanned activity." In re Kaseweter, Case No. 31390-1-II (App. 8 to PRP). The jury convicted Mr. Kaseweter of conspiracy to commit kidnapping in the

first degree, and as an accomplice for (1) taking a motor vehicle without owner's permission, (2) two counts of kidnapping in the first degree, and (3) two counts of assault in the first degree. CP 7. He was sentenced to 17 years in prison. CP 10.

Mr. Kaseweter's convictions were affirmed on direct appeal, App. 7 to PRP (State v. Kaseweter, No. 17448-1-II), and a personal restraint petition raising the invalid accomplice liability instruction was dismissed as time-barred. In re the Personal Restraint of Domingo, 155 Wn.2d 356, 359, 119 P.3d 816 (2005).

On February 7, 2003, Donovan Shirk told law students from the Innocence Project Northwest at the University of Washington that Bob Kaseweter had nothing to do with the crimes of which he was convicted. App. 3 to PRP. Donovan Shirk wrote and signed a declaration, stating under penalty of perjury that Bob Kaseweter was not involved in the planning or commission of the crimes. App. 1 to PRP.

In November 2003, James Shirk recanted his trial testimony and signed a declaration stating that he only implicated Bob Kaseweter in 1992 because Donovan Shirk told him that Mr. Kaseweter was involved and because he wanted to avoid spending 25 years in prison. App. 2 to PRP. He stated, "I never saw

Kaseweter hand Donovan the gun, handcuffs, or the key to Ogle's car." App. 2 to PRP. In fact, James Shirk was never even in Bob Kaseweter's house that night. App. 2 to PRP.

Mr. Kaseweter filed a personal restraint petition based on this newly discovered evidence. Eventually, the case was remanded for a reference hearing to assess the reliability of James Shirk's recantation.

At the reference hearing on October 25, 2006, James Shirk reiterated that Bob Kaseweter was not involved in the events of April 23, 1992. 10/25/06 RP 22-23. James Shirk spoke of how he had turned his life around in the last ten years since moving to Idaho. He had stopped using methamphetamine and drinking alcohol, had reconnected with his son and brought him into his home, had held down steady jobs, and had married his wife, Vickie, and spent time with his stepdaughter and granddaughter. 10/25/06 RP 14-20. James Shirk testified that his motive for recanting was "to clear the record." 10/25/06 RP 45. He explained:

It's wrong to keep somebody in prison who hasn't had anything to do with this particular incident. . . . I want to clear my conscience. . . . I feel that I did something wrong to somebody and it's cost them, and now I need to set it right.

10/25/06 RP 46. Five other witnesses, among them family members and colleagues, testified that James Shirk is now a hard-working, trustworthy, dependable, generous, and truthful man.

10/25/06 RP 4-13, 98-116; Ex. 2. The State presented no witnesses at the reference hearing.

The trial court denied Mr. Kaseweter's personal restraint petition. CP 32-33. The court concluded that James Shirk's recantation was not reliable because his story has changed many times, "in each instance to coincide with Donovan Shirk's version of events." CP 45. The court also concluded that "[t]here is independent corroborative evidence of Kaseweter's involvement in these crimes." CP 45.

Mr. Kaseweter appeals. CP 47.

D. ARGUMENT

MR. KASEWETER IS ENTITLED TO A NEW TRIAL BECAUSE HIS ALLEGED ACCOMPLICE'S TRIAL TESTIMONY WAS PERJURED, THE RECONTATION WAS RELIABLE, AND INSUFFICIENT INDEPENDENT EVIDENCE EXISTS TO SUPPORT THE CONVICTIONS.

1. A new trial must be granted when a witness whose testimony was necessary to convict a defendant reliably recants that testimony. A personal restraint petition based on a recantation

must be granted if the recantation is reliable and it (1) will probably change the result of the trial, (2) was discovered since 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. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996) (discussing rule in context of CrR 7.8(b) motion); In re the Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) (holding same standard applies to PRP).

The trial court first determines reliability before evaluating the remaining five factors. Macon, 128 Wn.2d at 804. A court evaluates the reliability of a recantation by considering the circumstances surrounding both the original testimony and the recantation. See Macon, 128 Wn.2d at 802-03; State v. Smith, 80 Wn. App. 462, 471, 909 P.2d 1335 (1996). Although not a controlling factor, an important consideration is the degree to which independent corroborating evidence supports the original testimony. See Macon, 128 Wn.2d at 803-04; Smith, 128 Wn. App. at 471. Other factors include the witness's age, his possible reasons for recanting, relevant facts at the time of the recantation, and the passage of time between the original testimony and the recantation. Macon, 128 Wn.2d at 802.

Credibility of recantation evidence is a component of reliability, and is evaluated based on rationality, internal consistency, consistency with other evidence, and common experience. In re the Personal Restraint of Clements, 125 Wn. App. 634, 644, n.3, 106 P.3d 244 (2005). An objective standard applies to the reliability determination: “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.” Smith, 128 Wn. App. at 471.

If the recantation is reliable and the conviction is based solely on the recanting witness’s original testimony, the five factors above are satisfied as a matter of law and a new trial must be granted. Macon, 128 Wn.2d at 804. A conviction is “based solely on the recanting witness’s original testimony” where the other evidence, though corroborative of the original testimony, is insufficient on its own to support the conviction. State v. Landon, 69 Wn. App. 83, 90, 848 P.2d 724 (1993). In sum, the trial court “shall determine whether the testimony [at the original trial] was, in fact, perjured and, if so, whether the jury’s verdict of guilty was likely to

be influenced thereby.” State v. Rolax, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974); See Macon, 128 Wn.2d at 801.

On review, the trial court’s findings of fact will be upheld only if supported by substantial evidence. Macon, 128 Wn.2d at 799. The conclusions of law and judgment must be supported by the surviving findings of fact. Id. This Court reviews the trial court’s conclusions of law de novo. Id. The determination of whether a recantation warrants a new trial is reviewed for abuse of discretion. Id. at 801-02.

2. The recantation of James Shirk, the actual perpetrator of the crimes, was reliable. The circumstances surrounding James Shirk’s recantation indicate that his current testimony is objectively reliable. First, as the trial court properly concluded, the circumstances under which James Shirk recanted do not suggest improper influence or coercion. CP 44. This is in stark contrast to the child-rape cases in which impressionable youngsters change their stories to please disbelieving adult family members. See, e.g., Macon, 128 Wn.2d at 797-98, 802 (child victim recanted under pressure from her mother, who married the defendant after he was convicted and did not believe her daughter’s accusations); State v. Eder, 78 Wn. App. 352, 356-57, 899 P.2d 810 (1995) (after child

accused her stepfather of rape, mother forced child to move out of house and said she could move back only if she recanted).

Further, James Shirk does not have a motive to recant falsely and did have a motive to testify falsely at the original trial. Contrast State v. Ieng, 87 Wn. App. 873, 881-82, 942 P.2d 1091 (1997) (witness motivated to recant by his desire to continue a relationship with the defendant's sister). James Shirk's motive for recanting was "to clear the record." 10/25/06 RP 45. He explained:

It's wrong to keep somebody in prison who hasn't had anything to do with this particular incident. . . . I want to clear my conscience. . . . I feel that I did something wrong to somebody and it's cost them, and now I need to set it right.

10/25/06 RP 46. Mr. Shirk had nothing to gain by recanting, and a lot to lose – he could have been prosecuted for perjury. 10/26/05 RP 79.

In contrast, James Shirk had a great deal to gain in 1993 by implicating Mr. Kaseweter at trial. In exchange for his testimony, he received a sentence of nine months, rather than the 25 years he faced on the charges initially. 6/15/93 RP 102-04. He admitted that the specter of spending a quarter of a century in prison motivated him to "change his story" and testify against Mr. Kaseweter. 6/15/93

RP 100. His pure motives for recanting in contrast to his need to save himself in 1993 support the reliability of his current testimony.

The dearth of independent evidence corroborating Mr. Kaseweter's guilt further supports the conclusion that James Shirk's recantation is reliable. It is undisputed that Mr. Kaseweter was not at the scene of the crime with Donovan and James Shirk. The only evidence apart from James Shirk's testimony at trial was Roberta Ogle's testimony about her breakup with Mr. Kaseweter, his taking her birth control pills and leaving her a note, and the fact that she lost her car key at the same time Mr. Kaseweter allegedly took her birth control pills. 6/15/93 RP 3, 6-9. The independent evidence does not come close to being sufficient to support convictions for first degree assault, first degree kidnapping, taking a motor vehicle, and conspiracy to commit kidnapping (see subsection 4, below).

Relatedly, the only other perpetrator of the crime, Donovan Shirk, has also signed a sworn declaration stating that Bob Kaseweter was not involved in the crimes. App. 1 to PRP. This declaration, combined with the paucity of evidence implicating Mr. Kaseweter, lends credence to James Shirk's recantation. Contrast Clements, 125 Wn. App. at 638 (recantation not reliable where the

other person who directly witnessed the crime corroborated the recanting witness's original testimony).

Other circumstances underscore the reliability of the recantation. At the time he testified at Mr. Kaseweter's trial, James Shirk used methamphetamine daily. 10/25/06 RP 19. By his own admission, his addiction caused him to lie, cheat, and steal. 10/25/06 RP 20. He also abused alcohol. 10/25/06 RP 20. In contrast, he had been sober for six years at the time he recanted his trial testimony at the reference hearing. 10/25/06 RP 19-20.

James Shirk's current family members, friends, and colleagues view him as extremely honest and responsible. Mr. Shirk moved to Idaho over 10 years ago in order to start a new life and "get clean." 10/25/06 RP 16. He met and later married Vickie Shirk, who attended the reference hearing and testified that "you can always count on [James] to tell you the truth." 10/25/06 RP 9-10. In the six and a half years she has known him, James Shirk has always been "considerate," and a "hard worker." 10/25/06 RP 8. He renewed contact with his son and took him into his and Vickie's home four years ago in order to help him avoid making the same mistakes James had made as a young man. 10/25/06 RP 10, 46.

Vickie's daughter and James's stepdaughter, Carrie Miller, also testified by video deposition. Ex. 3, track 3. According to Ms. Miller, James Shirk is "an awesome guy" who is always there to help if she needs anything and is a "great grandpa" to her daughter. Ms. Miller described James Shirk as "very truthful" and "very credible." Id.

Zee Wade, the manager of Traveler's Oasis, where James Shirk worked for six years, also testified about James Shirk's current reputation for truthfulness. Mr. Wade stated, "He's always been very honest with me. He's been [a] very dependable, responsible person since I've known him." 10/25/06 RP 103. Mr. Wade worked with James daily and entrusted him with all the keys to the complex. 10/25/06 RP 102, 104. Faye Featherly, another manager, similarly testified that they "trusted him with a set of keys that enabled him to enter areas where no one else could." She added, "I think he's very credible. I never felt like he was dishonest with me." 10/25/06 RP 111.

Lenore Brewer testified by video deposition and recounted James Shirk's evolution from an immature, self-centered, angry young man to a mature, calm, trustworthy adult. Ex. 3, track 4. She met James Shirk in 1995 or 1996, and they worked together for

many years, first at the Depot Grill and later at Traveler's Oasis. The two became so close while working and carpooling together that Ms. Brewer informally "adopted" James Shirk as her son. When Ms. Brewer first met Mr. Shirk, he was young, wild, angry, and did not trust anyone. Now, he is the most "unangry" person Ms. Brewer knows. Id.

Ms. Brewer describes James Shirk as "very credible," and notes, "If he tells you he's going to do something, he does it, and any time I need anything, all I've got to do is pick up the phone and he's right there to do it for me.... And I don't think there's a lot of people in the world that would do that for a 65-year-old woman that's not related to them." Ex. 3, track 4. Ms. Brewer testified that the changes in James Shirk from 1995 to the present are "like night and day." She stated that when he was young, he was just "out for himself," but now he's "very mature," competent, and settled. Id.

The State did not call any witnesses to rebut the testimony of James Shirk's character witnesses. The trial court did not take the testimony of Vickie Shirk, Zee Wade, Faye Featherly, Carrie Miller, and Lenore Brewer into account in rendering its decision. CP 34-46. The totality of the circumstances described above leads to the conclusion that James Shirk's recantation "has such indicia of

reliability or credibility as to be persuasive to a reasonable juror if presented at a new trial.” See Smith, 128 Wn. App. at 471. The trial court erred in concluding to the contrary.

3. Whether or not James Shirk’s new testimony is credible, his original testimony was perjured. The reason for evaluating the reliability of a recantation is to determine whether the recanting witness’s original testimony was perjured. Rolax, 84 Wn.2d at 838. This is so because a conviction based on unreliable evidence violates due process. Jackson v. Virginia, 443 U.S. 307, 314-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In most cases in which a court concludes that a recantation is unreliable, it simultaneously finds the witness’s original testimony to be reliable. See, e.g., Macon, 128 Wn.2d at 797-803; Clements, 125 Wn. App. at 638. But here, the trial court concluded that both James Shirk’s testimony at the recantation hearing and his original testimony were “inordinately influenced” by his brother, Donovan Shirk. CP 45 (Conclusion of Law 7). The court noted that James Shirk “has changed his version of events on several occasions, in each instance to coincide with Donovan Shirk’s version of events.” Id.

Although Mr. Kaseweter submits that James Shirk's testimony at the recantation hearing was reliable, it does not matter whether the trial court agrees, because the trial judge concluded that nothing James Shirk has said is reliable. CP 45. Given that James Shirk's trial testimony was unreliable, a new trial must be granted if the jury's verdict was likely influenced by the perjured testimony. Rolax, 84 Wn.2d at 838. As discussed below, the evidence apart from James Shirk's unreliable testimony is insufficient to support the convictions, and therefore Mr. Kaseweter's petition must be granted.

4. Absent the perjured testimony, insufficient evidence exists to find Mr. Kaseweter guilty of the crimes of which he was convicted. A new trial must be granted where the jury's verdict of guilty was likely influenced by perjured testimony. Rolax, 84 Wn.2d at 838; See Macon, 128 Wn.2d at 801. Absent James Shirk's perjured testimony, no rational trier of fact could find Mr. Kaseweter guilty of the crimes of which he was convicted. Accordingly, a new trial must be granted.

Mr. Kaseweter was convicted of conspiracy to commit kidnapping in the first degree, and as an accomplice for (1) taking a motor vehicle without owner's permission, (2) two counts of

kidnapping in the first degree, and (3) two counts of assault in the first degree. CP 7. Donovan and James Shirk committed these crimes; Mr. Kaseweter was not present at the scene but was convicted as an accomplice after the State incorrectly argued that one could be convicted as an accomplice so long as he had knowledge of “a” crime committed by the principal. In re the Personal Restraint of Domingo, 155 Wn.2d 356, 368 n.8, 119 P.3d 816 (2005). The jury was instructed that “an accomplice, having agreed to participate in a criminal act, runs the risk of having another participant exceed the scope of the preplanned activity.” In re Kaseweter, Case No. 31390-1-II (App. 8 to PRP). This “in for a dime, in for a dollar” theory of complicity the State presented at Mr. Kaseweter’s trial is invalid. Domingo, 155 Wn.2d at 365.

A person is guilty of a crime as an accomplice if, “with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020 (emphasis added). Knowledge that a principal intends to commit a crime does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). Rather, “in

order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged.” State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (emphasis in original).

Absent James Shirk’s perjured testimony, insufficient evidence remains to support Mr. Kaseweter’s convictions.² No physical evidence linking Mr. Kaseweter to the crimes was presented at trial. Nobody apart from James Shirk testified that they saw handcuffs at all, let alone handcuffs linked to Mr. Kaseweter. Donovan Shirk did not testify at Mr. Kaseweter’s trial, and has since signed a sworn declaration stating that Mr. Kaseweter was not involved in the crimes. App. 1 to PRP.

The trial court erroneously concluded that evidence independent of James Shirk’s testimony – particularly Roberta Ogle’s testimony about the incidents surrounding her breakup with Mr. Kaseweter – constitutes sufficient corroborating evidence to deny a new trial. CP 45-46. The judge found that the following

² Even if the perjured testimony were true, insufficient evidence was presented to convict Mr. Kaseweter under an accomplice liability theory. However, Mr. Kaseweter failed to assign error to the improper accomplice liability instructions on direct appeal, and his PRP raising the issue was dismissed as time-barred. See Domingo, 155 Wn.2d 356 at 359.

evidence was sufficient to convict Mr. Kaseweter on all six counts beyond a reasonable doubt.³

Ogle testified about Kaseweter's emotional and erratic behavior in the weeks prior to the incident, including entering her residence without permission, stealing her key and birth control pills, and following her to Planned Parenthood to leave a note about her "problems." The key used by Donovan and James Shirk on the night of the incident was the same key which turned up missing from the console at the same time that Kaseweter took Ogle's birth control pills. Donovan Shirk was Kaseweter's friend, and the two of them met at some point just before the incident. Even in James Shirk's recanted testimony, Kaseweter and Donovan discussed something, and Kaseweter handed an object to Donovan Shirk. Ogle described the weapon used by Donovan Shirk as the same .45 caliber pistol carried by Kaseweter on a regular basis. James Shirk had not seen Donovan Shirk with this pistol, or the car key, before the two of them drove to Kaseweter's home on the night of the incident. Immediately after leaving the residence, Donovan Shirk and James Shirk drove to the location where the incident occurred.

CP 45-46.

As a preliminary matter, substantial evidence does not support the finding that "Ogle described the weapon used by

³ The court's language indicates that it based its conclusion on an erroneous application of accomplice liability. The court stated, "There is independent corroborative evidence of Kaseweter's involvement in these crimes. . . . Even discounting James Shirk's testimony, a rational trier of fact could find that Kaseweter was involved in the incident, and that the evidence supported his conviction." CP 45-46. Mr. Kaseweter had six convictions (five on an accomplice liability theory), not one. CP 7. And even if he was "involved in the incident" – a conclusion he disputes – his convictions cannot stand unless sufficient evidence supports the conclusion that he promoted the specific crimes of which he was convicted: two counts of assault in the first degree, two counts of kidnapping in the first degree, and one count of taking a motor vehicle. See RCW 9A.08.020.

Donovan Shirk as the same .45 caliber pistol carried by Kaseweter on a regular basis.” CP 46. Rather, Ms. Ogle testified on direct examination that the gun Donovan Shirk used “looked like Bob’s gun, one of Bob’s guns,” i.e. it was “similar to” a gun that Mr. Kaseweter had – not that it was the same gun. 6/15/93 RP 17. On cross-examination Ms. Ogle clarified that it was not the same gun, and that the gun Donovan Shirk used against her “looked a lot longer than Bob’s gun.” 6/15/93 RP 68. Thus, she told the police officer within a week of the incident that she was “relatively certain” the pistol used in the crimes was not Mr. Kaseweter’s. 6/15/93 RP 69.

Nor did Ms. Ogle testify that Mr. Kaseweter “stole” her keys, as the court found. CP 45-46. Rather, she stated that they “turned up missing,” but that Mr. Kaseweter denied taking them. 6/15/93 RP 6-8.

Regardless, the circumstantial evidence detailed above is insufficient to support the convictions. Although a jury may infer the existence or nonexistence of facts based on circumstantial evidence, “an inference should not arise where there are other reasonable conclusions that would follow from the circumstances.” State v. Bencivenga, 137 Wn.2d 703, 708, 974 P.2d 832 (1999).

Plenty of reasonable conclusions follow from the above circumstances other than the conclusion that Mr. Kaseweter knowingly facilitated the commission of first-degree assault, first-degree kidnapping, and taking a motor vehicle.

Breaking down the findings on which the court bases its conclusion, it is clear that an inference of guilt cannot arise. First, the trial court noted that "Ogle testified about Kaseweter's emotional and erratic behavior in the weeks prior to the incident, including entering her residence without permission, stealing her key and birth control pills, and following her to Planned Parenthood to leave a note about her 'problems.'" Plenty of reasonable conclusions follow from these circumstances other than that Mr. Kaseweter is guilty of two counts of first-degree assault, two counts of first-degree kidnapping, taking a motor vehicle, and conspiracy to commit kidnapping.

As discussed above, substantial evidence does not support the finding that Ms. Ogle testified that Mr. Kaseweter stole her keys. Furthermore, Ms. Ogle testified that she frequently left her car unlocked with the key inside. 6/15/93 RP 6-7, 53. And Ms. Ogle regularly lost her keys, including when she attempted to produce them at Donovan Shirk's trial and again at Bob Kaseweter's trial.

6/15/93 RP 21, 29. Given that Ms. Ogle was prone to losing her keys and often kept her car unlocked, the inference that Mr. Kaseweter stole her car keys, supplied them to the Shirks, and encouraged them to use it to commit the crime of taking a motor vehicle cannot arise.

Nor can assault and kidnapping be inferred from the fact that Mr. Kaseweter was emotional and erratic, left a note, and took some birth control pills. If this were a proper inference, a significant percentage of ex-boyfriends and ex-girlfriends would be charged with kidnapping and assault. The actual perpetrator of the crimes, Donovan Shirk, had his own motive for committing them: he and the victim did not get along at their mutual place of employment and he "hate[d] that fucking bitch more than anything in the world."

6/15/93 RP 116.

Next, the court notes that "[t]he key used by Donovan and James Shirk on the night of the incident was the same key which turned up missing from the console at the same time that Kaseweter took Ogle's birth control pills." CP 46. Again, given that Ms. Ogle kept her car unlocked and regularly lost her keys, it would take even more than a pyramiding of inferences to support the conviction for taking a motor vehicle beyond a reasonable doubt.

Without question it does not prove that Mr. Kaseweter was an accomplice to assault or kidnapping.

The court then discusses the fact that Donovan Shirk went to Bob Kaseweter's house the week before the incident, and that Mr. Kaseweter gave Donovan a small object. CP 46. It is not reasonable to infer guilt of any crime from this activity. Donovan Shirk and Bob Kaseweter were friends and colleagues, and like all friends and colleagues were more likely to have gone to each other's houses for work or play than for plotting crimes. Even combining this visit with the other evidence, a factfinder would have to engage in rampant speculation to conclude that Mr. Kaseweter took the car keys because he did not deny taking the birth control pills, and the small object Mr. Kaseweter gave to Donovan Shirk was that set of keys, and Mr. Kaseweter wanted Donovan Shirk to use the key to take Ms. Ogle's car. And even that tenuous thread would apply only to the TMV charge. There is absolutely no evidence – direct or circumstantial – of assault, kidnapping, or conspiracy to commit kidnapping.

Finally, the court noted that Donovan and James Shirk stopped by Bob Kaseweter's empty home just before engaging in the crimes, and that James Shirk had not seen Donovan Shirk with

the gun or key until the night in question. CP 46. This finding does not support a conviction on any of the six counts. James and Donovan Shirk did not live together, so there is no reason to assume James should have seen the key or the gun before the night in question. 10/25/06 RP 18. The fact that they stopped by Mr. Kaseweter's house when Mr. Kaseweter was not home cannot possibly support an inference that Mr. Kaseweter knowingly facilitated the specific crimes in question.

Both of the actual perpetrators of the crimes, Donovan and James Shirk, now deny that Bob Kaseweter was involved as an absent accomplice and co-conspirator. The remaining evidence against Mr. Kaseweter shows only that he had a difficult breakup with his girlfriend, Roberta Ogle, and that he spent time with his friend and colleague, Donovan Shirk. This is insufficient to support convictions for kidnapping, taking a motor vehicle, and assault.

5. Mr. Kaseweter's petition must be granted. A new trial must be granted where a defendant's conviction depends on the perjured testimony of a witness who later reliably recants that testimony. Macon, 128 Wn.2d at 804; Rolax, 84 Wn.2d at 838. Because Bob Kaseweter's convictions as an absent accomplice and co-conspirator depended on the perjured testimony of the

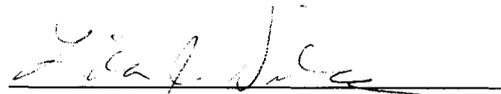
actual perpetrator of the crime, his personal restraint petition must be granted and his case remanded for a new trial.

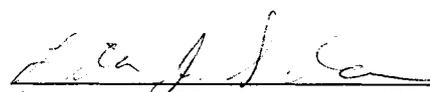
E. CONCLUSION

For the reasons set forth above, Mr. Kaseweter respectfully requests that this Court reverse the trial court order denying his personal restraint petition, and remand for a new trial.

DATED this 14th day of September, 2007.

Respectfully submitted,


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE THE PERSONAL RESTRAINT PETITION)	
OF BOB KASEWETER,)	
)	COA NO. 36234-1-II
Appellant,)	
)	
v.)	
)	
STATE OF WASHINGTON,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 14TH DAY OF SEPTEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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DIVISION TWO