

NO. 36234-1-II

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

STATE OF WASHINGTON, Respondent

v.

BOB ROY KASEWETER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 93-1-00019-7

BRIEF OF RESPONDENT

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pm 11/30/07

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I. STATEMENT OF FACTS

The issue raised in this appeal deals with recanted testimony from one of the witnesses. This issue had previously gone to Division II in 2005. The Order Dismissing the Petition under the Division II No. 32372-9-II sets forth, in great detail, the facts as they relate to this criminal activity. A copy of that Order Dismissing Petition is attached hereto and by this reference incorporated herein.

The matter was referred to the State Supreme Court under No. 77121-9. The Supreme Court entered an Order on March 7, 2006, granting discretionary review and transferring the matter to the Clark County Superior Court for a determination on the merits of the personal restraint petition.

The hearing on the merits of the personal restraint petition and dealing with the question of recantation by one of the witnesses was heard on October 25, 2006. As a result of that hearing, the trial court entered an Order Denying Personal Restraint Petition. (CP 32). It also filed its Findings of Fact and Conclusions of Law, filed on March 23, 2007. (CP 34). The Findings of Fact and Conclusions of Law set forth by the trial court at that time further clarify and assist in understanding the nature of the factual recitation, not only set forth at the time of the hearing, but also further clarifying the overall matter. A copy of the Findings of Fact

and Conclusions of Law (CP 34) is attached hereto and by this reference incorporated herein.

To further clarify issues of the statement of facts, the State will refer to areas of the testimony from the October 25, 2006, hearing. At that hearing, the witness who was attempting to recant trial testimony is James Shirk. As the factual recitation from both the Findings of Fact and the Division II Opinion indicate, James Shirk and his brother, Donovan Shirk, using a ruse, attacked Roberta Ogle and her boyfriend, Andrew Kington, outside her residence.

James Shirk testified that he had never met her before and did not know why they were there in the parking lot at her residence. (RP 49). He did testify at the reference hearing that Donovan Shirk had keys to her car, that he had given the keys to him and that he gotten the keys after coming from Mr. Kaseweter's house at a previous time. (RP 51).

James Shirk further indicated that Donovan Shirk had told him that this was all Kaseweter's idea. (RP 56; 59). When the court specifically asked James Shirk about what Donovan Shirk had told him about Mr. Kaseweter's involvement, he told the judge that Kaseweter was behind it because he had some vendetta against the girl. (RP 67).

Also, part of the testimony at the reference hearing was the law student, Steven Lewis, and the investigator, Herbert Filer. They had

sought out James Shirk to determine whether or not he was still consistent with what he had previously testified to. This came to light because of indications from Donovan Shirk that truthful testimony had not been supplied at the time of Mr. Kaseweter's trial.

It is interesting to note that the law student, Steven Lewis, when he finally confronted James Shirk was told by Mr. Shirk that everything he said at trial was true. (RP 75; 82). Further, that he reviewed his brother, Donovan Shirk's, statement and said that it was a lie, referring to Donovan Shirk's statement itself. (RP 75-76; 83). Herbert Filer, the investigator that was with the law student also indicated that when initially confronted that James Shirk said that everything that he had testified to was true and that Donovan Shirk's statement was a lie. (RP 94).

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is that he should be entitled to a new trial because of recantation by one of the witnesses that testified at the trial.

Recantations are not rare in criminal trials and are inherently questionable. State v. Hanson, 126 Wn. App. 276, 108 P.3d 177 (2005); State v. Macon, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996); State v. Young, 62 Wn. App. 895, 900, 802 P.2d 829 (1991).

When faced with the decision of whether to grant a new trial based on newly discovered evidence or recantation of trial testimony, the trial judge, not the jury, must assess the credibility of the proffered testimony. State v. Macon, 128 Wn.2d at 801. In that context, the trial court must determine whether a witness' recantation is reliable. *Id.* In State v. Castro, 32 Wn. App. 559, 648 P.2d 485 (1982), it was held that the trial court did not abuse its discretion in ruling that a witness' statement did not have a high probability of trustworthiness. Further, in State v. Goforth, 33 Wn. App. 405, 409, 655 P.2d 714 (1992), the court, looking at the question of newly discovered evidence and whether or not it will probably result in a different outcome upon retrial, must necessarily pass upon the credibility significance, and cogency of the proffered evidence.

Recantation may be considered newly discovered evidence for purposes of CrR 7.8(b)(2). State v. Macon, 128 Wn.2d at 799-800. But to obtain a new trial, the defendant must show that the new evidence (1) was discovered after trial, (2) will probably change the outcome, (3) is material, (4) is not merely cumulative or impeaching, and (5) could not have been discovered before trial with due diligence. A trial court may deny a CrR 7.8 motion for new trial for lack of any one of these listed factors. Macon, 128 Wn.2d at 800. As indicated in a footnote in the case

of In Re Personal Restraint of Clements, 125 Wn. App. 634, 644, 106 P.3d 244 (2005)

Discussions of recantation evidence often merge the issues of reliability and credibility. Reliability is the overriding concern and encompasses all relevant circumstances surrounding the recantation, including possible undue influence, coercion, and any other improper motive or influence. See Macon, 128 Wn.2d at 802; State v. Landon, 69 Wn. App. 83, 93, 848 P.2d 724 (1993). Credibility amounts to a threshold determination of plausibility that involves more than the demeanor of witnesses. A credibility determination includes an assessment of the evidence in light of its rationality, internal consistency, consistency with other evidence, and common experience. See Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). In this context, credibility is a component of reliability.

Finally, in order to obtain a new trial based on newly discovered evidence, a defendant must show among other things that the evidence is material. Macon, 128 Wn.2d at 800. If the recantation of an important witness is not credible, then it is not material, and an essential factor that would support a new trial is missing. State v. Ieng, 87 Wn. App. 873, 875, 942 P.2d 1091 (1997). A trial court's denial of a motion for new trial is within its sound discretion and will be reversed only for abuse of that discretion. State v. Cardenas, 146 Wn.2d 400, 412, 47 P.3d 127 (2002).

Judge Lewis, when he entered his findings of fact after the reference hearing, was particularly detailed in his analysis of the contradictions between both Shirk brothers, their previous trials and the

testimony of James Shirk. After reviewing all of the findings that were entered and the information that had been supplied to the court, the court made the following observations as part of its conclusions of law:

Conclusion of Law:

No. 7 – James Shirk appears to be inordinately influenced by the statements of his brother with regard to this incident. He has changed his version of events on several occasions, in each instance to coincide with Donovan Shirk’s version of events. This willingness to support his brother includes lying under oath at Donovan Shirk’s trial. During the interview with investigators, James Shirk initially indicated that there was no reason to change his trial testimony. It was only after being advised that Donovan Shirk had indicated that Kaseweter was not involved that James Shirk agreed to recant his testimony. These circumstances indicate that Donovan’s influence over James continues, despite his contrary assertions.

No. 8 – In addition, the recantation, viewed objectively, is not credible. James Shirk has given a number of different statements about this incident, including different versions between his written statement to investigators in 2003, and his testimony at the reference hearing in 2006. His testimony contradicted his written statement and contradicted the statements of Donovan Shirk, concerning their continuing contact. This lack of credibility is one factor in this court’s conclusion that the recantation is not reliable.

Conclusions of Law, No. 7-8 of the Findings of Fact and Conclusions of Law (CP 34).

The trial court went on from there to discuss the independent corroborative evidence of Kaseweter’s involvement in these crimes. It

was the final conclusion of the judge that James Shirk's recantation was not the type of evidence which would justify a new trial. Because of that, he denied the personal restraint petition.

As indicated elsewhere in the materials, James Shirk has given multiple recitations and multiple sets of facts always with the "guidance" of his brother, Donovan. This is particularly telling in this matter when the law student and investigator confront him in Idaho, that he initially indicates that what he said at the time of trial was true but it was only after he was told that Donovan had changed his version of events that James Shirk decided to also change his story. In fact, initially when he reviewed Donovan Shirk's statement, he indicated that it was a lie. The State submits that there is nothing reliable about any of this information that was supplied to the law student or to the investigator when they confronted him in the State of Idaho. Questions of reliability and credibility appear to merge, to a certain extent, and it appears that there is no reliability or credibility with any of this subsequent conduct. There is a reason that recanted testimony is viewed suspiciously and is highly suspect in the law. This is a prime example of why. The State submits that there has been no showing of any justification or reason to grant a new trial under these circumstances.

III. CONCLUSION

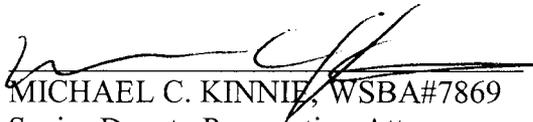
The trial court properly denied the personal restraint petition. The Court of Appeals should deny it also.

DATED this 27 day of November, 2007.

Respectfully submitted:

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By:


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APPENDIX "A"

DIVISION II, NO. 32372-9-II

ORDER DISMISSING PETITION

KO

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

In re the
Personal Restraint Petition of

BOB R. KASEWETER,

Petitioner.

No. 32372-9-II

ORDER DISMISSING PETITION

FILED

MAY 16 2005

#93-1-00019-7

JoAnne McBride, Clerk, Clark Co

Bob R. Kaseweter seeks relief from personal restraint imposed following his 1993 convictions of conspiracy to commit kidnapping in the first degree, taking a motor vehicle without owner's permission, two counts of kidnapping in the first degree and two counts of assault in the first degree. He contends that the principal witness against him, James Shirk, has recently recanted his testimony, and so he is entitled to a new trial.

In 1989, Kaseweter, Roberta Ogle and Donovan Shirk worked together at an automobile parts store. Kaseweter and Ogle dated for a time, but broke up in March 1992, when Ogle began dating Andy Kington. Soon after, Ogle noticed her car keys and birth control pills were missing. She accused Kaseweter, who denied taking the car keys but did not deny taking the birth control pills. Several weeks later, Kaseweter left a note for Ogle on her car, which stated in part that "God had a plan for her" but that she "didn't know what it was." Report of Proceedings at 9.

At about 3:45 a.m. on April 23, 1992, while in Kington's apartment, Ogle and Kington were awakened by pounding on the front door. Kington saw a man he did not recognize and asked what he wanted. The man, who Kington and Ogle later identified as

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James Shirk, told him that someone was pushing Ogle's car out of the parking lot. After calling police and dressing, Kington and Ogle accompanied James to the place where Ogle's car had been pushed. As they approached the car, a man, who Ogle recognized as Donovan Shirk,¹ pointed a handgun at Kington and ordered him into the car. Kington refused. Ogle asked Donovan why he was doing this and Donovan responded "somebody wants to talk to you." RP at 39. Ogle got into the driver's seat of her car and found the key in the ignition. Kington jumped in the passenger seat and Ogle sped away. They heard a gun being fired and bullets hitting the car. One of the bullets struck Kington in the hand.

The next day, police interviewed James about the events of the night before. He told the police that he had said that he had gone bowling, had left the bowling alley and had gone home to bed. He denied any involvement in the incident involving Ogle and Kington.

The State charged Donovan with numerous crimes arising out the incident involving Ogle and Kington. James testified consistent with his statement to the police and denied any involvement in the incident. The jury convicted Donovan. After conviction, Donovan implicated James. The State then charged James with numerous crimes. According to James, he was facing 25 years of imprisonment if found guilty of the crimes. He agreed to testify against Kaseweter in exchange for the State's recommendation of a sentence of nine months, which the court followed.

The State charged Kaseweter with conspiracy to commit kidnapping in the first degree, taking a motor vehicle without owner's permission, two counts of kidnapping in

¹ To enhance clarity, the remainder of this order refers to the Shirks by their first names.

the first degree and two counts of assault in the first degree. James testified as follows: While riding with Donovan on the evening of April 22, Donovan had driven to Kaseweter's house in Portland. Once in the house, Kaseweter and Donovan had a conversation in the kitchen. Kaseweter then gave him handcuffs, a key to Ogle's car and a .45 caliber automatic pistol. He heard Kaseweter tell Donovan that the gun was not to be used and that Kaseweter wanted it returned. Donovan then drove them to Kington's apartment, and at Donovan's direction, he used the key that Kaseweter had given him to drive Ogle's car out of the parking out and into the street. At Donovan's direction, he went to Kington's apartment and told Ogle and Kington that someone was pushing Ogle's car out the parking lot. When he brought Ogle and Kington back to the car, Donovan pointed the pistol at them and ordered them into the car. As Ogle drove away, Donovan started shooting at the car. After Ogle drove away, and hearing the police approaching, they drove away and Donovan threw the pistol in the Columbia River.

On cross-examination, James admitted that he lied to the police and lied in his testimony at Donovan's trial when he denied any involvement in the incident with Ogle and Kington. He said he changed his story "when [his lawyer] told me I was facing 25 years." RP at 100.

Donovan refused to testify at Kaseweter's trial, invoking his right against self-incrimination. A jury convicted Kaseweter as charged. This court affirmed his conviction. *State v. Kaseweter*, No. 17448-1-II (unpublished opinion, filed October 11, 1995).

In 2003, at Kaseweter's request, members of the Northwest Innocence Project interviewed Donovan and James. Donovan gave a declaration stating that Kaseweter

[Ogle or Kington] in any manner,” that the incident “was never instigated or promoted by or planned by” Kaseweter and that “all actions were committed by myself and [James] . . . solely by ourselves, and for our own interests.” Appendix 1 in Support of Personal Restraint Petition.

After being interviewed, James signed a declaration, which a Northwest Innocence Project member had drafted, and in which he recanted his testimony against Kaseweter. He declared that all his information about Kaseweter’s involvement came from Donovan, with whom he no longer speaks. He declared as follows:

I never heard or saw Bob Kaseweter come up with any planning or strategy for what Donovan and myself did. I never saw Kaseweter hand Donovan the gun, handcuffs, or the key to Ogle’s car. . . . I did not go inside Kaseweter’s house on the night of the crime because I was in the car listening to the radio. . . . When Donovan got back to the car [after going up to Kaseweter’s house] he told me Bob wasn’t there so we left. Because I was in the car, listening to the radio, I never heard Bob say “don’t use the gun – I want it returned.” Donovan told me Bob said that and I believed him. I believed Kaseweter was behind it because Donovan kept telling me that he was. . . .

I stated incorrectly at Kaseweter’s trial that I believed I had seen Kaseweter hand Donovan the gun, keys, and handcuffs and that I believed I heard him say not to use the gun. I never actually saw or heard these things but Donovan told me that it happened and I was convinced it must have happened. . . . I also said I saw it because I wanted to cooperate with the prosecution after my lawyer told me I was facing 25 years. I told them what they wanted to hear and it was also what my brother had told me happened. . . . I feel bad that what I said led to Kaseweter going to prison by I did not know then that Donovan had been misleading me all along. I also didn’t want to do 25 years for something that Donovan caused and actually did. . . . I continue to be very upset that Donovan got me involved in this incident. . . . Since I served my time for my part in this crime, I have moved on with my life and make every effort to be straight and honest with people. I am a loving husband and father, a hard and responsible worker, and have stayed out of trouble for the past ten years. I just want the truth to be told so that everyone involved in this stupid crime can get on with their lives.

Appendix 2 in Support of Personal Restraint Petition.

Kaseweter contends that James's recantation constitutes newly discovered evidence, such that the one-year time bar on collateral attacks, RCW 10.73.090, does not bar his petition. RCW 10.73.100(1).² He also contends that the newly discovered evidence entitles him to a new trial under *In re Lord*, 123 Wn.2d 296, 319-20 (1994), because James's recantation: (1) would probably change the result of his trial; (2) was discovered since the trial; (3) could not have been discovered before the trial through the exercise of due diligence; (4) is material; and (5) is not cumulative or impeaching.

While Kaseweter is correct that his petition is not time-barred, he is incorrect that James's recantation constitutes grounds for a new trial. When a defendant is convicted "solely on the testimony of [a] now recanting witness," it is an abuse of discretion for a court, on a petition for post-conviction relief, not to grant a new trial. *State v Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds* in *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975) (emphasis in original). But the recantation must be reliable before a new trial is required. *State v. Macon*, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996) (citing *Rolax*). Recantation testimony is "inherently questionable" and does not as a matter of law entitle a defendant to a new trial. *Macon*, 128 Wn.2d at 801. In assessing the reliability of a recantation, the court should consider "the circumstances surrounding the case, . . . , [the] possible reasons for recanting, relevant facts at the time of [the] recantation , and the passage of time between [the] testimony and [the] recantation." *Macon*, 128 Wn.2d at 801.

² Kaseweter filed an earlier personal restraint petition, in which he alleged that James's recantation was newly discovered evidence and that the jury instructions on accomplice liability in his trial were erroneous. This court denied Kaseweter's petition as an untimely mixed petition. Order Dismissing Petition, No. 31390-1-II, filed August 16, 2004. Kaseweter refiled his petition, omitting the claim of erroneous jury instructions.

Under these standards, Kaseweter fails to show that James's recantation is reliable. He has now presented three versions of the incident involving Ogle and Kington. First, to the police and at Donovan's trial, he denied, under oath, any involvement in the incident and claimed he was home sleeping at the time. Second, at Kaseweter's trial, he testified, under oath, that Kaseweter: (1) gave him the handcuffs, keys and pistol; (2) discussed his plans with Donovan in the kitchen; and (3) gave instructions not to use the pistol and to return it. In his testimony at Kaseweter's trial, he admitted his previous lies and admitted he was testifying in order to receive a much lighter sentence for his involvement. Despite this admission of lying and taking advantage of a plea agreement, the jury found James's testimony credible and convicted Kaseweter. Now, ten years later, and after having had a falling-out with Donovan, he offers a third version, in which he: (1) never went into Kaseweter's house; (2) did not receive the handcuffs, key and pistol from Kaseweter; (3) did not see Donovan receive the handcuffs, key and pistol from Kaseweter, and (4) never heard Kaseweter give instructions not to use the pistol and to return the pistol.

These circumstances make James's recantation unreliable. A jury found James's testimony about Kaseweter's involvement to be sufficiently credible to convict Kaseweter, despite James's admission to past lies. His recantation misstates the testimony he gave at Kaseweter's trial, in that he asserts that he testified that he saw Kaseweter give Donovan the handcuffs, key and pistol. He actually testified that Kaseweter gave him the handcuffs, key and pistol. In addition, James did not come forward on his own with his desire to recant his testimony. He did so only after being

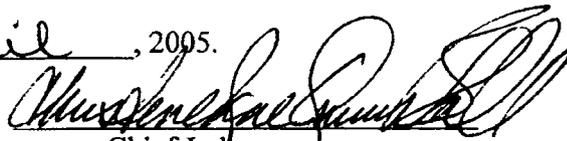
contacted by persons acting on Kaseweter's behalf. Kaseweter fails to show that James's recantation was reliable.

As a result, Kaseweter fails to show that the recantation would probably change the result of the trial, were it to be presented to the jury. Further, while important, James's testimony was not the sole evidence implicating Kaseweter. Ogle testified about Kaseweter's possible theft of her car key and about the note he left on her car. She testified about the interactions between Donovan and Kaseweter while they were employed together. And she testified that when he was attempted to abduct her, Donovan said that someone wanted to talk with her. A rational trier of fact could find that Kaseweter was that someone and that Kaseweter was the person who directed Donovan to Kington's apartment. Thus, there was other evidence implicating Kaseweter in the kidnapping and assault of Ogle and Kington.

Without a showing that James's recantation would probably change the result of the trial, Kaseweter fails to show that he is entitled to a new trial on grounds of newly discovered evidence. Accordingly, it is hereby

ORDERED that Kaseweter's petition is dismissed under RAP 16.11(b).

DATED this 29 day of April, 2005.

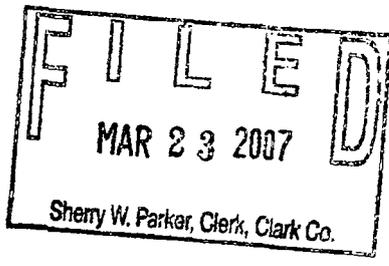

Chief Judge

cc: Jacqueline McMurtrie
Bob R. Kaseweter
Clark County Clerk
County Cause No. 93-1-00019-7
Robert W. Shannon

APPENDIX "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

In re the Personal Restraint of)	
)	Superior Court No. 93-1-00019-7
)	
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
)	
BOB R. KASEWETER,)	
)	
Petitioner.)	

THIS MATTER came regularly before the undersigned Judge of the above-entitled Court, pursuant to the order of the Washington Supreme Court, dated March 7, 2006, in Docket No. 77121-9, which transferred the personal restraint petition of Bob R. Kaseweter to the Clark County Superior Court, for determination on the merits. Petitioner was represented by Jacqueline McMurtrie and Gerald Wear. Respondent State of Washington was represented by Robert Shannon.

The Court considered the records and files herein, including the testimony presented at the petitioner's original trial on June 14-17, 1993; the declarations and materials submitted concerning the personal restraint petition; and the testimony presented at a reference hearing conducted on October 25, 2006. The Court also considered the written and oral arguments of the parties, and reviewed applicable case

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law. Based upon the evidence listed above, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. In 1989 and 1990, Roberta Ogle worked at Schuck's Auto Parts in Portland, Oregon. While working at this store, Ogle became acquainted with fellow employees Donovan Shirk and Bob Kaseweter. The three worked together at the Portland store for approximately four months.

2. Roberta Ogle and Donovan Shirk came to dislike each other as a result of working together. Ogle believed that Shirk was a womanizer, and acted like "scum". Shirk developed a mutual, intense dislike of Ogle. After Shirk and Ogle stopped working together, they did not see one another for more than one year.

3. After working together for a period of time, Ogle and Kaseweter became romantically involved. Their relationship progressed to the point where they began to discuss marriage. In March, 1992, Ogle introduced Kaseweter to her pastor, Terry Pettit, and each advised Pettit that they were engaged.

4. In March 1992, Ogle began dating Andrew Kington. Ogle did not immediately advise Kaseweter that she was seeing Kington. Ogle testified at Kaseweter's 1993 trial (hereafter, at trial), that she returned home after a date to discover Kaseweter inside her home without permission. Kaseweter asked Ogle "who Andy was" and engaged her in an extended discussion about their relationship. He asked Ogle to make several phone calls, including to Kington, to Pettit, and to Lydia Kaseweter, his sister-in-law. After this incident, Ogle and Kaseweter terminated their romantic relationship.

5. At trial, Ogle described Kaseweter as very upset, aggravated and hurt by the termination of their relationship. Shortly after the breakup, Ogle discovered that her car keys and birth control pills were missing. The missing key was kept in the car console with the birth control pills. Ogle confronted Kaseweter, who admitted taking the birth control pills, but denied taking the car's key. Kaseweter was aware of where Ogle kept her keys.

6. On Easter Sunday, April 19, 1992, Ogle saw Kaseweter at church, but did not speak to him. After services, Ogle drove to a Planned Parenthood office for an appointment. When she returned to her car, she found a note from Kaseweter. At trial, Ogle testified that the note indicated that she had problems, needed to talk to her friends, and that "God had a plan for me, and I didn't know what it was".

7. At approximately 3:45 a.m. on April 23, 1992, Ogle and Kington were together at his apartment in Clark County, Washington. They were awakened by a knock on the door to the apartment, but chose not to answer since they did not recognize the person. When the man knocked a second time, approximately 15 minutes later, Kington asked what he wanted. The stranger asked if someone in the residence owned a burgundy Chevrolet Berretta. Kington said yes, because Ogle owned a Berretta. The man at the door said that someone was pushing the Berretta out of the parking lot.

8. Kington called 911 to report that the car was being stolen. After he and Ogle dressed, they followed the stranger, later identified as James Shirk, out to the street, where the car was now parked. After they reached the car, Donovan Shirk walked toward them from the other side of the street. Donovan Shirk and James Shirk are

brothers. Donovan Shirk pulled out a gun, and cocked it. He pointed the gun at Ogle and Kington, and told them to get into the car.

9. Donovan Shirk grabbed Ogle and pointed the gun at her head. Ogle knocked the gun away, and Kington asked Donovan Shirk what was going on. Donovan Shirk indicated that they were “going to go for a ride”. When Kington asked where they were going, Donovan Shirk indicated “somebody wants to talk to you”. Kington replied “if Bob wants to talk, why doesn’t he come here?” Donovan Shirk did not indicate that “Bob” was not the person who wanted to talk to them, or that some other person was involved. Donovan Shirk and Bob Kaseweter were friends, and Ogle knew that they had a friendly relationship from work.

10. Ogle finally entered the driver’s seat of her car at Donovan Shirk’s request, and found that her missing key was in the ignition. As Kington and Donovan Shirk continued to argue, Ogle told Kington to get in the car, then sped away from the scene. Donovan Shirk fired the gun at the car several times as it drove away. One of the bullets struck Kington in the hand, breaking two bones. A few seconds later, police arrived in the area and Donovan and James Shirk fled.

11. 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. Although she made inconsistent statements to authorities in the past, she asserted at trial that the pistol “looked like Bob’s gun, one of Bob’s guns”.

12. Police arrested Donovan Shirk and charged him with first degree attempted murder, first degree assault, taking a motor vehicle without permission, and two counts of

first degree kidnapping. Prior to Donovan's trial, James Shirk told police that he had been bowling on the evening before the incident, and that he had gone home directly after leaving the bowling alley. He denied being at the scene of the attack, or being involved in any way.

13. At Donovan Shirk's trial, James Shirk testified under oath that neither he nor Donovan was near the scene of the incident at the time it occurred. James Shirk testified that Donovan was with him during the evening. A jury convicted Donovan Shirk of multiple felonies, and he was sentenced to prison.

14. Prior to sentencing, Donovan Shirk was charged with escape, and faced additional criminal penalties. Following his arrest on the escape charge, Donovan Shirk told law enforcement officials, that James Shirk and Bob Kaseweter were also involved in the attack on Ogle and Kington. Donovan Shirk was not called to testify at Kaseweter's subsequent trial, after he asserted his Fifth Amendment privileges.

15. James Shirk was arrested, and charged with a number of crimes relating to the incident with Ogle and Kington. James agreed to plead guilty to kidnapping in the second degree and assault in the second degree. The prosecutor recommended nine months, substantially less than the 25-year prison sentence James Shirk faced if convicted on his original charges. As part of the plea negotiations, James Shirk agreed to testify at Kaseweter's trial.

16. Kaseweter was charged with conspiracy to commit first degree kidnapping and second degree assault, taking a motor vehicle without permission, two counts of kidnapping in the first degree, and two counts of assault in the first degree. His case proceeded to trial, beginning on June 14, 1993. Ogle testified consistent with the facts

summarized above. At trial, James Shirk testified that he and Donovan went to Kaseweter's home on April 22, 1992. Both Donovan and James went inside the Kaseweter home. James Shirk saw Kaseweter give Donovan Shirk a set of handcuffs, a single car key, and a .45 caliber pistol. James Shirk did not testify that he heard any discussion between Donovan Shirk and Kaseweter, except that Kaseweter told Donovan not to use the gun, because he wanted it back.

17. At trial, James Shirk also testified about Donovan and James Shirk's activities near Kington's residence. After Donovan Shirk shot at Ogle's vehicle, he and James Shirk left the area and disposed of the gun by throwing it in the Columbia River. Donovan Shirk told James Shirk to keep his mouth shut concerning the incident.

18. At trial, James Shirk admitted that he had lied to the police prior to the commencement of Donovan Shirk's trial. He also indicated that he lied under oath at Donovan's trial. James Shirk testified about the substantial reduction in the potential penalties he faced, and indicated this was his motivation for changing his testimony. Other witnesses also testified during the trial. After hearing all of the evidence, a jury convicted Kaseweter of a number of felony crimes; he was sentenced to 17 years in prison.

19. In February, 2003, law students working with the Innocence Project Northwest Clinic, a program of the University of Washington Law School, agreed to assist Kaseweter. The students, Steven Lewis and Brooke Nelson, interviewed Donovan Shirk, who asserted that Kaseweter was not involved in the crimes committed against Ogle and Kington. Donovan Shirk told the law students that he told James Shirk what to

say at trial, contacting James through their grandmother. Donovan Shirk provided a written declaration to Lewis and Nelson.

20. In 2003, Lewis and investigator Terry Filer located James Shirk in Eden, Idaho. They made arrangements to meet with James Shirk, who at first was reluctant to speak to them. James Shirk initially denied that he had testified untruthfully at Kaseweter's trial. After being told that Donovan Shirk had indicated that Kaseweter was not involved, James Shirk recanted. He indicated that Donovan had previously convinced him that Kaseweter was involved, and that this was the basis for his testimony at trial. James Shirk indicated that he had not witnessed any conversation between Donovan Shirk and Kaseweter, that he did not see any exchange between them, and that he had not been in Kaseweter's residence on the night of the incident. Although James Shirk indicated that he and Donovan had gone to the Kaseweter residence on the night of the incident, he told the investigators that he had stayed in the car listening to the radio, while Donovan approached the house for a few minutes. The house appeared to be unoccupied, because there were no cars in the driveway. After a few minutes, Donovan returned, and indicated to James Shirk that Kaseweter was not there. The two then drove directly to the scene of the incident with Ogle and Kington.

21. James Shirk provided a declaration to the investigators, on November 3, 2003, recanting parts of his trial testimony. The declaration reads as follows:

I, James B. Shirk, declare: My belief that Bob Kaseweter was involved in the crime that occurred on April 23, 1992 was based on what I was told by my brother, Donovan Shirk. Donovan led me to believe that Bob Kaseweter was behind the crime against Roberta Ogle and Andy Kington. I never saw or heard Bob Kaseweter come up with any planning or strategy for what Donovan and myself did. I never saw Kaseweter hand Donovan the gun, handcuffs, or the key to Ogle's car. In fact, I don't

remember ever seeing any handcuffs but these were brought up at Kaseweter's trial because Donovan had mentioned them to me. Donovan later told me that he had gotten the gun, key and some handcuffs from Kaseweter and I believed him. I did not go inside Kaseweter's house on the night of the crime because I was in the car listening to the radio. When we got to Kaseweter's house, there was no car in the driveway and it didn't look like anyone was home. Donovan went up to the house but I don't know if he went inside or not because my attention was on the radio—one of my favorite tunes had come on the radio. When Donovan got back to the car he told me Bob wasn't there so we left. Because I was in the car, listening to the radio, I never heard Bob say "don't use the gun—I want it returned." Donovan told me Bob said that and I believed him. I believed Kaseweter was behind it because Donovan kept telling me that he was. Donovan made me believe that it was so.

I stated incorrectly at Kaseweter's trial that I believed I had seen Kaseweter hand Donovan the gun, keys, and handcuffs and that I believed I had heard him say not to use the gun. I never actually saw or heard these things but Donovan told me that it happened and I was convinced it must have happened. I said I saw it because I believed that was what happened based on what Donovan told me. I also said I saw it because I wanted to cooperate with the prosecution after my lawyer told me I was facing 25 years. I told them what they wanted to hear and it was also what my brother had told me happened. He made me believe it. At trial I said if you didn't believe me then ask my brother and he'll verify everything I said. I said that because I felt what I was saying had actually happened because I had believed the things he had told me about Kaseweter's involvement. I feel bad that what I said led to Kaseweter going to prison but I did not know then that Donovan had been misleading me all along. I also didn't want to do 25 years for something that Donovan caused and actually did. My statements at trial about Kaseweter's involvement with this crime were all based on statements made to me by my brother Donovan Shirk. My brother asked me to ride along with him as a favor on the night of the crime. I had no idea what he was planning to do and never believed that he would actually end up shooting at people. I continue to be very upset that Donovan got me involved in this incident. Because of this incident, my brother and I no longer speak to each other and I don't want anything to do with him anymore. Since I served my time for my part in this crime, I have moved on with my life and made every effort to be straight and honest with people. I am a loving husband and father, a hard and responsible worker, and have stayed out of trouble for

the last ten years. I just want the truth to be told so that everyone involved in this stupid crime can get on with their lives.

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

22. Based upon the recantation of James Shirk, Kaseweter filed a personal restraint petition, seeking a new trial. The reference hearing on the personal restraint petition was held on October 25, 2006. James Shirk testified at the hearing, and repeated his partial recantation of the testimony he provided at Kaseweter's trial. In his testimony, James Shirk indicated that he had not entered the residence on the evening in question, and did not know whether Donovan entered the residence and spoke to Kaseweter. At the hearing, James Shirk indicated that the two had been at Kaseweter's residence shortly before the incident, but not on the same day. During this meeting between Donovan Shirk and Kaseweter, James saw Donovan receive something from Kaseweter, but he could not determine what it was.

23. James Shirk's testimony at the reference hearing contradicted his declaration. In the declaration, James Shirk claimed that his testimony at Kaseweter's trial was the result of repeated statements by Donovan Shirk that Kaseweter was involved. According to the statement, James Shirk indicated that "I believed Kaseweter was behind it, because Donovan kept telling me that he was". During the reference hearing, however, James Shirk indicated that Donovan had spoken to him briefly of Kaseweter's involvement in the early morning hours immediately after the incident. James Shirk claimed that he and Donovan Shirk had not spoken to each other since that day.

24. James Shirk's testimony also directly contradicts Donovan Shirk's statements in his interview with Lewis and Nelson. Donovan Shirk indicated that he and James

Shirk had coordinated their testimony at Donovan's trial, and that Donovan had advised James Shirk on how to testify at Kaseweter's trial, by communicating through their grandmother. James Shirk testified that he was not contacted by anyone on Donovan's behalf, and that he did not coordinate his stories with Donovan. He reiterated that his last contact with Donovan Shirk was on the night of the incident, and that he had not communicated with him in the 15 years since the incident. He specifically denied that his grandmother had acted as an intermediary.

25. 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.

Based upon the foregoing Findings of Fact, the Court enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of these proceedings, and the parties hereto.

2. To obtain a new trial based upon newly discovered evidence, a defendant must establish that the evidence: (1) will probably change the result of the trial; (2) was discovered after 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.

3. Recantation evidence of a material witness can be newly discovered evidence. Such testimony is inherently questionable, and does not necessarily, as a matter of law, entitle the defendant to a new trial. A new trial will only be granted automatically if the

defendant is convicted solely upon the testimony of a witness who later recants, under circumstances indicating the recantation is reliable.

4. When a defendant is convicted upon the testimony of the witness who later recants, the trial court must first determine whether the recantation is reliable. Reliability is determined by considering “all relevant circumstances surrounding the recantation, including possible undue influence, coercion, and any other improper motive or influence. . . . Credibility amounts to a threshold determination of plausibility that involves more than the demeanor of witnesses. A credibility determination includes an assessment of evidence in light of its rationality, internal consistency, consistency with other evidence, and common experience. . . . In this context, credibility is a component of reliability.” *In Re Personal Restraint of Clements*, 125 Wn. App. 634, 644 (footnote 3), 106 P.3d 244 (2005).

5. If the court finds that the surrounding circumstances indicate that the recantation is reliable—in other words, that it would be persuasive to a reasonable juror, considering all of the evidence, that the recanting witness had in fact perjured himself at the original trial—then the court considers whether independent corroborating evidence supports the conviction. If the conviction was obtained solely as the result of the witness’s testimony, a new trial must be granted. If the court concludes that independent corroborating evidence supports the conviction, then the decision to grant a new trial is discretionary.

6. The circumstances under which Lewis and Filer obtained the recantation of James Shirk do not suggest improper influence or coercion. James Shirk is an adult, residing in Idaho, and has completed his sentence regarding these charges. There is no

evidence that he has been contacted by Kaseweter directly, or that Kaseweter has any specific influence over him. Although the interview with James Shirk could have been less supportive, as discussed below, there is no indication that he was promised anything or threatened in some way if he did not change his statements.

7. James Shirk appears to be inordinately influenced by the statements of his brother with regard to this incident. He has changed his version of events on several occasions, in each instance to coincide with Donovan Shirk's version of events. This willingness to support his brother includes lying under oath at Donovan Shirk's trial. During the interview with investigators, James Shirk initially indicated that there was no reason to change his trial testimony. It was only after being advised that Donovan Shirk had indicated that Kaseweter was not involved that James Shirk agreed to recant his testimony. These circumstances indicate that Donovan's influence over James continues, despite his contrary assertions.

8. In addition, the recantation, viewed objectively, is not credible. James Shirk has given a number of different statements about this incident, including different versions between his written statement to investigators in 2003, and his testimony at the reference hearing in 2006. His testimony contradicted his written statement, and contradicted the statements of Donovan Shirk, concerning their continuing contact. This lack of credibility is one factor in this court's conclusion that the recantation is not reliable.

9. There is independent corroborative evidence of Kaseweter's involvement in these crimes. 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. 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.

10. There is no basis for overturning Kaseweter's conviction, based upon James Shirk's latest version of events. His recantation is not the type of evidence which would justify a new trial. The personal restraint petition should be denied.

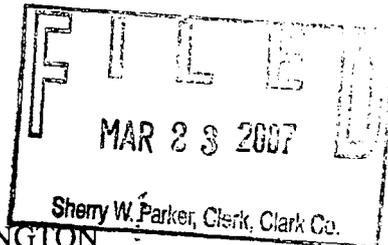
DATED this 22nd day of March, 2007.



Judge Robert A. Lewis

APPENDIX "C"

ORDER DENYING PERSONAL RESTRAINT PETITION



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

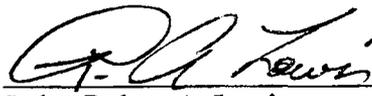
In re the Personal Restraint of)
) NO. 93-1-00019-7
)
) ORDER DENYING PERSONAL
) RESTRAINT PETITION
)
BOB R. KASEWETER,)
)
Petitioner.)

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court, pursuant to the order of the Washington Supreme Court, dated March 7, 2006, in Docket No. 77121-9, which transferred the personal restraint petition of Bob R. Kaseweter to the court for determination of the petition on its merits, pursuant to RAP 16.12; and the court having considered the records and files herein, including the evidence presented at the petitioner's jury trial, the declarations and materials submitted concerning the personal restraint petition, and the evidence presented at a reference hearing conducted on October 25, 2006; and the court having considered the written and oral arguments of the parties, and applicable case law, and having entered its Findings of Fact and Conclusions of Law concerning the merits of the petition; and being fully advised, now, therefore,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the personal restraint petition of Bob R. Kaseweter, filed September, 2004, is denied.

DATED this 22nd day of March, 2007.



Judge Robert A. Lewis

