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COURT APPEALS
DIVISION II

No. 36371-2-II

COURT APPEALS

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II



OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

DAVID BRISSETTE,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II Judge
Cause No. 04-1-00392-0

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering the March 12, 2007, order granting a new trial on counts 4 and 5 involving the non-recanting victim S.L.B. CP2 15, CP2 16.¹

2. The trial court erred by entering conclusion of law D, which states that:

But for the testimony of JLH, the result in the counts relating to SLB would have been different.

CP2 3-7.

3. The trial court erred by entering conclusion of law E, which states that:

JLH's post-trial recantation is material to the jury's finding of guilt on the counts relating to SLB as the tidal wave of JLH's testimony carried the counts relating to SLB.

CP2 3-7.

¹ For the sake of clarity, two sets of Clerk's Papers were designated in this case. Clerk's Papers originally designated as part of defendant's direct appeal are referred to as "CP1". The subsequent designation of Clerk's Papers are referred to as "CP2".

4. The trial court erred by denying the State's motion to reconsider its order granting the defendant a new trial on counts 4 and 5. CP2 3-7.

B. ISSUES

Whether the trial court abused its discretion by granting a new child molestation trial for a victim, S.L.B., who has never wavered in her allegations of abuse, on the grounds that another victim, J.L.H., whose testimony never touched upon the abuse perpetrated upon S.L.B. by the defendant, recanted her allegations that the defendant abused her in response to maternal pressure?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS²

On September 24, 2004, the State charged the defendant, David Brissette, with one count of first degree child molestation, one count of second degree child molestation, and one count of rape of a child in the third degree. CP1 229-230. The victim in all three counts was identified as "Jane Doe" with a date of birth of 11/20/1988. "Jane Doe" is referred to throughout this brief as J.L.H.

Subsequent to the filing of these charges, the State received a copy of a California Child Protective Services investigation involving

allegations that both J.L.H. and her sister, S.L.B. (dob 05/06/1991) had been sexually abused by the defendant. The investigation included copies of the audio-taped forensic interviews with J.L.H. and S.L.B. The defendant was provided with a copy of this investigation. CP1 176-182.

On August 4, 2006, the State moved to amend the original information to include one count of child molestation in the second degree as it related to S.L.B. (count 4 of the first amended information.). RP-PT-1, CP1 183-185, CP1 176-182. The Court allowed the amendment of the information, but gave defendant the option of severing Count 4 from Counts 1 through 3 because of the timing of the amendment and because the new count involved a different victim. RP-PT-9-10. Defendant elected to try all of the counts together, and did not seek to sever the counts at any other time.³ See RP 542.

During trial, S.L.B. disclosed a second occurrence of child molestation. The State moved, prior to resting, to amend the information to conform to the evidence. RP 534. The Court granted the State's motion, adding Count 5 – Child Molestation in the Second Degree – relating to S.L.B. RP 544. The defendant did not seek a severance of

² For the sake of clarity, the Report of Proceedings will be referenced as follows: RP-PT refers to the pretrial hearing of August 4, 2006; RP refers to the jury trial of August 8, 2006 through August 18, 2006, and all other hearings held in this case.

³ Pursuant to CrR 4.4(a)(2), the defendant waived any claim that the charges should be severed by failing to move for severance at the close of all the evidence.

charges at this time.

The jury, which was instructed to consider each count separately and to not let its verdict on one count control its decision on another count, CP1 101, returned verdicts of “guilty” on counts 1 and 2, which involved J.L.H., and acquitted on count 3, which also involved J.L.H. The jury also found the defendant guilty on counts 4 and 5, which involved S.L.B. CP1 89-93.

Prior to sentencing in this matter, the defendant filed a motion for a new trial based on allegations that J.L.H. had recanted her trial testimony. CP1 50-53. The trial court held a hearing on the motion on October 19, 2006, which included the testimony of J.L.H. and documentary evidence presented by the State refuting J.L.H.’s alleged recantation. CP1 126 CP1 126.1, RP 903-951. After considering J.L.H.’s testimony and the evidence, the trial judge found that J.L.H. had offered perjured testimony at trial and granted the defendant’s motion for a new trial as to counts 1 and 2. RP 949-951, CP1 11-13. The trial judge additionally found that J.L.H.’s recantation did not amount to a recantation of S.L.B.’s testimony and denied the defendant’s motion for a new trial as to Counts 4 and 5. RP 951, CP1 11-13.

The trial court proceeded to sentence the defendant on counts 4 and 5 on October 19, 2007. CP1 19-34. Eleven days later, the trial court

entered its written order and findings of fact and conclusions of law in support of the grant for a new trial on counts 1 and 2. CP1 11-13. The defendant filed a motion for reconsideration on the denial of his motion for a new trial on counts 4 and 5 the same day that the written order was entered. CP1 14-15. While the motion to reconsider was pending, the defendant filed a notice of appeal. CP1 8.

On March 12, 2007, the trial court held a hearing on the defendant's motion to reconsider. RP 966-983. The trial court entered a handwritten order granting the motion on March 12, 2007. CP2 15. This order was ineffectual as the trial court had not obtained this Court's permission to enter such an order. *See* RAP 7.2(e), Attachment A. (designated October 15, 2007).

On May 2, 2007, this Court granted permission to the trial court to enter its order granting a new trial on counts 4 and 5. Prior to the trial court's entry of an authorized order, the State filed a timely motion to reconsider the trial court's order granting the defendant's reconsideration motion. CP2 8-11; CP2 3-7. The trial court denied the State's motion to reconsider and entered findings of fact and conclusions of law in support of its order vacating judgment on counts 4 and 5. CP2 3-7. Following the entry of this order, the defendant's appeal was dismissed. Attachment B (designated October 15, 2007).

The State, however, filed a timely notice of appeal from the trial court's order granting the defendant a new trial on counts 4 and 5. Attachment C. (designated October 15, 2007).

2. SUBSTANTIVE FACTS

A. S.L.B. – Counts 4 and 5

S.L.B. was about 9-years-old when the defendant began rubbing her butt. She was approximately 12 years old when the defendant first touched her breasts. RP 416. That incident occurred in the living room of the family's trailer. S.L.B. got up that morning and went into the living room to give the defendant a hug, as was customary. RP 417. The defendant was sitting in his chair and he began rubbing S.L.B.'s back. Then, he touched her breasts and said she was growing. RP 418. The touching occurred on the inside of her clothes, with skin touching skin. RP 418, 511.

S.L.B. recalled another incident where the defendant put his mouth on her breasts. RP 419. Again, S.L.B. had gone to give the defendant his customary hug, and again the defendant began rubbing her back. This time, however, the defendant pushed her shirt up and put his mouth on her breasts. RP 420, 511. The incident lasted about half a minute or so by

S.L.B.'s estimate. RP 420. She recalled that both incidents occurred shortly before J.L.H. ran away from home. RP 421.

After J.L.H. ran away from home, S.L.B. and another sibling relocated to California to live with a maternal aunt and uncle. RP 397-398. Shortly after J.L.H. arrived in California, S.L.B. disclosed to her that the defendant had been sexually abusing her as well. RP 411. S.L.B. was talking with J.L.H. about friends back home when she started to cry and disclosed that the Defendant had touched her in inappropriate places. RP 412-413.

S.L.B. told J.L.H. the defendant had touched her on her breasts and her butt. RP 413. S.L.B. had never before told anyone about the inappropriate touching and, in fact, had told a few people that nothing like that had ever happened to her. RP 415.

After her disclosure, S.L.B.'s brothers started being mean to her after they had moved to California, telling her that they hated her because of her testimony. RP 430. Furthermore, the defendant told S.L.B. that she should never "tell anybody what he had done so that he wouldn't get in trouble." RP 531.

B. J.L.H. – Counts 1, 2 and 3

The defendant began sexually abusing J.L.H. when she was about 9 or 10 years old. RP 68. The first incident J.L.H. remembers is a time

when she was rubbing the defendant's back "and he had flipped over and I was on his stomach. And he started rubbing me on my back and started grabbing my ass and said how well I was developing." RP 68.

When J.L.H. was 10 years old, he rubbed her breasts and her butt, and started rubbing her vagina with his hand on the outside of her clothes. RP 110. When she was 11 years old, the touching progressed from outside of J.L.H.'s clothes, to the inside of her clothes – on bare skin. RP 111. This pattern of sexual touching continued until J.L.H. was about 13 or 14 years old. RP 114. The pattern changed somewhat in that the defendant would have his clothes off and J.L.H. would have her clothes off. RP 114-116. When J.L.H. was 15, the touching continued, but the defendant additionally began rubbing his penis on her and ejaculating. RP 74-76, RP 117. He also began sucking on her breasts with his mouth. RP 118.

This pattern of abuse continued until the summer of 2004 when the defendant had sexual intercourse with J.L.H. RP 27, RP 62-64.

J.L.H. told her mother about the sexual abuse in roughly 2000. RP 80. While she was telling her mother, the defendant

. . . just sat there and laughed at me and he – I told him he – if I had ever told mom, she would never believe me; that she would believe him. And I had told her, and I was crying. And I told her and he just sat there laughing at me saying well she's lying, she's lying. And of course mom

believed him, but she kept me away from him for like a couple weeks.

RP 80-81.

J.L.H. kept a diary, but never wrote down anything about the abuse because her parents read her diaries and the diaries would have been taken away from her if they saw any of the abuse written down. RP 108, RP 321, RP 345.

After J.L.H. told her mother about the abuse, she never told anyone else until she told her friend Ashley sometime in the late summer of 2004. RP 81-82. Shortly after disclosing to Ashley, J.L.H. disclosed the abuse to Ashley's grandmother, Debra Sanders, on or about October 10, 2004. RP 82-83. Ms. Sanders was the person who helped her leave home and report the sexual abuse to the police. RP 62, 196.

In the early hours of September 13, 2004, J.L.H. left home and reported to Mason County Sheriff's Office Deputy Bill Reed that her step-father, David Brissette, had been sexually abusing her over the course of the past five to six years. RP 22-23; RP 62. CPS was contacted and J.L.H. was taken into protective custody and eventually placed in a foster home. RP 25.

J.L.H. also reported the sexual abuse during an examination by sexual assault nurse examiner Laurie Davis, ARNP, on September 24, 2004. RP 214, 460.

In November 2004, J.L.H. went to live with a maternal uncle and aunt in Riverside, California. RP 55, RP 172, where two of her other siblings were already living. RP 293. One of those siblings was her half-sister, S.L.B. RP 293.

J.L.H. never told her sister S.L.B. about the abuse while they were living in the family home, however, after they had both left, J.L.H. told S.L.B. what had happened. RP 104, RP 293, RP 409-410. J.L.H. didn't go into detail, but generally related that the defendant would rub her and that every time she sat on his lap, he would rub her. RP 104, RP 508. After J.L.H. had disclosed the abuse, J.L.H. asked S.L.B. if anything had happened to her. RP 295. S.L.B. "started bawling" and told J.L.H. that the defendant had been touching her, too, rubbing powder on her back or rubbing her body with the powder. RP 104, 411-413. J.L.H. told her aunt and uncle about S.L.B.'s disclosure. RP 104. Previously, S.L.B. had told J.L.H. that nothing had happened. RP 104-105.

J.L.H. did not testify regarding any observations of sexual abuse perpetrated by defendant against S.L.B.

S.L.B. confirmed that defendant occasionally took J.L.H. back to the house because either J.L.H. or the Defendant had forgotten something. RP 422. She estimated that they would be gone for about a half an hour or so. She also recalled seeing the defendant rub J.L.H. on the butt, and described the rubbing like a circular motion. RP 527, 529. S.L.B. also confirmed that her mother occasionally went to bible study with Debra Sanders, which was consistent with J.L.H.'s testimony. RP 427.

Both J.L.H. and S.L.B. were interviewed by a forensic interviewer, Vera Diaz, in February 2005 after the disclosures were reported to the California Health and Welfare Agency, Department of Social Services. RP 125, 193.

Sometime in September 2005, J.L.H.'s brother called defendant's attorney, Rick Cordes, and had J.L.H. speak with him. RP 125, RP 296. During J.L.H.'s conversation with Mr. Cordes, she verbally recanted her statements regarding the defendant's sexual abuse of her. RP 297-298.

However, in 2006, at trial, J.L.H. testified that she was under a great deal of pressure from her three brothers during this time period. Her brothers blamed her for splitting up the family and tried to get her to change what she had told Deputy Reed. RP 92. They "kept giving [her] a hard time about it", telling her how much of a liar she was, that she didn't know anything, and that they wanted to go home. RP 93. They yelled,

screamed, and cussed at her. J.L.H. thought things might be better if she recanted. RP 92, 93, 334-338

Furthermore, J.L.H. also talked with her mother during this period. RP 93. During those conversations, her mother asked her to change what she had told Deputy Reed because her mother wanted all of them to come home. RP 93. Her mother promised J.L.H. that if she changed her story, they would have a better house, they could go to school, they could dress the way they wanted, and could do things that normal kids do. J.L.H. did not really believe her mother and told her mother that she would not come home if the defendant was still there. RP 93-94. J.L.H. was scared because she didn't want to go back home and have the abuse happen again. RP 94. She also later told her mother that what she had told Deputy Reed was true. RP 335.

Prior to sentencing, J.L.H. recanted her trial testimony. CP1 50-53. In open court, J.L.H. testified that the sexual molestation did not happen and that she told her mother that she was surprised that the defendant had been convicted. RP 906-907; 911-912.

On cross-examination, J.L.H. testified that her mother arranged for her bus ticket back to Washington from California, behind her aunt and uncle's back. RP 923. She also testified that her mother promised her that

things would be better and things would be different if she came back to Washington. RP 924.

J.L.H. was shown documents she had hand-written while she was down in California. The first exhibit was a five page document that was consistent with her trial testimony and consistent with what she told Deputy Reed. RP 926, CP1 36-49. She testified that those pages were written by her and that no one had pressured her and that no one made her write those five pages. RP 926. The second exhibit was an entry in a notebook, written by J.L.H., in which she said that she chose to tell the truth regardless of what her mother thought of her. RP 927, CP1 36-49.

The entry read as follows:

Have you ever thought of having to choose between right and wrong. If you said yes, you are correct because we all have. We have all been there. I have to choose to tell a lie about my stepdad raping me so that my mom would still like me or tell the truth where I can feel free and clean from him. I chose to tell the truth regardless of what my mom thought of me. If I had done the other, it would have – it would have my whole life screwed up.

RP 928.

J.L.H. further testified that she had seen her mother for the first time in two years when she came back to Washington for trial in August 2006. She said it was very emotional for her and that it matters a great

deal to her that her mother likes her. RP 929. Additionally, J.L.H. confirmed that S.L.B. had not recanted her testimony. RP 929.

J.L.H. was also questioned about her prior recantation:

Q: You recanted once before, didn't you, [J.L.H.]?

A: What do you mean by that question?

Q: I mean once before you told the defense attorney in this case that these acts didn't happen, correct?

A: Correct.

Q: And we went through all that during trial, and he cross-examined you and asked you a whole lot of questions about that at trial, didn't he?

A: Yes.

Q: And at the time of trial you said that the reason that you had recanted was because you were under a lot of family pressure from your brothers to – to take back your story. Do you remember that?

A: Yes.

Q: And in fact what you testified to was that you thought it would make everything better, and make everything go away if you changed your story. Do you remember that?

A: Yes.

Q: Is that what you think today?

A: Yes.

RP 932

The third exhibit consisted of a pink spiral binder with journal entries CP1 36-49. All of the exhibits were consistent with the testimony J.L.H. offered at trial.

After considering J.L.H.'s testimony and the evidence, the Court found that J.L.H. had offered perjured testimony at trial, that the recantation was newly found evidence that would probably change the result of the trial, that the evidence proffered at the hearing was discovered after the trial and could not have reasonably been discovered before trial by the exercise of due diligence, that the evidence was material to the issues for the trier of fact, and was not simply cumulative or impeaching. RP 950. The Court granted a new trial with respect to Counts 1 and 2, but also found it could not make the same findings with respect to Counts 4 and 5, and denied the motion for new trial with respect to Counts 4 and 5.

Defendant was sentenced to 36 months on Counts 4 and 5. CP1 19-34. Defendant timely appealed his convictions as to Counts 4 and 5. CP1 8. The State elected to dismiss Counts 1 and 2 without prejudice. CP1 1-2.

While Defendant's appeal was pending, he collaterally moved the trial court for a reconsideration of the Court's ruling as to Counts 4 and 5. CP1 14-15. The Court heard Defendant's motion on March 12, 2007. RP 966-983. No new evidence was presented at that hearing. The Court

granted the Defendant's motion for a new trial as to Counts 4 and 5. CP2 15, CP2 16.

The State moved for reconsideration of the trial court's granting of a new trial with respect to Counts 4 and 5. RP 986-998. The trial court denied the State's motion and entered Findings of Fact and Conclusions of Law consistent with its ruling. CP2 3-7. The State filed a timely notice of appeal. Attachment C (designated October 15, 2007).

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL ON THE COUNTS INVOLVING THE NON-RECANTING CHILD VICTIM

A trial court's decision to grant or deny a new trial will not be disturbed absent a manifest abuse of discretion. *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989); *State v. Crowell*, 92 Wn.2d 143, 154, 594 P.2d 905 (1979). An abuse of discretion will only be found when no reasonable judge would have reached the same conclusion. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), citing *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

In determining whether a defendant should be granted a new trial based upon newly discovered evidence pursuant to CrR 7.8(b), the defendant must prove that the evidence: (a) will probably change the

result of the trial, (b) was discovered after the trial; (c) could not have been discovered before trial by exercising due diligence; (d) is material, and (e) is not merely cumulative or impeaching. *State v. Macon*, 128 Wn.2d 784, 803-804, 911 P.2d 1004 (1996). The absence of any one of these factors is sufficient to deny a new trial.

When the newly discovered evidence is recantation testimony, additional factors must be considered. First, the trial court must determine whether the recantation is reliable before considering defendant's motion for a new trial based on the recantation. *Id.*, at 804. If the trial court, after carefully considering the evidence, rejects the recanted testimony, or determines that it is of doubtful or insignificant value, the court's denial of defendant's motion for a new trial will not be lightly set aside by an appellate court. *Id.*, citing *State v. Wynn*, 178 Wn. 287, 289, 34 P.2d 900 (1934).

Here, the trial court found that J.L.H.'s post-verdict sworn testimony that the defendant never sexually molested her was credible. RP 949-951, CP1 11-13. This decision, which resulted in the granting of a new trial on counts 1 and 2, is not reviewable on appeal. *See, e.g., State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are not reviewable on appeal).

J.L.H.'s recantation, even if true, had no impact on the evidence that supported counts 4 and 5. In reversing counts 4 and 5, the trial court merely indicated that "the tidal wave of J.L.H.'s testimony carried the counts relating to S.L.B.". CP2 3-7. This statement, however, is unsupported by the record.

J.L.H.'s only testimony regarding the counts involving S.L.B. related to S.L.B.'s disclosure that the defendant had inappropriately touched her. J.L.H.'s recantation did not include a repudiation of this portion of her testimony. S.L.B.'s testimony regarding the disclosure to J.L.H., moreover, was consistent with J.L.H.'s testimony. Compare RP 104 with RP 411-413. S.L.B. has not repudiated her trial testimony. *See* RP 929 (J.L.H. indicating that S.L.B. has not recanted). The granting of a new trial with respect to counts 4 and 5 was, therefore, error.

The trial court's decision to vacate counts 4 and 5 is also inconsistent with the rationale underlying joinder of offenses and the presumption that juries follow the instructions they are given. Charges are joined to promote judicial economy.⁴ *See, e.g., State v. Kalakosky*, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). Adopting the rule promoted by

⁴ Offenses are properly joined even if they are not even if would not be cross-admissible in separate trials. *State v. Kalakosky*, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). Here, the State never requested a jury instruction pursuant to ER 404(b), and made no argument that the jury should consider the defendant's conduct with respect to one child in determining whether he molested the other child.)

the trial judge, that all convictions must be reversed if the evidence underlying some counts is proved to be unreliable, is contrary to the purposes of joinder. This proposed rule, moreover, is unsupported by the case law.

In *State v. Coe*, 109 Wn.2d 832, 750 P.2d 208 (1988), the defendant was charged with raping four different women. All four counts were tried together and the jury convicted the defendant on three counts. *Id.*, at 835. On appeal, the Washington Supreme Court determined that the testimony from two of the women, who had been hypnotized, was unreliable. The remedy fashioned by the Court, however, was not the reversal of all the convictions. Instead, the Court reversed the counts that were supported by the testimony of the hypnotized women, and affirmed the testimony that was supported by the testimony of the victim who had not been hypnotized. *Coe*, 109 Wn.2d at 838-39, 850. This same result is mandated here – the vacation of the convictions related to the recanting victim, J.L.H., and the affirmance of the convictions related to the non-recanting victim, S.L.B.

The rule proposed by the trial court judge, that all counts must be reversed if evidence supporting some of the counts is found to be unreliable also violates the presumption that juries follow their instructions. *See, e.g., State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514

(1994); *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984).

Here, the jury was instructed, consistent with WPIC 3.01, that, “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP1 101. The jury’s verdict convicting the defendant of two of the counts involving J.L.H., while acquitting him of the third count involving J.L.H., proves that they obeyed this directive. Accordingly, there is no support for the trial judge’s conclusion that, but for J.L.H.’s trial testimony, the jury would not have convicted the defendant of molesting S.L.B.

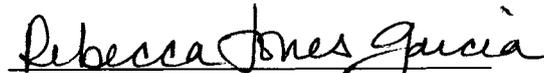
Here, S.L.B.’s testimony is more than ample to sustain the verdicts of “guilty” on counts 4 and 5. The trial court’s vacation of those convictions must, therefore, be reversed.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court reverse the trial court's grant of a new trial as to counts 4 and 5, and reinstate the convictions and sentence as imposed.

DATED October 25, 2007, at Shelton, Washington.

Respectfully submitted,



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

STATE OF WASHINGTON,)
)
 Respondent,) No. 36371-2-II
)
 vs.) DECLARATION OF
) FILING/MAILING
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 DAVID M. BRISSETTE,)
)
 Appellant,)
 _____)

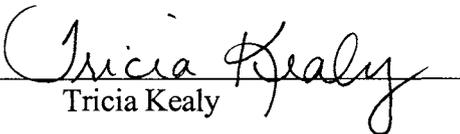
I, TRICIA KEALY, declare and state as follows:

On October 25, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (APPELLANT'S FIRST AMENDED BRIEF), to:

Eric J. Nielsen
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I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 25th day of October, 2007, at Shelton, Washington.


Tricia Kealy

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FILED
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COURT OF APPEALS
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ATTACHMENT

“A”



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Centralia, WA, 98531-0058

CASE #: 35611-2-II
State of Washington, Respondent v. David M. Brissette, Appellant
Mason County Cause No. 04-1-00392-0

Dear Counsel,

On March 12, 2007, the trial court entered an order vacating judgment and sentence in the above-entitled matter. Counsel has not complied with RAP 7.2(e) therefore the order is considered premature and placed in the file without action.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:skw
cc: Hon. James B. Sawyer
Mason Co Superior Court

*James B. Sawyer
Superior Ct*

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ATTACHMENT

“B”

RECEIVED & FILED IN
CO. CLERK'S OFFICE

2007 AUG 28 P 3:11

MASON CO. WA.
PAT SWARTOS, CO. CLERK

BY ag³ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

DAVID M. BRISSETTE,
Appellant.

No. 35611-2-II

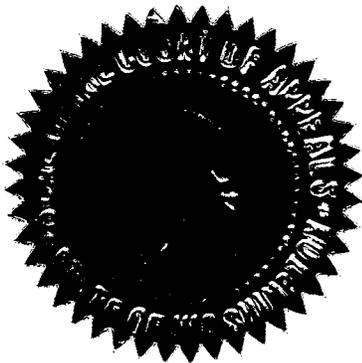
MANDATE

Mason County Cause No.
04-1-00392-0

The State of Washington to: The Superior Court of the State of Washington
in and for Mason County

This is to certify that the Court of Appeals of the State of Washington, Division II, considered and granted a motion to dismiss the appeal in the above entitled case on June 25, 2007. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court.

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IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed the
seal of said Court at Tacoma, this
15th day of August, 2007.

David
Clerk of the Court of Appeals,
State of Washington, Div. II

CASE #: 35611-2-II, Mandate Pg 2
State of Washington, Respondent v. David M. Brissette, Appellant

Indeterminate Sentence Review Bd

Peter B. Tiller
The Tiller Law Firm
PO Box 58
Centralia, WA, 98531-0058

Monty Dale Cobb
Mason County Prosecutors Office
521 N 4th Ave Ste A
PO Box 639
Shelton, WA, 98584-0639

Hon. James B. Sawyer
Mason Co Superior Court Judge
PO Box 340
Shelton, WA 98584

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
DAVID M. BRISSETTE,
Appellant.

No. 35611-2-II

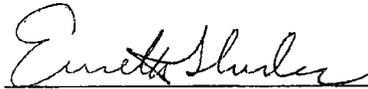
RULING DISMISSING APPEAL

FILED
COURT OF APPEALS
DIVISION II
07 JUN 25 AM 9:47
STATE OF WASHINGTON
BY 

THIS MATTER comes before the undersigned upon the basis of a motion by the appellant to dismiss review in the above-entitled appeal as moot. On the basis of this motion, it is

ORDERED that the above-entitled appeal is dismissed with prejudice and without cost to either party.

DATED this 25th day of June, 2007.


COURT COMMISSIONER

Monty Dale Cobb
Mason County Prosecutors Office
521 N 4th Ave Ste A
PO Box 639
Shelton, WA, 98584-0639

Peter B. Tiller
The Tiller Law Firm
PO Box 58
Centralia, WA, 98531-0058

David Brissette
c/o Shirley & Roger Bellinghausen
E-980 St. Andrews Drive
Shelton, WA 98584

ATTACHMENT

“C”

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2007 MAY 21 P 4: 36

MASON CO. WA.
PAT SWARTOS, CO. CLERK

BY cy DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR MASON COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

David M. Brissette
Defendant.

No. 04-1-00392-0

NOTICE OF APPEAL TO
COURT OF APPEALS and
DECLARATION OF SERVICE
(NACA / AFSR)

State of Washington, ^{Plaintiff}~~Defendant~~, seeks review by the designated
appellate court of the trial court's

denial of the State's motion for reconsideration
Describe decision or part of decision party wants reviewed

entered on 5/21/2007

A copy of the decision is attached to this notice.

DATED 5/21/2007

State of Washington
~~Defendant's Signature~~

Mason Co. Prosecutor's Office
Address

PO Box 639
City, State, Zip

Shelton, WA 98583

by Rebecca Jones Garcia, DPA
Attorney's Name (WSBA #) 27780

P.O. Box 639
Address

Shelton, WA 98583
City, State, Zip

(360) 427-9670, x417
Telephone Number

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that I served a copy of this notice of appeal by personal delivery / U. S. Mail (postage prepaid) to:

Rick Cordes

Rick Cordes, Attorney for Defendant
2625B Parkmont Lane SW
Olympic, WA 98502

5/21/2007 Shelton, WA
Date Place of Signing

Rebecca Jones Garcia
Signature (WSBA # 27780)

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Deni

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MAY 21 2007

PAT SWARTOS, Clerk of the
Superior Court of Mason Co. Wash.

IN THE SUPERIOR COURT MASON COUNTY STATE OF WASHINGTON	
STATE OF WASHINGTON, v. DAVID M. BRISSETTE	No. 04-1-00392-0 FINDINGS AND CONCLUSIONS ON STATE'S MOTION TO RECONSIDER ORDER GRANTING NEW TRIAL

1. BACKGROUND

David Brissette was convicted by a jury on August 16, 2006 of four counts of Molestation. Subsequent to trial but before sentencing, JLH recanted her trial testimony while under oath in a hearing before the court. Prior to sentencing, the trial court granted defense counsel's motion for new trial as to counts 1 and 2 due to the victim's (JLH) recantation. The trial court denied defense counsel's motion for new trial as to counts 4 and 5 (victim identified as SLB)

FINDINGS AND CONCLUSION
STATE'S MOTION
FOR RECONSIDERATION

Upon defense counsel's motion for reconsideration, the trial court granted a new trial for counts 4 and 5 finding that "JLH's perjurous (sic) testimony at trial may have impacted the jury's deliberation as to counts IV and V involving SLB." See March 12, 2007 order.

The State moved for reconsideration of the March 12, 2007 order asserting that the trial court applied the incorrect legal standard and failed to address the required factors as outlined in *State v. Macon*, 128 Wn.2d 784 (1996). Defense counsel objected to the timeliness of the State's motion.

A hearing was held on April 13, 2007. The defendant was present along with his counsel, Cliff (Rick) Cordes. The State was represented by Monty Cobb, Chief Civil DPA.

The State's Motion to Strike trial dates was granted by agreement of the parties and the criminal case stayed by separate order pending further action of the Court of Appeals.

Following argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS AND CONCLUSION
STATE'S MOTION
FOR RECONSIDERATION

FINDINGS OF FACT

1. The State's motions were filed prior to the Court of Appeals granting permission for the trial court's March 12, 2007 orders to be filed.
2. The Court of Appeals had granted permission for the March 12, 2007 orders to be filed by order dated April 11, 2007.
3. The trial court had not included a discussion of the *Macon* factors in its decision of March 12, 2007. The trial court considered the *Macon* factors in the defendant's first motion for new trial.
4. Prior to trial JLH had recanted to her mother and the defendant's attorney on the telephone and then withdrawn her recantation.
5. JLH testified regarding her pre-trial recantation at trial.
6. One count relating to SLB was charged at the time trial began. The second count was added during trial based on testimony of SLB regarding a previously undisclosed incident.
7. The testimony of JLH at trial was more extensive and more continuous than the testimony of SLB.

FINDINGS AND CONCLUSION
STATE'S MOTION
FOR RECONSIDERATION

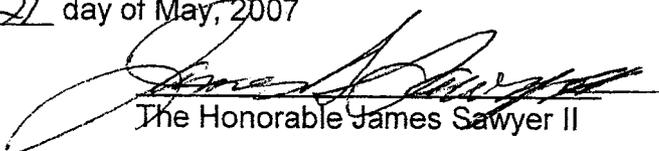
CONCLUSIONS OF LAW

- A. The State's motions were timely as the March 12, 2007 would have been effective no sooner than the date the Court of Appeals granted permission for the orders to be filed.
- B. The trial court had jurisdiction to hear this motion.
- C. But for the testimony of JLH, the result in the counts relating to SLB would have been different.
- D. The evidence of JLH's post-trial recantation could not have been discovered until after trial in spite of the prior recantation.
- E. JLH's post-trial recantation is material to the jury's finding of guilt on the counts relating to SLB as the tidal wave of JLH's testimony carried the counts relating to SLB.
- F. The post-trial recantation of JLH was not merely cumulative or impeaching.

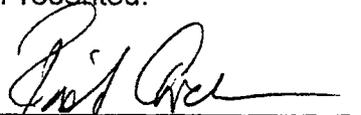
ORDER

Based on the foregoing Findings and Conclusions, the State's motion for reconsideration is denied.

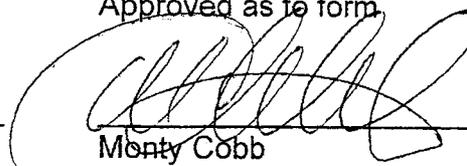
So ordered this 21st day of May, 2007


The Honorable James Sawyer II

Presented:


Clifford Cordes
Attorney for Defendant

Approved as to form


Monty Cobb
Ch. Civil DPA

FINDINGS AND CONCLUSION
STATE'S MOTION
FOR RECONSIDERATION