

NO. 47661-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF JOSEPH PETERSON:

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PETERSON,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. II. ISSUES2

 1. Whether Peterson is an aggrieved party pursuant to RAP
 3.1 where he was the prevailing party on the ultimate
 issue in the case.....2

 2. Whether the trial court correctly determined that Peterson
 had been convicted of a crime of sexual violence when
 the evidence consisted, in part, of a recorded recollection
 of the victim.2

III. STATEMENT OF THE CASE2

IV. ARGUMENT5

 A. Peterson is Not an Aggrieved Party and He Has No Right
 to Appeal.....5

 B. The Trial Court Correctly Determined That Peterson’s
 Prior Assault Was Sexually Motivated.....8

 1. The Victim’s Handwritten Statement Constitutes an
 Exception to the Hearsay Rule Under ER 803(a)(5).....9

 2. The Victim’s Tape Recorded Statement Constitutes
 an Exception to the Hearsay Rule Under ER
 803(a)(5).....18

 3. The Trial Court Correctly Determined That Peterson
 Had Been Convicted of a Crime of Sexual Violence21

 a. The Findings of Fact Are Supported By
 Substantial Evidence21

 b. The Findings of Fact Support the Trial Court’s
 Conclusion26

V. CONCLUSION29

TABLE OF AUTHORITIES

Cases

<i>Cingular Wireless, L.L. C. v. Thurston County</i> , 131 Wn. App. 756, 129 P.3d 300 (2006).....	12, 22, 26
<i>Elterich v. Arndt</i> , 175 Wash. 562, 27 P.2d 1102 (1933)	7
<i>Goodell v. ITT-Federal Support Serv.'s, Inc.</i> , 89 Wn.2d 488, 573 P.2d 1292 (1978).....	23
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wash.2d 340, 172 P.3d 688 (2007)	22
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	12
<i>In re Det. of Rushton</i> , 190 Wn. App. 358, 359 P.3d 935 (2015).....	12, 22
<i>In re Foreclosure of Liens</i> , 123 Wn.2d 197, 867 P.2d 605 (1994).....	12, 22
<i>In re Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	10
<i>In re: Barr</i> , 102 Wn.2d 265, 684 P.2d 712 (1984).....	27
<i>J.L. Storedahl & Sons, Inc. v. Cowlitz County</i> , 125 Wn. App. 1, 103 P.3d 802 (2004).....	26
<i>Maehren v. City of Seattle</i> , 92 Wn.2d 480, 599 P.2d 1255 (1979).....	23
<i>Mitchell v. Washington State Inst. of Pub. Policy</i> , 153 Wn. App. 803, 225 P.3d 280 (2009).....	12, 22, 26

<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	11, 20, 22
<i>Sheets v. Benevolent and Protective Order of Keglers</i> , 34 Wn.2d 851, 210 P.2d 690 (1949).....	6, 7
<i>State ex rel. Simeon v. Superior Court</i> , 20 Wn.2d 88, 145 P.2d 1017 (1944).....	6
<i>State v. Alexander</i> , 125 Wn.2d 717, 888 P.2d 1169 (1995).....	5
<i>State v. Alvarado</i> , 89 Wn. App. 543, 949 P.2d 831 (1998).....	passim
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997).....	10
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	11, 20, 22
<i>State v. Hyder</i> , 159 Wn. App. 234, 244 P.3d 454 (2011).....	10
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999).....	5
<i>State v. Marcy</i> , 680 A.2d 76 (Vt. 1996).....	16
<i>State v. Mathes</i> , 47 Wn. App. 863, 737 P.2d 700 (1987).....	11, 15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	11, 20, 22
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	10

<i>State v. Tarrer</i> , 140 Wn. App. 166, 165 P.3d 35 (2007).....	5
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003).....	5, 6, 7
<i>Tacoma v. State</i> , 117 Wn.2d 348, 816 P.2d 7 (1991).....	12, 22
<i>Terrill v. Tacoma</i> , 195 Wash. 275, 80 P.2d 858 (1939)	7
<i>U.S. v. Porter</i> , 986 F.2d 1014 (6 th Cir. 1993)	12

Statutes

RCW 9.94A.020(47).....	27
RCW 9.94A.030.....	4, 8, 21
RCW 9.94A.030(47).....	8, 21
RCW 71.09	1, 4
RCW 71.09.010(17).....	8
RCW 71.09.010(17)(c)	21
RCW 71.09.020(17).....	1, 5, 21
RCW 71.09.020(17)(c)	4
RCW 71.09.020(18).....	3

Other Authorities

5B Karl B. Tegland,
Wash. Practice § 368 at 186 (3rd ed.1989)..... 10, 11

5C Karl B. Tegland,
Wash. Prac., Evidence Law and Practice § 803.29 (5th ed.) 14

Broun, McCormick on Evidence
Sec. 283 (two volume 4th ed.) 14

Mueller & Kirkpatrick,
4 Federal Evidence § 443 (2d ed.) 14

Rules

ER 802 9

ER 803(a) 10

ER 803(a)(5) passim

RAP 2.3 7

RAP 3.1 2, 5

I. INTRODUCTION

Pursuant to the Rules of Appellate Procedure, only parties that are aggrieved are entitled to seek review of the appellate courts. Here, Joseph Peterson prevailed in his jury trial, and now asks this Court to reverse the trial court's ruling on a preliminary matter.

The State filed a petition alleging that Peterson was a sexually violent predator pursuant to RCW 71.09 in March of 2013, when he was about to be released from prison following his conviction for Child Molestation in the Third Degree. The trial court first determined the threshold question of whether his prior conviction for assault was sexually motivated, and thus would qualify as a predicate sexually violent offense pursuant to RCW 71.09.020(17). Following a lengthy evidentiary hearing on this threshold question, the court found that the assault was sexually motivated. The court relied, in part, on the recorded recollection of the victim of the assault, along with her live testimony, photographs of the crime scene, the statements and testimony of Peterson, the testimony of a detective, a prosecutor, the victim's ex-husband and two of her neighbors. The case then proceeded to a jury trial to determine the ultimate issue.

Peterson prevailed at the trial; the jury determined that he did not meet the criteria of a sexually violent predator, and thus he was released from confinement.

Peterson, having prevailed on the ultimate issue, is not an aggrieved party and cannot appeal from the court's preliminary determination. Moreover, even if this court does address the issue, the trial court correctly determined that Peterson had previously been convicted of a crime of sexual violence.

II. II. ISSUES

- 1. Whether Peterson is an aggrieved party pursuant to RAP 3.1 where he was the prevailing party on the ultimate issue in the case.**
- 2. Whether the trial court correctly determined that Peterson had been convicted of a crime of sexual violence when the evidence consisted, in part, of a recorded recollection of the victim.**

III. STATEMENT OF THE CASE

Joseph Peterson has been convicted of several criminal sexual offenses. At age 18, he was charged with Child Molestation in the First Degree. CP 5-6. He later pleaded guilty to the amended charge of Assault of a Child in the Third Degree with Sexual Motivation. *Id.* While he was still on community custody for that conviction, Peterson was charged with rape. The rape charge was based on the victim's report to the Lakewood Police Department.¹ *Id.*; VRP 50. The victim, Heather Lowry, reported that she met Peterson on a bus on the morning of February 14, 2007. Exhibit 7; Exhibit 8. They met up later that same day and went to his house. *Id.* Once

¹ The victim was Heather Lowry. At the time of the trial, she had re-married and was known as Heather Blakely. For purposes of this brief, she will be referred by the name Lowry. VRP (01/29/15) 72.

inside his house, he held a small black pistol against her stomach and told her to be quiet. Exhibit 8 pg. 10-11.² He pushed her down on the bed and held her hands together above her head. *Id.* at 14. He was on top of her, pulled her pants down and penetrated her vagina with his penis. *Id.* at 17-8. She repeatedly told him to stop and kneed him in the groin, at which point she got up off the bed, pulled up her pants, and fled the residence. *Id.* at 17; 19-20. Peterson was charged with Rape in the First Degree. CP 5. Peterson later plead guilty to the amended charge of Assault in the Second Degree. CP 5. While he was still on community custody for that conviction, he was charged with two counts of Child Molestation in the Third Degree. CP 8. He later plead guilty to the amended charge of one count of Child Molestation in the Third Degree and was sentenced to prison. CP 9. Prior to his release from prison, the state filed a petition alleging he was a Sexually Violent Predator, which includes a requirement that he have a prior conviction of a crime of sexual violence.³ CP 1-2. “Crimes of sexual violence” are defined by the statute and include:

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

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

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

RCW 71.09.020(17)(c).

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

The Court first made a determination that the victim’s recorded recollection was admissible as substantive evidence. CP 311-13; VRP (02/03/15) 93-4. Thereafter, the court went on to consider the issue of whether the State proved beyond a reasonable doubt that the Peterson’s prior assault conviction was a sexually motivated crime. CP 314-318; VRP (02/03/15) 94-5. Following several days of testimony, the court ruled that the State had met its burden of proving beyond a reasonable doubt that Peterson’s conviction for assault in the second degree was a sexually motivated offense. CP 314-18. Thereafter, the remaining issues were tried by a jury. Peterson prevailed at the jury trial when the jury

determined that he did not meet the criteria as a sexually violent predator. CP 406.

Peterson now appeals only the preliminary determination that he has been convicted of a Sexually Violent Offense as defined by RCW 71.09.020(17). Peterson's Brief at 1. He also specifically assigns error to the court's decision to admit the recorded recollection evidence under Evidence Rule 803(a)(5) and he assigns error to the court's finding that the victim's accounts are credible. *Id.* at 1-2.

IV. ARGUMENT

A. Peterson is Not an Aggrieved Party and He Has No Right to Appeal.

"Only an aggrieved party may seek review by the appellate court." RAP 3.1. An aggrieved party must have a present substantial interest in the subject matter of the appeal and he must be aggrieved "in a legal sense." *State v. Tarrer*, 140 Wn. App. 166, 169, 165 P.3d 35, 36-37 (2007) quoting *State v. Mahone*, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999). Moreover, a party is not entitled to seek review of an issue by a higher court when it prevails on that issue below. *Id.*, citing *State v. Alexander*, 125 Wn.2d 717, 721 n. 6, 888 P.2d 1169 (1995).

Appellate courts have defined "aggrieved party" as one whose personal right or pecuniary interests have been affected. *State v. Taylor*, 150 Wn.2d 599, 601-04, 80 P.3d 605, 606-08 (2003), citing *State ex rel.*

Simeon v. Superior Court, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944); *Sheets v. Benevolent and Protective Order of Keglers*, 34 Wn.2d 851, 210 P.2d 690 (1949). An aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result. *Sheets*, at 855.

In *Taylor*, the State dismissed a criminal prosecution without prejudice. Taylor appealed, but the court of appeals held that he was not an aggrieved party. “Until the State refiles charges against Taylor, if indeed it does, he is under no restriction, and he has the benefit of a running statute of limitations. We cannot conclude, therefore, that he has been injured in any legal sense.” *Id.*

In *Sheets*, the Supreme Court dismissed the appeal of two individuals who appealed a portion of an order entered following a show cause hearing. The case stemmed from a dispute between two Spokane lodges that were organized to provide places of recreation for local and visiting bowlers.⁴ There was, apparently, overlap between the members and officers of the two lodges. The court noted that “[u]sually the same men acted as officers for the two lodges.” *Sheets*, at 852. The manager of one of the lodges was convicted of gambling, but prior to his conviction a controversy arose between various members and officers of the two

⁴ Lodge No. 1 was incorporated as “Benevolent and Protective Order of Keglers.” About two years later, the Grand Lodge was incorporated as “Grand Lodge of the Benevolent and Protective Order of Keglers of America.” *Sheets*, at 852.

lodges. Eventually, Sheets and Cooley commenced a cause of action against one lodge on behalf of the other lodge and they sought a restraining order. The trial court ordered that the two lodges were separate and had no relation to each other. *Id.* at 691-2. Sheets and Cooley appealed only that portion of the order. The court held that the Sheets and Cooley were not aggrieved in a legal sense because the portion of the order they were appealing did not constitute a denial of a personal or property right; nor had there been any burden or obligation imposed upon them. “They, as individuals, are just simply not damaged by the portion of the judgment appealed from.” *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690, 692 (1949) citing *Elterich v. Arndt*, 175 Wash. 562, 27 P.2d 1102 (1933); *Terrill v. Tacoma*, 195 Wash. 275, 80 P.2d 858 (1939).

Peterson won his jury trial and has no right to appeal a preliminary pre-trial ruling that he does not like.⁵ Just like Taylor, Sheets, and Cooley in *Taylor* and *Sheets*, he is not damaged and he is under no restriction. The threshold determination, that his prior conviction constitutes a crime of sexual violence, is not a denial of a personal or property right and does not impose upon him a burden or obligation. Similar to Taylor, Peterson is not

⁵ Certainly, Peterson could have sought discretionary review of this issue pursuant to RAP 2.3 prior to his commitment trial, although he chose not to and he prevailed on the ultimate issue.

an aggrieved party unless and until the State refiles a petition alleging he is an SVP, and unless and until the State actually uses the trial court's determination in another SVP proceeding, he is not injured in any legal sense. Peterson has not been damaged by the trial court's order. Because he is not injured or damaged by the order, he has not been denied a personal or property right, and he has had no burden imposed upon him, he is not aggrieved in a legal sense and accordingly, he is not entitled to seek review. The Court should dismiss the appeal.

B. The Trial Court Correctly Determined That Peterson's Prior Assault Was Sexually Motivated.

If this Court finds that Peterson has a right to appeal, this court should affirm the trial court's finding. For purposes of the SVP statute, a sexually violent offense includes any assault in the second degree which, either at the time of sentencing or subsequently during civil commitment proceedings, has been determined beyond a reasonable doubt to be sexually motivated as that term is defined in RCW 9.94A.030. RCW 71.09.010(17). "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47). The trial court relied in part on recorded recollections of the victim, which were admitted as substantive evidence. The court also considered Ms. Lowry's live testimony at trial (VRP [01/29/15] 71-155 and [02/02/15] 3-32), photographs of the crime scene (CP 403), the statements and testimony of

Peterson (Exhibit 85; CP 462-495; VRP [02/03/15] 46), the testimony of Lakewood Police Detective Holmes (VRP [01/29/15] 49-122), the testimony of Deputy Prosecutor Sven Nelson (VRP [02/03/15] 8-44), the testimony of Ms. Lowry's ex-husband (VRP [02/02/15] 78-111), and the testimony of two neighbors, Inez Lowe (VRP [02/03/15] 40-65) and Sarah Stetsman (VRP [02/03/15] 66-77). The trial court entered Findings of Fact, Conclusions of Law and an Order related to the issue of Peterson's sexually violent offense. CP 314-18. The court entered separate Findings of Fact and an Order related to the recorded recollection evidence admitted by the court under Evidence Rule 803(b)(5). CP 311-13.

1. The Victim's Handwritten Statement Constitutes an Exception to the Hearsay Rule Under ER 803(a)(5)

Peterson contends the trial court erred when it admitted into evidence the victim's handwritten statement that she signed and provided to police on the day of the rape. Generally hearsay is not admissible. Evidence Rule (ER) 802. There are, however, specific exceptions to the general rule. ER 803(a)(5) provides as follows:

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a). The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831, 834 (1998), citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); 5B Karl B. Tegland, Wash. Practice § 368 at 186 (3rd ed.1989); *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. *State v. Hyder*, 159 Wn. App. 234, 246, 244 P.3d 454 (2011); see also *In re Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based on untenable grounds. *Hyder*, 159 Wn. App. at 246; see also *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (“An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.”).

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

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

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

Here, the State fully complied with the rules and laid the proper foundation. After a comprehensive evidentiary hearing, the trial court ruled that the hand written statement was admissible as substantive evidence. The court entered the Findings of Fact and an Order admitting the victim's hand written statement. CP 311-13. The court entered unchallenged findings that satisfy the first three factors of the above test. *Id.* As for the fourth factor, the court found it had been satisfied for four reasons. The first three reasons are: D1. [The declarant] did not disavow her statements; D2. [The declarant] averred the accuracy of the statement at the time of making the statement; and D3. The recording process was reliable. *Id.* Because Peterson did not challenge these findings, they are verities on appeal. E.g., *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002) citing *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Peterson challenges only Finding of Fact D4, that the totality of the circumstances establish the trustworthiness of the statements.⁶ Findings of

⁶ That the "totality of the circumstances establish the trustworthiness of the statement" is not a specific requirement of ER 803(a)(5). It is instead an analysis from case law when the declarant is unable to establish that the record was accurate reflects

fact, when challenged, are examined to determine whether the findings are supported by substantial evidence and whether the findings of fact and conclusions of law support the trial court's order. *In re Det. of Rushton*, 190 Wn. App. 358, 370, 359 P.3d 935, 941 (2015) citing *In re Foreclosure of Liens*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994); *Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 284-85 (2009) citing *Cingular Wireless, L.L. C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). In the end, "A trial court's findings of fact must justify its conclusions of law." *Id.* at 814, citing *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

Accordingly, the only issue now before the court is whether the challenged finding, D4, is supported by substantial evidence and whether all the findings support the court's order.

The totality of evidence presented during the hearing established that the victim of the crime, Heather Lowry, had significant memory loss between the time she reported being raped and the time she testified at trial. VRP (01/29/15) 72-75. On February 14, 2007, just after she reported

their prior knowledge. *State v. Alvarado*, at 551-52, citing *U.S. v. Porter*, 986 F.2d 1014, 1017-18 (6th Cir. 1993).

the rape to the police, Ms. Lowry provided the officers with a handwritten statement detailing the event. Exhibit 7; VRP (01/29/15) 76. A few days later, she was questioned in more detail by detectives when she provided a tape recorded statement to the detectives. Exhibit 8; VRP (01/29/15) 51-4. Ms. Lowry testified at the hearing that she recognized her handwritten statement because she recognized her own handwriting. VRP (01/29/15) 76. She testified that she did not remember writing it and that reviewing the document did not refresh her recollection of the events described in the writing. *Id.* at 76-77. She said that although she does not remember the events, she believes the content of her handwritten statement is accurate and true. *Id.* at 79. She testified she remembered the event when she wrote the statement, “and I would have been able to recall exactly what had happened.” *Id.* at 79. The two-page handwritten statement indicates it was written and signed on February 14, 2007 by Heather Lowry. Exhibit 7. The document described in detail a sexual assault perpetrated that same day by a male known as Joey. *Id.* Based on her testimony and the contents of the document, the first three factors therefore were easily satisfied. *See State v. Alvarado*, 89 Wn. App. 543, 549, 949 P.2d 831, 835 (1998).

The fourth factor, part of which is challenged here, is whether the recording accurately reflects her prior knowledge. “In most jurisdictions, the foundation testimony must come from the same person who made the

out-of-court statement. In other words, the hearsay exception applies only if the out-of-court declarant is present in court and testifies to the probable accuracy of the statement in question.” 5C Wash. Prac., Evidence Law and Practice § 803.29 (5th ed.) *citing* Broun, McCormick on Evidence Sec. 283 (two volume 4th ed.) (“The witness must acknowledge at trial the accuracy of the statement”), and Mueller & Kirkpatrick, 4 Federal Evidence § 443 (2d ed.) (“While the exception does not expressly say that the maker of a statement must attest to its accuracy at trial, a live endorsement seems necessary.”).

The Washington State Supreme Court (WSSC) has held that there is no particular method of establishing accuracy, rather the issue must be resolved on a case-by-case basis. *State v. Alvarado*, 89 Wn. App. 543, 551-52, 949 P.2d 831, 836 (1998).

We hold that the requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. The court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Id. Here, unlike in *Mathes* and *Alvarado*, Ms. Lowry **did** testify that she believed the hand written statement was accurate and reflected her knowledge at the time it was written. VRP (01/29/15) 80-81. Further, the

court found, and the evidence established, that Ms. Lowry has never recanted or disavowed the events in the statement. *Id.* at 82. Indeed, she testified that she believes what she told the police in her handwritten statement true and accurate because her memory was there at the time and she would have been able to recall exactly what had happened. *Id.* at 79. The statement itself contains the printed proviso just above her signature that the statement is being made under penalty of perjury and “that the statements contained on this handwritten form (front and back and any additional pages) are true and correct.” Exhibit 7. Clearly the record contains substantial evidence to support the trial court’s Findings of Fact D1, D2, and D3.

As for Peterson’s challenge of Finding of Fact, D4, the WSSC noted that some jurisdictions have sanctioned admitting recorded recollections even in the absence of the declarant testifying to the probable accuracy of the statement when sufficient indicia of reliability exist under a totality of the circumstances test. *Alvarado*, at 551. For example, a trial court found a recorded recollection was reliable when the statement was given in close temporal proximity to the assault; it described the events chronologically and in detail; the witness spoke coherently and logically in giving it; the police officer's interviews with other witnesses corroborated

the statement; and the victim never recanted. *Id.* at 551, citing *State v. Marcy*, 680 A.2d 76, 78 (Vt. 1996).

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

Here, like the *Alvarado* case, Ms. Lowry gave two statements to the police. The first was her hand written statement the day of the rape. Exhibit 7. The second statement a tape recorded statement 7 days later. Exhibit 8. The content of the two statements is consistent with each other. See Exhibit 7; Exhibit 8. The content indicates that Ms. Lowry was lucid and she at no time suggested she did not remember the event. *Id.* She acknowledged at the time of each statement that it was true and correct. Exhibit 7; Exhibit 8 at pg. 27

Furthermore, the trial court noted that the content of the two statements was largely corroborated by the physical evidence and the testimony of other witnesses as well as the suspect's confession. VRP (02/03/15) 92-3. For instance, the trial court noted Peterson testified he and Ms. Lowry were hanging out at his house (CP 468); his mom was asleep on the couch (CP 473;475); there was a toy gun with an orange tip at the scene (CP 475-76); Peterson held Ms. Lowry's hands above her head (CP 481); Peterson confirmed there was some sexual contact, and they had genital contact (CP 480-83). *Id.*

The admission of the handwritten statement is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. Given the fact that the statements are comprehensive, consistent and corroborated, the trial court's finding that the totality of the circumstances establish the trustworthiness of the statement is supported by substantial evidence. The court's decision was not manifestly unreasonable or based on untenable grounds. The criteria for the recorded recollection exception to the hearsay rule had been met and the court did not err in admitting her hand written statement.

2. The Victim's Tape Recorded Statement Constitutes an Exception to the Hearsay Rule Under ER 803(a)(5)

Peterson contends the trial court erred when it admitted into evidence a tape recorded statement the victim provided Lakewood Police seven days after the rape. The criteria of Evidence Rule 803(a)(5), a recorded recollection as an exception to the hearsay rule, is set forth above.

During the evidentiary hearing, Detective Holmes testified that she first contacted Ms. Lowry on February 14, 2007, a few hours after the reported rape occurred. VRP (01/29/15) 50. That day, Ms. Lowry showed the police the residence where the rape occurred. *Id.* at 51. While Ms. Lowry was seated in the police car, the officers contacted Peterson who came outside. *Id.* Ms. Lowry could see Peterson and she identified as the suspect. *Id.*

On February 20, 2007, Detective Holmes took a detailed tape recorded statement from Heather Lowry. Exhibit 8; VRP (1/9/15) 51-2. After taping Ms. Lowry's statement, Detective Holmes arranged for the tape recording to be transcribed into a written document. *Id.* at 52. The detective reviewed the written transcript while listening to the tape recording and verified that the transcript was accurate. *Id.* at 52-53. During the course of the 40 minute tape recorded statement, Ms. Lowry described

the rape in detail. Exhibit 8. At the time of taping the statement, she affirmed that the contents of the statement were true and accurate. *Id.* at 27.

At the hearing in 2015, Ms. Lowry testified that she “kind of” remembered giving a tape recorded statement to the police. VRP (01/29/15) 79. She testified that she had reviewed a transcript of the tape recording a couple time and it did refresh her memory about the events the day of the rape. *Id.* at 79-80. She said that she does not entirely remember the physical contact between herself and Peterson and reviewing the transcript of the tape recorded statement did not refresh her memory about the event. *Id.* at 80. She testified that when she gave the police her tape recorded statement she believes the information she provided to the police was accurate. *Id.* at 81. Indeed, she testified that she believes what she told the police is true because she would have “nothing to gain from making up a story. To me, it doesn't seem like it would be smart.” *Id.*

A recorded recollection can include not just writings, but also tape recorded statements. *State v. Alvarado*, 89 Wn. App. 543, 549, 949 P.2d 831 (1998) *review denied*, 135 Wn.2d 1014 (1998). As with the handwritten statement, the only finding challenged by Peterson is D4, that the “totality of the circumstances establish the trustworthiness of the

statements.” The other unchallenged findings of fact are verities on appeal. E.g., *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002) citing *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

As noted above, the applicable analysis is found in *Alvarado*. 89 Wn. App. 551-52. Ms. Lowry gave two statements to the police. The first was her hand written statement the day of the rape. Exhibit 7. The second statement a tape recorded statement seven days later. Exhibit 8. The content of the two statements indicate that Ms. Lowry was consistent and lucid and while making the statements. Exhibit 7; Exhibit 8. She never suggested she could not remember the events. Exhibit 7; Exhibit 8. The trial court noted in its oral ruling that both the handwritten statement and the tape recorded statement, which was played in open court were cogent, tracked, detailed, responsive and corroborated. VRP (02/03/15) 92-4. The content of the two statements were corroborated by the physical evidence and the testimony of other witnesses as well as the suspect’s confession. *Id.*; *See also*, Peterson’s testimony at CP 462-495.

The admission of the tape recorded statement is within the sound discretion of the trial court and should not be reversed absent a manifest abuse of discretion. Given the fact that the statements are comprehensive, consistent and corroborated, the trial court’s finding – that the totality of

the circumstances establish the trustworthiness of the statement – is supported by substantial evidence. The court’s decision was not manifestly unreasonable or based on untenable grounds. The criteria for the recorded recollection exception to the hearsay rule had been met and the court did not err in admitting her hand written statement. This Court should affirm the ruling.

3. The Trial Court Correctly Determined That Peterson Had Been Convicted of a Crime of Sexual Violence

For purposes of the SVP statute, a sexually violent offense includes any assault in the second degree which, either at the time of sentencing or subsequently during civil commitment proceedings, has been determined beyond a reasonable doubt to be sexually motivated as that term is defined in RCW 9.94A.030. RCW 71.09.010(17)(c). “Sexual motivation” means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47).

a. The Findings of Fact Are Supported By Substantial Evidence

Peterson assigns error to the trial court’s order that he “has been convicted of a Sexually Violent Offense as defined by RCW 71.09.020(17).” He specifically assigns error to Finding of Fact 5

and 7.⁷ The court's other unchallenged findings of fact are verities. E.g., *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002) citing *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Findings of fact, when challenged, are examined to determine whether the findings are supported by substantial evidence and whether the findings of fact and conclusions of law support the trial court's order. *In re Det. of Rushton*, 190 Wn. App. 358, 370, 359 P.3d 935, 941 (2015) citing *In re Foreclosure of Liens*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994); *Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 284-85 (2009) citing *Cingular Wireless, L.L. C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). In the end, "A trial court's findings of fact must justify its conclusions of law." *Id.* at 814, citing *Hegwine v. Longview Fibre Co.*, 162 Wash.2d 340, 353, 172 P.3d 688 (2007).

⁷ The court entered one set of Findings for the "Order on Admissibility of Evidence" (CP 311-13) and completely separate Order supported by "Findings of Fact and Conclusions of Law Re: SVP Bench Trial on Bifurcated Issue of Sexually Violent Offense." CP 314-18.

Peterson assigns error to specific language in Finding of Fact 5, insofar as it related to the admissibility of the recorded recollections as substantive evidence.⁸ The entire finding is as follows:

On February 14, 2007, Heather Lowry provided a handwritten account of events to a Lakewood Police Officer. On February 20, 2007, Heather Lowry provided a tape-recorded statement to Lakewood Police Detectives Holmes and Miller. Heather Lowry lacks current sufficient memory to testify about all the events, but her recorded past recollections are admissible as substantive evidence under Evidence Rule 803(a)(5).

CP 315-16. Peterson challenged the admissibility of the handwritten and tape recorded statements at the preliminary evidentiary hearing, which has been addressed above.⁹ The court's evidentiary findings are supported by substantial evidence, and the findings support the court's decision that the recorded recollections satisfy the criteria as an exception to the hearsay rule. The decision to admit or refuse evidence lies within the sound discretion of the trial court and will not be reversed except upon a showing of abuse of discretion. *E.g., Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255, 1260 (1979) *citing Goodell v. ITT-Federal Support Serv.' s, Inc.*, 89 Wn.2d 488, 573 P.2d 1292 (1978). The court did not

⁸ Peterson's Brief at 1.

⁹ This is essentially another challenge to the court's determination that Ms. Lowry's recorded recollections satisfy the exception to the hearsay rule under ER 803 (a)(5). The State's responsive argument above is equally applicable here.

abuse its discretion in determining that the recorded recollections are admissible. This assignment of error is without merit.

Peterson also assigns error to Finding of Fact 7, which related to Ms. Lowry's credibility. The entire Finding of Fact is as follows:

Although, witnesses testified that in February 2007 Heather Lowry had a reputation of dishonesty, most of her account of events was corroborated by the testimony of Respondent and by physical evidence, which makes her account credible. Further, her reputation from 2007 has no bearing on her current testimony in 2015, which was credible. Based on the totality of evidence presented, Heather Lowry's accounts are credible.

CP 316.

Findings of Fact 8, 9, and 10 are unchallenged, and accordingly they are verities. These verities establish that Peterson made inconsistent statements regarding these events. For instance, he initially told police he had been home all day on February 14, 2007, which was not true. CP 316. It is a verity that Peterson later admitted to police many details of meeting Ms. Lowry, and that the details corroborated her account of events. *Id.* Peterson corroborates that he and Ms. Lowry had extensive sexual contact with their genitals exposed, he testified that they had sexual intercourse, but later testified that he could not remember whether they had intercourse or not. *Id.* It is a verity that Peterson told police Ms. Lowry probably felt like he forced her to have sexual activity. *Id.* Peterson told police he had

not intended to hurt her, but he admitted that he had sexual activity, including intercourse, with Ms. Lowry. *Id.*

Finding of Fact 9, also a verity, establishes that Peterson testified in 2014 about these events and he again corroborated many of the details provided by Ms. Lowry. CP 316. It is a verity that Peterson's statements to police and testimony contain many inconsistencies and lack credibility. *Id.*

Significantly, the court specifically found that Ms. Lowry was credible and it is a verity that Peterson was not. CP 316. The court acknowledged that it considered and weighed the testimony that in 2007 Ms. Lowry had a reputation for dishonesty. CP 316. The judge specifically addressed the weight of that reputation evidence in his oral ruling:

I am mindful that the respondent has submitted testimony questioning the credibility of Ms. Lowry. **I am considering that testimony, I'm weighing it accordingly**, including the testimony of the former husband with whom there, at least was, and possibly still is, an acrimonious relationship. I'm weighing that testimony of Mr. Lowry accordingly.

VRP (02/04/15) 157. When ruling on the admissibility of the recorded recollections, the judge again stated on the record that he considered and weighed the testimony regarding Ms. Lowry's reputation, but he believed "there was some bias associated" with that witness. VRP (02/03/15) 90. We defer to the fact finder and "consider all of the evidence and reasonable inferences in the light most favorable to the party who

prevailed in the highest forum that exercised fact-finding authority.” *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 284-85 (2009), *Cingular Wireless*, 131 Wn. App. at 768, 129 P.3d 300. And “[w]e reserve credibility determinations for the fact finder and do not review them on appeal.” *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 11, 103 P.3d 802 (2004). *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 284-85 (2009).

Because it is a verity that the evidence substantially corroborates Ms. Lowry’s recorded recollections, the trial court did not abuse its discretion in finding that Ms. Lowry’s account of events was credible. The trial court’s determination is well supported by the record and should not be disturbed.

b. The Findings of Fact Support the Trial Court’s Conclusion

Peterson assigned error to the trial court’s conclusion that he has been convicted of a Sexually Violent Offense. Peterson’s brief at 1. The trial court reached this conclusion by two means: first the court found that Peterson had a valid prior conviction for assault in the second degree which was proven to have been committed with sexual motivation (Conclusions of Law 5); and second, the court found that the event in

question did in fact constitute an assault in the second degree with sexual motivation (Conclusions of Law 6). CP 317.

The first means is supported by the record. It is a verity Peterson plead guilty to Assault in the Second Degree, denying his actual guilt, and citing *In re: Barr*.¹⁰ CP 315; *see also* Exhibit 3; Exhibit 4. Because Respondent has been convicted of Assault in the Second Degree, the trial court was making a determination about whether the assault was sexually motivated. The definition is as follows:

“Sexual motivation” means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

RCW 9.94A.020(47). Peterson has not challenged Finding of Fact 10, which is a verity. That unchallenged Finding of Fact is as follows:

Respondent’s activities with Ms. Lowry on February 14, 2007, were committed, at least in part, for his sexual gratification.

CP 317, Finding of Fact 10. Because it is a verity that Peterson had been convicted of Assault in the Second Degree, and because it is a verity that the Peterson’s acts were committed, at least in part, for his sexual gratification, the trial court did not abuse its discretion in concluding that Peterson had been convicted of Assault in the Second Degree that was committed with sexual motivation.

¹⁰ *In re: Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

The trial court's second means of reaching this conclusion is also supported by the record. The trial court concluded that the State had proved beyond a reasonable doubt that Peterson actually committed an Assault in the Second Degree with Sexual Motivation. CP 317 Conclusion of Law 6.¹¹ Peterson has not challenged the trial court's Finding of Fact 6, which is a verity.

Heather Lowry's recorded past recollections establish that Respondent engaged in sexual intercourse with her by means of forcible compulsion and that Respondent used what appeared to be a deadly weapon. The weapon in question was later determined to be a toy gun rather than a firearm.

CP 316, Finding of Fact 6. The trial court noted that in addition to Ms. Lowry's account of events, the other evidence corroborated her. VRP (02/03/15) 92-3. For instance, Peterson testified that they met on a bus (CP 465-67), they went to separate appointments and met up again (CP 469-70); they went to his house to hang out (CP 468); his mother was asleep on the couch (CP 473; 475); they went into a bedroom where there was a phone and a radio (CP 474)¹²; there was a toy gun at the residence (CP 475-76); she was on her back on the bed and he was on top of her

¹¹ In the oral ruling, the court said the following: "However, even if I could not rely upon the facially valid conviction, I find that the totality of the evidence in this case convinces me beyond a reasonable doubt that the respondent did commit the crime of Assault in the Second Degree." VRP (02/04/15) 159.

¹² Lakewood Police officers served a search warrant at Peterson's house and photographed the radio which was set to the station described by Ms. Lowry. VRP (01/29/15) 104-05.

(CP 477; 482); Peterson used his hands to overpower her hands (CP 481); he had his penis exposed and was rubbing her genitals and they started having intercourse (CP 475-80). The victim's account is that she repeatedly told him to stop and kneed him in the groin. Exhibit 7; Exhibit 8 at 13; 17. Peterson testified that she asked him to stop so he stopped (CP 480) and he also testified that the sexual encounter ended because he got bored (CP 484). This verity, that Peterson engaged in sexual intercourse with her by means of forcible compulsion, along with the verity that Peterson committed these acts for his own sexual motivation, is not only supported by the record, but supports the trial court's conclusion. The court's conclusion that Peterson actually committed an assault in the second degree with sexual motivation is amply supported by the unchallenged findings of fact and the record. The trial court did not err.

V. CONCLUSION

Peterson is not an aggrieved party and he has no right to appeal. This Court should dismiss the appeal outright.

Even assuming he could argue he is aggrieved, Peterson cannot demonstrate that the trial court's evidentiary rulings constitute an abuse of discretion. The criteria of Evidence Rule 803(a)(5) was satisfied. The challenged Findings of Fact are supported by substantial evidence. The

trial court's conclusions of law are supported by the findings of fact.

Peterson's appeal should be dismissed and/or denied.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

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NO. 47661-4-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

JOSEPH MARION PETERSON,

Appellant.

DECLARATION OF
SERVICE

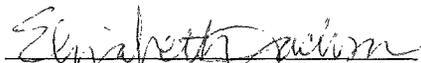
I, Elizabeth Jackson, declare as follows:

On April 18, 2016, I sent via electronic mail true and correct copies of Brief of Respondent, and Declaration of Service, addressed as follows:

Eric Nielsen sloanej@nwattorney.net

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

DATED this 18th day of April, 2016, at Seattle, Washington.


ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL

April 18, 2016 - 3:48 PM

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