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No. 51173-8-II

Kitsap County No. 09-1-01567-6

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARK OLSEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
KITSAP COUNTY

The Honorable Judge Jeanette M. Dalton

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The lower court abused its discretion and appellant Edward Olsen was deprived of a fundamentally fair proceeding and his CrR 3.1(b)(2) rights to counsel when the court held an evidentiary hearing on Olsen's motion for a new trial but refused to allow Olsen to be present.
2. The lower court judge abused her discretion by applying the wrong standard to the motion for a new trial.
3. Had the correct standard been applied, the motion would likely have been granted, because the only two witnesses to the conduct making up the crimes have now recanted material elements of their claims at trial.
4. The lower court proceeding violated the appearance of fairness and rules regarding the neutrality of the court..
5. Appellant assigns error to the ORDER ON MOTION FOR NEW TRIAL which provides, in relevant part:

Given the substantial corroboration at trial for the initial statements made by both Ms. Devenney and her son, later testified to at trial, this Court finds that it is unlikely that either's testimony at trial was perjured. Additionally, the newly discovered statements, if true, are not only not corroborated by the other evidence presented at the trial, they are not consistent with the behavior described, the observations from other objective witnesses, or Mr. [sic] Devenney's own statements about the event, and do not seem reasonable in light of all the other evidence.

CP 381. Appellant also assigns error to the portion of the order which provides:

The inconsistencies of the new statements, coupled with the Court's observations of both witnesses' [sic] trial testimony and their "recanting" testimony lead this Court to the conclusion that neither Ms. Devenney's [sic] nor her son's new statements are credible. The Court cannot therefore conclude that the outcome of the trial would

probably be changed by the new statements.

CP 381.

6. Appellant assigns error to Finding of Fact and Conclusions of Law Finding XL, which provides:

That the newly discovered statements are not only not corroborated by the other evidence at trial, they are not consistent with the behavior described, the observations from the other objective witnesses, or Ms. Devenny's own testimony about the event, and do not seem reasonable in light of all the other evidence.

CP 391.

7. Appellant assigns error to motion for new trial Conclusion of Law II, "[t]hat the recanting testimony of Ms. Devenny and Jordan Olsen are not credible,"

That because the recanting statements are not credible, this court cannot conclude that those statements would probably change the result of the trial.

CP 391-92.

B. QUESTIONS PRESENTED

1. Where a trial court decides to hold an evidentiary hearing on a defendant's CrR 7.8 motion for a new trial does the court violate the defendant's minimal due process rights and CrR 3.1(b)(2) rights to counsel by holding the hearing without him present even when counsel says he needs the defendant there during the testimony?
2. To determine whether a recantation is credible and thus supports granting a motion for a new trial, the lower court is supposed to examine the circumstances surrounding the recantation, such as the age of the witness, whether they live with a person who might influence them into recanting or whether they have a motive or interest in recanting.

Did the lower court abuse its discretion and apply the wrong legal standard by instead examining the evidence the court recalled from the trial years before

and concluding that the recantations were not “credible” in comparison to the testimony at trial and asking if the recantations seemed “consistent” with the testimony at trial, or seemed “reasonable in light of all the other evidence?”

3. The defendant was alleged to have committed attempted second-degree murder and felony harassment by pouring gasoline on his “ex” in her bed, waving around a lighter and threatening that she was going to “die this time.” The defense was that the gasoline had gotten on the bed because it was on the dog who jumped on the bed after the defendant had poured the gas from the can in his hand. Does the trial court abuse its discretion in denying a motion for a new trial when the only witnesses to the alleged “pouring” and other facts admit they lied and no pouring, threats, or lighter were involved so that the evidence would have been consistent with the defendant’s exculpatory version of events?
4. Where one of two crucial witnesses was only 12 at the time of the incident and 13 at trial, did the trial court err in failing to consider the unique developmental aspects of his age and how it likely materially affected his suggestibility to his mom’s lies and his mistaken support of her version events at trial?
5. After the parties had examined each witness, the judge then personally questioned them, using cross-examination style techniques and clearly conveying her opinion of the motion. That examination was longer than that of either counsel and that questioning established parts of the state’s argument the prosecutor had not. On reversal and remand for a new hearing on the motion, should the matter be decided by a different judge because the appearance of fairness was violated?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Edward M. Olsen was charged by second amended information filed in Kitsap County superior court with attempted first-degree premeditated murder of Bonnie Devenny (count 1),

attempted second-degree murder (also of Devenny) (count 2), first-degree burglary (count 3), felony harassment (count 4), and third-degree malicious mischief (count 5) CP 18-26; RCW 9A.28.020; RCW 9A.32.050; RCW 9A.46.020; RCW 9A.48.090; RCW 9A.52.020. Counts 1-4 were all charged with domestic violence special allegations and a domestic violence sentencing aggravator and count 5, the gross misdemeanor, was charged with the allegation. CP 18-26; RCW 9.94A.535; RCW 10,99.020.

After a jury trial in 2010, Mr. Olsen was found not guilty of attempted first-degree murder (count 1), but guilty as charged of all the other counts as charged, with the domestic violence findings and enhancements. CP 27-35. Olsen was ordered to serve an exceptional sentence of 360 months. CP 36-47, 52-54.

Mr. Olsen appealed and the court of appeals, Division Two, affirmed. See CP 55; State v. Olsen, 175 Wn. App. 269, 309 p.3d 518 (2013), affirmed, 180 Wn.2d 468, 325 P.3d 187, cert. denied, __ U.S. __, 135 S. Ct. 287, 190 L. Ed.2d 210 (2014). On May 15, 2014, the Supreme Court affirmed. See id. The Mandate issued on June 6, 2014. CP 56-57.

On January 31, 2017, Mr. Olsen filed a motion for a new trial based on newly discovered evidence. CP 212. Proceedings on the motion were held before the Honorable Judge Jeanette Dalton on February 17, March 17, April 14, and June 5, 26 and 27, and July 21,

2017, with the motion denied in writing on November 9, 2017.¹ CP 378-81. Written findings of fact and conclusions of law were entered on December 8, 2017.² CP 389-91. This appeal follows. See CP 382-86.

2. Summary of relevant facts from trial³

In November of 2009, Jordan Olsen was just 12 years old. RP 573-74. By the later trial in 2010, he had turned 13 and would describing being in eighth grade, loving sports, not liking science and having two older brothers. RP 574, 581.

By age 12, however, Jordan⁴ had already heard his parents fight. RP 581-82. He remembered an argument in early November of 2009, where both his mom and dad were yelling in his mom's

¹The verbatim report of proceedings consists of eight volumes, which will be referred to as follows:

February 17, 2017, as "1RP;"
March 17, 2017, as "2RP;"
April 14, 2017, as "3RP;"
June 5, 2017, as "4RP;"
June 26, 2017, as "5RP;"
June 27, 2017, as "6RP;"
July 21, 2017, as "7RP;"
December 9, 2017, as "8RP."

²A copy of the Order is attached as Appendix A. A copy of the Findings and Conclusions is attached as Appendix B.

³As part of the motion for a new trial, Mr. Olsen attached the transcripts containing the testimony of Jordan Olsen, Olsen's son, and Bonnie Devenny, Jordan's mom and Olsen's "ex," from the 2010 trial. See CP 74-212. After the hearing, he filed additional transcripts of trial testimony for Terrance Black and Detective Tovar. CP 255-307. This statement of facts regarding the first trial is taken from those trial transcripts and the published decision in the original appeal. Mr. Olsen has filed a motion to transfer the complete trial transcripts from the original trial to this cause number.

⁴Because he shares a last name with Mr. Olsen, the appellant, Jordan, who is not an adult, will be referred to herein by his first name with no disrespect intended.

bedroom and Jordan tried to get in. RP 581-82. When he did so, he saw his mom and dad engaging in “a lot of fist throwing.” RP 581-82. Jordan’s mom, Bonnie Devenny and his dad, Edward Olsen, had a troubled relationship including domestic violence allegations. See Olsen, 175 Wn. App. at 271-72. Olsen and Devenny were no longer together but Olsen was around and lived with them off and on recently. Id.

On the night of the incident, November 28, Jordan got home about 1 a.m. - technically November 29. RP 578. He watched some tv and then fell asleep next to his mom in her bed. RP 578. He thought he kept hearing his dog go back and forth and whimpering that night next to the bedroom door, instead of sleeping on the edge of the bed as usual. RP 584. Jordan also thought he heard sounds in the house and they made him wake up, but his mom reassured him. RP 584.

Jordan testified at the later trial that he woke up to his mom screaming “and somebody dosing gasoline on us.” RP 584, 585. He also testified that he saw his dad “dousing gasoline on his mother.” RP 585. Jordan then leapt up immediately and attacked. RP 585. At trial, he said he did not know it was his dad until he heard the intruder speak. RP 585.

When asked to describe what he could actually see when he first woke up, however, Jordan admitted that it was very dark and he, “couldn’t see much.” RP 585-86. He conceded that he did not recognize who was pouring the gas but maintained he saw the

pouring occur and saw a gas can in the intruder's hands. RP 586. Indeed, he described the gas can he said he saw, saying it was small and red with either a black or yellow "tube" and looked like one the family had in their garage. RP 586, 605.

On cross-examination Jordan agreed nobody was pouring gas on *him* "purposely." RP 602. He got it on himself when he and the intruder fought. RP 989.

Bonnie Devenny testified about the incident but first described the fight her son had seen a few weeks earlier. RP 620. Devenny said she had taken six blows to the face in that altercation. RP 620. She did not report it to law enforcement but said that Olsen had told her she "would be sorry" if she did. RP 620.

Devenny described getting home from a trip out of town, falling asleep at about 10 p.m. the night of the incident and Jordan coming into her room, watching tv and then both falling asleep. RP 624. According to Devenny, she was awakened when "gasoline poured on" her and "Ed Olsen standing over . . . [her] with a gas can." RP 625. The gas got all over her legs and, Devenny said, into her face and hair. RP 626.

Devenny started screaming and struggling to get up but she was caught in the sheets and also, she thought, Olsen had pushed her back down. RP 626. At that point, Devenny testified, she saw Olsen with a "candle lighter in his hand." RP 626. Although Devenny had candles in her room, she was adamant that she had not lit them recently or used that lighter in her bedroom at all. RP 626.

In fact, Devenny said, she did not keep a lighter in her room. RP 626. Instead, she kept them in the junk drawer in the kitchen. RP 626, 674. Devenny was sure that she had not left the lighter in her room, nor had she put left one on her bedside table. RP 626, 674. Such a lighter, however, was depicted on that table in a photo of the room later taken by police. RP 626, 674.

According to Devenny, Olsen then threatened her, saying she was “going to die this time, bitch[.]” RP 626. Devenny said she was “freaking out,” covered in gas and trying to get up and that Olsen was swinging the lighter around. RP 627.

For his part, Jordan did not at first recall anything about any threats. RP 587. When asked what Olsen had said during the brief incident, Jordan testified that he had heard Olsen ask, “where’s Frank,” apparently referring to Devenny’s new boyfriend. RP 587. When the prosecutor asked if Olsen had said anything else, Jordan answered in the negative. RP 587. When the prosecutor then asked, “[d]id he say anything to your mom,” Jordan then responded, “[y]eah. He said, “[y]ou are going to die.” RP 587.

After Jordan lunged at Olsen, Devenny got away, went into the bathroom and crawled out of the window, going to her workplace nearby where police were called. RP 585, 635. Meanwhile, Jordan and his dad struggled and ended up in the hallway when Jordan’s dog bit him and his dad then left. RP 585.

Mr. Olsen had admitted breaking a window on Devenny’s car to get the garage door opener and using the opener to get inside, but

thought Devenny was still on a trip and thus would not be home. See Olsen, 175 Wn. App. at 276. Olsen had eaten some casserole and had a drink on the couch, watching tv, then gone to the bathroom but could not get inside because a dog was there. Id. Olsen tried to coax the dog out unsuccessfully with some of the casserole, then went to the garage, got the gas can and started pouring gas on the dog, which ran out and into the bedroom. Id. The dog jumped on the bed and got gas all over Devenny, with Olsen following behind, still holding the can. Id.

At trial, Devenny described domestic violence in her relationship with Olsen. RP 622. In 1999, in one incident, the two were fighting and Devenny said he had teed her up with an electrical cord or maybe a belt and said something like she should say goodbye to her children and that he was going to leave her in the woods. RP 622. Devenny could not recall how the situation ultimately defused. RP 622. She admitted, she had only recalled the incident after being reminded of it recently. RP 599-607. In another incident in California in 2000, Devenny said, Olsen had told her, “[i]f I can’t have you nobody else will,” then “duct taped” her and told her he was going to cut her into pieces and put her in a blue storage tote. RP 623. One of their sons testified that this incident had started with Devenny assaulting one of the kids and Olsen stopping her. See Olsen, supra.

Terrance Black was at Devenny’s workplace and called the police when she arrived. RP 234-35. He testified that he tried to

relate to the police operator exactly what Devenny told him had happened but she was not easy to understand. RP 231-35. Black thought Devenny said someone had broken in and poured gasoline on her. RP 231. He also thought she said who it was but he could not really “get” exactly what she was saying. RP 231. He spoke to her for at most a minute before calling police. RP 255-56. He did not hear her later talking with officers and admitted at trial he was hard of hearing. RP 237.

Detective Michael Tovar of the Bainbridge Island Police Department responded to the 9-1-1 call. RP 262. He described Devenny as hysterical and noted her legs but not her face or other areas appearing red. RP 262. The officer thought Devenny initially had a hard time speaking to him and “looked scared.” RP 244.

Devenny told Tovar she was awakened by Olsen pouring gas on her and saying “die bitch die.” RP 246. She also told him that she got away by jumping from the bed and that caused Olsen to drop the gas can and lose his balance. RP 262. She also never said anything about him having a lighter or waving it around. RP 246, 262.

At trial, Detective Tovar testified that he had asked Devenny if she saw any flame at any time during the incident. RP 277. Devenny had told the officer, “[n]o.” RP 277.

While on the property later looking for Olsen (who fled but ultimately turned himself in), Detective Tovar noticed a window broken out on the car. RP 254. He shone his flashlight into the car and saw a rock inside. RP 255-56. He also saw an indentation where

the garage door opener was likely to be in the car. RP 246-53. Inside the house the officer smelled a strong odor of gas in the bedroom and saw a small, red plastic gas can at the foot of the bed. RP 246-53.

Olsen spoke to detectives after his arrest. Olsen, 175 Wn. App. at 275-76. He told them he had broken the window out of the car with a large rock in order to get the garage door opener, so he could get in. 175 Wn. App. at 275-76. He thought Devenny was still out of town. Id. Once inside, he sat on the couch, ate some “casserole,” and watched some TV. Id. When he went to go use the bathroom, the dog was inside and Olsen could not get in. Id. Olsen really needed to use the bathroom so he tried to coax the dog out with the casserole, but that did not work. Id. Olsen told officer he then went to the garage, took out the gas can, went into the bathroom and started pouring gasoline on the dog to get it to leave the bathroom, and the dog, wet with gas, ran into the bedroom, jumped on the bed and got gas all over Devenny, who he did not think was home. Id.

Olsen was convicted of, *inter alia*, attempted second-degree murder and felony harassment, both with domestic violence aggravators. Olsen, 175 Wn. App. at 173-74. On direct appeal, this Court described those convictions as being “for pouring gasoline on and threatening to kill Bonnie Devenny.” Olsen, 175 Wn. App. at 173-74.

3. Motion for a new trial

Several years after the Supreme Court issued its mandate affirming from Mr. Olsen’s direct appeal, Bonnie Devenny and

Jordan Olsen came back to court. 6RP 1-4. This time, they said, they were there to tell the truth. 6RP 1-4, 39-49.

In their sworn affidavits and again at the hearing on the motion for a new trial, both witnesses admitted that they had lied at trial in 2010. CP 87-90, 91-94 6RP 1-4, 39-49.

More specifically, Ms. Devenny admitted that Mr. Olsen had not poured gasoline on her, did not have a lighter, and had not said anything threatening. 6RP 5-6; CP 87-90. Jordan admitted that he had not seen Olsen pour anything on his mom, never saw a lighter and had not heard any threats. 6RP 39-42; CP 91-94. Devenny was in a new relationship and did not want her ex around to ruin things. 6RP 5-9; CP 88. So she made up the stuff about Olsen pouring the gas and threatening her and having a lighter even though she had not seen any of that happen, because she wanted him to go away for a long time. 6RP 7; CP 88-89. Jordan, who had been just 12, had believed his mom's claims and embellished his story to support what she said had happened. 6RP 39-42; CP 91-94.

At the hearing, Devenny explained that the lighter that was depicted as Olsen's at trial was actually hers. 6RP 5-7. She had lied when she said she had not used it in her room; she used it for the candles. 6RP 6-7, 22. She had lied when she had asserted at trial that the lighters stayed in the kitchen drawer; the one depicted in the police photo of her nightstand was used for the candles in her room and stayed on the nightstand or in its drawer. 6RP 6-7.

Devenny had come up with the idea to claim Olsen had a

lighter later, she said, after seeing the police photos with the lighter shown on the bedside table. 6RP 23.

Devenny also conceded that Olsen had not poured gas on her, either. 6RP 17-21. She had lied when she had claimed at trial that she believed, “he was going to catch me on fire” during the incident. 6RP 17-23. She thought she had kicked the gas can trying to get out of the covers in which she was caught, either from on the floor or in his hand. 6RP 17-23.

Her claim at trial that Olsen had intentionally pushed her down when she had been trying to get up was not true, either. 6RP 6-7, 17-18. Devenny actually was not sure that he had pushed her. 6RP 6-7, 17-18. She had embellished that claim; it could have been that he did but also could have been that she was tangled in the bedcovers and fell back. 6RP 6-7, 17-18. Devenny did not recall Mr. Olsen saying anything like, “[w]here’s Frank,” but was clear that Olsen had not said the “die bitch” comment. 6RP 15, 41.

Devenny was remorseful for her lies years later at the motion hearing, but had just wanted Olsen to go away. 6RP 18-23. She was involved with a new man at the time and thought the relationship would be the “one” or somehow make life wonderful. 5RP 8, 23. She was afraid Olsen would ruin it if he was around, because she always ended up back with him. 6RP 8, 23. Devenny thus wanted Olsen to go away to prison for as long as possible. 6RP 8, 14.

In order to do that, she admitted, Devenny had exaggerated what happened and lied at trial. 6RP 8, 14.

But her lies had weighed on her. 6RP 8. A little after trial, she told her kids. 6RP 11-16. When she did, they were upset, demanding to know why it had taken so long for her to finally tell the truth. 6RP 15-16. She said it was hard for her to admit she was lying because it meant having to tell her sons what she had done - and ask for them to forgive. 6RP 16.

Devenny denied that her recantation was “buyer’s remorse[.]” RP 9-19. Instead, she had “done a lot of soul-searching” leading to her coming forward to tell the truth. 6RP 9. She realized she had “caused somebody else’s life to be where he is” with her lies. 6RP 9. Ironically, she had done so because she thought him “being out of the picture” would make her happy in her new relationship. 6RP 9.

Ms. Devenny admitted, “I hurt not only my kids but their father, sitting somewhere he doesn’t deserve to be.” 6RP 9-10.

Devenny was sure, however, that Olsen had broken the window out on her car, and that he had broken in. 6RP 8-9, 22-23. She did not dispute there was some sort of scuffle in the bedroom, either. 6RP 8-9, 22-23.

Jordan Olsen, now an adult, still remembered the main events of the incident and hearing Olsen asking, “[w]here’s Frank?” 6RP 41. He admitted, however, that he had not heard anything else. 6RP 31. He had lied when he claimed at trial to have heard the “die bitch” threat his mom had claimed Olsen had made. 6RP 31. He had also lied when he had testified that he saw his father “dousing” his mother with gas. 6RP 44-45.

In fact, he had not seen his dad pour anything - even before he knew the intruder was his dad. 6RP 45-46.

Jordan testified, however, that his mom had not asked him to lie. 6RP 45, 49. No one had. 6RP 45, 49. Instead, he had heard his mom say her version of events - that his dad had poured the gas, that he had said "die, bitch, die" or something similar - and then had heard the police talk about that version of events as if it was what had happened. 6RP 45. For Jordan, who was only 13 at the time of trial, his mom's stories essentially "became my reality of the situation." 6RP 45, 49.

When the prosecutor asked, "nobody counseled you on telling the truth or said anything to you about what you should say," Jordan answered, "[n]o." 6RP 49. He then went on:

I wasn't trying to make up anything. My - - it was a traumatic incident for me. And with most traumatic incidents, I try and not think about it at all and almost block it from my memory. But what I had heard several times from other people's stories became my story.

6RP 49. Jordan and his mom both made efforts to try to remedy the effect of their lies, reaching out, he said, trying to correct his testimony several times. 6RP 46. They had finally found an attorney to take the case and that was the current motion. 6RP 46.

D ARGUMENT

THE LOWER COURT ERRED AND ABUSED ITS
DISCRETION IN DENYING THE MOTION

After Mr. Olsen moved for a new trial, the lower court determined that it needed to hear testimony from the recanting

witnesses - and the prosecution should have a chance to cross-examine. The court erred and abused its discretion in then holding the evidentiary hearing on the motion for a new trial without allowing Mr. Olsen to be present or assist counsel at the hearing.

In addition, the judge applied the wrong standard in denying the motion. Finally, the judge's behavior below was such that the appearance of fairness and judicial norms were violated and the new trial hearing should therefore be in front of a new judge.

1. Error in holding the evidentiary hearing without allowing Mr. Olsen to be present or assist

First, this Court should reverse and remand for a new hearing on the motion for a new trial, because the lower court abused its discretion and erred in refusing to allow Mr. Olsen to be present, assist or testify at the evidentiary hearing on that motion.

a. Relevant facts

At the first hearing on the motion, counsel was in another court and thus absent. 1RP 2-3. Judge Dalton went forward, discussing the case briefly with the prosecutor, who told the judge the process the state wanted her to use. 1RP 2-3. The prosecutor told Judge Dalton the state did not have to respond to the motion unless she ordered it, suggesting the court could just decide based on the affidavits. 1RP 2-3. The judge also said she was not sure if she was going to "anticipate any oral argument." 1RP 3. She set the timing for the state's response and said counsel would be informed. 1RP 3-4.

When the parties next appeared, they argued about what

process the judge should use to decide the motion. 3RP 1-2. Counsel argued the judge should “retain jurisdiction” and grant what he to as a “reference hearing” - an evidentiary hearing in which the court would hear from the witnesses. 3RP 1-2. Counsel declared, “I don’t know how the court assesses their credibility without hearing from them.” 3RP 2.

Judge Dalton stated her belief that first, she had to determine if there was “corroboration” to the recantations. 3RP 2. If she found such corroboration, she said, she would need to then engage in “an assessment of credibility.” 3RP 2. She was “not clear” on “what needs to be corroborated,” however. 3RP 3. The state argued that the caselaw was not clear but that the “primary focus of the inquiry” was “credibility of the recantation in light of the trial.” 3RP 3.

The judge also stated her opinion that there was “significant corroboration” of the original testimony at trial, but counsel demurred. 3RP 4. He noted that, while there was significant corroboration of the break in and damage to the car, there was little to no corroboration on the facts of what was alleged to have occurred with the gasoline. 3RP 4.

Judge Dalton ordered a hearing, stating, “I do believe it’s necessary for me to have these individuals in the courtroom so that I can see them,” and suggesting that the prosecution should conduct cross-examination at that hearing “as to the issue of recantation and what has been going on in their lives between then and now.” 3RP 3-4. The judge thought that evidence “would be important to the

court's analysis of credibility[.]” 3RP 3-4. The prosecutor argued that the court could just base its decision on written documents and rely on its memory from the first trial in determining credibility. 3RP 5.

Indeed, the prosecutor said, the court should compare its assessment of credibility of the testimony at trial, “compare the strength of the State’s case” to the recantation in that light, and deny the motion. 3RP 4-5.

At that point, Judge Dalton again stated her lack of understanding of the role she had to play, saying “I don’t know because the law doesn’t tell me what I need to corroborate.” 3RP 6-7.

The judge was also concerned about the motive for recantation, wondering if it was just that the witnesses were feeling “bad about what” they had done in testifying. 3RP 10. She wanted an evidentiary hearing in order to have “an opportunity to hear from both of the witnesses” and to give the state “an opportunity to also ask some questions.” 3RP 11.

When the discussion turned to timing and counsel mentioned the need to transfer Mr. Olsen back from the Department of Corrections (DOC) for the hearing, the judge then interrupted. 3RP 11-12. She asked, “[h]e doesn’t need to be here before the hearing, does he?” 3RP 11-12. Counsel responded that he needed his client nearby to be prepared and, in addition, might want Olsen to testify. 3RP 12.

Judge Dalton, however, said Olsen would not be testifying, because there would be “nothing about his testimony that would be

relevant to whether the witnesses are or aren't credible." 3RP 12.

Ultimately, the judge was willing to have Olsen transferred back to be able to have him consult with counsel, but she was clear that he would not "be here in the courtroom for the motion for a new trial." 3RP 13. Counsel argued that an evidentiary "reference hearing" was a "critical stage of the proceedings" but the prosecutor argued that Mr. Olsen had no rights in the hearing and the entire conduct of the proceeding was up to the court's total and absolute discretion. 3RP 13. The judge said she was willing to reconsider her rulings, if counsel found some relevant caselaw. 3RP 14.

On June 5th, the date for the scheduled hearing, DOC had failed to transport Mr. Olsen. 4RP 2. Counsel noted this and the judge then inquired, "[s]o you still need an opportunity to discuss this with him?" 4RP 2. Counsel again argued that Mr. Olsen should be present for the evidentiary hearing. 4RP 2-3. He admitted, however, that he could not come up with a case saying so "off the top" off his head. 4RP 2-3. He had not filed a brief on the issue, despite his earlier promise. 4RP 2-3; see 3RP 14.

Judge Dalton again told counsel, "I will need you to brief the issue about his attendance at a reference hearing." 4RP 3. She was sure her discretion was absolute on the issue. 4RP 3. The judge also said that, "[g]iven the nature of the hearing itself," the recantation and what the judge thought were the "overarching issues of domestic violence," her "inclination" was not to allow Olsen to be present. 4RP 2.

Judge Dalton then spoke directly to the proposed witnesses, warning them that they had testified under oath at trial and that they had a right to consult with an attorney about any potential testimony. 4RP 4. She cautioned them, “[y]ou may or may not have a Fifth Amendment privilege, if what you say under oath could potentially constitute a crime.” 4RP 4-5.

On June 26, another short hearing occurred and the issue was again discussed. 5RP 2. Counsel said he had done some research but could not find a case “directly on point.” 5RP 2. He still objected, however, to the court’s ruling that Mr. Olsen could not be present. 5RP 2-3. Counsel argued that he needed the ability to consult with Mr. Olsen “if unexpected things happen,” and that the court’s ruling excluding Olsen thus also impaired Olsen’s right to counsel. 5RP 2-3.

Judge Dalton thought it was sufficient that counsel was there to represent Mr. Olsen’s “interests in the courtroom.” 5RP 3-4. Counsel argued that he thought it was a “critical stage” and that Mr. Olsen would have Sixth Amendment or confrontation clause rights if there was testimony under oath. 5RP 3-4. The prosecutor argued that, like “[a]ll post-conviction matters,” there were no rights at issue and the judge had absolute discretion. 5RP 4. After the judge reaffirmed her ruling that Olsen would not be allowed to attend, she told a spectator who was allowed to ask a question about what “harm” having Olsen there might cause, saying, “[i]t doesn’t matter whether it’s good, bad, or the alternative. I’m not going to have him brought up.” 5RP 6. After again warning the witnesses about

potential criminal liability for felony perjury and suggesting they consult with attorneys, the judge then decided she had no authority to appoint either of them one. 5RP 1-9.

The next day, June 27, 2017, at the evidentiary hearing on the motion for a new trial, counsel noted for the record that Mr. Olsen was absent, “pursuant to the Court’s order[.]” 6RP 1-2

- b. Mr. Olsen had the right to be present and to assist at the evidentiary hearing

The trial court erred and violated Mr. Olsen’s limited due process rights and CrR 3.1(b)(2) rights to counsel by holding the evidentiary hearing without Olsen, thus also refusing to allow him to assist counsel during the hearing.

In general, federal and state courts have found no Sixth or Fourteenth Amendment right to counsel and it is not a “critical phase” of a criminal trial proceeding where the defendant brings a post-conviction motion for a new trial. See, Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed.2d 549 (1987); In re the Personal Restraint of Bonds, Jr., 165 Wn.2d 135, 196 P.3d 672 (2008).

In our state, however, the rules and practice of post-conviction review are different - and more broad. See In re the Personal Restraint of Runyan, 121 Wn.2d 432, 439, 835 P.2d 424 (1993); see also, In re the Personal Restraint of Tsai, 183 Wn.2d 91, 103, 351 P.3d 138 (2015). Both trial and appellate courts hear collateral challenges to state criminal convictions. See RAP Title 16 (setting forth appellate “personal restraint petition” procedure); CrR

7.8(b)(2).

Here, Mr. Olsen brought his motion in the trial court under CrR 7.8(b)(2). That rule, titled “RELIEF FROM JUDGMENT OR ORDER,” provides as follows:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

. . .

- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5[.]

CrR 7.8(b)(2).

The rule sets forth the procedure to be used, requiring that the request “shall be made by motion stating the grounds. . . and supported by affidavits[.]” CrR 7.8(c)(1). Further, the rule provides that trial court “shall” transfer the motion to the Court of Appeals for consideration as a personal restraint petition “unless the court determines that the motion is not barred by RCW 10.73.090 and either (I) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.” CrR 7.8(c)(2).

If the trial court does not transfer the case to the Court of Appeals, the lower court then “shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.” CrR 7.8(c)(3).

CrR 7.8 does not explicitly provide that the procedure used upon such a motion includes the right to counsel but in fact there is such a rule-based right. State v. Robinson, 153 Wn.2d 689, 107 P.3d

90 (2004). CrR 3.1(b)(2) provides, in relevant part, that “[a] lawyer **shall** be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review” (emphasis added).

Counsel is not just provided for at the lower court level, either; under RAP 16.11, this Court also has the authority to appoint counsel in a request for collateral relief brought by way of personal restraint petition. RAP 16.11; Robinson, 153 Wn.2d at 695.

The RAP provision was adopted in essentially the same form as now in 1976, more than 40 years ago. Robinson, 153 Wn.2d at 695. Even before that rule, however, former CrR 7.7 (1973), provided for appointment of counsel at state public expense for some requests for post-conviction relief. Robinson, 153 Wn.2d at 695; see former CrR 7.7(b), (e) (1973).

In Robinson, supra, the Supreme Court discussed the application of CrR 3.1(b)(2) and the right to counsel when a defendant files a motion for a new trial or to set aside a verdict under CrR 7.8. Robinson, 153 Wn.2d at 697. First, the Robinson Court noted that a trial court may deny such a motion without holding a hearing, “if the facts alleged in the affidavits” supporting the motion “do not establish grounds for relief.” Robinson, 153 Wn.2d at 697.

Next, the Court turned to the rules providing for post-conviction, post-sentencing review. 153 Wn.2d at 697. The Robinson Court noted that, in both former CrR 7.7 (1973) and RAP 16.11, there is a right to counsel once the court has made a preliminary finding, serving a sort of “gatekeeping” role. Robinson, 153 Wn.2d at 696.

Under RAP 16.11, appointment is authorized in the court of appeals once the chief judge has made the initial determination that the personal restraint petition establishes “grounds for relief.” Robinson, 153 Wn.2d at 696. Former CrR 7.7 (1973) similarly allowed appointment of counsel at public expense once there had been a determination that the petition was not “frivolous.” See Robinson, 153 Wn.2d at 696.

As a result, the Robinson Court held, the CrR 3.1(b)(2) right to an attorney for post-conviction relief under CrR 7.8 is subject to the same threshold determination. 153 Wn.2d at 696. If the trial court does not find that the motion or request establishes “grounds for relief,” the judge may “dismiss the petition or deny the motion without a hearing on the merits.” Id. But if the judge decides to hold a hearing on the merits, then the movant has a right to counsel under CrR 3.1(b)(2).

Further, the defendant need not show he will ultimately prevail in order to meet that initial threshold of establishing “grounds for relief.” 153 Wn.2d at 696-97. Instead, the CrR 3.1(b)(2) obligation to provide counsel arises “after an initial determination has been made that the motion is **not frivolous.**” 153 Wn.2d at 696 n. 6 (emphasis added).

Thus, once the trial court has determined that a motion for a new trial is not frivolous, under CrR 3.1(b)(2), the defendant has the right to counsel to pursue that motion. In Robinson, because the trial court had summarily denied the defendant’s motion and not

held a hearing, the court had effectively made the required finding that the motion was frivolous. 153 Wn.2d at 696. In contrast, if the trial court decides to hold an evidentiary hearing, implicit in that decision is the finding that sufficient facts were alleged to warrant that hearing. State v. Harrell, 80 Wash. App. 802, 911 P.2d 1034 (1996).

Here, the trial court and prosecutor were simply wrong. Mr. Olsen had a right to counsel under CrR 3.1(b)(2). But counsel was wrong, too. The post-verdict, post-sentencing motion for a new trial was not a “critical stage” of the criminal proceeding and no state or federal constitutional right was involved. Mr. Olsen *did* have a rule-based right to counsel and that right was improperly infringed below, but counsel failed to cite the rule or Robinson and the trial court therefore continued to labor under the misimpression that there were no standards or rights involved once an evidentiary hearing was being held. When a state creates a system which provides a right to seek redress in a court which is not constitutionally required, the state’s procedures must still comport with minimal due process rights. Evitts v. Lucey, 469 U.S. 387, 394, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). As the Evitts Court declared, “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause.” 469 U.S. at 401. Refusing to allow Mr. Olsen to be present to assist his counsel during the evidentiary hearing interfered

with his right to counsel under CrR 3.1(b)(2).

Further, the Court should address this issues despite counsel's failure to raise it the proper context of the rule-based right - instead of the constitutional arguments he made. Counsel is ineffective when he or she falls below a certain minimum standard and that failure prejudices the defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Robinson was decided in 2004; the motion was filed on Mr. Olsen's behalf years later. Failure to cite controlling case law is ineffective assistance where it prejudices your client. See State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980).

Had counsel cited the correct rule and provided copies of Robinson, Judge Dalton would have abused her discretion in not then holding that mr. Olsen had a rule-based right to counsel.

Mr. Olsen was also entitled to be physically present at the hearing. In 1895, in *dicta*, our state's highest court declared that a court could hear a motion for a new trial in the defendant's absence. See State v. Greer, 11 Wash. 244, 39 P. 874 (1895). But the ruling was *dicta* (and thus superfluous). In Greer, the defense attorney explicitly waived the defendant's right to be present at the hearing. 11 Wash. at 248. Further, the Greer Court did not ask whether the defendant was entitled to be present at the hearing in the first place, instead declaring, "even if [the defendant] had a right to be present, it was waived[.]" 11 Wash. at 248.

The next discussion of the issue in this state appears to have

been State v. Ward (“Ward I”), 135 Wash. 482, 238 P. 11 (1925), and State v. Ward (“Ward II”), 139 Wash. 196, 246 P. 1119 (1926). Mr. Ward was convicted based upon the testimony of his daughter - with slight corroboration by her brother. Ward I, 135 Wash. at 482-83. Ward moved for a new trial based in part on the brother’s recantation. Id. After holding a hearing with the defendant and counsel in court and conducting an oral examination of the recanting witness, the trial court took the case under advisement. 135 Wash. at 483. It later denied the motion in writing. 135 Wash. at 483.

Shortly after, however, the court received a letter which it would describe as “purporting to come from” the sister, the “complaining witness,” also recanting and saying she had not been abused. 135 Wash. at 483-84. Without informing the defendant or defense counsel, the trial court ordered that victim brought from the “girl’s home” by the superintendent of that facility, then questioned her - and let the prosecutor question her - at length. 135 Wash. at 484. She ended up taking back her recantation and reaffirming her testimony at trial that she had been abused. 135 Wash. at 483. She said that she had lied when recanting because she did not want to see her dad in prison. 125 Wash. at 484. The trial court then declared it had “no doubt” that her trial testimony was “true” and that the motion for a new trial should be denied. 135 Wash. at 484.

On review, our state’s highest court chided the trial judge for “clearing his mind of doubt” about the recantation in this way. Id. The Court was concerned about the examination of the witness

occurring by the state and court without giving the defendant notice and an opportunity to be present or represented by counsel. 135 Wash. at 485. Even when affidavits are used, the Court noted, the opposing party still has “an opportunity” to respond to meet the “case made against him” as part of “equality and fairness.” *Id.*

The Court agreed that a trial court judge has the “power and right” to take oral testimony and have a hearing on a motion for a new trial - or to decide the issue based solely on affidavits. 135 Wash. at 485-86. If a hearing was held, however, the Supreme Court found, it was “nevertheless one of the most important rights relating to the introduction of evidence, in both civil and criminal cases,” to allow the defendant to be there and cross-examine the witness. 135 Wash. at 485-86. The Court also dismissed the caselaw holding that no constitutional provision or statute required that the defendant was present at a post-conviction motion as not controlling, under the relevant facts. 135 Wash. at 485-86. Put simply, the Court declared, “the taking of oral testimony was entirely discretionary and proper,” but “it was improper to do it without notice to appellant or his attorney.” Ward I, 135 Wash. at 486.

After the hearing on remand, the defendant appealed again. Ward II, 139 Wash. at 196. In Ward II, the Supreme Court described its holding of Ward I, declaring, “[t]he judgment was reversed because of prejudice to appellant’s rights in the taking of adverse testimony on a motion a new trial without giving the appellant notice and opportunity to be present in person or by counsel.” 139

Wash. at 196. This time, however, because “[b]oth sides were accorded a fair hearing,” the Court affirmed. Id.

A few years later, in State v. Hager, 157 Wash. 664, 290 P. 230 (1930), the 16-year-old defendant was charged with second-degree burglary and grand larceny and convicted after a jury trial. 157 Wash. at 666. He moved for an arrest of judgment based on an affidavit that six jurors had signed “which tended to impeach their verdict.” Id. After the motion was filed, the prosecutor asked for - and the court granted - subpoenas for the six jurors, calling them into court without counsel or the defendant present. 157 Wash. at 667-68. The judge then asked the jurors if any of them wanted to say anything about the affidavits, saying he would listen but they were not required to speak. 157 Wash. at 667. None did. 157 Wash. at 667. On appeal, the Supreme Court compared the situation to a motion for a new trial, then broadly cited Greer as holding that, when a motion for a new trial was being heard, “the presence of the accused is not necessary.” Hager, 157 Wash. at 556-57. The Court gave no other explanation and went no further into the discussion. Id.

A few years later, in State v. Walker, 13 Wn. App. 545, 536 P.2d 657, review denied, 86 Wn.3d 1005 (1975), the court of appeals addressed the issue in the context of post-trial motions which had been filed after the filing of a notice of appeal. 13 Wash. App. at 546. That case, however, involved the due process right to be present at a hearing regarding your own competency to stand trial in the first place. Id.

Nevertheless, in that context, the appellate court noted that, while Greer seemed to hold that a motion for a new trial could be held without the defendant being present, those cases did not involve testimony being taken or an evidentiary hearing on a motion. Walker, 13 Wn. App. at 546-47. The Court then held, “in this jurisdiction as in others,” evidence should not be taken in the absence of the defendant, who “had the right to participate and be present to contradict the witnesses who testified and to assist counsel by bringing to his counsel’s attention matters which might be known only to the defendant.” Id.

Those same principles should apply where, as here, the trial court has made the determination that an evidentiary hearing should be held. Counsel specifically noted that he needed Mr. Olsen present to assist while the witnesses were on the stand. Further, taking evidence and ruling on it in the defendant’s absence was inconsistent with the holdings of Ward I and Ward II. This Court should so hold and should reverse and remand for a new hearing, at which Mr. Olsen should be allowed to be present.

2. The lower court abused its discretion in denying the motion by applying an improper standard

Even if reversal and remand for a new hearing on the motion for a new trial were not otherwise required, this Court should grant Mr. Olsen a new hearing on his motion for a new trial, because the lower court applied an incorrect standard as a matter of law, and ultimately abused its discretion in denying Mr. Olsen’s motion.

To warrant a new trial based on newly discovered evidence, the defendant must establish that the evidence 1) will probably change the result of the trial, 2) was discovered since trial, 3) could not have been discovered before trial with the exercise of due diligence, 4) is material, and 5) is not merely “cumulative or impeaching.” State v. Swan, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990). The trial court’s factual findings are reviewed to determine whether they are supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). If so, the findings must also be sufficient to support the court’s conclusions of law. Id.

Here, the trial court found all of those standards met but one - that the evidence “will probably change the result of the trial.” But the judge abused her discretion in reaching that conclusion, by applying the wrong standard as a matter of law.

In general, this Court reviews a discretionary decision such as a denial of a motion for a new trial for “abuse of discretion.” See State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, such as when it depends upon findings of fact not supported by substantial evidence in the record. In re the Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). A decision is based on “untenable reasons” - and the trial court has abused its discretion - if the decision is reached by applying the wrong legal standard. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Here, the trial judge denied the motion based on her conclusion that the recantations were not credible, but she based that conclusion applying the wrong standard. To decide a motion for a new trial based on recantation evidence, the trial court makes a “threshold inquiry” into the “reliability” of the recantation, based on the relevant circumstances of that evidence coming to light. Macon, 128 Wn.2d at 799-800. The question is whether a “reasonable juror” would find the recantation reliable, given the circumstances under which it was made. Id. The court looks at the relevant circumstances such as the age of the witness who is recanting, the timing and circumstances of the recantation, and possible motives or reasons to recant. Macon, 128 Wn.2d at 799-800.

Thus, where the motion for a new trial was based on recantation of a youthful victim, the trial court did not err in denying the motion after finding that pressure from family members who did not believe the initial accusations had coerced the victim to recant. State v. Eder, 78 Wn. App. 352, 357, 899 P.2d 810 (1995), review denied, 129 Wn.2d 1013 (1996). And where a victim who was five at the time of trial and had lived with a supporting relative but was moved to live with her unbelieving mother and then recanted, the trial court relied on testimony indicating the child was “malleable” and that the other evidence at trial corroborated the original testimony, in denying the motion. Macon, 128 Wn.2d at 802-803.

Instead of applying the proper standard, here Judge Dalton

reached her conclusion that the recantations were not “credible” based not on the circumstances of the recantations or the facts surrounding them but instead by applying a quasi-sufficiency of the evidence analysis based on the evidence at trial. The judge reached her conclusion based on her belief that 1) the recantations were “not corroborated by the other evidence at trial,” 2) the recantations were “not consistent” with the “behavior” described at trial or “the observations from other objective witnesses,” 3) the recantations were not consistent with “Ms. Devenny’s own testimony about the event” at the first trial and 4) that the recantations “do not seem reasonable in light of all the other evidence.” CP 378-91.

It is irrelevant, of course, whether Devenny’s *recantation* was inconsistent with her testimony at trial - that is the whole nature of a recantation. Further, whether the evidence at the first trial might have been seen as sufficient to support a conviction says nothing about the circumstances of the recantation. Nor was it required for the trial court to find that there was evidence at the first trial indicating the witnesses were lying *then*. Regardless of how credible they may have seemed at trial, it was their credibility in recanting that the judge was required to consider, not sufficiency of the evidence.

Had the judge applied the correct standard, the recantations would have been deemed credible and the motion then granted. Starting with Jordan, the timing and circumstances of the recantation and the possible motives support finding that the

recantation was credible.

Jordan was just 12 years old during the incident, 13 at the time of the trial. As a result, he suffered from the “vulnerabilities of youth,” recognized by the highest court in our country and in our state. See Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 825 (2010); State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). Those vulnerabilities are cognitive and neurological developmental differences which occur naturally as a result of youth and usually disappear as a young adult in the early twenties. Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The vulnerabilities, often called the “mitigating qualities of youth,” include a lack of maturity and underdeveloped sense of responsibility, an increased inability to resist taking “impetuous and ill-considered actions and decisions,” increased inability to resist pressure from peers and figures of authority (including a need to “please”), and increased susceptibility to outside pressures, including a reduced ability to control or escape their environment. Houston-Sconiers, 188 Wn.2d at 18-19.

Thus, where police stop and question a 13-year-old as opposed to an adult, a different standard applied to determine whether the defendant would have felt “free to leave” for the purposes of their rights under Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). In J.D.B., the high Court recognized as “beyond dispute” that children respond differently to police and

figures of authority than would an adult. 564 U.S. at 264.

The defendant in *J.D.B.* was 13 years old and a uniformed officer talked to him in a school conference room, along with an assistant principal and another officer. 564 U.S. at 266. They started with small talk and then ended up asking about alleged crimes. *Id.* The youth was not read his rights first and was never told he was free to leave the room or did not have to speak. *Id.* He ended up confessing and writing a statement. *Id.* The crucial issue was whether he was “in custody” for purposes of the police questioning, i.e., whether a “reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave,” applying an objective standard. 564 U.S. at 271-72.

The Court first noted that the child’s age was “more than a chronological fact,” that children are generally less mature and responsible, that they lack experience, perspective and judgment and are more vulnerable to outside pressures than adults. *Id.* The Court found that the custody inquiry should be made by examining whether a “reasonable juvenile” of the defendant’s age would have felt free to leave in the suspect’s position, rather than applying the standard for a “reasonable adult.” *Id.*

Here, like in *J.D.B.*, Jordan was only 13 at the time of trial - younger when the incident occurred. He was living with his mother and testified it was his “instinct” to protect her. It was dark, the incident was fast, there was screaming and he was scared. He testified that he heard his mom tell officers that the gas had been

poured and that she had been threatened, and that became part of his narrative, too.

At the motion hearing, however, the judge faulted him as if he had been a full grown adult and not barely a teen when he had testified at trial. Instead of considering how his youth and accompanying vulnerabilities at the time of trial could well have led him to testify falsely in support of his mom, the judge appeared to just dismiss the idea that the conversation had occurred based on those vulnerabilities.

For example, the court clearly applied an adult standard and understanding of functioning memory and importance when expressing disbelief that Jordan would not know exactly the date[when his mother had told him that she had lied about his father at trial, although he knew it had been a few years before. 6RP 53. At that hearing, the following exchange occurred:

[JUDGE]: Right. So when did your mother tell you that she had lied during the trial?

A: I don't - - I don't recall. I couldn't give you a date or anything.

Q: How old were you?

A: I'm not sure. It's been eight years, and it was - - I couldn't give you a time frame. Probably a couple years or so.

Q: It seems to me that that would be a big deal to all of you if you knew that your father had been convicted based on a lie, but you don't remember at what point that happened?

A: No.

6RP 52-53. The judge then moved on to examining Jordan about the nature of his memory and when he realized he had lied:

[JUDGE]: At what point did you realize or when did you realize that what you had told everyone was not real, that it was a thing - - it was what, a false memory?

A: Could you rephrase the question?

Q: Well, you said you testified to certain details because you had heard other people saying that, your mother saying those things, and so that became your reality.

Was that a false memory? When you say it became your reality, did you know it was true or not true?

A: I'm confused by that question. Are you asking me, was the reality that I had thought was my reality, was that true?

Q: Correct. What you testified to.

A: I'm honestly very confused right now. I'm not sure what you're trying to ask.

Q: So when I hear someone else say that, because of what someone else said that they care about, their mother, about an event, even though they didn't have an independent recollection, that what that person said is true, that's their reality. When someone says that's their reality, what I hear is, that's their actual memory. That's what they believe actually happened.

Is it true for you? Did you actually believe that that happened?

A: Yeah.

Q: So when were you - - when did you get to a point where you didn't believe that happened anymore?

A: Once I was told.

Q: And when was that?

A: I - - like I said, maybe a couple years afterward.

6RP 54-55. The exchange then went on:

[JUDGE]: Okay. So what did you do with that information?

A: I don't know. I tried to - - for several years after the incident, I had tried to figure out exactly what happened and why, you know, so - - I mean, the whole time I had been trying to get all my ducks in a row and figure out what actually happened.

Q: Because you didn't trust your memory?

A: No.

Q: You did not trust your memory?

A: Correct.

Q: How is it that you trust your memory now?

6RP 54-55.

Despite the judge's skepticism at the hearing, in fact the situation in which Jordan found himself and his developmental age at trial made it highly likely that, as he said, he was influenced to misrepresent and parrot crucial facts his mom had said at trial. And those are the very facts she now admitted lying about.

As far as the recantation, by that time, Jordan was a young adult in his 20s. As such, he was far less likely to be susceptible to outside pressures, or act impulsively, or lie to protect and support his mom who kept a roof over his head and with whom he was so close that as a teen, they still slept next to each other occasionally in bed.

Notably, Jordan's testimony at trial was equivocal in many

ways relevant to the crucial facts, now recanted. He first did not remember any threats, and had to be prompted several times before he finally repeated at trial the “die, bitch” comment his mom had claimed to hear - the crucial evidence of intent and of the threat to kill required for felony harassment. See RP 587. Jordan admitted that it was very dark and he, “couldn’t see much” but still maintained he could see the intruder pouring gas and the color of the gas can. RP 585-86. He was present and heard his mom talking to the officer before he was interviewed, too.

The circumstances of the recantation for Devenny, too, support a finding of credibility. At the time of the recantation, they were no longer involved. He had been in custody for many years; thus, even assuming the dynamic of domestic violence cycles, she was not under the sway of living with or seeing Olsen at the time of the recantation. Nor was there any evidence she was in some way beholden to his family for rent or subject to some motive or pressure to recant. Indeed, the testimony of both of the recanting witnesses was that they had not talked with Olsen about their recantations or “collaborated” in writing them out.

In fact, the recantations themselves support a finding of credibility, because of their content. Neither Jordan nor his mom let Olsen truly off the hook. Olsen’s convictions for malicious mischief and first-degree burglary were untouched by the recantations. Rather than clearing him completely, the recantations simply clarify what the witnesses actually saw, heard and experienced and

admitted that they had exaggerated and even lied at the trial.

Had the court applied the correct standard, she would have likely found the recantations credible and thus likely to change the result at trial for the felony harassment and second-degree attempted murder convictions. Indeed, applying her own analysis, she was incorrect. Contrary to what the judge declared, the recantations *were* corroborated by the other evidence, they *were* consistent with the behavior described and observations, and they *were* reasonable in light of the other evidence.

First, there *was* no other evidence but that which was recanted at trial for the felony harassment. That crime requires proof that the perpetrator knowingly threatened to kill the person threatened or any other person immediately or in the future and “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(b); State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2004). Because it regulates speech, the felony harassment statute is limited by the First Amendment so that the state may only criminalize “true threats” which are clearly made with the required intent rather than hyperbole or jokes. State v. Williams, 144 Wn.2d 197, 206-207, 26 P.890 (2001).

Thus, there had to be a “threat to kill” communicated by Olsen to Devenny which she reasonably believed would be carried out. And the evidence of that in this case - the only threat to kill alleged - were the claims from Devenny, repeated by Jordan, that

Olsen had made the “die, bitch” comment during the incident. Both of those statements were recanted.

Further, those statements were relied on to support the second-degree attempted murder - as was the now-recanted claims that, despite the darkness in the room, Devenny and Jordan had seen the intruder pouring a clear liquid and noted the color of the container in his hand. To prove the attempted murder the state had to show the intent to kill and taking a substantial step towards that act. Here, the intent was supported by the now-recanted “die, bitch” claim, and the “substantial step” was the pouring of the gas, with the lighter to hand. The pouring, the presence of the lighter and the threat, all now recanted, were essential parts of the state’s case proving the crime.

The trial court correctly found that the recantations were not “merely impeaching.” But newly discovered evidence which is impeaching would “likely affect the verdict” if it “devastates a witness’s uncorroborated testimony establishing an element of the offense.” State v. Savaria, 82 Wn. App. 832, 919 P.2d 1263 (1996), overruled in part and on other grounds by, State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2004).

In Savaria, the defendant was convicted of felony harassment for calling the victim and threatening to kill her. It was error for the trial court to deny the motion for a new trial based on newly discovered evidence of her phone records which would have impeached her claim that he made that call. 82 Wn. App. at 837-38.

Even though the newly discovered evidence would technically “impeach” the witness at trial, it also went directly to the evidence of the threat. Id. Further, it was used to show the victim was in “reasonable fear” of the defendant. And the defendant denied having made the threat at all. Id.

Similarly, here, the newly discovered evidence would “likely affect the verdict” for both the attempted second-degree murder and felony harassment crimes. Those counts were both based on the testimony which the crucial witnesses have now admitted was a lie. As this Court itself noted in the original appeal, Olsen was convicted of attempted second-degree murder and felony harassment for “pouring gasoline on and threatening to kill Bonnie Devenny.” Olsen, 175 Wn. App. at 173-74.

The trial judge applied the wrong standard in denying the motion for a new trial. Because of that abuse of discretion, reversal and remand for a new hearing on that motion is required.

3. The judge’s conduct implicated the appearance of fairness and a fundamentally fair proceeding

Reversal and remand for a new hearing before a different judge should also be granted, because the judge greatly exceeded the bounds of proper conduct and the result was a proceeding which was far from fundamentally fair, where the judge acted in a partisan fashion in violation of the applicable code of judicial conduct and the appearance of fairness doctrine.

a. Relevant facts

At the motion hearing, once the parties had conducted their examinations, the judge took over. First with Devenny and then with Jordan, Judge Dalton questioned them at length. 6RP 24-37, 50-62.

The judge questioned Devenny about whether Olsen would have been given permission to stay over if he had asked and Devenny said yes, that he could have stayed in the “boys’ room.” 6RP 25-26. Devenny maintained that she would not have been afraid if she had realized that it was him standing at her bed. 6RP 26.

Judge Dalton also questioned why it would have been that a stranger would have come into her home and stood next to her bed, “gas can in hand,” also asking, “[w]hat do you think a stranger would have intended from that?” 6RP 27. Ms. Devenny responded that she did not really know, although it could have been to burglarize the house. 6RP 27. Judge Dalton then declared, “[m]ost burglaries don’t happen with gas in hand.” 6RP 27. Devenny responded, “[o]kay.” 6RP 27.

After Devenny said that she had decided to claim the candle lighter part of the incident after seeing the pictures, the following exchange then occurred:

[JUDGE]: So you made the decision to lie at the nursing facility that was next-door to your home?

A: Correct.

Q: At what point in time did you tell Jordan to lie?

A: I didn’t tell him to lie.

Q: Did you ever tell him to lie?

A: No.

6RP 28-29. The judge appeared to disbelieve the answers and continued to confront Devenny, stating, “[s]o you didn’t have any opportunity to collude with Jordan” or tell him “you make sure that you tell them that.” 6RP 29. The following exchange then occurred:

[JUDGE]: So why would Jordan’s recollection indicate that he poured gas on you as opposed to your - -

A: Maybe - -

Q: I mean, it seems coincidental, doesn’t it, that he says[,] that Jordan - -

A: Maybe he - -

Q: - - said he poured gas?

A: You know, because that’s what I was saying. “He poured gas on me.”

6RP 29-30. The judge then asked if Devenny had told her son to tell the truth at trial and Devenny admitted she “really didn’t do anything with him” regarding his testimony. 6RP30.

With Jordan, the judge, again, conducted her own examination. 6RP 50-51. She questioned whether Jordan’s “reality” had been impacted by the time he gave a statement to police, eliciting that Jordan had been “able to remember” that night and what he told police that night would be true but it had “morphed” after hearing what his mom had claimed occurred. 6RP 50-51.

The judge asked Jordan about his description of seeing the gas can at trial, then asked, “[i]s that still your truth?” 6RP 52. When

Jordan said “[n]o” and that he did not recall seeing a gas can that night, the judge then established that Jordan thought a can like that was in the garage. 6RP 52. The judge then examined Jordan about his testimony of his dad saying, “[w]here’s Frank,” asking if it was “before you leapt up to get him, or was that while you were fighting?” 6RP 52. When Jordan said he “couldn’t tell” the court, that he remembered the statement but could not say when it was, and the following exchange occurred:

- [JUDGE]: Well, we know that it couldn’t have been after the fight, right?
- A: I don’t - - I don’t know that.
- Q: Well, your dog bit you, and then what happened?
- A: I fell to the ground and got up and looked around the house.
- Q: Okay. Nobody was there?
- A: Right.
- Q: Including your father?
- A: Yeah.
- Q: So - - and your mother wasn’t there?
- A: Right.
- Q: So do you think it was possible he said “Where’s Frank,” while he was not there?

6RP 52-53.

The judge then queried Jordan about whether he had talked to his dad about the incident, and Jordan said he had not discussed the incident with his dad. 6RP 55-56. The judge then asked about

Jordan visiting his dad and, even though Jordan had said he had not discussed the issue with his dad, the judge then asked, “[a]nd what has he told you about this?” 6RP 56. When Jordan again said he had not talked about the incident with his dad, he also said he thought it would be “sort of a conflict of interest to discuss the story with my father and also very uncomfortable for me, too.” 6RP 56. The judge asked why it would be uncomfortable and Jordan said, “why would I want to discuss that with him? It was a traumatic incident.” 6RP 56. Jordan said he was older now and would rather focus on his future relationship not his past with his dad. 6RP 56.

At one point, the judge said she remembered him testifying about the incident in California involving the cord or belt. 6RP 57-58. It was actually another brother who gave that testimony and the judge did not remember. 6RP 57-58. The judge asked Jordan what he thought “about all that,” and Jordan said he did not think “much.” 6RP 56-57. The following exchange then occurred:

- [JUDGE]: So when did this collaboration occur that got you actually to the point of doing affidavits?
- A: What do you mean? What collaboration?
- Q: Well, you and your mother were together when you did your affidavits.
- A: No.
- Q: You did that separately?
- A: Yeah.
- Q: Okay. So how did that happen that these affidavits were even done?

A: Well, we had been trying to - - we had talked to, I think, three different lawyers or - - and we had been trying to get to this point for a long time. Once someone was actually - - came up to the table and was ready and they wanted to go for it, we went for it.

6RP 58. The judge asked Jordan “who is ‘we,’” and the young man responded, “[m]y mother and I.” 6RP 58. The judge again asked, “[j]ust your mother and you? No one else?” 6RP 58. The judge asked “how long has this effort being going on,” and Jordan thought it had been possibly two or three years, remembering that they had met someone who was a motorcycle police officer, apparently regarding the case. 6RP 58. The following exchange then occurred:

[JUDGE]: Did you ever call the prosecutor’s office to tell them that this was not true, that the conviction was apparently based on lies?

A: Personally?

Q: Mm-hm.

A: No, I don’t believe I did.

Q: How about your mom, to your knowledge?

A: I wouldn’t have an idea.

Q: And why was that not on the table?

A: I wouldn’t know. My mother and I don’t communicate about everything.

Q: Well, wouldn’t you think that it’s a good idea to at least tell the prosecutors that you guys had lied?

A: Yes.

Q: I mean, they’re the ones that started this whole process of accusing your dad; right?

6RP 58-59. The judge then questioned why Jordan would have attacked without knowing who it was standing next to the bed. He said, “[b]ecause, when I went to bed, there was two people in the house, and when I woke up, there was three[.]” 6RP 58-59. The judge again asked, “I mean, why attack,” when Jordan could have just asked, “[h]ey, who are you, and what are you doing here?” 6RP 59. The judge also asked, “[w]hat difference does it make that there’s an intruder in the house? Why is that sinister?” 6RP 59-60. Once he knew it was his dad, he said, he was also aware that his dad had fought with his mother recently and he did not stop trying to thwart what he thought at the time was an attack. 6RP 60-61.

The judge then examined Jordan about whether his dad had permission to be there, that he would likely have been given permission if he had called to ask, but “he didn’t do that.” 6RP 61.

After the court’s questioning was through, counsel mentioned that the judge’s “skepticism” of what the witnesses were saying now in their recantations was clear, as was that the court was “taking an adversarial position” in its questioning, using a “cross-examination adverse” manner. 6RP 63. He said he had not objected because the judge was “going to be the one who exercises its discretion” and would be depending on what the judge believed. 6RP 64. The judge’s tone continued through argument with counsel noting it had come through in the questioning of the witnesses and discussions with counsel. 6RP 74. He felt the need to remind the court it “needs to look at this objectively and say, if her current

testimony is believed, would the jury probably reach a different result[.]” 6RP 74.

b. The judge’s conduct violated the relevant rules, due process and the appearance of fairness

The “appearance of fairness” doctrine is intended to prevent decision-making by anyone with any potential interest or bias. See State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). The reason for this rule is that, “[n]ext in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.” State v. Madry, 8 Wn. App. 61, 70, 584 P.2d 1156 (1972). There is no question that a trial judge may, of course, question witnesses by asking “clarifying question,” it must not “appear that the court’s attitudes towards the merits of the case” are reasonably inferred from the questioning. See State v. Carothers, 84 Wash. 2d 256, 267, 525 P.2d 731 (1974), disapproved of in part and on other grounds by, State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984).⁵ The trial judge exceeds that limit when she does not ask just clarifying questions but starts to establish parts of the state’s case it had not itself brought out. State v. Eisner, 95 Wn.2d 458, 626 P.2d 10 (1981); see also, former RCW 4.12.040 (2016) (unbiased judge).

The question is whether a reasonably prudent, disinterested person watching would conclude that all the parties in the case

⁵Harris was overturned on other grounds by State v. McKinsey, 116 Wn.2d 911, 810 P.2d 907 (1991).

received a fair, neutral and impartial hearing. See Tatham v. Rogers, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). Viewing the record here, the trial court's tone and questioning made it clear the judge had a bias, so that a reasonably prudent, disinterested person would have been concerned whether Olsen received a fair, neutral and impartial hearing. On remand for a new trial on Olsen's motion, the case should be before a different judge.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new hearing on Mr. Olsen's motion for a new trial, before a different judge.

DATED this 20th day of August, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us, and by first class postage prepaid, to Mr. Edward Olsen, DOC 782316, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 20th day of August, 2018,



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