

FILED
Court of Appeals
Division II
State of Washington

NO. 51173-8-II
10/22/2018 1:06 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARK OLSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-01567-6

BRIEF OF RESPONDENT

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SERVICE	<p>Kathryn A. Russell Selk Pmb #176 Seattle, Wa 98115-6655 Email: KARSdroit@aol.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED October 22, 2018, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....4

 1. Original Trial5

 2. Motion hearing.....10

III. ARGUMENT.....12

 A. OLSEN WAS REPRESENTED BY RETAINED COUNSEL THROUGHOUT THE TRIAL COURT PROCEEDINGS AND AS A RESULT HIS RIGHT TO COUNSEL OR NOT WAS NOT CONSIDERED BELOW AND THE TRIAL COURT PROPERLY EXCLUDED OLSEN FROM THE HEARING BECAUSE HE HAD NO RIGHT TO ATTEND.12

 1. There is no issue as to Olsen’s right to counsel because he had counsel.13

 2. There is only a limited, court rule based right to counsel in this post-conviction matter.14

 3. The trial court properly excluded Olsen from the evidentiary hearing.....16

 B. THE TRIAL COURT PROPERLY DENIED THE NEW TRIAL MOTION BY FINDING THAT THE RECANTATIONS WERE NOT CREDIBLE AND THENCE CONCLUDING THAT THE RECANTATIONS WOULD NOT PROBABLY CHANGE THE RESULT ON RETRIAL.20

 C. THE TRIAL COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE BY QUESTIONING A WITNESS AS AUTHORIZED BY THE WASHINGTON RULES OF EVIDENCE.....25

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

CASES

<i>Barber v. United States</i> , 142 F.2d 805 (4th Cir. 1944)	16
<i>Crowe v. United States</i> , 175 F.2d 799 (4th Cir. 1949)	16
<i>Moore v. Snohomish County</i> , 112 Wn.2d 915, 774 P.2d 1218 (1989).....	14
<i>Pennsylvania v. Finley</i> , 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).....	14
<i>State v. Carothers</i> , 84 Wn.2d 256, 525 p.2d 731 (1974)	26
<i>State v. Eisner</i> , 95 Wn.2d 458, 626 P.2d 10 (1981).....	27
<i>State v. Gassman</i> , 160 Wn. App. 600, 248 P.3d 155 (2011).....	22
<i>State v. Greer</i> , 11 Wash. 244, 39 P. 874 (1895)	18, 19
<i>State v. Grier</i> , 11 Wash. 244, 39 P. 874 (1895).....	18
<i>State v. Hager</i> , 157 Wash. 664, 290 P. 230 (1930).....	18
<i>State v. Harris</i> , 102 Wn.2d 148, 685 P.2d 584 (1984).....	26
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	14
<i>State v. Koloske</i> , 100 Wn.2d 889, 676 P.2d 456 (1984).....	14
<i>State v. Labeur</i> , 33 Wn. App. 762, 657 P.2d 802 review denied 99 Wn.2d 1013 (1983).....	14
<i>State v. Mabry</i> , 8 Wn. App. 61, 584 P.2d 1156 (1972).....	26
<i>State v. Macon</i> , 128 Wn.2d 784, 911 P.2d 1004 (1996).....	20, 21, 22
<i>State v. Olsen</i> , 175 Wn. App. 269, 309 P.3d 518 (2013).....	2
<i>State v. Olsen</i> , 180 Wn.2d 468, 325 P.3d 187 (2014).....	2, 13, 16
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172 (1972).....	26
<i>State v. Riofta</i> , 166 Wn.2d 358, 209 P.3d 467 (2009).....	22

<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005).....	15
<i>State v. Scott</i> , 150 Wn. App. 281, 207 P.3d 495 (2009).....	22
<i>State v. Walker</i> , 13 Wn. App. 545, 536 P.2d 657 (1975).....	16
<i>State v. Ward</i> , 135 Wash. 482, 238 P. 11 (1925).....	17
<i>State v. Ward</i> , 139 Wash. 196, 246 P. 1119 (1926).....	18
<i>Tatham v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012).....	27
<i>U. S. v. Provost</i> , 969 F.2d 617 (8th Cir., 1992)	20
<i>Washington is State v. Macon</i> , 128 Wn.2d 784, 911 P.2d 1004 (1996).....	21

STATUTORY AUTHORITIES

RCW 10.73.150	15
RCW 10.73.150(4).....	15

RULES AND REGULATIONS

ER 614	25, 28
ER 614(b).....	25, 27, 28
RAP 1.1(a)	15
RAP 16.15(h)	15

ADDITIONAL AUTHORITIES

, https://www.merriam-webster.com	25
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in not allowing the defendant to attend a post-conviction hearing?
2. Whether the trial court erred in denying the motion for new trial based on a finding that the recantation testimony was not credible and concluding that that newly discovered evidence would not probably change the result on retrial?
3. Whether the trial court erred by questioning a witness in a post-conviction evidentiary hearing?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Edward Mark Olsen was convicted of attempted second degree murder, domestic violence, first degree burglary, domestic violence, and third degree malicious mischief, domestic violence. CP 36-37. On April 11, 2011, judgment and sentence was entered, sentencing Olsen to 360 months of total confinement. CP 38. The trial court entered findings of fact and conclusions of law regarding the exceptional sentence. CP 52-53. The trial court relied on findings of aggravated domestic violence in imposing the exceptional sentence. *Id.* The Honorable Jeanette Dalton presided over the trial and sentencing.

Division II of the Washington Court of Appeals affirmed the conviction and sentence. *State v. Olsen*, 175 Wn. App. 269, 309 P.3d 518 (2013). Review was granted on the issue of the comparability of California convictions and the Supreme Court affirmed. *State v. Olsen*, 180 Wn.2d 468, 325 P.3d 187 (2014).

On January 31, 2017, Olsen asserted a motion for a “new trial” through retained counsel. CP 212. He asserted newly discovered evidence as the grounds for a new trial. CP 74. The newly discovered evidence is the recanted testimony of the victims of Olsen’s convictions, Bonnie Devenny, Olsen’s erstwhile significant other, and Jordan Olsen, Olsen’s son. CP 75. Affidavits by the victims provided incident testimony that was different than the testimony received at trial. CP 87-94.

The trial court ordered the state to respond to Olsen’s motion pursuant to CrR 7.8(c)(3). RP, 2/17/17, 4. The matter was set for hearing. Id. Later, the trial court granted a “reference hearing” on the matter because the court wanted to see the witnesses. RP, 4/14/17, 3.

The defense raised the subject of a production order to bring Olsen from prison for the hearing. RP, 4/14/17, 12. The state objected, arguing that Olsen had no right to attend. Id. Olsen’s attorney allowed that he may want Olsen to testify. Id. The trial court opined that Olsen’s

testimony would not be relevant to the question of the credibility of the recantations. *Id.* The trial court ruled that Olsen may be transported but that he would not be in the courtroom for the motion hearing. RP, 4/14/17, 13.

The defense persisted arguing that Olsen should attend an evidentiary hearing. RP, 4/14/17, 13. The trial court asked whether there is a constitutional right to appear. *Id.* The defense responded in the affirmative because the hearing is a critical stage. *Id.* The trial court iterated its ruling that Olsen could be transported from prison but could not attend the hearing unless the defense could produce case law conferring on him a right to attend. RP, 4/14/17, 14. Defense counsel said he would brief the issue. *Id.* No briefing on the issue was received.

At the next hearing, evidence was not taken because the process of transporting Olsen had failed. RP, 6/5/17, 2. The defense again asserted that Olsen had a right to attend the hearing. *Id.* The trial court did not change its ruling and again asked the defense to brief the issue. RP, 6/5/17, 3. The trial court added that its reason for excluding Olsen from the hearing was the “overarching issues of domestic violence.” *Id.*

Later, Olsen was transported and counsel was able to confer with him. RP, 6/26/17, 2.

After the attorneys questioned Ms. Devenny, the trial court had

some questions. RP, 6/27/17, 24-37. After the attorneys questioned Jordan Olsen, the trial court had some questions of him as well. RP, 2/27/17, 50-61.

The trial court entered a written order denying Olsen's motion. CP 378. The trial court ruled that

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

CP 380.

Findings of fact and conclusions of law were entered. CP 389. The trial court addressed the differences between trial testimony and the recantations in light of the other evidence in the case. The trial court repeated that "the recanting testimony of Ms. Devenney and Jordan Olsen are not credible." CP 391.

B. FACTS

Facts are drawn from the original certified appellate record and transcription of the instant hearing.¹

¹ Olsen's motion to incorporate the record from direct appeal has been granted. The state will cite to those volumes and refer to transcription of the present hearing by date.

1. Original Trial

Terrence Black worked the graveyard shift at the Wyatt House Retirement Center on Bainbridge Island. 3RP 229. Bonnie Devenny was a coworker. 3RP 230. On November 29, 2009, Devenny showed up around 4:00 a.m., screaming and banging on the front door of Wyatt House. 3RP 230-31, 239. Black let her and her 12-year-old son in. 3RP 230.

Devenny screamed that someone had broken into her house and poured gas on her while she was sleeping in bed. 3RP 231. She was hysterical; Black could barely understand her. 3RP 231. All he could really make out was that someone had broken in and poured gasoline on her. 3RP 231. She identified the person, but he could not understand who. 3RP 231. She did not appear injured, but said her legs were burning from the gas. 3RP 231. Black called 911 about five minutes after she got there. 3RP 232. Devenny could be heard in the background of the 911 recording. 3RP 233.

Bainbridge Island patrol officer Michael Tovar responded to the call from the Wyatt House. 3RP 239-40. He received the call from the dispatch center at 4:45 a.m. 3RP 241. He arrived two minutes later. 3RP 241. Devenny and her son were seated on the floor of the lobby when Tovar arrived. 3RP 242. She was hyperventilating and hysterical. 3RP 242. She was wearing shorts and the top of both her legs were very red.

3RP 242. Tovar asked her what was going on and Devenny responded that she was in bed and was awoken by her ex-husband, Olsen, pouring gasoline on her. 3RP 246. Olsen said, "Die, bitch, die." 3RP 246. She jumped up and knocked Olsen back. 3RP 246. They tried to exit through the hallway, but Olsen blocked the way. 3RP 246. Devenny then went into the bathroom and yelled for help. 3RP 246. She crawled out the bathroom window and ran to the Wyatt House, which was about a block from her home. 3RP 246.

Another officer, Walt Berg, arrived and heard Devenny telling Tovar that she had awoken to her ex-husband pouring gasoline on her and yelling "Die, bitch." Berg could smell gasoline when he walked in to the Wyatt House. 3RP 299. It was coming from Devenny. 3RP 299. Devenny appeared to be upset when Berg arrived, she was crying and looked scared. 3RP 305. Devenny was wearing shorts and a T-shirt and was barefoot. 3RP 313. Her son, JEO, also appeared to be upset. 3RP 313.²

The officers went to the residence. The front door was wide open. 3RP 250. They went in, looking for Olsen. 3RP 250. They did a sweep of the house. 3RP 250. There was no one in the house. 3RP 250. Tovar and Berg immediately smelled the odor of gasoline when they entered the house. 3RP 250, 300. The odor became stronger as they went down the

² During the direct appeal, Jordan Olsen was still a minor and referred to as JEO.

hallway. 3 RP 301. The gas odor was strongest in the master bedroom. 3RP 251, 302. In the master bedroom there was a small red plastic gas can on the floor at the foot of the bed. 3RP 253. The blankets and bed sheets were off the bed and messed up on the floor at the foot of the bed. 3RP 253-54, 302.

Devenney and her son were taken to a fire station to clean the gasoline off of them. 4RP 322-23. Detective Ziemba arrived and Devenney was still on the gurney in the back of the ambulance. 4RP 325. JEO was sitting next to her on the jump seat. 4RP 325. They both seemed shocked, very overwhelmed, confused and scared. 4RP 326-27. JEO did not want to leave his mother to talk to Ziemba. 4RP 327. Devenney had an injury on her leg. 4RP 326. Ziemba could smell the odor of gasoline, even though they had already changed clothes. 4RP 326.

Ziemba was with the victims no more than 30 minutes. 4RP 327. After talking to them, Ziemba went to the house. 4RP 328. Ziemba had called his partner, Christian Hemion and asked him to go to the house as well. 4RP 323,390. The screen from the bathroom window was laying in the yard. 4RP 330. There was an overpowering smell of gasoline in the house. 4RP 330, 392. It was strongest in the master bedroom. 4RP 393. The odor of gasoline in the bedroom was so strong it made Ziemba nauseous. 4RP 331. The master bedroom was in disarray; the bed clothes

had been thrown off the bed and were on the floor. 4RP 331, 393. The comforter was wet. 4RP 337,445.

Ziamba saw a lighter on the night stand next to the bed. 4RP 332, 393. The lighter was usually kept in a junk drawer in the kitchen. 5RP 612. He took it into evidence. 4RP 333. There was a gas can on the floor. 4RP 393. The can was near the corner of the bed closest to the door. 4RP 398. The can did not have a cap on it. 4RP 446. It was a one gallon, four ounce can. 4RP 447. There was a small amount of gas left in it. 4RP 447. There was not any other gasoline in the house. 4RP 447.

JEO testified that on the night of the incident, he got home around 1:00 a.m. 5RP 583. No one was in the living room when JEO got home. 5RP 606. He went into his mother's room to watch a Husky game, which his aunt had recorded. 5RP 583. He fell asleep about an hour into the game. 5RP 584. He heard noises and woke up. 5RP 584. He told his mother, but she told him to go back to sleep. 5RP 584.

Later, JEO woke up again and heard his dog pacing and whimpering. 5RP 584. Then he awoke to his mother screaming and someone pouring gasoline on them. 5RP 584. JEO saw it was his father, and tried to stop him. 5RP 585. The gas can looked like the one they kept in the garage. 5RP 586. Olsen said, "Where is Frank?" and "You are going to die." 5RP 587. Devenny had begun dating a man named Frank

Fullner. 5RP 617.

JEO and Olsen ended up struggling in the hallway and his mother escaped through the bathroom window. 5RP 585. The dog got involved in the altercation and ended up biting JEO. 5RP 587. The dog came down the hallway from the living room. 5RP 587. JEO fell to the floor, and when he got up, Olsen was gone. 5RP 585. JEO ran out the front door. 5RP 585. When he ran out of the house, he heard his mother screaming and ran after her. 5RP 588. They went to the home where she worked and someone let them in. 5RP 588. The police came and took them to the firehouse where they showered. 5RP 588. JEO was wearing only his boxers and some sox. 5RP 589.

Devenny sais that a few weeks before the incident, she and Olsen had a physical altercation and he struck her six times in the face. 5RP 619. She suffered a cut above her left eye. 5RP 620. She did not report it to the police because Olsen said she would be sorry if she did. 5RP 620.

The day of the incident, she went to bed around 10:00. 5RP 624. At that time, her car was parked in the driveway. 5RP 609. There was a garage door opener on the visor, and the windows were intact when she went to bed. JEO came in around 1:30 and asked if he could sleep in her room because he had heard noises. 5RP 624. He watched TV for some time and fell asleep. 5RP 625.

Devenny had not seen Olsen for over a week the night of the incident. 5RP 617. She had previously told him he could no longer stay at the house. 5RP 617. She had developed a relationship with Frank Fullner between Halloween and the date of the incident. 5RP 617. Fullner stayed over a few times when Olsen was staying there. 5RP 618.

Devenny awoke to Olsen pouring gasoline on her. 5RP 625. She struggled to get up, and Olsen told her he had a lighter and that she was "going to die this time, bitch." 5RP 626. He had the lighter in his hand and was swinging it around. 5RP 627. She took the threat seriously. 5RP 627.

JEO lunged at Olsen and forced him into the hallway. 5RP 635. She ran into the bathroom and escaped through the window. 5RP 635. She fled to the Wyatt House, where she had worked for several years. 5RP 636. She did not see the dog that night. 5RP 635. The dog was not in the room when he poured the gas on her. 5RP 635.

2. Motion hearing

Both Bonnie Devenney and JEO asserted affidavits with the new trial motion claiming that they lied at trial. CP 87-90, 91-94. Devenney alleged that she lied because she had met a new man and wanted Olsen to go away. CP 88. She wanted to break a cycle of splitting up with Olsen and then taking him back. Id.

Devenny claims now that she never saw a lighter. CP 89. She

claims that Olsen did not “pour” gasoline on her. Id. Devenny claims now that Olsen never said anything to her. Id. She now believes that she kicked the gas can in the struggle, causing it to spill on her. Id. She claims that she made up much of her trial testimony in order to punish Olsen. CP 89. Now, her children are growing up without a father and Olsen’s plight weighs heavily upon her. Id.

The affidavit of Jordan Olsen is similar. He now claims that Olsen did not utter any threats during the incident. CP 92-93. He now claims that he did not see a gas can or a lighter that night. CP 93. He claims that his trial testimony was in conformance with what his mother and other people said about the incident. CP 93-94.

Devenny’s hearing testimony began with her assertion that she was not truthful in her original testimony. RP, 6/27/17, 4. When she awoke, she kicked the gas can. Id. She knew she had kicked the can because she smelled gasoline. RP, 6/27/17, 5. He was not pouring the gas. RP, 6/27/17, 5, 6 She never saw a lighter. Id. Devenney never heard Olsen threaten her. RP, 6/27/17, 6. Her actions are explained by the fact that she was tangled in the bed covers. Id. Her fear and hysteria that was observed at the retirement home was simply because she had gasoline on her. RP, 6/27/17, 7.

Devenny iterated her affidavit statements that she lied at trial to get rid of Olsen. RP, 6/27/17, 7-8. She could not explain why Olsen had a

gas can in the bedroom after he had broken into the house. RP, 6/27/17, 35.

Jordan Olsen recalled his father saying “where’s Frank” during the incident. RP, 6/27/17, 40. But he did not remember any threats. RP, 6/27/17, 41. He smelled gas but never saw a gas can or a lighter. RP, 6/27/17, 42. He jumped over his mother and onto the man in the room and they both fell into a closet. Id. He explained his trial testimony that Olsen was “dousing” Devenney with gas by saying that that was a story he had heard. RP, 6/27/17, 45. Jordan Olsen changed his story because he had several years to get it straight. RP, 6/27/17, 54-55. He believes his memory to be better now because he has spoken with his mother about the true story. RP, 6/27/17, 55.

III. ARGUMENT

A. **OLSEN WAS REPRESENTED BY RETAINED COUNSEL THROUGHOUT THE TRIAL COURT PROCEEDINGS AND AS A RESULT HIS RIGHT TO COUNSEL OR NOT WAS NOT CONSIDERED BELOW AND THE TRIAL COURT PROPERLY EXCLUDED OLSEN FROM THE HEARING BECAUSE HE HAD NO RIGHT TO ATTEND.**

Olsen argues that the trial court abused its discretion by not ordering that defendant Olsen be brought to the hearing. This claim is without merit because Olsen had no constitutional right to attend the

hearing and because the trial court's ruling was based on tenable grounds.

First, Olsen says that not only did he not attend the hearing, he was not allowed to testify. Brief at 16 (the trial court erred "in refusing to allow Mr. Olsen to be present, assist *or testify*...") (emphasis added). The state is unaware of any point in this proceeding that Olsen offered his testimony. There are times in the record that the trial court said that given the issues in the matter, Olsen's testimony would be irrelevant. But nowhere in the record does defense counsel actually offer Olsen's testimony.

1. There is no issue as to Olsen's right to counsel because he had counsel.

There is no issue in this case regarding Olsen's right to counsel or not. The matter was commenced and conducted by Olsen's retained counsel. Moreover, at no point in this proceeding did the state argue to the trial court that Olsen did not have a right to counsel. *See* Brief at 25 ("the trial court *and prosecutor* were simply wrong. Mr. Olsen had a right to counsel...") (emphasis added). No party ever contested Olsen's right to counsel; since he had a lawyer the issue simply does not exist.

The argument becomes confusing as Olsen argues that this court should consider counsel to have been ineffective for failing to argue that he had a right to counsel when he already had counsel. Brief at 26. That

argument will not be further addressed.

2. There is only a limited, court rule based right to counsel in this post-conviction matter.

As for appointed counsel, there is no federal constitutional right to counsel in this proceeding. The United States Supreme Court has tersely held that “the right to appointed counsel extends to the first appeal of right, and no further.” *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

Neither does Washington constitutional law confer a right to appointed counsel in post-conviction cases. Washington honors the 6th Amendment of the United States Constitution and provides counsel, on a constitutional basis, at the initiation of formal charges. *See State v. Kalakosky*, 121 Wn.2d 525, 534, 852 P.2d 1064 (1993). That right, as with federal jurisprudence, ends after the first appeal as of right. *See State v. Koloske*, 100 Wn.2d 889, 892, 676 P.2d 456 (1984).

Thereafter, the right evaporates primarily because collateral attacks are considered to be civil cases. *See State v. Labeur*, 33 Wn. App. 762, 657 P.2d 802 *review denied* 99 Wn.2d 1013 (1983). Thus there must be a statutory authorization for the expenditure of public funds in order for a court to appoint counsel. *See Moore v. Snohomish County*, 112 Wn.2d 915, 774 P.2d 1218 (1989) (expert witness appointed under court rule

could not be paid from public funds absent express authorization of the expenditure).

As for rule-based rights, RAP 16.15(h) allows that counsel may be appointed on a collateral attack but requires that the appellate court must find indigency. This and all the RAP provisions are of dubious value in the present case since this was a superior court proceeding and the Rules of Appellate Procedure apply to proceedings in the Court of Appeals or Supreme Court. RAP 1.1(a). In any event, no appellate court was in a position to find indigence so the rule is inapplicable.

RCW 10.73.150 is another possibility of finding a rule-based right. But again unless it is a capital case the statute requires jurisdiction in and findings by the appellate court. RCW 10.73.150(4) (if not a death penalty case, counsel may be provided only after the chief judge determines the petition is not frivolous).

Finally, CrR 3.1 may provide a litigant a right to counsel in post-conviction matters. *State v. Robinson*, 153 Wn.2d 689, 107 P.3d 90 (2005). The Supreme Court held that the appointment of counsel in a CrR 7.8 motion depended on the judge's initial determination of the merit or not of the petition like the similar requirement in RAP 16.15(h). 153 Wn.2d at 696. If the trial court's initially determines that the petition has some merit, "counsel may be provided if not already available." *Id.*

(emphasis added).

Olsen had no constitutional right to counsel. But Olsen had counsel throughout this proceeding. Under these circumstances, the trial court, and indeed Olsen's counsel, had no need to consider Olsen's possible CrR 3.1 entitlement to appointed counsel.

3. *The trial court properly excluded Olsen from the evidentiary hearing.*

Olsen's absence from the evidentiary hearing violated none of his rights. As one federal court put it

Whether the motion is treated as in the nature of a petition for writ of error coram nobis under the old practice or as a motion for a new trial, it is perfectly clear that appellant had no constitutional right to be present at the hearing of the motion and cannot complain because the Court refused to order that he be brought from prison and produced at the hearing.

Barber v. U.S., 142 F.2d 805 (4th Cir. 1944) *cert. denied* 322 U.S. 741 (1944); *see also Crowe v. U.S.*, 175 F.2d 799, 801 (4th Cir. 1949) (decision to allow prisoner to attend is matter of trial court discretion).

State v. Walker does not command a different result. 13 Wn. App. 545, 536 P.2d 657 (1975) *review denied* 86 Wn.2d 1005 (1975). The case involved the odd circumstance of considering Walker's competence to stand trial in a post-trial proceeding. The case was decided on a defendant's right to be personally present during trial and the right to confrontation. The Court of Appeals held that "[t]he evidentiary hearing

on the competence of the defendant to stand trial was an essential part of the trial. He had the right to be present in person.” 13 Wn. App. at 558. Olsen has no argument that the present hearing was “an essential part” of his trial. *Walker* does not support Olsen’s argument.

Neither does *State v. Ward*, 135 Wash. 482, 238 P. 11 (1925), establish any right to presence in the present matter. There, defendant had been present during questioning on a motion for new trial. But after the hearing, the trial court received a letter from the complaining witness ostensibly recanting trial testimony. The letter occasioned the trial court to hail the complaining witness into court where she was questioned by the court and the prosecutor. 135 Wash. at 483. Further, it appears that no record of this questioning was kept. *Id.* at 485.

The Supreme Court stated that the case was not decided on the issue of the defendant’s right to presence at such hearings. 135 Wash. at 486-87. In fact the Supreme Court noted that

The principle of a number of authorities that there is no constitutional or statutory necessity for the presence of the defendant in the taking of such testimony on the hearing of a motion for a new trial is in no way involved, but it is simply a question of his having notice of the hearing and an opportunity to be heard at the examination of the witness with the right of cross-examination.

Id. (page break omitted). Thus the case states the rule that, even in 1925, there is no constitutional or statutory right to presence at the hearing. The

Supreme Court reversed based on a failure of notice to the defendant *or* his attorney.

In the second *State v. Ward*, 139 Wash. 196, 246 P. 1119 (1926), The Supreme Court noted that the first *Ward* appeal resulted in reversal for failure to give notice and an opportunity to be heard “in person *or by counsel*.” Id. (emphasis added). No other principle relevant to the present issue is discussed in the case.

Olsen also cites to *State v. Hager*, 157 Wash. 664, 290 P. 230 (1930). A motion for new trial based on affidavits from a number of jurors was considered. The trial court had called the jurors in and asked them if they had more to say; they declined. The defense was not present at the time. But “[t]his was no part of a trial and the appellant was not required to be present.” 157 Wash. at 665 (alteration added). “The situation is very similar to that when a motion for new trial is being heard, and it has been held that at such a time the presence of the accused is not necessary.” Id., citing *State v. Greer*, 11 Wash. 244, 39 P. 874 (1895).³

Finally, *State v. Grier*, 11 Wash. 244, 39 P. 874 (1895) provides no support for Olsen. Grier assigned error to the trial court’s decision of her new trial motion in her absence. The Supreme Court held that “the

³ The *Hager* decision quotes from “*State v. Greer*” while the case at the same citation is *State v. Gier*.

motions for a new trial and in arrest of judgment were properly heard by the court in the absence of the defendant, and that, even if she had a right to be present, it was waived by the action of her counsel at the time the motions were heard.” 11 Wash. at 248.

Thus, Olsen asserts no authority establishing any sort of right to attend the hearing in the present case. If there were, trial courts would have to have defendants transported and produced in court every time they consider post-conviction motions; even when the decision is made on affidavits only.

There being no right to attend, the trial court’s action should be reviewed under an abuse of discretion standard of review. Here, the trial court articulated two tenable reasons: that Olsen would have no testimony relevant to the issue to be addressed in the hearing and that the hearing involved domestic violence victims. The trial court did not abuse its discretion.

B. THE TRIAL COURT PROPERLY DENIED THE NEW TRIAL MOTION BY FINDING THAT THE RECANTATIONS WERE NOT CREDIBLE AND THENCE CONCLUDING THAT THE RECANTATIONS WOULD NOT PROBABLY CHANGE THE RESULT ON RETRIAL.

Olsen next claims that the denial of his motion was in error because the trial court applied an improper standard. This claim is without merit because the trial court properly found that the recantations would not probably change the result because they, the recantations, were not credible. The denial of a new trial motion is reviewed for abuse of discretion. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

When considering recantation evidence, the federal courts use a test which is only slightly different than Washington's test. As in Washington, the ultimate question in federal court is whether the newly discovered recantation "would probably produce an acquittal." *U. S. v. Provost*, 969 F.2d 617, 620 (8th Cir., 1992). There, the United States Court of Appeals rebuffed appellant's argument that the District Court erred by not holding an evidentiary hearing and therein considering the credibility of the recanting witness. When the District Court presides over a trial and observes the recanting witness's original testimony, it is in a position to rule on the recantations without a hearing. *Id.*

The *Provost* Court framed the issue just as it can be framed in the

present case:

The question of whether recanted testimony would probably produce an acquittal on retrial rests in large part on the credibility of the recantation. In *Bednar*, we observed that where a witness makes subsequent statements directly contradicting earlier testimony the witness either is lying now, was lying then, or lied both times. Hence, if the court concludes that the recantation is not credible and does not affect the credibility of the original testimony, then it probably would not produce an acquittal on retrial.

Id. (internal citation and quotation omitted).

The seminal case on this issue in Washington is *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996). The *Macon* Court did consider recantation to be newly discovered evidence. 128 Wn.2d at 800. It then announced the test for such new evidence:

To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.

Id. Further, “[a] new trial may be denied if any one of these factors is absent.” Id. (alteration added).

Since “[r]ecantation testimony is inherently questionable” and “does not necessarily, or as a matter of law, entitle the defendant to a new trial,” a determination of the issue lies in the sound discretion of the trial

court. *Id.* at 801-02. It is important to note that the test requires that the evidence will “probably change” the result, not “possibly” change the result; “defendants seeking post-conviction relief face a heavy burden and are in a significantly different situation than a person facing trial.” *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011) *rev denied* 172 Wn.2d 1002 (2011) *citing State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009).

Further, the *Macon* Court announced the proper procedure in the exercise of the trial court’s discretion. The threshold determination is reliability or credibility of the recantation “under the total circumstances.” *Id.* at 804. *See State v. Gassman, supra* at 609. (“When considering whether newly discovered evidence will probably change the trial’s outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence.”). The trial court should consider whether independent evidence supports the original testimony but this is not a controlling factor. *Id.* If the recantation is determined to be unreliable and the motion for new trial is denied, there is no abuse of discretion. *Id.*; *See State v. Scott*, 150 Wn. App. 281, 289-300, 207 P.3d 495 (2009) (if superior court finds recantation credible, then the court is to consider the motion to withdraw guilty plea).

Although the *Macon* Court’s treatment of the issue is somewhat

cryptic, subsequent cases have established the rule that if the testimony of the recanting witness is the “sole” evidence establishing guilt and the trial court finds the recantation credible, it is an abuse of discretion to deny the motion. *See In re Clements*, 125 Wn. App. 634, 641-42 106 P.3d 244 (2005).

Olsen argues that the trial court’s findings that the recanting testimony was not credible and therefore would not probably change the result on retrial should not control because the trial court applied the wrong standard. Brief at 32. Olsen does not provide a different “standard” for judging credibility. The argument appears to be that the trial court should have ignored the trial evidence, the inconsistency between the recantations and “the observations of other objective witnesses,” the inconsistencies between the two different stories of Ms. Devenny, and the finding that the recantations are not reasonable in light of all the other evidence.

Instead, Olsen would have the court consider other matters like whether Ms. Devenney was under Olsen’s sway in a domestic violence sense. Brief at 39. Or, Ms. Devenney’s possible monetary ties to Olsen or his family. *Id.* Or, that the recantations did not absolve Olsen of all of his crimes. *Id.* True, these factors and many others like them, limited by the imaginations of advocates and judges only, may go into the credibility

findings of a trier of fact. But that observation does not establish that the considerations of the trial court in this matter were wrong. It remains that after careful consideration the trial court decided that the lack of credibility of the recantations made it not probable that the result of a new trial would be different. In doing so the trial court merely followed the command to consider all the circumstances in making the decision.

Further, Olsen believes that United States Supreme Court authority that considers the brain functions of young people who have committed heinous crimes should be applied to Jordan Olsen. While there is truth in the proposition that Jordan Olsen has grown and matured between instances of testimony, it is unclear how the jurisprudence is to be applied to him in this context. Olsen certainly did not raise his son's maturation as an issue below. In any event, it is clear and dispositive that the trial court simply did not believe his recantation testimony.

The trial court herein followed the law. As noted, in considering whether or not newly discovered evidence will probably change the result of a new trial, the trial court is charged with considering the "*credibility, significance, and cogency*" of the evidence. *State v. Gassman, supra* (emphasis added). The recantations herein failed that test. The trial court properly found that all of the prongs of the newly discovered evidence test must be met and properly found that they were not. Moreover, the trial

court's reasons for doing so are tenable on this record. The motion for new trial was properly denied.

C. THE TRIAL COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE BY QUESTIONING A WITNESS AS AUTHORIZED BY THE WASHINGTON RULES OF EVIDENCE.

Olsen next claims that the trial court violated the appearance of fairness doctrine by questioning Ms. Devenney and Jordan Olsen at the hearing. This claim is without merit because Rule of Evidence 614(b) allows exactly what the trial court did.

Olsen does not cite or discuss the rule that seems on its face to control the question, ER 614(b). The rule provides that

The court may interrogate witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence."

The concomitant principle is that a jurist need not be so cautious when not before a jury. Significantly, the rule does not say that the court may simply question a witness; the rule allows "interrogation." The word means more than mere questioning; it means to "question formally and systematically." Merriam-Webster, <https://www.merriam-webster.com>.

The five cases Olsen cites as authority do not address ER 614 or

questioning by a judge in a post-conviction hearing. Olsen asserts no authority that provides analysis of when it is appropriate or not for a judge to ask questions of a witness in such hearings.

Olsen cites *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1972) for a general statement about the appearance of fairness. The issue in the case involved a probation officer who had been sued by the defendant and then wrote a presentence report recommending an exceptional sentence. No issue of a judge asking questions arose in the case.

Olsen cites *State v. Mabry*, 8 Wn. App. 61, 584 P.2d 1156 (1972) for another general proposition. But that case dealt with a group of superior court judges, including the trial judge, doing their own investigation of a hotel used as a house of prostitution. It turns out the defendant was the manager of the hotel. Again, no issue of a judge questioning witnesses arose.

Olsen cites to *State v. Carothers*, 84 Wn.2d 256, 525 p.2d 731 (1974), *disapproved on other grounds*, *State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984). The words ‘appearance of fairness’ do not appear in the decision. Nor is there any questioning from a judge in that case. The only issue in the case remotely like the present issue is a claim that the trial judge commented on the evidence in a jury instruction. 84 Wn.2d at 267.

Olsen cites to *State v. Eisner*, 95 Wn.2d 458, 626 P.2d 10 (1981). This also is a case proceeding under an allegation of judicial comment on the evidence. *Id.* at 461-62. But the case did involve judicial questioning of a complaining witness. In fact, the five-year-old complaining witness had given testimony that fell short of the proof required to establish the charge of child rape. 95 Wn.2d at 459. Then, the trial judge questioned her and managed to elicit response that did meet the elements of child rape. *Id.* at 459-60. Here again the words ‘appearance of fairness’ do not appear in the decision. The case is clearly distinct from the present case as it deals with a judge’s behavior in front of a jury and, arguably, the judge’s failure to act “cautiously” in that context as required by the evidence rule. Moreover, the case does allow that “a trial judge may, of course, question witnesses” but that discretion is in the case of a jury trial more limited and may not evince the trial court’s attitude toward the evidence.

Finally, Olsen relies on a dissolution case, *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012). There the complaint was that the trial judge had been biased in property distribution because the judge was too close with the attorney for one of the litigants, including being law partners. The case deals with external information about bias and says nothing about a judge questioning a witness.

The trial judge here did no more than follow ER 614(b). Olsen

asserts no case addressing ER 614 nor provides the court of any analysis of that rule absent authority.⁴ Olsen's complaint is focused on the interrogation appearance of the trial court's questioning. But no authority cited indicates that the trial court in this case was unfair in doing what the evidence rule allows. And, of course, there was no jury to hear an improper comment on the evidence. There was no abuse of discretion and no violation of the appearance of fairness doctrine. This issue fails.

IV. CONCLUSION

For the foregoing reasons, the denial of Olsen's motion for new trial should be affirmed.

DATED October 22, 2018.

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⁴ There does not appear to be any Washington case-law addressing ER 614(b) and the federal rule is somewhat different. And, of course, federal judges are not prohibited from commenting on the evidence.

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

October 22, 2018 - 1:06 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Edward Mark Olsen, Appellant
Superior Court Case Number: 09-1-01567-6

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