

NO. 44906-4-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

ROBERT E. JAMES

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR

The Honorable Mark McCauley, Judge

---

---

CORRECTED BRIEF OF APPELLANT

---

---

LISE ELLNER  
Attorney for Appellant  
WSBA# 20955

LAW OFFICES OF LISE ELLNER  
P.O. Box 2711  
Vashon, WA 98070

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Trial Facts</u> .....	2
2. <u>Jury Instruction</u> .....	3
3. <u>Admission of ER 803(5) Evidence</u> .....	3
C. <u>ARGUMENT</u> .....	7
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED RAPE IN THE SECOND DEGREE. ....	7
2. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING ER 803(5) EVIDENCE OF RECORDED RECOLLECTION WHERE THE COMPLAINANT COULD NOT ADOPT THE STATEMENT AS ACCURATE.....	10
<u>Prejudicial Error</u> .....	14
D. <u>CONCLUSION</u> .....	15

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>State v. Alvarado</i> , 89 Wn.App. 543, 949 P.2d 831 (1998).....	11, 12
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	11
<i>State v. Briejer</i> , 172 Wn.App. 209, 289 P.3d 698 (2012).....	10, 14
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997).....	10
<i>State v. Chapin</i> , 118 Wn. 2d 681, 826 P. 2d 194 (1992).....	8,9
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	8
<i>State v. Elmi</i> , 166 Wn.2d 209, 207 P.3d 439 (2009).....	8
<i>State v. Ferreira</i> , 69 Wn.App. 465, 850 P.2d 541 (1993).....	8
<i>State v. Huelett</i> , 92 Wn.2d 967, 603 P.2d 1258 (1979).....	10
<i>State v. Mathes</i> , 47 Wn.App. 863, 737 P.2d 700 (1987).....	11
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	10
<b><u>FEDERAL CASES</u></b>	
<b><u>RULES, STATUTES AND OTHERS</u></b>	
ER 803(5).....	1,3,9,10,12, 14, 15
RCW 9A.08.010(1)(a).....	8
RCW 9A.44.050.....	8

A. ASSIGNMENTS OF ERROR

1. The state failed to prove rape in the second degree by forcible compulsion.
2. The state failed to prove rape in the second degree by lack of consent.
3. The trial court abused its discretion by admitting a recorded recollection without complying with ER 803(5).

Issues Pertaining to Assignment of Error

1. Did the state prove beyond a reasonable doubt the elements of rape in the second degree by forcible compulsion?
2. Did the state prove beyond a reasonable doubt the elements of rape in the second degree by lack of consent?
3. Did the trial court abuse its discretion by admitting a recorded recollection without complying with ER 803(5)?

B. STATEMENT OF THE CASE

1. Trial Facts

SC drinks alcohol all day, every day and has done so since she was eleven years old. RP 13. On June 30, 2012 SC was drunk, got into a fight with her boyfriend and left their apartment stumbling down the road. RP 5-6. SC accepted a ride from an unknown man driving a car. RP 7. SC remembers going to a motel, watching TV and waking up hurt and in pain.

RP 7-8. SC could not remember what happened during the night and did not remember having sex. RP 8, 11. SC called for help and the police arrived and showed her a photo montage. SC picked out #6, and stated that he was Louis Pluff, someone she had known her whole life. RP 9-10.

SC was transported to the hospital and treated for an anal tear. IRP 61. During the medical examination, the nurse did not find evidence of fresh bleeding but there was menstrual blood present. IRP 60. According to the nurse Miriam Thompson, SC said she has three personalities and the personality present during the examination was a 12 year old child. IRP 69-67. SC told the nurse she drank until she was “three sheets to the wind” and that she was anally raped by Louis Pluff. IRP 59, 65.

The Washington State Crime Lab scientist did not find any sperm DNA on the anal swab but did find the presence of P30 a protein possibly associated with sperm. IRP 79. There was no male DNA found on the vaginal or anal swabs. IRP 79. The lab analyzed a swab from SC’s neck that was consistent with mixed DNA from SC and Mr. James. IRP 80.

Jason Capps an Aberdeen police officer interviewed SC at the motel and at the hospital while she was in pain and attached to an IV codeine pump. RP 77, 81-82. Capps wrote the statement out for SC and read it to her because SC could not write at that time. RP 83-84. SC told Capps what happened to the best of her knowledge but did not know if it was true. RP

14-15. SC was worried about her health, in pain and did not want to talk to the police. RP 14-16. SC would not have asked Capps to correct the statement because she has the mentality of a twelve year old and said she would have signed the document because Capps told her to sign it. RP 19-20. At the time of the interview, SC said she was in so much pain and so high on pain killers that she would not even have recognized her own mother. RP 21.

2. Jury Instruction

Ms. James excepted to jury instruction # 9 on the lesser included second degree rape, section 2-B regarding incapacity, based on a lack of evidence. CP 44-52. The trial court denied the exception ruling there was sufficient evidence of intoxication and provided the instruction over objection.1 RP 123. James was convicted of the lesser included second degree rape. CP 92-103, 97. This timely appeal follows. CP 114.

3. Admission of ER 803(5) Evidence

Mr. James objected to the police officer reading SC's statement in to evidence under ER 803(5). RP 84.

I wasn't even in my right mind still so I don't understand how I would have told him it was Room 129 if I don't even know.  
Q. Well, I know you don't remember now. But what I'm  
22 asking is would you have signed a statement for

23 the police if you had not reviewed it and believed  
24 it to be accurate?  
25 A. If a police officer was telling me to sign it then  
I'm going to sign it.  
2 Q. So you would -- but would you have signed it if it  
3 wasn't correct? Do you understand what I'm  
4 asking?  
5 A. Yes, I would have signed it.  
6 Q. So you would have signed it if it was not correct?  
7 A. Yeah, because I don't even --  
Would you -- after this happened you spoke to  
17 Officer Capps, correct?  
18 A. Yes.  
19 Q. And did you tell him what happened?  
20 A. Yes.  
21 Q. And did you tell him anything that wasn't true to  
22 the best of your knowledge?  
23 A. (The witness nods her head.)  
24 Q. Did you tell him only things that were true?  
25 A. I don't -- I don't know.  
15  
1 Q. So --  
2 A. I can't even say that because I look at that paper  
3 now and it's just -- I don't know. I don't  
4 remember.  
5 And they came to talk to me and at that minute I  
6 was really worried about my health, and I was  
7 worried about, you know, being hurt and being in a hospital  
and I really didn't even want to talk to  
9 them, I just wanted to make sure I was going to be  
okay.  
11 Q. Sure.  
And so -- but at the time when you gave this it  
15 was when it was fresh and it just happened, right?  
16 A. Yes, I went from the motel room to the hospital.  
17 Q. And so the information you would have given to the  
officer was what you remembered happening, right?  
19 A. Yes.  
20 Q. And would it be your normal habit to tell the  
21 truth to the police officer?  
22 A. Yes.

23 Q. And I understand that -- what you're saying is you can't  
read this now and tell me this is what

25 happened, correct?

1 A. Yes.

2 Q. But you also -- your memory isn't such, you can't

3 read this and tell me that this is incorrect in

4 any way?

RP 14-17.

And would you have signed it if it was untruthful?

3 A. I -- yes, I signed it.

4 Q. But you as a person, if the officer gave you

5 something, a statement, and there was something

6 that's wrong in it, would you have corrected it?

7 A. Yes.

.....

(By Ms. Svoboda) And so would you -- just in

20 general would you sign a statement for the police

21 that was untruthful or incorrect?

22 A. No.

RP 17-18.

Now, would you have carefully

25 reviewed what the police officer asked you to sign or do you  
just sign whatever they tell you to

sign?

3 A. Well, considering that I'm on disability because

4 I've got the mind of a 12 year old, if a police

5 officer tells me to sign something -- I'm on SSI

6 and I'm on disability for this, and if a police

7 officer asks me to sign something and they are of

8 authority then I think that I'm supposed to be

9 signing that as a child. As a child, that is my

10 disability.

11 Q. So you see the police as authority figures?

12 A. Yes.

13 Q. Do you feel free to tell them to change what

14 they're asking you to sign?

15 A. No.

16 Q. Would you even read something they asked you to sign thoroughly before you signed it?

18 A. The whole thing is is that even when they talked

19 to me in the hospital I was hooked up to

20 everything. I was pushing that codeine button

21 that -- I don't even know.

22 I don't even know if my mom would have come into that room right now, I'm cut from here to here

24 (indicating). I probably shouldn't have been signing anything at that minute.

1 Q. You had been taking a lot of pain-killing drugs?

2 A. Yes. I was tied to the bed, I was in pain.

3 Q. All right. Did you say you might not have known your own mother if she walked in?

5 A. Yes, they had me cut. I was hurt.

RP 20-21. SC's statement written by officer Capps is as follows:

"I got to the Thunderbird last night around dark.

23 I went to Room 129 with Pluff, don't know first

24 name. Pluff is 10 to 15 years older than me.

25 Pluff is Native American and grew up with my older

103 Pluff has black hair with some being

2 gray. He was wearing a red and black shirt. He

3 is about 6 3 or 4.

4 "He rented the room last night. We arrived in a

5 gray silver sedan I think was his girlfriend's

6 car. I went in the room and sat on the bed to

7 watch TV. I said, 'Get out of the way I'm trying

8 to watch TV.' Pluff said, 'Your not here to watch

9 TV, you're going to give me what you're really

10 here for.'

11 "I said, 'I'm going home' and went to the door.

12 He grabbed my arm and threw me on the bed and

13 tried to take me from the front. I said, 'No,'

14 and he turned me around and he took me from my

15 back side. The whole time I was yelling at him to

16 stop.

17 "I was pulling his hair and scraping him with my

18 fingernails to try and get him off of me. He was  
19 too strong, I could not move him off of me. After  
20 Pluff was done raping me he took off out of the  
21 room. I screamed and screamed when he was raping  
22 me wanting for him to stop. He left when he was  
23 done.

24 "I stayed the night in the bed in the room. I  
25 could not move because my bottom area hurt too  
10 bad. I got up a couple times to go to the door to  
2 holler for help but no one was outside. I didn't  
3 have clothes on when I was trying to get help. I  
4 don't remember calling 911.

5 "I used to date Pluff's" -- it's cut off. "I  
6 used to date Pluff's nephew. Pluff might have  
7 gotten out of jail recently. I had Officer Capps  
8 write this statement for me."

RP 103-104.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED RAPE IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d

1068. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trier of fact determines “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); *Elmi*, 166 Wn.2d at 216-217. The trier of fact also looks to “all of the circumstances of the case, including ..... the nature of the prior relationship and any previous threats” to determine intent. *State v. Ferreira*, 69 Wn.App. 465, 468-69, 850 P.2d 541 (1993).

As charged, to prove rape in the second degree the state was required to establish beyond a reasonable doubt the following elements:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion;
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

RCW 9A.44.050.

In *State v. Chapin*, 118 Wn. 2d 681, 685– 86, 826 P. 2d 194 (1992), the Court held the evidence of rape in the second degree insufficient where a patient with Alzheimer's disease told his wife, in response to her questions, that a nurse had raped him a day or so earlier. *Chapin*, 118 Wn. 2d at 683-684. The Supreme Court noted that the patient

had been “calm and had engaged in his usual activities” prior to making his statement to his wife. *Chapin*, 118 Wn.2d at 689.

The Supreme Court held the evidence insufficient to establish rape in the second degree where (1) Chapin asked another aide to trade patients with him; (2) the other aide reported that the victim’s behavior towards Chapin suddenly changed from cooperative to extremely hostile; (3) the victim’s gait indicated he was in pain when walking; and (4) the victim’s rectal area was observed to be “very red and irritated and swollen”. *Chapin*, 118 Wn.2d at 692.

Here, SC’s injuries revealed an anal tear but not the presence of semen. Rather the Washington State Patrol lab found the presence of P30 a protein associated with semen. 1RP 78-80, 83. There was no DNA linking this protein to Mr. James. Rather there was a mixture of DNA on SC’s neck that revealed the presence of both her and Mr. James DNA. 1RP 80. SC did not recognize Mr. James and believed the person she was with was Louis Pluff. RP 9. SC did not remember having sex with anyone. RP 11. Mr. James testified that he tried but was too drunk to have sex. 1RP 99-100. This evidence like the evidence in *Chapin* was insufficient to establish rape by forcible compulsion or by lack of consent.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING ER 803(5) EVIDENCE OF RECORDED RECOLLECTION WHERE THE COMPLAINANT COULD NOT ADOPT THE STATEMENT AS ACCURATE.

The trial court abused its discretion by admitting SC's statement to police, made when she was heavily medicated and in extreme pain. A trial court's decision to grant or deny an evidentiary motion is reviewed for abuse of discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Briejer*, 172 Wn.App. 209, 224-225, n7, 289 P.3d 698 (2012)

A trial court abuses its discretion if it misapplies an evidence rule. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

The rule at issue in this case is ER 803(5). This rules provides in relevant part"

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

ER 803(a)(5). The party offering the evidence must establish the foundational elements by a preponderance of the evidence. *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993). The foundational elements for ER 803(5) require the court to determine if: (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) examine the totality of the circumstances does the record reflect the witness's prior knowledge accurately. *State v. Alvarado*, 89 Wn.App. 543, 551-552, 949 P.2d 831 (1998); *State v. Mathes*, 47 Wn.App. 863, 867-68, 737 P.2d 700 (1987). A recorded recollection is admitted as substantive evidence. *Id.*

In *State v. Alvarado*, the Court held that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial as long as the witness once knew and adopted the statement as accurate. *Alvarado*, 89 Wn.App. at 551. In *Alvarado*, a man told police he was an eyewitness to a murder and gave police three statements. *Alvarado*, 89 Wn.App. at 446.

In two statements, the man said that he was an eye witness to a

murder and named the defendant as the shooter. *Alvarado*, 89 Wn.App. at 446. But, at trial, the witness denied being at the scene of the shooting. *Alvarado*, 89 Wn.App. at 447. although his testimony differed from the statements, the court held that the statements were admissible under ER 803(a)(5), because the witness did not expressly disavow their accuracy. *Id.* at 552–53, 949 P.2d 407. Additionally, the witness gave two of the statements on the same day, only eight days after the murder, and the statements were consistent and reflected a “detailed and fairly comprehensive knowledge of the crime.” *Id.*

In *State v. Derouin*, 116 Wn.App. 38, 45-46, 64 P.3d 35 (2003) the defendant like Alvarez did not disavow his statement, but she was told that the statement if false would constitute the crime of perjury. The Court held that this was an indicia of reliability that along with:

(1) Hano's testimony regarding his phone call that morning from Michelle; (2) Michelle's description of the events of that morning to Hano were markedly similar to the statements she made in the past recorded recollection; (3) Hano's testimony thus supported the accuracy of the statement at the time it was made; and (4) Deputy Robinson also testified that he photographed a great deal of damage to personal property inside the Derouin residence. This testimony corroborates the accuracy of Michelle's prior statement.

*Derouin*, 116 Wn.App. at 47.

In *State v. White*, 152 Wn.App. 173, 185, 215 P.3d 251 (2009) the declarant claimed to have been “too intoxicated’ ” to know if the statement initialed by her was accurate but did not disavow it. The officer however read the statement to the victim who could have corrected any errors and White initialed each page and signed the document under penalty of perjury. Moreover the officer testified that the victim was “certainly functional”. *White*, 152 Wn.App. at 185.

In the instant case unlike in *Derouin* and *White*, SC did not sign the statement, she was not advised that the failure to correct a mistake constituted the crime of perjury, SC unlike the witnesses in *Derouin* and *White* has the mentality of a 12 year old, who would not have been capable of correcting a police officer and the crime in this case was not a domestic violence crime.

SC testified she thought the person in the motel room was Louis Pluff. RP 9-10. This is a disavowal. SC did not remember agreeing to have sex or having sex in the motel room. RP 11. SC’s memory is poor because she began drinking at age 11 and has been drinking daily since that time from the moment she wakes up until she goes to sleep at night RP 13. SC stated that because she gave the police a statement “it seemed like” she remembered what happened. RP 13.

She was not however able to testify that the statement was accurate

and complete because she was completely drunk when the incident occurred, had no recollection of a rape or of having sex, had the mentality of a 12 year old, and would not have told the police to make corrections to the statement they wrote for her because she did what she was told. SC was also on IV pain medication preoccupied and worried about her health and so high on pain killers that she would not even have recognized her own mother RP 14-21. In short, SC never affirmed that the statement the police wrote was ever true and accurate. *Id.* There is no indicia of reliability present in this case.

Under the *Alvarez* test the state did not establish the ER 803(5) criteria: (1) that the statement pertained to a matter about which SC once had knowledge; or (3) that the statement was made or adopted by the SC when the matter was fresh in her memory, or (4) that the record reflects SC's prior knowledge accurately. The trial abused its discretion in admitting the statement absent other indicia of reliability.

#### Prejudicial Error

The error admitting SC's statement was not harmless. "An evidentiary error [that] is not of constitutional magnitude ... requires reversal only if the error, within reasonable probability, materially affected the outcome." *Briejer*, 172 Wn.App. at 228, quoting, *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002)

quoting, *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). The Supreme Court in *State v. Brown*, 127 Wn.2d 749, 757, 903 P.2d 459 (1995), reversed an evidentiary ruling admitting an excited utterance that misapplied ER 803(a)(2).

Here, the trial court misapplied ER 803(5) and admitted highly prejudicial evidence that within reasonable probability, materially affected the outcome the trial. Without the statement, there was no evidence that Mr. James raped SC. Here as in *Brown*, the trial court's misapplication of ER 803(5) was prejudicial error requiring remand for a new trial.

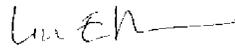
D. CONCLUSION

Mr. James respectfully requests this Court reverse his conviction for rape in the second for insufficient evidence, or in the alternative remand for a new trial because of constitutional and evidentiary errors that prejudiced his right to a fair trial

DATED this May 6, 2014.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



---

Lise Ellner, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor Gfuller@co.grays-harbor.wa.us and *Robert James DOC# 365127* Airway Heights Corrections Center Post Office Box 2049 Airway Heights, WA 99001\_a true copy of the document to which this certificate is affixed, on May 6, 2014. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. James and electronically to the prosecutor.



Signature

**ELLNER LAW OFFICE**

**May 06, 2014 - 8:29 PM**

**Transmittal Letter**

Document Uploaded: 449064-Other Brief.pdf

Case Name: State v. James

Court of Appeals Case Number: 44906-4

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Other

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

corrected brief

Sender Name: Lise Ellner - Email: [liseellnerlaw@comcast.net](mailto:liseellnerlaw@comcast.net)

A copy of this document has been emailed to the following addresses:

[Gfuller@co.grays-harbor.wa.us](mailto:Gfuller@co.grays-harbor.wa.us)