SUPREME COURT NO. _____
COA NO. 47661-4-II

IN THE SUPREME COURT OF WASHINGTON

IN RE DETENTION OF JOSEPH PETERSON:

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PETERSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Nevin, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joseph Peterson asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Peterson requests review of the partially published decision in In re Detention of Joseph M. Peterson, Court of Appeals No. 47661-4-II (slip op. filed January 31, 2017), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

What are the circumstances that are considered in determining whether a prior statement is sufficiently reliable to qualify as a recorded recollection under the hearsay rule exception, and whether such circumstances include inconsistent statements, motive to lie and reputation for dishonesty at the time the statements were made?

D. STATEMENT OF THE CASE

In 2013, the State filed a petition seeking Joseph Peterson's civil commitment under chapter 71.09 RCW. CP 1-3. The petition alleged Peterson's second degree assault conviction from 2007 was sexually motivated and so met the criteria for a "sexually violent offense" under RCW 71.09.020(17). CP 1-2. The parties stipulated to a bifurcated trial. CP 184-88. A bench trial would be held to allow the trial court to determine whether Peterson's second degree assault conviction was a

sexually violent offense. Id. If the trial court determined Peterson's second degree assault conviction was a sexually violent offense, the remaining issues would be tried to a jury. Id.

In 2007, the State originally charged Peterson with first degree rape against H.L., an adult female. 3RP[1] 10. The investigating detective, Kim Holmes, informed the prosecutor that H.L. was lying. CP 350. The State reduced the charge to second degree assault. Ex. 3. Peterson entered a Barr[2] plea to that charge. Ex. 3, 4; 3RP 14-16, 24-25. This was the conviction at issue in determining whether Peterson had been convicted of a predicate crime necessary for commitment under chapter 71.09 RCW. CP 230-33. An evidentiary hearing was held on the "sexually violent offense" issue, at which the following evidence was produced.

On February 14, 2007, H.L. gave a written statement to police in which she alleged Peterson raped her at his residence earlier that day. Ex. 7. On February 20, she provided a recorded statement to detectives in which she describes the circumstances of meeting Peterson and the rape, alleging Peterson threatened her with what appeared to be a gun. Ex. 8 (transcript of taped interview). The threshold issue at the hearing was

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[1] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 1/29/15, 1/30/15; 2RP - 2/2/15; 3RP - one volume consisting of 2/3/15, 2/4/15; 4RP - 2/6/15.

[2] In re Pers. Restraint of Barr, 102 Wn.2d 265, 684 P.2d 712 (1984).

whether these hearsay statements were admissible as recorded recollections under ER 803(a)(5). 1RP 83-84; 2RP 37, 81.

H.L. was 32 years old at the time of the hearing. 1RP 72. She testified that she started losing her memory in 2013 due to migraines. 1RP 73-75, 135. She had gained some memory back since then. 1RP 135-36.

H.L. used to be married to Jonathan Lowry. 1RP 72. In 2007, she lived with him and their three children at an apartment complex near McChord Air Force Base. 1RP 124-25. They were divorced at the time but had become engaged again and were living together, trying to make the relationship work. 1RP 125, 127-28. H.L. testified their renewed relationship started out great but went downhill. 1RP 125, 127. She caught Mr. Lowry cheating and he abused her. 1RP 127, 141. She was depressed. 1RP 128. She had been diagnosed with bipolar disorder and situational depression when she was 17 years old, and she continued to suffer from those conditions through 2007. 1RP 128-29.

On the day in question, she recalled being at DSHS and then being on the bus. 1RP 75, 76, 77. At the time of her encounter with Peterson, H.L. testified that she was looking for a "friend." 1RP 140. She recalled a "tiny bit" about the event, although she recalled more each time she tried. 1RP 73, 137. H.L. did not remember writing the statement admitted as Exhibit 7, but recognized her handwriting. 1RP 76. Exhibit 7 did not

refresh her memory. 1RP 76. But she said what she wrote down was "the event that happened" and that its contents were true. 1RP 77-79.

H.L. remembered going to Peterson's house on the bus. 1RP 76, 142. H.L. did not remember, or did "not exactly" remember, reporting to the police that she had been raped. 1RP 73. She kind of remembered giving a recorded statement. 1RP 79. Looking at Exhibit 8 (transcript of interview) refreshed her memory to some extent. 1RP 79-80. She remembered going down by the base, and a little bit about the house layout. 1RP 80. But reading Exhibit 8 did not refresh her memory about what happened. 1RP 80. She believed the information she provided in the recorded interview was accurate.[3] 1RP 80-81. She would have been able to recall what happened at the time. 1RP 81. She never recanted or denied the rape occurred. 1RP 82. H.L. asserted she had nothing to gain from making up a story. 1RP 81.

Kim Holmes was the detective who took H.L.'s recorded statement in 2007. 1RP 51-52. Holmes acknowledged there were differences between H.L.'s initial statement to law enforcement and what she said in the recorded interview. 1RP 63. For example, H.L. initially told police that she met Peterson in the afternoon while on bus 300 headed to

[3] The court overruled defense counsel's objections that H.L. could not affirm the accuracy of her statements because she had no memory of the event. 1RP 78, 81.

McChord Air Force Base. 1RP 64. She told Holmes in the recorded interview that she met Peterson in the morning on a bus that was not headed to McChord. 1RP 64.

In her initial statement, she did not mention she met Peterson earlier in the day and arranged to meet him a second time. 1RP 65. In the recorded interview, she said she had met Peterson on the bus earlier, got his phone number, and asked him to meet her later in the day. 1RP 65-66.

In her initial statement, she did not say she had any phone contact with Peterson. 1RP 66. In her recorded interview, she said she had a 20-minute phone call with Peterson in which they discussed a variety of topics and arranged to meet later. 1RP 66.

In her initial statement, H.L. indicated she went to Peterson's apartment because her cell phone battery was almost dead. 1RP 66. In her recorded statement, she said she was running out of minutes on her phone, which was one reason why she went to Peterson's residence. 1RP 67.

In her initial statement, H.L. indicated she intended to call Mr. Lowry, which was the reason she needed to use a phone. 1RP 67-68. In her recorded interview, H.L. said she telephoned Mr. Lowry on her cell phone on the bus after she left Peterson's apartment. 1RP 68.

In the recorded interview, H.L. maintained no conversation occurred in the apartment; they did not listen to music or hang out. 1RP 100. H.L. informed detective Holmes that she told Peterson on the bus or phone that 100.7 was one of her favorite radio stations. 1RP 105; Ex. 8 (p. 11-12). Peterson told the detective that he turned to that specific station for her so they could listen to music. 1RP 105. When police executed the search warrant, Peterson's radio was tuned to 100.7. 1RP 105.

In her initial statement and handwritten statement, H.L. said Peterson held what appeared to be a gun in his left hand. 1RP 68, 93-94. In her statement to Holmes, she said he had the gun in his right hand. 1RP 68, 93-94.

In her recorded interview, H.L. claimed she was "officially penetrated" in the vagina while her legs were closed and her pants were at mid-thigh. 1RP 99, 114-15. The detectives interviewing her questioned how that was physically possible. 1RP 99, 114-15.

H.L. told Holmes that Mr. Lowry did not believe she was raped; that he thought she had consensual sex and felt guilty about it afterward because they were not doing well and breaking up. 1RP 112. To Holmes, H.L. was adamant about the sex being forced and that she did not intend to have sex with Peterson. 1RP 112.

Detective Holmes interviewed Peterson. 1RP 58-59. Holmes told Peterson there was an allegation that he raped a woman earlier that day in his apartment. 1RP 63. Peterson indicated he penetrated H.L.'s vagina and was sorry if he pushed her. 1RP 118. He stopped when she looked like she was not interested in continuing. 1RP 118. Police executed a search warrant and found a toy gun in Peterson's living room. 1RP 54, 106.

The defense presented several witnesses at the hearing. Inez Lowe was a neighbor in the apartment complex where H.L. lived in 2007. 2RP 40-41. Lowe was friends with Mr. Lowry, but did not like H.L. 2RP 59. H.L. told Lowe that she was raped, but did not seem upset and did not act like someone who had been raped.[4] 2RP 42-43, 64. In her deposition, Lowe described H.L. as "bothered." 2RP 56-57. Lowe also described H.L. as someone who acted bizarre and had wild mood swings. 2RP 60-63, 70. As of 2007, H.L. had a reputation for dishonesty at the apartment complex and a reputation for dishonesty at work. 2RP 55, 70-71, 73.

Jonathan Lowry also testified for the defense. He was married to H.L. from 2002-2005 and tried to reconcile with her starting in 2006. 2RP 78-79. H.L. was off her medication during the two weeks prior to the rape

[4] Another neighbor at the apartment complex, Sarah Stetsman, testified that H.L. did not act upset when she said she was raped. 2RP 67, 69.

allegation. 2RP 86. She had attempted suicide before the allegation and attempted suicide again afterward. 1RP 147-48; 2RP 8, 13, 88-89.

According to Mr. Lowry, on the day in question H.L. went to DSHS by bus and was expected home between 1 and 2 p.m. 2RP 91-92. H.L. called Mr. Lowry in the early afternoon to say she was at Lakewood Town Center. 2RP 92. She could have taken bus 204 from Lakewood Town Center to get home directly, but instead she took bus 300, which took her somewhere else. 2RP 93, 104-05.

Mr. Lowry received another call from H.L. later in afternoon, saying she was still at Lakewood Town Center. 2RP 94-95. She arrived home between 3:30 and 4 pm. 2RP 95. She was three or four hours late in getting back from DSHS. 2RP 95. When asked why she was late, H.L. initially responded it was none of his business. 2RP 96. After prodding, she said she was raped. 2RP 96. He insisted she call the police. 2RP 96-97. She initially refused, but after 20 minutes made the call. 2RP 97. Her demeanor changed from calm to sobbing at that time. 2RP 97.

After she arrived home, H.L. told Mr. Lowry that she went to use someone's phone to call and tell him she was going to be home late. 2RP 98. The guy's phone was in his bedroom. 2RP 98. She told him her cell phone died, which did not make sense because her phone was fully charged when she left in morning and 500 minutes were put on it a few

days before. 2RP 91, 105-06. In her recorded interview, H.L. indicated she was running out of minutes on her phone on the date of the incident, which is one reason why she went to Peterson's apartment. 1RP 67.

H.L. said the guy grabbed her really hard on the bicep and threw her down. 2RP 99. Mr. Lowry did not see any marks on H.L. 2RP 99. H.L. also told Mr. Lowry that the guy pulled out a gun after he raped her, but she later realized the gun was fake. 2RP 98, 101. She noticed the gun when she was running out of the door of the apartment. 2RP 100. She never said the gun was used during the rape. 2RP 102. In her recorded statement, H.L. maintained Peterson shoved a gun in her stomach as soon as she entered the bedroom. Ex. 8 (p. 10).

Mr. Lowry testified they were in process of separating again at the time of her encounter with Peterson. 2RP 102. He believed H.L. had sexual relations but then claimed rape rather than admit to cheating on him. 2RP 103.[5]

Peterson was originally charged with first degree rape. 3RP 10. Peterson's plea to an amended charge of second degree assault carried a substantially reduced sentence. 3RP 14-16, 24-25. Detective Holmes told the prosecutor that she believed H.L. was lying. 1RP 101-02. The

[5] Their present relationship was very shaky. 2RP 106. He worried that he would not be able to see their kids as much as a result of testifying. 2RP 106.

prosecutor, Sven Nelson, had concerns about H.L.'s credibility because parts of her story were inconsistent. 3RP 19-20. The prosecutor was unable to reach H.L. after an interview with the defense attorney was scheduled. 3RP 19, 22, 31.

Following the evidentiary hearing, the trial court ruled the two hearsay statements made by H.L. qualified as prior recorded recollections under ER 803(a)(5) and could therefore be considered as substantive evidence. CP 311-13; 3RP 87-94. Relying on those statements, the court concluded the State proved beyond a reasonable doubt that Peterson had been convicted of second degree assault and that the assault against H.L. was done with sexual motivation, thus qualifying as a "sexually violent offense" under RCW 71.09.020(17). CP 314-18; 3RP 153-59.

A jury tried the remaining issues, but did not find Peterson met the definition of a sexually violent predator. CP 405. The court ordered Peterson's release. CP 406. Peterson appealed, challenging the trial court's order that his prior offense qualifies as a "sexually violent offense" as defined by RCW 71.09.020(17). See Corrected Brief of Appellant; Reply Brief of Appellant.

The Court of Appeals found Peterson was an aggrieved party but affirmed, holding the trial court did not err by admitting the H.L.'s statements as recorded recollections under ER 803(a)(5). Slip op.at 1.

The Court of Appeals noted Peterson's argument that the facts surrounding H.L.'s statements do not establish other indicia of reliability to support the admission of the statements. Id. at 6. Specifically, Peterson relied on inconsistencies in H.L.'s statements, H.L.'s motive to fabricate the allegation of rape, and H.L.'s reputation for dishonesty. Id.

But the Court of Appeals believed "Peterson's argument actually challenges the credibility of H.L.'s statements, not the accuracy of the recorded recollection which is required for admission under ER 803(a)(5)." Id. In other words, Peterson's argument went "to the weight of the evidence, not to its admissibility." Id. at 8. This is so, according to the Court of Appeals, because Washington cases "imply a distinction between the accuracy of the recorded recollection itself and the credibility of the witness's statement." Id. at 6 (citing State v. Alvarado, 89 Wn. App. 543, 552, 949 P.2d 831 (1998); State v. Derouin, 116 Wn. App. 38, 44-47, 64 P.3d 35 (2003)). In determining admissibility, courts look in part to whether "the record reflects the witness' prior knowledge accurately." Slip op. at 5 (quoting Alvarado, 89 Wn. App. at 548). The Court of Appeals insisted "[t]he accuracy of the record means that the recorded recollection itself accurately states the witness's perceptions of the event. In contrast, credibility refers to whether the content of the witness's statement is truthful. For the purposes of ER 803(a)(5), accuracy applies to the record,

credibility applies to the content—these are distinctions between form and substance." Slip op. at 6.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS DECISION CONFLICTS WITH OTHER DECISIONS ON THE LEGAL STANDARD FOR DETERMINING ADMISSIBILITY OF RECORDED RECOLLECTIONS AS AN EXCEPTION TO THE HEARSAY RULE.

Hearsay is generally inadmissible. ER 802. One exception to the hearsay rule is recorded recollection, which is 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).

To be admissible, the following factors must be met: (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' memory; and (4) the record reflects the witness' prior knowledge accurately. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009).

In considering the fourth factor — whether the record reflects the witness' prior knowledge accurately — courts must consider the totality of circumstances. Alvarado, 89 Wn. App. at 551. Relevant circumstances include (1) whether the declarant disavows accuracy; (2) whether the witness claimed accuracy when she made the statement; (3) whether the recording process was reliable; and (4) whether other indicia of reliability establishment the accuracy of the statement. Alvarado, 89 Wn. App. at 551-52; White, 152 Wn. App. at 184.

The law in this area is a mess. In State v. Nava, Division Three of the Court of Appeals affirmed a trial court's decision admitting statements as recorded recollections because the trial court, in assessing their accuracy in the face of the witness's disavowal, found the statements to be credible. State v. Nava, 177 Wn.App. 272, 294, 296-97, 311 P.3d 83 (2013), review denied, 179 Wn.2d 1019 (2014). Now Division Two of the Court of Appeals has affirmed a trial court's decision admitting statements as recorded recollections because the trial court "properly distinguished between the accuracy of the record itself and the credibility of the witness." Slip op. at 7.

Nava and Peterson are a study in polar contrasts. Under Nava, the trial court assesses the credibility of the statement to determine admissibility. Under Peterson, the trial court disregards whether the

statement is credible and focuses solely on whether the record accurately reflected the witness's perceptions at the time the statement was made. These two decisions take extreme and diametrically opposed positions on how to assess admissibility of statements as recorded recollections. This is a conflict in the law warranting review under RAP 13.4(b)(2). Further, trial courts need a consistent standard for guidance, given the frequency with which this evidentiary rule arises. In this regard, Peterson's case raises an issue of substantial public importance warranting review under RAP 13.4(b)(4).

Peterson disagrees with both Nava and the Court of Appeals decision in his case regarding the proper analytical framework for assessing whether a statement can be admitted as a recorded recollection. Determining admissibility is not a matter of assessing witness credibility and Nava is wrong in that respect. But neither is it reducible to whether the record accurately reflected the witness's perceptions at the time the statement was made, regardless of whether other indicia show the statement is unreliable. The problem with the Court of Appeals decision is that it reads out of existence a portion of the established test for determining the admissibility of prior statements as recorded recollections: whether other "indicia of reliability" establish the accuracy of the statement. The test by which courts are to determine the fourth prong of

accuracy is a totality of circumstances test. Derouin, 116 Wn. App. at 44 (citing Alvarado, 89 Wn. App. at 551). The Court of Appeals in Peterson's case has in effect held the totality of circumstances cannot be taken into account in determining reliability. The Court of Appeals affirmed the trial court's decision by looking to the first three factors of the test for admitting recorded recollections while ignoring the fourth. Slip op. at 7-8.

The inconsistencies in H.L.'s statements, H.L.'s motive to fabricate the allegation of rape, and H.L.'s reputation for dishonesty are all appropriate circumstances to consider in determining whether the record reflects the witness' prior knowledge accurately. They are part of the "other indicia of reliability" analysis under the totality of circumstances test for determining admissibility. The linchpin of the test for admissibility is reliability of the statement. See Derouin, 116 Wn. App. at 46 ("In adopting a totality of the circumstances test as opposed to the requirement that the declarant attest to the statements accuracy on the stand, the Alvarado court set forth several prongs that may be considered when determining indicia of reliability."). Assessment of reliability is not the same as assessment of credibility. There is a distinction between the two, but the Court of Appeals did not draw the correct distinction.

The multi-factor test for admitting child hearsay is instructive by analogy. In addressing whether a child's hearsay statement is reliable and thus admissible: "the scope of the inquiry required under the child hearsay statute is restricted to issues pertaining to reliability rather than credibility. The focus is on the time, content, and circumstances of the statements, not on their weight and substance in the subsequent search for truth." State v. Gregory, 80 Wn. App. 516, 521, 910 P.2d 505 (1996).

The same dynamic presents itself in assessing the reliability of statements as recorded recollections under ER 803(a)(5). Peterson's argument about inconsistencies in the statements, motive to fabricate and reputation for dishonesty at the time the statements were made all go to the timing, content, and circumstances of the statements. These considerations implicate admissibility because they are relevant indicia of reliability. Whether or not the witness was credible — whether she was telling the truth in making the statement — is not part of this analysis. The credibility determination is for the trier of fact to make in the event the statement is admitted into evidence. But taking into account relevant circumstances in determining the reliability of the statement is a proper function of the trial court acting as evidentiary gatekeeper.

The Court of Appeals relied on Alvarado and Derouin as support for its position, but in both of those decisions the appellate court

considered circumstances that the Court of Appeals' analysis would deem impermissible. In Alvarado, circumstances that showed the statements to be reliable included their timing, the consistency between the two statements, corroborating physical evidence and witness interviews, and the defendant's confession. Alvarado, 89 Wn. App. at 552. Of significance, the statements reflected "a detailed and fairly comprehensive knowledge of the crime" and the witness "answered all questions lucidly and at no time suggested that he was unsure of what he remembered." Id. These are the same types of things that the Court of Appeals in Peterson's case condemns as going to weight, not admissibility.

In Derouin, other sufficient indicia of reliability which weighed in favor of admitting the statement included the fact that the victim's description of the events to another person were markedly similar to the statements she made in the past recorded recollection and photographic evidence corroborated the accuracy of the prior statement. Derouin, 116 Wn. App. at 47. Again, the Court of Appeals decision in Peterson's case would bar consideration of these circumstances. This Court should take review to clarify what circumstances are properly taken into account in determining the admissibility of a prior statement as a recorded recollection.

As argued to the Court of Appeals, H.L.'s hearsay statements were improperly admitted because the test for admission under ER 803(a)(5) was not met. The inconsistencies in H.L.'s statements, H.L.'s motive to fabricate the allegation of rape, and H.L.'s reputation for dishonesty show H.L.'s statements to police were not reliable under the totality of the circumstances. The error was not harmless because the court relied on these statements to find Peterson was convicted of a sexually violent offense. CP 316 (FF 5, 6).

F. CONCLUSION

For the reasons stated above, Peterson requests that this Court grant review.

DATED this 2nd day of March 2017.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Detention of: JOSEPH M. PETERSON, Appellant.	No. 47661-4-II PUBLISHED IN PART OPINION

SUTTON, J. — Joseph M. Peterson appeals from the trial court's order concluding that his second degree assault conviction is a sexually violent offense for the purpose of civil commitment for sexually violent predators (SVP) under chapter 71.09 RCW. Peterson argues that the trial court erred by admitting the victim's statements as recorded recollections under ER 803(a)(5). We hold that the trial court did not err by admitting the victim's recorded recollections under ER 803(a)(5). Accordingly, we affirm the trial court.

FACTS

On March 29, 2013, the State filed a petition seeking Peterson's involuntary commitment as a SVP. The petition alleged that, on July 2, 2007, Peterson was convicted of second degree assault and that the assault was sexually motivated because the charges originated from a rape complaint. Therefore, Peterson's second degree assault conviction met the criteria for a sexually violent offense under RCW 71.09.020(17)(c). The petition also alleged that Peterson met the other criteria for an SVP.

Peterson and the State stipulated that Peterson's SVP trial would be bifurcated. First, a bench trial would be held to allow the trial court to determine whether Peterson's second degree assault conviction was a sexually violent offense. Second, if the trial court determined that Peterson's second degree assault conviction was a sexually violent offense, the remaining issues in the SVP petition would be tried to a jury.

The State moved to admit two of H.L.'s[1] statements as recorded recollections under ER 803(a)(5) to establish that the second degree assault was sexually motivated. Specifically, the State moved to admit H.L.'s handwritten statement given to detectives on the date of the incident and H.L.'s taped recorded statement given to detectives six days after the incident.

At the hearing, H.L. testified that she had experienced memory loss and could not recall the events surrounding the 2007 assault. When asked to review her handwritten statement, H.L. testified that she recognized her handwriting but that she did not remember writing the statement. She also testified that she believed that what she wrote was true because "my memory was there at that time, and I would have been able to recall exactly what had happened." 1 Verbatim Report of Proceedings (VRP) at 79. H.L. also testified that she remembered going to give a recorded statement to the police, but she could not remember the conversation itself. H.L. testified that she believed her recorded statement was also true and accurate. She also testified, "I have nothing to gain from making up a story. To me, it doesn't seem like it would be smart." 1 VRP at 81. Finally, H.L. testified that she had not ever recanted or denied her statements.

[1] H.L. is the victim in the assault and we use initials to protect the victim's privacy.

The State also presented the testimony of Detective Kim Holmes of the Lakewood Police Department, who was the detective assigned to investigate H.L.'s rape complaint. Holmes also testified that the recording accurately reflected her memory of the interview.

Peterson objected to the admission of H.L.'s statements arguing that they did not meet the requirements of ER 803(a)(5) for recorded recollections. Peterson presented testimony from Detective Holmes that showed several inconsistencies between H.L.'s handwritten statement and her recorded statement. Peterson also called two former residents of H.L.'s apartment complex to testify that, at the time of the incident, H.L. had a reputation for dishonesty. And, H.L.'s ex-husband, who H.L. lived with at the time of the incident, also testified that he did not believe her statement that she had been raped.

The trial court then entered the following findings of fact:

> A. Both records pertain to a matter about which [H.L.] once had personal knowledge.
>
> B. [H.L.] now has an insufficient recollection about the matter to testify fully and accurately.
>
> C. The records were made or adopted by [H.L.] when the matter was fresh in her mind.
>
> D. The records reflect [H.L.]'s prior knowledge accurately because:
>
> 1. [H.L.] did not disavow the accuracy of her statements.
> 2. [H.L.] averred accuracy at the time of making the statements.
> 3. The recording process was reliable for both statements.
> 4. The totality of the circumstances establish the trustworthiness of the statements.

Clerk's Papers (CP) at 312. Based on its findings, the trial court concluded that H.L.'s prior statements were admissible as recorded recollections under ER 803(a)(5).

After the bench trial, the trial court entered findings of fact and conclusions of law on whether Peterson's second degree assault conviction was a sexually violent offense. The trial court

found that Peterson was originally charged with first degree rape, but that he had entered a guilty plea to an amended charge of second degree assault. The trial court found that H.L.'s statements regarding the incident were credible and that Peterson's statements were not credible. And, the trial court found that Peterson's actions were committed for his sexual gratification. Based on its findings, the trial court concluded that the State proved, beyond a reasonable doubt, that Peterson has a valid conviction for second degree assault that was committed with sexual motivation. Therefore, the trial court concluded that Peterson had a conviction for a sexually violent offense under RCW 71.09.020(17)(c).

Peterson's SVP petition then proceeded to a jury trial. The jury found that the State did not meet its burden to prove beyond a reasonable doubt that Peterson was a sexually violent predator. Based on the jury's verdict, Peterson was released from confinement. Peterson appeals the trial court's order concluding that his second degree assault conviction is a sexually violent offense.

ANALYSIS

Peterson argues that the trial court erred by admitting H.L.'s prior statements as recorded recollections under ER 803(a)(5). The State argues that Peterson's appeal is not appropriately before us because Peterson is not an aggrieved party under RAP 3.1. For the reasons set forth in the unpublished portion of this opinion, we have determined that Peterson is an aggrieved party. Therefore, we consider the merits of his argument that the trial court erred by admitting the victim's statements under ER 803(a)(5).

Peterson argues that the trial court abused its discretion by admitting H.L.'s statements because H.L.'s prior statements lack other indicia of reliability. The trial court did not abuse its

discretion in finding that H.L.'s statements were admissible as recorded recollections. Accordingly, we affirm.

We review a trial court's ruling admitting evidence under ER 803(a)(5) for an abuse of discretion. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). ER 803(a)(5) states,

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

Evidence is admissible under ER 803(a)(5) when:

> (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' memory; and (4) the record reflects the witness' prior knowledge accurately.

Alvarado, 89 Wn. App. at 548 (citing *State v. Mathes*, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987); ER 803(a)(5)). Peterson does not challenge the first three factors. The only issue is whether the recorded recollection reflects H.L.'s prior knowledge accurately.

When determining whether the record reflects the witness's prior knowledge accurately, the trial court must examine the totality of the circumstances. *Alvarado*, 89 Wn. App. at 551-52. The totality of the circumstances includes:

> (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Alvarado, 89 Wn. App. at 552. Peterson argues that the facts surrounding H.L.'s statements do not establish other indicia of reliability to support the admission of the statements. Specifically, Peterson relies on inconsistencies in H.L.'s statements, H.L.'s motive to fabricate the allegation of rape, and H.L.'s reputation for dishonesty. However, Peterson's argument actually challenges the credibility of H.L.'s statements, not the accuracy of the recorded recollection which is required for admission under ER 803(a)(5).

Washington cases addressing the admissibility of recorded recollections imply a distinction between the accuracy of the recorded recollection itself and the credibility of the witness's statement. *See Alvarado*, 89 Wn. App. at 552; *State v. Derouin*, 116 Wn. App. 38, 44-47, 64 P.3d 35 (2003). The accuracy of the record means that the recorded recollection itself accurately states the witness's perceptions of the event. In contrast, credibility refers to whether the content of the witness's statement is truthful. For the purposes of ER 803(a)(5), accuracy applies to the record, credibility applies to the content–these are distinctions between form and substance.

Division I of this court's analysis in *Alvarado* is instructive. There, the court determined that the records admitted by the trial court under ER 803(a)(5) satisfied the accuracy prong even though the witness had demonstrated he was capable of lying and he had made other statements about the incident that he admitted were false. 89 Wn. App. at 552-53. The court also noted that admission of the witness's conflicting statements "provided a context from which defense counsel could assail [the witness's] credibility." *Alvarado*, 89 Wn. App. at 553. The court's analysis in *Alvarado* demonstrates that a record can be considered accurate for the purposes under ER 803(a)(5) even when a witness's credibility is clearly questionable.

The appellate court's analysis in *Derouin*, provides additional support for the distinction between form and substance under ER 803(a)(5). 116 Wn. App. at 44-47. The court in *Derouin* evaluated the totality of the circumstances, considered whether the recording process was reliable, and noted that the recording process was not ideal because the detective wrote the statement which the witness then signed under the penalty of perjury. *Derouin*, 116 Wn. App. at 46. The court noted, "Such a recording process makes it more likely that the statement contained inaccuracies or statements flavored by the officer's perception of the events and not the actual witness's perceptions." *Derouin*, 116 Wn. App. at 46. The court examined whether the record itself accurately reflected the *witness's perceptions,* not whether the perceptions themselves were accurate. *Derouin*, 116 Wn. App. at 46. The court observed, "Any inaccuracies within the statement due to the recording process can be argued at trial and should go to the weight, not the admissibility of the evidence." *Derouin*, 116 Wn. App. at 46. The court's analysis in *Derouin* further supports the distinction between the accuracy of the record itself and the credibility of the witness.

Here, the trial court properly distinguished between the accuracy of the record itself and the credibility of the witness to determine whether H.L.'s statements were admissible as recorded recollections under ER 803(a)(5). The trial court found that the recording processes were reliable, that H.L. had handwritten her first statement, and that H.L. testified that she recognized her handwriting and signature on the statement. H.L's second statements were recorded and the detective, who was involved in the interview, testified that the recording and transcript accurately reflected the detective's recollection of the interview. The trial court also noted that H.L. never disavowed the statements. And, at the time she made the statements, H.L. averred that the

statements were accurate. Given the totality of the circumstances, the trial court did not abuse its discretion in determining that the records accurately reflected H.L.'s statements regarding the incident. Peterson's argument against admission relates to H.L.'s credibility and goes to the weight of the evidence, not to its admissibility. Accordingly, the trial court did not abuse its discretion by admitting H.L.'s prior statements as recorded recollections under ER 803(a)(5).

A majority of the panel having determined that only the foregoing portion of this opinion will be published in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ORDER ON SEXUALLY VIOLENT OFFENSE

Peterson assigns error to the trial court's order concluding that his second degree assault conviction is a sexually violent offense under RCW 71.09.020(17)(c). Peterson's argument challenging H.L.'s statements relates to H.L.'s credibility. Because credibility determinations are reserved solely for the trier of fact, Peterson's challenge to the trial court's order fails.

When reviewing a trial court's decision following a bench trial, our review is limited to whether substantial evidence supports any challenged findings of fact and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Unchallenged findings of fact are verities on appeal. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). We do not review credibility determinations. *State v. Kaiser*, 161 Wn. App. 705, 724, 254 P.3d 850 (2011). Here, the trial court made a specific finding of fact that H.L. was credible, which finding Peterson challenges. But Peterson's challenge fails because we do not review credibility determinations.

H.L.'s statements regarding the incident establish that Peterson had sexual intercourse with her. The fact that sexual intercourse occurred supports the trial court's conclusion that the assault was committed for Peterson's sexual gratification, making the crime sexually motivated under former RCW 9.94A.030(47).[2] Because the second degree assault was sexually motivated, the trial court properly concluded that Peterson's second degree assault conviction was a sexually violent offense under RCW 71.09.020(17)(c). Accordingly, we affirm the trial court's order concluding that Peterson's second degree assault conviction is a sexually violent offense.

AGGRIEVED PARTY

The State argues that we should decline to address Peterson's appeal because he is not an aggrieved party as required by RAP 3.1. Specifically, the State argues that Peterson is not aggrieved because a jury decided the ultimate issue in this case–whether Peterson is an SVP–in Peterson's favor and Peterson has been released from confinement. Because the trial court's order legally establishes that the State has proven a predicate sexually violent offense, the trial court's order has continuing legal consequences for Peterson. Accordingly, Peterson is an aggrieved party.

Under RAP 3.1, "[O]nly an aggrieved party may seek review by the appellate court." An aggrieved party is "one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003) (citing *State ex rel. Simeon v. Superior Court for King County*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944)). An aggrieved party's interest must be

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[2] Former RCW 9.94A.030(47) (2012), *recodified as* RCW 9.94A.030(48) states,

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

present and substantial rather than contingent. *Tinker v. Kent Gypsum Supply, Inc.*, 95 Wn. App. 761, 764-65, 977 P.2d 627 (1999). "An aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result." *Taylor*, 150 Wn.2d at 603. A party may not seek appellate review of an issue on which the party prevailed simply because the party does not agree with the trial court's reasoning. *State v. Alexander*, 125 Wn.2d 717, 721 n.6, 888 P.2d 1169 (1995).

The State argues that Peterson prevailed on the ultimate issue at the trial court–whether he is an SVP–therefore, he is not an aggrieved party entitled to appeal under RAP 3.1. The State relies on *Taylor* to argue that, because the trial court's order has no effect unless the State files a new SVP petition, Peterson is not under any burden or obligation from the trial court's order. We disagree.

In *Taylor*, our Supreme Court held that the defendant was not an aggrieved party entitled to seek discretionary review of the trial court's order dismissing his criminal charges without prejudice. 150 Wn.2d at 603. Specifically, our Supreme Court stated, "Until the State refiles charges against [the defendant], if indeed it does, he is under no restriction, and he has the benefit of a running statute of limitations. We cannot conclude, therefore, that he has been injured in any legal sense." *Taylor*, 150 Wn.2d at 603. However, under the SVP statute, the trial court's order has continuing legal consequences for Peterson. Therefore, the facts of this case are sufficiently distinguishable from those in *Taylor*.

Under chapter 71.09 RCW, the State may involuntary commit a person who is found to be an SVP. A conviction for a crime of sexual violence is a predicate to a finding that a person is an SVP. RCW 71.09.020(18). In many cases, the conviction for a crime of sexual violence itself is

sufficient to establish this predicate finding. RCW 71.09.020(17)(a). However, in some cases, such as in Peterson's, a trial court must make a finding of sexual motivation at a commitment hearing before a conviction can be a predicate sexually violent offense. RCW 71.09.020(17)(c). Once the State establishes a predicate sexually violent offense by a person, the State can rely on the trial court's order as a basis to file a new SVP petition. Under RCW 71.09.040, once the State establishes probable cause for an SVP petition, a trial court must hold the person in total confinement pending a trial on the SVP petition.[3]

Here, the trial court's finding, that Peterson's second degree assault conviction is a sexually violent offense, has legal consequences to Peterson. Based on the trial court's order, the State has established a predicate sexually violent offense for the purposes of a SVP petition. RCW 71.09.030(1)(e). Therefore, in this case, the trial court's order provides a basis for the State to file a new SVP petition.

Because the trial court's order has legal consequences, the trial court's order is more analogous to an order in an involuntary commitment proceeding. *See In re Det. of M.K.*, 168 Wn. App. 621, 279 P.3d 897 (2012). In *M.K.*, we addressed whether an appeal was moot after an involuntary commitment period had expired. We held that "it is clear that MK's appeal of his involuntary commitment order is not moot, despite the treatment period in the challenged order having expired, because a trial court presiding over future involuntary commitment hearings may consider MK's prior involuntary commitment orders when making its commitment

[3] RCW 71.09.040(4) provides, "If the probable cause determination is made, the judge shall direct that the person be transferred to the custody of the department of social and health services for placement in a total confinement facility operated by the department. In no event shall the person be released from confinement prior to trial."

determination." 168 Wn. App. at 629. Although *M.K.* addressed an issue of mootness, rather than whether the appellant was an aggrieved party, the reasoning is similar. Like an involuntary commitment order, the trial court's order here has a continuing, future effect because the order subjects Peterson to the SVP statute.

Because the trial court's order subjects Peterson to the SVP statute, the order affects his personal right to be free from potential total confinement pending an SVP trial. Although this effect is still contingent on the State filing a new SVP petition, the threat of total confinement pending another SVP trial is substantial. Accordingly, Peterson is an aggrieved party under RAP 3.1.

CONCLUSION

Peterson is an aggrieved party under RAP 3.1, therefore, we consider the merits of his argument on appeal. The trial court did not abuse its discretion in admitting H.L.'s statements under ER 803(a)(5), and we do not review credibility determinations. Accordingly, we affirm the trial court's order concluding that Peterson's second degree assault conviction is a sexually violent offense.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

Lee, J.
LEE, J.

NIELSEN, BROMAN & KOCH, PLLC

March 02, 2017 - 12:12 PM

Transmittal Letter

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Court of Appeals Case Number: 47661-4

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