

NO. 36371-2-II

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

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STATE OF WASHINGTON,

Appellant,

v.

DAVID BRISSETTE,

Respondent.

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

The Honorable James B. Sawyer, II, Judge

STATE OF WASHINGTON  
BY DEPUTY

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

	Page
A. <u>ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural History</u> .....	1
2. <u>Evidence At Trial</u> .....	4
a. <u>J.L.H.'s Testimony</u> .....	7
b. <u>S.L.B.'s Testimony</u> .....	8
c. <u>Other Testimony</u> .....	10
C. <u>ARGUMENT</u> .....	12
THE TRIAL COURT EXERCISED SOUND DISCRETION IN DETERMINING ONE SISTER'S PERJURED TESTIMONY WAS MATERIAL EVIDENCE THAT LIKELY AFFECTED THE VERDICT ON ALL COUNTS. ....	12
1. <u>The Trial Judge's Decision To Grant A New Trial Must Be Affirmed Unless No Reasonable Person Would Do The Same.</u> .....	12
2. <u>The Trial Court's Determination That J.L.H.'s Testimony Was Material And Probably Affected The Verdict On Counts Relating To S.L.B. Is Supported By Substantial Evidence.</u> .....	14
D. <u>CONCLUSION</u> .....	27

**TABLE OF AUTHORITIES**

	Page
 <b><u>WASHINGTON CASES</u></b>	
<u>In re Det. of Kistenmacher,</u> 134 Wn. App. 72, 138 P.3d 648 (2006) . . . . .	13
<u>Roe v. Snyder,</u> 100 Wn. 311, 170 P. 1027 (1918) . . . . .	20
<u>State v. Baker,</u> 89 Wn. App. 726, 950 P.2d 486 (1997) . . . . .	16-18, 23
<u>State v. Bradford,</u> 60 Wn. App. 857, 808 P.2d 174 (1991) . . . . .	22
<u>State v. Bynum,</u> 76 Wn. App. 262, 884 P.2d 10 (1994) . . . . .	21
<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990) . . . . .	14
<u>State v. Coe,</u> 101 Wn.2d 772, 684 P.2d 668 (1984) . . . . .	16, 25, 26
<u>State v. Coe,</u> 109 Wn.2d 832, 750 P.2d 208 (1988) . . . . .	25, 26
<u>State v. Condon,</u> 72 Wn. App. 638, 865 P.2d 521 (1993) . . . . .	15
<u>State v. Crowell,</u> 92 Wn.2d 143, 594 P.2d 905 (1979) . . . . .	13

**TABLE OF AUTHORITIES (CONT'D)**

	Page
 <b><u>WASHINGTON CASES (CONT'D)</u></b>	
<b><u>State v. Dawkins,</u></b> 71 Wn. App. 902, 863 P.2d 124 (1993) . . . . .	17, 19, 20
<b><u>State v. DeVincentis,</u></b> 150 Wn.2d 11, 74 P.3d 119 (2003) . . . . .	18, 23
<b><u>State v. Dickerson,</u></b> 69 Wn. App. 744, 850 P.2d 1366 (1993) . . . . .	24
<b><u>State v. Escalona,</u></b> 49 Wn. App. 251, 742 P.2d 190 (1987) . . . . .	24
<b><u>State v. Huelett,</u></b> 92 Wn.2d 967, 603 P.2d 1258 (1979) . . . . .	13
<b><u>State v. Israel,</u></b> 113 Wn. App. 243, 54 P.3d 1218 (2002) . . . . .	13
<b><u>State v. Lewis,</u></b> 130 Wn.2d 700, 927 P.2d 235 (1996) . . . . .	13
<b><u>State v. Lough,</u></b> 125 Wn.2d 847, 889 P.2d 487 (1995) . . . . .	17, 18, 23
<b><u>State v. Macon,</u></b> 128 Wn.2d 784, 911 P.2d 1004 (1996) . . . . .	12-14
<b><u>State v. Saltarelli,</u></b> 98 Wn.2d 358, 655 P.2d 697 (1982) . . . . .	16, 17

**TABLE OF AUTHORITIES (CONT'D)**

Page

**WASHINGTON CASES (CONT'D)**

State v. Wade,  
98 Wn. App. 328, 989 P.2d 576 (1999) . . . . . 15

State v. Walton,  
64 Wn. App. 410, 824 P.2d 533 (1992) . . . . . 19

State v. Wilson,  
136 Wn. App. 596, 150 P.3d 144 (2007) . . . . . 13

State v. Wynn,  
178 Wn. 287, 34 P.2d 900 (1934) . . . . . 20

**FEDERAL CASES**

Nix v. Whiteside,  
475 U.S. 157, 106 S. Ct. 988,  
89 L. Ed.2d 123 (1986) . . . . . 14

Taylor v. Illinois,  
484 U.S. 400, 108 S. Ct. 646,  
98 L. Ed. 2d 798 (1988) . . . . . 14

**RULES, STATUTES AND OTHERS**

Black's Law Dictionary (7th ed. 1999) . . . . . 16

CrR 7.5(a)(3) . . . . . 2, 12

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHERS (CONT'D)</u></b>	
ER 401 .....	22
ER 404 .....	15
ER 404(b) .....	15, 17, 18
RCW 9A.72.020(1) .....	14
Slough & Knightly, <u>Other Vices, Other Crimes</u> , 41 Iowa L.Rev. 325 (1956) .....	16

A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

The jury heard two sisters accuse their father, David Brissette, of sexually abusing them. The older sister coherently described the alleged abuse in compelling detail. The younger sister's testimony was weak. The jury convicted Brissette of abusing both girls. After trial, the judge determined the older sister perjured herself in testifying Brissette abused her. Did the trial judge exercise sound discretion in granting a new trial on counts pertaining to the younger sister where the judge, who is in the best position to assess prejudice within the context of a trial, determined the older sister's perjured testimony probably influenced the outcome on counts involving the younger sister?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged respondent David Brissette with first degree child molestation (count I), second degree child molestation (count II), and third degree child rape (count III). CP1<sup>1</sup> 168-70. J.L.H., Brissette's stepdaugh-

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<sup>1</sup> Two sets of Clerk's papers were designated in this case. In accordance with the State's designation, "CP1" refers to Clerk's Papers originally designated under COA No. 35611-2-II. "CP2" refers to Clerk's Papers designated under COA No. 36371-2-II.

ter, was the alleged victim. CP1 168-70; RP<sup>2</sup> 799. The State also charged Brissette with two counts of second degree child molestation (counts IV and V) against Brissette's biological daughter, S.L.B. CP1 168-70; RP 799. A jury acquitted Brissette of rape but convicted him on all molestation counts. CP1 89-93.

After the verdict but before sentencing, J.L.H. recanted her testimony that Brissette abused her. RP 903-934. At the recantation hearing, J.L.H. testified Brissette was innocent and had done nothing to her. RP 905-06, 934. Contrary to trial testimony, J.L.H. further maintained S.L.B. never said Brissette abused her and in fact told J.L.H. there was no abuse. RP 916-17. The trial court found J.L.H. perjured herself in testifying at trial that Brissette abused her. CP1 11-13. Pursuant to CrR 7.5(a)(3), the court granted Brissette's motion for a new trial on the molestation charges pertaining to J.L.H. CP1 1-2, 11-13, 50-53; RP 949-50. The court determined the recantation was newly found evidence that would probably change the result of the trial; could not have reasonably been discovered before trial; was material to the issues; and was not merely cumulative or impeaching. CP1 12; RP 950.

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<sup>2</sup> This brief uses the State's designation of the verbatim report of proceedings.

The court initially denied Brissette's motion for a new trial on the molestation charges pertaining to S.L.B. because J.L.H.'s recantation did not amount to a recantation of S.L.B.'s testimony. CP1 12, 50-53; RP 951. The court ultimately granted Brissette's motion to reconsider, vacated the convictions pertaining to S.L.B., and ordered a new trial on those counts because "JLH's perjurous [sic] testimony at trial may have impacted the jury's deliberations as to counts IV and V involving SLB." CP2 15-16, 25-34; RP 966-78.

The trial court denied the state's motion to reconsider. CP2 3-7, 8-11; RP 996-98. In support, the court found "the testimony of JLH at trial was more extensive and more continuous than the testimony of SLB." CP2 5 (Finding of Fact 7). The court found "JLH's post-trial recantation is material to the jury's finding of guilt on the counts relating to SLB as the tidal wave of JLH's testimony carried the counts relating to SLB." CP2 6 (Conclusion of Law E). The court also determined the jury's verdict on the counts relating to S.L.B. would have been different but for J.L.H.'s perjured testimony. CP2 6 (Conclusion of Law C). The State appeals the trial court's grant of a new trial on counts IV and V pertaining to S.L.B.

2. Evidence At Trial

J.L.H. (d.o.b. 11/20/88) and S.L.B. (d.o.b. 5/6/91) are sisters. RP 51, 396-97. S.L.B. and J.L.H. lived in a singlewide trailer with their father, mother and three brothers about eight miles outside Shelton. RP 28-29, 398, 400. Brissette worked odd jobs to support his family. RP 829-31, 838. His disabled wife received SSI. RP 856. The trailer had no running water. RP 403. Electricity came from a gas generator. RP 61, 403-04. The family took baths in a storage tub placed in the living room and everyone used the same bath water. RP 59, 114-15, 406, 811. RP 115. They used an outdoors port-a-pottie for a bathroom. RP 59, 130, 403. RP 564. Much of their clothing was second-hand. RP 809.

J.L.H. did not like living in a cluttered and unclean house. RP 122, 163. She wanted running water, an inside bathroom, a "house that wasn't falling to pieces," and "a room that had a roof and insulation so you weren't freezing in winter." RP 123. Basically, J.L.H. wanted "to have a life that everybody else seems to have." RP 123. S.L.B., for her part, thought the place was a pigsty. RP 441.

Both girls were subject to strict household rules. RP 86-87, 96, 165-69, 423-25, 502-03, 840. They needed to wear baggy clothes. RP 86, 167, 423. They could not wear pants "like other girls wore." RP 86.

They could not wear earrings, jewelry, perfume or make-up. RP 86-87, 165-66, 424. They were not allowed to expose skin, and for this reason could not even wear a swimming suit while swimming. RP 86, 167, 425, 502-03. They were not allowed to wear their hair up except in a ponytail. RP 86, 166. They could not color their hair. RP 167. They could not have boyfriends. RP 87, 96, 424. J.L.H. wanted to date boys and be like her friends, but her parents would not let her. RP 840. They were not allowed to listen to anything but Christian music or read anything but the Bible or Christian books. RP 169. They were not allowed to go to school or participate in school activities. RP 163-64. They were home schooled. RP 60, 164.

The girls shared a bedroom, which had no attached door. RP 84, 432, 442. There was little privacy with seven people in the small trailer. RP 163, 839. J.L.H. was never left alone. RP 89. She was tired of being constantly watched. RP 563. Brissette would not let the girls go anywhere by themselves. RP 407, 564. J.L.H. lamented her stepfather was "a control freak." RP 90.

These rules became more oppressive for J.L.H. as she grew older. RP 170. She became cocky, rebellious and argumentative in the year

before she accused Brissette of molesting her. RP 823, 840. J.L.H. hated living in her stepfather's house and wanted to run away. RP 435.

J.L.H. initially asked a neighbor, Debra Sanders, to help her run away because she did not like her living conditions. RP 186-89. Sanders refused because J.L.H.'s desire to escape her living conditions was not a good enough reason. RP 188, 190. Sanders said she would only help J.L.B. run away if Brissette sexually abused her.<sup>3</sup> RP 192. A short time later, J.L.H. said she wanted to run away because Brissette sexually abused her. RP 82-83, 188-90. Presented with this new reason, Sanders brought J.L.H. to the sheriff's office, where J.L.H. accused Brissette of sexually abusing her over the past five or six years. RP 22-23, 62-64, 66-67, 196, 297. Just before she left home and asked Sanders for help, J.L.H. argued with Brissette over him being such a "control freak." RP 291-92.

J.L.H. was placed into protective custody. RP 25, 29, 649-51. She began living with her aunt and uncle in California in November 2004. RP 173-74. S.L.B. moved there shortly after J.L.H. accused their father of abuse. RP 293, 397, 399.

The 5,000 square foot California house consisted of five bedrooms, four bathrooms, a dining room, a living room, a family room, and a

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<sup>3</sup> Admitted to show J.L.H.'s state of mind. RP 191.

kitchen. RP 174, 503. According to S.L.B., the house had "fun" things, like a trampoline, swing set, tree house, basketball court, a mini golf course, a water slide, a pool, a pool table room, and a jacuzzi. RP 174-75, 503. After J.L.H. left home, she had boyfriends, dressed in previously forbidden clothing, colored her hair, wore jewelry, pierced her ears, went to school like other kids, listened to the music she wanted, and read whatever she wanted. RP 166-68, 171-73, 176-77. J.L.H. liked it better this way and she did not want to go back to living in Shelton. RP 173, 177. S.L.B. felt she was getting a better education in California. RP 408.

a. J.L.H.'s Testimony

Both sisters testified at trial, but the jury heard nearly 300 pages worth of testimony from J.L.H. before it heard a word out of S.L.B. RP 54-100, 102-05, 107-156, 160-200, 202-218, 227-78, 281-300, 304-340, 342-350, 385-95. J.L.H. testified in great detail for two days about all the horrible things Brissette supposedly did to her. RP 69-71, 74-77, 80, 85, 103-04, 110-18, 119, 202-06, 208-12, 233-48, 253-55, 262-78, 282-89, 324, 327-28, 330-31. J.L.H. said Brissette started rubbing her breasts and butt when she was nine. RP 67-68, 109-110. According to J.L.H., Brissette continued to do these things when she was 10, but also started rubbing her vagina on the outside of her clothes with his hand. RP 110.

When she was 11, Brissette rubbed her breasts and butt and started rubbing her vagina on the inside of her clothing. RP 111. When she was 13 or 14, Brissette started rubbing her all over her body, including her breasts and vagina, when he powdered her after she took a bath. RP 114, 236-37. When she was 15, Brissette began sucking J.L.H.'s breast and rubbing his penis on her until ejaculation. 74-76, 117-18. In August or early September 2004, Brissette had sexual intercourse with J.L.H. RP 27, 62-64, 212-13. The jury never learned J.L.H.'s accusations were all lies. CP1 12.

Shortly after arriving in California, J.L.H. told her sister for the first time that Brissette had abused her. RP 104, 293, 409-10. J.L.H. did not go into detail, but told her sister that Brissette rubbed her. RP 104, 508. J.L.H. asked if Brissette had done anything to S.L.B., at which point S.L.B. said Brissette had also inappropriately rubbed her. RP 104. S.L.B. did not tell her aunt and uncle about the alleged abuse. RP 104. In fact, S.L.B. did not tell anyone other than her sister. RP 104. J.L.H., however, told her aunt and uncle that Brissette had abused S.L.B. RP 104.

b. S.L.B.'s Testimony

S.L.B.'s testimony was much less extensive than her sister's testimony. RP 396-446, 495-516, 521-532. When J.L.H. told S.L.B.

about Brissette's alleged abuse, S.L.B. did not know what to think, was confused, and had no emotional response. RP 410-11. The same subject came up later, but S.L.B. could not remember when or where. RP 410. S.L.B. then said she could not remember that another conversation took place at all. RP 410. She later testified she told her sister something happened to her as well. RP 411. S.L.B. told J.L.H. that Brissette touched her in "inappropriate places." RP 413. J.L.H. asked what kind of places, and S.L.B. said, "like I told her my breasts, my butt, those are -- that -- that's it." RP 413. S.L.B. never told anyone else about the abuse. RP 415.

Like J.L.H., S.L.B. testified that Brissette started touching her when she was nine years old. RP 415. She later told someone else he started touching her when she was 11. RP 522. She claimed Brissette rubbed her butt on the outside of her clothing "[l]ike almost every day." RP 415-16, 513, 530. She testified Brissette touched her breast twice. RP 511, 529, 532. But she had earlier told someone that Brissette touched her breast many times. RP 532. On the stand, she admitted she lied when she earlier said Brissette touched her breast many times. RP 532. S.L.B. said she saw Brissette rub J.L.H.'s butt using a circular motion -- the same way he allegedly touched S.L.B. RP 527, 529.

She never told J.L.H. that Brissette touched her while the two lived in Washington. RP 435. Her only disclosure of abuse occurred in California when she allegedly told her sister, who turned around and told their aunt and uncle. RP 431. S.L.B. later told others that Brissette never abused her. RP 415, 509. Although S.L.B. said Brissette rubbed her butt "almost every day," none of the five other people living in the trailer ever saw Brissette inappropriately touch her. RP 416, 510-11.

c. Other Testimony

Aside from J.L.H.'s perjured testimony, S.L.B.'s testimony stood alone. RP 104, 294-95, 411-13. The testimony of other State's witnesses dealt exclusively with J.L.H.'s allegations. RP 21-52, 447-494, 546-79, 649-53, 726-797.

A doctor and nurse who worked in a sexual assault clinic examined J.L.H. for signs of abuse in September 2004. RP 448, 460-61, 727, 729. The clinic examined patients referred from entities such as Child Protective Services and law enforcement when there is an allegation of sexual abuse. RP 469, 473. The nurse testified J.L.H. disclosed Brissette had abused her. RP 732-34. She examined J.L.H. for signs of abuse and noticed a "suspicious" area in the hymen where the skin was separated. RP 735-36, 740. A doctor who supervised the examination agreed with the nurse's

assessment that the exam was normal but for a "suspicious" tissue "irregularity" in J.L.H.'s hymen. RP 460-61, 463, 480-82, 486. The doctor concluded the irregularity was "very concerning for sexual assault," even though there were no behavioral symptoms of abuse. RP 467, 475. The only physical symptom of abuse was painful urination, but this pain ended a year before the alleged rape in September 2004. RP 476-77. The doctor conceded the relevant time frames did not match. RP 477. In the end, the doctor was unable to diagnose vaginal penetration. RP 488-89.

Brissette denied inappropriately touching either of his daughters. RP 820, 822-23, 826-27. According to Brissette, S.L.B. told family friends she had not been abused. RP 674-75. S.L.B. did not change her story until her sister came to live with her in California. RP 677-80. Brissette's wife testified she never saw Brissette do anything inappropriate and that S.L.B. admitted before trial that Brissette had never touched her. RP 851, 853. Gordon Van Huis, a family friend who worked in law enforcement for 14 years, testified S.L.B. asked him why her father had been arrested shortly after the event. RP 867, 869, 871. When Van Huis told S.L.B. that J.L.H. accused their father of molestation, S.L.B. looked shocked and confused and asked "[w]hy would she say that?" RP 872.

C. ARGUMENT

THE TRIAL COURT EXERCISED SOUND DISCRETION IN DETERMINING ONE SISTER'S PERJURED TESTIMONY WAS MATERIAL EVIDENCE THAT LIKELY AFFECTED THE VERDICT ON ALL COUNTS.

The trial judge reasonably determined J.L.H.'s lies regarding Brissette's alleged molestation probably affected the jury's verdicts on counts relating to S.L.B.'s alleged molestation. This Court should therefore affirm the trial court's grant of a new trial.

1. The Trial Judge's Decision To Grant A New Trial Must Be Affirmed Unless No Reasonable Person Would Do The Same.

A trial court may grant a new trial based on newly discovered evidence pursuant to CrR 7.5(a)(3). Recantation is a form of newly discovered evidence. State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996). A new trial is appropriate when the moving party establishes the evidence: (1) will probably change the result of the trial; (2) was discovered since 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. at 800. If the trial court finds the post-verdict recantation credible, it must determine the likelihood of whether the jury's verdict was influenced by the original testimony and whether the new recantation evidence might lead to a different result. Id. at 801.

The decision to grant or deny a motion for new trial is within the discretion of the trial court and will be overturned only for an abuse of that discretion. State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). "Such abuse occurs only if 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 trial judge's decision is given great deference because the judge is in the best position to decide whether prejudice results in the context of trial. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than one denying it. Crowell, 92 Wn.2d at 145-46; State v. Israel, 113 Wn. App. 243, 296, 54 P.3d 1218 (2002).

Appellate review of factual findings is limited to whether the findings are supported by substantial evidence and whether the findings support the conclusions of law. Macon, 128 Wn.2d at 799. Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person that the declared premise is true. In re Det. of Kistmacher, 134 Wn. App. 72, 75, 138 P.3d 648 (2006). If the standard is satisfied, this Court will not substitute its judgment for the trial court's judgment even though it may have resolved a factual dispute differently. Id. Unchallenged findings of fact are verities on appeal. State v. Wilson,

136 Wn. App. 596, 605, 150 P.3d 144 (2007). This Court reviews issues of law de novo. Macon, 128 Wn.2d at 799.

2. The Trial Court's Determination That J.L.H.'s Testimony Was Material And Probably Affected The Verdict On Counts Relating To S.L.B. Is Supported By Substantial Evidence.

A trial is the search for truth. Nix v. Whiteside, 475 U.S. 157, 166, 106 S. Ct. 988, 998, 89 L. Ed.2d 123 (1986). To this end, "the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony." Taylor v. Illinois, 484 U.S. 400, 417, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The trial judge determined J.L.H. lied when she testified Brissette sexually abused her on innumerable occasions over the course of many years.<sup>4</sup> The State properly concedes it cannot challenge the trial judge's credibility determination that J.L.H. perjured herself. Brief of Appellant (BOA) at 17 (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). "It is for the trial court to determine whether the original testimony of a recanting witness was perjured and, if so, whether the jury's verdict was likely influenced by it." Macon, 128 Wn.2d at 801. Such a determination can constitute a material fact and grounds for a new trial. Id.

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<sup>4</sup> "A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law." RCW 9A.72.020(1).

The State nevertheless claims the court should not have granted a new trial on counts IV and V because S.L.B. did not recant her testimony and J.L.H.'s testimony on those counts related only to S.L.B.'s disclosure that Brissette inappropriately touched her. BOA at 18. According to the State, what the trial court found to be J.L.H.'s "tidal wave" of testimony was immaterial to the counts involving S.L.B. BOA at 18. As set forth below, the State's argument fails to recognize the many different ways in which J.L.H.'s perjured testimony probably influenced juror deliberation on the question of whether Brissette abused S.L.B.

In relation to the counts naming S.L.B. as the alleged victim of child molestation, evidence that Brissette sexually abused J.L.H. on other occasions constitutes "other acts" of molestation under ER 404. ER 404(b) prohibits the admission of evidence to prove the person acted in conformity with his character on a particular occasion. Such an inference is forbidden "because it depends on the defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of a crime that is similar or identical to the one charged can be extremely prejudicial because it is likely jurors will conclude the defendant had a propensity for committing that type of crime. State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993). The potential

prejudice from evidence of other acts is highest in sex cases. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). "One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders. . . . Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Coe, 101 Wn.2d 772, 781, 684 P.2d 668 (1984) (quoting Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325, 333-34 (1956)).

The State, however, maintains there was no evidence showing J.L.H.'s perjured testimony was material to the jury's deliberation on counts relating to S.L.B. BOA at 1, 18. J.L.H.'s testimony is material if it is "[o]f such a nature that knowledge of the item would affect a person's decision-making process" or has "some logical connection with the consequential facts." Black's Law Dictionary 991 (7th ed. 1999). "When the allegation is child molestation, evidence of prior similar acts creates a likelihood that the jury will convict based solely upon character." State v. Baker, 89 Wn. App. 726, 736, 950 P.2d 486 (1997). If evidence of other bad acts is admitted, "the court must explain its purpose to the jury. These steps are particularly important in sex cases . . . where the potential

for prejudice is at its highest." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (citations and internal quotation marks omitted).

The trial court gave no such limiting instruction here. See Saltarelli, 98 Wn.2d at 362 (when ER 404(b) evidence is admitted for purpose other than propensity, an explanation should be made to the jury of the permissible purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose). In the absence of proper instruction, the jury likely considered evidence of alleged molestation against J.L.H. as evidence of Brissette's propensity to molest S.L.B. Baker, 89 Wn. App. at 736, 737. J.L.H.'s perjured testimony painted Brissette as a "criminal type" who was likely to have committed crimes against S.L.B. for just that reason. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). J.L.H.'s testimony was material to the jury's verdict relating to S.L.B. because a jury is likely to convict based solely on character when there is evidence of other child molestation acts.

On the other hand, similar acts of child molestation are also "highly probative of common scheme or plan, particularly in child sex abuse cases, because of (1) the secrecy in which the acts occur, (2) the vulnerability of the victims, (3) the lack of physical proof of the crime, (4) the degree of

public opprobrium associated with the accusation, (5) the unwillingness of victims to testify, and (6) the jury's general inability to assess the credibility of child witnesses." Baker, 89 Wn. App. at 736. The jury could just as well have considered evidence of abuse against J.L.H. as part of Brissette's "common scheme or plan, which involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes." State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). When the existence of the criminal act is at issue, as in Brissette's case, evidence of sufficiently similar features between a prior act and the disputed act is relevant to the material issue of whether a crime occurred. Id. at 20; Lough, 125 Wn.2d at 862. J.L.H.'s testimony was material because evidence that Brissette molested J.L.H. is highly probative of whether he molested S.L.B.

In affirming the trial court's decision to admit evidence of other sex crimes under the common plan exception to ER 404(b), the Supreme Court in Lough held the trial court acted within its discretion in determining evidence of other sex crimes was "of consequence" to the charged sex offenses because the testimony of the victim, standing alone, was more vulnerable to attack without the common plan evidence. Lough, 125 Wn.2d at 861-62. S.L.B.'s testimony would similarly have been more vulnerable

to attack had the jury not heard evidence that Brissette also molested J.L.H. The trial court recognized S.L.B.'s testimony was so weak he would not have been surprised had Brissette been acquitted on charges relating to her. RP 996-97. There was no corroborating evidence of S.L.B.'s abuse aside from J.L.H.'s testimony about S.L.B.'s alleged disclosure. The court concluded J.L.H.'s perjured testimony, which was more convincing, probably influenced the jury as they deliberated on the counts relating to S.L.B. CP2 5-6; RP 996-98. The trier of fact, not the appellate court, generally weighs the persuasiveness of evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

But the impact of J.L.H.'s testimony on counts relating to S.L.B. went even further because it undermined the credibility of Brissette's defense on the S.L.B. counts. In Dawkins, this Court affirmed the trial court's grant of a new trial on a second degree child molestation charge because defense counsel was ineffective in failing to object to evidence of uncharged molestation acts. Dawkins, 71 Wn. App. at 909-11. Dawkins, who denied molesting the alleged victim, was prejudiced because evidence of other sex acts demolished the credibility of his denial. Id. at 905, 909. "Because there were no eyewitnesses to the touching, nor any physical evidence, the question of guilt thus necessarily turned on the relative

credibility of the accused and the accuser." Id. at 909. The accuser's testimony concerning Dawkins cast him as "a person of abnormal bent, driven by biological inclination" and, for this, reason, "it was relatively easy for the jury to believe Dawkins must be guilty because he could not help himself, and thus was more likely to be less credible in his recitation of events . . . than [the alleged victim] was." Id. at 910.

Brissette denied molesting S.L.B. As in Dawkins, no one witnessed S.L.B.'s alleged molestations and there was no physical evidence to corroborate her accusation. The question of guilt turned on whether the jury believed Brissette's denial or S.L.B.'s accusation. Having heard extensive evidence that Brissette continuously molested S.L.B.'s sister over the course of many years, the jury discredited Brissette's denial that he molested S.L.B. The jury should have never heard J.L.H.'s perjured testimony but once it did, the damage to Brissette's defense was done.

Whether new evidence could probably have changed the result is a matter of trial court discretion because "[t]he trial judge is in a peculiarly advantageous position, under the prevailing circumstances, to pass upon the showing made for a new trial." State v. Wynn, 178 Wn. 287, 289-90, 34 P.2d 900 (1934); Roe v. Snyder, 100 Wn. 311, 317, 170 P. 1027 (1918). This case aptly illustrates the axiom. In ruling on the state's

motion to reconsider, the trial judge remarked "I sat through a lengthy trial, listened to the testimony of all of the witnesses in the case, and I think have a pretty good feel for how that testimony fell together in the process of going to the jury." RP 996. The trial judge also pointed out, "I can understand the argument that it really isn't material to [S.L.B.'s] two counts. But you also have to have participated in the trial to have a full feel for how the evidence fit together, and the essential tidal wave effect that the [J.L.H.] testimony had in being able to assist and carry along, I believe, the result in [S.L.B.'s] case." RP 997-98; see State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) (appellate court may look to trial court's oral ruling to interpret written findings when there is no inconsistency).

Even from the cold record, it is apparent S.L.B.'s testimony was much weaker than J.L.H.'s perjured testimony. RP 396-446, 495-516, 521-532. She gave one word or short, clipped answers in response to both leading and non-leading questions posed to her. RP 396-446, 495-516, 521-532. Time and again, S.L.B. could only say she did not know or could not remember in response to simple questions. RP 397, 402-03, 408-11, 415, 419-20, 422, 425, 431, 433, 439-40, 500, 504, 507, 515-16, 522, 530-32. But for J.L.H.'s testimony regarding the circumstances

surrounding S.L.B.'s single disclosure of abuse, S.L.B.'s testimony would have stood alone. There was no corroboration from other witnesses about what allegedly happened to her. Under these circumstances, the trial court acted well within its discretion in finding the "tidal wave" of J.L.H.'s testimony carried the counts relating to S.L.B. along with it.

The State suggests the trial court's instruction cured the taint of J.L.H.'s perjured testimony. BOA 19-20. Before deliberations, the court instructed the jury "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP1 101; RP 888-89.

While this instruction tells the jury to deliberate on each count separately, it does not tell the jury what evidence it can or cannot consider on each count. State v. Bradford, 60 Wn. App. 857, 861-62, 808 P.2d 174 (1991). Absent a limiting instruction, all evidence is applicable on all counts as long as the evidence is relevant.<sup>5</sup> Id. Indeed, the court instructed the jury that it "must consider all of the evidence that I have admitted that relates to the proposition" and that such evidence included witness testimony. CP1 95 (Instruction 1). And the trial court never gave a

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<sup>5</sup> "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

limiting instruction that the jury could not consider evidence of Brissette's repeated molestation of J.L.H. as evidence of his propensity to molest her sister, S.L.B.

Evidence that Brissette molested J.L.H. was relevant to whether he molested S.L.B. DeVincentis, 150 Wn.2d at 20; Lough, 125 Wn.2d at 861-62. There is nothing in the record to suggest the jury artificially compartmentalized evidence relating to the alleged abuse of the two sisters. And the fact that this trial involved two sisters pointing their finger at a father, rather than two unrelated victims accusing a stranger, could only serve to fuse S.L.B.'s alleged molestation and J.L.H.'s alleged molestation in the minds of jurors.

The inference created from other acts of child molestation is so prejudicial in some circumstances that the prejudice cannot be cured by instruction. Baker, 89 Wn. App. at 736. The trial judge here carefully considered its instruction that "each count stands on its own" but also recognized "we're in the process of . . . multiple count trials on how the testimony of one may impact the outcome of another." RP 996. The judge concluded "although jurors are expected to apply the instructions as given to them, and that is that each count is a crime unto itself and must be considered as to itself, the decision in one count cannot effect [sic] the

decision in another count. In this particular case, the testimony of [J.L.H.] was a lynch pin to the whole process. Her testimony was more extensive than [S.L.B.'s]. Very frankly, it had more continuity to it than [S.L.B.'s]." RP 996. The trial judge further stated, "As we went through the trial, I frankly would not have been surprised had the jury come back in [S.L.B.'s] case with a different decision, based on the lack of continuity in her testimony." RP 997.

The trial court is in a much better position than an appellate court operating from a cold record to evaluate whether the erroneous admission of J.L.H.'s perjured testimony could be cured by admonition or requires a new trial based on the whole flow of the trial and context of the improper evidence. State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993). No instruction can remove the prejudicial impression created by seemingly relevant but improperly admitted evidence that is "of such a nature as to likely impress itself upon the minds of the jurors" and cause them to treat the evidence as proof of criminal propensity. State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (citation omitted) (where defendant charged with deadly weapon assault, new trial warranted where victim improperly testified defendant had committed same crime before).

Moreover, this Court should not lose sight of the fact that the jury never learned J.L.H. perjured herself. This is not a case where the irregularity was discovered before the jury returned a verdict and the court could potentially save the trial by giving a curative instruction to disregard inadmissible testimony. No such curative instruction could be given in this case because the perjured testimony was not discovered until after the jury returned a verdict. The jury was left to accept J.L.H.'s testimony, and all the corroborative evidence of that testimony,<sup>6</sup> as the truth in deliberating upon whether Brissette not only molested J.L.H. but also S.L.B.

The State argues the trial court's decision conflicts with joinder principles and the need to promote judicial economy. BOA at 18. The issue in this case is not whether the court properly joined multiple charges. The issue is whether the court exercised sound discretion in finding J.L.H.'s perjured testimony probably impacted the verdict on counts related to S.L.B. There is no conflict.

The State claims State v. Coe requires reversal. BOA at 19; State v. Coe, 109 Wn.2d 832, 838-39, 750 P.2d 208 (1988). Coe is inapposite. The Court in Coe did not review a trial court's discretionary decision

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<sup>6</sup> The officer who took J.L.H.'s complaint, the CPS worker who placed J.L.H. outside the home, and the neighbor who took J.L.H. to the police corroborated J.L.H.'s story. RP 21-52, 546-579, 649-53.

regarding the need for a new trial because the case did not involve a motion for a new trial. Nor did Coe involve review of a trial court's discretionary determination of the prejudicial impact of improper evidence, as in Brissette's case. Rather, the only issue was whether the trial court erred in admitting the post-hypnotic testimony of two victims as proof they were raped. Id. at 838. On the facts of that case, the Court affirmed the count relating to the un hypnotized victim because it determined, without analysis, that the count was unaffected by the testimony of the hypnotized victims. Id. at 839.

In contrast, the trial court here expressly determined the prejudicial impact of J.L.H.'s perjured testimony warranted a new trial because it tainted the counts relating to S.L.B. In assessing prejudicial impact, broad discretion must be accorded to the trial judge because "he is in a superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions. He is therefore able, on the basis of personal observation, to evaluate the impressions made by witnesses, whereas [the appellate court] must deal with the cold record." Coe, 101 Wn.2d at 782 (citation omitted).

Here, substantial evidence supports the trial court's finding that J.L.H.'s perjured testimony probably changed the outcome of the case on all counts. The State's argument to the contrary should be rejected.

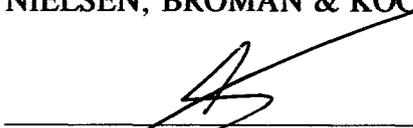
D. CONCLUSION

For the reasons stated, this Court should affirm the trial court's grant of a new trial on counts IV and V.

DATED this 18th day of January, 2008.

Respectfully Submitted,

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No. 36371-2-II

Certificate of Service by Mail

On January 18, 2008, I deposited in the mails of the United States of America,  
A properly stamped and addressed envelope directed to:

Rebecca Lynn Jones Garcia  
Mason County Prosecutor's Office  
PO Box 639  
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Containing a copy of the brief of respondent, re David Brissette Cause No. 36371-2-II,  
in the Court of Appeals, Division II, for the state of Washington.

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



John Sloane  
Office Manager  
Nielsen, Broman & Koch  
Done in Seattle, Washington

Date

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