

COA NO. 47661-4-II

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

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IN RE DETENTION OF JOSEPH PETERSON:

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PETERSON,

Appellant.

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

The Honorable Jack Nevin, Judge

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BRIEF OF APPELLANT (CORRECTED)

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CASEY GRANNIS  
Attorney for appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting hearsay statements as prior recorded recollections under ER 803(a)(5). CP 311-13.

2. The trial court erred in entering the following "finding" in its "Order On Admissibility Of ER 803(a)(5) Evidence": "The totality of the circumstances establish the trustworthiness of the statements." CP 312 (FF D.4.).

3. The trial court erred in entering an order that appellant "has been convicted of a Sexually Violent Offense as defined in RCW 71.09.020(17)." CP 314-18.

4. The trial court erred in entering the following "findings of fact" in its "Findings Of Fact And Conclusions Of Law Re: SVP Bench Trial On Bifurcated Issue Of Sexually Violent Offense":

a. "her recorded past recollections are admissible as substantive evidence under Evidence Rule 803(a)(5)." CP 316 (FF 5).

b. "Although, witnesses testified that in February 2007 [H.L.] had a reputation of dishonesty, most of her accounts of events was corroborated by the testimony of Respondent and by physical evidence, which makes her account credible. Further, her reputation from 2007 has no bearing on her current testimony in 2015, which was credible. Based

on the totality of evidence presented, [H.L.'s] accounts are credible." CP 316 (FF 7).

Issue Pertaining to Assignments Of Error

Whether the trial court erroneously admitted hearsay statements as recorded recollections under ER 803(a)(5), which the court relied on to conclude appellant's prior assault conviction qualified as a crime of sexual violence as defined under the civil commitment law?

**B. STATEMENT OF THE CASE**

1. *Procedural Facts*

In 2013, the State filed a petition seeking Joseph Peterson's civil commitment under chapter 71.09 RCW. CP 1-3. The parties stipulated the issue of whether Peterson was convicted of a "sexually violent offense" as defined in RCW 71.09.020(17) would be bifurcated from the other issues in the case and determined by the judge. CP 184-88.

Some background is in order. In 2007, the State originally charged Peterson with first degree rape against H.L., an adult female. 3RP<sup>1</sup> 10. The investigating detective, Kim Holmes, informed the prosecutor that H.L. was lying. CP 350. The State reduced the charge to second degree

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<sup>1</sup> 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.

assault. Ex. 3. Peterson entered a Barr<sup>2</sup> 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.

Following an evidentiary hearing on the matter, the trial court ruled two hearsay statements made by H.L. qualified as prior recorded recollections 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 (SVP). CP 405. The court ordered Peterson's release. CP 406. Peterson appeals, challenging the trial court's order that his prior offense qualifies as a "sexually violent offense" as defined by RCW 71.09.020(17). CP 324-30.

2. *Evidentiary hearing on the "sexually violent offense" issue*

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.

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<sup>2</sup> In re Pers. Restraint of Barr, 102 Wn.2d 265, 684 P.2d 712 (1984).

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 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 by the time of the hearing. 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 was 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.<sup>3</sup> 1RP 80-81. She would have been able to recall what happened at the time. 1RP 81. She never recanted or

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<sup>3</sup> 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.

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 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.<sup>4</sup> 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-

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<sup>4</sup> 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.

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 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.<sup>5</sup>

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 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.

**C. ARGUMENT**

**1. THE COURT ERRED WHEN IT ADMITTED THE HEARSAY STATEMENTS MADE BY H.L. TO POLICE UNDER ER 803(a)(5).**

The trial court admitted H.L.'s written statement and recorded interview into evidence under ER 803(a)(5). Those hearsay statements were improperly admitted because the test for admission under ER 803(a)(5) was not met. Under the totality of the circumstances, H.L.'s statements to police were not reliable. The error was not harmless because

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<sup>5</sup> 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.

the court relied on these statements to find Peterson was convicted of a sexually violent offense.

**a. Overview of the predicate offense element.**

To appreciate the significance of the trial court's ER 803(a)(5) ruling, a summary of relevant law under chapter 71.09 RCW is appropriate. "At the SVP determination trial, there is but one question for the finder of fact: Has the State proved, beyond a reasonable doubt, that the respondent is an SVP?" In re Detention of Post, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010) (citing RCW 71.09.060(1)). To answer this question in the affirmative, the State must prove three elements: (1) that the person "has been convicted of or charged with a crime of sexual violence," (2) that he "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Post, 170 Wn.2d at 309 (quoting RCW 71.09.020(18)).

The first element — whether Peterson has been convicted of a crime of sexual violence — is at issue here. Peterson entered an Alford/Barr<sup>6</sup> plea to second degree assault. Ex. 4. The statutory definition

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<sup>6</sup> North Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (guilty plea where defendant does not admit committing the crime); Barr, 102 Wn.2d at 269-70 (plea can be voluntary and intelligent absent a factual basis for the ultimate charges).

of "sexually violent offense" includes second degree assault "which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030." RCW 71.09.020(17)(c). "Sexual motivation" means "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(48).

In an Alford plea, the defendant "has not admitted committing the crime." In re Detention of Stout, 159 Wn.2d 357, 366, 150 P.3d 86 (2007) (quoting Clark v. Baines, 150 Wn.2d 905, 916, 84 P.3d 245 (2004)). An Alford plea is a conviction. RCW 9.94A.030(9) ("conviction" includes "acceptance of a plea of guilty"). But Peterson's plea did not include a sexual motivation component. Because Peterson merely pleaded guilty to second degree assault, the State did not establish sexual motivation at the sentencing hearing. To establish the "crime of sexual violence" element of its commitment case, the State therefore needed to prove the second degree assault was committed with sexual motivation through other evidence. In re Detention of Stout, 128 Wn. App. 21, 26-27, 114 P.3d 658 (2005) aff'd, 159 Wn.2d 357, 150 P.3d 86 (2007).

The trial court relied on H.L.'s prior statements to find Peterson assaulted H.L. with sexual motivation. The issue of whether the trial court properly admitted those statements into evidence under ER 803(a)(5) is therefore dispositive of the ultimate issue of whether the State proved the "crime of sexual violence" element of its case.

- b. The totality of circumstances does not show the hearsay statements are reliable and so they should not have been admitted as recorded recollections.**

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).

"A recorded recollection is admitted as substantive evidence." State v. Nava, 177 Wn.App. 272, 290, 311 P.3d 83 (2013), review denied, 179 Wn.2d 1019 (2014). The admission of statements under ER 803(a)(5) is reviewed for abuse of discretion. State v. Derouin, 116 Wn. App. 38, 42, 64 P, 3d 35 (2003).

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. State v. Alvarado, 89 Wn. App. 543, 551, 949 P.2d 831 (1998). There is no particular method of establishing accuracy; the issue must be resolved on a case-by-case basis. 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 State failed to show the prior statements accurately reflect H.B.'s prior knowledge. Under the totality of the circumstances, H.B.'s statements to police were not reliable and should not have been admitted.

H.L. did not disavow the accuracy of her statements, she claimed accuracy when she made the statements, and the recording process was reliable. But other indicia show the statements were unreliable under the

totality of circumstances standard. As set forth below, no witness or physical evidence corroborated her story that she was raped, she gave inconsistent details about what happened that day, and she had a motive to lie about being raped.

In its written findings on the ultimate issue of whether the State proved the predicate conviction element, the court found: "Although, witnesses testified that in February 2007 [H.L.] had a reputation of dishonesty, most of her accounts of events was corroborated by the testimony of Respondent and by physical evidence, which makes her account credible. Further, her reputation from 2007 has no bearing on her current testimony in 2015, which was credible. Based on the totality of evidence presented, [H.L.'s] accounts are credible." CP 316 (FF 7).

This finding is associated with the court's factual determination of whether the State proved the predicate conviction element beyond a reasonable doubt. Separate findings were entered on the recorded recollection issue. CP 311-13. This finding is therefore inapplicable to the court's recorded recollection ruling.

But in an abundance of caution, Peterson challenges this finding. The trial court found "most of her accounts of events was corroborated by the testimony of Respondent and by physical evidence." CP 316 (FF 7). This is true in a sense but not in a way that matters. In his deposition

testimony, Peterson maintained H.L. affirmatively invited him to have sex and the two engaged in a consensual sexual encounter. CP 474-77, 481; see 1RP 48 (portion of deposition published); see also Ex. 85 (Peterson's statement to police). That account is diametrically opposed to what H.L. alleged in her statements. Corroboration most certainly does not refer to the most important fact at issue: whether the sex was consensual or forced.

Peterson's testimony and H.L.'s statements agreed that they met on the bus, she came to his residence, there was a toy gun present, and they had sex. CP 465-88; 3RP 93. The confirmation of these facts says nothing about the crucial disagreement at issue. Peterson did not confess to raping H.L. He maintained the sex was consensual. Peterson did not corroborate H.L.'s story that he raped her.

Peterson said they played a game called "mercy" before sex, which involved him taking her hands and overpowering her while they were clothed. CP 480-81; Ex. 85 (p. 6). H.L. denied playing this game. Ex. 8 (p. 25).

Turning to the physical evidence, H.L. told Mr. Lowry that Peterson forcefully grabbed her bicep and threw her down. 2RP 99. Yet Mr. Lowry saw no marks on her. 2RP 99. She said there were cuts in her private area, which might indicate forcible rape. 1RP 97-98. But no rape kit evidence or medical testimony was introduced to corroborate that claim. 1RP 97-98.

Police found that toy gun in Peterson's living room, out in the open. 1RP 54, 106. Its presence does not corroborate H.L.'s contention that Peterson threatened her with the gun and raped her. Peterson's testimony was that it was his cousin's toy gun. CP 475. When she noticed the gun in the bedroom closet, he put it in the living room because she did not like guns. CP 475-76. Nowhere in his testimony is there any suggestion he used the toy gun to threaten H.L. See also Ex. 85 (p. 9). There is no corroboration of the important fact of whether he threatened her with the toy gun to facilitate sex.

Moreover, there were inconsistencies between H.L.'s initial statement to law enforcement and what she said in the recorded interview. 1RP 63-68, 93-94. H.L.'s account of the mechanics of the rape is also problematic. She claimed she was vaginally penetrated 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. This is another circumstance that casts doubt on the accuracy of her allegation.

H.L., meanwhile, had a reputation for dishonesty in 2007, when her encounter with Peterson took place. 2RP 55, 70-71, 73. That further cuts against the reliability of her statement. The trial court found "her reputation from 2007 has no bearing on her current testimony in 2015,

which was credible." CP 316 (FF 7). In determining the reliability of her statement under the recorded recollection test, the relevant time period is 2007, when she gave her statement. She had a reputation for dishonesty when she alleged Peterson raped her. The trial court credited H.L.'s 2015 testimony that she lacked sufficient memory to testify about what happened that day. That has no bearing on the reliability of her statements in 2007.

Moreover, H.L. had a motive to lie. H.L. acknowledged she was looking for a "friend" at the time. 1RP 75, 140. She acknowledged being "attracted" to Peterson on the phone. Ex. 8 (p. 26). She had been caught going over to another man's residence. Mr. Lowry, with whom she had resumed a relationship, knew her account of how she wound up at Peterson's residence did not make sense. Her story about needing go there to use the phone is problematic because her cell phone was charged and she had minutes on it. 1RP 67; 2RP 91, 98, 105-06. There was no need to go to Peterson's residence. She had to go out of her way to go to Peterson's residence, bypassing the bus line that would have taken her directly home in much shorter time in favor of the bus that took her to Peterson's residence. 2RP 93, 104-05. H.L. wound up alone in the bedroom of a man she had just met. There was a basis to believe H.L. had sexual relations but then claimed rape rather than admit to cheating on Mr. Lowry. 2RP 103.

For these reasons, the trial court erred in determining "[t]he totality of the circumstances establish the trustworthiness of the statements." CP 312 (FF D.4.). The totality of the circumstances shows their unreliability. Cf. Alvarado, 89 Wn. App. at 552-53 (statements were admissible because the witness did not disavow their accuracy and the circumstances, including consistent details, corroborating physical evidence, corroborating witness interviews, and defendant's confession, indicated the statements were reliable).

The court found "[b]ased on the totality of evidence presented, [H.L.'s] accounts are credible." CP 316 (FF 7). While it is appropriate for the trier of fact to make credibility determinations on the ultimate issue of whether the State proved the predicate offense element beyond a reasonable doubt, it is not appropriate to make such a determination in ruling on the preliminary question of whether H.L.'s statements were admissible under ER 803(a)(5). The linchpin of the test for admissibility is reliability of the statement. Assessment of reliability is not the same as assessment of credibility.

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). The focus must remain on the factors showing or undermining reliability of the statement. Credibility determinations cannot be used as a substitute for that analysis.

For the reasons stated, the court erred in determining the statements were admissible as recorded recollections under ER 803(a)(5). CP 311-13; CP 316 (FF 5).

**c. The evidentiary error prejudiced the outcome.**

Evidentiary error requires reversal "if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This means the error is deemed harmless only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The erroneous admission of H.L.'s statements materially affected the outcome of the bench trial. Given the limited nature of Peterson's plea and H.L.'s lack of memory on the matter, the court relied on these statements as the basis to conclude the State proved the assault for which Peterson was convicted was done with sexual

motivation and so qualified as a sexually violent offense. CP 316 (FF 5, 6). There is no question their admission prejudiced the outcome. The trial court erred in entering an order that appellant "has been convicted of a Sexually Violent Offense as defined in RCW 71.09.020(17)" because it is based on the erroneously admitted statements. CP 314-18. Reversal of the trial court's order finding Peterson to have committed a sexually violent offense is therefore required. CP 314-18.

**D. CONCLUSION**

For the reasons stated, Peterson requests that this Court vacate the trial court's order on the sexually violent offense issue.

DATED this 17<sup>th</sup> day of March 2016.

Respectfully submitted

NIELSEN, BROMAN & KOCH, PLLC

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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47661-4-II
	)	
JOSEPH PETERSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17<sup>TH</sup> DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT (CORRECTED)** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH PETERSON  
18816 SMOKEY POINT BOULEVARD  
ARLINGTON WA, 98223

**SIGNED** IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF MARCH 2016.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**March 17, 2016 - 4:52 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 47661-4

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**Comments:**

\*\*\*\*\* Corrected Appellant's Brief \*\*\*\*\*

Sender Name: Patrick P Mayavsky - Email: [mayovskyp@nwattorney.net](mailto:mayovskyp@nwattorney.net)

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

[CRJSVPEF@ATG.WA.GOV](mailto:CRJSVPEF@ATG.WA.GOV)

[brookeb@atg.wa.gov](mailto:brookeb@atg.wa.gov)

[kristieb@atg.wa.gov](mailto:kristieb@atg.wa.gov)