FILED
10/9/2017 4:11 PM
Court of Appeals
Division I
State of Washington

SUPREME COURT NO. _____

Court of Appeals No.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DONALD McELFISH, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Rules

I. IDENTITY OF PETITIONER

Petitioner Donald McElfish, through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION

Mr. McElfish seeks review of the decision by the Court of Appeals issued on August 7, 2017. The Court reversed the trial court order for a new trial and remanded for a determination based only on findings that are supported by substantial evidence. A copy of the Court's opinion is attached as Appendix A. The Court denied Mr. McElfish's motion for reconsideration on September 8, 2017. Mr. McElfish was the respondent below and the petitioner in this matter. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

A. Where the trial court's oral ruling interprets and clarifies its written findings of fact and conclusions of law, may the reviewing Court rely on that reasoning to find substantial evidence supporting the finding?

B. Where a witness's testimony sharply differs from the complaining witness's testimony, is a trial court's finding that there was no direct evidence corroborating the complaining witness's testimony supported by substantial evidence?

IV. STATEMENT OF THE CASE

1. Trial Testimony

In July 2013, Cowlitz County prosecutors charged Donald McElfish by information with attempted rape in the first degree, indecent liberties- forcible compulsion, kidnapping in the first degree, assault in the second degree with intent to commit a felony with sexual motivation. CP1-2. He was convicted on all counts with the exception of indecent liberties. CP 5.

At trial, C.M. testified that on October 4, 2012, she and a friend spent the night at a home where Mr. McElfish, Brandt Jensen and a few other individuals lived. (5/12/14 RP 9-10). The following day, October 5, Jensen was intoxicated. (5/12/14 RP 12). As he had done on previous occasions, he accused C.M. of having taken a particular bag from him and told her she had to return it to him. (5/12/14 RP 13-14). When she was unable to produce the bag, he became angry, grabbed her arm and said, "We're going to talk to Donnie [McElfish] about this." (5/12/14 RP 16-17;88). Along with Ron Easly, who was there that day, he walked her down to the garage, where Mr. McElfish lived. (5/12/14 RP 17).

When they arrived at the garage/shop, Jensen screamed at a sleeping McElfish to wake up. (5/12/14 RP 19-20). C.M. said McElfish was not really awake and just sat. (5/12/14 RP 20). Jensen hit her in the

face several times and told her to take off her clothing. (5/12/14 RP 24). He pulled out his gun. (5/12/14 RP 26). She complied and Jensen duct taped her to a chair. (5/12/14 RP 25). In the process of duct taping, Jensen cut himself and angrily threatened to stab her. (5/12/14 RP 26).

He screamed in her face and threatened to kill her. (5/12/14 RP 33). Jensen told her that she would have to have sex with him, Easly, McElfish and the dog in order to pay for stealing the bag. (5/12/14 RP 34). McElfish did not say or do anything. (5/12/14 RP 29). Easley and Jensen left in order to attend to Jensen's cut finger. (5/12/14 RP 34-35).

Alone with McElfish, she testified he said, "Well, are you going to …get it done, or are you going to get it done before they come back down or –about participating or something." 5/12/14 RP 35). She spoke with McElfish and said that he acknowledged he would never rape someone. (5/12/14 RP 36). She stated he kind of "poked" her breast. (5/12/14 RP 38). In answer to the prosecutor's questioning "Did he try and touch your vagina?" she responded, "just a little—barely….I can't really put my finger on that …he might have." (5/12/14 RP39).

Alone in the room with Mr. McElfish, she removed the duct tape and got up from the chair. He did not stop her. She grabbed one of his shirts. (5/12/14 RP 37;40-41;43). He grabbed it back and said, "Give me that, that's my shirt." (5/12/14 RP 41). She climbed on top of his computer

to get out a window. (5/12/14 RP 43). He tried to pull her down and told her to get off of his computer. (5/12/14 RP 43;105). She jumped on his bed and thought he was blocking her from leaving. (5/12/14 RP 44). She reported that Mr. McElfish then opened a sliding glass door and called for Jensen and Easly. (5/12/14 RP 44). She grabbed a small towel and ran out the backdoor. She said he tried to grab her, but she was already partly out the door and he did not "have much to grab onto" and she ran. (5/12/14 RP 45).

As she ran along the road, she unsuccessfully tried to stop three cars for help. (5/12/14 RP 53). She eventually went to a home and hid on top of a shelf behind some garbage bags in the carport. (5/12/14 RP 55). She left that spot and broke into the home to hide. (5/12/14 RP 58). She grabbed some pajamas, and crawled around the house on the floor with a flashlight. (5/12/14 RP 59). She climbed into a bathroom cupboard and pulled some flowers in front of the door and remained hidden for about an hour. (5/12/14 RP 61). She came out because "my organs were cramping up…my heartbeat was so loud inside there that I thought maybe they could hear it out there if they were in there. Every sound was amplified…" (5/12/14 RP 61).

She left the hiding spot and found some alcohol to drink. (5/12/14 RP 63). She then found a phone and called a friend to come and get her.

(5/12/14 RP 64). The woman who owned the home returned and called the police. (5/12/14 RP 68).

2. Recantation

Two years later, based on a declaration by C.M., Mr. McElfish filed a motion for a new trial on grounds of newly discovered evidence. (CP 18-27). The court granted a hearing and heard testimony on May 10, 2016.

C.M. testified that she had spoken with other people in the community and based on those discussions, an acquaintance named Cindy prepared an affidavit for her. (5/10/16 RP 8). C.M. said that on the day she saw the affidavit she was having a hard time staying awake and felt sick. Cindy told her that if any of the facts were not accurate that they should be changed to the correct facts. (5/10/16 RP 33). C.M. did not change anything. She took the document to the Kalama City Hall, and before a notary signed the document under penalty of perjury. (5/10/16 RP 8-9;CP 25-27).

C.M. testified that she was surprised to learn Jensen received far less prison time than Mr. McElfish, and was concerned that Mr. McElfish was unfairly punished. (5/10/16 RP 7-8). She testified that she had difficulty with trusting people. While she feared that people would be mad at her, the reality was that no one had threatened her on behalf of Mr.

McElfish. (5/10/16 RP 44). She was very concerned, however, that she would be charged with perjury because of the change in her testimony. (5/10/16 RP 35).

C.M. testified fairly similar to her trial testimony and added that Mr. McElfish had no part in beating or threatening her. (5/10/16 RP 47). He appeared to be scared of Jensen and she believed he was acting out of fear. (5/10/16 RP 48). He did not kidnap her. (5/10/16 RP 31). He did not try to rape her. (5/10/16 RP 31;39). She did not remember testifying that he attempted to touch her vagina. (5/10/16 RP 40). She also testified that when she was attempting to climb on Mr. McElfish's computer he told her to get off of it; he did not tell she could not leave or try to pull her down. (5/10/16 RP 24).

In its oral ruling, the court found the written declaration submitted by C.M. was not completely reliable. (5/10/16 RP 66). The court noted, however, that the reliability determination was based on her testimony and not the written declaration. The court found her testimony to be reliable. (5/10/16 RP 66-67).

Having found C.M.'s testimony reliable, the court further found that she had recanted, in part: specifically, that Mr. McElfish had not touched her in a sexual manner and did not try to rape her. (5/10/16 RP 67). The court also found that C.M.'s testimony placed Mr. McElfish in a

far more limited role than at her trial. (5/10/16 RP 66-67). The court analyzed the five Williams factors finding (1) the changed testimony would probably change the results of a trial if a new trial were granted; (2) as with most or all recantations it follows the trial and thus was discovered since the trial; (3) the evidence could not have been discovered before trial by exercising due diligence; (4) the statements were material and admissible at a new trial; (5) the evidence is neither cumulative nor impeaching in its nature. (5/10/16 RP 68-69). The court entered findings of fact and conclusions of law and ordered a new trial. CP 34-37. The State appealed the trial court decision. CP 32.

Division One of the Court of Appeals reversed the trial court decision, holding that findings of fact 6, 8, and 9 were not based on substantial evidence. It remanded for the trial court to make a determination based only on findings that are supported by substantial evidence. Op. at 12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). The ruling by the Court of Appeals involves an issue of substantial public interest. Determination of reliability of

recantation testimony is a crucial factor in the trial court authorizing a new trial.

a. Finding of Fact 6

At pages 7-8 of its opinion, the Court held the trial court's Finding of Fact 6 was not supported by substantial evidence.

> At the hearing on May 10[,][C.M.] testified she was aware of the contents of the affidavit and that half of the affidavit was incorrect and that half of it was correct.

(CP 36).

The Court correctly pointed out that no one asked C.M. to estimate the proportion of the written affidavit that was correct and the proportion that was incorrect. However, a reviewing Court may look to the trial court's oral ruling to interpret its written findings and conclusions to the extent the oral and written rulings are consistent. *State v. Bynum,* 76 Wn. App. 262, 266, 884 P.2d 10 (1994). Here, the oral and written rulings by the trial court are consistent. In its oral ruling, the court reasoned:

> [t]he court does not find that statement [affidavit] is completely reliable because [C.M.] testified she didn't type it up and *there are inaccurate statements*. However, she also testifies *there are statements that were correct in that statement*. So, although -- because it was created, typed up, by another person, it does have inaccurate information, she identified that information that wasn't accurate; but, again, however, she does testify there are also statements in that statement that were correct.

5/10/16 RP 66. (emphasis added).

The trial court's intent and reasoning for the finding is further informed by Conclusion of Law 1:

> The testimony of [C.M.] on May 10, 2016, and in part the affidavit dated February 18, 2015, constituted a recantation of her trial testimony.

(CP 36).

Viewing the written finding in the context of the oral ruling, the finding was supported by substantial evidence. Alternatively, on remand, the trial court may excise the word "half" and insert the word "part" and the finding will be unequivocally supported by substantial evidence.

b. Finding of Fact 8

c.

At pages 8-10 of its opinion, the Court held the trial courts written Finding of Fact 8 was not supported by substantial evidence:

> Inconsistent with her testimony at trial, while stating Mr. McElfish touched her breast, she testified that Mr. McElfish did not touch her in a sexual manner. She denied that he touched her vagina and added that at the time of this incident, the defendant appeared to be scared of Jensen. The court finds this testimony to be reliable.

(CP 37).

At trial, the prosecutor asked C.M.:

> Q. "Did he touch you at any point when you were in the room after you got loose from the chair on your body?
> A. That was when I was still sitting on the chair.
> Q. Okay. So tell me about that.
> A. I don't know. He just kind of like tried – like I don't know, it's –
> Q. Okay
> A. He just – I don't – it's kind of like he touched – he like – I can't really remember specifically, but he like touched my boob or just,

you know, tried to – I can't remember. He just kind of – if he was my friend, he wouldn't do that, so it wasn't like (3/10/14 RP 37-38).

The implication from her testimony was that it was not a 'friendly' touch, but rather, an unwelcome sexual touch.

At the later hearing, the prosecutor posed the following:

Q. You also said just a few moments ago that Donnie didn't really do anything sexual. The question was did he do anything sexual and you said, "not really." What do you mean?
A. I mean, he didn't –I don't know. He—he just – he didn't, like, try to rape me, like, or anything, really.
Q. Did he try to touch you in any other way, besides the touching of your breast?
A. No, but he—when I grabbed his shirt to cover my body with it he said, "give me my shirt," and grabbed it back from me…
Q. Now, during the trial, at the original trial, you testified that you remembered something about him trying to touch you anywhere else on your body and you said on your privates – your private area.
A. I don't remember that, I don't
I mean, I -- I might have blanked -- blacked it out, or something. (5/10/16 RP 39-40).

It is unclear from the record whether C.M. meant she forgot testifying about an attempted touching, or whether an attempted touching ever happened. What she did *not* testify to was an attempt by McElfish to touch her vagina.

When specifically asked "Did he try to touch you at any point while you were still sitting in the chair?" she responded "[h]e, like, touched my boob or something". (5/10/16 RP 38). Regarding touching her breast, C.M. testified "He just touched –grabbed me, or something…it happened…he just

went real fast." (5/10/16 RP 45). She was asked if she could point to anything to show that the touching was sexual in nature and responded: "Well, I don't know he did it, but it must've been something." (5/10/16 RP 46). She then explained that he "grabbed" her breast. Id. The "must've been something" referred to touching her breast, not her vaginal area. When asked if he tried to touch her in any other way, 'besides the touching of your breast' she responded "No, but he—when I grabbed his shirt to cover my body with it he said, "Give me my shirt," and grabbed it back from me…" (5/10/16 RP 39).

C.M. was clear that McElfish did not do anything sexual toward her. (5/10/16 RP 29). She clarified that he did not try to have sex with her or rape her or "anything along those lines." (5/10/16 RP 29,31,39,48). She also testified McElfish never tried to kidnap her. (5/10/16 RP 31).

The trial court's oral ruling stated:

> It is the Court's finding that based on the testimony of C.M. today that she has recanted, at least in part, her prior testimony. In particular, the statements that the defendant did not touch her in a sexual manner and she made a few different statements representing that, including he did not rape her, and specifically responded he –… he did not touch her in a sexual manner.

(5/10/16 RP 67).

The trial court's written finding includes information the court surmised from the confused and confusing answer given by C.M. regarding

denial of touching her vagina. The finding is supported by substantial evidence. However, on remand, the trial court could simply excise that portion of the written finding, and tailor finding of fact 8 to its oral ruling.

c. Finding of Fact 9

At pages 10-12 of its opinion, the Court addressed the trial court's Finding of Fact 9:

> There was no direct evidence at trial that corroborated the claims made by [C.M.].

(CP 36).

The Court held the finding was too broad because the testimony of Deputy Hammer and Tabitha Gaylor provided "some direct evidence" corroborating C.M.'s claims. The Court cited to *State v. Macon,* 128 Wn.2d 784, 800, 911 P.2d 1004 (1996) as authority for its ruling on the issue: that a witness's statements to others, if admitted at trial, may be independent corroboration of her trial testimony, even if it is later recanted.

It is the role of the trial court at a recantation hearing to determine the credibility and reliability of the recanting witness. *State v. York*, 78 Wn.App. 352, 361, 899 P.2d 810 (1995). The existence of independent corroborating evidence "might make the determination easier, but the absence of corroborating evidence does not relieve the trial court of its threshold responsibility." *Id*. Even if there were direct corroborating evidence at trial, the court is still tasked with making a threshold determination: If a court

finds the recantation testimony credible, but there is independent corroborating evidence to support the conviction, "the trial court may grant a new trial or not, it is entirely within the court's discretion." *Id*. Thus, whether independent corroborating evidence exists to support the original testimony of a recanting witness is not a controlling factor in determining whether to grant a new trial on the basis of newly discovered evidence. *State v. Ieng*, 87 Wn.App. 873, 881, 942 P.2d 1091(1997).

Similarly, the nonexistence of corroborating evidence is also not a dispositive factor: the trial court must make its own determination concerning the credibility of a recantation. *Ieng,* 87 Wn.App. at 880.

Significantly, the trial record here shows that Deputy Hammer's testimony did *not* corroborate the testimony of C.M. at critical points. He testified to a significantly different and more incriminating set of facts than C.M. testified to at trial and at the later evidentiary hearing.

Hammer testified she told him that all three men, Brandt Jensen, Ron Easley, and Mr. McElfish, took her down into Mr. McElfish's bedroom. 3RP 12. At the hearings, she testified Jensen and Easely took her down to the shop and woke a sleeping McElfish. (5/12/14 RP 16-17,20; 5/10/16 RP 15-16).

Hammer said she told him that after Jensen cut his finger "they" started pushing her around and yelling at her. 3RP 14. She testified that only Jensen hit and screamed at her. (5/12/14 RP 24,33; 5/10/16 RP 18).

He said she reported that Jensen duct taped her to the chair, and she managed to get her arms and legs loose, while Jensen was still in the room. 3RP 14. By contrast, she testified Jensen and Easley left and she removed the duct tape. Mr. McElfish did not interfere with her freeing herself. (5/12/14 RP 37,40-41, 43;5/10/16 RP 23-24).

Hammer said she told him that after she got free from the duct tape, Jensen ordered her into the bedroom where McElfish and Easley were waiting. 3RP 14. Then Easley and Jensen left. 3RP 14-15. He reported she told him she was on the bed with McElfish, where he grabbed her breasts, her body, and attempted to grab her vagina. 3RP 15. She testified Jensen was already gone when she freed herself from the tape. (5/10/16 RP 25-26). She did not testify she was ever on a bed with McElfish. The testimony of Hammer was not corroborating evidence.

Similarly, Ms. Gaylor did not go into to the shop when only C.M. and McElfish were inside. She did not know what occurred inside the room. (3/12/14 RP 184-186).

Mr. McElfish asks the Court to hold, as it did in *Ieng,* that the *existence or nonexistence* of corroborating evidence is irrelevant, as it is not

a dispositive factor in determining reliability. The testimony of Detective Hammer did not provide "direct evidence" and the trial court's finding was supported by substantial evidence.

VI. CONCLUSION

Based on the foregoing facts and authority, Mr. McElfish respectfully asks this Court to accept review of his petition.

Submitted this 9th day of October 2017.

Marie Trombley

Marie J. Trombley, WSBA 41410
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. DONALD HOWARD MCELFISH, Respondent.	)	No. 76737-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 7, 2017

TRICKEY, A.C.J. — The State appeals the trial court's order granting Donald McElfish's motion for a new trial on the basis of newly discovered evidence. The court granted the motion after a hearing to test the reliability of the complaining witness's alleged recantation of her accusation. We conclude there is insufficient evidence to support three of the trial court's findings of fact from that hearing. Because the trial court relied on those unsupported findings when it granted the defendant's motion, its decision was based on untenable reasons. Accordingly, the trial court abused its discretion. We reverse.

FACTS

In March 2014, Donald McElfish was convicted in a jury trial of attempted rape in the second degree, kidnapping in the first degree, and assault in the second degree - intent to commit a felony with sexual motivation for his role in an attack on C.M. in October 2012.

At the original trial, C.M. testified to the following events. On October 5, 2012, C.M. was at a friend's house in Woodland, Washington. She ran into Brandt Jensen, who was staying there, in the entryway of the house. Jensen was angry with C.M. because he believed that she had or had stolen his bag. Jensen grabbed

her by the arm and marched her from the main house down to the garage/shop to see McElfish. Ron Easley, who had also been in the entryway, accompanied them.

When they arrived at the garage/shop, Jensen started screaming at McElfish, who was sleeping there. Jensen told McElfish that C.M. had to pay for stealing his bag. Jensen tried to make C.M. admit to stealing the bag, but she would not.

When C.M. continued to deny taking the bag, Jensen hit her twice in the face. Jensen told her to "get naked, get [her] clothes off and sit in the chair."[1] He hit her again, intimidated her with a gun, and "got crazy," so she complied.[2] Jensen also pulled a knife out around that same time.

Jensen told her that she was going to have to have sex with them, and possibly a dog, as "pay back."[3] In the process of using the knife to cut the duct tape, Jensen cut his finger. Jensen and Easley went back upstairs to the main house to clean up Jensen's wound.

McElfish asked C.M. something about whether they should "get it done before [Jensen and Easley came] back down."[4] Then C.M. reminded McElfish that he had once told her he would never have "sex or something" with someone who "didn't want it."[5] So, McElfish stopped. While C.M. was still taped to the chair, McElfish touched her breast and touched or tried to touch her vagina.

C.M. managed to get loose from the duct tape. She tried to cover herself

---

[1] Report of Proceedings (RP) (Mar. 12, 2014) at 24.
[2] RP (Mar. 12, 2014) at 24-25.
[3] RP (Mar. 12, 2014) at 33-34.
[4] RP (Mar. 12, 2014) at 35.
[5] RP (Mar. 12, 2014) at 35.

with a shirt that was in the room, but McElfish yanked it out of her hands and told her it was his shirt. Tabitha Gaylor came to check on C.M., but McElfish "got mad" and told Gaylor to go away.[6] C.M. screamed to Gaylor for help.

In the room, there was a small window above a computer desk. C.M. tried to get out through the window, but McElfish "freaked out about his computer" and tried to pull her back down.[7] McElfish went to the sliding glass doors and yelled for Jensen and Easley to come back. C.M. ran out a back door and got away. McElfish tried to grab her but was unsuccessful.

In April 2015, McElfish filed a motion for a new trial or hearing on the basis of newly discovered evidence, an affidavit by C.M. that significantly recanted her trial testimony. In the affidavit, C.M. explicitly apologized for having given false testimony incriminating McElfish at trial. She explained that McElfish had not been involved in the attack and had actually helped her escape, by convincing Jensen and Easley to leave the room and then, as soon as they were far enough away, telling C.M. to run away out the other door. She credited McElfish with saving her life.

The trial court held an evidentiary hearing so that C.M. could answer questions about her affidavit and her earlier testimony. At the hearing, C.M. acknowledged that she had signed the affidavit in front of a notary but explained that someone else had typed the affidavit. She stated that some of the things in the affidavit were not true, including that McElfish had helped her escape. She said that she was scared when she signed the affidavit and was not feeling well.

---

[6] RP (Mar. 12, 2014) at 42.
[7] RP (Mar. 12, 2014) at 43.

The State and McElfish also asked C.M. about the events on October 5, 2012. C.M.'s account of the attack was largely similar to her original trial testimony. However, at several points, C.M. was unable to remember details about McElfish's actions.

The trial court concluded that C.M.'s testimony at the hearing, "and in part the affidavit," constituted a recantation of her trial testimony.[8] The trial court granted McElfish's motion for a new trial.

ANALYSIS

The State argues that the trial court abused its discretion because it based its decision on unsupported findings of fact. Specifically, the State argues that substantial evidence did not support the trial court's findings that C.M. testified at trial that McElfish had touched her vagina, that C.M. testified at the hearing that the affidavit was half correct, that C.M.'s testimony at the hearing was inconsistent with her trial testimony, and that there was no evidence corroborating C.M.'s trial testimony.[9] We conclude that some of these findings are not supported by substantial evidence, thus, the trial court based its decision on untenable grounds.

The trial court may order a new trial on the basis of newly discovered evidence. CrR 7.8(b)(2). But the court should not order a new trial "unless the moving party demonstrates that the evidence (1) will probably change the result of

[8] Clerk's Papers (CP) at 36.

[9] The State also assigns error to the trial court's finding that the evidence of C.M.'s recantation was newly discovered and could not have been discovered prior to trial by exerting due diligence. Br. of Appellant at 1. The State waives that assignment of error by failing to support it with argument, and, in any event, appears to concede that the evidence could not have been discovered prior to trial. Br. of Appellant at 23; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992).

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." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981) (emphasis omitted).

We review a trial court's decision to grant a new trial for an abuse of discretion. State v. Ieng, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). A trial court's decision is based on untenable grounds when its findings of fact are not supported by the record. Fiorito, 112 Wn. App. at 664.

Appellate review of the trial court's findings of fact is limited to whether they are supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Substantial evidence exists "'if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'" Lodis v. Corbis Holdings, Inc., 192 Wn. App. 30, 61, 366 P.3d 1246 (2015) (quoting Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980), review denied, 185 Wn.2d 1038, 377 P.3d 744 (2016)).

We address each of the trial court's challenged findings of fact in turn.

Finding of Fact No. 2

> At the trial, the alleged victim [C.M.] testified that Brandt Jensen and Ronald Easley took her from the main residence of the home she was visiting to a nearby shop where the defendant resided. She testified that in the defendant['s] residence she was assaulted by Jensen, forced to disrobe and was tied to a chair with duct tape. She testified that the defendant did not participate in these acts. She

> testified that while she was restrained, the defendant touched her breasts and vagina.[10]

The State argues that the trial court's second finding of fact is not supported by substantial evidence because C.M. never testified at trial that McElfish had touched her vagina. We disagree.

At trial, after C.M. testified that McElfish had touched her breast, the State asked her about what other physical contact she had with McElfish:

> [State:] Okay. Did he try and touch you anywhere else on your body?
>
> [C.M.:] I do remember something about, I don't know, I don't want to talk about it.
>
> [State:] I know you don't want to talk about it. I need you to talk about it.
>
> [C.M.:] Well, God, well, you know, that area.
>
> [State:] What do you call that area?
>
> [C.M.:] I don't think he really -- he just was --
>
> [State:] No, what do we call that area?
>
> [C.M.:] Oh, gosh. Do I have to say it? Privates.
>
> [State:] Okay. Is it your vagina?
>
> [C.M.:] Yeah, gosh darn it.
>
> [State:] Did he try and touch your vagina?
>
> [C.M.:] Just a little -- barely.
>
> [State:] Okay. Did he actually touch your vagina?
>
> [C.M.:] I can't really put my finger on that because that's just a --
>
> [State:] Did he try?

---

[10] CP at 35.

[C.M.:] Yeah.

[State:] Okay.

[C.M.:] He might have.[11]

It is clear that C.M. testified that McElfish at least tried to touch her vagina. But a rational and fair-minded person could also believe that C.M.'s equivocal and halting responses to whether McElfish actually touched her vagina, followed by her final statement that McElfish "might have," was testimony that McElfish did actually touch her vagina. Therefore, we will not disturb this finding of fact.

Finding of Fact No. 6

> At the hearing on May 10[,] [C.M.] testified she was aware of the contents of the affidavit and that half of the affidavit was incorrect and that half of it was correct.[12]

The State argues that while there is evidence that C.M. agreed with some of her statements in the affidavit and disavowed some of the other statements, there was no evidence of what portion of the affidavit she believed was correct. We agree.

C.M. testified at the hearing that the affidavit was "a lot wrong."[13] No one asked C.M. to estimate what portion of the affidavit she currently agreed with at the hearing. C.M. agreed with several specific statements identified by McElfish's counsel. But C.M.'s hearing testimony contradicted at least half of the material facts in the affidavit, including when McElfish woke up, McElfish's role in encouraging Jensen and Easley to leave the room, what McElfish said to her when

---

[11] RP (Mar. 12, 2014) at 38-39.
[12] CP at 36.
[13] RP (May 10, 2016) at 47.

they were alone in the room, and whether he helped or hindered her escape.[14] Because C.M.'s testimony flatly contradicted the majority of the affidavit, she said the affidavit was "a lot wrong," and agreed with only a few, specific statements, there is no support for the trial court's finding that C.M. testified that half of the affidavit was correct.

Finding of Fact No. 8

> Inconsistent with her testimony at trial, while stating that Mr. McElfish touched her breast, she testified that Mr. McElfish did not touch her in a sexual manner. She denied that he touched her vagina and added that at the time of this incident, the defendant appeared to be scared of Jensen. The court finds this testimony to be reliable.[15]

The State argues that this finding of fact is not supported by substantial evidence because C.M.'s hearing testimony was consistent with her trial testimony since C.M. did not testify that McElfish did not touch her in a sexual manner and C.M. did not deny that McElfish touched her vagina. We agree.

At the hearing, C.M. struggled with testifying about McElfish's actions, just as she had done at the trial. When McElfish's counsel asked if McElfish had done "anything sexual" to her, C.M. responded, "Well, not really," but added that McElfish had "tried."[16]

The State asked C.M. whether McElfish had touched her breast, and she replied that he had. Afterward, McElfish's counsel asked for more details about McElfish touching her breast. C.M. rejected McElfish's counsel's suggestion that

---

[14] C.M.'s hearing testimony also contradicted portions of the affidavit that are not material to McElfish's actions. For example, contrary to her testimony at the hearing, C.M. stated in her affidavit that Jensen had drawn the gun in the main house and threatened to kill anyone who tried to stop him.
[15] CP at 36.
[16] RP (May 10, 2016) at 29-30.

McElfish had touched her breast when he was giving her something to drink. McElfish's counsel also asked if there was anything she could "point to, to show that any touching was sexual in nature."[17] C.M. said she could not, but it "must've been something."[18]

> The State also asked about any other times McElfish had tried to touch her.
>
> [State:] Did he try to touch you in any other way, besides the touching of your breast?
>
> [C.M.:] No, but he -- when I grabbed his shirt to cover my body with it he said, "Give me my shirt," and grabbed it back from me, and that shocked me, too, because he's always been my friend before that and I figured he, at least, would say something to the guys like "calm down," you know, to Brandt, because Brandt would usually listen to him.
>
> [State:] Now, during the trial, at the original trial, you testified that you remembered something about him trying to touch you anywhere else on your body and you said on your privates – your private area.
>
> [C.M.:] I don't remember that, I don't --
>
> [State:] Okay.
>
> [C.M.:] I mean, I -- I might have blanked -- blacked it out, or something.[19]

C.M.'s testimony establishes that two of the facts embedded in this finding are incorrect. First, C.M. never testified that McElfish did not touch her in a sexual manner. While C.M. could not point to any evidence to show that McElfish did touch her in a sexual manner, she disagreed with McElfish's counsel's attempts to provide non-sexual explanations for McElfish's touching of her breast.

Second, C.M. did not deny that McElfish touched her vagina. The only time

---

[17] RP (May 10, 2016) at 46.
[18] RP (May 10, 2016) at 46.
[19] RP (May 10, 2016) at 39-40.

anyone asked C.M. specifically about McElfish touching her vagina, or near it, she said she did not remember it happening but immediately clarified that she might have blacked out the memory. While she did not testify that McElfish touched her vagina, she also did not deny that McElfish touched her vagina.

McElfish argues that C.M.'s negative response to the State's question whether McElfish had touched her in any way beside her breast, is the same as denying that McElfish touched her vagina. We disagree. The State's next question gave C.M. an opportunity to deny that this specific act occurred, but she did not. She merely said she did not remember it happening. A rational, fair-minded person would not take C.M.'s responses to those two questions as her affirmatively denying that McElfish touched or tried to touch her vagina.

Accordingly, we conclude that this finding is, in part, not supported by substantial evidence.

Finding of Fact No. 9

> There was no direct evidence at trial that corroborated the claims made by [C.M.][20]

The State argues that this finding of fact is not supported by substantial evidence because witnesses testified about how C.M. had described the attack right after the incident and Gaylor's testimony at trial corroborated some of C.M.'s account. McElfish argues that the finding is supported by substantial evidence because C.M. was the sole source of information about what had happened while C.M. was in the room alone with McElfish. We agree with the State.

Here, there was some evidence produced at trial that corroborated C.M.'s

---

[20] CP at 36.

account. At trial, C.M. testified that Gaylor had come to check on her, and C.M. screamed to her for help. In response, McElfish had "got[ten] mad" and "told her to go away or whatever, go away."[21] Similarly, Gaylor testified that at trial, on October 5, 2012, she saw Jensen and C.M. walk down to the garage/shop. Later that day, she spoke to Jensen. Something that Jensen said made her want to talk to McElfish. When Gaylor knocked on the door, McElfish asked who it was. After she identified herself, McElfish told her he was busy, in an agitated tone. As Gaylor walked away, she heard C.M. scream her name, sounding scared.

Deputy Jason Hammer testified that C.M. told him that McElfish had "grabbed her breasts, grabbed her body and attempted to grab her vagina."[22] Deputy Hammer also testified that C.M. told him that she escaped when McElfish tried to get Jensen's attention.

McElfish argues that Deputy Hammer's testimony is not direct evidence.[23] We disagree. A witness's statements to other people, if admitted at trial, may be independent corroboration of her trial testimony, even if she later recants her trial testimony. See Macon, 128 Wn.2d at 800. In Macon, the court concluded that a young victim's earlier reports of sexual abuse to others, which had been introduced at trial, were independent corroboration of her trial testimony—even after she recanted. Macon, 128 Wn.2d at 800-01. Deputy Hammer testified about what C.M. said happened. His testimony provides direct evidence of what happened in

---

[21] RP (Mar. 12, 2014) at 42.
[22] RP (Mar. 13, 2014) at 15.
[23] Merla Paul, whose house C.M. broke into to hide from Jensen, also testified. She testified about discovering C.M. at her house and what C.M. had told her about the attack, but did not relate anything C.M. said about McElfish's specific acts.

the room with McElfish, not circumstantial evidence.

In short, the trial court's finding that there was "*no direct evidence*" is too broad.[24] Gaylor and Deputy Hammer offered some direct evidence corroborating C.M.'s claims. Thus, this finding of fact is not supported by substantial evidence.

In conclusion, the trial court's sixth, eighth, and ninth findings of fact were, at least in part, not based on substantial evidence. Because the trial court relied on these findings of fact when it decided whether to grant McElfish's motion for a new trial, its decision was based on untenable grounds. Accordingly, the trial court abused its discretion by granting the motion.

We reverse the trial court's order and remand for a determination based only on findings that are supported by substantial evidence.

Trickey, ACJ

WE CONCUR:

Dwyer, J.

Appelwick, J.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 AUG -7 AM 10:39

[24] CP at 36 (emphasis added).

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Donald McElfish, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on

October 9, 2017 to:

Donald McElfish
624 Cloverdale Road
Kalama, WA 98625

And by electronic service by prior agreement between the parties to:

EMAIL: WallaceA@co.cowlitz.wa.us
Cowlitz County Prosecutor
312 SW 1st Ave Rm 105
Kelso, WA 98625

Marie Trombley

Marie Trombley WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

MARIE TROMBLEY

October 09, 2017 - 4:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76737-2
Appellate Court Case Title:	State of Washington, Appellant v. Donald McElfish, Respondent
Superior Court Case Number:	12-1-01146-7

The following documents have been uploaded:

- 767372_Petition_for_Review_20171009160912D1233954_2703.pdf
  This File Contains:
  Petition for Review
  The Original File Name was McElfishPetition.pdf

A copy of the uploaded files will be sent to:

- WallaceA@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net
Address:
PO BOX 829
GRAHAM, WA, 98338-0829
Phone: 253-445-7920

Note: The Filing Id is 20171009160912D1233954