

NO. 49043-9-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

DONALD MCELFIN,

Respondent.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

1. The State assigns error to Finding of Fact number two as there was not substantial evidence to support this finding.
2. The State assigns error to Finding of Fact number six as there was not substantial evidence to support this finding.
3. The State assigns error to Finding of Fact number eight as there was not substantial evidence to support this finding.
4. The State assigns error to Finding of Fact number nine as there was not substantial evidence to support this finding.
5. The State assigns error to Finding of Fact number ten as there was not substantial evidence to support this finding.
6. The trial court erred in entering conclusion of law number one.
7. The trial court erred in entering conclusion of law number two.
8. The trial court erred in entering conclusion of law number three.
9. The trial court erred in entering conclusion of law number four.
10. The trial court erred in entering conclusion of law number five.
11. The trial court erred in granting McElfish's motion for a new trial and vacating the judgement and sentence entered in this case.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court have substantial evidence to support its findings of fact?

2. Did the trial court err in determining that the testimony of Cheryl Miranda on May 10, 2016, constituted a reliable recantation of her trial testimony?
3. Did the trial court err in determining that the affidavit, in part, constituted a reliable recantation of Cheryl Miranda's trial testimony?
4. Did the trial court err in concluding that all five of the *State v. Williams* factors had been met?
5. Did the trial court abuse its discretion when it granted the motion for a new trial and vacated the judgement and sentence?

III. STATEMENT OF THE CASE

On June 19, 2013, the State of Washington charged Donald McElfish with attempted first degree rape, first degree kidnapping, second degree assault with sexual motivation, and indecent liberties. CP 1. Prior to trial, the State sought and was granted a material witness warrant to secure the presence of the victim, Cheryl Miranda, at trial. CP 4. At trial, Miranda testified as follows. On October 5, 2012, she was at a residence with Brandt Jensen, Donald McElfish, and various other people. RP 3/12/14, 9.¹ Jensen was drunk and angry because he thought Miranda had stolen a bag that belonged to him. RP 3/12/14, 12–13. He grabbed her arm

¹ There are multiple verbatim reports of proceedings in this case, including those from the original trial and those from the recantation hearing. All RPs will be labelled with the date on the cover of the transcript and the relevant page number.

and marched her down to a shop or garage that was separate from the house. Another man, who went by the name of Piglet, accompanied them. RP 3/12/14, 16; 18. McElfish, who lived in the garage, was sleeping when Jensen went in and yelled to McElfish to get up because they were going to talk to Miranda about her stealing the bag. RP 3/12/14, 20.

Jensen said that Miranda was going to have to pay for stealing his bag. RP 3/12/14, 21. He told her to take her clothes off and sit in a chair, and then pulled a gun out and showed it to her, to threaten her. RP 3/12/14, 25; 26. He then duct-taped her to the chair, and threatened to cut her with a knife he was using to cut the tape. RP 3/12/14, 26. McElfish and Piglet were standing nearby; McElfish did not tell Jensen to stop or to let Miranda go. RP 3/12/14, 29. At two separate times, two different people came to the garage and knocked on the door. McElfish screamed at the people to go away because he was “busy.” RP 3/12/14, 30–31; 42.

Jensen told Miranda that he was going to kill her, and that all three of the men were going to have sex with her in retribution for her stealing his bag. RP 3/12/14, 34. Jensen and Piglet then left the room because Jensen had cut himself while he was taping Miranda to the chair. RP 3/12/14, 35. McElfish and Miranda were alone in the room and McElfish said, “Well, are you going to get, you know, get it done, or are you going to get it done before they come back down.” RP 3/12/14, 35. She reminded

him of a time that he had told her he would never force a woman to do anything she did not want to do and he “just kind of stopped and he said: Yeah, you’re right.” RP 3/12/14, 36. At some point when she was still taped to the chair, though, McElfish touched her breast and tried to touch her vagina. RP 3/12/14, 38–39. Miranda testified that she could not remember if he actually touched her vagina. *Id.*

Miranda was eventually able to free herself from the tape. She tried to run around McElfish and jump on the bed to get away. RP 3/12/14, 37. She grabbed a shirt to try to cover herself but McElfish yanked it out of her hand and said, “Give me that, that’s my shirt” in an angry tone of voice. RP 3/12/14, 41. Miranda then tried to escape out a window but McElfish pulled her down from the window and blocked her exit. RP 3/12/14, 43–44. He then went to the door to call Jensen and Piglet back. RP 3/12/14, 44. She ran toward the other door to escape and grabbed a small towel to try to cover herself. RP 3/12/14, 45. She was partially out the door when McElfish grabbed her and tried to pull her back into the garage. RP 3/12/14, 45; 48. She was able to escape, though, and ran away. RP 3/12/14, 52. She ran to the home of Merla Paul, where she hid until Paul came home and called the police. RP 3/12/14, 54; 209.

Vicky Cahoon and Tabitha Gaylor were the two individuals who knocked on the door of the garage during this incident. They testified that

McElfish yelled at them to go away. Gaylor testified that Miranda screamed her name at the top of her lungs and that she sounded scared. RP 3/12/14, 146–47; 183. Merla Paul then testified that she found Miranda in her home and Miranda told her what had happened. RP 3/12/14, 212. She testified that Miranda had said that three men took her clothes off, duct-taped her to a chair, and were going to rape her. *Id.* Miranda had told her that one of the men was in the Gypsy Joker motorcycle gang. *Id.* She also told Paul that she was able to get away when two of the men left one man alone with her to get started. *Id.*

Finally, Deputy Jason Hammer testified that he spoke to Miranda on October 5, 2012, and what she told him about the events that transpired matched her own testimony. RP 3/13/14, 11–17. She told him that McElfish had grabbed her breasts and body, and tried to grab her vagina. RP 3/13/14, 15. McElfish was found guilty of all the charges except indecent liberties. CP 5.

Approximately two and one-half years later, on April 9, 2015, McElfish moved for a new trial based on the discovery of new evidence – namely, a typed document titled “Declaration of Cheryl L. Miranda” that purported to recant Miranda’s trial testimony. CP 18–27. This document was signed by Cheryl Miranda in front of a notary on February 18, 2015. CP 26; RP 5/10/16, 9. The document stated, in relevant part, “He

[McElfish] looked at me and pointed to the back door of his room and he opened it and told me to run. He said he would tell Brandt that he fell back to sleep and guessed that I got out the back door. The tape was loose and as I leaped towards the door, Donald reached for a piece of the tape dangling from my wrist. I now realize he was only trying to help me get the tape off. Donald handed me a small white towel. I fled without my clothes, because I was so scared and I just wanted out of that insane situation.” CP 25–26.

The trial court held a factual hearing on May 10, 2016, to determine whether the written statement was a recantation, whether it was credible, whether Miranda would adhere to it under oath and subject to cross-examination, and whether the motion for a new trial should be granted. RP 5/10/16, 3. Miranda testified as follows at the hearing. On October 5, 2012, Miranda was at the residence of McElfish and some other people. RP 5/10/16, 10. Brandt Jensen was there and was angry with Miranda because he thought she had stolen a bag from him. RP 5/10/16, 12. He and another man walked her down to the garage where McElfish’s bedroom was and woke up McElfish. RP 5/10/16, 15. Then Jensen hit Miranda a couple of times, displayed a firearm, and made her take her clothes off. RP 5/10/16, 17. He then duct-taped her to a chair. While Jensen was doing this, McElfish was standing nearby; he was not participating or encouraging Jensen. RP 5/10/16, 19.

Jensen told Miranda that she was going to have to “take care” of all three men, which she took to mean that she would have to have sex with all three of them, then he and the other man left her alone with McElfish. RP 5/10/16, 21–23. Once they left, Miranda was able to free herself from the duct-tape and jumped on a computer table to try to get out the window. RP 5/10/16, 24. McElfish yelled at her to get off his computer, so she got down. *Id.* There was a short conversation where McElfish said something to the effect of “let’s get busy before they come back,” and Miranda reminded him of a time that he had said he would never force a woman. RP 5/10/16, 25. He then went to the door to call the other men back. *Id.* While he was doing this, Miranda was able to get another door open and try to get out. RP 5/10/16, 28. McElfish grabbed her and tried to pull her back in, but she was able to escape. RP 5/10/16, 29.

Miranda also testified that McElfish never did anything sexual to her, but that he tried to. RP 5/10/16, 29–30. When asked, “But it’s your testimony here today that my client did not attempt to rape you; correct?” Miranda answered, “I don’t know, I got away first. I don’t know if he would have or not.” RP 5/10/16, 48. She also testified that he “touched her boob or something.” RP 5/10/16, 38. She later clarified that he grabbed her right breast when she was seated, duct-taped to the chair. RP 5/10/16, 46. She was unable to remember if he had touched or attempted to touch her vagina.

RP 5/10/16, 40. She was clear, however, that he had grabbed her breast and tried to prevent her from leaving the room. RP 5/10/16, 50.

With regard to the written statement that was the basis of McElfish's motion for a new trial, Miranda explained that she did not write the statement. A woman named Cindy previously typed the statement and invited Miranda over to her house. RP 5/10/16, 33. When she got there, Cindy offered her a milkshake, which she accepted, and then became sick to her stomach and very sleepy and could not stay awake. *Id.* She began reading the statement and told Cindy that it made it sound like Miranda had lied, but was unable to read very much of the statement because of how sleepy and ill she became. *Id.* In fact, she did not even read the entire statement before she signed it. RP 5/10/16, 40. Miranda also emphasized the fact that when she signed the document, she was fearful of Jensen and his friends because some of them were in the Gypsy Joker motorcycle gang. RP 5/10/16, 41. Miranda testified that there was a lot wrong with the statement, but that parts of it were correct. RP 5/10/16, 47. One part that was incorrect was that McElfish did not try to help her escape and was not trying to get the tape off her wrist, as the statement said. RP 5/10/16, 34; 42.

The court found that the typed statement was not completely reliable because Miranda testified that she did not type it and that it contained

inaccuracies. RP 5/10/16, 66. However, the court then stated that the relevant question was whether Miranda's testimony at the hearing was a recantation of her trial testimony and found that it was. RP 5/10/16, 66–67. The court specifically noted Miranda's statements that McElfish did not touch her in a sexual manner, he did not rape her, and that his role in the incident was more limited. RP 5/10/16, 67. The court then examined the *Williams* factors and found that all five had been shown. RP 5/10/16, 68–69. Based on those findings, the court granted McElfish's motion for a new trial.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews a trial court's findings of fact by determining whether they are supported by substantial evidence, and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). A trial court's decision to grant or deny a new trial is reviewed for abuse of discretion. *State v. Ieng*, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997); *State v. Macon*, 128 Wn.2d 784, 803, 911 P.2d 1004 (1996).

B. THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT AS THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THESE FINDINGS.

A court's finding of fact must be supported by substantial evidence. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

1. Finding of Fact number two

In McElfish's case, finding of fact number two reads as follows:

At the trial, the alleged victim Cheryl Miranda 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.

CP 35. In fact, Miranda's testimony at trial was that McElfish tried to touch her vagina, and he "might have" actually touched her vagina. RP 3/12/14, 39. She was unable to remember if he actually touched her vagina, saying, "I can't really put my finger on that..." *Id.* There is no evidence that Miranda testified that McElfish touched her vagina. Therefore, there was not substantial evidence to support finding of fact number two, and it was made in error.

2. Finding of Fact number six

In this case, Finding of Fact number six states:

At the hearing on May 10, she 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. Miranda in fact stated, "It's a lot wrong." RP 5/10/16, 47. She testified that some things in the statement were true, such as that McElfish was not involved in taking Miranda to the garage, hitting her, or threatening her with weapons. *Id.* There is no evidence that Miranda testified that half of the statement was correct and half was incorrect. Therefore, there was not substantial evidence to support finding of fact number six, and it was made in error.

3. Finding of Fact number eight

Finding of Fact number eight states:

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 36. At both the trial and the hearing on May 10, 2016, Miranda testified that McElfish touched her breast. RP 3/12/14, 38; RP 5/10/16, 46. At the trial, she did not testify at all regarding whether McElfish touched her in a sexual manner. There is no evidence that she testified to his intent, so any

testimony from the May 10 hearing cannot be inconsistent – there is nothing with which it can be inconsistent. Additionally, whether McElfish had sexual intent when he touched Miranda’s breast and reached for her vagina is a jury question. At the trial, Miranda testified about what happened and the State argued that the evidence showed McElfish had sexual intent. Different people may have different definitions of what a “sexual manner” is, and a lay person would not necessarily understand that sexual intent is a legal conclusion. That is why it was left to the jury to determine whether, under the law, it could be said that McElfish’s intent was sexual. Finally, contrary to what Finding of Fact number eight states, Miranda did not deny that McElfish touched her vagina at the May 10 hearing. She stated that she did not remember saying that McElfish tried to touch her on her private area. RP 5/10/16, 40. Merely not remembering something is not the same as saying it did not happen. Therefore, there is not substantial evidence to support this finding of fact.

4. Finding of Fact number nine

Finding of Fact number nine states, “There was no direct evidence at trial that corroborated the claims made by Cheryl Miranda.” In fact, the testimony of Vicky Cahoon, Tabitha Gaylor, Merla Paul, and Deputy Jason Hammer all corroborated what Miranda testified to at trial. Though these people were not in the room with Miranda and McElfish during the incident,

their testimony regarding Miranda's excited utterances, as well as hearing her yell for help, is sufficient to support McElfish's conviction. *See Macon*, 128 Wn.2d at 800. Therefore, there was corroborating evidence to support Miranda's testimony, and there is not substantial evidence to support finding of fact number nine.

C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED MCELFISH'S MOTION FOR A NEW TRIAL AND VACATED THE JUDGMENT AND SENTENCE.

A trial court's decision to grant or deny a new trial is reviewed for abuse of discretion. *Ieng*, 87 Wn. App. at 877; *Macon*, 128 Wn.2d at 803. A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court abused its discretion when it granted McElfish's motion for a new trial because the decision was based on the untenable grounds that the written statement and Miranda's testimony constituted a recantation, that the recantation was reliable, and that all five of the requirements stated in *State v. Williams* applied.

1. ***The trial court erred when it found that, in part, the affidavit signed February 18, 2015, constituted a recantation of Miranda's trial testimony because she did not adhere to the statement when she was under oath and subject to cross-examination.***

To recant means to “withdraw or renounce formally or publicly.” *Black's Law Dictionary* (10th Ed. 2014). Washington courts have construed this definition to mean that the recanting person must recant in open court while under oath and subject to cross examination. *State v. Landon*, 69 Wn. App. 83, 92, 848 P.2d 724 (1993); *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995). In *Landon*, the victim purported to recant via an out-of-court and unsworn written statement. 69 Wn. App. at 87. Division II of the Washington Court of Appeals held that the written statement was not sufficient to grant a new trial but did entitle the defendant to a hearing in the superior court to determine whether the victim would recant in open court while under oath. *Id.* at 92–3. If the victim adheres to the facts in the written statement while under oath in open court and subject to cross-examination, it is within the trial court's discretion to grant a new trial, based on various factors that will be discussed below. *Id.* at 93. In this case, however, the victim did not adhere to the facts in the written statement at hearing.

At the hearing on May 10, 2016, Miranda testified that she did not write the alleged recantation statement, though she did sign it. RP 5/10/16,

32; 9. She testified that she did not talk to the person that wrote it about what had happened; the woman that wrote the statement had been to court and already knew what had happened. RP 5/10/16, 32. That woman typed the statement and invited Miranda over to her home to read it. Miranda testified that she was given a milkshake, started feeling sleepy and sick, and was unable to finish reading the statement. *Id.* She also testified that the statement was “a lot wrong.” RP 5/10/16, 47.

Miranda did testify that some things in the statement were true, such as that McElfish was not involved in taking Miranda to the garage, hitting her, or threatening her with weapons; and that McElfish was sleeping when Jensen and Miranda arrived in the garage. RP 5/10/16, 47. However, the things in the written statement that Miranda indicated were true are not relevant to this inquiry. They are undisputed facts about Jensen’s involvement in the incident, which Miranda testified to at the trial and at the May 10 hearing. The only part of the written statement that is different from Miranda’s trial testimony is paragraph 5, where it states that McElfish was trying to get the tape off Miranda’s wrist. At the hearing on May 10, 2016, Miranda explicitly disavowed this statement, testifying that McElfish was not trying to help her get the tape off and in fact grabbed her to try to keep her from fleeing. RP 5/10/2016, 42. Miranda did not adhere to the facts in

the written statement when she was under oath and subject to cross-examination.

Under Washington case law, if a victim adheres to the facts in the written statement while under oath in open court and subject to cross-examination, it is within the trial court's discretion to grant a new trial. *Landon*, 69 Wn. App. at 93. Therefore, if a victim does *not* adhere to the facts in the written statement, it is *not* within the trial court's discretion to grant a new trial. Once Miranda did not adhere to the relevant portions of the written statement (and in fact explicitly disavowed them), the trial court had no discretion to grant a new trial and erred by doing so.

2. *The trial court erred when it found that Miranda's testimony on May 10, 2016, constituted a recantation.*

Miranda's testimony at the May 10, 2016, hearing did not differ substantially from her trial testimony. Her testimony on May 10 did not withdraw or repudiate her trial testimony. In fact, at both the trial and the hearing she testified that Jensen took her to the garage, McElfish was sleeping but woke up, Jensen threatened her and taped her to a chair, and then Jensen left the room. RP 3/12/14, 21–35; RP 5/10/16, 10–23. She testified at both the trial and the hearing that McElfish touched her breast. RP 3/12/14, 38; RP 5/10/16, 38. She testified at both the trial and the hearing that McElfish grabbed her and tried to pull her back into the room

after she was able to free herself from the duct tape. RP 3/12/14, 48; RP 5/10/16, 29. The only difference in her testimony was that, at the May 10 hearing, she testified that she did not remember if McElfish had touched or attempted to touch her vagina. RP 5/10/16, 40. Merely not remembering something that happened approximately four years before is not a repudiation that it happened. Miranda's testimony at the May 10 hearing does not indicate that she perjured herself at trial. In fact, she reaffirmed her trial testimony. Miranda's testimony at the May 10 hearing is simply not a recantation of her trial testimony.

At the May 10 hearing, the trial court found that Miranda's testimony that McElfish did not touch her in a sexual way and did not rape her was a recantation of her trial testimony. RP 5/10/16, 67. First, this is not a recantation because she did not testify at the trial that he touched her in a sexual way or that he raped her. The testimony from both the trial and the hearing match. She testified at trial that he touched her breast and reached for her vagina, and the jury was left to determine whether the touching was in a sexual manner. Then, at the hearing, Miranda testified that, while McElfish did not touch her in a sexual way, he tried to. RP 5/10/16, 30. This is important because, at trial, the State argued McElfish's guilt to the attempted rape and the assault with sexual motivation as an accomplice. *See* RP 3/14/14, 32–35; 44–46.

The jury was given WPIC 10.51, which states:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. A person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime, he or she either, (1) solicits, commands, encourages or requests another person to commit the crime or, (2) aides or agrees to aide another person in planning or committing the crime.

The word “aid” means all assistance, whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

RP 3/14/14, 12. The State then argued that McElfish was an accomplice to Jensen by his presence and by preventing Miranda from leaving the room, grabbing her, and trying to pull her back into the room. RP 3/14/14, 33–34. Jensen hit and punched Miranda with the intent of subduing her so the three men could rape her; he also duct-taped her to the chair. McElfish was standing nearby ready to help, then assaulted her by touching her breast and reaching for her vagina, and prevented her from leaving the room. By convicting McElfish, the jury found that he was an accomplice to Jensen’s actions with regard to the attempted rape and the assault with sexual motivation. Miranda’s testimony at both the trial and the May 10 hearing

match regarding the actions of both Jensen and McElfish. Especially when it is taken into account that the State argued McElfish's guilt as an accomplice, it is clear there was no recantation in this case. It was an abuse of discretion for the trial court to grant a motion for a new trial.

Finally, while Miranda testified at the May 10 hearing that McElfish did not try to rape her (RP 5/10/16, 31), she did not testify at the original trial that he did try to rape her. Therefore, this statement is not a recantation. Additionally, McElfish was charged with attempted rape. An attempt requires a substantial step toward commission of the crime. RCW 9A.28.020. A substantial step is "conduct that strongly indicates a criminal purpose, and is more than mere preparation." WPIC 100.05; RP 3/14/14, 13. A lay person, like Cheryl Miranda, may not know what a substantial step is, or that a person can be guilty of attempted rape even if there is no penetration, genital touching, or force involved. A lay person like Miranda also may not realize that McElfish was charged as an accomplice to Jensen, so acts that Jensen did could be evidence of McElfish's guilt. As the State argued in closing in this case, "[L]ook what the defendant did after that. After Cheryl gets out of the chair, he says: Are we going to do this? Are you going to be cooperative? What does that show you what his intent is? His intent is to follow through with sex, but he doesn't just stop there. He touches her breast, he reaches for her vagina, and she's able to twist away."

RP 3/14/14, 37. The substantial step is McElfish touching Miranda's breast and reaching for her vagina – acts that she did not recant. In fact, when asked if McElfish did anything sexual to Miranda, she stated, "Well, not really....He tried, though." RP 5/10/16, 29–30. Because there was no recantation in this case, the trial court abused its discretion when it granted the motion for a new trial.

3. ***Even if the typed document or Miranda's testimony on May 10, 2016, constituted a recantation, the trial court erred when it found that they were credible.***

Recantation testimony is inherently suspect. *Macon*, 128 Wn.2d at 804. A person who is "convicted of a crime is not entitled to a new trial solely because a key prosecution witness recants important trial testimony." *Ieng*, 87 Wn. App. at 874, *citing Macon*, 128 Wn.2d at 804. The recantation must be credible for it to be material, and it must be material in order to be the basis for a new trial. *Id.* In assessing the credibility of the victim's alleged recantation, the court is to consider the surrounding circumstances, including possible reasons for recanting, relevant facts at the time of the recantation, and the passage of time between the testimony and the recantation. *Macon*, 128 Wn.2d at 802. Whether there is independent evidence to support the recanting witness's original testimony is not a controlling factor. *Macon*, 128 Wn.2d at 804.

First, with regard to the written statement, it was typed and signed eleven months after McElfish was convicted and approximately three and one-half years after the crime occurred. CP 1; CP 5. To think that Miranda's memory of the event would be clearer nearly a year after the trial testimony is incredible. Additionally, Miranda testified that she did not type the written statement, did not speak to the person who wrote it prior to reading it, was unable to read the entire thing, and was feeling very sick and sleepy when she signed it. RP 5/10/16, 32–35. She also testified that she was afraid of the person who typed the statement and of the other people that were at the house, and that she was intimidated by them. RP 5/10/16, 35; 36. The circumstances that existed at the time that Miranda signed the statement, including the fear that Miranda felt, as well as the passage of time between the trial and when the document was signed all point to the document not being credible or reliable.

Second, with regard to Miranda's testimony, the May 10, 2016, hearing occurred two years after McElfish was convicted and three and one-half years after the crime occurred. Again, her memory of the incident after more than three years had passed would almost certainly be worse than her memory directly after the incident and at trial. In fact, Miranda testified that she could not remember whether McElfish touched her vagina. RP 5.10.16, 40. This shows that her memory was affected by the passage of

time, which tends to make any alleged recantation not credible. Additionally, Miranda testified that she was concerned after the trial that somebody was going to kill her – either Jensen’s friends or McElfish’s friends – especially because Jensen had been a member of the Gypsy Joker motorcycle gang. RP 5/10/16, 41. Miranda’s fear is especially notable because the State had to obtain a material witness warrant to secure her presence at McElfish’s trial. CP 4. She was afraid to testify against McElfish; any alleged recantation is a direct result of this fear. Therefore, if this Court finds that Miranda’s testimony was a recantation, it simply is not reliable given the fact that Miranda’s memory was affected by the passage of time and that she was in fear for her life both before and after McElfish’s trial. In short, Miranda had a reason to recant – she was afraid somebody was going to kill her because she testified against McElfish in his trial. The trial court abused its discretion by failing to consider possible reasons for the alleged recantation, the passage of time, and the circumstances surrounding both the written statement and Miranda’s testimony on May 10.

4. ***Even if Miranda's testimony on May 10, 2016 constituted a reliable recantation, the trial court erred when it found that all five of the State v. Williams factors applied.***

A recantation is generally considered “newly discovered evidence.” *Macon*, 128 Wn.2d at 799. However, the existence of a recantation does not automatically entitle the defendant to a new trial. To obtain a new trial based on newly discovered evidence, the defendant must “prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after 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). If any one of these factors is missing, a new trial may be denied. *Id.*

Here, the evidence was discovered after the trial and likely could not have been discovered prior to trial. However, the alleged recantation is not material, is cumulative or impeaching, and likely would not have changed the result of the trial.

First, Miranda's alleged recantation – both the written statement and her testimony on May 10 – is not material. The written statement is not material because Miranda did not write it, did not read the entire document, felt very ill when she signed it, and was afraid and intimidated. She also testified that it was incorrect in many aspects, including that McElfish did not try to help her get the tape off her arm. RP 5/10/16, 42. Then, her

testimony at the May 10 hearing reaffirmed her trial testimony. However, even if this Court finds that Miranda's testimony at the May 10 hearing was a recantation, it is nonetheless not material because Miranda's memory was affected by the passage of time and she was in fear for her life after McElfish's trial. Therefore, one factor is not met and the trial court abused its discretion in granting a new trial.

Second, Miranda's testimony at the May 10, 2016, hearing is merely impeaching and would not have changed the result of the trial. There were only slight differences between Miranda's testimony at the hearing and her testimony at trial. Any inconsistencies in the testimony would be used in a new trial to impeach her memory. Therefore, the testimony is simply impeachment and a second *Williams* factor has not been met.

Additionally, if Miranda were to testify at a new trial exactly the way she testified at the hearing, it would not change the outcome. She would still testify that McElfish touched her breast, blocked her exit, and grabbed her to prevent her from leaving. She would still testify to all the things that Jensen did to which McElfish was an accomplice. She would testify that he tried to touch her in a sexual way and that she thought he was going to rape her. Therefore, based on Miranda's testimony alone, the outcome would not have changed. When the other evidence from the trial

is taken into account, an alleged recantation would not change the result of the trial.

Multiple people testified about their contact with Miranda after she was in the garage with McElfish. Merla Paul testified at the trial that Miranda had broken into her house and was very scared and upset. RP 3/12/14, 208; 211. She testified that Miranda had said that three men took her clothes off, duct-taped her to a chair, and were going to rape her. RP 3/12/14, 212. Miranda had told her that one of the men was in the Gypsy Joker motorcycle gang. *Id.* She also told Paul that she was able to get away when two of the men left one man alone with her to get started. *Id.*

Then, Deputy Jason Hammer testified that he spoke to Miranda right after the incident and she told him that McElfish had grabbed her breasts and body, and tried to grab her vagina. RP 3/13/14, 15. Vicky Cahoon and Tabitha Gaylor were the two individuals who knocked on the door of the garage during this incident. They testified that McElfish yelled at them to go away. Gaylor testified that Miranda screamed her name and sounded scared. RP 3/12/14, 146–47; 183. Given Miranda's excited utterances that were testified to by Mrs. Paul and Deputy Hammer, the corroborating evidence from Ms. Cahoon and Ms. Gaylor, the physical evidence, and Miranda's extreme fear for her life, this alleged recantation evidence would not have changed the outcome of the trial. She would have had a motive to

recant or minimize on the stand, and when a reasonable jury was presented with the evidence, this recantation would not change the outcome of the trial. Because three of the *Williams* factors have not been met, the trial court abused its discretion when it granted a new trial.

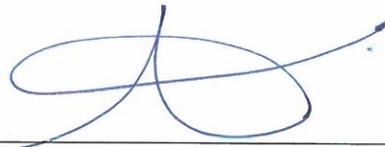
V. CONCLUSION

For the foregoing reasons the State respectfully asks this Court to reverse the decision of the trial court which granted the motion for a new trial based on the alleged recantation of Cheryl Miranda. The State requests this Court reinstate McElfish's convictions.

Respectfully submitted this 30th day of Sept, 2016.

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Sept. 30th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 30, 2016 - 2:54 PM

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