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Division II
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No. 52115-6-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Donald Howard McElfish,

Appellant.

Second Amended Brief of Appellant

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1. Introduction

Donald McElfish was originally convicted and sentenced in April 2014 of Attempted Rape in the Second Degree, Kidnapping in the First Degree, and Assault in the Second Degree with intent to commit a felony with sexual motivation. CP 4. This is the third appeal of the same case. While the first appeal was pending (*McElfish I*), the state's key witness—the victim, C.M.—signed a declaration recanting her trial testimony. *See* CP 24-25.

Based on the declaration and on live testimony from C.M. at a CrR 7.8 hearing, the trial court vacated the judgment and sentence and granted McElfish a new trial. CP 90. The state appealed (*McElfish II*). This Court, Division I, reversed the order granting a new trial, holding that many of the trial court's findings of fact were not supported by substantial evidence. *McElfish II: State v. McElfish*, 200 Wn. App. 1017 (2017) (unpublished). Division I remanded for a new determination based only on findings supported by substantial evidence.

Division I's decision improperly substituted the appellate court's judgment for that of the trial court. The prior decision was erroneous and works manifest injustice against McElfish. This Court should revisit that decision under RAP 2.5(c)(2).

2. Assignments of Error

Assignments of Error

1. Division I erred in reversing the trial court's original findings of fact 6, 8, and 9 and in reversing the trial court's original conclusions of law.

Issues Pertaining to Assignments of Error

1. Whether this Court should review the prior decision of Division I in *McElfish II* under RAP 2.5(c)(2).
2. Whether Division I improperly substituted its own judgment for that of the trial court instead of applying the deferential "substantial evidence" and "abuse of discretion" standards.
3. Whether the interests of justice support reviewing and overturning Division I's prior decision in *McElfish II*.

3. Statement of the Case

3.1 Underlying facts of the case as adduced at trial.

This Court summarized the basic facts of the case in *McElfish I*: "Brandt Jensen accused CM of stealing a bag that belonged to him. With McElfish and another man present, Jensen displayed a gun and a knife and forced CM to take her clothes off. He told her that all three men were going to have sex with her. Jensen and the other man then left CM with McElfish. McElfish then grabbed CM's breast, tried to touch her vagina, and blocked her from leaving. She pleaded with him to leave her alone, but he persisted. CM finally was able to escape."

McElfish I: State v. McElfish, 190 Wn. App. 1038 (2015)
(unpublished).

In *McElfish II*, Division I described C.M.'s testimony of the facts in more detail:

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." He hit her again, intimidated her with a gun, and "got crazy," so she complied. 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." 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." 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.” 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 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. 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. 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.

3.2 Trial court's findings in granting McElfish's motion for new trial.

In granting McElfish's motion for a new trial on the basis of C.M.'s subsequent recantation declaration and live testimony at the hearing, the trial court entered the following findings of fact:

1. On March 17, 2014 the above defendant was convicted after a jury trial on the charges of Attempted Rape in the 2nd Degree, Kidnaping in the 1st Degree and Assault in the 2nd Degree with Sexual Motivation.
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.

3. She also testified at trial that while restraining her in the chair, Jensen cut himself and that when this occurred he and Easley retreated to the main residence. When this occurred she was able to free herself from her restraints and escape the shop area. She testified that the defendant had tried to stop her.
4. On February 18, 2015 [C.M.] signed an affidavit, a copy of this affidavit was attached to the defendant's original pro se motion, and was attachment A to defense counsel's motion for a new trial. This affidavit stated that her trial testimony as to Mr. McElfish was wholly incorrect and that he was not a participant in the actions taken against her by Mr. Jensen.
5. At a hearing on May 10, 2016, [C.M.] testified regarding the affidavit and its contents. At one point during the hearing she denied authorship of the affidavit, She also testified that she was the signor of the document, and that she had taken to get it notarized at the City of Kalama City Hall. She testified that she represented that the contents of the affidavit were correct to the notary at the time of signing.
6. 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.

7. Consistent with her testimony at the trial, she testified that Brandt Jensen and Ronald Easley took her from the main residence to a shop where the defendant resided. She testified that in the defendants residence, she was assaulted by Jensen, forced to disrobe and was tied to a chair with duct tape. She affirmed that the defendant did not take part or encourage these actions.
8. 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.
9. There was no direct evidence at trial that corroborated the claims made by [C.M.].
10. The evidence of recantation was discovered after the trial, and could not have been discovered prior to trial by exerting due diligence.

CP 115-16.¹ The trial court entered the following Conclusions 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.
2. The jury's verdict on March 17, 2014 was likely influenced by [C.M.'s] original testimony.

¹ ~~The trial court's original findings and conclusions are a part of a supplemental designation of clerk's papers, which counsel has not yet received. Counsel will file an amended brief once the correct CP numbers are known.~~

3. Based upon the testimony given during the recantation on May 10, 2016, the results of a trial would likely be different if a new trial is granted.

CP 116.

3.3 Division One held that some of the findings were not supported by substantial evidence.

In reversing the trial court's order granting a new trial, Division I took issue with the trial court's Finding of Fact No. 6, specifically the portion that stated, "that half of the affidavit was incorrect and that half of it was correct." *McElfish II*. The court held, "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." *McElfish II*.

Division I also took issue with Finding of Fact No. 8, specifically with the portions of the finding that stated that McElfish did not touch her in a sexual manner and that she denied that he touched her vagina. The court noted, "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." The court also noted, "While she did not

testify that McElfish touched her vagina, she also did not deny that McElfish touched her vagina.” *McElfish II*.

Division I took issue with Finding of Fact No. 9. The court held that Deputy Hammer’s testimony, “that C.M. told him that McElfish had ‘grabbed her breasts, grabbed her body and attempted to grab her vagina,’” was direct evidence that corroborated C.M.’s original trial testimony.

3.4 On remand, the trial court entered new findings of fact.

On remand, the trial court reviewed C.M.’s testimony from the trial and from the 7.8 hearing. RP 30; CP 33-86 (trial testimony); CP 125-70 (hearing testimony)². After hearing argument of counsel, the trial court ruled that C.M. had not recanted her testimony. RP 50. The trial court entered new findings of fact and denied the motion for new trial. CP 106-07.

The following findings of fact were substantially different from the original findings:

6. [C.M.] further testified that there were some things in the document that were correct, including that the defendant was asleep when she, Jensen, and Easley entered; that the defendant had a more limited role in the incident than Jensen; and that the defendant was likely afraid of Jensen as well. However, she flatly contradicted the majority of the affidavit.

² ~~C.M.’s recantation testimony is also part of the supplemental designation of clerk’s papers.~~

...

8. [C.M.]’s hearing testimony was further consistent with her trial testimony in that she testified that the defendant had touched her breast. Additionally, [C.M.] did not deny that the defendant touched her vagina – she testified that she could not remember.
9. [C.M.] never testified at the hearing that the defendant did not touch her in a sexual manner. She disagreed with non-sexual explanations for the defendant’s behavior, saying that she could not point to anything showing the touching was sexual but that “it must’ve been something.”

CP 107.

The trial court concluded that C.M.’s declaration was not reliable and therefore was not a recantation of her trial testimony. CP 107. The trial court also concluded that C.M.’s testimony at the hearing was not a recantation of her trial testimony. CP 107.

4. Argument

On this third appeal of the same case, this Court is permitted to review issues that were raised in the previous appeals. Under RAP 2.5(c)(2), “The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.”

In the state’s appeal from the trial court’s order granting a new trial, *McElfish II*, Division I of this Court purported to apply substantial evidence and abuse of discretion standards of review to the trial court’s original findings and conclusions in granting a new trial. But in reality, Division I substituted its own judgment for that of the trial court on questions of credibility and reliability of C.M.’s hearing testimony—questions on which the trial court should have been entitled to great deference, having been present at the hearing to observe C.M.’s testimony in person. This Court—Division II—should review the prior decision of Division I and apply the correct, deferential standards of review to the trial court’s original findings and conclusions in the order granting a new trial.

4.1 Standard of Review

A trial court's ruling on a motion for new trial is reviewed for manifest abuse of discretion. *State v. York*, 41 Wn. App. 538, 543, 704 P.2d 1252 (1985). “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). An even stricter standard—“a much stronger showing of abuse of discretion”—must be met before a reviewing court can reverse an order **granting** a new trial (as opposed to an order denying a new trial). *York*, 41 Wn. App. at

543 (citing *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

This Court reviews a trial court's findings of fact only to determine whether they are supported by substantial evidence. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Substantial evidence exists if there is a quantum of evidence that, if believed, could persuade a rational, fair-minded person of the truth of the finding. *State v. Kidder*, 197 Wn. App. 292, 316, 389 P.3d 664 (2016).

So long as this substantial evidence standard is met, it is inappropriate for a reviewing court to substitute its own judgment for that of the trial court even though it might have resolved a factual dispute differently. *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016). Given the fact finder's superior opportunity to assess witness demeanor and credibility, appellate courts must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Truong*, 168 Wn. App. 529, 534, 277 P.3d 74 (2012).

An erroneous finding that does not materially affect the trial court's conclusions of law is not prejudicial and does not warrant reversal. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

4.2 Common legal foundations applicable in this case

4.2.1 Recantation

A motion for a new trial based on a witness's recantation of their trial testimony may be granted if the trial court finds that the changes in the witness's testimony would probably change the outcome of the case if a new trial was granted. *York*, 41 Wn. App. at 543.³ The trial court must first determine whether the recantation is reliable. *Macon*, 128 Wn.2d at 804. If the trial court finds the recantation testimony reliable, it must then determine whether the original jury verdict was likely influenced by the now recanted testimony. *Id.* at 801. These matters rest in the sound discretion of the trial court and will not be disturbed except for clear and manifest abuse. *Id.* at 801-02.

After a trial court finds that the original verdict was likely influenced by the recanted testimony, there are two possible paths for the analysis. If there was other, independent evidence that corroborated the original testimony **and** would be sufficient, in itself, to justify a conviction and penal sentence, the grant of a new trial rests within the sound discretion of the trial judge. *Macon*, 128 Wn.2d at 800; *York*, 41 Wn. App. at 543.

³ Note that there are five elements that must be met before granting a motion for a new trial, but only this one element is at issue in this appeal and in *McElfish II*.

However, where there is no corroborating testimony, or where the corroborating testimony would not be sufficient, in itself, to support a conviction, the trial court **must** grant a new trial. *York*, 41 Wn. App. at 543 (“this court has squarely held that it is an abuse of discretion not to grant a new trial”).

4.2.2 Elements of the crimes charged

In order to determine whether a change in testimony would likely change the outcome of the trial or whether corroborating evidence would be sufficient to support a conviction, the trial court must consider the essential elements of the crimes of which the defendant was convicted, which it would be the state’s burden to prove in a new trial.

In this case, McElfish was convicted of 1) Attempted Rape in the Second Degree; 2) Kidnapping in the First Degree; and 3) Assault in the Second Degree with intent to commit a felony with sexual motivation. CP 4. The jury was instructed that McElfish could be guilty as a principal or as an accomplice. *See McElfish I*.

The essential elements of second degree rape are 1) engaging in sexual intercourse with the victim; and 2) that the sexual intercourse occurred by forcible compulsion.⁴ RCW

⁴ Second degree rape is an alternative means crime, but forcible compulsion is the only alternative means that could possibly fit the evidence in this case.

9A.44.050; WPIC 41.02. Sexual intercourse is not an element of **attempted** second degree rape, so long as the state proves that the defendant 1) did an act that was a substantial step toward engaging in intercourse by forcible compulsion; and 2) the act was done with the intent to commit rape. *State v. Gallegos*, 65 Wn. App. 230, 235, 828 P.2d 37 (1992); RCW 9A.28.020; WPIC 100.02.

The elements of first degree kidnapping are 1) intentionally abducting the victim; 2) with intent to a) facilitate commission of a felony; b) inflict bodily injury on the victim; or c) inflict extreme mental distress.⁵ RCW 9A.40.020; WPIC 39.02. “Abduct’ means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(1); WPIC 39.30. “Restrain’ means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.” RCW 9A.40.010(6); WPIC 39.30.

The elements of second degree assault with intent to commit a felony with sexual motivation are 1) an assault of the victim; 2) with intent to commit a felony; 3) for the purpose of

⁵ Again, first degree kidnapping is an alternative means crime. The listed elements are the only means that could conceivably meet the evidence in this case.

his or her sexual gratification. RCW 9A.36.021; RCW 9.94A.835; RCW 9.94A.030(48). An assault is an intentional touching of another person that is harmful or offensive. WPIC 35.50. An assault can also be an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury. WPIC 35.50.

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) aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020; WPIC 10.51. A person “aids” another in committing a crime by associating himself with the undertaking, participating in it as in something he desires to bring about, and seeking by his action to make it succeed. *State v. Knight*, 176 Wn. App. 936, 949, 309 P.3d 776 (2013).

The State must prove more than a person’s physical presence at the crime scene and assent to establish accomplice liability. *State v. McDaniel*, 155 Wn. App. 829, 863, 230 P.3d 245 (2010). “Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—is not sufficient to establish accomplice liability. Rather, the State must prove that the defendant was ready to assist the

principal in the crime and that he shared in the criminal intent of the principal, thus demonstrating a community of unlawful purpose at the time the act was committed.” *Truong*, 168 Wn. App. at 540.

4.3 This Court should review the prior decision in *McElfish II*, reverse and remand for re-entry of the original findings, conclusions, and order for new trial.

4.3.1 Under RAP 2.5(c)(2), an appellate court may review a decision in a prior appeal in the same case if the prior decision was clearly erroneous and would work a manifest injustice on a party.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wash.2d 33, 41, 123 P.3d 844 (2005). However, RAP 2.5(c)(2) provides an exception to the law of the case doctrine when a case returns to an appellate court after a remand: “The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case.” An appellate court should revisit an issue if the earlier decision was erroneous and justice would be best served by a review of that decision. *Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 544, 94 P.3d 390 (2004).

4.3.2 The prior decision in *McElfish II* was erroneous because Division I substituted its own judgment in striking down the findings, rather than applying a substantial evidence standard of review.

Division I's review of the trial court's original findings of fact is suspect. The court asserted that it was applying a substantial evidence standard, but instead of deferring to the trial court's determinations of credibility and persuasiveness of evidence, the court reached its own conclusions from the dry record and substituted its own judgment for that of the trial court. An appellate court cannot substitute its own judgment as to what the evidence means. The prior decision was erroneous and should be revisited.

The trial court's original Finding 8 stated that C.M. testified that McElfish did not touch her in a sexual manner; that C.M. denied that he touched her vagina; and that McElfish appeared to be scared of Jensen. The finding also stated that the trial court found this testimony to be reliable.

Division I selected quotes out of the dry record that it believed demonstrated that C.M. was not changing her testimony on these points. But in doing so, it substituted its own judgment of the meaning of C.M.'s words. Division I could not see C.M.'s mannerisms at the hearing. Division I could not see

her eyes, her gestures, or any other clues that would affect one's perception of the testimony C.M. was providing.

The trial court had a superior opportunity to observe the manner of C.M.'s testimony. The trial court determined that C.M.'s testimony at the hearing was reliable. Division I should have deferred to that determination. The trial court determined that C.M.'s equivocal words, given the complete context of her testimony and the nuances that cannot appear in a dry, written transcript, were intended to mean that McElfish did not touch her in a sexual manner; that he did not touch her vagina; and that he was likely motivated by fear of Jensen rather than by a common criminal intent.

The prior decision of Division I was erroneous because the court substituted its own judgment rather than applying the correct, deferential, substantial evidence standard of review. This Court should review the decision and uphold the trial court's original findings.

4.3.3 The prior decision in *McElfish II* was erroneous because Division I substituted its own judgment in reversing the trial court's conclusions, rather than applying an abuse of discretion standard of review.

Division I asserted that it was applying an abuse of discretion standard in assessing the trial court's original conclusions of law. However, what the court actually did was to

simply hold that the trial court abused its discretion because the findings were not supported by substantial evidence. That is not the proper standard for reviewing a trial court's conclusions in a recantation situation.

As set forth above, a trial court decision granting a new trial cannot be reversed except with a heightened showing of abuse of discretion. Erroneous findings of fact that do not materially affect the trial court's conclusions do not support reversal of the trial court's order.

After finding error in the findings of fact, Division I should have analyzed the conclusions to see if they did, in fact, rely on the erroneous findings.

The trial court's original Finding 6 stated that "half of the affidavit was incorrect and that half of it was correct." Division I found that this estimation was not supported by substantial evidence. However, this finding is not material to the trial court's conclusions that C.M.'s hearing testimony was a recantation of her trial testimony and that the outcome would probably be different if a new trial was granted. Division I's opinion on Finding 6 did not require reversal.

As noted above, Division I's opinion on Finding 8 was erroneous for failure to defer to the trial court on the interpretation of C.M.'s testimony. Finding 8 was supported by substantial evidence. It supported the trial court's conclusions.

Division I disagreed with the trial court on whether there was other evidence at trial that corroborated C.M.'s original trial testimony. But the presence or lack of corroborating testimony does not mandate any particular decision on the motion for new trial. As noted above, when there is corroborating evidence, the decision to grant a new trial is still within the sound discretion of the trial court. Division I did not explain how granting a new trial despite Deputy Hammer's hearsay testimony about what happened in the garage would be a manifest abuse of discretion. It was not.

The trial court did not abuse its discretion in granting McElfish's motion for a new trial. Division I simply disagreed with the trial court's decision. It was error for Division I to substitute its judgment for that of the trial court without showing any abuse of discretion. This Court should review the prior decision and uphold the trial court's original findings, conclusions, and order granting a new trial.

4.3.4 The interests of justice would be served by a review of the decision in *McElfish II*.

McElfish is serving a term of 100 months to life on the basis of testimony that C.M. felt the need to modify. McElfish was not an active participant in the criminal acts. Jensen was the driving force and the perpetrator of the acts that constitute

attempted rape, kidnapping, and assault. McElfish did not aid Jensen in those acts. McElfish was present for some of them. The fact that he did not try to stop Jensen is not enough to make him an accomplice. As C.M. clarified in her recantation testimony, McElfish appeared to be afraid of Jensen and was likely motivated by fear rather than by any shared criminal intent. Under C.M.'s new testimony, McElfish was not an accomplice to Jensen's attempted rape, kidnapping, and assault of C.M. It is a manifest injustice for McElfish to be convicted and sentenced as an accomplice.

A jury should get a new opportunity to determine whether McElfish was guilty of attempted rape. With C.M.'s revised testimony, it is unclear whether McElfish intended to have intercourse with her. It is unclear whether McElfish took a substantial step toward doing so.

A jury should get a new opportunity to determine whether McElfish was guilty of kidnapping. With C.M.'s revised testimony, it is unclear whether McElfish restrained C.M. with the intent to facilitate a felony. There is no evidence that McElfish intended to inflict bodily harm or emotional distress.

A jury should get a new opportunity to determine whether McElfish was guilty of assault with intent to commit a felony with sexual motivation. C.M.'s revised testimony is that McElfish did not touch her in a sexual manner. It is unclear

whether any touching by McElfish was done with the intent to commit a felony.

There is a reasonable likelihood, as found by the trial court in its original findings and conclusions, that the outcome could be different if a new trial is granted. It is a manifest injustice to refuse a new trial under such circumstances.

5. Conclusion

The prior decision of Division I in *McElfish II* was erroneous. Review of the decision would serve the interests of justice. This Court should revisit the decision and uphold the original findings, conclusions, and order granting a new trial.

Respectfully submitted this 5th day of March, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on March 5, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Aila Wallace
Cowlitz County Prosecutor's Office
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SIGNED at Lacey, Washington, this 5th day of March, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
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OLYMPIC APPEALS PLLC

March 05, 2019 - 11:24 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52115-6
Appellate Court Case Title: State of Washington, Respondent v. Donald Howard McElfish, Appellant
Superior Court Case Number: 12-1-01146-7

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**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,
Respondent,
v.
Donald Howard McElfish,
Appellant.

No. 52115-6-II

**Notice Regarding Second
Amended Brief of Appellant**

Donald McElfish, Appellant, respectfully submits to the Court and the parties this Notice regarding the Second Amended Brief of Appellant, filed today, March 5, 2019.

The Amended Brief of Appellant, filed February 21, 2019, contained some incomplete record references on pages 6, 7, and 8, due to the fact that counsel had not yet received copies of the supplemental clerk's papers. Those papers were received on February 27. The Second Amended Brief filed today corrects the incomplete references and strikes out the accompanying footnotes. No other changes have been made.

I declare under penalty of perjury under the laws of the State of Washington that the facts set forth above are true and correct.

SIGNED in Lacey, Washington, this 5th day of March, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
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DATED this 5th day of March, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
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