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Division II
State of Washington
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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.

Reply Brief of Appellant

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1. Reply Argument

McElfish is asking this Court to review the prior decision of Division I in this case, under RAP 2.5(c)(2). In *McElfish II* Division I 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. Division I's decision was therefore clearly erroneous and worked a manifest injustice on McElfish, who was stripped of his opportunity for a new trial.

1.1 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.

1.1.1 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.

In his opening brief, McElfish argued that this Court should review Division I's prior decision in this case under RAP 2.5(c)(2). 2d. Amend. Br. of App. at 16. He argued that this Court should revisit the decision because it was erroneous and justice would be best served by review of the decision. 2d. Amend. Br. of

App. at 16 (citing *Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 544, 94 P.3d 390 (2004)).

The State does not disagree with the standard for revisiting a prior appellate decision, but merely disagrees that the standard applies here.

1.1.2 The prior decision in *McElfish II* was erroneous because Division I substituted its own judgment rather than applying the appropriate, deferential standards of review.

McElfish argued that the prior decision was erroneous because Division I substituted its own judgment from the dry record and failed to defer to the trial court's determinations of demeanor, credibility, and persuasiveness of C.M.'s testimony. 2d. Amend. Br. of App. at 17-18. He also argued that Division I substituted its own judgment rather than reviewing the trial court's conclusions for abuse of discretion. 2d. Amend. Br. of App. at 18-20.

The State is wrong when it argues that there was not substantial evidence for Finding 6. The Findings states, "[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 116. The State argues the finding is unsupported because C.M. never testified as to how much of the affidavit was correct or incorrect. This is splitting hairs too finely.

The **import** of the finding is not that C.M. testified to a specific percentage; it is that C.M.'s testimony at the hearing demonstrated that the affidavit was partly incorrect and partly correct. The precise percentage is immaterial. The import of this finding was supported by substantial evidence. As Division I observed, "there is evidence that C.M. agreed with some of her statements in the affidavit and disavowed some of the other statements." *McElfish II*, 200 Wn. App. 1017, at *4 (2017) (unpublished).

The specific percentage of C.M.'s disagreement with the affidavit is immaterial because it did not affect the trial court's original conclusions. The trial court concluded that the affidavit "in part" constituted a recantation of her trial testimony. CP 116. The trial court did not specify how much or how little of the affidavit constituted a recantation. Even if only one-quarter of the affidavit was correct and only line out of that quarter constituted a recantation, the essence of the finding was supported by substantial evidence and the finding supported the conclusion.

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). Division I was wrong to substitute its own judgment.

On Finding 8, the State would have this Court elevate the cold transcript above the trial court's live observations of what actually took place in the courtroom. But testimony is more than words. A witness's pace of speech, tone of voice, volume, gestures, facial expression, gaze, and other aural or physical cues can have an immense impact on the meaning of the words spoken. It is for this reason that courts have long held that trial courts are in a superior position to determine the credibility of witnesses and to weigh testimony. *E.g., Bale v. Allison*, 173 Wn. App. 435, 459, 294 P.3d 789 (2013).

Here, the words of C.M.'s testimony were equivocal. Throughout her testimony, she struggled to express in words what happened when it came to sensitive topics such as how McElfish did or did not touch private areas of her body. The trial court was in a far better position to determine what C.M. meant when, for example, in answer to the question, "is there anything you can point to, to show that any touching was sexual in nature?" she testified, "Well, I don't know he did it, but it must've been something." CP 166.

Division I interpreted these words to mean that C.M. believed the touching was sexual. But the words themselves do not clearly express one way or the other. The trial court was in a superior position to determine, from observing the live testimony, what C.M. was actually trying to express. Finding 8

did not misstate the testimony; it weighed the testimony as a whole and found as fact that C.M. was communicating that the touching was not sexual and that McElfish did not touch her vagina.

Where C.M.'s equivocal words could have supported a finding either way, Division I was wrong to substitute its own judgment based on the dry record for that of the trial court based on live observation. Finding 8 was supported by substantial evidence and supported the trial court's conclusion that C.M.'s testimony was a recantation.

Any error in Finding 9 did not warrant reversal of the trial court's grant of a new trial, for similar reasons to Finding 6. When there is no corroborating evidence, a new trial is required. *State v. York*, 41 Wn. App. 538, 543, 704 P.2d 1252 (1985). But when there is 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. *Id.*; *State v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

Even assuming that Finding 9 was erroneous—that is, that there was direct evidence that corroborated C.M.'s original testimony—that does not end the analysis. The next question is whether the corroborating evidence was "sufficient in itself to justify a conviction and penal sentence." *Macon*, 128 Wn.2d at

800. If it was not—such as the testimony of Vicky Cahoon, Tabitha Gaylor, or Merla Paul, which at best corroborated only minor details that did not relate to the elements of the charged crimes—then it was not sufficient to even be called "corroborating evidence" in the context of the recantation analysis.

Assuming the testimony of Deputy Hammer contained enough details to establish the elements of the charged crimes, the existence of such corroborating testimony does not make an order for a new trial erroneous. Rather, it is the existence of corroborating testimony that triggers the trial court's discretion to decide whether a new trial should be ordered.

Thus, an error in Finding 9 does not, in itself, require reversal. Rather, the next step in review of the trial court's decision is to determine whether this finding affected the decision. The State suggests that there is no authority to support this proposition, but the authority was cited in McElfish's opening brief. 2d. Amend. Br. of App. at 11. "An erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal." *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). Indeed, this is the standard method of reviewing findings of fact and conclusions of law: to review the findings for substantial evidence and then to determine whether the supported findings

support the conclusions of law. *E.g., Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012); *see also Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 920, 401 P.3d 381 (2017) (excluding unsupported findings when "determining whether the conclusion of law flows from the findings of fact").

The State is wrong when it suggests that the trial court thought it was required to grant a new trial. Nothing in the findings of fact and conclusions of law suggests that this was the case. Rather, the trial court's oral opinion verifies that, rather than feeling compelled to grant a new trial, the trial court analyzed "five factors that need to be found in order to grant a new trial." CP 187. In particular, the trial court found, based on the evidence, that C.M.'s changed testimony would probably change the results of the trial if a new trial were granted. CP 188.

This was an exercise of discretion that could have been reviewed by Division I. Even excluding Finding 9 from consideration, the remaining findings supported the trial court's exercise of discretion to grant a new trial. Granting a new trial despite Deputy Hammer's hearsay testimony about what happened in the garage was not a manifest abuse of discretion.

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

The trial court's order of a new trial was not an abuse of discretion. Division I's erroneous reversal of that order works a manifest injustice against McElfish. McElfish is serving a term of 100 months to life on the basis of testimony that C.M. felt the need to recant. McElfish should have the opportunity to have C.M.'s revised testimony reviewed by a jury at trial.

Under C.M.'s new testimony, McElfish was not an accomplice to Jensen's crimes because he did not participate in them as something he desired to bring about. *See State v. Knight*, 176 Wn. App. 936, 949, 309 P.3d 776 (2013). Rather, he was motivated by fear of Jensen.

Because he was not an accomplice, he can only be convicted in a new trial if he personally committed the charged crimes. But, under C.M.'s new testimony, it is unclear whether McElfish intended to rape her or attempted to do so. It is unclear whether McElfish restrained C.M. (kidnapping) with intent to commit a felony. It is unclear whether any touching (assault) was done with sexual motivation or 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.

The State's only counter-argument is that it would be a manifest injustice to force C.M. to testify for a third time. Yet it must be remembered that C.M. is the one who came forward with a desire to revise her trial testimony. She was not forced to testify a second time. She volunteered. The natural result of her recantation is a new trial. There is no injustice from her coming back to court to testify at the new trial that she, herself brought to pass.

2. 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 7th day of June, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on June 7, 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.

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