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Court of Appeals  
Division II  
State of Washington  
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NO. 52115-6-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DONALD HOWARD McELFISH,

Appellant.

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RESPONDENT'S BRIEF

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## I. RESPONSE TO ASSIGNMENT OF ERROR

This Court should follow the law of the case and decline to review the decision of Division I. Additionally, Division I did not err by reversing the trial court's order granting McElfish's motion for a new trial because the trial court abused its discretion by relying on findings unsupported by the record.

## II. STATEMENT OF THE CASE

The State agrees with McElfish's Statement of the Case.

## III. ARGUMENT

**This Court should follow the law of the case because the Division I opinion was not clearly erroneous and it did not work a manifest injustice on McElfish.**

The law of the case doctrine holds that an appellate court ruling on an issue of law must be followed in any subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The purpose of this doctrine is to promote finality and efficiency in the judicial process. *Id.* However, RAP 2.5(c)(2) establishes an exception to this common-law doctrine. That rule states, "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.”

The exception codified in RAP 2.5(c)(2) is written in discretionary, not mandatory, terms; the rule uses the word “may” instead of “shall.” *Roberson*, 156 Wn.2d at 42. Therefore, the appellate court has discretion in applying RAP 2.5(c)(2). There are at least two recognized exceptions to the law of the case doctrine contemplated by RAP 2.5(c)(2). The first is that an appellate court may review a prior decision in the same case if the prior decision is clearly erroneous, the erroneous decision works a manifest injustice to one party, and no corresponding injustice would result to the other party if the decision were reversed. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008); *Folsom v. Spokane County*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). The second exception, which does not apply here, is that a prior decision may be reviewed in the event of an intervening change in the law. *Id.*

In this case, the decision of Division I was not clearly erroneous. Division I applied the correct standards of review when reviewing the trial court's decision and in finding that the trial court abused its discretion by granting McElfish's motion for a new trial. Additionally, the interests of justice support the reinstatement of McElfish's convictions. Therefore,

this Court should follow the law of the case and decline to review Division I's decision.

*A. Division I's decision in McElfish II was not clearly erroneous because that Court applied the correct "substantial evidence" standard of review to the trial court's findings of fact.*

A reviewing 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 court's findings 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). Division I found that three of the trial court's findings were not supported by substantial evidence – Findings 6, 8, and 9. In so doing, Division I accorded the trial court the requisite deference but nonetheless concluded that the findings were not supported by substantial evidence.

First, the original Finding of Fact number 6 states: "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. This finding of fact is not supported by substantial evidence because C.M. testified at the hearing that the affidavit was "a lot wrong."

She was never asked to quantify what percentage was correct or incorrect. She agreed with several specific statements, but C.M.'s hearing testimony contradicted at least half of the material facts in the affidavit, including whether McElfish helped or hindered her escape. The trial court's finding number 6 is simply incorrect and is not supported by the record.

Second, the original Finding of Fact number 8 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. This finding was not supported by substantial evidence because C.M.'s testimony at the hearing and the trial were consistent in that she never said McElfish did not touch her in a sexual manner and she did not deny that he touched her vagina. First, at both the trial and the hearing on May 10, 2016, C.M. testified that McElfish touched her breast. RP 3/12/14, 38; RP 5/10/16, 46. Therefore, her testimony on this point was not inconsistent. Second, while she testified at trial that McElfish touched her vagina, she did not deny the touching at the hearing – she said that she could not remember. RP 5/10/16, 40. Third, she did not testify at the trial at all regarding whether McElfish touched her in a sexual manner; therefore, her hearing testimony could not have been inconsistent with her

trial testimony on this point. Then, at the hearing, C.M. did not testify that McElfish did not touch her in a sexual manner. In fact, she disagreed with McElfish's counsel's attempts to provide non-sexual explanations for McElfish's touching of her breast, saying it "must've been something." RP 5/10/16, 39. There was simply no indication in C.M.'s testimony – either from the trial or the hearing – that she denied McElfish touched her in a sexual manner or that she denied he touched her vagina. Therefore, Division I correctly found that there was not substantial evidence to support Finding of Fact number 8.

McElfish now argues that Division I should have blindly deferred to the trial court because that court had the opportunity to observe C.M.'s demeanor while she was testifying. However, that argument asks this Court to ignore C.M.'s exact words, elucidated in the transcripts from the trial and the May 10 hearing, and instead assume the existence of gestures and eye contact not captured by the record that directly contradicted the words she was saying. The State agrees that a trial court is entitled to deference regarding the credibility of witnesses, due to its singular ability to observe the manner and body language of the witness while testifying. However, if a finding of fact misstates the testimony, the credibility or reliability of the witness is not in issue. C.M.'s reliability would be crucial if she had testified at the hearing that McElfish did NOT touch her breast,

since she testified at the trial that he had. In that case, the trial court would have to determine which of the two statements was credible and reliable. Here, however, C.M.'s testimony did not change – she stated at both the trial and the hearing that he touched her breast. Finding of Fact number 8 misstated C.M.'s testimony, making it seem like she had changed her testimony when, in reality, her hearing testimony and her trial testimony were similar. McElfish's argument asks this Court to defer to the trial court's finding of reliability of statements that were never made. There was not substantial evidence to support Finding number 8.

Finally, the original Finding of Fact number 9 states, "There was no direct evidence at trial that corroborated the claims made by C.M." In fact, the testimony of Vicky Cahoon, Tabitha Gaylor, Merla Paul, and Deputy Jason Hammer all corroborated what C.M. testified to at trial. Deputy Hammer testified about what C.M. said happened, including that McElfish grabbed her breast and tried to grab her vagina. A witness's statements to other people can be independent corroboration of that witness's trial testimony, even if that trial testimony is later recanted. *Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). Therefore, Deputy Hammer's testimony was direct evidence corroborating what C.M. said happened. Finding of fact 9 was therefore not supported by substantial evidence. Division I's decision was not clearly erroneous as it applied the

correct standard of review. Therefore, this Court should follow the law of the case doctrine and decline to review the previous decision.

*B. Division I's decision in McElfish II was not clearly erroneous because that Court applied the correct "abuse of discretion" standard of review to the trial court's grant of a new trial.*

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). 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). A trial court's decision is based on untenable grounds when its findings of facts are not supported by the record. *In re Marriage of Fiorito*, 112 Wn. App. 657, 663, 50 P.3d 298 (2002).

In this case, Division I found that three of the trial court's findings of fact were not based on substantial evidence and were therefore not supported by the record. Because the trial court necessarily relied on the erroneous findings in making its decision to grant McElfish's motion for a new trial, that decision was based on untenable grounds. McElfish argues that the trial court did not rely on Finding of Fact 6 because, in his opinion, it was not material. However, all of the trial court's Findings are material because the findings provide the facts to which the law is applied. Without the trial court's findings, including Finding of Fact 6, the trial

court would be unable to make legal conclusions regarding McElfish's motion. Additionally, the trial court's Conclusion Number 1 stated that the affidavit was "in part" a recantation of C.M.'s trial testimony. This Conclusion clearly relied on Finding 6. As argued above, Finding 6 was not based on substantial evidence and it was therefore an abuse of discretion for the trial court to rely on it.

McElfish argues that, instead of remanding the case back to the trial court for a determination based on findings supported by the record, Division I should have analyzed the trial court's conclusions of law to determine if they relied on the erroneous findings, but offers no authority to support this argument. In fact, Division I correctly remanded the case so the trial court could make conclusions of law based only on the findings that were properly supported.

Finally, Division I properly found that the trial court abused its discretion in Finding Number 9. McElfish is correct that, when there is corroborating evidence to support the conviction, a decision to grant a new trial is within the trial court's discretion. However, if there is no independent corroborating evidence, the trial court must grant a new trial. *State v. Eder*, 78 Wn. App. 352, 361, 899 P.2d 810 (1995), citing *State v. Powell*, 51 Wn. 372, 98 P. 741 (1909). In this case, the trial court in this case improperly found that there was no corroborating evidence and

therefore incorrectly believed that it was required to grant McElfish's motion. The trial court thereby abused its discretion in granting the motion.

While a trial court has discretion in ruling on a motion for a new trial, that discretion can be abused. One way a trial court abuses its discretion is by making conclusions based on findings of fact that are not supported by the record. Division I's decision was not clearly erroneous as it applied the correct standard of review. Therefore, this Court should follow the law of the case doctrine and decline to review the previous decision.

*C. Division I's decision did not work a manifest injustice.*

The trial court in this case incorrectly found that C.M.'s testimony at the May 10, 2016, hearing was a recantation of her trial testimony. In fact, her testimony at the hearing did not differ substantially from her trial testimony. Her testimony on May 10 did not withdraw or repudiate her trial testimony. 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 material 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. C.M.'s testimony at the May 10 hearing was not a recantation of her trial testimony, and it was error for the trial court to conclude that it was. The trial court recognized that error on remand when it reconsidered the trial and motion hearing and held that C.M.'s statements were not a recantation.

This case began with a jury verdict of guilt against McElfish, and continued with C.M. reaffirming her trial testimony. Jury verdicts are not lightly set aside. The interests of justice would best be served by honoring a jury verdict that was based on testimony that – rather than being recanted – was reiterated at a later hearing. There was no manifest injustice in Division I's decision to remand the case to the trial court for conclusions based only on findings supported by the record. There would be a manifest injustice perpetrated if McElfish is granted a new trial – a rape and kidnapping victim would be required to testify for a third time about what occurred on October 5, 2012, even though her original trial

testimony was not recanted; the State would have to re-try a case that is over five years old, with the concomitant loss of memory and destruction or degradation of physical evidence that re-trial entails; and massive amount of judicial time and resources would be taken to present substantially the same testimony to a new jury. There is no manifest injustice to McElfish in Division I's ruling but there will be such an injustice if a new trial is granted. Therefore, this Court should follow the law of the case and decline to review the previous decision.

#### IV. CONCLUSION

Division I did not err by reversing the trial court's order granting McElfish's motion for a new trial because the trial court abused its discretion by relying on findings unsupported by the record. Therefore, this Court should follow the law of the case and decline to review the decision of Division I.

Respectfully submitted this ~~17<sup>th</sup>~~ day of April, 2019.

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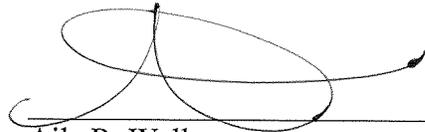
**CERTIFICATE OF SERVICE**

Aila Wallace certifies that opposing counsel was served electronically via the Division II portal:

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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 April 17, 2019.

  
Aila R. Wallace

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**Transmittal Information**

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