

FILED
SUPREME COURT
STATE OF WASHINGTON
11/3/2017 2:25 PM
BY SUSAN L. CARLSON
CLERK

NO. 95088-1
COA NO. 76737-2-I
Cowlitz Co. Cause NO. 12-1-01146-7

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DONALD HOWARD MCELFISH
Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the August 7, 2017, unpublished opinion of the Court of Appeals in *State v. McElfish*, COA No. 76737-2-I. This decision reversed the trial court's grant of McElfish's motion for a new trial and remanded the case for a determination by the trial court based only on findings that are supported by substantial evidence.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that three of the trial court's findings were not supported by substantial evidence. The trial court's oral ruling did not sufficiently clarify its written findings, and the trial court's finding that there was no corroborative evidence was not supported by substantial evidence.

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 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.

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.

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.

The State timely appealed, and Division One of the Court of Appeals reverse the trial court, holding that findings of fact six, eight, and nine were not based on substantial evidence. It remanded the case for the trial court

to make a determination based only on findings that are supported by substantial evidence.

IV. ARGUMENT

1. The Court of Appeals properly held that the trial court's findings of fact were not supported by substantial evidence. Therefore, the petition for review should not be granted.

RAP 13.4(b) states that a petition for review will be accepted by the Supreme Court only if at least one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division I Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue

of substantial public interest. The factors leading to a decision to grant or deny a motion for a new trial are not an issue of substantial public interest.

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). When a trial court makes findings of fact that are not based on substantial evidence, it is an abuse of that discretion. 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).

In this case, the Court of Appeals correctly held that three of the trial court's findings were not supported by substantial evidence – Findings Six, Eight, and Nine.

a) *Finding of Fact number six*

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 was not asked to estimate what percentage of the affidavit was true, and in fact

her hearing testimony contradicted many of the material facts in the affidavit. The trial court's oral ruling does not supply the substantial evidence required. At most, the court's oral ruling simply states that some statements were correct and some were not. While it may be true that the trial court could simply change one word in the language of that finding, an appellate court cannot exchange certain words for others and *then* decide whether findings are supported by substantial evidence. There simply is no support in the record for the finding that half of the affidavit was correct and half was incorrect. Therefore, the Court of Appeals correctly held that finding of fact number six was not supported by substantial evidence.

b) 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, Miranda disagreed with McElfish's counsel's attempts to provide non-sexual explanations for his touching of her breasts. 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, immediately adding that she may have blacked out the memory. RP 5/10/16, 40. Merely not remembering something is not the same as saying it did not happen, and she never ever say that he did not touch her vagina. Therefore, the trial court appropriately found that there is not substantial evidence to support this finding of fact.

c) 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.

The factors that a trial court relies upon when granting or denying a motion for a new trial do not raise a significant question of public interest. The Court of Appeals correctly held that the trial court abused its discretion in this case, which is a relatively limited question that does not impact the public at large. Therefore, there is no basis for this Court to grant review.

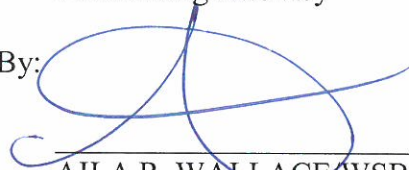
V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 3rd day of November, 2017.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petitioner for Review was served electronically via Supreme Court Portal to the following:

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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 November 3rd, 2017.


Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

November 03, 2017 - 2:25 PM

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Superior Court Case Number: 12-1-01146-7

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