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SUPREME COURT NO. 102216-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

AKEEM MOORE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

The State seeks review of Division Three's unpublished decision in State v. Moore, 39501-4-III (Op.), filed June 27, 2023. The decision is unpublished because it is a straightforward application of Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). It does not meet any of the RAP 13.4 criteria for review; the State is simply seeking a second opinion on the sufficiency of the evidence to prove Count 1.

Mr. Moore does not expect this Court will grant review for that purpose. If it does, he asks that it also grant review of the sufficiency holding on Count 2. He maintains the evidence was also insufficient to prove that count.

B. ISSUE PRESENTED

A Pierce County jury convicted Akeem Moore of two counts of rape of a child. The alleged victim was his daughter, C.F. Mr. Moore has always maintained his complete innocence, but in his direct appeal he raised a more limited argument: that

the evidence was insufficient to prove that either rape occurred in Washington State.

The Court of Appeals agreed with respect to Count 1 and disagreed with respect to Count 2. Does this decision warrant this Court's review under RAP 13.4(2)(b)? (No. The Court of Appeals applied Jackson v. Virginia, 443 U.S. at 319. The State proposes to replace Jackson's rule with one that permits convictions based on speculation. Even if that were a good idea, this Court has no power to approve it.)

C. STATEMENT OF THE CASE

The facts are detailed in Mr. Moore's opening and reply briefs to the Court of Appeals. It was undisputed at trial that C.F. lived in Washington State, at the Springbrook Lane townhomes, for the first three to four months of the charging window. See Br. of App. at 3-4 (citing RP 512-15, 541, 598-99). It was also undisputed that C.F. lived in Oregon, with Mr. Moore, her mother, and her brother, for about one month between April and

May of 2019; that she then lived in Arkansas with her mother, grandmother, brother, and several other relatives until September of 2019; and that she then returned to Washington where she stayed periodically in hotels and other places when Mr. Moore was also in the area. See Br. of App. at 4-6 (RP 518-28, 547, 601).

While C.F. was living with her grandmother in Arkansas, she stated, "'My daddy put his pee-pee in my pee-pee.'" See Br. of App. at 5 (quoting RP 523). In October of 2019, CF. and her brother went to live with their grandmother again, in Pierce County, and C.F. made the same statement. See Br. of App. at 6-7 (citing RP 527-29, 605). She said it happened at an unspecified Motel 6. See Br. of App. at 7 (citing RP 557-59).

After C.F. made the October statement, the grandmother took her to Mary Bridge Children's Hospital, where she told a forensic child interviewer that Mr. Moore had put his pee-pee in her pee-pee two times, at an old house and a hotel. See Br. of

App. at 7-8 (citing RP 725, 758, 677; Ex. 1-A at 2:04:01 to 2:04:22, 2:25:56 to 2:26:21).

The forensic interview yielded overwhelming evidence that the "old house" C.F. recalled was in Oregon. See Br. of App. at 8-9, 28-32. Nevertheless, the Pierce County Prosecutor charged Mr. Moore with two counts of child rape, allegedly occurring in Washington between January and October of 2019. CP 3-4, 21-22; RP 611-12.

In the trial court, the State argued that Count 1 took place at the Springbrook Lane townhomes, C.F.'s maternal grandmother's house, before the family left Washington State. RP 773-74, 790-92. It advanced this argument repeatedly, to both the trial court and the jury, even though *no* evidence, circumstantial or direct, placed Mr. Moore at this house at any time. See Br. of App. at 20-24, 28-31.

On appeal, the State apparently realized that it could not advance this theory in good faith, and it adopted a new one: now,

it contended Mr. Moore committed the rape at his mother's home, before the family left Washington State. See Reply Br. at 3-7 (citing Resp. at 16-17). But no evidence, direct or circumstantial, placed C.F. at this home during this time frame, so the evidence was also insufficient to sustain this new theory. Id.

In fact, no evidence showed that any rape, at all, occurred before the family left Washington State. See Br. of App. at 31-23 (citing RP 157-58, 460, 497-98, 588-92, 595-96, 602-03, 790-92).

Division Three recognized this, in an unpublished decision applying the indisputable rule that speculation cannot sustain a criminal conviction. That Court "'view[ed] the evidence in the light most favorable to . . . [and] dr[e]w all reasonable inferences in favor of the State.'" Op. at 16 (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). It "defer[red] to the factfinder on issues of conflicting testimony, credibility of

witnesses, and the persuasiveness of the evidence.'" Op. at 16 (quoting State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)).

Contrary to the State's petition for review, Division Three "d[id] *not* treat circumstantial evidence as less reliable than direct evidence." Op. at 17 (quoting State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)) (emphasis added); compare with State's Pet. at 15-17. And it recognized that "[c]ontradictions and discrepancies in the evidence in a criminal prosecution do not warrant dismissal of the case." Op. at 17-18 (citing State v. Whitman, 179 N.C. App. 657, 635 S.E.2d 906, 914 (2006)).

Applying these principles, Division Three found that any rational jury would have to speculate to conclude that Count 1 occurred in Washington. But it rejected Mr. Moore's sufficiency challenge to Count 2.

D. REASONS THIS COURT SHOULD DENY THE STATE'S PETITION FOR REVIEW

The State contends Division Three broke radical new ground in an unpublished opinion, importing a heightened sufficiency standard from Arkansas and "readopt[ing]" an evidentiary doctrine this Court rejected in 1980. Pet. at 11, 15-17. The State's overarching theory is unclear: it contends either that Division Three crafted a new rule for "evidence regarding situs of the crime," or that Division Three applied a broader radical rule it adopted five years ago in State v. Jamieson, 4 Wn. App. 2d 184, 198-99, 421 P.3d 463 (2018). Compare Pet. at 4 with Pet. at 17-18. In either case, the State's arguments are materially misleading.

In State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013), this Court cited Jackson, 443 U.S. at 319, for the rule that "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." In State v. Rich, it cited

Jackson for the rule that "[a] '"modicum"' of evidence does not meet this standard." Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting Jackson, 443 U.S. at 320).

In Jamieson, 4 Wn. App. 2d at 198-99, Division Three reached the conservative and sensible conclusion that an inference is "reasonable," for purposes of due process, when it "likely, but not necessarily," follows from the evidence. In other words, if the evidence is equally consistent with guilt or innocence, and the jury must therefore speculate to break the tie, it does not prove guilt beyond a reasonable doubt. Id.

For these inarguable principles, Division Three relied on State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996);[1] State v.

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[1] Aten held that "the *corpus delicti* is *not* established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause." 130 Wn.2d at 660 (emphasis in original). In other words, evidence consistent with a reasonable hypothesis of innocence is not proof of guilt beyond a reasonable doubt. Id. at 660-62.

Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994);[2] and three civil cases, noting that the evidentiary standard for a criminal conviction must be at least as stringent as for a civil judgment. Jamieson, 4 Wn. App. 2d at 199-200.

The State now attempts to cast both Jamieson and the unpublished decision in Mr. Moore's appeal as radical departures from the Jackson standard. It does so by materially misrepresenting the case law it discusses.

[2] Hanna observed that, "[w]hen an inference is only *part* of the prosecution's proof supporting an element of the crime, due process requires the presumed fact to flow 'more likely than not' from proof of the basic fact." 123 Wn.2d at 710 (quoting Ulster County v. Allen, 442 U.S. 140, 165, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)) (emphasis added). It did not reach the question whether, where the inference was the *only* evidence supporting an element, "the more stringent reasonable-doubt standard may apply." Id. at 711.

1. Contrary to the State's petition, the Jackson sufficiency standard requires "more than substantial evidence."

The State correctly observes that State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), "repudiated Washington's old substantial evidence test" in favor of Jackson's standard. Pet. at 14. But it obscures significance of this repudiation: that Jackson requires more than "substantial evidence." PRV at 13-15.

In fact, Green recognized that Jackson's standard was "more rigorous" than the old "substantial evidence" test, and that the old test "would fail 'to supply a workable or even a predictable standard for determining whether the due process command of Winship[3] has been honored." Green, 94 Wn.2d at 220-22 (quoting Jackson, 443 U.S. at 320). Green "rejected [the old] substantial evidence standard . . . because *it does not require*

[3] In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

proof beyond a reasonable doubt." Vasquez, 178 Wn.2d at 6 (citing Green, 94 Wn.2d at 221-22) (emphasis added).

The State contends Division Three subverted Green and Jackson by applying a "more than substantial evidence" standard in Mr. Moore's appeal. Pet. at 20. This is exactly wrong. As explained, Green held that Jackson demands "more than [the old] substantial evidence [standard]." Pet. at 20; see Green, 94 Wn.2d at 221-22. There is no reason to grant review just so this Court can say that again.

2. Contrary to the State's petition, Division Three neither rehabilitated the "multiple hypothesis doctrine" nor imported case law from Arkansas.

The State contends that Division Three has "readopted the multiple hypothesis doctrine" rejected in State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1974) and State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), by importing a sufficiency standard from Arkansas. Pet. at 15-25. This is incorrect.

In Gosby, this Court disapproved an old jury instruction that implied circumstantial evidence was inherently less reliable than direct evidence. 85 Wn.2d at 764-68. Contrary to the State's argument in the petition for review, however, Gosby did not hold that evidence equally consistent with guilt and innocence might nevertheless be proof of guilt beyond a reasonable doubt. Such a holding would be absurd and irreconcilable with the Jackson standard. Instead, Gosby simply held that the traditional reasonable doubt instruction was sufficient, by itself, to guard against an unsupported verdict. 85 Wn.2d at 764-68.

The same is true of Delmarter, in which this Court held that an element of the charged offense "may be inferred . . . where it is plainly indicated as a matter of logical *probability*." 94 Wn.2d at 638 (emphasis added).

Both Gosby and Delmarter are entirely consistent with Division Three's decision in Mr. Moore's appeal. E.g., Op. at 17

("[i]n analyzing the sufficiency of the evidence, this court does not treat circumstantial evidence as less reliable than direct evidence") (citing Delmarter, 94 Wn.2d at 638); id. ("when an inference supports an element of the crime, due process requires the presumed fact to flow more likely than not from proof of the basic fact") (citing Hanna, 123 Wn.2d at 710; Jamieson, 4 Wn. App. at 200). But the State seeks to obscure this consistency by claiming Division Three imported an inconsistent sufficiency standard from Arkansas. Pet. at 18-24.

This is misleading for two reasons.

First, Division Three did not import any foreign law. The Court of Appeals cited an Arkansas decision for rule that "[s]ubstantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other *without resorting to speculation or conjecture*." Op. at 18 (citing Booth v. State, 26 Ark. App. 115, 761 S.W.2d 607, 608 (1989)). It might just as well have

cited Vasquez, 178 Wn.2d at 6; Delmarter, 94 Wn.2d at 638; Aten, 130 Wn.2d at 660-62; or Hanna, 123 Wn.2d at 710-11, for this principle. The State does not explain what *less* rigorous standard would be consistent with due process.

Second, while Arkansas calls its state constitutional sufficiency standard by another name, it is substantively indistinguishable from the Jackson standard. Compare Jones v. State, 269 Ark. 119, 120, 598 S.W.2d 748 (1980) (state "[s]ubstantial evidence . . . test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal force to inconsistent inferences") (internal quotations omitted) with Jackson, 443 U.S. at 320 ("'a mere modicum of evidence may satisfy a "no evidence" standard . . .' Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . could be deemed a 'mere modicum.' But it could not seriously be argued

that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt."); see Williams v. State, 351 Ark. 215, 91 S.W.3d 54, 61 (2002) ("[t]his court actually held in Jones that the substantial-evidence standard is consistent with the rational fact-finder standard enunciated in Jackson . . . [t]he substantial-evidence standard, while not explicitly reciting the standard from Jackson word-for-word, requires that evidence supporting a conviction must compel reasonable minds to a conclusion . . . and, thereby, ensures that the evidence was convincing to a point that any rational fact-finder *could have* found guilty beyond a reasonable doubt") (emphasis added).

Just like Washington appellate courts, Arkansas appellate courts overturn jury verdicts only when they necessarily depend on speculation—and this is true even though Arkansas also still employs the multiple hypothesis jury instruction. E.g., Kellenworth v. State, 614 S.W.3d 804, 807 (Ark. 2021) ("[t]he

question whether circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide") Hartman v. State, 454 S.W.3d 721, 725 (Ark. 2015) ("[w]hether circumstantial evidence excludes every other reasonable hypothesis [besides guilt] is usually a question for the jury," and jury's answer will be disturbed only if it necessarily rests on speculation); King v. State, 266 S.W.3d 205, 207 (Ark. 2007) ("'circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable conclusion. That rule, . . . is usually for the jury . . ., the test in [the appellate] court being the requirement of substantial evidence. . . . It is only when circumstantial evidence leaves the jury, in determining guilt, *solely to speculation and conjecture*, that we hold it is insufficient as a matter of law.'") (Quoting Brown v. State, 258 Ark. 360, 361, 524 S.W.2d 616, 616-17 (1975)) (Emphasis added.).

The State's musings about "substantial evidence" and "multiple hypotheses" are semantic red herrings. Under Jackson, due process demands the appellate court reverse a conviction resting on speculation. Even if this Court wanted to adopt a different rule (and it presumably does not), the federal constitution prohibits it. There is no basis for review.

E. CONCLUSION

The Court of Appeals properly applied the Jackson standard, which prohibits criminal convictions based on speculation. That unpublished analysis does not warrant review. If this Court nevertheless grants review, it should also review the Court of Appeals' sufficiency holding as to Count 2.

I certify that this document was prepared using word processing software and contains 2,646 words excluding the parts exempted by RAP 18.17.

DATED this 24th day of August, 2023.

Respectfully submitted,

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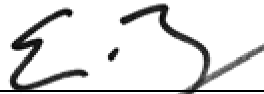

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