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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. ___________
NO. 74872-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN COOK,

Appellant.

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

The Honorable George N. Bowden, Judge

PETITION FOR REVIEW

JENNIFER J. SWEIGERT
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/DECISION BELOW

Steven Cook requests this Court grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Cook, No. 74872-6-I, filed June 19, 2017. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

The court must grant a request for post-conviction DNA testing when a favorable result would give rise to a reasonable probability of innocence. Appellant was convicted of indecent liberties by forcible compulsion based solely on the complaining witness' testimony. The forensic nurse testified there would likely be DNA on the swabs if appellant had inserted his finger into the complaining witness' vagina as she claimed. Would a favorable DNA test create a reasonable probability of innocence by showing the complaining witness was not believable?

C. STATEMENT OF THE CASE

1. Procedural Facts

Cook was acquitted of second-degree rape but convicted of indecent liberties committed by forcible compulsion based on allegations by a massage client that he held her down and touched her vagina. 5RP[1] 2. The conviction was affirmed on appeal, and Cook filed a motion for post-

[1] There are seven volumes of Verbatim Report of Proceedings referenced as follows: RP – Feb. 19, 2016; 1RP – Aug. 22, 2014; 2RP – Sept. 22, 2014; 3RP – Sept. 23, 2014; 4RP – Sept. 24, 2014; 5RP – Sept. 25, 2014; 6RP – Oct. 23, 2014.

conviction DNA testing. CP 22-27. The superior court denied that order, and the Court of Appeals affirmed. CP 6, 13,14; Opinion at 1.

2. Substantive Facts

Cook was a licensed massage therapist with no criminal history. 3RP 222; 6RP 8. Complaining witness N.R. claimed that, during a massage appointment, he held her down and inserted his finger into her vagina up to the knuckle, several times. 2RP 66-67. When asked about the incident, Cook acknowledged that he had noticed her flinch and wondered if he might have inadvertently touched her vagina during his massage of her legs. 3RP 169-70, 236-37, 244-45.

For two days after the incident, N.R. did not go to the police. 2RP 75, 78-81; 3RP 114. When she finally did make her allegations and evidence was collected, police told her that, with the time that had passed, the chances of finding DNA were slim. 3RP 177-78.

But the forensic nurse who testified at trial had a better analysis of the likelihood of finding DNA. The nurse took four Q-tip style swabs of N.R.'s vagina. 3RP 216. Her goal was to cover a broad area. 3RP 216. She testified she tries to cover as much of the area as possible. 3RP 217. She testified it would also be potentially possible to find massage oil on the swabs. 3RP 217-18.

She testified that swabs are routinely tested even when the swab occurs up to a week after an alleged rape. 3RP 210. While not highly likely, she testified that, under the circumstances, if N.R.'s accusations were correct, it would be "likely" to find DNA. 3RP 210. She stated, "It's probably not highly likely, but it is likely." 3RP 210. As she pointed out, "Everyone transfers evidence to everyone when you touch them." 3RP 210. She later stated there was a "slim possibility" that the four swabs she took from N.R.'s vagina would show foreign DNA. 3RP 219. With the oil that was on Cook's hands, she explained, the contact described by N.R. would "more than likely leave skin cells and oil" behind. 3RP 214.

The State decided not to have the swabs tested. 3RP 179. Despite N.R.'s unequivocal testimony about penetration, the jury found Cook not guilty of rape, convicting him only on the charge of indecent liberties by forcible compulsion. 5RP 2.

In his request for post-conviction DNA testing of the swabs, Cook explained that the absence of any of his DNA on the swabs of N.R.'s vaginal area would show that no sexual assault occurred. CP 22-27. The superior court judge who heard Cook's post-conviction motion for DNA testing was not the judge who presided at his trial. RP 1. The new judge denied Cook's request for three reasons: first, if Cook's DNA were to be found on the swabs, it would essentially prove him guilty of the rape he was acquitted of;

second, if someone else's DNA were found on the swabs, it would not disprove the indecent liberties; and third, assuming the complaining witness testified that the sexual contact required for indecent liberties occurred, post-conviction DNA testing is not authorized for purposes of impeaching a witness. RP 10. The court acknowledged it would be very little inconvenience to the State to perform the tests Cook requested. RP 9-10.

The Court of Appeals affirmed the trial court's decision on the grounds that "the evidence established Cook admitted he touched N.R.'s vagina," quoting the detective's testimony that:

> He told me that while he was rubbing the inside of – rubbing her legs, that he went up inside of her thigh, that his fingers touched the outside of her vagina, and that he knew that he had touched her vagina because he saw his hand touch her vagina and that [N.R.] visually flinched when he did that.

Opinion at 5.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

POST-CONVICTION DNA TESTING IS WARRANTED BECAUSE IT COULD CAST ADDITIONAL DOUBT ON THE COMPLAINING WITNESS' TESTIMONY THAT WAS THE ONLY SUPPORT FOR THE FINDING OF FORCIBLE COMPULSION.

The opportunity for post-conviction DNA testing acts as a safeguard against the possibility that an innocent person has been convicted. RCW 10.73.170; State v. Crumpton, 181 Wn.2d 252, 258, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 368, 209 P.3d 467

(2009)). Testing must be permitted when the person meets the procedural and the substantive requirements of the statute. RCW 10.73.170. In Cook's case, DNA testing would prove the complaining witness was utterly unbelievable. This would, in turn, create a reasonable probability of innocence because that witness' testimony was the only evidence of the forcible compulsion that is an essential element of the crime. Cook asks this Court to grant review under RAP 13.4, reverse the Court of Appeals, and grant his motion for post-conviction DNA testing.

a. Cook is entitled to DNA testing to show the complaining witness was not believable with regards to the forcible compulsion element of indecent liberties.

The superior court erred in denying Cook's request for DNA testing when that testing would destroy the credibility of the only witness against him. A convicted person is entitled to DNA testing when the test would yield significant new information about the identity of the perpetrator and there is a "likelihood that the DNA would demonstrate innocence on a more probable than not basis." RCW 10.73.170; State v. Thompson, 173 Wn.2d 865, 875-76, 271 P.3d 204 (2012).

In assessing the request, the court must assume the result of the DNA testing would be favorable to the convicted person. Crumpton, 181 Wn.2d at 255. The court must also assess the impact of favorable DNA evidence in

light of the other evidence at trial, but should not focus on the weight of the other evidence, since any trial leading to a guilty verdict will likely have strong evidence of guilt. Id. at 262. The court must allow the testing when a favorable DNA test would "raise a reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367-68.

Here, DNA testing would raise a reasonable probability that Cook did not commit indecent liberties because no crime was committed. Cook was convicted of indecent liberties based solely on testimony by N.R., who claimed he penetrated her vagina with his finger during a massage. The jury acquitted Cook of a rape charge that would have required a showing of penetration. 5RP 2; RCW 9A.44.010(1); RCW 9A.44.050. The jury found Cook not guilty despite the client's testimony that he plunged his fingers quite deeply into her vagina. She claimed his finger penetrated her vagina at least three times and up to the knuckle. 2RP 66-67. If the jury had found N.R. to be a credible witness, it would not have acquitted Cook of rape.

The absence of Cook's DNA would be significant, despite the small size of the swabs in relation to the vaginal wall, because four swabs were taken, and the nurse attempted to cover as much surface area as possible. 3RP 216-17. She also testified it was likely that touch DNA could be found under these circumstances. 3RP 210. An absence of touch DNA in the vagina would be entirely consistent with Cook's statements insisting that

there was, at most, a possibility of brief, accidental contact on the exterior of the vagina. 3RP 169-70, 236-37, 244-45. It would, however, refute N.R.'s testimony that Cook's finger penetrated inside her vagina up to the knuckle several times. 2RP 66-67. An absence of Cook's DNA in N.R.'s vaginal area is far more consistent with Cook's innocent explanation of the incident than with N.R.'s story. Testing the swabs would provide the significant new information required under RCW 10.73.170(2)(a)(iii) and would give rise to a likelihood of probable innocence as required under RCW 10.73.170(3).

This case is a classic he-said-she-said. The forcible compulsion element necessary to convict Cook of indecent liberties rested solely on N.R.'s testimony. RCW 9A.44.100. With evidence showing no DNA was found, there is a reasonable probability the jury would have found even more reason to doubt her credibility on the indecent liberties charge, specifically her claim of forcible compulsion.

b. Review is warranted because the Court of Appeals decision is in conflict with case law requiring it to consider all the evidence at trial.

Cook asks this Court to grant review under RAP 13.4(b)(1) and (2) because the Court of Appeals decision is in conflict with Crumpton, 181 Wn.2d at 255, and In re Bradford, 140 Wn. App. 124, 127-132, 165 P.3d 31 (2007). Under Crumpton, in ruling on a request for post-conviction DNA testing, the court must presume a favorable result. Crumpton, 181 Wn.2d at

255. The Court of Appeals recited this standard, but then focused on only one piece of testimony to deny Cook's request. Opinion at 5 (citing testimony of detective regarding Cook's statement). The court cited one aspect of Cook's statement as related by the detective without considering the other aspects of Cook's statement and his testimony at trial as well as the extremely compromised credibility of the complaining witness.

Immediately after telling the officer he touched N.R.'s vagina during the massage, he explained that he only thought he might have because she flinched and any contact was purely accidental. 3RP 169-70. This was not a confession to indecent liberties. Taken in context, Cook did not admit there was significant contact with N.R.'s vagina such that there would be DNA left behind. Even taking the detective's testimony about his statement at face value and out of context, it did not refer to any penetration of the vagina. And nothing in Cook's statement could be construed as admitting the forcible compulsion required for conviction. Therefore, his statement does not negate the import of favorable DNA test results.

The Court of Appeals decision is also in conflict with Bradford because it assumed DNA testing was not warranted based on Cook's statement to the detective. Opinion at 5. Even in cases where the defendant confesses, DNA may demonstrate a high probability of innocence. In Bradford, testing excluding the defendant as the source of DNA found on

a mask used to cover the rape victim's face required a new trial despite the defendant's confession to the crime. 140 Wn. App. at 127-132; see also Riofta, 166 Wn.2d at 377-378 (Chambers, J., concurring in dissent) (discussing fallibility of confessions and eyewitness testimony as revealed by DNA testing). Cook's statement was not a confession even to sexual contact, let alone forcible compulsion. And even if it were, that would not deprive him of the opportunity for DNA testing to prove his innocence. Bradford, 140 Wn. App. at 127-132. Cook asks this Court to grant review, reverse the Court of Appeals, and remand to permit him to obtain the simple remedy of post-conviction DNA testing to which the law entitles him.

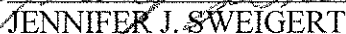
E. CONCLUSION

The Court of Appeals opinion conflicts with precedent and deprives Cook of the opportunity to show his innocence via DNA testing. Cook therefore requests this Court grant review under RAP 13.4 (b)(1), and (2).

DATED this 18th day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. STEVEN LEE COOK, Appellant.	)	No. 74872-6-I UNPUBLISHED OPINION FILED: June 19, 2017

SCHINDLER, J. — A jury convicted Steven Lee Cook of indecent liberties by forcible compulsion. Cook appeals denial of the motion for postconviction DNA[1] testing. Because the superior court did not abuse its discretion in concluding a favorable DNA test result would not demonstrate Cook was innocent of indecent liberties by forcible compulsion on a more probable than not basis, we affirm.

Indecent Liberties Count

This is the second appeal in this case. The facts are set forth in State v. Cook, 191 Wn. App. 1007, 2015 WL 6872295, and will be repeated only as necessary.

Cook is a licensed massage therapist. In June 2014, N.R. went to Cook for massage therapy to treat injuries she sustained in a car accident. N.R. had four massage appointments with Cook.

[1] Deoxyribonucleic acid.

On July 6, 2014, N.R. went to the fifth massage therapy appointment. During the massage, Cook pressed on her lower back with one hand so that she could not get up. N.R. stated Cook then touched her genitals with his other hand and repeatedly inserted a finger into her vagina. N.R. testified that after she got home, "[t]he first thing I did was take a shower. I just wanted all evidence of that off of me."

On July 8, N.R. reported what happened to the police. On July 10, N.R. met with Lynnwood Police Department Detective Jacqueline Arnett. Forensic nurse examiner Dale Fukura performed a sexual assault examination on N.R. and obtained four swabs from her vagina. Between July 6 and July 10, N.R. had showered and used the restroom numerous times.

Detective Arnett interviewed Cook on July 15. Cook admitted that he touched N.R.'s vagina during the massage but denied inserting his fingers into N.R.'s vagina.

The State charged Cook with rape in the second degree in violation of RCW 9A.44.050(1)(d) and indecent liberties by forcible compulsion in violation of RCW 9A.44.100(1)(a).

The State called a number of witnesses at trial, including N.R., Detective Arnett, and forensic nurse examiner Fukura.

Detective Arnett primarily worked on sexual assault cases. Detective Arnett testified that when she interviewed Cook on July 15, Cook admitted he "touched the outside of [N.R.'s] vagina." Cook denied inserting his finger into N.R.'s vagina. Detective Arnett told the jury she did not request a DNA test of the swabs collected during the sexual assault examination based on the low probability of obtaining DNA evidence. Detective Arnett believed that "the likelihood of locating touch DNA was incredibly unlikely." Detective Arnett also testified that the presence of Cook's DNA on

the swabs "would have been consistent" with his admission that he had touched N.R.'s vagina.

Nurse Fukura testified that it is standard practice to take vaginal swabs for a sexual assault examination within seven days of the alleged assault. Nurse Fukura testified she collected the four swabs by "insert[ing a Q-tip] into the vagina." Nurse Fukura stated that in this case, where the exam took place four days after the alleged assault, it was "possible" that there could be DNA evidence. She later described finding DNA evidence on the swabs as a "slim possibility." Nurse Fukura further explained that unless she swabbed the exact spot allegedly touched, DNA would not be detected.

Cook testified. Cook denied touching N.R. "in a sexual way" during the massage.

The jury acquitted Cook of rape in the second degree. The jury convicted Cook of indecent liberties by forcible compulsion. We affirmed Cook's conviction. Cook, 2015 WL 6872295, at *1.

Motion for Postconviction DNA Testing

On December 9, 2015, Cook filed a pro se motion for postconviction DNA testing of the swabs taken during N.R.'s sexual assault examination. Cook argued that "[i]f there is no touch DNA and no traces of massage oil on the inside of [N.R.]'s vagina it would prove no sexual assault occurred." The court held a hearing on the motion. The court denied Cook's motion.

> Mr. Cook, I'm going to deny your motion for these reasons: First . . . , the reality is if that testing showed the existence of your DNA on a swab that was taken from inside the complaining witness's vagina, it would serve only to provide evidence of your guilt for a charge that the jury acquitted you of.
>
> If, on the other hand, the DNA evidence came back even hypothetically showing someone else's DNA, it would not disprove the allegation of a sexual touching which is the crux of the conviction at issue here.

Cook appeals, arguing the superior court erred in denying his request for postconviction DNA testing.

A trial court's decision on a motion for postconviction DNA testing is reviewed under an abuse of discretion standard. State v. Gentry, 183 Wn.2d 749, 764, 356 P.3d 714 (2015); State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014); State v. Thompson, 173 Wn.2d 865, 870, 271 P.3d 204 (2012); State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A court abuses its discretion if its decision rests on facts unsupported in the record or was reached by applying the wrong legal standard. Gentry, 183 Wn.2d at 764; Crumpton, 181 Wn.2d at 257.

Cook claims DNA testing would refute the testimony of N.R. and create a reasonable inference that he is innocent of indecent liberties by forcible compulsion.

Under RCW 10.73.170(3), the court can grant a motion requesting DNA testing only if the "convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." In determining whether the evidence would prove his innocence, " 'a court should presume DNA evidence would be favorable to the convicted individual.' " Gentry, 183 Wn.2d at 765 (quoting Crumpton, 181 Wn.2d at 255). When determining whether a favorable result would likely demonstrate innocence, the court must consider all the evidence presented at trial. Gentry, 183 Wn.2d 766-69; Crumpton, 181 Wn.2d at 262; Riofta, 166 Wn.2d at 367-69.

Under RCW 9A.44.100(1)(a), a person is guilty of indecent liberties by forcible compulsion "when he or she knowingly causes another person to have sexual contact with him or her or another . . . [b]y forcible compulsion." RCW 9A.44.010(2) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done

for the purpose of gratifying sexual desire of either party or a third party." The distinguishing feature between the crimes of indecent liberties and rape is the element of penetration. State v. Cain, 28 Wn. App. 462, 465, 624 P.2d 732 (1981). Penetration is not an element of indecent liberties. RCW 9A.44.100, .010(1), (2).

Assuming a favorable DNA test result and considering all the evidence presented at trial, the record supports the court's conclusion that Cook is not innocent on a more probable than not basis of indecent liberties by forcible compulsion.

The evidence established Cook admitted he touched N.R.'s vagina. Detective Arnett testified that Cook admitted he touched N.R.'s vagina.

> He told me that while he was rubbing the inside of — rubbing her legs, that he went up inside of her thigh, that his fingers touched the outside of her vagina, and that he knew that he had touched her vagina because he saw his hand touch her vagina, and that [N.R.] visually flinched when he did that.

The court did not abuse its discretion in concluding a favorable DNA test result would not demonstrate Cook was innocent of indecent liberties by forcible compulsion on a more probable than not basis.

Statement of Additional Grounds

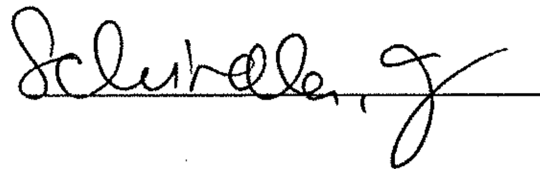
Cook raises a number of challenges to his 2014 conviction in his statement of additional grounds. All of the issues Cook raises are issues he raised or could have raised in his first appeal. A defendant may not raise issues in a second appeal that were or could have been raised in an initial appeal. State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); State v. Fort, 190 Wn. App. 202, 233, 360 P.3d 820 (2015); State v. Mandanas, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). This rule applies even to issues of constitutional magnitude. Sauve, 100 Wn.2d at 87; Fort, 190 Wn. App. at 233-34; Mandanas, 163 Wn. App. at 717. The proper method to raise new issues not

addressed in a first appeal is through a personal restraint petition. Sauve, 100 Wn.2d at 87; Fort, 190 Wn. App. at 234; Mandanas, 163 Wn. App. at 717.

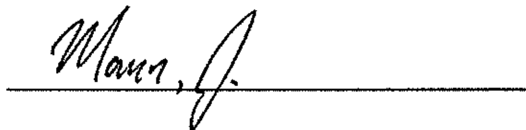
Appellate Costs

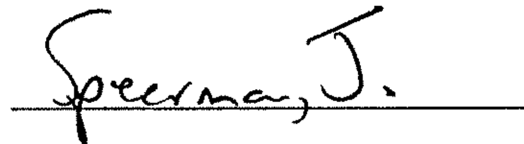
Cook asks us to deny appellate costs. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Cook was found indigent by the trial court. Under RAP 14.2, if the State has evidence indicating that Cook's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner. State v. St. Clare, 198 Wn. App. 371, 382, 393 P.3d 836 (2017).

We affirm.



WE CONCUR:





NIELSEN, BROMAN & KOCH P.L.L.C.

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