

No. 68056-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIS ALLEN WHIPPLE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

The prosecution glaringly misrepresents the critical testimony in an effort to support the verdict notwithstanding the paucity of necessary evidence

As recounted in detail in Whipple's Opening Brief, the prosecution did not elicit historical facts on which it could prove the four separate counts charged. Instead, it told the jury that they should feel it "in their stomach" that the complainant S.T. was a sad and truthful person and should not assume nothing happened just because S.T. did not describe multiple separate incidents of sexual intercourse as required for the four charged offenses. 2RP 206, 232.

Although courts permit some leeway to the prosecution in cases involving children who are unable to state that acts occurred on certain dates or times, this does not excuse the prosecution from establishing the specific acts alleged with more than a modicum of clarity. The burden of proof remains proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is not lessened simply because the complainant is unable to allege what happened that might constitute the charged crime.

In Jackson v. Virginia, the Supreme Court overruled prior case law permitting a reviewing court to simply defer to the jury as long as

some evidence was presented. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (overruling prior cases that used a “substantial evidence” test to review the sufficiency of evidence based on Jackson). In Jackson, the Court rejected a sufficiency of the evidence test that asked merely was there some evidence supporting the conviction, and instead held that the heightened burden of proof in a criminal case required “more rigorous” appellate review. Green, 94 Wn.2d at 222.

Under the more rigorous test of Jackson, reasonable inferences from the evidence are construed in favor of the prosecution but a case may not rest on speculation or conjecture. United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010). “[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case.” Id. A “mere modicum” of evidence does not “rationally support a conviction beyond a reasonable doubt.” Jackson, 443 U.S. at 320. The prosecution urges the Court to apply a lessened standard of review and simply surmise that the jury must have decided S.T. was the type of person who would not lie, yet that does not

account for the lack of basic facts on which the alleged offense must rest.

The prosecution exaggerates the evidence it presented. S.T. never said that Whipple licked her “pee pee” four separate times. She never explained what her “pee pee” was. She never asserted that whatever “licking” occurred penetrated her sexual organ, which is a mandatory element of rape of a child in the first degree. RCW 9A.44.073(1); RCW 9A.44.010 (1) (defining sexual intercourse).

S.T. did not look at a diagram of a human body and explain what parts of her body she was talking about. She had no consistent language to describe her genitals. The prosecution never tried to clarify that she was discussing her genitals. S.T.’s lack of specific testimony meeting the elements of sexual intercourse, and the absence of other evidence demonstrating that S.T. was the victim of “sexual intercourse” as defined by RCW 9A.44.010 (1), results in insufficient evidence of the charged crime.

When she said she was “licked,” she never said where on her body she was licked other than one time involving the “pee pee.” 1RP 52, 54-55. When the prosecutor asked if it was always the same, she said no, it was different. 1RP 55. The prosecutor asked, “Did anything

touch you in the bathroom on these other different times?” 1RP 56-57.

S.T. said, “No.” 1RP 57.

S.T. said she was not licked more than one time, and never said she was licked in a sex organ. 1RP 52. Even if her “pee pee” could be considered a “sex organ” notwithstanding the prosecution’s failure to elicit such evidence, S.T. insisted that each interaction with Whipple was different and was not the same type of touching each time. 1RP 55. S.T. never described acts with sufficient specificity for the jury to determine whether any acts that constitute “sexual intercourse” occurred on multiple occasions.

In Jackson, the Supreme Court recognized the jurors could make irrational decisions when reviewing allegations and the reviewing court does not permit such a conviction to stand. 443 U.S. at 317. The likelihood of an irrational decision is enhanced when the prosecution encourages such decision-making. Here, the prosecutor urged the jury to use speculation and inferences as the basis of its verdicts.

On appeal, the prosecution recasts the case against Whipple as a test of credibility. But S.T.’s truthfulness is only relevant if S.T. made allegations that, if true, would prove the charged crime. The record certainly provides reasons to question S.T.’s ability to accurately

recount what happened. But before credibility can be weighed, the complainant has to make allegations that would establish the four charged crimes. S.T.'s limited, vague testimony claiming different things happened at different times and never describing actual sexual penetration as charged demonstrates the State's failure to present sufficient evidence to rationally prove the allegations beyond a reasonable doubt.

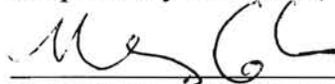
Due to the State's failure to elicit historical facts demonstrating four separate incidents of "sexual intercourse" beyond a reasonable doubt, the verdicts violate the requirements of due process of law. Jackson, 443 U.S. at 319-20; State v. Green, 94 Wn.2d at 221-22. Alternatively, the challenged sentencing conditions should be stricken as explained in Whipple's Opening Brief.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Whipple respectfully requests this Court reverse his convictions and alternatively, strike the vague and impermissible sentencing conditions.

DATED this 26th day of September 2012.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
) NO. 68056-1-I
)
)
 WILLIS WHIPPLE,)
)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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