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NO. 102216-6
Court of Appeals No. 39501-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

AKEEM MOORE,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 20-1-00984-1

PETITION FOR REVIEW

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I. INTRODUCTION

Review is warranted in this case because the court of appeals did not employ the well-established *Jackson v. Virginia*[1] standard for sufficiency of the evidence. Instead, the court created an idiosyncratic "more than substantial evidence" test cobbled together from Washington civil cases and an Arkansas case to reverse a child rape conviction. The court of appeals' unprecedented test will sow confusion among the lower courts and practitioners as to whether *Jackson v. Virginia* can be diluted in this fashion.

The new test conflicts with existing precedent and will deprive the public of the ability to hold offenders accountable by lowering the threshold for overturning a jury's verdict. Allowing this insidious test to take hold in Washington will deprive the most vulnerable victims – children, elderly, homeless, and impoverished – of justice because they are least likely to identify

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[1] *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

the situs of the crime with the specificity the "more than substantial evidence" test demands. This petition for review should be granted pursuant to RAP 13.4(b)(1), (2), and (4).

II. IDENTITY OF PETITIONER

The State seeks review of the unpublished opinion of the court of appeals in *State of Washington v. Akeem Ali Moore*, No. 39501-4-III (June 27, 2023). A copy of the slip opinion may be found in the appendix.

III. COURT OF APPEALS DECISION

The court of appeals reversed Akeem Moore's conviction on count one. The court did so by ignoring the *Jackson v. Virginia*[2] standard for sufficiency of the evidence. Although the court cited *Jackson v. Virginia*, it quickly departed from the traditional any rational trier of fact test. Instead, the court, relying on decisions from foreign jurisdictions and civil cases

[2] *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

adopted a "more than substantial evidence"[3] test. This test makes the court the thirteenth juror and creates different classes of circumstantial evidence.

The existence of two different standards of review for insufficiency of the evidence claims—one adopted by this Court, and one adopted by the court of appeals--will create confusion for courts and practitioners. Is the court's idiosyncratic "more than substantial evidence" test in addition to the *Jackson* test or does it operate to the exclusion of the *Jackson* test? Does this unique substantial evidence test apply to half-time motions to dismiss for insufficiency of the evidence or only to post-verdict challenges? Does the test apply to all elements of the crime or only to the situs of the crime?

The sole justification for the new test is that "[l]egal logic demands . . . more convincing evidence in a criminal trial than in a civil suit." Slip op. at 18. The "more than substantial evidence"

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[3] Slip op. at 18.

test resulted in the reversal of a rape conviction that would be affirmed under *Jackson v. Virginia*, because the 5-year-old victim, who was 7 years old when she testified, could not distinguish between state and city names. The "more than substantial evidence" test is both incorrect and harmful and demands review under RAP 13.4(b)(1), (2), and/or (4).

IV. ISSUE PRESENTED FOR REVIEW

The court of appeals adopted a new test for the sufficiency of the evidence regarding situs of the crime. This test differentiates between "valuable circumstantial evidence" and "inconsequential circumstantial evidence,"[4] in a manner that conflicts with the United States Supreme Court's *Jackson v.*

[4] The opinion does not identify a term for the non-valuable circumstantial evidence. The phrase "inconsequential circumstantial evidence" was selected after reviewing a thesaurus. *See* Classic Thesaurus, *valuable>antonyms* (available at https://www.classicthesaurus.com/valuable/antonyms (last visited Jul. 21, 2023)). No disrespect to the lower court is intended by this word selection.

Virginia test that was adopted in Washington in 1980.[5] This test is also inconsistent with Washington's repudiation in 1975[6] of the requirement that circumstantial evidence will only be credited when it is inconsistent with innocence. Should the "more than substantial evidence" test be rejected by this Court?

V. STATEMENT OF THE CASE

Defendant Akeem Moore was convicted of two counts of first-degree rape of a child. CP 52-53. The court of appeals reversed count one, finding that insufficient evidence supported the jury's conclusion that the crime took place in the State of Washington. Slip op. at 1.

C.F. was seven at the time of trial, five at the time of the abuse. RP 471, 473, 516, 688, 727; CP 21, 41, 44, 48. She disclosed that her father Moore raped her in two locations—on

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[5] *See State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

[6] *See State v. Gosby*, 85 Wn.2d 758, 765-66, 539 P.2d 680 (1975); *accord State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2 99 (1980).

Moore's bed in a little house and in a Motel 6. *See, e.g.*, RP 478, 482-485, 486, 764; Ex. 1 at 2:04 – 2:08, 2:24-26; 2:33:14. The court of appeals is satisfied that the Motel 6 was in Washington. Slip. Op. at 1, 22.[7] It is not satisfied that the little house was in Washington. Slip. Op. at 1, 20.

C.F. described that the little house was the only house that she had lived in with her father, and it was in the same area as the Motel 6. RP 490; Ex. 1 at 2:33:16. Only two addresses, both of which are in Pierce County, Washington, meet this description -- her paternal grandmother's stand-alone house (RP 533, 655) and her maternal grandmother's Springfield townhome apartment which C.F. described as being a "mansion house." RP 532, 598.

The opinion misapprehends the jurisdictional element the State was required to prove—that the crime occurred in "the

[7] C.F. identified two Pierce County Motel 6's as the place where the second rape occurred, and there was no evidence that C.F. stayed at a Motel 6 in Oregon. RP 529, 557-59.

State of Washington"[8] rather than in a particular house in Washington. The opinion misapprehends which Pierce County house was proven to be the location of the rape. Slip. Op. at 20 (misperceiving that the rape took place in the maternal grandmother's apartment).[9] C.F. described the rape as occurring in Moore's bedroom. RP 483. Moore only had a bedroom at his mother's home. RP 483. The State asserted, based on the testimony and exhibits, that count one took place in the paternal grandmother's stand-alone home. Br. of Resp. at 16-17.

Although the opinion acknowledged that "[a] finder of fact could conclude that Akeem Moore gained access to [C.F.] at his mother's residence in Tacoma and that the residence was an 'old house,'" it reversed the conviction on count 1 because "[t]he State never argued during trial that one of the rapes occurred at [his] mother's residence." Slip op. at 21. But the jury was

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[8] CP 44.

[9] *See also* Slip op. at 22 (claiming that "the State argues one of the rapes must have occurred in Springbrook Apartments.").

instructed to base its verdict solely on the testimony it heard from the witnesses and the exhibits admitted during trial—not the comments or arguments of the attorneys. CP 33, 34.

The opinion also reversed count one because it had unanswered questions: "we do not know if [C.F.] was taken to the paternal grandmother's house before she disclosed rape to [her cousin K.C.]."[10] Slip op. at 21. This is not the opinion's only reference to the appellate court judges' own unanswered questions. *See* Slip op. at 4, 5, 19, 20 ("We do not know").

Throughout the opinion, the panel distinguishes between "[v]aluable circumstantial evidence" and its opposite. Slip op. at 22. The opinion classifies as "inconsequential circumstantial evidence" uncorroborated evidence,[11] evidence supported by

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[10] The State appreciates the court of appeals' use of pseudonyms for both C.F. and her brother. The opinion, however, utilizes other family member's full names, including that of C.F.'s minor cousin. Because the names contained in the opinion enable a reader to easily identify C.F., the State will use initials and/or refer to other family members based upon their relationship to C.F.

[11] *See, e.g.,* Slip op. at 3 ("No one testified that Akeem Moore

inconsistent or conflicting testimony,[12] that it believes may also be consistent with innocence, and events it believes unlikely based on its identification of biases. Slip op. at 20 ("This court should not rely on its own inferences from the evidence, but we observe that the grandmother disliked Moore and may not have permitted Moore inside her residences.").

Because any rational trier of fact could find that the little house rape occurred in Washington based upon (1) C.F.'s testimony that the rape occurred in Tacoma in a little house that was close to the Motel 6[13] and (2) C.F.'s aunt's testimony that her daughter (C.F.'s cousin K.C.) asked her why she let Moore

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stayed at the Springbrook Lane Apartments, let alone that he entered the grandmother's apartment."), 13 ("[C.F.'s] mother, …, did not testify at the trial."), 20 ("More importantly, no testimony suggested that Akeem Moore had contact with [C.F] at Springbrook apartments.").

[12] *See, e.g.,* Slip op. at 20 (noting that C.F. testified that the old house rape occurred in Oregon and in Washington); 21 (noting C.F.'s brother's inconsistent testimony); 22 (noting conflicting evidence that C.F. disclosed she was raped prior to C.F. leaving for Oregon).

[13] RP 490, 501.

take C.F. to Oregon after he had touched C.F. inappropriately,[14] the State files this timely petition for review. The State seeks the repudiation of the opinion's pernicious "more than substantial evidence"[15] test, and the reinstatement of count one.

VI. ARGUMENT

Declaring that "the State should present more than substantial evidence supporting all elements of the crime in order to sustain a guilty verdict," slip op. at 18, and accepting Moore's contention that insufficient evidence supports that the little house rape occurred in Washington because the circumstantial evidence was equally consistent with the rape occurring in Oregon,[16] the court of appeals turned its back on established Washington law. Instead, the court, seeking a test under which

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[14] RP 602-03.

[15] Slip op. at 18.

[16] *See* Brief of Appellant at 26-28 (relying on *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013)).

it could reverse a verdict it disagreed with, turned to our sister state of Arkansas.

If the Arkansas standard of review for sufficiency of the evidence is to be applied in this state, this Court should make that determination. If the Arkansas standard of review for sufficiency of the evidence is to be the law in this state, it needs to be applied to all cases and all courts –not just those in Division III. Review is proper in this case because the instant opinion conflicts with opinions issued by both this Court and the court of appeals, and the question presented involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2), and (3).

A. The United States Supreme Court's *Jackson v. Virginia* Test for Sufficiency of the Evidence

Jackson v. Virginia was the first case in which the United States Supreme Court considered the question of what standard a reviewing court should apply to ensure that the due process

standard recognized in *Winship*[17] that requires proof beyond a reasonable doubt of every element of the crime was met. *Jackson v. Virginia*, 443 U.S. at 313-14. The Court noted that the critical inquiry on review was not satisfied by mere proof that the jury was properly instructed. *Id.* at 318. Nor did the inquiry demand that a reviewing court, itself, believe that the evidence at the trial established guilt beyond a reasonable doubt. *Id.* at 318-19. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

The Court noted that:

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the

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

> evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 319 (footnotes omitted).

The Court cautioned that the adopted standard "does not permit a court to make its own subjective determination of guilt or innocence." *Jackson*, 443 U.S. at 319 n. 13. The adopted standard does not require the prosecution to rule out every hypothesis except that of guilt beyond a reasonable doubt. *Id.* at 326. The adopted standard does require a court to defer to the trier of fact's resolution of conflicting inferences. *Id.* at 326.

B. This Court's Replacement of Washington's Prior Substantial Evidence Test With the *Jackson v. Virginia* Test

Prior to *Jackson v. Virginia*, Washington applied a "substantial evidence" test to insufficiency of the evidence challenges. *See, e.g., State v. Randecker*, 79 Wn.2d 512, 487 P.2d 1295 (1971). This test, like the "any rational trier of fact" test adopted by the United States Supreme Court did not require

the reviewing court to be satisfied beyond a reasonable doubt that the defendant was guilty as charged. *Id.*, 79 Wn.2d at 517-18 ("The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict."). This test differed from the *Jackson v. Virginia* test in that it only presented a question of law. *State v. Reynolds*, 51 Wn.2d 830, 834, 322 P.2d 356 (1958).

In *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), this Court repudiated Washington's old substantial evidence test and adopted the *Jackson v. Virginia* test. 94 Wn.2d at 220-21. This Court noted that the "any rational trier of fact" test "impinges upon a jury's discretion only to the extent necessary to protect the constitutional standard of reasonable doubt." *Id.* at 221. This Court has rejected all calls to dilute, modify, or alter the *Jackson v. Virginia* sufficiency of the evidence test. *See, e.g., State v.*

Rich, 184 Wn.2d 897, 908-09, 365 P.3d 746 (2016) (rejecting requirement that the State must establish facts that are not elements of the crime; rejecting a piecemeal review of evidence in favor of a totality of the evidence analysis); *State v. Berg*, 181 Wn.2d 857, 872, 337 P.3d 310 (2014) (refusing to adopt an "incidental" to another crime sufficiency of the evidence test). This Court has also scrupulously guarded against reviewing courts becoming, in essence, a thirteenth juror. *See generally State v. Williams*, 96 Wn.2d 215, 221, 227, 634 P.2d 868 (1981).

C. Washington's Rejection of the "Multiple Hypothesis" Doctrine When Applying the *Jackson v. Virginia* Test to Circumstantial Evidence

The same year *Green* was decided, this Court held in *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), that circumstantial and direct evidence are to be considered equally reliable by the reviewing court in determining the sufficiency of the evidence. The Court supported its decision with a citation to *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

In *Gosby*, this Court discussed the traditional multiple hypothesis jury instruction. This instruction was provided to a jury when the State's case rested entirely upon circumstantial evidence. *Id.* 85 Wn.2d at 765. The instruction informed the jury that

> the circumstances proved by the State must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any reasonable hypothesis or theory which would establish, or tend to establish, his innocence.

Gosby, 85 Wn.2d at 764.

The multiple hypothesis circumstantial evidence instruction was supported by an assumption that circumstantial evidence is inherently suspicious and less trustworthy than is direct evidence. *Gosby*, at 765-66. It was assumed that the multiple-hypothesis instruction was desirable to guard against an improper reliance and use by the jury of tenuous circumstantial evidence. *Id.*

Deciding that circumstantial evidence can be more trustworthy and probative of particular facts in some cases and that no generalization realistically can be made that one class of evidence is per se more reliable than the other, this Court overruled its prior cases that mandated the use of a multiple-hypothesis instruction. *Gosby*, 85 Wn.2d at 767. This Court determined that instructing the jury adequately on reasonable doubt was sufficient. *Id.* at 768.

D. Division III Readopts the Repudiated "Multiple Hypothesis" Doctrine

The *Moore* court relied on an earlier opinion that improperly readopted the multiple hypothesis doctrine. An appellate court, however, lacks the power to overrule, revise, or abrogate one of this Court's opinions. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 211, 444 P.3d 1235 (2019). Nonetheless, this is

exactly what Division III did *sub silento* in *State v. Jameison*, 4 Wash. App. 2d 184, 421 P.3d 463, 472 (2018).[18]

Deciding that "Washington law, if not the federal constitution, demands that inferences in the criminal setting be based only on likelihood, not possibility," *id.* at 200, Division III reinstated the multiple-hypothesis doctrine and extended it to both direct and circumstantial evidence. Relying on civil cases and foreign authority,[19] Division III held that a conviction would be based on speculation and conjuncture, rather than reasonable inferences, when the evidence is consistent with innocence in

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[18] A copy of *Jameison* may be found in the appendix.

[19] Division III justified its reliance on civil appeals because "the law should demand stricter controls on use of inferences in a criminal case." *Jameison*, 4 Wn. App. 2d at 198. It does not explain its reliance on opinions from Montana, New Jersey, and New Mexico. *Id.* The Washington civil cases cited in *Jameison* in support of its readoption of a multiple-hypothesis test all predate this Court's *Delmarter* decision and all, but one, predates *Gosby*. *See Jameison*, 4 Wn. App. 2d at 197-198 (citing *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963), *Brucker v. Matsen*, 18 Wn.2d 375, 139 P.2d 276 (1943), and *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947).

addition to guilt. *Jameison*, 4 Wn. App. 2d at 197-198. Lacking undisputed evidence of guilt and possessing unanswered questions, Division III affirmed the summary dismissal of homicide charges. *Id.* at 187, 200, 202-03, 211.

Possibly in the hopes that the *Jameison's* multiple-hypothesis inference test would be limited to its context—a pre-trial *Knapstad*[20] motion—the State did not seek further review. Unfortunately, Division III has now, in this case, extended *Jamieson's* test to a post-verdict sufficiency of the evidence challenge. Relying on *Jamieson*, civil cases,[21] and opinions from Arkansas and North Carolina, Division III adopts a "more than substantial evidence" standard of review that empowers a reviewing court to reverse a verdict or render a directed verdict

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[20] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

[21] The civil cases relied on in the slip opinion, once again, all predate this Court's *Delmarter* decision, and one predates *Gosby*. *See* Slip op. at 17-18 (citing *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947), *Levy v. North American Co. for Life & Health Insurance*, 90 Wn.2d 846, 586 P.2d 845 (1978), and *Hojem v. Kelly*, 93 Wn.2d 143, 606 P.2d 275 (1980)).

whenever the court has unanswered questions or believes the evidence does not eliminate every possibility of innocence.

The new "more than substantial evidence" standard of review conflicts with *Jackson v. Virginia*, *Green*, *Delmarter*, *Gosby*, and a legion of other Washington appellate court cases.[22] Division III's adoption of its new standard is not accompanied by a showing that the existing Washington standard is both incorrect and harmful.[23] The only justification Division III offers for adopting the Arkansas standard of review is its belief that "[l]egal logic demands . . . more convincing evidence in a criminal trial than in a civil suit." Slip op. at 18. This offhand

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[22] *See, e.g., State v. Zunker*, 112 Wn. App. 130, 135, 48 P.3d 344 (Div. III 2002) (acknowledging the reasonable hypothesis theory is no longer the law in Washington); *State v. Gerard*, 36 Wn. App. 7, 10, 671 P.2d 286 (Div. I 1983) (acknowledging that the multiple hypothesis theory is inapplicable to a challenge to the sufficiency of the evidence).

[23] This Court will only overrule its own precedent if the precedent is both incorrect and harmful. *See, e.g., State v. Barber*, 170 Wn.2d 854, 864-65, 248 P.3d 494 (2011). Incorrectness and harmfulness are separate inquires. *State v. Otton*, 185 Wn.2d 673, 687-88, 374 P.3d 1108 (2016).

assertion fails to account for the unanimity requirement and higher burden of proof in criminal trials, as well as other distinctions. But, at a minimum, if the *Jackson v. Virginia* test is to be abandoned in Washington, it should be done by this Court rather than by the court of appeals, and only on proof that the *Jackson* standard is incorrect and harmful.

E. Arkansas's Substantial Evidence Test Decisions Have No Place in a Washington Sufficiency of the Evidence Challenge

Division III finds support for its new "more than substantial evidence" test in an Arkansas appellate court decision. *See* Slip op. at 18 (citing *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989). But Arkansas decisions have no place in a Washington appellate decision addressing a claim of insufficiency of the evidence. This is because Arkansas law conflicts with this Court's decisions in *Green* and *Delmarter*.

1. Arkansas Has Not Adopted *Jackson v. Virginia*

Shortly after *Jackson v. Virginia* was decided the Arkansas Supreme Court rejected the United States Supreme Court's "any

rational trier of fact" test in favor of its own preexisting substantial evidence test. *Jones v. State*, 598 S.W.2d 748, 749 (Ark. 1980). Arkansas defines "substantial evidence" as:

> "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture." Ford on Evidence, Vol. 4, s 549, page 2760. Substantial evidence has also been defined as "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." Wigmore on Evidence, Vol. IX, 3rd ed. s 2494, footnote at page 300. *See also Tigue v. Caddo Minerals Co.*, 253 Ark. 1140, 491 S.W.2d 574; *Goza v. Central Ark. Dev. Council*, 254 Ark. 694, 496 S.W.2d 388.

Jones, 598 S.W.2d at 749.

In subsequent years, the Arkansas Supreme Court has steadfastly refused requests to adopt the *Jackson v. Virginia's* "rational trier of fact" test. *Muhammad v. State*, 494 S.W.3d 440, 441-42 (Ark. App. 2016). Thus, a jury verdict will be set aside in Arkansas whenever an appellate court determines that the

evidence is not forceful enough to compel a conclusion of guilt. *Id.* at 442.

Although inconsistent testimony does not render proof insufficient as a matter of law, and Arkansas courts acknowledge that the weighing of evidence lies within the province of the jury, the substantial evidence test allows a reviewing court to disregard a witness's testimony if it is "so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." *Kitchen v. State*, 607 S.W.2d 345, 356 (Ark. 1980).

2. Arkansas Has Retained the Multiple-Hypothesis Doctrine

Circumstantial evidence in Arkansas will only sustain a verdict when it excludes every reasonable hypothesis consistent with innocence. *Hartman v. State*, 454 S.W.3d 721, 725 (Ark. 2015). With respect to the exclusion of every other reasonable hypothesis, the Arkansas Supreme Court has stated that:

> This demands that in a case depending upon circumstantial evidence the circumstances relied

> upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused. Circumstances, however strong they maybe, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all.

Gregory v. State, 15 S.W.3d 690, 694 (Ark. 2000), quoting with approval *Bowie v. State*, 49 S.W.2d 1049, 1052 (Ark. 1932).

Accordingly, Arkansas juries are instructed that

> A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. *However, circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion.*

1 Arkansas Model Jury Instructions - Criminal AMCI 2d 106 (emphasis added). *See also Laird v. State*, 476 S.W.2d 811, 813 (Ark. 1972).

While it is normally a properly instructed jury's duty to determine whether circumstantial evidence excludes every hypothesis consistent with innocence, the substantial evidence test allows a reviewing court to set aside a conviction when it can identify two equally reasonable hypotheses. *See, e.g., State v. King*, 266 S.W.3d 205, (Ark. App. 2007). This is because Arkansas courts deem a verdict based on circumstantial evidence that does not exclude every other reasonable hypothesis but the guilt of the accused to be one based on "speculation and conjecture." *Darveille v. State*, 609 S.W.2d 50, 51 (Ark. 1980).

F. Any Rational Trier of Fact Could Find that the Little House Rape Occurred in Washington

Under *Jackson v. Virginia*, *Green*, and *Delmarter* there was clearly sufficient evidence to support the jury's determination that the little house rape occurred in Washington. C.F. identified two Pierce County Motel 6's as the location of the second rape and she stated that the little house rape occurred "nearby." There were two houses "nearby," both in the state of

Washington where the first rape could have occurred. In addition, C.F. told her cousin about the first rape prior to moving to Oregon with Moore. But applying the Arkansas test, Division III found grounds to overrule the jury.

Application of the Arkansas test in future cases lowers the threshold for a directed verdict in criminal cases and impinges on the role of the jury as factfinder. In cases in which the location of the crime is largely dependent on circumstantial evidence, the Arkansas test denies justice to the young, the elderly, the homeless, the severely injured, and the alcohol or drug impaired victim who cannot through direct testimony establish the location of the offense.

VII. CONCLUSION

Review must be granted in this case to ensure that all challenges to the sufficiency of the evidence are subjected to the same standard of review. Division III has demonstrated on two separate occasions – this case and in *Jameison* – its disinclination

to apply *Jackson v. Virginia*'s rational juror test. Only action by this Court will reverse the trend.

This document contains 4,598 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of July, 2023.

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Certificate of Service:
The undersigned certifies that on this day she delivered by E-file to the attorney of record for the respondent true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

7/26/2023	*s/ Kimberly Hale*
Date	Signature

VIII. INDEX TO APPENDICES

FILED
JUNE 27, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 39501-4-III
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
AKEEM ALI MOORE,	)	
	)	
Appellant.	)	

FEARING, J. — Akeem Moore challenges two convictions for rape of a child, one of which allegedly occurred in an old house and a second which allegedly occurred in a Motel 6. He argues insufficient evidence sustains the crimes' element that the rapes occurred in Washington State. After reviewing the entire trial record, we conclude that sufficient evidence supports a jury finding beyond a reasonable doubt that a rape at Motel 6 occurred within the state of Washington, but insufficient evidence supports a verdict that a rape occurred in an old house in Washington. We affirm one conviction and reverse one conviction.

FACTS

This prosecution arises out of the alleged rape of a child, Jane, by her father, Akeem Moore. Because Moore challenges the sufficiency of the State's evidence to

demonstrate that one or both of the rapes occurred within Washington State, we present the facts in the light most favorable to the State. Because of the importance of the words used by those testifying, we quote at length trial testimony.

Jane is a pseudonym. We employ pseudonyms for all children. The facts are difficult to follow without a glossary of Akeem Moore's and Jane's family members.

Akeem Moore	Father of Jane. Accused.
Brandon Corsair	Uncle of Jane. Son of Sandra Camden. Lives in Arkansas. Adopted Richard, Jane's younger brother.
Candice Ferguson	Mother of Jane. Wife of accused.
Jane	Child victim.
John	Older brother of Jane. Son of Akeem Moore and Candice Ferguson.
Michael Camden	Brother of Sandra Camden. Granduncle of Jane. Resides most of the relevant time in Arkansas.
Neomyah Haskins	Boyfriend of Tabitha Camden, aunt of Jane.
Richard	Younger half-brother of Jane. Fathered by one other than Akeem Moore.
Sandra Camden	Grandmother of Jane. Mother of Candice Ferguson. Mother-in-law of the accused.
Tabitha Camden	Aunt of Jane. Sister of Candice Ferguson. Daughter of Sandra Camden
Tawnya	Older cousin of Jane. Tabitha Camden's daughter.

Appellant Akeem Moore and Candice Ferguson parented two children: Jane and John. Jane was born in June 2014. John is one year older. Father Akeem Moore had no contact with Jane between December 1, 2016 and January 1, 2019. The State alleged the rapes occurred between January 2019 and October 2019.

Candice Ferguson frequently moved because of poverty, and she and her children often stayed in cars and motels, including Motel 6s. Ferguson struggles with addictions.

According to grandmother Sandra Camden, Ferguson and her two children likely stayed in more than one Motel 6. The children also lived in numerous foster care homes both before and after the incidents giving rise to the criminal charges.

We lay the backdrop for the contact between Akeem Moore and Jane beginning in January 2019, by outlining where Jane lived. In January 2019, Jane lived in the home of her maternal grandmother, Sandra Camden, at Springbrook Lane Apartments in Lakewood, Pierce County. Also living in the Springbrook Lane apartment were Jane's mother, Candice Ferguson; Jane's elder brother, John; Jane's younger half-brother, Richard; Jane's aunt Tabitha Camden; the aunt's boyfriend Neomyah Haskins; and Jane's cousin, Tawnya. No one testified that Akeem Moore stayed at the Springbrook Lane Apartments, let alone that he entered the grandmother's apartment.

In April 2019, the landlord evicted Jane's extended family from Springbrook Lane Apartments. Mother Candice Ferguson, Jane, and John departed to an apartment in Sunrise, Oregon, to live with Akeem Moore. Grandmother Sandra Camden does not know if the couple and the two children stayed in any Motel 6 on the way to Oregon or at any time in Oregon. The remaining family members from the Springbrook Lane Apartments moved to Arkansas because of the lower cost of living. Sandra Camden grew up in Arkansas, and some of her family continued to live in that state. Those moving to Arkansas stopped in Oregon in route to Arkansas. Sandra Camden, concerned

about John and Jane's wellbeing, unsuccessfully tried to convince Candice Ferguson to let the children come to Arkansas.

One month later, in May 2019, Candice Ferguson, Jane, and John, moved to Arkansas to join the rest of the family. A child protection services agency assisted the trio with the relocation. We do not know the reason for the intervention of the child protection agency. Father Akeem Moore remained in Oregon. Neomyah Haskins and Tabitha Camden broke up, and Haskins left Arkansas before the rest of the family departed the state.

In September 2019, the extended family departed from Arkansas to return to Pierce County. Grandmother Sandra Camden could not procure in Arkansas the care she needed for her multiple sclerosis. Candice Ferguson was pregnant and wanted to return to Akeem Moore. Jane's younger half-brother Richard remained in Arkansas, where Uncle Brandon Corsair adopted him. Sandra Camden's brother, Michael Camden, who had resided in Arkansas before the appearance of the clan, returned with his sister's family to Washington. We do not know where family members slept at night on their arrival in Pierce County in September.

The extended Camden family separated, in October 2019, after returning to Washington. Sandra Camden drove back to Arkansas to ferry her brother and check the mail. Michael Camden needed to return to Arkansas because he had attempted to steal a van.

While Sandra Camden drove to and from Arkansas, Tabitha Camden, Candice Ferguson, and the two sisters' children, Tawnya, John, and Jane, stayed for awhile in a Motel 6. During trial, Tabitha Camden first testified that the two sisters and their children stayed in Motel 6 a couple times. She later testified that she and her daughter stayed in the motel only one night and then moved to an Econo Lodge. Tabitha testified that Akeem Moore joined them at the Motel 6. Ferguson, Moore, and the couple's children stayed longer in the Motel 6 than Tabitha Camden. Moore told a law enforcement officer that he once visited with his family in a motel. Eventually, in October 2019, Candice Ferguson, John, and Jane left with Moore to return to Oregon.

In the meantime, Sandra Camden attempted to leave her brother in Arkansas, but he refused to exit the car. Sandra Camden returned to Washington State, through Colorado, and placed her brother behind a Walmart store with his three children and a dog. In October 2019, grandmother Sandra returned to Pierce County. She was homeless and lived in a van at first, but then a friend, Robin, opened her home to Sandra Camden and presumably others.

Eventually, Sandra Camden procured an apartment in Tacoma. Later in October 2019, Jane and John returned to the residence of maternal grandmother Sandra Camden in Tacoma. Candice Ferguson abandoned the children at the Tacoma apartment.

Candice Ferguson sometimes took John and Jane to Akeem Moore's mother's house in the Tacoma area. We do not know the name of Moore's mother. We do not

know what dates or even months, between January and October 2019, that the children stayed at the paternal grandmother's home. Candice Ferguson and Akeem Moore also spent some nights at the Tacoma home of Moore's mother. The paternal grandmother lived in a house, rather than an apartment. Moore told the police officer that, during one night when his children stayed at his mother's residence, the children slept in his bedroom, while he slept in a car.

We now outline trial testimony about the alleged rape and then Jane's reporting of the molestation. After the allegations arose, Keri Arnold, a forensic interviewer, interviewed Jane. The jury saw and heard the videotape of the interview. In the video, Jane discussed rapes occurring in an "old house" and "hotel."

> KERI ARNOLD: Where did daddy put his pee-pee in your pee-pee?
> [JANE]: At the hotel and the old house.
> KERI ARNOLD: Where is the old house?
> [JANE]: Um, it's far away.

Exhibit 1-A at 02:04:10 PM (citation to time of day depicted in video exhibit).

> KERI ARNOLD: When daddy stuck his pee-pee in where were you at?
> [JANE]: I was at the old house.
> KERI ARNOLD: Where in the old house were you?
> [JANE]: Just take a left and a right and go . . . it's a number one, so you have to [inaudible] and get a phone at the office.
> KERI ARNOLD: Okay. So how about . . . when daddy stuck his pee-pee in, where were you at the house?
> [JANE]: Um, because, because, my nana dropped me off, and my mom dropped me off with him.

Exhibit 1-A at 02:07:40 PM

KERI ARNOLD: Did daddy stick his pee-pee in your pee-pee at just one old house, or was it more than one old house?
[JANE]: One old house and one hotel.

Exhibit 1-A at 02:26:16 PM

KERI ARNOLD: Tell me about the old house. What did the old house look like?
[JANE]: The old house is with brown stuff in there and there's a kitchen we got all the stuff out of the car.

Exhibit 1-A at 02:26:44 PM

KERI ARNOLD: Who lived at the old house?
[JANE]: My dad and my mom and [John] and me.

Exhibit 1-A at 02:27:33 PM

KERI ARNOLD: When daddy stuck his pee-pee in your pee-pee, where did [half-brother] [Richard] live?
[JANE]: With Brandon.
KERI ARNOLD: With Brandon?
[JANE]: Mm-hm.

Exhibit 1-A at 02:37:42 PM

Jane testified at trial. Jane responded during direct examination:

Q. Can you tell me what happened?
A. We went in this little Motel 6, and we—I slept on one bed, and my dad slept on the other bed.
Q. Then what happened?
A. And then my privates got touched.
Q. By who?
A. By my dad.

Q. Nope. Okay. Is that the only place that happened?
A. No.

Q. Where else did it happen?
A. We had a little house.
Q. Yeah? What happened at the little house?
A. It happened the same thing.
Q. Was anyone else there, or was it just you and your dad?
A. It was me and my dad and my mom and my brother, [John].
Q. Was there anyone else—anywhere else where it happened or was it just at the Motel 6 and the little house?
A. Just the little house.
Q. Where was the Motel 6?
A. It was in, I think, Oregon.
Q. Oregon? What about the little house, where was the little house?
A. It was like Motel 6, but we hurried up and went over there.

Report of Proceedings (RP) at 478-79.

During cross-examination, Jane testified:

Q. And the Motel 6 you say was down when you were in Oregon; is that right?
A. Yep.
Q. Okay. And I wasn't quite sure I heard you. You said when the other guy, Mr. Hashimoto [the State's attorney]—he was the guy that was just asking you questions. Okay? He had asked you about where the little house was. Okay? Did you say that was also in the same place where—in the same area where the Motel 6 was?
A. Yep.
Q. When you came back to Washington, did you have—when you first got back here after coming back from where you were living with Uncle—or staying there where Uncle Mike was—
A. Uncle Mike?
Q. Where you were staying with Uncle Mike in Arkansas, right?
A. Yep.
Q. When you came back here to—did you come right back to Tacoma, you know, or somewhere else on the way?
A. Somewhere else on the way.
Q. You eventually got back here, right?
A. Yep.

Q. And at first did you have a place to stay, a house?
A. Yep.
Q. Or were you staying in an apartment?
A. A house.
Q. It was a house at first?
A. Yep, and then an apartment.
Q. Then didn't you also for a while you had to stay in a car?
A. Yeah.
Q. Because you didn't have a house?
A. No.
Q. No, you didn't have a house or, no, I'm wrong?
A. We was in the car first, and then we found a house. It was cheap, and then we went to Motel 6 after when the house got a little bit more.
Q. So I had the wrong order?
A. Yep.
Q. Then when you didn't stay in the house, then you then stayed in another Motel 6?
A. Yep.
Q. Is that Motel 6 you stayed at at that point different than the Motel 6 you stayed at in Oregon?
A. Yep.
Q. Is what happened with your dad, was that at the one in—the first one in Oregon or the one back here in Washington?
A. In Oregon.

RP at 490-92.

During redirect examination, Jane avowed:

Q. Do you remember when—I think his name is Travis—when Travis, the defense attorney, was asking you questions, and he asked you when this happened whether you were in Washington? Do you remember that?
A. Yep.
Q. Do you remember your answer being we weren't in Washington, we were in Tacoma?
A. Yep.
Q. Was that true?

A. Yep.
Q. So did this happen in Tacoma?
A. Yep.

RP at 501.

Finally, on recross-examination, Jane testified:

Q. When you said before that this happened in Oregon, and it was asked whether it happened in Tacoma. Are you sure whether it happened in Tacoma or Oregon?
A. Yep.
Q. You sure?
A. Yep.
Q. Did you tell me before it happened Oregon [sic]?
A. It happened in Oregon.
Q. And okay. Well, he just asked you if it happened in Tacoma.
MR. HASHIMOTO: Objection, asked and answered.
THE COURT: Overruled. Re-ask your question.
Q. (By Mr. Currie) Do you know for sure?
A. No.

RP at 502-03.

Jane's brother John testified at trial during direct examination:

Q. Okay. So the last time you and me talked, you told me about something that you said happened in an apartment. Do you remember that?
A. A part?
Q. Apartment.
A. Yeah.
Q. In a room in an apartment, right?
A. Yeah.
Q. Okay. So tell me what happened between your dad and [Jane] in the room in the apartment.
A. He just put his pee-pee in [Jane's] pee-pee.
Q. How do you know that?
A. It's because I saw it.
Q. Okay.

A. And [Jane] told me too. I was asleep.

Q. Do you remember who all was in the apartment the day that you saw what you saw?
A. Mommy, dad, and me, and [Jane]. That's all.

RP at 569-70.

Q. Okay. Now, I'm going to ask you a little bit about the apartment. Okay?
A. Okay.
Q. Did you stay in the apartment for a long time or short time?
A. For a long time because they kept going into apartments, in, like, twenty apartments, I think. It was too much. I can't explain it.

RP at 572-73.

During cross-examination, John averred:

Q. So when you're talking about somebody sticking their privates between [Jane] and your dad, is this something you saw or—
A. Nothing that I saw. I was— how should I see—
Q. You heard something?
A. Yeah, I just kept hearing something. I kept hearing something. I kept hearing something, and I was awake.

RP at 578-79.

Q. How about the apartment where we're talking about that this thing that happened that you saw or that you heard with [Jane] and your dad, do you remember where that was?
A. Yeah. Actually, no, I didn't. It was not an apartment. I think it was 6—616, I think. I think it was 616.
Q. Do you know—do you remember how long ago it was?
A. I think it was, like, seven years old, seven years ago, like one year. Seven years old, a year, I think.

RP at 581-82.

At some unidentified time, Jane told cousin Tawnya that Jane's father hurt her. Jane used the word "vagina" and added that her father touched her also in other forbidden places. Tawnya first testified at trial that Jane whispered in her ear at Candice Ferguson's house when Tawnya's mother, grandmother, and Aunt Candice were present. Tawnya did not identify the location of Candice Ferguson's residence at the time of the whisper. Later Tawnya testified that the whisper occurred adjacent to her grandmother's jeep. Jane never disclosed to Tawnya the location where Jane's father molested her.

According to cousin Tawnya, as the family departed for Arkansas, presumably in April 2019, Tawnya told her mother Tabitha Camden that Akeem Moore had touched Jane inappropriately. Tawnya also testified that she told her grandmother of the touching, although the grandmother did not confirm this disclosure from Tawnya. Tawnya was twelve years old at the time of her trial testimony in October 2021. Tawnya testified that she was between 4 and 8 years of age, inclusive, when Jane whispered the comment of her father molesting her. Jane denied telling Tawnya about the abuse.

While in Arkansas, grandmother Sandra Camden witnessed Jane randomly approach a police officer. Camden overheard Jane claim to the officer: "'My daddy put his pee-pee in my pee-pee.'" RP at 523. Neither police nor a family member took action after the disclosure.

On an unidentified day, presumably in October 2019 after the family's return from Arkansas, grandmother Sandra Camden drove Jane and John in the Tacoma area, when

Jane declared "'That's where it happened, nana.'" RP at 529. Grandmother Camden asked, "'What happened?'" Jane replied, "'My daddy put his pee-pee in my pee-pee again.'" RP at 529. The grandmother and grandchildren were then passing a Motel 6. During trial Sandra Camden did not specify the location of this Motel 6.

Later in testimony, Sandra Camden averred that Jane twice, while driving by a Motel 6, disclosed inappropriate touching by her father. One incident occurred in Fife, a community in Pierce County. The second occurred while driving on Hosmer Street in Tacoma. When passing the motel in Fife, Jane cried when declaring: "'That's where it happened, nana.'" RP at 559. Grandmother Camden assumed that Jane reacted to the Motel 6 sign on the hotel building.

Grandmother Sandra Camden took Jane to Mary Bridge Children's Hospital. Blair Minson, a sexual assault nurse, examined Jane, and child forensic interviewer Keri Arnold interviewed Jane. The physical exam revealed no injuries.

PROCEDURE

The State of Washington charged Akeem Moore with two counts of rape of a child in the first degree. The charges went to trial. Moore and Jane's mother, Sandra Camden, did not testify at the trial.

At the conclusion of trial, Akeem Moore sought dismissal of the charges on the ground that no rational jury could find beyond a reasonable doubt that any alleged rape occurred within the state of Washington. The superior court denied the motion.

During closing, the State's attorney intoned:

> So let's talk about separate and distinct acts. . . . And you have to find if you find the defendant guilty of two counts. Okay? You have to find that those two counts are separate and distinct. Okay? That means that there's two instances. . . . That's also been folded into by what's Jury Instruction No. 12, which has two paragraphs. And essentially what that says is that to find the defendant guilty, you have to be unanimous as to which act has been proved.
>
> If you want to find—if you think that the evidence is proved beyond a reasonable doubt two crimes, you would need to find—unanimously agree that this happened on at least twice on two separate occasions.

RP at 789. The prosecuting attorney later added:

> *Not only that, but she described two places at least where this happened, the old house and a hotel.*
>
> We talked earlier about the [Tawnya] whisper and how it happened earlier on in 2019. Where were they living then? They weren't living at hotels. They were living at Springbrook Lane, a townhome. Or, I submit to you, as a five-year-old girl might describe it after about half the year goes on, the old house. And then, well, what a coincidence. She discloses in a car in Fife after they had been living in hotels. Well, now it's the old house and hotel. It's happened on two distinct occasions. Not only that, but she's driving around with [grandmother] Sandra and points out two separate Motel 6s in Fife and on Hosmer. "That's where it happened, nana." That happened on more than one occasion.

RP at 790-91 (emphasis added).

The prosecuting attorney continued later:

> So now we have to prove that it happened in Washington. I will note that during your deliberation one of you might say, "Well, they were down in Oregon for a little bit. How do we know it didn't happen in Oregon?" *It might have happened in Oregon.* He was living with her. The State is not debating that, but the State has evidence that it had occurred in Washington. We have a disclosure that was made on the 4th of April 2019 when [Jane] was living in Washington and never left the state, except for a

> one-day trip, and they didn't stay anywhere except to go to an outlet mall or something like that, and they came right back to their same living situation. Then we have them coming back.
>
> Pointing to Hosmer, pointing to Fife, that's where it happened in Motel 6 right there. We have evidence that shows that they were living in an apartment, and they're down in Oregon. Sandra visited them there. State's proved Element 4 beyond a reasonable doubt that these events happened in Washington, and we have the timeline here again.

RP at 792 (emphasis added).

During closing, Akeem Moore's trial counsel emphasized that grandmother Sandra Camden concluded that, when Jane identified the Motel 6 in Fife and the Motel 6 on Hosmer Street in Tacoma, Jane was not specifying that each discrete Motel 6 was the location for a rape, but rather referencing Motel 6 generically as the location. Counsel highlighted that Jane also mentioned a Motel 26 and that the family could have stayed in Motel 6 in Oregon.

In rebuttal, the State's attorney argued:

> So those two jury instructions are the things I want to talk about. First, I will deal with the jurisdictional element. So what inference can you draw from [Aunt] Tabitha's statement that [Tawnya] told me before they left Washington that something had happened. . . . There are two possible inferences, the State suggests.
>
> One of them is, okay, that the Oregon thing is off the table. Okay? Because at least the first incident, what I call the old house incident, that would be Count I had to occur before they got to Oregon. It had to occur in Washington. They never left the state, other than that.

RP at 824.

The jury convicted Moore of both charges of rape.

LAW AND ANALYSIS

On appeal, Akeem Moore repeats the theme of his trial motion to dismiss. Moore challenges the sufficiency of the evidence presented at trial to sustain the jury's findings on both counts that the criminal acts occurred in Washington. He does not argue against a finding of rape.

A person who commits any crime in the state of Washington, in whole or in part, is liable to punishment here. RCW 9A.04.030(1). Thus, a court may exercise criminal jurisdiction if an essential element of an offense was committed within the state. *State v. Lane*, 112 Wn.2d 464, 471, 771 P.2d 1150 (1989). Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution. *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997). We treat the location of any rape the same as any fact needed to be demonstrated beyond a reasonable doubt.

Washington courts repeatedly pronounce the standard of review for challenges to sufficiency of evidence. On sufficiency of the evidence review, this court asks whether "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201 (1992). This court defers to the factfinder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Sufficiency of the evidence is a question of constitutional magnitude because due process requires the State to prove its case beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Anderson*, 198 Wn.2d 672, 685-86, 498 P.3d 903 (2021).

No witness testified directly as to the precise location of any rape. Therefore, the jury needed to rely on circumstantial evidence. In analyzing the sufficiency of evidence, this court does not treat circumstantial evidence as less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Still, 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. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994); *State v. Jameison*, 4 Wn. App. 2d 184, 200, 421 P.3d 463 (2018). Whether an inference meets the appropriate standard must be determined on a case-by-case basis in light of the particular evidence presented to the jury in each case. *State v. Jameison*, 4 Wn. App. 2d 184, 200 (2018).

When considering a motion to dismiss for insufficiency of evidence, the court only reviews the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. *State v. Barnett*, 368 N.C. 710, 782 S.E.2d 885, 888 (2016). Contradictions and discrepancies in the evidence in a criminal prosecution do not warrant

dismissal of the case. *State v. Whitman*, 179 N.C. App. 657, 635 S.E.2d 906, 914 (2006). Substantial 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. *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607, 608 (1989). Conversely, when assessing sufficiency of evidence, we may not rest on guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). We are not justified in inferring, from mere possibilities, the existence of facts. *Gardner v. Seymour*, 27 Wn.2d 802, 810-11, 180 P.2d 564 (1947).

In a civil suit, an opposing party may obtain a directed verdict or judgment notwithstanding the verdict when no competent evidence or reasonable inference from the evidence would sustain a jury verdict in favor of the nonmoving party. *Levy v. North American Co. for Life & and Health Insurance*, 90 Wn.2d 846, 586 P.2d 845 (1978). But, in determining whether to grant such a motion, the opposing party must have presented "substantial evidence," as distinguished from a "mere scintilla" of evidence, to support the verdict. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

We find no case to distinguish between the quantum of evidence needed to prove a fact beyond a reasonable doubt as opposed to by a preponderance of evidence. Legal logic demands, however, more convincing evidence in a criminal trial than in a civil suit. Thus, the State should present more than substantial evidence supporting all elements of the crime in order to sustain a guilty verdict.

The State did not identify in its information the locations of the two respective counts. In closing argument, a prosecutor may specify on which acts the State relies to prove each separate count. *State v. Pena Fuentes*, 179 Wn.2d 808, 824-26, 318 P.3d 257 (2014). We read the State's closing argument to have specified that count one occurred while Jane lived in an old house and count two occurred in a Motel 6.

We review the locations where Jane resided from January to October 2019. Beginning in January, Jane resided at Springbrook Lane Apartments in Lakewood with her grandmother, mother, and extended family. In April she moved to Oregon with her mother, father, and brother John. We do not know the nature of the housing in Oregon. Although the grandmother and extended family stopped at one of the Oregon residences, no witness described the nature of the residence. Jane lived in Arkansas for one month, but no witness described the housing in Arkansas.

In September 2019, Jane returned to Pierce County. We do not know where family members slept at night on their arrival in Pierce County in September. For a while in October, Jane stayed with her mother, Aunt Tabitha, brother, and cousin in a Motel 6 in the Tacoma area. Akeem Moore joined the group at the Motel 6, and Aunt Tabitha and her daughter vacated the motel before Jane's immediate family. Akeem Moore, Candice Ferguson, John, and Jane then left again to return Oregon. We do not know the nature of the housing during the second time that Jane lived with her father in Oregon. Within a month, Jane returned to her grandmother's recently rented apartment in Tacoma.

Candice Ferguson and Akeem Moore, with the children, also spent some nights at the Tacoma home of Akeem Moore's mother. We do not know the dates of the stays. We assume the residence was a single-family residence that included at least two bedrooms, one of which Moore's mother assigned to Moore.

We conclude that the State did not prove beyond a reasonable doubt that count 1, which nominated an old house as the situs of the rape, occurred in Washington State. The State contends that, when Jane mentioned the old house, she referenced the Springbrook Apartments. We recognize that a small child may not distinguish between an apartment and a single-family residence. Nevertheless, we consider this possibility to be speculation. No other witness ever equated the apartment to an old house. The State never asked Jane if she understood the difference between a house and an apartment, and, if so, what constituted the difference. Akeem Moore and Jane may have interacted in a house in Oregon. Most importantly, no testimony suggested that Akeem Moore had contact with Jane at Springbrook Apartments. This court should not rely on its own inferences from the evidence, but we observe that the grandmother disliked Moore and may not have permitted Moore inside her residences.

Jane's testimony did not help to locate the old house. More often than not, she testified that all rapes occurred in Oregon. Jane told a law enforcement officer in Arkansas that her father put his pee-pee in her pee-pee. By this time, Jane had already resided with her father in Oregon. Jane testified that the house was located in the same

area as the Motel 6. Nevertheless, she provided this testimony at the same time she said that the Motel 6, where the rape occurred, was in Oregon.

We recognize the difficulty of procuring reliable testimony from a child, which often frustrates prosecution of child sex abuse cases. *State v. Jones*, 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989); *State v. Dunn*, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005). A child hearsay statute functions to alleviate these difficulties. RCW 9A.44.120. Nevertheless, not even the hearsay testimony offered by the State demonstrated beyond a reasonable doubt that any rape occurred in an old house in Washington State.

A finder of fact could conclude that Akeem Moore gained access to Jane at his mother's residence in Tacoma and that the residence was an "old house." The State never argued during trial that one of the rapes occurred at the mother's residence. Also, we do not know if Jane was taken to the paternal grandmother's house before she disclosed rape to Tawnya.

John's testimony fails to supply a foundation on which to conclude beyond a reasonable doubt that a rape occurred at Springbrook Apartments. Although he initially stated he saw his father stick his "pee-pee" in his sister's "pee-pee" in an apartment, he also testified he did not see such conduct. He never identified the location of the apartment. He stated he lived in twenty apartments. He also testified inconsistently that whatever he saw or heard did not happen in an apartment. He may have suggested the incident happened at a place with the number 6.

The State emphasizes that some evidence showed that Jane disclosed at least one rape to her cousin Tawnya before Jane left for Oregon in April 2019. Based on this testimony, the State argues one of the rapes must have occurred in Springbrook Apartments. Still, the State presented no testimony of access by Akeem Moore to Jane at this Lakewood apartment. Any contact remains speculation. Also, Tawnya also testified that the disclosure occurred years before Jane and she resided at the apartment.

We conclude that a jury could have reasonably concluded that a rape occurred at a Motel 6 in Washington State. The undisputed evidence placed Jane and Akeem Moore together at a Motel 6 in the Tacoma area at a time when only Jane's immediate family was present. Although Akeem Moore, through argument, implied that he may have stayed with Jane in an Oregon hotel, he presented no testimony supporting such an alleged fact. Valuable circumstantial evidence supports a finding of a rape in a Washington Motel 6.

CONCLUSION

We remand to the superior court with directions to reverse the conviction for count 1 of child rape and dismiss the charge with prejudice. We affirm the conviction on charge 2. During remand, the superior court should resentence Akeem Moore.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Pennell, J.
Pennell, J.

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. James, Wash.App. Div. 3, June 1, 2023

4 Wash.App.2d 184
Court of Appeals of Washington, Division 3.

STATE of Washington, Petitioner,

v.

Lashawn Douxshae JAMEISON, Respondent,

Kwame Davon Bates Anthony

Gilbert Williams Defendants.

No. 34768-1-III
|
FILED JUNE 28, 2018

Synopsis

Background: Defendant was charged with first-degree murder by extreme indifference, or in alternative manslaughter, on theory of accomplice liability, arising out of gunfight between defendant and friend on one side, and shooter on other, that resulted in shooting death of innocent bystander, and multiple counts of drive-by shooting. The Superior Court, Spokane County, Michael P. Price, J., granted defendant's motion to dismiss murder charges and dismissed all but two of drive-by shooting counts. State appealed.

Holdings: The Court of Appeals, Fearing, J., held that:

[1] evidence did not support State's assertions that defendant and shooter "squared off" during gunfight and that defendant assumed fighting position, for purposes of determining whether undisputed evidence established prima facie case of guilt on murder charges;

[2] in reviewing undisputed facts on motion to dismiss, appellate court would not draw inference of existence of agreement between defendant and shooter to resolve dispute by armed violence;

[3] defendant did not "encourage" shooter to engage in gunfight, as basis for murder charges on theory of accomplice liability; and

[4] defendant was not in "immediate area" of vehicle used for transportation him from nightclub when he engaged in gunfight, as required to support charges for drive-by shooting.

Affirmed; remanded.

West Headnotes (19)

[1] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Inferences or deductions from evidence

On review of an order on a motion to dismiss an indictment based on an assertion that the undisputed facts do not establish a prima facie case of guilt, the appellate court views the facts and all reasonable inferences in the light most favorable to the State. Wash. Super. Ct. Crim. R. 8.3(c)(3).

[2] **Criminal Law** Nature of Decision Appealed from as Affecting Scope of Review

An appellate court will uphold the trial court's dismissal of a charge if no rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime.

[3] **Homicide** Parties to offenses

Evidence did not support State's assertions that defendant and shooter "squared off" during gunfight that resulted in shooting death of innocent bystander, and that defendant assumed fighting position, for purposes of determining whether undisputed evidence established prima facie case of guilt, thus warranting dismissal of charges for murder by extreme indifference, or in alternative for manslaughter, on theory of accomplice liability; rather, undisputed record evidence, including video evidence, repeatedly demonstrated that shooter "squared off" with defendant's friend, while defendant, although armed, was crouched behind vehicle, and that shooter fired fatal shot before defendant

discharged his gun. Wash. Super. Ct. Crim. R. 8.3(c)(3).

[4] **Homicide** Parties to offenses

In determining undisputed facts on defendant's motion to dismiss charges for murder by extreme indifference, or in alternative for manslaughter, on theory of accomplice liability, which charges arose out of gunfight that resulted in shooting death of innocent bystander, appellate court would not draw inference of existence of agreement between defendant and shooter to resolve dispute by armed violence, based on review of evidence as whole; there was no evidence of agreement, evidence showed that defendant retrieved his gun from car only after shooter grabbed his weapon, in order to defend himself, and although defendant could have fired his gun at shooter, he did not fire his gun until after shooter fired his weapon in defendant's direction and struck victim instead. Wash. Super. Ct. Crim. R. 8.3(c)(3).

[5] **Criminal Law** Inferences from evidence

A verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts; conversely, an inference is not reasonable if based on speculation or conjecture.

2 Cases that cite this headnote

[6] **Criminal Law** Inferences from evidence

Any reasonable inference must likely, but not necessarily, follow from an underlying truth.

[7] **Criminal Law** Degree of proof

When evidence is equally consistent with two hypotheses, the evidence tends to prove neither.

2 Cases that cite this headnote

[8] **Criminal Law** Inferences from evidence

A court will not infer a circumstance when no more than a possibility is shown; it is not justified in inferring, from mere possibility, the existence of facts.

2 Cases that cite this headnote

[9] **Constitutional Law** Presumptions, inferences, and burden of proof

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, and whether an inference meets the appropriate standard must be determined on a case-by-case basis in light of the particular evidence presented to the jury in each case. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[10] **Homicide** Recklessness, wantonness, or extreme indifference

The mens rea of murder by extreme indifference is aggravated recklessness, which requires greater culpability than ordinary recklessness or more than mere disregard for the safety of others. Wash. Rev. Code Ann. § 9A.32.030(b).

[11] **Homicide** Recklessness, wantonness, or extreme indifference

"Recklessly," in the context of a charge for manslaughter, means that a person knew of and disregarded a substantial risk that a homicide may occur. Wash. Rev. Code Ann. § 9A.32.060.

[12] **Criminal Law** Theory and Grounds of Decision in Lower Court

An appellate court holds the discretion to affirm on any grounds supported by the record.

2 Cases that cite this headnote

[13] **Homicide** Aiding, abetting, or other participation in offense

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Homicide Aiding, abetting, or other participation in offense

Defendant did not "encourage" shooter to engage in gunfight between himself and shooter, as basis for charges for first-degree murder by extreme indifference or, in alternative for manslaughter, on theory of accomplice liability, arising out of shooting death of innocent bystander, based on evidence that defendant and friend went to car to arm themselves following altercation with shooter, whom they knew to be armed; defendant never sought to assist shooter, shooter was firing his weapon in defendant's direction when bystander was shot, defendant was not seeking shooter's success in firing his gun at defendant and friend, defendant and shooter were clearly acting as antagonists, defendant legally owned his gun, law did not require him to leave area, defendant fired his gun after shooter fired his weapon, and defendant was shooter's intended victim. Wash. Rev. Code Ann. §§ 9A.08.020(3)(a)(i), 9A.32.030(b), 9A.32.060.

[14] **Criminal Law** Community of unlawful intent

Regardless of whether the State relies on the word "encourage" or the words "solicit" or "command" as the basis for imposition of accomplice liability, an accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. Wash. Rev. Code Ann. § 9A.08.020(3)(a)(i).

5 Cases that cite this headnote

[15] **Criminal Law** Principals, Aiders, Abettors, and Accomplices in General

Criminal Law Presence

A defendant's presence and knowledge of the crime alone are insufficient to impose accomplice liability, absent evidence from which a readiness to assist or an intent to encourage could be inferred. Wash. Rev. Code Ann. § 9A.08.020(3)(a)(i).

2 Cases that cite this headnote

[16] **Criminal Law** Principals, Aiders, Abettors, and Accomplices in General

A person is not an "accomplice" to a crime if he or she is a victim of that same crime. Wash. Rev. Code Ann. § 9A.08.020.

3 Cases that cite this headnote

[17] **Assault and Battery** Firing from vehicle; drive-by shooting

The crime of drive-by shooting demands that the shooter be in the immediate area of the vehicle that transported him. Wash. Rev. Code Ann. § 9A.36.045(1).

[18] **Assault and Battery** Firing from vehicle; drive-by shooting

The crime of drive-by shooting contemplates a shooter who is either inside a vehicle or within easy or immediate reach of the vehicle, and intervening obstacles disqualify a location from being within the "immediate area" of the vehicle used to transport him. Wash. Rev. Code Ann. § 9A.36.045(1).

[19] **Assault and Battery** Firing from vehicle; drive-by shooting

Defendant was not in "immediate area" of vehicle used for transportation him from nightclub when he engaged in gunfight with shooter in front of nightclub, as required to support charge for drive-by shooting, where defendant was crouched behind different car when shooting started, and car he was crouched behind and light pole were obstacles that stood between him and vehicle he drove away in, and his vehicle was not within immediate reach. Wash. Rev. Code Ann. § 9A.36.045(1).

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****465** Appeal from Spokane Superior Court, Docket No: 16-1-00720-2, Honorable Michael P. Price, Judge

Attorneys and Law Firms

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PUBLISHED OPINION

Fearing, J.

****466** ***187** ¶ 1 We address intriguing questions worthy of a criminal law class examination, but which carry monumental consequences to the accused, Lashawn Jameison. This appeal primarily asks whether an accused, who, in response to an antagonist retrieving a gun, also arms himself and hides behind a vehicle, suffers accomplice liability for homicide when, without the accused shooting his firearm, the antagonist fires his gun and the bullet strikes and kills an innocent bystander. The State argues ***188** that the accused bears liability because he encouraged his adversary to fire the gun. The State emphasizes that Lashawn Jameison later exchanged gunfire.

¶ 2 The appeal also asks whether the same accused may be convicted of a drive-by shooting when he retrieves a gun from the car in which he arrived to the scene of the homicide but crouches behind another car at the time he returns fire. We affirm the trial court's summary dismissal of the homicide charges and twelve of fourteen of the drive-by shooting charges. We affirm the dismissal of the drive-by shooting charges based on our decision in *State v. Vasquez*, 2 Wash. App. 2d 632, 415 P.3d 1205 (2018), decided after the trial court ruling.

FACTS

¶ 3 This prosecution arises from a confrontation between Kwame Bates and defendant Lashawn Jameison, on the one hand, and Anthony Williams, on the other hand, during which skirmish Williams fired his gun and killed bystander Eduardo Villagomez. A video partially captures the confrontation and shooting.

¶ 4 On the night of January 17-18, 2016, Lashawn Jameison and Kwame Bates joined a group of five hundred young adults at the Palomino Club in Spokane to celebrate Martin Luther King Jr. Day. Bates drove Jameison to the club in a white Toyota Camry owned by Bates' girlfriend, which car gains significance as events transpire. Bates parked the Camry on Lidgerwood Street in front of a Department of Licensing building adjacent to the club. A Chrysler parked behind the Camry on the street. We do not know the time of night that Bates and Jameison arrived at the celebration.

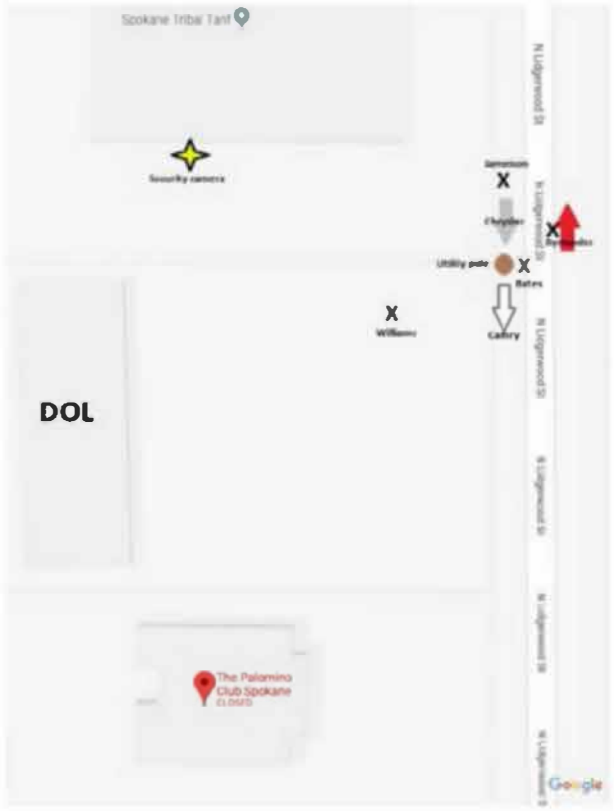
¶ 5 The Palomino Club closed at 2 a.m. on January 18. As Lashawn Jameison and Kwame Bates exited the club at closing, another patron, Anthony Williams, shoved Sierra, a female friend of Bates. The shove began a deadly chain of ***189** events. As a result of the push, Bates and Williams argued. Jameison did not participate in the quarrel. Williams jumped a metal fence bordering the club parking lot, retrieved a handgun from a car parked in the adjacent Department of Licensing parking lot, and returned to the entrance of the club. Williams paced to and from the club building, the adjacent lot, and Lidgerwood Street.

¶ 6 Both Kwame Bates and Lashawn Jameison, knowing that Anthony Williams possessed a firearm, returned to the white Toyota Camry and armed themselves. Both Bates and Jameison lawfully owned firearms. During this activity, other patrons of the Palomino Club departed the building and walked to their cars parked in the club parking lot, in the adjacent parking lot, and on the street.

¶ 7 Lashawn Jameison, with gun in hand, retreated and separated himself from Kwame Bates and Anthony Williams. Jameison hid at the rear of the Chrysler parked behind the Camry, while Bates stood by a power pole near the Camry. Bates and Williams, with Williams then in the Department of Licensing parking lot, faced one another as Martin Luther King Jr. Day celebrants continued to walk to their cars. According to Bates, he "does not back down" from a fight as long as the fight is fair. Clerk's Papers (CP) at 158. Jameison crouched behind the Chrysler.

****467**

***190**



¶ 8 A friend of Anthony Williams drove the friend's car into the parking lot. Williams stepped behind his friend's vehicle and discharged his gun in Bates' direction. The bullet missed Bates and struck Eduardo Villagomez, a bystander walking along the street. Villagomez slumped to the street. Tragically an unsuspecting driver of a car drove over Villagomez's stricken body. Villagomez died as a result of the bullet wound and the force of the vehicle.

¶ 9 After Anthony Williams' discharge of gunfire, Kwame Bates ran from the power pole and joined Lashawn Jameison behind the stationary Chrysler. Seconds after Williams fired the first shot, Bates and Jameison stood, returned fire, and crouched again behind the Chrysler. Jameison fired, at most, two shots toward Williams. Williams returned additional shots toward Bates and Jameison. Bates rose again and returned fire as Williams entered the vehicle driven by his friend. The friend drove the vehicle from the parking lot and club. Bates and Jameison entered the Camry and also departed the neighborhood.

***191** ¶ 10 Because the State contends inferences from the facts support accomplice liability, we now repeat and quote evidence in its unedited form and as presented to the trial court. Spokane Police Detective Marty Hill reviewed a security video and, based on this viewing, wrote in an amended statement of investigating officer:

> This individual is a black male dressed in a bright red top (later identified as Lashawn D. Jameison, [black male], 04/18/1994).... Jameison appears to be crouching down behind the Chrysler 300 as if hiding prior to being joined by Bates.

CP at 8. Detective Hill added:

> A sedan, later found to be driven by Jazzmine Dunlap, pulls into the lot[,] and a male approaches the driver rear door. This male, later identified as Anthony G. Williams, [black male], 08/18/1993, then begins to fire shots at Jameison and Bates who are secreted behind the Chrysler 300. The victim, later identified as Eduardo Villagomez, [Hispanic male], 01/15/1995, and his three companions, later identified as Carlos Villagomez, Miguel L. Martinez, and Rosario A. Ayala, are on Lidgerwood St. to the north and directly in the line of fire, but not involved in this gunfire. *Williams appears to be engaging Bates. Williams appears to fire first at Bates*, who then retreats to the Chrysler 300 where Jameison had secreted himself. Jameison and Bates are observed shooting south towards Williams, exchanging gunfire.

CP at 9 (emphasis added) (boldface omitted).

¶ 11 In his amended statement of investigating officer, Detective Marty Hill shares ****468** the story as told by Kwame Bates during an interview by Hill:

> As he [Bates] approached his car, the white 1993 Toyota Camry ..., he did see L-Jay [Lashawn Jameison] behind the Chrysler 300. Bates put himself standing in the street to the east of his car. Bates said the male with the gray sweatshirt [Anthony Williams] approached him from the parking lot of the DMV [Department of Motor Vehicles] building. Bates stated this male was yelling at him and he thought he and this unknown male were going to have a fair fight. Bates stated he does not back down from fights as long as they are fair.
>
> ***192** Bates stated this unknown male pulled out his firearm. Bates said he ran to his right and jumped behind the Chrysler 300 as the male began shooting. Bates said he could hear bullets striking the Chrysler. Bates admitted that he returned fire towards this male as the male was running towards a gray colored car. Bates indicated that he fired between six and seven shots. Bates said when the male entered the car, he did not continue to shoot anymore, but

> he and L-Jay jumped into the white 1993 Toyota Camry ... and they drove away.
>
> Bates said it happened so fast, "I thought it was over for me."

CP at 12.

¶ 12 Stefanie Collins, a deputy prosecuting attorney, signed a statement outlining facts in chronological order. Collins declared in part:

> 11. A Chevy Cruze pulls into the DOL [Department of Licensing] lot—later determined to be driven by a friend of Williams', Jazzmine Dunlap. The car stops in the DOL lot and Williams approaches it. Williams faces Lidgerwood and is walking back and forth along the driver's side of the car;
>
> 12. *Williams and Bates square off*. They are approximately 30-60 feet apart. Bates is facing Williams in the DOL lot. Williams is facing Bates, whose [sic] is on Lidgerwood.

CP at 133-34 (emphasis added).

PROCEDURE

¶ 13 The State of Washington charged Lashawn Jameison with first degree murder by extreme indifference and, in the alternative, first degree manslaughter as the result of the death of Eduardo Villagomez. The State acknowledged that Anthony Williams shot Eduardo Villagomez but charged Jameison with accomplice liability. The State also charged Jameison with fourteen counts of drive-by shooting as a result of Jameison's returning of gunfire. The fourteen charges arise from the presence of at least fourteen club patrons in the vicinity at the time of the shooting.

***193** ¶ 14 Lashawn Jameison moved to dismiss the homicide charges pursuant to *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986). Jameison emphasized that the video of the scene and law enforcement officers' reports and affidavits demonstrated beyond dispute that Anthony Williams killed the decedent while Jameison ducked behind a car, shielding himself from Williams' attack. Jameison added that, because he had not fired a shot by the time Williams' bullet struck Eduardo Villagomez and because he himself was a victim of Williams' violence, he could not be guilty of murder even as an accomplice. Jameison posited the same arguments for the alternative charge of manslaughter.

¶ 15 Lashawn Jameison also moved to dismiss the drive-by shooting charges for insufficient evidence of recklessness. In the alternative, he argued that all but one count should be dismissed because he fired only one shot. He based the latter argument on law enforcement's discovering, at the crime scene, only one shell casing matching his gun.

¶ 16 As part of its response to Lashawn Jameison's motion to dismiss, the State filed a certificate of Deputy Prosecuting Attorney Stefanie W. Collins, which outlines the facts in serial and chronological form. We previously quoted two paragraphs from the certificate. Collins declared that she based the facts on her review of police reports and ****469** security video. In reply, Jameison asked that Collins' certificate be struck because Collins did not base her certificate on percipient knowledge. The trial court's order of dismissal does not indicate whether the court granted the motion to strike.

¶ 17 The trial court dismissed the first degree murder and first degree manslaughter charges on the basis, in part, that Lashawn Jameison did not cause the death of Eduardo Villagomez. The trial court also ruled that the unit of prosecution for drive-by shooting charges was the number of shots fired by Jameison. Because of a dispute of fact as to whether Jameison fired one or two shots, the trial court ***194** dismissed all but two of the fourteen drive-by shooting counts.

¶ 18 The State requested and this court granted discretionary review of the trial court's dismissal of some of the pending charges. After we accepted discretionary review, this court decided *State v. Vasquez*, 2 Wash. App. 2d 632, 415 P.3d 1205 (2018), which delineates the elements of a drive-by shooting prosecution. We requested that both parties address *Vasquez* during oral argument.

LAW AND ANALYSIS

Facts and Inferences

¶ 19 The State appeals dismissal of the murder, manslaughter, and twelve drive-by shooting charges. Lashawn Jameison has not sought review of the trial court's refusal to dismiss the remaining two drive-by shooting counts. Before addressing the substantive law of homicide and drive-by shootings, we first determine what facts to apply to the law. The parties contest what constitutes the unquestioned facts and the

permissible inferences from those facts. We must resolve this dispute of undisputed facts.

¶ 20 CrR 8.3(c) permits an accused to seek dismissal of charges before trial. The rule declares:

> On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.
>
> (1) The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties. The stipulation, affidavit or declaration may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding the motion to dismiss. ...
>
> (2) The prosecuting attorney may submit affidavits or declarations in opposition to defendant's supporting affidavits or ***195** declarations. The affidavits or declarations may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding defendant's motion to dismiss. ...
>
> (3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and *the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney.* The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. ...
>
> (4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

CrR 8.3(c) (emphasis added) (boldface omitted).

¶ 21 The order in response to Lashawn Jameison's motion to dismiss does not list the affidavits, declarations, or reports reviewed by the trial court. Therefore, we have scoured all evidence forwarded to this appellate court. We included in our review the certificate of Stefanie Collins, to which Jameison objected, without determining the propriety of its use. Jameison's trial court entered findings of fact, but we conclude we must determine the facts on our own since the trial court does not resolve disputed facts on a motion to dismiss.

¶ 22 Trial courts should grant an accused's motion to dismiss when the undisputed facts ****470** do not establish a prima facie case of guilt. CrR 8.3(c)(3). The law labels such motions to dismiss as *Knapstad* motions in reference to a leading Washington decision, *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986). The Supreme Court adopted CrR 8.3(c)(3) in light of its *Knapstad* decision. A *Knapstad* motion in a criminal case corresponds to a summary judgment motion in a civil case.

[1] **[2]** ¶ 23 We review de novo a trial court's decision to grant a *Knapstad* motion and to dismiss a criminal prosecution ***196** under CrR 8.3(c). *State v. Bauer*, 180 Wash.2d 929, 935, 329 P.3d 67 (2014). During review, as demanded by the criminal rule, this court views the facts and all reasonable inferences in the light most favorable to the State. *State v. O'Meara*, 143 Wash. App. 638, 642, 180 P.3d 196 (2008). An appellate court will uphold the trial court's dismissal of a charge if no rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *State v. Snedden*, 112 Wash. App. 122, 127, 47 P.3d 184 (2002), *aff'd*, 149 Wash.2d 914, 73 P.3d 995 (2003).

[3] ¶ 24 On discretionary review, the State of Washington writes that Lashawn Jameison's act of arming himself and "squaring off" with Anthony Williams encouraged Williams to fire his gun, which ultimately caused the death of Eduardo Villagomez. We agree the record shows that Jameison armed himself. We disagree with the State's assertion that Jameison "squared off" with Williams. The record of evidence repeatedly states that Anthony Williams and Kwame Bates "squared off." The record also indicates that Williams shot toward Jameison in addition to Bates. Nevertheless, whereas Jameison armed himself, no police report or other record claims that Jameison "squared off" with Williams. He instead crouched behind a car. Assuming Jameison "squared off" with Williams, the "squaring off" occurred after Williams fired the fatal shot.

¶ 25 The State additionally writes that Lashawn Jameison assumed a fighting position. We also disagree with this factual assertion. The only testimony about Jameison's physical stance concerns his crouching as if hiding behind a car because of Anthony Williams' brandishing a weapon. The video confirms this testimony.

[4] ¶ 26 The State repeatedly refers, in its briefing, to an agreement between Lashawn Jameison and Anthony Williams to fight. The record lacks any entry of an agreement between Jameison and Williams to fight, let alone an agreement between Kwame Bates and Williams to fight. The State concedes the record does not authenticate that ***197** Jameison overtly agreed to fight. The State contends, however, that Jameison's actions in taking up arms and assuming a fighting position near Bates manifested Jameison's agreement to resolve differences by violence. In this regard, the State faults the trial court for failing to draw all reasonable inferences from the facts in favor of the State. We would be more likely to reverse the trial court's dismissal of homicide charges if facts supported such a rational inference of an agreement to which Jameison was a party.

¶ 27 We struggle in the abstract with what assay to employ when adjudging what reasonable inferences we may deduce from established facts. Therefore, we first comb for definitions and synonyms for our key word "inference." Our state high court has defined an "inference" as a logical deduction or conclusion from an established fact. *Fannin v. Roe*, 62 Wash.2d 239, 242, 382 P.2d 264 (1963). *State v. Aten*, 130 Wash.2d 640, 658, 927 P.2d 210 (1996) refers to a "reasonable and logical" inference, again suggesting that a permissible inference must be logical. A foreign court wrote that a reasonable inference may be defined as a process of reasoning whereby, from facts admitted or established by the evidence or from common knowledge or experience, a trier of fact may reasonably conclude that a further fact is established. *Stambaugh v. Hayes*, 1940-NMSC-048, 44 N.M. 443, 103 P.2d 640, 645. 5 *West's Encyclopedia of American Law* 396 (2d ed. 2005) partly defines "inference" as:

> Inferences are deductions or conclusions that with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

****471** ¶ 28 Based on these definitions, we must summon logic, common sense, and experience in surmising additional or circumstantial facts from already established or direct facts. We hope that our experience coincides with common sense and our common sense abides logic.

[5] ¶ 29 Washington case law further teaches that a verdict does not rest on speculation or conjecture when founded on ***198** reasonable inferences drawn from circumstantial facts. *State Farm Mutual Insurance Company v. Padilla*, 14 Wash. App. 337, 339-40, 540 P.2d 1395 (1975). This proposition conversely suggests that an inference is not reasonable if based on speculation or conjecture. This observation, however, only begs the question of what constitutes speculation and conjecture.

[6] ¶ 30 A court occasionally faces the question of whether the trier of fact may infer only those facts that necessarily or always follow from established circumstances, whether the trier of fact may deduce those facts likely to have occurred as a result of the underlying circumstances, or whether the trier of fact may even employ inferences that exist as one of many possible inferences. We conclude that any reasonable inference must likely, but not necessarily, follow from an underlying truth.

[7] **[8]** ¶ 31 When evidence is equally consistent with two hypotheses, the evidence tends to prove neither. *Stambaugh v. Hayes*, 103 P.2d at 645 (1940). We will not infer a circumstance when no more than a possibility is shown. *Brucker v. Matsen*, 18 Wash.2d 375, 382, 139 P.2d 276 (1943). We are not justified in inferring, from mere possibilities, the existence of facts. *Gardner v. Seymour*, 27 Wash.2d 802, 810-11, 180 P.2d 564 (1947). Some of the decisions we cite entail civil appeals, but the law should demand stricter controls on use of inferences in a criminal case.

¶ 32 We also conclude that, in determining whether we should draw an inference that Lashawn Jameison agreed to fight, we do not rely only on the facts that Jameison retrieved his weapon and hid behind a car. Some cases teach that, when drawing inferences, the trier of fact should not isolate discrete facts but instead draw reasonable inferences after viewing the evidence as a whole. *State v. Sanchez*, 2017 MT 192, 388 Mont. 262, 399 P.3d 886, 890; *State v. Stull*, 403 N.J. Super. 501, 506, 959 A.2d 286 (App. Div. 2008).

***199** ¶ 33 A leading Washington criminal decision regarding reasonable inferences comes in the setting of the corpus delicti rule but should apply to *Knapstad* motions because the corpus delicti question involved the sufficiency of evidence based on reasonable inferences. In *State v. Aten*, 130 Wash.2d 640, 927 P.2d 210 (1996), the high court reviewed whether reasonable inferences from evidence, other than Vicki Aten's confession, supported a finding that a criminal act caused the death of an infant so that the corpus delicti rule did not bar introduction of the confession as evidence. On the night of January 30, Aten cared for a four-month-old child. She found the child dead the next morning. A physician, who performed an autopsy on the infant, concluded that the child died of sudden infant death syndrome (SIDS), a form of

acute respiratory failure. He acknowledged suffocation could cause acute respiratory failure. But he also testified he could not determine in an autopsy whether SIDS or suffocation caused the acute respiratory failure. The State argued that the evidence sufficed to prove the corpus delicti because one logical and reasonable inference from the evidence was that the infant died from suffocation by Aten, a criminal act.

¶ 34 The Supreme Court, in *State v. Aten*, noted that it had not previously addressed directly the issue whether the State establishes the corpus delicti when evidence independent of a defendant's statements is consistent with reasonable and logical inferences of both criminal agency and innocence. The court held that the State does not establish corpus delicti when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause. The circumstantial evidence proving the corpus delicti must be consistent with guilt and inconsistent with a hypothesis of innocence. Accordingly, since the independent evidence from the child's death supported a reasonable and logical inference or hypothesis of ****472** innocence, that is, that the child died of SIDS, insufficient evidence established the corpus delicti.

***200** **[9]** ¶ 35 Washington law, if not the federal constitution, demands that inferences in the criminal setting be based only on likelihood, not possibility. 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. *State v. Hanna*, 123 Wash.2d 704, 710, 871 P.2d 135 (1994). Whether an inference meets the appropriate standard must be determined on a case-by-case basis in light of the particular evidence presented to the jury in each case. *State v. Hanna*, 123 Wash.2d at 712, 871 P.2d 135.

¶ 36 We conclude that we should not draw an inference that Lashawn Jameison agreed to fight with Anthony Williams. Merriam Webster's online dictionary lists "agree" as a transitive verb meaning "a : to concur in (something ...) b : to consent to a course of action." https://www.merriam-webster.com/dictionary/agree (last visited June 19, 2018). No evidence directly confirms that Jameison concurred in Williams shooting at Jameison's direction. Experience, common sense, and logic easily depict Williams acting on his own without any consent from Jameison or Bates. The State in essence portrays Lashawn Jameison and Anthony Williams as agreeing to a duel. The totality of the undisputed facts, however, leads one to conclude that Jameison never consented to a duel. Jameison retrieved his firearm only after Williams grabbed his weapon and in order to defend himself. He could have shot at Williams before Williams first shot in his direction, but he never did.

¶ 37 The State also writes that Lashawn Jameison encouraged Anthony Williams to fire his weapon. The State may ask this court to infer encouragement as a factual matter from the conduct of Jameison. We deem whether or not Jameison encouraged Williams to be more a legal question, since we must decide whether any encouragement occurred within the meaning of RCW 9A.08.020, the accomplice liability statute.

***201** Homicide

¶ 38 We arrive at our discussion of the substantive law. The murder and manslaughter charges raise the same question so we merge the analysis of these two alternative charges. We must decide whether, under the undisputed facts, the State can sustain a conviction for either crime against Lashawn Jameison based on accomplice liability.

[10] ¶ 39 Before addressing accomplice liability, we review the murder and manslaughter statutes. RCW 9A.32.030 covers first degree murder by extreme indifference. The statute declares:

> (1) A person is guilty of murder in the first degree when:
>
> ....
>
> (b) Under circumstances manifesting an *extreme indifference to human life*, he or she engages in conduct which creates a grave risk of death to any person, and thereby *causes the death of a person*....

(Emphasis added.) The mens rea of murder by extreme indifference is aggravated recklessness, which requires greater culpability than ordinary recklessness or more than mere disregard for the safety of others. *State v. Dunbar*, 117 Wash.2d 587, 594, 817 P.2d 1360 (1991).

[11] ¶ 40 Manslaughter in the first degree occurs when a person recklessly causes the death of another person. RCW 9A.32.060. The statute intones:

> (1) A person is guilty of manslaughter in the first degree when:
>
> (a) He or she *recklessly causes the death of another person*....

(Emphasis added.) "Recklessly" means, for purposes of defining manslaughter, that a person knew of and disregarded a substantial risk that a homicide may occur. *State v. Gamble*, 154 Wash.2d 457, 467, 114 P.3d 646 (2005). First ***202** degree manslaughter differs from first degree murder in that the former requires only mere recklessness, while the latter requires aggravated recklessness.

¶ 41 This appeal concerns more the nature of accomplice liability than the elements of murder or manslaughter. RCW 9A.08.020 imposes ****473** accomplice liability in the following circumstances:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> ....
>
> (c) He or she is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) *With knowledge that it will promote or facilitate the commission of the crime*, he or she:
>
> (i) Solicits, commands, *encourages*, or requests such other person to commit it; or
>
> (ii) Aids or *agrees to aid* such other person in planning or committing it; or
>
> (b) His or her conduct is expressly declared by law to establish his or her complicity.
>
> ....
>
> (5) Unless otherwise provided by this title or by the law defining the crime, *a person is not an accomplice in a crime committed by another person if:*
>
> *(a) He or she is a victim of that crime....*

(Emphasis added.) The State relies on the word "encourages" inserted in RCW 9A.08.020(3)(a)(i) in prosecuting Lashawn Jameison.

¶ 42 When we read the accomplice liability statute, RCW 9A.08.020, with the murder and manslaughter statutes, ***203** RCW 9A.32.030 and RCW 9A.32.060, this appeal raises numerous discrete questions. First, did Lashawn Jameison cause the death of Eduardo Villagomez? Second, may Lashawn Jameison be guilty of accomplice liability when the mens rea under the accomplice liability statute affords liability based on knowingly promoting a crime but the underlying crimes demand only a mens rea of recklessness? Stated differently, does Washington's accomplice liability statute permit convictions based on underlying crimes with a mental state less than knowledge? Third, did Lashawn Jameison know that his arming himself and hiding behind a car would promote or facilitate the killing of someone? Fourth, did Lashawn Jameison encourage Anthony Williams to discharge Williams' first shot, which killed Villagomez? Fifth, was Jameison a victim of the initial shot fired by Williams? Sixth, and related to the fifth question, may an accused be the accomplice to a shooting when the shooter attempts to harm the accused or a companion of the accused with the deadly bullet?

[12] **[13]** ¶ 43 On appeal, the parties ably devote pages to the question of whether one can be an accomplice to a crime with a mens rea of recklessness. The trial court based its dismissal on the lack of causation. We ignore these questions and render our decision on other grounds. We hold discretion to affirm on any grounds supported by the record. *State ex rel. Eikenberry v. Frodert*, 84 Wash. App. 20, 25, 924 P.2d 933 (1996). We address and conflate the fourth, fifth, and six questions. We find that the conduct of Jameison in arming himself and hiding behind a car from the bullets of Anthony Williams ineptly fulfills the meaning of "encouragement" and his situation borders on victimhood. In turn, imposing criminal liability on Jameison conflicts with general principles of accomplice liability and disserves policies behind imposing accomplice liability. Numerous decisions support our conclusion.

¶ 44 According to the State, Jameison encouraged Anthony Williams' conduct by words or conduct, including ***204** taking up arms with his companion Kwame Bates, agreeing to fight, assuming a strategic fighting position, and squaring off with Williams. The State adds that Jameison colluded with Bates to engage in an extremely reckless gunfight that resulted in the unintended death of Eduardo Villagomez. According to the State, but for Jameison's conduct, Williams "may not" have been encouraged to fire his pistol. We have already concluded that the record fails to support inferences that Jameison agreed to a fight, assumed a strategic fighting position, or squared off with Williams.

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Therefore, we ask whether Jameison's retrieval of a weapon, walking to the Chrysler, **474 and crouching behind the car "encourage[d]" the fatal criminal conduct of Anthony Williams within the meaning of RCW 9A.08.020(3)(a)(i).

¶ 45 Our key term is "encourage." RCW 9A.08.020 lacks a definition for this common word. Because of the word's familiarity, we should not need to ponder a dictionary definition, but we mention one for its limited assistance. A dictionary defines "encourage":

1 a: to inspire with courage, spirit, or hope: hearten

— she was *encouraged* to continue by her early success

b: to attempt to persuade: urge

— they *encouraged* him to go back to school

2: to spur on: stimulate

— warm weather *encourages* plant growth

3: to give help or patronage to: foster

— government grants designed to *encourage* conservation https://www.merriam-webster.com/dictionary/encourage (last visited June 19, 2018). The conduct of Lashawn Jameison awkwardly fits within the import of inspiring Anthony Williams for success, persuading Williams to shoot, spurring Williams to action, or patronizing Williams.

[14] **[15]** ¶ 46 Under Washington case law, regardless of whether the State relies on the word "encourage" or the words "solicit" or "command" within RCW 9A.08.020(3)(a)(i), an *205 accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. *In re Welfare of Wilson*, 91 Wash.2d 487, 491, 588 P.2d 1161 (1979); *State v. LaRue*, 74 Wash. App. 757, 762, 875 P.2d 701 (1994). Presence and knowledge alone are insufficient, absent evidence from which a readiness to assist or an intent to encourage could be inferred, to support a finding of accomplice liability. *In re Welfare of Wilson*, 91 Wash.2d at 491-92, 588 P.2d 1161.

¶ 47 Lashawn Jameison never sought to assist Anthony Williams. He never directly encouraged Williams to shoot either him or Kwame Bates. Williams wanted to shoot or wound Bates or Jameison. Jameison did not seek this goal. Jameison and Williams acted as antagonists. They entered any fight from opposite poles.

¶ 48 We review two cases on which the State relies and another decision and then compare the three decisions with other decisions. In *In re Personal Restraint of Sandoval*, 189 Wash.2d 811, 408 P.3d 675 (2018), the high court affirmed accomplice liability for murder when Eduardo Sandoval helped plan a retaliatory attack against a rival gang and participated in the homicidal attack as a lookout for the shooters. We note that the State prosecuted the colleague of the shooter, not the colleagues of the dead rival gang member who indirectly encouraged the murder by engaging in gang activity toward Sandoval's gang.

¶ 49 The State relies on *State v. Parker*, 60 Wash. App. 719, 806 P.2d 1241 (1991). On the night of September 2, 1988, Robert Parker and his fiancée, Cherie Marie Keese, drove respective cars on Interstate 405 near Bellevue. Keese followed Parker twenty to twenty-five car lengths behind. She flashed her lights several times to get his attention and sped to catch him. Parker knew that Keese wished to pull even. Parker told his passenger that Keese would need to follow them to Bellevue because he did not intend to stop. Keese increased her speed to drive tandem with Parker. *206 Parker responded by accelerating further in order to elude her. The two cars traveled in excess of 100 miles per hour. Parker's passenger asked him to slow. Keese's passenger uttered the same request to Keese. Eyewitnesses considered the two cars to be racing. As the two cars approached a third car in the interstate's center lane, Keese changed lanes and lost control of her car. Her car careened through the highway's median and struck an oncoming vehicle. The collision killed Keese's passenger, and the driver of the oncoming car suffered permanent and serious head injury. Parker's car stopped without incident. The State prosecuted Parker as an accomplice on the theory he encouraged Keese's reckless driving. The jury found him guilty.

¶ 50 This court, in *State v. Parker*, 60 Wash. App. 719, 806 P.2d 1241 (1991), considered **475 Robert Parker to have engaged in a venture with Keese and to be an active participant in the venture. The two engaged in a cat and mouse game. Keese testified that she would have slowed if Parker had decreased his speed.

¶ 51 Robert Parker engaged in the unlawful behavior of reckless driving before the fatal accident. Jameison engaged in no unlawful behavior before Williams fired the bullet that

killed Eduardo Villagomez. Jameison grabbed a gun that he owned legally. He stood his ground. The law did not compel him to leave the area of the Palomino Club. He fired only after Williams fired. Lashawn Jameison also never worked in tandem with Anthony Williams.

¶ 52 The State emphasizes *Black v. State*, 103 Ohio St. 434, 133 N.E. 795 (1921). In *Black*, Harry Black and Ward Logan, police officers, while on duty, entered a saloon. The two officers drank whiskey and then argued with other patrons about the merits of various firearms. A small target was placed in the rear of the saloon, and the officers and others demonstrated the capabilities of assorted firearms by firing six or seven shots. One of those shots missed the target or penetrated through the target, passed through the rear of the saloon, and fatally wounded David Gerber, who ***207** walked in the busy alley at the rear of the saloon. A jury convicted the officers of manslaughter. On appeal, the officers asserted that the evidence did not suffice to convict them because the State failed to present proof that a bullet fired by either killed Gerber. The court affirmed the conviction by holding that all those who had a common purpose to participate in the shooting at the target were equally guilty of the commission of the crime.

¶ 53 Lashawn Jameison lacked a common purpose with Anthony Williams. We know who fired the shot that killed Eduardo Villagomez.

[16] ¶ 54 Another Washington decision on point is *City of Auburn v. Hedlund*, 165 Wash.2d 645, 201 P.3d 315 (2009). As previously noted, a person is not an accomplice to a crime if he or she is a victim of that same crime. Teresa Hedlund hosted a party where liquor flowed. Following the party, Hedlund rode with five other passengers squashed into a Ford Escort. Hedlund remarkably videotaped the trip. The driver was intoxicated as a result of the party, and he drove into a concrete pillar. Hedlund was the only survivor of the single car accident. She sustained serious injuries herself. The city of Auburn charged her with being an accomplice to driving under the influence and reckless driving. The State contended that Hedlund's videotaping encouraged the driver to showboat and drive recklessly. At the close of the City's case in chief, the trial court dismissed the charges because a victim may not be charged as an accomplice under RCW 9A.08.020. The Supreme Court affirmed.

¶ 55 In *Hedlund*, the State of Washington argued before the Washington Supreme Court that Hedlund should not be considered a victim of the driver's crime because Hedlund's acts of encouragement occurred before the collision with the column. The court rejected the argument. The exception for victims does not extend only to those whose complicity coextended at the time of the crime. Although the court deemed Hedlund's conduct to be reprehensible, the court did not wish to limit the definition of the term "victim."

***208** ¶ 56 Although Anthony Williams likely wished to strike Kwame Bates, not Lashawn Jameison, with the first bullet, one police report declared that Williams also fired the first shot in Jameison's direction. In that sense, Jameison was a victim of Williams's assaultive behavior.

¶ 57 If we read "encourage" too broadly, the ramifications of accomplice liability could be endless. One can analogize Lashawn Jameison's station to the purchaser of a controlled substance. The State could contend and some states have contended that the purchaser of the substance commits not only the crime of possession of the controlled substance but also the crime of delivery of the substance by reason of accomplice liability. By reason of the buyer wishing to purchase the unlawful drugs, the buyer encouraged the seller to deliver the drugs.

¶ 58 In *Robinson v. State*, 815 S.W.2d 361 (Tex. App. 1991), the State convicted Michael ****476** Robinson of delivery of marijuana. The appellate court reversed because the defendant purchased the marijuana from a third party. The State argued that, as purchaser, Robinson solicited, encouraged, directed, or aided the commission of the offense. The court noted that the victim of the crime may not be held as an accomplice even though his conduct in a significant sense assists in the commission of the crime. Since the buyer and the seller enter the transaction from opposite poles, they do not aid and assist one another. Their conduct is the antithesis of one another.

¶ 59 We worry about other ramifications of the State's theory of criminal liability. If one stretches the State's argument, Lashawn Jameison would be responsible for his own murder, if Anthony Williams' bullet struck him.

¶ 60 Let us assume a man nags at his wife. An irritated wife retrieves a gun and shoots at her husband. The bullet misses and wounds the couple's child. Under the State's theory, the husband could incur accomplice liability. The husband's conduct encouraged the wife to fire her gun. One may consider this example extreme because the husband ***209**

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performed no unlawful act and the wife acted irrationally. Nevertheless, Lashawn Jameison performed no criminal act preceding Anthony Williams' first bullet and Williams acted irrationally.

Drive-By Shootings

¶ 61 On appeal, as in the trial court, the parties dispute whether the unit of prosecution for the charge of drive-by shooting constitutes the number of shots fired by the accused or the number of bystanders threatened by the shootings. We address a distinct question.

¶ 62 The controlling statute, RCW 9A.36.045(1), declares:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge *is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter* or the firearm, or both, to the scene of the discharge.

(Emphasis added.) Key to this appeal is what constitutes the immediate area of the motor vehicle that transported the shooter.

¶ 63 We decline to address how to gauge the unit of prosecution for the offense of drive-by shooting. After the parties filed briefs, this court decided *State v. Vasquez*, 2 Wash. App. 2d 632, 415 P.3d 1205 (2018), which requires a stated proximity between the shooter and his vehicle for purposes of the prosecution. We directed the parties to address this recent decision.

¶ 64 In *State v. Vasquez*, Anthony Vasquez shot and killed Juan Garcia as Garcia sat in the front passenger side of a GMC Envoy parked at the Airport Grocery in Moses Lake. For minutes prior to the shooting, the Envoy was parked near the Airport Grocery's front entrance. Vasquez then arrived at the scene in a Toyota pickup. The Toyota ***210** was parked on the side of the grocery, next to a fenced utility area, approximately sixty-three feet away from the Envoy. Once the Toyota was parked, Vasquez ran from the pickup and hid behind the utility fence for a minute. Vasquez then rushed around the corner of the grocery, across the front-side of the Envoy, and over to the area of the front passenger window of the Envoy. The front window was partially rolled down, exposing Garcia to Vasquez. Vasquez shot and killed Garcia from point-blank range. Vasquez then retreated to the Toyota and the car sped away.

[17] ¶ 65 On appeal, this court agreed with Anthony Vasquez that the State's evidence did not suffice to convict him of a drive-by shooting. RCW 9A.36.045(1) demands that the shooter be in the "immediate area" of the vehicle that transported him. We did not establish a concise measurement for determining the immediate area. Nevertheless, we relied on *State v. Rodgers*, 146 Wash.2d 55, 43 P.3d 1 (2002), when fashioning some language to assist in measuring the immediate area in individual circumstances. The legislature narrowly drew the "drive-by shooting" definition. *Rodgers* and *Vasquez* employed two dictionary definitions of "immediate." ****477** The first defined "immediate" as "existing without intervening space or substance ... being near at hand: not far apart or distant." Webster's Third New International Dictionary 1129 (1986); *State v. Rodgers*, 146 Wash.2d at 62, 43 P.3d 1; *State v. Vasquez*, 2 Wash. App. 2d at 636, 415 P.3d 1205. The second defined "immediate" as "[n]ot separated in respect to place; not separated by the intervention of any intermediate object." Black's Law Dictionary 749 (6th ed. 1990); *State v. Rodgers*, 146 Wash.2d at 62, 43 P.3d 1; *State v. Vasquez*, 2 Wash. App. 2d at 636, 415 P.3d 1205.

[18] ¶ 66 Based on these dictionary definitions, we wrote, in *State v. Vasquez*, that the immediate area was either inside the vehicle or from within a few feet or yards of the vehicle. The crime of drive-by shooting contemplates a shooter who is either inside a vehicle or within easy or immediate reach of the vehicle. Intervening obstacles disqualify a location from being within the immediate area.

***211** **[19]** ¶ 67 In *State v. Rodgers*, the Supreme Court held two blocks did not fall within the immediate area. In *State v. Vasquez*, we held that a distance of sixty-three feet did not qualify as the immediate area. When Lashawn Jameison fired his responding shots, Jameison likely stood closer than sixty-three feet of the Toyota Camry, the car in which he traveled to the Palomino Club. We still hold that Jameison did not stand within the immediate area. The obstacle of an additional car and a telephone pole stood between Jameison and the Camry. The Camry was not within his immediate reach. Jameison stood more than a few feet or yards from the Camry.

¶ 68 We do not base our decision on the ground that the shooting lacked proximity in time to when Lashawn Jameison arrived in the Toyota Camry, but we note that Jameison had

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not recently ridden in the car. He had entered a club and partied in the intervening minutes.

¶ 69 The State appealed the dismissal of twelve of the fourteen drive-by shooting charges. We affirm the dismissal of those twelve charges, but lack authority to now dismiss the remaining two charges because those charges are not before the court. We remand for further proceedings with regard to the two charges in light of our opinion.

CONCLUSION

¶ 70 We affirm the trial court's dismissal of the murder and manslaughter charges and twelve of fourteen drive-by shooting charges brought against Lashawn Jameison. We remand for further proceedings consistent with our opinion.

Lawrence-Berrey, C.J.

Siddoway, J., concur.

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