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COA NO. 36764-9-III

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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CARLOS JAMIE-MCDOUGALL,
Petitioner.

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

Spokane County Cause No. 16-1-01233-32

The Honorable John O. Cooney, Judge

PETITION FOR REVIEW

Skylar T. Brett
Attorney for Appellant/Petitioner

LAW OFFICE OF SKYLAR T. BRETT, PLLC
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

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I. IDENTITY OF PETITIONER

Petitioner Carlos Jamie-McDougall, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Carlos Jamie-McDougall seeks review of the Court of Appeals unpublished opinion entered on May 6, 2021. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

A conviction must be reversed for insufficient evidence when no rational jury could have found the allegation proved beyond a reasonable doubt. Did the state present insufficient evidence to convict Mr. Jamie-McDougall of two counts of rape of a child when the prosecutor elected to base one of those counts on an allegation that was not supported by any evidence?

IV. STATEMENT OF THE CASE

Carlos Jamie-McDougall was nineteen years old when his daughter, I.J.M. was born. RP 96.¹ Mr. Jamie-McDougall spent time with I.J.M. almost daily. RP 91. But, per the parenting plan with her mother, Mr. Jamie-McDougall was never allowed to be alone with his daughter.

¹ Unless otherwise specified, all citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volumes spanning 2/11/19 *et seq.*

RP 98. All of his contact with I.J.M. had to supervised by someone else.

RP 98. This was not difficult to achieve because Mr. Jamie-McDougall lived in a household with six other people. RP 99.

In fact, I.J.M.'s mother was also present during almost all of Mr. Jamie-McDougall's time with his daughter. RP 90-91.

When I.J.M. was about four years old, she disclosed to several family members that her mother's current boyfriend, Antonio Castillo, had touched her inappropriately. RP 166-67, 174, 184-85. I.J.M. lived with her mother and Castillo at the time. RP 99.

Those family members told I.J.M.'s mother about what she had said. RP 167, 174, 185. But the mother never took any action. Instead, she accused Mr. Jamie-McDougall of touching I.J.M. inappropriately and reported those claims to the police. *See* RP 92-94.

The state charged Mr. Jamie-McDougall with two counts of rape of a child in the first degree and one count of first-degree child molestation. CP 1-2.

The police never took any steps to investigate the allegations against Castillo. RP 150.

Mr. Jamie-McDougall's trial occurred about four years later, when I.J.M. was eight years old. *See* RP *generally*. By that time, I.J.M. claimed not to remember what had happened. RP 106-07.

At trial, I.J.M. testified that no one else had lived with her and her mother at the time of the abuse, apparently forgetting that Castillo lived with them at that time. RP 99, 110.

I.J.M. also said that she spent the night at her father's house frequently during the time of the allegations. RP 111. But her mother testified that she only spent the night there one or two times. RP 100.

The vast majority of the state's evidence was in the form of a video of a forensic interview conducted when I.J.M. was four years old. *See* Ex. 1. Many of I.J.M.'s claims during that interview were internally inconsistent. *See* RP (exhibit 1).

For example, I.J.M. said that Mr. Jamie-McDougall's fingers had been inside her body and that he had put "his privates" in hers. RP (exhibit 1) 21, 25. But she also said that nobody put anything inside her body. RP (exhibit 1) 30.

When asked to circle parts on a picture of a child's body that had been touched, I.J.M. circled her vaginal area in addition to her buttocks. RP (exhibit 1) 24; RP 127-28. But she did not say anything about where she had been touched on her buttocks or what part of Mr. Jamie-McDougall's body (if any) had touched her there. *See* RP (exhibit 1) *generally*.

Even so, during closing argument, the prosecutor elected to rely on the claim that Mr. Jamie-McDougall's penis had contacted I.J.M.'s anus for one of the two charges of rape of a child. RP 220. The other count was based on the allegation that Mr. Jamie-McDougall's fingers had penetrated I.J.M.'s vagina. RP 221.

The jury found Mr. Jamie-McDougall guilty of each charge. CP 101-03.

Mr. Jamie-McDougall timely appealed. CP 149. The Court of Appeals affirmed his convictions but remanded his case for resentencing in light of the Supreme Court's decision in *State v. Blake*.² See Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that the state presented insufficient evidence to support Mr. Jamie-McDougall's conviction for one of the counts of rape of a child because "patently equivocal" evidence is insufficient to constitute proof beyond a reasonable doubt.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element of the charge proven beyond a reasonable

² *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012)
review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013).

In order to convict Mr. Jamie-McDougall of rape of a child in Counts I and II, the state was required to prove beyond a reasonable doubt that he engaged in sexual intercourse with I.J.M. CP 1; RCW 9A.44.073.

The term sexual intercourse is defined as follows:

“Sexual intercourse”

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1).

In order to differentiate Count I from Count II – both of which charged Mr. Jamie-McDougall with rape of a child – the state elected to rely upon a different type of alleged conduct in support of each charge. *See* RP 212-21.

The prosecutor informed the jury that one of the counts was based on the allegation that Mr. Jamie-McDougall had penetrated I.J.M.’s vagina with his fingers. RP 221. The other count was based on the state’s claim

that Mr. Jamie-McDougall's penis had come into contact with I.J.M.'s anus. RP 220.

But there was no evidence that Mr. Jamie-McDougall's penis had ever contacted I.J.M.'s anus. *See RP generally*. When I.J.M. circled the areas where Mr. Jamie-McDougall had touched her on a picture of a child's body, she indicated that he had touched her buttocks. *See RP (exhibit 1) 24; RP 127-28*. But she did not say anything about where she had been touched on her buttocks or what part of Mr. Jamie-McDougall's body (if any) had touched her there. *See RP (exhibit 1) generally*.

I.J.M. said that Mr. Jamie-McDougall touched her with his hand. RP (exhibit 1) 25. She was explicit that Mr. Jamie-McDougall did not touch her with anything other than his hands. RP (exhibit 1) 29. She also explicitly said that Mr. Jamie-McDougall's "private" did not touch her anywhere on her body. RP (exhibit 1) 30.

I.J.M. also said, contradictorily that Mr. Jamie-McDougall had put his "private" inside of her "private." RP (exhibit 1) 25. The prosecution apparently took that disclosure to mean that Mr. Jamie-McDougall had penetrated I.J.M.'s vagina, electing to rely on that allegation for one of the counts of rape of a child.

But there was no evidence to support the state's claim that Mr. Jamie-McDougall's penis had contacted I.J.M.'s anus, as claimed in the

prosecutor's election for the second count of rape of a child. *See* RP (exhibit 1) *generally*. Indeed, there was no evidence that any part of his body had ever touched her anus, only that something had touched her buttocks. I.J.M. did not clarify what part of Mr. Jamie-McDougall's body, if any, had touched her buttocks. *See* RP (exhibit 1) *generally*. No rational jury could have found the allegation of contact between Mr. Jamie-McDougall's penis and I.J.M.'s anus proved beyond a reasonable doubt.

Even so, the Court of Appeals affirms that conviction, relying on I.J.M.'s claim that Mr. Jamie-McDougall's "privates" and gone into her "privates." Appendix, p. 5. The Court notes that I.J.M. pointed to her buttocks in the video as she said that. Appendix, p. 5. But penetration of the buttocks does not qualify as sexual intercourse. *See State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011).

When combined with I.J.M.'s statements that no one had put anything inside her body and that Mr. Jamie-McDougall's "private" did not touch her anywhere on her body, the evidence of anal penetration was "patently equivocal." RP (exhibit 1) 30; *State v. Vasquez*, 178 Wn.2d 1, 14-15, 309 P.3d 318 (2013).

A reviewing court may draw reasonable inferences, but may not resort to speculation or "arbitrary assumption." *Id.* at 16 (*citing Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *Bailey*

v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)).

Accordingly, a conviction is supported by insufficient evidence if the state presents only equivocal evidence as to an element. *Id.* at 14.

In *Vasquez*, for example, this Court reversed a forgery conviction for insufficient evidence because the state presented only equivocal evidence that the accused had acted with intent to injure or defraud. *Id.* The evidence demonstrated that Mr. Vasquez possessed counterfeit identification cards, but it was not clear whether he had ever intended to pass them off as valid. *Id.* at 14-15.

The testimony on the issue was “unclear” because it could have demonstrated that Vasquez admitted only to owning the cards, or it could have meant that he had tried to persuade the state’s witness that they were legitimate documents. *Id.* at 15. Accordingly, this Court held that the evidence was “patently equivocal and [could not] serve as a basis for inferring Vasquez’s intent to injure or defraud.” *Id.*

The same is true of the evidence in Mr. Jamie-McDougall’s case, at most, the evidence of anal penetration was equivocal. I.J.M. pointed to her buttocks when appearing to describe penetration, but she also said that nothing had ever entered her body. RP (exhibit 1) 25, 30. That “patently equivocal” evidence is insufficient to prove the element beyond a reasonable doubt. *Id.*

No rational jury could have found beyond a reasonable doubt that Mr. Jamie-McDougall committed two counts of rape of a child, as they were elected by the prosecutor during closing. The Court of Appeals should have reversed one of of Mr. Jamie-McDougall's convictions for rape of a child for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

VI. CONCLUSION

The issue raised by Mr. Jamie-McDougall's case is significant under the State Constitution because it addresses the evidence necessary to constitute proof beyond a reasonable doubt. The issue is of substantial public interest because it could impact a large number of criminal cases. This Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted June 4, 2021.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review,
postage pre-paid, to:

Carlos Jamie-McDougall/DOC#404168
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the
recipient(s).

In addition, I electronically filed the original with the Court of
Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 4, 2021.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

FILED
MAY 6, 2021
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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 36764-9-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
CARLOS ANTHONY JAIME-)	
MCDUGALL, a/k/a CARLOS JAMIE-)	
MCDUGALL,)	
)	
Appellant.)	

PENNELL, C.J. — Carlos Jaime-McDougall appeals his convictions for two counts of child rape and one count of child molestation. We affirm his conviction, but remand for resentencing pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

FACTS

In 2015, four-year-old I.J.M.¹ made statements to her mother indicating she had been sexually assaulted by her then 19-year-old father, Carlos Jaime-McDougall. At the time of the disclosure, Mr. Jaime-McDougall did not live with I.J.M. and her mother. He had visitation with I.J.M. pursuant to a parenting plan. I.J.M.'s mother reported I.J.M.'s statements to law enforcement.

The State's investigation included a forensic interview of I.J.M. She told the interviewer Mr. Jaime-McDougall put his "privates in mine all the time." Ex. 1 at 15 min., 17 sec.; Verbatim Transcript of Exhibit No. 1 (Nov. 30, 2015) (VTE) at 21. Through the use of diagrams, I.J.M. identified the areas she referred to as "privates" as the areas of the front pelvis and buttocks. I.J.M. reported Mr. Jaime-McDougall touched her privates with his hand and put his fingers inside her body. I.J.M. referred to her buttocks as her "booty."

The interviewer asked I.J.M. whether anyone had ever shown her their privates. I.J.M. responded that Mr. Jaime-McDougall had. The interviewer then asked where Mr.

¹ To protect the privacy interests of the child victims, we use their initials throughout this opinion. Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

Jaime-McDougall's privates went. I.J.M. said "in here," while pointing to her "privates," and "in my booty too," while pointing to her buttocks. Ex. 1 at 0:21:34; VTE at 28. As I.J.M. pointed, she moved her arm back and forth.

The interviewer presented I.J.M. with a diagram of an adult man. I.J.M. was asked to draw a circle around the part of the body Mr. Jaime-McDougall used to touch her privates. I.J.M. drew a circle around the figure's hand. The interviewer asked if Mr. Jaime-McDougall had ever touched her privates or put something in her privates with any other part of his body. I.J.M. answered, "no." Ex. 1 at 22 min., 48 sec.; VTE at 29. The interviewer then asked I.J.M. to indicate on the diagram where Mr. Jaime-McDougall's privates were. I.J.M. circled the area around the penis. The interviewer then again asked, with the diagrams previously used by I.J.M. to identify her privates, where Mr. Jaime-McDougall's privates went. I.J.M. pointed to the previously-identified areas of the pelvis and buttocks. When asked where her mother spanked her, I.J.M. said, "my booty." Ex. 1 at 24 min., 29 sec.; VTE at 31-32.

The State charged Mr. Jaime-McDougall with two counts of first degree child rape and one count of first degree child molestation. Trial took place when I.J.M. was eight years old. At trial, the State played the recording of I.J.M.'s forensic interview. It also

introduced the diagrams used by I.J.M. during her interview. I.J.M. testified, but could not recall the details of the assaults.

During closing, the State differentiated the two counts of child rape. The State explained one count pertained to vaginal penetration and the other pertained to anal penetration. The jury found Mr. Jaime-McDougall guilty on both counts of child rape and the count of child molestation.

At his sentencing, Mr. Jaime-McDougall's attorney recommended a low-end sentence of 209 months. The court accepted this recommendation and imposed a 209-month sentence, to be followed by a lifetime term of community custody.

Mr. Jaime-McDougall now appeals.

ANALYSIS

Sufficiency of evidence

Mr. Jaime-McDougall contends the State did not prove one of the two counts of child rape because the evidence failed to show anal penetration. We disagree.

The standard governing a challenge to the sufficiency of the State's evidence is rigorous. We view the evidence in the light most favorable to the State and ask "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). As part of our

sufficiency analysis, we do not engage in credibility determinations. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009).

We “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Id.* at 874-75.

“A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” RCW 9A.44.073. “Sexual intercourse” is defined as having “its ordinary meaning” and “any penetration of the vagina or anus however slight, by an object, when committed on one person by another.” RCW 9A.44.010(1)(a), (b). Proof that the defendant penetrated the victim’s buttocks, but not the anus, is insufficient to establish “sexual intercourse” and therefore child rape. *State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

While the State’s evidence of anal penetration was not overwhelming, it was sufficient. I.J.M. indicated Mr. Jaime-McDougall’s “privates,” i.e., his penis, went in her “privates,” i.e. her vagina, and “booty.” Ex. 1 at 21 min., 34 sec.; VTE at 30. This was accompanied by I.J.M. thrusting her arm back and forth, while pointing at her buttocks, in a way evocative of sexual intercourse. From this testimony, the jury could reasonably

infer I.J.M. was describing anal penetration. Inconsistencies in I.J.M.'s testimony were for the jury to resolve, they are not an issue for appeal.²

Sentencing claims

Mr. Jaime-McDougall raises several claims regarding the legality of his sentence, one of which is dispositive. After Mr. Jaime-McDougall's case was submitted, the Supreme Court decided *Blake*, which voided Washington's criminal law prohibiting possession of controlled substances. Mr. Jaime-McDougall has a prior conviction for possession of controlled substances. That conviction was used to enhance his standard sentencing range. The parties agree that, in light of *Blake*, Mr. Jaime-McDougall is entitled to resentencing based on an offender score that does not include the controlled substances conviction. We agree with this assessment. Because Mr. Jaime-McDougall will be resentenced, we need not address his remaining sentencing claims.


² The State interprets Mr. Jaime-McDougall's sufficiency challenge to also raise a double jeopardy claim. We do not read Mr. Jaime-McDougall's brief in this manner. To the extent Mr. Jaime-McDougall intended to raise a double jeopardy challenge, his claim will not be reviewed as it is inadequately briefed. *Thomas*, 150 Wn.2d at 868-69.

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CONCLUSION

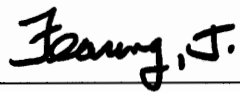
Mr. Jaime-McDougall's convictions are affirmed, but this matter is remanded for resentencing pursuant to *Blake*.

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.



Pennell, C.J.

WE CONCUR:



Fearing, J.



Staab, J.

LAW OFFICE OF SKYLAR BRETT

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