No.
Court of Appeals No. 39076-4-III

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CODY KLOEPPER,

Petitioner.

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

Petition for Review

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A. Introduction

A few numbers must drive the determination of whether Cody Kloepper is entitled to a new trial. Those numbers are 1 in 54,000,000,000,000,000 and 0. The first is the minimum chance that semen found on the rape victim in this single-assailant assault belonged to anyone other than Sal Contreras. The second, 0, is the amount of Cody Kloepper's semen and DNA found on the rape victim's clothing or person. That second number, 0, is also the number of jurors who learned of this evidence at the trial that led to Mr. Kloepper's conviction for the crime.

The question on appeal is would those numbers have mattered to the jury which convicted Mr. Kloepper. The trial court said no; this DNA evidence would not probably change the verdict. The Court of Appeals agreed with that conclusion. That conclusion is indefensible. By any standard, Mr. Kloepper is entitled to a new trial.

B. Identity of Petitioner and Opinion Below

Sal Contreras's semen and DNA were found all over the victim's clothing. Mr. Kloepper's DNA was found nowhere on the victim's body or clothing. But to this day State has never charged Contreras with the crimes. Instead, Mr. Kloepper was convicted of the crimes in 2011. Contreras even testified at trial on behalf of the prosecution.

A jury convicted Mr. Kloepper based almost exclusively on circumstantial evidence. The jury never knew of the DNA evidence as the testing was not performed until years later. And when it was discovered, Contreras changed his story.

Contreras's new explanation contradicts his trial testimony. It is clear he either lied at trial or is lying now. It is also now clear he has lied on numerous occasion to police investigating the case. And yet he has still never been charged with committing any crime.

But that is not all that has changed. In response to Mr. Kloepper's motion for new trial, the prosecution manufactured

a new theory to try to explain away all that was wrong with its theory at trial in light of the new evidence.

Nonetheless, the lower courts have concluded none of this would have allowed a single juror to come to a different conclusion than they did at trial. The courts denied a motion for a new trial concluding Mr. Kloepper has not shown the newly discovered DNA evidence and evidence of Contreras's lies would have probably changed the result of trial.

That conclusion is incorrect. That conclusion is contrary to cases of this Court and the Court of Appeals. That conclusion creates an issue of substantial public interest.

Mr. Kloepper asks this Court to accept review under RAP 13.4.

C Issues Presented

1. A person is entitled to a new trial under CrR 7.8 where newly discovered evidence would probably change the outcome of the trial. That standard is met where a single juror hearing the new evidence could have a doubt regarding the state's case.

The victim testified she was attacked by a single person. DNA evidence discovered several years after Mr. Klopper's trial excluded him as the source of semen on the victim's clothing. Instead, that testing determined Sal Contreras was the sole source of the semen. Because that new evidence could cause a juror to have a reasonable doubt as to the state's trial case that new evidence would probably change the outcome of the trial.

2. When determining whether newly discovered evidence would probably change the outcome of trial, a court must consider the new evidence in light of the evidence the jury heard at trial. Here, however the court weighed the new evidence against evidence which was never presented to the jury. In fact, the court weighed the new evidence against new testimony of a witness who had testified at trial, but now offered evidence contradicting their trial testimony. And the court weighed the evidence against a new theory of guilt the State had not and could not have presented to the jury. The court wrongly relied on this new and contradictory testimony to

conclude the exculpatory DNA evidence would not probably have changed the outcome of trial.

3. Where an important witness offers sworn statements which contradict the testimony they provided at trial, that contradictory statement is newly discovered evidence warranting a new trial. Here, Sal Contreras provided sworn testimony which contradicts several key aspects of his trial testimony. Rather than provide the court a basis on which to deny Mr. Kloepper's motion for new trial, Contreras's new testimony further supports the need for a new trial.

D. Statement of the Case

1. A women is attacked in her apartment.

As she prepared coffee early one Saturday morning in her Richland apartment a women was attacked by a man. 1RP 126.[1]

[1] This Court granted Mr. Kloepper's motion to transfer the transcripts from the direct appeal following his trial, 39076-4-III. The Verbatim Report of Proceedings now consist of seven volumes and will be cited as follows: Volume 1 consisting of the proceedings of August 4, 8, and 9, 2011; Volume 2 consisting of the proceedings of August 10, 2011;

The man hit her repeatedly in the head and body with a metal bar. 1RP 127-29. The man either did or attempted to penetrate the victim with his penis or possible a finger, she could not tell. 1RP 130-31, 135.

After her attacker left her apartment, the victim called 911. 1RP 132. The victim twice told the operator she did not know her attacker and had not seen him before. 1RP 162, CP 380, 382. At one point she posited the man looked like an employee of the apartment complex. CP 380. She then quickly repeated she did not know who it was. *Id.*

When the first officer arrived she told them she did not know the man. 1RP 93.

Volume 3 consisting of the proceedings of August 11, 2011; Volume 4 consisting of the proceedings of August 12 and 15, 2011, and November 4, 2011; Volume 5 consisting of the proceedings of September 23, 2011; Volume 6 consisting of the proceedings of September 29, 2021, and July 13, 2022; and, Volume 7 consisting of the proceedings of November 19, 2021, and January 21, 2022.

2. Police suspect Mr. Kloepper is the attacker.

Mr. Kloepper was a maintenance employee at the apartment complex where the attack occurred. 4RP 627. The night before he had met a friend at a bar. 2RP 244-45. The two drank beer for several hours.

When Mr. Kloepper got home to his house in Kennewick, he began reviewing Craigslist ads for casual sexual encounters. 4RP 632. He responded to an ad posted by Sal Contreras. *Id.* After a period of texting the two agreed to meet at Contreras's home in Finley. 4RP 633-34.

Mr. Kloepper explained that after he arrived the two talked for a while discussing family and work. 4RP 634. Later, Contreras performed oral sex on him. *Id.* Following sex, Mr. Kloepper was angry with himself as a he had a wife and kids. *Id.* He asked Contreras to delete his number and he left. *Id.*

Mr. Kloepper was due to work a few hours later so he drove to the apartment complex, retrieved keys from the manager's office and slept in a vacant apartment. 4RP 634-35.

Several hours after the attack, a co-worker saw Mr. Kloepper leaving the complex's office. 3RP 462-63. A key box in the manager's office, accessible to all employees, contains keys for each apartment. 3RP 413. Mr. Kloepper told his colleague he had spent the night in a vacant apartment he had been working on because he was too drunk to drive all the way home. 3RP 463. He further explained he was too hungover to work and was going home. *Id.*

Police investigating the attack came to his home that afternoon and asked Mr. Kloepper for an interview. He agreed. Mr. Kloepper told police he followed his friend home from the bar and then spent the night at the apartment complex where he worked. 3RP 517-18. However, the friend would testify Mr. Kloepper had not followed him home. 2RP 276.

3. The victim identifies Karl Goering as the man who attacked her and insists Mr. Kloepper was not the person who attacked her.

That afternoon, due to her injuries, the victim was transferred from a Tri-Cities' hospital to a hospital in Spokane. 2RP 216, 218.

At the Spokane hospital she viewed a photo array which included a photo of Mr. Kloepper.[2] 1RP 138-40, 3RP 552. She knew Mr. Kloepper, having seen him numerous times at the complex. 1RP 140, 3RP 552. She did not identify him as her attacker. 3RP 552.

A few days later, the victim viewed a second photo array at the police department. Police included Mr. Kloepper's photo in this array as well. RP 524-26. The victim recognized him, but did not identify him has her attacker. However, when she viewed a photo of Karl Goering her jaw dropped and her eyes

[2] Officer's used the photo of Mr. Kloepper from his employee ID obtained from the apartment complex. 2RP 334-35. The coworker he ran into on Saturday morning believed his hair was longer that morning than in the photo showed to the victim in Spokane that afternoon. 3RP 462.

opened wide. RP 370-71. She said "that is the guy." *Id.* at 371. She was "absolutely adamant" Goering attack her. 1RP 144.

A few days later she picked Goering out of a line up. 2RP 343. Again, she was "positive" Goring attacked her. 1RP 144.

The State charged Goering. *Id.*

When asked by Goering's attorney if Mr. Kloepper was her attacker the victim insisted he was not. 1RP 145. She added, she had memorized Goering's face during the attack. *Id.* Again she was "positive" and "adamant" Goering attacked her. 1RP 144-45.

4. The victim abandons her identification of Goering after police incorrectly tell her DNA found at the scene "matches" Mr. Kloepper. The victim is now confident Mr. Klopper was her attacker.

Among the evidence collected at the scene was a small piece of rubber covered in the victim's blood. Y-STR DNA testing of that rubber fragment revealed a mixed male sample. 4RP 588. Y-STR testing cannot provide the degree of individualization that other forensic DNA testing can. 4RP 583.

Instead, it merely provides that the tested chromosome is within a particular male's paternal lineage. *Id*. In this case, the results showed the sample was consistent with Mr. Kloepper's, his paternal lineage, and 1 in 440 of males in the population at large. *Id.*

Despite the obvious limitations of Y-STR testing, police detectives inaccurately told the victim the DNA "matched" Mr. Kloepper. CP 236, 242.

The State charged Mr. Kloepper with the crime. CP 6-8.

Despite her prior "absolute" certainty Goering attacked her, at trial the victim told the jury Mr. Kloepper had. She offered she had not previously identified Mr. Kloepper because she did not want to accuse an innocent man. 1RP 147. But if she was certain he was her attacker, as she testified at trial, she would not have been accusing an innocent man. Nor did she explain how her desire not to accuse an innocent could explain her certainty that Mr. Goering, apparently an innocent man, was her attacker.

5. The State calls Sal Contreras as a witness.

When the police first contacted Contreras he lied to them. He told them he and Mr. Kloepper met in an Albertson's parking lot, and that nothing more happened. 2RP 296.

At trial his story changed. Contreras told the jury he and Mr. Kloepper connected via Craigslist. After several texts, Mr. Kloepper arrived at Contreras's house in Finley. 2RP 295-96. Contreras was immediately turned off by Mr. Kloepper's intoxication and the smell of cigarettes. 2RP 297-99. Contreras told Mr. Kloepper he was not interested in sex and asked him to leave.

Mr. Contreras insisted the entire encounter lasted no more than 15 to 20 minutes. 2RP 298-99, 301. He was adamant no sexual contact occurred. He told the jury, that he "definitely" would have acknowledged it had it occurred. 2RP 310.

In their closing argument, the prosecutor told the jury Contreras had voluntarily appeared for trial to "do the right thing." 4RP 707. The prosecutor told jurors Contreras had

assured them that had he had sexual contact with Mr. Kloepper he would have told them. 4RP 708. The prosecutor accused Mr. Kloepper of lying about the sexual encounter. 4RP 707-08.

The jury convicted Mr. Kloepper. CP 9.

6. DNA identifies Sal Contreras's semen in numerous locations on the sweatshirt and pants the victim wore at the time of the attack.

Several years after trial the parties stipulated to an order to conduct DNA testing on several items including the sweatshirt and sweatpants the victim was wearing when she was attacked. That testing revealed the presence of semen in a number of locations on both the sweatshirt and pants. CP 124-27. Testing determined the semen was from a single source, meaning only one male. DNA testing excluded Mr. Kloepper as the source of that semen. *Id.*

Further testing confirmed Contreras was a match to the DNA in the semen stains. CP 128-29 Additionally, testing confirmed Contreras was included as a possible source of the mixed Y-STR sample from the rubber item. *Id.* The chance that

a person other than Contreras was the source of the semen on the victim's clothing was no less than 1 in 54 quadrillion. *Id.*

Dr. Charlotte Word articulated two possible explanations for the presence of Contreras's DNA. CP 137, 732-33. First that the semen and DNA was transferred directly from the attacker to the victim in the course of the assault. CP 138. Second, the DNA and semen was transferred from Contreras to the attacker and then to the victim's clothing during the attack. CP 140-41, 733. Dr. Word explained the chain of events necessary for such a secondary transfer, coupled with Contreras's semen in multiple locations on the victim's clothing and the complete absence of any of Mr. Kloepper's DNA made that theory extremely unlikely. CP 138, 733.

Mr. Kloepper filed a motion for a new trial. CP 52-360.

7. Contreras changes his story again.

When contacted by police after these results, Contreras continued to deny there had been any sexual contact with Mr.

Kloepper. 6RP 92-93. Only after officers told him his DNA was found on the rape victim's clothing did his story begin changed.

At a hearing on Mr. Kloepper's motion for new trial, the court permitted Contreras to testify under oath. Contrary to his repeated claims at trial that his contact with Mr. Kloepper lasted only 15 to 20 minutes, Contreras now testified it lasted anywhere from 45 minutes to an hour-and-a-half. 6RP 52. Before the jury, Contreras dismissed the night as insignificant and a long time ago. 2RP 297, 301. At trial, Contreras adamantly denied any sexual contact occurred. 2RP 310. But 11 years later he recalled there was a significant amount of touching. He even thought he may have possibly ejaculated, although he was not sure. 6RP 50-51, 88. When asked directly, he could not say for sure he had ejaculated. 6RP 88.

The State responded to Mr. Kloepper's motion for a new trial, by arguing for the first time that Contreras's DNA and semen were transferred to the victim's clothing by Mr. Kloepper. CP 369-71. The State made no effort to explain how

its new theory could fit with the evidence the jury heard from Contreras that he did not have sexual contact with Mr. Kloepper.

Mr. Klopper responded that the State's new evidence and theory was a question for a jury.

> *8. The trial court concludes, and the Court of Appeals affirms, that evidence of Contreras's semen and DNA on the victim, but not Mr. Kloepper's, would not probably have changed the outcome of trial.*

Despite Contreras's inability to say so even in his new testimony, the judge concluded there was a "good possibility" Contreras did ejaculate. CP 854. The judge then surmised this "suggests" the most likely explanation was that his semen was transferred onto Mr. Kloepper and subsequently to the victim's clothing. *Id.*

Based on that theory, the court concluded the evidence of Contreras's DNA and semen on the victim, but not Mr. Kloepper's, would probably not have changed the jury's verdict. CP 951. The court never explained how that theory

could work with the testimony that Contreras actually provided before the jury: that no sexual contact occurred.

The court denied Mr. Kloepper's motion for a new trial. CP 968.

The Court of Appeals affirmed that decision saying

> There is nothing in the record to suggest [Contreras] could have been the attacker. . . . Nothing places the man anywhere near the victim's apartment on the night of the attack.

Opinion at 2.

Nothing, except, of course, Contreras's semen, and only his semen, was found all over the victim's clothing. Nothing except Contreras lying to police about his activities that night, not once, not twice, but three times. Nothing except that Contreras lied under oath either to the jury or at the subsequent hearing, or both. And, nothing except, of course, that there was absolutely no evidence before the jurors that would have permitted them to conclude Mr. Kloepper transferred Contreras's semen to the scene after a sexual encounter

between the two because Mr. Contreras told police and the jury no sexual encounter occurred.

All of that placed Contreras at "the victim's apartment on the night of the attack," contrary to the Court's conclusion. Opinion at 2.

E. Argument

The conclusion that exculpatory DNA results would not have mattered to the jury which convicted Mr. Kloepper is absurd. If Mr. Kloepper's case does not demonstrate an entitlement to a new a trial, no case ever could.

Recognizing the ability of DNA to identify cases of wrongful conviction, Washington, like many other jurisdictions, has created a procedure for people to obtain DNA testing post-conviction. Legislative material explained the motivation of these changes. "Where DNA can establish actual innocence, the recommendations encourage the pursuit of truth over the invocation of appellate time bars." Substitute House Bill 2491, *Senate Bill Report*, 2 (56th Legislature, 2000 Regular Session)

The ability to seek post-conviction DNA testing has expanded over time. In 2005, with respect to one such expansion, prosecutors and attorneys representing convicted persons testified alike in favor of such expansion. A legislative summary of that testimony provides "DNA testing helps to ensure that justice is administered correctly for those few people that have been convicted of crimes that they did not commit." Substitute House Bill 1014, *House Bill Report*, 3 (59th Legislature, 2005 Regular Session).

None of that matters where a jury is never permitted to consider the exculpatory results.

In this case, a critical witness lied to the jury. But it was not Mr. Kloepper. Semen and DNA was found all over the victim's clothing. But it was not Mr. Kloepper's. Mr. Kloepper's DNA was found nowhere on the victim or her clothing. The semen belonged to a witness who testified for the State. And that is the same witness who lied to the jury. The

power of DNA to ensure just outcomes is lost when juries are not permitted to hear of these exculpatory results.

The analysis of both the trial court and the Court of Appeals eviscerates the hope and power of DNA to shed light on unjust convictions. And, the opinion of the Court of Appeals alters the standard for a new trial, contrary to the long-standing jurisprudence of this Court and the Court of Appeals.

1. Mr. Kloepper demonstrated the result of trial would have probably been different had the jury known Contreras's semen was found on the victim but Mr. Kloepper's DNA was not.

Among other requirements newly discovered evidence warrants a new trial where the evidence "will probably change the result of the trial." *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). That is the only criteria at issue here, and that standard is met in this case. Mr. Kloepper has shown the jury probably would not have returned a guilty verdict, had it known Mr. Kloepper's DNA was not on the victim but Contreras's DNA was.

Importantly, a motion for new trial is not a challenge to the sufficiency of the State's evidence. *State v. Davis*, 25 Wn. App. 134, 139-40, 605 P.3d 359 (1980) (evidence warrants a new trial even if it does "not completely exonerate[]"). It is enough to show "a rational trier of fact could reasonably doubt" the state's case. *State v. Roche*, 114 Wn. App. 424, 437, 59 P.3d 682 (2002). And that makes sense. Even a single juror holding a reasonable doubt prevents a conviction. That hung jury is by definition a different result than the guilty verdict obtained at trial.

These cases also make clear, a motion for new trial based upon newly discovered evidence is not a challenge to the sufficiency of the State's evidence supporting conviction. If it were, the proponent would not be asking for a new trial at all but outright dismissal as that is only remedy for insufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)

A request for a new trial based upon newly discovered evidence does not require the person to show they would be acquitted. The motion does not require the person show the State could not convict them based upon the evidence. It requires only that the person show the jury, at the trial which already occurred, would have reached a different result had they known of the newly discovered evidence. A hung jury is a "different result."

In fact, even newly discovered impeachment evidence warrants a new trial where it only undercuts the credibility of an important witness. *State v. Scott*, 150 Wn. App. 281, 294-97, 207 P.3d 495 (2009); *State v. Savaria*, 82 Wn. App. 832, 837-38, 919 P.2d 1263 (1996), *disapproved on other grounds, State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). Contreras's testimony at the motion hearing contradicting his trial testimony does just that.

One person committed the rape. Contreras's semen and DNA were all over the victim's clothing. Mr. Kloepper's semen

and DNA were nowhere to be found on the clothing. There was no explanation before the jury as to how Contreras's semen ended up all over the victim's clothing. The only conclusion the jury could have reached was that Contreras's semen was there because he committed the rape. Mr. Kloepper has shown a lone reasonable juror could have a reasonable doubt in light of the newly discovered evidence of Contreras's semen on the victim's clothing.

The State has insisted Mr. Kloepper must instead meet a higher burden and demonstrate the newly discovered evidence would have resulted in his acquittal. Amd. Brief of Resp't 27-31. Not one Washington case requires a person establish that they would have been acquitted (although Mr. Kloepper makes that showing here); they only require proof that a different outcome was required. Instead, every Washington cases the prosecutor cites parrots some variation of the standard that it would "probably change the result." A hung jury is a different result than a conviction.

The Court of Appeals purports to accept that demonstrating an acquittal is not required. Opinion at 11. Nonetheless, that erroneous reasoning permeates the opinion. The Court focuses entirely upon whether a jury *could* convict Mr. Kloepper. The court even faults Mr. Kloepper for failing to account for the possibility of conviction following a new trial. Opinion at 11.

First, that evinces the Court's misapprehension of the relevant standard; again, this is not a sufficiency challenge nor is a showing of acquittal required. Second, Mr. Kloepper does acknowledge the possibility of a second conviction following a new trial. That risk exists for every trial. But that risk does not foreclose his entitlement to have that trial. Again, he need not show he would win at a new trial, only that the newly discovered would "probably change the result of the trial" which already occurred. *Williams*, 96 Wn.2d at 223.

It is worth repeating the new evidence here would likely have led to an acquittal. The point remains, the standard of

"probably change the outcome" may be met even if the newly discovered evidence would lead only to a hung jury. Even as it claims not to, the opinion of the Court of Appeals relies on an incorrect legal standard.

> *2. When determining whether the newly discovered evidence would have probably changed the jury's verdict, the court must evaluate the new evidence in light of the evidence presented at trial.*

The question is whether the result probably would have been different if that same evidence *plus the new evidence* were presented to a jury. *See Davis,* 25 Wn. App. at 140-41 (emphasis added). The discovery of Contreras's semen and DNA stands in stark contrast to the evidence the State presented at trial. There was no evidence at trial from which the jury could have concluded the Contreras's semen was transferred by Mr. Kloepper.

It is not likely a reasonable prosecutor in a single-assailant rape case would choose to prosecute any person other than the person whose semen and DNA were found on the

victim. It is doubtful a reasonable prosecutor would make any other choice knowing the person to whom the semen and DNA belonged had lied to the jury and to police at least twice.

And assuming the prosecutor pursued that case, it could not have relied on Contreras's testimony to attack Mr. Kloepper's credibility. Instead, Contreras almost certainly would have asserted his Fifth Amendment privilege not to incriminate himself. And the State would still have been left to explain how Contreras's semen and DNA were on the victim but Mr. Kloepper's were not. And, would have needed to explain why Contreras lied.

Yet the Court of Appeals concludes "[t]here is nothing in the record to suggest" Contreras was "anywhere near" the crime. Opinion at 2. Contreras's semen and DNA were all over the victim's clothing. Mr. Kloepper's was not. That is pretty strong evidence of where Contreras was at the time of the crime. Indeed, countless individuals have been charged and convicted based upon such DNA evidence alone.

The Court of Appeals, as did the trial court, reaches its conclusion by crediting evidence the jury never heard. The court credits evidence that contradicts the evidence the jury did hear. The court credits evidence that requires the conclusion that a principle prosecution witness lied at trial. And upon doing so, the court concludes "all of the evidence presented **at trial** supports the conclusion that Mr. Kloepper left Mr. Contreras's DNA at the crime scene." Opinion at 12 (emphasis added.) But in fact there was no evidence presented at trial that allowed that conclusion, for one simple reason. There was no evidence at trial to explain how Mr. Kloepper would have happened to have possession of Contreras's semen in the first place. The court's reasoning rests on a misapplication of the law.

Mr. Kloepper must show the newly discovered would "probably change the result of the trial" when the new evidence is considered with the evidence the jury actually heard at the

trial which already occurred. *Williams*, 96 Wn.2d at 223. Mr. Kloepper met that standard.

> *3. This Court should grant review to correct the injustice that flows from the Court of Appeals opinion in this case and the injustice the opinion will visit in the future on people wrongly convicted.*

The Court of Appeals opinion employed an incorrect standard and analysis to reach its conclusion. The opinion conflicts with decisions of this Court and the Court of Appeals.

By undercutting the value of exculpatory DNA evidence the opinion raises an issue of substantial public interest. The opinion places out of reach the power of DNA evidence to shine light on wrongful convictions. If Mr. Kloepper's case does not demonstrate an entitlement to a new a trial, no case ever could.

This Court should accept review under RAP 13.4.

F. Conclusion

Mr. Kloepper is entitled to have a jury to consider the new, significant and exculpatory evidence. Mr. Kloepper is entitled to a new trial.

This Court should grant review to correct the injustice that flows from the Court of Appeals in this case and the injustice the opinion will visit in the future on people wrongly convicted.

This brief complies with RAP 18.17 and contains 4735 words.

Respectfully submitted this 18th day of June, 2024.

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WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 39076-4-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION**
CODY JOSEPH KLOEPPER,	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated April 16, 2024, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Fearing, Cooney

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
CHIEF JUDGE

FILED
APRIL 16, 2024
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, Respondent, v. CODY JOSEPH KLOEPPER, Appellant.	)))))))))	No. 39076-4-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Cody Kloepper, convicted of rape in the first degree, burglary in the first degree, and assault in the first degree, appeals the trial court's order denying his request for a new trial.

Mr. Kloepper's conviction rested on overwhelming evidence, including (1) his DNA as the major contributor on a fragment of glove used by the attacker, (2) his physical description matching the attacker's, (3) his afterhours, unauthorized presence at the apartment complex where the attack occurred, at the time the attack occurred, (4) his decision, hours after the attack, to cut his shaggy hair so he would not match the attacker's description, and (5) his access to the victim's apartment key, where evidence suggested the victim's door was locked and the attacker did not force entry. After Mr.

Kloepper's conviction, the Innocence Project obtained evidence of a second man's trace DNA on both the glove fragment and the victim's clothing. Mr. Kloepper and the second man had had intimate contact hours before the attack. Because there was only one attacker, either Mr. Kloepper had brought the second man's DNA to the crime scene, or the second man had brought Mr. Kloepper's DNA to the crime scene.

There is nothing in the record to suggest the second man could have been the attacker. The man did not match the victim's description of her attacker as a tall, white male with shaggy hair. The man is Hispanic with a strong accent. Nothing places the man anywhere near the victim's apartment on the night of the attack.

In light of the overwhelming inculpatory evidence against Mr. Kloepper and the exculpatory evidence favoring the second man, we conclude the trial court did not abuse its discretion when it denied Mr. Kloepper's request for a new trial.

FACTS

The attack

At 4:00 a.m. on December 5, 2009, a man attacked D.W. with a metal bar as she brewed coffee in her apartment at the Villas Apartments in Benton County. D.W. did not hear any forced entry and habitually kept her doors locked at night. As she struggled with her attacker, D.W. sustained multiple serious injuries to her head and arms. The attacker eventually ordered D.W. to the floor, and digitally penetrated her vagina and

anus. Before this happened, D.W. heard the attacker applying a latex glove. After the attack, the assailant covered D.W. with a blanket and fled.

D.W. called 911. When the dispatcher asked D.W. to identify her attacker, D.W. replied, "He looked like one of the Villa[s] people. The Villa[s'] maintenance people." Clerk's Papers (CP) at 380 (911 call transcript). D.W. described the assailant as a white male over six feet tall with shaggy brown hair. She said he had been shirtless during the attack. D.W. further stated that the attacker "looked like I hate to say it." CP at 382 (911 call transcript). Instead of completing her statement, D.W. said, "I don't know who he was. I just don't know who he was. I hadn't seen him before." CP at 382 (911 call transcript). D.W. later attributed this reluctance to identify Cody Kloepper as her attacker to her fear of inadvertently accusing an innocent man. D.W. also testified that she was afraid, at that moment, to speak Mr. Kloepper's name aloud.

Investigation and trial

Law enforcement initially identified Mr. Kloepper as a person of interest in the attack because Mr. Kloepper, a maintenance worker at the Villas, had been present at work the morning of the attack but then had left without explanation. Interest in Mr. Kloepper as a suspect cooled when D.W. twice identified a separate suspect, Carl Goehring, from a photo array law enforcement showed her. D.W. also identified Mr. Goehring from a lineup. Mr. Kloepper himself appeared in the photo arrays. However,

he did not fit D.W.'s memory of the attacker as Mr. Kloepper in the photograph had cropped hair, rather than shaggy hair.

The State charged Mr. Goehring with the crime. However, when DNA collected from the crime scene matched Mr. Kloepper, the State charged Mr. Kloepper instead. At trial, D.W. identified Mr. Kloepper as her attacker.

The DNA sample matching Mr. Kloepper was collected from a latex glove fragment discovered on the floor in D.W.'s apartment. The fragment had a major DNA contributor and a minor DNA contributor.[1] The major contributor's DNA matched 1 out of every 440 males and was consistent with Mr. Kloepper's DNA. Along with this DNA evidence, the State presented the following evidence against Mr. Kloepper:

- Opportunity. In the hours before the attack, Mr. Kloepper had returned to the Villas after a night of heavy drinking. Planning to sleep in a vacant apartment before working the next morning, Mr. Kloepper accessed the key cabinet in the property manager's office, where a key to D.W.'s apartment also was available. Both D.W.'s testimony and the physical condition of her doorjamb later confirmed the attacker had entered her apartment by key

[1] At trial, the DNA technician testified there was a "very, very small amount of this minor component. Actually, so low that [she] really [could not] do much analyses with it, other than saying there was a tiny, tiny amount of DNA from this other contributor." Rep. of Proc. (Aug. 12, 2011) at 582.

rather than using force. Additionally, Mr. Kloepper on prior occasions had completed maintenance requests at D.W.'s apartment. From that experience, the State argued, he would have known D.W. was a small woman living alone. The Villas encompasses nearly 300 units, and D.W.'s apartment was on the fourth floor. To reach D.W.'s apartment, the attacker needed to ascend past multiple other apartments on four landings. All this, the State argued, suggested a targeted attack guided by information Mr. Kloepper possessed.

- Motive. Before driving to the Villas Apartments on the night of the attack, Mr. Kloepper had actively sought out a random sexual encounter. Specifically, he drove 20 miles from his house in Richland to Finley, Washington, where he responded to a personal ad posted on Craigslist by Salvador Contreras.[2] Mr. Kloepper had never met Mr. Contreras before that night. While the men disputed what occurred between them, both agreed that the possibility of sex motivated their encounter. Mr. Contreras testified that Mr. Kloepper left his home in Finley approximately three hours before the attack on D.W. Mr. Contreras further testified that Mr.

[2] We take judicial notice that Mr. Kloepper's 2009 house in Richland is approximately 20 miles from Finley, Washington.

Kloepper was sexually frustrated and angry when he left.

- Identification. As mentioned above, D.W. in the moments after the attack, described her attacker as a white male over six feet tall with shaggy brown hair who "looked like one of the Villa[s] people. The Villa[s'] maintenance people." CP at 380 (911 call transcript). Mr. Kloepper fit every aspect of this description. He was a maintenance worker at the Villas. He is a six-foot-four-inch white male with brown hair. At the time of the attack, his hair hung nearly to his shoulders.
- Obfuscation. Soon after the attack, Mr. Kloepper obscured his connection to the crime:
    - Within hours of the attack, Mr. Kloepper left work without notifying his supervisor and shaved his hair short. Mr. Kloepper later told a coworker that he cut his hair because he "looked like that guy that assaulted the girl." Rep. of Proc. (RP) (Aug. 11, 2011) at 467.
    - Within one month of the attack, Mr. Kloepper added additional tattoos to his body.
    - Mr. Kloepper initially lied to law enforcement about his whereabouts and activities on the night of the attack.

The jury convicted Mr. Kloepper of all charges. The trial court sentenced him to 25.5 years' confinement and community custody for life.

Additional DNA testing

Nine years after Mr. Kloepper's conviction, additional DNA testing detected trace amounts[3] of spermatozoa on two articles of clothing D.W. had worn during the attack. The testing proved conclusively that the spermatozoa belonged neither to Carl Goehring nor to Cody Kloepper, but to Salvador Contreras, with whom Mr. Kloepper had rendezvoused shortly before the attack.[4] Mr. Contreras' DNA also matched the trace minor contributor DNA from the glove fragment found at the crime scene. On the basis of these discoveries, Mr. Kloepper moved for a new trial.

At a hearing pursuant to that motion, Mr. Contreras offered further testimony regarding his own and Mr. Kloepper's activities prior to the attack. By the date of the hearing, 12 years had elapsed since the attack; Mr. Contreras admitted his recollection

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[3] Sweatpants: stain 2 (5 spermatozoa); stain 3 (0-1 spermatozoa); and stain 8, (1 spermatozoa). Sweatshirt: stain 1 (1 spermatozoa); stain 2 (4 spermatozoa); stain 4 (0-1 spermatozoa); stain 5 (0-1 spermatozoa); and stain 7 (6 spermatozoa). See CP at 607-09.

By contrast, 200 million to 300 million spermatozoa are released in one ejaculation. Zilpah Sheikh, Mary Anne Duncan & Matt McMillen, *What Is Sperm?*, WEBMD (Dec. 23, 2023), https://www.webmd.com/infertility-and-reproduction/sperm-and-semen-faq [https://perma.cc/Z3DN-G9CG].

[4] Mr. Contreras is a convicted felon whose DNA appears in the national Combined DNA Index System (CODIS) database.

was imperfect. Nevertheless, he testified much as he had testified at trial:[5] Mr. Kloepper had appeared at Mr. Contreras' home in Finley in response to a personal ad Mr. Contreras had posted online. Mr. Kloepper remained briefly at the home, making sexual overtures to Mr. Contreras, before departing in anger. The two did not have sex. However, Mr. Contreras in his new testimony stated that he—Mr. Contreras—likely ejaculated while in physical contact with Mr. Kloepper. Mr. Contreras testified that he had a history of premature ejaculation in response only to physical touch, absent sexual intercourse and even absent an erection. Before testifying, Mr. Contreras had learned from law enforcement that his sperm had been found at the crime scene.

Citing Mr. Contreras' testimony, the State opposed Mr. Kloepper's motion for a new trial on the grounds of a transfer DNA theory. Specifically, the State argued that Mr. Contreras likely deposited his DNA onto Mr. Kloepper during their encounter in Finley, after which Mr. Kloepper carried that DNA to Richland and deposited it—along with his

[5] The principle discrepancy between Mr. Contreras' original and subsequent testimony related to time. At trial, Mr. Contreras estimated Mr. Kloepper had been at his home only 15 to 20 minutes. At the hearing, he testified Mr. Kloepper had remained at his home for 45 to 90 minutes. When pressed about this discrepancy, Mr. Contreras admitted that his recollection at the hearing differed from his recollection at trial. Mr. Contreras at trial also testified that Mr. Kloepper had removed his shirt during the encounter. At the hearing, Mr. Contreras did not remember Mr. Kloepper removing his shirt.

own DNA—at the crime scene. To support this theory, the State cited academic literature verifying the phenomenon of transfer DNA.

The State also emphasized that no circumstantial evidence linked Mr. Contreras to the attack independent of his connection to Mr. Kloepper. Because the original jury already knew unidentified DNA had been found at the crime scene, identifying Mr. Contreras as a contributor—without more—merely put a name to one of the unidentified samples without otherwise changing the facts of the case.

In a memorandum opinion, the trial court denied Mr. Kloepper's motion for a new trial. The court meticulously highlighted the overwhelming evidence against Mr. Kloepper and the paucity of evidence against Mr. Contreras. The court concluded:

> [T]he direct and circumstantial evidence presented at trial was overwhelming against the defendant. The identity of Mr. Contreras's DNA evidence on the tip of the rubber glove fragment as the minor contributor to the DNA profile, and his sperm located on the victim's sweatpants and sweatshirt, would not likely change the result of the verdict, in light of the other overwhelming evidence against Mr. Kloepper.

CP at 856.

Mr. Kloepper timely appeals the trial court's decision.

ANALYSIS

Standard of review

Mr. Kloepper argues the trial court erred by denying his request for a new trial. This court reviews a trial court's refusal to grant a new trial for abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court operates within its discretion when its findings derive from the factual record, its conclusions apply sound law, and its decisions are not manifestly unreasonable. *Clark v. Teng*, 195 Wn. App. 482, 492, 380 P.3d 73 (2016).

Standard for a new trial

A trial court may grant a new trial when the movant presents newly discovered material evidence that could not have been discovered and produced at the original trial. CrR 7.8(b)(2); CrR 7.5(a)(3). A defendant obtains a new trial on these grounds only when the evidence, in addition to being newly discovered, material, and admissible, would "probably change the result if a new trial is granted." *State v. Letellier*, 16 Wn. App. 695, 699-700, 558 P.2d 838 (1977). Evidence that is "merely cumulative or impeaching" does not meet this standard. *Id.* at 700.

Mr. Kloepper argues that *Letellier* requires him to show only that the newly discovered evidence would change one juror's mind, resulting in a mistrial, rather than

changing all jurors' minds, resulting in an acquittal. He produces no cases that support this "single juror" argument.[6]

The State responds that Mr. Kloepper's "single juror" argument is inconsistent with *Letellier* and argues that Mr. Kloepper must show that the newly discovered evidence would probably result in an acquittal, not merely a mistrial. In support of its view, the State cites numerous Washington cases. However, none of the cited cases clarify the *Letellier* standard, let alone clarify the standard in the State's favor. The State also cites cases outside our jurisdiction to support its view.

We observe that Mr. Kloepper's "single juror" argument does not account for the likelihood that the State would retry the case in the event of a mistrial. Because of this likelihood, we discern little if any practical difference in the two standards.

The new DNA evidence would not probably change the result[7]

The discovery of another individual's sperm on the clothes of a rape victim, paired with a lack of the defendant's sperm on the same clothes, would seem to create

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[6] Mr. Kloepper argues that *State v. Roche*, 114 Wn. App. 424, 59 P.3d 682 (2002), supports this position. However, the *Roche* court never clarified whether newly discovered evidence, to warrant a new trial, must create reasonable doubt in the mind of one juror or the minds of 12. Instead, the court concluded only that the newly discovered evidence in that case was so compelling that the defendant should never have stood trial at all. *Id.* at 440.

[7] The State conceded every *Letellier* element except the probability of new evidence changing the result at trial.

reasonable doubt as to the defendant's guilt. This is especially true given the report submitted by Dr. Charlotte Word, suggesting that transfer deposits of DNA are an unlikely occurrence.

However, in this instance, both Mr. Contreras' DNA and Mr. Kloepper's DNA were discovered at the crime scene. Because D.W. testified that only one person attacked her, we must conclude that a transfer DNA deposit—however unlikely—occurred in this case. Either Mr. Contreras carried Mr. Kloepper's DNA to the crime scene or Mr. Kloepper carried Mr. Contreras' DNA to the crime scene. The unlikelihood of such a transfer makes no difference to our analysis because the unlikelihood applies equally to both scenarios.

The question is who left the other's DNA at the crime scene. More specifically, the question is whether a jury could reasonably doubt that Mr. Kloepper left Mr. Contreras' DNA at the crime scene. The trial court determined this question against Mr. Kloepper. We find no abuse of discretion. Indeed, all of the evidence presented at trial supports the conclusion that Mr. Kloepper left Mr. Contreras' DNA at the crime scene, rather than the other way around.

First, Mr. Kloepper knew the victim, knew where she lived, and knew she lived alone. There is no evidence Mr. Contreras knew the victim or knew anything about her.

Second, Mr. Kloepper admitted he was present and drunk at the Villas when the attack occurred. Although he worked at the Villas, the attack occurred around 4:00 in the morning, and Mr. Kloepper had no legitimate reason to be there. By contrast, other than his trace DNA, there is no evidence that Mr. Contreras left his home in the dead of night and drove 20 miles to the Villas.

Third, Mr. Kloepper admitted he accessed the key cabinet soon before the attack, and the key cabinet also contained a key to D.W.'s apartment. Evidence suggests the attacker accessed D.W.'s apartment with a key. By contrast, there is no evidence to suggest Mr. Contreras had access to D.W.'s apartment key.

Fourth, D.W. reported to the 911 dispatcher that her attacker resembled one of the Villas maintenance workers. Mr. Kloepper was a Villas maintenance worker. Moreover, the only Villas employee present at the Villas at the time of the attack was Mr. Kloepper. There is no evidence that Mr. Contreras resembles any Villas employee.

Fifth, D.W. described her attacker as a white male. Mr. Kloepper is a white male, whereas Mr. Contreras is Hispanic. In arguing that the trial court should deny Mr. Kloepper's request for a new trial the State observed, without objection, that Mr. Contreras has "a very strong, noticeable Hispanic accent." RP (Mar. 22, 2022) at 122.

Sixth, D.W. described her attacker as having shaggy hair. Mr. Kloepper at the time of the attack had shaggy hair, and even cut his shaggy hair after the attack because,

as he put it, he "looked like that guy that assaulted the girl." RP (Aug. 11, 2011) at 467. By contrast, there is no evidence Mr. Contreras ever had shaggy hair.

Because no reasonable jury could disregard all of the inculpatory evidence against Mr. Kloepper *and* the exculpatory evidence favoring Mr. Contreras, we conclude the trial court did not abuse its discretion when it denied Mr. Kloepper's motion for a new trial.

Affirmed.

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.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Cooney, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39076-4-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website

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MARIA ANA ARRANZA RILEY, Paralegal Date: June 18, 2024
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