

**ARIZONA SUPREME COURT**

STATE OF ARIZONA, ) No. CR-23-0026-PR  
 )  
 Appellee, ) Court of Appeals No.  
 ) 2 CA-CR 2021-0111  
 v. )  
 ) Pima County Superior Court  
 CHARLEY CONLEY, JR., ) No. CR-2018-2849-001  
 )  
 Appellant. )  
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 )

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## **INTEREST OF *AMICUS CURIAE***

Arizona Attorneys for Criminal Justice (AACJ), the Arizona affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and those attorneys who defend them.

For years, appellate courts have applied the sufficiency of evidence standard to cases in which it doesn't apply. Under the sufficiency of evidence standard, appellate courts review evidence in the light most favorable to sustaining a verdict and resolve all discrepancies against the appealing party. And appellate courts do that in criminal case after criminal case in their general recitation of the facts.

While this misapplication is improper in any case, it creates an injustice when the appellate courts then allow that standard to penetrate a harmless-error analysis. Just as it did in this case.

*Amicus* offers this brief because examples abound of the court of appeals' misapplication of sufficiency standard, and its impact on harmless error. In recent years, this court has granted review in two cases for the purpose of clarifying fundamental error. *State v. Henderson*, 210 Ariz. 561 (2005); *State v. Escalante*, 245 Ariz. 135 (2018). The time has come for this Court to clarify that the sufficiency standard has no place in the general recitation of facts, and no place in a harmless-error review.

## ARGUMENT

**This Court should grant review to clarify that the sufficiency of evidence standard does not apply to every criminal appeal, and especially does not apply during a harmlessness analysis.**

In case after case, toward the beginning of the factual history, our court of appeals inserts a legal statement that the facts are construed in favor of sustaining the conviction, with all inferences resolved against the defendant.

The lower court followed suit in the first line of paragraph 2: “We view the evidence in the light most favorable to sustaining the jury’s verdicts, resolving all reasonable inferences against Conley.” Opinion ¶ 2. The court has made similar statements in several recent cases. *E.g.*, *State v. Teran*, 253 Ariz. 165, ¶ 2 (App. 2022); *State v. Reed*, 252 Ariz. 236, n.2 (App. 2021).

But this standard did not apply to Conley’s case.

Nor does it apply in the vast majority of cases where it is introduced.

And the constant misuse of the standard negatively impacts harmless-error review—like it did in Conley’s case.

### **1. The standard to view evidence in the light most favorable to sustaining the verdict is reserved for sufficiency claims.**

The legal requirement that courts view evidence in the light most favorable to sustaining the convictions derives from sufficiency of the evidence claims.

The lower court's citation in this case proves the point. To support its proposition that the evidence should be viewed in the light most favorable to sustaining the verdict, the lower court cited *State v. Gamez*, 227 Ariz. 445, 446 n.1 (App. 2011). Opinion ¶ 2.

*Gamez* in turn relied upon *State v. Manzanedo*, 210 Ariz. 292, ¶ 3 (App. 2005).

*Manzanedo* applied this standard because it was reviewing a sufficiency of the evidence claim. Just one paragraph earlier, the Court explained: "Manzanedo argues that there was insufficient evidence to sustain his conviction for criminal damage ...." *Id.* at ¶ 2. When reviewing the sufficiency claim, the court thus stated, "We view the evidence in the light most favorable to sustaining Manzanedo's convictions and resolve all reasonable inferences against him." *Id.* at ¶ 3 (citing *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997)). And it ruled on sufficiency, deciding that "Officer Glass's testimony was sufficient to prove that Manzanedo had damaged the property of another." *Id.*

*Manzanedo's* citation to this Court's decision in *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997), further illustrates the point.

*Rienhardt* involved a sufficiency issue. In *Rienhardt*, this Court linked the standard of review to sufficiency of the evidence claims: "In reviewing sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining

the verdict, and resolve all reasonable inferences against the defendant.” *Id.* (citing *State v. Gallegos*, 178 Ariz. 1, 9 (1994)).

The constant decision to apply this standard beyond sufficiency of the evidence claims is problematic.

For example, Conley’s case never should have been viewed in the light most favorable to sustaining the verdict precisely because Conley raised a severance issue. In *State v. Moore*, this Court explained that joinder is not viewed in the light most favorable to the state or sustaining a verdict; rather, courts must resolve all doubts in the defendant’s favor. 108 Ariz. 215, 218 (1972). This Court understood that a defendant should be convicted “by evidence which shows he is guilty of that offense alone,” not by “proof of his guilt of one or a score of other offenses in his lifetime ....” *Id.* Quoting the Oklahoma Court of Criminal Appeals, this Court ruled that when “any doubt is entertained, it is to be resolved in favor of defendant.” *Id.* (quoting *Hardin v. State*, 462 P.2d 357, 360 (Okla. Crim. Ct. 1969)); *see also State v. Roper*, 140 Ariz. 459, 461-62 (App. 1984).

Although the lower court correctly decided the motion to sever should have been granted, the lower court never should have viewed the evidence in the light most favorable to the state. The court should have viewed the evidence in the light most favorable to Conley.

This becomes even more problematic when harmless error is evaluated.

**2. In *Conley*, the court of appeals majority incorrectly applied that standard to their harmlessness analysis.**

In *State v. Bible*, this Court made clear that, when considering harmlessness arguments, appellate courts are to “consider the error in light of all the evidence.” 175 Ariz. 549, 588 (1993).

Moreover, “Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.” *Henderson*, 210 Ariz. 561, ¶ 18. “A reviewing court making this harmless error inquiry does not ... ‘become a second jury to determine whether the defendant is guilty.’” *Neder v. U.S.*, 527 U.S. 1, 19 (1999). Thus, when engaging in a harmlessness review, courts do not “look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty.” *Weiler v. U.S.*, 323 U.S. 606, 611 (1945). To do so would be to supersede the role of the jury. *Id.* Instead, reviewing courts ask “whether the record contains evidence that could rationally lead to a contrary finding,” and find error harmless only if the answer is no. *Neder*, 527 U.S. at 19.

During a harmless-error review, appellate courts are supposed to consider all evidence—not just some of it—and the state bears the burden to prove beyond a reasonable doubt that error was harmless.

Unfortunately, the *Conley* majority’s decision to view the evidence in the light most favorable to upholding the verdict permeated their harmlessness analysis.

For example, the majority emphasized, “when cross-examining the victims and otherwise throughout trial, the defense’s primary focus was the incompetence of law enforcement’s investigation of these four cases .... Of course, neither inadequate investigations nor a systemic lack of sensitivity for sexual assault victims would exonerate Conley.” Opinion ¶ 15.

But an insufficient investigation is absolutely a basis for arguing reasonable doubt. As the Supreme Judicial Court of Massachusetts has explained, “Defendants have the right to base their defense on the failure of police adequately to investigate a murder in order to raise the issue of reasonable doubt as to the defendant’s guilt in the minds of the jury.” *Com. v. Phinney*, 843 N.E.2d 1024, 1033 (Mass. 2006). And Arizona cases have repeatedly recognized instances where defendants have challenged the adequacy of police investigation. *E.g.*, *State v. Atwood*, 171 Ariz. 576, 605-06 (1992) (overturned on other grounds by *State v. Nordstrom*, 200 Ariz. 229, ¶ 25 (2001)); *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 19 (App. 2009) (overturned on other grounds by *State v. Bonfiglio*, 231 Ariz. 371, ¶ 15 (2013)); *State v. Wooten*, 193 Ariz. 357, ¶ 29 n.3 (App. 1998).

The majority below reached their conclusion *because* they viewed the evidence in the light most favorable to sustaining the verdict.

Further illustrating how the improperly applied sufficiency of the evidence standard permeated the harmlessness review, the majority below construed the evidence to minimize problems.

Chief among this was the fact that there was no DNA evidence to support two of the victims. *See* Opinion ¶ 17. But the two judges in the majority below hand-waved this evidentiary shortcoming because one of the victims had a cervical abrasion that—according to the prosecution’s expert—was inconsistent with consensual sex, and because Conley’s defense attorney pivoted to present a global defense rather than argue consent. *Id.* at ¶ 18. Indeed, the defense attorney’s strategy decision—necessitated by the improper joinder—carried the day for the majority: “In the absence of any factual challenge of any kind to C.B.’s testimony that she was raped, coupled with Conley’s admission of sexual intercourse with her and the physical evidence that corroborated the forcible nature of the act, we are satisfied that any failure to sever charges did not affect the jury’s verdict.” *Id.*

The majority’s decision is problematic because it failed to recognize the impact of the error on the two charges without DNA evidence. “Having been damaged by erroneously admitted testimony, defendant ‘was entitled to adjust his strategy.’” *State v. Lindsey*, 149 Ariz. 472, 477 (1986) (quoting *State v. Ellerson*, 125 Ariz. 249, 251 (1980)). Conley’s counsel no doubt recognized that presenting different defenses to each of the four rapes would result in loss of credibility with

the jury. *See U.S. v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (“Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility.”). Thus, Conley could not reasonably defend this trial by claiming that C.B. consented while W.L. straight-up lied, in addition to whatever defenses he could muster for the cases with DNA evidence.

Appellate courts are not supposed to cherry-pick the evidence they find persuasive when conducting a harmlessness evaluation; judges are supposed to consider all the evidence and hold the state to the burden to prove beyond a reasonable doubt that the error had no impact on the verdict. That is not what happened here.

### **3. This incorrect standard is particularly harmful in the context of improper joinder.**

The prejudice ensuing from improperly joined offenses has been widely acknowledged and empirically validated. One study found that “the joinder of charges has a prejudicial effect on the defendant, increasing the chances of conviction of the most serious charge by more than 10%” in federal cases. Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 401 (2006). Social scientists generally agree that the joinder of offenses “biases jurors’ judgments against a defendant because jurors attribute multiple instances of wrongdoing to a defendant’s criminal disposition and confuse evidence relevant to multiple charges.”

Edie Greene & Brian H. Bornstein, *Nudging the Justice System Toward Better Decisions*, 103 J. Crim. L. & Criminology 1155, 1163 (2013) (citing Dennis J. Devine, *Jury Decision Making: The State of Science* (2012)); Kenneth S. Bordens & Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law & Hum. Behav. 339, 349-50 (1985); Edith Greene & Elizabeth F. Loftus, *When Crimes Are Joined at Trial*, 9 Law & Hum. Behav. 193, 204-06 (1985); Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity and Limiting Instructions*, 9 Law & Hum. Behav. 319, 332-35 (1985)).

When offenses are joined at trial, defendants are unable to make fair and consistent trial strategy choices. Generally, the prejudice that ensues falls into three distinct categories:

- (1) the jury may believe that a person charged with a large number of offenses has a criminal disposition, and as a result, may aggregate the evidence against him or her, or perhaps lessen the presumption of innocence;
- (2) the evidence of guilt on one count may “spillover” to other counts, and lead to a conviction on those other counts even though the spillover evidence would have been inadmissible at a separate trial; and
- (3) a defendant may wish to testify in his own defense on one charge but not testify on another.

§ 223 Prejudicial Joinder of Offenses, 1A Fed. Prac. & Proc. Crim. § 223 (5th ed.).

This was precisely the point Judge Cattani made in his partial dissent. “In my view,” Judge Cattani explained, “it is difficult to conceive of a case in which a

defendant is not unfairly prejudiced by the improper joinder of sexual assault counts, let alone the joinder of counts involving unrefuted DNA evidence establishing guilt on those counts with counts for which there is no biological evidence.” Opinion ¶ 33 (Cattani, J, dissenting). Judge Cattani thus agreed “with Conley that the state was improperly permitted to carry out a strategy whereby its weaker cases were tried alongside its stronger cases so the jury would find Conley guilty of all the alleged offenses.” *Id.* The improperly joined offenses ensured the jurors believed Conley had a “criminal disposition” to commit the offenses. And the evidence of guilt in some counts “spilled over” to other counts for which there was little evidence.

Joining all four rapes in a single trial ensured that he could not present any viable defense to any particular act because it would be inconsistent to others. For example, in the two cases with DNA, Conley could not reasonably pursue mistaken identity and he would have no choice but to present a consent defense. In the other two cases without DNA, however, he had greater options. Thus, while the court was correct to note that “[t]he defense did not meaningfully challenge the credibility of any one of them during cross-examination” and thus “had no theory of the case that meaningfully challenged the most powerful evidence presented by the state: the victims’ unambiguous testimony that they were raped by him,” Opinion ¶ 15, this is true only because the four cases were joined.

The lower court's erroneous application of the harmless error standard warrants review. Review will provide an opportunity for this Court to correct a persistent problem that continues to undermine the fairness of criminal appeals.

**4. This Court should grant review to clarify that evidence is only viewed in the light favorable to upholding convictions when a defendant raises sufficiency—and never in a harmlessness review.**

This case is not an isolated incident. Rather, the court of appeals repeatedly, and with little regard for the type of claim at issue, views the evidence in the light most favorable to the state. This is true even when the correct standard is the opposite.

For example, instructional issues must be viewed in the light most favorable to the proponent. *See State v. King*, 225 Ariz. 87, ¶ 13 (2010). But our court of appeals commonly views the evidence in the light most favorable to sustaining the verdict. *State v. Preston*, 1 CA-CR 21-0138, 2022 WL 1222444, ¶ 2 (App. 2022 Memo.); *State v. Rushing*, 2 CA-CR 2021-0050, 2022 WL 710212, ¶ 2 (App. 2022 Memo.).

The problem repeats itself when the admission of evidence is at issue. *State v. Shoenhardt*, 1 CA-CR 21-0546, 2022 WL 2439770, ¶ 2 (App. 2022 Memo.); *State v. Scott*, 1 CA-CR 21-0024, 2022 WL 552055, ¶ 9 and n.1 (App. 2022 Memo.); *State v. Novak*, 2 CA-CR 2021-0058, 2022 WL 1122680, ¶¶ 2-3 (App. 2022 Memo.).

After this Court’s remand in *State v. Hernandez (Hernandez II)*, 250 Ariz. 28 (2020), a two-judge majority agreed that the trial court erroneously precluded expert testimony on eyewitness identification. *State v. Hernandez (Hernandez III)*, 2 CA-CR 2018-0042, 2022 WL 200133 (App. 2022 Memo.), *review denied* (Nov. 1, 2022). Nevertheless, a different two-judge majority found the error harmless because there was sufficient evidence of guilt through the officer’s testimony. *Id.* at ¶¶ 19-21. Undoubtedly, this analysis was infected by the fact that it “view[ed] the facts in the light most favorable to sustaining the jury’s verdicts and resolve[d] all reasonable inferences against Hernandez.” *Id.* at ¶ 2. The majority relied on the fact that defense counsel cross-examined the State’s only witness, who identified Hernandez with certainty based on a moment’s glance in a near-collision. *Id.* at ¶¶ 19-21. One judge dissented in part and recognized how harmful the preclusion ruling was to the defense. *Id.* at ¶¶ 31-36 (Eckerstrom, J., dissenting in part). It is absurd to base a conclusion of harmless error on such flimsy evidence, but it was inevitable based on the erroneous application of the sufficiency standard.

In addition to *Hernandez*, at least five other Petitions for Review have been filed over the last three years that raised nearly identical issues:

1. *State v. Caballero*, PFR, 2020 WL 6646750;
2. *State v. Fuentes*, PFR, 2020 WL 4707472;
3. *State v. Cortez*, PFR, 2020 WL 8714777;

4. *State v. Knourek*, PFR, 2021 WL 4440137;
5. *State v. Woodley*, PFR, 2022 WL 19767634.

This error has become so entrenched that our court of appeals believes the standard applies universally to the recitation of facts, not to sufficiency claims. This recurring issue deserves review.

This case is uniquely suited for review because the incorrect standard permeated the majority's harmless analysis of a severance claim. How can a person in Conley's position ever prevail in a harmless analysis if the court views the evidence in the light most favorable to sustaining the verdict and resolves all inferences against him?

### CONCLUSION

For these reasons, *amicus curiae* asks this Court to grant review.

RESPECTFULLY SUBMITTED this 15th day of May, 2023.

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