ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	No. CR-19-0206-PR
	)	
Respondent/Appellee,	)	Court of Appeals No.
	)	2 CA-CR 2017-0286
v.	)	
	)	Pima County Superior Court
ORESTES ROBERTO YBARRA,	)	No. CR-20154650001
	)	
Petitioner/Appellant.	)	
	)	

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER ORESTES ROBERTO YBARRA

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES iii

INTRODUCTION 1

INTERESTS OF *AMICUS CURIAE* 2

ARGUMENTS

I. A growing number of jurisdictions have accepted the principle set out in *Yonkman*, holding that evidence of an acquittal should be admissible when the State seeks to introduce evidence of acquitted conduct. Although the court of appeals acknowledged the principle set out in *Yonkman*, it diluted the decision's effectiveness, rendering it nearly non-existent. This Court's review is necessary to end the now-uncertain fate of *Yonkman*'s application 4

II. When the State seeks to admit evidence of acquitted conduct as evidence in the substantive offense, admission of the prior acquittal should not be limited to only to an acquittal jury instruction. Instead, the jury should also be instructed on how to properly consider the prior acquittal and what weight, if any, it should be given. 7

III. The court of appeals improperly focused on prejudice to the State's ability to obtain a conviction in determining that Rule 403 prevented admission of acquittal evidence. The State cannot claim unfair prejudice just because evidence may hurt its case. The danger of unfair prejudice to the accused by not admitting acquittal evidence outweighs any concern of prejudice to the State obtaining a conviction.......... 9

IV. The court of appeals' reading of *Yonkman* is too narrow and created a distinction where none exists. The court focused too heavily on whether the trial court used the proper verbiage when describing the prior proceeding or whether the uncharged conduct was "intrinsic" to the offense and focused too minimally on *Yonkman*'s major concern—the danger of improper juror speculation when evidence of an acquittal is not admitted 11

CONCLUSION 14

TABLE OF CASES AND AUTHORITIES

CASES PAGES

Hess v. State, 20 P.3d 1121 (Alaska 2001) 6, 7, 13

Kinney v. People, 187 P.3d 548 (Colo. 2008) 4

Nolan v. State, 131 A.2d 851 (Md. 1957) 5

People v. Bedoya, 758 N.E.2d 366 (Ill. 2001) 5, 6

People v. Griffin, 426 P.2d 507 (Cal. 1967) 7, 13

Philmon v. State, 593 S.W.2d 504 (Ark. Ct. App. 1980) 5

State v. Abdi, 226 Ariz. 361 (Ct. App. 2011) 2

State v. Carson, 243 Ariz. 463 (2018) 11

State v. Castro, 163 Ariz. 465 (Ct. App. 1989) 11

State v. Cooperman, 232 Ariz. 347 (2013) 10

State v. Dann, 220 Ariz. 351 (2009) 11

State v. Davis, 127 Ariz. 285 (Ct. App. 1980) 13

State v. Hardin, 99 Ariz. 56 (1965) 8

State v. Hardy, 230 Ariz. 281 (2012) 10

State v. Jones, No. 19-C-268, 2019 WL 4051706 (Md. Ct. App. Aug. 28, 2019) 5

State v. Machado, 224 Ariz. 343 (Ct. App. 2010) 10, 11

State v. Miller, 226 Ariz. 190 (Ct. App. 2011) 10

State v. Noriega, 187 Ariz. 282 (Ct. App. 1996) 2

State v. Price, 123 Ariz. 166 (1979) 8

State v. Rodriquez, 192 Ariz. 58 (1998) 10

State v. Schurz, 176 Ariz. 46 (1993) 10

State v. Smith, 532 P.2d 9 (Or. 1975) 6

State v. Sucharew, 205 Ariz. 16 (Ct. App. 2003) 2

State v. Washington, 257 N.W.2d 890 (Iowa 1977) 5

State v. Ybarra, No. 2 CA-CR 2017-0286, 2019 WL 2233299 (Ct. App. May 22, 2019) 1, 12

State v. Yonkman, 233 Ariz. 369 (Ct. App. 2013) 1, 4, 5, 13

United States v. De La Rosa, 171 F.3d 215 (5th Cir. 1999) 6

United States v. Dennis, 625 F.2d 782 (8th Cir. 1980).................... 10-11

United States v. Tirrell, 120 F.3d 670 (7th Cir. 1997)....................6

United States v. Wells, 347 F.3d 280 (8th Cir. 2003) 6

Walker v. State, 921 P.2d 923 (Nev. 1996)....................5

Williams v. D.C., 77 A.3d 425 (D.C. 2013)....................5

ARIZONA REVISED STATUTES

A.R.S. § 13-115....................8

ARIZONA CONSTITUTION

Ariz. Const. art. II, § 4 4

Ariz. Const. art. II, § 24 4

OTHER AUTHORITIES

Ariz. R. Evid. 403 ....9, 10, 11

Ariz. R. Evid. 404 7

Edward J. Imwinkelried, *Uncharged Misconduct Evidence* §§ 10:10 (1984 & Nov. 2018 Supp.)..6

INTRODUCTION

This case presents a question whether a criminal defendant is permitted to admit evidence of an acquittal after the State admits evidence of acquitted conduct during a new trial. In *State v. Yonkman*, 233 Ariz. 369 (Ct. App. 2013), the court of appeals held that evidence of an acquittal should be admitted when the jury is provided details of prior trials or investigations that could lead a jury to speculate that the defendant was tried and convicted of certain conduct. *Id.* at 375 ¶ 21. It held that a properly drafted jury instruction is sufficient to ensure the jury does not give undue weight to the prior acquittal. *Id.*

Yet, in *State v. Ybarra*, No. 2 CA-CR 2017-0286, 2019 WL 223399 (Ariz. Ct. App. May 22, 2019) ("*Decision*"), the court of appeals seeks to avoid application of *Yonkman* by creating distinctions based on verbiage used to discuss prior proceedings and by applying a very narrow reading of *Yonkman*. The court of appeals creates these distinctions out of concern that admission of the acquittal could confuse the jury but, more importantly, would hurt the State's chances of a conviction. *Id.* at *4, ¶ 17. The court of appeals placed the State's non-existent right to a conviction above the substantive rights of a criminal defendant. There needs to be an easily applicable standard for admission of acquittal evidence or acquittal instructions where the State admits evidence of acquitted conduct.[1]

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1 AACJ's decision to brief only the issue of the *Yonkman* application should not

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state 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 to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus offers this brief in support of Petitioner because a defendant's right to present evidence of an acquittal or, at a minimum, present an acquittal instruction is critical to the right to a fair trial and touches on the core of AACJ's mission. The decision in this case narrows the holding in *Yonkman* to such an extent that it would be effectively nonexistent. Arizona consistently uses jury instructions to advise on the law and the appropriate use of evidence.[2] The same result should occur here. In

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be interpreted as implicitly suggesting that Ybarra's other issues are not worthy of this Court's review.

2 *State v. Abdi*, 226 Ariz. 361, 365 (Ct. App. 2011) ("The purpose of jury instructions is to inform the jury of the applicable law."); *see also State v. Sucharew*, 205 Ariz. 16, 26 (Ct. App. 2003) ("The purpose of such instructions, therefore, is to guide the jury with respect to the law when it considers whether the State met its burden of proving all the elements of the offense."); *State v. Noriega*, 187 Ariz. 282, 284 (Ct. App. 1996) ("Jury instructions are, in essence, a guide to the proper verdict.").

addition, this Court should not permit evidentiary rules based on whether it would hurt the State's chance at a conviction. The State has no right to a conviction. Allowing courts to premise the application of evidentiary rules on whether it hurts the State's chances at a conviction endangers the foundation of our criminal system.

ARGUMENTS

I. A growing number of jurisdictions have accepted the principle set out in *Yonkman*, holding that evidence of an acquittal should be admissible when the State seeks to introduce evidence of acquitted conduct. Although the court of appeals acknowledged the principle set out in *Yonkman*, it diluted the decision's effectiveness, rendering it nearly non-existent. This Court's review is necessary to end the now-uncertain fate of *Yonkman*'s application.

Some of the most fundamental rights of a criminal defendant include the right to due process and the right to a fair trial. Ariz. Const. art. 2, §§ 4, 24. A defendant's Sixth Amendment right to confront and cross-examine his accuser is a fundamental part of due process. *Id.* § 24. Arizona needs a rule that recognizes a defendant's right for the jury to receive acquittal information when the State seeks to admit evidence of acquitted conduct. Admitting evidence of an acquittal or, at a minimum, allowing for an acquittal instruction is key to ensuring a fair trial. A properly drafted jury instruction is sufficient to ensure the evidence is properly considered by the jury and given the weight it deserves.

This Court should accept review and approve the holding of *Yonkman*. A defendant is entitled to an acquittal instruction when the jury hears details of prior trials or criminal investigations such that the jury may speculate that the defendant was tried or convicted of the prior acts. *Yonkman*, 233 Ariz. at 369, ¶ 21 (citing *Kinney v. People*, 187 P.3d 548, 557–58 (Colo. 2008)). The court of appeals in *Yonkman* held that "the lack of an acquittal instruction creates a pronounced risk of

juror confusion adverse to the defendant." *Id.* This Court should take this opportunity to approve *Yonkman*'s directive.

There is a growing list of jurisdictions that have found in favor of informing the second jury of prior acquittals when the second jury hears evidence of conduct of which the defendant was previously acquitted. *See, e.g. Philmon v. State,* 593 S.W.2d 504, 507 (Ark. Ct. App. 1980) ("If the state had introduced the evidence of a different offense having been charged against the accused, the accused would have been entitled to show he was acquitted of that charge."); *Williams v. D.C.*, 77 A.3d 425, 434 (D.C. 2013) (holding that evidence of prior acquittal can be admitted to "correct" the assumption that the defendant in fact was tried and convicted of the uncharged conduct); *People v. Bedoya,* 758 N.E.2d 366, 381 (Ill. 2001) (holding that the trial court is required to notify the jury that the defendant was acquitted of uncharged conduct because "the risk of misleading or overpersuading the jury is palpable"); *State v. Washington,* 257 N.W.2d 890, 893 (Iowa 1977) (holding that the trial court would have erred had it not allowed the defendant to notify the jury of a favorable disposition to uncharged conduct); *Nolan v. State,* 131 A.2d 851, 857–58 (Md. 1957), *abrogated on other grounds by State v. Jones*, No. 19-C-268, 2019 WL 4051706 (Md. Ct. App. Aug. 28, 2019) (holding that evidence of an acquittal is admissible "for no other purpose than for the purpose of affecting the weight of the evidence against the accused"); *Walker v. State,* 921 P.2d 923, 927–28 (Nev. 1996)

(holding that once evidence is admitted of uncharged conduct of which the defendant was previously acquitted, the defendant should be allowed to inform the jury of the prior acquittal); *State v. Smith,* 532 P.2d 9, 11–12 (Or. 1975) ("We are of the opinion that in any case in which the state attempts to prove the defendant's guilt by showing other offenses of which he was charged, the defendant should be permitted to show that he was acquitted of the charge."). *But see United States v. Wells*, 347 F.3d 280, 285–86 (8th Cir. 2003); *United States v. De La Rosa*, 171 F.3d 215, 219–20 (5th Cir. 1999); *United States v. Tirrell*, 120 F.3d 670, 677–78 (7th Cir. 1997).

Admission of acquittal evidence has become the progressive approach because "the testimony about the acquittal effectively neutralizes the uncharged misconduct evidence." Edward J. Imwinkelried, *Uncharged Misconduct Evidence* §§ 10:10 (1984 & Nov. 2018 Supp.). It puts both parties on equal footing with respect to the conduct. Ultimately, these jurisdictions relied on principles of fairness and also found that evidence of the acquittal is relevant because it allows the jury to balance the information presented by the prosecution about the uncharged conduct with the knowledge that a previous jury found that the defendant was not guilty of that conduct. *See, e.g.*, *Bedoya*, 758 N.E.2d at 381; *Hess v. State,* 20 P.3d 1121, 1125 (Alaska 2001).

II. When the State seeks to admit evidence of acquitted conduct as evidence in the substantive offense, admission of the prior acquittal should not be limited to only to an acquittal jury instruction. Instead, the jury should also be instructed on how to properly consider the prior acquittal and what weight, if any, it should be given.

This Court should not limit the application of *Yonkman* strictly to an acquittal instruction for Rule 404 purposes. Admission of an acquittal can be useful to the jury in understanding the case as a whole and making a determination of guilt or innocence. *See, e.g.*, *Hess*, 20 P.3d at 1125 (evidence of an acquittal is relevant and admissible because the jury "may reasonably infer a greater probability of innocence from the fact of the acquittal"); *People v. Griffin*, 426 P.2d 507, 510–11 (Cal. 1967) ("[W]e are convinced that we should not depart from the rule that a properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime."). This Court should do the same.

If a jury hears facts from a prior trial or hearing where the defendant was acquitted, there is no away around the jury speculating about the results of those proceedings. The risk of the jury misusing the information of an acquittal is far outweighed by the prejudice to a defendant if the jury assumes the defendant engaged in the acquitted conduct and that leads to a conviction on the new offense. Information about the prior acquittal could shed light on a witness's credibility and truthfulness, as well as help the jury put the State's case into a proper context. Rather than allowing the exclusion of such evidence out of concern it might confuse the

issues, the Court can instruct the jury on how to use the information. However, the absence of acquittal evidence may well condemn the defendant and result in a conviction based on a skewed and one-sided perspective of the facts.

"[E]vidence showing the defendant had or may have committed other crimes not charged in the information is prejudicial and inadmissible." *State v. Hardin*, 99 Ariz. 56, 58–59 (1965). There are exceptions to the rule, including the "complete story" doctrine. *Id.* The Court has recognized an exception where evidence of other offenses is needed to complete the story. *See, e.g.*, *State v. Price*, 123 Ariz. 166, 168 (1979). Just as the State would argue that the conduct was intrinsic to the charged offense so it fell within the exception, the defense should get to counter that the defendant was acquitted of the conduct alleged by the State.

The position that "acquittals are not of consequence" "because they only show the State failed to prove every element of the other offenses beyond a reasonable doubt" conflicts with the very premise of our legal system. Response at 14. A defendant is presumed innocent. A.R.S. § 13-115. Irrespective of whether a defendant is acquitted because the jury found actual innocence or whether it determined the State failed to meet its burden, the result remains the same. That is not to say the acquitted conduct can't be used in other ways where there is a lesser standard of proof. But, if the State seeks to introduce evidence of acquitted conduct, it is only fair that a defendant should be permitted to challenge the State's assertion

and present contrary evidence.

The State's position that knowledge of an acquittal has minimal relevance is unfounded. The State's real concern is that knowledge of an acquittal may cause a jury to look more closely at the State's case and may hurt its chance at a conviction. Allowing the State to admit evidence of acquitted conduct without challenge stands to have the opposite effect on a defendant – it may lead the jury to reach a guilty verdict based upon assumption the defendant was convicted of other conduct. The answer is to allow both sides to present their position and instruct the jury on the proper use of the evidence the weight it should be given, if any.

III. The court of appeals improperly focused on prejudice to the State's ability to obtain a conviction in determining that Rule 403 prevented admission of acquittal evidence. The State cannot claim unfair prejudice just because evidence may hurt its case. The danger of unfair prejudice to the accused by not admitting acquittal evidence outweighs any concern of prejudice to the State obtaining a conviction.

The State has no right to a conviction. A criminal defendant has rights that the State does not possess. The court of appeals affirmed the trial court's use of Rule 403 to find that, even if the acquittals were relevant, they were properly excluded because it "would have prejudiced the state's case." *Decision*, at *4, ¶ 17. The only prejudice identified by the State was the possibility the jury could put weight in the previous jury's findings and it could hurt its chances at a conviction. *Id.* This is not a valid reason to exclude evidence under Rule 403. This Court should not condone exclusion of evidence out of a fear it could hurt the state's case. This is particularly

true when the evidence sought to be presented has far greater probative value to the defendant.

A party is entitled to a jury instruction on any theory reasonably supported by the evidence. *State v. Rodriquez*, 192 Ariz. 58 (1998). The fact of an acquittal of conduct alleged to be "other acts" or intrinsically intertwined with the alleged offense may have direct relevance to the defense theory of a case. Jury instructions are meant to inform the jury of the applicable law in terms they can understand. *State v. Miller*, 226 Ariz. 190, 192 (Ct. App. 2011). A trial court has considerable discretion in making evidentiary rulings. *State v. Cooperman*, 232 Ariz. 347, 351 (2013). For the purpose of excluding evidence under Rule 403, the court has to determine that the probative value is substantially outweighed by danger of unfair prejudice. Ariz. R. Evid. 403; *State v. Hardy*, 230 Ariz. 281, 290 (2012). "Unfair prejudice means an undue tendency to suggest decision on an improper basis…such as emotion, sympathy or horror." *Hardy*, 230 Ariz. at 290 (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)). When judges apply their discretion to overstep the boundaries of Rule 403, they may be shielded from reversal based on the standard of review. This can lead to inconsistent application and results.

Arizona has recognized that "[t]he general rule is that the [Rule 403] balance should be struck in favor of admission." *State v. Machado*, 224 Ariz. 343, 349 n.1 (App. 2010), *aff'd*, 226 Ariz. 281 (2011) (quoting *United States v. Dennis*, 625 F.2d

782, 797 (8th Cir. 1980)). The court should have viewed the evidence "in a light most favorable to its proponent maximizing its probative value and minimizing its prejudicial value." *Id.* (quoting *State v. Castro*, 163 Ariz. 465, 473 (App. 1989)) (discussing third-party culpability). The trial court must also consider whether a jury instruction can cure or lessen the prejudice by admission. *See State v. Dann*, 220 Ariz. 351, 369–70 (2009) (court determined if any prejudice existed by admission of statement, it was cured by instructions). The court views evidence in the light most favorable to a defendant's request for instruction. *State v. Carson*, 243 Ariz. 463, 463 (2018).

The court of appeals failed to consider *Machado* or *Carson* in affirming the trial court's holding that Rule 403 is a proper mechanism for the State to exclude evidence on the basis that it could hurt the State's chances at a conviction if the jury were allowed to learn of information highly probative to the defense.

IV. The court of appeals' reading of *Yonkman* is too narrow and created a distinction where none exists. The court focused too heavily on whether the trial court used the proper verbiage when describing the prior proceeding or whether the uncharged conduct was "intrinsic" to the offense and focused too minimally on *Yonkman*'s major concern—the danger of improper juror speculation when evidence of an acquittal is not admitted.

The court of appeals held *Yonkman* was distinguishable and thus inapplicable to the facts of Ybarra's case. *Decision*, at *3, ¶ 16. The court relies on a distinction where there is none and, in doing so, the court of appeals reads the directive of *Yonkman* too narrowly. Under the distinction created by the court of appeals, it is

difficult to define a situation where *Yonkman* would apply. It based its decision on two distinguishing facts: First, the testimony in *Ybarra* was referred to as "previous testimony" or from a "prior hearing." *Id.* Second, the alleged offenses all occurred within the same course of events and involved the same victim. *Id.* Neither of these facts changes the application of *Yonkman*.

The first distinguishing fact is a misnomer. There is little difference in facts between *Yonkman* and *Ybarra*. There needs to be a case-by-case approach to analyzing admission of acquittal evidence or requests for acquittal instructions. However, there also needs to be clear guidelines for when the evidence should be admissible and when an instruction would be appropriate. Creating a distinction based solely on verbiage will lead to inconsistent application. Despite the verbiage used, the implication is the same. The fact that prior under oath testimony exists and is being used in a criminal trial raises concern the jury could speculate on the source of that testimony. Where any possible suggestion exists, the Court should err in favor of admission of evidence or inclusion of an acquittal instruction.

The second distinguishing factor was whether *Yonkman* applied in cases where the State claims the conduct is intrinsic to the offense. *Decision*, at *3, ¶ 16. The State argues that *Yonkman* applies only where the defendant seeks to admit "other act" evidence, not where the acquitted conduct is intrinsic to the remained charged acts. Response at 11. The court of appeals used this to avoid application of

Yonkman. The State argues that applying *Yonkman* to *Ybarra*'s case would result in a major expansion of *Yonkman's* holding. No such expansion would result. The State's position relies on a narrow reading of *Yonkman* and is inconsistent with prior opinions of the Court. *Yonkman* looked at admission under "other acts" evidence admitted by the State. *Yonkman*, 233 Ariz. at 373–74. However, its holding is not limited to just "other act" evidence. *Yonkman* also discussed uses as fact evidence. *Id*. at 374–75 Arguably, the premise that a defendant should get to admit evidence of an acquittal where acquitted conduct is admitted is even more prominent in situations where the evidence is claimed as "intrinsic".

In *State v. Davis*, the court of appeals previously held that evidence of an acquittal was admissible to "weaken and rebut the prosecution's evidence of the other crime." 127 Ariz. 285, 286 (Ct. App. 1980). The *Yonkman* court acknowledged *Davis* and its position that "when evidence of acquitted conduct is presented, the fact of the acquittal often becomes admissible under [the rules of evidence]." 233 Ariz. at 375, ¶ 21. *Yonkman* and *Davis* are consistent with other jurisdictions allowing the use of an acquittal to challenge the State's case. *See, e.g. People v. Griffin,* 426 P.2d 507, 510–11 (Cal. 1967) ("[W]e are convinced that we should not depart from the rule that a properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime."); *Hess v. State,* 20 P.3d 1121, 1125 (Alaska 2001) (holding that evidence of an acquittal is relevant and admissible because the

jury "may reasonably infer a greater probability of innocence from the fact of the acquittal").

The fact that conduct was performed contemporaneously with and directly facilitated the commission of the charged acts does not prevent application of *Yonkman*. Response at 12. If anything, it shows an even greater importance for admission of evidence of the acquittal or an acquittal instruction. This Court should not read *Yonkman* so narrowly that it renders it effectively non-existent.

CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court recognize *Yonkman* and set a standard allowing information about an acquittal to be presented to the jury if the State seeks to admit evidence of the acquitted conduct. Jury instructions can be properly tailored to address the concern of improper use of acquittal information. This Court should also affirm that Rule 403 is not a mechanism for the court to exclude evidence on the basis that admission of evidence could hurt the prosecution's chances of a conviction. The state has no right to a conviction. The law cannot permit the prosecution to claim unfair prejudice because it believes admission of evidence would hurt its chances at a conviction.

RESPECTFULLY SUBMITTED this 28th day of October, 2019.

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