ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION IV & I

CACR06-1487

31 October 2007

JAMES WILLIAM KING,
APPELLANT

v.

STATE OF ARKANSAS,
APPELLEE

AN APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [CR-05-4563]

THE HONORABLE TIMOTHY DAVIS FOX, CIRCUIT JUDGE

SUPPLEMENTAL OPINION ON DENIAL OF PETITION FOR REHEARING

In an earlier opinion, this court reversed James King's theft conviction because it was not supported by substantial evidence. *King v. State*, CACR 06-1487, slip op. (Ark. App., 12 September 2007) (unpublished). The State now petitions for a rehearing to correct an alleged error of law in our decision. It asserts that the determination of whether circumstantial evidence excludes every other hypothesis consistent with the appellant's guilt was solely for the fact-finder to decide. *Carmichael v. State*, 340 Ark. 598, 602, 12 S.W.3d 225, 227 (2000). And citing *Martin v. State*, 346 Ark. 198, 203, 57 S.W.3d 136, 139–40 (2001), the State argues that, as an appellate court, we were not permitted to second-guess the fact-finder's decision.

Indeed, both *Martin* and *Carmichael* have statements that seem to immunize a fact-finder's determination about the sufficiency of the evidence from appellate review. We are grateful to the State for exposing this murkiness in our law. Nevertheless we deny the State's petition for rehearing because, after careful review, we conclude that settled law supports our decision in this case. There is a long line of precedent in which our courts have discussed the appellate standard for reviewing the judgment in a criminal case when the evidence is entirely circumstantial. We take this opportunity to confirm that standard of review.

I.

First, we note that *Martin* is about corroborating an accomplice's testimony with circumstantial evidence. This is a different issue from the one we face in this case where no alleged accomplice testified. *Martin's* issue, however, is related to the issue here. *Martin* relies on *Johnson v. State* for the proposition that an appellate court may not consider whether the evidence excludes every other reasonable hypothesis but that of guilt. 303 Ark. 12, 17, 792 S.W.2d 863, 865 (1990). That point of law comes from *Cassell v. State*, which correctly recites the substantial-evidence standard for reviewing a conviction based entirely on circumstantial evidence. 273 Ark. 59, 62, 616 S.W.2d 485, 486–87 (1981).

Cassell's holding is good law. It follows the special rule we have for

circumstantial-evidence convictions:

> In order to sustain a conviction based solely on circumstantial evidence, the circumstances must be consistent with the guilt of the accused and inconsistent with his innocence, and incapable of explanation on any other reasonable hypotheses than that of guilt. When the circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as sufficient to support a conviction.

Ayers v. State, 247 Ark. 174, 176–77, 444 S.W.2d 695, 696–97 (1969). This standard for reviewing convictions is long-standing and sound:

> In questioning the sufficiency of the proof counsel rely upon the rule, . . . that circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable conclusion. That rule, . . . is usually for the jury (or for the trial judge in a non-jury case), the test in this court being the requirement of substantial evidence. . . . It is only when circumstantial evidence leaves the jury, in determining guilt, solely to speculation and conjecture that we hold it insufficient as a matter of law.

Brown v. State, 258 Ark. 360, 361, 524 S.W.2d 616, 616–17 (1975) (George Rose Smith) (citation omitted).

Though clear in its inception, this oft-repeated standard has been clouded by slight modifications in the language of the opinions over time. Cases such as *Carmichael*, on which the State now relies, correctly state the part of the standard identifying the fact-finder's role, but they do not refer to the appellate court's role in reviewing the judgment. These cases include phrases like: "Once a trial court determines the evidence is sufficient to go to the jury, the question of whether the

circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide." *Gregory v. State*, 341 Ark. 243, 248, 15 S.W.3d 690, 694 (2000); *see also Carter v. State*, 324 Ark. 395, 398, 921 S.W.2d 924, 925 (1996); *Abbott v. State*, 256 Ark. 558, 561–62, 508 S.W.2d 733, 735 (1974); AMI—Crim. 106. This is a correct, but incomplete, statement of our law.

Carmichael and like cases do not include the important nuance that describes the appellate court's role. A full statement of the standard of review must recognize both parts of the inquiry, the fact-finder's role at trial and the appellate court's role on appeal. In many opinions, the appellate court's role is signaled by using the word "usually" when describing the fact-finder's role. *Brown, supra*; *Cristee v. State*, 25 Ark. App. 303, 306, 757 S.W.2d 565, 567 (1988) ("whether circumstantial evidence excludes every other reasonable hypothesis is *usually* a question for the jury")(emphasis added); *see also Deviney v. State*, 14 Ark. App. 70, 74, 685 S.W.2d 179, 181 (1985); *Murry v. State*, 276 Ark. 372, 378, 635 S.W.2d 237, 241 (1982); *Smith v. State*, 264 Ark. 874, 880, 575 S.W.2d 677, 681 (1979). In other opinions, however, the second part of the standard is simply omitted, implying that the fact-finder's decision in a circumstantial evidence case is essentially immune from review. That is not the law. Our original standard of review remains intact.

II.

On appeal, the question is this: when the evidence is viewed in the light most favorable to the State, does substantial evidence support the judgment? When the State's case is made of entirely circumstantial evidence, if it leaves the fact-finder to speculation and conjecture, then the evidence is insufficient as a matter of law. *Deviney*, 14 Ark. App. at 74, 685 S.W.2d at 181; *Cristee*, 25 Ark. App. at 306, 757 S.W.2d at 567; *Abbott*, 256 Ark. at 561–62, 508 S.W.2d at 735; *Ledford v. State*, 234 Ark. 226, 230, 351 S.W.2d 425,427–28 (1961); *Scott v. State*, 180 Ark. 408, 412, 21 S.W.2d 186, 188 (1929). Two equally reasonable conclusions about what happened raise only a suspicion of guilt. On appeal, we may consider whether the record—viewed in the light most favorable to the State—presents this situation, and thus required the fact-finder to speculate to convict the defendant. This is the same question the circuit court faces in deciding whether to send the case to the fact-finder at trial. In asking this question we are not doing the fact-finder's job. Instead, like the circuit court, we are weighing whether the evidence was strong enough to put the case in the fact-finder's hands for decision. And we must set aside any judgment based upon evidence that required the fact-finder to rely on speculation and conjecture. *Gregory v. State*, 341 Ark. at 248, 15 S.W.3d at 694; *Carter*, 324 Ark. at 398, 921 S.W.2d at 925; *Smith*, 264 Ark. at 880, 575 S.W.2d at 681.

III.

In King's case, we followed this standard of review. We did not consider any proof that supported King's innocence. We recited the record in the light most favorable to the State. That record was simply insufficient. The State proved only that a co-worker saw King moving the store's hardware out the front door. King's job at the store, however, was to move hardware. Without more, the co-worker's testimony does not prove that King was guilty of exercising unauthorized control over any store item with the purpose of permanently depriving the store of it. Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2003). The circuit court, as the finder of fact, therefore had to speculate to find King guilty. This it may not do.

We stand by our reversal of King's conviction. Petition denied.

PITTMAN, C.J., HART, BIRD, HEFFLEY and MILLER, JJ., agree.