NO. 46753-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT FRANKLIN LEONARD,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

I. Whether appellant is permitted to bring on appeal for the first time a complaint of corpus delicti when he failed to object at trial.

II. Whether it was error for defense counsel to not object on basis of corpus delicti and therefore his performance was deficient despite the fact an objection would not have been sustained because sufficient evidence was entered to meet any concern.

III. Whether defense counsel provided ineffective assistance by not investigating an issue of an undiagnosed impairment to present as a defense for appellant.

IV. Whether the appellant, after the State showed he was advised of his Miranda warnings on several occasions, agreed that he understood those warnings, agreed to speak with officers about the case, was overcome by an officer's obsequious need to help him through the interview process even though he testified that he was hot and tired after working an eight-hour shift.

V. Whether it was error for the trial court to impose jury costs on the appellant when he was tried through bench trial.

II. ANSWERS

I. No. An appellant cannot raise an issue of corpus delicti on appeal that was not first preserved by objection at trial.

II. No. Failing to object was not error because the State had met its burden to permit entry of the appellant's statements.

III. No. It was a trial tactic, intended to garner sympathy from the court.

IV. No. The trial court properly admitted the statements because the State met its burden, showing that the defendant made knowing, intelligent and voluntary waiver and that he willingly spoke with officers.

V. Yes. The appellant did not request trial by jury and was not tried by jury.

III. FACTS

From the end of 2011 through nearly the entirety of 2012, Robert Leonard carried on an affair with a minor boy, C.H. RP 301. They met in an internet chatroom for gay men, called Truckersucker.com. RP 61, 300. Initially, C.H. lied about his age to gain access to the site--he was curious about his sexuality, and wanted to discover himself. However, this relationship developed from the basic online interactions to include lengthy phone conversations. Colt was thirteen at the time, and his voice had not yet deepened through the processes of puberty. RP 71. Indeed, his voice only deepened after the relationship ended. C.H. had also made known that he was a minor. RP 62.

Throughout their conversations, they discussed many things: the problems Colt had with his stepfather, their love of cars, that appellant drove a red truck, the outdoors, that appellant lived in Washington in a doublewide trailer, that the appellant was a janitor at a school, and sex. RP 40-41, 63, 302-03. They texted their fantasies to each other. RP 41- 45. The defendant described jacking big loads onto the steering wheel of his truck. C.H. also

described masturbating. RP 42. The communications included discussion of sexual penetration, oral and anal. RP 302, 307. These communications occurred through numerous text messages, emails, and phone calls.

Eventually, in October, 2012, they were caught. C.H.'s mother observed a number of indecent text messages on C.H's phone. RP 24-28. She called police. Police made contact with the appellant, spoke with him and obtained numerous pieces of mail, his email address, telephone number, and his computer, all of which were entered into evidence during trial. RP 274-78. The computer was provided to Maggi Holbrook of the Vancouver Police Cybercrimes unit, who performed a forensic examination of the computer's hard drive.

Detective Holbrook found numerous artifacts of conversations between C.H. and the appellant on the appellant's computer. RP 159-79. These included pieces of sexualized conversations regarding masturbation.

C.H.'s iPhone was presented to the Vancouver Police Cybercrimes lab for forensic review. Eric Thomas performed the examination of the phone. He found complete text and email conversations between numbers associated with the appellant and C.H.. RP 81, 118. He also found complete conversations between their relevant email addresses. RP 95-132.These were entered into evidence at trial. Exhibit 12.

Officers spoke with the appellant. He admitted to conversations with C.H. He also admitted to knowing C.H's age, RP 301, and that the conversations were sexual in nature.

During a recorded statement, secondary to the original interview, the appellant began to describe other possible victims. RP 310. These were not relevant to the current case, but officers were concerned they may have other crimes to investigate. This turned out to not be the case, and were a portion of the appellant's imaginative recollection. RP 329-30, 295.

IV. ARGUMENT

I. Because appellant failed to object at trial to the entry of his statements he waived his right to appeal.

The corpus delicti rule "is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make proper objection to the trial court to preserve the issue." *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 531 (1996) *citing State v. C.D.W.*, 76 Wn.App. 761, 763-64, 887 P.2d 911 (1995)(failure to comply with the corpus delicti rule is not constitutional error and requires proper objection at the trial level).

In the present case, appellant did not object to the entry of his statements when they were played at trial. RP 326-27. This effectively waived any issue on appeal. Indeed, the failure to object precludes appellate

review because, even if corpus delicti was not met, sufficient proof may have existed during trial but failure to object omits that proof from the record. *C.D.W.*, 76 Wash.App. at 763-64, 887 P.2d 911. The analysis should end here.

a. Sufficient evidence independent of appellant's confession existed.

If the court does find the appellant preserved this issue on appeal, it should find that sufficient evidence did exist to justify the entry of his statements at trial—an analysis it should not perform, because this is a corpus issue, not an issue of sufficiency.

Corpus delicti means the "'body of the crime' " and must be proved by evidence sufficient to support the inference that there has been a criminal act. *State v. Aten*, 130 Wash.2d 640, 655, 927 P.2d 210 (1996) (*quoting 1 McCormick on Evidence § 145*, at 227 (John W. Strong ed., 4th ed.1992)). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. *Aten*, 130 Wash.2d at 655–56, 927 P.2d 210; *State v. Vangerpen*, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995). The State must present other independent evidence to corroborate a defendant's incriminating statement. *Aten*, 130 Wash.2d at 656, 927 P.2d 210. In other words, the State must present evidence independent of the incriminating

statement that the crime a defendant described in the statement actually occurred.

In determining whether there is sufficient independent evidence under the *corpus delicti* rule, courts review the evidence in the light most favorable to the State. *Aten*, 130 Wash.2d at 658, 927 P.2d 210. The independent evidence need not be sufficient to support a conviction, but it must provide *prima facie* corroboration of the crime described in a defendant's incriminating statement. Id. at 656, 927 P.2d 210. *Prima facie* corroboration of a defendant's incriminating statement exists if the independent evidence supports a "'logical and reasonable inference' of the facts sought to be proved." Id. at 656, 927 P.2d 210 (*quoting Vangerpen*, 125 Wash.2d at 796, 888 P.2d 1177).

In addition to corroborating a defendant's incriminating statement, the independent evidence "'must be consistent with guilt and inconsistent with a hypothesis of innocence.' " Id. at 660, 927 P.2d 210 (*quoting State v. Lung*, 70 Wash.2d 365, 372, 423 P.2d 72 (1967)). If the independent evidence supports "reasonable and logical inferences of both criminal agency and noncriminal cause," it is insufficient to corroborate a defendant's admission of guilt. Id.

The appellant was charged with and convicted of communicating with a minor for immoral purposes and it was alleged that the communication took place through electronic means. RCW 9.68.090(2). An immoral purpose refers to sexual misconduct. *State v. Falco*, 59 Wash.App. 354, 358, 796 P.2d 796 (1990). The State showed the appellant communicated through text messages as well as emails regarding sexual conduct with a minor boy, who was between the ages of thirteen and fourteen at the time of the communication. The State showed the appellant understood the victim to be at least two years younger than sixteen; this specific period was referenced in a text conversation with the victim. RP 167-69. In that conversation, the following email/text exchange took place:

> Appellant: "Love you beyond any reason, Colt. Wish you were here with me, but you have a couple years to wait."
>
> Victim: "Yes, but when those years are over, I'll make my way up to you no matter what or how." RP 169.

Additionally, the State showed that on multiple occasions, between August 2012 and October 2012, the appellant had phone conversations with the victim. RP 82. This fact is crucial because the victim's voice did not change due to puberty until several years following those conversations. RP 71. The court took pains to differentiate between conversations and communications. It found that the appellant had "a clue" of the victim's age

through these conversations. RP 379-80. This evidence was sufficient to prove beyond a reasonable doubt that the appellant committed the charged crime.

There is a difference between no evidence of guilt and some evidence of guilt that should not be overlooked. Appellant confuses the two when citing *State v. Dow*, where the State conceded it could not present any evidence of guilt. 168 Wn.2d 243, 254-55, 227 P.3d 1278 (2010). Here, the State presented evidence the appellant knew the victim must wait two years before he could meet him. Even if the appellant's acknowledgment that the victim could not be with him for another two years is not considered enough evidence to show knowledge of the victim's age, that acknowledgment coupled with the phone calls suggests the appellant was aware, which is enough to permit the State to enter his statements into evidence. It was only after this evidence was introduced that the State also introduced the appellant's own statements. The appellant admitted to knowing that the victim was between the ages of thirteen and fourteen. RP 289.

II. Appellant received effective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the performance prejudiced the defendant's case. *Strickland v. Washington*, 466

U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705–06, 940 P.2d 1239 (1997). To satisfy the prejudice prong, a defendant must show a "reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel provided effective assistance. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003). To rebut this presumption, a defendant bears the burden of establishing the absence of any "'conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (*quoting State v. Reichenbach*, 153Wn.2d 126, 130, 101 P.3d 80 (2004)).

a. Counsel was effective because the State entered sufficient evidence justifying the admission of his statements into evidence.

The State entered evidence sufficient to satisfy any concern of *Corpus delicti*. The question then turns not on whether he should have objected but whether an objection would actually have been sustained.

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the

defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337 n. 4, 899 P.2d 1251; *State v. Hendrickson*, 129 Wash.2d 61, 80, 917 P.2d 563 (1996); and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

Given the evidence presented, it cannot be said that any objection would have been sustained. Furthermore, the court made its finding of guilt based on the evidence presented outside of the appellant's statements. Juries are allowed to make inferences from all relevant evidence. Trial courts are permitted to make the same inferences. If the trial court made its finding of guilt based on the evidence outside of the appellant's statements, it is safe to presume any objection would not have been sustained. Failure to object is a matter of legitimate trial strategy and appellant has not overcome his burden. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); *State v. Schumacher*, __ Wn.App. __, 347 P.3d 494 (April 1, 2015).

b. Counsel did not rely upon a theory other than general denial.

Failure to investigate a trial theory is not often considered ineffective. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). Defense counsel argued at closing that his client may not have the acumen to understand the questions presented to him by the State. He did not argue that his client should be acquitted due to his intellectual challenges, but that perhaps his perceivable limitations contributed to his statements and that those statements should be overlooked. Essentially, defense counsel argued the trial court should hold the State to the evidence, excluding the appellant's admissions. RP 361-62.

In the course of this argument, defense counsel laid a record for his reasons not to pursue a competency evaluation. RP 362. Defense counsel was not concerned enough to have the appellant evaluated. Neither did the trial court, and the trial court was in best position to evaluate appellant's competency at trial. *State v. Neslund*, 50 Wn.App. 531, 566-67, 749 P.2d 725 (1988). Consequently, defense counsel's observations were simply that, observations intended to draw attention away from the appellant's statements and focus on the evidence presented by the State. Regardless of the fact it failed, it was a reasonable trial tactic.

III. Appellant made a knowing, intelligent, and voluntary waiver of his Miranda rights.

Miranda claims are reviewed de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Unchallenged findings of fact, including those made during suppression hearings, are binding on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

It is undisputed that on multiple occasions the appellant was informed of his *Miranda* rights. RP 248, 249, 250.

Appellant claims the court erred by admitting the statements he made to the police. Before admitting a defendant's custodial statements, the State must prove, by a preponderance of the evidence, that police advised the defendant of his *Miranda* rights and that he knowingly, voluntarily, and intelligently waived those rights. *State v. Burkins*, 94 Wn.App. 677, 694, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999). When considering the voluntariness of the defendant's statements, courts consider whether, given the totality of the circumstances, the defendant's will was overcome. Id. These circumstances include the defendant's condition and mental abilities. *Id.*

The record reflects that the appellant understood his constitutional rights. RP 185-242. An appearance of understanding suggests a valid

waiver. *See State v. Ellison*, 36 Wn.App. 564, 572, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984); *State v. Davis*, 34 Wn.App. 546, 549, 662 P.2d 78, review denied, 100 Wn.2d 1005 (1983). The court's conclusion the waiver was valid was supported by the evidence and the record. RP 247-53.

The appellant was advised of his Miranda rights from the outset of police interaction. RP 187. Officer Murray and Officer Palmquist continued to advise or remind the appellant of his rights throughout their interaction with him. Officer Murray took unusual pains to ensure the appellant was aware of his rights. These efforts were not specifically catered to the appellant, but were consistent with Officer Murray's standard approach to advising suspects of their Miranda rights. RP 187-89, 192, 216-17, 223. He made clear to the appellant that the appellant was in control of the conversation and how that conversation proceeded. RP 192, 194-95. The appellant understood his rights when initially informed of them. RP 193. Afterward, Officer Murray took every precaution to ensure he did not violate the appellant's constitutional rights. RP 196-97.

Officer Murray made several other efforts to inform the appellant of his rights. RP 198, 220, 223. Indeed, at one point, he offered to read them again to the appellant, who declined, stating that he understood his rights. RP 199, 201. Ultimately, the appellant willingly spoke with Officers. RP

201. The interview was recorded, and the recorded interview was played for the court to review. RP 203. The recording reflected what Officer Murray testified. RP 204-207. It also reflected the second time officer Murray advised the appellant of his rights. RP 207. He agreed to speak with officers. 207.

The appellant returned to the Woodland Police office the next day. Another interview took place. The appellant wanted to begin discussion of the case, but, before he did so, Officer Murray made certain he did not say anything until he was re-advised of his rights. RP 211. Again, he agreed to speak with officers.

The appellant described himself as confused, because he "was just hot, tired, and [] just out of it," after working an eight hour day. RP 233. The appellant also described himself as a reader and a person who put together jigsaw puzzles. RP 235. He admitted that he understood what was going on when his rights were being read. RP 240. And that he willingly gave a 25-minute recorded statement that was neither forced nor commanded by officers. RP 240-41.

Nothing about the interaction between the appellant and the officers suggested it was involuntary or coercive. The appellant may have a learning disability, but that was never testified to nor was it presented during his

testimony. It was an argument made by defense to persuade the trial court to find that his client's statements were the result of officers overcoming his will. RP 245. This simply was not accurate, and the trial court ruled that to be the case. RP 253. The more likely story is that he was like he said: hot and tired, after working a long day. Regardless of being a relative novice to the legal world, which is not reason to invalidate a disclosure, the appellant was familiar with the process of *Miranda*; he understood them from television cop shows, and the number of times he was instructed of them by officers. RP 254. His statements were properly admitted into evidence.

a. <u>Though properly admitted, if found to be error, it was harmless</u>.

Admission of an involuntary confession obtained in violation of Miranda is subject to treatment as harmless error. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 1255, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991). To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 111 S.Ct. at 1257; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 24 A.L.R.3d 1065, *reh'g denied*, 386 U.S. 987, 18 L.Ed.2d 241 (1967); *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). The

Washington Supreme Court has adopted the "overwhelming untainted evidence" standard in harmless error analysis; therefore, we look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. *Guloy*, 104 Wash.2d at 426, 705 P.2d 1182.

The untainted evidence upon which the trial court relied consisted of text and emails between the appellant and victim; admissions within those text and emails that he understood the victim was underage; and the subject matter of those text and emails. The communications were of a sexual nature, describing mutual masturbation and other sexual acts. These communications were sent from Cowlitz County, State of Washington. The telephone number and email accounts associated with the communications belonged to the appellant. RP 57, 108, 161-62, 264-72. A keyword search for the victim's email address was performed on the appellant's computer, and resulted in 77,900 hits. RP 159-60. There were a gross number of interactions found on the appellant's computer to suggest these were not anything other than a known and purposeful communication with the victim. This was enough to prove beyond a reasonable doubt that appellant communicated with a minor for immoral purposes through electronic means. Consequently, if the court finds the admission of the appellant's statements was error, it was harmless beyond a reasonable doubt.

IV. The Court exceeded its authority by ordering the appellant to pay jury costs.

The State agrees with appellant that jury costs should not have been awarded, if they were. The appellant was tried by bench only.

V. CONCLUSION

Because appellant failed to object at the time of trial, he is prohibited from arguing corpus delicti on appeal. Regardless, sufficient evidence was presented at trial to overcome any objection that would have been made. That evidence was sufficient to prove beyond a reasonable doubt that the appellant committed the crime of communicating with a minor for immoral purposes through electronic means. Furthermore, though unnecessary to convict him of the crime, the trial court properly admitted the appellant's statements.

For those reasons, the State respectfully requests this court affirm the conviction, but remand to address the issue of jury fees.

Respectfully submitted this 29th day of May, 2015.

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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on May 27th, 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 29, 2015 - 12:32 PM

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