NO. 92989-1
COA NO. 46753-4-II
Cowlitz Co. Cause NO. 13-1-01192-9

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEONARD,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the March 9, 2016, unpublished opinion of the Court of Appeals in *State v. Leonard*, COA No. 46753-4-II. The relevant portion of this decision upheld the petitioner's conviction for one count of communication with a minor for immoral purposes.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that the State produced sufficient independent evidence at trial to satisfy *corpus delicti* and trial counsel was not ineffective.

III. STATEMENT OF THE CASE

Leonard and C.H., a minor boy, met in an online chat room in 2011. RP 301. C.H. was thirteen at the time and his voice had not yet deepened. RP 71. C.H. also made it known that he was a minor. RP 62.

Leonard and C.H. continued to talk with each other via phone, email, and text messages for a little over a year. Their conversations were largely sexual in nature. RP 40–41, 63, 302. Eventually, in October 2012, C.H.'s mother discovered these conversations on C.H.'s cell phone. She called police who investigated and ultimately charged Leonard with one count of

communicating with a minor for immoral purposes. During the investigation, Leonard admitted to having the conversations with C.H. and admitted to knowing that C.H. was a minor. RP 301.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

A. This Court should decline to review the *corpus* challenge as the defendant failed to object at trial to the entry of his statements and thereby 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, Leonard did not object to the entry of his statements at trial. RP 326–27. This failure to object waives any issue on appeal. In fact, 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 Wn. App. at 763–64. The Court of Appeals reviewed this issue in the guise of a claim of ineffective assistance of counsel, which is a constitutional issue that may be raised for the first time on appeal under RAP 2.5(a). However, *corpus* is not a sufficiency of the evidence requirement. Additionally, this is not an issue of substantial public interest that should be determined by

the Supreme Court. Therefore, this Court should not grant Leonard's petition and the analysis should end here. However, if this Court hears the issue, the State produced sufficient independent evidence at trial to satisfy *corpus delicti*.

B. The Court of Appeals properly held that the State produced sufficient independent evidence at trial to satisfy *corpus delicti*.

Corpus delicti means the "body of the crime" and must be proven by evidence sufficient to support the inference that there has been a criminal act. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. *Id.*; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The State must present other independent evidence to corroborate a defendant's incriminating statement. *Aten*, 130 Wn.2d at 656. 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. 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. *Prima facie* corroboration exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved." *Id.* (*quoting Vangerpen*, 125 Wn.2d at 796).

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 (*quoting State v. Lung*, 70 Wn.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.*

Leonard 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 Wn. 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:

Leonard: "Love you beyond any reason, [C.H.]. Wish you were here with me, but you have a couple years to wait."

C.H.: "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, Leonard 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 after those conversations took place. RP 71. The court took pains to differentiate between conversations and communications. It found that Leonard had "a clue" of the victim's age through these conversations. RP 379-80. Furthermore, the state presented evidence including a message from C.H. to Leonard that he had to be asleep for school, an email discussing that C.H. was going to band camp, and C.H.'s own testimony that he gave Leonard clues about his age. RP 129; Ex. 16 at 14; RP 66. This evidence was sufficient to prove beyond a reasonable doubt that the appellant committed the charged crime. Therefore, *corpus delicti* was established.

Furthermore, the decision of the Court of Appeals in this case is not in contrast with the Supreme Court's decision in *Dow* or *Brockob*. First, there is a difference between no evidence of guilt and some evidence of guilt that should not be overlooked. Leonard 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, 227 P.3d 1278 (2010). Here, the State presented evidence showing that Leonard knew the victim must wait two years before he could meet him. Even if Leonard's acknowledgment that the victim could not be with him for another two years is not considered sufficient evidence to show knowledge of the victim's age, that acknowledgment coupled with the phone calls suggests the appellant was aware. Additionally, Leonard admitted to knowing that the victim was between the ages of thirteen and fourteen. RP 289. These all indicate some evidence of guilt, in contrast to *Dow* where there was no evidence of guilt.

Similarly, in *Brockob*, there was no evidence to support an inference that the defendant guilty of the crime with which he was charged. 159 Wn.2d 311, 332, 150 P.3d 59 (2006). Brockob was caught shoplifting Sudafed, and was charged with one count of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. *Id.* at 319. The defendant admitted that he stole the Sudafed to give to someone who was going to make methamphetamine, but the State had no independent evidence to support this assertion other than an officer's assertion that Sudafed is a methamphetamine precursor. *Id.* at 332. Therefore, the Court found that the State's evidence only supported an inference that Brockob had shoplifted, not that he was guilty of possession with intent. *Id.* Here,

on the other hand, there was evidence that C.H.'s voice was higher in pitch, he was in school, and could not visit Leonard for two more years. Taken together, there is sufficient evidence to support an inference that Leonard was guilty of the crime with which he was charged – communicating with a minor for immoral purposes. Therefore, the Court of Appeals decision in this case is not in conflict with any other case, nor is it an issue of substantial public interest. The petition should be denied.

C. Leonard 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 (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*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

When a 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; (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *McFarland*, 127 Wash.2d at 337 n. 4; *State v. Hendrickson*, 129 Wash.2d 61, 80, 917 P.2d 563 (1996).

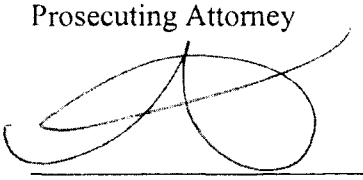
Given the evidence presented, it cannot be said that any objection would have been sustained. Furthermore, the court made its finding of guilt based on the evidence presented outside of the appellant's statements. Juries are allowed to make inferences from all relevant evidence. Trial courts are permitted 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. Therefore, the petition should be denied.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 11th day of May, 2016.

RYAN JURVAKAINEN
Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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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 11th, 2016.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
Subject: RE: PAs Office Scanned Item ROBERT LEONARD, 92989-1, RESPONSE TO PETITION FOR REVIEW

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Attached, please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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