No. 46753-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Leonard,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-01192-9

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

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ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE UNDER THE RULE OF *CORPUS DELICTI* TO CONVICT MR. LEONARD BECAUSE THERE WAS NO INDEPENDENT EVIDENCE THAT HE KNEW OR SHOULD HAVE KNOWN THAT C.H. WAS A MINOR.

1. The state cannot point to evidence independent of Mr. Leonard's statement that is not also consistent with innocence.

C.H. never told Mr. Leonard his true age. RP 66. Mr. Leonard met C.H. on an adult-only web forum. RP 67. C.H. sent Mr. Leonard photos of men who did not appear to be minors, claiming that they were pictures of himself. Ex. 12, pp. 34-35, 67-70.

Still, the trial court found that the state had proved that Mr. Leonard knew C.H. was a minor because he told the police that he was thirteen years old. RP 381. Absent independent evidence that Mr. Leonard knew or should have known that C.H. was a minor, there was insufficient evidence to convict him under the rule of *corpus delicti*.

To support a conviction under *corpus delicti* rule, the state must present independent evidence corroborating "*the specific crime* with which the defendant has been charged." *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (emphasis in original). In other words, the state must provide independent evidence corroborating each element of the charged crime. *State v. Dow*, 168 Wn.2d 243, 251, 254, 227 P.3d 1278 (2010).

Here, the independent evidence was insufficient to prove that Mr. Leonard knew that C.H. was a minor, as required to convict him for communicating with a minor for immoral purposes. *Id.*; *State v. Aljutily*, 149 Wn. App. 286, 296, 202 P.3d 1004 (2009).

Still, Respondent relies exclusively on cases predating *Brockob* and *Dow* to argue that the independent evidence was sufficient in Mr. Leonard's case. Brief of Respondent, pp. 5-8 (*citing State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996); *State v.Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)). Insofar as those cases contradict the more recent holding that the *corpus* rule requires independent evidence of *each element* of the offense, they are no longer good law.

Additionally, the state's independent evidence is insufficient if it supports a logical inference of both guilt and innocence. *Brockob*, 159 Wn.2d at 329-30. To prove a *prima facie* case, the state's independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *Id.* at 329.

Here, Respondent is unable to point to any evidence that is consistent with Mr. Leonard knowing that C.H. was a minor and inconsistent with his not knowing.

The state points to two things as independent evidence that Mr. Leonard knew that C.H. was a minor: (1) text messages indicating that

C.H. would be unable to come to Washington for two more years and (2) testimony that C.H.'s voice did not change until after their interactions ended. Brief of Respondent, pp. 7-8.

But each of those pieces of evidence is also consistent with innocence.

As to (1), there are myriad possible reasons why C.H. would have been unable to come to Washington for two more years: he could have been waiting to finish college, to save enough money, to end an assignment at work, complete probation, or resolve a health issue. Indeed, C.H. could have simply had a personal boundary that he did not want to move to another state for a relationship until he had known the person for a requisite number of years.

The evidence that C.H. did not want to come to Washington until two years had passed cannot establish the *corpus delicti* of the offense.

The same is true of the evidence that C.H.'s voice did not change until after his relationship with Mr. Leonard ended. No witness testified regarding what his voice sounded like before it changed. Indeed, the pitch of the voices of both pre-pubescent boys and adult men varies widely. Even if C.H.'s voice was particularly high, Mr. Leonard could have believed that he simply sounded effeminate.

C.H. also took numerous measures to conceal his age in his dealings with Mr. Leonard – sending photos of older men and claiming they were of himself, as well as using a false birth date to access adult-only websites. Ex. 12; RP 67. He could have altered his voice when he spoke with Mr. Leonard on the phone, if it had been necessary.

The evidence that C.H.'s voice changed after he stopped talking with Mr. Leonard is consistent with both guilt and innocence. It does not provide independent evidence of the *corpus* of the crime.

Because there was no independent evidence that Mr. Leonard knew or should have known that C.H. was a minor, the state has not established the *corpus delicti* of the element that he intended his communications to reach a minor. Mr. Leonard's conviction must be reversed for insufficient evidence. *Id*.

2. Like a traditional insufficiency claim, an argument that the evidence is insufficient to convict under the rule of *corpus delicti* need not be preserved below.

If the state does not provide independent evidence to corroborate each element of a charged crime under the rule of *corpus delicti*, the evidence is insufficient to convict. *Dow*, 168 Wn.2d at 254. Issues regarding the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998).

Still, the state argues that Mr. Leonard cannot raise his sufficiency claim for the first time on appeal because the *corpus* rule is the equivalent of a rule of evidence. Brief of Respondent, pp. 4-5 (*citing State v. C.D.W.*, 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995)).[1]

Since *C.D.W.*, however, the Washington Supreme Court has provided significantly more guidance regarding the operation of the rule of *corpus delicti* in this state. *See e.g. Brockob*, 159 Wn.2d 311; *Dow*, 168 Wn.2d 243.

Specifically, the court has drawn a clear distinction between the *corpus* rule as a test for admissibility on one hand and as a test of sufficiency on the other. *See Dow*, 168 Wn.2d at 253-54. In fact, the Supreme Court has reversed cases for insufficient evidence under the rule of *corpus* even when the issue was not raised during trial. *See Brockob*, 159 Wn.2d at 320, 326, 333, 335.

Like any insufficiency issue, a claim of insufficient evidence under the rule of *corpus delicti* can be raised for the first time on appeal. RAP 2.5.

3. If the *corpus* issue is not preserved, Mr. Leonard received ineffective assistance of counsel.

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[1] The state also relies on *State v. Dodgen*, 81 Wn. App. 487, 492, 915 P.2d 531 (1996). Brief of Respondent, p. 4. But the statement regarding objections in the trial court was dicta in that case, in which the court addressed the merits of the corpus claim.

Failure to validly raise that the evidence is insufficient under the rule of *corpus delicti* constitutes ineffective assistance of counsel. *State v. C.D.W.*, 76 Wn. App. at 764-65.

As outlined above, the state failed to provide insufficient evidence that Mr. Leonard knew that C.H. was a minor. Accordingly, a well-timed objection by defense counsel would have been sustained and the charges against Mr. Leonard would have been dismissed.

If the sufficiency issue under the rule of *corpus delicti* may not be raised for the first time on review, Mr. Leonard was deprived of the effective assistance of counsel. *Id.*; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). His conviction must be reversed and the case remanded for a new trial. *Id.*

II. MR. LEONARD'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT ANY INVESTIGATION INTO THE THEORY UPON WHICH HE RELIED AT TRIAL.

Mr. Leonard relies on the argument set forth in his Opening Brief.

III. THE STATE FAILED TO ESTABLISH THAT MR. LEONARD MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS.

Mr. Leonard relies on the argument set forth in his Opening Brief.

IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. LEONARD TO PAY A JURY DEMAND FEE FOR HIS BENCH TRIAL

The state concedes this error. Brief of Respondent, p. 17. The order for Mr. Leonard to pay a jury demand fee must be stricken.

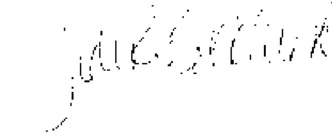
CONCLUSION

Mr. Leonard's conviction must be reversed for the reasons set forth above and in the Opening Brief.

The state concedes that the court exceeded its authority by ordering Mr. Leonard to pay a jury demand fee when he had a bench trial. That order must be stricken from the Judgment and Sentence.

Respectfully submitted on June 12, 2015,

BACKLUND AND MISTRY



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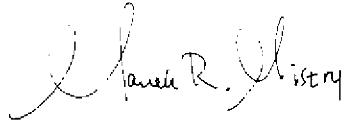

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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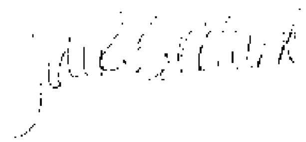
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on June 12, 2015.



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