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STATE OF WASHINGTON
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NO. 40192-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CALEB LEEDY KISOR,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

1. Assignment of Error 1

2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

1. Factual History 3

2. Procedural History 4

D. ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR ATTEMPTED FIRST DEGREE CHILD MOLESTATION BECAUSE, UNDER THE *CORPUS DELECTI* RULE, NO EVIDENCE INDEPENDENT OF THE DEFENDANT'S STATEMENTS ESTABLISHES THE EXISTENCE OF THE CRIME CHARGED 12

II. THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL AFTER A STATE'S WITNESS VIOLATED A PRETRIAL RULING AND INFORMED THE JURY THAT THERE HAD BEEN A PRIOR TRIAL IN THIS CASE DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT 19

E. CONCLUSION 24

F. APPENDIX

1. Washington Constitution, Article 1, § 3 25

2. United States Constitution, Fourteenth Amendment 25

3. RCW 10.58.035 26

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 19

Hudson v. Louisiana,
450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) 12

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 12

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 13

State Cases

Bremerton v. Corbett, 106 Wn.2d 569, 723 P.2d 1135 (1986) 13, 14

State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982) 12

State v. Ashurst, 45 Wn.App. 48, 723 P.2d 1189 (1986) 13

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 12

State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010) 16, 17

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 20

State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970) 20

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 13

State v. Hamrick, 19 Wn.App. 417, 576 P.2d 912 (1978) 14

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) 20

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 13

State v. Munson, 7 Wash. 239, 34 P. 932 (1893) 14

State v. Ray, 130 Wn.2d 673, 926 P.2d 904 (1996) 14

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 19

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 13

State v. Thamert, 45 Wn.App. 143, 723 P.2d 1204 (1986) 20

State v. Wilson, 38 Wn.2d 593, 231 P.2d 288 (1951) 20

Constitutional Provisions

Washington Constitution, Article 1, § 3 12

United States Constitution, Fourteenth Amendment 12, 19

Statutes and Court Rules

RCW 9A.28.020 17

RCW 9A.44.010 . . . . . 17, 18

RCW 9A.44.083 17

RCW 10.58.035 . . . . . 15, 16

ER 401 20

ER 402 20

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for attempted first degree child molestation because, under the *corpus delicti* rule, no evidence independent of the defendant's statements establishes the existence of the crime charged.

2. The trial court's refusal to grant a mistrial after a state's witness violated a pretrial ruling and informed the jury that there had been a prior trial in this case denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does a trial court deny a defendant due process if it holds that a defendant's statements are sufficient to sustain a conviction when the state fails to prove the existence of the crime charged with evidence independent of those statements as required under the *corpus delicti* rule?

2. Does a trial court's refusal to grant a mistrial after a state's witness violates a pretrial ruling and informs the jury that there had been a prior trial in this case deny the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when the jury would have returned a verdict of acquittal but for the admission of that improper evidence?

STATEMENT OF THE CASE

Factual History

Sometime in the summer of 2007, Rebecca Kisor took her 11-year-old daughter KB and her 18-month-old son JK with her to clean her father's house in Chehalis, which she did about once a month. RP 36-37. Rebecca's 19-year-old brother Caleb Kisor also lives in the house and was present on this particular day. RP 35, 38-40. While Rebecca cleaned, KB stayed in the living room watching the television and JK ran around the house playing. RP 19-20. JK is fairly noisy when playing, and after a while Rebecca noticed that it had become quiet, so she went to look for him. RP 38-40. After noting that he was not in the living room with KB, Rebecca went down the hall to see if JK was in the bathroom or one of the bedrooms. *Id.* Although only 18-months-old, JK can walk around quite well, and he can open doors by himself. RP 38-40.

When Rebecca walked down the hallway, she saw that the door to her brother Caleb's room was partially open so she looked inside as it was not unusual for JK to play with his uncle in his room. RP 40-41. Upon looking inside, she saw JK standing close to Caleb, whose penis was exposed and about five or 6 inches from JK's head. RP 40-41. Upon seeing this, Rebecca entered the room, grabbed JK, and took him out into the living room. *Id.* As she did, Caleb threw himself face first onto his bed. *Id.* After a few minutes,

Rebecca went back into the bedroom to talk with Caleb. RP 42-44. During this conversation, Rebecca asked Caleb if JK had touched his penis and Caleb, who was crying, admitted that he had. *Id.* Rebecca then went and called one of her other sisters, who came over and spoke with Caleb. RP 48. By contrast, according to Caleb, he did not admit to any touching or intent to do so. RP 90-110. Rather, his only conduct and intent was to expose himself. *Id.*

A week or so after this incident, Caleb went to see a therapist by the name of Sandra Ames. RP 74-79. During his first meeting with Ms Ames, Caleb told her that his nephew JK had been in his bedroom and that he had exposed himself to JK. *Id.* When asked why he did this, Caleb stated that he did not know. *Id.* According to Ms Ames, Caleb appeared remorseful and emotional during this first therapy session. *Id.* However, according to Ms Ames, in neither of the two sessions she had with Caleb did he tell her that he had touched JK or that JK had touched him. RP 79-81.

Although Rebecca did not contact the police concerning the incident between JK and her brother Caleb, Ms Ames did report Caleb's admissions to the police. RP 48, 74-79. Eventually, the police did contact Rebecca and KB and took statements from them about the incident. RP 48.

Procedural History

By information filed September 25, 2007, the Lewis County

Prosecutor charged the defendant Caleb Leedy Kisor with one count of child molestation in the first degree. CP 1-2. The trial in this case was continued a number of times, and the defense eventually moved to exclude the admission of any of the defendant's statements on the basis that the state could not establish a *corpus delicti* for the crime charged. CP 18-19, 20-28. Specifically, the defense argued that absent the defendant's admissions, there was no evidence that there had ever been a sexual touching. CP 18-19, 20-28. Following testimony and argument by the parties, the court granted the motion, and later entered the following findings of fact and conclusions of law on the motion.

I. FINDINGS OF FACT

> 1.1 J.R.K., a male, has a birth date of 3/24/2006; Rebecca Kisor is the mother of J.R.K. Rebecca Kisor is the half-sister of the Defendant. J.R.K. is the nephew of the Defendant.
>
> 1.2 J.R.K. is not competent to testify as a witness based on the testimony provided. Also, both the State and the Defendant stipulated to the finding of incompetence.
>
> 1.3 In August 2007, Rebecca Kisor, the Defendant, J.R.K., and Ms Kisor's daughter were at the home of Rebecca Kisor's father in Chehalis. While doing dishes in the kitchen, Ms. Kisor heard J.R.K. giggling down the hallway. Then Ms. Kisor noticed that J.R.K. was silent for one or two minutes.
>
> 1.4 Ms. Kisor walked down the hallway to the room of the Defendant. The doorway was open approximately four to six inches wide. Upon opening the door, Ms. Kisor observed the Defendant and J.R.K. standing close to each other near the bed. Ms. Kisor saw the Defendant's pants unzipped with his genitals exposed. The

Defendant's exposed penis was four to six inches from the face of J.R.K.

1.5 When Ms. Kisor entered the room, the Defendant jumped back and threw himself on his bed, covered his face, placed his genitals back into his pants, and zipped up his pants. The Defendant became very upset when Ms. Kisor came into the room and he began crying.

1.6 Ms. Kisor took her son out of the room. Ms. Kisor returned to washing dishes. After approximately ten to fifteen minutes passed, Ms. Kisor returned to the Defendant's bedroom. Ms. Kisor asked the Defendant what he was thinking, and the Defendant did not respond. Ms. Kisor asked if J.R.K. touched the Defendant's penis, and the Defendant replied, "yes." Ms. Kisor asked the Defendant why he did it, and the Defendant stated that he did not know. Ms. Kisor asked if the Defendant had placed his penis in the mouth of J.R.K., and the Defendant stated that he did not.

1.7 After her conversation with the defendant, Ms. Kisor contacted a family member. Ms. Kisor did not report the incident to law enforcement.

1.8 Prior to meeting with the defendant, Sandra Ames spoke with the defendant's brother-in-law, Mark. During that conversation, Mark indicated that the defendant needed to see a counselor regarding an issue of exposures as reported by his sister-in-law. Based upon this call, the counselor contacted the Health Department, CPS, her supervisor and the police to determine reporting requirements. The police instructed the counselor to question the person and then report what was disclosed.

1.9 On or about August 23, 2007, the Defendant met with Sandra Ames, a registered counselor, at her office for a counseling session. The Defendant told Ms. Ames that he wanted counseling because he was upset about exposing himself to his one-and-a-half-year-old nephew. The defendant stated that the exposure occurred when he and his nephew were in a bedroom. The Defendant also told Ms. Ames that Rebecca Kisor, a half-sister of the Defendant, walked into the room while he was in the process of exposing himself. The Defendant expressed remorse. During the counseling session , the

Defendant cried and was emotionally distraught over it happening.

1.10 On August 23, 2007, Sandra Ames reported the Defendant's disclosure to the Chehalis Police Department.

1.11 In a second counseling session with Sandra Ames, the Defendant discussed the incident. The Defendant stated that he was discouraged about what happened and fearful about the consequences.

II. CONCLUSIONS OF LAW

2.1 The court has jurisdiction over the Defendant and the subject matter of this action.

2.2 The State has not established the *corpus delicti* of the charged crime under Washington case law, that crime being Child Molestation in the First Degree. Assuming the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State, the independent evidence presented by the State does not establish sufficient circumstances that support a logical and reasonable inference that sexual contact occurred between J.R.K. and the Defendant. There is no evidence of touching or sexual contact independent of the defendant's statements.

2.3 Under RCW 10.58.035, the State has not presented substantial independent evidence that would tend to establish the trustworthiness of the defendant's statements and admission regarding sexual contact between the Defendant and J.R.K.

2.4 The defense motion to suppress the Defendant's statements is granted. This Court ordered that the Defendant's statements to Sandra Ames and Rebecca Kisor are suppressed.

CP 42-44.

Based upon this ruling, the prosecutor moved to amend the information to charge attempted child molestation in the first degree and the court granted the motion. CP 110-111. The state then moved the court to

reconsider its prior ruling on the admission of the defendant's statements based upon the argument that (1) the charge was now attempted child molestation, and (2) the state did have sufficient evidence to establish a *corpus delicti* on this charge. CP 73B. Following argument, the trial court granted the motion and reversed its prior ruling and entered an order allowing the state to elicit the alleged statements by the defendant. RP 66-76.

On August 27, 2009, the case came on for trial before a jury with the state calling Sandra Ames and Rebecca Kisor as its only witnesses, and the defendant testifying as the only witness on his behalf. CP 140-141. The state then recalled Rebecca Kisor for short rebuttal. CP 142. Following instruction by the court and argument by counsel, the jury retired to consider its verdict. *Id.* After a little more than nine hours of deliberation, the jury informed the court that it was hopelessly deadlocked and the court declared a mistrial with the consent of both parties. CP 143, 202-243.

The parties appeared for the retrial on November 12, 2009. RP 1. As part of the pretrial motions, the court instructed both counsel to refrain from referring to a "prior trial" or in any way informing the jury that this case had previously been tried to a jury. RP 8. Rather, the court ordered the parties to refer to a "prior hearing" if it became necessary to refer to the previous testimony of witnesses. *Id.* The court instructions on this point were as follows:

> One other thing to put on the record. As we discussed before, if there's going to be questions about prior testimony at the prior trial, the questions need to be phrased did you testify at a prior hearing rather than discussion about a trial.

RP 8.

Following this instruction to counsel, the parties conducted *voir dire*, the court gave its preliminary instructions to the jury, and both counsel presented their opening statements. RP 9-18. The state then called Kamika Bruland, Rebecca Kisor, and Sandra Ames as its witnesses before closing its case. RP 18, 34, 74. They testified to the facts contained in the preceding factual history. *See* Factual History.

During cross-examination on Rebecca Kisor, the defense specifically sought to point out that her current testimony concerning the extent of her conversations with the defendant was inconsistent with her prior testimony. RP 59-60. In so doing, the defense was careful to only refer to "when you testified previously." RP 60. However, when asked this question, Rebecca specifically violated the court's pretrial order and informed the jury that there had been a prior trial in this case. *Id.* This exchange went as follows:

> Q And in fact, when you testified previously you were asked, "Did you have any – After those couple questions did you have any more conversation with Caleb that day about what had happened?" Do you remember that question?
>
> A From the last trial are you talking about?
>
> Q No. From one of the hearings.

A Oh. I believe the question was asked to the extent, yes.

Q And your answer was, "No. we did not," correct?

A Yes, I did say that.

Q So your testimony is different today, right?

A Yes, it is.

RP 60.

At this point the court excused the jury at the request of defense counsel. RP 60. Once the jury was out, the defense moved for a mistrial on the basis that Rebecca Kisor's reference to the prior trial had violated the court's specific pretrial ruling, that it had not been invited by the defense, and that it had denied the defendant a fair trial on the basis that the jury would no doubt assume that the defendant had previously been convicted once and was only getting a new trial because an appeals court had reversed a prior jury's verdict. RP 60-64. Defense counsel also argued that any limiting instruction would only exacerbate the error and further prejudice the defendant. *Id.* Following argument by the state, the court denied the motion. *Id.*

After the close of the state's case, the defendant again took the stand as the only witness for the defense. CP 90. However, this time the state did not call any witnesses in rebuttal. *Id.* The court then instructed the jury with no objection from either party, followed by counsels' arguments to the jury. RP 112, 121-152. Following a little over four hours of deliberation the next

day, the jury returned a verdict of guilty. CP 152, 155-160, CP 223, 245. After receipt of the verdict, the court ordered the defendant into custody and instructed the Department of Corrections to prepare a pre-sentence investigation report. RP 159-160.

On December 23, 2009, the court sentenced the defendant to life in prison with a minimum mandatory time to serve of 38.25 months to serve before first being eligible to appear before the indeterminate sentencing review board. CP 262. The defendant thereafter filed timely notice of appeal. CP 276-291.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR ATTEMPTED FIRST DEGREE CHILD MOLESTATION BECAUSE, UNDER THE *CORPUS Delicti* RULE, NO EVIDENCE INDEPENDENT OF THE DEFENDANT'S STATEMENTS ESTABLISHES THE EXISTENCE OF THE CRIME CHARGED.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In addition, under the traditional *corpus delicti* rule, a defendant's extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986). The "*corpus delicti*" usually involves two elements: "(1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof." *Bremerton*

v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Although the independent proof of the crime charged need not be sufficient to support a conviction, the state must present "evidence of sufficient circumstances which would support a logical and reasonable inference" that the charged crime occurred. *Id.* at 578-79; *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

Washington courts have followed this rule of evidence since statehood. *See e.g. State v. Munson*, 7 Wash. 239, 34 P. 932 (1893). Over the years, the Washington Supreme Court has repeatedly refused the state's requests to replace it with the "trustworthiness" standard applied in federal courts. *See State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) ("[T]his Court has previously considered the arguments for adopting the "trustworthiness" standard, and it has consistently declined to abandon the *corpus delicti* rule").

In *Bremerton v. Corbett*, *supra*, the court gave the following history behind this common law rule of evidence.

> The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. The requirement of independent proof of the corpus delicti before a confession is admissible was influenced somewhat by those widely reported cases in which the "victim" returned alive after his supposed murderer had been tried and convicted, and in some instances executed. It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically. This distrust stems from

> the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. Thus, it is clear that the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false.

City of Bremerton v. Corbett, 106 Wn.2d at 576-577 (citations omitted).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to eliminate the traditional *corpus delicti* rule and replace it with a "trustworthiness" doctrine. The first section of this statute states:

> (1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

RCW 10.58.035(1).

The second paragraph of this rule creates four non-exclusive factors the court "shall" consider in determining whether or not a defendant's statement will be admissible under the statute. This second section states:

> (2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:
>
> (a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

> (b) The character of the witness reporting the statement and the number of witnesses to the statement;
>
> (c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or
>
> (d) The relationship between the witness and the defendant.

RCW 10.58.035(2).

While an initial review of RCW 10.58.035 might indicate that it has replaced the *corpus delicti* rule in its entirety, any such conclusion would be inaccurate. The reason is that the *corpus delicti* rule has always addressed two issues. The first is the admissibility of evidence. The second is the sufficiency of evidence to sustain a conviction. As the Washington State Supreme Court explained in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), the new statute addresses only the former issue of the admissibility of a defendant's statement. Thus, while a defendant's statements would not have been admissible under the *corpus delicti* rule, they might now be admissible if the requirements of RCW 10.58.035 are met. However, absent independent proof of the existence of the crime charged, under the *corpus delicti* rule, those statements would still be insufficient to sustain a conviction. The court stated the following on this issue in *Dow*:

> Subsection (4) provides that "[n]othing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict." RCW 10.58.035

> (emphasis added). This subsection establishes that the legislature has left intact the requirement that a defendant cannot be convicted without sufficient evidence to establish every element of the crime, which is consistent with the *corpus delicti* doctrine and our cases. Considering RCW 10.58.035's plain language, we hold that any departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The corpus delicti doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statement.

State v. Dow, 168 Wn.2d at 253-254 (citation omitted).

In the case at bar, the state charged the defendant with attempted child molestation under RCW 9A.28.020 and RCW 9A.44.083. Under RCW 9A.28.020(1), "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." Under RCW 9A.44.083, the crime of first degree child molestation is defined as follows:

> (1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083.

In RCW 9A.44.010(2), the Washington legislature gave the term "sexual contact" a specific definition for the use of that term in RCW 9A.44.130 and all other statutes contained in RCW 9A.44. The definition is:

> (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

Thus, in order to sustain a conviction in this case, the state had the burden of proving beyond a reasonable doubt that the defendant, with intent to have sexual contact with a person under 12-years-old, did an act that constituted "a substantial step toward the commission of that crime." In the context of the *corpus delicti* issue, this rule means that absent the defendant's statements, the record must contain some evidence that the defendant, with intent to have sexual contact with a person under 12-years-old, did an act that constituted "a substantial step toward the commission of that crime."

In the case at bar, absent the defendant's statements, the only evidence that the state presented on the issue of the defendant's intent and actions was that the defendant's penis was exposed within close proximity to his young nephew. The fact that the two of them were in the defendant's bedroom did not support this conclusion because, as the state's witnesses admitted, this fact was not unusual and was no indicator of any criminal intent. In addition, the remainder of the facts do not support an inference that the defendant had committed this crime. First, as the state's witnesses admitted, the door to the defendant's bedroom, while not completely open, was not shut and anyone on the outside of the room could see inside to what was happening inside.

Thus, there was no evidence supporting an inference that the defendant had attempted to secret the child's presence. Second, the child's own mother and sister were within the same house under circumstances in which both of them had access to the whole house and moved freely in it. Thus, nothing can be inferred from the evidence other than the defendant had his penis exposed in the presence of his young nephew. This does not constitute some evidence that the defendant had committed the crime charged. Consequently, the only evidence that the defendant committed the crime came from his statements which were admitted into evidence. As the Washington Supreme Court clarified in *Dow*, under the *corpus delicti* rule, this evidence is not sufficient to sustain a conviction. As a result, this court should reverse and remand with instructions to dismiss.

II. THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL AFTER A STATE'S WITNESS VIOLATED A PRETRIAL RULING AND INFORMED THE JURY THAT THERE HAD BEEN A PRIOR TRIAL IN THIS CASE DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process under United States Constitution, Fourteenth Amendment, and Washington Constitution, Article 1, § 3, does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a trial

untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

To be admissible in any trial, evidence must meet the test of relevance. *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995). Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the "existence of any fact" as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant

then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant's arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

As the preceding statement of the case set out, the first trial in the case at bar ended up in a mistrial when the jury became hopelessly deadlocked. CP 203-204. When the case came on for a new trial, the court entered an order *in limine* precluding either party from eliciting any evidence indicating that there had been a prior trial. The basis for that ruling, which neither side disputed, was that the fact of the prior trial, deadlocked jury, and order of mistrial was completely irrelevant. There should be little question of the correctness of this ruling, since the fact of the prior trial was not a fact at issue before the second jury. Certainly the fact that a witness had presented sworn statements in a prior hearing could properly be raised under the correct circumstances. However, the fact that this was at a prior trial had no relevance at all.

The court's ruling on this issue went as follows:

> One other thing to put on the record. As we discussed before, if there's going to be questions about prior testimony at the prior trial, the question need to be phrased did you testify at a prior hearing rather than discussion about a trial.

RP 8.

During cross-examination on Rebecca Kisor, the defense specifically sought to point out that her current testimony concerning the extent of her conversations with the defendant was inconsistent with her prior testimony. RP 59-60. In so doing, the defense was careful to only refer to "when you testified previously." RP 60. However, when asked this question, Rebecca specifically violated the court's pretrial order and informed the jury that there had been a prior trial in this case. *Id.* This exchange went as follows:

> Q And in fact, when you testified previously you were asked, "Did you have any – After those couple questions did you have any more conversation with Caleb that day about what had happened?" Do you remember that question?
>
> A From the last trial are you talking about?
>
> Q No. From one of the hearings.
>
> A Oh. I believe the question was asked to the extent, yes.
>
> Q And your answer was, "No. we did not," correct?
>
> A Yes, I did say that.
>
> Q So your testimony is different today, right?
>
> A Yes, it is.

RP 60.

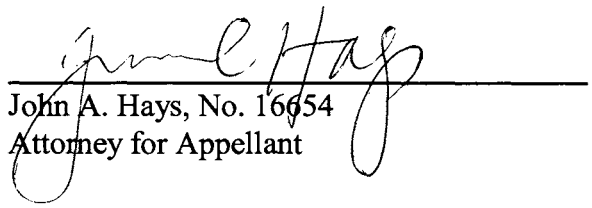
At this point the court excused the jury at the request of defense counsel, who then moved for a mistrial, arguing that this evidence prejudiced the jury as it would assume that there had been a prior trial in the case, that the defendant had been found guilty, and that the only reason there was a retrial was because of the ruling of an appellate court. Appellant argues that trial counsel's argument was well taken and that this evidence denied the defendant a fair trial. In making this argument, it should be noted that the state's evidence in this case was far from overwhelming. As the defendant's counsel pointed out in his support for the motion for a mistrial, the first trial had ended after nine hours of deliberation with a jury deadlocked 10 to 2 to acquit. The only apparent difference between the prior trial and the case before this court was the admission of this improper evidence. Thus, it is more likely than not that but for the admission of this evidence, the jury would have returned a verdict of acquittal. Thus, the error caused prejudice and the defendant is entitled to a new trial.

CONCLUSION

The trial court erred when it admitted the defendant's statements under the corpus delicti rule. Since no other evidence of the existence of the crime charge exists, this court should remand with instructions to dismiss. In the alternative, this court should vacate the defendant's conviction and remand for a new trial based upon the trial court's refusal to declare a mistrial after a state's witness presented inadmissible evidence that denied the defendant a fair trial.

DATED this 1st day of June, 2010.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 10.58.035
Statement of defendant – Admissibility

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

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STATE OF WASHINGTON
BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**APPEAL NO: 40192-4-II**
vs.	**AFFIRMATION OF SERVICE**
CALEB LEEDY KISOR, **Appellant.**	

STATE OF WASHINGTON)
) **vs.**
COUNTY OF LEWIS)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **June 1, 2010**, I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2.. AFFIRMATION OF SERVICE

to the following:

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Dated this 1ST day of JUNE, 2010 at LONGVIEW, Washington.

Cathy Russell

CATHY RUSSELL
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