

NO. 71712-0-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

Snohomish County No. 13-1-00390-7

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STATE OF WASHINGTON,

Appellant,

v.

DAVID F. RUIZ,

Respondent.

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BRIEF OF RESPONDENT

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PEREZ & PEREZ LAW, PLLC  
Attorneys for David F. Ruiz

Robert Perez, Esq.  
Washington State Bar #36221  
1520 140<sup>th</sup> Avenue Northeast, Suite 200  
Bellevue, Washington 98005  
Telephone: (425) 748-5005

**TABLE OF CONTENTS**

Table of Authorities.....ii

I. QUESTIONS PRESENTED.....1

II. PROCEDURAL BACKGROUND.....1

III. FACTUAL BACKGROUND.....3

IV. ARGUMENT.....5

V. CONCLUSION.....11

**TABLE OF AUTHORITIES**

**State Cases**

*People v. Helton*, 195 Ill.App.3d 410, 142 Ill.Dec. 48, 53, 552 N.E.2d 398, 403, *appeal denied*, 133 Ill.2d 565, 149 Ill.Dec. 329, 561 N.E.2d 699(1990).....10

*State v. Aten*, 130 Wn.2d 640 (1996).....7, 9

*State v. Biles*, 73, Wn. App. 281, 284 (1994).....9

*State v. Brockob*, 159 Wn.2d 311 (200.....7, 9

*State v. Hardin*, 691 S.W.2d 578, 580 (Tenn.Crim.App.1985).....10

*State v. Knapstad*, 107 Wash.2d 346 (1986) .....2, 5

*State v. Swan*, 114 Wn.2d 613, 638, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).....10

## I. QUESTIONS PRESENTED

Did the trial court properly exercise its discretion in dismissing a case for failure to state a prima facie case of Indecent Liberties when: after a night of heavy drinking a witness fell asleep on a couch at a friend's house; when he awoke his pants were down and had undetermined "stains" on them; Respondent was asleep on the same couch in close proximity with his hand on the witness' thigh; the witness told police that his penis "felt weird"?

Did a 2<sup>nd</sup> Superior Court judge, upon re-filing by the State, properly exercise its discretion in dismissing the case a second time for failure to state a prima facie case after the witness provided a statement declaring that he knew what it felt like to have oral sex performed on him and it was similar to how he felt when he awoke?

## II. PROCEDURAL BACKGROUND

Mr. Ruiz was first arraigned on one count of Indecent Liberties on April 10, 2013. The incident is alleged to have occurred sometime in the early hours of Saturday, February 11, 2012. CP 17

On October 8, 2013, counsel for the State of Washington filed a 1st Amended Information charging Mr. Ruiz with a second count of Indecent Liberties. CP 81 Pursuant to *State v. Knapstad*,

107 Wash.2d 346 (1986), Defense counsel filed a motion to dismiss both counts based on a failure to establish a prima facie case, or a corpus. CP 83 On October 24, 2013, at the hearing on the motion, counsel for the State provided defense counsel for the first time a “new” statement from the alleged victim, dated October 23, 2013. 10/24 RP 2 The Honorable Janice E. Ellis, former elected Prosecutor for Snohomish County, found no excusable neglect in failing to turn over the statement prior to the hearing and disregarded it for the purposes of the hearing. 10/24 RP 10 After hearing argument by the parties on the merits of the motion to dismiss based on the pleadings before the court, Judge Ellis held that no prima facie case had been established and granted the defense motion to dismiss. CP 57

On December 13, 2013, counsel for the State of Washington filed a 2<sup>nd</sup> Amended Information charging Mr. Ruiz with two counts of Indecent Liberties alleging the same facts supporting the charges previously dismissed. CP 55 Defense counsel filed a motion to dismiss on the same grounds raised against the previous filing. CP 34 A hearing on the motion was held on March 12, 2014, at which time the witness’ “new statement” was added and considered by the court. CP 33 After hearing argument by the parties on the merits of the motion to dismiss, the Honorable George Bowden

held that the State had still not established a prima facie case and granted the defense motion to dismiss. CP 1 The State now appeals.

### III. FACTUAL BACKGROUND

On Friday, February 10, 2012, a small gathering of friends and co-workers hung out, drank beer, and played video games at a house located at 1618 McDougal Avenue in Everett, Washington, the home of Heather Graham and Renae Engstrom. CP 68 After drinking and playing video games until 1:30am, Saturday, February 11, 2012 everyone passed out at various locations around the house, some in bedrooms, some on couches. Heather Graham presumably slept in her own bedroom with her now-husband, Adam Kuehl. Renae Engstrom presumably slept in her own bedroom. Robert Babcock, the complaining witness in this case, passed out on the living room couch. David Ruiz, the accused, was also passed out on or near the same living room couch. CP 28

The next morning, all occupants went their separate ways and David Ruiz left the house without any reason to believe that anything unusual or inappropriate had occurred. Three days later, David received a text message from Renae giving him the first indication that he was being accused. CP 30

Three days after the sleepover, Babcock contacted police. CP 28 In his written statement, he said "I went to bed on the living room couch. When I woke up my pants were down ... my penis felt weird ... David was laying with his hand on my inner thigh and his head on my lap." CP 28

According to their written statements, Adam Kuehl and Heather Graham left Heather's bedroom at separate times during the night and passed by or through the living room where Ruiz and Babcock were sleeping, on their way to the kitchen to get water. They again individually passed by or through the living room on their way back to Heather's bedroom. As Adam "passed through [he] saw David sleeping with his face on the couch." CP 31 Adam then returned to Heather's room. Heather stated that she saw Babcock and David on the couch, but didn't have her glasses on and "could only see dark outlines". "David was on the couch and he was leaning towards Robbie. Nothing looked weird to me." CP 32

Ten days after the alleged incident, police questioned David Ruiz at the Everett Police Station. David admitted he had been drinking heavily and didn't remember much of what occurred that evening. He told police, "Well, we went to ... on the couch basically we slept ... and then I ended up basically just cuddling or whatever

[with Robbie] ... [Robbie was] sleeping and then I fell asleep and then woke up and he shifted and I remember I ... I did put my hand in the pants ... but I didn't touch any ... I don't remember touching anything." CP 24 Police then mischaracterized the written statements of the witnesses in an apparent effort to observe Mr. Ruiz' reaction, telling him that the witnesses reported seeing his head in Babcock's crotch, something no one had ever said. Upon being confronted by police with these characterizations, and unsure of what had actually happened, David appeared to acquiesce and made more incriminating statements reflecting the accusations offered by police, interspersed with his continuing assertions that "I'm not sure, to be honest ..." CP 85 He stated this was because he had been passed out and really had a no recollection of what had happened during the night. CP 85 This is the essence of the "confession" in this case.

#### IV. ARGUMENT

In reviewing a dismissal pursuant to *State v. Knapstad*, this Court reviews the issues *de novo*. It is worth noting that not one, but *two* Superior Court judges reviewed the facts of this case and found insufficient evidence to support a prima facie that any crime had occurred.

The State places great emphasis on what it characterizes as “semen stains” found on Babcock’s pants, yet there is nothing in the record to support any finding of what kind of stains were found, the pants were never seized or tested. For all that is known, the dark areas on Babcock’s pants which police characterized as “dark stains” could be Babcock’s own urine after a night of heavy drinking. They could be water stains, or they could be semen, it is simply unknown. Despite this ambiguity, the State claims that the only reasonable inference for the presence of the stains, when viewed in the light most favorable to the State, is that they are semen **and** that they are the product of illicit sexual contact. These leaps to conclusion are not supported by any evidence and based entirely on speculation and conjecture.

Even if somehow it could be determined that the “stains” are seminal fluid, the only reasonable inference that could be drawn is that ejaculation had occurred. But there is nothing inherent in the presence of semen suggesting 3<sup>rd</sup> party involvement or anything illicit. An equally logical inference is that the witness ejaculated on his own without any help from Respondent. An equally logical inference is that he ejaculated with the help of someone else in the house that night and without any criminal agency whatsoever. It is only speculation and conjecture, not logic or reason, that leads to

any inference of 3<sup>rd</sup> party involvement, let alone illegal 3<sup>rd</sup> party action. The State is ignoring the Court's rulings in *State v. Aten*, 130 Wn.2d 640 (1996) and *State v. Brockob*, 159 Wn.2d 311 (2006).

In *Aten*, the Court made clear that the independent evidence necessary to corroborate a "confession" cannot be ambiguous, and went on to discuss what is "ambiguous" in this context. Evidence capable of supporting theories consistent with both guilt and innocence is **legally insufficient**. The *Brockob* Court simply clarified its holding in *Aten* and stated a bright line rule that guides a determination of sufficiency of corroborating evidence in corpus cases, stating, "in other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event **and** one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement."<sup>1</sup> The kind of ambiguity that results in insufficiency, then, is that which supports reasonable inferences both of guilt and of innocence.

First, evidence, of "dark stains," even when taken in a light most favorable to the State, cannot support a logical inference that they are semen. Second, another leap of speculation is required to infer that the semen is a result of *sexual contact* with a 3<sup>rd</sup> party.

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<sup>1</sup> *State v. Brockob*, 159 Wn.2d 311, 330 (2006).

Third, it requires yet another leap of conjecture to infer that the sexual contact was somehow illicit and criminal. This case presents precisely the situation described in *Aten* as insufficient: evidence that supports a reasonable inference of a criminal agency causing the event **and** several that do not involve a criminal agency.

Mr. Ruiz may have been in close proximity to Mr. Babcock and even in the proximity of his penis. But mere opportunity to commit a criminal act, standing alone, provides no proof that a defendant committed a criminal act and is insufficient to establish *corpus delicti*. At best, it demonstrates a potential for opportunity. But there are any number of non-criminal scenarios that could explain the facts of this case. For all anyone knows, Mr. Babcock may have arisen from the couch in the middle of the night to urinate after a heavy night of drinking and messed himself and failed to pull up his pants. Equally possible, he might have masturbated during the night and been too drunk to remember. He may have had a dream that was sexual in nature and ejaculated without any 3<sup>rd</sup> party contact at all. Finally, he may even have had *consensual* contact with Mr. Ruiz or someone else and been too ashamed or too drunk to admit it or even remember. Any one of these non-criminal scenarios is every bit as logically inferred from the facts confronting Mr. Babcock after he woke up from a night of drinking. The bright

line rules set down in *Aten* and *Brockob* apply and the evidence here is insufficient.

The “new statement” added to the case alleging that Babcock had experienced oral sex in the past and that when he woke up that morning, his penis felt as it did after oral sex, does not change the result. The State misstates the rule of law in *State v. Biles* 73, Wn. App. 281, 284 (1994), alleging that “physical sensation alone, such as pain, can also be a form of independent evidence sufficient to establish the corpus delicti of sexual abuse.”<sup>2</sup> That may be true when such evidence corroborates some direct evidence of illegality, but that is not the case here. In *Biles*, the complaining witness alleged that she had been raped, that it hurt, that she cried during the act, and that she had witnessed the abuse with her own eyes, and went on to demonstrate to police how she had been raped. These direct eyewitness accounts were the foundation of the evidence against the defendant and the physical sensation of pain that she described was incidental to the already sufficient corroboration of the crime based on her eyewitness account. *Biles* states “the courts have found that complaints of genital pain **during sexual contact** are sufficient corroborating evidence of penetration

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<sup>2</sup> State’s Response, lines 13-14, page 6 of 8.

(emphasis supplied), *State v. Swan*, 114 Wash.2d 613, 638, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); *People v. Helton*, 195 Ill.App.3d 410, 142 Ill.Dec. 48, 53, 552 N.E.2d 398, 403, *appeal denied*, 133 Ill.2d 565, 149 Ill.Dec. 329, 561 N.E.2d 699 (1990); *State v. Hardin*, 691 S.W.2d 578, 580 (Tenn.Crim.App.1985).” The clear reading of the cases cited in *Biles* is that the specific physical sensation of *pain* coupled with eye witness testimonial evidence of sexual contact is sufficient corroborating evidence of penetration in support of a rape charge. The Court specifically required both elements of pain *and* eye witness testimony to establish sufficient corroborative evidence of penetration to support a charge of rape.

Here, there is only evidence that Mr. Babcock’s penis felt “weird.” In his new statement, he adds that it felt like it does “after oral sex.” This court should take judicial notice that it is not possible to wake up after the fact and determine that the “weird” feeling in one’s penis is the necessary result of oral contact. There is no way to know this absent some actual evidence of oral sex, eyewitness or otherwise. There is no evidence here of pain, only of “weirdness” described by the witness as feeling “like oral sex”. Even if it were possible to determine after the fact which part of some 3<sup>rd</sup> party’s body had been used to touch a body part that feels “weird” after

waking up after a night of drinking, even if that were possible, and it is not, it would ***still*** not be enough to sustain a prima facie case because physical sensation of “contact” alone is insufficient. And it is even more lacking in the absence of any evidence of a criminal agency by a 3<sup>rd</sup> party.

**V. CONCLUSION**

For all of the above reasons, it is not possible for the State to establish a corpus delicti of the crime charged against David Ruiz with these facts. The required “independent evidence” of the crime must establish that a crime has been committed. “My penis felt weird,” even when supplemented by “as it does after oral sex,” is wholly insufficient as independent evidence to establish that any crime was committed. Accordingly, the charge of Indecent Liberties was properly dismissed by both Judges who considered all the evidence in the light most favorable to the Staet and dismissed the case twice. Neither Judge abused its discretion.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of December, 2014.

  
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ROBERT PEREZ, WSBA #36221  
Attorney for Respondent

STATE OF WASHINGTON  
CLERK OF COURT  
JAN 23 2015 10:10

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**AFFIDAVIT OF SERVICE**

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The undersigned certifies that on the 23<sup>rd</sup> day of December, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS – DIVISION 1  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

SETH A. FINE  
DEPUTY PROSECUTING ATTORNEY  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE, M/S #504  
EVERETT, WA 98201

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause;

**BRIEF OF RESPONDENT**

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed in Bellevue, WA the 23<sup>rd</sup> day of December, 2014.



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KARLA LINDER  
Paralegal  
Perez & Perez Law, PLLC