

NO. 65859-0+-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MUNNIER QUASIM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

1. Did the trial court administer justice openly when it required the parties to exercise preemptory challenges to jurors in an open courtroom but excluded potential jurors from the process?

2. Did trial counsel waive a *corpus delicti* claim by conceding there was sufficient corroborating evidence of *corpus delicti* as to forcible rape where the jury unanimously determined that a forcible rape occurred?

3. Is the *corpus delicti* rule inapplicable to statements of a defendant that are self-serving denials rather than confessions?

4. Did the trial court properly admit self-serving statements of the defendant where independent evidence showed that the victim was raped forcibly or when she could not consent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Munnier Quasim was charged by amended information with rape in the second degree, accomplished either by forcible compulsion or by engaging in sexual intercourse with A.M. when she was unable to consent. CP 22-23. Trial began on June 2, 2009 before the Honorable Catherine Shaffer. The jury was seated

and sworn on June 10, 2009, and returned a verdict of guilty as charged. CP 80. The jury also returned a special verdict showing that it unanimously agreed that the defendant had raped the victim by forcible compulsion and when she was unable to consent. CP 81. Quasim filed this timely appeal from the trial court's judgment and sentence. CP 95-109.

2. SUBSTANTIVE FACTS

A.M. is a Seattle visual artist who lived in a Seattle Housing Authority (SHA) apartment on Capital Hill. 6/14/10RP 128-31. She is quite small and weighs between 117-121 pounds. 6/15/10RP 89; 6/16/10 RP 89.¹ She lived on the fifth floor of the SHA building and Quasim lived on the second floor. 6/14/10RP 131. A.M. knew Quasim casually and they occasionally met to play dominoes and socialize. 6/14/10RP 132. They shared marijuana and alcohol and A.M. often got bottled water from Quasim because he kept cases of water in his apartment. 6/14/10RP 132-33. A.M. considered Quasim to be a nice, friendly guy. 6/14/10RP 134. They never had a physical, sexual or emotional relationship. 6/14/10RP 134, 142.

¹ The trial court commented that the victim was "absolutely tiny." 6/17/10RP 172.

Quasim occasionally "hit on" A.M. and, when rebuffed, he would say, "I have patience. I can wait. I have patience." 6/14/10RP 134. A.M. borrowed about \$85 from Quasim to cover some unpaid bills. 6/14/10RP 143.

A.M. and Quasim continued with this casual friendship for some time until a few months before December, 2008 when Quasim left a series of notes on A.M.'s door which A.M. found to be vulgar, disrespectful and scary. 6/14/10RP 135-36.² The notes were admitted into evidence and read to the jury. Exs. 27, 28. The notes made reference to another man Quasim believed A.M. was seeing, they told her she should stop toying with Quasim's emotions, that she could not be trusted with his heart, that she was "too teasing," that she was a dishonest heart-breaker, and that she should "put up or shut up." 6/14/10RP 138.³ Other notes said, "I understand you have to have a big dick . . . Tell me I can move on with my life I don't want you if you are with others" and "don't lie its you that chose another lover and you will never be true to me or

² Forensic analysis confirmed the notes were written by Quasim. 6/16/10RP 24. Quasim also admitted to writing the notes. 6/21/10RP 158.

³ This is simply a summary of the handwritten notes. The summary corrects misspellings and other grammatical difficulties in the original. The State has filed a supplemental designation of clerk's papers so this court may review the notes in their complete and original form.

another man or woman" and "the truth is you have a lover in [sic] Building you are fucking! is this the way to treat me!" Exs. 27, 28.

A.M. was angry at the letters and she called Quasim, told him he was crazy, and said she would be calling the police.

6/14/10RP 143. A former SHA manager, Sarah VanCleve, testified that she had seen the letters and she confirmed that A.M. reported this incident to her. 6/14/10RP 10-11, 30-31. A.M. reported the incident to the police officer assigned to the SHA building. The officer contacted Quasim and told him to stay away from A.M.

6/14/10RP 105, 144. After that things were "tense" when A.M. saw Quasim but, over time tensions lessened, and A.M. would occasionally let him into her apartment if she felt like getting high. 6/14/10RP 146-47.

On December 4, 2008, Quasim stopped by with a full bottle of tequila and some marijuana. A.M. was drinking quite a bit in those days and she was quite pleased to see the defendant's gift. He usually brought only small amounts of tequila. 6/14/10RP 147-48, 150. Had he not brought the alcohol, she "would not have been bothered with him." 6/14/10RP 151. He also brought an alcoholic beverage for himself in a mason jar. 6/14/10RP 147-51. Quasim asked if he could watch the television program "Smallville" that

started at 8 p.m. They watched the program, drank, and smoked the marijuana. 6/14/10RP 155-59. Generally, marijuana would make A.M. very creative and the amount of alcohol she drank that night would have given her a little buzz. 6/14/10RP 160.

The last thing A.M. remembers is watching Smallville on television. She was clothed, there had been no sexual contact, no touching, and no hitting between them. Everything was fine. 6/14/10RP 161.

A.M. awoke at about 4:30 a.m. the following morning. She was lying naked on the chaise lounge, she hurt all over, and her vagina was sore. 6/14/10RP 163. Her head hurt like it had been hit, not like a hangover. She also felt really drugged, out of sorts, and cloudy in the head like she had taken a bunch of pills. 6/14/10RP 164. She had been unconscious, perhaps from being hit on the head, but she had no memory of the period when she was unconscious. 6/14/10RP 196.

A.M. assessed her injuries. She had a black eye, her back hurt, and she had glass in her hair. She cried because she believed she had been beaten and raped. 6/14/10RP 165. She knew that she had been raped because she did not generally have sex with men, her vagina was torn and stinging, there was a bump

on her head, her eye was injured, and tufts of hair had been pulled from her head. 6/14/10RP 166; 6/15/10RP 67. She did not consent to sex with Quasim, she had never had sex with him in the past. 6/14/10RP 187-88. The mason jar Quasim had brought lay broken on the floor. 6/14/10RP 167. A.M. had bruising on her body consistent with the shape of the jar's opening. 6/15/10RP 62-63. Her wallet had been emptied of about \$400. 6/15/10RP 89.

A.M. took her dog outside, returned to bed for several hours, then reported the attack to Sarah VanCleve, who had known A.M. for years. VanCleve testified that A.M. was "upset and distraught . . . like she was in shock." 6/14/10RP 148. She described "a really big goose egg" prominent on A.M.'s forehead such that her forehead appeared misshapen. Id. A.M. complained of pain in her vaginal area. 6/14/10RP 149. VanCleve accompanied A.M. back to A.M.'s unit and found it to be uncharacteristically "trashed." 6/14/10RP 150. The police were called and A.M. went to the hospital. 6/14/10RP 157.

Treatment providers confirmed A.M.'s injuries. 6/16/10RP 47-88 (treating physician), 6/16/10RP 103; 6/17/10RP 38-93 (sexual assault nurse). The treating physician noted that A.M.'s head injury was not likely caused by a fall because the injury was to

the top of her head. 6/16/10RP 85. The sexual assault nurse described A.M. as complaining that her entire vaginal area was tender. She had a tear drop-shaped abrasion that measured about 1 centimeter by ½ centimeter near her vaginal opening. 6/17/10RP 59-60. It was also noted that the victim had amnesia for the event. 6/16/10RP 59 (physician); 6/17/10RP 43 (nurse).

The man living next to A.M.'s unit, Jordan Attenborough, testified that he heard a great deal of commotion in A.M.'s unit on the night of December 4th. 6/14/10RP 65. He heard glass breaking, things being thrown against a wall, and A.M.'s dog barking incessantly. The barking dog was "disturbed" and "more ferocious" than usual. 6/14/10RP 69-71. The sound of glass breaking occurred before 11:30 p.m. 6/14/10RP 92. At some point after midnight he heard A.M. loudly shout "get off" or "get out." 6/14/10RP 71, 85. The tone of voice did not suggest pleasure. 6/14/10RP 92.

In response to noises he heard, Attenborough triggered an alarm and back-up building manager Donald Glick responded. 6/14/10RP 96. Glick was reluctant to open the door based on a barking dog so he simply terminated his involvement. 6/14/10RP

99. Attenborough was frustrated by Glick's inaction and slammed the door in his face. 6/14/10RP 75.

Chemical analysis of the drinking glasses in A.M.'s apartment was inconclusive. There were no traces of controlled substances or legend drugs on the glass A.M. was believed to have used. 6/15/10RP 104-05. A negative test could be caused by dilution, testing of the wrong glass, or the fact that drugs were not in the glass. 6/15/10RP 105. The glass was not tested for "knockout" drugs. 6/15/10RP 105.

Patrol officers contacted Quasim at his apartment. They asked him what had occurred the night before and, with no prompting whatsoever, Quasim launched into a detailed recitation of a sexual encounter with A.M. He spoke uninterrupted for about five minutes and described a night of hot, rough, loud sex during which the victim had fallen down and hurt herself. 6/17/10RP 112-13 (Officer Hoang); 6/17/10RP 131-32 (Officer Elliott). One officer found Quasim's monologue odd and asked Quasim why he was so eager to provide that sort of detail about his sex life. Quasim answered that he figured the police would show up to his door so he wanted to have his answers prepared before they arrived. 6/17/10RP 114-15 (Officer Hoang); 133 (Officer Elliott).

A few weeks after December 4th, A.M. was in her apartment with her nephew when the nephew found a used condom underneath a chair. 6/14/10RP 186. A.M. retrieved the condom, turned it over to police, and testing revealed that it had DNA from Quasim and from A.M. 6/15/10RP 184-85.

A former SHA manager, Sarah VanCleve, testified that Quasim had mental health issues that apparently contributed to his making numerous abusive and unfounded written complaints against other residents. 6/14/2010RP 40-47. At sentencing, the trial judge noted that Quasim (and at least one of his witnesses) clearly had mental health issues and was delusional.

Quasim's version of events was starkly different from A.M.'s. He told police, a commissioner in a civil proceeding, and the jury that the victim had either forced or cajoled him into sex against his will. See Exs. 67, 68. In the January 27, 2009 hearing the judge asked, "You're basically sayin' that she forced herself on you?" Ex. 67, p. 8. Quasim replied, "Oh, absolutely sir." Id. At the February 2, 2009 hearing Quasim said, "She raped me in her apartment. She raped me." Ex. 68, p. 5. At trial, Quasim adopted the testimony given at the two civil hearings. 6/21/10RP 135. He testified that he was 5' 7" tall, weighed 173 pounds and that the

victim was much smaller than him. 6/21/10RP 142. Still, he insisted that she "overpowered me." Id. He claimed that she had multiple orgasms while he had none and this angered her, causing her to order him out of the apartment. 6/21/10RP 186-88, 195. He claimed she was injured by falling. 6/21/10RP 196-97. Quasim also asserted that A.M. coerced him into having sex on several occasions, including December 4th, through threats or seduction. 6/21/10RP 155-56, 174-84.

C. ARGUMENT

Quasim argues that he is entitled to reversal of his conviction because the trial court required the lawyers to exercise preemptory challenges outside the presence of the jurors. He also argues that his various statements to police and a commissioner should have been excluded under the *corpus delicti* rule. Neither of these arguments merit reversal. The trial court acted well within its discretion to exclude jurors during the exercise of preemptory challenges and such a practice does not violate open courtroom principles. And, Quasim's statements about the events of December 4, 2009 were admissible where they were not

"confessions" and there was substantial independent evidence that Quasim raped A.M.

1. POTENTIAL JURORS ARE NOT THE "PUBLIC" DURING *VOIR DIRE*, SO PUBLIC TRIAL GUARANTEES ARE NOT VIOLATED WHEN POTENTIAL JURORS ARE EXCLUDED FROM A PORTION OF *VOIR DIRE*.

Quasim argues that he is entitled to a new trial because the trial court closed the proceedings when it excluded jurors as the parties exercised preemptory challenges. Br. of App. at 7-23. This argument has been rejected by all three divisions of the Court of Appeals. Potential jurors are not members of the public for purposes of open courtroom analysis because once they are sworn by the trial court they become officers of the court, and are no longer simply members of the public. State v. Price, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009); State v. Erikson, 146 Wn. App. 200, 205-06 n.2, 189 P.3d 245 (2008); State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008). This case is controlled by those decisions.

Moreover, excluding a person or a category of persons from a courtroom is not a "closure" of the court because the proceedings remain open for the public to observe. State v. Lormor, No.

84319-8 slip op. (Wash.S.Ct., 7/21/11) (2011 WL 2899578). The Court in Lormor held that

Lormor's trial was conducted in an open courtroom. No showing is made that public attendance during the trial, or at any other stage, was prohibited. While it is unclear from the record whether there were any other observers in the courtroom, what is clear is that only one person was excluded, and there was no general prohibition for spectators or any other exclusion of the public. Our cases establish when a closure occurs. . . . Factually, the exclusion of one person, without more, is simply not a closure under those scenarios.

Rather, a "closure" of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. This does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself.

Lormor, 2011 WL 2899578 at *4.

Under this caselaw, a court closure did not occur when potential jurors were excluded during the exercise of preemptory challenges.

Moreover, trial courts have wide discretion to manage the *voir dire* processes and relief will be granted on appeal only if the defendant can show error and prejudice. State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000). Quasim has shown neither error nor prejudice.

Quasim gives short shrift to the trial court's reasons for excluding jurors during the exercise of preemptory challenges. The trial court excluded jurors from the exercise of preemptory challenges for three reasons: 1) avoid embarrassment to jurors who were excused; 2) avoid having the jurors speculate about why certain other jurors were excused, and by which lawyer; 3) to improve the court's ability to handle challenges to the racial makeup of the jury. 6/3/10RP 158-59. These were perfectly legitimate concerns. Although some courts may not follow this procedure or share these concerns, this court's approach is surely well within the broad range of decision-making permitted under the law. There was no abuse of discretion.

Finally, Quasim has shown no prejudice from excluding the panel during preemptory challenges. The most that Quasim alleges is that his lawyer may have momentarily stumbled during the exercise of preemptory challenges when counsel asked the court to clarify which juror was next to be challenged. Br. of App. at 23-24. The court answered counsel's question, counsel referred to his notes about the juror, and counsel then proceeded to exercise a preemptory challenge as to that juror, apparently without difficulty or regret. 6/10/10RP 117-19. Quasim does not allege that this

juror should have remained on the jury or that some other juror should have been excused. Counsel was given a full opportunity to question and challenge jurors and he used all his preemptory challenges. 6/10/10RP 115-21. There is simply no reason to conclude from this record that Quasim was prejudiced by the court's chosen procedure or by his lawyer's considered decision to excuse this juror. Quasim is not entitled to a new trial on this basis.

2. THERE WAS NO VIOLATION OF THE *CORPUS DELICTI* RULE.

Quasim argues that there was no independent evidence that he committed rape in the second degree so his various statements to police should have been barred by the *corpus delicti* rule. Br. of App. at 24-35. This argument should be rejected for several reasons.

First, Quasim conceded that his *corpus delicti* argument applied only to the "unable to consent" prong of rape in the second degree, not to the "forcible compulsion" prong. Because the jury unanimously convicted Quasim on both theories of rape in the second degree -- "forcible compulsion" and "unable to consent" -- Quasim's statements were properly admitted as to the forcible

compulsion theory. Second, this is not a *corpus delicti* case at all because the defendant's statements offered into evidence were not incriminating statements or confessions. Third, there was a plethora of corroborating evidence to show that the victim did not consent to intercourse and was either forcibly raped by the defendant or the defendant had intercourse with her when she was unable to consent after being rendered unconscious.

a. Relevant Facts.

During the State's case Quasim moved to prevent the jury from hearing his statements to police and to a court commissioner about the events of December 4, 2009. CP 52-54; 6/16/10RP 5; 6/17/10RP 11-14. When Quasim raised his corpus challenge, the trial court noted that there appeared to be ample corroborating evidence of forcible rape. 6/17/10RP 7-8. Defense counsel then argued that the statements violated the *corpus delicti* rule because there was no independent evidence that the victim was unable to consent. 6/17/10RP 11-14. In the course of that argument, counsel said, "I would concede that on the use of force prong, there is a basis the court can conclude, as Your Honor has articulated,

that there's sufficient evidence." 6/17/10RP 12. Counsel repeated this concession at the end of his argument:

On the other prong I think the Court has articulated a basis which I anticipate the Court will make a finding is sufficient and perhaps sufficient to admit statements as to that prong.

6/17/10RP 18.

The trial court rejected Quasim's arguments on multiple grounds. First, the court ruled that there was independent corroborating evidence as to both prongs of rape. 6/17/10RP 20-22, 24. Second, the court noted that the victim was not dead or incompetent, so the *corpus* statute was irrelevant. 6/17/10RP 22. Third, the court noted that corpus was not an issue because Quasim's statements were not denials. 6/17/10RP 22-23. In fact, Quasim's statements were wholly self-serving. 6/17/10RP 16. Quasim essentially claimed in these statements that the victim not only consented to sexual intercourse with him, she insisted on intercourse, and he only reluctantly complied with her demands. 6/21/10RP 135-84; 6/17/10RP 113-15 (Officer Hoang), 131-33 (Officer Elliott); Exs. 67, 68 (statements from civil proceedings).

b. *Corpus Delicti* Rule -- General Principles.

Traditionally, a defendant could not be convicted of a crime based on his or her confession alone. State v. Lutes, 38 Wn.2d 475, 482, 230 P.2d 786 (1951). This principle, often referred to in Washington as the *corpus delicti* rule, was originally stated in State v. Meyer, 37 Wn.2d 759, 763, 226 P.2d 204 (1951):

In order to establish the *corpus delicti* of any crime, there must be shown to have existed, a certain act or result forming the basis of the criminal charge and the existence of a criminal agency as the cause of such act or result . . .

The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession . . .

The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.

As a corollary to the *corpus delicti* rule, a criminal defendant's extrajudicial confession or admission is not admissible at trial absent independent *prima facie* proof to support a logical and reasonable inference that the charged crime occurred. State v. Smith, 115 Wn.2d 775, 780, 801 P.2d 975 (1990). This rule was called the *corpus delicti* corroboration rule. State v. Ashhurst, 45 Wn. App. 48, 50, 723 P.2d 1189 (1986); Bremerton v. Corbett, 42

Wn. App. 45, 48, 708 P.2d 408 (1985), affirmed, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986).

The *corpus delicti* corroboration rule is a judicially created rule of evidence; it is not constitutionally mandated. State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010). The rule arose from judicial distrust of confessions; it was created to prevent the possibility of a conviction based solely on a false confession. Bremerton v. Corbett, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986).

Pursuant to the *corpus delicti* corroboration rule, the independent proof necessary to corroborate a confession need not be sufficient to support a conviction or even sufficient to send the case to the jury. Bremerton, 106 Wn.2d 578. The State need only present sufficient circumstances to support a logical and reasonable inference that the charged crime occurred. Bremerton, 106 Wn.2d 578-79; State v. Cobelli, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989). In assessing the sufficiency of the independent proof of the *corpus delicti*, the reviewing court must assume the truth of the State's evidence and draw all reasonable inferences therefrom in the light most favorable to the State.

Bremerton, 106 Wn.2d 571. Either direct or circumstantial evidence may be used. State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967). It is not necessary that the evidence exclude every reasonable hypothesis consistent with the defendant's innocence or with the crime having not occurred. Bremerton, 106 Wn.2d 578. However, if the independent evidence merely establishes a coin toss, i.e., it is equally plausible that injury was caused by innocent conduct versus criminal conduct, the corroboration rule is not satisfied. State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

Once a defendant elects to testify or present evidence, a reviewing court reviews a *corpus delicti* challenge in light of all the evidence introduced at trial, including the defendant's evidence. State v. McPhee, 156 Wn. App. 44, 230 P.3d 284 (2010); State v. Liles-Heide, 94 Wn. App. 569, 970 P.2d 349 (1999).

In 2003, the legislature enacted a statute designed to ensure the admissibility of confessions even when independent corroborating evidence was absent. RCW 10.58.035.⁴ The statute is constitutional but it addresses only admissibility, not sufficiency of the evidence. State v. Dow, 168 Wn.2d 253-54. The statute is not pertinent to this case because the victim is not deceased or

⁴ 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.

incompetent. Moreover, as argued below, independent corroborating evidence exists to support *corpus delicti*.

c. Quasim Conceded There Was Sufficient Corroboration Of *Corpus Delicti* As To Rape By Forcible Compulsion And The Jury Convicted On That Basis.

During argument on the *corpus delicti* issue defense counsel clearly admitted that there was sufficient corroborating evidence of a forcible rape to satisfy the *corpus delicti* rule. 6/17/10RP 11, 18. The jury subsequently convicted him of rape by forcible compulsion. CP 81. Had Quasim been convicted of only the “unable to consent” prong of rape, he might have been able to raise a *corpus* claim. But, because *corpus delicti* is a judicially-created evidentiary rule rather than a constitutional requirement, the defendant's failure to raise it at trial generally waives appellate review. State v. Dodgen, 81 Wn. App. 487, 492-93, 915 P.2d 531 (1996). If failure to preserve the claim waives appellate review, then an express concession likewise waives review. Quasim's *corpus delicti* arguments should not be considered because they were waived.

d. The *Corpus Delicti* Rule Bars Confessions, Not Self-Serving Statements That Were Not Offered For Their Truth.

Another threshold question in this case is whether the *corpus delicti* corroboration rule applies to this case at all. There is no question that Quasim's statements offered into evidence were not confessions. Quasim agreed that he had intercourse with the victim but sexual intercourse is not, of course, a crime. Quasim's statements would be incriminatory only if they included an admission to forced sex or sex while the victim was incapable of consent. Quasim denied such facts. The trial court reasoned that if Quasim's statement was not an admission of wrongdoing or a confession, the *corpus delicti* rule was inapplicable because the statements were not being offered to prove the elements of the crime. 6/17/10RP 8. Quasim now argues this conclusion was incorrect because all statements of a defendant must be corroborated. Br. of App. at 27 (citing State v. Brockob, 159 Wn.2d 311, 328 n.11, 150 P.3d 59 (2006)). This argument should be rejected.

Footnote 11 in Brockob mistakenly cites to language in State v. Aten wherein the court held it would undermine the *corpus delicti* rule to corroborate a defendant's confession with the defendant's

other statements because those other statements were, themselves, uncorroborated. Aten, 130 Wn.2d at 657-58. "It logically follows that [Aten's] statements should not be considered independent proof of the *corpus delicti* in this case." Aten, at 658. Thus, this language from Aten was focused on what qualified as corroborating evidence; it did not hold that all statements of any kind *require* corroboration. The court in Brockob seems to have transposed the object, i.e., corroborating statements, with the subject, i.e., the primary statement that needs to be corroborated.

In any event, neither the footnote in Brockob nor the language in Aten were necessary to the decision because in both cases the statements offered were actually incriminating. Thus, the language in these cases as to what constitutes a "statement" is not binding in this case. State v. Johnson, 159 Wn. App. 766, 777 n.8, 247 P.3d 11 (2011) ("Statements made in the course of the Supreme Court's reasoning that go beyond the facts before the court and are "wholly incidental" to the basic decision constitute obiter dictum and do not bind us").

Moreover, logic dictates that the *corpus delicti* rule apply only to statements that are incriminating. The whole purpose of the doctrine is to prevent conviction based solely on a confession. If

the statement offered into evidence is a denial of guilt, then it is not incriminating, it is not a confession, and it cannot establish the crime because it is a denial of the crime. And, if there is no *other* evidence of the crime, there is simply insufficient evidence to prove the defendant guilty, meaning the question is one of sufficiency, not *corpus*. The *corpus delicti* rule is simply irrelevant.

Finally, applying the *corpus delicti* rule to self-serving denials of a crime would lead to absurd results. "Under the Washington rule . . . evidence must independently corroborate or confirm a defendant's incriminating statement" before the incriminating statement could be admitted into evidence. Brockob, 159 Wn.2d at 328-29 (italics omitted). If this rule applies to a statement wherein a defendant *denies* the crime, it will require the prosecution to *corroborate* the defendant's denial in order to admit the statement into evidence. But, the prosecution clearly cannot corroborate a denial that it believes is false.⁵ The prosecution surely believes the evidence conflicts with the defendant's denial, or it would not have filed charges. Thus, under Quasim's interpretation of the *corpus*

⁵ The prosecution obviously offered Quasim's statement to show the jury that Quasim had no reasonable explanation for what occurred on December 4th. Indeed, Quasim's fanciful story left little doubt as to the truth of A.M.'s allegations. Still, the story was hardly offered because it was true.

delicti rule, it would require the prosecution to marshal evidence to defeat its own case before admitting evidence to assist in proving its case. Obviously, this is absurd and in no way serves purposes of the *corpus delicti* rule. This Court should hold that the rule does not apply to self-serving denials.

e. Independent Evidence Supported The Admission Of Quasim's Statements.

Even if Quasim had not waived the issue, and even if the *corpus delicti* rule applies to self-serving statements, Quasim's arguments should be rejected because a wealth of independent evidence supported the State's case. The independent evidence must be viewed in the light most favorable to the State. Brockob, at 328. The question is whether the trial court abused its discretion in admitting the evidence. State v. Lung 70 Wn.2d at 372.

As noted above, Quasim conceded that there was sufficient independent evidence of a forcible rape. This concession was well taken, as the evidence clearly supported it. A.M. awoke to soreness in her entire vaginal area, she had a vaginal abrasion, she had a cut near her eye, she had a serious lump on her head, and her back was scraped. In addition, her neighbor heard a great

deal of commotion during the night including her shouts of “get off” or “get out.” She immediately reported she had been raped and her demeanor was consistent with someone who had just been raped. See also 8/13/10RP 150 (trial court's assessment at sentencing of the evidence of violent rape).

Evidence sufficient to establish a prima facie case also supported the “unable to consent” prong. A.M. was clearly unconscious during the relevant period, either because she had been drugged – which is the way she felt upon awakening – or because she had been hit on the head. She testified that she had never had sex with Quasim, did not consent to sex on that night, and would not have consented because she did not like having sex with men. The fact that she was so seriously injured yet completely unaware of her injuries until 4:30 a.m. also confirms that she was unconscious and unable to consent.

Moreover, the letters Quasim delivered to A.M. show a motive to commit rape, either by force or when she was not able to consent. The letters were angry and filled with sexual references suggesting a desire on Quasim's part to have intercourse with A.M. regardless of her wishes.

Quasim argues that this is a case like Aten or Brockob where independent evidence equally supports an innocent and a criminal explanation. He argues that the evidence could just as easily support a story of consensual, rough sex, as it could support a charge of rape. Br. of App. at 30--33. This argument is meritless and ignores the severe nature of the victim's injuries, her emphatic denial that she did not and would not have consented to sex with Quasim, her unconsciousness during the relevant time period, the condition of her apartment, the reports from her neighbor, her demeanor after the event, and the physical evidence. By far, the most natural inference from the independent evidence is that this woman was raped. Quasim's argument also totally ignores the sinister notes and letters he left for this victim; notes that showed a prurient interest in her and an intense anger over his unrequited romantic desires. This evidence heavily weighs in favor of establishing a *corpus delicti* for rape.

Finally, Quasim's argument that the evidence is equally consistent with an innocent explanation should be rejected for another reason, to wit: the argument is premised on Quasim's own statement. In other words, about the only possible alternative explanation for this set of facts is the defendant's own fanciful story.

However, the *corpus delicti* analysis turns on evidence *independent* of the defendant's statement. Aten, at 657-58. Quasim should not be able to pick and choose favorable elements of his own statement to undermine the admissibility of that statement. The truly independent evidence in this case easily supports the finding of criminal agency rather than innocent circumstances, and Quasim has failed to show an abuse of discretion by the trial court who saw the testimony of these witnesses.

Thus, even if the *corpus delicti* rule applies to this case, it was satisfied as to both prongs of the rape in the second degree charge.

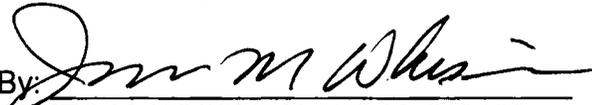
D. CONCLUSION

For the foregoing reasons, this Court should affirm Quasim's conviction for rape in the second degree.

DATED this 26th day of August, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk and Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MUNNIER QUASIM, Cause No. 65859-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

8/29/11
Date 8/29/11

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