

COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 28 7:12:34
NO. 71712-0-1

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

STATE OF WASHINGTON,

Appellant,

v.

DAVID F. RUIZ,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred in dismissing the case.

II. ISSUE

A witness was prepared to testify that he went to sleep on a couch. When he woke up, his pants were pulled down to just above his knees and his penis was exposed. The defendant was laying with his hand on the witness's inner thigh and his head on the witness's lap. There were semen stains on the witness's pants. The witness's penis felt like it did after oral sex. Was this evidence sufficient to establish the *corpus delicti* of the crime of indecent liberties?

III. STATEMENT OF THE CASE

A. STATE'S EVIDENCE.

This is an appeal from a pre-trial dismissal for insufficiency of the evidence. The State presented police reports showing the following:

On February 10-11, 2012, R.B. stayed overnight with some co-workers. They spent the evening drinking beer and playing video games. One of the people at the residence was the defendant, David Ruiz. CP 28.

At around 1:30 a.m., R.B. went to sleep on the couch in the living room. The defendant went to sleep in his girlfriend's bedroom. CP 28. When R.B. went to sleep, he was fully clothed. He was wearing black slacks with a belt. His belt and zipper were fastened. CP 33.

When R.B. woke up in the morning, his pants were pulled down to just above his knees. His penis was exposed through the hole in his boxers. The defendant was sleeping with his head next to R.B.'s penis. The defendant had a hand just above R.B.'s knee. There were stains on both sides of R.B.'s pants. Through prior experience, he recognized the stains as semen. R.B. had previously had oral sex with women. His penis felt just like he did have oral sex. CP.33.

R.B. confronted the defendant about this. The defendant admitted that he had given R.B. oral sex. CP 28-29. When confronted by his girlfriend, the defendant said that he was ashamed and sorry. CP 30. When questioned by police, the defendant denied engaging in oral sex. He admitted, however, that he had fondled R.B.'s penis with his hand. CP 25.

B. PROCEDURE.

The defendant was charged with two counts of indecent liberties. CP 81. He moved to dismiss the charge for failure to establish the *corpus delicti*. CP 83-102. In response, the State presented police reports, including a statement from R.B. CP 64-80.

On the day of the hearing on this motion, the State obtained an additional statement from R.B., setting out further details. 10/24 RP 2. The defendant objected to consideration of this statement. 10/24 RP 5-7. The court declined to consider it. 10/24 RP 10. It ruled that the other evidence was insufficient to establish the *corpus delicti*. 10/24 RP 20-22. It therefore dismissed the case without prejudice. CP 57. The court noted, however, that the State would be able to re-file the case and present additional evidence. 10/24 RP 24.

The State re-filed the same charges. CP 55. The defendant again moved to dismiss. CP 34-52. In response, the State presented police reports that included both the original statement from R.B. and an additional statement from him. CP 16-33. R.B.'s

original statement is attached to this brief as Appendix A. CP 28-29.

His second statement is attached as Appendix B. CP 33.¹

The court again determined that the evidence was insufficient to establish the *corpus delicti*. 3/6 RP 9-12. It again dismissed the case. CP 1. The State has appealed from this dismissal.

IV. ARGUMENT

THE VICTIM'S STATEMENTS SUPPORT A REASONABLE INFERENCE THAT HE HAD BEEN SUBJECTED TO SEXUAL CONTACT WHILE HE WAS UNCONSCIOUS.

The trial court dismissed this case under CrR 8.3(c). CP 1. That rule allows a court to dismiss a case prior to trial "due to insufficient evidence establishing a prima facie case of the crime charged." The rule establishes the following standards:

The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible

¹ The State has redacted identifying information that is irrelevant to the issues on appeal.

This rule codifies the procedure set out in State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). See Drafter's Comment to 2008 Amendment to CrR 8.3, quoted in 4A Tegland, Rules Practice at 158 (2013 Supp.) A dismissal under Knapstad is reviewed de novo. State v. Montano, 169 Wn.2d 872, 876 ¶ 8, 239 P.3d 360 (2010).

The trial court believed that the evidence was insufficient to establish the *corpus delicti*. The basic standards are set out in State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996):

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*.

"*Prima facie*" in this context means there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved. The evidence need not be enough to support a conviction or send the case to the jury.

Id. at 656 (citations omitted).

The rule was further explained in State v. Angulo, 148 Wn. App. 642, 200 P.3d 752 (2009), review denied, 170 Wn.2d 1009 (2010):

The rule requires proof of both a criminal act and a criminal agency or cause for the act. It is the State's burden to establish these requirements on a *prima facie* basis. However, *prima facie* in this context appears to mean that the evidence must preponderate in favor of the existence of a criminal act or agency. If the evidence could equally point to both a criminal or non-criminal cause, then the State has not met its burden of establishing the *corpus delicti*. Evidence corroborating an incriminating statement must relate to the crime charged; evidence of some other tangentially-related crime is not sufficient. The corroboration does not require proof of all elements of the charged offense.

Id. at 653 ¶ 26 (citations omitted).

In the present case, the State presented the following evidence independent of the defendant's confessions:

1. R.B. went to sleep on a couch. When he woke up, his pants were pulled down to just above his knees and his penis was exposed. CP 33.
2. The defendant was laying with his hand on R.B's inner thigh and his head on R.B's lap. CP 28.
3. There were semen stains on R.B.'s pants. CP 33.
4. R.B.'s penis felt like it did after oral sex. CP 33.

These facts support a logical and reasonable inference that someone had engaged in sexual contact with R.B. while he was asleep. The evidence was therefore sufficient to allow consideration of the defendant's confessions. Those confessions, if true, establish the defendant's guilt.

The defendant argued that the evidence was insufficient to disprove non-criminal conduct. CP 45-51. He relied on the Supreme Court's statement that "if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement." State v. Brockob, 159 Wn.2d 311, 329 ¶ 35, 1509 P.3d 59 (2006). This argument contains two critical flaws.

First, it disregards R.B.'s statement that, when he awoke, his "penis felt like I just did have oral sex." CP 33. This statement, if true, establishes that someone had oral sex with him while he was asleep – which would constitute indecent liberties. The defendant argued that the court should "consider the nature, timing, and reliability" of this statement. CP 50. Any consideration of those factors would be improper. "In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant's statements, this Court assumes the truth of the State's evidence

and all reasonable inferences from it in a light most favorable to the State.” Aten, 130 Wn.2d at 658. The same standard applies when considering motions to dismiss under CrR 8.3(c). The reliability of the victim’s statements must be resolved by the jury at trial, not by the judge in ruling on a pre-trial motion.

Second, the defendant’s argument assumes that the evidence must *completely* disprove any possible innocent explanation. In fact, “the evidence must preponderate in favor of the existence of a criminal act.” Angulo, 148 Wn. App. at 653 ¶ 26. If a criminal act is more probable, the evidence is sufficient, even if there is some possibility of an innocent cause. .

An example of this analysis appears in State v. Hummel, 165 Wn. App. 749, 266 P.3d 289 (2012), review denied, 178 Wn.2d 1023 (2013). That was a murder case in which no trace of the victim’s body was ever found. The victim’s daughter came home from school to find that her mother was gone. A project the victim was working on was left uncompleted. No one ever heard from her again. Id. at 759-61 ¶ 16. This court held that this evidence supported a reasonable and logical inference that the victim had died as a result of a criminal act. Id. at 766 ¶ 25.

Of course, it is theoretically possible that the victim had decided to renounce her former identity and change her life completely.² It is also theoretically possible that she died accidentally, under circumstances that prevented her body from being discovered or identified. In Hummel, the defendant argued that any such possibility would prevent proof of the *corpus delicti*. He pointed to the Supreme Court's statement that the evidence of the *corpus delicti* must prove "the nonexistence of any reasonable hypothesis of innocence." State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967). This court held that the rule was not so restrictive:

[W]hen viewed in context, [Lung] clearly holds that ... where the independent circumstantial evidence is sufficient to convince reasonable minds of the fact of death and of the causal connection between the death and a criminal act, the *corpus delicti* is satisfied and the accused's statements are admissible

Hummel, 165 Wn. App. at 768 ¶29. Similarly in the present case, the evidence is sufficient to convince a reasonable person that a criminal act of sexual contact occurred.

The trial court gave several reasons for holding the evidence insufficient. 3/6 RP 10-12. First, it questioned what crime had

² A few examples of such events are set out in 7 Wigmore, Evidence § 2081 (1940). For a fictional example, see Hammet, The Maltese Falcon, ch. 7 (1929).

occurred: "it could have been indecent liberties or rape by the defendant, or it could have been an incident of indecent exposure by the victim." 3/6 RP 10. According to R.B.'s statements, he fell asleep fully clothed. He woke up with his penis exposed and feeling like he just had oral sex. CP 33. If this statement is true, he did not engage in indecent exposure. Rather, someone had sexual contact with him while he was asleep. A person who is unconscious is by definition "physically helpless." RCW 9A.44.010(5). Sexual contact with such a person constitutes indecent liberties. RCW 9A.44.100(1)(b). It makes no difference that the act might also constitute some other crime.

Second, the court believed that "the alleged victim is unable to accurately say what happened." 3/6 RP 10. As already discussed, R.B. described facts that give rise to a reasonable inference that an act of indecent liberties occurred. Whether that description is "accurate" is a question for the jury, not the court.

Third, the court pointed to the "possibility that [R.B.] may have had a wet dream, or he may have been masturbating." R.B., however, described experiencing the sensations of oral sex. Again, it is for the jury to decide if that description was accurate. If it was, he was not masturbating or experiencing a "wet dream."

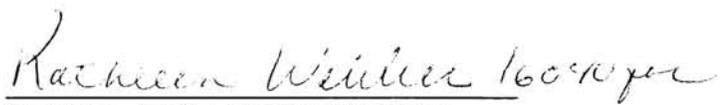
When all the evidence in this case is considered together, it establishes a logical and reasonable inference that someone had sexual contact with R.B. while he was unconscious. Even if there might be some other possibility, the evidence preponderates in favor of the existence of a criminal act. Under such circumstances, the State is entitled to have a jury determine the defendant's guilt. The trial court erred in holding the evidence insufficient.

V. CONCLUSION

The evidence was sufficient to establish the *corpus delicti* of the crime of indecent liberties. The trial court therefore erred in dismissing the case under CrR 8.3(b). The order of dismissal should be reversed and the case remanded for trial.

Respectfully submitted on October 27, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Appellant

EVERETT POLICE DEPARTMENT STATEMENT FORM

CASE # DD 12-2919

STATEMENT OF:	B	R	G
	LAST NAME	FIRST NAME	MIDDLE NAME
white RACE	M SEX	6'0 HEIGHT	200 WEIGHT
	DATE OF BIRTH	blue EYE COLOR	brown HAIR COLOR
RESIDENCE:	lake Stevens CITY		Wa STATE
	STREET ADDRESS		98258 ZIP
HOME PHONE #:	WORK/CELL#	EMPLOYMENT:	
ALTERNATE CONTACT (IN CASE OF RELOCATION): K G C			

on ~~Saturday~~ ^{Friday} February 10th I R B went to my coworkers house to stay the night to be closer to work because I take the bus and work at 6am. My Co-worker has 2 roommates R H R had her sister over visiting for the weekend. So they invited their friend David Ruiz. They were drinking throughout the night. They had approximately 4-5 beers each. We were all playing video games until 1:30am then David Ruiz said he was going to sleep in R room. So I went to bed on the living room couch. When I woke up my pants were down with stains on them, my penis felt weird like something happened, and David was laying with his hand on my inner thigh and his head on my lap. I then shocked and distrot just woke up H who was my ride to work and went to work. H said that her and her boyfriend woke up and different times in the night to walk out to the kitchen for some water. H's boyfriend A went out around 2am to see David on one side of the couch and me on the other. H said she woke up around 3am to see David laying on me soundly sleeping on my lap. David has admitted to this action that he

THIS STATEMENT WAS WRITTEN ON MY BEHALF BY: R B

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING WRITTEN STATEMENT, CONSISTING OF 2 PAGES, IS TRUTHFUL AND ACCURATE TO THE BEST OF MY PERSONAL KNOWLEDGE. EACH PAGE AND ALL CORRECTIONS, IF ANY, BEAR MY INITIALS. I HAVE READ / HAVE BEEN READ THE FOREGOING DECLARATION AND UNDERSTAND THAT THIS DOCUMENT MAY BE USED IN A COURT OF LAW. (RB)

(DECLARANT SIGNATURE)

Kevin G. Johnson 1/6
(OFFICER OR WITNESS SIGNATURE)

Everett Wa
(CITY AND STATE WHERE SIGNED)

2/14/2012
(DATE OF STATEMENT)

13:47

Page 1 of 2

(INIT.) _____
PD-004 Rev 7/2007

APPENDIX A

gave me R P oral sex that Night of February 12th
2012. This event happened at [REDACTED] Everett wa 98201
This is the Residence of K G [REDACTED] H [REDACTED] G [REDACTED]
[REDACTED] P [REDACTED] E [REDACTED] G [REDACTED]

David's phone number is [REDACTED]

THIS STATEMENT WAS WRITTEN ON MY BEHALF BY: R C

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING WRITTEN STATEMENT, CONSISTING OF 2 PAGES, IS TRUTHFUL AND ACCURATE TO THE BEST OF MY PERSONAL KNOWLEDGE. EACH PAGE AND ALL CORRECTIONS, IF ANY, BEAR MY INITIALS. I HAVE READ I HAVE BEEN READ THE FOREGOING DECLARATION AND UNDERSTAND THAT THIS DOCUMENT MAY BE USED IN A COURT OF LAW. (RB)

(DECLARANT SIGNATURE)
Everett wa
(CITY AND STATE WHERE SIGNED)

[Signature] 164
(OFFICER OR WITNESS SIGNATURE)
02/14/2012
(DATE OF STATEMENT)

EVERETT POLICE DEPARTMENT STATEMENT FORM

CASE # DD 12-2919

STATEMENT OF:	B [REDACTED]	R [REDACTED]	G [REDACTED]
	LAST NAME	FIRST NAME	MIDDLE NAME
white	M	6'0"	200
RACE	SEX	HEIGHT	WEIGHT
	[REDACTED]	Blue	light Brown
	DATE OF BIRTH	EYE COLOR	HAIR COLOR
RESIDENCE:	[REDACTED]	Kirkland	WA
	STREET ADDRESS	CITY	STATE
			98034
			ZIP
HOME PHONE #:	[REDACTED]	WORK/CELL#:	[REDACTED]
		EMPLOYMENT:	[REDACTED]
ALTERNATE CONTACT (IN CASE OF RELOCATION):	D [REDACTED] R [REDACTED] [REDACTED]		

I was at my friend Kevin's house and spent the night there when I went to sleep I was fully clothed with black slacks they were fastened at my belt with a belt and zipper all were fastened. when I woke up my pants were just above my knees my penis was exposed through the hole in my boxers and David Ruiz was sleeping with his head right next to my penis on my upper right thigh and had a hand just above my knee on the same leg. There were stains on my pants, I have had sex with women before and have had semen on my clothes from "pulling out" to avoid pregnancy there were stains on both thighs of my pants and my boxers of semen right next to my penis. I have had oral sex with women before and my penis felt like I just did have oral sex.

THIS STATEMENT WAS WRITTEN ON MY BEHALF BY: R [REDACTED] B [REDACTED]

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING WRITTEN STATEMENT, CONSISTING OF 1 PAGES, IS TRUTHFUL AND ACCURATE TO THE BEST OF MY PERSONAL KNOWLEDGE. EACH PAGE AND ALL CORRECTIONS, IF ANY, BEAR MY INITIALS. I HAVE READ [RB] / HAVE BEEN READ [RB] THE FOREGOING DECLARATION AND UNDERSTAND THAT THIS DOCUMENT MAY BE USED IN A COURT OF LAW. (RB)

[Signature]
(DECLARANT SIGNATURE)

[Signature]
(OFFICER OR WITNESS SIGNATURE)

marysville Wa
(CITY AND STATE WHERE SIGNED)

10/23/13
(DATE OF STATEMENT)

APPENDIX B

2014 OCT 28 PM 2:34

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

THE STATE OF WASHINGTON,

Appellant.

v.

DAVID F. RUIZ,

Respondent.

No. 71712-0-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of October, 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 I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

SARAH J. PEREZ
ATTORNEY AT LAW
1520 140th AVENUE N.E., SUITE 200
BELLEVUE, WA 98005-4501

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

BRIEF OF APPELLANT

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

Signed at the Snohomish County Prosecutor's Office this 27th day of October, 2014.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and includes a long horizontal flourish extending to the right.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit