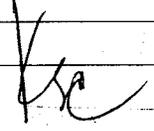


NO. 33694-4

CLERK OF COURT  
COUNTY OF PIERCE

FILED 03-1-30



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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CELINE K. MCCOY, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 03-1-05039-5

---

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying the defendant's request for a continuance when the case was approximately 20 months old and the case had been continued eight prior times all at the defendant's request? (Defendant's Assignment of Error No. 1 and 3).

2. Did the trial court properly exercise its discretion in denying the defendant's motion for a mistrial on the basis of witness unavailability when the defendant made no efforts to secure the witnesses' presence and made no offer of proof as to the witness' materiality? (Defendant's Assignment of Error No. 3 and 4).

3. Did the trial court properly exercise its discretion in denying the defendant's motion for a mistrial when the court's impartiality could not reasonably be called into question? (Defendant's Assignment of Error No. 2).

4. If juror misconduct occurred, can the defendant show any prejudice when the remaining jurors were not effected by the excused juror's book? (Defendant's Assignment of Error No. 5).

5. Has the defendant failed to preserve a corpus delicti issue on appeal, and alternatively, was there a showing of corpus delicti for the admission of the defendant's statements? (Defendant's Assignment of Error No. 6).

B. STATEMENT OF THE CASE.

1. Pretrial Continuances

On October 29, 2003, CELINE KAY MCCOY, hereinafter "defendant" was charged with two counts of theft in the first degree and two counts of theft in the second degree. CP 1-5. The defendant was later charged by amended information on May 17, 2005 with two counts of theft in the first degree and one count of theft in the second degree. CP 27-28.

The trial date was originally set for December 15, 2003. CP 101. On November 24, 2003, the trial was continued at the defendant's request until February 18, 2004. CP 103. On January 30, 2004, the trial was continued at the defendant's request for the second time until March 31, 2004. CP 6. On March 4, 2004, trial was continued at the defendant's request for the third time until April 29, 2004. CP 104.

On April 29, 2004, the defendant failed to appear and a warrant was issued. CP 108-110. On May 13, 2004, a new trial date was set for June 28, 2004. CP 25. On June 15, 2004, the trial was continued at the defendant's request for the fourth time until September 9, 2004. CP 113.

On August 5, 2004, trial was continued at the defendant's request for a fifth time until November 11, 2004. CP 7. On October 21, 2004, trial was continued at the defendant's request for the sixth time until December 8, 2004. CP 8. On December 2, 2004, trial was continued at the defendant's request for the seventh time until March 15, 2005. CP 9. On March 15, 2005, trial was continued at the defendant's request for the eighth time until May 17, 2005. CP 14.

On May 11, 2005, defense counsel filed a motion for a continuance. CP 19-20. The motion indicated that the defendant had disclosed two potential witnesses who would not be available to testify until June 2005. Id. Defense counsel indicated that he did not know if the witnesses would be material to the case. Id.

On May 12, 2005, both parties appeared before Judge Chushcoff for a CrR 3.5 hearing. IRP<sup>1</sup> 1-3. Defendant appeared asking for another continuance. IRP 4. Defense counsel indicated that the defendant had just disclosed to him that she was the victim of domestic violence, which raised concerns about the defendant's competency. IRP 4-5. Defense counsel indicated that he wanted to explore a diminished capacity defense. IRP 5. The court denied the defense motion, finding that the defendant appeared to understand the charges against her and the procedures of the

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<sup>1</sup> IRP refers to the verbatim report of proceedings that occurred on May 12, 2005.  
IIRP refers to the verbatim report of proceedings that occurred on May 17-18, 2005.  
IIIRP refers to the verbatim report of proceedings that occurred on May 19, 2005.

court. IRP 7. Defense counsel indicated to the court that the defendant did understand the charges against her and was able to assist counsel in her defense. IRP 8.

## 2. Multiple Attorneys

On March 25, 2004, the defendant's attorney, Curtis Huff, was permitted to withdraw and attorney John Felleisen was substituted in as the defendant's attorney. CP 105. On April 5, 2004, John Felleisen withdrew as the defendant's attorney, and Herbert Kebne appeared as counsel. CP 106. On April 7, 2004, Herbert Kebne withdrew as the defendant's attorney and Paul Banken appeared as counsel. CP 107. On April 29, 2004, the defendant failed to appear for trial. CP 108-110. The defendant was later surrendered by a bail bond company. CP 111-112.

On December 2, 2004, Paul Banken withdrew and James Walker substituted in as counsel. CP 10. On February 10, 2005, James Walker filed a motion to withdraw and affidavit, which indicated that he was seeking to withdraw on the basis of RPC<sup>2</sup> 1.5. CP 11-12. On February 15, 2005, James Walker was permitted to withdraw. CP 13. On February 25, 2005, Paul Banken was appointed again as counsel.<sup>3</sup> CP 117. On

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<sup>2</sup> Rules of Professional Conduct

<sup>3</sup> While the notice of appointment was unsigned, Paul Banken signed paperwork after February 25, 2005, so it appears that the notice of appearance was effective even though it was unsigned.

March 15, 2005, Paul Banken sought to withdraw under RPC 1.15(b)(1).<sup>4</sup> CP 15-16. On March 15, 2005, Paul Banken was permitted to withdraw, and the next day Scott Messinger appeared as new counsel. CP 17.

### 3. Pretrial Hearings

A CrR 3.5 hearing was conducted. IRP 8. Deputy Mock testified at the hearing that the defendant was advised of her Miranda warnings after being placed under arrest. IRP 10. The defendant indicated that she understood her rights and wished to speak to Deputy Mock. IRP 11. The defendant then admitted that she had been depositing money for Smiley's Auto Sales, had changed the deposit slips and kept the monetary difference. IRP 12. The defendant estimated that she had taken approximately \$4900.00. Id. Deputy Mock did not threaten the defendant or make any promises to her. Id. The defendant also signed an Advisement of Rights form and completed a written statement. IRP 13-14. The court found that all statements made by the defendant were voluntary statements and were admissible at trial. CP 120-123; IRP 29.

On May 17, 2005, both parties appeared before the Honorable Judge Beverly Grant. IIRP 1. Defendant made a motion for another continuance. IIRP 4-5. Defense counsel stated that he had witnesses he

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<sup>4</sup> RPC 1.15(b)(1) states: "Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."

had tried to contact that were material to the defense. IIRP 5. Defense counsel stated that he had made the same motion on May 16, 2005, in front of Judge Orlando, who denied the motion for a continuance.<sup>5</sup> Judge Grant stated that she was ready to proceed with trial. IIRP 6. Defense counsel next indicated that the defendant was not prepared for trial because she had a death in her family. IIRP 6-7. The court offered the defendant an opportunity to change her clothes before jury selection and the defendant declined. IIRP 9.

After the defense motion for a continuance was denied and the court indicated that trial was going forward, defendant made a motion for Judge Grant to recuse herself because the defendant and Judge Grant allegedly attend the same church. IIRP 18. Defendant also alleged that Judge Grant represented her in a personal injury case in 1998. IIRP 18-19. The court then made the following ruling:

It could not have—I don't think it was me directly, no I don't even recognize her. So I am not willing to recuse myself, if she goes to my same church. I have no social dealings with her at all and quite honestly I don't even recognize her. I didn't recognize her when she came in.

IIRP 19.

Defendant then made a motion to hire a new attorney. Id. The court confirmed that the first trial setting in the case was December 15,

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<sup>5</sup> The transcripts from the May 16, 2005, motion for a continuance in front of Judge Orlando have not been provided to the State.

2003, and indicated that it was time to move the case forward. IIRP 20-21.

The defendant stated that she had met with Judge Grant and her husband when Judge Grant was in private practice. IIRP 21. Judge Grant stated that during the time frame when the defendant alleged the representation occurred she was busy with cases against the State and did not recognize the defendant. IIRP 21-22.

#### 4. Facts Adduced at Trial

On October 28, 2003, Pierce County Sheriff's Deputy Scott Mock was dispatched to Smiley's Auto Sales in reference to a theft. IIRP 32. He contacted the defendant and escorted her to his patrol car. IIRP 33-34. The defendant was advised of her rights and she agreed to speak with Deputy Mock. IIRP 34. The defendant stated that she had been altering deposit slips and taking money from the deposits. IIRP 36. She stated that she had taken approximately \$4900.00. Id. The defendant also completed a handwritten statement. CP 29 (Exhibit #1); IIRP 38.

Linda Petty was the office manager at Smiley's Auto Sales. IIP 52-53. She was reconciling bank statements and noticed that one of the deposit slips did not match to what she had copied. IIRP 53. She made copies of the deposit slips. IIRP 54. Petty called the bank and learned that the deposit had been altered. IIRP 53. A deposit slip dated October 23, 2003, had been altered by \$300.00. CP 29 (Exhibit #4); IIRP 53. The

deposit slip was originally for \$979.00, and was altered to \$676.00. IIRP 56. After Petty discovered the discrepancy she went through the account and checked for other discrepancies. IIRP 53. She then discovered that two cash deposits were also missing. Id. One missing cash deposit dated October 22, 2003, was for \$2,326.52. CP 29 (Exhibit #2); IIRP 54-55. The second missing cash deposit dated October 20, 2003, was for \$2,300.01. CP 29 (Exhibit #3); IIRP 53.

Upon discovering the discrepancies, Petty immediately informed the owners of Smiley's Auto Sales. IIRP 57. She also had a conversation with the defendant about the deposits. IIRP 57-58. The defendant indicated that she gave the deposits to Petty. IIRP 58. In a later conversation the defendant told Petty that the manager had told her he was going to give her a loan, and that her explanation as to why the money was gone. IIRP 58. It was not the usual practice for the defendant to make the deposits, but did it as a favor to Petty because she was leaving town. IIRP 59. Petty estimated that there was approximately \$4,900.00 missing. Id.

Brian Erker, a part owner of Smiley's Auto Sales, indicated that the defendant was previously an employee. IIRP 64-65. The defendant admitted to Erker that she had taken deposit money. IIRP 66. He stated that there was approximately \$5,000.00 missing. Id. Earlier, the defendant had asked Erker for a \$3,000.00 loan. IIRP 67. Erker had indicated that she could not have a loan. Id. When asked if the defendant

could have been confused, Erker stated that he was “very, very clear.”

IIRP 69. Erker never recovered any of his money. IIRP 67. Erker never gave the defendant permission to take the money from the business. IIRP 70.

After Erker’s testimony, defendant moved for a mistrial on the basis that Erker “lied on the stand” and that the defendant could not call witnesses to contradict Erker’s testimony. IIRP 71. The court denied the motion for a mistrial on the basis that defendant had ample time to investigate and that there were multiple continuances. IIRP 71-74. Defense counsel indicated that the witness is in Florida. IIRP 77. The court then stated that the defendant had ample notice to secure an out of state subpoena or other method to secure the witnesses’ presence. IIRP 77.

There were no objections to the jury instructions. Id. After the jury instructions were read to the jury, the court clerk indicated that Juror No. 12 had a book in the jury room relating to hidden jury tactics. IIRP 78-79. The court examined the book, which was titled, “The Hidden Jury and Other Secret Tactics Lawyers Use to Win.” IIRP 84. The book purported itself to be a “frank look at the way lawyers look for bias jurors and why people think the justice system at times does not seem to work.” IIRP 85. Juror No. 12 indicated that he did not discuss the book with anyone. IIRP 88. He did not read the book in the presence of other jurors.

IIRP 89. One juror did ask Juror No. 12 about the title of the book. IIRP 90.

Defendant made a motion that the juror be removed on the basis of juror misconduct and requested a mistrial. IIRP 95. The court excused the juror. IIRP 100. The other jurors were called out and questioned by the court. IIRP 102-103. Juror No. 5 indicated that she saw that book but that it was partially covered. Id. Jurors 7, 9, 10, 11, and 13 also saw the book. IIRP 104-106. The court denied the motion for a mistrial. IIRP 108. The court made the following ruling:

All right. At this time your motion is denied after careful scrutiny of the initial juror who had the book along with the jury panel itself, it appears that no one had any conversation about the subject matter or topic or any substance about the book other than that they saw it on a table in the jury room or saw it downstairs, that he was sort of isolated from the others reading a book. One juror in particular said they weren't too sure what he was reading but he was reading a book.

The other jurors have alluded to the fact that they had little or no conversation at all so I don't believe it was something where, first of all, I believe the juror actually in good faith was trying to be a good juror. But mistakenly fell outside of the Court's order and he almost looked tearful when we had to dismiss him from the jury. So I really believe he was trying to do his civic duty and serve and felt quite embarrassed that this had happened to him.

Second of all, all of the jurors we have now taken the time to pole (sp), if you will, all of the jurors who may or may not have had contact with this book. None of them have expressed that their role or decision making process would be or has been adversely impacted at all by the book. And

so your motion is denied. Your motion and argument are still preserved for the record.

IIRP 108-109.

On May 19, 2005, the defendant was convicted of theft in the first degree in count I and guilty of theft in the second degree in count III. IIRP 3-4. The defendant was sentenced to a DOSA<sup>6</sup> sentence of 25 months in custody and 25 months on community custody on count I, and 12.75 months in custody and 12.75 months of community custody on count II. CP 69-81. A timely notice of appeal was filed on August 19, 2005. CP 84-97.

C. ARGUMENT.

1. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFNDANT'S REQUEST FOR A CONTINUANCE WHEN THE CASE WAS APPROXIMATELY 20 MONTHS OLD AND HAD BEEN CONTINUED EIGHT PRIOR TIMES ALL AT THE DEFENDANT'S REQUEST.

A trial court's denial of a continuance is reviewed under an abuse of discretion standard. State v. Brett, 126 Wn.2d 136, 204, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996), vacated on other grounds, 142 Wn.2d 868, 16 P.3d 601 (2001); State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). Reversal of a

trial court's discretionary decision is appropriate only if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision to deny a continuance will be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974), overruled on other grounds by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). There are no mechanical tests to determine whether a denial of continuance deprives a criminal defendant of a fair trial. The reviewing court must examine the circumstances presented in each case. Eller, 84 Wn.2d at 96. Of particular interest are the reasons presented to the trial judge at the time the request is denied. State v. Kelly, 32 Wn. App. 112, 114-115, 645 P.2d 1146, review denied, 97 Wn.2d 1037 (1982).

In the present case, the defendant was charged in October 2003. Approximately 20 months later, the case went to trial. There were a total of eight continuances in the case, *all* at the defendant's request. The defendant now alleges that she identified two witnesses who would testify on her behalf. Brief of Appellant at 9. However, such assertion is incorrect. While defense counsel indicated to the court on the day of trial that he had disclosed the names and telephone numbers of the witnesses to

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<sup>6</sup> Drug Offender Sentencing Alternative

the State, and that the witnesses were material, no offer of proof as to the materiality of the alleged witnesses was ever made. Moreover, the record does not contain the alleged witnesses names or a witness list. The court also indicated, and the record supports, that no request was made for an out of state subpoena for any of the witnesses.

It is clear from the record that the defendant attempted to delay the trial for multiple reasons. At the CrR 3.5 hearing on May 12, 2005, the defendant indicated that she *was* planning on proceeding with the hearing but half an hour before the hearing the defendant indicated that she may have brain damage. IRP 4-5.

On the day of trial the defendant made another motion for a continuance to secure defense witnesses. IIRP 5. When the court denied that motion, the defendant made a series of other motions to delay the case. She then indicated that she was not prepared to go to trial because she had allegedly suffered a death in her family. IIRP 6-7. When the court indicated that the case was going to go forward, the defendant asked the court to recuse herself because they allegedly attended the same church, although the defendant did not specify what church, and the court did not recognize the defendant. IIRP 18-19. She claimed that Judge Grant had represented her when Judge Grant was in private practice, but the court did not recognize her. IIRP 18-19. When the court refused to recuse herself, the defendant made a motion to hire a new attorney. IIRP 20-21.

It is clear that defendant was intentionally attempting to delay her case from proceeding to trial. The trial court was within its discretion in denying the defendant's request for a continuance after eight prior defense continuances had been granted and the defendant had approximately 20 months to secure her alleged witnesses. The record does not contain any witness list filed by the defendant, nor does it appear that the defendant ever requested an out of state subpoena.

Finally, there was never any offer of proof made by the defendant as to what the alleged witnesses' anticipated testimony would be, so the court had no information on which to make a determination as to whether they were material or not. The defendant was trying to avoid going to trial, and made a variety of requests in an attempt to continue the trial further. While the defendant correctly states that a defendant has the right to present relevant and material testimony, the defendant made no showing whatsoever which would suggest that the alleged out of state witnesses had relevant or material testimony to present. Based on the lack of any offer of proof at trial, the defendant cannot show a Constitutional violation, or an abuse of discretion. The trial court properly exercised its discretion in denying the defense motion for a continuance.

2. THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR A MISTRIAL ON THE BASIS OF WITNESS UNAVAILABILITY WHEN THE DEFENDANT MADE NO ATTEMPTS TO SECURE THE WITNESS' PRESENCE AND MADE NO OFFER OF PROOF REGARDING THE WITNESS' MATERIALITY AND THE DEFENDANT CANNOT SHOW A VIOLATION OF HER CONSTITUTIONAL RIGHTS.

A trial court's determination of whether to grant a mistrial is reviewed for abuse of discretion. State v. Whitney, 78 Wn. App. 506, 515, 897 P.2d 374 (1995). Abuse of discretion occurs if there has been an error and a substantial likelihood exists that resulting prejudice affected the jury's verdict. Id. Defendant must have been so prejudiced that only a new trial will ensure a fair trial. Whitney, 78 Wn. App. at 515. As argued above, no steps were taken by the defendant to secure her alleged witnesses—no out of state subpoenas were requested, no witness list was filed, and no offer of proof regarding the witness' anticipated testimony was presented. The trial court did not err in denying the motion for a mistrial so the defendant could secure unnamed witnesses. Moreover, because the defendant failed to make even an offer of proof as to the anticipated testimony of the alleged witnesses, the defendant has no record on which to assert that the verdicts would have been different if the witnesses had testified. There was ample evidence presented to the jury

with regard to the defendant's guilt, and the presence of the alleged witnesses would not have changed the result in this case.

Finally, the defendant never provided any testimonial affidavits from the alleged witnesses regarding what their testimony would have been. See State v. Crumpton, 90 Wn. App. 297, 952 P.2d 110, review denied, 136 Wn.2d 1016, 966 P.2d 1277 (1998); State v. Hobbs, 13 Wn. App. 866, 538 P.2d 838, review denied, 85 Wn.2d 1019 (1975). The defendant cannot establish that a Constitutional violation occurred and the Court properly exercised its discretion in denying the defendant's motion for a continuance and later motion for a mistrial.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR RECUSAL SINCE THE TRIAL JUDGE'S IMPARTIALITY COULD NOT REASONABLY BE CALLED INTO QUESTION.

On appeal, a trial court's recusal decision is reviewed for an abuse of discretion. Smith v. Behr Process Corp., 113 Wn. App. 306, 340, 54 P.3d 665 (2002). "Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned." Smith, 113 Wn. App. at 340 (quoting Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 840, 14 P.3d 877 (2000)).

The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'

Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)(quoting In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2nd Cir. 1988)).

- a. Judge Grant properly exercised her discretion in denying a motion that she recuse herself on the basis that, after disfavorable rulings to the defendant, the defendant alleged that she and Judge Grant attended the same church and Judge Grant did not recognize the defendant.

In the present case, the defendant made a motion for Judge Grant to recuse herself because the defendant asserted that she and Judge Grant attended the same church. IIRP 18. The defendant's motion came after Judge Grant had denied the motion for a continuance on the day of trial, and indicated that the case was going forward despite the defendant claiming that she was not prepared for trial due to an alleged death in her family. The defendant did not make a motion for recusal when she was initially assigned to Judge Grant for trial, but rather waited for Judge Grant to make a ruling on a motion for a continuance. After Judge Grant indicated multiple times that the case was moving forward, the defendant alleged that she and Judge Grant attended the same church. IIRP 18. Clearly, the motion for Judge Grant to recuse herself was an attempt by the defendant to delay the case even further. The defendant never

specified which church she was asserting both she and Judge Grant attended.

Finally, Judge Grant indicated on the record that she did not have any social dealings with the defendant and did not recognize her. IIRP 19. It is clear that Judge Grant's impartiality could not have been reasonably questioned by a reasonable person who knows and understands all the relevant facts. The defendant's claim that she attended the same church as Judge Grant came only after Judge Grant made other rulings in the case that were unfavorable to the defendant. Judge Grant properly exercised her discretion in denying the defendant's motion for a recusal based on the fact that the defendant indicated that they both attended the same unidentified church.

- b. Judge Grant properly exercised her discretion in denying a motion that she recuse herself on the basis that, after unfavorable rulings to the defendant, the defendant alleged that Judge Grant and her husband had represented the defendant previously when Judge Grant indicated that she did not recognize the defendant.

After Judge Grant denied the defendant's motion for a continuance, and indicated multiple times that the case was moving forward, the defendant asserted that she had been represented by Judge Grant in a prior lawsuit. IIRP. The defendant did not specify what role Judge Grant had in the case, nor did she specify the outcome of any

alleged case. IIRP 18-19. When questioned further by the court, the defendant indicated that it was Judge Grant's law firm that had allegedly represented her. IIRP 21. The defendant did not allege that Judge Grant had represented her previously until after Judge Grant denied the defendant's motion for a continuance. The defendant claimed that she spoke to Judge Grant on the telephone and that she met with Judge Grant and her husband. IIRP 21. Clearly, the defendant was again attempting to delay the case from going to trial.

Judge Grant correctly determined that the allegations made by the defendant were "ruses." IIRP 19. Judge Grant indicated that during the time period when the alleged representation was to have occurred she was busy with cases against the State, and again stated that she did not recognize the defendant. IIRP 21-22. Again, a reasonable person who knows and understands all of the relevant facts would not reasonably question Judge Grant's impartiality—she indicated multiple times that she did not recognize the defendant. It is clear that the defendant was merely attempting to delay the trial, and was making assertions without any merit. Judge Grant properly exercised her discretion in denying the defendant's request that she recuse herself.

4. IF THE DEFENDANT CAN SHOW THAT JUROR MISCONDUCT OCCURRED, ANY MISCONDUCT DID NOT IMPACT THE REMAINING JURORS AND THE DEFENDANT CANNOT ESTABLISH ANY PREJUDICE.

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial; there must be prejudice. State v. Barnes, 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

It is well-settled that hearsay affidavits are not sufficient to establish juror misconduct. State v. Hawkins, 72 Wn.2d at 566-567; State v. Wilson, 42 Wash. 56, 84 P. 409 (1906); State v. Simmons, 52 Wash. 132, 100 P. 269 (1909); Haggard v. Seattle, 61 Wash. 499, 112 P. 503 (1911); State v. Pepoon, 62 Wash. 635, 114 P. 449 (1911); Maryland Cas. Co. v. Seattle Elec. Co., 75 Wash. 430, 134 P. 1097 (1913); State v. Prince, 154 Wash. 409, 282 P. 907 (1929); State v. Patterson, 183 Wash. 239, 48 P.2d 193 (1935).

In Maryland Cas. Co. v. Seattle Elec. Co., 75 Wash. at 436-437 the Supreme Court reversed an order of the trial court granting a new trial that

was based upon juror misconduct where the only proof offered was the reporter's stenographic report, containing a hearsay statement of what the foreman of the jury told the bailiff about a juror's misconduct. The court held this was insufficient proof of the misconduct.

Here defendant asserts that juror misconduct occurred when one juror was discovered with a book entitled "The Hidden Jury and Other Secret Tactics that Lawyers Use to Win." IIRP 84. The juror did not discuss the contents of the book with anyone. IIRP 88. He did not read the book in the jury room. IIRP 88-89. The juror was ultimately excused. IIR 100.

The entire jury panel was questioned. IIRP 102-103. None of the jurors had any discussions regarding the book. IIRP 103-104. The court read all of the chapter titles in the book, as well as both covers, and nothing suggested that the presence of the book or the contents of the book prejudiced the defendant. IIRP 84-108. The book appeared to be about courts and juries in general. Id. Nothing read by the court suggested that the book was specific to any issues presented in the case. Moreover, the only juror to have actually read any of the book was excused. It is not reasonable to believe that the mere presence of the book in the front of the remaining jurors could have affected their verdict. The trial court made a finding that none of the remaining jurors had any conversations of any

substance about the book other than seeing the cover. IIRP 108. The court also made a finding that none of the remaining jurors expressed that their decision making process would be adversely affected by the book. IIRP 107, 109. This record does not provide basis for reversal of the conviction.

5. THE DEFENDANT FAILED TO PRESERVE THE CORPUS DELICTI ISSUE ON APPEAL; ALTERNATIVELY, THERE WAS A SHOWING OF CORPUS DELICTI FOR ADMISSION OF DEFENDANT'S STATEMENTS.

“The corpus delicti rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make proper objection to the trial court to preserve the issue. State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995). The failure to object precludes appellate review because “it may well be that ‘proof of the corpus delicti was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was omitted.’” C.D.W., at 763-64 (quoting People v. Wright, 52 Cal. 3d 367, 404, 802 P.2d 221, 245, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991)); but see State v. Pietrzak, 110 Wn. App. 670, 41 P.3d 1240 (2002) (finding that the rule is more than a rule of evidence, crafted to protect a defendant from an unjust conviction based on a false confession).

Here, the defendant never raised the issue of corpus delicti below and this court should not consider this evidentiary issue for the first time on appeal. The State may have had additional evidence to present in response to a corpus delicti objection. It is unfair to allow the defendant to raise it at this time.

Assuming, *arguendo*, that the corpus delicti issue is properly preserved, the evidence supports an inference that the crimes did occur. “‘*Corpus delicti*’ literally means ‘body of the crime.’” State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (citations omitted). A defendant’s confession alone is inefficient to establish corpus delicti absent independent evidence. Aten, 130 Wn.2d at 655-56. “The independent evidence need not be sufficient to support conviction or to even send the case to the jury.” State v. Pietrzak, 110 Wn. App. 670, 679, 41 P.2d 1240 (2002), citing Aten, at 655-56. However, the evidence must be sufficient to support a logical and reasonable inference of the facts to be proved at trial. Id. To determine whether the corpus delicti was established the court “assumes the truth of the State’s evidence and all reasonable inferences from it in a light most favorable to the State.” Pietrzak, at 679, quoting State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). Proof may be by direct or circumstantial evidence. Id. Where a defendant puts on a case following the denial of a corpus delicti motion, the defendant waives his or her challenge to the sufficiency of the evidence as it stood at that point. Pietrzak, 110 Wn. App. at 680, citations omitted.

Corpus delicti consists of two elements: (1) an injury or loss and (2) someone's criminal act which caused it. Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Proof of the corpus delicti of any crime requires evidence that the crime charge was committed by someone. State v. Komoto, 40 Wn. App. 200, 206, 697 P.2d 1025 (1985). "[T]he identity of the person who has committed the crime is not normally material in establishing the corpus delicti [sic]; however, identity must be proven to sustain a conviction of the crime charged. Komoto, 40 Wn. App. at 205.

To establish the criminal act of theft in the first degree the State must show that there was a theft of property or services which exceed \$1,500.00. RCW 9A.56.030. To establish the criminal act of theft in the second degree the State must show that there was a theft of property or services which exceeds \$250.00 but does not exceed \$1,500.00. RCW 9A.56.040.

Here, examining the evidence in the light most favorable to the State, the facts support a logical and reasonable inference that the defendant committed theft in the first degree and theft in the second degree. Petty, the office manager, stated that she makes copies of her deposit slips for her records. IIRP 54. She discovered that a cash deposit for October 20, 2003, was missing. IIRP 53-55. The missing cash deposit was for \$2,326.52. CP 29 (Exhibit #2); IIRP 54. Petty also discovered that a deposit was missing had been altered by \$300.00, from a total

deposit of \$976.00 to \$676.00. IIRP 56. The deposit was made out for October 23, 2003. CP 29 (Exhibit #4); IIRP 56. The alteration on the deposit slip did not match what Petty had originally filled out. IIRP 56.

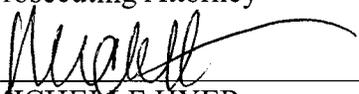
While the identify of the perpetrator is typically not required on a corpus delicti showing, there was additional evidence, absent the defendant's confessions, that the defendant was the individual who committed the thefts. The defendant was making the bank deposits for the business because Petty was leaving the office early. IIRP 59. Before the money was taken, the defendant had asked one of the owners at Smiley's Auto Sales for a loan, and her request was denied. IIRP 67. Based on the corroborative evidence, the corpus delicti of theft in the first degree and theft in the second degree is established.

D. CONCLUSION.

The State respectfully requests that this court affirm the defendant's convictions.

DATED: July 20, 2006.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
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MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

APPELLANT'S  
COURT REPORT

NOV 21 11:30

U.S. MAIL  
TACOMA, WA

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/26/02  
Date Signature *Theresa Johnson*