

State Appeal

NO. 34580-3

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

STATE OF WASHINGTON, APPELLANT

v.

ANDREW HENDRICKSON, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable David M. Kenworthy

No. 05-1-03311-0

APPELLANT'S OPENING BRIEF

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A. APPELLANT'S ASSIGNMENTS OF ERROR.

1. The Superior Court erred when it dismissed this case, despite agreeing with the trial court's finding that corpus delicti had been established at trial.

2. The Superior Court erred when it awarded costs to the appellant below.

B. ISSUES PRESENTED

1. Did the trial court act properly when it ruled that the State presented sufficient evidence to establish corpus delicti for the crime of driving under the influence of intoxicants?

2. If the State did err by eliciting testimony regarding defendant's statements prior to establishing the independent evidence required for corpus delicti, was such error harmless?

3. Did the Superior Court err when it assigned costs to defendant?

C. STATEMENT OF THE CASE.

1. Procedure

On February 28, 2005, the State charged Andrew Christian Hendrickson, hereinafter, “defendant,” with one count of driving while under the influence of intoxicants. CP¹ 11.

On June 6, 2005, the case was heard in Pierce County District Court. CP (TRP 1). Defendant brought two pretrial motions, the first to exclude the State’s expert witness, a toxicologist, from testifying as to the effects of alcohol on a person’s reactions. CP (TRP 5). Defendant’s second motion was to preclude Deputy Weigley and Trooper Ames from testifying as to their opinion of defendant’s intoxication. CP (TRP 7).

The court ruled that the toxicologist could testify as to the effects of alcohol on the human system, and that the officers could testify as to what they observed. CP (TRP 14-15). Defendant also requested that the State not elicit testimony regarding defendant’s admissions of driving the vehicle until the State proved corpus delicti. CP (TRP 18). When invited by the State to make a pretrial motion, defendant declined. CP (TRP 18-19). Defendant did ask, however, that the State not refer to defendant’s

¹ Citations to the Clerk’s Papers will be to “CP.” The citations to the transcripts of the Superior Court actions on RALJ appeal will be to “RP,” followed by the date of the hearing. The trial transcript was designated as Clerk’s Papers, but was sent under a separate cover, without numbering by the Clerk. For the Court’s convenience, the “CP” designation for the trial transcripts will be followed by the transcript page number. For example, the citation to page 6 of the trial transcript will be to “CP (TRP 6).”

admissions in its opening statement. CP (TRP 19). The State did not mention defendant's admissions in its opening. CP (TRP 108).

At trial, over defendant's repeated objections, the State elicited testimony from both Deputy Weigley and Trooper Ames that defendant admitted to drinking and driving the vehicle. CP (TRP 113, 157-59, 163, 168). All of defendant's corpus delicti objections were overruled by the court. See CP (TRP 1-236). At the close of the State's case, defendant moved to dismiss the case, alleging that the State failed to prove the corpus delicti of the crime. CP (TRP 201). The court found that the State met the minimum requirements of corpus to put the matter before the jury. CP (TRP 203). The jury found defendant guilty of driving while under the influence of intoxicants. CP 11.

Defendant filed a timely notice of appeal. CP 1-2. On appeal, the defendant alleged that (1) the court erred in allowing expert testimony on the effects of alcohol on a person, and (2) the court erred in allowing testimony regarding defendant's statements to be admitted before the State proved corpus delicti. CP 3-9.

The State filed a response brief. CP 10-26. In response, the State argued that (1) the trial court properly exercised its discretion in allowing the State to present expert testimony regarding the effect of alcohol on a person's ability to operate a motor vehicle, (2) the State presented sufficient evidence to prove corpus delicti, and (3) even if the court did err by allowing the statements, such error was harmless. CP 10. The State

also argued at the hearing that it was the defendant's trial strategy not to raise corpus in a pretrial motion, defendant placed himself at the discretion of the court for the admission of evidence during trial. RP (02/10/06) 8.

On February 10, 2006, the parties appeared before the Honorable Beverly G. Grant for the first hearing on the RALJ appeal in Pierce County Superior Court. RP (02/10/06) 2. Before hearing argument, Judge Grant made a tentative ruling, holding that the expert witness should have been allowed to testify under Rule of Evidence 702. RP (02/10/06) 4. Judge Grant then went on to instruct the parties that she wanted argument relating to the corpus issue, stating:

And I will issue an independent ruling, because I wanted to, instead of just reading the selective part of your transcript, I wanted to take the time to read the entire transcript. And I apologize, but I just haven't had time to do that.

RP (02/10/06) 4-5.

In his argument, defendant asserted that the State conceded that corpus delicti was violated, but that such violation was harmless. RP (02/10/06) 5. Defendant then raised a Crawford² issue, stating, "So, we have testimonial confrontational hearsay that at the same time now is trying to boot-strap into a corpus delicti and it can't be done." RP (02/10/06) 5.

² Crawford v. Washington, 541 U.S. 296, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

The State argued that the fact that defendant was alone at the crash scene when the officers responded, the keys were in the vehicle, the testimony introduced outside the presence of the jury that the vehicle was registered to defendant, defendant had cuts and scrapes on his body was sufficient independent evidence necessary to establish corpus delicti. RP (02/10/06) 8-9. The prosecutor also explained that the State had reserved its harmless error argument, and had not conceded error. RP (02/10/06) 11.

Defendant responded that corpus is a foundation issue, not to be raised pretrial. RP (02/10/06) 9. Specifically, defendant argued, “You sit there and you object so you can say, ‘Well, let’s hear all of the evidence and we’ll see if we have a corpus delicti.’” RP (02/10/06) 9.

After hearing the arguments from both parties, Judge Grant stated:

But even though it’s clear that all the evidence was introduced throughout, if I recall correctly, at one point in time the commissioner said that there was a concern, saying, ‘Well, why don’t we just acknowledge Mr. Dinwiddie’s [defense counsel] objections as preserved throughout the depo,’ and the commissioner said, ‘No, he’s entitled to object each way.’

So I’ve read some of it, but I, in all honesty, haven’t finished reading, and it’s a couple hundred pages. I just would like to read it. And why don’t each of you submit your perspective Orders, if you have it, and I will sign the Order that I think is appropriate.”

RP (02/10/06) 12. Judge Grant reserved her ruling at that time and held the hearing over until the following Friday. RP (02/10/06) 14.

On February 17, 2006, the parties appeared before Judge Grant and she issued a ruling in favor of defendant and dismissed the charges against him. See RP (02/17/06).

On February 24, 2006, Judge Grant issued, sua sponte, a motion for reconsideration and the parties appeared before her again. RP (02/24/06) 8. At that hearing, Judge Grant explained that she had reread State v. McConville, 122 Wn. App. 640, 94 P.3d 401 (2004), review denied, 153 Wn.2d 1025, 110 P.3d 213 (2005), and she wanted to hear argument on the issue. RP (02/24/06) 8. Defense counsel made an argument indicating that corpus delicti must be met at the time defendant makes a statement and that he was precluded from raising other evidentiary issues based on the timing of defendant's arrest. RP (02/24/06) 6-8.

After defendant's argument, Judge Grant stated:

Let me ask you this: I'm reading from McConville, 122 Wn. App. 640, 650 n.22, 94 P.3d 401 (2004).

* * *

Now it's on page 5 at the bottom, after it cites, "We had more on evidence and others," it reads, "the evidence of the corpus [sic] should be put in before a confession is certainly good practice." So, that acknowledged what you're both saying, and it's occasionally said to be the rule, but the better view is that the trial judge may determine the order of this evidence on the general principles of otherwise prevailing.

RP (02/24/06) 10-11. Defendant requested the hearing be set over a week to give him time to respond. RP (02/24/06) 11-12. Judge Grant had not signed any order at that time, and she agreed to set the hearing over. RP (02/24/06) 11-12.

On March 3, 2006, the parties appeared before Judge Grant for the fourth time. RP (03/03/06) 1. Judge Grant questioned that if defendant can raise corpus at any time during the trial, “why can’t the Court wait until all of the evidence is in and then determine if that corpus delicti has been met?” RP (03/03/06) 8. Again, defense counsel’s argument was that corpus delicti must be met at the time defendant was arrested because, “[a]t the time they were arresting him, at the time they were doing all their stuff, they didn’t have any independent evidence he was driving.” RP (03/03/06) 9.

The State argued that any error in the order in which a defendant’s statements were admitted is harmless, provided that the State established the independent evidence during the course of the trial. RP (03/03/06) 11-12. The State also reminded the court that, if corpus delicti had not been met at trial, defendant’s case would have been dismissed or he would have had other remedies available. RP (03/03/06) 14-15. Finally, the State argued that, if the court were to find that the statements were admitted in error, remand for a new trial was the appropriate remedy since the State had established the corpus delicti of the case. RP (03/03/06) 15-16.

Despite making a ruling that the State had provided proof, through independent evidence, that defendant was driving the vehicle, Judge Grant held that remand would undermine the corpus delicti rule and dismissed the charges against defendant. RP (03/03/06) 19. Judge Grant reversed the trial court and made the following rulings:

(1) The finding of guilt by jury trial is reversed, and this cause is dismissed.

(2) The reason for this Court's rulings are:

(a) Mary Wilson, a forensic scientist from the Washington State Toxicology Laboratory was properly permitted to give testimony under Evidence Rule 702 regarding the effects of alcohol on the human body and the effect of alcohol on an individual's ability to operate a motor vehicle.

(b) The trial court erred in permitting the State to introduce the defendant's statements/admissions before corpus delicti for the crime was established.

(c) Information from the Department of Licensing regarding the ownership of the vehicle was properly admitted at trial.

(d) This court does find that the State introduced sufficient evidence at trial to establish corpus delicti independent of the defendant's statements/admissions, but such evidence should have been presented at trial before the defendant's statements were admitted.

(e) The error in allowing the introduction of the defendant's statements before all of the independent evidence was introduced was not harmless.

CP 29-31. The court also awarded defendant costs on appeal. CP 27-28. The court stayed the payment of costs pending discretionary review. RP (03/03/06) 24.

The State filed a Notice for Discretionary Review on March 20, 2006. CP 32-38. The Court of Appeals granted the State's motion for discretionary review. CP 39-41.

2. Facts

On January 13, 2005, at approximately 1:30 in the morning, Deputy Steven Weigley saw a dark object, later identified as defendant, dart off the left shoulder of the road. CP (TRP 111-12). Conditions were clear and cold, the roadway was bare and dry, and there was good visibility in the area. CP (TRP 123). Deputy Weigley turned his car around and stopped next to where defendant was standing. CP (TRP 112-13). The deputy asked defendant if he was okay and defendant dropped to his knees, started to cry, and stated that he had crashed. CP (TRP 113). Deputy Weigley saw no one else in the vicinity, but asked defendant if he had any passengers or anyone else with him, defendant responded that he was by himself. CP (TRP 113-14). Deputy Weigley observed that defendant was unsteady with his balance and there was an obvious odor of intoxicants about him. CP (TRP 114). Defendant was also complaining about pain in his arms and wrists, so Deputy Weigley called the fire department paramedics. CP (TRP 114). The deputy located defendant's car off the road, at the bottom of ravine. CP (TRP 114).

At approximately 1:40 a.m., Trooper Jonathan Ames responded to the scene. CP (TRP 123). Medical vehicles had already arrived. CP (TRP 123). Trooper Ames saw that the keys to the car were still hanging in the ignition and established through the Department of Licensing (DOL) link on his mobile unit that defendant was the registered owner of the vehicle. CP (TRP 126). He then interviewed defendant while defendant was in the ambulance. CP (TRP 157). Defendant told Trooper Ames that he had been driving the vehicle when it went off the road and that he had been alone in the car. CP (TRP 157-59). Defendant admitted he was intoxicated and stated that he thought he was impaired in a 1.20 level of intoxication. CP (TRP 163). Defendant also stated that he should not have been driving. CP (TRP 163).

Based on defendant's speech which was fast and slow; his physical appearance, including watery, bloodshot eyes and his flushed face; the statements he made; and the strong odor of alcohol coming from him, Trooper Ames determined that defendant was intoxicated. CP (TRP 164-65). Trooper Ames determined that defendant was obviously intoxicated and that it was not safe to allow defendant to drive. CP (TRP 165).

Trooper Ames placed defendant under arrest for driving a motor vehicle while under the influence of an intoxication liquor and/or drug and read defendant his Miranda³ rights. CP (TRP 166). Defendant did not

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

waive his Miranda rights and Trooper Ames made no further inquiries. CP (TRP 167). Defendant later made a spontaneous comment, stating, “Legally, I am too drunk to drive.” CP (TRP 168). During his discussion with Trooper Ames, defendant declined to do a field sobriety or a blood alcohol test even though there are tests that would have been appropriate for him to do, even while in the ambulance. CP (TRP 170-71, 177-78).

Trooper Ames’ investigation ultimately revealed that defendant’s car had been traveling the wrong direction in the westbound lane of Highway 302, crossed back into the eastbound lane, and began a broadside skid and crossed over the double yellow center line again, crossing the westbound lane and off the roadway to the north where it came to rest at the bottom of a ravine. CP (TRP 175). Trooper Ames also determined that defendant had been driving the vehicle when it crashed based on the fact that defendant was alone at the scene of the accident, the keys were in the vehicle’s ignition, and defendant had small cuts and scrapes on his hand. CP (TRP 126, 159). Trooper Ames also established that defendant was the registered owner of the vehicle through the DOL link in his mobile unit. CP (TRP 134, 153).

D. ARGUMENT.

1. THE TRIAL COURT ACTED PROPERLY WHEN IT RULED THAT THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH CORPUS DELICTI FOR THE CRIME OF DRIVING UNDER THE INFLUENCE OF INTOXICANTS.

The “corpus delicti rule” is described as follows:

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.

State v. Smith, 115 Wn.2d 775, 790-81, 801 P.2d 975 (1990). “In this context, ‘prima facie’ means that there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proven.” Smith, 115 Wn.2d at 781, citing City of Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986).

Proof of the corpus delicti of any crime requires evidence that the crime charged 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; however, identity must be proven to sustain a conviction of the crime charged. Komoto, 40 Wn. App. at 205. In crimes such as

attempt, conspiracy, perjury, and reckless or drunken driving, many courts and commentators have determined that the appropriate application of corpus delicti is to prove that the crime charged has been committed by a particular person. See Bremerton, 106 Wn.2d at 578. The corpus delicti of driving or being in actual physical control of a motor vehicle while intoxicated is “met by proof that [a person was] driving or in actual physical control of a vehicle while intoxicated.” Bremerton, at 578.

It is not necessary that the evidence exclude every reasonable hypothesis consistent with a person not driving a car. Bremerton, at 578. The amount of proof needed is “evidence of sufficient circumstances which would support a logical and reasonable deduction of the fact sought to be proved, . . . which is less than that necessary to take the case to the jury.” Komoto, 40 Wn. App. at 206. Washington courts have characterized the requirement as “slight evidence” or a “relatively modest amount.” See State v. Hamrick, 19 Wn. App. 417, 576 P.2d 912 (1978); State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995).

A very small amount of independent evidence will establish the prima facie showing. For instance, the fact that a defendant was found behind the wheel of a car stopped on the inside shoulder of a freeway was found to be sufficient. State v. Whilhem, 78 Wn. App. 188, 896 P.2d 105 (1995). The independent test was also satisfied when a defendant was present at the scene of an accident, in close proximity to a vehicle registered to him, and the only other person who could have been driving

was passed out behind the front seats of the vehicle. State v. Sjorgren, 71 Wn. App. 779 (1993). In Bremerton, the court held that being the only person at the scene of the accident may be sufficient prima facie evidence of the corpus delicti. 106 Wn.2d at 580.

Washington courts encourage defendants to raise corpus delicti challenges in pretrial motions. State v. McConville, 122 Wn. App. 640, 650 n. 22, 94 P.3d 401 (2004), review denied, 153 Wn.2d 1025, 110 P.3d 213 (2005). However, when the issue is not brought up pretrial, courts have held that, while the evidence establishing corpus delicti *should* be admitted before a confession, *the trial judge may determine the order of the evidence on the general principles otherwise prevailing*. See McConville, at 650; see also State v. Lung, 70 Wn.2d 365, 370-73, 423 P.2d 72 (1967) (The trial court admitted the defendant's confession on the condition that it would be later withdrawn if the State failed to prove corpus delicti.).

In the present case, defendant made passing reference to corpus delicti before the trial, but did not address corpus delicti in a pretrial motion. CP (TRP 18-19). He first raised a corpus delicti challenge when the State elicited testimony from Deputy Weigley regarding defendant's statements at the time the officer contacted defendant. CP (TRP 113). When he saw defendant on the side of the road, Deputy Weigley asked defendant if he was okay. CP (TRP 113). Defendant responded that "he had crashed." CP (TRP 113). Defendant's statement explains Deputy

Weigley's decision to stop to render aid to defendant and his subsequent finding of the car, registered to defendant, off the road at the bottom of a ravine. CP (TRP 113-14). It is not unreasonable or inappropriate during direct examination to start from the beginning of the incident.

The State went on to establish, through the testimony of Deputy Weigley and Trooper Ames, that defendant was alone at the scene of the accident, the keys were in the vehicle's ignition, and the vehicle was registered to defendant. CP (TRP 113, 126, 159). Deputy Weigley testified that, through his own observations, there was no one else in the vicinity of the car who could have been driving at the time it went off the road. CP (TRP 113-14). Trooper Ames established that defendant was the registered owner of the vehicle through the DOL link in his mobile unit. CP (TRP 134, 153).

This evidence is sufficient to establish *prima facie corpus delicti*. The State need not independently prove *corpus delicti* before the defendant's admissions may be considered, when defendant does not make a *corpus delicti* challenge pretrial despite defense counsel's assertion to this effect at trial. See McConville, 122 Wn. App. 640. The independent evidence, such as the absence of anyone but defendant in the vicinity of a crashed vehicle which was registered to defendant, is sufficient to establish *corpus delicti*. Defendant's admissions, taken with the

independent evidence, were sufficient to prove to a rational jury, beyond a reasonable doubt, that defendant was driving the vehicle when it went off the road.

The Superior Court erred in reversing jury verdict. In its reversal, Superior Court determined that, while the State did establish the corpus delicti of the case, the trial court erred in permitting the State to introduce the defendant's statements/admissions before corpus delicti for the crime was established. CP 29-31. However, the trial court, in denying defendant's motion to dismiss at the close of the State's case, specifically addressed the issue of corpus delicti, stating:

But now I am going to find that the State has met the minimum requirements of corpus to put this matter before the jury but beyond that I wouldn't want to make any declaration as to what they've met and that's up to the jury to make the fact finding.

CP (TRP 203).

The Superior Court's ruling is completely contrary to established case law because the lower court had the discretion to hear the evidence and determine if the State had met its burden and its decision on evidentiary matters could not be overturned absent a showing of abuse of discretion. See McConville, 122 Wn. App. at 650. The Superior Court's ruling was clearly erroneous and this Court should reverse the Superior Court's ruling and affirm defendant's conviction.

2. IF THE STATE DID ERR BY ELICITING TESTIMONY REGARDING DEFENDANT'S STATEMENTS PRIOR TO ESTABLISHING THE INDEPENDENT EVIDENCE REQUIRED FOR CORPUS DELICTI, SUCH ERROR WAS HARMLESS.

A harmless error is an error which is trivial, formal, or merely academic, was not prejudicial to the substantial rights of the defendant, and in no way affected the final outcome of the case. State v. Thacker, 94 Wn.2d 276, 283, 616 P.2d 655 (1980).

The corpus delicti rule is not a constitutional sufficiency of the evidence requirement, but rather a judicially created rule of evidence requiring proper foundation to be laid before a confession is admitted into evidence. State v. C.D.W., 76 Wn. App. 761, 763, 887 P.2d 911 (1995). Where the error is from violation of an evidentiary rule rather than a constitutional mandate, the improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In the present case, all the evidence independent of defendant's admissions was admitted by the trial court. As discussed above, the independent evidence was sufficient to establish corpus delicti. Even the Superior Court found that there was sufficient evidence to establish corpus delicti. CP 29-31. If the State had not presented sufficient evidence, the trial court would have granted the defendant's motion to dismiss, rather

than sending the case to the jury. Any error in the order in which the State presented the evidence was harmless.

3. BECAUSE THE COURT ERRED IN DISMISSING THIS CASE, THE COURT'S ORDER ASSIGNING COSTS TO DEFENDANT WAS ALSO IN ERROR.

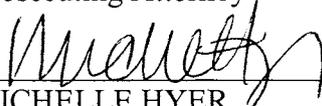
The party who substantially prevails on appeal shall be awarded costs on appeal. RALJ 9.3(a). However, as argued above, the Superior Court erred when it dismissed this case, despite finding that the State met the independent evidence requirements of corpus delicti. CP 29-31. Because the court erred in dismissing this case, the court's award of costs to defendant was also in error. See CP 27-28. The Superior Court's order for costs should be vacated.

E. CONCLUSION.

The State respectfully requests this Court to reverse the Superior Court's ruling dismissing this case and to affirm the trial court's ruling on corpus delicti and defendant's conviction.

DATED: October 6, 2006.

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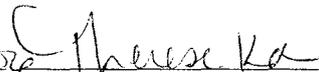
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Certificate of Service:

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.

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