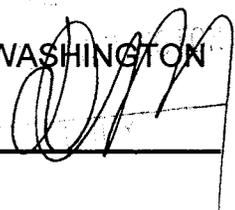


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NO. 40192-4-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II



STATE OF WASHINGTON,

Respondent,

vs.

CALEB LEEDY KISOR

Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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STATEMENT OF THE CASE

Without waiving the right to challenge any facts later, and except as more fully referenced and discussed below, Appellant's Statement of the Case is adequate for the purpose of responding to this appeal.

ARGUMENT

A. SUFFICIENT INDEPENDENT, CORROBORATING EVIDENCE WAS PRESENTED TO PROVE THE *CORPUS DELICTI* OF THE CRIME OF ATTEMPTED CHILD MOLESTATION IN THE FIRST DEGREE.

Kisor first argues there was insufficient corroborating evidence presented to prove the *corpus delicti* of the crime of attempted child molestation in the first degree. Respondent disagrees.

Under the corpus delicti rule, a court may not consider a defendant's confession or admission unless the State has established the corpus delicti of the crime through independent proof. State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). The independent proof need not establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence; it need only support a *logical and reasonable inference* the crime occurred. State v. Ackerman, 90 Wn.App. 477, 485, 953 P.2d 816 (1998). In other words, a defendant's incriminating statement alone

is not sufficient to establish that the crime took place. State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2007), *citing*, State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1966); State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). [T]he State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred." Brocob, supra. Additionally, Washington's interpretation of the corpus delicti rule is (somewhat puzzlingly) more demanding under recent case law than the traditional understanding of the rule. That is, "the State must still prove very element of the crime charged by evidence independent of the defendant's statement." State v. Dow, 163 Wn.2d 243, 254, ___ P.3d ___(2010).¹

When determining whether there is sufficient independent evidence under the *corpus delicti* rule, the evidence is reviewed in the light most favorable to the State. Brocob, 159 Wn.2d at 328. In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and

¹ Respondent is not making an issue of this here, but our Supreme Court's recent "narrowing" or more demanding view of the corpus delicti rule as announced in Brocob and reiterated in Dow departs from even this State's earlier case law on this issue. Still--as far as Respondent can tell--none of the earlier case law has been reversed or noted as "abrogated" on the corpus delicti issue by Brocob or Dow. See e.g., State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990).

inconsistent with a hypothesis of innocence." Aten, 130 Wn.2d at 660.

The crime in the present case is *attempted* child molestation in the first degree. Criminal attempt requires "intent to commit a specific crime" and "a substantial step toward the commission of that crime." RCW 9A.28.010(1). "Whether conduct constitutes a 'substantial step' toward the commission of a crime is a question of fact." State v. Billups, 62 Wn. App. 122, 126, 813 P.2d 149 (1991)(emphasis added)(citing State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978)). The Model Penal Code provides the definition of 'substantial step' for purposes of the crime of attempt in Washington. Workman, 90 Wn.2d at 452. For conduct to be a "substantial step" it must be "strongly corroborative of the actor's criminal purpose." Workman, 90 Wn.2d at 451 (quoting Model Penal Code sec. 5.01(2)).

The elements of attempted child molestation in the first degree are: taking a substantial step with the intent of having sexual contact with one who is less than 12 years of age, at least 36 months younger than the perpetrator, and to whom the perpetrator is not married. RCW 9A.44.083(1); RCW 9A.28.020(1).

In the present case, there is absolutely no "innocent" explanation for Caleb Kisor's actions. Indeed, Kisor's *own reaction* after the victim's mother walked in on him and JK shows that Kisor's conduct is "inconsistent with a hypothesis of innocence." Aten, supra; RP 41-43.

The evidence presented here--excluding Kisor's statements--is as follows. On the day of the incident, JK (the victim) was 17 months old, and Caleb was 20 years old. RP 35, 36. JK's mother, Rebecca Kisor, was in the kitchen of her father's house washing dishes, and she could hear JK playing elsewhere in the house. RP 37-39. Rebecca said she heard JK playing but then it got quiet. Rebecca said that JK, "was only a year and a half and when they get quiet you know they're getting into something so I stopped what I was doing." RP 40. Rebecca's daughter Kamika was also at the house that day and Kamika agreed that Caleb was at the residence that day as well. RP 24. When looking for JK, Rebecca asked Kamika where JK was and Kamika said JK was back playing with Caleb. RP 23. Kamika could not remember what day or month it was when this occurred. RP 25, 33.

Rebecca then went to look for JK. Rebecca walked down the hallway and saw that the bathroom door was open, but the door

to the spare room and Rebecca's father's room were closed. RP 70. Rebecca then went towards Caleb's bedroom and saw that "Caleb's door was open a couple inches," so she opened the door and saw JK inside with Caleb. RP 40. Before Rebecca opened the door, she did not hear any sounds coming from Caleb's room. RP 40. Rebecca said that only Caleb and JK were in the bedroom and that Caleb was standing next to the bed. RP 40. Caleb was facing the doorway and JK was facing Caleb. RP 40,41. Caleb was wearing jeans and a T-shirt. RP 46. Caleb's jeans were unzipped, and his bare penis was exposed. RP 46. Caleb's penis was about 6 inches from JK's face. RP 41. When Caleb saw Rebecca open the door, Caleb "threw himself on the bed. . . on his stomach . . . and his face into the pillow" and it sounded like he was crying. RP 41. Rebecca grabbed JK and took him out of the bedroom. RP 41. When Rebecca returned to Caleb's bedroom ten to fifteen minutes later, Caleb was still crying. RP 42,43. After this incident, Caleb Kisor also sought counseling with Sandra Ames. RP 48, 74-86.

Thus, as specifically cited to the record above--*without* Caleb's statements--what we have here is JK's mother walking in on Caleb Kisor alone in his bedroom with 17-month-old JK. The bedroom door was only open several inches. RP 40. JK's mother

observed that Caleb's jeans were unzipped and his penis was exposed. Caleb's exposed penis was about 6 inches from JK's face, as little JK stood facing Caleb. RP 40. What *possible* "innocent" explanation could there be for this scenario? Why would a 20-year-old man be in his bedroom alone with a 17 month old child, with the door nearly closed, and the 20-year-old has his pants unzipped, and his penis exposed so that his penis is only about six inches from the infant's face?

Viewed in the light most favorable to the State, all of these facts--without Caleb's statements--clearly "support a *logical and reasonable inference* the crime occurred." Ackerman, 90 Wn.App. at 485. More to the point, this evidence supports a logical and reasonable inference that Caleb Kisor took a *substantial step* towards committing the crime of child molestation in the first degree. Indeed, the trial court's consideration of this evidence when it granted the State's motion to admit Caleb's statements as to *attempted* child molestation is spot-on (and the trial court's analysis is clearly made *without* considering Caleb's statements):

[T]his is a very different situation with this charge, with an amended charge of attempted child molestation in the first degree. Clearly there is evidence of a substantial step when they--the defendant is in the bedroom with this child with his penis exposed within 6 inches of the child's face, the reaction that he had when he--when the child's mother came

into the room, all of those things are clearly enough to establish a prima facie case of the crime of attempted child molestation in the first degree. Is it proof beyond a reasonable? Is there proof of intent beyond a reasonable doubt based on this? I don't know. That's a question for the jury. But there is certainly a prima facie case of the attempt in this case.

So, the State here can meet the corpus delicti rule with the evidence that was presented here Again, we're dealing with a very different burden [than at trial], very different set of circumstances when you're dealing with an attempt rather than with the completed act of child molestation in the first degree.

RP 76. The trial court's review of the evidence and its ruling in this case is correct, and is consistent with the latest--albeit more strict--*corpus delicti* law. See, Brocob, supra; Dow, supra.

Even under the more-demanding view of the corpus rule in those cases, the trial court here correctly found sufficient corroborating evidence to prove the *corpus* of attempted child molestation in the first degree, *even without* the additional evidence of Caleb's "consciousness-of-guilt" behavior upon being seen by JK's mother when she opened the door to the bedroom and saw what was happening. Specifically, upon seeing JK's mother in the bedroom doorway, Caleb quickly turned around and threw himself face down on his bed, with his head in his pillow, crying. RP 41. And Caleb was still crying when JK's mother returned to the bedroom 10 to 15 minutes later. RP 42,43. This evidence is not

the reaction of an "innocent" person, and is further independent evidence of corpus. In addition, we also have the evidence that Caleb sought counseling after this incident.

All of the aforementioned evidence amply supports "a logical and reasonable inference" independent of Caleb's statements, to prove the corpus delicti of attempted child molestation in the first degree. This Court should agree, and should affirm the trial court's ruling admitting Kisor's statements, and should affirm the conviction.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED KISOR'S MOTION FOR A MISTRIAL BASED ON A WITNESS' INADVERTENT AND FLEETING MENTION OF THE WORDS "LAST TRIAL" IN THE FORM OF A QUESTION DURING CROSS EXAMINATION.

Kisor also claims the trial court should have granted his motion for a mistrial when Rebecca Kisor inadvertently and extremely briefly mentioned the prohibited words "last trial" during cross examination. This argument is also without merit.

The grant or denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wash.2d 700, 707, 927 P.2d 235 (1996). "A trial court abuses its discretion if its decision is based on untenable grounds or is made for untenable reasons." State v. Andrews, 66 Wash.App. 804, 810, 832 P.2d 1373 (1992)

(citing Davis v. Globe Mach. Mfg. Co., 102 Wash.2d 68, 77, 684 P.2d 692 (1984)). "A trial court's denial of a motion for mistrial will only be overturned when there is a 'substantial likelihood' that the error prompting the mistrial affected the jury's verdict." State v. Rodriguez, 146 Wash.2d 260, 269-270, 45 P.3d 541(2002), *citing* State v. Russell, 125 Wash.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wash.2d 315, 332-33, 804 P.2d 10 (1991)). Indeed, trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)(citation omitted).

"In determining whether the effect of an irregular occurrence at trial affected the trial's outcome, this court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." State v. Greiff, 141 Wash.2d 910, 921, 10 P.3d 390 396 (2000), *citing*, State v. Hopson, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989).

Applying the above-set-out law to the instant case, it is obvious that the complained-of conduct by the State's witness was

not so egregious or prejudicial so as to require a mistrial. Greiff, supra. Here, the "irregularity" was not serious, nor did it involve "cumulative evidence," and it was Kisor who decided (reasonably) not to have the court instruct the jury to disregard the statement because he did not want to call undue attention to the statement. RP 63; Greiff, supra.; Hopson, supra. And, as discussed below, the complained-of reference was so brief and fleeting that it could not possibly have influenced the jury's verdict.

In the present case, it is undisputed that the trial court had admonished the parties to instruct their witnesses not to refer to Kisor's prior jury trial using that term. RP 60 (defense counsel stating without contradiction that the trial court previously ruled the prior trial could not be mentioned). Instead, it was agreed that the witnesses would reference the prior trial only as a prior "hearing." RP 61 (defense counsel noting that he used the word "hearing" and not "trial.") The State did admonish its witnesses accordingly. RP 61 (prosecutor noting the witnesses were told not to mention "trial".

Nonetheless, as sometimes happens despite everyone's best efforts, State's witness Rebecca Kisor slipped and used the word "trial" when responding to questions on cross examination. The exchange went, in pertinent part, as follows:

DEFENSE COUNSEL: [W]hen you testified previously you were asked, "Did you have any --After those couple questions did you have any more conversation with Caleb that day about what had happened?" Do you remember that question?

REBECCA KISOR: From the last trial are you talking about?

DEFENSE COUNSEL: No. From one of the hearings.

RP 60. That was the extent of the "irregularity." As this quoted portion shows, Rebecca Kisor's obviously unintentional reference to the prior "trial" was exceedingly brief and fleeting. RP 60.

Furthermore, Ms Kisor mentions the words "last trial" on cross examination, in the form of a brief *question*, to which defense counsel, not missing a beat, immediately responds by *correcting her*--in such a way that did not call undue attention to the error (excellent "save" by defense counsel). Id. And, when the trial court asked if Kisor wanted it to tell the jury to disregard the remark, Kisor rejected the suggestion--noting that it might call undue attention to the remark, stating, "Do I think a limiting instruction is appropriate? Yes. But out of an abundance of caution for my client, I'm not going to request one at this time simply because I do not want to bring more attention to it." RP 63.

Under these circumstances and context, it really strains credulity to claim that this barely-there reference was even heard by the jury, let alone that it was "mistrial-worthy," or that it affected the outcome of this trial. Russell, supra; Greiff, supra. And the trial court seemingly agreed that this was a very minor error, as it denied the motion and explained:

[t]he way that question came up, there have been a number of questions about testifying previously. And I don't believe that what happened here was intentional and it was in passing. . . . And the way it happened it was sort of an aside in the questioning, the focus was about what the question was, not what type of hearing it was.

I don't believe this rises to the level of a mistrial. I don't think there's been undue prejudice here by that statement. . . .

RP 62 (emphasis added). The trial court's reasoning was sound, is supported by the facts, and its ruling on this issue was correct.

In sum, this mere "blip" of a slip could not possibly have had so big an impact on the jury that it would convict Kisor simply because it heard the words "last trial" uttered by the witness under the circumstances presented here. Because Kisor cannot show that this minor error affected the jury's verdict, this Courts should uphold the trial court's ruling and should affirm Kisor's conviction.

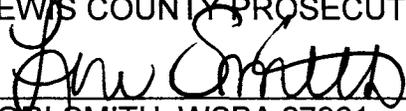
CONCLUSION

For all of the foregoing reasons, this Court should affirm
Kisor's conviction and sentence in all respects.

RESPECTFULLY SUBMITTED this 10th day of August, 2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:

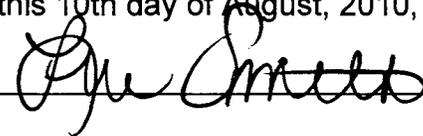

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Declaration of Service

The undersigned certifies that a copy of the document to which this
certificate is attached was served upon the Appellant by U.S. mail,
addressed to Appellant's Attorney as follows:

John Hays
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Dated this 10th day of August, 2010, at Chehalis, Washington.



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