

No. 43456-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KELLY EARNEST MERZ,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-03758-6
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to exclude Kelly Merz's confession to sexually violating human remains.
2. The trial court erred in not dismissing the charge of sexually violating human remains because the State failed to establish the corpus delicti of the crime independent of Kelly Merz's confession.
3. The trial court erred when it refused to instruct the jury in accordance with the defense's proposed instruction defining the element of premeditation.
4. The trial court erred when it used Court's Instruction 9 to define the element of premeditation for the jury.
5. Appellant was denied his right to a fair trial, and the State was relieved of its burden of proving all the elements of the crime, when the trial court did not properly explain the element of premeditation to the jury.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the State failed to establish the corpus delicti of the crime based on evidence independent of Kelly Merz's confession? (Assignments of Error 1 & 2)
2. Whether the trial court erred when it failed to exclude Kelly

Merz's confession to sexually violating human remains, because the State failed to establish the corpus delicti of the crime independent of Merz's confession? (Assignment of Error 1)

3. Is there sufficient independent evidence, aside from Kelly Merz's confession, to support Merz's conviction for sexually violating human remains? (Assignment of Error 2)
4. Where the trial court's jury instruction defining premeditation did not fully convey to the jury the factors that must be proved in order to find premeditated intent, was Kelly Merz denied his right to a fair trial? (Assignments of Error 3, 4, & 5)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Kelly Merz and his tenants, Cori Lewis and Fem Miranda, lived as roommates in a duplex in Puyallup. (RP2 214-15; RP5 612)¹ Lewis and Miranda were not ideal tenants, and Merz took legal steps to have them evicted. (RP5 612, 630) Miranda moved out in late August of 2011, but Lewis remained. (RP5 629) Merz

¹ The transcripts labeled Volumes 1 thru 6, will be referred to as "RP#." Any other transcripts will be referred to by the date of the proceeding contained therein.

subsequently changed his mind and decided to let Lewis stay, but because the legal process was already in motion she still received official eviction papers on September 11, 2011. (RP5 631, 632-33)

This made Lewis angry, and she began calling friends and family to complain about Merz, calling him weird and a pervert. (RP5 633) Lewis and Merz also argued. (RP5 616) Merz testified at trial that he could not remember what happened next. (RP5 614-15) But Merz told investigators that Lewis head-butted him and gave him a split lip. (RP4 555; RP5 635-36) They wrestled, and Merz tried to break Lewis' neck by twisting it from side to side. (RP4 556)

When that did not work, Merz pulled a gun out of his pants pocket and shot Lewis in the head. (RP2 238; RP4 556) Merz then cleaned the apartment, removed Lewis' body, disposed of it by burying it in a shallow grave in the nearby woods, and scattered potentially incriminating evidence at various sites in the area. (RP5 618, 619, 620)

On September 12, 2011, Merz called his ex-wife, Cheryl Merz, and told her that he had "just lost it" and killed his roommate. (RP2 215, 216) Merz was upset and crying. (RP2 215, 216) Cheryl went to the police station and reported what Merz had told

her. (RP2 217-18; RP3 294-95, 296) Pierce County Sheriff's Deputies responded to Merz's apartment to investigate. (RP2 231) When they contacted Merz outside of his apartment, he said "I am the person you need to talk to." (RP2 233, 234)

Merz spoke to the Deputies and was very cooperative, even driving with Deputies so he could show them all of the locations where he had left evidence. (RP2 236-51; RP3 299-304) During the drive, Merz seemed upset about what had happened, and said that he had not planned to kill Lewis. (RP2 270)

Investigators recovered a number of items at the various locations, including bloody clothing, shell casings, bullets, a shovel, and the gun. (RP3 358-59, 366, 368; RP4 476, 485-86, 496-97) Investigators also found Lewis' body in the location where Merz said he had buried it. (RP3 372-73, 381) Lewis was buried naked, and her body had been placed on top of her clothing. (RP3 383-84; RP4 502, 504, 506)

At one point during his recorded statement, Merz told the Detective that he thought Lewis' vagina looked pretty, so he pulled down her panties and kissed it. (RP4 558) Concerned that he may have left DNA evidence, he took dirt and rubbed it in her vaginal area. (RP4 558)

The medical examiner testified that Lewis likely died almost immediately from a gunshot wound to the head. (RP4 591) He also noted that there was dirt in Lewis' vaginal area, but could not say whether it was placed there by hand or whether it was placed there as a result of being buried. (RP4 581, 593-94) The medical examiner also noted that Lewis had postmortem injuries on her body consistent with being dragged naked on the ground. (RP4 583, 593)

B. PROCEDURAL HISTORY

The State charged Merz with one count of first degree premeditated murder (RCW 9A.32.030) and one count of sexually violating human remains (RCW 9A.44.105). (CP 3-4)

Merz moved, citing the corpus delicti rule, to exclude the statements he made to detectives regarding possible sexual contact between Merz and Lewis at the burial site and to dismiss the sexually violating human remains charge. (CP 5-10; RP2 153-59, 162-65) The State argued that Merz's confession was admissible, and that the evidence was sufficient to proceed to trial, because independent evidence corroborated his confession. (CP 35-39; RP2 159-62) The trial court agreed with the State, and denied Merz's motions. (RP2 165-66) The trial court also denied

Merz's motion to dismiss the charge on the same grounds after the State rested its case in chief. (RP5 602-06)

The jury convicted Merz as charged. (RP5 724-26; CP 97-99) The trial court sentenced Merz within his standard range to 393 months of confinement. (RP6 766, 768; CP 110, 113) This appeal timely follows. (CP 133)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI OF THE CRIME OF SEXUALLY VIOLATING HUMAN REMAINS WITH EVIDENCE INDEPENDENT OF MERZ'S CONFESSION.

The corpus delicti rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. City of Bremerton v. Corbett, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). Under the rule, the court may not consider a defendant's confessions or admissions of guilt unless the State has established the corpus delicti through independent evidence. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

However, under RCW 10.58.035, a lawfully obtained and otherwise admissible statement of a defendant may be admitted when: (1) independent proof of the crime is absent; (2) the alleged victim is dead or incompetent to testify; and (3) the defendant's

statement is found trustworthy based on a nonexclusive set of statutory factors that the trial court must consider. The statute also requires that, “[w]here the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.” RCW 10.58.035(3).

In this case, the trial court failed to articulate, either orally or in writing, any consideration of the required factors. Instead, the trial court simply found independent evidence to corroborate Merz’s confession that it felt was sufficient to defeat both his motion to suppress the confession and his motion to dismiss the charge. (RP2 165; RP5 606) The trial court’s failure to properly consider the statutory factors as required by RCW 10.58.035 was an abuse of discretion.

Nevertheless, RCW 10.58.035 only addresses admissibility and not sufficiency. State v. Dow, 168 Wn.2d 243, 253, 227 P.3d 1278, 1282 (2010). Therefore, even if the statements were properly admitted, “the State must still prove every element of the crime charged by evidence independent of the defendant’s statement.” Dow, 168 Wn.2d at 254.

“A defendant’s incriminating statement alone is not sufficient

to establish that a crime took place.” State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). “Where no other evidence exists to support the confession, a conviction cannot be supported solely by a confession.” Dow, 168 Wn.2d at 249. Furthermore, the corpus delicti is not established when the independent evidence could at the same time support a reasonable and logical inference of both a criminal and a noncriminal cause. State v. Aten, 130 Wn.2d 640, 660, 927 P.2d 210 (1996).

Under RCW 9A.44.105(1), “Any person who has sexual intercourse or sexual contact with a dead human body” is guilty of the crime of sexually violating human remains. Sexual contact means “any touching by a person of the sexual or other intimate parts of a dead human body done for the purpose of gratifying the sexual desire of the person.” RCW 9A.44.105(2)(b). Thus, to establish the corpus delicti of the offense as charged in this case, the State had to establish, independent of Merz's confession, that a touching of the sexual parts occurred between Merz and Lewis, and that the touching was for the purpose of gratifying Merz's sexual desire.

Cases addressing the corpus delicti in relation to indecent liberty crimes are instructive here. In those cases, the criminal act

has been established through numerous means. *See, e.g., State v. Clevenger*, 69 Wn.2d 136, 417 P.2d 626 (1966) (physical injuries to three year old established the corpus delicti); *State v. Acheson*, 48 Wn. App. 630, 740 P.2d 346 (1987) (same); *State v. Stuhr*, 1 Wn.2d 521, 96 P.2d 479 (1939) (officer observed suspect in dark corner of garage performing unnatural act with a young girl); *State v. Mathis*, 73 Wn. App. 341, 869 P.2d 106 (1994) (defendant's testimony at trial, along with victim's statement that defendant had kissed her, put his hands down her underpants, and allowed her to sleep overnight at his house established the corpus delicti); *State v. Biles*, 73 Wn. App. 281, 871 P.2d 159 (1994) (child testified that her father performed the alleged acts); *State v. Frey*, 43 Wn. App. 605, 718 P.2d 846 (1986) (child demonstrated explicit sexual acts with unclothed, anatomically correct dolls consistent with her earlier statements attributing such acts to defendant).

The Washington Supreme Court's opinion in *State v. Ray*, 130 Wn.2d 673, 679-81, 926 P.2d 904, 906-07 (1996), is also highly instructive. In that case, Ray told police that he had placed his daughter's hand on his penis. 130 Wn.2d at 676. The State's independent evidence was summarized as follows:

"At approximately one in the morning, three-year-old

L.R. came to her parents' bedroom and asked for a glass of water. Ray, probably nude, accompanied his daughter back to her room. Ray later returned to his room upset and crying. Ray awakened his wife and talked to her. His wife became upset and rushed to check on L.R. After further discussion with his wife, Ray, who was still upset, placed an emergency call to his sexual deviancy counselor.”

Ray, 130 Wn.2d at 689 (quoting State v. Ray, 33582-1-1, slip op. at 4 (1995)). The trial court dismissed the molestation charge against Ray when it found the State did not introduce sufficient evidence to establish the corpus delicti of the crime, independent of the confession. Ray, 130 Wn.2d at 675. The Supreme Court affirmed the trial court, explaining:

These facts suggest that *something* out of the ordinary occurred, but it is a leap in logic to conclude that any kind of criminal conduct occurred, let alone the specific conduct of first degree child molestation. Defendant's emergency call to his sexual deviancy therapist is inconclusive; one's placing an emergency call to a therapist shows that the patient is disturbed by something, but the unrest could be caused by unfulfilled urges, nightmares, or a subjective sense of guilt.

The sparse facts surrounding Ray's getting a glass of water for his daughter fail to rule out Ray's criminality or innocence. Even though Ray speculatively could have molested L.R., and even though he had the opportunity to do so, the mere opportunity to commit a criminal act, standing alone, provides no proof that the defendant committed the criminal act. Without any evidence, direct or circumstantial, that Ray molested L.R., the State has failed to establish the corpus delicti, and Ray's

confession was properly excluded by the trial court.

Ray, 130 Wn.2d at 680-81 (citations omitted) (emphasis in original).

In this case, the State's independent evidence is that Lewis was found naked and her clothes were buried under her body, indicating she arrived at the scene clothed and Merz removed her clothing. (RP3 383, 387; RP4 504) But as in Ray, it requires a "leap of logic" to conclude, based on this evidence, that the charged criminal act took place.

The trial court denied Merz's motions because it found that this independent evidence corroborated Merz's confession. (RP2 165; RP5 604, 606) But mere corroboration is not sufficient under the corpus delicti rule. The independent evidence must indicate that the charged crime occurred, and in this case it simply did not. Without Merz's statements, the remaining evidence does not support a reasonable and logical inference that a criminal act involving sexual contact took place.

The State did not present sufficient corroborating evidence to establish the corpus delicti of the charged crime. The trial court should have dismissed the charge upon the defense's pretrial and half-time motions. And this Court must now reverse and dismiss this conviction with prejudice.

B. THE JURY INSTRUCTION DEFINING PREMEDITATION DID NOT FULLY CONVEY TO THE JURY THE FACTORS THAT MUST BE PROVED IN ORDER TO FIND PREMEDITATED INTENT.

A criminal defendant has a due process right to instructions that clearly and accurately instruct the jury regarding the law to be applied in a given case. U.S. Const. amend. 5, 14; Wash. Const. art. I § 3; Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is higher than for statutes; while a court can resolve an ambiguously-worded statute through statutory construction, “a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). It is improper to instruct the jury in a way that relieves the State of its burden of proof or that fails to correctly inform the jury of an essential ingredient of the crime. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

In this case, the prosecution charged Merz with one count of first degree murder, requiring the State to prove that he acted with premeditation.² (CP 3) Premeditation has long been recognized as

² RCW 9A.32.030(1)(a) states, in relevant part: “A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]”

a difficult concept to define and assess. Judge Benjamin Cardozo described the phrase “deliberate and premeditated” as “so obscure that no jury hearing it . . . can fairly be expected to assimilate and understand it.” Matthew Pauley, 37 AM. CRIM. L. REV. 145, 161 (1999) (quoting Benjamin Cardozo, WHAT MEDICINE CAN DO FOR LAW, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 371, 382-84 (M. Hall ed., 1947)).

Premeditation is not the same as intent to kill. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). While intent means only “acting with the objective or purpose to accomplish a result which constitutes a crime”, premeditation involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876.

Premeditation must involve “more than a moment in point of time,” RCW 9A.32.020(1), but mere opportunity to deliberate is not sufficient to support a finding of premeditation. Pirtle, 127 Wn.2d at 644. It is therefore possible for a person to act with an intent to kill

that is not premeditated. Brooks, 97 Wn.2d at 876. For this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

Over defense objection, the trial court in this case gave the following instruction defining premeditation:

Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

(CP 83 (Court's Instruction 9); RP5 645-49, 665). The given instruction is identical to WPIC 26.01.01. Comparison of WPIC 26.01.01 with existing case law defining premeditation reveals several legal deficiencies.

WPIC 26.01.01 begins with the statement: "Premeditation means thought over beforehand." Though not an incorrect statement, it is woefully incomplete and does not fully advise the jury of the requirements of the law.

The WPIC also uses the phrase "any deliberation" to define premeditation. WPIC 26.01.01. This does not adequately convey

the requirement of reflection, deliberation and reasoning on the intent to take a life. In other words, it does not explain that the deliberative process must be specifically upon the matter of whether to take a human life. Pirtle, 127 Wn.2d 644. “Any deliberation” that “forms an intent to take human life” is not the same as premeditation. To follow the State’s instruction is to miss the manifest meaning of the concept of premeditation.

The instruction also does not explain to the jury that formation of the intent to kill is not sufficient to establish premeditation. Brooks, 97 Wn.2d at 876. This is the critical distinction between first and second degree murder. See RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a).³ A jury instruction that collapses that distinction is improper. See State v. Shirley, 60 Wn.2d 277, 279, 373 P.2d 777 (1962).

Finally, the State may only establish premeditation by circumstantial evidence when “the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” Pirtle, 127 Wn.2d at 643; Gentry, 125 Wn.2d at 597.

³ RCW 9A.32.050(1)(a) states, in relevant part: “A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person[.]”

The WPIC does not express this requirement. This is especially problematic because WPIC 5.01, which was also given in this case, tells the jury that “[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.” CP 119 (Court’s Instruction 4). WPIC 26.01.01 does not explain to the jury that this is not the standard to apply when determining whether the State proved the element of premeditation.

The trial court refused to give the Merz’s proposed instruction defining premeditation, which read:

Premeditation means thought over beforehand. Premeditation is the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short or long, in which a design to kill is deliberately formed. Mere opportunity to deliberate is not sufficient to support a finding of premeditation.

(CP 47, 57-60; RP5 649, 665) The proposed instruction was based on language pulled from Pirtle, State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), and a long line of Washington cases. It was a more accurate and complete definition of premeditation, which would have fully and correctly advised the jury of the definition of premeditation, and of the facts the State must prove in order to

establish premeditation.

The failure to accurately inform the jury of the constitutional requirements of a conviction is presumptively prejudicial unless it is affirmatively proven to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Once an error is presumed to be prejudicial, it is the State's burden to show that it was harmless. State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). Moreover, “[a] legally erroneous instruction cannot be saved by the test for sufficiency.” LeFaber, 128 Wn.2d at 903 (citing Wanrow, 88 Wn.2d at 237). Because the instruction given by the trial court did not accurately state the law regarding premeditation, Merz’s right to a fair trial was prejudiced and his conviction should be reversed.

V. CONCLUSION

The State failed to present sufficient independent evidence showing that Merz committed the crime of sexually violating human remains. That conviction must be reversed and dismissed.

Additionally, Merz offered an instruction defining premeditation that accurately stated the law and would have made the pertinent standard manifestly apparent to the jury. Accordingly, the trial court’s refusal to give Merz’s proposed instruction or otherwise clarify the meaning of premeditation deprived Merz of his

right to a fair trial, and requires that his murder conviction be reversed.

DATED: October 31, 2012



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CERTIFICATE OF MAILING

I certify that on 10/31/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kelly E. Merz, DOC# 357023, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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