

NO. 43456-3

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

STATE OF WASHINGTON, RESPONDENT

v.

KELLY MERZ, APPELLANT

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DIVISION II
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Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-03758-6

BRIEF OF RESPONDENT

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

1. Did the State present sufficient evidence to corroborate defendant's confession to Sexually Violating Human Remains and satisfy the corpus delicti rule?
2. Did the trial court error in giving instruction 9 to the jury when the instruction has been upheld by the appellate courts numerous times and any further challenges to the instruction have been deemed frivolous?

B. STATEMENT OF THE CASE.

1. Procedure

On September 13, 2011, the State charged defendant, Kelly Merz with one count of murder in the first degree. CP 1. The victim was Cori Lewis. CP 1. On March 2, 2012, the State filed an amended information which added a count of sexually violating human remains. CP 3-4, 3/2/12RP 3.

On March 15, 2012, the case proceeded to trial in front of the Honorable Vicki Hogan. RP 5. Defendant requested to go pro se and after a thorough colloquy, the trial court denied that request as it was clear defendant was only making the request to gain a continuance. RP 10-31.

A CrR 3.5 hearing was held and the trial court ruled that defendant's statements were admissible. RP 33-140, CP 127-132.

The trial court next heard defendant's *corpus delicti* motion in regards to count II, sexually violating human remains. RP 153-164. Both sides filed briefs. CP 5-10, 35-39. After hearing arguments from both sides, the trial court ruled that the *corpus delicti* had been met. RP 164. The trial court found that *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278(2010) set a low standard and that there was a modicum of sufficiency such that the State had met its burden. RP 164. The trial court also denied defendant's subsequent motion to sever. RP 197-200. Defendant renewed his *corpus* motion after the State had rested. RP 602. The trial court again found that there was sufficient independent evidence including that the victim was naked, her clothes were buried underneath her including her underwear and there was dirt placed in her vaginal area. RP 606.

The jury found defendant guilty as charged of both counts as well as the firearm enhancement on count I. RP 724-725, CP 97-101.

Sentencing was held on May 18, 2012. The trial court sentenced defendant to the high end on both counts, with the charges to run concurrently and the firearm enhancement to run consecutively for a total of 393 months. RP 739-741, 765-766, CP 107-120.

Defendant filed a timely notice of appeal. RP 775, CP 133.

2. Facts

On September 12, 2011, defendant, Kelly Merz, called his ex-wife Cherylynn Merz. RP 212, 214. Defendant was crying. RP 214.

Defendant said he had killed his roommate. RP 215. Defendant said he lost it, buried her, and that he hadn't had much sleep. RP 215. Ms. Merz went to the police department to report what defendant had told her. RP 216.

Deputy James Oetting was dispatched after Ms. Merz made her report. RP 230. The deputy arrived at the apartment complex in Puyallup where defendant and saw defendant walking from the west side of the complex. RP 230, 232. Defendant's hands were up, his face was scratched, and he appeared nervous. RP 232. Defendant said he was the person they needed to talk to. RP 233. Defendant said he had killed his roommate, Cori Lewis. RP 235. Defendant said he shot her in the top of the head with a .380 semi-automatic pistol. RP 235-236, 257, 299, 550. Defendant said he buried the victim's body off 224th Street near 86th. RP 236.

Defendant told the deputy that the day before, he and the victim got in an argument over bills. RP 236, 237, 299. The argument took place

in the doorway of the victim's room. RP 236. The victim head butted defendant so he tried to break her neck. RP 236. When that didn't work, defendant pulled out a pistol and shot her. RP 236. Defendant then panicked because the victim was bleeding so he got some grocery bags and put them over the victim's head. RP 236. Defendant duct taped the bags to stop the bleeding and then threw the victim's body out the window before dragging the body to his car. RP 237, 260. Defendant drove to an area off of Gem Heights, removed the body from his car and placed it under a cardboard box while he looked for a place to bury the body. RP 237-238. A man approached him and asked him what he was doing. RP 238. Defendant told the man he had pulled over to use the restroom but the man called police. RP 238. Police arrived, contacted defendant and then let him go. RP 238. He told the officer the scratches on his face were from pulling out blackberry bushes at his rental property. RP 238-239. After the officer left, defendant loaded the body back into his car. RP 238. Defendant then went to the rental property to pull out the blackberry bushes to create an alibi. RP 239, 249.

Defendant then drove to a location off 244th to bury the body. RP 239. The body was heavier than defendant expected. RP 248. Defendant didn't think it would look good to have the victim buried with the bag over her head so he took it off. RP 248. The ground was very rocky so he did

not bury the victim very deep. RP 248-249. Defendant planned to go get pepper and dump it on the body so that the animals would stay away. RP 248-249.

David Qunatrell lives at 187th and Meridian. RP 418. On September 11, 2011, he saw a man parked off the road. RP 418. The car was up on the jogging path and one of the passenger doors was open. RP 419. A man, later identified as defendant, came out of the woods with a scratched face and seemed nervous. RP 419, 420. Defendant said he had stopped to "take a piss" but Mr. Quantrell felt that something was not right and called 911. RP 422. Mr. Qunatrell told the deputy that he saw drag marks into the bushes. RP 426-427.

Deputy Inga Carpeneter responded to the 911 call. RP 458. Defendant said he got scratches from a blackberry bush. RP 462. Defendant was clear of warrant and the car belonged to him so she let him go. RP 463, 464. The Deputy said Mr. Quantrell never told her about any drag marks. RP 469.

Lawrence Anderson lives on 86th Avenue. RP 508. On September 11, 2011, in the evening, he saw a blue car backed off the road with its trunk open. RP 508-509. Mr. Anderson walked to the spot where he saw the car and heard metal clanking on rocks and then the trunk lid close and the car pull away. RP 511-512. When he saw the deputies in

the same area the next day, he gave them the license plate of the car he had seen. RP 513.

Defendant was cooperative with police and offered to take them every place he had discarded evidence. RP 241, 299-304. Blue jeans, an empty bag of .380 Winchester ammunition, work boots, and a bag with bloody items were found behind Parker Paints on Meridian. RP 243, 473, 476-477, 482. A retractable razor blade was also in the bag. RP 482. The blood on the jeans was later found to be the victim's. RP 534. Casings were found in the blackberry bushes behind the South Hill Library. RP 244, 305-305, 354, 359. A plastic bag with duct tape and a shirt were found hanging off a tree at 159th and 9th Ave. RP 246, 365-366, 496. The tank top had blood on it and a soiled towel was also found. RP 365-366. A large piece of cardboard was found at the site where defendant first tried to dump the body. RP 247, 390, 392.

At the burial site, officers located blood in the ground and discovered the body. RP 373, 380. The area appeared as if someone had tried to camouflage something. RP 499. Several articles of clothing, the victim's clothes, were underneath the body including a pair of pants, a hoody jacket and a pair of underwear. RP 383-384, 504. The victim was completely naked except for her bra that was still semi attached to her body but was not covering her front. RP 387, 504.

A box on top of the safe in defendant's home contained a handgun. RP 320. There were stains on the floor of the victim's bedroom which were positive for blood. RP 330, 331, 335. A five gallon bucket was found in defendant's room that had Tilex and a red stained cloth. RP 337. A stain was found on the steering wheel of defendant's car. RP 399. Another stain was found in the passenger area of the vehicle. RP 400. The stains were positive for blood. RP 401, 404. The blood in the car was the victim's. RP 532, 533.

Detective Denny Wood interviewed defendant. RP 554, Ex. 225. Defendant was crying and had scratches on his ears, neck, nose, and head as well as a bite mark on his arm. RP 554. Defendant said he got into an altercation with his roommate, that she head butted him and split his lip so he tried to break her neck and she scratched his face. RP 555, Ex. 225. Defendant twisted her neck with both hands, back and forth, trying to break it. RP 556, Ex. 225. He then shot her in the head. RP 556, Ex. 225. After admitting he killed her, defendant then described how he went to various places to hide evidence. RP 557, Ex. 225.

During his interview with Detective Wood, defendant said he pulled the victim's panties off before he buried her. RP 558, Ex. 225. Defendant said he kissed her vagina and he did so because it was pretty. RP 558, Ex. 225. Defendant was concerned that he might have left DNA

so he rubbed dirt on the victim's vagina and pushed it in to try and hide his DNA. RP 558, Ex. 225.

Dr. Thomas Clark conducted the autopsy of the victim. RP 577. The victim's bra was under her neck. RP 580. There was a small amount of dirt at the entrance of the victim's vagina. RP 581, 593. The Dr. was unable to say how the dirt had gotten there. RP 593, 594. A bullet was found above the victim's right eye from a single gunshot wound to the head and there were dragging injuries on her body. RP 582, 583, 584. The victim died from the gunshot wound to the head and her death was classified as a homicide. RP 591, 592.

Defendant testified in his own defense. Defendant did not remember getting head butted or getting scratches in the face. RP 613, 615. He did remember pulling out the pistol, shooting the victim, and pushing the victim out of the window. RP 615, 616. Defendant claimed he blacked out but remembered putting the bags over the victim's head, pushing her out the window and then dragging her to his car. RP 618-691. Defendant also stated that he and the victim talked about sex. RP 626. Defendant again stated that he tried to break the victim's neck and when that didn't work he pulled out his gun and shot her. RP 636, 642. The next morning he got rid of the evidence. RP 636, 639-641.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT INDEPENDENT EVIDENCE TO CORROBORATE DEFENDANT'S CONFESSION AND TO SATISFY THE CORPUS DELICTI RULE AS TO THE COUNT OF SEXUALLY VIOLATING HUMAN REMAINS.

The corpus delicti rule states that a defendant's confessions alone are insufficient to convict him and must be corroborated by independent evidence. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). This rule "arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge." *Aten*, 130 Wn.2d at 656-57. The purpose of the rule is to protect defendants from unjust convictions based solely on confessions which may be of questionable reliability. *Aten*, 130 Wn.2d at 657. The corpus delicti doctrine "tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession." *Dow*, 168 Wn.2d at 249 (citing *State v. Brockob*, 159 Wn.2d 311, 327-328, 150 P.3d 59 (2006)). The rule in Washington has been stated by the Supreme Court:

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.

Aten, 130 Wn. 2d at 656. (Internal citations omitted).

In 2003, the Washington legislature modified the corpus delicti rule when it enacted RCW 10.58.035. The statute provides:

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where 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.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

RCW 10.58.035. RCW 10.58.035 concerns the admissibility of a defendant's statement and not the sufficiency. RCW 10.58.035, *Dow*, 168 Wn.2d 253. The corpus delicti rule is a mixed question of law and fact and so is reviewed de novo. *Dow*, 168 Wn.2d at 248.

The prosecution has the burden of proof to show the corpus delicti. The corroborating evidence need not show the crime beyond a reasonable doubt, or even by a preponderance of the evidence. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). The evidence need only "support a finding that the charged crime was committed by someone." *State v. Bernal*, 109 Wn. App. 150, 152, 33 P.3d 1106 (2001) (emphasis added). Generally, the corpus delicti rule does not require the prosecution to establish who committed the charged crime. *Bernal*, 109 Wn. App. at 152-153; *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994). In assessing whether there is sufficient

evidence of the corpus delicti, independent of a defendant's statements, the Court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *Aten*, 130 Wn. 2d at 658; *City of Bremerton v. Corbett*, 106 Wn. 2d 569, 571, 723 P. 2d 1135 (1986); *see also Brockob*, 159 Wn.2d at 328.

The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. *Brockob*, 159 Wn.2d at 328. Prima facie corroboration exists if the independent evidence supports a “logical and reasonable inference” of the facts the State seeks to prove. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). “Prima facie” in this context means there is “evidence of sufficient circumstances which would support a logical and reasonable inference” of the facts sought to be proved. *Vangerpen*, at 796. The independent evidence must be consistent with guilt and inconsistent with innocence. *Aten*, 130 Wn.2d at 660. The amount of evidence needed is “less than that necessary to take the case to the jury.” *State v. Komoto*, 40 Wn. App. 200, 206, 697 P.2d 1025 (1985) citing *State v. Fagundes*, 26 Wn. App. 477, 484, 614 P.2d 198, 625 P.2d 179, *review denied*, 94 Wn.2d 1014 (1980). The evidence required is “slight evidence” or a “relatively modest

amount.” *State v. Hamrick*, 19 Wn. App. 417, 576 P.2d 912 (1978); *State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995).

The corpus delicti rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement. *State v. Dodgen*, 81 Wn. App. 487, 492, 915 P.2d 531 (1996). A defendant must make proper objection to the trial court to preserve the issue. *Dodgen*, 81 Wn. App. at 492; *State v. C.D.W.*, 16 Wn. App. 761, 763-64, 887 P.2d 911 (1995).

In that instant case, defendant challenged the corpus delicti of count II, sexually violating human remains. Defendant challenged this at the trial level and as such, preserved the issue for appeal. RP 153-164, 602-606, CP 5-10. To convict a defendant of sexually violating human remains, the State must prove the defendant had sexual contact with a dead human body. RCW 9A.44.105. Sexual contact means any touching 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).

Defendant told Sgt. Wood that he kissed the victim's vagina prior to burying her. RP 558, Ex. 225, page 69. Defendant said he did this because her vagina looked pretty. Ex. 225, page 72. Defendant described the victim's vagina as clean shaven. Ex. 225, page 70. Defendant stated

he pulled off the victim's panties and then kissed her. RP 558, Ex. 225, page 68. Concerned that he might have left DNA, defendant took some soil and rubbed it into the "lips" of the victim's vagina. RP 558, Ex. 225, page 83.

There was independent evidence to corroborate defendant's statement that he had sexual contact with a dead human body. The victim was found naked with only her bra which was over her shoulder and backwards, not covering her front. RP 387, 504, 580. The victim's underwear had been removed and was found underneath her body as were her pants and hooded sweatshirt. RP 383-384, 504. There was dirt at the entrance of the victim's vagina. RP 581, 593. Looking at the evidence in totality and in the light most favorable to the State, as required by case law, there is sufficient evidence to corroborate defendant's statements and to show the prima facie corroboration of the crime. The fact that defendant's clothes were buried with her shows that defendant was not worried about hiding the clothes. He did not discard them someplace else. They were with the body. This also supports the notion that the victim's body arrived at the gravesite clothed but that the clothes were removed by defendant. While the medical examiner could not say how the dirt got onto the victim's vagina, there dirt was present and is further physical

evidence that the crime offered. The State had sufficient evidence to corroborate defendant's statement that a crime had occurred.

Defendant cites *State v. Ray*, 130 Wn.2d 673, 926 P.2d 904 (1996), and claims the instant case is similar in terms of lack of corpus delicti. In *Ray*, the defendant's three year old daughter came to his room in the middle of the night asking for a glass of water. *Ray*, 130 Wn.2d at 680. The defendant, who sleeps nude, took his daughter back to her room and when he came back to his room he was upset and crying. *Id.* He woke up his wife and talked to her. *Id.* His wife was upset, went and checked on their daughter and then had a conversation with defendant where they decided he should call his sexual deviancy counselor. *Id.* In contrast to the facts of *Dow*, 168 Wn.2d 243 and *Ray*, 130 Wn.2d 673, where the State had no corroborating evidence and no physical evidence respectively, the State here had sufficient corroborating evidence to meet the corpus delicti. The State had physical corroboration of defendant's actions in that the clothes were with the victim, buried underneath her. The logical inference is that defendant was not trying to hide the clothes or obscure them. The logical inference is that defendant stripped the victim naked before burying her. This is more indicative of criminal behavior than innocent behavior. There was also dirt at the entrance to the victim's vagina which is consistent with defendant trying to obscure his DNA.

This was sufficient to go to the jury as only a slight amount of evidence is required. The trial court properly reviewed the case law and determined that the standard had been met. The State presented sufficient corroborating evidence and the trial court found accordingly. The corpus delicti of the crime was sufficiently corroborated.

2. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 9 AS THE INSTRUCTION HAD BEEN UPHELD BY THE SUPREME COURT AND ANY FURTHER CHALLENGE TO THE INSTRUCTION HAS BEEN NOTED AS FRIVOLOUS.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).

Defendant argues that instruction number 9, WPIC 26.01.01, the definition of premeditation, does not sufficiently define the term. See WPIC 26.01.01. Defendant made the same argument in the trial court and so has preserved the issue for appeal. However, defendant's argument has been repeatedly rejected by the Washington Supreme Court. The court has held that the language in WPIC 26.01.01 "adequately stated the rule regarding premeditation." *State v. Benn*, 120 Wn.2d 631, 658, 845 P.2d 289 (1993). Further, as noted in *State v. Clark*, 143 Wn.2d 731, 770, 24 P.3d 1006 (2001), the Supreme Court has upheld this instruction on so many occasions that "further challenge to the instruction is frivolous."

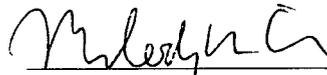
(See also *In re Personal Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994); and *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988)). In fact, the case law cited by trial counsel as well as appellate counsel all predates *Clark*. Defendant presents no new case law or new argument to show why well settled case law should be overturned. The trial court even noted that all of defendant's cases were considered by the court in *Clark* and rejected. RP 649. The trial court used the proper WPIC instruction that has repeatedly been upheld and embodies the statutory definition of premeditation. There is nothing to suggest that the instruction the court gave was improper. The trial court did not abuse its discretion in giving the jurors instruction 9. Defendant's challenge is frivolous.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm defendant's conviction and sentence.

DATED: March 15, 2013

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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.

3-18-13 *Cherese Kal*
Date Signature

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