

NO. 45207-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

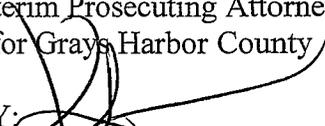
GERALD W. MILLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

At the time of trial, Regina Miller and the appellant had been married approximately two and a half years. 6/4/13 RP 19. The Millers have two daughters in common, G.M. and L.M. 6/4/13 RP 20. G.M. was born on May 20, 2008. 6/4/13 RP 20.

On February 19, 2013, the appellant and G.M. were in the living room sitting in the recliner and Regina was on the adjacent couch. 6/4/13 RP 22. The appellant was tickling G.M. and Regina heard laughing. 6/4/13 RP 22. When Regina turned and looked, she saw the appellant “had a hold of her leg and his fingertips were up in her vagina area.” 6/4/13 RP 23. The appellant’s fingers were moving on G.M.’s vaginal area. 6/4/13 RP 23. G.M. was wearing clothing at the time, but the appellant touched G.M.’s vaginal area from the outside of her pants. 6/4/13 RP 23. Regina did not confront the appellant as she was afraid of what he would do. 6/4/13 RP 24. Instead, she just told G.M. to go to bed. 6/4/13 RP 24.

After witnessing this, Regina left the area with her children. 6/4/13 RP 24. Regina delayed leaving by two days in order to get money to leave with. 6/4/13 RP 24. On February 21, 2013, Regina Miller made a report to the Grays Harbor County Sheriff’s Office that she had witnessed the appellant molesting their four year old daughter, G.M. 6/4/13 RP 16.

Regina also observed some concerning behavior with her six year old daughter, L.M. 6/4/13 RP 25. However, Regina had not seen any actual inappropriate contact between the two.

A Grays Harbor County Sheriff's Deputy contacted Regina by phone and asked her to explain what had happened. 6/4/13 RP 16-17. Regina was crying and scared, but did not express anger towards the appellant. 6/4/13 RP 17.

G.M. was interviewed at the Children's Advocacy Center. However, due to her age it was difficult to interview her and she did not disclose any inappropriate touching. The six year old was not interviewed due to developmental delays that precluded an interview. 6/4/13 RP 35-36.

On March 6, 2013, Detective Wallace made contact with the appellant to take a statement. 6/4/13 RP 34.¹ Wallace told the appellant that his family was fine, and the appellant acknowledged that Regina had left. The appellant stated that he thought she was just kind of upset at something, and that she would go cool off and come back. 6/4/13 RP 36.

Between February 21 and March 6, 2013, the appellant had not heard from Regina or his children. 6/4/13 RP 70-71. The appellant did not notify any authorities about this disappearance. 6/4/13 RP 71.

¹ The Appellant's Brief relies on the facts as recited by the defendant at trial; however, the Court specifically discounted this version of events in the 3.5 Findings and Conclusions. CP 65-69.

Detective Wallace confronted the appellant with the fact that Regina went to the police and reported that she saw the appellant touching G.M. inappropriately on her vagina. 6/4/13 RP 36. The detective also told the appellant that he had conducted an interview on both children and that both children had disclosed that he had touched them on the vagina. 6/4/13 RP 36.

The appellant eventually admitted that he had touched both girls on the vagina. 6/4/13 RP 37. The appellant was nervous and he started crying. 6/4/13 RP 43. The appellant stated that during the past six months, he has been playing with the kids by tickling them. 6/4/13 RP 38. He stated that when he was tickling them he would then get a “momentary lapse of judgment” and touch both G.M. and her sister on their vaginas through their clothes. 6/4/13 RP 38. The appellant stated he would realize what he was doing was wrong and stop.

The appellant stated that he had touched each girl approximately three times each in an inappropriate manner and that the touching was only through their clothes and never skin to skin. 6/4/13 RP 38. A written statement was prepared and signed by the appellant. 6/4/13 RP 39. This statement was read to the jury and mirrored the statements testified to by the detective. 6/4/13 RP 40-41. Additionally, the appellant stated that he

knew what he was doing was wrong and he believed “treatment would reinforce the tools not to reoffend or inappropriately touch [his] children.” 6/4/13 RP 40-41.

Kevin Voss testified that he shared a cell with the appellant at the Grays Harbor County Jail. 6/4/13 RP 79-80. The appellant told Voss that “his youngest daughter would sit on his lap and move back and forth to where he would have an erection.” 6/4/13 RP 80. He also told Voss that he would tickle his daughter in between her legs and get “closer and closer to the private area.” 6/4/13 RP 80. The appellant told Voss not to repeat this. 6/4/13 RP 80.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. Can the appellant raise a corpus delicti challenge for the first time on appeal?

No. The appellant did not preserve this issue properly in the trial court.

On appeal, the appellant contends for the first time that his confession should not have been admitted because it violated the corpus delicti rule. “In Washington, a confession, standing alone, is insufficient to establish the corpus delicti of a crime.” *State v. Smith*, 115 Wash.2d 775, 780, 801 P.2d 975 (1990). There must be some independent proof that

establishes that the crime occurred before the confession can be considered. *Smith*, at 781, 801 P.2d 975. The corpus delicti is usually proven by establishing “(1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof.” *Bremerton v. Corbett*, 106 Wash.2d 569, 573–74, 723 P.2d 1135 (1986).

However, by failing to object in the trial court, the appellant waived his right to challenge the State's compliance with the corpus delicti rule. The State contends that corpus delicti should be characterized as a rule of evidence which is not constitutionally grounded. The appellant, on the other hand, contends that the corpus delicti rule is best characterized as a sufficiency of the evidence argument. Brief of Appellant 10. The significance of the characterization is that whether sufficient evidence exists to support a conviction constitutes an issue of constitutional magnitude which can be raised for the first time on appeal. *State v. Alvarez*, 74 Wash.App. 250, 255, 872 P.2d 1123 (1994).

Division Three has held that the corpus delicti rule is a rule of evidence not a sufficiency of the evidence requirement. *State v. C.D.W.*, 76 Wash. App. 761, 762-65, 887 P.2d 911, 912-14 (1995).

Further, our Supreme Court has held that the corpus delicti rule is judicially created, not constitutionally mandated. *Corbett*, 106 Wash.2d at

576, 723 P.2d 1135. Thus, the Supreme Court has impliedly recognized that 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.

This interpretation finds support in the fact that the federal courts themselves have replaced the requirement that the elements of the corpus delicti be independently corroborated with a less stringent corroboration rule. *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); *Landsdown v. United States*, 348 F.2d 405, 409 (5th Cir.1965). If independent corroboration of the corpus delicti were constitutionally required in order to satisfy sufficiency of the evidence considerations, that requirement could not have been so easily abandoned.

Moreover, other state courts have concluded that the corpus delicti rule is a rule of evidence. *See, e.g., People v. Sally*, 12 Cal.App.4th 1621, 16 Cal.Rptr.2d 161, 164–165, *review denied* (1993); *State v. Beverly*, 224 Conn. 372, 618 A.2d 1335, 1336 (1993); *State v. Grant*, 284 A.2d 674, 675 (Me.1971). The California Supreme Court has, therefore, concluded that the failure to object precludes appellate review because “[i]t may well be that ‘proof of the corpus delicti was available and at hand during the

trial, but that in the absence of [a] specific objection calling for such proof it was omitted.’ ” *People v. Wright*, 52 Cal.3d 367, 276 Cal.Rptr. 731, 755, 802 P.2d 221, 245 (1990) (quoting *People v. Mitchell*, 239 Cal.App.2d 318, 48 Cal.Rptr. 533, 536 (1966)), *cert. denied, sub nom. Wright v. California*, 502 U.S. 834, 112 S.Ct. 113, 116 L.Ed.2d 82 (1991).

The State asks the Court to adopt this analysis. The failure to comply with the corpus delicti rule is a non-constitutional error requiring a proper objection below. Having failed to object, the appellant has waived his right to raise the issue on appeal.

B. Was defense counsel ineffective for failing to challenge the *corpus delicti* at the trial level?

No. This was a legitimate trial strategy and there was sufficient evidence to get past such a challenge.

Appellant’s Prior Sex Offense Conviction

The appellant was convicted of Child Molestation in Bibb County Georgia in 2000. The documents from Georgia indicate that the appellant molested an older daughter in 1999 and also a step-daughter in 1997, these victims are not involved in the instant case. CP 46-64.

The State did not introduce this at trial. However, after the appellant testified that “I would never want that to happen to my children, nor would I ever do that to my children” and that “I don’t know about the

system,” the State asserted that the appellant had opened the door to this information being introduced. 6/4/13 RP 60, 64, 65-66. The appellant’s trial counsel vehemently argued against admitting this evidence. 6/4/13 RP 66-67. The trial court found a “small opening maybe of the door” but ruled not to admit the prior conviction. 6/4/13 RP 67-68.

Ineffective Assistance of Counsel Standard

As noted in *C.D.W.*, such waiver of a corpus delicti challenge at the trial court does not necessarily mean that the State ultimately prevails. The Court must address the appellant’s contention that if his attorney waived his right to challenge the State’s compliance with the rule, such conduct constituted ineffective assistance of counsel.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable

standard, but also that his attorney's failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. In analyzing the first prong, the court must decide whether defense counsel's actions constituted a tactical decision which was part of the normal process of formulating a trial strategy. *See, e.g., Tarica*, at 373, 798 P.2d 296.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

In this case, trial counsel made a valid trial decision to not challenge corpus delicti. If such a challenge had been made, it is highly likely that the trial court would have allowed the State to introduce this evidence. Although a limiting instruction would have been given that this should not be used for propensity, only to prove the appellant's sexual gratification, it would have been extremely prejudicial to the defense that the appellant did not (and would not) commit such a crime. Therefore, the appellant cannot show that under the first prong that counsel's performance was deficient.

Corpus Delicti Rule

Corpus delicti must be proved by evidence sufficient to support the inference that there has been a criminal act. *State v. Brockob*, 159 Wash. 2d 311, 327-29, 150 P.3d 59, 68 (2006); see *State v. Aten*, 130 Wash.2d 640, 655, 927 P.2d 210 (1996) (quoting 1 McCormick on Evidence § 145, at 227 (John W. Strong ed., 4th ed.1992)). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. *Aten*, 130 Wash.2d at 655-56, 927 P.2d 210; *State v. Vangerpen*, 125 Wash.2d

782, 796, 888 P.2d 1177 (1995). The State must present other independent evidence to corroborate a defendant's incriminating statement. *Aten*, 130 Wash.2d at 656, 927 P.2d 210. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred. *Brockob*, 159 Wash. 2d 328.

In determining whether there is sufficient independent evidence under the corpus delicti rule, we review the evidence in the light most favorable to the State. *Brockob* 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*. *Id.* Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a “ ‘logical and reasonable inference’ of the facts sought to be proved.” *Aten* at 656, 927 P.2d 210 (quoting *Vangerpen*, 125 Wash.2d at 796, 888 P.2d 1177).

In addition to corroborating a defendant's incriminating statement, the independent evidence “ ‘must be consistent with guilt and inconsistent with a[] hypothesis of innocence.’ ” *Aten* at 660, 927 P.2d 210 (quoting *State v. Lung*, 70 Wash.2d 365, 372, 423 P.2d 72 (1967)). If the independent evidence supports “reasonable and logical inferences of both

criminal agency and noncriminal cause,” it is insufficient to corroborate a defendant's admission of guilt. *Id.*

Sufficient Facts to Prove Corpus Delicti

RCW 9A.44.083(1) provides:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

Sexual contact is defined by RCW 9A.44.010(2) as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”

“Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.” *State v. Powell*, 62 Wash.App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wash.2d 1013, 824 P.2d 491 (1992) (citations omitted).

In this case, the appellant was seen by his wife rubbing their four year old daughter's vaginal area under the guise of tickling her. It is

difficult for a paper record to relay the observations that she made. However, this touching was repellant enough that she packed her two young daughters up and fled the family home. Regina Miller specifically testified that this was not a touching that related to any caregiving function. 6/4/13 RP 31-32.

It is also probative as to consciousness of guilt that the appellant did not report his wife and daughters' absence to anyone. He did not seek any assistance in finding them or determining whether or not they were safe. This indicates that he knew why his wife left, and that he was hoping she would return without notifying law enforcement.

The facts of this case are sufficient to make a prima facie showing of the corpus delicti; therefore, the appellant cannot prevail on the second prong of *Strickland* either. Under *Powell* sexual gratification is a valid inference of these facts. The State must, and did, show more to prove the case beyond a reasonable doubt; however, for corpus delicti the presented facts are sufficient.

C. Are there sufficient facts to support the jury's finding that the appellant's crime was aggravated?

Yes. The appellant used his position of trust and the victim was particularly vulnerable.

Abuse of Position of Trust

When analyzing whether or not the appellant abused a position of trust, it is helpful to look at the pattern jury instruction.

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the [victim of the offense] [location of the offense] because of the trust relationship. [A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.]

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

[There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between [the defendant] [or] [an organization to which the defendant belonged] and [the victim] [or] [someone who entrusted the victim to the [defendant's] [or] [organization's] care.]

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.23 (3d Ed).

The courts have held that, as long as it is not included as an element in the to-convict instruction, the parent-child relationship can be the basis for this aggravating factor. In *State v. Hyder*, the defendant was

convicted of Incest in the Second Degree and the jury found he abused a position of trust. The court held that “the relevant inquiry [of Incest 2nd] is whether the defendant is related to the person with whom he has sexual contact and that he knows of that relationship. The position of trust aggravating factor requires that the defendant used his position of trust to facilitate the crime.” *State v. Hyder*, 159 Wash. App. 234, 262, 244 P.3d 454, 468 (2011).

In this case, it is highly unlikely that the appellant would have had access to the victim if he hadn't been her father. Further, he used G.M.'s trust to allow him to “tickle” her, thus facilitating his molestation. The jury properly considered this question, and their verdict should be affirmed.

Particularly Vulnerable

Again, looking to the pattern instruction is helpful.

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of (name of crime). The victim's vulnerability must also be a substantial factor in the commission of the crime.

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.11 (3d Ed).

The victim in this case was only four years old. The testimony was that she was unable to provide a statement regarding the molestation. In fact, the inference is that, due to her young age, it is highly unlikely that the appellant's guise of playing and tickling prevented her from fully

understanding that the touching was inappropriate. Child Molestation in the First Degree encompasses victims from birth to the age of 12. This is a wide range of development and communication. Even by the appellant's analysis, this particular case is a "twilight area." Brief of Appellant 22.

Therefore, the jury's decision on this issue should control and not be disturbed on review.

III. CONCLUSION

For all the reasons above, the State respectfully asks that the appeal be denied on all grounds, and that the Court affirm the verdict of the jury and the sentence imposed by the trial court.

DATED this 10th day of August, 2014.

Respectfully Submitted,

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GRAYS HARBOR COUNTY PROSECUTOR

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