

NO. 48154-5-II

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

STATE OF WASHINGTON,

Respondent,

vs.

RUBEN EDWARD CORTEZ,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it failed to enter findings of fact and conclusions of law after the CrR 3.5 hearing in this case.
2. Substantial evidence does not support the defendant's conviction for failure to register because no evidence identified the defendant as the person whose convictions for sex offenses were admitted into evidence.

Issues Pertaining to Assignments of Error

1. Does a trial court err if fails to enter findings of fact and conclusions of law after the CrR 3.5 hearing?
2. Does substantial evidence support a defendant's conviction for failure to register as a sex offender when no evidence identifies the defendant as the person whose convictions for sex offenses were admitted into evidence?

STATEMENT OF THE CASE

On February 9, 2015, Vancouver Police Officer Jason Mills arrested the defendant Ruben Cortez on a charge of failure to register as a sex offender. RP 15-20. Once at the jail Officer Mills went through the booking process with the defendant and then took him into an interview room to interrogate him about the failure to register allegation. *Id.*

At the beginning of the interview in the jail Officer Mills “informed” the defendant of his rights under *Miranda v. Arizona*. He was not sure if he read the defendant those rights from a card or simply recited them from memory. RP 18-20. Officer Mills later testified that he told the defendant the following about his rights under *Miranda*:

Q. Okay. Can you now testify or put on the record what rights you advised Mr. Cortez on that date?

A. Yes. I stated to Mr. Cortez that: “You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present while you’re being questioned. If you cannot afford to hire a lawyer, one will appointed to represent you at no expense.”

I then asked him if he understood his rights, and having those rights in mind, did he wish to continue speaking with me about the investigation.

RP 20.

By contrast, the defendant testified at the CrR 3.5 hearing that he did not remember the officer reading him his *Miranda* rights, and that even if the

Officer took this step, he (the defendant) was far too emotionally distraught to understand or knowingly waive those rights. RP 26-31.

Following the defendant's arrest the Clark County Prosecutor charged the defendant Ruben Edward Cortez with one count of failure to register as a sex offender. CP 1-2. At a subsequent CrR 3.5 hearing the court found Officer Mills' advice of rights to the defendant sufficient under *Miranda* and CrR 3.5 and then ruled that the defendant's subsequent statements to the officer were admissible in the state's case-in-chief. RP 34-35. To date, counsel has been unable to find any written findings of fact or conclusions of law in the trial record to support the court's decision in the CrR 3.5 hearing. CP 1-121.

This case later came to trial, during which Officer Mills informed the jury that after giving the defendant *Miranda* warnings the defendant told him that he had a prior juvenile conviction for a sex offense, that he did not believe he had to register, that he had moved back to Vancouver from Tukwila, and that he did not register with the Clark County Sheriff's Office because he believed he had an outstanding warrant for his arrest. RP 132-136.

In addition, during trial the state called a Clark County Sheriff's Office Identification Specialist by the name of Nancy Druckenmiller to identify State's Exhibit No. 1 as a 2/9/15 booking sheet for a "Ruben Edward

Cortez.” RP 50. She further identified State’s Exhibit No. 2 as a Clark County Juvenile Court Order of Commitment showing that on 9/8/94 a “Ruben Edward Cortez, Jr.” had been convicted of the sex offense of first degree rape of a child. RP 149-151; Trial Exhibit No. 2. Mr. Druckenmiller also identified State’s Exhibit No. 4 as a King County Superior Court judgment and sentence showing that on 3/4/05 a “Ruben Edward Cortez” had been convicted of failure to register as a sex offender.” RP 151-152; Trial Exhibit No. 4. According to Ms Druckenmiller, her analysis of the fingerprints found on the booking sheet (Trial Exhibit No. 1), the Clark County juvenile commitment for first degree rape of a child (Trial Exhibit No. 2), and the King County judgment and sentence for failure to register (Trial Exhibit No. 4) were all made by the same person. RP 149-152.

On cross-examination Ms Druckenmiller admitted that she did not know whether or not the fingerprints on the 2/19/15 booking sheet (Trial Exhibit No. 1) belonged to Ruben Edward Cortez Jr. or Ruben Edward Cortez Sr. RP 69. Neither did she identify the defendant in the courtroom as the person whose fingerprints were on State’s Exhibit No. 1. RP 45-76, 149-155. In fact, during his testimony Officer Mills was never shown the 2/19/15 booking sheet (Trial Exhibit No. 1) and he did not identify the defendant in the courtroom as the person identified in that document. RP 125-150. Neither did any other witness review the 2/19/15 booking sheet

(Trial Exhibit No. 1) and identify the defendant in the courtroom as the person whose fingerprints appeared on that document. *See* RP 45-76 (Nancy Druckenmiller); 85-100 (Katherine Driggers); 101-113 (Vincente Condez); 115-121 (Tyson Taylor); 125-140 (Jason Mills); 149-155 (Nancy Druckenmiller recalled); 157-182 (Sola Wingenbach); and 183-191 (Reid Lancaster).

Following the close of the state's case the defense rested without calling any witnesses, after which the court instructed the jury without objection from either party and both parties presented closing arguments. RP 191-194, 198-209, 209-238; CP 46-66. The jury thereafter retired for deliberation and later returned a verdict of guilty. RP 241-244; CP 67.

At the subsequent sentencing hearing in this case the state argued that the defendant's offender score was 10½ points based upon the following criminal history:

Crime	County or Court	Date of Crime	Sentence Date	Pts.
Trespass 1	Clark	1/11/92	2/10/92	
Trespass 2	Clark	8/20/93	7/28/94	
Theft 3	Clark	8/20/93	7/28/94	
Child Molest 1	Clark	12/6/93	9/8/94	
Child Rape 1	Clark	12/6/93	9/8/94	3
TMVWOP	Clark	11/8/95	3/6/96	½

TMVWOP	Clark	8/2/96	9/4/96	1
PV	Clark		1/31/97	
DWLS 2	Clark	10/15/96	1/31/97	
PV	Clark		10/24/97	
PV	Clark		10/28/99	
Failure to Register	Clark	10/15/97	10/28/99	1
DUI	Lewis	3/22/98	11/17/99	
DWLS 3	Lewis	3/22/98	11/17/99	
Refusal to Cooperate	Lewis	3/22/98	11/17/99	
Forgery	Lewis	3/22/98	11/30/99	1
TMVWOP	Lewis	3/22/98	11/30/99	1
Bail Jumping	Lewis	4/2/98	11/30/99	1
PV	Clark		5/8/01	
PV	Clark		5/8/01	
PV	Clark		9/18/01	
PV	Clark		9/18/01	
Theft 2	King	8/11/01	7/26/02	1
DWLS 3	Snohomish	2/9/02	8/8/03	
DUI	Aukeen	6/21/03	1/12/05	
Failure to Register	King	7/1/04	3/4/05	1
PV	Clark		3/8/05	
PV	Clark		3/8/05	
DWLS 3	Des Moines	7/29/09	1/6/10	
Att. Failure to Reg.	King	9/1/11	7/23/13	

CP 115-118.

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The defense disputed the state's proof on the 1/6/10 DWLS 3 conviction out of Des Moines Municipal Court, thus arguing that all of the defendant's prior Class C convictions had washed, yielding an offender score of 4 points. RP 245-248; CP 90-95. In resolving this issue the court reviewed Sentencing Exhibit No. 5, which was a certified copy of Des Moines Municipal Court Docket showing that on 1/10/10 the court found a "Cortez, Ruben Edward Jr AKA Contez, Ruben R Jr AKA Wilcox, Jacob Adam" guilty on a charge of DWLS 3. In presenting this document the state admitted that no other documents in the Des Moines Municipal Court file for this case. *Id.* The trial court found this Docket sheet sufficient to prove the existence of the conviction. RP 248-263. Thus, the court held that this conviction prevented the defendant's prior non-sex Class C felonies from washing out of his offender score. *Id.* Consequently, the trial court found that the defendant's offender score was 9+ points, that his range was 43 to 57, and that he should receive a sentence of 43 months. CP 101-117; RP 248-263. They did not impose any discretionary legal-financial obligations. *Id.* The defendant thereafter filed timely notice of appeal. CP 118.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE CrR 3.5 HEARING IN THIS CASE.

The United States Constitution, Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” Similarly, Washington Constitution, Article 1, § 9 states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In addition, under United States Constitution, Sixth Amendment, a defendant has the right to consult an attorney prior to answering any questions during custodial interrogation. This protection is also guaranteed under Washington Constitution, Article 1, § 22.

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v.*

Brown, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogations." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68

L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5. Part (c) of this rule states:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5(c).

As part (c) of this rule states, the trial court has the duty to enter written findings of fact and conclusions of law following a CrR 3.5 hearing. These written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). As a result, the court’s failure to enter such findings and conclusions as required under CrR 3.5(c) is error and is not harmless unless the court’s oral findings are sufficient for appellate review of the issue. *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998).

In the case at bar the trial court has not entered written findings of fact and conclusions of law on the CrR 3.5 hearing. This failure prevents adequate appellate review. As a result, this court should reverse the defendant's conviction and remand for entry of findings and for a new trial.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR FAILURE TO REGISTER BECAUSE NO EVIDENCE IDENTIFIED THE DEFENDANT AS THE PERSON WHOSE CONVICTIONS FOR SEX OFFENSES WERE ADMITTED INTO EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence

may be attacked for the first time on appeal as a due process violation. *Id.*

“Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant with failure to register as a sex offender under RCW 9A.44.132(1)(b). Subsection (1) of this statute states:

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person’s first conviction for a felony failure to

register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law.

(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions, the failure to register under this subsection is a class B felony.

RCW 9A.44.132(1).

Under this statute the state has the burden of proving beyond a reasonable doubt that the defendant “has a duty to register under RCW 9A.44.130 for a felony sex offense.” As the following argues, in this case the state failed to present substantial evidence on this essential element of the crime. Specifically, the state’s evidence failed to prove that the defendant was the person whose fingerprints appeared on Trial Exhibit No. 1. Absent this evidence there was no proof that the defendant was the “Ruben Cortez” whose name appears on the judgments for sex offenses admitted into evidence.

Identification of a defendant as the perpetrator of an offense, as with almost any other fact at issue in a criminal or civil trial, may be proven by either direct or circumstantial evidence. *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Neither type of evidence is necessarily better than the other, and in many instances circumstantial

evidence such as a fingerprint for example, can be much more reliable than direct evidence such as the eyewitness identification, depending on the many factors that can affect the reliability of eyewitness identification. *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

The presentation of in-court identification of the defendant as the perpetrator of the crime would be, by itself, substantial evidence on the identification issue regardless of the success the defense has in questioning the accuracy of that identification. *See State v. Edwards*, 23 Wn.App. 893, 600 P.2d 566 (1979) (eyewitness identification of the defendant as the perpetrator of the offense constitutes substantial evidence in spite of the credibility of the alibi witnesses); *see also State v. Lane*, 4 Wn.App. 745, 484 P.2d 432 (1971) (eyewitness identification of a defendant although “not as strong as that of his co-defendant” still “constitutes substantial evidence”). By contrast, the absence of an in-court identification leaves the question open whether or not the state has presented substantial evidence on identification. As the cases of *State v. Giles*, 53 Wn.2d 386, 333 P.2d 923 (1959), *State v. Smith*, 12 Wn.App. 720, 531 P.2d 843 (1975), and *State v. Nicholas*, 34 Wn.App. 775, 663 P.2d 1356 (1983) explain, substantial evidence of identification must come from another source.

In *State v. Giles*, *supra*, the defendant, his wife, their twenty-one-month-old baby, and one other person attended a drive-in movie

marathon from 6:00 pm to 4:30 am the next morning. At 4:24 am that morning, the child was found dead of multiple acute blunt force injuries to the left scalp that had been inflicted some time while the child was in the presence of the three adults. The state later charged the defendant with the homicide, and eventually obtained a conviction for manslaughter. Following entry of the verdict in the case, the defendant moved for arrest of judgment on the basis that the state had failed to prove that he was the criminal agent, or in the alternative, for a new trial. The trial court denied the motion for arrest of judgment but did grant a new trial. The state then appealed the order granting a new trial, and the defendant cross-appealed the denial of the motion for arrest of judgment.

On appeal, the Washington Supreme Court vacated the conviction and ordered the Information dismissed on the basis that the state had failed to present substantial evidence that the defendant had committed the offense charged. The court stated:

Two other persons besides the defendant and his infant daughter were in the car during the performance. Throughout the night the adults drank bottled beer provided by defendant. There is, however, no proof as to who inflicted the injuries from which the child died. Reprehensible and repulsive as the conduct of the defendant is, nevertheless, it is not proof of manslaughter.

State v. Giles, 53 Wn.2d at 386-387.

In *State v. Smith*, *supra*, the defendant also appealed his conviction for

killing his own child. In this case, the defendant had left at midnight for a walk with his 2½-year-old son. When he returned alone the next morning, he gave inconsistent answers to his wife's questions about where their son was. A short time later, the police found the child drowned in a creek behind the defendant's house. The state later charged the defendant of First Degree Murder. Following conviction, the defendant appealed, arguing in reliance upon *Giles* that the state had failed to prove that he was the perpetrator of the criminal act. However, the Court of Appeals disagreed, finding sufficient corroborating evidence that the defendant committed the offense. The court held:

There was also substantial evidence of the identity of Smith as the criminal agent. In addition to the inculpatory statements listed above was evidence placing him in the creek. Officer Stanley, who received the pants Smith had been wearing on the evening and morning in question from Officer Lentz, testified that upon examination he found sand throughout them. Moreover, they were wet, with the area 2 inches above the knee and down wetter than the rest, indicating that Smith had stooped down in the stream. His jacket and socks were wet and had sand in them. There were dark spots on the back of the pants.

State v. Smith, 12 Wn.App. at 731.

Finally, in *State v. Nicholas, supra*, the defendant was charged with First Degree Rape and First Degree Burglary after a police dog tracked him from the victim's house just after the attack to a location a few blocks away. Following his conviction, the defendant argued that his conviction should be

vacated because under the decision in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), dog tracking evidence does not constitute substantial evidence sufficient to sustain a conviction absent corroborating evidence proving that the defendant was the perpetrator of the crime. Although the Court of Appeals agreed with his legal argument, it affirmed, finding sufficient corroboration. The court stated:

Nicholas fit the victim's description of the rapist. He was extremely sweaty. He was reasonably close to the victim's residence and he was not excluded from consideration by the medical tests. He had fresh bleeding cuts on his cheek and nose and a scratch on the other side of his nose. Fingernail scrapings taken from the victim contained human blood. This evidence, taken together with the tracking dog identification, was sufficient to satisfy the standard of *State v. Green, supra*.

State v. Nicholas, 34 Wn.App. at 779

When seen in the light most favorable to the state, the record in the case at bar fails to raise to the level of substantial evidence that the defendant was the Ruben Cortez whose booking sheet with fingerprints attached was admitted into evidence. Although the officer who identified the booking sheet (Trial Exhibit No. 1) did note that the name on it was Ruben Edward Cortez, she did not identify the defendant in the courtroom as that person and she could not even identify whether or not the booking sheet was for Ruben Edward Cortez Junior or Senior. Neither did the state call upon the arresting officer, who claimed he was with the defendant at the jail, to examine

booking sheet and testify that it belonged to the defendant.

This lack of evidence was critical because the state's witnesses did not identify the defendant in the courtroom as the Ruben Cortez whose convictions for a sex offense were admitted into evidence. Rather, the state's evidence was that the person whose fingerprints appeared on the booking sheet was the same person whose fingerprints appeared on the exhibits showing the fact of the prior convictions. Thus, the state's evidence fails to prove the essential element of identity.

In this case the state may argue that substantial evidence on identity arises from Officer Mills' testimony that the defendant admitted that he had a prior conviction for a sex offense. However, any such argument fails for two reasons. The first reason is contained in the first argument in this brief. Absent the entry of findings on the CrR 3.5 hearing, there is no way for this court to determine whether or not these statements should have been admitted into evidence. The second argument is that under the *corpus delicti* rule, these statements may not be used absent some evidence of the existence of a crime. The following sets out this argument.

Under the traditional *corpus delicti* rule, a defendant's extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986). The "*corpus delicti*" usually involves

two elements: “(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 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Although the independent proof of the crime charged need not be sufficient to support a conviction, the state must present “evidence of sufficient circumstances which would support a logical and reasonable inference” that the charged crime occurred. *Id.* at 578-79; *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to eliminate the traditional *corpus delicti* rule and replace it with a “trustworthiness” doctrine. While an initial review of RCW 10.58.035 might indicate that it has replaced the *corpus delicti* rule in its entirety, any such conclusion would be inaccurate. The reason is that the *corpus delicti* rule has always addressed two issues. The first is the admissibility of evidence. The second is the sufficiency of evidence to sustain a conviction. As the Washington State Supreme Court explained in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), the new statute addresses only the former issue of the admissibility of a defendant’s statement. Thus, while a defendant’s statements would not have been admissible under the *corpus delicti* rule, they might now be admissible if the requirements of RCW 10.58.035 are met. However, absent independent proof of the existence of the crime charged, under the *corpus delicti* rule, those statements would still be insufficient to

sustain a conviction. The court stated the following on this issue in *Dow*:

Subsection (4) provides that “[n]othing 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 (emphasis added). This subsection establishes that the legislature has left intact the requirement that a defendant cannot be convicted without sufficient evidence to establish every element of the crime, which is consistent with the *corpus delicti* doctrine and our cases. Considering RCW 10.58.035’s plain language, we hold that any departure from the traditional *corpus delicti* rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The *corpus delicti* doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant’s statement.

State v. Dow, 168 Wn.2d at 253-254 (citation omitted).

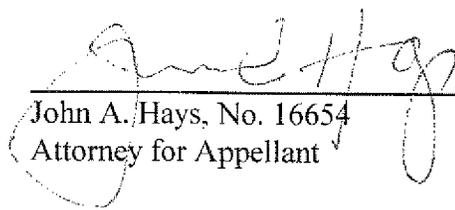
In the case at bar, the state charged the defendant with failure to register. As was argued above, absent the defendant’s statements there is a lack of substantial evidence that the defendant even had a registration requirement. Thus, absent the defendant’s statements, there was no evidence that a crime had occurred. Rather, there was merely evidence that a person by the name of Ruben Cortez was a sex offender who was required to register. Consequently, under the *corpus delicti* rule the admission of the defendant’s statements cannot save that lack of substantial evidence on identity. As a result, this court should reverse the defendant’s conviction and remand for dismissal with prejudice.

CONCLUSION

This court should reverse the defendant's conviction and remand for dismissal with prejudice based upon the state's failure to present substantial evidence of the crime charged.

DATED this 7th day of March, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 10.58.035
Statement of defendant – Admissibility

(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.

RULE 3.5
CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

NO. 48154-5-II

vs.

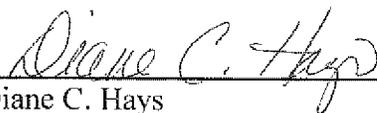
**AFFIRMATION
OF SERVICE**

**RUBEN EDWARD CORTEZ,
Appellant.**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
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Dated this March 7, 2016, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

March 07, 2016 - 3:52 PM

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Court of Appeals Case Number: 48154-5

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