

**FILED**

AUG 22 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29724-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JESUS FABIAN PERALES,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Blaine G. Gibson, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to support the special verdict finding that the defendant committed the murder to conceal the commission of the crime of Second Degree Rape, or to protect or conceal the identity of any person committing that crime.

2. The trial court erred in denying the defendant's motion to strike the aggravating circumstance factor based on second degree rape from the special verdict interrogatories submitted to the jury.

3. The trial court erred in imposing a deadly weapon enhancement.

*Issues Pertaining to Assignments of Error*

1. Was there was insufficient evidence that the crime of second degree rape was committed?

2. Was Mr. Perales' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of aggravated first degree murder?

3. Was there insufficient evidence to support the special verdict finding that the defendant was armed with a deadly weapon when the crime of murder was committed?

**B. STATEMENT OF THE CASE**

In February 2009, the body of 14-year-old Francisca Hernandez was found in water near the edge of the Yakima River near Prosser, Washington. RP 116, 130–31, 145, 364, 437, 487–91, 515. Her throat had been slit by a knife. RP 512, 520.

Francisca was last seen leaving 18-year-old Miguel Flores' house in Outlook, Washington (near Sunnyside) the afternoon of Monday, October 20, 2008. RP 226–27, 231. Flores' parents were out of town. RP 234. At Flores' urging through numerous cell phone calls, Francisca had skipped school to attend a small party at Flores' house. RP 233–35, 291, 297. Also at the party were Flores' younger brother Luis Lopez, and their friends and neighbors—16-year-old Jose Angel Lopez, the 21-year-old defendant Jesus Perales<sup>1</sup> and Mr. Perales' younger brother, Isaac Perales. CP 124; RP 229, 236, 239, 544, 574, 605–06, 834–35, 838. Some people sat at the kitchen table, playing card games that involved drinking beer if you lost. RP 237–38, 835–36. Flores and Francisca wandered into a

bedroom for possible sexual activity but were apparently unsuccessful due to having drunk too much, and they rejoined the others. RP 239–41, 262, 268–69, 303–08, 548–49.

A little later, Francisca went into the bathroom and was followed by Isaac. Luis heard moans and groans from the bathroom and went outside to tell Flores about it. Flores went inside and pounded on the door, yelling at them to stop. Five minutes later Isaac came out and sat at the table. RP 242–44, 549–51, 553, 559. Flores said Mr. Perales was sitting there shaking his head from side to side, and Isaac said he hadn't done anything. RP 244–45. Flores checked on Francisca and found her sitting on the bathroom floor, sounding pretty intoxicated, with her clothes disheveled and her pants down around her thighs. He asked if she wanted to go home. She said yes, and both Flores and Mr. Perales had to help get her into Flores' step-father's car. RP 234, 246–48, 254, 270–71, 283.

At trial<sup>2</sup>, Flores said he began driving the car towards her home in Sunnyside, with Francisca passed out in the back seat and Mr. Perales as passenger. RP 130–31, 248. At some point Francisca awakened and said several times that Isaac had raped her and that she was going to tell the

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<sup>1</sup> The defendant's nickname is "Jesse". RP 235. Jose Angel Lopez testified that Jesse was not at the house that day. RP 835–36.

<sup>2</sup> In his several statements to police, Flores gave information that differed from or contradicted his testimony at trial in varying degrees. *See* RP 261–313.

police. Flores said Mr. Perales “tripped out”, told her to shut up, made a comment that he couldn’t let his brother go down for that, and then directed Flores to turn around and head out into the rural area so that Mr. Perales could think of what to do. RP 248–51.

After awhile, Mr. Perales told Flores to stop on a road adjacent to the canal system and said they’d just leave Francisca somewhere to sleep and she’d wake up and forget about everything. He pulled the sleeping Francisca out of the backseat and told Flores to continue driving forward very slowly. Flores said he was fiddling with the radio and didn’t look to see what they were doing. Within five to seven seconds, Mr. Perales tapped on the back of the car and got inside. He was alone and said Francisca was okay. Flores hadn’t heard any screaming or yelling, and there was no blood on Mr. Perales. Flores dropped Mr. Perales off at his own house and returned home. RP 251–53, 276–78, 283.

Flores said he knew that Mr. Perales at times carried knives, such as pocket knives, folding knives or a knife that would fit in a sheath, and that the biggest knife he’d seen had a 6 to 8 inch blade. RP 256–57. Flores did not recall seeing Mr. Perales with a knife the evening of the incident, and there was no evidence any one else ever saw Mr. Perales with a knife. RP 257. No knives or guns were ever found. RP 376, 444.

Mr. Perales was charged with aggravated first degree (premeditated) murder or in the alternative with first degree (felony) murder. CP 69–70. The court denied defense counsel’s motion to dismiss the aggravating circumstance based on a theory of second degree rape. RP 765–72, 774.

In pertinent part, the jury was instructed as to aggravating circumstances:

Instruction 11. If you find the defendant guilty of the crime of First Degree (Premeditated) Murder, you must then determine whether any of the following aggravating circumstances exist:

1. The defendant committed the murder to conceal the commission of the crime of Second Degree Rape, or to protect or conceal the identity of any person committing that crime.
2. The defendant committed the murder to conceal the commission of the crime of Indecent Liberties, or to protect or conceal the identity of any person committing that crime.
3. The murder was committed in the course of, in furtherance of, or in immediate flight from the crime of First Degree Kidnapping.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable

doubt, you should answer the special verdict "yes" as to that circumstance.

CP 104.

Second Degree Rape and sexual intercourse were defined for the jury:

Instruction 12. A person commits the crime of Second Degree Rape when he engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

CP 105.

The jury was instructed as to other circumstances:

Instruction 21. If you find the defendant guilty of the crime of First Degree (Premeditated) Murder, the alternate crime of First Degree (Felony) Murder, or the crime of Second Degree Murder, then you must determine if any of the following circumstances exist:

1. The defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.
2. The defendant was armed with a deadly weapon when the crime was committed.

The State has the burden of proving the existence of one or both of these circumstances beyond a reasonable doubt. In order for you to find the existence of one of these circumstances in this case, you must unanimously agree that the circumstance has been proved beyond a reasonable doubt.

You should consider each of the above circumstances separately. If you unanimously agree that a specific circumstance has been proved beyond a reasonable doubt, you should answer the special verdict “yes” as to that circumstance.

RP 111.

The jury was instructed that a deadly weapon is:

Instruction 23. ... [A]n implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.

A knife having a blade longer than three inches is a deadly weapon. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

CP 112.

The jury convicted Mr. Perales of First Degree (Premeditated) Murder, and found by special verdict the State had proved beyond a reasonable doubt the existence of the three aggravating circumstances (set forth in Instruction 11 at CP 104) and the two circumstances of particular vulnerability and being armed with a deadly weapon (set forth in Instruction 21 at CP 111). CP 117, CP 121–21, 123.

The court sentenced Mr. Perales to life imprisonment without the possibility of release or parole plus 24 months deadly weapon enhancement on Count 1. CP 125. This appeal followed. CP 131.

**C. ARGUMENT**

**1. Mr. Perales' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of aggravated first degree murder.<sup>3</sup>**

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: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” 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

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<sup>3</sup> Assignment of Error 1 and 2.

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)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068

(citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Here, there is insufficient evidence of the aggravating circumstance of concealment because there was no evidence that the crime allegedly sought to be concealed—second degree rape—had been committed by anyone. Aggravated first degree murder includes the aggravating circumstance that:

(9) The person committed the murder to conceal the commission of *a crime* or to protect or conceal the identity of any person committing *a crime*, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030.

RCW 10.95.020(9) (emphasis added). Due process does not require that the crime to be concealed be charged and included in the jury instructions "so long as the jury could have concluded that a crime was in fact

committed.” State v. Jeffries, 105 Wn.2d 398, 420, 717 P.2d 722 (1986).

However, each of the possible crimes must be supported by sufficient evidence. State v. Longworth, 52 Wn. App. 453, 465, 761 P.2d 67 (1988).

Herein, the State assumed the added burden to prove that the crime being concealed was the specific crime of second degree rape<sup>4</sup> by instructing the jury as follows:

Instruction 11. If you find the defendant guilty of the crime of First Degree (Premeditated) Murder, you must then determine whether any of the following aggravating circumstances exist:

1. The defendant committed the murder to conceal the commission of the crime of Second Degree Rape, or to protect or conceal the identity of any person committing that crime.

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CP 104. Second Degree Rape was defined for the jury as:

Instruction 12. A person commits the crime of Second Degree Rape when he engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

CP 105. Thus, in order to prove second degree rape the State was required to prove that sexual intercourse occurred. The operation of the “law of the

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<sup>4</sup> The State charged the specific crime of second degree rape in its Second Amended Information. CP 69. The Second Amended Information and Instruction 11 do not allege attempted second degree rape. CP 69; 104.

case” doctrine may be raised for the first time on appeal. State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988). If there is insufficient evidence to prove the added element, reversal is required. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995)).

Here, there was no evidence that sexual intercourse took place between Mr. Perales’ brother, Isaac<sup>5</sup>, and Francisca. 14-year-old Francisca allegedly claimed she had been raped, but her assertion is unsupported by actual evidence. Although the act of sexual penetration may be proved by circumstantial evidence, the scope of appellate review is limited to a determination of whether the state has produced substantial evidence tending to establish the circumstances from which the jury could reasonably infer the act or acts to be proved. In so doing, the appellate court does not weigh the evidence, but merely examines its sufficiency. State v. Boggs, 80 Wn.2d 427, 431, 495 P.2d 321 (1972).

In Boggs, the defendant admitted being present in the victim’s house and confessed to the killing, for which he could give no explanation, but denied raping or attempting to rape the victim. Boggs, 80 Wn.2d at 428–29. The pathologist concluded that the victim had been raped, based

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<sup>5</sup> During closing the State acknowledged that Miguel Flores and Francisca only *attempted* to have sexual intercourse. RP 915.

on his autopsy findings of tearing and hemorrhaging of the vaginal wall, penetration of the vaginal cavity by a blunt object such as fingers or forcible intercourse, lack of expected lubrication if consensual, and presence of a fluid in the vagina that is normally ejected through a penis. Boggs, 80 Wn.2d at 430. On appeal, the court concluded there was substantial evidence tending to establish both rape and its perpetrator, and held that the trial court properly submitted the issue of rape to the jury under the felony-murder charge. Id. at 431.

Here, unlike in Boggs, there was no direct *or* sufficiently substantial circumstantial evidence of sexual penetration. Dr. Reynolds testified that during the autopsy, he found no tears or other mechanical damage in the tissue of the vaginal area. RP 517, 524. There was no testimony that semen or other DNA material was present. Isaac did not testify about what happened in the bathroom. Luis heard moans and groans that made him think they were having sex in the bathroom, but such sounds are equally consistent with acts comprising only indecent liberties.

Flores found Francisca in the room with her clothes disheveled and her pants down around her thighs. However, such disarray of clothes fits within the description that was found insufficient to allow a charge to go

forward of rape in State v. Maupin, 63 Wn. App. 887, 893-894, 822 P.2d 355 (1992) (“Rather, the record discloses only that Mr. Maupin displayed a sexual interest in Ms. Fraijo. As to the child, Mr. Maupin merely commented the child was “pretty” and “needed a father”. The other evidence, panties missing from the body when it was found, a tear in the child's nightgown, the fact the lower half of the child's body was not covered by the snowsuit, and the content of the “Mudflap” note, at most suggests the possibility of some unspecified sex offense”). Without any evidence of penetration, the dishevelment of Francisca’s clothes is also consistent with possible acts of indecent liberties or other unspecified sex offenses.

Even after viewing this scant evidence in the light most favorable to the State, no rational juror could have found that sexual intercourse had taken place between Isaac and Francisca. Thus, the State failed to prove an essential element of the crime beyond a reasonable doubt. Therefore, the evidence was insufficient to support the special verdict finding of an aggravated circumstance based on concealment of the crime of Second Degree Rape.

**2. There was insufficient evidence to support the special verdict finding that the defendant was armed with a deadly weapon when the crime of murder was committed.<sup>6</sup>**

The applicable law regarding insufficiency of the evidence is set forth in the preceding section. Here, the jury was instructed that a deadly weapon is:

[A]n implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death.

A knife having a blade longer than three inches is a deadly weapon. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

CP 112 (Instruction 23). No weapon of any type was found in connection with Francisca's murder. Dr. Jeffrey Reynolds testified that her throat had been slit by a knife with a rigid blade at least three inches long. RP 512, 520. Miguel Flores said he knew that Mr. Perales at times carried knives, such as pocket knives, folding knives or a knife that would fit in a sheath, and that the biggest knife he'd seen had a 6 to 8 inch blade. RP 256–57. Flores did not recall seeing Mr. Perales with a knife the evening of the incident, and there was no evidence any one else *ever* saw Mr. Perales with a knife. RP 257.

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<sup>6</sup> Assignment of Error 3.

Since no knife was found, the jury had no evidence that the blade was longer than three inches (and therefore a *per se* a deadly weapon) or less than three inches long (and therefore a deadly weapon if the jury so found). Further, the jury instruction failed to tell the jury whether a blade that was exactly three inches long either would or could be a deadly weapon. Without an actual knife and without a proper instruction as to the applicable law, the jury could only impermissibly speculate about the length of a blade and whether it fell within the definition of a deadly weapon.

There was insufficient evidence to support the special verdict finding that the defendant was armed with a deadly weapon. Therefore the deadly weapon sentencing enhancement must be vacated.

**D. CONCLUSION**

For the reasons stated, this Court should vacate the special findings of an aggravating circumstance based on concealment and that Mr. Perales was armed with a deadly weapon, and remand the matter for resentencing.

Respectfully submitted August 22, 2011.

  
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