

**FILED**

FEBRUARY 9, 2012

Court of Appeals  
Division III  
State of Washington

NO. 301222-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

THE STATE OF WASHINGTON, Respondent

v.

JOSE LUIS ZAPIEN, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 11-1-00473-6

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

BRENDAN M. SIEFKEN, Deputy  
Prosecuting Attorney  
BAR NO. 41219  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

ISSUES ..... 1

1. DID DEFENSE COUNSEL FAIL TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MAKE A CORPUS DELICTI CHALLENGE? ..... 1

2. DID DEFENSE COUNSEL FAIL TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MAKE A CORPUS DELICTI CHALLENGE? ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF PROCEDURE ..... 5

ARGUMENT ..... 6

1. THE COURT PROPERLY USED DISCRETION WHEN IT ALLOWED DEPUTY REINING TO GIVE TESTIMONY IN THE FORM OF AN OPINION BASED ON HER TRAINING, EXPERIENCE, AND OBSERVATIONS. .... 6

2. THE DECISION TO NOT RAISE A CORPUS DELICTI CHALLENGE DID NOT PREVENT THE DEFENDANT FROM RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL. .... 9

CONCLUSION ..... 13

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*City of Seattle v. Heatley*,  
70 Wn. App. 573, 854 P.2d 658 (1993) ..... 6, 7

*Davis v. Baugh Indus. Contractors, Inc.*,  
159 Wn.2d 413, 150 P.3d 545 (2007) ..... 6

*State v. Aho*,  
137 Wn.2d 736, 975 P.2d 512 (1999) ..... 10

*State v. Aten*,  
130 Wn.2d 640, 927 P.2d 210 (1996) ..... 11

*State v. Farr-Lenzini*,  
93 Wn. App. 453, 970 P.2d 313 (1999) ..... 6

*State v. Horton*,  
116 Wn. App. 909, 68 P.3d 1145 (2003) ..... 9

*State v. Kirkman*,  
159 Wn.2d 918, 155 P.3d 125 (2007) ..... 6

*State v. McFarland*,  
127 Wn.2d 322, 899 P.2d 1251 (1995) ..... 9, 10

*State v. Nelson*,  
152 Wn. App. 755, 219 P.3d 100 (2009) ..... 7

**UNITED STATES SUPREME COURT CASES**

*Strickland v. Washington*, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .... 9, 10

**REGULATIONS AND COURT RULES**

CrR 3.5 ..... 5  
ER 702 ..... 6  
ER 704 ..... 6

## ISSUES

1. DID THE COURT ERRONEOUSLY ADMIT EXPERT TESTIMONY FROM DEPUTY ARIN REINING?
2. DID DEFENSE COUNSEL FAIL TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MAKE A CORPUS DELICTI CHALLENGE?

## STATEMENT OF THE CASE

On May 5, 2011, Benton County Sheriff Deputies Arin Reining and Abel Campos responded to a complaint of cockfighting at 168102 West 215 PR SW in Benton County, Washington. (07/18-19/2011, Report of Proceedings<sup>1</sup> 60). The deputies contacted Maria Zapien, who identified herself as the property owner, and then gave the deputies consent to search the property. (RP 60-61).

Deputy Campos identified the defendant in court and testified that he spoke with the defendant on the day of the investigation. (RP 62). Deputy Campos testified that the defendant admitted that six of the roosters were his and

---

<sup>1</sup> The Verbatim Report of Proceedings of the Trial held on July 18-19, 2011, hereinafter referred to as "RP."

that he raised them for fighting. (RP 64). The defendant advised that he borrows blades at the fights and returns them to the owners once the fight is over. (RP 64-65). The defendant advised that he takes his roosters in wooden crates to fight in different areas of Benton County and Yakima County. (RP 65).

Deputy Reining testified that she has been a deputy with the Benton County Sheriff's Department for 13 years. (RP 74). Deputy Reining testified that she has received extra training in regards to investigating animal fighting and cruelty. (RP 75). Deputy Reining testified that she has received training on the organizational aspects of cock fighting, how roosters are prepared for fighting, and all arenas of fighting. (RP 75). Over a defense objection, the court allowed some limited questioning of Deputy Reining in the area of cock fighting organization and stated that it "is appropriate given that this is an area that I don't think many people

have particular knowledge of." (RP 78). Deputy Reining testified that based on her training and experience with animals and cock fighting investigations, rooster combs are cut to prepare them for fighting so they are out of the way. (RP 78-79). Deputy Reining testified that people who have free-range chickens on their property typically would not have more than one rooster. (RP 79). Deputy Reining testified that roosters prepared for fighting will commonly have their spurs shaved to a point or cut off completely to accommodate razor blades that get attached to their feet. (RP 79).

Deputy Reining walked around the property and counted 35 roosters and six hens on the property. (RP 81). Deputy Reining testified that in her experience, the amount of roosters on the property was not typical of a normal chicken operation or breeding program. (RP 81). Deputy Reining testified that the process of cutting combs and spurs makes them useless for showing at

the fair. (RP 81). Deputy Reining testified that she observed multiple brands and types of feed, vitamin supplement powders, and gravel powders on the property. She testified that those were not commonly used for free-range, pet, and egg-laying chickens. (RP 84). Deputy Reining observed supplements commonly used to enhance roosters. (RP 85).

Deputy Reining testified that she observed a preparation area outside the trailer that was identified as belonging to the defendant. There she observed and photographed blood splatter and feathers in the preparation area along with tie downs, a soiled, rusted needle, thread, and scissors. (RP 86). She identified the thread and needle as supplies used to stitch up roosters after the combs have been cut. (RP 86). Deputy Reining testified that she found wooden boxes on the property that were of the type that are commonly used to transport roosters for fights. She observed blood spatter and feathers inside

one of the boxes that was consistent with having put a rooster inside that had just fought. (RP 87).

Deputy Reining testified that her observations of the property and the chickens were consistent with chickens that were raised for cock fighting. (RP 92). The court overruled the defense attorney's objection to this testimony. (RP 93).

#### **STATEMENT OF PROCEDURE**

On May 10, 2011, the defendant was charged by information with Animal Fighting. (CP 1). On July 18, 2011, the first day of trial, the court held a hearing pursuant to CrR 3.5 and found the defendant's statements to be admissible. (RP 26-28). On July 19, 2011, a jury trial was held, and the defendant was found guilty as charged. (CP 52; RP 151-153). This appeal followed. (CP 63).

## ARGUMENT

**1. THE COURT PROPERLY USED DISCRETION WHEN IT ALLOWED DEPUTY REINING TO GIVE TESTIMONY IN THE FORM OF AN OPINION BASED ON HER TRAINING, EXPERIENCE, AND OBSERVATIONS.**

In Washington, experts are permitted to testify on subjects that are outside the understanding of the average person. ER 702. Expert opinions are not prohibited because they embrace the ultimate issue to be decided by the trier of fact. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007); *State v. Kirkman*, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). Additionally, ER 704 expressly allows for the admission of an otherwise admissible opinion or inference on an ultimate issue that the trier of fact must decide. *City of Seattle v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993). "To be otherwise admissible, opinion evidence must also satisfy ER 403, ER 701, and ER 702." *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999); see also *City*

of *Seattle v. Heatley*, 70 Wn. App. at 579. In a similar case involving a dogfighting operation, the court allowed the State's expert to testify that based on his training, experience, and view of the evidence, he believed that dogs were being kept on the defendant's property with the intent that they be engaged in a dogfighting exhibition. *State v. Nelson*, 152 Wn. App. 755, 767, 219 P.3d 100, (2009).

While the animals are different, the rationale and the reasoning behind *Nelson* are applicable to the facts in the defendant's case. Animal fighting, and specifically cock fighting, is an activity that is beyond the average person's realm of understanding. The trial court understood that as shown by its decision to overrule defense counsel's objection, in which it stated, "[S]ome background information, from the Court's perspective, is appropriate given that this is an area that I don't think many people have particular knowledge of." (RP 78). At

trial, Deputy Reining testified that she had been a Benton County Sheriff Deputy for 13 years. (RP 74). Deputy Reining testified that she has received extra training in regards to investigating animal fighting and cruelty, and that she has received training on the organizational aspects of cock fighting, how roosters are prepared for fighting, and all arenas of fighting. (RP 75). Deputy Reining testified that rooster combs are cut to prepare them for fighting so they are out of the way. (RP 78-79). Deputy Reining testified that roosters that are prepared for fighting will commonly have their spurs shaved to a point or cut off completely to accommodate razor blades that get attached to their feet. (RP 79).

Deputy Reining's training and experience in the field of animal fighting and animal cruelty provided an appropriate foundation to allow her to give her opinion of what the roosters on the property were being used for. The court did not

err when it allowed her opinion based on the totality of her observations.

**2. THE DECISION TO NOT RAISE A CORPUS DELICTI CHALLENGE DID NOT PREVENT THE DEFENDANT FROM RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL.**

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance on the part of counsel, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If one of these two elements is absent, an ineffective counsel claim will fail. *Id.* at 687-89.

Deficient performance of trial counsel is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But appellate courts engage in a strong presumption that representation is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *citing*

*State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. McFarland*, 127 Wn.2d at 336. Counsel's legitimate trial strategy or tactics cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

To satisfy the prejudice prong of the ineffective assistance of counsel claim, the appellant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent counsel, the result would have differed, thereby undermining this court's confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. at 694.

In the case at bar, the defendant is unable to meet the burden of either prong; therefore, the defendant was not denied effective assistance

of counsel. In this State, confessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the *corpus delicti* and must be corroborated by other evidence. Washington courts often cite the traditional statement of the "*corpus delicti* rule" which provides:

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*.

"*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.

*State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). In the present case, there was sufficient evidence independent of the defendant's admissions that the roosters on the

property were raised and possessed for the purpose of fighting. The independent evidence consisted of Deputy Reining's observations which included: the condition of the roosters' combs and spurs, the presence of 35 roosters and six hens on the property, the presence of wooden transport boxes containing blood and feathers inside, the preparation area covered in blood and feathers, and the presence of multiple bird feed and enhancing supplements. The totality of this evidence provides a prima facie case of animal fighting, and thus satisfies a corpus delicti challenge.

The defendant's trial counsel recognized the importance of the defendant's statements in the present case and attempted to have them suppressed at the pre-trial hearing. There is no colorable corpus delicti challenge under the facts of the case at bar, and trial counsel's performance was not deficient for failing to raise such challenge.

**CONCLUSION**

The court did not err in allowing testimony from Deputy Reining in the form of an expert opinion in animal fighting, and the defendant was not denied effective assistance of counsel. Accordingly, the conviction of the defendant for Animal Fighting should be affirmed.

**RESPECTFULLY SUBMITTED** this 9th day of  
February 2012.

**ANDY MILLER**  
Prosecutor



**BRENDAN M. SIEFKEN,** Deputy  
Prosecuting Attorney  
Bar No. 41219  
Ofc. Id. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Dennis W. Morgan  
Attorney at Law  
120 W. Main Avenue  
Ritzville, WA 99169-1408

E-mail service by agreement was made to the following parties:  
nodblspk@rcabletv.com

Jose Luis Zapien  
168102 215 PR SW  
Prosser, WA 99350

U.S. Regular Mail,  
Postage Prepaid

Signed at Kennewick, Washington on February 9, 2012.



Pamela Bradshaw  
Legal Assistant