

81243-8

FILED
COURT OF APPEALS
DIVISION II

08 FEB 19 AM 9:12

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 34802-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
FEB 22 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
ajr

STATE OF WASHINGTON,

Respondent,

vs.

KEITH IAN DOW,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(206) 423-3084

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
A. Identity of Petitioner	4
B. Decision of the Court of Appeals	4
C. Issues Presented for Review	4
D. Statement of the Case	5
E. Argument Why Review Should Be Accepted	7
F. Conclusion	16
G. Appendix	
RCW 10.58.035	17

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 13

Opper v. United States, 348 U.S. 84,
75 S.Ct. 158, 99 L.Ed. 101, 45 A.L.R.2d 1308 (1954) 14-16

United States v. Lopez-Alvarez,
970 F.2d 583 (9th Cir. 1992) 15, 16

State Cases

Bremerton v. Corbett, 106 Wn.2d 569, 723 P.2d 1135 (1986) ... 9, 10, 12

State v. Ashurst, 45 Wn.App. 48, 723 P.2d 1189 (1986) 9

State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999) 13

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 13

State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) 13

State v. Hamrick, 19 Wn.App. 417, 576 P.2d 912 (1978) 9

State v. Munson, 7 Wash. 239, 34 P. 932 (1893) 9

State v. Ray, 130 Wn.2d 673, 926 P.2d 904 (1996) 10

Constitutional Provisions

United States Constitutional, Fourteenth Amendment 9, 13

Statutes & Court Rules

RAP 13.4 8

RCW 10.58.035 9-13, 16

Final Bill Report, EHB 1427, 58th Legislature (Wash. 2003) 11

A. *IDENTITY OF PETITIONER*

KEITH IAN DOW asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the decision of the Court of Appeals reversing the Cowlitz County Superior Court judgment dismissing the charges in this case. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

I. IN ORDER TO MEET THE MINIMUM REQUIREMENTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, SHOULD THIS COURT INTERPRET RCW 10.58.035 TO REQUIRE SOME INDEPENDENT EVIDENCE OF THE EXISTENCE OF A CRIME PRIOR TO THE ADMISSION OF A DEFENDANT'S STATEMENTS INTO EIVDENCE?

II. ABSENT SOME INDEPENDENT EVIDENCE OF THE EXISTENCE OF A CRIME, MAY A DEFENDANT'S UNCORROBORATED STATEMENTS ALONE CONSTITUTE SUBSTANTIAL EVIDENCE OF A CRIME WITHOUT OFFENDING DUE PROCESS UNDER THE FOURTEENTH AMENDMENT?

D. *STATEMENT OF THE CASE*

By amended information filed April 3, 2006, the Cowlitz County Prosecutor charged the defendant Keith Ian Dow with one count of child molestation in the first degree. CP 3-4. The court later held a hearing and determined that the complaining witness was not competent to testify. CP 5.

Later, on the morning of trial, the defense moved (1) to exclude any evidence of the defendant's tape recorded statements to the police prior to his arrest under the corpus delecti rule, and (2) to dismiss because with or without the defendant's tape recorded statements the prosecutor did not have substantial evidence to support a conviction. RP 1-4. The prosecutor argued that the defendant's statements were admissible under RCW 10.58.035, and that this statement was substantial evidence of guilt. *Id.*

In support of its arguments, the state called the police officer who interviewed the defendant to testify concerning the facts surrounding her taking the defendant's statements. RP 5-12. After this testimony and argument by counsel the court granted the defendant's motion and dismissed the charge. RP 41-42. The court later entered the following findings of fact and conclusions of law on its ruling:

FINDINGS OF FACT

1. In the course of a pretrial hearing, the state's complaining witness, four years of age, was conceded by the state and held by the court to be incompetent to be a witness for the state in the course of the trial on the pending charge.
2. The charge against the defendant in this matter is based on allegations regarding an incident that occurred in a bedroom when only the defendant and the four-year-old witness were present.
3. The court had reviewed the evidence available to the state, which includes the transcript of an interview conducted by police with the defendant which the state seeks to admit into evidence against the

defendant. The state concedes there is no other available evidence against the defendant in this case.

4. The defendant argues that there is insufficient evidence to satisfy the requirements of a corpus delicti to support the admission of the statement.

5. The state maintains that the defendant's transcribed statement is admissible pursuant to RCW 10.58.035.

6. After reviewing the transcript of the police officer's interview with the defendant, the court finds that the contents of the statement do not comprise a confession but instead appears to exonerate the defendant from the charge alleged herein.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter in the above-entitled action.

2. The corpus delicti rule traditionally followed by the courts in the State of Washington provides that the confession or admission of the defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence establishing a prima facie case against the defendant.

3. In regard to the state's contention that the enactment of RCW 10.58.035 reflects the intent of the Washington State Legislature to depart from the traditional corpus delicti rule, a review of the legislative history of the enactment of this statute does reflect that the legislature did indicate intent to adopt what was described as the "trustworthiness" enunciated by the United State's Supreme Court and Opper v United States.

4. In reviewing that case and its progeny, it is apparent that the standard for admission by these federal cases is that there is a corroboration requirement that is two pronged: first, although the state may not introduce independent evidence of the corpus delicti in conformance with the traditional test, it must introduce sufficient evidence that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to

establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable. Only when both of these prongs are satisfied will the evidence be deemed sufficient in a case in which the conviction depends in part on such admission.

5. In order to satisfy minimum due process requirements in Washington State courts, while the legislature has the ability to modify the corpus delicti rule as a rule of evidence, the Opper standard which consists of the two prong test set forth above, represents the requirements that at a minimum must be satisfied in order to guarantee the due process rights of defendants in Washington State courts.

6. In regards to the trustworthiness prong of the above test, which is always a preliminary threshold issue to be resolved by the trial court, the statements in issue satisfy that prong of the test.

7. However, in regard to the first prong of the test requiring sufficient evidence to establish that the criminal conduct at the core of the offense charged against this defendant has occurred, there is simply insufficient evidence to satisfy that prong of the test and as a result, the statement of the defendant is inadmissible in evidence.

CP 5-8.

Following entry of these findings, the state filed timely notice of appeal.

CP 14. The Court of Appeals, Division II, with one judge dissenting, has now reversed trial court. Petitioner seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case at bar presents a significant question of constitutional magnitude that should be reviewed under RAP 13.4(b)(3). In addition, as a case of first impression on the applicability and constitutionality of RCW 10.58.035, this case involves an issue of substantial public interest that should be determined

by this court under RAP 13.4(b)(4). Specifically, accepting review herein will allow this court to review the questions whether or not RCW 10.58.035, which has replaced the *corpus delicti* rule in Washington, allows the admission of a defendant's statements into evidence absent some evidence of the existence of a crime, and whether a conviction based solely upon a defendant's uncorroborated statements absent independent evidence of the commission of a crime violates a defendant's right to due process under United States Constitution, Fourteenth Amendment. The following presents this argument.

Under the *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). Washington courts have followed this rule of evidence since statehood. *See e.g. State v. Munson*, 7 Wash. 239,

34 P. 932 (1893). This court has repeatedly refused the state's requests to replace it with the "trustworthiness" standard applied in federal courts. See *State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) ("[T]his Court has previously considered the arguments for adopting the "trustworthiness" standard, and it has consistently declined to abandon the *corpus delicti* rule").

In *Bremerton v. Corbett*, *supra*, this court gave the following history behind this common law rule of evidence.

The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. The requirement of independent proof of the corpus delicti before a confession is admissible was influenced somewhat by those widely reported cases in which the "victim" returned alive after his supposed murderer had been tried and convicted, and in some instances executed. It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically. This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. Thus, it is clear that the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false.

City of Bremerton v. Corbett, 106 Wn.2d at 576-577 (citations omitted).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to eliminate the *corpus delicti* rule and replace it with a "trustworthiness" doctrine. In the first line of the summary to the Final Bill Report on RCW 10.58.035, the legislature states:

The traditional corpus delicti rule is changed to a trustworthiness rule

and standards for evaluating trustworthiness are provided.

Final Bill Report, EHB 1427, 58th Legislature (Wash. 2003).

The same final bill report states the following concerning the legislature's understanding of the "trustworthiness" doctrine.

In 1954 the United States Supreme Court, in *Opper v. United States*, adopted what is referred to as the "trustworthiness" doctrine. The "trustworthiness" doctrine provides that a defendant's confession or admission may be admitted to establish the corpus delicti if there is substantial independent evidence that tends to establish the trustworthiness of the confession or admission. The independent evidence does not need to establish, by itself, the corpus delicti. It need only support the essential facts of the confession or admission sufficiently to justify a jury inference that the confession or admission is true.

Final Bill Report, EHB 1427, 58th Legislature (Wash. 2003).

The first section of RCW 10.58.035 states:

(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.

RCW 10.58.035(1).

The second paragraph of this rule creates four non-exclusive factors the court "shall" consider in determining whether or not a defendant's statement will be admissible under the statute. This second section states:

(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.

RCW 10.58.035(2).

As the court pointed out in *Bremerton v. Corbett*, the purpose of the corpus delicti rule is twofold: “to prevent not only the possibility that a false confession was secured by means of police coercion or abuse, but also the possibility that a confession, though voluntarily given, is false.” *Bremerton v. Corbett*, 106 Wn.2d at 577. Factors (b), (c), and (d) of RCW 10.58.035(2) deal directly with the former concern for preventing convictions based upon false confessions secured by coercion or abuse, particularly by the police. By contrast, only factor (a) deals directly with the latter concern of preventing convictions based upon false confessions voluntarily given.

This statute gives no direction at all concerning the relative weight of each of these factors, and does not set any type of formula for admissibility other than giving the court direction on what type of facts are relevant to the court’s decision. Although no case law yet exists in Washington on this rule,

its application undoubtedly lies within the sound discretion of the trial court as do other rules of evidence. *See State v. Hamlet*, 133 Wn.2d 314, 944 P.2d 1026 (1997) (“Admissibility of evidence lies within the sound discretion of the trial court and the court’s decision will not be reversed absent abuse of that discretion.”) (citing *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992)). Thus, a trial court’s decision on the admissibility of the defendant’s statement under RCW 10.58.035 should be affirmed unless the state can prove the existence of a manifest abuse of discretion. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999).

While due process under United States Constitution, Fourteenth Amendment, does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). As was explained by the court in *Bremerton v. Corbett*, *supra*, the purpose of the *corpus delicti* rule was to prevent the admission of evidence (a defendant’s false confession) that was (1) unreliable because it many times arose from either police coercion or from or the defendant’s own false statement, and (2) unfairly prejudicial because of the undue weight that juries tended to give such evidence. Thus, while the *corpus delicti* rule has not traditionally been seen

as a constitutional requirement, its purpose is to prevent convictions based solely upon inherently unreliable evidence. Since the right to a fair trial untainted by unreliable and unfairly prejudicial evidence is one of the guarantees of due process, and since this is the same goal of the *corpus delicti* rule, the claim that the *corpus delicti* rule is “not constitutional” is merely a semantical device to deny the application of due process under the Fourteenth Amendment through the *corpus delicti* rule.

The fact that the legislature has mandated the adoption of the federal “trustworthiness” rule or doctrine as originally set out in *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101, 45 A.L.R.2d 1308 (1954), does not mean that the legislature or the court have abandoned the underlying principle of assuring each defendant the constitutional due process right to a fair trial untainted by unreliable evidence. Rather, as a review of *Opper* reveals, the United States Supreme Court was simply creating a new formula for determining whether or not a defendant’s statements were sufficiently reliable to admit into evidence when the existence of an underlying crime was in question. The court’s holding on this issue was as follows:

We think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other

necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

Opper v. United States, 348 U.S. at 93.

In *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992), the Ninth Circuit examined the “trustworthiness” doctrine and concluded that the corroboration requirement of *Opper* has two prongs:

First, although the state need not introduce independent evidence of the corpus delicti in conformance with the traditional test, it must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable. Only when both these prongs are satisfied will a jury be “sufficiently justified” in believing the truth of a criminal admission; only then will the evidence be deemed sufficient in a case in which the conviction depends in part on such admission.

United States v. Lopez-Alvarez, 970 F.2d at 592.

In *Lopez-Alvarez* the court also explained that while the “trustworthiness” rule frees the state from proving a corpus delicti on every element of the crime charged, the state still has the burden of presenting some independent evidence of criminal conduct before a defendant’s statements may be admitted into evidence. The court held:

[T]he state no longer need introduce independent, tangible evidence supporting every element of the corpus delicti. Instead, the state is required to support independently only the gravamen of the offense – the existence of the injury that forms the core of the offense and a link to a

criminal actor – with tangible evidence.

United States v. Lopez-Alvarez, 970 F.2d at 591; *see also* *Wong Sun v. United States*, 371 U.S. 471, 489 n.15, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) (“Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. . . . One uncorroborated admission by the accused does not, standing alone, corroborate an unverified confession.”).

In its brief to the Court of Appeals, the state suggests that in RCW 10.58.035, the Washington Legislature was free to and did adopt an admissibility standard for a defendant’s admissions that falls below the requirements of the “trustworthiness” rule originally adopted in *Opper*. As the previous references to *Opper* and *Lopez-Alvarez* explain, this argument is simply not correct. In *Opper* and those cases applying it, the courts clarify that evidence that does not meet the “trustworthiness” standard is not inadmissible because it doesn’t meet a formulaic test; such evidence is inadmissible because it is not reliable or trustworthy. By setting a test for determining whether or not a defendant’s admissions are reliable or trustworthy, the court was thereby setting a minimum due process standard under United States Constitution, Fourteenth Amendment. The Court of Appeals decision otherwise is in error. As a result, petitioner respectfully

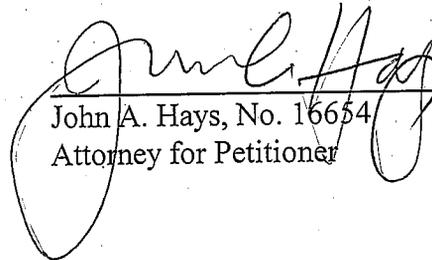
requests that this court grant review and hold that as a minimum requirement of due process, RCW 10.58.035 must be interpreted to require some independent evidence of the existence of a crime before a defendant's statement may be admitted under the rule, and before a conviction can be sustained.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 14th day of February, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

RCW 10.58.035

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.

FACTS

The Cowlitz County prosecutor charged Dow by amended information with one count of first degree child molestation,¹ committed on or about September 9, 2005. Following a pretrial hearing, the trial court found that the four-year-old victim, who was three at the time of the alleged offense, was not competent to testify and that her statements to others were not admissible.²

Dow then moved to suppress the statements he made during a police interview, arguing that these statements were inadmissible because of lack of *corpus delicti*.³ The State conceded that, without the alleged victim's statements, it lacked independent evidence to establish *corpus delicti*, but it argued that Dow's statements were admissible under RCW 10.58.035 which provides:

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

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

¹ 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.

RCW 9A.44.010(2) provides: "Sexual contact" means 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."

² The State conceded this issue.

³ Dow does not challenge the voluntariness of his statements nor their admissibility under CrR 3.5.

(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.

The trial court held a hearing on the admissibility of Dow's statement. At the hearing, the State supplied the trial court with a 21-page transcript of the taped police interview, and the police officer who conducted the interview testified that she interviewed Dow at his mother's house in Portland, Oregon, with two other officers present; that Dow was very cooperative; that the interview environment was "very comfortable"; that nothing "coercive or hostile" took place during the course of the interview; and that she arrested Dow at the end of the interview. Report of Proceedings at 6.

In its written findings of fact, the trial court stated:

The court had reviewed the evidence available to the state, which includes the transcript of an interview conducted by a police [sic] with the defendant, which the state seeks to admit into evidence against the defendant. The state concedes there is no other available evidence against the defendant in this case.

Clerk's Papers (CP) at 5-6.

In its written conclusions of law, it stated:

2. The corpus delicti rule traditionally followed by the courts in the State of Washington provides that the confession or admission of the defendant charged with a crime cannot [be] used to prove the defendant's guilt in the absence of independent evidence establishing a prima facie case against the defendant.

3. In regard to the state's contention that the enactment of RCW 10.58.035 reflects the intent of the Washington State Legislature to depart from the

traditional corpus delicti rule, a review of the legislative history of the enactment of this statute does reflect that the legislature did indicate intent to adopt what was described as the “trustworthiness” enunciated by the United State’s [sic] Supreme Court and Opper v United States.

4. In reviewing that case and its progeny, it is apparent that the standard for admission by these federal cases is that there is a corroboration requirement that is two pronged: *first, although the state may not introduce independent evidence of the corpus delicti in conformance with the traditional test, it must introduce sufficient evidence that the criminal conduct at the core of the offense has occurred.* Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable. Only when *both* of these prongs are satisfied will the evidence be deemed sufficient in a case in which the conviction depends in part on such admission.

5. In order to satisfy *minimum due process requirements* in Washington State courts, while the legislature has the ability to modify the corpus delicti rule as a rule of evidence, *the Opper standard which consists of the two prong test set forth above, represents the requirements that at a minimum must be satisfied in order to guarantee the due process rights of defendants in Washington State courts.*

6. In regard to the trustworthiness prong of the above test, which is always a preliminary threshold issue to be resolved by the trial court, the statements in issue satisfy that prong of the test.

7. However, *in regard to the first prong* of the test requiring sufficient evidence to establish that the criminal conduct at the core of the offense charged against this defendant has occurred, *there is simply insufficient evidence to satisfy that prong of the test and as a result, the statement of the defendant is inadmissible in evidence.*

CP at 6-7 (emphasis added).

The State admitted that, without Dow’s statements, it could not proceed. The trial court dismissed the charge and the State appeals. RAP 2.2(b)(2).⁴

⁴ RAP 2.2(b) provides in relevant part:

[T]he State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

....
(2) . . . A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

In this case of first impression, we address whether the trial court properly required the State to establish by independent evidence that the criminal conduct at the core of the offense charged occurred before admitting Dow's trustworthy statement under RCW 10.58.035.

ANALYSIS

Generally, whether evidence will be admitted at trial is an issue for the sound exercise of the trial court's discretion. *State v. Wade*, 138 Wn.2d 460, 463-64, 979 P.2d 850 (1999). Determining admissibility under RCW 10.58.035, however, is a mixed question of law and fact. We review the trial court's application of the statute under the error of law standard,⁵ and we review the trial court's finding of the trustworthiness of Dow's statement for substantial evidence.⁶

When it enacted RCW 10.58.035, the legislature intended to change the *corpus delicti* standard to provide that a defendant's trustworthy confessions, admissions, and statements shall be admissible in cases where, because the alleged victim had died or was incompetent to testify, the State could not present independent evidence establishing the *corpus delicti* of the crime. Here, the trial court found that Dow's statement to police was trustworthy, but ruled that it was not admissible because the State had failed to introduce independent evidence that the criminal conduct at the core of the offense had occurred. The State argues that the trial court failed to properly apply the factors set out in RCW 10.58.035 and, thus, erred in ruling that Dow's statement to police was inadmissible as a matter of law. We agree.

⁵ "The choice, interpretation, or application of a statute to a set of facts is a matter of law reviewed de novo." *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

⁶ See *State v. Johnson*, 115 Wn. App. 890, 897, 64 P.3d 88 (2003).

The *corpus delicti* rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant's statements or admissions. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006); *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996); *State v. C.D.W.*, 76 Wn. App. 761, 763, 887 P.2d 911 (1995) (citing *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986)). And our Supreme Court has held that the *corpus delicti* rule, particularly the requirement that the State establish some independent corroboration that the offense occurred, is judicially created, not constitutionally mandated.

Unlike the principles enunciated in *Miranda v. Arizona*, [384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966),] and the development of similar constitutional doctrines relating to the voluntariness of confessions, *the corpus delicti rule does not have a constitutional source*; it is traceable to English law and was early established in America.

Corbett, 106 Wn.2d at 576 (emphasis added); *see also C.D.W.*, 76 Wn. App. at 763.

Although these cases support the State's assertion that Washington's version of the *corpus delicti* rule is not a constitutional standard, they do not address whether the federal version of the *corpus delicti* rule is a constitutional standard.⁷ To determine that issue, we must examine whether the *corroboration rule* discussed in *Opper v. United States*, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101 (1954), *United States v. Lopez-Alvarez*, 970 F.2d 583, *cert. denied*, 506 U.S. 989 (1992), and related cases is based in common law, in which case the legislature may alter it by statute, or whether it is a statement of the minimal due process requirements established in the federal constitution.

⁷ Division One of this court noted in *C.D.W.* that the conclusion that *corpus delicti* is not constitutionally based "finds [additional] 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." 76 Wn. App. at 763 (citing *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)).

In *Opper*, our nation's highest court stated that the State is not required to establish *corpus delicti* independently of a defendant's statement, but it is required to show that a defendant's statement is reliable before it can be admitted. 348 U.S. at 93-94. The Court did not state that this requirement was a constitutional requirement; instead, it recognized that the corroboration requirement was based on an expansion of the common law and general concepts of justice:

In the United States our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. . . . See *Warszower v. United States*, 312 U.S. 342, 345 [n.2, 61 S. Ct. 603, 85 L. Ed. 876 (1941)]. We have gone further in that direction than has the common law of England. There the courts have been hesitant to lay down a rule that an uncorroborated extrajudicial confession may not send an accused to prison or to death. In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession.

Opper, 348 U.S. at 89-90 (footnote omitted).

Similarly, in *Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954), the Court stated:

The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, *Warszower*[, 312 U.S. at 345 n.2]; *Isaacs v. United States*, 159 U.S. 487, 16 S. Ct. 51, 40 L. Ed. 229 [(1895)]; cf. *Miles v. United States*, 103 U.S. 304, 311-12, 26 L. Ed. 481 [(1880)], and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts, *Forte v. United States*, 94 F.2d 236 [(1937)]. . . . Its purpose is to prevent "errors in convictions based upon untrue confessions alone," *Warszower*[, 312 U.S. at 347]; *its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused*. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, *Bram v. United States*, [168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897)]; *Wilson v. United States*, [162 U.S. 613, 622-23, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)], further caution is warranted because the accused

may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be “involuntary” within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made, Note, 28 IND. L. J. 374. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror. Nevertheless, because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the dangers which gave rise to them.

Smith, 348 U.S. at 152-53 (emphasis added).

Nor do these controlling cases set out a common law basis for the corroboration rule; they note that the corroboration rule is a judicially-created exclusionary rule, necessary only to protect a defendant from being convicted based on unreliable evidence that can easily be misconstrued by a jury. Our Supreme Court thus recognized that a trial court is in a better position to evaluate the weight of particular evidence (defendant’s statements) in light of the surrounding circumstances, which suggests that the corroboration rule is evidentiary and not constitutionally based.

The *Smith* Court also noted that, although its application was later expanded, the corroboration requirement was given limited application at its inception, applying only to serious crimes of violence, which were at the time capital offenses. 348 U.S. at 153-54. This limitation is an additional indication that the corroboration requirement was not constitutionally based; had it been a constitutional limitation, it would have applied across the board at its inception.

Nine years later, in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the Court reiterated that the corroboration requirement was judicially, not constitutionally, created, stating:

It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. We observed in [*Smith*, 348 U.S. at 153], that the requirement of corroboration is rooted in “a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.”

Wong Sun, 371 U.S. at 488-89 (footnote omitted) (quoting *Smith*, 348 U.S. at 153).

And the federal courts have continued to recognize that the corroboration rule is not constitutionally based. In *Lopez-Alvarez*, the court stated that the corroboration standard arose “from the high incidence of false confessions and the resulting need to prevent ‘errors in convictions based upon untrue confessions alone,’” and from “the belief that ‘a system of criminal law enforcement which comes to depend on the “confession” will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.’” 970 F.2d at 589 & n.5 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); *Warszower*, 312 U.S. at 347). It further stated that the Court had established this approach in *Wong Sun*. *Lopez-Alvarez*, 970 F.2d at 591 (citing *Wong Sun*, 371 U.S. 471). But it also noted that the *Smith* Court held there could be circumstances where independent corroboration was not required because the circumstances of the admission were sufficient to establish its reliability absent this proof. *Lopez-Alvarez*, 970 F.2d at 589-90 n.6.

Additionally, in *In re Application of Aschmieller*, 403 F. Supp. 983 (S.D.S.D. 1975), *aff'd*, 534 F.2d 830 (8th Cir. 1976), the court stated:

The requirement of corroboration of an extrajudicial confession of the accused or the corpus delicti rule has never been termed a constitutional requirement. [*United States*] *ex rel. Hayward v. Johnson*, 508 F.2d 322, 330 (3rd Cir.) (n.28 citing *Smith*, 348 U.S. at 152-53)], *cert. denied*, 422 U.S. 1011 [(1975)]. Additionally, it should be noted that the requirement of corroboration of

the testimony of an accomplice is not a constitutional right. *Johnson v. Turner*, 429 F.2d 1152, 1155 (10th Cir. 1970); *Lee v. Henderson*, 342 F. Supp. 561, 566 (W.D.N.Y. 1972); *Wampler v. Warden, Maryland Penitentiary*, 224 F. Supp. 37, 40 (D.Md. 1963). The requirement of corroboration in both cases focuses upon the inherently suspect and untrustworthy nature of the respective forms of evidence. Neither has been constitutionally required, however, and a violation of either rule does not raise a question cognizable in a habeas corpus hearing.

403 F. Supp. at 985.

Thus, case law weighs heavily *against* the trial court's conclusion here that corroboration was a federal constitutional requirement.⁸

We conclude that the independent evidence or corroboration requirement is not constitutionally based and that there is no constitutional impediment to admitting a defendant's statements found trustworthy under RCW 10.58.035(1). Thus, the trial court erred when it excluded Dow's statement on that basis.

Dow argues that, although the legislature clearly intended to adopt the *Opper* standard, because RCW 10.58.035(2)(a) is cast as a factor rather than an independent requirement, it failed to do so. See E.H.B. 1427, 58th Leg., Reg. Sess. (Wash. 2003); compare *Lopez-Alvarez*, 970 F.2d 583. The problematic provision reads, "Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense." RCW 10.58.035(2)(a) (emphasis added). We note that the provision seems oxymoronic. To be relevant, evidence must either corroborate or contradict the defendant's statement or the elements of the offense. Thus, RCW 10.58.035(2)(a) adds little to the analysis the trial court

⁸ Although Dow briefly mentions the State Constitution, he appears to concede that the due process standards are the same under the federal and state constitutions. See *State v. Fortune*, 128 Wn.2d 464, 475, 909 P.2d 930 (1996) (in absence of argument, we will construe the state due process clause consistently with the federal due process clause). Accordingly, we have addressed only the federal due process issue.

necessarily undertakes in evaluating the trustworthiness of the confession, admission, or statement. And Dow has not presented a persuasive argument or authority demonstrating how the wording results in faulty analysis or in the admission of an unreliable confession, admission, or statement.

Assuming *arguendo* that the *corpus delicti* rule is grounded in due process principles, RCW 10.58.035 satisfies the core due process requirement that the defendant receive a fair trial and requires that he not be convicted on the basis of an unreliable confession by demanding some indication of reliability before a defendant's inculpatory statement is submitted to a jury. In addition, the statute ensures that the defendant may argue to the trier of fact that the statement is not trustworthy or is otherwise insufficient to support a conviction. The requirement that there be some indicia of reliability before the statement is admitted, and that the defendant be able to argue unreliability or insufficiency, protects the defendant from being convicted based solely on an unreliable statement. And nothing indicates that these requirements fall below those analyzed in *Opper*. RCW 10.58.035 is a lawful exercise of legislative authority and the trial court erred by refusing to analyze the admissibility of Dow's trustworthy statement under the factors set out in that statute.

I agree with both my learned colleagues. The *corpus delicti* rule is not constitutionally based and it addresses both admissibility and sufficiency of evidence. RCW 10.58.035 is a valid refinement of the *corpus delicti* rule but it addresses only admissibility, not sufficiency. As the dissent points out, RCW 10.58.035 does not change our long-standing rule that a confession alone will not support a finding of guilt; to support a conviction, the State must establish a *corpus delicti* by proof independent of the confession.

In this case, it is premature to dismiss. On remand, the trial court should consider admissibility of the confession as set forth in the majority. The defense may file a *Knapstad* motion and the trial court should consider in that context whether independent proof of a corpus delicti exists. In spite of the State's concessions in the record, the proper place to address these or other deficiencies in the State's case is at such a *Knapstad* hearing. Thus, I would hold that the dissent's call for dismissal comes too soon.

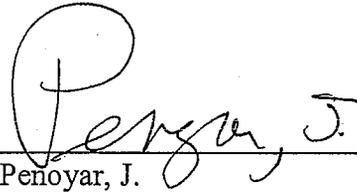
Accordingly, we reverse and remand for the trial court to apply each of the factors set out in RCW 10.58.035⁹ to Dow's statement and determine its admissibility and for any such further hearings as may be appropriate.¹⁰


QUINN-BRINTNALL, J.

⁹ We note that the lenient *corpus delicti* requirements of RCW 10.58.035 do not lessen the State's burden of proving the elements of the charged offense beyond a reasonable doubt. Nor do they alter the legal requirement that a defendant's conviction will be affirmed only when the record contains sufficient evidence from which any jury could find the defendant committed each element of the charged offense beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

¹⁰ We note that, on this record, the trial court could have dismissed the charge for insufficient evidence under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), that issue is not before us. In Finding of Fact No. 3, the trial court specifically found that the *only* evidence against Dow was his statement; and in Finding of Fact No. 6, it found that the statement was ultimately exculpatory rather than sufficient to support a conviction. The State does not challenge these findings, and they are verities on appeal. *Brockob*, 159 Wn.2d at 343. These findings clearly establish that the trial court could have dismissed the case without prejudice under *Knapstad*. But the record also shows that because the State objected that it had not had the opportunity to present all the relevant evidence at the *corpus delicti* hearing, the trial court did not decide the motion to dismiss under *Knapstad*. Therefore, where the trial court did not decide the *Knapstad* motion because the State contended that it had not had sufficient time to respond, we do not address Dow's alternate motion to dismiss under *Knapstad*.

PENoyAR, J. (concurring) — I concur in the reasoning and the result of the majority. I also agree with the dissent, however, that a conviction cannot stand unless the State establishes a *corpus delicti* that a crime has occurred, independent from any confession. Thus, the fact that a confession may be admissible under RCW 10.58.035 does not mean that the confession, standing alone and regardless of its content, is sufficient for conviction. In this particular case, the correct course is to remand to the trial court for a *Knapstad*¹ hearing, a trial or any other appropriate proceeding.



Penoyar, J.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

HOUGHTON, C.J. (dissenting) -- I respectfully dissent. Although I agree with the majority that the *corpus delicti* rule does not derive from the constitution, its purpose is to ensure that sufficient evidence supports criminal conviction. RCW 10.58.035 establishes standards for admitting uncorroborated confessions into evidence, but it does not abrogate the long line of cases holding that uncorroborated confessions are insufficient to establish the defendant's guilt. Accordingly, I would affirm the trial court's dismissal of charges against Keith Ian Dow but on alternative grounds, I would hold that absent independent proof that a crime occurred, his statements are insufficient to establish guilt as a matter of law.

The majority opinion at page 6 states, "The *corpus delicti* rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant's statements or admissions." But the *corpus delicti* rule does not merely set a standard for the admission of statements into evidence, it establishes that an uncorroborated confession is insufficient evidence to sustain a conviction as a matter of law unless independent proof shows that a crime occurred. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996); *see also* JOHN W. STRONG ET AL., 1 MCCORMICK ON EVIDENCE § 145, at 525 (5th ed. 1999) ("There is no justification for treating the rule as one related to admissibility of defendant's admissions; the requirement should be only one of evidence sufficiency.").

Corpus delicti means "body of the crime" and prevents convictions for crimes that never occurred. *Aten*, 130 Wn.2d at 655 (quoting 1 MCCORMICK ON EVIDENCE § 145, at 557 (4th ed. 1992)). The *corpus delicti* rule requires proof of (1) an injury or loss and (2) a criminal act that caused it. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Our Supreme Court articulated this standard in *Aten*, 130 Wn.2d at 656:

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.

(Quoting *State v. Meyer*, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951.) And our courts continue to follow the *Aten* rule to require independent evidence corroborating confessions. See, e.g., *State v. Baxter*, 134 Wn. App. 587, 596, 141 P.3d 92 (2006); *State v. Rooks*, 130 Wn. App. 787, 802, 125 P.3d 192 (2005), *review denied*, 158 Wn.2d 1007 (2006).

RCW 10.58.035 purports to limit this rule by providing that a trustworthy admission of the defendant is admissible as evidence even absent independent proof of the *corpus delicti*. But the statute does not limit the long standing, deeply imbedded rule that an uncorroborated confession is insufficient evidence to support a conviction. The State admitted it did not have any direct evidence that sexual contact actually occurred without the confession. Absent such proof, only Dow's statements could establish whether any criminal conduct took place. But the *corpus delicti* rule does not permit this result.

Accordingly, I would affirm the trial court but on different grounds. Therefore, I dissent.



Houghton, C.J.