

81243-8

NO. 34802-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

KEITH IAN DOW,

Respondent.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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 ORIGINAL

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iii

B. STATEMENT OF THE CASE 1

C. ARGUMENT

I. THE STATE’S FAILURE TO ADEQUATELY PERFECT THE RECORD PRECLUDES APPELLATE REVIEW OF THE STATE’S ARGUMENTS 4

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT THE DEFENDANT’S STATEMENTS WERE NOT ADMISSIBLE UNDER RCW 10.58.035 7

III. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT RCW 10.58.035 WOULD BE UNCONSTITUTIONAL ABSENT A REQUIREMENT FOR SOME INDEPENDENT EVIDENCE OF THE EXISTENCE OF A CRIME PRIOR TO THE ADMISSION OF A DEFENDANT’S STATEMENTS INTO EVIDENCE 12

IV. THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THE CHARGE AGAINST THE DEFENDANT BECAUSE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT THE STATE DOES NOT HAVE SUBSTANTIAL EVIDENCE OF GUILT 17

D. CONCLUSION 21

E. APPENDIX

1. Washington Constitution, Article 1, § 3 22

2. United States Constitution, Fourteenth Amendment 22

3. RCW 10.58.035 23

TABLE OF AUTHORITIES

	Page
<i>Federal Cases</i>	
<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968)	13
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	19
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	20
<i>Opper v. United States</i> , 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954)	13, 16, 17
<i>United States v. Lopez-Alvarez</i> , 970 F.2d 583 (9th Cir. 1992)	14-16
<i>Wong Sun v. United States</i> , 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)	15

State Cases

<i>Bremerton v. Corbett</i> , 106 Wn.2d 569, 723 P.2d 1135 (1986)	7, 8, 10
<i>Olmsted v. Mulder</i> , 72 Wn.App. 169, 863 P.2d 1355 (1993)	5
<i>State v. Ashurst</i> , 45 Wn.App. 48, 723 P.2d 1189 (1986)	7
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996)	20
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	19
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004)	18
<i>State v. Elmore</i> , 139 Wn.2d 250, 985 P.2d 289 (1999)	11
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999)	13

<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	20
<i>State v. Groom</i> , 133 Wn.2d 679, 947 P.2d 240 (1997)	18, 19
<i>State v. Hamlet</i> , 133 Wn.2d 314, 944 P.2d 1026 (1997)	11
<i>State v. Hamrick</i> , 19 Wn.App. 417, 576 P.2d 912 (1978)	7
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	16, 21
<i>State v. Jamison</i> , 105 Wn.App. 572, 20 P.3d 1010 (2001)	11
<i>State v. Johnson</i> , 113 Wn.App. 582, 54 P.3d 155 (2002)	4, 5
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974).	20
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986)	18-20
<i>State v. Lee</i> , 135 Wn.2d 369, 957 P.2d 741 (1998)	17
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992)	11
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	19
<i>State v. Munson</i> , 7 Wash. 239, 34 P. 932 (1893)	7
<i>State v. Ray</i> , 130 Wn.2d 673, 926 P.2d 904 (1996)	7
<i>State v. Stevens</i> , 58 Wn.App. 478, 794 P.2d 38 (1990)	4
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	13
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	20

Constitutional Provisions

Washington Constitution, Article 1, § 3	12, 16, 17
United States Constitution, Fourteenth Amendment	16, 17

Statutes and Court Rules

RAP 9.1 4
RAP 10.3 5
RAP 10.4 6
RCW 9A.44.010 21
RCW 10.58.035 5-12, 16

Other Authorities

Final Bill Report, EHB 1427, 58th Legislature (Wash. 2003) 9

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 a 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 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.

ARGUMENT

I. THE STATE'S FAILURE TO ADEQUATELY PERFECT THE RECORD PRECLUDES APPELLATE REVIEW OF THE STATE'S ARGUMENTS.

Under RAP 9.1(a) the "record on review" may include information from any of the following four sources: (1) a "report of proceedings," (2) "clerk's papers," (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. RAP 9.1(a). The failure to adequately perfect the "record on review" sufficient to allow the court to review a particular assignment of error precludes the court's consideration of that issue. *State v. Johnson*, 113 Wn.App. 582, 54 P.3d 155 (2002).

For example, in *State v. Stevens*, 58 Wn.App. 478, 794 P.2d 38 (1990), a defendant convicted of first degree statutory rape appealed, arguing in part that the trial court had erred when it admitted colposcope photographs into evidence. However, the defendant failed to include these exhibits in his designation of clerk's papers. As a result, they were not made a part of the record on appeal and the court refused to consider this argument.

Similarly, in *State v. Johnson, supra*, the defendant appealed from his conviction for murder and argued in part that the trial court erred when it admitted certain autopsy photographs. The court of appeals refused to consider this argument because the defendant did not include the photographs in the record on appeal. The court held: "And Johnson's complaints about

the autopsy photographs are unreviewable as he has not provided the exhibits.” *State v. Johnson*, 113 Wn.App. at 491. *See also Olmsted v. Mulder*, 72 Wn.App. 169, 183, 863 P.2d 1355 (1993) (the burden is on the party aggrieved by a court decision to perfect the record so this court has before it all the evidence necessary to resolve the issue).

In the case at bar appellant argues that the trial court erred when it failed to rule that under RCW 10.58.035 a taped, transcribed statement the defendant gave to the police was admissible in spite of the corpus delicti rule. As far as appellant can tell, the state never made this statement a part of the record at the trial level. Even had it done so, the state has not made this document part of the “record on review.” Rather, the state has attached a copy of a document as an appendix to its brief that the state apparently claims is the transcription of the defendant’s statements to the police. This action violates RAP 10.3(a)(7), which states:

(7) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

RAP 10.3(a)(7).

The exception noted in the rule states:

(c) Text of Statute, Rule, Jury Instruction, or the Like. If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or

include them by copy in the text or in an appendix to the brief.

RAP 10.4(c).

In the case at bar the document the state has attached to its brief is not part of the “record on appeal.” In addition, the state has failed to get this court’s permission to attach this document to its brief. Since it is not a “statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like” under RAP 10.4(c), this court should not consider it as part of this appeal.

As is explained in Argument II herein, in order to determine the admissibility of a defendant’s statement under RCW 10.58.035(2)(b), the court should consider a number of nonexclusive factors, including “whether there is any evidence corroborating or contradicting *the facts set out in the statement* including the elements of the offense.” In order to determine whether or not the trial court abused its discretion under this factor, this court on appeal must have a copy of the disputed statement in order to review the trial court’s evaluation of “evidence corroborating” the “facts set out in the statement.” Thus, absent the statement, this court cannot effectively review the state’s argument on appeal. As a result, this court should affirm the trial court’s decision.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT THE DEFENDANT'S STATEMENTS WERE NOT ADMISSIBLE UNDER RCW 10.58.035.

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). The Washington Supreme 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*, the Washington supreme 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, factor (a) deals directly with the latter concern for preventing convictions based upon false confession 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, in the case at bar, the 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). An abuse of discretion occurs only when the court bases its decision on clearly untenable or manifestly unreasonable grounds, or when no reasonable person would take the view adopted by the trial court. *State v. Jamison*, 105 Wn.App. 572, 20 P.3d 1010 (2001).

In the case at bar the trial court’s oral decision indicates that it specifically considered the factors listed in RCW 10.58.035(2). In the court’s opinion factors (b), (c), and (d) militated towards admitting the defendant’s statements as the court found nothing to indicate coercion or overbearing within the facts surrounding the giving of the defendant’s statements. However, the court then went on to address the first factor and noted that there was no independent evidence of any kind to corroborate or contradict the facts set out in the statement or the existence of a crime. In addition, the court noted that the statement, while an admission of underlying facts, was actually a denial of any of all the elements of the crime charged. Thus, under the facts of this case, the court found that the defendant’s statement was not admissible under RCW 10.58.035. This decision making process shows a

thoughtful, careful analysis of the facts and factors under RCW 10.58.035 and does not constitute a decision “on clearly untenable or manifestly unreasonable grounds,” or a decision that “no reasonable person would take.” Thus, the state has failed to prove that the trial court abused its discretion and this court should affirm the ruling of the trial court.

III. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT RCW 10.58.035 WOULD BE UNCONSTITUTIONAL ABSENT A REQUIREMENT FOR SOME INDEPENDENT EVIDENCE OF THE EXISTENCE OF A CRIME PRIOR TO THE ADMISSION OF A DEFENDANT’S STATEMENTS INTO EVIDENCE.

While due process under Washington Constitution, Article 1, § 3 and 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, assuring the constitutional right to a fair trial free from unreliable evidence has always been the underlying

principle of 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 issues 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 the case at bar the trial court reviewed all of the evidence the state presented and found that there was no independent evidence at all to support a conclusion that “the criminal conduct at the core of the offense ha[d] occurred.” (to quote from *Lopez-Alvarez*). The court’s finding was as follows:

3. The court had reviewed the evidence available to the state, which includes the transcript of an interview conducted by a 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.

CP 5-6.

The state has not assigned error to this finding, which thereby becomes a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). As this finding clarifies, there is no independent evidence at all to support a conclusion that the “criminal conduct at the core of the offense” occurred. Thus, under *Lopez-Alvarez* as it explains *Opper*, the defendant’s statement is not admissible and the trial court did not err when it so ruled.

In its brief the state suggests that in RCW 10.58.035 the Washington Legislature was free to 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. Washington Constitution, Article 1, § 3, provides equal but not greater due process protection. *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741 (1998). As a result, the standard set in *Opper* also functions as the minimum requirements for due process under Washington Constitution, Article 1, § 3.

The state’s argument that the Washington legislature was free to adopt a lesser standard of admissibility than that set in *Opper* is also incorrect because it presupposes that the legislature did adopt a lesser standard. Rather, as was set out in Argument II, the legislative history to RCW 10.58.035 clarifies that the legislature specifically intended to and did adopt the standard set in *Opper*. As a result, the trial court in this case did not err when it applied the *Opper* standard.

IV. THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THE CHARGE AGAINST THE DEFENDANT BECAUSE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT THE STATE DOES NOT HAVE SUBSTANTIAL EVIDENCE OF GUILT.

In the case at bar the defense also made a motion to dismiss under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing that even if the defendant's statements were admissible, there was still insufficient evidence to support a conviction. While the court did not reach this argument, this court may yet affirm on this or any other legal basis that the record adequately supports. *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004). As the following explains, if this court allows the state to supplement the record with the transcript of the defendant's statement to the police, then the record on appeal will allow this court to affirm under *Knapstad*.

In criminal cases, just as in civil cases, the defendant is entitled to judgment in his or her favor as a matter of law, if the evidence, seen in the light most favorable to the state, is insufficient to prove each and every element of the crime charged. *State v. Knapstad, supra*. In *State v. Groom*, 133 Wn.2d 679, 947 P.2d 240 (1997), the Washington State Supreme Court reviewed the procedures for such a motion to dismiss as follows:

Under *Knapstad*, 107 Wash.2d at 356, 729 P.2d 48, such a motion should be initiated by a sworn affidavit "alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." Then "[t]he State can defeat the motion by filing an

affidavit which specifically denies the material facts alleged in the defendant's affidavit. If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory." *Id.* On the other hand, "[i]f the State does not deny the undisputed facts or allege other material facts," the court must decide "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." *Id.* at 356-57, 729 P.2d 48. "Since the court is not to rule on factual questions, no findings of fact should be entered." *Id.* at 357, 729 P.2d 48.

State v Groom, 133 Wn.2d at 634.

In other words, the issue under *Knapstad* is whether there is substantial evidence to support each and every element of the crime charged beyond a reasonable doubt. This standard is identical to the standard for determining whether substantial evidence supports a conviction on appeal. The substantial evidence rule derives from the principle that as a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, 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.* Similarly, any charge not supported by substantial evidence is subject to dismissal under *Knapstad*.

“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 addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

In the case at bar Finding of Fact No. 3 as quoted in Argument III

clarifies that the only evidence the state has on guilt came from the defendant's statement to the police. However, as the court notes in Finding of Fact No. 6, the defendant's statement to the police is not a confession.

Rather, it is a denial. This finding states:

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.

CP 6.

The state has also failed to assign error to this finding. As a result, it is also a verity on appeal. *State v. Hill, supra*. However, were this court to go behind this finding and examine the defendant's statement as attached as an appendix to the state's brief, the conclusion is the same. The defendant admits to certain physical contact with the complaining witness, but he denies any sexual contact, and he absolutely denies that he acted with "sexual intent." Under RCW 9A.44.010(2), the term "sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." Since the defendant's statement denies both the sexual touching and any actions "for the purpose of gratifying sexual desire" his statement is not an admission. Thus, there is no substantial evidence to support a conviction, and this court should affirm the dismissal.

CONCLUSION

The trial court did not err when granted the defendant's motion to suppress his statement to the police and when it granted the defendant's motion to dismiss.

DATED this 19th day of January, 2007.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

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.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,)

Appellant,)

vs.)

KEITH IAN DOW,
Respondent)

NO. 05-1-01199-5
COURT OF APPEALS NO:
34802-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

COUNTY OF COWLITZ)

ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 19TH day of JANUARY, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTORNEY
312 S.W. 1ST STREET
KELSO, WA 98626

KEITH IAN DOW
905 YEW ST.
KELSO, WA 98626

and that said envelope contained the following:

- 1. BRIEF OF RESPONDENT
- 2. AFFIDAVIT OF MAILING

DATED this 19TH day of JANUARY, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 19th day of JANUARY 2007.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009

AFFIDAVIT OF MAILING - 1

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