IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TERRY COXE, Appellant.	No. 39568-1-II UNPUBLISHED OPINION

Worswick, A.C.J. — Terry Coxe appeals his conviction for two counts of first degree child molestation, arguing (1) improper denial of his jury trial waiver, (2) insufficient evidence, (3) ineffective assistance of counsel, and (4) excessive sentence. We affirm.

FACTS

Terry Coxe was convicted of two counts of first degree child molestation against his step-granddaughter, B.K. B.K., who was in second grade when the crime occurred, was living with her mother, Eden Kelly, in the household of Coxe and his wife Myrna, B.K.'s grandmother. B.K. told Kelly that Coxe had touched her buttocks inside her underwear while B.K. was sitting on Coxe's lap at the computer. B.K. said she asked Coxe to stop, which he did, but he soon did it again, again stopping when B.K. told him to. Kelly brought B.K. to B.K.'s school counselor,

Sharon Hedlund. B.K. told Hedlund that Coxe had touched her buttocks inside her underwear twice within a few minutes while in front of the computer, and once on a prior occasion. Hedlund reported the incident to the police.

Deputy Matthew Wallace conducted a voluntary interview with Coxe, who told Deputy Wallace that he had held B.K. on his lap, rubbed her tummy and back, had tickled her and wrestled with her. Coxe said he might have accidentally touched B.K.'s bottom during wrestling. At a second interview, Coxe admitted to Deputy Wallace that he had been struggling with sex addiction all his life. Coxe said that he had given B.K. a belly rub once, but stopped because he thought it might be inappropriate. Coxe also said that B.K. was a very intelligent girl and was not prone to being coached. Coxe said that he might have touched B.K. inappropriately, but that his mind could be blocking the incident.

The State charged Coxe with two counts of first degree child molestation. Before trial, Coxe moved to waive his right to trial by jury. The trial court denied Coxe's motion because the case turned on the credibility of witnesses, making it proper for a jury. At trial, B.K. testified that Coxe put his hand inside her underwear and touched her buttocks while she was on his lap in front of the computer, and before that, when she was sitting on his lap on a green chair. Kelly and Hedlund testified about B.K.'s statements to them. Deputy Wallace recounted Coxe's statements from the voluntary interviews. Defense counsel did not object to the admission of Coxe's statements. At the close of the State's case, defense counsel moved to dismiss the charges, arguing that the State had failed to prove the element of sexual gratification. The trial court

denied the motion. At the close of Coxe's case, defense counsel renewed the motion to dismiss. The trial court again denied the motion. The jury found Coxe guilty of both counts of first degree child molestation. The jury also issued a special verdict finding that Coxe had abused his position of trust with B.K on both counts.

The trial court sentenced Coxe to two consecutive 67 month sentences for a total of 134 months. The trial court stated that the sentence might have been lower but for the aggravating factor that Coxe abused his position of trust, and but for the fact that Coxe accepted no responsibility for the crime.

ANALYSIS

I. Jury Trial Waiver

Coxe argues that the trial court erred by refusing his motion to waive trial by jury. Under CrR 6.1(a) and RCW 10.01.060, a defendant may waive his right to a jury trial with consent of the court. A defendant does not have a constitutional right to a bench trial. *State v. Oakley*, 117 Wn. App. 730, 743, 72 P.3d 1114 (2003). Rather, this court reviews the refusal to accept a jury trial waiver for abuse of discretion. *See State v. Batten*, 17 Wn. App. 428, 439-40, 563 P.2d 1287 (1977); *State v. Newsome*, 10 Wn. App. 505, 506-07, 518 P.2d 741 (1974).

Here, the trial court held that Coxe's case was better suited for a jury trial than a bench trial because it turned on issues of credibility. Coxe argues that, because judges may properly determine credibility in a bench trial, the trial court abused its discretion by refusing Coxe's jury trial waiver on this basis.

In *State v. Turner*, 16 Wn. App. 292, 295, 555 P.2d 1382 (1976), we upheld a judge's refusal to grant a jury waiver for reasons including increased public confidence in the verdict and reduced burden on the court. Here, the rationale for denying the jury waiver is as compelling as the rationale upheld in *Turner*. The trial court therefore did not abuse its discretion.

Additionally, this court will not reverse the refusal of a jury trial waiver unless the defendant shows that he was prejudiced by having his case tried to a jury. *See State v. Maloney*, 78 Wn.2d 922, 928, 481 P.2d 1 (1971). Here, Coxe does not argue that the jury trial was unfair, and there is nothing in the record to suggest as much. Coxe's argument on this point fails.

II. Sufficiency of Evidence

Coxe next argues that the State presented inadequate evidence for the jury to convict him beyond a reasonable doubt. Specifically, Coxe argues that the State failed to prove that he touched B.K. for sexual gratification, which is an element of child molestation.[1] Coxe asserts that the State was required to present additional evidence of sexual gratification, beyond the fact that Coxe touched B.K. "Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Coxe relies on *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), for the proposition that the State must prove sexual gratification by extrinsic evidence, beyond the

[1] RCW 9A.44.083, Child Molestation in the First Degree, prohibits sexual contact with a person who is under 12, where the perpetrator is at least 36 months older and not married to the victim. RCW 9A.44.010(2) defines "sexual contact" 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."

circumstances of the touching alone. In *Powell*, the defendant hugged a child across the chest,

touched her groin through her underwear when helping her off his lap, and touched her thighs. 62 Wn. App. at 916. The court noted that each touch was outside the clothes and susceptible of innocent explanation. *Powell*, 62 Wn. App. at 918. The *Powell* court held that, when an adult is a caretaker for a child, "in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification."[2] 62 Wn. App. at 917 (footnote omitted). The *Powell* court held that, under such facts, the State could not prove sexual gratification without extrinsic evidence beyond the circumstances of the touching. 62 Wn. App. at 918. Here, Coxe was one of B.K.'s caretakers. And Coxe touched an intimate area of B.K., not a primary erogenous area.

The State argues, however, that *Powell* does not forbid the jury to infer sexual gratification from the circumstances of the touching. The State cites *State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224 (1989) for the proposition that the jury may consider the circumstantial evidence of the touching to find sexual gratification, even where the defendant was the victim's caretaker. In *Wilson*, the defendant was partly disrobed, and the victim was naked at the time of the touching. 56 Wn. App. at 69. Although *Wilson* permitted the jury to infer sexual gratification from the circumstances of the touching, the circumstances were far more damning than in *Powell*. Read together, *Powell* and *Wilson* hold that, while the jury may consider the circumstances of the touching to infer sexual gratification, those circumstances must be

[2] *Powell* notes that intimate areas are areas near the primary erogenous areas, such as hips, buttocks, and lower abdomen. 62 Wn. App. at 917 n.3.

unequivocal, unlike the potentially innocent touching in *Powell*.

The State further distinguishes the instant case from *Powell* by citing other cases where the jury was permitted to infer sexual gratification from the circumstances of the touching. *State v. Harstad*, 153 Wn. App. 10, 21-22, 218 P.3d 624 (2009); *State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005); *State v. T.E.H.*, 91 Wn. App. 908, 916-17, 960 P.2d 441 (1998). Unlike in *Powell*, in each of these cases the touching at issue was either inside the clothing or was not susceptible of innocent explanation. The touching here is likewise distinguishable from *Powell* because the touch was under the clothes, occurred multiple times, recurred after the child requested it to stop, and was unequivocally not susceptible of innocent explanation. Unlike the potentially innocent touches in *Powell,* Coxe's repeatedly placing a hand inside B.K.'s underwear while she was seated in his lap was not susceptible of innocent explanation. Because the touching here was not susceptible of innocent explanation, *Powell* does not apply and extrinsic evidence of sexual gratification was not required. We hold that the circumstances here provided sufficient evidence for the jury to find sexual gratification beyond a reasonable doubt. Coxe's claim as to sufficiency of the evidence fails.

III. Ineffective Assistance of Counsel

Coxe next argues that defense counsel's failure to raise the corpus delicti rule at trial was ineffective assistance of counsel. Appellate courts review an ineffective assistance claim de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). The Sixth Amendment to the United States Constitution guarantees effective assistance of counsel. *See In re Pers. Restraint of Riley*,

122 Wn.2d 772, 779-80, 863 P.2d 554 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Denial of effective assistance is manifest error affecting a constitutional right, reviewable for the first time on appeal. *See State v. Holley*, 75 Wn. App. 191, 196-97, 876 P.2d 973 (1994); RAP 2.5(a). But when an ineffective assistance claim rests on counsel's failure to object, the defendant bears the burden to show that the objection would have been successful. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The corpus delicti ("body of the crime") rule requires the State to provide sufficient evidence to prove that a crime took place before the State may admit the defendant's own statements. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006). To prove the corpus delicti, the State need not establish each element of the crime beyond a reasonable doubt, or even by a preponderance of the evidence.[3] *State v. C.M.C.*, 110 Wn. App. 285, 288, 40 P.3d 690 (2002). Rather, the State must provide prima facie to establish that *someone* committed a crime. *C.M.C.*, 110 Wn. App. at 288.

As we hold above, the State presented sufficient evidence for the jury to convict Coxe beyond a reasonable doubt without relying on his statements. When the State presents sufficient evidence to convict, independent of the defendant's statements, the corpus delicti rule is satisfied

[3] In *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010), the Court held in dictum that, to prove the corpus delicti, "the State must still prove every element of the crime charged by evidence independent of the defendant's statement." This holding appears to offhandedly reverse longstanding precedent that the State need not prove every element of the crime charged to prove the corpus delicti. *See, e.g.*, *State v. Angulo*, 148 Wn. App. 642, 653, 200 P.2d 752 (2009) (citing *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967)). The *Dow* court's holding was most likely a misstatement of established corpus delicti doctrine, not a reversal sub silentio.

per se. Coxe's objection under the corpus delicti rule would have failed, so Coxe has failed to meet his burden to show ineffective assistance and his claim fails.

IV. Excessive Sentence

Coxe argues that, assuming his conviction was valid, his sentence was excessive. The trial court sentenced Coxe to the minimum sentence of 67 months for both first degree child molestation offenses, but ordered Coxe to serve the sentences consecutively for a total of 134 months. Under RCW 9.94A.589(1)(a), consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. Under RCW 9.94A.535, a court may impose an exceptional sentence when the statute's enumerated aggravating factors are present. To reverse an exceptional sentence, this court must find: "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive . . . ." RCW 9.94A.585(4).

Here, the jury returned a special verdict that Coxe abused his position of trust by molesting B.K., an aggravating factor. RCW 9.94A.535(3)(n). But Coxe argues that this sentence was clearly excessive because both his conduct and his abuse of trust were not particularly egregious. We review whether a sentence was clearly excessive for abuse of discretion. *State v. Smith*, 124 Wn. App. 417, 435, 102 P.3d 158 (2004). We hold that the sentence was not clearly excessive and the trial court did not abuse its discretion in imposing consecutive minimum sentences. We therefore affirm Coxe's sentence.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Serko, J.P.T.