

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

STATE OF WASHINGTON,	)	No. 29724-1-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
JESUS FABIAN PERALES,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	
	)	

Siddoway, J. — Jesus Perales appeals his conviction of aggravated first degree murder. Relying on the delayed discovery of the partially decomposed body of his victim in the Yakima River three months after her throat had been cut at a location well upstream, he argues that the evidence that remained and was presented by the State was insufficient to prove she was killed to conceal a rape or that she was killed with a deadly weapon. We conclude that the evidence was clearly sufficient to support the conviction and the challenged findings, and affirm.

FACTS AND PROCEDURAL BACKGROUND

On October 20, 2008, 14-year-old Francisca Hernandez accepted an invitation

from Miguel Flores to skip school and join him at a party at the home of his mother and stepfather while the parents were away. The party began at about 11 a.m. Among others present were Miguel's younger brother, Luis; 21-year-old Jesus Perales; and Jesus' younger brother, Isaac.<sup>1</sup>

Most of those in attendance were drinking beer, including as a part of card games in which a player drawing an ace would have to "chug" his or her beer. <sup>2</sup> Report of Proceedings (RP) (Dec. 30, 2010) at 238. Francisca drank to the point of intoxication. At some point in the afternoon, she and Miguel retired to his bedroom and had sex. Afterwards, Miguel went outside to smoke a cigarette. Francisca first rejoined the group but then went to use the bathroom. Isaac followed her into the bathroom a few moments later.

Luis noticed Isaac follow Francisca and then heard noises suggesting that Isaac was having sex with her, which he went outside to report to Miguel; Miguel later testified that Luis told him Isaac might be raping Francisca, because he thought he heard her scream "like, no, stop." *Id.* at 243. Miguel came inside and pounded on the bathroom door, swearing at Isaac and demanding to know what he was doing. Isaac came out, but

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<sup>1</sup> In providing the factual background we refer to those present at the party by their first names to avoid confusion, given the common last names of several. We intend no disrespect. While we recognize that witnesses regularly referred to Jesus as "Jesse," we use his legal name.

not for several minutes.

Miguel entered the bathroom and found Francisca sitting on the floor, with her pants down to her thighs and shirt askew. He helped her dress, after which she told Miguel she wanted to go home. Miguel and Jesus helped her into the back seat of Miguel's stepfather's car and began the drive to her home in Sunnyside, with Miguel driving and Jesus sitting in the front passenger seat.

As they drove, Francisca began speaking about what had happened in the bathroom and stated several times that Isaac had raped her. She also said she was going to report him to the police. According to Miguel, Jesus told her to "shut up," remarked that "I can't let my brother go down for that," and then told Miguel to turn around and drive to a rural area so that he could think about what to do. *Id.* at 249.

He ultimately told Miguel to stop on a road by the canal system. By this point Francisca had passed out in the back seat, and Jesus said they should leave her somewhere to sleep. Jesus pulled Francisca out of the back seat and told Miguel to drive slowly, so that the car would not appear to anyone who might be watching to be stopped. Very shortly thereafter, Jesus tapped on the back of the car and Miguel stopped again, to let him back inside. Jesus said that Francisca was okay. Miguel had neither heard nor did he see anything suggesting she had been harmed.

The next day, however, Jesus admitted to Miguel that he had killed Francisca and

told him he should sell or burn his stepfather's car. He threatened Miguel should he report what had happened. Miguel soon became aware that law enforcement was investigating the disappearance of Francisca but initially remained silent. He decided to come forward after Luis was questioned and Miguel learned from police flyers that he himself had become a person of interest. Miguel consented to three taped interviews with police detectives beginning in late November, providing additional details over time. Francisca's body was recovered from the Yakima River three months later, after being discovered by a local fisherman.

Jesus Perales was charged with aggravated first degree murder. If convicted, a sentence of life without the possibility of release or parole would be mandatory. RCW 10.95.030. To prove aggravated first degree murder, the State must prove first degree premeditated murder as defined by RCW 9A.32.030(1)(a) and one or more of the aggravating circumstances specified by RCW 10.95.020. The amended information alleged the following aggravating circumstances:

[That the] premeditated First Degree Murder was committed

- (1) for the purpose to conceal the commission of a crime, Second Degree Rape and/or Indecent Liberties, and/or to conceal the identity of the persons committing said crime, or
- (2) in the course of, in furtherance of, or in immediate flight from the crime of Second Degree Rape and/or First Degree Kidnapping.

Clerk's Papers (CP) at 69. Deadly weapon and victim vulnerability aggravators were also

charged.

At trial, the State called as a witness the forensic pathologist who had conducted the autopsy of Francisca. He testified that the autopsy revealed that Francisca's neck had been slashed and she had bled to death. He expressed the opinion, for reasons he explained, that the assailant had to have used a nonserrated blade of at least three inches in length to make the cut. He found no evidence of a sexual assault.

There was no evidence at trial that Jesus had been seen with a knife on October 20 and no knife was recovered by law enforcement. Miguel did testify, however, that he knew Jesus at times carried knives and that the biggest knife he had seen Jesus carry had a six- to eight-inch blade.

The jury was instructed on the elements of first degree premeditated murder, first degree felony murder, and second degree murder. It found Mr. Perales guilty of aggravated first degree murder, finding, by special verdict, each of the three aggravating circumstances submitted for its decision. It also found by special verdict that Mr. Perales was armed with a deadly weapon in committing the crime.

The court sentenced Mr. Perales to the mandatory life imprisonment without the possibility of parole plus an additional 24 months for the deadly weapon enhancement. This appeal followed.

## ANALYSIS

Mr. Perales challenges the sufficiency of the evidence to establish the special verdict findings (1) that he committed the murder to conceal the commission of the crime of second degree rape or to protect or conceal the identity of a person committing that crime and (2) that he was armed with a deadly weapon.

When reviewing a defendant's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the necessary quantum of proof exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). When conducting a substantial evidence review, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Epefanio*, 156 Wn. App. 378, 384, 234 P.3d 253, *review denied*, 170 Wn.2d 1011 (2010).

I

Mr. Perales argues that there is insufficient evidence of the aggravating circumstance of concealment of second degree rape because there was no evidence that a second degree rape was committed. He concedes that the State was not obliged to specifically allege or instruct on the crime to be concealed or the person being protected. *State v. Gentry*, 125 Wn.2d 570, 602-03, 888 P.2d 1105 (1995); *State v. Jeffries*, 105 Wn.2d 398, 420, 717 P.2d 722 (1986) (concluding that due process “does not require that the specific crime be charged and included in the jury instructions”). But while such instruction was not required, the State was required to present sufficient evidence that the murder was committed with the intent to conceal a crime or the identity of a person committing a crime. *State v. Longworth*, 52 Wn. App. 453, 465-66, 761 P.2d 67 (1988). And because the State chose in this case to identify second degree rape as a crime that, in its view, the murder was intended to conceal—including in the jury instructions and special verdict forms—Mr. Perales contends that the State assumed the added burden of proving that the crime being concealed was second degree rape. Br. of Appellant at 11-12; *State v. Hickman*, 135 Wn.2d 97, 103-04, 954 P.2d 900 (1998) (under law of the case doctrine, State assumes the burden of added elements included in the jury’s instructions).

Mr. Perales argues that here, unlike in *State v. Boggs*, 80 Wn.2d 427, 431, 495 P.2d 321 (1972), there was no direct or sufficiently substantial circumstantial evidence of

sexual penetration. The forensic pathologist testified that he found no tears or other mechanical damage in the tissue of the vaginal area. There was no testimony that semen or other DNA (deoxyribonucleic acid) material was present. Isaac did not testify to anything happening in the bathroom.

Addressing the evidence that was presented, Mr. Perales argues that Luis's testimony as to what he heard is as consistent with indecent liberties as it is with rape. He characterizes Miguel's testimony as to Francisca's appearance when he entered the bathroom as comparable to evidence that was found insufficient to support a charge of rape in *State v. Maupin*, 63 Wn. App. 887, 894, 822 P.2d 355 (1992) (lacking expert opinion of sexual intercourse given the condition of the victim's body, the facts that her panties were missing, her nightgown was torn, and the lower half of her body was not covered by her snowsuit "at most suggests the possibility of some unspecified sex offense").

The State responds first that even if accepted, Mr. Perales's argument does not entitle him to relief because it identified two alternative aggravating circumstances, both of which the jury found. Its proof of these other aggravating circumstances is not challenged on appeal. We agree.

The jury was instructed on the following three aggravating circumstances from RCW 10.95.020:



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

.....

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

.....

(d) Kidnapping in the first degree.

After finding Mr. Perales guilty of first degree premeditated murder, the jury found all three circumstances by special verdict.

Only one aggravator need be found in order to elevate a first degree premeditated murder conviction to aggravated first degree murder. RCW 10.95.020 (requiring that “one or more of the following aggravating circumstances exist”); *see also In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339-40, 752 P.2d 1338 (1988) (either of two alternative aggravating circumstances would be sufficient to constitute aggravated first degree murder). Mr. Perales challenges only the first of the three aggravating factors found by the jury, without assigning error or otherwise contesting the other two. He even concedes that the evidence presented would support the jury’s determination that the crime of indecent liberties occurred. Br. of Appellant at 13-14. As a result, even if Mr. Perales could persuade us that substantial evidence did not support the finding that he committed the murder to conceal the commission of the crime of second degree rape, the insufficiency would be harmless.

The State also argues that the evidence was sufficient and we find it unquestionably so. Mr. Perales acknowledges that Francisca “allegedly claimed she had been raped.” *Id.* at 12. But he inexplicably dismisses her “alleged claim” and proceeds to discuss the shortcomings in what he refers to as the “actual evidence.” *Id.* Francisca’s allegations were actual evidence. Mr. Perales did not object at trial to Miguel’s testimony that Francisca repeatedly said that Isaac had raped her, and defense counsel conceded before trial that the statements would qualify as excited utterances.<sup>2</sup> 1 RP (Dec. 14, 2010) at 38. Mr. Perales has not attempted to assign error to the admission of that evidence. Excited utterances are admissible under ER 803(a)(2) and, where they would be admitted under the historical doctrine of *res gestae*, they do not violate the confrontation clause. *State v. Pugh*, 167 Wn.2d 825, 834-37, 225 P.3d 892 (2009).

Francisca’s repeated statements that Isaac raped her are further supported by the testimony of what Luis heard in the bathroom and reported to Miguel, and by Miguel’s

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<sup>2</sup> The following exchange occurred during the hearing on motions in limine:

[Defense counsel]: . . . I’m assuming that [the prosecutor] intends to present through [Miguel] statements made by [Francisca], or alleged statements made by her, when she was in the car. And I’ve looked and looked at that. It appears that it’s probably admissible under the excited utterance rule.

[Prosecutor]: Yeah, *res gestae*.

[Defense counsel]: Yeah. So I just wanted to make, for the record, that I wasn’t ignoring that aspect.

1 RP (Dec. 14, 2010) at 38.

testimony on Francisca's location and condition when he entered the bathroom. The absence of evidence of vaginal injury or DNA is unpersuasive. Evidence was presented that Isaac's rape followed shortly after Francisca had engaged in consensual sexual relations with Miguel and at a time when she was inebriated and may not have resisted, making mechanical injury less likely. Although a vaginal swab taken did not produce DNA, an officer present when Francisca's body was recovered testified that a great deal of water had been within her body cavities for months.

Substantial evidence supported the jury's finding of the aggravating circumstance of concealment of second degree rape.

## II

Mr. Perales also argues that substantial evidence does not support the jury's verdict on the deadly weapon aggravating factor. We review the evidence supporting the jury's verdict on an aggravating factor for substantial evidence, just as we do when evaluating the sufficiency of the evidence supporting the elements of a crime. *State v. Webb*, 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011).

A knife is a deadly weapon as a matter of law if it has a blade longer than three inches. RCW 9.94A.825; *State v. Zumwalt*, 79 Wn. App. 124, 129, 901 P.2d 319 (1995). To prove that a knife with a shorter blade was a deadly weapon, the State must prove that the knife had the capacity to cause the victim's death and was used in a way that was

likely to produce or could have easily and readily produced death. *Zumwalt*, 79 Wn. App. at 129-30; *see also State v. Peterson*, 138 Wn. App. 477, 484, 157 P.3d 446 (2007) (recognizing that a knife with a blade of exactly three inches is not a deadly weapon *per se*).

Mr. Perales's challenge to the sufficiency of evidence proceeds in some respects from the instructions given to the jury, which defined deadly weapon as

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

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

CP at 112 (Instruction 23). He points out that the second paragraph above leaves an instructional vacuum when it comes to a knife having a blade of exactly three inches, since it speaks of only knives with longer or shorter blades. Given the State's inability to produce a knife and this gap in instruction 23, he argues the jury "could only impermissibly speculate about the length of a blade and whether it fell within the definition of a deadly weapon." Br. of Appellant at 16.

To the extent that Mr. Perales relies on a shortcoming in instruction 23, error has not been preserved. No objection was made to the instruction at the time of trial. He has not provided argument that would support our considering instructional error for the first

time on appeal. RAP 2.5(a); RAP 10.3(a)(6); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (setting forth the analytical process for deciding whether an instructional error alleged for the first time on appeal constitutes manifest constitutional error).

He is entitled to raise a substantial evidence challenge for the first time on appeal, *Hickman*, 135 Wn.2d at 103 n.3, but his argument to that end is unpersuasive. The State's inability to produce the murder weapon is inconsequential, since the abundant circumstantial evidence presented is as reliable as direct evidence for purposes of our review. *See State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984) (the State need not produce the actual weapon to prove that a defendant was armed during the commission of an offense).

While the testimony of the pathologist and Miguel did not provide a basis for determining whether the knife had a blade that was exactly three inches long or whether it was longer, it did support a finding that the knife had the capacity to cause Francisca's death and was used in a way that was likely to produce death. The forensic pathologist described the wound to the front of Francisca's throat as being "halfway through the neck," explaining that "[w]hen it hits bone, it stops." 4 RP (Jan. 4, 2011) at 512, 513-14. He expressed his opinion that the assailant had to have used a "lot of force" to have the knife track in a straight line through tissue. *Id.* at 514. In further explaining the force required, he testified, "[E]ither you're talking about somebody swinging a heavy sword or

they're from behind[,] because they've had the flesh or muscles to brace and the head can't move because it's up against the assailant, or they have a grip on them and they can maintain the same degree of force without the body moving.” *Id.* at 524-25. The officer who photographed the recovery of Francisca's body and the autopsy testified similarly, that her neck was cut from one side of the neck across to the other. His photographs of her wound were admitted into evidence.

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Here again, substantial evidence supports the jury's finding. The judgment and sentence is affirmed.

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

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Brown, J.