

IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI

State of Missouri, )  
 )  
 Plaintiff, ) Case No. 12CG-CR00686  
 v. )  
 )  
 James Clay Waller, II, )  
 )  
 Defendant. )

STATE’S TRIAL BRIEF  
ON CHARGE AND INSTRUCTION  
AND SUFFICIENCY OF EVIDENCE

“NO BODY, NO PROBLEM”

The prosecution of a murder case without a body presents unusual but not unprecedented issues in a criminal prosecution. A misconception of the “corpus delicti” rule is that there cannot be a murder conviction without a dead body. That is simply not true. In Missouri and other states, murder convictions are uniformly upheld in cases where the victim’s body was never found. In fact, the situation is so common that Thomas A. DiBiase, a former Assistant United States Attorney, has created a web site where he maintains a list of successful “no body” prosecutions. The list currently includes 356 cases in 48 different states ([www.nobodymurdercases.com](http://www.nobodymurdercases.com)). Far from being a new development, a conviction for murder based entirely on circumstantial evidence in absence of a dead body has been an accepted part of the common law

since the 1792 case of *The King v. Hindmarsh*, 168 Eng. Rep. 387 (1792). See Francis Paul Greene, “I Ain’t Got No Body: The Moral Uncertainty of Bodiless Murder Jurisprudence in New York After *People v. Bierenbaum*,” 71 *Fordham L. Rev.* 2863, 2874 (2003).

### CORPUS DELICTI

It is not an element of the corpus delicti of a murder case that a dead body be found. Rather, corpus delicti consists of two elements. The state must prove: (1) the death of the victim; and (2) the criminal agency of another in causing the victim’s death. *State v. Edwards*, 116 S.W.3d 511, 545 (Mo. banc 2003); *State v. Ellison*, 980 S.W.2d 97, 101 (Mo. App. W.D. 1998). These elements may be proven by circumstantial evidence, but are not established until it has been proved that the death was not self-inflicted, due to natural causes, or an accident. *Id.* As one court noted, “The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward.” *People v. Manson*, 139 Cal. Rptr. 275, 298 (Cal. App. 1977).

Circumstantial evidence proving the death of the victim can include the circumstances surrounding her disappearance, her relationships to others, her plans at the time of her disappearance, and her daily habits

and marital situation (especially when the husband is the suspect); these things can all be used to prove that a voluntary disappearance was unlikely. See *State v. Nicely*, 529 N.E.2d 1236, 1240 (Ohio 1988) (“It is well-established that murder can be proven in absence of a body.”); *State v. Owens*, 359 S.E.2d 275, 278 (S.C. 1987) (“Other courts considering ‘no body’ murder cases have allowed evidence of the victim’s personal habits and relationships as circumstantial evidence from which an inference could be drawn that the victim’s sudden disappearance was the result of death by a criminal act. The circumstantial evidence surrounding Mr. Vereen’s sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships, is sufficient to establish the corpus delicti of murder or that the victim is dead by the hand of another.”); *State v. Reberterano*, 681 P.2d 1265, 1267 (Utah 1984) (“Apparently no case in Utah has decided whether the production of a corpse is necessary in a homicide case to prove the corpus delicti. However, other jurisdictions, with which we agree, have uniformly held that a corpse is not necessary to establish the corpus delicti and that a death may be established by circumstantial evidence.”); *Epperly v. Commonwealth*, 294 S.E.2d 882, 891 (Va. 1982) (“Although this is the first such case to come to this Court in which the

victim's body was not found, we have long held that the corpus delicti may be proved by circumstantial evidence.”). As the *Epperly* court noted:

Worldwide communication and travel today are so facile that a jury may properly take into account the unlikelihood that an absent person, in view of his health, habits, disposition, and personal relationships would voluntarily flee, ‘go underground,’ and remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence.

294 S.E.2d at 890. In the present case, the state will show through Jacque Waller's abrupt disappearance, her unused credit cards and cell phone, her loving relationships with her parents and her children, her good health, her successful job, and her plans for the future, including a divorce and a new start in life, that she did not depart this world voluntarily.

In *State v. Barker*, 945 N.E.2d 1107 (Ohio App. 2010), the court upheld a conviction when the evidence implied it was unlikely the victim, Shelly Turner, disappeared voluntarily. On the last night she was seen alive, Turner asked her mother to watch her two young sons while she went with her fiancé to a bar for a drink. She disappeared. Her bank account was never touched. She left behind all of her personal belongings, including her purse, identification and cash. She'd had a

good relationship with her mother and children. There was no indication she viewed her life as one of hardship, from which she should flee. On the contrary, she was in good health, and on the day she died she had bought pumpkins to carve later with her sons. By the time the case went to trial, she had been missing for three years. These facts proved beyond a reasonable doubt that she was dead.

A well-known Missouri case is *State v. Lamb*, 28 Mo. 218 (Mo. 1859). In this case, a husband confessed that he had drowned his wife in the Mississippi river by taking her out on the river in a skiff and throwing her into the water and holding her head underwater until she was dead. He then tied stones to her body and sunk it. She was never found. His conviction was upheld. The Missouri Supreme Court noted: “Although the dead body has not been found, and although no witness swore that he saw the perpetration of the murder, yet the circumstances extrinsic to the confession, and established by other evidence, are so strong that they cannot fail to satisfy any unbiased mind that the accused is guilty of the crime of which he has been convicted.” 28 Mo. at 232.

#### THE CHARGE

When a body has not been found, it is not always possible to charge with specificity the exact means the killer used to commit the homicide.

It is sufficient for the prosecutor to charge that the defendant, after deliberation, killed the victim “by some means unknown.” *State v. Owens*, 359 S.E.2d 275, 277 (S.C. 1987) (“Allegations [in a murder charge] . . . may state that death was caused by a means or instrumentality unknown.”).

In a 2011 prosecution in Boone County, Missouri, a defendant was convicted in a murder case where the victim’s body was never found. In *State v. Johnny Wright*, Boone County Case No. 13R0185012318, the prosecutor charged a “no body” case by alleging that the defendant “feloniously, willfully, premeditatedly, intentionally and of his malice aforethought, did make an assault upon Rebecca Doisy and, in some way and manner and by some means unknown, thereby caused the death of Rebecca Doisy.” The case is currently on appeal in the Western District and is appeal number WD73973.

The Western District affirmed a conviction in 1998 in a murder case where the manner of death was not specified in the charge. *State v. Ellison*, 980 S.W.2d 97 (Mo. App. W.D. 1998). In *Ellison*, a husband was convicted of murdering his wife. By the time her body was found buried in the basement of their home eighteen months after her disappearance, it was decomposed so badly that the exact manner of death could not be

determined, even by autopsy. In *Ellison*, the charge simply read that “the defendant knowingly caused the death of Sheila Ann Ellison by unknown means.”

A prosecutor, when charging a crime, should be specific when possible, but prosecutors are not required to state the exact weapon used to hurt the victim when they cannot tell from the evidence exactly what weapon was used. For example, in *State v. Courtney*, 202 S.W.2d 72 (Mo. 1947), the Missouri Supreme Court upheld a conviction where the charge alleged that the defendant “in some way and manner and by some means, instruments and weapons to this informant unknown, did then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, hit, strike, beat and wound the said Frank Nicholas Adams in and upon the head and body . . . giving to the said Frank Nicholas Adams . . . one mortal wound, of which said mortal wound the said Frank Nicholas Adams . . . did die.” *Id.* at 73. The Missouri Supreme Court held: “It was not necessary to state in the information the weapon used by the appellant in making the assault.” *Id.* at 74. The Court of Appeals has since cited *Courtney* with approval for the proposition that “it is not necessary that an information which charges murder allege the manner in

which the deceased was killed.” *State v. Clark*, 546 S.W.2d 455, 463 (Mo. App. K.C. 1976).

Similarly, in another Missouri murder case where the victim’s body was never found, the prosecution did not allege the exact manner of death in the charge. The husband was convicted of murdering his wife based upon the fact she was missing and that some of her blood was found in her car. Since it was obvious she had been bleeding shortly before her disappearance, but the means of causing her to bleed was unknown, the first degree murder charge alleged that “the defendant, after deliberation, knowingly caused the death of [the victim] by inflicting a wound which caused sufficient blood loss to result in her death.” The first degree murder conviction was affirmed on appeal, and was considered so routine that “a published opinion would have no precedential value.” *State v. Brinson*, Mo. App. W.D. 67863, June 30, 2009.

#### THE JURY INSTRUCTION

In the same way that a charge does not necessarily need to specify the manner used to kill the victim, likewise the verdict directing instruction need not name the exact means of causing the death. All that



is required is that the elements of the crime are set out in the verdict director.

In the 2011 Boone County prosecution of Johnny Wright for second degree murder for killing Rebecca Doisy in 1976, whose body was never found, the verdict director read as follows:

INSTRUCTION NO. \_\_\_\_\_

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 5, 1976, in the County of Boone, State

of Missouri, that the defendant caused the death of Rebecca Doisy by some means unknown, and

Second, that the defendant intended to take the life of Rebecca

Doisy, and

Third, that the defendant did not do so in fear suddenly provoked by

the unexpected acts or conduct of Rebecca Doisy, then you will find the defendant guilty of murder in the second degree.

An examination of the Notes on Use to Missouri's pattern criminal jury instructions shows that this instruction was properly drawn. MAI-CR 3d 304.02, Note 11 discusses the need to include all elements of the offense in a verdict director. It reads:

Each verdict directing instruction must contain all of the essential elements of the offense. A careful reading of the appropriate statutes is necessary, as well an examination of the charge against the defendant. Consideration must be given to the evidence in the case.

Since the “manner” of death is not an element of the crime of murder it is not necessary to include the manner of death in the verdict director, when the exact manner is not known.

Another Missouri murder case where the manner of death was not specified in the charge or verdict director was *State v. Ellison*, 980 S.W.2d 97 (Mo. App. W.D. 1998). In *Ellison*, a husband was convicted of murdering his wife. By the time her body was found buried in the basement of their home eighteen months after her disappearance, it was decomposed so badly that the exact manner of death could not be determined, even by autopsy. There were “no obvious injuries, no signs of trauma, and x-rays failed to reveal any bullets or other metal objects in the body.” From the corpse alone, the forensic pathologist could not “exclude a death by natural causes or by accident,” and he could not exclude “strangulation, asphyxiation or suffocation” as the cause of death. He ruled the death a homicide “based upon the circumstances under which her body was found.” *Id.* at 100. The “circumstances” included evidence that the defendant had admitted he killed her and hid her body, but “declined” to “supply further detail as to the alleged accidental nature” of her death. The court noted that “conduct by a defendant in concealing a body or other evidence of a crime” supports an

inference of deliberation. *Id.* at 102. The court cited *State v. Nyhuis*, 906 S.W.2d 405 (Mo. App. E.D. 1995), where the defendant’s actions in hiding his missing wife’s body in a freezer belied his claim that she had died of accidental causes. In *Ellison*, the charge simply read that “the defendant knowingly caused the death of Sheila Ann Ellison by unknown means.” Likewise, the jury instruction read:

INSTRUCTION NO. \_\_\_\_\_

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about February 5, 1994, in the County of Lafayette,

State of Missouri, the defendant caused the death of Sheila

Ann Ellison by unknown means, and

Second, that defendant knew that his conduct was practically certain

to cause the death of Sheila Ann Ellison, or that it was the

defendant’s purpose to cause serious physical injury to or

cause the death of Sheila Ann Ellison,

then you will find the defendant guilty of murder in the second degree.

Describing the manner of death as being “by unknown means” was sufficient. Ellison’s conviction and life sentence for second degree murder was affirmed on appeal.

CONCLUSION

WHEREFORE, for the reasons stated above, the court should overrule any claim of insufficiency of the evidence in this case on the grounds of the lack of a body, and should overrule any attack upon the charge or the proposed verdict director for not specifying the means of death.

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