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No. 96905-1

COA # 49355-1-II
Lewis County No. 16-1-129-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

JENNIFER KAY THAYER,

Appellant/Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Ms. Jennifer K. Thayer, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(4), Ms. Thayer seeks review of a portion of the decision of the court of appeals, Division Two, issued October 9, 2018, as amended on reconsideration ordered January 29, 2019, in State v. Thayer, 5 Wn. App.2d 1034 (2018), *as amended*, __ Wn. App.2d ___ (January 29, 2019).

A copy of the opinion is attached hereto as Appendix A. A copy of the ruling on the motion to reconsider is attached hereto as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

The state claimed that Petitioner, a caregiver, unlawfully possessed the same painkiller on specific dates. She was charged with one count for each of the dates, spanning about six months.

It was undisputed that Petitioner had *lawfully* picked up the prescriptions from a pharmacy on the specific dates. It was also undisputed that three people had access to the medication at the group home.

Petitioner's statements to an investigator and officer were admitted over a *corpus delicti* objection. Those statements indicated that Petitioner confessed to having consumed the drugs and said she alone had the relevant door key.

1. Where the state chooses to charge separate counts for different days upon which it claims the Petitioner unlawfully possessed pills, does the state fail to meet its burden under the *corpus delicti* rule to support all of the separate counts by showing only that Petitioner *lawfully* possessed the pills on those dates but that pills appeared to have gone missing at some point over a six-month time?

2. Does the *corpus delicti* rule require proof that lawful possession had been converted to unlawful possession on

or about specific dates if the state claims each date supports a separate conviction?

D. STATEMENT OF THE CASE

1. Procedural posture

Petitioner Jennifer Thayer was charged by amended information with eight separate counts of unlawful possession of a controlled substance (Vicodin pills), alleged to have been committed by use of a position of trust, confidence, or fiduciary responsibility. CP 16-21; RCW 9.94A.535(3)(n); RCW 69.50.4013(1). Each count was alleged to have occurred on a different day. CP 16-21. At the bench trial, the prosecution dismissed two of the counts as unsupported by the evidence. 3RP 56. The judge then found Thayer guilty of the remaining six counts. 3RP 56.

A standard-range sentence was imposed and stayed pending appeal. 5RP 7-9. On October 9, 2018, the court of appeals, Division Two, rejected Thayer's arguments and affirmed. See App. A. Thayer made a motion to reconsider on legal financial obligations, which was granted and the opinion ordered amended on January 29, 2019. See App. B. This Petition follows.

2. Facts relevant to issues on review

The state charged Jennifer Thayer with having unlawfully possessed hydrocodone on the following dates: May 5, June 8, July 6, August 11, September 9, October 15, November 17, 2015, and January 2, 2016. CP 16-21. Prior to the bench trial, the state dismissed the counts for May 5 and January 2. 3RP3-4.

At trial, Ms. Thayer repeatedly raised a *corpus delicti* objection. 3RP 27-31. The evidence against Ms. Thayer came largely from the testimony of Carole Smith, who works with licensed adult family homes and oversees providers by visiting the homes and checking them for things like proper fire suppression and admitting packets. 3RP 15-16. Smith testified that, when she conducted a review, she would look at the medication logs, called "MAR" sheets, which are supposed to be available for review when someone shows up to do so. 3RP 16-18. Although there are no standards for how they are formatted, MAR sheets are supposed to be current and list all medications, including when the medicine was given. 3RP 18.

Ms. Smith said a caregiver was supposed to note the time and date and amount of medicine given and "sign off" immediately, rather than waiting for the end of a shift. 3RP 18-19.

Sometimes, caregivers would split a shift, so both would have access to medication. 3RP 20. There was also overlap when shifts changed. 3RP 20.

In January of 2016, Smith reviewed the MAR sheets for a patient, Margaret Greear, as part of a regular yearly review. 3RP 20. The caregiver who helped Smith get the records that day was Jennifer Thayer. 3RP 21. When Smith asked, Thayer gave her a box from a locked cabinet in the kitchen but Smith noted there was no hydrocodone inside. 3RP 24. Smith asked about it and Thayer then took her to a locked office with another filing cabinet, explaining that this medicine is locked up and that she takes out only half at a time for the medication

box when needed. 3RP 25.

Although Smith testified that the bottle she saw was from April of 2015 and there were only seven pills left in the bottle, Smith did not preserve that bottle for evidence. 3RP 25. Smith said the month's logs did not show any hydrocodone had been "signed off," which made her wonder if the patient had received the medicine that month. 3RP 25-26. Smith did not keep or provide the log she said made her concerned. 3RP 26-27.

Smith then testified that Thayer provided other logs and records which indicated that the prescription had started in April of 2015 but that only 61 pills were accounted for in the logs but the prescription was for 180 pills. 3RP 26-27.

Before Smith could testify about what Thayer had said when confronted about the discrepancy, counsel objected based on *corpus delicti*, arguing that the state had shown only that there was missing medicine in April of 2015, but that was not one of the dates the state had charged. 3RP 27-28.

On *voir dire*, Smith admitted that there were three separate caregivers who worked at the home during the relevant times and that all three had access to the medication. 3RP 29. Smith also conceded that all three were regularly working shifts during that time. 3RP 29. Caregivers other than Thayer were given access to and signed off on hydrocodone pills in the forms from the month of April but other months had no information and the forms were blank. 3RP 30.

Counsel renewed his motion, pointing out:

> So, the audit was in late January of 2016 and the witness is talking about a pill bottle in April of 2015. Neither of those dates were at issue here. So we're not dealing with any charges from April of 2015 or January of 2016. And that is really the essence of our case because nothing has been presented that anybody committed a crime during these six charged counts.

The prosecutor said that the dates for the counts were based on dates the prescription was refilled in the months June-November 2015. 3RP 31. There were no prescription bottles admitted showing that such prescriptions had been filled. 3RP 32-33.

Smith conceded there was nothing unusual or illegal about Thayer picking up prescriptions for residents on those dates. 3RP 36. There was no evidence of what happened to the medicine, except that the pills were not in the home and no one had written them down as required on the "MARs." 3RP 37.

Over defense objection as to *corpus delicti*, Smith was allowed to testify that Thayer had admitted she was the only one with the key to the office where the hydrocodone was stored. 3RP 31-37.

The Lewis County Sheriff's Office sent a detective who spoke with Thayer at the home without reading her any rights. 3RP 41-42. Again, counsel objected under the *corpus delicti* rule, but the officer was allowed to testify about what Thayer told him. 3RP 42. According to the detective, Thayer had been confronted and said the last time Greear had been given the medicine was April. 3RP 43. The detective did not believe Thayer and pulled out documents and demanded, "[d]id you use them or did you sell them?" 3RP 43. The officer also testified that Thayer admitted picking up the prescriptions over the months and had

used the drug herself. 3RP 43-44.

But the detective never asked Thayer when she had consumed the pills and Thayer never said any dates upon which it occurred. 3RP 47. The officer conceded that Thayer had not violated any laws by picking up the prescriptions. 3RP 47-48.

At the close of the state's evidence, Thayer moved to dismiss the six counts because the state had not proven unlawful possession on any of the charged dates, which were when the prescriptions were lawfully picked up. 3RP 48. The judge relied on Thayer's admission to the officer that she had consumed the pills and said the monthly prescription showed pills picked up but not lawfully dispensed. 3RP 50.

The prosecution admitted, in closing argument, "we know when she picked up the prescriptions but we don't know exactly when she used them." 3RP 54. The trial judge agreed that Thayer had not committed any crime by picking up the prescriptions on the relevant dates charged. 3RP 55-56.

In the CrR 6.1 findings and conclusions for the bench trial, the judge found that Thayer had "used the hydrocodone prescribed" to Ms. Greear, had picked up the prescriptions from June through November of 2015 and consumed them at some point, and had paid for the prescriptions herself instead of billing the family in order to hide her use. CP 51-52.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT SHOULD GRANT REVIEW BECAUSE THE PROPER SCOPE OF THE *CORPUS DELICTI* RULE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND THE RULE SHOULD REQUIRE THE STATE TO PROVIDE SUFFICIENT CORROBORATING EVIDENCE TO SUPPORT EACH COUNT

The *corpus delicti* rule prohibits the state from using a confession or admission as sole support for a conviction of guilt. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). This Court has described the *corpus delicti* rule as both a rule of admissibility and a rule of evidentiary sufficiency. State v. Dow, 168 Wn.2d 243, 251, 227 P.3d 1278 (2010). Over the years, this Court has carefully defined the limits of the rule and what it requires. See City of Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986); see also State v. Cardenas-Flores, 189 Wn.2d 243, 252, 401 P.3d 19 (2017), Dow, supra; State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

In this case, this Court should grant review under RAP 13.4(b)(4) and (4), to address what is required under the *corpus delicti* rule where the state charges multiple counts based on unlawful possession alleged on multiple dates.

To meet the rule, the state must present evidence *other* than the defendant's confession to prove that the crime the defendant described in her confession actually occurred. Brockob, 159 Wn.2d at 327. The *corpus delicti* rule is judicially created, but it mitigates important concerns about the unreliability of confessions of guilt. See Corbett, 106 Wn.2d at 575-77. To meet its burden under the rule, this Court has held that the independent evidence must provide "prima facie corroboration"

of the crime described in the confession. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Further, it must support the *specific* crime charged. Brockob, 159 Wn.2d at 328-29. While the evidence may be circumstantial, it must be "consistent with guilt and inconsistent with innocence." Aten, 130 Wn.2d at 663 (1996).

In general, *corpus delicti* does not require proof that a particular person committed the relevant crime. See, e.g., State v. Solomon, 73 Wn. App. 724, 728, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994). If it is shown that *someone* committed the crime, that is enough to satisfy the rule. Id. This makes sense because the rule is supposed to provide the "objective proof or substantial fact that a crime has been committed." 73 Wn. App. at 726-27.

Thus, to satisfy the *corpus delicti* rule, the state must show sufficient untainted corroborating evidence to show that each charged crime occurred. And as this Court held in Brockob, the state must corroborate the specific crimes charged, not just general criminality. 159 Wn.2d at 329.

In holding that the trial court did not err and the *corpus delicti* rule was met for all six of the counts, the court of appeals focused on generic conduct which was *not a crime.* The court declared that Thayer was charged with "six counts of possession of a controlled substance," not *unlawful* possession. App. A at 6. It then held that the *corpus delicti* for "possession of a controlled substance" was "independent evidence that (1) a person (2) possessed a controlled substance" - not *unlawfully* possessed, just possessed. App. A at 6. Applying that incorrect

standard, it held that there was sufficient corroborating evidence under the *corpus delicti* rule, because "The State presented pharmacy slips with Thayer's signature indicating that Thayer picked up Greear's Vicodin prescription," Smith did not see those bottles or records indicating anyone had given that medicine to Greear, and therefore someone must have taken the pills at some time. App. A at 6.

This reasoning, not only based on an incorrect standard, mistakes the point. The state did not charge *one* count of unlawful possession of a controlled substance - it charged eight and went to trial on six. The only evidence at trial was that Thayer had lawfully possessed the hydrocodone on the dates she picked up the prescriptions - June 8, July 6, August 11, September 9, October 15, and November 17, 2015. The assumption was made that the other drugs were all missing because they were not present in January 2016 when the audit occurred.

At most, the evidence showed that, at some point, someone unlawfully possessed those pills. But that does not prove that unlawful possessions occurred monthly as opposed to on a date after all the pills had been acquired.

The court of appeals also strangely held that it was not necessary for the state to prove that there was an unlawful possession of the drugs on the specific dates. App. A at 6. Division Two declared that it was not necessary for the State to prove that Thayer unlawfully possessed the drugs because "lawful" possession is an affirmative defense. App. A at 7. Again, however, that was not the point. The state claimed Thayer had unlawfully possessed drugs on six specific dates. It then presented only

evidence of *lawful* possession on those dates. It was the state's due process burden to prove that lawful possession was converted to unlawful possession on or about those specific dates in order to support each separate count.

This Court has held that the independent corroborating evidence to support each count must not only be for the specific crime but also must be inconsistent with innocence. Brockob, 159 Wn.2d at 329-30. Where, as here, the state attempts to prove multiple counts of unlawful possession of the same drug and the counts are defined solely based on alleged date of unlawful possession, the *corpus delicti* rule should be held to require corroborating evidence that there were, in fact, such multiple crimes on those different dates. The court of appeals erred in holding that the state met its burden under the *corpus delicti* rule and in affirming the six separate convictions based on the dates the state showed lawful - not unlawful - possession. This Court should grant review under RAP 13.4(b)(4) and so hold.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 28th day of February, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Lewis County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Jennifer Thayer, 212 John Road, Chehalis, WA. 98532.

DATED this 28th day of February, 2019.

/s/ Kathryn Russell Selk
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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 9, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JENNIFER THAYER, Appellant.	No. 49355-1-II UNPUBLISHED OPINION

BJORGEN, J. — Jennifer Thayer appeals from her convictions of six counts of possession of a controlled substance, Vicodin. Thayer argues that (1) the State did not present sufficient independent evidence of the corpus delicti for possession of a controlled substance to admit her confession into evidence and (2) the State did not present sufficient evidence to convict her of six counts of possession of a controlled substance.

Thayer's arguments fail, and we affirm the trial court.

FACTS

In January 2016, Carole Smith, an adult family home licensor and complaint investigator for the Department of Social Health and Services (DSHS), audited the files of an adult care facility (Facility). As part of the audit, Smith reviewed medication administration records (MAR) for residents of the Facility and the Facility's medication management, among other matters. A MAR "tells how the residents have received their medications, what time of day, [and who has] provided [the medication]." Verbatim Report of Proceedings (VRP) (June 27, 2016) at 17.

During the January 2016 audit, Smith reviewed the MARs for Margaret Greear, a resident at the Facility. Smith noticed that the Vicodin[1] prescribed to Greear was not with her other medication. Smith asked Thayer, a caregiver and resident manager of the Facility, about the missing Vicodin. Thayer retrieved a bottle of Vicodin from a locked office. Smith questioned Thayer about why the Vicodin was not kept with the other medication and Thayer responded that she kept the Vicodin separate from the other medications in a locked office. Thayer also told Smith that she was the only one with a key to the locked office.

The bottle retrieved by Thayer was dated April 2015 and had 7 remaining pills of the original 180 that came in the bottle. Greear's MARs indicated that she had received only 61 Vicodin pills in April 2015, leaving 112 pills unaccounted for.[2] Greear's MARs also indicated that Greear received Vicodin on only two days between May 2015 and December 2015.[3] Smith did not see any Vicodin prescription bottles that were filled between June and November 2015. Based on her audit of the Facility, including her conversation with Thayer, Smith informed the DSHS Complaint Resolution Unit of a possible medication problem.

The DSHS Complaint Resolution Unit referred the matter to the Lewis County Sheriff's Office. Detective Gene Seiber responded to Smith's report and spoke with Thayer at the Facility regarding the discrepancy with the Vicodin. Thayer reported to Detective Seiber that the last time that Greear had received Vicodin was in April. Thayer also reported that Greear's family

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[1] The record also refers to Vicodin as "Hydrocodone." Ex. at 3-12. For clarity, this opinion refers to Vicodin throughout.

[2] Smith also testified that "117-ish" pills were unaccounted for. VRP (June 27, 2016) at 27. The disparity between this and the conclusion from the figures above that 112 were not accounted for is not significant for our purposes.

[3] Thayer and the State stipulated that Thayer picked up Greear's Vicodin prescription in July.

either brought the Vicodin to the Facility or dropped it into the mailbox. Detective Seiber showed Thayer the MARs for Greear, the six prescriptions for Vicodin for Greear between June and November, and pharmacy pick-up receipts for Greear's Vicodin signed by Thayer between June and November.

After a few moments, Detective Seiber asked Thayer whether she sold or consumed the Vicodin. Thayer responded that she had used the pills. Thayer confirmed that she had picked up the Vicodin prescriptions between June and November 2015, paid for the prescriptions with her own money, and used those prescriptions herself. The six prescriptions between June and November consisted of 720 Vicodin pills.

In relevant part, the State charged Thayer with six counts[4] of possession of a controlled substance under former RCW 69.50.4013 (2015).[5] The counts were associated with the following dates, which corresponded to the dates Thayer picked up the Vicodin prescriptions: On or about June 8, 2015 (count II), on or about July 6 (count III), on or about August 11 (count IV), on or about September 9 (count V), on or about October 15 (count VI), and on or about November 17 (count VII). All of the charges included the additional allegation that Thayer had abused a position of trust to facilitate the offense.

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[4] The State initially charged Thayer with one count of possession of a controlled substance and then amended the charge to eight counts. Ultimately, the State dropped two counts, resulting in six total counts of possession of a controlled substance based on Vicodin possession.

[5] Former RCW 69.50.4013(1) states,

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by [the Uniform Controlled Substances Act, chapter 69.50 RCW].

At trial, the defense raised an objection to the discussion of Thayer's admissions to Smith and Detective Seiber on the grounds of corpus delicti. The court overruled Thayer's corpus delicti objection, finding:

> I think there's enough here . . . with the evidence of the missing pills and where they were and who had possession of the rest of the pills here, that being Ms. Thayer, there's enough to get around [corpus delicti]. So the objection on the basis of corpus is overruled.

VRP (June 27, 2016) at 28-29. Following a bench trial, the trial court found Thayer guilty of all six counts of possession of Vicodin and that she abused a position of trust with respect to each count. The court entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

1.18 Thayer was the only person with a key to her office where the Vicodin was located.

1.19 No other care providers were allowed in Thayer's office.

. . . .

1.25 Thayer informed Det[ective] Seiber that the last time [Vicodin] was provided to Ms. Greear was in April of 2015.

. . . .

1.27 Thayer used the [Vicodin] prescribed to Ms. Greear for her own personal consumption.

1.28 Thayer picked up the prescriptions for Ms. Greear and [kept] them for herself.

1.29 Thayer kept for herself the prescriptions picked up for Ms. Greear June through November of 2015.

1.30 Thayer paid for the prescriptions herself so Ms. Greear's family would not know about the [Vicodin] being given.

CONCLUSIONS OF LAW

. . . .

2.2 [Thayer] unlawfully possessed a controlled substance, [Vicodin], when she used the pills prescribed to Margaret Greear for personal consumption.

2.3 This possession occurred on or about June 8, 2015; July 6, 2015; August 11, 2015; September 9, 2015; October 15, 2015; and November 17[,] 2015.

Suppl. Clerk's Papers (CP) at 50-52.

Thayer appeals her convictions for six counts of possession of a controlled substance.

ANALYSIS

I. CORPUS DELICTI

Thayer argues that the State did not present sufficient independent evidence of the corpus delicti of possession of a controlled substance, and therefore the trial court erred by admitting Thayer's statements at the bench trial. We disagree.

A. Legal Principles

Under the corpus delicti rule, the confession or admission of a person charged with a crime is not sufficient, standing alone, to prove guilt. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). Instead, the confession or admission must be corroborated by independent evidence of the corpus delicti or "'body of the crime.'" *Id.* (quoting JOHN W. STRONG, 1 MCCORMICK ON EVIDENCE § 145 at 227 (4th ed. 1992)). "The body of the crime 'usually consists of two elements: (1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof.'" *State v. Cardenas-Flores*, 189 Wn.2d 243, 252, 401 P.3d 19 (2017) (quoting *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986)). If the corpus delicti is not corroborated by independent evidence, the defendant's confessions cannot be considered. *State v. Hummel*, 165 Wn. App. 749, 758-59, 266 P.3d 269 (2012).

Typically, "[p]roof of the identity of the person who committed the crime is not part of the corpus delicti, which only requires proof that a crime was committed by someone." *Corbett*, 106 Wn.2d at 574. We review de novo whether sufficient corroborating evidence exists to satisfy the corpus delicti rule. *State v. Hotchkiss*, 1 Wn. App. 2d 275, 279, 404 P.3d 629 (2017), *review denied*, 190 Wn.2d 1005 (2018).

Independent evidence is sufficient if it prima facie establishes the corpus delicti. *Hummel*, 165 Wn. App. at 758-59. Prima facie evidence is that showing circumstances that

support a logical and reasonable inference of the facts sought to be proved. *Id.* at 759. "In analyzing whether there is sufficient evidence to support the corpus delicti of the crime, this court 'assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State.'" *Id.* (quoting *Aten*, 130 Wn.2d at 658). The independent evidence may be either direct or circumstantial; it need not be of such character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. *Hummel*, 165 Wn. App. at 758-59.

B. The State Provided Sufficient Independent Corroborating Evidence

Thayer was charged with six counts of possession of a controlled substance pursuant to former RCW 69.50.4013(1). To establish the corpus delicti for possession of a controlled substance, the State must provide independent evidence that (1) a person (2) possessed a controlled substance. *State v. Solomon*, 73 Wn. App. 724, 728-29, 870 P.2d 1019 (1994).

The State has presented sufficient independent corroborating evidence to establish the corpus delicti of the crime. The State presented pharmacy slips with Thayer's signature indicating that Thayer picked up Greear's Vicodin prescription. CP at 27 (June 27, 2016, Exhibit list); *see* VRP (June 27, 2016) at 42-43. Thayer also stipulated that she picked up Greear's Vicodin prescription on six occasions. Greear's MARs show that she was not given any Vicodin for the months of June through November. Further, Smith testified that she did not see the Vicodin bottles that Thayer picked up for Greear between June and November at the Facility during her audit. Taken together, this evidence allows a reasonable inference that someone removed the pills from the Facility after Thayer picked up the prescriptions, and therefore possessed a controlled substance.

C. Lawful Possession

Thayer argues that in order to establish the corpus delicti, the State was required to prove that her possession of the Vicodin was unlawful because Thayer could lawfully possess the Vicodin, on behalf of her patients, in her role as an adult caregiver. We disagree.

Lawful possession is an affirmative defense to possession of a controlled substance. *State v. Hathaway*, 161 Wn. App. 634, 650, 251 P.3d 253 (2011). "The defendant must prove an affirmative defense by a preponderance of the evidence," and "[a]n affirmative defense does not negate any elements of the charged crime." *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). "An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so." *Fry*, 168 Wn.2d at 7. Additionally,

> [i]t is not necessary for the state to negate any exemption or exception in this [Uniform Controlled Substances Act] in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

RCW 69.50.506(a). Because lawful possession is an affirmative defense that Thayer had the burden to prove, the State did not need to negate lawful possession in order to establish the corpus delicti of possession.

To the extent that Thayer argues that the State had additional obligations under the corpus delicti rule based on her status as a caregiver, she fails to provide authority supporting that argument. We decline to address arguments unsupported by citation to authority or argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The State presented sufficient evidence to establish the corpus delicti for possession of a controlled substance. The trial court did not err by admitting Thayer's statements at trial.

II. Sufficiency of The Evidence

Thayer asserts that findings of fact 1.18, 1.19, 1.25, and 1.27-1.30 are not supported by sufficient evidence and that certain conclusions of law are not supported by the findings. We disagree.

A. Legal Principles

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that may reasonably be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We do not review credibility determinations, which are reserved for the trier of fact. *Mines*, 163 Wn.2d at 391. Furthermore, we consider direct and circumstantial evidence equally reliable in evaluating the sufficiency of the evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Following a bench trial, our review is "limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014), *on remand*, 191 Wn. App. 759 (2015), *as corrected* (Feb. 11, 2016).

Substantial evidence is evidence sufficient to persuade a fair-minded, rational individual that the finding is true. *Homan*, 181 Wn.2d at 105-06. The party challenging the findings of fact bears the burden to demonstrate that substantial evidence does not support the findings. *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010). Unchallenged findings of fact are verities on

appeal. *Homan*, 181 Wn.2d at 106. The State retains its burden of proving all the necessary elements of a crime beyond a reasonable doubt. *Homan*, 181 Wn.2d at 106.

B. Substantial Evidence Supports the Trial Court's Findings and the Findings Support the Conclusions of Law

Smith testified that Thayer reported that she was the only person with access to the locked office. A fair-minded, rational finder of fact could infer from Thayer's statement that she was the only person with a key to the office and that only she could access the office. Further, Detective Seiber testified that Thayer reported that she had picked up the Vicodin prescriptions between June and November 2015, paid for the prescriptions with her own money, and used those prescriptions herself. Detective Seiber testified that Thayer reported that the last time Greear had received Vicodin was in April 2015. Detective Seiber also testified that Thayer reported paying for the prescriptions herself so Ms. Greear's family would not know that the Vicodin prescriptions were being filled. Based on the testimony of Smith and Detective Seiber, a fair-minded, rational finder of fact could find the trial court's findings true. Accordingly, findings of fact 1.18, 1.19, 1.25, and 1.27-1.30 are supported by substantial evidence. Those findings in turn support the trial court's conclusions of law.

Thayer argues that the findings of fact and the conclusions of law based on those findings are supported only by Thayer's own statements, which are insufficient to support a conviction under the corpus delicti rule. Thayer misunderstands the application of the corpus delicti rule. The corpus delicti rule prevents admission of the defendant's confession without independent corroborating evidence. *Hummel*, 165 Wn. App. at 758-59. When the corpus delicti is established, the defendant's statements may be considered. Importantly, on appeal, we do not weigh credibility of witnesses or weigh evidence, and we consider direct and circumstantial evidence equally reliable in evaluating the sufficiency of the evidence. *Kintz*, 169 Wn.2d at 551;

Mines, 163 Wn.2d at 391. Here, as explained above, the State presented sufficient evidence of the corpus delicti of possession of a controlled substance, and Thayer's statements were properly considered. The trial court's findings of fact are supported by substantial evidence in the record.

Thayer appears to argue that conclusions of law 2.2 and 2.3 are not supported by the findings of fact because absent her confession, the State has not shown that she possessed a controlled substance on the dates alleged in the charging information. We disagree.

To prove unlawful possession of a controlled substance, "the State must prove only 'the nature of the substance and the fact of possession.'" *Hathaway*, 161 Wn. App. at 645-46 (quoting *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004)). "[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi." *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996); *State v. Yallup*, 3 Wn. App. 2d 546, 553, 416 P.3d 1250 (2018). "When charging using 'on or about' or similar language, the proof is not limited to the delineated time period." *Yallup*, 3 Wn. App. 2d at 553.

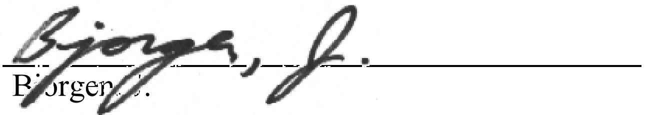
Here, Thayer did not raise an alibi defense at trial. Thayer admitted to Detective Seiber that she had used the Vicodin from the prescriptions she picked up between June and November (approximately 720 pills) for personal use. Based on Thayer's admission and the amount of Vicodin that was missing, a rational trier of fact could determine that Thayer possessed Vicodin "on or about" each of the days listed in the six counts of possession of a controlled substance. Therefore, the trial court's findings of fact support conclusions of law 2.2 and 2.3.

Thayer also assigns error to conclusions of law 2.4, 2.5 and 2.6. These are, respectively, that Thayer's possession occurred in the State of Washington, that she is guilty beyond a reasonable doubt of counts II-VII, and that she violated a position of trust with respect to each

count. Thayer's challenge to conclusion of law 2.5 appears to be an extension of her sufficiency of the evidence argument, which we address above. Therefore we do not independently consider it. Thayer does not present any argument regarding conclusions of law 2.4 and 2.6. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *Cowiche Canyon*, 118 Wn.2d at 809. Therefore, we decline to consider Thayer's assignments of error regarding conclusions of law 2.4 and 2.6.

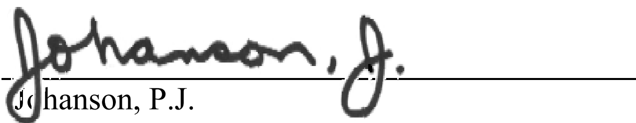
We affirm Thayer's conviction.

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.



Bjorgen, J.

We concur:



Johanson, P.J.

Sutton, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

January 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JENNIFER THAYER, Appellant.	No. 49355-1-II ORDER GRANTING MOTION FOR RECONSIDERATION AND REMANDING TO THE TRIAL COURT

The appellant has filed a motion for reconsideration of our decision in this appeal filed on October 9, 2018. In its motion, the appellant requests that all discretionary legal financial obligations (LFOs) and certain other LFOs be stricken under the recent Supreme Court decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). *Ramirez*, issued on September 20, 2018, increased the requirements for an inquiry into ability to pay discretionary LFOs. 191 Wn.2d at 744-45. *Ramirez* also applied the requirements of Laws of 2018, chapter 269 to the appeal, even though Ramirez was sentenced before the 2018 legislation was enacted or effective. *Id.* at 747, et seq.

Thayer was sentenced and filed her notice of appeal on August 23, 2016. On the same date, the superior court issued an order of indigency authorizing review at public expense. The 2018 legislation limits the application of LFOs to indigent persons. As noted, *Ramirez* applies the 2018 legislation to sentencings that occurred before that legislation took effect. Therefore, the course of action most consistent with *Ramirez* is to remand this matter to the superior court to reconsider LFOs under the requirements of the 2018 legislation. On remand the superior court

would also comply with the requirements of *Ramirez* in assessing ability to pay discretionary LFOs.

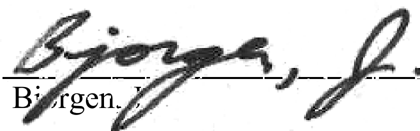
RAP 12.4(c) requires that a reconsideration motion "state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended." At the time of sentencing or of filing her notice of appeal, Thayer could not have raised issues under *Ramirez* or the 2018 legislation, since each was almost two years in the future. Therefore, to fully follow *Ramirez* in these circumstances, we waive the requirement of RAP 12.4(c) under RAP 1.2.

We grant Thayer's motion for reconsideration and remand to the superior court to reconsider LFOs under the requirements of the 2018 legislation and to comply with the requirements of *Ramirez* in assessing ability to pay discretionary LFOs. With this resolution, it is not necessary to revise our opinion of October 9, 2018 on Thayer's appeal.

IT IS SO ORDERED.

Jjs: Bjorgen, Johanson, Sutton

FOR THE COURT:



Bjorgen, J.

RUSSELL SELK LAW OFFICE

February 28, 2019 - 4:24 PM

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