

No. 49355-1-II

#16-1-129-1

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER KAY THAYER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

The Honorable James W. Lawler, Trial Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence under the *corpus delicti* rule to support admission of the incriminating statements of appellant, Jennifer Thayer, or support the six convictions for unlawful possession of a controlled substance, and the trial court erred in holding to the contrary.
2. Appellant assigns error to the CrR 6.1 Findings of Fact and Conclusions of Law findings under the *corpus delicti* rule, as follows:
 - 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. Seiber that the last time hydrocodone medication was provided to Ms. Greear was in April of 2015,
...
 - 1.27 Thayer used the hydrocodone prescribed to Ms. Greear for her own personal consumption.
 - 1.28 Thayer picked up the prescriptions for Ms. Greear and keeping [sic] 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 hydrocodone being given.

CP 51.

3. Appellant assigns error to the CrR 6.1 Findings of Fact and Conclusions of Law conclusions, as follows:
 - 2.2 The defendant unlawfully possessed a controlled substance, hydrocodone, 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.
- 2.4 The defendant's possession of hydrocodone occurred in the State of Washington.
- 2.5 The defendant is guilty of all counts beyond a reasonable doubt.
- 2.6 Thayer violated a position of trust with respect to each count she is convicted of.

CP 52.

B. QUESTIONS PRESENTED

1. Where the prosecution claims that the defendant committed multiple counts of unlawful possession of a controlled substance on different days over a period of time, does it fail to satisfy the *corpus delicti* rule by proving only that someone likely unlawfully possessed drugs at some point without any proof of any particular day upon which the unlawful possession occurred?
2. Is evidence insufficient to satisfy the *corpus delicti* rule where the state proved that the drugs were lawfully possessed on the dates charged as the dates of the different counts of unlawful possession but failed to prove that anyone unlawfully possessed the drugs on those dates?
3. Are the trial court's CrR 6.1 findings insufficient to support six separate convictions for unlawful possession of hydrocodone on specific dates where the findings do not separately address each count and further are they insufficient under the *corpus delicti* rule to the extent they are based upon the declarations of the defendant?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jennifer Kay Thayer was charged in Lewis County superior court by amended information with eight counts of

possession of a controlled substance, each alleged to have been committing by use of the defendant's "position of trust, confidence, or fiduciary responsibility" to facilitate the commission of the current offense[.]" CP 16-21; RCW 9.94A.535(3)(n); RCW 69.50.4013(1). The counts were charged with identical language but different dates, as follows: count I- May 4, 2015, count II-June 8, 2015, count III-July 6, 2015, count IV-August 11, 2015, count V-September 9, 2015, count VI-October 15, 2015, count VII-November 17, 2015, and count VIII-January 2, 2016. CP 16-21.

After hearings before the Honorable Judge Richard L. Brosey on April 5 and 14, May 26, June 2, 9 and 23, 2016, a bench trial was held before the Honorable Judge James W. Lawler on June 24 and 27, 2016. CP 24-26; 2RP 1,¹ 3RP 1.

Prior to trial, the prosecution dismissed counts I and VIII for lack of evidence. 3RP 4. Judge Lawler found Ms. Thayer guilty of the remaining six counts. 3RP 56. On August 23, 2016, Judge Lawler imposed a standard range sentence. 5RP 7. The sentence was stayed pending appeal. 5RP 9.

Ms. Thayer appealed and this pleading follows. See CP 41.

¹The transcript in this case consists of 7 volumes, not chronologically paginated, which will be referred to as follows:
the transcript containing the proceedings of April 5 and 14, May 26, June 2, 9 and 23, 2016, as "1RP;"
June 24, 2016, as "2RP;"
June 27, 2016, as "3RP;"
July 7, 2016, as "4RP;"
August 23, 2016, as "5RP;"
May 18, 2017, as "6RP;"
May 22, 2017, as "7RP."

2. Testimony at trial and the *corpus delicti* motions

Carole Smith, an employee with Residential Care Services (RCS) under the state Department of Social and Health Services, works with licensed adult family homes and investigates complaints about them. 3RP 12. Smith's job involves overseeing providers who are licensed and, as part of that job, she annually visits adult family homes to "determine whether or not they are meeting the minimum qualifications to remain licensed." 3RP 13. This involves such things as checking aides to make sure they have been put through the required background checks or have the right first aid training. 3RP 13. It covered other areas, too, like fire drills, fire extinguishers and medical equipment and appropriate information in admitting packets and consent forms. 3RP 15-16.

Caregivers do such things as provide bathing, toilet management, activities, food, medication and other "basic care needs of an elderly person" in the home. 3RP 13-14. As part of her work, Smith would chose two caregivers and two residents and "completely check" them, meaning review the records regarding their care. 3RP 12-13.

When she did a review, Smith looked at something called the medication log system sheets, which allow her to check things like whether a resident got their blood sugar checked as prescribed and the proper amount of insulin has been administered. 3RP 16-17. She said these sheets, "MAR" sheets, are supposed to be ready for review when someone show up to check, but the way they are prepared is

very different from place to place. 3RP 18. In some places they are handwritten, sometimes pharmacies do up a list and sometimes there was a “combination.” 3RP 18. However they were kept, though, they were supposed to be current and all the medications are supposed to be listed. 3RP 18.

In her reviews, Smith would “typically” go through a medication log to see if the prescriptions in the file match the medication log, were not expired and had been signed off. 3RP 14. In addition, she said “we’ll actually look at the bottle themselves to see how many pills are left,” so that if there was a prescription for 100 but only a few left in a bottle and a medication log that did not reflect that it would be “a red flag and we’ll look further.” 3RP 14.

According to Smith, the law required that a provider was supposed to provide the medication, such as insulin, and then document it by putting their initials in “the med log,” and then “you sign of when the time was that you gave the medication and how much.” 3RP 18. Smith said caregivers are not supposed to “wait until the end of the day to sign off different medications.” 3RP 18-19.

Smith conceded there could be “a split caregiver shift” with more than one caregiver working in a home at a given time, both with access to the medication. 3RP 20. She testified that this was why it was important for people fill out the forms at the time medication is given, to avoid someone getting a “potential overdose.” 3RP 20. Smith also said that caregivers “typically don’t work 24 hours a day,” with caregivers having “overlapping shifts” at night and then in the

morning. 3RP 20.

In January of 2016, Smith reviewed MAR sheets for a patient named Margaret Greear as part of a regular audit of an unspecified adult family home. 3RP 20. The sheets she reviewed were for 2015. 3RP 20.

Smith was at the home to look through the logs. 3RP 23-24. The caregiver she was with that day was Jennifer Thayer. 3RP 21. Smith reviewed the logs and asked for the medication box. 3RP 23-24. According to Smith, Thayer gave her the box which was stored in a locked cabinet in the kitchen. 3RP 24. When Smith noticed there were no hydrocodone pills in the box, she asked where they were kept. 3RP 21. Thayer went to a locked office by the front door and to a filing cabinet. 3RP 24. Smith asked why the medicine was in a different place. 3RP 24. Smith testified that Thayer responded that she keeps this particular medicine locked up, only takes out half at a time, puts it into a different bottle and “puts it in the medication box for that resident so that her caregivers can administer when it’s necessary.” 3RP 25.

Smith did not preserve and the state did not present the prescription bottle Thayer then gave to Smith. 3RP 25. Smith testified, however, that the bottle fill date was from April of 2015 and there were only seven pills left in the bottle. 3RP 25. Xx

Smith said she looked at what she described as the month’s medication log from Thayer. 3RP 25-26. She said it did not show any hydrocodone “signed off.” 3RP 25-26. This made Smith believe that

the resident or patient had not been administered hydrocodone that month. 3RP 25-26.

Like the prescription bottle, Smith did not have any copy of the medication log she said showed this point. 3RP 26. She was allowed to testify about her recollection of the log despite this lack. 3RP 26. xx

Smith then testified that Thayer provided her with other logs and records which appeared to indicate to Smith that the hydrocodone prescription had started in April of 2015 and that it appeared there were pills missing. 3RP 26-27. Smith said the logs indicated the resident had been given “I think a total of 61 pills Vicodin pills [hydrocodone] in the month of April,” as indicated by the logs which had been signed off, but the prescription appeared to have been for 180 pills and there were only seven let. 3RP 26-27. Smith estimated there might be about “117-ish pills at that time.” 3RP 27.

At that point, before Smith could testify about what Thayer said when Smith questioned her, counsel raised an objection based on *corpus delicti* for the counts not relating to April of 2015. 3RP 27. He pointed out that the state had not proved anyone unlawfully possessed controlled substances on those dates. 3RP 27-28. At that point, the prosecutor moved to admit exhibits that showed that Ms. Thayer had picked up prescriptions the dates the prosecution had charged. 3RP 28. Counsel pointed out that the fact that Thayer had picked up the drugs was insufficient to prove unlawful possession six times on the given dates. 3RP 28. The trial judge said, “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 that.”

At that point, counsel asked to *voir dire*, and the court granted the request. 3RP 28-29.

On *voir dire*, Smith admitted that there were three caregivers who worked at the home in question. 3RP 29. All three had access to medication. 3RP 29. And all were regularly working shifts during the relevant time. 3RP 29-30.

Smith conceded that, over the month of April 2015, other caregivers had access to and signed off on the hydrocodone pills, but for other months the information forms were blank. 3RP 30.

Counsel then renewed the *corpus delicti* motion. 3RP 30-31. He pointed out that the state had chosen to charge multiple counts for particular dates they said the unlawful possession occurred, but they had not proven that *anyone* had unlawfully possessed *anything* on those dates. 3RP 30. When the prosecutor again stated there was evidence that there were 117 pills missing and that was all that was required, counsel responded:

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 [or charged]. 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 argued that there were prescriptions refilled for hydrocodone in subsequent months, “June through November,” and Smith did not see prescription bottles for those months. 3RP 31. The

court again overruled the *corpus delicti* objection. 3RP 32.

At that point, Smith testified that the way that the drugs were being kept was against “policy.” 3RP 33. Smith also testified that Thayer was the resident manager and oversaw the home. 3RP 33.

Regarding Thayer’s statements to Smith, Smith testified that Thayer told Smith that Thayer was the only one with the key to her office. 3RP 33-34.

Smith admitted there was nothing unusual about a caregiver or resident manager pick up prescriptions for people who are residents in their facility. 3RP 36. At some homes, the medications were delivered. 3RP 36-37. Smith did not know what happened to any of the missing medication. 3RP 37. All she knew was that the prescriptions were lawfully picked up by Thayer and there were pills that “weren’t in the home and they weren’t on the MARs.” 3RP 37. It was not, she conceded, a violation of any DSHS requirement for a care provider or resident manager to pick up medication. 3RP 38-39.

Based on her conversation with Thayer, Smith notified the Complaint Resolution Unit about the medication issue and contacted a pharmacy for Greear, as well as the prescribing physician. 3RP 35. Lewis County Sheriff’s Office Detective Gene Seiber received a fax from Smith and went to the home to speak with Thayer. 3RP 40-41. The detective asked Thayer to talk him through “the process on what DSHS was saying was a potential issue and specifically dealing with the medications and narcotics,” but did not read Thayer her rights. 3RP 41-42.

At this point, again, counsel objected under the *corpus delicti* rule. 3RP 42-43. Over that objection, Detective Seiber then testified about what Thayer told him. 3RP 42. First, he said that Thayer had said something about the family bringing the medicine by. 3RP 42. The detective also testified that Thayer said that the last time Greear had been given the medicine was April. 3RP 42. Over counsel's objection to improper opinion testimony, the officer then said, "[a]t that point I knew that this wasn't correct." 3RP 42-43. The reason he thought that was because he had looked at MAR sheets and prescriptions which he said showed that there were prescriptions "beyond April of 2015." 3RP 43.

The detective then pulled out the documents he had and showed them to Thayer. 3RP 43. According to the detective, Thayer stayed quiet and put her head down. 3RP 43. The detective then asked, "[d]id you use them or did you sell them?" 3RP 43. Seiber testified that Thayer admitted picking up prescriptions in June through November and had admitted using hydrocodone. 3RP 43-44.

Detective Seibert never asked Thayer when she had consumed the pills and she never said any dates. 3RP 47. The officer conceded that Thayer had not violated any laws by picking up the prescriptions. 3RP 47-48.

According to the officer, Thayer said she had not billed the family for the prescriptions because the family would then know that she was getting them "even though she had told the family that Margaret didn't need them anymore." 3RP 44-45. The officer

admitted that having a caregiver pay for drugs and then get reimbursed might be one way things were supposed to be done. 3RP 46.

At the close of the state's evidence, Thayer moved to dismiss on two grounds. 3RP 48. First, counsel argued that there was insufficient evidence to prove the six counts, because the prosecution had alleged unlawful possession on six separate dates but had not proven that any unlawful possession had occurred on those dates. 3RP 48. Instead, he noted, the dates that had been charged were the dates when Thayer had picked up the prescriptions. 3RP 48. Counsel pointed out that the state's witnesses had conceded "it is not against the law for care providers to go and pick up prescriptions." 3RP 48. The trial judge denied the motion to dismiss, saying that the monthly prescriptions showed the number of pills being picked up each month and that Thayer had admitted consuming them. 3RP 50. Regarding the dates, the judge said the charges were "on or about" the alleged days. 3RP 50.

Thayer did not present any evidence in defense. 3RP 50-51. In closing argument, the prosecutor urged the court to convict based upon the dates Thayer had picked up the prescriptions. 3RP 51. He argued that the court knew Thayer was guilty of using the drugs because she had admitted it and had told the officer that she had "attempted to hide her purchase" by paying for the prescriptions herself. 3RP 52. The prosecutor also argued that his having "charged specific dates" did not "negate from the ability to convict" on all of the

counts because they allegations were “on or about.” 3RP 52.

For his part, counsel pointed out that the audit occurred in late January of 2016, but the amended information covered different dates through November 17, 2015. 3RP 53. He noted that, from November 17 to January of 2016, several months had passed during which “something could have happened” to the pills. 3RP 53. He also argued that “on or about” did not cover all intervening days not charged. 3RP 53-54.

In rebuttal closing argument, the prosecutor admitted, “we know when she picked up the prescriptions but we don’t know exactly when she used them.” 3RP 54.

In finding Thayer guilty of the five counts, the judge focused on what he said was the “biggest issue . . . the on or about language.” 3RP 56. The judge conceded that Thayer had not committed any crime by picking up the prescriptions on the relevant dates charged. 3RP 56. The judge declared, the “problem occurs when the shortage of pills is discovered,” which was in January of 2016. 3RP 56.

The judge next relied on the testimony of Thayer’s own statement that she was the “only one with the key.” 3RP 57. The court also noted that there were prescriptions located, picked up, paid for and not reflected in a MAR, “[s]o now we know that they’re missing[.]” 3RP 57.

Regarding the question of dates, the judge said that there was “clearly circumstantial evidence” that Thayer was “using those on or about the days that she’s picking them up,” based on there being 120

pills in the prescription. 3RP 57. The judge also found the aggravator of “abuse of trust” because of Thayer’s position of responsibility. 3RP 58.

After Thayer filed her notice of appeal, the case was entirely perfected but the state initially failed to propose and trial court failed to enter the mandatory CrR 6.1 written findings of fact and conclusions of law to support the bench trial, entering such findings only after appellant’s initial opening brief was filed. See Appellant’s Opening Brief (“AOB”), at 1-5. Those findings were entered on May 22, 2017. See CP 49.

D. ARGUMENT

REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE MULTIPLE CRIMES UNDER THE *CORPUS DELICTI* RULE

This Court should reverse and dismiss all of the six convictions for unlawful possession of a controlled substance under the *corpus delicti* rule. State v. Cardenas-Flores, __ Wn.2d __, 401 P.3d 19 (2017). That rule requires evidence of “the body of the crime” to be proved in order to prevent convictions based on false confessions. See id. This means that there must be proof of both an injury or loss and that a criminal act caused that loss. See City of Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 721 P.2d 1135 (1986). To meet the rule, the state must present evidence, other than the defendant’s confession, that the crime the defendant “described in” the confession actually occurred. State v. Brockob, 159 Wn.2d 311, 327, 150 P.3d 59 (2006). While the

rule is not mandated by either state or federal constitution, it is both a rule of admissibility and a rule of sufficiency. Cardenas-Flores, 401 P.3d at 26. It may be raised for the first time on appeal - although in this case was repeatedly raised below. See id.

Thayer was accused of unlawfully possessing hydrocodone on several separate days, leading to each of the different counts. CP 16-21. Unlawful possession of a controlled substance under RCW 69.50.4013(1) is a strict liability offense. See State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004). The elements are, simply, that a person is in *unlawful* possession of an identified controlled substance. See, e.g., State v. Deer, 175 Wn.2d 725, 734-35, 287 P.3d 539 (2012). Mere proximity is not enough to show “possession,” although possession may be either actual or “constructive.” State v. Cote, 123 Wn. App. 546, 548, 96 P.3d 410 (2004). A person is in “constructive possession” of something when, based on the totality of the circumstances, the evidence shows the defendant exercised “dominion and control” over it. See State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

In this case, the state convicted Ms. Thayer of unlawfully possessing hydrocodone on several different days, as follows: for count II, “[o]n or about June 8, 2015,” for count III, “[o]n or about July 6, 2015,” for count IV, “[o]n or about August 11, 2015,” for count V, “[o]n or about September 9, 2015,” for count VI, “[o]n or about October 15, 2015,” and for count VII, “[o]n or about November 17, 2015.” CP 16-21. The prosecution chose those dates because those

were the dates when Thayer *legally* picked up the prescriptions. But the convictions were in violation of the *corpus delicti* rule, because, without Ms. Thayer's statements, there was insufficient evidence to support all of the convictions.

For years, our state's highest court and the highest court in the country have recognized serious concerns about the reliability of a person's confession of guilt. See, *Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 2d 192 (1954); *Corbett*, 106 Wn.2d at 575-77. The judicially-created *corpus delicti* rule mitigates some of these concerns, by ensuring that the state is not relieved of the full weight of its burden of proof and a person cannot be convicted based upon her statements alone. See *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

Under the *corpus delicti* rule, a defendant may not be convicted based on her incriminating statements and the statements are deemed inadmissible at trial unless the state presents sufficient evidence, independent of the defendant's statements, that a crime was committed. See *State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). This is a burden of production, which requires the prosecutor to produce "evidence sufficient to support a finding that someone committed a crime." *State v. Pineda*, 99 Wn. App. 65, 77, 992 P.2d 525 (2000). The *corpus delicti* rule is both an issue of sufficiency of the evidence to admit the defendant's incriminating statement and the sufficiency of the evidence to convict, but it has been deemed nonconstitutional. See *Dow*, 168 Wn.2d at 249. This Court will

nevertheless review the issue where, as here, the defendant raised the issue below. Brockob, 159 Wn.2d at 328.

To satisfy the *corpus delicti* rule, the state must present evidence that the crime described in the statement actually occurred, and the evidence must be *independent* of the defendant's statements. 159 Wn.2d at 328. In general, the *corpus delicti* rule requires independent proof of only two elements, 1) an injury or loss and 2) that the cause of the injury or loss was someone's criminal act. Corbett, 106 Wn.2d at 573-74. But to be sufficient, the independent evidence must provide "prima facie corroboration" of the crime described by the defendant. See State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Prima facie corroboration of a defendant's statement exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved." Brockob, 159 Wn.2d at 328.

On review, this Court takes the evidence in the light most favorable to the state. See State v. Oneda, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). But while the independent evidence need not be direct and may be circumstantial, if it is circumstantial, the evidence must "consistent with guilt and inconsistent with innocence." State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996).

In this case, there was not such evidence consistent with guilt but inconsistent with innocence. Normally, with a possession offense, the state need not also prove the offender's identity, with a few exceptions. See State v. Hamrick, 19 Wn. App. 417, 419, 76 P.2d 912

(1978). This is because, in general, *corpus delicti* requires only proof sufficient to show that *someone* committed the crime, not that it was a particular person. See, e.g., State v. Solomon, 73 Wn. App. 724, 728, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994).

Thus, for example, in Solomon, there was sufficient proof to satisfy the *corpus delicti* rule where officers went into an apartment with a warrant for narcotics, found drugs and were told by the defendant that he was the boyfriend of the renter and lived there. Id. The drugs were found in a bedroom nightstand, along with a light bill and other items addressed to the woman renter. 73 Wn. App. at 727. At trial, the defendant raised a *corpus delicti* objection. In affirming, Division One noted that *corpus delicti* refers to “the objective proof or substantial fact that a crime has been committed.” 73 Wn. App. at 726-27.

In reaching this conclusion, the appellate court noted that, in general, unlawful possession of a controlled substance usually requires only proof that someone is in possession of a drug to establish the “body of the crime.” 73 Wn. App. at 728-29. Because there was evidence *someone* had possessed the drug at the home, the Court found, the *corpus delicti* minimum was met. Id.

But this is not the normal drug possession case. In this case, the state’s own evidence established that Ms. Thayer *lawfully* possessed the hydrocodone when she picked up the prescriptions. See 3RP 36-39, 46-47.

Smith admitted there was nothing unusual about a caregiver or

resident manager such as Thayer picking up prescriptions for people who are residents in their facility. 3RP 36. She further admitted the pills were lawfully picked up by Thayer on the relevant dates. 3RP 36-37. It was not normal, not even a violation of any DSHS requirement for a care provider or resident manager to pick up medication. 3RP 38-39. And the detective admitted that Thayer had not broken any laws by picking up the prescriptions on those dates. 3RP 47-48.

Thus, the only evidence at trial was that Thayer had *lawfully* possessed hydrocodone on the dates she picked up the prescriptions, June 8, July 6, August 11, September 9, October 15, and November 17, 2016. To prove the *corpus delicti* of *unlawful* possession under the unique facts of this case, the prosecution thus had to prove that the lawful possession (on behalf of the patient) was converted to unlawful possession on or about the relevant date.

The problem with the state's case is that it chose to charge multiple, separate "unlawful possession" cases without proof of when the possession became unlawful. Based on the evidence at trial *without* Ms. Thayer's statement, the state failed to provide evidence sufficient to prove all of the separate counts. And the trial court's findings are insufficient or do not withstand review.

CrR 6.1(d) governs bench trials, and provides, in relevant part:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

In order to be adequate, the trial court must adequately identify the

evidence relied on to support *each individual count*, focusing on the elements of the crime and identifying the factual basis supporting each. See State v. Wilks, 70 Wn.2d 626, 628, 424 P.2d 663 (1967). In a case like this, where the *corpus delicti* rule is involved and there are multiple counts, it is especially important to separate out the findings supported *only* by the statements of the defendant and those supported by other evidence, because the corroborating evidence must be *independent* of the defendant's statements. See, e.g., Brockob, 159 Wn.2d at 358. And it must support each separate conviction. Id.

But the bulk of the findings entered below were supported only by Ms. Thayer's own statements and thus cannot support the conviction under the *corpus delicti* rule. Finding 1.18, that "Thayer was the only person with a key to her office where the Vicodin was located," was based only on what Thayer said. 3RP 33-34; CP 51. Finding 1.19, that "No other care providers were allowed in Thayer's office," was also based solely upon what Thayer said. 3RP 33-34; CP 51. Finding 1.25, that "Thayer informed Det. Seiber that the last time hydrocodone medication was provided to Ms. Greear was in April of 2015," is also based solely on her statement. 3RP 43-44; CP 51.

Also based only on Thayer's admissions are all of the following findings:

- 1.27 Thayer used the hydrocodone prescribed to Ms. Greear for her own personal consumption.
- 1.28 Thayer picked up the prescriptions for Ms. Greear and keeping [sic] 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 hydrocodone being given.

CP 51. Indeed, each of these findings was originally written to make its source of evidence clear, as follows:

- 1.27 Thayer ~~admitted to using~~ used the hydrocodone prescribed to Ms. Greear for her own personal consumption.
- 1.28 Thayer ~~admitted to picking up~~ picked up the prescriptions for Ms. Greear and keeping [sic] them for herself.
- 1.29 Thayer ~~admitted to keeping~~ kept for herself the prescriptions picked up for Ms. Greear June through November of 2015.
- 1.30 Thayer ~~stated she was paying~~ paid for the prescriptions herself so Ms. Greear's family would not know about the hydrocodone being given.

CP 51. Again, all of these "findings" were based on the alleged statements of Ms. Thayer, regarding paying for the prescriptions so the family would not know (3RP 44-45), that she had used the pills (3RP 43-44), and that she was purchasing them herself so the family would not know (3RP 43-44).

Thus, the trial court's findings and conclusions themselves make clear the *corpus delicti* problem with this case. Absent Thayer's statements, taken in the light most favorable to the state, the evidence showed that Thayer lawfully picked up the prescriptions on the dates alleged as counts for unlawful possession, that there were three caregivers who worked at the home during the relevant time, that all had access to the medication, and all were regularly working shifts

during the relevant time. 3RP 29-30. In addition, other caregivers had access to and signed off on the hydrocodone pills, but for other months the information forms were blank. 3RP 30. This was not sufficient to satisfy the *corpus delicti* rule for the separate counts. There was not sufficient evidence without her statements that Thayer unlawfully possessed hydrocodone on the same dates that she lawfully possessed the drugs.

The trial court erred in denying Thayer's motions to dismiss the multiple counts of unlawful possession of hydrocodone under the *corpus delicti* rule. At most, without Ms. Thayer's statements, there was an indication that at some point in time some medicine three different people had access to had not been accounted for, but the evidence was simply insufficient to prove that Ms. Thayer committed the separate crimes alleged in each of the six separate counts, i.e., unlawfully possessed the hydrocodone on or about - for count II, June 8, 2015, count III-July 6, 2015, count IV-August 11, 2015, count V-September 9, 2015, count VI-October 15, 2015, and count VII-November 17, 2015. This Court should so hold and should reverse.

E. CONCLUSION

The state failed to present sufficient independent corroborating evidence under the *corpus delicti* rule for the six separate counts of unlawful possession. This Court should so hold and should reverse.

DATED this 9th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

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 Opening Brief to opposing counsel VIA this Court's upload service, at Lewis County Prosecutor's Office, sara.beigh@lewiscountywa.gov, and to Ms. Jennifer Thayer, 200 Washington Way, Unit A, Centralia, WA. 98531.

DATED this 9th day of October, 2017.

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