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NO. 51944-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

D.D.,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn K. Haan, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to present sufficient evidence to establish *corpus delecti*, independent of D.D.'s own statements, to support a logical and reasonable inference that E.V.'s death was caused by a criminal act.

2. The juvenile court violated D.D.'s Sixth Amendment right to control his defense when it found him guilty of the lesser included offense of second degree manslaughter.

3. D.D. assigns error to the juvenile court's finding that respondent's testimony as to how he was holding the shotgun at the time it discharged is not logical. The height at which E.V. was shot and where the pellets struck the window beyond him contradict the respondent's testimony. CP 74 (FF13).

4. D.D. assigns error to the juvenile court's finding that respondent's statements to the first responders were reliable and that they were supported by the physical evidence and the texts to [N.W.] CP 74 (FF 17).

5. D.D. assigns error to the juvenile court's finding that respondent had fired a different 12-gauge shotgun approximately 10 times. CP 74 (FF 20).

6. D.D. assigns error to the juvenile court's conclusion that the respondent who had been taught gun safety, had been taught not to touch the gun in his grandparent's room, knew enough about guns to know the danger they present, manipulated the gun to complete the two-step process to load the chamber of the gun, knew the guns can fire and cause damage, and with this knowledge still chose to point the 12-gauge Benelli shotgun at E.V. and pulled the trigger while holding it at shoulder height 30-33' away, he failed to be aware of a substantial risk that a wrongful act may occur, and this failure was a gross deviation from that of a reasonable 13-year-old with his experience with firearms in the same situation. CP 76 (CL 9).

7. The state failed to prove beyond a reasonable doubt the charge of manslaughter in the second degree.

#### B. ISSUES PRESENTED ON APPEAL

1. Whether, under the facts of this case, the *corpus delicti*

rule requires corroboration of any statement made by D.D., whether confession, admission, or even neutral description?

2. Whether the state failed to present sufficient evidence to establish the *corpus delicti* of second degree manslaughter when the evidence supports both a hypothesis of innocence and a hypothesis of guilt?

3. Whether the juvenile court violated D.D.'s Sixth Amendment right to autonomy and to control his defense by finding him guilty of second degree manslaughter after the close of evidence when the state employed an all or nothing strategy, presented no evidence specific to second degree manslaughter, made no argument about second degree manslaughter, and D.D.'s sole defense was that he did not act recklessly?

4. Whether the state established beyond a reasonable doubt the element of criminal negligence in the manslaughter charge where D.D.'s experience with guns led him to understand that the gun could not be loaded after he emptied

the chamber and pulled the charging handle?

C. STATEMENT OF THE CASE

1. Procedural History

Juvenile D.D. was charged by information with manslaughter in the first degree while armed with a firearm (RCW 9A.32.060(1)(a), 9.41.010(10), 13.40.196)). CP 4. After a fact-finding, the court adjudicated D.D. guilty of the lesser included offense of manslaughter in the second degree while armed with a firearm (RCW 9A.32.070, 9.41.010(10), 13.40.196). CP 56. D.D. timely appeals. CP 66.

2. Substantive Facts

a. Physical Evidence

On October 14, 2017 twelve-year-old E.F., and 13-year-old best friends D.D. and E.V., were alone in a home with multiple loaded firearms. RP 137, 173, 174, 187-88, 540, 543, 545, 554. A few hours later, a 911 dispatcher received a call stating that E.V. had been shot and was dead. RP 137, 138. When Detective Ness Aguilar arrived E.V. was lying on the couch. RP 88. Paramedics arrived, moved E.V. to the floor in front of the couch and attempted life-saving measures, but pronounced him dead shortly after they arrived. RP 99, 101, 153.

Pathologist Cliff Nelson determined that E.V. died of a gunshot wound but was unable to specify the mechanism by which the death occurred. RP 368-69.

The incident occurred at the Tollefsons' home, who are E.F. and D.D.'s grandparents. RP 189, 539. Deputies found a Benelli 12-gauge shotgun, a pellet gun, and a handgun in the Tollefsons' bedroom. RP 159, 462, 473, 530. Mr. Tollefson kept his firearms loaded with two bullets in the tube and the safety off. RP 545.

Detectives found a spent Universal 8 shotgun shell under the bed about 30 feet away from the couch where they found E.V. RP 396-97, 479. The shotgun shell pellets were concentrated at E.V.'s neck but spread 17 inches vertical and 15.5 inches horizontal. RP 350-51. E.V. was 74 inches tall. RP 339. Although some of the pellets hit the window behind the couch Dr. Nelson was unable to conclude the height and angle of the gun based on the spread pattern. RP 350, 368, 372, 387. Instead, the spread pattern is determined by a combination of the choke (the narrowing at the end of the barrel as opposed to a perfect cylinder), the muzzle to target distance, and the type of ammunition. RP 373.

Deputy Jordan Spencer, who is the Cowlitz County Range

Master, test fired the Benelli from several different distances, but not from different heights. RP 424, 425, 426, 427. The spread on E.V.'s body most consistently matched a 30 to 33 foot range. RP 518-19.

Even as an experienced range master, it took Spencer roughly 10 minutes to familiarize himself with the shotgun because it was drastically different than some of the shotguns Spencer had fired in his career. RP 441, 444. If the Benelli had an empty chamber with two bullets in the tube, it could load and fire those bullets by first pushing a button on the side of the gun and then pulling the charging handle. RP 431, 443. Unlike other shotguns, pulling the Benelli's charging handle loaded the gun. RP 443.

No fingerprints or palm prints were found on the gun. RP 327, 513-14.

b. Events before and after the shooting

D.D. lived in an apartment adjacent to the Tollefson's house with his parents. RP 539-40. D.D.'s cousin, E.F., lived in the main house on the weekends when she came to visit her mother. RP 189. E.V. had spent the night at his best friend D.D.'s house the night before, as he often did. RP 562. On the morning of October 14, the boys went to the main house to spend time with E.F. RP 564.

The three teenagers moved around the house as they grew tired of their current activity. RP 196, 200-01. At one point, D.D. answered a FaceTime call from his then girlfriend, N.W. RP 243-44. Although this was a video call, both N.W. and D.D. engaged in other activities while on the call and did not pay close attention to what the other was doing. RP 245, 258. Eventually, E.F. stayed in her room while the boys playfully interacted in the living room. RP 216-17.

A few minutes later, E.F. heard what she described as a balloon popping then heard the fire alarm. RP 202. D.D. appeared in her room frantic and screamed, "call 911! I shot [E.V.]" RP 203. D.D. called 911. RP 206. During the call D.D. was so frantic he first gave the dispatcher the wrong address. RP 136.

When the police arrived, D.D. went outside and led the police to E.V. RP 80, 88, 146. Deputies Jason Hammer and Ness Aguilar arrived first. RP 79. Within a few minutes seven first responder personnel arrived, including firefighter/EMT Jonathan Woods. RP 98.

At least three other deputies also arrived. RP 121, 130-31, 376, 452. D.D. was hysterical and could not form complete sentences. RP 89. Shortly after the paramedics arrived, D.D.'s mother and grandmother arrived. RP 84. When D.D. saw his mother,

he started to sob and cry. RP 84. In the midst of the chaos that ensued, Deputies Aguilar, Hammer, and James Hanberry and firefighter Woods all spoke to D.D. about the incident. RP 84, 85, 103, 118, 128, 149.

On the day of E.V.'s death, N.W. asked D.D., through text message, what occurred. RP 247. The following exchange took place:

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|--|
| <b>NW:</b> What happened? RP 253; Exh. 127   |
| <b>DD:</b> I shot [E.V.] and now he's dead. RP 253; Exh. 127   |
| <b>NW:</b> What?   |
| <b>DD:</b> "I don't care if you break up with me. Go on ahead." RP 253; Exh. 127   |
| <b>DD:</b> "[E.V.]'s dead." RP 254; Exh. 127.  |
| <b>NW:</b> Are you serious?  |
| <b>DD:</b> "Why did you tell [K.] RP 254; Exh. 127   |
| <b>DD:</b> "Don't tell anyone." RP 254; Exh. 127.  |
| <b>DD:</b> "There's a chance that I might be going to jail, but that's a one percent chance that I am." RP 254; Exh. 127 |
| <b>DD:</b> "You have to promise me never to tell anyone." RP 254; Exh. 127.  |

c. The Fact Finding

At the fact finding D.D. moved in limine to exclude all statements and admissions D.D. made to law enforcement and emergency personnel until the state could positively establish the *corpus delicti* through some corroborating evidence independent of D.D.'s statements. CP 25. The trial court denied D.D.'s motion. RP 57.

First responders testified to the following:

| <b>Statements to Firefighter/EMT Jonathan Woods</b>                         | <b>Statement overheard by Deputy James Hanberry</b>                | <b>Statements to Deputy Jason Hammer</b>   | <b>Statements to Deputy Ness Aguilar</b>   |
|---|--|--|--|
| D.D. said he pointed the gun at [E.V.] and pulled the trigger. RP 103, 118. | D.D. said to his grandmother, "I thought it was unloaded." RP 128. | D.D. said he racked the gun and he knew it was empty because a round came out of the shotgun and he grabbed it. RP 149 | D.D. asked if he was going to Juvie? RP 84 |

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|--|--|---|---|
| D.D. said he shot the Benelli multiple times prior to the October 14 incident. RP 103. |  | D.D. said he shot [E.V.] with birdshot. RP 149.   | D.D. said he thought the gun was empty.” RP 85. |
| D.D. said he thought the gun was unloaded and did not mean to shoot E.V. RP 103.       |  | D.D. said he racked the shotgun to make sure it was not loaded, and then fired it at [E.V.] RP 149. |   |

D.D. testified that he met E.V. in middle school, they instantly became friends, and they spent about 5-6 days a week together. RP 553, 556. Prior to October 14, D.D. had fired a firearm about 10 times in his life. RP 558. One of those times he used a shotgun, but it was a pump action shotgun. RP 558-59. Unlike the Benelli, when D.D. pulled down the grip of the pump action shotgun a shell came out of the slot area, which emptied the gun. RP 561. On October 14, D.D. pulled back the lever on the Benelli, like he had done to empty the pump action shotgun, and nothing came out so he thought the gun was unloaded. RP 583. Then D.D. “mess[ed] around with it” and “twirled it around.” RP 585. D.D. could have touched one of the

buttons when he flipped the gun around. RP 582.

D.D. testified he thought the safety was on and he did not know where E.V. was positioned in the house. RP 584, 585. D.D. did not point the gun in any direction and did not pull the trigger, but it discharged while he was handling it. RP 586. After it fired, D.D. saw E.V. and realized E.V. was hit. RP 587. D.D. denied telling firefighter Woods that he pointed the gun at E.V. and pulled the trigger. RP 594. D.D. did not intentionally point the gun at anyone that day. RP 612.

The juvenile court found D.D. not guilty of first degree manslaughter and convicted him of second degree manslaughter.

#### D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENT OF CRIMINAL NEGLIGENCE IN THE MANSLAUGHTER CHARGE

The state failed to prove beyond a reasonable doubt the element of criminal negligence when D.D.'s experience with guns led him to understand that the gun could not be loaded after he emptied the chamber and pulled the trigger.

In a criminal prosecution, the state must prove beyond a

reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

Evidence is sufficient to support a conviction when viewed in the light most favorable to the prosecution it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If there is insufficient evidence to prove an element of a crime, the reviewing court must reverse the conviction. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015).

Following a bench trial, this court reviews the findings of fact for substantial evidence. *State v. C.B.*, 195 Wn. App. 528, 535, 380 P.3d 626 (2016) (citing *State v. Homan*, 181 Wn.2d 102, 105–06, 330 P.3d 182 (2014)). “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *C.B.*, 195 Wn. App. at 535 (quoting *Homan*, 181 Wn.2d at 106). This court defers to the juvenile court, as finder of fact, for purposes of resolving conflicting testimony and evaluating the

persuasiveness of the evidence. *C.B.*, 195 Wn. App. at 535-36.

To convict D.D. of second degree manslaughter the state had to prove that he “fail[ed] to be aware of a substantial risk that a wrongful act may occur” and that unawareness “constitute[d] a gross deviation from the standard of care that a reasonable [person] would exercise in the same situation.” RCW 9A.08.010(1)(d).

When the defendant is a juvenile, the court applies the reasonable child standard to determine whether a child of the same age, intelligence, maturity and experience as the juvenile defendant would have acted in the same manner under the same circumstances. *Bauman by Chapman v. Crawford*, 104 Wn. 2d 241, 248, 704 P.2d 1181 (1985).

The United States Supreme Court has acknowledged that “[d]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” and “parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham v. Fla.*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010).

This newly-developed research and science demonstrating that the adolescent brain functions very differently than the adult

brain, has shaped modern jurisprudence. The United States Supreme Court has made several important decisions about how to sentence juveniles. First, in *Roper v. Simmons*, 543 U.S. 551, 569–70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Court abolished the death penalty for juveniles. Later, in *Graham*, 560 U.S. 48, the Court struck down the imposition of mandatory life sentences for youth convicted of non-homicide crimes. Finally, in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407(2012), the Court held that mandatory life without parole sentences are unconstitutional for juveniles convicted of homicide crimes.

Delinquent behavior is common in youth. It is estimated that about one third of young people engaged in some sort of deviant behavior before “aging out” of such conduct. Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 6 (2011).<sup>1</sup>

Here, the juvenile court’s basis for finding the element of criminal negligence is not supported by substantial evidence. The trial court concluded that D.D. knew enough about guns to know the danger they present, but the evidence in the record shows that D.D.

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<sup>1</sup>Available at [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) (Last visited 11/19/18).

took measures to empty the gun and thought he had emptied the gun. CP 76 (CL 9); RP 582-83. D.D.'s previous experience with a shotgun was with a pump action shotgun, which emptied by pulling the handle. RP 559, 560. An empty gun poses no threat.

The juvenile court's finding that D.D. fired a different 12-gauge shotgun approximately 10 times is not supported by substantial evidence. D.D. testified that he had shot a firearm approximately 10 times in his life but did not specify that each of those ten occasions involved a 12-gauge shotgun. Despite D.D.'s generic testimony about shooting firearms, the juvenile court specifically found that D.D. fired a different 12-gauge shotgun approximately 10 times. CP 74 (FF 20). Therefore, finding of fact 20 is erroneous.

A child of D.D.'s age and experience could not be expected to know that different shotguns have different loading mechanisms. RP 561. Even Spencer, who is a firearms expert and who trains other officers how to use firearms, did not know how to operate the Benelli. RP 414, 441. It took him approximately ten minutes to familiarize himself with that particular shotgun. RP 444. If it took a firearms expert ten minutes to learn how to load and unload the Benelli, a thirteen year old child could not be expected to know that unloading

the shotgun the way he was taught would actually load it.

There is no evidence in the record to support the juvenile court's conclusion that D.D. should have known about the two-step process to load the Benelli, which could be completed by pressing a button on the side of the gun and then pulling the charging handle. CP 76 (CL 9); RP 431, 443.

Additionally, the juvenile court's conclusion that D.D. pulled the trigger while holding the Benelli at shoulder height was mere speculation and not supported by substantial evidence. The state argued that because E.V. was 74 inches tall and the pellets were concentrated at his neck, about 10 to 11 inches below the top of his head, that D.D. must have shot E.V. from shoulder height. RP 624.

The state's theory was not supported by substantial evidence presented at the fact finding. Spencer did not test the shotgun from different heights and the pathologist was unable to conclude the height from which the gun was fired. RP 350, 368, 372, 387, 424-27. The state did not present any testimony about the pellets' trajectory and the physical evidence did not show whether E.V. was sitting or standing when he was shot. Pellet holes in the window behind the couch would not persuade a fair minded person that D.D. held the

gun at shoulder height.

D.D. was in the early part of adolescence and the parts of his brain involved in behavior control had not fully matured. *Graham*, 560 U.S. 48, 68. There is insufficient evidence to prove that a thirteen year old boy of D.D.'s same intelligence, maturity and experience should have known that pointing an unloaded gun at someone may kill them. Accordingly, the evidence is insufficient to prove the element of criminal negligence. *Bauman*, 104 Wn. 2d at 248.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (*quoting State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Therefore, this Court must reverse D.D.'s conviction and remand for dismissal with prejudice.

2. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH *CORPUS DELICTI*, INDEPENDENT OF D.D.'S OWN STATEMENTS, TO SUPPORT A LOGICAL AND REASONABLE INFERENCE THAT E.V.'S DEATH WAS CAUSED BY A CRIMINAL ACT

The state failed to present sufficient evidence to establish the *corpus delicti*, independent of D.D.'s own statements, to support a logical and reasonable inference that E.V.'s death was caused by a criminal act.

- a. *Corpus Delecti Rule*

*Corpus delecti*, consists of two elements the state must prove at trial in a homicide case: (1) the fact of death and (2) a causal connection between the death and a criminal act. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). The *corpus delicti* can be proved by either direct or circumstantial evidence. *Aten*, 130 Wn. 2d at 655. The State need not prove the mens rea to satisfy *corpus delicti*. *State v. Cardenas-Flores*, 189 Wn.2d 243, 264, 401 P.3d 19 (2017) (citing *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74,

723 P.2d 1135 (1986)). But, the state does have to establish a crime was committed. *Aten*, 130 Wn. 2d at 655.

b. Standard of Review for *Corpus Delicti*

*Corpus delicti* is a sufficiency rule. *Cardenas-Flores*, 189 Wn. 2d at 263. A defendant's confession or admission cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that confession or admission. *Aten*, 130 Wn.2d at 655-56; *State v. Whalen*, 131 Wn. App. 58, 62, 126 P.3d 55 (2005). The state has the burden of producing evidence sufficient to satisfy the *corpus delicti* rule. *Whalen*, 131 Wn. App. at 62 (*citing State v. Riley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993)).

The independent corroborative evidence need not establish the *corpus delicti* beyond a reasonable doubt. *Cardenas-Flores*, 189 Wn. 2d at 258. It is sufficient if independent proof *prima facie* establishes the *corpus delicti*. *Cardenas-Flores*, 189 Wn. 2d at 258 (*citing State v. Meyer*, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951)). "Prima facie corroboration ... exists if the independent evidence supports a 'logical and reasonable inference of the facts'" the state seeks to prove. *Cardenas-Flores*, 189 Wn. 2d at 258 (*citing State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), as

*amended* (Jan. 26, 2007)) (internal quotation marks omitted) (quoting *Aten*, 130 Wn.2d at 656).

In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant's statements, this Court assumes the truth of the state's evidence and all reasonable inferences from it in a light most favorable to the state. *Aten*, 130 Wn.2d at 658 (citing *Corbett*, 106 Wn.2d at 571).

c. The *Corpus Delicti* Rule Requires Corroboration Of Any Statement Made By D.D., Whether Confession, Admission, Or Even Neutral Description

The *corpus delicti* rule requires corroboration of all D.D.'s statements regardless of whether each statement was categorized as a confession, admission, or even a neutral description. *Aten*, 79 Wn. App. at 89. The purpose of corroboration is to prevent “against coerced admissions” and “uncorroborated admissions springing from a false subjective sense of guilt. A defendant who falsely believes herself guilty may “admit” that guilt through any description corpus. *Aten*, 79 Wn. App. at 89.

In *Aten*<sup>2</sup>, the defendant was charged with second degree

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<sup>2</sup> Although the facts were laid out in *Aten*, 79 Wn. App. 79, the facts here are taken from the Supreme Court decision in *Aten*, 130 Wn.2d 640.

manslaughter of four-month-old Sandra Biber who died under Aten's care two days after Sandra was diagnosed with a simple upper respiratory infection. *Aten*, 130 Wn.2d at 643-44, 645. The pathologist concluded Sandra died of Sudden Infant Death Syndrome (SIDS), although he could not rule out manual interference or suffocation. *Aten*, 130 Wn.2d at 646, 659.

On the morning of Sandra's death, Aten made exculpatory statements to the paramedics and to the officers who arrived on the scene. *Aten*, 130 Wn.2d at 645-46. After Sandra's death, Aten began storing and giving away some of her possessions. *Aten*, 130 Wn.2d at 659. When her daughter asked for an explanation, Aten said was the sheriff "might lock the whole house up." *Aten*, 130 Wn.2d at 648. Aten voluntarily admitted herself to a hospital, where she was diagnosed with grief and depression. *Aten*, 130 Wn.2d at 648. Aten told Sandra's mother she killed Sandra by smothering her with a pillow. *Aten*, 130 Wn.2d at 649. Aten told police officers and a CPS worker she killed Sandra by placing her hand over Sandra's mouth and nose. *Aten*, 130 Wn.2d at 652, 653.

At trial, Aten moved to exclude all her statements because the state had not established the *corpus delicti* of the crime with evidence

independent of those statements. *Aten*, 130 Wn.2d at 654. The trial court denied both motions and on appeal this Court reversed her conviction and the Supreme Court. *Aten*, 79 Wn. App. at 91; *Aten*, 130 Wn.2d at 655.

The Washington Supreme Court affirmed this Court's holding and agreed that "[t]he purpose of the *corpus delicti* doctrine would be frustrated if the court allowed a false confession to be 'corroborated' by a false admission, or even by seemingly innocent statements.". *Aten*, 130 Wn.2d at 657-58.

Divisions One and Three have considered a defendant's statement to someone other than law enforcement independent evidence of the *corpus delicti*. See *State v. Hummel*, 165 Wn. App. 749, 755, 759, 266 P.3d 269 (2012) (Division One considered that the lied to his children about his wife's whereabouts as part of the independent evidence to establish the *corpus delicti* of first degree murder.); *State v. Grogan*, 158 Wn. App. 272, 277, 246 P.3d 196 (2010). (Division Three considered the defendant's statement to his stepson that he "inappropriately" touched the victim independent evidence to corroborate the *corpus delicti* of first degree child molestation.)

But, Division two has not considered these types of statements in at least two cases. In *State v. Picard*, 90 Wn. App. 890, 894, 901-02, 954 P.2d 336 (1998) this Court did not consider defendant's statement to his father that he "set the house on fire" or to his brother that he "took a Benda torch ... through the house and lit different spots of the house on fire" independent evidence of the *corpus delicti* of arson). And recently this Court distinguished *Grogan* in its unpublished opinion in *State v. Syfrett*, 195 Wn. App. 1037 (2016), 2016 WL 4249191 \*1, 4.<sup>3</sup>

In *Syfrett*, this Court applied the principle it first articulated in *Aten*, that one of the purposes of corroboration is to prevent "uncorroborated admissions springing from a false subjective sense of guilt" when it did not consider Syfrett's statements as independent evidence of child molestation. *Syfrett*, 2016 WL 4249191 \*4; *Aten*, 79 Wn. App. at 89.

Syfrett's told both a pre-employment background investigator and a friend that he "briefly touched the genitals of his cousin's

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<sup>3</sup> Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

daughter, E.S.” and that the touching caused an erection. *Syfrett*, 2016 WL 4249191 \*4. But, Syfrett told his friend he did not touch E.S. for sexual gratification, but only disclosed the incident because he was anxious it would keep him from being hired as law enforcement. *Syfrett*, 2016 WL 4249191 \*1. Without Syfrett’s statements the state could not establish the *corpus delicti* of first degree child molestation because there was no independent evidence that supported an inference the contact was sexual in nature. *Syfrett*, 2016 WL 4249191 \*4.

Here, this court should again adhere to the principle it first articulated in *Aten* that “[t]he purpose of the *corpus delicti* doctrine would be frustrated if the court allowed a false confession to be ‘corroborated’ by a false admission, or even by seemingly innocent statements.”. *Aten*, 79 Wn. App. at 89.

Like *Aten*, D.D. was grief stricken by E.V.’s death. He was visibly shaken and inconsolable according to the first responders’ testimony. RP 89. Just as *Aten* expressed that she thought the sheriff was going to “lock up the whole house”, D.D. asked Detective Aguilar if he was going to “juvie” and D.D. told his girlfriend that he might be going to jail. RP 84, 254. Like *Aten*, if the witnesses’ testimony was

believed, D.D. made exculpatory, inculpatory, and inconsistent statements about E.V.'s death. RP 84, 85, 103, 118, 128, 149.

D.D.'s statement to his girlfriend not to tell anyone about E.V.'s death is a perfect example of admissions springing from a false subjective sense of guilt. Therefore, like in *Aten*, the doctrine of *corpus delicti* requires corroboration of all of D.D.'s statements and not just the statements he made to the police. This includes seemingly innocent statements or facially neutral statements. *Aten*, 79 Wn. App. at 89.

d. The Independent Evidence Is Insufficient To Establish the *Corpus Delicti* of Second Degree Manslaughter

The independent evidence, absent all statements made by D.D., is insufficient to establish the *corpus delicti* of manslaughter in the second degree.

Under RCW 9A.32.070 (1), “[a] person is guilty of manslaughter in the second degree when, with criminal negligence, [that person] causes the death of another person.”

Criminal negligence occurs when one “fails to be aware of a substantial risk that a wrongful act may occur” and that unawareness “constitutes a gross deviation from the standard of care that a

reasonable [person] would exercise in the same situation.” RCW 9A.08.010(1)(d).

If the independence evidence supports reasonable and logical inferences of both criminal agency and noncriminal agency it is insufficient to establish the *corpus delicti*. *Aten*, 130 Wn.2d at 660. “The independent evidence ‘must be consistent with guilt and inconsistent with a [ ] hypothesis of innocence.’” *Cardenas-Flores*, 189 Wn. 2d at 264. (internal citations omitted).

In *State v. Rooks*, 130 Wn. App. 787, 794, 125 P.3d 192 (2005), the defendant was charged with murder in the second degree. Rooks’ brother told police that Rooks admitted strangling the victim. *Rooks*, 130 Wn. App. at 791. Similar to *Aten*, the medical examiner could not rule out strangulation or drug overdose as the cause of death. *Rooks*, 130 Wn. App. at 794. Rooks relied on *Aten* and argued that because the evidence supports a reasonable and logical inference of both criminal and noncriminal causes of death, the *corpus delicti* was not established. *Rooks*, 130 Wn. App. at 803.

Division One limited its holding to the facts of Rook’s case and held under *Aten*, the state established the *corpus delicti* of the crime because, although there was evidence the victim died of a drug

overdose, the state presented overwhelming independent evidence establishing the victim's death was the result of a criminal act. *Rooks*, 130 Wn.2d at 804. The Washington Supreme Court denied review. *Rooks*, 158 Wn.2d 1007, 143 P.3d 830 (2007).

In contrast, the Washington Supreme Court accepted review of *Brockob* and held that “*Aten* modified the [*corpus delicti*] rule and, in so doing, increased the state's burden. It held that if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement.” *Brockob*, 159 Wn. 2d at 330 (*citing Aten*, 130 Wn.2d at 660–61).

Here, the independent evidence was insufficient to corroborate D.D.'s statements because it supports both a hypothesis of innocence and a hypothesis of guilt. Even if this Court finds the analysis in *Rooks* is sound (limited to its facts), the instant case is readily distinguishable because the evidence that a crime took place is not overwhelming. The evidence independent of D.D.'s statements is as follows:

- E.F. heard a gunshot followed by screams
- E.V. was shot from 30-33 feet away
- The shotgun could be cocked by pressing a button on the side of the gun, which could have been pressed when D.D. twirled the gun.

- A bullet was loaded by pulling on the charging handle in the same manner that empties other shotguns
- The pellets that hit the window behind the couch ranged from five feet to five feet and a few inches from the floor
- E.V. was 74 inches tall
- the pellets were concentrated in E.V.'s neck
- There were no fingerprints or palm prints on the gun to prove D.D. aimed the gun.
- No test fire was conducted from different heights
- Dr. Nelson was unable to conclude the height from which the gun was fired

RP 153, 202, 203, 327, 339, 350-51, 368, 372, 387, 404, 424, 425, 426, 427, 431, 443, 513-14, 518-19, 535, 561, 582.

This evidence supports a hypothesis that the gun accidentally discharged and hit E.V. None of the independent evidence is inconsistent with innocence. The independent evidence shows D.D. attempted to empty the chamber. It does not show that D.D. saw E.V. when he twirled the gun around. This is insufficient to show criminal agency because it does not show D.D. failed to be aware of a substantial risk that a wrongful act may occur and that his unawareness constituted a gross deviation from the standard of care that a reasonable [person] would exercise in the same situation. RCW 9A.08.010(1)(d).

It cannot be reasonably or logically inferred, from the height

at which the pellets hit the window behind the couch, that D.D. aimed the gun at E.V. and pulled the trigger because the pathologist was unable to conclude the height at which the gun was fired and Detective Spencer did not test fire the gun from different heights. RP 372-73, 424-27.

Because the independent evidence supports both a hypothesis of innocence and a hypothesis of guilt, there was insufficient evidence to establish the *corpus delicti*. *Brockob*, 159 Wn. 2d at 330.

Like in *Aten*, the state did not prove a criminal agency simply because a criminal act could not be ruled out. *Aten*, 130 Wn.2d at 659-60.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *Hickman*, 135 Wn.2d at 103 (*quoting Hardesty*, 129 Wn.2d at 309). Therefore, this Court must reverse D.D.’s conviction and remand for dismissal with prejudice.

3. THE TRIAL COURT VIOLATED  
D.D.'S SIXTH AMENDMENT  
RIGHT TO CONTROL HIS  
DEFENSE WHEN IT FOUND HIM  
GUILTY OF SECOND DEGREE  
MANSLAUGHTER

The trial court violated D.D.'s Sixth Amendment right to control his defense when it found him guilty of second degree manslaughter when the state did not raise the lesser included argument until closing arguments, and D.D.'s sole defense was related to defeating the element of recklessness.

In Washington a defendant charged with a crime may also be tried on a lesser degree or a lesser included offense. RCW 10.61.003, .006, .010; *In re Heidarj*, 159 Wn. App. 601, 609–10, 248 P.3d 550 (2011), *aff'd*, 174 Wn.2d 288, 274 P.3d 366 (2012).

There are three subsections of Chapter 10.61 that address lesser included offenses:

Upon an indictment or information for an offense consisting of different degrees, the jury **may** find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003 (emphasis added)

In all other cases the defendant **may** be found guilty of an

offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

RCW 10.61.006 (emphasis added)

Upon the trial of an indictment or information, the defendant **may** be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

RCW 10.61.010 (emphasis added) These are all permissive, not mandatory. The plain language of each subsection states a defendant **may** be convicted of a lesser offense.

In a jury trial either the state or the defendant may request a lesser included offense. *Heidari*, 159 Wn. App. at 615. The state may employ an all or nothing strategy and not request a lesser included instruction. In that case, the Court of Appeals “need not ‘rescue[] the State from a failed strategy’” if the conviction is reversed on appeal. *Heidari*, 159 Wn. App. at 615 (citing *State v. Garcia*, 146 Wn. App. 821, 834, 193 P.3d 181 (2008) (Schulteis, C.J., dissenting)).

In contrast, when a case is tried to the bench, RCW 10.61.003, .006, and .010 puts the defendant on notice that he may be convicted of a lesser included offense and no instructions are required. *Heidari*, 159 Wn. App. at 609–10. Generally, the judge

“may properly find defendant guilty of any inferior degree crime of the crimes included within the original information.” *State v. Peterson*, 133 Wn.2d 885, 892–93, 948 P.2d 381 (1997).

However, a criminal defendant has an implicit Sixth Amendment right to control his defense. U.S. Const. Amends. V, VI, XIV; Wash. Const. art. I, § 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Lynch*, 178 Wn.2d 487, 491–92, 309 P.3d 482 (2013) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“Although not stated in the [Sixth] Amendment in so many words, the right ... to make one's own defense personally [ ] is thus necessarily implied by the structure of the Amendment.”)); *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (“*Faretta* embodies ‘the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.’” (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir.1979))).

The defendant's right to control his defense is necessary “to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.” *Lynch*, 178 Wn. 2d at 491–92 (citing *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013)).

In *Coristine*, the Washington Supreme Court held that the trial court impermissibly interfered with Coristine's Sixth Amendment right to present a defense when it failed to respect Coristine's decision to waive an affirmative defense. *Coristine*, 177 Wn.2d at 379. The Court's reasoning is illustrative.

Coristine was charged with second degree rape of L.F. and his sole defense was that the state failed to prove its case – that L.F. did not have the capacity to consent. *Coristine*, 177 Wn.2d at 373, 378-79. After the close of evidence, the trial court instructed the jury on the affirmative defense of reasonable belief over the Coristine's objection. *Coristine*, 177 Wn.2d at 375.

The Washington Supreme Court found that the instruction risked confusion between L.F.'s capacity to consent and Coristine's reasonable belief about her capacity. *Coristine*, 177 Wn.2d at 381. Therefore, the instruction interfered with Coristine's straightforward presentation of his sole defense—that L.F. was in fact not incapacitated. *Coristine*, 177 Wn.2d at 381. This was an impermissible violation of Coristine's right to autonomy and to control his defense. *Coristine*, 177 Wn.2d at 375.

*Heidari*, 159 Wn. App. 601 is also illustrative. Although the

issue in *Heidari* was whether the Court of Appeals can remand to enter judgment on a lesser included offense when the jury was not instructed on that crime, the reviewing court's analysis provides guidance here.

In *Heidari*, 159 Wn. App at 608, the defendant was charged with second degree child molestation. Neither the state nor the defendant requested an instruction on the lesser included offense of attempted child molestation. *Heidari*, 159 Wn. App. at 602. The state conceded the evidence was insufficient as a matter of law to support Heidari's second degree child molestation conviction, but requested the Court of Appeals remand to enter judgment on the lesser included offense. *Heidari*, 159 Wn. App. at 602.

The state argued prohibiting remand for entry of judgment on a lesser included charge in a jury trial case but allowing it in a bench trial case creates an inequitable result. Defendants receiving jury trials would receive different treatment than those receiving bench trials or trials in juvenile court. *Heidari*, 159 Wn. App. at 615. It would also reward less diligent defendants who did not request a lesser included offense. *Heidari*, 159 Wn. App. at 615.

The Court of Appeals rejected the state's policy arguments and found that the result was equitable because both the state and the defendant contribute to the outcome. For example, a defendant can ask for a jury or not. *Heidari*, 159 Wn. App. at 615 (citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 700 (1984)). And either the defendant or the state may request a lesser included instruction. Further, the Court of Appeals recognized that the prosecutor gambled on an all or nothing approach and lost. *Heidari*, 159 Wn. App. at 615.

Here, similar to *Coristine*, D.D.'s sole defense was that the state failed to prove its case of first degree manslaughter because it could not prove D.D. knew of and disregarded a substantial risk. D.D. presented evidence that the Benelli shotgun operated differently than the shotgun D.D. had previously used. Based on his previous experience with a different kind of shotgun, D.D. believed that pulling the charging handle would empty the gun, not load it.

Similar to the jury instruction in *Coristine*, the trial court's consideration of second degree manslaughter interfered with D.D.'s straightforward presentation of his sole defense – that the state did not prove he was aware of and disregarded a substantial risk.

Because the state did not seriously pursue second degree manslaughter, D.D. focused solely on defending first degree manslaughter to his own detriment. To zealously defend against first degree manslaughter, D.D. had to take the stand to explain how he handled the gun and risk conceding facts that could support second degree manslaughter. D.D. took that risk because he crafted a defense responsive to the state's all or nothing strategy.

To allow the juvenile court to consider a lesser included offense after the close of evidence when both parties employed an all or nothing strategy violates D.D.'s autonomy and control over his defense and unfairly rescues the state from its failed strategy.

Further, the *Heidari* court's explanation of why it is not inequitable to create a different result between defendants who are tried by a jury and those who are tried by the bench is not applicable here because the *Heidari* court did not adequately consider how it would unfairly affect juvenile defendants. Unlike in *Heidari*, D.D. and the state did not both contribute to the outcome. The *Heidari* Court noted that a defendant bore the risk of being convicted of a lesser included offense when he did not request a jury trial, but a juvenile

cannot request a jury. A bench trial is his only choice. RCW 13.04.021(2).

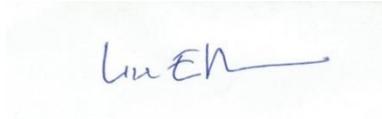
Importantly, D.D.'s strategy of all or nothing resulted in him being acquitted on the first degree manslaughter charge. This created an inequitable result because an adult who exercised his right to a jury trial and employed this all or nothing strategy would have been fully acquitted, where D.D. was convicted of a lesser included charge despite being found not guilty of first degree manslaughter. Therefore, D.D.'s conviction for second degree manslaughter creates an inequitable result between adult and juvenile defendants and impermissibly interferes with D.D.'s Sixth Amendment right to autonomy and to control his defense.

#### E. CONCLUSION

D.D. respectfully requests that this court remand this case to the juvenile court for dismissal with prejudice of second degree manslaughter based on insufficient evidence.

DATED this 27<sup>th</sup> day of November 2018.

Respectfully submitted,



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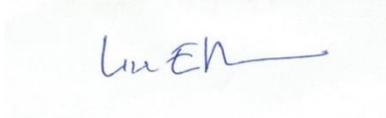
LISE ELLNER, WSBA No. 20955  
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ERIN SPERGER, WSBA No. 45931  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor's Office [appeals@co.cowlitz.wa.us](mailto:appeals@co.cowlitz.wa.us) and D.D., c/o Green Hill School, 375 S.W. 11th Street, Chehalis, WA 98532 a true copy of the document to which this certificate is affixed on November 27, 2018. Service was made by electronically to the prosecutor and Dawson Dunn by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**November 27, 2018 - 10:57 AM**

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