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NO. 51944-5-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAWSON DUNN,

Appellant.

RESPONDENT'S BRIEF

ERIC BENTSON/WSBA 38471
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Dunn's conviction should be affirmed because:

- (1) There was sufficient evidence for the court to find that Dunn acted with criminal negligence when he shot and killed E.V. by pointing a shotgun at him and pulling the trigger;
- (2) There was independent proof sufficient to establish *corpus delicti*; and
- (3) The trial court was permitted to find the lesser degree offense of manslaughter in the second degree on the original charge of manslaughter in the first degree.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Taken in the light most favorable to the State, was there sufficient evidence for the court to find Dunn acted with criminal negligence when he killed E.V. by shooting him with a shotgun after pointing the shotgun at him and pulling the trigger?
- B. Was there independent proof sufficient to infer a death was caused by a criminal agency independent of Dunn's statements, when that evidence showed E.V. was shot in the neck, face, and chest by a shotgun operated by another that was pointed at him and fired from approximately 33 feet away?
- C. Was the court permitted to find a lesser degree offense of manslaughter in the second degree when the only difference in the two charges was the mental state involved, doing so was authorized by statute, and Dunn argued both the original and lesser charges at trial?

III. STATEMENT OF THE CASE

In 2017, on weekends when her mother had custody of her, 12-year-old E.F. lived at her grandparents' house at 1525 Carroll Road in Kelso. RP 188-89, 194. E.F.'s cousin, Dawson Dunn, lived in a separate building on the property with his parents. RP 190-91, 540. On October 13, 2017, 13-year-old E.V. spent the night with 13-year-old Dunn. RP 333, 554, 562. E.V. and Dunn were friends who attended the eighth grade together at Coweeman Middle School. RP 230-34.

On the morning of October 14, 2017, E.F. was alone at her grandparents' house when Dunn and E.V. came to the house. RP 195. E.F., E.V., and Dunn were the only people in the house that morning. RP 195. Eventually, in the living room of the house, E.F. and E.V. watched YouTube on E.F.'s phone. RP 196. While they watched YouTube, Dunn entered his grandparents' master bedroom. RP 149, 197. The master bedroom had two glass French doors that opened to the living room. RP 152, 197. Dunn would keep Nerf guns in his grandparents' bedroom. RP 197. While Dunn was in the bedroom, E.F. noticed him going through his grandparents' drawers on his grandfather's side of the bed, where Dunn and E.F.'s grandfather, Dennis Tollefson, kept money, magazines, and a pistol. RP 198, 540. In the corner, on the same side of the room behind a blue chair, Tollefson kept a shotgun and a pellet gun leaning against the wall. RP 123,

199, 540. Tollefson had instructed Dunn and E.F. not to play with these guns. RP 199, 544. One of these guns was a camouflage 12-gauge Benelli shotgun with a flashlight taped to the barrel. RP 106, 415-16.

E.F. returned to her bedroom. RP 200. Dunn communicated with his girlfriend N.W. through a video chat for iPhones called FaceTime. RP 243. Both Dunn and E.V. spoke with N.W. through FaceTime. RP 245. E.V. left the conversation. RP 245. Dunn entered another room in the house with the phone he was using face up so that N.W. only observed the ceiling. RP 245. N.W. heard Dunn say, "Look at this." RP 246.

Eventually, both Dunn and E.V. came to E.F.'s bedroom. RP 200. Dunn left the bedroom. RP 200. E.V. left the bedroom with E.F.'s phone. RP 200. After leaving with the phone, E.F. heard E.V. threaten to text N.W. RP 201. A few minutes later, E.F. heard Dunn tell E.V., "Stop chasing me." RP 201. Through FaceTime, N.W. heard Dunn and E.V. running around and laughing as if they were chasing each other. RP 246. Shortly after this, both E.F. and N.W. heard a gunshot. RP 202, 246-47.

Dunn came screaming into E.F.'s room saying, "I shot [E.V.]." RP 203. Dunn told E.F. to call 911; however, E.V. had taken her phone. RP 203, 205. Dunn retrieved E.F.'s phone from the window sill by the bed. RP 205. This was the same window near the drawer Dunn had gone through earlier near where the camouflage shotgun was kept in the corner against

the wall. RP 205. E.F. was confused because she had thought E.V. had her phone. RP 205. Dunn brought E.F. the phone, and she unlocked it. RP 206. Dunn called 911 on his own phone. RP 136, 206. Dunn used E.F.'s phone to call his father and other people. RP 206. On one of these calls Dunn said, "I shot [E.V.]." RP 209. E.F. attempted to save E.V.'s life and performed chest compressions on him as instructed by the dispatcher. RP 209.

Cowlitz County Sheriff's Office Deputies Ness Aguilar and Jason Hammer responded to the 911 call at 11:42 a.m. RP 79. Deputy Aguilar observed E.F. conducting chest compressions on E.V. and took over for her. RP 80-81. Medical personnel from Cowlitz 2 Fire and Rescue arrived and took over life-saving measures. RP 83, 99. Dunn's mother came to the house and comforted Dunn. RP 85. Dunn told his mother, "I thought it was empty." RP 85.

E.V. had suffered extreme trauma to his body from birdshot extending from his face to his chest. RP 100. E.V. was not breathing. RP 100. Neither a defibrillator nor suctioning his airway were effective. RP 100. E.V.'s heart was not beating. RP 101. Firefighter/EMT Jonathan Woods observed that E.V. was dead. RP 101. Woods contacted Dunn and asked him about what had happened. RP 102.

Dunn told Woods that he had pointed the shotgun at E.V. and pulled the trigger. RP 102-03. Dunn told Woods that he racked the gun and a shell came out. RP 103. Dunn said he was surprised that the shotgun was loaded. RP 103. He then told Woods he racked the shotgun again, did not see anything, and pointed the gun at E.V. RP 103. Dunn told Woods he thought the shotgun was unloaded. RP 103. Dunn told Woods that after he pointed the shotgun at E.V., he pulled the trigger. RP 103. Dunn told Woods that after he was shot, E.V. reached toward his neck/chest area and fell back onto the couch. RP 103. Woods asked Dunn if he had ever shot the gun before. RP 103. Dunn told Woods he was familiar with the shotgun and had shot that particular gun multiple times. RP 103.

Dunn told Deputy Hammer that E.V. had been chasing him. RP 149. Dunn told Deputy Hammer “he went into the master bedroom, retrieved a shotgun, racked it to make sure it wasn’t loaded, and then fired it at [E.V.]” RP 149. Dunn also claimed that when he racked the shotgun a round came out causing him to believe it was unloaded. RP 149. Deputy Hammer entered the master bedroom and attempted to find the live round that Dunn claimed he had ejected but was unable to find it. RP 150. Deputy Hammer observed the camouflage shotgun propped up against the wall. RP 150. Beside the shotgun was also a black pellet rifle. RP 151. On the floor by the bed was a spent (fired) red Winchester 12-gauge shotgun shell

marked "Universal 8." RP 151-52. Looking out the open French doors from inside the bedroom, Deputy Hammer observed that E.V. had fallen directly in line with a person looking straight out of the bedroom through the doors. RP 152. Following this same line, beyond E.V., Deputy Hammer observed holes in the kitchen window consistent with overspray from a shotgun blast. RP 153.

Deputy James Hanberry entered the master bedroom and observed the camouflage shotgun and the black pellet gun leaned against the wall. RP 123. Deputy Hanberry observed a spent shotgun shell on the floor. RP 123. Deputy Hanberry checked the shotgun and noted the tube was empty. RP 125. He racked the shotgun and a live round ejected. RP 126. After doing so the shotgun no longer held any ammunition. RP 126. Deputy Hanberry later heard Dunn tell his grandmother, "I thought it was unloaded," and, "He was chasing me." RP 128.

Detective Sergeant ("Sgt") Brad Thurman responded to the house to investigate. RP 376. A search warrant was obtained for the house. RP 382. In the kitchen window beyond E.V., in line with the shotgun blast, Sgt Thurman observed six indentations from shotgun pellets. RP 385. Sgt Thurman measured these six indentations. RP 391-93. The lowest indentation in the window was $60\frac{3}{4}$ inches above the floor. RP 393. The highest indentation was $71\frac{5}{8}$ inches above the floor. RP 390; CP 82

(Exhibit 116). Sgt Thurman also measured the distance from the master bedroom to E.V. and to the kitchen window along the same line of sight. RP 394; CP 81 (Exhibit 115). The distance from the back wall of the master bedroom to the bedroom's doorway was 18 feet, three inches. RP 394. The distance from the bedroom doorway to the kitchen window was 50 feet, two inches. RP 394. From the back bedroom wall to the couch that E.V. fell upon after being shot was a distance that ranged from 30 feet, 3 inches to 37 feet. RP 397; CP 81 (Exhibit 115).

An autopsy was conducted on E.V. RP 338. The medical examiner, Dr. Cliff Nelson, observed that E.V. was 74 inches tall and had received a shotgun blast to the front of his body. RP 339-340. Dr. Nelson testified that the cause of E.V.'s death was a shotgun wound to the head, neck, and chest. RP 371. The spread of the blast covered E.V.'s head, neck, and chest. RP 340. Dr. Nelson explained that the largest accumulation of the pellet mass was to E.V.'s lower neck area. RP 351, 371. Dr. Nelson noted that the spread of the shotgun pellets would allow for a determination of the distance from the end of the barrel to where E.V. had received the blast. RP 346. Dr. Nelson explained that such a determination would require test firing and made no claim regarding the distance of the blast. RP 346. Dr. Nelson measured the spread of the shotgun blast, finding it was 17 inches by 15½ inches. RP 370-71.

The shotgun was later test-fired at various distances using the same type of shell that had been fired at E.V. RP 405. At a distance of 15 feet, the spread of the pellets was approximately seven inches in diameter. RP 518. At a distance of 21 feet, the spread of the pellets was approximately 9 inches in diameter. RP 518. At a distance of 30 feet the spread of the pellets was 15 to 16 inches in diameter. RP 518. At a distance of 33 feet, the spread of the pellets was 16 to 17 inches in diameter. RP 519.

Dunn testified that he had gone into his grandfather's room and handled the shotgun. RP 580. He also testified that he had been told not to touch it, and that he had never touched it before. RP 580. Dunn claimed he pulled a lever on the shotgun to make sure it was unloaded. RP 582. He testified that he twirled the shotgun around. RP 585. He claimed while he was playing around with the shotgun it discharged. RP 585-86. He claimed he had no knowledge of where E.V. was when it discharged. RP 586. He also claimed he did not pull the trigger. RP 586. Dunn denied pointing the shotgun at E.V. or pulling the trigger. RP 594.

When cross-examined, Dunn admitted he knew it was important to know how to use a gun before operating it. RP 599. He admitted it was not a good idea to point a gun at a person or pull the trigger while pointing a gun at another person. RP 599. Dunn admitted that he knew the shotgun was capable of killing a person. RP 611. He also admitted that he had

violated his grandfather's rule to not play with the gun. RP 611. He admitted that when he had shot a shotgun at the range prior to shooting E.V. he had gone through rules for shooting with the range master. RP 600. Dunn agreed that one of the rules he had learned at the range was not to point guns at people. RP 600. He also admitted from his training at the gun range that he knew how to hold a shotgun up against his shoulder to absorb the kick when firing. RP 600. Dunn also claimed that when the shotgun discharged he was holding it slightly above his waste. RP 611.

During closing argument, Dunn's attorney argued what was at issue was Dunn's mental state, asking, "Did he have intent? Did he have recklessness? Did he have criminal negligence?" RP 641. Dunn's attorney later defined manslaughter in the second degree for the court, stating: "A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of [a] substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard." RP 652. Dunn's attorney then argued that he had not acted with criminal negligence because he had received misinformation on the shotgun due to operating a different shotgun. RP 652. Dunn's attorney concluded by stating: "[H]e is not guilty of Manslaughter in the First Degree because he was not reckless. And he was

not guilty of the lesser offense of Manslaughter in the Second Degree because he did not act with criminal negligence.” RP 653.

When the court reached its verdict, it rejected Dunn’s claim to holding the gun at his waist because this would not have been consistent with shot placement on E.V. and the kitchen window beyond him. RP 672-73. The court also did not find Dunn’s claim credible that the shotgun fired without the trigger being pulled. RP 673. The court found Dunn’s statements to the first responders that he had racked the gun, pointed it at E.V. and shot it, were reliable. RP 673. Unlike his testimony, his prior statements were made close in time to the event, while he was still upset, and they were supported by the physical evidence. RP 673.

The court considered the applicable mental state of a 13-year-old and did not find beyond a reasonable doubt that Dunn acted recklessly. RP 676. However, the court did find that 13-year-old Dunn was aware guns were dangerous, and despite this knowledge, he pointed the gun at E.V. and pulled the trigger. RP 677. The court found Dunn acted with criminal negligence and was thus guilty of manslaughter in the second degree. RP 678.

IV. ARGUMENT

A. TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR THE COURT TO FIND DUNN GUILTY OF MANSLAUGHTER IN THE SECOND DEGREE.

Taken in the light most favorable to the State, there was sufficient evidence for the court to find Dunn acted with criminal negligence and caused the death of E.V. The Washington Supreme Court has stated:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When determining the sufficiency of evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn. App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn. App. at 707-08. "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

RCW 9A.32.070(1) states: "A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person." According to RCW 9A.08.010(1)(d):

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Further, “[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element is also established if a person acts intentionally, knowingly, or recklessly.” RCW 9A.08.010(2).

On several occasions Washington courts have examined the sufficiency of evidence of recklessness and criminal negligence, both of which may sustain a conviction for manslaughter in the second degree.¹ Evidence was sufficient for the jury to infer criminal negligence when a defendant brought a loaded shotgun to the scene of an altercation and it discharged during a struggle, because it was possible for the jury to infer the defendant overreacted by bringing a loaded gun to the scene. *State v. Fondren*, 41 Wn. App. 17, 24, 701 P.2d 810 (1985). Evidence was sufficient for a jury to conclude a diabetic defendant acted either recklessly or with criminal negligence, when he failed to appropriately monitor his blood sugar and act with appropriate caution with a gun that he claimed to have accidentally shot the victim with while showing it to her. *State v. Guilliot*, 106 Wn. App. 355, 367-68, 22 P.3d 1266 (2001). Testimony that the defendant accidentally discharged a gun during a struggle was a sufficient factual basis to instruct the jury on both first and second degree

¹ See RCW 9A.08.010(2).

manslaughter. *State v. Berlin*, 133 Wn.2d 541, 551-52, 947 P.2d 700 (1997).

Here, there was overwhelming evidence to support the court's finding that Dunn acted with criminal negligence when he caused the death of E.V. Dunn was aware that the shotgun was capable of killing. Although he was an eighth grader, he had experience firing a 12-gauge shotgun at the gun range. He told Jonathan Woods he had previously fired the shotgun he killed E.V. with multiple times. Dunn admitted to picking up the gun and operating the loading mechanism. Dunn testified that he was not supposed to touch the shotgun. Dunn admitted that he violated his grandfather's rule by handling the gun. Dunn admitted he knew better than to point guns at other people. Dunn admitted he knew better than to pull the trigger while pointing guns at people.

Despite this awareness of guns, Dunn told Deputy Hammer he picked up the gun and racked it, causing a shell to eject, and then fired at E.V. Dunn told Jonathan Woods he racked the shotgun again, did not see anything, and pointed the gun at E.V. Dunn told Woods that after he pointed the shotgun at E.V., he pulled the trigger. After E.V. was shot, Dunn told his grandmother that E.V. had been chasing him, and that he thought the gun was unloaded.

The physical evidence demonstrated Dunn pointed the shotgun at E.V. and pulled the trigger. The spread of the pellets on E.V. was between 15½ and 17 inches, indicating he had been shot from a distance of roughly 33 feet away. Based on the location of where E.V. was hit and the direction of the pellets, this required the shotgun to be fired from the master bedroom. The shotgun was fired through the open doorway with the blast centered on the front of E.V.'s neck. Further, the path of the pellets demonstrated they maintained a roughly five foot parallel path to the ground. E.V. was 74 inches tall. The central part of the blast was to E.V.'s neck roughly a foot less than his height. The few pellets that went beyond him entered the window at roughly the same height at a range of 60¾ to 71⅝ inches. Taken in the light most favorable to the State, it was reasonable for the court to infer the shotgun was aimed and fired at E.V.

Not only did this show the shotgun was aimed, it contradicted Dunn's testimony. Had the gun been held as low as Dunn claimed—at his waist—and the barrel been at enough of an angle for the blast to strike E.V. where it did, then the pellets that traveled beyond E.V. would have struck far above the window, likely in the ceiling, rather than maintain a relatively constant path parallel to the ground. This did not require an expert on the human body or firearms to understand, but rather a basic understanding of angles. Additionally, Dunn's testimony that the gun fired itself without the

trigger being pulled was not credible, especially when the gun was tested and fired by Deputy Spencer and found to be operating properly. RP 412-428. Of course, Dunn's claim that the gun had fired in this manner directly contradicted what he told Deputy Hammer and Jonathan Woods on the day E.V. was killed. For these reasons, the court correctly rejected Dunn's claim that he did not aim the gun at E.V. or pull the trigger.

Further, although the court rejected Dunn's claims regarding his handling of the shotgun, even if his claims were correct it would have provided sufficient evidence for the court to find he acted with criminal negligence. Dunn claimed he violated his grandfather's rules by handling the gun. He also claimed, contrary to his earlier statements on the day of the shooting, that he had never used the shotgun before. He testified he was aware that guns were capable of killing and that he had been instructed on gun safety at the range. He then claimed he played with the gun by twirling it. Thus, according to his own testimony, Dunn was aware the shotgun was capable killing, was unfamiliar with how to operate it, and had been warned not to handle it. Yet he testified that he picked up the gun, manipulated the loading mechanism, and then began playing with the gun by twirling it. Even if such actions had caused the gun to fire, they would still have permitted the court to find criminal negligence. An adolescent with experience handling and firing guns of any sort, should have been aware of

the substantial risk that a wrongful act could occur and that this was a gross deviation from the standard of care a reasonable person would exercise in the same situation.

Dunn's claims regarding the lesser maturity of juveniles as compared to adults ignores two important considerations. First, the cases he cites relate to the appropriate sentences for juveniles who have been convicted of crimes, not whether there was sufficient evidence of those juveniles' mental states to convict them of those crimes. Second, the trial court did consider Dunn's youth in determining the correct mental state to apply. The court found that because Dunn was 13-years-old and believed the gun to be unloaded, he had not acted with recklessness. For this exact reason, the court found Dunn did not "know of" and disregard a substantial risk. Rather, due to his youth, the court found Dunn failed to be aware of a substantial risk that a wrongful act could occur and that this was a gross deviation from that of a reasonable 13-year-old with his experience with firearms. Considering that the evidence strongly corroborated Dunn's original admission to manipulating the charging mechanism, pointing the gun at E.V., and pulling the trigger, there was sufficient evidence for the court to find he acted with criminal negligence.

B. THERE WAS SUFFICIENT INDEPENDENT EVIDENCE TO CORROBORATE DUNN'S CONFESSION.

There was independent proof of a crime to corroborate Dunn's admissions and establish *corpus delicti*. The rule of *corpus delicti* is stated as follows:

The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

State v. Meyer, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). Dunn claims there was not independent proof that a crime occurred absent his statements to establish *corpus delicti*. However, when the independent evidence is considered in the light most favorable to the State, there was independent proof of a crime absent his statements corroborating that crime, allowing the court to consider his statements in combination with this independent proof to determine his guilt.

“Corpus delicti means the ‘body of the crime’ and must be proved by evidence sufficient to support the inference there has been a criminal act.” *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006). “The corpus delicti rule was established to protect a defendant from the possibility of an unjust conviction based upon a false confession alone.” *State v. Vagerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). “[I]t is a

safeguard to ensure an incriminating statement relates to an actual offense.” *State v. Angulo*, 148 Wn. App. 642, 657, 200 P.3d 752 (2009). “The State must present other independent evidence to corroborate a defendant’s incriminating statement. In other words, the State must present evidence independent of the incriminating statement that the crime the defendant *described in the statement* actually occurred.” *Brockob*, 159 Wn.2d at 328.

“The independent evidence need not be of such a character as would establish *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.” *Meyer*, 37 Wn.2d at 763-64. “‘*Prima facie*’ in this context means there is ‘evidence of sufficient circumstances which would support a logical and reasonable inference’ of the facts sought to be proved.” *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). “[T]he independent evidence need not be sufficient to support a conviction or even to send the case to the jury.” *City of Bremerton v. Corbett*, 106 Wn.2d 569, 578, 723 P.2d 1135 (1986). *Corpus delicti* “can be established by either direct or circumstantial evidence.” *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967). “In assessing whether there is sufficient evidence of *corpus delicti*, independent of the defendant’s statements, this Court assumes the truth of the State’s evidence and all reasonable inferences from it in the light most favorable to the State.” *Aten*, 130 Wn.2d at 658.

“The corpus delicti in a homicide case requires (1) the fact of death and (2) a causal connection between the death and a criminal agency[.]” *Lung*, 70 Wn.2d at 371. *Corpus delicti* does not require something beyond this well-established standard: “[T]he State is not required to present independent evidence sufficient to demonstrate anything other than the fact of death and a causal connection between the death and a criminal act.” *State v. Young*, 196 Wn. App. 214, 222, 382 P.3d 716 (2016). For example, “[w]hile the State must establish the mental element of the crime beyond a reasonable doubt to sustain a conviction, mens rea is not required to satisfy corpus delicti.” *State v. Cardenas-Flores*, 189 Wn.2d 243, 263-64, 401 P.3d 19 (2017). Further, evidence connecting the defendant to the crime is not required: “[T]he corpus delicti does not require proof of a causal relation between the death and the accused.” *Lung*, 70 Wn.2d at 371. “[P]roof of identity, while a necessary element to be proved at trial need not be proved to establish the corpus delicti of the charged crime.” *State v. Hummel*, 165 Wn. App. 749, 765, 266 P.3d 269 (2012).

In *Aten*, an infant was found dead and an autopsy of the child did not reveal whether the cause of death was from manual interference or Sudden Infant Death Syndrome (“SIDS”). 130 Wn.2d at 646. 10 days later, the child’s babysitter, while hospitalized for mental illness, said she had killed the baby by smothering her with a pillow. *Id.* at 649. The following

day, while suffering from hallucinations, she again said she had killed the baby, but this time said she had placed her hand over the baby's mouth. *Id.* at 653. Other than the babysitter's statements there was no independent evidence of a causal connection between the fact of death and a criminal act; thus, *corpus delicti* was not established. *See id.* at 661.

In *State v. Rooks*, 130 Wn. App. 787, 794, 125 P.3d 192 (2005), the medical examiner could not rule out a drug overdose or strangulation as the victim's cause of death. Rooks confessed to strangling the victim. *Id.* The Court of Appeals clarified that *Aten* should not be read as holding *corpus delicti* could not be established when there is more than one possible explanation for a death:

But *Aten* clearly states there was no reasonable inference of criminal conduct in that case. *Aten*, 130 Wn.2d at 661. Because the Court concluded there was no reasonable and logical inference that the infant died as a result of criminal negligence, *Aten* does not hold that the *corpus delicti* cannot be established where there are reasonable and logical inferences of both criminal and noncriminal causes of death.

Id. at 803-04. While there was scant evidence the victim died from an overdose, the totality of the independent evidence led to the conclusion that the death was caused by a criminal act. *Id.* at 806.

Brockob, relying on *Aten*, explained that *corpus delicti* required the independent evidence corroborating a defendant's incriminating statement ““must be consistent with guilt and inconsistent with a hypothesis of

innocence.’” 159 Wn.2d at 329 (quoting *Aten* 130 Wn.2d at 660 (quoting *Lung* 70 Wn.2d at 365)). In *Hummel*, the Court of Appeals explained that *Lung* was the original source of this citation. 165 Wn. App at 766. However, in 1967, when *Lung* was decided, this requirement was unrelated to the application of the *corpus delicti* rule, but rather related to how circumstantial evidence was to be weighed by a jury. *Id.* at 768 n.6. In 1975, the Washington Supreme Court abrogated this rule because of the nationwide realization that circumstantial evidence was not necessarily less reliable than direct evidence. *Id.*; see *State v. Grosby*, 85 Wn.2d 758, 762-66, 539 P.2d 680 (1975).² Due to the change in how circumstantial evidence is now evaluated in all other matters, it makes sense to evaluate circumstantial evidence in the same manner when considering *corpus delicti*.³

In *Lung*, Lung’s estranged wife disappeared and her body was never recovered. 70 Wn.2d at 366-68. Lung told police a loaded rifle in his closet accidentally discharged when he reached into the closet for a jacket, and his

² The rule that existed when *Lung* was decided required the jury be instructed that “to sustain a conviction on circumstantial evidence alone, the circumstances proved by the State must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any reasonable hypothesis or theory which would establish, or tend to establish innocence.” *Id.* at 768 n.6.

³ Circumstantial evidence is no longer considered of a lesser value than direct evidence. As WPIC 1.03 instructs jurors, “[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.”

wife, who was nearby, was shot and killed. *Id.* at 367. Lung claimed he disposed of her body in the Snohomish River. *Id.* Lung also claimed he put the victim's coat, purse, and shoes in her car. *Id.* 368. Other evidence corroborated portions of his statements. An examination of the victim's coat revealed a .30 caliber bullet hole in the right-hand pocket, and an expert testified that this hole was made with Lung's rifle. *Id.* 367-68. Blood found in Lung's house confirmed where the victim was standing when she was shot. *Id.* at 369. Her watch and ring were found on a window sill where Lung said she had placed them before the shooting. *Id.* at 368. And, a patrol officer observed Lung's truck on the road to the location in the river where he claimed he had dumped the body. *Id.* at 369.

In finding that Lung's statements were sufficiently corroborated by independent evidence to establish *corpus delicti*, the Supreme Court stated:

The difficulty in the case at bar is the fact that the body of the victim was never found. Is the body or some part thereof required to establish the 'fact of death' element in the *corpus delicti*? We think not. To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable and would lead to absurdity and injustice.

The final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence. All that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable men of the existence of that fact. The law employs the judgment of reasonable minds as the only means of arriving at the truth by inference from the facts

and circumstances in evidence. If this were not true, an infinite number of crimes involving the elements of a specific intent would go unpunished.

Id. at 371; *see also Hummel*, 165 Wn. App. at 767-68. Thus, the primary thrust of *Lung* was not that *corpus delicti* required heightened scrutiny of circumstantial evidence as independent proof, but that independent proof could consist of circumstantial evidence. It is also noteworthy that *Lung* did not require the independent proof to eliminate any possible innocent explanation of the victim's disappearance or death, only that it be sufficient to convince a reasonably-minded fact-finder of the existence of the crime to corroborate Lung's statements.

In *Cardenas-Flores* the Supreme Court provided a clarifying example of what is required for independent evidence to be consistent with guilt and inconsistent with a hypothesis of innocence. 189 Wn.2d at 264. *Cardenas-Flores* involved an assault of a child where an X-ray of a fracture to the child's leg showed a greater amount of force than would occur every day and that demonstrated compression and twisting of the child's leg. *Id.* at 265. Cardenas-Flores had made several admissions to having caused the injury. *Id.* at 249. There was no evidence of genetic disorder or that the fracture was self-inflicted. *Id.* at 265. Thus, the evidence supported the logical inference that non-accidental trauma caused the child's fracture. *Id.*

This was consistent with guilt and inconsistent with innocence, which provided sufficient evidence to satisfy *corpus delicti*. *Id.*

Here, absent Dunn's statements, there was independent proof that established both the fact of E.V.'s death and that this death was caused by criminal agency. E.V. was killed by a shotgun blast with a spread indicating the gunshot was from roughly 33 feet away. The pellets beyond E.V. in the kitchen window showed the direction of where the shotgun blast had originated. A distance of roughly 33 feet placed the gun in the master bedroom. At this location a 12-gauge camouflage shotgun was located, and a spent shotgun shell was found on the floor nearby. No weapon was found anywhere near E.V., and there was no evidence of any shooting in self-defense. The spread of the shotgun blast was from a distance that made it impossible for E.V. to have shot himself. It also eliminated any possibility that the shotgun had been fired during a struggle between E.V. and another. And, according to E.F. and N.W., only one other person, Dunn, was in this part of the house when the shotgun blast occurred.⁴ Immediately after the shooting, Dunn was frantic and upset. Taken together, this evidence was independent proof sufficient to infer manslaughter in the second degree and establish *corpus delicti*.

⁴ While it is unnecessary to *corpus delicti* to identify Dunn as the shooter, the fact of another person being present in the vicinity of the shotgun is inconsistent with any conclusion that E.V. shot himself.

However, there was also independent evidence the shotgun was also aimed at E.V. when fired. All pellets located either entered E.V.'s body or the window beyond him. The shot to E.V. was centered on his person. The center of the blast was primarily to the front of his neck with the spread extending to his head and upper chest. Considering E.V. was 74 inches tall and his neck was roughly a 10 to 12 inches below the top of his head, this would have put the center of the blast at around 62 inches. The pellet indentations in the window beyond E.V. were in line with where his body was struck and ranged in height from $60\frac{3}{4}$ inches to $71\frac{5}{8}$ inches. The total distance from the back bedroom wall to the kitchen window was 68 feet 5 inches. E.V.'s body was found at roughly the halfway point between the back bedroom wall and the kitchen window. Thus, the flight path of the pellets remained inline and roughly parallel to the floor. Further, this height was also consistent with a shotgun being fired while braced against a person's shoulder, just below the neck.⁵

The evidence of aiming a shotgun at another and shooting that person through the neck would establish independent proof of intentionally

⁵ Dunn complains that the medical examiner did not testify to the path the pellets traveled in the house, but this would not be testimony one would expect from a medical examiner. There was extensive testimony from Deputy Spencer regarding the operation and test firing of the shotgun. RP 412-439. Further, it is common knowledge that all guns fire out of the barrel and that ammunition fired travels in the direction the barrel is pointed. Thus, it was a reasonable inference that the shotgun was aimed, as Dunn admitted to first responders.

firing the gun at another. Under RCW 9A.08.010(2), evidence of intent also satisfies criminal negligence.⁶ Thus, E.V.'s death was consistent with having been shot by another person in a criminal manner. It was inconsistent with any innocent explanation for the shooting. As such, Dunn's statements that he pointed the gun at E.V. and pulled the trigger, as well as his numerous other statements admitting to shooting E.V., were corroborated by independent proof sufficient to establish *corpus delicti*.⁷

⁶ Considering the strong evidence of an intentional shooting absent Dunn's statements, it would likely have provided sufficient evidence for murder had that charge been pursued. Ironically, Dunn's statements on the day of the shooting immediately seeking to call 911, saying he shot E.V., and that he thought the gun was unloaded may have led to a lesser charge and conviction. Had he lied about aiming the gun that day and told police the same story he told in court, it is less likely he would have been believed due to the overwhelming evidence that the gun had been aimed.

⁷ Although unnecessary to discuss due to the large quantum of independent proof here, Dunn's statements to people other than the police could also be considered to corroborate his confession. *See State v. Grogan*, 158 Wn. App. 272, 277, 246 P.3d 196 (2010).

C. DUNN’S SIXTH AMENDMENT RIGHT TO CONTROL HIS DEFENSE WAS NOT VIOLATED WHEN HE ARGUED AGAINST BOTH FIRST AND SECOND DEGREE MANSLAUGHTER AT TRIAL.

The trial court did not violate Dunn’s right to control his defense when he was on notice that a court was permitted to find him guilty of a lesser degree offense, and he argued the lesser degree offense during closing argument. “The trial court judge, as the trier of fact, is not constrained by instructions and may consider the charged offense as well as any lesser included offense.” *In re Pers. Restraint of Heidari*, 159 Wn. App. 601, 609, 248 P.3d 550 (2011), *aff’d*, 174 Wn.2d 288, 274 P.3d 366 (2012) (citing *State v. Peterson*, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997)). Dunn claims, without authority supporting his proposition, that his right to control his defense under the Sixth Amendment was violated when the court found him guilty of the lesser degree offense of manslaughter in the second degree. Dunn’s argument is without merit. First, legally his claim fails. A person charged with a crime is on statutory notice that he or she may be convicted of any lesser degree offense. And, as stated above, a trial court judge is not constrained by jury instructions and may consider a lesser offense. Second, his claim of having asserted an “all or nothing defense” is incorrect. Dunn’s attorney specifically raised the issue of the lesser degree offense and argued against it during his closing argument.

In a bench trial, the judge “may properly find the defendant guilty of any inferior degree crime of the crimes included within the original information.” *Peterson*, 133 Wn.2d at 893. “This is because RCW 10.61.003 and RCW 10.61.006 notify a defendant charged with a crime that he may also be tried on a lesser degree or a lesser included offense.” *Heidari*, 159 Wn. App. at 609-610. RCW 10.61.003 states:

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 10.61.006 continues by providing:

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 charge in the indictment or information.

And, RCW 10.61.010 states:

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.

Moreover, in a bench trial, a trial court may *sua sponte* amend charges to include a lesser included offense. *See State v. Jollo*, 38 Wn. App. 469, 474, 685 P.2d 669 (1984). Thus, it is well-settled that the law permits a trial judge to find a lesser degree offense.

Here, the trial court was permitted to find Dunn guilty of the lesser degree offense of manslaughter in the second degree. Dunn was put on notice of this possibility by the legislature and this was also well-established by case law. Dunn provides no contrary legal authority on this issue. Further, Dunn was in the same situation as an adult would have been in a bench trial—his attorney had notice that he could be convicted of a lesser degree of manslaughter and argued against second degree manslaughter. Dunn does not argue or cite any authority that the inability to have a jury trial in juvenile court itself violates the Sixth Amendment, so this Court should not consider it.⁸ RAP 10.3(a)(6); *see also State v. Bonds*, 174 Wn. App. 553, 567 n.2, 299 P.3d 663 (2013) (“We do not consider claims unsupported by argument or citation to legal authority”).

Further, Dunn’s reliance on *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013), is misplaced. In *Cortisine*, the trial court’s introduction of an affirmative defense jury instruction violated the defendant’s Sixth Amendment right to control his defense because “the instruction risked confusion between . . . the victim’s capacity and Coristine’s ‘reasonable belief’ in her capacity, an issue that had not been directly addressed in the evidence.” *Id.* at 381. Whereas *Coristine* involved interference with a

⁸ Moreover, there are many possible jury instructions that a party may choose to propose in a jury trial. The ability to propose instructions should not limit a judge’s ability to decide according to the law.

defendant's strategic decision to control a defense, the law permits both the court and the prosecutor to pursue a lesser degree offense.

Finally, Dunn did not pursue the "all or nothing" strategy he now claims. While a court could have found his testimony—which the court rejected—supported a finding of criminal negligence, this was not his attorney's argument at trial. Dunn's attorney actively argued against the lesser degree offense of second degree manslaughter after Dunn testified. Dunn's attorney argued: "Did he have intent? Did he have recklessness? Did he have criminal negligence?" RP 641. He also defined manslaughter in the second degree for the court during his argument: "A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of [a] substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard." RP 652. And, he concluded his closing argument by specifically addressing both offenses: "[H]e is not guilty of Manslaughter in the First Degree because he was not reckless. And he was not guilty of the lesser offense of Manslaughter in the Second Degree because he did not act with criminal negligence." RP 653. Thus, nothing about the trial court proceedings impacted Dunn's ability to control his defense because he was able to and did in fact argue against the lesser included offense of second degree manslaughter.

V. **CONCLUSION**

For the above stated reasons, Dunn's conviction should be affirmed.

Respectfully submitted this 29th day of March, 2019.



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

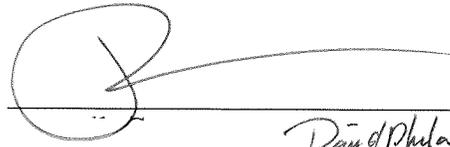
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Lisa Ellner
Attorney at Law
P.O. Box 2711
Vashon, WA 98070-2711
Liseellnerlaw@comcast.net
erin@legalwellspring.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on 3/29, 2019.



David Phelan 36637

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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