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FEBRUARY 25, 2015
Court of Appeals
Division III
State of Washington

NO. 32857-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JEFFERY ROBERT MAY,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

- i. Whether the State provided sufficient independent proof to corroborate the respondent's extrajudicial statements and establish the *corpus delicti* of a controlled substance homicide?
- ii. Whether the Court committed error by applying a beyond a reasonable doubt standard rather than a reasonable and logical inference standard?
- iii. Whether the Court committed error by applying a multiple hypothesis test to the facts?

II. STATEMENT OF THE CASE

On September 5, 2013, Jeffery Robert May and Danielle Dunn returned to his motor home located at 2016 Swan Avenue in Yakima, Washington. Clerk's Papers at 52. A neighbor of May, Ben Fromm, indicated that the evening prior to Dunn's death, Dunn appeared to be "pretty high." CP at 52. However, Mr. Fromm stated during the morning of September 6, 2013, he observed Dunn and she appeared to be a little better. CP at 52.

Mr. Fromm next saw Dunn the evening of September 6, 2013, when May entered Mr. Fromm's residence requesting his help with Dunn. CP at 53. Mr. Fromm contacted 9-1-1. CP at 54. Shortly thereafter, medical personnel arrived and began performing life saving measures on Dunn. CP at 55, 56. As treatment was ongoing, May told the responding medical

personnel that Dunn had used one half gram of methamphetamine. CP at 27.

On September 6, 2013, Dunn died of a methamphetamine overdose. CP at 21.

May provided Officer Lee Dunn's purse and cell phone. CP at 27. There was a box of unused syringes in May's trailer. Supplemental Report of Proceedings (SRP) at page 5, 13. However, no used syringes were found at the residence. SRP at 21. Law enforcement did not locate any empty bags containing trace evidence of methamphetamine or used syringes either in the residence or on Dunn. SRP at 19.

May was subsequently arrested and searched incident to arrest. Officer Lee found a small baggy in May's pants pocket. CP at 27. This small baggy was weighed and tested positive for the methamphetamine. CP at 32. The bag of methamphetamine weighed one gram. CP at 32. Pre and Post-*Miranda* May admitted that he gave Dunn methamphetamine, which she injected herself. CP at 27, 32. After she injected herself with methamphetamine, Dunn became disoriented, started speaking strange, and vomited. CP at 32. May explained further that after he did not hear a heartbeat coming from Dunn, he went into the main house to get Mr. Fromm. CP at 32, 33.

On September 9, 2013, Dr. Reynolds performed an autopsy on Dunn. Dr. Reynolds determined that the cause of death was a methamphetamine overdose. CP at 21. Dr. Reynolds noted that Dunn was an intravenous drug user. CP at 22.

May was charged with a felony, controlled substance homicide, in violation of RCW 69.50.415. CP at 5.

On June 6, 2014, the Court conducted an evidentiary hearing and found insufficient independent evidence to establish the *corpus delicti* of a controlled substances homicide. SRP at 23-25. That same day the Court signed an order granting the Defense's motion to dismiss. CP at 44. On September 11, 2014, the Court entered its Findings of Fact and Conclusions of Law. CP at 60-63. The State filed a Motion for Reconsideration on June 13, 2014. CP at 45-59. The Court denied this motion on October 8, 2014. CP at 64. The State timely filed Notice of Appeal. CP at 65.

III. ARGUMENT

A. THE STATE PROVIDED SUFFICIENT INDEPENDENT EVIDENCE TO CORROBORATE THE DEFENDANT'S EXTRAJUDICIAL STATEMENTS AND ESTABLISH THE *CORPUS DELICTI* OF A CONTROLLED SUBSTANCE HOMICIDE

The State provided sufficient evidence to establish the *corpus delicti* of a controlled substances homicide and the Court failed to follow established precedent in suppressing May's statements. The appellate courts apply a *de novo* review of the trial court's decision on the *corpus delicti* rule. *State v. Pineda*, 99 Wn.App. 65, 77-78, 992 P.2d 525 (2000). *Corpus delicti* means the "body of the crime." MCCORMICK ON EVIDENCE § 145, at 227 (John W. Strong ed., 4th ed. 1992).

The purpose of the *corpus delicti* rule is to ensure that a defendant is not convicted solely on the admission of a confession into evidence. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996); *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Therefore, before a court will admit a defendant's incriminating statement into evidence, the "State must present other independent evidence to corroborate a defendant's incriminating statement." *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006).

“A defendant’s confession is insufficient to establish the *corpus delicti*; but if there is independent evidence of the crime, the confession may ‘be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.” *State v. Baxter*, 134 Wn. App. 587, 596 (2006) (quoting *Aten*, 130 Wn.2d at 656, 927 P.2d 210 (1996)). If there is independent proof corroborating the statement, the *corpus delicti* may be established by a combination of the independent proof and the confession. *State v. Meyer*, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951); *See also State v. Lung*, 70 Wn.2d 365, 371-72, 423 P.2d 72 (1967). The State may prove *corpus delicti* through either direct or circumstantial evidence. *State v. Thompson*, 73 Wn. App. 654, 659, 870 P.2d 1022 (1994). Direct and circumstantial evidence are to be given equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

The evidence is sufficient if it *prima facie* establishes the *corpus delicti*. *Meyer*, 37 Wn.2d at 763-64. The evidence does not have to rise to the level of beyond a reasonable doubt or a preponderance of evidence. *Id.*; *See also City of Bremerton v. Corbett*, 106 Wn.2d 569, 578, 723 P.2d 1135 (1986) (the evidence does not have to support a conviction or even support the case being received by the jury).

When determining if the State established a *prima facie* case to satisfy the *corpus delicti* rule, the Court will view the evidence in the light most favorable to the State and assumes the truth of the State's evidence when determining the sufficiency of the independent evidence. *Aten*, 130 Wn.2d at 658. *Prima facie* in this context means that the evidence supports a "logical and reasonable inference of the facts sought to be proved" and in this case the crime described in the defendant's statement. *Brockob*, 159 Wn.2d at 328, citing *Aten*, 130 Wn.2d at 656 (quoting *State v. Vangerpen*, 125 Wn.2d at 796).

The *corpus delicti* of a crime "usually consists of two elements: (1) an injury or loss (e.g., death or missing property) and (2) someone's criminal act as the cause thereof." *Corbett*, 106 Wn.2d at 573-74, citing *Meyer*, 37 Wn.2d at 763. The *corpus delicti* in a homicide case requires proof of a "death and a causal connection between the death and a criminal act." *State v. Hummel*, 165 Wn. App. 749, 758, 266 P.3d 269 (2012). In a controlled substance homicide, the *corpus delicti* is established with independent proof of a drug delivered to the victim and that the victim's use of the drug resulted in death. *State v. Bernal*, 109 Wn.App. 150, 153, 33 P.3d 1106 (2001). Accordingly, in the instant case, the State would have to provide independent evidence that the decedent died as a result of

her use of methamphetamine and that methamphetamine was delivered to her.

Satisfying the *corpus delicti* rule does not require the State to present evidence proving that the person who committed the crime was the defendant. *State v. Zillyette*, 163 Wn. App. 124, 129, 256 P.3d 1288 (2011), *reversed on other grounds*, 173 Wn.2d 784 (2012). The *corpus delicti* rule only requires proof that a crime was committed by someone. *Id.*, citing *Corbett*, 106 Wn.2d at 574. However, the “State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred.” *Brockob*, 159 Wn.2d at 327-28.

In this case, the State presented sufficient independent evidence to establish the *corpus delicti*, independent of any of May’s statements. The autopsy report notes that Dunn died from a methamphetamine overdose. CP at 21. This establishes the first prong of the *corpus delicti* required in a homicide case.

The remaining issue is simply whether the State provided sufficient independent evidence that there was a causal connection between the death and the criminal act of delivery. In this case, there is substantial independent evidence to establish this causal connection. Dunn died at May’s residence. Inside this residence were unused syringes, a well-

known mode for consuming methamphetamine. There were no syringes in Dunn's personal belongings, which were searched. Additionally, in the motion for reconsideration, the State provided the transcript of Ben Fromm's interview, wherein he stated that Dunn appeared to be "pretty high" the evening of September 5th, when he saw her at May's trailer. CP at 52. The following morning, on the day of Dunn's death, she appeared to have sobered up or at least was coming off of her high. Dr. Reynolds noted in his autopsy report that Dunn was an intravenous drug user. This evidence establishes that methamphetamine was consumed after Mr. Fromm saw Dunn that morning. Moreover, May possessed a gram of methamphetamine that was secured at the time of his arrest on September 6, 2013, the day Dunn overdosed on methamphetamine at May's residence.

Independent of May's statement to law enforcement, Dunn was high at May's residence and she died from injecting methamphetamine. There were no syringes or controlled substances in Dunn's personal belongings, rather, the only syringes found were in May's residence and he had several unused syringes. Moreover, the only evidence of methamphetamine found at the time Dunn's death was methamphetamine on May's person. This necessarily establishes a *prima facie* case for the purpose of the *corpus delicti* rule.

Furthermore, this independent evidence sufficiently corroborates May's statement to both the medics and law enforcement that Dunn injected methamphetamine and that he provide the methamphetamine to Dunn. Because the independent proof, both direct and circumstantial, corroborates May's statement, the inference to be drawn is that it is not a false or coerced statement. *Bencivenga*, 137 Wn.2d at 711(both circumstantial evidence and direct evidence are equally reliable). Additionally, there is no evidence to support – and no party has even suggested – May was forced or coerced to give this statement. Accordingly, the Court may consider a combination of the independent proof and May's extrajudicial statements to establish the *corpus delicti* of a controlled substance homicide. *See Meyer*, 37 Wn.2d at 763-64.

B. THE COURT ERRED BY HOLDING THE STATE TO A BEYOND A REASONABLE DOUBT STANDARD RATHER THAN A REASONABLE AND LOGICAL INFERENCE STANDARD

The Court erred by applying a beyond a reasonable standard and requiring the State to prove that the drugs ingested by Dunn were the exact drugs that May possessed. SRP at 19. At this threshold point in determining admissibility of evidence, the evidence does not have to rise to the level of beyond a reasonable doubt or even a preponderance of evidence. *Meyer*, 37 Wn.2d at 763-64. Moreover, the State need only

show that a crime was committed by someone, not the specific defendant. *Zillyette*, 163 Wn. App. at 129, citing *Corbett*, 106 Wn.2d at 574 (proving identity is not a requirement to establish *corpus delicti*).

There is no evidence in the record that would even suggest that Dunn was manufacturing methamphetamine or had received methamphetamine that day from anyone else. Rather the evidence supports the inference that the only person that could have delivered the methamphetamine to Dunn was May. May and Dunn were together the morning of her death. CP at 52. Ben Fromm indicated that after having seen May and Dunn together that morning, he did not hear anything until the time of the incident. This leads to the inference that Dunn and May remained together that day and into the early evening, at which point Dunn overdosed and died. May was subsequently found to have methamphetamine in his left front pocket and Dunn had none.

The trial court referring to *Bernal* and *Zillyette*, concluded that the State failed to establish the *corpus delicti*, because the State could not show exactly that the methamphetamine Dunn overdosed on came from the same batch of methamphetamine that May possessed at the time of his arrest.

The trial court stated on the record that:

You know, it's been my experience in living in this valley for as long as I have – because there's probably not a whole lot of quality control over the manufacture or processing of methamphetamine. And it would seem to me that one type of methamphetamine would have certain indicators or markers that should show up and if it would – if there was a causal connection between the methamphetamine found on Mr. May's person and the methamphetamine found in her system then I think then you do make a causal connection there, which is required clearly under the *corpus delicti*. There's got to be a causal connection between the evidence and – and the actions of the defendant in this case.

You don't have that connection here and I cannot say that is – it is a reasonable and logical conclusion, even on a *prima facie* basis, to suggest that just because he had methamphetamine in his pocket that that fact, independent of his statement, and the fact that she died in his residence is enough to logically infer that the issue of delivery. There's – in the Court's opinion, simply no evidence of delivery in this particular case.

(SRP 24, 25).

Furthermore, the trial court further erred by completely disregarding all the evidence presented by the State that independently corroborated the Respondent's statement.

In *Bernal*, the victim died from a heroin overdose on December 5, 1999. *Bernal*, 109 Wn. App. at 152. On December 7, 1999, the defendant was interviewed by law enforcement where she admitted to selling the victim heroin on December 4, 1999. *Id.* Aside from the defendant's statement, there was no other evidence of delivery provided by the State.

Id. Upon defense counsel’s motion, the trial court dismissed the case on the grounds that the State failed to establish the *corpus delicti*. *Id.*

Division II concluded that the trial court’s ruling was correct because the State produced “absolutely nothing about how Reid [the victim] acquired the heroin that caused his death.” *Bernal*, 109 Wn. App. at 154. The court went further and stated that it “can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means – but the record gives no rational basis for inferring one possibility over the other.”

Id. The majority opinion supplies clarification that is instructive in this case,

[A]ccording to the dissent, it is simply speculation unsupported by evidence that Reid could have found or stolen the heroin. We agree entirely – but it is equally speculative to infer that Reid obtained the heroin by delivery. There is simply no evidence, independent of Bernal’s statements, from which to *infer* how Reid obtained heroin.

Id. (emphasis added)

The important point is that the Court is empowered to draw logical and reasonable inferences based upon the evidence presented. The facts in this case are vastly different from those in *Bernal*. In particular, in *Bernal* there simply was the death of the victim and the defendant’s statement. The victim died at his own home and the defendant only lived in the same trailer park, not in the same residence. This is an important distinction

between the present case and *Bernal*. Here, the State provided evidence: (1) that Dunn died from a methamphetamine overdose; (2) that she died at May's home, where the only people present were Dunn and May; (3) that May had a box of syringes in his residence; and (4) May had methamphetamine on his person.

There is more than sufficient evidence to *infer* that the death of Dunn was the result of a methamphetamine overdose and to find a causal connection between that death and criminal activity (i.e. a delivery of methamphetamine) committed by May.

Accordingly, the court erred by relying on *Bernal* as a barometer of the evidence needed to establish *corpus delicti* and holding the State to a beyond a reasonable doubt standard.

The present case is more akin to the facts presented in *Zillyette*. In *Zillyette*, the victim was found dead in his bedroom. *Zillyette*, 163 Wn. App. at 126. A subsequent blood test concluded that he died as a result of an overdose of methadone and alprazolam. *Id.* An examination of the victim's phone revealed a photograph, date stamped March 31, 2009, showing a handful of blue oval pills, white rectangular pills, and a white prescription bottle cap. *Zillyette*, 163 Wn. App. at 127. Also, the last person the victim had called that evening was *Zillyette*. *Id.* Subsequently, *Zillyette* was interviewed by law enforcement and admitted that she

picked up her prescriptions, which included methadone and Xanax, and met with the victim. *Id.* While meeting with the victim, the victim took a picture of the pills in his hand. *Id.* Both the victim and Zillyette consumed some of the pills later that evening. *Id.*

The trial court held that there was sufficient independent evidence to corroborate the defendant's statement and found the *corpus delicti* established. *Zillyette*, 163 Wn. App. at 127.

Here, the trial court attempted to distinguish *Zillyette*. SRP at 26. In its analysis of the *Zillyette* case to the facts presented in this case, the trial court concluded that the most distinguishing factor between the two was the photograph of the pills taken in *Zillyette* proved that the pills were from the defendant and were consumed by the victim resulting in his ultimate death. The *Zillyette* opinion does not support the trial court's findings herein. In fact, the photograph in question was of a hand holding pills. There was no indication in the photograph that Zillyette had provided the pills. Additionally, similar to the instant case, there was no way to establish that the pills in the photograph were the exact pills the victim consumed that caused his death. Rather they were just the same type of pills. It was reasonable for the court to infer that the pills were the same. However, it certainly did not rise to the standard of proof that the trial court in the present case erroneously relied upon.

Proving that the methamphetamine consumed by the victim came from the same batch of methamphetamine possessed by the defendant is not possible. Even assuming *arguendo*, such is scientifically possible, the standard does not require proving the case beyond a reasonable doubt, nevermind proving the case to an absolute certainty.

As the court is well aware, the State's burden in establishing the *corpus delicti* is well below the standard of beyond a reasonable doubt. *Meyer*, 37 Wn.2d at 763-64. If the standard the trial court applied was the correct standard, it would set a precedent that the only controlled substance homicides that could move beyond a *corpus delicti* motion would be those where additional witnesses were present to state that the victim received the drugs from the defendant. This is an absurd result and certainly fails to follow the intent of the rule, which is to prevent the admission of false or coerced confessions. *Aten*, 130 Wn.2d at 655-56. By requiring the State to provide this type of evidence, the trial court placed an incorrect burden on the State and therefore erred.

In *Zillyette*, the Court of Appeals concluded that the statement was sufficiently corroborated and the *corpus delicti* was established. *Zillyette*, 163 Wn. App. at 131. Accordingly, in this case the State, as in *Zillyette*, presented sufficient independent evidence to corroborate May's statements

that he provided the drugs that Dunn overdosed on. The *corpus delicti* was, therefore, established.

C. THE COURT ERRED BY APPLYING A MULTIPLE HYPOTHESIS TEST TO THE FACTS

The Court erred by applying a multiple hypothesis test to the facts in this case. Although the Court did not specifically state that it was relying on a hypothesis of innocence test, by requiring the State to provide evidence that the drugs Dunn died from were the exact drugs that May possessed was a tacit application of that rule. The Court should note that trial defense counsel argued that the State had an additional burden of disproving reasonable hypotheses of innocence. SRP at 20. However, in *Hummel* the Court reviewed the defendant's argument that the State must prove "the nonexistence of any reasonable hypothesis of innocence".

Hummel, 165 Wn. App. at 769. The Court in footnote 6 stated that

[T]he statement in *Aten* that proof of the *corpus delicti* must be inconsistent with innocence was both dictum and a misreading of a long-abandoned evidentiary and jury instruction standard that was unrelated to the *corpus delicti* rule.

Hummel, 165 Wn. App. at 769, fn. 6.

The Court held that the *corpus delicti* "is satisfied where the totality of the independent evidence supports a reasonable and logical inference that

there was a death and a causal connection between the death and a criminal act.” *Hummel*, 165 Wn. App. at 769-70.

Footnote 6 also provides additional analysis into this arcane rule and the reasoning behind the Court abandoning the rule. The purpose underlying the multiple hypothesis rule “was unrelated to the application of the *corpus delicti* rule, but instead was related to how circumstantial evidence was weighed in 1967 when *Lung* was decided.” *Hummel*, 165 Wn. App. at 769, fn. 6. However, the evidentiary issue that the rule sought to remedy was rectified in *State v. Gosby*, 85 Wn.2d 758, 762-66, 539 P.2d 680 (1975), where the Supreme Court held that circumstantial evidence was just as reliable as direct evidence.

In the case before this Court, the trial court, after the defense counsel argued that the State must disprove any reasonable hypotheses of innocence, stated that the State cannot prove, chemically, that the drugs possessed by May were the drugs Dunn overdosed on. The court went on to state, that if the State had such proof, the causal connection “potentially” would establish the *corpus delicti*. SRP at 25. In announcing as much, the trial court illustrated a misunderstanding and misapplication of the State’s burden.

IV. CONCLUSION

The State provided sufficient independent evidence to corroborate May's admissions that he provided methamphetamine to Dunn, which she later injected resulting in her death. The trial court erred in its application of the facts to the *corpus delicti* rule. Moreover, the trial court erred by requiring the State to disprove a hypothesis of innocence, that Dunn may have overdosed from drugs provided from someone else. Accordingly, the State requests that this Court remand the case back to the trial court for further proceedings.

Respectfully submitted this 25th day of February 2015,

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Appendix A

DECLARATION OF SERVICE

I, Patrick J. Cashman state that on February 25, 2015, I deposited a copy of this filing and a copy of the Verbatim and Supplemental Report of Proceedings in the United States Mail, pre-paid postage to

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of February, 2015 at Yakima, Washington,

s/Patrick J. Cashman

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