

66049-7

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NO. 66049-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

Jason Absher,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

ABSENT MR. ABSHER'S OWN STATEMENTS, THE STATE LACKED *PRIMA FACIE* EVIDENCE OF THE CRIME CHARGED, ATTEMPTED POSSESSION WITH INTENT TO DELIVER OXYCONTIN.

In his opening brief, Mr. Absher argued that his conviction for attempted possession of a controlled substance with intent to deliver must be reversed on de novo review under the *corpus delicti* rule. The *corpus delicti* rule requires that the prosecution's evidence corroborate the specific crime charged, independent of the defendant's extrajudicial statements. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006); State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). The prosecution "must present evidence that is independent of the defendant's statement and that corroborates not just a *crime* but *the specific crime* with which the defendant has been charged." Brockob, 159 Wn.2d at 329. Mr. Absher was arrested, and subsequently convicted, based on contact with a police-paid informant who solicited and then sold fake Oxycontin pills to Mr. Absher.

The State fails to overcome this argument in its response brief. Notably, the State relies on two cases from a different context to show adequate proof of intent to deliver. State v. Hagler,

74 Wn. App. 232, 872 P.2d 85 (1994) and State v. Campos, 100 Wn. App. 218, 998 P.2d 893 (2000) both examine sufficiency of the evidence at trial, not application of the *corpus delicti* rule. See Resp. Br. at 6, 11. Hagler, moreover, involved a juvenile and the court factored the defendant's age into its conclusion that the evidence of intent was sufficient. 74 Wn. App. at 236-37. In Campos, the court found sufficient evidence not just from defendant's possession of large amounts of cash in small denominations and a large amount of cocaine. 100 Wn. App. at 223-24. In that case, the State also introduced evidence that "tools of the drug trade," a pager, a cell phone, and a charger for the phone were found in defendant's vehicle. Id. at 224. This exceeds the State's evidence here with regard to Mr. Absher.

The State asserts, without support, that Mr. Absher's statements to the confidential informant during her solicitation of Mr. Absher may be included as part of independent corroborating evidence to overcome *corpus delicti* concerns. Resp. Br. at 9. At best, this is a question of first impression in which the weight of authority favors the contrary position—that the State must have *prima facie* evidence beyond defendant's statements. In State v. Dyson, this Court considered only statements made to an

undercover police officer *during* commission of the alleged crime. State v. Dyson, 91 Wn. App. 761, 763-64, 959 P.2d 1138 (1998). In that case, this Court did not consider statements to a police-paid informant preceding the exchange in question. Dyson, accordingly, provides no greater support for the State's position than it claims State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996), does for Mr. Absher's argument that all defendant's statements cannot be used to establish defendant's *prima facie* case. See Resp. Br. at 9 n.4 (arguing Aten is inapplicable because the defendant's statements were made after the alleged crime).

Additional reasoning weighs in Mr. Absher's favor on this issue. The historical bases for the *corpus delicti* rule apply equally to defendant's pre-commission statements to a confidential informant. As recited in Bremerton v. Corbett, the *corpus delicti* rule stemmed from the "possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon a mistaken perception of the facts or law, or given by a mentally disturbed individual." Bremerton v. Corbett, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). Just as with a post-commission statement to police, defendant's statements are just as likely to be misreported, misconstrued, based upon mistaken perception or

given by a mentally disturbed individual when elicited by a confidential informant while luring the defendant into criminal activity. The *corpus delicti* rule also accounts for the fact that a defendant's own incriminating statements "would probably be accepted uncritically by a jury." Aten, 130 Wn.2d at 656-57. This concern is equally present in the case of Mr. Absher's statements to the confidential informant. Therefore, as stated in Aten, "any statement made by the defendant, whether inculpatory, exculpatory or facially neutral[.]" is excluded from the independent corroborating evidence considered under the *corpus delicti* rule. 130 Wn.2d at 657-58.

The State misconstrues Washington courts' application of the rule. The State argues that witness testimony does not support an innocent explanation and argument alone is insufficient to assert an innocent hypothesis. Resp. Br. at 10-11. *Corpus delicti*, however, requires the court to view the independent evidence—here, hand motions, meeting with two other people, the quantity of pills purchased—and determine whether it supports a reasonable inference of activity other than the crime charged. Brockob, 159 Wn.2d at 329-30. In other words, the court is not required to accept the State's inference from the evidence. Rather, the court must

consider whether an innocent explanation also may be inferred. Id. at 330 (“if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement” (citing Aten, 130 Wn.2d at 660–61)).

In this vein, the State ignores a plethora of reasonable, innocent explanations for Mr. Blozkyl remaining in his vehicle in the Walmart parking lot after he visited with Mr. Absher. Resp. Br. at 10. For example, Mr. Blozkyl might have been securing additional money owed Mr. Absher or Mr. Blozkyl might have been making a cellular phone call or waiting for a friend or relative before going shopping.

Finally, the State argues that, if Mr. Absher prevails on the *corpus delicti* issue, remand for entry of judgment on the lesser included crime, attempted possession of a controlled substance, is the proper remedy. Resp. Br. at 12. Because the jury was specifically instructed on the lesser included attempted possession crime, Mr. Absher agrees remand is the proper remedy. CP 74-75 (jury instructions on attempted possession); see State v. Cobelli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1990); see also In re Pers. Restraint Petit. of Heidari, 159 Wn. App. 601, 607-08, 248 P.3d 550 (2011) (citing cases where appellate court remanded for entry of

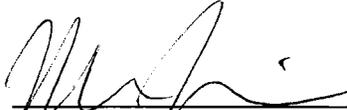
judgment on lesser included offense where jury was instructed on that lesser included crime).¹

B. CONCLUSION

Mr. Absher's conviction must be remanded for entry of an amended judgment because, as argued above and in his opening brief, the State had insufficient independent evidence to prove a *prima facie* case of attempted possession of Oxycontin with intent to deliver under the *corpus delicti* doctrine.

DATED this 1st day of September, 2011.

Respectfully submitted,



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¹ Heidari is pending review before the Washington Supreme Court on the issue whether remand for entry of amended judgment is the appropriate remedy where the jury was *not* instructed on the lesser included crime. No. 85653-2 (oral argument scheduled November 8, 2011).