

66049-7

66049-7

NO. 66049-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON ABSHER,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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A. ISSUE

1. Whether the trial court properly denied Jason Absher's motion to dismiss for lack of *corpus delicti*?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Absher with Attempted Violation of the Uniform Controlled Substances Act: Possession with Intent to Deliver Oxycontin. CP 25. The jury convicted Absher as charged. CP 52; RP 705.¹ The court imposed a standard-range sentence of 20 days on Electronic Home Detention and 80 hours of community service. CP 88-94; RP 723-24.

2. SUBSTANTIVE FACTS

Since 2003, Auburn Police Detective Jeff Crawford has worked with Patricia Quinn, a confidential informant, to conduct undercover narcotics operations. RP 379. In early May 2009, Quinn met Absher and offered to sell him a large quantity of Oxycontin pills for \$25 each. RP 496-98. Absher and Quinn

¹ The State adopts the Appellant's reference system.

discussed potential quantities and prices where Quinn acted as the "middleman" and Crawford posed as the supplier. RP 381, 498.

Ultimately, Absher agreed to purchase 420 Oxycontin pills from Quinn for \$25 a pill. RP 513. Absher told Quinn that he intended to buy the pills for himself and at least two others. RP 514. Absher arranged to meet Quinn on May 14, 2009, in the Walmart parking lot at the Auburn Supermall around 8 p.m. RP 499, 517, 520. Multiple undercover police officers arrived prior to the transaction to provide additional surveillance and security. RP 570-72, 607-09.

One of the officers, Detective Douglas Faini, saw Absher drive into the Walmart parking lot and park near a dark-colored Acura with a person sitting in the driver's seat. RP 573-74. The Acura driver exited the car and entered Absher's truck where the two engaged in "back-and-forth, shuffling motions with their hands" consistent with counting money. RP 574-75. After a few minutes, the Acura driver got out of Absher's truck and left the parking lot. RP 575-76.

A couple minutes later, a Subaru pulled up next to Absher. RP 576. The Subaru driver, later identified as Brandon Blokzyl, exited his car and sat in the front passenger seat of Absher's truck.

RP 576-77. Absher and Blokzyl engaged in similar hand motions consistent with counting money for a few minutes before Blokzyl exited the truck and returned to his Subaru. RP 576-77. Unlike the Acura driver, Blokzyl remained in his car parked next to Absher's truck. RP 577.

Prior to Blokzyl's arrival, Absher told Quinn over the phone that he was waiting for a "guy from Milton to come in and bring the rest of the money." RP 522. Within minutes, Quinn saw Blokzyl park next to Absher and talk with him. RP 523. Afterward, Absher called Quinn to tell her that he had all the money and needed to count it. RP 523. Quinn suggested that Absher come over to her car and count the money in front of her and Absher agreed. RP 523.

When Absher arrived, he pulled out "[r]olls and wads of money" from his two front pockets. RP 524. Absher counted out \$10,500 in cash and exchanged it for 420 imitation Oxycontin pills.² RP 524-25. Absher told Quinn that 50 of the pills were for him, 150 of the pills were for a friend, and the remainder belonged to

² Crawford had previously obtained imitation Oxycontin pills from a drug manufacturer that looked identical to actual Oxycontin. RP 410.

people in Milton. RP 525-26. After Absher exited the car, Quinn gave a "good buy signal" to Crawford, who had been watching nearby. RP 417. Police arrested Absher moments later carrying the 420 imitation Oxycontin pills. RP 580-82. Blokzyl was also arrested. RP 421.

Post-Miranda, Absher admitted at the scene to having just purchased 420 Oxycontin pills for \$10,500. RP 420. Although Absher admitted that Blokzyl had given him "several thousand dollars" for 150 pills, he refused to name anyone else who had given him money. RP 420. The next day at the station, Absher provided a more detailed statement in writing, admitting to having purchased the pills for "several people." RP 424-25; Ex. 2.

C. ARGUMENT

**1. SUFFICIENT INDEPENDENT EVIDENCE
CORROBORATES THE CRIME CHARGED.**

Absher argues that the State failed to establish *corpus delicti*. Absher's claim fails. The State produced sufficient evidence, independent of Absher's confession, that he committed the crime charged. Immediately before he met with Quinn, Absher met separately with the co-defendant, Blokzyl, and another person,

and appeared to count money with them. As Blokzyl waited, Absher gave Quinn \$10,500 cash for 420 imitation Oxycontin pills. Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the State produced sufficient evidence to establish that Absher committed attempted possession of Oxycontin with the intent to deliver.

To establish *corpus delicti*, the State must present independent evidence that corroborates the defendant's confession to having committed the crime charged. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2007). The purpose of the rule is to protect a defendant from being unjustly convicted based on a confession alone. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The doctrine stems from judicial concerns that a defendant's confession might be misconstrued, coerced, or false, and that the jury might accept it uncritically. State v. Aten, 130 Wn.2d 640, 656-57, 927 P.2d 210 (1996).

The State must produce *prima facie* evidence that the crime described by the defendant actually occurred. Id. at 656. The independent evidence need not establish the crime beyond a reasonable doubt, or even by a preponderance of the evidence. Id. Rather, the evidence is sufficient if it supports a "logical and

reasonable inference" that the crime occurred, and is inconsistent with a hypothesis of both guilt and innocence.³ Brockob, 159 Wn.2d at 328-29. On appeal, the reviewing court considers all of the evidence presented at trial in the light most favorable to the State, drawing all reasonable inferences therefrom. Id. at 328; Aten, 130 Wn.2d at 658; State v. Dodgen, 81 Wn. App. 487, 492-93, 915 P.2d 531 (1996).

To establish *corpus delicti* in this case, the State had to produce *prima facie* evidence that Absher took a substantial step toward possessing Oxycontin with the intent to deliver it. RCW 9A.28.020; RCW 69.50.401(1), (2)(a). Intent to deliver may be inferred from the circumstances when a defendant possesses a large amount of a controlled substance and a substantial amount of cash. See State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (inferring intent to deliver where juvenile defendant possessed 24 rocks of cocaine and \$342); State v. Campos, 100 Wn. App. 218, 222, 223-24, 998 P.2d 893 (2000) (same).

³ Washington courts have declined to adopt the more relaxed federal standard, which requires only that the independent corroborating evidence "tend to establish the trustworthiness of the confession." State v. Aten, 130 Wn.2d 640, 662-63, 927 P.2d 210 (1996).

Here, the trial court properly found that the State satisfied its burden under *corpus delicti*. The court applied the correct standard, recognizing that "the independent evidence must corroborate the crime charged" and "be consistent with guilt, and inconsistent with innocence." RP 327; CP 85-86. Using that standard, the court found that Absher's purchase of over 400 imitation Oxycontin pills, shortly after having met with two different individuals and appearing to count money with them, amounted to "sufficient corroborative evidence" of the crime charged. RP 327-28; CP 86-87.

The court likened the facts of this case to one of the three consolidated appeals considered by the Washington Supreme Court in Brockob, stating:

[T]his is the most similar to the Gonzales situation where Mr. Gonzales was charged with purchasing Ephedrine with intent to manufacture methamphetamine. The Supreme Court concluded that Mr. Gonzales' possession of coffee filters, which is also used to manufacture methamphetamine, was sufficient evidence even though one could argue that being in possession of coffee filters merely suggests that Mr. Gonzales was a coffee drinker in addition to a consumer of Ephedrine. However, the Supreme Court found that even that minimal additional evidence was sufficient. Here, while it is possible that the two individuals who interacted with the Defendant in the truck were playing cards, or paying him money

that they already owed to him, this does not seem plausible or likely given the context.

CP 86-87. Given the record and the case law, the trial court properly analogized this case to the “Gonzales situation” and denied Absher's motion to dismiss based on *corpus delicti*.

Similar to Gonzales, Absher appeared to be “acting in concert with another person” to engage in a criminal act. Brockob, 150 Wn.2d at 333. Absher met separately with Blokzyl and another individual immediately prior to the transaction and engaged in hand movements consistent with counting money, corroborating Absher’s statement that he raised the \$10,500 cash by collecting money from others. RP 420-21, 573-77. Blokzyl’s continued presence in the parking lot while Absher purchased the supposed narcotics further corroborates Absher’s statement that he bought 150 of the pills for Blokzyl. RP 420-21, 576-77. Absher’s interaction with others, coupled with his possession of a large amount of cash and 420 imitation Oxycontin pills, is sufficient independent evidence to corroborate Absher’s confession to having committed the crime charged.

Although not necessary for the resolution of this appeal, the Court should consider Absher's statements to Quinn prior to, and

during the transaction, as independent evidence of the crime charged. Absher incorrectly argues that the "*corpus delicti* rule forbids consideration" of Absher's statements to the confidential informant. Appellant's Br. at 9 n.3, 12. This Court has previously held that *corpus delicti* does not apply to a defendant's statements to an undercover officer during the commission of a crime because they are "part of the crime itself," and a confession, by definition, "is an expression of guilt as to a past act." State v. Dyson, 91 Wn. App. 761, 762-63, 959 P.2d 1138 (1998).

Absher's statements to Quinn prior to the exchange were not a confession because they were made *in anticipation* of the crime being committed. Absher's statements during the exchange were also not a confession because they "were made as part of the crime itself." Id. at 763. This Court should reject Absher's claim that *corpus delicti* applies to every statement made by a defendant.⁴

⁴ Absher mistakenly relies on State v. Aten for the broad proposition that "*corpus delicti* applies to 'any statement made by the defendant.'" Appellant's Br. at 9-10, n.3. Absher overlooks the fact that all of Aten's statements were made *after* the crime was committed. 130 Wn.2d at 645-54.

Absher's renewed argument on appeal that he could have been "playing cards," "paying back a debt," or engaging in some other innocent activity in his truck with Blokzyl and the other individual is meritless. Appellant's Br. at 13; RP 98-101; CP 9. Absher's argument disregards the standard on review and overlooks the case law specifically addressing the issue.

On appeal, this Court must consider the evidence in the light most favorable to the State and draw all reasonable inferences therefrom. Brockob, 159 Wn.2d at 328. It is not reasonable to infer that Absher was playing cards in his truck, at night in a Walmart parking lot, with \$10,500 cash in his possession, for no more than a few minutes each time, immediately prior to buying 420 purported Oxycontin pills. RP 573-77. Nor is it reasonable to infer that Absher was settling a debt prior to the exchange, given that Blokzyl waited in his car next to Absher's truck while Absher purchased a large quantity of supposed narcotics. RP 576-77.

There is no independent evidence in the record from which the court could have inferred that Absher was playing cards, reconciling debts, or engaging in other innocent activity. This case

stands in stark contrast to other cases where courts have found that a *witness's testimony* provided sufficient independent evidence to support a hypothesis of innocence. See Brockob, 149 Wn.2d at 334-35 (witness testified that he gave the defendant permission to take the property at issue); Aten, 130 Wn.2d at 659-61 (forensic pathologist testified that the victim could have died from suffocation or Sudden Infant Death Syndrome (SIDS)). The fact that Absher can suggest an innocent explanation for his hand movements is insufficient. *Corpus delicti* is lacking when independent evidence, not argument, leads to hypotheses of both guilt and innocence. Brockob, 159 Wn.2d at 335.

Absher's additional argument that the large quantity of pills he possessed supports only the inference that he intended to possess Oxycontin, rather than the inference that he intended to deliver it, is equally meritless. An intent to deliver may be inferred when a defendant possesses a large amount of a controlled substance along with additional evidence, such as the defendant's possession of a substantial amount of cash. Hagler, 74 Wn. App. at 236; Campos, 100 Wn. App. at 223-24. Absher's exchange of

\$10,500 cash for 420 purported Oxycontin pills, combined with his apparent money counting and Blokzyl's waiting, is sufficient independent evidence to support the inference that he intended to deliver the purported Oxycontin. The trial court properly denied Absher's motion to dismiss for lack of *corpus delicti*.

Finally, Absher wrongly contends that his conviction "must be reversed" if the Court finds insufficient independent evidence to support a *prima facie* case of the crime charged. Appellant's Br. at 14. Given that Absher has only challenged the State's evidence on the element of intent to deliver, and that the jury necessarily found all of the elements of the lesser included crime of attempted possession of Oxycontin, the proper remedy is to remand this case to the trial court for entry of judgment on the lesser included offense. See State v. Heidari, 159 Wn. App. 601, 607-08, 248 P.3d 550 (2011) (citing multiple Washington cases where appellate courts have remanded for entry of judgment on the lesser included offense, including cases involving the current charges); CP 74-75 (instructing the jury on attempted possession of Oxycontin).

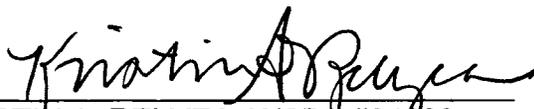
D. CONCLUSION

For the reasons stated above, the Court should affirm
Absher's conviction.

DATED this 3rd day of August, 2011.

Respectfully submitted,

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