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WASHINGTON STATE
SUPREME COURT

No. ______________

COA # 48963-5-II

Clark County # 14-1-02055-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAFE W. HOTCHKISS, II,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLARK COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Lafe Hotchkiss II, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(1) and (4), Petitioner seeks review of the published decision of the two-judge majority and one-judge concurrence of the court of appeals, Division Two, issued on November 7, 2017, in State v. Hotchkiss, __ Wn. App. __, 404 P.3d 629 (2017).[1]

C. ISSUES PRESENTED FOR REVIEW

In State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), this Court held that independent evidence is not sufficient to corroborate a defendant's incriminating statements under the *corpus delicti* rule unless that evidence is inconsistent with a hypothesis of innocence.

1. Should review be granted under RAP 13.4(b)(1), because the two-judge majority in this case refused to follow Brockob, even though recognizing that a "strict application" of Brockob would require reversal of the conviction?

2. Should review be granted under RAP 13.4(b)(4), because the question of whether to overrule the holding of Brockob and thus change the *corpus delicti* rule is an issue of substantial public importance and, as it stands, the court of appeals' published, divided opinion sows serious doubt about its proper application?

D. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Lafe W. Hotchkiss, II, was convicted after a bench trial before the Honorable Judge Scott Collier in Clark County of,

[1]A copy is attached hereto as Appendix A.

inter alia, possession of methamphetamine with intent to deliver. CP 18-19, 126; RCW 69.50.401; RCW 69.50.435. Judge Collier also found that the crime was committed within a protected "school bus route stop enhancement" zone. CP 18-19, 126; RP 225; RCW 9.94A.533(6). A standard-range sentence was imposed. RP 238, 252.

Petitioner appealed and, on November 7, 2017, Division Two of the court of appeals issued a published decision affirming the conviction. See Hotchkiss, 404 P.3d at 629. The decision was divided into a two-judge majority and a one-judge concurrence. See id. This Petition timely follows.

b. Overview of relevant facts

Officers working with a drug task force got a warrant for the home of Lafe Hotchkiss. RP 262-65, 296. They went to his workplace, arrested and searched him. RP 267-68. A search of a locked box on his motorcycle turned up nothing incriminating, but his jacket had a small amount of suspected heroin. RP 281-82, 286.

Officer then took Mr. Hotchkiss to his house while it was being searched. RP 267-68. When they arrived, three adults and a child were standing outside, and an officer admitted he was unsure if they also lived at the home as renters. RP 277.

In a bedroom associated with Hotchkiss, officers found a safe. RP 271. They questioned him about it, securing the unlocking code. RP 272. Inside the safe were a cellular telephone, $2,150 in case and 8.1 grams of a substance which later tested positive for the presence

of methamphetamine. RP 294-95.

The phone's contents were searched and nothing incriminating found. RP 303. An officer would admit the residence had no baggies, scales, sales records, weighing tools, cutting tools, cutting substances or other indication of sales inside. RP 257-307. A claim in the warrant affidavit was that a confidential informant had seen such items in the home. RP 257-307; see CP 46-47.

An experienced sergeant described the amount as a "small quantity" of drugs for a drug dealer. RP 303. The sergeant also admitted that his estimates that a normal "hit" would be between .2 grams and .4 grams, "[i]t could be more. It could be less." RP 337. Thus, he said, one gram of methamphetamine could have five hits or potential three, two or even one. RP 338. The same officer testified, over defense objection, that it would be "very rare" for someone to have eight grams for just personal use. RP 339. The sergeant admitted, however, he had "seen it." RP 339.

Another officer who arrested Petitioner and read him his rights questioning him when the safe was originally found. RP 270-71. According to the officer, Hotchkiss said there was an "8-ball" of methamphetamine in the state - approximately 3.8 grams. RP 271. The officer said Hotchkiss also admitted to being a dealer. RP 271. Hotchkiss reportedly said he got about that amount of drugs daily and "broke it down" or cut it, then sold it to about 10 different people. RP 271-72.

Mr. Hotchkiss, however, disputed the officer's claims that he had confessed to selling methamphetamine. RP 322. He said he and his roommate were heavy users and they would probably consume about 3-4 grams a day themselves. RP 321. Regarding the money, a paystub entered into evidence showed that he worked and earned about $16-17 an hour. RP 322. He said some of the money was from that and also rent, because his renters paid him $1150 per month. RP 322.

At trial, Hotchkiss objected to admission of his alleged confession under the *corpus delicti* rule. RP 255-56, 309. He also argued that, absent that statement there was insufficient independent evidence of possession with "intent to deliver" to support the conviction, so that it must be reversed. RP 255-56, 309.

The trial judge agreed the amount of drugs was not a "large dealer amount." RP 360-61. Indeed, the judge said:

> I have to concede, though, just for the record . . . we typically sometimes see a little bit more. You see packaging material. Don't have that here. You see scales. They didn't come up with that. Those are not present here.

RP 360-61. The judge pondered whether the evidence was sufficient to "tip over" on the side of admission of the incriminating statement under the *corpus delicti* rule, ultimately concluding that the combination of the drugs and money together was enough. RP 361. The judge admitted again, however, "[i]t's not a strong case" and that it was "close." RP 361.

In the later entered written findings and conclusions, the trial court declared that the "detectives" - plural - had all stated on their training that the amount "could be more than a personal use amount, could be a deliverable amount." CP 235-36. Two of the three officers who testified, however, were never asked that question. See RP 281-96; CP 235-36; see also Brief of Appellant ("BOA"), at 15-16.

The court of appeals issued a published decision in which a two-judge majority and a one-judge concurrence affirmed. Hotchkiss, 404 P.3d at 629.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW SHOULD BE GRANTED BECAUSE THE PUBLISHED DECISION OF THE MAJORITY OF THE DIVIDED COURT OF APPEALS IS IN DIRECT CONFLICT WITH BROCKOB AND THERE ARE SIGNIFICANT QUESTIONS ABOUT HOW COURTS SHOULD APPLY THE CRUCIAL *CORPUS DELICTI* RULE

In Brockob, supra, this Court held that independent evidence is not sufficient to corroborate a defendant's incriminating statements under the *corpus delicti* rule unless that independent evidence is inconsistent with a hypothesis of innocence. 159 Wn.2d at 660. This was not a new holding - this Court had previously so declared. See State v. Aten, 130 Wn.2d 640, 661, 927 P.2d 210 (1996); Brockob, 159 Wn.2d at 660-61 (relying on Aten).

In this case, the two-judge majority conceded that Brockob - and Aten - so hold. Hotchkiss, 404 P.3d at 632-33. More specifically,

the court of appeals agreed,

> Hotchkiss is correct that the Supreme Court stated in Brockob - quoting its earlier decision in Aten, 130 Wn.2d at 660, 927 P.2d 210 - that to corroborate a defendant's incriminating statement, the independent evidence must be inconsistent with a hypothesis of innocence. 159 Wn.2d at 329, 150 P.3d 59. The court emphasized that independent evidence is not sufficient if it supports reasonable inferences of both a criminal explanation and a noncriminal explanation. Id. at 330, 150 P.3d 59.

Hotchkiss, 404 P.3d at 633.

The majority then failed to apply that holding to this case. 404 P.3d at 633. After conceding that 1) a "strict application of this rule would suggest the independent evidence must be inconsistent with a hypothesis of innocence," and 2) the money in the safe could well be consistent with innocence, the majority in this case nevertheless concluded that Brockob should not be read in so "strict" a fashion as to apply.

More specifically, the majority here found that Brockob was inconsistent with cases holding that "corroborating evidence need not be sufficient to establish that a crime has been committed beyond a reasonable doubt or by a preponderance of the evidence." Hotchkiss, 404 P.3d at 633. Because Brockob says that corroborating evidence must be inconsistent with an innocent explanation in order to be sufficient, the majority here declared, it essentially contradicts that rule. Hotchkiss, 404 P.3d at 633. The majority then held in its published opinion that mere possession of a controlled substance and possession of money with it was sufficient - even though the

"independent corroborating evidence" - the money - was also consistent with innocence. Id.

The concurring judge found this theory of Brockob unpersuasive. Hotchkiss, 404 P.3d at 634 (Worswick, J., concurring).[2]

This Court should grant review under both RAP 13.4(b)(1) and RAP 13.4(b)(4). The judicially created *corpus delicti* rule is meant to mitigate concerns about the general reliability of a defendant's confession. See City of Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986); Smith v. United States, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 2d 192 (1954). As this Court has recently made clear, the *corpus delicti* rule goes directly to the sufficiency of the evidence to convict. See, State v. Cardenas-Flores, 189 Wn.2d 243, 401 P.3d 19 (2017). And lack of sufficiency is an issue of such import that this Court has held a *corpus delicti* objection may be raised for the first time on appeal. Id. Indeed, the issue is significant enough that the appellate court is tasked with using a very high review and applying *de novo* review to ensure that the requirements of the *corpus delicti* rule have been met. See, State v. Dow, 168 Wn.2d 243, 227 P.2d 1278 (2010). Here, Mr. Hotchkiss objected below.

It is settled that even possession of a quantity of drugs

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[2]For her part, she would have held the evidence insufficient under the *corpus delicti* rule, but would then have found the evidence of possession with intent to deliver even without the incriminating statements. Hotchkiss, 404 P.3d at 634-35.

deemed greater than "normal" for personal use cannot alone support a conviction for possession with intent to deliver. See State v. Goodman, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). Further, a conviction for possession with intent to deliver cannot be based on testimony about what a "normal" user would possess. See State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993).

This Court specifically held in Brockob that, "[u]nder the *corpus delicti* rule, if the independent evidence supports hypotheses of both guilt and innocence, **it is insufficient to corroborate a defendant's admission of guilt.**" Brockob, 159 Wn.2d at 335 (emphasis added). The court of appeals majority below directly conflicts with that holding of Brockob - indeed, it eliminates it, thus effectively rewriting this Court's ruling in that case. This Court should grant review under RAP 13.4(b)(1) to address that conflict, especially because of the additional confusion the divided opinion will engender on the issue.

Review should also be granted under RAP 13.4(b)(4), because of the very significant, serious questions raised and the need for this Court to address the proper scope and application of the *corpus delicti* rule. Challenges in application of that rule have often proved difficult for lower appellate courts, and this Court has thus taken review to ensure that this important doctrine of criminal law - and sufficiency - is properly applied. See, e.g., Cardenas-Flores, supra, Brockob, 159 Wn.2d at 328; Aten, 130 Wn.2d at 660-61; City of

Bremerton, supra. The published, divided decision in this case not only conflicts with this Court's holding in Brockob but casts serious doubt on proper application of the *corpus delicti* rule in cases involving possession of a controlled substance where the state claims intent to deliver. This Court should grant review and should hold that the independent evidence was insufficient under the *corpus delicti* rule, and that, without the incriminating statements, the conviction for possession with intent to deliver the methamphetamine found in the safe cannot stand.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 7th day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Clark County Prosecutor's Office via this Court's upload service and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Lafe Hotchkiss, II, DOC 707165, Airway Heights CC, P.O. Box 2049, Airway Heights, Wa. 99001-2049.

DATED this 7th day of December, 2017.

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404 P.3d 629
Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Lafe William HOTCHKISS, II, Appellant.

No. 48963-5-II
|
November 7, 2017

Synopsis
Background: Defendant was convicted following a bench trial in the Clark Superior Court, No. 14-1-02055-4, Scott A. Collier, J., of possession of a controlled substance with intent to deliver. He appealed.

[Holding:] The Court of Appeals, Maxa, J., held that quantity of drugs, combined with amount of cash in defendant's possession, provided sufficient corroborating evidence of intent to deliver independent of defendant's incriminating statement to satisfy **corpus delicti** rule.

Affirmed.

Worswick, J., filed concurring opinion.

***630** Appeal from Clark Superior Court, No. 14-1-02055-4, Honorable Scott A. Collier.

Attorneys and Law Firms

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PUBLISHED OPINION

Maxa, J.

¶1 Lafe Hotchkiss, II appeals his conviction for possession of a controlled substance with intent to deliver—methamphetamine.[1] Law enforcement discovered 8.1 grams of methamphetamine and $2,150 in cash in a search of Hotchkiss's residence, and during questioning Hotchkiss admitted that he was selling the methamphetamine to several customers.

1 Hotchkiss also was convicted of possession of a controlled substance—heroin. He is not appealing that conviction.

¶2 Hotchkiss argues that, under the **corpus delicti** rule, there was insufficient corroborating evidence independent of his incriminating statement that he intended to deliver methamphetamine. As a result, he argues that the trial court could not consider his statement and that without the statement there was insufficient evidence to convict him of possession with intent to deliver.

¶3 We hold that the quantity of the methamphetamine combined with the amount of cash in Hotchkiss's possession provided sufficient corroborating evidence of intent to deliver independent of Hotchkiss's incriminating statement to satisfy the **corpus delicti** rule. Accordingly, we affirm Hotchkiss's conviction.

FACTS

¶4 Law enforcement officers executed a search warrant on Hotchkiss's residence in Vancouver. During the search, Hotchkiss admitted that he had an "8-ball"—approximately 3.8 grams—of methamphetamine in a safe and provided the officers with the code. Report of Proceedings at 271. He also stated that he procured about one 8-ball of methamphetamine every day and broke it down, and estimated that he had about 10 customers. Inside the safe, officers found 8.1 grams of methamphetamine and $2,150 in cash. The State charged Hotchkiss with possession of a controlled substance with intent to deliver—methamphetamine.

¶5 At a bench trial, officers testified about finding the methamphetamine and cash and about Hotchkiss's statement that he had 10 methamphetamine customers. After the State rested,

Hotchkiss requested that the trial court disregard the testimony regarding his incriminating statement under the **corpus delicti** rule because there was insufficient evidence corroborating his statement. The court reserved its ruling on the **corpus delicti** issue.

¶6 Hotchkiss then testified that he and a woman who lived with him used three or four grams of methamphetamine per day. He also testified that the cash in the safe came from other people living at his residence, who paid rent of $1,150 per month in cash, and from his employment. He claimed that any statement he made to the officers about selling methamphetamine referred to his actions 20 years earlier.

***631** ¶7 On rebuttal, an officer with extensive experience dealing with methamphetamine users and sellers testified that a typical methamphetamine dose is 0.2 to 0.4 grams. He also testified that it would be very rare that someone would possess eight grams of methamphetamine solely for personal use.

¶8 The trial court found that the quantity of methamphetamine in Hotchkiss's possession combined with the amount of cash recovered with the drugs was sufficient corroborating evidence to satisfy the **corpus delicti** rule. The court then found Hotchkiss guilty of possession of methamphetamine with intent to deliver.

¶9 Hotchkiss appeals his conviction.

ANALYSIS

A. **CORPUS DELICTI** RULE

[1]¶10 The **corpus delicti** rule prevents the State from establishing that a crime occurred solely based on the defendant's incriminating statement. *State v. Green*, 182 Wash.App. 133, 143, 328 P.3d 988 (2014). The State must present corroborating evidence independent of the incriminating statement that the charged crime occurred. *Id.* Without such corroborating evidence, the defendant's statement alone is insufficient to support a conviction. *State v. Dow*, 168 Wash.2d 243, 249-51, 227 P.3d 1278 (2010).

[2] [3]¶11 We review de novo whether sufficient corroborating evidence exists to satisfy the **corpus delicti** rule. *Green*, 182 Wash.App. at 143, 328 P.3d 988. In making this determination, we view the evidence and all reasonable inferences therefrom in the light most favorable to the State. *Id.* And we consider the totality of the independent evidence. *See State v. Aten*, 130 Wash.2d 640, 661, 927 P.2d 210 (1996). The independent evidence by itself need not be sufficient to support a conviction or even show that the offense occurred by a preponderance of

the evidence; it must only support a logical and reasonable inference that the charged crime has occurred. *Id.* at 656, 927 P.2d 210.

[4]¶12 In addition, the Supreme Court has stated that to satisfy the **corpus delicti** rule, "the independent evidence 'must be consistent with guilt and inconsistent with a [ ] hypothesis of innocence.' " *State v. Brockob*, 159 Wash.2d 311, 329, 150 P.3d 59 (2006) (quoting *Aten*, 130 Wash.2d at 660, 927 P.2d 210). The court stated that independent evidence is insufficient to corroborate a defendant's incriminating statement when it "supports 'reasonable and logical inferences of both criminal agency and noncriminal cause.' " *Brockob*, 159 Wash.2d at 329, 150 P.3d 59 (quoting *Aten*, 130 Wash.2d at 660, 927 P.2d 210). "In other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement." *Brockob*, 159 Wash.2d at 330, 150 P.3d 59.

B. CORROBORATING EVIDENCE ANALYSIS

¶13 Hotchkiss argues that under the **corpus delicti** rule, the State failed to present sufficient independent evidence to corroborate his incriminating statement that he intended to deliver methamphetamine and therefore the trial court could not consider that statement. We disagree.

1. Possession of Methamphetamine and Cash

a. Sufficiency of Evidence to Convict

¶14 Analyzing the **corpus delicti** rule in the context of a possession with intent to deliver charge requires an understanding of the evidence necessary to convict a defendant of that charge.

[5]¶15 Several cases involving sufficiency of evidence *to convict* (rather than the **corpus delicti** rule) have addressed whether a finder of fact can draw an inference of intent to deliver from a defendant's possession of significant amounts of a controlled substance. The general rule is that "[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver." *State v. O'Connor*, 155 Wash.App. 282, 290, 229 P.3d 880 (2010).

¶16 For example, in *State v. Brown* the defendant was in possession of 20 rocks of crack cocaine, which an officer testified was ***632** definitely more than the amount commonly possessed for personal use only. 68 Wash.App. 480, 482, 843 P.2d 1098 (1993). The court held that the possession of more than a normal amount needed for personal use did not provide

sufficient evidence to establish an intent to deliver. Id. at 485, 843 P.2d 1098. The court expressly rejected a rule that "any person possessing a controlled substance in an amount greater than some experienced law enforcement officer believes is 'usual' or 'customary' for personal use is subject to conviction for possession with intent to deliver." Id.

[6]¶17 However, the cases also state that a finder of fact can infer intent to deliver from possession of a significant amount of a controlled substance plus at least one additional factor. O'Connor, 155 Wash.App. at 290, 229 P.3d 880; Brown, 68 Wash.App. at 484, 843 P.2d 1098. And one of those additional factors is the defendant's possession of a large amount of cash. O'Connor, 155 Wash.App. at 290, 229 P.3d 880; *see also* State v. Campos, 100 Wash.App. 218, 223-24, 998 P.2d 893 (2000) (the defendant possessed a large amount of cocaine and $1,750 in cash); State v. Hagler, 74 Wash.App. 232, 236-37, 872 P.2d 85 (1994) (the defendant possessed a large amount of cocaine and $342 in cash); State v. Lane, 56 Wash.App. 286, 290, 297-98, 786 P.2d 277 (1989) (the defendant possessed enough cocaine for eight typical sales and $850 in cash). In fact, in Brown the court specifically noted when finding insufficient evidence of intent to deliver that the defendant did *not* possess a substantial amount of money. 68 Wash.App. at 484, 843 P.2d 1098.

b. Sufficiency of Corroborating Evidence

[7]¶18 The same general rules for sufficiency of evidence to convict apply for corroborating evidence under the **corpus delicti** rule. Possession of a controlled substance standing alone cannot constitute sufficient corroborating evidence of an intent to deliver. State v. Cobelli, 56 Wash.App. 921, 925, 788 P.2d 1081 (1989); *see also* State v. Whalen, 131 Wash.App. 58, 63, 126 P.3d 55 (2005) (stating rule in the context of possession of pseudoephedrine with intent to manufacture methamphetamine). However, the **corpus delicti** rule is satisfied if "at least one additional factor, suggestive of intent" is present. Whalen, 131 Wash.App. at 63, 126 P.3d 55.

c. Analysis

[8]¶19 Here, the State presented evidence that (1) Hotchkiss had 8.1 grams of methamphetamine in his possession; (2) given an average dose size of 0.2 to 0.4 grams, such an amount typically would produce 20 to 40 doses; and (3) it would be very rare for a person to possess that amount merely for personal use. Under the general rule, this evidence standing alone would not be sufficient either to convict Hotchkiss of possession of methamphetamine with intent to deliver or to provide corroborating evidence under the **corpus delicti** rule.

¶20 But the State presented evidence of an additional factor suggestive of intent to deliver—$2,150 of cash in Hotchkiss's safe next to the methamphetamine. Under the cases discussed above, this methamphetamine and cash evidence would be sufficient to support a *conviction* for possession of methamphetamine with intent to deliver. *O'Connor*, 155 Wash.App. at 290, 229 P.3d 880. In addition, the possession of the methamphetamine combined with this additional factor should be sufficient to provide corroborating evidence of Hotchkiss's incriminating statement under the **corpus delicti** rule. *See* *Whalen*, 131 Wash.App. at 63, 126 P.3d 55.

2. Reasonable Inference of No Intent

¶21 Hotchkiss argues that even if his possession of $2,150 supports an inference that he intended to deliver the methamphetamine, that evidence also is consistent with an innocent explanation—that the cash was rent money he collected and pay from his employment. He claims that under *Brockob*, possession of the cash cannot constitute corroborating evidence for his incriminating statement because it is not inconsistent with a hypothesis of innocence. 159 Wash.2d at 329, 150 P.3d 59.

¶22 As noted above, Hotchkiss is correct that the Supreme Court stated in *Brockob*—quoting its earlier decision in *Aten*, 130 Wash.2d at 660, 927 P.2d 210—that to corroborate ***633** a defendant's incriminating statement, the independent evidence must be inconsistent with a hypothesis of innocence. 159 Wash.2d at 329, 150 P.3d 59. The court emphasized that independent evidence is not sufficient if it supports reasonable inferences of both a criminal explanation and a noncriminal explanation. *Id.* at 330, 150 P.3d 59.

¶23 Here, a strict application of this rule would suggest that the independent evidence was not sufficient to satisfy the **corpus delicti** rule. Hotchkiss's possession of 8.1 grams of methamphetamine and $2,150 in cash created an inference that he intended to deliver the methamphetamine. But technically that evidence is not inconsistent with innocence and also could support an inference that Hotchkiss did not have an intent to deliver. The methamphetamine could have been for personal use only and the cash could have come from a source other than selling drugs.

¶24 But we do not read *Brockob* as contradicting the general rule stated above that possession of a controlled substance *plus one other factor* is sufficient to satisfy the **corpus delicti** rule for an incriminating statement that the defendant intended to distribute the substance. *Whalen*, 131 Wash.App. at 63, 126 P.3d 55. *Brockob* involved three consolidated cases, two of which—the *Brockob* case and the *Gonzalez* case—addressed charges of possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine. 159 Wash.2d at 319, 321, 150 P.3d 59. In both of those cases, the court applied the general rules regarding possession of a controlled substance when analyzing the **corpus delicti** rule. *Id.* at 330-33, 150 P.3d 59.

¶25 In the *Brockob* case, the defendant made an incriminating statement and was charged with unlawful possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine. *Id.* at 319, 150 P.3d 59. The evidence showed that the defendant attempted to shoplift the tablets from 24 to 30 packages of cold medicine and that the tablets could be used to make methamphetamine. 159 Wash.2d at 318-19, 331, 150 P.3d 59. Citing *Whalen*, 131 Wash.App. at 64, 126 P.3d 55, the court held that mere possession of the cold tablets supported an inference that he intended to steal them, but did not support an inference that he intended to manufacture methamphetamine. *Brockob*, 159 Wash.2d at 331-32, 150 P.3d 59. Further, the court noted that the defendant "did not possess anything else used in the manufacturing process." *Id.* at 332, 150 P.3d 59. Therefore, the court held that the evidence was insufficient to corroborate the defendant's incriminating statement that he was stealing the cold tablets for the manufacture of methamphetamine. *Id.* at 333, 150 P.3d 59.

¶26 Significantly, the court in its analysis did not rely on the rule it had stated earlier that to corroborate a defendant's incriminating statement, the independent evidence must be inconsistent with a hypothesis of innocence. The court stated, "Contrary to the dissent's claim, our conclusion is not based on whether the State's evidence supported an inference that Brockob was innocent of committing a crime." *Id.* at 332, 150 P.3d 59. Instead, the court's holding was based on the absence of any evidence in addition to mere possession that would allow an inference of intent. *See id.* at 332-33, 150 P.3d 59.

¶27 In the *Gonzalez* case, the defendant made an incriminating statement and was charged with unlawful possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine and attempted manufacture of methamphetamine. *Id.* at 321, 150 P.3d 59. The independent evidence was that the defendant had possession of three bottles of tablets containing ephedrine and several loose unused coffee filters, that ephedrine and coffee filters were used to manufacture methamphetamine, and that he was purchasing the ephedrine for another person. *Id.* at 321-22, 150 P.3d 59.

¶28 The court noted that unlike in the *Brockob* case, there was something more than the defendant's mere possession of the tablets—he also possessed coffee filters (which commonly are used to make methamphetamine) and apparently was acting in concert with another person. *Id.* at 333, 150 P.3d 59. Therefore, the court held that the independent evidence was sufficient to corroborate the incriminating statement that he had purchased the ephedrine for another person to make methamphetamine. *Id.*

***634** ¶29 Under a strict application of the "inconsistent with a hypothesis of innocence" rule, the independent evidence in the *Gonzalez* case would have been insufficient to corroborate the defendant's incriminating statement. Certainly there could have been an innocent explanation for possession of coffee filters. Instead, the court determined that possession plus the additional factors supported an inference that the defendant intended to manufacture methamphetamine

without focusing on the fact that there also was an inference of a noncriminal reason for possessing the ephedrine and the coffee filters. *Id.* at 333, 150 P.3d 59.

[9]¶30 Hotchkiss's argument here is inconsistent with the *Gonzalez* case. Further, holding that the evidence was insufficient to corroborate Hotchkiss's incriminating statement would lead to an absurd result. Under the cases cited above, Hotchkiss's possession of a significant quantity of methamphetamine plus a large amount of cash was sufficient evidence to support a *conviction* for possession of methamphetamine with intent to deliver. *E.g., O'Connor*, 155 Wash.App. at 290, 229 P.3d 880. But the **corpus delicti** cases uniformly hold that corroborating evidence need not be sufficient to establish that a crime has been committed beyond a reasonable doubt or even by a preponderance of the evidence. *Aten*, 130 Wash.2d at 656, 927 P.2d 210. In other words, less evidence is required to corroborate a defendant's incriminating statement than to support a conviction. *See id.*

¶31 Therefore, it would be incongruous to hold that Hotchkiss's possession of methamphetamine and a large amount of cash would be sufficient to uphold his conviction under a higher beyond a reasonable doubt standard, but insufficient to satisfy the **corpus delicti** rule under a standard lower even than a preponderance of the evidence.[2]

2 We acknowledge that in the third consolidated case in *Brockob*, the *Cobabe* case, the Supreme Court held that even though the evidence was insufficient to corroborate the defendant's incriminating statement, it was sufficient to convict him. 159 Wash.2d at 353, 150 P.3d 59. It is difficult to reconcile this holding with the well-settled rule that corroborating evidence does not even need to rise to the level of preponderance of the evidence. *E.g., Aten*, 130 Wash.2d at 656, 927 P.2d 210. Therefore, we decide this case consistently with the well-established rule in *Aten*.

3. **Corpus Delicti** Analysis

¶32 We apply the general rule, stated in *Whalen* and confirmed in the *Gonzalez* case in *Brockob*, that possession of a controlled substance plus an additional factor is sufficient to corroborate a defendant's incriminating statement that he or she intended to distribute the substance and thereby satisfy the **corpus delicti** rule. Under this rule, we hold that the amount of methamphetamine in Hotchkiss's possession combined with an additional factor—possession of a large amount of cash—is sufficient to create an inference that Hotchkiss intended to deliver the methamphetamine and therefore is sufficient to corroborate his incriminating statement.

¶33 Accordingly, we conclude that the State has satisfied the **corpus delicti** rule and therefore that the trial court could consider Hotchkiss's statement. And considering Hotchkiss's statement, we hold that the evidence was sufficient to support his conviction.

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CONCLUSION

¶34 We affirm Hotchkiss' conviction of possession of methamphetamine with intent to deliver.

I concur:

BJORGEN, C.J.

Worswick, J., (concurring)

¶35 I concur in the result. Although I appreciate the majority's attempt to factually distinguish the *Cobabe*[3] case, I do not believe they are entirely successful. Majority at 634 n.2. *Cobabe* clearly stands for the proposition that evidence may be sufficient to convict beyond a reasonable doubt but may still be insufficient for purposes of **corpus delicti**. *Compare* ***635** *State v. Brockob*, 159 Wash.2d 311, 341, 150 P.3d 59 (2006), *with* 159 Wash.2d at 335, 150 P.3d 59.

3 The *State v. Cobabe* case was the third consolidated case in *State v. Brockob*, 159 Wash.2d 311, 150 P.3d 59 (2006).

¶36 Jeremy Ray Cobabe was convicted of second degree attempted robbery for his actions in relation to a CD/DVD (compact disc/digital video disc) player. 159 Wash.2d at 326, 150 P.3d 59. In that case, some evidence was presented that Cobabe tried to take the player so that the owner would be forced to meet with Cobabe, which corroborated the theory of robbery; other evidence was presented that Cobabe had the owner's permission to take the player, which undermined an essential element of the crime. 159 Wash.2d at 334-35, 150 P.3d 59. Thus, evidence supported a hypothesis of both guilt and innocence. 159 Wash.2d at 334-35, 150 P.3d 59. Citing *State v. Aten*, 130 Wash.2d 640, 660, 927 P.2d 210 (1996), our Supreme Court concluded that the independent evidence was insufficient to corroborate Cobabe's incriminating statement under the **corpus delicti** rule but nonetheless concluded there was sufficient evidence to support his conviction beyond a reasonable doubt. *Brockob*, 159 Wash.2d at 335, 150 P.3d 59; see 159 Wash.2d at 341, 150 P.3d 59.

¶37 The majority states, "It is difficult to reconcile [the] holding [in the *Cobabe* case] with the well-settled rule that corroborating evidence does not even need to rise to the level of preponderance of the evidence." Majority at 634 n. 2. This was also the position taken by the dissent in the *Cobabe* case, which did not carry the day. *Brockob*, 159 Wash.2d at 353-54, 150 P.3d 59 (Madsen, J., dissenting). The Supreme Court alone can decide whether to revisit this issue.

¶38 We are bound to follow our Supreme Court's precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566, 578, 146 P.3d 423 (2006). And the *Cobabe* case compels the result here. Hotchkiss was in possession of a large quantity of methamphetamine and cash. The majority has decided that independent evidence corroborated the fact that he was in possession of the cash through innocent means. Thus, under *Cobabe*, the evidence was insufficient to admit Hotchkiss's statement; under established precedent,[4] the evidence was sufficient to convict him beyond a reasonable doubt without his statement.

4 *See State v. O'Connor*, 155 Wash.App. 282, 290-91, 229 P.3d 880 (2010); *State v. Campos*, 100 Wash.App. 218, 223-24, 998 P.2d 893 (2000); *State v. Hagler*, 74 Wash.App. 232, 236-37, 872 P.2d 85 (1994); *State v. Lane*, 56 Wash.App. 286, 297-98, 786 P.2d 277 (1989).

¶39 For these reasons, I would affirm.

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