

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.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The *corpus delicti* rule requires that the State have sufficient evidence (1) independent of the defendant's own statements and (2) inconsistent with a hypothesis of innocence (3) to prove a *prima facie* case (4) for each element (5) of the crime charged. Here, the State charged Jason Absher with attempted possession of Oxycontin with intent to deliver. The evidence against Mr. Absher was comprised almost entirely of his statements to a confidential police informant and to police officers. The State's minimal independent evidence consisted of Mr. Absher entering the informant's car and giving her money in exchange for pills, prior to which the police observed Mr. Absher meet two people in his car and shuffle his hands. The State's independent evidence fails to establish a *prima facie* case of attempted possession with *intent to deliver* Oxycontin.

B. ASSIGNMENTS OF ERROR

1. The State failed to establish the *corpus delicti* of the charged crime.
2. The trial court erred when it failed to dismiss the case on *corpus delicti* grounds.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The *corpus delicti* rule requires the prosecution to present evidence that is independent of the defendant's own statements and that corroborates not just a *crime* but *the specific crime* with which the defendant has been charged. The State's evidence must establish a *prima facie* case of every element of the crime charged and must be inconsistent with innocent conduct. Where the State's independent evidence was insufficient to establish a *prima facie* case on every element of attempted possession of Oxycontin with intent to deliver and where the independent evidence was consistent with an innocent hypothesis, did the State fail to satisfy the *corpus delicti* rule requiring reversal of Mr. Absher's conviction?

D. STATEMENT OF THE CASE

In approximately May 2009, Mr. Absher met Patricia Quinn, a very recent acquaintance of his father. RP 496. On May 13, 2009, Ms. Quinn offered to sell Mr. Absher Oxycontin pills. RP 497. He was interested. RP 497.

Unbeknownst to Mr. Absher or his father, Ms. Quinn has served as an informant for the Auburn Police Department for nine

years. RP 490.¹ Prior to Ms. Quinn meeting Mr. Absher, Detective Jeff Crawford of the Auburn Police informed Ms. Quinn that the police had secured Oxycontin pills and were interested in arranging a “reverse controlled buy.” RP 446-47, 497.² Detective Crawford told Ms. Quinn to keep her eyes and ears open for an opportunity. RP 447, 533.

Detective Crawford controlled the deal and listened in on telephone conversations between Mr. Absher and Ms. Quinn. RP 382-84, 498-500. Detective Crawford instructed Ms. Quinn to offer Mr. Absher the price of 25 dollars a pill for a large enough quantity, with an even greater discount if he purchased more than 1,000 pills. RP 384. Both prices were a significant reduction from the street price, which was 50 to 65 dollars per pill. RP 385; see RP 595.

At Detective Crawford’s direction, Ms. Quinn called Mr. Absher on the afternoon of the deal and, with Detective Crawford surreptitiously listening in, he told her: “I need 50. I have a friend

¹ She has worked about 150 controlled buys, for which she is paid between 50 and 520 dollars. RP 476-77, 493. For her work on Mr. Absher’s case, the police paid Ms. Quinn 260 dollars. RP 533.

² In a “reverse controlled buy,” the police act as the supplier and dealer instead of the purchaser. See RP 446-47. Ms. Quinn was not told that the pills were fake. RP 533.

that wants 150, and there is another person that wants 300 but he is still at work.” RP 387-89. In a later call Mr. Absher told Ms. Quinn he was having trouble reaching the alleged purchaser of 300 pills but wanted to move forward with the deal today and was prepared to purchase 200 pills. RP 390. Ms. Quinn told him she would check with her “source” (Detective Crawford) and called back quickly with details of the purchase to be set for 8 p.m. RP 391. Mr. Absher agreed. RP 391. At 7 p.m., Mr. Absher called Ms. Quinn and told her he had enough money to purchase 420 pills. RP 391. Detective Crawford listened to each of these calls. RP 384-91, 500, 518.

Police surveillance arrived at the designated place, the Walmart parking lot at the Auburn Supermall, in advance of the deal to secure the area. RP 398, 570, 572. A surveillance officer observed Mr. Absher’s vehicle pull into a parking spot next to a dark Acura. RP 574. The Acura driver got out of his car and into the passenger side of Mr. Absher’s vehicle. RP 574. The officer observed the men make back-and-forth shuffling motions with their hands, while they were looking down and conversing. RP 574-75. The driver of the Acura then returned to his own car and exited the parking lot. RP 575.

A few minutes later, a Subaru with a male driver pulled up alongside Mr. Absher's car. RP 523, 576. After conversing with Mr. Absher, the driver of the Subaru entered the front passenger side of Mr. Absher's car. RP 576. After some similar shuffling motions made by both gentlemen, the Subaru driver returned to his own car. RP 576. The Subaru remained in the parking lot. RP 577.

Detective Crawford then observed Mr. Absher walk up to the informant's vehicle and enter the passenger's seat. RP 416-17. Mr. Absher and Ms. Quinn were looking down and making hand motions that appeared to be counting something, which he believed was money. RP 417. About three minutes later Mr. Absher exited the passenger seat and started walking towards his car. RP 417. Ms. Quinn gave Detective Crawford the pre-designated "good buy" sign. RP 417. Upon contacting Ms. Quinn, Detective Crawford recovered \$10,500 provided by Mr. Absher and confirmed that he had exchanged it for the 420 Oxycontin pills. RP 418; see 523-25.

Mr. Absher was arrested by two surveillance officers on his way back to his car. RP 580-82. He was carrying a paper sack with the packaged fake Oxycontin pills the police had provided Ms. Quinn. RP 582-83. He cooperated with the police at the scene and

during an interview at the jail the following day. RP 419-20, 584, 593, 623. He made inculpatory statements and provided a written statement. RP 419-20, 422, 424, 428-29, 584-85; Exhibit 2. Mr. Absher also cooperated by introducing the police to a friend of his who could assist in investigative efforts, though ultimately the police never capitalized on the contact. RP 431, 433; see RP 457 (Absher did not himself have information to provide to the police).

Prior to trial, Mr. Absher moved to suppress his extrajudicial statements to Ms. Quinn, the paid police informant, and the police based on the *corpus delicti* rule. RP 98; CP 7-16. After hearing testimony and argument, the court found the State had satisfied its burden. RP 327-29.

A jury convicted Mr. Absher of the crime charged: attempted possession with intent to deliver Oxycontin. CP 52.

E. ARGUMENT

THE STATE FAILED TO ESTABLISH THE *CORPUS*
OF THE CRIME OF ATTEMPTED POSSESSION
WITH INTENT TO DELIVER OXYCONTIN
THROUGH EVIDENCE INDEPENDENT OF MR.
ABSHER'S OWN STATEMENTS.

The State must offer evidence corroborating the specific crime charged, independent of the defendant's own statements, to establish the mandatory *corpus delicti*. The independent evidence

must be inconsistent with innocent conduct. The State charged Mr. Absher with attempted possession with intent to deliver Oxycontin but almost all of its evidence derived from Mr. Absher's statements to the police and to a paid police informant. The State thus had insufficient independent evidence, inconsistent with a hypothesis of innocence, to establish a *prima facie* case. Accordingly, Mr. Absher's conviction must be reversed.

1. The *corpus delicti* rule requires the State to have evidence that is independent of defendant's extrajudicial statements, establishes a *prima facie* case for the crime charged, and is inconsistent with an innocent hypothesis.

The *corpus delicti* rule is an ancient common law doctrine which finds its roots in English law. Bremerton v. Corbett, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). It 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); see also State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). Thus, 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; see Dow, 168 Wn.2d at 254 ("the State

must still prove every element of the crime charged by evidence independent of the defendant's statement."). The State bears the burden of producing sufficient evidence, which the court views in the light most favorable to the State. State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2010). This Court reviews the issue *de novo*. Id. at 77-78.

The *corpus delicti* doctrine guards against a conviction predicated on a defendant's statements alone, where there is no separate proof that the particular crime occurred. The purpose of the traditional *corpus delicti* rule is to safeguard an accused person from unjust conviction based upon confessions alone which may be of questionable reliability. State v. Aten, 130 Wn.2d 640, 657, 927 P.2d 210 (1996). The 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, 106 Wn.2d at 576. It also accounts for the view that a defendant's own incriminating statements "would probably be accepted uncritically by a jury." Aten, 130 Wn.2d at 656-57. Because the rule is designed to protect against both false confessions resulting from police coercion as well as a voluntary confession that is false,

Smith v. United States, 348 U.S. 147, 153, 75 S. Ct. 194, 99 L. Ed. 2d 192 (1954), the rule is not limited to statements made during custodial interrogation, Bremerton, 106 Wn.2d at 576. In fact, “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. Aten, 130 Wn.2d at 657-58.

In Brockob and Dow, the Washington Supreme Court explained the rigors of Washington’s judicially-created *corpus* rule. Washington departed from a more lenient federal standard for *corpus* in State v. Aten, 130 Wn.2d 640, which it reaffirmed in Dow, 168 Wn.2d at 252, and Brockob, 159 Wn.2d at 328-29. While the federal rule requires only evidence tending to establish the reliability of the defendant’s statements, Washington demands sufficient evidence to prove a *prima facie* case of every element of the crime charged by evidence independent of the defendant’s statements. Dow, 168 Wn.2d at 254.³ “‘Prima facie’ in this context

³ The rule in Washington appears broader in additional respects. Federal case law indicates that the rule applies only to statements made subsequent to the crime. Opper v. United States, 348 U.S. 84, 90, 75 S. Ct. 158, 99 L. Ed. 101 (1954) (citing Warszower v. United States, 312 U.S. 342, 348, 61 S. Ct. 603, 85 L. Ed. 876 (1941)). However, to this counsel’s knowledge, the rule has never been so limited in this State, and the case law indicates it should not be. See Dow, 168 Wn.2d at 253 (rejecting relevance of Opper to this State’s rule); Aten, 130 Wn.2d at 657-58 (holding *corpus delicti* rule applies to “any

means there is 'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." Aten, 130 Wn.2d at 656 (quoting State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)).

Not only must the corroborating evidence prove a *prima facie* case, the State's independent evidence must also be "consistent with guilt and inconsistent with a hypothesis of innocence." Brockob, 159 Wn.2d at 329 (internal citations omitted). If "the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement." Id. at 330.

In Brockob, the Supreme Court considered three independent challenges to convictions under *corpus delicti*. With regard to Mr. Brockob, the defendant stole about 20 packages of Sudafed, which could be used to make methamphetamine, and he admitted his purpose was to help someone make methamphetamine. 159 Wn.2d at 319. The State charged Brockob with possession of pseudoephedrine with intent to manufacture methamphetamine. Id. Possession of Sudafed alone

statement made by the defendant"). In light of Aten and this State's more recent application of the rule in Dow, 168 Wn.2d at 252-53, and Brockob, 159 Wn.2d at 328-29, it is appropriately applied here to defendant's statements to the paid police informant.

does not prove the intent to make methamphetamine, and the only evidence independent of Brockob's statement of his intent was a police officer's testimony that Sudafed was commonly used to make methamphetamine. *Id.* at 331. The Brockob court held the prosecution had not proved the *corpus delicti* of the crime independent of the defendant's statement because the officer's testimony that Sudafed may be used to make methamphetamine "does not necessarily lead to the logical inference that Brockob intended to do so, without more." *Id.* at 332.

In another case consolidated with Brockob, the court considered whether the charged crime of attempted manufacture of methamphetamine was supported by sufficient independent evidence. 159 Wn.2d at 320-22. When the defendant in that case, Mr. Gonzales, was arrested the police seized a brown paper bag with three new sealed bottles containing ephedrine tablets and several loose unused coffee filters in two different sizes. *Id.* at 321. From Mr. Gonzales' companion, the police seized one bottle of ephedrine tablets. *Id.* The court held the State satisfied the *corpus delicti* rule because unlike Mr. Brockob, the evidence independent of Mr. Gonzales' confession included possession of ephedrine and coffee filters, and a companion apparently acting in concert to

acquire more than the legal quantity of ephedrine. Id. at 333.

Here, the State's independent evidence was insufficient to establish a *prima facie* case as required by the *corpus delicti* rule.

2. The State's independent evidence here was insufficient absent Mr. Absher's statements.

The State charged Mr. Absher with attempted possession of Oxycontin with intent to deliver. Independent of Mr. Absher's statements to the police and its paid informant, the State was required to establish a *prima facie* case on each element: (1) a substantial step, (2) intent to possess Oxycontin with intent to deliver, and (3) that the crime occurred in Washington.

The State was not able to set forth an independent, *prima facie* case of Mr. Absher's intent to possess Oxycontin with intent to deliver. The *corpus delicti* rule forbids consideration of any of Mr. Absher's statements to the confidential informant or to police. See Aten, 130 Wn.2d at 253; note 3, supra. Thus Mr. Absher's conversations with Ms. Quinn regarding assembling people and money to make a purchase are not independent evidence. The State's best, and only, evidence, therefore, is police observation of Mr. Absher's interaction with two individuals in the Walmart parking

lot, which involved the shuffling of hands under Mr. Absher's dashboard.

Brockob and Aten instruct that where the evidence supports the reasonable inference of a criminal explanation and an explanation that does not involve criminal agency, the evidence is insufficient. Brockob, 159 Wn.2d at 330 (discussing Aten's modification of the rule to increase the State's burden). Mr. Absher's meeting with others in the Walmart parking lot and moving his hands could be consistent with the exchange of money to purchase Oxycontin on behalf of the others. However, it could also be consistent with noncriminal activity: playing cards, paying for services rendered, paying back a debt, exchanging coupons or event tickets. This evidence alone is thus insufficient to establish the State's *prima facie* case on the intent element.

Nor can the State rely on police observation of Mr. Absher's other conduct in the Walmart parking lot to prove intent to deliver. Though Mr. Absher's exchange of money for a bag of pills may be sufficient independent evidence to establish intent to possess, the State charged Mr. Absher with attempted possession with intent to *deliver*. Accordingly, the independent evidence must support that crime. Brockob, 159 Wn.2d at 329. Similarly, the sheer quantity of

pills purchased does not prove that Mr. Absher intended to deliver the controlled substance—he could merely have been supporting his own addiction. Cf. RP 103-04 (prosecutor’s argument that addict known to take up to 30 pills per day).

Consequently, the State lacked sufficient evidence to support a *prima facie* case absent Mr. Absher’s own statements.

3. Mr. Absher’s conviction must be reversed.

Absent evidence of the *corpus delicti* of the crime, Mr. Absher’s statements are inadmissible and the State’s evidence is insufficient. Dow, 168 Wn.2d at 255. The remedy is to reverse the conviction and dismiss the charge.

F. CONCLUSION

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. Accordingly, Mr. Absher’s conviction must be reversed.

DATED this 4th day of May, 2011.

Respectfully submitted,



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