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COURT OF APPEALS

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BY: *[Signature]*

No. 40401-0-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

BRENDA J. ZILLYETTE,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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H. STEWARD MENEFEE  
Prosecuting Attorney  
for Grays Harbor County

BY: *[Signature]*  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

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**T A B L E**

**Table of Contents**

RESPONDENT’S COUNTERSTATEMENT OF THE CASE ..... 1  
    Procedural History. .... 1  
    Factual Background. .... 1

RESPONSE TO ASSIGNMENTS OF ERROR ..... 6

    1. The State presented ample independent proof  
    to establish the *corpus delicti* of the crime of  
    Controlled Substance Homicide. .... 6

    2. The Information properly informed the defendant  
    of all of the elements of the crime charged. .... 12

**TABLE OF AUTHORITIES**

**Table of Cases**

State v. Aten, 130 Wn.2d 640, 656, 927  
    P.2d 210, citing State v. Meyer, 37  
    Wn.2d 759, 226 P.2d 204 (1951) ..... 6, 7

State v. Brockob, 159 Wn.2d 311,  
    150 P.3d 59 (2006) ..... 7

State v. Brosius, 154 Wn.App. 714, 721,  
    255 P.3d 1049 (2010) ..... 14

State v. Dow, 168 Wn.2d 243, 227  
    P.3d 1278 (2010) ..... 6

State v. Goodman, 150 Wn.2d 774, 785-86,  
    83 P.3d 410 (2004) ..... 12

State v. Kjorsvik, 117 Wn.2d 93, 105-108,  
    812 P.2d 86 (1991) ..... 13, 14

State v. Leach, 113 Wn.2d 679, 688,  
    782 P.2d 552 (1989) ..... 14

|                                                                                             |    |
|---------------------------------------------------------------------------------------------|----|
| <u>State v. Nonog</u> , Washington Supreme Court<br>No. 82094-5 decided July 22, 2010 ..... | 13 |
| <u>State v. Page</u> , 147 Wn.App. 849, 856,<br>199 P.3d 437 (2008) .....                   | 7  |
| <u>State v. Vangerpen</u> , 125 Wn.2d 782, 796,<br>888 P.2d 1177 (1995) .....               | 7  |
| <u>State v. Winings</u> , 126 Wn.App. 75 ,85,<br>107 P.3d 141 (2005) .....                  | 14 |

### STATUTES

|                            |        |
|----------------------------|--------|
| RCW 69.50.415 .....        | 1, 14  |
| RCW 10.58.035 .....        | 1, 6   |
| RCW 69.50.401 .....        | 12, 14 |
| RCW 69.50.401(4) .....     | 12     |
| RCW 69.50.205(c)(14) ..... | 14     |

### **Table of Court Rules**

|               |   |
|---------------|---|
| CrR 3.5 ..... | 1 |
|---------------|---|

### OTHER

## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

### **Procedural History.**

The defendant was charged by Information on September 10, 2009, with Controlled Substance Homicide, RCW 69.50.415. (CP 1-2). The defendant subsequently filed a motion to dismiss alleging the State's inability to prove the *corpus delicti* of the crime. (CP 16-18). That hearing, and a CrR 3.5 hearing, were held on November 12, 2009. The court made findings as required by RCW 10.58.035. The court denied the motion to dismiss. (CP 52-54). The defendant subsequently executed a waiver of trial by jury. (CP 40). The defendant's statements were found to be admissible. The matter was tried to the court. The court returned a verdict of guilty. The court entered Findings of Fact and Conclusions of Law in support of the verdict. (CP 86-90).

### **Factual Background.**

On March 31, 2009, Austin Burrows was eighteen years of age. He lived with his father, Rick Green, in Elma, Washington. (RP 8-9, Findings of Fact 1 CP 86). Austin returned home at about 11 p.m. on the evening of March 31, 2009. He spoke briefly with his father who was in

bed watching television. As far as Mr. Green could see Austin was fine. (CP 9-10, 12-13). Mr. Green did not see his son alive again. Mr. Green returned home from work on the evening of April 1, 2009. Around 6 p.m. he went up to his son's room to call him for dinner. When he went into the room he found his son's body. (CP 10-11, Findings of Fact 8, CP 87).

Law enforcement and aid personnel were called to respond to the scene. Photographs were taken of the scene and evidence was collected from Austin's bedroom. Among the items collected were prescription tablets of alprazolam (Xanax) and Methadone and Austin's DVD player. (Exhibit 8, 9, CP 94-95, 19).

A subsequent post mortem examination of the body of Austin Burrows was conducted by Dr. Emanuel Lacsina. A sample of Burrow's blood was taken. It was found to contain high levels of both Methadone and alprazolam. (RP 70-71, 72). Dr. Lacsina determined that Austin Burrows died of acute Methadone intoxication. (RP 87, Findings of Fact 11, CP 88). Burrows was otherwise "perfectly healthy." (RP 84).

On the evening of March 31, 2009, the defendant went to the Elma Pharmacy and filled two prescriptions, one for 45 tablets of Methadone, another for 60 tablets of alprazolam (Xanax), both of which are controlled substances. The prescription was filled at 4:38 p.m. and given to the defendant by the pharmacy technician, Melanie Lindley. (RP 54-55, Exhibit 7, Findings of Fact 3, CP 87).

The defendant and Austin Burrows were known to be acquaintances. A mutual acquaintance, James Russell, had first seen them together on Larson Hill near Elma about two weeks prior to Austin's death. Russell recalled that Austin and Ms. Zillyette "started hanging out with us" in the two weeks prior to Austin's death. (RP 37-39). The defendant's live-in boyfriend, Randy Holm, was aware that the defendant and Austin Burrows had been together. He had met Burrows through a neighbor, Aaron Knutson. (RP 40, Findings of Fact 2, CP 86-87). Knutson had introduced them a month or so prior. (RP 101). The defendant did drugs with Knutson and Austin. (RP 101). The defendant's daughter, Sarah, had confronted her mother and the defendant at a local convenience store, asking Austin why he was running around doing drugs with her mother. (RP 126).

The defendant spoke to her boyfriend at their residence around 9:00 p.m. on the evening of March 31, 2009. (RP 42). She then left driving her Dodge pickup truck. (RP 43, Exhibit 4). Around midnight she called home telling him that she had wrecked the truck. (RP 45, 46). She returned to the residence and spoke to Holm between 2 and 2:30 a.m. on April 1, 2009. (RP 47). She explained that she had been "doing pills" with Austin on Larson Hill. (RP 48-49, Findings of Fact 5, CP 87). The following morning Holm observed the damage to the truck. (RP 47, Findings of Fact 6, 7, CP 87).

After he learned of Austin's death, Holm discovered the prescription bottles that had been filled at the pharmacy. He recalled that the Methadone bottle was labeled to contain 45 tablets. He observed that there were only 3 or 4 of the "blue ones" (alprazolam) left and a couple of methadone tablets. (RP 49-50, Findings of Fact 9, CP 87).

On the evening of March 31, 2009, Austin Burrows sent a picture from his cell phone to two of his friends, Mitchell Grandorff and Joshua Dierick. Grandorff recalled receiving the picture on his cell phone at about 9:30 a.m. on March 31, 2009. The picture showed Austin's hand holding a large number of pills and a screw cap from a prescription bottle. (Exhibit 3, Findings of Fact 4, CP 87). The pills were later identified by the pharmacy technician, Melanie Lindley, as consistent with the alprazolam and methadone prescribed to the defendant and filled by her on March 31, 2009. (RP 57). Mitchell Grandorff received a second text message from Burrows at around 11:36 p.m. on March 31, 2009. Grandorff responded to Burrows saying, "You're going die." (RP 34-36).

As part of the investigation, Detective Keith Peterson of the Grays Harbor County Sheriff's Office examined Austin's cell phone. He found the photograph, Exhibit 3, on Austin's cell phone. He noted that the photograph had been transmitted from the cell phone. (RP 109-110). He discovered that the last call was placed on April 1, 2009, at 3:10 a. m. to the defendant's phone. (RP 113-114). Peterson found a number of calls

from the defendant's phone to Austin's cell phone on the morning of April 1, 2009. (RP 115-116).

Detective Peterson subsequently interviewed the defendant. Following the initial interview, Peterson prepared a written statement which the defendant reviewed and signed. (Exhibit 5, RP 117-119). In that statement she made admissions concerning her conduct, almost all of which were independently confirmed through testimony at trial: (1) She had met Austin Burrows through Aaron Knutson a couple of months prior; (2) She and Austin Burrows began hanging out together, "... meeting and snorting pills together." She identified Larson Hill as one of the areas where they would meet and do drugs; (3) Austin had a gray colored DVD player that had no cord (Exhibit 9, RP 112-113); (4) Tuesday afternoon (March 31, 2009) she went to the doctor and got a prescription for sixty 1 mg Xanax and forty-five 5mg Methadone which she filled at the Elma Pharmacy. She described the Xanax as blue "football shaped" pills and the Methadone as "like square Tic Tacs"; (5) Austin Burrows put a number of pills in his hand, took a picture of the pills and sent it to "someone"; (6) She and Austin consumed her medication together that night; and (7) She was driving her pickup truck. She ran into a tree and damaged the pickup truck.

In her statement to Peterson, the defendant readily admitted that she and Austin Burrows both consumed the prescription medication that she had purchased that afternoon.

## RESPONSE TO ASSIGNMENTS OF ERROR

**1. The State presented ample independent proof to establish the *corpus delicti* of the crime of Controlled Substance Homicide.**

At the time of the proceedings herein, the State believed that RCW 10.58.035 would govern the admissibility of the defendant's out-of-court statements. A hearing was held and findings were entered pursuant to the provisions of RCW 10.58.035. The State believed, at the time, that the express purpose of the statute was to allow for conviction by proof beyond reasonable doubt based solely on the out-of-court statement of the defendant. The purpose of the statute seemed to be to eliminate the common law *corpus delicti* rule. The Supreme Court has since ruled otherwise. State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010).

In Dow, the court held that RCW 10.58.035 pertains only to the admissibility of the defendant's confession and not to the sufficiency of evidence required to support a conviction. Accordingly, the State will demonstrate herein, as it did to the trial court, that there was ample evidence, independent of the confession, to support the conviction of the defendant.

*The corpus delicti* rule is well understood. See State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210, citing State v. Meyer, 37 Wn.2d 759, 226 P.2d 204 (1951):

The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession

may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if the *prima facie* establishes the *corpus delicti*.

As the court went on to further explain in Aten, the corroborating evidence need not be enough to support a conviction or to even send the case to the jury. There only need be “*prima facie*” evidence. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

“Prima facie” in this context, means that there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved. The independent evidence need not have been sufficient to support a conviction or even to send the case to the jury.

The State must present evidence, independent of the confession that the crime described actually occurred. State v. Page, 147 Wn.App. 849, 856, 199 P.3d 437 (2008). The State is entitled to have the evidence reviewed in a light most favorable to the State. Page, 147 Wn.App. at p. 856. The State need only provide *prima facie* corroboration of the crime described by the defendant. State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006). Thus, for example, in State v. Brockob, supra, defendant Gonzalez confessed to possession of ephedrine with intent to manufacture methamphetamine. His confession was found to be sufficiently

corroborated by his possession of ephedrine, his attempts to obtain additional ephedrine, and his possession of coffee filters which were typically used in the manufacturing process.

The defendant was charged with Controlled Substance Homicide. The State was required to prove three elements: That the defendant delivered a controlled substance to Austin Burrows, that Austin Burrows ingested it and it and that Austin Burrows subsequently died from its effects. Contrary to the defendant's assertion, the independent proof herein is substantial and easily supports the out-of-court statements of the defendant.

The defendant and Austin Burrows were known to be friends. They had been introduced by Aaron Knutson. They did drugs with Knutson. They "hung out" together for at least two weeks prior to Austin's death. They were together on the night of March 31, - April 1, 2009. The defendant admitted as much to her boyfriend, Randy Holm, that evening when she arrived home. Austin placed a call to the defendant's cell phone on April 1, 2010, at 3:10 a.m. She tried to call Austin on the morning of April 1, 2010. These facts support her statement about the nature of their relationship. They also support her admission that she gave her drugs to Austin to consume.

The defendant filled a prescription for 45 Methadone tablets and 60 alprazolam tablets in the late afternoon of March 31, 2009. Later that evening Austin Burrows had a substantial number those pills in his hand,

along with a screw top for one of the prescription bottles. An examination of Exhibit 3 shows a substantial number of both alprazolam and Methadone pills. He sent photos of these to his friends. The facts support a finding that these were the pills that the defendant purchased at the pharmacy. This is confirmed, independently, by the fact that when the pill bottles were later discovered, both bottles were almost empty. Once again, given the relationship between the parties, there is every reason to support a finding by the trier of fact that the defendant gave these pills to Austin.

Likewise, it is immediately apparent from the review of the independent evidence that the pills shown in Exhibit 3 were the Methadone pills that caused Austin's death. The photograph sent to Mitchell Grandorff and Joshua Dierick shows Austin holding the defendant's prescription medication. It is not a coincidence that he later died from ingestion of those pills. It is not for the defendant to now speculate that perhaps Austin had an independent source for the Methadone tablets that killed him.

Substantial portions of her written statement were corroborated through independent evidence. In her statement to law enforcement the defendant said, "I met Austin Burrows through Aaron Knutson about a couple of months ago. He was in Aaron's house. We were taking pills together." Aaron Knutson, James Russell and her daughter, Sarah, confirmed that the defendant and Austin were friends and had been

running around together. Knutson testified that he, Austin and the defendant consumed drugs together.

In her statement the defendant stated "We met in several places including ... Larson Hill.... Both of us would bring drugs and we would do them. Austin would always bring a gray colored DVD player without a cord." Russell identified that he had first met her in the Larson Hill area near Elma when introduced by Austin. Police recovered Austin's DVD player as described by the defendant in her statement.

In her statement to police the defendant stated, "Tuesday afternoon I went to the doctor and got a prescription for 60 mg Xanax and 45 mg Methadone. I bought them at the Elma Pharmacy." She went on to say that "Xanax are little blue pills like football shapes. The Methadone looked like square Tic Tacs."

Melanie Lindley's testimony established, independent of the defendant's admissions, that the defendant had filled a prescription for Methadone and Xanax on the evening of March 31, 2009, Ms. Lindley identified the pills in the photograph as 60 mg Xanax and 45 mg methadone. This confirms the statement of the defendant in which she gave a description of the pills. Exhibit 3 shows those pills in Austin's hand.

On the evening of March 31, 2009, Austin put a large number of those pills in his hand, took a picture of the pills and sent them to his friends. The picture was found on the cell phone. The friends confirmed

receiving the picture. The defendant told Detective Peterson in her statement "he took a picture of the pills in his hand."

Later in the evening the defendant ran her truck into a tree, causing damage to the truck. Her boyfriend, Randy Holm, saw the damage. The defendant told Holm, on the night that it occurred, that she had run the truck into a tree. These independent facts confirm the defendant's admission, given to Detective Peterson, that she had run her vehicle into a tree that night.

In her statement to Detective Peterson she readily admitted that she and Austin Burrows had consumed the prescription medication. This admission is supported by independent evidence to include their relationship, including the fact that they consumed drugs together on previous occasions, the fact that she had purchased the pills earlier in the day, the fact that she had allowed the defendant to place a large number of pills in his hand and take a picture, and the fact that they had spent the night together.

Furthermore, there can be no doubt that Austin Burrows died as a consequence of the ingestion of the pills provided by the defendant. He died of an overdose of Methadone. Substantial quantities of alprazolam were also found in his blood. The defendant had a substantial quantity of Methadone from a prescription that she had just filled. The logical and

reasonable inference, based on the evidence presented, is that Austin Burrows died from prescription drugs provided to him by the defendant.

This assignment of error must be denied.

**2. The Information properly informed the defendant of all of the elements of the crime charged.**

A copy of the Information in this matter is attached hereto and incorporated herein by this reference. The defendant's complaint is that, although the Information alleged "...delivery of a ...controlled substance in violation of RCW 69.50.401..." the State neglected to include the particular subsections of 69.50.401. The defendant is apparently asserting now that somehow she was misled and did not receive notice that it was a controlled substance other than a controlled substance listed in RCW 69.50.401(4). The State asserts that the defendant was given fair notice. She certainly understood, given all of the circumstances, that she was accused of delivering her prescription medication, Methadone, to the defendant which medication caused his death. The specific identity of the controlled substance allegedly delivered is not an essential element of the offense unless it increases the punishment. State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). The identity of the particular controlled substance delivered does not effect the level of punishment for Controlled Substance Homicide.

The defendant expressed no confusion to the trial court. She did not request a Bill of Particulars. To claim now that somehow she did not know, or that the information did not fully inform her of the nature of the charge is a classic example of “sandbagging.”

No challenge to the sufficiency of the information was made prior to the time the State rested. Accordingly, this court must adopt a liberal construction rule when considering challenges to the information raised for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 105-108, 812 P.2d 86 (1991); State v. Nonog, Washington Supreme Court No. 82094-5 decided July 22, 2010:

In *State v. Kjorsvik*, 117 Wn.2d 93, 105-108, 812 P.2d 86 (1991), we adopted a liberal construction rule when considering challenges to the information raised for the first time on appeal. Liberal construction balances the defendant’s right to notice against the risk of what Professor Wayne R. LaFave termed “sandbagging” – that is, that a defendant might keep quiet about the defects in the information only to challenge them after the State has rested and can no longer amend it. *Id.* at 103, 4 106, 108. When a defendant challenges the information for the first time on appeal, we determine if the elements “appear in any form, or by fair construction can they be found, in the charging document.” *Id.* at 105. We read the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” *Id.* at 109. If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him. *Id.* at 106.

The purpose of the requirement that the information contain all essential elements is to ensure that the defendant can prepare a defense. Kjorsvik, 117 Wn.2d at 97. This defendant was given notice of the elements of the offense “... to a reasonable certainty...” State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989).

As indicated, above, the proper test is: “(1) whether the necessary elements appear in any form or can be found by fair construction in the charging document; and, if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the inartful, vague or ambiguous charging language.” State v. Brosius, 154 Wn.App. 714, 721, 255 P.3d 1049 (2010). The charging language herein cites to the entire statute, RCW 69.50.401, which includes those three portions of RCW 69.50.401 set forth in the controlled substance homicide statute, RCW 69.50.415. On its face the charging document alleges delivery of a controlled substance from one of the four listed schedules, which includes the drug in question, Methadone, which is a Schedule II controlled substance. See RCW 69.50.205(c)(14). It alleges sufficient facts to support each element of the offense. That is all that is required. State v. Winings, 126 Wn.App. 75, 85, 107 P.3d 141 (2005). The defendant is not claiming prejudice. Indeed the defendant cannot show any prejudice. Any problem could have been simply remedied by a request for a Bill of Particulars. Winings, supra, 126 Wn.App. at 84.

Unlike most such alleged violations, the information herein did not leave out an element. Rather, it contained surplus language. The failure to include reference to the specific subsection did not mislead the defendant. it did not hinder the defendant in the preparation of her defense. The defendant was fairly apprised of the nature of the charge.

This assignment of error must be denied.

Respectfully Submitted,

By: *Gerald R. Fuller*  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143



Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

FILED IN THE OFFICE OF COUNTY CLERK GRAYS HARBOR COUNTY WA '09 SEP 10 11:38

Done this 6 day of August 2010  
Cheryl Brown, Clerk By [Signature] CHERYL BROWN COUNTY CLERK  
Deputy Clerk

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,  
Plaintiff,  
v.  
BRENDA J. ZILLYETTE,  
DOB: 06-04-1966  
Defendant.

No.: 09-1-00404-1  
**INFORMATION**  
P.A. No.: CR09-0383  
P.R. No.: GHSO 09-4945

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GRAYS HARBOR COUNTY WA  
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I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of CONTROLLED SUBSTANCE HOMICIDE, committed as follows:

That the said defendant, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31,-April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

CONTRARY TO RCW 69.50.415 and against the peace and dignity of the State of Washington.

DATED this 10 day of September, 2009.

H. STEWARD MENEFEE  
Prosecuting Attorney  
for Grays Harbor County

BY: [Signature]  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

GRF/lh

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

STATE OF WASHINGTON,

Respondent,

No.: 40401-0-II

v.

**DECLARATION OF MAILING**

BRENDA J. HAYES,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 9<sup>th</sup> day of August, 2010, I mailed a copy of the Brief of Respondent to John A. Hays; Attorney at Law; 1402 Broadway; Longview, WA 98632, and Brenda J. Zillyette 338705; Washington Corrections Center for Women; P. O. Box 17; Gig Harbor, WA 98335-0017, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 9<sup>th</sup> day of August, 2010, at Montesano, Washington.

Barbara Chapman