

NO. 47606-1-II

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

STATE OF WASHINGTON, Appellant

v.

GARRETT THOMAS SYFRETT, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02430-4

REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

The State submits this reply brief to address some of Respondent's statements and arguments in his Response Brief. The *corpus delicti* rule exists to protect a defendant from being convicted based on his or her confession alone because the possibility exists that the "confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual." *Corbett v. Bremerton*, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986). The policy goals of the rule are sensible, those goals are not furthered in the rule's application to Syfrett who, while employed by the United States Border Patrol, first confessed his crime to a friend of his in law enforcement, then as part of pre-employment background check with a Sheriff's Office, then to a background investigator for that office, then to his boss at Border Patrol, and finally to the detective investigating this case.

- I. **Syfrett's analysis of the *corpus delicti* rule as it applies to the crime of Child Molestation is anchored in *State v. Dow's* dictum, which he mischaracterizes as its "unambiguous holding," and a failure to address *State v. Grogan*.**

"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.*” *State v. Dow*, 168 Wn.2d 243, 252, 227 P.3d 1278 (2010) (emphasis added) (quoting *State v. Aten*, 103 Wn.2d 640, 656, 927 P.2d 210 (1996)). The independent evidence need not be sufficient to support a conviction, but it must provide *prima facie* corroboration of the crime described in a defendant’s incriminating statement. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

Syfrett argues that the “unambiguous holding of *Dow* is that the State must ‘prove every element of the crime charged by evidence independent of the defendant’s statement.’” Br. of Resp. at 20 (quoting *Dow*, 168 Wn.2d at 254), 21, 25, 35. *Dow*’s issue statement, on the contrary, clarifies that the issue before the court was:

Issues

- I. Is RCW 10.58.035 constitutional, or does it impermissibly erode the requirements of the corpus delicti doctrine?

Id. at 248. After analyzing the issue, *Dow* concluded that “[c]onsidering RCW 10.58.035’s plain language, we *hold* that any departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction.” *Id.* at 253-54 (emphasis added). Furthermore, in *Dow* the

State conceded that it did not have “any evidence corroborating or contradicting the facts set out in the [defendant’s] statement[s],” which themselves the trial court found *exculpatory*. *Id.* at 247-48, 254. Thus, there was no basis relevant to the issue before the court requiring it to declare that “the State must still prove every element of the crime charged by evidence independent of the defendant’s statement.” *Id.* at 254.

The defendant in *State v. Hummel* made the same argument that Syfrett now urges this court to accept, but as *Hummel* explained at length:

Hummel takes this statement [(the *Dow* statement)] out of context. First, the sentence was entirely unnecessary to resolve *Dow*. It was undisputed that there was no evidence, other than the defendant’s statements, to establish that the charged crime had been committed. Thus, the Court had no reason to analyze or elaborate on the quantum of proof necessary to establish the corpus delicti because there was none, and the Court’s statement on this issue was “wholly incidental” to the decision. Statements made in the course of the Supreme Court’s reasoning that are “wholly incidental” to the basic decision constitute dictum and do not bind us. *See Burress v. Richens*, 3 Wn.App. 63, 66, 472 P.2d 396 (1970).

Second, if the cited statement is to be taken at face value, as is urged by Hummel, it directly contradicts, without explicitly overruling or distinguishing, decades of supreme court and court of appeals decisions holding that proof of identity, while a necessary element to be proved at trial, need not be proved to establish the corpus delicti of the charged crime. Moreover, neither Hummel nor the *Dow* court cite to any case holding that every element of the charged crime need be proved to establish the corpus delicti. Although the statement upon which Hummel relies was followed by a citation to *State v. Brockob*, as noted in

the citation itself, that case held only that “[a] defendant’s incriminating statement alone is not sufficient to establish that a crime took place.” *Brockob*, 159 Wn.2d at 328 (citing *Aten*, 130 Wn.2d at 655–56). Moreover, the *Brockob* court explicitly stated: “The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant’s incriminating statement.” *Id.* at 328. Nowhere in *Brockob* did the Court indicate that the State was required to prove every element of the charged crime to establish the *corpus delicti*.

165 Wn.App. 749, 764-66, 266 P.3d 269 (2012) *review denied*, 176 Wn.2d 1023, 297 P.3d 708 (2013). Therefore, *Dow*, and *Brockob* for that matter, does not stand for the proposition that evidence independent of a defendant’s incriminating statement must be, in and of itself, sufficient to prove a defendant’s guilt, i.e., every element of the crime. Instead, it remains true that the *corpus delicti* of a crime may be established by offering evidence independent of a defendant’s incriminating statement, so long as that evidence provides *prima facie* corroboration of the crime that was described in the incriminating statement.

Even if, however, the *Dow dicta* is followed, Syfrett ignores *State v. Grogan*, whereafter the Supreme Court granted review and remanded in light of *Dow*, the court of appeals properly found the *corpus delicti* of child molestation satisfied when the evidence consisted of the six-year-old victim reporting that “Pap-pa” touched her “down there,” when asked what she meant, the victim pointed to her vagina and then to the

defendant, and the defendant admitted to inappropriately touching the victim. 158 Wn.App. 272, 273, 277, 246 P.3d 196 (2010). *Grogan* is not meaningfully legally distinguishable from the case before the court.

II. The State produced independent evidence of a “criminal agency.”

Syfrett is correct that part of establishing the *corpus delicti* is producing evidence of a criminal agency. *State v. Meyer*, 37 WN.2d 759, 226 P.2d 204 (1951); Br. of Resp. at 28-29.¹ He is wrong, however, that the State ignored this requirement. Br. of Resp. at 33. The State argues that when a three or four-year-old girl spontaneously exclaims that a teenage or slightly older boy—who is not her babysitter, not her brother, and not tasked with her care, but had been present and had the opportunity—has touched a sexual organ of hers it is a logical and reasonable inference that the touching occurred. Br. of App. at 14-15. Moreover, in assuming the truth of the State's evidence and viewing all reasonable inferences therefrom in the light most favorable to the State, the conduct of *that* teenage or slightly older boy touching a sexual organ

¹ Syfrett also advances the argument that the State must “disprove an[y] innocent hypothesis” in order to establish the *corpus delicti* of a crime. Br. of Resp. at 38; *But see State v. Rooks*, 130 Wn.App. 787, 803-04, 125 P.3d 192 (2005) (citing *Aten*, 130 Wn.2d at 661) and *Hummel*, 165 Wn.App. at 767-771 (disagreeing that this is the proper test for determining whether the *corpus delicti* has been established).

of a three or four-year-old girl is much more likely to be of a criminal nature than one of innocence. *Id.*

This type of inference is countenanced by the child molestation case law for which an inference of intent in similar situations has been held to be sufficient evidence of intent such that it could establish guilt—a much higher bar than prima facie corroboration of the child molestation for which the defendant confessed. *State v. Wilson*, 56 Wn.App. 63, 68, 782 P.2d 224 (1989); *State v. Ramirez*, 46 Wn.App. 223, 730 P.2d 98 (1986) (holding that proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification); *see also State v. Price*, 127 Wn.App. 193, 110 P.3d 1171(2005), *aff'd*, 158 Wn.2d 630, 146 P.3d 1183 (2006) (holding inference of sexual gratification sufficient for conviction). Moreover, *Grogan, supra*, necessarily establishes that the reporting of a touching of the genitals by the victim that corroborates a defendant's statements admitting to an improper touching satisfies the *corpus delicti* when the relationship between parties is not one similar to a parent/child relationship.

Syfrett's analogies or hypotheticals which seek to present the State's position as absurd are simplistic and unhelpful. Br. of Resp. at 33-34. To be truly analogous—or an appropriate hypothetical—to this

situation, a little girl would have to be left at the doctor's office by her mother to have her ear infection checked on. After the girl leaves the appointment she reports to her mother that a doctor who was not supposed to be examining her "touched her potty." The mother would then call her own mother seeking guidance and refuse to take her child back to that doctor's office. Then, another doctor, who also was not supposed to be examining the child, but worked at the same office, worked that day, and had the opportunity to see the girl, would confess to molesting her to his boss, a friend, a potential future employer, and the police. To claim that the *corpus delicti* would not be satisfied in such a situation perverts the traditional application of the rule and its policy goals.

III. The trial court's ruling cannot be affirmed on other grounds because the record is insufficient to establish the admissibility of the statement in question.

Syfrett correctly notes that an appellate court can affirm the trial on alternative grounds so long as there is a sufficient record to support the alternative holding. Br. of Resp. at 40. Here, however, the record is insufficient to support the trial court's dismissal on alternative grounds. Syfrett argues without citation to authority that if E.S's statement is considered inadmissible hearsay that it cannot be offered to prove the *corpus delicti* and that E.S's statement is inadmissible under RCW 9A.44.120, which is known as the child hearsay rule. Br. of Resp. at 40-

41. First, E.S.'s statement may be admissible under multiple theories, since that was not the issue before the trial court the parties did not advance any arguments to that end, to include the child hearsay rule, that it was not offered for the truth of the matter asserted, that it is admissible under the fact of complaint rule, or some other hearsay exception. Furthermore, the reason that RCW 9A.44.120 requires a hearing to determine whether the child's statement is sufficiently reliable to be admitted is because the inquiry can be far reaching and his highly fact dependent. Absent such a hearing it is not possible to look at the bare record before us and prejudge the admissibility of E.S.'s statement. Thus, this court should decline Syfrett's invitation to affirm the trial court on his suggested alternative grounds.

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CONCLUSION

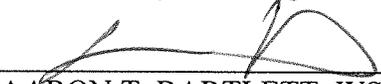
This court should reverse the trial court's order dismissing the case against Mr. Syfrett.

DATED this 22 day of Jan, 2016.

Respectfully submitted:

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