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DIVISION II

NO. 40401-0-II

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STATE OF WASHINGTON
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DIVISION II

FILED
AUG 29 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

STATE OF WASHINGTON,

Respondent,

vs.

BRENDA J. ZILLYETTE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Brenda J. Zillyette asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Grays Harbor County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Under the *corpus delecti* rule, and consistent with due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for controlled substance homicide when the evidence, independent of the defendant's statements, equally supports two inferences as to how the decedent obtained the controlled substance from which he died: (1) that the defendant knowingly delivered the controlled substance to the decedent, and (2) that the decedent took the controlled substance from the defendant without her knowledge?

2. Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and consistent with the decision of this court in *State v. Kjorsvik*, need a defendant show actual prejudice to be entitled to dismissal without prejudice when the information, even under an expansive interpretation, still fails in any form or fair construction to allege each and every element of the crime charged?

D. STATEMENT OF THE CASE

Factual History

On the evening of April 1, 2009, Rich Green returned home from work to find his 18-year-old son Austin Burrows dead in his bedroom of a

methadone overdose. RP 10-11, 67-81¹. Mr. Green had spoken to his son the previous evening at about 11:00 pm and he seemed fine. RP 9-10. A subsequent blood test revealed that Austin also had alprazolam and the metabolite of clonazepam in his blood. RP 67-81, 81-92. Methadone is an opiate used to treat pain. *Id.* It is also prescribed to heroin addicts to prevent the symptoms incident to withdrawal. *Id.* Alprazolam, commonly known as Xanax, is an anti-anxiety medication. *Id.* While Austin Burrows did not have a prescription for either methadone or alprazolam, the defendant Brenda Zillyette did. RP 52-67. In fact, she had refilled her prescriptions for both medications at 4:28 pm the previous day, receiving 45 five milligram methadone pills, and some 1 milligram alprazolam tablets. *Id.* The day after Austin's death, the defendant's boyfriend gave the pill bottles to the police. RP 50. There were a few methadone and alprazolam tablets in the bottles. RP 50, 92-95.

In fact, the defendant and Austin Burrows had become acquainted a few months before his death. RP 99-104. According to one of Austin's friends, about two months prior to Austin's death, he, the defendant, and Austin had "hung out" and ingested drugs together a couple of times. *Id.* Another friend

¹"RP 11/12/09 [page #] refers to the verbatim report of the hearing held on the date indicated. "RP [page #] refers to the verbatim report of the trial held on February 1, 2010.

had seen Austin and the defendant in a truck together about two weeks before Austin's death. RP 37-39. However, no person saw the defendant and Austin either together or in the vicinity of each other for two weeks prior to Austin's death. RP 8-163.

During the evening of March 31st, Austin sent a picture of his hand full of pills to a few friends over their cell phones. RP 24-25, 26-31, 31-37. Some of the pills were 5 milligram methadone tablets and 1 milligram alprazolam tablets. RP 57. According to the defendant's boyfriend, the defendant was home for about an hour on the evening of March 31st, sometime around 9:00 pm. She then left and returned at about midnight or 1:00 am. RP 45-46.

Procedural History

By information filed September 9, 2009, the Grays Harbor County Prosecutor charged the defendant Brenda J. Zillyette with one count of controlled substance homicide. CP 1-2. The information alleged as follows:

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.

CP 1 (capitals in original).

Prior to trial, the defense moved to dismiss, arguing that the state's evidence failed to establish a *corpus delicti* for the crime charged, and that absent a *corpus delicti*, the state could not produce substantial evidence to support the charge, even though the defendant had made numerous statements that she had shared her methadone tablets with the defendant the night before his death. CP 16-18, 19-32. The trial court denied the motion. RP 11/12/09 1-22. The case later came on for trial before the bench, the defendant having waived her right to a jury trial. CP 77-80.

At trial, the state called 15 witnesses, who testified to the facts contained in the preceding factual history. *See* Factual History. In addition, a number of these witnesses testified that the defendant had told them that she had provided the methadone that the defendant had ingested prior to his death. RP 48-51, 102-103, 106-107, 123, 128; Exhibit 5. Following the state's witnesses, the defense called a medical expert and a police officer. RP 137, 161. The defendant did not testify. RP 1-163. After the close of the defendant's case, the parties presented their closing arguments, and the court found the defendant guilty. RP 164-172. The court later sentenced the defendant to 55 months in prison, which was within the standard range. CP

91-99. The defendant thereafter filed timely notice of appeal. CP 101-102.

On appeal, the defendant argued that substantial evidence did not support her conviction for controlled substance homicide because no evidence independent of her statements supported the conclusion that she or anyone else had delivered a controlled substance to the decedent. *See* Opening Brief of Appellant. In addition, she argued that the information was defective because it failed to allege that she had delivered a schedule 1 or 2 drug to the decedent, which was an essential element of the crime charged. *Id.* By decision filed August 11, 2011, the Court of Appeals affirmed, holding that (1) there was evidence to support the conclusion that the decedent had died after ingesting the drugs that the defendant had obtained pursuant to her prescription, thus meeting the *corpus delecti* rule, and (2) that the defendant was not entitled to dismissal without prejudice because she had failed to show prejudice from the fact that the state had failed to allege each and every element of the crime charged. *See* Published Opinion, filed August 11, 2011. The defendant now seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully argues that this court should accept review because (1) this case presents important questions of constitutional law; (2) this case presents an issue of continuing concern defining the applicability of the *corpus delecti* rule following the adoption of RCW 10.58.035 and this

court's decision in *State v. Dow, supra*; and (3) the decision of the Court of Appeals conflicts with this court's decision in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). The following presents these arguments.

In the case at bar, the Court of Appeals ruled that the state had met the requirements of the *corpus delecti* rule because the evidence, when seen in the light most favorable to the state, tended to show that the decedent had ingested drugs from two prescriptions the defendant filed the day before the decedent died. The court stated as follows on this issue:

Unlike *Bernal*, where the State provided no independent proof of delivery, the independent evidence in this record establishes a reasonable inference that someone, specifically Zillyette, provided Burrows with the methadone and alprazolam pills that caused his death. The record shows that (1) Burrows and Zillyette were friends and had ingested drugs together on previous occasions; (2) on the afternoon before he died, Burrows sent his friends a photograph of himself holding a handful of pills and a white prescription bottle cap; (3) the pills in the picture were identified as methadone and alprazolam; (4) Burrows did not have prescriptions for those medications but Zillyette did; and (5) Zillyette had filled her prescriptions that afternoon and her prescription bottles were almost empty the next day. This independent evidence supports a reasonable inference that Burrows acquired the methadone and alprazolam from Zillyette, rather than acquiring the pills in some other way. Thus, the State produced sufficient independent evidence of delivery to corroborate Zillyette's incriminating statements and support her conviction for controlled substance homicide.

State v. Zilyette, at 6.

The defendant does not dispute the Court of Appeals' conclusion that "[t]his independent evidence supports a reasonable inference that Burrows acquired the methadone and alprazolam from Zillyette, rather than acquiring

the pills in some other way.” A more accurate way to state this conclusion is that the independent evidence supports a reasonable inference that Burrows ingested some of the drugs from the prescription the defendant filled on that day. However, what does not follow is the Court of Appeals’ subsequent conclusion that this constituted “sufficient independent evidence of delivery” to constitute substantial evidence when combined with the defendant’s statements. The reason this second conclusion is erroneous is that it ignores the equally plausible alternative that the decedent took the drugs from the defendant without her knowledge or consent. The defendant might have given some of her methadone to Austin, or Austin might have taken some of the methadone from the defendant without her knowledge. The problem is that the evidence presented at trial is equally as speculative. Either possibility is equally as likely. As an examination of the decision in *State v. Bernal*, 109 Wn.App. 150, 33 P.3d 1106 (2001), reveals, these facts do not establish a *corpus delicti* for the crime of controlled substance homicide.

In *Bernal*, the state charged the defendant with controlled substance homicide and delivery of heroin, after the 14-year-old son of her boyfriend died of a heroin overdose in the trailer she provided for her boyfriend’s son. Following the death, the defendant had admitted that she had sold the boy the heroin he had used. The defendant later successfully moved to dismiss the

charge, arguing that the state's evidence failed to establish a *corpus delicti* for the delivery. When the trial court agreed and dismissed, the state appealed, arguing that the evidence indicated that someone had delivered heroin to the decedent, and that this evidence was sufficient to prove the *corpus delicti* of the offense. However, the Court of Appeals disagreed, holding as follows:

Bernal does not dispute that the State produced evidence sufficient to support a finding that Reid's use of heroin resulted in his death. The remaining question is the same for both counts: Did the State produce evidence, independent of Bernal's statements, sufficient to support a finding that the heroin was delivered to Reid by someone else?

The State did not produce such evidence. The record shows that Reid was found dead of a heroin overdose. Excepting Bernal's statement, the record shows absolutely nothing about how Reid acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means-but the record gives no rational basis for inferring one possibility over the others.

According to the dissent, it is simply speculation unsupported by evidence that Reid could have found or stolen the heroin. We agree entirely-but it is equally speculative to infer that Reid obtained the heroin by delivery. There is simply no evidence, independent of Bernal's statements, from which to infer how Reid obtained heroin.

Washington's *corpus delicti* rule has not been satisfied, and the trial court correctly dismissed the case. Its judgment is affirmed.

State v. Bernal, 109 Wn.App. at 153-154.

In *Bernal*, the court held that it was simply speculation to conclude that someone delivered heroin to the decedent. Thus, there was no *corpus delicti* for the offense, and no basis to admit the defendant's statements into evidence. So in the case at bar, it was simply speculation to conclude that

someone delivered methadone to Austin. Thus, in the case at bar, as in *Bernal*, there was no *corpus delecti* for the crime of delivery. As a result, even though the defendant's statements were properly admitted under RCW 10.58.035, under this court's decision in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), there was no substantial evidence to support the conviction for controlled substance homicide.

Allowing the Court of Appeals' decision to stand in this case will have two deleterious effects. First, it will undermine the *corpus delecti* rule in Washington by suggesting that as long as a criminal act is as equally likely the cause of the act in question, the *corpus delecti* is met even though a non-criminal cause is equally as likely. Thus, evidence that is mere speculation will now be sufficient in Washington to support a *corpus delecti*. As this court's decision in *Dow* explains, the integrity of the *corpus delecti* rule is still a matter of vital continuing concern sufficient to warrant review in this case. In addition, as the decision in *Dow* clarifies, absent a *corpus delecti*, there is insufficient evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to support a conviction. Thus, review should also be granted in this case because it has a significant impact on what constitutes evidence sufficient to support a conviction as a constitutional requirement under due process.

Apart from the *corpus delecti* issue, this court should also accept review

because the published decision of the Court of Appeals conflicts with and undermines the decision of this court in *State v. Kjorsvik, supra*. In *Kjorsvik*, this court explained that if the defense objects to the sufficiency of an information prior to trial, the court must strictly construe the information against the state; whereas, if the defense first objects post-trial, the court will liberally construe the information to the benefit of the state.

In *Kjorsvik*, the defendant was convicted of First Degree Robbery under an information that alleged that he “did unlawfully take personal property . . .” *Kjorsvik*, 117 Wn.2d at 96. For the first time on appeal, the defendant argued that his conviction should be reversed because the information failed to allege the “essential” (court created) element of intent (e.g. that he “intentionally” took personal property as opposed to “unlawfully” taking personal property). In its opinion, the court specifically adopted the rule that an information is defective unless it alleges all of the “essential” elements of the crime, regardless whether the elements were statutorily or judicially created. The court then went on to note that in determining whether or not the essential elements are alleged, it will employ a liberal interpretation of the information if the issue is raised for the first time on appeal, and a strict interpretation of the information if the issue was raised pretrial. This court stated as follows on this issue:

In the present case, however, the information charged that the

defendant unlawfully, with force, and against the shopkeeper's will, took the money while armed with a deadly weapon. It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money. The case before us is thus clearly distinguishable from *Hicks*. Giving the information charging this defendant a liberal construction in favor of its validity, reading it as a whole and in a common sense manner, we conclude that it did inform the defendant of all the elements of robbery.

State v. Kjorsvik, 117 Wn.2d at 111.

In the case at bar, the state charged the defendant with controlled substance homicide under in the RCW 69.50.415. In determining what the elements are for this offense, it is first necessary to review RCW 69.50.401.

This statute states:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.50.401.

Under RCW 69.50.101(d), the term "controlled substance" is defined as "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules." Schedules I through V are defined in RCW 69.50.204, .206, .208, .210, and .220 respectively.

While RCW 69.50.401(1) makes it a crime to deliver any "controlled substance" to another person, section (2) of that statute sets out different

penalties for the crime depending upon the type or class of the controlled substance delivered. With RCW 69.50.401 in mind, one can now turn to RCW 69.50.415 in order to determine what the elements are for the crime of controlled substance homicide. This statute provides as follows:

(1) A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2) (a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide.

RCW 69.50.415.

Under this statute, the crime of controlled substance homicide includes three elements: (1) the defendant delivered one of the “controlled substances” listed in RCW 69.50.401(2)(a), (b), or (c) to another person, (2) the person to whom the defendant delivered that listed “controlled substance” thereafter ingested it, and (3) the person who ingested that “controlled substance” then died from its effects. By contrast, if the “controlled substance” the defendant delivered and the decedent ingested was one that falls within the categories listed in RCW 69.50.402(e)&(f), then the defendant has not committed the crime charged, because RCW 69.50.415 specifically limits its application to the delivery of those controlled substances listed in sections (a), (b), and (c). Herein lies the error in the information in the case at bar since it fails to allege the delivery of a controlled substance listed in sections (a), (b), or (c) of RCW 69.50.

In the case at bar, the information the state filed alleged the following:

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.

CP 1.

The deficiency in this information is glaringly apparent after reviewing the definition for the offense of controlled substance homicide in RCW 69.50.415, particularly after examining the five different categories of controlled substances found in RCW 69.50.401(2). By failing to allege that the "controlled substance" the defendant delivered was one of those controlled substances listed in RCW 69.50.401(2)(a), (b), or (c), the state failed to allege a crime. Had the state at least included a claim that the "controlled substance" the defendant delivered was "methadone," the state might be able to defend a post-conviction notice attack on the basis that "methadone" was one of the listed drugs, even though the information did not specifically allege this fact. However, the state did not even include this allegation.

An analogy can be drawn to an information that alleges that one delivered a “medication” to another person who took it and died, thereby violating RCW 69.50.401. While it is true that many, if not most, controlled substances listed in the five schedules defined by the legislature are “medications” which physicians in this state prescribe to patients, many “medications” are sold over the counter and are not listed or regulated under RCW 69.50. Thus, by alleging that a defendant delivered a “medication,” an information would not be alleging a crime, having failed to include the essential element that the “medication” was a controlled substance.

Similarly, in the case at bar, the allegation that the defendant delivered a “controlled substance” to another person also fails to allege an essential element of the offense charged because it fails to alleged that the “controlled substance” was one of the limited classes of such substances included in the crime. Thus, even with a liberal interpretation of the information, it still failed to allege a crime, and it left the defendant without notice of what conduct the state alleged constituted the crime charged. In spite of this fact, the Court of Appeals affirmed the defendant’s conviction because it misstated the rule from *Kjorsvik*. The Court of Appeals stated:

Zillyette did not challenge the information at trial. When a defendant challenges the information for the first time on appeal, she must show that she was actually prejudiced by the vague language used in the information, meaning she did not actually receive notice of the charges that she must be prepared to defend against. *State v. Goodman*, 150

Wn.2d 774, 788-89, 83 P.3d 410 (2004). Zillyette does not contend that she was actually misled by the information and expressed no confusion at trial about the specific identity of the controlled substances at issue. Accordingly, we hold that the information was sufficient.

State v. Zillyette, at 7.

This is neither the holding from *Kjorsvik* nor *Goodman*. Rather, as a careful review of these two cases reveals, the defendant who challenges an information for the first time on appeal only fails if a liberal interpretation of the language of the information contains the necessary elements, and the defendant cannot show prejudice. However, if a liberal review of the language of the information still fails to allege every element of the offense, then the defendant need not show prejudice because it is conclusively presumed. This court stated as follows on this issue:

Under the first *Kjorsvik* prong we look solely to the face of the charging instrument. “Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied.” If the necessary elements are neither found nor fairly implied in the charging document, “we presume prejudice and reverse without reaching the question of prejudice.”

State v. Goodman, 150 Wn.2d at 788.

In *Goodman*, the defendant argued for the first time on appeal that an information was defective because it alleged that the defendant delivered “meth” as opposed to “methamphetamine.” In analyzing this claim, the court found that under the more liberal review of the charging document applicable, the term “meth” did put the defense on notice that the substance

alleged was actually "methamphetamine." Thus, no prejudice was presumed and since the defense could show no actual prejudice, the defendant's claim failed.

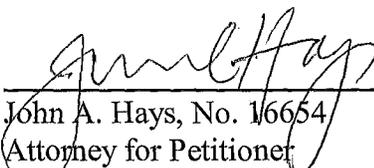
The facts in the case at bar are different from those in *Goodman*. In the case at bar, the information, even under the liberal interpretation, fails to allege a crime. Thus, prejudice is presumed and the Court of Appeals erred when it even addressed the issue of actual prejudice. The decision of the Court of Appeals significantly alters and conflicts with the holdings from *Kjorsvik* and *Goodman*. The defendant respectfully requests that this court accept review on this basis also.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 22nd day of August, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

G. APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 10.58.035
Statement of defendant--Admissibility

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

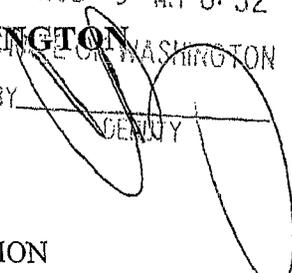
(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

FILED
COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY  CLERK
AGENCY

STATE OF WASHINGTON,

No. 40401-0-II

Respondent,

PUBLISHED OPINION

v.

BRENDA J. ZILLYETTE,

Appellant.

ARMSTRONG, J. — Brenda Zillyette appeals her conviction for controlled substance homicide for the death of Austin Burrows, arguing that (1) the State failed to prove the corpus delicti of the crime by failing to provide sufficient independent proof that she delivered the drugs Burrows died from and (2) the State failed to allege every element of the crime in the information. Finding no reversible error, we affirm.

FACTS

On April 1, 2009, Rick Green found his son, Burrows, dead in his bedroom. Blood testing showed that Burrows had died from an overdose of methadone and alprazolam (also known as Xanax).¹

Detective Keith Peterson examined Burrows's cell phone and discovered that on the evening of March 31, 2009, Burrows had sent several friends a photograph of a handful of blue oval pills, white rectangular pills, and a white prescription bottle cap. Detective Peterson also

¹ Methadone is an opiate prescribed for pain management. It is also prescribed for people who are addicted to other opiates, such as heroin, as part of a methadone maintenance treatment program. Alprazolam is an antidepressant typically prescribed for anxiety or panic disorders.

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discovered that the last person Burrows called was Zillyette at 3:10 A.M., on the morning of April 1, 2009.

Detective Peterson interviewed Zillyette at the crisis clinic where she had voluntarily committed herself after Burrows's death. Zillyette told him that she and Burrows were friends and had ingested drugs together on a regular basis. On March 31, 2009, she picked up her prescriptions for methadone and Xanax and met Burrows on Larson Hill. She described the Xanax as blue pills shaped like footballs and the methadone as white tablets shaped like tic-tacs. She said Burrows took a picture of the pills in his hand and sent it to some of his friends. She and Burrows took some of the pills then and some later that evening. She tried to call Burrows the next morning and found out later that day that he had died. Detective Peterson prepared a written statement based on the interview, which Zillyette reviewed and signed.²

The State charged Zillyette with controlled substance homicide. Defense counsel moved to dismiss the charge, arguing that the State would not be able to prove the corpus delicti of the crime because there was no evidence independent of Zillyette's statements that she had delivered the drugs to Burrows. The trial court denied the motion to dismiss, ruling that Zillyette's statements were admissible under RCW 10.58.035 and that the State's evidence, if proven at trial, provided substantial corroborative evidence of her statements.

At trial, Aaron Knutson testified that he had introduced Zillyette to Burrows and the three of them had ingested drugs together on multiple occasions. Sarah Zillyette testified that she had confronted Burrows and her mother about their drug use on one occasion. Detective Peterson testified to the photograph and call records on Burrows's cell phone, and to his interview with

² Following a CrR 3.5 hearing, the trial court ruled that Zillyette was not in custody at the time of the interview and her statements were voluntary.

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Zillyette. Joshua Dierick and Mitchell Grandorff testified that they both received the photograph of Burrows holding a handful of blue and white pills and a prescription bottle cap on the evening of March 31, 2009. A pharmacist identified the pills in the photograph as methadone and alprazolam. The pharmacist also testified that Zillyette had picked up her prescriptions for methadone and alprazolam on March 31, 2009, and that Burrows did not have a prescription for those medications. Randy Holm, Zillyette's boyfriend, testified that Zillyette came home around 2:00 or 2:30 A.M., on the morning of April 1, and told him that she had been "doing pills with Austin on Larson Hill," specifically, her Xanax and methadone pills. Report of Proceedings (Feb. 10, 2010) at 48-49. Holm also testified that Zillyette's prescription bottles had only a few pills left in them the next day.

The trial court found Zillyette guilty of controlled substance homicide and sentenced her to 55 months of confinement.³

ANALYSIS

I. CORPUS DELICTI

Zillyette renews her corpus delicti argument on appeal, arguing that the State failed to provide sufficient independent evidence of the delivery element of controlled substance homicide. We disagree.

"Corpus delicti" means the "body of the crime" and consists of two elements that the State must prove: a criminal act and a resulting injury or loss. *See State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996); *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). "Proof of the identity of the person who committed the crime is not part of the corpus

³ Zillyette had waived her right to a jury trial.

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delicti, which only requires proof that a crime was committed by someone.” *Corbett*, 106 Wn.2d at 574. In Washington, a defendant’s incriminating statements are not sufficient, standing alone, to establish that a crime took place. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006); *Aten*, 130 Wn.2d at 656. The State must present independent evidence corroborating the defendant’s incriminating statement. *Brockob*, 159 Wn.2d at 328; *Aten*, 130 Wn.2d at 655-56. The court may then consider the independent evidence in connection with the defendant’s confession, and establish the corpus delicti by a combination of the confession and the independent proof. *State v. Lung*, 70 Wn.2d 365, 371-72, 423 P.2d 72 (1967).

Under RCW 10.58.035,⁴ a defendant’s incriminating statements may be admissible even when independent proof of the corpus delicti is absent. Our Supreme Court recently held that RCW 10.58.035 addresses only the admissibility of such statements, however, not their sufficiency to support a conviction, and confirmed the rule that “[a] defendant’s incriminating statement alone is not sufficient to establish that a crime took place.” *State v. Dow*, 168 Wn.2d 243, 252-53, 227 P.3d 1278 (2010) (quoting *Brockob*, 159 Wn.2d at 328).

In determining whether sufficient independent evidence supports a conviction, we review the evidence in the light most favorable to the State. *Brockob*, 159 Wn.2d at 328. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in the defendant’s incriminating statements. *Brockob*,

⁴ RCW 10.58.035(1) provides, in relevant part:

[W]here independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the [defendant’s statements].

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159 Wn.2d at 328. In other words, the independent evidence must support a “‘logical and reasonable inference’ of the facts sought to be proved.” *Brockob*, 159 Wn.2d at 328 (quoting *Aten*, 130 Wn.2d at 656).

The criminal act at issue here is controlled substance homicide, which a person commits by unlawfully delivering a controlled substance to another person who subsequently uses the controlled substance and dies as a result. RCW 69.50.415. Zillyette argues that the State failed to produce sufficient independent evidence of delivery, likening this case to *State v. Bernal*, 109 Wn. App. 150, 152, 33 P.3d 1106 (2001).

In *Bernal*, a 14-year-old boy was found dead of a heroin overdose and the defendant admitted to selling the heroin to him. *Bernal*, 109 Wn. App. at 152. Based on this evidence alone, the State charged the defendant with controlled substance homicide. *Bernal*, 109 Wn. App. at 152. The trial court granted the defendant’s motion to dismiss, ruling that the State lacked sufficient evidence to prove the corpus delicti of the crime. *Bernal*, 109 Wn. App. at 152.

We affirmed, reasoning:

Excepting [the defendant’s] statement, the record shows absolutely nothing about how [the victim] acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means—but the record gives *no* rational basis for inferring one possibility over the others. . . . There is simply no evidence, independent of [the defendant’s] statements, from which to infer how [the victim] obtained heroin.

Bernal, 109 Wn. App. at 154.

Unlike *Bernal*, where the State provided no independent proof of delivery, the independent evidence in this record establishes a reasonable inference that someone, specifically Zillyette, provided Burrows with the methadone and alprazolam pills that caused his death. The record shows that (1) Burrows and Zillyette were friends and had ingested drugs together on

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previous occasions; (2) on the afternoon before he died, Burrows sent his friends a photograph of himself holding a handful of pills and a white prescription bottle cap; (3) the pills in the picture were identified as methadone and alprazolam; (4) Burrows did not have prescriptions for those medications but Zillyette did; and (5) Zillyette had filled her prescriptions that afternoon and her prescription bottles were almost empty the next day.⁵ This independent evidence supports a reasonable inference that Burrows acquired the methadone and alprazolam from Zillyette, rather than acquiring the pills in some other way. Thus, the State produced sufficient independent evidence of delivery to corroborate Zillyette's incriminating statements and support her conviction for controlled substance homicide. *See Brockob*, 159 Wn.2d at 328; *Aten*, 130 Wn.2d at 656.

II. INFORMATION

Zillyette also argues that the State failed to allege all of the elements of controlled substance homicide in the information. The information alleged:

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.

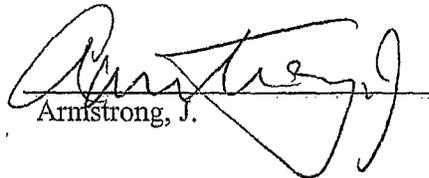
⁵ The State argues that we can also rely on the statement of Zillyette made to Holm on the night of Burrows's death that she and Burrows had been taking her methadone and alprazolam pills together. The corroboration requirement does not apply to incriminating statements made prior to or during the course of an offense. *See State v. Pietrzak*, 110 Wn. App. 670, 680-81, 41 P.3d 1240 (2002); *State v. Dyson*, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998); 1 MCCORMICK ON EVIDENCE § 145, at 593-94 (Kenneth S. Broun Ed., 6th ed. 2006 & Supp. 2010). But it is unnecessary for us to determine whether Zillyette's statement fits within this exception because there is sufficient independent corroborating evidence here without relying on any of her statements.

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Clerk's Papers at 1. RCW 69.50.415(1) provides, "A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2)(a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide." Zillyette contends that by failing to allege the specific controlled substances that were delivered to Burrows, the State failed to allege a crime.

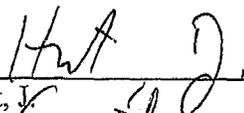
Zillyette did not challenge the information at trial. When a defendant challenges the information for the first time on appeal, she must show that she was actually prejudiced by the vague language used in the information, meaning she did not actually receive notice of the charges that she must be prepared to defend against. *State v. Goodman*, 150 Wn.2d 774, 788-89, 83 P.3d 410 (2004). Zillyette does not contend that she was actually misled by the information and expressed no confusion at trial about the specific identity of the controlled substances at issue. Accordingly, we hold that the information was sufficient.

Affirmed.

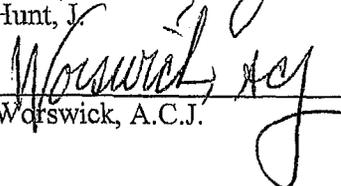


Armstrong, J.

We concur:



Hunt, J.



Worswick, A.C.J.