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Division Two
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. GARRETT SYFRETT, Respondent.	No. 47606-1-II UNPUBLISHED OPINION

BJORGEN, C.J — The State appeals the trial court's dismissal of a charge of first degree child molestation brought against respondent Garrett Syfrett. The trial court dismissed the charge on grounds that independent evidence did not adequately corroborate Syfrett's confession and establish the corpus delicti of the offense. The State only presented evidence that Syfrett may have touched the victim's genitals and argues on appeal that this was sufficient to establish the corpus delicti. We hold that the evidence was insufficient to show that the touching was sexual in nature or purpose and, therefore, that the State did not establish the corpus delicti of first degree child molestation. Accordingly, we affirm the trial court's dismissal of the charge.

FACTS

As part of a pre-employment background check, Syfrett disclosed to a background investigator that at some point between 2000 and 2002, he briefly touched the genitals of his cousin's daughter, E.S.,[1] when she was three or four years old. He said that the incident occurred at his parents' house and that he was 17 or 18 years old at the time. He admitted to getting an erection while playing with E.S. and subsequently touching her genitals without penetration.

[1] Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases*.

Syfrett told the same story to a friend who worked for the Renton Police Department, and the background investigator contacted that friend about the incident as well. The friend told the investigator that Syfrett had disclosed the incident to him seeking advice regarding its impact on potential law enforcement hiring. He mentioned that Syfrett had told him he touched E.S. out of curiosity rather than for sexual gratification.

The background investigator contacted E.S. and her mother regarding the incident. E.S. had no memory of the events. However, her mother recalled that sometime in 2004 or 2005, when E.S. was three or four years old, E.S. had said that "Gideon touched my potty." Clerk's Papers (CP) at 5. Syfrett's mother had babysat E.S. at her house during that period, when Syfrett and his brother Gideon still lived with her. E.S.'s mother talked to her own mother about E.S.'s statement, and they decided that Gideon probably helped E.S. clean up after using the bathroom. E.S.'s mother never told Syfrett's mother about the incident, but she stopped asking her to babysit E.S. soon after.

Following the investigation, the State charged Syfrett with one count of first degree child molestation. Syfrett moved to dismiss the charge, arguing in part that the State did not have sufficient evidence to establish the corpus delicti of the crime and corroborate his incriminating statements. Following a hearing on the corpus delicti question, the trial court granted Syfrett's motion and dismissed the charges for lack of sufficient evidence. The State moved to reconsider the dismissal, but the trial court denied the motion.

The State appeals the trial court's dismissal of the charge against Syfrett.

ANALYSIS

The State argues that the trial court erred in ruling that it had not established the corpus delicti by sufficient independent evidence and, consequently, in dismissing its charge against Syfrett. We disagree.

Under the corpus delicti rule, a defendant's confession is inadmissible if the State cannot establish the corpus delicti of the crime with independent evidence. "Corpus delicti means the 'body of the crime' and must be proved by evidence sufficient to support the inference that there has been a criminal act." *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006) (internal quotation marks omitted). To prove corpus delicti, the State must present independent evidence that corroborates a defendant's incriminating statements. *Id.* at 328. "[I]t is a safeguard to ensure that an incriminating statement relates to an actual offense." *State v. Angulo*, 148 Wn. App. 642, 657, 200 P.3d 752 (2009). The rule tests the sufficiency of the State's evidence, *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010), although the State need only make a prima facie showing that the crime was committed. *State v. McPhee*, 156 Wn. App. 44, 60, 230 P.3d 284 (2010).

We review a trial court's determination regarding satisfaction of the corpus delicti rule de novo, engaging in the same inquiry as the trial court. *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). In determining whether the State's evidence was sufficient for purposes of the rule, we view the evidence in the light most favorable to the State.

Under RCW 9A.44.083(1),

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

For purposes of the statute, "'[s]exual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

The dispute in this appeal revolves around whether establishing the corpus delicti of first degree child molestation requires the State to produce independent evidence that the defendant's contact with the victim was sexual. The State argues that evidence showing the act of touching a child's genitals is sufficient to corroborate a confession to first degree child molestation. Syfrett argues that the State's evidence must show more than mere genital contact, which could be innocent; it must show that the contact was sexual in nature or purpose.

According to the State, evidence of genital contact alone can establish the corpus delicti of first degree child molestation. The State relies on two cases. In *State v. Ray*, the defendant confessed to police that he had forced his three-year-old daughter to touch his genitals. 130 Wn.2d 673, 676, 926 P.2d 904 (1996). The State's independent evidence showed that the defendant had accompanied his daughter to her room in the early morning, then came to his wife upset and crying. *Id*. at 680. His wife, alarmed, checked on their daughter. *Id*. The defendant then called his sexual deviancy therapist. *Id*. Our Supreme Court held that this evidence supported a prima facie showing only that the defendant had an opportunity to commit the crime, but not that any criminal act in fact occurred. *Id*. at 680-81. It noted that evidence of opportunity and sexual motivation were insufficient to establish the corpus delicti, and that "the State had to establish, independent of Defendant's confession, that touching of the sexual organs occurred between Defendant and [the victim]." *Id*. at 679; *see also id*. at 681.

In *State v. Grogan*, the victim had told her caregiver that the defendant had "touched me down there," and pointed to her vagina. 158 Wn. App. 272, 274, 246 P.3d 196 (2010). The victim

later died. At her funeral, the defendant told the victim's stepfather that he had "touched [the victim] inappropriately." *Id*. at 275. The defendant also made incriminating statements to police. *Id*. at 274; *see also State v. Grogan*, 147 Wn. App. 511, 518, 522, 195 P.3d 1017 (2008) (*Grogan* I). Division Three of this court held that the corpus delicti was established by the victim's statement regarding genital touching "in conjunction with [her step-father's] testimony that [the defendant] admitted inappropriately touching [her.]" *Grogan*, 158 Wn. App. at 277. It held that the State therefore had sufficiently corroborated defendant's incriminating statements to police, rendering them admissible under the corpus delicti rule.

In neither *Ray* nor *Grogan* did the reviewing court hold that evidence of genital contact *alone* was sufficient to establish corpus delicti. Instead, we can glean from *Ray* that contact may not simply be inferred from opportunity and motivation, and gather from *Grogan* that evidence of genital contact described as "inappropriate" is sufficient to support an inference of sexual contact.[2] Here, however, the State presented independent evidence showing only that a teenage boy[3] touched

[2] *Grogan* held that the corpus delicti was established by the victim's statement "in conjunction with" evidence of another statement by the defendant. *Id*. at 277. We express no opinion whether the corpus delicti for one incriminating statement may be established in part by evidence of another incriminating statement by the defendant.

[3] It is immaterial that E.S. stated that Syfrett's brother, not Syfrett, touched her. To satisfy the corpus delicti rule, the State must show that the crime was committed but generally need not show that the defendant was the one who committed it. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). Identity will only be part of the corpus delicti if it is necessary to establish an element of the crime. *See, e.g., id*. First degree child molestation requires that the perpetrator be at least 36 months older than, and not be married to, the victim. RCW 9A.44.083(1). These criteria implicate identity to some extent. However, both Syfrett and his brother met these criteria, as both were teenagers at the time and neither was, or could have been, married to E.S. Therefore, even if the State's evidence pointed to Syfrett's brother alone, it could sufficiently establish the corpus delicti.

the genitals of a very young girl. While *Ray* and *Grogan* are instructive, they are not determinative of the question presented in this appeal.

We hold that the State cannot establish the corpus delicti of first degree child molestation without presenting independent evidence sufficient to make a prima facie showing that (1) there was contact between the defendant and the victim, and (2) the contact was sexual in nature or purpose. "In order to establish the *corpus delicti* of any crime, there must be shown to have existed, a certain act or result forming the basis of the criminal charge and the existence of a criminal agency as the cause of such act or result." *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951) (alteration in original). Where the nature of an act establishes its criminality per se, mens rea need not be shown by independent evidence to establish the corpus delicti. *See State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *Angulo*, 148 Wn. App. at 656. However, where an act may be performed both innocently and criminally, the State must produce independent evidence of a culpable mental state.[4] *Brockob*, 159 Wn.2d at 332.

Because contact with a child may be innocent, the State cannot establish the corpus delicti of first degree child molestation without producing independent evidence that supports an

[4] Syfrett argues that the corpus delicti rule always requires the State to produce independent evidence establishing *each element* of the crime, including mens rea. He finds support for this argument from *Dow*, in which our Supreme Court stated that "[g]enerally, the corpus delicti rule prevents a defendant from being convicted based on his or her confession alone and requires independent evidence sufficient to establish every element of the crime charged." 168 Wn.2d at 250-51. However, the State in *Dow* produced no corroborating evidence at all. *Id*. at 254. Therefore, the statement that the corpus delicti rule requires independent proof of all elements of the crime—which would have overruled prior cases, *e.g.*, *Lung*, 70 Wn.2d at 371—was arguably dictum.

In *State v. Hummel*, 165 Wn. App. 749, 764, 266 P.3d 269 (2012), Division One of our court rejected the argument that *Dow* overruled prior case law and established a new, more stringent corpus delicti rule. It found it unlikely that the court would overrule long-standing case law sub silentio and considered the statement to be mere dictum. *Id.* at 765. We agree with Division One's interpretation of *Dow*.

inference that the contact was sexual in nature or purpose. Such an inference may be drawn from the totality of facts and circumstances independently established. *See State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). For example, "[p]roof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification, although we require additional proof of sexual purpose when clothes cover the intimate part touched." *Id.* at 21.

However, "the corpus delicti is not established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause." *State v. Aten*, 130 Wn.2d 640, 660, 927 P.2d 210 (1996) (emphasis omitted). Where "the facts suggest there is an innocent hypothesis for the events" even when viewed in the light most favorable to the State, they are insufficient to corroborate a defendant's incriminating statement. *Brockob*, 159 Wn.2d at 335.

The State's independent evidence was insufficient to establish that E.S. was the victim of sexual contact. The State's only corroborating evidence that E.S. was molested was her statement that "Gideon touched my potty." CP at 5. This indicates that genital contact occurred, but is silent as to the nature or purpose of that contact. Moreover, the evidence supports an inference only that a relative with a possible caretaking function touched E.S.'s genitals. As Syfrett points out, the contact could have been innocent, intended to help E.S. clean after using the bathroom. *See State v. Johnson*, 96 Wn.2d 926, 933, 639 P.2d 1332 (1982) *overruled on other grounds by State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995) (indicating in dicta that a sexual motivation cannot be inferred solely from genital contact apparently intended to clean a child after defecation). In fact, this was the way E.S.'s mother originally interpreted the statement.

The only evidence that indicates that the touching was sexual is Syfrett's confession. The State's independent evidence was insufficient to make a prima facie showing of sexual contact. Therefore, the State failed to adequately establish the corpus delicti of first degree child molestation.[5] For that reason, we affirm the trial court's dismissal of the charge against Syfrett.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, C.J.

We concur:

WORSWICK, J.

MAXA, J.

[5] Syfrett argues that E.S.'s statement was also inadmissible as hearsay not subject to any exception. The State counters that it may have been admissible under RCW 9A.44.120, the "child hearsay rule." However, a hearing and subsequent findings are necessary to render child hearsay admissible under the rule. RCW 9A.44.120(1). Because the trial court held Syfrett's confession inadmissible under the corpus delicti doctrine and dismissed the charge for lack of evidence, it did not reach the question of whether E.S.'s statement was admissible under RCW 9A.44.120. Therefore, we have not been presented with an adequate record on which to evaluate the admissibility of E.S.'s hearsay statement. Consequently, we decline to reach the issue.