NO. 42635-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

KENNETH YOUNGBLOOD,
Appellant.

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

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

STATEMENT OF THE CASE 1

ARGUMENT 2

INSTRUCTING THE JURY WITH A MODIFIED WPIC 4.01 WAS HARMLESS ERROR 2

THERE WAS AMPLE EVIDENCE THAT THE APPELLANT ACTED RECKLESSLY 6

CONCLUSION 8

TABLE OF AUTHORITIES

Table of Cases

State v. Barrington, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988) 6

State v. Bashaw, 169 Wn .2d 133, 147, 234 P.3d 195 (2010) 4

State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) 3, 4

State v. Carmillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 6

State v. Castillo, 150 Wn.App. 466, 469, 208 P.3d 1201 (2009) 3-5

State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993) 6

State v. Lundy, 162 Wn.App. 865, 871, 256 P.3d 466 (2011) 4, 5

State v. McCollum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) 6

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 6

OTHER

WPIC 4.01 . . . . . 2, 4, 5, 8

STATEMENT OF THE CASE

On December 19, 2009, at approximately 1:00 p.m. Aberdeen police were called out to the residence of the appellant. RP 22. The call was regarding a deceased person. On scene Officer Kegel observed a dead person on the floor of the residence's bathroom. This person was identified as Mark Davis. *Id.* 23.

On the night of the 18th, Mark Davis had gone to the Old Lonesome Tavern in Aberdeen, Washington. RP 85. When he arrived, he seemed intoxicated to the bartender. RP 86. During his time at the tavern he had shared drinks with friends, and ultimately was cut off by the bartender. At the time Mr. Davis left the tavern he was visibly intoxicated. RP 87.

After Mr. Davis left the tavern he met the appellant and began a conversation. RP 104. Also, present was the appellant's daughter, Katherine Youngblood, and Emily Brisby. *Id.* The four returned to the appellant's residence. RP 105.

The four sat down in the living room and began drinking Black Velvet. RP 106. At some point Mark Davis became emotional and expressed a desire to kill himself. *Id.* After Mr. Davis became distraught, the appellant offered him pills to calm him down. Emily Brisby stated that he gave him 10 to 20 pills.

After approximately 20 minutes Mr. Davis got up to go to the bathroom. RP 111. He was so intoxicated that Katherine and Ken Youngblood had to carry him into the bathroom.

After an hour and a half Emily Brisby checked on Mark Davis. RP 112. Mr. Davis had fallen from the toilet and was resting his head on the side of the tub. She noticed he was still breathing.

The appellant told the girls not to call 911, and that Mark Davis would be fine. RP 113. At approximately 4:00 a.m. the girls left. *Id.* Some time after that Mark Davis died.

Toxicology revealed that Mr. Davis had a blood alcohol content of .23, and that Mr. Davis had a blood concentration of Quetiapine of 1.34 milligrams per liter and a blood concentration of amino clonazepam of 0.02 milligrams per liter. RP 69. All of these substances have an additive effect on the nervous system, which means that the sedative effect of each is compounded by the presence of the others. RP 72.

Pathologist Emmanuel Lacsina testified that Mr. Davis died of a combination of the toxic effects of alcohol and Quetiapine.

ARGUMENT

INSTRUCTING THE JURY WITH A MODIFIED WPIC 4.01 WAS HARMLESS ERROR

The defendant argues that the trial court violated his state and federal due process rights in giving the reasonable doubt instruction because its language lacked one sentence from WPIC 4.01. This contention is incorrect. The instruction given by the trial court omitted the

sentence "The defendant has no burden of proving that a reasonable doubt exists." Supp. CP, Instruction No. 3. However, the court's instruction correctly stated that "The State...has the burden of proving each element of the crimes beyond a reasonable doubt" and "A defendant is presumed innocent." Supp. CP, Instruction Nos. 3.

Further, the trial court's "to convict" instructions informed the jury that it could only return a verdict of guilty if it found that each element of the crime charged has been proved beyond a reasonable doubt. Supp. CP, Instruction Nos. 5. This instruction also informed the jury that it must find the defendant not guilty if it had a reasonable doubt as to any one element. *Id.* The trial court's instructions did not place an affirmative obligation on the defendant to prove the existence of a reasonable doubt. There is nothing in the record to indicate that either party argued contrary to the instructions or attempted to shift a burden of proof onto the defendant.

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Castillo*, 150 Wn.App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Bennett*, 161 Wn.2d at 307. It is reversible error to instruct the jury in a manner relieving the State of its burden to prove

every element of a crime beyond a reasonable doubt. *Bennett*, 161 Wn.2d at 307.

An erroneous jury instruction is "generally subject to a constitutional harmless error analysis." *State v. Lundy*, 162 Wn.App. 865, 871, 256 P.3d 466 (2011). The Court may hold the error harmless if it is satisfied " 'beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Lundy*, 162 Wn.App. at 872 (*quoting State v. Bashaw*, 169 Wn .2d 133, 147, 234 P.3d 195 (2010)). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *Lundy*, 162 Wn.App. 872.

The defendant argues that the reasonable doubt jury instruction 3's omission of one sentence from the language of WPIC 4.01 was reversible error under our Supreme Court's *Bennett* decision. *Bennett* "instructed" trial courts "to use the WPIC 4.01 instruction ... until a better instruction is approved." 161 Wn.2d at 318. The *Bennett* court, however, did not decide whether the failure to give the entire WPIC 4.01 was automatically reversible or instead subject to harmless error analysis.

Division One in *Castillo* concluded that such failure was grounds for automatic reversal. *State v. Castillo,* 150 Wn.App. 466, 472. Two years after Division One filed *Castillo,* Division Two reached the opposite conclusion in *Lundy*, disagreeing with *Castillo* and holding that failure to give WPIC 4.01 verbatim was subject to harmless error analysis and that

the deviating reasonable doubt instruction in *Lundy* was harmless error. *Lundy*, 162 Wn.App. at 872–73.

The reasonable doubt jury instruction here differed from WPIC 4.01 only in its omission of the following sentence: "The defendant has no burden of proving that a reasonable doubt exists." The defendant contends that this omission was not harmless error. The defendant points out that the reasonable doubt instruction in *Lundy*, which was held to be harmless error, deviated from WPIC 4.01 only in that it reversed the order of the first two paragraphs of WPIC 4.01 and modified the first three sentences of the paragraph on the State's burden of proof.

In *Castillo*, the omission of the "defendant has no burden" sentence was significant because the State's cross-examination and closing argument "suggested Castillo needed to explain why [the victim] might be lying." 150 Wn.App. at 473. Here, in contrast, the State never made any such suggestion. Because the State never attempted to shift its burden of proof here, as it did in Castillo, the reasonable doubt instruction did not prejudice the defendant like it prejudiced Castillo.

Furthermore, the reasonable doubt instruction here did not contain any such potentially misleading or confusing language or alterations. It deviated from WPIC 4.01 only in a single, limited respect, which as explained above, was not harmful because the State never attempted to shift the burden of proof to the defendant. More importantly, instruction 3 included the following language establishing that the State clearly bore the

burden of proof beyond a reasonable doubt: "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." Supp. CP.

THERE WAS AMPLE EVIDENCE THAT THE APPELLANT ACTED RECKLESSLY

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy,* 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington,* 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The defendant argues that the Respondent failed to prove that it is a matter of "common knowledge" that the combination of prescription drug and alcohol could create a risk of death. In a criminal jury trial the State is

not required to present evidence as to the common knowledge of the jurors. The jury is instructed that they should use their "common experience" when analyzing the evidence presented. Supp CP, Instruction 4. The common experience of the jurors is the information that they bring to the a trial. It is the reason the jury is there.

It is common knowledge that prescription drugs have side effects, and in the case of some drugs the side effect of overdose is death. It is also common knowledge that mixing certain prescription drugs and alcohol can cause death. The reckless act was giving a prescription drug to an intoxicated person not knowing what the result of the interaction would be. His lack of knowledge compounds his recklessness, it does not mitigate it.

The appellant further argues that the victims action of taking the pills handed to him was a "new independent cause." This argument is without merit. The appellant asks this Court to substitute it wisdom for the wisdom of the jury. There is clearly a causal connect between handing a man prescription drugs and his ingesting them. Whether his ingesting the pills is "new" and "independent" is a question of fact for the jury to resolve. The appellant asks this Court to find as a matter of law that the victim's action constituted a intervening cause. There is no legal basis for this argument.

CONCLUSION

The defendant fails to demonstrate that the omission of this sentence from the instruction caused him prejudice, especially in light of the fact that the State never attempted to shift the burden of proof to him, the jury was aware that the State bore the burden, and the evidence supporting the convictions was overwhelming. The State asks that the Court find that omission of this sentence from WPIC 4.01 in instruction 3 was harmless error.

Moreover, there was ample evidence presented to the jury to sustain a conviction. For these reasons the state asks the Court to affirm the verdict in this case.

DATED this 25 day of January, 2013.

Respectfully Submitted,

By: _____
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KCN/

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

STATE OF WASHINGTON, Respondent, v. KENNETH YOUNGBLOOD, Appellant.	No.: 42635-8-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 25th day of January, 2013, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507, 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 25th day of January, 2013, at Montesano, Washington.

Barbara Chapman

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