89716-6

No. 42633-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

KENNETH YOUNGBLOOD,
Appellant.

PETITION FOR REVIEW

Prosecuting Attorney
for Grays Harbor County

BY: Gerald R Fuller
GERALD R. FULLER
Interim Prosecuting Attorney
WSBA #5143

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE

Table of Contents

TABLE OF AUTHORITIES

Table of Cases

STATUTES

A. Identity of Moving Party.

The State of Washington by and through Gerald R. Fuller, Interim Prosecuting Attorney for Grays Harbor County.

B. Relief Requested.

The State of Washington asks that the Supreme Court of the State of Washington accept review of the decision in this matter reversing the conviction of the defendant for the crime of Manslaughter in the First Degree.

C. Grounds for Review.

1. The decision of the Court of Appeals reversing the conviction of the defendant for alleged lack of proof beyond a reasonable doubt raises a significant question of law concerning the standard applied by the Court of Appeals.

2. The refusal of the Court of Appeals to consider whether there was evidence to support a conviction for the lesser degree of Manslaughter in the Second Degree raises a significant issue concerning the authority of the Court of Appeals to direct the verdict for a lesser included degree of the charged offense, an issue upon which there are conflicting Court of Appeal's decisions and upon which there is confusion in light of the Supreme Court's decision in State v. Green, 91 Wn.2d 431, 433-35, 588 P.2d 1370 (1979).

D. Statement of the Case.

Procedural Background

The defendant was charged by Information on May 13, 2010, with Controlled Substance Homicide and Manslaughter in the First Degree. (CP 1-3). The controlled substance in question, Quetiapine (Seroquel), was not

a schedule I or II controlled substances. Accordingly, the charge of Controlled Substance Homicide was dismissed and the matter went to trial on the charge of Manslaughter in the First Degree. On August 24, 2011, the jury returned a verdict finding the defendant guilty of Manslaughter in the First Degree. Judgment and Sentence was entered on September 23, 2011. The defendant was sentenced to serve a term of confinement of 102 months in prison. (CP 4-11).

By unpublished opinion dated November 13, 2013, the Court of Appeals reversed the conviction of the defendant holding that there was insufficient evidence to establish that the defendant acted recklessly. The Court of Appeals held that there was insufficient evidence to establish that the defendant "knew of and disregarded a substantial risk" that providing the decedent with 10 to 12 Seroquel (Quetiapine) may cause the death of the decedent. The Court of Appeals noted that the record did not include the prescription bottle, Exhibit 1, that contained the warning label. The defendant did not include the exhibit in the record on appeal.

The Court of Appeals did not address the issue of whether there was evidence sufficient to prove beyond a reasonable doubt that the defendant acted with criminal negligence, the mental state necessary to establish the lesser degree offense of Manslaughter in the Second Degree.

A Motion for Reconsideration was filed asking the Court of Appeals to reconsider both its decision on the sufficiency of the evidence and its authority to direct a verdict for a lesser degree of the offense. By

order of December 13, 2013, the Court denied the Motion for Reconsideration.

The defendant did not include the exhibits as part of the record. The Court of Appeals by letter dated December 18, 2013, denied a request to supplement the record to include the pill bottle, Exhibit 1.

Factual Background

On December 18, 2009, the decedent, Mark A. Davis, had been with his mother, Nancy Estergard. Ms. Estergard last saw her son when she dropped him off that day to attend the funeral of one of his friends who had committed suicide. Ms. Estergard stated that her son had been under stress because of the death of his friend. (RP 16).

On the morning of December 19, 2009, Aberdeen Police were dispatched to the residence of the defendant. Fire Department Paramedics had earlier been called. Mr. Adams was found, deceased, in the bathroom of the defendant's residence. (RP 22). Officers observed a number of prescription bottles throughout the house, one of which was the defendant's prescription for Seroquel (RP 39-40). The container was sitting next to the recliner on the night stand.

A post mortem examination was subsequently conducted by Emanuel Lacsina. Aside from a fatty liver, secondary to alcohol abuse, the decedent was "perfectly healthy." (RP 56-57). The defendant's blood alcohol level at the time of his death was 0.235/.230. Toxicology testing

yielded the presence of Quetiapine (Seroquel) at a level of 1.34 mg per liter.

Alcohol and the Seroquel are respiratory depressants. The combination of the two drugs caused Mr. Davis' death. (RP 57, 72). The level of Quetiapine found was in excess of therapeutic levels although the level found was not in and of itself fatal. Its combination with the alcohol consumed by the decedent caused the victim's death. (RP 72-73). The toxicologist could not say exactly how many pills the decedent ingested other than he most certainly took more than three. (RP 80-82).

Following his friend's funeral, Mr. Adams went to a local tavern. The bar maid noted that he was "buzzed" and cut him off. (RP 86). After closing time, the decedent met up with Emily Brisby, the defendant, and the defendant's daughter, Katherine Youngblood. They all made plans to go to an after hours party at the defendant's residence. (RP 104).

Once they arrived, witnesses observed that the decedent was distraught. (RP 107). The defendant offered Mr. Adams some pills. (RP 108). Ms Brisby recalls that the defendant told Mr. Adams that the pills would "calm him down." The defendant handed 10 to 20 pills to the decedent who then ingested them. (RP 108). She identified Exhibit 1 as the pill bottle that she saw in the defendant's possession at the time the pills were given to Mr. Adams. (RP 109). Ms. Brisby saw the decedent take the pills, washing them down with Black Velvet and Coca Cola. (RP 110).

Ms. Brisby observed that the decedent was "pretty intoxicated." (RP 115). When given the pills, the decedent asked "what are these?" The defendant told him to "just take them." (RP 126).

The decedent sat in the recliner for about 20 minutes. Later, Mr. Adams had to be helped to the bathroom. (RP 111). At this point, he was heavily sedated. He was unable to sit upright on the toilet. He fell over into the bathtub.

The decedent told Billie Jo Cornejo, who he saw at the bar, that he wanted to commit suicide. The decedent later repeated this to Katherine Youngblood and the defendant at the defendant's residence. (RP 112). When Emily Brisby told the defendant that she wanted to call 911, the defendant told her not to. (RP 113-120).

E. Argument Why Review Should be Accepted.

1. The decision of the Court of Appeals reversing the conviction of the defendant for alleged lack of proof beyond a reasonable doubt raises a significant question of law concerning the standard applied by the Court of Appeals.

The question at hand is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are deemed equally reliable and credibility determinations are for

the trier of fact. State v. Delmater, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Quite simply, the Court of Appeals did not apply this standard to the facts of this case. The court held that the defendant could not have reasonably known that giving the decedent 10 to 20 pills of his prescription medication could cause the decedent's death. Finally, when it was finally brought to the court's attention that the record was not complete, the court denied a request to supplement the record.

In any event, the current record is sufficient to demonstrate the court's error. The pills were the defendant's prescription. He received a large number of pills which he ordered by mail (RP 146). The defendant certainly knew how the medication effected him. (RP 166). He told the decedent that the medication would "calm him down." The jury was entitled to determine, based upon this alone and their common experience, that a person of reasonable intelligence, such as the defendant, who had been taking the medication, would know the risks involved.

Furthermore, there is evidence from which the jury could have determined that the defendant acted with intent to assist the decedent in committing suicide. The defendant heard the decedent say that he wanted to die. The defendant intentionally gave the decedent a large amount of the pills. The defendant observed that the defendant was being severely effected by his ingestion of the pills. The defendant not only refused to get help for the decedent but told others that were present not to seek help.

The jury was instructed that they may rely upon their "common experience when analyzing the evidence presented." There isn't a person alive that doesn't know that prescription drugs have side effects and that taking prescription drugs in large amounts such as this may have an extreme side effect. There isn't a person of common intelligence who doesn't know that mixing prescription drugs and alcohol can cause death.

The Court of Appeals has substituted its opinion and analysis of the evidence for that of the jury. The decision of the Court of Appeals must be reversed. At a minimum, the matter should be remanded with direction to allow supplementation of the record and reconsideration of the opinion in light of the entire record.

2. In the alternative, this Court should either remand the matter to the trial court for entry of the Judgment of the lesser degree crime of Manslaughter in the Second Degree or remand this matter to the Court of Appeals directing that the court address the issue of sufficiency of the evidence for the lesser degree crime of Manslaughter in the Second Degree.

As stated above, there was ample evidence to support the jury's verdict and the jury's determination that the defendant acted recklessly. Even if this court disagrees, there is certainly ample evidence to find that this defendant acted with criminal negligence, the mental state necessary to establish the crime of Manslaughter in the Second Degree. The Court of Appeals has refused to consider whether there was proof beyond a reasonable doubt that the defendant acted with criminal negligence. The Court of Appeals in this case has declined to address whether it has

authority to remand this matter to the trial court for entry of Judgment and Sentence on the lesser degree offense of Manslaughter in the Second Degree.

There is confusion on this issue and conflict between the reported cases. In State v. Gilbert, 68 Wn.App. 379, 384-87, 842 P.2d 1029 (1993) the defendant was charged with Burglary in the First Degree. The Court of Appeals, Division I, found that there was insufficient evidence to establish that an assault had occurred in the course of the burglary. The court directed that the matter be remanded to the trial court for entry of judgment on the lesser included offense of Residential Burglary even though the jury had not been instructed on that lesser offense. In addressing this issue, the Court of Appeals held as follows. Gilbert, 68 Wn.App. at P. 384-85.

> We are aware of the Supreme Court's admonishment that "[i]n general, a remand for simple resentencing on a 'lesser included offense' is only permissible when the jury has been explicitly instructed thereon." *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980). However, that statement was dictum, and unsupported by any citation to authority. Nor has our research revealed any authority which supports that proposition. Logically, in fact, the dispositive issue should *not* be whether the jury was instructed on the lesser included offense, but rather whether the jury necessarily found each element of the lesser included offense in reaching its verdict on the crime charged.
>
> We find no logical reason, when each element of the lesser included offense has been found, that the trial court's failure to

> instruct on the lesser included offense should prevent this court from directing the trial court to enter such a conviction. *See State v.Plakke*, 31 Wn. App. 262, 267, 639 P.2d 796 (1982), *overruled on other grounds in State v. Davis*, 35 Wn. App. 506, 667 P.2d 1117 (1983), *aff'd,* 101 Wn.2d 654, 682 P.2d 883 (1984).
>
> *State v. Brown*, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988); *accord*, *State v. Ellard*, 46 Wn. App. 242, 730 P.2d 109 (1986), *review denied*, 108 Wn.2d 1011 (1987) where Division Two vacated convictions on two counts of first degree theft and remanded for sentencing on one count each of second and third degree theft based on insufficiency of the evidence for first degree theft.

In State v. Gamble, 118 Wn.App. 332, 72 P.3d 1139 (2003) the defendant's conviction for felony Murder in the Second Degree was reversed based upon the decision of the Supreme Court in Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Division II of the Court of Appeals directed that the matter be remanded to the trial court for entry of judgment of the lesser included offense of Manslaughter in the First Degree even though the jury was not instructed on that lesser offense.

In Personal Restraint Petition of Heidari, 159 Wn.App. 601, 606-616, 248 P.3d 550 (2001). Division I of the Court of Appeals reversed its holding in Gilbert and held that a matter may only be remanded for entry of judgment on a lesser included offense or a lesser degree offense if that offense was submitted to the jury for its consideration.

The Court of Appeals in Heidari has attributed this confusion to the language of the Supreme Court in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Green was charged with Aggravated Murder in the First Degree. He initially challenged the prosecution alleging that the State had unfettered authority to charge either Aggravated Murder in the First Degree or felony Murder in the First Degree and that therefore, he was denied equal protection of the laws. The Supreme Court rejected this argument. State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979).

In Green the aggravators were that the killing was committed in the course of and in furtherance of rape and/or kidnaping. Upon reconsideration, the court in Green held that there was insufficient evidence to support the alternative means alleged that the defendant had committed the crime in the course of kidnaping. The Supreme Court refused the State's request that the matter be remanded to the Superior Court for entry of Judgment on the crime of Murder in the First Degree stating as follows: Green, at p. 234-235, 616 P.2d 628 (1980).

> In the case at hand the jury was not instructed on the subject of a "lesser included offense." In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. *Based upon the giving of such an instruction* it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense. *See State v. Jones,* 22 Wn. App 447, 454, 591 P.2d 796

> (1979); *State v. Martell*, 22 Wn. App. 415, 419, 591 P.2d 789 (1979); *State v. Liles,* 11 Wn. App. 166, 171-73, 521 P.2d 973 (1974); *see also People v. Codding,* 191 Colo. 168, 551 P.2d 192 (1976); *United States v. Thweatt,* 433 F.2d 1226, 1234 (D.C. Cir. 1970); *Austin v. United States,* 382 F.2d 129 142 (D.C. Cir. 1967). In addition, it is clear a case may be remanded for resentencing on a "lesser included offense" only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense. *See State v. Jones, supra; see also State v. Jackson,* 40 Ore. App. 759, 596 P.2d 600, 602 (1979). Obviously, there is no such clear disclosure in this record. We have previously determined there was insufficient evidence to support the kidnapping element and that it is impossible to know whether the jury determined unanimously that the element of rape had been established beyond a reasonable doubt. Accordingly, we cannot say the jury found all the elements of the lesser included offense of first degree murder which is dependent upon proof of the crime of rape. Consequently, the cause cannot be remanded for sentencing on the lesser included offense of first degree murder. (emphasis supplied)

The above language, first of all, was only agreed upon by four justices of the Supreme Court. Secondly, the statement regarding the necessity of instructing on the lesser included offense of Murder in the First Degree is clearly dicta in light of the particular facts in Green. The court in Green determined that there was insufficient evidence to support the alternative means that the murder was committed in the course of the kidnaping. The court in Green also found that there was no way to determine on the record whether the jury was unanimous as to either of the

alternative means. Accordingly, under the circumstances, it was unable to determine that the jury unanimously found proof beyond a reasonable doubt that the killing was committed in the course of either the rape or the kidnaping. In short, the record did not that disclose the trier of fact, in reaching its verdict, unanimously found each of the elements of the lesser offense beyond a reasonable doubt. In light of these circumstances, any assertion by the court in Green that remand for resentencing on a lesser included offense is only permissible when the jury has been instructed on the lesser included offense is dicta.

The lead opinion in Green did get it right when it stated that a matter may be remanded for resentencing on a lesser included offense if the record discloses the trier of fact expressly found each of the elements of the lesser offense. Green, 94 Wn.2d at p. 234-235. That is clearly what happened here. By its verdict that the jury found beyond a reasonable doubt that the defendant acted recklessly. The jury necessarily determined, also, that the defendant acted with the lesser included mental state of criminal negligence. As pointed out by the court in Green, there was no such proof in the record in that case. Green, 94 Wn.2d at p. 235.

The Court of Appeals, Division I, has since held that the jury must be instructed on the lesser degree of the charged offense in order for the Court of Appeals to remand the matter for entry of judgment on a lesser included offense. Personal Restraint Petition of Heidari, 159 Wn.App. 601, 248 P.3d 550 (2011). In Heidari, the State conceded that there was

insufficient evidence to support a conviction for Child Molestation in the Second Degree due to insufficiency of the evidence concerning whether there had been sexual contact. The State asked that the court remand the matter to the trial court for entry of Judgment and Sentence for Attempt to Commit Child Molestation in the Second Degree. See RCW 10.61.003.

The decision in Heidari is clearly distinguishable from the State in case at hand. First of all, the court in Heidari, never set forth the facts. There is no way to tell from a review of the decision in Heidari, whether or not there was evidence in the record to support an attempt to commit the crime of Child Molestation in the Second Degree and whether the jury, by its verdict, necessarily found that the defendant had also committed an attempt. An attempt requires an intent to commit the completed crime. The insufficiency of the evidence in Heidari could have been either because there was no touching or because what touching there was could not be proven beyond a reasonable doubt to have been for sexual gratification. Under those circumstances, it is impossible to determine whether the trier of fact expressly found each of the elements of a lesser offense.

F. Conclusion.

The decision of the Court of Appeals must be reversed. This court should reinstate the verdict of the jury or remand for supplementation of the record and reconsideration based upon the entire record. In the

alternative, this matter should be remanded to enter judgment for the crime of Manslaughter in the Second Degree.

DATED this 19 day of December, 2013.

Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Interim Prosecuting Attorney
WSBA #5143

GRF/ws

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, Sarah L. Wisdom hereby declare as follows:

On the 19th day of December, 2013, I mailed a copy of the Petition for Review to Jodi R. Backlund and Manek R. Mistry, P.O. Box 6490, Olympia, WA 98507-6490, 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 19th day of December, 2013, at Montesano, Washington.

Sarah L Wisdom

PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH RAY YOUNGBLOOD, Appellant.	No. 42635-8-II UNPUBLISHED OPINION

WORSWICK, C.J. – A jury found Kenneth Youngblood guilty of first degree manslaughter. Youngblood appeals his conviction, asserting that (1) the State presented insufficient evidence to prove the recklessness and causation elements of first degree manslaughter and (2) the trial court's reasonable doubt instruction misled the jury on the State's burden of proof. Because the State presented insufficient evidence to prove the recklessness element of first degree manslaughter, we reverse Youngblood's conviction and remand for dismissal with prejudice.

FACTS

On December 18, 2009, Mark Davis went to an Aberdeen, Washington bar after attending a memorial service for a friend who had committed suicide. Youngblood was also at the bar that evening. While at the bar, Davis appeared to be intoxicated. Davis slurred his speech, cried over the death of his friend, and repeatedly stated that he wanted to kill himself.

Youngblood was speaking with Davis outside the bar when Youngblood's daughter, Katherine Youngblood, and Katherine's friend, Emily Brisby, arrived.[1] The four made plans to meet at Youngblood's home. When they arrived at Youngblood's home, the four began drinking and talking. Shortly thereafter, Davis became upset and suicidal. After Davis became distraught, Youngblood offered him between 10 and 20 pills to calm him down. According to Brisby, Youngblood handed Davis 10 to 20 pills but, when asked, refused to tell Davis what kind of pills they were, stating only that "they were to calm him down." Report of Proceedings (RP) at 109.

Shorty after ingesting the pills, Davis became "spac[e]y" and appeared to be "heavily sedated." RP at 110. After approximately 20 minutes, Davis tried to go to the bathroom but was too intoxicated to walk and had to be carried to the bathroom by Youngblood and Katherine. For the next few hours, Brisby frequently checked the bathroom to see if Davis was okay. She saw that Davis had fallen from the toilet with his head resting on the side of the bathtub and that he was still breathing. Brisby stated that she wanted to call 911, but Youngblood told her not to call 911 because he had taken that amount of the medication before and knew that Davis would be okay. Before leaving Youngblood's home at around 3:30 to 4:00 AM, Brisby checked on Davis and saw that he was still breathing. The following day, medics were called to Youngblood's home and found that Davis had died on the bathroom floor.

Youngblood told police officers that he had an illness that made it difficult "for him to remember things, particularly when he has been taking his medication or been drinking." RP at 33. Youngblood stated to the officers that he had hosted an after-hours party at his house with

[1] For clarity, we refer to Katherine Youngblood by her first name, intending no disrespect.

Davis, Katherine, and Brisby. Youngblood also told officers about his prescribed medications after the officers noticed several prescription bottles around his home. Officers collected several prescription bottles as evidence, including a half-filled bottle of Seroquel.[2] The State charged Youngblood with first degree manslaughter and controlled substances homicide.[3]

At trial, forensic toxicologist Brianne O'Reilly testified that she had tested a sample of Davis's blood, which test revealed Davis had a blood alcohol level of 0.230 to 0.235. O'Reilly's test of Davis's blood sample also revealed the presence of Seroquel and clonazepam, an anti-seizure medication. O'Reilly stated that the presence of Seroquel in Davis's blood sample exceeded the therapeutic dosage associated with the drug. But O'Reilly was unwilling to opine that the Seroquel in Davis's system caused his death. O'Reilly stated that she had trouble determining a fatal toxicity level for Seroquel because it is "in general considered a pretty safe medication." RP at 70.

Forensic pathologist Emmanuel Lacsina testified that he had performed Davis's autopsy, which revealed that Davis had high levels of alcohol and Seroquel in his system when he died. Lacsina stated his opinion that the combination of Seroquel and alcohol caused Davis's death. Lacsina also testified that this was the first case that he had examined where Seroquel was a factor in a person's death.

---

[2] According to the trial trial testimony, Seroquel is a brand name for the drug "quetiapine," an "anti-psychotic medication generally used in the treatment of schizophrenia or bipolar mania." RP at 69.

[3] Before trial, the trial court granted the State's motion to dismiss the controlled substances homicide charge. Thus, we do not address whether sufficient evidence would have supported that charge.

The jury returned a verdict finding Youngblood guilty of first degree manslaughter. Youngblood timely appeals his conviction.

ANALYSIS

Youngblood argues that the State presented insufficient evidence to support his first degree manslaughter conviction. Specifically, Youngblood contends that the State's evidence was insufficient to support the recklessness element of first degree manslaughter. We agree.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). To convict Youngblood for first degree manslaughter, the State had to prove beyond a reasonable doubt the essential elements of former RCW 9A.32.060 (1997), which provided in relevant part, "A person is guilty of manslaughter in the first degree when . . . [h]e recklessly causes the death of another person." Thus, to sustain Youngblood's first degree manslaughter conviction on appeal, the State's evidence must have been sufficient to prove that he acted recklessly.

RCW 9A.08.010(c) provides, "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(c)'s definition of recklessness contains both subjective and objective components, such that it requires the jury to determine "both what the defendant knew and how a reasonable person would have acted knowing these facts." *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). When determining whether a defendant acted recklessly under this definition, the trier of fact "is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists." *R.H.S.*, 94 Wn. App. at 847.

Youngblood contends that the State failed to present any evidence that he had actual knowledge of the substantial risk of death created by providing 10 to 20 Seroquel pills to a highly intoxicated Davis. In response, the State does not point to any evidence in the record supporting the jury finding that Youngblood had specific knowledge of a substantial risk of death that could occur by providing Seroquel to Davis, but instead asserts that it is a matter of "common knowledge" that mixing prescription medication with alcohol could have adverse side effects, including death. Br. of Respondent at 6. But, even accepting the State's argument that a reasonable person in Youngblood's position would believe that giving a large quantity of prescription medication to an intoxicated person could result in adverse side effects, including the *possibility* of death, here the State was required to prove that Youngblood knew of and disregarded a *substantial risk* that death would occur by providing an intoxicated Davis with Seroquel pills. RCW 9A.08.010(c). We hold that the State failed to meet this burden.

The State did not present any evidence that Youngblood had actual knowledge of the risks associated with combining Seroquel with alcohol, let alone a substantial risk of death. For example, the State did not present any testimony from a physician or pharmacist stating that they typically caution patients against mixing Seroquel and alcohol due to the risk of death, nor did the State present any documentary evidence, such as text from a warning label on the prescription bottle or physician's note. And the State did not present the half-filled prescription bottle of Seroquel that police had collected from Youngblood's apartment.

The State's evidence also failed to establish that a reasonable person would believe that giving Seroquel to an intoxicated person would likely result in the person's death. Although forensic toxicologist O'Reilly testified that the manufacturers of Seroquel warn against mixing the drug with alcohol, she did not testify that such manufacturers' warnings included information about a substantial risk of death associated with combining Seroquel and alcohol. And O'Reilly did not opine that Seroquel was the cause of Davis's death, testifying instead that Seroquel is "in general considered a pretty safe medication." RP at 70.

Forensic pathologist Lacsina's testimony similarly failed to establish knowledge of a substantial risk of death associated with providing Seroquel to an intoxicated person. Although Lacsina concluded that the combination of Seroquel and alcohol caused Davis's death, he admitted that this was the first case he had examined in which Seroquel was a factor in causing someone's death. In light of the State's own expert witnesses' testimony that Seroquel is generally considered a safe medication (O'Reilly) and that this was the only case examined by the witness where Seroquel was a factor in death (Lacsina), we cannot accept the State's claim

that the substantial risk of death associated with combining Seroquel and alcohol is a matter of "common knowledge."

Because the State's evidence was insufficient to prove that Youngblood knew, or that a reasonable person in Youngblood's position would know, of a substantial risk of death associated with providing Seroquel to a person under the effects of alcohol, it failed to establish the element of recklessness required to sustain a first degree manslaughter conviction. Accordingly, we reverse Youngblood's first degree manslaughter conviction and remand for dismissal with prejudice.[4]

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.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.

[4] Because we reverse Youngblood's conviction based on the insufficiency of the State's evidence, we need not address his remaining issues.