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Court of Appeals
Division III
State of Washington

No. 33424-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SARAH E. HEIDT,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction for delivery of an imitation controlled substance.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was Ms. Heidt's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the charged crime?

C. STATEMENT OF THE CASE

Sarah Heidt stole and consumed some liquid Oxycodone from a patient's prescription medicine bottle at the assisted living facility where she worked and replaced what she had taken with melted popsicle liquid. RP 87-90, 103-07, 142-43. As a result, the strength of the diluted Oxycodone was about 60 times less than its original strength. RP 221, 234-35, 240-41.

Ms. Heidt was charged and convicted of manufacture, deliver or possess with intent to deliver an imitation controlled substance. CP 22, 52. The jury was instructed in pertinent part:

No. 13. A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance or result. It is not necessary that the person

know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information which would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

No. 15. To convict the defendant of the crime of manufacture, distribute, or possess with the intent to distribute, an imitation controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 25, 2014, the defendant knowingly
 - (a) manufactured an imitation controlled substance; or
 - (b) distributed an imitation controlled substance; or
 - (c) possessed with the intent to distribute an imitation controlled substance . . .

If you find from the evidence that element (2) and any of the alternative elements (1)(a) or (1)(b) or (1)(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP 38, 40.

The jury found by special verdict that Ms. Heidt committed the offense only by knowingly distributing an imitation controlled substance.

CP 52.

This appeal followed. CP 72.

D. ARGUMENT

1. Ms. Heidt's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the charged crime.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test 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) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, 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, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "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, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997),

evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 69.52.020(3) provides in pertinent part:

“Imitation controlled substance” means a substance that is *not a controlled substance*, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance . . . (italicized emphasis added)

Here, the substance Ms. Heidt was charged with and convicted of distributing was by definition not an imitation controlled substance. The Washington State Patrol lab technician testified that while the medicine had been significantly diluted with limonene [popsicle juice], it still contained Oxycodone. RP 221, 234-35, 240-41. Thus, the substance at issue was still a controlled substance and by definition not an imitation controlled substance. Therefore, the State failed to prove this essential element of the charged crime.

The evidence was also insufficient for a second reason, namely the mens rea of “knowingly distribute” was not proved. Ms. Heidt had no intent to distribute the diluted Oxycodone. It is clear from the evidence

her sole purpose in diluting the Oxycodone with popsicle juice was to cover up the theft—nothing more.

This case is essentially a more sophisticated version of the teenage son (or daughter) sneaking sips from Dad’s whiskey bottle and then adding water to bring the diluted whiskey back to the original level. The sole intent is to get away with stealing the whiskey, not to distribute diluted whiskey to Dad. Similarly, Ms. Heidt is guilty only of stealing the Oxycodone and probably adulterating a drug¹. Therefore, the evidence is also insufficient on this basis.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted November 30, 2015,

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¹ The jury was instructed on this latter crime as a lesser included offense. CP 41-44.

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 30, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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