

FILED
FEB 18, 2016
Court of Appeals
Division III
State of Washington

NO. 33424-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SARAH ELIZABETH HEIDT, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY THE ASSIGNMENT OF ERROR

1. Was there sufficient evidence presented at trial to support Heidt's conviction for distribution of an imitation controlled substance?

B. ANSWER TO THE ISSUE PRESENTED BY THE ASSIGNMENT OF ERROR

1. There was sufficient evidence presented at trial to support Heidt's conviction for distribution of an imitation controlled substance.

II. STATEMENT OF THE CASE

The Appellant, Sarah Elizabeth Heidt, was convicted of manufacture, distribute, or possess with the intent to distribute an imitation controlled substance after a jury trial. The charge stems from the following facts:

Glen Isom hired Heidt to work as a nursing assistance at Garden Terrace Adult Family Home in Yakima, Washington. RP at 87-89. Isom owned and operated the facility. *Id.* at 87. Isom positively identified Heidt in court as the person he hired to work at his facility in May 2014. *Id.* at 88-89.

Heidt's first day of work was May 24, 2014. *Id.* Isom testified that apart from shadowing him, part of Heidt's duties included helping care for Margaret Thorson. *Id.* at 89. Thorson had recently been admitted into

hospice, and her pain management plan required that she take Oxycodone every two hours. *Id.* at 89-92. Thorson's Oxycodone was in liquid form in a bottle and was administered with an eye dropper or syringe. *Id.* at 90. The liquid Oxycodone was yellow in color. *Id.* at 97. Isom testified that all of the medications for residents were kept in a locked cabinet in the kitchen. *Id.* at 90.

During the job shadow, Isom showed Heidt where the locked cabinet was, and explained what medications were in there. *Id.* at 91.

The next day, Heidt started her shift at 7:00 in the morning. *Id.* Isom testified that it was a Sunday and he recalled that as part of his normal routine he helped transport several residents to church services. *Id.* at 92. This activity required that Isom leave by 8:45 a.m., drive the residents to the church for service starting at 9:00 a.m., return to his facility for 40 minutes, and then drive back to the church to pick up the residents. *Id.* at 92. Isom stated he gave Thorson her dose of Oxycodone at 7:30 a.m. and also at 9:30 a.m. when he returned from church. *Id.* at 93.

After Isom returned with the residents from church, he assisted a nurse install a catheter in one of the residents. *Id.* at 94. During the procedure, Heidt knocked on the door, and asked if she could go home because she was not feeling well. *Id.* at 95. Isom asked Heidt to stay until after they finished the procedure and then he and she could talk. *Id.* at 95.

Heidt stuck around. *Id.* Isom recalled that Heidt appeared very fidgety and just said that she had to go because she did not feel well. *Id.* at 96. Isom told Heidt that she go home. *Id.* He also told Heidt that he would cover the rest of her shift, and that she needed to call him to let him know whether she would come into work the next day. *Id.*

Later that day around 3:30 p.m., Isom recalled that Thorson's Oxycodone "looked odd" when he held it up to the light. *Id.* at 96. It was "cloudy" and "murky" rather than the yellow color it usually was. *Id.* at 97. Isom opened the bottle and smelled it. He thought that it smelled like pop or Kool Aid. *Id.* at 103. Isom then went through the drawers in the kitchen to try to find something that resembled the smell. *Id.* at 103. In doing this, Isom found two popsicle sticks on the top of the rose clippings in the garbage. *Id.* The garbage was taken out each evening which led Isom to conclude that the popsicles were consumed that morning. *Id.* Isom testified that the popsicles were kept in the freezer and that he purchased them on Thursday as a treat for the residents after their hair appointments. *Id.* at 104. None of the residents ate any popsicles on Thursday or at the barbeque the night before. *Id.* Isom checked the popsicle box the night before and found it unopened. *Id.* at 105. Isom also asked staff if they had any popsicles and they said no. *Id.*

Isom recalled that earlier that day he cut roses from the garden and put the clippings in the garbage. *Id.* at 106.

Isom checked the popsicle box in the freezer and found that it had been opened. *Id.* He took out the yellow popsicle, melted it, and noticed that the smell matched that of the substance in Thorson's Oxycodone bottle. *Id.* at 107.

Heidt never called that night and did not show up for work the next day. *Id.* at 108. Isom left Heidt several messages, but she never called him back. *Id.* Isom then called the police who showed up and collected Thorson's Oxycodone medication as evidence. *Id.*

About three months later, Isom testified that Sergeant Mike Costello of the Yakima Police Department contacted him about the popsicles. *Id.* at 108. Isom recalled the exact brand of popsicles and that he purchased them from the same store that he did in May. Isom kept the popsicles in the freezer until Sergeant Costello collected them. *Id.* at 109-10.

Sergeant Costello testified that in addition to the popsicles he collected from Isom, he collected a 30-milliliter container of Oxycodone from Yakima Memorial Hospital to submit to the Washington State Crime Laboratory as a control sample. *Id.* at 122. Sergeant Costello then melted yellow and orange popsicles at room temperature, placed them in unused prescription bottles he obtained from the hospital, and submitted the

samples to the Washington State Crime Laboratory. *Id.* at 123. He also submitted the control sample of Oxycodone and Thorson's Oxycodone to the lab. *Id.*

Officer Jeffrey Miller testified that on May 26, 2014 he spoke with Isom and collected Thorson's Oxycodone bottle as evidence. *Id.* at 139; 141. He further testified that he spoke with Heidt. Officer Miller testified that he told Heidt that the incident was on video as part of a ruse. *Id.* at 142. Heidt then admitted that she took some of the medication from the bottle. *Id.* In a subsequent statement, Heidt admitted to Officer Miller that she put popsicle juice in Thorson's Oxycodone bottle. *Id.* at 143.

The final witness to testify for the State was Jason Trigg, a Forensic Scientist with the Washington State Crime Laboratory in Kennewick, Washington. *Id.* at 219. Trigg testified that four samples were submitted to the lab for analysis; three of which were control samples. *Id.* at 69. One control sample was an unopened bottle of medicine with the factory seal intact while the other two control samples were melted popsicles. *Id.* The fourth sample was in a bottle of medicine. *Id.* Trigg testified that he tested the samples in accordance with the lab's standard procedures. *Id.* at 230-31. In the Oxycodone bottle collected from Isom, Trigg testified that it contained Oxycodone and a trace amount of limonene. *Id.* at 235; SE 1. Trigg explained that trace meant there was more Oxycodone present in the

bottle than there was limonene. *Id.* The sample contained nine milliliters of liquid. RP at 237. Trigg noted that the concentration of Oxycodone was significantly less in item one than it was in item twelve, the control sample. RP at 237; SE 1; SE 4. Trigg conservatively estimated that the control sample of Oxycodone was 60 times stronger than the sample of Thorson's medication. RP at 241. He explained that one sample could have been diluted since limonene was not present in the control sample of Oxycodone. *Id.* at 242. The source of limonene in item number one was not determined. *Id.* at 264; SE 1.

The defense did not present any witnesses. After deliberating, the jury found Heidt guilty of manufacture, distribute, or possess with intent to distribute an imitation controlled substance. CP at 50. In the special verdict form that asked the jury to specify which prong(s) they assessed culpability under, the jury unanimously found that Heidt knowingly distributed an imitation controlled substance. *Id.* at 52.

Heidt was sentenced on April 30, 2015. The trial court sentenced Heidt under the first time offender waiver to 60 days of confinement with 45 days suspended and 12 months of community custody. RP at 421-22. Had the court not sentenced Heidt under the first time offender waiver, her standard range would have been 12 months and one day to 20 months of imprisonment. *Id.* This timely appeal then followed.

III. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THE ELEMENTS OF DISTRIBUTE AN IMITATION CONTROLLED SUBSTANCE.

Heidt challenges the conviction on the ground that Thorson's medicine contained Oxycodone, a controlled substance, not an imitation controlled substance. Brief of Appellant at 8. This argument misses the mark. Evidence admitted at trial proved that Heidt diluted the bottle of Thorson's Oxycodone with melted yellow popsicles. The diluted Oxycodone was then distributed to Thorson as part of her treatment for pain management.

The jury was properly instructed as to the elements of manufacture, distribute, or possess with the intent to distribute an imitation controlled substance.

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; and
- (2) That any of these acts occurred in the State of Washington.

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. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) or (1)(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

CP at 40. After considering all of the evidence, the jury found beyond a reasonable doubt that Heidt knowingly distributed an imitation controlled substance. *Id.* at 50. There was overwhelming evidence to support that each element of the crime had been proven beyond a reasonable doubt.

In evaluating challenges based on the sufficiency of the evidence, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Aguilar*, 153 Wn. App. 265, 275, 223 P.3d 1158 (2009). There is sufficient evidence to support a conviction “when viewed in the light most favorable to the

State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 275 (quoting *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1994)).

The first flaw in Heidt’s argument is that she fails to acknowledge that melted popsicles would be considered an imitation controlled substance under RCW 69.52.020. Heidt correctly identifies the applicable statute, but does not apply it properly. Under the statute, an

“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. Appearance includes, but is not limited to, color, shape, size, and markings of the dosage unit. Representation includes, but is not limited to, representations or factors of the following nature:

- (a) Statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;
- (b) Statements made to the recipient that the substance may be resold for inordinate profit; or
- (c) Whether the substance is packaged in a manner normally used for illicit controlled substances.

RCW 69.52.020(3)(a)-(c). Heidt is correct that Thorson’s medication contained Oxycodone, a schedule two controlled substance. RCW

69.50.101(2)(e); RCW 69.50.206(1)(xvi). However, Oxycodone was not the only thing found in Thorson's medication. It also contained limonene. RP 241-42.

Thorson's medication was 60 times less potent than the control sample of Oxycodone obtained from the hospital. RP at 241; *Cf.* SE 1 with SE 4. Forensic Scientist Trigg testified that the most plausible explanation for the disparity in the potency of the two medications was that one had been diluted since the control sample did not contain limonene whereas the other sample did. RP at 242. Lending further support to Trigg's theory is Heidt's own statements to law enforcement in which she admitted to diluting Thorson's Oxycodone with melted popsicles after she consumed some of Thorson's Oxycodone. *Id.* at 142-43. This evidence substantiates that Thorson's medication contained an imitation controlled substance, that being the melted popsicle Heidt used to dilute the medication after consuming some of it.

Moving now to the second flaw in Heidt's argument is the fact that she misapplies the definition of distribute. Under RCW 69.52.020(2), "distribute" is defined as the actual, constructive, or attempted transfer or delivery or dispensing of an imitation controlled substance to another. Thorson was prescribed Oxycodone for pain management. RP at 89-92. Heidt did not "distribute" Oxycodone to Thorson who already had a

prescription for it because part of her job duties required administering Oxycodone to Thorson. Rather, Heidt consumed some of Thorson's Oxycodone while caring for her. *Id.* at 142. Heidt then used melted yellow popsicles from Isom's freezer to dilute Thorson's Oxycodone to conceal the fact that she consumed some of the medication. *Id.* at 143. After Heidt left, Isom administered the diluted Oxycodone to Thorson every two hours for pain management until he realized that it "looked odd" when he held it up to the light. *Id.* at 90-92. When Isom administered the diluted Oxycodone to Thorson, the act satisfied the definition of "distribute" under RCW 69.52.020(2). Isom transferred the diluted Oxycodone to Thorson when he administered it to her. Alternately, Isom dispensed the diluted Oxycodone to Thorson when he administered it to her.

This evidence also shows that Heidt knew that the diluted Oxycodone would be "distributed" to Thorson because Thorson's treatment plan required that she receive Oxycodone every two hours. RP at 88-92. Heidt argues unpersuasively that she did not "knowingly distribute" an imitation controlled substance. Brief of Appellant at 8. The trial court properly instructed the jury as to the definition of "knowingly" which mirrored the language of RCW 9A.08.010.

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.

CP at 38. After receiving that instruction, the jury determined that Heidt acted knowingly when she distributed an imitation controlled substance.

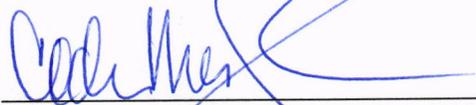
The jury's determination that Heidt acted knowingly was supported by sufficient evidence. In reviewing the evidence presented at trial, it established that on Heidt's very first day of work she shadowed Isom and learned how to care for Thorson. RP at 88-92. Part of Thorson's care required that she received Oxycodone every two hours. *Id.* Isom's testimony corroborated that Heidt learned Thorson received Oxycodone every two hours for pain management. *Id.* It further corroborated that Heidt knew where Thorson's Oxycodone was kept and where the popsicles were kept. *Id.* Viewing the evidence in the light most favorable to the State, the evidence proved that Heidt knew that after she diluted Thorson's medication with the melted popsicles, that medicine would be administered

to Thorson every two hours. This, in turn, established that there was overwhelming evidence to prove each element of the crime of distribute an imitation controlled substance. The imitation controlled substance was not the Oxycodone as Heidt suggests. Rather, the imitation controlled substance was the melted popsicles Heidt used to dilute Thorson's Oxycodone after she consumed some of Thorson's Oxycodone.

IV. CONCLUSION

Viewing the evidence in the light most favorable to the State and all reasonable inferences that may be drawn from that evidence, there was sufficient evidence presented at trial to support the elements of distribute an imitation controlled substance.

Respectfully submitted this 18th day of February, 2016,



CODEE L. MCDANIEL WSBA #42045
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on February 18, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. David Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of February, 2016 at Yakima, Washington.



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