

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0981

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL BUMAN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
THE HONORABLE STEVEN J. ANDREASEN, JUDGE

APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision: July 1, 2020)

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QUESTION PRESENTED FOR FURTHER REVIEW

Whether the Court of Appeals Erred in Finding a Jury Instruction was Submitted in Error and that the Error Was Prejudicial to the Defendant.

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STATEMENT SUPPORTING FURTHER REVIEW

It is undisputed that Buman, a registered nurse, discontinued a vital and long-term medication of a healthcare facility resident without an order by a physician or a physician's assistant to do so. Finding that the district court erred in submitting a jury instruction and that the error was prejudicial, the Court of Appeals reversed Buman's conviction of wanton neglect of a resident of a healthcare facility in violation of Iowa Code section 726.7(3). *State v. Buman*, 19-0981, 2020 WL 356965 (Iowa Ct. App. July 1, 2020).

The objectionable instruction set forth a portion of a standards of nursing practice contained in the Iowa Administrative Rules and included a caution that the jury could only consider the standard "in determining whether the State has proven beyond a reasonable doubt the elements" of the crime of wanton neglect of a resident in a health care facility resulting in serious injury.¹ Instruction No. 17; App. 15.

While the State does not believe the district court erred in submitting Instruction 17, its request for further review is primarily

¹ Buman was charged with committing the crime of wanton neglect of a resident in a health care facility resulting in injury; however, the jury convicted Buman of the lesser charge of wanton neglect of a resident in a healthcare facility. Verdict; App. 16.

based upon the Court of Appeals determination that the instruction, if improper, was prejudicial to Buman and required a new trial.

In finding prejudice, the Court did not give the jury credit for being able to comprehend simple distinctions. A reasonable jury could understand “the difference between (1) an administrative code that set standards for the practice of nursing and (2) the crime of Wanton Neglect of a Resident in a Healthcare Facility—whose elements were clearly explained in Instruction 15[,]” and would not have been confused or misled by the instructions. *Buman*, slip op. at *12 (May, J., dissenting).

The State requests this Court grant further review to address the Court of Appeals determination that the instruction, if improper, was prejudicial to Buman.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals reversed the jury's verdict finding Buman guilty of wanton neglect of a resident in a healthcare facility. The State seeks further review. Iowa R. App. P. 6.1103.

Facts

In the early morning hours of October 27, 2016, Chelsea Clay, Administrator of the Pride Group Residential Care Facility (RCF) in LeMars, Iowa, received a call from her staff informing her that resident Joe Lenz was on the front lawn refusing to come inside the building. Trial Tr. (Vol. 1) p. 67, line 11-p. 68, line 1. She immediately drove to the RCF where she saw Lenz in front of the building; he was agitated, rocking back and forth, and talking to himself. Trial Tr. (Vol. 1) p. 69, line 8-20, p. 70, lines 8-12. Lenz was "so scared and so upset and so out of his mind that he didn't understand where he was or what was going on, and he was just terrified." Trial Tr. (Vol. 1) p. 73, lines 8-12. Clay learned that Lenz apparently heard a door slam, thought it was a bomb, and ran out of the building. Trial Tr. (Vol. 1) p. 67, lines 20-23, p. 68, lines 16-22.

Police arrived and helped Clay restrain Lenz. Trial Tr. (Vol. 1) p. 75, line 23-p. 76, line 18. Lenz was eventually transported to the nearest hospital with a psychiatric care unit where he stayed for over week. Trial Tr. (Vol. 1) p. 78, line 9-p. 79, line 24.

Lenz had been a resident at the facility since 1993. Trial Tr. (Vol. 1) p. 40, lines 4-8, p. 41, lines 2-5. He had been “diagnosed with chronic paranoid schizophrenia with catatonic features” and obsessive-compulsive disorder as well as mild intellectual disability, pervasive developmental disorder. Trial Tr. (Vol. 2) p. 59, line 15-p. 62, line 1. For at least eight years prior to incident, Lenz was taking 200 milligrams of Clozapine, a second-generation antipsychotic, every evening. Trial Tr. (Vol. 2) p. 65, line 13-p. 66, line 6, p.67, line 18-22, p. 73, line 21-p. 74, line 6.

Following Lenz’s hospitalization, Dr. Albert Okine, the physician assistant (PA) responsible for Lenz’s treatment, discovered that his Clozapine had been discontinued on or about October 18, 2016. Trial Tr. (Vol. 1) p. 59, lines 2-4, p. 61, line 19-p. 62, line 14, p. 79, line 12-p. 80, line 14. Although only a physician or PA can add or remove medications from a medical administrative record (hereinafter “MAR”), neither Dr. Okine, nor any other physician had

done so. Trial Tr. (Vol. 1) p. 60, lines 5-12, p. 61, line 19-p. 62, line 14, p. 88, line 7-p. 89, line 15, (Vol. 2) p. 13, lines 1-15, p. 39, lines 13-16, p. 87, lines 7-9.

Department of Inspections and Appeals Investigator Ryan Dostal asked Buman, a registered nurse who was working at the RCF on October 18, 2016, about whether he had discontinued the Clozapine. Trial Tr. (Vol. 2) p. 191, lines 3-6. Buman first told Dostal that he had found that the pharmacy had erred, “that the pharmacy had not sent the medication or perhaps sent the wrong medication and he found it.” Trial Tr. (Vol. 2) p. 191, lines 7-15, p. 192, lines 17-18. However, Buman changed his story and then told Dostal that

he thought perhaps the drug had been changed to a different name or a generic version of the same drug, so he searched the MAR for an additional name or a drug he wasn’t familiar with, and having found none, said that he assumed it had been discontinued, so he wrote DC’ed on the MAR.

Trial Tr. (Vol. 2) p. 191, line 22-p. 192, line 3. Then Buman stated that he might have compounded the pharmacy’s error. Trial Tr. (Vol. 2) p. 192, lines 17-21. Dostal asked Buman if there had been a physician’s order to discontinue the Clozapine; Buman “admitted that he did not talk to a physician.” Trial Tr. (Vol. 2) p. 193, lines 16-25.

Buman claimed to have tried to check Lenz's medical record but was unable to obtain it. Trial Tr. (Vol. 2) p. 194, lines 18-25. "He admitted he didn't call the pharmacy, he didn't call the DON [director of nursing], he didn't call anyone else. He just made the assumption that it should have been DC'ed, so he made the call to do so." Trial Tr. (Vol. 2) p. 195, lines 1-4. Buman admitted that he had written Clozapine was "DC'ed," or discontinued, on Lenz's MAR on or about October 18, 2016. Trial Tr. (Vol. 1) 48, line 17-p. 49, line 3, p. 86, lines 5-8, (Vol. 2) p. 38, lines 3-7.

On July 9, 2018, the State filed a trial information charging Buman with wanton neglect of a resident of a healthcare facility causing serious injury. Trial Information; App. 5. Buman pleaded not guilty. Arraignment Order; App. 7.

At an April 2019 jury trial, Dr. Okine explained that there may be serious health consequences for a patient if Clozapine is stopped abruptly; it is a drug that should be gradually reduced. Trial Tr. (Vol. 2) p. 90, line 23-p. 91, line 18, p. 109, lines 5-15. When Dr. Okine observed him in the hospital after the night of October 27, 2016, Lenz was struggling with catatonia as well as hallucinations. Trial Tr. (Vol. 2) p. 94, line 16-p. 95, line 21. Dr. Okine testified that even once Lenz

was stabilized and released from the hospital, he never returned to his “baseline” condition. Trial Tr. (Vol. 2) p. 116, line 18-p. 117, line 19.

Clay also observed that Lenz was not the same after the night of October 27, 2106. Trial Tr. (Vol. 1) p. 101, lines 19-p. 104, line 18.

Dr. Okine further testified that if a medication was not present in a medication cart, a nurse would call their supervisor, the PA, a doctor, or go to a hospital to address the situation. Trial Tr. (Vol. 2) p. 86, line 18-p. 87, line 3, p. 88, line 18-p. 89, line 17. However, a nurse cannot simply alter a patient’s medication without informing others on staff. Trial Tr. (Vol. 2) p. 89, lines 18-19.

Buman testified that he had been a registered nurse since 2004. Trial Tr. (Vol. 3) p. 28, lines 17-23. He started working at the Pride Group RCF in November 2015. Trial Tr. (Vol. 3) p. 28, line 22-p. 29, line 1.

Buman explained that the Clozapine was not present among Lenz’s medications on October 18, 2016. He saw that on the MAR that nurse Ream had written “NA” in the MAR on October 14 and 15, 2016. Trial Tr. (Vol. 3) p. 39, lines 6-24. Buman admitted that he had written “DC’ed” on Lenz’s MAR. Trial Tr. (Vol. 3) p. 42, lines 1-5. He testified that his “conclusion after checking for the medication,

checking the records that were available to me, and discussion with Mr. Lenz earlier that the medication must have been discontinued and someone failed to follow through by making the final entry on the MAR.” Trial Tr. (Vol. 3) p. 42, lines 6-12.

The jury found Buman guilty of wanton neglect of a resident of a healthcare facility but did not find he caused a serious injury to Lenz. Verdict; App. 16.

Additional facts will be set forth below as relevant to the State’s argument.

ARGUMENT

I. The Court of Appeals Erred in Finding Jury Instruction 17 was Improper and that its Submission was Prejudicial to Buman.

Preservation of Error

The State agrees that Buman preserved error on this issue by objecting to the submission of Instruction 17 and obtaining the district court’s ruling on his objection. Trial Tr. (Vol. 3) p. 71, line 12- p. 72, line 25. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (“issues must be presented to and passed upon by the district court before they can be raised and decided on appeal”).

Standard of Review

The appellate court reviews “challenges to jury instructions for correction of errors at law.” *Alcala v. Marriott Int’l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (citation omitted). Jury instructions are considered “in their entirety and [the appellate court] will not reverse if the instructions have not misled the jury.” *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000).

Merits

Buman argues the district court erred in submitting Instruction 17 to the jury. He maintains Instruction 17, in combination with Exhibit 15,² was confusing to the jury and thus prejudicial to him.

The jury was instructed about the elements of the charged crime in Instruction 15. It provided:

² The Court of Appeals also found that State’s Exhibit 15, a copy of the Iowa Administrative Rules pertaining to standards of care for registered nurses, of “limited relevance in a criminal setting and with a potential to confuse a jury, extreme caution must be exercised if it is offered up again on retrial.” *Buman*, slip op. at *9-10. The State maintains the Court of Appeals erred in finding that State’s Exhibit 15 evidence was not relevant. *See United States v. Alerre*, 430 F.3d 681, 691 (4th Cir.2005) (“evidence that a physician's performance has consistently departed from accepted professional standards may properly be relevant to establish that the physician contravened the criminal standard of liability”).

In regard to the charge of Wanton Neglect of a Resident of a Healthcare Facility Resulting in Serious Injury, the State must prove beyond a reasonable doubt the following numbered elements:

1. On or about the 18th day of October 2106, in Plymouth County, Iowa, Defendant Michael Buman knowingly acted in a manner likely to be injurious to the physical or mental welfare of Joseph Lenz.
2. At said time and date, Joseph Lenz was a resident of a healthcare facility. The Pride Group RCF is a healthcare facility.
3. The acts of Defendant Michael Buman resulted in serious injury to Joseph Lenz.

Instruction 15; App. 13.

Instruction 17 provided:

In accordance with the standards in the Iowa Administrative Code, a registered nurse is required to follow a medical regimen prescribed by a physician. If a medical regimen prescribed by a physician is not carried out by a registered nurse, the registered nurse is required to timely notify the physician who prescribed the medical regimen and also document on the medical record that the physician was notified and the reason for not executing the physician's order. *A violation of this standard, in and of itself, is not a criminal act.* You may consider this standard only in determining whether the State has proven beyond a reasonable doubt the elements of the charge set forth in Instruction 15.

Instruction 17 (Emphasis added.); App. 15.

There is nothing improper about reciting a standard of professional care, contained in an exhibit, and informing the jury how it could consider that standard in its deliberations. In overruling Buman's resistance to Instruction 17, the district court correctly observed that "based on the evidence that it really is not disputed, this claim that Mr. Buman, as a registered nurse, did not have authority to, quote, discontinue the medication Clozapine. It's up to the jury whether he did so." Trial Tr. (Vol. 3) p. 72, lines 3-10.

Because the jury found Buman not guilty of causing a serious injury, he contends "the jury thought a violation of the standard was enough to convict the defendant of wanton neglect." Appellant's Brief, p. 21. However, the jury's conclusion that there was no serious injury to Lenz did not militate a conclusion that Buman was not guilty of the crime of wanton neglect of a resident in a healthcare facility.

The jury was given a definition of "knowingly" as used in Instruction 15. Instruction 15A provided: "For Defendant Michael Buman to do something knowingly means he had a conscious awareness that he was acting in a manner likely to be injurious to the physical or mental welfare of Joseph Lenz." Instruction 15A; App. 14. The jury could reasonably find Buman acted with wanton neglect by

knowingly acting in a manner likely to be injurious to the physical or mental welfare of Lenz and yet find that the wanton neglect did not actually cause serious injury. Instruction 17 explicitly cautioned the jury that a violation of the nursing standards was not itself a criminal act. Instruction 17; App. 15.

Moreover, if the district court erred in submitting Instruction 17, the error was not prejudicial to Buman. “The trial court commits prejudicial error when it materially misstates the law.” *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000). Here, the district court’s instructions did not misstate the law.

Additionally, as Judge May observed in his dissent, “a case must only be retried if the instructions were so ‘misleading and confusing’ that ‘it is “very possible” the jury could reasonably have interpreted the instruction[s] incorrectly’” *Buman*, slip op. at *14 (May, J., dissenting) (quoting *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 902 (Iowa 2015)). “[I]t is not ‘very possible’ the jury misunderstood the duty to convict only if the ‘State . . . proved beyond a reasonable doubt’ the elements marshalled in Instruction 15.” *Id.*

A reasonable jury could understand “the difference between (1) an administrative code that set standards for the practice of nursing

and (2) the crime of Wanton Neglect of a Resident in a Healthcare Facility—whose elements were clearly explained in Instruction 15[,]” and would not have been confused or misled by the instructions. *Buman*, slip op. at *12 (May, J., dissenting). Therefore, the Court of Appeals erred in concluding that the submission of Instruction 17 was prejudicial to *Buman* and required a new trial.

CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court grant the application for further review, vacate the Court of Appeals decision, and affirm *Buman*’s conviction.

REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,685** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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