

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

APPELLEE'S AMENDED BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court Did Not Abuse Its Discretion in Admitting a Portion of the Iowa Administrative Code.

Authorities

People v. Gaglione, 138 Cal. App. 3d 52, 187 Cal. Rptr. 603 (Ct. App. 1982)
People v. Speringo, 258 A.D.2d 379, 686 N.Y.S.2d 8 (1999)
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II. The District Court Did Not Err in Submitting Instruction 17.

Authorities

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)
State v. Manna, 534 N.W.2d 642 (Iowa 1995)

III. The State Presented Sufficient Evidence to Prove Buman Guilty of Wanton Neglect of a Resident in a Healthcare Facility Beyond a Reasonable Doubt.

Authorities

State v. Crone, 545 N.W.2d 267 (Iowa 1996)
State v. McPhillips, 580 N.W.2d 748 (Iowa 1998)
State v. Robinson, 288 N.W.2d 337 (Iowa 1980)
State v. Schories, 827 N.W.2d 659 (Iowa 2013)

ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Michael Buman, appeals the judgment and sentence entered upon his conviction of wanton neglect of a resident in a healthcare facility in violation of Iowa Code sections 726.7(1) and 726.7(3). He argues: (1) the district court abused its discretion in admitting into evidence a portion of the Iowa Administrative Code; (2) the district court erred in instructing the jury; and (3) the evidence was insufficient to support his conviction.

Course of Proceedings

The State accepts Buman's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

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 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 called Jane Ream, who worked as a nurse at the Pride Group RCF in October 2016, as a defense witness. Trial Tr. (Vol. 3) p. 3, lines 3-25. She remembered that on October 13, 2016, the RCF received medications from the pharmacy and she noticed that the Clozapine was not present. The next morning, Ream informed the director of nursing about its absence. Trial Tr. (Vol. 3) p. 8, line 17-p. 9, line 1.

Ream worked at the RCF on October 15 and October 16, 2016; she maintained the Clozapine was not present either of these days. Trial Tr. (Vol. 3) p. 9, line 25. Ream wrote “NA,” indicating not available, on the MAR for those two days. Trial Tr. (Vol. 3) p. 9, line 16-p. 10, line 4. Ream noted that on October 17, 2016, the MAR indicated that another authorized employee had administered the Clozapine to Lenz and that on October 18, 2016, Buman indicated on the MAR that he administered the medication to Lenz. Trial Tr. (Vol. 3) p. 11, lines 1-23, p. 14, lines 2-6, 11-25.

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 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 found he had not caused a serious injury. Verdict; App. 16.

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

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Admitting a Portion of the Iowa Administrative Code.

Preservation of Error

Buman objected to the admission of Exhibit 15 "on the grounds of irrelevant and immaterial and improper encroachment on the duty

of the Court to instruct upon the law [. . .] and no proper foundation laid for it.” Trial Tr. (Vol. 2) p. 187, lines 4-19. The district court overruled the objection. Trial Tr. (Vol. 2) p. 187, lines 20-21.

Buman asserts he objected to the evidence pursuant to Iowa Rule of Evidence 5.403, providing that relevant evidence may be excluded if its probative value is outweighed by its prejudicial effect. Appellant’s Brief, p. 13. The State disagrees that Buman’s objection alerted the district court to the concern he raises on appeal. *State v. Sharpe*, 304 N.W.2d 220, 225 (Iowa 1981) (“an objection in the trial court on the ground of relevancy is insufficient to preserve error on the ground of unfair prejudice”). Therefore, Buman has not preserved error on this issue.

Standard of Review

This court “generally review[s] evidentiary rulings for abuse of discretion.” *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997); accord *State v. Bugely*, 562 N.W.2d 173, 177 (Iowa 1997) (applying abuse of discretion standard in reviewing admission of other crimes evidence). An abuse of discretion occurs when the trial court exercises its discretion “on grounds or for reasons clearly untenable or to an

extent clearly unreasonable.” *State v. Wilson*, 878 N.W.2d 203, 210–11 (Iowa 2016), reh'g denied (Apr. 13, 2016).

Merits

Iowa Rule of Evidence 5.401 provides that relevant evidence is evidence that “has any tendency to make a fact more or less probable than it would be without the evidence” and is “of consequence in determining the action.” Generally, relevant evidence is admissible. Iowa R. Evid. 5.402. However, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Iowa R. Evid. 5.403.

Buman argues the district court erred in admitting Exhibit 15 over his relevance objection. He maintains that the exhibit is “misleading, irrelevant and gave the jury a different standard to follow than the elements of the offense.” Appellant’s Brief, p. 17.

Exhibit 15 is a portion of the Iowa Administrative Code that pertains to standards of care for registered nurses. It provided, in pertinent part:

The registered nurse shall recognize and understand the legal implications of

accountability. Accountability includes but need not be limited to the following:

[...]

e. Executing the regimen prescribed by a physician. In executing the medical regimen as prescribed by the physician, the registered nurse shall exercise professional judgment in accordance with the minimum standards of nursing practice as defined in these rules. If the medical regimen prescribed by the physician is not carried out, based on the registered nurse's professional judgment, accountability shall include but need not be limited to the following:

(1) Timely notification of the physician who prescribed the medical regimen that the order(s) was not executed and reason(s) for the same.

(2) Documentation on the medical record that the physician was notified and reason(s) for not executing the order(s).

Exhibit 15; App. 12. Exhibit 15 was relevant to the issue of whether Buman had acted with wanton neglect in discontinuing a prescribed medication.

Similar evidence of a standard of care was found relevant in *People v. Speringo*, 258 A.D.2d 379, 380, 686 N.Y.S.2d 8, 9 (1999), wherein the Court found that “sections of the Police Department Patrol Guide recommending against the carrying of a weapon while off-duty in places where alcoholic beverages were being consumed,”

was relevant “to defendant's awareness of a risk attendant with that act, and the Patrol Guide did not impose a standard higher than the recklessness standard that the People were required to prove.” *See also People v. Gaglione*, 138 Cal. App. 3d 52, 56, 187 Cal. Rptr. 603, 605 (Ct. App. 1982) (the city’s operation and maintenance manual “was legitimate evidence of the standards imposed by the city on defendant and, thus, were the ‘industry standards’ for the plant involved”).

Moreover, other witnesses testified about the standard of care expected of a nurse dispensing medication. RCF Administrator Chelsea Clay, Dr. Okine, investigator Ryan Dostal, and Buman’s own witness, nurse Jane Ream, each testified that only a physician or PA could order that a medication be discontinued. Most of these witnesses also described the proper protocol for nurses to utilize when a medication is unavailable. Trial Tr. (Vol. I) 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. 18, lines 6-15, p. 19, lines 16-25, p. 39, lines 13-16, p. 87, lines 7-9, p. 185, lines 9-16, p. 186, lines 2-23, p. 198, line 24-p. 199, line 9, (Vol.3) p. 8, lines 7-14, p. 15, lines 8-17.

The probative value of State’s Exhibit 15 was not outweighed by its prejudicial effect. The jury was specifically instructed that a violation of the nursing standard of care, set forth in Exhibit 15, did not equate with a criminal act. Instruction 17; App. 15. “Cautionary instructions are sufficient to mitigate the prejudicial impact of inadmissible evidence ‘in all but the most extreme cases.’” *State v. Plain*, 898 N.W.2d 801, 815 (Iowa 2017) (quoting *State v. Breitbach*, 488 N.W.2d 444, 448 (Iowa 1992)).

The district court did not err in admitting State’s Exhibit 15.

II. The District Court Did Not Err in Submitting Instruction 17.

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).

Merits

Buman argues the district court erred in submitting Instruction 17 to the jury. He maintains Instruction 17, in combination with Exhibit 15, 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:

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.

In overruling Buman's resistance to Instruction 17, the district court "note[d] 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. It's up to the jury to determine whether or not that was a violation of the standard. The standard itself is not disputed."

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. This is inaccurate.

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.

The jury could not have been misled by the inclusion of the instruction. The instruction was plain that a violation of the standards set forth in Exhibit 15 did not constitute a criminal act.

Instruction 17 provided the jury with guidance for how it should apply the law. The district court did not err in submitting Instruction 17.

III. The State Presented Sufficient Evidence to Prove Buman Guilty of Wanton Neglect of a Resident in a Healthcare Facility Beyond a Reasonable Doubt.

Preservation of Error

The State agrees Buman preserved error on this issue by moving for a judgment of acquittal and obtaining the district court's ruling on the motion. Trial Tr. (Vol. 3) p. 73, lines 12-23. *See State v. Schories*, 827 N.W.2d 659, 664 (Iowa 2013), as corrected (Feb. 25, 2013) (noting "that in order to preserve error on a motion to acquit, the defendant must specifically identify the elements for which there was insufficient evidence").

Standard of Review

Review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). The reviewing court will uphold the denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *Id.* at 752. Substantial evidence is evidence that could convince a trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). In determining whether there is sufficient evidence, the court considers all the evidence. *State*

v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). However, the court views the evidence in a light most favorable to the State and makes all reasonable inferences that may be drawn from the evidence.

McPhillips, 580 N.W.2d at 752.

Merits

Buman contends the State failed to present sufficient evidence to prove him guilty of wanton neglect of a resident of a healthcare facility. Specifically, Buman maintains the State failed to prove that he knowingly acted in a manner likely to be injurious to Lenz. Buman asserts that he did not act in such a manner because the evidence supported his testimony that he believed the absence of the Clozapine meant that it had been discontinued, therefore, he asserts, he simply performed a clerical task in noting this on the MAR.

The evidence demonstrated that the notation “DC’ed” on a resident’s MAR indicated to anyone administering the medication that it had been discontinued. Trial Tr. (Vol. 1) p. 85, lines 1-8, (Vol. 2) p. 37, lines 15-22, p. 189, lines 2-15. Chelsea Clay, Dr. Okine, Ryan Dostal, even defense witness nurse Jane Ream, each testified that only a PA or physician has the authority at the RCF to discontinue a patient’s medication. Trial Tr. (Vol. I) 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. 18, lines 6-15, p. 19, lines 16-25, p. 32, lines 12-15, p. 39, lines 9-16, p. 87, lines 7-14, p. 185, lines 9-16, p. 185, lines 9-16, p. 186, lines 2-23, p. 187, line 25-p. 188, line 3, p. 198, line 24-p. 199, line 9, (Vol.3) p. 8, lines 7-14, p. 15, lines 5-17.

The evidence showed that a registered nurse would not fail to administer a prescribed medication to a patient simply because it was not present. A nurse, and specifically a nurse working at the RCF, was required to notify the nursing supervisor or the physician if a medication was absent. Trial Tr. (Vol. 1) p. 93, line 18-p. 97, line 3, (Vol. 2) p. 39, lines 9-16, p. 88, line 18-p. 89, line 19, p. 185, lines 17-18, p. 186, lines 2-23, p. 188, lines 16-23, p. 198, line 3-p. 199, line 9.

Buman admitted that he discontinued a prescribed medication, one that was vital to Lenz's well-being, without a physician's order. Although he claimed he discontinued it as a clerical matter, he and made no effort to inform the supervising nurse, the PA, or the physician. The State proved that he knowingly acted in a manner likely to be injurious to Lenz, a resident of a healthcare facility.

CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court to affirm Buman's conviction of wanton neglect of a resident of a healthcare facility.

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 **3,786** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: February 24, 2020



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