

IN THE SUPREME COURT OF IOWA

NO. 19-0981

STATE OF IOWA,

Plaintiff- Appellee

vs

MICHAEL BUMAN,

Defendant - Appellant

DECISION OF IOWA COURT OF APPEALS FILED JULY 1, 2020

**APPELLANT BUMAN'S RESISTANCE TO APPELLEE STATE'S
APPLICATION FOR FURTHER REVIEW**

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CERTIFICATE OF SERVICE

I hereby certify that on the 31ST day of July, 2020, I electronically filed the foregoing Resistance to the Application for Further Review with the Clerk of the Supreme Court using EDMS and further served this Resistance to Application for Further Review on all parties of record by EDMS and to Appellant via United States Postal Service.

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STATEMENT IN RESISTANCE TO FURTHER REVIEW

The Plaintiff-Appellee's Petition for Further Review does not implicate any of the grounds upon which this Court traditionally grants further review. *See* Iowa R. App. P. 6.1103(1). Rather, the Application asks the Supreme Court to reverse the decision of the Court of Appeals without support of any of the enumerated grounds within Iowa R. App. P. 6.1103(1).

Indeed, the application does not allege the Court of Appeals Decision was in conflict with a decision of this court or the court of appeals on an important matter, Iowa R. App. P. 6.1103(1)(b)(1). The application does not allege that the court of appeals decided a substantial question of constitutional law or an important question of law that has not been, but should be settled by the Supreme Court, Iowa R. App. P. 6.1103(1)(b)(2). The application does not allege that the court of appeals has decided a case where there is an important question of changing legal principles, Iowa R. App. P. 6.1103(1)(b)(3). And the application has not alleged that this case presents an issue of broad public importance that the supreme court should ultimately determine, Iowa R. App. P. 6.1103(1)(b)(4).

While the enumerated grounds of Rule 6.1103(1) aren't controlling, the State's application in this case simply alleges that they disagree with the

court of appeals finding that State's exhibit 15 which set forth the Administrative Code's minimum standard of care, combined with Jury Instruction 17 referring to that standard of care, could confuse the jury or lead it to misapply the law on whether Buman knowingly acted in a manner likely to injure the resident (Court of Appeals Decision at p. 9). Iowa law requires that a jury instruction that misstates the law, confuses or misleads the jury is prejudicial and requires reversal, *State v Hunt*, 801 N.W.2d 336, 375 (Iowa 2011), *State v Mathias*, 936 N.W.2d 222, 226 (Iowa 2019).

The court of appeals decision is consistent with Iowa law and does not raise any Constitutional issues or issues of import beyond this case. If the State is unhappy with the court of appeals decision, they have the opportunity to retry Mr. Buman on remand. The Application for Further Review should be denied.

BRIEF IN RESISTANCE TO FURTHER REVIEW

Statement of Facts

The defendant, Michael Buman, began his career in the medical field when he became an Emergency Medical Technician in 1977. His nursing career in 1980 and he became a registered nurse since 2004. (Trial Tr. Vol. 3 p. 29). In November of 2015, Buman began working at the Pride Group

facility in Le Mars, Iowa (Trial Tr. Vol. 3 p. 29). During his time at Pride Group there was no formal orientation other than computer modules that were completed as the nurse was working at the Pride Group (Trial Tr. Vol. 3 p. 31). There was a manual that could be referred to from time to time as necessary.

Mr. Buman exclusively worked the night shift at Pride Group, from 6:00 p.m. to 6:00 a.m. (Trial Tr. Vol. 3. p 34). His duties were either to be the medicine passer - distributing medications to residents or to handle direct care with the residents (Trial Tr. Vol. 3. p. 34). For the relevant portion of October 2015, Buman worked on October 9-11, 14, 19, 22-23, 26-28 (Appx. p. 9).

In October 2015, Joe Lenz was a resident of the Pride Group and had been living there for 20 years or more (Trial Tr. Vol. 1, p.40). Joe was diagnosed with chronic paranoid schizophrenia with catatonic features, obsessive compulsive disorder and mild intellectual disability (Trial Tr. Vol. 2 p. 59). Joe was prescribed a number of medications for his diagnoses (Trial Tr. Vol. 2, p. 64-66).

At Pride Group, the doctor's orders for medications were issued by an off site psychiatrist or medial doctor. In the case of Mr. Lenz, a Psychiatric

Physicians Assistant, Albert Okine, and the prescriptions were filled by L & M Pharmacy. (Trial Tr. Vol. I p.162) The pharmacy delivered a two-week supply of medications at a time. The medications were on trays for each resident with individual drawers for each medication that patient was taking. (Trial Tr. Vol. 3 p.4).

Nurse Jane Ream testified that Joe Lenz had been taking a number of medications including Clozapine. The Clozapine was available for her to give to him on October 12 and 13, 2015, but on October 15, 2015 it was not there (Trial Tr. Vol. 3. p 6). Nurse Ream testified that she first became aware that the medication was not there when the supply of medications arrived on October 13, 2019 (Trial Tr. Vol. 3. p. 7). As per protocol at Pride Group, Nurse Ream reported that the medication was missing to the day shift nurse so that she could contact the pharmacy (Trial Tr. Vol. 3 p 9). She then marked “NA” on Joe Lenz’ medication administration record (MAR) on October 15 and 16, 2015, as it was still not there (Trial Tr. vol. 3 p. 9-10) (Appx. p.10). On October 17, 2015, the initials AW for Alex Westergard, a med passer appear on Joe Lenz’ MAR (Trial Tr. Vol 3 p 40) (Appx. p. 10) however, Mr. Westergard did not testify and there was not testimony regarding whether the Clozapine was actually present.

On October 18, 2015, Mr. Buman was working. He testified that he initialed Joe Lenz' MAR indicating that he administered the Clozapine, but he was in automatic mode with his initials, and the Clozapine was not really present (Trial Tr. Vol 3, pp 40-41). Buman testified that Joe Lenz asked him why he hadn't been receiving it and Buman searched to see if the medication had been misplaced, but did not find it (Trial Tr. Vol. 3, p.43).

Buman testified that he checked the records available to him at the time and talked to Joe Lenz. He believed that the medication must have been discontinued, but no one marked the chart, so he made the notation DC'd on Mr. Lenz' MAR (Trial Tr. Vol. 3, p. 42). Chelsea Clay, administrator of the Pride Group Facility testified that DC would tell the other medicine passers not to administer the drug, but it wouldn't impact the pharmacy delivering the drug because the pharmacy wouldn't see the MAR after they had printed it and delivered it to the facility (Trial Tr. Vol 1 p. 88, Vol. 2 p.. 28). There was no evidence presented as to whether or not the pharmacy had delivered Clozapine for Joe Lenz after the DC was placed on the MAR.

On October 27, 2016, Joe Lenz had a psychotic episode. He believed the building was on fire and ran out into the night. Law enforcement

arrived to assist, and Joe Lenz was taken to the hospital (Trial Tr. Vol 1, pp 72-78). Albert Okine, Joe Lenz' psychiatric physicians assistant, testified over objection by the defense, that he believed that Joe not receiving his Clozapine led to the psychotic break on October 27,2016 (Trial Tr. Vol 2 p 146).

The State charged Buman with wanton neglect of a resident of a healthcare facility causing serious injury on July 9, 2018.

During trial, Exhibit 15 was admitted over objection by the defense. Exhibit 15 is a portion of the Iowa Administrative Code for the practice of nursing by registered nurses. It includes a number of duties from supervising others to delegating tasks to determining nursing care and executing the regime set out by the physician. (Appx. p. 13). The court also gave an instruction that included a portion of Exhibit 15 along with limiting language on how that instruction could be used. (Appx. p.15).

After deliberation, the jury found the defendant guilty of the lesser included offense of Wanton Neglect of a Resident of a Healthcare Facility, thus finding that any actions by Buman did not cause serious injury to Joe Lenz (Appx. p. 16).

ARGUMENT

The Court of Appeals Correctly Found that Instruction 17 in Combination with Exhibit 15 Could Confuse the Jury or Lead it to Misapply the Law on Whether Buman Knowingly Acted in a Manner Likely to Injure the Resident.

Standard of Review:

In the Application for Further Review, the State argues that the jury instructions given did not prejudice Mr. Buman, therefore the conviction should not have been reversed and remanded (Application for Further Review p. 11). This argument seems to change the standard of review for errors in jury instructions requiring the proof of actual prejudice when “Errors in jury instructions are presumed prejudicial unless the record affirmatively establishes that there was no prejudice” *State v Robinson*, 927 N.W.2d 672 (Iowa App 2019) *citing State v Murray*, 796 N.W.2d 907, 908 (Iowa 2011)(*quoting State v Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)). This court has further stated: “[W]e review challenged to jury instructions for correction of errors of law.” *Alcala v Marriott Int’l, Inc.* 880 N.W. 2d 699, 707 (Iowa 2016) (quoting *Anderson v State*, 692 N.W.2d 360, 363 (Iowa 2005)). Erroneous jury instructions warrant “reversal when prejudice results.” *State v Coleman*, 907 N.W.2d 124, 138 (Iowa 2018), Prejudice

results when jury instructions mislead the jury or materially misstate the law. *Id.* We also “review refusals to give a requested jury instruction for correction of errors at law.” *Alcala*, 880 N.W.2d at 707. In doing so, we consider the jury instructions as a whole rather than in isolation to determine whether they correctly state the law, *State v Harrison*, 914 N.W.2d 178, 188 (Iowa 2018) ; *State v Benson*, 919 N.W.2d 237, 241-242 (Iowa 2018).

Discussion:

The defendant in this case was charged with Wanton Neglect of a Resident of a Healthcare Facility. The elements of the offense are: 1) that the defendant knowingly acted in a manner likely to be injurious to the physical or mental welfare of the resident, 2) resulting in serious injury. Iowa Code Sections 726.7(1) and 726.7(2). The jury verdict did not find that serious injury resulted and the defendant was convicted of the lesser included offense of wanton neglect of a resident of a healthcare facility.

In this case, the State introduced the Iowa Administrative Code’s standard for registered nurses in the State of Iowa as Exhibit 15. It was the combination of this exhibit with Jury Instruction 17, which included a portion of Exhibit 15 but no real instructions on how to use it, that the court

of appeals found was misleading and confusing.

Exhibit 15 is Iowa Administrative Code (IAC) 655-6.2(5). The first sentence of the exhibit states “The registered nurse shall recognize and understand the legal implications of accountability. Accountability includes but need not be limited to the following;...” (Appx. p. 12). Clearly, this sentence seems to say that whatever follows makes the person who may not have adhered perfectly to the standard legally accountable. The exhibit includes such things as performing or supervising activities, assigning and supervising persons, using professional judgment, delegating tasks etc. None of these were at issue in this trial, but they were included in Exhibit 15.

IAC 655-6.2(5)(e) explains executing the regimen prescribed by a physician and sets out that if the regimen isn't or can't be followed, a nurse must timely notify the physician who prescribed the medical regimen and document the medical record that the physician was notified and the reasons that the regimen wasn't carried out. This was, to a large extent, the basis of the entire case presented by the state and was used not to show that the defendant knowingly acted in a manner likely to be injurious to a resident, but rather to say that he didn't follow this standard as written, therefore he is

guilty. In effect this exhibit changed the law of the case and made it a strict liability offense, which it is not.

Mr. Buman made a clerical notation on the nurse's medication distribution sheet. He did not discontinue a medication. He did not notify the pharmacy and ask them to stop sending it, he did not change a doctor's order to eliminate the medication. While most of the medications for Mr. Lenz were there, the Clozapine was not. Buman couldn't find it. He noticed that it had not been there for a number of days, assumed it had been discontinued and wrote "DC'd" on the (MAR). (Trial Tr. Vol 3 pp. 41-42).

Nurse Ream testified the Clozapine wasn't there when she changed over the new medication from the pharmacy several days before the notation was made on the MAR by Buman. She followed the protocols of the facility and notified the day nurse so the day nurse would follow up. (Trial Tr.3 Vol 3 pp.8-9). It is unknown if the day nurse followed up after she received this information. Nurse Ream's actions were the protocols of the facility.

When questioned by the prosecutor whether Buman told the director of nursing that the medication wasn't available or had been discontinued, Buman stated that he did tell her that, and when questioned about whether

he told the administrator that the medication wasn't present so he entered discontinued, he testified that he did tell her that as well (Trial Tr. Vol 3, p. 62 lines 13-25).

Both Buman and Nurse Ream believed they had followed the protocols of the Pride Group Residential Facility. These protocols are different from Exhibit 15 but neither the Pride Group protocols nor the IAC standard in Exhibit 15 meets the standard of knowingly acting in a manner likely to be injurious because they have no mens rea requirement. By admitting Exhibit 15, the jury was presented with a document that stated there is legal accountability for not following the IAC standards which could easily lead them to believe if you don't follow the standards you are guilty of this offense. Other than the specific portion of Exhibit 15 that was contained in Instruction 17, there was no instruction to the jury on how to use the Administrative Code Sections contained in Exhibit 15.

The Iowa Administrative Code does not trump the elements of an offense in a criminal case. Because it was possible to violate the standards on Exhibit 15 without knowingly acting in a manner likely to be injurious to a resident of a residential facility, the exhibit itself is misleading, irrelevant and gave the jury a different standard to follow than the elements of the

offense as set out in the jury instructions.

The district court recognized the potential misuse of a portion of the Iowa Administrative Code Section contained in Exhibit 15. During the jury instruction conference, there was a discussion of Instruction 17 which included part of the Administrative Code standard relating to a nurse's responsibility in carrying out a physician's treatment regimen. The Court stated, "...Otherwise, the Court believes it is important to the jury to avoid confusion and potential prejudice to Mr. Buman to add that further explanation so that the jury understands that the state is required to prove more than simply that Mr. Buman did something in violation of this standard in order for it to raise to the level of the criminal act that is charged" (Trial Tr. Vol. 3 p 72 lines 13-20)

While the Court correctly saw the issue and intended to prevent confusion, the instruction doesn't really clear up the confusion at all.

Instruction 17 states:

In accordance with the standards in 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 ¹ (Appx. p.15)

So, Exhibit 15 tells them that there is legal accountability for not following a whole host of standards. Instruction 17 highlights one of the standards in evidence and while it says a violation of this standard in and of itself is not a criminal act, the jury can use it to determine if the State has proven the elements. What Jury Instruction 17 does not do is specify which of the elements this goes to, it does not explain that although Exhibit 15 says there is legal accountability for not following the standards , that is not criminal accountability in this case without having all the elements of the offense proven and it doesn't explain whether the nurse must follow only the standard or if the fact that the protocol of the Pride Group Facility (the night nurse notifying the day nurse)(Trial Tr. Vol 3 p. 9) was followed is sufficient to meet the standard.

The combination of Exhibit 15 and Instruction 17 is confusing and creates more questions than it answers. Instruction 17 is part a statement of standards and partially a cautionary instruction. While the courts have said, "Only in extreme cases will a cautionary instruction be deemed insufficient

¹Instruction 15 sets out the elements of the offense.

to remove the danger of prejudice”, *State v Conner*, 314 N.W.2d 427,429 (Iowa 1982) citing *State v Belieu*, 288 N.W. 2d 895, 901 (Iowa 1980), this is one of those cases.

Much of the testimony in this trial focused on the serious injury the state alleged occurred after Mr. Lenz did not receive his medication. The alleged injury included a psychotic break (Trial Tr. Vol I p. 90) and the expert testimony was that this was indeed an injury believed to be caused by Mr. Lenz not receiving his medication (Trial Tr. Vol II p. 100). The jury did not find that a serious injury resulted from Mr. Buman’s actions (Appx. p. 16). For the jury to find that there was no serious injury in this case, but to find that Mr. Buman knowing acted in a manner likely to be injurious only makes sense if the jury thought a violation of the standard was enough to convict the defendant of wanton neglect.

The court of appeals was correct in finding that in combination Exhibit 15 and Jury Instruction 17 could confuse the jury or lead it to misapply the law on whether Buman knowingly acted in a manner likely to injure the resident. Further review should be denied and procedendo issued.

CONCLUSION

For the reasons set forth above, the Defendant, Michael Buman respectfully requests that the Appellee's Request for Further Review be Denied and Procedendo be issued.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because it contains 3147 words, excluding the parts of the brief exempted by Iowa R. App. P 6.903(1)(g)(1) or
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Word Perfect 2020 in (Times New Roman 14 point)

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