COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2491-CR **Cir. Ct. No. 2001CF5641**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES S. POEHLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. James Poehlman appeals[1] from a judgment convicting him of two drug-related crimes: first-degree reckless homicide by delivering a Schedule II controlled substance (Oxycodone) and delivering a Schedule IV controlled substance (Diazepam). Poehlman argues on appeal that the circuit court's modified jury instruction on the first-degree reckless homicide charge erroneously interpreted the charging statute. Because we conclude that the circuit court's instruction was not in error, we affirm the circuit court's judgment.

¶2 The State submitted evidence to the jury indicating that Poehlman gave Diazepam, also known as Valium, and Oxycodone to Jeffrey Hough who died shortly after consuming both substances. Dr. Jeffrey Jentzen, Medical Examiner for Milwaukee County, testified that Hough died as the result of a "mixed drug overdose." Dr. Jentzen testified that the amount of Valium found in Hough's toxicology results was not at lethal levels. However, Dr. Jentzen testified that the amount of Oxycodone was "significant" and "may be enough to have caused death in and of itself." Dr. Jentzen went on to explain that "[I]t's our experience in dealing with these drugs … that the concentrations of the Oxycodone in this case fits in, consistent, with what we call mixed drug overdoses or the cause of – or Oxycodone being used in connection with another drug." Dr. Jentzen concluded his testimony by stating, "It would be my opinion that the Oxycodone was a substantial factor in causing the death."

[1] The State argues that the court lacks jurisdiction over the appeal because it was untimely filed. This court's records reflect that we issued an order extending the deadline for Poehlman to file his notice of appeal or postconviction motion through October 29, 2004, pursuant to WIS. STAT. RULE 809.82(2)(b). Poehlman timely filed his notice of appeal on September 20, 2004. Accordingly, we have jurisdiction over the appeal.

¶3 The relevant portion of WIS. STAT. § 940.02(2)(a)2 defines first-degree reckless homicide as follows:

> (2) Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:
>
> (a) By manufacture, distribution or delivery, in violation of s. 961.41 of a controlled substance included in schedule I or II under ch. 961 . . . if another human being uses the controlled substance . . . and dies as a result of that use. This paragraph applies:
>
> . . . .
>
> 2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.

¶4 The circuit court gave the following instruction on first-degree reckless homicide:

> First degree reckless homicide, as defined in Section 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery of a controlled substance in violation of Section 961.41, which another human being uses and dies as a result of that use.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present:
>
> . . . .
>
> The evidence in this case must establish that Jeffrey Hough used the Oxycodone delivered and died as a result of that use. This requires that the relation of cause and effect exists between the death of Jeffrey Hough and the use of the Oxycodone. The death may result from using the Oxycodone by itself or using it together with any other substance. Before the relation of cause and effect can be found to exist, it must appear that the use of the Oxycodone was a substantial factor in producing the death.

The jury convicted Poehlman on the homicide count as well as on the possession count.

¶5 On appeal, Poehlman argues that language inserted by the circuit court into the instruction, "The death may result from using the Oxycodone by itself or using it together with any other substance," materially misstated the statute under which Poehlman was charged. Poehlman contends that application of a plain reading of the statute required proof that Oxycodone, "the controlled substance in question" had to "be mixed or combined with the Diazepam itself" when Hough consumed them for the statute to apply. We disagree.

¶6 The standard of review applicable to the question presented by this appeal is well settled:

> A trial court has broad discretion in instructing a jury, but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). Whether a crime charged was a natural and probable consequence of the crime with which a defendant allegedly assisted is a factual issue for the jury. *State v. Ivy*, 119 Wis. 2d 591, 601, 350 N.W.2d 622 (1984). Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review. *See State v. Pettit*, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992).
>
> Whether a jury instruction violated a defendant's right to due process is a question of law subject to our *de novo* review. *Id.* at 639. In reviewing a claimed jury instruction error, we do not review the challenged words or phrases in isolation. *Id.* at 637. Rather, jury instructions "must be viewed in the context of the overall charge." *Id.*

> Relief is not warranted, however, unless the court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury" in the manner asserted by the challenger to the instruction. *Id*. at 638.

State v. Groth, 2002 WI App 299, ¶¶8-9, 258 Wis. 2d 889, 655 N.W.2d 163. If an appellate court finds error in a jury instruction, the court reviews the error under harmless-error standards. ***State v. Harvey***, 2002 WI 93, ¶¶45, 48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189.

¶7 This case involves a Schedule II drug. The statute does not require the concurrent administration of a mixture of Schedule II drugs or a Schedule II drug and a cutting agent for it to apply. Rather, it requires that death result as a consequence of being given a Schedule II controlled substance irrespective of "whether or not" the controlled substance was mixed or not mixed with other agents.

¶8 Here, Poehlman gave Hough Oxycodone, which Hough consumed along with Valium. The medical evidence showed that Hough died as a result of his consecutive consumption of both drugs and that Hough's consumption of the Schedule II drug, Oxycodone, was a "substantial factor" causing his death.

¶9 We conclude, therefore, that the circuit court's modification of the standard jury instructions tracked the statute. The instruction correctly reflected that the statute does not require that two drugs be mixed together but, rather, that criminal liability attaches if the Schedule I or Schedule II drug used alone or separately in sequence with any other substance results in death.

¶10 Given the record before the jury, we conclude that the circuit court was correct in modifying the instruction to assist the jury in making a reasonable

analysis of the evidence. *See* ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 487 N.W.2d 67 (1992).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.