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DISTRICT III

November 14, 2023

To:

Hon. Mitchell J. Metropulos
Circuit Court Judge
Electronic Notice

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
Electronic Notice

Lisa E.F. Kumfer
Electronic Notice

Steven Roy
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1744-CR State of Wisconsin v. Kyle M. Chay (L. C. No. 2019CF954)

Before Stark, P.J., Hruz and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kyle Chay appeals a judgment of conviction, entered following a jury trial, for first-degree reckless homicide by delivery of a controlled substance, contrary to WIS. STAT. § 940.02(2)(a) (2021-22),[1] as a repeater. Contrary to binding Wisconsin precedent, Chay asks this court to "require but-for causation to convict defendants for drug overdose homicides." Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Just days after being released from prison, Kevin[2] was found unresponsive in a gas station bathroom. Efforts to revive him were unsuccessful, and he was pronounced dead at the scene. Medical personnel located various items associated with intravenous drug use on Kevin's person, along with eight tinfoil packets or bindles. Chemical testing was performed on two of the eight bindles and revealed the presence of heroin, fentanyl, and cyclopropylfentanyl. Kevin's cause of death was initially listed as fentanyl toxicity. However, additional testing later revealed that in addition to fentanyl, Kevin's blood contained gabapentin, morphine, naloxone, sertraline, 6-monoacetylmorphine, and codeine at the time of his death. The medical examiner therefore changed Kevin's cause of death to mixed drug toxicity.

Phone records showed that Chay had arranged to sell drugs to Kevin on the day of Kevin's death. Text messages between the two men indicated that Chay knew that the substance he sold Kevin was strong, and he warned Kevin to "[b]e careful."

The State charged Chay with first-degree reckless homicide by delivery of a controlled substance, contrary to WIS. STAT. § 940.02(2)(a), as a repeater. The case proceeded to a five-day jury trial. To convict Chay of the crime charged, the State needed to prove the following elements: (1) Chay delivered a substance; (2) the substance contained fentanyl, which is a controlled substance; (3) Chay knew or believed that the substance he delivered was or contained a controlled substance; (4) Kevin used the substance that Chay delivered; and (5) Kevin died as a result of his use of the substance. *See* § 940.02(2)(a); *see also* WIS JI—CRIMINAL 1021 (2023).

[2] Although not required by WIS. STAT. RULE 809.86, we refer to the homicide victim in this case using a pseudonym to protect his family's privacy.

At the time of Chay's trial, the pattern jury instruction applicable to violations of WIS. STAT. § 940.02(2)(a) stated, with respect to the causation element: "This requires that use of the controlled substance was a substantial factor in causing the death." *See* WIS JI—CRIMINAL 1021 (2011). The State asked the circuit court to add the following language regarding causation to the pattern instruction:

> A substantial factor need not be the sole or primary factor causing death.
>
> There may be more than one cause of death. The use of one substance may produce it, or the use of two or more substances might jointly produce it.
>
> The death must result from either the use of the controlled substance by itself, or with any compound, mixture, diluent, or other substance mixed or combined with the controlled substance.

(Formatting altered.)

Chay objected to the State's proposed amendment to the pattern jury instruction. In addition, based on the United States Supreme Court's decision in ***Burrage v. United States***, 571 U.S. 204 (2014), Chay asked the circuit court to amend the pattern jury instruction's language regarding causation to remove the statement that use of the controlled substance must have been a "substantial factor" in causing the victim's death and to instead state:

> 4. (Name of victim) used the substance alleged to have been delivered by the defendant and died as a result of that use.
>
> **This requires that (Name of victim) would not have died but-for his use of the delivered controlled substance.**

The circuit court ultimately instructed the jury consistent with the State's requested language on causation. The jury returned a guilty verdict, and the court sentenced Chay to nine years' initial confinement followed by five years' extended supervision.

Chay now appeals, arguing that this court should "distinguish prior cases" and "require but-for causation to convict defendants for drug overdose homicides." Although the precise contours of Chay's argument are not entirely clear, it appears Chay is challenging the circuit court's decision to instruct the jury that, in order to prove the causation element of the first-degree reckless homicide charge, the State needed to prove that Kevin's use of a controlled substance delivered by Chay was a "substantial factor" in causing Kevin's death.

A circuit court has broad discretion in instructing the jury and properly exercises its discretion when the instructions correctly state the law and comport with the facts of the case. ***State v. Langlois***, 2018 WI 73, ¶34, 382 Wis. 2d 414, 913 N.W.2d 812. Whether a particular instruction correctly states the law is a question of law that we review independently. ***Id.***

Here, the circuit court's instruction on causation accurately stated the law. As relevant to this case, a person is guilty of first-degree reckless homicide under WIS. STAT. § 940.02(2)(a) when he or she "causes the death of another human being" under the following circumstances: by delivery of a controlled substance "if another human being uses the controlled substance … and dies as a result of that use." The Wisconsin Supreme Court has long held that a person's conduct causes a particular result when his or her conduct is a substantial factor in producing that result. *See, e.g.*, ***Lang v. Baumann***, 213 Wis. 258, 264, 251 N.W. 461 (1933).

More specifically, the Wisconsin Supreme Court has expressly held, in the criminal law context, that "[a]n actor causes death if his or her conduct is a 'substantial factor' in bringing about that result." ***State v. Oimen***, 184 Wis. 2d 423, 435, 516 N.W.2d 399 (1994) (citation omitted); *see also* ***Cranmore v. State***, 85 Wis. 2d 722, 775, 271 N.W.2d 402 (Ct. App. 1978) ("The state is only required to prove beyond a reasonable doubt that the defendants' acts were 'a

substantial factor in producing the death.'" (citation omitted)). More recently, in 2018, the supreme court reiterated in a case where the defendant was charged with homicide by negligent handling of a dangerous weapon that the term "cause" means that "the defendant's act was a substantial factor in producing the death." ***Langlois***, 382 Wis. 2d 414, ¶61 (citation omitted). This court cannot overrule or disregard these Wisconsin Supreme Court decisions and adopt a new but-for causation standard for purposes of WIS. STAT. § 940.02(2)(a). *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Chay argues that he is not asking us to overrule any prior Wisconsin Supreme Court decisions. He asserts that our supreme court has never addressed the specific issue of whether the causation element in WIS. STAT. § 940.02(2)(a) requires a defendant's conduct to be a but-for cause of the victim's death or merely a substantial factor in causing the victim's death. Chay therefore argues that, in order to adopt a but-for causation standard for violations of § 940.02(2)(a), this court need not overrule the supreme court cases cited above but can instead distinguish those cases on the grounds that they did not specifically address § 940.02(2)(a).

We are not persuaded. Fundamentally, Chay is asking us to disregard established Wisconsin precedent holding that causation in the criminal law context requires proof that the defendant's conduct was a substantial factor in causing a particular result. Chay cites no language from the supreme court's prior decisions suggesting that the substantial factor standard applies only to certain crimes, rather than applying generally to all crimes in this state. If the supreme court believes that the substantial factor standard is no longer appropriate—either generally or in the specific context at issue here—then the supreme court may alter the

applicable standard. This court, however, lacks the authority to do so. *See* ***Cook***, 208 Wis. 2d at 189.

Chay also argues that adopting a but-for standard of causation for purposes of WIS. STAT. § 940.02(2)(a) would be consistent with the United States Supreme Court's decision in ***Burrage***. There, the Court interpreted a federal sentencing statute that permits an enhanced sentence for a defendant convicted of distributing a controlled substance when "death or serious bodily injury results from" the use of that substance. ***Burrage***, 571 U.S. at 209 (citation omitted). In that context, the Court concluded that the statutory phrase "results from" required but-for causation. ***Id.*** at 210-15.

The Supreme Court's decision in ***Burrage*** does not control our decision in this case. "Wisconsin courts are not bound by decisions of the United States Supreme Court when federal law does not govern the dispute." ***State v. Gary M.B.***, 2004 WI 33, ¶17, 270 Wis. 2d 62, 676 N.W.2d 475. This case presents an issue of state, not federal, law.

Furthermore, while "[d]ecisions by the United States Supreme Court are persuasive in connection with the interpretation of Wisconsin statutes when the federal statute interpreted by the United States Supreme Court is similar to the Wisconsin statute," ***Bowen v. LIRC***, 2007 WI App 45, ¶10 n.4, 299 Wis. 2d 800, 730 N.W.2d 164, in this case, binding Wisconsin precedent requires us to conclude that the substantial factor standard applies to the causation element in WIS. STAT. § 940.02(2)(a). In addition, we note that the federal statute at issue in ***Burrage*** used the phrase "results from," whereas § 940.02(2)(a) requires the State to prove that the victim died "as *a result* of" the use of a controlled substance. (Emphasis added.) We agree with the State that the statutory phrase "as a result of" is broader than the phrase "results from" and indicates

that but-for causation is not necessary. This conclusion is buttressed by the fact that the legislature expressly stated that § 940.02(2)(a) applies "[w]hether the human being dies as a result of using the controlled substance … by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance or controlled substance analog" and "[w]hether or not the controlled substance … is mixed or combined with any compound, mixture, diluent or other substance after the violation of [WIS. STAT. §] 961.41 occurs." *See* § 940.02(2)(a)1.-2.

For these reasons, we do not find the Supreme Court's decision in ***Burrage*** persuasive regarding the standard of causation required under WIS. STAT. § 940.02(2)(a). The circuit court's instruction on causation accurately stated the law, and the court did not erroneously exercise its discretion when instructing the jury.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals