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DISTRICT II

February 8, 2017

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Racine, WI 53403

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

2016AP157-CR State of Wisconsin v. Kristie L. Fitzgerald (L.C. #2013CF1130)
2016AP158-CR State of Wisconsin v. Kristie L. Fitzgerald (L.C. #2013CF1671)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

A jury found Kristie L. Fitzgerald guilty of second-degree reckless homicide after the person to whom she supplied a Schedule 3 narcotic was found dead. Fitzgerald appeals from amended judgments convicting her of that charge, of possession with intent to deliver narcotics, and of three counts of felony bail jumping and from the order denying postconviction relief. She

argues solely that the evidence was insufficient to support her convictions.[1] Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21(2015-16).[2] We affirm the judgments and order.

Whether the evidence was sufficient to support the verdict is a question of law that we review de novo. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410.

> When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State. If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction.

State v. Long, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557 (citations omitted). "We will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty." ***Id.*** We may not overturn the verdict if there is any possibility that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Fitzgerald does not dispute that in the days before the death of the fifty-three-year-old victim, an acknowledged drug abuser, she provided him a "strip" of the Schedule 3 opiate Suboxone, the trade name of buprenorphine. The victim's mother testified that for a day or so before her son died, he had not been feeling well and had a "hacking" cough."

[1] Fitzgerald's appellate brief also sought relief from the imposition of multiple DNA surcharges. She filed postappellate briefing motions in the trial court, however, and was granted the requested relief, as reflected in the amended judgments of conviction. Accordingly, we do not address that issue.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Dr. Brian Linert, the medical examiner (M.E.) testifying for the State, testified that the victim's blood revealed the presence of buprenorphine and its metabolite, norbuprenorphine; that, besides being addicting, the substances can decrease one's capacity to breathe; that the combined levels of the substances fell within a range that "might result in someone's death," as it "would push him above the strictly therapeutic range"; that the victim's heart was enlarged, indicating high blood pressure; and that cardiomegaly and hypertension are chronic conditions. While acknowledging he could not state the cause of death with one hundred percent certainty, Linert opined that the victim's long-standing poor health without serious incident pointed more to an acute lethal event, specifically, in his "reasonable medical opinion," acute buprenorphine intoxication. Linert's more seasoned colleagues concurred with that conclusion.

Dr. Zelda Okia, the defense M.E., disagreed to the extent that she would have tested the victim's urine and microscopically examined his organs before opining on the cause of death. She also testified that the substances in the victim's blood measured at a therapeutic level and that, given his history of drug use, one Suboxone strip should not have caused his death. Both M.E.s agreed that buprenorphine poses the risk of death if not taken under a physician's supervision. The victim did not have a buprenorphine prescription.

The jury found Fitzgerald guilty. The trial court denied both her motion for judgment notwithstanding the verdict (JNOV) and her postconviction motion arguing that the JNOV denial was error. This appeal followed.

Fitzgerald argues that, coupled with Okia's testimony, no reasonable jury could have found guilt beyond a reasonable doubt based on Linert's opinion that the drug and its metabolite only "might" have caused the victim's death. If Fitzgerald is contending that Linert's testimony

was not given to the required degree of certitude, she has forfeited her right to review of that claim by not objecting at trial. *See* ***State v. Wind***, 60 Wis. 2d 267, 273, 208 N.W.2d 357 (1973).

More to the point, when faced with a record of historical facts that supports more than one inference, this court must accept and follow the inference the trier of fact drew, unless the evidence on which that inference was based is incredible as a matter of law. ***Poellinger***, 153 Wis. 2d at 506-07. It is for the jury to determine the weight, credibility, and reliability of expert testimony. ***State v. Zanelli***, 223 Wis. 2d 545, 554, 589 N.W.2d 687 (Ct. App. 1998).

> No particular words of art are necessary to express the degree of medical certainty required to remove an expert opinion from the realm of mere possibility or conjecture. The test to be applied is whether a reasonable interpretation of the expert's words demonstrate that he was expressing his expert medical opinion. This court has held expressions such as "I felt," "I feel," "I believe," "liable," "likely," and "probably" to be sufficient.

Drexler v. All Am. Life & Cas. Co., 72 Wis. 2d 420, 432-33, 241 N.W.2d 401 (1976) (footnote omitted).

We conclude the evidence supports a finding that acute buprenorphine intoxication caused the victim's death and, accordingly, that there was sufficient evidence to support Fitzgerald's homicide conviction. Therefore,

IT IS ORDERED that the judgments and the order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals