

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2023 Session

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. CHARLES HOLLON

**Appeal from the Circuit Court for Marion County
No. 11394A Thomas W. Graham, Judge**

No. M2022-00815-CCA-R9-CD

The Defendant, Charles Hollon, has been charged with second degree murder through the delivery of fentanyl pursuant to Tennessee Code Annotated section 39-13-210(a)(3). In this interlocutory appeal, the issue is whether the State must prove beyond a reasonable doubt that the Defendant knew the substance being unlawfully distributed or delivered was fentanyl or carfentanil. In a proposed jury instruction, the trial court held that it did, but we respectfully disagree. Instead, we hold that the State may satisfy this element by proving beyond a reasonable doubt that (i) the defendant disregarded a substantial and unjustifiable risk that the substance delivered to the user was fentanyl or carfentanil; and (ii) the defendant's disregard of that risk constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint. Accordingly, we respectfully vacate the trial court's order and remand the case for further proceedings.

**Tenn. R. App. 9 Interlocutory Appeal;
Interlocutory Order of the Circuit Court Vacated; Case Remanded**

TOM GREENHOLTZ, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Courtney C. Lynch, District Attorney General; and David O. McGovern, Assistant District Attorney General, for the appellant, State of Tennessee.

Samuel F. Hudson, Dunlap, Tennessee, for the appellee, Charles Hollon.

OPINION

FACTUAL BACKGROUND

On April 5, 2021, the Marion County Grand Jury charged the Defendant, Charles Hollon, with the second degree murder of Kelsey Lynn Green by unlawful distribution or delivery¹ of fentanyl or carfentanil. *See* Tenn. Code Ann. § 39-13-210(a)(3) (Supp. 2019). The day before the trial, the State requested that the trial court rule on the culpable mental state required for the offense. The Defendant argued that the statute required the State to prove beyond a reasonable doubt that the Defendant knew the substance he delivered to the victim was fentanyl. The State disagreed, arguing that the statute required only that the Defendant act recklessly in distributing or delivering the substance.

The trial court continued the trial date, and on April 21, 2022, it filed a written order setting forth a proposed jury instruction. The trial court's proposed instruction generally followed the Tennessee Pattern Jury Instruction for the indicted offense. *See* T.P.I.–Crim. 7.05(a). However, consistent with the Defendant's argument, the court's proposed instruction contained an additional paragraph not found in the pattern instruction, which is indicated here in bolded text:

Second Degree Murder

Any person who commits second degree murder is guilty of a crime.

For you to find the Defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) that the Defendant unlawfully distributed [*fentanyl*] [*carfentanil*] [*in combination with (name drug)*], [*a Schedule __ controlled substance*] [*a controlled substance analog*];
- (2) that said drug was the proximate cause of the death of the user; and
- (3) that the Defendant acted either intentionally, knowingly or recklessly.

In addition to the definitions hereinafter set forth for intentionally, knowingly or recklessly, the State must have proven beyond a reasonable doubt from all the evidence in the case that at the time of the alleged delivery of the subject pill to the victim, the Defendant knew the pill contained or could have contained fentanyl.

¹ Unlawful dispensation is not at issue in this appeal.

On May 12, 2022, the State asked the trial court for permission to seek an interlocutory appeal to review this order. The State argued that the applicable mental state “is not directed to knowledge of the substance allegedly delivered,” as the trial court believed, but related only to the “knowledge that the Defendant is delivering the substance.” The State also argued that it would face irreparable injury and would be denied an effective appeal if it could not prove the Defendant’s knowledge as required by the trial court’s proposed instruction. The trial court granted the State’s motion, and we granted permission to seek an interlocutory appeal on August 22, 2022. *See* Tenn. R. App. P. 9.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that “the first question for a reviewing court on any issue is ‘what is the appropriate standard of review?’” *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). As noted, the issue is whether the trial court’s proposed jury instruction correctly requires the State to prove beyond a reasonable doubt that the Defendant knew the substance being unlawfully distributed or delivered was fentanyl or carfentanil pursuant to Tennessee Code Annotated section 39-13-210(a)(3).

“In criminal cases, a defendant has the right to a correct and complete charge of the law.” *State v. Bowman*, 327 S.W.3d 69, 93 (Tenn. Crim. App. 2009). “The material elements of the charged offense should be described and defined in connection with that offense.” *Id.* “The propriety of a jury instruction is a mixed question of law and fact, reviewed de novo with no presumption of correctness.” *Id.*

In reviewing the trial court’s proposed instruction, this Court must carefully examine the statute defining the offense to determine the correct mental state to be applied to the elements. Because this issue requires a legal interpretation of a statute, the issue is one of law that this Court likewise reviews de novo with no presumption of correctness. *State v. Jones*, 589 S.W.3d 747, 756 (Tenn. 2019).

ANALYSIS

In Tennessee, “[t]he power to define criminal offenses and assess punishments for crimes is vested in the legislature.” *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017). In general, our legislature has chosen to define criminal offenses through the combination of two components: a voluntary act and a culpable mental state. Tenn. Code Ann. § 39-11-101(2) (2018); *State v. Turner*, 953 S.W.2d 213, 216 (Tenn. Crim. App. 1996) (“However, in general, a minimum requirement for criminal liability is the performance of a voluntary act.”). As to the culpable mental state, or mens rea, our law provides that “[a] person commits an offense who acts intentionally, knowingly, recklessly or with criminal

negligence, *as the definition of the offense requires*, with respect to each element of the offense.” Tenn. Code Ann. § 39-11-301(a)(1) (2018) (emphasis added).

The General Assembly has explained that “a culpable mental state is required . . . unless the definition of an offense plainly dispenses with a mental element,” *id.* § 39-11-301(b), as it does for the offense of driving under the influence as one example, *Turner*, 953 S.W.2d at 215. However, the General Assembly has also made it clear that, if the definition of the offense does not plainly dispense with a mental element, the offense impliedly carries a culpable mental state consisting of “intent, knowledge or recklessness.” *Id.* § 39-11-301(b), (c).

Tennessee Code Annotated section 39-13-210(a)(3) (Supp. 2019) defines the offense of second degree murder, in relevant part, as being

[a] killing of another by unlawful distribution or unlawful delivery or unlawful dispensation of fentanyl or carfentanil, when those substances alone, or in combination with any substance scheduled as a controlled substance by the Tennessee Drug Control Act of 1989, compiled in chapter 17, part 4 of this title and in title 53, chapter 11, parts 3 and 4, including controlled substance analogs, is the proximate cause of the death of the user.

Tennessee Code Annotated 39-13-210(a)(3) neither expressly requires, nor plainly dispenses with, the requirement for a culpable mental state. As such, “intent, knowledge, or recklessness” suffices to establish the necessary culpable mental state. Tenn. Code Ann. § 39-11-301(c). Indeed, we have reached this same conclusion concerning the substantially identical crime in section 39-13-210(a)(2) prohibiting the “killing of another which results from the unlawful distribution of any Schedule I or Schedule II drug when such drug is the proximate cause of the death of the user.” *Canter v. State*, No. E2003-00654-CCA-R3-PC, 2004 WL 626717, at *8 (Tenn. Crim. App. Mar. 30, 2004); *accord* Tenn. Op. Att’y Gen. No. 14-72 (July 23, 2014) (“In the absence of similar language defining the elements of second-degree murder under § 39-13-210(a)(2), the mere omission of a listed mental state for subdivision (a)(2) offenses does not signify an intention to dispense with a mental-state requirement. . . . Therefore, intent, knowledge, or recklessness suffice to establish the culpable mental state for second-degree murder under § 39-13-210(a)(2).”).

However, to acknowledge that the statute requires, at a minimum, proof of a recklessness mental state is not to say *how* that requirement applies. In our criminal code, the applicable mens rea “is defined with reference to two or three of the following possible conduct elements: (1) nature of defendant’s conduct, (2) circumstances surrounding the defendant’s conduct, and (3) result of the defendant’s conduct.” *See State v. Page*, 81

S.W.3d 781, 787 (Tenn. Crim. App. 2002) (citing Tenn. Code Ann. § 39-11-302). As such, a culpable mental state may apply differently depending on the type of conduct element at issue. *See State v. Dupree*, No. W1999-01019-CCA-R3-CD, 2001 WL 91794, at *7 (Tenn. Crim. App. Jan. 30, 2001) (“Since a crime may consist of more than one ‘conduct element,’ there may be different mens rea requirements as to the different ‘conduct elements’ that constitute the crime, even if the required culpability is the same[.]”).

As can be seen from the plain language of Tenn. Code Ann. § 39-13-210(a)(3), the offense of second degree murder through the delivery of fentanyl has three elements:

- that the defendant unlawfully delivered a substance to a user; and
- that the substance delivered to the user was fentanyl or carfentanil; and
- that the fentanyl or carfentanil, either alone or with other controlled substances or controlled substance analogues, was the proximate cause of the user’s death.

The second element, which is at issue in this case, is related to the circumstances surrounding the defendant’s conduct, as it describes the situation relating to the defendant’s culpability. *See Dupree*, 2001 WL 91794, at *6 (defining a “circumstances surrounding the conduct” element as referring to “a situation which relates to the actor’s culpability, e.g., lack of victim’s consent or stolen status of property.”).

When applied to a surrounding circumstances element, the mens rea of recklessness means that “the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist[.]” Tenn. Code Ann. § 39-11-302(c) (2018). As applied to this case, then, a defendant could be held criminally responsible if, among other things, he was “aware of but consciously disregard[ed] a substantial and unjustifiable risk” that the substance he distributed was fentanyl or carfentanil, even if he did not know that the substance was, in fact, fentanyl or carfentanil. In other words, the statute focuses on a defendant’s *awareness* of risks, not on a defendant’s subjective *knowledge* of the circumstances surrounding his or her conduct. As such, even when a defendant subjectively believes that a substance is not fentanyl, the State may satisfy this element by proving beyond a reasonable doubt that

- the defendant disregarded a substantial and unjustifiable *risk* that the substance delivered to the user was fentanyl or carfentanil; and

- the defendant’s disregard of that risk “constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.”

See id. Of course, recklessness is also satisfied if the State proves that the defendant *knew* that the delivered substance was fentanyl as well.² *See* Tenn. Code Ann. § 39-11-301(a)(2); *State v. Clark*, 452 S.W.3d 268, 296 (Tenn. 2014) (recognizing that when “recklessness is a sufficiently culpable mental state to support a conviction,” then “the more-culpable” mental state of knowing “may also support such a conviction.”).

In response, the Defendant’s counsel noted at oral argument that Tennessee Code Annotated section 39-11-210(a)(3) requires an “unlawful” delivery. He posited that a delivery could be “unlawful” only if it also violated Tennessee Code Annotated section 39-17-417(a)(2). The Defendant then reasoned that, because a defendant cannot be convicted of delivering a controlled substance under section 39-17-417 without proof that he or she was aware of the actual substance delivered, *State v. Biles*, No. M2011-02090-CCA-R3-CD, 2012 WL 6200461, at *5 (Tenn. Crim. App. Dec. 12, 2012), this knowledge requirement must also apply to section 39-13-210(a)(3) as well.

For two reasons, we respectfully disagree. First, the term “unlawful” is typically understood as meaning simply “without legal justification.” *See State v. Julian*, No. 03C01-9511-CV-00371, 1997 WL 412539, at *23 (Tenn. Crim. App. July 24, 1997) (“‘Unlawful’ generally means ‘without legal justification,’ yet our supreme court has determined that if a defendant is charged to have committed a crime ‘unlawfully,’ this means that he had no legal justification and that the defendant had some form of intent or knowledge of this fact.”); *Terrell v. State*, 86 Tenn. 523, 8 S.W. 212, 214 (1888) (“‘Unlawfully’ always means without legal justification[.]”); *see also* BLACK’S LAW DICTIONARY (defining “unlawful” as “[n]ot authorized by law; illegal” and “[c]riminally punishable”). As such, unless the term “unlawful” is statutorily defined, the term does not generally create an additional element that must be alleged and proven by the State. *Compare* Tenn. Code Ann. § 39-13-301(2) (defining “unlawful” for purposes of false imprisonment) *with Johnson v. Mills*, No. E2002-02175-CCA-R3-PC, 2003 WL 22438517, at *3 (Tenn. Crim. App. Oct. 28, 2003) (“[W]e are unaware of any authority for the Defendant’s proposition that the term ‘unlawful’ in the child rape statute creates an additional element that must be alleged and proven by the State.”). In this context, the term

² An “intentional” mens rea would not apply, though. Generally, “[w]hen recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly.” Tenn. Code Ann. § 39-11-301(a)(2). However, because the definition of “intentionally” adopted by our legislature does not refer to elements defining the circumstances surrounding a defendant’s conduct, Tenn. Code Ann. § 39-11-302(a) (defining “Intentional[ly]” as applying only to nature- or results-of-conduct elements), only the mentes reae of recklessness and knowledge are applicable as to this particular type of conduct element.

“unlawfully” is not statutorily defined, and as such, we do not interpret the legislature’s use of this undefined term, without more, as impliedly importing knowledge requirements from a separate statute.

Second, in the specific context of section 39-13-210(a)(3), the term “unlawful” modifies only the nature-of-conduct elements of distribution, delivery, and dispensation. Indeed, in purposefully repeating the word “unlawful” immediately before each nature-of-conduct element, the legislature plainly limited the application of this term to those elements alone, thereby criminalizing a defendant’s act of distribution, delivery, or dispensation only when the act was without any legal justification. The term “unlawful” simply does not modify, define, or even speak to, the circumstances surrounding the defendant’s conduct.

We conclude that the trial court’s proposed jury instruction requires a heightened mens rea element that the General Assembly did not include when it enacted Tennessee Code Annotated section 39-13-210(a)(3). Therefore, “[t]aken as a whole, the jury charge [proposed] by the trial court does not provide the clear and distinct exposition of the law required in Tennessee and as such interferes with the right to trial by jury.” *State v. Phipps*, 883 S.W.2d 138, 151 (Tenn. Crim. App. 1994) (citing *State v. McAfee*, 737 S.W.2d 304 (Tenn. Crim. App. 1987)). As such, we respectfully vacate that part of the trial court’s interlocutory order entered on April 21, 2022, which would require the State to prove beyond a reasonable doubt that the Defendant knew that the delivered substance was fentanyl.

CONCLUSION

In summary, we hold that Tennessee Code Annotated section 39-13-210(a)(3) does not require the State to prove that the Defendant knew that the substance being delivered was fentanyl or carfentanil. Instead, the State may satisfy this element by proving beyond a reasonable doubt that (i) the defendant disregarded a substantial and unjustifiable risk that the substance delivered to the user was fentanyl or carfentanil; and (ii) the defendant’s disregard of that risk constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant’s standpoint. Accordingly, we respectfully vacate the trial court’s order entered on April 21, 2022, and we remand this case to the trial court for further proceedings consistent with this opinion.

TOM GREENHOLTZ, JUDGE