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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1033**

State of Minnesota,
Respondent,

vs.

Bryan Joseph Hodapp,
Appellant.

**Filed May 30, 2017
Affirmed; motion denied
Kirk, Judge**

St. Louis County District Court
File No. 69VI-CR-15-161

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Kirk, Judge; and Toussaint,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KIRK, Judge

Appellant Bryan Joseph Hodapp challenges his convictions for third-degree controlled-substance murder and culpable-negligence second-degree manslaughter arguing that the evidence at his trial was insufficient and that the jury instructions constituted plain error. We affirm Hodapp's convictions because (1) the evidence was sufficient to prove beyond a reasonable doubt that Hodapp gave the drugs to the victim K.W. and that the two did not jointly acquire or jointly possess the drugs; (2) the evidence was sufficient to prove beyond a reasonable doubt that Hodapp breached a duty of care owed to K.W. causing her death; and (3) the jury instructions did not constitute plain error. We deny the state's motion to strike portions of Hodapp's reply brief.

FACTS

Hodapp and K.W. met at work in January of 2013, and the two started dating soon after. In late June of 2013, Hodapp moved in with K.W. and her parents. According to Hodapp, he and K.W. became friends with C.G. through work, and the two bought drugs together from C.G. In early July 2013, Hodapp bought some pills from C.G., who explained the pills contained extracted psilocybin, the hallucinogen chemical found in mushrooms.

Hodapp said that K.W. was "bugging" him about trying the pills. Hodapp told K.W. that he did not think she was in the right state of mind to take the pills because she was on a number of medications, including Adderall, an antidepressant and a sleeping pill. Hodapp was concerned that K.W. would have a "bad trip."

Hodapp admitted to investigators that he had the pills for a few weeks after buying them, and he did not try them because he wanted another person to try them first. He explained that neither he nor others he spoke with had ever heard of synthetic mushrooms or mushrooms in pill form. He admitted that there was a possibility there might be something else in the pills.

On August 30, 2013, Hodapp and K.W. attended a wedding rehearsal dinner at Giants Ridge. At the dinner, K.W. asked Hodapp if she could take the pills, which were then in Hodapp's car. Hodapp gave K.W. permission to take the pills in his car with his friend B.Z.

Hodapp accompanied K.W. and B.Z. to his car. He was present because he wanted to make sure K.W. did not ingest too much of the pill. Hodapp made sure that K.W. took only one-third of a pill. Inside Hodapp's car, K.W. broke the pill open and snorted one-third of its contents. After taking the pill's contents, K.W. returned to the party and was having a good time socializing with other people. After dinner, Hodapp noticed that K.W. was acting "weird," so he decided they should leave because he did not know if she was going to have a "good trip."

Around 9:00 p.m., Hodapp and K.W. left the dinner in Hodapp's car. Hodapp began driving home to Duluth because he had to work the next morning. He initially told law enforcement that K.W. screamed and began to have seizures while in the passenger seat. K.W. was twisting around and shuffling in her seat. Hodapp spoke to his friend Z.T. on his mobile phone and told him because K.W. was acting strange he would drive to meet

Z.T. at his friend K.O.'s apartment in Babbitt, which was 25 minutes away, but closer than Duluth.

On the way to Babbitt, K.W. was drooling and continued to twist around in her seat. Hodapp said that she was jumping around from the floorboards to the back seat, mumbling a lot, and tensing up. Hodapp said the last time K.W. actually communicated to him was at the dinner at Giants Ridge. When the two arrived in Babbitt, K.W. was almost in a sleeping state, her eyes were closed, and she was breathing. K.W. was carried from the car up to K.O.'s apartment and placed on a mattress on the floor.

Z.T. and K.O. left the apartment to go to a bar. Hodapp stayed with K.W., who was sweating profusely and mumbling. Hodapp soon called Z.T. and K.O. back to the apartment because he was scared and did not want to be alone with K.W. K.W. vomited on the floor. K.W.'s condition then deteriorated: her lips turned blue and Hodapp gave her CPR for a few minutes. Hodapp and his friends drove K.W. to a hospital in Ely. Hodapp did not call 911 because he was afraid of getting in trouble, as he was on supervised release from prison. Hodapp thought that driving would be faster than calling an ambulance.

After arriving at the hospital in Ely, nurses rushed K.W. to the emergency room after noticing she was not breathing. Initially, Hodapp did not tell the doctor what K.W. ingested out of fear of getting himself or K.W. in trouble. After 20 minutes a doctor told Hodapp he needed to know what K.W. ingested to save her. Hodapp told the doctor that K.W. "might have taken some mushrooms." K.W. died of an overdose at the hospital.

Hodapp gave a number of inconsistent statements concerning the events that led to K.W.'s death. That night at the hospital, shortly before midnight and before K.W.'s death,

Hodapp lied to a sheriff's deputy in a recorded statement, saying that he met K.W. at the Fortune Bay Casino earlier that evening. After K.W.'s death, the deputy searched Hodapp's car and found the pills and some marijuana in Hodapp's glovebox. Hodapp claimed at trial that before K.W.'s death, he went to his vehicle and took the pills, which he claims were in K.W.'s purse, and put them in his glovebox. Hodapp previously stated that it was after K.W.'s death that he went to his car and placed the pills in his glovebox because he did not want to get her in trouble, even though K.W. had by then passed away.

The pills found in the glovebox later tested positive for a synthetic drug called 25I-NBOMe. K.W.'s blood also tested positive for the substance. The medical examiner testified at trial that K.W. died of an overdose of 25I-NBOMe, which, effective August 1, 2013, was a schedule I controlled substance. *See* 2013 Minn. Laws ch. 113, art. 3, § 2 (codified at Minn. Stat. § 152.02, subd. 2 (Supp. 2013)).

On September 3, 2013, Hodapp spoke with his parole officer and told him that he did not tell the sheriff's deputy the truth on the night of K.W.'s death about meeting K.W. at Fortune Bay. At the urging of his parole officer, Hodapp gave a voluntary statement that same day to investigators saying that he and K.W. actually went to a wedding rehearsal. Hodapp again was untruthful with the investigators when he told them he did not know if K.W. actually took mushrooms. Hodapp admitted that he "should have just went straight to the hospital" and call 911 because "then she'd probably be alive."

On September 6, 2016, Hodapp again spoke to his parole officer saying that he purchased the "shroom" pills from a guy he worked with and that K.W. wanted to try them. That same day, Hodapp told investigators in a recorded statement that K.W. took the pills.

Hodapp told the investigators that after K.W. asked him if she could do the “shrooms” Hodapp said “fine, go ahead and do it, they’re in the car.” Hodapp said that he knew K.W. would have a bad trip, and he said, “I should’ve never gave it to her.”

On February 11, 2015, the state charged Hodapp with third-degree murder by controlled substance, and second-degree manslaughter by culpable negligence. At trial, the jury heard Hodapp’s recorded statements to law enforcement. Hodapp’s version of events at trial differed from his recorded statements to the investigators and his parole officer. For example, Hodapp’s testimony painted K.W. as having possession over the pills and himself as a spectator to her drug use. He testified that he and K.W. purchased the pills together from C.G. and that K.W. had possession over the pills from the time they bought them in July until she took the pill in his car at the rehearsal dinner.

At the close of the state’s case-in-chief, Hodapp moved for judgment of acquittal on the culpable-negligence manslaughter charge, arguing the state could not prove that Hodapp owed K.W. a duty of care. The court denied the motion. The jury returned a verdict of guilty on both counts.

This appeal follows. After briefing was completed, the state moved to strike a portion of Hodapp’s reply brief.

D E C I S I O N

I. Motion to Strike

The state moved this court, pursuant to Minn. R. Civ. App. P. 128.02, subd. 4, to strike a portion of Hodapp’s reply brief.

Under this court's rules of procedure, "The appellant may file a brief in reply to the brief of the respondent." Minn. R. Civ. App. P. 128.02, subd. 3. But, the "reply brief must be confined to new matter raised in the brief of the respondent." *Id.* "If an argument is raised in a reply brief but not raised in an appellant's main brief, and it exceeds the scope of the respondent's brief, it is not properly before this court and may be stricken from the reply brief." *Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 707 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003).

Here, Hodapp raised the jury instruction issues in his opening brief. The state argued in its response brief that Hodapp failed to articulate what the jury instruction should have said. Hodapp's proposed jury instructions in his reply brief were in response to the state's arguments on the jury instruction issue. Because Hodapp's argument in the reply brief was related to arguments he made in his main brief, and it did not exceed the scope of the state's brief, we deny the state's motion to strike.

II. Sufficiency of the Evidence – Third-Degree Murder by Controlled Substance

Hodapp argues his conviction of third-degree murder by controlled substance must be reversed because the state failed to prove beyond a reasonable doubt that he and K.W. did not jointly acquire and jointly possess the 25I-NBOMe pills that caused K.W.'s death.

In considering a sufficiency-of-the-evidence claim, appellate courts are "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). Appellate courts "view[] the evidence in the light most favorable to the jury's verdict, assuming the

jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

A person commits the crime of third-degree murder by controlled substance when that person, "without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, [or] giving away . . . a controlled substance." Minn. Stat. § 609.195(b) (2012). A person who jointly acquires and jointly possesses a controlled substance with another may not be convicted of third-degree murder under Minn. Stat. § 609.195(b), if the other joint possessor dies from the drug use. *State v. Carithers*, 490 N.W.2d 620, 620, 622 (Minn. 1992). It follows that for Hodapp to be guilty of "giving away" drugs, the state needed to prove that he did not jointly acquire *or* jointly possess the drugs with K.W.

Hodapp argues that this case is exactly like *Carithers* because the state did not show at trial that the drugs were not jointly acquired or jointly possessed. In *Carithers*, which involved two consolidated cases, the supreme court reversed two convictions based on joint acquisition or joint possession. *Id.* at 621. In the first case, the defendant and his wife rode in a vehicle to the place of purchase. *Id.* The husband bought heroin while his wife was in the car. *Id.* The two took the heroin home, the husband prepared the syringes for himself and his wife, and the husband "shot up" at the same time as his wife. *Id.* The wife passed out and died. *Id.* In the second case, the wife went alone to buy the heroin, but it was undisputed that she was buying the drugs for herself and her husband. *Id.* She brought the

heroin home and used half, and showed her husband where she hid it before leaving the house. *Id.* While she was gone her husband injected himself and died of an overdose. *Id.*

Here, unlike in *Carithers*, in viewing the evidence in the light most favorable to the jury's verdict and assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary at trial, a reasonable jury could have concluded that the drugs were neither jointly acquired nor jointly possessed. On the acquisition issue, Hodapp's probation officer testified that Hodapp said he purchased the pills. Hodapp admitted to an investigator that he had the pills for a couple of weeks. He said that the pills were in capsule form "when I got them." When Hodapp was asked by the investigator why, after purchasing the pills, he never tried them, Hodapp did not correct the investigator's assertion that he bought the pills. Hodapp also told investigators about conversations he had with his dealer about the correct dosage of the pills.

Additionally, the evidence was sufficient to prove that Hodapp solely possessed the pills. Hodapp admitted to the investigator that he gave K.W. the pills when he said: "I should've never gave it to her." Hodapp also told the investigator that he had the pills for a couple of weeks and that during this time "she was asking me to take them." At the rehearsal dinner, K.W. asked Hodapp "if . . . she could do some 'shrooms,'" and Hodapp gave her permission to take the pills in his car. Hodapp also said he went with K.W. to the car because he "wanted to make sure that she didn't do too much," and he made sure that she only took one-third of a pill, per the drug dealer's instructions.

Hodapp argues that even though he said he bought the pills from a friend, this statement did not prove that K.W. was not with him when the pills were acquired, that K.W. did not pay for the pills, or that Hodapp did not purchase the pills at K.W.'s request. Hodapp testified at trial that he and K.W. decided to purchase the drugs together from C.G. and that K.W. grabbed the pills and put them in her purse. Given that the jury was presented with Hodapp's multiple inconsistent statements to law enforcement, the jury was free to disregard Hodapp's trial testimony concerning his acquisition and possession of the pills. Further, even if the two jointly acquired the pills, the evidence at trial was sufficient to prove that at some point K.W. extinguished her possessory interest because she had to seek Hodapp's permission to access the pills, and Hodapp admitted he gave her the pills.

Because the jury could have reasonably concluded that K.W. and Hodapp did not jointly possess the pills, or if the pills were jointly acquired, that by the time of the rehearsal dinner K.W. extinguished her possessory interest, the evidence was sufficient to prove that Hodapp "gave" the pills to K.W.

III. Jury Instruction on the Third-Degree Murder by Controlled Substance Charge

Hodapp next argues that the district court committed reversible error because it improperly shifted the burden to Hodapp of proving that K.W. and Hodapp jointly acquired and jointly possessed the pills that caused K.W.'s death.

Because the jury instructions were not objected to at trial, this court applies a plain-error analysis. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under the plain-error test, "the challenging party must show: 1) error, 2) that is plain, and 3) that affects

substantial rights. If all three prongs are satisfied, the court determines whether the error must be addressed to ensure the fairness and integrity of the judicial proceedings.” *Id.* (citation omitted).

A. Error

A district court “is given considerable latitude in selecting the language of jury instructions,” and instructions are not erroneous unless they materially misstate the law. *Id.* “[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case.” *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

At the close of the trial the jury was instructed:

The elements of murder in the third degree are:

First, the death of [K.W.] must be proven.

Second, the defendant was the proximate cause of [K.W.]’s death by, directly or indirectly, the defendant’s unlawfully giving away, delivering, exchanging, distributing or administering 25I-NBOMe.

...

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

Here, the district court listed the standard elements from the CRIMJIG. *See* 10 *Minnesota Practice*, CRIMJIG 11.40 (2016). Next, the court gave the *Carithers* instruction: “The defendant is not guilty of a crime involving the unlawful giving away . . . [of] a controlled substance, if the defendant jointly acquires and jointly possesses a controlled substance and the other acquirer and possessor dies after ingesting the controlled substance.”

Hodapp argues the instruction was a misstatement of law because it did not clarify to the jury that it was the state's burden to prove that Hodapp and K.W. did not jointly acquire or jointly possess the pills. Hodapp proposes an instruction that lists the *Carithers* law as additional elements, before the jury is instructed on the state's burden of proof. While the better practice may have been to place the *Carithers* instructions before the sentence that says the state has a burden to prove the elements beyond a reasonable doubt, the jury instructions as a whole did not materially misstate the law. The district court instructed the jury in general that the "[t]he burden of proving guilt is on the state." Further, the *Carithers* instruction clarifies that a defendant is not guilty by way of sale or giving drugs away when there is joint acquisition and joint possession. Therefore, the jury instructions, as a whole, indicated that it was the state's burden to prove that Hodapp gave K.W. the pills. The placement of the *Carithers* instruction after the elements and proof-beyond-a-reasonable-doubt instruction on the elements was not a material misstatement of the law.

B. Plain error

Even if there was error, it was not plain. "An error is plain if it was 'clear' or 'obvious' . . . [or it] contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). As made clear in *State v. Milton*, even when an omission of necessary language in a jury instruction is erroneous, it is not "clear" or "obvious" error unless appellate courts have required such specific language. 821 N.W.2d 789, 807 (Minn. 2012). It is not "clear" or "obvious" that the *Carithers* instruction clarifying the "giving away" element is itself an added element of the crime that must be

placed immediately next to the other elements or is simply an explanation of when a defendant cannot be found to have given away drugs. What is clear and obvious is that the state has the burden to prove guilt beyond a reasonable doubt, and the district court instructed the jury on this burden in its general instructions.

C. *Substantial rights, and fairness and integrity*

Even assuming arguendo that there was plain error, Hodapp cannot show that such an error “substantially affected the verdict.” “To show that the error affected substantial rights, the defendant bears the heavy burden of showing that the error was prejudicial—that is, the defendant must show that there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotation omitted).

In addition to the district court’s general jury instruction that the burden of proof was on the state, the state also explicitly told the jury that it was the state’s burden to prove that Hodapp gave the pills to K.W. and that the pills were not jointly acquired or jointly possessed. Because the jury instruction did not affect Hodapp’s substantial rights, we need not decide whether any error must be corrected to “ensure the fairness and integrity of the judicial proceedings.”

IV. Sufficiency of the Evidence – Culpable-Negligence Manslaughter

Hodapp next argues that the evidence was insufficient for a jury to convict him on the culpable-negligence manslaughter charge because the state did not prove beyond a reasonable doubt that Hodapp had a duty to K.W., breached that duty, or that Hodapp’s breach of a duty was the proximate cause of K.W.’s death.

A person is guilty of manslaughter in the second degree if the person “causes the death of another . . . (1) by the person’s culpable negligence, whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another.” Minn. Stat. § 609.205(1) (2016). “Culpable negligence is more than ordinary negligence and more than gross negligence. It is gross negligence coupled with the element of recklessness.” *State v. Back*, 775 N.W.2d 866, 869 (Minn. 2009) (quotations and citations omitted). Culpable negligence is “intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others.” *State v. Spann*, 289 Minn. 497, 499, 182 N.W.2d 873, 875 (1970).

“A defendant cannot be negligent, culpably or otherwise, unless the defendant has a duty that he or she breached.” *Back*, 775 N.W.2d at 869. “Whether a person has a duty of care is an issue for the [district] court to determine as a matter of law.” *Id.* (quotation omitted). This court reviews questions of law de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). A general duty of reasonable care arises when the defendant’s own conduct creates a foreseeable risk of injury to a person. *Id.* at 23. A risk is foreseeable if it is one that “was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” *Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014).

The evidence at trial was sufficient to show Hodapp owed a duty of care to K.W. because Hodapp’s misfeasance and illegal conduct created a foreseeable risk of injury to K.W. Hodapp (1) bought the pills, (2) knew the pills were not ordinary mushrooms because

they were in pill form, (3) knew that others had not heard of synthetic mushrooms, (4) was worried enough about the pills that he wanted another person to try them first before he did, and (5) knew K.W. was on a number of medications. Knowing all of this, he gave K.W. access to the pills in his car and supervised her taking the pills because he was worried she would take too much. Further, Hodapp's conduct of driving K.W. to Babbitt instead of a hospital, not calling 911 because he did not want to get in trouble, and not telling the doctor what K.W. ingested, all while K.W. was overdosing, was conduct that created a foreseeable risk creating a duty of care.

Next, Hodapp argues the evidence was insufficient to establish that he breached a duty of care owed to K.W. Caselaw on criminal culpable negligence does not use the tort-law concept of a "breach of duty," but instead provides that under the culpable-negligence statute "the State must establish that [Hodapp] acted with gross negligence (objective test) and acted in conscious disregard of the risk created by [his] conduct (subjective test)." *State v. King*, 367 N.W.2d 599, 603 (Minn. App. 1985). Under the objective test, a person acts with gross negligence through a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982). Under the subjective "recklessness" test, a person consciously disregards a substantial and unjustifiable risk. *State v. Frost*, 342 N.W.2d 317, 319 (Minn. 1983). In essence, a breach of duty occurs through gross negligence and recklessness.

The evidence at trial in this case was sufficient on both prongs. Hodapp's conduct in (1) giving K.W. the pills, (2) not calling 911 and driving K.W. to Babbitt instead of the hospital while she was exhibiting serious symptoms of overdosing, and (3) not telling the

doctor what she ingested, were gross deviations from the standard of care a reasonably prudent person would take. Hodapp also acted in conscious disregard of the substantial and unjustifiable risk that K.W. would overdose and die when, after observing her alarming overdose symptoms, he decided not to call 911 for assistance, did not immediately take K.W. to a hospital, and withheld information from the doctor regarding what she ingested.

Finally, Hodapp argues that the evidence was insufficient to show that Hodapp's conduct was the "proximate cause" of K.W.'s death. For the state to prove culpable-negligence manslaughter it must prove beyond a reasonable doubt that the acts of Hodapp were the proximate cause of K.W.'s death. *State v. Schaub*, 231 Minn. 512, 517, 44 N.W.2d 61, 64 (1950). Conduct was the proximate cause of an injury where it "was a substantial factor in bringing about the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). The state proved that Hodapp's conduct was a substantial factor in K.W.'s death in two ways: (1) Hodapp gave K.W. a drug that caused her to overdose and die, and (2) Hodapp actively hindered K.W.'s medical treatment by causing a significant delay in her accessing care.

The evidence was sufficient to convict Hodapp of second-degree manslaughter.

V. Jury Instructions on the Manslaughter Charge

Hodapp argues that the district court committed reversible error in failing to instruct the jury that the state was required to prove beyond a reasonable doubt that (1) Hodapp had a duty of care to K.W., (2) Hodapp breached that specific duty, and (3) the specific breach was the proximate cause of K.W.'s death. Hodapp did not object to the instructions so the same plain-error analysis applies.

A. Error

Here the district court gave the standard CRIMJIG instructions on second-degree manslaughter by culpable negligence:

The elements of manslaughter in the second degree are:

First, the death of [K.W.] must be proven.

Second, the defendant caused the death of [K.W.], by culpable negligence, whereby the defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm. “Culpable negligence” is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. . . .

See 10 Minnesota Practice, CRIMJIG 11.56 (2016).

First, the district court did not err in failing to instruct the jury on duty of care. Whether a person has a duty of care “is an issue for the court to determine as a matter of law.” *Back*, 775 N.W.2d at 869. Here, the district court correctly determined that Hodapp had a duty of care as a matter of law. Omitting further instructions or clarifications on this element was not erroneous.

Hodapp argues that the district court should have clarified the nature of the duty that arose because the jury could have impermissibly found that a duty existed before K.W. ingested the pills or that Hodapp breached a duty by acquiescing to K.W.’s drug use. But, as discussed above, Hodapp’s conduct in buying the pills and giving them to K.W. could have been a breach of a duty based on what he knew about the pills and K.W.

Second, the district court correctly instructed the jury on how to determine that a breach of duty occurred because the court’s instructions incorporated both the gross

negligence language and the recklessness language as required by *King*, 367 N.W.2d at 603.

Hodapp, though, is correct that the district court committed error in not instructing the jury on proximate cause, because to sustain a conviction of manslaughter in the second degree the state must prove beyond a reasonable doubt that the defendant's actions were the "proximate cause" of the victim's death. *Back*, 775 N.W.2d at 869 n.5; *Schaub*, 231 Minn. at 512, 44 N.W.2d at 62.

B. *Plain error*

The error was plain because based on *Back* and *Schaub* it is clear and obvious the jury needed to be instructed on the element of "proximate cause," a legal term of art.

C. *Substantial rights, and fairness and integrity*

But, Hodapp cannot carry the "heavy burden," as required by *Burg*, 648 N.W.2d at 677, by showing there is a reasonable likelihood that the error substantially affected the verdict. Here, the jury was instructed that the second element of culpable negligence was "the defendant *caused* the death of K.W." (Emphasis added.) It is not reasonably likely that changing the instructions to "the defendant was the *proximate cause* of the death of K.W." would have affected the verdict. The common meaning of the word "cause" is "[t]he producer of an effect, result, or consequence." *The American Heritage Dictionary* 295 (5th ed. 2011). Given that common meaning, and the facts of this case, it is unlikely a jury would have determined that Hodapp's actions were only a small factor in K.W.'s death and not a "substantial factor." There was substantial evidence at trial of Hodapp's gross negligence and recklessness in giving K.W. the pills and not seeking help sooner

after observing symptoms of K.W.'s overdose. Because the error did not affect Hodapp's substantial rights, we need not determine whether the error must be corrected to "ensure the fairness and integrity of the judicial proceedings."

Affirmed; motion denied.