Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-18-00481-CR

Dorothy A. **HOLLOWAY**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR0541
Honorable Sid L. Harle, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: December 18, 2019

I respectfully dissent because the record does not establish Holloway's criminally culpable reckless state of mind. The majority holds that Holloway's driving without her LifeVest after using methamphetamine was a "substantial and unjustifiable" risk, which resulted in her experiencing a cardiac arrest while driving and causing an accident resulting in death. However, when viewed in the light most favorable to the verdict, the record contains no evidence that would allow a rational jury to find beyond a reasonable doubt that Holloway's failure to use her LifeVest caused her cardiac arrest and the resulting accident, or that would allow a rational jury to find

beyond a reasonable doubt that Holloway was subjectively aware that she posed an extreme risk to fellow drivers.

Having indicted Holloway for manslaughter, the State was required to prove beyond a reasonable doubt that she "did recklessly cause the death of an individual, . . . by disregarding a known risk of heart failure, and/or operating a motor vehicle contrary to medical instructions, and/or failing to follow medical aftercare instructions, and/or operating a motor vehicle after consuming an illegal substance, which acts and omissions resulted in the motor vehicle driven by [her] to collide with [another] motor vehicle . . . ." *See* TEX. PENAL CODE ANN. § 19.04. Criminal recklessness requires a defendant to be actually aware of but consciously disregard a "substantial and unjustifiable" risk created by the defendant's conduct. *See id.* § 6.03(c); *Williams v. State*, 235 S.W.3d 742, 751–53 (Tex. Crim. App. 2007). This "devil may care" or "not giving a damn" attitude toward the risk distinguishes the culpable mental state of criminal recklessness from that of criminal negligence. *See Williams*, 235 S.W.3d at 751–52. Criminal negligence "assesses blame for the failure to foresee the risk that an objectively reasonable person would have foreseen." *Id.* at 752; *see* TEX. PENAL CODE ANN. § 6.03(d). For criminal recklessness, the "combination of an awareness of the magnitude of the risk and the conscious disregard for consequences is crucial." *Williams*, 235 S.W.3d at 752–53 (footnote omitted). To assess criminal recklessness, a factfinder must examine a defendant's conduct to determine whether:

> (1) the alleged act or omission, viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred;
>
> (2) that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation (i.e., it involved an "extreme degree of risk, considering the probability and magnitude of the potential harm to others"),

> (3) the defendant was consciously aware of that "substantial and unjustifiable" risk at the time of the conduct; and
>
> (4) the defendant consciously disregarded that risk.

Id. at 755–56 (footnote omitted).

Holloway's failure to wear her LifeVest did not create a "substantial and unjustifiable" risk of the type of harm that occurred because the LifeVest had little to nothing to do with Holloway experiencing a cardiac arrest while driving and causing an accident resulting in death. *See Williams*, 235 S.W.3d at 755. No witness testified at trial that Holloway's failure to wear a LifeVest caused Holloway's cardiac arrest.[1] Instead, the record establishes that a LifeVest is a wearable cardiac defibrillator used to treat cardiac arrest.[2] A LifeVest detects potentially lethal arrhythmias (abnormal heart rhythms) and issues a high-pitched alarm upon detection. The wearer then presses response buttons if conscious to abort a shock. If the wearer is not conscious and unable to press the response buttons, the LifeVest delivers a 150 joule shock.[3] In total, the process takes approximately thirty seconds; the LifeVest monitors the arrhythmia for fifteen seconds and then the alarm sounds for another fifteen seconds before a shock is delivered. According to the LifeVest representative, heart arrhythmias have no symptoms, unlike heart attacks. At most, a person suffering an arrhythmia may have some dizziness a half second before losing consciousness. The LifeVest representative also testified that the company that supplies the LifeVest does not want conscious patients receiving shocks. In fact, the patient agreement Holloway signed warns:

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[1] Various doctors testified that Holloway's non ischemic congestive heart failure could have been caused by a number of factors, including genetics, uncontrolled hypertension, cardio toxins like chemotherapy, excessive alcohol consumption, certain medications and drugs, stress, other medical issues like thyroid disease, and infections.

[2] Although the LifeVest acts as an emergency treatment, the patient agreement Holloway signed warned: "Even if the LifeVest device delivers the treatment shock, my condition may not be treatable and death may occur."

[3] One of Holloway's treating physicians testified about the shock, "[F]rom what I hear from all the patients, it's—it's quite painful." Holloway's expert described the shock as the "equivalent to having a mule kick you in the chest or get[ting] hit with a baseball bat in the chest."

> There is a chance that the LifeVest device may act as if I have a life-threatening heart rhythm when, in fact, I do not. Although I can prevent a treatment shock by holding the response buttons, if I do not I may receive an unnecessary and painful shock. Rarely, a shock to the heart that does not need one results in disability or death.

The record shows that Holloway, as instructed, overrode an impending shock twelve times on December 2, 2015, when she was conscious.

There is no evidence in the record that a wearer administered a LifeVest shock immediately regains his or her faculties. Instead, Holloway's expert testified that a wearer administered a shock may take a few minutes to fully regain his or her faculties, although the period is different from patient to patient. In Holloway's case, she did not regain consciousness when shocked by EMS at the scene of the accident, although her heart returned to a normal rhythm after the shock. Holloway later regained consciousness at the hospital.

I would hold that the evidence adduced is legally insufficient for a rational jury to find beyond a reasonable doubt that Holloway's failure to wear her LifeVest created a "substantial and unjustifiable" risk of the type of harm that occurred—experiencing a cardiac arrest while driving and causing an accident resulting in death. *See Williams*, 235 S.W.3d at 755–56. The evidence shows that the LifeVest is a treatment for cardiac arrest, not a cause. Viewing the evidence in the light most favorable to the verdict, the best-case scenario, had Holloway worn her LifeVest, would have been that she would have suffered a cardiac arrest after a half-second of dizziness and sped down the highway unconscious for approximately fifteen seconds before regaining her faculties. Most importantly, the State at best showed that the LifeVest addressed a risk Holloway alone faced—the risk to Holloway of death following a sudden cardiac arrest. The State's evidence pertaining to the LifeVest simply did not address a known risk to other drivers that Holloway posed due to her potential to suffer a sudden cardiac arrest.

As to the risk Holloway posed to other drivers from the possibility that she could suffer a sudden cardiac arrest, the record does not permit a rational jury to infer that Holloway was consciously aware of this risk. Certainly, a rational jury could infer that Holloway had a "devil may care" attitude toward her health. Viewing the evidence in the light most favorable to the verdict, the record shows that Holloway smoked tobacco, drank Big Red, failed to take heart medicine as prescribed, and consumed methamphetamine after her doctors warned her of the adverse consequences for these actions and omissions.[4] However, the doctors' warnings, by and large, suggest only that Holloway was at risk of suffering a repeat of her prior symptoms, and not at risk of sudden loss of consciousness from a cardiac arrest while driving.

In August 2015, Holloway was treated at a hospital, when she presented with congestion and trouble breathing, and she was diagnosed with congestive heart failure. Holloway was seen by a cardiologist, who testified that he saw Holloway for shortness of breath and edema, which is swelling of the ankles, feet, and legs. The cardiologist testified that he would typically counsel a patient with congestive heart failure about a treatment plan, including removal of fluids with medication, dietary change, and medication compliance. Holloway's other treating physician from August 2015 testified that Holloway's treatment plan consisted of "breathing treatments, medication that involve diuretics which promote . . . fluid loss and assist breathing[, and] blood pressure medicine." The physician also recommended that Holloway undertake "lifestyle changes," including weight loss, exercise, and consumption of low salt foods. The medical records

[4] The majority focuses on only one of these actions or omissions—consumption of methamphetamine—as contributing to Holloway experiencing a cardiac arrest while driving and causing an accident resulting in death; however, the warnings given to Holloway about consuming methamphetamine were similar to those for other medically risky actions and omissions. In fact, as compared to smoking tobacco, the warnings were less dire. As the majority recognizes, the State concedes the evidence does not establish that Holloway was intoxicated on methamphetamine at the time of the accident. The State's theory as to methamphetamine consumption is that Holloway knew the risk to her heart posed by continued methamphetamine use but, nevertheless, consumed methamphetamine, which contributed to her cardiac arrest, which in turn led to the accident and the victim's death.

from the August 2015 hospital visit show that the physician instructed Holloway upon discharge "to present to the nearest Emergency Department or call 911 should their [sic] symptoms return or worsen." Holloway's discharge paperwork instructs Holloway to call a physician for "[s]hortness of breath" and "[i]ncreased swelling." The discharge paperwork also includes "Heart Healthy Instructions." These provide that Holloway should call her doctor if she has any of the following symptoms:

> * Trouble breathing, especially during activity or when lying flat
> * Waking up out of breath at night
> * Frequent dry, hacking cough, especially when lying down
> * Feeling tired, weak, faint or dizzy
> * Swollen feet, ankles and legs
> *Nausea, with stomach swelling, pain and tenderness
> * If you experience chest pain, call 911 to go to the nearest EMERGENCY DEPARTMENT immediately.

The instructions also state:

> * DO NOT SMOKE OR USE TOBACCO PRODUCTS. Tobacco is probably the single most dangerous thing you can do to your health. Nicotine robs the heart of oxygen and contracts blood vessels, which raises heart rate and blood pressure. If you smoke or use tobacco products, discuss alternatives with your doctor. The most important thing is that you continue to try to quit until you are successful!

Holloway was readmitted to the hospital in November 2015. Her attending physician testified that "[s]he presented with shortness of breath of two days duration." The physician elicited Holloway's "social history," which was documented on medical records as follows:

> The patient admits to smoking 1 pack per day for more than 20 years. The patient denies any alcohol, and currently not using any drugs. She used methamphetamine about 1–1/2 years back when she lost her mother.

The physician testified that he diagnosed Holloway with "acute systolic congestive heart failure," which signified a worsening of her congestive heart failure and a chronic condition. According to the physician, he would have counseled:

> compliance with the medications, monitoring of her symptoms, following up with the doctors. And mainly lifestyle modification[,] . . . including the amount of fluids that they take, water or any fluid and the salt intake and quitting the smoking and [if] they are taking alcohol or doing recreational drugs asking them to quit.

The cardiologist who treated Holloway in November 2015 noted on medical records that Holloway was "drinking Big Red" during her stay. According to the cardiologist, this fact was important because:

> [w]hen someone comes in for congestive heart failure, they have an accumulation of fluid on their body because their heart cannot pump that fluid out, so to speak. When you talk to patients with congestive heart failure you tell them what to do and what not to do. One of the things they cannot do is drink soda, eat excessive sodium, and you counsel them on diet. And so my comment here was to imply that she was not being compliant.

The November 2015 medical records also reflect that the cardiologist discussed fluid restrictions of 1,500 milliliters per day and reduced salt intake with Holloway. The cardiologist testified that his medical partner ordered Holloway a LifeVest during her November 2015 hospital stay. The cardiologist further testified that he did not remember telling Holloway not to drive. He also testified that he discusses with patients who receive LifeVests that they are at risk of sudden cardiac death. The November 2015 hospital discharge information states the same "Heart Healthy Instructions," as the August 2015 discharge information. The discharge information also states that Holloway should call her physician for "[c]hest pain," "[s]hortness of breath," and "[i]ncreased swelling."

Viewed in the light most favorable to the prosecution, the record establishes that Holloway was repeatedly warned of dire consequences to her health from continued tobacco smoking, failure to modify her diet, failure to take medicine as prescribed, and consumption of methamphetamine. However, the warnings Holloway received about noncompliance focused primarily on a return of her previous symptoms. Some warnings she received also suggest a gradual onset of symptoms.

For example, Holloway was instructed to call 911 and head to her nearest emergency room if symptoms returned. These warnings suggest Holloway would have time to act before becoming debilitated.

The strongest evidence that suggests Holloway's awareness of the danger she posed as a driver from sudden loss of consciousness relate to the LifeVest. Viewing the record in the light most favorable to the prosecution, the record shows that Holloway was instructed to wear her LifeVest at all times, except when showering. Holloway was told by her cardiologist that the LifeVest's "purpose is to prevent sudden cardiac death by shocking the patient" and "[w]ithout the LifeVest she is at risk for sudden cardiac death." The cardiologist did not tell Holloway specifically not to drive. A reasonable person may have understood the cardiologist's warning of sudden cardiac death to imply a risk of sudden loss of consciousness. A reasonable person may also have understood this risk to be heightened if doctors' warnings were not followed. We must be mindful, however, that Holloway cannot be held criminally reckless for simply failing to foresee a risk that a reasonable person would have comprehended. *Compare* TEX. PENAL CODE ANN. § 6.03(c) (criminal recklessness), *with id.* § 6.03(d) (criminal negligence). Holloway was not explicitly warned that she posed a "substantial and unjustifiable" risk to other drivers if she failed to comply with medical instructions to curb her tobacco smoking, end her methamphetamine consumption, take heart medication, and modify her diet.

On this record, I would hold that the evidence is legally insufficient for a rational jury to find beyond a reasonable doubt that Holloway subjectively weighed warnings to foresee an extreme risk of sudden loss of consciousness while driving if she continued to disregard medical instructions.[5] In other cases holding drivers criminally reckless for failing to follow medical

[5] The majority singles out Holloway's disregard of instructions to quit methamphetamine use; however, I cannot make the distinction between the medical warnings Holloway received as to methamphetamine use and warnings she

instructions, the patient's risk as a driver were stated explicitly by medical professionals. *See, e.g.*, *Pugh v. State*, No. 14-09-00492-CR, 2011 WL 175499, at *7 (Tex. App.—Houston [14th Dist.] Jan. 20, 2011, pet. ref'd) (mem. op., not designated for publication) (upholding manslaughter verdict where the evidence showed a patient had been instructed by doctors not to drive unless he had been free of seizures for six months, but the patient drove in disregard to this warning); *Robertson v. State*, 109 S.W.3d 13, 19 (Tex. App.—El Paso 2003, no pet.) (upholding manslaughter verdict where evidence established a patient had a history of automobile accidents caused by his susceptibility to seizures, the patient was prescribed anti-epileptic medicine, and the patient was instructed not to drive until approved to drive by a neurologist but the patient, nevertheless, drove without approval). Some cases impute knowledge based on prior experiences of loss of control while driving, a factor not present here. *See, e.g.*, *Robertson*, 109 S.W.3d at 21. Other cases impute knowledge based on a patient's medical training, also a factor not present here. *See, e.g.*, *Young v. State*, 358 S.W.3d 790, 802 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (upholding conviction for recklessly causing serious bodily injury to a child based on a defendant's failure to obtain medical treatment for her daughter who had suffered physical abuse from the defendant's boyfriend where the defendant was a registered nurse with extensive training in the identification of victims of abuse).

In sum, the medical warnings Holloway received were too general and unfocused to establish Holloway's actual awareness and conscious disregard of a substantial risk she posed to fellow drivers from sudden cardiac arrest. *Cf. State v. Jones*, 151 S.W.3d 494, 497–501 (Tenn. Crim. App. 2004) (holding evidence was legally insufficient to find that a defendant's failure to

received about other risky behavior, most notably tobacco smoking, to justify a sole focus on methamphetamine consumption. Notably, the State did not charge Holloway with intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08.

perceive a risk from holding a two-year-old child on one's lap in front of an air bag constituted a gross deviation from the standard of care, even though the defendant had received information upon discharge from the hospital after the birth of her son advising parents to always use car seats and to "never hold a child in your lap" in the car); *State v. Owens*, 820 S.W.2d 757, 760–61 (Tenn. Crim. App. 1991) (holding evidence was legally insufficient to support a mother's conviction for criminally negligent homicide of her eleven-month-old daughter who died of bronchitis and pneumonia, even though the mother's primary care physician had warned her that taking her disabled daughter into public places would expose the daughter to a great risk of infection and the mother regularly took her daughter out with her, and several witnesses related incidents in which the care the mother gave to her daughter did not conform to the instructions given by doctors); *see also Williams*, 235 S.W.3d at 766 (citing *Jones* and *Owens* in support of a conclusion that the warnings given to a defendant were too general and unfocused to establish that the defendant was subjectively aware of a risk).

This case presents singular facts. I respectfully dissent because the evidence is legally insufficient for a rational jury to find beyond a reasonable doubt that Holloway was actually aware but consciously disregarded that she posed an extreme risk of causing death to fellow drivers due to her consumption of methamphetamine in contravention of medical warnings and to her failure to wear a LifeVest as prescribed.

Rebeca C. Martinez, Justice

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