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IN THE COURT OF APPEALS OF IOWA

347

Filed November 26, 1985

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BENJAMIN PERRY CALDWELL,

Defendant-Appellant.

5-363
84-1119

Appeal from the Iowa District Court for Johnson County - L. Vern Robinson, Judge.

Defendant appeals a jury verdict finding him guilty of second degree murder in violation of Iowa Code sections 707.1 and 707.3 (1983). **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Steven K. Hansen, Assistant Attorney General, and Linda McGuire, Assistant Johnson County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Defendant Caldwell appeals a jury verdict finding him guilty of second degree murder in violation of Iowa Code sections 707.1 and 707.3 (1983). He contends that the trial court erred in its instructions to the jury in that: (1) it failed to instruct the jury on foreseeability as an aspect of proximate cause; (2) it erred in instructing the jury that voluntary intoxication can never reduce murder to manslaughter; and, (3) it incorrectly instructed the jury on recklessness. We affirm.

Defendant was convicted of murdering his live-in girlfriend, Ellen Egan, on October 29, 1983. For the most part, testimony revealed that the couple loved each other and were planning to get married, but trouble often arose when they drank alcohol. Defendant historically exhibited excessive jealousy when he had been drinking. It was under this set of circumstances that the events took place the night of Ellen's death.

Defendant and Ellen had been out the night of October 29, 1983, visiting friends at several Halloween parties in Iowa City. As the night progressed both Caldwell and Ellen became more and more inebriated until, after an argument, they separated company. Caldwell returned to their apartment, but Ellen went to another party. Witnesses stated that she was "very drunk" at this gathering. Ellen eventually decided to go home, and left the party which was on the second floor of the building. On her way down the stairs, however, she apparently tripped and tumbled down the stairway making quite a lot of noise but evidently was not hurt. She took a cab to their apartment shortly thereafter.

Upon arriving home, Ellen was confronted by defendant as to her whereabouts. Too drunk to offer any argument, Ellen tried to get away from defendant, who was by this time shoving her and slapping her. The argument culminated in defendant hitting Ellen's head against the bathroom door four or five times.

He testified that he stopped striking her when he noticed a drop of blood coming from her nose. She came up to him a minute later in their bedroom, but he pushed her away and she hit the wall and slid to the floor. He then picked her up and laid her on the bed and went to bed himself.

Defendant awoke at 5:00 a.m. and found that when he tried to awaken Ellen she did not respond and that fluid was coming out of her mouth. He immediately called an ambulance which arrived shortly thereafter. They were unable to revive Ellen and she was pronounced dead at the University Hospital at 6:37 a.m.

Autopsy reports showed that Ellen's skull was not fractured, nor did it disclose any massive blows which alone could have been responsible for her death. She died from a subdural hematoma and cerebral edema. Medical evidence, and expert testimony revealed that repeated blows, albeit relatively minor, could have caused her injuries. Additional expert testimony revealed that Ellen's high blood alcohol level—.151 milligrams per deciliter at the time of her death and probably .200 four hours earlier—may have been a strong contributory factor in her death. It was impossible to medically determine whether the blunt trauma causing her fatal injuries was a result of the blows from defendant or the fall down the stairway. Defendant produced a psychologist who testified that in his opinion, defendant's conduct that night was due to his intoxication and that Caldwell intended neither to kill, nor harm Ellen. Another psychologist opined that defendant did not appreciate the risks to Ellen due to his conduct.

The jury returned a verdict of murder in the second degree and defendant appeals from the resulting judgment.

I. **Instruction on Causation.** Caldwell challenges the trial court's instruction to the jury on the issue of causation of Ellen's death. He asserts, in essence,

that the instruction omitted the requirement that his conduct was the proximate cause of the victim's death; and, that the instruction should have expressly required a finding of foreseeability.

Since Caldwell was charged with second degree murder, the jury was required to find a specified result, the killing of another person, and that defendant's conduct was a cause of that result. The State had to show both cause in fact and proximate or legal cause. State v. Marti, 290 N.W.2d 570, 584-85 (Iowa 1980). Cause in fact is determined under the well-known principles of "but for the defendant's conduct, the harm or damage would not have occurred." Id. The legal or proximate cause element requires that there be sufficient causal relationship between the defendant's conduct and the proscribed harm to fairly hold him criminally responsible. Id.; W. LaFave & A. Scott, Handbook on Criminal Law § 35, at 248 (1972).

We hold that the submitted instruction properly instructed the jury on the issue of factual and legal or proximate causation. The second paragraph of Instruction No. 13 requires that the conduct must have been "a substantial factor in bringing about the death" (legal or proximate cause), and that "if it had not been for such conduct" the death would not have occurred (cause in fact). See Pedersen v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972).

Defendant's contention that the jury instruction was required to mention foreseeability is without merit. The question of proximate cause depends essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have occurred. W. Prosser & W. Keeton, Prosser and Keeton on Torts § 42, at 273 (5th ed. 1984). The instruction given required the State to prove that defendant's conduct had such an effect "as to lead a reasonable person to regard it as a cause" of death. Proximate cause "is based upon such a nebulous, undefined consideration as policy, a universal

formula for legal causation is untenable. Rather, it is most fruitfully approached by using criteria adopted to a particular problem area, such as intervening causes." State v. Marti, 290 N.W.2d at 585. The instruction properly dealt with the issue of causation.

II. **Instruction on Intoxication.** At trial, the court instructed the jury that "no amount of voluntary use of intoxicants can excuse a murder and reduce a murder to manslaughter." Defendant argues on appeal that this is a misstatement of the law. He claims that intoxication may be relevant to negate the existence of malice aforethought and, therefore, reduce murder to manslaughter. We disagree.

Our courts have long recognized that intoxication may excuse the commission of a crime when it prevents one from forming specific criminal intent. State v. Watts, 244 N.W.2d 586, 590 (Iowa 1976); State v. Linzmeyer, 248 Iowa 31, 35, 79 N.W.2d 206, 208 (1956). However, where the alleged offense does not require a specific intent, no amount of voluntary intoxication assures an acquittal or reduction of the charge. State v. Sill, 199 N.W.2d 47, 49 (Iowa 1972).

In the case at bar, the defendant was charged with second-degree murder, an offense that has no specific intent element. See State v. Miller, 359 N.W.2d 508, 511 (Iowa Ct. App. 1984). It would follow that no amount of intoxication would excuse the crime and, thus, the trial court's instruction was correct. Today, however, we are asked to expand upon these common law principles and hold that intoxication is not only relevant to specific intent, but also malice aforethought. We are not inclined to do so.

As defendant acknowledges, this is not a question of first impression. In State v. Hall, 214 N.W.2d 205, 208-09 (Iowa 1974), the supreme court specifically held that voluntary intoxication would not negate malice aforethought.

While Caldwell does not dispute this, he argues that the subsequent enactment of Iowa Code section 701.5 changed this established rule. Section 701.5 provides as follows:

> The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates his or her guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

(Emphasis added.) It is defendant's position that the final phrase of this provision is indicative of the legislature's intent to change the law. We disagree.

A statute will not be presumed to overturn long-established legal principles "unless an intention to do so plainly appears by express declaration or necessary or unmistakenable implication, and the language employed meets of no other reasonable construction." Hines v. Illinois Central Gulf R.R., 330 N.W.2d 284, 289 (Iowa 1983) (quoting Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969)). In the present case, the statutory language relied upon by petitioner does not evidence a clear intent to change the rule enunciated in Hall. Rather, as the supreme court indicated in State v. Collins, 305 N.W.2d 434, 437 (Iowa 1981), section 701.5 is substantially a codification of prior law. The language "or in proving any element of the public offense" merely allows evidence of intoxication when it is a specific element of the public offense. See, e.g., Iowa Code ch. 321B (1985) (Intoxicated Drivers).

Based on these reasons, we conclude that the trial court's intoxication instruction was appropriate. Simply stated, temporary intoxication is evidence to be considered on the issue of intent; it is not a relevant consideration in determining the existence of malice aforethought.

III. Instruction on Recklessness. Caldwell also challenges the following instruction on recklessness:

> A person is reckless or acts recklessly, when he willfully or wantonly disregards the safety of persons or property. It is more than a lack of reasonable care which may cause unintentional injury. Rather, recklessness is conduct, which is consciously done with a willful or wanton disregard of the consequences, when a person knows or should know a risk of harm to another is created.
>
> Though recklessness is willful, that is intentional, it is not intentional in the sense that harm is intended to result. It is however, conduct which shows that the person knew or should have known of a danger and proceeded without any care or concern of the results of his actions.

He claims the court should have instructed the jury that his acts must have involved a high and unreasonable risk of death and that he must, in fact, have been aware of the risk. We disagree.

Recklessness has been defined as "conduct evidencing either a willful or wanton disregard for the safety of others." State v. Kernes, 262 N.W.2d 602, 605 (Iowa 1978). According to Kernes, the conduct "should be conscious and intentional, creating a risk of harm to others, where such risk is or should be known to defendants." Id.

In the present case, the trial court's instruction on recklessness accurately sets forth these principles. This is all that is required. Error does not result simply because the court fails to use the precise language requested by the defendant. See State v. Lott, 255 N.W.2d 105, 108-09 (Iowa 1977).

Finding no error, we affirm the conviction.

AFFIRMED.

Donielson, P.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I dissent. I agree with the majority on the issues of proximate and legal causation in Division I of the majority opinion. I cannot assent, however, to the majority's analysis of the remaining issues raised by defendant Caldwell.

I. **Instruction on Intoxication.** The trial court submitted an instruction to the jury which stated:

> You are instructed that no amount of voluntary use of intoxicants can excuse a murder and reduce a murder to manslaughter.

Defendant objects to this instruction and claims that intoxication may be relevant to negate the existence of malice aforethought. He also made timely objections to other instructions that would have allowed the jury to consider his intoxication in determining whether or not he was capable of forming the requisite mental state for second degree murder or manslaughter. The trial court overruled all of his objections.

Defendant bases his argument on the language of section 701.5 of the Iowa Code, which was enacted in 1979. Section 701.5 states:

> The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates his or her guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

At the outset I feel it necessary to take issue with the majority's interpretation of defendant's reliance on section 701.5. The majority framed defendant's argument as follows. "It is defendant's position that the final phrase of this provision is indicative of the legislature's intent to change the law." This simply is not true. Defendant's fundamental appellate argument is simply that the instruction given by the court cannot be reconciled with section 701.5. Further analysis of this basic argument reveals that section 701.5 does not change prior

Iowa case law, but rather codifies it and does so to support his position in this appeal.

I choose to follow defendant's interpretation of not only the statute but also the case law both before and after its enactment. Adoption of defendant's position will provide judicial clarification of the legislature's intent in section 701.5. Therefore, three questions must be asked and answered: (A) what does a natural and plain reading of the statutory language reveal as to its meaning; (B) can the language of the statute be reconciled with the case law on this issue both before and after its enactment; and finally, (C) if the case law and the statutory language can be reconciled, can they in turn be reconciled with the instruction given by the court?

A. What is the natural and plain meaning of the statute? It is generally presumed that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. American Home Products Corp. v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). The legislature is presumed to know the usual meaning ascribed by courts to language and to intend that meaning in statutes unless context shows otherwise. State v. Jones, 298 N.W.2d 296, 298 (Iowa 1980). The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute. Id.

The statute says that intoxication "may be shown where it is relevant in proving the person's specific intent or recklessness ... or in proving any element of the public offense ... charged." When the word "or" is used in a statute it is presumed to be disjunctive unless the contrary legislative intent appears. Kearney v. Ahmann, 264 N.W.2d 768, 769 (Iowa 1978). Therefore, it is proper to presume that the legislature intended intoxication to be shown, where relevant, to not only specific intent, but also recklessness, and any element, general or specific, involved in the elements of the offense charged. The instruc-

tion, on the other hand, clearly states that intoxication "cannot reduce," therefore should not be shown if the charge is murder, regardless what the elements or the degree of the murder charges are. Clearly, the instruction and the statute under this initial analysis, cannot be reconciled.

B. Can the statutory language, as we have just interpreted it, be reconciled with the case law? For the answer to this question, I must begin by acknowledging the language of State v. Collins, 305 N.W.2d 434, 437 (Iowa 1981), which states that section 701.5 is substantially a codification of prior case law. The majority relies upon this premise for their interpretation of section 701.5, because it is their position that the leading Iowa case on this issue, State v. Hall, 214 N.W.2d 205, 208-09 (Iowa 1974), stands for the black-letter rule of law that intoxication cannot reduce murder to manslaughter. I can accept this interpretation of Hall, in that certainly intoxication by itself will not negate malice aforethought that has previously been shown to exist in a defendant. But I cannot accept the principle or the construction of Hall to also mean that intoxication is absolutely irrelevant to the issue of reducing murder to manslaughter. Hall does not say this, and neither does section 701.5.

Starting then, with the premise that section 701.5 is substantially a codification of prior case law, a close analysis is required of the decisions both before and after Hall. In State v. Gramenz, 256 Iowa 134, 142, 143, 126 N.W.2d 285, 290, 291 (1964), the Iowa Supreme Court was confronted with the issue of whether mental illness should be considered by the jury to reduce a crime of murder down to manslaughter. The defendant argued that if intoxication can be shown to reduce murder to manslaughter, then mental illness should be used in the same way. In refuting the defendant's claim for a mental illness instruction the Gramenz court compared the legal effects of intoxication and mental illness to the crimes of murder and particularly proof of malice. In its analysis, the

Gramenz court cited with approval language of the California Supreme Court in People v. Wells, 33 Cal.2d 330, 202 P.2d 53:

> [A] defendant on trial under the general plea of not guilty is conclusively presumed to be sane and evidence to show "lack of capacity" to commit the crime charged, or any degree thereof, is inadmissible. This proposition insofar as a showing of lack of capacity because of legal insanity is concerned, appears to be exactly what is contemplated by the legislation cited, but to construe and apply such legislation as permitting the prosecution to adduce evidence to prove a specific mental state essential to the crime and at the same time precluding the defendant from adducing otherwise competent and material evidence to disprove such particular mental state, short of evidence of legal insanity (which can be heard on the trial of that issue), would, we think, constitute an invalid interference with the trial process. A defendant charged with a crime is presumed to be innocent of, and is entitled to appear and defend against, the charge in its entirety, not merely as to some of its elements but as to each and all of these elements.

Intoxication "while not an excuse for crime may disprove the presence of some particular state of mind and hence 'show the less and not the greater offense was in fact committed.' " Gramenz, at 290, citing Perkins on Criminal Law, pp. 769-771. The Gramenz court then discussed the application of intoxication to the issue of the "general intent" element, second degree murder, and malice aforethought rather than the specific elements required in first degree murder.

> While malice aforethought is the specific state of mind necessary to convict of murder, it is far different from the specific intent which is a necessary element of murder in the first degree. It may be express or implied from the acts and conduct of defendant. In State v. Hofer, 238 Iowa 820, 833, 28 N.W.2d 475, 482, we approved of an instruction which, in part, defined malice aforethought as "a fixed purpose or design to do some physical harm to another existing prior to the act complained of; it need not be shown to have existed for any length of time before, but only requires such deliberation as makes a person appreciate and understand at the time the act is committed its nature and probable consequences as distinguished from an act done in the heat of passion . . . ." (Emphasis added).

Gramenz, at 290. Emphasizing that mental illness will not reduce murder to manslaughter, the court continued:

> "No amount of voluntary intoxication can entirely excuse a homicide and thereby entitle the slayer to an acquittal." Perkins on Criminal Law, p. 791. See also State v. Pell, 140 Iowa 655, 119 N.W. 154; State v. Wilson, 166 Iowa 140 Iowa 655, 119 N.W. 154; State v. Wilson, 166 Iowa 309, 144 N.W. 47, 147 N.W. 739; State v. Wilson, 234 Iowa 60, 11 N.W.2d 737. Therefore a person who is so intoxicated that he is unable to entertain malice aforethought as defined above would still be convicted of manslaughter, while a person in the same state of mind but who is suffering from mental illness of such a nature that he could not appreciate and understand the nature and probable consequences of his act, would be entitled to an acquittal. Insanity will justify an acquittal, voluntary intoxication will not.

At first glance, State v. Hall and State v. Gramenz appear to be contradictory. It is even more confusing when both decisions rely upon State v. Wilson, 166 Iowa 309, 144 N.W. 47, 147 N.W. 739 (1914), as their authority. In a supplemental opinion, the Wilson court addressed the issue of whether voluntary intoxication might be considered to reduce murder in the second degree to manslaughter. The court said:

> It needs hardly to be said that if a drunken man takes the life of another, unaccompanied by circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though express malice has not been proven. But if there is evidence of provocation which, if acted upon immediately by a sober man, would be regarded as sufficient to reduce the offense to manslaughter, and the inquiry is whether the accused actually acted thereon, it is held by the weight of authority that evidence of intoxication may be considered in deciding whether the fatal act is to be attributed to malice, or to the passion of anger, excited by the previous provocation; such passion or anger being more easily excitable in an intoxicated person than in one who is sober. Rafferty v. People, 66 Ill. 118; State v. McCants, 1 Speers (S.C.) 384; Jones v. State, 29 Ga. 594; State v. Johnson, 41 Conn. 584; People v. Rogers, 18 N.Y. 9 (72 Am. Dec. 484); Rex v. Thomas, 7 C. & P. 817. Says Bishop, in volume 1, section 414, of Bishop's Criminal Law:
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> > The question is whether the killing was from a provocation given at the time, or from previous malice. Evidence of the prisoner's

> having been too drunk to carry malice may be admitted. And the consideration is not to be withheld from the jury, that his drunkenness may render more weighty the presumption of his having yielded to the provocation, rather than to previous malice, because of the fact that a drunken man's passions are more easily aroused than a sober one's.
>
> This much has been said to indicate when and for what purpose evidence of intoxication may be considered in determining whether the killing was murder in the second degree or manslaughter. There was evidence of provocation which, if believed, must have been found sufficient, and if acted on by the accused while under the dominion of passion, rather than because of previous malice, would have reduced the offense to manslaughter. The court might well have told the jury that in passing on the issue of whether defendant, in what he did, the provocation having been found sufficient, was dominated by passion or previous malice, the evidence of intoxication might be considered. But the court did instruct the jury that unless the defendant, in shooting his wife, acted with malice, either express or implied, he should be found guilty of manslaughter only, and that all the evidence should be considered. This necessarily included that bearing on the defendant's alleged intoxication.

State v. Wilson, 116 Iowa at 327-28 (emphasis added).

A case-law analysis of Iowa Code section 701.5 (1979), would allow evidence of the defendant's intoxication to go to the jury if his passion of anger, concerning what he thought was Ellen's infidelity, would have been sufficient to provoke a sober man to do what defendant did. To reemphasize the language of State v. Wilson, "[T]he court might well have told the jury that in passing on the issue of whether defendant, in what he did, the provocation having been sufficient, was dominated by passion or previous malice, the evidence of intoxication might be considered." The question therefore comes down to whether the defendant harbored a preexisting malice for his girlfriend, or was he provoked to display his anger at her when she came home later than he did and they were both drunk. Would a sober man have been provoked to anger under these circumstances? Intoxicated, did the defendant possess malice in that he was "able to appreciate

and understand at the time the act was committed its nature and probable consequences?" State v. Hofer, 238 Iowa 820, 833, 28 N.W.2d 475, 482; State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964).

It is at this point, I must ask when was it proved that defendant did indeed harbor the required malice to convict him of second degree murder? Certainly malice need only be inferred. But the crucial question, under the facts of this case, is when exactly did the defendant possess the malice toward his girlfriend? When did defendant form in his mind the intent to do such bodily harm to his girlfriend that the natural and probable consequences of that harm would result in death? Under the standards of reasonable doubt, these questions are essential for the jury to address.

I submit that the record is barren of evidence of any inference of malice on the part of defendant before he was intoxicated. The record shows that the mental state which provoked defendant to do what he did arose after he became intoxicated. This provoked mental state then manifested itself into slaps and pushes, neither of which were medically proved to be the cause of death, nor were they shown to be actions which a reasonable person, even when sober, would appreciate and understand death to be the natural and probable consequences. The record shows that whatever malice existed on the part of defendant, was not only not negated by intoxication, but rather arose because of intoxication.

I believe Hall does not stand for the rule of law stated by the majority. I also do not believe Hall is controlling for the case before us. The Hall court stated on page 210:

> In those cases in which an accused claims that sudden provocation reduces the homicide to manslaughter, State v. Pierce Wilson does permit intoxication to be considered on whether the defendant did in fact kill in the passion

> of anger brought on by provocation which would be sufficient if acted on by a sober man. We do not have such a case here.

Recent Iowa cases have substantially followed Hall, and yet have utilized language that has not really clarified the specific question now before this court. Two cases, State v. Collins, supra, and State v. Aguilar, 325 N.W.2d 100 (Iowa 1982), dealt with the specific intent crime of first degree murder. In both cases, however, language appears to allow an instruction on the defendant's mental conditions other than specific intent. "Temporary intoxication is simply evidence to be considered by the jury on the issue of intent." Collins, at 437. "As the court held in Collins, when evidence shows the mental condition at issue was caused by voluntary intoxication it is sufficient to instruct on that issue and not give an additional instruction on diminished responsibility." Aguilar, at 103.

Assuming, therefore, that section 701.5 is a codification of prior Iowa case law, I would hold that 701.5 would allow evidence of intoxication to be submitted to the jury. Section 701.5 states that intoxication is relevant ". . . in proving any element of the public offense with which the person is charged." This language would comport with the language in State v. Wilson, at 327-28, as well as State v. Hall, at 210. Cases decided after the section was enacted say nothing to contradict this position. Clearly then, the statute and the case law can be reconciled.

C. Can the case law and statutory language be reconciled with the instructions given by the court? As I stated in section A of this dissent, the instruction clearly commands the jury that intoxication should not be considered if the charge is murder. At worst it is a clear contradiction of the plain language of section 701.5, and the case law supporting it. At best it is grossly misleading because the law clearly states that malice must be shown to exist

prior to intoxication before intoxication becomes irrelevant for second degree murder.

One final point is worthy of note. Recent criticism his arisen concerning the distinction between specific intent crimes and general intent crimes concerning the admissibility of intoxication and subsequent jury instructions. As one commentator has stated:

> In State v. York, 293 N.W.2d 13 (Iowa 1980), the court stated that intoxication may be a defense to a crime requiring specific intent, but not to a crime requiring general intent. In view of the specific language of I.C.A. § 701.5, which states that intoxication will be relevant if it affects the proof of any element of the public offense with which the person is charged, the distinction seemed to be unwarranted, since intoxication conceivably could have some bearing upon the proof of general intent as well as specific intent. The specific-general intent distinction is a confusing one, primarily because courts are not consistent in defining these terms. However, the better view is that a specific intent is an intent to produce some result beyond the accomplishment of the criminal act itself. A general intent is the intent to do the act with no further anticipations. (Emphasis ours.)

4 J. Yeager & R. Carlson, Iowa Practice (Supp. 1984) § 8 at 4.

As noted earlier, malice has been defined, in part as a "fixed purpose or design . . . as makes a person appreciate and understand at the time the act is committed its natural [sic] and probable consequences . . . ." State v. Hofer, 238 Iowa 820, 823, 28 N.W.2d 475, 482. This would seem to be in accord more with the specific intent definition provided above in that it would seem to be an "intent to produce some result beyond the accomplishment of the criminal act itself." 4 J. Yeager & R. Carlson, Iowa Practice (Supp. 1984) § 8 at 4. This readily displays the inconsistency the commentator has noted and shows the need for further clarification of the last sentence in section 701.5. I believe the majority's holding today fails to provide that clarification.

III. Instruction on Recklessness. I must also dissent from the majority's affirmance of the court's instruction on the recklessness requirement of involun-

tary manslaughter. The defendant claims that according to Iowa Code sections 707.5(1) and (2), the trial court should have instructed the jury that his acts must have involved a high and unreasonable risk of death and that he must in fact have been aware of the risk.

The trial court submitted the following instruction to the jury:

> A person is reckless or acts recklessly, when he willfully or wantonly disregards the safety of persons or property. It is more than a lack of reasonable care which may cause unintentional injury. Rather, recklessness is conduct, which is consciously done with a willful or wanton disregard of the consequences, when a person knows or should know a risk of harm to another is created.
>
> Though recklessness is willful, that is intentional, it is not intentional in the sense that harm is intended to result. It is however, conduct which shows that the person knew or should have known of a danger and proceeded without any care or concern for the results of his actions.

In State v. Conner, 292 N.W.2d 682, 684 (Iowa 1980), the supreme court said:

> [R]ecklessness is an implied requirement of subsection 707.5(2). As noted in J. Yeager & R. Carlson, 4 Iowa Practice: Criminal Law and Procedure § 148 (1979), "the words 'in a manner likely to cause death or serious injury' implies an awareness of the risk or at least that the accused should have been aware of the risk." It is this subjective awareness of the risk, although usually determined objectively, that distinguishes civil negligence, which requires only objective awareness of the risk, from criminal negligence, id.; see W. LaFave & A. Scott, Handbook on Criminal Law § 30, at 209-15 (1972); R. Perkins, Criminal Law 760-61 (2d ed. 1969), and has been considered a required element of manslaughter in our prior cases, see State v. Wallin, 195 N.W.2d 95, 99 (Iowa 1972); State v. Boner, 186 N.W.2d 161, 166 (Iowa 1971) ("what might be considered actionable negligence in the law of torts, unaccompanied by a wanton and reckless disregard or indifference to the safety of others will not constitute the basis for a conviction of the crime of manslaughter"). More recently, we have labeled this standard of culpability "recklessness." State v. Kernes, 262 N.W.2d 602, 605-06 (Iowa 1978).

The majority upholds the instruction and relies upon State v. Kernes, 262 N.W.2d 602 (Iowa 1978). It is true, in Kernes, the supreme court stated that

there should be no distinction between the standard of conduct required for involuntary manslaughter by shooting or involuntary manslaughter by motor vehicle. Kernes at 605. However, the same court also said, "[I]t is plain that culpability of a person's unintentional death-causing conduct must still be weighed in light of all surrounding facts and circumstances, the activity he or she engaged in at the relevant time, and the inherent risk to others of the activity or instrumentalities involved." Id.

> We believe that convicting someone of involuntary manslaughter, thereby subjecting him to a possible sentence of five years of imprisonment, when that individual was not conscious of the grave risks of his acts is unjust. It stigmatizes and punishes one who is morally blameless. See W. LaFave & A. Scott, supra § 79, at 602 ("Where ... the result is both unintended and produced without any consciousness of the risk of producing it, it seems too harsh and illogical.").

State v. Conner, 292 N.W.2d at 686.

The facts of this case are not similar to facts where the defendant is using a gun or driving a car, and therefore was not engaged in activity that inherently lends itself to the possibility of death when done recklessly. The conduct of defendant the night of Ellen's death was not proven to be such that he should have been conscious of the grave risks of his acts. Therefore,I would hold that the trial court erred in not giving an instruction to the jury that required them to find that the defendant's actions were done, "in a manner likely to cause death or serious injury," and that defendant either was aware or should have been aware of such a risk.

For the reasons given, I would reverse the trial court and remand for a new trial.