NO. 2021-0860

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 109128

STATE OF OHIO
Plaintiff-Appellee

-vs-

CRONIE W. LLOYD
Defendant-Appellant

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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INTRODUCTION

Cronie Lloyd's new counsel would have tried his case differently. In the Eighth District Court of Appeals, Lloyd's appellate counsel criticized trial counsel's decision not to request jury instructions on lesser-included or inferior offenses. To the Court, that criticism has expanded to claim that counsel may have "presented" the state's plea offer differently. Appellant's Br., pg. 17-18. And that is precisely what this case is about. There is no broad legal question for the Court to decide, no conflict of law, no matter of statutory interpretation. The real issue before the Court is a defendant who now regrets his decision to go to trial and wants a plea that is no longer available.

Put simply, the Court "should not have accepted jurisdiction over this case. Appellant['s] proposition[] of law…involve[s] nothing more than applying settled law. Correcting a perceived legal error is not something [this Court] should do." *State v. Jones*, Slip Op. No. 2021-Ohio-3311, ¶33 (Donnelly, J., dissenting)(internal citations omitted). "The analysis about what is reasonable trial strategy would be different in a hypothetical case—under a hypothetical statute […]. [The Court's] job is to decide the case before [it], not hypotheticals." *State v. Mohamed*, 151 Ohio St.3d 320, 2017-Ohio-7468, ¶24. Correcting a perceived legal error is precisely what the Court is asked to do in this case.

The Court should dismiss this case as improvidently allowed or in the alternative affirm the decision of the Eighth District Court of Appeals.

STATEMENT OF CASE AND FACTS

The following statement of the case and statement of the facts are taken from the Eighth District's decision in this case:

> "In February 2019, Lloyd was named in a two-count indictment, charging him with murder in violation of R.C. 2903.02(B), and felonious assault in violation of R.C. 2903.11(A)(1), with notice of prior conviction and repeat violent offender specifications. The indictment stemmed from allegations that Lloyd, then 48 years old, caused the death of the 83-year old victim, Gary Power ("Power"), during the commission of a felonious assault offense. Lloyd pleaded not guilty to the offenses and the matter proceeded to a jury trial where the following facts were adduced.
>
> On February 3, 2019, Lloyd and Power were involved in a minor traffic accident while leaving a bar located in Independence, Ohio. The men pulled their vehicles into a nearby gas station, where they proceeded to engage in a verbal argument. During the verbal dispute, the men made gestures towards their vehicles and assessed the damage caused by the accident. The men were standing several feet apart when Power began walking towards the rear of his vehicle. As Power walked past Lloyd, Lloyd suddenly threw a single punch, without warning, that connected with Power's jaw. Power immediately lost consciousness and fell to the ground, striking his head on the concrete. Lloyd unsuccessfully attempted to throw a second punch as Power was falling to the ground. The incident, which lasted less than two minutes, was captured by nearby surveillance cameras.
>
> Lloyd quickly fled the scene without rendering aid or calling 911. Officer Everett Haworth ("Officer Everett") of the Independence Police Department testified that he was patrolling the area when he observed Lloyd's vehicle pull out of the gas station at a high rate of speed. Upon observing Lloyd drive through a red light, Officer Haworth activated his overhead lights and attempted to initiate a traffic stop of Lloyd's vehicle. Lloyd, however, ignored Officer Haworth's siren and "continued to accelerate." (Tr. 170.) Officer Haworth explained that he decided to terminate his pursuit of Lloyd's vehicle because he received a radio broadcast to respond to an altercation that was taking place in the parking lot of a nearby Denny's restaurant. Officer Haworth stated that he prioritized the "40-person brawl" over Lloyd's traffic violations.
>
> After resolving the purported conflict in the Denny's parking lot, Officer Haworth noticed that there was a vehicle parked at the gas station where his pursuit of Lloyd's vehicle had begun. Upon further investigation, Officer Haworth observed "an older white male," later identified as Power, "laying on the pavement." (Tr. 171.) Power was unconscious and had a large laceration on the back of his head. Officer Haworth immediately called for an ambulance,

and Power was transported to a nearby hospital. Power was pronounced dead two days after sustaining his injuries.

Officer Haworth testified that he then made contact with the gas station attendant and obtained permission to review the gas station's security video footage. Based on his review of the video footage, Officer Haworth determined that a crime had occurred and that it was necessary to secure the scene and Power's vehicle. Relevant to this appeal, Officer Haworth testified that he collected a cigarette that was found near Power's body. Officer Haworth explained that he "believe[d] that the cigarette may have fallen from either the suspect or the victim." (Tr. 178.)

Sergeant Michael Murphy ("Sgt. Murphy") of the Independence Police Department testified that he was assigned to investigate the incident. In the course of his investigation, Sgt. Murphy photographed Power in the hospital, spoke with Power's relatives, and reviewed surveillance footage recovered from the gas station and the bar where Lloyd and Power had been prior to the traffic accident. Following Power's death, the investigating officers submitted physical evidence to the crime laboratory for forensic testing, including the cigarette recovered from the scene and swabs taken from areas of Power's vehicle that Lloyd had touched to regain his balance after punching Power.

Andrea Davis ("Davis"), a forensic scientist with the Ohio Bureau of Criminal Investigation, testified that the cigarette and a swab taken from the passenger's side door of Power's vehicle contained a profile that was consistent with Lloyd's DNA. In addition, the investigating officers confirmed that Lloyd was the owner of a vehicle that was the same color, make, and model as the vehicle depicted on the surveillance video footage.

Dr. David Dolinak, M.D. ("Dr. Dolinak"), provided extensive testimony regarding Power's medical history and the scope and nature of his injuries. Based on his review of the relevant medical records, Dr. Dolinak testified that Power sustained extensive head injuries, including fractures of his skull and bleeding and bruising in his brain. Dr. Dolinak explained that the initial impact to the left side of Power's jaw cause him to "fall to the ground hard enough to hit his head fairly hard on the ground." (Tr. 428.) Based on the nature and extent of his injuries, Dr. Dolinak opined, to a reasonable degree of medical certainty, that Power's cause of death was a blunt force head injury and that the manner of death was a homicide.

At the conclusion of trial, Lloyd was found guilty of murder and felonious assault as charged in the indictment. He was sentenced to life in prison with the possibility of parole after 15 years."

State v. Lloyd, 8th Dist. No. 109128, 2021-Ohio-1808, ¶3-11.

Lloyd raised 5 assignments of error below. Relevant here, Lloyd challenged his representation in two assignments of error:

> **Assignment of Error II**: Mr. Lloyd was denied the effective assistance of counsel where trial counsel failed to request a jury instruction on the lesser included offenses of assault and involuntary manslaughter.
>
> **Assignment of Error III**: Mr. Lloyd was denied the effective assistance of counsel were trial counsel failed to request a jury instruction on the inferior offense of aggravated assault and voluntarily manslaughter.

Lloyd cited to the *Strickland* standard in support of both assignments of error. Appellant's Br., Eighth District Case No. 109128, pg. 10. Lloyd ***did not*** argue below that trial counsel's deficiencies are what caused him to reject a plea offer. Following a full analysis, the Eighth District Court of Appeals affirmed. *Id*. Lloyd sought jurisdiction on two propositions of law, and this Court narrowly granted jurisdiction on one. For the reasons that follow, this case should be dismissed as improvidently allowed or alternatively affirmed.

ARGUMENT

Appellee's Proposition of Law: It is reasonable trial strategy for a criminal defense attorney not to request a jury instruction on a lesser-included or inferior-offense and instead pursue a complete acquittal.

A. This Case Should be Dismissed as Improvidently Allowed

Before turning to the merits of Lloyd's argument, it is worth noting that Lloyd's proposition of law rests entirely on settled legal principles. All Lloyd really argues is that he should have received relief under *Strickland v. Washington,* 466 U.S. 668 (1984). But this Court should not "engage in error correction on an issue that will not likely reoccur." *State v. Azeen*, 163 Ohio St.3d 447, 170 N.E.3d 864, 2021-Ohio-1735, ¶41 (Stewart, J., dissenting). This Court "avoid[s] accepting jurisdiction over cases in which a party is asking this court to review a lower court's application of specific facts to a settled legal principle. Such cases-like this one-are 'factbound.' Th[is opinion would] announce[] no rule of law, nor does it clarify an existing rule of law. Deciding this appeal thus serves no real purpose." *Id*. at ¶53. "Rather than engage in error correction" this Court "should dismiss this appeal as improvidently accepted." *Id*. at ¶53.

This Court's "review…involves error correction and no more, and this appeal should therefore be dismissed as improvidently accepted." *Azeen* at ¶57 (Brunner, J., dissenting). "[N]othing in this appeal involves the consideration of a disputed or unclear issue of law. Instead, the entirety of the [this Court's opinion would be] devoted to determining whether well-established law was correctly applied to the unique facts of this case. In short, this appeal seeks error correction. But [this Court's] precedent is clear that [it does] not take cases presenting pure error

correction. *See Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 492, 2000- Ohio 397, 727 N.E.2d 1265 (2000) (Cook, J., concurring) ("According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases"). [This Court should] therefore dismiss this case as improvidently accepted." *Id*. at ¶72.

It is true that most appeals to this Court will likely involve the correction of some error. Respectfully, *Azeen* did not involve error correction because it involved an overexpansion of this Court's precedent, but the same cannot be said here. Lloyd's proposition of law asks this Court to do nothing more than determine "whether well-established law was correctly applied to the unique facts of this case." *Azeen* at ¶72 (Brunner, J., dissenting).The case should be dismissed.

B. Standard of Review

In 1984, the Supreme Court of the United States held that a convicted defendant's claim that "counsel's assistance was so defective as to require reversal of a conviction…has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Court further instructed courts to "indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

The *Strickland* standard has been applied by thousands of cases since 1984. A recent search on Lexis shows that *Strickland* has been cited by Ohio courts 14, 223 times, 286 of which have been by this Court. It is the same standard that Lloyd asks this Court to apply here.

C. The Eighth District Court of Appeals Properly Applied *Strickland* to Lloyd's claim.

Lloyd argued below that his trial counsel was constitutionally ineffective because counsel failed to request certain jury instructions. The Eighth District, as it was required to do, applied the law from this Court and the Supreme Court of the United States. Specifically, the appellate court applied the following standard:

> "To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he or she was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Id.* at 694.
>
> In Ohio, a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999- Ohio 102, 714 N.E.2d 905 (1999). In evaluating trial counsel's performance, appellate review is highly deferential as there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland* at 689. Appellate courts are not permitted to second-guess the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965 (1995). Even instances of debatable

> strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987).
>
> Relevant to the circumstances presented in this case, it is well settled that there is a presumption that 'the failure to request an instruction on a lesser-included offense constitutes a reasonable 'all or nothing' trial strategy.' *State v. Lewis*, 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265, ¶ 51, quoting *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶ 20. 'By not requesting an instruction on a lesser-included offense, the hope is that the jury will acquit the defendant if the evidence does not support all the elements of the offense charged.' *Id.* at ¶ 52, citing *State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, ¶ 119 ("It would have been inconsistent to argue for complete acquittal while at the same time arguing for the lesser-included offense."); *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483, ¶ 47 (Trial courts tend to overrule [ineffective assistance] arguments based upon reviewing court's deference to the all- or-nothing trial strategy.); *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996- Ohio 71, 658 N.E.2d 764 (1996) ("Failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel.")."
>
> *State v. Lloyd*, 8th Dist. No. 109128, 2021-Ohio-1808, ¶29-31.

Consistent with binding precedent, the Eight District noted a presumption that trial counsel's performance was objectively reasonable. A presumption can, as Lloyd argues, be rebutted.[1] For example, Lloyd was presumed innocent until he was proven guilty beyond a reasonable doubt. But as Lloyd concedes, the Eighth District held that Lloyd "fail[ed] to overcome the presumption that defense counsel made a tactical decision to seek acquittal rather than a conviction on a lesser-included offense." *Lloyd* at ¶¶32, 34; Appellant's Br., pg. 3 ("[c]haracterizing Lloyd's attorney's decisions as 'strategic,' ***having found that counsel's competence was not rebutted***, the court of appeals treated counsel's decisions as unreviewable for deficient performance."). The

[1] A "presumption" has been defined as "a rule of law, statutory or judicial, by which [a] finding of a basic fact gives rise to existence of presumed fact, until [the] presumption is rebutted." *United States v. Chase*, 18 F.3d 1166, 1172 n. 7 (4th Cir. 1994)(quoting Black's Law Dictionary 1185 (6th ed. 1990)).

Eighth District ***did not*** hold that an argument like Lloyd's could *never* rebut the presumption afforded counsel, only that Lloyd failed to do so here.

The Eighth District has, on prior occasions, found that a defendant rebutted the presumption that his trial counsel's conduct was objectively reasonable. In *State v. Dobson*, 8th Dist. No. , 2010-Ohio-2339, the court found that counsel's "failure to know the law virtually nullified defendant's only theory of acquittal." *Id*. at ¶34. Due to that error and others, the Eighth District vacated Dobson's convictions. As *Dobson* shows, it is possible for a defendant to rebut the presumption, it's just that Lloyd didn't.

Lloyd's disagreement is really with the outcome, not the standard that was applied. To the extent Lloyd argues that the Eighth District reached the wrong conclusion, he is mistaken. Faced with overwhelming evidence, counsel chose to focus her closing argument on the state's inability to prove *mens rea*. The record shows that trial counsel was aware that the state had to prove that Lloyd acted knowingly, and that counsel chose to focus on the lack of proof of that element:

> "…I'm also sure that when a person throws a punch and hits someone in the fact, we've seen it in so many different contexts, we've seen it on a football field where players get angry and throw a punch, we've seen it in the playground where people get angry and throw a punch, where kids get angry and throw a punch. Sometimes you see it in the workplace when people get angry and throw a punch.
>
> But you have to ask yourself, when you think about all of those scenarios, are any or all of those people intending to cause the death of the person that they thew a punch at? And [you have] to be honest and say no.
>
> You could throw a punch at a workplace, but not knowing, not examining the area around the workplace first. And unfortunately, a person could fall to the

ground, hit a corner of a table or a machine and eventually die from the impact. ***But that does not negate the state's burden or the issue of knowingly***."

Tr. 513-514. (Emphasis added).

"I asked you to think about how often people deliver punches and ***whether or not they knowingly—because you have to understand that knowingly is an element of the crime***. And there is no way that Mr. Lloyd could have knowingly been aware that hitting someone with one punch would cause the death of that individual.

"…And so we're asking you not to ignore the punch, but to know that generally and in this case the one punch, my client could not have ever known that the one punch would lead to the death of Mr. Power.

Did he commit an assault? No doubt about it. Was he provoked in any way? Absolutely not. Did he have the right to put his hands in any way, shape or form on Mr. Power? No, he did not.

But did he knowingly cause the death of this gentlemen? I say to you there is more than reasonable doubt."

Tr. 518-519. (Emphasis added).

"I simply stand before you and I ask you to keep your oath that you took prior to becoming jurors and do your best to separate sympathy from facts in evidence. And we submit to you that there is no doubt, my client, he didn't hit Mr. Power with a bat. He didn't hit him with a gun. He didn't beat him with a pole. ***He didn't do the obvious thing that one would think someone would do with intent to cause serious physical harm***. Unfortunately, he did assault Mr. Power. ***But he did not knowingly do so with the intent to cause death***. We're asking you to find him not guilty of murder. Thank you.

Tr. 522-523. (Emphasis added).

Lloyd claims that trial counsel "believed that the State had to prove that Lloyd had an intent to kill[,]" Appellant's Br., pg. 12, but that is not what counsel said. Rather, counsel argued Lloyd was not aware that his conduct would probably cause what it did. *See* R.C. 2901.22(B). There is no question that Mr. Power suffered serious physical harm which is why trial counsel primarily focused on the *mens rea*.

The appellate court found that Lloyd's counsel "argued throughout closing arguments that the nature and breadth of Lloyd's conduct in this case could not support the necessary elements of felonious assault and felony murder. While defense counsel did not dispute that Lloyd struck Power, she reiterated that Lloyd landed a single punch and could not have acted knowingly or otherwise anticipated the serious physical harm that resulted from the impact of Power's fall." *Lloyd* at ¶32. It makes sense then that trial counsel would not request additional jury instructions that would all but require Lloyd be convicted of something.

This Court, along with many appellate courts, has recognized an "all-or-nothing" trial strategy as a reasonable tactical decision. *See State v. Clayton,* 62 Ohio St.2d 45, 47-49, 402 N.E.2d 1189 (1980); *State v. Lewis*, 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265, ¶51; *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶20; *State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, ¶119; *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483, ¶47.

Equally important, the Eighth District found that the instructions would have been improper regardless. "[E]ven if this court were to ignore the deference afforded to defense counsel's trial tactics, we find the court's failure to provide instructions on the lesser-included and inferior-degree offenses did not amount to plain error based on the evidence presented at trial." *Lloyd* at ¶43. The facts simply didn't warrant an instruction on assault, aggravated assault, and/or involuntary manslaughter.

The Eighth District applied the standard that this Court routinely applies. This case doesn't present a need for guidance. Each application of *Strickland* depends on

the individual case. Sometimes, as in *Dobson*, relief is warranted and sometimes, like here, it is not.

D. There is nothing in the record before the Court to suggest that the Eighth District should have arrived at a different result.

The record before the Court clearly supports that trial counsel used a sound (and common) trial strategy when she declined to request an instruction on lesser-included or inferior offenses. There is no evidence that counsel "believed that the State had to prove that Lloyd had an intent to kill." Appellant's Br., pg. 12.

As this Court has said, "[t]he record may reveal that trial counsel did not request a certain jury instruction, but, without more, the court of appeals would have to guess as to why trial counsel did not make the request." *State v. Griffie*, 74 Ohio St.3d 332, 333 (1996). The record supports what the Eighth District found-that trial counsel challenged the state's ability to prove Lloyd acted knowingly. If Lloyd can show otherwise then he may have different avenues of relief to pursue, but it does not require the Court to engage in hypothetical analysis of what a sufficient claim might look like.

E. This Court's recent application of *Strickland* does nothing to undermine the Eighth District's opinion in *Lloyd*.

Lloyd cites favorably to this Court's opinion in *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634 as an instance where this Court "refused to accept the presumption of competence in cases where trial counsel's strategic decisions were unreasonable." Appellant's Br., pg. 16. Glen Bates was convicted of aggravated murder and sentenced to death for murdering his two-year-old daughter. Unlike Lloyd, Bates had an

automatic direct appeal to this Court because of his sentence.

A majority of the Court vacated Bates's convictions, holding that he was "deprived of his constitutional right to the effective assistance of counsel when defense counsel, during voir dire, failed to question or strike a racially biased juror." *Bates* at ¶1. This Court, like the appellate court in *Lloyd*, applied *Strickland*:

> "To prevail on his ineffective-assistance claims, Bates must demonstrate both that 'counsel's representation fell below an objective standard of reasonableness' and that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, Bates must show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment.' *Id.* at 687. And to establish prejudice, he must show 'that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.' *Id.*
>
> To satisfy *Strickland*'s first prong, Bates must demonstrate that defense counsel's performance was objectively unreasonable in light of counsel's failure to question or strike the jurors at issue. *Hughes v. United States*, 258 F.3d 453, 461 (6th Cir.2001). To show prejudice under *Strickland* in this instance, Bates '*must* show that [a] juror was *actually biased* against him.' (Emphasis added in *Mundt*.) *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 67, quoting *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir.2001)."
>
> *Bates* at ¶¶24-25.

In *Bates*, like *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, the Court found that trial counsel's performance was deficient because "there appears to be no discernable reason why defense counsel" did not question a prospective juror about racially biased comments. *Bates* at ¶32. *Bates* is another example of an application of *Strickland* to the facts of that case. The *Bates* opinion is no different than *Lloyd*, it merely reached a different outcome. Again, there is nothing to clarify and no "guidance" needed; Lloyd failed to show that his trial counsel was ineffective, and his assignments of error were properly denied below.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court either dismiss the instance case as improvidently allowed or affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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ORC Ann. 2901.22, Part 1 of 2

Current through File 70 (HB 169) of the 134th (2021-2022) General Assembly; acts signed as of December 23, 2021.

§ 2901.22 Culpable mental states.

(A) A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

(C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

History

134 v H 511. Eff 1-1-74; 2014 SB361, § 1, effective March 23, 2015.

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