STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2014AP001711-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHAN CAFFERO,

Defendant-Appellant.

On Appeal from the Judgment of Conviction, Entered in the Circuit Court for Marathon County, the Honorable Michael Moran, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

Cases

Page

Wisconsin Statutes

Other

STATUTES INVOLVED

941.10 Negligent handling of burning material.

(1) Whoever handles burning material in a highly negligent manner is guilty of a Class A misdemeanor.

(2) Burning material is handled in a highly negligent manner if handled with criminal negligence under s. 939.25 or under circumstances in which the person should realize that a substantial and unreasonable risk of serious damage to another's property is created.

939.25 Criminal negligence.

(1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another …

(2) If criminal negligence is an element of a crime in chs. 939 to 951 or 346.62, the negligence is indicated by the "negligent" or "negligently."

939.05 Parties to crime.

(1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if the person:

a. Directly commits the crime; or

b. Intentionally aids and abets the commission of it; or

c. Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime…

ISSUE PRESENTED

Was the evidence presented at trial sufficient for the jury to have properly found Caffero guilty of negligent handling of burning material as party to the crime?

The trial court answered yes. (39:110-112).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested.

STATEMENT OF THE CASE

Defendant Nathan Caffero was charged in this case with negligent handling of burning material as party to a crime and obstructing an officer, contrary to Wis. Stats. §§ 941.10(1), 939.05, and 946.41(1). (13; App 104-07). Caffero exercised his right to a trial by jury on these charges. Caffero moved for a directed verdict at the end of the State's case but his motion was denied. (39:109-112; App 148-51). The trial took one day. Ultimately, the jury found Caffero guilty of both counts. (29; App 102). Judge Moran sentenced Caffero to nine months in jail on each count, concurrent to each other, and ordered restitution in the amount of $1000. (42:12; 29). The judgment of conviction was filed on March 7, 2014. (29).

Caffero filed a timely notice of intent to pursue postconviction relief on March 10, 2014. (30). He did not file a postconviction motion pursuant to Wis. Stat. § 809.30(2)(h). He filed a timely notice of appeal. (31). The sole issue is the sufficiency of the evidence adduced to support his conviction for negligent handling of burning material as party to a crime.

STATEMENT OF FACTS

The following evidence, relevant to the charge of negligent handling of burning material as party to the crime, was before the jury:

Around midnight on the morning of February 4, 2013, Nathan Caffero's girlfriend, Katelyn Muxlow, lit a stick of incense and placed the burning incense in a roll of toilet paper. (39:55, 57, 79, 80, 119; 20: Exh.1 at 6:39:10-35, 7:13:23-27; App 101). Caffero went into the bathroom around 12:45 a.m. and saw a roll of toilet paper on the floor that was burning a little at the top. (39:52, 55; 20: Exh.1 at 6:38:38-6:39:09, 6:40:00-37; App 101). Caffero poured water on the toilet paper roll, after which the burning incense and the burning roll both appeared to be extinguished. *Id*. Since all burning ceased, Caffero thought he had put enough water on the roll, left it on the floor of the bathroom, and went to bed. *Id*. No evidence was presented at trial that Caffero went into the bathroom again before he woke up in the morning to a smoky apartment roughly around 6:00 a.m.[1]

Around 2:00-3:00 a.m., Muxlow went into the bathroom and saw that the toilet paper roll was wet. (39:120; App 157). At this time, the toilet paper roll and incense appeared to be out, and Muxlow did not see any burning or smoking. (20: Exh.1 at 6:44:00-12; 39:56; App 101). She then went back to bed. (39:120; App 157)

Over the next several hours while the couple was sleeping, the toilet paper roll must have rekindled. (39:55-56,

[1] The squad camera video presented to the jury shows that Officer Hines arrived on the scene at 6:19 a.m. He presumably arrived within 5-10 minutes of the 911 call. Caffero called 911 within 5-10 minutes of waking up to the smoky apartment. 6:40:36. Therefore, Caffero and Muxlow would have woken up to the smoke roughly around 6:00 a.m.

93, 105; App 123-24, 144, 147; 20: Exh.1 at 6:38:57-6:39:09, 6:39:22-40; 6:44:00-12; App 101). Rekindling is when a fire appears to be out only to reignite. (39:93, 105; App 144, 147). Caffero and Muxlow woke up to a smoky apartment roughly around 6:00 a.m. Caffero then went into the bathroom, saw a hole in the floor where the toilet paper roll had been, and realized they needed to get out of the apartment. (20: Exh.1 at 6:42:38-6:43:04; 39:56; App 101, 124). Caffero ran downstairs, alerted a neighbor of the danger, and asked the neighbor to call the fire department. (*Id*; 39:114-15).

Officer Thomas Hines arrived on the scene in his squad car, which contained a recording device. (39:53; App 121). Since it was cold outside and the couple could not go into their burning apartment complex, Muxlow, Caffero, and their baby girl took shelter in Officer Hines' squad car. *Id*. Officer Hines' interview with the couple was recorded and presented to the jury as Exhibit 1, in the following relevant parts:

6:38:17 – 6:38:57

…

Off. Hines:	And you think the fire started in the…
Caffero:	Bathroom.
Off. Hines:	Bathroom? Do you know what started that?
Caffero:	A roll of toilet paper.
Off. Hines:	And how do you think the toilet paper started on fire?
Caffero:	What happened was we were burning incense and we left it on the toilet paper roll. And I came back in the bathroom about an hour later and it was smoking. And I put some water on it. I thought I put enough water on it but I obviously didn't. And so…

6:38:57 – 6:39:20

Caffero: It…I wet the toilet paper roll around 1 a.m. but I don't think I wet it good enough. And then it must have relit back up. And then I…we woke up to smoky house. Got out. Called the fire department.

Off. Hines: What time did you light that incense?

Muxlow: Me, I lit the incense around 12 a.m. … (unintelligible)

6:39:20 – 6:40:34

…

Muxlow: I lit the incense at 12 in the morning. Like 12 or uh, yeah, around 12. We put it out at around like 12:45, but it must have still been on fire or something was still burning…(unintelligible)

Off. Hines: You tried to put it out at 12:45?

Muxlow: Yeah - I don't - I'm thinking that the incense that was, cuz it was on the floor when I last saw it, it must have still been lit and it was, it was on the rug and in the bathroom.

Off. Hines: So at 12:45 you knew something was wrong?

Muxlow: At 12:45 we put water on the toilet paper roll, and, cuz we don't know exactly what started the fire. It could have been anything. But we're guessing that it was the incense or the toilet paper roll was still on fire.

Caffero: Not on fire but like…

Muxlow: Not on fire but, you know, like it must have been burning or something…

Caffero: It was just burnt a little bit at the top and that's our last roll of toilet paper so I ran a little bit of water under it and, you know and it wasn't smoking or anything and I thought it was fine. But the roll of toilet paper was still a little bit warm. And so I put water on it and I thought it was fine.

6:40:36 – 6:44:49

Caffero: And then about, we went to sleep right after that. And so at right about 5, 10 minutes before we called you guys…it would have took a really long time.

Muxlow: Really.

Caffero: Yeah. Cuz there was no flames.

Muxlow: We're not sure exactly what started it but we're guessing it was the toilet paper roll caught on fire.

…

Off. Hines: So was this incense smoking at like 12:45 this morning?

Muxlow: Yes, but it was…the last time I saw the incense it was out. And the paper, the toilet roll appeared to be out as well. Cuz we felt good cuz, [unintelligible]…

Off. Hines: Where was it located in the bathroom?

…

Caffero: Right next to the bathtub.

…

(20: Exhibit 1; 39:55-56). After Officer Hines left the squad car, Caffero and Muxlow were speaking amongst themselves. The following recorded conversation was played for the jury, in relevant part:

Caffero: It's not my fault you fucking burned the house down.

Muxlow: Yeah I did it.

Caffero: If anything, I'm gonna get charged…

Muxlow: Really, why?

Caffero: I'm just as much responsible as you are.

Muxlow: Really you didn't light it. You just tried to put the toilet paper roll out.

Caffero:	Yeah and I didn't do a good enough job. Therefore I was handling burning material, you know what I mean, like I could have prevented it but I didn't. We're both…you're not going to jail. I will.
…	
Caffero:	I should have put a lot more water on that toilet paper roll. That was our last toilet paper. If it wasn't I would have took forever to drenched it wet, threw it away, and got another one.

(20: Exhibit 1; 39:57; App 101, 125).

The State presented four witnesses: Officer Thomas Hines, Detective Nathan Pauls, Jeremy Kopp, and David DeStantis.

Officer Hines testified about the above statements that Muxlow and Caffero made to him in the squad car. (39:48-57; App 116-25).

Detective Pauls testified that the fire was determined to be accidental and was caused by a burning roll of toilet paper. (39:85, 91). He testified that he interviewed the couple twice regarding the incident. (39:78, 81; App 129, 132). Neither of those interviews were recorded. (39:86; App 137).

His first interview with the couple took place at the emergency room on February 4 – the day of the fire. (39:79; App 130). Detective Pauls testified that Muxlow told him that she had put an incense stick in a roll of toilet paper. (39:79-80; App 130-31). He also testified that Caffero denied ever placing the incense and toilet paper on the floor. (39:94-95; 145-46).

His second interview with Muxlow and Caffero took place at their hotel room the next day. (39:81-82; App 132-33). During this interview, Caffero told Detective Pauls that the incense was on the floor when he doused it with water. (39:83; App 134).

Detective Pauls testified that, given the two interviews with him and one with Officer Hines, initially it was Caffero who lit the incense, and then it was Muxlow. (39:92; App 143). When defense counsel probed further about when exactly Caffero said he lit the incense, Detective Pauls testified that the only evidence supporting the theory that Caffero lit the incense was, at one point early on in the investigation, Caffero used the word "we" when speaking to Officer Hines:

> Defense Atty: When did [Caffero] tell you he lit the incense?
>
> Det. Pauls: There was one portion early on that was a "we" that was used. Other than that, it was never told me that [Caffero] lit the incense at all.
>
> Defense Atty: When did he make the statement that "we" lit the incense to you?
>
> Det. Pauls: That was through Officer Hines at the initial.
>
> Defense Atty: So it was made to Officer Hines, not to you?
>
> Det. Pauls: Correct.

(39:92; App 143). Specifically, the statement Caffero made to Officer Hines when he used the word "we" was as follows: "We were burning incense and we left it on the toilet paper roll." (20: Exhibit 1 at 6:38:38-45; 39:55; App 101, 123). In that same interview with Officer Hines, Muxlow told Officer Hines that she was the one who lit the incense. (20: Exhibit 1 at 6:39:09-33; 39:55; App 101, 123).

Jeremy Kopp and David DeStantis both testified as to the damage in apartment as a result of the fire and the test burn they conducted. (39:96-105).

After the State rested, the defense moved for a directed verdict. (39:109; App 148). The State responded:

> Caffero was aware that a toilet paper roll was burning, an incense stick was burning. *He assisted by attempting*

> *to put it out*, but in his own words, didn't do a good enough job.

(39:110; App 149)(emphasis added). The court denied Caffero's motion, reasoning:

> …There was testimony given that it appears a toilet paper roll was used, and there was incense placed between it, and that incense was left burning at some point during the night, and at some point, Mr. Caffero attempted to put out that incense burning, but that it rekindled. That's been the testimony, and that that rekindling may have been the cause for the fire in this matter.
>
> Now, negligence talks about foreseeableness (sic) and whether someone did something foreseeable that could be damage to the property. It could be argued that having a toilet paper roll, setting on fire and not tending to it would have the foreseeable consequences of causing a fire. That was according to the testimony done by one of the parties. The testimony was that Ms. Muxlow may have done that, but that Mr. Caffero was aware of it; and certainly aware of it to the extent that he attempted to put out the fire or to put more water on the toilet paper in order to put it out, which did not occur. My turn.
>
> So that in and of itself would suggest to me that there is a quantum of evidence that has been provided at this point that could sustain a verdict on Count 1 as a party to a crime. Again, I am not commenting on the strength of that evidence; that is a jury question. But on that basis, I will deny the motion for a directed verdict that this time, and this is going to be a jury question.
>
> Did you wish to make a record of any further objections or statements?

(39:110-12; App 149-51). Defense counsel responded:

> Just that I don't think just being aware that someone else had created a risk means that he assisted in committing it
>
> …
>
> …[T]he jury instruction allows for an instruction if supported by the evidence that a person does not aid and abet if he or she is only a bystander or spectator and does nothing to assist in the commission of the crime.

(39:112; App 151). The court responded:

> The evidence was that he allowed it to remain there. He tried to put it out, did not remove it from the area, did not do anything else. So he did, according to the testimony, and I am not taking any position on strength of the testimony or credibility, but that he did manipulate what has been testified as the cause of the fire, did have some type of manipulation of that; was aware of the fact that there was a fire at some point, and I will say that that's enough to at least, given the threshold amount or quantum of evidence needed to defeat a request for directed verdict, is enough to go to a jury.
>
> I am not saying it's over the top, but I am saying there is enough here that I can deny your motion, and I will deny your motion at this time. Let's bring the jury in.

Id.

The defense presented two witnesses: Janet Zappandiano and Katelyn Muxlow.

Janet Zappandiano was Caffero and Muxlow's downstairs neighbor at the time of the incident. (39:114; App 153). She testified that Caffero came downstairs to her apartment, said there was a fire and they all needed to get out, and asked her to call 911. (39:115; App 154).

Katelyn Muxlow testified that she accidentally burned a toilet paper roll and caught the house on fire. (39:119; App 156). She testified that she put the incense on the top of the toilet paper roll, that she was the one who decided to do this, and that Caffero had absolutely nothing to do with the lighting of the incense or the decision to place the burning incense in the roll of toilet paper. *Id*. She testified that she went to the bathroom right around 2:00 or 3:00 a.m. right before she went to bed. (39:120; App 157). At that time, she saw that the toilet paper roll was wet, although she never actually witnessed Caffero putting out the toilet paper roll. (39:120, 124; App 157, 161).

In its opening statement, the State argued that Caffero created a risk of death or great bodily harm by not putting enough water on the toilet paper roll. (39:41; App 114).

By its closing argument, the State instead argued that Caffero assisted in the commission of the crime *not* by putting water on the burning roll, but rather by leaving that roll on the floor after Muxlow placed it there:

> The defendant could have picked up that toilet paper roll and put it in the sink, doused it with water. He could have put it in the toilet and made sure it was submerged. He left it on the floor. He let it burn through the floor, and you saw the results. You saw the photographs; you saw the damages.
>
> …
>
> When he went into a house or an apartment full of smoke, and when he went into the bathroom and saw a burning roll [of] toilet paper, did he move it? It was still in the same spot that he stated it was initially; between a bathtub and a toilet. That's where the hole was found, where it burned through the floor. Look at the results. Look at what happened here.
>
> …He was the one who walked in. He was the one who didn't move the toilet paper roll. He is the one that let it on the floor and let it burn through the floor.
>
> *Pouring water on the toilet paper roll isn't at issue in this case. Leaving it there, leaving a smoldering, burning toilet paper roll on the floor is at issue in this case*.

(39:140, 152-53; App 164, 167-68)(emphasis added).

ARGUMENT

I. The evidence presented at trial was insufficient to have found Caffero guilty beyond a reasonable doubt of negligent handling of burning material as party to the crime.

The question of whether the evidence is sufficient to support a conviction is a question of law this Court reviews de novo. *See State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d

43, 717 N.W.2d 676. When conducting such a review, this Court considers the evidence in the light most favorable to the State and will reverse where the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

If the evidence is insufficient to support a conviction on a particular charge, this Court must reverse the judgment of conviction and direct the circuit court to enter a judgment of acquittal on that charge. *State v. Ivy*, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (1984); see *State v. Henning*, 2004 WI 89, ¶ 22, 273 Wis. 2d 352, 681 N.W.2d 871. "[D]ouble jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence. Where the evidence is found insufficient to convict the defendant at trial, the defendant cannot again be prosecuted." *Id*.

A conviction for party to a crime may be obtained when the defendant either directly committed the crime, or when the defendant intentionally aided and abetted the person who directly committed the crime. As such, there are two possible theories that would permit Caffero's conviction under party to a crime: (1) that Caffero himself created a risk of death or great bodily harm, or (2) that Caffero's girlfriend created the risk, and that Caffero assisted her in creating that risk and acted with the purpose to do so. WIS JI-CRIMINAL 400. The evidence presented at trial was wholly insufficient to support a conviction on either theory. Caffero will address each theory in turn.

A. The evidence presented at trial was insufficient to show that Caffero directly committed the crime of negligent handling of burning material.

The evidence presented at trial was wholly insufficient to show that Caffero directly committed the crime of negligent handling of burning material. Wisconsin JI – Criminal 1310 sets forth the two elements for this crime: (1) the defendant handled burning material, and (2) the defendant did so in a manner constituting criminal negligence.

1. **Element One: The evidence was insufficient to show that Caffero handled burning material.**

Regarding element one, there was insufficient evidence at trial to show that Caffero actually handled the burning material. In its closing argument, the State set forth the supporting evidence that it believed fulfilled element one, stating:

> The first element which we discussed is that the defendant has to handle burning material. You heard testimony in that regard, and you actually heard the defendant's own words. He said, yeah, I placed the toilet paper roll on the ground and I poured water on it, but I didn't do a good enough job. You heard that. You heard that on the video. You heard the defendant admit that he handled it.

(39:138-39; App 162-63).

To begin, the mere act of pouring water on a toilet paper roll does not constitute handling burning material. Water is not burning material; water is used to put fires out, not start them. The burning material here would be the incense and the toilet paper roll. The State presented no evidence at trial to show that Caffero actually touched the toilet paper roll or the incense when he put water on it.

To continue, despite what the State claimed in its closing argument, there is absolutely no statement from Caffero in the video footage – or in any evidence presented at trial – that Caffero placed the toilet paper roll on the ground. All the evidence shows that Caffero *left* the toilet paper roll on the floor after it was already there, but was not the one who placed it there. This is an important distinction, as one involves physical contact with the burning material and the other does not.

Officer Hines testified that Caffero told him the toilet paper roll with the incense "was set on the floor." (39:51;

App 119). With the use of passive voice, this is not evidence that Caffero was the one who set it on the floor.

Officer Hines testified that Caffero told him the toilet paper was on the floor between the toilet and the bathtub, and that after he poured water on the burning toilet paper roll, he left it on the floor. (39:52; App 120). This is not evidence that Caffero *placed* the toilet paper roll on the floor.

When Muxlow and Caffero were in the squad car by themselves, Muxlow told Caffero, "Really, you didn't light it. You just tried to put the toilet paper roll out." (20: Exh.1 at 7:13:23-27; 39:57; App 101, 125). This is evidence that the only role Caffero played in the incident was putting water on the toilet paper roll.

Finally, Detective Pauls testified that Caffero specifically denied placing the toilet paper roll on the floor. (39:94; App 145).

There was no evidence that Caffero put the roll and incense on the floor. Rather, the evidence shows that Caffero left it on the floor after it had already been placed there. Leaving something on the floor does not constitute handling it.

The State then argued that Caffero admitted he handled the burning material. (39:139; App 163). The State was likely referring to the following statement made by Caffero in the squad car when he and Muxlow were talking amongst themselves:

Caffero:	If anything, I'm gonna get charged…
Muxlow:	Really, why?
Caffero:	I'm just as much responsible as you are.
Muxlow:	Really? You didn't light it. You just tried to put the toilet paper roll out.
Caffero:	Yeah and I didn't do a good enough job. Therefore I was handling burning material, you know what I mean, like I could have presented it but I didn't.

> We're both…you're not going to jail. I will.

(20: Exh.1 at 7:12:19-40; 39:57; App 101, 125). This statement in no way proves that Caffero handled burning material. Indeed, Caffero's statement does not even make sense. Caffero was under the illogical impression that simply being unsuccessful in his attempt to prevent the fire means he handled burning material.

Caffero is not a scholar of the law. He has no legal training. He is not an authority on what constitutes 'handling burning material.' He was simply beating himself up for not successfully preventing the fire, and he was catastrophizing the legal consequences of that. If this is what the State was relying upon in arguing that Caffero admitted he handled burning material, Caffero's illogical opinion on the matter is the type of evidence that "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The evidence overwhelmingly shows that Muxlow was the one who handled the incense and toilet paper, not Caffero. Muxlow consistently maintained throughout the investigation and at trial that she was the one handled them. When she was in the squad car immediately after the fire occurred, Muxlow told Officer Hines that she lit the incense (20: Exh.1 at 6:39:09-33; 39:57; App 101, 125). While in the emergency room, she told Detective Pauls that she put an incense stick in a roll of toilet paper. (39:79, 81; App 130, 132). She claimed responsibility for lighting the incense – or at least cleared responsibility from Caffero – when she and Caffero were in the squad car by themselves, having a seemingly candid conversation without any officers present. (20: Exh.1 at 7:13:23-30; 39:57; App 101, 125). She went under oath at trial and testified that she was the one put the incense on top of the toilet paper roll. (39:119; App 156). She testified that she accidentally burned a toilet paper roll and caught the house on fire. *Id*.

During the initial interview in the squad car when Officer Hines asked what had happened, Caffero replied,

"What happened was we were burning incense and we left it on the toilet paper roll." (20: Exh.1 at 6:38:38-50; 39:55; App 101, 123). Indeed, Caffero did leave the incense on the toilet paper roll after Muxlow placed it there. And indeed, the couple was burning incense in their apartment. This statement does not mean or infer that Caffero actually lit the incense, and it does not mean or infer he had any physical contact with either the roll or the incense.

By way of analogy, if a husband were at home watching a movie with his wife, and if the husband were to state, "We were watching a movie," that statement is not evidence that the husband took the DVD out of the case, inserted the DVD into the player, and pressed play. It does not mean that the husband had physical contact with or "handled" any technological device. Using the husband's statement as evidence that he had physical contact with the DVD or DVD player would be "so lacking in probative value and force that no trier of fact, acting reasonably, could have found" beyond a reasonable doubt that the husband handled those items. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The same is true here. Caffero's statement is not evidence that he lit the incense or touched any burning material. Caffero's statement is simply a description of what was happening in the apartment.

Furthermore, the State itself even relied on the fact that Caffero did not handle the burning material in trying to prove another element of the crime. The State's theory was that Caffero aided and abetted Muxlow in her crime because he did not pick up or move the burning material:

> The defendant could have picked up that toilet paper roll and put it in the sink, doused it with water. He could have put it in the toilet and made sure it was submerged. He left it on the floor…
>
> …
>
> When he went into … the bathroom and saw a burning roll [of] toilet paper, did he move it? It was still in the same spot that he stated it was initially; between a

> bathtub and a toilet. That's where the hole was found, where it burned through the floor.
>
> …He was the one who walked in. He was the one who didn't move the toilet paper roll. He is the one that let it on the floor and let it burn through the floor.

(39:140, 152-53; App 164, 167-68).

No reasonable jury could find beyond a reasonable doubt that Caffero handled the incense or toilet paper. Therefore, no reasonable jury could find beyond a reasonable doubt that Caffero directly committed the crime of negligent handling of burning material.

2. Element Two: The evidence was insufficient that Caffero created a risk of death or great bodily harm.

The evidence was also insufficient to prove element two. Element two requires a showing of criminal negligence. Criminal negligence in this context means that all of the following must be present: (1) the defendant's handling of burning material created a risk of death or great bodily harm, (2) the risk of death or great bodily harm was unreasonable and substantial, and (3) the defendant should have been aware that his handling of burning material created the unreasonable and substantial risk of death or great bodily harm. WI JI-CRIM 1310. The State presented insufficient evidence to show that Caffero's handling of burning material created a risk of death or great bodily harm.

Lighting of the incense

As a preliminary matter, the question of *who* lit the incense is irrelevant because the lighting of the incense was not what created the risk of death or great bodily harm. Rather, it was the *placement* of that incense in the toilet paper roll that created the risk.

Indeed, burning incense in the home is certainly safe when that incense is placed on an incense burner that is specifically designed for such purposes. That same stick of burning incense would be unsafe when placed in a flammable object such as a toilet paper roll. Thus, it is not the lighting of

the incense that created the risk; it is the placement of that incense on the toilet paper roll that created the risk. The relevant question that should be asked is not who lit the incense, but rather who put the burning incense in the toilet paper roll.

Even if this Court finds it is relevant to determine who lit the incense, no reasonable jury could conclude that it was Caffero. As explained above, Muxlow clearly and consistently claimed responsibility for lighting the incense. (20: Exh.1 at 6:39:09-33; 7:13:23-30; 39:57, 121-122; App 101, 125, 158-59). Muxlow never claimed that anyone but her lit the incense.

Furthermore, on cross examination, Detective Pauls testified that the only evidence supporting the theory that Caffero lit the incense was, at one point early on in the investigation when speaking with Officer Hines, Caffero happened to use the word "we":

> Defense Atty: When did [Caffero] tell you he lit the incense?
>
> Det. Pauls: There was one portion early on that was a "we" that was used. Other than that, it was never told me that [Caffero] lit the incense at all.
>
> Defense Atty: When did he make the statement that "we" lit the incense to you?
>
> Det. Pauls: That was through Officer Hines at the initial.
>
> Defense Atty: So it was made to Officer Hines, not to you?
>
> Det. Pauls: Correct.

(39:92; App 143). The statement Detective Pauls is referring to here is when Caffero told Officer Hines, "[W]e were burning incense…" (20: Exh.1 at 6:38:38-42; 39:55; App 101, 123).

The State's entire case that Caffero lit the incense comes down to this solitary statement.

No reasonable jury could conclude beyond a reasonable doubt that Caffero actually lit the incense based on this statement.

At no point at trial was any evidence presented that Caffero uttered the words, 'We *lit* the incense.' Detective Pauls established in his testimony that Caffero never said it to him. (39:92; App 143). Furthermore, in the squad car video – which is the clearest and most undisputable evidence of what Caffero said to Officer Hines – the words "we lit the incense" were simply not uttered. The words "*I* lit the incense" *were* uttered, and they were uttered by *Muxlow*. (20: Exh.1 at 6:39:10-6:39:35; 39:55; App 101, 123).

As addressed above, the statement "we *were burning* incense" is not evidence that Caffero actually lit the incense, just as "we were watching a movie" is not evidence that that person put the DVD into the DVD player and pressed play.

Again, the question of *who* lit the incense is irrelevant. But even if this Court finds it is relevant, no reasonable jury could find beyond a reasonable doubt that Caffero actually lit the incense based on the mere statement, "[W]e *were burning* incense." Such evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Placing the incense on the toilet paper roll

What is relevant here is not who lit the incense, but rather who placed the incense on the flammable toilet paper roll. There was absolutely no evidence presented at trial to show that Caffero put the incense on the roll of toilet paper, made the decision to put it there, or in any way influenced Muxlow's decision to put it there.

In fact, every piece of evidence presented on the matter shows the opposite – that Muxlow put the incense in the toilet paper roll and that Caffero played no role in that placement. (39:79-80, 119; App 130-31, 156). Detective Pauls testified that Muxlow said she put an incense stick in a

roll of toilet paper. (39:79-80; App 130-31). Muxlow also testified that she was the one who put the incense on top of the toilet paper roll, that Caffero did not tell her to do this, and that Caffero played absolutely no role in deciding to put the incense in the toilet paper roll. (39:119; App 156). Testimony from the other witnesses is silent on the issue.

At no point did the State present evidence that Caffero placed the incense stick in the toilet paper roll. As such, no reasonable jury could find that he did.

Putting water on the toilet paper roll

In its opening statement, the State argued that Caffero created a risk of death or great bodily harm by not putting enough water on the toilet paper roll. (39:41; 114). However, the State apparently abandoned this theory at closing, noting in its closing argument that:

> Pouring water on the toilet paper roll isn't at issue in this case. Leaving it there, leaving a smoldering, burning toilet paper roll on the floor is at issue in this case.

(39:153; App 168).

It is elementary that putting water on a burning toilet paper roll does not create a risk of death or great bodily harm. It reduces that risk.

The definition of "create" is "to bring into existence." Merriam-Webster.com, n.d. Web. 22 July 2014. <http://www.merriam-webster.com/dictionary/create. Here, the placement of the lit incense on the toilet paper roll was what brought the risk of death or great bodily harm into existence. Putting water on the burning toilet paper roll *decreased* the risk; indeed, if Caffero had not put any water on the toilet paper roll, the fire would likely have advanced much faster than it did, and with potentially more devastating results.

No reasonable jury could find beyond a reasonable doubt that Caffero created a risk of death or great bodily harm by pouring water on the burning toilet paper roll.

B. The evidence presented at trial was insufficient to show that Caffero intentionally aided and abetted the commission of the crime of negligent handling of burning material.

Wis. Stat. Section 939.05 provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it. A defendant is concerned in the commission of the crime if he intentionally aids and abets the commission of a crime.

A person intentionally aids and abets the commission of a crime when, "acting with knowledge or belief that another person is committing or intends to commit a crime," he knowingly either (1) assists the person who commits the crime, or (2) is ready and willing to assist, and the person who commits the crime knows of this willingness. WIS JI – CRIMINAL 405; see also *State v. Rundle*, 176 Wis. 2d 985, 1000 n.18, 500 N.W.2d 916 (1993). To intentionally aid and abet a crime, the defendant must have a conscious desire to assist the commission of that crime. *Rundle*, 176 Wis. 2d at 990; *See State v. Hecht*, 116 Wis. 2d 605, 342 N.W.2d 721 (1984).

A bystander or spectator who does nothing to assist in the commission of the crime is not liable for aiding and abetting. WIS JI – CRIMINAL 405. Similarly, a person who is merely present while a crime is being committed and fails to stop or to report the criminal activity is not a party to the crime. See *Rundle*, 176 Wis. 2d at 1008.

In *State v. Rundle*, the Wisconsin Supreme Court considered whether a father who did nothing to stop his wife's "constant and horrific" abuse of their young daughter was himself guilty of aiding and abetting the child abuse. *Id*. at 992. The State prosecuted Rundle as a party to the crime, arguing he aided and abetted his wife's behavior because he "stood back," failed to intervene to protect the child, and failed to report the abuse to police. *Id*. at 993. The court noted:

> [T]he legislature intended that, in order to obtain a conviction under … [WIS. STAT. §] 939.05(2)(b) … the state must prove (1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of a crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance.

Id. at 990. The court held that even though Rundle may have been guilty under a different statute that criminalizes failure to prevent child abuse, evidence that he stood back and failed to prevent the abuse was insufficient to show he had intentionally aided and abetted his wife's crime. *Id*. at 1008.

1. State's First Theory: That Caffero assisted in the commission of the crime by attempting to put out the burning toilet paper roll and being unsuccessful in his attempt.

In the instant case, the State's initial theory was that Caffero assisted in the commission of the crime by attempting to put out the smoldering toilet paper roll and being unsuccessful in this attempt. (39:41, 109). After the defense moved for a directed verdict, the State argued:

> Caffero was aware that a toilet paper roll was burning, an incense stick was burning. He assisted by attempting to put it out, but in his own words, didn't do a good enough job.

(39:109; App 148). The State made a similar argument in its opening statement. (39:41; App 114).[2]

The act of pouring water on a burning toilet paper roll in no way constitutes assisting in the commission of negligent handling of burning material.

[2] Specifically, the State argued: "Caffero's decision to not use too much water on the roll when he found it on fire created a risk of death or great bodily harm, that the risk was unreasonable and substantial, and that Caffero should have known the way he handled the toilet paper roll and the incense created that risk." (39:41).

First, per *Rundle*, Caffero had no legal duty under Wis. Stats. §§ 941.10 & 939.05 to put *any amount* of water on the fire at all. That he put enough water on it to extinguish the burning – but not enough to keep it from rekindling – cannot be a basis for guilt for this crime.

Second, pouring any amount of water on a burning material decreases the risk of a fire. Since Caffero reduced the risk, he could not have aided Muxlow in *creating* a risk of death or great bodily harm.

Third, Caffero was clearly trying to prevent a fire by pouring water on the roll; no reasonable jury could find that Caffero had a conscious desire or intent that this conduct – pouring water on the roll – would assist Muxlow in creating the risk of death or great bodily harm. *Rundle*, 176 Wis. 2d at 990.

If Rundle could not be guilty as a party to the ongoing abuse he observed and did not try to stop, then it is inconceivable that Caffero could be guilty as party to Muxlow's negligent handling of burning material, when he *did* try to stop it.

According to *Rundle*, if Caffero had instead simply stood back and had taken no action to prevent the spread of fire, then he could not be guilty of intentionally aiding and abetting this crime because he would have been an onlooker.

It is illogical – and surely contrary to legislative intent – that someone would be in a *worse* legal position if they try to help by throwing some water on a burning roll, than if they just stand there, watch the fire burn a hole through the floor, and do absolutely nothing to stop it. Surely due process cannot allow such a result.

2. State's Second Theory: That Caffero assisted in the commission of the crime by failing to move the burning toilet paper roll from the floor.

By its closing argument, the State apparently abandoned its initial theory. Instead, it argued that Caffero assisted in the commission of the crime *not* by putting water

on the burning roll, but rather by leaving that roll on the floor after Muxlow placed it there. The State argued:

> The defendant could have picked up that toilet paper roll and put it in the sink, doused it with water. He could have put it in the toilet and made sure it was submerged. He left it on the floor. He let it burn through the floor, and you saw the results. You saw the photographs; you saw the damages.
>
> …
>
> When he went into a house or an apartment full of smoke, and when he went into the bathroom and saw a burning roll [of] toilet paper, did he move it? It was still in the same spot that he stated it was initially; between a bathtub and a toilet. That's where the hole was found, where it burned through the floor. Look at the results. Look at what happened here.
>
> …He was the one who walked in. He was the one who didn't move the toilet paper roll. He is the one that let it on the floor and let it burn through the floor.
>
> Pouring water on the toilet paper roll isn't at issue in this case. Leaving it there, leaving a smoldering, burning toilet paper roll on the floor is at issue in this case.

(39:140, 152-53; App 164, 167-68).

This analysis flies in the face of *Rundle*. Rundle could have held his wife back when she went to hit their daughter. He could have reported his daughter's abuse to police or a school official. He could have dove in front of his daughter and used his body as a shield to take the blows for her. He could have done a lot of things to protect his daughter from his wife's abuse. Just as Rundle could not be guilty of intentionally aiding and abetting child abuse by doing nothing to stop it, Caffero cannot be guilty of intentionally aiding and abetting Muxlow's crime by not moving the toilet paper roll.

Leaving a roll of toilet paper on the floor is not overt action; it is inaction. Party to a crime liability does not allow conviction for inaction; it requires that the defendant "undertake some conduct, (either verbal or *overt action*) which as a matter of objective fact aids another person in the execution of a crime…" *State v. Balistreri*, 106 Wis. 2d 741,

758, 317 N.W.2d 493 (1982)(quoting *State v. Asfoor*, 75 Wis. 2d 411, 427-29, 249 N.W.2d 529 (1977)(emphasis added). A bystander who does nothing to assist in the commission of the crime is not liable for aiding and abetting. WIS JI – CRIMINAL 405. Similarly, a person who is merely present while a crime is being committed and fails to stop or to report the criminal activity is not a party to the crime. See *Rundle*, 176 Wis. 2d at 1008.

The State's last words to the jury regarding count one were that Caffero's role in pouring water on the roll was not at issue in this case. (39:153; App 168). As a result, if the jury convicted Caffero on the intentionally aiding and abetting theory, then the jury likely convicted Caffero based solely on the fact that they believed he aided and abetted by leaving the toilet paper roll on the floor.[3]

As failing to move a burning material is not assisting in the commission of the crime, no reasonable jury could find Caffero guilty of intentionally aiding abetting under this theory.

3. Under either theory, the State presented no evidence at trial to show that Caffero had the purpose to assist Muxlow in creating a risk of death or great bodily harm.

To intentionally aid and abet a crime, a defendant must have the *purpose* to assist the commission of that crime. WIS JI-CRIMINAL 400 (emphasis added). The State presented absolutely no evidence at trial to show this.

While there are circumstances in which a defendant can intentionally aid and abet a negligent crime, this is not one of them. Although Wisconsin appellate courts have previously upheld convictions for intentionally aiding and abetting negligent crimes, in those cases evidence was presented at trial that the defendant-appellants had the purpose to engage in criminal behavior.

[3] The court denied Caffero's motion to poll the jury on which theory of liability they chose to convict on. (39:165-166; App 176-77).

In *State v. Cydzik*, 60 Wis. 2d 683, 211 N.W.2d 421 (1973), Cydzik intended on participating in an armed robbery, but was convicted of intentionally aiding and abetting the murder that occurred during the robbery. Cydzik argued that he could not be guilty of aiding and abetting first degree murder because "[e]very act, every move that [he] made that evening was connected to the robbery, and not to the murder." 60 Wis. 2d 683 at 696.

The Wisconsin Supreme Court upheld the conviction for intentionally aiding and abetting first degree murder, holding that someone who intentionally aids and abets the commission of a crime is responsible not only for the intended crime, but also for other crimes that are committed as a natural and probable consequence of the intended criminal acts. *Id*. at 697. The court held that, while Cydzik may have only had it in mind to participate in the robbery, murder is a natural and probable consequence of the actions he took in furtherance of that robbery. *Id*.

In *State v. Asfoor*, 249 N.W.2d 529, 75 Wis. 2d 411 (1977), Asfoor was convicted of injury by negligent use of a weapon as party to the crime. At trial, the State presented evidence showing the following: A fight erupted at a hotel between three men: Kutil, Schubert, and Layland. 75 Wis. 2d at 421. Schubert left the hotel and went to Asfoor's apartment in order to gather more people to "do some hostile damage" to Kutil. *Id*. at 428. Asfoor was standing close-by when Schubert told Jewell (another man that Schubert was trying to enlist) that he "wanted to see [Kutil] get shot." *Id*. at 420. Initially Asfoor seemed nervous about this plan, but he agreed to go along with it and agreed to drive to the hotel. *Id*. at 421. Before they left, Jewell got a shotgun and placed it in the back seat of Asfoor's car. *Id*. Asfoor drove to the hotel. *Id*. The men got out of the car and Jewell and Schubert both had guns in hand. Jewell shot Kutil. When the police arrived and asked about additional weapons, Asfoor reached under the front passenger seat of his car and pulled out a knife, a holster, and a handgun. *Id*.

On appeal, Asfoor argued that it is impossible to intend the crime of negligent injury by use of a weapon. The court noted that, while "it is true that intent and negligence are

mutually exclusive and one cannot intend to injure someone by negligent conduct," there are "often many intentional acts which lead to an injury caused by negligence." *Id*. at 428. The court elaborated:

> He intended his acts; knowing his friends' plans to do 'hostile damage' to the victim, he voluntarily drove the car to the hotel. His acts demonstrated that if assistance became necessary in the commission of a crime, he was ready to provide it. In fact, he did provide assistance by allowing the use of one of his guns and by driving Schubert and Jewell to the motel. Without his assistance the crime could not have taken place. When he set out, he aided his companions and must be held responsible for the natural consequences of his act.
>
> …
>
> [Asfoor] consciously agreed to aid his companions when he knew they were planning a crime. He took overt actions to further their conduct. He intended to place the handgun on the floorboard of the car. He was conscious that the shotgun was in the back seat. … All these intentional acts led to an injury when one of those he aided acted negligently while using a weapon.

Id. Under this reasoning, the court upheld Asfoor's conviction. *Id*.

What happened in the instance case is such a far cry from *Cydzik* and *Asfoor* that those cases are inapposite. Both Cydzik and Asfoor engaged in intentional acts in which they knowingly assisted in criminal behavior. For example, the intentional acts in Asfoor were driving the shooter to the hotel when he knew his friend wanted to do "hostile damage" to the victim, allowing guns in his car, and allowing his friend to use one of his guns.

In contrast, Caffero's one intentional act in regards to the fire was throwing water on the burning toilet paper roll with the intention to put it out, but not doing a 'good enough job.' The intentional act at issue here reduced the risk of death or great bodily harm. Caffero had the mens rea to reduce that risk and make the apartment *safer*. Caffero's "participation" was strictly an attempt to put the fire out. It was strictly an attempt to reduce the risk.

No reasonable jury could find that he had the mens rea to do create any kind of a risk of death or great bodily harm. No reasonable jury could find that Caffero had the purpose to assist in the commission of Muxlow's crime.

CONCLUSION

The evidence presented at trial does not support Caffero's conviction for negligent handling of burning material as party to the crime, under any of the State's theories.

WHEREFORE, for all the reasons stated above, Nathan Caffero respectfully urges this Court to vacate his judgment of conviction for negligent handling of burning material as party to the crime and remand for entry of a judgment of acquittal as well as an order that Caffero be reimbursed for restitution costs related to this conviction.

Dated this _____ day of September, 2014.

Respectfully submitted,

_____
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that is is: proportional serif font, minimum printing resolution of

200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,528 words.

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in context and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties. Copies have been sent to: ADA Michael Puerner, Office of the District Attorney, Marathon County Courthouse, 500 Forest Street, Wausau, WI 54403.

Dated this _____ day of September, 2014.

Signed:

_____

Christina C. Starner
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APPENDIX

INDEX TO APPENDIX

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of September, 2014.

Signed:

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