

RECEIVED

11-17-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 2014AP001711-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHAN CAFFERO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MARATHON COUNTY CIRCUIT
COURT, THE HONORABLE MICHAEL K. MORAN,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

MICHAEL J. PUERNER
Assistant District Attorney
State Bar No. 1070406

Attorney for Plaintiff-Respondent
State of Wisconsin

Marathon County District Attorneys Office
500 Forest Street
Wausau, WI 54403
(715) 261-1111
(715) 261-1110 (Fax)
michael.puerner@da.wi.gov

TABLE OF CONTENTS

	Page
ISSUE PRESENTED FOR REVIEW	1
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	2
SUPPLEMENTAL STATEMENT OF FACTS.....	2
ARGUMENT.....	2
I. THE EVIDENCE WAS SUFFICIENT TO SHOW CAFFERO NEGLIGENTLY HANDLED BURNING MATERIAL.	2
A. The standard of review is extremely deferential to the jury’s verdict.....	3
B. Evidence supports the jury’s verdict that Caffero handled burning material.....	4
C. Evidence supports the jury’s verdict that Caffero created a risk of death or great bodily harm or acted under circumstances in which he should have realized that a substantial and unreasonable risk of serious damage to another’s property was created....	6
CONCLUSION.....	9

CASES CITED

<i>State v. Poellinger</i> , 153 Wis. 2d 493, 451 N.W.2d 752.....	3, 6
<i>State v. Hayes</i> , 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203.....	4
<i>State v. Schutte</i> , 2006 WI App 135, 295 Wis. 2d 256, 720 N.W.2d 469.....	6
<i>Hart v. State</i> , 75 Wis. 2d 371, 249 N.W.2d 810.....	6
<i>State v. Barman</i> , 183 Wis. 2d 180, 515 N.W.2d 493 (Ct. App. 1994).....	14

STATUTES CITED

Wis. Stat. § 941.10.....	2, 4, 6, 7
Wis. Stat. § 939.25.....	2, 6, 7

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2014AP001711-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
NATHAN CAFFERO,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MARATHON COUNTY CIRCUIT
COURT, THE HONORABLE MICHAEL K. MORAN,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED FOR REVIEW

- I. Was the evidence presented at trial sufficient for the jury to have properly found Caffero guilty of negligent handling of burning material?

The jury found Caffero guilty of the charge.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Caffero that this case does not warrant oral argument or publication of the Court's decision.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented in Caffero's brief will be set forth where necessary in the Argument section.

ARGUMENT

I. THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SHOW CAFFERO NEGLIGENTLY HANDLED BURNING MATERIAL

On June 11, 2013, a Marathon County jury found Nathan Caffero guilty of two misdemeanor crimes. Caffero now challenges the jury verdict for one of those crimes, negligent handling of burning material, a crime contrary to Wisconsin Statute Section 941.10. This statute creates a crime whenever a person "handles burning material in a highly negligent manner." Wis. Stat. § 941.10. The statute itself further states that "[b]urning 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."

The evidence presented at trial was sufficient to show that Caffero negligently handled burning material (in this case, a lit stick of incense and a burning toilet paper roll) and that he did so in a highly negligent manner. Caffero's handling of the burning materials – his lighting and manipulation of the material and, ultimately, his

decision to leave the still-warm and recently-kindled material on the floor in a position where it ultimately burned through the floor and ignited a blaze – was criminally negligent. The jury was properly instructed by the trial court regarding criminal negligence (39:128.) The jury returned a guilty verdict, and this reasonable and well-supported verdict should stand.

A. The standard of review is extremely deferential to the jury's verdict

In his brief, Caffero asserts that the sole issue for this appeal is the sufficiency of the evidence adduced at trial in support of his conviction for negligent handling of burning material. As this Court is aware, the bar for overturning a jury verdict due to insufficient evidence is a high one:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict* even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (emphasis added and internal citation)

omitted). A reviewing court will “give great deference to the determination of the trier of fact,” and “must examine the record to find facts that support upholding the jury's decision to convict.” *State v. Hayes*, 2004 WI 80, 273 Wis. 2d 1, 25, 681 N.W.2d 203, 215.

B. Evidence supports the jury's finding that Caffero handled burning material.

To find Caffero guilty of negligent handling of burning material, the jury was required to find that Caffero handled burning material. Wis. Stat. § 941.10. Caffero attempts to claim that no evidence was presented that he handled the burning material (Caffero Brief at 17.) However, the evidence presented at trial was replete with direct testimony and inferences to be drawn from that testimony in support of the State's assertion that Caffero handled burning material.

The trial court noted after the close of the State's case that there was testimony that Caffero “did manipulate what has been testified as the cause of the fire.” (39:112.) The jury heard evidence and testimony, including Caffero's own words to law enforcement during the investigation of this crime, that showed that Caffero and his girlfriend were burning incense in their bathroom and left that incense on a toilet paper roll (39:51-52; 20: Ex. 1.)

The jury heard from Officer Hines about his interview of Caffero. Hines indicated that Caffero stated that he and another person lit some incense the evening of this incident (39:51-52.) Hines relayed to the jury that Caffero admitted that he put water on the incense and toilet paper, but did not put a lot on it (39:52.) Hines stated that Caffero informed him the toilet paper roll and incense were both set on the floor (39:51.) Caffero admits that when he returned to the bathroom later in the evening,

the toilet paper was warm (39:56.) Caffero admits that he didn't put enough water on the roll, and his girlfriend admits that the roll must have still been on fire or still burning after her use of the incense and toilet paper roll ceased (20:Ex. 1.)

The jury also heard evidence that Caffero attempted to avoid responsibility for his actions in this case by changing his story to law enforcement. The jury heard that Caffero and his girlfriend provided multiple different explanations for how the fire started in their apartment (39:80-81.) The first explanation provided directly from Caffero was that he and his girlfriend were burning incense in their bathroom and left that incense on a toilet paper roll (39:51-52; 20: Ex. 1.) Caffero specifically told Officer Hines that "we were burning incense and we left it on the toilet paper roll." (20: Ex 1, 39:55.) Caffero himself specifically admits his involvement in handling the burning material that ignited his apartment.

When Caffero began to worry that he may be charged for his actions, his story began to change and his explanations to law enforcement began to differ (20: Ex. 1; 39:57.) Caffero's discussion of that concern, and his concoction of an alternative explanation for what had occurred, was captured on a squad video recording that the jury was able to hear (*id.*) The jury also heard Caffero's attempts to deflect blame: he attempted to claim, contrary to the evidence developed by investigators, that after water was placed on the toilet paper and incense, the material was placed on a stand nowhere near the floor (39:80.) Caffero later even specifically denied that the toilet paper was ever placed on the floor (39:81.) Caffero later stated the paper and incense were on the floor at the time of the incident (39:83.) Finally, Caffero also attempted to blame an electrical failure for the ignition of his apartment, honing in on a conversation he overheard between fire investigators and law enforcement (39:80, 82.)

Taken together, Caffero's initial admission to law enforcement that he and his girlfriend ("we") were burning incense and that the incense was left on a toilet paper roll (20: Ex 1, 39:55), combined with Caffero's later attempts to deflect blame and responsibility, provide sufficient basis for the jury to find that Caffero's first explanation was the truth of what had occurred. The jury could have, and likely did, find Caffero's multiple deflections and stories to be incredible, and found that his initial response, in which he indicated that "we" lit the incense, was the correct response. Caffero's admission that he and his girlfriend were burning incense, and Officer Hines' testimony that Caffero and his girlfriend had lit some incense that evening, when examined under the very high standard set forth in *Poellinger*, shows that the jury had sufficient evidence to find Caffero handled burning material.

- C. Evidence supports the jury's verdict that Caffero created a risk of death or great bodily harm or acted under circumstances in which he should have realized that a substantial and unreasonable risk of serious damage to another's property was created

To find Caffero guilty of negligent handling of burning material, the jury was required to find that Caffero handled burning material in a highly negligent manner. Wis. Stat. § 941.10. Burning material is handled in a highly negligent manner if the material is handled with criminal negligence or if the material is handled under circumstances in which the person should realize that a substantial and unreasonable risk of serious damage to another's property is created. *Id.*

Wisconsin Statute Section 939.25 defines criminal negligence as "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." The risk created must "be

considered great by the ordinary person, having in mind all the circumstances of the case, including the seriousness of the probable consequences.” *State v. Schutte*, 2006 WI App 135, 295 Wis. 2d 256, 272, 720 N.W.2d 469 (citing *Hart v. State*, 75 Wis.2d 371, 383-84, 249 N.W.2d 810 (1977)). Courts use an objective standard to examine criminal negligence, measuring a defendant’s acts “against whether a normally prudent person under the same circumstances should reasonably have foreseen such conduct exposed another to unreasonable risk and high probability of bodily harm.” *State v. Barman*, 183 Wis. 2d 180, 199, 515 N.W.2d 493 (Ct. App. 1994).

Officer Hines testified that Caffero informed him that he and his girlfriend were burning incense in their bathroom and left that incense on a toilet paper roll (39:51-52; 20: Ex. 1.) Caffero admitted to Officer Hines that the incense and toilet paper roll were set on the floor of the bathroom (39:51.)

The trial court recapped the State’s evidence accurately after Caffero’s motion for a directed verdict. The court indicated that 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.” (39:110-111.) The court further stated that 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.” (39:111.) Finally, the court indicated that there was testimony that Caffero himself did manipulate the incense and toilet paper (39:112.)

The combination of Caffero manipulating or handling burning material, that material rekindling, and Caffero not properly tending to the rekindled material all created a substantial and unreasonable risk of death or great bodily harm to another, Wis. Stat. §939.25, and created circumstances in which he should have realized

that a substantial and unreasonable risk of serious damage to another's property was created, Wis. Stat. § 941.10.

The apartment complex in question was a two-story wood-framed apartment building with three units (39:101.) The resident of the apartment directly below Caffero's apartment was present at the time of the fire (39:114.) Detective Nathan Pauls indicated that a heavy burn pattern was identified in the bathroom area of Caffero's apartment (39:71.) This pattern was located directly between the toilet and bathtub where Caffero initially told law enforcement he had placed the paper and incense (39:71-72.) Investigators observed a hole in the floor that corresponded with the toilet paper roll as it was described (39:73.) Investigators testified to heavy damage to the apartment complex (39:97) and indicated that the damage and patterns were consistent with the origin being a burning toilet paper roll (39:99, 104-105.)

Caffero's handling of the burning materials – his lighting and manipulation of the material and, ultimately, his decision to leave the still-warm (39:56) material on the floor in a position where it ultimately burned through the floor and ignited a blaze – was criminally negligent. His actions, manipulations, and decisions created a substantial and unreasonable risk of death or great bodily harm to Caffero's neighbors, his girlfriend, and his child. Caffero's actions, manipulations, and decisions led to a burning incense stick and toilet paper roll igniting, and then created a situation where the still-warm and capable of rekindling material burned through the floor. Caffero should have realized the risk of lighting a stick of incense, leaving it on a roll of toilet paper, and then leaving the recently-ignited roll of paper in the middle of a bathroom floor instead of submerged in water or placed on a non-combustible surface. An ordinary person, having in mind all the circumstances of the case, including the seriousness of the probable consequences, would have considered the risk of these actions, manipulations, and decisions to be great.

Additionally, Caffero's actions, manipulations, and decisions showed that Caffero handled the burning material under circumstances in which the person should realize that a substantial and unreasonable risk of serious damage to another's property is created. Caffero's actions, manipulations, and decisions led to a burning incense stick and toilet paper roll igniting, and then created a situation where the still-warm and capable of rekindling material burned through the floor. Caffero should have realized that lighting a stick of incense, leaving it on a roll of toilet paper, and then leaving the recently-ignited roll of paper in the middle of a bathroom floor instead of submerged in water or placed on a non-combustible surface would create a substantial and unreasonable risk of property damage.

CONCLUSION

Given the evidence adduced at trial and the high burden associated with a challenge to sufficiency of the evidence, the State respectfully requests that this Court affirm the jury's verdict.

Dated this 13th day of November, 2014.

Respectfully submitted,

MICHAEL J. PUERNER
Assistant District Attorney
State Bar No. 1070406

Attorney for Plaintiff-Respondent
State of Wisconsin

Marathon County District Attorneys Office
500 Forest Street
Wausau, WI 54403
(715) 261-1111
(715) 261-1110 (Fax)
michael.puerner@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,757 words.

Dated this 13th day of November, 2014.

Michael Puerner
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Dated this 13th day of November, 2014.

Michael Puerner
Assistant District Attorney