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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REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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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.

A. The State concedes that 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.

The State does not respond to Caffero's argument that the evidence was insufficient to show that Caffero intentionally aided and abetted the commission of negligent handling of burning material. Therefore, the State, in effect, concedes this point. *See Charolais Breeding Rances Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

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

This entire case comes down to one solitary statement that Caffero made to Officer Hines. While Caffero and Muxlow were seeking shelter in Officer Hines' squad car immediately after the fire, Officer Hines inquired about the cause of the fire. Caffero, in an attempt to explain what happened, stated:

> 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)

That statement is the only thing the State is basing Caffero's conviction for Negligent Handling of Burning Material on. This evidence is so lacking in probative value that no jury, acting reasonably, could have found Caffero guilty beyond a reasonable doubt. See *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

1. The evidence was insufficient to show beyond a reasonable doubt that Caffero handled burning material.

While juries certainly may draw appropriate inferences, those inferences must be based on evidence that has sufficient probative value for a reasonable jury to have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis. 2d at 507 (1990).

The State points to Officer Hines' testimony that Caffero stated he and another person lit the incense. (Respondent's Brief at 4). First, Caffero notes that those words came out of the prosecutor's mouth, not the witness'. The State phrased its question: "Did Mr. Caffero state that he and another person lit some incense that evening or that morning?" (39:51; App. 101). The officer's response was: "Yes. Him and his girlfriend, roommate, were in my squad car." (39:52; App 102).

Second, later in the trial it was established that the suggestion that Caffero lit the incense was based solely on the following statement by Caffero: "[W]e were burning incense…" (20: Exh.1 at 6:38:38-50; 39:55, 92). 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 he spoke to Officer Hines. (39:92; App. 103). Indeed, the only time Caffero used a "we" in reference to the burning material during his conversation with Officer Hines was when Caffero

said, "We were burning incense and we left it on the toilet paper roll." (20:Exh 1). That was the original statement that led to any and all suggestions that Caffero lit or handled the incense.

This point was further clarified for the jury when Caffero's actual conversations with Officer Hines were played for the jury. (20:Exh.1; 39:55-57). In it, Caffero never tells Officer Hines "we lit the incense" but rather states "we were burning incense…". Subsequently, Muxlow follows up by saying, "*I* lit the incense." (20: Exh.1 at 6:39:10-6:39:35; 39:55)(emphasis added).

In its brief on appeal, the State argues that Caffero's statement "we were burning incense," combined with his inconsistent statements when he later changed his story, provided sufficient basis for the jury to find that he handled the burning material:

> 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.

(Respondent's Brief at 6).

To be sure, Caffero was convicted of Obstructing an Officer after changing his story about the cause of the fire. Caffero is not fighting that conviction. No matter what the jury believed about Caffero's credibility or inconsistent statements, the jury is not allowed to pull their belief that Caffero handled the burning material from thin air. There must be some evidence of sufficient probative value presented to them that can prove beyond a reasonable doubt he handled the burning material. *See State v. Poellinger*, 153 Wis. 2d 493 (1990). Here, there was not.

The State's comment that Caffero's "initial response" indicated that "'we' lit the incense" is simply not true. The only word the State quotes here is 'we,' because that is the only word that Caffero actually said. Caffero did not say, "we lit the incense." (20:Exh.1). He said "we were burning incense…" (20: Exh.1 at 6:38:38-45; 39:55). There is a big difference between the two.

The ultimate question in this section is: Could a reasonable jury find that Caffero's statement "we were burning incense" proves beyond a reasonable doubt that Caffero handled the burning material? The answer is no.

If a wife were to tell a friend, "we were grilling out at our house yesterday," that statement by itself cannot prove beyond a reasonable doubt that she was the one to actually fire up the charcoal and put the burgers on the grill.

If a wife were to tell a houseguest, "we're warming up the house," that statement by itself cannot prove beyond a reasonable doubt that she, and not her husband, actually pressed the buttons on the thermostat.

Neither can Caffero's statement, "we were burning incense…" prove *beyond a reasonable doubt* that he lit the incense and therefore handled the burning material.

2. The evidence was insufficient to prove beyond a reasonable doubt that Caffero created a risk of death or great bodily harm.

The State does not respond to Caffero's arguments that Caffero did not create a risk of death or great bodily harm by pouring water on the roll. Therefore, the State concedes that point. *See Charolais Breeding Rances Ltd. v. FPC Sec. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The State argues that Caffero created a risk of death or great bodily harm by the combination of the following: lighting the stick of incense, leaving it on a roll of toilet paper, and then leaving the recently-lit burning materials on the floor. (Respondent's Brief at 9).

As Caffero argued in his original brief, the question of who lit the incense is irrelevant to this element because the lighting of the incense is not what created the risk of death or great bodily harm.

It is common knowledge that people routinely burn incense in their homes without causing fires, because they typically place the incense on a tray that is specifically designed for this purpose. The lighting of the incense did not create the risk of death or great bodily harm; the *placement* of the incense in the toilet paper roll – a flammable object – created that risk.

Although Caffero set forth this argument in his brief-in-chief, the State makes no attempt to explain why the determination of who lit the incense has any relevance to this element.

Even if this Court finds it relevant to determine who lit the incense, no reasonable jury could conclude that it was Caffero.

As explained in his brief-in-chief, although other aspects of her story changed, 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). She told Officer Hines immediately following the fire that she lit the incense. (20: Exh.1 at 6:39:09-33; 39:57). While in the squad car having a seemingly candid conversation with Caffero after Officer Hines left, she expressed confusion about how Caffero could possibly be punished when he did not light the incense. (20: Exh.1 at 7:13:23-30; 39:57). Muxlow testified under oath in front of the jury that she was the one who burned the toilet paper roll and caught the house on fire, and that Caffero played no role in lighting the incense. (39:121-22). Throughout the entire investigation and all the way up to her testifying under oath at Caffero's trial, Muxlow consistently claimed that she was the one to light the incense, even though it was against her penal interest to do so.

Even in the light most favorable to the State – even if the jury completely disregarded Muxlow's claims that she lit the incense – the conviction still cannot stand. The State's

entire case that Caffero lit the incense comes down to Caffero's statement to Officer Hines, "we were burning incense…" (20: Exh.1 at 6:38:38-45; 39:55).

As previously addressed, this statement in itself is not sufficient evidence to show beyond a reasonable doubt that Caffero actually lit the incense, just as "we were grilling out" is not sufficiently probative to prove beyond a reasonable doubt that a person lit up the charcoal, and just as "we're warming up the house" is not sufficiently probative to prove beyond a reasonable doubt that a person pressed the buttons on the thermostat.

Who lit the incense is not relevant. But even if this Court finds it is, no reasonable jury could find beyond a reasonable doubt that it was Caffero based on that mere statement.

In its brief on appeal, the State presented no probative evidence to prove the real issue: who placed the incense in the toilet paper roll. In its brief, the State's entire argument that Caffero placed it there is as follows:

> 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*.
>
> …
>
> 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.

(Respondent's Brief at 7, 9) (emphasis added).

Thus, the State's entire case that Caffero placed the incense stick on the toilet paper roll comes down, once again, to that single statement: "What happened was we were

burning incense and we left it on the toilet paper roll." (20: Exh.1 at 6:38:38-45; 39:55).

This statement is entirely true. Caffero did leave the incense on the toilet paper roll after Muxlow placed it there. The relevant question is not who *left* it there, but who *placed* it there.

Every piece of evidence presented at trial about who placed the incense on the toilet paper shows that it was Muxlow. 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 against her penal interest 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). The other witnesses are silent as to who placed the incense on the roll.

Even eliminating Muxlow's testimony, Caffero's statement cannot support a finding *beyond a reasonable doubt* that Caffero was the one to *place* the incense on the toilet paper roll.

CONCLUSION

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

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 24th day of November, 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 2,069 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 24th day of November, 2014.

Signed:

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Christina C. Starner

APPENDIX

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Portions of jury trial transcript 101-103

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 24th day of November, 2014.

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