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WISCONSIN COURT OF APPEALS  
DISTRICT IV  
APPEAL FROM THE CIRCUIT COURT  
OF WAUPACA COUNTY  
HONORABLE TODD P. WOLF

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STATE OF WISCONSIN,  
PLAINTIFF-RESPONDENT,  
V.  
JONATHAN N. REIHER,  
DEFENDANT-APPELLANT.

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REPLY BRIEF AND ARGUMENT OF APPELLANT

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### ARGUMENT

I. Mr. Reiher disagrees that his conduct created an unreasonable and substantial risk of death or great bodily harm that was at the time foreseeable.

Mr. Reiher disagrees that his conduct created an unreasonable and substantial risk of death or great bodily harm that was at the time foreseeable.

The state argues that the totality of circumstances provides a factual basis for the conviction to 2<sup>nd</sup> degree recklessly endangering safety. There appears to be no factual dispute that the damage was done, Mr. Reiher turned off the gas to the furnace. Accordingly, the key issue can be boiled down to, as the circuit court implicitly found, whether it was foreseeable that the gas at some point would be turned back on and an explosion would occur. (DOC 92:16).

The state focuses its argument on the assertion that after turning off the gas, a reasonable person would believe that “at some point, the gas would be turned back on.” (Brief of Respondent, p.14). Perhaps so. However, the more specific relevant issue is whether a reasonable person would believe, not that the gas would be turned back on *at some point*, but rather, before the damage had been repaired.

There appears to be no dispute that the damage inside the house was extensive. According to the state's argument at the motion hearing, the house was rendered "unlivable." (DOC 92:9). It is extremely unlikely that the owner of the residence was unaware of its condition. (DOC 5:11). The owner's father was present with law enforcement when the basement/furnace damage was discovered. (DOC 5:12).

Would a reasonable person really believe that it was foreseeable that the propane tank would be refilled and the gas turned back on *before* the furnace damage had been repaired by the owners who were most certainly aware of it?

Neither the state nor the circuit court addressed this specific question.

The state makes the point that Mr. Reiher admitted being "culpable" and described his conduct as "the snowball that started the avalanche." (Brief of Respondent, p.13). However, Mr. Reiher's description of himself or use of a particular adjective does not satisfy the factual basis requirement. Whether or not an actor describes himself as "culpable" is not an element of this offense. In order to satisfy the elements of the offense, the actor must engage in conduct that is "criminally reckless." Such conduct is that which

knowingly creates an unreasonable and substantial risk of death or great bodily harm.

Accordingly, whether or not Mr. Reiher was “the snowball that started the avalanche” – in essence the proximate cause - is irrelevant to the determination of whether a factual basis exists for his plea. The relevant question is not whether Mr. Reiher’s conduct itself was the ultimate or proximate cause of the accident. The question is whether his course of conduct, taken as a whole, was criminally reckless.

The state offers no specific caselaw to support the argument that a person who engages in conduct that creates a substantial and unreasonable risk of death or great bodily harm, and then knowingly takes affirmative steps to eliminate the risk, has acted in a criminally reckless manner.

Based on the published caselaw, the relevant question in determining whether conduct is criminally reckless is whether the outcome is foreseeable. For example, if a person places a “MacGyver bomb” in a mailbox, it is foreseeable that it might explode. See State v. Brulport, 202 Wis. 2d 505, 551 N.W.2d 824 (Ct.App.1996). If a person hits someone over the head with a loaded gun, it is foreseeable that the gun might discharge. See State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct.App.1991). If a person throws a rock at

the head of another person, it is foreseeable that the rock might strike and injure the other person. See State v. Williams, 190 Wis. 2d 1, 527 N.W.2d 338 (Ct.App.1994).

Applying that standard to the question of whether Mr. Reiher acted with criminal recklessness by creating an unreasonable and foreseeable substantial risk, the answer is in the negative. It was neither probable nor easily imagined at the time of his conduct that the gas tank at the residence would be refilled and the gas turned back on before all of the basement furnace damage had been repaired. Given that the residence owners were aware of the furnace damage, it is difficult to imagine the furnace becoming operational again before being fully repaired or replaced. Accordingly, Mr. Reiher submits that it cannot reasonably be said that his entire course of conduct created an unreasonable and substantial risk of death or great bodily harm.

As the court observed in State v. Thomas, 2000 WI 13, ¶19, 232 Wis. 2d 714, 605 N.W.2d 836 (2000), a factual basis can be established without the agreement of the defendant. In other words and as applied to the present case, Mr. Reiher's concurrence or adoption of culpability does not determine whether a factual basis exists. The purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant

who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not constitute the charged crime. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

In this case, Mr. Reiher's description of himself as a proximate cause to the incident and his acceptance of culpability do not create a factual basis for his plea. Once the damage had been caused, Mr. Reiher took affirmative and effective steps to eliminate the risk and the foreseeability of an accident. As such, his conduct was not criminally reckless.

#### CONCLUSION AND REQUEST FOR RELIEF

Mr. Reiher respectfully requests that this court reverse the denial of his motion for postconviction relief and vacate the judgment of conviction, and remand this case for further proceedings.

Dated this 22<sup>nd</sup> day of May, 2020.

Respectfully submitted,

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Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 971 words.

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