COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1711-CR **Cir. Ct. No. 2013CM374**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN M. CAFFERO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed.*

¶1 HRUZ, J.[1] Nathan Caffero appeals a judgment convicting him of one misdemeanor count of negligent handling of burning material as a party to a crime and one misdemeanor count of obstructing an officer. The sole issue on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 versions unless otherwise noted.

appeal involves the sufficiency of the evidence supporting Caffero's conviction for negligent handling of burning material. For the reasons stated below, we affirm.

BACKGROUND

¶2 The following is based on the evidence presented at Caffero's trial. Shortly after 6:00 a.m. on February 4, 2013, the fire department and law enforcement responded to a report of a fire in a two-story, three-unit apartment building in Wausau. Caffero lived in the apartment building with his girlfriend, Katelyn Muxlow, and their infant daughter. They had exited the building before officials arrived, after having woken up to a smoky apartment.

¶3 Caffero, Muxlow and their child took shelter in Wausau police officer Thomas Hines' squad car. The ensuing conversation between Hines, Caffero and Muxlow was recorded, and portions were entered into evidence and played for the jury. Hines first asked where the couple thought the fire had originated. Caffero replied, "[The] bathroom," and explained:

> 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.

He continued: "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 [a] smoky house. Got out. Called the fire department." Hines then asked, "What time did you light that incense?" Muxlow responded, "Me, I lit the incense around 12 a.m." Caffero further explained the toilet paper roll

> 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.

The State asked Hines whether Caffero "stated that after he poured water on the burning toilet paper roll, he put it – he left it on the floor …?" Hines confirmed this account. Hines also confirmed Caffero told him that "he put some water on [the roll]" and "he didn't want to put a lot of water on it." It is undisputed that Caffero and Muxlow (and their infant daughter) were the only people in their apartment the night of the fire.

¶4 The jury also heard a portion of a later conversation between Caffero and Muxlow that took place outside of Hines' presence, but while they were still in the squad car:

> 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.[2]

¶5 Wausau police detective Nathan Pauls also testified at trial. Pauls testified to his conclusion that the fire was accidental and originated from a

[2] We observe the jury also heard Caffero and Muxlow discuss their awareness of the likelihood their conversation was being recorded.

burning roll of toilet paper on Caffero and Muxlow's bathroom floor. Pauls testified that during his first interview with Caffero and Muxlow, Caffero told Pauls he thought it had been an electrical fire, attributable to faulty wiring in the apartment. Pauls reminded the couple of the original information they had provided to officer Hines, which had been relayed to detective Pauls. Pauls testified that after that admonition:

> [Muxlow] essentially said … that she put an incense stick in a roll of toilet paper, put it next to the toilet, on top of a garbage can along the wall, facing the opposite side of the tub. Around midnight she smelled something burning, and [Caffero] went into the bathroom and doused the roll of toilet paper with water.
>
> About an hour and a half later, [Muxlow] went to the bathroom and the toilet paper was completely soaked, and she had placed it on a stand next to the kitchen sink at that point in time so it was nowhere near the floor or the toilet.

Pauls stated this account of events was significant to him because the information originally provided to Hines had changed, specifically with respect to "the incense inside the toilet paper on the floor in between the toilet and the tub. That was completely omitted during this interview."

¶6 Pauls also testified both Muxlow and Caffero denied ever saying that they placed the toilet paper roll on the floor of the bathroom. Further, defense counsel asked Pauls, "Every time you talked to [Caffero] and [Muxlow], [Muxlow] said she lit the incense?" Pauls answered, "The majority of the time, yes. There was one time when they said 'we.' Other than that, it was [Muxlow]." Defense counsel confirmed with Pauls that neither Caffero nor anyone else ever told Pauls that Caffero lit the incense; Pauls agreed and stated, "There was one portion early on that was a 'we' that was used." Defense counsel clarified with Pauls that this "we" statement was the statement made to Hines in the squad car

during the initial interview, in which Caffero stated, among other things, "we were burning incense and we left it on the toilet paper roll."

¶7 Muxlow, in turn, testified that she "accidentally burned a toilet paper roll and caught the house on fire." She stated that she "put the incense on top of the toilet paper roll." She denied that Caffero had played any role in deciding to place the incense in the toilet paper roll. Muxlow further testified Caffero was unaware that the incense had been lit, but instead was in the living room and "might have been sleeping" when she lit the incense. Caffero did not testify at trial.

¶8 At the close of the State's case, Caffero moved for a directed verdict. The circuit court stated it was "not taking any position on strength of the testimony or credibility," but it observed there was testimony that Caffero "did manipulate what has been testified as the cause of the fire … [and] was aware of the fact that there was a fire at some point[.]" It denied the motion, concluding that the evidence was "enough to go to a jury." The jury ultimately found Caffero guilty both of obstructing an officer and of negligent handling of burning material as a party to a crime.

STANDARD OF REVIEW

¶9 Whether the evidence presented to a jury is sufficient to sustain its verdict is a question of law. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. However, in reviewing a sufficiency of the evidence claim, "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 reasonable trier of fact "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451

N.W.2d 752 (1990). We extend "great deference to the determination of the trier of fact" and search the record for "facts that support upholding the jury's decision to convict." ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203 (footnote omitted). Further, "[w]hen faced with a record of historical facts which supports more than one inference," we "must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

> 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.

Id. at 507 (citing ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989)).

DISCUSSION

¶10 Caffero was charged, and the jury found him guilty, under WIS. STAT. § 941.10,[3] which provides:

[3] Caffero was charged with negligent handling of burning material as a party to the crime. Therefore, the jury could find him guilty if it concluded he directly committed the crime or if it found he intentionally aided and abetted in the commission of the crime. *See* ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979) ("[I]t [i]s not necessary that [the jury] be agreed as to the theory of participation."). WISCONSIN STAT. § 939.05 provides in relevant part:

> **(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:

(continued)

> **(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.

On appeal, he contests the sufficiency of the evidence presented at his trial as it pertains to both elements of § 941.10. Specifically, Caffero first argues the testimony at trial was insufficient for the jury to reasonably conclude he "handled" the toilet paper roll and incense. Second, he contends no reasonable jury could have concluded he handled burning material in a highly negligent manner, as that conduct is defined within the law. Indeed, Caffero posits that his alleged act of trying to douse the toilet-paper-surrounded incense stick burning in his apartment bathroom was an act that reduced risk.

¶11 Caffero insists the "entire case comes down to one solitary statement that [he] made to Officer Hines"—namely, his statement that "[w]hat happened was we were burning incense and we left it on the toilet paper roll." Caffero argues that without more than this single statement, the evidence was so lacking in probative value that no jury, acting reasonably, could have found guilt beyond a

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> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it[.]

We observe the State fails to respond to Caffero's arguments that the evidence was insufficient to prove he intentionally aided and abetted the commission of the crime. In so doing, it has conceded that argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted). Accordingly, we evaluate whether there was sufficient evidence to support Caffero's conviction under the theory that he directly committed the crime of negligent handling of burning material.

reasonable doubt. He asserts the evidence "overwhelmingly" showed it was only Muxlow who handled the incense and toilet paper roll.

¶12 The State responds that Caffero's conviction is sufficiently supported—especially in light of our deferential standard of review—by direct testimony, by reasonable inferences to be drawn from that testimony, and by certain, undisputed facts. In particular, the State emphasizes that, in Caffero's first explanation to police of how the fire started, he admitted "we were burning incense and we left it on the toilet paper roll." The State contends that, given Caffero's "attempts to deflect blame [and] responsibility" through his changing versions of events, it was reasonable for the jury to conclude his first explanation was truthful. It also argues the circumstances were such that Caffero should have realized that he created a substantial and unreasonable risk both of serious damage to another's property and of death or great bodily harm to another, *see* WIS. STAT. §§ 941.10, 939.25, through "[t]he combination of … manipulating or handling burning material, that material rekindling, and … not properly tending to the rekindled material …."

¶13 Caffero's arguments fail principally because he improperly discounts both this court's standard of review as well as the reasonable inferences a jury could have drawn from the totality of the evidence at his trial. We again observe "[t]he function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence." ***Poellinger***, 153 Wis. 2d at 503. Importantly, this function belongs to the jury, and not to this court. We are required to extend "great deference to the determination of the trier of fact" and search the record for "facts that support upholding the jury's decision to convict." ***Hayes***, 273 Wis. 2d 1, ¶57.

¶14 Caffero directs this court only to the testimony and inferences favorable to his arguments. He ignores all reasonable inferences unfavorable to him, including competing inferences the jury could have drawn from that "one solitary statement that [he] made to Officer Hines." We compare Caffero's position on appeal to the defendant's in ***Poellinger***, where the supreme court observed

> The defendant is, in essence, asking this court to sit as a judge or jury making findings of fact and to apply the hypothesis of innocence rule *de novo* to the evidence presented at her trial to determine if, in our view, the hypothesis that she did not know that she possessed cocaine is sufficiently reasonable to warrant reversal of her conviction.

Poellinger, 153 Wis. 2d at 505-06. Similarly, Caffero is asking this court to determine if, in our view, the hypothesis that he did not handle the burning material is sufficiently reasonable to warrant reversal of his conviction. As the supreme court concluded, "[i]t is not the role of an appellate court to do that." ***Id.*** at 506.

¶15 We conclude the evidence, though circumstantial and requiring that inferences be drawn by the jury, was not so lacking in probative value that the jury could not weigh the witnesses' credibility and reasonably determine Caffero had handled burning material in a manner constituting criminal negligence. *See* ***Yelk v. Seefeldt***, 35 Wis. 2d 271, 280, 151 N.W.2d 4 (1967) ("A fact proved by inference can in turn be the foundation of another inference, and the jury can, therefore, draw an inference from an inference") (citation omitted). It is undisputed that Caffero, Muxlow, or both of them handled the toilet-paper-surrounded incense stick burning in their apartment bathroom. Despite Caffero's objections to the contrary, the jury could place greater significance on the initial

information provided by Caffero and Muxlow that "we were burning incense and we left it on the toilet paper roll," and could have attributed to Caffero the attendant "handling" activities. That statement, along with the other facts in the case, permitted a jury to reasonably infer he was involved in physically placing the incense on the toilet paper roll or otherwise handling those materials. The jury also was entitled to reject as incredible Muxlow's testimony that she, and only she, handled the toilet paper roll and incense.

¶16 In terms of weighing the differing versions of events, the jury could have found important that the "we" statement came first—before the couple had the opportunity to digest the implication of the damage done. In fact, the jury was aware that the "we" statement occurred prior to the conversation conducted outside the presence of officer Hines in which Caffero and Muxlow discussed the consequences of, and potential liability for, the fire. In short, Caffero's arguments as to which inferences regarding his involvement in handling the burning materials better flow from the evidence fail to render unreasonable the competing inference of his handling the burning materials.

¶17 Furthermore, the testimony at trial indicated the incense and toilet paper roll were handled beyond the initial lighting of the stick and its placement on the roll in the bathroom. For example, Muxlow testified she placed the roll and incense elsewhere after Caffero had put some water on the roll—nonetheless, the toilet paper roll eventually rekindled on the floor between the bathtub and toilet, as evidenced by photographs of the hole in the floor. Caffero himself told law enforcement the toilet paper roll was warm to his touch after he used water in an attempt to extinguish the burning incense stick, and Officer Hines confirmed Caffero told him he had left the toilet paper roll and incense on the floor after wetting it a little.

¶18 While Caffero appears to believe there was only one incident of "handling"—which occurred when the incense was placed on or in the toilet paper roll—we reject such a restricted definition. Instead, we understand "handling" to mean "[t]o operate with the hands; manipulate[;] … [t]o deal with or have responsibility for; conduct." ***State v. Bodoh***, 226 Wis. 2d 718, 731, 595 N.W.2d 330 (1999) (citing *The American Heritage Dictionary of the English Language* at 819 (3d ed. 1992)). Whether the jury inferred Caffero picked up the toilet paper roll to wet it and placed it, still warm to his own touch, back on the floor, or that he otherwise "operated with the hands; manipulated; dealt with or had responsibility for" the incense and toilet paper during the course of the evening, it was not unreasonable to so infer.

¶19 "It is not within the province of … any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989); *see also* ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994) (We may only reject an inference reached by the trier of fact if the evidence on which that inference is based is inherently incredible). Here, the jury's inference that Caffero handled the incense and toilet paper roll was not unreasonable. The jury could reasonably discount Muxlow's testimony as protective and Caffero's various statements to police as self-serving.

¶20 Once we accept the inferences as reasonable and sufficient to find Caffero handled burning material, it is not difficult to find support for the second element of the offense, which requires the crime be committed in a criminally negligent manner. Incense was lit, placed on or in a highly flammable roll of toilet paper, and left unattended at night on a floor (indeed, left unattended while Caffero and Muxlow slept) in a multi-unit apartment building. There was

testimony that Caffero and Muxlow were aware that the toilet paper had ignited and Caffero even used water in an attempt to extinguish the burning, amply suggesting his knowledge that, if left to burn, it could cause harm. Additional testimony indicated Caffero knew the toilet paper roll was still warm to the touch, yet it was placed or left on the floor. It is undisputed that the materials rekindled in the early morning hours and eventually burned a hole through the floor of the apartment, which was located in a wood-framed building. A jury could reasonably conclude those were circumstances in which Caffero, objectively, should have realized a substantial and unreasonable risk of serious damage to another's property was created, or that he created a substantial and unreasonable risk of death or great bodily harm to another.

¶21 Despite Caffero's attempts to construe the testimony adduced at his trial as supporting his insufficiency claims, we conclude the jury's verdict is supported by reasonable inferences that can be drawn from all of the evidence presented at trial. We reiterate the narrowness of our review: "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," we may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it. ***Poellinger***, 153 Wis. 2d at 507 (emphasis added). Ultimately, it was not outside the realm of reason for the jury to draw the necessary inferences to conclude Caffero handled the burning material in a highly negligent manner.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.