COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3241-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. LANZEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. James Lanzel appeals from a judgment of conviction for recklessly endangering safety and possession of materials or components with intent to assemble an improvised explosive device. The issues on appeal are whether: (1) the jury's verdict was inconsistent; (2) the evidence was

sufficient to convict; and (3) the late hour of jury deliberations affected the verdict. We affirm.

The State alleged that Lanzel transferred an explosive device that was eventually given to Scott Sill, who attempted to plant it to injure or kill another person. As Sill was installing it, however, the device exploded and seriously injured him. Several weeks later, police executed a search warrant at Lanzel's residence and found bomb-making materials. The State charged Lanzel with one count of transferring an explosive device, one count of possession of materials or components with intent to assemble an improvised explosive device and one count of recklessly endangering safety. The jury found Lanzel not guilty of the transferring charge and guilty of the other two charges.

Lanzel argues that the evidence was insufficient to sustain the conviction for recklessly endangering safety. On review, we must affirm the conviction "unless the evidence, viewed most favorably to the [S]tate 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." ***State v. Brulport***, 202 Wis.2d 505, 518-19, 551 N.W.2d 824, 828-29 (Ct. App. 1996) (quotation and quoted source omitted).

Lanzel first argues that the conviction for endangering safety is inconsistent with the acquittal for transferring an explosive device. According to Lanzel, he could not have endangered safety by making the device that injured Sill because the jury acquitted him of making that device. We reject the argument for at least two reasons. First, Lanzel was not charged with, and the jury did not acquit him of, *making* the bomb that caused the injury—he was charged with transferring that device. The jury may well have believed that Lanzel made the

device but found the State's case lacking as to some other element of the transferring charge. Second, regardless of its opinions about who made the bomb that caused the injury, the jury could have concluded that Lanzel endangered safety by making and possessing the devices that were found in his residence upon execution of the search warrant.

Lanzel next argues that the evidence is insufficient on several of the elements of endangering safety. As we noted above, the jury could have adopted at least two possible theories in support of this conviction. Because one theory is sufficient, we will discuss only that one. The jury could have concluded that Lanzel recklessly endangered safety by making and possessing the explosive devices found at his residence. It knew, for example, that two children of Lanzel's live-in companion were present in the residence when the warrant was executed. The devices were found on a partial wall between Lanzel's workshop and the living room, and there was testimony that these devices were volatile and could be set off by static electricity, bumping or overheating. This evidence was sufficient to support the elements of the charge. *See* ***Brulport***, 202 Wis.2d at 519-20, 551 N.W.2d at 829.

Finally, Lanzel argues that the judgment should be reversed because the jury deliberated to a late hour. On the final day of trial, testimony ended at 7:43 p.m. Lanzel requested that the court allow the jury to begin deliberations the next day, but the court declined, and deliberations continued until 1:37 a.m. The court had contact with the jury several times during deliberations, and at no time did the jury express fatigue or a desire to stop deliberating. Although Lanzel frames this as a constitutional issue, it is ordinarily addressed in Wisconsin as a matter of the trial court's discretion. *See, e.g.,* ***State v. Spraggin,*** 71 Wis.2d 604, 628-29, 239 N.W.2d 297, 312-13 (1976). We conclude the court did not

erroneously exercise its discretion here. The jury continued to perform its work without complaint about the lateness of the hour, despite opportunities to make such complaints to the court. Lanzel's argument that the late hour affected the jury's deliberation is mere speculation.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.