COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1492-FT

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

IN THE INTEREST OF JONATHON R., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JONATHON R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Reversed.*

ANDERSON, J. Jonathon R. appeals the trial court's dispositional order adjudging him delinquent because of the negligent handling of burning material in violation of § 941.10, STATS. Jonathon contends that the evidence was insufficient to prove beyond a reasonable doubt that his conduct created an unreasonable and substantial risk of death or great bodily harm. We

reluctantly reverse because of the failure of proof that there was a victim or potential victim of Jonathon's conduct.

Our review on this appeal challenging the sufficiency of the evidence is very restricted. The standard of review for sufficiency of the evidence in a juvenile case under ch. 938, STATS., requires us to view the evidence from the standpoint most favorable to the state and the conviction. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We may not reverse a conviction unless the evidence "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** The largely undisputed evidence of Officer Gary Radtke at the factfinding hearing establishes the following facts.

On the morning of October 5, 1996, Jonathon's mother called the police to report that her son had been playing with fire the evening before. Radtke responded to the call and met with Jonathon and his mother. In his investigation, Radtke found a melted peanut butter jar ten to fifteen feet behind a detached garage. The melted jar was sitting on top of a burned patch of grass two to three feet in diameter. Although Jonathon was uncooperative, he finally admitted that he burned the jar using an aerosol can of carburetor cleaner and a disposable lighter. Jonathon also told Radtke that he had sprayed the contents of the aerosol can into the flame of the lighter to create a crude flame-throwing device. Radtke offered an opinion, based upon his training and experience, that the lighting of the contents of an aerosol can is very dangerous because it can blow up, "[Y]ou got a two to three foot flame that could hurt them[ ] or would hurt other people with [it]and destroy property."

Based upon this evidence the trial court held:

> I am finding a kid holding a lighter up to an aerosol can is going to create either loss of eye or finger or loss of a limb against himself or endanger somebody else or setting himself on fire; and as a finder of fact I am finding beyond a reasonable doubt that somebody engaged with that kind of material there is reasonable inference that great bodily harm will occur, great bodily harm, disfigurement or loss or use of function of bodily functions; not just going to singe an eyebrow or something.

On appeal, Jonathon concedes that he handled burning material. However, he argues that the State failed to prove beyond a reasonable doubt that his torching of the jar created an unreasonable and substantial risk of death or great bodily harm. He points out the obvious, that no one died or suffered any injury as a result of his conduct. He then contends that the sole question was "whether there was a substantial and unreasonable risk that someone would die, become disfigured or suffer some kind of serious injury." He asserts that although "[i]t is also possible that a boy could set off an explosion of an aerosol can," the State failed to prove that this risk was substantial and unreasonable.

The State counters that "[b]y making his own home-made flame-thrower, Jonathon created a substantial risk of serious bodily injury." The State argues that the trial court made the logical inference that the inherent danger of using fire to ignite a highly combustible material in an uncontrolled outdoor setting created a substantial and unreasonable risk of great bodily harm.

We conclude that it is not necessary to directly address the argument of the parties to resolve this appeal. Jonathon and the State overlook an important element of the charge of negligent handling of burning material, the requirement that there be a victim or a potential victim. Section 941.10, STATS., provides:

> **(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.

Because the State chose to prosecute Jonathon's conduct as creating a substantial and unreasonable risk of great bodily harm, the definition of criminal negligence in § 939.25(1), STATS., is also important.

> In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct which the actor should realize creates a substantial and unreasonable risk of death or great bodily harm *to another*. [Emphasis added.]

The record of the factfinding hearing is lacking any evidence that at the time Jonathon sprayed the contents of the aerosol can into the flame of the lighter there was any person, other than Jonathon, in the vicinity.[1] It is not enough that there is a substantial and unreasonable risk of harm to the actor—performing moronic acts that could harm oneself is not a crime. The statute requires that there be a substantial and unreasonable risk of harm to another. When the only competent evidence is that Jonathon used the homemade flame-thrower in an open space with no other person around, there is no probative evidence that his foolish and absurd conduct created a substantial and unreasonable risk of harm to another. Without a potential victim within the zone of danger created by Jonathon, there is absolutely no risk of harm to another person.

[1] We are aware, from the police report attached to the delinquency petition, that when Jonathon burned the jar, Tony D. was present. However, this critical evidence was never presented to the juvenile court. Tony was called as a witness at Jonathon's factfinding hearing but invoked his Fifth Amendment privilege and did not testify, and the State lost the testimony of the potential victim. During his testimony, Radtke offered a reference to Tony and his potential involvement; unfortunately, the prosecutor did not follow through. Since our review of the sufficiency of the record is limited to the competent evidence and reasonable inferences presented during the factfinding hearing, we reluctantly reverse.

By the Court.—Order reversed.

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