COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1471-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LIBBY A. VITATOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

¶1 PETERSON, J. Libby A. Vitatoe appeals a judgment convicting her of negligent operation of a vehicle in violation of § 941.01(1), STATS. She claims the evidence was insufficient to support a jury finding that she was criminally negligent. This court disagrees and affirms the judgment.

FACTS[1]

¶2 Vitatoe drove her car to the IGA grocery store and gas station in Baldwin. She stopped in a no parking zone while her daughter ran into the store. Another car pulled in behind, nearly blocking her. When her daughter returned, Vitatoe, with some difficulty, managed to back out. She then pulled up to a gas pump.

¶3 John Eggen, one of the store's owners, was servicing a vehicle and saw Vitatoe drive up to the pump. Eggen testified that Vitatoe rolled down her window part way and he walked over to her car. Vitatoe started yelling at Eggen, accusing him of being the person who had blocked her car at the no parking zone. Eggen raised his voice in response. During the argument, Eggen leaned with his right elbow or forearm on Vitatoe's partly opened car window. Eggen further testified that Vitatoe's vehicle "left in a rapid state," requiring Eggen to "move away from the car real fast." His jacket was caught between the window and the frame and he was dragged by the vehicle for the full length of the pumps—seventy-seven feet. He heard the passenger scream "he's stuck on the car or he's hanging on." His jacket finally came loose and he fell. Eggen said it all happened very quickly. He estimated he was dragged for about four seconds. Vitatoe drove away without stopping.

¶4 There were skid marks on the pavement from Eggen's shoes. He sustained a one-inch scrape on his knee and an abrasion on his hand. He went to a clinic where he was treated for two to two-and-one-half hours for removal of

[1] Vitatoe recites many facts favorable to her interpretation of the evidence. However, an appellate court is constrained to view the evidence in a light most favorable to uphold the jury's verdict. *See* ***State v. Poellinger***, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990).

"blacktop and that sort of stuff." At the time of trial—one year after the incident—Eggen was still being treated by a chiropractor for stiffness and soreness of his knee.

STANDARD OF REVIEW

¶5 Vitatoe claims that there is insufficient evidence to support the jury's verdict. This court will not substitute its judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id***. at 506, 451 N.W.2d at 757. Therefore, this court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id***. at 507, 451 N.W.2d at 758.

ANALYSIS

¶6 Vitatoe was convicted of negligent operation of a vehicle in violation of § 941.01, STATS., which provides:

> Negligent operation of vehicle.
>
> (1) Whoever endangers another's safety by a high degree of negligence in the operation of a vehicle, not upon a highway as defined in s. 340.01, is guilty of a Class A misdemeanor.

The State was required to prove three elements: (1) Vitatoe operated a vehicle (2) in a manner constituting a high degree of negligence (3) that endangered the

safety of Eggen. *See* WIS JI—CRIMINAL 1300. Vitatoe's appeal is focused on the second element only.

¶7 A high degree of negligence is the same as criminal negligence. *See* WIS JI—CRIMINAL 1300, cmt., p. 5. Criminal negligence is defined in § 939.25(1), STATS.[2] The jury instructions define the term as follows:

> "Criminal negligence" means:
>
> • the conduct created a risk of death or great bodily harm; and
>
> • the risk of death or great bodily harm was unreasonable and substantial; and
>
> • the defendant should have been aware that her conduct created the unreasonable and substantial risk of death or great bodily harm.

WIS JI—CRIMINAL 925. In criminal negligence cases, the emphasis is on the conduct, not the actor's state of mind. *See* ***Hart v.*** **State** 75, Wis.2d 371, 383 n.4, 249 N.W.2d 810, 815 n.4 (1977). The analysis of criminal negligence is purely objective and the crime may be completed without any criminal intent. *See* ***State v. Lindvig***, 205 Wis.2d 100, 105, 555 N.W.2d 197, 199 (Ct. App. 1996).

¶8 This court concludes that the evidence was sufficient to support a jury finding that Vitatoe was criminally negligent. Vitatoe dragged Eggen along beside her car for seventy-seven feet over cement and asphalt. Eggen was apparently knocked off his feet, since scrape marks from his shoes were found at

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[2] Section 939.25, STATS., states, in relevant part:

> Criminal negligence.
> (1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another

the site. Vitatoe calculates that she was going only thirteen miles per hour, but that speed is still substantially faster than most human beings can travel on foot. Vitatoe also makes much of the testimony that the event lasted only four seconds. However, the jury could have reasonably concluded that four seconds was a long time under these circumstances. Many driving situations require split second reactions. A four-second delay could often spell disaster. Here, the jury could have reasonably concluded that Vitatoe should have stopped quickly. The evidence indicated, however, that not only did she fail to stop quickly, she apparently did not stop at all.

¶9 Vitatoe correctly points out that criminal negligence is more than ordinary negligence in terms of both (1) the seriousness of the harm risked—death or great bodily harm, and (2) the magnitude of the risk—substantial. The evidence supported both objective findings here. First, the jury could have concluded that dragging a human over this surface for this distance at this speed posed a risk of death or great bodily harm. A head striking pavement, for example, could have resulted in a catastrophic injury. Second, the jury could have concluded that the risk was substantial. There was a distinct chance that a man knocked off his feet, dragged beside a car for seventy-seven feet on a hard surface could be seriously injured.

By the Court.—Judgment affirmed.

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