COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0677-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHAD A. PRITCHARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Chad A. Pritchard appeals his conviction for negligent handling of burning materials and an order denying his postconviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

motion for relief. He contends that the circuit court committed five reversible errors: (1) it denied a new trial when a juror did not truthfully answer questions during *voir dire*; (2) it incorrectly concluded that the State had made a *prima facie* case that Pritchard's handling of burning materials created a substantial and unreasonable risk of serious damage; (3) it erroneously admitted evidence; (4) it erroneously exercised its discretion in instructing the jury; and (5) it ordered restitution when no nexus existed between his crime and the damage. We conclude that Pritchard's contentions are without merit. Therefore, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Early in the morning of August 1, 1998, a fire destroyed a wooden garage belonging to Stanley Kirschbaum in the City of Beaver Dam. Chad Pritchard, a tenant in the apartment building adjoining the garage, told police officers that around 2:00 a.m. he had flicked a lit cigarette into the garage despite knowing that old papers were stored in it.

¶3 Pritchard was charged with negligent handling of burning material under WIS. STAT. § 941.10.[2] At trial, a police officer testified, over Pritchard's objection, that Pritchard's car was parked at the curb during the night of the fire, even though Pritchard was allowed to park in the garage. Photographs showing

[2] WISCONSIN STAT. § 941.10. **Negligent handling of burning material.**

> **(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.

the destruction of the garage were admitted, again over Pritchard's objection. At the close of the prosecution's case, Pritchard moved for dismissal on the grounds that the State had not proven his actions had created a substantial and unreasonable risk of serious damage to the property of others. The circuit court denied the motion. At the conclusion of the evidentiary portion of the trial, Pritchard requested a jury instruction defining "criminal negligence." Instead, the circuit court gave instructions that defined the crime of negligent handling of burning materials as conduct occurring "under circumstances in which the defendant should have realized that [his conduct caused] a substantial and unreasonable risk of serious damage to another's property …."

¶4 Pritchard was convicted. The circuit court withheld sentence and placed him on probation for two years. As a condition of probation, he was required to pay $7,200 in restitution for the damage to the garage and its contents.

¶5 Pritchard moved for a new trial on the ground that one of the jurors had failed to answer *voir dire* questions truthfully. His motion was based on a response to a jury questionnaire sent by his attorney wherein Juror V. wrote that another juror had stated, "[I]f you know the Pritchards you know that family is nothing but trouble." Although he did not know the other juror's name, Juror V. described him as an older man who had retired from John Deere and who was going to Florida. Research by Pritchard's attorney identified Juror S. as the likely speaker.

¶6 The circuit court held a postconviction hearing to determine whether Juror S. had failed to respond truthfully to *voir dire* questions. Juror V., Juror S. and two other jurors testified. At the conclusion of the testimony, the circuit court found that Juror S. had not made any false or misleading statements during *voir*

dire and denied Pritchard's motion for postconviction relief. Pritchard raises this issue as well as several others on appeal.

DISCUSSION

Standard of Review.

¶7 A circuit court's determination on a motion for a new trial or relief from judgment because a juror failed to fully disclose information during *voir dire* is a discretionary decision. *See* ***State v. Wyss,*** 124 Wis. 2d 681, 717-18, 370 N.W.2d 745, 762 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752, 757 (1990). We will affirm a discretionary decision that applies the correct law to a reasonable view of the facts. *See* ***Ansani v. Cascade Mountain, Inc.,*** 223 Wis. 2d 39, 54, 588 N.W.2d 321, 327 (Ct. App. 1998). Additionally, we will affirm a circuit court's finding of fact unless it is clearly wrong. *See* ***State v. Pitsch,*** 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (Ct. App. 1985); WIS. STAT. § 805.17(2).

¶8 We review a circuit court's decision to deny a defendant's motion to dismiss *de novo*. *See* ***State v. Duda,*** 60 Wis. 2d 431, 439, 210 N.W.2d 763, 767 (1973). The admission of evidence and instruction of a jury are discretionary decisions of the circuit court. *See* ***Ansani,*** 223 Wis. 2d at 45, 588 N.W.2d at 324. "The trial court has broad discretion when instructing the jury." ***Finley v. Culligan,*** 201 Wis. 2d 611, 620, 548 N.W.2d 854, 858 (Ct. App. 1996). No grounds for reversal exist if the overall meaning communicated by the instructions was a correct statement of the law. *See* ***id.*** And finally, whether a circuit court has authority to order restitution, given a particular set of facts, is also a question of law which we review *de novo*. *See* ***State v. Walters***, 224 Wis. 2d 897, 901, 591 N.W.2d 874, 875 (Ct. App. 1999).

***Voir Dire* Questions.**

¶9 During *voir dire*, jurors were asked to raise their hands if they knew Chad Pritchard or any member of his family. Jurors also were asked to raise their hands if they felt they could not try the case fairly and impartially. Juror S. did not raise his hand in response to any of these questions. Pritchard contends that a new trial is warranted because Juror S. was reported to have said, "[I]f you know the Pritchards you know that family is nothing but trouble," and this proves that Juror S. incorrectly answered questions during *voir dire*.

¶10 A defendant who claims that a juror failed to answer *voir dire* questions correctly and completely may win a new trial only by proving that "(1) a juror incorrectly or incompletely responded to a material question on *voir dire* and if so that (2) it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." ***State v. Faucher,*** 227 Wis. 2d 700, 726, 596 N.W.2d 770, 782 (1999) (citing ***Wyss,*** 124 Wis. 2d at 726, 370 N.W.2d at 766). Pritchard contends that no reasonable judge could have found that Juror S. correctly and completely responded to the *voir dire* questions. We disagree.

¶11 When the circuit court heard Pritchard's postconviction motion for a new trial, Juror V. testified that he had heard the statement. According to Juror V., a female juror also heard the remark. Juror V. did not know her name, nor could he describe her. Two other jurors testified that they had not heard it. Pritchard also introduced an affidavit from his father to the effect that his father had been involved in laying off Juror S.'s son. Juror S. testified by telephone and said that he did not know Pritchard or his family, that he had no biases or prejudices against Pritchard, and that he had never said that the family was nothing but trouble.

¶12 After considering all of the evidence before it, the circuit court denied Pritchard's motion for a new trial, stating:

> The evidence is that one juror … recalls [that] another juror who he believes is [Juror S. stated] after the end of deliberations … that if you know the Pritchards, that family is nothing but trouble. That statement was done after deliberations were ended. He cannot point to anything that indicates that this juror had any knowledge of the family, and this isn't a statement where a juror said during deliberations, ["I have known Mr. Pritchard's family."] … There's nothing in the record indicating that in fact he had any knowledge of the Pritchard family. There's nothing indicating that he in fact had any bias or prejudice. And, therefore, there's nothing in the record showing that he incorrectly answered the *voir dire* question at the time of *voir dire*.

¶13 We conclude that on the record before us the finding of the circuit court that Juror S. did not incorrectly or incompletely answer questions during *voir dire* is not clearly wrong. One witness said he had heard Juror S. make the statement; two others said they had not. Juror S., himself, denied making the statement and affirmed the correctness of his *voir dire* responses. Therefore, because Pritchard did not meet the first element of the ***Faucher*** test, we conclude the circuit court did not erroneously exercise its discretion in denying Pritchard's motion for a new trial on this basis.

Motion to Dismiss.

¶14 Pritchard asserts that the circuit court erred when it denied his motion to dismiss at the close of the State's case. He argues that the State failed to

meet its burden to prove that Pritchard's negligent flicking a lit cigarette into the garage created a substantial and unreasonable risk of serious damage.[3]

¶15 To defeat a motion to dismiss at the close of its case, the State must show that it has introduced evidence sufficient to prove guilt beyond a reasonable doubt when the State's evidence is viewed in the most favorable light. *See* ***Duda,*** 60 Wis. 2d at 439, 210 N.W.2d at 767. Detective Meyer of the Beaver Dam Police Department testified that he had interviewed Pritchard on August 4th, three days after the fire. Detective Meyer testified that Pritchard told him that he had thrown a lit cigarette into the garage. He also testified that Pritchard said he had placed boxes of paper in the garage. Pritchard's landlord, Stanley Kirschbaum, testified that the garage was made of wood, that Pritchard had lived in the apartment building next to the garage for nearly a year, and that Pritchard had a parking space in the garage. This evidence, considered in the most favorable light, is sufficient to prove Pritchard's guilt beyond a reasonable doubt.

Evidentiary Issues.

¶16 Pritchard next contends that the circuit court erred by admitting pictures of the destroyed garage, Officer Kreuziger's testimony about the location of Pritchard's car during the fire, and Pritchard's statement to Detective Meyer that he had flicked a lit cigarette into the garage, which contained debris, including papers. We conclude that the trial court properly exercised its discretion in admitting the evidence.

[3] Pritchard does not dispute that the State sufficiently proved that he had handled burning materials.

¶17 As we have explained previously, "Photographs should be admitted if they help the jury gain a better understanding of material facts …." ***Ellsworth v. Schelbrock,*** 229 Wis. 2d 542, 559, 600 N.W.2d 247, 254 (Ct. App. 1999). In deciding to admit evidence that the garage burned down, the circuit court reasoned that the destruction of the garage was relevant because it was part of the story of what happened, and it showed the degree of risk created by Pritchard's conduct. We conclude that this was an appropriate exercise of the circuit court's discretion.

¶18 Pritchard also contends that the circuit court erred by admitting testimony that his car was not in the garage the night of the fire. In his view, this testimony implied that he deliberately set the fire at a time when his own property would not be damaged. In admitting the testimony, the circuit court reasoned that the location of Pritchard's car was relevant because it went to the issue of where the fire started in the garage. We conclude that this also was an appropriate exercise of the circuit court's discretion.

¶19 As a final evidentiary contention, Pritchard asserts that the circuit court erred in concluding that he had not invoked his privilege against self-incrimination during a November 30th interview with Detective Meyer and Officer Nieman. As a result, he reasons, the circuit court erred in allowing Detective Meyer and Officer Nieman to testify about information they subsequently gathered from Pritchard during the interview. Our review of the record does not disclose that either police officer testified about the November 30th interview. Detective Meyer testified only about an August 4th interview with Pritchard, and Officer Nieman did not testify about any conversations with Pritchard at all. Accordingly, we find no merit in Pritchard's contention.

Jury Instructions.

¶20 Pritchard asserts that the circuit court erred by not including a definition of "criminal negligence" in JI-Criminal 1310, the standard jury instruction regarding the crime of negligent handling of burning materials. Pritchard reasons that this omission deprived his attorney of the opportunity to explain the difference between criminal and civil negligence to the jury and therefore prejudiced him. We disagree.

¶21 At trial, Pritchard requested the circuit court to instruct the jury in the distinction between criminal negligence and civil negligence. The circuit court denied Pritchard's request, reasoning that defining "criminal negligence" in the instructions would likely confuse the jury. The court read the following instruction:

> Negligent handling of burning material, as defined in Section 941.10(1) of the Criminal Code of Wisconsin, is committed by one who handles burning material in a highly negligent manner.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> The first element requires that the defendant handled burning material.
>
> The second element requires that the defendant did so under circumstances in which the defendant should have realized that a substantial and unreasonable risk of serious damage to another's property is created.
>
> If you are satisfied beyond a reasonable doubt that the defendant handled burning material and did so under circumstances in which the defendant should have realized that a substantial and unreasonable risk of serious damage to another's property is created, you should find the defendant guilty.

> If you are not so satisfied, you must find the defendant not guilty.

¶22 The jury instruction that the court read is the standard instruction on the crime of negligent handling of burning material when only property is put at risk. It identifies two elements of the crime: that the defendant handled burning materials, and that he did so under circumstances in which he should have realized that a serious and unreasonable risk to another's property was created. These elements correctly state the elements of the crime established in WIS. STAT. § 941.10.

Restitution.

¶23 Pritchard contends that the circuit court lacked authority to order him to pay restitution for damage to the garage and its contents because the State failed to prove that his negligent conduct caused the fire. We disagree.

¶24 In construing the restitution statute, we begin by noting its mandatory directive. Under WIS. STAT. § 973.20(1r), a circuit court must order full or partial restitution to any victim of a crime considered at sentencing,[4] unless the circuit court finds a substantial reason exists not to do so and states the reason. This furthers one of the primary purposes of restitution: to compensate the victim. *See* ***State v. Sweat***, 208 Wis. 2d 409, 422, 561 N.W.2d 695, 700 (1997). Section 973.20 "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." ***State v. Kennedy***, 190 Wis. 2d 252, 258, 528 N.W.2d 9, 11 (Ct. App. 1994). Additionally, we construe the restitution statute "broadly and liberally in order to

[4] A "[c]rime considered at sentencing" is the crime of conviction, as well as any crime read in at sentencing. WIS. STAT. § 973.20(1g)(a).

allow victims to recover their losses [that occur] as a result of a defendant's criminal conduct." ***State v. Anderson***, 215 Wis. 2d 673, 682, 573 N.W.2d 872, 875 (Ct. App. 1997).

¶25 There must be a causal nexus between the damage sustained by the victim of the crime and a crime considered at sentencing. *See* ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104, 109 (1999) (citing ***State v. Behnke***, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996)). In proving causation, the victim need show only that the defendant's criminal activity was a substantial factor in causing the damage. *See* ***Behnke***, 203 Wis. 2d at 59, 553 N.W.2d at 273. A substantial factor is one in which a crime considered at sentencing was a "precipitating cause of the injury" such that the resultant special damage was a natural consequence of it. ***Id.***; WIS. STAT. § 973.20(5)(a).

¶26 In arguing that the circuit court lacked the authority to order restitution, Pritchard contends that the State failed to prove that his actions were a cause of the garage fire. We note that at the restitution hearing the circuit court found that the damage resulted from Pritchard's actions.

> The Court finds from the evidence at trial that Section 973.20(2) is complied with in the sense that the crime considered, the negligent handling of burning material … by the defendant, Mr. Pritchard, resulted in damage to the vehicle owned by Jeanne Dittberner, that it resulted in damage to the property owned by Stanley Kirschbaum. The proximity of time between the negligent handling of burning material by Mr. Pritchard and the observation by Miss Dittberner of the commencement of the fire results in only one logical conclusion and that is that Mr. Pritchard's negligent handling of the burning material resulted in the damage to the vehicle and to the building.

¶27 The circuit court's finding is not clearly erroneous. Pritchard said that at approximately 2:00 a.m. he flicked a lit cigarette into a wooden garage that contained flammable materials, including boxes of paper. Dittberner testified that she heard crackling noises and saw the fire between 2:30 a.m. and 2:45 a.m. Officer Kreuziger testified that the garage was fully engulfed in flames around 3:30 a.m., ninety minutes after Pritchard flicked his lit cigarette into it, and Officer Nieman testified that the garage was totally destroyed when he arrived at 3:38 a.m. Accordingly, we affirm the circuit court's restitution order.

CONCLUSION

¶28 We conclude that the circuit court did not erroneously exercise its discretion in its denial of Pritchard's postconviction motion, in the admission of evidence, and in instructing the jury. We further conclude that the circuit court correctly concluded that the State had introduced sufficient evidence to prove the elements of the crime and therefore its denial of Pritchard's motion to dismiss at the end of the State's case was not an error. Finally, we conclude that a sufficient nexus existed between Pritchard's actions and the resulting fire to support the restitution order. Therefore, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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