COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP749-FT **Cir. Ct. No. 2006JV11**

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

IN THE INTEREST OF EUGENE H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EUGENE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.[1] Eugene H. appeals a dispositional order finding him delinquent. Eugene contends the court applied the wrong legal standards. He also contends the remedy for the error is a directed verdict of acquittal. We agree the court applied the wrong legal standards. However, we conclude Eugene is entitled to a new trial, not a directed verdict.

BACKGROUND

¶2 This appeal arises out of a pedestrian-motorcycle accident on May 26, 2006. Eugene was the operator of the motorcycle and struck a five-year-old girl, Jayden O. Eugene was twelve years old at the time of the incident. Jayden sustained serious injuries in the incident, including a broken leg and facial injuries.

¶3 The State filed a delinquency petition alleging Eugene endangered the safety of another person by negligently operating a vehicle not on a public highway in violation of WIS. STAT. § 941.01(1). The matter was tried to the court on August 4, 2006.

¶4 At the trial, Amber T. testified she had been walking down the sidewalk with Jayden and two other children. She said several boys had driven motorcycles down the sidewalk, forcing her and the three others off the sidewalk onto the grass. Amber testified Eugene was driving the first motorcycle. She said Jayden was not able to get off the sidewalk in time and was hit by Eugene's motorcycle.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 and is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 Eugene's story was different. He testified he had been the last of four motorcycles driving on a dirt ATV track that ran next to the sidewalk. One of the pedestrians had thrown rocks at the first three motorcycles, and Jayden, imitating the thrower, had reached out into the ATV track to pick up a rock. Eugene was unable to avoid Jayden because he had just gone over a bump in the trail. Eugene admitted he could have been going as much as thirty-five miles an hour at the time.

¶6 After both parties rested, the court discussed in detail WIS. STAT. § 23.33(3)(g), which provides that all-terrain vehicles may not drive over ten miles per hour when within 150 feet of a dwelling. The court also discussed WIS. STAT. § 891.44, which provides that a child less than seven years old cannot be negligent. Relying in part on both statutes, the court concluded Eugene had negligently operated his motorcycle in violation of WIS. STAT. § 941.01(1) and adjudged him delinquent.

DISCUSSION

¶7 Eugene argues the court should not have relied on either WIS. STAT. §§ 23.33(3)(g) or 891.44. He also contends he is entitled to a directed verdict of acquittal.

I. WISCONSIN STAT. § 23.33(3)(g)

¶8 WISCONSIN STAT. § 23.33(3)(g) prohibits operation of an all-terrain vehicle "within 150 feet of a dwelling at a speed exceeding 10 miles per hour." Eugene contends § 23.33(3)(g) is not applicable here because (1) Eugene's motorcycle is not an "all-terrain vehicle," and (2) there was no evidence that the accident occurred within 150 feet of a dwelling. *See* WIS. STAT. §§ 23.33(1)(b),

340.01(2g) ("all-terrain vehicle" is "an engine-driven device … designed to travel on 3 or more low-pressure tires.").

¶9 The State concedes WIS. STAT. § 23.33(3)(g) is not applicable. In fact, it took the position at trial that Eugene was driving a motorcycle, not an ATV. Additionally, the State does not dispute Eugene's contention that there was no evidence about any dwelling whatsoever. Instead, the State argues the court's discussion of § 23.33(3)(g) was "simply … a comparison" and not the legal standard the court applied.

¶10 The State's argument is not consistent with the record. In closing arguments, defense counsel argued Eugene had not been negligent because he had been driving on the ATV track and had simply lost control when Jayden stepped in front of him. The court responded by saying "But isn't [your argument] up against, though, the legislature already said 10 miles per hour if this was an ATV?" The court later returned to the ATV issue in making its findings, stating:

> [T]here is a very specific class of people the legislature is looking out for when they say that you have to travel 10 miles an hour in basically a residential area if you drive an ATV on a trail… I just can't help but think that they're really concerned about smaller kids….
>
> ….
>
> [Eugene] is going three times the limit… I think that's up there on these specific duties that goes past negligence and probably high degree. If you're traveling three times the limit… I would say that there is a disparity between what obligation he did have and how he handled that….

The court then concluded Eugene had been delinquent.

¶11 The quoted language above shows the court based its negligence finding in part on its belief that Eugene had violated WIS. STAT. § 23.33(3)(g). The court therefore applied the wrong standard.

II. WISCONSIN STAT. § 891.44

¶12 WISCONSIN STAT. § 891.44 provides that a child less than seven years old is conclusively presumed to be "incapable of … contributory negligence or of any negligence whatsoever." Eugene argues the court compared Jayden's negligence to Eugene's negligence and concluded that because Jayden could not be negligent, Eugene must have been negligent.

¶13 The State does not argue that a comparison of Jayden's and Eugene's negligence is appropriate here. A victim's contributory negligence is not a defense to a criminal negligence charge.[2] WIS. STAT. § 939.14; *see also* ***State v. Lohmeier***, 205 Wis. 2d 183, 195, 556 N.W.2d 90 (1996). Instead, whether a person's conduct is negligent focuses on the defendant. That is, criminal negligence is "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…." WIS. STAT. § 939.25. The existence of fault on the part of a victim has no bearing on whether a person engages in conduct he or she should know creates a certain type of risk to others.

[2] WISCONSIN STAT. § 941.01 uses the term "high degree of negligence" rather than "negligent" or "negligently." The latter terms invoke the definition of criminal negligence in WIS. STAT. § 939.25. *See* WIS. STAT. § 939.25(2). However, WIS. STAT. § 939.25(1) defines criminal negligence as "negligence to a high degree," and neither side argues a different definition of "high degree of negligence" is appropriate.

¶14 The State again disputes Eugene's interpretation of the court's remarks. However, early in its decision the court referred to WIS. STAT. § 891.44 twice, stating it was trying to determine whether Jayden or Eugene had the right-of-way. At the end of its discussion, the court returned to the contributory negligence issue, stating that "I think the State has shown a high degree of negligence here because the small person under age seven isn't capable of being at fault and beneficiary of whatever protection the law would allow." While the court's statement defies any clear meaning, the best reading of it is that offered by Eugene: the court concluded Eugene had been negligent in part because Jayden had not been. This was error.

III. Eugene's remedy

¶15 In general, the remedy when the court applies the wrong standard of law is a new trial. *See* ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶1, 267 Wis. 2d 873, 672 N.W.2d 141. Eugene contends, however, that the correct remedy here is a directed verdict of acquittal.

¶16 Eugene relies on ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997). ***Wulff*** was a sexual assault case. The information charged Wulff with second-degree sexual assault by having sexual intercourse or contact with a person he knew was unconscious. The information tracked the statutory definition of "sexual intercourse," which includes oral, anal, and genital sex. ***Id.*** at 148.

¶17 However, the instructions submitted to the jury defined "sexual intercourse" as including only anal and genital sex and did not mention oral sex. ***Id.*** Wulff was convicted and challenged the sufficiency of the evidence. Under the particular facts of the case, there was evidence showing he attempted to engage

in oral sex with the victim, but no evidence of genital or anal sex. ***Id.*** at 151-52. The court ordered Wulff acquitted:

> [A]dmittedly there was evidence sufficient to sustain a conviction on review if the jury had been instructed to deliberate the fellatio intercourse or sexual contact theories of culpability. However … "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury."

Id. at 152 (citations omitted).

¶18 The remedy in ***Wulff*** is based on double jeopardy principles. That is, as a general rule the State is free to retry a defendant whose conviction is overturned on appeal. ***State v. Henning***, 2004 WI 89, ¶19, 273 Wis. 2d 352, 681 N.W.2d 871. However, when a conviction is reversed based on insufficient evidence, double jeopardy principles require a directed verdict of acquittal. ***Id.*** at ¶22. This prevents "a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." ***Burks v. United States***, 437 U.S. 1, 11 (1978).

¶19 Eugene does not argue that the prosecution's evidence that he drove his motorcycle into a group of children on a sidewalk is insufficient to show a violation of WIS. STAT. § 941.01(1). Rather, he argues the circuit court here—like the court in ***Wulff***—defined the crime in such a narrow way that the evidence required acquittal. That is, he argues the court's statements were equivalent to a jury instruction allowing conviction only if Eugene had violated WIS. STAT. § 23.33(3)(g).

¶20 Eugene misreads the court's statements. The court recognized that Eugene was delinquent only if Eugene's conduct had been criminally negligent. The court erroneously concluded Eugene's supposed violation of WIS. STAT.

§ 23.33(3)(g) and the victim's contributory negligence were relevant to Eugene's negligence. This incorrect standard of law was equivalent to a jury instruction misstating the law defining criminal negligence. It was not, as Eugene contends, the equivalent of an instruction that criminal negligence existed only if Eugene had violated WIS. STAT. § 23.33(3)(g).

¶21 The State remains free to retry Eugene. *See* ***Henning***, 273 Wis. 2d 352, ¶19. In the new trial, the court shall decide whether Eugene violated WIS. STAT. § 941.01(1) without reference to WIS. STAT. §§ 23.33(3)(g) or 891.44.

By the Court.—Order reversed and cause remanded with directions.

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