COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP788-CR **Cir. Ct. No. 2008CM7544**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KERRY J. COLLINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Kerry Collins appeals the judgment, entered following a jury verdict, convicting him of one count of negligent handling of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

burning material, contrary to WIS. STAT. § 941.10 (2009-10). Collins argues that there was insufficient evidence presented at his trial to convict him. This court disagrees and affirms.

I. BACKGROUND.

¶2 A City of Milwaukee mechanical engineer, Daniel Pitts, testified at Collins's jury trial that around 3:25 or 3:30 p.m. on the afternoon of December 17, 2008, he and Babette Kis, a City of Milwaukee architect, went to look at a men's restroom being remodeled in City Hall.[2] A sign on the door alerted people that the restroom was closed for remodeling. Inside, the mirrors, sinks, toilets, lights, and much of the tile had been removed, leaving an area where the plumbing, piping, and insulation was exposed.

¶3 Pitts stated that when they entered the restroom, he smelled and saw smoke. He also saw a bright light, like a flame, coming from an opening in the wall which he called a "pipe chase." There were two sets of pipes in the chase, one of which was covered with flammable insulation. Pitts later identified the source of the light as a flare.

¶4 Kis, the architect, testified that she had been in the fifth floor restroom earlier that afternoon to inspect a broken pipe. She recounted how she left to get Pitts, who was in the building across the street, and that they returned at "about 3:17, three something." She told the jury that there was no flare in the restroom when she left to get Pitts. However, she stated that when she and Pitts

[2] Although Pitts testified that the restroom was on the seventh floor, all the other witnesses placed it on the fifth floor. During cross-examination, Pitts said he could be wrong about the floor. Several restrooms on different floors were being remodeled at the same time.

opened the door to the fifth floor restroom, she saw smoke and red flames in the chase space, which she described as the space that carries the pipes between the men's and women's restrooms.

¶5 After seeing the flare and smoke, both Pitts and Kis went to the first floor to report the fire, and they ran into Milwaukee Police Officer Richard Miller, who was working security detail at City Hall. Pitts and Kis told Officer Miller what they had seen. Milwaukee Police Lieutenant Dexter Hines testified that on the day in question he was standing on the sixth floor, also working security, when he looked down at the open atrium at about 3:15 to 3:30 p.m. when he saw a man, later identified as Collins, wearing a hooded coat, light blue jogging pants, and gloves go into the restroom on the fifth floor. Like Pitts, Lieutenant Hines noted that this restroom had a sign on it saying it was closed for remodeling. Hines estimated that Collins was in the restroom for about four or five minutes before he exited, then looked both ways before walking to the stairwell. Hines then saw Collins return and re-enter the restroom again for a short time. When Collins came out of the restroom this second time, Hines said "he came out quickly, walked to the elevators, and … frantically push[ed] the elevator button." Hines, thinking this behavior suspicious, radioed Officer Miller to detain Collins when he got off the elevator.

¶6 Officer Miller also testified. He recounted how he received a call from Hines, and upon seeing Collins, he followed him outside City Hall and eventually stopped him and asked for identification. Collins gave him his name and showed him his driver's license. Collins explained that he had been looking at job postings on the seventh floor. Officer Miller asked Collins to return to City Hall with him and Collins agreed. Officer Miller then patted Collins down. Hines joined them and Collins was asked about entering the fifth floor restroom. Collins

denied being in the fifth floor restroom. After talking to Collins for several minutes, Officer Miller let Collins go. Collins left City Hall for the second and final time at about 3:33 p.m. Officer Miller then ran into Pitts and Kis and learned of the fire in the fifth floor restroom. He went up to the fifth floor restroom, saw the flare, reached in, grabbed it, and blew it out.

¶7 During Officer Miller's testimony, the jury was shown a video that was monitored by him while working security at City Hall. The video showed a camera inside City Hall on the day in question. It showed Collins coming into the building for the first time at 3:16 p.m., almost 3:17 p.m., and leaving for the first time at 3:23 p.m. Officer Miller said he was not sure of the clock's accuracy. On cross-examination, Officer Miller said he did not smell a sulfuric odor on Collins's clothing, nor did Collins possess a lighter.

¶8 Another City Hall employee, Maria Monteagudo, related her contact with Collins. She explained that she works for the department where city job applications are processed. Her office is on the seventh floor of City Hall. She explained that Collins applied to take a test for a City job but was rejected. She explained that he was rejected because the deadline for the job application was November 26, 2008, at 4:45 p.m., and Collins's application was time stamped 5:22 p.m.[3] She said Collins also failed to bring his commercial driver's license with him, which is a requirement. She related that Collins then filed an appeal. However, his appeal was denied at an evening hearing which Collins attended on December 16, 2008, the night before the fire.

[3] Apparently Collins time-stamped his own application. Ordinarily, it is done by one of the City employees.

¶9 Several witnesses were called on Collins's behalf. The Milwaukee detective who executed a search warrant at Collins's residence told the jury that nothing incriminating was found at his house. Collins's neighbor, Curtis Hansen, who conducted some experiments with flares that he bought in an automotive store, testified that his experiments showed that the flare emits a lot of smoke, almost immediately gives off a strong sulfuric odor, and is impossible to blow out, although he did not try to do so when the flare was quite short. Hansen timed the burn length of the flares and stated they last sixteen to seventeen minutes. Another defense witness testified that Collins had a reputation for being a truthful person.

¶10 Collins also testified in his own defense. Contrary to his statement to Officer Miller, Collins admitted at trial to being in the fifth floor restroom on the day in question. He said he had not been taking his anti-depressant medication for about a week when he went to City Hall that day to look for employment opportunities. Collins said that he was suffering from severe anxiety and cold sweats. He claimed that he got off on the wrong floor and was feeling light headed and sick, so he decided to go into the restroom to lie down for a couple of minutes.

¶11 Collins said that after lying down for several minutes he got up and left, but then discovered that he had lost his keys, so he went back into the restroom and retrieved his keys. He then exited the building and shortly thereafter was stopped by Officer Miller. He denied having lit a flare in the restroom.

¶12 On cross-examination, Collins admitted that because of his mental and physical condition on December 17, 2008, he may not have remembered everything that occurred. He denied being asked by the police on December 17,

2008, if he had been on the fifth floor; rather, he claimed he was just asked if he had been "up there."

¶13 As noted, the jury found Collins guilty. He was sentenced to five months in the House of Correction. This sentence was stayed and Collins was placed on probation for twelve months with conditions, including thirty days in the House of Correction with Huber privileges. This appeal follows.

II. ANALYSIS.

¶14 Collins bases his claim of insufficient evidence on four grounds. He argues that: (1) the absence of sulfuric odor on his person when he was stopped after leaving City Hall proves he was not the person who ignited the flare; (2) the timeline for the events prevents Collins from being the person who placed the flare in the plumbing chase; (3) he had no ignition source for the flare on his person when stopped, thereby exonerating him; and (4) even if Collins was responsible for the igniting the flare, there was no evidence of criminal negligence. This court disagrees.

¶15 ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), addresses the appropriate standard of review this court uses when asked to determine whether there is sufficient evidence to support a conviction:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state 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.... If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

¶16 Reasonable inferences must also be given to circumstantial evidence because it "is oftentimes stronger and more satisfactory than direct evidence." ***Id.***, 153 Wis. 2d at 501. Whether the elements of the statute under which a defendant is charged are satisfied by the evidence is, however, an issue of law that we review *de novo*. *See* ***State v. Turnpaugh***, 2007 WI App 222, ¶2, 305 Wis. 2d 722, 741 N.W.2d 488.

¶17 The trial court read the following jury instruction to the jury:

> Negligent handling of burning material, as defined by [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:
>
> One, that the defendant handled burning material.
>
> Two, that the defendant did so in a manner constituting criminal negligence.
>
> Criminal negligence means the defendant's handling of burning material 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 his handling of burning material created the unreasonable and substantial risk of death or great bodily harm.
>
> If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty.

(Some spacing and capitalization added.) Thus, this court reviews the record to see if the State proved the two elements of the crime viewing the evidence in the

light must favorable to the State as required. *See* ***Turnpaugh***, 305 Wis. 2d 722, ¶12; ***Poellinger***, 153 Wis. 2d at 507.

¶18 Collins first argues that, because Officer Miller did not detect any sulfuric odor that would have been generated by a lit flare on Collins's clothes, he could not have been the one who ignited it. This court disagrees. First, it would not be impossible to ignite a flare in an empty restroom and not have a sulfuric odor attach to one's clothing if one did it quickly. Second, as the State points out, Officer Miller's first encounter with Collins was outside on a cold December day. It is unlikely that the sulfuric odor—had there been an odor—would have been smelled under those conditions. Further, at this time Officer Miller did not know about the fire, and thus would not have had a heightened awareness of odors. It is also possible that the smell dissipated during this time. Nevertheless, even assuming that no sulfuric odor existed, this was but one piece of evidence suggesting innocence that the jury considered along with other pieces of evidence that strongly suggested guilt. *See* ***Poellinger***, 153 Wis. 2d at 507. For instance, Collins originally told Officer Miller that he had been on the seventh floor, not the fifth floor, and he denied being in the fifth floor restroom, yet at trial he completely changed his story, admitting that he *had* been in the fifth floor restroom but had only been there because he was ill. Further, Collins never told the officer that he had had a panic attack or lost his keys, as he testified in court.

¶19 Collins's second argument is that there was insufficient evidence of his guilt because there were problems with the State's timeline. Collins argues that if the flare burned for approximately sixteen or seventeen minutes, as suggested by Collins's neighbor's experiments with flares, Collins could not have been the person who ignited the flare because the City Hall clock had him leaving for the first time at 3:23 p.m., and Officer Miller testified that when he entered the

restroom at about 3:35 p.m., the flare was so short that he could blow it out. Collins contends that a flare ignited during the first time that he was in the building—from about 3:16 to 3:23 p.m.—could not have been "exhausted and cooled to handling temperature twelve or thirteen minutes later." However, the evidence revealed that the flare must have been placed in the restroom in the approximate fifteen-minute time span that it took Kis to get Pitts because she saw no flare when she left. During this fifteen-minute time frame, Hines saw Collins enter the fifth floor restroom. Moreover, Officer Miller did not go the fifth floor and enter the restroom until he released Collins. Collins left City Hall for the second and final time at 3:33 p.m. Consequently, Officer Miller did not enter the restroom and blow out the flare until approximately 3:35 p.m.—about eighteen minutes after Collins first entered the building. This was ample time for Collins to ignite the flare and have the flare close to the end of its sixteen- to seventeen-minute life span when Officer Miller entered the restroom and blew it out. The jury was aware of the variances in time given by the State's witnesses and could have weighed the evidence against evidence to find Collins guilty beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 507; ***Turnpaugh***, 305 Wis. 2d 722, ¶2.

¶20 Collins also argues that the lack of a device being found on his person to ignite the flare proves that he did not light the flare. At trial, the parties stipulated that: "safety flares … require a high-heat source for ignition and an igniter button is built into the end of each flare to provide it." Although Collins did not have an ignition source on his person when he was stopped, he could have easily disposed of it in a garbage can, while in the elevator, or outside City Hall on the street. The lack of a device to ignite the flare is not fatal to the State's case. Again, the jury was aware of this fact and the jury must have determined that there

was sufficient other evidence that pointed to guilt. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶21 Finally, Collins submits that even if he did light the flare, there is "insufficient evidence to show that its placement in the [pipe] chase was criminally negligent." As noted, the jury was instructed that "criminal negligence means the defendant's handling of burning material 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 his handling of burning material created the unreasonable and substantial risk of death or great bodily harm."

¶22 While it is true that the flare caused almost no damage, it had the potential to cause "a risk of death or great bodily harm," and Collins knew it was dangerous. First, the parties stipulated that the flare's flame burned in excess of 3600 degrees Fahrenheit and the flare burned in excess of fifteen minutes. This flare was placed inside an open wall of City Hall. Pictures were admitted into evidence showing that the flare was placed in the general vicinity of wall board and wood 2 x 4's. The flare was also close to insulation on one of the pipes, which a mechanical engineer testified was flammable. Due to the construction, the restroom contained debris consisting of wallboard and wood pieces which could easily have caught fire. Numerous employees and members of the public were inside City Hall at the time the fire was discovered. Had a fire started in the plumbing chase in the restroom, it could have easily spread. Thus, the potential for a serious and destructive fire existed. There can be little doubt that the flare created an unreasonable and substantial risk of death or great bodily harm. As a result, Collins's actions were not inadvertent. Consequently, his actions constituted criminal negligence.

¶23 In sum, the State proved by both direct evidence and circumstantial evidence the elements of the crime. Accordingly, this court affirms.

By the Court.—Judgment affirmed.

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