COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP1341-CR
2010AP2011-CR

Cir. Ct. Nos. 2008CF342
2008CF343

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE J. KNUTSON,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAAP, INC.,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Dale Knutson and CAAP, Inc. (collectively Knutson) appeal from judgments of conviction of party to the crime of the unlicensed storage of hazardous waste contrary to WIS. STAT. § 291.97(2)(b)2. (2009-10).[1] Knutson argues that the jury was improperly instructed that the prosecution only had to prove that Knutson knew that the material had the potential to be harmful to others or the environment and that Knutson was entitled to a mistake instruction. Knutson contends that the prosecution was required to prove that Knutson knew that the substance being stored was hazardous waste. We conclude that ***State v. Fettig***, 172 Wis. 2d 428, 493 N.W.2d 254 (Ct. App. 1992), controls as to the instruction for a violation of § 291.97(2)(b)2., and that the facts did not support the requested mistake instruction. We affirm the judgments.

¶2 Dale Knutson solely owns and operates CAAP, Inc., which performs asbestos abatement. Knutson had previously removed asbestos related materials for Milwaukee Water Works (MWW). In October 2004 Knutson picked up eight barrels from MWW which Knutson believed contained silica sand and sodium bisulfite. The barrels were taken to property owned by Dale and his wife and stored in a cube van on the property. When transferring the barrels to the van,

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

Dale Knutson was also convicted of two misdemeanor counts of obstructing an officer but does not challenge that judgment of conviction on appeal.

Dale noticed one barrel had a label with "phosphoric acid" written in black marker. Knutson wrote MWW to obtain documentation of the contents of the barrels and offered to return the barrel that had the acid label. MWW suggested that the contents of the barrels be tested and asked Knutson to provide a quote for such work. Knutson advised MWW that the cost would be approximately $1,100 per barrel. Although MWW records indicate that it sent Knutson authorization for the testing in January 2005, Knutson never received the facsimile transmission.

¶3 In October 2005 Knutson moved the barrel with the acid label from the van so that it could be picked up by a waste remover. The barrel dropped to its side and a yellow or brown material began to ooze out. The material had a strong sulfur smell, much like the sodium bisulfite Knutson had utilized on the property. A law enforcement officer observed the spilled material and in the vicinity of the spill the officer's eyes began to water, he started coughing, and he could not catch his breath. Later that same day the sand covering the spilled material was bubbling. A Department of Natural Resources employee conducted a pH test on the spilled material and the test indicated that an acid was present. An environmental cleanup service was called to the site to neutralize and remove the spilled material. A search warrant was executed the next day and several barrels were removed from the van. Some of the material in the barrels was found to have a pH level falling within the definition of a hazardous waste. The substance was not conclusively determined to be phosphoric acid.

¶4 Knutson was charged with three counts of violating WIS. STAT. § 291.97(2)(b)2., one each for the transportation, disposal, and storing of a hazardous waste. Under § 291.97(2)(b)2., a person who willfully "[s]tores, treats, transports or disposes of any hazardous waste without a license required under

s. … 291.25" is guilty of a felony. The pattern jury instruction WIS JI—CRIMINAL 5200, was used to instruct the jury on the third element of the crime as follows:

> The third element requires that the defendant stored hazardous waste willfully. "Willfully" requires that the defendant intentionally stored hazardous waste and *knew that the material had the potential to be harmful to others or to the environment*. It does not require that the defendant knew that a license was required to carry on those activities, or knew that he was violating any particular law, or knew that the material was defined by law to be a hazardous waste.

(Emphasis added.)

¶5 Knutson argues that WIS. STAT. § 291.97(2)(b)2., requires the prosecution to prove that a defendant has knowledge that he is storing hazardous waste and that the jury instruction failed to convey that requirement.[2] The trial court has broad discretion with respect to the submission of jury instructions. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). Whether the trial court correctly instructed the jury is a question of law which this court reviews de novo. ***State v. Sartin***, 200 Wis. 2d 47, 53, 546 N.W.2d 449 (1996).

¶6 In ***Fettig***, the court addressed the degree of knowledge or willfulness necessary for a conviction for storing and disposing of hazardous wastes under Wisconsin's Hazardous Waste Management Act. ***Fettig***, 172 Wis. 2d at 436. The court concluded that the enforcement provision of the act, now WIS. STAT. § 291.97, was more accurately described as a regulatory scheme with potential

[2] Knutson's theory of defense was that Knutson believed the barrels only contained sodium bisulfite and that Knutson had done a sufficient amount of research to determine that sodium bisulfite was not a hazardous waste and that the spill of the small amount of material did not have to be reported.

criminal penalties and that it should be construed to effectuate the regulatory purpose of protecting the public health. ***Fettig***, 172 Wis. 2d at 440. As such, a diminished *mens rea* requirement was appropriate and ignorance of the law would be no defense. ***Id.*** at 442-43. The court held the statute does not require proof that one who willfully stores or disposes of hazardous wastes also must know that a license is required to carry on those activities. ***Id.*** at 433, 446. Specifically the court held that "the word 'wilfully' reaches only to '[s]tores, treats, transports or disposes of;' consequently, the state need prove only that any of those activities was done wilfully and that the person so acted without a license." ***Id.*** at 433. In ***Fettig*** the trial court had instructed the jury:

> It is not necessary for the State to show that the defendant knew that it/he was violating any particular law or knew that the material being disposed was a statutorily defined hazardous waste. *It is sufficient that the State show that the defendant knew the material had the potential to be harmful to others or the environment* or in other words was not an innocuous substance, like water.

Id. at 435 (emphasis added). The ***Fettig*** court concluded that the jury had been properly instructed.

¶7 Knutson argues that ***Fettig*** is limited to whether a defendant needs to know of the licensing requirement and that the jury instruction committee overstepped the holding in ***Fettig*** by adopting the jury instruction used in ***Fettig*** to relieve the prosecution of the burden to prove that the defendant knew that a "hazardous waste" was being stored. The ***Fettig*** court addressed what portion of the statute "willfully" reaches and limited it only to the willful transportation, storage, or disposal. That construction removes the remainder portion of the statute, including "hazardous waste," from the willfulness requirement. We are bound by the ***Fettig*** holding. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d

246 (1997). Consequently, we cannot conclude that the trial court's instruction that the prosecution need only prove that Knutson knew that the material had the potential to be harmful to others or to the environment was error.

¶8 In requesting a jury instruction that the defendant knowingly stored hazardous waste, Knutson also requested that the jury be instructed on mistake: "In deciding whether the defendant acted willfully, you must consider the evidence that the defendant believed that the item stored was not hazardous waste. If an honest error of facts results in a person's not having the knowledge required for a crime, the person is not guilty of that crime." *See* WIS JI—CRIMINAL 770. The trial court denied the request for a mistake instruction concluding that WIS JI—CRIMINAL 5200 allowed Knutson to argue that he was unaware that the substance being stored was dangerous to the environment. The trial court's discretion in instructing the jury must be exercised in order "'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). The trial court is not required to give requested instructions unless the evidence reasonably requires it. ***Johnson v. State***, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978). This court independently reviews whether a jury instruction is appropriate under the specific facts of a given case. ***State v. Groth***, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163.

¶9 Here the evidence did not permit a finding that there was a mistake of fact as to Knutson's knowledge that the stored material had the potential to be harmful to others or to the environment. Knutson saw the acid label on the barrel; Knutson contacted MWW to ascertain the true contents of the barrel. Knutson even contacted an environmental waste disposal company to pick up the barrel

with the acid label, albeit nearly a year after he took possession of it. The evidence only permits the view that Knutson suspected the substance was something other than sodium bisulfite but he dropped the ball in his inquiry as to its true nature. Even if the sulfur odor Knutson observed when he spilled the material lead him to believe the substance was just sodium bisulfite, he had already stored the material under circumstances which he knew was potentially harmful to persons or the environment. That explains the jury's acquittal of the transportation and disposing counts and a finding of guilt on the storage count. We conclude that the evidence did not permit the giving of the mistake instruction.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.