COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2012

A. John Voelker
Acting Clerk of Court of Appe

Appeal No. 2011AP82 **Cir. Ct. No. 2009CF348**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL R. WILFERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed*.

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Paul R. Wilfert appeals from a judgment convicting him of disorderly conduct and second-degree recklessly endangering safety. He contends that his conviction for second-degree recklessly endangering safety violated his right to be free from double jeopardy. Alternatively, he

maintains that there was insufficient evidence to convict him of that crime. We reject both of these claims and affirm the judgment.

¶2 On March 21, 2009, Wilfert and Donald Puchalski were driving to a friend's house when they got into a verbal altercation with fourteen-year-old M.C.W. as he was walking two teenaged girls home from a visit. M.C.W. called home on his cell phone, and his father arrived on the scene soon thereafter, at which point the verbal altercation became physical. Wilfert and Puchalski were subsequently charged with physical abuse of a child, first-degree recklessly endangering safety, misdemeanor battery with use of a dangerous weapon, and disorderly conduct with use of a dangerous weapon.

¶3 The charge of first-degree recklessly endangering safety stemmed from allegations that Wilfert had threatened M.C.W. with the van he was driving. At trial, the two teenaged girls testified that Wilfert's van initially passed them, but then backed up and almost hit M.C.W. M.C.W. confirmed the girls' account and indicated that the van backed up toward him and slammed on its brakes, stopping about one foot away from him. M.C.W. also testified that after the girls left him and he started to walk home, the men in the van "started acting like they were going to hit [him]" by slowing down, speeding up, and then hitting the brakes. According to M.C.W., the van did this three to four times, each time coming within three feet of him.

¶4 At the conclusion of the trial, the prosecution asked the circuit court to instruct the jury on second-degree recklessly endangering safety as a lesser-

included offense of first-degree recklessly endangering safety,[1] based on the testimony that Wilfert threatened M.C.W. with his van. Wilfert's counsel acknowledged that the instruction was proper, and the court submitted it to the jury. Ultimately, the jury found Wilfert not guilty of physical abuse of a child, battery, and first-degree recklessly endangering safety, but guilty of disorderly conduct and second-degree recklessly endangering safety. Wilfert now appeals.

¶5 On appeal, Wilfert contends that his conviction for second-degree recklessly endangering safety violated his constitutional right to be free from double jeopardy. Wilfert submits that when the jury returned a not guilty verdict on the greater offense of first-degree recklessly endangering safety, they were precluded from returning a guilty verdict on the lesser offense of second-degree recklessly endangering safety. Whether an individual's right to be free from double jeopardy has been violated is a question of law that this court reviews de novo. ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

¶6 The United States and Wisconsin Constitutions provide that no one shall be placed twice in jeopardy for the same offense. U.S. CONST. amend V; WIS. CONST. art. I, § 8(1).[2] In general, the double jeopardy clause protects a defendant from subsequent prosecution(s) for the same offense after an acquittal or

[1] Second-degree recklessly endangering safety has two elements: (1) the defendant endangered the safety of another human being; and (2) the defendant endangered the safety of another by criminally reckless conduct. WIS JI-CRIMINAL 1347. First-degree recklessly endangering safety has the same two elements plus an additional one—the circumstances of the defendant's conduct showed utter disregard for human life. WIS JI-CRIMINAL 1345.

[2] Because of the similarities between the federal and state constitutions on this point, Wisconsin courts generally view the two provisions as having identical scope and purpose. *See, e.g.*, ***State v. Henning***, 2004 WI 89, ¶16 n.8, 273 Wis. 2d 352, 681 N.W.2d 871.

conviction, and it also protects against multiple punishments for the same offense. ***State v. Henning***, 2004 WI 89, ¶16, 273 Wis. 2d 352, 681 N.W.2d 871.

¶7 Offenses are the same in law if one is a lesser-included offense of the other. *See* ***State v. Stevens***, 123 Wis. 2d 303, 321-22, 367 N.W.2d 788 (1985). Although an acquittal on the greater offense would, therefore, bar a "second" or "successive" prosecution of a lesser-included offense, charges filed simultaneously do not implicate double jeopardy unless they ultimately violate the prohibition against multiple punishments for the same offense. ***Henning***, 273 Wis. 2d 352, ¶¶27, 37.

¶8 To illustrate this distinction, the Wisconsin Supreme Court offered the following observation for cases involving multiple related offenses:

> In the context of a multi-count indictment or a multi-indictment trial involving related offenses, multiple jeopardies for different manifestations of the "same offense" routinely begin simultaneously and run along parallel tracks. Clearly, no double jeopardy problem is involved. In a multi-count indictment for armed robbery, for instance, simultaneous jeopardies will be suffered for 1) armed robbery, 2) simple robbery, 3) theft, and 4) assault and battery. In a literal sense, this involves not simply double jeopardy or even triple jeopardy but quadruple jeopardy for the "same offense," except that that is not the way we count. The reason there is no impediment to these apparently multiple parallel jeopardies is that "double jeopardy" essentially means "former jeopardy" and is primarily concerned, therefore, with regulating subsequent and sequential jeopardies. In the fundamentally different environment of simultaneous jeopardy, its only concern is with the avoidance of multiple punishment and that is a concern that is not addressed until the time for sentencing.
>
> While these routinely simultaneous jeopardies are legitimately proceeding along their parallel tracks, the termination of jeopardy on one or more of the tracks-through the declaration of a mistrial, the entry of a *nol pros*, the granting of a directed verdict of acquittal, *the rendering of a verdict of acquittal*, the rendering of a verdict of

> conviction, etc.-has no carry-over effect on the other jeopardies still proceeding along their own tracks.

Id., ¶48 (citation omitted; emphasis in the original). Accordingly, the court observed that "where multiple offenses are consolidated in one trial, termination of jeopardy on one count does not directly impact the proceedings on other counts, even if the offenses are the 'same' for double jeopardy purposes." ***Id.***

¶9 Applying these principles, we are satisfied that no double jeopardy violation occurred in this case. Here, Wilfert was placed in simultaneous jeopardy for the crimes of first-degree recklessly endangering safety and second-degree recklessly endangering safety. As such, when the jury returned its not guilty verdict on the greater offense, that act had no preclusive effect on the lesser offense, even though that offense was the "same" for double jeopardy purposes. *See* ***id.*** Consequently, the jury was free to find Wilfert guilty of second-degree recklessly endangering safety.

¶10 Wilfert next maintains that there was insufficient evidence to convict him of second-degree recklessly endangering safety. Specifically, he asserts that his conduct while driving his van did not and could not have created an unreasonable and substantial risk of death or great bodily harm.

¶11 In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorable 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. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,

this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶12 To convict Wilfert of second-degree recklessly endangering safety, the State was required to prove that: (1) Wilfert endangered the safety of another human being; and (2) Wilfert endangered the safety of another by criminally reckless conduct. WIS JI-CRIMINAL 1347. This requires that Wilfert's conduct created an unreasonable and substantial risk of death or great bodily harm to another and that Wilfert was aware that his conduct created such a risk. *See* ***id.*** (defining criminally reckless conduct).

¶13 As noted, at trial, the two teenaged girls who had been walking home with M.C.W. testified that Wilfert's van initially passed them, but then backed up and almost hit M.C.W. M.C.W. confirmed the girls' account and indicated that the van backed up toward him and slammed on its brakes, stopping about one foot away from him. M.C.W. also testified that after the girls left him and he started to walk home, the men in the van "started acting like they were going to hit [him]" by slowing down, speeding up, and then hitting the brakes. According to M.C.W., the van did this three to four times, each time coming within three feet of him.

¶14 Viewing this evidence in a light most favorable to the State and conviction, we conclude that a jury, acting reasonably, could have found Wilfert guilty of second-degree recklessly endangering safety. As noted by the State, automobiles are both extremely heavy and incredibly powerful. Had Wilfert failed to stop in time to avoid hitting M.C.W., M.C.W. easily could have suffered great bodily harm or death, even if the van had been travelling at a low speed. As a result, it was not unreasonable for the jury to conclude that Wilfert's conduct

while driving his van created an unreasonable and substantial risk of death or great bodily harm.

By the Court.—Judgment affirmed.

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