

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1314-CR

Cir. Ct. No. 2009CF219

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE J. CALLION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Eugene Callion appeals a judgment of conviction for second-degree reckless endangerment contrary to WIS. STAT. § 941.30(2) and

an order denying his postconviction motion for a new trial.¹ On appeal, he claims his trial counsel was ineffective and the circuit court erred in admitting evidence of his bizarre post-arrest behavior. He also asserts there was insufficient evidence to convict him. We affirm.

BACKGROUND

¶2 At trial, officer Jeremy Stover testified that he responded to a 911 call from Callion's apartment. While in the apartment, Callion pointed a loaded handgun toward Stover's abdomen. Callion was disarmed, arrested, and taken to a hospital, where he made several bizarre statements and urinated on himself. He was then taken to jail, where a preliminary breath test (PBT) revealed a blood alcohol level of .218.

¶3 Callion also testified at trial and acknowledged wielding the handgun, but denied pointing the gun at Stover. Callion claimed he was actually aiming the gun at another man in the apartment, Andre Crayton, when Stover stepped into the gun's path.² The jury found Callion guilty of second-degree reckless endangerment.

¶4 Callion moved for postconviction relief, seeking a new trial for ineffective assistance of counsel. Callion argued his counsel should have sought to exclude evidence of Callion's bizarre post-arrest behavior. He also argued trial

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

² Police later discovered that Crayton was also armed.

counsel should have objected to the testimony regarding the PBT result. The circuit court entered an order denying Callion's postconviction motion.

DISCUSSION

¶5 On appeal, Callion raises three arguments. First, he reiterates the effective assistance of trial counsel claims cited in his postconviction motion. Second, he argues the circuit court erroneously admitted evidence of his post-arrest behavior. Third, Callion challenges the sufficiency of the evidence supporting his conviction.

I. Ineffective Assistance of Trial Counsel

¶6 To succeed on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Love*, 284 Wis. 2d 111, ¶30.

¶7 Whether the defendant received ineffective assistance of counsel is a mixed question of law and fact. *Johnson*, 153 Wis. 2d at 127. The circuit court's historical findings of fact will not be overturned unless clearly erroneous. *Id.* However, "[t]he ultimate determination of whether counsel's performance was

deficient and prejudicial to the defense are questions of law which this court reviews independently.” *Id.* at 128.

¶8 Callion first argues that his trial counsel was ineffective for failing to object to the admission of evidence regarding his post-arrest behavior. At trial, Stover testified that Callion made several bizarre statements following his arrest. Callion said he had other weapons that officers would not be able to find, and repeatedly claimed he was an operative for the Department of Defense and a highly trained combatant. At the hospital, Callion urinated on himself and then claimed that this was standard procedure, and that washing his hands was a “civilian procedure.” Callion also claimed that the government would be able to find and kill him in jail, and that he had contemplated dousing himself in gasoline and lighting himself on fire when police arrived at his apartment.

¶9 Callion maintains that this evidence was irrelevant in light of his decision not to pursue a defense of not guilty by reason of mental disease or defect. We disagree. At trial, the State was required to prove that Callion was criminally reckless; in other words, that Callion created “an unreasonable and substantial risk of death or great bodily harm” and was “aware of that risk.” *See* WIS. STAT. § 939.24. Evidence of Callion’s post-arrest behavior was relevant to an assessment of Callion’s mental state at the time he pointed the handgun at Stover.

¶10 We also note that counsel did seek to exclude evidence of Callion’s post-arrest behavior. Before trial, counsel argued that the evidence should be excluded under WIS. STAT. § 904.03 because its probative value was substantially outweighed by the danger of unfair prejudice. The circuit court denied Callion’s motion, concluding that the evidence was relevant and that it would not shock or

disturb the jury. Callion's counsel was clearly engaged in the proceedings and rendered constitutionally acceptable representation.

¶11 Callion also claims his trial counsel was ineffective for failing to object to testimony regarding the PBT result. Prosecutors seeking to introduce PBT results are required to present evidence of the device's scientific accuracy and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results. *State v. Doerr*, 229 Wis. 2d 616, 625, 599 N.W.2d 897 (Ct. App. 1999). It is error for the trial court to allow the evidentiary use of PBT results without a proper foundation for the jury to interpret the evidence. *Id.* at 626. The State appears to concede that the prosecutor did not lay an adequate foundation for the PBT evidence, and, therefore, that Callion's trial counsel was deficient for failing to object to its introduction.³

¶12 However, Callion has failed to show prejudice stemming from his attorney's failure to object to testimony regarding the PBT result. As we shall later explain, other evidence produced by the State overwhelmingly demonstrated Stover's guilt. *See infra* Part III. As the circuit court recognized, the testimony regarding the PBT result was of little importance. Further, there was ample other evidence from which the jury could infer that Callion was intoxicated at the time of the offense.

³ Callion's counsel did not object at the time the evidence was introduced. However, trial counsel did request, at the close of the State's case, that the court strike the testimony regarding the PBT result and instruct the jury to disregard the testimony. The circuit court denied this motion, finding that the objection was untimely and that the evidence was relevant and not overly prejudicial.

II. Admission of Testimony Regarding Callion's Post-arrest Behavior

¶13 Callion next asserts the circuit court erroneously admitted evidence of his post-arrest behavior. A portion of Callion's argument on this point overlaps his ineffective assistance claim. Specifically, Callion argues the circuit court erred because the evidence was irrelevant. We reject this argument for the reasons previously stated.

¶14 Callion also argues the post-arrest behavior evidence was "other acts" evidence inadmissible under WIS. STAT. § 904.04(2)(a). That statute provides that evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." *Id.* However, an act does not fall within § 904.04(2)(a)'s purview simply because it can be classified as factually "different" than the crime charged. *State v. Bauer*, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. There must be some similarity, some nexus, between the other act and the charged offense; otherwise, the evidence is not being introduced to show that the defendant acted in accordance with his or her prior conduct. *Id.*

¶15 Here, Callion's post-arrest behavior was not "other acts" evidence because there is no similarity between that behavior and the charged crime. Thus, evidence of that behavior could not be used to prove that Callion had a propensity to act in a criminally reckless manner. Instead, the evidence was offered for the permissible purposes of establishing Callion's mental state and providing context for the crime. *See State v. Jensen*, 2011 WI App 3, ¶84, 331 Wis. 2d 440, 794 N.W.2d 482. In other words, the evidence was admissible as part of the "panorama of evidence" surrounding the offense. *Id.*, ¶85 (citing *State v.*

Johnson, 184 Wis. 2d 324, 348-49, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring)).

III. Sufficiency of the Evidence

¶16 Callion next contends the evidence was insufficient to convict him of second-degree reckless endangerment. We will uphold a jury verdict “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.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). “An appellate court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with nature or with fully established or conceded facts.” *State v. Daniels*, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983).

¶17 Second-degree recklessly endangering safety under WIS. STAT. § 941.30(2) requires proof that: (1) the defendant endangered the safety of another human being (2) by criminally reckless conduct. *See* WIS JI—CRIMINAL 1347 (APR. 2003). “Criminal recklessness” means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. WIS. STAT. § 939.24(1). “Great bodily harm” means serious bodily injury. WIS. STAT. § 939.22(14).

¶18 Here, the evidence was sufficient for a reasonable trier of fact to find guilt beyond a reasonable doubt. At trial, Stover testified that when he entered the apartment, he saw Callion light a piece of cardboard on fire and drop it near open liquor bottles. Callion’s right hand then disappeared from Stover’s view. As Callion moved toward Stover, he raised a handgun. Callion’s hand was “on the

grip of the gun with his finger up near the trigger.” Stover then described the motion Callion made with the gun:

At that point, he was walking generally towards me, raising his hand, the gun crossing my body and coming up. It was pointed towards my abdomen. ... [H]is arm went past me, towards the people that were on the couch.

....

So he had—he had gone across my body with it, pointed it at me, and continued past me with the handgun. I stepped into his path, grabbed his right wrist with my right hand, grabbed the handgun with my left hand, and pulled the handgun out of his hand.

Stover further testified the gun was only six inches away when Callion pointed it at him. Officer Tomas Baxter, who received the gun immediately after Callion was disarmed, testified that the gun was loaded and had a round chambered. In sum, the evidence at trial established that Callion briefly pointed a loaded firearm directly at Stover, with his finger near the trigger.

¶19 Callion raises a number of other arguments that we summarily reject. Callion claims we must accept his testimony that he never pointed the gun at Stover. The jury was not required to believe this self-serving testimony. In addition, Callion concedes that the “gun only for seconds crossed the path of Officer Stover” There was sufficient evidence that Callion did, in fact, point the loaded weapon at Stover, thereby endangering his safety. Callion also asserts that Stover was in no danger because he was directing the weapon toward Crayton when it passed over Stover. This argument is frivolous and will not be addressed further.

¶20 Callion also points to his trial testimony that the gun’s safety was on. He cites no other evidence to that effect. The jury was entitled to disbelieve this

self-serving testimony. In any event, a loaded handgun is a dangerous and potentially lethal weapon. The presence of a safety switch, which may be deactivated by the mere flick of a finger, does not negate those characteristics.

¶21 Callion's remaining arguments are entirely frivolous. Callion cites the fact that he was easily disarmed as proof that he did not endanger Stover. He also emphasizes that he was not immediately killed by the officers after drawing his weapon. While we appreciate Callion's postconviction epiphany that he is fortunate to be alive after aiming a loaded weapon at a law enforcement officer, the evidence was more than sufficient to support his conviction.

By the Court.—Judgment and order affirmed.

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

