

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2003

Cornelia G. Clark
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. 02-2022-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-160

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Andrew Thomas appeals from a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree reckless endangerment and one count each of criminal trespass and pointing a firearm at

another, contrary to WIS. STAT. §§ 941.30(1), 943.14 and 941.20(1)(c) (1999-2000)¹ respectively. Thomas argues that the evidence at trial was insufficient to support his convictions for first-degree reckless endangerment. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 In September 2001, an amended information charged Thomas with two counts of first-degree reckless endangerment and one count each of criminal trespass, possession of a firearm while intoxicated, pointing a firearm at another and resisting an officer. The charges arose from allegations regarding an altercation between Thomas and his brother Gregory. After a trial, the jury returned verdicts finding Thomas guilty of all but the possession of a firearm while intoxicated and resisting an officer charges. Thomas was convicted upon the jury's verdicts and this appeal follows.

ANALYSIS

¶3 Thomas argues that the evidence at trial was insufficient to support his convictions for first-degree reckless endangerment.² We must uphold Thomas's convictions "unless the evidence, viewed most favorably to the state and the conviction[s], is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Thomas does not raise any issues challenging his convictions for criminal trespass and pointing a firearm at another.

N.W.2d 752 (1990). If there is a possibility that the jury “could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we must uphold the verdict even if we believe that the jury “should not have found guilt based on the evidence before it.” *Id.* at 507. It is the jury’s function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury’s finding “unless the evidence on which that inference is based is incredible as a matter of law.” *Poellinger*, 153 Wis. 2d at 506-07.

¶4 Here, the trial court instructed the jury that in order to find Thomas guilty of first-degree recklessly endangering safety, the State had to prove beyond a reasonable doubt that: (1) Thomas endangered the safety of another human being; (2) Thomas endangered the safety of another by criminally reckless conduct; and (3) the circumstances of Thomas’s conduct showed utter disregard for human life. *See* WIS. STAT. § 941.30(1); WIS JI—CRIMINAL 1345 (2002). Thomas contends the State failed to prove the second and third elements of the offense.

A. Criminally Reckless Conduct

¶5 Criminally reckless conduct is defined as conduct that creates a risk of death or great bodily harm to another person where the risk was unreasonable and substantial and the defendant was aware that his or her conduct created the unreasonable and substantial risk of death or great bodily harm.

¶6 At trial, the jury heard testimony that Thomas and his brother had been arguing on the phone. After twice hanging up on Thomas, Gregory called

Thomas back and told him “to come on down, and let’s settle it,” expecting that there would be “a big argument, more than likely a fight.” Gregory ultimately walked outside his back door and saw Thomas sitting in his car about forty feet away. When Gregory yelled out to his brother, Thomas stood up, took three steps from the car, reached into his belt and pulled out a gun.

¶7 Realizing Thomas had a gun, Gregory tried to back away. Thomas, however, pursued Gregory and threatened him by saying he “was dead.” Gregory testified that Thomas stood “right in front of me with the gun up over his head ... kicking at me and hitting me.” Gregory further testified that he was looking “right into the barrel of the gun.” The altercation was interrupted when a van pulled into the parking lot and Gregory told Thomas that it was a police SWAT team. Gregory subsequently ran into his basement apartment and called 911. Thomas followed and again pointed the gun at Gregory, telling him to hang up the phone. The 911 tape recorded Thomas saying to Gregory, “you’re so ... close to smoke,” and “I’ll ... kill you, Greg.” As Thomas was making these threats, Gregory was looking into the barrel of the gun and trying to grab the barrel while Thomas was hitting him.

¶8 Gregory ultimately escaped through the front door when Thomas was distracted by the police. Gregory testified that during the various struggles, he tried to get his hand on Thomas’s wrist but could not get the gun pointed away from him. When the police arrived, Thomas came running up the stairs from the basement apartment, still holding the gun. The police ordered Thomas to put the gun down twice before Thomas gave up the weapon.

¶9 Superior Police Department Captain Scott Campbell described the operation of the gun for the jury. Campbell testified that live rounds are loaded

into a magazine and the magazine is placed into the gun's grip. Campbell explained that when the magazine is in, even with just one bullet, that bullet is in a position to be placed in the firing chamber by pulling back on the slide at the top of the gun. Opening the slide at the top of the gun transfers a live round from the magazine to the gun's chamber, making it ready to fire.

¶10 Campbell testified that when he recovered the weapon from Thomas, he immediately removed the magazine because "there was a chance that some single-action weapons fire very easily, almost a hair's breadth on the trigger." Campbell testified that the gun's safety was off and although there was no bullet in the chamber, there was one live round of ammunition in the magazine of the gun.

¶11 At the close of the State's case, Thomas moved to dismiss the two counts of first-degree reckless endangerment, arguing that there was no bullet in the gun's chamber. The trial court denied the motion, stating that a "simple maneuver or a simple movement could have activated or put the shell into the chamber." On appeal, Thomas concedes that although there may have been some risk that the gun would have discharged during the altercation with Gregory, the risk was not objectively unreasonable and substantial because the absence of a round in the gun's chamber made it incapable of firing. The absence of a bullet in the gun's chamber, however, ignores the fact that the slide mechanism could have been operated by accident during the struggle. As the trial court noted, a "simple maneuver" was all that was necessary to charge the weapon. This evidence is

sufficient to establish that Thomas endangered the safety of another by criminally reckless conduct.³

B. Utter Disregard for Human Life

¶12 Likewise, Thomas claims the State failed to prove that the circumstances of his conduct showed utter disregard for human life. In determining whether the State has proven this element, the fact-finder is instructed to consider “what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.” WIS JI—CRIMINAL 1345.

¶13 Thomas argues he showed at least “some” regard for life “because the gun he brandished was not capable of firing.” Thomas emphasizes the fact that he did not inject the round into the gun’s chamber and attempted to hold the gun away from his brother’s grasp to avoid the chance that the gun would accidentally discharge. Citing *Wagner v. State*, 76 Wis. 2d 30, 250 N.W.2d 331 (1977), and *Balistreri v. State*, 83 Wis. 2d 440, 265 N.W.2d 290 (1978), Thomas contends that his actions did not evince a “depraved mind ... so inherently fraught with danger to the victim’s life that to engage in it implies a constructive intent to maim or kill.” In *Wagner*, a defendant involved in a drag race swerved his car in

³ Thomas, citing an earlier rendition of the statute, nevertheless contends that his conduct was not criminally reckless because it was not imminently dangerous (dangerous in and of itself), see WIS. STAT. § 941.30 (1985-86), and could only have resulted in injury by “misadventure.” See *State v. Olson*, 75 Wis. 2d 575, 594, 250 N.W.2d 12 (1977). Even assuming the imminently dangerous element was applicable under the updated statute, we conclude that Thomas’s conduct was dangerous in and of itself and was not the kind of conduct that “might casually produce death by misadventure.” See *Olson*, 75 Wis. 2d at 594. Thomas attacked his brother with a gun that could easily have been activated and discharged.

an unsuccessful effort to avoid hitting and ultimately killing a pedestrian. Likewise, in *Balistreri*, a defendant, involved in a high-speed chase with police, ran several red lights and drove the wrong way down one-way streets, but turned on his headlights, swerved to avoid a squad car, honked his horn and braked to avoid a collision. In those cases, our supreme court concluded that the defendants' actions showed some regard for the life of others. See *Wagner*, 76 Wis. 2d at 47; *Balistreri*, 83 Wis. 2d at 457.

¶14 Here, Thomas contends that his conduct is analogous to the evasive actions taken by the defendants in *Wagner* and *Balistreri*. We are not persuaded. Unlike the defendants in *Wagner* and *Balistreri*, Thomas took no evasive actions such as putting the gun down or, at a minimum, engaging the gun's safety. Thomas attacked Gregory with a loaded gun, keeping the barrel pointed at Gregory as he threatened to kill him. Although Thomas had not advanced a bullet into the gun's chamber, he attacked his brother with the gun's safety off. As the trial court observed, a simple maneuver was all that was necessary to charge the weapon. The jury could therefore reasonably conclude that Thomas's conduct evinced an utter disregard for human life. Because the jury heard sufficient evidence to support Thomas's convictions, we affirm the judgment.

By the Court.—Judgment affirmed.

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

