

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 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. 03-2291-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000107

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICOLE JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Nicole Jackson appeals from that portion of the judgment convicting her of being party to the crime of entry into a locked coin

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

box, contrary to WIS. STAT. §§ 943.125(1)² and 939.05. She contends the court's instructions to the jury erroneously contained a mandatory conclusive presumption and the evidence was insufficient to support the jury's verdict for entry into a locked coin box. Although the court's instruction was erroneous, we conclude that the error was harmless. Additionally, because the evidence supports the jury's verdict, the judgment is affirmed.

¶2 The evidence at the jury trial showed that in an attempt to steal money, Jackson and Jonathon Peck entered the Bruce Laundromat where they pried the soap vending machine from the wall, attempted to pry open a Pepsi soda machine and attempted to remove coins from a commercial washing machine. The first issue involves the first element of the jury instruction for entry into a locked coin box with respect to the washing machine. Jackson and Peck removed the "coin mechanic" from the washing machine, but were unsuccessful in their attempt to pry open the washing machine where the coins were deposited into another container.³ The coin mechanic is the device that first counts the coins deposited into the washing machine. Both containers were components attached to the commercial washing machine.

² WISCONSIN STAT. § 943.125(1) provides: "**Entry into locked coin box. (1)** Whoever intentionally enters a locked coin box of another without consent and with intent to steal therefrom is guilty of a Class A misdemeanor."

³ Jackson admitted to the police that her involvement in the crimes was to act as a lookout while Peck attempted to remove money from the soap vending machine, soda machine, and washing machine. On the other hand, Peck testified that Jackson assisted him in their attempts to pry open the machines. However, the difference is irrelevant as Jackson was convicted as a party to the crime by aiding Peck, whether it be by acting as a lookout or physically helping him attempt to remove the money from the machines. See WIS. STAT. § 939.05.

¶3 Initially, the court instructed the jury:

The first element requires that the defendant intentionally entered a locked coin box of another. Coin box means any device or receptacle designed to receive money or any other thing of value. *A washing machine is a coin box.* (Emphasis supplied.)

After the jury retired to the jury room for deliberations, defense counsel objected to the court's instruction that, "A washing machine is a coin box." After some discussion with both counsel, the court instructed the jury, "a commercial washing machine of the nature and type involved in this case is a locked coin box." Jackson argues this supplemental instruction created a mandatory conclusive presumption relieving the State of its burden of proof on this first element.

¶4 The State concedes the supplemented jury instruction erroneously created a mandatory conclusive presumption, but contends the error was harmless. We agree.

¶5 In *State v. Harvey*, 2002 WI 93, ¶5, 254 Wis. 2d 442, 647 N.W.2d 189, the Wisconsin Supreme Court recognized that a jury instruction directing a jury to accept as true a judicially noticed fact that constitutes an element of the crime is indistinguishable from a mandatory conclusive presumption on an elemental fact, which is unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), and *State v. Kuntz*, 160 Wis. 2d 722, 737, 467 N.W.2d 531 (1991). However, the *Harvey* court also recognized that under *Kuntz* and *Neder v. United States*, 527 U.S. 1, 4 (1999), this type of constitutional instructional error is subject to application of the harmless error rule. *Harvey*, 254 Wis. 2d 442, ¶6. In *Neder*, the United States Supreme Court held that a jury instruction improperly omitting an element of the offense is subject to harmless error analysis. *Neder*, 527 U.S. at 15. A constitutional or other error is harmless if it is clear beyond a

reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.* at 18.

¶6 The undisputed evidence is that the commercial washing machine had a coin mechanic where one deposits the coins and then an electric sensor counted each coin as it went through and started the machine. While the statutory definition of a coin box does not specifically identify a commercial washer as a coin box, the definition encompasses the entire machine into which coins are inserted.

¶7 WISCONSIN STAT. § 943.125(3) provides:

In this section, "coin box" means any device or receptacle designed to receive money or any other thing of value. The term includes a depository box, parking meter, vending machine, pay telephone, money changing machine, coin-operated phonograph and amusement machine if they are designed to receive money or other thing of value.

¶8 A reasonable jury would find that the vandalized commercial washing machine was a coin box as defined in WIS. STAT. § 943.125(3). Obviously, it was designed to receive money. Therefore, we are satisfied the court's jury instruction was harmless error in that it is clear beyond a reasonable doubt that a rational jury would have found Jackson guilty absent the error.

¶9 Next, Jackson contends the jury lacked sufficient evidence to convict her of aiding and abetting entry into a locked coin box. Essentially, she relies on Peck's testimony stating that he and Jackson were unsuccessful in their attempt to pry open the washing machine where the coins were deposited. First, Jackson contends there is no evidence that she or Peck removed the coin mechanic and, second, she repeats her argument that even if there is evidence they removed the

coin mechanic, it was not a coin box as it merely counted the money entering the washing machine. We reject both arguments.

¶10 The laundromat's owner testified that his business had been vandalized when someone had removed the soap vending machine, broke the coin mechanic from the washing machine, and attempted to pry open the soda machine and washing machine. Jackson admitted to the police that she was involved in the theft at the laundromat.

¶11 With respect to the washing machine, Peck testified that in their attempt to get money from the washing machine, he and Jackson tried to pry it open, but were unsuccessful. Although Peck never testified that they removed the coin mechanic from the washing machine, his testimony, combined with the owner's testimony that the coin mechanic was forcibly removed, is sufficient for the jury to conclude that Jackson aided Peck in entering a locked coin box. By breaking into the coin mechanic component of the commercial washing machine, Jackson and her accomplice unlawfully entered a locked coin box. Therefore, the judgment is affirmed.

By the Court.—Judgment affirmed.

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

