

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2010

David R. Schanker
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. 2009AP1370-CR

Cir. Ct. No. 2008CF52

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACINTO S. RICO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jacinto S. Rico appeals from a judgment entered after a jury rejected his theory of self-defense and found him guilty of one count of first-degree reckless injury for stabbing Timothy Lowe and one count of first-

degree recklessly endangering safety for stabbing John Thrasher.¹ Rico does not dispute that he stabbed Thrasher and Lowe. Rather, he claims the evidence was insufficient to support the jury's verdicts on his convictions for first-degree reckless injury and first-degree recklessly endangering safety. Specifically, Rico contends the evidence was insufficient to satisfy the element "under circumstances which show an utter disregard for human life." See WIS. STAT. §§ 940.23(1)(a) and 941.30(1) (2007-08).² We disagree and affirm.

¶2 When reviewing the sufficiency of the evidence, this court will reverse a conviction only if the evidence 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. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We view the evidence most favorably to the verdict. *Id.* at 504. Thus, we must search the record to support the conclusion the fact finder reached. *State v. Owen*, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996). Even if we believe that the trier of fact should not have found guilt based on the evidence, we may not overturn a verdict if there exists any possibility that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. *State v. Johannes*, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999).

¶3 An element common to first-degree reckless injury and first-degree recklessly endangering safety is that the defendant's conduct showed an utter

¹ Rico also was convicted of resisting or obstructing an officer but he does not challenge that conviction on appeal. All crimes were charged as a repeater.

² All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

disregard for human life. WIS. STAT. §§ 940.23(1)(a) and 941.30(1); WIS JI—CRIMINAL 1250 and 1345. It is measured objectively on the basis of what a reasonable person in the defendant’s position would have known, *see State v. Jensen*, 2000 WI 84, ¶¶16-17, 236 Wis. 2d 521, 613 N.W.2d 170, and can be established by evidence of heightened risk, such as by evidence of a particularly obvious, potentially lethal danger. *Id.*, ¶17. Utter disregard is proved through an examination of the type of act, its nature, why the perpetrator acted as he or she did, the extent of the victim’s injuries and the degree of force required to cause those injuries. *See State v. Edmunds*, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999). The ultimate question regarding this element is whether the totality of the circumstances showed any regard for human life. *See id.*

¶4 The State presented sufficient evidence to establish that Rico’s conduct demonstrated utter disregard for human life. Lowe testified that he and Thrasher left a strip club after several hours of drinking at various bars. Rico was outside the club talking to Brandie Gregory, Lowe’s “blind date” which mutually had not worked out. Thrasher and Rico began arguing and it escalated to a physical altercation. Lowe, who had been trying to “talk them down,” got between the two men to separate them. He heard Thrasher say, “He’s got a knife.” Lowe then realized he had been stabbed.

¶5 Thrasher testified that he was introduced to Rico inside the club, that there was “an attitude” between them and that they “both didn’t like each other.” He and Rico exchanged words outside the club. Thrasher admitted he hit Rico first, punching him three times in the face. Rico then stabbed Thrasher in the side.

¶6 Gregory testified that Thrasher grew upset with her during the evening because she rebuffed his advances. She was talking to Rico when she saw

Lowe and Thrasher leave through the front door so she and Rico went out the back. Lowe and Thrasher came around to the back of the club.³ Thrasher called her names and pushed her so she “smacked him in the face.” Thrasher pushed her to the ground. Rico then “got in the middle of it” and Thrasher hit him. Both she and Lowe tried to break up the fight. When the fight ended, she and Rico went back inside the club. She did not know anyone had been stabbed.

¶7 Rico testified in his own defense. He shared a six-pack with a friend at his house, went later to a bar where he had more beer and two shots and then stopped at the strip club “for a last drink” about 11:30 p.m. He and Gregory began talking inside but went outside because Thrasher was looking at him “like he had a problem.” When Lowe and Thrasher showed up behind the club, Thrasher began insulting Gregory. Rico did not want to get involved at first but did when Gregory “hit the ground” because he thought Thrasher had “gone too far.” Thrasher hit him several times. Rico got “very scared” when Lowe stepped in because Rico thought it would be two against one and he “could barely stand” Thrasher’s punches. Rico did not leave because he did not want to leave Gregory alone with Lowe and Thrasher. He felt “trapped” and decided to use the knife he carries in his back pocket and uses for work.

¶8 A police officer who responded to the scene testified that he arrived to find Lowe bleeding from the chest, going in and out of consciousness and “not really responsive.” The officer recovered a five-inch folding-blade knife from Rico’s pants pocket. The emergency room physician testified that Lowe presented

³ Lowe testified they went to the rear of the club to get their car, then remembered it was at a bar they had been to earlier. Thrasher testified that as they were walking away from the club they saw Gregory and Rico there and “guess[ed]” Lowe wanted to say good-bye to Gregory.

in critical condition with “life-threatening” injuries. He had three stab wounds, the most serious being one to the left side of his chest. Thrasher’s abdominal wound was “relatively superficial” and did not cause internal injury.

¶9 The totality of Rico’s conduct establishes his lack of regard for human life. He had been drinking throughout much of the evening. He carried a knife in his pocket. He decided to use the knife on unarmed men, one of whom testified to trying to defuse the situation. He did not report the incident despite knowing that he stabbed two men. The jury alone determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from it. *Johannes*, 229 Wis. 2d at 222. Thus, the jury was entitled to discredit Rico’s testimony that the knife was for use at work and that he was “very scared” and felt “trapped.” It reasonably could have believed instead that Rico should have known Lowe was not an aggressor and that Rico and Thrasher were equally working out their “attitudes” and mutual dislike. Thrasher may have provoked Rico, but the jury also reasonably could have concluded that a reasonable person in Rico’s position would have known that a knife presents a “heightened risk” and “potentially lethal danger.” *See Jensen*, 236 Wis. 2d 521, ¶17. Indeed, the severity of Lowe’s injury bears that out. The fact that Thrasher was not more seriously injured was mere chance and does not contradict the jury’s finding that Rico displayed utter disregard for human life.

By the Court.—Judgment affirmed.

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

