

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP2780-CR

Cir. Ct. No. 2013CF298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
NICHOLAS J. McNAMARA, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. David Miller appeals a judgment of conviction.
We affirm.

¶2 Miller was convicted of four counts of second-degree recklessly endangering safety. Briefly described, the charges were based on allegations that Miller pointed a loaded pistol at four different people at various times.

¶3 Miller argues that the evidence was insufficient. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶4 The jury was instructed, as part of the definition for “criminally reckless conduct,” that the State must prove that Miller’s actions created an “unreasonable and substantial” risk of death or great bodily harm. Miller argues that the State failed to prove that there was a substantial risk that went beyond more than a small risk of the type that is present in many ordinary situations. As examples of the kind of evidence that he believes was required, Miller points to the lack of evidence about sensitivity of the trigger mechanism or the frequency with which this particular pistol spontaneously misfires.

¶5 We reject the argument. The State is not required to prove the substantiality of the risk in terms of numerical probabilities. Nor is the amount of risk based solely on technical factors about the firearm itself, because it also includes factors about the person handling it and the surrounding circumstances. It is up to the jury to determine the amount of risk that was present and apply its own judgment as to what amount of risk qualifies as “substantial.” Because of the potential for accidental discharges, a reasonable jury could find that pointing a loaded gun at a person creates a substantial risk of death or great bodily harm.

¶6 As to one victim, Miller further argues that there was no evidence that Miller “actually aimed” the gun at that person, and that he never raised the gun above his waist level. This argument fails because, first, a gun does not need to be above waist level to be aimed and, second, the victim testified that the gun was “oriented ... at myself,” and agreed that the “business end” of the gun was pointed towards him.

¶7 Miller also briefly argues that the evidence was insufficient to show that he *knew* he was creating an unreasonable and substantial risk. He asserts that all of the witnesses testified that he was joking around when pointing the gun.

¶8 Even if it is true that this was the testimony, Miller’s argument assumes that joking around and knowledge of creating a risk are necessarily inconsistent. They are not. Some people will play practical jokes that they know involve a risk of injury. Some people may “joke around” in a way that uses the creation of a risk more to place themselves in a position of dominance, or to express otherwise unexpressed hostility or aggression, than to actually evoke mirth. These are elements of human behavior that would be within a jury’s knowledge, and could reasonably be used in this case to conclude that even if Miller appeared to be joking around, he was nonetheless aware that he was creating a risk.

¶9 Miller next argues that the court improperly admitted certain expert testimony about recommended firearm safety practices such as not pointing guns at people who are not intended targets. We conclude that any error was harmless. Miller concedes that pointing a loaded gun at people creates a risk of death or great bodily harm. However, he argues that here the jury was required to find that there was a *substantial* risk, and that because these experts testified in a way that

suggested Miller had violated gun safety rules, the jury could have decided “that because Miller’s actions failed to comply with the standards they set out, Miller was guilty.”

¶10 This is a vague and weak claim of harm. Miller does not clearly articulate how the expert testimony would have increased the chance that the jury would find that the risk rose to the level of substantial. The idea that it is unsafe to point a loaded gun at someone is obvious enough to jurors that we see little potential for the expert testimony about gun safety practices to have changed the jury’s assessment of the seriousness of the risk in Miller’s case.

¶11 Miller next argues that the court erred by admitting evidence of other firearms, ammunition, and bulletproof vests that Miller legally owned. He argues that this evidence was not relevant and that its probative value was outweighed by the danger of unfair prejudice.

¶12 As to relevancy, the State responds that Miller’s ownership of multiple guns is relevant to the element of whether he was aware that his conduct created a substantial risk. We agree. Ownership of multiple guns can reasonably be seen as implying significant experience with, and interest in, the subject. It can then reasonably be inferred that a person with that level of experience and interest is likely to be aware of potential risks in this kind of behavior. In addition, the court limited the details about each item that could be given.

¶13 As to unfair prejudice, Miller argues that his ownership of this many guns may have caused the jury to regard him as a dangerous person who must be stopped by a finding of guilt in this case, regardless of what the evidence showed. We conclude that the court’s limiting instruction sufficiently reduced the danger of unfair prejudice. That instruction told the jury that it could consider this evidence

“only on the issue of the defendant’s knowledge; that is, whether the defendant was aware of facts that are required to make criminal the offense charged.”

¶14 Miller next argues that the court erred by admitting evidence that one of Miller’s guns discharged accidentally while he practiced drawing it from a holster. He argues that this was irrelevant because that discharge was under circumstances different from the charged conduct in his case. We conclude that the evidence was relevant to whether Miller was aware that his conduct created a substantial risk. His own experience of an accidental discharge, even under different circumstances, provides a reasonable basis to infer that Miller knew that discharges can happen accidentally and at times he does not expect.

¶15 Miller next argues that we should grant him a new trial in the interest of justice under WIS. STAT. § 752.35 (2013-14) because the real controversy was not fully tried. His argument assembles various pieces of evidence, some objected to and some not, that Miller argues had the effect of suggesting to the jury that he was a danger to the community. Without attempting to discuss each piece of evidence here, we are satisfied that the cumulative effect of it was not sufficient to prevent the jury from focusing on the real controversy, namely, whether Miller’s actions towards the victims in this case met the elements of the crime charged.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

