STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2013AP358-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ALAN SPERBER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of Brown County, Hon. Marc Hammer,
Circuit Judge, presiding.

TABLE OF CONTENTS

Page

ISSUES FOR REVIEW 5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 6

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 7-20

1. The Accident 7-12
2. After The Accident 12-16
3. Jury Questions to the Court 16-20

ARGUMENT 20-34

I. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO SEEK AN INSTRUCTION IN RESPONSE TO JURY QUESTIONS THAT THE STATE HAD TO PROVE THE DEFENDANT KNEW THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED. 20-33

1. Legal Standards--Ineffective Assistance of Counsel. 20-21
2. Trial Counsel should have requested re-instruction. 21-33

II. ALTERNATIVELY, THE REAL CONTROVERSY WAS NOT FULLY TRIED WHEN THE TRIAL COURT FAILED TO RE-INSTRUCT THE JURY THE STATE MUST PROVE THE DEFENDANT WAS AWARE THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED. 33-34

CONCLUSION 34

CERTIFICATIONS 35-37, 40

APPENDIX 38

CASES CITED

Bollenbach v. U.S., 326 U.S. 607 (1946)	24, 33
In re Commitment of Laxton, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784	24, 32
State v. Anderson, 2006 WI 77, 291 Wis.2d 673, 717 N.W.2d 74	24, 33
State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983)	21
State v. Fonte, 2005 WI 77, 281 Wis. 2d 654, 698 N.W.2d 594	24
State v. Gordon, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.	25
State v. Harvey, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189.	24
State v. Harvey, 139 Wis.2d 353, 407 N.W.2d 235 (1987)	21
State v. Hubbard, 2007 WI App 240, 306 Wis.2d 356, 742 N.W.2d 893, *reversed on other grounds*, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839	24, 25, 32
State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211	25
State v. Littrup, 164 Wis.2d 120, 473 N.W.2d 164 (Ct.App. 1991)	21

State v. Marcum, 25, 33, 34
166 Wis.2d 908, 480 N.W.2d 545 (Ct.App.1992)

State v. Pitsch, 20
124 Wis.2d 628, 369 N.W.2d 711 (1985)

State v. Smith, 21
207 Wis.2d 258, 558 N.W.2d 379 (1997)

Strickland v. Washington, 20, 21
466 U.S. 688 (1984)

WISCONSIN STATUTES CITED

Wis. Stat. § 346.67(1) 6, 21, 25
Wis. Stat. § 752.35 25, 33

OTHER AUTHORITY

JI-WIS 2670 16, 21, 22, 25, 26, 32

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2013AP358-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ALAN SPERBER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ISSUES FOR REVIEW

1. Was trial counsel ineffective when, in response to the jury twice asking for clarification, he failed to seek an instruction that defendant had to know the accident involved another person at the time it occurred?

The Trial Court Answered: "No."

2. Was the real controversy fully tried when the pattern instruction did not specify when the defendant had to know the accident involved another person, the jury twice asked for clarification as to when the defendant had to know, and the trial court refused to re-instruct?

The Trial Court Answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE

Mark Sperber (Sperber) was charged on January 31, 2011, with one count of Hit and Run Involving Death, contrary to Wis. Stat. § 346.67(1), a class D felony, for an incident that occurred on January 25, 2011. A four-day jury trial was held on November 14 -17, 2011. The contested issue was whether Sperber was aware the accident involved a person at the time it occurred. The standard pattern instruction does not specify when the defendant had to know the accident involved another person, and the jury twice asked the trial court to clarify this point. The trial court, however, did not do so but rather directed the jury to re-read the instructions already given. The jury found Sperber guilty. Sperber was sentenced on February 9, 2012, to a 20 year sentence, with 10 years of initial confinement. (82; Appendix ("A"), p. 1-2).

Sperber filed a motion for postconviction relief on October 29, 2012. (89). The parties stipulated to trial counsel's testimony. (104.2; A:19-20). The matter was briefed and on January 31, 2013, the trial court rendered an oral decision. (119; A:3-17). A written order denying Sperber's postconviction motion was filed on February 4, 2013. (99; A:18). Sperber filed a notice of appeal February 13, 2013. The record was filed with the Court of Appeals on March 28, 2013. In an order dated May 3, 2013, this Court extended the time for Sperber to file his brief-in-chief to May 24, 2013.

STATEMENT OF FACTS

1. The Accident

At the time of trial, Sperber was 40 years old living with his wife in rural Forestville, Wisconsin, about 40 miles northeast of Green Bay. He was an 18-year employee of Roland Machinery, a heavy equipment dealer and servicing company located in De Pere, Wisconsin. (114:294; 116:526). He started out as a technician's assistant, became a field service technician in 1996, and in 2005 was promoted to corporate trainer. (116:526).

On Tuesday, January 25, 2011, at approximately 3:30 p.m., Sperber had completed his second day of training service technicians at the Roland De Pere facility. The trainees were staying at a Best Western Hotel in Green Bay, and had invited him to come and have a drink with them at the hotel. (116:530). He was reluctant, as he had a cold coming on and wasn't feeling well. (116:531). Nonetheless, he drove to the hotel and arrived a little before 4:00 p.m. (116:532). Between 4:00 p.m. and when he left at 5:30 p.m., he had three drinks. (116:532-533). By his own account, he did not feel intoxicated. (116:578). He typically ate all day during trainings. (115:497). One of his students testified he did not appear intoxicated, thick tongued or unsteady. (115:374).[1]

Sperber left the hotel at about 5:30 p.m., eventually ending up on Velp Avenue heading west. (116:534). He was in a

---

1 In fact, Sperber made a series of phone calls near the time of the accident, and by all accounts sounded "normal." At 5:31 p.m. he called his wife (115:482; 116:544); at 5:37 p.m. and again at 6:48 p.m. he called a colleague about a work-related mechanics competition he was involved with (115:462-463; 116:544); and at 6:46 p.m. he called his training manager. (115:468-469; 116:546).

company vehicle, a white Ford F-150 pick-up truck with a white topper. (116:549). Velp is a U.S. Highway designated four-lane artery with no shoulder. The curbs were covered with blackened snow banks which intruded two feet into the roadway. (114:274). It was rush hour, moreover, and the traffic was heavy, with cars behind him and on the left. (116:537) The roadway was dark and wet.[2] (116:535). While traveling in the right lane, Sperber hit what he assumed to be one of the larger type garbage cans used for automatic pickup just as he passed Gallagher street.[3] (116:536). He saw something move to the right. (116:582). He tried to move to the left lane but couldn't because a car was there. (116:582). He maneuvered left but stayed in the right lane. (116:582). He did not stop on Velp, but continued less than a 100 feet to Lyndon, the next available street to the right. (116:537-538) (see map, A:21). He turned on Lyndon--a short street--and followed it down to Mary, where he found light from a house situated on the corner to his right. (116:537-538, 582). He got out of the truck on the driver's side, walked around the front to the right front side, and noticed some damage to the grille. (116:539, 584) He believed something hit his right front tire but was not able to fully inspect it. (116:541, 588). He then got back in the truck, took a right on Mary to Shea, took Shea back to Velp (now east of the accident site) and then went left on Velp (east) towards main street. (116:539-540). He looked left and right when he turned on Velp, but could not see the point of impact from that location. (116:599).

The truck was driving fine but Sperber was concerned about the tire. He had decided to go east on Velp rather than continue west as he could pick-up the road north either way and going east he had the option of stopping at Pomp's Tire. (116:541). By the time he got to Webster Street, however, he

---

2 Sunset was at 4:51 p.m. (114:273).

3 Sperber conceded the white truck that hit the wheelchair was his. (116:549).

noticed the tire indicator was reading normal and the engine wasn't overheating, so he took Webster to I-43 and I-43 to 54/57 north. (116:542).

There were three eyewitness to the collision: Melissa Wolcanski, Daniel Emmel, and Jeffrey Holl.

Melissa Wolcanski was about four car-lengths directly behind Sperber in the right lane. (115:444). She saw Sperber's brake lights come on but he did not stop. (115:445, 454, 455). She did not see anything fly up in front of the truck or anything else to suggest a collision. (115:448). She turned into the left lane to go around him. She then saw a wheelchair in the road but did not see a person. (115:443, 445-446). Just as she passed Sperber's truck, she saw him turn onto a side street and slow down. (115:446, 452).

Daniel Emmel was heading west on Velp. Just before Gallagher street he saw a man in a wheel chair traveling in the right lane. (114:127). He swerved to miss him and then turned right on Gallagher to drop off a friend. (114:127, 141). He turned around to come back out to Velp, but was delayed waiting for someone to back out of their driveway. (114:127, 141). When he got back to Velp he looked left (east) and right (west). He tried to find the wheelchair but couldn't. (114:127, 131, 142, 143). Just then a white truck drove by heading west on Velp. He appeared to be going the speed limit of 35 mph.[4] (146). As he passed, Emmel saw the wheelchair in the truck's headlights in the far right lane. (114:128, 132). The white truck "applied brakes, hit the wheel chair, [and] the person in the wheelchair *rolled* 20 yards roughly along the snowbank." (emphasis added). Although Emmel believes the truck driver hit the brakes "hard," road conditions were wet and there were no

4 This was confirmed by the State's accident reconstructionist who testified Sperber was traveling between 34 and 40 m.p.h. (114:266).

tires squealing. (114:144). The truck "momentarily stopped" as it pulled around and then turned right on Lyndon Street.[5] (114:135). The truck stopped on Lyndon street with the front half of the truck behind a house. Emmel could only see the back half. (114:130-131, 138). Emmel then pulled up to the scene of the accident, put on his four-ways, and dialed 911. (114:103-131). After calling 911 he got out and started walking towards the truck when it drove off. (114:140, 147). He was the only person at the scene at the time. (114:147-148). He could not see the person in the truck; nor could he see if the person was in or out of the truck. (114:148). The wheelchair was lying on its side. (114:133, 137).

Jeffrey Holl was stopped on Gallagher Street facing south towards Velp when he saw a man in a wheelchair directly in front of him crossing Velp from south to north, and then heading west on Velp in the right lane. (114:156, 158, 176). Holl then turned right on Velp and went around the wheelchair. (114:158, 176). He kept watching in his rearview mirror because: "there's a guy in the lane of traffic and it was fairly dark and he was in a wheelchair." (114:172). He was mostly able to see the wheelchair because of the headlights of the vehicle coming behind him. (114:162). That vehicle collided with the back of the wheelchair. (114:165). Both the wheelchair and the person "went airborne," with the body moving more towards the right. (114:163, 165, 166). The truck then paused, went halfway into the left lane, and then turned right on Lyndon. (114:167). He stopped "for a bit" on Lyndon. (114:179). As "soon as [the truck] got past like these houses and stuff, I didn't see any more of him." (114:170).

Paul DeGrave came onto the scene shortly after the accident. (114:194). He stopped and approached the person standing there (presumably Emmel), and asked where the

---

5 In his statement to police, Emmel did not say the white truck stopped on Velp, but rather, stopped momentarily on Lyndon. (114:216).

vehicle was that struck the wheelchair. (114:192). The witness pointed west towards Lyndon Street, where a truck was parked facing north. (114:186, 191). According to DeGrave, he noticed the "silhouette of an individual leaning over his steering wheel and staring back at what was going on in the roadway...." he couldn't tell who it was, but "[t]hey were watching us, just a shadow." (114:191-192). He turned his attention towards the accident scene and when he looked back up, "the truck was pulling away." (114:192, 194). When asked if someone had walked towards the vehicle, DeGrave responded: "Nobody had walked, not that I'm aware of." (114:192).

The next person on the scene was Nicholas Craig, a firefighter traveling westbound Velp. (114:110). He saw a vehicle stopped in the right hand lane with its flashers on, and when he moved to the left to go around, he saw a wheelchair and a person lying on the ground. (114:111-112). He immediately pulled off on to Lyndon Street and focused his attention on assisting the injured man. (114:111-112, 120).

The first police officer on the scene was Ronald Schaden (114:204). He was dispatched at 5:38 p.m. (114:212). When he arrived the wheelchair was tipped on its side. (114:207, 208). The injured man had on black winter gloves; black pants; black multicolored socks; a black and multicolored jacket; and a purple and black checkered shirt. (114:218, 269). The wheelchair was black without any reflective materials. (114:273). He described the accident scene as "kind of dark." When presented with a photo of the scene the state had taken 11 months after the accident[6], the officer responded: "It wasn't

6 The State presented a series of photos taken in November of 2011, some 11 months after the accident. See e.g. 52:Ex. 7. The photos were meant to illustrate Sperber's ability to see the wheelchair as he proceeded west on Velp. The amount of illumination differed greatly, however, from the photos taken the night of the accident, which were much darker. See e.g. Ex. 18. Further, they did not include the substantial snow banks present on January 25.

illuminated this well when I was there,...." (114:206). In fact, the closest street lamp was 119 feet from the point of impact, on the other side of the road. (114:269, 273).

2. After The Accident

Sperber arrived home between 6:15 and 6:20 p.m. He told his wife he hit a garbage can on the way home. (116:548). At 6:46 p.m., Sperber called his training supervisor, Michael Bond, and left a voice message reporting the accident. Sperber said he had hit a garbage can or dumpster, and had minor damage. (115:468-469, 116:547). Sperber sounded normal. (115:469). He went to bed between 8:30 and 9:00 p.m. (116:548). Sperber spoke with Bond the next morning at 7:24 a.m. According to Bond, they discussed the damage and how they were going to get it repaired. (115:470). Sperber asked Bond if they should do it in the shop. Bond responded by authorizing an in-house repair. Bond reasoned that the shop wasn't busy, and they would have to pay a $1,000 deductible anyway if they made a claim on their insurance policy. (115:470, 471, 473). As Roland's general manager explained, the general rule was that if the damage was more than $1,000, the matter was forwarded to the insurance carrier. If less than $1,000, it was up to the employee's immediate supervisor to decide how or whether to fix it. (115:360).

At the shop, Sperber asked Brent Richardson, the service manager, if he would assign Adam VandeHey to help him with the repairs. (115:352) Richardson agreed. (115:347). Sperber did not seem worried or nervous. (115:353). Sperber removed the grille and the headlight (116:551), and over the next three days Sperber and VandeHey did the body work when they had time. (114:05). Sperber was still teaching, so he "bounced back and forth" between the classroom and the shop as he was able. (116:552). It was not unusual for Sperber to help as it was his truck. (114:305). In fact, Sperber could have done all the work himself. (114:316; 115:352). He was traveling the next week

on company business, however, so he wanted it fixed before then. (116:556).

Sperber called Dorsch Ford and two other auto parts dealers in Green Bay for a used grille and headlamp. (116:549, 553, 554). None had used parts available. (114:308; 116:554). New parts were around $600. (114:308; 116:553). Sperber then called Terry Telford, a person in the Milwaukee area he regularly obtained parts from. (115:336, 342, 343). Telford could not find used parts, however, but did offer to get new parts for around $400. (115:343; 116:554, 555). Richardson also spoke with Telford about getting parts. (115:347). Telford delivered the parts to Sperber over the noon hour on Wednesday, January 27, in Port Washington. (115:340; 116:556, 557).

The State called William Londo, a parts man from Broadway Chevrolet of Green Bay. (114:277) He stated they would have delivered the parts to Roland at the wholesale price of $415. (114:290). Retail would have been $561.49. (114:290) When asked, Sperber testified that he didn't call Broadway because they are a Chevrolet dealer. (116:554).

Several witnesses also testified that it would not have been unusual for Sperber to pay for the parts upfront and then get reimbursed with his weekly expense report. (115:357, 361, 472). Sperber never did turn in an expense report, however, because he was waiting for receipts from Telford and was terminated before he had a chance to do so. (116:573).

The body work and painting were done on Wednesday, January 27, but the truck was left in the shop until Thursday so the paint could dry. (116:560). Sperber chose not to repair a pop can sized dent in the bumper as this was just cosmetic and the price of a new bumper wasn't worth it. (114:300; 116:561).

Richardson helped Sperber take the cap off at Roland before Sperber took the truck home on Thursday. (114:319-320;

116:552, 562). He intended to take Friday off and planned on hauling some wood. (114:320; 116:564). Sperber typically took Fridays off during the weeks he did training. (115:488, 498; 116:562). He hadn't been feeling well all week so he called in sick. (114:312; 115:353, 372, 373-374, 383, 464). Because he wasn't feeling well, he spent Thursday night just hanging out at home. (116:561).

On Friday, January 28, the Green Bay Police received an anonymous tip that Mark Sperber was having right-front repairs done at Roland Machine on a vehicle consistent with that identified at the scene. (115:383) According to Det. James Duebner, he and Det. Argall went to Roland and learned that Sperber had called in sick that day. (115:383). They obtained Sperber's address and drove out to his residence, arriving at approximately 10:00 a.m. (116:564). They saw a white truck sitting in the driveway. (115:385). The cap was off and there were woodcutting tools in the back. (115:419). Sperber came out of the garage--he had heard his dogs barking--and met the two detectives. (115:385; 116:564). They asked if he was Mark Sperber and told him they were investigating a hit and run. (115:386). They noted the car had been washed and could smell fresh paint. (115:388). They saw the dent in the bumper. (115:387). They asked Sperber if the damage was fresh and he told them it was, that he had hit a garbage can on Tuesday night. (115:388). They asked if he had replaced any other parts, and he told them he replaced the grille and the headlight. (115:389) Sperber says he got the parts from his residence from a damaged vehicle. (115:390) The detective told Sperber he wasn't buying it because a garbage can would not leave that kind of dent in the bumper. (115:389, 391). It was cold, and he asked Sperber if they could go into the house. (115:391).

Inside the house, the detectives introduced themselves to Sperber's Wife, Kathy, and they gathered around the breakfast bar in the kitchen. (115:490). The interview was not recorded. (115:421). They asked Sperber for a detailed account of what

happened Tuesday night. According to Duebner, Sperber initially denied going to the bar before the accident, but later admitted he had three double scotch and waters. (115:392, 398, 399-400). Duebner also claims he never got a clear answer concerning Sperber's route home after he stopped on Lyndon Street. (115:397) As the interview progressed, both Kathy and Sperber started asking why hitting a garbage can was being treated so seriously. (115:400, 418, 422, 423, 492-493; 116:570). Duebner purposely ignored the question for some time, until he finally told them Sperber had hit a wheelchair. (115:492; 116:570-571). Sperber asked if anyone was in the wheelchair, and Duebner answered there was. (115:493; 116:571). Sperber then asked if the person was OK, and Duebner answered the person had died. (115:400, 494; 116:571). When asked if either of the Sperbers were surprised to hear this information, Duebner answered: "Mrs. Sperber was definitely. Mr. Sperber there was a reaction, whether it was out of surprise or the fact that, you know, if you want to say the cat is out of the bag, for lack of a better term." (115:429) In a previous hearing, Duebner testified that Sperber "appeared a little bit stunned." (115:429). According to Sperber, this was the first he learned he had hit someone. (116:572). Sperber gave the detectives permission to search the house. (116:573). When Duebner told Sperber the businesses at the impact point were abandoned, so there would be no garbage cans; and further, his drinking before an accident was a good motive for hit and run, Sperber asked if he should get a lawyer. (115:401, 403, 404). Sperber called his boss, who told him he had to find his own lawyer. (115:405). Sperber was then arrested, and the truck was seized. (115:405).

Sperber disagreed with some of the Detective's testimony. First, he did not specify to Duebner which parts in particular he had replaced on the truck, nor did he tell them him he got the replacement parts from a damaged vehicle he had at his residence. (116:567, 569) What Sperber did tell Duebner was that he had used *paint* from home that was left over from a

previous repair. (116:567). Second, Sperber did not deny going to the bar, but rather said that he had considered not going. (115:495; 116:569).

According to the forensic examiner, the deceased died from a head injury. He was not run over. (114:228, 233-234).

3. Jury Questions to the Court

The jury was instructed as to the five elements contained in WIS JI 2670. The only element contested at trial, however, was the second. On that element, the Court instructed the jury: "The second element requires that the defendant knew that the vehicle he was operating was involved in an accident involving a person." (116:614-615). The jury was released for deliberation at 1:54 p.m. At 3:05 p.m. the jury came back with a question:

> Concerning time (sic) two on the list of rules, does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements for the second item?

(116:672). The following colloquy then took place between the Court and counsel:

> [116:672] The Court: …. Now, you know, obviously our choices are for me to answer – not answer – for me to tell them something or for me to say, folks, I can't answer those questions. Those are questions that you will have to answer by looking at the jury instructions and your notes.
>
> [A.D.A.] Mr. Coaty: Your honor, the language of [673] number two, the defendant knew the vehicle he was operating was involved in an accident involving a person. I think that's pretty clear on its face. Is that what the questions is?
>
> The Court: Well, I – what *their question: Does the defendant have to be aware? I think does he have to know that he hit a*

person at the time of the accident or the days following the incident in order to fulfill the requirements of the second term? They use the word "aware." I (sic) got to be that's synonymous does the defendant have to know?

[A.D.A.] Ms. Zuidmulder: I think, your honor, the State's position would be that you just stated it that just look at the jury instructions, and I feel like any other direction might mislead them.

The Court: I'm very hesitant to start playing with the jury. If we answer this question, it may influence their answers to other questions.

Mr. Coaty: Yes.

The Court: If they are focused on this question, it means they're doing their job. They're debating. They're considering. *You know, my only concern is it is a question of law, not a question of fact?*

Mr. Coaty: Your honor, could His Honor [674] pull out what the jury instruction is?

The Court: Don't have my copies of the instruction. I told the bailiff to leave the instructions in the jury room. So does anybody have a copy of the instructions?

[Defense Counsel] Mr. Musolf: I do, your honor. And there is a footnote 7 dealing with that issue, regarding element two.
….
The Court: … 2670 says Section 346.67 does not clearly specify what kind of knowledge the defendant must have to be guilty of this offense. The committee concluded that the defendant must know the vehicle he was operating was involved in an accident involving a person or an attended vehicle. It is this knowledge that triggers the duty to stop and render aid.

But the instruction we sent back ***doesn't it tell them that they have to make a finding that he was aware [675] that he hit a vehicle at the time of the accident?*** I mean, that is the second element. ***It sounds to me they want me to answer element two.*** Isn't that how you read their question?

Ms. Zuidmulder: *I do, Your Honor.*

Mr. Musolf: *Yes.*

The Court: I can't answer element two for Christ's sake.

Mr. Musolf: I think if you --

The Court [sic?]: If you take all five elements in combination, it implies that at the time of the accident he knew he hit a person. I think that's what it implies, but I agree with the Court. I'd be hesitant to answer anything beyond reading the instruction and coming up with your own decision.

[The Court?]: *I don't think I can in good conscious (sic) answer any question that goes directly to an element of the charged offense.* ***Really what they want me to do they want me to tell them what the answer to that element is.*** *It's the critical element.*

Ms. Zuidmulder: Um-hum

Mr. Coaty: I wonder, Your Honor, if the Court would simply say please refer to the jury instruction.

The Court: I got to tell them what [676] instruction to refer to. I'd say I can't answer the question. Refer to Instruction No. 2670.

Mr. Musolf: Um-Hum

The Court: All right. Because my handwriting is so bad, *I'm going to have the clerk write on their note the following: "I cannot answer this question. Refer to Instruction 2670."*

Anything else that you want me to say or do, Mr. Coaty?

Mr. Coaty: No, Your Honor.

The Court: Ms. Zuidmulder?

Ms. Zuidmulder: No. Thank you.

The Court: Mr. Musolf?

Mr. Musolf: No.

(116:672-676). At 5:56 p.m., the jury sent a note requesting certain written witness statements. (116:677) At 6:08 p.m., while the request for statements was still being considered, the jury sent an additional question:

> The Court: All right I just received a note from the jury. It reads as follows: *'Are we trying to determine Mark's guilt of knowing he hit a person or a trash can immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?'* Signed juror foreperson at 6 o'clock.
>
> So the question are we trying to determine Mark's guilt of knowing that he hit a person or a trash can immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?
>
> My inclination is to instruct them again to review the jury instruction that we had focused on.
>
> [688] Mr. Coaty: 2670, your Honor
>
> The Court: Thank you. 2670. Do you have a request? Do you have a suggestion? Do you have some guidance from the State in terms of what you'd like for me to do?
>
> Mr. Coaty: Your Honor, I think simply reading 2670 – and, Your Honor, I wonder if there is a variation of again the jury saying, geez, Your Honor, would you help us out here? I think it's self-explanatory in terms of –
>
> The Court: Mr. Musolf?
>
> Ms. Musolf: I would agree. I guess the only thing I would suggest is maybe saying read 2670 in its entirety.
>
> The Court: Any objection?
>
> Mr Coaty: No.
>
> The Court: I think that makes sense. My concern is that the jury may infer that they are doing something wrong. They're not. They're having a tough time. This is a tough case. *And I think to*

supplement the instruction by telling them to review the whole thing in its entirety, ***hopefully, they'll think it's got to be in here or else the judge wouldn't tell us to do it****, so the answer has to be in here and eventually they will hopefully realize it's their directive (sic) [689] knowledge that's going to answer that question so I'll hand this note to the clerk and ask her to write on the bottom of that the following: "Read 2670 in its entirety."*

Any further instruction you have me give, Mr. Coaty?

Mr. Coaty: No, Your Honor

The Court: Ms. Zuidmulder?

Ms. Zuidmulder: No.

The Court: Mr. Musolf?
Mr. Musolf: No.

(116:687-689).

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO SEEK AN INSTRUCTION IN RESPONSE TO JURY QUESTIONS THAT THE STATE HAD TO PROVE THE DEFENDANT KNEW THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED.

1. Legal Standards--Ineffective Assistance of Counsel

The defendant was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial

counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel, for example, has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *Id*. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

2. Trial Counsel should have requested re-instruction.

The defendant was charged with one count of hit and run – resulting in death, contrary to Wis. Stat. § 346.67(1). The jury was instructed as to the five elements contained in WIS JI 2670. The only contested element was the second. On that element, the Court instructed the jury: "The second element requires that the defendant knew that the vehicle he was operating was involved in an accident involving a person." (116:614-615). The jury was released for deliberation at 1:54 p.m. At 3:05 p.m. the jury came back with a question:

> Concerning time (sic) two on the list of rules, does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements for the second item?

(116:672). The trial court understood the jury to be asking whether Sperber had "to know that he hit a person at the time of the accident" (116:673). The trial court then asked, however, "doesn't [the instruction we sent back] tell them that they have to make a finding that he was aware that he hit a vehicle [sic] at the time of the accident?" (116:674-675). While the trial court expressed concern whether the jury was asking "a question of law, not a question of fact," it nonetheless interpreted the jury's question as wanting the trial court to answer element two: "Really what they want me to do they want me to tell them what the answer to that element is. It's the critical element." (116:675). The trial court could not in good conscience "answer any question that goes directly to an element of the charged offense." (116:675). The jury was instructed: "I cannot answer this question. Refer to Instruction 2670." (116:676). Sperber's trial counsel agreed. (116:676).

Three hours later the jury again asked:

> *'Are we trying to determine Mark's guilt of knowing he hit a person or a trash can immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?'* Signed juror foreperson at 6 o'clock.

(emphasis added) (116:687). After a short discussion the trial court decided:

> ...to supplement the instruction by telling them to review the whole thing in its entirety, *hopefully, they'll think it's got to be in here or else the judge wouldn't tell us to do it,* so the answer has to be in here and eventually they will hopefully realize it's their directive (sic) [689] knowledge that's going to answer that question so I'll hand this note to the clerk and ask her to write on the bottom of that the following: "Read 2670 in its entirety."

(116:688-689). Again, trial counsel agreed. (116:688).

In its postconviction decision, the trial court essentially found there was a lack of prejudice. The trial court first observed: "[b]ecause the jury seeks clarification does not mean in my mind that they were confused, that they were in error, that they didn't fulfill their function." (119:17; A:10). The trial court then articulated "two other factors" it relied upon in denying the motion.

The first "factor" was "the evidence that was before the jury." (119:17; A:10). Essentially, the trial court did a sufficiency of the evidence analysis, finding "there was ample evidence at trial for the jury to conclude that the defendant knew he hit a person at the time of the accident." (119:18; A:11). The trial court also suggested, however, that no evidence supported a finding that defendant did not know "he hit a person at some time after the accident but before his first police contact." (119:19; A:12). The trial court also agreed with the State "that the timing issue is wrapped into the entire jury instruction as a whole and you can't pull out one question on one portion of the jury instruction element and say this is ambiguous so the verdict is ambiguous." (119:18; A:11).

The second "factor" was the lack of any reaction to the trial court's polling of each juror:

> And when someone turns to me when I ask them directly and I look them in the eye, that's their verdict, what they're telling me is, judge, I've thought about this, I understand everything I was doing there, I'm satisfied that in this case the defendant is guilty beyond a reasonable doubt. There's just no basis for me to conclude a lack of clarification or a lack of ambiguity.
> ....If they at any point in time, any one of them thought it was unclear that they didn't know what they were doing, that there was some pause or hesitation after the jury instruction told them what

> the burden of proof is, they would have said something. I am convinced of that.

(119:19-20; A:12-13).

A new trial is necessary where "the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law." *In re Commitment of Laxton*, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. "'[A]n allegedly erroneous jury instruction warrants reversal and a new trial […] if the error [is] prejudicial.'" *State v. Fonte*, 2005 WI 77, ¶15, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted). "'An error is prejudicial if it probably […] misled the jury.'" The beneficiary of the error has the burden of proving lack of prejudice. *State v. Harvey*, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189. Likewise, jury instructions which have the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged are unconstitutional under the Fifth and Sixth Amendments. *Id*., at ¶23.

In addition, when a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *State v. Hubbard*, 2007 WI App 240, 306 Wis.2d 356, ¶14, 742 N.W.2d 893, *reversed*[7] *on other grounds*, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, citing *Bollenbach v. U.S.*, 326 U.S. 607, 612-13 (1946). See also *State v. Anderson*, 2006 WI 77, ¶ 109, 291 Wis.2d 673, 717 N.W.2d 74 ("In gauging the circuit court's exercise of discretion in responding to the jury's request, we also apply the legal standard that a circuit court is obligated

---

7 The Court of Appeals' decision in *Hubbard* was reversed by the Wisconsin Supreme Court because the defendant requested a response to the jury's question that was not an accurate statement of law. The reversal did not have any impact on the legal standards articulated in that case, which are also consistent with another Wisconsin Supreme Court case. See *State v. Anderson*, 2006 WI 77, ¶ 109, 291 Wis.2d 673, 717 N.W.2d 74.

to respond to a jury inquiry with sufficient specificity to clarify the jury's problem.") (Emphasis added). As the *Hubbard* court notes: "Jury instructions must have two key characteristics in order to protect the integrity of our jury system: (1) legal accuracy, and (2) comprehensibility." *Id*., at ¶19. Jurors "cannot follow instructions that they do not comprehend." *Id*. Unclear instructions, moreover, "lead to uncertainty about how to apply the law to the facts, which may invite the jury to decide the case without regard to the facts or the law." *Id*. While jury instructions may be legally accurate, the real controversy is not fully tried when the jury admits in its questions to the court it did not understand a key legal concept of the charge before it. *Id*.

An unobjected to jury instruction may be reviewed under a claim of ineffective assistance of counsel or Wis. Stat. §752.35 (discretionary reversal when the defendant claims that the real controversy has not been fully tried.) *State v. Marcum*, 166 Wis.2d 908, 916, 480 N.W.2d 545 (Ct.App.1992) (Trial counsel's failure to object to improper unanimity instruction prejudicial); *State v. Krueger*, 2001 WI App 14, &1, 240 Wis.2d 644, 647, 623 N.W.2d 211, 212 (Trial counsel's failure to object to instruction which did not contain an element of the crime was prejudicial). Instructional error is subject to harmless error analysis. See *State v. Gordon*, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765.

Trial counsel rendered ineffective assistance of counsel when he failed to request an answer to the jury's questions which would have clarified the legal standard it had to apply. As the jury instructions committee itself noted, Wis. Stat. § 346.67 requires the State to prove defendant knew the accident involved a person, "which triggers the duty to stop and render aid." WIS JI 2670, n. 6. In order to stop and render aid, defendant's knowledge would have to be contemporaneous with

the accident.[8] Not an hour later, not a day later, and not 5 days later. Yet the instruction itself does not make this critical element clear.[9] Twice the jury sought clarification on this point, specifically expressing its uncertainty over when the defendant had to know.

The jury first asked, after a little more than an hour of deliberations: "…does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements for the second item? (116:672). The Court acknowledged this may be a question of law, and further, was *the* contested issue of the case. Nonetheless, the trial court responded incorrectly because it was operating under the assumption that the original instruction did, in fact, "tell them that they have to make a finding that he was aware that he hit a vehicle [sic] at the time of the accident[]" (116:674-675). Based on this erroneous assumption, the trial court erroneously concluded the jury was simply looking for the trial court to tell them what the answer was to the second element. (116:675). Thus, it told the jury to re-read the instructions already given—the same instructions the jury had already found unhelpful and concededly failed to clarify this point.

Some three hours later, the jury asked for clarification again. The second question was more pointed. The jury asked whether they were supposed to determine if Sperber "[knew] he hit a person or a trash can immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?" (116:687). Again, the Court instructed the jury "read 2670 in its entirety."

---

8 Any timeframe beyond the ability to stop and render aid at the scene would implicate vagueness or lack of notice grounds.

9 The instruction is not time specific: "The second element requires that the defendant knew that the vehicle he was operating was involved in an accident involving a person." JI-Wis Criminal 2670.

In both instances, trial counsel consented to the Court's response. (116:676,689). He did not propose any alternatives. In particular, he did not propose a response which clarified what the State had to prove, i.e., that defendant knew the accident involved a person *at the time the accident occurred.* Trial counsel's failure to do so was deficient. There is simply no conceivable reason—strategic or otherwise—for trial counsel to leave the jury's knowledge on this legal standard uncertain.

Based on the stipulation between the parties, trial counsel now agrees he was deficient and Sperber was prejudiced. He would have testified as follows at the postconviction hearing:

> a. that trial counsel was deficient when he failed to object to the trial court's re-instruction in response to the jury's questions concerning whether the defendant had to know the accident involved another person at the time of the accident, or some later time prior to his arrest;
>
> b. that trial counsel was deficient when he did not specifically request the jury be reinstructed that it must find defendant knew the accident involved a person at the time the accident occurred;
>
> c. that, in trial counsel's opinion, the failure to specifically instruct the jury the state must prove defendant knew the accident involved a person at the time it occurred prejudiced the defendant;
>
> d. that trial counsel's failure to object to the trial court's proposed instruction or specifically request an instruction was not a conscious trial strategy or based on any strategic considerations.

(104.2:1; A:19).

Trial counsel's deficiency prejudiced the defendant. There is no way to know which time-frame the jury ultimately applied. If the jury concluded the State need only prove the defendant was aware the accident involved a person at some point prior to his arrest, then the State was improperly relieved

of its burden of proof on this element.[10] Worse, the jury could have convicted him by agreeing he had knowledge sometime after the accident when such a finding should have resulted in acquittal. Alternatively, there is no assurance of unanimity. The jurors could have left the legal standard unresolved, with some believing defendant had knowledge at the time of the accident and others who didn't. There is no getting around the lack of clarity on whether the State had to prove knowledge at the time of the accident or some time later. By failing to address the jury's uncertainty on this critical element directly, the trial court rendered the verdict unreliable.

The trial court's postconviction decision is largely a sufficiency of the evidence analysis and thus has no bearing on the question before the Court. Likewise, there is no legal or factual relevance to the trial court's assumption that if the jurors were "unclear" about what they were doing "they would have said something" when polled. (119:20; A:13). Indeed, the irony of this assumption is apparently lost on the trial court.

The trial court does implicate harmless error, however, when it suggests there was no evidentiary basis for the jury to infer Sperber was unaware the accident involved a person at the time it occurred. The postconviction decision also makes a vague reference to the State's argument that while the second element does not specify when the defendant had to know the accident involved a person, when read together, the elements imply that knowledge had to be at the time of the accident. (119:18; A:11). Each of these will be addressed in turn.

Apart from Sperber's testimony, which alone should be sufficient to put his knowledge at the time of the accident in

---

10 There were repeated references to media coverage of the accident in the record, with the clear implication that Sperber should have at least heard about it in the days after the accident and put two and two together. (see e.g. 114:306, 311; 115:406, 485; 116:631-632).

dispute, there was plenty of other evidence from which the jury could reasonably conclude Sperber was unaware the accident involved a person at the time it occurred.

No one can reasonably dispute the victim put himself in extreme danger under these circumstances. The roadway was dark and wet. (116:535). Every driver knows what a wet road does to headlight illumination. There was no shoulder, and the substantial snow banks, covered with black soot and dirt, intruded two-feet into the roadway, thus forcing the victim well into the lane of traffic. (52:Ex. 18). The victim was dressed in dark clothing, and the back of the wheelchair was black without any reflective material. (114:218, 269, 273). No one, moreover, would have expected a wheelchair in a busy lane of traffic at rush hour under these conditions. Even though he knew the wheelchair was out there somewhere, Daniel Emmel testified he could not see it when he came back to Velp and looked west from Gallagher. (114:127, 131, 142, 143). Jeffrey Holl saw the wheel chair as it crossed Velp from south to north while he was waiting on Gallagher street, so when he turned right onto Velp he knew it was there and went around it. Nonetheless, he was concerned enough that he kept an eye on the wheelchair in his rearview mirror. He knew the person was at risk--being that it was "dark" and the person was in "lane of traffic...." (114:172). Under these circumstances, it was certainly possible Sperber did not see the wheelchair before he ran into it.

In addition, the State's contention that Sperber could not have missed seeing the victim and the wheelchair flying through the air in front of him omits several other possibilities. While Holl testified the wheelchair and person "went airborne," the record is unclear as to how high. (114:163, 165, 166). Sperber was in a truck, so his line of vision was higher than it would have been in a car, and driving at 35 m.p.h. he would have been looking ahead rather than down at his bumper. Melissa Wolcanski was directly behind Sperber when his brake lights came on, and she testified she did not see anything fly up in

front of the truck or anything else to suggest a collision. (115:448). Further, Emmel testified that upon impact the wheelchair "rolled" some 20 yards "along the snow bank." (114:144).

Further, the fact that Sperber stopped so close to the scene significantly undermines the State's theory that he knew he hit a person at the time of the collision. If he did know he hit someone, and intended to run, why would he stop so near the scene where both he and his truck could be identified? This fact alone is sufficient to cast doubt on Sperber's knowledge.

The State also argued Sperber would have seen the wheelchair or the person lying in the road when he got out of his car on Lyndon Street, even if he hadn't known at the time of impact. Paul Degrave testified that when he looked at the truck parked on Lyndon Street, he noticed the "silhouette of an individual leaning over his steering wheel and staring back at what was going on in the roadway...." (114:191-192). Yet other state witnesses contradicted this testimony. According to Emmel, he could only see the back half of Sperber's truck. The front half was behind a house. (114:130-131, 138). This is consistent with Sperber's testimony that he did not stop on Lyndon until he was nearly to Mary Street. (116:537-538, 582). Holl testified that Sperber turned on to Lyndon and "basically just disappeared." (114:170). It also would have been difficult for Sperber to see a wheelchair or person lying sideways behind the substantial snow bank present on the night of the accident--even if his view of the accident scene was otherwise unobstructed. (114:133, 137)

At trial, the State also tried to show consciousness of guilt by emphasizing that Sperber fixed the damage to the truck in-house; that he got the parts from a guy in Milwaukee rather than locally; and that he removed the topper after the damage was fixed. As the record shows, however, these facts are equally consistent with Sperber's innocence.

As it turned out, fixing the truck in-house was routine at Roland Machine when the damage was $1,000 or less. (115:360). With an insurance deductible of $1,000, it made no sense to report the accident, collect little or nothing, and risk an increase in premium. Sperber hardly kept it a secret, moreover. At a minimum, his immediate supervisor knew (115:470); the shop supervisor knew (115:352); and the technician who helped with the repairs knew. (114:05). In addition, he made a rational economic choice to leave a dent the size of a pop can in the bumper. (114:300; 116:561). Had his goal been to eliminate any evidence of a collision, he would have fixed that as well.

As far as the parts were concerned, Sperber was looking for used parts to keep costs down. If anything, this slowed the process of getting the damage repaired. When he was unable to get used parts in Green Bay (and there was no evidence to the contrary), he turned to an acquaintance (Telford) in Milwaukee who had routinely, it turned out, supplied him with parts. (115:336, 342, 343). When Telford was also unable to supply used parts but offered new parts at a price lower than Sperber had been quoted at Dorsch Ford and two other locations, it made sense for him to buy them. Even the service manager, Richardson, had spoken with Telford. (115:347). Not only did Sperber provide a logical explanation for getting his parts from Telford, it was no secret. The record is also clear that even though Sperber was paying for the parts himself, he could put it on his expense report as he would anything else business related. (115:357, 361, 472).

Sperber removed the topper with Richardson's help. (114:319-320; 116:552, 562). Adam VandeHey also knew the topper had been removed before it left Roland. (114:318-320). Sperber also had a reason. He removed the topper because he was going to haul firewood that weekend. (114:320; 116:564). When the cops arrived on Friday, there were log cutting tools in the truck bed. (115:419).

In short, the record fails to support the trial court's suggestion that no jury could reasonably infer a lack of knowledge at the time of the accident. Indeed, having twice requested clarification on this point, this jury clearly did not view the evidence as conclusive. In contrast to its postconviction decision, moreover, the trial court noted during deliberations that the jury was "having a tough time. This is a tough case." (116:688).

The trial court's postconviction decision also suggests agreement with the State's argument that the fourth element of the instruction essentially cures the lack of specificity in the second element and therefore reinstruction on this element was not necessary. The State acknowledges the second element contained in the pattern jury instruction is unclear as to when the defendant must know the accident involved a person. The fourth element, however, requires the jury to find that "the defendant did not *immediately* stop his vehicle at the scene of the accident and remain at the scene. WIS JI 2670 (emphasis added)." The State reasons it would be "physically impossible" to "immediately stop and remain at the scene of the accident without contemporaneous knowledge." (97:5).

Whether a jury can be expected to engage in such an elements analysis or not, it was obviously unable to make this connection on its own or it wouldn't have twice asked for clarification. Jurors "usually do not possess law degrees." *Hubbard*, 2008 WI at ¶26. The objective of an instruction is "not only to state the law accurately but also to explain what the law means....." *Id*. Jurors should be given a clear statement on what the law is, not a riddle to solve.

More importantly, the State applies the wrong legal standard. The case it relies on, *In re Commitment of Laxton*, *supra*, did not involve a specific request from the jury. When the jury makes "explicit its difficulties," the issue for the Court

is not limited to whether the substantive instruction is legally sufficient. A circuit court "***is obligated*** to respond to a jury inquiry with sufficient specificity to clarify the jury's problem." *Anderson*, at ¶ 109. It must "clear them away with concrete accuracy." *Bollenbach, at* 612–13. In this case, the jury's problem was not clarified.

The result is that no one knows *what* standard *was* applied. The jury's questions to the Court suggest two or more possibilities. The first question asked whether defendant must know "at the time of the accident" or "the days following the incident"; the second asked whether defendant must know "immediately after the accident" or "before or on the day he was taken into custody." Under these circumstances, where the jury itself has articulated multiple standards, the risk defendant was convicted under the wrong legal standard by at least one juror is substantial.

II. ALTERNATIVELY, THE REAL CONTROVERSY WAS NOT FULLY TRIED WHEN THE TRIAL COURT FAILED TO RE-INSTRUCT THE JURY THE STATE MUST PROVE THE DEFENDANT WAS AWARE THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED.

An unobjected to jury instruction may be reviewed under a claim of ineffective assistance of counsel or Wis. Stat. §752.35 (discretionary reversal when the defendant claims that the real controversy has not been fully tried). *State v. Marcum*, 166 Wis.2d 908, 916, 480 N.W.2d 545 (Ct.App.1992).

For the same reasons argued above, the Court should reverse. The real controversy was not fully tried. The only contested issue at trial was whether the defendant knew the accident involved a person at the time it occurred. The jury twice asked for clarification on this point as it was obviously

confused as to *when* knowledge was required for liability under the statute. This was a pure question of law which the Court had a duty to clarify when requested. See *State v. Hubbard*, 2007 WI App 240 at ¶19 (While jury instructions may be legally accurate, the real controversy is not fully tried when the jury admits in its questions to the court it did not understand a key legal concept of the charge before it.) The result was a trial where the jury did not understand, and therefore did not know how to apply, a key element necessary for conviction. The real controversy—i.e. did the defendant know the accident involved a person at the time of the accident—was not fully tried.

CONCLUSION

This Court should reverse the conviction and remand for a new trial with proper jury instructions.

Respectfully submitted this 24th day of May, 2013.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

The Statement of the Case; Statement of Facts; Argument; and Conclusion sections of this brief contain 9375 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of May, 2013.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of May, 2013.

MILLER APPELLATE PRACTICE, LLC

By_____

Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on May 24, 2013. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 24th day of May, 2013.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX

	Page
Judgment of Conviction February 9, 2012; Record Item No. 82	1-2
Decision on Postconviction Motion January 31, 2013; Record Item No. 119	3-17
Order Denying Postconviction Motion February 4, 2013; Record Item No. 99	18
Partial Stipulation of Facts March 12, 2013; Record Item No. 104.2	19-20
Map	21

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13).
I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 24th day of May, 2013.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780