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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CITY OF RHINELANDER,
Plaintiff-Respondent,

v.

Appeal No. 2015AP302

THOMAS V. WAKELY,
Defendant-APPELLANT.

ON THE APPEAL FROM A JUDGMENT
IN FAVOR OF THE PLAINTIFF-RESPONDENT
ENTERED BY THE ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE PATRICK F. O'MELIA, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

(I) Did the circuit court's jury instructions fail to include an element of the accident reporting statute, Wis. Stat. § 346.70(1), thereby misstating the law and also misleading the jury, constituting prejudicial error?

(II) Did the circuit court's erroneous jury instruction cause the real controversy not to be fully tried and justice to be miscarried, thereby warranting a new trial under Wis. Stat. § 751.06?

(III) Was the evidence presented at trial insufficient to maintain the jury's verdict?

The trial court answered: No.

**STATEMENT AS TO ORAL ARGUMENT
AND PUBLICATION**

Oral argument is not necessary because the arguments can be made by written brief. Publication is not necessary because established matters of law may govern the facts of this case.

STATEMENT OF THE CASE

On August 16, 2014, the defendant-appellant, Thomas V. Wakely (hereinafter "Mr. Wakely"), drove his vehicle toward an intersection and had a near collision with a bicyclist, Nick Freund, who then jumped off his bicycle and fell to the ground. Upon witnessing the bicyclist fall, Mr. Wakely immediately got out of his vehicle, observed the situation, and spoke briefly with the bicyclist.

As a result of the accident, the bicyclist suffered minor injury to his body, i.e., two bruises on his left side and a cut on his left hand, and minor damage to his bicycle. Mr. Wakely testifies that the bicyclist insisted on leaving the scene - without indicating any need for medical treatment - and desired to continue riding his bicycle to his friend's house. After observing that the injury to the bicyclist and damage to the bicycle were not serious, Mr. Wakely returned to his car and drove home.

Soon thereafter on the same night, a police officer came to Mr. Wakely's home to speak with him regarding the incident and then issued Mr. Wakely a citation for failing to report an accident under Wis. Stat. § 346.70(1).

On December 22, 2014, a jury trial was held in Oneida County Circuit Court, presided by the Honorable Patrick F.

O'Melia. The defendant-appellant, Mr. Wakely, pled not guilty to the offense.

The plaintiff-respondent, City of Rhineland, presented evidence, including photographs, that the bicyclist suffered minor injury and that the bicycle had minor damage as a result of the accident involving Mr. Wakely. The bicyclist testified that the only injury he suffered were a bruise on his left shin, a bruise on his left elbow, and a cut on his left hand that was bleeding. Jury Trial Tr., 12/22/14, at 92:8-17 (A-App. 101).

In regards to the damage to the bicycle as a result of the accident, the bicyclist testified that the handle bars on his bicycle were "shifted", but that it was fixed at the scene when his friend came with tools to help. Jury Trial Tr., 12/22/14, at 96:9-19 (A-App. 102).

The plaintiff-respondent, City of Rhineland, however, did not present any evidence regarding the apparent extent of the personal injury as relating to the apparent cost of medical treatment, nor the apparent extent of the property damage as relating to the apparent cost of fixing the bicycle.

At trial, during the jury instructions conference, the client objected to the judge's instructions regarding the

definition of an accident under the relevant statute. Jury Trial Tr., 12/22/14, at 239:16 (A-App. 103).

The jury instructions given by the judge to the jury at the close of all the evidence included a description of the offense with which Mr. Wakely was charged, Wis. Stat. § 346.70(1), but failed to include the following element regarding the apparent cost: "an accident resulting in injury . . . to an apparent extent of \$200 or more, or total damage . . . to an apparent extent of \$1,000 or more." Jury Trial Tr., 12/22/14, at 248:5-249:17 (A-App. 104).

The jury found the defendant-appellant guilty of the offense under Wis. Stat. § 346.70(1). Jury Trial Tr., 12/22/14, at 272:16-19 (A-App. 105).

This appeal followed.

ARGUMENT

Pursuant to Wis. Stat. § 346.70(1), an individual has a statutory duty to report an accident under the following circumstances:

The operator or occupant of a vehicle involved in an accident resulting in injury to or death of any person . . . to an *apparent extent of \$200 or more*, or total damage to property owned by any one person . . . to an *apparent extent of \$1,000 or more* shall immediately by the quickest means of communication give notice of such accident to the police department, the sheriff's department or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer.

(emphasis added) In order for an individual to be statutorily required to report an accident, the "apparent extent" of the personal injury must be \$200 or more at the time of the accident, or the "apparent extent" of the property damage must be \$1000 or more at the time of the accident. Thus, at the time of the accident, the apparent cost of the injury or damage must meet the statutory minimum amount in order for the accident to be reportable under the statute.

In the case at hand, the statutory element at issue involves the "apparent extent" of the injury to the bicyclist and the "apparent extent" of the damage to the bicycle that resulted from the accident. The jury instructions regarding the offense, however, failed to

include the element of apparent cost under Wis. Stat. § 346.70(1), and thus the following three questions are raised on appeal: (I) Did the circuit court's erroneous jury instructions constitute prejudicial error?; (II) (II) Does the circuit court's erroneous jury instruction warrant a new trial under Wis. Stat. § 751.06?; and (III) Was the evidence presented at trial insufficient to maintain the jury's verdict?

Here, we believe the verdict should be reversed and the matter remanded with instructions to address the issues set forth hereinafter.

I. THE CIRCUIT COURT'S JURY INSTRUCTIONS FAILED TO INCLUDE AN ELEMENT OF THE ACCIDENT REPORTING STATUTE, WIS. STAT. § 346.70(1), THEREBY MISSTATING THE LAW AND ALSO MISLEADING THE JURY, CONSTITUTING PREJUDICIAL ERROR

According to Wisconsin case law, the circuit court has broad discretion in instructing a jury. *Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10 (1992) (citation omitted). A circuit court is required, however, to exercise its discretion "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Neumann*, 2013 WI 58, ¶ 89, 348 Wis. 2d 455, 832 N.W.2d 455 (citation omitted). The courts recognize that "[t]he

correctness of the jury instruction affects the validity of a jury's verdict." *Kochanski v. Speedway SuperAmerica, LLC*, 2014 WI 72, ¶ 11, 356 Wis. 2d 1, 850 N.W.2d 160 (citations omitted).

On appeal, the jury instructions are reviewed as a whole to determine whether "the overall meaning communicated by the instructions was a correct statement of the law" in order to determine whether or not grounds for reversal exist. *Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10 (1992) (citation omitted). Where a jury instruction erroneously states the applicable statute, the appellate court must determine "whether, under the totality of the circumstances, the erroneous instruction constituted harmless error." *State v. Beamon*, 2013 WI 47, ¶ 27, 347 Wis. 2d 559, 830 N.W.2d 681 (citations omitted). An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted).

Further, an erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. *Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10 (1992) (citation omitted). An error is prejudicial if it "probably and not merely possibly misled the jury." *Id.* at 850.

Whether an error is prejudicial is a question of law for the appellate court's independent review. *State v. Neumann*, 2013 WI 58, ¶ 89, 348 Wis. 2d 455, 832 N.W.2d 455 (citation omitted).

In this case, the jury instruction regarding the statutory requirements of Wis. Stat. § 346.70(1) failed to include an essential element of the offense, thereby constituting an incorrect statement of the law as applied to this particular case. The judge failed to include any reference to the statutory element regarding the "apparent extent" of any injury or damage that would deem the accident reportable under law.

Considering the totality of the circumstances and the overall meaning communicated by the jury instructions in this case, the failure to instruct the jury on an element of the relevant statute is clearly not harmless error because the erroneous instruction went directly to the jury's findings. As a result of the failing to include an essential element in the jury instruction, the jury found the defendant-appellant guilty; however, absent the error, a rational jury would have found the defendant-appellant not guilty because there was no evidence presented at trial that showed the "apparent extent" of the injury or damage met the statutory minimum under Wis. Stat. § 346.70(1).

Thus, beyond a reasonable doubt, the erroneous instruction was clearly not harmless.

Also, the erroneous jury instruction in this case is prejudicial because the jury was misled by the failure to include an essential element of the offense. The jury only considered the facts of the accident under the incorrect statement of the law, and the error misled the jury to believe that a guilty verdict must be rendered as long as the defendant-appellant had caused any injury to the bicyclist or damage to the bicycle.

Based on the evidence presented in this case, the only injury that the bicyclist suffered were two bruises and a cut, which would most likely be found to amount to less than \$200 in medical treatment costs. The bicyclist did not show any serious injury or indicate any need for medical treatment. A reasonable person would have concluded that the injury was minor. Also, the only damage to the bicycle was a "shifted" handle bar, which would most likely be found to amount to less than \$1000 in repair costs.

There was absolutely no evidence presented at trial pertaining to the cost of any personal injury or property damage. The plaintiff-respondent has the burden of proving every fact necessary to constitute guilt under the statute, and must prove all the elements of Wis. Stat. § 346.70(1).

Because the plaintiff-respondent failed to submit any evidence as to whether the "apparent extent" of any injury or damage met the statutory minimum amount, any such evidence is deemed waived in this case.

If the error had not occurred, the jury would have been instructed on all the elements of the relevant statute, and thus required to consider whether or not the accident caused any injury or damage that would meet the statutory minimum in apparent costs at the time of the accident. Moreover, if the jury had been instructed about the element regarding the apparent cost at the time of the accident, which a reasonable person would have found not to meet the statutory minimum, the verdict would have been not guilty.

Accordingly, since the overall meaning communicated by the jury instruction was an incomplete and incorrect statement of the law, and the verdict would have been different if the error had not occurred, the erroneous jury instruction in this case constituted prejudicial error, warranting reversal and a new trial.

II. THE CIRCUIT COURT'S ERRONEOUS JURY INSTRUCTION CAUSED THE REAL CONTROVERSY NOT TO BE FULLY TRIED AND JUSTICE TO BE MISCARRIED, THEREBY WARRANTING A NEW TRIAL UNDER WIS. STAT. § 751.06

The appellate court has discretionary authority to order a new trial under Wis. Stat. § 751.06:

In an appeal in the supreme court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record, and may direct the entry of the proper judgment or remit the case to the trial court for the entry of the proper judgment or for a new trial....

The statute specifies the circumstances in which this discretionary authority may be invoked: (1) when the real controversy has not been fully tried, and (2) when justice has probably miscarried. *Morden v. Continental AG*, 2000 WI 51, ¶ 88, 235 Wis. 2d 325, 611 N.W.2d 659.

The Supreme Court of Wisconsin has concluded that the use of an erroneous jury instruction prevented a "full, fair trial of the issues." *Air Wisconsin, Inc. v. North Central Airlines, Inc.*, 98 Wis. 2d 301, 318, 296 N.W.2d 749 (1980). More recently, the Court noted that insufficient jury instructions may result in a controversy not being fully tried, therefore warranting a new trial. *State v. Perkins*, 2001 WI 46, ¶ 49, 243 Wis. 2d 141, 626 N.W.2d 762.

In this case, the jury was not instructed on the "apparent extent" element of the accident reporting statute, Wis. Stat. § 346.70(1), and thus the case was not fully tried. The question of whether or not the "apparent extent" of the injury or damage met the statutory requirements under Wis. Stat. § 346.70(1) goes to the heart of Mr. Wakely's duty to report the accident in this case. The jury did not consider the issue regarding the apparent cost of the injury or damage at all because it was not instructed to do so. Since the jury was not given the required instructions with all the elements of the relevant statute, the jury only considered that any injury or damage caused by the accident should lead to finding the defendant-appellant guilty of violating Wis. Stat. § 346.70(1). Thus, the guilty verdict was based upon an incomplete and erroneous statement of law. Further, if a new trial is held, there is a substantial probability that a different verdict would result. As such, the case was not fully tried and there was a miscarriage of justice.

Accordingly, due to the plain error and in the interest of justice, the failure to include an essential element in the jury instruction warrants reversal and a new trial.

III. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO MAINTAIN THE JURY'S VERDICT

The appellate court's review of a jury's verdict is narrow and a jury verdict will be sustained "if there is any credible evidence to support it." *Morden v. Continental AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659 (citation omitted).

In this case, Mr. Wakely does not dispute the fact that the accident resulted in minor injury to the bicyclist and minor damage to the bicycle. The statutory element at issue, however, is the "apparent extent" of the injury and damage that resulted from the accident, which would deem the accident reportable under Wis. Stat. § 346.70(1).

At trial, there was no evidence presented that gave rise to any inference that the injury or damage caused by the accident met the statutory minimum under Wis. Stat. § 346.70(1). The only evidence regarding the "apparent extent" of any injury or damage at the time of the accident was the testimony that the bicyclist had two bruises, a cut, and "shifted" handle bars - none of which support the finding that the cost of such injury or damage amounted to the statutory minimum.

Accordingly, since there is absolutely no evidence that the "apparent extent" of the personal injury to the

bicyclist was \$200 or more and the "apparent extent" of the property damage to the bicycle was \$1000 or more as required by Wis. Stat. § 346.70(1), the jury verdict cannot be upheld and must be reversed.

CONCLUSION

For the reasons set forth above, the erroneous jury instruction and insufficient evidence constitute reversible error, and the defendant-appellant, Thomas V. Wakely, respectfully requests the Court to reverse the verdict and remand the case for a new trial.

Respectfully submitted this 4th day of September, 2015.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. sec. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font.

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

The length of this brief is 22 pages.

Respectfully submitted this 4th day of September, 2015.

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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.

Respectfully submitted this 4th day of September, 2015.

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A P P E N D I X

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A-App. 104:	Jury Trial Tr., 12/22/14, at 248:5-249:17.
A-App. 105:	Jury Trial Tr., 12/22/14, at 272:16-19.

APPENDIX CERTIFICATION

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 Wis. Stats. sec. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) 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 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 or juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 4th day of September, 2015.

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