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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP000339
Trial Court Case No. 2021TR002416

County of Monroe,

Plaintiff-Respondent,

V.

Christian Wayne Kling,

Defendant-Appellant

In the Monroe County Circuit Court,
The Honorable Todd L. Ziegler, Branch I, Presiding

PLAINTIFF - RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

On August 3, 2021, the Circuit Court found the Defendant-Appellant guilty in Monroe County Case Number 2021TR002416 of Failure of Operator to Notify Police of Accident as a forfeiture offense under §346.70(1) of Wisconsin Statutes and not guilty in Monroe County Case Number 2021TR2415 of Failure to Keep Vehicle Under Control as a forfeiture offense under §346.57(2).

The Defendant-Appellant contests the Circuit Court's finding of guilt at Court Trial in Monroe County Case Number 2021TR002416 for Failure of Operator to Notify Police of Accident as a forfeiture offense under §346.70(1) of Wisconsin Statutes. The Plaintiff-Respondent, on the other hand, argues the Court of Appeals should affirm the conviction.

While Monroe County stands by its argument with respect to the second citation for Failure to Keep Vehicle Under Control, Monroe County does not seek review of the finding of not guilty in that action as Monroe County believes the Court's finding was not clearly erroneous as an exercise of the Circuit Court's discretion.

The parties agree that a single-vehicle accident occurred on Wednesday, April 7, 2021 at 3:45p.m. on County O at the F Corners or Salzwedel Corners in the Town of Lincoln, Monroe County, State of Wisconsin involving the Defendant-Appellant Christian Wayne Kling as the driver of a Mustang with respect to the charge of Failure of Operator to Notify Police of Accident under §346.70(1). The Defendant-Appellant, however, contests that Monroe County met

its burden of proof as to the latter elements with regard to elements of: the apparent extent of total damage to property owned by any one person in the accident was \$1,000 or more, and whether the Defendant-Appellant immediately by the quickest means of communication gave 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. The Circuit Court found all three elements were met based upon evidence presented at trial.¹

STATEMENT OF ORAL ARGUMENT & PUBLICATION

Monroe County defers to the Court to determine whether oral argument is appropriate pursuant to §809.22 of Wisconsin Statutes and does not request publication of the opinion in this matter pursuant to §809.23 of Wisconsin Statutes.

STATEMENT OF THE CASE & FACTS

The parties are in virtual agreement as outlined in the Court Trial Transcript Volume 1 and Volume 2 that the Defendant-Appellant Christian Wayne Kling was involved in a one-vehicle accident as the driver of a Mustang on Wednesday, April 7, 2021 at 3:45p.m. in the Town of Lincoln, Monroe County, State of Wisconsin

¹ Page 47, Line 13 to Page 55, Line 22 of Court Trial Transcript Volume 2.

while passing through “The F Corners” or “Salzwedel Corners” portion of County O.

The parties are also in agreement that a variety of bystanders stopped at the scene in the immediate aftermath of the accident—namely Timothy McNaughton and Justin Lynn, who were coworkers of the Defendant-Appellant and Donald Brown, who was driving home from his work at Toro and worked on the side as part of the Town of Lincoln Fire Department responding to fires, traffic accidents, emergency and medical calls. The Defendant-Appellant requested a ride from Donald Brown first, to which Mr. Brown declined saying “Absolutely not.”² He also asked the Defendant-Appellant if he contacted law enforcement to which the Defendant-Appellant responded “No.” Mr. Brown contacted dispatch on his own accord via his cellular phone, after a period of poor cellular service which is common in this area, at which point he noticed the defendant departing in another vehicle at a high rate of speed. Dispatch asked him to identify the departing vehicle containing the defendant, but Mr. Brown was unable to catch up to the vehicle to do so.

Deputy Matthew Hoskins responded within 12 minutes or less of notification of the accident, indicating “I was first on-scene.”³ Deputy Hoskins testified to having responded to thousands of accidents and writing thousands of incident reports over 25 years in law enforcement. He also attended Northwest

² Page 7, Lines 20-21 of the Court Trial Transcript Volume 1.

³ Page 20, Lines 21-23 of the Court Trial Transcript Volume 1.

University for accident reconstruction school. He testified that his role in reconstruction and investigation of accidents involves estimating the costs of damages to vehicles and property.

Deputy Hoskins' testified: "The vehicle left during the straight portion of the roadway, and the passenger wheels began going off gradually onto the gravel portion of the road across the fog line, and it just kept going inch-by-inch straight. As the road began to curve to the left, the vehicle simply just went straight into the mailbox and at the mailbox it's the apex of the curve. As soon as the vehicle struck the curve, that is when the driver made a 180, by taking the wheel and turning it, spinning the car opposite facing it north."⁴ With respect to damage, Deputy Hoskins testified that "you have both the tires peeled off, you have damage all along the passenger side, you have a lot of front end damage and the vehicle's leaking, you know, that's way over the threshold of \$1,000."⁵ He later testified, "the whole passenger side was bottomed out into the dirt, that the tires were off the rims. The front bumper on the passenger side was actually dug into the ground and leaking fluid, so no, you couldn't drive the vehicle. The vehicle was inoperable."⁶

The Defendant-Appellant contests the amount of the damage to the vehicle exceeding the statutory threshold. The Defendant-Appellant presented evidence, which he argues substantiates a total cost of repair of less than \$1,000. The

⁴ Page 5, Lines 9-19 of the Court Trial Transcript Volume 1.

⁵ Page 19, Lines 14-18 of the Court Trial Transcript Volume 2.

⁶ Page 26, Lines 7-13 of the Court Trial Transcript Volume 1.

Defense called witnesses such as his significant other and the tow truck driver to contest whether the vehicle was leaking fluid and for purposes of estimating damages. The tow truck driver Robert Larkin acknowledged his business does not conduct estimates and did not repair the Defendant-Appellant's vehicle.⁷ Meanwhile, Defendant-Appellant's significant other Elizabeth Van de Vanter acknowledged "the tires were off and the side panel was off, and the front bumper."⁸ The Defendant-Appellant later testified, "So there I was in the ditch, and I was shaken up. And I got out of my car; I looked around my car, and I noticed that the bumper, there was a big hole in my bumper, and the bottom trim popped off of it. Didn't break or anything. And both my tires on the passenger side were knocked off the rims. So when I looked at it all, I seen that the trim, right, it didn't break, it just kind of popped off. There's like, little clips that clip in and poke in and push it back on, and the major thing that happened was it put a big hole in my bumper."⁹ The Defendant-Appellant during his own testimony acknowledged not fully repairing the vehicle by the conclusion of the Court Trial, which was approximately nine months following the accident. The Defendant-Appellant also acknowledged the accident was sufficient to require towing of the vehicle from the scene. The Defendant-Appellant did, however, pay for replacement of the damaged mailbox, which Deputy Hoskins testified can cost

⁷ Page 26, Line 12 to Page 27 Line 1 of Court Trial Transcript Volume 2.

⁸ Page 28, Lines 23-24 of Court Trial Transcript Volume 2.

⁹ Page 32, Lines 13-23 of Court Trial Transcript Volume 2.

from \$24 to hundreds of dollars with the replacement on the lower end given it's age.¹⁰

When asked whether he would characterize the Defendant-Appellant's notice of the accident provided to dispatch and law enforcement to be by the quickest means possible from his experience with accident investigations, Deputy Hoskins testified, "I would not," noting "in my report I think I document it was 34 minutes after the initial report from the firemen that's already testified."¹¹ Deputy Hoskins noted the Defendant-Appellant could have asked multiple people in the vicinity of the accident if he could use their respective phones to report the incident to law enforcement.¹² Defendant-Appellant testified that his coworker "took me home. Plugged my phone on the charger, let it charge to like three percent, and then I called, I forgot, maybe the tow truck first, and then I was going to call the sheriff's department to let them know that it was there, I'm okay, and that I'll retrieve my vehicle. And so they patched me through to Deputy Hoskins. I talked to him to report it."¹³

STANDARD OF REVIEW

The burden of proof for conviction of any person charged with a violation of any traffic regulation shall be evidence that is clear, satisfactory and convincing

¹⁰ Page 20, Lines 7-16 of the Court Trial Transcript Volume 1.

¹¹ Page 10, Lines 16-21 of Court Trial Transcript Volume 1.

¹² Page 11, Lines 1-19, Court Trial Transcript Volume 1.

¹³ Page 33, Line 22 to Page 34 Line 4 of the Court Trial Transcript Volume 2.

under §345.45 of Wisconsin Statutes. As a traffic forfeiture citation, Monroe County believes clear, satisfactory and convincing is the burden of proof in this matter. Monroe County further believes the standard of review by the Court of Appeals of the Circuit Court's finding of Defendant-Appellant's guilt on the charge of Failure of Operator to Notify Police of Accident as a forfeiture offense under §346.70(1) of Wisconsin Statutes is a "clearly erroneous" standard. §805.17(2) as it relates to a Trial to the Court provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity for the trial court to judge the credibility of the witnesses." The clearly erroneous standard applies when the evidence in the record consists of disputed testimony and a video recording as is the case here. State of Wisconsin v. Jeffrey D. Walli, 334 Wis.2d 402, 799 N.W.2d 898, 2011 WI App 86. In *Walli*, the Court of Appeals when faced with a traffic forfeiture cited §805.17(2) of Wisconsin Statutes, which the Court of Appeals noted provides that "In all actions tried upon the facts without a jury...[The trial court's] [f]indings of fact shall not be set aside unless clearly erroneous." The Court of Appeals in *Walli* also noted that the Attorney General in a supplementary brief "reminds us that the Wisconsin Constitution limits our jurisdiction to appellate jurisdiction, blocking our ability to engage in fact finding." *See* Wis. Const. art. VII, § 5. In this case, the Defendant-Appellant's appeal challenges the sufficiency of the evidence—which was largely in the form of testimony and a video recording—in meeting the burden of proof of clear, satisfactory and convincing in arriving at a finding of guilt by the Circuit

Court over a traffic forfeiture citation such that Monroe County believes the clearly erroneous standard should also apply here for purposes of appellate review. The Court of Appeals outlined the three elements of §346.70(1) relating to Failure of Operator to Notify Police of Accident, depending up circumstances, in an unpublished opinion in City of Rhineland v. Thomas v. Wakely, 369 Wis.2d 72, 879 N.W.2d 808 (2016).

ARGUMENT

THE TRIAL COURT’S FINDING OF GUILT BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE OF §345.45 FOR FAILURE OF OPERATOR TO NOTIFY POLICE OF ACCIDENT UNDER §346.70(1) IS NOT CLEARLY ERRONEOUS.

Monroe County believes the testimony and video evidence admitted at trial meets the burden of proof of clear, satisfactory and convincing evidence to support conviction and that the Circuit Court’s finding of guilty for Failure of Operator to Notify Police of Accident as a forfeiture offense under §346.70(1) of Wisconsin Statutes is not clearly erroneous.

A. THERE IS NO DISPUTE OVER MEETING BURDEN OF PROOF ON FIRST ELEMENT OF §346.70(1).

Monroe County believes the evidence meets the first element of §346.70(1) of Wisconsin Statutes as there is no dispute by the parties that the Defendant-

Appellant Christian Wayne Kling was involved in a one-vehicle accident as the driver of a Mustang on Wednesday, April 7, 2021 at 3:45p.m. in the Town of Lincoln, Monroe County, State of Wisconsin while passing through “The F Corners” or “Salzwedel Corners” portion of County O.¹⁴

B. SUBSTANTIATION OF THE SECOND ELEMENT OF §346.70(1) AS TO TOTAL DAMAGE FROM THE ACCIDENT OF APPARENT EXTENT OF \$1,000 OR MORE IS MET.

The second element of §346.70(1), as it applies to this case, requires that Monroe County prove by clear, satisfactory and convincing evidence that the operator was involved in an accident resulting in total damage to property owned by any one person to an apparent extent of \$1,000 or more. Total damage is defined as “the sum total cost of putting the property damaged in the condition it was before the accident, if repair thereof if practical, and if not practical, the sum total cost of replacing such property.” Moreover, the statute provides: “For purposes of this subsection if any property which is damaged is held in a form of joint or multiple ownership, the property shall be considered to be owned by one person.” The parties are in virtual agreement that the Mustang was inoperable following the accident and required towing after sustaining damage consisting of at minimum a broken front bumper, two tires off of rims, and damage all along the

¹⁴ Court Trial Transcript Volumes 1 and 2.

side panel including affecting trim. Moreover, Deputy Hoskins, who has a quarter-century of accident training and investigation experience as a law enforcement officer including conducting damage estimates, testified that the Defendant-Appellant's vehicle the damage was in his words "way over the threshold of \$1,000."¹⁵ Furthermore, the Defendant-Appellant admitted he never completed full repair of the vehicle, but instead speculated on the remaining cost of many of the repairs beyond the towing cost, without substantiating that he has any special professional training or experience to conduct such an estimate. The Trial Court commented on the insufficiency of the evidence presented by the Defendant on this element in rebutting the County's evidence.¹⁶

C. SUBSTANTIATION OF THIRD ELEMENT OF §346.70(1) AS TO
FAILING TO IMMEDIATELY REPORT BY QUICKEST MEANS OF
COMMUNICATION POSSIBLE IS MET AS DEFENDANT FAILED TO
REPORT ACCIDENT FOR AS MANY AS 34 MINUTES.

The third and final element requires that Monroe County prove by clear, satisfactory and convincing evidence that the operator failed to "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" as

¹⁵ Page 19, Lines 17-18 and Page 53, Line 5 to Page 55, Line 19 of the Court Trial Transcript Volume 1

¹⁶ Page 46, Lines 11 to 12 of the Court Trial Transcript Volume 2.

required by the word “shall” in §346.70(1) of Wisconsin Statutes. The record shows that the Defendant sought a ride away from the scene from at least two bystanders rather than using his phone or asking to use a bystander’s phone to immediately report the accident. The record shows the Defendant-Appellant, who as the operator had the obligation to make the report under §346.70, did not use a phone to report the accident to the police department, the sheriff’s department or the traffic department of the county or municipality or a state traffic patrol officer for as many as 34 minutes following the accident. In the meantime, a bystander named Donald Brown testified that he took it upon himself to call 911, for which the Defendant-Appellant, upon hearing Mr. Brown’s testimony on Cross-Examination took credit, responded, “There you go. I did call 911,”¹⁷ although there is no evidence Defendant-Appellant knew Donald Brown was a fireman, made the call or requested it, or knew the call took place until soliciting testimony from Mr. Brown at the Court Trial. Later, when testifying under oath, the Defendant-Appellant acknowledged that upon arriving home leaving the accident scene, “I was going to call the sheriff’s department to let them know it was there, I’m okay, and that I’ll retrieve my vehicle. And so they patched me through to Deputy Hoskins. I talked to him to report it.”¹⁸ The Trial Court commented that the far delay exceeded what is allowed under the statute for reporting the accident.¹⁹

¹⁷ Page 12, Line 11 of the Court Trial Transcript Volume 1.

¹⁸ Page 33, Line 25 to Page 34, Line 4 of the Court Trial Transcript Volume 2.

¹⁹ Page 51, Line 21 to Page 53, Line 4 of the Court Trial Transcript Volume 2.

CONCLUSION

For the aforementioned reasons, Monroe County asserts that it admitted sufficient evidence in the form of testimony and audiovisual evidence at trial such that the Court of Appeals should affirm the Circuit Court's finding of the Defendant's guilty by clear, satisfactory and convincing proof for Failure of Operator to Notify Police of Accident as a forfeiture offense under §346.70(1) of Wisconsin Statutes, and make an additional finding that the Circuit Court's finding of guilt on that charge was not clearly erroneous such that the forfeiture conviction can or should be aside by the Court of Appeals.

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DISTRICT IV

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Trial Court Case No. 2021TR002416

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) (bm) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes or footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 16 pages, 3270 words.

Dated this 26th day of July, 2022.

Respectfully submitted,



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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.

Dated this 26th day of July, 2022.

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