**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 8, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP302** **Cir. Ct. No. 2014TR2141**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**CITY OF RHINELANDER,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS V. WAKELY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Thomas Wakely appeals a judgment entered against him for failing to notify police of an accident, contrary to WIS. STAT. § 346.70(1). Wakely challenges the sufficiency of the evidence and argues he is entitled to a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version.

new trial based upon the circuit court's erroneous jury instructions. We conclude sufficient evidence was presented during the trial to sustain the jury's verdict and the circuit court did not erroneously exercise its discretion in instructing the jury. We, therefore, reject Wakely's request for a new trial and affirm the judgment.[2]

## BACKGROUND

¶2 On August 16, 2014, at approximately 9:00 p.m., Wakely struck or nearly struck a bicyclist while operating a motor vehicle within the City of Rhinelander. The bicyclist suffered physical injuries observable at the accident scene including a gash on his left hand that was open and bleeding. His bicycle was also damaged, but his friend was able to repair it at the scene.

¶3 Wakely stopped briefly to speak with the bicyclist and check on the situation. The bicyclist claims that during this exchange, he told Wakely that Wakely had struck him. Wakely, conversely, claims the bicyclist said he had not been struck by Wakely's vehicle.

¶4 Wakely left the accident scene before the police arrived and failed to contact law enforcement to report the accident. A witness to the accident tried unsuccessfully to contact 9-1-1. The witness instead flagged down a patrol sergeant with the City police department who was in the area. Following an investigation, Wakely was issued a municipal citation for failing to notify the police of an accident, contrary to WIS. STAT. § 346.70(1). Wakely entered a plea

[2] We further deny the City of Rhinelander's request to dismiss this appeal pursuant to WIS. STAT. RULE 809.83(2).

of not guilty. A unanimous six-person jury found Wakely guilty of the charged offense. Wakely now appeals.[3]

## DISCUSSION

¶5 First, Wakely argues the evidence at trial was insufficient to maintain the jury's verdict. We disagree. Our review of a jury's verdict is narrow. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will sustain a jury's verdict if there is any credible evidence to support it, even when that evidence is contradicted and the contradictory evidence appears stronger and more convincing. *See* ***id.***, ¶¶38-39.

¶6 As relevant here, WIS. STAT. § 346.70(1) provides:

> IMMEDIATE NOTICE OF ACCIDENT. *The operator or occupant of a vehicle involved in an accident resulting in injury to or death of any person*, any damage to state or other government-owned property, except a state or other government-owned vehicle, to an apparent extent of $200 or more, *or* total damage to property owned by any one person or to a state or other government-owned vehicle 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*. In this subsection, *"injury" means injury to a person of a physical nature resulting in death or the need of first aid or attention by a physician or surgeon, whether or not first aid or medical or surgical treatment was actually received ....*

(Emphasis added.) Wakely's argument that insufficient evidence was presented at trial is based upon the false premise that, in order for him to be found guilty of

[3] Wakely appeared pro se in the circuit court. He initially appeared pro se during this appeal but retained counsel before filing his appellate brief.

violating § 346.70(1), he must have caused damage and injury to the "apparent [monetary] extent" he claims was required by the statute ($200 or more, *or* total damage to property owned by any one person or to a state or other government-owned vehicle to an apparent extent of $1,000). However, under § 346.70(1), if the operator of a vehicle is involved in an accident in which a person is injured as defined in the statute, that operator is required to report the accident to law enforcement. The plain language of § 346.70(1) in no way requires a person's injuries to reach a monetary threshold before the accident is reportable.[4] Wakely was required to report the accident based solely upon the bicyclist's resulting injury. The evidence presented at trial (other than Wakely's testimony) indicated Wakely's vehicle collided with the bicyclist, the bicyclist was injured, and Wakely failed to report the accident to law enforcement. As a result, the evidence was sufficient to sustain the verdict.

¶7 Wakely next claims the circuit court erroneously instructed the jury by failing to include an element of WIS. STAT. § 346.70(1).[5] A circuit court has

[4] Statutory interpretation presents a question of law that we review de novo. ***State v. Neumann***, 179 Wis. 2d 687, 706, 508 N.W.2d 54 (Ct. App. 1993). "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted).

[5] The circuit court instructed the jury that the City had to prove the following elements by clear, satisfactory, and convincing evidence:

> One, that Thomas Wakely operated a vehicle in an accident. Accident refers to situations where one or more vehicles are involved in some type of collision or near collision with another vehicle, object, or person.
>
> Number two, the accident resulted in injury to [the bicyclist]. Injury means to a person of a physical nature resulting in death or the need of first aid or attention by physician or surgeon, whether or not first aid or medical or surgical treatment was actually received.

(continued)

broad discretion when instructing a jury. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). "If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***Id.*** at 850. Whether the jury instructions are a correct statement of the law is a question of law that we review de novo. *See* ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993).

¶8 Wakely incorrectly maintains the circuit court was required to instruct the jury that in order for a person 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 $1,000 or more at the time of the accident. As we have already explained, the City was not required to prove the bicyclist's injuries reached a particular monetary threshold. Additionally, the question before the jury in this case was whether Wakely was guilty of violating WIS. STAT. § 346.70(1) based on the bicyclist's injuries, not the damage to the bicycle. *See supra* ¶7 n.5. Accordingly, the court was not required under the facts of this case to instruct the jury on an "apparent extent" element.[6]

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> Third, that Thomas Wakely did not 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 patrol officer.

[6] The City also correctly argues Wakely forfeited this issue by failing to raise his "apparent extent" element argument in the circuit court. "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." ***State v. Dowdy***, 2012 WI 12, ¶¶5, 43, 338 Wis. 2d 565, 808 N.W.2d 691 (citing ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52). Additionally, WIS. STAT. § 805.13(3), which discusses the instruction and verdict conference, provides in relevant part:

(continued)

¶9 Wakely further argues we should exercise our discretion to grant him a new trial under WIS. STAT. § 751.06[7] because the real controversy was not fully tried and justice was miscarried. However, Wakely takes issue only with the circuit court's failure to instruct the jury on the "apparent extent" element; he does not provide any other basis on which we should grant him a new trial. Again, the circuit court was not required to include an "apparent extent" element in its instructions to the jury. A new trial, therefore, is not warranted. The real controversy was fully tried and justice was not miscarried.

¶10 The City asks us, in a footnote to its brief, to dismiss this appeal pursuant to WIS. STAT. RULE 809.83 because Wakely "willfully ignored" our April 22, 2015 order. As relevant here, RULE 809.83(2) states:

> NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or with a requirement of these rules [of appellate procedure], other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a

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> The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.) Subsection 805.13(3) uses the term "waiver"; however, our supreme court has clarified that "forfeiture" is the proper term for the concept described in the statute. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419. Wakely provides no response to the City's forfeiture argument. This argument is thus conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

[7] We assume Wakely meant to cite WIS. STAT. § 752.35, not WIS. STAT. § 751.06. The statutes are identical except that § 751.06 applies in the supreme court, while § 752.35 applies in the court of appeals.

> paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

On April 22, 2015, we issued an order granting Wakely, then pro se, a sixty-day extension to file his appellate brief. Based on a courtesy copy of correspondence from the City to Wakely, indicating Wakely had not served it with any documents filed in this court, we also ordered Wakely to "serve copies of all documents sent to this court on opposing counsel within [ten] days of the date of this order." According to the City, Wakely has yet to serve it with any of those documents.[8]

¶11 While Wakely does not challenge the City's claims, we nonetheless decline the City's request to dismiss this appeal. Dismissal of an appeal under WIS. STAT. RULE 809.83(2) is a drastic sanction that "represents an abrupt termination of litigation[,] and in many cases it imposes a finality to both issues and claims." *See* ***State v. Smythe***, 225 Wis. 2d 456, 468-69, 592 N.W.2d 628 (1999). RULE 809.83(2) does not require us to dismiss an appeal whenever we are confronted with a party's failure to comply with an order; that is just one of several sanctions we may impose. *See* RULE 809.83(2). In issuing our decision, we do not rely upon any documents filed by Wakely prior to his briefs. The City cites no prejudice from Wakely's claimed violation of our order. Given the circumstances of this case, we do not believe dismissing Wakely's appeal is

[8] While self-represented, Wakely filed a motion to convert this appeal from a one-judge panel to a three-judge panel. The filing of that motion predated the City's representation that Wakely had not served it with any documents filed in this court. Wakely does not dispute the City's assertion that he never served the City with those papers. Based upon Wakely's failure to serve his motion on the City as required by WIS. STAT. RULE 809.80(2) and WIS. STAT. § 801.14, and his failure to comply with our order, we determine the motion was not properly filed. As a result, Wakely waived the right to request this matter be decided by a three-judge panel. *See* WIS. STAT. RULE 809.41(1).

appropriate. We do, however, admonish Wakely that future violations may result in sanctions. *See* ***id.***

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.