STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2011AP507-CR
(Fond du Lac County Case No. 09-CF-284)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN M. KLINGELHOETS,

Defendant-Appellant.

Appeal From The Judgment of Conviction and the Final Order Entered In The Circuit Court For Fond du Lac County, The Honorable Robert J. Wirtz, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Whether the evidence was sufficient for conviction on the felony charge of cruel mistreatment of an animal given the absence of evidence that Klingelhoets intended to kill the animal or was aware that his conduct was practically certain to cause that result.

The jury convicted Klingelhoets of felony mistreatment of an animal. However, it was not instructed that, to convict Klingelhoets under Wis. Stat. §951.18(1), he must have intended to kill the animal or was aware that his conduct was practically certain to cause its death. The state below conceded that Klingelhoets did not have such intent or awareness. The circuit court, however, held that such intent or awareness was not required for conviction.

2. Whether the evidence was sufficient for conviction on the misdemeanor charge under Wis. Stat. §951.09 given the absence of

evidence that Klingelhoets used a deadly weapon.

The circuit court concluded that the evidence was sufficient for conviction.

3. Whether the jury instructions denied Klingelhoets due process and the right to a jury verdict on all facts necessary for conviction on the felony charge of cruel mistreatment of animals.

The circuit court denied Klingelhoets' motion on this ground, holding that the statute does not require the intent to kill the animal or awareness that one's conduct is practically certain to cause that result.

4. Whether reversal is appropriate in the interests of justice under Wis. Stat. §752.35 on the grounds the instructions' failure to require proof beyond a reasonable doubt of all facts necessary for conviction on the felony charge resulted in the real controversy not being fully tried.

The circuit court did not address this claim but denied Klingelhoets' similar motion for reversal in the interests of justice in that court's discretion.

5. Whether trial counsel's failure to object to the inaccurate jury instructions on the felony charge denied Klingelhoets the effective assistance of counsel.

The circuit court denied Klingelhoets' motion on this ground. That court held that Wis. Stat. §951.18(1) does not require the intent to kill the animal or awareness that one's conduct is practically certain to cause that result and that trial counsel accordingly did not act unreasonably by failing to object to the instruction on that ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall

within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication also likely is justified under Wis. Stat. (Rule) 809.23. Although Klingelhoets' entitlement to relief is clear under established authority, the appellate courts have not previously applied that authority to the specific criminal statutes at issue here.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed October 16, 2009, the state charged Klingelhoets with one felony count of intentional cruel mistreatment of an animal, resulting in death, in violation of Wis. Stat. §§951.02 & 951.18(1), and one misdemeanor count of intentionally shooting a caged or staked animal with a deadly weapon, in violation of Wis. Stat. §951.09(1). (R1). The charges arose from an incident in which Klingelhoets, annoyed by the barking of his neighbor's dog, sought to quiet it with "a little sting in the butt" with an pellet gun. While two pellets barely broke the skin, a third pellet tragically and unexpectedly entered the dog's spine, causing serious injury for which it was euthanized. (R65:111-14, 170).

The case went to trial, and on May 20, 2010, a jury found Klingelhoets guilty on both counts. (R66:248). The circuit court, Hon. Robert J. Wirtz, presiding, denied defense counsel's motion for a

judgment of not guilty on Count 1, notwithstanding the verdict, but did so by remarking that "there was a debatable case." *Id*. at 251.

On July 19, 2010, the circuit court, Hon. Robert J. Wirtz, presiding, sentenced Klingelhoets to consecutive terms of four and a half months jail time on each count with Huber work release privileges. (R67:29-30). In addition, the court ordered Klingelhoets to pay $1,397.91 in restitution. *Id*.

By post-conviction motion filed January 18, 2011, Klingelhoets sought a new trial on the felony count on the grounds that the jury instructions failed to require proof that he intended to kill the neighbor's dog and thus failed to require proof beyond a reasonable doubt of all facts necessary for conviction on that charge (R54:4-13).[1] Klingelhoets also sought dismissal of the misdemeanor count because the evidence was insufficient to prove beyond a reasonable doubt that the pellet gun was a deadly weapon as required for conviction on that charge (*id.*:14-19).

In its response, the state agreed that Klingelhoets would not be guilty of the felony if the intent to kill was a required element of that offense. However, the state asserted that such an intent is not required under Wis. Stat. §951.18(1). The state further argued that, since the jury convicted Klingelhoets of the misdemeanor charge, the evidence could not be insufficient. (R71).

Klingelhoets' trial counsel, Rob Bellin, testified at the February 18, 2011, motion hearing that he had to draft his own instruction from scratch for the felony charge because there was no standard jury instruction on that offense. Although he believed at the time that his instruction was correct, he also knew that Klingelhoets' intent was "the crux of the case." He was familiar with the statutory definitions of

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[1] Because trial counsel failed to object to the defective instruction, Klingelhoets sought reversal on grounds of ineffective assistance of counsel and interests of justice (R54:9-13).

"intent" and "intentionally" in Wis. Stat. §939.23, and in particular was familiar with Wis. Stat. §939.23(3) and how it operates. However, he already was in the mindset from prior conversations with the prosecutor that the result need not be intended and simply overlooked application of the statutory definitions here. Bellin never determined that §939.23(3)'s definition of "intentionally" did not apply to the criminal statute at issue here. (R68:5-9).

The circuit court, however, denied Klingelhoets' post-conviction motion (R68:30-35; App. 31-36). That court concluded that the detective's "rather general testimony" that pellet guns are used for hunting was "probably sufficient evidence to say that this particular gun, under these circumstances, was a deadly weapon," despite the detective's admission that this was probably at limit of the pellet gun's range (R68:30-31; App. 31-32). As for the felony charge, the court interpreted Wis. Stat. §951.18(1) as requiring only the intent to violate the cruel mistreatment statute. According to that court, the statute does not require proof that the defendant intended to kill the animal. (R68:31-35; App. 32-36).

The circuit court entered its written order denying Klingelhoets' post-conviction motion on February 18, 2011, and Klingelhoets filed his notice of appeal on March 2, 2011 (R58). On May 24, 2011, this Court granted Klingelhoets' motion to correct the record, extending the time for filing Klingelhoets' opening brief to 10 days after receipt of the supplemental return (R73, 74).

TRIAL EVIDENCE

There is no suggestion that Klingelhoets intended to cause the dog's death, and the state conceded as much in response to his post-conviction motion (R71:1).

A frequent owner himself, Klingelhoets loved dogs. (R65:139, 146, 150, 159-165). The animal at issue here, a Jack Russell Terrier, was a frequent barker (*id.*:85, 166, 185), and, as Klingelhoets ex-

plained, his intent was just to stop the dog from barking by giving him a "little sting in the butt." (*Id.*:124, 170, 183-84, 188).

The object used to fire the pellets was a .177 caliber, single pump, break action GAMO pellet gun with attached scope. (*Id.*:124, 128, 136). Klingelhoets purchased the pellet gun along with a target to engage in target practice in his backyard. (*Id.*:99, 132, 167). Detective Charles Sosinski considered the pellet gun to be at the "upper end of the velocities" within the .177 caliber category. (*Id.*:128). In the detective's opinion, pellet guns such as the one used by Klingelhoets have a range of 150 to 200 feet. (*Id.*:129).[2] Detective Sosinski candidly admitted, however, that he has never analyzed or tested the capabilities of a pellet gun. (*Id.*:135).

Klingelhoets fired the pellet gun from a distance of at least 144 feet, (*Id.*:124, 169), hitting the animal three times, twice in its back right leg and once in the neck. (*Id.*:170-71). His shots were aimed at the dog's rear end and he did not believe either of the first two hit the dog as it did not appear to react and continued to bark. However, after the third shot, it was clear that the animal had been hit, as it immediately went down. (*Id.*:170-71, 182-83). After seeing this, Klingelhoets panicked and went over to inform the owner, Tina Randolph, that her dog had been injured. (*Id.*:171-72). Tragically, some time later the animal had to be euthanized at a local veterinarian's office based on complications from the pellet wound. (*Id.*:112-13).

In her contact with the animal, Ms. Randolph observed a "small couple centimeter hole in the side of his neck." (*Id.*:92). Ms. Randolph did not observe any injuries to the animal's rear end. (*Id.*:91). Similarly, the treating veterinarian was unaware of the two wounds

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[2] Because the actual pellet gun owned by Klingelhoets was not available at trial, Detective Sosinski's testimony was based on a pellet gun he owned – albeit a different model – and a purchased model matched by the store keeping unit (SKU) on the original receipt from Klingelhoets' purchase. (R65:134-36).

inflicted to the rear end of the dog until the area was later shaved. Indeed, the damage caused by the first two shots was limited to the skin, failing to penetrate any of the dog's muscle tissue. (*Id*.:115).

The veterinarian was surprised that a pellet – fired by the third shot – punctured the animal's skin and happened to enter an 8 millimeter cavity in the spinal column, coming to rest in the spinal canal. (*Id*.:115-16). She testified that "there are lots of places that [the pellet] could have gone besides the spine" which would not have caused the type of serious damage caused to the animal. (*Id*.:116).

ARGUMENT
I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EITHER COUNT

The evidence was insufficient to establish guilt beyond a reasonable doubt of either of the two charges alleged against Klingelhoets. Although arguing below that intent to kill the dog is not a necessary element of felony mistreatment of an animal in violation of Wis. Stat. §951.18(1) as alleged in Count 1, the state conceded that, if it were wrong on that point, Klingelhoets "would not be guilty of that crime." (R71:1). As for the misdemeanor charge in Count 2 of shooting a staked animal, the evidence similarly is insufficient because it fails to establish that the pellet gun was a "deadly weapon" as used in this case.

The circuit court instructed the jury on the lesser included offense of misdemeanor cruel mistreatment of an animal (R66:209-212),[3] and the evidence was sufficient on that included charge. Klingelhoets accordingly is entitled to dismissal of the felony and remand with directions to enter conviction for the included misdemeanor on Count 1. *See* ***State v. Myers***, 158 Wis.2d 356, 371-74, 461

[3] Pursuant to Wis. Stat. § 951.18(1), "[a]ny person who intentionally or negligently violates [Wis. Stat. §951.02] is guilty of a Class A misdemeanor."

N.W.2d 777 (1990) (following reversal for insufficiency of the evidence, appellate court may remand for conviction of a lesser included offense if the jury received instruction on it). Because there was no lesser included offense for the misdemeanor charge in Count 2, the insufficiency of the evidence on that count mandates dismissal of the charge. ***Id.***

A. Applicable Legal Standards

The burden in a criminal case is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***In re Winship***, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Rushing***, 197 Wis.2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995) (citing ***Jackson***, 443 U.S. at 319).

Of course, the Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." ***Chiarella v. United States***, 445 U.S. 222, 236 (1980). The Court thus can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. ***State v. Wulff***, 207 Wis.2d 144, 152, 557 N.W.2d 813 (1997).

This Court "review[s] challenges to the sufficiency of the evidence necessary to support a verdict *de novo*, applying the same standards as the circuit court." ***State v. Wanta***, 224 Wis.2d 679, 688, 592 N.W.2d 645 (Ct. App. 1999) (citation omitted).

B. Because Klingelhoets Concededly Did Not Intend to Kill the Dog, the Evidence Was Insufficient Under Wis. Stat. §951.18(1) in Count 1

Conviction for felony mistreatment of an animal in violation of Wis. Stat. §951.18(1) requires a jury finding beyond a reasonable doubt

that Klingelhoets both intended to cruelly mistreat an animal and in doing so, intended to cause the animal's death or was aware that consequence was practically certain to result from his actions.[4] As the state properly conceded below, however, the evidence was insufficient to support the latter *mens rea* requirement (R71:1).

The determinative question, therefore, is one of statutory interpretation, a question reviewed *de novo*. ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506 (1997).

1. Felony mistreatment of an animal requires proof beyond a reasonable doubt that the defendant either intended the particular consequence of his or her conduct or was aware that it was practically certain to result.

Interpretation of a statute begins with its language. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain, the inquiry should stop. ***Id.*** Plain meaning may be ascertained not only from the words employed in the statue, but from the context. ***Id.***, ¶46. Thus, courts "interpret statutory language in the context in which those words are used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** Moreover, "statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.*** When the statutory language is ambiguous, the Court may consult extrinsic sources of interpretation. ***Id.***, ¶48. The purpose of statutory interpretation is to give full effect to the

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[4] Section 951.18(1) alternatively provides that:

> Any person who intentionally violates s. 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony.

References in this brief to felony mistreatment apply only to that provision criminalizing intentional mistreatment causing death of the animal.

Legislature's policy choices. ***Id.***, ¶44.

Count 1 of the Information charged Klingelhoets with violating Wis. Stat. §§951.02 & 951.18(1) (R8). Section 951.02 provides that:

> No person may treat any animal, whether belonging to the person or another, in a cruel manner. This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices.

In relevant part, §951.18(1) provides that:

> Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement or death of an animal is guilty of a Class I felony.

Cruel mistreatment of an animal carrying a potential jail term, was once a strict liability offense. *See* ***State v. Stanfield***, 105 Wis.2d 553, 561, 314 N.W.2d 339(1982) ("[W]e conclude that the legislature did not intend to require intent or negligence as an element of the crime of mistreating animals . . .. Nor does the fact that conviction . . . carries a potential prison sentence require that we read those elements into the offense.").[5] Nevertheless, the holding in ***Stanfield*** has little, if any, significance on today's corresponding animal mistreatment statute housed in Chapter 951. Indeed, the holding of ***Stanfield*** appears to have only applied to the defendant before the Court. *See* ***id.*** at 566 (Abrahamson, J., dissenting) ("[T]his court's decision on the meaning of the 1975 statute has no precedential or long-term value; it affects only this case"). This point was made by the majority as well. *See* ***id.*** at 559 n.4 (noting that subsequent to the commencement of the action before it, the legislature amended the statute, subjecting a person to a forfeiture unless it was found he or she acted with negligence or intent).

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[5] The defendant in ***Stanfield*** was sentenced under Wis. Stat. §948.18(1) (1975), which provided: "Any person violating ss. 948.02, 948.03, 948.05, 948.06, 948.07, 948.08, 948.09, 948.13, 948.14, or 948.15 (1) may be find not more than $500 or imprisoned not more than one year in the county jail or both." 105 Wis.2d at 558 n.3.

Today's animal mistreatment statute reflects this. *See* Wis. Stat. §951.18(1) ("Any person violating s. 951.02 . . . is subject to a Class C forfeiture"). As the potential penalty increases, intent becomes a necessary element for a conviction. *See id*. ("Any person who intentionally or negligently violates [§951.02] is guilty of a Class A misdemeanor. Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement or death of an animal, is guilty of a Class I felony").

Whether intent is an element of an offense within Wisconsin's Criminal Code, as indicated in Wis. Stat. §939.23(1), is dictated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of the verbs "know" or "believe." *See also* ***State v. Alfonsi***, 33 Wis.2d 469, 486, 147 N.W.2d 550 (1967) (Hallows, J., dissenting) ("Whenever the Code intends a crime to include specific criminal intent, it so provides or exact language is used which comes under sec. 939.23, Stats., which defines when intent is an element of a crime"). Wis Stat. §939.23(3) further defines "intentionally" as when:

> the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Each of the provisions in §939.23(3) independently requires that Klingelhoets either intended to kill the dog or was aware the his actions were practically certain to cause that result. First, "intentionally" requires that "the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Because no one has suggested (nor reasonably could suggest) that Klingelhoets was in any way aware that his actions were "practically certain to cause" the death of the dog, we can focus

here on the first alternative, i.e., that he had "a purpose to do the thing or cause the result specified."

Although the felony provision of §951.18(1) at issue here requires both a particular act, i.e., violation of the cruel mistreatment statute, and a particular result, in this case, death, the court below construed the definition of intentionally in §939.23(3) disjunctively. That is, according to that court, the state need prove only one of the required purposes:

> THE COURT: . . .
>
> > And as I take a look at these [sic] 939.23(3) that section talks about whether an actor has a purpose to do a thing, which the statute does, or cause the result specified and some other things. It doesn't require that, in this case, the defendant have both intentionally – had the purpose to intend to cause a thing and, also, intend the result specified. It's one or the other.

(R68:34; App. 35).

With due respect, that interpretation makes no sense. Concededly, "or" generally is disjunctive. ***State ex rel. Rich v. Steiner***, 160 Wis. 175, 151 N.W. 256, 257 (1915). Wisconsin courts have made clear, however, that "[a] strict reading of the word 'or' should not be undertaken where to do so would render the language of the statute dubious." ***State v. Duychak***, 133 Wis.2d 307, 317, 395 N.W.2d 795 (1986). As the Supreme Court long ago explained:

> The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.

State ex rel. Rich, 151 N.W. at 257 (citation omitted).

This Court's decision in ***Duychak*** is instructive here. The Court there addressed the N.G.I. defense under Wis. Stat. §971.15(1). The Court found that the statute "is clearly written in the disjunctive," providing a defense only to a defendant who has a "mental disease *or* defect." 133 Wis.2d at 316 (quoting §971.15(1) (emphasis added by Court)). It nonetheless concluded that, given the Legislature's intent to provide a defense where the defendant's mental condition makes him unable to appreciate the wrongfulness of his conduct or to conform to the requirements of law, the statute "should not be read so as to exclude a claim that the combined effect of both a mental disease and mental defect resulted in such inability. ***Id.*** at 317.

By its terms, §939.23(3) requires the defendant to intend the thing or result "specified." Here, both the act and the result are "specified" in §951.18(1). Where the Legislature criminalizes the intentional combination of a particular act (cruel mistreatment) with a particular result (death), it certainly did not intend to provide the state with a choice of *mens rea* elements (either the purpose to commit the act *or* the purpose to cause the result, but not both). This Court "must avoid unreasonable results in the interpretation of statutes . . . ." ***Duychak***, 133 Wis.2d at 317 (citation omitted).

Rather, the only reasonable interpretation of the purpose alternative under §939.23(3) is that the state must prove the defendant's purpose with regard to whatever is "specified" in the statute defining the crime. Thus, if the statute proscribes a particular act, then the state must prove the defendant's purpose to do that act. If it proscribes a particular result, the state must prove the defendant's purpose to cause that result. And, if it proscribes, as here, both an act and a result, the state must prove the defendant's purpose to both commit the act and cause the result.

Because §951.18(1) specifies both violation of §951.02 and resulting death as elements of the felony mistreatment offense as applied here, the first sentence of §939.23(3) accordingly mandates

proof that Klingelhoets had the mental purpose both to cruelly mistreat the animal and to kill it.

Second, as demonstrated by the second sentence in §939.23(3), the legislature's use of the term "intentionally" imposes a *mens rea* requirement on all conduct which follows that term. That is, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Wis. Stat. §939.23(3). By placing the prohibited result after the term "intentionally," the plain language of §951.18(1) thus requires proof that the defendant knew (or believed, *see* Wis. Stat. §939.23(2))[6] that his actions would produce the proscribed result.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), is instructive as it demonstrates the multiple implications of the term "intentionally." The defendant in ***Spraggin*** was charged with intentionally receiving or concealing stolen property in violation of Wis. Stat. §943.34 (1985-86). It had to first be shown that the defendant intended to receive or conceal the property (or believe that the act, if successful, would cause that result). *See* Wis. JI-Criminal 1481 (1982). Second, because the phrase "stolen property" appeared after the term "intentionally," it had to be shown that the defendant knew – either subjectively or based on belief – that the property was stolen. Indeed, as the Court explained, to be convicted under this statute the state had to prove not only that the defendant had the intent to receive or conceal the property, but also that she knew that the property was stolen. ***Spraggin***, 71 Wis.2d at 617-18. *See also* ***State v. Lossman***, 118 Wis.2d 526, 534-35, 348 N.W.2d 159 (1984) (resisting an officer in violation of Wis. Stat. §946.41(1) "unambiguously" requires the defendant's knowledge of "all the specific facts which follow 'knowingly' in the statute.").

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[6] Section 939.23(2) provides that "'[k]now' requires only that the actor believes that the specified fact exists."

To be sure, there are rare instances in which the word "intentionally" appears but where the context dictates that criminal intent need not be proven as to all conduct that follows the term:

> (1) If a section contains alternatives, knowledge of the facts in only one of those alternatives need be proved, for only facts in one alternative need be proved to exist in order to make the actor's conduct criminal. (2) The next exception is the one stated in subsection (6). Crimes in which the age of a minor is a material element generally have been enacted for the protection of those minors, and it has been the policy of the law to hold a person guilty regardless of his mistake as to the minor's age. This policy is continued in the code. (3) The third exception is obvious from the wording of certain sections defining specific crimes even though the exception is not spelled out in this section. For example, in the section providing that it is a crime to intentionally burn one's own building or structure under circumstances in which one should realize he is creating an unreasonable risk of death or great bodily harm to another, it is obvious that the objective standard of 'should realize' applies to the latter part of the section, not the subjective requirement of actual knowledge.

V *Judiciary Committee Report on the Criminal Code*, Wisconsin Legislative Council at 21 (1953).

The wording of §951.18(1) does not spell out such an obvious, or even non-obvious, exception to the rule. To the contrary, §951.18(1) is indicative of the legislature's intent to require that the actor have knowledge of those facts which are set forth after the word "intentionally." That is, to convict Klingelhoets of violating §951.18(1), it must be proven, beyond a reasonable doubt, that he intended to cruelly mistreatment the animal, that his mistreatment of the animal caused its death, and that, in acting the way in which he did, he knew or believed that his actions would cause that result.

The circuit court's contrary conclusion apparently was based on

the placement of a comma between "intentionally violates s. 951.02" and "resulting in the mutilation, disfigurement or death of an animal" in §951.18(1):

> It goes on to talk about whether an actor has – must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally." I agree with Mr. Christenson's analysis grammatically or syntactically of that, of those sections, and I do find that given the [sic] 951.18, the comma that's put in there, and the way it's written, saying "resulting in the mutilation," it's a separate – it's separate from the part about saying "a person who intentionally violates 951.02." If the legislature had wanted the result intended, they could have written it that way, but it isn't written that way . . ..

(R68:34; App. 35).

However, this once again makes no sense. Contrary to the circuit court's apparent assumption, there is no express or implied "comma exception" to §939.23(3). The second sentence of §939.23(3) does not say that "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally,' *unless what follows is separated by a comma*." To paraphrase the circuit court, the Legislature certainly knew how to write a "comma exception" into §939.23(3) if it wanted to do so, but the statute contains no such exception. The plain language of the statute controls, ***Kalal***, 2004 WI 58, ¶45, and contains no such exception.

Nor does §951.18(1) suggest any such exception. Once again, the Legislature knew full well how to write a statute that would avoid the knowledge requirement of §939.23(3) by placing the prohibited result *before* the word "intentionally." Criminal statutes often refer first to the proscribed result, followed by the prohibited act and mental state. *See, e.g.*, Wis. Stat. §940.01(1); Wis. Stat. §940.03; Wis. Stat. §940.04(2)(b); Wis. Stat. §940.05(1); Wis. Stat. §940.08(1) & (2); Wis.

Stat. §940.10; Wis. Stat. §940.19(1)-(5); Wis. Stat. 940.195(1)-(5). Had the Legislature intended to exclude the proscribed results of a felony mistreatment offense from the knowledge requirement of §939.23(3), it would have written §951.18(1) consistently with the format of these other provisions as follows:

> Whoever causes the mutilation, disfigurement or death of an animal by intentionally violating s. 951.02 is guilty of a Class I felony.

"The legislature is presumed to act with full knowledge of existing laws and judicial interpretations of them." ***State v. Gordon***, 111 Wis.2d 133, 145, 330 N.W.2d 564 (1983). Its choice to write §951.18(1) in such a way as to trigger application of §939.23(3) accordingly must be assumed to have been intentional.

2. Because the evidence concededly failed to establish that Klingelhoets either intended the death of the animal or acted with the knowledge or belief that his actions would cause its death, the evidence is insufficient for conviction of felony mistreatment of an animal.

The state below properly conceded that, if §951.18(1) required proof that Klingelhoets knew or intended that his actions would cause the dog's death, "then the defendant would not be guilty of that crime." (R71:1). No one ever disputed the fact that Klingelhoets' intent was not to kill the dog, but merely to quiet it with "a little sting in the butt." (R65:124, 148, 170, 184). As the state explained its position regarding Count 1 at trial:

> I guess, what's important to note about that, those elements, is that there's no intent to kill. *I don't think that the defendant was trying to kill his neighbor's dog*, but a person doesn't have to have the intent to kill to have -- to have committed this crime.

(R65:72).

Because there was insufficient evidence that Klingelhoets either

intended to kill his neighbor's dog or believed that his actions would kill the dog, he is entitled to dismissal of that charge. *E.g.*, ***Wulff***, *supra*. However, the insufficiency concerns the element of the felony that Klingelhoets have the knowledge or intent that his actions kill the animal. Such knowledge or intent is not an element of the lesser, misdemeanor offense of intentionally or negligently violating the cruel mistreatment statute, Wis. Stat. §§951.02 & 951.18(1). Because the evidence remains sufficient on the lesser charge, and the jury in fact was instructed on that charge (R66:209-212), the Court may order substitution of a conviction for that charge in place of the invalid felony conviction. ***Myers***, 158 Wis.2d at 371-74.

C. The Evidence Was Insufficient to Establish that the Pellet Gun was a "Deadly Weapon" as Used Here as Required for Conviction under Wis. Stat. §951.09 in Count 2

In order to obtain a conviction under Wis. Stat. §951.09 as alleged in Count 2, the state must be prove that the defendant shot, killed, or wounded a tied or confined animal "with a firearm, *or with any deadly weapon*...." A pellet gun is not a firearm. ***Rafferty v. State***, 29 Wis.2d 470, 475, 138 N.W.2d 741 (1966). Accordingly, the conviction's validity turns on whether the pellet gun was a "deadly weapon."

Intriguingly, however, neither Wisconsin case law nor its statutes provide a definition of the phrase "deadly weapon" – the closest being weapons which are described as "dangerous." *See* Wis. Stat. §939.22(10).[7] Accordingly, at trial, the court used a definition

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[7] Wis. Stat. §939.22(10) defines a "dangerous weapon" as "any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily (continued...)

from a United States Supreme Court case, ***Washington v. Recuenco***, 548 U.S. 212, 226 (2006) (Stevens, J., dissenting) (defining "deadly weapon" as "any implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death").

Because no rational trier of fact could have found all elements of Wis. Stat. §951.09 under the instructions given based on the evidence against Klingelhoets, the conviction must be vacated and the charge dismissed.

1. The evidence was insufficient to convict Klingelhoets for using a deadly weapon

Simply put, although a pellet gun has the capacity to cause death – as it did in this case – the manner in which it was used here–shooting at an animal from a distance of at least 144 feet away – was not likely to produce or easily and readily capable of producing death. What happened in this case was undoubtedly a freak occurrence.

Pursuant to Wis. Stat. §951.09, "No person may shoot, kill or wound with a firearm, or with any deadly weapon, any animal that is tied, staked out, caged or otherwise intentionally confined in an artificial enclosure, regardless of size." At the close of the evidence, the circuit court instructed the jury on §951.09 as follows:

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> 1. The defendant shot, killed, or wounded an animal with a deadly weapon.
>
> 2. The defendant intended to shoot, kill, or

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[7] (...continued)
harm."

wound an animal with a deadly weapon.

3. The animal was tied.

"Deadly weapon" means an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.

(R66:213).

Given that the first two shots from Klingelhoets' pellet gun barely raised a welt on the animal's behind, and given the totally freak nature of the wound that resulted in its death, no rational jury could conclude beyond a reasonable doubt that the pellet gun, as used, was "likely to produce or may easily and readily produce death." The freak nature of the injury here is the exact opposite of that required for a deadly weapon under the instruction.

While Wisconsin courts have held that a pellet gun is a *dangerous* weapon, *see, e.g.*, ***Rafferty v. State***, 29 Wis.2d 470, 477, 138 N.W.2d 741 (1966) ("We conclude that a pellet gun used as a compressed air weapon is a dangerous weapon calculated or likely to produce great bodily harm"); ***State v. Antes***, 74 Wis.2d 317, 325, 246 N.W.2d 671 (1976) (use of unloaded pellet gun as a bludgeon constitutes a dangerous weapon); ***State v. Norris***, 214 Wis.2d 25, 30 n.4, 571 N.W.2d 857 (Ct. App. 1997) (same); ***In Interest of Michelle A.D.***, 181 Wis.2d 917, 925-26, 512 N.W.2d 248 (Ct. App. 1994) (affirming the conclusion in ***Rafferty*** as a matter of law and extending it to BB guns, as well), counsel is unaware of any Wisconsin court which has held, as a matter of law, that a pellet or BB gun is a *deadly* weapon.

A dangerous weapon is not necessarily a deadly weapon. A deadly weapon, under the instruction here, must be both capable of inflicting death and, "from the manner in which it is used, . . . likely to produce or may easily and readily produce death." A dangerous weapon, on the other hand, includes "any device designed as a weapon and capable of producing death *or great bodily harm*" or "any other

device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death *or great bodily harm*." Wis. Stat. §939.22(10) (emphasis added).

Moreover, the rationale for deeming a pellet gun a dangerous weapon does not support finding it to be a deadly weapon under the instructions here. In ***Rafferty***, the defendant was charged with robbery while armed with a dangerous weapon for holding up a gas station. The defendant pulled a pellet gun on the attendant, ordered him to lie on the floor and, at some point, stuck him on the head with the weapon, causing the weapon to discharge, lodging a pellet in a wall. 29 Wis.2d at 477. A prior statement of the current definition, "dangerous weapon" was defined at the time as

> any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

Id. at 475.[8] Thus, the Court explained, the question was "whether a pellet gun is a 'device designed as a weapon and capable of producing death or great bodily harm.'" ***Id.***

Per the statutory definition, a pellet gun could potentially fall into one of three categories, thus making it a dangerous weapon: (1) a firearm; (2) a device designed as a weapon and capable of producing death or great bodily harm; and (3) any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm. *See* Wis. Stat. §939.22(10).

As to the first category, the Court held that a pellet gun is not a

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[8] "Dangerous weapon," currently is defined in Wis. Stat. §939.22(10). *See* footnote 7, *supra*.

firearm. ***Rafferty***, 29 Wis.2d at 475. In regards to the second, the Court concluded that it was clear that a pellet gun is a weapon. Moreover, because it was discharged at close range, embedding a pellet in a wall and evincing its "striking power," it was likely to produce great bodily harm. ***Id.*** at 477. Finally, when used as bludgeon, the Court explained, a pellet gun becomes an instrumentality calculated to produce great bodily harm. ***Id.*** Notably, however, the Court did not describe a pellet gun – even when discharged at close range and used as a bludgeon – as capable of producing or likely to produce death.

The manner in which Klingelhoets used the pellet gun does not make it a deadly weapon, i.e., a weapon that is, in the manner in which it was used, "likely to produce or may easily or readily produce death." The pellet gun was fired from at least 144 feet (near the upper end of its range, according to Detective Sosinski), and the evidence demonstrates that the first two shots barely broke the skin. If a weapon is "likely to produce or may easily or readily produce death" in the manner in which this one was used, one would expect it would cause much more than just a welt from a direct hit. The veterinarian's shock at the freakish nature of the mortal wound further corroborates the fact that death as a result of Klingelhoets' use of this gun was highly *unlikely*.

This Court must not fall into the logical fallacy that, because the animal in fact died, the pellet gun must have been a deadly weapon. It does not follow logically from "if the gun is a deadly weapon, then it is likely to cause death" to "the gun caused a death and therefore must be a deadly weapon." This is the "affirming the consequent" or "converse error" of logic committed by reasoning in the form:

1. If P, then Q.

2. Q.

3. Therefore, P.

An argument of this form is invalid, i.e., the conclusion can be false even when statements 1 and 2 are true. Since P was never asserted as the *only* sufficient condition for Q, other factors could account for Q (while P was false).

Nor does the circuit court's rationale for finding sufficient evidence hold water. According to that court:

> I am troubled by the argument, here, about whether the result proves the fact that it was a deadly weapon, whether this was some kind of freak accident. You know, there wasn't a lot of testimony about whether the pellet gun was, as used in this particular case, a deadly weapon and, in part, I'm struggling with the idea of whether or not the evidence was sufficient because -- because the result that happened and, also, because of the fact that I think it probably is common knowledge that pellet guns are deadly. People buy them for such purpose. And that's why I asked you whether something more was needed here. Should there have been expert testimony? Should there have been, maybe, greater testimony about, you know, apart from just human experience that pellet guns are bought and sold for purposes of shooting animals and what appears to be an injury in this case which killed the animal by entering, I guess, the intervertebral spaces on this dog. Now, could somebody have made that shot again? I don't know.
>
> *What I think I'm left with is the testimony of the officer or the detective generally. It was rather general testimony to say that these guns are used for hunting, that it -- that the range of the gun, that this was probably at its limit, if you will. Words to that effect. And I find that that was probably sufficient evidence to say that this particular gun, under these circumstances, was a deadly weapon.* It might have been better or nicer to have more testimony, but I think the question here is whether this was sufficient testimony to prove that this was a deadly weapon and I think the description by the officer or the detective, rather, was sufficient to cover that subject that

> that was a deadly weapon that is able to -- able to and likely to cause death. And I know that he -- or easily or readily produce death. He didn't use those magic words, but I think that his testimony was adequate to get across the idea that that's what this weapon is used for and that's what it can do and inflict. There certainly wasn't testimony to the effect of -- there wasn't any kind of energy calculation to say what was necessary to kill this animal at a certain distance and whether this gun could produce that, but I none -- I still find that the officer's testimony was adequate to express to the jury that this gun could kill things and that that's -- that that was likely. And I will deny the motion with regard to that.

(R68:30-32; App. 31-33 (emphasis added)).

Evidence, or the juror's "common knowledge or experience," if any,[9] that a pellet gun can be used for hunting and "could kill things" is not sufficient to support beyond a reasonable doubt the required finding that the particular pellet gun at issue here was, "from the manner in which it is used, . . . likely to produce or may easily and readily produce death." Any number of different weapons, from sticks and homemade slingshots to high powered rifles, can be used for hunting. Knowing that something may have the power to kill under some circumstances, however, does not also imply knowledge of whether it can do so as used in a particular case. A weapon that may be very lethal at three feet may have no effect at 30. Likewise, a weapon that may be lethal to a bird or small squirrel at a particular distance may have no effect on a larger animal, such as a raccoon or a small dog, at the same distance. Accordingly, making the leap from "it can be used for hunting" to "it is a deadly weapon on the facts here" is pure speculation.

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[9] There was no evidence that any of the jurors had any experience, let alone relevant experience, with pellet guns. Indeed, even Detective Sosinski admitted that, although he owned a different type of pellet gun, he had never analyzed or tested the capabilities of a pellet gun (R65:135).

Nor is the evidence sufficient based on Detective Sosinski's belief that pellet guns such as Klingelhoets' have a "range" of 150 to 200 feet (R65:129). Even if we ignore the fact that Sosinski admitted having no basis for supporting this belief (*id.*:135), the state proffered no explanation of what Sosinski meant by "range." The jury accordingly was left to speculate whether this is the "range" for which a pellet can kill, that within which the pellet could dent a paper target, or merely that within which it might remain minimally airborne.

A conviction cannot be based, as here, upon a string of assumptions, speculation and guesswork. Where, as here, the desired inference can be attained only by "building an inference upon an inference," the result is speculation rather than a rational and permissible process of inferring one fact from another. ***Home Savings Bank v. Gertenbach***, 270 Wis. 386, 404, 71 N.W.2d 347 (1955).

At best, the evidence supports a speculative possibility that the pellet gun might possibly fall within the instruction's definition of "deadly weapon." Conviction of a criminal offense cannot be based upon such speculation. *E.g.*, ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 116, 194 N.W.2d 808 (1972).[10]

Because no rational trier of fact could have found that the state proved beyond a reasonable doubt that the pellet gun used by Klingelhoets was a "deadly weapon," the evidence was insufficient for conviction on Count 2. The conviction on that count accordingly must be vacated and the charge dismissed. *E.g.*, ***Wulff***, *supra*.

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[10] Even a civil verdict cannot be based upon speculation of this kind. ***Foseid v. State Bank of Cross Plains,*** 197 Wis.2d 772, 790-91, 541 N.W.2d 203 (Ct. App. 1995) (verdict cannot be based on "conjecture and speculation"); ***Cudd v. Crownhart,*** 122 Wis.2d 656, 662, 364 N.W.2d 158 (Ct. App. 1985) (verdict cannot be based on "mere speculation").

II.

BECAUSE THE INSTRUCTIONS PERMITTED CONVICTION WITHOUT A JURY FINDING BEYOND A REASONABLE DOUBT OF ALL FACTS NECESSARY FOR CONVICTION ON THE FELONY COUNT, KLINGELHOETS IS ENTITLED TO A NEW TRIAL ON THAT COUNT

As demonstrated in Section I,B, *supra*, felony mistreatment of an animal under Wis. Stat. §951.18(1) requires proof beyond a reasonable doubt that the defendant either intended the prohibited consequence or at least knew or believed that consequence would result from his actions. At the time of trial, however, both the parties and the circuit court mistakenly believed that no such proof was required. *E.g.*, (R65:12, 72). That same mistaken belief is evident from the instructions submitted to the jury:

> Intentionally mistreating an animal, as charged in Count 1 of the Information and as defined in Section 951.02, 951.18(1) of the Criminal Code, is committed by one who intentionally treats any animal in a cruel manner and such treatment results in the animal's death.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> 1. The defendant treated an animal in a cruel manner. "Cruel" means causing unnecessary and excessive pain or suffering or unjustifiable injury or death.
>
> 2. The defendant intentionally treated an animal in a cruel manner. "Intentionally" requires that the defendant acted with a mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result.

3. The defendant's treatment of an animal in a cruel manner resulted in the animal's death.

(R66:208-09).

Because the jury instructions permitted a conviction without the required finding that Klingelhoets intended to kill the animal, he was denied the right to a jury verdict on all facts necessary for conviction even if the evidence was minimally sufficient on that charge.

Although trial counsel failed to object to the defective jury instructions, and thus waived Klingelhoets' right to appellate review of this claim, Wis. Stat. §805.13; *see* ***State v. Schumacher***, 144 Wis.2d 388, 398-40, 424 N.W.2d 672 (1988), reversal remains appropriate on either of two grounds. First, the failure to require proof of all necessary elements of the charged offense beyond a reasonable doubt resulted in the real controversy not being fully tried, justifying reversal in the interests of justice under Wis. Stat. §752.35. Second, trial counsel's unreasonable failure to object to the defective instruction denied Klingelhoets the effective assistance of counsel.

A. The Right to a Jury Verdict Beyond a Reasonable Doubt on All Facts Necessary for Conviction

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358, 364 (1970). The Sixth Amendment, as enforced against the states through the Fourteenth, generally mandates that the jury, rather than the judge, make that determination. *E.g.*, ***Sullivan v. Louisiana***, 508 U.S. 275, 277 (1993); ***Apprendi v. New Jersey***, 530 U.S. 466, 476 (2000) (Constitutional due process and jury trial guarantees require that any fact other than prior conviction which increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

The Supreme Court accordingly has long recognized that instructions which relieve the state of its burden of proving all facts or elements necessary for conviction beyond a reasonable doubt violate due process. *E.g.*, ***California v. Roy***, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); ***Carella v. California***, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). Wisconsin authority is in accord. *E.g.*, ***State v. Howard***, 211 Wis.2d 269, 564 N.W.2d 753 (1997); ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994).

B. Reversal Is Appropriate in the Interests of Justice

Even if the Court does not otherwise grant Klingelhoets relief, the instructional error justifies reversal in the interests of justice under Wis. Stat. §752.35 because the instructions' failure to require proof beyond a reasonable doubt on all facts necessary for conviction resulted in the real controversy not being fully tried, as well as a miscarriage of justice. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's broad discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id.*** at 13.

This Court may exercise its discretion under §752.35 without regard for whether the circuit court misused its discretion in denying reversal in the interests of justice. *See* ***Stivarius v. DiVall***, 121 Wis.2d 145, 152 & n.5, 358 N.W.2d 530 (1984).

Although trial counsel's failure to object to the jury instructions means Klingelhoets cannot challenge those instructions as of right, Wis. Stat. §805.13, ***Schumacher***, 144 Wis.2d at 398-40, the Supreme Court has recognized that reversal in the interests of justice is justified when, as here, "an erroneous instruction prevented the real controversy in a case from being tried." ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis.2d 570, 754 N.W.2d 150 (citing ***State v. Bannister***, 2007 WI 86, ¶41, 302

Wis.2d 158, 734 N.W.2d 892).

The real controversy in this case was whether the facts proved Klingelhoets' guilt of *all* the elements of the offense beyond a reasonable doubt. By allowing the jury to convict based only on a finding of the intent to cruelly mistreat an animal rather than the required intent to cause death, the jury instructions denied Klingelhoets the right to a jury verdict beyond a reasonable doubt on all facts necessary for conviction. The state conceded that Klingelhoets did not intend to kill the dog (R65:72). By effectively taking one element of the offense from the jury, therefore, the erroneous instructions prevented the real controversy regarding that element from being tried.[11]

The interests of justice also require grant of a new trial, ***State v. Henley***, 2010 WI 97, ¶63, 328 Wis.2d 544, 787 N.W.2d 350, because it is probable, indeed inescapable, given the erroneous jury instructions, that justice has miscarried in this case. ***Vollmer***, 156 Wis.2d at 19. With the proper jury instruction, the outcome in this case would have been different, as the state even admitted that it "[did not] think that the defendant was trying to kill his neighbor's dog . . . ." (R65:72).

Even if the Court should find sufficient evidence for conviction on the felony mistreatment count, therefore, the weakness of the state's case on the issue of intent and the nature of the identified error as directly relieving the state of its obligation to prove all facts necessary for conviction beyond a reasonable doubt cannot help but create "a substantial probability of a different result on retrial." ***Vollmer***, 156 Wis.2d at 16-17.

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[11] Under the "real controversy not tried" category of "interests of justice" cases, "it is unnecessary . . . to first conclude that the outcome would be different on retrial" prior to ordering a new trial. ***Vollmer***, 156 Wis.2d at 19. As amply demonstrated throughout this motion, however, the facts of this case establish just such a probability of acquittal upon retrial.

C. Klingelhoets Was Denied the Effective Assistance of Counsel

Klingelhoets was denied the effective assistance of counsel at trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. As Klingelhoets' trial counsel, Robert Bellin, conceded at the post-conviction hearing, there was no legitimate tactical basis for his failure to object to the fatally defective felony mistreatment instruction (R68:5-6). Moreover, such failure was unreasonable under prevailing professional norms, and Klingelhoets' defense was prejudiced by it.

1. Standard for ineffectiveness

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 688 (1984)). It is not necessary to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the ***Strickland*** test is met when counsel's errors resulted from oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354 (quoting ***Strickland***, 466 U.S. at 693). Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had

a reasonable doubt respecting guilt." ***Id.*** at 357.

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" ***Id.***, (quoting ***Strickland***, 466 U.S. at 694). If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695. In assessing resulting prejudice, therefore, the Court must assess the cumulative effect of *all* errors and may not merely review each in isolation. *E.g.*, ***Washington v. Smith***, 219 F.3d 620, 634-35 (7th Cir. 2000); ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis.2d 571, 665 N.W.2d 305.

Once the facts are established, each prong of the analysis is reviewed *de novo*. ***State v. Cummings***, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996).

2. Trial counsel's performance was deficient

A reasonable attorney in trial counsel's position would not have failed to object to instructions that relieved the state of its obligation to prove all elements of the charged offense beyond a reasonable doubt. There is no possible strategic or tactical benefit to be gained by such a failure, and Attorney Bellin concedes that he merely overlooked the instructional error (R68:5-6).

"Ignorance of well-defined legal principles, of course, is nearly inexcusable." ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583. Moreover, counsel is expected to research and correctly interpret relevant portions of the law. ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis.2d 571, 665 N.W.2d 305.

This is not a case where the "unsettled" nature of the law would excuse attorney error. *Compare* ***State v. Thayer,*** 2001 WI App 51, ¶14,

241 Wis.2d 417, 626 N.W.2d 811.[12] Although no prior decision had applied the requirements of §939.23(3) specifically to felony mistreatment under §951.18(1), the requirements of §939.23(3) and their application to *every* criminal statute were well-established at the time of trial. *See* ***Alfonsi***, *supra*. The Supreme Court has held that ignorance of how general legal standards would apply to specific facts is not acceptable even from a *pro se* defendant. *See* ***State v. Allen***, 2010 WI 89, ¶91, 328 Wis.2d 1, 786 N.W.2d 124. No lesser standard reasonably can be applied to trained legal counsel.

Regardless of whether the law on a particular point is "settled," a lawyer must act reasonably in the circumstances. If the attorney knows or should know that a potential legal objection exists and that success on that objection would further the defense, the question is whether the attorney acts reasonably by failing to raise it, not whether the law is unsettled. A reasonable attorney knows that only by objecting when the law is unsettled will the issue be preserved so that the law can be settled on appeal.

Bellin, moreover, never attempted to excuse his failure to object based on some perceived uncertainty in the law. To the contrary, he candidly conceded that he was fully aware at the time both of the requirements of §939.23(3) and how they operate, as well as the fact that Klingelhoets' intent was "the crux of the case." He never determined that §939.23(3)'s definition of "intentionally" did not apply to the criminal statute at issue here; he simply did not think of it. (R68:5-9). His failure to object was due to oversight rather than any belief or determination that the law was unsettled such that an objection would be inappropriate.

"'Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not

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[12] ***Thayer's*** validity currently is before the Wisconsin Supreme Court. ***State v. Domke***, Appeal No. 2009AP2422-CR (review granted February 8, 2011).

construct strategic defenses which counsel does not offer.'" ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004) (quoting ***Harris v. Reed***, 894 F.2d 871, 878 (7th Cir. 1990)). *See also* ***Kimmelman v. Morrison***, 477 U.S. 365, 386-87 (1986) (same).

Deficient performance is shown where, as here, counsel's failures are the results of oversight rather than a reasoned defense strategy. *E.g.*, ***Wiggins***, 539 U.S. at 534; ***Moffett***, 147 Wis.2d at 354.

3. Trial counsel's deficient performance prejudiced Klingelhoets' defense at trial

For the reasons already stated, there is more than a reasonable probability of a different result had trial counsel not unreasonably failed to object to the defective jury instruction. Such an objection would have guaranteed either that a proper instruction requiring proof beyond a reasonable doubt of Klingelhoets' intent to kill the animal would have been given or that the failure to do so would have been reversed on appeal. Such an instruction almost certainly would have resulted in acquittal given that even the state candidly admitted that it "[did not] think that the defendant was trying to kill his neighbor's dog . . . ." (R65:72). As explained in Section I, B, *supra,* moreover, substantial reason exists why the jury would reach the same conclusion regarding Klingelhoets' lack of intent to cause the animal's death.

CONCLUSION

For these reasons, Shawn M. Klingelhoets respectfully asks that the Court reverse the order denying his postconviction motion, dismiss the charge under Count 2, and either dismiss the felony mistreatment charge or grant him a new trial on Count 1.

Dated at Milwaukee, Wisconsin, June 6, 2011.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,843 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

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

_____
Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 6th day of June, 2011, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Shawn M. Klingelhoets to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak