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

---

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

Robert R. Henak
State Bar No. 1016803
James C. Remington
State Bar No. 1079773

HENAK LAW OFFICE, S.C.
316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

Other Authorities

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EITHER COUNT

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

While the state is correct that Klingelhoets' entitlement to relief turns on statutory interpretation, it misconstrues both the applicable statutes and Klingelhoets' argument. The combination of the definition of "intentionally" in Wis. Stat. §939.23(3) and the use of that term in the definition of the offense in Wis. Stat. §951.18(1) dictates that conviction requires that Klingelhoets intended to kill the dog.

First, the state misconstrues §939.23(3), which defines "inten-

tionally" 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."

At issue is the meaning of "or" in the first alternative provided by §939.23(3), where the actor "has a purpose to do the thing or cause the result specified." Contrary to the state's assertion, Klingelhoets does not construe "or" in §939.23(3) as "and." That would make no sense because there are criminal provisions that specify only an intentional act or only an intentional result, so it is impossible in some cases to have the purpose both to do the thing and to cause the result.

Rather, the question is whether "or" is inclusive or exclusive in this specific context. "Or" may be *inclusive* in the sense of "and/or," i.e., "A or B or both." Alternatively, "or" may be *exclusive* in the sense of "A or B but not both." The state construes "or" in this context as exclusive. The plain meaning and context of the provision, however, dictates otherwise.

Whether "or" is inclusive or exclusive generally turns on context. Thus, a menu providing a choice of "soup or salad" likely is exclusive; one would not assume that choosing both is a viable option. On the other hand, a job advertizement providing that "applicants must have a PhD or teaching experience" would not rationally be construed as excluding someone with both. *See also* ***State v. Duychak***, 133 Wis.2d 307, 317, 395 N.W.2d 795 (1986) ("mental disease or defect" as used in Wis. Stat. §971.15(1) inclusive, i.e., mental disease or mental defect or both).

As demonstrated in Klingelhoets' opening brief, construction of "purpose to do the thing or cause the result specified" rationally incorporates the inclusive meaning of "or," with the required intent turning on the thing or result specified in the substantive criminal statute.

Accordingly, when the statute defining the crime specifies a particular act, the defendant must have the purpose of committing that act. Where that statute specifies a particular result, the defendant must have the purpose of causing that result. And when, as here, the statute specifies both an act and a result, the defendant must have the purpose both to commit the act and to cause the result. This is the only rational interpretation given the express statutory reference to the "thing or . . . result specified." This language also is much more efficient than detailing each alternative in the statute such as set forth in this paragraph.

Contrary to the state's assertion, State's Brief at 11, this common sense construction of §939.23(3) is further supported by the fact that "or" is used twice in its first sentence in two significantly *different* contexts. *See* ***State v. Cole***, 2003 WI 59, ¶35 n.35, 262 Wis.2d 167, 663 N.W.2d 700 (citation omitted) ("We reject an interpretation which ascribes different meanings to the same word as it variously appears in a statute *unless the context clearly requires such an approach*" (emphasis added)).

Again, that section 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 the first context, therefore, the state must prove that the defendant "*either* has a purpose [of something] *or* is aware [of something]." In the second, the "purpose" prong is broken down into "has a purpose to do the thing *or* cause the result *specified*." [1]

Under common usage, the "either . . . or" formulation of the first context is exclusive. That is, the state need prove one or the other but not both. *E.g.*, *X Oxford English Dictionary* at 882 (2d ed. 1989) (defining "either/or" - "a secondary function is to emphasize the mutual

---

[1] Although the state twice attaches "either" to the purpose clause, State's Brief at 9, 10, that appears to be oversight, as it later acknowledges that "either" distinguishes purpose from awareness rather than the two purposes identified in the statute. *Id.* at 12.

exclusiveness, = either of the two, but not both").

The Legislature, however, did not use this "either . . . or" exclusive disjunction language in defining the purpose alternative. Rather, it merely used "or" while referring to both the thing or act specified in the statute and the result specified in the statute. "*Exclusive or*," http://en.wikipedia.org/wiki/Exclusive_or ("In English, the construct 'either ... or' is usually used to indicate exclusive or and 'or' generally used for inclusive").

Because the Legislature used different formulations in the two contexts, it must be assumed that it intended different meanings, with "either . . . or" bearing its normal meaning of identifying exclusive alternatives while "or" in the "purpose" clause and without the modifier bears its common meaning as inclusive.

The state's analysis of the statute's wording accordingly must fail. Not only is §939.23(3) more rationally construed as defining the required purpose in terms of act or result or both depending on what is specified in the criminal statute, but the Legislature's use of different language in the purpose clause indicates a different meaning from the "either . . . or" language it also used.

Equally misplaced is the state's rejection of the requirement in the second sentence of §939.23(3) imposing a *mens rea* requirement on everything following the term "intentionally." State's Brief at 13-21; *see* Klingelhoets' Brief at 12-15. The plain meaning of that provision is not rendered "absurd" by either the hazing statute, Wis. Stat. §948.51(2), or contributing to the delinquency of a child statute, Wis. Stat. §948.40(1). In each, the penalty provision identifying the prohibited result is contained in a separate subsection than the provision containing the "intentionally" requirement. By its terms, therefore, the second sentence of §939.23(3) does not apply.

Section §951.18(1), on the other hand, renders a felon of "[a]ny person who intentionally violates s.951.02, resulting in the mutilation, disfigurement or death of an animal." Because "resulting in . . . death" follows "intentionally" and is necessary to the crime charged, Klingelhoets was required to intend that result under the plain language

of §939.23(3).

Homicide resulting from negligent control of a vicious animal in violation of Wis. Stat. §940.07 likewise does not render the plain meaning of §939.23(3) "absurd." Section 940.07 provides that

> Whoever knowing the vicious propensities of any animal, intentionally allows it to go at large . . ., if such animal, while so at large . . ., kills any human being . . .[is guilty of a felony].

As noted in Klingelhoets' Brief at 13, the Judiciary Committee Report recognizes that there are rare instances in which context dictates that criminal intent need not be proven as to all conduct that follows the term "intentionally." Section 940.07 is such a case, falling within the third category:

> 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.

V *Judiciary Committee Report on the Criminal Code*, Wisconsin Legislative Council at 21 (1953). Section 940.07's specific identification of the knowledge required (i.e., of the vicious propensities) and the requirement of an independent act of will by the animal are inconsistent with requiring knowledge the animal will kill. Also, if the defendant had such knowledge, the offense would be intentional homicide, not negligent.

The state's reliance on the circuit court's "comma exception" to the plain meaning of §939.23(3) also is misplaced. State's Brief at 17-18. As support for that exception, it relies upon a committee report to the unsuccessful 1951 Senate Bill that preceded the 1953 Criminal Code revisions:

> Exactly what intent is required in a particular crime must depend on what words or groups of words "intentionally" or "with intent to" modifies in that crime. In general, it can be said that they modify the whole clause which follows them.

VII *Judiciary Committee Report on the Criminal Code*, Wisconsin

Legislative Council, at 18 (1950) (Supp. App. 1-3).

Critically, however, the version of the Criminal Code revisions referenced in that report was not enacted. Moreover, the "intent" provision in that bill was substantially different than that subsequently enacted in Wis. Stat. §939.23. Section 939.23, as enacted, did not reflect the restrictive, "whole clause" language of the committee report, instead providing that the *mens rea* requirement extends to "those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'"

If the Legislature intended to enact the "comma exception" by limiting the *mens rea* requirement to the following clause as suggested by the 1950 Committee Report, it would have done so and knew how to do it. It chose not to do so, enacting instead the inclusive language of §939.23(3).

Notably, the state itself seems to acknowledge this point. It cites the 1971 version of the cruelty to animals statute as "prohibit[ing] the intentional killing of animals." State's Brief at 19. However, that statute applied to a person who "(a) Intentionally tortures any animal, or without justification kills any domestic animal of another without the owner's consent." Wis. Stat. §947.10(1)(a) (1971). Given the placement of the comma after "animal," application of the state's interpretation of §939.23(3) here would bar application of "intentionally" beyond that comma to "kills any domestic animal." Yet, the state concedes that it does. *See also* ***State v. Stanfield***, 105 Wis.2d 553, 560, 314 N.W.2d 339 (1982) (holding that this provision "explicitly required proof of intent").

The state's legislative history argument, State's Brief at 19-20, ignores the fact that it is the penalty provision, §951.18(1), and not Wis. Stat. §951.02, that imposes the *mens rea* requirement.

Finally, the state's overall analysis seems to assume that criminal statutes are interpreted broadly to uphold the conviction. That is not the case. Penal statutes are to be construed strictly to safeguard the defendant's rights. *See* ***State v. Kittilstad***, 231 Wis.2d 245, 266-67, 603 N.W.2d 732 (1999). Similarly, when the meaning of a criminal statute

is in doubt, it should be interpreted in favor of the accused. *See* ***State v. Cole***, 2003 WI 59, ¶13, 262 Wis.2d 167, 663 N.W.2d 700.

Applying the plain language of both sentences of §939.23(3) to §951.18(1) independently produces the same result - Klingelhoets' conviction for felony mistreatment of an animal required proof beyond a reasonable doubt that he intended to kill the animal. Because the evidence concededly failed to support such a finding, the evidence was insufficient for conviction. Klingelhoets therefore is entitled to dismissal of the felony conviction and entry of a conviction for misdemeanor mistreatment of an animal. Klingelhoets' Brief at 15-16.

B. 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

The validity of Klingelhoets' conviction under Count 2 turns on whether the state presented sufficient evidence that the pellet gun used in this case was a "deadly weapon." The jury instructions defined "deadly weapon" as:

> 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). This definition therefore requires two independent elements. It is insufficient that the implement has "the capacity to inflict death." Rather, it also must be "likely to produce" death or "easily and readily produce death" in the "manner in which it is used."

Despite the totally freak nature of the wound that killed the dog, the state insists that the death itself proves that the pellet gun was a deadly weapon. State's Brief at 22-26. As such, the state ignores the requirement the weapon not only that be capable of causing death and in fact cause death, but that death also is "likely" or "easily and readily" produced by the "manner in which it is used." According to the state, because the pellet gun caused the death, that death must have been "likely" or "easily and readily" produced.

The state's argument reflects exactly the logical fallacy Klingelhoets warned against in his opening brief. Klingelhoets' Brief at 20-21. Simply put, just because death occurred in this case, does not mean that, from the manner in which it was used, the pellet gun was likely to produce or may easily and readily produce death.

Given the state's argument, the fact that someone was struck by lightning would render being struck by lightning a likely or easily and readily produced event. Yet, we know from the National Weather Service, that the odds of a person being struck by lightning during an 80 year period is 1:10,000. National Weather Service (2011), http://www.lightningsafety.noaa.gov/medical.htm. *See also* Ronald Bailey, *Don't Be Terrorized*, August 11, 2006, http://reason.com/archives/2006/08/11/dont-be-terrorized (comparing the long odds of being killed by incidents such as automobile accident, murder, falling, airplane accident, or terrorism).

Likewise here, the fact that the dog died does not itself make death a likely or easily and readily produced result of shooting at the dog with this pellet gun from 144 feet away. The fact that two other shots barely broke the skin alone demonstrates the freakish nature of the death here. If the velocity of the pellets shot in this case was barely sufficient to break the skin, one could hardly expect it sufficient to kill at all, let alone easily.

The veterinarian's testimony about the freakish nation of the injury here further nullifies the state's argument that the fact of death means that this pellet gun was likely to produce death in the manner in which it was used (R65:115-16). The fact that "the specific injury was unlikely," as conceded by the state, State's Brief at 24, necessarily rebuts its assertion that the death was "likely."

Also, it is not enough that "[t]he veterinarian gave no indication that she was in any way surprised that a pellet from a pellet gun could kill the dog," or that she "did not even hint that the specific injury in this case was the only type of injury that the dog could have suffered that would have caused its death." State's Brief at 24. The burden was on the state to prove that death was likely from Klingelhoets' actions.

Its speculation of what the veterinarian might have said on that point if asked is not evidence.

Finally, the state suggests that applying the definition of "deadly weapon" it agreed to at trial would mean that a shotgun or handgun that causes minor injury in particular circumstances would not be a deadly weapon. State's Brief at 26. First, both of those objects are firearms, and thus explicitly covered by Wis. Stat. §951.09. A pellet gun is not a firearm. ***Rafferty v. State***, 29 Wis.2d 470, 475, 138 N.W.2d 741 (1966).

Second, even if not otherwise covered by the statute, the question is whether the object is likely to produce or may easily and readily produce death from the manner in which it is used. A shotgun fired beyond its normal range, or when loaded with birdshot, would be unlikely to kill a cow, for instance, whatever the likelihood of death under other circumstances.

In this case, contrary to the state and circuit court's position, we are assisted by the fact that the first two pellets were capable of causing only minor injuries, barely breaking the skin. That two out of three pellets did not cause muscle damage – let alone death – means that the manner in which the pellet gun was used was not likely or readily and easily death-producing. Indeed, this is why it is significant that the treating veterinarian was surprised that a pellet somehow managed to find its way through an 8-millimeter cavity in the animal's spinal column (R65:115-16). Klingelhoets could not have made that shot and caused that result again if he tried – namely, it was a freak accident.

The fact that a particular weapon *can* kill in the manner in which it is used does not establish that the weapon is *likely* to kill under those circumstances. The state proved only the former. Conviction required proof of both. The evidence accordingly was insufficient on Count 2 and Klingelhoets is entitled to dismissal of that count.

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

The state does not dispute that, if intent to kill the animal is a required element of the mistreatment count, Klingelhoets is entitled *at least* to a new trial with proper instructions. State's Brief at 27-28.

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, if that is not granted, grant him a new trial on Count 1.

Dated at Milwaukee, Wisconsin, September 26, 2011.

Respectfully submitted,

SHAWN M. KLINGELHOETS,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

Attorney Robert R. Henak
State Bar No. 1016803
James C. Remington
State Bar No. 1079773

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

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 2,964 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

Klingelhoets Reply Brf.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 27th day of September, 2011, I caused 10 copies of the Reply Brief 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

Klingelhoets Reply Brf.wpd