

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0227-CR

Cir. Ct. No. 01CM000067

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID G. MADDOX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ David Maddox appeals from a judgment after a jury trial convicting him of four misdemeanor counts of causing injury by intoxicated operation of a motor vehicle, contrary to WIS. STAT. § 346.63(2)(a)1.² He argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² WISCONSIN STAT. § 346.63(2)(a)1 provides:

(continued)

that (1) the evidence was insufficient to show that he caused an injury; (2) the real controversy was not fully tried when the court instructed the jury that injury includes physical pain; and (3) he is entitled to be resentenced because the court's order requiring him to write a letter of apology to the victims was not authorized by the statute. We reject his arguments and affirm the judgment.

¶2 While operating his vehicle under the influence of an intoxicant, Maddox struck another vehicle in which there were four adults and a baby. One occupant, Amy Laird, testified that as a result of the accident she suffered pain in her shoulder and neck. She also had scrapes and severe bruises on her right arm and leg. Another occupant, Erik Huebler, testified that after the accident he felt pain in his neck, midsection, trapezius, rhomboids, erector spine and levator scapula. He eventually had to have surgery to relieve the pain in his low back and leg. The two-month old baby had a bruise on his forehead. Nancy Huebler testified that she had a lot of pain in her lower back, numbness in her left foot, and some pain in her neck and shoulder. The remaining occupant indicated that he was not injured.

Operating under influence of intoxicant or other drug.

....

(2)(a) It is unlawful for any person to cause injury to another person by the operation of a vehicle while:

1. Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

¶3 The jury found Maddox guilty of four misdemeanor counts of causing injury by intoxicated use of a motor vehicle, and the trial court sentenced him to consecutive terms in the county jail of one year on three of the counts and six months in the county jail on the remaining count. The court also ordered Maddox to write a letter of apology to the injured occupants of the struck vehicle. However, the court subsequently vacated that part of the sentence requiring the apology letter.

¶4 Because one of the issues for the jury to determine was whether the occupants of the struck vehicle suffered any injury, the court instructed the jury that injury means “physical pain, illness or any impairment of physical condition.” The court adopted this language from the definition of bodily harm under WIS. STAT. § 939.22(4) and BLACK’S LAW DICTIONARY.

¶5 Maddox concedes that if injury includes physical pain, the evidence is sufficient to support the jury’s verdict. He argues, however, the real controversy was not fully tried because the court’s instruction when defining injury was unnecessary and misleading. The standard jury instruction for the crime charged against Maddox, WIS JI—CRIMINAL 2665 contains no definition of injury.

¶6 At the State’s request, the trial court defined injury for the jury because the evidence had produced some issues as to whether the occupants of the struck vehicle were injured. It has been long established that trial courts have wide discretion regarding the instructions given to the jury. *State v. Waites*, 158 Wis. 2d 376, 383, 462 N.W.2d 206 (1990).

¶7 The issue then is whether the term “injury” in WIS. STAT. § 346.63(2)(a)1 includes physical pain. The interpretation of a statute presents a question of law this court determines without deference to the trial court’s

determination. *Three & One Co. v. Geilfuss*, 178 Wis. 2d 400, 412, 504 N.W.2d 393 (Ct. App. 1993). Where the plain meaning of a statute is unambiguous, the words of the statute must be given their obvious and intended meaning. *Id.* When determining the plain and ordinary meaning of words, we may look to definitions in a recognized dictionary. *Frank v. Wisconsin Mut. Ins. Co.*, 198 Wis. 2d 689, 695, 543 N.W.2d 535 (Ct. App. 1995).

¶8 We are satisfied that the word “injury” has a common and ordinary meaning that encompasses physical pain. This is supported by reference to a recognized dictionary, which defines injury as “an act that damages, harms or hurts.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1164 (unabr. 1993). The dictionary also states that injury, hurt, damage, harm and mischief mean in common the act or result of inflicting on a person or thing something that causes loss, pain, distress or impairment. Further, although we recognize that such definitions are not controlling, we note, as did the trial court, other chapters of the criminal code define bodily harm to include pain under WIS. STAT. § 939.22(4). None of these definitions suggest that the common and ordinary meaning of “injury” excludes pain. Therefore, we are satisfied the trial court did not err when exercising its discretion to define injury so as to include physical pain. Consequently, we reject Maddox’s argument that the evidence was insufficient to support the jury’s verdict and that the real controversy was not fully tried.

¶9 Next, Maddox argues that although the trial court vacated the portion of the sentence requiring him to write a letter of apology to the persons injured in the struck car, he is required to be resentenced. Maddox reasons that because the trial court recognized it had no authority to order him to write a letter of apology, the sentence was illegal and the proper procedure is resentencing. We agree with the State. When a trial court imposes a sentence in excess of that authorized by

law, the remedy is to void the portion that is in excess and the remaining sentence shall stand commuted. WIS. STAT. § 973.13.³ That is exactly what the trial court did in this case when it recognized it had no authority to require Maddox to write the letters of apology. It vacated that part of the sentence in excess of that authorized by law and the remaining part of the sentence stood commuted.

By the Court.—Judgment affirmed.

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

³ WISCONSIN STAT. § 973.13 provides: “**Excessive sentence, errors cured.** In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”