

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2012

Diane M. Fremgen
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. 2011AP2751

Cir. Ct. No. 2011TR3248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANN R. FLEGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Ann Flegel appeals a forfeiture judgment for failing to yield to a bicyclist. She contends the circuit court erred by denying her motion for leave to file a jury demand and by finding her guilty. We affirm.

BACKGROUND

¶2 The State cited Flegel for failing to yield to a bicyclist after Flegel, a pedestrian, stepped in front of a bicyclist traveling on the roadway. The citation gave Flegel a September 12, 2011 court date before the “Door County Circuit Court Traffic Intake.” It advised that she was not required to appear, but it instructed that if she wished to dispute the citation, she either needed to appear in court or enter a “not guilty” plea by mail prior to her court date. The citation also provided, in relevant part, “Your trial will be before a judge, unless you demand a jury trial in writing within 10 days of the court date on your citation and enclose the proper fee Jury demands in Municipal court can only be made for intoxicated driving charges.”

¶3 On September 8, Flegel, pro se, faxed a letter to the Door County Clerk of Courts indicating she wished to contest the citation. On September 23, Flegel, represented by counsel, faxed a jury demand to the clerk of courts. The circuit court denied Flegel’s jury demand because it was untimely.

¶4 Flegel then filed a motion for leave to file a jury demand. She asserted she “was not properly informed of her right to a jury trial in that she (erroneously) believed she was not entitled to a jury trial because her citation was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

not issued for intoxicated driving charges.” The State objected and argued the citation clearly indicated she was in circuit court—not municipal court. The circuit court denied Flegel’s motion and found the citation language regarding the jury demand was not “confusing or misleading.” Consequently, the court reasoned it could not find any excusable neglect for Flegel’s failure to timely file the demand.

¶5 At the court trial, Vanessa Wylie testified that on July 21, 2011, she was biking home from work and coming down a hill when a woman took three steps into the road in front of her. When Wylie saw the woman, she started yelling for her to get out of the way. At the same time, Wylie maneuvered her bicycle closer toward the center of the road to avoid a collision. The woman, however, did not appear to hear Wylie’s warnings and took one more step directly into Wylie’s path and the two collided. Wylie explained that the woman did not acknowledge her until a “split second” before they collided. On impact, Wylie flipped over Flegel and landed on her head, shoulders, and back.

¶6 Wylie opined that, at the time of the collision, she was traveling approximately twenty miles per hour down the hill. She “slam[med] on [her] brakes” to try and avoid the collision and her brake lever “ripped off her bike when [she] hit the ground because [she] was gripping it so hard.” Wylie could not go into the other lane of traffic to avoid the collision because there was an oncoming vehicle.

¶7 Richard Larsen testified that he was sitting in his parked truck with the windows rolled down when he heard someone screaming, “Get out of the way.” He observed a woman in the street, who was then hit by a bicyclist. Larsen explained that it appeared as though the woman was “looking at somebody that

might have been over across the street” and, she was “kind of wandering out in the street” before the bicyclist hit her.

¶8 Flegel testified that she and her husband had stopped to get ice cream. Her husband parked the vehicle on the side of the road, exited the driver’s side door, which was nearest to the road, and walked across the street to the ice cream parlor. Flegel exited the vehicle on the side closest to the sidewalk and checked on her dog in the backseat. She testified she then heard a woman screaming, “Get out of the way,” and “Stop, stop, stop.” She could not remember where she was when she heard the screaming, but did not believe she was in the street. Flegel stepped in the road and saw a figure coming toward her. She tried to get out of the way but was hit by the bicyclist. Flegel was severely injured and taken to the trauma center. She stayed in intensive care for five days.

¶9 The circuit court found Flegel guilty of failing to yield to Wylie. Flegel appeals.

DISCUSSION

I. Untimely Jury Demand

¶10 Flegel first argues the circuit court erred by denying her motion for leave to file her jury demand.² Citing *State ex rel. Prentice v. County Court*, 70 Wis. 2d 230, 240, 234 N.W.2d 283 (1975), she argues the circuit court had the discretion to extend the time period for filing the demand if it determined her

² Flegel concedes her jury demand was untimely.

untimely filing was due to excusable neglect. Flegel argues the circuit court erred by determining her failure to timely file was not due to excusable neglect.

¶11 Excusable neglect is “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). “It is ‘not synonymous with neglect, carelessness or inattentiveness.’” *Id.* (citation omitted). Flegel asserts her failure to timely file constituted excusable neglect because the jury information contained in the citation is “literally unintelligible and in no way comprehensively and properly explains a person’s right to a jury.”

¶12 We disagree. The citation clearly states that, if an individual disputes the citation, he or she will have a trial “before a judge, unless you demand a jury trial in writing within 10 days of the court date on your citation.” Although the citation states, “Jury demands in Municipal court can only be made for intoxicated driving charges,” any confusion about the court handling Flegel’s citation was resolved by the citation’s provision that Flegel’s scheduled appearance was before the “Door County Circuit Court Traffic Intake.” Because the citation unambiguously describes the process for requesting a jury trial and provides that Flegel’s court appearance was in the circuit court, her failure to timely file her jury demand did not constitute excusable neglect.

II. Failing to Yield

¶13 Flegel next argues the circuit court erred by finding her guilty of failing to yield. Specifically, she argues the last step she took, immediately before she collided with Wylie, showed she yielded to Wylie.

¶14 When reviewing a challenge to the sufficiency of the evidence to support a conviction, we review the evidence in the light most favorable to the conviction. *State v. Kimbrough*, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. The conviction will not be reversed unless the evidence is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt. *See State v. Watkins*, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244. The credibility of the witnesses and the weight given to evidence are determinations made by the fact finder. *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

¶15 WISCONSIN STAT. § 346.25 provides in relevant part, “Every pedestrian ... crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right-of-way to all vehicles upon the roadway.” Bicyclists operating on a roadway are considered vehicles under § 346.25. *See* WIS. STAT. § 346.02(4).

¶16 Here, the evidence shows Flegel was in the roadway and not in a crosswalk when the collision occurred. Although Flegel testified she “felt like [she] mov[ed] away” from the figure coming toward her, the circuit court specifically found that, based on Flegel’s repeated statements regarding her lack of recollection, it could not give any weight to Flegel’s testimony. *See Poellinger*, 153 Wis. 2d at 504. The circuit court, however, did find Wylie to be “highly credible.” Wylie testified Flegel did not appear to hear her warnings or acknowledge her until a split second before they collided. Moreover, Larsen testified that when he heard Wylie yelling to get out of the way, he observed that Flegel was focused on someone across the road and looked as though she was “just wandering out in the roadway.” We conclude the evidence supports the circuit court’s determination that Flegel failed to yield to Wylie.

By the Court.—Judgment affirmed.

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

