

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 14, 1995

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

NOTICE

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

No. 95-1888-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OLIVIA M. CAVIALE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Iowa County:
JAMES P. FIEDLER, Judge. *Affirmed.*

GARTZKE, P.J.¹ Olivia M. Caviale appeals from a judgment convicting her of violating § 346.63(1)(a) and (b), STATS. Caviale asserts the complaint should have been dismissed because the charging portion omits an element of the offense, that she was operating a motor vehicle on a highway or on premises held out to the public for the use of a motor vehicle, and because the complaint does not establish probable cause to believe that she is the person who committed the crime charged. The consequences are, she asserts, that the

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

trial court lacked subject-matter jurisdiction, the judgment must be reversed and this action remanded with directions to dismiss it, "without prejudice." We reject her contentions and affirm.

The charging portion of the complaint alleges that Caviale

unlawfully operate[d] a motor vehicle while under the influence of an intoxicant, contrary to Section 346.63(1)(a) of the Wisconsin Statutes, ... [and] unlawfully operate[d] a motor vehicle while having a blood alcohol concentration of .1% or more by weight, contrary to Section 346.63(1)(b) of the Wisconsin Statutes.

To violate § 346.63(1), STATS., a person must operate the vehicle on a "highway" or on "premises held out to the public for use of their motor vehicles." Sections 346.02(1) and 346.61, STATS. The charging portion of the complaint does not expressly allege either element.

A complaint failing to allege all of the elements of an offense is sufficient if it correctly cites the applicable substantive criminal statute. *State v. Petrone*, 161 Wis.2d 530, 558, 468 N.W.2d 676, 686 (1991). This rule applies even when the court reads an element of the offense into the statute. *Id.* The complaint correctly cited the substantive criminal statute, § 346.63(1)(a) and (b), STATS., and we construe § 346.63(1)(a) and (b), to include the element of operating on a highway or on premises held out to the public. We do so because § 346.61, STATS., provides in relevant part, "In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles" It is senseless to read § 346.63(1)(a) or (b) as not incorporating that provision. The pleadings therefore sufficiently allege all the elements of the offense.

Moreover, the narrative portion of the complaint dispels any doubt that Caviale was charged with operating on a public highway. The complaint alleges that the arresting officer saw the vehicle driven by Caviale "operating on East Merrimac Street."

Finally, § 971.26, STATS., provides in relevant part, "No ... complaint ... shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Under the circumstances, the claimed pleading defect is a matter of form, and Caviale does not argue that it prejudiced her.

We reject the argument that the complaint fails to state probable cause because it did not factually link Caviale to the offense. The narrative alleges that the arresting officer

observed a vehicle operating on East Merrimac Street. Forbes [the officer] states said vehicle was missing the driver's side red tail lamp. Forbes states she also observed said vehicle deviating from its lane of travel. Forbes states at one point the driver of said vehicle attempted to make a right hand turn into a driveway, then swerved quickly left back onto East Merrimac Street. Forbes states she stopped said vehicle. Forbes states she made contact with the driver of said vehicle later identified as Olivia M. Caviale, d.o.b. 01/25/60.

The narrative then refers to Caviale by name in ten other places. It is cavilling to claim that the complaint "states no facts to show that it was this defendant, the named person charged, whom the officer saw driving."

This court is reluctant to label an appeal prosecuted by an experienced attorney as frivolous, and we do not do so here. However, this appeal hovers on the brink.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.