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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appellate Case No. 2008 AP 2759-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DANIEL H. HANSON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

**Appealed from a Judgment of Conviction Entered
in the Circuit Court for Kenosha County
the Honorable Wilbur W. Warren, III Presiding
Trial Court Case No. 07 CF 421**

Respectfully Submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii-iii
STATEMENT OF THE ISSUES	1
STATEMENT ON ORAL ARGUMENT	1
STATEMENT ON PUBLICATION.....	2
STATEMENT OF THE FACTS AND CASE	2-21
ARGUMENT	21-37
 I. THE EVIDENCE AT MR. HANSON’S JURY TRIAL WAS INSUFFICIENT TO SUSTAIN HIS ELUDING CONVICTION BECAUSE THE STATE FAILED TO PROVE THAT MR. HANSON KNOWINGLY ATTEMPTED TO ELUDE THE DEPUTY.	
 II. THE REAL CONTROVERSY WAS NOT FULLY TRIED.	
CONCLUSION	38
APPENDIX	(Filed Separately)

TABLE OF AUTHORITIES

United States Supreme Court:

Crawford v. Washington,
541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 177 (2004) 34

Wisconsin Court Cases:

Schulz v. St. Mary's Hospital,
81 Wis. 2d 638, 658, 260 N.W.2d 783 (1978) 33

State v. Haase,
2006 WI App 86, 293 Wis. 2d 322, 716 N.W.2d 526 28

State v. Jensen,
2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518 34

State v. Thomas,
161 Wis. 2d 616, 468 N.W.2d 729 (Ct App. 1991)..... 26

State v. Smith,
2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854 31-32

State v. Peters,
2002 WI App 243, 258 Wis. 2d 148, 653 N.W.2d 300 26

State v. Ortiz,
2001 WI App 215, 247 Wis. 2d 836, 634 N.W.2d 860.)..... 28

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990). 22

<i>State v. Watkins,</i> 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244.	26
--	----

Wisconsin Court Cases: (Cont.)

<i>State v. Zimmerman,</i> 2003 WI App 196, 266 Wis. 2d 1003, 669 N.W.2d 762	36
---	----

Statutes:

Wis. Stat. § 346.04(3),.....	22
Wis. Stat. § 346.04(2t),.....	25
Wis. Stat. § 904.04(1).....	27,29
Wis. Stat. § 752.35,	25-26

STATEMENT OF THE ISSUES

- I. WHETHER THE EVIDENCE AT MR. HANSON'S JURY TRIAL WAS INSUFFICIENT TO SUSTAIN HIS ELUDING CONVICTION BECAUSE THE STATE FAILED TO PROVE THAT MR. HANSON KNOWINGLY FLED OR ATTEMPTED TO ELUDE THE DEPUTY?**

Trial Court Answered: **No.**

- II. WHETHER A NEW TRIAL SHOULD BE GRANTED BECAUSE THE REAL CONTROVERSY WAS NOT FULLY TRIED IN THIS CASE?**

Trial Court Answered: **No.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes that while this case presents a unique fact pattern, the publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF FACTS AND CASE

On June, 29, 2006, on or about 10:00 am, Deputy Eric Klinkhammer of the Kenosha County Sheriff's Department was monitoring traffic on I-94. (R39 at 38.); (App. at 138.) Deputy Klinkhammer had a "ride-along" with him that day. When asked who the ride-along was, the deputy answered "Randi." (R39 at 39-40.); (App. at 139-140.) Ms. Randi Derby was an intern at the Kenosha County Sherriff's Department who wanted a career in law enforcement. (R39 at 39-40.); (App. at 139-140.)

Eventually Deputy Klinkhammer noticed and decided to stop a speeding red Ford Mustang. (R39 at 40-1.); (App. at 140-1.) Later, it

was learned that the vehicle was operated by Daniel H. Hanson, the Defendant-Appellant. (R39 at 40-1, 42.); (App. at 140-1, 142.)

Deputy Klinkhammer did not initiate the traffic stop of Mr. Hanson's vehicle by activating his lights. (R39 at 41.); (App. at 141.)

Rather, Deputy Klinkhammer pulled next to Mr. Hanson's vehicle and motioned with his hand for him to pull over. *Id.* Deputy Klinkhammer testified that this is a routine practice of his, in order to avoid vehicles pulling onto the median. *Id.*

It is unclear whether Deputy Klinkhammer later activated his lights as they both pulled over. Deputy Klinkhammer initially testified that he activated his lights after Mr. Hanson began to pull over. (R39 at 42.); (App. at 142.) Mr. Hanson, however, testified that he was stopped only by the deputy's hand motion. (R39 at 305.); (App. at 305.)

After both vehicles came to a complete stop, Mr. Hanson exited his vehicle with his driver's license in hand. (R39 at 43, 63.); (App. at 143, 163.) Deputy Klinkhammer indicated that he used a PA

microphone to tell Mr. Hanson to get back in his car. (R39 at 43.); (App. at 143.) Ms. Derby's initial statement on this case did not reference any use of a PA system. (R39 at 123.); (App. at 223.) At trial, however, Ms. Derby said that it was used and that perhaps Mr. Hanson did not hear the PA because of the traffic. (R39 at 105.); (App. at 205.) Mr. Hanson testified that Deputy Klinkhammer did not use a PA system. (R39 at 229.); (App. at 329.)

All parties agreed that Deputy Klinkhammer then exited the squad car and approached Mr. Hanson telling him to get back into his car. (R39 at 46, 105, 206.); (App. at 146, 205, 306.)

Deputy Klinkhammer testified over defense objection that he told Mr. Hanson to get back in his car because, "I-94 is a dangerous place. When I was a younger deputy, we had an officer get hit who had to retire." (R39 at 44.); (App. at 144.) Moments later, Deputy Klinkhammer again testified over objection that "we've all seen the videos on *Cops* and *America's Video's* [sic] and all that of cops getting

struck and killed because they don't approach on [the passenger side of a stopped vehicle.]" (R39 at 49.); (App. at 149.)

On cross-examination, Deputy Klinkhammer continued on the dangers of traffic stops saying, "There's no routine traffic stop. Deputy Fabiano was killed by a guy with a gun."¹ (R39 at 65.); (App. at 165.)

Deputy Klinkhammer approached Mr. Hanson, and the stories again diverge. Deputy Klinkhammer stated that Mr. Hanson was "acting very bizarre", e.g., yelling and screaming, flailing his arms stating that "I was taking his rights away and that he didn't want to be there and he didn't want to deal with me." (R39 at 46, 47.); (App. at 146, 147.)

Deputy Klinkhammer further testified, "Initially when he was raising his voice and walking around flailing his arms and pacing back and forth, I took my baton off my belt and extended it and I held it

¹ While not discussed in greater detail in the trial, Kenosha County Sheriff's Deputy Frank Fabiano, Jr. was shot and killed during a traffic stop just

next to my leg.” (R39 at 48.); (App. at 148.) Deputy Klinkhammer used his baton to demonstrate “that this was a serious situation and that he needed to get back into his car.” *Id.* Deputy Klinkhammer then called for backup for the first time. (R39 at 48.); (App. at 148.)

In total, the deputy testified that once outside his squad car, he asked Mr. Hanson to get into his car 7 to 9 times before he complied. *See* (R39 at 47-8.); (App. at 147-8.)

On cross-examination, Deputy Klinkhammer admitted that Mr. Hanson exited his vehicle with his license extended towards him. (R39 at 63.); (App. at 163.) Further, Deputy Klinkhammer admitted that he “didn’t want to go near [Mr. Hanson].” *Id.*

Conversely, Mr. Hanson testified that it was Deputy Klinkhammer who was immediately “screaming at the top of his lungs. . . . ‘Get back in the car,’ really loudly and very frighteningly.” (R39 at 206.); (App. at 306.) Mr. Hanson said that the situation was disorienting/confusing. (R39 at 206-7.); (App. at 306-7.) Specifically,

over one year prior to the trial date. (App. at 486-7).

Mr. Hanson thought it was unusual that he was stopped with a hand motion, and not lights. (R39 at 207.); (App. at 307.) Second, Mr. Hanson stated that he did not believe he looked like a threat. *Id.* He had his driver's license in his hand, both hands in plain view and was dressed professionally. *Id.*

Mr. Hanson testified that he could not remember how many times he was asked to get into his vehicle before he complied. (R39 at 229.); (App. at 329.) Mr. Hanson said that once he realized that the deputy would not take his license and was angry, he got back in his car. *Id.*

Ms. Derby, the ride-along, testified that while she could not hear anything, Deputy Klinkhammer was gesturing "get back in your car" and Mr. Hanson appeared angry and seemed to be saying "just take his driver's license." (R39 at 105.); (App. at 205.) She did not describe Mr. Hanson as acting bizarre.

At this point, the respective stories diverge on even basic facts. Specifically, once Mr. Hanson entered his vehicle, Deputy

Klinkhammer testified that Mr. Hanson refused to roll down his window. (R39 at 50.); (App. at 150.) Further, Mr. Hanson continued to yell and scream that the deputy had no right to stop him and that “there’s no reason that he needed to give me his license.” *Id.* Eventually, Mr. Hanson “aggressively” gave Deputy Klinkhammer his license. (R39 at 51.); (App. at 151.)

Conversely, Mr. Hanson stated that once he was finally able to hand over his license, the deputy took it “very gruffly.” (R39 at 208.); (App. at 308.) Inexplicably, Ms. Derby testified she observed Mr. Hanson “flick his driver’s license out the window. It fell to the ground.” (R39 at 106.); (App. at 206.) Next, Ms. Derby testified that while Deputy Klinkhammer was walking back to the squad with the license, Mr. Hanson exited his vehicle a second time. (R39 at 108.); (App. at 208.) Deputy Klinkhammer originally testified to these same facts. (R39 at 51.); (App. at 151.) Later, however, Deputy Klinkhammer admitted that it was not until he had entered his squad

and had begun writing the ticket that Mr. Hansin exited his vehicle the second time. (R39 at 53.); (App. at 153.)

Mr. Hanson testified that while he wished he had not, he did exit a second time to ask why he was pulled over and other basic questions. (R39 at 209.); (App. at 309.) Mr. Hanson testified that the deputy immediately started screaming at the top of his lungs, “Get back in the car.” (R39 at 210.); (App. at 310.) Mr. Hanson said they did have a brief conversation after which he stated, “You have to tell me why I’m being pulled over.” *Id.* In response, Deputy Klinkhammer again showed the baton. *Id.* Mr. Hanson started back to his car with the deputy following. *Id.* Mr. Hanson testified that he was never told he was under arrest. (R39 at 223.); (App. at 323.)

Deputy Klinkhammer had a different version of events. He testified that once they were both out of their vehicles again, Mr. Hanson started acting “very bizarre” and was ranting. (R39 at 51.); (App. at 151.)

Deputy Klinkhammer, having previously called for backup, now notifies dispatch he needs help. (R39 at 49.); (App. at 149.) Deputy Klinkhammer testified that he took out his baton for a second time only after observing Mr. Hanson's bizarre rantings.² (R39 at 52.); (App. at 152.)

The deputy then testified that Mr. Hanson's demeanor was escalating. (R39 at 52.); (App. at 152.) Specifically, Mr. Hanson was pacing back and forth faster, his arms were flailing and his voice was getting louder and louder. *Id.*

Further, Deputy Klinkhammer testified that he continued to order Mr. Hanson back into his car, and again called to check where his backup was because he was afraid that "this is going to go into a physical confrontation. . . . Based on my experience and [Mr. Hanson's] demeanor." (R39 at 53.); (App. at 153.)

² On cross-examination Deputy Klinkhammer admitted that at the preliminary hearing in this case he had said that "during the stage where I told him he was under arrest, my baton was not out." (R39 at 74.); (App. at 274.)

Deputy Klinkhammer then testified that after he “continued and continued” to order Mr. Hanson into his car, that he told Mr. Hanson that he was under arrest. *Id.* In response, Deputy Klinkhammer testified that Mr. Hanson “turned quickly and began to run back to the car.” (R39 at 54.); (App. at 154.)

Ms. Derby had a different version of this encounter. As stated above, she testified that Deputy Klinkhammer never re-entered the squad car. Rather, Ms. Derby said that as he was returning to the squad car Deputy Klinkhammer “turned around and again started ordering him to get back inside his vehicle and drew his baton.” *Id.* Ms. Derby added that:

Deputy Klinkhammer drew his baton and from what it appeared to me, was continuing to order him back inside the vehicle.... And then after what seemed to be a couple of words back and forth, probably five, ten seconds worth, the driver of the red Mustang kind of turned around very abruptly and stormed back to his vehicle.”

(R39 at 109.); (App. at 209.)

Again, Ms. Derby did not describe Mr. Hanson’s behavior as “bizarre.”

All agreed that as Mr. Hanson was approaching his car, the deputy grabbed Mr. Hanson's right shoulder and ripped his shirt. (R39 at 54, 110.); (App. at 154, 210.) Mr. Hanson further testified that in the process of grabbing him, the deputy struck him in the back of the head. (R39 at 211.); (App. at 311.)

Once in his vehicle, Mr. Hanson testified that he was really scared and immediately called 911. (R39 at 212.); (App. at 312.); (R41) He then testified that he carefully drove away from the scene of the stop and began asking the 911 operator for directions to the nearest police station. (R39 at 212, 214.); (App. at 312, 314.) The deputy admitted that he did not observe any danger or risk to other vehicles as Mr. Hanson re-entered the interstate. (R39 at 78.); (App. at 178.)

The deputy had testified earlier that he entered his vehicle and then "activated [his] lights and siren and pursued him." *Id.* (citing the preliminary hearing transcript). Ms. Derby agreed that the deputy then got into the squad car, turned on the emergency siren and lights, and followed the red Mustang. (R39 at 113.); (App. at 213.) There is no

testimony in the record that the deputy had disengaged his emergency lights post-stop.

Mr. Hanson and Ms. Derby agree that he did not speed or drive erratically. (R39 at 113, 215.); (App. at 213, 315.) They also agree that he stayed in the right hand lane. *Id.* A citizen witness, Mr. Anthony Bowen, said at one point, “In the man’s defense, meaning Mr. Hanson’s, he did not speed and was obeying all the rules of the road and probably going under the speed limit.” (R39 at 141.); (App. at 241.)(internal quote omitted).

The deputy testified at the trial that Mr. Hanson drove in the center lane, then cut over and exited at Highway 50. (R39 at 56.); (App. at 156.) The deputy’s previous preliminary hearing testimony was Mr. Hanson was in the right lane. (R39 at 78-9.); (App. at 178-9.)

During this time, Mr. Hanson was calmly and repeatedly requesting and receiving directions to a police station where “there’ll be cool heads.” (R41-audio of 911 call); (R39 at 216.); (App. at 316.)

There are other conflicting statements regarding Mr. Hanson's driving after exiting I-94. Deputy Klinkhammer testified for the first time on the State's redirect that Mr. Hanson endangered a vehicle as he exited the interstate at Highway 50.³ (R39 at 87.); (App. at 187.)

Ms. Derby testified that Mr. Hanson "drove his vehicle between two vehicles trying to maneuver through traffic" at the end of the off ramp. (R39 at 113.); (App. at 213.) Conversely, Deputy Klinkhammer observed no such maneuvers at the end of the ramp. Then Ms. Derby testified that Mr. Hanson would have struck a second squad car parked at the bottom of the off ramp, but the Mustang continued to go around him. (R39 at 116.); (App. at 216.)

On cross-examination, Ms. Derby admitted that in her initial written statement, she stated that Mr. Hanson stopped at the bottom of the off ramp for "a minute, then drove around the squad car." (R39 at

³ This testimony was a result of the State asking the deputy to read his police report, and then asking him if that refreshed his recollection. ((R39 at 86-7.); (App. at 86-7.)) The defense objected as the deputy had not indicated that his memory needed any refreshing. The trial court overruled the objection and the deputy then testified that Mr. Hanson "narrowly missed another vehicle that was

125-6.); (App. at 225-6.) Further, both Deputy Klinkhammer and Mr. Hanson testified that he stopped at the bottom of the ramp. (R39 at 79-80, 215.); (App. at 179-80, 315.)

The second squad was operated by Deputy Samuel Sturino. Deputy Sturino testified that “it didn’t appear” to him that Mr. Hanson stopped at that stop light at the bottom of the ramp. ⁴(R39 at 166.); (App. at 266.) Further, Deputy Sturino testified that he was worried that other vehicles would be struck by Mr. Hanson as he came through the intersection. (R39 at 158.); (App. at 258.)

As Deputy Sturino watched Mr. Hanson’s vehicle drive through the intersection without stopping, he testified that Mr. Hanson “made a move like he was going to swerve and hit me.” (R39 at 158.); (App. at 258.) Accordingly, Deputy Sturino “made an evasive maneuver to the left, almost hitting another car.” *Id.*

also exiting on Highway 50.” (R39 at 87.); (App. at 87.)

⁴ Deputy Sturino further testified, “I did not see him stop, no, sir.” (R39

Further, Deputy Sturino testified as follows:

Q: If you had not made the evasive move, would there have been a collision?

A: Yeah, probably there would have been, right.

Deputy Sturino then testified that the next intersection was so clogged with traffic that Mr. Hanson had to stop. (R39 at 159.); (App. at 259.) Further, he testified that he stopped Mr. Hanson short of the intersection by pulling his squad in front of Mr. Hanson's vehicle. (R39 at 158-9, 168.); (App. at 258-9, 268.) Conversely, Deputy Klinkhammer, Mr. Bowen and Mr. Hanson all testified that Mr. Hanson was the first person in line at the next stoplight. (R39 at 82, 147, 216-17.); (App. at 182, 247, 316-17.) Deputy Klinkhammer then testified as follows:

Q: So [Mr. Hanson] did not get hung up in traffic as you indicated? He again complied with the traffic light, true?

A: Traffic was heavy but he stopped.

at 167.); (App. at 267.)

Q: And he didn't stop because there was traffic blocking him. He stopped because he was the first person in line and the light was red, correct?

A: The light was red. He stopped.

(R39 at 82-3.); (App. at 182-3.)

As Mr. Hanson was stopped at the second red light, the Deputies surrounded his vehicle, exited their squad with guns drawn. (R39 at 59.); (App. at 159.) Mr. Hanson was still on the phone with 911 at the time. The 911 tape does not contain any commands from the officers prior to his window being broken and ultimately being pulled out of the vehicle. (R41.)

Mr. Hanson was arrested and eventually charged with misdemeanors. (R39 at 234-5.); (App. at 334-5.) However, the jury was informed during the trial that plea negotiations broke down, and the misdemeanor charges were dismissed and the current charges were filed, i.e., two counts of Obstructing an Officer and one count of felony Eluding an Officer. (R39 at 234-5.); (App. at 334-5.) Oddly, when this topic came up during the trial, the State asked Mr. Hanson,

“That’s not true, is it, though?” *Id.* While not clear on the record, it appears that the State acknowledged that Mr. Hanson was telling the truth. *Id.*

Prior to trial, Mr. Hanson, by counsel, filed motions in limine. Relevant to this appeal is number 5. (R10 at 2.) Specifically, Mr. Hanson requested that he be allowed to introduce character evidence of the victim, Deputy Klinkhammer pursuant to Section 904.04(1)(a). *Id.* (citing *State v. Ortiz*, 247 Wis. 2d 836 (Ct. App. 2001). Specifically, Section 904.04(1)(b) allows introduction of relevant character traits of alleged victims. *Id.*

Mr. Hanson made a proffer that a principal from a former school where Deputy Klinkhammer was a liaison officer would testify that he had a reputation in the community as “being confrontational, aggressive and hot-tempered.” (R38 at 12-13.); (App. at 367-8.) The State argued against the motion stating that the deputy was “not a victim as contemplated by that statute under this specific fact pattern.” (R39 at 7.); (App. at 107.)

The trial court denied the motion to admit the character evidence distinguishing *Ortiz* as a restitution case, and holding that the deputy was not a victim, and that obstructing and eluding are victimless crimes. (R39 at 9.); (App. at 109.)

During the trial and deliberations, the 911 call made by Mr. Hanson was played to the jury. (R39 at 152.); (App. at 252.) & (R40 at 97.); (App. at 471.) The 911 call was unredacted and contained statements made by the 911 dispatcher such as “you’re violating the law” and “you’re endangering other cars.” (R39 at 149.); (App. at 249.) Mr. Hanson’s trial counsel did seek a cautionary instruction which the court modified and then played the call to the jury.

Lastly, in its final closing remarks, the State read from Deputy Klinkhammer’s police report. (R40 at 81.); (App. at 455.) That portion of the police report, however, was only used to refresh the deputy’s recollection. An objection to strike was made by the defense, but the Court did not strike the State’s remarks. *Id.*

At the end of the trial, Mr. Hanson was convicted of all charges.

Mr. Hanson now appeals his convictions.

ARGUMENT

I. THE EVIDENCE AT MR. HANSON’S JURY TRIAL WAS INSUFFICIENT TO SUSTAIN HIS ELUDING CONVICTION BECAUSE THE STATE FAILED TO PROVE THAT MR. HANSON KNOWINGLY FLED OR ATTEMPTED TO ELUDE THE DEPUTY.

In order to overturn a conviction, appellate courts must determine whether the evidence, “viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

The jury was instructed in this case that to convict Mr. Hanson of Eluding an Officer under Section 346.04(3), it must be satisfied beyond a reasonable doubt that:

One. The Defendant operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police vehicle. “Traffic officer” means every

officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.

Two: The defendant knowingly fled or attempted to allude s[sic] a traffic officer by willful disregard of the visual or audible signal so as to endanger other vehicles.

(R40 at 25.); (App. at 399.)

In the present case, it is undisputed that Mr. Hanson was attempting to drive to a police station. In its closing argument, the State turned the jury instructions on their head and argued:

Oh, and by the way, he's running to the police. That seemed to be the theme, wasn't it? He's not running from the police, he's running to the police. The police are coming to him in the form of Deputy Sturino.

(R40 at 50.); (App. at 424.)

Again, it is undisputed that the police wanted to stop Mr. Hanson. However, to convict Mr. Hanson of Eluding an Officer, the State needed to prove that he was **knowingly fleeing or attempting to elude** them.

⁵ Mr. Hanson believes this is nothing more than a typo. "Elude" and "allude" are phonetically similar. Furthermore, the written jury instructions contain the word "elude."

In fact, Mr. Hanson was not trying to flee or elude anyone. He was speaking with police on a 911 call. (R41) The police knew where he was going because the 911 operator was giving him directions to the nearest police station, i.e., the Pleasant Prairie police station. (R39 at 216.); (App. at 316.) More importantly, Mr. Hanson was following those directions.

Further, Mr. Hanson was not speeding away and obeyed all speed limits.⁶ (R39 at 141.); (App. at 241.) The deputies did not state that they had trouble following Mr. Hanson. Most importantly, the deputies achieved their intended result, which was to apprehend Mr. Hanson. A result that not even Mr. Hanson was looking to avoid. Again, he wanted to be in an environment with “cool heads.” (R40 at 215.); (App. at 315.)

At trial, the defense focused on whether Mr. Hanson endangered any other vehicles and self-defense. While defense

⁶ Again, Mr. Bowen testified that he said Mr. Hanson “did not speed and was obeying all the rules of the road and probably going under the speed limit.”

counsel did argue in closing that Mr. Hanson was “going to the police,” counsel did not make any arguments on what it means in the instructions to “**knowingly flee or attempt to elude.**” *See* (R40 at 59.); (App. at 433.)

A conviction under the facts of this case would lead to absurd results. For example, one could be convicted for Eluding an Officer under Section 346.04(3), if they see a marked squad with its lights on behind them, and they drive a short distance past some admittedly safe locations, to stop at a location they feel is more safe.

The facts of Mr. Hanson’s case may very well be a violation of Section 346.04(2t), which states:

No operator of a vehicle, after having received a visible or audible signal to stop her or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

Wis. Stat. § 346.04(2t).

(R39 at 141.); (App. at 241.)

However, a conviction for Eluding an Officer under Section 346.04.(3), should not stand where a suspect calls 911 and tells police where they are going to stop their vehicle.

II. THE REAL CONTROVERSY WAS NOT FULLY TRIED

Section 752.35 States, in relevant part:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried . . . the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Section 752.35, stats.

Thus, this Court may grant a new trial in the interest of justice when it appears from the record that the real controversy has not been fully tried. *State v. Peters*, 2002 WI App 243, ¶18, 258 Wis. 2d 148, 653 N.W.2d 300. While this Court's discretionary reversal power is formidable, it "is to be used sparingly." *State v. Watkins*, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244.

Discretionary reversals because the real controversy had not been fully tried have been granted for a variety of reasons: for the erroneous admission or exclusion of evidence, when misunderstandings have thwarted justice, and where an erroneous jury instruction had a significantly adverse impact on the case. *State v. Thomas*, 161 Wis. 2d 616, 625-26, 468 N.W.2d 729 (Ct App. 1991).

In the present case, the jury both heard evidence it should not have heard, and it was not given an opportunity to hear important testimony that should have been admitted.

A. The Jury Should have Heard Character Evidence That Deputy Klinkhammer had a Reputation in the Community as Being Confrontational, Aggressive and Hot-Tempered.

Section 904.04(1) states, in part:

(1) Character Evidence Generally. Evidence of a person's character or trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

....

(b) Character of victim. Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character

trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

In the present case, Mr. Hanson was charged with two counts of Obstructing an Officer and one count of Eluding an Officer. Appellate courts have previously held that police officers can be the victim of crimes. *State v. Haase*, 2006 WI App 86, ¶14, 293 Wis. 2d 322, 716 N.W.2d 526 (citing *State v. Ortiz*, 2001 WI App 215, 247 Wis. 2d 836, 634 N.W.2d 860.).

In *Haase*, the defendant was convicted of Eluding an Officer. *Haase*, 2006 WI App at ¶14. The chase resulted in a squad car being destroyed. *Id.* The trial court ordered Haase to pay restitution to the Sheriff's Department for the damage caused to the car, and he appealed.

The *Haase* court noted that Haase led the police officers on a chase, and that Haase eluded officers. *Id.* Thus, the *Haase* court held that the “officers, not the department, were the direct victims of his

conduct.” *Id.* Therefore, Haase did not have to pay restitution for the squad car.

In the present case, Deputy Klinkhammer was the direct object/recipient of Mr. Hanson’s alleged obstructing and eluding behavior. It is a distinction without a difference to say that Deputy Klinkhammer did not request any damages and thus should not be considered a victim. The test should be that if Deputy Klinkhammer would have been awarded damages for losses suffered as a result of Mr. Hanson’s conduct, then he is a victim for the purposes of Section 904.04(1)(b).

Ironically, the trial court’s ruling did not stop the State from submitting evidence that the deputies were endangered.⁷ *See* (R39 at 53.); (App. at 153.)(Deputy Klinkhammer testified that he was “afraid” of a physical confrontation with Mr. Hanson).

⁷ Further, the State asked Ms. Derby “In your opinion, was the deputy [Klinkhammer] in any danger . . . from the vehicle as he [Mr. Hanson] pulled away?” (R39 at 111.); (App. at 211.)

Again, Mr. Hanson wanted to introduce evidence that Deputy Klinkhammer had a reputation of being “confrontational, aggressive and hot-tempered.” (R38 at 12-13.); (App. at 367-8.) This testimony would have been very helpful to the jury as one of the main issues in the case was self-defense. The proposed evidence should have been admitted, and the jury should have been able to consider it during deliberations.

B. The Jury Should Not Have Heard So Many Individual Bad Acts Committed Against Deputies, Especially the Murder Of Deputy Fabiano.

The jury in this case heard many references to injuries suffered by deputies as they perform their duties. First, Deputy Klinkhammer testified about a deputy who was so badly injured in a traffic stop, that he had to retire. (R39 at 44.); (App. at 144.)

Second, Deputy Klinkhammer referred to the TV show COPS and America’s Funnies Home Videos showing graphic video footage of officers “getting struck and killed” during traffic stops. (R39 at 46-7.); (App. at 146-7.)

Third, Deputy Klinkhammer referred to the tragic murder of Kenosha County Sherriff's Deputy Frank Fabiano, Jr. Deputy Fabiano was shot and killed by an illegal alien during a traffic stop just about one year earlier. (R39 at 53.); (App. at 153.) Clearly the dangers that law enforcement officers face in their work was relevant in the trial. However, the repetitive nature of Deputy Klinkhammer's referral to specific, graphic injuries and murder of other officers unfairly impacted the jury in this case. Again, this jury was asked if Mr. Hanson acted in self-defense.

Most egregious, however, was the State's planned use of Deputy Fabiano's murder in its closing argument. Specifically, the State argued, "It wasn't that long ago in this community where a routine traffic stop ended very, very tragically." (R40 at 44.); (App. at 418.) An objection was made, but was overruled. *Id.* Thus, Mr. Hanson was left with no way to unring that bell.

This jury was entitled to decide this case on the facts of this case, not the tragedies befallen other officers. *See State v. Smith*,

2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The State’s reference to Deputy Fabiano’s murder in closing arguments could only appeal to their emotions and to prejudice the jurors against Mr. Hanson.

C. The Jury Should Not Have Heard the 911 Call Unredacted.

During the trial and deliberations, the 911 call made by Mr. Hanson was played to the jury. (R39 at 152.); (App. at 252.) & (R40 at 97.); (App. at 471.) The 911 call was unredacted and contained many inadmissible hearsay statements made by the 911 dispatcher such as “you’re violating the law” and “you’re endangering other cars.” (R39 at 149.); (App. at 249.)

Defense counsel sought an instruction stating that the 911 dispatcher was not an eyewitness and accordingly, that their statements were not relevant to the case. (R39 at 148-52.); (App. at 248-52.) The State argued that the 911 dispatcher’s statements were relevant. (R39 at 148.); (App. at 248.) Ultimately the trial court

agreed to tell the jury that the 911 dispatcher was not an eyewitness, but then added “any comments made by the 911 operator in the recording regarding laws being broken are the operator’s conclusions.” (R39 at 152.); (App. at 252.)

The defense argued that the trial court’s instruction was insufficient. (R39 at 150-1.); (App. at 250-1.) The defense, however, failed to suggest that the audio recording be redacted. (R39 at 152.); (App. at 252.)

The cautionary instruction allowed the jury to speculate that while the 911 dispatcher was not an eyewitness, they had other special knowledge outside the record that helped them reach their conclusion. *See Schulz v. St. Mary’s Hospital*, 81 Wis. 2d 638, 658, 260 N.W.2d 783 (1978)(“Verdicts cannot be permitted to rest upon speculation or conjecture.”)

To the contrary, the 911 operator had no firsthand knowledge of any facts in the case, making the operator’s comments in the 911 call inadmissible hearsay. Moreover, the 911 dispatcher’s

statements were not subject to confrontation. *State v. Jensen*, 2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518 (“The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.”); *See also Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 177 (2004). Thus, the 911 dispatcher’s “conclusions” were not subject to the ultimate truth finding function of cross-examination.

The jury obviously found the 911 call very important because they asked for the tape to be replayed during deliberations. Thus, the inadmissible statements played a key role in the outcome of this case.

D. The Jury Heard Inadmissible Statements Regarding (1) the Charging History in the Case Including that the Charges Were Increased from Misdemeanor to Felony Charges, and (2) the Deputy’s Police Report.

The jury was informed during the trial that Mr. Hanson was originally charged with misdemeanors and that they were later increased to felony charges. (R39 at 234-5.); (App. at 334-5.) The

trial court acknowledged that the jury should not have been informed of any plea bargaining or the level of charges in the case. (R39 at 252-3.); (App. at 352-3.)

The trial court did create an instruction striking the inadmissible information from the record and indicating that the information should not be considered during deliberations. (R40 at 22.); (App. at 396.) The information, however, was not struck until the next day. Thus, individual jurors might have implied that there was a justifiable reason for the charges to be increased.

Normally, the limiting instruction would be the end of the discussion. However, it adds to the overall level of inadmissible information the jury was receiving in this case and the need for a new trial.

Further, in its final closing remarks, the State read from Deputy Klinkhammer's police report. (R40 at 81.); (App. at 455.) That portion of the police report, however, was only used to refresh the

deputy's recollection. An objection to strike was made by the defense, but the Court did not strike the State's remarks. *Id.*

Normally, this would not be a major problem either. However, the number of statements that the jury heard that they should not, combined with the character evidence they should have heard should lead to a new trial in the interest of justice because the real controversy was not heard. *See generally State v. Zimmerman*, 2003 WI App 196 ¶¶34, 47-49, 266 Wis. 2d 1003, 669 N.W.2d 762.

Lastly, the real controversy in this case was not fully tried for the reasons stated in the first section of this brief. In other words, literally, the real issue in the case was not properly before the jury because they were never asked to find that Mr. Hanson was not knowingly fleeing or attempting to elude the deputies because they knew where he was going and his intention to stop there.

CONCLUSION

WHEREFOR, Mr. Hanson respectfully requests this Court to reverse his conviction for insufficient evidence or, in the alternative, order a new trial in the interests of justice because the real controversy was not fully tried below.

Dated this ____ day of December, 2009.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 5,873 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

- (1) a table of contents;
- (2) the findings or opinion of the trial court; and
- (3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 22nd day of December, 2009.

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