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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.

REPLY 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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FACTS

The State does not object to the facts in Mr. Hanson's Initial Brief. Importantly, the State never denied that Deputy Klinkhammer had a reputation for "being confrontational, aggressive and hot-tempered." *See* (R38 at12-13.)

The following facts are undisputed. Mr. Hanson was stopped for speeding in an unusual manner because Deputy Klinkhammer used a hand signal, rather than his emergency lights. (Hanson's br. at 6.)(citing R39 at 40-1, 42.) After stopping, Mr. Hanson exited his vehicle with his license extended towards Deputy Klinkhammer. (Hanson's br. at 9.)(citing R39 at 63.) Deputy Klinkhammer responded, in part, by using his baton to demonstrate "that his was a serious situation and that he needed to get back into his car." (Hanson's br. at 9.)(citing R39 at 48.) After Mr. Hanson again exited his vehicle, Deputy Klinkhammer drew his baton again (a fact he previously denied). (Hanson's br. at 13)(citing R39 at 52, 74.)

When Mr. Hanson returned to his vehicle, the deputy grabbed and ripped his shirt. (Hanson's br. at 15)(citing R39 at 54, 110.) Once in his vehicle, Mr. Hanson testified he was scared and immediately called 911. (Hanson's br. at 15)(citing R39 at 212.) He testified that he then carefully drove away from the scene.[1] (Hanson's br. at 15)(citing R39 at 212, 214.)

While speaking with the 911 dispatcher, Mr. Hanson repeatedly requested, received and followed directions to a police station. (Hanson's br. at 15, 16)(citing R41-911 call and R39 at 216.)

Mr. Hanson stopped at a red light prior to reaching the police station and deputies surrounded his vehicle and took Mr. Hanson into custody. *See* (Hanson's br. at 20)(citing R39 at 59.)

1 The deputy testified that he then "activated [his] lights and siren and pursued him." (Hanson br. at 15)(citing R39 at 78.)

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 ELUDED THE DEPUTY BY WILLFUL OR WANTON DISREGARD OF THE OFFICER'S SIGNAL.

Wisconsin Statute section 346.04(3) provides, in part:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, **shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal . . .**

Thus, the State argued that they jury had to be satisfied beyond a reasonable doubt that:

- Hanson "operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police vehicle"; and
- Hanson "knowingly fled or attempted to [elude] a traffic officer by willful disregard of the visual or audible signal so as to endanger other vehicles."

(State's br. at 5.)(citing R40 at 25 and Wis. JI-Criminal 2630(2003)).

Again, Mr. Hanson previously argued that he was not knowingly fleeing or attempting to elude anyone. (Hanson's br. at 23-

25.) Rather, Mr. Hanson was on the phone with a 911 dispatcher, receiving and following directions to the nearest police station. (R41.); (R39 at 216.) Importantly, this is not the type of self-help cited by the State in *State v. Young*, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729 (suspect ran away to avoid police contact). Rather, Mr. Hanson was seeking the aid of police. Again, Mr. Hanson lacked any criminal intent and was not fleeing or attempting to elude anyone. Rather, Mr. Hanson was seeking police aid by driving to a safe location, i.e., a police station. (R41.);(R39 at 215, 216.)

Importantly, the deputies did not state they had trouble following Mr. Hanson, in part, because Mr. Hanson did not speed and because law enforcement knew where Mr. Hanson was going. (R39 at 113, 141, 215.);(R41.) Moreover, not even the State argues that Mr. Hanson was attempting to elude officers. Most importantly, the deputies achieved their intended result, which was to apprehend Mr. Hanson, when he stopped for a red light. *See* (R39 at 59.)

The State claims that "Mr. Hanson's testimony and the 911 recording provided direct evidence that Hanson knowingly fled from Deputy Klinkhammer: Hanson said in both that he was getting away from Deputy Klinkhammer (41:Ex.6)." (State's br. at 6.) To the contrary, Mr. Hanson testified as follows:

> Q: Was your goal in doing this to get away from the police?
>
> A: No. I wanted to go to the police, to safety, to people that could protect me.

(R39 at 223.)

Under cross-examination by the State, Mr. Hanson testified:

> Q: …. You were actually, I keep hearing, running to the police. You weren't running away from him; you were running to the police, right?
>
> A: I wanted to go to the police station.

(R39 at 238.)

Likewise, the 911 call does not support the State's position. Specifically, the 911 call does not contain the statement that Mr. Hanson wanted to "get away from Deputy Klinkhammer." Rather, Mr.

Hanson states repeatedly during the 911 call his desire to get to the police station. *See* (R41.); (R39 at 212-216.)

Again, the State failed to argue any facts to prove the "knowing" element during trial. In its Response Brief, the State argues for the first time that "the circumstances surrounding Hanson's fleeing provided circumstantial evidence of Hanson's intent." (State's br. at 6.) To the contrary, all the evidence indicates that Mr. Hanson lacked any criminal intent and did not flee or attempt to elude any officers.

Mr. Hanson never testified or said during the 911 call that Deputy Klinkhammer could not follow him to the police station or arrest him once they arrived there. Rather, Mr. Hanson wanted a safe location for his interaction with law enforcement. *See* (R39 at 215.)

A. Statutory Interpretation.

The State cites a small portion of Section 346.04(3) out of context, and asks this court to interpret its meaning. (State's br. at 3). Specifically, the State argues that Section 346.04(3) "proscribes

fleeing from 'any traffic officer.'" (State's br. at 3.) The State's interpretation is unreasonable.

The interpretation of a statute begins with the language of the statute itself. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain, the inquiry should stop. *Id.* Plain meaning may be ascertained not only from the words employed in the statue, but from the context. *Id.* at ¶46. Thus, courts "interpret statutory language in the context in which those words are used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* Moreover, "statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.*

First, "flee" and "attempt to elude" must mean different things, otherwise the words would be superfluous. Importantly, thefreedictionary.com indicates that a synonym for the word "elude" is

"flee" and that "escape" is a synonym of both "flee" and "elude." *See* http://www.thefreedictionary.com/fleeing and http://www.thefreedictionary.com/elude. Thus, to give each word its own meaning, one must examine the context that the statute uses each word.

Section 346.04(3) uses the word "flee" alone, whereas the word "elude" is limited by the phrase "attempt to elude." Certainly one could not argue that it is not a violation of Section 346.05(3) if one successfully eluded police. Therefore, when read in context "flee" contemplates the completed act of escaping from police. Therefore, because Mr. Hanson did not escape, he cannot be convicted of fleeing police.

Second, the State ignores the rest of the statute. In other words, to convict Mr. Hanson, the State had to prove that he "**knowingly fled . . . a traffic officer by willful disregard of the**

visual or audible signal as to endanger other vehicles."[2] (State's br. at 5.)(citing R40 at 25 and Wis. JI-Criminal 2630.)(emphasis added). Thus, even if the State's argument defining "flee" is successful, the State must argue that Mr. Hanson "willfully disregarded the signal." Mr. Hanson, however, did not disregard the signal. Rather, Mr. Hanson responded to the signal by calling 911 and requesting directions to a police station.

Third, the rule of lenity should also be applied. *See State v. Rabe*, 96 Wis. 2d 48, 291 N.W.2d 809. The "rule of lenity" requires that "before a man can be punished as a criminal . . . his case must be plainly and unmistakably within the provisions of some statute." *U.S. v. Gradwell*, 243 U.S. 476, 485 (1917). Again, there is no evidence that that Mr. Hanson was fleeing, attempting to elude or otherwise escaping police. Rather, Mr. Hanson was unmistakably seeking police aid by requesting a safe place to stop. Section 346.04(3) should not be

2 The State only charged Mr. Hanson with a violation of Section 346.04(3) by "willful disregard of visual and audible signals so as to endanger or interfere with the operation of police vehicles or other vehicles." (R39 at 88-89.)

read so broadly as to convict a driver of a felony when they call 911, request and follow directions to a police station.

B. Per Se Argument.

The State argues that Mr. Hanson seeks a *per se* rule that calling 911 for directions to a police station could never constitute a violation of Section 346.04(3). (State's br. at 3.) Mr. Hanson has made no such argument. For example, such a call would not be a safe haven if the driver ignored the directions, or if the State could otherwise establish that the suspect had no intention of stopping. It is undisputed that Mr. Hanson was driving to the police station--Mr. Hanson did not speed and even stopped at the red light where he was arrested. (R39 at 141.); (App. at 241.)

C. Absurd Results.

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--so long as they increased their speed while doing so.

Mr. Hanson is not arguing, as the State suggests, that such a driver would not face other possible criminal penalties. *See* (State's br. at 3-4.) Again, the facts of Mr. Hanson's case may be a violation of Section 346.04(2t).

However, a felony conviction for Eluding an Officer under Section 346.04(3), should not stand where a suspect calls 911 and tells police that they will stop their vehicle at a specific, safe location and then proceeds to drive to that location.

II. THE REAL CONTROVERSY WAS NOT FULLY TRIED.

Appellate courts 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. In such cases, the appellate court need not determine that a new trial would likely result in a different outcome. *State v. Watkins*, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244.

A new trial, on all counts, is required in the interests of justice because: (1) the real controversy was not fully tried as described above, i.e., the jury did not hear arguments regarding whether Mr. Hanson **knowingly** fled or attempted to elude the deputy's signal by **willful or wanton** disregard of that signal; (2) the jury heard testimony it should not have heard: and (3) the jury was not given an opportunity to hear other 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.

Deputy Klinkhammer had previously worked as a school liaison officer. Mr. Hanson wanted to introduce evidence from the school principal where Deputy Klinkhammer had worked that the deputy had a reputation for being "confrontational, aggressive and hot-tempered." (R38 at 12-13.); (App. at 367-8.) Importantly, the State never denied that Deputy Klinkhammer had such a reputation.

This reputation evidence was admissible pursuant to

Section 904.04(1)(b). The State makes the conclusory statement that the circuit court was right to exclude the evidence. (State's br. at 8.) Next, the State refuses to "delve into the merits" of Mr. Hanson's evidentiary claim. (State's br. at 8.) By only making a concluslory statement, the State has waived any argument that the trial court made the correct determination. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

Next, the State claims that the excluded evidence was harmless because Mr. Hanson still made a partial self-defense argument. The excluded testimony, however, would have also gone to the deputy's bias, and helped the jury make factual determinations as there were many discrepancies in the testimony. (Hanson's br. at 5-23.)

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

The jury heard many references to injuries suffered by deputies as they performed their duties.

- One deputy was so badly injured in a traffic stop, that he had to retire. (R39 at 44.)

- Deputy Klinkhammer referred to videos showing graphic footage of officers "getting struck and killed" during traffic stops. (R39 at 49.)

- 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 65.)

- The State referred to Deputy Fabiano's murder in its closing argument, "It wasn't that long ago in this community where a routine traffic stop ended very, very tragically." (R40 at 44.)

The State protests that all the evidence was properly ruled admissible. (State's br. at 9.) Admittedly, the dangers that law enforcement officers face was relevant. However, that does not mean that the State should be allowed to present unlimited evidence on just how dangerous.

If the State made just one or two of these statements over the course of multiple days of testimony, then the State's argument would carry more weight. However, four separate descriptions of deputies being injured and killed during one day of testimony and closing

arguments was gratuitous, unnecessary and, in total, had a tendency to influence the outcome of the trial by appealing to the jury's sympathies. *See* Section 904.03. In fact, three of the references were within 16 pages of transcript testimony.

Most egregious was the State's calculated use of Deputy Fabiano's murder in closing argument. (R40 at 44.) The State could have easily discussed the dangers officers face without a direct reference to the recent murder of a local deputy. In total, these references to the injuries and deaths of law enforcement officers were unduly prejudicial. *See State v. Smith*, 2003 WI App 234, ¶23

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

The State no longer argues that the 911 operator's statements were properly presented to the jury. *See* (R39 at 148.) Rather, the State argues that the trial court "clearly instructed the jury, however, not to rely on the 911 dispatcher's statements." (State's br. at 11.) The trial court did not make that instruction. Rather, the trial

court instructed the jury that "any comments made by the 911 operator in the recording regarding laws being broken are the operator's conclusions. It is for you, the jury to decide…." (R39 at 152.)

Thus, the trial court did not instruct the jury "not to rely on the 911 dispatcher's statements." Furthermore, the instruction only discussed the dispatcher's statements regarding laws being broken. All of the dispatcher's statements, however, were inadmissible. Further, the circuit court did not instruct the jury that the 911 dispatcher was not a witness and had no personal knowledge of the facts of the case. Rather, the jury was left to accept every statement made by the dispatcher as true in violation of Mr. Hanson's right to confrontation. *See State v. Jenson*, 2007 WI 26, ¶13.

D. The Jury Heard Inadmissible Statements Regarding (1) the Charging History in the Case Including that the Charges Were Increased form 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 State claims that the curative instruction solved any problems associated with the jury hearing this information and that there is no basis for Mr. Hanson to be concerned about them. *See* (State's br. at 12-13.) The State's argument begs the question, if a jury hearing such information is not a problem, why should juries not hear it in the first place? The answer is that it invites jurors to speculate about facts not relevant to whether Mr. Hanson is guilty or innocent of the charges he faces. Admittedly, curative instructions would typically solve the problem, but the facts of this case require Mr. Hanson to request a new trial because the jury heard yet more information they should not have heard.

Further, the State read from Deputy Klinkhammer's police report during closing argument. (R40 at 81.); (App. at 455.)

That portion of the police report, however, was only used to refresh the deputy's recollection.

Again, 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, on all counts, in the interest of justice because the real controversy was not tried. *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** feeing or attempting to elude the deputies **by willful disregard** of a visual signal.

CONCLUSION

WHEREFOR, Mr. Hanson respectfully requests this Court to reverse his conviction for insufficient evidence and/or, order a new

trial, on all remaining counts, in the interests of justice because the real controversy was not fully tried below.

Dated this ____ day of April, 2010.

Respectfully submitted,

LANNING LAW OFFICES, LLC

By:_____

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(d) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,992 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12)

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served an all opposing parties.

Dated this 9th day of April, 2010.

Respectfully submitted:

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