STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2008AP2759-CR
(Kenosha County Case No. 07CF421)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL H. HANSON,

Defendant-Appellant-Petitioner.

Appeal from the Judgment of Conviction
Entered in the Circuit Court for Kenosha County,
The Honorable Wilbur W. Warren, III, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

CHAD A. LANNING
State Bar No. 1027573
LANNING LAW OFFICES, LLC
2100 Gateway Ct, Suite 200
West Bend, WI 53095
(262) 334-9900

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant-Petitioner

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ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to convict Hanson of felony fleeing in violation of Wis. Stat. §346.04(3).

The circuit court and the Court of Appeals both held that the evidence was sufficient for conviction.

2. Whether the circuit court committed reversible error by excluding evidence of Officer Klinkhammer's reputation in the community as being confrontational, aggressive, and hot-tempered;

The circuit court denied Hanson's motion to admit the character evidence and the Court of Appeals affirmed.

3. Whether a new trial is appropriate in the interests of justice under Wis. Stat. §751.06 on the grounds that the real controversy was not fully tried given that the parties, the trial court, and the jury did not have the benefit of this Court's interpretation of the "willful and wanton disregard" element of felony fleeing under Wis. Stat. §346.04(3).

The lower courts did not address whether this Court should exercise its discretion under §751.06. The Court of Appeals did decline to exercise its own discretion to order a new trial on this grounds under Wis. Stat. §752.35.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

The state originally charged Daniel Hanson with one count of misdemeanor fleeing in violation of Wis. Stat. §346.04(2t) and two counts of obstructing an officer in violation of Wis. Stat. §946.41. *State of Wisconsin vs. Daniel H. Hanson*, Kenosha County Case Number 2006CM001359. However, when Hanson refused to plead, the state dismissed the misdemeanor complaint and recharged the case, raising the fleeing to a felony. (R38:3-4; R39:234-35; R1).

The charges arose from a disagreement after Kenosha County Sheriff's Deputy Eric Klinkhammer pulled Hanson over for speeding. After Klinkhammer twice pulled out his baton and then chased and grabbed Hanson, ripping Hanson's shirt, Hanson feared for his safety. He therefore drove off and immediately called 911 for the location of the nearest police station where he could safely surrender himself to "cool[er] heads."

After one day of testimony, the jury rejected Hanson's claim of self-defense and convicted him as charged (R40:100-01). On Septem-

ber 11, 2008, the circuit court, Hon. Wilbur W. Warren, III, presiding, sentenced Hanson to a fine of $1,245 on the fleeing count and 60 days concurrent jail time with Huber release on the two obstructing counts (R28). The court stayed all sentences pending this appeal (*id*.).

Hanson appealed to the Court of Appeals, challenging the sufficiency of the evidence on the felony fleeing charge and seeking a new trial in the interests of justice on all three counts due to cumulative effect of several alleged errors. On October 6, 2010, the Court of Appeals issued its decision affirming the convictions (App. 1-15).

By Order dated February 8, 2011, this Court granted Hanson's petition for review.

STATEMENT OF FACTS

Like a modern day *Rashomon*, the specific "facts" in this matter turn on which of the various witnesses is speaking and, in some instances, when.

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

Klinkhammer decided to stop a red Ford Mustang driven by Daniel H. Hanson (R39:40-42). Klinkhammer did not initiate the traffic stop of Hanson's vehicle by activating his lights. Rather, he pulled next to Hanson's vehicle and motioned with his hand for him to pull over. (R39:41). As Hanson explained it at trial, Klinkhammer drove along beside him for about three minutes before "forcefully" gesturing for him to pull over, which he did immediately (*id.*:207, 232).

It is unclear whether Klinkhammer later activated his lights as they both pulled over. He initially testified that he activated his lights after Hanson began to pull over (R39:42). Hanson, however, testified that he was stopped only by the deputy's hand motion (R39:205, 207).

After both vehicles came to a complete stop, Hanson exited his vehicle with his driver's license in hand (R39:43, 63). Klinkhammer indicated that he used a PA microphone to tell Hanson to get back in his car (R39:43). Ms. Derby's initial statement on this case did not reference any use of a PA system (R39:123). At trial, however, she said that Klinkhammer used it and that perhaps Hanson did not hear the PA because of the traffic (R39:105). Hanson testified that Deputy Klinkhammer did not use a PA system (R39:229).

All parties agreed that Klinkhammer then exited the squad car and approached Hanson telling him to get back into his car (R39:46, 105, 206). Klinkhammer testified that he did so because "I-94 is a dangerous place. When I was a younger deputy, we had an officer get hit who had to retire." (R39:44). Moments later, Klinkhammer again noted 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.]" (R39:49). Klinkhammer continued this theme on cross-examination, noting that "[t]here's no routine traffic stop. Deputy Fabiano was killed by a guy with a gun." (R39:65).

Klinkhammer approached Hanson and the stories again diverge. Klinkhammer stated that 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." (R39:46, 47).

Klinkhammer responded by taking his baton off his belt and "extended it and . . . held it next to [his] leg." (R39:48). He used his baton to demonstrate "that this was a serious situation and that [Hanson] needed to get back into his car." (*Id.*). Klinkhammer then called for backup for the first time. (R39:48). The deputy testified that, once outside his squad car, he asked Hanson a number of times to return to his car before he complied. (*See* R39:47).

On cross-examination, Klinkhammer admitted that Hanson exited his vehicle while holding out his driver's license (R39:63-64).

Further, Klinkhammer admitted that he "didn't want to go near [Hanson]." (*Id.*:63).

Conversely, Hanson testified that it was Klinkhammer who was immediately "screaming at the top of his lungs. . . . 'Get back in the car,' really loudly and very frighteningly." (R39:206). Hanson was just trying to give Klinkhammer his license and the deputy started "screaming bloody murder" (*id.*:230-31). Hanson said that the situation was disorienting and confusing (*id.*:206-7). He thought it was unusual that he was stopped with a hand motion and not lights (*id.*:207). Second, Hanson stated that he did not believe he looked like a threat. He had his driver's license in his hand, both hands in plain view and was dressed professionally. (*Id.*).

Hanson could not remember how many times he was told to get into his vehicle before he complied. As soon as he realized that the deputy would not take his license and was angry, he got back in his car. (R39:229, 232).

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

At this point, the respective accounts diverge on even basic facts. Specifically, Klinkhammer claimed that, once Hanson entered his vehicle, he had to ask two or three times before Hanson rolled down his window. (R39:50-51). Further, 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, according to Klinkhammer, Hanson "aggressively" gave him his license (R39:51). Derby testified she observed Hanson "flick his driver's license out the window. It fell to the ground." (*Id.*:106). Conversely, Hanson stated that, once he was finally able to hand over his license, the deputy took it "very gruffly" (*id.*:208).

Derby testified that while Deputy Klinkhammer was walking

back to the squad with the license, Hanson exited his vehicle a second time (R39:108). Klinkhammer originally testified to these same facts (*id.*:51). Later, however, he admitted that it was not until he had entered his squad and had begun writing the ticket that Hanson exited his vehicle the second time (*id.*:53-54).

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 (R39:209). The deputy then immediately started screaming again at the top of his lungs, "Get back in the car." (*Id.*). Hanson said they did have a brief conversation in which Klinkhammer claimed he had been speeding, although Hanson in fact had been driving only a little over 65 and slower than several cars that had passed him. (*Id.*:209-11). Klinkhammer again showed the baton and Hanson started back to his car (*id.*:210). Klinkhammer never told him he was under arrest (*id.*:223).

Klinkhammer had a different version of events. He claimed that, once they were both out of their vehicles again, Hanson started acting "very bizarre" and was ranting (R39:51). Klinkhammer, having previously called for backup, then notified dispatch he needed help (*id.*:52). Klinkhammer asserted that he took out his baton for a second time only after observing Hanson's bizarre ranting (*id.*). The deputy claimed that Hanson's demeanor was escalating. Specifically, he was pacing back and forth faster, his arms were flailing and his voice was getting louder and louder. (R39:52).

Klinkhammer stated that he continued to order 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 [Hanson's] demeanor." (R39:53). Klinkhammer then testified that after he "continued and continued" to order Hanson into his car, he told Hanson that he was under arrest (*id.*). Klinkhammer claimed that, in response, Hanson "turned quickly and began to run back to the car." (*Id.*:54).

Derby had a different version of this encounter. As stated above,

she testified that Klinkhammer never re-entered the squad car. Rather, she said that as he was returning to the squad car Klinkhammer "turned around and again started ordering [Hanson] to get back inside his vehicle and drew his baton." (R39:108). 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.

(*Id.*:109-10). Again, Derby did not describe Hanson's behavior as "bizarre."

All agreed that as Hanson approached his car, the deputy pursued him, grabbed Hanson's right shoulder and ripped his shirt (R39:54, 110). Hanson further testified that, as he was following the deputy's direction to return to his car, Klinkhammer grabbed him and struck him in the back of the head with the baton (*id.*:211).

Once in his vehicle, Hanson testified that he was really frighted and immediately called 911 (R39:212; *see* 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 (R39:212, 214). Klinkhammer admitted that he did not observe any danger or risk to other vehicles as Hanson re-entered the interstate (*id.*:78).

Klinkhammer had previously testified that he then entered his vehicle, "activated [his] lights and siren and pursued him" (R39:78 (citing the preliminary hearing transcript)). Derby agreed that the deputy then got into the squad car, turned on the emergency siren and lights, and followed the red Mustang (*id.*:113).

Hanson and Derby agreed that Hanson did not speed or drive erratically at that point (R39:113, 214-15). They also agreed that he stayed in the right hand lane (*id.*:113, 214-15). A citizen witness, Anthony Bowen, said that Hanson "did not speed and was obeying all the rules of the road and probably going under the speed limit." (R39:

at 141).

Klinkhammer claimed at trial that Hanson drove in the center lane, then cut over and exited at Highway 50 (R39:56). However, his previous testimony at the preliminary hearing was consistent with Hanson's and Derby's trial testimony, i.e., that Hanson was in the right lane (R39:78-9).

During this time, Hanson repeatedly requested and received directions to a police station where "there'll be cool heads." (R39:216; R41-audo of 911 call).

There are other conflicting statements regarding Hanson's driving after exiting I-94. Klinkhammer testified for the first time on redirect that Hanson endangered a vehicle as he exited the interstate at Highway 50 (R39:87).

Derby testified that Hanson "drove his vehicle between two vehicles trying to maneuver through traffic" at the end of the off ramp (*id.*:113). Conversely, Klinkhammer observed no such maneuvers at the end of the ramp. Then Derby testified that Hanson would have struck a second squad car parked at the bottom of the off ramp if Hanson had not stopped, but he did and then continued to go around it (*id.*:116). On cross-examination, Derby admitted that she stated in her initial written statement that Hanson stopped at the bottom of the off ramp for "a minute, then drove around the squad car." (*Id.*:125-6). Both Klinkhammer and Hanson also testified that he stopped at the bottom of the ramp (*id.*:79-80, 215).

The second squad was operated by Deputy Samuel Sturino. Sturino testified that it did not appear to him that Hanson stopped at that stop light at the bottom of the ramp (R39:166). Further, Sturino claimed that he was worried that other vehicles would be struck by Hanson as he came through the intersection (*id.*:157-58).

Sturino asserted that, as he watched Hanson's vehicle drive through the intersection, Hanson "made a move like he was going to swerve and hit me." (R39:158). Accordingly, Sturino "made an evasive

maneuver to the left, almost hitting another car" (*id.*), and claimed that there probably would have been a collision if he had not made and evasive move (*id.*).

Sturino then testified that the next intersection was so clogged with traffic that Hanson had to stop (R39:159). However, he also claimed that he stopped Hanson short of the intersection by pulling his squad in front of Hanson's vehicle (*id.*:158-9, 168). Conversely, Klinkhammer, Bowen, and Hanson all testified that Hanson was the first person in line at the next stoplight (*id.*:82, 147, 216-17). Klinkhammer then testified as follows:

> Q: So [Mr. Hanson] really didn't get hung up in traffic as you indicated? He again complied with the traffic light, true?
>
> A: Traffic was heavy but he stopped.
>
> 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.

(R39:82-83).

As Hanson was stopped at the second red light, the deputies surrounded his vehicle and exited their squad with guns drawn (R39:59). Hanson was still on the phone with 911 at the time (*id.*:117, 161-64). Although the officers claimed that they ordered Hanson out of the car several times, the 911 tape does not contain any commands from the officers prior to Klinkhammer breaking Hanson's car window with his baton and pulling him from the vehicle (*id.*:117, 161-64; *see* R41).

ARGUMENT

I.

BECAUSE HE DID NOT WILLFULLY OR WANTONLY DISREGARD THE SIGNAL TO PULL OVER, HANSON DID NOT VIOLATE WIS. STAT. §346.04(3)

The issue before the Court is whether Daniel Hanson is guilty of violating Wis. Stat. §346.04(3) where it is undisputed that he left the scene of the initial traffic stop due to fear for his safety, immediately called 911 for directions to the nearest police station where "there'll be cool heads" (R41:audio of 911 call; R39:215), and was proceeding to that location to surrender himself until Deputies Klinkhammer and Sturino forcibly stopped him and broke out his window to drag him from the car (R41:audio of 911 call; R39:60-61).

As relevant here, Wis. Stat. §346.04(3) provides that

> 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 so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians . . ..

Absent resulting bodily harm or property damage, violation of §346.04(3) is a Class I felony. Wis. Stat. §346.17(3).

Although phrased in terms of sufficiency of the evidence, the real question here concerns the proper construction of Wis. Stat. §346.04(3), and more specifically the requirement that the defendant acted in "willful or wanton disregard" of a traffic officer's signal to pull over. It is that requirement that distinguishes felony eluding from misdemeanor failure to stop.[1] Hanson does not here dispute that

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[1] Pursuant to Wis. Stat. §346.04(2t)

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

(continued...)

Klinkhammer signaled him to stop or that he failed to immediately do so.

Because the undisputed evidence demonstrated that Hanson believed in good faith that his actions were necessary to protect himself from Klinkhammer, he did not act in willful or wanton disregard of the officers' signals to stop. The evidence accordingly was insufficient as a matter of law to convict him of felony eluding under §346.04(3).

A. Applicable Legal Standards

1. Sufficiency of the Evidence

The burden in a criminal case is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***In re Winship***, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Rushing***, 197 Wis.2d 631, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing ***Jackson***, 443 U.S. at 319).

Of course, the Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." ***Chiarella v. United States***, 445 U.S. 222, 236 (1980). The Court thus can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. ***State v. Wulff***, 207 Wis.2d 144, 557 N.W.2d 813, 817 (1997).

Review in this case requires the application of Section 346.04(3) to the facts of this case. Determination of what the law is and application of the law to the facts present questions of law subject to independent review. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717

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[1] (...continued)
to stop his or her vehicle as promptly as safety reasonably permits.

See Wis. Stat. §346.17(2t) ("Any person violating s. 346.04(2t) may be fined not more than $10,000 or imprisoned for not more than 9 months or both").

N.W.2d 676. Also subject to independent review is the question of whether the evidence presented to the jury was sufficient to sustain its verdict. ***Id.*** (citation omitted).

2. Felony Eluding

Section §346.04 defines four offenses. Section 346.04(1) penalizes any simple failure to obey "any lawful order, signal or direction from a traffic officer," as a non-criminal forfeiture. *See* Wis. Stat. §346.17(1). Section 346.04(2) penalizes disobeying a traffic sign and is not relevant here. Sections 346.094(2t) and 346.17(2t) make it a misdemeanor for any driver to fail to comply with a traffic officer's directive to stop:

> No operator of a vehicle, after having received a visible or audible signal to stop his 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.

Section 346.04(3), the provision involved in this case, penalizes fleeing or attempting to elude a traffic officer under certain circumstances as a felony. As relevant here, §346.04(3) defines those circumstances as follows:

> 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 so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians . . ..[2]

Thus, the legislative scheme envisions three grades of offense covering one who fails to stop for a traffic officer: a non-criminal forfeiture for simply disobeying the signal to stop, a misdemeanor for

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[2] Although not at issue here, §346.04(3) alternatively authorizes conviction for one who knowingly flees or attempts to elude a traffic officer or marked police vehicle by "increas[ing] the speed of his vehicle or extinguish[ing] the lights of his vehicle in an attempt to elude or flee." *See* ***State v. Sterzinger***, 2002 WI App 171, ¶9 & n.3, 256 Wis.2d 925, 649 N.W.2d 677.

knowingly failing to stop when safely able to do so, and a felony for fleeing or attempting to elude under certain aggravating circumstances. Felony fleeing is distinguished from the misdemeanor offense primarily by the added requirement that the defendant must have acted with "willful or wanton disregard of [the officer's] signal so as to interfere with or endanger" others.

Oddly enough, Hanson can find no prior decision construing the "willful or wanton disregard" element of §346.04(3). ***State v. Van Meter***, 72 Wis.2d 754, 242 N.W.2d 206 (1976), merely paraphrased the statutory requirements on the way to finding that separate charges for eluding deputies in two separate counties can support two separate convictions. ***State v. Oppermann***, 156 Wis.2d 241, 456 N.W.2d 625 (Ct. App. 1990), addressed whether a police vehicle equipped with lights and siren but otherwise bearing no markings was nonetheless a "marked police vehicle." Consistent with two prior Attorney General Opinions, the court held that it was not and that the evidence against Oppermann accordingly was insufficient.

The Court of Appeals came closest to the question presented here in ***State v. Sterzinger***, 2002 WI App 171, 256 Wis.2d 925, 649 N.W.2d 677. The issue there was whether the defendant's flight or attempt to elude must have actually interfered with or endangered another and whether the defendant must know that his actions did so. ***Id.*** ¶1. The court divided the relevant language of §346.04(3) into three parts, "each expressing a distinct thought or idea:"

> (1) No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle,
>
> (2) shall knowingly flee or attempt to elude any traffic officer,
>
> (3) by wilful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians.

Id. ¶9. The court held that "the statute plainly requires knowledge"

concerning the requirement of flight or attempt to elude, ***id.*** ¶¶7, 10, but that the statutory requirement that the defendant act "knowingly" does not apply to the interference or endangerment requirement, ***id.*** ¶¶10-11. The court further held that the defendant need not have actually interfered with or endangered another, but that "conduct which creates a risk or likelihood of interference or endangerment is sufficient." ***Id.*** ¶¶12-19. Oddly, the court did not consider what effect, if any, the "willful or wanton disregard" requirement may have on its holding.

Although no prior decisions have defined the "willful or wanton disregard" element, its meaning can be derived from traditional rules for statutory interpretation. Statutory interpretation is a legal determination reviewed *de novo*. ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506 (1997).

Interpretation of a statute begins with its language. ***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.*** ¶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.***

"Willful or wanton disregard" is not defined in the statute. Wisconsin courts have long recognized that the term "wilful" or "willful" is almost invariably ambiguous, and that its meaning depends on its context and the purpose for which it is used:

> The term, "wilful," is ambiguous and is susceptible to many meanings. This court, over one hundred years ago, stated:
>
> > "The word willfully, as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of

> intensity according to the context and evident purpose of the writer." ***State v. Preston***, 34 Wis. 675, 683 (1874).
>
> This court in ***Preston*** acknowledged that, where the word was used in a criminal statute, the concept of "legal malice" was expressed, but in other cases it would "mean little more than plain intentionally, or designedly." P. 683.
>
> ***Preston*** makes clear that there is no one and certain meaning that can be ascribed to "wilful" which will in all cases convey its meaning. A word or term which can reasonably be understood in more than one sense or can convey more than one meaning is ambiguous.

DOT v. Transportation Comm'n, 111 Wis.2d 80, 87, 330 N.W.2d 159 (1983).

While "willful" alone might be ambiguous, statutory ambiguity must be assessed from context. Specifically, §346.04(3) is a criminal statute. This Court long ago recognized that, in the criminal context, willfully requires more than mere knowledge or intent to act. Rather, it requires a purpose to do wrong without justifiable excuse:

> The word "willfully" has acquired a pretty well defined meaning in criminal statutes. While its lexiconic significance may in some association be no more than intentionally or even knowingly, yet, when used to describe acts which shall be punished criminally, it includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, according to the great weight of authority. [Citations omitted]. This meaning for the word has been declared for Wisconsin statutes in the words of Dixon, C. J., in **State v. Preston**, 34 Wis. 675, as satisfied only by "evil intent without justifiable excuse." It is used "to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty" . . ..

State v. Brown, 137 Wis. 543, 119 N.W. 338, 340 (1909) (citations omitted).

Context here also necessarily must account for the entire phrase:

"willful or wanton disregard." ***Kalal*,** 2004 WI 58, ¶45. *See also* ***State v. Popenhagen***, 2008 WI 55, ¶46 n.25, 309 Wis.2d 601, 749 N.W.2d 611 (Under the maxim *noscitur a sociis,* "words may be defined by accompanying words, that is, that the meaning of doubtful words may be determined by reference to their relationship with other associated words or phrases").

Standard dictionary definitions of the remaining terms provide context to the meaning of willful in §346.04(3) similar to that of "legal malice" generally attributed to the word in the criminal context. Wantonness, for instance, is defined as

> Conduct that indicates the actor is aware of the risks but indifferent to the results; wantonness usu. suggests a greater degree of culpability than recklessness, and it often connotes malice in criminal-law contexts.

Black's Law Dictionary at 660 (Pocket ed. 1996). *See also* Merriam-Webster Dictionary at 826 (1997) (defining wanton, *inter alia*, as "having no regard for justice or for other persons' feelings, rights, or safety").

At the same time, "disregard" is defined as "to pay no attention to: treat as unworthy of notice or regard." Merriam-Webster Dictionary at 225 (1997). Synonyms listed by the Merriam-Webster Dictionary On-Line, are despise, scorn, or flout. http://www.merriam-webster.com/dictionary/disregard. Moreover, by modifying "disregard" with the terms "willful or wanton," the Legislature necessarily intended something more than just the knowing failure to comply inherent in the term disregard itself. *See* ***Kalal***, 2004 WI 58, ¶46 (statutes read to give reasonable effect to every word).

Context of the entire phrase thus removes any ambiguity in the single term willful. Willful or wanton disregard, as used in §346.04(3), unambiguously encompasses not merely the knowing failure to comply with an officer's signal to stop, but a knowing scorn or flouting of the officer's signal with indifference to the results or some type of evil intent beyond the mere failure to comply. In other words, in this Court's language in ***Preston***, *supra*, "evil intent without justifiable

excuse."

The legislative history and structure of §346.04(3), as well as the use of the terms "willful and wanton" in analogous contexts confirms this plain meaning of the statutory language.

Section 346.04(3) was first enacted in 1965, and it has not substantively changed since that time. *See* 1965 Laws of Wisconsin, ch. 187, §2. The original grade of the offense was a misdemeanor, 1965 Laws of Wisconsin, ch.187, §4. In 1993, the Legislature amended the penalty section related to §346.04(3) from a misdemeanor to a felony. *See* 1993 Laws of Wisconsin, ch. 189, §1. That change was explained by the State of Wisconsin Criminal Penalties Study Committee Final Report, August 31, 1999:

> Until 1994 an act of fleeing that did not result in injury or property damage was a misdemeanor. In that year the misdemeanor was elevated to a 2-year felony. Doubtless this occurred because some fleeing episodes, though not resulting in injury or property damage, nonetheless pose great threats to the safety of officers and others and thus deserve felony treatment.

Report, Part II, D.4.d., p. 57 (footnotes omitted) (App. 31).

Changing §346.04(3) to a felony, however, left a substantial gap between the simple failure to obey "any lawful order, signal or direction from a traffic officer," as a non-criminal forfeiture, Wis. Stat. §346.04(1); *see* Wis. Stat. §346.17(1), and felony fleeing under §346.04(3). Based on the Criminal Penalties Study Committee's recommendation and observation that "[s]ome episodes are short, don't involve high speed, do not seriously compromise public safety, etc.," Report, Part II, D.4.d, p.57-58 (App. 31-32), the Legislature enacted the crime of misdemeanor fleeing in Wis. Stat. §346.04(2t). 2000 Wis. Act. 109, §443.

The three levels of fleeing represented in §346.04 reflect the Legislature's intent to graduate the punitive response based on the gravity of the fleeing offense, with the felony penalties available under §346.04(3) reserved solely for the most aggravated violations. Thus,

contrary to the Court of Appeals holding (App. 7-9), something more is required for the felony than the knowledge that one is failing to stop in response to a traffic officer's signal and evidence that such failure risked interfering with or endangering others. That something is that the defendant acted with "willful or wanton disregard."

In addition to ***Preston's*** recognition that "willful" in a criminal context generally requires "legal malice," analogous uses of the phrase "willful or wanton disregard" similarly require something more than mere intent or knowledge that one is violating some duty. Thus, this Court held in ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 296 N.W. 636 (1941), that the type of misconduct sufficient to deny one unemployment benefits requires conduct evincing a "wilful or wanton disregard of an employer's interests," and that mistakes resulting, *inter alia*, from "good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." 296 N.W. at 640. *See also* ***Patrick Cudahy Inc. v. LIRC***, 2006 WI App 211, ¶12, 296 Wis.2d 751, 723 N.W.2d 756.

Similarly, in defining the element of "high degree of negligence" necessary for the offense of negligent homicide by use of a motor vehicle, this Court in ***State ex rel. Zent v. Yanny***, 244 Wis. 342, 12 N.W. 45 (1943), this Court noted as follows:

> It is considered that the negligence requisite for a conviction under sec. 340.271(2) is substantially and appreciably higher in magnitude than ordinary negligence. It is negligence of an aggravated character. It is great negligence. *It represents indifference to legal duty.* It is conduct that not only creates unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to such other person. In other words, the culpability which characterizes all negligence is magnified to a higher degree as compared with that present in ordinary negligence. *On the other hand, it is something less than wilful and wanton conduct which, by the law of this state, is the virtual equivalent of intentional wrong.*

Id., 244 Wis. at 347 (emphasis added).

"Willful or wanton" also has similar meaning in the context of punitive damages and tort law:

> A person's conduct is wanton, willful and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on the person's part to the consequences of his or her actions, even though he or she may not intend insult or injury.

Sharp ex rel. Gordon v. Case Corp., 227 Wis.2d 1, ¶40, 595 N.W.2d 380 (1999). *See also* Dan B. Dobbs, *The Law of Torts* 351 (2000) (Willful or wanton misconduct is more than gross negligence and is characterized as intentionally doing or omitting to do something, knowing that this will result in harm or with a disregard of the consequences); William Prosser et al., *Handbook of the Law of Torts* 9-10 (5th ed. 1985) (Punitive damages may be based upon "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or *such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton*." (emphasis added).

These interpretations of "wanton or willful," as well as ***Preston's***, long predated the enactment of §346.04(3) in 1965. The Legislature is presumed to have knowledge of prior interpretations of the language it chooses to use. ***Mack v. Joint School District No. 3***, 92 Wis.2d 476, 489, 285 N.W.2d 604 (1979) ("When the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws, including statutes"); ***Mitchell v. Town of Plover***, 53 Wis. 548, 11 N.W. 27, 31 (1881) ("it must be presumed the legislature enacted what they prepared, with a knowledge of the language used by them and intending that the language so prepared and used should be interpreted according to the rules prescribed by law for that purpose").

The Legislature thus must have intended the phrase "willful or wanton disregard" in §346.04(3) to have the same meaning. In other words, to be convicted of violating that statute on a theory of risking interference or danger by disregarding the officer's signal, it is not enough merely to know that one is disregarding a traffic officer's signal

to stop. Rather, the defendant must demonstrate a knowing scorn or flouting of the officer's signal with indifference to the results or some type of evil intent beyond the mere failure to comply. The good faith belief in the need for one's actions, even if unreasonable or mistaken, is the antithesis of such willful and wanton disregard and thus nullifies this element of the offense. ***Boynton***, *supra*.

B. The Undisputed Evidence Shows that Hanson did not Act with the Willful or Wanton Disregard Necessary for Conviction Under §346.04(3)

The undisputed evidence demonstrates that Hanson acted in the good faith belief that his conduct was necessary to protect himself from being assaulted by Klinkhammer. Whether or not that belief was reasonable, such as would support a finding of self-defense under Wis. Stat. §939.48, his actual, good faith belief negates the necessary element of the offense that he act in "willful or wanton disregard" of the officer's signal to stop. Accordingly, the evidence was insufficient to convict him of violating Wis. Stat. §346.04(3).

Although the specifics and cause may be in dispute, the evidence is undisputed that Klinkhammer considered this traffic stop, like all traffic stops, to be dangerous, whether due to the risk of being struck by traffic or the possibility of being killed by the driver, as was Dep. Frank Fabiano, Jr., just a year earlier. (R39:41, 44, 49, 65). It was with these thoughts in mind that, after pulling Hanson over for speeding, Klinkhammer yelled and twice pulled his baton from his utility belt while confronting Hanson (*id.*:48, 52). Klinkhammer also admitted chasing Hanson and grabbing him with such force as to rip his shirt just prior to Hanson leaving the scene (*id.*:54). The Court of Appeals also deemed it undisputed that,

> from the time Hanson left the scene of the initial stop until he was apprehended on Highway 50, he was in constant contact with a Kenosha 911 dispatcher. Hanson called 911 to report that a Kenosha police officer "beat [him] in the head" and to request assistance in locating the nearest police station. The recording of the 911 call was introduced at trial. Hanson can be heard informing

> the 911 dispatcher that he was going to the police station and that he would not pull over because he believed the officer would beat him with a stick; he was scared for his life.

(App. 5). Finally, it is undisputed that, after Klinkhammer and Sturino stopped Hanson again, they broke his car window to remove him from the car and, in police euphemism for tackling or forcibly throwing someone to the ground, "directed him to the ground." (R39:60-61).

Under these circumstances, there is no reasonable dispute that Hanson in fact feared for his safety when he left the scene of the traffic stop, sought assistance from the 911 operator, and attempted to proceed to the closest police station where "there'll be cool heads" (R41:audio of 911 call; R39:215). This was not the prototypical case of fleeing where the defendant is trying to avoid any contact with the police. To the contrary, Hanson sought out the police to protect him from the beating he feared from Klinkhammer. Even then, the evidence was that Hanson remained within the speed limit, stopped at red lights, and was even stopped at a red light at the time the officers surrounded him (R39:56-57, 81-83, 141-42).

It is undisputed, therefore, that Hanson did not act from the type of evil purpose or indifference to the consequences required for conviction under the "willful or wanton disregard" theory raised by the state here. To the contrary, regardless of whether his actions were reasonable so as to constitute perfect self-defense, the evidence is that Hanson acted in the good faith belief that his actions were necessary to protect himself. He obeyed all traffic laws other than those requiring that he not flee the officer he feared would beat him and sought to surrender himself at the nearest police station. *Cf.* ***United States v. Bailey***, 444 U.S. 394, 415 (1980) ("where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force").

The Court of Appeals accordingly is wrong is asserting that

knowingly fleeing a traffic officer is sufficient for conviction or that, "as long as Hanson, after having received a visual or audible signal from a traffic officer or marked police vehicle, fled or attempted to elude that officer, it makes no difference under §346.04(3) that he was fleeing to a police station. (App.7-8). Knowledge of the officer's signal is not enough; the defendant must act in "willful or wanton disregard." The evidence fails to demonstrate that element of the offense.

C. Hanson did not Knowingly Flee or Attempt to Elude as Required for Conviction Under Wis. Stat. §346.04(3).

While not necessary to reverse the Court of Appeals' decision, this Court should also consider whether Hanson "knowingly fled or attempted to elude" the deputy as prohibited by §346.04(3). See ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate courts generally decide cases on the narrowest possible ground).

In other words, the broader issue before this court is whether a citizen is guilty of violating §346.04(3) where it is undisputed that the citizen left the scene of a traffic stop because he feared for his safety, immediately called 911 for directions to the nearest police station, and then proceeded to that location to surrender himself.

In addition to fleeing with "willful or wanton disregard," §346.04(3) also makes a felony of a driver's knowingly fleeing or attempting to elude a traffic officer by "increas[ing] the speed of the operator's vehicle" or by "extinguishing the lights of the vehicle in an attempt to elude or flee." *See* Wis JI- Criminal 2630 (2003).

In the present case, the Court of Appeals limited its discussion on what constituted "fleeing" or "attempting to elude" to two sentences:

> [T]he audio recording of Hanson's 911 call indicates that Hanson continued to operate his vehicle despite receiving visual and audible signals from the officers, both of whom were operating fully-marked squad cars. It is also clear from the 911 recording that Hanson knew that the

> officers were pursuing him, but he intended to proceed to a police station anyway.

(App. 8 (footnote omitted)). Thus, the Court of Appeals equated driving after receiving a signal from law enforcement with "fleeing" or "attempting to elude," regardless of the reason the person continued driving. (*See* App. 7-8 ("it makes no difference under §346.04(3) that he was fleeing to a police station")).

The court of appeals' interpretation of §346.04(3) will lead to absurd results. For example, a citizen should not be labeled a felon by simply failing to immediately stop their vehicle after receiving a signal from a marked squad car and slightly increasing their speed as they drive to a safe location for the stop.[3] Without question, it is common for citizens to drive for some period of time after first seeing police lights behind them (R39:157 (Deputy Sturino: "As you probably know, people don't usually stop for squad cars"). Section 346.04(3) should not make them felons if they increased their speed at any time before coming to a complete stop.

While courts have not defined the terms "fleeing" or "attempting to elude," these terms contemplate criminalizing more than a citizen driving to a safe location. Rather, these terms encompass intentional, dangerous driving behaviors. *See* ***United States v. LaCasse***, 567 F.3d 763, 766-67 (6th Cir. 2009) (construing whether Michigan's "fleeing and eluding" statute qualifies as a violent felony under the Armed Career Criminal Act).

The ***LaCasse*** court found that "fleeing and eluding" was counted under the Armed Career Criminal Act because it involves "aggressive conduct; the offender is attempting to outrun a police cruiser." ***Id.*** at 766. Moreover, the ***LaCasse*** court rhetorically stated "what is fleeing and eluding but an attempt to escape." ***Id.*** at 767.

Moreover, the rule of lenity should also be applied when

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[3] Importantly, the legislature did not intend Section 346.04(3) to be a "strict liability" offense. ***State v. Sterzinger***, 2002 WI App. 171, ¶7, 256 Wis. 2d 925; 649 N.W.2d 677.

construing the terms "fleeing" and "attempting to elude." *See* ***State v. Rabe***, 96 Wis. 2d 48, 291 N.W.2d 809 (1980). 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." ***United States v. Gradwell***, 243 U.S. 476, 485 (1917).

Citizens would be stunned to learn that they would be considered "fleeing" or "attempting to elude" a police officer by failing to stop immediately upon seeing squad lights behind them. Likewise, they would be mortified to discover that, if they then hit the acceleration pedal, they were suddenly guilty of a felony when they only intended to stop in a safe location.

Again, there is no evidence in this case that Hanson was fleeing, attempting to elude or otherwise escaping police. Rather, Hanson was unmistakably seeking police aid by requesting a safe place to stop and turn himself in. Section 346.04(3) should not be read so broadly as to convict a driver of a felony when they call 911 to request and follow directions to a police station.

II.

THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF KLINKHAMMER'S REPUTATION AS BEING CONFRONTATIONAL, AGGRESSIVE, AND HOT-TEMPERED

The circuit court erred and prejudiced Hanson's defense to all three charges by excluding evidence that Officer Klinkhammer is, by nature, confrontational, aggressive, and hot-tempered. Such evidence was properly admissible under Wis. Stat. §904.04(1)(b) and would have substantially corroborated Hanson's account of both Klinkhammer's conduct and why Hanson reasonably feared for his well-being.[4]

Although admission of evidence generally is left to the trial court's sound discretion, the court erroneously exercises its discretion,

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[4] Hanson raised this claim below and in his petition for review in the context of his interests of justice claim. However, because the claim was fully preserved below, it is appropriate to consider it as an independent claim for relief.

as here, by ruling unreasonably or applying the wrong legal standard. ***State v. Miller***, 231 Wis.2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999).

A. Background

By motion in limine, Hanson requested, *inter alia*, that he be allowed to introduce character evidence of the victim, Deputy Klinkhammer, pursuant to §904.04(1)(b) (allowing introduction of relevant character traits of alleged victims). (R10:2 (citing ***State v. Ortiz***, 247 Wis. 2d 836 (Ct. App. 2001)).

On the first day of trial, Hanson made a proffer that the principal from a former school where Klinkhammer was a liaison offer would testify that he had a reputation in the community as "being confrontational, aggressive and hot-tempered." The court took the motion under advisement. (R38:12-14; App. 17-19). The state subsequently argued against the motion stating that the deputy was "not a victim as contemplated by that statute under this specific fact pattern." (R39:6-7; App. 23-24).

The trial court denied the motion to admit the character evidence, distinguishing ***Ortiz*** as a restitution case. The court held that the deputy was not a victim and that obstructing and eluding are victimless crimes. (R39:8-10; App. 25-27).

The Court of Appeals affirmed on the same grounds and adding that exclusion of the reputation evidence did not prevent the real controversy from being tried since the jury heard Hanson's own account of the incident. (App. 9-12).

B. The Circuit Court Erred by Excluding the Evidence

As relevant here, Wis. Stat. §904.04(1) provides as follows:

> (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 inconformity 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.

Evidence of the victim's character is admissible under §904.04(1)(b) as circumstantial evidence regarding the victim's conduct on a particular occasion. Blinka, Daniel, *Wisconsin Evidence* §404.5 at 166-67 (3d ed. 2008) ("Blinka"). "Wide latitude should be granted to defendants in the use of the victim's character for this purpose." *Id.* at 167 (citing ***State v. Boykins***, 119 Wis.2d 272, 350 N.W.2d 710 (Ct. App. 1984)).

There is no dispute that, if Klinkhammer was a "victim" of Hanson's alleged crimes, then the circuit court erred in excluding evidence of his hot-tempered and aggressive character. *See* ***Boykins***, 119 Wis.2d at 279 ("Where there is a sufficient factual basis to raise the issue of self-defense, and the violent character of the victim is an essential element of the defense, proof of the victim's reputation for being violent is relevant and admissible"). Nor is there any dispute 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). The controlling question is whether Klinkhammer was a victim in this case.

The Evidence Code does not define "victim." Nor is that term defined in Wis. Stat. §939.22. However, the term is defined consistently throughout the Criminal Code as "[a] person against whom a crime has been committed." Wis. Stat. §950.02(4)(a)1; Wis. Stat. §§971.17(4m)(a)3 & (6m); Wis. Stat. §972.14(1)(b). *See also* Wis. Stat. §940.41(2).

Contrary to the lower court's suggestions, the offenses here were not "victimless crimes." In the present case, the state charged Hanson with two counts of obstructing *an officer* and one count of eluding *an officer*. In each charge, Klinkhammer was the officer Hanson allegedly

obstructed or eluded. Klinkhammer, in other words, was allegedly deprived of something to which he legally was entitled, whether cooperation or obedience. It also was Klinkhammer, among others, whom Hanson's alleged fleeing supposedly interfered with or endangered.

In ***Haase***, the defendant was convicted of eluding an officer following a chase resulting in a squad car being destroyed. ***Haase***, ¶14. The trial court ordered Haase to pay restitution to the Sherriff'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, Klinkhammer was the direct object/recipient of Hanson's alleged obstructing and eluding behavior. It is a distinction without a difference to say that Klinkhammer did not request any restitution for damages resulting from this case and thus he should not be considered a victim. The test should be that if Klinkhammer would have been awarded restitution for losses suffered as a result of Hanson's conduct, then he is a victim for the purposes of §904.04(1)(b).

Ironically, the circuit court's ruling did not stop the state from submitting evidence and arguing to the jury that the deputies were endangered. (*E.g.*, R39:53 (Klinkhammer testified that he was "afraid" of a physical confrontation with Hanson)).[5] For example, during closing arguments the state described all traffic stops as scary events to be feared:

> [Klinkhammer] gets out of the car and approaches [Hanson]. He didn't know who he was. He could have been drunk. He could have been on alcohol. He could have been on drugs. He could

[5] Further, the state attempted to ask Derby, "In your opinion, was the deputy [Klinkhammer] in any danger . . . from the vehicle as he [Hanson] pulled away?" (R39:111).

> have been, could have been, could have been. He could have been on anything. He doesn't know. That's the point. This officer doesn't know. He has a right to have control of this situation. It wasn't that long ago in this community where a routine traffic stop ended very, very tragically. . . .

(R40:43-43 (referring to Deputy Fabiano's murder)).

Thus, the Court of Appeals' determination that the "evidence did not support a finding that Klinkhammer suffered injury, sustained losses or was otherwise victimized so as to make relevant the proffered character evidence" (App. 12) was undercut by the state's own arguments.

Because Klinkhammer was an alleged victim of Hanson's conduct, the circuit court erroneously exercised its discretion in excluding evidence of his reputation as confrontational, aggressive, and hot-tempered. *E.g.*, ***Boykins***, *supra*.

C. Exclusion of the Evidence Denied Hanson the Right to Present a Defense

Because the proffered evidence was highly relevant, indeed critical, to Hanson's defense, its exclusion violated not only state rules of evidence, but also his constitutional rights to due process and to present a defense. *See, e.g.*, ***Pennsylvania v. Ritchie***, 480 U.S. 39, 40 (1987) (recognizing criminal defendant's "right to put before the jury evidence that might influence the determination of the guilt"); ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986).

While the admission of evidence generally rests within the sound exercise of trial court discretion and may be subject to reasonable restrictions, ***United States v. Scheffer***, 523 U.S. 303, 308 (1998), such limitations may deny the defendant his rights to due process, compulsory process, and confrontation where, as here, they have the effect of concealing relevant, exculpatory evidence from the jury. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673 (1986). The jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'"

Davis v. Alaska, 415 U.S. 308, 317 (1974) (citation omitted).

A defendant's right to present a defense includes the right to offer testimony by witnesses and to compel their attendance. ***Chambers v. Mississippi***, 410 U.S. 284 (1973); ***Washington v. Texas***, 388 U.S. 14, 19 (1967). The Supreme Court has recognized that "few rights are more fundamental than that of an accused to present witnesses in his own defense." ***Chambers***, 410 U.S. at 302.

At the same time, a defendant's right to present relevant testimony is not without limitation and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." ***Chambers***, 410 U.S. at 295; ***Rock v. Arkansas***, 483 U.S. 44, 55 (1987). Still, while "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," ***Scheffer***, 523 U.S. at 308, the Supreme Court has expressed disapproval of rules "applied mechanistically to defeat the ends of justice," ***Rock***, 483 U.S. at 55. Accordingly, such rules violate the right to present a defense if their application in a particular case is "arbitrary" or "disproportionate to the purposes they are designed to serve." ***Rock***, 483 U.S. at 56.

Even if evidence is properly excluded under state evidence rules, such exclusion may violate the defendant's constitutional rights. *E.g.*, ***State v. St. George***, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777. To establish that exclusion of defense evidence violates his right to present a defense, the defendant must show (1) that admission of the evidence would not have been a misuse of discretion, (2) that the evidence "was relevant to a material issue in [the] case," (3) that the evidence "was necessary to the defendant's case," and (4) that "[t]he probative value of the [evidence] outweighed its prejudicial effect." ***St. George***, ¶54 (footnotes omitted). "After the defendant successfully satisfies these four factors to establish a constitutional right to present the [evidence,] a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." ***Id.*** ¶55.

There can be no reasonable dispute that evidence of Klinkhammer's reputation as confrontational, aggressive, and hot-tempered was admissible under Wisconsin law, such that the trial court would not have misused its discretion by admitting evidence of it. *See* Section II,B, *supra*. Nor is there any reasonable dispute that such evidence was relevant to the central issues in the case, that the evidence corroborating Hanson's account of Klinkhammer's unreasonable and threatening conduct was critical to his defense, and that, given the high probative value of such evidence and the total absence of any conflicting unfair prejudicial effect, the former outweighed the latter. Nor is there any rational argument that the state has *any* legitimate interest in excluding evidence of Klinkhammer's confrontational and hot-tempered character, let alone a compelling one. Indeed, the state has never disputed that the evidence accurately reflects Klinkhammer's character. As such, the improper exclusion of the evidence denied Hanson the rights to due process and to present a defense. ***St. George***, *supra*; ***Chambers***, *supra*.

D. The Error was not Harmless

Given the importance to Hanson's defense of evidence corroborating his account of this incident, it cannot reasonably be suggested that the improper exclusion of evidence of Klinkhammer's confrontational, aggressive, and hot-tempered character was harmless beyond a reasonable doubt. *See* ***State v. Dyess***, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (beneficiary of error must demonstrate harmlessness beyond reasonable doubt).

In the present case, the state charged Hanson with two counts of obstructing an officer and one count of felony eluding an officer. Hanson raised a defense of self-defense to all three charges, which requires not only that he "believed that there was an actual or imminent unlawful interference with [his] person" and that "his actions were necessary to prevent or terminate the interference," but that those beliefs were reasonable (R40:26). Wis. Stat. §939.48(1). As discussed in Section I, *supra*, moreover, Hanson's good faith belief that he had to flee Klinkhammer to avoid being beaten likewise provides a defense to

the felony fleeing charge even if that belief was unreasonable.

To corroborate those defenses, Hanson sought to introduce evidence that Klinkhammer had a reputation for being "confrontational, aggressive and hot-tempered." (R38:12-13; App. 17-18). This testimony was critical to Hanson's defense as he needed to explain to the jury both that he in fact feared for his safety as he drove away from Klinkhammer and that the fear was reasonable. This reputation evidence was especially critical in light of the state's repeated efforts to say that it was the deputies who were in danger.

The verdicts in this case turned on the relative credibility of Hanson's account and Klinkhammer's. If Klinkhammer is to be believed, then Hanson became irrationally upset, bizarrely ranting about being pulled over for a speeding ticket, confronting the officer, and eventually jumping into his car and driving off for no apparent reason but to avoid being placed under arrest. Under Hanson's account, it was Klinkhammer who was abrupt, confrontational, and dictatorial, twice threatening Hanson with a baton merely because Hanson had the nerve to exit his vehicle to offer Klinkhammer his license and to ask why he was stopped. As Hanson explained to the 911 operator, "he would not pull over because he believed the officer would beat him with a stick [and] he was scared for his life." (App. 5 (citing R41 (the 911 recording))).

Klinkhammer's account was partially corroborated by Derby, the intern, although her desire for a career in law enforcement could be viewed as creating bias in favor of Klinkhammer.[6] Hanson's account similarly, albeit indirectly, was corroborated by the witnesses to his truthful character and Klinkhammer's expressed anxiety over the perceived danger of traffic stops in generally. The latter would provide a reason *why* a traffic officer could overreact in the manner Hanson described, indirectly corroborating his account. However, it would not directly corroborate that account of Klinkhammer's actions absent

[6] In fact, she did ultimately obtain employment as a police dispatcher (R39:101).

evidence that he was the type of officer who would overreact in such circumstances.

The excluded character evidence would have filled that hole in the defense case, showing that Klinkhammer had not only reason for the type of anxieties that could cause him to overreact in this particular situation, but the kind of hot-tempered personality to easily do so. If Klinkhammer is so confrontational, aggressive, and hot-tempered in a school setting, how much more so must he be during a traffic stop that he views as inherently dangerous?

Even without the excluded evidence, the circuit court found that there was sufficient basis for a finding of self-defense. Because a defendant's corroborated account is far more powerful than the defendant's account alone, *e.g.*, ***Crisp v. Duckworth***, 743 F.2d 580, 585 (7th Cir. 1984) ("[h]aving independent witnesses corroborate a defendant's story may be essential"); ***State v. Harris***, 2003 WI App 144, ¶40, 266 Wis.2d 200, 667 N.W.2d 813; ***State v. Sturgeon***, 231 Wis.2d 487, 500, 605 N.W.2d 589 (Ct. App. 1999), the erroneous exclusion of the evidence cannot be excused as harmless beyond a reasonable doubt.

III.

REVERSAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Even if the Court should find the evidence marginally sufficient for conviction on the felony fleeing charge, the interests of justice require grant of relief pursuant to Wis. Stat. §751.06 because neither the parties, the circuit court, nor the jury were aware at the time of trial regarding this Court's interpretation of §346.04(3).[7] As such, the central issue in the case concerning whether Hanson acted in "willful or wanton disregard" was not fully tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). This Court may exercise its discretion under §751.06 without regard for whether the Court of

[7] This Court also has the inherent power to reverse a conviction and order a new trial in the interests of justice. ***State v. Hicks***, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996).

Appeals misused its discretion under Wis. Stat. §752.35. *See* ***Stivarius v. DiVall***, 121 Wis.2d 145, 358 N.W.2d 530, 534 & n.5 (1984).

This Court need not determine that a new trial would likely result in a different outcome in order to grant a new trial in the interests of justice where the real controversy was not fully tried. ***State v. Watkins***, 2002 WI 101, 97, 255 Wis. 2d 265, 647 N.W.2d 244.

In addition to the issue of self-defense, the central issue at trial concerned whether and when someone who failed to pull over in response to a traffic officer's signal, and instead called 911 for help locating a police station where he could surrender to "cool[er] heads," is guilty of felony fleeing under §346.04(3). Prior to this Court's decision in this case, no court addressed the requirement that the defendant show "willful or wanton disregard" in such a case. The parties did not have the benefit of this Court's construction of that requirement in preparing and presenting their cases at trial and the jury was not instructed on what that element of the offense required.

Because this case was not tried in light of the Court's interpretation of that requirement, it cannot rationally be said that the real controversy was fully tried. *See also* ***State v. Thomas***, 161 Wis. 2d 616, 625-26, 468 N.W.2d 729 (Ct App. 1991) (reversal in the interest of justice because controversy not fully tried where misunderstandings have thwarted justice).

CONCLUSION

For these reasons, Daniel H. Hanson respectfully asks that the Court reverse the Court of Appeals' decision and remand this matter to the circuit court for full hearing and decision on the merits of his ineffective assistance of counsel claims.

Dated at Milwaukee, Wisconsin, March 10, 2011.

Respectfully submitted,

DANIEL H. HANSON,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.

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Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

CHAD A. LANNING
State Bar No. 1027573
LANNING LAW OFFICES, LLC
2100 Gateway Ct, Suite 200
West Bend, WI 53095
(262) 334-9900

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,422 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

Consol. Hanson SCT Brf.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 10th day of March, 2011, I caused 22 copies of the Brief and Appendix of Defendant-Appellant-Petitioner to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak

Consol. Hanson SCT Brf.wpd