STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP2759-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL H. HANSON,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A COURT OF APPEALS' DECISION UPHOLDING A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE WILBUR W. WARREN III PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF ISSUES

Issue One

Was there sufficient evidence to convict Daniel Hanson of fleeing under Wis. Stat. § 346.04(3), based on evidence that he knowingly disregarded a law enforcement officer's signal and endangered others while fleeing? Or does Wis. Stat. § 346.04(3) only cover people with "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" (Hanson-Br. 15).

Hanson was convicted of violating Wis. Stat. § 346.04(3) after a jury trial. The court of appeals held that Hanson could be convicted of fleeing despite evidence that he tried driving to a police station when he fled. The court of appeals further held that there was sufficient evidence to convict Hanson of fleeing under Wis. Stat. § 346.04(3).

Issue Two

Hanson raises evidentiary and constitutional claims that he did not raise in the court of appeals or in his petition for review and that are not in this court's order granting review. Did Hanson properly preserve his evidentiary and constitutional claims for review?

Neither the circuit court nor the court of appeals considered this issue.

Issue Three

The circuit court excluded testimony Hanson sought to introduce about the reputation of the deputy from whom he fled, reasoning that the deputy was not a victim under Wis. Stat. § 904.04(1). Did the circuit court properly exercise its discretion?

The court of appeals did not consider this claim because Hanson did not raise it below. The court of appeals did, however, decline to discretionarily reverse Hanson's conviction based on the exclusion of the evidence. It reasoned that the circuit court had properly excluded the testimony and that the testimony's exclusion did not keep the real controversy from being fully tried.

Issue Four

Did the exclusion of the reputation testimony violate Hanson's constitutional right to present a defense?

Neither the circuit court nor the court of appeals considered this issue because Hanson did not raise it.

Issue Five

Should this court discretionarily reverse Hanson's fleeing conviction because this court had not issued a decision interpreting the meaning of "willful or wanton" in Wis. Stat. § 346.04(3) before Hanson's trial?

Neither the circuit court nor the court of appeals has considered the issue. The court of appeals declined to exercise its own discretionary-reversal power, however, based on distinct grounds Hanson presented to it involving various evidentiary rulings.[1]

STATEMENT OF THE CASE

Daniel Hanson is challenging a Wisconsin Court of Appeals' decision upholding his convictions for one count of felony fleeing, in violation of Wis. Stat. § 346.04(3), and two counts of obstructing an officer, in violation of Wis. Stat. § 946.41(1) (36).

Hanson's convictions stem from events that occurred after Hanson was stopped for speeding, which culminated in Hanson driving off and being arrested after two deputies chased him down.

[1]Contrary to what Hanson claims, he asked the court of appeals to discretionarily reverse his conviction on different grounds than those he does this court (Hanson-Br. vii).

Hanson was convicted after a jury trial in which he claimed to have fled in self-defense and in which the self-defense instruction was given (40:26).[2]

The Wisconsin Court of Appeals upheld Hanson's convictions in *State of Wisconsin v. Daniel H. Hanson*, 2008AP2759-CR (Wis. Ct. App. Dist. II Oct. 6, 2010), for the following reasons:

First, the court of appeals rejected Hanson's claim that he could not be convicted of fleeing since he tried driving to a police station when he fled (*id.* at ¶13). It noted that "[w]hile Hanson speaks generally of fleeing 'the police,' the statute expressly makes it a violation of the law to elude 'any traffic officer'" (*id.*). It also noted that the purposes of Wis. Stat. § 346.04(3)—"foster[ing] cooperation with individual officers at the time of the initial stop while also discouraging unsafe driving"—were implicated regardless of Hanson's destination (*id.*).

Second, the court of appeals held that there was sufficient evidence to convict Hanson of fleeing under Wis. Stat. § 346.04(3) (*id.* at ¶¶14-15). It recounted the evidence that Hanson knew officers were pursuing him and the evidence that Hanson interfered with or endangered other vehicles (*id.* at ¶15).

Third, the court of appeals declined Hanson's request to discretionarily reverse his conviction (*id.* at ¶¶17-24). Hanson based his request on several evidentiary decisions, including the circuit court's decision to exclude testimony about the reputation the deputy who stopped him. The court of appeals held that the decision excluding the testimony did not provide a basis for discretionary

[2]Hanson claims that the prosecutor dismissed a misdemeanor case and then filed felony charges because he did not agree to a plea deal (Hanson-Br. 1). The charging history is irrelevant. But it is worth noting that Hanson's characterization is not supported by the record. The prosecutor explained before trial that the case "was originally charged as a misdemeanor, but it was dismissed so it could be recharged properly as the felony that it is" (38:4-5).

reversal because the circuit court had properly excluded the testimony and because the testimony's exclusion did not keep the real controversy in Hanson's case from being fully tried (*id.* at ¶¶19-21).

Hanson petitioned this court for review of the court of appeals' decision. He asked this court to review the court of appeals' decision upholding his fleeing conviction. He also asked this court to consider discretionarily reversing his conviction based on the same evidentiary issues he raised in his discretionary-reversal claim in the court of appeals. This court granted Hanson's petition in an order specifically instructing the parties that they could only raise the issues on which they had petitioned for review (R-Ap. 101-02). Hanson, now represented by new counsel, raises a statutory construction and sufficiency of the evidence claim involving his felony fleeing conviction similar to one he raised before. Contrary to this court's order granting review, however, Hanson raises new evidentiary and constitutional claims.

STATEMENT OF FACTS

Traffic Stop

Deputy Eric Klinkhammer pulled Daniel Hanson over for speeding on I-94 at around 10:00 a.m. on June 29, 2006 (39:40-41). Hanson was driving his red Ford Mustang 83 miles per hour in a 65 mile per hour zone (39:40-41).

Hanson got out of his car immediately after being stopped, while Deputy Klinkhammer was still in his squad car calling the stop in (39:43). Deputy Klinkhammer ordered Hanson three times to get back in his car over the squad car's PA system (39:45, 104-05).

Hanson did not comply, so Deputy Klinkhammer approached Hanson and repeatedly ordered him to get back into his car (39:46, 104-05). Deputy Klinkhammer

stated that Hanson acted "bizarrely," differently than any of the thousands of other people he had pulled over for speeding in his fifteen years as an officer (39:46-47). Hanson yelled and screamed, paced back and forth, and angrily waved his driver's license around (39:46-47, 104-05).

Deputy Klinkhammer was concerned for his safety and for Hanson's (39:44-45). He was also concerned that Hanson was hiding something in his car (39:45). In addition to ordering Hanson to get inside his car, Deputy Klinkhammer extended his baton and held it next to his leg "so [Hanson] could see that this was a serious situation and that he needed to get back into his car" (39:48). Deputy Klinkhammer also "radioed for backup because the situation was getting out of control" (39:48).

Hanson finally returned to his car after being ordered to do so 10 to 12 times (39:47-48). Deputy Klinkhammer approached Hanson's car from the passenger's side to avoid traffic (39:50-51). He asked Hanson to roll down his window and to provide his driver's license (39:50-51). Hanson rolled down his window a "couple inches" and "aggressively" turned over his driver's license, all the while continuing to complain about being stopped (39:51, 106).

Deputy Klinkhammer told Hanson that he was going to be cited for speeding and started back to his squad car (39:51). Before Deputy Klinkhammer made it back to his squad car, however, Hanson got out of his car for a second time and began yelling and screaming at Deputy Klinkhammer again (39:51, 108).[3] Hanson's demeanor escalated (39:52). Hanson began "to pace back and forth faster," his arms kept "flailing," and his voice got "louder and louder and louder" (39:52).

[3]Deputy Klinkhammer equivocated about whether he was en route to the squad car or had entered the squad car when Hanson got out of his car the second time (39:54). Randi Derby testified that Deputy Klinkhammer was walking back to his car (39:106-07).

Increasingly concerned about Hanson's "bizarre" behavior, Deputy Klinkhammer radioed to dispatch that he needed help immediately and tried keeping his distance from Hanson (39:52). He also tried repeating what "worked" before, ordering Hanson back into his car and extending his baton back by his leg (39:52). Deputy Klinkhammer called to check on back up again and then decided to arrest Hanson after all else failed (39:53).

When Deputy Klinkhammer told Hanson he was under arrest, Hanson quickly turned and raced back to his car (39:54). Deputy Klinkhammer chased Hanson and tried to stop him by grabbing his shirt (39:54, 109-10). Hanson pulled away from Deputy Klinkhammer as he got inside his car, causing his shirt to rip (39:54). Hanson then locked his car doors and drove off with Deputy Klinkhammer standing just inches away (39:54-55, 110).

Chase

A chase ensued.

After Hanson drove off, Deputy Klinkhammer ran back to his squad car and radioed into dispatch that Hanson "had left" and was "10-96"—a police code meaning that someone was "[c]razy, mentally and emotionally deranged" (39:55). Deputy Klinkhammer then chased Hanson on the interstate with his squad car's lights and siren on (39:56).

Hanson, driving the speed limit, exited I-94 at Highway 50 (39:57). Deputy Sam Sturino joined the chase there. Deputy Sturino pulled his squad car onto the bottom of the exit ramp (39:57-58). Hanson swerved around Deputy Sturino's squad car, barely missing it by just two to four feet (39:58, 135-37, 157-59).

Hanson drove along Highway 50, which was busy and congested. Hanson continued on Highway 50 until he had to stop for a light (39:59, 156). Deputy Klinkhammer

and Deputy Sturino boxed in Hanson's car after he stopped (39:59, 159-60).

Arrest

Deputy Klinkhammer and Deputy Sturino then drew their guns and ran up to Hanson's car (39:59). They repeatedly ordered Hanson to get out of his car and told him that they would break his window if he did not comply (39:59-60, 163). Hanson did not get out of his car, so Deputy Klinkhammer used his baton to break Hanson's window (39:60, 163). Deputy Klinkhammer then opened Hanson's door, took Hanson outside his car, and placed Hanson on the ground where Hanson was handcuffed and arrested (39:60-61, 138-39, 164).

911 Call

Throughout the chase and until his arrest, Hanson was on the phone with 911 (41:Ex.6). Hanson told the dispatcher that he was going to a police station because "a Kenosha police officer" was an "angry person" who "does not value life" and had "beaten him" (41:Ex.6). The dispatcher repeatedly told Hanson to pull over, that he was endangering people, that other officers were coming to the scene, and that the nearest police station was seven to ten miles away (41:Ex.6). Police sirens can be heard throughout the 911 call (41:Ex. 6).

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT HANSON OF FELONY FLEEING REGARDLESS OF HIS SUBJECTIVE REASONS FOR FLEEING.

A. Introduction.

Hanson's first claim only involves his fleeing conviction. Hanson claims that he could not be convicted

of violating the felony fleeing statute, Wis. Stat. § 346.04(3), because he lacked the requisite "evil" intent.

Wisconsin Stat. § 346.04(3) provides:

> 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, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

The jury found Hanson guilty of violating Wis. Stat. § 346.04(3) by willfully disregarding a signal "so as to endanger other vehicles" (40:25). It did so despite being given the self-defense instruction (40:26). The circuit court had instructed it that it must acquit Hanson of fleeing unless the state proved that Hanson did not act based on "a reasonable belief" that he was in "actual or imminent" harm and that "his actions were necessary to prevent or terminate the interference" (40:26).

Hanson interprets the phrase "willful or wanton" in Wis. Stat. § 346.04(3) as requiring "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" (Hanson-Br. 15). He challenges his fleeing conviction on the ground that he lacked such intent. He, in essence, tries to use the phrase "willful or wanton" to get what he could not get with the self-defense instruction: a subjective good faith defense that completely exonerates a person who had a reason, however unreasonable, for fleeing or who did not understand the dangers of fleeing.

Hanson's interpretation of Wis. Stat. § 346.04(3) is not supported by the text, structure, or context of Wis. Stat. § 346.04(3). Further, it would lead to absurd results, allowing people to flee law enforcement anytime they

perceived themselves as having a good reason for doing so or they failed to consider the dangers they created.

When the text and structure of Wis. Stat. § 346.04(3) are taken in context, with the purposes of Wis. Stat. § 346.04(3) in mind, it is clear that a person's reasons for fleeing and understanding of the dangers they created are irrelevant. People who flee law enforcement in such a manner "so as to interfere with or endanger" others may be convicted of fleeing if they intentionally disregarded a law enforcement signal. There was sufficient—overwhelming—evidence that Hanson did.

B. Standard of review and applicable principles of law.

Though Hanson characterizes his claim as a sufficiency of the evidence claim, it is really a statutory interpretation claim concerning what must be proven to establish a violation of Wis. Stat. § 346.04(3). It thus presents a question of statutory interpretation subject to this court's *de novo* review. *See State v. Conner*, 2011 WI 8, ¶17, __ Wis.2d __, __ N.W.2d __; *State v. Davis*, 2008 WI 71, ¶18, 310 Wis.2d 583, 751 N.W.2d 332.

In interpreting statutes, this court focuses on statutory text, structure, and context with an eye towards avoiding absurd results. *Conner*, 2011 WI 8, ¶17. This court has explained:

> "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is 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. Statutory language is read

> where possible to give reasonable effect to every word, in order to avoid surplusage."

Id. ¶39, *quoting State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110.

C. A person's reasons for fleeing and understanding of the dangers of fleeing do not matter under Wis. Stat. § 346.04(3).

1. Introduction.

Wisconsin Stat. § 346.04(3) makes it a felony for drivers to "knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal." The phrase "willful or wanton disregard of such signal" explains how a person "knowingly flees or attempts to allude."

Given this structure, the phrase "willful or wanton disregard" can do one of two things: it can be synonymous with "knowingly," or it can change the knowledge requirement, either heightening or lowering the requirement. Consideration of the context of and purposes of Wis. Stat. § 346.04(3) and the possibility of absurd results supports the former interpretation and certainly does not support the type of subjective good faith defense—and heightening of the knowledge requirement—Hanson contends.

2. The text and structure of Wis. Stat. § 346.04(3) indicate that the phrase "willful or wanton" means knowingly.

Hanson claims that the phrase "willful or wanton" signifies more than knowingly. He interprets the phrase as requiring "indifference to the results or some type of

evil intent beyond the mere failure to comply" with an officer's signal (Hanson-Br. 15). Thus, Hanson reads the phrase as creating a subjective good faith defense and as requiring either that a person understood the dangers created by fleeing or had some type of evil intent beyond disregarding a police signal.

Wisconsin Stat. § 346.04(3) provides no support for Hanson's claim that it requires "some type of evil intent beyond the mere failure to comply" (Hanson-Br. 15). The statute says absolutely nothing about a person's reasons for fleeing anywhere, let alone in connection with the knowledge requirement.

Wisconsin Stat. § 346.04(3) does touch upon the dangers of fleeing. It includes as an element that flight must "interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians." The "interfere with or endanger" element could be interpreted as a heightening the knowledge requirement. But it should not be.

This court has never considered whether a person must know that they interfered with or endangered others to be convicted under Wis. Stat. § 346.04(3). But the court of appeals held that a person does not in *State v. Sterzinger*, 2002 WI App 171, ¶11, 256 Wis.2d 925, 649 N.W.2d 677 ("'[K]nowingly' in Wis. Stat. § 346.04(3) applies to only 'flee or attempt to elude,' and not to 'interfere with or endanger.'").

The court of appeals' holding in *Sterzinger* is supported by the text and structure of Wis. Stat. § 346.04(3). The "interfere with or endanger" provision is akin to the later provisions prohibiting persons from increasing speed or turning off lights when fleeing.[4] Wisconsin Stat. § 346.04(3) does not require that a person

[4]There was sufficient evidence to convict Hanson based on the fact that he increased his speed when driving away from Deputy Klinkhammer. The prosecution did not present that theory to the jury, however, so the state does not rely on it now.

knowingly increased his speed or knowingly turned off his car lights when fleeing. It follows that Wis. Stat. § 346.04(3) also does not require that a person knowingly interfered with or endangered others when fleeing. All three provisions target dangers that people create when fleeing, dangers that exist regardless of a person's intent in driving a particular manner. Providing a defense for people who do not appreciate the dangers created by fleeing would only serve to reward people for failing to think through or appreciate the risks of an inherently dangerous endeavor.

3. The purposes of Wis. Stat. § 346.04(3) do not depend on a person's reasons for fleeing or understanding of the dangers fleeing creates.

When the requirements of Wis. Stat. § 346.04(3) are taken together, it is clear that Wis. Stat. § 346.04(3) has two purposes: fostering cooperation with a law enforcement officer's signal to stop and avoiding unsafe driving. The court of appeals recognized this when it rejected Hanson's claim, stating: "[T]he objectives of the statute are readily discerned from its language. It seeks to foster cooperation with individual officers at the time of the initial stop while also discouraging unsafe driving." *Hanson*, ¶13. These purposes are reflected by the fact that Wis. Stat. § 346.04(3) is included in the "Rules of the Road" chapter of the Wisconsin Code. They are also reflected by the legislative history of the misdemeanor felony statute, Wis. Stat. § 346.04(2t), which indicates that the legislature was concerned in § 346.04(3) about fleeing episodes that "pose great threats to the safety of officers and others" (A-Ap. 31).

Consideration of these purposes further undermines Hanson's argument. Neither purpose depends on whether someone understands the dangers of fleeing or on whether someone harbors some type of evil intent beyond just the

intent to disobey police. The purposes are implicated anytime someone knowingly flees police in a way that interferes with or endangers others.

4. Considerations of a person's reasons for fleeing and understanding of the dangers of fleeing would undermine the purposes of Wis. Stat. § 346.04(3) and lead to absurd results.

Not only are a person's reasons for fleeing and understanding of the dangers of fleeing immaterial to the purposes of Wis. Stat. § 346.04(3), consideration of such subjective beliefs—and recognition of a subjective good faith defense—would undermine the purposes of Wis. Stat. § 346.04(3) and lead to absurd results.

Just take Hanson's case.

The jury convicted Hanson of fleeing even though he presented a self-defense defense. Let's assume the jury accepted Hanson's testimony that he feared Deputy Klinkhammer and believed he needed to flee to protect himself. Then it apparently determined that Hanson's fear or decision to flee was unreasonable. Hanson is essentially trying to get what he could not get with the self-defense instruction: an imperfect self-defense defense where none is authorized, where he did not request one, and where his self-defense defense failed; an imperfect self-defense defense that would not just reduce his criminal exposure, as such a defense would in the homicide context, but that would completely exonerate him. *See State v. Gomaz*, 141 Wis.2d 302, 307, 414 N.W.2d 626 (1987) (discussion of imperfect self-defense defense in homicide case).

The absurdity of Hanson's position becomes even more clear when considered in light of all the evidence of

the danger Hanson created—evidence the jury apparently accepted. Hanson led law enforcement on a chase down an interstate and a busy road until he was boxed in at a stop light. He nearly crashed into a squad car in the process. It is hard to believe that Hanson did not on some level understand the danger he was creating by fleeing, if not when he drove away from Deputy Klinkhammer then at least by the time he swerved around and nearly hit Deputy Sturino's squad car. To the extent he did not, however, it is unclear why he should be rewarded—and let off—for ignoring such obvious danger.

The implications of Hanson's argument extend well beyond Hanson's case however. Hanson's argument is seemingly limitless in scope. Hanson does nothing to reign it in. It seemingly encompasses—and would exonerate—anyone who had a good personal justification for fleeing and who did not think through the dangers of fleeing. Among the beneficiaries of Hanson's subjective good faith defense:

- A nervous first-time father driving his laboring wife to the hospital, whom police signal to stop, who disregards a siren and unintentionally cuts off several cars trying to get to the hospital as quickly as possible.

- An attorney, who overslept the morning of supreme court argument, whom police signal to stop, who disregards a siren and runs a red light trying to make it to court on time.

- A Green Bay Packers fan, who got stuck in a supermarket line buying snacks for the Super Bowl, whom police signal to stop, who disregards a siren in the hopes of getting home in time for kickoff, who follows traffic laws but causes a police officer to run a red light chasing after him.

When these instances are considered, the absurdity of Hanson's argument becomes more apparent.

Like Hanson, all the people in these examples had good, non-evil reasons for fleeing, separate and apart from escaping police. Fleeing was merely a means to their self-appointed ends. They all chose their own ends, their own justifications, above police directives and public safety. None of them set out to endanger others. But they all did, two without even realizing it.

As Hanson's case and these examples demonstrate, it is a bit redundant to speak in terms of fleeing with an intent to interfere with or endanger others. Fleeing is an inherently dangerous activity—especially when, as with Hanson's flight, it happens on busy roads. Anyone who flees on some level disregards the dangers he creates.

The only way to fulfill the purposes of Wis. Stat. § 346.04(3), in turn, is without consideration of the personal calculus and comprehension involved in someone's decision to flee. The only intent that matters under Wis. Stat. § 346.04(3) is the intent to flee police. If a person knowingly flees police in a manner that endangers the public, then that person may be convicted of felony fleeing, irrespective of his reasons for fleeing or understanding of the dangers he created.

5. The case law, dictionary definition of "wanton," and legislative history of Wis. Stat. § 346.04(2t) Hanson cites do not support imposing a subjective bad faith requirement on Wis. Stat. § 346.04(3).

Hanson uses case law, a dictionary definition of the word "wanton," and legislative history involving the misdemeanor fleeing statute, Wis. Stat. § 346.04(2t), in an

effort to establish that Wis. Stat. § 346.04(3) contains a subjective bad faith requirement.

None of these help him.

Case Law

Hanson tries to use case law, some century-old, to support his contention that "willful or wanton" always requires evil intent in the criminal context (Hanson-Br. 13-17). But the case law does not support, and if anything contradicts, Hanson's interpretation.

This court has never held that "willful" always connotes evil intent in the criminal context. It has repeatedly held that the word "willful" "cannot be defined without reference to its use in a specific statute." *State v. Cissell*, 127 Wis.2d 205, 210, 378 N.W.2d 691 (1985), *quoting Dept. of Transp. v. Transp. Comm.*, 111 Wis.2d 80, 87, 330 N.W.2d 159 (1983); *State v. Preston*, 34 Wis. 675, 685 (1874). Moreover, it has interpreted the word "willful" in a felony criminal statute as synonymous with "intentional." *See Cissell*, 127 Wis.2d at 210.

In *State v. Cissell*, this court considered whether the felony abandonment statute, Wis. Stat. § 52.05(1), had identical elements as the misdemeanor nonsupport statute, Wis. Stat. § 52.055. The former created a felony penalty for "[a]ny person who deserts or willfully neglects or refuses to provide support. Wis. Stat. § 52.05(1) (1983-84). The latter created a misdemeanor penalty for "[a]ny parent who intentionally neglects or refuses to provide" support. Wis. Stat. § 52.055 (1983-84).

This court rejected the argument that "willful means more than intentional" in all criminal statutes. *Cissell*, 127 Wis.2d at 211. It held that the word "willfully" in Wis. Stat. § 52.05(1) meant the same thing—and required the same proof—as the word "intentionally" in Wis. Stat. § 52.05(1). It defined both words in terms of the "general statement of the "*mens rea* element of criminal intent

crimes" in Wis. Stat. § 939.23(3). *Id.* at 211-12. Wisconsin Stat. § 939.23 provides that "[w]hen criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by" various words including "intentionally" and "some form of the verb[ ] 'know.'" This court reasoned that "[a]lthough sec. 52.055 is not part of the criminal code," it sets forth "a crime which requires proof of criminal intent by its own language." *Id.* at 211.

This court's analysis in *Cissell* undermines Hanson's claim that "willful or wanton" always requires evil intent in criminal statutes. It brings us back to the statutory analysis of Wis. Stat. § 346.04(3) the state provides above—an analysis that indicates that "willful or wanton" means knowing in Wis. Stat. § 346.04(3).

Dictionary Definition

Hanson's reliance on the dictionary definition of the word "wanton" falters in two important respects.

First, the dictionary definition does not trump what the text, structure, and context of Wis. Stat. § 346.04(3) indicate about the meaning of the phrase "willful or wanton" in it. *See Kalal*, 271 Wis.2d 633, ¶49 ("Many words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used."); *Cissell*, 127 Wis.2d at 210-11 ("Willful" must be interpreted in the context of specific statutes.)

Second, Hanson fails to account for the facts of his own case and the standard jury instruction for Wis. Stat. § 346.04(3). The circuit court did not use the word "wanton" when it instructed the jury on Wis. Stat. § 346.04(3). Its omission was consistent with the standard jury instruction for Wis. Stat. § 346.04(3). *See* Wis. JI-Criminal 2630 (2003). The standard jury instruction for Wis. Stat. § 346.04(3) only includes the word "willful." *See* Wis. JI-Criminal 2630. The Jury Instructions Committee explains in a footnote that it omitted the word "wanton" because the word "does not add anything

substantial to the offense." *Id.* at 4 n.3. It advises that the word "wanton" "should be added" "[i]f it appears . . . appropriate to a given case." *Id.*

Hanson did not seek to add the word "wanton" to the jury instruction at his trial, presumably because he deemed it unnecessary. Having failed to insist at trial on inclusion of the word "wanton" in the jury instruction, Hanson may not now use the word to impose added requirements onto Wis. Stat. § 346.04(3) beyond what the word "willful" creates. *See* Wis. Stat. § 805.13(3); *State v. Glenn*, 199 Wis.2d 575, 590, 545 N.W.2d 230 (1996) ("§ 805.13(3) requires an objection to the proposed jury instructions be made or any error is waived.").

Legislative History of Wis. Stat. § 346.04(2t)

The legislative history involving the misdemeanor fleeing statute, Wis. Stat. § 346.04(2t), does not help Hanson either.

First, legislative history does not trump plain statutory meaning, as discerned by an analysis of statutory text, structure, and context with an eye towards avoiding absurd results. *See Kalal*, 271 Wis.2d 633, ¶51 ("[A]s a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.").

Second, the legislative history Hanson cites involving Wis. Stat. § 346.04(2t) does not even involve the statute at issue, the felony fleeing statute, Wis. Stat. § 346.04(3). The fact that the legislature created a crime of misdemeanor fleeing to give prosecutors more discretion and to cover less dangerous instances of fleeing says nothing about the knowledge requirement for the earlier-enacted crime of felony fleeing. There is no indication that the legislature intended to heighten the knowledge requirement for Wis. Stat. § 346.04(3) when it

enacted Wis. Stat. § 346.04(2t), or alternatively, that it enacted Wis. Stat. § 346.04(2t) because Wis. Stat. § 346.04(3) required the type of subjective bad faith Hanson claims.

D. There was sufficient evidence to convict Hanson of felony fleeing under Wis. Stat. § 346.06(3).

With the proper interpretation of Wis. Stat. § 346.06(3) in mind, it is clear that there was sufficient evidence to convict Hanson of felony fleeing.

The state prosecuted Hanson for knowingly fleeing a traffic officer after having "received a visual or audible signal from a marked police vehicle" and "by willful disregard of the visual or audible signal so as to endanger or interfere with the operation of the police vehicle or other vehicles" (7; 40:23). To find Hanson guilty, the 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."

(40:25.) *See* Wis. JI-Criminal 2630.

The question on appeal for a sufficiency of the evidence claim is whether "the evidence, viewed most favorably to the state and 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). An appellate court "may not" reverse a conviction for insufficient evidence unless this standard is met. *Id.*

The evidence of Hanson's flight was clearly sufficient to convict him under Wis. Stat. § 346.04(3).

Several witnesses testified that Hanson operated a motor vehicle while Deputy Klinkhammer and Deputy Sturino had their emergency lights and sirens on. They included: Hanson; Deputy Klinkhammer; Deputy Sturino; Randi Derby, an intern who was riding along with Deputy Klinkhammer; and Anthony Bowen, a citizen who saw some of the events when driving by (39:56, 113, 118, 140, 153-54). The 911 recording also provided evidence that Hanson operated a motor vehicle "after receiving a visual or audio signal from a marked police car." It captured Hanson explaining how and why he had driven off and had the sound of sirens in the background (41:Ex. 6).

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). Additionally, the circumstances surrounding Hanson's fleeing provided circumstantial evidence of Hanson's knowledge. Hanson drove off fast while Deputy Klinkhammer had him stopped and after Deputy Klinkhammer told him he was under arrest and tried to restrain him (39:54-55, 110, 132, 211). Hanson kept driving even though Deputy Klinkhammer and Deputy Sturino pursued him with their emergency lights and sirens on and despite the 911 dispatcher's repeated orders to pull over (41:Ex. 6).

There was also plenty of evidence that Hanson interfered with and endangered others. Deputy Klinkhammer, Deputy Sturino, Randi Derby, and Anthony Bowen all testified that Deputy Sturino had to swerve to avoid being hit by Hanson on the exit ramp to Highway 50 (39:57, 115-16, 137, 157-58). Deputy Klinkhammer testified that Hanson cut over from the center lane, narrowly missing another vehicle, on the exit ramp (39:56-57). Randi Derby testified that Hanson

maneuvered between two cars by the exit ramp and went on the left side of the median (39:113-14).

All in all, there was plenty of evidence that Hanson knowingly disregarded a law enforcement officer's signal and that Hanson interfered with or endangered others while in flight. That was all that was required to convict him of fleeing under Wis. Stat. § 346.04(3).

E. Convicting Hanson of felony fleeing is not absurd.

Hanson claims that convicting him of felony fleeing is absurd and that citizens would be "stunned" to learn that his conduct was felonious (Hanson-Br. at 22-23). He likens his case to a case involving someone who increased their speed and drove to a safe location rather than immediately stopping (*id.* at 22).

Hanson bases his comparison on a resurrection of a statutory-construction argument he made in the court of appeals, which he based on the fact that he tried driving to a police station when he fled. The comparison does not hold. Someone who drove ahead to find a safe location to stop would not be knowingly disregarding a police signal but would merely be trying to follow a police order in a safe way. That is not what Hanson did.

Hanson drove off after Deputy Klinkhammer told him he was under arrest, while Deputy Klinkhammer was inches away from his car. He forced Deputy Klinkhammer and Deputy Sturino to chase him on busy roads. He ignored their sirens and lights and the 911 dispatcher's entreaties to pull over. He insisted on going to a police station even though the dispatcher told him the nearest was seven to ten miles away and despite the dispatcher's proposed alternative of pulling over, staying on the phone, and waiting for other police. He endangered others in the process, among other ways, by nearly crashing into Deputy Sturino's squad car.

There is nothing absurd about convicting Hanson of felony fleeing based on what he did. Hanson makes a big deal about his destination. As the court of appeals noted, however, Wis. Stat. § 346.04(3) "expressly makes it a violation of the law to elude 'any traffic officer.'" *Hanson*, ¶13. The fact that Hanson was trying to drive to a police station (seven to ten miles away) does not change the fact that he endangered others while knowingly fleeing a law enforcement officer. His actions—his disregard of police signals and endangerment of others—are precisely what Wis. Stat. § 346.04(3) prohibits.

II. HANSON DID NOT PRESERVE HIS EVIDENTIARY AND CONSTITUTIONAL CLAIMS INVOLVING THE EXCLUSION OF EVIDENCE.

A. Introduction.

Hanson next raises evidentiary and constitutional claims involving the circuit court's decision excluding the testimony of a principal at a school where Deputy Klinkhammer formerly worked, who would have testified that Deputy Klinkhammer had a reputation at the school for being "by nature, confrontational, aggressive, and hot tempered" (Hanson-Br. at 23). He raises both claims for the first time in his merits brief to this court, in violation of this court's order granting review (R-Ap. 101-02).

Circuit Court's Denial of Motion in Limine

Hanson filed a motion in limine before trial in which he moved:

> That the Court specifically permit the defendant to introduce character evidence, in the form of opinion and/or reputation evidence, against the state's primary witness and alleged victim, Deputy Klinkhammer. More specifically, this evidence would include, but would not necessarily be limited to, testimony that the deputy is aggressive, violent, confrontational and hot-headed, pursuant to Sec. 904.04(1)(b), Stats., which permits

> introduction of relevant character traits of an alleged victim. *See also State v. Ortiz*, 2001 WI App. 215, 247 Wis. 2d 836 (Ct. App. 2001) (holding that police officers are considered "victims" when the defendant is alleged to have obstructed them or failed to comply with their attempts to take him into custody).

(10:2.)

Counsel explained at a hearing that the principal of the school where Deputy Klinkhammer had worked as a liaison officer "will testify through her contacts with students, administrators and other school teachers" that Deputy Klinkhammer "has a reputation as being confrontational, aggressive and hot-tempered" (38:12-13).

The circuit court denied the motion (39:14). It noted that Wis. Stat. § 904.04(1)(b) allows the introduction of character evidence of victims in criminal cases (39:8). But it concluded that Deputy Klinkhammer was not a victim (39:8-9). It characterized fleeing and obstructing as "victimless crimes" (39:9). It distinguished the *Ortiz* case Hanson cited in his motion on the grounds that *Ortiz* is a restitution case, stating:

> The Ortiz case here principally is a case that deals with statutory construction of the restitution statute. They're determining who has a right, if anyone, to restitution as between the City, who's asking for it. And in the Ortiz decision, the Court says that it's not the City of Racine who's the victim. It's the police officers who would be the victims here, at least for the purposes of restitution. Does that make the officers victims here simply because they're out doing their duty and they're confronting someone like they confronted in Ortiz here? I don't think that that changes the law here to make every police officer a victim so that on a minor traffic arrest, the officer then is identified and labeled as a victim. I think a victim has to be the object of something and not simply an officer doing the standard work that he's hired to do.
>
> The charges here of fleeing an officer and two counts of obstructing to this Court's way of thinking are victimless crimes. This isn't a situation where Mr. Hanson is either to be rewarded for his good behavior in

> not striking the officers or otherwise causing harm, or to be penalized by being prevented from introducing character evidence of the officers with whom he came in contact because he didn't cause any harm. It's a question of whether, in his actions, he created a victim. I don't see in this set of facts where a victim was created. I don't think that law enforcement has that label attached simply because they're performing their duties.
>
> The holdings of Ortiz, I think, if not *dicta*, certainly are used for the purposes of distinguishing the status of the City, who was seeking restitution, from the officers involved here, who were not seeking restitution, in labeling the victim or otherwise. So the Court under these circumstances does not feel as though it would be appropriate to permit evidence of character.

(39:8-10.)

Hanson's Failure to Raise his Evidentiary and Constitutional Claims in the Court of Appeals

Hanson did not directly challenge the circuit court's decision excluding the principal's testimony in the court of appeals. He only addressed the decision in the context of asking the court of appeals to discretionarily reverse his conviction in the interest of justice (*Hanson*, ¶17). He claimed that the combination of that and several other evidentiary decisions kept the real controversy in his case from being fully tried (*id.*).

The court of appeals declined to exercise its discretionary-reversal authority (*id.* at ¶¶21, 25).

As part of its analysis of Hanson's discretionary-reversal claim, the court of appeals first considered the propriety of the circuit court's evidentiary ruling. It concluded that the circuit court properly excluded the principal's testimony. It rejected the analogy Hanson drew to another restitution case, *State v. Haase*, 2006 WI App 86, 293 Wis.2d 232, 716 N.W.2d 526, stating: "We fail to see how the restitution cases, which address standing and damages, have any relevance at all" (*id.* at ¶19). It also accepted the circuit court's finding that

Deputy Klinkhammer was not a victim given the facts, stating: "While the testimony underlying Hanson's defense clearly portrayed Klinkhammer as the aggressor, 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" (*id*. at ¶20).

The court of appeals then applied the discretionary-reversal standard and concluded that "the exclusion of this character evidence did not prevent the real controversy from being tried" (*id.* at ¶21). It stated:

> The jury heard Hanson's testimony that Klinkhammer screamed "at the top of his lungs," took out his baton, acted "gruffly" and "angrily" in taking Hanson's license, grabbed him, ripped his shirt, and struck him on the back of the head. The jury also heard testimony from four character witnesses that Hanson is a truthful and fair person. We agree with the State that the exclusion of testimony from a single witness as to Klinkhammer's reputation for being "hot-headed" did not prevent the real controversy from being fully tried.

(*Id.*)

Hanson's Failure to Raise his Evidentiary and Constitutional Claims in his Petition for Review

Hanson also did not raise a direct evidentiary challenge in his petition for review to this court. He argued that "the jury should have heard character evidence" solely in the context of asking this court to consider discretionarily reversing his conviction (Hanson-Pet. 39-44; R-Ap. 103-09). He did not purport to be raising an evidentiary claim, set forth the applicable standards for an evidentiary claim, or so much as claim that the circuit court erroneously exercised its discretion by excluding the principal's testimony. He did not mention his constitutional right to present a defense at all.

B. Hanson did not preserve his evidentiary or constitutional claims for review.

This court should reject Hanson's evidentiary and constitutional claims without addressing their merits because they are not properly before this court. Hanson raises both claims for the first time now. He did not raise them in the court of appeals; neither party petitioned for review on them; and this court did not order briefing on them. Hanson's first-time presentation of the claims in his merits brief before this court plainly violates this court's rules. *See* Wis. Stat. § 809.62(6).

It may be tempting to overlook Hanson's violation because Hanson raised a related interest of justice claim in the court of appeals and in his petition for review. That is what Hanson tries to do, at least with his evidentiary claim. Hanson equates his evidentiary claim with his interest of justice claim, claiming in one sentence in a footnote that it is "appropriate to consider it as an independent claim for relief" because he "fully preserved" it "in the context of his interests of justice claim" (Hanson-Br. 23 n.4). He says nothing about his failure to raise his constitutional claim before.

This court should not turn the blind eye Hanson invites it to. Hanson's evidentiary and constitutional claims are distinct from his interest of justice claim. They have different legal standards and different ends. They cannot be raised "in the context" of an interest of justice claim anymore than they could be raised "in the context of" an ineffective assistance claim involving counsel's failure to raise an evidentiary objection. Hanson should not be allowed to circumvent this court's rules by morphing his interest of justice claim into new factually-related but legally-distinct claims now.

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE PRINCIPAL'S TESTIMONY ABOUT DEPUTY KLINKHAMMER'S REPUTATION AT A SCHOOL, AND ANY ERROR IN EXCLUDING THE TESTIMONY WAS HARMLESS.

The state maintains that this court should reject Hanson's evidentiary claim without considering its merits because Hanson did not properly preserve it. *See* Argument II. The state addresses the merits of the claim in this section only as a precaution, to avoid forfeiting a merits argument should this court choose to disregard its rules and to address the claim.

1. Standard of review.

This court reviews evidentiary decisions for an erroneous exercise of discretion and upholds them if a circuit court "'examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.'" *State v. Campbell*, 2006 WI 99, ¶27, 294 Wis.2d 100, 718 N.W.2d 649 (citation omitted). But it independently reviews whether a circuit court applied the proper legal standard when exercising discretion. *See City of Madison v. State Dept. of Workforce Development*, 2003 WI 76, ¶10, 262 Wis.2d 652, 664 N.W.2d 584.

2. The circuit court properly ruled that Deputy Klinkhammer is not a victim under Wis. Stat. § 904.04(1).

Wisconsin Stat. § 904.04(1) allows defendants to present evidence of a victim's character as circumstantial evidence of the victim's conduct at a specific time. It provides in relevant part:

> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a 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 . . . .

To understand whether Deputy Klinkhammer is a victim under Wis. Stat. § 904.04(1), one must start with the three statutes at issue—Wis. Stat. § 904.04(1); the fleeing statute, Wis. Stat. § 346.04(3); and the obstruction statute, Wis. Stat. § 946.41—considering the statutes' text, structure, and context with an eye towards avoiding absurd results. *See* Argument I.B.; *Conner*, 2011 WI 8, ¶39, *quoting Kalal*, 271 Wis.2d 633, ¶46.

The victim character exception in Wis. Stat. § 904.04(1) is limited to victims, and thus, does not apply to victimless crimes. *See* 7 Daniel D. Blinka, Wisconsin Practice Series, Wisconsin Evidence, 165-66 (3d ed. 2008) (The victim character exception in § 904.04(1) "is narrow and applies to only crime 'victims'; thus, so-called 'victimless crimes' (e.g., drug dealing) fall within the general ban against using third-parties' character as circumstantial evidence of conduct.").

Wisconsin Stat. § 904.04(1) does not define who is a victim. But consideration of the fleeing and obstruction statutes indicate that Deputy Klinkhammer is not a victim under them, or in turn, under Wis. Stat. § 904.04(1).

Both the fleeing statute, Wis. Stat. § 346.04(3), and the obstruction statute, Wis. Stat. § 946.41, discuss law enforcement officers in terms of their official capacities, as public representatives giving orders that need to be followed to protect public safety and facilitate the administration of government. Wisconsin Stat. § 346.04(3) is in the "Rules of the Road" chapter of the

Wisconsin Statutes. It prohibits people from fleeing a traffic officer's signal. Wisconsin Stat. § 946.41 is in the "Interference with Law Enforcement" subchapter of the "Crimes Against Government and its Administration" chapter of the Wisconsin Statutes. It prohibits people from resisting or obstructing officers "doing any act in an official capacity and with lawful authority."

The crimes of fleeing and obstruction always involve a law enforcement officer because they proscribe disobedience to a law enforcement officer's signal or command. But a law enforcement officer is ultimately no more a victim of fleeing or obstruction than any member of the public; for both crimes occur when a law enforcement officer is acting as a public agent and giving the public's command. In this way, law enforcement officers in fleeing and obstructing incidents are similar to law enforcement officers who investigate crimes well-established to be victimless, like drug dealing. They are public agents at the forefront of enforcing laws. They witness crimes and are certainly affected by crimes. But they are not victims, so testimony about their character is not admissible under Wis. Stat. § 904.04(1).

Instead of looking to the statutes at issue, Hanson turns to an entirely unrelated statute, the restitution statute, Wis. Stat. § 973.20, and a court of appeals' decision interpreting it. He relies on a restitution case, *State v. Haase*, 2006 WI App 86, 293 Wis.2d 322, 716 N.W.2d 526, and argues that "[t]he 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)" (Hanson-Br. 26).

Hanson's reliance is misplaced.

Wisconsin Stat. § 973.20 is very different than the fleeing and obstructing statutes. It is focused on personal losses rather than public interests. It does not depend on whether a party was acting in an official capacity. It

provides a way for people—victims—to be compensated for damages they incur due to crimes.

The court of appeals' decision in *Haase*, in turn, provides absolutely no guidance on whether a law enforcement officer involved in a fleeing or obstruction incident is a victim for purposes of Wis. Stat. § 904.04(1).[5]

Haase involved whether a sheriff's department could get restitution for a squad car destroyed during a chase. *Haase*, 293 Wis.2d 322, ¶1. The defendant led officers on a high speed car chase. *Id.* He eventually tried to elude police by driving onto a farm field and going on foot. *Id.* An officer followed the defendant onto the field and pursued him on foot. *Id.* ¶2. The officer's squad car burst into flames after he exited it. *Id.* The circuit court ordered the defendant to pay the sheriff's department restitution for the squad car. *Id.* ¶4. The court of appeals reversed. It recognized that government agencies may recover restitution. But it held that the sheriff's department could not get restitution for the squad car because the sheriff's department "was not the direct victim of Haase's criminal conduct." *Id.* ¶17.

The court of appeals in *Haase* discussed the officer as part of a fact-specific, causal analysis of the particular harm the defendant caused. It reasoned that the defendant's actions directly affected the officer rather than the sheriff's department. It distinguished cases in which defendants had directly destroyed government property such as, for example, by vandalizing it or by intentionally

[5]The *Ortiz* case Hanson cited in the circuit court is similarly inapposite. It involved whether a city could receive restitution for costs incurred during a standoff with the defendant. The court of appeals engaged in the same type of fact-specific, causal analysis of damages and harm caused as it did in *Haase*. *See State v. Ortiz*, 2001 WI App 215, ¶¶15-24, 247 Wis.2d 836, 634 N.W.2d 860. *Ortiz* does not provide any more of a basis than *Haase* does for treating Deputy Klinkhammer as a victim under Wis. Stat. § 904.04(1).

crashing into a police car. *Id.* at ¶¶14, 16. It did not award the officer restitution (and thus does not provide a basis for treating Deputy Klinkhammer as a victim under Hanson's would-be-awarded-restitution test). It merely referenced the officer in discussing the chain of causation relevant to the sheriff department's restitution claim.

3. Wisconsin Stat. § 904.03 provides an alternate basis for upholding the circuit court's discretionary ruling excluding the principal's testimony.

Hanson acts as if Wis. Stat. § 904.04(1) is the end of the story. But it is not. Even if Deputy Klinkhammer were a victim under Wis. Stat. § 904.04(1), the principal's testimony about his reputation at school would still have to satisfy other requirements. The circuit court would still have discretion to exclude it if it were not relevant, *see* Wis. Stat. § 904.01, or if its probative value were substantially outweighed by the dangers set forth in Wis. Stat. § 904.03.

If this court were to conclude that the circuit court erred in ruling that Deputy Klinkhammer is not a victim under Wis. Stat. § 904.04(1), it would be required, as part of its discretionary review of the circuit court's evidentiary decision, to independently review the record to see if the circuit court's decision could still be upheld as a proper exercise of discretion. *See State v. Hunt*, 2003 WI 81, ¶¶43-45, 263 Wis.2d 1, 666 N.W.2d 771.

Wisconsin Stat. § 904.03 is an alternate basis for upholding the circuit court's ruling. It provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

To understand whether the principal's testimony could have been excluded under Wis. Stat. § 904.03, it is important to understand why Hanson wanted to admit the evidence and how Hanson could have used it.

Hanson wanted to present the principal's testimony that Deputy Klinkhammer had a reputation among staff and students at the school as "confrontational, aggressive and hot-tempered" (38:12-13). If this evidence had been admitted, Hanson could have used it to help prove that Deputy Klinkhammer "acted in conformity" with that character "on a particular occasion"—that is, to corroborate his account of Deputy Klinkhammer's actions before and during his flight. *See* Wis. Stat. § 904.04(1).

Hanson claims that he could have used the evidence not only to corroborate his account of what happened but also to explain "why Hanson reasonably feared for his well-being" (Hanson-Br. 23). To the extent Hanson claims that the principal's testimony could have supported his self-defense defense, beyond just corroborating his account of events, he ignores the record and settled law concerning the use of character and reputation evidence to prove that a defendant reasonably acted in self-defense.

This court held in *McMorris v. State* that "[w]hen the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident." 58 Wis.2d 144, 152, 205 N.W.2d 559 (1973). When Hanson sought to introduce the principal's testimony regarding Deputy Klinkhammer's reputation at the school, the state objected in part because there was "no evidence that the defendant . . . knew of the[ ] character flaws" about which she would have testified (38:13). Hanson's attorney responded: "it's not McMorris evidence. We're not using it for that purpose" (38:14).

Hanson cites the court of appeals' decision in *State v. Boykins*, 119 Wis.2d 272, 350 N.W.2d 710 (Ct. App. 1984), to support his claim that the principal's testimony was admissible (Hanson-Br. 25). Hanson does not develop an argument around *Boykins* or explain whether he is trying to use *Boykins* to argue that the principal's testimony was admissible under Wis. Stat. § 904.04(1) or for additional reasons he did not present at trial. Given Hanson's lack of clarity, however, it is worth noting that *Boykins* does not establish that the principal's testimony would have been admissible to establish the reasonableness of Hanson's beliefs and actions during the fleeing incident.

Boykins is distinguishable on its facts and for its legal holding. It did not involve an evidentiary claim but a constitutional claim involving the defendant's right to present a defense in a homicide case. The court of appeals held that the exclusion of evidence of the victim's violent character, along with exclusion of evidence of specific instances of violent conduct by the defendant, violated the defendant's right to a present a defense.

In addition to being distinguishable, *Boykins* is a court of appeals' decision, which is not binding on this court and does not trump this court's decision in *McMorris*. This court has never held that a defendant can present character evidence to establish the reasonableness of a self-defense defense in all types of cases and regardless of what a defendant knew. On the contrary, it has consistently discussed *McMorris* evidence in terms of specific instances of conduct about which a defendant knew before allegedly acting in self-defense. *See State v. Head*, 2002 WI 99, ¶128, 255 Wis.2d 194, 648 N.W.2d 413; *State v. Daniels*, 160 Wis.2d 85, 465 N.W.2d 633 (1991); *McAllister v. State*, 74 Wis.2d 246, 246 N.W.2d 511 (1976). This is reflected in a distinction Daniel Blinka draws in his evidence treatise between "*McMorris* evidence (specific instances of the victim's violence known to defendant at the time)" and "reputation or opinion testimony as to the victim's character for violence

offered to show the victim's violent propensities (i.e. circumstantial evidence of conduct)." Blinka at 168.

Based on the case law and Hanson's own representations to the circuit court, therefore, Hanson could only use the evidence to corroborate his account of what happened.

Here is where Wis. Stat. § 904.03 kicks in.

The principal's testimony about Deputy Klinkhammer's reputation at the school had little if any probative value. The principal had no knowledge of what happened during the stop or Hanson's flight. She could only relay what some people thought of Deputy Klinkhammer in a school environment considerably different than the circumstances of a traffic stop on I-94.

What little, if any, probative value the principal's testimony would have had was countered by the considerations in Wis. Stat. § 904.03. The principal's testimony may have confused jurors given how different of a situation it involved. Moreover, the principal's testimony was repetitive of other, more powerful evidence for Hanson. Hanson described Deputy Klinkhammer in the same light the principal would have—as confrontational, aggressive, and hot-tempered (39:203-39). Hanson corroborated his testimony by having four witnesses testify about his own truthfulness (39:192-202). His account was also corroborated somewhat by the 911 call, in which he sounded panicked and described Deputy Klinkhammer as an "angry person" who "does not value life" and who had "beaten him" (41:Ex. 6).

Even if the principal's testimony had been admissible under Wis. Stat. § 904.04(1), therefore, the circuit court would have been well within its discretion to exclude the evidence based on Wis. Stat. § 904.03. Wisconsin Stat. § 904.03 thus provides an alternate basis for this court to uphold the circuit court's ruling excluding the principal's testimony, one this court would be required

to consider given its duty to independently review the record before reversing discretionary evidentiary decisions.

4. Any error in excluding the principal's testimony was harmless.

There is yet another fatal hurdle to Hanson's evidentiary claim: even if the circuit court erroneously exercised its discretion by excluding the principal's testimony, Hanson would not be entitled to relief because any error was harmless.

Errors are harmless, and do not provide a basis for relief, if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty even absent them. *See* Wis. Stat. § 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."); *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis.2d 442, 647 N.W.2d 189, *quoting Neder v. United States*, 527 U.S. 1, 18 (1999).

If the circuit court had erred by excluding the principal's testimony, the error would clearly be harmless.

As the state explains above in connection with Wis. Stat. § 904.03, the principal's testimony about how some people perceived Deputy Klinkhammer in a school setting said little if anything about how Deputy Klinkhammer acted when stopping someone on I-94. It would have added little to the mix of what Hanson presented about what happened, about Deputy Klinkhammer's actions during the stop, and about his own credibility. Further, it certainly would not have overcome all of the other evidence presented at Hanson's trial—evidence that included not only Deputy Klinkhammer's testimony but also the 911 call as well as the testimony of Deputy Sturino, Randi Derby, and Anthony Bowen.

IV. THE EXCLUSION OF THE PRINCIPAL'S TESTIMONY ABOUT DEPUTY KLINKHAMMER'S REPUTATION AT A SCHOOL DID NOT DEPRIVE HANSON OF HIS RIGHT TO PRESENT A DEFENSE.

As with Hanson's evidentiary claim, the state maintains that this court should reject Hanson's constitutional claim without considering its merits because Hanson did not properly preserve the claim. *See* Argument II. The state addresses the merits of Hanson's constitutional claim in this section only as a precaution, to avoid forfeiting a merits argument should this court choose to disregard its rules and address them.

1. Relevant law; standard of review.

Criminal defendants have a constitutional right to present a defense under the United States and Wisconsin Constitutions. *State v. St. George*, 2002 WI 50, ¶14, 252 Wis.2d 499, 643 N.W.2d 777. The right includes the ability both to confront adverse witnesses and to call favorable witnesses—abilities the United States Supreme Court and this court have called "fundamental and essential to achieving the constitutional objective of a fair trial." *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990).

Whether a defendant's constitutional right to present a defense was violated is a question of constitutional fact that this court reviews on the basis of established facts de novo, but benefiting from the analysis of the circuit court and the court of appeals. *St. George*, 252 Wis.2d 499, ¶16.

2. Hanson's right to present a defense was not violated.

Hanson's constitutional claim fails on the merits for two reasons, both of which the state discussed above when explaining why his evidentiary claim lacks merit.

First, Hanson's claim fails because the principal's testimony was inadmissible under Wis. Stat. § 904.04(1) and arguably Wis. Stat. § 904.03 as well. The right to present a defense is not absolute. Defendants must follow evidentiary rules and may not present irrelevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."); *Pulizzano*, 155 Wis.2d at 646 ("Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.") As the state explains in Argument III. above, the principal's testimony was not admissible under Wis. Stat. § 904.04(1) and could have also been excluded under Wis. Stat. § 904.03. Hanson consequently did not have a constitutional right to present it.

Second, the principal's testimony would have added little, if anything, to Hanson's defense. Hanson was able to present his self-defense defense and to get a self-defense instruction for the fleeing charge The latter is significant because the circuit court would have only instructed the jury on self-defense if the evidence warranted such an instruction and provided some basis for concluding that Hanson reasonably fled to protect himself from Deputy Klinkhammer (38:14-18; 40:6-7). The principal's testimony would not have changed Hanson's

self-defense defense in any appreciable way. Hanson could only have used it to corroborate his version of events. But the principal did not have any knowledge about what happened and could only testify about how Deputy Klinkhammer was viewed by some people in an entirely different, unrelated environment. Her testimony would have duplicated and been overshadowed by the other evidence that supported Hanson's defense.

V. REVERSING HANSON'S FELONY FLEEING CONVICTION WOULD NOT SERVE THE INTERESTS OF JUSTICE.

Hanson concludes by asking this court to discretionarily reverse his fleeing conviction in the interest of justice. He claims that the real controversy was not fully tried with his fleeing conviction 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)" (Hanson-Br. 31).

Hanson's request is unprecedented and striking in its breadth. Hanson is in essence claiming that discretionary reversal is appropriate anytime a defendant conjures up a new way of interpreting a statute after being convicted, even if this court rejects the defendant's interpretation. In making his request, he completely fails to take into account the discretionary reversal standard.

This court's authority to discretionarily reverse convictions is set forth in Wis. Stat. § 751.06, which provides:

> In an appeal in the supreme court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record.

This case does not present "exceptional" circumstances warranting discretionary reversal. *See State v. Hicks*, 202 Wis.2d 150, 161, 549 N.W.2d 435 (1996).

Hanson's discretionary-reversal request is tied to his argument that Wis. Stat. § 346.04(3) requires "evil intent." As the state explains in Argument I., however, Hanson is wrong in his interpretation of Wis. Stat. § 346.04(3). Analysis of the text, structure, and context of Wis. Stat. § 346.04(3) with an eye towards avoiding absurd results indicates that "willful or wanton" is synonymous with knowing in Wis. Stat. § 346.04(3).

Hanson fails to point to anything at his trial that would have been different if this court had previously ruled that "willful or wanton" means knowing in Wis. Stat. § 346.04(3). The record indicates that nothing would have been. Though the circuit court and parties never discussed the meaning of "willful or wanton" in Wis. Stat. § 346.04(3), they seemed to treat it as synonymous with knowing. A decision from this court confirming the knowledge requirement would not have changed much if anything. The jury instruction may have been expanded to further articulate the knowledge requirement. But that would not have any significant effect. Hanson presumably would have presented the same self-defense defense, the state would have presented the same case it did, and the jury would have been charged with evaluating the same facts in light of the same legal standards.

Hanson had his day in court. He presented his self-defense defense, and the jury found him guilty of fleeing contrary to Wis. Stat. § 346.04(3) in a verdict that was supported by plenty of evidence. Reversing Hanson's fleeing conviction would not serve—and would thwart—the interests of justice.

CONCLUSION

The state respectfully asks this court to affirm the court of appeals' decision affirming Daniel Hanson's convictions for fleeing and obstructing a law enforcement officer.

Dated this 30th day of March, 2011.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief has 11,471 words, 10,905 of which are contained in portions of the brief referred to in Wis. Stat. § 809.19(1)(d), (e), and (f). *See* Wis. Stat. § 809.19(8)(c)1.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 on all opposing parties.

Dated this 30th day of March, 2011.

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