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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I.

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

A. Applicable Legal Standards

Hanson's opening brief explained how the text, history, context, and structure of the statute and the language deliberately chosen by the Legislature to distinguish felony from misdemeanor liability for fleeing in Wis. Stat. §346.04(3) require that "willful or wanton disregard" contemplates more than mere intent or knowledge that one is not complying with an officer's directive to stop. Rather, the state must prove that the defendant demonstrated a knowing scorn or flouting of the officer's signal with indifference to the results or some type of evil intent beyond mere failure to comply. Hanson's Brief at 9-19. Even if mistaken, the defendant's good faith belief in the need for his actions nullifies this element of the offense. *E.g.*, ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 296 N.W. 636, 640 (1941).

In response, the state proffers a redundancy. Under its interpretation, "willful or wanton disregard" means merely "knowingly." State's Brief at 11-13. Thus, the state would render a felon of anyone who "knowingly flees or attempts to elude any traffic officer by [knowingly failing to comply with] an officer's signal so as to interfere with or endanger the officer or others."

Not surprisingly, the state fails to suggest any reason why the Legislature would use "willful or wanton disregard," terms with a long history and well-known meaning in the criminal law, if it really meant "knowingly." Nor does the state suggest why the Legislature would include a redundant *mens rea* requirement given that the first "knowingly" in §346.04(3) already would encompass the failure to comply with the signal.

The state suggests that it is necessary to render the "willful or wanton disregard" language meaningless to fulfill the purposes of the statute and to avoid exoneration of those who flee. State's Brief at 8-10, 13-16. In doing so, it ignores the Legislature's separation of fleeing offenses into three grades, with the willful or wanton disregard language applying only to the most aggravated. Wis. Stat. §§346.04(1), (2t) & (3).

All three fleeing offenses, whether forfeiture, misdemeanor, or felony, further the legislative purpose of fostering cooperation with law enforcement and avoiding unsafe driving, as do separate provisions criminalizing resisting and reckless driving (both misdemeanors). Wis. Stat. §§941.01 & 946.41. Accordingly, nothing about that purpose mandates or even supports the state's theory that it requires a particular mental state for the aggravated, felony version of the offense. Also, where, as here, the fleeing is not in willful or wanton disregard, the defendant is not "exonerated," as repeatedly but mistakenly claimed by the state. *E.g.*, State's Brief at 14-15. Rather, he may be guilty of a lesser offense, just as the Legislature intended.

Contrary to the state's assertion, State's Brief at 17-18, Hanson does not assert that "willful" always requires evil motive in the criminal

context. He acknowledges that, in a given context, the Legislature may intend some other meaning. *Compare* ***State v. Cissell***, 127 Wis.2d 205, 378 N.W.2d 691 (1985) (construing "willful" as "intentional" in felony abandonment statute), *with* ***State v. Brown***, 137 Wis. 543, 119 N.W. 338, 340 (1909) (in criminal statute, "willfully" requires not just intentionally or knowingly, but a purpose to do wrong without justifiable excuse).

Here, however, the Legislature clearly did not intend "willful" to mean merely knowingly or even intentionally. The Legislature was fully aware of the latter terms and would have used them if they fully expressed the desired meaning. Instead, it chose in 1965 to combine "willful" with "wanton" and "disregard" to express its precise meaning. Rather than "intentionally" or "knowingly," the Legislature chose to use different terms with a clearly defined meaning in the criminal law at the time as requiring more than just intent, but a purpose to do wrong without justifiable excuse. Hanson's Brief at 11-19; *e.g.*, ***Brown***, *supra*. Nothing in the state's argument rationally suggests otherwise.[1]

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

The state does not dispute, and therefore concedes, that the evidence was insufficient to establish that Hanson acted in "willful or wanton disregard" as those terms are historically defined and reflected in Hanson's brief. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded). Rather, it only argues that the evidence was sufficient if "willful or wanton disregard" is interpreted as imposing a redundant knowledge requirement. State's Brief at 20-22. Because the state's statutory interpretation fails, its resulting sufficiency argument necessarily fails as well.

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[1] The state's reference to the jury instructions is misplaced. State's Brief at 18-20. Sufficiency turns on the statutory requirements for conviction. Only the Legislature can create a crime.

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

Even under the state's interpretation of "willful or wanton disregard" as imposing merely a redundant knowledge requirement, the evidence was insufficient. Hanson's Brief at 21-23. Hanson indisputably was running *to* the police because he believed it necessary to protect himself from a rogue cop, not from them, and attempted to do so as cautiously as possible. Whichever account is believed, he was traveling within the speed limits, stopped at red lights, caused no accidents, and either stopped or swerved to avoid hitting Sturino's car when Sturino drove into his path (R39:57, 79-83, 92, 113, 116, 125-27, 137, 141-42, 147, 156-59, 167-69, 212, 214-17, 222-23). Even the state concedes that "[s]omeone who drove ahead to find a safe location to stop would not be knowingly disregarding a police signal," State's Brief at 22. That is exactly what the evidence reflects Hanson was trying to do -- drive ahead to find a safe place where he could stop without being attacked by Klinkhammer.

II.

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

A. Hanson Did Not Waive His Evidentiary Arguments by Raising them Previously in the Context of an Interests of Justice Claim

Hanson sought admission of evidence of Klinkhammer's reputation as being confrontational, aggressive, and hot-tempered in the circuit court and objected on both statutory and "right to present a defense" grounds to the exclusion of that evidence (R10:2; R38:12-14; R39:6-10, 95-96; App. 17-19, 23-27; S.App. 2-3).[2] He raised the same

[2] In his initial appendix, Hanson overlooked the fact that the trial court overruled his counsel's renewed objection to exclusion of the evidence after Klinkhammer testified to feeling threatened by Hanson's actions (R39:95-96; (continued...)

statutory claim in the Court of Appeals, albeit in the context of a broader Interests of Justice argument, Hanson's Ct. App. Brief at 28-31, and the Court of Appeals denied that statutory claim on its merits (App. 9-12). Hanson again expressly raised the statutory claim in his petition for review, again through the Interests of Justice procedure, Hanson's Petition for Review at 41-44, and this Court granted review on the claims he raised. Order of February 8, 2011.

The state's suggestion that Hanson raised his statutory argument for the first time in his opening brief and somehow forfeited or waived that claim, or that he is barred from raising it, State's Brief at 23-27, thus is factually inaccurate. He raised it at every stage of these proceedings and the lower courts ruled on that claim on the merits. As for this Court's Order granting review on Hanson's Interests of Justice claim, Wis. Stat. (Rule) 809.62(2)(a) expressly provides that "[t]he statement of an issue shall be deemed to comprise every subsidiary issue as determined by the court." Because Hanson's statutory evidentiary argument was contained within the issues on which this Court granted review, nothing prevents him from jettisoning other, weaker components of the Interests of Justice claim while raising a fully preserved component as a stand alone claim. *See* ***State v. Weber***, 164 Wis.2d 788, 476 N.W.2d 867 (1991) (distinguishing issues presented for review from specific arguments supporting them).

The state has a stronger argument on the constitutional component of his claim. Although Hanson's trial counsel argued that exclusion of the evidence of Klinkhammer's hot-tempered character violated Hanson's right to present a defense as well as Wis. Stat. §904.04(1)(b) (R39:6-8; App. 23-25), neither his Court of Appeals brief nor his Petition for Review mentions that aspect of his claim. The Court therefore could deem that constitutional component forfeited. *But see* ***Weber***, *supra*. However, it need not do so and should not given that the matter was preserved in the circuit court, presents a purely legal

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[2] (...continued)
S.App. 2-3). Because Wis. Stat. (Rule) 809.19(2) requires the Appendix to include such findings, he includes them in his Supplemental Appendix ("S.App.").

issue that is closely related to an issue that is properly before the Court, and is fully briefed by the parties.[3] *See, e.g.*, ***State v. Knapp***, 2005 WI 127, ¶56, 285 Wis.2d 86, 700 N.W.2d 899, quoting ***Bradley v. State***, 36 Wis.2d 345, 359-59a, 153 N.W.2d 38, 155 N.W.2d 564 (1967) ("[T]his court may nevertheless decide a constitutional question not raised below if it appears in the interests of justice to do so and where there are no factual issues that need resolution.").

Of course, this Court also has the authority under Wis. Stat. §751.06 to reverse on these grounds in the interests of justice.

B. The Circuit Court Erred by Excluding the Evidence

According to the charges here, Klinkhammer was a "victim," i.e., "[a] person against whom a crime has been committed," *e.g.*, Wis. Stat. §950.02(4)(a)1, because he was allegedly deprived of something to which he legally was entitled, whether cooperation or obedience, and because Hanson's alleged fleeing supposedly interfered with or endangered him. *See* Hanson's Brief at 24-27. *See also* ***Hawthorne v. State***, 99 Wis.2d 673, 299 N.W.2d 866 (1981) (referring to the "victim" of endangerment); ***State v. Dearborn***, 2008 WI App 131, ¶37, 313 Wis.2d 767, 758 N.W.2d 463 (obstructing invades "interest of a warden to be free from interference in the performance of his or her duties"), *aff'd*, 2010 WI 84, ¶2 n.3, 327 Wis.2d 252, 786 N.W.2d 97; ***State v. Haase***, 2006 WI App 86, ¶14, 293 Wis.2d 322, 716 N.W.2d 526 (deputies were victims of defendant's eluding and resisting arrest).

The state chooses not to apply statutory and common sense definitions of "victim" to the facts here. Instead, it makes the novel suggestion that law enforcement victims of fleeing or obstructing offenses are not really "victims" as used in Wis. Stat. §904.04(1) because they are "public agents." State's Brief at 30. However, nothing in the language or purpose of the Rule, or in the state's argument, supports its proposed "public agent" exception. *Cf.*, ***State v. Howard-Hastings***, 218 Wis.2d 152, 579 N.W.2d 290 (Ct. App. 1998)

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[3] The state's constitutional argument rests entirely on its response to Hanson's statutory claim. State's Brief at 37-39.

(government can be a "victim").

A law enforcement officer who is denied the cooperation, obedience, and freedom from interference or endangerment by a fleeing or obstructing offense is neither a mere witness nor interchangeable with just any member of the public. The state presumably is not suggesting that an officer physically or financially injured by such offenses is excluded from the definition of "victim" applicable in §904.04(1) and throughout the statutes (R39:6-7 (admitting Klinkhammer would be victim if physically injured by offense)). *See* ***State v. Lee***, 2008 WI App 185, 314 Wis.2d 764, 762 N.W.2d 431 (state argues officer injured while apprehending defendant a victim entitled to restitution). Yet, its argument provides no basis for distinguishing official "victims" who suffer physical harm as a result of criminal acts from those who suffer harms to non-physical interests.

Nor does the state suggest any rational reason why the Legislature might have intended *sub silento* to define "victim" more restrictively for purposes of §904.04(1) than the common sense definition statutory language and precedent apply elsewhere in the statutes. Statutory interpretation must account for all applications, not merely the desired result in a particular case. ***Bank Mut. v. S.J. Boyer Const., Inc.***, 2010 WI 74, ¶31, 326 Wis.2d 521, 785 N.W.2d 462 ("When the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears").

The state's fall-back argument that the evidence could have been excluded under Wis. Stat. §904.03 misconstrues why Hanson was entitled to the evidence. *See* State's Brief at 32-36. Reputation evidence of Klinkhammer's confrontational and hot-tempered character was offered and admissible, as the state concedes, *id.* at 33, to show that he acted in conformity with that character on this occasion, thereby corroborating Hanson's account of it. Hanson did not and does not seek admission of evidence of specific acts, nor does he suggest that the evidence was admissible under ***McMorris v. State***, 58 Wis.2d 144, 205 N.W.2d 559 (1973) (R38:14). The reputation evidence corroborates

Hanson's account of Klinkhammer's apparently irrational and confrontational attitude and conduct during this incident *and thereby* would have corroborated the reasonableness of Hanson's belief in the need to protect himself.

The state does not and cannot rationally suggest unfair prejudice from admission of unbiased evidence corroborating his account. The difference in settings enhances, rather than confuses the corroborating effect. The fact that Klinkhammer is confrontational and hot-tempered even in a non-adversarial school setting makes it far more likely that these characteristics would evidence themselves in the context of an adversarial setting such as a traffic stop.

Nor can the evidence rationally be deemed cumulative. Evidence is not "cumulative" unless it "supports a fact established by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), citing Black's Law Dictionary 577 (7th ed. 1999); *see* ***Wilson v. Plank***, 41 Wis. 94 (1876). No other evidence corroborated Hanson's account of Klinkhammer's confrontational and hot-tempered actions during the stop. *See* Hanson's Brief at 29-31.

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

The state's constitutional argument merely parrots its mistaken assertions that independent and unbiased evidence of Klinkhammer's confrontational and hot-tempered character was inadmissible and its exclusion harmless. State's Brief at 37-39. It therefore fails for the same reasons its prior arguments do.

D. The Error was not Harmless

The state's harmless error argument, State's Brief at 36, is conclusory and fails to approach its required showing that exclusion of evidence corroborating Hanson's account of the incident was harmless beyond a reasonable doubt. ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis.2d 442, 647 N.W.2d 189. *See supra*; Hanson's Brief at 29-31.

Contrary to the state's apparent belief, this Court is not permitted

to act as a sort of "super-jury" in the guise of harmless error analysis. ***Neder v. United States,*** 527 U.S. 1, 19 (1999). Rather, where, as here, the facts are in dispute and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. *See* ***id.*** ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless").

As the state notes, State's Brief at 38, the trial court deemed the evidence sufficient to require a self-defense instruction even without the important corroboration provided by independent and unbiased evidence of Klinkhammer's confrontational and hot-tempered character. For the reasons already shown, moreover, independent and unbiased evidence that Klinkhammer is confrontational and ill-tempered even in the non-adversarial context of a school provides substantial corroboration for Hanson's accounts of both Klinkhammer's bizarre and threatening conduct at the scene of the traffic stop and Hanson's attempts to comply with the officers' directives at the site of the ultimate stop. *See* Hanson's Brief at 29-31. The latter is especially true given that the 911 tape already reflects the absence of any audible directive to exit the vehicle before Klinkhammer smashed the car window with his baton (*see* R41;Exh.6).

III.

REVERSAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

If the Court interprets §346.04(3) differently than the jury instructions or explains the elements in a manner not provided to the jury, but nonetheless finds the evidence sufficient for conviction under that interpretation, Hanson still is entitled to a new trial with proper instructions. Absent those instructions, the real controversy regarding whether Hanson acted in willful or wanton disregard was not fully tried. *Cf.* ***State v. Peete***, 185 Wis.2d 4, 21-23, 517 N.W.2d 149 (1994).

The state once again misconstrues Hanson's argument. If the Court somehow adopts the state's claim that the willful or wanton

disregard requirement is merely redundant of the knowledge element already contained in §346.04(3) and the instructions, then there is no reason for a new trial. However, if this Court interprets that requirement in a manner not explained to the jury, application of that new interpretation to the facts here was not fully tried. Indeed, failure to grant a new trial under those circumstances implicates the right to a jury verdict beyond a reasonable doubt on all facts necessary for conviction. *E.g.*, ***Carella v. California***, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process); *see* ***Apprendi v. New Jersey***, 530 U.S. 466, 476 (2000) (constitutional due process and jury trial guarantees require that any fact, other than prior conviction, which increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

CONCLUSION

For these reasons, and for those in his opening brief, Daniel H. Hanson respectfully asks that the Court reverse the Court of Appeals' decision, direct an acquittal on Count 1, and order a new trial on all remaining counts.

Dated at Milwaukee, Wisconsin, April 18, 2011.

Respectfully submitted,

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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 reply brief produced with a proportional serif font. The length of this brief is 3,000 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 Reply.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 18th day of April, 2011, I caused 22 copies of the Reply Brief and Supplemental 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

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