STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1057-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TARAN Q. RACZKA,

Defendant-Appellant.

On a Petition for Leave to Appeal a Nonfinal Order
Entered in the Circuit Court of Walworth County,
the Honorable James L. Carlson, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Is evidence that the defendant had a history of seizures, immediately after the accident he displayed physical symptoms that mirrored his previous seizures and his physician believed he suffered a seizure at the time of the accident relevant to: (1) the affirmative defense that the death would have occurred even if the defendant exercised due care and did not have a detectable amount of a restricted controlled substance in his blood and (2) whether the death was caused by criminally reckless conduct?

The circuit court answered: No. In a pretrial ruling, the circuit court excluded "any evidence at trial relating to the defendant's history of seizures, medical treatment for seizures including but not limited to his anti-seizure medication prescription, and testimony by any witness regarding the defendant ever having a seizure at any time."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The briefs should adequately set forth the law on this issue.

STATEMENT OF THE CASE

The state filed a complaint on March 10, 2015, charging Mr. Raczka with homicide by intoxicated use of a vehicle in violation of Wis. Stat. § 940.09(1)(am), second degree reckless homicide in violation of Wis. Stat. § 940.09(1)(am) and operating a motor vehicle with a

detectable amount of a restricted controlled substance in violation of Wis. Stat. § 346.65(1)(am). (1). At a pretrial hearing held on May 10, 2016, the court granted the state's motion in limine to prohibit any testimony that Mr. Raczka suffered a seizure at the time of the accident. (26; 19; App. 101). Mr. Raczka petitioned for leave to appeal the court's nonfinal order and on July 11, 2016, this court granted the petition for leave to appeal. (23; App. 102).

STATEMENT OF FACTS

The morning of October 27, 2014, Mr. Raczka picked up his coworker, Jeffrey Bonsall, at his home. The men went to a work site to do pressure washing and then headed to a painting job in Milwaukee. (26:58). At 9:30 a.m., Mr. Raczka's car suddenly veered off the road and crashed into a tree. Mr. Bonsall was killed and Mr. Raczka was injured and taken to the hospital. (1:2).

At the hospital, a nurse drew Mr. Raczka's blood. It was later determined that marijuana and cocaine were present in his blood. Mr. Raczka admitted using marijuana the weekend before the crash. (1:3; 26:67).

The state filed a complaint charging Mr. Raczka with homicide by intoxicated use of a vehicle in violation of Wis. Stat. § 940.09(1)(am), second degree reckless homicide in violation of Wis. Stat. § 940.09(1)(am) and operating a motor vehicle with a detectable amount of a restricted controlled substance in violation of Wis. Stat. § 346.65(1)(am). (1). Prior to trial, the state filed a motion asking the court to prohibit Mr. Raczka from presenting any evidence that he had a history of seizures or that he had a seizure at the time of the accident. (17).

At a hearing on this motion, Mr. Raczka informed the court that he intended to raise an affirmative defense pursuant to Wis. Stat. § 940.09(2)(a). Mr. Raczka intended to present evidence that prior to the crash he suffered from a seizure and this caused the accident. To support this defense, Mr. Raczka would present five witnesses: (1) eyewitness Quenton Wolf would testify that immediately after the crash he saw Mr. Raczka's arms flailing in an uncontrollable manner and his eyes rolling to the back of his head; (2) Deni Reich, Mr. Raczka's mother, would testify that she observed Mr. Raczka's seizures and his arms would flail just as Mr. Wolf described; (3) Dr. Arshad Ahmed, Mr. Raczka's physician, would testify that Mr. Raczka had a history of seizures and that in his opinion the accident was caused by a seizure; (4) Shawn Flynn, the victim's girlfriend, would testify that Mr. Raczka appeared sober and awake when he came by at 8:30 a.m. to pick up Mr. Bonsall; and (5) Mr. Raczka would testify that he believed he suffered a seizure immediately prior to the crash. (26:55, 57, 68, 71, 98-100).

The defense would also present evidence showing that Mr. Raczka was driving 57 miles per hour in a 55 mile per hour zone but two seconds before the crash the vehicle was traveling at 40 miles per hour. There was no evidence of distracted driving, cell phone use or eating. The sheriff's office report noted Mr. Raczka's history of seizures and the accident reconstruction report listed a seizure as a possible contributing cause to the accident. At the hearing on the motion in limine, the defense offered an exhibit containing police reports, hospital records and Dr. Ahmed's report. (26:55, 57, 68, 71, 98-100).

The state countered with evidence that the emergency room reports did not mention seizures and that Mr. Raczka

had a seizure the previous spring but did not follow up with his doctor due to financial reasons. For the previous year Mr. Raczka had not been regularly taking his seizure medication. (26:78-81).

The court granted the state's motion, adopting the state's theory that even if Mr. Raczka had a seizure it would not be a defense because Mr. Raczka was negligent for failing to regularly take his anti-seizure medication. (26:104). The court entered a written order stating:

> [T]he court hereby grants the State's motion to exclude any evidence at trial relating to the defendant's history of seizures, medical treatment for seizures including but not limited to his anti-seizure medication prescription, and testimony by any witness regarding the defendant ever having a seizure at any time.

(19; App. 101).

Mr. Raczka filed a Petition for Leave to Appeal a Nonfinal Order and this court granted the Petition. (23; App. 102).

ARGUMENT

I. Evidence That Mr. Raczka Had a History of Seizures and That a Seizure Caused the Accident Was Relevant to Both the Affirmative Defense That the Crash Would Have Occurred Even if Mr. Raczka Exercised Due Care and Had a Detectable Amount of a Restricted Controlled Substance in His Blood and as to Whether His Conduct Was Criminally Reckless.

A. Introduction and standard of review.

When Mr. Raczka was driving a coworker to work at 9:30 a.m., he suddenly veered off the road and into a tree. The passenger was killed. Because Mr. Raczka had THC and cocaine in his system at the time of the accident, the state charged him with homicide by intoxicated use of a vehicle and second degree reckless homicide. (1). Mr. Raczka intended to introduce evidence that he had a history of seizures and suffered a seizure at the time of the accident. (26:55, 57, 68, 71, 98-100). The court refused to allow the jury to hear any of this evidence. (26:104). The testimony Mr. Raczka intended to offer was clearly relevant. The trial court's refusal to allow Mr. Raczka to present this relevant evidence was a denial of his constitutional right to present a defense. The constitutional right to present a defense is rooted in the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment as well as Article I, Section 7 of the Wisconsin Constitution. ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990); ***Strickland v. Washington***, 466 U.S. 668, 684-685 (1984); ***Washington v. Texas***, 388 U.S.14, 23 (1976); ***Davis v. Alaska***, 415 U.S. 308 (1974). Because the court's exclusion of relevant evidence denied Mr. Raczka his right to present a defense, this court should reverse the trial court's ruling and order that Mr. Raczka be allowed to present the seizure evidence.

When admissibility of evidence is challenged, the burden is on the proponent of the evidence to show why it is admissible. ***State v. Leighton***, 2000 WI App 156, ¶ 47, 237 Wis. 2d 709, 616 N.W.2d 126. It is a matter of constitutional fact whether the exclusion of evidence offered by a defendant violated the constitutional right to present a defense. A circuit court errs if it exercises its discretion to admit or exclude evidence in a way that denies the defendant the constitutional right to present a defense. ***State v.***

St. George, 2002 WI 50 ¶¶16, 49, 252 Wis. 2d 499, 643 N.W.2d 777; ***Crane v. Kentucky***, 476 U.S. 683, 689-90 (1986). Whether a circuit court's evidentiary ruling abridged a defendant's right to present a defense is a question of constitutional fact this court reviews de novo. ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

The state filed a motion a limine asking the court to prohibit any testimony or evidence relating to Mr. Raczka's seizure history or any claim that a seizure caused the accident. (17). Mr. Raczka presented an offer of proof including medical documentation, police reports and a summary of witness testimony. The offer of proof included eyewitness testimony that after the accident Mr. Raczka's arms were flailing, supported by the testimony of Mr. Raczka's mother (the eyewitness description of Mr. Raczka's appearance matched his appearance during seizures); the testimony of Mr. Raczka's doctor (that Mr. Raczka had a history of seizures and that in the doctor's opinion Mr. Raczka suffered a seizure at the time of the accident); which matched the testimony of the victim's girlfriend (Mr. Raczka did not appear intoxicated or tired when he picked up the victim for work); which is ultimately supported by Mr. Raczka (who would testify that he believed he suffered from a seizure while driving). (26:55, 57, 68, 71, 98-100).

The court granted the state's motion to exclude all evidence related to a seziure, adopting the state's theory that even if Mr. Raczka had a seizure it would not be a defense because Mr. Raczka was negligent for failing to regularly take his anti-seizure medication and the defendant's negligence cannot support the affirmative defense. (26:104).

B. The seizure evidence was relevant to the affirmative defense in Wis. Stat. § 940.09(2)(a).

1. A defendant can present the affirmative defense if there is evidence that there was an intervening cause to the accident.

In Count 1, the state charged Mr. Raczka with homicide by operation of a vehicle with a detectable amount of a restricted controlled substance in violation of Wis. Stat. § 940.09(1)(am). This statute provides that whoever causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood is guilty of a Class D felony.

The legislature created an affirmative defense to this charge in Wis. Stat. § 940.09(2)(a):

> In any action under this section, the defendant has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and…did not have a detectable amount of a restricted controlled substance in his or her blood…

The jury instruction mirrors the statutory language of the affirmative defense:

> Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood. The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.

Wis JI-Criminal 1187.

The Wisconsin Supreme Court in ***State v. Caibaiosai***, 122 Wis. 2d 587, 596, 363 N.W.2d 574 (1985), held that the affirmative defense in Wis. Stat. § 940.09(2) "is meant to provide a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual."

This court defined 'intervening cause" in ***State v. Turk***, 154 Wis. 2d 294, 296, 453 N.W.2d 163 (Ct. App. 1990), (citing ***State v. Nester***, 336 S.E.2d 187, 189 (W.Va. 1985)). ***Turk*** held "An intervening cause is a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury."

A seizure is an intervening cause because it breaks the causal connection between the driving and the death. Mr. Raczka's affirmative defense is simple: his seizure caused the accident.

2. The seizure evidence was relevant to the affirmative defense because it was the intervening cause.

The question is whether evidence of Mr. Raczka's seizure history and the testimony supporting the claim that a seizure caused the accident is relevant to the affirmative defense. The answer to that question is yes.

Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. The criterion of relevancy is "whether

the evidence sought to be introduced would shed any light on the subject of inquiry." ***State v. Lindh***, 161 Wis. 2d 324, 348, 468 N.W.2d 168 (1991). When admissibility of evidence is challenged, the burden is on the proponent of the evidence to show why it is admissible. ***State v. Leighton***, 2000 WI App 156, ¶ 47.

There are two parts to a relevancy determination. First, the evidence must relate to a fact or proposition that is of consequence to the determination of the case, and second, the evidence must have "a tendency to make a consequential fact more probable or less probable than it would be without the evidence." ***State v. Swope***, 2008 WI App 175, ¶ 20, 315 Wis. 2d 120, 762 N.W.2d 725, *citing* ***State v. Sullivan***, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998).

As for the first part of the relevancy analysis, the court must focus on "the pleadings and contested issues in the case." ***State v. Payano***, 2009 WI 86, ¶ 392, 320 Wis. 2d 348, 768 N.W.2d 832. The evidence is not relevant if it is offered on an issue that is not in dispute in the case. ***Id.***

The affirmative defense requires proof of an intervening cause to the accident. Mr. Raczka intended to provide proof of an intervening cause to the accident. Testimony from Mr. Raczka's doctor is relevant because it provides medical context to that seizure history and a medical opinion that a seizure occurred at the time of the accident. Testimony from Mr. Wolf and from Mr. Raczka's mother is relevant because it supports the claim that Mr. Raczka was suffering from a seizure immediately after the accident which supports the claim that seconds before the crash he was having a seizure. Mr. Raczka's testimony that he believed a seizure caused the accident is relevant because he is familiar with his seizure disorder and can describe how he felt before

and after the accident. Mr. Bonsall's girlfriend's testimony lends further support to the seizure defense because it negates any claim that he was intoxicated at the time he picked Mr. Bonsall up for work that morning.

This seizure evidence indisputably relates to an intervening cause of the accident which is "a fact that is of consequence to the determination of the case." ***State v. Swope***, 2008 WI App 175, ¶ 20.

The second point in evaluating relevancy is a "common sense" determination as to whether the evidence has probative value when offered in support of a fact of consequence. ***State v. Payano***, 2009 WI 86 at ¶¶ 68-70.

Common sense says that if a person has a seizure while driving, the accident would have occurred even if the person did not have any amount of restricted controlled substances in his blood. The seizure evidence is absolutely on point with the purpose of the affirmative defense and therefore meets the relevancy test.

The circuit court failed to conduct the relevancy test and instead applied the wrong analysis when it refused to allow any seizure evidence. Instead of considering relevancy, the court jumped ahead to conclude that Mr. Raczka was negligent for failing to properly take his anti-seizure medication and therefore the seizure was "something that he's in control of." (26:101). The circuit court ignored the relevancy issue and in its place made a factual determination that should have been made by the jury.

In determining whether the evidence supported the affirmative defense, neither the circuit court nor this court may weigh the evidence. ***State v. Coleman***, 206 Wis. 2d 199, 213-14, 556 N.W.2d 701 (1996). Rather, the evidence must

be viewed in the light most favorable to the theory of defense. ***State v. Head***, 2002 WI 99, ¶113, 255 Wis. 2d 194, 648 N.W.2d 413. The only question is whether a reasonable construction of the evidence, viewed most favorably to the defendant, supports the affirmative defense. ***Coleman***, 206 Wis. 2d at 214. "'If this question is answered affirmatively, then it is for the jury, not the trial court or this court, to determine whether to believe defendant's version of the events.'" ***Id.***, *quoting* ***State v. Mendoza***, 80 Wis. 2d 122, 154, 258 N.W.2d 260 (1977).

The circuit court did not properly analyze whether the evidence was relevant. The circuit court did not view the evidence in the light most favorable to the theory of defense. The seizure evidence was clearly relevant and the jury should have the opportunity to hear and evaluate this relevant evidence.

3. At this stage of the proceedings, the issue is not whether the jury instruction should be given; only whether the evidence is relevant.

It is critical to bear in mind that the circuit court ruled the jury could not hear any seizure evidence. The issue before the court is not whether the affirmative defense instruction should have been given or whether the evidence was sufficient to convict. The question is only whether Mr. Raczka should have been allowed to present his affirmative defense. Most cases addressing the affirmative defense relate to the issue of whether the jury instruction should be given. The evidence itself has already been admitted. (*See* ***Caibaiosai*** (witness allowed to testify that passenger and road conditions generally can impact motorcyclist's control); ***State v. Muckerheide***, 2007 WI 5,

298 Wis. 2d 553, 725 N.W.2d 930 (defendant permitted to testify that passenger grabbed the steering wheel); ***State v. Lohmeier***, 205 Wis. 2d 183, 189, 556 N.W.2d 90 (1996) (jury heard evidence that victims were walking in the road at the time of the accident and that victims walked in road on other occasions)).

As Mr. Raczka explained above, the standard for admitting the evidence is relevance. The relevancy standard is even lower than the minimal standard for giving the affirmative defense. The United States Supreme Court has recognized that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." ***Mathews v. United States***, 485 U.S. 61, 63 (1988) (defendant entitled to instruction on affirmative defense of entrapment even if he denies elements of the crime). And our supreme court has asserted that "[a] court errs when it fails to give an instruction on an issue raised by the evidence." ***State v. Head***, 2002 WI 99, ¶44 (defendant entitled to instruction on self-defense).

The jury instruction notes for Wis. Stat. § 940.09(1)(am) provide guidance by explaining that "When there is 'some evidence' of the defense in the case, the second set of closing paragraphs should be used." Wis JI-Criminal 1187 fn 8. This "some evidence" standard is reaffirmed in Wis JI-Criminal 2600, which notes that "The defense is addressed in the instructions by providing an alternative ending for use in cases where there is 'some evidence' of the defense."

Caibaiosai confirms that the instruction standard is minimal: where the legislature provides an affirmative defense "trial judges have a duty to so instruct the jury in all

cases when *any* exonerating evidence is received tending to show that the [injuries] would have occurred even if the defendant had not been under the influence of intoxicants." 122 Wis. 2d 587 at 600. (emphasis added).

The circuit court can make the "some evidence" or "any exonerating evidence" determination and preclude the affirmative defense after the testimony. Because he met the relevancy test, Mr. Raczka should have had the opportunity to present the seizure evidence to the jury.

4. Whether Mr. Raczka was negligent for failing to regularly take his seizure mediation is a jury question and does not preclude the affirmative defense because a seizure is an unpredictable, involuntary medical episode.

The circuit court's ruling was based on the state's argument that even if Mr. Raczka had a seizure that fact wouldn't support the affirmative defense. The state argued that Mr. Raczka was negligent because he failed to regularly take his seizure medications. Pursuant to ***Caibaiosai***, a defendant's negligence cannot be an affirmative defense to this charge. 122 Wis. 2d at 600. Therefore, the state's position is that even if a seizure caused the accident, the affirmative defense cannot apply because Mr. Raczka's negligence in not taking his medication caused the seizure. (26:98).

The state's reasoning makes a defendant's failure to take seizure mediation analogous to a defendant's choice to close his eyes while driving. If a defendant had a detectable amount of a restricted controlled substance at the time of the accident and he also closed his eyes while driving, the

defendant cannot use his negligent act of closing his eyes to avoid a Wis. Stat. § 940.09(1)(am) conviction.

The state's argument misses the mark. First, the defense was prepared to present evidence that even individuals who faithfully take their seizure medications still suffer from seizures. Medication cannot guarantee that a person will not suffer a seizure. Likewise, the failure to regularly take medication does not guarantee that a seizure will occur. (26:101). The state could attempt to argue that Mr. Raczka was negligent for failing to take his medication, but the question of whether the seizure was an intervening cause was still a question for the jury.

Second, unlike the closed eyes while driving hypothetical, Mr. Raczka did not make a decision to drive while having a seizure. Mr. Raczka did not *choose* to have a seizure. He did not *choose* to take the risk of driving while having a seizure. Having a seizure is an uncontrollable, unintentional, unpredictable event.

Further, the state's claim that Mr. Raczka was negligent for failing to take his medication and that negligence resulted in the accident is not supported by any evidence. The state offered nothing but pure speculation that Mr. Raczka's failure to take the medication resulted in his seizure. The state didn't prove that a person can predict when a seizure will occur. The state is holding the defense to an impossible standard. According to the state, in order to assert the affirmative defense Mr. Raczka must be able to prove that even if he had taken his medication he still would have had a seizure at 9:30 a.m. on October 27, 2014.

The legislature created an affirmative defense to the strict liability crime in Wis. Stat. § 940.09(1)(am). The legislature specifically chose to allow a defendant to present

facts showing that even if he exercised due care and did not have the restricted controlled substance in his blood the death would still have occurred. The state attempts to eradicate this defense by cutting off the jury's ability to assess whether Mr. Raczka's medical condition was an intervening cause. There are individuals, arguably including Mr. Raczka, who cannot afford prescription medication. Under the state's theory, those individuals cannot present evidence of the affirmative defense to the jury. This sweeping limitation is inconsistent with the legislature's clear intention in providing the affirmative defense.

The seizure evidence was relevant. The question of whether Mr. Raczka was negligent for failing to take his medication is an argument for the jury to consider after it hears that relevant seizure evidence.

C. Evidence that Mr. Raczka suffered from a seizure was relevant to whether his conduct was criminally reckless.

The state also charged Mr. Raczka with second degree reckless homicide. (1). Criminally reckless conduct requires that the defendant's act was a substantial factor in causing the death and that the defendant was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm. Wis JI-Criminal 1060. The seizure evidence is relevant to the question of what caused the accident and whether Mr. Raczka was aware of risk. Because of the seizure evidence's relevance to recklessness the jury should be permitted to hear that evidence.

Wisconsin Statute § 940.06(1) provides: Whoever recklessly causes the death of another human being is guilty of a Class D felony.

> The jury instruction lists two elements for the offense:
>
> 1. The defendant caused the death of (name of victim).
>
> "Cause" means the defendant's act was a substantial factor in producing the death.
>
> 2. The defendant caused the death by criminally reckless conduct.
>
> Criminally reckless conduct means:
>
> - the conduct created a risk of death or great bodily harm to another person; and
> - the risk of death or great bodily harm was unreasonable and substantial; and
> - the defendant was aware that (his) conduct created the unreasonable and substantial risk of death or great bodily harm.

Wis JI-Criminal 1060.

In its motion in limine, the state argued that the presence of restricted controlled substances in Mr. Raczka's blood "was reckless behavior resulting in the crash and death."(17:3).

If the state's position is that the presence of the restricted controlled substances is per se reckless, Mr. Raczka could find no law supporting that argument. And any determination of per se recklessness would run contrary to common sense.

For example, assume that a restricted controlled substance like THC remains in the blood for 30 days. On the 29th day the defendant is in an accident that seriously injures his passenger. At the time of the accident, the THC did not affect the defendant's driving and the defendant had no idea that the presence of the THC in his blood created an unreasonable and substantial risk of death or great bodily harm. If the theory is that the presence of the THC is per se reckless, the defendant would have no defense to the charge even though the facts clearly suggest significant factual questions for the jury to resolve. The degree of risk created and the defendant's awareness of the risk are clearly jury questions and cannot be circumvented by a claim of per se recklessness.

If the state intends to argue to the jury that the ingestion of the restricted controlled substances was criminally reckless, the seizure evidence is relevant. As discussed in Section B above, relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

The state has to prove beyond a reasonable doubt that Mr. Raczka's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that Mr. Raczka was aware that his conduct created that risk. Wis JI-Criminal 1060, Wis. Stat. § 939.24(1). Seizure evidence relates to issues that determine the case: did Mr. Raczka's conduct create unreasonable and substantial risk and was he aware of that risk?

Whether Mr. Raczka had a seizure directly impacts whether his conduct created the unreasonable and substantial risk. Whether Mr. Raczka had a seizure directly impacts whether, in light of his history of seizures, he was aware of that risk. (subjective awareness of the risk is required, ***State v. Neumann***, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560). The seizure evidence goes to contested issues. The state might argue that Mr. Raczka's medical history and his failure to regularly take his medication created the risk and that Mr. Raczka knew of the risk. The defense might argue that the seizure was a spontaneous and unpredictable event. The jury would weigh the evidence and decide.

The seizure evidence also has probative value when offered in support of a fact or consequence. ***State v. Payano***, 2009 WI 86 at ¶¶ 68-70. In addition to the evidence's direct impact on the critical question of recklessness, the seizure evidence provides a second possible cause of the accident. The circuit court's ruling precludes any evidence of an alternate cause and precludes the jury from determining whether a seizure, and not the restricted controlled substance, caused the accident. The jury must be able to evaluate the evidence and decide whether the accident was caused by the restricted controlled substance, the seizure or some other factor.

Because the circuit court excluded all seizure evidence, and because the seizure evidence was relevant to the question of criminal recklessness, this court should reverse the order and allow the jury to hear the seizure evidence at trial.

CONCLUSION

For the reasons set forth above, Mr. Raczka respectfully requests that this court reverse the trial court's decision and order that Mr. Raczka be allowed to present the seizure evidence at trial.

Dated this 5th day of October, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,687 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5th day of October, 2016.

Signed:

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Leave to Appeal (R:23).. 102-103

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 5th day of October, 2016.

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