STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1057-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TARAN Q. RACZKA,

Defendant-Appellant.

ON PETITION FOR LEAVE TO APPEAL A NONFINAL ORDER GRANTING THE STATE'S MOTION IN LIMINE ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE JAMES L. CARLSON, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

When charged with homicide by intoxicated use of a vehicle, a defendant can raise an affirmative defense that the death would have occurred because of an intervening cause even if he had exercised due care. Here, the State sought a pretrial ruling excluding evidence that a seizure, not the defendant's use of restricted controlled substances, caused the victim's death. Is the seizure evidence relevant as an intervening cause of the crash if Raczka exercised due care?

The circuit court answered no.

This court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

On October 27, 2014, Taran Raczka drove a vehicle with Jeffrey Bonsall in the passenger seat. Around 9:31 a.m., Raczka drove the car off the road and crashed into a tree. (1:2.) The crash killed Bonsall. (1:2.) A witness, Quentin Wolf, described Raczka as basically unconscious, but thrashing his legs and body. (1:2.) When Deputy Brenda Thurin arrived, Raczka was not having a seizure. (48:93.) Raczka had metabolites of marijuana and cocaine in his blood when the car crashed. (1:3.) At the hospital, Raczka yelled at and fought with medical personnel. (32:1.) The

emergency room medical records do not discuss a seizure or Raczka's seizure disorder. (32:10-15.)

On November 4, 2014, Raczka told Deputy Thurin that he had a history of seizures, and that a seizure may have "possibly" caused the crash. (1:3.) He said, "I have seizures and after thinking about it, I believe that is what happened." (32:3.) The Walworth County Sheriff prepared a "possible contributing factor" report that contained this statement. (32:6.)

Raczka does have a history of seizures. In 2011, Dr. Arshad Ahmed examined Raczka after he had a "generalized convulsive seizure." (32:7.) On March 25, 2011, Dr. Ahmed prescribed Raczka 300 milligrams of Dilantin[1] daily. (32:4.) On April 25, 2013, Dr. Ahmed saw Raczka as a follow up from the 2011 seizure and recorded in Raczka's medical file that he had not had any seizures while on Dilantin. (32:7.) Raczka reported to Dr. Ahmed that he smoked a half of a pack of cigarettes daily and drank 84 cans of beer per week. (32:8.) Dr. Ahmed advised Raczka not to drink and told him to follow up again in one year. (32:10.)

Raczka did not follow up with Dr. Ahmed until November 18, 2014, more than three weeks after the crash. (32:15.) At that time, Raczka reported having a seizure in the spring of 2014, and explained that he did not follow up with Dr. Ahmed about it because of financial concerns. (32:15.) Raczka admitted that he did not take his seizure medication regularly, if at all. (32:15.) He told Deputy Thurin that he smoked marijuana two days before the crash, but denied using marijuana on the date of the crash. (1:3.)

[1] Dilantin is also known as Phenytoin. (32:7.)

Raczka told Dr. Ahmed that he did not use illicit drugs. (32:15.)

The State charged Raczka with homicide by vehicle by use of a controlled substance, second degree reckless homicide, and second offense of operating with a restricted controlled substance in his blood. (7.)

The State filed a motion in limine asking the court to exclude all evidence relating to Raczka's seizure disorder or history of seizures. (28:2-3.) The State asserted that Raczka wanted the jury to speculate that Raczka had a seizure before the crash. (28:3.) A defendant can raise a defense that the controlled substance was not the cause of death. The defendant has an affirmative defense if he or she proves that the death would have occurred even if: (1) he had been exercising due care, (2) there was no intervening cause, and (3) he did not have a prohibited concentration of a controlled substance in his blood. The State argued that Raczka could not use the evidence to meet his burden under Wis. Stat. § 940.09(2)(a) because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, wasting the court's time, or misleading the jury. (28:3.)

At the motion hearing, the State pointed out that Raczka knew he had a seizure disorder, that he did not take his medicine, and that he instead used cocaine and marijuana. (48:46.) The State argued that Raczka's seizure evidence did not support the affirmative defense but proved that he was negligent. (48:46.) The State believed that Raczka's evidence was purely speculative and not direct evidence that the death resulted from an intervening cause. (48:50.) The State argued that Raczka should not have driven with cocaine and marijuana metabolites in his blood,

and that his use of those substances caused the accident. (48:59.)

Raczka told the court that he planned to present evidence from Wolf, the first person on the scene of the crash, that he saw Raczka's arms flailing in an uncontrollable manner. (48:55.) Raczka's mother, Deni Reich, would also testify that she has seen Raczka's seizures and that is exactly what they look like. (48:55.) Raczka also planned to present Dr. Ahmed's testimony that a seizure caused the crash. (48:55.) Raczka represented that Deputy Thurin would testify that Raczka told her about his seizure history and prescription on November 4, 2014. (48:55-56.) Shawn Flynn would testify that she saw Raczka at 8:30 a.m. on October 27, 2014, and Raczka was not sleepy or intoxicated. (48:99.)

Raczka argued that this evidence was all relevant to the affirmative defense that the seizure was an intervening cause. (48:56.) He conceded that not taking his seizure medication constituted negligence, but insisted that he did not know he would have a seizure on the day of the crash. (48:57.) He argued that a seizure is the only explanation of why the crash occurred. (48:58.)

The circuit court granted the State's motion and ordered all evidence relating to Raczka's seizure disorder excluded from the trial. (48:104.) Raczka filed a petition for leave to appeal. This Court granted that petition. (37:2.)

ARGUMENT

I. Raczka's seizure disorder was not relevant to the affirmative defense because he failed to exercise due care.

A. This Court reviews the circuit court's decision to exclude the evidence under an erroneous exercise of discretion standard.

This Court reviews a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Mayo*, 2007 WI 78, ¶ 31, 301 Wis. 2d 642, 734 N.W.2d 115. Reviewing courts will sustain a circuit court's decision as long as it "examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion using a demonstrated rational process." *Id.*; *see also State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Further, if a circuit court failed to articulate its reasoning, reviewing courts "independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Sullivan*, 216 Wis. 2d at 781.

Raczka asserts that this Court should review the decision to exclude the evidence as a question of constitutional fact. (Raczka's Br. 5-6.) In the standard of review section he presents the question of whether he was denied his constitutional right to present a defense. (Raczka's Br. 6.) But Raczka's brief argues only that the circuit court erred because the evidence was relevant. (Raczka's Br. 7-18.) He develops no constitutional argument. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Therefore, the proper question is whether the evidence was relevant and the proper standard is whether the circuit court erroneously exercised its discretion. *See Mayo*, 301 Wis. 2d 642, ¶ 31.

B. To support the affirmative defense, a defendant must present relevant evidence that the death would have occurred because of an intervening cause even if he was exercising due care.

Raczka faced a charge of homicide by operation or handling of a vehicle with a detectable amount of restricted controlled substances in his blood. *See* Wis. Stat. § 940.09(1)(am). The elements of that offense are that: (1) the defendant operated a vehicle; (2) the defendant's operation of a vehicle caused the death of a victim; and (3) the defendant had a detectable amount of a restricted controlled substance in his blood at the time the defendant operated a vehicle. Wis. JI Criminal 1187 (2011).

No person may drive while the person has a detectable amount of a restricted controlled substance in his or her blood. Wis. Stat. § 346.63(1)(am). Public safety is per se endangered when a person drives a motor vehicle while having a detectable concentration in their blood of a controlled substance. *See State v. Smet*, 2005 WI App 263, ¶ 13, 288 Wis. 2d 525, 709 N.W.2d 474.

The State does not need to prove that the defendant's use of the restricted controlled substance directly caused the victim's death. *State v. Caibaiosai*, 122 Wis. 2d 587, 594, 363 N.W.2d 574 (1985). The Legislature concluded that combining intoxication with operating a motor vehicle is "pervasively antisocial" and "inherently evil." *Id.* at 593. When a defendant engages in "an inherently dangerous activity" it is "reasonably foreseeable that driving while intoxicated may result in the death of an individual." *Id.* at 594.

A defendant can raise a defense that the controlled substance was not the cause of death. "[I]f 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 he or she . . . did not have a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 940.09(2)(a).

The Legislature first enacted the affirmative defense in 1981. It amended the statute to provide: "The actor has a defense if it appears by a preponderance of the evidence that the death would have occurred even if the actor had not been under the influence of an intoxicant or a controlled substance or a combination thereof or did not have a [prohibited] blood alcohol concentration." Wis. Stat. § 940.09(2) (1981-82).

The Wisconsin Supreme Court interpreted that language to mean that an affirmative defense exists when "there is an intervening cause between the intoxicated operation of the automobile and the death of an individual. *Caibaiosai*, 122 Wis. 2d at 596. 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." *State v. Turk*, 154 Wis. 2d 294, 296, 453 N.W.2d 163 (Ct. App. 1990).

After *Caibaiosai*, the Legislature amended Wis. Stat. § 904.09(2) to reflect the interpretation of the *Caibaiosai* court. *See* drafting file for 1989 Wis. Act 275. (R-App. 101.) After the amendment, the affirmative defense is available if the defendant can prove "by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have a [prohibited] blood alcohol concentration." 1989 Wis. Act 275 § 5. The due

care and intervening cause language remain intact in the current version of Wis. Stat. § 940.09(2)(a) (2015-16).[2]

Relevance 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 evidence must be of consequence to the determination of the action and must have probative value when offered for that purpose. *State v. Payano*, 2009 WI 86, ¶ 68, 320 Wis. 2d 348, 768 N.W.2d 832. Relevant evidence is generally admissible while irrelevant evidence is generally inadmissible. Wis. Stat. § 904.02.

"[R]elevant[ ] 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." Wis. Stat. § 904.03.

The defendant has an affirmative defense if he or she proves that the death would have occurred even if: (1) he had been exercising due care, (2) there was no intervening cause, and (3) he did not have a prohibited concentration of a controlled substance in his blood. *See* Wis. Stat. § 940.09(2); *Caibaiosai*, 122 Wis. 2d at 596. A defendant must meet his burden by the greater weight of the credible evidence. Wis. JI-Criminal 1187. "'Credible evidence' is evidence which in the light of reason and common sense is worthy of belief." *Id.*

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

C. The evidence relating to Raczka's seizure disorder was not relevant under Wis. Stat. § 940.09(2) because he was not exercising due care at the time of the crash.

Raczka's seizure evidence is not relevant to a fact of consequence in this case. Presenting the evidence to the jury posed a risk of misleading the jury and confusing the issues. The circuit court properly exercised its discretion when it granted the State's motion in limine to exclude the evidence.

Raczka presented no evidence that he actually had a seizure that caused Bonsall's death. Raczka attempts to argue that because he has a seizure disorder and showed some signs of having a seizure *after* the crash that a seizure *caused* the crash. The evidence does not support this conclusion.

A week after the crash, Raczka declared for the first time that a seizure probably caused the crash. (32:3.) At the scene of the crash and in the hospital, Raczka never mentioned his seizure disorder. He has had seizures in the past and presumably knew what he feels like after one ends. His testimony about the seizure causing the crash is self-serving and unsupported by any facts.

Likewise, Dr. Ahmed's report that a seizure caused the crash is based on Raczka's self-report. It's noteworthy that Raczka reported to Dr. Ahmed that he never used illicit drugs, a report that was demonstrably false. (32:15.) Dr. Ahmed's opinion about the cause of the crash is based completely on Raczka's self-serving and incomplete statements. Thus, his testimony is not probative and therefore not relevant to the affirmative defense.

Raczka asserts that Wolf would describe how, after the crash, Raczka's arms were flailing in an uncontrollable

manner. (48:55.) This testimony would be contrary to Wolf's account at the time of the crash that Raczka was basically unconscious and thrashing his legs and body. (1:2.) Also, while Wolf's evidence might imply that Raczka had a seizure, it would not help the jury to determine if the seizure caused the crash or the crash caused a seizure.

Without direct evidence that a seizure caused the crash (or that he even had a seizure), Raczka can only speculate that he may have had a seizure and that this seizure may have caused the crash. This speculation upon speculation would only mislead the jury and confuse the issues.

Raczka did not exercise due care and a seizure could not have caused the crash. For the sake of argument, assume that Raczka did have a seizure and that it did happen before the crash. The seizure would still not be relevant to the affirmative defense in Wis. Stat. § 940.09(2)(a).

To be relevant, the affirmative defense evidence must show that Raczka acted with due care and something other than his use of the restricted controlled substances caused Bonsall's death. He cannot present evidence consistent with that defense because, if he did have a seizure, his failure to take his seizure medication contributed to the crash and demonstrates that he did not act with due care.

Raczka was diagnosed with a seizure disorder in 2011. (32:7.) He knew that drinking could aggravate his disorder. (32:10.) He took the prescribed medicine daily for two years. (32:7.) During that period of time, Raczka did not have any seizures. (32:7.)

Raczka stopped taking his seizure medicine at some point. The record does not contain the actual date that Raczka stopped taking Dilantin. On November 18, 2014, Dr. Ahmed wrote that "over the past year [Raczka] has not been taking his Dilantin regularly, if at all." (32:15.) The record shows that Raczka had a seizure in the spring of 2014, several months before the accident. (32:15.)

Assuming for the sake of argument Raczka had a seizure on October 27, 2014; it was at least the second seizure he experienced after he stopped taking his seizure medication. This was preceded by a period of over two years of no seizures while taking the medication. Therefore, if Raczka had a seizure on the day of the accident, his lack of medication contributed to the seizure and thus the death of Bonsall. Raczka asserts that he has evidence that medication cannot guarantee a person will not have a seizure. (Raczka's Br. 14.) But the evidence in the record is that Raczka did not have a seizure while taking the medication and did have seizures when he failed to take his medication. Raczka presented no relevant evidence showing that he acted with due care.

Continuing to assume that Raczka did have a seizure, Raczka's use of cocaine and marijuana negates his claim that he acted with due care. Cocaine in particular can lower a person's seizure threshold making it more likely that they will have a seizure after taking the cocaine. Barbara S. Koppel et al., *Relation of Cocaine Use to Seizures and Epilepsy*, 37 Epilepsia, 875 (1996).[3] Since Raczka failed to take his seizure medication while also taking cocaine, he failed to act with due care. Raczka's position seems to be

[3] Abstract available at https://www.ncbi.nlm.nih.gov/pubmed/8814101.

that he can disregard the risks of not taking his medication and taking illicit drugs, but still tell the jury about his seizure disorder under the affirmative defense statute. He cannot.

Raczka argues that he could not be found negligent for causing the crash because he did not know he would have a seizure that day. (Raczka's Br. 14.) This is a false narrative. Raczka knew he had a seizure disorder. He knew in the past that Dr. Ahmed had told him not to drive for a period of time after having a seizure. Raczka knew he was not taking his seizure medication and knew that he used cocaine and marijuana. Raczka should not have been driving under those conditions. It does not matter that he could not predict that he would have a seizure that day. His actions made it unsafe for him to drive.

Raczka fails to present evidence sufficient to show he had a seizure. His speculative evidence is insufficient because it cannot be viewed without examining Raczka's lack of due care. Raczka does not have any evidence relevant under the affirmative defense to show that he acted with due care and something other than the restricted controlled substances in his blood caused Bonsall's death. The circuit court properly exercised it discretion in excluding the evidence.

II. Raczka waived his argument that the seizure evidence is relevant to the criminally reckless charge by failing to raise it in the circuit court.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing

that the issue was raised before the circuit court." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (plurality opinion; citations omitted).

Raczka argues that the seizure evidence was also relevant to the question of whether his conduct was criminally reckless. (Raczka's Br. 15-18.) In the circuit court, he did not argue that the seizure evidence was relevant for any purpose other than evidence of an intervening cause and the affirmative defense to homicide by a vehicle with a prohibited concentration of a restricted controlled substance.

Because it was not raised in the circuit court, the circuit court did not address whether the seizure evidence could have been relevant to the charge that Raczka committed second degree reckless homicide. Since Raczka failed to raise this claim in the circuit court, this Court should not consider it.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's order granting the State's motion in limine.

Dated this 16th day of December, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,423 words.

Dated this 16th day of December, 2016.

_____
CHRISTINE A. REMINGTON
Assistant Attorney General

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 16th day of December, 2016.

_____
CHRISTINE A. REMINGTON
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
BRIEF OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

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CHRISTINE A. REMINGTON
Assistant Attorney General

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WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

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

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

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