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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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.

Mr. Raczka simply asks this court to hold that he can present evidence supporting his claim that he had a seizure at the time of the accident. This court is not asked to decide whether the affirmative defense instruction should be given. The circuit court answers that question. This court is not asked to decide whether the defense was established to a reasonable certainty by the greater weight of the credible evidence. The jury answers that question. The issue before this court is relevancy.

The state makes two arguments: (1) evidence that Mr. Raczka had a seizure is prejudicial because it would confuse or mislead the jury; and (2) Mr. Raczka did not act with due care because he did not regularly take his anti-seizure medications and had restricted controlled substances in his blood. (State's Brief at 9-12).

The state's argument avoids the threshold relevancy question at issue in this case by making an argument more akin to a sufficiency claim. The factual questions the state raises are questions that apply primarily to the third part of the analysis: whether the jury should find that the defense proved by a reasonable certainty by the greater weight of the credible evidence that Mr. Raczka exercised due care. (State's Brief at 9-12).

The real question is whether the seizure evidence is relevant. The relevancy standard is broad: "The expansive definition of relevancy in Wis. Stat. § 904.01 is the true cornerstone of the Wisconsin Rules of Evidence." ***State v. Marinez***, 2011 WI 12 ¶33, 331 Wis. 2d 568, 797 N.W.2d 399 (citing Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence and § 808.1, § 401.1 at 97 (3d ed. 2008)). *See also* ***State v. Hungerford***, 84 Wis. 2d 236, 257, 267 N.W.2d 258 (1978)(relevance is defined broadly).

Not only is relevancy defined expansively, there is a strong presumption that proffered evidence is relevant. ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997).

Bearing in mind the presumption of admission and the expansive definition of relevancy, the state's arguments fall short. The state complains that Mr. Raczka's testimony is self-serving and therefore would be misleading to the jury. (State's Brief at 9) A defendant's testimony by its nature is self-serving. Taking the state's argument to its logical conclusion, a defendant's testimony would never be relevant because it is always self-serving. The state also claims that Mr. Raczka's testimony is "unsupported by any facts." (State's Brief at 9). To the contrary, the defense presented an abundance of facts supporting its claim, including eyewitness testimony, Mr. Raczka's treating physician, Mr. Raczka's mother and the girlfriend of the victim. (48:55, 57, 68, 71, 98-100)[1].

[1] Mr. Raczka incorrectly cited the May 10, 2016, hearing as (26) in his brief-in-chief. Undersigned counsel did not receive a copy of the Amended Notice of Compilation of Record (52) and was unaware the document was filed until reviewing the state's brief.

The state also splits hairs when it tries to portray the evidence as confusing and misleading. The state argues that eyewitness testimony describing Mr. Raczka as flailing his arms in an uncontrollable manner immediately after the accident is contrary to the witness' account at the scene that Mr. Raczka was thrashing his legs and body. (State's Brief at 10). It appears that these descriptions are consistent. Regardless, is difficult to imagine how this would confuse or mislead the jury.

It is important to remember that the state can cross examine each defense witness on these points and present its own witnesses to contradict the defense claims. The jury can choose to reject the defense witnesses. The role of the fact finder is to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts. "The trier of fact is free to choose among conflicting inferences of the evidence…" ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

For the same reason, the state's argument that Mr. Raczka's failure to take his seizure medications equates to a lack of due care fails to properly address the relevancy question. (State's Brief at 10-11). The state attempts to turn the analysis around and argue that Mr. Raczka presented no relevant evidence showing that he acted with due care. (State's Brief at 11). In fact, the state goes so far as to assert without support that "his failure to take his seizure medication contributed to the crash…" (State's Brief at 10). The state also misstates the evidence when it claims that Mr. Raczka "conceded that not taking his seizure medication constituted negligence…" (State's Brief at 4). In fact, Mr. Raczka argued that he was negligent only if he knew he was going to have a seizure while he was driving the day of the accident but he had no way of knowing this. (48:57).

The real question is whether the abundance of evidence regarding seizures meets the "strong presumption" of relevance. ***State v. Richardson***, 210 Wis. 2d at 707. Whether the relevant seizure evidence is sufficient to support the affirmative defense instruction will be determined by the circuit court. Whether, in light of Mr. Raczka's history of seizures, the failure to regularly take seizure medication somehow resulted in the accident and negates a claim of due care is a jury question. All of the evidence the state describes about Mr. Raczka's seizure history and medication history would be fair game for the state to try to challenge at trial. Assuming the circuit court gave the affirmative defense instruction, the jury would then "choose among conflicting inferences" and make its determination. ***State v. Poellinger***, 153 Wis. 2d at 506.

Indicative of its argument moving away from a relevancy argument and into a sufficiency argument is the state's bald assertion that "a seizure could not have caused the crash." (State's Brief at 10). It is unclear how the state arrives at this definitive conclusion, but what is clear is that such a conclusion is for the jury to make. This court should find that the seizure evidence is relevant and, if so instructed by the circuit court, put the jury in the position to evaluate the evidence.

The state argues that Mr. Raczka failed to develop his claim that he was denied his constitutional right to present a defense. (State's Brief at 5). Mr. Raczka argues that the trial court's refusal to allow the presentation of relevant evidence denied him his constitutional right to present a defense. Without the seizure evidence, Mr. Raczka had no basis to ask for the affirmative defense instruction. Without the affirmative defense instruction, Mr. Raczka had no defense.

Therefore, the circuit court's ruling denied him his right to present a defense.

Finally, the state argues that Mr. Raczka waived his argument that the seizure evidence is relevant to the criminally reckless charge because he failed to raise it in the circuit court. (State's Brief at 12-13).

The state filed a motion in limine regarding the seizure evidence. (26, 28). The parties briefed the issue and the court held an extensive evidentiary hearing. (48). When the court ruled the evidence was not admissible, Mr. Raczka filed a Petition for Leave to Appeal and this court granted the petition. (37). The issue of whether the seizure evidence was relevant was thoroughly litigated and the issue regarding the second degree reckless homicide count was specifically raised in the Petition for Leave to Appeal and addressed in this court's order granting the Petition. (37).

The heart of the argument was that seizure evidence is relevant to whether there was an intervening cause to the accident; this theory is consistent as to both counts. The two charges are inextricably related and they are being tried together. The circuit court had the comprehensive arguments before it and its reasoning applies equally to the second count. (48).

Further, this is an interlocutory appeal. If this court rules on the first count but not the second, defense counsel could file a pretrial motion asking the circuit court to rule on the evidence as it applies to count two. The aggrieved party could then file a Petition for Leave to Appeal potentially placing virtually the same issue before this court again. If the issue is not resolved pretrial and Mr. Raczka is convicted, the issue would have to be raised either on postconviction in the

form of an ineffective assistance of counsel claim or on a Notice of Appeal in this court.

Mr. Raczka faces two very serious felony charges. The issue as to both counts is clearly defined and closely related and this court should rule on this issue as it applies to both counts.

CONCLUSION

For the reasons stated above, as well as those set forth in the brief-in-chief, this court should reverse the trial court's decision and order that Mr. Raczka be allowed to present the seizure evidence at trial.

Dated this 18th day of January 2017.

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 1,532 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 18th day of January, 2017.

Signed:

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