STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP1879-CR

JOSHUA J. LUTHER,

Defendant-Appellant.

APPEAL OF NONFINAL ORDER GRANTING MOTION *IN LIMINE* TO EXCLUDE EVIDENCE, THE HONORABLE BRIAN PFITZINGER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

1. **IS EVIDENCE OF MR. LUTHER'S NON-IMPAIRMENT RELEVANT TO THE DUE CARE DEFENSE CONTAINED IN SECTION 940.25(2)(a)?**

   The trial court concluded that it is not.

2. **IS EVIDENCE OF MR. LUTHER'S NON-IMPAIRMENT RELEVANT FOR ANY OTHER PURPOSE?**

   The trial court concluded that it is not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument, but is fully willing to provide oral argument if the court deems it helpful in addressing the merits of the appellant's claims.

The appellant believes publication is warranted as this appeal raises unsettled questions of law that are important to the statewide administration of justice.

STATEMENT OF THE CASE

This case involves the State of Wisconsin prosecuting Joshua Luther for a drugged-driving-injury case despite strong evidence that Mr. Luther was not impaired at the time of the accident (1, 22, 54: 12-13). In the early afternoon of May 1, 2015, Mr. Luther was involved in a collision while driving his work van southeast on Highway DE near the Highway 151 intersection (1: 1). The accident caused serious injuries to J.Z. (1). Deputies from the Dodge County Sheriff's Office arrived on scene, and Deputy Scott Ziorgen made contact with Mr. Luther, who was visibly distraught over what had just occurred (54: 13). Mr. Luther answered all of Deputy Ziorgen's questions appropriately, and did not show any signs of impairment (54: 12-13).

Due to the seriousness of the accident, Deputy Ziorgen sought a blood sample from Mr. Luther (54: 12). Mr. Luther responded that he had not been drinking but had smoked marijuana the night before (1: 3). Deputy Ziorgen then transported him to the hospital, where staff performed a blood draw (1: 3-4). The State Lab of Hygiene later tested Mr. Luther's blood and produced a report asserting that he had 1.4 ng/ml of delta-9-THC in his blood (a very low level on the spectrum) (22: 2-3). Based on the lab results, the State charged Mr. Luther with one felony count of causing great bodily harm by operating a vehicle with a detectible amount of delta-9-THC in his blood, contrary to section 940.25(1)(am) (1).

As the case progressed, the State filed a motion *in limine* to prohibit the defense from informing or arguing to the jury that Mr. Luther was not impaired at the time of the driving (11):

> The State in this case has only charge [sic] Use of a Vehicle with a Restricted Controlled Substance in Blood Causing Great Bodily Harm. The issue of impairment is not before the court and is not relevant to this charge. The State requests that the court prohibit evidence and argument that relate to issues of impairment. The State further requests restriction [sic] prohibiting evidence related to opinions and research

about how certain levels of delta-9 THC have been found to correlate with levels of impairment.

(11).

The defense filed a responsive brief along with a notice of intent to offer at trial the opinion of Dr. Richard Kingston, Pharm.D, an expert on toxicology, that there is no credible evidence in this case showing that Mr. Luther was impaired at the time of the accident (22: 4). In fact, according to Dr. Kingston, the totality of the evidence—including the blood results, observations of witnesses at the scene, and witness testimony in court—supports the opinion that Mr. Luther was not impaired at the time of the accident (22: 4).

Wisconsin law provides an affirmative defense to this charge is the defendant can prove by a preponderance of the evidence that the accident would have occurred even if the defendant had been exercising due care and did not have a detectible amount of a restricted controlled substance in his or her blood (the "due care" defense). Wis. Stat. § 940.25(2)(a). The defense offered Dr. Kingston's testimony to show that Mr. Luther was exercising due care at the time the accident occurred and that the accident was not due to his impairment (21: 2). Mr. Luther's lack of impairment is relevant to whether the accident would have occurred regardless of the presence of THC because his reported THC level was so low that it could not have contributed to the accident (21: 2).

The court held a hearing on the issue at which it barred Dr. Kingston's testimony and any other evidence showing that Mr. Luther was not impaired (55). The court's ruling bars non-impairment evidence for any purpose.[1] (32). The court acknowledged "language in a lot of cases that [...] truly confuses the issue and is fodder for argument" (55: 14). It then excluded all evidence of Mr. Luther's non-impairment as irrelevant to the due care defense (55: 11-13). It never

[1] Including, for instance, whether Mr. Luther's statements to police, or observations of the scene are reliable. If Mr. Luther were to testify at trial, the court's order would bar any meaningful inquiry into his mental state at the time of the accident. The jury would be left with the assumption that Mr. Luther was impaired at the time and could discount his testimony entirely without giving the defense an opportunity to demonstrate otherwise.

referred to the language of the statute, emphasizing instead language from a case which the Supreme Court of Wisconsin later clarified was an incomplete statement of the law (55: 10-13). ***See State v. Lohmeier***, 205 Wis. 2d 183, 194-95, 556 N.W.2d 90 (1996). The court then issued a nonfinal order granting the State's motion to exclude Dr. Kingston's testimony, and any other evidence relating to Mr. Luther's lack of impairment (32).

The defense petitioned for leave to appeal the court's nonfinal order, which the State agreed was appropriate for interlocutory review. This Court stayed the trial court proceedings on October 5, 2016, and granted the defense petition on June 13, 2017. This appeal now follows.

ARGUMENT

I. THE CIRCUIT COURT'S EXCLUSION OF DR. KINGSTON'S OPINION VIOLATES MR. LUTHER'S CONSTITUTIONAL RIGHT TO PRESENT EXPERT TESTIMONY

A. Standard of Review

The admissibility of expert opinion testimony lies in the discretion of the circuit court. A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record. Appellate courts decide any questions of law which may arise during its review of an exercise of discretion independently of the circuit court. ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777

B. The circuit court's exclusion of Dr. Kingston's testimony violates Mr. Luther's right to present a defense

At the initial motion *in limine* hearing on June 9, 2016, undersigned counsel objected to the exclusion of non-impairment evidence as a violation of Mr. Luther's constitutional right to present a defense. A defendant has a constitutional right to present a defense, including expert

testimony. ***See id.***, ¶¶54-73. This right applies subject to a two-part test. ***Id.***, ¶53-55. The defense must first show:

1. The testimony of the expert witness complies with Wis. Stat. § 907.02 governing the admission of expert testimony;
2. The expert witness's testimony was clearly relevant to a material issue in the case;
3. The expert's testimony was necessary to the defense case; and
4. The probative value of the defense expert testimony outweighed its prejudicial effect.

Id. If the defense satisfies these factors, the inquiry shifts to whether the State has a compelling interest in excluding the evidence that outweighs the defendant's right to present a defense. ***Id.***, ¶55.

As discussed in greater detail below, the trial court did not analyze the relevancy of Dr. Kingston's testimony in relation to the text of section 940.25(2)(a). It concluded the testimony was irrelevant based on a misreading of the case law. It did not analyze whether Dr. Kingston's proposed testimony satisfies the requirements of section 907.02, whether it was necessary to the defense, whether its probative value outweighs its prejudicial effect, or whether the State has a compelling interest to exclude the evidence that would outweigh Mr. Luther's right to present a defense. Dr. Kingston's proposed testimony satisfies all four factors set forth in ***St. George*** and there is no compelling state interest that outweighs his right to present expert testimony.

The proposed testimony complies with section 907.02. As indicated in his 40-page *curriculum vitae*, Dr. Kingston is a clinical professor in the Division of Professional Education at the University of Minnesota School of Pharmacy (23). He has extensive education and experience in forensic toxicology and possesses the knowledge, skills, and training to apply the facts of this case to principles and methods that can reliably determine the level of Mr. Luther's impairment—or in this case lack thereof—at the time of the incident. His proposed testimony would be helpful to explain to a jury of laypersons the science behind drug consumption and impairment. Clearly

he is qualified under section 907.02 to serve as an expert at trial.

Dr. Kingston's testimony is also relevant to a material issue in the case. A principle issue in this case is whether the accident would have occurred even if Mr. Luther had been exercising due care and did not have a detectible amount of a restricted controlled substance in his blood. The fact that Mr. Luther was not impaired goes to show that he was in fact exercising due care, and that the presence of THC in his blood, if any, did not contribute to the accident.

Moreover, Dr. Kington's testimony is central to Mr. Luther's defense. There is a good chance the trial would turn out to be a contest of experts. Leaving the defense to fend for itself without an expert at trial would create a perceived imbalance and would prejudice his right to present a complete defense.

Finally, the probative value of Dr. Kingston's testimony outweighs any prejudicial value it might have. The State's reply trial brief suggests that its primary concern with Dr. Kingston's testimony is that of jury nullification (26: 8). However, if that is the only concern it could be addressed by argument, a limiting instruction, or some other means less severe than excluding his testimony.[2] In any event, it is a concern that seems to discount the presumption that the jury will follow the law. ***See State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994) (reiterating that appellate courts must presume that juries follow a circuit court's instructions). The proposed testimony is highly probative of whether the accident would have happened anyway, while the State's concern regarding jury nullification is speculative and could be addressed by argument or objection at trial.

Applying the second part of the ***St. George*** test, the State simply does not have a compelling interest that outweighs Mr. Luther's right to present a defense. The State

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[2] The State could be entitled to a limiting instruction. Wis. Stat. § 901.06 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

is concerned that the jury will not follow the law. That concern is likely present in many cases. A routine concern of local prosecutors over jury nullification cannot trump a constitutional right.

II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY EXCLUDING EVIDENCE OF MR. LUTHER'S NON-IMPAIRMENT BECAUSE IT DID NOT PROPERLY APPLY THE STATUTORY LANGUAGE AND THE CASE LAW TO THE FACTS OF THIS CASE

A. Standard of Review

Appellate courts will uphold a trial court's determination of relevancy unless it constitutes an erroneous exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 345, 340 N.W.2d 498 (1983). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. '[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'" ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) (***quoting State v. Hutnik***, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968)) (internal citation omitted). Decisions based on an error of law go beyond the limits of discretion. ***Hutnik***, 39 Wis. 2d 754, 763.

B. The court did not analyze the language of section 940.25(2)(a) nor did it consider whether non-impairment evidence makes a fact of consequence to the action more or less probable, as required by section 904.01

The circuit court did not expressly analyze the text of the due care defense. Nor did it analyze whether Mr. Luther's lack of impairment tends to make it more likely that this accident "would have occurred even if the defendant had been exercising due care and did not have a detectible amount of a

restricted controlled substance in his or her blood" as required under section 904.01 (55). ***See also*** Wis. Stat. § 940.25(2)(a). In neglecting to engage in this analysis, the court skipped over a critical step in determining the meaning of the statute.

This case presents a question of statutory interpretation: does "great bodily harm would have occurred even if the defendant had been exercising due care and did not have a detectible amount of a restricted controlled substance in his or her blood" as used in section 940.25(2)(a) mean what it says? Wisconsin law provides a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a detectible amount of THC in his blood.

Mr. Luther's lack of impairment is relevant to whether the accident would have occurred regardless of presence of THC because his reported THC level was so negligible that it could not have contributed to the accident. Therefore, Mr. Luther has the right to demonstrate that the trace amount of THC allegedly in his system contributed nothing to the driving behavior and accident. The jury is entitled to infer that the accident would have occurred even without the THC, because it was present in an amount that is insufficient to affect anyone's ability to drive.

The analytical framework for statutory interpretation is well-established. The analysis begins with the statute's language, and if the meaning is plain, the inquiry typically ends there. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** (citations omitted). In determining a statute's plain meaning, the scope, context, structure, and purpose are important. ***See id.***, ¶¶45–46, 49. "A statute's purpose ... may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole." ***Id.***, ¶49.

Section 940.25(2)(a) unambiguously states that "[t]he

defendant has a defense if he or she proves by a preponderance of the evidence that the great bodily harm 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, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have an alcohol concentration described under sub. (1) (b), (bm), (d) or (e)." The affirmative defense asks whether the harm would have occurred regardless of the driver's impairment. The circuit court's decision essentially concluded that this language means something other than what it says without analyzing the text itself.

Moreover, the court engaged in no discussion over the standard of relevancy. Relevant evidence is that which has any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Wis. Stat. § 904.01. Relevancy asks "whether the evidence sought to be introduced would shed any light on the subject of inquiry. Evidence is relevant when it indicates that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence. Any fact which tends to prove a material issue is relevant." ***Rogers v. State***. 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980) (internal citations omitted).

Non-impairment evidence is relevant to the due care defense because the fact that Mr. Luther was not impaired at the time of driving makes it more probable that the accident would have occurred regardless of the scant level of THC reportedly detected in his blood. The trial court simply passed over this analysis, concluding that the due care defense only applied where the defense can show that an "intervening cause" was responsible for the harm. It based this conclusion on a misreading of the case law and the nature of an affirmative defense.

C. The court did not correctly apply existing case law to the facts of this case

In deciding to bar Dr. Kingston's testimony as irrelevant to any factual scenario where the due care defense

might apply, the court cited language from the majority opinion and dissent found in ***State v. Caibaiosai***, 122 Wis. 2d 587, 599, 363 N.W.2d 574 (1985), suggesting there must be some "intervening cause" of the accident. However, the Wisconsin Supreme Court in ***Lohmeier***, 205 Wis. 2d 183, 194-95, later clarified that an intervening cause is merely one way to prove the defense. ***See id.*** at 194-94. In ***Lohmeier*** the principle dispute was over the relationship between the due care defense in section 940.09(2) (1993-94) and the contributory negligence rule in section 939.14 (1993-94).[3] ***Id.*** at 194. In that case the Court found that despite the rule against acquittal based on the contributory negligence of a victim, a victim's negligent conduct could be used to establish whether the accident would have occurred even if the driver had not been under the influence and had exercised due care. ***Id.*** at 195.

The ***Lohmeier*** Court squarely addressed the due care defense in light of ***Caibaiosai*** in language that makes clear that the defense is available without the need to prove an "intervening cause":

> In ***State v. Caibaiosai***, this court stated that § 940.09(2) 'provide[s] a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual.' Although it is correct that § 940.09(2) provides an affirmative defense where there is an intervening cause, this defense can also be understood by focusing on the language of the statute itself, which makes no reference to an intervening cause. Under § 940.09(2), "[A] 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 he or she had not been under the influence of an intoxicant...."

Lohmeier, 205 Wis. 2d 183, 194-95 (emphasis added, internal citations omitted). This interpretation is certainly

[3] Wis. Stat. § 939.14 (1993-94) provided that "[i]t is no defense to a prosecution for a crime that the victim was also guilty of a crime or was contributorily negligent." Copies of both statutes are included in the appendix.

consistent with ***Caibaiosai***, which says that the due care defense asks whether the harm would have occurred regardless of the driver's impairment. ***See Caibaiosai***, 122 Wis. 2d 587, 599, 363 N.W.2d 574 (1985). That is the consistent theme running through all of the cases.

For example, ***Jacobs*** clearly supports the admissibility of non-impairment evidence to support the due care defense. In that case, the circuit court permitted the defense to present evidence of lack of impairment and the issue appeared noncontroversial:

> Jacobs' primary defense at trial [...] was that the death would have occurred even if Jacobs had been exercising due care and had not had alcohol or the cocaine metabolite in his bloodstream. In support of that defense, he highlighted the fact that Jacobs passed the majority of his field sobriety tests [...]."

Id., ¶15 (emphasis added). The question in that case was not whether evidence of non-impairment is admissible—it certainly was admitted at that trial. ***Id.*** The question was whether the defendant's trial counsel was ineffective for failing to object to improper character testimony unrelated to impairment and pursuing what turned out to be an unsuccessful defense strategy under the facts of that case. ***See id.***, ¶33.

In ***Caibaiosai*** the defendant was convicted of homicide by intoxicated operation of a vehicle. ***Id.*** at 589. The questions before the Court were whether the statute at issue required proof of the defendant's intoxication, conceptualized as an isolated act, and the victim's death, and whether the circuit court erred by refusing to give the due care defense instruction based on speculative testimony that a passenger on the back of the motorcycle that crashed could have caused the crash. ***Id.*** The Court concluded that the statute under consideration did not require that the State prove a causal connection between the defendant's intoxication and the accident. ***Id.*** at 594. The State simply had to prove that the defendant was operating a vehicle while intoxicated and caused the victim's death. ***Id.***

The Court further concluded that the testimony of a witness that the motorcycle's passenger could have caused the crash was too speculative to instruct the jury on the due care defense because there was no evidence showing "that [the] accident would have occurred even though he had not been under the influence." ***Id.*** at 599 (emphasis added). The Court then noted that "trial judges have a duty to so instruct the jury in all cases when exonerating evidence is received tending to show that the death would have occurred even if the defendant had not been under the influence." ***Id.*** at 600 (emphasis added). The Court rejected the defendant's claim that the affirmative defense should be available if it was the defendant's negligence, and not his intoxication, that caused the crash. ***Id.*** This case presents no similar issue because the statute applicable here requires the defense to prove both that the accident happened even though Mr. Luther was exercising due care (was not impaired and took reasonable steps to avoid an accident) and regardless of the minimal amount of delta-9-THC reportedly detected in his system (consistent with non-impairment).

More importantly, in that case there was no evidence that the accident would have occurred even if the driver was not under the influence because Mr. Caibaiosai was driving impaired. In this case, there is compelling evidence that the accident would have occurred even if Mr. Luther had no THC in his system, because the trace amount was not a contributing factor to the accident. The plain language of the statute applicable in this case provides an affirmative defense to Mr. Luther if he can demonstrate that the accident occurred even though he was exercising due care and despite the barely traceable amounts of THC allegedly found in his blood.

What all of these decisions have in common is that they conceptualize the due care defense as asking whether the accident would have occurred regardless of the presence of drugs or alcohol. ***State v. Gardner*** characterized the defense as follows:

> The legislature, in enacting this statute, provided a defendant with a true affirmative defense in WIS. STAT. § 940.25(2)(a), which permits a defendant to show that the presence of the illegal drug was not the

> cause of the accident— that the injury would have occurred even if he or she had not used illegal drugs and driven. The affirmative defense provided for in the statute constitutes an absolute defense to the criminal act.

2006 WI App 92, ¶23, 292 Wis. 2d 682, 715 N.W.2d 720 (emphasis added). The State does not have to prove impairment caused the injury under section 940.25, but the defense is clearly entitled to argue that impairment did not cause the injury. It would therefore be absurd to prohibit the defense from presenting evidence that there was no impairment to begin with.

State v. Turk also presents the due care defense as asking whether the injury was disconnected from the impairment. 154 Wis. 2d 294, 295, 453 N.W.2d 163 (Ct. App. 1990). The narrow issue before the court in ***Turk*** was whether the defendant could argue the injured passenger's failure to wear seatbelts was the actual cause of their injuries, not the impaired driving. The Court of Appeals rejected that argument, adopting the reasoning of a West Virginia case that found that allowing such a defense would be analogous to absolving someone of murder because the victim was not wearing a bulletproof vest. Nevertheless, in ***Turk*** the circuit court posed the due care inquiry as follows: "Would the injury still have happened anyway?" ***Id.*** at 295. Throughout all of the cases cited by the State in its trial briefs, the common underpinning of the due care defense is whether the defendant can show the accident would have occurred regardless of the presence of drugs or alcohol.

A driver's complete lack of impairment is highly relevant to whether the accident "would still have happened anyway." ***See id.*** at 295. The court's decision to exclude non-impairment for any purpose involved no analysis of section 904.01 (55: 13). It never referred to the language of the statute, instead focusing on language in ***Caibaiosai*** that the Supreme Court of Wisconsin later rejected as incomplete (55: 11-13). ***Lohmeier***, 205 Wis. 2d 183, 194-95. It was also based on a misapprehension of the nature of an affirmative defense

D. The court based its decision on an erroneous conclusion that admitting non-impairment evidence would serve only to negate an element of the State's case

In rendering its decision, the court suggested a fundamental misreading of the interplay between the elements of the offense and the presence of an affirmative defense despite those elements:

> [I]t doesn't appear to me in anything that I've read that there is any intention by our legislature to be able to go in and take out an element of the crime. That's not what it's there for.

(55: 13) This analysis appears to misapprehend entirely the nature of an affirmative defense. The circuit court is correct that the State is not required to prove impairment. It does not follow that impairment is irrelevant to the defense. An affirmative defense assumes the State can meet its burden but provides an independent avenue for acquittal.

State v. Loomer makes clear that an affirmative defense does not negate an element of the crime charged. If it did, the affirmative defense would unconstitutionally shift the burden to a defendant to prove his or her innocence. 153 Wis. 2d 645, 650-51, 451 N.W.2d 470 (Ct. App 1989). ***Loomer*** dealt with this element of the due care defense directly, and found that it is not unconstitutional (that is to say, it does not involve the defense seeking to negate an element of the offense). ***Id.*** As ***Loomer*** states, the State does not have to prove a causal connection between the impairment and the injury. ***Id.*** at 650. That is why it is constitutional to place the burden on a defendant to prove there is no such connection.

Loomer involved a motorist convicted of causing injury by intoxicated use of a motor vehicle. ***Id.*** at 648. In that case the Court considered whether the circuit court erred in instructing the jury that the defendant bore the burden of proving the affirmative defense. ***Id.*** The Court noted that it is unconstitutional to place the burden on a defendant to prove an affirmative defense when that defense requires the defendant to negate a mental state the prosecution has to

prove to convict. ***Id.*** at 650-51. But where an affirmative defense provides an independent defense that does not require the defendant to negate an element of the state's case-in-chief, it is constitutional to place the burden of persuasion on the defendant. ***Id.*** at 651. The Court in that case did not extensively discuss the parameters of the due care defense. It was simply asked whether it is constitutional to put the burden on the defense to prove it. ***Id.*** As discussed in more detail below, ***Loomer*** directly contradicts the trial court's assertion that offering evidence of non-impairment would seek to negate an element of the crime.

The circuit court's decision to exclude non-impairment evidence misreads the interaction between the State's burden of proof and that of the defense. An affirmative defense assumes that the State is able to meet its burden, but provides an independent avenue for demonstrating that the defendant cannot be held legally responsible for the conduct. In this case, the affirmative defense allows Mr. Luther to show that even if the State has proven its case, he cannot be held criminally responsible because the scant amount of THC allegedly found in his system had nothing to do with the accident.

III. EVEN IF THE TEXT OF THE DUE CARE DEFENSE IS SOMEHOW AMBIGUOUS, THE RULE OF LENITY RESOLVES ANY AMBIGUITY IN FAVOR OF THE DEFENSE

Even if the language "great bodily harm would have occurred even if he [...] had been exercising due care and [...] did not have a detectible amount of a restricted controlled substance in his [...] blood" is somehow ambiguous, the rule of lenity dictates that confusion over ambiguous language in a criminal statute must be resolved in favor of the defense. ***See State v. Guarnero***, 363 Wis. 2d 857, ¶¶26-27, 867 N.W.2d 400. The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, "a court should apply the rule of lenity and interpret the statute in favor of the accused." ***Id.*** at ¶26. It is a canon of strict construction ensuring fair warning to defendants regarding the application of criminal statutes. ***Id.***

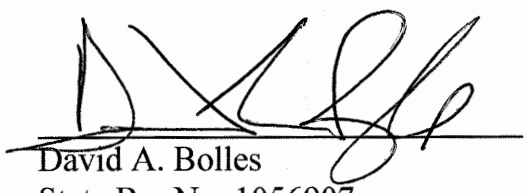
The court seemed to signal confusion over the meaning of 940.25(2)(a) in light of the case law, stating "I think it's easy to get sidetracked because it's not totally clear what exactly the defense is" (55: 10). If that were the case, it would amount to a "grievous ambiguity" entitling a defendant to protection against overreach. ***See Guarnero***, 363 Wis. 2d 857, ¶27. A defendant could reasonably conclude from reading the statute that it permits him or her to use whatever evidence is available to show that the accident would have happened regardless of the presence of drugs or alcohol. That is what happened here, as the defense has invested much time, effort, and hard-earned money to buttress that argument by showing that Mr. Luther was not impaired at the time of the accident. If there happen to be other reasonable interpretations, they must be discarded in favor of the rule of lenity. The Constitution, common-sense, and notions of fair play demand it.

CONCLUSION

The trial court lamented that there appears to be no appellate case directly addressing whether evidence of non-impairment is admissible to support the due care defense (55: 17). It reasoned that the lack of case law on this issue suggests there is no merit to the defense's position (55: 17). Another explanation for the lack of appellate litigation on this issue might be that most prosecutors would not seek to imprison drivers who cause accidents while not impaired.

The State seeks to conceal from the jury the highly relevant fact that Mr. Luther was not impaired at the time of this accident, thereby depriving Mr. Luther of the right to present a defense. The Constitution, statutes, case law, common-sense, and fairness require otherwise. The circuit court's decision to exclude this evidence must be reversed.

Respectfully submitted: 9/5/2017:



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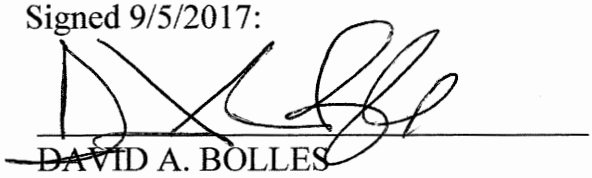
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,974 words. I further certify that this brief conforms to the rule contained in s. 809.86(4) relating to identification of alleged victims.

Signed 9/5/2017:



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CERTIFICATION OF COMPIANCE WITH RULE 809.19(2)(b)

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

Signed 9/5/2017:

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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 s. 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.

Signed 9/5/2017:

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