STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP1879-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA J. LUTHER,

Defendant-Appellant.

ON APPEAL FROM A NONFINAL ORDER GRANTING A MOTION TO EXCLUDE EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE BRIAN A. PFITZINGER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Wisconsin Stat. § 940.25(2)(a) provides an affirmative defense to a charge of causing great bodily harm by operating a vehicle with a restricted controlled substance, if a defendant proves that the great bodily harm would have occurred even if he or she had been exercising due care and not operating with a restricted controlled substance in his or her blood. Is evidence that a defendant was not impaired by a restricted controlled substance relevant and admissible to prove the affirmative defense?

   The circuit court answered "no" and granted the State's motion to exclude expert testimony that Luther was not impaired when he caused the great bodily harm.

   This Court should answer "no" and affirm the circuit court's decision.

2. The circuit court granted the State's motion to exclude expert testimony that Luther was not impaired. Did the court's ruling deny Luther the constitutional right to present a defense?

   The circuit court did not answer, but it concluded that the proposed expert testimony was irrelevant and inadmissible.

   This Court should answer "no" and affirm the circuit court's decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument. The State agrees with the plaintiff-appellant, Joshua J. Luther, that publication of this Court's opinion will likely be appropriate.

INTRODUCTION

Joshua J. Luther drove a van while he had THC in his blood. While attempting to cross a highway, he drove his van into a motorcycle, causing the motorcycle to explode, severely injuring the motorcyclist. He has been charged with causing great bodily harm by operation of a vehicle with a detectable amount of a restricted controlled substance in his blood. Before trial, the State moved to exclude evidence at trial that the level of THC in Luther's blood was insufficient to cause impairment. The circuit court concluded that this evidence was irrelevant to the affirmative defense that the crash would have occurred even if Luther had exercised due care and not been driving with a restricted controlled substance in his blood. Accordingly, the court granted the State's motion excluding the evidence. Luther now appeals that decision.

This appeal concerns the affirmative defense to a charge of causing injury or death by operating a vehicle with a detectable presence of a restricted controlled substance. Specifically, it concerns what a defendant must prove for the affirmative defense to apply, and whether a lack of impairment is relevant to the defense. Because the circuit court properly concluded that the affirmative defense applies only when a defendant can show an intervening cause between the driving and the injury or death, or that something other than the driving caused the injury or death, and that evidence of lack of impairment is irrelevant, it properly granted the State's motion to exclude the evidence. This Court should affirm that decision.

STATEMENT OF THE CASE AND FACTS

Luther crashed his van into a motorcycle on the afternoon of May 1, 2015. (R. 54:3–4.) Luther was on a county highway and had stopped at a stop sign at the intersection of US Highway 151 in Dodge County. (R. 54:6–

7.) JPZ was riding a motorcycle down US 151. When JPZ reached the intersection, Luther pulled out, hitting the motorcycle. (R. 54:7.) The motorcycle exploded, and JPZ's leg was severed. (R. 1:2; 54:4–5.)

Dodge County Sheriff's Deputy Scott Ziorgen arrived and spoke to Luther, who told the deputy he did not see the motorcycle when he pulled out. (R. 54:7.) Luther said that he had not been drinking, but that he had smoked marijuana the night before. (R. 54:7.) The deputy asked Luther if he would submit to a chemical test, and Luther agreed. (R. 54:7.) Deputy Ziorgen transported Luther to the hospital for a blood draw. (R. 54:7–8.) A test revealed that Luther's blood contained 1.4 ng/mL of delta-9-THC. (R. 54:10.)

The State charged Luther with causing injury by operating a vehicle with a detectable presence of a controlled substance in his blood, contrary to Wis. Stat. § 940.25(1)(am). (R. 1; 7.) Before trial, the State filed a motion in limine seeking, among other things, to "prohibit evidence and argument that relate to issues of impairment," and "evidence related to opinions and research about how certain levels of delta-9 THC have been found to correlate with levels of impairment." (R. 11:2.) Luther filed a letter objecting to the State's motion. (R. 12.) He later filed notice of intent to offer expert testimony at trial, to show that he was not impaired by the THC in his system when he crashed his van into the motorcycle. (R. 21.)

After briefing and a hearing, the circuit court, the Honorable Brian A. Pfitzinger, granted the State's motion. (R. 32.) The court concluded that evidence that Luther was not impaired by the THC in his system was not relevant to the charged crime, or to the affirmative defense provided in Wis. Stat. § 940.25(2)(a). This Court then granted Luther's petition to appeal the circuit court's non-final order excluding evidence that Luther was not impaired.

STANDARD OF REVIEW

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 legal standard, 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.

Whether a defendant is denied his or her constitutional right to present a defense is a question of constitutional fact that a reviewing court determines independently. *State v. Shomberg*, 2006 WI 9, ¶ 26, 288 Wis. 2d 1, 709 N.W.2d 370 (citing *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis. 2d 499, 643 N.W.2d 777).

ARGUMENT

I. The circuit court properly excluded evidence that Luther was not impaired by the restricted controlled substance that was in his blood when he crashed his van and caused great bodily harm.

A. Applicable legal principles.

1. Applicable principles relating to relevancy.

The circuit court granted the State's motion to exclude evidence that Luther was not impaired by THC, the restricted controlled substance in his blood, because it

concluded that the evidence was not relevant to the charged crime or the affirmative defense. Wisconsin Stat. § 904.01 defines relevant evidence as: "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." Relevant evidence is generally admissible at trial. Wis. Stat. § 904.02. However, "[a]lthough relevant, 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.

2. Under the elements of the crime at issue, whether the driver was impaired by the restricted controlled substance is not relevant.

Luther was charged with causing great bodily harm by use of a vehicle with a restricted controlled substance in his blood. As Luther appears to agree, impairment is not an element of the crime. The State is required to prove three elements: (1) the defendant operated a vehicle; (2) the operation was a substantial factor in producing great bodily harm; and (3) the defendant had a detectable amount of a controlled substance in his blood when he operated the vehicle. Wis. Stat. § 940.25; Wis. JI–Criminal 1266 (2011). To prove the third element, the State does not need to prove that the restricted controlled substance had any effect. A chemical test showing a detectable amount of a controlled substance in a person's blood is "prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect." Wis. Stat. § 885.235(1k).

3. Under the affirmative defense in Wis. Stat. § 940.05(2)(a), evidence that the driver was not impaired by the controlled substance in his system is also not relevant.

The Legislature has provided an affirmative defense to the crime of causing great bodily harm by operation of a vehicle with a restricted controlled substance in a person's blood. The statute 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 did not have a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 940.25(2)(a). This affirmative defense "constitutes an absolute defense to the criminal act." *State v. Gardner*, 2006 WI App 92, ¶ 23, 292 Wis. 2d 682, 715 N.W.2d 720.[1] Whether the defendant was impaired by the controlled substance is not relevant to this affirmative defense.

In *State v. Caibaiosai*, 122 Wis. 2d 587, 363 N.W.2d 574 (1985), the Wisconsin Supreme Court interpreted similar statutory language in Wis. Stat. § 940.09, causing death by operation of a vehicle while intoxicated. The affirmative defense at issue in *Caibaiosai* provided 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 described under

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[1] The same affirmative defense applies to Wis. Stat. § 940.09 "Homicide by intoxicated use of a vehicle," and Wis. Stat. § 346.63(2) "Operating under the influence of an intoxicant or other drug and causing injury."

sub. (1)(b)." *Caibaiosai*, 122 Wis. 2d at 596 n.3 (citing Wis. Stat. § 940.09(2) (1984–85)).

The supreme court explained the purpose of the statute, noting that "[i]t is negligence per se to operate a motor vehicle while under the influence of intoxicants." *Caibaiosai*, 122 Wis. 2d at 595. The court added that "[t]he people of this state through their legislature have determined in sec. 940.09(1)(a) that the operation of a motor vehicle by one who is under the influence of intoxicants is a risk that will not be tolerated." *Id.*

The supreme court explained the affirmative defense, stating that "[t]he legislature in sec. 940.09(2), Stats., has recognized there may be intervening factors between the fact of operating an automobile under the influence of intoxicants and the death of another and that the defendant should have that defense available to be proven by a preponderance of the evidence." *Id.* at 598. The supreme court did not define an "intervening cause," but this Court later defined an intervening cause as "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).

In *Caibaiosai*, the defendant asserted that the affirmative defense was available if he could show that "the accident would have occurred without the intoxication." *Caibaiosai*, 122 Wis. 2d at 600. The supreme court explicitly rejected that assertion, stating, "This is not a correct application of the affirmative defense. If it were, the defendant could exonerate himself by claiming he was negligent and thereby avoid the consequences of having caused the death while operating a motor vehicle while intoxicated." *Id.* The court concluded that "[t]he defendant's negligence is not an element to be proven in

prosecuting this offense and is not an affirmative defense to its commission." *Id.*

In dissent, Justice Abrahamson concluded that the statute was unconstitutional. *Id.* at 610 (Abrahamson, J., dissenting). She noted that a person could be convicted of violating Wis. Stat. § 940.09(1)(a) if the person operated a motor vehicle while under the influence of an intoxicant if a child darted out and the person's vehicle hit and killed the child, if another car hit the person's vehicle, killing the person's passenger, or if the vehicle crashed after skidding on an oil slick, and the passenger was killed. *Id.* at 603–04. Justice Abrahamson concluded that in any of these scenarios, the intoxicated driver would be guilty of homicide, even though no driver, whether intoxicated or sober, could have prevented the death. *Id.*

After *Caibaiosai*, the Legislature amended Wis. Stat. § 904.09(2) to better reflect the interpretation of the *Caibaiosai* court. The Legislative Reference Bureau's analysis of the resulting bill states that in *Caibaiosai*, the supreme court "held that this affirmative defense is available only when there is an intervening cause between the defendant's conduct of driving under the influence and the victim's death." *See* drafting file for 1989 Wis. Act 275. The analysis further states that "[u]nder this bill, the defendant has an affirmative defense to the charge or causing death or injury while under the influence of an intoxicant, drugs or both only if he or she proves by a preponderance of the evidence that the injury or death would have occurred even if he or she had not been under the influence of an intoxicant, drugs or both and that the injury would have occurred even if he or she had been exercising due care." *See* drafting file for 1989 Wis. Act 275.

The amended statute added language requiring that to prevail on the affirmative defense, a defendant must prove

that he or she was exercising due care when he or she operated the vehicle.

Since 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 language—which requires a defendant to show an intervening cause—appears both in Wis. Stat. § 940.09(2)(a) and Wis. Stat. § 940.25(2)(a), the statute at issue here.

As the supreme court made clear in *Caibaiosai*, a defendant has no defense based on proving that he or she would have caused the death or injury by negligent driving even if he or she had not been under the influence of an intoxicant. Instead, the defendant must prove that he or she was not driving negligently and was exercising due care, and some condition rendered the crash and great bodily harm unavoidable. Or put another way, an intervening cause resulted in the death or injury.

Luther argues that, contrary to *Caibaiosia*, the supreme court has since clarified that an intervening cause is merely one way to prove the defense. He relies on *State v. Lohmeier*, 205 Wis. 2d 183, 194–95, 556 N.W.2d 90 (1996), in which the court addressed whether a defendant could have an affirmative defense by proving that the victims were contributorily negligent.

In *Lohmeier*, the defendant was driving while intoxicated when his vehicle struck and killed two women. *Lohmeier*, 205 Wis. 2d at 188. The defendant presented evidence that the women were walking on the roadway on the right side of the road. *Id.*

The supreme court concluded that evidence that the women were contributorily negligent could be the basis of the affirmative defense. The court noted that "[a]lthough 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." *Id.* at 194. The court concluded, "Clearly, situations can arise where, because of the victim's conduct, an accident would have been unavoidable even if the defendant had been driving with due care and had not been under the influence." *Id.* at 195. In a footnote, the court noted that "[t]he 'dart-out' fact pattern is an illustrative example of when the defense could be established through the victim's conduct." *Id.* at 195 n.9. The court cautioned that "the affirmative defense would not be applicable simply because a victim did not take a precautionary measure, like wearing a seat belt. In such a case, it cannot be said that the accident would have been unavoidable, even if the defendant was sober and driving with due care." *Id.* (citing *Turk*, 154 Wis. 2d 294).

In *Lohmeier*, the supreme court viewed evidence of contributory negligence of the victims as somehow different than evidence of an intervening cause. But both require that the defendant prove that he or she was exercising due care, and that some condition occurred—other than the defendant's driving—that caused the injury or death or made the injury or death unavoidable. It makes no difference whether this is termed an intervening cause or something else. What is required is that some condition occurred that meant that the injury or death would have occurred even if the defendant was driving with due care, and regardless of whether the defendant was driving with or without a restricted controlled substance in his or her blood.

B. Luther fails to show that evidence of non-impairment would establish the affirmative defense.

Luther wants to present expert testimony that he was not impaired by the THC in his system. He asserts that this non-impairment evidence is relevant and admissible. But he has not even asserted that some condition occurred other than his driving—some intervening cause—that resulted in the crash and the injury. Luther's argument is seemingly that he was driving so poorly that the THC in his system made no difference—he was going to hit the motorcycle and cause great bodily harm regardless of the THC. But that is precisely the type of argument that the supreme court rejected in *Caibaiosai*, 122 Wis. 2d at 600 ("The defendant's negligence is not an element to be proven in prosecuting this offense and is not an affirmative defense to its commission."). And the Legislature subsequently precluded that argument by amending the affirmative defense to require a defendant to prove that the injury would have occurred even if he she had been exercising due care.

The affirmative defense does not apply in his case because Luther was not exercising due care when he caused the great bodily harm. Luther was driving with THC in his system. He stopped his van at a stop sign. A motorcycle traveled down a highway and was passing the intersection at which Luther's van had stopped. The motorcyclist had the right of way. Luther pulled his van into the intersection, directly into the motorcycle that was passing by, causing the motorcyclist great bodily harm. Luther does not dispute that the motorcyclist had the right of way, or that he told a police officer that he didn't see the motorcycle when he pulled out. Luther cannot prove the affirmative defense to causing great bodily harm while operating with a restricted controlled substance, because he cannot prove that he was exercising

due care by driving his van into a motorcycle that had the right of way.

The affirmative defense would apply if the situation were reversed. Imagine that Luther had THC in his system while he drove his van down the highway at a legal speed, and was passing through the intersection with the right of way, when a motorcyclist that had stopped at a stop sign pulled out and drove directly into the van, and the motorcyclist suffered great bodily harm. Luther would have an affirmative defense to a charge of causing great bodily harm while operating with a restricted controlled substance, because he was driving with due care, albeit with THC in his system, and he could not have avoided the crash.

Luther relies on *State v. Jacobs*, 2012 WI App 104, 344 Wis. 2d 142, 822 N.W.2d 885, stating that it "clearly supports the admissibility of non-impairment evidence to support the due care defense." (Luther's Br. 11.) It does not. In *Jacobs*, non-impairment evidence was admitted at trial. *Jacobs*, 344 Wis. 2d 142, ¶ 15. But whether the evidence was properly admitted was not at issue on appeal. *Id.* ¶ 1.

Luther also relies on *Gardner*, 292 Wis. 2d 682, ¶ 23, as holding that while the State does not have to prove that impairment caused the injury, the defense is entitled to argue that impairment did not cause the injury. (Luther's Br. 13.)

In *Gardner*, this Court explained that the affirmative defense "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." *Gardner*, 292 Wis. 2d 682, ¶ 23. This Court did not address the other statutory requirement—that a defendant must also show that the injury was unavoidable, even had he or she been exercising due care is his driving. But the statute plainly requires a

defendant to prove that some condition occurred—outside of the defendant's driving—such that the injury was unavoidable, and would have occurred regardless of whether the defendant had used drugs before driving.

Luther cites *Turk*, 154 Wis. 2d at 295, for the proposition that the inquiry in regards to due process is "[w]ould the injury still have happened anyway?" (Luther's Br. 13.) But in *Turk*, this Court explicitly viewed that inquiry as a question whether there was an intervening cause. This Court adopted the reasoning of the Supreme Court of West Virginia in *State v. Nester*, 336 S.E.2d 187, 189 (W. Va. 1985), that "[a]n 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." *Turk*, 154 Wis. 2d at 296. And in *Lohmeier*, the supreme court cited *Turk* for the proposition that to prove the affirmative defense, a defendant must prove that "the accident would have been unavoidable, even if the defendant was sober and driving with due care." *Lohmeier*, 205 Wis. 2d at 195 n.9 (citing *Turk*, 154 Wis. 2d 294).

Luther argues that his "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." (Luther's Br. 8.)

But even if Luther were correct about the THC in his system not contributing to the crash and the great bodily harm, that evidence would not prove the affirmative defense.

Luther has presented nothing indicating that the crash was caused by anything other than his driving his van directly into a motorcycle that was traveling lawfully down the highway. He has presented nothing indicating that he was exercising due care when some condition—other than

his driving—caused his van to hit the motorcycle, resulting in great bodily harm. Put another way, Luther has presented no intervening cause—nothing that broke the causal connection between his driving and the injury.

Luther seemingly argues that he is entitled to present evidence that having a controlled substance in his blood did not cause the crash. (Luther's Br. 12.) He also asks this Court to apply the rule of lenity and interpret the affirmative defense as permitting a defendant "to use whatever evidence is available to show that the accident would have happened regardless of the presence of drugs or alcohol." (Luther's Br. 16.)

Luther's arguments miss the point. The affirmative defense does not operate to absolve a person who shows that the injury would have occurred because the person's driving was so bad that he would have caused the injury even without a restricted controlled substance in his blood. That is precisely the proposition that the supreme court rejected in *Caibaiosai* as "not a correct application of the affirmative defense." *Caibaiosai*, 122 Wis. 2d at 600. The court added that "[i]f it were, the defendant could exonerate himself by claiming he was negligent and thereby avoid the consequences of having caused the death while operating a motor vehicle while intoxicated." *Id.*

Luther cannot properly present evidence that the THC in his blood did not matter, and did not impair his driving ability, on the theory that he would have driven his van directly into the motorcycle whether he had THC in his blood or not. That is not the affirmative defense. Luther must prove an intervening cause, or that the great bodily harm would have been unavoidable even had he been exercising due care and not had a restricted controlled substance in his blood. He has not pointed to any evidence to that effect.

C. The circuit court properly applied the law and properly exercised its discretion in granting the State's motion to exclude the expert testimony.

At the hearing on the State's motion to exclude Luther's proposed expert testimony, the circuit court explained that it was granting the motion because it concluded that the proposed testimony was not relevant. Luther argues that the circuit court erred in three respects, by (1) not analyzing the language of Wis. Stat. § 940.25(2)(a) or considering whether evidence of non-impairment makes any material fact more or less probable (Luther's Br. 7–9); (2) not correctly applying the law to the facts (Luther's Br. 9–13); and (3) basing its decision on an erroneous understanding to affirmative defenses. (Luther's Br. 14–15.) All three of Luther's arguments are wrong.

Contrary to Luther's arguments, the circuit court considered the words of the statute and explanations of the statute by the supreme court and this Court, and concluded that the evidence Luther wanted to present was not relevant. The court noted at the hearing that the State had to prove three elements, impairment was not an element of the charged crime, and was not relevant to any of the elements. (R. 55:9.) The court then addressed the affirmative defense. It cited *Turk* for the definition of "intervening cause" as "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." (R. 55:11.) The court noted that in *Caibaiosai*, Justice Abrahamson's dissenting opinion gave examples of possible intervening causes. (R. 55:11–12.) The circuit court concluded that evidence that Luther was not impaired—when impairment is not an element of the crime and when there is no evidence of an intervening cause—is not what the Legislature contemplated in providing the

affirmative defense. (R. 55:13.) Accordingly, the court granted the State's motion to exclude the evidence.

The court's decision does not evince a misunderstanding of affirmative defenses. Luther notes that the court stated, "[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." (R. 55:13; Luther's Br. 14.) The court was correct. In a case in which a defendant is charged with operating while under the influence of an intoxicant, impairment is an element, and evidence of non-impairment would go to disprove that element. But as the court recognized, evidence of non-impairment would not be relevant to the affirmative defense. As the court noted, the affirmative defense does not negate an element, but is meant to apply to situations in which "the defendant is driving, his vehicle stops at a red light and is plowed into . . . by a third party." (R. 55:13.)

Further evidence that the court's decision excluding the expert testimony was correct is found in the pattern jury instruction that applies to a charge of causing great bodily harm by operation of a vehicle with a restricted controlled substance in one's blood, when a defendant presents evidence of the affirmative defense. The instruction states, in relevant part, that:

> Wisconsin law provides that it is 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 detectable amount of THC is his or her blood.
>
> The burden is on the defendant to prove by a evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.

Wis. JI–Criminal 1266.

Even if the circuit court had allowed Luther's expert to testify that in his opinion, Luther was not impaired, that evidence would not have entitled Luther to the instruction on the affirmative defense. Luther has pointed to no evidence that the crash and great bodily harm would have occurred if he had been exercising due care. In his offer of proof, and in his brief on appeal, Luther has pointed to no evidence of some condition that rendered the crash and great bodily harm unavoidable. Or put another way, he has pointed to no intervening cause that means that the crash and great bodily harm would have occurred even had he been exercising due care. Luther has not pointed to any evidence that, even if believed by the jury, would establish the affirmative defense. He therefore would not have been entitled to an instruction on the affirmative defense even if the court had not excluded the evidence.

For all of these reasons, the circuit court properly exercised its discretion in granting the State's motion to exclude the proposed expert testimony that Luther was not impaired by the THC in his system, and this Court should affirm.

II. The circuit court's decision to exclude evidence of non-impairment did not deny Luther his constitutional right to present a defense.

A. Applicable legal principles.

The Confrontation Clause and the Compulsory Process Clause together grant the defendant a constitutional right to present a defense. *See State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294–95 (1973)). However, "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under

standard rules of evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (alteration in original) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). Rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Whether a defendant has a constitutional right to present expert witness testimony is decided in a two-part inquiry. First, the defendant must satisfy four factors through an offer of proof. The defendant must show that the expert testimony (1) meets the standards governing expert testimony; (2) is clearly relevant; (3) is necessary to the defense; and (4) that the testimony's probative value outweighs its prejudicial effect. *State v. St. George*, 2002 WI 50, ¶ 54, 252 Wis. 2d 499, 643 N.W.2d 777. If the defendant satisfies each factor, a court must determine "whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." *Id.* ¶ 55.

B. Luther was not denied the constitutional right to present a defense.

The evidence that Luther wants to present does not meet any of the four criteria.

First, the expert testimony would not "assist the trier of fact to understand the evidence or determine a fact in issue." Luther asserts that the expert can reliably determine whether Luther was impaired, and that the "proposed testimony would be helpful to explain to a jury of laypersons the science behind drug consumption and impairment." (Luther's Br. 5.)

But the jury has no need to understand "the science behind drug consumption and impairment," because

whether Luther was impaired is irrelevant. The issue for the criminal charge is whether Luther had a restricted controlled substance in his blood, not whether the drug resulted in impairment. Evidence of a chemical test showing a detectable amount of a controlled substance in a person's blood is "prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect." Wis. Stat. § 885.235(1k). Luther does not argue that his expert would testify that Luther did not have a restricted controlled substance in his blood when he crashed his van into the motorcycle.

The issue for the affirmative defense is whether Luther can prove that the crash and great bodily harm would have occurred even if he was exercising due care and had not had a restricted controlled substance in his blood. In other words, as the supreme court put it in *Caibaiosai*, whether there was an intervening cause. Or as the supreme court put it in *Lohmeier*, whether the crash and great bodily harm were unavoidable even if the defendant had been driving with due care and did not have a restricted controlled substance in his blood.

The proposed expert testimony about whether Luther was impaired, and "the science behind drug consumption and impairment," would not help the jury understand whether there was an intervening cause. And the proposed testimony would not help the jury understand whether the crash and great bodily harm were unavoidable even if he had been exercising due care and had not had a restricted controlled substance in his blood. He has pointed to nothing indicating that the cause of the crash and great bodily harm was anything other than his driving. He has not presented anything that even arguably would meet his burden of proving that the crash and great bodily harm would have

occurred had he been driving with due care and without a restricted controlled substance in his blood.

The proposed expert testimony also fails to satisfy the second criterion. As explained above, the testimony is not relevant to a material issue in this case, either in terms of the elements of the crime or the affirmative defense.

The proposed expert testimony also fails to satisfy the third criterion. The expert testimony is not necessary to Luther's defense, because with or without the testimony, he cannot prove the affirmative defense. As explained above, Luther has not presented any evidence of an intervening cause, or any evidence that the crash and great bodily harm were unavoidable even if he had exercised due care and even if he had not had a restricted controlled substance in his blood.

Luther argues that the proposed expert testimony is crucial to his defense because "[t]here is a good chance the trial would turn out to be a contest of experts." (Luther's Br. 6.)

But Luther made clear in the circuit court that he is not seeking to present expert testimony challenging the accuracy of the test. (R. 55:4–5.) The proposed expert testimony relates only to the effect of the controlled substance on Luther, and whether he as impaired. (R. 55:4–5.) But the State had no need to present expert testimony on that issue because that issue is irrelevant. There will be no battle of experts on the issues relevant to the case.

Finally, the proposed expert testimony also fails to satisfy the fourth criterion. The probative value of the expert testimony does not outweigh its prejudicial effect, because the expert testimony has no probative value. And the testimony could have significant prejudicial effect. The only purpose in presenting the testimony—which would be

nowhere near sufficient to meet Luther's burden of proving the affirmative defense—is to suggest to the jury that Luther was not impaired, and that it is somehow unfair for him to be found guilty of the charged crime. This is simply an invitation for jury nullification. A defendant has no right to argue for jury nullification, *State v. Bjerkaas*, 163 Wis. 2d 949, 959–63, 472 N.W.2d 615 (Ct. App. 1991), much less a right to present evidence for the purpose of arguing jury nullification.

Because the expert testimony was properly excluded under the first part of the two–part test, this Court need not address the second part. But the evidence would properly be excluded under that part as well. For the same reasons that the probative value of the testimony does not outweigh the prejudicial effect, any right to present the evidence is outweighed by the State's interest in preventing Luther from seeking jury nullification.

For all of these reasons, Luther has not demonstrated that the circuit court's decision granting the State's motion to exclude expert testimony that he was not impaired by the THC in his system denied Luther the constitutional right to present a defense.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the circuit court's non-final order granting the State's motion to exclude evidence that Luther was not impaired by the THC in his system.

Dated this 20th day of November, 2017.

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 5990 words.

_____
MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 20th day of November, 2017.

_____
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