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STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT IV

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2016AP1879-CR

JOSHUA J. LUTHER,

Defendant-Appellant.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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**ARGUMENT**

**I. THE STATE’S ARGUMENT REQUIRES THIS COURT TO DECIDE A JURY QUESTION, WHICH IS IMPERMISSIBLE AS MADE CLEAR IN *STATE V. RACZKA***

In its attempt to establish Joshua Luther’s guilt before trial, the State dismisses the jury’s responsibility for deciding the facts of this case. It is the jury’s job to decide whether Joshua exercised due care and whether the test showing a trace amount of THC in his system is reliable. It is also the jury’s job to decide whether the accident would have happened anyway. This Court’s recent decision in *State v. Raczka* makes that clear. *See generally* No. 2016AP001057-CR, unpublished slip op. (Ct. App. Dec. 20, 2017) (three-judge panel, recommended for publication).

*Raczka* involved a similar prosecution in which the defense sought to introduce evidence that a seizure caused the accident rather than impairment. *Id.*, ¶¶3-4. The State moved to exclude that evidence, arguing that the defendant was negligent as a matter of law for failing to take his seizure medication before driving. *Id.*, ¶5. The circuit court granted the State’s motion to exclude, and this Court reversed, finding that the circuit court had improperly decided what should

have been a jury issue. *See id.*, ¶¶7, 15; *See also Grana v. Summerford*, 12 Wis. 2d 517, 521, 107 N.W.2d 463 (1961) (holding that a collision following a left turn does not establish a violation of the failure to yield statute as a matter of law; whether the statute was violated depends on the facts of the particular case). This Court observed that whether Raczka was negligent is a question of fact that cannot be presumed as a matter of law:

Many factors could impact Raczka's duty of care and the foreseeability of harm. [...] After hearing all of the evidence, and judging the credibility of the witnesses, a jury might conclude that Raczka had been exercising due care under the circumstances and that he did have a seizure leading to the accident.

*Raczka*, ¶15. The Court found that the circuit court based its ruling on an erroneous view of the law, reversed and remanded the case with instructions to admit the defense evidence. *Id.*, ¶19.

As in *Raczka*, this Court cannot conclude that Mr. Luther was negligent as a matter of law. Many factors impact whether he exercised due care and whether the accident would have happened anyway. His lack of impairment constitutes one such factor. Hearing that evidence would make a jury more likely to find that he exercised due care and that something other than negligence or trace THC levels caused the accident. Only a jury can make this decision. The State's brief attempts to obfuscate that crucial point.

The State relies on *State v. Caibaiosai* to assert that the due care defense requires the defense to identify before trial a specific intervening cause and that the defense cannot argue that Mr. Luther's negligence caused the accident. (State's Br. 11.) However, as the State's brief and *Raczka* both make clear, a subsequent amendment to the statutory language addresses the negligence question raised by *Caibaiosai*. *See Raczka*, ¶11. And as the Wisconsin Supreme Court later clarified in *State v. Lohmeier*, the due care defense makes no reference to an intervening cause. 205 Wis. 2d 183, 194-95, 556 N.W.2d 90 (1996). Demonstrating an intervening cause is one way to prove the defense, but the language of the statute is broader. *See id.*

The plain language of section 940.25(2)(a) does not require that a defendant actually exercise due care. It enables the defense to argue that the accident occurred for some reason other than the driver's negligence or reported THC level. Showing that the driver exercised due care clearly is one way to prove the defense. If the jury concludes that Mr. Luther exercised due care and the accident happened anyway, that is an absolute defense. But even if the jury finds that Mr. Luther did not exercise due care, if it concludes the accident would have happened anyway, that also constitutes an absolute defense. Under either scenario the plain language of section 940.25 permits the defense to introduce evidence of non-impairment to show that whatever the cause, it was not impairment.

In any event, none of the cases cited by the State compel the defense to proffer evidence at this stage in the proceedings. The State's claim that Mr. Luther has proffered no evidence that would entitle him to a jury instruction is entirely premature. (State's Br. 17.) The State cannot compel the defense to reveal its evidence and arguments before trial. The State can only speculate what that evidence will show. The State can make its case to the jury, but its preferred version of events at this stage in the proceedings are not dispositive. Joshua Luther's lack of impairment is relevant to this case in many ways.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence [...] more probable or less probable than it would without the evidence." Wis. Stat. § 904.01 (emphasis added). The overwhelming evidence of Mr. Luther's non-impairment makes the existence of at least four material facts more probable: 1) Mr. Luther's non-impairment makes it more probable that he exercised due care and that the accident would have happened anyway, 2) his non-impairment makes it more probable that he will be found credible by a jury, 3) his non-impairment makes it more probable that he did not cause the accident, and 4) his non-impairment makes it more probable that the actual amount of THC reportedly in his bloodstream fell below the "detectability" threshold required for the State meet its burden.

**II. EVIDENCE THAT MR. LUTHER WAS NOT IMPAIRED IS RELEVANT TO WHETHER HE EXERCISED DUE CARE, WHETHER HIS TRIAL TESTIMONY IS CREDIBLE, WHETHER HE CAUSED THE ACCIDENT, AND WHETHER HE HAD A “DETECTABLE” AMOUNT OF THC IN HIS BLOOD**

The circuit court ruled that evidence of Mr. Luther’s non-impairment is irrelevant for any purpose, including the due care defense. Not only is the evidence relevant to whether he exercised due care and some cause other than THC levels caused the accident, it is relevant to his mental state at the time, and therefore to the reliability of his anticipated trial testimony, and it is relevant to whether he caused the accident and whether the blood test result establishes that he was above the “detectability” level (greater than 1.0 ng/mL) that the State must prove at trial.

**A. Mr. Luther’s non-impairment makes it more likely that he exercised due care at the time of the accident and that the accident would have happened anyway**

The Wisconsin Criminal Code does not define “due care” as the term is used in section 940.25. Under common law the term connotes the degree of caution for the safety of himself or herself and others an ordinarily prudent and rational person would use under the circumstances. Failure to exercise due care constitutes negligence.

Driving while impaired is the quintessentially negligent act. Driving impaired is the opposite of due care. Driving impaired shows a cavalier disregard for the safety of oneself and others because it dulls the senses, impairs perception and judgment, and unreasonably increases the chance that an accident will happen because impaired motorists lack the ability to safely operate a car.

Driving while not impaired shows no such disregard. Driving while not impaired is how an ordinarily prudent and rational person behaves. Driving while not impaired is a



crucial component to the exercise of due care. Mr. Luther's lack of impairment goes to show that he exercised due care when the accident occurred.

The State asserts that Mr. Luther "fails to show that evidence of non-impairment would establish the affirmative defense" and that "the affirmative defense does not apply in his case because Luther was not exercising due care." (State's Br. 11). The State's argument appears to regard the record as though a trial has already happened. The State presumes without knowing how the evidence will develop at trial. It attempts to head off any attempt to assert the due care defense by characterizing Mr. Luther's driving as presumptively negligent. As discussed in greater detail above, *Raczka* rejects the State's position. *See id.*, ¶15. The State attempts to compel this Court to reach a factual conclusion only a jury can make. The parties will have an opportunity to argue whether the due care defense fits the facts of this case at the jury instruction conference and the trial itself.

**B. Mr. Luther's non-impairment makes it more likely that his testimony will be found credible**

Evidence that Mr. Luther was not impaired is also relevant because it makes it more likely that a jury will find his trial testimony credible. Joshua Luther has an absolute right to testify in his defense at trial. The circuit court will instruct the jurors before and after the trial that they are the sole determinants of witnesses' credibility. Wis. JI—Criminal 300. In making that determination, the court will instruct jurors that they are to consider, among other factors:

[T]he clearness of the witness' recollection, the opportunity the witness had for observing or knowing the matters [testified to], [...] [and] all other facts and circumstances during the trial which tend either to support or discredit the testimony.

*Id.* The fact that Mr. Luther was not impaired means his testimony is more reliable than if he were impaired at the time of the accident. Impaired drivers are far less capable of perceiving events accurately and later recalling those events at trial. The entire rationale for prosecuting impaired drivers is that their impairment severely hampers their ability to

perceive and respond to events with sound judgment as they occur. Impaired drivers make for terrible trial witnesses.

The unimpaired driver does not suffer from these inherent deficiencies. The unimpaired driver can see what is happening and respond appropriately. The unimpaired driver can accurately perceive situations, and can more readily recall them as they happened. Unimpaired drivers are far more credible witnesses. Mr. Luther drove unimpaired. The defense expects to show that his trial testimony is reliable because his recollection of the accident is more credible than would be that of an impaired driver.

The defense seeks only to inform the jury that Mr. Luther was not impaired at the time of the accident. The State goes to great lengths to conceal this information from it. Were the State to prevail, the jury would be left with the impression that Mr. Luther was impaired when this accident occurred, even when the only credible evidence produced so far shows just the opposite. Evidence showing Luther was not impaired is relevant to whether the jury should believe his testimony and the jury must be permitted to hear that evidence at trial.

### **C. Mr. Luther's non-impairment makes it less likely that he caused the accident**

Just as non-impairment makes it more probable that a driver exercised due care, it also makes it less probable as a general matter that the driver's actions caused the accident. Under section 940.25, the State must prove three elements 1) the defendant operated a vehicle, and 2) caused great bodily harm, 3) while having a detectable amount of a restricted controlled substance in his or her blood. Wis. JI—Criminal 1266. The driver's non-impairment is relevant to both causation and whether there was a "detectable" amount (>1.0 ng/mL<sup>1</sup>) of THC in the blood.

As to causation, in a failure to yield situation involving a motorcycle, non-impairment makes it more likely that the driver maintained a reasonable lookout and that the motorcyclist may have had the bad fortune of being in the

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<sup>1</sup> (See 34: 2.)

driver's blind spot. For example, a driver might keep a reasonable lookout but have his or her view of the motorcyclist obstructed by the left roof pillar of the vehicle. In that event, a jury could reasonably conclude that something other than the driver's negligence (in this instance, the blind spot) caused the accident. Non-impairment is clearly relevant to that calculation. The jury must be permitted to weigh that exonerating evidence along with any countervailing evidence presented by the State.

**D. Mr. Luther's non-impairment makes it more likely that he had less than 1.0 ng/mL (i.e. a "detectable" amount) of THC in his blood**

The State must also prove that Mr. Luther had a "detectable" amount of THC in his blood. That is a different threshold than any amount in his blood. According to the State Hygiene Lab report, Mr. Luther had 1.4 ng/mL of THC in his bloodstream. (35: 2.) The lab does not report results below the 1.0 ng/mL ("detectability") threshold. (35: 2.) If the defense can show reasonable doubt whether the reported blood result could be .5 ng/mL higher than the actual amount in Mr. Luther's blood, the jury would be required to acquit him.

Mr. Luther's non-impairment makes it more likely that he had less than a "detectable" amount of THC in his blood. If he were impaired, it would increase the chance that he had a detectable amount in his blood. If not, it would be less likely to be detectable. Non-impairment is a factor the jury should consider when it hears all the evidence, including that of the State's blood expert and any evidence the defense may seek to offer at trial. Non-impairment evidence is relevant for many purposes and must be admitted at trial.

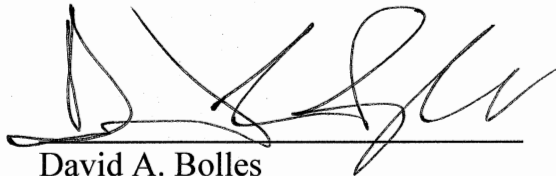
**CONCLUSION**

The State's chief concern about non-impairment evidence appears to be that the jury might sympathize with Mr. Luther if it knows he is being criminally prosecuted for being involved in an accident unrelated to impairment. That is speculative and may or may not be the case if he appears in court to tell his story. But the State's routine concern cannot

trump Mr. Luther's right to present his defense and it cannot trump the plain language of the statute.

No Wisconsin appellate court has ruled on whether evidence of non-impairment is relevant to the due care defense. The overwhelming majority of prosecutions involve drivers who caused injuries while clearly impaired. That is not what happened here. The State seeks to conceal evidence that Mr. Luther was not impaired while the defense seeks to have the jury consider that evidence along with all the rest. A full and fair consideration of Mr. Luther's rights and the language of section 940.25 requires this Court to reverse the circuit court's order and direct it to admit evidence of non-impairment at trial.

Respectfully submitted: 1/22/18:

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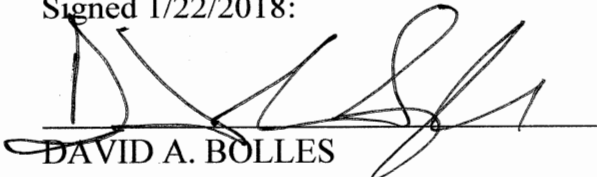
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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,407 words. I further certify that this brief conforms to the rule contained in s. 809.86(4) relating to identification of alleged victims.

Signed 1/22/2018:



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## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

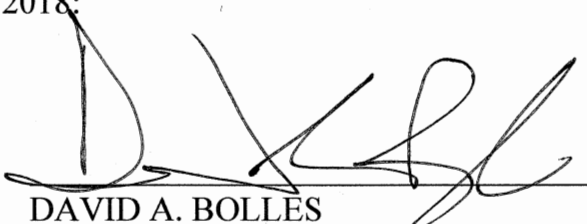
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

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 1/22/2018:



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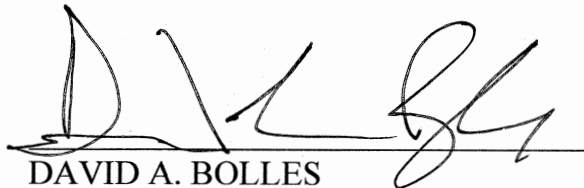
**CERTIFICATION OF COMPLIANCE  
WITH RULE 809.19(2)(b)**

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.

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