

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP91-CR

Cir. Ct. No. 2005CF706

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. NOLLENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Nollenberg appeals a judgment of conviction for homicide by intoxicated use of a vehicle and an order denying his

postconviction motion. We exercise our discretion to reverse Nollenberg's conviction in the interest of justice and remand for a new trial.

BACKGROUND

¶2 In the early morning hours of September 24, 2005, Nollenberg struck and killed James Weber, a pedestrian, with his pickup truck. Nollenberg was arrested, and a blood test revealed a blood alcohol concentration nearly two and a half times the legal limit. He was charged with two counts of homicide by intoxicated use of a vehicle, one by driving under the influence and one by driving with a prohibited alcohol content.

¶3 At trial, Nollenberg raised the inevitability defense authorized by WIS. STAT. § 940.09(2)(a).¹ This statute provides a defense if the defendant proves the death would have occurred even if he or she had been exercising due care and was not intoxicated. Nollenberg argued Weber would have been killed even if Nollenberg had been sober and exercising due care because it was impossible to see Weber in time to avoid him.

¶4 The State agreed Nollenberg could not see Weber in time to react, but argued the accident was not inevitable, in part because Nollenberg was not using adequate illumination.² Trooper Timothy Austin, who wrote a collision analysis and reconstruction report on the accident, testified Nollenberg was using

¹ References to the Wisconsin Statutes are to the 2007-08 version.

² The State also argued the accident occurred because Nollenberg strayed over the centerline into what would have been the oncoming lane of traffic. Nollenberg contended the accident occurred in his own lane. Both parties provided expert testimony to support their positions.

his low beams when he struck Weber and the beams did not illuminate as far as they should have because they were misaligned. He testified that “based on federal vehicle specs, [Nollenberg’s lights] should have reached out about 230 feet,” but that they actually only illuminated 104 feet ahead—“less than half of what [the illumination] should have been.”

¶5 The State relied on this testimony to rebut Nollenberg’s argument that Weber’s death was inevitable. In its closing statement, the State argued:

I think you want to do the math. Due care ... 230 feet of illumination, actual, 104. More than twice the area of illumination. That’s not due care, it’s not a standard of his due care, it’s that would a person exercising due care have been able to avoid the accident [*sic*]. Well, I can say and should say and want you to believe that he would have at least as much time to avoid a collision

Nollenberg did not object to this argument or contest that his headlights were improperly aligned.³ The jury found Nollenberg guilty of homicide by intoxicated use by driving with a prohibited alcohol content, but found him not guilty of homicide by intoxicated use by driving under the influence.

¶6 Nollenberg moved for postconviction relief, arguing, as relevant here, that Austin’s testimony about the headlights not meeting “federal specs” deprived him of the right to present a defense. First, he contended the jury should have been instructed that due care under WIS. STAT. § 940.09(2)(a) refers only to driving, not vehicle maintenance. Second, he asserted that even if due care included maintenance, the State misrepresented the applicable standard because WIS. STAT. § 347.10(2)(b) only requires a vehicle’s low beams to illuminate 100

³ Nollenberg’s expert agreed Nollenberg’s headlights were aimed further downward than usual.

feet ahead. The court denied his motion, concluding it was unlikely the jury was confused by the State's evidence.

DISCUSSION

¶7 Nollenberg raises a number of issues on appeal. The only one we address, however, is whether he is entitled to a new trial in the interest of justice. WISCONSIN STAT. § 752.35 authorizes us to reverse in the interest of justice and remand for a new trial “if it appears from the record that the real controversy has not been fully tried.” We may exercise our discretion under this statute without regard for whether the circuit court misused its discretion. See *Stivarius v. DiVall*, 121 Wis. 2d 145, 153 n.5, 358 N.W.2d 530 (1984).

¶8 Nollenberg argues the circuit court should have instructed the jury that the State's evidence about his headlights was not proof he failed to exercise due care. He contends this evidence confused and misled the jury because his headlights in fact conformed to the requirements of WIS. STAT. § 347.10(2)(b)—which he asserts is proof he used adequate illumination. To illustrate the jury's confusion, Nollenberg points to his acquittal on the under-the-influence charge. He argues that because the jury determined his driving was not impaired, it is likely the jury concluded the accident was avoidable solely because of his allegedly inadequate illumination.

¶9 We do not agree with Nollenberg that the court's instructions on due care were deficient. However, we conclude the real controversy was not fully tried because the jury did not hear evidence that Nollenberg complied with WIS. STAT. § 347.10(2)(b). This evidence was essential for the jury to determine whether Nollenberg's inability to see Weber was caused by his own lack of due care.

¶10 The “federal specs” Austin referred to at trial apparently are the Federal Motor Vehicle Safety Standards. These standards apply to manufacturers of motor vehicles, not to drivers, and “identify minimum criteria for headlamp design.”⁴ A vehicle’s compliance with these standards, however, is not dispositive of whether a driver has complied with state traffic laws. The Wisconsin Statutes and the Wisconsin Administrative Code contain a number of provisions outlining vehicle illumination requirements. *See* WIS. STAT. ch. 347, subchapter II, and WIS. ADMIN. CODE TRANS § 305 (May 2004). Among other things, they require a vehicle’s low beams to illuminate at least 100 feet ahead. WIS. STAT. § 347.10(2)(b). Nollenberg’s illuminated 104 feet.

¶11 Here, the jury had an incomplete picture because of important missing evidence. To properly determine whether Nollenberg’s inability to see Weber was caused by his lack of due care, the jury had to decide how far Nollenberg should have been able to see. How far he would have been able to see were his headlights properly aligned is relevant to this inquiry. But this presents only a partial picture. To complete the picture, the jury also needed evidence of the standard imposed by statute.

¶12 We do not agree with Nollenberg that his compliance with WIS. STAT. § 347.10(2)(b) itself establishes due care. While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, Ch. 5, § 36 (5th ed. 1984). However, because the State presented evidence Nollenberg’s vehicle

⁴ *See* <http://www.nhtsa.dot.gov/cars/rules/import/fmvss/index.html> (last visited September 21, 2009).

did not conform to “federal specs,” evidence he complied with WIS. STAT. § 347.10(2)(b) was essential for the jury to properly evaluate his vehicle’s illumination. Because the jury did not hear this evidence, we conclude the real controversy was not fully tried and Nollenberg should be granted a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

