**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 20, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1057-CR** **Cir. Ct. No. 2015CF98**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TARAN Q. RACZKA,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Walworth County: JAMES L. CARSON, Judge. *Reversed and cause remanded with directions*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. On October 27, 2014, Taran Q. Raczka crashed his car into a tree, killing his passenger. Tests showed restricted controlled substances in his blood, and Raczka was charged with homicide by intoxicated use of a vehicle and second-degree reckless homicide. Consistent with the affirmative

defense in WIS. STAT. § 940.09(2)(a) (2015-16),[1] Raczka sought to present evidence that the accident was caused by a seizure and not the presence of controlled substances in his body. The circuit court, however, granted a motion in limine by the State to exclude all evidence relating to this defense. The issue is whether the circuit court erroneously exercised its discretion by excluding the evidence. We conclude it did.

## BACKGROUND

¶2 On a clear, dry October morning in 2014, Raczka picked up his coworker, Jeffrey Bonsall, around 8:30 a.m. and headed for work. Following a pressure washing job, the two headed off to a painting job. But at 9:30 a.m., Raczka's car suddenly veered off the road and crashed into a tree, killing Bonsall. The crash data indicated that the vehicle "drove off the road in a soft curve … under power with no attempt at breaking." The vehicle was travelling close to the posted speed limit, and there was no evidence that Raczka had been distracted while he was driving. After the accident, a blood test revealed traces of marijuana and cocaine in Raczka's blood, both restricted controlled substances. Raczka admitted to using marijuana the weekend before the crash, but denied using it the day of the crash. The State charged Raczka with homicide by intoxicated use of a vehicle and second-degree reckless homicide.[2]

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Raczka was also charged with operating with a restricted controlled substance in his blood. That charge is not at issue in this appeal.

¶3 Wisconsin law, however, provides that a defendant has an affirmative defense to homicide by intoxicated use of a vehicle 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 … did not have a detectable amount of a restricted controlled substance in his or her blood." WIS. STAT. § 940.09(2)(a). Raczka sought to raise this defense and meet this burden by showing that the accident was caused by a seizure.

¶4 To support his claim, Raczka proffered the following witness testimony along with related medical and police documentation. Raczka and his physician would testify that Raczka had a history of seizures. Bonsall's girlfriend would testify that Raczka appeared sober and awake when he picked up Bonsall at 8:30 a.m.—just an hour before the accident. The initial witness at the scene of the crash would testify that "he saw Mr. Raczka's arms flailing in an uncontrollable manner," which Raczka's mother would testify is what Raczka's seizures looked like. Raczka's physician would also testify that a seizure caused the accident. Raczka too planned to testify that although he could not recall the accident, he believed he suffered a seizure that caused the accident.[3]

¶5 The State filed a motion in limine to prevent Raczka from presenting any evidence of a seizure with respect to any of Raczka's charges. Even assuming that Raczka suffered a seizure, the State maintained that he should not be allowed to offer this defense because Raczka was negligent in failing to take his prescribed

[3] Raczka also maintained that a deputy who interviewed Raczka would testify that Raczka told her about his seizure history, his prescription, and that it may have been a seizure that caused the accident. But the State disputed whether such evidence would in fact be forthcoming or inadmissible hearsay.

seizure medication. The State relied on medical records indicating that Raczka was prescribed an antiseizure medication after suffering a seizure in 2011. He purportedly suffered another seizure sometime in the spring of 2014, but he did not go to the doctor at that time due to financial concerns. The records also indicated that Raczka did not take his medication "regularly, if at all" in the year leading up to the accident.

¶6 After a hearing, the circuit court concluded that any evidence that Raczka had a seizure was inadmissible because Raczka's failure to take his medication was negligent as a matter of law and a total bar to a defense under WIS. STAT. § 940.09(2)(a). The court explained that as a matter of law there must be "an independent cause out of the control of the defendant" to raise a plausible, valid defense. Raczka sought leave to appeal this order, which we granted. *See* WIS. STAT. RULE § 809.50(3).

## DISCUSSION

¶7 Whether to admit evidence is generally a discretionary decision by the circuit court. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. However, "if the exercise of discretion is based on an incorrect legal standard, it is an erroneous exercise of discretion." ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶23, 249 Wis. 2d 115, 637 N.W.2d 80. Because we disagree with the court's legal conclusion, we reverse the circuit court's order.

¶8 In an attempt to hold those who cause death by drugged driving accountable, the legislature enacted WIS. STAT. § 940.09 entitled, "Homicide by intoxicated use of a vehicle or firearm." Section 940.09(1) provides in pertinent part that "[a]ny person who … [c]auses the death of another by the operation or handling of a vehicle while under the influence of an intoxicant" or "while the

person has a detectable amount of a restricted controlled substance in his or her blood" is guilty of a Class D Felony. *See* § 940.09(1)(am), (1c)(a). With regard to controlled substances, the State must prove: (1) the defendant operated a vehicle, (2) the operation of the vehicle caused the death of another, and (3) the defendant had a detectible amount of a restricted controlled substance in his or her blood. WIS JI—CRIMINAL 1187. Accordingly, where a blood test reveals the presence of a restricted controlled substance,[4] homicide by intoxicated use of a vehicle is a type of strict liability offense; the State only need prove that the restricted controlled substance was present and the defendant caused the death of another by using a motor vehicle. *See* ***id.*** The State need not prove that the defendant was impaired in any way or that the presence of restricted controlled substances had anything to do with the accident.

¶9 Though generally structured as a strict liability offense, it is not without exception. The legislature has provided an affirmative defense to the charge contained in WIS. STAT. § 940.09(2)(a). First enacted in 1981, the original version read as follows:

> The actor has 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.

1981 Wis. Laws ch. 20, §1817g. This statutory language was understood to provide "a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual." ***State v. Caibaiosai***, 122 Wis. 2d 587, 596, 363 N.W.2d 574 (1985). In other words,

[4] Such a test is "prima facie evidence on the issue of the person having a detectible amount of a restricted controlled substance in his or her blood." WIS. STAT. § 885.235(1k).

once it was shown that a defendant was under the influence of an intoxicant, the burden was on the defendant to demonstrate that something unrelated to his or her intoxication caused the accident. *See* ***id.*** at 596-98.

¶10 In ***Caibaiosai***, the court considered whether the defendant's own negligence can constitute an intervening cause. The defendant maintained, among other things, that he ought to have been allowed to introduce evidence that his own negligent operation of a motorcycle caused the accident—i.e., his negligent driving caused the injury and it would have occurred even if he had not been under the influence of an intoxicant. *See* ***id.*** at 600. The supreme court rejected this argument and held that "[t]he defendant's negligence is … not an affirmative defense." ***Id.***

¶11 Just a few years after ***Caibaiosai***, the legislature amended the statute and added the proviso that the defendant raising this affirmative defense must also prove "the death would have occurred even if he or she had been exercising due care." *See* 1989 Wis. Act 275. Thus, the current statute provides:

> In any action under this section, the 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, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have [a prohibited alcohol concentration].

WIS. STAT. § 940.09(2)(a). It appears the addition of the phrase "even if he or she had been exercising due care" incorporates and codifies the ***Caibaiosai*** court's conclusion that the defendant's own negligence is not a defense. Thus, the statute provides that Raczka has a statutory defense to his charge of homicide by intoxicated use of a vehicle if he can convince a jury by a preponderance of the

evidence that the accident would have occurred even if he (1) had been "exercising due care" and (2) had no restricted controlled substances in his blood. *See* § 940.09(2)(a).

¶12 The heart of this case is whether evidence that the accident was caused by a seizure was admissible under this statutory defense. Because Raczka failed to take his prescribed seizure medication, the State argues that Raczka was negligent and not exercising due care. Since he cannot raise his own negligence as a defense, the State reasons that any evidence of a seizure was not relevant.[5] Alternatively, the State suggests the evidence was properly excluded because it was too speculative, not probative, and therefore not relevant. Raczka counters that whether he was negligent by failing to take his medication is a question of fact for the jury, and the evidence should have been admitted because it tended to show that the accident was caused by a seizure.[6]

¶13 Under the plain text of WIS. STAT. § 940.09(2)(a), a seizure can, as a general matter, be a defense to the charge of homicide by intoxicated use of a vehicle. By way of example, consider a defendant who has no prior history of seizures, no prescribed medication, or any other indication that he or she might

[5] The State also suggests that even if the evidence was relevant, we may affirm the circuit court because it properly exercised its discretion by excluding the evidence as "pos[ing] a risk of misleading the jury and confusing the issues." But this was not the circuit court's rationale for excluding the evidence. Rather, the court exercised its discretion based on the incorrect legal conclusion that Raczka was negligent as a matter of law, and any seizure Raczka suffered would have been the result of this negligence. Accordingly, we must reverse. *See* ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶23, 249 Wis. 2d 115, 637 N.W.2d 80 (an exercise of discretion based on an incorrect theory of law is erroneous).

[6] The State insists that Raczka conceded during the motion hearing that failing to take his seizure medication was negligent. We read the record differently. During the hearing and on appeal, Raczka consistently maintained that the mere failure to take his medication was not negligent, or at least presented a factual question of negligence.

have a seizure that would lead to an accident. And assume the defendant has a seizure while driving that causes an accident where another is killed. Even if that defendant had a detectable amount of a restricted controlled substance in his or her bloodstream, para. (2)(a) would allow evidence of the seizure to be used as a defense. A nonnegligent event—the seizure—would have caused the accident irrespective of the presence of a restricted controlled substance. *See* ***id.*** To track the statute's language, "the death would have occurred even if [the defendant] had been exercising due care." ***Id.*** So long as evidence is not inadmissible for some other reason, the statute plainly allows defendants to present this kind of relevant evidence and make their case. Evidence of a seizure clearly fits the bill.

¶14 Here, we are presented with a slightly different scenario. Raczka acknowledges that he has some history of seizures and that he failed to take his seizure medication as prescribed. Per WIS. STAT. § 940.09, whether Raczka may raise his seizure as a defense depends on whether the accident would have occurred if he had exercised due care. Critical to this inquiry is whether the alleged seizure that caused the accident was the result of his own negligent conduct in failing to take his medication. As the circuit court correctly recognized, if failing to take the medication was negligent and this negligence caused the seizure and the crash, then the statute offers no defense. The accident would not have occurred if Raczka had been exercising due care. *See* § 940.09(2)(a).

¶15 However, whether Raczka's failure to take his medication was a failure to exercise due care is a question of fact; it cannot be presumed as a matter of law. Many factors could impact Raczka's duty of care and the foreseeability of harm. Any patient who, like Raczka, is prescribed antiseizure medication would likely consider any verbal instructions from his doctor, the side effects of the

medication, the benefits and relative effectiveness of the medication generally, the benefits and relative effectiveness for Raczka in the past, Raczka's propensity for seizures, the inability to procure the medication because of cost, and other such concerns. After hearing the relevant 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.[7] On the other hand, the jury could conclude that Raczka did not meet his burden to prove that he had a seizure, or that even if he did, he was exercising due care when he failed to take his medication. At the very least, we cannot see how failure to take prescribed medication prior to driving at all times and in all places constitutes negligence as a matter of law.

¶16 The core statutory question in Raczka's defense to the charge of homicide by intoxicated use of a vehicle is whether the accident would have occurred anyway if Raczka had been exercising due care and had not been under the influence of intoxicants. Raczka has put forward evidence attempting to show just that. This evidence is not just speculative; it is relevant to the affirmative defense. The jury is entitled to hear and weigh this evidence.

¶17 Raczka was also charged with second-degree reckless homicide and argues that this same evidence is relevant to his defense on this charge. The State fails to respond to the substance of this argument. Rather, it urges that we treat this argument as waived because Raczka failed to raise it in the circuit court. In

[7] Such a conclusion could be reached many ways. For example, the jury could conclude that Raczka was exercising due care under the circumstances by foregoing his medication and driving. The jury could also conclude that the seizure medication was of limited effectiveness and the resulting accident would have occurred even if Raczka had taken his medication. All of this would, of course, depend on the evidence at trial.

our order granting leave to appeal in this case, we indicated we would consider whether evidence of a seizure was "probative" on the issue of Raczka's "criminal reckless[ness]." Consistent with our order, we will consider the claim.

¶18 In order to convict Raczka of second-degree reckless homicide, the State must prove that Raczka caused Bonsall's death "by criminally reckless conduct." WIS JI—CRIMINAL 1060. Showing that the accident was caused by a seizure, and not criminally reckless conduct, tends to negate this element. The evidence is plainly relevant to the charge and admissible. *See* WIS. STAT. § 904.01 (relevant evidence is any evidence that tends to make the existence of a fact of consequence more or less probable).

## CONCLUSION

¶19 In sum, it is for the jury to determine whether Raczka can meet his burden to prove that his choice to drive while unmedicated was an exercise of due care and whether the seizure was an intervening cause of Bonsall's death. Accordingly, Raczka's evidence tending to show that he suffered a seizure that caused the accident and the resulting death was relevant to the defense he is statutorily entitled to present under WIS. STAT. § 940.09(2)(a). We also conclude that evidence that a seizure caused the accident is relevant to whether Raczka was criminally reckless. Therefore, the circuit court's order precluding this evidence is reversed.

*By the Court.*—Order reversed and cause remanded with directions.

Recommended for publication in the official reports.