COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-1315-CR
00-2047-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ELGINE L. STORLIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. Elgine Storlie appeals a judgment convicting him of injury by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.25(1)(a)

(1999-2000).[1] Storlie drove a motor vehicle involved in an accident which resulted in injuries to his passenger. At trial, Storlie argued to the jury that the passenger's assault on him while driving, and not his own intoxication or operation of the vehicle, caused the passenger's injuries. Storlie claims the trial court deprived him of his defense by instructing the jury on the affirmative defense provided under § 940.25(2). We conclude the trial court did not err in instructing the jury because: (1) the instructions accurately stated the law, and the trial court did not erroneously exercise its discretion in giving them; and (2) there is not a reasonable likelihood that the jury was misled and applied the instructions in an unconstitutional manner. We therefore reject Storlie's claim of error and affirm the judgment.

BACKGROUND

¶2 Storlie drove a motor vehicle over a curb and into a tree. His passenger suffered severe lacerations and broken bones, requiring a five-day hospitalization. The State charged him with injury by intoxicated use of a vehicle and injury by operation of a vehicle with a prohibited alcohol concentration.

¶3 At trial, Storlie's counsel told the jury in an opening statement that the only issue in the case was what caused the passenger's injuries. She asserted that jurors would "not be able to be convinced beyond a reasonable doubt that a driver, no matter what his alcohol concentration may be, should be able to operate a vehicle, to avoid an accident, when his passenger is sexually assaulting him."

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The passenger testified he met Storlie at a bar and they decided to go to another location. The passenger denied that Storlie said he did not want to drive or that he felt too inebriated to do so. The passenger also denied making any sexual advances toward Storlie while Storlie was driving the vehicle. According to the passenger, Storlie drove the vehicle at a speed of 40 to 50 miles per hour on a 25 mile-per-hour street, and he passed another vehicle. The passenger testified that he told Storlie to slow down, but he did not. An eyewitness also testified that Storlie's vehicle passed his vehicle at 50 to 55 miles per hour shortly before the accident. Storlie failed to successfully manage a curve and hit a tree; his passenger went partially through the windshield and suffered serious injuries.

¶5 Storlie's defense that the passenger's conduct caused his own injuries was based on Storlie's testimony that the passenger had bought him drinks, insisted that Storlie drive, and then sexually assaulted him while he drove. Storlie testified that after meeting him at the bar, the passenger bought Storlie numerous alcoholic drinks. Storlie claimed that the passenger also engaged in some sexual conversation and contact while at the bar, including kissing, unzipping Storlie's pants, and fondling him.

¶6 Later, the two decided to go to another location for a drink and some food. According to Storlie, he told the passenger that he did not want to drive because he had had too much to drink, but the passenger insisted. Storlie testified that while he was driving, the passenger unzipped Storlie's pants, and Storlie pushed him away. He said the passenger joked about performing oral sex on Storlie in the car, and then attempted to unzip Storlie's pants again. Storlie testified that both of his arms were busy fending off the passenger's advances, and immediately thereafter, the accident occurred. Storlie admitted that his driving was affected by his alcohol consumption, but asserted that he "most likely [would]

not" "have gotten into that accident if not for what [the passenger] was doing" to him while driving the car.

¶7 At the instruction conference, the State requested the court to instruct the jury on the affirmative defense provided under WIS. STAT. § 940.25(2).[2] *See* WIS JI—CRIMINAL 1188. Defense counsel opposed giving the instruction and, alternatively, requested the court to instruct the jury that evidence of the passenger's conduct was relevant "on the question of whether the actions of the defendant caused great bodily harm to another," as well as to the statutory affirmative defense. The trial court decided to instruct the jury on the affirmative defense, and to employ the pattern instructions without Storlie's proposed modification. Specifically, the court instructed the jury as follows regarding the elements of the offense and the affirmative defense:

> Section 940.25(1)(a) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while under the influence of an intoxicant.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> First, that the defendant operated a vehicle.

[2] WISCONSIN STAT. § 940.25(2) provides as follows:

> The 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 or did not have an alcohol concentration described under sub. (1)(b), (bm), (d) or (e).

Second, that the defendant's operation of the vehicle caused great bodily harm to [the passenger].

Third, that the defendant was under the influence of an intoxicant at the time he operated a vehicle.

The first element requires that the defendant operated a vehicle.

The second element requires that the defendant's operation of a vehicle caused great bodily harm to [the passenger].

"Cause" means that the defendant's operation of a vehicle was a substantial factor in producing great bodily harm. There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it. It is not required that the great bodily harm was caused by any drinking of alcohol or by any negligent or improper operation of the vehicle. What is required is that the great bodily harm was caused by the defendant's operation of the vehicle.

…. [The court instructed the jury regarding the phrase "under the influence of an intoxicant" and the significance of blood test results.]

If you are not satisfied beyond a reasonable doubt that the defendant caused great bodily harm to [the passenger] by operating a vehicle while the defendant was under the influence of an intoxicant you must find the defendant not guilty.

If you are satisfied beyond a reasonable doubt that the defendant caused great bodily harm to [the passenger] by operating a vehicle while the defendant was under the influence of an intoxicant, you must determine whether the defendant has a defense to this crime by considering the following:

Would great bodily harm to [the passenger] have occurred even if the defendant had been exercising due care and had not been under the influence?

Wisconsin law provides that it is a defense to the crime charged in this case if you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the great bodily harm would have occurred even if the defendant had been exercising due care and had not been under the influence.

By the greater weight of the evidence is meant evidence which, when weighed against that opposed to it, has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

Evidence has been received relating to the conduct of [the passenger] at the time of the alleged crime. Any failure by [the passenger] to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider the evidence of conduct of [the passenger] in deciding whether the defendant has established that great bodily harm to [the passenger] would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the great bodily harm suffered by [the passenger] would have occurred even if the defendant had been exercising due care and had not been under the influence, you must find the defendant not guilty.

Finally, if you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that the great bodily harm would have occurred even if the defendant had been exercising due care and had not been under the influence, and if you are satisfied beyond a reasonable doubt that the defendant caused great bodily harm to [the passenger] by operation of a vehicle while the defendant was under the influence of an intoxicant you should find the defendant guilty.

See WIS JI—CRIMINAL 1262 and 1188.

¶8 The jury found Storlie guilty, and the trial court entered a judgment of conviction and imposed sentence. Storlie appeals the judgment.[3]

ANALYSIS

¶9 Storlie characterizes the court's instructions as "erroneous" because they eliminated his "cause" defense in this case. It is not altogether clear whether Storlie is claiming that the instructions incorrectly state the law, or that there was no evidentiary basis for the court to give the instructions it did. We address both issues, reviewing the former de novo, ***State v. Olson***, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998), and the latter with deference to the trial court's exercise of discretion. *See* ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). We then consider the constitutional concerns Storlie raises regarding the State's burden of proof and the possibility that the jury was misled regarding it by the instructions.

¶10 The instructions accurately describe the elements of the offense and the State's burden to prove them. The State need only prove beyond a reasonable doubt that Storlie's operation of the vehicle caused the passenger's injuries, not that Storlie's intoxication did so, and the burden of proving the affirmative defense that the injuries would have occurred even if Storlie had been sober and exercising due care rests on Storlie. *See* ***State v. Loomer***, 153 Wis. 2d 645, 649-51, 451

[3] The court ordered Storlie to pay restitution of $32,136.85. Storlie also appealed the restitution order, and we granted Storlie's motion to consolidate that appeal with this one. However, Storlie has since stated his intention to file a voluntary dismissal of his appeal of the restitution order. To date, he has neither filed a voluntary dismissal, nor briefed the restitution issues on appeal. We thus deem Storlie to have abandoned any challenge to the restitution order and summarily affirm the same.

N.W.2d 470 (Ct. App. 1989). The paragraph relating to the effect of the passenger's conduct comports with the supreme court's holding and directions in ***State v. Lohmeier***, 205 Wis. 2d 183, 194-99, 556 N.W.2d 90 (1996) (recommending an instruction that explains "that although the victim's contributory negligence is not a defense, the jury may consider the acts of the victim in relation to" an affirmative defense). In short, we conclude that the trial court's instructions regarding the elements of the offense and the affirmative defense, quoted at length above, is not an erroneous statement of the law.

¶11 We consider next whether the trial court erroneously exercised its discretion by giving the affirmative defense instruction in this case. A trial court has wide discretion in determining which instructions to give to the jury, both as to language and emphasis, and the court should seek to "fully and fairly inform the jury of the rules of law applicable to the case." ***State v. Turner***, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983). We conclude that, based on the evidence presented to the jury in this case, the trial court did not erroneously exercise its discretion in giving the instructions it did.

¶12 From her opening statement, Storlie's counsel made it clear that the passenger's conduct would be the central issue in the case.[4] Storlie testified to what his passenger said and did in the bar and in his vehicle just prior to the accident. And, although the passenger gave vastly conflicting testimony, the evidence before the jury clearly posed the question raised by the affirmative defense under WIS. STAT. § 940.25(2): "Would [the passenger's injuries] have

[4] Storlie conceded his intoxication, his operation of the vehicle, and the injuries sustained by his passenger in closing argument.

occurred even if the defendant had been exercising due care and had not been under the influence?" WIS JI—CRIMINAL 1188.

¶13 The supreme court has directed that, where the legislature provides an affirmative defense such as the one under WIS. STAT. § 940.25(2), "trial judges have a duty to so instruct the jury in all cases when any exonerating evidence is received tending to show that the [injuries] would have occurred even if the defendant had not been under the influence of intoxicants." ***State v. Caibaiosai***, 122 Wis. 2d 587, 600, 363 N.W.2d 574 (1985). We conclude that the trial court did not erroneously exercise its discretion by discharging its duty to instruct on the affirmative defense, regardless of the defendant's objection to giving the instruction. *Cf.* ***State v. Fleming***, 181 Wis. 2d 546, 551-52, 510 N.W.2d 837 (Ct. App. 1993) (finding no error when court, at state's request and over defense objection, instructed jury on a lesser included offense for which there were reasonable grounds in the evidence).

¶14 With respect to the paragraph in the affirmative defense instruction dealing specifically with the passenger's conduct, the supreme court has commented that trial courts should not, "*without clear justification*, give a contributory negligence instruction in a criminal case." *See* ***Lohmeier***, 205 Wis. 2d at 199 (emphasis added). In a note to the revised WIS JI—CRIMINAL 1188, the Criminal Jury Instruction Committee suggests that there is "clear justification" for including the paragraph in question in the following circumstances:

> [1] evidence of the victim's conduct has been admitted; [2] that conduct involves what might be described as "negligent" conduct; [3] either the state or the defense requests the instruction; and [4] the trial court concludes that in the context of the particular case, the instruction

> would add to the jury's ability to understand the legal standard it is to apply.

WIS JI—CRIMINAL 1188 n.5.

¶15 The trial court determined that all four of the foregoing circumstances were present, and we agree. Storlie introduced evidence of the passenger's conduct immediately prior to the accident. The passenger's conduct allegedly "involves what might be described as 'negligent' conduct"—groping another person while that person is driving a motor vehicle. The State requested the instruction. Finally, the trial court concluded in the context of this particular case, the instruction would add to the jury's ability to understand the legal standard it is to apply:

> I was left with the distinct impression, from listening to [Storlie's counsel's] opening statement, that the … thrust of the defense, was going to be that the activities of [the passenger] were the reason why he ended up with great bodily harm.
>
> ….
>
> And I am satisfied, as to the reasons I've already stated, as it relates to the record, including both opening statement by [Storlie's counsel], and some of the evidence which I recall just off the top of my head, that … in the context of this particular case, the instruction would add to the jury's ability to understand the legal standard it is to apply, because otherwise I don't feel they're really getting any instruction from the Court, as to how they are to factor in the testimony, if they find it to be credible, of what [the passenger] did.

We thus conclude there was "clear justification" for the court to give the "contributory negligence" paragraph, and the court did not erroneously exercise its discretion in doing so.

¶16 Storlie argues that the court erred in giving the affirmative defense instruction because he presented evidence of the passenger's conduct solely as a defense negating the element of causation, not as a defense under WIS. STAT. § 940.25(2). He is particularly critical of the court's election to give the "contributory negligence" paragraph, arguing that its language informed "the jury that [the affirmative defense] was the only issue in the case upon which [the passenger]'s conduct could be considered." He argues that by giving this instruction without the modification he requested (stating that the passenger's conduct was also relevant to "whether the actions of the defendant caused" the passenger's injuries), the trial court deprived him of the defense he presented in favor of one he did not. He asserts that "[i]n the present case, there was no defense of 'contributory negligence.'"[5]

¶17 We conclude, however, that Storlie *did* raise the affirmative defense under WIS. STAT. § 940.25(2), despite his disavowals. He did so through his opening statement and in the testimony he gave at trial regarding the passenger's conduct immediately prior to the accident. Storlie's attorney told the jury in her opening statement: "I submit to you that you will not be able to be convinced beyond a reasonable doubt that a driver, no matter what his alcohol concentration may be, should be able to operate a vehicle, to avoid an accident, when his passenger is sexually assaulting him." That is the essence of the statutory defense

[5] In support of this argument, Storlie cites the supreme court's recognition in ***State v. Lohmeier***, 205 Wis. 2d 183, 556 N.W.2d 90 (1996) that "evidence of a victim's negligence … is often relevant on the issue of causation." ***Id***. at 196. We note, however, that the court also recognized that "[i]t is widely recognized that contributory negligence is not a defense in a criminal prosecution," ***id***. at 195, and the court recommended a "bridging instruction," such as the one at issue here, be given in order to ensure that a jury is not confused when a victim's conduct provides a basis for a defense under provisions such as WIS. STAT. § 940.25(2). *See* ***id***. at 196-97.

at issue—a defendant's claim that, even if he had been stone cold sober and exercising due care, the injury-producing accident would have happened anyway.

¶18 In sum, we conclude that the trial court did not deprive Storlie of his defense, as he contends. He points to no testimony or other evidence he wished to present that was excluded, nor to any arguments he wished to make that were curtailed. In closing argument, Storlie's counsel argued, alternatively, that (1) the passenger caused the accident, and (2) even if Storlie's operation of the vehicle caused the passenger's injuries, the affirmative defense applies because the passenger would not have been injured but for his own conduct:

> If, for some reason, you find you are able to be convinced beyond a reasonable doubt, that in spite of what [the passenger] did to [Storlie], that the State's met its burden on the cause element, then and only then, you get to the question of the affirmative defense, when you're told that, if you're satisfied to a reasonable certainty by the great weight of the credible evidence that the great bodily harm would have occurred even if the defendant had been exercising due care and had not been under the influence. You should be so satisfied.
>
> If [Storlie] had not consumed anything that night, the act of a passenger sexually assaulting you is still more than enough to cause you to miss a curve and go off the road, if that doesn't do it, what would?

Instead of being "deprived of a defense" by the court's instructions, they provided him two, but the jury accepted neither. The court did not erroneously exercise its discretion in giving instructions that were reasonably required by the evidence at trial.

¶19 Finally, Storlie claims that the interplay of the jury instructions given could have misled the jury. He argues that instructing the jury on the contributory

negligence rule with the "bridging instruction" was confusing and therefore subject to misinterpretation. Storlie also contends that the proper standard for our review of this issue should be a determination of "whether a reasonable juror *might* have interpreted the instruction to, in this case, disallow or burden [his] 'cause' defense." *See* ***Francis v. Franklin***, 471 U.S. 307, 318 (1985). We reject both the proffered standard and the conclusion Storlie would have us reach.

¶20 Whether the trial court denied Storlie a meaningful opportunity for the jury to consider his causation defense raises a due process issue, and it is thus a question of constitutional fact which we review de novo. *See* ***Lohmeier***, 205 Wis. 2d at 191-92. "[T]he proper standard for Wisconsin courts to apply when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution." ***Id.*** at 193 (adopting the standard set forth by the United States Supreme Court in ***Boyde v. California***, 494 U.S. 370, 378-81 (1990) and ***Estelle v. McGuire***, 502 U.S. 62, 72-73 (1991)). The court specifically rejected a review based on how a "single hypothetical 'reasonable' juror could or might have interpreted the instruction," ***Lohmeier***, 205 Wis. 2d at 193 (quoting ***Boyde***, 494 U.S. at 380-81), noting further:

> Wisconsin courts should not reverse a conviction simply because the jury possibly *could have been misled*; rather, a new trial should be ordered only if there is a *reasonable likelihood* that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner. Furthermore, in making this determination, appellate courts should view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation.

Id. at 193-94 (emphasis added). Accordingly, we apply the "reasonable likelihood" standard in this case.[6]

¶21 The court specifically instructed the jury that "the State must prove by evidence which satisfies you beyond a reasonable doubt" that all of the elements of the crime were present, including that Storlie's operation of the vehicle caused the injuries. The court also told the jury that if it was not satisfied beyond a reasonable doubt that Storlie caused great bodily harm to the passenger by operating a vehicle while he was under the influence of an intoxicant, it must find Storlie not guilty. Only after explaining the foregoing did the court go on to tell jurors that if they were satisfied beyond a reasonable doubt that Storlie did cause great bodily harm to the passenger by operating a vehicle while under the influence of an intoxicant, they must then determine whether the affirmative defense was established in this case.

¶22 Moreover, nearly all of the evidence Storlie presented to the jury related to his claim that the passenger caused his own injuries. In addition, as we have noted, Storlie's attorney emphasized the causation issue in her opening statement, and again in closing argument. The jury was instructed, correctly, that

[6] Storlie attempts to distinguish ***Boyde*** and ***Estelle*** because they dealt with "ambiguous" instructions, while ***Francis*** dealt with a jury instruction that shifted the burden of proof from the State to the defendant. Storlie contends that the ***Francis*** standard should apply here because the instructions the trial court gave "functionally" shifted the burden of proof on the cause element from the State to him, effectively creating a presumption for the defendant to rebut. We disagree that the instructions given, which we have concluded accurately state the applicable law, created any impermissible presumptions. The supreme court has determined that a statute such as WIS. STAT. § 940.25, by removing the State's burden to prove a causal connection between the intoxicated condition of a vehicle operator and injuries suffered by another person, and instead permitting the defendant to disprove that linkage, does not violate the constitution. ***State v. Caibaiosai***, 122 Wis. 2d 587, 594-98, 363 N.W.2d 574 (1985) (holding that WIS. STAT. § 940.09(1)(a), death by intoxicated use of a motor vehicle, was constitutional).

> "Cause" means that the defendant's operation of a vehicle was a substantial factor in producing great bodily harm. There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Thus, even if the jury believed Storlie's testimony regarding the passenger's conduct immediately preceding the accident, it could still have concluded that Storlie's operation of his vehicle was a substantial factor in producing the passenger's injuries.

¶23 Thus, "in light of the context of the entire proceedings," ***Lohmeier***, 205 Wis. 2d at 197, we conclude there is no reasonable likelihood that the court's instructions misled the jury into thinking it could not consider the passenger's conduct in deciding whether the State had proven that Storlie's operation of his vehicle caused great bodily harm to the passenger.

CONCLUSION

¶24 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶25 DYKMAN, P.J. *(concurring).* Can a trial court force a defendant to assert an affirmative defense that he or she specifically declines to assert? The majority does not directly address this issue. Nonetheless, in affirming Storlie's conviction by assuming that a trial court may do this, the majority answers the question "Yes."

¶26 This is an issue that goes beyond the unique affirmative defense provided in WIS. STAT. § 940.25(2) (1999-2000).[7] Intoxication, WIS. STAT. § 939.42, Mistake, WIS. STAT. § 939.43, Provocation, WIS. STAT. § 939.44, Privilege, WIS. STAT. § 939.45, Coercion, WIS STAT. § 939.46, Necessity, WIS. STAT. § 939.47, Self-defense, WIS. STAT. § 939.48, and lack of cause, WIS. STAT. §§ 940.25(2) and 940.09(2), all provide affirmative defenses to criminal liability. It seems strange that from now on, trial courts will be free to require defendants to assert affirmative defenses by giving jury instructions on those defenses.

¶27 The difficulty with the majority's analysis in this case is that it confuses the element of cause in the crime of injury by intoxicated use of a vehicle with the element of cause in the affirmative defense also found in the statute. Under the facts of this case, that is easy to do. Storlie asserts that he did not cause great bodily harm to his passenger because the passenger caused his own injuries by interfering with Storlie's operation of the vehicle. The trial court believed Storlie was asserting that Storlie's passenger would have been injured even if

[7] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Storlie was not intoxicated and was exercising due care. Both concepts are similar, though phrased differently. The significant difference between the crime and the affirmative defense is that the State must prove the crime, but Storlie has the burden of proof on the affirmative defense.

¶28 To begin with, it appears strange that a plaintiff, here the State, can complain that a defendant has not asserted an affirmative defense. It is also strange that upon hearing the State's complaint, the trial court can instruct the jury on an affirmative defense that the defendant has not raised. The usual situation is reversed. A plaintiff objects to a defendant's belated attempt to raise an affirmative defense. WISCONSIN STAT. § 802.02(3) requires a defendant to "set forth affirmatively" in a responsive pleading "any matter constituting an avoidance or affirmative defense …." In ***Oetzman v. Ahrens***, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988), we noted that "[A]ffirmative defenses are deemed waived if not raised in the pleadings." Here, a defendant complains that a plaintiff has forced an affirmative defense on him.

¶29 Perhaps because forcing a defendant to assert an affirmative defense is counterintuitive, and is almost never done, there is little authority on point. The Supreme Court of New York, Appellate Division, considered the constitutionality of a statute making it an affirmative defense to robbery that a firearm used in the robbery was not a loaded weapon capable of producing serious physical injury.[8] *See* ***People v. Felder***, 39 A.D.2d 373, 374 (N.Y. App. Div. 1972), *aff'd*, 297 N.E.2d 522 (N.Y. 1973). The defendant complained that to assert his affirmative

[8] The New York statute does not make the benign nature of the firearm a complete defense. If the defendant is successful in showing that the firearm was not loaded, he or she can only be convicted of second-degree robbery, not first-degree robbery. *See* ***People v. Felder***, 39 A.D.2d 373, 374-75 (N.Y. App. Div. 1972), *aff'd*, 297 N.E.2d 522 (N.Y. 1973).

defense, he was forced to give up his Fifth Amendment right to silence. ***Id.*** at 375. The court disagreed, and explained:

> The people must still establish every element of the substantive crime. The defendant is offered the opportunity to assert an affirmative defense, but is not forced to do so, and therefore is not compelled to be a witness against himself.

Id. at 379.

¶30 Common sense and ***Felder*** suggest that it should be a defendant's choice of whether to raise an affirmative defense. When a defendant, such as Storlie, expressly disclaims an affirmative defense, a trial court should accept that disclaimer, and proceed without the affirmative defense being a part of the case. To do otherwise turns the legislatively created defense into a weapon for the prosecution. Were I writing for a majority, I would conclude that the trial court erred by instructing the jury on a WIS. STAT. § 940.25(2) affirmative defense when Storlie had expressly disclaimed reliance on that defense.

¶31 Whether this error is prejudicial is a far closer call. Storlie views the facts of this case as establishing that the passenger caused the accident. He notes: "But, the 'failure to exercise due care' by [the passenger] was, in fact, the cause of the accident." However, Wisconsin law views cause differently. The supreme court has held that cause has a "consistent, well-established meaning in Wisconsin criminal law." ***State v. Oimen***, 184 Wis. 2d 423, 435, 516 N.W.2d 399 (1994). In ***Oimen***, a homicide case, the court explained that an actor causes death "if his or her conduct is a 'substantial factor' in bringing about that result." ***Id.*** "A 'substantial factor' need not be the sole cause of death." ***Id.*** at 436. The same is true in cases involving injury rather than death. We have held: "To establish causation, the State must prove beyond a reasonable doubt that [the defendant]'s

acts were a substantial factor in producing great bodily harm to [the victim]. A substantial factor need not be the sole or primary factor causing the great bodily harm." ***State v. Owen***, 202 Wis. 2d 620, 631, 551 N.W.2d 50 (Ct. App. 1996) (citation omitted).

¶32 Thus, all that was necessary for Storlie's conviction was that his operation of the vehicle was a cause of his passenger's injuries, and that he was then under the influence of an intoxicant. The passenger's actions might well have also been a cause of the passenger's injuries. But in order for Storlie to prevail in his defense, he would have had to convince the jury that the passenger's actions were the sole cause of his injuries. Conversely, to prevail, Storlie would also have had to convince the jury that his operation of the motor vehicle had nothing to do with his passenger's injuries. Even Storlie did not categorically deny that the accident would not have happened absent his passenger's actions. Storlie only testified that it was most likely that he would not have had the accident absent the passenger's actions. And a witness, Daniel Biggin, testified that he was passed by Storlie's vehicle and that Storlie was traveling fifty to fifty-five miles per hour when he was passed. Storlie's passenger also testified to Storlie's speed as forty to fifty miles per hour, and that he told Storlie to slow down because the speed limit was twenty-five miles per hour.

¶33 The trial court instructed the jury that Storlie had the burden of proof. It told the jury: "Consider evidence of the conduct of [Storlie's passenger] in deciding whether *the defendant has established* that great bodily harm to [the passenger] would have occurred even if the defendant had … been exercising due care." (Emphasis added.) The trial court also instructed the jury that the State had to prove by evidence which satisfied the jury beyond a reasonable doubt that three elements were present.

¶34 In the context of the instructions, it is apparent that the trial court distinguished the burden of the State to prove the crime and the burden of Storlie to prove the affirmative defense. But, having concluded that the trial court erred by instructing the jury on the unwanted affirmative defense, the question is whether there is a reasonable likelihood that the jury applied the instructions so as to require Storlie to prove his innocence. I agree with the majority that this is the test we are to use. *See* ***State v. Lohmeier***, 205 Wis. 2d 183, 193, 556 N.W.2d 90 (1996). Though Storlie argues that the State must show that it received no benefit from the error, ***Lohmeier*** applies the "reasonable likelihood" standard to all constitutional violations:

> We conclude that the proper standard for Wisconsin courts to apply when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution.

Id. Shifting the burden of proof from the State to the defendant violates the United States Constitution. *See* ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981).

¶35 Is there a reasonable likelihood that the jury was misled into believing that Storlie had the burden to prove his innocence, here that his operation of a motor vehicle did not cause his passenger's injuries? Though my conclusion would be different were I to use the test Storlie advocates, I conclude that under the "reasonable likelihood" test, the trial court's error was harmless. "Likely" is a synonym for "probable." ***State v. Kienitz***, 221 Wis. 2d 275, 294, 585 N.W.2d 609 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 423, 597 N.W.2d 712 (1999). Given the trial court's correct instruction on burden of proof, and the facts of this case, I do not believe that it was reasonably likely that the jury applied the jury

instructions in a way that shifted the State's burden of proof to Storlie. Accordingly, I concur with the majority's mandate affirming the trial court's judgment and order.