# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

March 27, 1996

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

## NOTICE

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**No. 94-2235-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DARYL G. HOFFMANN,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Daryl G. Hoffmann has appealed from a judgment convicting him of two counts of homicide by intoxicated use of a motor vehicle in violation of § 940.09(1)(a), STATS. The deaths occurred when a van being driven by Hoffmann collided with a Mercury Sable automobile being driven by Laurence Guderyon, one of the victims. Laurence's wife, Lillian Guderyon, was a passenger in the vehicle and was also killed.

Hoffmann contends that the trial court erroneously excluded evidence, that the police failed to preserve exculpatory evidence, that the evidence was insufficient to support a finding that he caused the accident, and that the jury was improperly instructed. We conclude that none of these issues have merit and affirm the judgment.

The collision between Hoffmann and the Guderyons occurred on a county highway at approximately 9:00 a.m. on May 23, 1993, a Sunday morning. The central issue at trial was whether Hoffmann caused the accident by crossing the center line or whether the Guderyons invaded Hoffmann's lane of traffic.

Hoffmann's first argument is that the trial court erroneously exercised its discretion by excluding testimony from Catherine Lucht, a friend of the Guderyons, indicating that Lillian told her approximately five days before the accident that she had a problem with Laurence falling asleep behind the wheel. The trial court excluded the proffered evidence after hearing an offer of proof.

A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988). Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger that it will mislead the jury. Section 904.03, STATS. We will not find an erroneous exercise of discretion by the trial court if any reasonable basis exists for the trial court's decision. *See* ***State v. Lindh***, 161 Wis.2d 324, 361 n.14, 468 N.W.2d 168, 181 (1991).

The trial court excluded the testimony from Lucht based on concerns that it was not probative of how Laurence was driving on the day of the accident and might mislead the jury. We find no basis for disturbing this determination. Hoffmann's offer of proof indicated only that Lillian told Lucht five days before the accident that Laurence had had some difficulty with falling asleep behind the wheel. However, Lucht's testimony also indicated that she

did not know any of the circumstances behind the statement, had never been in a vehicle with Laurence when he fell asleep and did not know whether Laurence had been out the night before the accident.

Based on the paucity of the proffered testimony, we conclude that the trial court acted within the scope of its discretion in excluding it on the ground that it was not probative of how Laurence was driving on the day of the accident. Lucht did not indicate that Lillian told her when the problem occurred, how often it occurred or how serious it was. She also did not indicate that she knew of any particular cause of the problem or whether it occurred at any particular time of day or under any particular circumstances. Since there was also no testimony indicating whether Laurence was tired on the morning of the accident, the trial court could properly determine that the evidence was not probative of how Laurence was driving at the time of the accident and would merely lead to speculation on the subject by the jury. The trial court therefore acted within the scope of its discretion by excluding the evidence as irrelevant and misleading.[1]

Hoffmann's next argument is that his due process rights were violated when the police failed to properly triangulate the position of the vehicles before removing them from the scene of the accident. He contends that if the police had taken proper measurements by triangulating the vehicles at the scene, the measurements would have shown which vehicle traveled into the wrong lane of traffic. He contends that the police knew the value of the evidence but "bungled" the reconstruction and thus failed to preserve evidence of "apparently exculpatory" value.

In support of his argument that the failure of the police to take measurements by triangulation constituted a due process violation, Hoffmann relies on ***California v. Trombetta***, 467 U.S. 479 (1984), and ***State v. Hahn***, 132

[1] Hoffmann contends that the evidence was probative in conjunction with evidence indicating that Laurence suffered from heart disease and that people with heart disease can tire more easily than people with normal hearts. However, nothing in the evidence indicated that Laurence's heart problems caused him to tire easily or that his heart problems were in any way a factor in the accident. The evidence regarding his heart problems therefore did not render improper the trial court's ruling on Lucht's proposed testimony.

Wis.2d 351, 392 N.W.2d 464 (Ct. App. 1986). In ***Hahn***, this court held that the defendant's right to due process was violated when the State failed to preserve a vehicle for testing, concluding that the test results might have played a significant role in the defendant's defense and that the evidence therefore had an apparent exculpatory value. ***Id.*** at 357-60, 392 N.W.2d at 466-67. This court based its holding on the Fourteenth Amendment to the United States Constitution and United States Supreme Court cases, including ***Trombetta.*** *See* ***Hahn***, 132 Wis.2d at 355-56, 392 N.W.2d at 465-66.

The federal law due process analysis relied on in ***Hahn*** has been superseded by the United States Supreme Court's decision in ***Arizona v. Youngblood***, 488 U.S. 51 (1988). *See* ***State v. Greenwold (Greenwold I),*** 181 Wis.2d 881, 885, 512 N.W.2d 237, 239 (Ct. App. 1994). In ***Youngblood***, the Court pointed out that the good faith or bad faith of the State is irrelevant when it fails to disclose material exculpatory evidence. ***Youngblood***, 488 U.S. at 57. However, it further held that unless a defendant can show bad faith on the part of the police, failure to preserve evidence which is merely potentially useful does not constitute a denial of due process. ***Id.*** at 58. It also indicated that negligence in failing to preserve evidence does not establish bad faith and that due process is not violated when the police fail to use a particular investigatory tool. ***Id.*** at 58-59. It noted that when the police fail to use a particular investigatory tool, the defendant is free to argue at trial that it might have led to exculpatory evidence, but the police do not have a constitutional duty to perform any particular tests. ***Id.*** at 59.

In ***Greenwold I***, 181 Wis.2d at 885, 512 N.W.2d at 239, this court pointed out that ***Youngblood*** had refined the rule previously discussed in ***Hahn***. Based on ***Youngblood***, we held that unless evidence was apparently exculpatory, or unless the officers acted in bad faith, no due process violation resulted from the failure to preserve evidence. ***Greenwold I***, 181 Wis.2d at 885, 512 N.W.2d at 239. As discussed in ***Youngblood***, we further held that evidence is "potentially useful" rather than "apparently exculpatory" when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant. ***Greenwold I***, 181 Wis.2d at 885, 512 N.W.2d at 239.

Subsequently, this court also expressly held that negligence by the police in failing to preserve evidence does not constitute bad faith for purposes

of a due process violation. ***State v. Greenwold (Greenwold II)***, 189 Wis.2d 59, 66, 525 N.W.2d 294, 296 (Ct. App. 1994). Bad faith is shown only if the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve, and they acted with official animus or made a conscious effort to suppress exculpatory evidence. ***Id.*** at 69, 525 N.W.2d at 298.

Under the standards set forth in ***Youngblood*** and the ***Greenwold*** cases, no basis exists to conclude that Hoffmann's due process rights were violated by the failure of the police to triangulate the scene of the accident. Hoffmann has not shown official animus or that the police made a conscious effort to suppress exculpatory evidence. He has shown nothing more than that subjecting the scene of the accident to measurement by triangulation might have led to evidence beneficial to him. He thus did not show that the police failed to preserve "apparently exculpatory" evidence. Since the failure of the police to use a particular investigatory tool also does not give rise to a due process violation, no basis for relief has been shown by Hoffmann.

Hoffmann's next challenge is to the sufficiency of the evidence to support his convictions. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the trier of fact, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). The credibility of the witnesses and the weight of the evidence are for the trier of fact. ***Id.*** We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the trier of fact. *See* ***id.*** A jury verdict will be overturned only if, viewing the evidence most favorably to the State and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. ***State v. Alles***, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982).

A violation of § 940.09(1)(a), STATS., occurs if the defendant causes the death of another by the operation of a motor vehicle while under the influence of an intoxicant. ***State v. Caibaiosai***, 122 Wis.2d 587, 593, 363 N.W.2d 574, 577 (1985). The State need not prove a causal connection between the defendant's intoxication and the death. ***Id.*** at 594, 363 N.W.2d at 577-78. However, § 940.09(2) creates an affirmative defense when there is an

intervening cause between the intoxicated operation of the automobile and the death. ***Caibaiosai***, 122 Wis.2d at 596, 363 N.W.2d at 578. It permits the defendant to escape liability if he or she establishes by a preponderance of the evidence that the death would have occurred even if he or she had not been under the influence of an intoxicant. Section 940.09(2); *see also* ***Caibaiosai***, 122 Wis.2d at 598, 363 N.W.2d at 579-80.

Hoffmann contends that the accident was caused when Laurence crossed the center line and collided with Hoffmann's van. However, the jury rejected this theory when, after being instructed on the State's burden of proof and Hoffmann's affirmative defense, it returned verdicts finding Hoffmann guilty of homicide by operation of a motor vehicle while under the influence of an intoxicant.

The jury's verdicts are supported by credible evidence indicating that the accident was caused when Hoffmann, rather than the Guderyons, crossed the center line with his vehicle. Hoffmann himself testified that he did not know for sure what happened when the accident occurred. However, an off-duty deputy chief of police testified that he heard the collision seconds after seeing Hoffmann's van drive past on the highway, observed the rear wheels of the van rise straight up and down three feet in the air, and saw that the left rear tire of the van was over the center line when it came to rest. His testimony regarding the resting spot of the left rear tire was corroborated by the testimony of two other officers at the scene, one of whom indicated that the left rear tire was completely over the center line, while the right rear tire of the van was resting immediately to the right of the center lane, thus placing almost the entire rear end of Hoffmann's van across the center line.

Additional evidence supporting a finding that it was Hoffmann, rather than the Guderyons, who crossed the center line was presented by Deputy Sheriff Eric Rockafield, Officer Kenneth Pileggi and Officer Kevin Schmidt. Testimony indicated that Rockafield had extensive training in accident investigation and reconstruction and that Pileggi had investigated hundreds of accidents. The combined testimony of these officers supported a finding that the suspension and undercarriage of Hoffmann's van was damaged in the accident and hit the roadway, creating fresh gouge marks. Based on the location and varying depths of the gouge marks, Rockafield concluded that the

accident occurred in the lane in which the Guderyons had been traveling, not in the lane in which Hoffmann properly should have been driving.[2]

Contrary to Hoffmann's implication, the evidence presented by the State was not inherently or patently incredible since it did not conflict with the laws of nature or with fully-established or conceded facts. *See* ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990). Moreover, as the finder of fact, the jury was entitled to accept the conclusions as to cause drawn by the State's witnesses and to reject the conclusions drawn by Hoffmann's expert, particularly since that expert admitted that he had no training in accident reconstruction or investigation and that his experience in accident investigation was minimal and primarily involved investigating mechanical failures.

Rockafield's conclusions regarding the location and cause of the collision were also corroborated by a written statement given to investigating officers two days after the accident by Russell Galoff, Hoffmann's passenger. In it, Galoff stated that Hoffmann's van was "going on the wrong side of the road" and that they were "a little farther over from the shoulder." Galoff subsequently retreated from his statement, testifying at the preliminary hearing that he believed the van was a little bit too far over but was not sure and testifying at trial that the van was in the proper lane before the accident. However, credibility determinations were for the jury, which was entitled to find that Galoff's first statement was the most reliable, particularly in light of the evidence that he left the scene of the accident and was found one-half mile away after the police went looking for him.

Based on the testimony and the inferences that could be drawn from it, the evidence was sufficient to permit the jury to find that Hoffmann caused the collision by crossing the center line and invading the Guderyons' lane of traffic. It therefore was also entitled to find him guilty of both counts of homicide.

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[2] Hoffmann attempts to attack Rockafield's opinion on the ground that he did not view the scene of the accident before the vehicles were removed and did not have the benefit of triangulated measurements. However, Rockafield testified that he was able to form an opinion as to the point of impact of the collision based on other available information. The jury was entitled to accept this explanation.

Hoffmann's final argument is that the trial court erred when it refused to instruct the jury on the charge of operating a motor vehicle while intoxicated in violation of § 346.63(1)(a), STATS., which he contends is a lesser-included offense of the crime of homicide by intoxicated use of a motor vehicle. Whether a lesser-included offense should have been submitted to the jury is a question of law which we review independently. ***State v. Martin***, 156 Wis.2d 399, 402, 456 N.W.2d 892, 894 (Ct. App. 1990), *aff'd*, 162 Wis.2d 883, 470 N.W.2d 900 (1991). The analysis has two steps that require a showing that the crime is a lesser-included offense of the crime charged and reasonable grounds in the evidence for acquittal of the greater offense and conviction on the lesser offense. ***Id.***

Except as otherwise specifically provided by statute, Wisconsin applies the "elements only" test to determine whether one crime is a lesser-included offense of another. ***Id.*** at 403, 456 N.W.2d at 894. A lesser-included offense is one which does not require proof of any fact in addition to those which must be proved for the crime charged. ***Id.*** The focus is on the statutes defining the offenses rather than on the facts of the particular case. ***Id.*** If conviction of the lesser crime requires proof of any element that is not essential to conviction of the crime charged, the lesser crime is not a lesser-included offense. ***Id.***

Applying these principles, we conclude that the trial court properly refused Hoffmann's instruction request. To convict a defendant of operating a motor vehicle while intoxicated in violation of § 346.63(1)(a), STATS., the prosecutor must prove that the defendant operated the vehicle upon a highway or other premises held out to the public for use of their motor vehicles. *See* §§ 346.02(1) and 346.61, STATS.; *see also* ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 554-55, 419 N.W.2d 236, 238 (1988). This fact need not be shown to convict a defendant of homicide by intoxicated use of a motor vehicle. *See* § 940.09(1)(a), STATS.; WIS J I—Criminal 1185. A lesser-included offense instruction therefore was not warranted.

*By the Court.*—Judgment affirmed.

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