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12-17-2021
Clerk of Circuit Court
Brown County, WI
2020CF001071

BY THE COURT:

DATE SIGNED: December 16, 2021

Electronically signed by John P. Zakowski

State of Wisconsin Circuit Court Judge Circuit Court Brown County

STATE OF WISCONSIN,

Plaintiff,

v.

ABDI FATAH AHMED,

Defendant.

DECISION

Case No. 20 CF 1071

The defendant is charged with three counts of first degree reckless homicide arising out a fatal accident at the intersection of Lombardi Avenue and 12th Street in Green Bay on June 28, 2020. A blood draw was taken from the decedent driver at the hospital. Three substances were found in the blood of the victim driver: 2.3 nanograms per milliliter of Delta 9 THC (marijuana), 11 nanograms per milliliter of Delta 9 THC-Carboxy (marijuana metabolite), and 32 nanograms per milliliter of amphetamine. On October 11, 2021, the defense filed a notice of intent to present expert testimony from James T. O'Donnell. He is an associate professor of Pharmacology hired by the defense to conduct an analysis to determine if the victim driver in the accident was impaired when he turned in front of the defendant's vehicle. Our motion hearing was held on November 11, 2021. The defendant wants the doctor to testify to his conclusion that the driver was driving illegally and that his use of drugs "may have impaired his ability to operate his vehicle and contributed to the accident."

The State objects arguing the information is irrelevant citing Wis. Stat. 939.14 which states a defendant is not immune from criminal liability even if the victim has been negligent. The State argues any contributory negligence on behalf of the victim is irrelevant and should not be admissible.

At the motion hearing the court heard the qualifications of Dr. O'Donnell. He is the associate professor of Pharmacology at Rusk Medical College and is employed in his own consulting firm, Pharma Consultant, Incorporated. He has given presentations on the effects of marijuana on driving. He has testified in over 40 states.

The doctor prepared a report for the defense after receiving information including lab reports and toxicology findings. He testified the effects of marijuana and the effects of amphetamines on driving is generally accepted in the pharmacology and toxicology community. His report states the amount of marijuana was at a level “associate with some driving impairments.” He stated there is “a study that shows lateral control, measurable lateral control impairment associated with levels below five nanograms per milliliter.” There was testimony that 2.3 nanograms per milliliter is roughly the equivalent of a blood alcohol reading of less than .05. The 32 nanograms of amphetamine were at “a therapeutic level and it may have caused impairment.” He further testified “the combination of the amphetamine and marijuana depending on whatever impairment occurred may have contributed to the accident.”

The report concluded the victim was driving illegally and may have been impaired at the time of the accident. At the motion hearing, Dr. O’Donnell could only testify to a degree of scientific certainty that based on the two drugs in the blood system, the victim *may* have been impaired. He made clear, “I cannot state with certainty that he was impaired by amphetamine. He could have been.” He admitted that the 2.3 amount of Delta 9 THC “is below the presumptive level of impairment.”

The State argued one cannot determine if the driver was impaired because there are other factors that need to be considered which may or may not affect impairment, including frequency of use, how recent was the use and physical observation of the driving. The doctor testified the carboxy amount detected suggests use about two hours before the accident. The State pointed out that the effects of smoking marijuana will typically peak within the first ten to thirty minutes after use.

The court’s knowledge of the case is limited to the allegations in the complaint, including a statement that the defendant was driving in excess of 90 mph on Lombardi Avenue. The victim vehicle turned left in front of the defendant and was struck by the defendant. The issue is not right-of-way but what caused the accident. The court anticipates the defense will acknowledge the defendant was speeding but that the substantial factor in causing the accident was the victim turning in front of an oncoming vehicle. Defense counsel has stated, “this is a case where the jury is going to have to decide whether the defendant’s actions were a substantial factor in the death of Mr. Saldana and the other two passengers.” The State argues the issue is whether the defendant’s conduct of driving between 90 mph and 100 mph is criminally reckless.

Analysis: The court has looked at the case of State v. Lohmeier, 205 Wis. 2d 183 (1996) which involved two pedestrians being struck by a drunk driver. There was evidence produced at trial that the victims were walking on the right side of the road as prohibited by statute. At issue were the jury instructions read to the jury. The jury was given an instruction requested by the State consistent with Wis. Stat. 939.14 which provides a defendant is not immune from criminal liability simply because the victim may have been negligent as well. The instruction read:

“You are further instructed as to these four counts that it is no defense to a prosecution for a crime that the victim may have been contributorily negligent.”

This appellate issue was whether this instruction deprived the defendant of a “meaningful opportunity” for consideration by the jury of his affirmative defense under 940.09(2).

Even though the issue had to do with the interface of certain jury instructions, the Lohmeier court was very explicit in stating:

“However, this rule does not mean that evidence of a victim’s negligence is irrelevant in a criminal proceeding...*it is often relevant on the issue of causation.*” The court referenced Hart v. State, 75 Wis. 2d 371 (1977) when it ruled “the victim’s negligence was relevant to determining whether the defendant’s (intoxicated) driving was a substantial factor in causing the victim’s death.”

The court realizes the driver here is not charged with operating while intoxicated where there exists the affirmative defense which was present in Lohmeier.

The Court has not been able to find a Wisconsin appellate case with a fact situation similar to this situation. Most cases involve a homicide by intoxicated use of a vehicle, which has an §904.09(2) affirmative defense, unlike the charges of homicide by negligent use of a vehicle or first degree reckless homicide.

While not having precedential value, cases from other jurisdictions can assist the court in its analysis of the facts. The court has reviewed a case decided by the Supreme Court of Georgia, Crowe v. State, 259 Ga. App. 780 (2003) which it finds to be very instructive. Crowe was convicted of two counts of vehicular homicide, but the Georgia Supreme Court reversed because it found the trial court excluded relevant evidence offered in Crowe’s defense.

The facts in that case involved a car driven by Judy Lynch which struck Crowe’s truck as Crowe was improperly backing the truck onto the highway. The accident killed two teenage girls in the Lynch vehicle. Lynch had the right of way and was traveling between 38 and 42 miles per

hours at the time of the crash. A chemical analysis performed on urine drawn from Lynch three hours after the crash revealed the presence of THC, bupropion and hydrocone. The trial court granted the State's motion in limine to exclude marijuana use prior to the crash. The Court of Appeals affirmed saying,

“Crowe had failed to establish any facts which would permit a jury to conclude that, at the time of the incident, Lynch's driving ability was impaired by the substances found in her urine.”

It found the evidence was irrelevant and “would only serve to impugn Lynch's character.” This is the same argument made by the State in our case.

However, the Georgia Supreme Court ruled evidence that Lynch *may* have been impaired by marijuana, and thereby less able to avoid the accident, would clearly be relevant to disputed issues in the case. The court ruled that

“in a vehicular homicide case, the conduct of *all* drivers involved in the accident is relevant to the extent it may impact the jury's determination of which driver's actions cause the injury, or whether the injury resulted from an unavoidable accident.”

The court went on to state the evidence of drug use was more than a mere fishing expedition:

“At the hearing on the motion in limine, an expert from the GBI Crime Lab testified that marijuana metabolites were detected in Lynch's urine but not her blood. The expert stated that marijuana metabolites are generally detectable in the blood for four hours after the use of marijuana, and that the metabolites remain detectable in the urine for forty-eight hours after use.

Therefore, the expert opined that Lynch had probably used marijuana between four and forty-eight hours before the blood and urine were drawn. Since Lynch's blood and urine were drawn almost three hours after the crash, it is possible, according to the expert's testimony, that Lynch used marijuana as recently as one hour prior to the accident. Because the expert also testified that a person may be impaired by marijuana for three to six hours after using it, the expert's testimony clearly revealed that the objective analysis performed on Lynch's urine was consistent with the possibility that Lynch was impaired by marijuana at the time of the crash. The expert could *not* state with any degree of certainty whether in fact Lynch was under the influence of marijuana at the time of the crash.”

The expert testified that marijuana can affect a person's ability to perform multi-tasking operations such as driving. Lynch's failure to see the truck or apply her brakes could support Crowe's assertion that Lynch *may* have been impaired by marijuana.

The State argued that Lynch's possible impairment was irrelevant because Crowe's actions left Lynch with no way to avoid the accident. The court ruled while it may be true, the causation issue is a fact for a jury to decide.

The Georgia Supreme Court went on to state:

"The jury is entitled to hear all the relevant evidence, judge the credibility of all the opposing witnesses, and make that decision for itself. The jury is not required to accept the State's experts' opinions. Whether or not Lynch was impaired, and whether or not her impairment contributed to the accident, was for the jury to determine...Because the record reveals the factual possibility that Lynch was impaired at the time of the crash, and that her impairment may have contributed to the accident, the trial court erred when it prohibited Crowe from presenting the urinalysis evidence..."

This court notes it did not find a statute in Georgia comparable to Wis. Stat. 939.14.

It then compares the evidence in our case with the Crowe analysis. Crowe was driving illegally. The defendant here was speeding excessively, therefore driving illegally. As such, he forfeited his right-of-way to the victim. Lynch had the right-of-way in the Crowe matter. Both victims had marijuana in their system, and the victim here also had a detectable level of methamphetamines. In Crowe, the expert opined Lynch may have used marijuana an hour before the crash and that generally "a person may be impaired by marijuana for three to six hours after using it." The proposed expert here opined the victim may have used marijuana two hours before the accident. He explained that marijuana use tends to slow reflexes, or reaction time, and that the use of methamphetamines tends to increase risk taking. In both cases, the defense expert explained how drug use could have impaired the driver and therefore contributed to the cause of the accident. However, both experts stated that they could *not* state with certainty that the respective drivers were in fact impaired as a result of drug use.

The court is concerned about such evidence being used as character evidence. However, the court interprets the Lohmeier case as stating that the arguably negligent actions of the victim, while not preventing the defendant from being held liable, can be relevant, and therefore admissible as to the issue of causation. As the Crowe case also stated, "the conduct of all drivers in the accident is relevant to the extent it *may* impact the jury's determination" of causation.

The court believes causation to be an issue in this case. The court recognizes that in a first degree reckless homicide prosecution the State is required to prove beyond a reasonable doubt only that the defendant's acts were a substantial factor in the victim's death, not the sole cause.

State v. Block, 170 Wis. 2d 656 (Ct. App. 1992). However, that does not prevent a defendant from introducing relevant evidence in his defense. The very nature of the accident and involvement of both drivers differentiates this case from others where the victim's drug use is irrelevant; for example, where a victim is shot but his earlier drug ingestion played no part in the shooting. The State claims the defendant's excessive speed was a substantial factor in the cause of the fatal accident. The defense claims the victim's failure to yield by turning left into the path of the defendant's oncoming vehicle was a substantial factor in the cause of the accident.

The evidence of marijuana and meth usage *may* be a reason the victim turned in front of the defendant, similar to the finding that the evidence of marijuana usage may be a reason Lynch did not brake or attempt to avoid the collision with Crowe.

The court will therefore permit the introduction of the drug evidence. It will allow the defense expert to testify. It has already ruled the doctor cannot comment that the victim was violating Wisconsin law having those drugs in his system. That conclusion is irrelevant to causation. Similar to Crowe, the expert cannot testify whether or not the victim was impaired. However, the expert can describe the general effects of marijuana and meth similar to the GBI expert in Crowe. The court finds the probative value of such evidence outweighs any prejudicial effect. Such information may assist the trier of fact in evaluating the causation issue.

The State's objection at the motion hearing was not to the doctor's qualifications but that his opinions were irrelevant. To the extent the court need address Daubert issues, it finds Dr. O'Donnell is qualified to testify at trial. His conclusions are based upon generally accepted pharmacological and toxicology principles.

The defense motion is GRANTED.