

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 22, 2006**

Cornelia G. Clark  
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. 2005AP81-CR**

**Cir. Ct. No. 2003CF4103**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STEVEN P. MUCKERHEIDE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Steven Muckerheide appeals from a judgment convicting him of homicide by use of a vehicle while having a prohibited blood alcohol concentration. At trial, Muckerheide claimed that the victim, who was Muckerheide's passenger, grabbed the steering wheel and caused the vehicle to

crash. In support of this theory, Muckerheide sought to introduce evidence that the victim had engaged in similar wheel-grabbing conduct in the past. The circuit court excluded the evidence because it was offered only to show that the victim acted in conformity with prior conduct and was therefore inadmissible other acts evidence under WIS. STAT. § 904.04 (2003-04).<sup>1</sup> On appeal, Muckerheide challenges the circuit court's exclusion of this evidence. We conclude that the circuit court properly exercised its discretion, and we affirm.

¶2 Muckerheide was driving while intoxicated<sup>2</sup> with a passenger, Michael Braun. The medical examiner testified that Braun's blood alcohol level was .17, and he also had detectable amounts of cocaine in his blood. Muckerheide testified at trial that he and Braun had been drinking before the crash, and Muckerheide conceded that he had also used cocaine that day. Muckerheide further conceded that "he shouldn't have been driving in the first place," but he and Braun wanted to go to a bar. On the way to the bar, Braun believed that he saw a vehicle coming at them at a curve in the road. Braun grabbed the steering wheel and pulled the vehicle toward the curb. Muckerheide, who was speeding at the time, tried to regain control of the vehicle as it headed toward a parked construction trailer. Muckerheide partially pulled the vehicle away from the curb, but the passenger side of the vehicle hit the parked trailer, killing Braun.

¶3 Muckerheide offered a defense under WIS. STAT. § 940.09(2)(a). Muckerheide claimed that Braun would have been killed in the crash even if

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Muckerheide's blood alcohol level shortly after the accident was .179.

Muckerheide had been exercising due care and had not been under the influence of an intoxicant, or had a prohibited alcohol concentration or restricted controlled substance in his blood.

¶4 In support of this defense, Muckerheide wanted to offer the testimony of Braun's father, Robert Braun. In a pretrial offer of proof, Muckerheide informed the court that Robert Braun would testify that Braun was a nervous passenger, and he would warn the driver when he perceived a traffic hazard. Robert Braun would have testified that on several occasions in the past year when Braun was his passenger, Braun pointed out traffic hazards. If Robert Braun did not react to the warning, Braun would gesture as if he were going to grab the steering wheel. On one occasion approximately a year before, Braun actually grabbed the steering wheel from his father, whom he believed was turning too close to a traffic island. Braun attempted to turn the wheel, but the vehicle struck the island. Muckerheide offered Robert Braun's testimony to support his claim that Braun's conduct, not Muckerheide's intoxicated state and speeding, caused the crash.

¶5 The State objected to this evidence because it was not sufficiently similar to the facts of this case. Muckerheide did not claim that he lost control of the vehicle while trying to deflect or otherwise respond to Braun's gesture toward the steering wheel. The State also contended that the single incident in which Braun succeeded in grabbing the steering wheel from his father was improper propensity evidence because it was only offered to show that in grabbing the steering wheel from Muckerheide, Braun acted in conformity with his prior conduct with his father. The circuit court excluded the evidence as inadmissible propensity evidence.

¶6 We consider whether the circuit court properly exercised its discretion in excluding the evidence. *State v. Gray*, 225 Wis. 2d 39, ¶12, 590 N.W.2d 918 (1999). WISCONSIN STAT. § 904.04(2) “precludes proof of other crimes, acts or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question.” *State v. Johnson*, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). The “evidence [must] be probative of some proposition (such as proof of motive, opportunity, etc.) other than the proposition that because the person did prior act X, he or she is of such a character and disposition to have committed present act Y.” *Id.* at 336-37. If it was not, the circuit court properly excluded the evidence.<sup>3</sup>

¶7 On appeal, Muckerheide argues that the testimony of Robert Braun was offered to show identity, control, absence of mistake and modus operandi, allowable purposes under WIS. STAT. § 904.04(2).

¶8 We conclude that the testimony of Robert Braun did not surmount the ban on propensity evidence. All of Muckerheide’s appellate arguments come down to a central premise: Braun was a nervous passenger who had a propensity to grab the steering wheel, Braun acted on that propensity on a past occasion with his father, and Braun acted in conformity with that propensity by grabbing the steering wheel from Muckerheide.

¶9 Other acts evidence must be evaluated for relevancy. *Gray*, 225 Wis. 2d 39, ¶14. The relevancy determination requires an assessment of probative value. *State v. Sullivan*, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998). Thus,

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<sup>3</sup> Because we decide this case under Wisconsin law, we do not address Muckerheide’s reliance upon *State v. Young*, 739 P.2d 1170 (Wash. Ct. App. 1987).

“[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence.” *Id.* at 787.

¶10 The incidents described by Robert Braun were not sufficiently similar to Braun’s alleged conduct with Muckerheide. There is no evidence that Braun only gestured toward Muckerheide’s steering wheel, as he had done on several occasions when his father was driving. There is no evidence that Braun used alcohol or drugs or was impaired by them prior to grabbing the steering wheel from his father on the one occasion described. In this case, Muckerheide testified that he and Braun had been drinking, and the medical examiner testified that Braun had a high level of alcohol and detectable levels of cocaine in his blood.

¶11 Given these dissimilarities, Robert Braun’s testimony only would have been probative of the fact that because Braun once grabbed the steering wheel from his father, he must have grabbed the steering wheel from Muckerheide. Robert Braun’s testimony was propensity evidence and was not offered for a proper purpose.<sup>4</sup> The circuit court properly barred it under WIS. STAT. § 904.04(2) as evidence offered to show “that a person acted in conformity with a particular disposition on the occasion in question.” *Johnson*, 184 Wis. 2d at 336.

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<sup>4</sup> When evidence is irrelevant or not offered for a proper purpose, its exclusion does not violate a defendant’s right to confrontation or to present a defense. See *State v. Walker*, 154 Wis. 2d 158, 192, 453 N.W.2d 127, *cert. denied*, 498 U.S. 962 (1990). Muckerheide was not deprived of his defense. Muckerheide testified that Braun grabbed the steering wheel from him, causing the crash and his own death. Therefore, this defense was before the jury.

¶12 Muckerheide argues that the evidence was admissible to provide context for the other evidence in the case. We disagree. The evidence was offered only to show that Braun acted in conformity with previous conduct.

*By the Court.*—Judgment affirmed.

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

