

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 23, 2003**

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. 03-0298-CR**

**Cir. Ct. No. 01CF000089**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT A. GARRIGAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Oconto County: RICHARD D. DELFORGE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott Garrigan appeals a judgment convicting him of killing Leanne Peetz and injuring Karri Spice in a drunk driving accident.

Garrigan offered the affirmative defense created by WIS. STAT. § 940.09(2),<sup>1</sup> that Peetz's death would have occurred even if Garrigan had exercised due care and had not been intoxicated. Garrigan argues that (1) the trial court improperly exercised its discretion and violated his constitutional right to present a defense by excluding evidence that Peetz violated several statutes by driving a moped at night without wearing a helmet, with a passenger and after having consumed alcohol; (2) his trial counsel was ineffective for failing to argue the evidentiary issues in terms of his constitutional right to present a defense and for conceding that Peetz was not required to wear a helmet; (3) the trial court should have instructed the jury regarding Peetz's failure to exercise due care; and (4) he is entitled to a new trial in the interest of justice because the true controversy was not fully tried. We reject these arguments and affirm the judgment of conviction and the order denying postconviction relief.

¶2 The accident occurred as Peetz and her passenger were about to make a left turn into Peetz's driveway from a county trunk highway. Garrigan struck Peetz's moped from behind as she slowed to between sixteen and twenty-five mph. Peetz's directional signal was on at the time of the accident, but Garrigan made inconsistent statements about observing Peetz's directional signal. The State's expert witness opined that Garrigan struck Peetz directly from behind in the middle of her lane of travel. The defense expert opined that Peetz was traveling from the right side of her lane to the left side at a thirty-degree angle to Garrigan's car. Neither expert faulted Peetz's driving. The jury rejected the affirmative defense and found Garrigan guilty of both offenses.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 The trial court properly excluded evidence that Peetz did not have a motorcycle license, was not wearing a helmet or eye protection, that she had been drinking and that it was not lawful for her to have a passenger on the moped. None of these alleged violations was relevant. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence. *See* WIS. STAT. § 940.01. The matters of consequence in this case are the elements of the offense and the affirmative defense. The elements of homicide by intoxicated use of a vehicle are that the defendant “caused the death of another by operating or handling a vehicle while under the influence of an intoxicant.” *See* WIS. STAT. § 940.09(1)(a). The affirmative defense allows the defendant to prove by the preponderance of the evidence that the death would have occurred even if he had been exercising due care and had not been intoxicated. *See* WIS. STAT. § 940.09(2). None of the proffered evidence would tend to make any of those factors more or less likely.

¶4 While there are situations in which the victim’s negligent conduct could establish that the accident would have been unavoidable even if the defendant had been driving with due care and had not been intoxicated, *see State v. Lohmeier*, 205 Wis. 2d 183, 195, 556 N.W.2d 90 (1996), of the excluded evidence in this case none fits that description. It is a nonsequitur to argue that Peetz would have died at the hands of a non-negligent, sober driver if she had been properly licensed, wearing appropriate safety gear, had not been drinking and did not have a passenger. Peetz’s contributory negligence is not an issue in the criminal prosecution. Only her alleged acts of negligence that would have rendered the accident unavoidable to a non-negligent, sober driver are relevant to the affirmative defense. The jury heard evidence regarding her speed, use of

directional signals and position on the road, factors that would relate to the affirmative defense. Because none of the excluded evidence, if proved, would tend to show that Peetz would have died even if Garrigan had not been negligent or intoxicated, the evidence was properly excluded as irrelevant.

¶5 Garrigan was not prejudiced by his attorney's failure to argue the evidentiary issues in terms of his constitutional right to present a defense. A defendant does not have a due process right to present irrelevant evidence. *See State v. Jackson*, 188 Wis. 2d 187, 189, 525 N.W.2d 739 (Ct. App. 1994). Likewise, Garrigan was not prejudiced by his trial counsel's concession that Peetz was not required to wear a helmet. Because evidence of the helmet violation was irrelevant, it should not have been admitted regardless of counsel's concession.

¶6 The trial court properly refused to instruct the jury on Peetz's contributory negligence. The court appropriately instructed the jury on the elements of the offense and the affirmative defense by reading WIS JI—CRIMINAL 1188 as amended following *Lohmeier*. Garrigan requested that the court also read a modified version of WIS JI—CIVIL 1354, which would inform the jury that a driver may not make a left turn or move left or right upon the roadway unless the movement can be made with reasonable safety. The trial court correctly concluded that the pattern jury instruction WIS JI—CRIMINAL 1188 adequately covered the law and the applicable facts in this case. The jury heard the evidence regarding Peetz's driving immediately before the accident. It was not necessary for the jury to know whether her driving violated any statutory provisions in order to determine whether the accident would have been unavoidable if Garrigan had exercised due care and had been sober. Any instruction that would encourage the jury to apply civil comparative negligence law to this case would be erroneous.

¶7 Finally, there is no basis for granting a new trial in the interest of justice. Because none of the excluded evidence was relevant, we conclude that the material issues were fully and fairly tried.

*By the Court.*—Judgment and order affirmed.

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

